UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-Civ-King

EMMA YAIZA DIAZ *et al.*,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of Florida

Defendant.

MEMORANDUM OF LAW IN OPPOSITION TO THE SECRETARY OF STATE'S MOTION IN LIMINE TO EXCLUDE TESTIMONY

Plaintiffs respectfully submit this Memorandum of Law in opposition to the Secretary of State's Motion in Limine to Exclude Witnesses. (D.E. No. 284.) As Plaintiffs explain below, Defendant Browning's motion is without basis in law and should be denied.

PRELIMINARY STATEMENT

Defendant Browning does not set forth any persuasive grounds for excluding testimony from the potential witnesses disclosed in each Union Plaintiff's Second Supplemental Response and Objection to Defendant Secretary of State's First Set of Interrogatories on October 3, 2007 (collectively referred to as the "October 3 Responses"). These potential witnesses were properly disclosed, their identities were evident from prior discovery, and their disclosure should not have come as any surprise to the Defendant Browning. Indeed, Defendant Browning was aware of these witnesses weeks, if not months or years, prior to the discovery deadline yet failed to depose a single

one of them. Some of the potential witnesses whose testimony Defendant Browning seeks to exclude were even identified by Defendant Browning *himself*.

A discovery violation has not occurred here, and, even if one did, precluding Plaintiffs from relying on the testimony of these potential witnesses would be unduly prejudicial. Defendant Browning's motion in limine should be denied.

ARGUMENT

I. Motions in Limine are Disfavored

Motions in limine are generally disfavored. *Roberts v. Charter National Life Insurance Co.*, 105 F.R.D. 492, 492 (S.D. Fla. 1985) (King, J.). They should be used to exclude evidence "only when evidence is clearly inadmissible on all potential grounds." *Stewart v. Hooters of America, Inc.*, Case No. 8:04-cv-40, 2007 U.S. Dist. LEXIS 44054, at *2-3 (M.D. Fla. June 18, 2007) (citing *Luce v. United States*, 469 U.S. 38, 41 (1984)). The Court may reconsider its determination on a motion in limine at any time during trial. *Id.* at *2 (a motion in limine "like any other interlocutory order, remains subject to reconsideration by the court through the trial"). The evidence Defendant Browning seeks to preclude is not inadmissible "on all grounds," nor does the Secretary so assert. On this basis alone, Defendant Browning's motion should be denied.

II. Plaintiffs' Potential Witnesses Should Not be Excluded Because Their Disclosure Was Not In Violation of the Discovery Rules

A. Plaintiffs' October 3 Responses Were Not in Violation of Fed. R. Civ. P. 26(e)

Secretary Browning has moved to exclude the testimony of certain election officials, certain union members, and individuals who likely were injured in 2004 and 2006. Because Defendant Browning was aware of all of these witnesses prior

to the close of discovery, yet chose not to depose *any of* these witnesses, Defendant Browning's motion in limine should be denied.

Secretary Browning does not fully state the rules under which he seeks preclusion. He suggests that Plaintiffs violated Federal Rule 26(e) by not amending their initial disclosures and therefore, the witnesses identified in Plaintiffs' October 3 Responses should be excluded. Defendant Browning's argument elevates form over substance and finds no support under the Federal Rules.

Rules 26(e)(1) and 26(e)(2) provide that disclosures and discovery responses shall be updated "if the party learns that the response is in some material respect incomplete or incorrect *and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing*." Fed. R. Civ. P. 26(e)(1) and 26(e)(2) (emphasis added).

Many of the potential witnesses the Secretary complains of were individuals *he* identified or were identified by his former co-defendants. Since the Secretary knew the identities of the potential witnesses, he should not protest now. Plaintiffs were under no obligation to supplement their initial disclosures. "[T]here is no need as a matter of form to submit a supplemental disclosure to include information already revealed by a witness in a deposition or otherwise through formal discovery." 6 C. Wright & A. Miller, Federal Practice and Procedure, § 2049.1, at p. 604; s*ee, e.g., Geico Cas. Co. v. Beauford*, Case No. 8:05-cv-697, 2007 U.S. Dist. LEXIS 61379, at *8 (M.D. Fla. Aug. 21, 2007) (finding that the plaintiff was not prejudiced by the late disclosure of a witness where plaintiff had "notice and knowledge of [the witness's] involvement in this case well before discovery closed"); *Lamothe v. Bal Harbour 101 Condominium Ass'n, Inc.*, Case. No. 05-23106-Civ, 2007 U.S. Dist. LEXIS 17477, at *4

(S.D. Fla. March 13, 2007) ("Defendant was clearly on notice that the Plaintiff believed that [the witness] had knowledge of these issues…").

