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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP, INCORPORATED, et al.,

Plaintiffs,

v.

AUBREY ELENIS, et al.,

Defendants.

Proceedings before SCOTT T. VARHOLAK, United States
Magistrate Judge, United States District Court for the
District of Colorado, commencing at 11:01 a.m., January 15,
2019, in the United States Courthouse, Denver, Colorado.

WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS
ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

APPEARANCES

JAMES CAMPBELL and JACOB WARNER, Attorneys at Law,
appearing for the Plaintiffs.

GRANT T. SULLIVAN, VINCENT MORSCHER and JACQUELYN
RICH FREDERICKS, Attorneys at Law, appearing for the
Defendants.

RULE 16(b) SCHEDULING CONFERENCE

1 PROCEEDINGS

2 (Whereupon, the within electronically recorded
3 proceedings are herein transcribed, pursuant to order of
4 counsel.)

5 THE COURT: This is 18-cv-2074. Can I have entries
6 of appearance, please.

7 MR. CAMPBELL: Good morning, Your Honor. James
8 Campbell on behalf of the plaintiffs, and I'm here with my
9 colleague Jacob Warner.

10 THE COURT: Good morning.

11 MR. SULLIVAN: Good morning, Your Honor. Grant
12 Sullivan for the defendants. With me is senior assistant
13 attorney's general Jacqueline Rich Fredericks and Vincent
14 Morscher.

15 THE COURT: Good morning. So I've reviewed the
16 proposed scheduling order in this case. I note that there
17 are a number of disputes. Before getting into those, I want
18 to encourage the parties as this case moves forward to try to
19 resolve some of the disputes that are arising in this case
20 through conferral.

21 I can see already, given that we're just getting
22 ready to enter a scheduling conference that I've already had
23 one discovery dispute hearing by the parties and there is I
24 think eight or nine disputes in the scheduling order itself,
25 that this case is beginning to trend towards one of those

1 cases where the parties are constantly before me on discovery
2 disputes. I want to discourage that, and so I want to
3 encourage the parties to try to reach resolution on some of
4 the disputes that occurs in this case.

5 So let's go through these then. The first is at
6 page 5, and this involves the timing of initial disclosures.
7 Plaintiffs propose January 22, defendants propose that it
8 occur after the hearing on the motion for preliminary
9 injunction. Let me hear from defendants on this because I
10 don't see why that makes sense to delay discovery until after
11 we get a ruling from Judge Daniel, because this case is going
12 to move forward regardless of Judge Daniel's ruling.

13 MR. SULLIVAN: Happy to, Your Honor, and I realize
14 our proposal is not entirely in line with the typical
15 sequence in the civil rules.

16 Typically in a normal case that seeks a preliminary
17 injunction, you're going to have that hearing well before the
18 Rule 26(f) conference. That didn't happen in this case, or
19 to the extent it did happen, Judge Daniel denied the original
20 PI motion and ask that it be amended to ask for a narrower
21 relief. So now we're in a position where we have a
22 forthcoming amended PI motion, simultaneous with what would
23 typically be the start of discovery in a normal case.

24 We see it as being typically a PI motion. PI
25 hearing is considered emergency in nature because the claimed

1 harm is supposed to be imminent in nature. So normally when
2 that happens everything else is put on hold and takes a back
3 seat to resolving the PI motion.

4 And the Tenth Circuit has said that a PI hearing
5 is -- a hearing for preliminary injunction is generally a
6 restricted proceeding often conducted under pressure time
7 constraints on limited evidence and expedited briefing
8 schedules. That's *Heideman v. South Salt Lake City*, 348 F.3d
9 1182 from the Tenth Circuit.

