IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

	)	
	)	Master Docket Case No. 19-cv-01717
In re: WATTS COORDINATED	)	
PRETRIAL PROCEEDINGS	)	Judge Franklin U. Valderrama
	)	
	)	Magistrate Judge Sheila M. Finnegan
	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO MODIFY THE FACT DISCOVERY DEADLINE

Nearly eight years after Ben Baker and Clarissa Glenn filed the first of the cases that now make up the *Coordinated Pretrial Proceedings* ("Coordinated Proceedings"), it is time for fact discovery to end. There are more than 175 individual cases, only one of them is set for trial, and none in 2024. Plaintiffs have been pushing for trials, and Defendants have consistently pushed back. They have not advanced their own trial plan, and instead recently took the position that no trials should be scheduled when the Court told the parties to meet and confer about Plaintiffs' trial plan. Instead, it appears that they want to take endless discovery.

Two weeks ago, Defendants asked for a nine-month discovery extension to take "well over 100 depositions." Dkt. 606 at 5. The Court denied that request, and now Defendants are back asking the Court for six months to take 153 depositions. This is nearly twice as many depositions as they took in the first seven years of these cases, and more than one deposition every single business day during the proposed extension. Defendants also plan to conduct unspecified (and unfettered) written discovery during this proposed extension, something they did not even ask for when the Court denied their previous request for a discovery extension.

Nearly 300,000 pages of documents have been exchanged in the Coordinated Proceedings; almost 250 document subpoenas have been issued; the parties have responded to well over 400 sets of written discovery; and almost 200 depositions have been taken.[1] Until very recently, Defendants never suggested that they wanted or intended to take a significant number of additional depositions. Instead, they had indicated that they would move for some unidentified discovery extension because of the *Waddy* trial in state court. That trial is anticipated to last no more than two weeks. It was not until the status report that the parties filed in early November 2023 that the Defendants asked for a significantly longer discovery extension of nine months, untethered to the *Waddy* trial, to allow them to take more than 100 depositions. After the Court rejected that request, they now ask to take even more depositions in a slightly shorter (though completely unrealistic) timeframe, and they seek to serve unlimited additional written discovery. There is no justification for Defendants' latest request.

With limited exceptions, the Court should reject Defendants' request to modify the current discovery scheduling order. Plaintiffs do not oppose Defendants' request to depose the remaining test-case Plaintiffs and 404(b) witnesses who have not been deposed. Plaintiffs also do not oppose Defendants' request to take a limited number of additional depositions of the individuals listed on Exhibit 1 to this brief, as Defendants at least arguably made reasonable efforts to take those depositions during fact discovery. That list is approximately 30 people, and those depositions will undoubtedly require substantial resources to complete.[2]

[1] A relatively small number of these depositions have been taken under the *Waddy* caption in state court.

[2] Plaintiffs also agree to withdraw from their disclosure all line prosecutors from their clients' underlying convictions who have not yet been deposed, which takes away a full category of individuals who Defendants have asked to depose.

Plaintiffs oppose the rest of Defendants' request. Defendants have not even attempted to show the requisite good cause required to modify the current scheduling order to take 153 additional depositions. By Plaintiffs' count, Defendants have taken 83 depositions to date. They now ask to take nearly double that amount, and they claim that they will get it done in six months (or 133 business days). This is neither realistic nor justified. Plaintiffs made significant efforts to narrow their witness disclosures throughout the litigation, including cutting hundreds of witnesses this past spring (without a similar move from Defendants), and yet Defendants still did not actively pursue the vast of majority of the depositions that they now claim they need. Defendants also fail to provide any reason that would justify extending the deadline to serve written discovery, which has already passed.

In all lawsuits, parties need to make choices about what discovery to conduct. Plaintiffs made those choices in the Coordinated Proceedings: they deposed a significant number of witnesses but also decided that it would be reasonable to not take other depositions, such as police officers who the Defendants disclosed to testify about arrests that are not at issue in these cases. Plaintiffs made those choices under the assumption that there was a real discovery deadline in place and with the goal of getting these cases to trial. Plaintiffs assume that Defendants made similar choices by prioritizing the witnesses they wanted to depose and the written discovery they wanted to serve. The Court should not let the Defendants revisit their choices, or their failure to make such choices, at the tail-end of discovery. It is time to move on to the next phase of litigation. Doing so is consistent with Rule 1 of the Federal Rules of Civil Procedure because it will ensure as best as possible a just and speedy resolution of the test cases. It is also consistent with the current scheduling order that has fact discovery closing on December 18, and it is even consistent with Defendants' goal of keeping the test cases on one

track, as expert discovery will have to proceed in the Baker/Glenn case in the coming months to meet the June 10, 2024 deadline for Daubert motions in that case.

