

**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' MOTION TO DEPOSE NEWLY IDENTIFIED FACT WITNESSES
AFTER THE CLOSE OF FORMAL DISCOVERY**

Defendants Asa Hutchinson, Governor of the State of Arkansas, in his official capacity, John Thurston, Secretary of State, in his official capacity, and Leslie Rutledge, Attorney General of Arkansas, in her official capacity, move the Court for an order permitting them to take the depositions of three recently identified third-party fact witnesses after the close of formal discovery in this case and, in support, state:

1. Due to the novel coronavirus pandemic, Defendants moved to stay all discovery in this case on April 3, 2020. (Doc. 40). On April 10, 2020, the Court ordered the parties to meet and confer regarding the production of electronic election return data but otherwise granted the Defendants' motion to stay discovery. (Doc. 42). The Defendants produced the electronic return data, but did not otherwise engage in discovery until after August 11, 2020, when the Court entered a new scheduling order confirming there was no longer a stay of discovery in place. (Doc. 49).

2. Since that time, the parties have engaged in exhaustive discovery. Plaintiffs have propounded three sets of interrogatories upon each of the Defendants, requests for admissions, and anywhere between four and six sets of requests for production of documents upon each of

the Defendants. The parties have exchanged thousands of pages of documents in various productions and will have taken a combined total of 18 depositions by August 23, 2021.

3. The discovery cutoff in this case is August 23, 2021. (Doc. 54).

4. On Friday, August 13, 2021, in the midst of back-to-back depositions that have been ongoing in this case all month, Plaintiffs served supplemental initial disclosures upon the Defendants identifying for the first time a number of individuals in possession of evidence they said they may use to support their claims at trial. (Ex. 1) Among those individuals are Arkansas State Senator Joyce Elliott and two state-court judges, Victor Hill and Alice Gray. (Ex. 1)

5. In light of Plaintiffs' supplemental disclosures, Defendants need to depose Senator Elliott, Judge Hill, and Judge Gray in order to prepare adequately for trial.

6. At the time Plaintiffs identified these individuals as potential trial witnesses, depositions were already scheduled in this case every business day through the discovery cut-off. Thus, it was impossible for Defendants to complete these needed depositions before the formal close of discovery.

7. Conducting these three depositions after the formal close of discovery will not prejudice Plaintiffs in any way. Defendants are not seeking to extend the discovery period generally or any other deadlines in this case. They seek only to be able to depose these newly identified witnesses so that they can prepare adequately for trial in this matter. The depositions will be scheduled to take place remotely via Zoom to eliminate any needed travel to Arkansas, as per the parties' prior course of dealing.

8. The Federal Rules of Civil Procedure provide that the Court may modify its scheduling order for good cause. *See* Fed. R. Civ. P. 16(b)(4). To establish good cause, the Defendants need only show diligence in attempting to meet the deadlines in the current

scheduling order. *See Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006).

While diligence is the primary factor for assessing good cause, nothing limits the Court's "broad discretion in establishing and enforcing the deadlines" in the scheduling order. *Portz v. St. Cloud State Univ.*, No. 16-1115 (JRT/LIB), 2017 WL 3332220, at *3 (D. Minn. Aug. 4, 2017) (citing *Marmo*, 457 F.3d at 759).

9. The circumstances described above constitute good cause for allowing the three third-party depositions to proceed after the close of formal discovery. The Defendants have been diligent in conducting discovery but will be unable to complete three depositions of newly identified witnesses under the current schedule.

10. Defendants have conferred with Plaintiffs in an effort to resolve this dispute without court intervention but were unable to reach an agreement regarding these depositions. (Ex. 2)

11. For all of these reasons, and for good cause shown, the Court should enter an order allowing Defendants to depose Senator Elliott, Judge Hill, and Judge Gray after the close of formal discovery in this case.

WHEREFORE, Defendants pray for an order permitting them to depose Joyce Elliott, Victor Hill, and Alice Gray after the formal discovery cut-off and for all other relief to which they may be entitled.

Dated: August 20, 2021

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

Vincent M. Wagner (2019071)
Deputy Solicitor General
Asher Steinberg (2019058)
Assistant Solicitor General
Jennifer L. Merritt (2002148)
Senior Assistant Attorney General
Michael Mosley (2002099)
Assistant Attorney General
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Tel: (501) 682-1319
Fax: (501) 682-2591

Jennifer.Merritt@ArkansasAG.gov

Counsel for Defendants

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

THE CHRISTIAN MINISTERIAL ALLIANCE,
et al.,

Plaintiffs,

v.