10 So in our view, with different that their
11 forthcoming amended PI motion is going to seek narrower
12 relief, we haven't seen what that relief is yet, but in our
13 view, the PI motion needs to take precedence over general
14 discovery, which is going to include initial disclosures, all
15 the things that go into --

16 THE COURT: But why? I mean, the fact that Judge
17 Daniel delayed -- that there was some delay in Judge Daniel's
18 ruling on the PI motion because -- and I reviewed the
19 transcript of that because he said that it was too broadly
20 worded, the initial PI motion, that may mean that the relief
21 sought by plaintiffs -- because in Judge Daniel's view they,
22 their motion was too broad, their relief is delayed longer
23 than you would typically have in a PI motion. But there is
24 nothing in either the case you cited or any case that I found
25 that said that discovery must be stayed, and I don't

1 understand see any benefit in staying discovery because all
2 that's going to do is delay this case three, four months --

3 MR. SULLIVAN: Right.

4 THE COURT: -- or whenever we get to Judge Daniel's
5 ruling. And I just don't see the benefit to either the
6 Court's calendar or to the parties of delaying this case any
7 further.

8 MR. SULLIVAN: Well, just to be clear, I don't
9 think -- we don't oppose delaying expedited limited discovery
10 that is narrowly tailored to the relief sought by the PI
11 motion. I think both parties contemplated some form of
12 limited expedited discovery again that's really focused on
13 the PI motion.

14 What we're concerned about is having kind of two
15 tracks, one -- track one that focuses on the PI motion and
16 then track two that is broader in scope, which general
17 discovery goes not just to the relief in the PI motion, but
18 anything that could be relevant or lead to relevant
19 information concerning the other claims and defenses. So in
20 our view, that second track should wait until the resolution,
21 the completion of the PI hearing. We think that doing two
22 tracks simultaneously would be burdensome on the parties,
23 burdensome on the clients and certainly I think the focus
24 should be, at least for now, on the forthcoming preliminary
25 injunction motion and hearing.

1 And I think the delay here would be short. I think
2 both parties anticipate a hearing either late February or
3 early March. So the delay, in our view, is minimal, and as
4 soon as that hearing is concluded, we would then go forward
5 with track two and do everything that's contemplated through
6 general discovery, including initial disclosures and the
7 like.

8 THE COURT: Okay. Let me hear from the
9 defendant -- or excuse me, from the plaintiff.

10 MR. CAMPBELL: So, Your Honor, our position is that
11 the stay on discovery has effectively been dissolved and,
12 therefore, the parties should be able to proceed with it
13 right away; that there shouldn't be a limitation on
14 discovery, the plaintiff shouldn't have to justify the need
15 for anything they want to seek now, which is the track that
16 the defendants propose.

17 So our proposal is that discovery begin
18 immediately, and while discovery is ongoing, each side be
19 able to submit five requests for production and five
20 interrogatories that must be responded to on an expedited
21 basis and to conduct a limited number of depositions before
22 the hearing on the MPI.

23 So we think that you can -- you can have some
24 expedited request built in, but that overall discovery should
25 begin and move forward now, particularly with the initial

1 disclosures. We see no reason why those should wait because
2 those could be directly relevant and helpful to the hearing
3 on the motion for preliminary injunction.

4 THE COURT: Okay. I'm going to adopt the
5 plaintiffs' position in this matter. I agree that -- I don't
6 see any benefit in delaying discovery at this point. It has
7 already been delayed because of my prior order, which I think
8 was required by the Supreme Court in Iqbal and Twombly that
9 said that once qualified immunity is raised, that issue must
10 be decided first and discovery stayed, but as a result of
11 that, we're now more than five months or right about five
12 months into this case and there has not been any discovery
13 that has occurred.

14 And the defendants' proposal would essentially --
15 the parties have proposed a March 11 hearing date, even
16 assuming -- which was two days, so to end on March 12. Even
17 assuming that Judge Daniel would rule from the bench -- and
18 again, that might not be a fair assumption, but even if he
19 did, we would not have a ruling -- we would not have under
20 defendants' proposal discovery even to be permitted to be
21 exchanged until the end of March, and then we're looking at
22 the end of April until we get any real discovery occurring in
23 this case. And I think that that's just too long to wait.
24 That would put us eight months into the case before we have
25 really any discovery exchange before -- between the parties,

1 and I don't think that that either benefits the court's
2 docket or the parties in attempting to resolve this case, and
3 so therefore with respect to 6(d), I am going to adopt the
4 plaintiff's position.

