

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

KENNETH L. MILLER, et al.,

Defendants.

No. 2:12-cv-184-WKS

**PLAINTIFFS' MOTION TO CLARIFY DISCOVERY SCHEDULE/ORDER AND
ALTERNATIVE MOTION TO MODIFY DISCOVERY SCHEDULE/ORDER**

Plaintiffs Janet Jenkins and Isabella Miller-Jenkins, through undersigned counsel, move for the Court to clarify the Discovery Schedule/Order, namely the deadline to complete discovery as modified by the Court's June 26, 2019 text-only order granting Plaintiffs' motion to modify the Discovery Schedule/Order. Plaintiffs and Defendants Philip Zodhates, Victoria Hyden, and Response Unlimited, Inc. disagree on whether the Court granted the six-week extension Plaintiffs originally sought—meaning that discovery closed in October—or the six-month extension to which Plaintiffs and all but three defendants agreed before the Court entered its order—meaning that discovery closes in March. In the alternative, if the Court indeed intended to grant only a six-week extension, Plaintiffs move to modify the Discovery Schedule/Order to conform to the agreed-upon six-month extension so that discovery closes on March 2, 2020.

PROCEDURAL BACKGROUND

On August 16, 2018, Plaintiffs filed a proposed Discovery Schedule/Order. *See* Pls.' Proposed Disc. Schedule/Order, ECF 320. Among other things, Plaintiffs proposed that "Parties

shall submit affirmative expert witness reports on or before four months before close of all discovery.” *Id.* at 4.

On August 29, 2018, the Court approved Plaintiffs’ proposed Discovery Schedule/Order and ordered it. *See* Order, ECF 329. The Court further ordered that “[c]ommencement of discovery is effective on August 29, 2018, and discovery shall be completed within one year of that date”—in other words, August 29, 2019. *Id.*

On April 29, 2019, Plaintiffs filed a motion to modify the Discovery Schedule/Order to extend the August 29, 2019 deadline to complete discovery by six weeks. *See* Pls.’ Mot. to Modify Disc. Schedule/Order, ECF 348. A six-week extension would have resulted in a discovery deadline of October 10, 2019, and a deadline to submit affirmative expert witness reports of June 10, 2019.

On May 13, 2019, Defendants Philip Zodiates, Victoria Hyden, and Response Unlimited, Inc. (“RUL”) (collectively, “RUL Defendants”) filed a response to Plaintiffs’ motion. *See* Resp. of Defs. Zodiates, Hyden and RUL to Pls.’ Mot. to Modify Disc. Schedule/Order Reflects Agreement of Pls.’ Counsel to Six-Month Extension (“RUL Defs.’ Resp.”), ECF 349. In that response, the RUL Defendants accurately represented to the Court that Plaintiffs and all defendants but Defendants Lisa Miller (who remains a fugitive), Kenneth Miller, and Timothy Miller had agreed “that a six-*month* extension of the discovery schedule is appropriate.” *Id.* at 1 (emphasis added). According to the RUL Defendants, “Plaintiffs’ mutual suggestion of an extension of six weeks . . . [was] unrealistic, and would only guarantee that the parties return to the Court with additional extension requests.” *Id.* at 2. A six-month extension would have

resulted in a discovery deadline of March 2, 2020,¹ and a deadline to submit affirmative expert witness reports of Friday, November 1, 2019.²

On June 26, 2019, the Court granted Plaintiffs' motion in a text-only order, stating only: "ORDER . . . granting [348] MOTION to the Discovery Schedule/Order." Order, ECF 355. The Court did not specify how it was modifying the Discovery Schedule/Order.

