The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, Plaintiffs, v. DONALD TRUMP, President of the United States, *et al.*, Defendants.	**No. 2:17-cv-00094-RAJ** **DEFENDANTS' MOTION FOR LEAVE TO TAKE ADDITIONAL DEPOSITIONS** **NOTE ON MOTION CALENDAR: October 2, 2020**

I. INTRODUCTION

On September 14, 2020, Plaintiffs disclosed the names of six new fact witnesses whom they may offer to testify in support of their claims. These individuals responded to Plaintiffs' class notice and have been the subject of extensive litigation and negotiation between the parties. *See* Dkt. Nos. 309, 325, 355, 369, 401. Defendants hereby move for leave to exceed the presumptive ten-deposition limit (which the Court has already expanded to fourteen for Plaintiffs) in order to depose these six newly-disclosed witnesses.

The parties have met and conferred on several occasions regarding this motion. During the meet and confer process concerning Plaintiffs' objections to Defendants' Fifth Supplemental Initial Disclosures, Defendants offered to allow Plaintiffs to depose some of Defendants' recently-disclosed rebuttal fact witnesses, *see* Dkt. No. 413, if Plaintiffs would allow Defendants

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to depose some of Plaintiffs' recently-disclosed fact witnesses in exchange. Plaintiffs rejected that proposal, and after the Court granted Plaintiffs' motion to depose four of Defendants' recently-disclosed fact witnesses, Plaintiffs confirmed their opposition to allowing Defendants an opportunity to depose any of Plaintiffs' recently-disclosed fact witnesses. Defendants now move to depose Plaintiffs' recently-disclosed fact witnesses, essentially requesting that the Court mandate the reasonable compromise that Defendants offered several weeks ago in an effort to avoid Court intervention.

II. BACKGROUND

At the outset of this case, Plaintiffs did not identify any potential witnesses that Defendants might have wanted to depose other than the five named plaintiffs. Based on that information, Defendants agreed to take no more than ten depositions. Dkt. No. 78 at 9. Since then, however, Plaintiffs' witness disclosures have sprawled considerably. As relevant here, on February 28, 2020, Plaintiffs disclosed nine individuals whom they intend to offer as expert witnesses under Fed. R. Civ. P. 702. Then, on September 14, 2020, Plaintiffs disclosed an additional six individuals who responded to Plaintiffs' class notice as potential fact witnesses.[1] Defendants hereby move for leave to exceed the presumptive ten-deposition limit in order to depose these six newly-disclosed witnesses.

[1] Plaintiffs initially disclosed these six individuals' names to Defendants on July 15, 2020. However, at that time, Plaintiffs were not sure if they were going to identify these individuals as witnesses. On September 14, 2020, Plaintiffs disclosed their intention to offer the six individuals as witnesses.

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III. ARGUMENT

A. Legal background

The Federal Rules of Civil Procedure presumptively limit the number of allowed depositions in a civil matter to ten per side, *see* Fed. R. Civ. P. 30(a)(2)(A), while giving trial courts broad authority to increase this number depending on the circumstances. Ordinarily, "[c]onsideration should . . . be given at the planning meeting of the parties under Rule 26(f) and at the time of a scheduling conference under Rule 16(b) as to enlargements or reductions in the number of depositions, eliminating the need for special motions." Fed. R .Civ. P. 30 Advisory Committee's Note (1993). However, as discovery progresses, it will sometimes unveil a need to allow depositions beyond those contemplated at the initial scheduling conference. *See Thykkuttathil v. Keese*, 294 F.R.D. 601, 602 (W.D. Wash. 2013). Upon such an event, Rule 30(a)(2) provides that the Court "must grant leave [to take additional depositions] to the extent consistent with Rule 26(b)(1) and (2)."

In considering whether to enlarge the number of allowable depositions, "the Court will consider whether: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." *Thykkuttathil*, 294 F.R.D. at 602. A party seeking to exceed the presumptive limit bears the burden of making a "particularized showing" of the

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need for additional depositions. *Id.* at 603. Parties should ordinarily exhaust their allowed number of depositions before making a request for additional depositions. *Id.*

B. The Court should grant Defendants' motion for leave to depose Plaintiffs' newly-disclosed witnesses.

Defendants' request for six additional depositions easily passes muster under the Federal Rules. First, Plaintiffs only recently disclosed each of these six individuals as potential witnesses whom Plaintiffs might offer to testify in support their claims. Thus, Defendants should have an opportunity to learn their anticipated testimony. *See U.S. ex rel. Schwartz v. TRW, Inc.*, 211 F.R.D. 388, 392 (C.D. Cal. 2002) ("Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute."). In fact, the Court granted Plaintiffs' motion for leave to depose Defendants' recently-disclosed fact witnesses in order to ensure that Plaintiffs are "not ambushed at trial." *See* Dkt. No. 413 at 3. By the same token, the Court should grant Defendants' motion for leave to depose Plaintiffs' recently-disclosed fact witnesses so that Defendants are "not ambushed at trial." *Id.*

Second, the discovery sought by Defendants is not unreasonably cumulative or duplicative, nor obtainable from another source. Plaintiffs have represented that they would like to offer these six witnesses to testify about their personal experiences. *See* Dkt. No. 309 at 11. In fact, in a prior motion, Plaintiffs described these witnesses' "stories" as "going directly to the core of Plaintiffs' case." *Id.* These witnesses' "stories" are obviously unique to each of them, and Defendants have no other means to learn their stories, test their credibility, or identify and present responsive evidence, unless Defendants can hear from the witnesses directly in advance of trial. Similarly, Defendants have not previously had an opportunity to learn these individuals'

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"stories" through discovery. As mentioned above, Plaintiffs disclosed the individuals as potential witnesses for the first time on September 14, 2020.

