THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, et al.,

Defendants.

No. 2:17-cv-00094-RAJ

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR LEAVE TO TAKE ADDITIONAL DEPOSITIONS

NOTE ON MOTION CALENDAR: October 2, 2020

Defendants represented in August 2020 that they "are not seeking to expand the number of depositions allowed per side" to depose any of the six individuals who responded to the class notice that have agreed to serve as witnesses in this case (hereinafter, the "notice responders"). Declaration of Nicholas Gellert ("Gellert Decl.") Ex. A (8/12/2020 email from Drew Brinkman). Within weeks of Plaintiffs relying on that clear representation, Defendants now seek relief in direct contradiction. This alone provides sufficient basis for the Court to deny Defendants' belated attempt to depose the notice responders.

Defendants' motion also should be denied because it is based on the premise that Defendants just learned that Plaintiffs desire to potentially call six notice responders as witnesses. This is simply not true. Defendants have known that Plaintiffs may want to have such individuals testify since at least November 2019. Defendants could have sought, but did

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not, to expand the number of depositions then. Rather, Defendants only first raised the issue in response to Plaintiffs requesting more depositions after Defendants belatedly identified witnesses in July 2020. Plaintiffs rejected Defendants' request for this *quid pro quo*—that Plaintiffs should only be granted leave for the additional depositions it requested if Defendants too got more depositions. Plaintiffs have consistently adhered to the Court's deadlines regarding disclosure of the notice responders. Giving Defendants more depositions would just reward them for their own tardy disclosures. Defendants have also failed to make any "particularized showing" as to why they require deposing any of the six notice responders. *Thykkuttathil v. Keese*, 294 F.R.D. 597, 603 (W.D. Wash. 2013). Therefore, the Court should reject Defendants' belated effort to further expand discovery and deny Defendants' motion.

BACKGROUND

A. Defendants Have Known Since November 2019 that Plaintiffs May Call Notice Responders as Witnesses, and Only First Raised Seeking Additional Depositions as a *Quid Pro Quo* to Plaintiffs Getting to Take Additional Depositions for Defendants' Late Disclosure of Witnesses.

Defendants have known for almost a year that Plaintiffs may include notice responders as potential witnesses. On November 29, 2019, Plaintiffs served Second Supplemental Initial Disclosures, which included notice to Defendants that Plaintiffs considered persons who responded to the class notice to have relevant testimonial information. Those Second Supplemental Initial Disclosures identified the following as a category of potential witnesses:

> 31. Class members who have responded to Plaintiffs' Class List posting.
>
> These individuals are likely to have discoverable information concerning their naturalization or adjustment of status applications.

Gellert Decl. Ex. C.

Very soon thereafter, on December 11, 2019, Plaintiffs sought permission from Defendants to allow Plaintiffs' counsel to interview persons that responded to the class notice, to ensure they were abiding by all applicable orders. *See* Declaration of Christine Sepe ¶ 7, Dkt. No. 310. On December 13, 2019, at Defendants' request, Plaintiffs provided a list of topics they

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wanted to cover at these interviews. *See id.* ¶¶ 11-12 and Ex B. One of the topics that Plaintiffs listed highlighted that Plaintiffs considered these notice responders might be witnesses in this case:

> 8. Would they be willing to be considered a potential witness in our litigation (where being a witness would result in the government being informed that they contacted us and were willing to testify about their situation).

Id., Ex. B.

Defendants refused Plaintiffs' request for the witness interviews, and Plaintiffs moved promptly to get the parties' dispute resolved, filing a motion on January 9, 2020. Dkt. No. 309. This motion was pending, therefore, before Defendants took a single deposition, and thus during the time when Defendants were evaluating what witnesses to depose. Defendants' opposition to the motion raised numerous arguments, but they did not complain about the impact on the number of depositions or raise the potential need for more depositions. Dkt. No. 325. Defendants similarly did not seek leave for more depositions when they learned on January 31, 2020 that Plaintiffs intended to disclose expert reports from as many as eleven witnesses, or when reports from nine experts were served on February 28, 2020. *See* Gellert Decl. ¶ 5.

The Court held a hearing on Plaintiffs' motion on May 14, 2020, and thereafter struck the motion and directed the parties to meet and confer to try to resolve the dispute. Dkt. No. 355. Those further negotiations successfully resulted in a stipulation for detailed protocols regarding Plaintiffs' interviews of notice responders, which was filed with the Court under seal on June 19, 2020 (Dkt. No. 369) and adopted as a Court order on June 23, 2020 (Dkt. No. 371). Notably, this is the only statement about depositions of the witnesses in that stipulated order:

> (n) Plaintiffs will not raise a timeliness objection to defendants deposing the six or fewer interviewees who are the subject of a further modification of the protective order, so long as all such depositions are completed within a month of the Court modifying the protective order.

