

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE**

Favian Busby, Michael Edgington, Russell
Leaks, and Joseph Nelson, *on their own behalf
and on behalf of those similarly situated*;

Petitioners-Plaintiffs,

v.

Floyd Bonner, Jr., *in his official capacity*,
Shelby County Sheriff, and the Shelby County
Sheriff's Office,

Respondents-Defendants.

Case No. 20-cv-2359-SHL

MOTION FOR EXPEDITED DISCOVERY

Favian Busby, Michael Edgington, Russell Leaks, and Joseph Nelson, on their own behalf and on behalf of those similarly situated (“Plaintiffs”), by and through their undersigned attorneys, hereby move this Court for an order expediting discovery pursuant to Federal Rule of Civil Procedure 26(d) and (f). In support of this Motion, Plaintiffs rely on the facts, law, and argument set forth in the accompanying Brief in Support.

WHEREFORE, Plaintiffs respectfully request that this Court set an expedited briefing schedule as necessary and appropriate under the circumstances and order expedited discovery in this matter as set forth in the accompanying Brief in Support.

Dated: June 19, 2020

Respectfully submitted

/s/ Brice M. Timmons

Brice M. Timmons (Bar No. 29582)
Black McLaren Jones Ryland & Griffiee,
A Professional Corporation
530 Oak Court Dr. Suite 360
Memphis, TN 38117
Telephone: (901) 762-0535
Facsimile: (901) 762-0527
btimmons@blackmclaw.com

Josh Spickler (Bar No. 021019)
Wesley Dozier (Bar No. 037735)
Just City
P.O. Box 41852
Memphis, TN 38174
Telephone: (901) 206-2226
josh@justcity.org

Steven John Mulroy (Bar No. 28831)
Bredesen Professor of Law
Cecil C. Humphreys School of Law,
University of Memphis
1 N. Front St.
Memphis, TN 38103
Telephone: (901) 603-8779
smulroy@memphis.edu

Andrea Woods
Amreeta S. Mathai
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
awoods@aclu.org
amathai@aclu.org

Zoe Brennan-Krohn
American Civil Liberties Union
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0769
zbrennan-krohn@aclu.org

Maria Morris*
American Civil Liberties Union
915 15th Street N.W., 7th Floor
Washington, D.C. 20005
Telephone: (202) 548-6607
mmorris@aclu.org

Thomas H. Castelli (Bar No. 24849)
Stella Yarbrough (Bar No. 33637)
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Telephone: (615) 320-7142
tcastelli@aclu-tn.org
syarbrough@aclu-tn.org

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Joseph Bial*

2001 K Street NW

Washington, D.C. 20006-1047

Telephone: (202) 223-7300

Fascimile: (202) 223-7420

jbial@paulweiss.com

Darren Johnson*

Jonathan M. Silberstein-Loeb

David Kimball-Stanley*

Adrienne Lee*

Avery Medjuck*

1285 Avenue of the Americas

New York, NY 10019-6064

Telephone: (212) 373-3000

Fascimile: (212) 757-3990

djohnson@paulweiss.com

jsilberstein-loeb@paulweiss.com

dkimball-stanley@paulweiss.com

alee@paulweiss.com

amedjuck@paulweiss.com

Attorneys for Plaintiffs

* Application for admission *pro hac vice* forthcoming

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE**

Favian Busby, Michael Edgington, Russell
Leaks, and Joseph Nelson, *on their own behalf
and on behalf of those similarly situated,*

Petitioners-
Plaintiffs,

v.

Floyd Bonner, Jr., *in his official capacity,*
Shelby County Sheriff, and the Shelby County
Sheriff's Office,

Respondents-
Defendants.

Case No. 20-cv-2359-SHL

BRIEF IN SUPPORT OF MOTION FOR EXPEDITED DISCOVERY

INTRODUCTION

To address the Court's concerns regarding the incomplete factual record and to begin to resolve the factual disputes between the parties on several critical issues, Plaintiffs seek limited, expedited discovery. Specifically, Plaintiffs seek responses to four tailored interrogatories and eight narrow requests for production, *see* Exs. A and B, focused on the Jail's response to COVID-19 and its efforts to protect the Class members in this action. Plaintiffs also seek the Court's leave to depose Kirk Fields, the Chief Jailer at the Jail, Bruce Randolph, the County Health Officer with the Shelby County Health Department, and Donna Randolph, the Medical Director for the Jail all of whom filed declarations in support of Defendants' opposition to Plaintiffs' Motion for a Temporary Restraining Order; namely. *See* Exs. C, D, and E. As allowed for in the Court's June 18 Inspection Order (ECF No. 56), Plaintiffs also seek leave to inspect the Shelby County Jail. *See* Ex. F.

