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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

ProtectMarriage.com, et al.,

Plaintiffs,

vs.

Debra Bowen, et al.,

Defendants.

Case No. 2:09-CV-00058-MCE-DAD

REPLY BRIEF IN SUPPORT OF MOTION TO MODIFY SCHEDULING ORDER TO EXTEND DEADLINES

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Plaintiffs' strategy during discovery in this matter has been simple – don't respond, delay instead. Defendants served written discovery requests on October 30, 2009, with seven months remaining in the discovery period. At the time, Defendants anticipated that after reviewing the relevant documents produced by Defendants, they would have the chance to make informed decisions about whether to follow up with targeted depositions, bringing discovery to a reasonable close by May 2010. But for the next six months, Plaintiffs stonewalled. In November, Plaintiffs produced no documents and no privilege log in response to Defendants' requests. When Defendants pressed for a response, Plaintiffs offered to produce documents in February, but they did not in fact complete their responses until March 23, nearly five months after Defendants' requests. And those responses were so inadequate that Defendants have now filed a motion to compel. As Plaintiffs' dilatory strategy became clear, Defendants concluded that the only fruitful source of information might be depositions, but Plaintiffs have indicated that the few deponents Defendants named will not be available until late May. For these reasons, Defendants are seeking a brief extension of the non-expert discovery period and subsequent deadlines.

In response to Defendants' motion, Plaintiffs make two arguments. First, they assert that there is no good cause for a 60-day extension of the discovery deadlines, claiming Defendants waited too long to serve written discovery and to notice depositions. But Defendants' discovery strategy was perfectly reasonable. They simply did not anticipate that their requests would be met with unresponsiveness and delay. Second, Plaintiffs assert that a 60-day extension is unwarranted because it would cause "potentially life-threatening" harm to their supporters. But Plaintiffs have offered absolutely no evidence of such harm – and never have.

I. There Is Good Cause To Modify The Scheduling Order Because Plaintiffs, Not Defendants, Caused The Delays That Necessitate An Extension.

Plaintiffs first argue that the Court should not amend the scheduling order because Defendants sat on their hands for too long, but this attempt to shift the blame for their delays is unavailing. Defendants diligently sought discovery from Plaintiffs in this case, and those attempts were met with a brick wall.

Plaintiffs accurately point out that Defendants did not serve written discovery requests until several months after the Court's May 2009 scheduling order. But the timing of Defendants' requests was reasonable for several reasons. First, Defendants served their requests in October, seven months before the close of non-expert discovery. At that time, that seven-month cushion seemed more than enough in light of the issues in the case, the small number of parties and the narrow time period during which Plaintiffs allegedly had suffered harm. It was hardly foreseeable that Plaintiffs would fail to produce a single responsive document for nearly four months, that they would not complete their production until late March, and that even then they would refuse to provide documents responsive to ten of Defendants' thirteen requests. Plaintiffs' suggestion that Defendants waited until the very last minute to pursue discovery is simply wrong.

Second, contrary to Plaintiffs' assertions, Defendants did not simply do nothing for five months after the Court issued its scheduling order. In early June, Plaintiffs moved for summary judgment, and after full briefing on Defendants' subsequent motion under Federal Rule of Civil Procedure 56(f), the Court denied Plaintiffs' summary judgment motion on June 24. (Dkt. 189.) The parties subsequently negotiated a protective order to address Plaintiffs' concerns that public discovery responses could expose their supporters to harm. The parties filed that stipulation on July 13, and the Court issued the order on July 15. (Dkt. 191, 193.) Defendants did not serve discovery requests immediately after the July order, but the timing of Defendants' requests in October was far from the glaring delay that Plaintiffs characterize.

Third, serving discovery requests in the fall made sense because Defendants expected that Plaintiffs would be able to produce all responsive records at that point. Plaintiffs are alleging that their supporters suffered threats, harassment or other harm as a result of the public disclosure of their contributions both before and after the passage of Proposition 8, and Defendants' discovery requests inquired about the extent and duration of the alleged harassment. Following State law, Plaintiffs filed "semi-annual" reports on January 31, 2009 disclosing contributions received in the final months of 2008, and filed additional reports on July 31, 2009 disclosing contributions received between January and June 2009. *See* Cal. Gov't Code § 84200. It was entirely reasonable for Defendants to seek discovery regarding alleged post-election harassment *after* Plaintiffs' post-election filings because that

is when any post-election harassment based on the public reports would have occurred. Defendants' discovery was designed to elicit a full record, not just an early one.

Similarly, Defendants had good reason for waiting to notice depositions. From the start, Defendants chose to seek documentary discovery before noticing any depositions in this matter. In counsel's judgment, depositions of Plaintiffs' representatives would be far more useful if the Defendants already had documentary information on relevant topics, such as Plaintiffs' communications with or about Proposition 8 supporters who allegedly suffered harassment, Plaintiffs' fundraising communications, their organizational structure, and the impact of California's disclosure laws on their ability to attract donors. Without that information, Defendants could not accurately assess whether they would need to take depositions at all, who the deponents would be, what the topics of questioning would be, and whether any 30(b)(6) depositions would be needed. When Defendants served their initial requests in October 2009, they fully expected to have at least a few months to review Plaintiffs' responses and make those determinations about depositions. But as discussed above, Plaintiffs did not produce any documents until February and did not complete their half-hearted disclosures until late March. After reviewing the documents that were finally produced, Defendants chose to take a few targeted depositions and contacted Plaintiffs to arrange the dates.

