

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
NATIONAL ASSOCIATION OF CRIMINAL)	
DEFENSE LAWYERS,)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 18-2399 (KBJ)
FEDERAL BUREAU OF PRISONS)	
)	
and)	
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendants.)	
_____)	

MOTION FOR AMENDED SCHEDULING ORDER AND ORDER TO SHOW CAUSE

Per the Court’s order and according to a one-week consensual extension per the Court’s General Order and Guidelines in FOIA Cases, Defendants Federal Bureau of Prisons (“BOP”) and Department of Justice (“DOJ”) were supposed to serve their motion for summary judgment on or before September 21, 2020. *See* Minute Order, June 30, 2020 (“June 30 Order”); *see also* Gen. Order & Guidelines Applicable to FOIA Cases Assigned to J. Ketanji Brown Jackson (“Gen. Order & Guidelines”), ECF No. 6; Decl. of Megan Graham (“Graham Decl.”) ¶¶ 28–29, Sept. 25, 2020. Despite clear statements that Plaintiff National Association of Criminal Defense Lawyers (“NACDL”) would not consent to an extension of the briefing schedule, Defendants failed to serve their opening brief by the deadline. Thus, NACDL respectfully requests that the Court enter an updated scheduling order directing to Defendants to file their opening brief by September 30, 2020, extend the other dates in the written briefing schedule commensurately, and issue an Order to Show Cause as to why Defendants should not be held in contempt.

Statement of Facts

The relevant facts related to this motion are covered in detail in the accompanying declaration of undersigned counsel. *See generally* Graham Decl.

Argument

Defendants have not yet served NACDL with their motion for summary judgment. In so doing, they have failed to comply with the Court's clear and unambiguous June 30, 2020 scheduling and the Court's General Order and Guidelines in FOIA Cases indicating for adjusting the schedule. *See* June 30 Order; Gen. Order & Guidelines ¶ 5(a)(i)(3); Graham Decl. ¶¶ 28–29 (explaining agreed-upon extension). For the reasons discussed herein, the Court should direct Defendants to file their opening brief by September 30, 2020, extend the other dates in the written briefing schedule commensurately, and issue an Order to Show Cause as to why Defendants should not be held in contempt.

I. Defendants Have Not Shown Good Cause for Their Failure to Timely Serve Their Summary Judgment Materials and the Resulting Delay Harms NACDL's Interests.

Once in litigation, FOIA cases are typically resolved on cross-motions for summary judgment. *Brayton v. Office of Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011) (“[T]he vast majority of FOIA cases can be resolved on summary judgment.”). These motions are governed by the Court's scheduling order in each case. *See Skybridge Spectrum Foundation v. FCC*, 842 F. Supp. 2d 65, 74 (D.D.C. 2012) (“After the FCC filed a responsive pleading, the Court set a schedule for the briefing of motions for summary judgment.”); *Blazy v. Tenet*, 979 F. Supp. 10, 27 (D.D.C. 1997) (reprimanding *pro se* plaintiff for filing motions outside of the Court's scheduling order).

“A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.” *Burns v. Levy*, No. 13-cv-898-CKK, 2019 WL 6465142, at

*29 (D.D.C. Dec. 2, 2019) (quotation marks and citation omitted); *see also DAG Enter., Inc. v. Exxon Mobil Corp.*, 226 F.R.D. 95, 104 (D.D.C. 2005) (“A Scheduling Order is intended to serve as the unalterable road map (absent good cause) for the remainder of the case.”). “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.” *Burns*, 2019 WL 6465142, at *29 (alterations, quotation marks, and citation omitted).

