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 Action No. 09-02030 (CKK)

ORDER
(February 8, 2013)

Plaintiffs Council on American Islamic Relations Action Network, Inc. and CAIR Foundation, Inc. (together "Plaintiffs") bring this action against several defendants: David Gaubatz and Chris Gaubatz (the "Gaubatz Defendants"); the Center for Security Policy, Inc. ("CSP") and three of its employees, Christine Brim, Adam Savit, and Sarah Pavlis; the Society of Americans for National Existence ("SANE") and David Yerushalmi, General Counsel to CSP (collectively "Defendants"). Plaintiffs allege that Defendants conceived and carried out a scheme to place Chris Gaubatz in an internship with Plaintiffs under an assumed identity, which allowed him to remove and copy thousands of Plaintiffs' internal documents and to record private conversations involving Plaintiffs' employees without consent or authorization. Plaintiffs contend that Defendants thereafter publicly disclosed and published the contents of those documents and recordings, including in a book co-authored by David Gaubatz, entitled *Muslim Mafia: Inside the Secret Underworld That's Conspiring to Islamize America* (hereinafter *"Muslim Mafia*").

Presently before the Court is Plaintiffs' [144] Motion for Extension of Discovery Period, which all Defendants have opposed, and which Plaintiffs filed on the evening of January 18, 2013 – the date on which discovery in this matter closed. *See* Scheduling and Procedures Order (Sept. 1, 2011), ECF No. [99], at 5. Through their motion, Plaintiffs seek a thirty-day enlargement of the discovery period to depose two non-party witnesses, Mr. Paul Sperry ("Sperry"), David Gaubatz's co-author of *Muslim Mafia*, and World Net Daily ("WND"), publisher of the book. According to Plaintiff, these two witnesses "are important to understanding the circumstances surrounding the publication of the book and the proceeds from that book." Pls' Mot. at 5. Upon consideration of the parties' submissions,[1] the relevant authorities, and the entire record in this case, the Court shall **DENY** Plaintiffs' [144] Motion for Extension of Discovery Period.

First, Plaintiffs' motion is untimely, and the Court could deny the requested relief on this ground alone. As Plaintiffs themselves acknowledge, they were "made aware" that Sperry and WND were unavailable for deposition at least as early as January 3, 2013. Pls' Mot. at 1. Yet Plaintiffs inexplicably failed to file the instant motion until the day discovery closed. Plaintiffs have been on notice for well over one year that all motions requesting an extension of time must be filed "at least four (4) business days prior to the first affected deadline" – *not* after the close of business on the date of such deadline. Scheduling and Procedures Order (Sept. 1, 2011), ECF No. [99], at 1.

[1]While the Court renders its decision on the record as a whole, its consideration has focused on the following documents: Pls' Mot. for Extension of Discovery Period ("Pls' Mot"), ECF No. [144]; Defs' Response Brief in Opp'n to Pls' Mot. to Re-Open Discovery and to Extend the Deadline for Discovery ("Defs' Opp'n"), ECF No. [145]; Pls' Reply to Defs' Opp'n to Pls' Mot. for Extension of the Discovery Period ("Pls' Reply"), ECF No. [146].

Second, Plaintiffs have failed entirely to show good cause for the requested enlargement of the discovery period. As this Court has previously observed, a scheduling order is "'intended to serve as 'the unalterable road map (absent good cause) for the remainder of the case.'" *Dag Enters., Inc. v. Exxon Mobil Corp.*, 226 F.R.D. 95, 104 (D.D.C. 2005) (citing *Olgyay v. Soc'y for Envtl. Graphic Design, Inc.*, 169 F.R.D. 219, 220 (D.D.C. 1996)). It is not a "frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Id*. "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.* (internal citations and quotation marks omitted). As such, Federal Rule of Civil Procedure 16(b) provides that a scheduling order "may be modified only for good cause and with the judge's consent."

"Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Dag Enters.*, 226 F.R.D. at 105 (citation and quotation marks omitted). Specifically, "'[g]ood cause' requires the party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension." *Id*. (citation omitted). "[A]lthough 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. If that party is not diligent, the inquiry should end." *Id.* (internal citations and marks omitted).

