

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF COLORADO

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

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4                   MASTERPIECE CAKESHOP INCORPORATED, et al.,

5                   Plaintiffs,

6                   v.

7                   AUBREY ELENIS, et al.,

8                   Defendants.

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10                   Proceedings before SCOTT T. VARHOLAK, United States  
11                   Magistrate Judge, United States District Court for the  
12                   District of Colorado, commencing at 4:06 p.m., March 1, 2019,  
13                   in the United States Courthouse, Denver, Colorado.

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

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18                   APPEARANCES

19                   RYAN TUCKER, DAVE CORTMAN and JACOB WARNER,  
20                   Attorneys at Law, appearing for the Plaintiffs.

21                   GRANT T. SULLIVAN, JACQUELYN  
22                   RICH FREDERICKS, VINCENT MORSCHER and MICHAEL McMASTER,  
23                   Attorneys at Law, appearing for the Defendants.

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24  
25                   TELEPHONIC DISCOVERY HEARING

1 P R O C E E D I N G S

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. Could I have  
6 entries of appearance, please.

7 MR. TUCKER: For the plaintiff, this is Ryan  
8 Tucker, Dave Cortman and Jake Warner here as well.

9 THE COURT: Good afternoon.

10 MR. TUCKER: Good afternoon.

11 MS. RICH FREDERICKS: Your Honor, for the State  
12 officials, it's Jacqueline Rich Fredericks, Grant Sullivan,  
13 Vincent Morscher and Michael McMaster.

14 THE COURT: Good afternoon.

15 MS. RICH FREDERICKS: Good afternoon.

16 THE COURT: So what remains at issue? What numbers  
17 remain at issue? I think we were through 28 yesterday. What  
18 is still out there?

19 MS. RICH FREDERICKS: Yeah, and Your Honor is going  
20 to be at a bit of disadvantage. Plaintiffs this afternoon  
21 propounded a new notice and so the parties have been working  
22 for about the last 45 minutes through that new notice. We  
23 had -- we had a discussion on new Number 6 and new Number 19.  
24 I think we've resolved those.

25 What is remaining presently is new Number 24, which

1 is an iteration of prior Number 29, and so we would like to  
2 discuss that one with you, Your Honor, and then new Number  
3 26, which is just a brand-new topic received today for the  
4 first time. So those are the two that we would like the  
5 Court's guidance with respect to.

6 THE COURT: Okay. Let's hear -- I obviously don't  
7 have them in front of me so why don't we hear what they are.

8 MS. RICH FREDERICKS: Yeah, I can read that. So  
9 topic 24, which is former topic 29, is the documents attached  
10 in support of defendant's response to plaintiff's motion for  
11 preliminary injunction and exhibits, and then there is a list  
12 of numbers attached in support of plaintiff's amended motion  
13 for preliminary injunction, including authenticating those  
14 documents and discussing the substance, context and author of  
15 those documents.

16 THE COURT: Okay.

17 MR. TUCKER: Before we begin, I should say that --  
18 this is Ryan Tucker -- that we had worked on this right  
19 before we called Your Honor. We were trying to -- we were in  
20 the middle of this, and we're not asking defendants to  
21 authenticate documents that did not come from them. So to  
22 the extent that, you know, there is a third-party document  
23 out there that they can't authenticate, obviously we're not  
24 going to ask that question.

25 THE COURT: Okay.

1 MR. TUCKER: But these are substantive documents,  
2 charging documents, social media posts from the commissioners  
3 that we're trying to get authenticated so that we can use  
4 them at the PI hearing.

5 THE COURT: What's the objection to that?

6 MS. RICH FREDERICKS: Yeah, Your Honor, so that --  
7 I have indicated to plaintiff's counsel that there is no  
8 objection to my client authenticating their own documents or  
9 them being asked about what is in their file; however, what  
10 has been included is broader than that. For example, the  
11 70-page brief that was filed in Masterpiece One before the  
12 Supreme Court has been included and I don't think that that's  
13 something that I can have a deponent up to speed on in such  
14 someone -- you know, they're asking about the legal positions  
15 taken in a brief before the Supreme Court. So that's one  
16 issue and that's Document 10.

