UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, *et al.*,

Defendants.

Case No. 1:23-cv-00129-DAE

PLAINTIFF'S OPPOSED MOTION TO EXTEND CASE DEADLINES

RULE CV-7(G) STATEMENT

Plaintiff conferred in good faith with counsel for Defendants on December 29, 2023, but defense counsel stated that this motion would be opposed.

INTRODUCTION

Plaintiff Richard Lowery brings this motion to extend all remaining case-management deadlines by at least 60 days, so that he may obtain adequate discovery about University of Texas (UT) President Jay Hartzell's role in the campaign to chill Lowery's speech and evaluate whether to add Hartzell, or others, as additional parties. The existing deadlines leave insufficient time for that process, as UT's lawyers have been systematically running out the clock to protect Hartzell. Their goal is to conceal Hartzell's involvement long enough to keep Lowery from deposing Hartzell, adding him as a party, or both.

The current deadline for Lowery to amend his complaint is March 2, with the discovery cut-off on May 1. Magistrate Judge Howell has set a hearing for Feb. 12, 2024, on a growing pile of discovery motions, which Lowery hopes will lead to the disclosure of a long-concealed text communication from Hartzell to defendants Lillian Mills, Ethan Burris, and Hartzell's fixer, Nancy Brazzil, as well as other discoverable material that UT strains to conceal. Even if Lowery obtains some, or all, of the relief he seeks at (or shortly after) the hearing, the 19 days (or less) before the cut-off to amend leaves too little time for Lowery to evaluate that evidence and the need for follow-up discovery, attempt to depose Hartzell, litigate about deposing Hartzell, conduct the deposition, and prepare and file what will almost certainly be an opposed motion to amend the complaint.

From the beginning of this lawsuit, Lowery has contended that Hartzell played some role in UT's campaign to silence him, perhaps because the president was offended that Lowery had publicly opined that Hartzell's job is to be skilled at lying to Republicans. Lowery has diligently sought discovery about this theory, even unsuccessfully seeking an early deposition of Hartzell.

UT mocked Lowery's theory, even proclaiming it "absurd"— but UT's lawyers have consistently obstructed Lowery's access to evidence about Hartzell and, tellingly, Hartzell has never filed a declaration disavowing all involvement in his subordinates' actions against Lowery, which commenced shortly after the belatedly-acknowledged text that UT refuses to turn over.

UT's efforts to cover up Hartzell's involvement are not new. Back in April 2023, Defendants Mills and Burris testified falsely in deposition on written question (DWQ) answers that Hartzell *never* texted about Lowery during the summer of 2022, but then changed their answer nearly eight months later, when UT produced its privilege log, for the first time disclosing an Aug. 5, 2022 text from Hartzell to the Defendants about Lowery. Similarly, UT refuses to reveal whether, when, or from whom Hartzell and other UT leaders sought legal advice about Lowery: although this information is ordinary foundational evidence that is routinely subject to disclosure.

UT's lawyers have also burned up valuable discovery time by slow-walking discovery productions, deposition scheduling, the exchange of privilege logs, and, perhaps most significantly, the disclosure of Hartzell's Aug. 5 text. Most recently, UT's lawyers moved to quash a subpoena to Kelly Kamm, a UT employee who filed an anonymous complaint about Lowery's speech in July 2022. The subpoena seeks to uncover whether Kamm used her secret account to exchange emails with any other UT employees, possibly coordinating her denunciation of Lowery with UT administrators or their allies. Rather than do a quick search and collection of her email on topics that are clearly relevant to the case, UT has objected to the subpoena in its entirety and filed a dubious facial attack on the subpoena.

The overall effect of UT's litigation tactics is that Lowery cannot effectively explore one, or more, plausible theories of the case which posit some involvement by

the person at the top of UT's hierarchy. To do so, Lowery needs more time. And an extension of the deadlines would signal to UT that its uncooperative discovery approach will not win it this case by running out the clock.

