Fax Transmittal

TO: The Hon. James C. Francis IV
United States District Court
Southern District of New York

FAX: (212) 805-7930

FROM: Paul D. Clement
H. Christopher Bartolomucci
Conor B. Dugan
Nicholas J. Nelson
BANCROFT PLLC

DATE: July 25, 2011

RE: *Windsor v. United States*, 10 Civ. 8435 (BSJ) (JCF)

TOTAL NUMBER OF PAGES (INCL. COVER): 7

COMMENTS:

Attached please find the Bipartisan Legal Advisory Group of the United State House of Representatives' opposition to Plaintiff's motion to compel, filed July 18, 2011, in the above-titled matter.

1919 M Street, N.W. • Suite 470 • Washington D.C. 20036
Telephone 202.234.0090 • www.bancroftpllc.com • Facsimile 202.234.2806

July 25, 2011

BY FACSIMILE & FIRST CLASS MAIL

Magistrate Judge James C. Francis IV
United States District Court
Southern District of New York
500 Pearl Street
New York City, New York 10007
Facsimile: (212) 805-7930

Re: *Windsor v. United States*, 10 Civ. 8435 (BSJ) (JCF)

Dear Judge Francis:

Plaintiff conflates the basic components of the pretrial litigation process: (1) the discovery of facts and (2) the presentation of facts and argument in support of proposed legal conclusions. Discovery is an opportunity for litigants to uncover the particular facts of a particular case. The basic tools of discovery include interrogatories, requests for documents, and requests for admission. *See* Fed. R. Civ. P. at Title V ("Disclosures and Discovery") (Rules 26-37). Argument, on the other hand, is the opportunity for litigants to marshal those facts in support of their proposed legal conclusions. The basic tools of pretrial argument include submissions for and against dismissal and/or summary judgment. *See id.* at Title III ("Pleadings and Motions") (including Rule 12), Title VII ("Judgment") (including Rule 56). Accordingly, the use of discovery tools to inquire regarding the legal conclusions that a litigation opponent plans to advance in arguing its case is an improper abuse of the discovery process, an abuse that (as here) serves only to waste the resources of all involved. The place for Plaintiff to learn the House's proposed legal conclusions is in the legal memoranda of the House in support of its forthcoming motion to dismiss (due one week from today, August 1, 2011) and opposition to Plaintiff's motion for summary judgment (also due one week from today, August 1, 2011).

First, Plaintiff demands that the Bipartisan Legal Advisory Group (the "House") list the "'legitimate government interest[s] rationally advanced by section 3 of DOMA'" and/or the "'compelling justifications for section 3 of DOMA.'" [House's] Objections & Resps. to Pl.'s First Set of Interrogs. at 3-4, attached as Ex. B to Pl.'s Letter Br. (July 18, 2011; exhibits corrected on July 19, 2011) (quoting Pl.'s Interrogs. Nos. 1 & 3). These are undisguised efforts to compel the House to state prematurely its proposed legal conclusions—a purpose for which discovery is not available. *See United States v. Watchmakers of Switz. Info. Ctr., Inc.*, 168 F. Supp. 904, 906-07 (S.D.N.Y. 1958) (sustaining objections to interrogatories "seek[ing] legal conclusions . . . incapable of answers sworn to under oath," and noting that "legal conclusions are not the proper subject of discovery proceedings"); *Fuller v. Knapp*, 24 F. 100, 105 (S.D.N.Y. 1885) ("[S]o far as the interrogatory calls for a legal conclusion it does not require an answer."); *see also Weddington v. Consolidated Rail Corp.*, 101 F.R.D. 71, 75 (N.D. Ind. 1984) ("[A]ny response to such requests necessitates a legal conclusion on the part of the defendant. Defendant's objections are, therefore, sustained.").

In *Mobil Oil Co. v. Dep't of Energy*, No. 81-340, 1982 WL 1135 (N.D.N.Y. Mar. 8, 1982), a district court in this Circuit squarely addressed the question of whether a particular interrogatory constituted an improper, premature request for a legal conclusion. The *Mobil Oil* court considered whether the inquiry could be answered "without referring to the facts of this case." 1982 WL 1135 at *2. Answering that question in the affirmative, the court recognized the request as seeking a "pure legal conclusion[]," i.e., a response unavailable via discovery. *Id.* (quotation marks omitted). So too here, where Plaintiff's interrogatories require no reference whatsoever to the facts of Plaintiff's case. Rather, Plaintiff's interrogatories request legal conclusions as to the bases for Section III of DOMA, bases that exist or do not exist apart from any facts of this case.

