IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL ON AMERICAN-ISLAMIC RELATIONS ACTION NETWORK, INC., *et al*.,

Plaintiffs,

-v.-

PAUL DAVID GAUBATZ, *et al*.,

Defendants.

CIVIL NO: 1:09-cv-02030-CKK-JMF

RESPONSE BRIEF

MEMORANDUM OF POINTS & AUTHORITIES

IN OPPOSITION TO PLAINTIFFS' MOTION

TO RE-OPEN DISCOVERY AND TO EXTEND THE DEADLINE FOR DISCOVERY

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I. Introduction.

All Defendants, Paul David Gaubatz ("Dave Gaubatz") and Chris Gaubatz (collectively the "Gaubatz Defendants"), the Center for Security Policy ("CSP"), Christine Brim, Adam Savit, and Sarah Pavlis (collectively the "CSP Defendants"), and the Society of Americans for National Existence ("SANE") and David Yerushalmi (SANE and Yerushalmi collectively the "SANE Defendants"), join in opposing Plaintiffs' motion to re-open discovery and to extend the discovery deadline beyond January 18, 2013 (Doc. No. 144) ("Motion" and cited as "Pls.' Mot."). Defendants oppose Plaintiffs' Motion because (1) it violates the Court's Scheduling Order (Doc. No. 99) in several pertinent respects and provides no basis for doing so, (2) it is substantively deficient, and (3) it is based upon what can only be termed a patently false presentation of the discovery record in this case. It is this last issue that is the most troubling to Defendants' counsel at a professional level. Plaintiffs have, through the declaration of their in-house legal counsel, Nadhira Al-Khalili, literally misrepresented the reason that depositions in this matter have all occurred in the last three weeks of discovery and disguised Plaintiffs' lack of diligence in serving its non-party subpoenas in a timely fashion. This misrepresentation, in context of Plaintiffs' parallel efforts to hide Raabia Wazir, a former employee who signed and proffered to this Court a declaration under penalty of perjury that was patently false and filed in support of Plaintiffs' motion for temporary and preliminary injunctive relief, suggests a troubling and abusive approach to civil litigation.

For these reasons, as more specifically set forth below, Defendants respectfully request this Court deny Plaintiffs' request for the extraordinary relief to re-open and extend a discovery period that remained open for 16 months and 18 days—a discovery period the Court itself noted at the Scheduling Conference was already extraordinarily long and would not be extended.

II. Plaintiffs' Motion Violates the Court's Scheduling Order and Is Untimely.

On January 3, 2013, during an on-the-record conference call with the Court to resolve Plaintiffs' oral motion to compel non-party Frank Gaffney to sit for an additional 2.5 hours of deposition questioning after Plaintiffs had deposed Mr. Gaffney for 7 hours, Plaintiffs raised an additional issue to extend discovery to permit Plaintiffs to depose non-parties World Net Daily ("WND") and Paul Sperry pursuant to subpoenas purportedly issued under Rule 45 of the Federal Rules of Civil Procedure. At the conclusion of the conference, the Court denied Plaintiffs' oral motion to compel additional deposition questioning of Mr. Gaffney (without prejudice) and refused to address Plaintiffs' request to extend discovery on the oral record before it. The Court concluded the conference call with a suggestion that the parties discuss further amongst themselves the advisability of extending discovery to take the depositions of WND and Mr. Sperry. (Minute Entry, dated January 3, 2013).

The next day, Friday, January 4, 2013, Plaintiffs' counsel, Gadeir Abbas, sent Defendants' counsel an email asking if Defendants would consent to extend discovery to take WND and Mr. Sperry's deposition. That same day, counsel for the Gaubatz Defendants and counsel for the CSP Defendants and SANE Defendants answered separately and in writing that they opposed extending discovery because Plaintiffs had failed to act diligently in serving and noticing the depositions.[1] A meet-and-confer was arranged and held on Tuesday, January 8, 2013, on this issue. Defendants were clear: there would be no consent to extend a discovery period that had already extended beyond 16 months and where Plaintiffs were solely responsible for the last minute depositions and the failure to serve the Rule 45 subpoenas on non-party witnesses. Thus, Plaintiffs understood that if they wished to take the depositions of WND and

[1] These facts will be addressed specifically in § V. *infra* in the discussion of Plaintiffs' misrepresentations to the Court regarding the discovery history of this litigation.

Mr. Sperry, they would be required to file a motion to extend the discovery deadline.

Plaintiffs knew full well the discovery period ended on January 18, 2013. Plaintiffs also knew full well that the Court's Scheduling Order required Plaintiffs to file any motion seeking an extension of a deadline at least four business days in advance of the deadline. (Scheduling Order [Doc. No. 99], ¶ 2(c) ("Motions for extensions of time **must be filed at least four (4) business days prior to the first affected deadline**.") (emphasis in the original). Thus, Plaintiffs knew at least nine business days prior to the January 18th discovery deadline that they would need to file this Motion. But, instead of complying with the Court's Scheduling Order and filing this Motion on January 14, four business days prior to the discovery deadline, Plaintiffs waited to file this Motion until the waning hours of the very last day of discovery—Friday night, January 18, 2013.

Plaintiffs provide no explanation for this delay precisely because there is none. Plaintiffs' counsel, Ms. Al-Khalili, who authored this Motion, attended only one day of depositions during the interim period between the meet-and-confer for this Motion and January 18. Plaintiffs' other two counsel of record, Gadeir Abbas and Munia Jabbar, conducted and defended the remainder of the depositions during this period, sometimes together but more often only Mr. Abbas was present. As with all of Plaintiffs' lack of diligence during the 16-month and 18-day discovery period, Plaintiffs have cynically abused discovery practice at every turn.

