

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

COURTHOUSE NEWS SERVICE :
 :
 Plaintiffs :
 :
 v. : Civil Action No.:1:22-cv-00548-ELH
 :
 PAMELA Q. HARRIS, in her official :
 capacity as the State Court Administrator :
 of the Administrative Office of the Courts :
 of Maryland, *et al.*, :
 :
 Defendants

EXPEDITED MOTION TO ACCELERATE DISCOVERY

Comes now the Plaintiff, COURTHOUSE NEWS SERVICE (“CNS”), by and through their attorneys, John P. Lynch, and the law firm of McNamee Hosea, P.A., and Jonathan E. Ginsberg, and the law firm of Bryan Cave Leighton Paisner LLP, and moves this Honorable Court to ORDER accelerated discovery in the above matter and in support thereof states:

1.) CNS commenced this suit on March 7, 2022 to challenge Defendants’ policy and practice of withholding access to newly e-filed civil complaints until after they are reviewed and docketed by court staff in violation of the First Amendment. ECF 1 (the “Complaint”).¹ As detailed in CNS’ motion for a preliminary injunction (ECF 9), this practice results in delayed public and press access to new complaints, sometimes for days.

¹ On April 18, 2022, CNS filed a motion requesting leave to amend the Complaint with the consent of Defendants’ counsel, ECF 8, and on April 19, 2022, the amended complaint was deemed filed with the court. ECF 10, 11.

2.) Defendants have opposed CNS' preliminary injunction motion (ECF 23) by providing statistical conclusions about the access delays without providing the underlying data used to reach those conclusions. CNS has requested, but Defendants have declined to produce, the underlying data in connection with the pending motions. In essence, they are playing a game of hide the evidentiary ball. The data proving delays is necessary to substantiate CNS' claim that Defendants' conduct violates the First Amendment, and to rebut Defendants' statistical conclusions and arguments in connection therewith, thus necessitating this expedited motion to accelerate discovery.

Relevant Procedural Background

3.) On April 22, 2022, the Honorable Ellen L. Hollander held a scheduling conference with the parties via telephone to set an order with mutually agreeable dates with respect to CNS' motion for preliminary injunction and Defendants' anticipated motion to dismiss.

4.) On April 25, 2022, the Court issued a Letter to Counsel to act as an Order of the Court (ECF 18), which was revised by letter dated April 26, 2022. ECF 19 ("Scheduling Order").

5.) Pursuant to the Scheduling Order, on May 31, 2022, Defendants filed "Defendants' Combined Motion to Dismiss Amended Complaint for Injunctive and Declaratory Relief and Opposition to Motion for Preliminary Injunction." ECF 23 ("Defendants' Combined Motion").

6.) The week prior to Defendants' May 31, 2022 submission, lead counsel for CNS, Jonathan E. Ginsberg of Bryan Cave Leighton Paisner LLP, had major and unexpected spine surgery, requiring several weeks of recovery that kept Mr. Ginsberg out

of the office until the week of June 27, 2022. Mr. Ginsberg is responsible for preparing CNS' Opposition to Defendants' Motion to Dismiss and Reply in further support of its Motion for Preliminary Injunction.

7.) As a result of Mr. Ginsberg's surgery and recovery, CNS filed a Consent Motion to Amend Scheduling Order and Reset Motions Hearing. ECF 24. The motion was granted by the Honorable Julie R. Rubin on June 27, 2022, and new dates set. ECF 26. CNS reply papers in further support of its preliminary injunction motion and in opposition to Defendants' motion to dismiss is currently due on July 20, 2022. *Id.*

This Court Should Accelerate Limited Discovery on an Expedited Basis

8.) In an attempt to escape the requirements of the First Amendment, Defendants' Combined Motion provides several conclusions regarding the purported average and median times, in business hours (rather than days), that elapsed between the time civil complaints were filed with the Defendant clerks' offices, and the time such filings were made available by Defendants to the public, for the period of October 1, 2021 through May 24, 2022 (the "Relevant Time Period"). *See, e.g.*, ECF 23-1, at 4 & ECF 23-33 ¶¶ 22-24.²

9.) In doing so, Defendants repeatedly claim to have provided "actual data" pertaining to these delay calculations. ECF 23-1 at 5, 19, 20, 39. However, the underlying raw data that Defendants use as a basis for their arguments, and to calculate the access

² As will be explained in CNS' reply papers in further support of its preliminary injunction motion, the "business hour" metric ignores that what matters to withstand constitutional scrutiny is whether *any* delay has been justified. Moreover, Defendants' claim that 85.2% of new complaints are available within "8 business hours and 1 minute," *see, e.g.*, ECF 23-33 ¶ 17, means that those complaints will not be available until at least the next business day (until Monday, for a Friday filing, or Tuesday, after a holiday weekend).

delays over the Relevant Time Period, *i.e.*, the date and time on which each complaint was filed, and then later accepted and made public by Defendants (the “Raw Delay Data”), was not included in the filing, and to date, despite multiple requests, has not been provided to either CNS or the Court. *See* ECF 23-1 at 20-21, 26, 50, and ECF 23-22 at 2-3.