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In other words, the stipulation says nothing regarding expanding the number of total depositions beyond ten. And, in fact, not once leading to this stipulated motion did Defendants ever suggest that they would want to so expand the number of depositions. Gellert Decl. ¶ 6.

On July 2, 2020, Defendants belatedly identified eight new witnesses, which resulted in more lengthy negotiations, and then motion practice, as to whether Plaintiffs should be given leave for additional depositions. Dkt. No. 397. In response to Plaintiffs' request for four additional depositions due to the belated disclosure of defense witnesses, Defendants, for the first time (on July 16, 2020), requested additional depositions. *See* Declaration of Nicholas Gellert ¶ 13 (Dkt. No. 398) (Defendants offered to allow Plaintiffs ***one*** additional deposition if Defendants could have additional depositions to depose ***any and all*** notice responders identified as trial witnesses). Plaintiffs refused this *quid pro quo* demand because, at all times, Plaintiffs' disclosures regarding the notice responders have been in accordance with the Court's orders and the parties' agreed-upon stipulations. And Defendants later acknowledged that they would have to depose any notice responders with their ten depositions permitted by the Federal Rules of Civil Procedure. *See* Gellert Decl. Ex. B (8/2/2020 email from Ethan Kanter) ("Defendants' selection of their 9th and 10th depositions" may include "one or more notice responders").

B. Defendants Have Known the Identity of the Notice Responder Witnesses Since July 15, 2020, and Even After that Disclosure, Defendants Confirmed that They Would Not Seek Additional Depositions.

Pursuant to the June 23, 2020, stipulated order that allowed Plaintiffs' counsel to conduct interviews of notice responders, Plaintiffs were obligated to advise Defendants by July 15, 2020, which interviewees Plaintiffs "would like to contact further or act as a witness in this case." Dkt. 371 at 3. Plaintiffs complied with this deadline, and on July 15, 2020, disclosed to Defendants the names and A#s of the notice responders. Gellert Decl. Ex. B (7/15/2020 email).

Defendants then had three weeks—until August 5, 2020—to advise if they would "object to plaintiffs' counsel having further contact with any particular interviewees identified by plaintiffs' counsel." Dkt. 371 at 3. Defendants represented that they needed this time to

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determine whether they thought it would pose an unacceptable risk if one or more of the identified individuals were pursued as a potential trial witness. Presumably, therefore, Defendants used this time to review file materials (*i.e.*, A-Files) about the witnesses and discussed the witnesses with knowledgeable individuals within USCIS or at other government agencies. On August 5, 2020, Defendants confirmed that they had no objection to further contact with the identified interviewees. Gellert Decl. Ex. A (8/5/2020 email from Drew Brinkman).

Pursuant to the stipulated order, the parties then had until August 12, 2020 to "file a stipulated motion to further modify the protective order, which would allow plaintiffs' counsel to contact the interviewees and ask them to serve as witnesses in the case." Dkt. 371 at 3. During the discussions on the draft of this filing, on August 7, 2020, Plaintiffs' counsel confirmed that they were aware that Defendants were potentially holding one of their ten depositions for one of the notice responder witnesses. Gellert Ex. A (8/7/2020 email from Sameer Ahmed) ("Defendants have indicated that they may want to use their 10th deposition on a notice responder, but first Plaintiffs will need time to determine which agree to serve as a witness in the case, as there is no reason (and we would object) to Defendants deposing a responder who has not so agreed."). Plaintiffs' counsel requested that they "be permitted up to three weeks from the Court's order granting the stipulated motion to notify Defendants which of the notice responders have agreed to serve as witnesses." *Id.* Defendants agreed and responded that they will not "notice any of the [notice responders] for depositions until you have notified us that they have agreed to serve as witnesses." Gellert Ex. A (8/11/2020 email from Drew Brinkman).[1]

However, on August 12, 2020, just hours before the parties' deadline to file a stipulated motion to modify the protective order, Defendants requested that the parties further clarify the

[1] The parties also agreed that "[n]either side will raise a timeliness objection if either party supplements their initial disclosures with evidence solely about the six or fewer interviewees who are the subject of a further modification of the protective order, so long as such supplement is provided no later than 30 days after the plaintiffs identify to defendants which of the six interviewees have agreed to serve as witnesses." Gellert Ex. A (8/12/2020 email from Heath Hyatt). Defendants represented that they "would be willing to proceed in this manner without filing a formal modification to Dkt. [3]71," and Plaintiffs agreed. *Id.* (8/11/2020 email from Drew Brinkman and 8/12/2020 email from Heath Hyatt).

