

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Case No. 14-cv-1242 (RCL)

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION
TO VACATE REMAINING DISCOVERY OBLIGATIONS**

Plaintiff Judicial Watch, Inc., by counsel, respectfully submits this memorandum in opposition to Defendant's motion to vacate. In an attempt to drastically expand the scope of the D.C. Circuit's recent decision regarding former Secretary of State Hillary Rodham Clinton's and Ms. Cheryl Mills' depositions, Defendant argues that *all* remaining discovery in this case should cease. But the D.C. Circuit decision did no such thing. It did not order that the Court's entire discovery order be vacated. In fact, Defendant did not seek mandamus or even join in the petition for a writ of mandamus filed by Secretary Clinton and Mills. It took the opposite position, arguing that mandamus was not appropriate. If nothing else, Defendant's motion to vacate is an artfully pleaded motion for reconsideration of this Court's discovery order. It should be denied.

MEMORANDUM OF POINTS AND AUTHORITIES

1. Defendant's motion seeks two alternative forms of relief. First, Defendant seeks to vacate all remaining discovery, which Plaintiff opposes on several grounds, necessitating the instant opposition. In the alternative, Defendant seeks to stay discovery pending further review

of the D.C. Circuit's ruling, which Plaintiff does not oppose. Because Defendant's motion to vacate is premature at best, Defendant has created the need for multiple filings that could have been avoided.

2. On August 13, 2020, the Court granted the parties' joint motion to extend the time to complete discovery until November 16, 2020. Order, ECF No. 169. The motion was necessitated in substantial part by the pending petition for writ of mandamus filed by Secretary Clinton and Mills, which challenged the Court's March 2, 2020 order authorizing their depositions. In their joint motion, the parties agreed that the only discovery that remained to be completed was the following four depositions: Secretary Clinton, Cheryl Mills, Brett Gittleson, and Yvette Jacks. Joint Mot. for an Extension, ECF No. 168.

3. On August 14, 2020, the D.C. Circuit granted the mandamus petition with respect to Secretary Clinton but denied it with respect to Mills. *See In re Hillary Rodham Clinton & Cheryl Mills*, No. 20-5056 (D.C. Cir. Aug. 14, 2020) (slip op.). Later, on August 31, 2020, the D.C. Circuit vacated its August 14, 2020 opinion and order and issued a new opinion and order. *See In re Hillary Rodham Clinton & Cheryl Mills*, No. 20-5056 (D.C. Cir. Aug. 31, 2020) (slip op.). Like the earlier opinion and order, the August 31, 2020 opinion and order granted the petition with respect to Secretary Clinton but denied it with respect to Mills. The only differences appear to concern language surrounding the D.C. Circuit's jurisdiction. *Id.* at 6-7, 18-19.

4. The parties have diverging and irreconcilable views of the D.C. Circuit's opinion. The next business day after the original opinion was issued, Defendant asked for Plaintiff's position on a motion to vacate all remaining discovery. ECF No. 170-2 at 4 (Pezzi Email dated August 17, 2020). As Defendant argues in its motion, Defendant claimed that certain language

in the opinion made any further discovery inappropriate and, accordingly, asserted that the Court's order with respect to all remaining depositions should be vacated. In response, Plaintiff pointed out that the D.C. Circuit's decision only granted relief to Secretary Clinton and did not alter the Court's order with respect to the depositions of the other three witnesses. Irrespective of the parties' conflicting views of the D.C. Circuit's opinion, Plaintiff also made clear that it was (and is) evaluating its appellate review options, including a petition for rehearing *en banc* and a petition for a writ of certiorari, and that any motion to vacate before Plaintiff's appeal is fully adjudicated would be improper and untimely at best. In response to Defendant's request and in the interest of judicial economy, Plaintiff offered to join in a motion to stay the remaining discovery pending further review of the D.C. Circuit's opinion, but without addressing the propriety of any motion to vacate in light of the opinion. ECF 170-2 at 1-2 (Cotca Emails dated September 3, 2020 and August 27, 2020). Defendant, or its attorney, was not satisfied and now seeks to vacate the remaining depositions before Plaintiff's review options are exhausted. To further justify its request, Defendant alleges ignorance about Plaintiff's intent to seek review. Def.'s Motion to Vacate, ECF No. 170 at 6. To be clear, Plaintiff will seek review by either a petition for a rehearing *en banc* or a petition for writ of certiorari, or both. *Id.*; Supreme Court Rule 10, 13; D.C. Cir. Rule 35.

