DOCKET NO. 14-13399-C

United States Court of Appeals

for the

Eleventh Circuit

FREEDOM FROM RELIGION FOUNDATION, INC.; DAN BARKER; ANNIE LAURIE GAYLOR; and DAVID WILLIAMSON,

Plaintiffs/Appellants,

v.

ORANGE COUNTY SCHOOL BOARD,

Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF DEFENDANT/APPELLEE

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SECOND AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1-1, Appellee, ORANGE COUNTY SCHOOL BOARD, certifies the following list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

Barker, Dan - Appellant

Brady, Steven M. - Counsel for Appellants

Burr & Forman LLP* - Law firm representing Appellee

Butler-Gordon, Kathleen - District 5 Member of Appellee

Cadle, Joie - District 1 Member of Appellee

Elliot, Patrick - Co-Counsel for Appellants

Flynn, Daryl - District 2 Member of Appellee

Freedom from Religion Foundation, Inc. - Appellant

Gaylor, Annie Laurie - Appellant

Geiger, Lisa J. - Counsel for Appellee

Gould, Pam - District 4 Member of Appellee

Jeffrey, Jr., Jerry H. - Former counsel for Appellants

Jenkins, Dr. Barbara M. - Superintendent of Appellee

Kobert, Linda - District 3 Member of Appellee (Current)

Marks, Howard S. - Counsel for Appellee

Moore, Christine - District 7 Member of Appellee

Orange County School Board - Appellee

Palmerini, John C.* - Associate General Counsel of Appellee

Roach, Rick - District 3 Member of Appellee (Former)

Robbinson, Nancy - District 6 Member of Appellee

Rodriguez, Diego "Woody"* - General Counsel of Appellee

Seidel, Andrew L. - Co-Counsel for Appellants

Sharp, Hon. G. Kendall* - Judge, United States District Court, Middle District of Florida

Spaulding, Hon. Karla R.* - Magistrate Judge, United States District Court, Middle District of Florida

Sublette, Bill - Chairman of Appellee

The Brady Law Firm, P.A. - Law firm representing Appellants

Wasula, Christine A. - Counsel for Appellants

Williamson, David - Appellant

CORPORATE DISCLOSURE STATEMENT

Counsel for Appellee, Orange County School Board, hereby certifies that it is not a publicly traded company.

/s/ Howard S. Marks
HOWARD S. MARKS, ESQ.
LISA J. GEIGER, ESQ.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee Orange County School Board does not believe that oral argument is necessary to resolve the issue presented in this appeal and it will not significantly aid the decisional process of this Court.

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I. STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Defendant-Appellee Orange County School Board disagrees that this Court has jurisdiction to review the orders appealed from below because, as more fully set forth in the argument below, the appeal has been rendered moot by the cessation of the challenged conduct. *Arguendo*, that the appeal is not moot, then Defendant-Appellee Orange County School Board adopts the Statement of Jurisdiction of the Initial Brief.

II. STATEMENT OF THE ISSUES

Appellants Freedom From Religion Foundation, Dan Barker, Annie Laurie Gaylor, and David Williamson requested permission to distribute materials at Appellee Orange County School Board's limited public forum in which outside groups are permitted to passively distribute materials at high school campuses. After review of those materials, Appellee Orange County School Board declined certain of the materials. Appellants Freedom From Religion Foundation, Dan Barker, Annie Laurie Gaylor, and David Williamson filed the District Court litigation to challenge Appellee Orange County School Board's decision declining certain materials as set forth in the litigation. Early in the District Court litigation, Appellee Orange County School Board re-evaluated its distribution decision and permitted the distribution of the materials subject of the District Court litigation. Based thereon, the District Court granted Appellee Orange County School Board's

Motion to Dismiss in its Order dated July 3, 2014 and dismissed the as-applied claims for prospective relief without prejudice.

The first issue is as follows:

> Was the District Court correct in entering its July 3, 2014 Order dismissing the claims for prospective relief as moot where there was no live controversy, concluding that Appellee Orange County School Board unconditionally allowed Appellants Freedom From Religion Foundation, Dan Barker, Annie Laurie Gaylor, and David Williamson to distribute all of the materials which are the subject of the District Court litigation, and that Appellee Orange County School Board had stopped its challenged distribution decision?

After the District Court dismissed the prospective claims as moot in its Order dated July 3, 2014, the District Court *sua sponte* entered its Order dated July 14, 2014 dismissing the case because all the materials upon which the District Court litigation was based were allowed to be distributed. The District Court found that any concern that unknown materials, which were not subject of the District Court litigation or review, would in the future be improperly reviewed was too hypothetical to maintain jurisdiction. The Complaint contained a request for nominal damages as part of its causes of action.

The second issue is as follows:

> Was the District Court correct in entering its July 14, 2014 Order dismissing the entirety of the case due to lack of subject matter jurisdiction even if the Complaint requested nominal damages?

Appellants Freedom From Religion Foundation, Dan Barker, Annie Laurie Gaylor, and David Williamson filed their Motion to Compel Depositions, which was denied by the District Court because it was untimely filed on the eve of the discovery deadline and because the delay in requesting relief was not excusable. Thereafter, Appellants Freedom From Religion Foundation, Dan Barker, Annie Laurie Gaylor, and David Williamson untimely filed their Motion to Re-open Limited Discovery and for Enlargements of the Corresponding Dispositive Motions Deadline, which was denied for failure to state good cause to support the re-opening of the discovery period after it had closed.

The third issue is as follows:

> Did the District Court abuse its discretion in denying the untimely Motion to Compel and Motion to Re-open Limited Discovery and for Enlargements of the Corresponding Dispositive Motions Deadline?

III. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.[1]

1. Parties.

Appellants Freedom From Religion Foundation, Dan Barker, Annie Laurie Gaylor, and David Williamson (collectively, "FFRF") published and/or sought to distribute materials, which are the subject of the Complaint, at Appellee Orange County School Board's 2013 annual limited public forum. A1, Page 2-3, ¶s 6, 8-10. The individual appellants in this action are all members of the organization Freedom From Religion Foundation. *Id.* Appellee Orange County School Board ("OCSB") is a governmental entity organized under the laws of the State of Florida. *Id.*, ¶13

2. Procedural Background.

On or about June 13, 2013, FFRF filed its Complaint ("Complaint"). *Id.* Count I of the Complaint is a First Amendment claim for violation of free speech. *Id.* Count II of the Complaint is a Fourteenth Amendment claim for violation of equal protection. *Id.* On or about August 19, 2013, OCSB filed its Answer and Affirmative Defenses to the Complaint ("Answer"). A13.

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[1]References to the Appendix/Docket will be cited as "A__ [page number(s) of the document] and/or [paragraph number(s) of the document]." References to the Initial Brief are cited as "IB, __ [Page(s)]." References to OCSB's Supplemental Appendix will be cited as "SA, ___ [Page number(s) of the document] or [paragraph number(s) of the document]."

On or about October 1, 2013, the District Court entered a Case Management and Scheduling Order ("Scheduling Order") agreed to by all parties in this litigation. A18. Under the Scheduling Order, the parties were given until April 14, 2014 to complete discovery, and until May 12, 2014 to file dispositive motions. *Id.*, Page 1. FFRF did not make any attempt to obtain discovery until about March 12, 2014 when it attempted to coordinate depositions of OCSB's corporate representative. A25, Page 1-2. One day later, on or about March 13, 2014, FFRF served their First Set of Interrogatories and First Request for Production of Documents on OCSB (together, "Written Discovery Requests"). A29, Page 1-3; A29-1; A29-2; A29-3. All of these discovery requests sought information relating to past practices of OCSB and were served prior to OCSB's Motion to Dismiss.

The deadline for the responses to the written discovery was on or about April 14, 2014, which was the last day of the discovery period. A25, Page 1-2 and Exhibit A; A29-3. On or about March 17, 2014, OCSB filed its Motion to Dismiss Injunctive and Declaratory Relief ("Motion to Dismiss"). A22. On or about April 14, 2014, OCSB served its Motion for Protective Order as to the First Set of Interrogatories and First Request for Production of Documents ("Motion for Protective Order"). A24. On the same date, OCSB served to its Responses and Objections to the First Set of Interrogatories and First Request for Production of Documents ("Discovery Objections"). A29-1 and A29-2. On or about April 14,

2014, FFRF served its Motion to Compel Depositions ("Motion to Compel"). A25. No motion to compel was directed to the Written Discovery Requests.

On or about April 14, 2014, the Magistrate denied the Motion to Compel as untimely. A27, Page 2. On or about April 21, 2014, which is about seven days after the close of the discovery period, FFRF filed its Motion to Reopen Limited Discovery and for Enlargement of Corresponding Dispositive Motions Deadline ("Motion to Reopen Discovery"), requesting an enlargement of time for the dispositive motion and discovery deadlines for the limited purpose of addressing the pending discovery requests.[2] A29. On or about April 23, 2014, the Magistrate recommended denial of the Motion to Reopen Discovery stating that FFRF did not file a motion to compel as to the Written Discovery Requests prior to the close of discovery and that FFRF did not show good cause for the untimely filing of a request for enlargement of time as to either the Written Discovery or the depositions. A27, Page 2. On or about May 7, 2014, the District Court adopted the Magistrate's recommendation denying the Motion to Compel, and denying the Motion for Protective Order. A31.

[2]None of the pending discovery requests related to jurisdictional issues, and all the pending discovery requests were made prior to OCSB's Motion to Dismiss, which raised the jurisdictional issues. A29, Page 1-3; A29-1; A29-2. The Motion to Re-open Discovery did not request additional discovery, including discovery aimed at the jurisdictional issues. *Id.*

On or about May 12, 2014, FFRF filed its Motion for Summary Judgment for Injunctive, Declaratory Relief and Incorporated Memorandum of Law ("Motion for Summary Judgment") seeking summary judgment on the Complaint. A36. On or about July 3, 2014, following completion of briefing and submission of affidavits by the parties, the District Court granted OCSB's Motion to Dismiss the claims for prospective relief based on mootness. A45. On or about July 14, 2014, the District Court *sua sponte* dismissed the action without prejudice for lack of subject matter jurisdiction, and, without reaching the merits, in the same order denied as moot the Motion for Summary Judgment. A47. On or about July 28, 2014, FFRF filed this instant appeal. A48.