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timing of any depositions of notice responders. Gellert Ex. A (8/12/2020 email from Drew Brinkman). Concerned that Defendants' intention was to expand the number of depositions to depose more than one notice responder, Plaintiffs immediately responded: "Are you seeking to expand the number of responders you plan to depose…? Please let [us] know if a brief phone call is in order to resolve this issue given the time of day." *Id.* (8/12/2020 email from Heath Hyatt). Defendants' counsel confirmed that they were not: "***We are not seeking to expand the number of depositions allowed per side.*** We are just clarifying the expected timing for the depositions of any notice responders." *Id.* (8/12/2020 email from Drew Brinkman) (emphasis added). Only after Defendants confirmed that they would not seek to expand the number of depositions—and in reliance on that representation—Plaintiffs then filed the parties' joint stipulation for order to modify the protective order. Gellert Decl. ¶ 7; *see* Dkts. 400, 401.

On August 24, 2020, the Court entered the stipulated order, which "permit[ed] Plaintiffs' counsel to communicate with the individuals listed in the stipulation through the pendency of this litigation." Dkt. 408. As agreed-upon by the parties, on September 14, 2020 (three weeks after August 24) Plaintiffs disclosed to Defendants the six notice responders who have agreed to serve as witnesses in this case. Gellert Decl. ¶ 8.[2]

ARGUMENT

A. Defendants Should Be Bound to Their Agreement Not "To Expand the Number of Depositions" to Depose the Notice Responders.

A party's failure to abide by representations and agreements made with the opposing party during the course of litigation demonstrates bad faith, and the Court may deny a party's request that contradicts a prior representation by that party. *See, e.g.*, *In re Bristol-Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 444 (D.N.J. 2002) (enforcing discovery agreement and stating that "[i]t is essential to our system of justice that lawyers and litigants, above all, abide by their

[2] Because by then Defendants had indicated that they might file this motion, Plaintiffs' counsel reminded Defendants of their prior representation that they would not seek to expand the number of depositions and advised Defendants that any effort to the contrary would be in contravention of that representation. *Id.*

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agreements and live up to their own expectations"); *Adams v. Austal, U.S.A., L.L.C.*, No. 08-0155-KD-N, 2010 U.S. Dist. LEXIS 151313, at *7 (S.D. Ala. Mar. 17, 2010) ("Defendant is bound by its attorney's discovery agreements."); *Alexander v. FBI*, 186 F.R.D. 144, 146 (D.D.C. 1999) (denying motion where party "clearly represented to opposing counsel" they would not pursue course of action); *Advocates for Individuals with Disabilities Found. Inc. v. Golden Rule Props. LLC*, No. CV-16-02413-PHX-GMS, 2016 U.S. Dist. LEXIS 153429, at *8-9 (D. Az. Nov. 4, 2016) (imposing sanctions on party due to their "manipulative bait-and-switch tactic" because it "evinces … bad faith") (quoting *Estate of Blas through Chargualaf v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986)); *cf. Antonenko v. Delos Prods.*, No. CV 17-4320-FMO (KSx), 2018 U.S. Dist. LEXIS 168313, at *17 (C.D. Cal. Sep. 28, 2018) ("[W]here the parties do not clearly indicate that they will be bound only by a written, formal agreement, out of court emails are sufficient to create an enforceable settlement agreement.").

Defendants clearly represented to Plaintiffs that they "are not seeking to expand the number of depositions allowed per side" to depose the notice responders. Gellert Ex. A. Because Plaintiffs were concerned that Defendants were aiming to expand the number of depositions, they only agreed to file the parties' joint stipulation after receiving confirmation that Defendants did not plan to expand the number of depositions. Therefore, Plaintiffs relied on Defendants' representation, and the Court should not permit their bad faith "bait-and-switch tactic" by now seeking additional depositions to depose the notice responders. If Plaintiffs knew that Defendants would now contradict their prior agreement, Plaintiffs would have ensured that the stipulated motion addressed this issue expressly. However, at the time, Defendants also represented that they wanted "to proceed in this manner without filing a formal modification" with the Court. Gellert Ex. A. Believing that Defendants would abide by their representation, Plaintiffs agreed that no formal modification was necessary. The Court should reject Defendants' bad faith conduct and deny their motion.

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B. Defendants' Motion is Untimely.

