UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIAM A. LINK, et al.,

Plaintiffs,

v.

MANNY DIAZ, JR., in his official capacity as the Florida Commissioner of Education, et al.,

Defendants.

Case No. 4:21-cv-00271-MW-MAF

OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO TAKE ADDITIONAL FACT DEPOSITIONS

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Discovery is scheduled to close in eight days, on September 21. *See* ECF No. 130. Based on the current schedule, once discovery has concluded, Defendants will have taken a total of 29 depositions—nearly triple the Federal Rule's default limit of ten per party. Eighteen depositions were requested—many for the first time—in an August 22 email from Defendants, including the request for 30(b)(6) testimony from local chapters of Plaintiff United Faculty of Florida (UFF). Plaintiffs' counsel stipulated to allowing Defendants to take 14 additional non-party depositions above the default rule, but could not agree to further exceed the limit for the additional corporate depositions of the UFF chapters because the late-breaking demand was untimely, disproportionate, and unduly burdensome. For the same reasons, the Court should deny Defendants' motion.

ARGUMENT

As evidenced by Plaintiff UFF's June 22 Responses to Defendants' May 23 document requests (attached to their Motion as Exhibit B, ECF No. 145-2), Defendants have been aware of the surveys by the local UFF chapters—which they claim justify these depositions—for at least three months. Yet, Defendants waited until the close of discovery was less than 30 days away, and at the beginning of the new school year, to demand that they be permitted to compel corporate representatives from volunteer, faculty-run chapters to prepare and sit for a deposition of unspecified scope so that Defendants may "prob[e]" public surveys that date back as far as 2018. Mot. at 3-4. Their motion should be denied. First, it fails to make the requisite showing that Defendants are entitled to the leave sought. Second, it appears styled to avoid the Court's clear orders requiring the parties to timely raise discovery disputes, so as to avoid litigating matters during the last 30 days before the close of discovery that could have been litigated earlier.

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A. Defendants fail to make the requisite showing to justify taking excess depositions.

As a threshold matter, Defendants fail to make the showing required by the Federal Rules to justify exceeding the default deposition limit without the consent of the other parties to the litigation. Rule 30 establishes a baseline limit of ten depositions per party. *See* Fed. R. Civ. P. 30(a)(2)(A)(i). Parties seeking leave to

exceed that limit over another party's objection must make a "particularized showing" as to why the discovery sought is necessary under the framework of Rule 26(b)(2). *Tardif ex rel. Yerk v. People for the Ethical Treatment of Animals*, No. 2:09-CV-537-FTM-29SPC, 2011 WL 2413630, at *1 (M.D. Fla. June 13, 2011). The Court must determine "whether the discovery sought is (1) unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." *Id.* Defendants do not explain how their request meets this standard. In fact, they do not even mention the applicable rules or the legal standard for the relief they seek. As such, they have failed to carry their burden and the motion should be denied.

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First, Defendants fail to identify any information sought that cannot be discovered through less burdensome means. Defendants argue for the relevance of four surveys which are already public, discussed widely by the press, or can even be accessed through the links embedded in Defendants' motion itself. Mot. at 2-3.

These surveys speak for themselves; and nowhere do Defendants explain what information could be gained by conducting the requested depositions, or how that information would be relevant or helpful to the case. The closest Defendants come is when they claim the depositions will be conducted "only on the limited topic of surveys administered to faculty members concerning issues of free expression." Mot. at 4. However, the terms of this "limited topic," or any form of proposed topic list that would accompany a corporate deposition notice, were not provided to Plaintiffs during the conferral process, nor were they provided to the Court as part of the motion. As a result, Plaintiffs and the Court are somewhat in the dark as to the discovery Defendants seek—which cannot satisfy the "particularized showing" that the information sought is necessary and proportional to the needs of the case. *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, No. 3:19-MD-2885, 2021 WL 9031166, at *2 (N.D. Fla. Nov. 15, 2021).

