INSTITUTE FOR FREE SPEECH

April 18, 2025

The Hon. James R. Cho
U.S. Magistrate Judge
225 Cadman Plaza East
Brooklyn, NY 11201

Via ECF

Re: *Alexander v. Sutton*, No. 1:24-cv-2224-DG-JRC

Dear Judge Cho:

The City Defendants' request for an extension to time to produce documents and for a Court-ordered claw-back agreement, Dkt. 90, is time-barred, lacks merit, and violates previous agreements between the parties. It should be denied.

FACTUAL BACKGROUND

For months, Plaintiffs and these Defendants have been conferring in an attempt to work out their discovery disputes without this Court's intervention. *See, e.g.*, Dkt. 81; Dkt. 71. Plaintiffs served Defendants with requests to produce documents on December 6, 2024. *See* Dkt. 69 at 1. Because of the upcoming holidays, Plaintiffs invited Defendants to seek extensions, and the parties agreed that Defendants could have an extra 21 days to respond to these requests (with response due January 27, 2025). *Id.*

On January 27, at 11:13 PM—47 minutes before the expiration of the extended deadline—Defendants responded to the interrogatories and requests for admission. They did not, however, produce any documents nor a privilege log. Instead, Defendants stated that they would produce non-privileged records, on a rolling basis, subject to the entry of a confidentiality order. Until this email, Defendants had never mentioned, and the parties had not discussed, either rolling production or a confidentiality order.

Over the next two months, counsel conferred four times (on January 30, February 5, February 14, and February 27) and exchanged approximately fifty emails. Dkt. 81. Parties managed to resolve most of their disputes and together twice sought extensions from this Court. *See* Dkt. 71; Dkt. 81. (On February 8, Defendants produced a small number of documents concerning individual-capacity Defendant Sutton, but the vast majority of documents responsive to Plaintiffs' discovery requests remain unproduced.) Parties also requested that Defendants have until April 15 to respond to the discovery requests—but with a critical qualification. Defendants would "receive until March 17, 2025 to either submit a protective order agreed to by both parties for this Court's endorsement or—if parties cannot agree about a protective order by that date certain—to file a letter brief moving for a protective order on that date." Dkt. 81.

Plaintiffs' overriding concern throughout this process, expressed repeatedly and clearly, is this: Plaintiffs wanted to prevent another situation where they would wait even longer, patiently, for discovery responses only to receive a dispute at the end of the extended period. Plaintiffs thus insisted on a date certain for any motion for a protective order, well ahead of any

production deadline. Absent a firm commitment to resolve or litigate discovery disputes well ahead of the responsive deadline, Plaintiffs would not have agreed to any further extension.

The March 17 deadline to file this motion was itself a significant concession to Defendants. Plaintiffs wanted this resolved much sooner, but Defendants claimed that they needed until March 17 owing to scheduling and staffing issues.

On March 6, the Court granted the requested extensions, stating that "the DOE shall produce documents by 4/15/2025," that "no amendment of the pleadings or joinder of additional parties permitted after 5/1/2025 without good cause," and that parties must "complete fact discovery by 6/9/2025." This Court also ordered that "[t]o the extent necessary, the City defendants shall move for a protective order by 3/17/2025."

In late February, the City Defendants asked Plaintiffs to consent to a bespoke 12-page protective order and a lengthy separate six-page claw-back agreement. Plaintiffs rejected these proposals as so overly complicated as to be largely incomprehensible, and thus difficult if not impossible to administer. Defendants' proposed claw-back agreement was a boilerplate that left key terms undefined, including bracketed "describe with specificity" placeholders. But one thing about this document was clear: its scope appeared to cover just about anything—including the clawing back of "testimony adduced at trial."

Plaintiffs took the position that they do not need to disprove the Defendants' entitlement to arguably limitless and frankly incomprehensible orders. Plaintiffs proposed the use of this Court's model confidentiality order, tailored to the responsive documents that might require protection.