Here, the moving party is NACDL, but Defendants are in breach of the scheduling order. Defendants have not shown good cause for their delay in serving their summary judgment motion or for failing to comply with the Court’s scheduling order. *Richardson v. Yellen*, 323 F.R.D. 444, 446 (D.D.C. 2018) (“To show good cause, the moving party must show both diligence and a lack of prejudice to the opposing parties.”). Defendants had months to prepare for summary judgment briefing and were on notice that NACDL would not consent to significant extensions of the briefing schedule. *See* Graham Decl. ¶ 10 (informing Defendants on January 30, 2020, that NACDL would challenge EOUSA search); ¶ 11 (informing Defendants on April 3, 2020, of NACDL’s planned challenges); ¶¶ 12–13 (clarifying challenges in early April 2020); ¶ 15 (informing Defendants of NACDL’s concerns about unnecessary delays); ¶¶ 19–20 (describing parties’ agreed-upon proposed schedule and Court’s scheduling order); ¶ 22 (informing Defendants on July 27, 2020, that NACDL would oppose significant extensions); ¶ 26 (informing Defendants on August 19, 2020, that NACDL would oppose abandoning the briefing schedule); ¶¶ 28–29 (describing parties agreement to a one-week extension in the schedule that was reached on September 8, 2020); ¶¶ 33–35 (describing parties’ disagreement on potential extension to briefing schedule on September 18, 2020). Despite this, Defendants simply refused to comply with the governing deadline of September 21, 2020, and ignored the Court’s process for settling the

dispute by waiting until the Court was closed for the evening before indicating they would not serve their motion on time. *See* Graham Decl. ¶¶ 37–38.

NACDL’s interests have been significantly harmed by this delay. NACDL filed its FOIA requests in August 2018 and this case has been pending for nearly two years. *See* Compl., ECF No. 1; App. A to 2d Am. Compl. (“BOP Request”), ECF No. 42-2; App. B to 2d Am. Compl. (“Main Justice Request”), ECF No. 42-3; App. C to 2d Am. Compl. (“EOUSA Request”), ECF No. 42-4. As NACDL indicated in its requests, the information is being sought to inform the public about the government’s policies, practices, and procedures related to the monitoring of incarcerated individuals’ emails with their lawyers. *See* BOP Request, at 2; Main Justice Request, at 3; EOUSA Request, at 2. In the intervening time, Congresspersons have introduced a bill to stop government monitoring of attorney-client emails, which has recently passed the House. *See* Effective Assistance of Counsel in the Digital Era Act, H.R. 5546, 116th Cong. (2020) (as passed by House, Sept. 21, 2020), <https://www.congress.gov/bill/116th-congress/house-bill/5546/text>. Given this advocacy landscape, NACDL’s interest in prompt disclosure and resolution of this case is even more acute than when the requests were filed.

Additionally, there is no reason for continued delay. Defendants have known about NACDL’s planned challenges for months and consented to the existent briefing schedule. *See* Graham Decl. ¶ 10 (informing Defendants on January 30, 2020, that NACDL would challenge EOUSA search); ¶ 11 (informing Defendants on April 3, 2020, of NACDL’s planned challenges); ¶¶ 19–20 (describing parties’ agreement on proposed schedule reached June 5, 2020, and Court’s scheduling order set June 30, 2020). And Defendants’ refusal to comply has shortened the time available to NACDL to prepare its opposition and cross-motion for summary judgment. Given that there has been no alteration in the schedule since the parties agreed to a one-week extension on

September 8, 2020, *see* Graham Decl. ¶¶ 28–29, NACDL’s cross-motion and opposition remain due on October 26, 2020. Thus, NACDL requests a modest adjustment to the briefing schedule, discussed below, to compensate for Defendants’ delay.

II. This Court Should Order Defendants to Show Cause Why They Should Not Be Held in Contempt for Violating the Court’s Orders.

There is “no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt.” *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *see also Int’l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F. Supp. 2d 35, 38 (D.D.C. 2010) (“Civil contempt is a remedial device that a court can utilize to achieve full compliance with its orders.”). “Such power is vital to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.” *Damus v. Wolf*, No. 18-cv-578-JEB, 2020 WL 601629, at *2 (D.D.C. Feb. 7, 2020) (quotation marks and citations omitted).

To establish contempt, NACDL “must show, by clear and convincing evidence, that: (1) there was a court order in place; (2) the order required certain conduct by the defendant; and (3) the defendant failed to comply with that order.” *Serv. Emps. Int’l Union Nat’l Indus. Pension Fund v. Artharee*, 48 F. Supp. 3d 25, 28 (D.D.C. 2014) (internal quotation marks omitted) (quoting *Int’l Painters*, 736 F. Supp. 2d at 38). In analyzing whether a party is in contempt, “the intent of the recalcitrant party is irrelevant, and the court must only determine whether its order has been violated.” *Negley v. FBI*, 766 F. Supp. 2d 190, 193 (D.D.C. 2011) (quotation marks and citations omitted), *aff’d*, No. 11-5296, 2012 WL 1155734 (D.C. Cir. Mar. 28, 2012). Once NACDL has made the required showing, Defendants bear the burden to “provide adequate detailed proof” to justify noncompliance, for example, by showing a good faith attempt to comply. *Serv. Emps. Int’l Union*, 48 F. Supp. 3d at 28–29.

