

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello**

Civil Action No. 11-cv-03350-CMA-BNB

COLORADO CHRISTIAN UNIVERSITY,

Plaintiff,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services,

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

HILDA SOLIS, Secretary of the United States Department of Labor,

UNITED STATES DEPARTMENT OF LABOR,

TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendant.

**ORDER DENYING AS UNTIMELY DEFENDANTS'
OBJECTIONS TO MAGISTRATE JUDGE'S RULING**

This matter is before the Court on "Defendants' Objections to Magistrate Judge's February 29, 2012 Order Denying a Stay of Discovery." (Doc. # 25.) For the reasons that follow, such objections are untimely, and the Court will not consider them.

I. BACKGROUND

On February 6, 2012, Defendants filed a "Motion to Postpone Rule 16(b) Scheduling Conference and Related Deadlines" for a period of 60 days. (Doc. # 16.) Defendants stated that the motion should be granted "because discovery, if any, should not commence until the Court has had time to rule on Defendants' forthcoming motion

to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (b)(6).” (*Id.* at 1.) They argued that “[c]ourts have broad discretion to stay proceedings, including discovery, when a pending dispositive motion may resolve some or all claims” and that a “stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned” (*Id.* at 3 (quotation marks and citations omitted).)

Plaintiff responded on February 7, 2012. (Doc. # 18.) It asserted that “postponing discovery would serve no meaningful purpose” and analyzed five factors that are often addressed when “considering a motion to stay or postpone discovery” (*Id.* at 1, 3.) Plaintiff argued that “[t]he interests of the parties and the Court weigh against delaying discovery” and cited to *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, No. 11-cv-01468, 2011 WL 4018207, at *2 (D. Colo. Sept. 8, 2011), for the proposition that “stays of discovery pending rulings on motions to dismiss generally are disfavored in this district.” (Doc. # 18 at 3 (emphasis deleted).)

Defendants replied that same day asserting, in part, that “[g]ranted defendants’ request to postpone the scheduling conference and related deadlines for 60 days will have the added benefit of allowing the Court to consider the substance of the motion to dismiss, and plaintiff’s response to it, before deciding whether to postpone discovery further, *i.e.*, until after the Court rules on defendants’ motion to dismiss.” (Doc. # 19 at 3 n.1.)

On February 9, 2012, Judge Boland denied Defendants' motion. (Doc. # 20.)

After citing the factors Plaintiff raised (see Doc. # 18 at 3), Judge Boland stated:

"Considering the factors leads me to conclude that a stay of discovery in this case is not warranted." (Doc. # 20 at 2.) He also relied on the same principle cited by Plaintiff in its response: "stays of discovery pending rulings on motions to dismiss generally are disfavored in this district." (*Id.* at 3 (quoting *SOLIDFX*, 2011 WL 4018207, at *2).)

On February 22, 2012, the parties submitted a "Joint Proposed Scheduling Order." (Doc. # 21.) In their statement of jurisdiction, Defendants explain that they "intend to file a motion to dismiss for lack of jurisdiction . . . on February 27, 2012. Defendants request that the Court delay the commencement of discovery until after this motion is resolved." (*Id.* at 4.)

On February 29, 2012, after Defendants had filed their "Motion to Dismiss for Lack of Jurisdiction" (Doc. # 22), Judge Boland held a scheduling conference. (See Doc. # 23.) At the beginning of the proceeding, he stated:

I've been over, of course, the motion to reschedule the scheduling conference, and denied it, and I thought that indicated my intention not to stay the case either, so I am going to go ahead and set a schedule today, and I won't stay the case for the reasons stated in my earlier order denying the motion to extend the scheduling conference.

(Doc. # 25-1 at 2-3.) In the "Scheduling Order" issued that day, "Defendants request that the Court delay the commencement of discovery until after this motion is resolved" is struck-through. (Doc. # 24 at 4.)

