

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION**

ASHLEY DIAMOND,

Plaintiff,

v.

TIMOTHY WARD, *et al.*,

Defendants.

No. 5:20-cv-00453-MTT

**PLAINTIFF’S REPLY IN SUPPORT OF HER MOTION TO AMEND SCHEDULING  
ORDER AND TO SUPPLEMENT EXPERT DISCLOSURES**

Plaintiff seeks a modest extension of time to complete discovery and cites justifications grounded in practicality, an inability, despite best efforts, to timely schedule all depositions and review voluminous discovery prior to the current discovery deadline, and based on her counsel’s staffing and health challenges. As Plaintiff explained at the April 14, 2022 Status Conference (“April 14 Hearing”), she is eager to proceed to trial and hoped to be able to conclude discovery by August 15, 2022. Unfortunately, her counsel has not been able to meet that goal. Plaintiff does not seek to extend discovery in scope, nor do her experts intend to alter their conclusions. She seeks merely to be provided an opportunity to update and supplement expert reports based on more than seven months of fact discovery since completed.

Defendants requested an additional 15-day extension of time at the April 15 Hearing and now concede that several depositions will need to be conducted outside of the current discovery deadline. Yet, inexplicably, Defendants now oppose *any* extension.<sup>1</sup> Defendants do not argue

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<sup>1</sup> The concession and agreement to conduct several depositions outside of discovery, which can only be done with leave of Court, but refusal to agree to extend discovery is baffling. As one court in this jurisdiction noted, “the present motion is couched as a request ‘for leave to conduct

that they would be prejudiced by the extension, only that—in their opinion—“it is not necessary.” (Dkt. 153 at 3). As set out below, the extension is not only necessary but narrow and fair to all parties. On the other hand, a denial will unfairly prejudice Plaintiff, based, in large part, on her counsel’s efforts to extend professional courtesy and act in accordance with the standards of conduct identified in the Local Rules.

Defendants identify three bases to support their opposition. Plaintiff responds to each with clarifying and additional information relevant to the disposition of this motion.

### **Expert Witness Supplemental Disclosure**

Defendants’ argument against allowing Plaintiff’s experts to supplement their reports is both unpersuasive and incorrect. Defendants complain that Plaintiff has not explained why supplementation is required. But she did and it should be obvious. Plaintiff’s expert reports were served on January 13, 2022. As of that time, only four depositions had been completed and only in the context of expedited discovery in preparation for the preliminary injunction hearing. Since the expert reports were served, a dozen depositions have been taken, with more to come, including statewide mental health director Dr. Javel Jackson.<sup>2</sup> Those depositions were of Plaintiff’s medical providers, GDC defendants, and GDC representatives and covered subjects

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... deposition outside of discovery period,’ the plaintiffs are essentially seeking an extension of the discovery deadline so that they may depose [Witness].” *Armitage v. Dolphin Plumbing & Mech., LLC*, No. 6:05-CV-890-ORL19KRS, 2006 WL 1679360, at \*1 (M.D. Fla. June 19, 2006).

<sup>2</sup> Dr. Jackson, whose testimony is particularly relevant to the medical care claims, was first noticed for a deposition on April 20, 2022, again on April 22, 2022 based on her availability, and the deposition was cancelled by her counsel on April 21, 2022. Plaintiff’s counsel has repeatedly requested Dr. Jackson’s availability and identified proposed dates. Plaintiff and all counsel tentatively scheduled her deposition for July 26, 2022. Her counsel relayed that he had not been able to reach her on July 22, 2022, and, accordingly, the July 26 deposition was cancelled, with an alternative date of August 5, 2022 offered and subsequently noticed. On July 28, 2022, Dr. Jackson’s counsel responded that she would not be available to be deposed until August 19, 2022 at the earliest.

on which Plaintiff's two experts opined. The testimony since provided—about the medical and mental health treatment Plaintiff has (or has not) received, about Defendants' notice of Plaintiff's condition and sexual assaults and harassment and treatment (or lack thereof) under their care, about PREA reporting and investigation (or lack thereof), and about how the facilities in which Plaintiff is housed are operated—is all relevant to their opinions and should at least be considered by the experts and incorporated as further bases for their opinions.<sup>3</sup> With respect to Plaintiff's gender dysphoria expert, Defendants have not timely supplemented Plaintiff's medical records since March, which may also be important as a consideration upon which Plaintiff's expert's opinion and testimony is based. Furthermore, Defendants do not assert, let alone explain how, they would be prejudiced by the requested supplementation. This is because they would not be prejudiced. Defendants might have some reason to complain if they had already deposed Plaintiff's experts, but neither has been deposed yet.