So while Defendants *could* have noticed depositions earlier in the year, the delay in doing so was caused by Plaintiffs' five-month drag in responding to written requests. And while it is true that Plaintiffs' counsel suggested in February that Brian Brown and Ron Prentice could be made available as deposition witnesses, they made that offer before producing a single document in response to Defendants' requests for production. Defendants can hardly be blamed for waiting to receive documents before deciding whether to take these depositions, what the subject of the depositions would be, and whether Brown and Prentice were even the right witnesses.

II. Plaintiffs Will Not Suffer Any Prejudice As A Result Of The Proposed 60-Day Extension.

Plaintiffs would suffer no harm from a short extension of the deadlines to allow Defendants to complete discovery. While Plaintiffs complain that the proposed extension would open them up to

"two further months of potential threats, harassment and reprisals" and "potentially life-threatening" harms, they offer no evidence to support their hyperbolic claims.

In denying Plaintiffs' motion for preliminary injunction earlier in this litigation, the Court concluded that Plaintiffs were simply unable to "garner support for" their argument that "the threat to Plaintiffs' First Amendment rights is so serious as to warrant an exception" to the State's disclosure laws. *See* Memorandum and Order, January 30, 2009 (Dkt. 88) at 45. Indeed, the Court noted that Plaintiffs had offered only "relatively minimal" proof of the type of harm they allege. *Id.* at 38. Nothing has changed. In discovery, Plaintiffs have produced no admissible evidence of harassment, threats or reprisals beyond the declarations they offered in support of their failed preliminary injunction motion. Their assertion of continuing harm is no more valid now than it was when they filed that motion. Indeed, it is far less so because nearly a year and a half have passed since Proposition 8 was on the ballot, and the heat of the accompanying electoral debate has subsided. And Plaintiffs' suggestion that the alleged harm will increase with the approaching November 2010 election is a red herring because same-sex marriage rights will not even be on the ballot in that election.[1]

Rather than provide any evidentiary support for their claims that a 60-day extension would put lives at risk, Plaintiffs cite the Supreme Court's recent reference to their own amicus brief in *Citizens United v. Federal Elections Commission*. But a line of dicta expressing "concern" about Plaintiffs' counsel's allegations cannot make up for the dearth of factual evidence here.[2]

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[1] *See* Cal. Secretary of State website, Qualified Statewide Ballot Measures, available at http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm (visited May 10, 2010).

[2] To the extent Plaintiffs have suggested that the Supreme Court would conclude the harassment they allege is serious enough to raise First Amendment concerns, the Court's reaction to Plaintiffs' counsel in the recent argument in *Doe v. Reed* indicates otherwise. The plaintiffs in that litigation are seeking an order requiring the State of Washington to withhold the names of individuals who signed a referendum petition opposing same-sex marriage. At the argument on April 28, 2010, a number of Justices, led by Justice Scalia, expressed deep skepticism of the plaintiffs' argument that the identities of participants in the political process should not be disclosed because of the types of incidents that Plaintiffs allege here. *See Doe v. Reed*, No. 09-559, Transcript of Argument, April 28, 2010 (available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-559.pdf) at 11-12 ("JUSTICE SCALIA: . . . [T]he fact is that running a democracy takes a certain amount of civic courage. And the First Amendment does not protect you from criticism or even nasty phone calls when you exercise your political rights to legislate, or to take part in the legislative process."), 28-29 ("JUSTICE SCALIA: . . .You know, you can't run a democracy this way, with everybody being afraid

Plaintiffs' failure to offer any evidence to support their allegations is particularly ironic because, of course, the entire point of the instant motion is to obtain that evidence, if it exists. Defendants are simply trying to use the discovery process to determine whether Plaintiffs' allegations of threats and harassment in this litigation have any factual support. And by opposing Defendants' motion, Plaintiffs are attempting to evade their obligation to provide such evidence by arguing that the time it would take to do so would subject them to further – heretofore unproven – harassment.

III. Conclusion

Plaintiffs should not reap the benefits of their dilatory tactics. An extension of the discovery period would allow Defendants to obtain the information they sought almost seven months ago without harming any party. In that 60-day period, the assigned magistrate could decide the parties' discovery dispute, Defendants could receive and review the documents they requested in October, and Defendants could ask questions of the deponents that Plaintiffs could not make available during the current non-expert discovery period. The parties and the Court itself have a substantial interest in a full and complete factual record. For these reasons, Defendants request that the Court grant the motion to modify the pretrial scheduling order.

Dated: May 10, 2010

By /s/Jonathan Givner
JONATHAN GIVNER

Attorney for Defendants
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of having his political positions known. . . . The threats [against referendum campaign manager] should be moved against vigorously, but just because there can be criminal activity doesn't mean that you -- you have to eliminate a procedure [allowing public access to the names of petition signers] that is otherwise perfectly reasonable.").