UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

ROBERT W. OTTO, PH.D. LMFT, individually and on behalf of his patients, and JULIE H. HAMILTON, PH.D., LMFT, individually and on behalf of her patients,	)	Civil Action No. 9:18-cv-80771-RLR
Plaintiffs,	)	
v.	)	
CITY OF BOCA RATON, FLORIDA, and COUNTY OF PALM BEACH, FLORIDA,	)	
Defendants.	)	

JOINT NOTICE OF CASE PROCEDURAL PROPOSAL

Pursuant to the Court's August 18, 2022, Order granting a preliminary injunction and instructing the parties to file a joint notice informing the Court of their respective positions on how the case should procedurally move forward [ECF No. 168], Plaintiffs, ROBERT W. OTTO, PH.D. LMFT and JULIE H. HAMILTON, PH.D., LMFT (collectively, "Plaintiffs"), and Defendants CITY OF BOCA RATON, FLORIDA ("City") and COUNTY OF PALM BEACH, FLORIDA ("County"), (collectively, "Defendants"), hereby provide the notice required by the Court.

A. AGREED POSITIONS AND AGREED PORTIONS OF THE PARTIES' PROPOSAL.

The parties have met and conferred. The parties are in disagreement over whether the case is moot, and over the scope of any future discovery, as set forth in their respective sections, *infra*. Should the Court find that the case is not moot, the parties are in agreement that the remaining claims should now proceed to discovery, dispositive motions, and trial. The parties agree that 120 days should be allotted for discovery (following the court's entry of a scheduling order), followed by a dispositive motion deadline 60 days after completion of merits discovery. The parties further agree that a trial should be scheduled on any claims that remain undisposed following dispositive motions.

B. PLAINTIFFS' ADDITIONAL POSITIONS AND PROPOSAL NOT AGREED TO BY DEFENDANTS.

The parties have two principal procedural disagreements: (1) whether Plaintiffs should be granted leave for a first-time amendment of their Complaint, and (2) whether Plaintiffs are entitled to factual discovery on Defendants' claim that declaratory and permanent injunctive relief are moot. Plaintiffs will discuss their position on these issues, and provide the Court with an update on the parties' settlement discussions.

1. Plaintiffs should be granted leave to amend their complaint.

After the filing of their initial Complaint, during the limited preliminary injunction discovery permitted by the Court, Plaintiffs learned that the City, the County and at least one private individual and one private organization engaged in a continuing conspiracy to deprive Plaintiffs of their constitutionally-protected rights, because of their discriminatory animus towards Plaintiffs. Plaintiffs seek the Court's leave to amend their Complaint, including to update their factual allegations (now more than four years old), and to assert a continuing 42 U.S.C. § 1985 conspiracy against the City and County. Plaintiffs also intend to conduct additional discovery from Defendants and from their co-conspirators to obtain further support for their claim.

Plaintiffs have sought Defendants' consent for leave to amend their Complaint, but, despite **claiming** that they do not want to "unnecessarily driv[e] up the cost of litigation for all parties involved," (dkt. 156 at 4), Defendants have unreasonably refused. Defendants' refusal is borderline frivolous, but in line with Defendants' **actions** in unnecessarily driving up the cost of litigation for all parties involved. (*See, e.g.*, dkts. 150-168).

Here, despite the fact that this case was filed four years ago, the case is still in its procedural infancy, because it was stayed for all but eight months of that entire time, and those eight months were spent litigating the preliminary injunction. (Dkt. 145). Defendants have never even answered

the initial Complaint.[1] Merits discovery has not even commenced.[2] Neither dispositive motions nor trial have even been scheduled. And Plaintiffs have never amended their initial Complaint.

Under these circumstances, there is no question that "[t]he court should freely give leave" for a first-time amendment of the Complaint, as mandated by the liberal amendment provision of Fed. R. Civ. P. 15(a)(2). *Id*. Indeed, "the rule as applied in this [the Eleventh] circuit" is that, where a plaintiff requests the opportunity to amend the Complaint, "a plaintiff **must** be given **at least one chance** to amend the complaint." *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999) (emphasis added). *See also*, *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (same); *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) (holding that Rule 15 "evinces a bias in favor of granting leave to amend"); *Bivin-Hunter v. Wyndham Vacation Resorts, Inc.*, No. 1:09-cv-03465-JOF, 2010 WL 1409855, *4 (N.D. Ga. Mar. 30, 2010) ("the general rule of this circuit is to allow a party at least one opportunity to amend a complaint"). In fact, as the Eleventh Circuit has held numerous times, it would be an abuse of discretion to deny Plaintiffs leave to amend where no substantial factor necessitates such denial. *See, e.g.*, *Bryant*, 252 F.3d at 1165; *Loggerhead Turtle v. Cnty. Council of Volusia Cnty.*, 148 F.3d 1231, 1258 (11th Cir. 1998); *McKinley v. Kaplan*, 177 F.3d 1253, 1258 (11th Cir. 1999).

