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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity,

Defendants.

Case No. CV04-8425 VAP (Ex)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL AND STAY OF PROCEEDINGS PENDING RESOLUTION OF MOTION AND APPEAL

Date: November 16, 2009
Time: 10:00 a.m.
Place: Courtroom of Hon. Virginia A. Phillips

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I. INTRODUCTION

The government's motion to certify for interlocutory appeal this Court's June 9 order granting in part and denying in part the government's motion to dismiss the first amended complaint filed by plaintiff Log Cabin Republicans is hypocritical, tardy, and a transparent attempt to avoid compliance with this Court's later order allowing discovery. It also violates Local Rule 7-3. Perhaps most importantly, the government's motion fails to meet the stringent requirements for the extraordinary relief afforded by 28 U.S.C. § 1292(b). For these reasons, explained in more detail below, the Court should deny the government's motion.

II. BACKGROUND

This Court has previously noted that "this is … a peculiar case and there's already been too many delays in it." Declaration of Aaron Kahn ("Kahn Decl.") Ex. A, p. 32. Plaintiff first initiated this case more than five years ago. The now-operative complaint was filed more than three and a half years ago.

On January 29, 2009, shortly after this matter was transferred to this Court's docket, the Court vacated an existing stay order and set a hearing date for the then-pending motion to dismiss. On June 9, 2009, this Court entered its Order Denying in Part and Granting in Part Motion to Dismiss. Dkt. No. 83.

Upon denying the government's motion to dismiss, the Court set a conference for July 6, 2009 to determine the scope of discovery and enter a scheduling order. Prior to the conference, the parties submitted a Joint Rule 26(f) Report (the "Rule 26 Report"). Dkt. No. 86. In the Rule 26 Report, the government argued that it should be exempt from certain provisions of Rule 26 of the Federal Rules of Civil Procedure. Rule 26 Report, pp. 1-5. Plaintiff disagreed and requested initial disclosures as well as all other discovery permitted under Rule 26 in the normal course. Id. at pp. 5-8. In the Rule 26 Report, the government said

it would file a motion for summary judgment and reserved the right to seek certification under 28 U.S.C. § 1292(b) in the event the Court permitted discovery. Id. at p. 5, ll. 3-6. The government did not, however, "reserve the right" to seek certification of the Court's order regarding the motion to dismiss.

On July 6, 2009, the Court held a Scheduling Conference, during which the parties argued at length regarding whether Plaintiff would be entitled to discovery. During the hearing, the Court noted that it was "inclined to think that the topics that the plaintiff has set forth in terms of discovery, in terms of areas in which it wants to do discovery, seem appropriate." Kahn Decl., Ex. A, p. 8. The Court did not issue a ruling during the hearing, but did state that it would "make a decision about discovery" "when [it] issue[d] the scheduling order." Kahn Decl., Ex. A, p. 29. The Court further noted that it would not "make sense" to issue a scheduling order without making a determination as to the appropriateness of discovery in this case

> only to have you go through the exercise of propounding discovery, then have the Government bring a motion saying discovery shouldn't be allowed and you go before Judge [Eick], the loser then appeals that to me. So, I'm going to rule on that when I issue the order, because you've briefed it, you've argued it, so I might as well rule on that.
>
> And then I'll set the dates. So that will be more efficient for everyone.

Kahn Decl., Ex. A, p. 29.

On July 24, 2009, the Court entered an order in which the Court held "Plaintiff is entitled to conduct discovery in this case to develop the basis for its facial challenge." Dkt. No. 91.[1] The Court also entered an order setting a discovery cut-off date of March 15, 2010 and a trial date of June 14, 2010. Dkt. No. 92.[2]

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[1] Minute Order Denying Defendants' Request Regarding Discovery (In Chambers) (the "Discovery Order").

[2] Civil Trial Scheduling Order (the "Scheduling Order").

Comporting with the Court's Scheduling Order, Plaintiff propounded its First Set of Requests for Production of Documents on September 15, 2009 (the "First Request for Production").[3] Such requests were well within the scope of discovery Plaintiff had identified both in the Joint Rule 26(f) Report and during the July 6 Status Conference. This is the only discovery request served to date; Plaintiff has not yet served any interrogatories or requests for admissions and has not yet noticed any depositions. The First Request for Production seeks documents both critical to the issues to be tried in June; for example, it calls for production of "studies … relating to the application of the ["Don't Ask, Don't Tell" policy (the "Policy")] to women in the United States Armed Forces" [Request No. 9]; documents concerning whether the presence in the United States Armed Forces of gay and lesbian American servicemembers has any effect on combat effectiveness, unit cohesion, unit morale, good order, discipline, or readiness to fight [*e.g.*, Requests No. 11-21]; and reports regarding the experience of other countries who do not deny the right to serve in the military to open gay or lesbian individuals [*e.g.*, Request Nos. 46-47].

