FILED
2020 Aug-14 PM 03:22
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PEOPLE FIRST OF ALABAMA, et al.,

Plaintiffs,

v.

JOHN MERRILL, in his official capacity as the Secretary of State of Alabama, et al.,

Defendants.

Case No.: 2:20-cv-00619-AKK

PLAINTIFFS' BRIEF IN OPPOSITION TO STATE DEFENDANTS' MOTION TO STAY DISCOVERY AND ALL RULE 26 OBLIGATIONS

Plaintiffs oppose the State of Alabama and Secretary of State John H. Merrill's ("State Defendants") motion to stay discovery pending a ruling on their motion to dismiss. The present motion—filed three weeks *after* their motion to dismiss and *after* the State Defendants deposed all Plaintiffs but *before* Plaintiffs' depositions of most defendants—is yet another attempt by the State Defendants to obtain a *de facto* victory by delaying adjudication of Plaintiffs' claims in the face of the rapidly approaching election date. Staying discovery pending resolution of the State Defendants' motion to dismiss will almost certainly postpone the September 8 trial date and would substantially increase the risk that any verdict granting Plaintiffs' requested relief would be issued too near the election for the relief to be implemented successfully. This attempt to delay a decision on the merits is especially unwarranted when the motion to dismiss filed by the State Defendants is unlikely to be dispositive of Plaintiffs' claims.

Despite the State Defendants' suggestion to the contrary, there is no general rule in the Eleventh Circuit that discovery must be stayed pending a decision on a motion to dismiss or that such a motion must be resolved before discovery can begin. This particularly holds true where, as here, the pending motion to dismiss does not seek dismissal of all claims. Courts in the Eleventh Circuit regularly allow discovery to proceed while motions to dismiss are pending. *See, e.g.*, *Eternal Strategies, LLC v. Clickbooth Holdings, Inc.*, No. 8:17-CV-1298-T-36MAP, 2017 WL 7311849, at

*3 (M.D. Fla. Sept. 20, 2017) (denying motion to stay discovery pending the Rule 16 conference); *Koock v. Sugar & Felsenthal, LLP*, No. 8:09-CV-609-T-17EAJ, 2009 WL 2579307, at *3 (M.D. Fla. Aug. 19, 2009) (denying motion to stay discovery while motion to dismiss was pending); *In re Winn Dixie Stores, Inc.*, No. 304-CV-194J-33MCR, 2007 WL 1877887, at *3 (M.D. Fla. June 28, 2007) (same).

Indeed, courts typically *disfavor* motions to stay "because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery." *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997). Courts accordingly balance the harm "produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery." *Id*. "To this end, the court must take a 'preliminary peek' at the merits of the dispositive motion to see if it 'appears to be clearly meritorious and truly case dispositive.'" *Myeress v. Marmont Hill, Inc.*, No. 2:18-cv-438-FtM-38CM, 2018 U.S. Dist. LEXIS 177521, at *3 (M.D. Fla. Oct. 16, 2018) (quoting *McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006)); *see also Great W. Cas. Co. v. Firstfleet, Inc.*, No. CA 12-00623-KD-N, 2013 WL 3337283, at *1 (S.D. Ala. July 2, 2013) ("A request to stay discovery pending a resolution of a motion is rarely appropriate unless resolution of the motion will dispose of the entire case.").

Throughout the inquiry, the moving party bears the burden of showing good cause and reasonableness—a burden that the State Defendants cannot meet here. A "preliminary peek" reveals that the State Defendants' motion to dismiss is unlikely to result in the dismissal of the case. This Court has already ruled that Plaintiffs are likely to succeed on the merits of their claims. *See generally* Doc. 58. The sovereign immunity arguments are at odds with both this Court's prior rulings and governing Eleventh Circuit precedent. *See id*. at 27-30. And the State Defendants' mootness argument with respect to the Excuse Requirement ignores the scope of relief sought by Plaintiffs, which is to permit all Alabamians to vote absentee "as long as the pandemic continues to present a danger to Plaintiffs and other voters," and not just for the November general election. *See* Doc. 134 at 6-7. As set forth in greater detail in Plaintiffs' Brief in Opposition to State Defendants' Motion to Dismiss (Doc. 134), the Amended Complaint easily satisfies the motion to dismiss standard, which only requires the complaint to contain sufficient factual matter to state a claim for relief that is plausible on its face. *Id*. at 7-15. In short, there is little chance that the State Defendants' motion will dispose of the entire case and obviate the need for discovery.

