

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CELIA VALDEZ, GRACIELA GRAJEDA,
ROANNA BEGAY, JESSE RODRIGUEZ,
and ASSOCIATION OF COMMUNITY
ORGANIZATIONS FOR REFORM NOW,

Plaintiffs,

v.

MARY HERRERA, in her official capacity
as New Mexico Secretary of State,
PAMELA S. HYDE in her official capacity
as Secretary of New Mexico Human
Services Department, FRED SANDOVAL
in his official capacity as the Director of the
Income Support Division of the New
Mexico Human Services Department,
CAROLYN INGRAM in her capacity as
the Director of the Medical Assistance
Division of the New Mexico Human
Services Department, RICK HOMANS in
his capacity as the Secretary of the New
Mexico Taxation and Revenue Department,
and MICHAEL SANDOVAL, in his
capacity as the Director of the Motor
Vehicle Division of the New Mexico
Taxation and Revenue Department,

Defendants.

Case No. 1:09-CV-00668 JCH/DJS

**RESPONSE TO PLAINTIFFS' MOTION TO ESTABLISH A REVISED
LITIGATION SCHEDULE AND COMPEL DISCOVERY
BY DEFENDANTS HSD AND TRD**

COME NOW the Defendants, Pamela Hyde, Fred Sandoval, and Carolyn Ingram
(collectively "HSD"), and Rick Homans and Michael Sandoval (collectively "TRD"), by
and through their counsel of record, Adrian Terry and Elaine Lujan, Assistant Attorneys

General, and by way of response, oppose the Plaintiffs' motion to establish a revised litigation schedule and compel discovery. Defendants HSD and TRD do not advocate a position with respect to Plaintiffs' motion to compel discovery.¹ However, Defendants HSD and TRD contend that the Plaintiffs' motion to establish a revised litigation schedule should be denied for the following reasons: (1) Defendants have complied with Plaintiffs' discovery requests; (2) factual discovery is substantially complete; (3) expert disclosure, discovery, and reports are unnecessary to the case at bar; (4) settlement negotiations between the parties will not be advanced by an extension of the litigation schedule; (5) Plaintiffs' requested extension will merely permit investigation of tangential and inconsequential matters, increasing litigation expenses; (6) Plaintiffs are fully capable of responding to Defendant HSD's motion for summary judgment; and (7) neither justice nor the interests of judicial economy requires an extension of the litigation schedule.

DISCUSSION

1. Factual Summary

Consistent with the Plaintiffs' contention in its motion and memorandum to extend the litigation schedule, Plaintiffs' request is straightforward. Plaintiffs request the Court to grant additional time and opportunity to conduct matters that Plaintiffs failed to do within the confines and timelines of the Court's scheduling order. Unfortunately for Plaintiffs, time for certain affairs, including discovery matters, has expired. Accordingly, the burden, risk, expense, and prejudice likely to occur to Defendants HSD and TRD if

¹ Counsel for Defendants HSD and TRD states that Defendant Herrera provided a Rule 30(b)(6) deponent for examination in accordance with the Court's Order [Docket No. 63] on May 26, 2010.

Plaintiffs' motion is granted should not be borne by any defendant in adversarial litigation where Plaintiffs' dissatisfaction with the progress of their cause of action is due to Plaintiffs' own failures or limitations. For these reasons, as well as the following arguments, Plaintiffs' request cannot be granted in any manner that is consistent with the interests of justice and the purpose of the civil rules of procedure; notwithstanding the fact that just cause for an extension has not been demonstrated. Furthermore, Defendants HSD and TRD rely on, and incorporate by reference, the arguments presented in Defendant HSD's Response in Opposition to Plaintiffs' Motion for a Continuance Regarding Defendant Hyde's Summary Judgment Motion [Docket No. 68].

2. Compliance with Discovery Requests

A recurring theme throughout Plaintiffs' recent pleadings, including their motion for revision of the litigation schedule, is that the Defendants have failed to comply with discovery requests. Furthermore, Plaintiffs contend that Defendants have instituted reprehensible practices, spurred by sinister motives, to inexcusably withhold, or unreasonably delay, the dissemination of critical information for dilatory purposes. Defendants HSD and TRD affirmatively assert that they have complied with Plaintiffs' discovery requests, subject to objections served in discovery responses and information within the custody and control of the Defendants.²

Moreover, the civil rules of procedure provide guidance for discovery grievances, whether perceived or actual. In either instance, the Plaintiffs have failed to assert any complaint they may have under the rules. *See* Fed. R. Civ. P. 26, 30, 33, 34, and 37.

² The Court's local rules provide that failure to seek a remedy under local rule 37 (motions to compel) within 20 days of receipt of an objection "constitutes acceptance of the objection." D.N.M.LR-Civ. 26.6.