B. Statement of the Facts.

1. Nature of Mootness Issues and Factual Background.

Despite FFRF's elaborate factual allegations in the Complaint, the case is actually very simple. OCSB has an annual limited public forum in which non-school groups are allowed to passively distribute literature on campuses to high school students.[3] A1, Pages 1, 4, ¶s 1, 18, 19; A13, Pages 1, 2, ¶s 1, 18, 19; A41, Page 3-4; A42, Page 2, ¶3; A45, Page 1. The forum began in 2012 after World Changers of Florida ("WCF") requested to distribute Bibles, and OCSB permitted

[3]Of course, OCSB can constitutionally close the limited public forum if OCSB choses in the future to do so, and then no outside groups will be permitted to distribute materials.

passive distribution of the Bible in a limited public forum in an attempt to conform to current jurisprudence. A1, Page 6, ¶31; A13, ¶31; A41, Page 3; A42, Page 2, ¶5; A1-1, Exhibit K; A45, Page 2. At all times, OCSB maintained a distinction between its own speech and the private speech of the nonstudents at the forum. A42, ¶8. Although OCSB opened its schools on the single-day forum for a limited basis, OCSB maintained its right to exclude speech that threatened the educational mission of its schools, which includes the exclusion of speech that would disrupt the learning environment and that would be age-inappropriate.[4] A1, Page 4, ¶s 18, 19; A41, Page 3-4; A45, Page 3; A13, Page 2, ¶s 18, 19; A1-1, Exhibits A, B; A42, Page 2, ¶6.

OCSB permitted this limited public forum in 2012 and on January 16, 2013 at which Bibles were passively distributed. A1, Page 5, ¶21; A13, Page 2, ¶21; A1-1, Exhibit K; A42, Page 2, ¶3. On or about January 15, 2013, FFRF sent a

[4]School districts and school officials are entitled to proscribe what constitutes appropriate literature for students in a limited forum in a school environment as long as the decisions are content neutral. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 89 S. Ct. 733, 21 L. Ed. 731 (1969). Schools are given deference in the determination of the appropriateness of materials in schools, and First Amendment analysis is circumscribed by the unique educational environment. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 664, 130 S. Ct. 2971-2976, 177 L. Ed. 838 (2010); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 108 S. Ct. 562, 570, 98 L. Ed. 592 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683-686, 106 S. Ct. 3159, 3164-3166, 92 L. Ed. 2d 549 (1986). It is reasonable for OCSB to require prior approval of materials before permitting outside groups to distribute literature. *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 969 (5th Cir. 1972).

letter to OCSB requesting that FFRF distribute materials. A1, Page 5, 6, ¶s 26, 27; A45, Page 1-2; A1-1, Exhibits D and E; A13, Page 3, ¶s 26, 27; A42, ¶7. To accommodate FFRF, OCSB provided FFRF the date of May 2, 2013 to distribute its materials and required FFRF to submit its proposed materials for review. A1-1, Exhibits A and L; A45, Page 3. The purpose of the review of FFRF's material was to determine whether the materials should be permitted pursuant to the standards set out in applicable jurisprudence.[5] A1-1, Exhibits A, B. FFRF submitted materials to OCSB to review for distribution, and OCSB did consider established jurisprudence when reviewing FFRF's materials.[6] A1-1, Exhibits A, B; A42, ¶C; A45, Page 3-1,

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[5]The District Court found in its July 3, 2014 Order that on January 16, 2013, OCSB permitted WCF to passively distribute copies of the Bible at eleven public schools in its district. A45, Page 1-2. The District Court went on to confirm that in its *World Changers of Fla., Inc. v. Dist. Sch. Bd. of Collier Cnty., Fla.*, No. 2:10-cv-419-FTM-36SPC, the District School Board of Collier County, Florida and *World Changers of Fla., Inc.* entered into a consent decree that "allows WCF the same access as all other outside, non-profit organizations to a limited public forum created by the defendant in its public schools." *Id.*, Page 2. The District Court noted that the consent decree prohibited viewpoint discrimination, but permitted the District School Board of Collier County, Florida, to prohibit literature that was, among other things, solicitation or advertisements, inappropriate for the age and maturity of students, pornographic, obscene or libelous, and is likely to cause substantial disruption at the schools. *Id.*, Page 2-3.

[6]OCSB had prior knowledge of the contents of the Bible and thus a formal re-review of the Bible was not necessary and would be futile. A42, Page 1-2, ¶ 1. Clearly, Florida statutory and constitutional law already permits Bibles in educational settings, including for comparative religion classes, for literary and

Based on existing jurisprudence OCSB made an initial decision not to approve distribution of certain specific materials set forth in the Complaint ("Distribution Decision"). A1-1, Exhibits A, B; A13, Page 8, ¶7; A42, ¶9; A45, Page 3-4. OCSB's attorneys responded by correspondence explaining that some of the materials would not be permitted at the forum due to, among other things, concern about the age-appropriateness of the material, lewdness of the material and the incendiary nature of the material. A1-1, Exhibits A, B; A19, ¶3; A42, ¶9; A45, Page 3-4. FFRF did not seek an appeal of the decision. Despite the exclusion of some materials, FFRF was permitted to distribute numerous materials that expressed their viewpoint on May 2, 2013. A1-1, Exhibits A, B; L; A42, ¶9; A45, Page 4.

On or about June 13, 2013, FFRF filed their two-count District Court action against OCSB for violation of free speech and equal protection ("Litigation"). A1. Shortly thereafter, OCSB, reconvened and made a deliberate decision to reconsider its initial Distribution Decision and committed itself to the distribution of all FFRF's materials which are subject of the District Court litigation. A21, Page 2, ¶s 3-5; A42, Page 3, 4, ¶10; A42-3; A19, Page 3; SA28, Page 1-4; A45, Page 4. On

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historical purposes, and other non-religious purposes. *Id.* Florida Statutes §1003.45(1), specifically authorizes the use of a Bible in public schools for an objective study of the Bible and religion. *Id.* On the other hand, FFRF's materials were not known to OCSB and required a comprehensive review in order to determine the appropriateness of each material.

or about December 9, 2013, counsel for OCSB sent notice to FFRF's counsel about the January 16, 2014 forum, and invited the Appellants to submit materials for review. A21-1; A21, Page 2, ¶s 3-5; A42, ¶10; A42-3; A19, Page 1-4; A45, Page 4. On or about, January 3, 2014, OCSB followed up on their counsel's notification with their own notice to FFRF, stating that FFRF could distribute all items previously submitted for review, including the materials which were declined in the initial distribution decision. A21-1; A21, Page 2, ¶s 3-5; A42, Page 3, 4, ¶10; A42-3; SA28, Page 1-4; A45, Page 4-5. The notice from OCSB stated that this decision was "an unconditional offer separate and apart from the current litigation." A21-1. OCSB has, in good faith, made statements in its affidavits, pleadings and writings that it is committed to reviewing materials in viewpoint neutral manner and that it will not prohibit the passive distribution of FFRF's materials which are the subject of this Litigation. A21; A21-1; A42, ¶s 8, 10; A42-1; A42-2; A42-3; A41; A19; SA28, Page 1-4.

On or about March 17, 2014, OCSB filed its Motion to Dismiss the Complaint as moot because FFRF is now permitted to distribute all of its proffered materials, which were declined in the initial Distribution Decision. A19. On or about July 3, 2014, the District Court granted OCSB's Motion to Dismiss grounded on mootness of the Litigation. A45. In the July 3, 2014 Order, the District Court held that FFRF did not rebut the presumption that OCSB "will not

reengage in the purportedly unconstitutional conduct that, to date, it has voluntarily ceased." *Id.*, Page 9. The District Court pronounced itself "satisfied that, after the conclusion of these proceedings, Defendant will not prohibit distribution of the materials that it initially refused but later allowed Plaintiffs to distribute." *Id.*, Page 10.

As a basis for the holdings, District Court found that OCSB used the Consent Decree as guideline for its review of materials at the annual forum and that the "voluntary adoption of the Collier County Consent Decree as a policy to govern the distribution of materials by outside groups, Defendant demonstrated a good faith effort to operate a limited public forum in an educational setting in a constitutionally permissible manner while also ensuring that the forum would not undermine its schools' basic educational mission." *Id.*, Page 7-8. Emphasis was also placed on OCSB's "recommitment to existing policy" even though leave to distribute all proffered materials occurred after the litigation. *Id.*, Page 8. The District Court also found that OCSB "unambiguously expressed its position that each of the materials Plaintiffs sought to distribute will be unconditionally allowed." *Id.*, Page 8. The District Court cited that FFRF was given opportunity to distribute materials at the January 16, 2014 forum and that FFRF's choice not to participate was inconsequential to the mootness analysis. *Id.*, Page 8. Similarly, the District Court held that any fear of future rejection of materials - especially

those not at issue in the litigation - was too hypothetical for review. *Id.*, Page 8, n.7.

Thereafter, on or about July 14, 2014, the District Court *sua sponte* dismissed the Litigation without prejudice for lack of subject matter jurisdiction. A47. Specifically, the District Court held "[t]he Court has previously held that Plaintiffs' claims for prospective relief are moot. Defendant has unconditionally allowed Plaintiffs to distribute all of the materials that they submitted to Defendant for prior approval. To the extent Plaintiffs' claims are based on their concern that any materials they might submit in the future might not be screened in a constitutionally permissible manner, these claims are hypothetical and thus beyond the Court's limited subject matter jurisdiction." A47, Page 1. Both of these orders are the subject of this Appeal. A45; A47.

2. Nature of Discovery Issues and Factual Background.

On or about October 1, 2013, the District Court entered its Scheduling Order. A18. Under the Scheduling Order, the parties were given until April 14, 2014 to complete discovery, and until May 12, 2014 to file dispositive motions. A18, Page 1-2. Trial was scheduled for the term beginning October 1, 2014. A18, Page 2. The Scheduling Order states that extensions of the Scheduling Order's deadlines are disfavored. A18, Page 4 at Section II(B)(2). About five months after the Scheduling Order and one month before the discovery cutoff, FFRF began its

discovery. A18; A29. First, on about March 12, 2014, FFRF's counsel attempted to contact OCSB's counsel to schedule OCSB's corporate representative's deposition. A29, Page 1-3; A25, Page 1; A25, Exhibit A. OCSB's counsel was unavailable for a deposition on the dates provided and no dates were subsequently coordinated or scheduled. *Id.* Thereafter, on or about March 14, 2014, FFRF served its Written Discovery Requests. A29, Page 1-3; A29-1; A29-2. None of these discovery requests relate to whether OCSB is likely to resume its challenged practices in the future. *Id.* At this point, FFRF had about a month to secure an extension of time for discovery prior to the discovery cutoff. A18, Page 1-2. Instead, FFRF waited until the eve of the conclusion of the discovery period to serve its Motion to Compel the deposition of OCSB's corporate representative. A29; A18, Page 1-2. The Magistrate recommended denial of the Motion to Compel as untimely finding that "Plaintiffs left no time for the requested depositions to occur. In addition, Plaintiffs' motion shows that counsel has known since at least March 12, 2014 that one of the Defendant's attorneys was claiming to be unavailable for the requested depositions, but failed to file the motion to compel until the last day of discovery." A27, Page 2. The Magistrate's recommendations were adopted by the District Court, and this order is at issue in the appeal. A33.