NACDL has satisfied its burden here. Defendants have violated a clear and unambiguous order from the Court about the briefing schedule. The Court ordered Defendants serve their motion for summary judgment on September 21, 2020. *See* June 30 Order. The Court’s General Order and Guidelines in FOIA Cases clearly states that the schedule can be adjusted without intervention from the Court only if the parties are in agreement. *See* Gen. Order & Guidelines ¶ 5(a)(i)(3). “In the event of a service-related scheduling dispute, counsel shall jointly call Chambers . . . to arrange for a telephone conference with the Court.” *Id.* Here, the parties understood and agreed to the extension that would mean Defendants’ motion for summary judgment must be served on September 21, 2020. *See* Graham Decl. ¶¶ 28–29. Further, Defendants knew NACDL would not consent to further extensions. *Id.* ¶ 34. Defendants did not serve their motion by the deadline. *Id.* ¶ 38. To be sure, Defendants did ask NACDL to call the Court if NACDL would not agree to their newly proposed six-week extension,, but that request came nearly four hours after the Court was closed for the day on the deadline and knowing that NACDL had already indicated it would not consent to an extension. Graham Decl. ¶ 37; *see also id.* ¶¶ 34–35; *id.* ¶ 40. This belated request to schedule a conference with the Court does not remedy Defendants non-compliance with the Court’s scheduling order. The Court’s order and the action required of Defendants were clear, and Defendants failed to comply.

Further, Defendants’ actions should foreclose a finding of good faith. NACDL raised concerns about EOUSA’s search nearly eight months ago. *See* Graham Decl. ¶ 10. NACDL presented the specific withholdings it planned to challenge nearly six months ago. *See* Graham Decl. ¶ 11. The parties—fully informed of the existing challenges—agreed to a briefing schedule nearly four months ago and the Court set the briefing schedule nearly three months ago. *See* Graham Decl. ¶¶ 19–20. Throughout subsequent negotiations, NACDL has been clear that it

believes Defendants have had ample time to prepare for summary judgment and it would be hesitant to extend the schedule to which Defendants had agreed. *See, e.g.*, Graham Decl. ¶¶ 22, 26, 34. Indeed, Defendants' last-minute attempt to seek a consensual extension was unambiguously rebuffed three days before Defendants' motion was due to be served. Graham Decl. ¶ 34. Despite this, Defendants again requested an extension nearly four hours after the Court closed on the day the motion was supposed to be served. Graham Decl. ¶ 37. Defendants were well aware that there was a scheduling dispute and instead elected to simply not comply with the pending deadlines or pursue the Court's process for settling the dispute until after the deadline passed. *See id.* Defendants have been fully aware of the issues for briefing and the schedule for months, and there is no good faith reason for Defendants' delay in serving its motion.

Conclusion

Based on the foregoing, NACDL respectfully requests that the Court grant the motion, issue an Order to Show Cause as to why Defendants should not be held in contempt, and enter an updated scheduling order with the following dates:

- Defendants' Motion for Summary Judgment shall be served on or before September 30, 2020;
- NACDL's Opposition and Cross-Motion for Summary Judgment shall be served on or before November 4, 2020;
- Defendants' Reply and Cross-Motion Opposition shall be served on or before December 9, 2020;
- NACDL's Cross-Motion Reply shall be served on or before January 6, 2021; and

- Briefs shall be filed as a batch within three business days of the service of the last reply brief, but in any event no later than the Final Filing Deadline of January 29, 2021.