For the simple reason that Defendants' Motion violates the Court's Scheduling Order in that it is untimely, it should be denied.

III. Plaintiffs' Motion Violates the Court's Scheduling Order by not Addressing Scheduling Issues.

The Court's Scheduling Order makes clear that any request to extend a deadline must include the effect on other deadlines or it will not be considered:

> (c) All motions for extensions of time **must include the following or they will not be considered**:
>
> > . . .
> > (iii) A statement of the impact that the requested extension would have on all other previously set deadlines;
> > (iv) A proposed schedule for any other affected deadlines, to be proposed only after consulting with opposing counsel . . ..

(Scheduling Order [Doc. No. 99] at ¶ 2(c)(i)-(v)) (emphasis in the original).

Plaintiffs' Motion seeks to re-open and to extend discovery by 30 days beyond the January 18 discovery deadline. But, what the Motion does not address at all is how this extension will affect the other deadlines imposed by the Court, nor does the Motion propose alternatives. Indeed, the Motion proposes no alternatives because Plaintiffs made no effort to consult with Defendants' counsel on these scheduling issues. Even more oddly, Plaintiffs' Motion does not even explain how Plaintiffs will be able to schedule these proposed non-party depositions within a 30-day period.

For example, there is no dispute that neither Martin Garbus nor Daniel Horowitz, counsel for WND and Mr. Sperry, informed Plaintiffs' counsel that either attorney would accept service of a subpoena for non-party Mr. Sperry. (Garbus Decl. at ¶¶ 1-9, at Ex. 1). Mr. Sperry does not reside within this Court's jurisdiction, and he has steadfastly refused to be subject to a deposition in this matter without actual personal service and a ruling on a motion to quash. Plaintiffs have not even attempted to serve him. (Garbus Decl. at ¶¶ 11-13, at Ex. 1; Al-Khalili Decl., Pls.' Mot. at Ex. S [Doc. No. 144-1] at ¶¶ 1-9). Moreover, although Mr. Garbus, as an accommodation, agreed on January 3, 2013, to accept service of process on behalf of WND, it is abundantly clear at this stage that WND will also move to quash Plaintiffs' Rule 30(b)(6) subpoena *duces tecum* on several grounds, not the least of which on the grounds that it is untimely, vague, overbroad, and a transparent effort to harass and oppress a non-party publisher of a book without any factual

basis of wrongdoing. (Garbus Decl. at ¶¶ 13-14, at Ex. 1).

What makes all of this even more egregious is that Plaintiffs have known since the day they filed this lawsuit, on October 29, 2009, more than three years ago, that WND was the publisher of the book Plaintiffs incredulously believe is probative[2] and that Mr. Sperry was the listed co-author.

But what this invariably means is that Plaintiffs' so-called 30-day extension of discovery will await the resolution of this Motion, the actual not-yet-effected service on Mr. Sperry, and the inevitable motions to quash, one of which will involve a district court from another jurisdiction. Yet, Plaintiffs do not bother explaining in their Motion how this delay will affect the mediation of this matter now scheduled for March 7, 2013,[3] and the Court-ordered status conference currently set for March 28, 2013,[4] the purpose of which is presumably to set a schedule for summary judgment motions and pre-trial and trial deadlines. What is clear, at least to Defendants, is that while mediation is a valuable process and worthwhile in this case, it will not be productive if discovery is ongoing. And, to add insult to injury to the scheduling in this matter is the fact that Plaintiffs' proposed additional discovery will entail additional motion practice.

All of this does not even begin to address the scheduling problems of a case that involves

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[2] Any argument that the book is even remotely relevant to this litigation at this stage is preposterous. Plaintiffs have already deposed Defendant Chris Gaubatz, who is the only Defendant who could testify about his actual conduct while interning at Plaintiffs' offices. Plaintiffs also deposed Defendant Dave Gaubatz, who is the putative co-author of the book. The book, actually written by Mr. Sperry, is hearsay at least twice removed. Moreover, there is not a shred of evidence after 16 months of discovery that WND or Mr. Sperry acted in any way to assist in any wrongdoing or were even involved during the time Defendant Chris Gaubatz interned at Plaintiffs' offices. All of this is only underscored by the fact that neither WND nor Mr. Sperry is a party to this litigation. (*See* §§ IV. & VI. *infra* [discussing Plaintiffs' failure to show any prejudice to their case if the proposed depositions do not go forward]).

[3] *See* Minute Entry, dated January 17, 2013.

[4] *See* Minute Entry, dated November 30, 2013.

eight separate Defendants and four active defense counsel. For example, Mr. Garbus is on travel in Asia until February 10, 2013, and is preoccupied during the remainder of the month due to his litigation calendar. (Garbus Decl. at ¶ 15, at Ex. 1). Mr. Horowitz begins a lengthy trial at the end of January. (Garbus Decl. at ¶ 15, at Ex. 1). Messrs. Muise and Yerushalmi, who both cleared their trial calendars for three weeks to allow Plaintiffs to take all of their depositions prior to the close of discovery, have several major federal matters that will require depositions throughout the months of February in Michigan and are otherwise occupied with a busy trial calendar through March 2013. (Muise Decl. at ¶ 13, at Ex. 2).