Responses to the First Request for Production were due on October 20, 2009. The government failed to either serve any response to the requests or to produce any documents by the deadline and did not request an extension of time to respond As of the date of this filing, Plaintiff has still not received any responses or objections to the requests. Instead, the government filed this motion.

III. ARGUMENT

A. The Court Should Deny The Motion Because The Government Failed To Comply With Local Rule 7-3

Local Rule 7-3 requires that a party discuss thoroughly the grounds for its motion with opposing counsel, preferably in person, and that such conference occur twenty days prior to filing the motion. Local Rule 7-3. The government failed to

[3] A copy of Log Cabin Republicans' First Request for Production is attached to the government's Motion.

comply with this rule before filing this motion.

The government first notified Plaintiff of its intention to file the motion on October 15, 2009 – the day before the government filed the motion – by a brief email. According to the government's email, "We intend to file today…." Kahn Decl., Ex. B, p. 36. In the motion, the government tacitly admits in a footnote it did not comply with Local Rule 7-3 (see government's Notice of Motion, p.3, n.1) but claims Plaintiff had sufficient notice based on "the history of the case," including the government's reservation of that right in the parties' Joint Rule 26(f) Report to seek certification in the event the Court ruled discovery regarding Plaintiff's claims was appropriate.

This claim is untrue. At no time prior to October 15, 2009 did the government ever confer with Plaintiff regarding a proposed motion to certify *the Court's ruling on the Motion to Dismiss*. Nor did the government ever confer with Plaintiff regarding a proposed motion to stay proceedings, including discovery, until that day.

Furthermore, the government did not meet and confer in good faith. Local Rule 7-3 required that the government discuss thoroughly the "substance" of the contemplated motion. Yet the government's email gave Plaintiff no indication of the basis or substance of the contemplated motion. Kahn Decl., Ex. B. In response, Plaintiff provided the government with a substantive explanation of the reasons why the motion is inappropriate; without responding or in any way identifying the basis or substance of its motion, the government simply filed its motion without any further discussion. Id.

Moreover, in the email exchange that the government uses as purported compliance with Local Rule 7-3, Plaintiff's counsel not only asked counsel for the government to notify the Court of the fact of their opposition to the motion, but also asked counsel for the government to provide the Court with a copy of the email explaining their reasons. Id. Counsel for the government failed to do so.

B. The Court Should Deny The Motion Because The Government Has Not Met Its Steep Burden Under Section 1292(B)

Jurisdiction of the circuit courts of appeal is centered on the final judgment rule. See 28 U.S.C. § 1291. Pursuant to the final judgment rule, an appeal may be taken only after final review of all issues involved in the case. See id. There are however, certain limited exceptions, applicable in extraordinary circumstances, to the final judgment rule. One such exception is section 1292(b) of title 28 of the United States Code, which permits litigants to bring "an immediate appeal of a non-final order upon the consent of both the district court and the court of appeals." Ariz. v. Ideal Basic Indus. (In re Cement Antitrust Litig.), 673 F.2d 1020, 1026 (9th Cir. 1992). According to the legislative history of section 1292(b), "this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." Id. Both the Supreme Court and the Ninth Circuit adhere to this standard. See id. (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978)).

In order to demonstrate that the extraordinary measure of certification is appropriate, the moving party must establish (1) "the order involves a controlling question of law as to which there is substantial ground for difference of opinion" and (2) "the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); Krangel v. General Dynamics Corp., 968 F.2d 914, 915 (9th Cir. 1992) (denying a motion for interlocutory appeal on the grounds that the district court did not find all the required elements of section 1292(b)); In re Cement Antitrust Litig., 673 F.2d at 1026 (requiring all elements of section 1292(b) to grant a motion for interlocutory appeal). Both elements must be present, Krangel, supra, 968 F.2d at 915; In re Cement Antitrust Litig., 673 F.2d at 1026, but the government has not met its burden of showing either of the two required elements.