On March 13, Defendants proposed that parties use this Court's "standing confidentiality order" with one change: an added provision stating "Attorney's Eyes Only: D-210 complaints and any underlying investigative material produced in accordance with D-210 (IV), that is not otherwise privileged, excluding determinations issued by the Chancellor or designee pursuant to D-210 (IV) (D)." On March 14, Plaintiffs responded, agreeing to the proposal "with the sole addition as suggested in [Defendants'] prior email" and asked Defendants to prepare a draft text of this revised confidentiality order, for parties to look over.

But Defendants sent nothing. On March 17—the deadline for any motion for a protective order—counsel for Plaintiffs again emailed Defendants' counsel, asking to see the draft text. Defendants' counsel never responded to these emails, never forwarded a draft text, and submitted nothing to the Court on March 17.

Weeks passed. On April 7, parties conferred over Microsoft Teams, to discuss other matters unrelated to Defendants' present motion. Two hours before this meeting, however, the City Defendants finally sent their draft revised text of this Court's model confidentiality order. Their revisions were far more extensive than what the parties agreed to in March, reaching, essentially, all documents and included, among other things, a commitment that "parties will enter in a separate clawback agreement." During the conference, Plaintiffs stated that they would only consent to a protective order containing the revisions parties agreed upon in March, and would not agree to new, more extensive revisions such as a separate claw-back agreement.

On April 11, the City Defendants moved for a 45-day extension to the discovery deadlines and asked this Court to issue "a standard claw back order pursuant to Fed. R. Evid. 502(d)." Dkt. 90. However, they have also offered to "submit a proposed claw back Order for the Court's

endorsement." *Id.*

On April 16, City Defendants sent Plaintiffs another proposed protective order, which Plaintiffs are evaluating.

PLAINTIFFS' POSITION

This motion would be meritless even if it were not time-barred.

Defendants have received substantial extensions of time to produce discovery without carrying their end of the bargain. Every time, Defendants ignore the new deadlines. And they repeatedly offer proposed orders that deviate substantially from anything contemplated, let alone agreed to, by the parties.

This Court's Individual Practices state that "the parties may submit to the Court for approval" a "form confidentiality order" provided, and "[i]f necessary and the parties deem appropriate, the parties may submit to the Court both a redlined version identifying the proposed changes, the reason for the changes, and a clean version . . . for the Court of adopt." Individual Practices at 4. The Court's form order itself notes that "[i]f any party believes a document not described in the above paragraph should nevertheless be considered confidential, it may make application to the Court. Such application shall only be granted for good cause shown." Form Order at 1. This Court's form order contains a provision, Section (f), addressing the claw back of unintentionally disclosed materials. *Id.* at 2.

Defendants, as the party seeking an extension and claw-back order, have the burden to show good cause. Although Plaintiffs do not object to the Court issuing its model confidentiality order with its claw back provision—even with revisions that parties agreed to on March 14—they believe that the extensive changes that Defendants have repeatedly proposed are neither necessary nor appropriate.

1. The motion for a protective order is time-barred.

"[M]otions for a protective order must be made in a timely manner, which ordinarily means that the motion must be made by the date set for the discovery or production unless there was no opportunity to so move." *Mahar v. US Xpress Enters., Inc.*, 688 F. Supp. 2d 95, 113 (N.D.N.Y. 2010); *see also Marino v. HoganWillig, PLLC*, No. 11-CV-453S(Sr), 2013 U.S. Dist. LEXIS 110358, at *9 (W.D.N.Y. Aug. 5, 2013) ("motions under Rule 26(c) must be served before the date set for production.") (citation omitted).

Here, this Court explicitly ordered Defendants to move for a protective order on or by March 17, 2025—long after the initial production date in January. Plaintiffs only reluctantly agreed to jointly request this late date for moving for relief as a strict condition of granting Defendants yet more time. And yet, Defendants ignored this date.

Defendants pretend that they are not violating this Court's deadline by suggesting that they only seek "a standard claw back order pursuant to Fed. R. Evid. 502(d)" to address "inadvertent production,"—rather than a protective order. Dkt. 90 at 2. But a claw back order is a form of protection. It is specious to claim that Defendants had only until March 17 to seek other forms of protection, but unlimited time to ask for a claw back. The deadline was clear, as was the reason for it. Indeed, this Court's form protective order contains a provision addressing the claw back of unintentionally disclosed materials. Form Order at 2. And for months, parties have negotiated about, among other things, possible revisions to this model claw back provision.