In response to the recommendation to deny the Motion to Compel, FFRF filed its Motion to Reopen Discovery, requesting an enlargement of time for the

dispositive motion and discovery deadlines for the limited purpose of addressing the pending discovery requests. A29. This Motion to Reopen Discovery was filed on April 21, 2014, which is about seven days after the close of the discovery period. A29; A18, Page 1-2. The Motion to Reopen Discovery was denied because FFRF did not show good cause for the untimely request to enlarge the discovery and dispositive motion period. A30, Page 1-2. The Magistrate found that

> [c]ounsel for Plaintiffs did not seek help from the Court to schedule the depositions of Defendant's representatives until the last day of the discovery period, which left no time available in the discovery period to schedule the depositions. In the present motion, counsel for Plaintiffs argues that he could not have filed the motion to schedule the depositions earlier because he was still trying to resolve the issue informally. While Local Rule 3.01(g) requires counsel to confer in good faith before filing discovery motions, it does not permit an attorney to delay seeking resolution form the Court for more than a month after the discovery dispute arose. Even though the Case Management Order permitted discovery motions to be filed until the last day of the discovery period '[a] Rule 16(b) Scheduling Order is not a license for a party to sit on its rights . . .'.

A30, Page 2-3. This order is at issue in this appeal. A30.

C. Standards of Review.

1. Discovery Motions.

A court's denial of a motion to compel discovery is reviewed for an abuse of discretion.[7] *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315 (11th Cir. 1999); *Taylor v. Nix*, 240 F. App'x 830, 834 (11th Cir. 2007). "A clear error of judgment or application of an incorrect legal standard is an abuse of discretion." *Carpenter v. Mohawk Indus.*, 541 F.3d 1048, 1055 (11th Cir. 2008). "District judges are accorded wide discretion in ruling upon discovery motions, and appellate review is accordingly deferential." *Ray v. Equifax Info. Servs., L.L.C.*, 327 F. App'x 819, 823 (11th Cir. 2009) (quoting *Iraola & CIA., S.A. v. Kimberly-Clark Corp.*, 325 F.3d 1274, 1286 (11th Cir. 2003)). Discovery rulings will not be overturned unless the ruling resulted in substantial harm. *Iraola*, 325 F.3d at 1286; *Watkins v. Regions Mortg. Inc.*, 555 F. App'x 922, 924 (11th Cir. 2014). District courts can deny a motion to compel based on delay in bringing the motion. *Hinson v. Clinch Cnty. Bd. of Educ.*, 231 F.3d 821, 826 (11th Cir. 2000); *Simpson v. Fla. Dep't of Corr.*, 134 F. App'x 303, 305 n.2 (11th Cir. 2005).

[7]This standard of review also applies to FFRF's argument that the District Court erred in ruling on the Motion to Dismiss without allegedly providing FFRF with the opportunity to conduct jurisdictional discovery. *Polk v. Nugent*, 554 F. App'x. 795, 798 (11th Cir. 2014). A decision limiting discovery will not be reversed absent "substantial harm to the appellant's case." *Id.*

2. Scheduling Order.

A district court's denial of a motion to amend a scheduling order is reviewed for an abuse of discretion. *Green Island Holdings, L.L.C. v. British Am. Isle of Venice, Ltd.*, 521 F. App'x 798, 800 (11th Cir. 2013); *Watkins*, 555 F. App'x at 924-25. Generally, holding litigants accountable to the scheduling order is not an abuse of discretion. *Watkins*, 555 F. App'x at 924. In order to meet an abuse of discretion standard an appellant bears the burden of showing that the district court made a clear error of judgment. *Carpenter*, 541 F.3d at 1055.

Modification of the Scheduling Order is governed by Fed. R. Civ. P. 16(b)(4), which states that a scheduling order "may be modified only for good cause and with the judge's consent." *Id.* Furthermore, M.D.L.R. 3.05(c)(2)(E) and the Scheduling Order both state that extensions of the discovery period and dispositive motions are disfavored. M.D.L.R. 3.05(c)(2)(E); A18, Page 4 at Section II(B)(2). This rule is supported by M.D.L.R. 3.09(b) which states in pertinent part:

> Failure to complete discovery procedures within the time established pursuant to Rule 3.05 of these rules shall not constitute cause for continuance unless such failure or inability is brought to the attention of the Court at least sixty (60) days in advance of any scheduled trial date *and is not the result of lack of diligence in pursuing such discovery.*

M.D.L.R. 3.09(b)(emphasis added). Similarly, the Scheduling Order states that motions for an extension of the discovery deadline are "disfavored" and "will not be extended absent a showing of good cause. Failure to complete discovery within

the time established by this Order shall not constitute cause for continuance." A18, Page 4 at Section II(B)(2).

Good cause means that "the schedule cannot 'be met despite the diligence of the party seeking the extension.'" *Sosa v. Airprint Sys.*, 133 F.3d 1417, 1418 (11th Cir. 1998). Mere carelessness offers no grounds for good cause nor does M.D.L.R. 3.01(g)'s requirement to meet and confer establish good cause. *Mann v. Taser Int'l*, 588 F.3d 1291, 1301 (11th Cir. 2009) (the Eleventh Circuit gives deference to the district court's interpretation of local rules, and review application of local rules on an abuse of discretion standard.); *S. Grouts & Mortars, Inc. v. 3M Co.*, 575 F.3d 1235, 1241-42 n.3 (11th Cir. 2009). A lack of diligence ends the good cause analysis. *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1231 (11th Cir. 2008).

3. Motion to Dismiss.

A district court's legal decision to grant a Fed. R. Civ. P. 12(b)(1) motion to dismiss on the ground of mootness is subject to a *de novo* standard of review. *Redeker-Barry v. United States*, 476 F.3d 1189, 1190 (11th Cir. 2007); *Jews for Jesus v. Hillsborough Cnty. Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998); *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1327 (11th Cir. 2004); *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1282 (11th Cir. 2004). However, factual findings concerning subject matter jurisdiction made by a district

court are reviewed under a clearly erroneous standard. *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1237 (11th Cir. 2002); *Troiano*, 382 F.3d at 1282.

On this appeal, mootness is the issue because OCSB filed a motion to dismiss as it had changed its Distribution Determination and provided a date for the distribution of all FFRF's materials. A19. FFRF asserts that in voluntary cessation defendant bears the heavy burden of showing that it is clear the allegedly wrongful behavior could not reasonably be expected to recur.[8] IB, Page 15. *Troiano*, 382 F.3d at 1281-82. This burden is grounded in concerns that the defendant might temporarily stop a challenged practice but return to its old ways. *Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen*, 586 F.3d 908, 916 (11th Cir. 2009). However, the Eleventh Circuit has held that voluntary cessation by a government actor gives rise to a rebuttable presumption that the challenged behavior will not recur. *Beta Upsilon Chi Upsilon Chapter*, 586 F.3d at 916; *Troiano*, 382 F.3d at 1283; *Coral Springs*, 371 F.3d at 1328–34; *Jacksonville Prop. Rights Ass'n v. City of Jacksonville*, 635 F.3d 1266, 1272 (11th Cir. 2011).

[8]FFRF correctly cites to *Friends of the Earth, Inc. v. Laidlaw Envtl., Svcs. (TOC), Inc.*, 528 U.S. 167, 170, 120 S. Ct. 693, 698 (2000) for the general rule that the party asserting mootness has the "heavy burden of persuad[ing] the court that the challenged conduct cannot reasonably be expected to start up again." IB, Page 15. However, FFRF neglects to point out that *Friends of the Earth, Inc.* does not address the situation where, as here, a government actor is asserting mootness. *Id.* The Eleventh Circuit has an exception to this general rule for government actors. *Troiano*, 382 F.3d at 1281-82.

An assertion of mootness by a government entity should be rejected "only when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated." *Beta Upsilon Chi Upsilon*, 586 F.3d at 917 (quoting *Troiano*, 382 F.3d at 1284 (internal quotation marks omitted)). This means that FFRF bears the burden of establishing that there is a substantial likelihood that the challenged conduct will recur. *Troiano*, 382 F.3d at 1283; *Jacksonville Prop. Rights Ass'n*, 635 F.3d at 1272.

IV. SUMMARY OF THE ARGUMENT

FFRF makes as-applied claims that its free speech and equal protection rights were violated by OCSB's Distribution Decision. A1. In the Order dated July 3, 2014, the District Court dismissed the prospective declaratory and injunctive claims as moot after OCSB permitted all FFRF's materials at issue in this suit to be distributed at any future forums. A45. The District Court held that OCSB's reconsideration of the Distribution Decision demonstrated its recommitment to its policies which balance a school district's educational interests with the interests of outside groups in the limited public forum. A45, Page 1-4, 8. FFRF appealed this Order dated July 3, 2014, but has not successfully shown error in the District Court's decision. A48.

In its ruling, the District Court noted that Eleventh Circuit affords a governmental entity such as OCSB a rebuttable presumption that it will not resume

challenged practices after the litigation terminates, and that there was no showing by FFRF that the presumption was overcome. A45, Page 9-10. The facts show that during the early part of the Litigation, OCSB permitted distribution of all of the materials subject of the litigation at the January 16, 2014 limited public forum, and promised both the District Court and FFRF that it will continue permit the materials going forward. A45, Page 1-4. The District Court was "satisfied" with OCSB's recommitment to the application of the established jurisprudence to the limited public forum and its assurances that it will not resume the challenged Distribution Decision. A45, Page 8-10. On the other hand, FFRF did not sufficiently show that there is substantial likelihood that the challenged Distribution Decision will be reinstated if the suit is dismissed. A45, Page 8-10. Hence, the claims for prospective relief were properly dismissed as moot in the Order dated July 3, 2014. A45. FFRF attempts to save its claim by asserting that the District Court erred in issuing its Order dated July 3, 2014 without giving FFRF an opportunity to conduct jurisdictional discovery. IB, Page 25. However, this supposition misses the point that FFRF had ample opportunity to conduct jurisdictional discovery prior to the ruling on the Motion to Dismiss, but opted not to undertake such discovery. A18, Page 1-2; A25, Page 1-2, A29, Page 1-3. Even so, FFRF did not properly request additional time for jurisdictional discovery. SA28, Page 5. Thus, this argument is not well-taken and should be denied.