In sharp contrast, staying discovery puts Plaintiffs' fundamental right to vote at risk by granting a *de facto* victory to the State Defendants. With the November 3 election less than three months away, the Court has recognized the "need for a

speedy resolution of this dispute" (Doc. 93 at 1), and has scheduled trial to begin on September 8. Delaying discovery, and therefore trial, substantially increases the risk that the time for remedying the violation of Plaintiffs' rights becomes too short for effective implementation. *See Forsyth v. Univ. of Ala. Bd. of Trs.*, No. 7:17-CV-00854-RDP, 2017 WL 11442143, at *2 (N.D. Ala. Aug. 21, 2017) (denying motion for stay pending ruling on motion to dismiss where "the harm Plaintiff would suffer from an indefinite delay in the commencement of discovery outweighs the likelihood that Defendants' motion to dismiss will entirely eliminate the need for discovery.").

Notably, in seeking a stay of discovery, the State Defendants do not allege that the discovery Plaintiffs seek is unreasonably burdensome. Nor could they. The discovery is narrowly tailored to the claims and defenses that will be at issue during the trial, including the implementation of the challenged provisions, the reasoning behind them, the burdens that the challenged provisions have on voters in light of the COVID-19 pandemic, information on how the challenged provisions allegedly prevent voter fraud, and data regarding absentee voting. These requests have been designed to allow Defendants to easily comply with them in the abbreviated discovery period established by the Court.

The State Defendants offer nothing that would merit a stay of discovery. First, they cite *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997), and subsequent cases to assert that this Court is compelled to stay discovery while the

State Defendants' motion to dismiss is pending. But, as noted above, that is not the law nor is *Chudasama* so broad. *Chudasama* stands "for the much narrower proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs mount." *Winn Dixie Stores*, 2007 WL 1877887, at *1; *Koock*, 2009 WL 2579307, at *2 (same). In *Chudasama*, the plaintiffs stated a claim "of questionable validity" that would have "dramatically enlarged" the scope of discovery and, during the eighteen months that the motion to dismiss remained pending, served discovery "ask[ing] for almost every tangible piece of information or property possessed by the defendants." *Chudasama*, 123 F.3d at 1368, 1356-60; *see also Jones v. Bank of Am. Corp.*, No. 4:08-cv-152, 2013 WL 5657700, at *2 (M.D. Ga. Oct. 15, 2013) ("What animated the Eleventh Circuit in *Chudasama* was the district court's decision to allow the plaintiffs to make their case through discovery even though the pleading almost certainly failed to state a claim.").[1]

Here, as discussed above, Plaintiffs have stated claims under long-established voting rights and discrimination law, many of which the Court has already deemed colorable in granting Plaintiffs' motion for a preliminary injunction. *See* Doc. 58. And Plaintiffs' discovery requests are narrowly tailored to meet the schedule already ordered by the court. Notably, the State's motion for a stay comes ***after*** defendants

[1] *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009) is likewise inapposite, as it holds only that a plaintiff must first establish a *prima facie* case that the district court had jurisdiction before a district court could grant discovery on the jurisdictional issue.

have taken Plaintiffs' fact depositions, but before Plaintiffs have had an opportunity to take most of Defendants' depositions. A discovery stay would only serve to prejudice Plaintiffs.

