

First, Plaintiffs' opposition contains numerous omissions, misrepresentations, and exaggerations of the procedural facts in this case.¹ Plaintiffs suggest that these skewed facts support their request that the subject stay extend for only three days beyond the ruling of the District Court on Defendants' Objection to the March 14 Order. But the only fact of real relevance to Defendants' motion is Plaintiffs' failure to divulge during the meet and confer their intent to consent to the stay but request the imposition of additional conditions. The parties conferred as required by the Local Rules on March 20, 2019. During that conference, Plaintiffs asked Defendants to commit to produce documents by a "date certain," and represented that they intended to file a motion requiring compliance by that date. Defendants informed Plaintiffs that they intended to file objections to the Order, and that they would need to seek to stay compliance with the Magistrate Judge's March 14 Order. The parties agreed that Defendants would move to stay and Plaintiffs informed Defendants that they would oppose that motion.

At no time between the parties' conference and Plaintiffs' filing of their "limited opposition" did Plaintiffs inform Defendants that they would consent to the requested stay with conditions or propose any restrictions on the requested stay (including those described in the opposition). Unfortunately, this is not the first time Plaintiffs have failed to raise issues during the meet and confer process. *See* Dkt. 93 at 16-17 (explaining Plaintiffs' failure to meet and confer in an earlier discovery dispute). Because Plaintiffs did not comply with their obligations, the parties were deprived of any opportunity to meaningfully negotiate the terms of a stay agreeable to both sides and this motion is now, perhaps unnecessarily, before the Court. For this

¹ Defendants generally dispute Plaintiffs' recitation of the facts and in no way waive their right to challenge these assertions if it becomes necessary later in the case. However, because Plaintiffs have now consented to Defendants' request in the motion at issue, Defendants see no need to burden the Court with a point-by-point refutation in this reply.

reason alone, the Court should deny the relief Plaintiffs seek in their “limited opposition.” *See Kolon Indus., Inc. v. E.I. Dupont De Nemours & Co.*, No. 3:11CV622, 2012 WL 12894840, at *3-4 (E.D. Va. Feb. 23, 2012); *Rainey v. Anderson*, No. 17CV444, 2018 WL 3636596, at *3 (E.D. Va. Apr. 11, 2018).

Plaintiffs next attempt to support their requested restrictions with accusations that government counsel has not been candid with the Court. Plaintiffs base this claim on the fact that government counsel divulged to the Court that one of the records submitted *in camera* is at issue in several other cases involving different claims. Plaintiffs assert that government counsel has breached an ethical duty by not providing further information about those cases. First, Plaintiffs’ allegations are simply untrue, as the facts which they allege Defendants to have concealed from the Court were discussed in detail by the parties at the hearing on February 22, 2019. *See* Feb. 22, 2019 Hearing Trans., 4:22-9:21. Second, the cases referenced by Plaintiffs—*Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017), and *Stone v. Trump*, No. CV GLR-17-2459, 2018 WL 6305131 (D. Md. Nov. 30, 2018)—are not “related cases” to the instant matter in the manner in which that term is used in district court litigation. *See, e.g., Terry v. Walker*, 369 F. Supp. 2d 818 (W.D. Va. 2005). The distinction is particularly clear here because an actual related case, *Roe v. Shanahan*, concerning similar issues and involving some of the same parties, has been effectively consolidated with this matter.

Thus, at bottom, Plaintiffs’ accusation is that Defendants lacked candor because Defense counsel actually revealed to the Court additional information about *different* cases brought in different courts, alleging different claims against different policies. In addition, Plaintiffs’ opposition notes—only after making this sensationalized allegation—that the deliberative process rulings in these other cases are stayed pending the final decision of the Ninth Circuit on

the writ of mandamus concerning the motion to compel documents in *Karnoski*. Therefore, even if the decisions in these cases were relevant, they are not final and should not be relied upon as guidance by this Court. Plaintiffs' hyperbole and misdirection clearly demonstrates the weakness in their substantive position.

As for the requested stay conditions themselves, Plaintiffs do not explain why it is necessary to substitute an extremely restrictive three days for the Court's already brief eleven-day compliance period. E.D. Va. L. R. 37(C). Moreover, the Local Rules contemplate that the eleven-day period will run from the "order on the motion, unless otherwise ordered by the Court." *Id.* The objection considered by the District Court will in effect be the discovery motion contemplated by the rule, and the rule's eleven-day compliance period would apply unless otherwise ordered by the District Court. The proposed three-day limitation would also be burdensome and prejudicial on Defendants and would deprive them of a meaningful opportunity to pursue a further appeal if necessary. Plaintiffs admit in their opposition the necessity of the stay to permit Defendants a meaningful opportunity to take their objection to the District Court. The same reasoning applies to any further challenge Defendants might pursue in the event of an adverse ruling.

Similarly, Plaintiffs provide no legal basis for their request that the Court require Defendants to notify them of an intent to seek mandamus within five days of an order of the District Court adjudicating Defendants' objections. First, the requirements and restrictions applicable to petitions for writs of mandamus are within the sole authority of the Court of Appeals for the Fourth Circuit. Fed. R. App. P. 21(a); Fed. R. Civ. P. 81(b) (abolishing writs of mandamus as a form of relief in the district court). The Federal Rules of Appellate Procedure establish no time limits for initiating a petition for a writ of mandamus and the District Court has

Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0889
Facsimile: (202) 616-8460
robert.m.norway@usdoj.gov

Counsel for the Government