The second issue on appeal is the District Court's *sua sponte* Order dated July 14, 2014 dismissing the case because there was no effective remedy the court could grant and, thus, no justiciable controversy remaining to be determined. A47. By *sua sponte* dismissing the case, the District Court effectively denied the FFRF's request for nominal damages, and FFRF claims this was an error. IB, Page 28. However, the District Court was correct in dismissing the entirety of the case even with the request for nominal damages relief because, even assuming *arguendo*, that FFRF had prevailed on the merits the decision would have no practical effect on the parties' future rights. Notably, FFRF did distribute some of its materials and was given the opportunity to distribute all its materials at issue in this Litigation. At this point, the nominal damage claim is merely an attempt to maintain jurisdiction for the issuance of an advisory opinion on hypothetical, future conduct. Alternatively, the nominal damage request is ancillary to the declaratory relief which is moot. A45, Page 9-10.

Finally, FFRF seeks reversal of the denial of the Motion to Re-open Discovery and Motion to Compel. A27; A30, A33. The Motion to Compel, which was filed on the eve of the discovery cutoff, was denied because FFRF did not request relief with enough time to provide the relief sought. A27, Page 2; A33. The untimely Motion to Re-open Discovery was denied because no good cause was shown to extend the discovery deadlines. A30, Page 1-2. Good cause was not

shown by FFRF because trying work out discovery informally is not an excuse to wait a month before seeking the court intervention. A30, Page 1-2. The facts clearly show that FFRF did not serve written discovery or seek the deposition of OCSB's corporate representative until about thirty days prior to the discovery deadline so any inability to pursue discovery prior to the close of discovery is caused by FFRF's own delay. *Id.* Additionally, FFRF was aware from March 12, 2014 that the depositions would require an extension of the discovery deadline due to scheduling conflicts, but failed to seek to compel depositions until the eve of the discovery deadline on April 14, 2014 and failed to move for an extension of the discovery period until after it closed. *Id.* Even so, the dismissal of the case has rendered the discovery issues irrelevant. A45; A47. There is no abuse of discretion in the discovery orders.

IV. ARGUMENT AND CITATIONS TO AUTHORITY

A. The District Court Properly Dismissed the Complaint as Moot Because OCSB has Changed its Distribution Decision and Permitted Distribution of All the Materials that are the Subject of this Litigation.

FFRF lost any cognizable interest in the outcome of the case because OCSB has permitted distribution all of the materials subject of this Litigation, has recommitted itself to the review of future materials in conformity with jurisprudence and has made good faith assurances that the challenged Distribution Decision will not be repeated. *Troiano*, 382 F.3d at 1282 ("If events occur

subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief dismissal is required because mootness is jurisdictional. Any decision on the merits of a moot case or issue would be an impermissible advisory opinion."). A case must be viable at all stages of the litigation and should be dismissed at any point the case ceases to be live. *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 726, 184 L.Ed.2d 553 (2013); Murphy v. Hunt, 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982); *Seay Outdoor Adver., Inc. v. City of Mary Esther*, 397 F.3d 943, 947 (11th Cir. 2005). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Already,* 133 S.Ct. at 727, quoting Alvarez v. Smith, 558 U.S. 87, 93, 130 S.Ct. 576, 175 L.Ed.2d 447 (2009)).

A canvassing of the jurisprudence in the Eleventh Circuit confirms that cases are routinely dismissed as moot after a governmental entity stops the challenged conduct and provides assurances that the conduct will not recur. *Seay*, 397 F.3d at 946 (dismissing complaint seeking permanent injunction and damages pursuant to Section 1983 due to mootness after finding that the offending code was replaced with a code that removed the "infirm provisions"); *Troiano*, 382 F.3d at 1281-82 (holding that where the defendant stopped the complained-of activity, the

complaint should be dismissed for mootness); *Jews for Jesus*, 162 F.3d at 628-29 (holding that where the defendant stopped prohibiting the distribution of literature at the airport after suit was filed, the complaint for declaratory and injunctive relief should be dismissed for mootness).

1. The District Court Correctly Determined that OCSB Unambiguously Terminated the Challenged Conduct, or, Alternatively, Recommitted itself to its Policy of Following Existing Jurisprudence.

The record is clear that during the course of the Litigation, OCSB unambiguously reversed the Distribution Decision and recommitted itself to its policy of following existing jurisprudence. A19; A21; A21-1; A42; A42-1; A42-2; A42-3; A45, Page 4, 8. OCSB has stated in written correspondence, pleadings and in affidavits that OCSB is committed to treating FFRF the same as other organizations seeking to distribute materials at the annual forum. *Id.* To that end, FFRF's materials, as outlined in this Litigation, will be permitted at the annual forum and any new materials submitted for review will be reviewed in an appropriately viewpoint neutral manner. *Id.* OCSB has no intention of changing its position in the future. A42, Page 3-4, ¶10; A42-3; A45, Page 8-10. *Beta Upsilon Chi Upsilon*, 586 F.3d at 917-18. In furtherance of this commitment, OCSB permitted FFRF to distribute all of their materials subject of this Litigation at the yearly forum held on January 16, 2014, and encouraged FFRF to submit

additional materials. A42, Page 3-4, ¶s 8,10; A45, Page 4, 8-10; A21, Page 2, ¶s 2-4.

Still, FFRF speculates that OCSB's conduct is ambiguous because OCSB "has not even completely ceased the offending conduct". IB, Page 17. FFRF supports this allegation by stating that OCSB is required to enact a new policy as to distribution and review processes to show that its challenged conduct has unambiguously ceased.[9] IB, Page 17-19. However, FFRF misses the mark because the issue in this Litigation is not the correction of OCSB's policies and processes.[10] To this end, the District Court correctly clarified the issues by describing OCSB's reversal of the Distribution Decision and promise to ensure viewpoint neutral distribution going forward as a "recommitment to existing policy". A45, Page 8; *Rosenbrock v. Mathis*, 745 F.3d 963, 972-73 (9th Cir. 2014).

The challenged conduct in this Litigation is the application of the existing policies and procedures to FFRF's materials, which resulted in the Distribution

[9]FFRF does not bring a facial challenge to the text of OCSB's policy for the annual forum and thus such a challenge is not before this Court. A1, Page 16, 17, 19, ¶s 68, 69, 80 and wherefore clause. Accordingly, any challenge to the distribution policy itself is irrelevant. *Beta Upsilon Chi Upsilon*, 586 F.3d at 918.

[10]*See Id.* Also, The District Court found that OCSB's adoption of the Consent Decree shows a "good faith effort to operate a limited public forum in an educational setting in a constitutionally permissible manner while also ensuring that the forum would not undermine its schools' basic educational mission." A45, Page 7-8.

Decision. Nothing can be more unambiguous than the reversal of that same Distribution Decision accompanied by sworn affidavits, writings and pleadings, all promising that similar actions will not be repeated.[11,12] A21, Page 1,-2; A42, Page 1-4; A28, Page 1-4; A19, Page 1-8; A21-1. OCSB has taken all the measures available to put right its Distribution Decision, and, even assuming, it was a claim in this Litigation there is nothing else OCSB could possibly do to show that, in the future, it would not improperly prohibit materials from being distributed. *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1134 (11th Cir. 2005). Importantly,

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[11]The District Court may rely on OCSB counsel's statements, and the District Court may presume that a governmental entity is unlikely to resume allegedly illegal activity. *Seay,* 397 F.3d at 946 (finding no reason to believe code would be re-enacted after counsel's assurances at oral argument); *Coral Springs*, 371 F.3d at 1332-33 (finding no bad faith in city's repeal of a code due to counsel's statements that city did not intend to re-enact code); *Christian Coalition of Alabama v. Cole,* 355 F.3d 1288 (11th Cir. 2004)(case was moot where defendants represented to the court that wrongful conduct would not be repeated). Courts do not generally doubt a governmental entity's assurances without direct stated evidence to the contrary. *See e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.1, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982)(city stated an express intention to reenact the ordinance); *Northeastern Fla. Chapter of the Assoc'd Gen. Contractors of Amer. v. City of Jacksonville*, 508 U.S. 656, 662, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)(court held case was not moot because city had already enacted an ordinance that was the same as the initial challenged ordinance).

[12]FFRF incorrectly states that OCSB's counsel John C. Palmerini's statements are unauthorized. IB, Page 19. All letters from Mr. Palmerini are on OCSB letterhead. *See e.g.* A21, Exhibit A; A42-2; A42-3. OCSB's affidavit by Mr. Palmerini specifically states that it is made by "John C. Palmerini as Associate General Counsel for Defendant" and that he "has the authority for the Orange County School Board to provide this affidavit." A21, Page 1-2; A42, Page 1.

FFRF does not contend that it has encountered any difficulty in presenting materials since the incident which gave rise to this Litigation. Under these circumstances, the District Court correctly found that OCSB "has unambiguously expressed its position that each of the materials Plaintiffs sought to distribute will be unconditionally allowed." A45, Page 8. Further Plaintiffs were provided an opportunity to distribute all of the materials for which they had sought prior approval at the distribution event that occurred on January 16, 2014." A45, Page 8; *Beta Upsilon Chi Upsilon*, 586 F.3d at 918.

2. The District Court Correctly Found That Unidentified and Hypothetical Materials Do Not Create a Justiciable Controversy.

FFRF speculates that after the District Court action is dismissed, OCSB secretly plans to prohibit FFRF's materials that have yet to be identified for review and distribution. IB, Page 19, 24. FFRF offers no evidence other than a vague fear that OCSB may improperly review materials in the future because OCSB has not expressly admitted its liability and because it has the right to review materials prior to distribution at high school campuses.[13] However, these arguments are unavailing

[13]At the outset, this argument is not within the scope of the pleadings because FFRF's as-applied challenge was based on specific materials outlined in the Complaint. Further, as the District Court noted in its July 3, 2014 Order, FFRF's arguments regarding unidentified, future materials are hypothetical. A45, Page 8. FFRF does not argue that OCSB has secret plans to go back on its current position to reverse the Distribution Decision.

because there is no evidence of any such secret intentions. *Id.*, at 1334 ("Mere speculation that the City may return to its previous ways is no substitute for concrete evidence of secret intentions."). A government's defense of its actions is not convincing concrete evidence that a government is reasonably likely to return to its unconstitutional behavior. *Nat'l Adver. Co.*, 402 F.3d at 1334; *Conserv. Action Project v. Moore*, No. 02-193-JD, 2002 WL 31834851, at *2-3 (D.N.H. Dec. 18, 2002); *Adams v. Boatwater Incorporated*, 313 F. 3d. 611, 614-15 (1st Cir. 2002). Likewise, the law is clear that OCSB's legitimate right to review materials prior to distribution at its schools does not raise an inference that OCSB will review these unidentified materials in an unconstitutional manner.[14,15] *Christian Coal. Of Ala.*, 355 F.3d at 1292-93 (commission's withdrawal of its advisory opinion was sufficient to support dismissal for mootness even though the commission has the authority to reissue an opinion); *Mont. Shooting Sports Ass'n v. Norton*, 355 F. Supp. 2d 19, 21 n.1 (D.D.C. 2004); *Isenbarger v. Farmer*, 463 F.Supp. 2d 13, 23 (D.D.C. 2006). Further, a governmental entity's motivation and purpose in receding from unconstitutional behavior or is not central to the mootness analysis. *Nat'l Adver. Co.*, 402 F.3d at 1334; *Beta Upsilon Chi Upsilon,*

[14]*See* fn. 4.

