

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
HUNTINGTON DIVISION

CHRISTOPHER FAIN, *et al.*, individually and  
on behalf of all others similarly situated,

*Plaintiffs,*

v.

WILLIAM CROUCH, *et al.*,

*Defendants.*

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS, JUDGE

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO AMEND  
SCHEDULING ORDER BY EXTENDING DEFENDANTS' EXPERT WITNESS  
DEADLINE**

Plaintiffs Christopher Fain, Shauntae Anderson and Leanne James, individually and on behalf of all others similarly situated, by and through counsel, hereby oppose Defendants' eleventh-hour motion to amend the Scheduling Order in this case by extending Defendants' expert witness disclosure deadline. Defendants' request to amend the Scheduling Order with a *full week* extension for their expert disclosure deadline—which has been in the case schedule since August 2021—should be denied, including because they fail to provide good cause, as is their burden. Defendants provide no reasonable basis for being unable to meet the deadline. Instead, Defendants' will deprive Plaintiffs of a full week from the agreed-upon month the schedule provides them for rebuttal. Plaintiffs are amenable to a two- or three-day extension of time from February 15 until February 17 or 18, provided that Plaintiffs receive a commensurate extension of their March 15 rebuttal report deadline to March 17 or March 18. But Defendants' request for a full additional week extension until February 21 is wholly unsupported, poses potential issues with deposition scheduling,<sup>1</sup> and should be denied.

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<sup>1</sup> The parties are finalizing the deposition schedule for the case, and Plaintiffs have offered

## FACTUAL BACKGROUND

1. On July 28, 2021, the parties jointly proposed a Scheduling Order which included an expert discovery deadline of April 29, 2022. *See* ECF No. 73. The jointly proposed Scheduling Order also included, *inter alia*, Plaintiffs' expert witness disclosure deadline of January 14, 2022; thirty days later, Defendants' expert witness disclosure deadline of February 15, 2022; and one month later, Plaintiffs' rebuttal disclosure deadline of March 15, 2022.

2. This Court approved the parties proposed Scheduling Order, without amendment to any of the jointly proposed deadlines, on August 6, 2021. *See* ECF No. 75.

3. On January 14, 2022, Plaintiffs timely served their expert disclosures of Dr. Dan Karasic and Dr. Loren Schechter. *See* ECF Nos. 182-183. Although Defendants describe the disclosures as totaling 138 pages in length, ECF No. 199 at 2, the disclosures total 46 pages excluding the required curriculum vitae and bibliography materials. Both Dr. Karasic and Dr. Schechter maintain active clinical and surgical practices, respectively, but timely prepared and served their expert disclosures under the long-standing deadline in the case schedule to do so.

4. Defendants waited to seek an extension until the February 15, 2022 deadline for their disclosure. They invoke nothing more than their expert's "clinical schedule." *See* ECF No. 199.

## ARGUMENT

Defendants' motion arrives at the eleventh hour and absent the showing of good cause they must make as the moving party under Local Rule 16.1(f). Further, Plaintiffs have good

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Defendants end-of-March dates for the deposition of Dr. Loren Schechter. Dr. Schechter has little to no availability in April because of long-standing obligations, which would not have posed any issue under the current schedule. Because Defendants seek to extend the schedule for disclosure, they should be prepared to depose Dr. Schechter promptly after any rebuttal report that he may serve.

cause to oppose Defendant's requested extension.

First, Defendants, just like Plaintiffs, have been aware of this deadline since they jointly proposed it and the Court approved it on August 6, 2021. ECF No. 75. Defendants thus have had more than six months to retain an expert, and the full month contemplated by the Scheduling Order to finalize that expert's disclosure after receiving Plaintiffs' disclosures. The 46 pages of written reports disclosed by Plaintiffs are reasonable for the scope of the case, and Defendants fail to explain why Dr. Levine could not have been timely retained over the last six months, and his report finalized over the last 30 days since Plaintiffs timely disclosed their reports—precisely as contemplated by the parties in the Case Schedule entered last August.

Defendants' joint motion describes a series of deadlines that have been extended in the case, but omits to mention that those joint requests by the parties *expressly* contemplated that the deadlines for expert disclosures would remain in place. *See* ECF No. 197 ¶ 1 (Defendant Haught's agreement that while the fact discovery cut-off should be stayed as to Plaintiff Leanne James' claims, "[t]his does not affect any other deadline in the case schedule for Defendant Haught and Ms. James, **including expert discovery**, and all other case schedule deadlines remain in effect") (emphasis added); ECF No. 193 ¶ 1 (Defendants Crouch, Beane, and the West Virginia Department of Health and Human Resources, Bureau for Medical Services agreement that extension of the fact discovery deadline to April 29, 2022 "will not affect any other deadline in the Scheduling Order"). Defendants supply no reason that they cannot honor the expert disclosure deadline that they clearly agreed to abide by in these other filings, as they cite nothing unusual or unexpected about their expert's schedule since they made those representations to Plaintiffs and the Court.

While it may well be true that Dr. Levine has a busy clinical practice—which also is true of Plaintiffs' experts—Defendants offer nothing resembling good cause for their inability to

finalize his report by the deadline. And they certainly do not demonstrate good cause for the *full week* they now request, particularly after representing that a few days would suffice. More importantly, they should not be rewarded for their inability to meet this long-standing deadline with an extension of their time that strips Plaintiffs of the agreed-upon time for rebuttal. Accordingly, Plaintiffs are amenable to a two- or three-day extension of time from February 15 until February 17 or 18, provided that Plaintiffs receive a commensurate extension of their March 15 rebuttal report deadline to March 17 or March 18.

### **CONCLUSION**

WHEREFORE, for the reasons stated herein Plaintiffs request the Court hereby deny Defendants' unsupported motion for an extension of time to February 21, 2022, to serve their expert witness disclosure. Plaintiffs request instead that Defendants be granted a two- or three-day extension of time from February 15 until February 17 or 18, and that Plaintiffs receive a commensurate extension of their March 15 rebuttal report deadline to March 17 or March 18.

\* \* \*

Dated: February 16, 2022

/s/ Walt Auvil

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### CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on February 16, 2022 with the Clerk of the Court using the CM/ECF system, which will send notification of filing, and a copy of the same, to the following CM/ECF participants:

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