FACTS AND BACKGROUND

This Court is aware of the facts of this case. Beginning in the summer of 2022, UT officials threatened Lowery and pressured him to stop publicly criticizing the university and its top officers. Dkt. 1. Because of this pressure, Lowery started self-censoring in late August 2022, and brought suit in defense of his First Amendment rights on February 8, 2023. *Id.* Barely a month later, on March 16, Lowery sought expedited discovery, requesting documents from and depositions of Jay Hartzell and other UT leaders. Dkt. 16. UT argued that Hartzell should never be deposed and insisted that all discovery be delayed until after its motion to dismiss. Dkt. 19 at 10-11, 13.

Defendants also refused, at the last minute, to hold a Rule 26(f) conference on March 22, as planned, and ignored the discovery requests that Plaintiff's counsel had already sent them. Dkt. 24-1 at 1-2; *cf.* FED. R. CIV. P. 26(f)(1) (stating that "parties must confer" about discovery planning "as soon as practicable"). Although Plaintiff tried to schedule the 26(f) conference on four separate occasions, UT's lawyers repeatedly declined to participate. *See, e.g.*, Dkt. 31-1 at 3; Dkt. 30 at 7. And, in the end, no conference occurred until September 25, after this Court denied UT's motion to dismiss. Dkt. 57 at 2.

For the last four months, UT has sought to slow-down the pace of discovery: communicating poorly, missing deadlines, withholding responsive material, and inadequately screening out non-responsive documents. Dkt. 64-1 at 4-5; Dkt. 64-7. Defendants, for instance, finished their rolling productions in response to Lowery's first two sets of RFPs over a month late, on December 8—even though their

response was originally due on October 30 and Lowery never consented to a rolling production or was properly informed about it. *Id.*

UT, moreover, systematically schedules events later than is reasonable, given the existing case schedule. Defendants did not supply their privilege log—containing a mere nine entries—until December 8. *Id.;* Kolde Dec. ¶ 4. In mid-November, when counsel requested deposition dates, UT's lawyers first ignored the email and then did not provide any dates, and Plaintiff's counsel was forced to unilaterally note the depositions in early January 2024. Kolde Dec. ¶¶ 10-11. This caused UT to claim hurriedly that the witnesses could not attend then so the depositions must be rescheduled for three different weeks in later January, requiring Lowery's lead counsel to fly repeatedly to Austin. *Id.* ¶ 12-13. Similarly, although Magistrate Judge Howell offered dates as early as January 24 or 25, UT would only agree to February 12 or 13 (among the later dates offered) for the contested discovery motions hearing. *Id.* ¶ 14.

Defendants originally denied under oath that Hartzell texted with them about Lowery during the summer of 2022, but they now admit that he did. *See* Dkt. 63 at 2. UT will not produce two communications with Hartzell about Lowery that occurred days before UT sought to silence him: materials that are now subject to an opposed motion to compel. Dkt. 60 at 7-10. UT also asserts that it does not need to reveal whether, when, or with whom Hartzell sought legal advice about dealing with Lowery. Dkt. 63 at 5-6. And UT has indicated that it will fight to prevent Hartzell from ever being deposed. Dkt. 19 at 10-11; Kolde Dec. ¶ 3.

UT's counsel is now also representing another UT employee named Kelly Kamm, in order to attempt quash a subpoena for her communications about Lowery—some of which may have been with people associated with Hartzell, Mills, or Burris. Dkt.

66; Kolde Dec. ¶¶ 17-18. Kamm is the source of anonymous email denouncing Lowery in July 2022. *Id.*

Under the present scheduling order, parties must file motions to amend pleadings or join additional parties by March 2, 2024, and complete all discovery by May 1. Dkt. 57. Lowery's counsel conferred via email and the phone with counsel for UT on December 27 and 28 respectively, to ask if Defendants would stipulate to a sixty-day extension of all discovery deadlines. Kolde Dec. ¶ 15. UT refused and asked Plaintiff to wait until after the February 12 hearing. *Id.* Defense counsel also declined to agree to keep open the Burris and Mills depositions (currently set for Jan. 17 and 29) in the event new materials are disclosed to Lowery after the Feb. 12 hearing that he may want to ask the Defendants about. *Id.* In order to avoid further delays, Lowery now files this motion.