17 MR. TUCKER: And I can comment on that. We --  
18 before we called Your Honor, we said we were not going to --

19 THE COURT: Okay.

20 MR. TUCKER: -- include documents in that list.

21 THE COURT: The Court can take judicial notice of  
22 another Court's records anyway, so go ahead.

23 MS. RICH FREDERICKS: Very good. Then we come to  
24 Exhibit 25 and Exhibit 28. These are not my clients'  
25 documents. These are outside entity's documents, and so

1 these are not documents that the Commission as an intuition  
2 is in a position to authenticate or to speak to  
3 substantively. One of them is a profile on the city of  
4 Denver's website about Commissioner Aragon and his work for  
5 them. One of them is --

6 MR. TUCKER: And to make this more simplistic,  
7 obviously if this is outside the defendant's wheelhouse,  
8 we're not going to expect them to authenticate documents that  
9 are not theirs.

10 THE COURT: Yeah. I mean, I think -- I think  
11 they're making it clear that only your documents are they  
12 asking you to authenticate.

13 MR. TUCKER: Right.

14 MS. RICH FREDERICKS: Okay, but I also don't know  
15 that the Commission, like, designee is in a position to be  
16 discussing substantively documents that are on third-party's  
17 websites.

18 THE COURT: I don't think they're asking you to. I  
19 think they're saying only -- only your documents.

20 MS. RICH FREDERICKS: My understanding was they had  
21 not withdrawn these two documents.

22 MR. TUCKER: Well, Your Honor, I think -- I think  
23 looking at 25, there is a couple of examples where there is a  
24 bio of a particular commissioner, and so it's that document  
25 that sits on the Denver, I think, website. So we're not

1 going to expect that we're going to get that document  
2 authenticated, but that one- or two-page document as it  
3 relates to the bio of a commissioner, we would want to at  
4 least have the opportunity to talk about it.

5 THE COURT: I think that's fine. I think you can  
6 get -- to the extent we're asking about a two-page bio of the  
7 commissioner, I think you can get a 30(b)(6) witness prepared  
8 to know what the commissioner's, who is involved in this  
9 case, background is. I think that's acceptable.

10 MS. RICH FREDERICKS: Okay. My concern in  
11 particular with Exhibit 28, though, is this is about a  
12 third-party organization, and I would analogize this to  
13 essentially the Bryce (ph) decision where his prior  
14 membership or not with this organization and questions about  
15 that would really I think cut against the prior order not to  
16 inquire into exactly that, their private (inaudible).

17 THE COURT: This is Exhibit 28 to Number 104?

18 MS. RICH FREDERICKS: Yes, Your Honor.

19 THE COURT: Let me look at it.

20 MR. TUCKER: I believe this is the document  
21 referred to on our complaint. Excuse me, maybe our motion  
22 for summary injunction. And my understanding is that the  
23 State has denied that this particular commissioner was  
24 affiliated with this organization, the National LGBTQ Task  
25 Force, so we thought it appropriate to be able to ask about

1 this particular document.

2 MS. RICH FREDERICKS: And I want to be very clear,  
3 we did not deny that at all. What we specifically indicated  
4 that he is not currently affiliated with this organization.

5 MR. TUCKER: Okay.

6 THE COURT: I'll allow them to ask the question  
7 whether he is or whether he isn't. It's on a public website.  
8 It's clear that, you know, at least the representation is  
9 that he has been a member of this organization for 25 years.  
10 I don't want them inquiring any further than just simply that  
11 question, was he a member or was he not, although I guess  
12 it's not a member, it's a community -- you know, let me read  
13 it.

14 What I'm going to allow is, I'm going to allow them  
15 to ask about the professional affiliations that are in here.  
16 So, for example, it says that he served as Governor John  
17 Hickenlooper's GLBT liaison, that question can be asked.  
18 Would he work for the mayor's agency for human rights, that  
19 question can be asked. Whether he is a member of the GLBT  
20 community for 25 years, I'm not exactly sure what that means.  
21 Does that mean that he's -- I'm not sure what that means.  
22 Does it mean he's an activist in that community? Does that  
23 mean what? I don't know what that means and so I'm not going  
24 to allow questioning into that.

25 The remainder of it, to the extent it's actually on

1 his professional affiliations, it's essentially his resume  
2 and I'll allow questioning into that.

3 Any others with respect to this -- or this topic?

4 MR. TUCKER: I'm sorry, Your Honor, I lost that  
5 last comment.

6 THE COURT: I said, Is there anything else with  
7 respect to this topic?

8 MS. RICH FREDERICKS: Yes. Document 36 and 37 are  
9 training documents for the Division. They're not Commission  
10 documents.