Plaintiffs are entitled to and have good cause for expedited discovery. Plaintiffs seek expedited discovery in connection with their pending motion for temporary injunctive relief and the Court has already ruled that a determination on the merits of Plaintiffs' motion requires further factual development. Plaintiffs seek this discovery on an expedited basis prior to the Court's scheduled hearing on their motion on July 1, 2020. The discovery sought is readily available to Defendants and easily produced, and even allowing for expedited discovery, Defendants have had and will have ample time to review the factual record. For these reasons, and for the reasons explained further below, the Court should grant Plaintiffs' motion for expedited discovery.

ARGUMENT

I. Good Cause Exists to Grant Expedited Discovery.

Plaintiffs have shown good cause for and they are entitled to expedited discovery. The Court has already determined that “[h]ere, the lack of a developed factual record prevents the Court from ruling on the merits,” and “[c]onsideration of Plaintiffs’ constitutional and statutory allegations requires a detailed examination of the facts.” Order, ECF No. 45 at 2. As the Court has observed, because “[n]o such record is before the Court,” and because “Plaintiffs and Defendants take divergent positions on several critical factual issues,” “the facts require further development to determine the likelihood of success on these particular claims.” Order, ECF No. 45 at 2, 4. Accordingly, the Court has ordered its own independent inspection of the Jail and left open the possibility that either party may hire “its own expert to conduct its own inspection.” Inspection Order, ECF No. 56 at 4. Accordingly, and in order to develop the facts necessary to determine their likelihood of success on their claims, Plaintiffs seek expedited discovery in the form of targeted interrogatories and requests for production, depositions of three of Defendants’ declarants in this matter, and an expert inspection of the Jail.

Plaintiffs have good cause for expedited discovery. To determine whether good cause exists, courts may consider: (1) whether a request for injunctive relief is pending, (2) the breadth of the discovery requests, (3) the purpose of the requests, (4) the burden to comply, and (5) how far in advance of the typical discovery process the request was made. *Arab Am. Civil Rights League v. Trump*, No. 17-10310, 2017 WL 5639928, at *2 (E.D. Mich. Mar. 31, 2017). Plaintiffs satisfy all five factors.

First, Plaintiffs’ Motion for a Temporary Restraining Order is pending, and the Court has already made clear the need to develop the evidentiary record before the Court

can rule on the merit of Plaintiffs' Motion. *Second*, Plaintiffs' discovery requests are "narrowly tailored" to obtain the information relevant to this determination. *See 5th Element Creative, LLC v. Kirsch*, 2010 WL 4102907, at *2 (E.D. Ky. Oct. 18, 2010). Specifically, Plaintiffs interrogatories, requests for production, and proposed depositions are limited to ascertaining information regarding the measures the Jail has taken since March 12, 2020, the date on which Governor Bill Lee issued Executive Order No. 14 declaring a state of emergency, to prevent the spread of COVID-19 and to identify and protect the members of the Class (as defined in the Court's June 10, 2020 Order (*see* ECF No. 38 at 17–18)).

Third, the compelling purpose of Plaintiffs' discovery requests is to develop the "distinct factual record" the Court needs to rule on the merits of Plaintiffs' claims. Order, ECF No. 45 at 2. The information Plaintiffs seek is necessary to show, for example, "whether inmates are socially distanced, whether appropriate cleaning procedures have been implemented and whether inmates have proper access to hygiene supplies." Order, ECF No. 45 at 3. Plaintiffs are entitled to corroborate Defendants' representations regarding the population of the Jail, the extent of the COVID-19 testing undertaken there, and the results of that testing, as well as their contention that they have mitigated the risk to members of the Class. *See* Defs. Opp., ECF No. 27 at 8, 27. The depositions Plaintiffs seek will provide an efficient and effective means in the limited time available to clarify the factual record. For the reasons in the Court's Orders of June 12 and 18, the Jail inspection that Plaintiffs seek is necessary to develop the factual record required for the adjudication of Plaintiffs' claims.

Fourth, Defendants can readily comply with Plaintiffs' requests. The information sought is available and easily produced. The information and documentation sought are either routinely created in the course of business or maintained in accordance with reporting requirements and monitoring of COVID-19. Defendants likely compiled much of the information in opposing Plaintiffs' Motion for a Temporary Restraining Order. Likewise, the three witnesses Plaintiffs seek to depose have already submitted declarations in this matter.