5 That brings us then to page 7, and this is -- the
6 first dispute on this page deals with the limitations, and it
7 looks like the dispute is whether -- the first dispute is
8 whether or not the limitations should be per side or per
9 plaintiff/defendant. So I'll hear briefly from each side.
10 I'll hear from plaintiff first on this one.

11 MR. CAMPBELL: Your Honor, we -- we have no
12 objection to a per side limitation --

13 THE COURT: Okay.

14 MR. CAMPBELL: -- that corresponds to a limitation
15 in the federal rules. So what I mean by that is
16 interrogatories are capped at 25, so a per side cap at 25
17 would be acceptable with us.

18 THE COURT: Okay.

19 MR. CAMPBELL: In contrast, Rule 34 does not cap
20 discovery -- or document requests and, therefore, we don't
21 think there should be a cap there. That's our position.

22 THE COURT: Okay. At least in this district, a
23 standard on -- well, I agree that the federal rules don't
24 apply to a cap. The standard for RFPs in this district is
25 25.

1 Let me hear from defendants as to whether you would
2 oppose 25, 25, 25 per side for admissions, production and
3 interrogatories.

4 MR. SULLIVAN: I think that our position is that
5 the standard slate should apply, again per side, which it
6 sounds like we have no disagreement on. So I think we're in
7 agreement with that.

8 The only caveat I would add is that the
9 limitation -- I think that the parties are in agreement with
10 that there shouldn't be expedited response deadlines perhaps
11 with the exception of a few, maybe five or something along
12 those lines.

13 THE COURT: And we'll get to that, but -- so what
14 I'm going to do is with respect to the presumptive number of
15 depositions or interrogatories, I'm going to limit each
16 side -- with respect to depositions, it's typically ten in
17 this district. Is that going to be sufficient for each side,
18 ten per side, as far as depositions?

19 MR. CAMPBELL: Your Honor, obviously we don't know
20 what discovery might reveal, but as we calculate it, we think
21 we would want to be right at around ten, and so if a few
22 people are uncovered during discovery that we might want to
23 add, bumping that up just slightly might be helpful.

24 THE COURT: Let me ask defendant, especially given
25 that we've got almost ten total -- I think we've got nine

1 defendants named in the case. Any objection to raising it to
2 15 depositions?

3 MR. SULLIVAN: We would like to stay at the
4 presumptive ten, Your Honor, with the caveat obviously that
5 the parties can seek leave to increase that if discovery
6 requires that for good cause.

7 THE COURT: I'll begin with the presumption, but
8 if -- again, I could see this being a case where additional
9 beyond ten is needed given that I think we've got nine
10 defendants named. And so if my suspicion that we may need
11 more does prove true, then either side can move for
12 additional ones.

13 So with respect to depositions and interrogatories,
14 I'm going to do ten depositions per side and 25
15 interrogatories per side.

16 Then with respect to the length of depositions,
17 seven hours, one day of seven hours is adopted, and then with
18 respect to request for production and request for admission,
19 I will do 25 each per side.

20 Okay.

21 MR. CAMPBELL: And, Your Honor, just to be clear,
22 are there any limitations on the timing of that in light of
23 the intervening --

24 THE COURT: I'm going to turn -- so that's the
25 general -- those are the general limitations. What I'm going

1 to do now is turn to -- it looks like each side wants some
2 form of expedited discovery to take place in here. I'm not
3 sure that I see a disagreement anymore after the defendants'
4 Document Number 97, but why don't I -- which was just filed
5 this morning, and I'm not sure plaintiff even had the
6 opportunity to see it. That has not been referred to me, but
7 I'll tell the parties if it is, I'm going to deny it as moot
8 because I'm going to take up these issues here today with
9 respect to this expedited portion.

10 So why don't I hear from each side what the
11 proposal is with respect to the expedited portion of this
12 discovery. I'll hear from plaintiff first.

