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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

STEPHEN RICHER,

Plaintiff,

v.

KARI LAKE, JEFFREY E. HALPERIN, KARI LAKE FOR ARIZONA, and SAVE ARIZONA FUND, INC.,

Defendants.

No. CV2023-009417

**MOTION PURSUANT TO RULES 16 AND 37 REQUESTING THAT THE COURT ENTER PLAINTIFF STEPHEN RICHER'S PROPOSED SCHEDULING ORDER, PROTECTIVE ORDER, AND ESI STIPULATION, OR IN THE ALTERNATIVE ORDER A SCHEDULING CONFERENCE**

**(Expedited Consideration Requested)**

(Assigned to the Honorable Jay Adleman)

Plaintiff Stephen Richer ("Richer" or "Plaintiff") moves the Court pursuant to Rules 16 and 37 to enter his Proposed Scheduling Order, Protective Order, and ESI Stipulation, or alternatively set a scheduling conference. This motion is necessary because Defendants Kari Lake, Jeffrey E. Halperin, Kari Lake for Arizona, and Save Arizona Fund, Inc. (collectively "Defendants") have refused to meet and confer in good faith regarding any of these basic procedural orders that are necessary for this case to move forward. Also, Richer requests monetary sanctions to compensate for Defendants' bad faith and to deter future instances of such conduct. This motion is based on the attached Memorandum of Points

and Authorities, the Declaration of Richer's counsel Daniel Maynard, and the Good Faith Consultation Certificate.

## MEMORANDUM OF POINTS AND AUTHORITIES

Just two months ago, Defendant Lake was telling anyone who would listen that she "stand[s] by everything [she's] said" about Stephen Richer and has "always been truthful when [she's] talked about elections."[1] Remarking on this case, Lake stated: "[D]iscovery goes both ways. I TRULY look forward to that."[2] Now, however, Defendants are singing a different tune: They are doing everything possible to waste time and stall discovery.

Defendants moved to dismiss under Rule 12(b)(6) and Arizona's anti-SLAPP statute, A.R.S. § 12-751. This Court denied both motions, and the Court of Appeals and the Arizona Supreme Court both declined to review that judgment. This Court and the Court of Appeals also denied Defendants' stay requests, and the administrative stay entered by the Supreme Court was lifted weeks ago on March 5, 2024.

There is no question that it is now time to start discovery under the Arizona Rules of Civil Procedure. But Defendants have stalled answering the complaint, even though it was due *last year*. *See* Application for Entry of Default (March 11, 2024). And instead of meeting and conferring in good faith with Richer's counsel regarding a schedule, a protective order, and an electronic discovery stipulation—as Richer has been requesting for months—Defendants have undertaken a campaign of obstruction to delay this case indefinitely. They've agreed to schedule multiple meet-and-confers and then have

[1] @KariLake, X (formerly Twitter) (Jan. 12, 2024, 10:10 AM), https://x.com/KariLake/status/1745825573602275651.

[2] *Id.*

unilaterally canceled them at the eleventh hour. They've agreed to review and mark up proposed documents and schedules (some of which they've had for months) and then have suddenly changed their minds. And, to boot, they use their own non-compliance with the Rules of Civil Procedure—namely their failure to file a timely answer—to try to justify their non-compliance with other basic requirements of civil litigation.

Those are not good faith litigation practices. They waste time and money and abuse the collegiality of Richer's counsel. Worse, they waste the resources of this Court by requiring motions, such as this one, to force Defendants' counsel to do what should be routine. Accordingly, Richer respectfully requests that this Court tell Defendants to halt their stalling tactics and thereby ensure the "just, speedy, and inexpensive determination of" this case. Ariz. R. Civ. P. 1.

For the reasons set forth below, this Court should enter Richer's Proposed Scheduling Order, ESI Stipulation, and Protective Order that Defendants have unduly delayed negotiating. This Court should also award attorneys' fees to Richer's counsel for the time wasted on Defendants' dilatory tactics. Further, even if the Court is not yet willing to resort to sanctions, it should nonetheless take immediate steps to halt Defendants' delay and require Defendants to file their proposed schedule and any proposed modifications to the ESI Stipulation and Protective Order within five days of this motion. Enough is enough.