[15]A violation of Constitutional rights must be reasonably expected to reoccur against FFRF, not simply others who one day may be in their place. *Conserv. Force v. Salazar*, 715 F. Supp. 2d 99, 105 (D.D.C. 2010).

586 F.3d at 915. What is critical for this Court's analysis is that OCSB has disavowed the alleged unconstitutional conduct and has permitted distribution of all of FFRF's materials which are subject of this Litigation when OCSB permits the forum. *Id.* There is no reasonable justification for FFRF's position that OCSB may review new submissions for the forum in a constitutionally inappropriate manner, and, as the District Court correctly found, such speculative issues are not proper for determination. A45, Page 8-9.

3. The District Court Correctly Found That OCSB is not Trying to Avoid Jurisdiction.

OCSB's reversal of the Distribution Decision was not done to avoid an adverse decision or to avoid jurisdiction of the District Court. This is shown by OCSB's swift remediation of its conduct after the filing of the Litigation. A19; A21; A21-1 and Exhibit A; SA28, Page 1-4. The corrections addressing FFRF's concerns came several months before any discovery or substantive motions were filed in the District Court and before any substantive rulings were made in the Litigation. *Jews for Jesus*, 162 F.3d at 629 (case was moot even though government's decision to lift prohibition on literature occurred one month after commencement of the lawsuit); *Coral Springs*, 371 F.3d at 1330 n.8. Furthermore, OCSB has stated in pleadings, affidavits and writings its firm intention to permit all of the materials subject of the Litigation when OCSB has its limited public forum. A19; A21; A41; A42; SA28, Page 1-4. Specifically, OCSB's

correspondence to FFRF stated its voluntary and unequivocal intention to permit all of the materials subject of the Litigation "separate and apart" from the outcome of the Litigation – meaning that the decision would stand regardless of the outcome of the Litigation. A21-1; A21. Having announced this decision to FFRF and the District Court, there is no reasonable basis for FFRF to conclude that OCSB will later change its mind and prohibit the materials during future forums. A45, Page 9-10.

4. The District Court Correctly Found That OCSB has Shown Commitment to its New Course of Conduct.

FFRF admits that it was permitted to submit new materials for the January 16, 2014 limited public forum and that it was permitted to distribute all of the materials subject of this Litigation at that limited public forum. A22-1, Page 2, ¶8; IB, Page 8. Nonetheless, FFRF improvises hypothetical arguments -which are outside the pleadings - to demonstrate that OCSB may not consistently apply its new course of conduct. IB, Page 18, 19, 24.

FFRF's fear that OCSB may reject new materials is unfounded and hypothetical, and, therefore, outside the District Court's subject matter jurisdiction. A45, Page 8; *Beta Upsilon Chi Upsilon*, 586 F.3d at 918; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Already*, 133 S.Ct. at 730; *Jews for Jesus*, 162 F.3d at 629. Moreover, the reality is that OCSB has made good-faith efforts to the rectify conduct which gave rise to this

Litigation. For example, OCSB not only permitted all materials subject of this Litigation going forward, but also actively notified and solicited FFRF's participation and new materials for the January 16, 2014 forum. A21-1; A21. Thus, the District Court correctly found that FFRF "were provided an opportunity to distribute all of the materials for which they sought prior approval at the distribution event that occurred on January 16, 2014. The fact that Plaintiffs chose not to participate in the January 16, 2014 event is of no consequence to the Court's mootness analysis." A45, Page 8.

5. FFRF Has Not Proven a Substantial Likelihood of Recurrence.

The facts in this case do not place this case into the category of cases where there is a substantial likelihood that the offending conduct will be reinstated if the Litigation is terminated. On the contrary, the District Court explicitly found that OCSB would not reinstate the challenged Distribution Decision and that OCSB has committed itself to following its view-point neutral policies going forward. A45, Page 8-10. However, FFRF has not – and cannot - come forward with any affirmative evidence that OCSB will reinstate its challenged conduct if the Litigation is dismissed. What FFRF seeks is an injunction aimed at controlling the course of events that theoretically could take place in future forums. A45, Page 8. But as the District Court pointed out in its July 3, 2014 Order, courts shy away

from overly interfering with a school board's educational determinations. *Id.*, Page 9, n.8.

Regardless, FFRF is not without redress because FFRF can reinstate review with the courts if OCSB's conduct in the future does not comport with Constitutional law. *Jews for Jesus*, 162 F.3d at 630 ("We may, of course, be mistaken about the secret intentions of Tampa International Airport's officials. If they choose to reinstate their restrictive policies—or adopt similar ones—the courthouse door is open to Jews for Jesus to reinstate its lawsuit. Under such circumstances, the case would not be moot even if the airport again revoked its policies in response to the lawsuit, because such "flip-flopping" would create a reasonable expectation that the airport would reinstate the challenged practice at the close of the lawsuit."). A45, Page 9-10. The District Court correctly dismissed the Litigation. A45.

6. The District Court Gave FFRF Opportunity for Discovery Prior to the July 3, 2014 Order Granting the Motion to Dismiss.

FFRF asserts that the District Court should have given FFRF the opportunity for discovery on jurisdictional issues prior to granting OCSB's Motion to Dismiss. However, this argument overlooks first that FFRF did not request additional time to conduct discovery specifically aimed at the jurisdictional issues, second that FFRF had ample opportunity to conduct discovery prior to the July 3, 2014 Order

granting the Motion to Dismiss, and third that additional discovery would not have had any practical effect on the outcome of the Motion to Dismiss.

When reviewing a 12(b)(1) motion for dismissal for lack of jurisdiction, Courts look to Rule 56, Federal Rules of Civil Procedure, for guidance in permitting jurisdictional discovery.[16] *Johnson v. United States*, 534 F.3d 958, 965 (8th Cir. 2008); *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004). Under Fed. R. Civ. P. 56(d), a party seeking additional discovery must file an affidavit describing why it cannot present facts essential to justify opposition without the additional discovery.[17] Fed. R. Civ. P. 56(d); *Johnson*, 534 F.3d at 964; *Wayton v. United Mine Workers of Am. Health & Ret. Funds*, 568 F. App'x 738, 743 (11th Cir. 2014) ("The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts, but must show the court how the stay will operate to permit him to rebut, through discovery, the movant's contentions.").

FFRF did not file an affidavit with the District Court or otherwise affirmatively seek any additional jurisdictional discovery. Instead FFRF stated in passing in its Response to the Motion to Dismiss that it was an error to ruling on

[16] *See* fn. 7.

[17] The notes to the 2010 Amendments to Fed. R. Civ. P. 56, state: "Subdivision (d) carries forward without substantial change the provisions of former subdivision (f)."

jurisdictional issues without jurisdictional discovery. A22, Page 17-19. Accordingly, FFRF did not properly request jurisdictional discovery and the District Court did not err on this basis.[18] *Herman v. Hartford Life & Accident Ins. Co.*, 508 F. App'x 923, 926-27 (11th Cir. 2013) (court did not deprive party of opportunity for discovery because a memorandum of law containing a request for additional discovery without citing to rules is not sufficient to invoke Rule 56(d)); *Johnson*, 534 F.3d at 965.

Moreover, this argument completely ignores that FFRF had opportunity to seek discovery because the case was not dismissed until after the discovery period closed. FFRF chose not to propound any discovery related to the jurisdictional issues and FFRF did not formally request the District Court leave for additional time for discovery on jurisdictional issues. [19] *Henriquez*, 500 F. App'x at 830; *Vesuna v. CSCS Intern. N.V.*, 405 F. App'x 371, 373 (11th Cir. 2010). The only

[18]Under any standard of pleading, FFRF's Response to the Motion to Dismiss does not adequately and timely request leave for additional jurisdictional discovery. *See e.g. Henriquez v. El Pais Q'Hubocali.com*, 500 F. App'x 824, 830 (11th Cir. 2012). Nor does the Motion to Compel or Motion to Re-open Discovery address jurisdictional discovery. A.25; A.29. None of these documents assert what facts are sought to be obtained, how the facts are expected raise a material issue of fact, the reasonable efforts made to obtain such facts or why the attempts were unsuccessful. A.25; A.29; A22, Page 17-19. *See, e.g., Johnson*, 534 F.3d at 964.

[19]All of the discovery was requested prior to the Motion to Dismiss being filed so there is little merit in FFRF's attempts to assert that the discovery was somehow aimed at jurisdictional issues. Even after the Motion to Dismiss was filed, FFRF failed to seek any discovery on the jurisdictional issues.

discovery undertaken was the Written Discovery and the request for a deposition of OCSB's representatives, none of which furthered the jurisdictional inquiry. *Jews for Jesus*, 162 F.3d at 630 (no error in deciding jurisdictional questions where the propounded discovery did not relate to the substantial likelihood that challenged practices would resume after dismissal). A25, Page 1-2; A29, Page 1-3; A29-1; A29-2. FFRF did not request, in either the Motion to Compel or the Motion to Re-Open Discovery, leave to undertake additional discovery related to the jurisdictional issues. A25, Page 1-2; A29, Page 1-3. Both of these motions were directed squarely at the earlier Written Discovery and deposition requests.[20] *Id.*, A29-1; A29-2. Further, regardless of the relevancy of the discovery, FFRF waited until the eve of the conclusion of the discovery period to serve its Motion to Compel the deposition, never filed a motion to compel directed at the Written Discovery, and waited until after the close of discovery to seek an extension of time. A27; A30; A33; Section C and D, below. FFRF cannot opine that they are prejudiced by the lack of discovery specifically aimed at the jurisdictional issues, when their omissions and delay caused the alleged harm. *Posner v. Essex Ins. Co, Ltd.*, 178 F.3d 1209, 1214, n. 7 (11th Cir. 1999). Last, the only issue presented for the Motion to Dismiss was whether, as a matter of law, the circumstances

[20]The Motion to Re-Open Discovery and Motion to Compel did not show good cause. A27; A30; A33.

warranted continued jurisdiction over the Litigation. As a practical matter under the facts of the Litigation there was nothing to be discovered. The Order dated July 3, 2014 considers the Motion to Dismiss and responsive pleadings, and cites to the Complaint supplemented by the Amended Affidavit of John C. Palmerini, and FFRF's Response in Opposition to the Motion to Dismiss and related Declaration of David Williamson.[21] A45, Page 1-4. None of these documents evidence any material disputed facts as the parties all agree, among other things, that OCSB permitted distribution of all materials subject of the litigation for the January 16, 2014 forum, and that FFRF did not distribute or submit new materials for distribution for the January 16, 2014 forum. A45, Page 1-4; A22-1; A21; A21-1. It was also clear that FFRF did not believe OCSB's representations that it would not revert to the challenged conduct merely because it had the legitimate right to review submissions going forward. A22; A22-1. As the facts were fully known, it is unclear how further factual development would have changed the outcome of the Motion to Dismiss. *Polk*, 554 F. App'x at 799-800 (affirming denial of discovery where nothing would have been uncovered in the deposition that would have changed the outcome in the case.).