13 MR. CAMPBELL: Your Honor, our request is that we
14 be allowed to serve five document requests that must be
15 responded to within 15 days and that we be able to do the
16 same thing with five interrogatories. We also request that
17 each side -- and the same would go, of course, it's a per
18 side --

19 THE COURT: Okay.

20 MR. CAMPBELL: -- contemplation, so we would
21 request doing five of both document requests and
22 interrogatories.

23 THE COURT: Okay.

24 MR. CAMPBELL: And we would obviously agree that
25 the other side could do the same.

1 THE COURT: Okay.

2 MR. CAMPBELL: We would also request the ability to
3 depose up to three people. Again, this is for each side.
4 And then in addition to that, we can depose anyone that the
5 defendants indicate they will call as a witness at the
6 preliminary injunction hearing, and likewise, they can do the
7 same. They can depose anyone that we indicate we'll call as
8 witness. And that should be, in our view, in addition to the
9 three depositions that each side is allotted.

10 THE COURT: And what is your timing for those
11 depositions? because you're proposing a March 11 hearing
12 date. You obviously need at least some period of time to get
13 the transcripts from those depositions, assuming you wish to
14 use those, so when would you propose that those be -- that
15 those depositions take place?

16 MR. CAMPBELL: Our view is that the document
17 requests and the interrogatories could come out this week,
18 and so if there is 15 days on those, that would put us
19 roughly at -- towards the end of the month or beginning of
20 February, and so we would expect sometime in the middle of
21 February for those depositions to happen. Second week, third
22 week of February, which I think would still give us enough
23 time to be ready for the March 11 hearing.

24 THE COURT: Okay, okay. Let me hear from defendant
25 on that proposal and counterproposal.

1 MR. SULLIVAN: Thank you, Your Honor. Our proposal
2 is not terribly different than plaintiffs, but there are a
3 few differences. We propose for -- again, this is just the
4 expedited piece of this --

5 THE COURT: Right.

6 MR. SULLIVAN: -- five RFPs with a 21-day response
7 period. We suggested no interrogatories. Up to four
8 depositions, again, per side. And we disagree with requiring
9 depositions for anyone who might testify at the preliminary
10 injunction hearing. And the reason for that is we simply
11 don't know yet who our witnesses might be. I don't know if
12 it's going to be one witness or several witnesses because I
13 haven't seen plaintiff's preliminary -- amended preliminary
14 injunction hearing.

15 And again, the nature of a preliminary injunction
16 hearing is supposed to be expedited and restricted evidence,
17 and you don't necessarily know everything that the witnesses
18 are going to say at a preliminary injunction hearing in
19 advance because it's, again, supposed to be an emergency-type
20 hearing that's imminent in nature. So it's not supposed to
21 be a full trial, and I think that's kind of what plaintiffs
22 are asking for by asking to depose all of the witnesses who
23 might testify at the preliminary injunction hearing.

24 So with those caveats, I think we're not too far
25 off. The number of depositions I think we can just cap at

1 four, rather than kind of leaving it open-ended for anyone
2 who might testify at the PI hearing.

3 THE COURT: Okay. Here is what I'm going to do.
4 I'm going to -- just making sure my dates are correct here.
5 What I'm going to do is I'm going to adopt a little bit from
6 each side. I'm going to do five requests for production.
7 The requests for production are to be served by January 21,
8 which is Monday. I'm going to do five interrogatories, also
9 to be served by 1/21.

10 The response to those -- and this is per side. The
11 response to those will be due -- I'm going to do the response
12 to the -- I'm going to do the response to each will be due by
13 February 8, which is about 18 days.

14 Then I'm going to do a total of four depositions
15 per side. Those are to be completed by February 28, which I
16 think might require some expedited ordering of transcripts,
17 but I think for most of them will allow you to still get your
18 transcripts in before the hearing if Judge Daniel sets it on
19 March 11.

