IN THE 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 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-cr

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR IMMEDIATE CLARIFICATION OF DISCOVERY ORDER

Fact discovery in this case closed in late November 2015, over two months ago. But on January 28, 2016, Defendants filed a request for "immediate clarification" of the fact discovery deadline, contending that issues relating to third-party subpoenas served during the fact discovery phase should be subject to further pursuit long after the close of fact discovery, apparently indefinitely, "until all appropriate documents called for by the subpoenas have been produced." *See* Mot. 5. Defendants' request should be denied. A "completion date for fact discovery" is exactly that—a deadline for completion of all fact discovery. And as Defendants

acknowledged at the time the parties negotiated the discovery schedule, third-party discovery is fact discovery. More than a month after the parties filed their agreed proposed schedule, Defendants served subpoenas on seventeen third parties. Rather than seeking limited, specified documents, the identical subpoenas each contained twelve sweeping requests. When the third parties objected to these overbroad and burdensome subpoenas, Defendants waited—sometimes weeks—to meet and confer regarding the subpoenas. And they opted not to seek to extend discovery before the November deadline came and went, nor did they file a single motion to compel prior to its expiration. Defendants' sudden burst of urgency in seeking an "immediate" ruling is thus belied by their conduct through the fall and winter. There is no good cause to allow this post-hoc adjustment to the parties' agreed schedule, which would substantially prejudice expert discovery that is complete except for remaining rebuttal reports. Plaintiffs devoted substantial resources to expediting fact discovery to comply with the Court's deadline; Defendants should be held to the same account.

BACKGROUND

This case challenges the constitutionality of Vermont's Act 120, which requires certain products containing genetically engineered ingredients to be labeled as having been "produced with genetic engineering," and prohibits such products from being described as "natural." 9 V.S.A. § 3043(b)-(c). Plaintiffs' First Amendment claims allege that Act 120 lacks sufficient support in the legislative record for its restrictions on speech—which is why Plaintiffs have maintained that the State is confined to the legislative record at the time Act 120 was passed when defending its speech restrictions. *See, e.g.*, Dkt. No. 105-1.

At this Court's August 4, 2015 hearing, the Court recognized the unusual nature of the case, ultimately permitting limited written fact discovery. *See, e.g.*, Aug. 4, 2015 Hr'g Tr. at

6:11-14; *id.* at 15:1-6; *id.* at 42:17-18 (with respect to document discovery, "I think there's going to be a lot less than anybody would think[.]"); *see also id.* at 44:6-8. This Court particularly cautioned against sweeping discovery requests issued to third-party members of the Plaintiff associations. *See id.* at 4:21-24 (observing that "there shouldn't be any depositions of plaintiffs' members about how they feel about GMOs and . . . whether they think they're good or bad. That's beside the point."); *id.* at 13:1-2 (setting forth the hypothetical, "No, [Defendants] are not going to do a 30(b)(6) inspection of ConAgra's files for the following 15 subjects"); *id.* at 21:20-25 ("I can see a document request for any studies, articles, . . . trials that support your contention that GE foods do not cause any adverse effects to human . . . well-being . . . . I don't see you doing anything beyond that."); *id.* at 23:9-13 ("[A]side from trials they themselves have done and testing they themselves have done, which I think is a fair question, I don't see how you get to individuals or even to [member] organizations for those materials.").

The parties negotiated a joint proposed scheduling order based on this limited conception of written discovery. In the course of negotiating the joint proposal, the parties expressly discussed application of the fact discovery deadline to third-party discovery. *See* Ex. 1. Defendants, at one point, sought to specifically *exclude* third-party discovery from the November 24, 2015 deadline, but Plaintiffs would not agree to allow third-party discovery to continue indefinitely. *See id.* at 4-6 (Aug. 27, 2015 4:37 p.m. E-Mail from M. Shafritz to E. Songer & 5:39 p.m. E-Mail from E. Songer to M. Shafritz). At that time, Defendants expressed the concern that a November 2015 "closing date for fact discovery could potentially allow [Plaintiffs'] members to run out the clock on third-party discovery." *Id.* at 2-3 (Aug. 27, 2015 9:25 p.m. E-Mail from M. Shafritz to E. Songer). The parties ultimately agreed to a November 2015 fact discovery deadline that did *not* exclude third-party discovery and placed the onus on a

party seeking discovery to move for an extension of the schedule if desired. *Id.* at 1-2 (Aug. 27, 2015 10:30 p.m. E-Mail from M. Shafritz to E. Songer).