ARGUMENT

I. LOWERY HAS DILIGENTLY SOUGHT DISCOVERY, BUT UT'S DELAY TACTICS ARE RUNNING OUT THE CLOCK

Although Lowery diligently pursued discovery about the causes of the pressure to silence him, UT has systematically delayed his access to information—to the point where UT only recently revealed (when it disclosed its privilege log) that two Defendants falsely testified that Jay Hartzell never texted them about Lowery.

Scheduling orders are vital for court efficiency, but they may be modified "for good cause and with the judge's consent." FED. R. CIV. P. 16(b)(4). The "purpose of the pretrial order" is "to expedite pretrial procedure" "toward the end of court efficiency." S&*W Enters. v. Southtrust Bank of Ala.*, 315 F.3d 533, 535 (5th Cir. 2003) (citations omitted). Accordingly, this good-cause standard is "midway" in stringency, because "imposing too demanding a standard for changing [scheduling] orders would be unrealistic and could be counterproductive," leading to

inefficiencies. *3 Moore's Federal Practice - Civil* § 16.14[1][a] (2023). The party seeking an extension meets this standard if it shows that "the deadlines cannot reasonably be met despite the diligence of the party needing the extension." *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 602 (5th Cir. 2021) (internal quotation omitted); *see also Puig v. Citibank, N.A.*, 514 F. App'x 483, 488 (5th Cir. 2013) (courts "look to the [moving party's] diligence in conducting discovery within the scheduling order's timeline.")

Lowery persistently sought discovery since March of last year. UT, however, refused to even hold a Rule 26(f) conference until late September. Since that time, Lowery has diligently searched all possible sources of relevant discovery, produced thousands of pages of responsive documents, supplied three privilege logs with more than four hundred entries, prepared for the impending depositions of three defendants, and briefed (counting this one) three separate discovery motions, with at least one more pending. *See* Dkt. 64-1. UT, in contrast, has routinely procrastinated on answering emails, responding to discovery requests, searching for responsive documents, and scheduling depositions. UT's purposeful delay tactics—not lack of diligence on Lowery's part—have forced the need for an extension.

II. THERE IS GOOD CAUSE TO CHANGE THE SCHEDULING ORDER TO ALLOW LOWERY TO INVESTIGATE HARTZELL'S INVOLVEMENT

Because UT prevents Lowery from discovering evidence to support one of his theories of his case, there is good cause for a modification of the scheduling order. Courts analyze good cause using four factors: "(1) the explanation for the failure to timely comply with the scheduling order; (2) the importance of the modification; (3) potential prejudice in allowing the modification; and (4) the availability of a continuance to cure such prejudice." *Springboards to Educ. v. Hous. Indep. Sch.*

Dist., 912 F.3d 805, 819 (5th Cir. 2019) (cleaned up). All four factors favor granting Lowery's extension request.

First, Plaintiff has fully complied with the current scheduling order, bringing this motion well in advance of the respective deadlines. *See* Dkt. 57. Courts in this circuit sometimes grant scheduling modifications even when deadlines have expired. *See, e.g.*, *Sanchez v. KHBJR Enters. LLC*, No. 5:17-CV-811-DAE, 2018 U.S. Dist. LEXIS 230166, at *8 (W.D. Tex. Apr. 12, 2018); *Viceroy Petroleum, L.P. v. Tadlock Pipe & Rentals, Inc.*, 5:14-CV-6-DAE, 2014 U.S. Dist. LEXIS 153866, 2014 WL 5488422, at *6 (W.D. Tex. Oct. 29, 2014). In contrast, Lowery timely brings this motion because he anticipates becoming unable to comply with that order *in the near future*.

