

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CASE NO. 1:18-CV-12119-RWZ

MASSACHUSETTS FISCAL ALLIANCE,)
)
Plaintiff,)
)
v.)
)
MICHAEL J. SULLIVAN, Director of)
Campaign and Political Finance, et al.,)
)
Defendants.)
)
)
)

**DEFENDANTS’ REPLY MEMORANDUM
IN FURTHER SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION
OF INFORMATION IN RESPONSE TO WRITTEN DISCOVERY REQUESTS**

The Defendants submit this Reply Memorandum to respond to three points raised in Plaintiff MassFiscal’s Opposition to the Defendants’ Motion to Compel.

1. The Motion to Compel Does Not Seek Third-Party Discovery from MassFiscal’s Contributors.

One of MassFiscal’s main reasons for opposing the requested discovery is the fear that “invasive” third-party discovery of MassFiscal’s contributors will damage its relationships with them. MassFiscal Opposition (“Opp.”) at 2. This fear is unfounded because this Motion does not seek third-party discovery from contributors. The only relief requested by this Motion is information identifying MassFiscal’s top five contributors since 2014, subject, if necessary, to an

appropriate protective order to prevent public disclosure of this information.¹ The Defendants are not seeking any third-party discovery of those contributors at this time, and there is no basis for MassFiscal's characterization that the Defendants have the "avowed intention" of pursuing third-party discovery of contributors. Opp. at 2. If this Motion is allowed, the Defendants will first need to review the contributor information itself to determine what further discovery, if any, may be necessary. And if further discovery is necessary, the Defendants would be able to pursue such discovery from MassFiscal itself by way of, for example, a Rule 30(b)(6) deposition. At this stage of the proceedings, the issue of third-party discovery is premature.

In any event, MassFiscal's fear of third-party discovery of its contributors can readily be addressed through discovery management. An order compelling MassFiscal to produce contributor information to the Defendants could provide that third-party discovery of those contributors would not take place pending further order of the Court. But fear of hypothetical future third-party discovery is not a valid reason to allow MassFiscal to avoid disclosure altogether.

2. Contributor Information May Demonstrate the Weakness of MassFiscal's Claim of Voter Confusion.

In addition to the reasons described in Defendants' opening brief at pp. 12-14, MassFiscal's Opposition highlights an additional issue to which the requested discovery is relevant: MassFiscal's assertion that disclosing the top five general contributors to the organization will not actually aid voters in evaluating an electioneering communication. MassFiscal characterizes this argument as one of the three interlocking arguments on which its

¹ Specifically, the information sought by the Defendants' discovery requests is the information required by the Local Rules' definition of "to identify": "the person's full name, present or last known address, and, when referring to a natural person, the present or last known place of employment." Local Rule 26.5(c)(3).

claims rely. Opp. Br. at 4. The gist of MassFiscal’s argument appears to be that identifying general contributors to an organization on the face of an ad will mislead voters because general contributors support only the organization itself, and may or may not support the ad in particular.²

The Defendants are entitled to test this premise through discovery. Discovery may reveal, for example, that MassFiscal’s top five contributors are all closely associated with MassFiscal and intimately familiar with its political advocacy. Indeed, this conclusion seems likely—especially if the top five contributors include individuals or entities such as MassFiscal’s founder, Rick Green, and its sister organization, Fiscal Alliance Foundation. If so, it is difficult to conceive exactly how the requirement to identify such contributors on the face of MassFiscal’s electioneering communications would “mislead” voters about anything. Thus, contributor identity information is relevant because it may tend to render one of MassFiscal’s three key assertions in this case less probable. *See* Fed. R. Evid. 401; *Bielunas v. F/V Misty Dawn, Inc.*, 621 F.3d 72, 76 (1st Cir. 2010) (“relevant evidence is ‘evidence having *any* tendency to make the existence of any fact that is of consequence’ more or less probable. To be relevant, the evidence need not definitively resolve a key issue in the case—it need only move the inquiry forward to some degree.”) (emphasis in original, internal citations omitted). Because MassFiscal intends to

² *See, e.g.*, Amd. Cplt. ¶ 92 (“By listing unrelated donors as the putative authors of a specific communication, then Mass. Gen. Laws ch. 55, § 18G undermines the First Amendment right to eschew association for expressive purposes.”) (internal quotation omitted); MassFiscal Memorandum of Law in Support of Motion for Preliminary Injunction, dated October 11, 2018 (Doc #8-1), at 16 (“By listing contributors that did not directly fund the communication on the face of the communication itself, the law will ‘mislead voters as to who really supports the communications’ by suggesting those contributors are directly responsible for the ad’s production.”).

rely on an assertion of voter confusion, it may not avoid discovery of facts that would tend to make that assertion more or less probable.

3. Facts Are Not Irrelevant in Facial Challenges.

Finally, MassFiscal's resort to facial challenge principles is misplaced. There is no principle of law that prohibits consideration of facts in a facial challenge. Courts do not review laws in a vacuum; they review them as applied to "actual fact[s]." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988).

A facial challenge under the First Amendment does not circumvent the need to consider the law's application to facts; rather, it increases the *number* of applications to be considered (as compared to an as-applied challenge under the First Amendment). As MassFiscal itself recognizes, "[t]o prevail [in a facial challenge], it must demonstrate that 'a substantial number of [the challenged law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" Opp. at 3 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). Likewise, a plaintiff asserting an overbreadth challenge, as MassFiscal does here (*see* Amd. Cplt. ¶¶ 108, 114, 119 & 131), bears the burden of demonstrating, "from the text of [the law] *and from actual fact*," that a substantial number of instances exist in which the law cannot be applied constitutionally. *United States v. Ackell*, 907 F.3d 67, 74 (1st Cir. 2018) (quoting *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)) (emphasis added); *New York State Club Ass'n*, 487 U.S. at 14 ("we are not informed of the characteristics of any particular clubs, and hence we cannot conclude that the law threatens to undermine the associational or expressive purposes of any club, let alone a substantial number of them"). The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to overbreadth challenge." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1983). Therefore,

MassFiscal's recent withdrawal of its as-applied challenge does not avoid consideration of a factual record – including identifying MassFiscal's top five contributors for the reasons advanced in both Defendants' opening brief and this Reply Memorandum.

CONCLUSION

For the foregoing reasons, the Defendants request an order compelling MassFiscal to identify MassFiscal's top five contributors as described by G.L. c. 55, § 18G for all relevant 12-month periods since 2014, in order to permit potential further discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document filed through the ECF system will be sent electronically to registered participants on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as nonregistered participants as of August 2, 2019.

/s/ Julie E. Green

Julie E. Green

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