Therefore, what Plaintiff seeks here is to require the House to write significant portions of the legal sections of its briefing on the summary judgment and dismissal motions and to deliver that briefing, not to the Court in accordance with the scheduling order entered in this matter, but to Plaintiff herself at an earlier date in response to discovery requests. Plaintiff presumably then would object if the House did not file identical versions of its briefs with the Court. Discovery and argument cannot be so easily conflated.

In any event, the House now has filed at least three substantive briefs in cases involving equal protection challenges to Section III of DOMA, in which briefs the House states clearly its proposed legal conclusions. *See* Mot. to Dismiss, *Golinski v. Office of Pers. Mgmt.*, No. 3:10-cv-00257-JSW (N.D. Cal. June 3, 2011) (ECF No. 119); Reply in Supp. of Mot. to Dismiss, *Golinski v. Office of Pers. Mgmt.*, No. 3:10-cv-00257-JSW (N.D. Cal. July 15, 2011) (ECF No. 150); Mot. to Dismiss, *Lui v. Holder*, No. 2:11-cv-01267-SVW (JCGx) (C.D. Cal. June 17, 2011) (ECF No. 19).[1] And only one week from today, the House will file its motion to dismiss and opposition to Plaintiff's motion for summary judgment in this litigation. It is then that the House will state its proposed legal conclusions in this litigation.

Second, Plaintiff demands that the House answer certain requests for admission (Plaintiff's request numbers 3-5, 8-9, 10-12, and 14-18,[2] *see* Pl.'s Letter Br. at 4) that necessarily

[1] Even if Plaintiff were ignorant of the bases that the House contends support DOMA (which she is not), her discovery requests still would represent an impermissible attempt to circumvent this Court's scheduling order. As the Court is aware, Plaintiff requested an unusually accelerated briefing in this case, despite the House's objections, and the Court agreed to a schedule that allowed Plaintiff to file her summary judgment motion before the House filed its motion to dismiss. *See* Revised Scheduling Order (May 11, 2011) (ECF No. 22). Plaintiff's discovery requests essentially are an attempt to undo this order of operations, by requiring the House to disclose the legal conclusions that it will propose in its motion to dismiss before the assigned date for her summary judgment motion.

[2] Plaintiff also demands that the House respond to her Request for Admission Number 1, which asks whether "*if*, at the time of her death, Thea Spyer had been married to a man instead of a woman, who was a U.S. Citizen and who survived Thea Spyer's death, her estate would have qualified for the estate tax marital deduction, 26 U.S.C. § 2056(a), and would not have been liable for any federal estate tax." (Emphasis added). But, as the House noted in its objections

seek the House's proposed legal conclusions and/or seek admissions as to sweeping generalizations regarding the history of all parts of the United States over all periods of time during the past 111 years. For example, Plaintiff seeks an admission that "in the twentieth century and continuing to the present, lesbians and gay men have experienced a history of unequal treatment in the United States because of their sexual orientation." Req. for Admis. No. 3. There is no doubt that some lesbians and gay men have experienced unequal treatment in some parts of the United States during some parts of the past 111 years. If that really is the issue on which Plaintiff aims to waste the time and resources of the parties and the Court, Plaintiff may declare a success. Beyond that, however, Plaintiff would demand that the House have performed (in thirty days no less) a sweeping history of our nation, one referencing the experience of lesbians and gay men in all parts of the United States during each and every particular time period over the past century and a decade, all in an attempt to determine whether any unequal treatment in a particular time and place, when aggregated with any unequal treatment in any other particular time and place, rises to some undefined level such as to qualify as a "history." This request is impossible to answer on its face, because there is no ascertainable criterion for determining the number and frequency of incidents that are required to rise to the level of such a "history." And even if there were, the actual number and frequency of such incidents certainly is not within the knowledge of the House. *See, e.g.*, *Rahman v. Smith & Wollensky Rest. Grp., Inc.*, No. 06-6198, 2008 WL 3823958, at *1 (S.D.N.Y. Aug. 14, 2008) (noting inappropriate nature of "sweeping demands for admission"); *see also Concerned Citizens of Belle Haven v. Belle Haven Club*, 223 F.R.D. 39, 44 (D. Conn. 2004) ("Rule 36 [regarding requests for admission] requires the responding party to make a *reasonable* inquiry, a *reasonable* effort, to secure information that is *readily available* from persons and documents within the responding party's *relative control*.") (emphasis added; quotation marks omitted); *Jackson Buff Corp. v. Marcelle*, 20 F.R.D. 139, 140-41 (E.D.N.Y. 1957) (party need not answer requests for admission as to which it lacks knowledge). Especially here, where Plaintiff seeks to bind the House to the semantic label of "history" to describe the unequal treatment of certain homosexual persons, the inquiry required would be decidedly unreasonable.

