

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

The Standard for Extending Discovery Deadlines

Although setting and extending discovery deadlines is likely the bane of many magistrate judges' existence, Magistrate Judge Katharine H. Parker issued a surprisingly interesting decision last month on just that topic. In *City of Almaty, Kazakhstan v. Ablyazov*, ___ F. Supp. 3d ____, 2018 WL 2148430 (S.D.N.Y. May 10, 2018), Judge Parker discussed the impact of the proportionality requirements in the Federal Rules of Civil Procedure on extension of discovery deadlines, and articulated a five-factor balancing test to apply when considering a motion for extension of a discovery schedule. That five-factor test should serve as a useful guide to federal litigators.



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'City of Almaty v. Ablyazov'

At issue before Judge Parker was the fifth request by plaintiffs for an extension of the discovery schedule. Without extended discussion of the underlying litigation, Judge Parker briefly noted that the case had been pending for almost three years, and that the claims remaining after extensive motion practice consisted of claims for fraudulent transfer of assets and for enforcement of a foreign judgment in New York. By the time plaintiffs sought their fifth extension of the discovery deadlines, the parties had already engaged in extensive discovery including 14 depositions, nine of which were taken by plaintiffs, and subpoenas to 15 non-parties in addition to document

productions between the parties. Plaintiffs requested additional time to complete discovery in order to take additional depositions, resolve various outstanding subpoenas, litigate potential motions to compel, seek production of additional documents and privilege logs, amend and supplement existing discovery responses, and serve requests to admit and interrogatories.

Legal Standard

Judge Parker began her analysis with the basic admonition contained in Rule 1 of the Federal Rules of Civil Procedure that the parties and the court should construe and apply the Rules "to secure the just, speedy and inexpensive determination of every action and proceeding." Noting that what is just and speedy varies from case to case, she allowed that in a complex civil litigation such as the case before her, discovery would take longer and be more expensive than in a typical

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civil case, and that efficiency and economy should be balanced against the parties' need to develop an adequate factual record. Judge Parker also referenced the 2015 amendments to Rule 26(b)(1), which replaced the broad language permitting discovery of information "reasonably calculated to lead to the discovery of admissible evidence," with language emphasizing proportionality. Rule 26(b)(1) now provides that: parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

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light of the 2015 proportionality amendments, she undertook to fill that void.

Five-Factor Balancing Test

Judge Parker announced a five-factor balancing test under which the court should consider: the discovery already conducted; the specific additional discovery sought; unavoidable obstacles that might require a longer schedule (such as discovery from non-parties, the

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need for extraterritorial discovery and the extent and complexity of ESI); avoidable obstacles (such as the failure of parties to cooperate in discovery); and "the need for the court to ensure that disputes are resolved fairly and efficiently, while minimizing costs to the parties to the greatest extent possible."

Applying that test to the request before her, Judge Parker held that the first two factors—the discovery already obtained and the additional discovery sought—required

the Court to assess whether the parties had developed an adequate record to present their claims and defenses, and in particular whether the additional discovery is both relevant and proportional to the needs of the case as required by Rule 26(b)(1). She concluded that the parties had already conducted extensive discovery and had an opportunity to develop their claims and defenses, but that most of the outstanding discovery had been contemplated by all parties and was necessary to ensure a fair resolution of the claims remaining in the case.

After listing all the items of outstanding discovery identified by plaintiffs in their request, Judge Parker made a specific finding that the remaining discovery was both necessary and reasonable, except for the number and scope of depositions still sought by plaintiffs. In particular, she found that the anticipated scope of one of the nonparty depositions was overbroad to the extent it sought information akin to post-judgment discovery. She also agreed with the objection voiced by a defendant, that that deposition, to be taken in Switzerland pursuant to the Hague Convention, should have been pursued earlier. She nevertheless permitted the deposition to proceed, noting

the likelihood that the witness has relevant information, the considerable amounts at stake in the litigation, the lack of meaningful documents produced by the defendants on the issue as to which the witness would be deposed, the fact that the parties would already be in Europe for another deposition, and that permitting the deposition would not delay resolution of the case because she was extending the discovery schedule for other purposes.

Noting the presumptive 10 deposition limit in Rule 30(a)(2), Judge Parker concluded that on the record before her, she would permit the plaintiffs only 12 depositions, rather than the total of 15 depositions they would get if their request was granted in full. She held that plaintiffs had not sufficiently explained what relevant information would be obtained through three of the witnesses plaintiffs proposed to depose, or how their depositions were proportional to the needs of the case, although she invited additional briefing on the relevance and proportionality of these depositions.

Judge Parker concluded that the third factor weighed in favor of extending discovery, listing as unavoidable obstacles the complexity of the case, the amount of

nonparty discovery needed, the fact that much of the evidence and many witnesses are located outside of the United States requiring resort to Hague convention procedures, and that one of the parties had been incarcerated and then in hiding while the case was pending, and that another was subject to an Interpol red notice (akin to an international arrest warrant), and

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could not travel to participate in discovery. She found that none of these obstacles could be blamed on the plaintiffs seeking the discovery extension.

As to the fourth factor—avoidable consequences—Judge Parker found that although each side had complained vigorously about the other's discovery tactics and she had had to decide multiple discovery disputes including an award of sanctions, no single party could be blamed for the delays caused by the discovery disputes. Accordingly, she held that the fourth factor was neutral in her analysis.

Finally, Judge Parker concluded that the final factor—the need to

ensure that disputes are resolved fairly and efficiently, while minimizing costs—weighed in favor of an extension. She held that the remaining discovery requested (with the exception of the depositions discussed earlier in her opinion) was necessary to fairly resolve the claims on their merits and was proportional to the needs of the case under Rule 26(b)(1).

Conclusion

By developing and applying a sensible test for evaluating motions for extension of time in light of the proportionality analysis mandated by Rule 26(b)(1), Judge Parker has provided a clear road map for litigants that, if followed, will encourage parties to engage in careful planning and execution of discovery, and to support requests for extension of discovery deadlines with concrete analysis of why additional discovery is both necessary and proportional to the matter.