ASA HUTCHINSON, et al.,

Defendants.

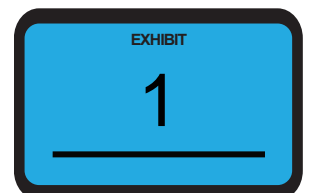
Civil Case No. 4:19-cv-402-JM

PLAINTIFFS' SUPPLEMENTAL DISCLOSURES

Pursuant to Rule 26, Plaintiffs, by and through their undersigned counsel, hereby submit these supplemental disclosures. Plaintiffs reserve the right to rely upon any facts, documents, other evidence or witnesses that may arise during the course of discovery in this action.

RESERVATION OF RIGHTS

These Supplemental Disclosures are not intended to, and do not, constitute admissions as to the relevance or admissibility of the information disclosed, and are made without any waiver of attorney-client privilege, work-product protection, or any other applicable privilege, protection, or immunity. Plaintiffs' Supplemental Disclosures are made without waiving Plaintiffs' right to object: (1) on the grounds of competency, privilege, relevancy, hearsay, or any other proper ground; (2) to the use of any information disclosed herein for any purpose, in whole or in part, in any subsequent proceeding in this action; or (3) on any and all proper grounds to



any other discovery request or motion relating to the subject matter of these Initial Disclosures consistent with the Federal Rules of Civil Procedure (“FRCP”) and the Local Rules of this Court.

Plaintiffs make these Supplemental Disclosures based upon the information reasonably available to them at the present time. Accordingly, Plaintiffs do not represent that these Supplemental Disclosures identify every individual, document, or tangible thing potentially relevant to this lawsuit. Plaintiffs reserve their right to clarify, alter, amend, modify, or supplement these Supplemental Disclosures if and when additional information becomes available to them, to the extent required by the FRCP and the Local Rules of this Court. The Supplemental Disclosures set forth below are made subject to the above qualifications, and provide or include the following information pursuant to Rule 26(a)(1)(A).

Pursuant to Rule 26(a)(1)(A)(i) and based on the information reasonably available to Plaintiffs at this time, Plaintiffs disclose that, in addition to the individuals identified in Initial Disclosures of Plaintiffs dated October 10, 2019, the following individuals are likely to have discoverable information that may be used to support Plaintiffs’ claims in this action:

A. Individuals

Based upon information currently available to Plaintiffs, the following individuals are likely to *have* discoverable information that the Plaintiffs may use to support their claims or defenses, not including information used solely for impeachment.

1. Individuals affiliated with Organizational Plaintiff Arkansas Community Institute (ACI), who must be contacted through undersigned counsel, including:
 - a. Jim Lynch, Board member;
 - b. Irene Holcomb, member.
2. Individuals involved with the Court of Appeals Apportionment Commission (aka Court of Appeals Redistricting Commission) and supported and/or opposed proposals for redistricting the Arkansas Court of Appeals, including:
 - a. Tim Humphries, 3015 N. Quail Creek Dr. Fayetteville, Arkansas 72703

- b. Butch Reeves, 308 Richwood Dr., Bryant, Arkansas 72022
3. Individuals who previously served or are currently serving as elected officials in the Arkansas General Assembly that has proposed, supported and/ or opposed legislation concerning redistricting and legislation with discriminatory impact, including:
 - a. Joyce Elliot. State Capitol Building, 500 Woodlane Street, Suite 320, Little Rock, Arkansas 72201-1090
4. Individuals who previously served or are currently serving as members on the Arkansas circuit court, specifically in *Hunt* districts, familiar with at-large voting, in combination with other voting practices that enhance the at-large voting electoral method's discriminatory effect, including:
 - a. Victor Hill, Little Rock, AR, 870.225.3548
 - b. Alice Gray, 401 West Markham Street, Room 350, Little Rock AR 72201

DATED: August 13, 2021

Respectfully Submitted,

/s/ Natasha Merle

Natasha Merle
Kristen A. Johnson
Victoria Wenger
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
Phone: (212) 965-2200
Fax: (212) 226-7592
nmerle@naacpldf.org
kjohnson@naacpldf.org
vwenger@naacpldf.org

Arkie Byrd
MAYS, BYRD & ASSOCIATES, P.A.
212 Center Street
Suite 700
Little Rock, AR 72201
Phone: (501) 372-6303
Fax: (501) 399-9280
abyrd@maysbyrdlaw.com

Philip Urofsky
Rachel Mossman
SHEARMAN & STERLING LLP
401 9th Street, NW, Suite 800
Washington, DC 20004
Phone: (202)508-8000
Fax: (202) 508-8100
Philip.Urofsky@Shearman.com
Rachel.Mossman@Shearman.com

Demian Alexander Ordway
Neil R. Lieberman
Eileen Monaghan DeLucia
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
Phone: (646) 837-5151
Fax: (646) 837-5150
dordway@hsgllp.com
nlieberman@hsgllp.com
edelucia@hsgllp.com

CERTIFICATE OF SERVICE

I certify that on August 13, 2021, I electronically sent a true and correct copy of the foregoing document to all counsel of record.

/s/ Natasha Merle
Natasha Merle

Jennifer Merritt

From: Jennifer Merritt
Sent: Friday, August 20, 2021 2:42 PM
To: 'Rachel Mossman'; 'Eileen Monaghan DeLucia'; 'Priscilla Consolo'; 'Victoria Wenger'; Vincent Wagner; Michael Mosley; Ariana Duford; Jonathon Greenblatt; Asher Steinberg; 'Arkie Byrd'; 'Natasha Merle'; Alicia Bello; Nina Sheth; Nadia Russell; 'Kristen A. Johnson'; 'Neil R. Lieberman'; Philip Urofsky; 'Demian Alexander Ordway'; 'Robert J. Morrow'
Cc: Toni Hamp
Subject: RE: CMA v. Thurston - discovery issues

Rachel:

Thank you for your email. I was defending the deposition of Dr. Peter Morrison in this case beginning at 8 am CST today and just had an opportunity to review your correspondence and confer with my colleagues. As you know, the discovery cutoff in this case is on Monday, August 23, the same date the Defendants have responses to written discovery due regarding the identification of trial witnesses/exhibits. The Defendants have in the past fully complied with their discovery obligations and will continue to do so. The issue today, however, is the need to depose new witnesses Plaintiffs just identified for the first time one week ago in supplemental initial disclosures. We have been conferring with Plaintiffs in good faith since Tuesday, August 17 regarding these depositions, but Plaintiffs have been unwilling to agree to them. In light of the impending discovery cutoff, Defendants intend to go ahead and file their motion to depose these witnesses with the Court. We are happy to continue to confer with you and will withdraw the motion should we reach an agreement in the future regarding these depositions.

Thanks,
Jennifer

Jennifer L. Merritt

Senior Assistant Attorney General
Office of Arkansas Attorney General Leslie Rutledge

From: Rachel Mossman <Rachel.Mossman@Shearman.com>
Sent: Friday, August 20, 2021 8:51 AM
To: Jennifer Merritt <jennifer.merritt@arkansasag.gov>; 'Eileen Monaghan DeLucia' <edelucia@hsgllp.com>; 'Priscilla Consolo' <pconsolo@hsgllp.com>; 'Victoria Wenger' <vwenger@naacpldf.org>; Vincent Wagner <vincent.wagner@arkansasag.gov>; Michael Mosley <michael.mosley@arkansasag.gov>; Ariana Duford <Ariana.Duford@Shearman.com>; Jonathon Greenblatt <greenblatt@ilawjg.com>; Asher Steinberg <asher.steinberg@arkansasag.gov>; 'Arkie Byrd' <abyrd@maysbyrdlaw.com>; 'Natasha Merle' <nmerle@naacpldf.org>; Alicia Bello <Alicia.Bello@Shearman.com>; Nina Sheth <Nina.Sheth@Shearman.com>; Nadia Russell <Nadia.Russell@Shearman.com>; 'Kristen A. Johnson' <kjohnson@naacpldf.org>; 'Neil R. Lieberman' <nlieberman@hsgllp.com>; Philip Urofsky <Philip.Urofsky@Shearman.com>; 'Demian Alexander Ordway' <dordway@hsgllp.com>; 'Robert J. Morrow' <rmorrow@hsgllp.com>
Cc: Toni Hamp <toni.hamp@arkansasag.gov>
Subject: RE: CMA v. Thurston - discovery issues

EXTERNAL EMAIL

Jennifer,

EXHIBIT

2

Thanks for the explanation of the expert costs. We agree with Defendants' proposal that the parties bear their own for depositions.

With regard to Defendants' request for agreement to take depositions after the close of discovery, we note that one of the individuals Defendants named was included in *Defendants'* production and a second was identified in Dr. McCrary's report, which was provided to Defendants in May. Thus, by Defendants' own previously stated rationale, these are witnesses who were known to Defendants well before Plaintiffs specifically identified them. Indeed, it is precisely to avoid this issue that Plaintiffs have repeatedly suggested a mutual exchange of lists of potential witnesses during the discovery period as opposed to Defendants apparent position that any name contained in discovery materials should be viewed as a potential witness.

Nevertheless, Plaintiffs may be able to agree to a limited number of depositions past the discovery deadline, but only after Defendants provide the complete information we have repeatedly requested about the witnesses upon which Defendants may rely and agree that Plaintiffs may also take a limited number of depositions should that list contain any individuals not already deposed by Plaintiffs.

As Plaintiffs noted in their letter to Defendants on Wednesday, Defendants have not identified any witnesses other than Peyton Murphy and Shelby Johnson. Notwithstanding Defendants' ongoing duty to update their disclosures if they learned they may rely on additional witnesses, they have not done so. If Defendants intend to call any witnesses other than Murphy, Johnson, their experts, or other individuals who have already been deposed, Plaintiffs again request that Defendants identify such potential witnesses or confirm that there are none.

If Defendants in fact intend to rely on additional witnesses not yet identified, Plaintiffs may seek depositions of those witnesses. Thus, Plaintiffs cannot be expected to reach an agreement on Defendants' post-deadline depositions without an opportunity to include an agreement that Plaintiffs may take additional depositions after the deadline as well.

In light of the impending end of the discovery, we encourage Defendants to respond promptly so that we can reach resolution. As always, we are happy to hop on a call to reach an agreement rather than exchanging rounds of emails.

Yours truly,
Rachel

From: Jennifer Merritt <jennifer.merritt@arkansasag.gov>

Sent: Wednesday, August 18, 2021 12:16 PM

To: Rachel Mossman <Rachel.Mossman@Shearman.com>; 'Eileen Monaghan DeLucia' <edelucia@hsgllp.com>; 'Priscilla Consolo' <pconsolo@hsgllp.com>; 'Victoria Wenger' <vwenger@naacpldf.org>; Vincent Wagner <vincent.wagner@arkansasag.gov>; Michael Mosley <michael.mosley@arkansasag.gov>; Ariana Duford <Ariana.Duford@Shearman.com>; Jonathon Greenblatt <greenblatt@ilawjg.com>; Asher Steinberg <asher.steinberg@arkansasag.gov>; 'Arkie Byrd' <abyrd@maysbyrdlaw.com>; 'Natasha Merle' <nmerle@naacpldf.org>; Alicia Bello <Alicia.Bello@Shearman.com>; Nina Sheth <Nina.Sheth@Shearman.com>; Nadia Russell <Nadia.Russell@Shearman.com>; 'Kristen A. Johnson' <kjohnson@naacpldf.org>; 'Neil R. Lieberman' <nlieberman@hsgllp.com>; Philip Urofsky <Philip.Urofsky@Shearman.com>; 'Demian Alexander Ordway' <dordway@hsgllp.com>; 'Robert J. Morrow' <rmorrow@hsgllp.com>

Cc: Toni Hamp <toni.hamp@arkansasag.gov>

Subject: RE: CMA v. Thurston - discovery issues

Rachel,

Thanks for your email. Regarding the expert costs, we are simply seeking confirmation that the parties will bear their own costs for their experts' time in sitting for depositions in this matter. We have handled the allocation of expert deposition fees two ways in various cases, sometimes billing the opposing party for the expert's time spent in deposition and in other cases the parties just bear their own costs. We propose the latter in this case since plaintiffs' experts have already been deposed and the cost issue is just now coming up. If Plaintiffs prefer to be billed for Dr. Morrison's and Dr. Alford's deposition time, just let us know.

Defendants seek Plaintiffs' position on conducting depositions of three witnesses identified in Plaintiffs' August 13, 2021, supplemental initial disclosures by agreement after the official close of discovery: Joyce Elliot, Victor Hill, and Alice Gray. Because Plaintiffs just identified these individuals as having discoverable information they may use to support their claims in this case a few days ago, and depositions were already scheduled in this matter every day between then and the discovery cutoff of August 23, 2021, it will be impossible to complete these depositions before the discovery cutoff. If Plaintiffs are unwilling to conduct these depositions after the close of discovery by agreement, then please let us know today so we can seek permission from the Court to do so.