20 I am going to require to -- actually, I'm going to
21 go back a bit. I'm going to put the response deadline to be
22 February 5, and I'll explain why in a moment. I'm going to
23 then require the parties to provide their witness list for
24 the preliminary hearing by the earlier of either February 11
25 or any date set by Judge Daniel. Obviously if he sets

1 another date, since it's his hearing, since it's his hearing,
2 then that's up to him if he wants to enter another date.

3 The reason I'm saying the response deadline of
4 February 5th and the witness list of February 11 is I'm
5 anticipating that the parties are going to conduct these
6 depositions between the weeks of February 11, February 18 and
7 February 25. And this way the parties will have some sense
8 of who the other side is calling prior to scheduling those --
9 prior to actually going forward with those depositions.

10 Now, that may still leave some witnesses who don't
11 get deposed. Frankly, for preliminary injunction hearing, I
12 don't see any problem with that. But to the extent that you
13 want to try to get some sense of, at least, who the main
14 witnesses are and have them deposed in advance of the
15 preliminary injunction hearing, this will allow you to do so.

16 So that's how I'm going to handle the expedited
17 portion of the discovery in advance of the preliminary
18 injunction hearing in this matter.

19 The next area of dispute noted by the parties is on
20 page 12. And this involves a reconsideration of my order on
21 the CORA discovery in this case -- or the CORA requests. And
22 while I recognize that the situation has now changed some in
23 that the stay -- and just so it's clear, the stay of
24 discovery is not lifted -- the stay of discovery has been
25 lifted, it doesn't change my ultimate analysis.

1 And to be clear, to the extent that I wasn't at the
2 previous hearing, I don't find that I lack the ability to
3 prohibit CORA requests in this matter. I think the law is
4 unclear on that, but I find that within my discretion, I
5 don't think it's appropriate, and I don't think it's
6 appropriate for the reasons I previously articulated. And
7 that I don't think simply because plaintiffs have brought a
8 lawsuit, that they should be prohibited from requesting the
9 same thing that any other citizen can request through the
10 Colorado Open Records Act. And to the extent that there's
11 concern about them abusing the Colorado Open Records Act, I
12 think that the solution to that is either through the Act
13 itself or through having them pay for costs of any such open
14 requests.

15 Now, if, as this case moves on, there is some level
16 of abuse or something is brought to my attention that the
17 plaintiffs in this matter are somehow abusing that process to
18 circumvent discovery, then through my discovery dispute
19 process, the defendants can bring that to my attention.

20 I'm anticipating that now the discovery is open,
21 that plaintiffs are going to be using the discovery process
22 primarily in order to obtain the documents that they need in
23 this case. But I think that the attempt to bar them from any
24 use of the Colorado Open Record Act or somehow prohibiting
25 documents that are obtained by any other person from seeing

1 the light of day because they were obtained through the
2 Colorado Open Records Act is not appropriate and, indeed,
3 probably is going to lead to more disputes than necessary as
4 to where the source of certain documents came from. So,
5 therefore, I'm going to deny the plaintiffs's request to
6 amend that.

7 That then leads us to the discovery period. And
8 here, I have already ruled as to when the discovery will
9 commence. And so that puts us -- if the parties are each
10 seeking 154 days, then we are looking at -- if it commences
11 on essentially tomorrow, we are looking at -- this may not be
12 exactly correct, but it's roughly going to be June 24 of
13 2019. So I will put here that discovery cutoff is June 24,
14 2019.

15 That then leads us to a dispositive motions
16 deadline. 35 days from that is July 29, 2019.

17 The parties don't believe that they are going to
18 need any expert discovery, but to the extent that it is
19 needed, I am fine with the date proposed by the parties,
20 which are 91 days before the discovery cutoff for
21 affirmatives and rebuttals being 35 days before the discovery
22 cutoff.

23 And then that, then, leads us to the issue of a
24 final pretrial. And here, what I'm going to do is simply put
25 further that that is to be set by Judge Daniel.

1 What Judge Daniel does is he waits until he sees
2 whether dispositive motions are filed or not filed, and then
3 he sets a combined final pretrial/trial preparation
4 conference and trial date. And so as a result, I don't
5 conduct any of those hearings for him and so it will just be
6 set by Judge Daniel.