Here, Plaintiffs' lack of diligence is alone sufficient grounds to deny the requested extension. While the parties quarrel over the accuracy of their respective representations concerning the scheduling of the depositions of WND and Sperry, as well as the relevance of this

non-party testimony generally, certain key facts are not disputed. First, Plaintiffs cannot and do not contest the fact that they have known, since the commencement of this action that WND published *Muslim Mafia* and that Sperry was at least the co-author of the book; however, Plaintiffs did not so much as mention their intent to depose these two non-parties until late November 2012 – approximately thirteen months after discovery commenced. *See* Pls' Mot. at 5. Plaintiffs have proffered no meaningful explanation for this apparent procrastination.

Further, although on January 3, 2013, counsel for the Gaubatz Defendants, Mr. Garbus, indicated his representation of and agreement to accept service on behalf of WND, neither Mr. Garbus nor Mr. Horowitz, counsel for WND and Sperry, ever informed Plaintiffs' counsel that they would accept service of a subpoena for non-party Sperry. *See* Defs' Opp'n at 4 (citing Defs' Opp'n, Ex. 1 (Garbus Decl.)). To the contrary, Mr. Garbus has alleged that he personally telephoned Plaintiffs' counsel on or about November 30, 2012 and informed counsel that he was not authorized to accept service for either WND or Sperry. Defs' Mem. at 17 (citing Defs' Opp'n, Ex. 1 (Garbus Decl.)). Plaintiffs' counsel contend that they reasonably understood that Mr. Garbus would accept service on WND and Sperry's behalf based upon his initial agreement to dates for these depositions and his failure to respond to a select portion of an email from Plaintiffs' counsel which read, in relevant part, "Are you authorized to accept subpoenas for them? If so, please find them attached. If not, please let me know ASAP." Pls' Mot. at 6-7 & Ex. L. Whatever implicit understanding Plaintiffs' counsel deems to have been reached, the fact of the matter is that the burden rested with Plaintiffs to notice and serve the non-party deponents, and Plaintiffs' counsel's failure to obtain an express authorization for acceptance of the

subpoenas by Mr. Garbus was, by any reasonable measure, careless. As the applicable case law makes clear, "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Dag Enters.*, 226 F.R.D. at 105 (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.3d 604, 610 (9th Cir. 1992)). Furthermore, the Court observes that Plaintiffs inexplicably *still* had not attempted to serve Sperry as of the date they filed the instant motion to extend, despite having been on notice by January 3, 2013, and perhaps sooner, of Defendants' position that Plaintiffs had failed to serve and notice the non-party depositions.

Finally, Plaintiffs' motion is deficient in that it does not address how its requested extension will affect the other deadlines imposed by the Court. *See* Scheduling and Procedures Order (Sept. 1, 2011), ECF No. [99], at 2. While Plaintiffs request a thirty-day extension, Plaintiffs make no effort to explain how they will be able to schedule and conduct these depositions within such a short time period, especially given that (1) Sperry has purportedly refused to subject himself to a deposition without personal service (which Plaintiffs have presumably still not effectuated) and a ruling on a motion to quash (which would necessarily be filed in a district court from another jurisdiction), *see* Defs' Opp'n at 4, 5 (citing Defs' Opp'n, Ex. 1 (Garbus Decl.)); and (2) WND also intends to move to quash Plaintiffs' Rule 30(b)(6) subpoena *duces tecum* on several grounds, *see id.* at 4-5 (citing Defs' Opp'n, Ex. 1 (Garbus Decl.)). Such delays would unavoidably affect the mediation of this matter, which is currently scheduled before Magistrate Judge Facciola for March 7, 2013, as well as the March 28, 2013 status conference before this Court. In this regard, the Court finds that extending discovery beyond the already exceedingly generous time period for discovery granted to the parties, over

Defendants' objections, would not only disrupt the Court's management of its docket, but would also prejudice Defendants by necessarily stinting mediation efforts and delaying the potential resolution of this matter through dispositive motions.

For all of the foregoing reasons, and because the Court finds that Plaintiffs' inability to efficiently manage their discovery in this matter and to comply with the Court's Scheduling and Procedures Order demonstrate that there exists no good cause to enlarge discovery, it is, this 8th day of February, 2013, hereby

ORDERED that Plaintiffs' [144] Motion for Extension of Discovery Period is **DENIED**.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge