IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, et al. Plaintiffs, v. KYLE ARDOIN, in his official capacity as the Secretary of State of Louisiana, Defendant	Case No. 18-625-SDD-EWD

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND REQUEST FOR A SCHEDULING OR STATUS CONFERENCE

Defendant's Motion for Protective Order, ECF No. 47 ("Motion")—filed nearly seven months after the Federal Rule of Civil Procedure 26(f) conference took place in this case and thirty days after he was served with discovery—is premised on the assumptions that the argument calling for a three-judge court raised in his pending motion to dismiss is meritorious and dispositive of Plaintiffs' substantive claims. These assumptions are wrong. Rather, the timing of Defendant's Motion coupled with a plain reading of it reveals that it is little more than an attempt to delay adjudication. Indeed, despite bearing the burden of demonstrating "good cause" for the entry of a protective order, Defendant's Motion cites only two cases in support of the broad, categorical arguments it advances—neither of which supports those positions in the slightest—and it makes only one conclusory claim of prejudice. The scant legal and factual authority provided falls far short of the "specific demonstration of fact[s]" that courts in this district have required for such requests, *June Med. Servs., LLC v. Gee*, No. 17-404-BAJ-RLB, 2018 WL 357874, at *1 (M.D. La. Jan. 10, 2018) (quoting *In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998)), and demonstrates that a

protective order is not a necessity, but rather a method for Defendant to achieve delay.

More importantly, Defendant's prejudice argument fundamentally misunderstands the impact of his own challenge under 28 U.S.C. § 2284. Even if this Court were to find that a three-judge court should be empaneled—a proposition that has been rejected by at least two other courts within the last year alone and is out of line with any reading of the statute, *see Chestnut v. Merrill*, No. 2:18-CV-00907-KOB (N.D. Ala. Jan. 28, 2019), ECF No. 40; *Thomas v. Bryant*, No. 3:18-CV-441-CWR-FKB (S.D. Miss. Feb. 5, 2019), ECF No. 51; *see also Dwight v. Kemp*, No. 1:18-CV-02869-RWS (N.D. Ga. Sept. 12, 13, 2018), ECF Nos. 25, 27—Plaintiffs' claims would not be dismissed. Instead, a three-judge court would simply be empaneled, and Plaintiffs' case, propounding the exact same discovery requested here and with the same single judge making determinations on discovery motions, would continue on the usual course, albeit severely delayed. As a result, any protective order staying discovery only further delays the inevitable and plainly prejudices Plaintiffs' ability to obtain not only discovery, but ultimate relief in this case. Accordingly, this Court should deny Defendant's request for a protective order, and order Defendant to respond to Plaintiffs' requests for production immediately. Plaintiffs also respectfully request that this Court set a scheduling conference or, in the alternative, a status conference so that this case may proceed.

BACKGROUND

Plaintiffs filed their Complaint in this action on June 13, 2018, alleging that the Louisiana congressional district map violates Section 2 of the Voting Rights Act. ECF No. 1. The Court ordered a scheduling conference be set for August 23, 2018. ECF No. 9. In the interim, on July 31, 2018, Defendant filed a motion to dismiss. ECF No. 16. On August 8, 2018, the parties held a Rule 26(f) conference, filing the resultant Joint Status Report with this Court on August 9, 2018. ECF

No. 17. On August 20, 2018, the Court canceled the scheduling order "in light of the pending Motion to Dismiss," stating that it would review the matter in 90 days. ECF No. 18.

On August 21, 2018, Plaintiffs filed an Amended Complaint mooting certain arguments in Defendant's motion to dismiss, ECF No. 19, along with a Response in Opposition to the motion to address the remaining arguments raised therein, including the three-judge court argument referenced here, ECF Nos. 20-22, 25-27. On September 10, 2018, Defendant filed a motion to dismiss the Amended Complaint, reasserting—sometimes verbatim—the same arguments regarding the three-judge court that it raised (and Plaintiffs addressed) in its initial motion. ECF No. 33. Plaintiffs filed their Response in Opposition on September 25, 2018. ECF Nos. 34, 39. Defendant filed a reply on October 3, 2018. ECF No. 35, 37. While the 90-day period designated by the Court in its order cancelling the scheduling conference lapsed on November 19, 2018, Defendant's motion to dismiss remains pending.