With all of these obvious logistical issues, Plaintiffs waited until the evening of the last day of discovery to file this Motion without even attempting to address these scheduling matters as required in any such motion pursuant to the Scheduling Order.

IV. Plaintiffs' Motion Fails to even Approximate Good Cause.

Plaintiffs acknowledge, by giving lip service to the legal standard for their Motion to extend the discovery deadline, that they carry the burden to establish the basis for an extension of discovery. Thus, Plaintiffs cite to Rule 16(b)(4) of the Federal Rules of Civil Procedure, which requires "good cause" for an extension of a scheduling deadline. And, while Plaintiffs additionally cite vaguely to case law in this Circuit for the general proposition that their failure to properly serve and pursue the depositions of WND and Mr. Sperry in a timely fashion should be excused because they were "diligent" and Defendants somehow obstructed their efforts, Plaintiffs' arguments to this point are both legally inapposite and factually dishonest. (Pls.' Mot. at 9-11). To properly address Plaintiffs' claim of good cause, Defendants return to a more appropriate and careful analysis of good cause—or, rather in this case, lack thereof—as set out by this Court in a considered opinion that has set the standard for good cause analysis in this

District and in several others.

In *DAG Enters. v. Exxon Mobil Corp.*, 226 F.R.D. 95, 104 (D.D.C. 2005) (Kollar-Kottely, J.), the Court began its analysis by explaining that non-party Rule 45 subpoenas are discovery subject to the discovery deadlines and by noting the importance of following the Court's Scheduling Order:

> A subpoena pursuant to Federal Rule of Civil Procedure 45 to a third-party is not exempt from discovery deadlines in scheduling orders. Rather, contrary to Plaintiffs' assertions, Rule 45 subpoenas are "discovery" under Rules 16 and 26 of the Federal Rules of Civil Procedure, and are subject to the same deadlines as other forms of discovery. *See, e.g., Integra Lifesciences I, Ltd. v. Merck KGaA*, 190 F.R.D. 556, 561 (S.D. Cal. 1999) ("Case law establishes that subpoenas under Rule 45 are discovery, and must be utilized within the time period permitted for discovery in a case."); *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 177 F.R.D. 443, 445 (D. Minn. 1997) (subpoenas under Rule 45, invoking the authority of the court to obtain the pretrial production of documents and things, are discovery within the definition of Fed. R. Civ. P. 26(a)(5) and are therefore subject to the time constraints that apply to all other methods of formal discovery); *Rice v. United States*, 164 F.R.D. 556, 558 (N.D. Okl. 1995) ("After careful consideration, the Court finds that the Rule 45 subpoenas *duces tecum* in this case constitute discovery."); *see also Puritan Inv. Corp. v. ASLL Corp.*, 1997 U.S. Dist. LEXIS 19559, Civ. No. 97-1580, 1997 WL 793569, at *1 (E.D.Pa. Dec. 9, 1997) ("Trial subpoenas may not be used, however, as a means to engage in discovery after the discovery deadline has passed."); *BASF Corp. v. Old World Trading Co.*, 1992 U.S. Dist. LEXIS 1111, Civ. No. 86-5602, 1992 WL 24076, at *2 (N.D.Ill. Feb. 4, 1992) ("Here, discovery has been closed for almost eleven months, and the court will not allow the parties to engage in discovery through trial subpoenas.").
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> A Scheduling Order is "'intended to serve as the unalterable road map (absent good cause) for the remainder of the case.'" *Olgyay v. Soc. for Envtl. Graphic Design, Inc.*, 169 F.R.D. 219, 220 (D.D.C. 1996) (quoting Final Report of the Civil Justice Reform Act Advisory Group of the United States District Court for the District of Columbia at 39 (Aug. 1993)). "'A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (quoting *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)). Indeed, "disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of litigation, and reward the indolent and the cavalier." *Id.* As such, Rule 16 of the Federal Rules of Civil Procedure makes plain that a scheduling order entered by a district judge "shall not be modified except upon a showing of good cause and by leave of the

> district judge. . . ." Fed. R. Civ. P. 16(b); *see also* LcvR 16.4 ("The court may modify the scheduling order at any time upon a showing of good cause.").

DAG Enters., 226 F.R.D. at 104.

In explaining the touchstone of the analysis of "good cause," this Court explained:

> Because the deadline for discovery expired, Plaintiffs are obligated to seek a modification of the Scheduling Order by demonstrating "good cause" before serving additional discovery and redrafting their expert reports. Fed. R. Civ. P. 16(b); LcvR 16.4(b); *Olgyay*, 169 F.R.D. at 219-20. "Rule 16(b)'s 'good cause standard primarily considers the diligence of the party seeking the amendment. The district court may modify the pretrial schedule if it cannot reasonably be met despite the diligence of the party seeking the extension.'" *Johnson*, 975 F.2d at 609 (quoting Fed. R. Civ. P. 16 advisory committee notes (1983 amendment)); *see also* 3 Moore's Federal Practice § 16.14[b] (2003) ("It seems clear that the factor on which courts are most likely to focus when making this determination is the relative diligence of the lawyer or lawyers who seek the change."). Importantly, "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Id*.; *see also Integra Lifesciences I*, 190 F.R.D. at 559-60 (if a party that seeks to extend the scheduling order to take untimely discovery "was not diligent, the inquiry should end"); 6A Wright, Miller & Kane, Federal Practice and Procedure § 1522.1 at 231 (2d ed. 1990) ("Good cause" "require[s] the party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension."); 3 Moore's Federal Practice § 16.14[b] (2003) ("'Good cause' is likely to be found when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party"). "Mere failure on the part of counsel to proceed promptly with the normal processes of discovery and trial preparation should not be considered good cause." *Olgyay*, 169 F.R.D. at 220 (quoting Final Report of the Civil Justice Reform Act Advisory Group of the United States District Court for the District of Columbia at 41 (Aug. 1993)). In sum, "although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification." *Johnson*, 975 F.2d at 609 (citing *Gestetner Corp.*, 108 F.R.D. at 141). "If that party is not diligent, the inquiry should end." *Id*.
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> Courts in this District have routinely denied requests for discovery beyond a cut-off date where a party has shown a lack of diligence during the allowed time period. *See, e.g., Smith Wilson Co. v. Trading & Dev. Establ.*, Civ. No. 90-1125, 1991 WL 171689, at *1 (D.D.C. Aug. 20, 1991) ("As counsel well knows, this Court established a firm discovery cut-off after consulting with counsel for both sides in open court."); *Secord v. Cockburn*, 747 F. Supp. 779, 786 (D.D.C. 1990) ("where a party fails to pursue discovery in the face of a court-ordered cutoff, as

> here, that party may not be heard to plead prejudice resulting from his own inaction") (citation omitted); *Senkow v. Herrington*, Civ. No. 86-2220, 1989 WL 46747, at *1 (D.D.C. Apr. 25, 1989) (denying more time for discovery where court had allowed 120 days and had notified parties in its scheduling order that it was "not inclined to grant further continuance of discovery").
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> Importantly, when analyzing the touchstone question of whether the requesting party has demonstrated "good cause," courts are guided by the rule that "when a plaintiff . . . is aware of the existence of documents before the discovery cutoff date and issues discovery requests, including subpoenas after the discovery deadline has passed, then the subpoenas . . . should be denied." *McNerney v. Archer Daniels Midland Co.*, 164 F.R.D. 584, 588 (W.D.N.Y. 1995) (citing cases).

DAG Enters., 226 F.R.D. at 105-06.

This case presents the quintessential example of the failure of "good cause" as that standard has been set out by this Court. Specifically, Plaintiffs have known since the filing of the original complaint in October 2009 that WND published the book Plaintiffs claim is probative and that Mr. Sperry was at least the co-author of that book. Yet, even based upon the voluminous, albeit selective, email communications between counsel filed in support of the Motion, Plaintiffs concede they did not mention the desire to depose Mr. Sperry until November 20, 2012. (Pls.' Mot., Ex. G [Doc. No. 144-1] at 35[5]). Plaintiffs did not mention any desire to depose WND until November 21, 2012. (Pls.' Mot., Ex. I [Doc. No. 144-1] at 41). Plaintiffs' Motion confirms that Plaintiffs only began to even mention deposing WND and Mr. Sperry in late November 2012. (Pls. Mot. at 5) ("Plaintiffs have been seeking the depositions of Mr. Paul Sperry and World Net Daily (WND) since November 2012."). This "seeking the depositions" of non-parties Mr. Sperry and WND, which did not even begin by email reference until November 20, 2012, was not the result of anything learned in discovery and certainly nothing learned

[5] All page references in citations to the exhibits filed in support of Plaintiffs' Motion at Doc. No. 144-1 are to the printed ECF page numbering of the ECF filing.

during depositions in this case taken only later in December 2012 and January 2013.[6] In other words, to the extent Plaintiffs think these non-party depositions are important today, they were no less important on September 1, 2011, when this Court issued its Scheduling Order and the discovery period formally began.

To avoid having to explain their delay for serving subpoenas on these non-parties and for their delay in even mentioning their desire to schedule the depositions, Plaintiffs now create a contrived explanation for the importance of these depositions developed only after the depositions taken from late December 2012 through January 18, 2013. Specifically, Plaintiffs offer **only** the following explanations:

> These two witnesses are important to understanding the circumstances surrounding the publication of the book Muslim Mafia and the proceeds from that book; Mr. Sperry authored the book, and World Net Daily published the book.

(Pls.' Mot. at 5).

> These two witnesses are expected to have material evidence with respect to Plaintiffs' claims. Sperry authored the book Muslim Mafia with and had access to the materials subject to this court's pending protective order. Because of the late dates that opposing counsel made their deponents available, Plaintiffs only learned this week that Sperry was the sole author of the book. WND is the company that published the book Muslim Mafia, and through the deposition of Chris Gaubatz on January 10, 2013, Plaintiffs now have reason to believe that WND had access to materials subject to the protective order as early as the summer of 2008.

[6] The depositions taken in this case were as follows: Frank Gaffney (non-party) taken by Plaintiffs on December 26, 2012; Raabia Wazir (non-party, former employee of Plaintiff CAIR Foundation, Inc.) taken by CSP Defendants on January 3, 2013; Paul Donvito (non-party) taken by Plaintiffs on January 7, 2013; Plaintiffs Council on American-Islamic Relations Action Network, Inc. and CAIR Foundation, Inc. and Corey Saylor (non-party, employee of CAIR Foundation, Inc. taken by CSP Defendants on January 8, 2013; Nihad Awad (non-party board member of Plaintiffs and employee of at least CAIR Foundation, Inc.) and Nadhira Al-Khalili (non-party employee of CAIR Foundation, Inc. and Plaintiffs' legal counsel) taken by CSP Defendants on January 9, 2013; Defendant Chris Gaubatz taken by Plaintiffs on January 10, 2013; Defendant Dave Gaubatz taken by Plaintiffs on January 14, 2013; Defendant Christine Brim taken by Plaintiffs on January 15, 2013; Defendants David Yerushalmi and CSP taken by Plaintiffs on January 17-18, 2013; and Defendant SANE taken by Plaintiffs on January 18, 2013.