Rather, Plaintiffs' have chosen to ignore their remedies under the rules and instead have filed this motion to extend the litigation schedule without reliance on any compelling authority in order to correct their own failures, whether strategic or related to diligence in advancing their cause of action.³ In either case, Defendants HSD and TRD are not required to accommodate Plaintiffs interests or concerns.

A review of Plaintiffs' motion reveals that their fundamental complaint, and the principal basis for their motion to extend the litigation schedule, is that Plaintiffs do not have all the facts necessary to prove their case.⁴ Essentially, Plaintiffs argue that Defendants have not provided the "smoking gun" that Plaintiffs contend exists. Each point of argument in Plaintiffs' motion rings with a common song – Plaintiffs' made requests, Plaintiffs didn't get what they wanted or expected, and now there is not enough time for Plaintiffs to request "follow-up" information to get what Plaintiffs allege they need. Unfortunately for Plaintiffs, Defendants HSD and TRD are not required to prove Plaintiffs' case on their behalf or support their litigation efforts.

3. General Objection to Existing Schedule

Although, not specifically stated by Plaintiffs in their motion, Plaintiffs appear to have a general objection to the current timelines set by the Court's scheduling order because a number of activities have deadlines that are either concurrent or within a short period of time, including the discovery deadline (June 1, 2010), response to Defendant

³ Defendants HSD and TRD do not contest the Court's authority to amend or alter its previous scheduling order pursuant to the precedent cited by the Plaintiffs or upon the Court's own initiative. Therefore, Plaintiffs' motion and this response do not rest on legal argument, but rather on an analysis of why Plaintiffs' contentions and allegations do not constitute "good cause" for divergence from the Court's current scheduling order.

⁴ The contention by Plaintiffs that essential factual discovery is incomplete is refuted by Defendants HSD and TRD in Section 8 herein.

HSD's summary judgment motion (June 1, 2010), responses to Defendant HSD and TRD's discovery requests, and matters relating to a settlement conference before the presiding Magistrate. The foregoing realities do not constitute a basis to amend or alter the Court's scheduling order. Every judicial action is subject to certain deadlines to ensure judicial economy as well as to prevent cases from languishing on the Court's docket. Furthermore, Plaintiffs requested a short extension to respond to Defendants' discovery requests and such an extension was granted until June 4, 2010. Thus far, scheduling issues between the parties has been an amicable process with reasonable accommodations made by both Plaintiffs and Defendants. However, Defendants HSD and TRD cannot bend to every whim and desire of Plaintiffs' counsel, including an extension of the litigation schedule in this matter.

4. Matters Related to the Secretary of State

Plaintiffs contend in their motion and memorandum in support that the litigation schedule, including discovery timelines, must be extended because of incomplete discovery related to the Secretary of State. Defendants HSD and TRD are not part of, or responsible for, interactions between the Plaintiffs and Defendant Herrera. Accordingly, any claims raised by Plaintiffs related to the Secretary of State do not concern, and should not impact, Defendants HSD and TRD. Moreover, representation of the State's executive agencies is bifurcated from Defendant Herrera's representation. Accordingly, Defendants HSD and TRD can neither confirm nor deny any interactions or communications between Plaintiffs and Defendant Herrera. Furthermore, Plaintiffs have had ample opportunity to conduct or compel any permissible discovery with or from the

Secretary of State's Office through the channels and methods provided under the civil rules of procedure.

Plaintiffs' specific allegation that Defendant Herrera's Rule 30(b)(6) deposition was *effectively* canceled based on a motion for protective order [Docket No. 43] filed by Defendant HSD is without merit. Plaintiffs *effectively* decided, perhaps improvidently, to consolidate travel arrangements for depositions related to separate defendants. Defendants HSD and TRD cannot bear the burden and effects of Plaintiffs' travel decisions. Without discussion of the merits of Defendant HSD's motion for protective order, Defendant HSD exercised its right to assert a valid defense to several notices of deposition. Although Defendant HSD did not prevail in its motion, Plaintiffs cannot use one party's actions to excuse Plaintiffs' non-action with respect to another party. Likewise, the fact that Plaintiffs *actually* canceled the Secretary of State's deposition because of travel arrangements cannot hold value when the action pending resides in the District of New Mexico.

Additionally, Plaintiffs' contention that conducting the Secretary of State's deposition "is a long-delayed first step in obtaining complete discovery" cannot constitute a valid consideration by any Court in determining litigation schedules. Requiring sequential discovery, at the sole direction of the Plaintiffs, would disrupt the discovery process and slow all court proceedings to crawl. Therefore, Plaintiffs contention must fail as a matter of judicial process.

