

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

AUGUST DEKKER, *et al.*,

Plaintiffs,

v.

JASON WEIDA, *et al.*,

Defendants.

Case No. 4:22-cv-00325-RH-MAF

**CONSENT MOTION TO WITHDRAW PLAINTIFFS' SECOND MOTION
TO COMPEL PRODUCTION OF DOCUMENTS**

On March 2, 2023, Plaintiffs filed their Second Motion to Compel Production of Documents and for Expedited Briefing and Ruling (Dkt. No. 109), which this Court set for a telephonic hearing on March 6, 2023 (Dkt. No. 111).

Now, Plaintiffs, by and through the undersigned counsel, respectfully request to withdraw without prejudice their Second Motion to Compel Production of Documents and for Expedited Briefing and Ruling in light of the representations made by Defendants' counsel on Sunday, March 5, 2023, that the documents at issue will be produced by 5:00pm on Monday, March 6, 2023. *See Exhibit A.*

Attorney Conference Certificate – Pursuant to Local Rule 7.1(C), counsel for the parties conferred and the motion is consented to.

Dated this 5th day of March 2023.

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Respectfully Submitted,

/s/ Omar Gonzalez-Pagan

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** Admitted pro hac vice*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2023, a true copy of the foregoing has been filed with the Court utilizing its CM/ECF system, which will transmit a notice of electronic filing to counsel of record for all parties in this matter registered with the Court for this purpose.

CERTIFICATE OF WORD COUNT

As required by Local Rule 7.1(F), I certify that this Notice contains 129 words.

/s/ Omar Gonzalez-Pagan
Counsel for Plaintiffs

Exhibit A

Omar Gonzalez-Pagan

From: Mohammad O. Jazil <mjazil@holtzmanvogel.com>
Sent: Sunday, March 5, 2023 2:04 PM
To: Omar Gonzalez-Pagan
Cc: Michael Beato; John Cycon; Gary V. Perko; Zack Bennington; Chelsea Dunn; Little, Joe; Simone Chriss; Katy DeBriere; Carl Charles; Abigail Coursolle; Catherine McKee; Altman, Jennifer; Rivaux, Shani; Miller, William C.; Shaw, Gary J.
Subject: RE: Dekker v. Weida: Follow Up on Two Documents

Counsel—

We conferred with our clients within the past hour concerning the motion to compel. If you withdraw the motion to compel, we propose providing you the following by 5pm tomorrow:

1. A copy of the 17-page response-to-comment document;
2. The final rulemaking script;
3. Draft rulemaking scripts with any legal advice redacted; and
4. Cover emails for the draft and final scripts with any legal advice redacted.

Please let me know if this works for you.

Many thanks,
Mo

From: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>
Sent: Thursday, March 2, 2023 5:03 PM
To: Mohammad O. Jazil <mjazil@holtzmanvogel.com>
Cc: Michael Beato <mbeato@HoltzmanVogel.com>; John Cycon <jcycon@HoltzmanVogel.com>; Gary V. Perko <gperko@HoltzmanVogel.com>; Zack Bennington <zbennington@HoltzmanVogel.com>; Chelsea Dunn <Chelsea.dunn@southernlegal.org>; Little, Joe <joe.little@pillsburylaw.com>; Simone Chriss <simone.chriss@southernlegal.org>; Katy DeBriere <debriere@floridahealthjustice.org>; Carl Charles <CCharles@lambdalegal.org>; Abigail Coursolle <coursolle@healthlaw.org>; Catherine McKee <mckee@healthlaw.org>; Altman, Jennifer <jennifer.altman@pillsburylaw.com>; Rivaux, Shani <shani.rivaux@pillsburylaw.com>; Miller, William C. <william.c.miller@pillsburylaw.com>; Shaw, Gary J. <gary.shaw@pillsburylaw.com>
Subject: RE: Dekker v. Weida: Follow Up on Two Documents

Mo,

Following up on this. We cannot wait til Monday. But will note your request for us to do so within the motion.

Omar

Omar Gonzalez-Pagan
[Pronouns:](#) He/Him/His
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Email: ogonzalez-pagan@lambdalegal.org | Mobile: (617) 686-3464

Lambda Legal: Making the case for equality

From: Mohammad O. Jazil <mjazil@holtzmanvogel.com>
Sent: Thursday, March 2, 2023 12:05 PM
To: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>
Cc: Michael Beato <mbeato@HoltzmanVogel.com>; John Cycon <jcycon@HoltzmanVogel.com>; Gary V. Perko <gperko@HoltzmanVogel.com>; Zack Bennington <zbennington@HoltzmanVogel.com>; Chelsea Dunn <Chelsea.dunn@southernlegal.org>; Little, Joe <joe.little@pillsburylaw.com>; Simone Chriss <simone.chriss@southernlegal.org>; Katy DeBriere <debriere@floridahealthjustice.org>; Carl Charles <CCharles@lambdalegal.org>; Abigail Coursolle <coursolle@healthlaw.org>; Catherine McKee <mckee@healthlaw.org>; Altman, Jennifer <jennifer.altman@pillsburylaw.com>; Rivaux, Shani <shani.rivaux@pillsburylaw.com>; Miller, William C. <william.c.miller@pillsburylaw.com>; Shaw, Gary J. <gary.shaw@pillsburylaw.com>
Subject: Re: Dekker v. Weida: Follow Up on Two Documents

Understood Omar.