The Court should also deny Defendant's motion because it is untimely. According to the case schedule, the deadline to file discovery-related motions was January 2, 2020. Dkt. 305 at 2. Although the parties agreed to extend some of the deadlines in the case schedule for specific reasons (including to take depositions and address Defendants' purported errors in CARRP-related data), *see* Dkt. 410 at 2, Defendants could have sought leave to depose the notice responders within the Court-ordered deadline, but they failed to do so. The Court recently denied Plaintiffs' attempt to file subpoenas for this very reason. *See* Dkt. 392 at 3 (denying "Plaintiff's request to subpoena third agencies as untimely" because "[t]he deadlines set by the Court have passed and it will not revisit that topic").

Defendants have known since November 2019 that Plaintiffs sought notice responders as potential witnesses. Defendants were sufficiently on notice of the nature of the witnesses that they could have sought leave for additional depositions in November 2019, or during the subsequent motion practice regarding the notice responder issue in January 2020. *See* Dkt. 325. They elected not to do so.

Defendants claim that "Plaintiffs only recently disclosed each of these six individuals as potential witnesses." Dkt. 414 at 4. This is disingenuous and incorrect. Plaintiffs could not previously confirm the identities of the notice responders earlier because Defendants strenuously objected to Plaintiffs having any communication with any notice responder under the Court's protective order. It was only after the parties agreed to and the Court entered two stipulations, dated June 23, 2020 (Dkt. 371) and August 24, 2020 (Dkt. 408), that allowed Plaintiffs to communicate with the six notice responders without restrictions and confirm their willingness to serve as witnesses in this case.

Pursuant to the parties' first stipulation, Plaintiffs disclosed the actual identities of the individual potential witnesses on July 15, 2020. Again, Defendants could have sought leave then for additional depositions. They elected not to do so. Instead, Defendants represented to

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Plaintiffs that they were satisfied with not expanding the number of depositions. Tellingly, nowhere in Defendants' motion do they make any argument demonstrating a need to depose any particular notice responder after their identities were disclosed to Defendants. This is further proof that Defendants could have filed their motion without receiving any of the identities of the notice responders who have confirmed being witnesses, but they simply failed to do so.

C. Defendants' Request Is Not Analogous to Plaintiffs' Request for Additional Depositions.

While Defendants argue that the Court should grant their motion because the Court recently granted Plaintiffs' request to conduct four additional depositions, *see* Dkt. 410 at 3, the two motions are not analogous. Plaintiffs moved to strike Defendants' belated disclosure of witnesses. Plaintiffs only offered that if the witnesses were to be allowed, Plaintiffs should get leave to take additional depositions as mitigation. The Court agreed and held that "this remedy will mitigate harm and prejudice to Plaintiffs" by Defendants' belated disclosures. *Id.*

In an apparent attempt to get Plaintiffs to drop their demand for this alternative relief, Defendants offered to allow Plaintiffs to take one more deposition if Defendants could have six more depositions. Because the situations were not analogous, Plaintiffs rejected Defendants' proposal.

Unlike Defendants, Plaintiffs did not belatedly identify witnesses. To the contrary, Plaintiffs told Defendants on November 29, 2019, that they might call notice responders as witnesses, and they thereafter worked promptly and diligently to get necessary approval from Defendants and the Court to be allowed to pursue that course. In disclosing the six notice responders as witnesses, Plaintiffs never violated any deadline set by the Court or agreed to by the parties.

Defendants complain that they have not been able to depose all trial witnesses and they "should have an opportunity to learn their anticipated testimony." Dkt. 414 at 4. But, without more, courts have repeatedly rejected that argument as insufficient to obtain additional

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depositions under Fed. R. Civ. P. 30(a)(2). Defendants' "assertion that [they] should not have to face trial witnesses and declarants without having first deposed them does not amount to a particularized showing as contemplated by the FRCP." *Dowkin v. Honolulu Police Dep't*, No. 10-00087 SOM-RLP, 2012 U.S. Dist. LEXIS 206050, at *8-9 (D. Haw. Sep. 28, 2012); *see also Thykkuttathil v. Keese*, 294 F.R.D. 597, 600 (W.D. Wash. 2013) (holding that defendants have "not met [their] burden of justifying the necessity of additional depositions" even though it "would bar defendants from taking the deposition of all but one lay witness out of the thirty disclosed by plaintiffs and from taking the depositions of two of the nine experts disclosed by plaintiffs"); *Lloyd v. Valley Forge Life Ins. Co.*, No. C06-5325 FDB, 2007 US. Dist. LEXIS 40526 at *7 (W.D. Wash. Mar. 23, 2007) ("The number of potential witnesses does not justify deposing everyone.").