1. The Government Has Not Established The Existence of a Controlling Question of Law

In an attempt to convince the Court that it can satisfy the first element of section 1292(b) – a controlling question of law as to which there is substantial ground for difference of opinion – the government merely reiterates the same arguments it previously made, at length, in the motion to dismiss. Notably, the government offers no new arguments or new decisions in support of the argument that its motion was wrongly decided. As the Court has already received and considered extensive briefing, conducted a lengthy oral argument and issued a detailed opinion concerning the motion to dismiss, Plaintiff will not retread over old ground. The prior briefing and the Court's order address fully the cases cited by the government, including Lawrence, Witt, Beller, Holmes, and Phillips v. Perry.

The government's true motivation for seeking certification is obvious and transparent. The government did not seek any form of appellate review of this Court's June 9 order denying, in part, its motion to dismiss for over four months. It filed this motion only four days before it was due to respond to discovery requests and did not mention any reason for this delay in its motion. It is painfully obvious that the government is seeking to prevent any discovery in this case. In trying to explain that the questions raised by the motion are controlling, the motion refers to the discovery served by Log Cabin Republicans.[4] Presumably because some of the requested documents will show that the Policy was and is based on prejudice

[4] *See, e.g.,* government's Memorandum of Points and Authorities, p. 2, ll. 12-15 ("Plaintiff's discovery requests confirm that certification is appropriate here—an immediate appeal of the Court's resolution of the controlling legal questions, if resolved in the government's favor, would obviate the need for the parties to engage in that burdensome discovery and end this litigation."). Of course, if that were the standard for certifying the denial of a motion to dismiss under section 1292(b), any party could claim that certification is appropriate to "obviate" the need for discovery.

against or animus towards homosexuals, and not on any constitutionally protected basis, and because it is unwilling or unable to seek appellate review of the Court's discovery order, the government instead belatedly asks the Court to certify the issues on the motion to dismiss for interlocutory appeal. The Court should see through this transparent attempt to evade discovery obligations.

2. An Appeal Would Impede, Not Advance, the Litigation

The second element of section 1292(b) requires that litigation be materially advanced by the immediate appeal, as opposed to impeded or delayed. 28 U.S.C. § 1292(b); see Shurance v. Planning Control Int'l, Inc., 839 F.2d 1347, 1348 (9th Cir. 1988) (denying an interlocutory appeal because an appeal would not advance litigation but "might well have the effect of delaying the resolution of this litigation, for an appeal probably could not be completed before [the trial date]"). Such applications are also to be brought as promptly as possible. See Weir v. Propst, 915 F2d 283, 286 (7th Cir. 1990)(Posner, J.) ("celerity was to be the touchstone of appealability under [28 U.S.C. § 1292(b)]….the parties ought to know at the earliest possible opportunity whether such an interruption is going to occur.").

The government has not satisfied this element. The trial date in this matter is approximately eight months away, in June 2010, a fact never mentioned once in the government's motion. Certifying an appeal would cause the trial of this already-delayed case to be put off for years. It is exceedingly unlikely that the Ninth Circuit could both rule on a request for certification and issue a decision on the underlying appeal before June 2010. According to the Ninth Circuit's website, a civil appeal could take anywhere from 15 to 32 months. "Frequently Asked Questions" (Updated April 2009), http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000084, ("approximately 12-20 months" "from the time of the notice of appeal until oral argument"; "most cases are decided within 3 months to a year" after oral

argument). Then, after an appeal, the case would have to return to this Court and obtain a new trial date.

Moreover, the government's claim that certification will advance this litigation is belied by its unexplained delay in bringing the motion. This Court entered the order denying the motion to dismiss on June 9, 2009. The government filed this motion on October 16, 2009, more than four months later. The motion offers no explanation for such delay.

Instead, the government argues that an interlocutory appeal will *advance* the litigation because it will protect it from "wide-ranging and unduly burdensome" discovery. Motion, p. 12, l.15. This reveals the government's true purpose in bringing this Motion: it does want to obey the Court's prior order that Plaintiff is entitled to conduct discovery on its claims. Throughout the motion, the government argues that the one set of discovery requests propounded by Plaintiff is "inappropriate" or "burdensome." Motion, p. 12, l. 9; see, e.g., Notice of Motion, p. 2, l. ("[a]n appeal will also materially advance the ultimate termination of this litigation because, if successful, it will end this litigation, and thus pretermit the burdensome, wide-ranging, and inappropriate discovery plaintiff seeks."); Motion p. 2, ll.3-9 ("inappropriate discovery"); p. 4, l.26 - p. 5, l.1 ("Searching for these documents … would impose an additional layer of burden upon the government that is wholly unnecessary and improper"); p. 12, ll.19-20 ("Such discovery is inappropriate."); p. 12, l.24 ("It is thus inappropriate to inquire into the subjective motivations of Congress and the Executive in enacting DADT").