## A. Factual Background

### 1. Richer's attempts to negotiate a Proposed Scheduling Order, ESI Stipulation, and Protective Order during the pendency of the motion to dismiss

Ariz. R. Civ. P. 16(b)(1) provides that "no later than 30 days after a party files an answer or ***files a motion directed at the complaint***, or 120 days after the action commences—whichever occurs first—that party and the plaintiff must meet and confer about the anticipated course of their case, including the tier to which it should be assigned under Rule 26.2 and the subjects set forth in Rule 16(b)(2) and (c)." (emphasis added).

Defendants filed motions to dismiss pursuant to Ariz. R. Civ. P. 12(b)(6) and A.R.S. § 12-751 (the Anti-SLAPP statute) in late August 2023, and the parties stipulated to an extension of the deadline for the parties to hold their early meeting until fourteen days after the motions were fully briefed, or November 13, 2023.[3] Richer's counsel accordingly sent a draft Joint Report and Proposed Scheduling Order to Defendants' counsel of record, Tim La Sota ("La Sota") and Jennifer Wright ("Wright") (Ex. A (Declaration) ¶ 9), on November 6, 2023, a week before the operative deadline for the early meeting. The parties then met and conferred regarding the Joint Report and Proposed Scheduling Order two days later. *Id.* ¶ 10. After that conference, at which the parties disagreed about the propriety of starting discovery, Defendants moved for a stay of discovery pending resolution of the motions to dismiss.

The Joint Report, with edits from La Sota, was filed with this Court on November 21. Declaration ¶ 12. Paragraph 13 of the Joint Report highlighted the parties'

[3] Defendant Halperin, who was added to the case in the First Amended Complaint, joined the motions to dismiss on December 18, 2023. *See* Notice of Joinder (Dec. 18, 2023).

disagreement on the need for a scheduling order: Richer believed it was appropriate for the Court to enter a scheduling order; Defendants disagreed. Richer attached his draft of the Proposed Scheduling Order to the Joint Report. *Id.* Also in late November, Richer's counsel sent Defendants' counsel a draft Protective Order and ESI Stipulation, with the goal of reaching consensus on those documents at the outset of discovery. *Id.* ¶ 13. Hearing nothing, Richer's counsel reupped that request on December 4, 2023 (*id.* ¶ 14), and later reiterated their "hope . . . that the parties can work together to avoid any unnecessary delay." *Id.* ¶ 16, Ex. 3.

**2. Richer's attempts to negotiate a Proposed Scheduling Order, ESI Stipulation, and Protective Order after the denial of the motions to dismiss**

This Court denied the motions to dismiss and the motion to stay discovery on December 19, 2023. Given that the prior proposal was out of date, the Court ordered the parties to submit a revised Proposed Scheduling Order by January 19, 2024.

To comply with this Court's order, Richer's counsel emailed La Sota and Wright on December 21, 2023, requesting to meet and confer on the Proposed Scheduling Order. Declaration ¶ 18, Ex. 4. After receiving no response, Richer's counsel again emailed La Sota and Wright on December 27, 2023 requesting dates to meet and confer. Declaration ¶ 19, Ex. 4. Wright responded on December 28, 2023, offering to meet and confer on January 5, 2023. Declaration ¶ 20, Ex. 4. Richer's counsel accepted the offer that same day and agreed to meet and confer on January 5, as Defendants proposed. Declaration ¶ 21, Ex. 4. Also, Richer's counsel requested that Defendants respond to Richer's proposed schedule in advance of the January 5 meet-and-confer to facilitate an efficient call (*id.*), a

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request that Richer's counsel reiterated on January 3 after having received no response. Declaration ¶ 22, Ex. 5. In that email, Richer's counsel also repeated their desire to discuss the proposed draft Protective Order and ESI Stipulation. *Id.*

Defendants finally responded on January 4—one day before the planned meet-and-confer. But rather than provide any position on the proposed schedule—the topic on which Defendants had agreed to confer—Defendants declared that they planned to file another motion to stay (this time pending their proposed petition for a special action) and therefore unilaterally limited the topics at the meet-and-confer to "[their] Motion to Stay, unless [Richer] would like to forgo the call and provide [his] position in writing." Declaration ¶ 23, Ex. 5. Richer's counsel immediately objected to Defendants' sudden reversal, noting that "Rule 5 of the Rules of Procedure for Special Actions makes clear that the filing of a complaint in a special action does not stay the underlying action, unless and until a stay is specifically ordered." Declaration ¶ 24, Ex. 5. But as a compromise, Richer offered to confer about both "the motion for a stay" that Defendants wanted to discuss as well as "the schedule" and "the proposed ESI and protective orders." *Id.*