On October 28, 2019, Plaintiffs emailed the RUL Defendants a letter regarding the RUL Defendants' responses and objections to Plaintiffs' first set of requests for production. Soto Decl. ¶ 2. Among other things, Plaintiffs asked whether Zodhiates continues to assert his Fifth Amendment right against compulsory self-incrimination after the Supreme Court of the United States denied his petition for a writ of certiorari. *Id.* Plaintiffs also asked the RUL Defendants to explain their boilerplate objections that many of Plaintiffs' requests were vague, ambiguous, and overbroad and to explain how they nonetheless interpreted those requests to be able to determine that no responsive documents exist. *Id.*

On October 29, 2019, the Court denied the RUL Defendants' motion to compel Jenkins's answers to their contention interrogatories, holding that, "[w]hile Plaintiffs may have had some opportunity to develop contentions based on the related criminal cases, it would be more

¹ Six months after August 29, 2019, is Saturday, February 29, 2020. Under Rule 6(a)(1)(C), "if the last day is a Saturday . . . , the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." Rule 6(a)(5) provides that "[t]he 'next day' is determined by continuing to count forward when the period is measured after an event." The next day that is not a Saturday, Sunday, or legal holiday after Saturday, February 29, 2020, is Monday, March 2, 2020.

² Four months before March 2, 2020, is Saturday, November 2, 2019. Rule 6(a)(5) provides that "[t]he 'next day' is determined by continuing to count . . . backward when measured before an event." The "next day" that is not a Saturday, Sunday, or legal holiday before Saturday, November 2, 2019, is Friday, November 1, 2019.

appropriate to delay contention interrogatories until the completion of discovery, when their answers can reflect a fuller scope of discovered information.” Op. & Order at 10, ECF 394.

That same day, the Court also granted in part and denied in part Plaintiffs’ motion to compel Defendants Liberty Counsel, Inc. and Rena Lindevaldsen (“Liberty Counsel Defendants”), *see* Op. & Order, ECF 395, and denied Defendant Timothy Miller’s motion to dismiss, *see* Op. & Order, ECF 396.

On October 30, 2019, the RUL Defendants asked to schedule a phone call to discuss the issues raised in Plaintiffs’ letter. Soto Decl. ¶ 3. A call was scheduled for November 6, 2019.

On November 1, 2019, Plaintiffs served on all parties their affirmative expert witness reports. *See* Disc. Certificate, ECF 399. That same day, the RUL Defendants asked Plaintiffs to explain why the reports were timely and should not be stricken because the RUL Defendants had calculated that affirmative expert reports were due June 19, 2019.³ Soto Decl. ¶ 4.

Plaintiffs and the RUL Defendants conferred by telephone on November 6, 2019, for approximately thirty minutes. Soto Decl. ¶ 5. Plaintiffs understand the RUL Defendants’ position to be that, despite the agreement of Plaintiffs and all but three defendants that the deadline to complete discovery should be extended by six *months*, *see* RUL Defs.’ Resp., ECF 349, the Court’s June 26, 2019 text-only order had only granted Plaintiffs’ original request for only a six-*week* extension of that deadline. *Id.* ¶ 6. Therefore, according to the RUL Defendants, discovery had already closed (presumably on October 10, 2019), Plaintiffs’ affirmative expert reports are

³ Plaintiffs are unsure how the RUL Defendants calculated a June 19, 2019 deadline.

untimely, and the RUL Defendants are prepared to file motions for summary judgment by what they calculate to be the November 21, 2019 deadline.⁴ *Id.*

ARGUMENT

I. The Parties Need the Court's Clarification of the Discovery Schedule/Order

The parties need the Court's clear and unambiguous guidance on the current deadline to complete discovery. It is Plaintiffs' position that the Court granted the six-month extension to which they and all but three defendants agreed, meaning that discovery closes on March 2, 2020. The RUL Defendants' response to Plaintiffs' original motion for a six-week extension made unambiguously clear to the Court that Plaintiffs and all but three defendants had agreed to a six-month extension. RUL Defs.' Resp. at 1, ECF 349. They even included it in the title of their response: "REFLECTS AGREEMENT OF PLAINTIFFS' COUNSEL TO SIX-MONTH EXTENSION." *Id.* at 1, ECF 349.