Defendants feign ignorance about the nature of Plaintiffs' proposed amendment. But Plaintiffs have described the nature of their proposed amendment to Defendants and the Court. If Defendants believe that Plaintiffs' proposed cause of action for conspiracy is legally barred, the

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[1] Defendants filed motions to dismiss, which were not adjudicated, and were terminated by the Court's Order staying the case. (Dkt. 145 at 3). Defendants' contention (p. 8 and note 4, *infra*), that their motions to dismiss are still somehow "fully briefed and pending" is quite puzzling, since this Court's stay order expressly noted that "All pending motions … are **TERMINATED**." (*Id*. (bold and caps emphasis in original)). Even more curious and quixotic is Defendants' contention that "the recent lift of the stay makes Defendants' Motions to Dismiss ripe for determination once again." (*Id*. at n.4). The Court will recall that Defendants moved to dismiss primarily on the grounds that Plaintiffs lack standing, and that Defendants' ordinances do not violate the First Amendment. (*See e.g.*, dkt. 34 at 3-14; dkt. 39 at 2-16). Apparently, Defendants are asking this Court to overrule the Eleventh Circuit's conclusive and binding determination of these issues, and to dismiss a lawsuit that not only has merit, but which they have in large part already lost.

[2] The Court permitted the parties to conduct limited discovery, on an abbreviated schedule, directed to Plaintiffs' motion for a preliminary injunction. (Dkt. 25).

civil rules provide a mechanism for Defendants to test the sufficiency of Plaintiffs' allegations after they are made, via motion to dismiss.

Accordingly, Plaintiffs believe that the question of leave to amend the Complaint is so one-sided, and their entitlement to a first amendment so clear, that the Court may dispose of this issue in summary fashion, grant them leave based on this submission, and include a deadline in the forthcoming scheduling order for Plaintiffs to file an amended complaint within 30 days after the entry of that order. **Defendants will, of course, retain their right to move, plead or otherwise respond to Plaintiffs' Amended Complaint**.

Alternatively, if the Court desires further briefing on this issue, the Court should include in the scheduling order a deadline for Plaintiffs to file a more formal motion for leave to amend their Complaint, and a proposed Amended Complaint, within 30 days after the entry of that order.

2. Plaintiffs are entitled to discovery on Defendants' claim of mootness.

As the Court is aware, Defendants contend that Plaintiffs' claims for declaratory and permanent injunctive relief are moot because Defendants have taken, or are taking, steps to "voluntarily" and "permanently" repeal their unconstitutional ordinances. (*See, e.g.*, dkts. 150-168). Plaintiffs dispute the genuineness of Defendants' professed actions, and intend to prove, **factually**, that Defendants have not mended their unconstitutional ways and deep-seated, invidious desire to unlawfully chill Plaintiffs' protected speech, and that, absent permanent injunctive relief, Defendants will resume their violation of Plaintiffs' constitutional rights. Plaintiffs intend to demonstrate, **factually**, that Defendants have not met their "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000).

"In a factual challenge [to subject matter jurisdiction], the district court **must** give the plaintiff an opportunity for discovery." *In re CP Ships Ltd. Securities Litigation,* 578 F.3d 1306, 1312 (11th Cir. 2009) (cleaned up) (emphasis added), abrogated on other grounds by *Morrison v. Nat'l Austl. Bank Ltd.,* 561 U.S. 247 (2010). Because a factual dispute exists here between the parties as to the Court's continuing subject-matter jurisdiction over Plaintiffs' claims for declaratory and permanent injunctive relief, discovery is appropriate and must be permitted, as it would be for any other claim. "Mootness contentions require an **intensely factual inquiry**." *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 463 (S.D. Fla. 1980) (emphasis added). "Mootness involves, in part, a factual inquiry" and "[a] Court acts improperly when it stays

discovery relating to a factual attack on jurisdiction without giving the plaintiff an opportunity for discovery." *Bloedorn v. Keel*, No. 6:09-cv-55, 2012 WL 777318, *3 (S.D. Ga. Mar. 6, 2012). Indeed, denial of discovery "is improper if [as here] the discovery relates to a factual attack on subject matter jurisdiction for which the plaintiff [as here] has had no opportunity to engage in discovery." *Id*. at *2-3 (reversing magistrate's denial of plaintiff's discovery on mootness defense, even though the court doubted that plaintiff could ultimately overcome mootness defense).