Nor does the State Defendants' mere invocation of a sovereign immunity defense on certain claims—but not others—warrant a discovery stay. The State Defendants' Motion to Dismiss asserts a sovereign immunity defense only with respect to the claims against the State under the Voting Rights Act and § 1983. *See* Doc. 112 at 7. As an initial matter, this argument is at odds with this Court's prior ruling that the Voting Rights Act validly abrogate state sovereign immunity on any claims against the State. *See* Doc. 58 at 30. Indeed, the State Defendants readily acknowledge that governing Eleventh Circuit caselaw also holds that the Voting Rights Act validly abrogated the States' sovereign immunity. Doc. 112 at 7 n.5. And with respect to the § 1983 claim, the State Defendants waived their sovereign immunity defense when they appealed this Court's rulings and argued to the Supreme Court that they sought to act as a defendants-intervenors. *See* Doc. 75 ¶ 60. Even in the unlikely event that the State Defendants prevail on their sovereign immunity arguments with respect to the claims under the Voting Rights Act and § 1983, this argument would not dispose of the remaining claims under the Americans with Disabilities Act, which challenge the same provisions of state law. As such, this case does not present the situation at issue in the cases relied on by the State

Defendants (*see* Doc. 148 at ¶ 6) where a finding of sovereign immunity would have stripped the Court of jurisdiction entirely, and would have obviated the need for the defendant to respond to any discovery.

Finally, the State Defendants suggest that a stay is appropriate because Plaintiffs may seek a preliminary injunction. However, discovery is still necessary to create a record upon which this court can assess the propriety of a preliminary injunction. *See* Fed. R. Civ. P. 65(a)(2) (contemplating submission of evidence on motion for preliminary injunction).

Conclusion

For the reasons set forth above, Plaintiffs respectfully ask that this Court deny the State Defendants' Motion to Stay Discovery and All Rule 26 Obligations.

DATED this 14th Day of August 2020.

Respectfully submitted,

/s/ Deuel Ross
Deuel Ross*
Natasha C. Merle*
Liliana Zaragoza*
Mahogane Reed*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
Tel.: (212) 965-2200
dross@naacpldf.org
nmerle@naacpldf.org
lzaragoza@naacpldf.org

/s/ William Van Der Pol
William Van Der Pol [ASB-211214F]
Jenny Ryan [ASB–5455-Y84J]
Maia Fleischman*
ALABAMA DISABILITIES ADVOCACY PROGRAM
Box 870395
Tuscaloosa, AL 35487
P: (205)348-4928
wvanderpoljr@adap.ua.edu
jrryan2@adap.ua.edu

Sarah Brannon* ++
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005-2313
202-675-2337
sbrannon@aclu.org

/s/ Caren E. Short
Caren E. Short (ASB-0646-P48N)
Nancy G. Abudu*
SOUTHERN POVERTY LAW CENTER
PO Box 1287
Decatur, GA 30031
P: (404) 521-6700
F: (404) 221-5857
caren.short@splcenter.org
nancy.abudu@splcenter.org

/s/ T. Alora Thomas-Lundborg
T. Alora Thomas-Lundborg*
Davin M. Rosborough*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2693
athomas@aclu.org
drosborough@aclu.org

/s/ Randall C. Marshall
Randall C. Marshall (ASB-3023-A56M)
ACLU FOUNDATION OF ALABAMA, INC.
P.O. Box 6179
Montgomery, AL 36106-0179
(334) 420-1741
rmarshall@aclualabama.org

/s/ Katrina Robson
Katrina Robson**
O'MELVENY & MYERS LLP
1625 Eye Street NW, Suite 1000
Washington, DC 20006
Phone: (202) 383-5300
Fax: (202) 383-5414
krobson@omm.com

Attorneys for Plaintiffs

*Admitted *pro hac vice*
***Pro hac vice* forthcoming
++ Not admitted in DC; DC practice

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to counsel of record.

.

/s/ Sarah Brannon
Sarah Brannon
Counsel for Plaintiffs