

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, ET AL.

DOCKET 3:18-cv-00625-SDD-EWD

VERSUS

KYLE ARDOIN, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF STATE

MOTION TO SUBSTITUTE

NOW INTO COURT, through undersigned counsel, comes defendant, Kyle Ardoin, in his official capacity as Secretary of State, who moves the Court as follows:

1.

Due to the inclusion of extraneous language in the title of the pleadings filed as Document Number 47, Defendant moves to substitute in lieu of various documents filed within Document Number 47, the following attached documents:

In lieu of Doc 47 – the attached Motion For Protective Order, Exhibit No. 1;

In lieu of Doc. 47-2 – the attachment Memorandum In Support of Motion For Protective Order, Exhibit No. 2;

In lieu of Doc 47-3 - the attached (proposed) Order, Exhibit No. 3.

The document originally filed as Doc 47-1 remains unchanged.

WHEREFORE, Defendant respectfully prays that this Motion To Substitute be granted. Defendant further prays for all full, general and equitable relief.

RESPECTFULLY SUBMITTED,

s/Celia R. Cangelosi
Celia R. Cangelosi
Bar Roll No. 12140
5551 Corporate Blvd., Suite 101
Baton Rouge, LA 70808
Telephone: (225) 231-1453
Facsimile: (225) 231-1456
Email: celiacan@bellsouth.net

JEFF LANDRY
ATTORNEY GENERAL

s/Carey T. Jones
Angelique Duhon Freel (La. Bar Roll No. 28561)
Carey Tom Jones (La. Bar Roll No. 07474)
Jeffrey M. Wale (La. Bar Roll No. 36070)
Assistant Attorneys General
Louisiana Department of Justice
Civil Division
P. O. BOX 94005
Baton Rouge, Louisiana 70804-9005
Telephone: (225) 326-6060
Facsimile: (225) 326-6098
Email: walej@ag.state.la.us
freela@ag.louisiana.gov
jonescar@ag.louisiana.gov

Jason Torchinsky (VSB 47481)
Phillip M. Gordon (TX 24096085)
HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC
45 N. Hill Drive, Suite 100
Warrenton, VA 20186
Telephone: (540) 341-8808
Facsimile: (540) 341-8809
Email: jtorchinsky@hvjt.law
pgordon@hvjt.law

Counsel for the Defendant

CERTIFICATE OF SERVICE

I do hereby certify that, on this 1st day of March, 2019, the foregoing pleading was filed electronically with the Clerk of Court using the CM/ECF system which gives notice of filing to all counsel of record. Counsel of record not registered in the CM/ECF system were served via other means.

s/Celia R. Cangelosi
CELIA R. CANGELOSI

UNITED STATES DISTRICT COURT
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KYLE ARDOIN, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF STATE

MOTION FOR PROTECTIVE ORDER

NOW INTO COURT, through undersigned counsel, comes the Defendant, Kyle Ardoin, in his official capacity as Secretary of State, who respectfully moves for a protective order pursuant to Fed. R. Civ. P. 26(c)(1)(A), 26(d) and other applicable rules for the reasons explained below.

1.

The plaintiffs served *Plaintiffs' First Set of Requests for Production of Documents to Defendant* on January 29, 2019. The requests for production, seven in numbers with subparts, are attached hereto as Exhibit A.

2.

Defendant has raised the Court's jurisdiction both in its *Motion to Dismiss*, (Doc 16) and in its *Motion to Dismiss First Amended Complaint* (Doc 33), and jurisdiction remains undecided at this juncture.

3.

Moreover, while the parties held an earlier 26(f) scheduling conference, Defendant opposed disclosures and discovery until jurisdiction was determined, and any dates for discovery proposed by the plaintiffs are stale so that the 26(f) conference is moot as if never held.

4.

The initial scheduling conference in the case was cancelled following Defendant's motion to dismiss (Docket Entry 18). No scheduling order has been entered in the case, and Defendant's opposition to disclosure and discovery remains unresolved.

5.

By email on February 26, 2019, from Carey T. Jones, attorney for Defendant, to Jennifer Wise Moroux, attorney for Plaintiffs, opposing counsel was asked whether the parties could agree to extending the time for discovery until after the motion to dismiss was decided, and was advised that absent agreement a protective order would be sought. Defense counsel never received a response to the February 26, 2019 email.

WHEREFORE, Defendant respectfully prays that the Court sustain Defendant's objection to premature discovery and issue a protective order staying initial disclosures and discovery, including and particularly *Plaintiffs' First Set of Requests for Production of Documents to Defendant*, pending a definitive determination of the Court's jurisdiction, the convening a new 26(f) conference, and the entry of a scheduling order by the Court.

RESPECTFULLY SUBMITTED,

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Celia R. Cangelosi
Bar Roll No. 12140
5551 Corporate Blvd., Suite 101
Baton Rouge, LA 70808
Telephone: (225) 231-1453
Facsimile: (225) 231-1456
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ATTORNEY GENERAL

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Jeffrey M. Wale (La. Bar Roll No. 36070)
Assistant Attorneys General
Louisiana Department of Justice
Civil Division
P. O. BOX 94005
Baton Rouge, Louisiana 70804-9005
Telephone: (225) 326-6060
Facsimile: (225) 326-6098
Email: walej@ag.state.la.us
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jonescar@ag.louisiana.gov

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Counsel for the Defendant

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CELIA R. CANGELOSI

UNITED STATES DISTRICT COURT
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KYLE ARDOIN, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF STATE

MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER

MAY IT PLEASE THE COURT:

Defendant, Kyle Ardoin, in his official capacity of Louisiana Secretary of State, respectfully moves for an order sustaining his objection to premature discovery and a stay and/or protective order against further disclosures and discovery pending a determination of the Court's jurisdiction, the convening a new 26(f) conference, and the entry of a scheduling order by the Court.