[21]OCSB also filed an affidavit opposing summary judgment which supplemented the affidavit in support of its Motion to Dismiss. A42.

While FFRF tries to cobble together an argument that discovery is necessary on the procedures for distribution and review, it is unclear why because as the District Court found OCSB was following the Consent Decree and existing jurisprudence and all of FFRF materials were permitted. Further, this point is outside of FFRF's Complaint as they only sought an as-applied challenge to certain materials. A1, Page 16, 17, 19, ¶s 68, 69, 80 and request for relief. For any of the above reasons, District Court did not abuse its discretion in ruling on the Motion to Dismiss without additional discovery. A45.

B. The District Court Properly Dismissed the Case – Including the Nominal Damages Relief - Because the Case Was Moot.

In its July 14, 2014 Order, the District Court *sua sponte* dismissed the entirety of the case without prejudice for lack of subject matter jurisdiction.[22] *Pac. Ins. Co. v. Gen. Dev. Corp.*, 28 F.3d 1093, 1096 (11th Cir. 1994) ("It is incumbent upon this court to consider issues of mootness *sua sponte* and, absent an applicable exception to the mootness doctrine, to dismiss any appeal that no longer presents a viable case or controversy."). A47. The District Court did not specifically address FFRF's request for nominal damages in the July 14, 2014 Order. A47. Clearly, the District Court was aware of the request for nominal damages but found it could

[22]There is a distinction between mootness of the entire action and mootness of a particular claim for relief. The prospective relief – the declaratory and injunctive relief – can be moot and dismissed from the action while other relief remains justiciable.

not maintain jurisdiction over this Litigation based solely on the assertion of a nominal damages. A47.

While a request for damages may save an otherwise moot claim, there is jurisprudence that shows a nominal damage claim does not always save the day. *See, e.g.*, *Seay*, 397 F.3d at 951 (complaint containing requests for injunctive relief, damages, costs and fees in conjunction with Equal Protection and First Amendment claims was dismissed as moot after the challenged ordinance was repealed). In this case, the District Court properly dismissed the Litigation despite the nominal damage request because an award of nominal damages will have no practical effect on the parties' future rights, cannot give meaningful relief and will result in an advisory opinion. *Soliman v. United States*, 296 F.3d 1237, 1242 (11th Cir. 2002); A47. Further, as the District Court noted, FFRF was permitted to distribute all the materials subject to this Litigation, which would have cured and mooted any alleged past violation. No meaningful relief can be afforded by a determination of the merits in this Litigation because the only challenged conduct was the Distribution Decision. OCSB agreed to allow the distribution of all FFRF's materials subject of this Litigation and, in fact, provided a specific date for that distribution. A47; A45; A21; A42; A42-1; A42-2; A42-3. At this point, the nominal damage claim is merely an attempt to maintain jurisdiction for the issuance of an advisory opinion.

Alternatively, the nominal damage request is ancillary to the declaratory relief which was held non-justiciable such that it is merely another form of declaratory relief. *See, e.g.*, *Freedom from Religion Found. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1029-30 (E.D. Wis. 2008); *Morrison v. Bd. of Educ.*, 521 F.3d 602, 611 (6th Cir. 2008); *Kerrigan v. Boucher*, 450 F.2d 487, 489-90 (2d Cir. 1971). Moreover, contrary to FFRF's claim in its initial brief, the Complaint was not a challenge to the policy of OCSB, but an as-applied challenge relating to certain specific materials. A1, Page 16, 17, 19, ¶s 68, 69, 80 and request for relief. FFRF's argument that sometime in the future FFRF may submit totally different materials for distribution at OCSB's forum and that OCSB may not approve then is at best hypothetical and is not a live controversy. A47, Page 1.

There is no colorable argument for relief because there is nothing left for the Court to decide. FFRF is merely trying to circumvent Article III limitations by raising nominal damages to secure an advisory opinion on an issue that is no longer live. Because there is nothing to remedy even if the District Court were disposed to do so, the claims are now moot and the dismissal should be affirmed.[23] A47.

[23]Nominal damages are usually $1.00. *Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S. Ct. 1042, 1054, 55 L. Ed. 2d 252 (1978) (Nominal damages are a token sum awarded to vindicate the infringed right.). In this case, FFRF was given the opportunity to distribute the materials that were at issue in this Litigation which in itself is vindication of any alleged infringed right. There is nothing to be gained

C. The District Court Did Not Abuse its Discretion By Denying the Motion to Compel.

On the last day of the discovery period, FFRF served its Motion to Compel which sought depositions and information relating to past practices of OCSB. A25. The District Court adopted the Magistrate's Order which found that the Motion to Compel was untimely on the last day of discovery because it left no time for the deposition to occur. A27, Page 2.

The Order on the Motion to Compel is not a clear error of judgment or application of an incorrect legal standard amounting to an abuse of discretion. *Sicar v. Chertoff*, 541 F.3d 1055, 1055 (11th Cir. 2008). First, although FFRF was given about seven months to conduct discovery, FFRF waited until about thirty days prior to the discovery deadline to seek depositions. A25, Page 1-2; A27, Page 2. Thus, any inability to pursue depositions and related motions to compel prior to the close of discovery are caused by FFRF's own delay. *Id.* Second, FFRF had been aware, by its own admission, from as early as March 12, 2014 that the depositions were unlikely to occur on the dates requested, but failed to seek to

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from a nominal damage award. This continued Litigation is an attempt by FFRF to seek attorneys' fees as evidenced by its civil appeal statement which seeks damages of $1.00 and attorneys' fees of $349,999. Further, an award of nominal damages does not automatically cause FFRF to be the prevailing party entitled to attorneys' fees. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.*S. 598, 604 n.6, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).

compel depositions until the eve of the discovery deadline.[24] *Id.* Finally, *arguendo*, that there was an abuse of discretion, no prejudice has occurred because the deposition would not have uncovered information that would have changed the outcome of the case. *Iraola & CIA., S.A.*, 325 F.3d at 1286 (discovery rulings are not overturned "unless the ruling resulted in substantial harm to the appellant's case.").

The crux of FFRF's argument is that the District Court should have granted the Motion to Compel because FFRF's Motion to Compel was filed within the discovery period (albeit, on the last day of the period). IB, Page 32. In support, FFRF argues that the Scheduling Order did not explicitly state that discovery motion were required to be filed with sufficient time to allow the discovery. IB, Page 32-33. This simplistic view ignores the jurisprudence which clearly holds that while a discovery motion filed on the eve of the discovery cutoff is timely in a technical sense, it can be properly denied because it effectively leaves no time for the requested depositions to occur. *Estate of Miller ex rel. Miller v. Toyota Motor Corp.*, No. 6:07-CB-1358-ORL-19DAB, 2009 WL 513038, at *1 (M.D. Fla. Feb. 27, 2009) (denied motion to compel filed on the eve of the discovery cutoff due to impact on other deadlines); *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662

[24]FFRF also failed to move for an enlargement of the discovery period until after it closed. A18, Page 1-2; A29.

F.3d 1292, 1306-07 (11th Cir. 2011). In this case, FFRF knew more than a month prior to the discovery cutoff that it would need Court intervention to hold depositions, but delayed its request to the point where it would cause untimely discovery to occur and would also likely cause delay in dispositive motions and trial. A27, Page 1-3; A25, Page 1-2.

While the Scheduling Order and other rules may be silent on the exact deadline for filing a motion directed at discovery, logic dictates that a motion to compel must be filed sufficiently in advance of the discovery deadline to permit the Court to hear any such motion and, if granted, for discovery to complete by the deadline. A30, Page 2; A27, Page 2; *Jim Boast Dodge, Inc. v. Daimler Chrysler Motors Co.*, No. 8:05-CV-1999-T-30MAP, 2007 WL 4409781, at *1 (M.D. Fla. Jan. 16, 2007) ("Moreover, the Court expects the parties to address discovery disputes promptly-before the discovery deadline passes or soon thereafter."); *U.S. District Court Middle District of Florida Discovery Practice Handbook,* at fn. 1. ("The Court follows the rule that *all discovery must be completed by that date* [in the scheduling order]."); *Grey v. Dall. Indep. Sch. Dist.*, 265 F. App'x 342, 348 (5th Cir. 2008) (finding no abuse of discretion where district court denied a motion to compel discovery when "it was filed on the day of the discovery deadline after an extensive discovery period"); *Reyes v. S.W.C. Structural, Inc.*, No. 08-22064-CIV, 2009 WL 792290, at *1-2 (S.D. Fla. Mar. 25, 2009) (denying motion to

compel Rule 26 disclosures where the parties knew there was a need for the disclosures months before filing the motion and the motion was filed just 20 days prior to the discovery deadline, which would not leave time to rule on the motion prior to the close of discovery); *Carter v. Broward Cnty. Sheriff's Dep't*, No. 11-61966-CIV, 2012 WL 6757559, at *6 (S.D. Fla. Dec. 7, 2012).

Further, the District Court's ruling is supported by the Scheduling Order which requires discovery to be completed within the bounds of the discovery deadline and which requires parties to seek court intervention where extensions on discovery will be required. A18, Page 3 at Section (I)(D) ("Each party shall timely serve discovery requests so that the Rules allow for a response prior to the discovery deadline"); A18, Page 3 at Section (I)(C) (". . . The parties may agree by stipulation on other limits on discovery within the context of the limits and deadlines established by this Case Management and Scheduling Order, but the parties may not alter the terms of this Order without leave of Court."). The resolution of the Motion to Compel would necessitate an extension of the discovery deadline - which was not requested until after the discovery deadline. A29. *See e.g., Fisher v. SP One Ltd.*, 559 F. App'x 873, 878-79 (11th Cir. 2014).

Further, FFRF wrongly relies on the meet and confer requirement under U.S. District Court Middle District of Florida Local Rule 3.01(g) to excuse its untimely

Motion to Compel because that rule does not authorize FFRF to ignore other court rules while pursuing informal resolution of discovery issues. A30, Page 2.

