

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

THE CHRISTIAN MINISTERIAL ALLIANCE, *et al.*,

PLAINTIFFS,

v.

Case No. 4:19-cv-00402-JM

**ASA HUTCHINSON,
the Governor of the State of Arkansas, *et al.*,**

DEFENDANTS.

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR AMENDED
SCHEDULING ORDER AND CLARIFICATION OF THE COURT'S APRIL 10, 2020, ORDER**

Defendants, Governor Asa Hutchinson, Secretary of State John Thurston, and Attorney General Leslie Rutledge, all sued in their official capacities, hereby respond to the Plaintiff's motion for an amended scheduling order and for clarification of the Court's April 10, 2020, order (Doc. 42).

1. Plaintiffs' claims, as amended to cure the fatal deficiencies identified by the Court in its February 2020 order (Doc. 36), have only been pending since March 2, 2020 (Doc. 37).

2. Less than two weeks later, the global coronavirus pandemic made its way to Arkansas. On April 3, 2020, and in light of the significant difficulties Defendants and counsel faced in participating in discovery due to mandatory telework, school closures, and other aggressive efforts to contain and combat the spread of COVID-19, Defendants filed a motion to stay all discovery for 90 days and for an amended scheduling order setting a new trial date in 2021. (Doc. 40).

3. The parties had conferred multiple times regarding the issues raised in Defendants' April 3 motion prior to its filing, but they could not agree on the appropriate procedural vehicle for bringing the issue before the Court. Plaintiffs' counsel wanted to file an amended Rule 26(f) Report with a detailed proposal for a new scheduling order complete with a new, self-selected trial date. Defense counsel objected to that approach both as procedurally improper and

an exercise in futility because only the Court is aware of its available trial settings, and all of the other dates in the scheduling order flow from the trial date. (*See* Doc. 41). Defendants sought relief in the form of a motion for a stay of discovery and an amended scheduling order. (Doc. 40). Plaintiffs opposed the motion and sought an order compelling the parties to confer and submit a proposed discovery schedule that included, at a minimum, the production of election return data in the Defendants' possession. (Doc. 41).

4. On April 10, 2020, the Court entered an order cancelling the scheduled trial and staying almost all discovery. (Doc. 42). "Given the uncertainties caused by the COVID-19 pandemic," the Court denied Defendants' request to "enter a new scheduling order at this time." *Id.* The Court ordered the parties to meet and confer "regarding the production of the election return data sought by Plaintiffs" within 20 days. *Id.* The Court indicated that, at that conference, the "Defendants should be able to identify what election return data is available electronically and the time frame needed to produce the data." *Id.* The Court otherwise granted Defendants' motion to stay discovery. *Id.* The parties conferred as ordered, and Defendants subsequently produced election return data available to them in electronic format as contemplated by the April 10 order.

5. In June, despite the Court's April 10 order rejecting these exact arguments, Plaintiffs continued to press Defendants for more discovery and for the parties, rather than the Court, to agree to the terms of a new scheduling order by insisting on the filing of an amended Joint Rule 26(f) Report. Plaintiffs also demanded that Defendants provide supplemental initial disclosures, documents related to the "interpretation" of the electronic data produced by Defendants pursuant to the April 10 order, and continued to press Defendants on a proposed ESI protocol that Defendants had already rejected on several prior occasions. (*See* Doc. 47-2).

6. In response, Defendants advised that while they agreed that it was time to start moving forward, Defendants believed that discussion regarding specific discovery issues was premature without a new trial date and final scheduling order from the Court. Defendants suggested that the parties file a joint request for a new trial setting with the Court. (Doc. 47-3 at 5-6).

7. The parties attempted to work together on a joint motion but, once again, Plaintiffs insisted on submitting an amended Rule 26(f) Report to the Court with a detailed proposed new schedule, including a proposed new trial date of July 19, 2021, without having any actual knowledge of the Court's available trial settings. *See id.* at 5. Such approach made little sense to the Defendants when the whole point of a Rule 26(f) Report is to apprise the Court of any conflicts with *the Court's* proposed trial date and schedule as set forth in the initial scheduling order. *See* Local Rule 26.1(9).

