UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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Roy Den Hollander,

Plaintiff on behalf of himself and all others similarly situated,

Docket No. 10 CV 9277 (LTS)(HBP)(ECF)

-against-

Members of the Board of Regents of the University of the State of New York, in their official and individual capacities;
Chancellor of the Board of Regents, Merryl H. Tisch, in her official and individual capacity;
New York State Commissioner of the Department of Education, David M. Steiner, in his official and individual capacity;
Acting President of the New York State Higher Education Services Corp., Elsa Magee, in her official and individual capacity;
U.S. Department of Education; and
U.S. Secretary of Education, Arne Duncan, in his official capacity;

Defendants.
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MEMORANDUM OF LAW IN OPPOSITION TO THE STATE AND U.S. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT BEFORE ANY DISCOVERY HAS TAKEN PLACE

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ARGUMENTS AGAINST GRANTING SUMMARY JUDGMENT

In deciding a motion for summary judgment, the record is reviewed in the light most favorable to the party opposing summary judgment, all ambiguities are resolved in favor of the opposing party, and all permissible inferences are drawn in that party's favor. *Stone v. City of Mount Vernon*, 118 F.3d 92, 93 (2d Cir. 1997); *Schwabenbauer v. Board of Education*, 667 F.2d 305, 313 (2d Cir. 1981). In this case, the opposing party is the Class Representative of the putative plaintiff class.

Class Representative's discovery requests

"Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." *Hellstrom v. U.S. Dep't of Veteran Affairs*, 201 F.3d 94, 97 (2d Cir. 2000). The Second Circuit has held "that summary judgment should only be granted if '*after discovery*, the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.'" *Id.* (internal quotation marks omitted)(alterations in original). The discovery conference under Fed. R. Civ. P. 26(f) has not yet been held, so there has been no discovery in this case. Summary judgment at this stage is therefore premature.

In addition, a number of material facts are lacking, which has required the Class Representative to request discovery before any summary judgment decision:

1. The flow of financing from Congressional appropriations that the United States Department of Education and its Secretary ("USDOE") provide to the University of the State of New York ("USNY") and are used to create and implement the Regents' master plans, policy statements, and action plans, in particular, the *Equity for Women, Regents Policy and Action Plan*, Opp. Stmt. Matl. Facts ¶ 13;

2. An expert's report denoting the tenets of Feminism, Opp. Stmt. Matl. Facts ¶ 20;

3. The source of the resources mandated by the New York State Legislature for the formulation and implementation of the Regents' master plans, policy statements, and action plans, Opp. Stmt. Matl. Facts ¶ 29;

4. Whether in approving curricula, the State considers the content of the courses included in the curricula, Opp. Stmt. Matl. Facts ¶ 52;

5. The amount of Bundy aid provided to Columbia University ("Columbia") that benefits its pervasively sectarian Institute for Women and Gender Studies ("IRWG") or, if this Court decides IRWG is not pervasively sectarian with regard to Feminism, then whether the Bundy aid is used for Feminist purposes or purely secular purposes at IRWG, Opp. Stmt. Matl. Facts ¶ 62;

6. The State claims that it does not review the content of courses in granting Bundy aid, which creates a genuine dispute necessitating the deposing of State officials who determine the granting of Bundy aid to see whether the State really turns a blind eye to course content in granting Bundy aid, Opp. Stmt. Matl. Facts ¶ 69;

7. The amount of federal awards from USDOE to Columbia that are received by IRWG and the use to which those awards are put, Opp. Stmt. Matl. Facts ¶ 72.

"Fed. R. Civ. P. 56(f) provides, as interpreted by court opinions, that when a party facing an adversary's motion for summary judgment reasonably advises the court that it needs discovery to be able to present facts needed to defend the motion, the court should defer decision of the motion until the party has had the opportunity to take discovery and rebut the motion." *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 386 (2d Cir. 2001).

In further support of discovery, the missing facts cited in numbers 1, 3, 4, 5, 6, and 7 are within the control of the defendants. "[A] party against which summary judgment is sought must be afforded a reasonable opportunity to elicit information within the control of his adversaries." *Jasco Tools, Inc. v. Dana Corp.*, 574 F.3d 129, 149-151 (2d Cir. 2009)(citation and internal quotes omitted).

