

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF VERMONT

_____)	
JANET JENKINS, ET AL.,)	
)	
Plaintiffs,)	
)	Docket No. 2:12-cv-00184
v.)	
)	
KENNETH L. MILLER, ET AL.,)	
)	
Defendants.)	
_____)	

**DEFENDANTS LIBERTY COUNSEL, INC. AND RENA M. LINDEVALDSEN’S
RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION TO “CLARIFY” THE
NUMBER OF DEPOSITIONS PLAINTIFF IS PERMITTED**

Pursuant to Local Rule 7 and 26, Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen (“Defendants”), by and through the undersigned counsel, hereby file their response in opposition to Plaintiff’s Motion to “Clarify” (meaning “expand”) the Number of Depositions Plaintiff is permitted to take. (Dkt. 432, “Motion”). In fact, Plaintiff’s Motion is not a motion to “clarify” anything, but is transparently a motion for leave to take depositions beyond those contemplated by the Federal Rules, established precedent, and common practice. Plaintiff seeks this unwarranted expansion without meeting her burden of establishing good cause, and without explaining why Plaintiff waited until the waning days of discovery to take **any** depositions, let alone the expanded number she now seeks to squeeze in a very short amount of discovery time remaining, to the prejudice of all parties. Plaintiff’s Motion should be denied, and the parties should be limited to ten depositions per side, as presumptively set by the Federal Rules.

LEGAL ARGUMENT

I. THE FEDERAL RULES, ESTABLISHED PRECEDENT AND COMMON PRACTICE ALL DICTATE THAT PARTIES ARE LIMITED TO TEN DEPOSITIONS PER SIDE.

Rule 30 limits all parties in litigation to **ten depositions total**. Indeed, “[a] party must obtain leave of court . . . if the parties have not stipulated to the deposition and the deposition would result in more than 10 depositions being taken.” Fed. R. Civ. P. 30(a)(2)(A)(i) (emphasis added). Established precedent likewise recognizes the ten-deposition limit. “The Federal Rules of Civil Procedure limit the number of depositions in any case to ten **per side**. A party may exceed this limit only with leave from the Court.” *Fortunati v. Campagne*, No. 1:07-CV-143, 2009 WL 1350406, *1 (D. Vt. May 12, 2009); *see also Scanlan v. Potter*, No. 1:05CV29991, 2006 WL 1207748, *1 (D. Vt. May 4, 2006) (noting the ten-deposition limit). The purpose of this rule “is to enable courts to maintain a tighter rein on the extent of discovery and to minimize the potential cost of wide-ranging discovery.” *Raba v. Suozzi*, No. CV 06-1109 (DRH)(AKT), 2006 WL 8435603, *1 (E.D.N.Y. Nov. 17, 2006).

The parties in this matter should be limited to the ten-deposition limit, and no considerations justify deviating from or expanding this limit. Jenkins claims that the circumstances in this matter warrant the depositions of each defendant and ten non-party depositions. (Motion at 1, 3, 5). This contention is incorrect for two reasons: (1) Jenkins cannot simply jump to depositions while bypassing other available discovery means and (2) the mere fact that a non-party witness might have relevant information is not sufficient to justify expanding the number of depositions.

First, though Jenkins believes that there are nine non-party witnesses who are likely to possess information relevant to this matter (Motion at 5), she utterly ignores the fact that **she has deployed no other discovery mechanisms for those witnesses prior to immediately jumping**

to depositions. Such a leap is directly contrary to the federal discovery rules. Indeed, it is well recognized that “[p]arties are often required to **exhaust less expensive and burdensome means** of discovery before resorting to a request for relief from Rule 30’s restrictions.” *Scanlan*, 2006 WL 1207748, at *1; *see also Whittingham v. Amherst Coll.*, 163 F.R.D. 170, 171 (D. Mass. 1995) (same). Indeed, the limits imposed by the Federal Rules were adopted “in order to encourage cost-effective discovery” that is judiciously engaged in by the litigants. *Whittingham*, 163 F.R.D. at 171. In fact, this court has declined to expand to the ten-deposition limit “without a showing that alternative means of discovery have been exhausted” prior to seeking such additional depositions. *Scanlan*, 2006 WL 1207748, at *1. Jenkins has not made such a showing here, and she cannot make such a showing because she has tried nothing else.

Second, Jenkins’ claim that the nine individual non-party witnesses are likely to have information relevant to this case is not dispositive of whether she should be allowed to depose everyone under sun. Indeed, “**the mere fact that individuals may have discoverable information does not necessarily entitle a party to depose each such individual.**” *Sigala v. Spikouris*, No. 00 CV 0983(ILG), 2002 WL 721078, *3 (E.D.N.Y. Mar. 7, 2002) (emphasis added). *See also Dixon v. Certaineed Corp.*, 164 F.R.D. 685, (D. Kan. 1996) (same).

The presumptive and time-tested limit of ten-depositions per side should be followed here.