Finally, Defendants incorrectly assert that “the scheduling order did not contemplate supplementation of expert disclosures or reports.” (Dkt. 153 at 4). In fact, the original scheduling order in this case (Dkt. 47 at 5) provides with respect to expert witness reports “Any supplemental expert reports must be served on or before October 2, 2021 . . . No additional supplemental reports may be disclosed or provided after this date without leave of Court.” The original scheduling order provided for supplemental expert reports and for good reason. Under the original schedule, Plaintiff's expert reports were due on July 6, 2021. The schedule allowed for supplemental reports because it anticipated that additional fact discovery likely would take

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<sup>3</sup> Pursuant to Federal Rule of Evidence 703, an expert witness may rely on deposition testimony in forming her opinions. *See, e.g., In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litig.*, 978 F. Supp. 2d 1053, 1073 n.25 (C.D. Cal. 2013) (holding that “[expert] may rely on deposition transcripts from this case to form his opinions” and citing Fed. R. Evid. 703).

place in the months after initial reports were served and the supplementation date on October 2. The supplementation date was also set with sufficient time between it and the January 3, 2022 close of all discovery deadline for the experts to be deposed on their initial and supplemental expert reports. When the discovery schedule got amended several times awaiting completion of the production of Plaintiff's expedited discovery and for other good cause, the supplemental expert discovery deadline was not adjusted accordingly. That oversight, of course, is the Parties', but it does not change the underlying rationale for allowing supplemental expert reports as contemplated by the original schedule. And, again, reviving the supplemental expert report deadline and the modest extension requested by Plaintiff will result in no prejudice. Therefore, good cause exists to reset the date for supplemental expert reports and to extend the discovery schedule as requested.

### **Deposition Scheduling**

Defendants make several mischaracterizations requiring clarification and additional information regarding depositions is warranted. First, Plaintiff sought to complete written discovery prior to depositions. However, as identified in correspondence to the Court on April 12, 2022, Defendants repeatedly delayed production, claiming to be "working" on it on January 13, January 31, February 5, March 1, March 21, March 28 and April 12, 2022. Indeed, Defendants did not complete production of written discovery served on September 24, 2021 until the Court ensured that they would do so by a date certain at the April 14 Hearing. Defendants' production of discovery served on September 24, 2021 was not complete until April 25, 2022.

Secondly, as explained in the April 14 Hearing and to opposing counsel, Plaintiff sought to depose institutional witnesses as a pre-requisite to deposing fact witnesses. She served a subpoena identifying the topics on September 24, 2021. However, Defendants' counsel

repeatedly delayed identifying and scheduling those depositions based on his workload. Plaintiff's counsel extended professional courtesy in response to the repeated delays, with follow-up requests for responses on at least five occasions, finally serving a notice pursuant to Rule 30(b)(6) on April 8, 2022 for depositions to begin on April 20, 2022. Defendants were unable to identify 30(b)(6) witnesses before the noticed deposition date. As a result, and in order to conduct fact and 30(b)(6) depositions on the same day where possible, the Parties agreed to reschedule three of the ten noticed depositions, conducting five as noticed. Defendants identified 30(b)(6) witnesses on April 20, 2022, objecting to some of the topics and unilaterally narrowing some of Plaintiff's topics, requiring exchange of additional information and negotiation, including two meet and confer discussions. On June 2, 2022, Plaintiff's counsel was still attempting to confirm dates for nine fact witnesses and eight 30(b)(6) witnesses. The majority of those witnesses were not confirmed with respect to their availability until July 11, 2022, leaving at least 17 witnesses for Plaintiff's counsel to prepare for and depose within 15 days.

Accordingly, Defendants have thwarted Plaintiff's ability to sequence and schedule witnesses and delayed or otherwise slow-walked Plaintiff's discovery and scheduling of depositions. Whether by design or circumstance, Defendants have managed to put Plaintiff's counsel over a barrel as they are attempting to maintain a grueling deposition schedule that is undermining the undersigned's health and that does not account for the possibility of a witness or counsel (again) catching COVID-19 or otherwise encountering an unforeseen inability to attend a scheduled deposition, and which does not allow time to depose an institutional witness and two important fact witnesses, *including a defendant*. By agreeing only to conduct depositions outside of discovery, of course, Defendants foreclose the ability to request documents that may become

known in the course of the depositions. Defendants' position is simply unfair, as well as prejudicial.