The parties filed their agreed schedule on August 27, Dkt. No. 116, and this Court subsequently entered it without alteration, simultaneously issuing a docket entry noting: "Fact discovery due by 11/24/2015." Dkt. No. 120.

Defendants issued seventeen third-party subpoenas on or around October 7, 2015 (or later, in a few instances). *See* Mot. 2. Each of the seventeen subpoenas contained twelve sweeping requests for production extending well beyond the limited scope of discovery contemplated when the parties met before the Court in August. For just one example, the subpoenas sought from every recipient all communications concerning any individual or institutional grant recipients relating to research on the broad topics of "genetics and biotechnology" or herbicides and pesticides used on genetically engineered crops. *See* Ex. 2 at 11 ¶ 10 (Subpoena). And Defendants' subpoenas seek not just any communications concerning scientists and institutions relating to such broad subjects of research, but also any communications about any payments or grants made to the researchers. *Id.* at 10 ¶ 9 (Subpoena).

Given the breadth of these requests and the limited scope of discovery in this case, the subpoena recipients responded with timely objections, including that the subpoenas were overbroad and unduly burdensome. *See* Ex. 3 (Third Parties' Subpoena Response Letters). Two recipients produced documents. *See* Mot. 4 & Friedman Decl. ¶¶ 6-7. Several others engaged in communications with the State about the scope of the subpoenas. *See* Ex. 4 at 2 (Nov. 25, 2015 5:05 p.m. E-Mail from K. Carr to L. Friedman) & 5 at 3-4 (Nov. 25, 2015 4:15 p.m. E-Mail from K. Carr to L. Friedman). The State often took days or even weeks to respond to those communications, and when it did, it declined to meaningfully narrow the requests. *See* Ex. 4 at 8

(Nov. 2, 2015 4:26 p.m. E-Mail from L. Friedman to K. Carr) (responding to subpoena objections more than 10 days after their delivery); Ex. 5 at 7 (Nov. 12, 2015 7:40 a.m. E-Mail from L. Friedman to K. Carr) (responding to subpoena objections 10 days after their delivery); Ex. 7 at 9-10 (Nov. 5, 2015 E-Mail from L. Friedman to J. Rosenthal) (responding to subpoena objections 14 days after their delivery). Some third parties were never even *contacted* by the State after service of their objections until fact discovery had already closed. *See* Ex. 6 at 1 (Dec. 9, 2015 E-Mail from K. Gallagher to T. Tabacchi).

Plaintiffs and Defendants moved expeditiously to complete document productions by November 24, 2015, and fact discovery closed that day. Dkt. No. 120. Neither side sought an extension of the fact discovery period. Since then, the Parties have produced reports for additional experts. *See* Dkt. Nos. 127, 128. Final expert reports—rebuttals to the additional experts—are currently due February 22, 2016. Dkt. No. 120.[1]

ARGUMENT

I. The November 24, 2015 Fact Discovery Deadline Applied to All Fact Discovery.

The November 2015 fact discovery deadline in the Court-ordered schedule applied to the category of fact discovery that is the subject of Defendants' motion. There is no other deadline for third-party discovery. And the parties' own discussions (not to mention case precedent) are inconsistent with Defendants' position that the State can continue efforts to extract discovery from third parties long after the close of discovery, as long as the initial requests were merely *served* during the fact discovery period.

[1] The parties are separately filing a joint motion to address the future deadlines on the schedule. Given that the Second Circuit has not yet ruled on Plaintiffs' appeal of the preliminary injunction decision, the parties agree that it is advisable to defer future discovery deadlines until a ruling is received. The parties' dispute relates to reopening fact discovery, more than two months after the passage of the deadline. Any justification for staying future deadlines would in no way provide cause for revisiting fact discovery more than two months after it closed.