Dated: September 25, 2020

Respectfully submitted,

/s/ Megan Graham
Megan Graham (*pro hac vice*)
Catherine Crump (*pro hac vice*)
Samuelson Law, Technology & Public
Policy Clinic
U.C. Berkeley School of Law
353 Law Building
Berkeley, CA 94720-7200
(510) 664-4381
mgraham@clinical.law.berkeley.edu

Counsel for Plaintiff

Barry J. Pollack, D.C. Bar #434513
Robbins, Russell, Englert, Orseck,
Untereiner & Sauber, LLP
1801 K Street, N.W.
Suite 411L
Washington, DC 20006
(202) 775-4514 phone
bpollack@robbinsrussell.com

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
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NATIONAL ASSOCIATION OF CRIMINAL)	
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and)	
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendants.)	
_____)	

DECLARATION OF MEGAN GRAHAM

Pursuant to 28 U.S.C. § 1746, I, Megan Graham, declare and state as follows:

1. I am a Clinical Supervising Attorney in the Samuelson Law, Technology & Public Policy Clinic at UC Berkeley School of Law. I have been with the Samuelson Clinic since August 2017.
2. On August 2, 2018, the National Association for Criminal Defense Lawyers (“NACDL”) submitted three identical Freedom of Information Act (“FOIA”) requests, first to the Bureau of Prisons (“BOP”) (the “BOP Request”); second to the Criminal Division, the Office of Information Policy, and the Office of Legal Counsel within the Department of Justice (“DOJ”) (the “Main Justice Request”); and third to the Executive Office for the United States Attorneys (“EOUSA”) (the “EOUSA Request”) (collectively, the “Requests”). The Requests generally sought information about the BOP’s and DOJ’s policies, practices, and procedures for monitoring email messages sent to or from incarcerated individuals in BOP facilities, particularly emails between attorneys and their clients.

3. On October 18, 2018, NACDL filed a complaint in this Court. NACDL filed the operative Second Amended Complaint on August 7, 2020.

4. I represent the National Association for Criminal Defense Lawyers (“NACDL”) in this action and have served as the primary contact for Defendants’ counsel since the beginning of the litigation.

5. The purpose of this declaration is to provide the Court with information and a timeline of my negotiations with Defendants regarding the summary judgment briefing schedule and the adequacy of EOUSA’s searches in response to the Requests.

6. Starting on May 31, 2019, I began asking opposing counsel for more information about Defendants’ various searches related to the Requests. I explained that I was seeking this information in hopes of narrowing the scope of our eventual summary judgment briefing. I repeated these requests for more information at several points over the subsequent year.

7. On June 28, 2019, Assistant United States Attorney (“AUSA”) Mark Nebeker emailed with a high-level description of EOUSA’s search. The description did not detail what any particular U.S. Attorney’s Office (“USAO”) had done, nor did it include a comprehensive list of terms the USAOs had used to conduct searches of electronic databases.

8. On January 23, 2020, I again emailed AUSA Nebeker—cc’ing AUSA Robert Caplen, who was due to take over this case upon AUSA Nebeker’s retirement—seeking information about EOUSA’s search.

9. On January 28, 2020, AUSA Nebeker provided the same high-level description he had shared on June 28, 2019.

10. On January 30, 2020, I emailed AUSA Nebeker, cc’ing AUSA Caplen, stating that NACDL could not “rule out the need to brief the adequacy of [EOUSA’s] search based on the

information provided. It's far too high-level to give us confidence that the searches conducted were adequate."

11. On April 3, 2020, I emailed AUSA Caplen to provide a list of searches and withholdings NACDL planned to challenge, among other matters. The first challenge I identified was "[a]dequacy of EOUSA's search."

12. On April 6 and 7, 2020, I received two emails with questions from AUSA Caplen about those challenged records, including a question about "what specifically Plaintiff is challenging about EOUSA's search." I responded to AUSA Caplen's email on April 7, 2020, with answers to his questions. I addressed his question about the EOUSA search by stating that the description provided was "too high-level and generalized for us to have confidence the searches run were adequate."

13. On April 8, 2020, AUSA Caplen emailed to confirm that he had received the explanation and stated that he would follow up with "any additional questions/clarifications."

14. On May 1, 2020, I emailed AUSA Caplen to propose a schedule for summary judgment briefing and noted that we were willing to "receive updates about EOUSA's search" in hopes of narrowing the scope of our dispute. AUSA Caplen replied on the same day requesting an extension for filing a Joint Status Report setting the briefing schedule as he was still addressing the issues we identified in NACDL's list of challenges.