8. In late June, Plaintiffs apparently served a subpoena *duces tecum* on the Arkansas Department of Transformation and Shared Services seeking production of GIS data regarding election precincts, the boundaries of voting districts in Arkansas, the Court of Appeals district boundaries, judicial district boundaries, county boundaries, and changes made to Arkansas election precincts from January 1, 1998, to the present. Plaintiffs did not serve advance notice of the third-party subpoena on the Defendants as required by Fed. R. Civ. P. 45(a)(4), and Defendants only learned about the subpoena from the third party, not from the Plaintiffs, on July 7, 2020. (Doc. 47-3 at 2). Only after Defendants' counsel brought this matter to the attention of Plaintiffs' counsel and requested service of any and all third-party subpoenas did Plaintiffs serve no-

tice of the third-party subpoena upon Defendants. (Doc. 47-3). The Department of Transformation and Shared Services responded to the Plaintiffs' subpoena and produced the requested GIS data to enable Plaintiffs' experts to continue their work in this case.

9. On July 7, because the Court had already granted Defendants' request for an amended scheduling order, and because Defendants believed that Plaintiffs' continued insistence on filing an amended Rule 26(f) Report (with detailed fictitious schedule based on Plaintiffs' proposed July 21, 2021 trial date) was procedurally inappropriate, inconsistent with local practice, and unlikely to be of much assistance to the Court, Defendants ultimately declined to join the motion. (Doc. 47-3 at 1).

10. Although the coronavirus pandemic continues, and with it our State's and nation's emergency, Defendants agree that the stay of discovery imposed by the Court in the April 10 order should be lifted and that discovery should proceed to the extent practicable. *See* <https://www.healthy.arkansas.gov/programs-services/topics/novel-coronavirus#Covidnumbers> (last accessed Aug. 6, 2020) (reporting 6,937 active COVID-19 cases and 912 new cases added today); Administrative Order Six, *In re: Court Operations During the Covid-19 Pandemic* (E.D. Ark. June 29, 2020).

11. These Defendants play critical roles in the State's response to the COVID-19 pandemic. The Governor is directing the State's response. The Attorney General is the chief law enforcement officer in the State, and she and her staff (including the lawyers assigned to this case) are charged with defending the State's response to the COVID-19 pandemic in numerous lawsuits, many of which are expedited, emergency proceedings. The Secretary is currently preparing for the November 2020 elections, and he, his staff, and his attorneys also are embroiled in

numerous other lawsuits related to the upcoming November 2020 elections (which are not at issue in this case).

12. In light of the extraordinary demands being placed on the named Defendants and their counsel since April 2020, and the reasonable expectation that these demands will continue unabated for the foreseeable future due to the ongoing pandemic, Defendants respectfully submit that if the Court grants Plaintiffs' motion and lifts the stay of discovery, then it afford more time for all parties' discovery responses than provided in the Federal Rules of Civil Procedure.

13. For the foregoing reasons, and for good cause shown, Defendants submit that a routine 45-day response time would be reasonable and appropriate, rather than the 30 days ordinarily provided under the Federal rules, with the option to seek leave of Court for more time if needed. *See* Fed. R. Civ. P. 33, 34, 36. The discovery rules afford the Court broad discretion to allow the responding party more than 30 days to serve its answers and objections to discovery requests. *See* Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A), 36(a)(3).

14. Because the Court has already entered an order granting the Defendants' motion for an amended scheduling order (Doc. 42), and the Court has indicated it will enter a new scheduling order when the uncertainties associated with the COVID-19 pandemic subside, Defendants believe that the Plaintiffs' motion for an amended scheduling order (Doc. 47) should be denied as moot.

15. If, however, the Court is inclined to enter an amended final scheduling order at this time, Defendants respectfully request that the Court schedule the bench trial sometime in late 2021 and push back all of the other dates in the 2019 scheduling order accordingly. Such a schedule should allow sufficient time for the parties to complete discovery and prepare for trial

despite the numerous scheduling and logistical challenges associated with doing so during a global health crisis.

16. Defendants' lead trial counsel has a conflict with Plaintiffs' proposed trial date of July 21, 2021, due to a previously scheduled and prepaid family vacation.

For these reasons, Defendants ask the Court to deny Plaintiffs' motion for an amended scheduling order. Defendants do not object to Plaintiffs' request to resume discovery, but respectfully request that the Court order that any and all discovery responses shall be due within 45 days of service.

Dated: August 6, 2020

Respectfully submitted,

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