FFRF shows no effort in securing depositions beyond its single late request and its untimely Motion to Compel, and thus the District Court did not abuse its discretion in managing the docket and discovery when entering its Order Denying the Motion to Compel. *Ellison v. Windt*, No. 6:99-CV-1268-ORLKRS, 2001 WL 118617, at *3 (M.D. Fla. Jan. 24, 2001) ("When, as here, a party fails to promptly seek enforcement of his rights, any prejudice suffered arises largely from the party's own inaction."); *Hinson*, 231 F.3d at 826 (denying motion to compel based on delay); *Simpson*, 134 F. App'x 303. Regardless, there was no harm to FFRF because no discovery requested was relevant to the jurisdictional issues, and thus the discovery would not have impacted the outcome of the case. *Iraola*, 325 F.3d at 1286. The Order denying the Motion to Compel should be affirmed. A27, Page 2; A33.

D. The District Court Did Not Abuse Its Discretion By Denying the Motion to Reopen Discovery.

Under the Scheduling Order entered on October 1, 2013, the parties were given until April 14, 2014 to complete discovery, and until May 12, 2014 to file dispositive motions. A18, Page 1-2. The Scheduling Order states that extensions of the Scheduling Order's deadlines are disfavored. A18, Page 4 at Section II(B)(2). After the discovery cutoff, FFRF requested that the Scheduling Order

be amended to enlarge the discovery deadline, and the dispositive motion deadline if the discovery deadline is extended.[25] A29, Page 1. The Motion to Re-Open Discovery requested additional time to take the corporate representative's deposition and to file a motion to compel responses to the Written Discovery.[26] A29, Page 1. In its Order Denying the Motion to Re-Open Discovery, the Magistrate held that no good cause was shown for the request to extend the discovery deadline. A30, Page 2-3.

In support, the Magistrate found that FFRF did not serve a motion to compel directed at the Written Discovery requests prior to the discovery cutoff as required by the Scheduling Order and, therefore, the request for an extension of discovery was "not well taken." A30, Page 2. The Magistrate further found that FFRF did not timely seek assistance from the court with the scheduling of depositions and that the Local Rules requiring good faith conference do not "permit an attorney to delay seeking resolution from the Court for more than a month after the discovery

[25]FFRF does not appear to be appealing portion of the order denying the dispositive motion deadline extension. *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1296-97 (11th Cir. 2010) (stating that it is "by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed.").

[26]FFRF did not serve a motion to compel responses to the Written Discovery.

dispute arose." A30, Page 2; *Mann*, 588 F.3d 1291 (the Eleventh Circuit gives deference to the district court's interpretation of local rules).

Modification of the Scheduling Order is governed by Fed. R. Civ. P. 16(b)(4), which states that a scheduling order "may be modified only for good cause and with the judge's consent." *Id.* Furthermore, M.D.L.R. 3.05(c)(2)(E) and the Scheduling Order both state that extensions of the discovery period and dispositive motions are disfavored. M.D.L.R. 3.05(c)(2)(E); A18, Page 4 at Section II (B)(2). The good cause offered by FFRF is that FFRF attempted to schedule depositions and resolve the scheduling conflicts informally, and did not see the need to apply to the Court for aid. A29, Page 1-2. FFRF's good cause is merely a white-washed statement that they waited six months to request depositions, and were unable to take the last-minute depositions. The Magistrate noted that FFRF was aware as early as March 12, 2014 that depositions were likely not going to be coordinated in the requested time period, but FFRF took no action to preserve entitlement to depositions. A30, Page 1-2. Similarly, FFRF has offered no good excuse as to why it did not file a motion to compel Written Discovery prior to the discovery cutoff or why it waited until the last month of discovery to undertake discovery. A30, Page 2; *Fisher*, 559 F. App'x at 878-79.

FFRF shows no effort in securing discovery, including but not limited to starting the discovery process early, attempting to timely extend the discovery

deadline, or timely seeking court intervention. A29, Page 1-2. Amazingly, even knowing the discovery was last-minute and running up on the close of discovery, FFRF did not move for an extension of the discovery deadline timely. FFRF's actions do not evidence diligence in the pursuit of discovery because the course of discovery was within FFRF's control.

Good cause means that "the schedule cannot 'be met despite the diligence of the party seeking the extension.'" *Sosa*, 133 F.3d at 1418; *Idearc Media Corp. v. Kimsey & Associates, P.A.*, No. 8:07-CV-1024-T-17EAJ, 2009 WL 413531, at *1 (M.D. Fla. Feb. 18, 2009). Mere "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Will-Burn Recording & Pub. Co. v. Universal Music Group Records*, No. 08-0387-WS-C, 2009 WL 1118944 at *2 (S.D. Ala. April 29, 2009)(quoting *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992)); *S. Grouts & Mortars*, 575 F.3d at 1241-42 n.3; *Williams v. Blue Cross & Blue Shield of Fla.*, *No*. 3:09cv225/MCR/MD, 2010 WL 3419720, at *1-2 (N.D. Fla. Aug. 26, 2010); *Beauregard v. Cont'l Tire N. Am., Inc*, No. 3:08-cv-37-J-32HTS, 2009 WL 464998, at *2 (M.D. Fla. Feb. 24, 2009); M.D.L.R. 3.09(b). Again, the Magistrate held that reliance on the meet and confer requirement of U.S. District Court Middle District of Florida Local Rule 3.01(g) is not good cause. A30, Page 2.

The Order on the Motion to Re-Open Discovery is not a clear error of judgment or application of an incorrect legal standard because FFRF had full knowledge of the need for discovery before the scheduling deadline passed and failed to take steps to timely direct the course of discovery. A30, Page 2-3. There is no abuse of discretion, and, regardless, there is no harm to FFRF because the requested discovery served no practical use in response to the Motion to Dismiss (and was itself irrelevant after the case was dismissed).[27] *Iraola & CIA., S.A.*, *32*5 F.3d at 1286; *Carpenter*, 541 F.3d at 1055.

[27]Again, FFRF only requested leave to compel the Written Discovery and the depositions, neither of which related to the substantial likelihood of the recurrence of the unconstitutional conduct. Also, jurisdictional discovery would have had no practical effect as the facts were all known.

VI. CONCLUSION

For the above reasons, this Court should affirm the District Court's orders.

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VII. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief contains 12,408 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point type.

This, the 21st day of January, 2015.

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VIII. CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on the 21st day of January, 2015, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following: **Steven M. Brady, Esquire** *(*steven@bradylaw.us*)*, and **Christine A. Wasula, Esquire** *(*chris@bradylaw.us*)*, The Brady Law Firm, P.A., 7380 W. Sand Lake Road, Suite 500, Orlando, Florida 32819; **Andrew L. Seidel, Esquire** *(*aseidel@ffrf.org*)*, and **Patrick Elliott, Esquire**, *(*pelliott@ffrf.org*)*, PO Box 750, Madison, Wisconsin 53701.

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ADDENDUM TO BRIEF

LOCAL RULES

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Published 12/1/2009

CHAPTER THREE
MOTIONS, DISCOVERY AND PRETRIAL PROCEEDINGS

RULE 3.01 MOTIONS; BRIEFS AND HEARINGS

(a) In a motion or other application for an order, the movant shall include a concise statement of the precise relief requested, a statement of the basis for the request, and a memorandum of legal authority in support of the request, all of which the movant shall include in a single document not more than twenty-five (25) pages.

(b) Each party opposing a motion or application shall file within fourteen (14) days after service of the motion or application a response that includes a memorandum of legal authority in opposition to the request, all of which the respondent shall include in a document not more than twenty (20) pages.

(c) No party shall file any reply or further memorandum directed to the motion or response allowed in (a) and (b) unless the Court grants leave.

(d) A motion requesting leave to file either a motion in excess of twenty-five (25) pages, a response in excess of twenty (20) pages, or a reply or further memorandum shall not exceed three (3) pages, shall specify the length of the proposed filing, and shall not include, as an attachment or otherwise, the proposed motion, response, reply, or other paper.

(e) Motions of an emergency nature may be considered and determined by the Court at any time, in its discretion (see also, Rule 4.05). The unwarranted designation of a motion as an emergency motion may result in the imposition of sanctions.

(f) All applications to the Court (i) requesting relief in any form, or (ii) citing authorities or presenting argument with respect to any matter awaiting decision, shall be made in writing (except as provided in Rule 7(b) of the Federal Rules of Civil Procedure) in accordance with this rule and in appropriate form pursuant to Rule 1.05; and, unless invited or directed by the presiding judge, shall not be addressed or presented to the Court in the form of a letter or the like. All pleadings and papers to be filed shall be filed with the Clerk of the Court and not with the judge thereof, except as provided by Rule 1.03(c) of these Rules.

(g) Before filing any motion in a civil case, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action, the moving party shall confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion, and shall file with the motion a statement (1) certifying that the moving counsel has conferred with opposing counsel and (2) stating whether counsel agree on the resolution of the motion. A certification to the effect that opposing counsel was unavailable for a conference before filing a motion is insufficient to satisfy the parties' obligation to confer. The moving party retains the duty to contact opposing counsel expeditiously after filing

and to supplement the motion promptly with a statement certifying whether or to what extent the parties have resolved the issue(s) presented in the motion. If the interested parties agree to all or part of the relief sought in any motion, the caption of the motion shall include the word "unopposed," "agreed," or "stipulated" or otherwise succinctly inform the reader that, as to all or part of the requested relief, no opposition exists.

(h) All dispositive motions must be so designated in the caption of the motion. All dispositive motions which are not decided within one hundred and eighty (180) days of the responsive filing (or the expiration of the time allowed for its filing under the local rules) shall be brought to the attention of the district judge by the movant by filing a "Notice To the Court" within ten days after the time for deciding the motion has expired. Movant shall file an additional "Notice To The Court" after the expiration of each and every additional thirty day period during which the motion remains undecided. Movant shall provide the Chief Judge of the Middle District with a copy of each and every "Notice To The Court" which movant is required to file under this rule.

(i) The use of telephonic hearings and conferences is encouraged, whenever possible, particularly when counsel are located in different cities.

(j) Motions and other applications will ordinarily be determined by the Court on the basis of the motion papers and briefs or legal memoranda; provided, however, the Court may allow oral argument upon the written request of any interested party or upon the Court's own motion. Requests for oral argument shall accompany the motion, or the opposing brief or legal memorandum, and shall estimate the time required for argument. All hearings on motions shall be noticed by the Clerk, as directed by the judge assigned to the case, either on regular motion days if practicable (pursuant to Rule 78, Fed.R.Civ.P.), or at such other times as the Court shall direct.

RULE 3.02 NOTICE OF DEPOSITIONS

Unless otherwise stipulated by all interested parties pursuant to Rule 29, Fed.R.Civ.P., and excepting the circumstances governed by Rule 30(a), Fed.R.Civ.P., a party desiring to take the deposition of any person upon oral examination shall give at least fourteen (14) days notice in writing to every other party to the action and to the deponent (if the deponent is not a party).