15. On May 4, 2020, I emailed to agree to the requested extension and to propose a schedule to the Court on June 5, 2020, a month later than the original agreed-upon date. I stated that NACDL could "not push [proposing a schedule] more than that." I wrote that:

[NACDL] identified concerns about the adequacy of EOUSA's search on January 30, and provided the list of specific records we plan to challenge more than a month ago. The agencies have already had significant time to provide justifications for

EOUSA's search and the agencies' withholdings, and we are concerned about unnecessarily prolonging this case.

16. On May 4, 2020, AUSA Caplen sent me an email with an attachment listing the USAOs that had not found responsive records. He stated that "[e]ach USAO FOIA Contact used the most effective means to identify potential records based upon the language of the FOIA request itself."

17. After a review of the information provided, internal discussions, and re-reviewing the records NACDL had received from EOUSA, I responded on May 14, 2020, stating that the information received on May 4, 2020, was not detailed enough for NACDL to drop its challenge to any of the searches. I also asked several clarifying questions, which AUSA Caplen answered over the subsequent two weeks.

18. On May 29, 2020, AUSA Caplen and I exchanged emails regarding the proposed schedule for summary judgment briefing, eventually reaching a consensus for the proposal.

19. On June 5, 2020, AUSA Caplen emailed to confirm the issues for briefing and to propose two minor changes to the proposed schedule that would "enable us to continue trying to narrow issues this month and in July." I responded on the same day confirming the issues for briefing and accepting the proposed dates. These dates are reflected in the parties' Fifteenth Joint Status Report that was filed that day. *See* ECF No. 40.

20. On June 30, 2020, the Court issued a minute order adopting the proposed schedule. The Court set the following dates:

- Plaintiff's Amended Complaint is due on or before 8/7/2020;
- Defendants' Answer to the Amended Complaint is due on or before 8/21/2020;
- Defendants' Motion for Summary Judgment shall be served on or before 9/14/2020;
- Plaintiff's Opposition and Cross-Motion for Summary Judgment shall be served on or before 10/19/2020;

- Defendants' Reply and Cross-Motion Opposition shall be served on or before 11/23/2020;
- Plaintiff's Cross-Motion Reply shall be served on or before 12/21/2020; and
- Final Filing Deadline of 1/29/2021.

See Minute Order, June 30, 2020.

21. On July 21, 2020, AUSA Kristin Brudy-Everett filed a notice of appearance indicating that she would be taking over the case from AUSA Caplen. *See* ECF No. 41.

22. On July 27, 2020, I reached out to AUSA Brudy-Everett. We spoke on the phone on July 31, 2020. During our call, AUSA Brudy-Everett mentioned that she may request adjustments of the deadlines, to which I responded that NACDL was unlikely to agree to significant extensions, but would be willing to narrow the briefing if the Defendants provided information adequate to justify either the searches or withholdings.

23. On August 12, 2020, AUSA Brudy-Everett and I had a phone call to discuss the status of the summary judgment briefing. On the call, AUSA Brudy-Everett asked whether NACDL would consent to an extension and whether NACDL would propose searches for the USAOs to run. I responded on the call that NACDL had sought information about the searches that were already run for months to no avail, and that I had concerns about whether it would be feasible to standardize the EOUSA searches given differences in file keeping systems and terminology used in the USAOs.

24. On August 13, 2020, I followed up with AUSA Brudy-Everett by email. I indicated that given how long NACDL had already given EOUSA to demonstrate its searches were adequate, NACDL would need assurances that any new searches would be run on an expedited timeframe, reiterated my questions about whether it would be feasible to craft a standardized search for the USAOs, and explained that we would expect Defendants to file a joint motion to bifurcate the

summary judgment briefing so we could proceed with briefing the withholdings related to the BOP and Main Justice Requests.

25. On August 17, 2020, AUSA Brudy-Everett replied that she did not know how quickly the EOUSA searches could be conducted or whether it would be possible to develop a standardized search for the USAOs to run. She tentatively indicated that she hoped the searches could be completed by mid-September with productions to follow thereafter. She also indicated that if Defendants bifurcated briefing, the searches would require more time to complete.