Third, the burden of permitting Defendants to take these six additional depositions does not outweigh the likely benefit. There is currently no trial date set, and the parties have acknowledged that they can negotiate a revised case schedule if the Court grants this motion. Dkt. No. 413 at 3. Furthermore, Plaintiffs claim that these six newly-identified witnesses' stories go "directly to the core of Plaintiffs' case." *See* Dkt. No. 309 at 11. If that is true, Defendants would suffer substantial prejudice if they are not permitted to learn what the witnesses have to say in advance of trial. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 862-63 (9th Cir. 2014) ("After disclosures of witnesses are made, a party can conduct discovery of what those witnesses would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context."). If these witnesses are as important to the case as Plaintiffs have claimed, then the Court should grant Defendants an opportunity to depose them. This case obviously raises substantial and important issues as it involves a nationwide challenge to a national-security-related vetting policy that has been in place at USCIS for over a decade. *See* Dkt. No. 47. In a case of this importance, the Court should accommodate Defendants' limited additional request for discovery given the minimal burden it will place on Plaintiffs and the Court. *See* Fed R. Civ. P. 26(b)(1) (noting that "the importance of the issues at stake in the litigation" is a factor in determining the proper scope of discovery).

Fourth, allowing these six depositions may ultimately benefit the Court if this case proceeds to trial. *See Martinez v. California*, 2008 WL 5101359 at *2 (E.D. Cal. Dec. 3, 2008) (additional depositions may be granted if they will "prevent delays at both the dispositive motion

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stage and trial"). By taking these depositions, Defendants may be able establish that these witnesses should be excluded at trial because they have no personal knowledge of how CARRP operates. Likewise, Defendants may be able to establish that the witnesses do not have any personal knowledge that might be helpful to the Court in reaching a decision as to whether CARRP is unlawful as to the class as a whole. *See* Dkt. No. 69 at 25 (stating that the Court's decision in this case "will not change based on facts particular to each class member"). Defendants may be able to establish that the witnesses' testimony is duplicative of other testimony, particularly the testimony of the named plaintiffs or Plaintiffs' purported "experts." Defendants may also be able to establish that the witnesses are not representative of the class, and that allowing their testimony at trial would simply cause delay and confuse the issues.

Finally, Defendants have exhausted their initial ten depositions, and Defendants have chosen those depositions with care so as not to burden Plaintiffs with unnecessary discovery demands. *See Barrow v. Greenville*, 202 F.R.D. 480, 483 (N.D. Tex. 2001) (a party seeking leave to exceed the ten-deposition limit should justify the ten depositions the party has already taken). Defendants have deposed three of the five named plaintiffs.[2] Defendants have also deposed (or will soon depose) seven of the nine individuals whom Plaintiffs have designated as expert witnesses under Fed. R. Civ. P. 702.[3] Defendants have made difficult choices about whom to depose, and to minimize the burdens of discovery, Defendants accept that they must

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[2] Defendants have deposed named plaintiffs Bengezi, Jihad, and Wagafe. Defendants noticed named plaintiff Ostadhassan for a deposition, but were informed by Plaintiffs' counsel that he no longer resides in the United States and is unable to appear for a deposition at this time. Defendants have reserved the right to take his deposition should he become available to testify. Defendants are not deposing named plaintiff Manzoor.

[3] Defendants have deposed Nermeen Arastu, Jeffrey Danik, Yliana Johansen-Mendez, and Marc Sageman. Defendants will also depose Jay Gairson and Thomas Ragland and have made arrangements with Plaintiffs' counsel to take those depositions in the next three weeks. At Plaintiffs' request, Defendants have agreed to allow Sean Kruskol to submit an updated report on or before September 21, 2020, at which time Defendants will decide whether to depose Mr. Kruskol or one of the other two witnesses whom Plaintiffs have designated as experts.

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conclude discovery without having had an opportunity to depose one of the named plaintiffs and two of the individuals whom Plaintiffs have designated as "expert" witnesses. However, Defendants believe that they will be unduly prejudiced if they are arbitrarily precluded from obtaining deposition testimony of these six fact witnesses, who were only recently identified by Plaintiffs, particularly given how important Plaintiffs have claimed their testimony is to their case.

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CONCLUSION

For the foregoing reasons, Defendants request that the Court grant Defendants' motion for leave to depose Plaintiffs' six newly-identified fact witnesses.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2020, I electronically served the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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