II. DISCUSSION

A. **NO FEBRUARY 29, 2012 DISCOVERY ORDER**

On March 13, 2012, Defendants filed objections to “Magistrate Judge Boyd N. Boland’s February 29, 2012 order denying defendants’ request for a stay of discovery” (Doc. # 25 at 1.) However, no such order occurred on February 29, 2012, as indicated in the block-quote above. At the hearing, Judge Boland explained to Defendants that he would not stay the case “for the reasons stated” previously in his February 9, 2012 order “denying the motion to extend the scheduling conference.” (Doc. # 25-1 at 3.) He further stated his understanding that the February 9, 2012 order “indicated [his] intention not to stay the case” (*Id.* at 2-3.) Thus, a straight-forward reading of the transcript indicates that Judge Boland was merely explaining to Defendants why he would refuse to alter the earlier ruling he had made not to stay the case. As Plaintiff argues, “[t]here is nothing to indicate that Magistrate Boland was issuing a new order to be appealed from.” (Doc. # 29 at 5.)

Such a reading of the February 9, 2012 transcript is bolstered by the context in which it occurred – *i.e.*, a scheduling conference and not a motions hearing. As of February 29, 2012, only two motions had been filed: the February 6 “Motion to Postpone Rule 16(b) Scheduling Conference and Related Deadlines” (Doc. # 16); and the February 27, 2012 “Motion to Dismiss for Lack of Jurisdiction” (Doc. # 22). As Plaintiff points out, any statement by Defendants in the “Joint Proposed Scheduling Order” (*e.g.*, Doc. # 21 at 4 (“Defendants request that the Court delay the commence-

ment of discovery until after this motion is resolved.”)) was necessarily “not a proper ‘motion’ that Magistrate Boland could have ruled on.” (Doc. # 29 at 6.) Under Fed. R. Civ. P. 7(b)(1), “[a] request for a court order must be made by motion.” Though it should go without saying, a proposed scheduling order is **not** a motion. Further, seeking affirmative relief in a filing other than a motion is improper under the local rules. D.C.COLO.LCivR 7.1(C) (“A motion shall be made in a separate paper.”)

Accordingly, on February 29, 2012, Judge Boland did not issue an order denying defendants’ request for a stay of discovery.

B. OBJECTIONS PERTAIN TO FEBRUARY 9, 2012 ORDER

Plaintiff argues, and the Court agrees, that Defendants’ objections actually pertain to Judge Boland’s February 9, 2012 order. As is evident from the quotations above, Defendants’ February 6, 2012 motion advocated for Judge Boland to exercise the “broad discretion” courts have to “stay proceedings, including discovery” when a dispositive motion is pending and that doing so would be “eminently logical.” Also, Plaintiff’s response argued directly “against delaying discovery,” which was obviously clear to Judge Boland when he stated that “a stay of discovery in this case is not warranted.” Given such direct and unambiguous language, the Court finds incredible Defendants’ assertion that Judge Boland’s refusal to stay the case “is not clear from the language of the February 9, 2012 order” (Doc. # 30 at 4 n.2.)

Because a plain reading of Defendants’ motion shows that they sought a stay of discovery, which Judge Boland denied on February 9, 2012, Defendants’ objections

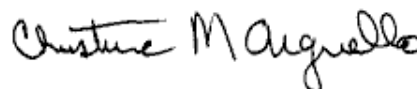
were due before February 24, 2012. See Fed. R. Civ. P. 72(a) (“A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to.”) Thus, Defendants’ March 13, 2012 objections were not timely filed, and Defendants may not assign as error a defect, if any, in the order.¹

III. CONCLUSION

For the foregoing reasons, the Court ORDERS that “Defendants’ Objections to Magistrate Judge’s February 29, 2012 Order Denying a Stay of Discovery” (Doc. # 25) is DENIED.

DATED: April 30, 2012

BY THE COURT:



CHRISTINE M. ARGUELLO
United States District Judge

¹ The Court is aware that its “power to revisit” the issue has not been stripped by Defendants’ failure to seek timely review of Judge Boland’s order, see *Allen v. Sybase, Inc.*, 468 F.3d 642, 658 (10th Cir. 2006), but declines to exercise such power *sua sponte*.