26. On August 19, 2020, I responded that NACDL could not agree to Defendants' proposal to change the briefing schedule. I noted that the government jointly requested the briefing schedule two months previously and was fully informed about the scope of NACDL's planned challenges at the time. I again expressed NACDL's willingness to narrow the specific challenges if Defendants provided information that demonstrated particular searches were adequate or withholdings were proper.

27. On September 3, 2020, I received an email from AUSA Brudy-Everett with draft search descriptions for twenty-one USAOs intended to help narrow the scope of NACDL's search challenges.

28. On September 4, 2020, AUSA Brudy-Everett requested a two-week extension on the motion for summary judgment during a phone call. I responded to her proposal in an email later that afternoon, stating that NACDL would agree to a "one-week extension on all four of the service dates" and specified that Defendants' opening brief would be served on September 21, 2020; NACDL's response and cross-motion would be served on October 6, 2020; Defendants' reply and response to cross-motion served would be on November 30, 2020; and NACDL's reply on cross-motion would be served on December 28, 2020.

29. On September 8, 2020, AUSA Brudy-Everett agreed to the one-week extension by email.

30. On September 11, 2020, AUSA Brudy-Everett shared two more draft search descriptions.

31. On September 12, 2020, two clinical law students under my supervision—Melody Wong and Schuyler Standley—emailed that NACDL agreed to drop seven offices from the search challenge.

32. Over the following week, the parties exchanged more emails regarding clarifications of search descriptions and new search descriptions.

33. On September 17, 2020, at 11:41pm ET, AUSA Brudy-Everett proposed moving “to abandon the briefing schedule in this case, or in the alternative, mov[ing] for partial summary judgement.” She argued that the case was not ripe for briefing because the Defendants are back in document production. AUSA Brudy-Everett also answered questions raised in previous emails and provided additional search descriptions.

34. On September 18, 2020, at 4:54pm ET, I responded that “NACDL filed this case nearly two years ago and indicated an intention to challenge EOUSA’s search in late January 2020. After that point, the government repeatedly represented that productions were complete and it was prepared to move to summary judgment briefing on the schedule agreed to in early June. As such, we will oppose any motion to adjust the schedule.”

35. That same evening, AUSA Brudy-Everett indicated she “understood” and provided additional answers to questions raised in previous emails.

36. On September 20, 2020, at 5:22pm ET, Ms. Wong and Ms. Standley informed AUSA Brudy-Everett that NACDL could remove three additional offices from its search challenge, and sought further updates.

37. On September 21, 2020, at 8:46pm ET, I received an email from AUSA Brudy-Everett. She did not serve the governments brief or indicate that she planned to serve Defendants' opening brief that day. Instead, among other things, AUSA Brudy-Everett proposed a new deadline of October 30, 2020, for Defendant's opening brief; November 30, 2020 for NACDL's opposition and cross motion; December 18, 2020 for Defendants' reply brief; and mid-January for NACDL's reply brief. In addition, she indicated that EOUSA pledged to produce all supplemental documents "within the next month" and that the parties "use the next two weeks to continue to try and narrow searches," such that we could "get it down to no challenges." AUSA Brudy-Everett indicated that if NACDL did not consent to this extension that we should call Chambers to request a conference to settle the dispute.

38. I did not receive Defendants' brief at any point on September 21, 2020.

39. On September 22, 2020, at 1:54 pm ET, I declined AUSA Brudy-Everett's proposal, stating that "NACDL will not consent to an extension of the briefing schedule" and pointing out that Defendants' most recent proposed deadline "extends far beyond your earlier request."

40. On September 23, 2020, AUSA Brudy-Everett and I called Chambers seeking to schedule a conference regarding the scheduling dispute. We left a voicemail requesting to schedule the conference, but have not yet been able to reach Chambers.

Executed: September 25, 2020

Respectfully submitted,

A handwritten signature in black ink that reads "Megan Graham". The signature is written in a cursive style and is positioned above a horizontal line.

Megan Graham (*pro hac vice*)
Samuelson Law, Technology & Public
Policy Clinic
U.C. Berkeley School of Law
353 Law Building
Berkeley, CA 94720-7200
(510) 664-4381
mgraham@clinical.law.berkeley.edu

Counsel for Plaintiff