U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

September 14, 2017

Via ECF
Honorable Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Washington et al. v. Sessions et al.*, 17 Civ. 5625 (AKH)

Dear Judge Hellerstein:

This Office represents the defendants, the United States of America, the Attorney General of the United States, the Administrator of the Drug Enforcement Administration, the U.S. Department of Justice, and the U.S. Drug Enforcement Administration (collectively, "Defendants"), in this challenge to the constitutionality of the regulation of marijuana under the Controlled Substances Act ("CSA"). Defendants write respectfully in response to the Court's direction to provide a letter concerning discovery in this matter.

The Court initially ordered the parties to confer regarding a joint discovery letter by September 11, 2017. Dkt. No. 26. On September 11, Plaintiffs sought and obtained Defendants' consent to extend that deadline by two days until September 13. As explained below, however, although Plaintiffs have proposed a series of discovery deadlines running through March 2018, Plaintiffs have refused to confer with Defendants regarding the topics that they envision discovery would address, notwithstanding the requirements of Rule 26 of the Federal Rules of Civil Procedure. Nor have Plaintiffs filed a joint letter with the Court by their requested deadline of September 13, 2017, even though we provided a written statement of Defendants' position for inclusion in such a letter.[1] In light of the Court's request for a prompt proposal regarding discovery, I respectfully submit this letter on behalf of Defendants to set forth Defendants' position.

Plaintiffs' Refusals to Confer

Defendants first sought Plaintiffs' views concerning their proposed discovery schedule on the night of September 8, 2017. Plaintiffs' first substantive response containing any detail of

[1] Defendants were informed on September 11 that one of Plaintiffs' counsel, Mr. Hiller, was unavailable that day due to a family emergency. As we have advised Plaintiffs, Defendants have no objection to permitting Plaintiffs any reasonable period of time to make any submissions in this case. However, because Plaintiffs sought only a two-day extension of time to file a joint letter with the Court, it is our understanding that at least some of Plaintiffs' counsel would be available during the intervening time to confer.

their proposed discovery plan was provided via e-mail at 4:54 p.m. on September 12, when Plaintiffs' counsel Ms. Rudick sent dates for a proposed discovery schedule that called for plaintiffs to serve several rounds of document requests, interrogatories, and requests for admission, and take depositions of parties and non-parties, but provided no information about the nature or scope of the discovery they would be seeking, or the subjects on which they would be seeking discovery, as required by Fed. R. Civ. P. 26. Defendants responded by email on September 13 at 8:43 a.m., (1) noting Defendants' request for reciprocal discovery on any subjects that the Court deemed appropriate for discovery in this action; (2) detailing Defendants' concerns with aspects of Plaintiffs' proposed discovery schedule; and (3) requesting information required by Rule 26(f)—specifically, "the subjects on which discovery may be needed" pursuant to Fed. R. Civ. P. 26(f)(3)(B).

Approximately four hours later, at 12:41 p.m., Plaintiffs' counsel sent an e-mail that declined to respond to any of the points raised by Defendants, and instead asked Defendants to propose a "counter-schedule" by 2:00 p.m. in order to meet the September 13 "deadline." Defendants responded by e-mail at 2:21 p.m., and (1) stated that proposing such a counter-schedule was impossible, given that Plaintiffs still refused to identify the subjects that they proposed as appropriate for discovery, and (2) requested the full draft of Plaintiffs' proposal to the Court, including the subjects required to be contained in a discovery plan under Fed. R. Civ. P. 26(f). By e-mail at 3:29 p.m., Plaintiffs' counsel (1) reiterated their refusal to provide a copy of their portion of the joint letter, (2) refused to disclose Plaintiffs' view on the appropriate subjects of discovery, and argued that they were not required to provide it,[2] and (3) demanded Defendants' portion of the letter by 5:30 p.m. if it was to be included in the joint submission.

At 5:29 p.m. on September 13, we provided Plaintiffs with our proposed response to the little of Plaintiffs' discovery plan that we had seen. While Plaintiffs confirmed receipt of Defendants' portion, no joint letter was filed, and Plaintiffs did not respond to Defendants' request for an update this morning. Accordingly, Defendants are filing this letter to respond to the Court's order, Dkt. No. 26, and to ensure that their views are on record.

As set out above, Plaintiffs have refused to respond to Defendants' requests for clarification and further information concerning their proposed discovery plan, refused to provide us with their draft joint letter to the Court so that we could respond, and ultimately failed to file a joint letter by the deadline they proposed.