II. PLAINTIFF IS NOT PREJUDICED BY HAVING TO ACT JUDICIOUSLY IN THE CONDUCT OF DISCOVERY, BUT THE PARTIES AND PROGRESS OF THIS CASE WOULD BE PREJUDICED FROM ALLOWING NUMEROUS DEPOSITIONS AT THE LAST MINUTE.

The purpose of the discovery rules is to ensure that litigants on both sides are operating on a level playing field where no party is unreasonably advantaged or disadvantaged. *See, e.g., Fed. Housing Fin. Auth. v. HSBC N. America Holdings, Inc.*, No. 11 Civ. 6189(DLC), 2014 WL 584300, *2 (S.D.N.Y. Feb. 14, 2014) (“Because of the American discovery process, all parties are

assumed to be litigating on a level playing field.”); *Gordon v. Target Corp.*, 318 F.R.D. 242, 246 (E.D.N.Y. 2016) (“The over-arching purpose of the discovery rules is to encourage the disclosure of information and materials to avoid unnecessary surprise and to level the playing field for both parties to litigation.”). It is worth noting that the federal rules contemplate the ten-deposition limit “**per side.**” *Fortunati*, 2009 WL 1350406, at *1.

Here, Plaintiff claims that the federal rule’s limit of ten deposition would be “woefully inadequate” because there are a total of nine Defendants. (Motion at 5). However, Plaintiff doesn’t explain how she can depose Defendants who are incarcerated or absent from the county. Nor does Plaintiff explain why she would need to depose several Defendants **as to which she has already moved for summary judgment.** (See dkt. 439). Clearly, Plaintiff has no intention or ability (or need) to depose all of the Defendants, but is seeking the ability to depose numerous other individuals in her fishing expedition.

If anything, the presumptive ten-deposition limit restricts Defendants much more than Plaintiff. Defendants too could come up with numerous individuals to depose. And, unlike Plaintiff, **Defendants must share the ten-deposition allotment among all of them**, while Plaintiff has no one else with whom she must share her allotted depositions. The number of Defendants therefore puts **Defendants**, not Plaintiff, at a distinct disadvantage. And yet, Defendants are making all efforts necessary to comply—and live with—the deposition limit imposed by the civil rules. Plaintiff should do likewise.

Moreover, this case has been ongoing for many years, and discovery has been ongoing for many, many months. **Plaintiff has yet to take a single deposition.** Even with the discovery extension provided to Plaintiff by this Court, discovery is now waning and fewer than two months will remain (after the current holidays). If Plaintiff wanted to expand the number of depositions

and take numerous deposition beyond the limit, she could and should have sought leave to do so many months ago, when it would have been less prejudicial to the parties and the progress of this case. Allowing Plaintiff to now depose the numerous individuals she belatedly seeks will almost certainly require yet another discovery extension, because it will be impossible to coordinate the schedules of numerous counsel, parties and non-party witnesses to accommodate the extraordinary number of depositions that Plaintiff now seeks to take in the limited remaining time. Plaintiff offers no explanation for her delay, and no good reason for belatedly changing the rules. Plaintiff's Motion should be denied.

Finally, Plaintiff and Defendants obviously have very different understandings of what the parties informally discussed and supposedly "stipulated" during their discovery conferences. Suffice it to say that Plaintiff and Defendants did not reach an agreement on the total number of depositions to be taken, and, as Plaintiff readily acknowledges, the Court did not address or resolve this issue in any of its prior orders. Accordingly, the ten-deposition limit of the civil rules still controls, and Plaintiff has not offered sufficient reason to overcome it. And, even if Defendants had agreed at the beginning of discovery, 19 months ago, to allow additional depositions – which they did not do – Defendants certainly did not agree to squeeze numerous depositions in the last two months of discovery, when counsel, parties and witness schedules make such an exercise all but impossible. Plaintiffs have no "stipulation" – written or oral – to present to this Court, such that would excuse their unexplained delay and allow the expansion of discovery they so belatedly seek.

In sum, Defendants are not asking for anything more than a level playing field in the conduct of discovery. "As the saying goes, 'what's good for the goose is good for the gander.'" *Caba v. Frankel*, No. 06 CV 4754(RJD)(RER), 2007 WL 1017649, *2 (E.D.N.Y. Mar. 30, 2007).

Defendants' position puts everyone on equal footing with no party suffering prejudice as a result of abiding by the presumptive ten-deposition limit. Plaintiff's feigned prejudice arguments should not be countenanced.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion should be denied. The parties should be limited to the ten-deposition per side limit imposed by the federal rules and common practice.

Respectfully submitted,

Anthony R. Duprey
NUESE, DUPREY, & PUTNAM
1 Cross Street
Middlebury, VT 05743
Phone: (802) 388-7966
Facsimile: (802) 388-9713
Email: anthony@ndp-law.com

/s/ Horatio G. Mihet
Horatio G. Mihet*
Roger K. Gannam*
Daniel J. Schmid*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Facsimile: (407) 875-0770
Email: hmihet@lc.org

*Attorneys for Defendants Liberty Counsel, Inc.
And Rena M. Lindevaldsen*

*Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 2019, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notice system.

/s/ Horatio G. Mihet
Horatio G. Mihet