All parties understood that the November 24, 2015 deadline would apply to the collection of discovery from third parties at the time they agreed to the schedule. *See* Ex. 1 at 1-2. Indeed, they built in a failsafe: the mechanism to prevent a third-party from "run[ning] out the clock" was to seek an extension of the fact discovery deadline. *See* Ex. 1 at 3. But the State did not seek any such an extension during the fact discovery period, despite the third parties' objections to the subpoenas. Instead, they allowed discovery to close—and over two months to pass—before filing the present motion.[2]

The parties' mutual understanding squares with Second Circuit precedent. *See, e.g.*, *Wantanabe Realty Corp. v. City of N.Y.*, 159 Fed. App'x 235, 240 n.2 (2d Cir. 2005) (observing that "[t]he district court reasonably concluded that Rule 45 subpoenas may not be used to circumvent discovery deadlines"). The law in this Circuit likewise makes clear that a party unable to secure discovery responses should seek relief from the Court *before* expiration of the discovery deadline. *See Gucci Am, Inc. v. Guess?, Inc.*, 790 F. Supp. 2d 136, 140-41 (S.D.N.Y. 2011) (denying motion to compel filed after close of fact discovery); *Owen v. No Parking Today, Inc.*, 280 F.R.D. 106, 112-13 (S.D.N.Y. 2011) (same).[3]

Defendants suggest that denying a post-hoc request to extend the fact discovery schedule would allow "third parties [to] avoid all of their legal obligations to respond to timely served

[2] Indeed, the State did not even raise the issue of difficulties obtaining discovery from third parties with Plaintiffs until mid-January, seven weeks after fact discovery closed.

[3] The two cases Defendants cite, both from the District of Columbia federal district court, do not alter this conclusion. In *Barnes v. District of Columbia*, the motion to compel was filed eleven days after the close of discovery. 289 F.R.D 1, 20 (D.D.C. 2012). Defendants' motion for clarification was not filed until two months after the close of fact discovery. And in *McFadden v. Ballard, Spahr, Andrews, & Ingersoll, LLP*, plaintiff's delay in filing a motion to compel was based in part on an express agreement to supplement responses. 243 F.R.D. 1, 10 (D.D.C. 2007). There is no such cause for delay here, by Defendants' own admission. *See* Friedman Decl. ¶ 9 (asserting that third parties "refused to engage in further discussions" after the deadline for completion of fact discovery).

subpoenas simply by running out the clock." Mot. 3. Not so. Defendants, not the third parties, ran out the clock by waiting weeks after receiving objections to the subpoenas—"until the eve of the fact-discovery cutoff"—to pursue third parties' responses. *Wilson v. Frito-Lay N. Am., Inc.*, 2015 WL 846546, at *2-3 (N.D. Cal. Feb. 25, 2015). Again, Defendants had a remedy available: "[T]hey could have raised the issue with the court within the . . . discovery period." *Hartman v. United Bank Card, Inc.*, 291 F.R.D. 591, 596 (W.D. Wash. Apr. 8, 2013) (denying motion to reopen class discovery where plaintiffs "issued subpoenas to . . . third party vendors, but then failed to enforce the subpoenas within the designated time limits"); *see also* L.R. 26(a)(7) ("Absent exceptional circumstances, requests [for "additional discovery time"] must be made before the discovery deadline expires."); *Corre Opportunities Fund, LP v. Emmis Comm'cns Corp.*, 2013 WL 1500461, at *2 (S.D. Ind. Apr. 10, 2013) (denying motion for "leave to complete certain non-party discovery" when subpoenas had been issued and discussed during discovery period but moving party did not file motion before the discovery cutoff date); *In re Health Mgmt., Inc.*, 1999 WL 33594132, at *6 (E.D.N.Y. Sept. 25, 1999) (affirming magistrate's order denying motion to compel subpoena response filed months after receiving the third party's response and the close of fact discovery). They did not.

