IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

JUNE MEDICAL SERVICES LLC, d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff, et al., Plaintiffs, v. REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health, et al., Defendants.	Case No. 3:16-CV-444-BAJ-RLB

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO STAY DISCOVERY

Plaintiffs have stated significant reasons for discovery to be stayed. Defendants' opposition confirms their strategy to gut important confidentiality protections, and ultimately to expose sensitive information that would subject Plaintiffs and others to needless safety and privacy risks. Piecemeal confidentiality objections—addressed via time-consuming letter-writing campaigns and then motions practice following every deposition—are not the appropriate vehicle to address Defendants' threshold disagreements about information covered by the Protective Orders.

Discovery also should be stayed because the Supreme Court is currently considering a case that will impact the legal standards and scope of discovery in this matter, *see June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *mandate stayed by* 139 S. Ct. 663 (2019), *petition for cert. filed*, No. 18-1323 (Apr. 17, 2019) (the "Admitting Privileges Case"), and Defendants themselves have invoked the Fifth Circuit's admitting privileges decision as a basis for demanding expansive discovery here.

Accordingly, Plaintiffs' Motion to Stay should be granted.

I. Piecemeal Challenges to Confidentiality Designations are not the Proper Vehicle to Challenge the Very Existence of the Protective Orders

Plaintiffs ask this Court to set a schedule for resolution of threshold confidentiality issues outside of the discovery process. Defendants acknowledge that they are using challenges to deposition designations as a vehicle to attack the very existence of the Protective Orders, based on their view that the orders are "too broad." Opp. at 3. Defendants concede that they aim to publish identities of anonymous Plaintiffs' and other abortion providers by "us[ing] the procedure specified in the Protective Order to challenge confidentiality designations," ECF 249 at 1 ("Opp."), but their approach clearly is not what is contemplated by the Order. To be sure, the Protective Order provides a mechanism for resolving good faith disputes about what is Confidential under its terms. ECF 96 ¶¶ 16. But, that is not what Defendants are doing. Rather, Defendants are abusing the process by raising "objections" to designations that fall squarely within settled aspects of the Protective Orders, and then refusing to budge on those untenable positions in order to logjam any reasonable resolution. ECF 237-1 at 6-8 ("Mem.").

This dispute is not a one-off issue limited to the deposition of Dr. Doe 2. *See* Mem. at 5-13. The same topics (which are explicitly enumerated in the Protective Order) will arise in most, if not all, of the *sixteen* remaining fact depositions that Defendants intend to take.[1] It makes no sense to litigate these threshold confidentiality questions on a piecemeal basis.

II. A Stay is Necessary Because Ongoing Disputes Regarding the Scope of Confidentiality Protections Must be Resolved in Order to Proceed with Discovery.

Discovery is only permitted regarding "any nonprivileged matter" that is relevant and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Defendants opposition does not

[1]The challenged designations include: individuals' identities, "personnel information," "financial information," clinic "policies and procedures," and other "sensitive information that could jeopardize the privacy of physicians, staff, patients, and others associated with Plaintiffs." ECF 96 ¶¶ 5-6 (Protective Order).

even mention Rule 26, let alone address the requisite discoverability standards. To determine whether discovery is proportional, a court must consider the sensitivity of information, including any interest in maintaining confidentiality. *Coughlin v. Lee*, 946 F.2d 1152, 1160 (5th Cir. 1991); *Tingle v. Hebert*, 2018 WL 1726667, at *8 (M.D. La. Apr. 10, 2018); *Williams v. Am. Int'l Grp., Inc.*, 2016 WL 3156066, at *2 (M.D. Ala. June 3, 2016) (privacy concerns may "tip the scales of proportionality against disclosure"). Assuming *arguendo* that sensitive information were deemed Confidential now, but made public later, Plaintiffs will have been robbed of the right to deem it nonproportional based on the absence of confidentiality protections. In light of the serious privacy and safety concerns at stake, the harm to Plaintiffs would be severe and irreparable.

