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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

HARRY POLLAK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 22-CV-49-ABJ**
	)	
SUSAN WILSON, et a.	)	
	)	
Defendants.	)	

Defendants' Reply to Plaintiff's Response
To Defendants' Motion to Compel

Defendants Susan Wilson et al. (referred to herein collectively as "SCSD2"), by and through their undersigned attorney, submit the following reply to the Plaintiff's response in opposition to SCSD2's motion to compel.

Pollak has not shown any evidence that disclosure of his personal e-mails, texts, and Facebook communications will deter FOF membership due to fears of threats, harassment, or reprisal.

As the party asserting the associational privilege, Pollak bears the initial burden of showing an objectively reasonable probability (as opposed to his own speculation) that compelled disclosure will deter membership in Free our Faces ("FOF") due to fears of threats, harassment or reprisal from either government officials or private parties which may affect members' physical well-being, political activities or economic interests. *See In re Motor Fuel Temperature Sales*

Practices Litigation, 707 F. Supp.2d 1145, 1163 n.26 (D.Kan. 2010) (citing *NAACP v. State of Ala.*, 357 U.S. 449, 462–63, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)).

Pollak tries to satisfy his burden by claiming that "[m]embers of the public, as well as government and law enforcement agencies, have compared FOF and other similar groups to terrorists, leading to criminal investigations in even peaceful speech and protests related to school policies." (ECF No. 48, p. 2, Ex. A and B). However, Pollak's assertions that FOF has been labeled or subject to harassment is simply unfounded. The evidence submitted by Pollak to satisfy his burden is a September 29, 2021 NSBA letter to the President that he says compares parent protests to "domestic terrorism" and a May 11, 2022 letter from a congressional committee to the Department of Justice that generally addresses protests at school board meetings. But these letters do not even reference FOF or anything related to Sheridan, Wyoming. There is nothing in the record other than Pollak's own self-serving statements that would indicate the requested discovery would subject anyone belonging to FOF to "threats, harassment, or reprisal." [1]

The Tenth Circuit has specifically addressed the proof necessary to establish a prima facie case of privilege as follows:

> Although we have not articulated the precise quantum of proof necessary to establish a prima facie case of privilege under the First Amendment, **we also have not held that one single unsworn statement is sufficient**. Rather, we have held that a party claiming a First Amendment chilling affect meets its burden by submitting, for example, **affidavits which "describe harassment and intimidation of [a group's] known members**, and the resulting reluctance of people sympathetic to the goals of [the group] to associate with [it] for fear of reprisals." *In re First Nat'l Bank*, 701 F.2d at 116–17. . . . *NAACP*, 357 U.S. at 462, 78 S.Ct. 1163 ("Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members **has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility**.")

[1] In his declaration, Pollak also refers to a public comment posted on a Sheridan Media website, but he did not include the specific comment in his brief. Upon review of the website referenced, it appears that the comment Pollak refers to does not name FOF.

In re Motor Fuel Temperature Sales Practices Litigation, 641 F.3d 470, 491 (10th Cir. 2011) (emphasis added).

Pollak's arguments based on his own unfounded speculation that the requested disclosure will "chill" FOF's rights to association are simply not sufficient. Theory and conjecture will not suffice. The law requires an objectively reasonable probability based on facts. Pollak cannot point the court to any actual conduct or action directed to him or other FOF members that would give rise to fear of threats, harassment, or reprisals. Accordingly, Pollak has not carried his burden of showing the associational privilege applies.

Pollak's communications are relevant to the claims he has asserted.

It is surprising that Pollak continues to argue that his email, text, and Facebook communications about the school district and/or its personnel are not relevant to the issues in his amended complaint. Surely, Pollak cannot on one hand argue to this court that he came to the school board meetings with legitimate purposes and then on the other hand claim that any evidence to the contrary is irrelevant. As previously represented to the court, SCSD2 believes that Pollak's claims have already been decided by the Tenth Circuit and that this case will be determined by summary judgment. However, if a trial becomes necessary, then SCSD2 must be allowed to conduct discovery regarding Pollak's intentions in coming to the board meetings so that it will be prepared to respond to his claims and will be able to show why the restrictions in Policy BEDH are necessary to ensure school board meetings are conducted in an orderly, efficient, and dignified manner.

The information being sought in discovery is not otherwise available to SCSD2.

Pollak contends that SCSD2 can obtain the requested information from Trustee Shelta Rambur, who was substituted as a defendant in her official capacity after being elected to the Board

of Trustees in November of 2022. (ECF No. 48, p. 9). This argument is misleading. Rambur is only a defendant in her official capacity as a board member, which in essence is a suit against the school district. *See Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105 (1985). Rambur is not named as a defendant in her individual capacity. SCSD2 does not have any control over her personal email communications or her communications as an administrator of the FOF Facebook page.

Pollak also argues that the SCSD2 can obtain the requested information from him directly during his deposition, which has tentatively been set for some time during July 18-20, 2023. However, Pollak clearly intends to assert the associational privilege during his deposition. The court should not allow Pollak and his legal counsel to unilaterally decide what information they think is relevant or privileged and only answer those questions they want to answer. SCSD2 should be given a fair opportunity to prepare for his deposition and should be able to inquire about the requested information during the deposition.

General Objections

Pollak continues to object to the discovery requests on the basis that they are overly broad and/or are not proportional to the needs of this case. (ECF No. 48, p. 10). SCSD2 has made multiple attempts to address these objections with Pollak's counsel. SCSD2 has agreed to narrow the scope of the discovery requests to information and documents that pertain to the school district during just the 2021/2022 school year to address Pollak's concern about the breadth of the requests. SCSD2 also offered to accept the emails and Facebook threads with the names of third parties redacted provided SCSD2 would have the opportunity to raise the issue later in the case if necessary. These modifications sufficiently address Pollak's general objections.

Wherefore, SCSD2 respectfully requests that the court enter an order compelling Pollak to provide the requested information.

Dated this 8th day of June, 2023.

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Certificate of Service

I, Kendal R. Hoopes, hereby certify that on June 8, 2023, I served a true and correct copy of the above and foregoing through the Case Management/Electronic Case Filing (CM/ECF) system for the United States Federal Court for the District of Wyoming.

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