7 So, I think that that gets us through all of the
8 disputes by the parties.

9 Am I -- is there anything that I'm missing in here?

10 MR. SULLIVAN: I have a couple of points of
11 clarification, Your Honor, if I could.

12 THE COURT: Okay.

13 MR. SULLIVAN: One point of clarification -- and
14 thank you for going through --

15 THE COURT: Sure.

16 MR. SULLIVAN: -- and explaining what you prefer on
17 the expedited period.

18 Point of clarification, are the parties permitted
19 to issue general discovery during this expedited window that
20 we have been discussing? Or is that going to be put to the
21 --

22 THE COURT: Yes, the parties are permitted to issue
23 general discovery during this period. But what I want the
24 parties to do -- and this goes back to sort of what I said at
25 the beginning -- as far as meeting and conferring and trying

1 to work things out, I recognize that the parties are going to
2 be focused primarily on the expedited portion of this and
3 trying to get ready for the preliminary injunction hearing,
4 so I caution the parties to don't serve 25 requests for
5 production immediately in this case. Or if you do, work with
6 each other on extensions of time so that the responses can be
7 due outside.

8 I don't want to set a multitiered discovery
9 deadline on this. I leave this to the parties' good
10 discretion to focus on the preliminary injunction first and
11 then -- you know, once that is done, then start moving
12 towards, you know, going forward on the other aspects of this
13 case. Okay.

14 MR. SULLIVAN: Very good, Your Honor. Thank you.

15 And then the only other issue I wanted to visit is
16 some other -- and this goes to kind of other limits that I
17 think are important from the defendants' perspectives on --
18 on the limits of discovery.

19 I envision some motions for protective order being
20 filed, based on what I understand plaintiffs to be issuing
21 discovery on, given that our client includes the
22 Commissioners, who act in quasi judicial and quasi
23 prosecutorial roles, and obviously, we have some concerns
24 about what sort of permissible areas can be inquired into
25 during depositions and through interrogatories and things.

1 I'm happy to outline what we would prefer to see as far as
2 limits if the Court would like to hear oral argument on that.

3 THE COURT: Well, let me tell you what I prefer as
4 far as how that moves forward. I was going to advise the
5 parties of this prior to the conclusion of this hearing.

6 If you look at my Practice Standards, I have a
7 method in which to handle discovery disputes. And what I do
8 is I don't want any motions for protective order filed. The
9 only ones of those that I wish to see are by outside parties
10 who essentially have to file that. With respect to the
11 parties who are here, what I want the parties to do is meet
12 and confer over any discovery disputes. I encourage that
13 meet and confer to be in person, but at a minimum, I require
14 it to be by phone, so not e-mails.

15 And to the extent that you can't reach an agreement
16 on any of these, contact my Chambers. I can get you in
17 within two weeks of when you contact my Chambers. With
18 respect to the expedited matters, I can probably get you in
19 even sooner than that. And then I have you file with -- just
20 e-mail to my Chambers one week before that hearing a joint
21 statement as to what the discovery disputes are.

22 That saves everybody, hopefully, two things: One,
23 the cost of filing a motion. Because I get it, when you file
24 a motion, you want the standards and everything else set
25 forth there and they -- it ends being a 15-page document

1 instead of a two-page document.

2 MR. SULLIVAN: Right.

3 THE COURT: And then second, when we go through the
4 motions process, it takes 35 days for that to be fully
5 briefed, I can get you in in two weeks.

6 So, that's how I want those -- those items to be
7 dealt with. And it goes the same with if you anticipate that
8 there's going to be areas that may involve some sort of
9 privilege in depositions, discuss it with each side first.
10 If plaintiff counsel says, Yes, I do want to get into that
11 and you believe it's privileged, contact my Chambers prior to
12 the deposition and I will get you in before the deposition
13 and then I can rule on all of those.