(Pls.' Mot. at 10) (quoting almost verbatim from the declaration of Nadhira Al-Khalili filed in support of the Motion at Ex. S, ¶ 9 [Doc. No. 144-1] at 79).

What is lacking in these transparently self-serving and empty rationalizations is exactly *what* Plaintiffs learned in Chris Gaubatz's deposition—or in fact in *any* discovery after filing the original complaint in October 2009—that would have created some additional importance to these depositions. That is, why would Plaintiffs have waited until, respectively, November 20 and 21, 2012—13 months after discovery began—to even mention Plaintiffs' desire to depose these non-parties? Or, for that matter, why would Plaintiffs not have made some effort to serve subpoenas on these "witnesses [who] are expected to have material evidence with respect to Plaintiffs' claims" at any time during discovery prior to their mention in late November 2012? Indeed, to this date, Plaintiffs have made no effort to actually serve Mr. Sperry. Moreover, there is in fact nothing in Defendant Chris Gaubatz's deposition, or in any other deposition, or in any of the voluminous documents produced by Defendants, or in any of the voluminous answers to Plaintiffs' interrogatories, all provided by Defendants in a timely fashion, that would create any new reason to depose Mr. Sperry or WND. Plaintiffs' failure to mention any specific "discovery" during the discovery period to have elevated the importance of these depositions of non-parties is telling in the extreme. Plaintiffs' failure to even mention these depositions until late-November 2012, and their failure to properly serve them is quite simply not explained in the Motion. This does not qualify for good cause. Rather, it qualifies as dilatory and the absence of good cause.

Even assuming *arguendo* that Plaintiffs have divined some extraordinary reason to vitiate this Court's Scheduling Order and to re-open discovery for some undetermined period of time while Plaintiffs attempt to locate and serve Mr. Sperry in another jurisdiction and the parties

engage in motion practice to brief Mr. Sperry's and WND's respective motions to quash, Plaintiffs' Motion misrepresents the facts that have led the parties and the Court to this last minute effort to re-open and extend discovery. Defendants turn to this misrepresentation in the following section.

V. Plaintiffs' Misrepresent the Factual Record in Multiple Ways to Manufacture Improperly "Good Cause."

As this Court has explained, in this District, the touchstone inquiry to establish "good cause" is whether the movant acted diligently to conduct the discovery it now seeks to conduct beyond the discovery deadline. *DAG Enters.*, 226 F.R.D. at 106. As noted above, Plaintiffs have not met this burden. They have learned nothing new over the past three-plus years since filing this lawsuit that would have justified waiting until November 20, 2012—the 14th month of discovery—days before the Thanksgiving holiday, the Christmas holiday and New Years, when counsel and witnesses are typically on vacation and unavailable—to even mention the desire to depose these non-parties. At best, Plaintiffs make some vague noise about something learned in depositions that Plaintiffs did not take until January 2013—the 17th and last month of discovery.

Even if we were to grant Plaintiffs an assumption that there was some last minute discovery, which inexplicably raised the bar on the importance of these depositions, this would not end the Court's inquiry. As the Court made clear in *DAG Enters.*, Plaintiffs must show they exercised reasonable diligence to arrange for and to take the non-party depositions they now seek. *Id*. at 108 ("Plaintiffs' lack of diligence and failure to pursue available discovery within the agreed-upon allotted time ensures that Plaintiffs cannot establish the 'good cause' necessary to persuade the Court to modify the Scheduling Order and permit Plaintiffs the opportunity to belatedly obtain the margin information discovery."). Indeed, Plaintiffs make no real effort to address the touchstone analysis (*i.e.*, what new insights occurred in November 2012 or for that

matter in January 2013 that excuse Plaintiffs delay in even mentioning these non-parties until the end of the discovery period), but instead decide to contort, if not misrepresent, the discovery record in this case to argue that their failures were actually due to some obstructionist behavior by Defendants.

Plaintiffs' revisionism is false on its face. At the start of discovery, during the meet-and-confer on the Proposed Joint Detailed Discovery Plan required of the parties by this Court's Scheduling Order, Plaintiffs took the position that they would not begin their proposed depositions until Defendants had complied with all of Plaintiffs' extant discovery requests—notably Plaintiffs' document requests. During the same meet-and-confer, the Gaubatz defendants insisted on depositions beginning immediately. The CSP Defendants agreed with Plaintiffs. These positions were memorialized in the Proposed Joint Detailed Discovery Plan filed with the Court on September 21, 2011. (Doc. No. 101 at §§ F. 1.-3.). Plaintiffs then served their first requests for document production upon Defendants Chris Gaubatz, Dave Gaubatz, and CSP (respectively on October 4, 25, and 26, 2011). The CSP Defendants served their first requests for document production upon Plaintiffs on November 14, 2011. Additional discovery requests, such as interrogatories and requests for admissions, were also served by the parties on each other.