Defendants' request for the Court to immediately rule on their "suggestion of mootness," and to deny Plaintiffs discovery on the factual issues surrounding Defendants' claimed voluntary cessation and propensity to return to their unconstitutional ways, is exactly what the courts rejected in *Bloedorn* and *Civiletti*. Defendants appear to contend that, just because government entities may be entitled to **some** leeway in proving voluntary cessation, they are also entitled to block any attempt to demonstrate, factually, that their voluntary cessation efforts are only temporary jurisdictional shams. Not surprisingly, Defendants cite no law for this proposition. This Court should reject Defendants' invitation to commit reversible error by denying factual discovery on whether Defendants' statements, conduct and actions demonstrate that Defendants are likely to return to their unconstitutional violations without permanent injunctive and declaratory relief.

Accordingly, the Court should permit discovery on the issue of mootness along with the other remaining issues in the case, and should delay action on Defendants' various "suggestions of mootness" until at least after discovery is complete and the parties have had an opportunity to brief the issues on summary judgment. If genuine issues of fact remain after dispositive motions, the issue of mootness over declaratory and permanent injunctive relief should be included with those issues that will be tried.

Finally, Plaintiffs are puzzled by Defendants' repeated reference to this "case" or this "action" being moot. Irrespective of Plaintiffs' claims for declaratory and permanent injunctive relief, there is no question that Plaintiffs' claims for damages (premised on multiple causes of action) and attorneys' fees are not moot. There is, therefore, no conceivable way in which this "case" could be moot.

3. Status of Settlement Discussions.

Previously, the County entreated the Court not to lift the stay, and to delay these proceedings, on account of settlement discussions that the County advised the Court were in progress. (Dkt. 156 at 3-4). Plaintiffs felt it was odd for the County to raise that issue with the

Court in the first place, but, since the issue was in fact raised, Plaintiffs now feel obliged to provide the Court with this update, to avoid any potential delay in scheduling of the case on account of formal or informal settlement discussions.

Defendants previously requested a settlement demand from Plaintiffs, and Plaintiffs promptly provided it as of August 11, 2022. (Dkt. 157 at 2-3). As of the filing of this Notice, neither Defendant has responded to Plaintiffs' settlement demand, and neither Defendant has committed to provide a response. Although Plaintiffs are amenable to continue informal settlement discussions during the course of this litigation, Plaintiffs do not believe that the case should be delayed for such discussions (especially given the apparent lack of urgency from Defendants). Nor do Plaintiffs believe that any formal settlement conferences are appropriate, warranted, necessary or likely to be any more fruitful than the discussions of the parties themselves.[3]

C. DEFENDANTS' ADDITIONAL POSITIONS AND PROPOSAL NOT AGREED TO BY PLAINTIFFS.

Defendants maintain that the threshold issue for the Court is whether this action is now moot. All eight counts of the Plaintiffs' Complaint are premised entirely on the challenged Ordinances. However, the City has filed a suggestion of Mootness [ECF No. 151], and the City's Challenged Ordinance has now been permanently repealed. *See* ECF No. 169. The County, similarly, is in the process of repealing its Challenged Ordinance in accordance with required, County procedures. *See* ECF No. 156. "When 'events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief' a claim must be dismissed as moot." *Haim v. Monroe Cnty.*, 479 F. Supp. 3d 1274, 1281 (S.D. Fla. 2020), *aff'd,* 858 Fed. App'x 340 (11th Cir. 2021) (quoting *Hall v. Sec'y, Alabama*, 902 F.3d 1294, 1297 (11th Cir. 2018)). "A case is moot when it no longer presents a live controversy with respect to which the Court can give meaningful relief." *Aaron Private Clinic Mgmt., LLC v. Berry*, 912 F.3d 1330, 1335 (11th Cir. 2019). "If the Court determines that it lacks subject matter jurisdiction, such as because the controversy becomes moot, it must dismiss the claim." *Haim*, 479 F. Supp. 3d at 1281 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S.

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[3] Defendants object to the inclusion of the "status of settlement discussions" in this filing, which Defendants believe are not only immaterial to the manner in which this case should proceed procedurally but also improper.

83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)); *see also Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) (noting "it is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking"). Thus, it is Defendants' position that the Plaintiffs' claims for declaratory relief and permanent injunction are moot in light of the permanent repeal of the County and City's Ordinances, and the Court must address the question of subject matter jurisdiction over the declaratory and permanent injunctive relief as the first procedural step moving forward.