Defendants' Position on Discovery

For the reasons set out in their letter dated September 11, 2017, it is Defendants' position that no discovery is appropriate in this matter, particularly before the Court rules on a motion to dismiss, which we believe will dispose of this case. At a minimum, the Court's ruling on a

[2] Plaintiff's counsel took the position that neither the Federal Rules nor the Court's order directing the filing of a discovery "outline," Dkt. No. 26, requires disclosure of the subjects of discovery. Instead, counsel responded, "Frankly, I have no doubt that you are fully aware of what the subjects of discovery will be." Government counsel, however, is unaware of the information Plaintiffs plan to seek in discovery.

motion to dismiss would clarify what, if any, claims remain, which in turn would determine the applicable legal standard and what, if any, discovery is needed. *See* Dkt. No. 27.

If the Court does not reconsider its order concerning the commencement of discovery, Defendants respectfully request that the Court direct Plaintiffs to confer and propose a discovery plan in compliance with Rule 26. Under Rule 26(f), a proposed discovery plan must contain the parties' views on "the subjects on which discovery may be needed," and the parties, in conferring, "must consider the nature and basis of their claims and defenses." Fed. R. Civ. P. 26(f)(2), (3)(B). Moreover, the Court's order directed the parties to "*outline the discovery* that will be necessary in this case, *along with* a proposed discovery and briefing schedule." Dkt. No. 26, at 2 (emphases added).

Despite the Court's order and the Federal Rules, Plaintiffs have refused (despite several requests) to provide Defendants any information concerning the outline of the discovery they plan to seek and how that information is relevant to their claims under the applicable legal standards. Without this information, Defendants cannot determine whether Plaintiffs' requested discovery is "relevant to any party's claim or defense" and "proportional to the needs of the case," or "whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Because Plaintiffs have provided no information about the material they believe to be relevant to their claims, and on what legal theory, or what they envision as the permissible scope of discovery, Defendants are unable to provide a considered response.

Moreover, for the reasons set out in Defendants' September 11 letter, Dkt. No. 27, it is not clear to Defendants what, if any, discovery could be relevant in this case. Without information as to the nature and scope of the discovery Plaintiffs plan to seek—whether through documents, testimony, or otherwise—Defendants cannot assess the reasonableness of Plaintiffs' proposed schedule. Because Plaintiffs refuse to confer, Defendants cannot assess "when discovery should be completed, and whether discovery should be conducted in phases or limited to or focused on particular issues," Fed. R. Civ. P. 26(f)(3)(B), discuss potential claims of privilege, Fed. R. Civ. P. 26(f)(3)(D), propose limitations on discovery, Fed. R. Civ. P. 26(f)(3)(E), or otherwise provide Defendants' views and proposals as required by the Federal Rules.

In response to the limited information that Plaintiffs did provide in their proposed discovery schedule, Defendants have the following responses and objections (which have been conveyed to Plaintiffs for inclusion in a joint letter that Plaintiffs did not file):

Defendant request that all deadlines and means of discovery comply with the Federal Rules of Civil Procedure and the Local Rules of the Southern District of New York. Plaintiffs have proposed to foreshorten certain deadlines, which Defendants maintain is inappropriate given the lack of exigency: Plaintiffs' proposal to Defendants was for an extended and plenary discovery schedule, including multiple rounds of document requests and depositions, which would extend from now until at least the end of March 2018. Moreover, as stated in Defendants' prior letter, Plaintiffs filed this case in July 2017 but took no action (including even to serve the complaint on the U.S. Attorney's Office) to move the case forward until early September, further undermining any claim of urgency.

Additionally, while Plaintiffs indicated that they plan to waive expert discovery, Defendants do not make such a waiver and request to add an expert deposition period to any discovery schedule, as Rule 26 provides. *See* Fed. R. Civ. P. 26(b)(4)(A).

As noted above, other than a first draft of a proposed discovery schedule, Plaintiffs have refused to provide Defendants with any draft letter to the Court. Thus, as far as Defendants are aware, Plaintiffs have not "outline[d] the discovery that will be necessary in this case," as the Court's order directed, Dkt. No. 26, at 2, nor proposed any "briefing schedule," as the Court also directed. If such proposals are contained in a forthcoming letter from Plaintiffs, Defendants have not seen them and thus cannot comment on them at this time.

On those points, Defendants respectfully submit that (1) in their view, no discovery is necessary in this case under rational basis review, but Defendants reserve the right to seek any reciprocal discovery if such discovery is permitted by the Court; and (2) any briefing schedule on a preliminary injunction motion shall begin with Plaintiffs' brief, to be filed within 30 days of the close of all discovery (if the Court permits discovery to proceed, which Defendants contend it should not); Defendants' opposition and any cross-motion for summary judgment shall be filed within 30 days of Plaintiffs' brief; Plaintiffs' reply/opposition shall be filed within 14 days of Defendants' opposition; and Defendants' reply shall be filed within 14 days of Plaintiffs' opposition.

Thank you for your consideration of this letter.

Respectfully submitted,

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