If you could wait to file until Monday, we would appreciate that.

Andrew Sheeran will be back in the office then and I'd like to discuss this issue with him in greater detail.

On Mar 2, 2023, at 12:01 PM, Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org> wrote:

Michael,

Thank you for the email. As I let Mo know yesterday, and as you lay out below, I think we are unfortunately going to have to take this up to the court expeditiously. We will be filing a motion to compel, noting Defendants' position that "Since the Parties disagree, we believe that it would make sense for us to submit the document for in camera review in order to get additional guidance." And intend on attaching your email below setting forth your position more fully.

Thanks,

Omar

Omar Gonzalez-Pagan

Pronouns: He/Him/His

Lambda Legal

Email: ogonzalez-pagan@lambdalegal.org | Mobile: (617) 686-3464

Lambda Legal: Making the case for equality

From: Michael Beato <mbeato@HoltzmanVogel.com>
Sent: Tuesday, February 28, 2023 7:19 PM
To: Omar Gonzalez-Pagan <ogonzalez-pagan@lambdalegal.org>; Chelsea Dunn <chelsea.dunn@southernlegal.org>; Little, Joe <joe.little@pillsburylaw.com>; Simone Chriss <simone.chriss@southernlegal.org>
Cc: John Cycon <jcycon@HoltzmanVogel.com>; Mohammad O. Jazil <mjazil@holtzmanvogel.com>; Gary V. Perko <gperko@HoltzmanVogel.com>; Zack Bennington <zbennington@HoltzmanVogel.com>
Subject: Dekker v. Weida: Follow Up on Two Documents

Counsel,

Following your February 27, 2023 email, and our meet and confer this morning, we agreed to provide you with our written position regarding two matters: (1) a 17-page document that was sent from AHCA to its experts; and (2) the communications and draft transcripts of the July 8, 2022 hearing.

With respect to the 17-page document, we first note that the document was included on our privilege log. (AHCA Priv. Log Row 143). The document was created around July 19, 2022. It summarizes AHCA's responses to comments received during the rulemaking process. While the federal Administrative Procedure Act requires federal agencies to respond to public comments during the rulemaking process, *see* 5 U.S.C. § 553(c) ("*After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.*" (emphasis added)); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."), we note that the Florida Administrative Procedure Act does not require this for state agencies, *see* ch. 120, Fla. Stat.

We further note that the document was created *after* the July 8, 2022 hearing, where several members of the public, including opposing counsel, threatened to sue AHCA if it promulgated the at-issue rule. *See, e.g.,* Defendants' Response in Opposition to Preliminary Injunction Motion Appendix 285-86 (Transcript of the July 8 Hearing) ("And this litigation that the state will certainly find itself embroiled in is wasting valuable state resources that could be better utilized enhancing the lives of Floridians rather than attacking them." (Simone Chriss)); App. 317 (stating that the challenged rule violates the Affordable Care Act and U.S. Constitution (Carl Charles)).

We can represent to you that the that 17-page document was created at the direction of counsel, under the threat of litigation. AHCA believed that a written, internal response to the public comments would assist in future litigation.

While we understand that Judge Hinkle stated that, for work-product purposes, litigation was imminent at the end of August 2022, we believe that these additional facts weigh in favor of not produce this document. Since the Parties disagree, we believe that it would make sense for us to submit the document for *in camera* review in order to get additional guidance. We welcome your thoughts though. We will also be discussing this issue further with our client to see whether the need to protect similar documents in future rulemakings outweighs the benefits of producing it here.

With respect to the communications and July 8 script drafts, as we have stated during our meet and confers, AHCA staff, including attorneys, provided comments and edits on the July 8 hearing script. It is difficult to redact or separate edits and comments, many of which were provided by attorneys. While our privilege log states that these communications and drafts are protected by the work-product privilege, we can amend our privilege log and state that these are attorney-client protected documents. We believe that these documents are protected by the attorney-client privilege because AHCA attorneys provided edits and comments on the July 8 draft script. Again, we note that in March 2022, the Biden Department of Justice threatened to sue states that address gender-affirming-care issues. We are happy to discuss this further at your convenience.

Michael Beato

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