The Court also should order a stay because open-ended discovery has proven unworkable and invites further abuse of the discovery process. Defendants have repeatedly opposed any stay of discovery, only to spend most of the intervening discovery period issuing threats to Plaintiffs' counsel. Mem. at 5-9. And Defendants' actions since Plaintiffs filed their Motion to Stay Discovery further demonstrate that, absent a stay, there is no end to this situation in sight. On June 21, Defendants filed yet another motion, this time seeking to strike portions of Dr. Doe 2's deposition testimony. ECF 250.[2] In the meet and confer leading up to their new motion, Defendants stated they were "entitled to [their] own litigation strategy," which would include filing "this motion and possibly others" in advance of the status conference set for July 12. Ex. A. Defendants then refused to answer any questions about what additional motions they intend to file. *Id.*

[2] It is unclear what legitimate purpose Defendants' Motion to Strike could serve at this time, as there is no relevant Court record of the deposition at this early stage of litigation. The appropriate time to raise that motion would be if and when the disputed testimony were to be used on the record for substantive purpose. Yet, Defendants insist on engaging in premature briefings about something that might never happen and/or might never become material. Plaintiffs will oppose the motion to strike in due course.

Because it is Defendants' own dilatory tactics that have delayed discovery, they cannot reasonably claim to be harmed by a stay. Nor does the fact that there is a non-enforcement agreement in place with respect to the challenged laws alter the analysis. Opp. at 16-17. Defendants' willingly entered into that stipulation not to enforce the challenged laws while this case is pending. Likewise, it has been Defendants' choice to draw out the process with endless discovery motions.[3]

III. Discovery Should be Stayed while the Supreme Court Considers the Admitting Privileges Case.

Defendants ask the Court to disregard the impact of the Admitting Privileges Case on this matter for two reasons, which both lack merit. First, Defendants discount the significance of the Admitting Privileges Case, arguing that it is just the typical "changing legal backdrop." Opp. at 14-15. But, Defendants fail to acknowledge the extraordinary circumstances here—that the Fifth Circuit's decision in the Admitting Privileges Case conflicts with the most recent binding Supreme Court precedent, *Whole Woman's Health v. Hellerstadt*, 136 S. Ct. 2292 (2016), decided just three years ago. The Fifth Circuit itself has recognized the unusual posture here, staying decision in a case challenging a Texas law nearly identical to H.B. 1081, the Louisiana D&E ban challenged in this litigation. *Whole Woman's Health*, 280 F. Supp. 3d 938 (W.D. Tex. 2017), *appeal docketed*, No. 17-51060 (5th Cir. Jan. 16, 2018), *held in abeyance by* Doc. 514871170 (5th Cir. Mar. 13, 2019).[4]

[3] Defendants make much of the fact that the non-enforcement stipulation initially contemplated a preliminary injunction hearing. Opp. at 16-17. But, Defendants neglect to mention that they later chose to set a schedule moving straight to discovery, rather than build in a schedule for preliminary injunction briefing, and thus themselves extended the duration of the non-enforcement agreement. (ECF No. 91).

[4] On March 15, 2019, just two days after the Fifth Circuit decided to hold the Texas D&E case in abeyance, Defendants invoked the Fifth Circuit's decision to seek a stay of a separate case also pending before this Court, *June Medical Services, LLC v. Gee*, No. 3:18-cv-404-BAJ-RLB ("June III"). Mem. at

Second, Defendants argue that a stay is not appropriate because this litigation "is not at a point where the Court is applying legal standards to facts." Opp. at 16. However, applicable legal standards directly inform and dictate the scope of fact discovery for any case. *See supra* Part II (discussing relevance and proportionality standards). This is especially true here, where Defendants have invoked the Fifth Circuit's Admitting Privileges decision as a basis to demand expansive discovery. *See* Ex. B (email demanding twenty fact depositions based on Defendants' view that the Admitting Privileges Case "underscores the importance of granular detail from the personal testimony of individuals, including abortion providers.").

IV. CONCLUSION

Accordingly, Plaintiffs' Motion to Stay should be granted.

Dated: July 1, 2019

Respectfully submitted,

/s/ Charles M. Samuel

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5. That same day, because Defendants' counsel had acknowledged the import of the Fifth Circuit's decision in the similar context of *June III*, Plaintiffs proposed a stay of this matter for the same reasons, including to cancel the upcoming deposition of Dr. Doe 2. *Id.* Yet, despite proposing a stay in *June III*, Defendants refused a similar stay proposal in this case.

There is no question that Plaintiffs suggested a stay at that time to preserve resources in light of the Admitting Privileges Case—the request came *just two days* after the Texas D&E case was stayed and *the same day* that Defendants sought to stay a related matter. Yet, Defendants attempt to paint Plaintiffs' request for a stay at that time as "concerning and telling," by mischaracterizing facts that have no bearing on this issue in any event. Opp. at 6 n.5. Plaintiffs strongly dispute the facts and allegations set forth in footnote 6 of Defendants' Opposition.

CERTIFICATE OF SERVICE

I certify that on this 1st day of July, 2019, I electronically filed a copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Emily Nestler

Emily Nestler