IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Phyllis Cummerlander, et al.,	:	
		Case No. 2:13-cv-0329
Plaintiffs,	:	
		JUDGE ALGENON L. MARBLEY
v.	:	
		Magistrate Judge Kemp
Patriot Preparatory Academy, et al.,	:	
Defendants.	:	

OPINION AND ORDER

This matter is before the Court on a second motion for leave to serve additional interrogatories instanter filed by plaintiffs Phyllis Cummerlander and her minor son, referred to as "JT." (Doc. 79). For the reasons set forth below, the motion for leave will be denied.

I. Background

Prior to filing the instant motion for leave, plaintiffs filed an initial motion for leave to serve additional interrogatories instanter. (Doc. 43). At issue in the motion were seven interrogatories numbered 3-9, which plaintiffs served on Patriot Academy. Those interrogatories consist of the following:

> Interrogatory No. 3: Identify by student name on the attached Exhibit A the seat location of each and every student assigned to and/or present in the Charles Kebealo class homeroom period at any time during April 20, 2012.
>
> Answer:
>
> Interrogatory No. 4: Describe the process and any related procedure(s) by which drug testing kits are procured, used and/or disposed of by the Academy? [sic]
>
> Answer:

Interrogatory No. 5: Identify by name, address and telephone number the vendor(s) or other source(s) from which drug kits are procured by the Academy.

Answer:

Interrogatory No. 6: Identify by brand name, or other information identifying the manufacturer, of the drug kit(s) possessed by the Academy on April 20, 2012 and/or on the date of response to this Interrogatory.

Answer:

Interrogatory No. 7: What specific action(s) were taken to obtain the "consent" of JT and/or Phyllis Cummerlander regarding the drug testing of JT on April 20, 2012?

Answer:

Interrogatory No. 8: What specific action(s) were taken by and/or on behalf of the Academy to investigate the allegation that JT smoked marijuana on April 20, 2012?

Answer:

Interrogatory No. 9: Identify any and all source(s) of information, including names, address and telephone number, forming the basis for or otherwise contributing to Academy Disciplinary Matter No. 202697 (dated April 20, 2012) which identifies JT with the " . . . sale or distribution of drugs".

Answer:

Defendants refused to respond to the interrogatories on the grounds that they exceeded the maximum allowable under Fed. R. Civ. P. 33(a). Defendants also argued that, under Fed. R. Civ. P. 26(b)(2)(c), the discovery requested was unreasonably cumulative and duplicative and that plaintiffs failed to make a particularized showing as to why the additional interrogatories were necessary.

The Court considered the initial motion for leave in an Opinion and Order issued on May 16, 2014. (Doc. 67). In that

Opinion and Order, this Court found that the record was insufficient to allow it to determine under Fed. R. Civ. P. 26(b)(2)(C) whether the discovery sought was unreasonably cumulative or duplicative. The Court noted that, at a minimum, it would need to examine the previous written interrogatories to determine whether the information requested could have been obtained in the initial twenty-five interrogatories allowed pursuant to Fed. R. Civ. P. 33. Consequently, the Court denied the motion without prejudice to plaintiffs' refiling of their motion with supporting evidence and argument as set forth in Fed. R. Civ. P. 26(b)(2), or, alternatively, an agreement among counsel about this issue.

On July 23, 2014, plaintiffs filed the second motion for leave to serve additional interrogatories instanter. (Doc. 79). Plaintiffs once again seek responses to the interrogatories numbered 3-9, and they assert that the motion is properly supported with evidence and argument as set forth in Fed. R. Civ. P. 26(b)(2). Plaintiffs further contend that they "sought the agreement of counsel this Court suggested to no avail except for the submission of information in response to Interrogatories Nos. 5 and 6...." Id. at 2.

On August 12, 2014, defendants filed an opposition to plaintiffs' motion. (Doc. 80). Defendants first contend that plaintiffs' motion should be denied because they "waited two months and seven days after the May 16 Order and fourteen days after the discovery cut off to file a properly supported motion for leave." Defendants argue that nothing in plaintiffs' motion establishes the diligence required to allow plaintiffs to conduct discovery after the relevant deadline.