That same day, Defendants refused Richer's proposed compromise. Defendants explained: "It would be futile to meet while we are seeking a stay of the proceedings in the Superior Court, especially given we have filed a Special Action in the Court of Appeals. To avoid wasting everyone's time, ***we will not be meeting tomorrow***, and ***we will be unavailable*** until after issues related to the stay are resolved." Declaration ¶ 27, Ex. 6 (emphasis added). Defendants closed by noting, "We can touch base next Friday, January

12, if no orders have been entered in the Superior Court or Court of Appeals regarding a stay of the trial court proceedings." *Id.*

This Court denied Defendants' stay request on January 9. Declaration ¶ 28. The Court of Appeals declined special action jurisdiction one day later on January 10. *Id.* So with Defendants' outstanding stay requests either denied or moot, Richer's counsel again emailed Defendants' counsel on January 10, requesting once more to meet and confer regarding the schedule and seeking input on the draft Protective Order and ESI Stipulation. *Id.* ¶ 29, Ex. 7.

Defendants did not respond. On January 12, with only one week left to comply with this Court's order to submit a proposed schedule, Richer's counsel reupped the request to meet and confer. Declaration ¶ 30, Ex. 7. In the same email, Richer's counsel also reminded Defendants' counsel that "you have failed to file" an answer, and cautioned that "[i]f you do not file an answer by 5pm on January 16, 2024, we will consider filing an application for default." *Id.*

Defendants responded later that day. Declaration ¶ 31, Ex. 7. Defendants acknowledged Richer's notice that they were in default, and stated that they would examine when their answer was due and "proceed appropriately." *Id.* Defendants also admitted that "[t]he protective order you sent appears sufficient and comprehensive," but requested a little extra time so that "our team" can review. *Id.* Finally, Defendants suggested a meet-and-confer on January 16. *Id.* On January 13, Richer accepted the offer to meet and confer, and again sent along an updated Proposed Scheduling Order (while yet again requesting feedback on the draft Protective Order and ESI Stipulation). *Id.* ¶ 32, Ex. 8.

At that point, Defendants' counsel started immediately backpedaling. In their next correspondence (on January 14), Defendants' counsel instead asserted that they "had not had a chance to fully discuss the protective order, and our client is unavailable to review the document and provide approval." Declaration ¶ 33, Ex. 8. Therefore, counsel stated Defendants "will not be agreeing to a protective order this week." *Id.* The same was true for the ESI Stipulation: even though Defendants' counsel had been in possession of the proposed ESI Stipulation since late November and had been prompted for edits on at least *four* prior occasions, Defendants' counsel stated that they did "not expect" that "we will get to marking up" the stipulation "as requested by EOD tomorrow, as it is a state holiday in Arizona." *Id.* Finally, Defendants again stated that they did not want to meet and confer regarding the schedule in light of a soon-to-be-pending motion to stay at the Arizona Supreme Court, and therefore suggested a postponement to Wednesday, January 17. *Id.*

Richer objected to Defendants' sudden delay, noting that this was the second time Defendants were canceling an agreed-upon meet-and-confer at the last minute, and Defendants still had not provided a position on the Protective Order, ESI Stipulation, or Proposed Scheduling Order, despite having had the proposed documents for weeks. Declaration ¶ 34, Ex. 8. Nonetheless, Richer postponed further attempts to negotiate a schedule after the Arizona Supreme Court entered an administrative discovery stay on January 16 (three days before the parties' proposed schedule was due to this Court).

### 3. Richer's attempts to negotiate a Proposed Scheduling Order, ESI Stipulation, and Protective Order after the Arizona Supreme Court lifted its stay

The Arizona Supreme Court denied Defendants' petition for review and lifted its discovery stay on March 5. Although that stay was lifted nearly three weeks ago, however, Richer still has not made any progress with Defendants towards negotiating the schedule and protective order and starting discovery. And Richer has tried.

On March 11, Richer filed a Notice of Default because Defendants still had not answered the Complaint. Declaration ¶ 37. Under the Rules of Civil Procedure, those answers were due on December 29, 2023—ten days after this Court denied the motions to dismiss. And Defendants knew that they were in default—Richer alerted them to that fact in January and raised the possibility of filing an application for default. Yet, rather than answer (as required by the Rules), Defendants used the possibility of default proceedings to request a stay from the Arizona Supreme Court (*see* January 15, 2024 Motion to Stay (filed in CV-24-0008-PR) at 6).