Meanwhile, on January 28, 2019, a district court in the Northern District of Alabama addressed the exact same three-judge court argument raised by Defendant here—and rejected it out of hand. *See* ECF No. 40.[1]

The following day, on January 29, 2019, Plaintiffs served their First Requests for Production.[2] On February 28, 2019, the day that Defendant's responses and objections were due,

[1] A district court in the Southern District of Mississippi denied a similar motion the following week. *Thomas*, No. 3:18-CV-441-CWR-FKB (S.D. Miss. Feb. 5, 2019), ECF No. 51. Notably, in that case, which involved a challenge to a statewide legislative plan under Section 2 of the Voting Rights Act, the defendant has argued that "[r]egarding congressional redistricting, . . . there is no ambiguity to resolve" under 28 U.S.C. § 2284. Defs.' Mem. in Supp. of Mot. to Stay Order Pending Appeal at 10, *Thomas*, ECF No. 64.

[2] Defendant's Memorandum in Support of Motion for Protective Order mistakenly states that Plaintiffs' First Requests for Production of Documents was served on February 29, 2019. Def.'s Mem. at 1. This is incorrect. The Requests were served via email on January 29, 2019, and the responses and objections thereto were due on February 28, 2019.

Defendant filed the instant Motion for Protective Order.

ARGUMENT

Defendant contends that the law categorically requires this Court (and all courts) to enter a protective order and stay discovery where a jurisdictional challenge is pending, but the case that he relies on for this proposition does not hold as much. Defendant relies solely on *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), to argue that any jurisdictional challenge prevents a case from moving forward. But in that case, the Court held only that a nonparty witness can challenge the court's lack of subject matter jurisdiction in defense of a civil contempt citation via an interlocutory appeal. *Id.* at 76. In reaching this decision, the Court did not address the interplay of jurisdiction and discovery during the pendency of a routine jurisdictional challenge, nor did it address whether a protective order should be issued when a court's jurisdiction is challenged. Rather, the Court focused solely on the appeal of a contempt order and based its determination on that issue in the unique context that applies to civil contempt orders. *See id.* at 76-77. Thus, while it is true, as Defendant notes, that the Court affirmed that where a district court lacks subject matter jurisdiction over the underlying action, it will also lack jurisdiction to issue a civil contempt order, *see id.* at 76-77, that finding has no bearing on the issue before this Court, i.e., whether a protective order should be issued and routine discovery between parties should be stayed.[3]

Instead, when considering whether to enter a protective order in circumstances similar to these, courts in the Fifth Circuit generally look to Rule 26(c), which "allows the Court to issue a

[3] Indeed, as discussed herein, *see* discussion *infra* 6-8, Defendant's argument on jurisdiction—and any statements by the Court in *U.S. Catholic Conference* pertaining to subject-matter jurisdiction—also have no bearing on this case as the empaneling of a three-judge court does not strip this Court of jurisdiction or impede it from making any decisions regarding discovery.

protective order after a showing of good cause 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *June Med. Servs.*, 2018 WL 357874, at *2 (quoting Rule 26(c)). Contrary to Defendant's suggestion, a "court is not required to stay discovery while a dispositive motion based on the pleadings is pending." *Mapp v. UMG Recordings, Inc.*, No. 15-602-JWD-RLB, 2017 WL 3599166, at *3 (M.D. La. Aug. 21, 2017). Rather, "Rule 26(c)'s 'good cause' requirement indicates that the party seeking a protective order has the burden 'to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *June Med. Serv.*, 2018 WL 357874, at *2 (quoting *In re Terra Int'l, Inc.*, 134 F.3d at 306). Issuing a "stay is the exception rather than the rule." *Notariano v. Tangipahoa Parish Sch. Bd.*, No. 61-17832, 2018 WL 3844882, at *2 (E.D. La. Aug. 13, 2018). Under this standard, Defendant's Motion—which sets forth no specific facts or supporting law—plainly falls far short of demonstrating the necessity of a protective order.[4]

As an initial matter, contrary to Defendant's assertion, Plaintiffs' requests for production are not premature. The only restriction on the commencement of discovery is Rule 26(d)(1), which provides that "[a] party may not seek discovery . . . before the parties have conferred as required by Rule 26(f)." As Defendant concedes, the parties held a Rule 26(f) conference on August 8, 2019. *See* Def.'s Mem. at 1 ("Prior to the filing of the First Amended Complaint, the parties held a Rule 26(f) conference."). Defendant's assertion that the August Rule 26(f) conference is no longer

[4] The timing of Defendant's Motion also makes it suspect. If Defendant really necessitated a protective order or stay of discovery, he could have moved for it when he filed his motion to dismiss or, at a minimum, when he was served with discovery requests given that the three-judge court challenge was still pending at that time. There was no need for Defendant to wait until the last moment—the day the response to the requests were due—to file his motion. Indeed, even if he is not successful in receiving a protective order, the timing of his filing alone has already resulted in further delay.

meaningful given the time that has passed since it took place—a proposition for which Defendant has provided no support—is of no consequence and, if anything, only highlights the need for discovery to commence given the delay that has already plagued this case.[5] Defendant's suggestion that discovery requests filed immediately after August 8, 2018 would be timely but discovery requests filed several months later are "premature" simply makes no sense.