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Second, although there was ample time during the discovery period for Defendants to pursue this discovery, they chose not to, waiting until the end of discovery to demand it in a way that will impose entirely avoidable and severe burdens on both the targeted deponents and the parties. The surveys cited by Defendants are public and date back as far as 2018. Mot. at 3. Even the most recent iteration cited—the 2022 survey conducted by the University of Florida chapter—

comes from a survey that has been conducted periodically since 2013.[1] That Defendants were aware of these surveys is reflected in their May 23, 2022 Requests for Production directed toward Plaintiff UFF, which demanded: "All surveys, polls, or questionnaires that UFF or any UFF campus chapter has distributed to faculty members in the last five (5) years." Ex. B to Mot., ECF 145-2, at 5. As UFF explained in its June 22 objections to those requests, those campus chapter materials are not in its possession, custody, or control. *Id.*, at 5. The requests were also facially overbroad, seeking *all* surveys, polls, or questionnaires from *any* UFF campus chapter. *Id.* Defendants did not define "surveys," "polls," or "questionnaires," nor did they limit the request to seek only such materials related to any specific topics. *Id.*

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Defendants did not respond to or express any issue with UFF's June 22 objections until nearly eight weeks later. *See* Ex. 1, Email from G. Levesque to F. Wermuth, Aug. 11, 2022. In response, Plaintiffs' counsel further explained UFF's objections to the discovery request, including that the request spanned 32 different chapters (most of which are entirely run by volunteers on volunteered time), did not define the key terms "surveys, polls, or questionnaires," and did not limit the form,

[1] *See* Faculty Working Conditions Survey, United Faculty of Florida–University of Florida, available at: https://uff-uf.org/faculty-climate-surveys-2/.

function, method, scope, purpose, or subject-matter of the materials sought. *See* Ex. 2, Ltr. from F. Wermuth to G. Levesque, Aug 16, 2022, at 1-2. In their August 11 Correspondence, Defendants indicated they intended to file a motion to compel, but they never did. *See* Ex. 1, Email from G. Levesque to F. Wermuth, Aug. 11, 2022.

Defendants made no indication that they intended to seek depositions of corporate representatives from UFF's local chapters until August 22, when, for the first time, defense counsel announced they would do so "in lieu of pursuing a motion to compel against UFF." Ex. 3, Email from G. Levesque to F. Wermuth on Aug. 22, 2022. At this point, however, the close of discovery was already less than 30 days away. Defendants' failure to timely pursue this matter upon receipt of UFF's objections to Defendants' discovery request on this topic on June 22 only serves to maximize the burden these depositions would have on the parties and the deponents.

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Perhaps most importantly, the heightened burden of these depositions outweighs the ostensible benefits, which remain unexplained in Defendants' motion. As Plaintiffs have explained to Defendants, campus chapters are largely run by faculty members who volunteer their time to the chapter. *See* Ex. 4, Email from F. Wermuth to G. Levesque, Aug. 24, 2022. These faculty members are most strained now, at the beginning of the school year, when teaching, research, and administrative responsibilities combine. And Defendants seek corporate depositions under Rule

30(b)(6)—which carries added obligations for a designated witness to prepare themselves with institutional knowledge, or face potential sanctions pursuant to the Federal Rules. *See Beaulieu v. Bd. of Tr. of Univ. of W. Fla.*, No. 3:07CV30/RV/EMT, 2007 WL 9734886, at *4 (N.D. Fla. Oct. 4, 2007) ("If the designated deponent cannot answer those questions, then the organization has failed to comply with its Rule 30(b)(6) obligations and may be subject to sanctions, etc.") (quotations omitted). This preparation burden is exacerbated at the start of a new year because staffing and membership changes routinely reshape the chapter organizations themselves—as well as their readily available institutional knowledge. It is further exacerbated by the undefined topic Defendants seek to explore: again, they seek to "prob[e]" surveys, some of which may have been implemented by persons who have left the organization, possibly years ago.

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Even with ample notice, it would be difficult for a volunteer organization with changing membership to fully educate itself on these surveys with confidence that they now know everything that is "known or reasonably known to the organization." Fed. R. Civ. P. 30(b)(6). Demanding that they do so in a matter of days at the busiest time of the year is patently unreasonable. This is to say nothing of the burdens on the parties themselves. After today, only one week remains in the discovery period; and there are already eleven depositions scheduled for that week in this case. These

burdens are disproportionate to the needs of this case and do not justify the non-descript "probing" that Defendants seek. Mot. at 4.

