

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Yanping Chen,

Plaintiff,

v.

**Federal Bureau of Investigation, U.S.
Department of Justice, U.S. Department
of Defense, and U.S. Department of
Homeland Security,**

Defendants.

Civil Action No. 1:18-cv-3074-CRC

Hon. Christopher R. Cooper
United States District Judge

JOINT STATUS REPORT

In accordance with the Court's May 2, 2022 minute order, Plaintiff Yanping Chen and Defendants Federal Bureau of Investigation, U.S. Department of Justice, U.S. Department of Defense, and U.S. Department of Homeland Security submit this joint status report updating the Court on the status of discovery requests directed at media entities and journalists; the parties' positions on mediation; and the second deposition of Stephen Rhoads.

Media Discovery

1. On May 18, 2022, Plaintiff first provided Defendants with notices of subpoenas duces tecum and subpoenas for deposition directed to Fox News Network, LLC ("Fox News") and journalists Catherine Herridge, Cyd Upson, and Pamela Browne.

2. Plaintiff states that she served Fox News and Ms. Upson on May 23, 2022. Plaintiff also states that, after multiple diligent attempts, she served Ms. Browne on June 14, 2022 and Ms. Herridge on June 16, 2022. Fox News and the three journalists have each retained Patrick Philbin from Ellis George Cipollone O'Brien Annaguey LLP as counsel.

3. Mr. Philbin has requested significant information and access to discovery in order to evaluate the subpoena response, including whether to move to quash the subpoenas based on the standard for exhaustion set forth in *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). Plaintiff's counsel and Mr. Philbin have spoken on multiple occasions, and Plaintiff provided Mr. Philbin with substantial written information about her discovery efforts in a detailed letter on June 23, 2022, followed by an initial production of non-confidential documents on June 27, 2022. After conferring about the restrictions in the Protective Order in this case (ECF No. 27) concerning discovery material that Defendants have designated as confidential, Plaintiff, Defendants, and Mr. Philbin came to an agreement permitting Plaintiff to provide an identified set of confidential discovery materials to Mr. Philbin. Plaintiff then provided a substantial additional production of documents consisting of materials designated confidential under the Protective Order on June 27, 2022.

4. After substantial negotiations, Plaintiff and Mr. Philbin have agreed that Ms. Upson and Ms. Browne will provide declarations in lieu of producing documents or providing testimony. Plaintiff intends to withdraw the subpoenas upon completion of the declarations.

5. Mr. Philbin requested extensions of time to evaluate and prepare Fox News's and Ms. Herridge's responses to the subpoenas. Mr. Philbin and Plaintiff have agreed to the following deadlines, by which the subpoenaed third parties will either produce documents in response to the subpoenas or file motions to quash:

- a. Fox News: July 20, 2022
- b. Ms. Herridge: July 22, 2022

Mediation

6. At the February 9, 2022 hearing, the Court and the parties discussed the possibility of a mediation with Judge Harvey. In the parties' April 8, 2022 Joint Status Report

(ECF No. 78), Defendants indicated that they needed additional time to determine their position on mediation. Defendants notified Plaintiff on May 18, 2022, that Defendants are amenable to mediation with Judge Harvey, and the parties have conferred about the logistics of the mediation process. The parties respectfully request that the Court refer the case for mediation with Judge Harvey for a period of 120 days. Subject to Judge Harvey's availability, the parties anticipate seeking to schedule a mediation session in September 2022. Because Plaintiff intends to continue media discovery and pursue the second deposition of Stephen Rhoads while the case is referred for mediation, the parties respectfully submit that discovery proceedings should not be stayed during the referral.

7. The parties also wish to alert the Court that there is one legal issue related to Defendants' affirmative defenses on which the parties may seek resolution from this Court if it presents a significant obstacle during mediation. But at this stage, the parties believe they can engage in a good-faith effort to resolve the case before resolution of that discrete issue.

Rhoads Deposition

8. On June 22, 2022, the Court granted Plaintiff leave to issue a deposition subpoena to Stephen Rhoads "for the limited purpose of obtaining testimony related to the apparent disappearance of the phone at issue and Rhoads's search of that phone for messages responsive to the prior subpoena issued to him under Federal Rule of Civil Procedure 45," while noting that Defendants "reserve[d] the right to oppose a second deposition in the context of any motion to quash." Minute Order (June 22, 2022).

9. That same day, June 22, Plaintiff notified Mr. Rhoads's counsel Paul Orfanedes and Michael Bekesha of the order and asked whether they would accept service of the deposition subpoena on behalf of Mr. Rhoads.

10. On June 27, 2022, Mr. Orfanedes responded that he is out of the country until the end of June and Mr. Bekesha is on parental leave. On July 1, 2022, Mr. Orfanedes indicated that they are authorized to accept service of the deposition subpoena. Plaintiff will promptly provide notice of the subpoena and serve Mr. Rhoads, setting the deposition on or around July 20, 2022.

Dated: July 1, 2022

/s/ Matt Jones

Matt Jones (D.C. Bar No. 502943)
Patrick Carome (D.C. Bar No. 385676)
Jessica Lutkenhaus (D.C. Bar No. 1046749)
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
matt.jones@wilmerhale.com
patrick.carome@wilmerhale.com
jessica.lutkenhaus@wilmerhale.com

Andrew C. Philips (D.C. Bar No. 998353)
Shannon B. Timmann (D.C. Bar No. 1614929)
Clare Locke LLP
10 Prince Street
Alexandria, VA 22314
Telephone: (202) 628-7400
andy@clarelocke.com
shannon@clarelocke.com

Counsel for Plaintiff

Respectfully submitted,

BRIAN D. NETTER
Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Garrett Coyle

CAROL FEDERIGHI
Senior Trial Counsel
GARRETT COYLE
LAUREL H. LUM
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
(202) 616-8016
garrett.coyle@usdoj.gov

Counsel for Defendants