The Gaubatz Defendants fully complied with all extant document requests and fully answered all interrogatories propounded upon them by Plaintiffs by early December 2011. Defendant CSP also fully complied with all extant discovery requests including full and complete answers to Plaintiffs' extant first set of interrogatories by December 2011 and by service of a supplemental and final production of documents by May 14, 2012. By this date as well, the Gaubatz Defendants had each responded fully to Plaintiffs' second set of document

requests and interrogatories. (Garbus Decl. at ¶¶ 19-20, at Ex. 1; Muise Decl. at ¶ 8, at Ex. 2). Indeed, throughout the lengthy discovery process, each and every Defendant has responded fully and timely to all of Plaintiffs' document requests, has interposed no objections to refuse to answer or respond to any document request, and in fact has even answered and responded to discovery requests regarding specific legal advice received or provided by Defendant(s) during what has been termed by the parties as the CAIR documentary film proposal to avoid the need for motion practice on the availability of attorney-client privilege. (Garbus Decl. at ¶ 21, at Ex. 1).

In contrast, notwithstanding CSP Defendants' document request served upon Plaintiffs on November 14, 2011, Plaintiffs had not produced a single document in response until October 25, 2012, nearly a year later.[7] Indeed, Plaintiffs did not fully comply with CSP Defendants' document request, at least by Plaintiffs' own admission, until November 20, 2012. (Pls. Mot., Ex. G [Doc. 144-1] at 35; *see also* Garbus Decl. at ¶ 22, at Ex. 1; Muise Decl. at ¶ 10, at Ex. 2). Moreover, as noted in previous motion practice in this matter, Plaintiffs played hide-and-seek not merely with documents, but also with their answers to Defendants' interrogatories. (*See, e.g.*, Defs.' Mot. for Leave to File Mot. for Summ. J. [Doc. No. 120] at 10-32; Defs.' Reply Br. in supp. of Mot. for Leave to File Mot. for Summ. J. [Doc. No. 123] at 10-22).

[7] Specifically, on December 14, 2011, Plaintiffs' produced no documents and their collective response to the 16 separate document requests of CSP Defendants' First Request for Production of Documents (served upon Plaintiffs on November 14, 2011) was as follows: "RESPONSIVE DOCUMENTS: Without waiving the previous objection, the Plaintiffs reserve the right to amend this response as discovery continues." On June 19, 2012, Plaintiffs supplemented two of its 16 individual responses from its original response by merely providing copies of documents previously produced by the Gaubatz Defendants in response to the stipulated preliminary injunction (Doc. No. 19)—that is, the documents purportedly removed from Plaintiffs' offices by Defendant Chris Gaubatz. But, Plaintiffs' had still not produced a single document relating to 14 other specific document requests. On October 24, 2012, Plaintiffs finally began production in earnest in response to CSP Defendants' First Request for Production of Documents but only "completed" that production, by Plaintiffs' counsel's own admission, on November 20, 2012.

This abbreviated study in contrasting responses to discovery practice is relevant here because throughout April and May 2012, after Defendants had **fully complied** with all extant discovery requests of Plaintiffs, the parties had ongoing email exchanges and telephonic conferences to discuss extant discovery issues and deposition scheduling. Plaintiffs' Motion, however, as purportedly supported by Ms. Al-Khalili's declaration, simply misrepresents the fact of these discussions by claiming none of them took place. That is, Plaintiffs' Motion, which again tracks almost verbatim Ms. Al-Khalili's declaration, claims Ms. Al-Khalili sent an email on March 16, 2012, to begin scheduling depositions and that Defendants ignored the email entirely only to hear back from Ms. Al-Khalili on August 29, 2012, in another effort to schedule depositions. (Pls.' Mot. at 2-3; Al-Khalili Decl. at ¶¶ 2-3 at Ex. S). Aside from the fact that Plaintiffs do no explain what they were doing from March to August 2012 to diligently schedule depositions, Plaintiffs' representations to the Court on this matter are false.

To begin, Defendants' counsel sent numerous emails during April and May 2012 to discuss discovery issues, including the scheduling of depositions. Indeed, there were many emails regarding an omnibus meet-and-confer to discuss all open discovery issues and a preparatory telephone conference took place during this time period. (Muise Decl. at ¶¶ 4-7, at Ex. 2). As a result, counsel for Plaintiffs and Defendants held a lengthy meet-and-confer on May 3, 2012, to cover discovery issues, including the scheduling of depositions. During the conference call, all counsel reconfirmed that no depositions would take place until all production of documents currently outstanding and discussed during the meet-and-confer was completed. Plaintiffs' counsel expressly agreed to this. In fact, by May 14, 2012, CSP Defendants supplemented and completed their previous document production. The Gaubatz Defendants had fully complied with all previous requests for document production in December 2011. Yet,

Plaintiffs had still not produced a single document to support their claims, to address Defendants' affirmative defenses, or to support a single dollar of damages. (Garbus Decl. at ¶¶ 19-24, at Ex. 1; Muise Decl. at ¶¶ 8-10, at Ex. 2).

In addition, during this lengthy meet-and-confer, counsel for all parties agreed that given the logistics of scheduling depositions and given the fact that Plaintiffs had still not produced a single document in response to legitimate and appropriate document requests—served upon Plaintiffs on November 14, 2011—Plaintiffs' witnesses would be deposed first, then the Gaubatz Defendants, then the CSP Defendants. However, there was no restriction on non-party subpoenas, and Plaintiffs never even mentioned the desire to depose WND or Mr. Sperry. (Garbus Decl. at ¶ 18, at Ex. 1; Muise Decl. at ¶¶ 8-11, at Ex. 2).