Finally, not only have Defendants failed to justify the depositions sought by their motion, they also have not met their burden to justify the numerous depositions they have already taken or noticed. *See In re 3M*, 2021 WL 9031166, at *2. But "[t]he party seeking leave to take additional depositions must also justify the necessity of the depositions previously taken without leave of court." *F.D.I.C. v. Nason Yeager Gerson White & Lioce, P.A.*, No. 2:13-CV-208-FTM-38, 2014 WL 1047245, at *2 (M.D. Fla. Mar. 17, 2014). Contrary to Defendants' representations of a "judicious" pursuit of depositions, Mot. at 6, their approach has been broad and undiscerning. Even excluding depositions of parties, their employees, and experts, Defendants will have taken a total of 14 depositions by the close of discovery, including those currently scheduled. By comparison, Plaintiffs are scheduled to take only six non-party depositions.[2] Defendants' apparent position has been that taking the deposition of anyone "identif[ied] on [Plaintiffs'] Rule 26 disclosures" is appropriate and proportional to the needs of the case. Mot. at 6. However, the mere

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[2] In total, Defendants will have taken 29 depositions by the end of discovery; Plaintiffs will have taken 12.

fact that a party "may call" a witness at trial is "not a sufficient reason to demonstrate the necessity for the deposition." *In re 3M*, 2021 WL 9031166, at *3.

B. Defendants' motion appears constructed to avoid the clear direction of the Court regarding the timeliness of discovery.

From the outset of this matter, this Court has clearly advised the parties that:

> Unless otherwise ordered by the Court, motions to compel discovery are due no later than 30 days before the close of discovery. The Court will ordinarily entertain a motion to compel brought during the last 30 days of discovery only on a showing of reasonable diligence during the discovery period and the discovery dispute in question arose during the last 30 days of discovery.

Initial Scheduling Order at 2 (ECF No. 41); *see also* Order Denying Mot. to Expedite Discovery at 2 (ECF No. 144). Defendants have not made a showing of reasonable diligence during the discovery period; indeed, they provide no explanation for why they waited to raise this issue until the last 30 days of discovery.

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Instead, Defendants side-step this requirement entirely, taking the apparent position that because their motion is titled as one for "leave," it is not truly a motion to compel, Mot. at 1, with the implication being it is not subject to the Court's order quoted above. However, in substance, Defendants' motion for leave seeks what a motion to compel seeks—an order from the Court to allow discovery that the parties have not been able to otherwise agree upon. And it does so in the last 30 days of

discovery, without attempting to meet the clear requirements of the Court's order governing such motions.

The fact that Defendants' motion spends time debating the issue of "possession, custody, or control," Mot. at 4-5, only serves to reinforce that Defendants are, in reality, attempting to untimely adjudicate their disagreement with a discovery objection that UFF made in June. *See* Ex. B to Mot., ECF 145-2.[3] Defendants had ample time to squarely and timely address that issue, but they chose not to. And they similarly chose to wait until the last 29 days of discovery to seek these additional, and unduly burdensome depositions. Thus, the motion should be denied, not only because Defendants fail to make the particularized showing necessary to justify allowing them to take these additional depositions under the Federal Rules, but also because it is untimely.

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[3] This discussion is not only a distraction, it misstates Plaintiffs' position on the issue. *Compare* Mot. at 4 *and* Ex. 2, Ltr. from F. Wermuth to G. Levesque, Aug. 16, 2022. And it further misapplies the law of corporations to a union with local chapters. *Compare* Mot. at 5, *with United States v. Int'l Union of Petroleum & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452–53 (9th Cir. 1989) ("A corporation must produce documents possessed by a subsidiary […]. Extending this principle to cover the relationship between an International union and its locals, however, is not consistent with federal labor law.").

CONCLUSION

For the reasons discussed, the Court should deny Defendants' motion for leave to take additional depositions above the Plaintiffs' objections.

LOCAL RULES CERTIFICATION

Undersigned counsel certifies that this response contains 2,327 words, excluding the case style, table of contents, table of authorities, and certificate of service.

Respectfully submitted this 13th day of September 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 13, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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