There is one more practical concern that comes with a further delay. Since filing their cases, ten of the Plaintiffs have passed away and had their estates substituted as parties in their cases. The Plaintiffs in the Coordinated Proceedings, like all other litigants, should be entitled to have their cases proceed expeditiously.

Defendants' request for a six-month discovery extension, which will almost surely be followed by another request when they fail to complete 150-plus depositions in 133 business days, will cause significant prejudice to Plaintiffs. Their request should be denied.

LEGAL STANDARD

"Scheduling orders and court-imposed deadlines matter." *Bowman v. Korte*, 962 F.3d 995, 998 (7th Cir. 2020). Federal Rule of Civil Procedure 16 governs the modification or amendment or scheduling orders. When a party seeks to modify a scheduling order, they must establish good cause. *Id*. The Seventh Circuit has explained "that good cause implies justification rather than excuse (negligence can be excused but not justified)." *Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 646 F.3d 401, 404 (7th Cir. 2011) (internal quotation marks omitted). "In making a Rule 16(b) good-cause determination, the primary consideration for district courts is the diligence of the party seeking amendment." *Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011). Courts must examine the diligence of the party seeking to extend time for discovery because one "the aims of Rule 16 [is] to prevent parties from delaying or procrastinating and to keep the case moving toward trial." *Id*. (internal quotation marks omitted).

ARGUMENT

Defendants have not shown good cause for the type of the extension they seek. In fact, they do not even acknowledge that good cause is required. Nor could Defendants meet that standard. Plaintiffs disclosed nearly all of the witnesses who Defendants want to depose long ago, and Defendants did not show reasonable diligence in seeking to depose the vast majority of them. Indeed, until shortly before filing this motion, Defendants had not indicated that they wanted to depose almost any of the witnesses they are now seeking an extension to depose. In fact, it appears that 15 of the people that Defendants want to depose have not even been disclosed by any party in the Coordinated Proceedings. Ex. 1 (listing individuals who Defendants want to depose but who were not disclosed in the litigation).[3] Plaintiffs address Defendants' specific requests below, but at the outset it is also worth noting that a number of the witnesses who Defendants claim that they want to depose have already been deposed.

I. Witnesses without contact information

Defendants seek to shift the blame for their delay in taking some of the depositions that they now apparently want to take by stating that Plaintiffs did not disclose contact information for 35 of the witnesses, but that complaint rings hollow. As an initial matter, Plaintiffs disclosed the contact information they had for witnesses, which is exactly what Rule 26 requires. When Plaintiffs had only a telephone number, they provided that number to Defendants. There is no evidence in the record that Defendants attempted to contact any of the witnesses for whom Plaintiffs provided a telephone number, and no evidence that Defendants tried to locate those

[3] Two of those individuals are current or former Assistant State's Attorneys (Nancy Adduci and Eric Sussman). Because Defendants are engaged in motion practice relating to the depositions of Assistant State's Attorneys, Plaintiffs do not oppose the request to depose those two individuals. It appears that Defendants sent a subpoena for the deposition of third-party Harold Seay on May 23, 2023, and therefore Plaintiffs do not oppose his deposition even though he also does not appear to have been disclosed by any party.

witnesses using that telephone number. Nor was there any indication until shortly before filing this motion that Defendants wanted to depose any of those individuals.

Plaintiffs also note that Defendants' chart showing witnesses for whom contact information was not provided is not entirely accurate. For example, Defendants contend that no contact information was provided for Willie Robinson, but he is a Plaintiff (now represented by the Flaxman firm) and potential 404(b) witness. As noted above, Plaintiffs do not oppose Defendants' request to complete the depositions of Plaintiffs or 404(b) witnesses. Defendants also say that Plaintiffs did not provide contact information for Lestor Boyd, but well before Defendants' motion was filed, Plaintiffs' counsel reminded defense counsel that Defendant City of Chicago (through COPA) interviewed Mr. Boyd at a Veterans Affairs hospital and produced a memorandum of that interview to all parties in the case. That memorandum listed Mr. Boyd's place of work and cell phone number. Ex. 2 (11/5/2023 email from S. Rauscher). Not only is there no evidence that Defendants sought to depose Mr. Boyd after receiving his contact information from COPA, but not taking his deposition would have been a reasonable choice given the existence of a written memorandum discussing his relevant knowledge.

In addition, at least three of the individuals who Defendants say they do not have contact information for are deceased, a fact that Plaintiffs informed Defendants of in interrogatory responses or through other means in the litigation. Compare Dkt. 614-1 at 10 (Defendants' proposed deposition list showing Penny Owens and Corey Owens) with Ex. 3 (Interrogatory answer noting that they are both deceased); Ex. 4 (Letter from EP to N. Adduci noting that Joyce Lawrence is deceased).