10.) Instead, Defendants label the conclusory findings of a Maryland Judiciary employee, Dr. Jamie L. Walter, Ph.D., as “actual data,” when it is in fact an interpretation of the underlying Raw Delay Data. ECF 23-1 & 23-33. Dr. Walter is the Director of the Research and Analysis section of the Administrative Office of the Courts (“AOC”) for the State’s Judiciary. According to Dr. Walter, AOC and Tyler Technologies, Inc. (“Tyler”), Defendants’ e-filing vendor, have the ability to, and did in fact, “monitor and track, with precision, the actual data at issue in this case by obtaining all the data directly from Tyler.” ECF 23-33, ¶ 6, at 2 and ¶ 7, at 2-3.

11.) The Raw Delay Data will establish that Defendants’ practice of withholding complaints until after docketing leads to inordinate access delays in violation of the First Amendment. Indeed, Defendants’ Combined Motion puts the Raw Delay Data at the heart of their defense, making it instrumental to the arguments before this Court in connection with CNS’ pending Motion for Preliminary Injunction and Defendants’ ongoing First Amendment violations.

12.) Counsel for CNS initially requested the Raw Delay Data from Defendants’ counsel, via email, on March 17, 2022, as part of an effort to pursue early discovery in an attempt to streamline the factual issues in this case. Defendants did not agree to produce the requested data, but then used that data to present conclusions regarding the access delays in their courts in Defendants’ Combined Motion. Thus, CNS renewed its request

for the underlying raw data on June 29, 2022, at 10:19 am,³ via email.

13.) On June 30, 2022, at 6:24 pm Defense Counsel⁴ again declined to provide the underlying data, stating via email, “*In sum, Defendants will not voluntarily produce the raw data you request at this time because discovery has not begun.*”⁵

14.) Defendants are asking the Court to rule in this matter based on the withheld Raw Delay Data even though their Combined Motion makes clear that the data is readily available to the Defendants, their expert, their vendor (Tyler), and their attorneys. In order to present an adequate record in connection with the parties’ pending motions, and to substantiate Defendants’ ongoing First Amendment violations, it is imperative that Defendants promptly produce the Raw Delay Data, particularly given that Plaintiff’s next set of papers in connection with the pending motions is due July 20, 2022.

15.) While the Court has not yet entered a scheduling order with respect to discovery and the Local Rules maintain that the issuance of a formal scheduling order will generally trigger the commencement of discovery, this Court may “otherwise order” full or limited discovery. U.S. District Court of Maryland, Local Rule 104.1, 104.4.

16.) As a result of Defendants’ refusal to provide the requested information, CNS requests this Honorable Court “...facilitate the just, speedy, and inexpensive conduct of discovery...”. U.S. District Court of Maryland Local Rules. Discovery Guidelines of the United States District Court for the District of Maryland. Appendix A. Guideline 1:

³ Plaintiff’s request sent via email from Counsel Jonathan Ginsberg, with John Lynch and James Tuomey, cc’d. Provided pursuant to Local Rule 104.7.

⁴ Defendants’ response sent via email from AAG Kevin Cox, with Kathryn Hummel, cc’d. Provided pursuant to Local Rule. 104.7.

⁵ Plaintiff sent a response via email from Counsel Jonathan Ginsberg, with John Lynch and James Toumey, cc’d, on July 5, 2022. Provided pursuant to Local Rule. 104.7.

Conduct of Discovery (July 1, 2021), p. 112. In this situation it is appropriate to pursue “...different or additional deadlines for the filing of motions or the completion of all or part of discovery; accelerated exchanges of disclosures, additional data, or descriptions of the parties’ claims and defenses...” *Id.*

17.) CNS has attempted to resolve this issue in good faith with the Defendants, and without being able to find a resolution, must seek the Court’s intervention in a timely manner. *Id.* at p. 113, ¶ f.

18.) Because Defendants’ have relied upon the Raw Delay Data in arguing their claim or defense they must, without awaiting a discovery request, provide “a copy – or description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control ...” Federal Rule of Civil Procedure 26(a)(1)(A)(ii).

19.) By Defendants’ own arguments, “The underlying computer-generated data from which the actual data and calculations were obtained was provided directly from Tyler and, therefore, this actual data is undeniably the best evidence of the issue in this case.” ECF 23-1, at 26. Allowing the Defendants to withhold, in other words hide, the Raw Delay Data they rely upon in their own filing will do nothing other than to delay the resolution of this matter and promulgate ongoing First Amendment violations.

WHEREFORE, the Plaintiff, CNS, requests this Honorable Court order the Defendants, by and through Counsel, to provide all Raw Delay Data relied upon in coming to the Defendants’ “actual data” conclusions, and further order the Defendants, by and through Counsel, to provide all Raw Delay Data relied upon by Jamie Walters Ph.D. in producing the Declaration of Jamie Walter, Ph.D. attached to Defendants’ motion and

identified as ECF 23-33; and grant such other and further relief as the nature of its cause may require.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below a copy of the foregoing was served via email and by first class mail, upon the following.

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07/08/2022
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/s/ John P. Lynch
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