5. Should Plaintiff succeed under either scenario, Defendant's argument that the Court's discovery order should be vacated would be moot. If Plaintiff does not succeed, the parties could have litigated Defendant's argument about the impact of the D.C. Circuit's opinion

on the remaining depositions at that time.¹ By proceeding with its motion to vacate, Defendant has forced the issue to be litigated now.

6. Defendant's sole argument for this Court to vacate its March 2, 2020 discovery order is that the D.C. Circuit's holding with respect to Secretary Clinton and Mills swept up the entirety of this Court's order authorizing the depositions of Gittleson and Jacks. But the D.C. Circuit did not go so far. Its decision only relates to the parties before it, *i.e.*, Secretary Clinton and Mills, and any suggestion that the D.C. Circuit's holding reached beyond those two parties is pure dictum and is not binding on this Court. *See Gabbs v. Exploration Co. v. Udall*, 315 F.2d 37, 39 (D.C. Cir. 1963) (though "dictum certainly deserves serious consideration," it is "not controlling on lower courts" because it is "an expression as to the law based on other facts," rather than the facts before the court); *see also Young v. New Process Steel*, 419 F.3d 1201, 1204 (11th Cir. 2005) (recognizing courts "are not bound to follow dictum") (citation omitted). The D.C. Circuit denied the petition with respect to Mills and did not rule on the depositions of Gittleson and Jacks. Defendant had its opportunity to join in the petition for mandamus relief. Instead, it unequivocally opposed the petition. The Court should decline Defendant's invitation to extend the D.C. Circuit's opinion to Gittleson and Jacks.

7. In the alternative, Defendant seeks an order to stay the remaining depositions pending Plaintiff's appeal – as previously proposed by Plaintiff. Although Plaintiff does not believe that a stay is necessary because the D.C. Circuit's opinion does not alter the March 2, 2020 order in any way with respect to the depositions of the other three witness, Plaintiff does

¹ Defendant is also wrong to claim that Plaintiff does not have a "right to appeal." Def.'s Motion to Vacate, ECF No. 170 at n 2. Plaintiff does not claim it has a right to rehearing *en banc* or review by the Supreme Court, but it certainly has the right to petition the D.C. Circuit for the rehearing and to ask the Supreme Court to review the D.C. Circuit's decision. Supreme Court Rule 10, 13; D.C. Cir. Rule 35.

not oppose a stay in the interest of judicial economy. Consistent with Plaintiff's previous representations to Defendant through counsel, a stay of the remaining discovery until final resolution of any appeal would allow for judicious use of this Court's resources and avoid frivolous briefing that Defendant appears to insist on pursuing. ECF 170-2 at 1 (Cotca Email dated September 3, 2020). Defendant attempts to bypass this issue altogether by arguing that Plaintiff's chances of obtaining reversal are remote. But that is true of all appeals, and in any event, is not a basis for vacatur.

8. By Plaintiff's calculation, any petition for rehearing *en banc* would need to be filed by October 15, 2020 and, if rehearing is not sought, any petition for writ of certiorari would need to be filed by November 30, 2020. *See* D.C. Cir. Rule 35; Supreme Court Rule 13, 30.

9. To keep the Court apprised of the status of Plaintiff's appeal, Plaintiff proposes to file a status report with the Court no later than 14 days from the disposition of any petitions for further appellate review, and, if further appellate review is granted, 14 days from the resolution of any such further appeals.

Dated: September 11, 2020

Respectfully submitted,

/s/ Ramona R. Cotca

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

_____)	
JUDICIAL WATCH, INC.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No. 14-cv-1242 (RCL)
)	
U.S. DEPARTMENT OF STATE,)	
)	
<i>Defendant.</i>)	
_____)	

[PROPOSED] ORDER

Upon consideration of Defendant’s Motion to Vacate Remaining Discovery Obligations, Plaintiff’s Opposition to Defendant’s Motion to Vacate, any replies, and the entire record herein, it is hereby

ORDERED that Defendant’s Motion to Vacate Remaining Discovery Obligations is **DENIED**; and it is further

ORDERED the remaining discovery in this matter is **STAYED** until any and all appeals in connection with the petition for a writ of mandamus filed by former Secretary of State Hillary Rodham Clinton and Cheryl Mills are fully adjudicated; and it is further

ORDERED that Plaintiff shall file a status report no later than 14 days from the disposition of any petitions for further appellate review, and, if further appellate review is granted, 14 days from the resolution of any such further appeals.

SO ORDERED.

Dated: _____, 2020

Royce C. Lamberth
United States District Judge