14 MR. SULLIVAN: Okay. Thank you for alerting me to
15 your preference on your Practice Standards.

16 THE COURT: Sure.

17 MR. SULLIVAN: I wonder if there might be room in
18 the scheduling order to put in -- there's just one or two
19 that give us particular heartburn and I wonder if it might
20 make sense to raise those now.

21 For example, intending to depose the Attorney
22 General, for instance. That's one which we obviously feel
23 very strongly about, the Attorney General is a high-ranking
24 official that is not deposed. And there's case law --
25 legends of case law supporting that. I think that's one

1 limit that should be in the scheduling order and I think that
2 it wouldn't really make sense to follow the procedure that
3 Your Honor described for an issue like that.

4 THE COURT: Well, I think it does because I'm aware
5 of the high-ranking official issue that generally, they are
6 not deposed. There are certain exceptions to that rule,
7 limited exceptions, such as they are the ultimate -- if they
8 were the decision-maker on that issue.

9 I don't -- I don't know in a vacuum here whether or
10 not those exceptions apply or do not apply. And it may be
11 that after conferral between the two sides, plaintiff may
12 say, We don't -- we don't want to depose the Attorney
13 General, that wasn't our intention.

14 And so that's why I have that discovery process so
15 that, hopefully, you all can work out most of these. And
16 then if you can't, then the issue becomes narrowly focused
17 where -- again, I know what the law is with respect to
18 deposing high-ranking officials. They can claim whatever
19 exception they believe applies and you can tell me why it
20 doesn't apply, and then I can issue a ruling on that.

21 MR. SULLIVAN: Very good, Your Honor.

22 THE COURT: All right. Anything further from
23 plaintiff?

24 MR. CAMPBELL: Just a few things, Your Honor.

25 On the Attorney General issue, we have no current

1 plans to depose the Attorney General, certainly not during
2 this initial expedited window.

3 But I will pick up one issue that I think the
4 defendants were -- were sort of hinting at and that is the
5 idea of deposing some of the Commissioners. We do intend to
6 depose the Commissioners, and their position, I think, is
7 that we can't even do that. So I wonder if it doesn't make
8 sense for us to start that process of briefing at least that
9 issue now because we are going to want to depose.

10 And, so the bottom line issue, as I read their
11 papers -- now, again, there hasn't been a ton of legal
12 argument laid out, but I understand their position to be that
13 there's some sort of privilege where they are not required to
14 stand for a deposition.

15 Our view is that there is a lot of case law out
16 there that says when what's relevant to the plaintiffs' claim
17 is the government official's intent, which is what we have
18 here, given the hostility claim that the Supreme Court just
19 recognized in Masterpiece One, we believe that those sorts of
20 privileges no longer apply.

21 So I do think that there might be some benefit to
22 starting dispute discussion resolution on that issue, in
23 particular.

24 THE COURT: Okay, that's fine.

25 Are the parties available February 4th at

1 11:00 a.m.?

2 MR. CAMPBELL: Your Honor, that is actually is the
3 day that we have the commencement hearing in the ongoing
4 state proceeding.

5 THE COURT: Okay.

6 MR. CAMPBELL: But if that's the only date that
7 could work, we could split up our legal team, so.

8 THE COURT: No, I can make it. How about the next
9 day, February 5 at 11 a.m.?

10 MR. SULLIVAN: I'm available, Your Honor.

11 THE COURT: Okay.

12 MR. CAMPBELL: Your Honor, we can have someone
13 attend that.

14 THE COURT: Then I will set this for hearing on
15 that issue. I can take up any other issues that would arise,
16 you know, between now and then on February 5.

17 What I will do is I want the parties to submit a
18 joint statement. My Practice Standards have page
19 limitations, but I will waive those page limitations for
20 this. And so I want the joint statement submitted by
21 January 29, which is one week in advance of that hearing and
22 two weeks from today's date.

23 And then since it's, I think, clear that we are
24 going to have at least that dispute, we will take that
25 dispute up on the 5th at 11:00.

1 The only additional item I have is -- as I
2 indicated, check my Practice Standards for discovery
3 disputes, but the only addition item that I have is to also
4 check Judge Daniel's Practice Standards because there may be
5 dates triggered by the scheduling order that are not in the
6 scheduling order.