Plaintiffs understand the RUL Defendants' position to be that, despite their own clear representation to the Court that the parties had stipulated to a longer extension, the Court nonetheless granted, without explanation, only a six-week extension. Their position that discovery closed on October 10, 2019, cannot be squared with the Court's order on October 29, 2019—nineteen days later—denying the RUL Defendants' motion to compel Jenkins's answers to their contention interrogatories because "it would be more appropriate to delay contention interrogatories until the completion of discovery, when their answers can reflect a fuller scope of

⁴ *See* Pls.' Proposed Disc. Schedule/Order ¶ 15, ECF 320 ("Motions, including summary judgment motions but excluding motions relating to the conduct of the trial, shall be filed on or before six weeks after close of all discovery.").

discovered information.” From the RUL Defendants’ perspective, discovery had long been completed.

II. If the Court Granted Only a Six-Week Extension, Good Cause Exists to Extend Discovery to March 2, 2020

If the Court indeed intended to grant only a six-week extension, good cause exists to extend the deadline to complete discovery to March 2, 2020—reflecting the agreed-upon six-month extension:

First, all but three of the parties had agreed to a six-month extension of discovery. Plaintiffs have in good faith operated under the assumption that the Court granted that extension. The Court’s text-only order was arguably ambiguous as to whether it granted Plaintiffs’ original request for a six-week extension or the six-month extension to which the parties stipulated before the Court decided the motion.

Second, Plaintiffs need additional time to acquire a “fuller scope of discovered information.” The Court just last week disposed of Plaintiffs’ motion to compel the Liberty Counsel Defendants, *see* Op. & Order, ECF 395, and Plaintiffs await their document production. The Court also just denied Timothy Miller’s motion to dismiss. *See* Op. & Order, ECF 396. He has not participated in discovery while his motion was pending, despite the Court’s local rule to the contrary, *see* L.R. 26(a)(3) (“Discovery . . . shall not be stayed during the pendency of a Fed. R. Civ. P. 12(b) or (c) motion.”), and despite not seeking or receiving a stay of discovery. To date, no party has noticed a deposition, and Plaintiffs intend to start noticing depositions forthwith.

Third, no party would be prejudiced by an extension of the deadline to complete discovery. To the contrary, an extension would allow them additional time to develop their defenses.

CONCLUSION

For these reasons, Plaintiffs' motion to clarify the Discovery Schedule/Order, namely the deadline to complete discovery as modified by the Court's June 26, 2019 text-only order granting Plaintiffs' motion to modify the Discovery Schedule/Order, should be granted, and the Court should enter an order specifying that discovery closes on March 2, 2020. In the alternative, Plaintiffs' alternative motion to modify the Discovery Schedule/Order should be granted, and the Court should enter an order extending the deadline to complete discovery to March 2, 2020.

November 7, 2019

Respectfully submitted.

/s/ Frank H. Langrock

Frank H. Langrock
Langrock Sperry & Wool, LLP
111 S. Pleasant Street
P.O. Drawer 351
Middlebury, Vermont 05753-0351
Phone: (802) 388-6356
Fax: (802) 388-6149
Email: flangrock@langrock.com

Sarah Star
Sarah Star, PL
P.O. Box 106
Middlebury, Vermont 05753
Phone: (802) 385-1023
Email: srs@sarahstarlaw.com

David C. Dinielli
Diego A. Soto
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104
Phone: (334) 956-8200
Fax: (334) 956-8481
Email: david.dinielli@splcenter.org
Email: diego.soto@splcenter.org

J. Tyler Clemons
Southern Poverty Law Center
201 St. Charles Avenue, Suite 2000

New Orleans, Louisiana 70170
Phone: (504) 526-1530
Fax: (504) 486-8947
Email: tyler.clemons@splcenter.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing document was served on the following counsel of record through the Court's CM/ECF system:

Brooks G. McArthur
Jarvis, McArthur & Williams, LLC
Counsel for Defendant Kenneth L. Miller

Horatio G. Mihet
Roger K. Gannam
Daniel Joseph Schmid
Liberty Counsel
*Counsel for Defendants Liberty Counsel, Inc. and
Rena M. Lindevaldsen*

Anthony R. Duprey
Neuse, Duprey & Putnam, PC
*Counsel for Defendants Liberty Counsel, Inc. and
Rena M. Lindevaldsen*

Norman C. Smith
Norman C. Smith, PC
Counsel for Defendant Linda M. Wall

Adam S. Hochschild
Hochschild Law Firm, LLC
Counsel for Defendant Linda M. Wall

Robert B. Hemley
Gravel & Shea PC
*Counsel for Defendants Philip Zodiates, Victoria
Hyden, and Response Unlimited, Inc.*

Michael J. Tierney
Wadleigh, Starr & Peters, PLLC
Counsel for Defendant Timothy D. Miller

November 7, 2019

/s/ Diego A. Soto _____
Diego A. Soto
Counsel for Plaintiffs

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No. 2:12-cv-184-WKS

**DECLARATION OF DIEGO A. SOTO
IN SUPPORT OF PLAINTIFFS' MOTION TO CLARIFY DISCOVERY
SCHEDULE/ORDER AND ALTERNATIVE MOTION TO MODIFY DISCOVERY
SCHEDULE/ORDER**

I, Diego A. Soto, declare under penalty of perjury that the following is true and correct:

1. I am a Staff Attorney at the Southern Poverty Law Center and represent Plaintiffs Janet Jenkins and Isabella Miller-Jenkins in this case.

2. On October 28, 2019, I emailed counsel for Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc. ("RUL") (collectively, "RUL Defendants") a letter regarding the RUL Defendants' responses and objections to Plaintiffs' first set of requests for production. Among other things, I asked whether Zodhiates continues to assert his Fifth Amendment right against compulsory self-incrimination after the Supreme Court of the United States denied his petition for a writ of certiorari. I also asked the RUL Defendants to explain their boilerplate objections that many of Plaintiffs' requests were vague, ambiguous, and overbroad and to explain how they nonetheless interpreted those requests to be able to determine that no responsive documents exist.

3. On October 30, 2019, counsel for the RUL Defendants asked to schedule a phone call to discuss the issues raised in my letter. A call was scheduled for November 6, 2019.

4. On November 1, 2019, in response to Plaintiffs' service of their affirmative expert witness reports, counsel for the RUL Defendants asked Plaintiffs to explain why the reports were timely and should not be stricken because the RUL Defendants had calculated that affirmative expert reports were due June 19, 2019.

5. On November 6, 2019, I conferred by telephone with counsel for the RUL Defendants in good faith to resolve, without court intervention, this dispute over the deadline to complete discovery. Present on the call for Plaintiffs were Emily Joselson, Esq., J. Tyler Clemons, Esq., Jessica Stone, and Claudia Huerta. Present on the call for the RUL Defendants were Robert Hemley, Esq. and Matthew Freedom, Esq. The call lasted approximately thirty minutes.

6. I understand the RUL Defendants to have taken the position on the call that the Court's June 26, 2019 text-only order had only granted Plaintiffs' original request for only a six-week extension of the deadline to complete discovery, that discovery therefore closed in October, and Plaintiffs' affirmative expert reports are untimely. I also understand the RUL Defendants to have represented that Hyden and RUL are prepared to file motions for summary judgment by what they calculate to be the November 21, 2019 deadline for such motions. Counsel for the RUL Defendants therefore suggested that Plaintiffs seek the Court's intervention.

Executed on November 7, 2019

/s/ Diego A. Soto

Diego A. Soto

Counsel for Plaintiffs