

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff</i>)	
)	
v.)	No. 2:11-cv-455-NT
)	
CONAGRA GROCERY PRODUCTS)	
COMPANY, LLC,)	
)	
<i>Defendant</i>)	

MEMORANDUM DECISION ON PLAINTIFF’S MOTION FOR RECONSIDERATION

The plaintiff has moved for reconsideration of my Order on Oral Motions for Protective Order (ECF No. 84), dated December 21, 2012, which was issued following a discovery teleconference held on November 27, 2012, and the subsequent submission by the parties of letter briefs, dated December 4, 2012, on the question of whether the defendant should be allowed to take the deposition of Tina Hennessy, an EPA enforcement coordinator. The order also addressed the defendant’s request to be allowed to depose Sarah Meeks, Enforcement Counsel for the Environmental Protection Agency’s Region I.¹ The plaintiff seeks reconsideration of that portion of the order allowing the deposition of Meeks. I deny the motion.

I. Procedural Background

On December 4, 2012, pursuant to my November 27, 2012 order, the defendant filed its letter brief with respect to the Hennessy deposition. It also informed the court, in an e-mail and

¹ The plaintiff suggests that Meeks is “opposing counsel” or “trial counsel,” Motion for Reconsideration of Order on Oral Motions for Protective Order (“Motion”) (ECF No. 99) at 2, 4, 8. She is neither. She has not entered an appearance in this action on behalf of the plaintiff, which is currently represented by six counsel of record. She is an attorney who is employed in-house by the plaintiff.

an attached letter, also dated December 4, 2012, and copied to the plaintiff's attorneys, that the parties were in dispute concerning the defendant's desire to depose Meeks following the deposition of David McIntyre, EPA Region I's Chief of Emergency Response and Removal. This second December 4 letter requested that the court "compel the deposition of Ms. Meeks" or, in the alternative, that another conference with the court be held to address this dispute.² Counsel for the plaintiff "promptly responded . . . by informing the Court that the United States would be available for a discovery conference pursuant to Local Rule 26(b)[.]" Motion at 2.

Eight days later, on December 12, 2012, the defendant filed Defendant's Motion to Extend Discovery Deadline, in which counsel for the defendant represented that the plaintiff did not oppose the motion. Defendant's Motion to Extend Discovery Deadline ("Motion to Extend") (ECF No. 76) at 1. In that motion, the defendant described the discovery dispute concerning Meeks, as well as the dispute regarding Hennessy, and a third dispute regarding Dr. Joan K. Meyer, the plaintiff's expert witness.³ *Id.* at 2-3. Other than the request for an extension, the defendant's motion did not request any relief with respect to the Meeks or Meyer disputes.

Two days later, without any obligation to expedite its response, the plaintiff filed Plaintiff's Partial Opposition to Defendant's Motion to Extend Discovery Deadline ("Extension Opposition") (ECF No. 77), accompanied, *inter alia*, by a copy of a cover letter dated November 30, 2012, from defense counsel to plaintiff's counsel enclosing a notice of the deposition of Meeks. ECF No. 77-1. The opposition included approximately two pages of argument entitled "ConAgra has not shown exceptional need to depose Attorney Meeks[.]" Extension Opposition

² Contrary to the plaintiff's contention, Motion at 10, the defendant did not "raise this issue . . . outside the normal practice of Local Rule 26(b)[.]" The defendant proceeded exactly as it should have. If anything was "outside the normal practice," it was my decision not to hold a telephone conference on the Meeks discovery issue, given its similarity to the Hennessy discovery issue fully addressed in the parties' letter briefs filed on the same day.

³ The dispute concerning Meyer was resolved at a telephone conference held on January 2, 2013. ECF No. 97.

at 2-4, followed by a second argument entitled “ConAgra has not shown exceptional need to continue the deposition of Dr. Meyer.” *Id.* at 4-6.

The defendant’s reply, filed on December 20, 2012, observed that the plaintiff’s opposition “addresses the merits of the disputes rather than the question pending before the Court, namely, whether the discovery deadline should be extended[.]” Defendant’s Reply to Plaintiff’s Partial Opposition to Defendant’s Motion to Extend Discovery Deadline (ECF No. 81) at 1. It nonetheless responded to the plaintiff’s arguments concerning Meeks and Meyer. *Id.* at 2-4.

My order addressing the plaintiff’s opposition to the depositions of Hennessy and Meeks was issued the next day, on December 21, 2012. ECF No. 84.

II. Discussion

The plaintiff’s first argument is that it was “denied the procedural opportunity to respond” to the defendant’s “brief” because I did not “hold[] a hearing pursuant to Local Rule 26(b) or . . . allow[] the United States to submit a substantive response to Defendant’s Brief.” Motion at 3. This is a reference to the defendant’s December 4, 2012, e-mail and attached letter.

Nothing in this court’s Local Rule 26 prohibited the plaintiff from filing a non-argumentative e-mail or letter responding to the defendant’s December 4 e-mail.⁴ Similarly, when the defendant again described the Meeks dispute in its December 12, 2012, motion, nothing prevented the plaintiff from filing a considered, substantive response.⁵ Indeed, the

⁴ The plaintiff asserts that the e-mail and attached letter “was, in substance, an impermissible discovery motion filed without the approval of the Court, and thus a violation of Local Rule 26(b).” Motion at 3. It did not “substantively respond,” it asserts, because it believed that “doing so would similarly be a violation of Local Rule 26(b).” The defendant’s submission did not violate Local Rule 26(b), but, if the plaintiff believed that it did, and particularly if it intended to rely on that belief in seeking the relief which it now seeks, or in remaining mute at the time, it was incumbent upon the plaintiff to raise that issue with the court when it received its copy of the e-mail and letter.