During the intervening months, Plaintiffs did in fact raise the issue of scheduling, and Defendants agreed that depositions could and should begin as early as July 2012 if Plaintiffs in fact completed production. The fact is that Plaintiffs did not even begin producing documents until October 25, 2012, and had not "completed" production, by their own admission, until November 20, 2012. This is why deposition scheduling did not take place in earnest until late November 2012. It was never the fact that Defendants were not ready, willing, and able to begin depositions earlier. The entire delay was the result of Plaintiffs failure to abide by the Rules, the Scheduling Order, and its own demands and agreements that document production precede depositions. (Garbus Decl. at ¶¶ 23-24, at Ex. 1; Muise Decl. at ¶ 12, at Ex. 2). This is precisely why Ms. Al-Khalili sent her November 20, 2012, email announcing that Plaintiffs had finally completed their production, and now it was appropriate to finally schedule depositions in earnest. (Pls. Mot., Ex. G [Doc. 144-1] at 35). And, indeed, the parties engaged in serious deposition scheduling at this point, but were obviously constrained by the holiday season and

travel/vacation schedules, including the unavailability of several of Plaintiffs' witnesses during December 2012. As a result, all parties agreed to take several depositions on certain days and to work hard to complete all depositions beginning the day after Christmas through January 18, 2013.

But beyond Plaintiffs' misrepresentations about the delay in starting depositions, Plaintiffs have also misrepresented two additional and pertinent facts. First, Plaintiffs claim in their Motion that both WND and Mr. Sperry were actually served. (Pls.' Mot. at 1) ("The undersigned properly effected service of subpoenas seeking deposition testimony on two non-party witnesses.") This is patently false. Mr. Sperry has never been served personally or through counsel. He has never authorized any counsel to accept service on his behalf, and no counsel ever informed Plaintiffs' counsel that he had. Indeed, Mr. Garbus, who represents both WND and Mr. Sperry, personally telephoned Ms. Al-Khalili on or about Friday, November 30, 2012, and expressly informed Ms. Al-Khalili that he was not authorized to accept service for either WND or Mr. Sperry. (Garbus Decl. at ¶ 25, at Ex. 1). It was not until January 3, 2013, as an accommodation to Plaintiffs, that Mr. Garbus informed Ms. Al-Khalili that he would accept service for WND (not Mr. Sperry), but as Mr. Garbus made clear subsequently, that service would only matter if there was "good cause" for the Court to re-open discovery. (Garbus Decl. at ¶ 10, at Ex. 1). But in all events, Mr. Sperry was most certainly never served directly or through any authorization to accept service.

Second, Plaintiffs' failure to even address Mr. Garbus' telephone conversation with Ms. Al-Khalili on November 30, 2012, whereupon Mr. Garbus stated expressly that he was not authorized to accept service on behalf of WND and Mr. Sperry, raises yet another troubling issue. (Garbus Decl. at ¶¶ 8-9, at Ex. 1). Plaintiffs seem to be claiming that their assumption

that email service upon Mr. Garbus without an expressed authorization was reasonable under the circumstances. This argument is not only unsupported, it is simply absurd. And, this can best be understood in context of the deposition of non-party witness Raabia Wazir.

At the start of this litigation, one of the key claims made by Plaintiffs was that Defendant Chris Gaubatz signed a confidentiality agreement, which he allegedly breached by disclosing audio-video recordings of conversations he had recorded inside Plaintiffs' offices and by taking certain documents from Plaintiffs' offices. With the filing of the original complaint in this matter, Plaintiffs also sought a temporary restraining order and preliminary injunction to force the Gaubatz Defendants to return documents, to immediately produce the audio-video recordings, and to cease disclosing them to the public. (Doc. No. 2). While Plaintiffs failed to actually produce a signed confidentiality agreement, they did produce a declaration by Raabia Wazir, a former employee who had been Defendant Chris Gaubatz's supervisor during his internship at Plaintiffs' offices. In that declaration, Wazir states unequivocally that she provided Defendant Chris Gaubatz with a confidentiality agreement and that he signed it and gave it to her. (Wazir Decl. at ¶ 9 [Doc. No. 7-1] as Ex. 1 in supp. of Pls.' Mot. for TRO and Prelim. Inj.). Defendant Chris Gaubatz, however, swore under oath in his answers to Plaintiffs' interrogatories that he never signed a confidentiality agreement. (Yerushalmi Decl. at ¶¶ 4-5, at Ex. 3.).

What made Wazir's sworn testimony in her declaration suspect is that the audio-video recording that captured her exchange with Defendant Chris Gaubatz clearly shows Wazir instructing Defendant Chris Gaubatz not to read the so-called confidentiality agreement but to just "do it on his own time." Nowhere do the audio-video recordings evidence that Defendant Chris Gaubatz signed the purported confidentiality agreement or that he returned it to Wazir.

Thus, the stage was set and all of the parties understood the importance of Raabia Wazir's deposition. However, when CSP Defendants' counsel asked Ms. Al-Khalili if Plaintiffs would make Ms. Wazir available for a deposition, Ms. Al-Khalili's literal answer to Defendants' counsel was: "good luck." (Pls.' Mot., Ex. G [Doc. No. 144-1] at 35; Yerushalmi Decl. at ¶ 6, at Ex. 3). In other words, one of Plaintiffs' key witnesses to establish the existence of an actual confidentiality agreement between Plaintiffs and Defendant Chris Gaubatz was "in the wind" as far as Plaintiffs were concerned, even though they had successfully located her post-CAIR employment to get her to sign her declaration swearing under oath that Defendant Chris Gaubatz signed and returned to her a confidentiality agreement. Was there any doubt that Wazir would magically reappear the moment ***Plaintiffs needed*** her written testimony to oppose Defendants' future motion for summary judgment or at trial? Little to none.