II. Defendants Have Not Shown Good Cause For Reopening Fact Discovery.

Extending the time for discovery requires a showing of good cause, and "[a]bsent exceptional circumstances, requests must be made before the discovery deadline expires." D. Vt. L.R. 26(a)(7); *see also Gucci*, 790 F. Supp. 2d at 139 ("[R]eopening discovery after the discovery period has closed requires a showing of good cause," and a party seeking to pursue further discovery responses through a "motion to compel after discovery has closed must similarly establish good cause."); Fed. R. Civ. P. 16(b)(4). Merely serving discovery requests during the pendency of the fact discovery period is not enough. "[A] party seeking modification

must demonstrate that, despite its diligent efforts, the schedule could not have reasonably been met." *Eng-Hatcher v. Sprint Nextel Corp.*, 2008 WL 4104015, at *1 (S.D.N.Y. Aug. 28, 2008) (citations omitted).

Defendants have not satisfied this standard. The parties filed their agreed discovery schedule on August 27. Defendants waited to issue subpoenas until October 7. And when they did, the majority of subpoenas called for the production of documents by October 23, 2015. The subpoena recipients timely submitted either their objections, or their documents, on or before October 23. And then Defendants apparently waited nearly three weeks from that date to even *initiate* discussions about the subpoenas with some third parties. Friedman Decl. ¶¶ 4, 9; Ex. 7 at 6-7 (Nov. 12, 2015 E-Mail from L. Friedman to J. Rosenthal). Other third parties were never even contacted about their objections during the fact discovery period. *See* Ex. 6 at 1. And as Defendants' own sparse (and incomplete) descriptions of their efforts suggest, the limited discussions they had during the fact discovery period fell far short of a reasonably diligent attempt to obtain relevant information prior to the close of discovery.[4]

[4] For example, Defendants fault Monsanto for purportedly responding to a November 12, 2015 proposed narrowing of its subpoena on December 4, 2015. *See* Friedman Decl. ¶ 9(a). In fact, counsel for Monsanto responded to Defendants' proposal on *November 17*, with a request for clarification and to raise additional questions. *See* Ex. 7 at 5-6 (Nov. 17, 2015 E-Mail from J. Rosenthal to L. Friedman). Defendants, for their part, did not respond until the day before fact discovery closed, and they took no steps to ensure production or file a motion to compel before the fact discovery deadline. *Id.* at 4-5.

Defendants also point to Bayer CropScience and E.I. Du Pont De Nemours & Co. for questioning the validity of the subpoenas after the close of fact discovery. *See* Friedman Decl. ¶ 9(c). But both companies declined, before the close of discovery, to provide substantive responses to Defendants without a sufficient written response to their relevance objections or material narrowing of the requests. *See* Exs. 4 & 5. Defense counsel responded (in part) five days later, after close of business on November 23, 2015, the day before the fact discovery deadline; they again did not attempt to ensure either the production of documents prior to the close of fact discovery or the ripeness of the dispute for a motion to compel.

Defendants maintain that they attempted to "limit and/or narrow the requests in various ways." Friedman Decl. ¶ 8. That is something of an overstatement. On the eve of the discovery deadline, Defendants agreed to "prioritize" certain categories of documents for production, but they commonly refused to promise relief from the remainder of the requests. *See* Ex. 4 at 2-3 ("Vermont has indicated that it is 'primarily' interested in certain information, suggesting that it may attempt to revive its full requests at some point in the future."). Nor did Defendants make any attempt to drive discussions to their conclusion before the end of fact discovery. Nor did they file a motion to extend the deadline. Nor did they file timely motions to compel when negotiations reached an impasse. Defendants have no basis to claim that they could not have met the discovery deadline or moved for an extension prior to the close of discovery despite their best efforts.

Defendants point to "dozens" of discussions with the numerous third-party subpoena recipients in pursuit of responses to their seventeen subpoenas. Mot. 2. The volume of discussions, and relatedly the many objections their requests prompted, was a problem of Defendants' own making. Notwithstanding the Court's guidance at the August 2015 hearing, Defendants elected to issue seventeen subpoenas, each containing twelve sweeping requests for production that extend far beyond the bounds the parties discussed with this Court in early August, including for example:

Finally, Defendants take issue with the time it took the Kellogg Company to respond to Defendants' November 17, 2015 proposal. *See* Friedman Decl. ¶ 9(b). But again, Defendants made no effort to follow up on their proposal before discovery closed or to confirm that Kellogg would refuse to produce documents before the deadline. They contacted Kellogg only on December 3, more than a week *after* the discovery deadline had passed, and even on that date only inquired when Kellogg would respond. *See* Ex. 8 at 2 (E-Mail from D. Panos to L. Friedman).

- A request for "all documents . . . concerning grants, payments, or other remuneration that [the subpoena recipient has] provided to scientists (other than [its] employees), colleges, universities, or research institutions" relating to research, writings, or presentations concerning topics as broad as "genetics and biotechnology."

- "All written communications" concerning topics as broad as "genetics and biotechnology" with "heads of departments at colleges, universities, or research institutions that [the subpoena recipient] provide[s] grants to, pay[s], or otherwise remunerate[s]" and that conduct research on topics as broad as "genetics and biotechnology."

- "All studies, reports, or analyses . . . concerning consumer purchasing habits related to GE food products, including . . . consumers' preferences for GE food products or non-GE food products."

See supra at 3-4; Ex. 2 at 10-11. It was entirely predictable that subpoenaed parties would lodge objections based on relevance, burden, and overbreadth. [5]

If Defendants nevertheless disagreed with the objections to their broadly worded subpoenas, they should have taken timely advantage of the remedy the Federal Rules provide by seeking enforcement of the subpoenas in the various courts where compliance was required. *See* Fed. R. Civ. P. 45(d)(2)(B)(i) (serving party may move to compel "*[a]t any time*" following service of objections). Defendants may have chosen not to pursue that course based on the effort required to file in the numerous jurisdictions implicated, but lack of effort is hardly an excuse for their failure to act or to raise the timing issue with this Court.

Defendants "knew of [their supposed] need for information" from the subpoena recipients "well before the fact discovery deadline," and they likewise had "ample opportunity to obtain the information during the fact discovery period," but nevertheless "failed to raise the issue with the Court at the appropriate time." *Gucci*, 790 F. Supp. 2d at 142. Their late-filed request "does not meet the good cause requirement." *Id.*

[5] While the substance of the objections are not before the Court, and would be left for resolution in the various jurisdictions where compliance would otherwise be required, the improper scope of the subpoenas further demonstrates the lack of good cause for reopening discovery.

III. Defendants' Request to Reopen Discovery is Untenable and Prejudicial.

Because Defendants are unable to demonstrate sufficient good cause—let alone exceptional circumstances—to reopen discovery, the question of whether the adverse party is or is not prejudiced by the reopening of discovery is beside the point. But in any event, affording Defendants a renewed opportunity to engage in the protracted pursuit of third-party documents of marginal, if any, relevance would cause Plaintiffs significant prejudice. The parties agreed on a case schedule that provided for consecutive fact discovery and additional expert discovery. *See* Dkt. No. 116; *see also* Ex. 1 at 6 (August 27, 2015 3:15 p.m. E-mail from E. Songer to M. Shafritz ("We feel strongly that expert discovery should not be ongoing while the factual record continues to change."). Plaintiffs then devoted substantial resources to complying with the fact discovery deadline. They then turned their attention to expert discovery, with both parties producing additional expert reports in December. Dkt. Nos. 127, 128. Allowing Defendants to move *backwards* to reopen fact discovery—to which these experts would have had no opportunity to respond—risks substantial prejudice. This radical relief is unjustified especially under these circumstances.

CONCLUSION

Defendants have made no showing of good cause to justify their request to reopen fact discovery to permit further pursuit of third-party subpoena responses. The Court should deny their motion.

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Respectfully submitted,

/s/ Catherine E. Stetson

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CERTIFICATE OF SERVICE

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