As noted above, the appropriateness of discovery has already been briefed, argued, carefully considered by this Court, and decided.[5] The government could

[5] In an ongoing case regarding the constitutionality of California's Proposition 8, Judge Vaughn R. Walker of the Northern District of California recently allowed discovery of communications between the Proposition's proponents and their political consultants and others because "the mix of information before and available to [an enacting body] forms a legislative history that may permit the court to discern whether the legislative intent of an initiative measure is consistent with and advances the governmental interest that its proponents claim in litigation

have sought appellate review from the Court's order, whether by mandamus or by seeking certification of that order. Furthermore, if the government had objections to individual discovery requests, the Local Rules and the Federal Rules of Civil Procedure provide a veritable toolbox of potential remedies. For example, the government could have served responses and objections to the discovery requests, met and conferred with Plaintiff, and engaged in motion practice regarding the contested discovery. The government took none of these steps.

The government not only repeatedly claims that the one set of requests for production is inappropriate and burdensome, it has the nerve to complain about the timing of the discovery. It complains that Log Cabin Republicans "has pursued this discovery even as Congress has indicated its intent to hold hearings on the continued wisdom of DADT, and even as the President has stated that he opposes the policy and has called for repeal of the statute." Motion at 2, ll. 9-12.[6] The motion even claims, again without any supporting evidence, that the discovery will somehow "interfere with the work of the political branches….." Id. at 13, line 11-14.

This complaint by the government is the height of hypocrisy. A bill to repeal DADT has been pending in Congress since 2005.[7] How long are Log Cabin Republicans to wait to serve discovery before a June 2010 trial date?

The government is correct that the President has stated several times that he opposes the policy and called for its repeal. For example, on June 29, 2009, the President offered the following remarks at a LGBT Pride Month Reception:

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challenging the validity of that measure or was a discriminatory motive." Perry v. Schwarzenegger, ___ F.R.D. ___, 2009 WL 3234131 at *7 (N.D. Cal. 2009).

[6] These factual statements are not supported by any declaration or other evidence presented with the motion.

[7] Military Readiness Enhancement Act of 2005, H.R. 1059, 109th Cong. (1st Sess. 2005); Military Readiness Enhancement Act of 2007, H.R. 1246, 110th Cong. (1st Sess. 2007); Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (1st Sess. 2009).

> And finally, I want to say a word about "don't ask, don't tell." As I said before --- I'll say it again – I believe "don't ask, don't tell" doesn't contribute to our national security. (Applause.) In fact, I believe preventing patriotic Americans form serving their country weakens our national security. (Applause.)
>
> Now, my administration is already working with the Pentagon and members of the House and the Senate on how we'll go about ending this policy, which will require an act of Congress.
>
> Someday, I'm confident, we'll look back at this transition and ask why it generated such angst, but as Commander-in-Chief, in a time of war, I do have a responsibility to see that this change is administered in a practical way and a way that takes over the long term. That's why I've asked the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to develop a plan for how to thoroughly implement a repeal.
>
> I know that every day that passes without a resolution is a deep disappointment to those men and women who continue to be discharged under this policy – patriots who often possess critical language skills and years of training and who've served this country well. But what I hope is that these cases underscore the urgency of reversing this policy not just because it's the right thing to do, but because it is essential for our national security.

The White House, Office of the Press Secretary, June 29, 2009, "Remarks by the President at LGBT Pride Month Reception,"

http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-LGBT-Pride-Month-Reception (emphasis added).

Similarly, on October 10, 2009, the President offered the following remarks at a Human Rights Campaign Dinner:

> We are moving ahead on Don't Ask Don't Tell. (Applause.) We should not be punishing patriotic Americans who have stepped forward to serve this country. We should be celebrating their willingness to show such courage and selflessness on behalf of their fellow citizens, especially when we're fighting two wars. (Applause.)
>
> We cannot afford to cut from our ranks people with the critical skills we need to fight any more than we can afford – for our military's integrity – to force those willing to do so into careers encumbered and compromised by having to live a lie. So I'm working with the Pentagon, its leadership, and the members of the House and Senate on ending this policy. Legislation has been introduced in the House to make this happen. I will end Don't Ask, Don't Tell. That's my commitment to you. (Applause.)