7 What I'm going to do because there were so many
8 disputes, that I think attempting to simply cross out, as I
9 normally do in a scheduling order, and handwrite in whose
10 side I adopted is going to make this document a compete mess.

11 So I'm going to go back and edit it and send out
12 the trial preparation -- or excuse me, the scheduling order.
13 But please look at it to make sure that there's nothing that
14 I missed and forgot to make a change in there or something
15 along those lines, that we don't have a dispute over what I
16 intended as the scheduling order down the road. I will
17 remember this for the next week or so, but I won't remember
18 it a month or two months from now as to what I intended.
19 Okay.

20 Anything further from either side?

21 MR. SULLIVAN: Perhaps this an issue we can visit
22 on the 5th, Your Honor. But one other limitation we were
23 going to propose in the scheduling order is a temporal
24 limitation. Masterpiece One, on June 4th, did rule that the
25 Commission had not acted in a mutual manner towards the

1 plaintiffs, so we have a federal court order that says that.
2 We are not trying to collaterally attack that order. We
3 respect that decision. So we view that anything prior to
4 June 4 on that issue of neutrality is really not relevant in
5 this case, so we were going to suggest a temporal limitation
6 for post-June 4, 2018, for the limits on discovery.

7 I think that's consistent with what Judge Daniel
8 said in his order denying our motion to dismiss. On page 22,
9 he said: The allegation is not that investigation on this
10 gardena (ph) charge has been in bad faith, but rather that
11 the decision to formalize it and progress to a complaint
12 process is the part that's under scrutiny here.

13 So that was another limitation on discovery we were
14 going to propose. Given that the RFPs and RFAs might soon be
15 issued, I don't know if it makes sense to address that issue
16 now, but we're certainly happy to address it now or on the
17 5th.

18 THE COURT: Let me hear from plaintiff on that.

19 MR. CAMPBELL: Your Honor, there's three reasons
20 why that doesn't make sense in our estimation.

21 The first is that that limitation does not appear
22 to be bilateral in the defendants' estimation. What I mean
23 by that is in the filing that they just lodged this morning,
24 they indicated that they want to ask the plaintiffs about all
25 the orders that they've declined in the past, and so they

1 appear to be wanting to go back before June 4 in asking our
2 clients for information. So that doesn't seem fair.

3 The second point is that the charge of
4 discrimination that kicked off the pending state proceeding
5 was filed nearly one year before that June 2018 date. And in
6 our opinion, it doesn't make sense to cut off all of that
7 obviously relevant information in light of this argument.

8 And then the last point, and I would stress this as
9 probably the most important point, is that the Supreme Court
10 in Masterpiece One specifically said that, quote, factors
11 relevant to the assessment of governmental neutrality include
12 the historical background of the decision under challenge
13 and, quote, the specific series of events leading to the
14 allegedly unlawful conduct.

15 So in our opinion, the Supreme Court has already
16 said that information before June of 2018 is relevant to the
17 issues we are raising.

18 THE COURT: I'm not, at this point, going to put
19 temporal limitation on this. To the extent that temporal
20 limitations come into play with respect to Rule 1, I can take
21 them up through my discovery procedures. But I can't
22 conclude at this stage that, as a matter of law, anything
23 before a June 2018 date is going to be irrelevant. And, so,
24 therefore, I'm not going to place a limitation at this point.

25 All right. Like I said, the scheduling order will

1 be out, hopefully, by the conclusion of today with the
2 changes in it. We'll be in recess.

3 (Whereupon, the within hearing was then in
4 conclusion at 11:43 a.m.)

5

6 CERTIFICATE OF TRANSCRIBER

7 I certify that the foregoing is a correct transcript to the
8 best of my ability to hear and understand the audio recording
9 and based on the quality of the audio recording from the
10 above-entitled matter.

11

12 /s/ Dyann Labo

February 1, 2019

13 Signature of Transcriber

Date

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