Indeed, in this case, both parties face the reality that not all potential trial witnesses will be deposed. Defendants have identified, on their various witness disclosures, a total of 28 fact witnesses that they control and two expert witnesses. Gellert Decl. ¶ 9. Even with the four additional depositions the Court allowed as remedy for Defendants' late witness disclosure, Plaintiffs will not be able to depose more than half of these potential trial witnesses. As a result, Plaintiffs will be deposing only one of Defendants' two expert witnesses, and will not be able to depose more than a dozen Government witnesses. The rationale for Plaintiffs' motion to exclude witnesses was not that Plaintiffs should get to depose everyone, but that they should be entitled to use their choice of depositions with complete information as to who the trial witnesses are (or to timely seek more depositions if needed). This is where the situations differ. Defendants knew well before any depositions were taken that the notice responders might be witnesses.

Defendants' other arguments should similarly be rejected. Defendants argue that information about the notice responders is not "obtainable from another source" and Defendants "have no other means to learn their stories . . . and present responsive evidence." Dkt. 414 at 4. But all of the notice responders have applied for either adjustment of status or naturalization (or

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both), and, if called to testify, will testify about the unreasonable delays and/or pretextual denials of their immigration benefit applications and the significant harm those delays and denials have caused them and their families. Defendants have in their possession the A-Files for all of the notice responders, which contain all records and correspondence regarding their immigration benefit applications. Additionally, the attorney for two notice responders, Thomas Ragland, is an expert witness in this case. Mr. Ragland's report contained information about these notice responders. Defendants recently deposed Mr. Ragland and asked him many questions about those notice responders. Gellert Decl. ¶ 10. Additionally, for two notice responders, Defendants have already disclosed a potential rebuttal witness who adjudicated their adjustment-of-status applications. Declaration of Nicholas Gellert (Dkt. No. 398) Ex. 2 (Defendants' Amended Fifth Set of Supplemental Initial Disclosures). Therefore, information about the notice responders is obtainable from other sources (including sources within Defendants' own possession), and Defendants do not need to depose them for that reason either. *See Lloyd*, 2007 US. Dist. LEXIS 40526 at *7-8 ("[W]ithout a showing that alternative means of discovery have been exhausted, the Court is unwilling to expand the number of depositions beyond the allotted ten."); *Dowkin*, 2012 U.S. Dist. LEXIS 206050, at *9 (denying motion for additional depositions because party "has not presented any evidence demonstrating that she has exhausted less expensive and burdensome means of discovery before resorting to a request for relief from the Court").

Defendants also argue they would like to depose the notice responders to "be able establish that these witnesses should be excluded at trial because they have no personal knowledge of how CARRP operates" or "do not have any personal knowledge that might be helpful to the Court in reaching a decision as to whether CARRP is unlawful as to the class as a whole." Dkt. 414 at 6. But the Court has already rejected this argument. *See, e.g.*, Dkt. 98 at 3 (holding that "information" pertaining to unnamed class members "is relevant" to Plaintiffs' claims); Dkt. 183 at 3 (permitting Plaintiffs' counsel to obtain "information about particular unnamed class members to develop evidence for use in their case").

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D. Plaintiffs Will Be Prejudiced by the Relief Defendants' Seek.

Finally, Defendants erroneously claim that deposing the six notice responders will place a "minimal burden" on Plaintiffs. Dkt. 414 at 5. That is incorrect. Defendants essentially argue that it is only fair that they get more depositions since the Court has allowed Plaintiffs more depositions. That was not the remedy that Plaintiffs sought. Depositions are time-consuming and expensive. Plaintiffs' preference was that Defendants' belated witnesses be struck, but they felt that they had to offer additional depositions as an alternative remedy, and that is what the Court's order allows. The relief Defendants seek here would compound the injury Plaintiffs have incurred due to Defendants' delinquent witness disclosures. Or, considered differently, Defendants would effectively be rewarded for their delinquency.

If the Court were to order the relief that Defendants seek, Plaintiffs would be forced to expend significant time and resources to prepare for and defend six additional depositions (even more than the four additional depositions that Plaintiffs received for Defendants' belated disclosure). Moreover, the additional depositions would also significantly prejudice the six notice responders who agreed to serve as witnesses in part based on Defendants' prior representation that they would not seek to expand the number of depositions to depose all of them.

In addition, as recognized in the recently filed Joint Status Report, the additional depositions Defendants seek would endanger the newly agreed and ordered case schedule. The parties would have to spend more resources renegotiating a briefing schedule that works around the holidays, with the end result of a potential delay of dispositive motions by another one or two months.

CONCLUSION

For each of these reasons, Plaintiffs respectfully request that the Court deny Defendants' motion.

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