Next, defendants argue that the information sought could have been obtained in the initial twenty-five interrogatories allowed pursuant to Fed. R. Civ. P. 33. Defendants state:

> For example, interrogatories Nos. 3-9 ask for information that would be found in the partes' initial disclosures and pre-trial statements. Interrogatory No. 9 asks for clearly objectionable trial strategy. Interrogatories #8 and #9 sought identification of documents and could have been framed as document requests. Thus, Plaintiffs' [sic] could have easily focused on substantive information in their initial interrogatories and obtained the desired information in their initial interrogatories.

For these reasons, defendants request that this Court deny plaintiffs' second motion for leave to serve additional interrogatories instanter.

On August 26, 2014, plaintiffs filed a reply brief in support of their motion. (Doc. 81). Plaintiffs argue that their motion is not untimely because it "seeks a remedy to Defendants [sic] refusal to respond to Plaintiffs [sic] timely served discovery request not permission to extend the discovery cut-off date." Alternatively, plaintiffs urge that they "diligently pursued the relief provided by the Order." Next, plaintiffs argue that:

> Even under Defendant's [sic] misguided application of the 'could have been obtained' language, the Second Motion should be granted. Defendant's [sic] nebulous reference to "initial disclosures and pre-trial statements" as sources for information sought by Interrogatories No. 3-9 is simply incorrect. Defendant's [sic] failure to specify the exact location of this information in these documents admits that these documents do not contain this information. For the first time, Defendant [sic] objects to Interrogatory No. 9 on "trial strategy" grounds. Even if timely made, this objection is not sustainable under the discovery rules as is privileged information. Contrary to Defendant's classification of Interrogatories No. 8 and 9 as document requests, these interrogatories seek commentary regarding "specific actions" and the identity of sources of information" not documents.

According to plaintiffs, defendants have failed to make an adequate showing that the information sought is unreasonably cumulative and duplicative. On this basis, plaintiffs urge that

their motion should be granted.

II. Discussion

As set forth in this Court's previous Opinion and Order, Fed. R. Civ. P. 33 provides that leave to serve additional interrogatories may be granted to the extent consistent with Fed. R. Civ. P. 26(b)(2). Fed. R. Civ. P. 26(b)(2)(C) requires the Court to limit the frequency or extent of discovery otherwise allowed under the relevant rules if it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C). Determinations as to whether the discovery will be permitted under Fed. R. Civ. P. 26(b)(2)(C) are made on a case-by-case basis and, by definition, involve an examination of whether the discovery is necessary and reasonable under the circumstances. See Myers v. Prudential Ins. Co. of Am., 581 F. Supp. 2d 904, 914 (E.D. Tenn. 2008).

The Court has reviewed the record in this case and finds that plaintiffs have had ample opportunity to obtain the information that they seek by discovery in this action. This is not a complex case, and plaintiffs chose not to include the interrogatories at issue in those allowable under Rule 33. Moreover, plaintiffs engaged in other discovery in this matter, which included serving document requests, requests for admission,

and deposing witnesses. There has been no suggestion that plaintiffs have exhausted the discovery available to them under the Federal Rules of Civil Procedure. For example, plaintiffs have not claimed that they have exhausted the ten deposition limit in Rule 30(a) and the interrogatories at issue are the only means by which they are able to obtain the requested information. In addition, plaintiffs have not claimed any financial hardship or other burden that could have resulted in their inability to obtain the requested information some other way in the course of discovery. In sum, plaintiffs have had ample opportunity to obtain the information by the other discovery which took place in this action, and they do not provide this Court with a compelling reason as to why the additional discovery is necessary in this instance. Based upon the foregoing, plaintiffs' second motion for leave to serve additional interrogatories instanter (Doc. 79) will be denied.

III. Conclusion

For the reasons set forth above, plaintiffs' second motion for leave to serve additional interrogatories instanter (Doc. 79) is denied.

IV. Motion to Reconsider

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.3.

/s/ Terence P. Kemp
United States Magistrate Judge