Counsel for CSP Defendants immediately understood the game Plaintiffs were playing and retained a private investigation firm to locate and serve Wazir. After a careful search of the surrounding states, Wazir was located attending law school in Kentucky, and she was personally served there on December 12, 2012, pursuant to a Rule 45 subpoena issued out of the United States District Court for the Western District of Kentucky. Not surprisingly, when CSP Defendants' counsel telephoned Wazir to confirm her attendance at the deposition scheduled for December 31, 2012, she informed counsel that she was represented by Gadeir Abbas, one of Plaintiffs' three in-house attorneys and counsel of record in this case. (Yerushalmi Decl. at ¶¶ 7-8, at Ex. 3).

What makes this narrative explosive is that under questioning from CSP Defendants' counsel at her deposition, Wazir admitted that she did not in fact have knowledge of ever receiving a signed confidentiality agreement from Defendant Chris Gaubatz. In other words, her

declaration submitted to support Plaintiffs' motion for a TRO and preliminary injunction was false. (Yerushalmi Decl. at ¶¶ 9-10, at Ex. 3). Moreover, during her deposition testimony, Wazir admitted that even though it was her responsibility to obtain confidentiality agreements, she could recall only one intern ever actually signing a confidentiality agreement, and that intern was not Defendant Chris Gaubatz. (Yerushalmi Decl. at ¶ 11, at Ex. 3). Indeed, Plaintiffs' ultimate document production evidences this carelessness by Plaintiffs because Plaintiffs could not produce signed confidentiality agreements for any number of interns, volunteers, and employees who worked at Plaintiffs' offices during the period at issue in this litigation. (Yerushalmi Decl. at ¶ 12, at Ex. 3). Further, Wazir admitted that the interns were never provided written rules, procedures, or policies about confidentiality or the proprietary nature of the materials the interns would deal with at Plaintiffs' offices. Wazir also testified she had no recollection of ever informing the interns about the confidentiality or proprietary nature of any information or materials available to the interns. (Yerushalmi Decl. at ¶ 13, at Ex. 3).

It is hardly surprising that Ms. Al-Khalili informed Defendants that Plaintiffs had no idea how to contact Wazir and "good luck" trying to serve her. It is similarly hardly surprising that once CSP Defendants, acting diligently as required by the circumstances, located and personally served Wazir in Kentucky, Plaintiffs' counsel showed up as Wazir's counsel for the deposition.

Under these circumstances, Plaintiffs' argument that they acted diligently in pursuing the depositions of WND and Mr. Sperry by simply assuming that Mr. Garbus would accept service of process on his clients' behalf is simply not credible. Moreover, Plaintiffs still have not explained why they did not even mention a desire to depose WND and Mr. Sperry until November 20-21, 2012, more than a year after discovery commenced. This is hardly an example of diligence or good cause.

VI. Defendants Will Suffer Prejudice if Discovery Is Re-Opened and Plaintiffs Will Suffer No Prejudice if Their Motion is Denied.

As this Court explained in *DAG Enters.*, while the relative prejudicial effect of granting or denying a motion to re-open discovery is not dispositive or even central to the traditional factor of "good cause," it may be weighed by a court when engaged in the balancing that often takes place in such matters. *DAG Enters.*, 226 F.R.D. at 108-12. In this case, both of these factors weigh in favor of denying the Motion. As noted at length above, Plaintiffs have not even attempted to explain why these depositions are critical to their case. Other than a vague reference to learning about the proceeds of the book, Plaintiffs have not explained how even that information affects their case. Even the issue of unjust enrichment would only touch upon the monies received by the Gaubatz Defendants for the book, not by a non-party publisher, WND, or by a co-author, Mr. Sperry.

Similarly, as noted above, the prejudice to Defendants for re-opening discovery in this matter is patent. The CSP Defendants specifically moved for leave to file a motion for summary judgment on May 2, 2012, precisely because there was no evidence to support any claims against them. (Doc. No. 120). The Court denied that motion by minute entry on June 12, 2012, on the grounds that discovery was still ongoing. Today, all Defendants are even more anxious to move for summary judgment, and although they are all prepared to engage in serious mediation, especially in light of the involvement of at least two insurance carriers, they are no less anxious to file their dispositive motions. Necessarily, opening up discovery at this stage, waiting for Plaintiffs to actually serve Mr. Sperry, briefing and waiting for two separate district courts to rule on the anticipated motions to quash, all for depositions of non-parties with no clear basis for those depositions, will work a tremendous prejudice to Defendants given that this litigation has been ongoing since October 2009. Mediation will be put off indefinitely and, in fact, given the

delay, possibly cancelled in order to allow Defendants to file their respective motions for summary judgment in a timely fashion. The status conference currently set for the end of March 2013 will also likely need to be reset given all that would need to precede it. In short, there is nothing to be gained and much to be lost by re-opening and extending discovery.

VII. Conclusion.

For all the reasons set forth above, Defendants ask the court to deny Plaintiffs' Motion to re-open discovery and to extend the discovery deadline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

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