The Class Representative in his Statement of Material Facts, which he signed under penalty of perjury, has requested discovery for the above missing material facts and to obtain an expert's opinion on the tenets of Feminism. As Judge Laura Taylor Swain held in *Holmes v.*

Lorch, 329 F. Supp. 2d 516, 529 (S.D.N.Y. 2004) by quoting *Dubai Islamic Bank v. Citibank, N.A.*, 126 F. Supp. 2d 659, 665 (S.D.N.Y. 2000)(internal citation and quotation marks omitted): "Rule 56(f) is a safeguard against premature grants of summary judgment and should be applied with a spirit of liberality." Even when a court believes any further discovery is unlikely to produce facts that will justify denying summary judgment, a court should not deny a continuance. *See Trend Export Funding Corp. v. Foreign Credit Ins. Assoc.*, 670 F. Supp. 480, 486-487 (S.D.N.Y. 1987)("Rule 56(f) is to be applied liberally by the courts."). That "spirit of liberality" supports this Court granting the Class Representative's discovery requests.

The discovery requested in the Class Representative's Statement of Material Facts will also sharpen the facts at issue and lead to a more accurate decision, since at this point in the case, a decision cannot be made without resolving factual disputes.

Intent Issue

When a party's state of mind or intent is at issue, summary judgment is ordinarily inappropriate. *Patrick v. Le Fevre*, 745 F.2d 153, 159 (2d Cir. 1984).

The State admits that "[t]he question to be answered in determining whether the challenged activities have a secular purpose is 'whether government's actual purpose is to endorse or disapprove of religion.'" (State Memo. p. 17, citing *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987)). A synonym for "intent" is "purpose." *Webster's New World Roget*, ed. 1999. Summary judgment, therefore, is inappropriate for determining the State's purpose in aiding the religion Feminism.

USDOE also admitted in its *Den Hollander I* motion to dismiss that "[W]ith regard to the 'establishment' component of the Establishment Clause, the relevant inquiry is whether the Government's intent … is to 'establish' the particular religion in question." (USDOE Memo. p.

18, which it incorporated into this proceeding by its Letter to Dismiss, at p. 2 n.3). Summary judgment, therefore, is also improper for determining USDOE's purpose in aiding the religion Feminism.

The Class Representative's state of mind presents a material fact for determining whether he has non-economic standing to bring an Establishment Clause claim. Non-economic standing requires that the Class Representative's contact with Feminist displays and communications involving Columbia made him uncomfortable and that he found them offensive. *Cooper v. United States Postal Serv.,* 577 F.3d 479, 491 (2009); *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101, 1108 (2d Cir. 1992). Summary judgment is therefore improper for determining the Class Representative's state of mind for standing purposes caused by contact with Feminism involving Columbia.

<u>Authenticity of State Documents</u>

The State documents submitted as exhibits B, C, D, H, J, K, L, M, N, O, and P in the Den Hollander Declaration in Opposition to the Defendants' original motions to dismiss are self-authenticating because they were acquired from various State Government websites. Fed. R. Evid. § 902(5).

<u>Verification of the Amended Complaint</u>

"A verified complaint is to be treated as an affidavit for summary judgment purposes, and therefore will be considered in determining whether material issues of fact exist, provided that it meets the other requirements for an affidavit under Rule 56(e). *See, e.g.*, Fed. R. Civ. P. 56(e) [now 56(c)(4)] (requiring affidavits to be made on personal knowledge, to set forth facts that would be admissible in evidence, and to demonstrate the affiant's competency to testify to the

matters in the affidavit)." *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995), *overruled in part on other grounds by Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The verified amended complaint in this proceeding can therefore be considered an affidavit except for those matters pleaded on "information and belief."

CONCLUSION

Summary judgment for the defendants is premature and inappropriate in this case because no discovery has been conducted, which leaves certain material facts missing, and the key material facts of the defendants' purposes in aiding religion are normally reserved for the jury.

Dated: New York, New York
June 18, 2011

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