Fifth, Defendants have already had adequate time to analyze the relevant facts such that they will not be prejudiced by expedited discovery at this stage. Indeed, Defendants have already opposed Plaintiffs' motions for a temporary restraining order and for class certification and they have briefed a motion to dismiss. Given that they will still have further and sufficient opportunity to review the facts of the case, expedited discovery may be ordered without prejudice to Defendants.

Plaintiffs are also entitled to expedited discovery now. Limited expedited discovery is appropriate if there is "insufficient evidence to establish whether a Temporary Restraining Order should be issued." *Hanover Am. Ins. Co. v. Tattooed Millionaire Entertainment, LLC*, 2016 WL 9307506 (W.D. Tenn. Nov. 22, 2016). Indeed, "[g]ood cause is usually found in cases involving requests for injunctive relief, [and] class actions" *Giltnane v. Tenn. Valley Auth.*, 2009 WL 230594, at *2 (E.D. Tenn. Jan. 30, 2009); *see also* Advisory Committee Notes to 1993 amendments to Fed. R. Civ. P. 26(d) (noting that discovery before a Rule 26(f) conference "will be appropriate in some cases, such as those involving requests for a preliminary injunction"); *Wilson v. Gordon*, 2014 WL 12788888, at *3 (M.D. Tenn. Aug. 14, 2014) (collecting cases) ("courts within the Sixth

Circuit have endorsed the view that expedited discovery . . . may be appropriate in cases in which a preliminary injunction is sought.”).

II. The Court Should Order Defendants to Oppose this Motion on an Expedited Basis.

So Defendants may submit arguments in reply to this motion before the July 1, 2020 hearing, Plaintiffs respectfully request that this Court set an expedited briefing schedule and order that Defendants file their opposition to this Motion, if any, not later than Monday, June 22, at 12:30 pm.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’ Motion.

Dated: June 19, 2020

Respectfully submitted,

/s/ Brice M. Timmons

Brice M. Timmons (Bar No. 29582)
Black McLaren Jones Ryland & Griffiee,
A Professional Corporation
530 Oak Court Dr. Suite 360
Memphis, TN 38117
Telephone: (901) 762-0535
Facsimile: (901) 762-0527
btimmons@blackmclaw.com

Josh Spickler (Bar No. 021019)
Wesley Dozier (Bar No. 037735)
Just City
P.O. Box 41852
Memphis, TN 38174
Telephone: (901) 206-2226
josh@justcity.org

Steven John Mulroy (Bar No. 28831)
Bredesen Professor of Law
Cecil C. Humphreys School of Law,
University of Memphis
1 N. Front St.
Memphis, TN 38103
Telephone: (901) 603-8779
smulroy@memphis.edu

Andrea Woods
Amreeta S. Mathai
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
awoods@aclu.org
amathai@aclu.org

Zoe Brennan-Krohn
American Civil Liberties Union
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0769
zbrennan-krohn@aclu.org

Maria Morris*
American Civil Liberties Union
915 15th Street N.W., 7th Floor
Washington, D.C. 20005
Telephone: (202) 548-6607
mmorris@aclu.org

Thomas H. Castelli (Bar No. 24849)
Stella Yarbrough (Bar No. 33637)
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Telephone: (615) 320-7142
tcastelli@aclu-tn.org
syarbrough@aclu-tn.org

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Joseph Bial*

2001 K Street NW

Washington, D.C. 20006-1047

Telephone: (202) 223-7300

Fascimile: (202) 223-7420

jbial@paulweiss.com

Darren Johnson*

Jonathan M. Silberstein-Loeb

David Kimball-Stanley*

Adrienne Lee*

Avery Medjuck*

1285 Avenue of the Americas

New York, NY 10019-6064

Telephone: (212) 373-3000

Fascimile: (212) 757-3990

djohnson@paulweiss.com

jsilberstein-loeb@paulweiss.com

dkimball-stanley@paulweiss.com

alee@paulweiss.com

amedjuck@paulweiss.com

Attorneys for Plaintiffs

* Application for admission *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I, Brice Timmons, hereby certify that on June 19, 2020, I caused a true and correct copy of the foregoing document to be filed and served electronically via the Court's electronic filing system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

Respectfully submitted,

/s/ Brice M. Timmons