⁵ The plaintiff asserts that it filed its response to this motion “less than one day after Defendant filed its Motion to Extend Discovery Deadline” because the defendant had represented that the motion was unopposed and the plaintiff “wanted to note its opposition before the Court ruled based on the Defendant’s assertion that its motion was

plaintiff's response was substantive, despite its assertion to the contrary. *Id.* at 2 n.1. In any event, the plaintiff has now presumably made all of the substantive arguments that it could have presented in a telephone conference on the issue or in response to the defendant's motion to extend the discovery deadlines, and thus has not been harmed by any procedural error that it now asserts.

It is important to note that what is at issue here is a discovery deposition, not trial testimony, and that the attorney whom the defendant wishes to depose does not represent a party in this litigation. This is significant because most of the case law cited by the plaintiff deals with potential depositions of lawyers who had appeared as counsel in the litigation at issue.⁶ Even the case which the plaintiff characterizes as "particularly similar" to this case, *id.* at 4, *Newkirk v. ConAgra Foods, Inc.*, Nos. 8:10-cv-22-LSC-FG3, CV-08-00273-FVS, 2010 WL 2135263 (D. Neb. May 27, 2010), is distinguishable.

In *Newkirk*, a law firm that was not representing the defendant in the underlying action but which had provided legal services to the defendant for over 30 years was subpoenaed by the plaintiff to testify about matters that all of the parties agreed were privileged or protected by the work product doctrine. *Id.* at *1. The law firm asked the court that had issued the subpoena to quash it. *Id.* The plaintiffs argued that the defendant had waived any privilege or work product protection. *Id.* at *2. Under those circumstances, the court imposed upon the party that served

unopposed." Motion at 2 n.1. Counsel for the plaintiff could have simply called the clerk's office and advised the court that the motion was not unopposed, and then submitted its response within the time allowed for filing of opposition to motions.

⁶ It is for this reason that the case of *Angela Adams Licensing, LLC v. Wal-Mart Stores, Inc.*, No. 2:11-cv-05-GZS, 2012 WL 752356 (D. Me. Mar. 7, 2012), cited by the plaintiff, United States' Reply to Defendant's Brief in Opposition to Plaintiff's Motion to Reconsider Order on Oral Motions for Protective Order ("Reply") (ECF No. 105) at 1-2, is inapposite. The same is true, along with other factual distinctions, of the opinion in *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55 (1st Cir. 2003), also cited by the plaintiff.

the subpoena the test that the plaintiff would have the court impose here.⁷ Here, I have already specified that the defendant may not query Meeks about any topic to which a privilege or the work product doctrine applies. Order on Oral Motion for Protective Order (ECF No. 84) at 3, 4.

In addition, the *Newkirk* court found it significant that “[t]he persons most knowledgeable on the[] documents and issues [in question] were already made available for deposition and have been deposed by the plaintiffs.” *Id.* at *6. Here, the defendant’s central point is that David McIntyre, the representative made available for deposition by the plaintiff, testified that he was not the person most knowledgeable about certain issues, and the defendant interprets his deposition testimony as an assertion that Meeks is the person most knowledgeable in that regard. It is a colorable claim, although, as I have already indicated, Order on Oral Motions for Protective Order at 4, perhaps not the interpretation most likely to be correct.⁸

The deposition of Attorney Meeks may well be brief and unproductive for the defendant. But, it is not the court’s role to prevent a litigant from potentially wasting one of the depositions it is allowed to conduct before trial. In addition, if the plaintiff ultimately presents evidence of the defendant’s intent to use this deposition to delay trial and/or to harass the plaintiff or its agents – beyond the plaintiff’s current speculation on these points, Motion at 10 – the court will of course consider a motion that presents that evidence appropriately.

⁷ The plaintiffs in that case would be allowed to depose the attorneys only if they showed that “(1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case.” 2010 WL 2135263 at *6.

⁸ “Q. . . . [I]f I wanted to ask somebody about the factual responses in this – specific actual responses [to interrogatories], you don’t know who I would talk to? A. Well, I would say you would inquire of Attorney Meeks.” [Deposition of] David McIntyre, October 23, 2012 (ECF No. 99-3) at 154-55. The plaintiff asserted that, in this response, McIntyre “was directing ConAgra to speak with Ms. Meeks to find out who the witnesses were with knowledge of the facts presented in a given interrogatory response.” Extension Opposition at 2 n.2. The defendant said that, by this response, McIntyre “identified Attorney Meeks as the individual with . . . knowledge [of the factual response to ConAgra’s interrogatories[.]]” Extension Reply at 2-3, or that he “informed” the defendant that Meeks “was the individual knowledgeable of the underlying facts as well as the completeness and accuracy of the United States’ responses to interrogatories[.]” Extension Motion at 2. The defendant’s current assertion that “[t]here can be only one conclusion from this testimony – that Ms. Meeks provided the factual background for the interrogatories[.]” Opposition at 2, reads more into the testimony than can reasonably be found there.

III. Conclusion

On the showing made, and for the foregoing reasons, the motion for reconsideration is **DENIED.**

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 31st day of January, 2013.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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