Lowery and his counsel have been extremely busy with discovery throughout the last four months, *see* Dkt. 64-1, and are continuing to pursue discovery diligently between now and March 2. In January alone, Plaintiff is scheduled to depose three witnesses, review UT's response to eight RFPs, thirteen interrogatories, and a subpoena, respond to UT's most recent set of RFPs, write briefs for pending discovery disputes, and prepare for oral argument in February. Kolde Dec. ¶ 16. Moreover, several important discovery conflicts will not be resolved until the Feb. 12 hearing, at the earliest.

Plaintiff cannot responsibly evaluate whether to join Hartzell as a defendant right now, because UT has withheld crucial documents and information about Hartzell's involvement. Lowery does not even know the time, subject, and participants of various conversations Hartzell had about Lowery. *See* Dkt. 60; *see also Hammond v. United States*, No. 1:21-CV-00686-DAE, 2023 U.S. Dist. LEXIS 217616, at *6-7 (W.D. Tex. June 6, 2023) (granting schedule modification as plaintiff did not know facts supporting proposed amendment until after deadline to amend).

Moreover, UT believes Hartzell should not be deposed and almost certainly will seek a protective order if Lowery schedules the president's deposition or adds him as a defendant. *See* Dkt. 19 at 10-11; Kolde Dec. ¶ 3 (UT's counsel stated in Rule 26(f) conference that any Hartzell deposition would be opposed).

Plaintiff filed the motion to compel pending before Judge Howell, *see* Dkt. 60, partly to ascertain whether there was a proper foundation for deposing Hartzell or adding him as a party. Even if Judge Howell rules on this discovery dispute immediately on February 12, Lowery would have only nineteen days until March 2 to review any documents that UT turns over, seek to depose Hartzell, defeat UT's inevitable motion for a protective order, potentially conduct limited supplemental depositions of Mills and Burris (which UT will likely also oppose), and move to amend his complaint and add Hartzell as a defendant. Performing all these tasks in nineteen days is impossible.

Second, Lowery's is entitled to a reasonable opportunity to explore his theories of the case. Scheduling modifications are important when they "directly affect a party's prospects of ultimate recovery." *Hammond*, 2023 U.S. Dist. LEXIS 217616, at *7 (cleaned up). From the beginning of this lawsuit, Lowery has argued that Hartzell played a key role in his silencing. *See* Dkt. 8-1 at ¶¶ 22-27, 43, 60; *see also* Dkt. 1 at ¶¶ 20-24, 36. Defendants themselves have acknowledged that whether Hartzell was the "ringleader" is a "central" theory of the case, albeit in a mocking tone that did not age well. Dkt. 34 at 4 n.1. (calling this theory "absurd" based on sworn evidence that UT now admits was inaccurate).

Third, modifying the scheduling order would not unfairly prejudice Defendants. "An amendment is prejudicial to the non-moving party if it would require the opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay resolution of the dispute." *3 Moore's Federal*

Practice - Civil § 16.14[1][b] (2023); *see also After II Movie, LLC v. Grande Commc'ns Networks LLC*, No. 1:21-CV-00709-RP, 2023 U.S. Dist. LEXIS 175061, at *12 (W.D. Tex. Sep. 29, 2023) (modification prejudicial if it "greatly increases the scope of the case and of discovery" or "imposes additional and avoidable costs in the form of more discovery and motion practice") (cleaned up). Hartzell's role has been an issue in this case from the beginning.

Extending the discovery period will not alter the scope of the case at all, for UT has known of the theory of Hartzell's involvement for almost a year (and has been trying to cover it up for nearly as long). Sixty days is a modest extension request, and it will allow the parties to sort through some important disputed issues.

Finally, there is no trial date set for this case yet, see Dkt. 57 at 2, so that allows for additional flexibility here. *Cf. Viceroy*, 2014 U.S. Dist. LEXIS 153866, at *14 (concluding that the fourth factor supported modification as "there is no trial date set").

CONCLUSION

This Court should issue a new scheduling order, extending all discovery deadlines by at least sixty days.

Respectfully submitted,

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