

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

Case No.: CV 01-08477 MMM (RCx)

Date: March 28, 2002

Title: *Cano, et al. v. Davis, et al.*

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**DOCKET ENTRY**

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**PRESENT:**

**HONORABLE STEPHEN REINHARDT, UNITED STATES CIRCUIT JUDGE;  
HONORABLE CHRISTINA SNYDER, UNITED STATES DISTRICT JUDGE;  
HONORABLE MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE**

Anel Huerta  
Deputy Clerk

N/A  
Court Reporter

**Attorneys Present for Plaintiff(s):**  
None

**Attorneys Present for Defendant(s):**  
None

**PROCEEDINGS: Order Granting Motions To Quash Subpoenas Ad Testificandum And  
Duces Tecum Served On Congressmen Berman, Filner, And Sherman**

Pursuant to the stipulation of counsel, Local Rule 7-15 and Rule 78 of the Federal Rules of Civil Procedure, the court vacated the March 26, 2002 hearing on the motions of Congress Members Howard Berman, Brad Sherman and Bob Filner to quash the subpoenas ad testificandum and duces tecum served on them by plaintiffs, and found the matter suitable for decision without oral argument. Having considered the briefs submitted by counsel, the court grants the motions as set forth below.

On February 13, 2002, plaintiffs served a staff member in Congress Member Sherman's Woodland Hills office with subpoenas compelling him to appear for deposition and produce documents.<sup>1</sup> The subpoena ad testificandum noticed Sherman's deposition in Los Angeles on March 14, 2002, when Sherman was scheduled to be in Washington D.C.<sup>2</sup> The subpoena duces tecum required production by Sherman, his agents and staff of a broad range of documents

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<sup>1</sup>See Memorandum of Law In Support of motion to Quash Third Party Subpoenas to Congressman Brad Sherman ("Sherman Mot.") at 3:16-19.

<sup>2</sup>See *id.* at 4:34; Ex. A.

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regarding the 2000-2001 redistricting process.<sup>3</sup> On February 14, 2002, plaintiffs served subpoenas on Congress Member Berman's District Office in Mission Hills. While plaintiffs notified the parties that they planned to serve subpoenas on Congress Member Filner, such service has not been effected to date.<sup>4</sup>

"Exceptional circumstances" are necessary to compel discovery from high ranking government officials. See *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993) (per curiam) (holding that high ranking government officials "... 'should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.' ... [They] have greater duties and time constraints than other witnesses ...," quoting *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)). See also *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (affirming "a settled rule ... that 'exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted,'" quoting *In re Officer of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991)); *Kyle Engineering Company v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) ("Heads of government agencies are not normally subject to deposition").

Courts have articulated a variety of factors relevant in assessing whether exceptional circumstances are present. Among the factors courts examine is whether the high ranking official "possess information essential to [the] case which is not obtainable from another source . . . ." *In re United States (Reno)*, 197 F.3d 310, 314 (8th Cir. 1999) (citing *In re FDIC, supra*, 58 F.3d at 1062). The Eighth Circuit, in fact, has gone so far as to state that the party seeking discovery must "show an entitlement to the relief sought in the case." *In re United States (Reno), supra*, 197 F.3d at 314. See also *In re FDIC, supra*, 58 F.3d at 1062 (denying defendants the right to depose high ranking officials of the FDIC after the agency brought a declaratory relief action because there was not "a strong showing of bad faith or improper behavior" in the record, "notwithstanding Pacific Union's allegations of misconduct (including conspiracy and cover-up) and assertions of gross abuse of power by government agencies and officials").

Plaintiffs assert that the Congress Members possess evidence relevant to the California Legislature's intent in enacting the redistricting plan, and that such evidence is relevant both to their Fourteenth Amendment and Voting Rights Act claims. It is clear, however, that with respect to both species of claim, plaintiffs must, in addition to proving intent, also prove that the Legislature's redistricting plan had a discriminatory effect on Latino voters. See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) ("Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter"); *Davis*

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<sup>3</sup>See *id.* at 4:5-8; Ex. B.

<sup>4</sup>See Memorandum in Support of Motion of Congressmen Filner and Berman to Quash Subpoenas ("Berman/Filner Mot.") at 5:14-24. Neither the Berman nor the Sherman subpoena was properly served as required by Rule 45 of the Federal Rules of Civil Procedure.

v. *Bandemer*, 478 U.S. 109, 127 (1986) (to prevail on Fourteenth Amendment vote dilution claim, plaintiffs must prove intentional discrimination against an identifiable political group; and an actual discriminatory effect on that group); *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) (“Even where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result”).

The Senate defendants have filed motions for summary judgment asserting that plaintiffs cannot raise a triable issue of fact regarding the discriminatory effect of the redistricting plan in the challenged State Senate and Congressional districts. Defendants’ motions also challenge, *inter alia*, the legal merit of plaintiffs’ claim under *Shaw v. Reno*, 509 U.S. 630 (1993). The Congress Members argue that, until these motions are decided, and it is determined both that plaintiffs have adduced sufficient evidence of discriminatory effect to move beyond summary judgment, and that plaintiffs’ *Shaw* claim is legally tenable,<sup>5</sup> they cannot demonstrate that the Congress Members’ deposition testimony is “essential” to their case. They argue further that plaintiffs cannot make a sufficient showing of entitlement to relief on the merits to warrant compelling the discovery under the “exceptional circumstances” standard applicable to high ranking officials.

The Supreme Court has cautioned that district courts adjudicating legislative redistricting claims must be mindful of “the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff’s showing at various stages of litigation and determining whether to permit discovery or trial to proceed.” *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995). Coupled with the “exceptional circumstances” standard applicable to depositions and discovery requests served on high ranking government officials, *Miller* counsels that the present subpoenas be quashed until such time following disposition of defendants’ summary judgment motions as the court determines that discovery regarding issues of intent is appropriate.<sup>6</sup>

Initials of Deputy Clerk 

cc: **Counsel of record (or parties)**

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<sup>5</sup>Defendants have raised substantial questions as to whether the challenged districts are of the type that can be the subject of a successful *Shaw* claim. The court believes it prudent to resolve that legal issue before addressing the factual merits of the claim or authorizing discovery relevant to it.

<sup>6</sup>It is true, as plaintiffs note, that the court, in its order denying plaintiffs’ application for temporary restraining order, stated that it believed plaintiffs presented sufficiently serious questions to make the case a fair ground for litigation. The court also stated, however, that it could not conclude on the limited record before it that plaintiffs would probably succeed on the merits of their claims. It is precisely the limited nature of the temporary restraining order record that leads the court to conclude that any assessment as to whether the Congress Members’ testimony is “essential” should await resolution of the pending summary judgment motions.