11 THE COURT: Let me hear from defendant.

12 MR. TUCKER: I imagine we could probably ask  
13 Director Elenis about those couple examples --

14 THE COURT: Okay.

15 MR. TUCKER: -- to the extent they're Division  
16 documents.

17 THE COURT: Okay, that sounds fair. Anything  
18 further with these?

19 MS. RICH FREDERICKS: 38 is the declaration by Dave  
20 Williams, so I'm not sure what we would be asking there. To  
21 the extent that were the third-party commissioners'  
22 conversations, I think there is a topic can that covers that,  
23 but in terms of the truth, veracity or authenticity of  
24 Mr. Williams' affidavit --

25 MR. TUCKER: Yeah, we're not -- we're not going to

1 do that I can assure you of that.

2 THE COURT: Okay, so 38 is off topics. And 39 --

3 MS. RICH FREDERICKS: And 39 we do not have an  
4 issue with, Your Honor.

5 THE COURT: All right. So then what's the other  
6 topic that was just added?

7 MS. RICH FREDERICKS: Your Honor, topic -- new  
8 topic 26, just in this afternoon, is whether any  
9 nonprivileged documents or e-mails responsive to plaintiff's  
10 expedited request for production to defendants were deleted  
11 or destroyed.

12 MR. TUCKER: And, Your Honor, to be -- to be clear  
13 here, this is actually a -- we're trying to narrow a couple  
14 requests that dealt with document retention issues, and so  
15 this is our attempt not at making a new one, but actually  
16 refining an old one, combining them.

17 And so that's our position on --

18 THE COURT: What's the harm --

19 MR. TUCKER: -- was there anything destroyed.

20 THE COURT: What's the harm with this question?  
21 It's essentially asking was there any spoliation of evidence.

22 MS. RICH FREDERICKS: I understand that, Your  
23 Honor, but it's -- it means that we have to have the deponent  
24 reask seven people because the deponent has been in  
25 interviews to prepare and some of those have come and gone.

1 In fact, I think all of them at this point. And so there may  
2 be some (inaudible) next week. Trying to wrangle the seven  
3 commissioners again for any new topic is really a big list in  
4 the next four days.

5 THE COURT: Well, it's simply asking the  
6 commissioners: Did you destroy any documents?

7 MS. RICH FREDERICKS: It's also -- it's not limited  
8 in time.

9 THE COURT: Let me ask -- let me ask this of  
10 plaintiff's counsel. Again, what I want to focus on is this  
11 preliminary hearing. If there were documents destroyed,  
12 you're not going to get them in time for the preliminary  
13 hearing anyways. Why can't you just simply ask this through  
14 an interrogatory as part of the regular discovery process?  
15 Why does it have to go through a 30(b)(6) deponent?

16 MR. TUCKER: Well, I guess it would -- it would --  
17 it could go towards I suppose some credibility issues, but  
18 I -- really what we're trying to do is just narrow it to this  
19 case. I realize there is not a time component to it, but we  
20 would just be asking specific to this case, and I think it's  
21 just a simple question of whether anything was destroyed or  
22 not.

23 THE COURT: I'll allow.

24 MR. TUCKER: Any --

25 THE COURT: I will allow -- what I will allow is

1 following question. I'll allow you to ask whether any  
2 documents pertaining to Masterpiece were destroyed. And I do  
3 it that way because when you -- when you list it as anything  
4 responsive to the request for production, some of those  
5 involve policies, procedures, et cetera, that now it's a  
6 deeper question of, well, did -- is it possible that we got  
7 rid of old procedures after this case began and then you  
8 really have to go back to all of the commissioners and have  
9 them search.

10 The narrower question of asking each commissioner  
11 did you destroy any documents related to Masterpiece since  
12 this case began should be a simple question to ask each of  
13 them. It frankly could be a simple e-mail. And obviously  
14 the answer to that should be no, but I'll allow that  
15 questioning. To the extent that there is a broader  
16 spoliation questions, those can be asked through  
17 interrogatories.

18 MS. RICH FREDERICKS: And I think what Your Honor  
19 just said is helpful. To the extent that it's from the time  
20 this case began, I think that that would be a more narrower  
21 and easier list, because if it's, you know, pertaining to  
22 this Masterpiece generally, obviously, there was prior  
23 litigation, but I think that that's a helpful clarification,  
24 and so with that we will (inaudible).

25 THE COURT: Okay. All right. Thank you,

1 everybody. We will be in recess. And as I indicated, I am  
2 available next Wednesday if necessary. All right, thank you.

3 (Whereupon, the within hearing was then in  
4 conclusion at 4:20 p.m.)

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CERTIFICATE OF TRANSCRIBER

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

12

13 /s/ Dyann Labo

March 5, 2019

14 Signature of Transcriber

Date

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