RULE 3.03 WRITTEN INTERROGATORIES; FILING OF DISCOVERY MATERIAL; EXCHANGE OF DISCOVERY REQUEST BY COMPUTER DISK

(a) Written interrogatories shall be so prepared and arranged that a blank space shall be provided after each separately numbered interrogatory. The space shall be reasonably calculated to enable the answering party to insert the answer within the space.

(b) The original of the written interrogatories and a copy shall be served on the party to whom the interrogatories are directed, and copies on all other parties. No copy of the written interrogatories shall be filed with the Court by the party propounding them. The answering party shall use the original of the written interrogatories for his answers and objections, if any; and the original shall be returned to the party propounding the interrogatories with copies served upon all other parties. The interrogatories as answered or objected to shall not be filed with the Court as a matter of course, but may later be filed by any party in whole or in part if necessary to presentation and consideration of a motion to compel, a motion for summary judgment, a motion for injunctive relief, or other similar proceedings.

(c) Notices of the taking of oral depositions shall not be filed with the Court as a matter of course (except as necessary to presentation and consideration of motions to compel); and transcripts of oral depositions shall not be filed unless and until requested by a party or ordered by the Court.

(d) Requests for the production of documents and other things, matters disclosed pursuant to Fed. R. Civ. P. 26, and requests for admission, and answers and responses thereto, shall not be filed with the Court as a matter of course but may later be filed in whole or in part if necessary to presentation and consideration of a motion to compel, a motion for summary judgment, a motion for injunctive relief, or other similar proceedings.

(e) Litigants' counsel should utilize computer technology to the maximum extent possible in all phases of litigation *i.e.*, to serve interrogatories on opposing counsel with a copy of the questions on computer disk in addition to the required printed copy.

RULE 3.04 MOTIONS TO COMPEL AND FOR PROTECTIVE ORDER

(a) A motion to compel discovery pursuant to Rule 36 or Rule 37, Fed.R.Civ.P., shall include quotation in full of each interrogatory, question on deposition, request for admission, or request for production to which the motion is addressed; each of which shall be followed immediately by quotation in full of the objection and grounds therefor as stated by the opposing party; or the answer or response which is asserted to be insufficient, immediately followed by a statement of the reason the motion should be granted. The opposing party shall then respond as required by Rule 3.01(b) of these rules.

(b) For the guidance of counsel in preparing or opposing contemplated motions for a protective order pursuant to Rule 26(c), Fed.R.Civ.P., related to the place of taking a party-litigant's deposition, or the deposition of the managing agent of a party, it is the general policy of the Court that a non-resident plaintiff may reasonably be deposed at least once in this District during the discovery stages of the case; and that a non-resident defendant who intends to be present in person at trial may reasonably be deposed at least once in this District either during the discovery stages of the case or within a week prior to trial as the circumstances seem to suggest. Otherwise, depositions of parties should usually be taken as in the case of other witnesses pursuant to Rule 45(d), Fed.R.Civ.P.. A non-resident, within the meaning of this rule, is a person residing outside the State of Florida.

MIDDLE DISTRICT DISCOVERY

A HANDBOOK ON CIVIL DISCOVERY PRACTICE IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Rev. 9/04/01

including if ordered by the Court, if necessary to the presentation or defense of a motion, or if required by Rule 26(a)(3).

Correspondence exchanged during the course of litigation either between opposing counsel or between counsel for one party and an unrepresented party should be filed with the Court only to comply with an order of the Court or when necessary to the presentation and consideration of a motion and only when the filing of traditional discovery material will clearly not suffice for the purpose. Counsel should carefully redact correspondence to exclude irrelevant and prejudicial material, e.g., settlement discussions.

2 - Filing Discovery or Other Papers Under Seal. In certain rare circumstances involving trade secrets or other confidential information, the Court may order the filing under seal of discovery in order to preserve the integrity of the information. However, the Court wishes to minimize the number of documents filed under seal. Applicable precedent allows the Court to file documents under seal only in certain limited circumstances. Therefore, no paper may be filed under seal without prior approval by the Court upon the demonstration of a sufficient legal and factual basis.

3 - Tailoring Discovery Requests to the Needs of the Case. A party should tailor discovery requests to the needs of each case. The content of the requests should apply to the particular case, and the form of discovery requested should be the one best suited to obtain the information sought. In each case a party should carefully determine which discovery methods will achieve the discovery goal of obtaining useful information as efficiently and inexpensively as possible for everyone concerned.

4 - Responding to Discovery Requests. A party responding to a discovery request should make diligent effort to provide a response that (i) fairly meets and complies with the discovery request and (ii) imposes no unnecessary burden or expense on the requesting party.

D. Supplementing Answers

Rule 26(e), Federal Rules of Civil Procedure, expressly provides that in many instances a party is under a duty to supplement or correct prior disclosures pursuant to Rule 26(a) or in discovery responses. Fairness and professionalism suggest a broader range of circumstances requiring supplementation. However, a party may not vary the provisions of the Federal Rules of Civil Procedure by placing supplementation language in a discovery request.

E. Timeliness and Sanctions

1 - Timeliness of Discovery Responses. The Federal Rules of Civil Procedure set forth explicit time limits for responding to discovery requests. If unable to answer timely, a lawyer should first seek an informal extension of time from counsel propounding the discovery. Counsel in this district typically accommodate reasonable requests for additional time. If unable to informally resolve the matter, counsel should move for an extension of time to respond. (See Local Rule 3.01(g), Middle District of Florida, requiring a certificate that counsel have conferred before seeking judicial relief.)

2 - Motions for Extensions of Time. Motions for extension of time within which to respond to discovery should be filed sparingly and only when counsel are unable to informally resolve their disputes. Counsel should be aware that the mere filing of a motion for an extension of time in which to respond does not, absent an order of the Court, extend the deadline for responding to discovery requests.

3 - Sanctions. Rule 37, Federal Rules of Civil Procedure, provides that if a party must seek relief from the Court to compel a recalcitrant party to respond, the moving party may be awarded reasonable expenses including attorney's fees incurred in compelling the responses. Rule 37 is enforced in this district. Further, if a Court order is obtained compelling discovery, unexcused failure to comply with such an order is treated by the Court with special gravity and disfavor.

4 - Stays of Discovery. Normally, the pendency of a motion to dismiss or a motion for summary judgment will not justify a unilateral motion to stay discovery pending resolution of the dispositive motion. Such motions for stay are rarely granted. However, unusual circumstances may justify a stay of discovery in a particular case upon a specific showing of prejudice or undue burden. This policy also applies to cases referred to arbitration or mediation under the Local Rules.

F. Completion of Discovery

1 - Deadline for Discovery Completion. The Court ordinarily sets a discovery completion date through its Case Management and Scheduling Order (although a Judge may have another method of setting and extending that deadline). The Court follows the rule that the completion date means that *all discovery must be completed by that date*. For example, interrogatories must be served more than thirty days prior to the completion date to permit the opposing party to respond before the discovery deadline. Untimely discovery requests are subject to objection on that basis. Counsel, by agreement, may conduct discovery after the formal completion date but should not expect the Court to resolve discovery disputes arising after the discovery completion date.

2 - Extension of Time for Discovery Completion. Occasionally, the Court will allow additional discovery time upon motion, but it is a serious mistake to assume that an extension of the discovery completion date will be granted. When allowed, the discovery completion date is normally extended only upon a written motion showing good cause (including due diligence in the pursuit of discovery before the completion date) and stating both the specific additional discovery needed and its purpose. Motions for extension of discovery time are treated with special disfavor if filed after the discovery completion date and will normally be granted only if it clearly appears that an extension will not necessitate the continuance of a scheduled trial.

II. DEPOSITIONS

A. General Policy and Practice

1 - Scheduling. A courteous lawyer is normally expected to accommodate the schedules of opposing lawyers. In doing so, the attorney should normally pre-arrange a deposition with opposing counsel before serving the notice. If this is not possible, counsel may unilaterally notice the deposition while at the same time indicating a willingness to be reasonable about any necessary rescheduling. Rule 30(a)(2)(A), Federal Rules of Civil Procedure, and Local Rule 3.02(b), Middle District of Florida, limit each *side* to no more than ten depositions unless otherwise ordered by the Court. Additionally, Local Rule 3.02(a) requires the party noticing the deposition to give a minimum (absent agreement or an order based upon some exigent circumstance) of ten days written notice to every other party and the deponent, if not a party, although giving substantially more than ten days notice is strongly encouraged. Customarily parties provide at least thirty days notice of a deposition. Rule 30(d)(2) limits a deposition to one day of seven hours, unless otherwise authorized by the Court or stipulated by the parties. This is generally interpreted to mean seven hours of actual testimony, with appropriate adjournments for meals, rest, or refreshment.

2 - Persons Who May Attend Depositions. Each lawyer may ordinarily be accompanied at the deposition by one representative of each client and, in technical depositions, one or more experts. Business necessity may require substitution for the representative of a party, but this privilege should not be abused. Lawyers may also be accompanied by records custodians, paralegals, secretaries, and the like, even though they may be called as technical witnesses on such questions as chain of custody, the foundation for the business record rule, or other technical matters. While more than one lawyer for each party may attend, only one should question the witness or make objections, absent an agreement to the contrary. Those in attendance should conduct themselves in the manner expected during courtroom proceedings in the presence of a judge. Conduct during depositions should accord with Local Rules 5.03(7), (8), (9), (12), (13), and (16), Middle District of Florida.

3 - Place Where Deposition May Be Taken. Local Rule 3.04(b), Middle District of Florida, provides that a non-resident plaintiff may reasonably expect to be deposed at least once in this district during the discovery stages of the case and that a non-resident defendant who intends to be present in person at trial may be deposed at least once in this district either during discovery in the case or within a week before trial, as the circumstances suggest. A non-resident is defined by Local Rule 3.04(b) as a person residing outside the state of Florida.

West's Florida Statutes Annotated
Title XLVIII. K-20 Education Code (Chapters 1000-1013)
Chapter 1003. Public K-12 Education (Refs & Annos)
Part IV. Public K-12 Educational Instruction

West's F.S.A. § 1003.45

1003.45. Permitting study of the Bible and religion; permitting brief meditation period

Effective: January 7, 2003
Currentness

(1) The district school board may install in the public schools in the district a secular program of education including, but not limited to, an objective study of the Bible and of religion.

(2) The district school board may provide that a brief period, not to exceed 2 minutes, for the purpose of silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district.

Credits
Added by Laws 2002, c. 2002-387, § 138, eff. Jan. 7, 2003.

West's F. S. A. § 1003.45, FL ST § 1003.45
Current through Ch. 255 (End) of the 2014 2nd Reg. Sess. and Sp. "A" Sess. of the Twenty-Third Legislature

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