Moreover, Defendants themselves have disclosed a significant number of witnesses with no contact information. *See*, *e.g.*, Ex. 5 (Watts April 2, 2019 Disclosures in Coordinated

Proceedings); Ex. 6 (Watts March 2, 2018 Disclosures in White Sr.). And unlike Plaintiffs, it does not appear that Defendants have made efforts to update those disclosures or reduce any of those witnesses from their lists during the litigation. In fact, in Defendants' chart of the witnesses they ask to depose even though Plaintiffs did not disclose them, 11 of the proposed witnesses are listed with contact information as "Address Unknown." Dkt. 614-1 at 16-21.[4]

II. Witnesses disclosed as being available for contact through counsel

Next, Defendants ask to depose all of the witnesses who are disclosed and listed as being available for scheduling through Plaintiffs' counsel. As noted in the introduction, Plaintiffs do not oppose this request as to any remaining test-case Plaintiffs or 404(b) witnesses who Defendants have not yet deposed. Plaintiffs also do not oppose the request to the extent it is limited to witnesses who Defendants sought to depose earlier in the litigation, but that is a relatively small number. Those witnesses are listed on Exhibit 1. As to the remaining witnesses in this category, Defendants have not shown good cause for not seeking to depose them earlier in the litigation. Allowing those depositions now would run counter to Rule 1's goal of ensuring just and speedy resolution of cases and to Rule 16's goal of getting cases ready for trial expeditiously.

III. Other witnesses

Defendants acknowledge that they are seeking to depose approximately 25 witnesses who Plaintiffs did not disclose. As noted above, some of those witnesses have not been disclosed by *any* party, and it is difficult to see what relevant information they might have. Defendants' request for these depositions is a perfect example of how they are refusing to make reasonable litigation choices that would allow the parties to finish these cases. For example, Defendants

[4] One of those witnesses is Joyce Lawrence. As noted above, the letter attached as Exhibit 4 and previously provided to Defendants noted that she was deceased.

apparently seek to depose Plaintiff Milton Delaney's criminal defense attorney from a case that is unrelated to the one he is suing about here. Not only would that deposition almost certainly call for only privileged information, but it is extremely unlikely to yield any information that is relevant to this case. Defendants also seek to depose two-line prosecutors from Plaintiff Phillip Thomas' bench trial despite the fact that Plaintiff withdrew those witnesses. They also continue to seek the deposition of one of Ben Baker's sons, Gerard Baker, despite the fact that Plaintiffs withdrew him as a witness long ago. Before he was withdrawn, Gerard Baker was disclosed as a damages witness. Defendants likely want to depose him about Mr. Baker's 2017 arrest, which is unrelated to Ben Baker's lawsuit and completely unnecessary. And as noted above, Joyce Lawrence, who was disclosed by Defendants but not Plaintiffs, is deceased. The Court should deny Defendants' request to take the depositions in this category as well.

IV. Plaintiffs already made significant reductions to their witness disclosures, unlike Defendants, thus providing another reason that Defendants cannot meet the good cause standard

Finally, Plaintiffs also note that they made significant efforts to limit the number of witnesses disclosed in the test cases, precisely to avoid this exact scenario where Defendants come to Court asking to continue dragging out the Coordinated Proceedings. Most significantly, Plaintiffs removed hundreds of 404(b) witnesses from their disclosures earlier in the litigation, and they did so without demanding that Defendants make a similar reduction of their own 404(b) witnesses. This is despite the fact that Defendants have seemingly disclosed every police officer who was involved in any of Plaintiffs' arrests even if the arrests are completely unrelated to Plaintiffs' lawsuits, as well as a significant number of other current and former officers who do not appear to have any relevant testimony to provide. Ex. 5 (Watts April 2, 2019 Disclosures in the Coordinated Proceedings); Ex. 7 (Mohammed February 5, 2019 Disclosures in Shaun James, listing many officers on the general topic of drugs and gang activity in Ida B. Wells, as well as

certain other witnesses with no contact information); Ex. 8 (Defendant Officers' Disclosures in Phillip Thomas, listing officers who may have been involved in three unrelated arrests of Mr. Thomas, as well as officers involved in a narcotics investigation that had nothing to do with Mr. Thomas); Ex. 9 (Defendant Officers' Disclosures in Allen Jackson, which largely consists of witnesses disclosed on topics other than the arrests involved in his lawsuit). When Plaintiffs sought to depose similarly situated officers in the *Waddy* case, they learned that some of the officers were dead, and nearly every other one had no memory whatsoever of Mr. Waddy or the arrests they were disclosed to talk about.

CONCLUSION

Defendants' motion to extend discovery should be denied in large part. Defendants should be given the extension that they asked for (February 29, 2024) to depose the remaining test-case Plaintiffs and 404(b) witnesses who have not yet been deposed. They should also be permitted to depose the limited number of additional witnesses listed on Exhibit 1 during that same time period. The remainder of their Defendants' motion should be denied.

Respectfully submitted,

/s/ Scott Rauscher

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