Defendants' request for a separate claw back order effectively seeks to amend or rewrite the Court's standard protective order. The motion violates the March 17 deadline.

2. A protective order is unnecessary.

In this lawsuit, Plaintiffs challenge Regulation D-210 both facially and as-applied, arguing that Defendants have violated Plaintiff's First Amendment rights "[b]y implementing and enforcing Regulation D-210, and by investigating and acting upon D-210 complaints lodged against Plaintiffs." Dkt. 1, ¶¶ 115-19. The DOE cannot cite their very regulation under challenge to hinder Plaintiffs' discovery into how that regulation is being applied against Plaintiffs and whether that regulation is enforced in a discriminatory manner.

Moreover, Regulation D-210 states that complaints and other investigation materials are not confidential. Rather, D-210 stresses that "[i]t is the DOE's policy to respect the privacy of all parties and witnesses" but that "the need for confidentiality must be balanced against the obligation to conduct and cooperate with required investigations, to provide due process to the subject, and/or to take necessary action to conciliate or resolve the complaint. Therefore, information regarding the complaint may need to be disclosed in certain circumstances as appropriate." Dkt. 13-12 at 5-6. Far from promising confidentiality, D-210 sets up a balancing test and recognizes that due process and other legal obligations may outweigh privacy.

Defendants' federal discovery obligations in a lawsuit specifically about the enforcement of Regulation D-210 greatly outweighs any privacy interests on the part of complainants and witnesses. The documents that Plaintiffs requested are relevant and proportionate to the needs of the case, see FED. R. CIV. P. 26(b)(1), because these documents will permit Plaintiffs to evaluate how Regulation D-210 was applied to Plaintiffs; to test the credibility of Defendants' declarations; to counter the DOE's argument that upcoming revisions of D-210 make judicial relief unnecessary (see Dkt. 64 at 2-3); to counter the DOE's argument that Regulation D-210 creates a fair and impartial appeals process that is sufficient remedy for Plaintiffs' injury (see Dkt. 49 at 2); and to show the motive and bias behind the investigations of Plaintiffs Maron and Alexander.

3. The motion violates the parties' previous agreement.

The City Defendants had abundant opportunity to seek a protective order, including a claw back provision, during the 101 days between December 6 and March 17. *See* Dkt. 81; Dkt. 69 at 1. The March 17 date certain was agreed to by both parties, because Plaintiffs needed to ensure that they would receive their long-requested discovery by April 15. Defendants knew this, yet waited until almost a month after the court-ordered deadline to file its motion. Defendants' last-minute motion violates the agreement that parties had worked out and suggests obstructionism, rather than good faith cooperation. *Cf.* LOCAL CIV. R. 26.4(a) (requiring cooperation among counsel in all phases of discovery).

April 15 has come and gone, and Plaintiffs still have not received the documents they requested over five months ago. The City Defendants have no better explanation for this delay than that they miscalculated how long they would need to coordinate with their own e-discovery division and review the responsive documents. *See* Dkt. 90 at 1-2. Defendants' own mistake is not a good cause to delay discovery and prejudice Plaintiffs' claim.

Moreover, in their motion, the City Defendants stated that they will only produce the "most responsive" documents "as soon as a confidentiality order and claw back agreement are in

place." Dkt. 90 at 2. That is, even once City Defendants finish their interminable review, they intend to hold those documents hostage until Plaintiffs and this Court gives them the protective order that they demand.

The City Defendants have already received extra time from Plaintiffs and this Court, in exchange for accepting a date certain on both its protective order and its document production. Defendants have now reneged on their agreement, demanding even more extra time and insisting on litigating a motion that is a month overdue.

Finally, Plaintiffs are constrained to note that Defendants' actions, including their repeated submission of proposals that go far beyond what the parties had agreed to, and their violations of this Court's March 17 deadline as well as the parties' understandings underlying this process, are not conducive to the settlement discussions on which they insist.

CONCLUSION

This Court should deny the City Defendants' motion for an extension and court-ordered claw back agreement and require Defendants immediately produce the requested documents.

Sincerely

/s/ Alan Gura
Alan Gura
Counsel for Plaintiffs