Indeed, the discovery requests at issue were propounded on January 29, 2019, nearly eight months after this case was filed, more than five months after the Rule 26(f) conference, and at least two months after this Court indicated that it would review the case upon cancellation of the scheduling conference. Accordingly, the requests are timely, fully in compliance with the rules, and should be answered.

More importantly, moving forward with discovery, regardless of the pending three-judge court challenge, will not prejudice Defendant. Defendant's argument that he will be prejudiced by having to comply with "expens[ive] and burden[some]" discovery at this stage necessarily assumes that success on his 28 U.S.C. § 2284 argument would result in dismissal of this case and entirely eliminate this Court's participation in its adjudication. Neither outcome is likely. Indeed, if this Court were to find that a three-judge court properly had jurisdiction over this action—which it should not, *see* Pls.' Br. in Opp. to Def.'s Mot. to Dismiss 2-8, ECF No. 27; Pls.' Mem. in Opp. to Def.'s Second Mot. to Dismiss 2-9, ECF No. 39; Pls.' Notice of Supp. Authority, ECF No. 40; Pls.' Reply in Supp. of Notice of Supp. Authority, ECF No. 46—the result would not be the wholesale dismissal of the case, but rather simply the empaneling of a three-judge court within the Fifth Circuit

[5] Defendant cites to *Joffrion v. Excel Maintenance Services*, Civ. No. 11-528-BAJ-CN, 2011 WL 6003196 (M.D. La. Nov. 30, 2011), in support of this argument, but *Joffrian* only reiterates that discovery may not commence until after the parties' Rule 26(f) conference which, as noted, has already taken place in this case. *Id.* at *1.

which would include Judge Dick. *See* 28 U.S.C. § 2284(b)(1) ("Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two *other* judges . . . . The judges so designated, *and the judge to whom the request was presented*, shall serve as members of the court.") (emphasis added).[6] Accordingly, Plaintiffs' challenge to Louisiana's congressional map would continue, and Defendant would have to respond to the same discovery requests. Thus, contrary to Defendant's assertion, ordering Defendant to respond to the discovery requests now will not result in any prejudice to him and does not weigh in favor of issuing a protective order. *See, e.g.*, *Notariano*, 2018 WL 3844882, at *3 (denying a request to stay discovery pending a motion to dismiss where it was "unlikely that the case as a whole will be dismissed as a result of the currently pending dispositive motions"); *Stanissis v. Dyncorp Int'l LLC*, No. 3:14-CV-2736-D, 2014 WL 7183942, at *1 (N.D. Tex. Dec. 17, 2014) (denying a motion to stay pending the resolution of a motion to dismiss where it was unlikely that the resolution of the motion would dispose of the case).

In contrast, the issuance of a protective order and corresponding stay of discovery will result

[6] Moreover, nothing in 28 U.S.C. § 2284 prevents a single judge from overseeing discovery issues until the panel is formed. Indeed, the statute explicitly provides that:

> A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

in significant prejudice to Plaintiffs, whose ability to obtain relief in this case will be prejudiced if discovery and, ultimately, a decision in this case continues to linger because it may mean that Plaintiffs are unable to obtain meaningful relief ahead of the next election. *Smith v. Clinton*, 687 F. Supp. 1310, 1312-13 (E.D. Ark. 1988) (an injury to voting rights is continuing, suffered anew each time an election is held). Plaintiffs brought this litigation nearly eight months ago to vindicate their voting rights and to ensure that the voting power of African Americans in Louisiana is no longer diluted under Louisiana's congressional district map in violation of the Voting Rights Acts. Since that time, at least one election has taken place under the problematic congressional district map, and with each day that passes the next election is rapidly approaching. Plaintiffs' interest in obtaining timely relief in this case is significant, and obtaining necessary discovery to ensure that Plaintiffs and Defendants are able to move forward with all deliberate speed once this Court issues a scheduling order and rules on the pending motion are critical to ensuring that that interest is met. Defendant should not be permitted to further delay that process—and perhaps ultimately deny Plaintiffs meaningful relief—by refusing to comply with discovery requests that were timely propounded.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Protective Order should be denied, and Defendant should be ordered to respond to Plaintiffs' requests for production immediately. Plaintiffs also respectfully request that this Court set a scheduling conference or, in the alternative, a status conference.

Dated: March 8, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2019, the foregoing Response in Opposition to Defendant's Motion for Protective Order and Request for a Scheduling or Status Conference was filed electronically with the Clerk of Court using the CM/ECF system.

s/ Jennifer Wise Moroux
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