

July 9, 2021

*VIA CM/ECF*

Hon. Marcia M. Henry  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: *Guan, et al. v. Mayorkas, et al.*, No. 19-cv-6570 (PKC/MMH)

Dear Judge Henry:



We represent Plaintiffs in the above-referenced lawsuit and submit this letter in opposition to Defendants’ motion for a third extension of time to serve the initial disclosures. ECF No. 47.

Defendants’ motion for a third extension will needlessly prolong this litigation, and Defendants have not established good cause for the additional time they seek. The parties have already sought two extensions of time to serve their initial disclosures, including the most recent 30-day extension to accommodate Defendants’ review of a proposed protective order. Defendants now seek an additional *60 days* to serve initial disclosures—and a concomitant seven-week delay to the commencement of discovery—to allow them further time to review the proposed protective order.

Plaintiffs respectfully request that the Court deny Defendants’ motion and order the parties to proceed with serving their initial disclosures by Monday, July 12, as currently required. Plaintiffs also request that the Court require the parties to submit a proposed protective order for approval by this Court by Monday, July 19.

## **I. Background**

Plaintiffs are five U.S. citizens and professional photojournalists who each traveled to Mexico between November 2018 and January 2019 to document conditions at the southern border. Mem. & Order, ECF No. 38, at 1, 3. They allege a First Amendment violation in connection with their referral to secondary inspection and subsequent questioning at various point of entry by Defendants upon their return to the United States. *Id.* at 1–2. On August 14, 2020, Defendants moved to dismiss the complaint. Mot. to Dismiss, ECF No. 29. On March 30, 2021, the Court denied Defendants’ motion to dismiss. Mem. & Order, ECF No. 38.

On April 21, 2021, counsel for the parties appeared before the Court for an initial conference. At that time, the Court gave the parties more than five weeks to serve initial disclosures pursuant to Federal Rule of Civil Procedure 26(a) by May 28, 2021, and to file a protective order prior to exchanging initial disclosures. *See* Minute Order (Apr. 21, 2021). On May 24, 2021, Defendants' counsel sent Plaintiffs' counsel a proposed protective order. On May 26, 2021, the parties jointly moved for an extension of the deadline to serve their initial disclosures. *See* ECF No. 44. On May 27, 2021, the Court granted the parties' requested extension for another two weeks, from May 28 to June 11, 2021. *See* Order (May 27, 2021).



On June 4, 2021, Plaintiffs' counsel sent Defendants' counsel an alternative proposed protective order. Plaintiffs' counsel stated that this proposed protective order would better serve both parties' purposes and help facilitate discovery. Plaintiffs' counsel further noted that this proposed protective order is similar to prior orders to which the ACLU has agreed with CBP in other litigation and cited to the cases of *Merchant v. Mayorkas*, No. 17-cv-11730 (D. Mass.) and *Wilwal v. Nielsen*, No. 17-cv-2835 (D. Minn.).

On June 8, 2021, Plaintiffs' counsel and Defendants' counsel conferred. During that conference, Defendants' counsel stated Defendants intended to seek yet another 30-day extension of the deadline to serve the initial disclosures, saying that they needed that period of time to review and respond to Plaintiffs' proposed protective order. Plaintiffs reluctantly agreed, and on June 9, 2021, the parties jointly moved for an additional 30-day extension of the deadline, from June 11 to July 12, 2021, to serve their initial disclosures. *See* ECF No. 46. In light of that request, the parties also requested a five-week extension, from June 21 to July 26, 2021, for the commencement of discovery. On June 11, 2021, the Court granted the parties' requested extension to serve their initial disclosures and to commence discovery. *See* Order (June 11, 2021).

On July 1, 2021, Defendants' counsel wrote to Plaintiffs' counsel, seeking Plaintiffs' consent for a third extension on the time to serve the initial disclosures. In their request, Defendants' counsel explained that Defendants had reviewed the proposed protective order in detail, but did not provide any comments or edits to that order. Instead, Defendants' counsel asserted that Defendants needed additional time to review and provide edits to the proposed protective order. On July 7, 2021, Plaintiffs' counsel informed Defendants' counsel that Plaintiffs would not consent to a third extension of time to serve the initial disclosures.

On July 8, 2021, Defendants filed their motion for a third extension of the time to serve the initial disclosures. ECF No. 47. In their motion, Defendants seek an extension of 60 days, from July 12 to September 10, 2021. Defendants also seek a seven-week extension, from July 26 to September 10, 2021, for the commencement of discovery.

## II. Initial Disclosures

Plaintiffs respectfully request that the Court order the parties to proceed with the exchange of initial disclosures on Monday, July 12, as required under the current case management plan. *See* Order (June 11, 2021). The parties' agreement on a protective order is not necessary in order to proceed with the exchange of initial disclosures and Plaintiffs are prepared to proceed with such exchange as contemplated. Any further delay to the exchange of initial disclosures, which would result in a further delay to the commencement of discovery, is unreasonable in light of the prior two extensions already granted by the Court, and is not supported by good cause.

## III. Protective Order

Given that this Court's Individual Motion Practices and Rules ("Individual Rules") require all protective orders to "be in the form posted to Judge Henry's website," Plaintiffs respectfully request that the Court order the parties to submit a proposed protective order, based on this Court's form, to the Court for approval by Monday, July 19. The Individual Rules further state that "[i]f a party believes that changes to the form order are required due to the circumstances of the case, it may submit to the Court proposed changes to the form using track changes or a similar method to identify the proposed changes." Plaintiffs are prepared to work with Defendants on a proposed protective order based on this Court's form and to submit any proposed changes—which they contemplate would be minimal—to the Court by Monday, July 19. Requiring the parties to use this Court's form will eliminate the need for further time-consuming back-and-forth between the parties regarding the protective order and permit the parties to adhere to the timelines in the current case management plan.

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For the reasons set forth above, Plaintiffs oppose Defendants' motion for a third extension of the time to serve the initial disclosures, and respectfully request the Court deny the motion. Plaintiffs further request the Court order the parties to proceed with serving their initial disclosures by Monday, July 12, as currently required, and to submit a proposed protective order, based on the "Protective Order Form" posted to this Court's website, for approval by this Court by Monday, July 19.



Respectfully submitted,

/s/ Scarlet Kim

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