UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GROCERY MANUFACTURERS ASSOCIATION, SNACK FOOD ASSOCIATION, INTERNATIONAL DAIRY FOODS ASSOCIATION, and NATIONAL ASSOCIATION OF MANUFACTURERS, Plaintiffs, v. WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont; PETER E. SHUMLIN, in his official capacity as Governor of Vermont; HARRY L. CHEN, in his official capacity as Commissioner of the Vermont Department of Health; and JAMES B. REARDON, in his official capacity as Commissioner of the Vermont Department of Finance and Management, Defendants.	Case No. 5:14-cv-117

DEFENDANTS' MOTION FOR IMMEDIATE CLARIFICATION OF DISCOVERY ORDER OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF THE DEADLINE FOR COMPLETION OF FACT DISCOVERY

On September 29, 2015, this Court approved the parties' stipulated Discovery Schedule/Order (Doc. 120). That Order sets November 24, 2015 as the deadline for the completion of fact discovery. Defendants, William H. Sorrell, Peter E. Shumlin, Harry L. Chen, and James B. Reardon (collectively, "the State"), respectfully request that the Court clarify that this deadline does not apply to outstanding responses to subpoenas that were properly served and called for the production of documents well in advance of that deadline. Alternatively, if the Court concludes that the fact discovery completion date may be invoked to cut off a party's obligation to provide responses that were due before the deadline, the State respectfully requests an extension of that deadline pursuant to the Court's Order. Pursuant to Local Rule 7(a)(7),

counsel for the State contacted Plaintiffs' counsel, who stated that they do not consent to the relief sought in this motion. In support of its Motion, the State relies on the following Memorandum of Law.

MEMORANDUM OF LAW

Background

On October 7, 2015, the State gave Plaintiffs notice that it would serve third-party subpoenas on 17 companies (16 of which are Plaintiffs' member companies) for the production of documents relevant to this litigation. Declaration of Lee Turner Friedman, dated January 27, 2016, ¶¶ 2-3 ("Friedman Decl."). Each subpoena listed October 23, 2015 as the deadline for producing these documents. *Id.* ¶ 4.[1] In response to these subpoenas, the third parties raised objections. *Id.* ¶ 7. Defense counsel then worked diligently to attempt to address these objections through dozens of subsequent conversations, emails, and letters, during which defense counsel made significant voluntary concessions limiting the document requests. *Id.* ¶ 8. Despite these efforts toward a cooperative resolution, to date only two companies have produced documents – and a total of only 6 documents between them. *Id.* ¶ 6. Rather, a number of the third parties now assert that this Court's scheduling order makes the State's timely served subpoenas "null and void" because the Order sets November 24, 2015 as the deadline for the completion of fact discovery. *Id.* ¶ 9.

Argument

Plaintiffs' members take the position that the fact discovery completion date contained in the Court's Discovery Order extinguishes their obligation to respond to the State's timely served

[1] Due to complications with service of process, the response date for certain subpoenas was ultimately extended past October 23, 2015, but all 17 subpoenas called for the production of documents weeks before the close of fact discovery. Friedman Decl. ¶ 5.

subpoenas. Likewise, Plaintiffs have stated that they agree with view and that no responses to the subpoenas are due from their members. The Court should reject this nonsensical interpretation of its Order.

Under Plaintiffs' extraordinary theory, third parties could avoid all of their legal obligations to respond to timely served subpoenas simply by running out the clock. That cannot be so. *See, e.g.*, *McFadden v. Ballard, Spahr, Andrews, & Ingersoll, LLP*, 243 F.R.D. 1, 11 (D.D.C. 2011) (if parties could not obtain "documents that were demanded during the discovery period," it would "create an incentive to delay responses and then 'run out the clock'"). Such an interpretation is particularly problematic here, since many of Plaintiffs' members at times took weeks to respond during the ongoing negotiations as to the appropriate scope of the document requests. Friedman Decl. ¶ 9. While they now contend that the Discovery Order must be amended to require any further responses, a party is "not seeking an amendment to the scheduling order" when, after discovery has closed, it seeks "the production of documents pursuant to requests served during the discovery period." *Barnes v. District of Columbia*, 289 F.R.D. 1, 20 (D.D.C. 2012). Far from "asking for 'new' discovery," this is simply "asking for discovery *they should have already received*." *Id.* (emphasis added).

Accordingly, the State respectfully requests that the Court immediately clarify its Discovery Order to note that the November 24, 2015 deadline for completion of fact discovery does not apply to outstanding responses to subpoenas that were properly served well in advance of that deadline and called for production before the deadline. No delay or prejudice will result from the requested clarification, given the April 18, 2016 completion date for expert discovery. Other discovery in this matter remains ongoing and will continue for months to come.

Alternatively, if the Court holds that the deadline for fact discovery extinguishes Plaintiffs' members' outstanding obligations to produce documents under the subpoenas, then the State respectfully requests an extension of that deadline until such documents have been produced. *See* Doc. 120 at 2, ¶ 4; *see also* Fed. R. Civ. P. 16(b)(4). As explained above and in the attached Declaration, the State issued the subpoenas to Plaintiffs' members in early October pursuant to Rule 45. The subpoenas called for the production of documents by October 23, 2015 – more than a month before the deadline of fact discovery. When the subpoena recipients refused to produce documents by that deadline, the State engaged in extensive negotiations with those companies and worked diligently to resolve the disputed issues without having to involve the Court. The State diligently continued these discussions until a number of Plaintiffs' members abruptly asserted that they were no longer obliged to produce *any* materials – and would not continue the meet-and-confer process – because the deadline for completion of fact discovery had run. *See* Friedman Decl. ¶¶ 8-9. Therefore, under paragraph 4 of the Court's Order, "additional time is necessary for the completion of fact discovery" and the deadline should be extended to allow the State pursue the outstanding responses. Doc. 120 at 2; *see also Scott v. Chipotle Mexican Grill, Inc.*, 300 F.R.D. 193, 198 (S.D.N.Y. 2014) (granting extension where "despite [a party's] best efforts, the deadline could not have been reasonably met").

As noted above, because discovery is ongoing in this matter, extending the fact discovery completion deadline to allow the State to continue its efforts to obtain documents it should have already received causes no prejudice to Plaintiffs. On the other hand, the State would be severely prejudiced if it were deprived of the documents sought by its timely and properly served discovery requests. For instance, as this Court previously stated, the State has "a right to know whether [Plaintiffs' member companies] have internal studies about the safety of

GMOs." Doc. 115 at 42 (Discovery Conference Tr. 42:8-10, dated Aug. 4, 2015). The State should not be deprived of this information because it engaged in good faith discussions with Plaintiffs' members to achieve their compliance with the valid subpoenas.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court clarify that the Discovery Order's fact discovery completion deadline does not apply to outstanding responses to third-party subpoenas that were properly served well in advance of that deadline or, in the alternative, extend that discovery deadline until all appropriate documents called for by the subpoenas have been produced.

DATED at Montpelier, Vermont this 28th day of January 2016.

STATE OF VERMONT

WILLIAM H. SORRELL
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CERTIFICATE OF SERVICE

I, Megan J. Shafritz, Esq., attorney for Defendants, hereby certify that on January 28, 2016, I electronically filed Defendants' Motion for Immediate Clarification of Discovery Order or, in the Alternative, for an Extension of the Deadline for Completion of Fact Discovery with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered participants.

DATED at Montpelier, Vermont this 28th day of January 2016.

STATE OF VERMONT

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