Plaintiffs continue to advocate herein the incorrect standard for determining whether the repeal of legislation gives rise to mootness by arguing a standard that is applicable to private litigants, and not governmental entities. "[T]he Supreme Court has held that the repeal of or amendment to challenged legislation rendered moot a plaintiff's request for injunctive relief." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004) (citing *Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 474 (1990) (holding that a Commerce Clause-based challenge to Florida banking statutes was rendered moot by amendments to the law); *Massachusetts v. Oakes,* 491 U.S. 576, 582–83 (1989) (holding that an overbreadth challenge to a child pornography law was rendered moot by amendment to the statute); *Princeton Univ. v. Schmid,* 455 U.S. 100, 103 (1982) (*per curiam*) (holding that the challenge to a university regulation was moot because the regulation had been substantially amended); *Kremens v. Bartley,* 431 U.S. 119, 128–29 (1977) (holding moot a constitutional challenge to a state statute governing the involuntary commitment of mentally ill minors, because the law had been replaced with a different statute); *Diffenderfer v. Cent. Baptist Church, Inc.,* 404 U.S. 412, 415 (1972) (holding moot a challenge to a Florida tax exemption for church property when the law had been repealed)). Given the presumption of validity of governmental repeal of legislation, there is no need to conduct discovery on the issue of mootness.

To the extent that the issue of mootness remains unresolved, at this juncture, it is purely an issue of law, and should be disposed of through motion practice as early as possible. To that end, Defendants propose that the Court allow the parties to file briefs outlining the issue of mootness

within 30 days of the filing of the Joint Notice. Additionally, Defendants note that their respective Motions to Dismiss [ECF Nos. 34, 39] remain fully briefed and pending.[4]

Should the Court agree that the action is moot, the sole issue that remains to be resolved by this Court will be the issue of Plaintiffs' actual damages and the amount of attorney's fees, to the extent the Court determines Plaintiffs are, in fact, entitled to either actual damages or attorney's fees. To the extent that discovery takes place, and an evidentiary proceeding or a trial follows on the issue of Plaintiff's damages, both should be limited to the issue of the Plaintiffs' damages (and the discovery limited to the issue of attorneys' fees).

Defendants maintain that, in light of the permanent repeal of the Challenged Ordinances, any discovery as to the issue of mootness is neither necessary nor proper, and that the Plaintiffs' request to do so is not made in good faith and is intended to continue to unnecessarily drive up the costs of this litigation. As such, Defendants would request that this Court stay any discovery on said issue pending this Court's ruling on the issue of mootness, and any discovery conducted by the Parties be limited to the issue of Plaintiffs' actual damages at this stage, and should Plaintiffs' file a motion for attorneys' fees, discovery as to the reasonableness of and support for the amount claimed.

To the extent Plaintiffs seek leave to amend their pleading, seeking leave to do so in a joint scheduling proposal is improper. Notably, Defendants have not seen any proposed amended complaint nor any motion requesting such an amendment, as would be required by Rule 15(a), Fed. R. Civ. P. And contrary to their claim that Defendants have "unreasonably refused" to agree to an amended pleading, Defendants cannot agree to an amendment to a pleading which they have not received or reviewed. Indeed, based on the limited information Plaintiffs have provided, Defendants anticipate Plaintiffs will seek to add a claim pursuant to Section 1985, based on information known to them since the passage of Defendants' [now-repealed] Challenged Ordinances and for a cause of action for which no liability exists against Defendants as a matter of law. "Although leave to amend shall be freely given when justice so requires, a motion to

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[4] Plaintiffs noted that the Motions to Dismiss were "terminated" when the Court stayed this matter. *See, supra*, n. 1. To the extent they imply, therefore, that these Motions are no longer pending or viable, they are incorrect. The stay merely paused the pendency of the Motions for the duration of the stay, and the recent lift of the stay makes Defendants' Motions to Dismiss ripe for determination once again.

amend may be denied on numerous grounds such as undue delay, undue prejudice to the defendants, and futility of the amendment.'"[5] *Maynard v. Bd. of Regents*, 342 F.3d 1281, 1287 (11th Cir. 2003) (quoting *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1284 (11th Cir. 2000)). Indeed, Defendants do not dispute that Plaintiffs may seek leave from the court to amend their pleading, but Defendants cannot evaluate whether such a motion has merit given the limited information provided. Certainly, Defendants cannot ascertain whether a proposed amendment is futile until they have reviewed the amendment containing the new claim. As such, Defendants request that this Court order the Plaintiffs to follow the established Federal Rules of Civil Procedure and Local Rules and that their request to amend their pleading be made through the requisite Rule 15 motion. This would give Defendants the opportunity to properly evaluate the Plaintiffs' arguments and respond accordingly.

DATED this August 25, 2022.

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[5] Any argument that Plaintiffs only had "limited" discovery prior to the preliminary injunction is simply disingenuous. Indeed, the parties conducted extensive written, merits discovery and depositions of Plaintiffs and representatives of the City and County.

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CERTIFICATE OF SERVICE

I hereby certify that on this August 25, 2022, I caused a true and correct copy of the foregoing to be filed electronically with the Court's CM/ECF system. Service upon all counsel of record will be effectuated by the Court's electronic notification system.

/s/ Horatio G. Mihet
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