Thanks,
Jennifer

Jennifer L. Merritt

Senior Assistant Attorney General
Office of Arkansas Attorney General Leslie Rutledge

From: Rachel Mossman <Rachel.Mossman@Shearman.com>

Sent: Wednesday, August 18, 2021 10:13 AM

To: Jennifer Merritt <jennifer.merritt@arkansasag.gov>; 'Eileen Monaghan DeLucia' <edelucia@hsgllp.com>; 'Priscilla Consolo' <pconsolo@hsgllp.com>; 'Victoria Wenger' <vwenger@naacpldf.org>; Vincent Wagner <vincent.wagner@arkansasag.gov>; Michael Mosley <michael.mosley@arkansasag.gov>; Ariana Duford <Ariana.Duford@Shearman.com>; Jonathon Greenblatt <greenblatt@ilawjg.com>; Asher Steinberg <asher.steinberg@arkansasag.gov>; 'Arkie Byrd' <abyrd@maysbyrdlaw.com>; 'Natasha Merle' <nmerle@naacpldf.org>; Alicia Bello <Alicia.Bello@Shearman.com>; Nina Sheth <Nina.Sheth@Shearman.com>; Nadia Russell <Nadia.Russell@Shearman.com>; 'Kristen A. Johnson' <kjohnson@naacpldf.org>; 'Neil R. Lieberman' <nlieberman@hsgllp.com>; Philip Urofsky <Philip.Urofsky@Shearman.com>; 'Demian Alexander Ordway' <dordway@hsgllp.com>; 'Robert J. Morrow' <rmorrow@hsgllp.com>

Cc: Toni Hamp <toni.hamp@arkansasag.gov>

Subject: RE: CMA v. Thurston - discovery issues

EXTERNAL EMAIL

Jennifer –

We write in response to the issues you raised in your email below.

First, thanks for your kind words regarding Judge Neal. We'll get back to you on his deposition.

Second, we are not sure what Defendants are requesting regarding expert costs. Could you please elaborate?

Third, discovery closes August 23, 2021 and the parties have not agreed to any extension. Thus, Plaintiffs do not understand what Defendants are suggesting by asking for availability for depositions in September. Please provide Defendants' position on the discovery deadline as well as the three witnesses Defendants would like to depose so that we can consider it.

Yours truly,
Rachel

From: Jennifer Merritt <jennifer.merritt@arkansasag.gov>

Sent: Tuesday, August 17, 2021 3:34 PM

To: 'Eileen Monaghan DeLucia' <edelucia@hsgllp.com>; 'Priscilla Consolo' <pconsolo@hsgllp.com>; 'Victoria Wenger' <vwenger@naacpldf.org>; Vincent Wagner <vincent.wagner@arkansasag.gov>; Michael Mosley <michael.mosley@arkansasag.gov>; Ariana Duford <Ariana.Duford@Shearman.com>; Jonathon Greenblatt <greenblatt@ilawjg.com>; Asher Steinberg <asher.steinberg@arkansasag.gov>; Rachel Mossman

<Rachel.Mossman@Shearman.com>; 'Arkie Byrd' <abyrd@maysbyrdlaw.com>; 'Natasha Merle' <nmerle@naacpldf.org>; Alicia Bello <Alicia.Bello@Shearman.com>; Nina Sheth <Nina.Sheth@Shearman.com>; Nadia Russell <Nadia.Russell@Shearman.com>; 'Kristen A. Johnson' <kjohnson@naacpldf.org>; 'Neil R. Lieberman' <nlieberman@hsgllp.com>; Philip Urofsky <Philip.Urofsky@Shearman.com>; 'Demian Alexander Ordway' <dordway@hsgllp.com>; 'Robert J. Morrow' <rmorrow@hsgllp.com>

Cc: Toni Hamp <toni.hamp@arkansasag.gov>

Subject: CMA v. Thurston - discovery issues

All,

We write regarding three discovery-related issues in this case. First, please provide us some dates in September for Judge Neal's deposition, which was noticed for August 18 but postponed at his and your request due to his ongoing health issues. We wish Judge Neal a speedy and full recovery.

Second, can the parties agree to bear their own expert fees for the ongoing expert depositions?

Third, Defendants would like to depose three third-party witnesses who were identified by Plaintiffs in their Supplemental Initial Disclosures served on August 13, 2021. Please provide some dates in September that work for Plaintiffs and we will issue subpoenas.

Thanks,
Jennifer

Jennifer L. Merritt

Senior Assistant Attorney General
Office of Arkansas Attorney General Leslie Rutledge

This communication and any attachments may be privileged or confidential. If you are not the intended recipient, you have received this in error and any review, distribution or copying of this communication is strictly prohibited. In such an event, please notify us immediately by reply email or by phone (collect at 212-848-4000) and immediately delete this message and all attachments.