Hon. Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST IMMIGRANT RIGHTS PROJECT ("NWIRP"), a nonprofit Washington public benefit corporation; and YUK MAN MAGGIE CHENG, an individual,

Plaintiff,

v.

JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; JAMES MCHENRY, in his official capacity as Acting Director of the Executive Office for Immigration Review; and JENNIFER BARNES, in her official capacity as Disciplinary Counsel for the Executive Office for Immigration Review,

Defendants.

Case No. 2:17-cv-00716

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY DISCOVERY PENDING RESOLUTION OF THEIR MOTION TO DISMISS

Noted on motion calendar for:
August 18, 2017

This Court should grant Defendants' motion to stay discovery deadlines and issuance of its Rule 16(b) scheduling order pending resolution of Defendants' motion to dismiss, as it would conserve resources of the parties and the taxpayer and avoid unnecessary discovery. Moreover, a ruling on the motion will provide further guidance to the parties as to the appropriate scope of

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discovery.[1] While Plaintiffs' arguments place heavy weight on their partial success at the early stages of this litigation, their arguments ignore the importance of avoiding the imposition of a heavy burden on an overextended governmental entity.

To the extent that Plaintiffs rely on the result of their motion for preliminary injunction, that in itself is insufficient to weigh against staying discovery. The Ninth Circuit made clear that "decisions on preliminary injunctions are just that – preliminary – and must often be made hastily and on less than a full record" and for that reason, the law of the case doctrine does not generally apply to decisions on preliminary injunctions. *S. Or. Barter Fair v. Jackson Cnty., Or.*, 372 F.3d 1128, 1136 (9th Cir. 2004). Consequently, because that preliminary decision does not preclude Defendants from raising their arguments on a motion to dismiss, Plaintiffs cannot contend that Defendants' arguments lack merit.

But even considering the Court's preliminary injunction decision, the possibility remains that multiple of Plaintiffs' claims may not survive Defendants' motion to dismiss, a factor that weighs in favor of postponing discovery until after resolution of the motion to dismiss. In *LASO v. LSC*, an Oregon district faced a similar issue as here, whether regulations impaired on a non-profit's First Amendment rights. *LASO v. LSC*, 561 F. Supp. 2d 1187, 1203-04 (D. Or. 2008). At the motion to dismiss stage, the *LASO* court dismissed a series of facial First Amendment claims but allowed an as-applied challenge to a regulation to proceed, which the court noted was "quite limited in scope." *Id.* Similarly here, the Court could potentially find that only certain claims can proceed, which would limit the scope of the issues in this litigation.

The need for a stay of discovery is even more necessary given the strong public interest in allowing the immigration courts to operate. As explained in Defendants' motion, the

[1] Alternatively, Defendants request to postpone discovery production, including further responses to Plaintiffs' First Discovery Requests, until after the exchange of initial disclosures (August 11), submission of a Joint Status Report and Discovery Plan to the Court (August 22), entry of a protective order, and this Court's issuance of a Rule 16(b) scheduling order, as discussed in Section B of Defendants' motion. *See* ECF 69 at 1-2, 6. Defendants understand that this motion did not affect the deadline to respond to Plaintiffs' First Discovery requests, to which Defendants provided responses on August 16 while reserving arguments made in this motion, and reserving objections to production of certain discovery until after entry of a protective order. Accordingly, notwithstanding Local Rule 7.1(j), Defendants' arguments remain applicable as to discovery generally and further responses to Plaintiffs' First Discovery requests specifically.

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immigration courts – including those in Seattle and Tacoma – are overextended and have a heavy backlog of cases. Report to Congressional Requesters on Immigration Courts at 87, http://www.gao.gov/assets/690/685022.pdf (last visited on August 18, 2017) (concluding that "[t]he doubling of the immigration courts' backlog over the last decade . . . poses challenges to EOIR in meeting its mission to adjudicate immigration cases by fairly, expeditiously, and uniformly administering and interpreting federal immigration laws."). EOIR should not be burdened with unnecessary discovery at this point in litigation while a motion to dismiss can inform the adequate scope of discovery – if any – going forward.

Plaintiffs also confuse Defendants' argument regarding the scope of the discovery request. Defendants point is that guidance in the form of a decision on the motion to dismiss will be useful going forward as it will permit the parties to assess adequate subjects of discovery.[2] ECF No. 69 at 4-5. A decision on the motion to dismiss will clarify the scope of discovery and guide any possible future discovery disputes.[3]

For these reasons, this Court should grant Defendants' motion to stay discovery pending resolution of their motion to dismiss.

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[2] While Plaintiffs argued that Defendants "have not identified any specific concerns" as to these requests, ECF 71 at 7, Defendants responded to Plaintiffs' First Discovery Requests and formally raised objections to aspects of their discovery requested believed to be overly broad or outside the scope of discovery.

[3] Defendants do not believe that the prior dispute between the parties regarding the timing of a Rule 26(f) conference in light of the Federal and the Local Rules is relevant to the question at hand – whether discovery should be stayed. Consequently, Defendants do not desire to relitigate prior disagreements with Plaintiffs' counsel as they fall outside the scope of the instant motion.

In any event, Defendants disagree with Plaintiffs' characterizations of the facts relating to the Rule 26(f) conference. Defendants' consistent view has been that a 26(f) conference was to be held after Court order, an issue that became moot once the Court entered an order regarding the initial deadlines. ECF No. 45. The parties then stipulated to conducting the Rule 26(f) conference at a different date and stipulated to an amendment of the initial deadlines "based on good cause" and without prejudice to Defendants seeking relief of other discovery deadlines. ECF No. 59. Defendants in no way declined Plaintiffs' invitation to participate in the Rule 26(f) simply to cause undue delay. Rather, as explained in their Motion to Amend the Court's Joint Status Report Order, Defendants view has always been that discovery should commence only after the filing of an Answer. *See* ECF 56.

Dated: August 18, 2017

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I certify that all participants are CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 18, 2017

Respectfully submitted.

/s/ Victor M. Mercado-Santana

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