That same day, Richer's counsel again provided Defendants with the Proposed Scheduling Order, ESI Stipulation, and Protective Order in an attempt to restart negotiations. Declaration ¶ 38, Ex. 9. Defendants did not respond. So Richer's counsel called La Sota on March 12, 2024 to yet again request Defendants' input on the case schedule. Declaration ¶ 39. On that call, La Sota agreed to have a conference call on March 15, 2024 at 9:00 a.m. to discuss the Proposed Scheduling Order. *Id.*

Although Defendants did not cancel that call—as they had with the two prior confirmed dates—they did not participate in a substantive meet-and-confer. Wright began

the March 15, 2024, call by stating that she was not prepared to discuss the case schedule or the draft proposals that Richer's counsel had recirculated four days earlier, and that she believed the purpose of the call was merely to discuss "the status of the case." Declaration ¶ 40. To avoid wasting time on the call in light of Wright's statement, both sides agreed to have a subsequent call on March 22, 2024 at 9:30 a.m. *Id.* ¶ 41. As part of that agreement, Defendants agreed to send over their proposed dates for a Proposed Scheduling Order by the end of business on Thursday, March 21, so that the parties would be able to discuss the proposal on March 22. *Id.* Defendants also agreed to email Richer's counsel by March 16 as to whether Defendants' counsel would be also prepared at the March 22 call to discuss the draft Protective Order and ESI Stipulation (which Richer's counsel had sent nearly four months earlier). *Id.* La Sota said the agreement to provide a counterproposal on the schedule in advance of the March 22 call was "in pen" (suggesting it was a firm commitment), and the agreement to provide comments on the ESI Stipulation and the protective order by the same date was "in pencil," pending confirmation from Defendants' counsel on March 16. *Id.* That agreement was memorialized in an email from Richer's counsel to Defendants' counsel shortly after the conference. *Id.* ¶ 42, Ex. 9.

Once again, Defendants wasted no time in breaking that agreement. Defendants never confirmed, as they had promised, whether they would be prepared to discuss the draft Protective Order and ESI Stipulation on March 22. Declaration ¶ 43. On March 19, having heard nothing, Richer's counsel followed up on the status of the ESI Stipulation and Protective Order, and again reminded Defendants that, per the parties' agreement, they needed to send over a proposed schedule on Thursday. *Id.*

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Defendants did not respond until Thursday afternoon. Yet rather than providing a proposed schedule, Defendants *yet again* unilaterally canceled the meet-and-confer at the last minute, noting that "we are not prepared to discuss the scheduling order, so there is no point in meeting tomorrow." Declaration ¶ 44, Ex. 9. Defendants based this fourth refusal to meet and confer on their need to file an answer and the supposed surprise of the Notice of Default (*id.*), neither of which were new developments. Richer had warned Defendants that they were in default in January, and had already filed the Notice of Default by the time Defendants agreed on March 15 to confer with Richer as to the schedule on March 22. Defendants again also refused to provide a position on the draft Protective Order and ESI Stipulation. *Id.*

**B. Argument**

Rule 16(h)(1)(E) provides that, in the absence of good cause, "the court—on motion or on its own—must enter such orders as are just, including, among others, any of the orders in Rule 37(b)(2)(A)(ii) through (vii), if a party or attorney . . . fails to participate in good faith in the preparation of a . . . Proposed Scheduling Order." Rule 16(h)(2) provides that, absent substantial justification, the Court shall award attorney's fees "in addition to or in place of any other sanction." Rule 16(d) requires this Court to set a scheduling conference if requested.

There is no cause—much less "good cause"—for Defendants' months-long delay and refusal to participate in the simple, routine litigation tasks of negotiating a scheduling order, a protective order, and an ESI stipulation. What should have been a simple process has instead taken months of effort by Richer's counsel, with nothing to show for it.