Plaintiff's additional questions seek information, for the same expanse of space and time, as to whether any unequal treatment amounted to "discrimination" (a term not defined by Plaintiff) and, if so, whether that discrimination was, on the one hand, "because of their sexual orientation," Req. for Admis. No. 4, or, on the other hand, "because of their perceived stereotyped characteristics," Req. for Admis. No. 5. Plaintiff further demands that the House report, again for the same expanse of space and time, on whether lesbians and gay men "have been denied jobs and other opportunities" (again, not defined by Plaintiff), Req. for Admis. No.

---

and responses, it "is without sufficient knowledge or information [or expertise, frankly] to admit or deny whether this hypothetical estate would have been entitled to the estate tax marital deduction," [House's] Objections & Resps. to Pl.'s First Req. for Admis. at 3, attached as Ex. A to Pl.'s Letter Br., much less whether that estate would have been "liable for any federal estate tax." Although Plaintiff asserts that her "Claim for Refund and Request for Abatement (Form 843) filed with the IRS" establishes that she would have been eligible for the deduction had she been married to a man, Pl.'s Letter Br. at 5, the House lacks knowledge as to the accuracy of the representations in the Claim, and Plaintiff offers no reason why the House (or the IRS) should be required to take the Claim at face value.

8, or "terminated from jobs and other opportunities" (still not defined), Req. for Admis. No. 9. These demands are improper, in addition to the reasons stated above, because they seek legal conclusions as to undefined terms. *See also, e.g.*, *Lane No. 1 v. Lane Masters Bowling Inc.*, Slip Op. No. 06-508, 2011 WL 1097861, at *11 (N.D.N.Y. Mar. 22, 2011) ("Requests that seek legal conclusions are not allowed under Rule 36.") (quotation marks omitted); *Sahu v. Union Carbide Corp.*, 262 F.R.D. 308, 317 (S.D.N.Y. 2009) (striking aspects of discovery requests dependent on undefined term—"operation"—susceptible to "various meanings, a number of which would make the requests overbroad"; also striking as unduly burdensome requests for admission that "appear to be an attempt to shift the burden of sifting through . . . discovery onto [the responding party]"); *Williams v. Krieger*, 61 F.R.D. 142, 144 (S.D.N.Y. 1973) (denying motion to compel five of six requests for admission where requests sought "admissions of law"). That Plaintiff already has offered in her summary judgment briefing (which she filed without any need for responses to these discovery requests) her own sweeping characterizations of American history, *see, e.g.*, Pl.'s Mem. in Supp. of Mot. for Summ. J. at 13-16 (June 24, 2011) (ECF No. 29), does not obligate the House to engage in any such exercise, much less in the context of its discovery responses.