The White House, Office of the Press Secretary, October 10, 2009, "Remarks by the President at Human Rights Campaign Dinner," http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Human-Rights-Campaign-Dinner.

In his own words, the President says that DADT "weakens our national security" and that reversing DADT "is essential for our national security." These statements are tantamount to admissions by our Commander-in-Chief that DADT is

unconstitutional! Yet, at the same time as bills are pending in Congress and at the same time as he makes these admissions, our President and Commander-in-Chief prevents openly gay and lesbian Americans from joining our Armed Forces, allows the continued discharge of patriotic gay and lesbian members of our Armed Forces[8], and allows closeted gay and lesbians to fight and die in wars in Iraq and Afghanistan. He also orders his lawyers to continue to oppose this action and to seek the extraordinary relief sought by the government's motion—*and to do so six days after the President's most recent public comments on DADT***.** For his lawyers to suggest that Log Cabin Republicans should stay any discovery because a bill is pending and the President has made promises might make sense if the government were to stay the enforcement of the policy, but it of course has not done so. The government's actions in this case speak much louder than its politicians' words and the discovery served by Log Cabin Republicans is appropriately timed to prepare for a June 2010 trial on these issues.

C. The Court Should Deny The Request For A Stay Pending Appeal

Notably absent from the motion is the standard for granting a stay of proceedings pending appeal. In determining whether to issue a stay, the Court must balance the following factors: "(1) whether the stay applicant has made a strong showing he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776 (1987); see Golden Gate

[8] According to one source, over 275 service members have been discharged under DADT since President Obama took office and another 2,000 resigned voluntarily as a result of the policy in 2009. L. Korb, S. Duggan, L.Conley, "How To End Don't Ask, Don't Tell," Christian Science Monitor, July 7, 2009. Through its discovery requests, Log Cabin Republicans seek definitive evidence regarding how many servicemembers have been discharged under the Policy in recent years [*e.g.*, Requests No. 7, 69-71].

Rest. Ass'n v. City & County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008); Lopez v. Heckler, 713 F.2d 1432, 1435-36 (9th Cir. 1983).

Previously, a stay had been entered in this case and the Court unwound it. The government has utterly failed to demonstrate that the institution of another stay in this oft-delayed case is warranted at this time. Remarkably, it offers no declaration or any other evidence supporting the request for such relief. At most, the government offers half a paragraph at the end of the motion requesting that the Court stay discovery while the Ninth Circuit considers its appeal. The government fails to claim, much less demonstrate, that it will be irreparably harmed by complying with the Court's order granting discovery, other than the customary duties that come with responding to discovery. Nor does the government address the fact that *Plaintiff* would be irreparably harmed in the event of a stay because its failure to respond to discovery will impede Plaintiff's ability to prepare for trial. Finally, the government does not address the public interest element of the stay standard, which favors appeals after final judgments and trials on the merits.

Significantly, a request for stay pending appeal does not automatically result in a stay. Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1480 (9th Cir. 1992); Nat'l Labor Relations Bd. v. Cincinnati Bronze, Inc., 829 F.2d 585, 588 (6th Cir. 1987) ("[A]lthough a district court may not expand upon an order after the notice of appeal has been filed, it may take action to enforce its order in the absence of a stay pending appeal."). None of the discovery deadlines have tolled because the government filed a motion *requesting* stay pending appeal. Indeed, the government was still obligated to respond to the discovery by October 20, 2009. As there is no intervening order stopping discovery from running, the government had the responsibility to respond to discovery or to seek an order tolling discovery before the expiration of the response deadline. By failing to timely respond to discovery, object, or seek an order extending the time to respond, the government has waived all defenses relating to the discovery.

IV. CONCLUSION

For the reasons shown above, including the government's failure to comply with Local Rule 7-3 and its failure to meet either, much less both, of the requirements for the extraordinary remedy in 28 U.S.C. § 1292(b), the Court should deny the government's motion.

Respectfully submitted,

Dated: November 2, 2009

WHITE & CASE LLP

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