Defendants' bad faith is the only plausible explanation for that delay. Defendants have two different lawyers as counsel of record (three including the ASU First Amendment Clinic), and have represented that at least one other law firm is now participating in the case and reviewing the proposed documents drafted by Richer's counsel. Declaration ¶¶ 40, 44. Defendants' counsel have been in possession of those proposals since November 2023. But instead of negotiating over those documents in good faith, Defendants' counsel have repeatedly played a bait-and-switch game: agreeing to discuss the documents, making Richer's counsel prepare for and attend meet-and-confers, and then suddenly professing their inability to participate until some later date—at which point the cycle starts anew. And it strains credulity to think that a group of lawyers that has been able to file multiple full-length motions and briefs in courts at every level of the Arizona judiciary—often on an emergency basis—has somehow lacked the time over the same four months to provide even preliminary input on the Proposed Scheduling Order, ESI Stipulation, and Protective Order in the intervening period.

Nor can Defendants' conduct be justified by Richer's filing of the Notice of Default. For one, any claim by Defendants that they were surprised by the Notice of Default is spurious. The deadline for filing an answer is set by the Arizona Rules of Civil Procedure (not by Richer), and Defendants are responsible for either meeting that deadline or approaching Richer to negotiate a reasonable extension. Moreover, Richer had already provided Defendants with a courtesy notice in January that they were in default—a notice that they acknowledged, said they would investigate, and then used to bolster their request for the now-lifted stay at the Arizona Supreme Court. *See* January 15, 2024 Motion to Stay

(filed in CV-24-0008-PR) at 6; Declaration ¶¶ 30-31. And having provided one courtesy notice of the default, Richer was not required to provide another two months later—particularly given Defendants' dilatory conduct.

In short, what is happening here is obvious: Defendants are attempting to gain a litigation advantage by strategic non-compliance with the Arizona Rules of Civil Procedure. So the only question left for this Court should be the appropriate sanction to stop Defendants' gamesmanship. Richer suggests that three separate, well-targeted sanctions would be appropriate to move this litigation forward efficiently, stop Defendants from benefitting from their bad faith conduct, and deter future misconduct.

*First*, Richer requests the Court enter his Proposed Scheduling Order (attached hereto as Exhibit B) given Defendants' complete failure to cooperate in its preparation or negotiation despite every opportunity to do so. Such a sanction would be reasonable here, not least because Richer's proposed schedule follows this Court's model discovery schedule and proposes an entirely reasonable set of deadlines for this case that should be readily met by the parties, so long as Defendants begin to litigate this case in good faith. And awarding this sanction would not, of course, preclude this Court from altering that schedule based on an appropriate motion supported by good cause. As a result, it is well-tailored to the present procedural posture: It would immediately stop Defendants' stalling of the discovery process so that this action can proceed.

*Second*, Richer requests the Court enter his proposed Protective Order and ESI Stipulation that are attached as Exhibits C and D to this motion. As with Richer's proposed schedule, the Protective Order and ESI Stipulation are standard issue in civil litigation.

Moreover, Defendants have had months to weigh in on those documents, and at least some of their counsel have admitted they are unobjectionable, but Defendants have repeatedly refused to provide any comments if they did have concerns. And of course, both documents could likewise be modified in the future upon a showing of good cause.

*Third*, Richer requests that this Court award monetary sanctions pursuant to Rule 16(h) against Wright and La Sota and/or Defendants themselves for the time Richer's counsel spent preparing for and attending the meet-and-confer on March 15 where (1) Wright and La Sota were entirely unprepared to confer on the subjects La Sota had agreed to discuss, and (2) Wright and La Sota immediately breached the agreement to prepare for and hold a meet-and-confer on at least the proposed schedule one week later on March 22. Although such a sanction represents only a small fraction of the time, efforts, and resources that Richer has expended in trying to negotiate a schedule, Richer believes that it would deter future gamesmanship from counsel that frustrates the just, speedy, and inexpensive determination of this case.

*Finally*, if this Court does not yet resort to the above sanctions, Richer requests that the Court at the very least treat this motion as a request for a Scheduling Conference under Rule 16(d), and simultaneously require Defendants to provide this Court with their proposed schedule within five days of this motion. Richer would respectfully request that the Court schedule the conference as soon as is practicable, and that the Court include deadlines for Defendants to raise any objections to Richer's proposed ESI Stipulation and Protective Order so that they too can be resolved at the conference.

After having raised these issues with Defendants on at least five separate occasions with no success, Richer's counsel unfortunately has no other choice but to seek the intervention of this Court.

RESPECTFULLY SUBMITTED this 25th day of March, 2024.

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