Plaintiff also requests a comparative assessment of the ability of lesbians and gay men vis-à-vis heterosexual persons "to perform in society," Req. for Admis. No. 10, and "to contribute to society," Req. for Admis. No. 11. She further requests an assessment of whether lesbians and gay men "are generally no less capable of loving, nurturing, and supporting their children," Req. for Admis. No. 14, "adequately car[ing] for their children," Req. for Admis. No. 15, "making good decisions regarding child rearing," Req. for Admis. No. 16, and "rais[ing] psychologically well-adjusted children," Req. for Admis. No. 17, with "no difference in child outcomes," Req. for Admis. No. 18. Again, no one doubts that homosexuals can contribute to society, including by raising children. What the House cannot do, and what Plaintiff may not properly demand that the House do, is offer a sweeping evaluation of the "general[]" ability of lesbians and homosexual men across the nation—let alone the "general[]" ability of the much larger class of heterosexual persons, as would be required for the comparison Plaintiff seeks—"to perform in society" or to raise "psychologically well-adjusted children" with particular "outcomes," whatever those terms, all un-defined, may mean. Plaintiff offers no yardstick against which to assess any of these statements. Of course, the phrase "contribute to society" has become a legal term of art in the equal-protection field. But, to the extent that Plaintiff wishes to attribute legal significance to the phrase (which she surely does), the request once again is a demand for an abstract legal conclusion that is not the proper subject of discovery. In this context also, the fact that Plaintiff already has offered in her summary judgment briefing her own sweeping characterizations on these issues, *see, e.g.*, Pl.'s Mem. in Supp. of Mot. for Summ. J. at 16-17, does nothing to obligate the House to engage in any such exercise, particularly in the separate context of discovery responses.

The sweeping nature and generality of Plaintiff's requests for admission means the only effect they could have on this litigation would be to breed innumerable further disputes about their meaning. For instance, if the House were to admit that sexual orientation generally is not relevant to one's ability to "perform in society," would this preclude the House from later noting that homosexuality is relevant to the number of children that one is likely to raise, and maintaining that this is a fact of which government decisionmakers properly may be cognizant?

This thought exercise—and the hundreds of other similar ones that would be possible—suggests what Plaintiff really is up to. Her Motion to Compel is aimed not at generating relevant information regarding the facts of this case or the application of law to those facts, but rather at forcing the House into a Hobson's choice. If compelled to respond, the House would be forced to choose between writing Plaintiff a blank check by admitting to a request the meaning of which will be determined later, or else denying the request and creating fodder for political attacks on Members of the House by gay-rights groups, which doubtless would exploit every ambiguity in the requests to generate more mud to sling, without regard to the facts or issues in play in this case. This Court should not be a party to such a manipulation of the discovery process.

* * *

For the foregoing reasons, the House respectfully requests that the Court deny Plaintiff's motion to compel further discovery responses.

Respectfully submitted,

Paul D. Clement
H. Christopher Bartolomucci
Conor B. Dugan
Nicholas J. Nelson
BANCROFT PLLC[3]
1919 M Street, Northwest, Suite 470
Washington, District of Columbia 20036
Telephone: (202) 234-0090
Facsimile: (202) 234-2806

Counsel for the Bipartisan Legal Advisory Group of the United States House of Representatives

OF COUNSEL:

Kerry W. Kircher, General Counsel
Christine M. Davenport, Senior Assistant Counsel
Katherine E. McCarron, Assistant Counsel
William Pittard, Assistant Counsel
Kirsten W. Konar, Assistant Counsel
OFFICE OF GENERAL COUNSEL
U.S. House of Representatives

---

[3] Bancroft PLLC has been "specially retained by the Office of General Counsel" of the House to litigate the constitutionality of Section III of DOMA on behalf of the House. Its attorneys are, therefore, "entitled, for the purpose of performing [that] function[], to enter an appearance in any proceeding before any court of the United States . . . without compliance with any requirement for admission to practice before such court . . . ." 2 U.S.C. § 130f(a).

219 Cannon House Office Building
Washington, District of Columbia 20515
Telephone: (202) 225-9700
Facsimile: (202) 226-1360

cc: Roberta A. Kaplan, Esquire *(Plaintiff's Counsel)*
Andrew J. Ehrlich, Esquire *(Plaintiff's Counsel)*
Alexis Karteron, Esquire *(Plaintiff's Counsel)*
Arthur Eisenberg, Esquire *(Plaintiff's Counsel)*
James D. Esseks, Esquire *(Plaintiff's Counsel)*
Melissa Goodman, Esquire *(Plaintiff's Counsel)*
Rose A. Saxe, Esquire *(Plaintiff's Counsel)*
Jean Lin, Esquire *(Executive Branch Counsel)*