5. Legal Arguments Based on Factual Discovery

Plaintiffs contend that certain information obtained during factual discovery and depositions provided a revelation about alleged practices by county voter registration

officials. As such, Plaintiffs require an extension of litigation timelines to address “highly revelant” issues concerning liability. *See* Memorandum in Support of Motion, p. 10 [Docket No. 60]. The foregoing statement is a legal conclusion that would be more appropriately stated in an argument by Plaintiffs in a motion for judgment or presented at the time of trial. These matters cannot and will not be advanced by granting Plaintiffs’ requested relief.

6. Timeliness of HSD Depositions

Plaintiffs contend that Defendant HSD was untimely in providing six HSD managers for depositions and during the scheduling of such depositions HSD filed a dilatory motion for protective order, limiting Plaintiffs’ ability to complete its factual discovery. Without engaging in unnecessary argument, Defendant HSD contends that certain facts are missing from Plaintiffs’ recitation of events related to HSD’s manager depositions. Plaintiffs inquired about HSD manager depositions. The parties conferred in good faith to schedule depositions. Concurrently, Defendant HSD raised discovery concerns which led to the filing of its motion for protection order [Docket No. 43].⁵ After Defendant HSD’s motion was denied, counsel promptly conferred to re-schedule the HSD manager depositions. Also noteworthy to this issue is the fact that Defendant HSD waived the notice requirements for notices of deposition in order to facilitate speedy scheduling and examination of the HSD manager depositions.

7. Discovery Production and Disclosures

⁵ The reasons for Defendant HSD’s motion for protective order are stated in the motion [Docket No. 43]. Defendant HSD leaves the determination of whether the motion was well-founded on existing law and rules to the Court, despite the fact that Defendant HSD’s request was denied.

Plaintiffs contend that Defendant HSD has been inexcusably tardy in its discovery productions and disclosures. However, Plaintiffs have not filed any motions to compel discovery. Defendant HSD provided all discovery productions and disclosure to Plaintiffs when such materials were discovered and made available. Therefore, the Court should not read anything into the course of events related to discovery, contrary to the plea of the Plaintiffs. Likewise, Plaintiffs do not maintain any right to establish a nexus between discovery productions and deposition examinations. Plaintiffs have the right under the rules of civil procedure to discover facts. The reality that some documentary information may not be available prior to deposition does not constitute a basis to extend the litigation schedule. Moreover, this contention by Plaintiffs is very similar to its request for sequential discovery as addressed above, which likewise fails for the reasons stated herein.

8. Prejudice to Defendants HSD and TRD

Plaintiffs contend that extending the litigation schedule in this matter should be freely granted to prevent injustice and because such an extension will not prejudice the Defendants. Plaintiffs' contention that the litigation schedule must be extended to prevent injustice is not well-founded. The Plaintiffs are required to prove their case at trial, not during discovery. Moreover, Plaintiffs are endowed with all of the personal knowledge of Celia Valdez, Graciela Grajeda, Roanna Begay, Jesse Rodriguez, Shawna Allers, ACORN, and the personal knowledge of others, like Project Vote, as pled in their complaint. Plaintiffs discovery propounded on Defendants HSD and TRD has primarily been related to the NVRA practices, polices, and procedures of these agencies, not their individual transactions with the named Plaintiffs. Consequently, Plaintiffs cannot assert a

good-faith argument that they do not have enough information to prove the elements of their claims; to wit: the claims of Valdez, Grajeda, Begay, Rodriguez, Allers, and ACORN. Furthermore, every trial contains contested facts from which the trier-of-fact will have to adjudge. Likewise, there may be undiscovered facts as defendants are not required to ensure that plaintiffs ask the correct questions in the discovery process.

Second, Plaintiffs contention that Defendants HSD and TRD will not be prejudiced by an extension of the litigation schedule is unbelievable and contrary to legal experience. An extension of the litigation schedule will extend the discovery deadlines as requested in Plaintiffs' motion. Accordingly, Defendants HSD and TRD will be asked to provide additional discovery and produce additional deponents. If this were not true, then a request to extend the litigation schedule would be unnecessary. As stated throughout this response, Plaintiffs' discovery requests have become tangential, inconsequential, duplicative, needlessly burdensome, and expensive. Effectively, Plaintiffs are asking the Court to permit Plaintiffs to perform discovery that they have failed to perform within the long-standing timelines set by the Court or otherwise permit the opportunity to continue their unproductive discovery assault on Defendants HSD and TRD.

PRAYER FOR RELIEF

WHEREFORE, Defendants HSD and TRD respectfully request the Court to deny Plaintiffs' motion to establish a revised litigation schedule and for such other and further relief as the Court deems just and equitable.

DATED this 1st day of June, 2010.

Respectfully Submitted,

GARY K. KING
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Plaintiffs' Motion to Establish Revised Litigation Schedule and Compel Discovery by Defendants HSD and TRD was served on all parties of record via the Court's CM/ECF case management system on this 1st day of June, 2010.

s/Adrian Terry
Adrian Terry