The plaintiffs served *Plaintiffs' First Set of Requests for Production of Documents to Defendant* on February 29, 2019. The plaintiffs' discovery requests are directed to the merits of the case. Presently pending and pending at the time the referenced discovery request was served is defendant's *Motion to Dismiss First Amended Complaint* (Doc 33) that, in part, challenges the Court's jurisdiction to hear the case absent the appointment of a three-judge panel under 28 U.S.C. § 2284.

Prior to the filing of the *First Amended Complaint*, the parties held a 26(f) conference. The plaintiffs proposed an ambitious discovery schedule. The defendant, however, opposed disclosures and discovery until the Court's jurisdiction could be determined. The parties'

respective positions were set out in a *Joint Status Report* (Doc 17). The Court has not held a scheduling conference, and no scheduling order has been entered. The defendant's objection to disclosures and discovery remains unresolved. Additionally, the discovery dates proposed by the plaintiffs are stale so that the 26(f) conference is now moot as if never held.

ARGUMENT

Where the jurisdiction of the district Court has been challenged, the case cannot move forward until jurisdiction to hear the case has been determined. In *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), a non-party witness challenged a contempt order of the district court that enforced a subpoena seeking extensive documentary evidence from the witness. The witness argued that the district court lacked jurisdiction to issue the subpoena that sought information on the merits of the case and thus had no power to enforce it. The Supreme Court recognized the inherent and legitimate authority of the district court to issue binding orders, including discovery orders, **to determine and rule upon its own jurisdiction**. However, the Court concluded that the subpoena power of a court cannot be more extensive than its jurisdiction. The court's authority at the outset is limited to a determination of its jurisdiction, and the discovery mechanisms provided by the Federal Rules are likewise limited to inquiries that would aid in a determination of jurisdiction. "It follows that if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void and an order of civil contempt based on the refusal to honor it must be reversed." *United States Catholic Conf.*, at 76-77.

Any disclosures and discovery requests that go to the merits of the case rather than to a determination of the court's jurisdiction are premature. The defendant has objected to the

jurisdiction of the court, and until jurisdiction is determined, he cannot be required to undergo the substantial expense and burden of producing the extensive catalog of documents sought by the plaintiffs in their present discovery requests. The plaintiffs' requests clearly seek merits discovery, and discovery on the merits puts the cart before the horse.

Additionally, a meaningful 26(f) conference must be held and a scheduling order issued before disclosures and discovery can commence. *Joffrion v. Excel Maint. Servs.*, 2011 U.S. Dist. LEXIS 137317, 2011 WL 6003196 (M.D. La. 2011). The defendant is mindful of the exception of Fed. R. Civ. P. 26(d)(2) allowing requests for production of documents more than 21 days after service and before the first Rule 26(f) conference, but the exception has no applicability where the defendant has excepted to the court's jurisdiction and further opposed the commencement of discovery pending a determination of jurisdiction.

Accordingly, the defendant submits that discovery on merits issues should be stayed until such time that the jurisdiction of the court to hear the case has been determined.

Because the discovery requests are premature, the defendant reserves substantive objections to the individual discovery requests pending a determination of the jurisdiction of the court over the merits of the case.

RESPECTFULLY SUBMITTED,

s/Celia R. Cangelosi
Celia R. Cangelosi
Bar Roll No. 12140
5551 Corporate Blvd., Suite 101
Baton Rouge, LA 70808
Telephone: (225) 231-1453
Facsimile: (225) 231-1456
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Jeffrey M. Wale (La. Bar Roll No. 36070)

Assistant Attorneys General

Louisiana Department of Justice

Civil Division

P. O. BOX 94005

Baton Rouge, Louisiana 70804-9005

Telephone: (225) 326-6060

Facsimile: (225) 326-6098

Email: walej@ag.state.la.us

freela@ag.louisiana.gov

jonescar@ag.louisiana.gov

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Phillip M. Gordon (TX 24096085)

HOLTZMAN VOGEL JOSEFIAK

TORCHINSKY PLLC

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Telephone: (540) 341-8808

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ORDER

Considering the *Motion For Protective Order* filed by Defendant, Kyle Ardoin:

IT IS ORDERED that a protective order issue herein staying initial disclosures and discovery, including and particularly *Plaintiffs' First Set of Requests for Production of Documents to Defendant*, pending a definitive determination of the Court's jurisdiction, the convening a new 26(f) conference, and the entry of a scheduling order by the Court.

Baton Rouge, Louisiana, this ____ day of _____, 2019.

Honorable Erin Wilder-Doomes
Magistrate Judge, Middle District of Louisiana

UNITED STATES DISTRICT COURT
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ORDER

Considering the *Motion To Substitute* filed by Defendant, Kyle Ardoin:

IT IS ORDERED that the attached *Motion To Substitute* is granted; and the following documents are substituted in lieu of those previously filed in Document Number 47:

Motion For Protective Order, in lieu of that previously filed as Doc 47;

Memorandum in Support of Protective Order, in lieu of that previously filed as Doc 47-2;

and

(Proposed) *Order*, in lieu of that previously filed as Doc 47-3.

Baton Rouge, Louisiana, this ____ day of _____, 2019.

Honorable Erin Wilder-Doomes
Magistrate Judge, Middle District of Louisiana