Prejudice is also manifest where recent depositions have revealed the existence of an additional witness for which there are few, if any, available dates on the calendar to conduct the deposition, requiring four attorneys and the witness to align availability on the same day, let alone prepare. Also, the most recent 30(b)(6) deposition witness, identified as most knowledgeable or prepared to testify about the application of GDC Transgender Policy (SOP 220.09) ("Policy") to Plaintiff and similarly situated incarcerated people, did not know who made Plaintiff's housing decisions pursuant to the Policy, how many similarly situated people had requested a safety placement pursuant to the Policy, the disposition or application of the Policy based on those requests, or whether safety reassessment had been conducted pursuant to the Policy as to Plaintiff or other similarly situated individuals. Plaintiff has noticed the deficiency to Defendants' counsel and requested a more prepared witness to testify in response to the outstanding subpoena. Counsel are attempting to find time to meet and confer on this and another outstanding discovery dispute. Again, the problem lies in the lack of calendar days to negotiate resolutions and schedule depositions. Plaintiff's counsel has other litigation and professional obligations that they are working hard to manage as well.

In terms of the characterization in Defendants' brief that Plaintiff's counsel had 'set and canceled' depositions, other than those canceled based on delay in identifying the 30(b)(6) witnesses, only three depositions have needed to be rescheduled—Dr. Jackson, at Defense counsel's request "due to an issue [that] has arisen"; Mr. Betterson, due to a death in Plaintiff's counsel's immediate family; and Ms. Iverster, due to witness's family emergency. All other depositions have been conducted on the dates agreed upon. With respect to the complaints

regarding the number and length of depositions, nearly all of the information relevant to the claims is in the custody and control of Defendants and those employed by them. Plaintiff has identified essential witness, and conducted depositions efficiently, pursuant to agreements, the federal rules and this Court's orders. Although a few of the depositions lasted more than six hours, exclusive of breaks and defense counsel questioning, many lasted only a few hours and others ended well before the time allotted by the federal rules. Plaintiff cannot be faulted for ensuring facts and evidence relevant to the case are gathered.

### **Document Review**

Finally, responding to Defendants' argument concerning document production, the Parties agree that Defendants served more than 110,000 pages of documents on April 25, 2022.<sup>4</sup> The parties also agree that the documents were not originally produced as a load file and accordingly were not accessible to Plaintiff to review until June 2, 2022.<sup>5</sup> Defendants fail to reveal that, on August 3, 2021, they refused to agree to produce discovery data in load file formats at the outset of the case.<sup>6</sup> As a result, Plaintiff expended enormous time and effort attempting to extract the data and access the files as produced. On June 1, 2022, after exchanges

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<sup>4</sup> According to Defendants, the documents produced are data allegedly forensically extracted from a cellphone allegedly found in Plaintiff's cell (when she was not present) on November 1, 2021, after which Plaintiff would have had no access to the device allegedly found in her cell. *Even if* Plaintiff had access to the device at one point, the notion that an incarcerated person had the ability or obligation to forensically gather, download, print, store or otherwise capture every keystroke made on the device is absurd.

<sup>5</sup> Defendants claim not to have delayed discovery. In reality, in addition to completing discovery served in September 2021, they did not complete production of the discovery served in May 2021 until December 2021, another *seven month* delay.

<sup>6</sup> A load file is the file used to code, capture or extract data from ESI processing into a database. Plaintiff discussed the need to produce data as load files in the Rule 26(f) conference, and in subsequent discussions, in an effort to arrive at an agreement to exchange ESI.

of information regarding inability to access production served April 25 and April 27, 2022, Defendants' counsel's paralegal offered to send the data via load file. Plaintiff was finally able to begin review on June 2, 2022.<sup>7</sup>

In sum, Defendants produced discovery, identified 30(b)(6) witnesses, and confirmed availability of witnesses on their own timeline. Plaintiff should not be prejudiced for her counsel's good faith efforts to cooperate with Defendants' counsel and extend professional courtesy as to his workload that resulted in delayed receipt of documents and deposition scheduling.

For the foregoing reasons, Plaintiff's request for a short extension of time to complete discovery should be granted.

Respectfully submitted,

July 29, 2022.

/s/ Scott McCoy

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<sup>7</sup> An attorney working full-time on document review is able to review, at most, 8,000 pages of data per week. Counsel has been diligently reviewing documents while scheduling, preparing and conducting depositions. It is no understatement to assert that the undersigned counsel has been working 70 to 80 hours a week for most of the past two months to meet the current deadline, to the detriment of her own health.

*\* Admitted Pro Hac Vice*

*Counsel for Plaintiff.*

**CERTIFICATE OF SERVICE**

I hereby certify that, on this date, the foregoing document and all attachments were served on all counsel of record through the Court's CM/ECF system.

*/s/ Scott McCoy*

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*Counsel for Plaintiff Ashley Diamond*