All of the individuals disclosed on October 3 by the Plaintiffs whom Defendant Browning now moves to exclude were identified in prior discovery responses or pleadings. First, and most absurdly, Defendant feigns surprise that Plaintiffs identified election officials and their staff members in Hillsborough and Manatee Counties in their October 3 Responses as witnesses with knowledge. Plaintiffs alleged in their original complaint, as well as subsequent amendments to the complaint, that these counties permitted a grace period in 2004. On September 26, 2007, Plaintiffs produced the declaration of Bob Sweat, supervisor of elections for Manatee County, yet Defendant made no effort to depose Mr. Sweat before the close of discovery. On October 12, 2007, Plaintiffs deposed Buddy Johnson, supervisor of elections for Hillsborough County, and Defendant had a full and fair opportunity to elicit Mr. Johnson's facts related to the claim in this case. [1] Accordingly, there is no basis for excluding the testimony of Mr. Sweat or Mr. Johnson.

Defendant Browning also seeks to exclude the testimony of the following union members who were disclosed, among others, by Plaintiffs in a supplemental interrogatory response on August 31, 2007, as those who were likely injured by the lack of a grace period: Patricia Anne Benvenuto, Deval Brown, Jr., Bladamir Hernandez, Marie Olive Gayle Kirlew, Hubert Elie, and Joan Stephenson-Coke. Defendant Browning was notified more than a month before the close of discovery that these individuals may have been injured, but took *no* steps to depose a single one of them.

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[1] At Buddy Johnson's deposition, counsel for Defendant Browning asked a total of two questions. (Johnson Dep. at 32-33, Ex. 1).

Defendant Browning does not move properly to exclude their testimony when he sat on his rights during discovery.

Finally, Defendant Browning seeks the exclusion of testimony of the likely injured voter registration applicants Plaintiffs identified in their October 3, Responses. These individuals were identified through the document productions of the former Defendant Supervisors of Elections, which were made available to Defendant Browning. For 2004, these are individuals who submitted their applications within a month before the close of books of the election and whose applications were deemed incomplete by the county election officials. For 2006, the individuals identified as likely injured were disclosed *by Defendant Browning*. These registrants applied to vote within the month before the close-of-books of elections and their applications were marked incomplete by the Florida Voter Registration System.

In short, Plaintiffs timely and properly disclosed all witnesses whose testimony Defendant Browning has moved to exclude. Because Plaintiffs complied with *Rule* 26(e), no discovery violation has occurred, and the testimony of these witnesses should not be excluded at trial.

B. Plaintiffs' Disclosure Was Not in Violation of Fed. R. Civ. P. 26(a)(3)

As Plaintiffs stated as an objection to the October 3 Responses, "Plaintiff[s] need not provide a list of witnesses [they] intend to call at trial until the parties submit their Pretrial Stipulations on November 30, 2007." Pursuant to Fed. R. Civ. P. 26(a)(3), all potential trial witnesses must be disclosed thirty days before trial. The Court has entered no other order. It is therefore, inappropriate for Defendant Browning to seek preclusion of witnesses that Plaintiffs have no obligation to disclose.

III. Defendants Do Not Establish Grounds For Preclusion *in the Eleventh Circuit*

"Striking witnesses or evidence in response to a discovery violation is a drastic remedy that should only be considered after other alternatives are exhausted or unavailable, and clearly only when the moving party has suffered harm or undue prejudice." *Lamothe v. Bal Harbour 101 Condominium Ass'n, Inc.*, Case. No. 05-23106-Civ, 2007 U.S. Dist. LEXIS 17477, at *2 (S.D. Fla. March 13, 2007). *Defendant Browning asks the Court to exercise this drastic remedy without citing a single case from the Eleventh Circuit in support of his argument that Plaintiffs should be preclude from relying on the potential witnesses identified at the close of discovery.* Instead he relies entirely on cases from the other circuits, most of which regard disclosure of expert witnesses, not lay witnesses. *See, e.g., Finley v. Marathon Oil Co.*, 75 F.3d 1225 (7th Cir. 1996) (evidence excluded because appellant had failed to meet deadline for disclosing rebuttal expert witness testimony); *J&J Celcom v. AT&T Wireless*, 215 Fed. Appx. 616 (9th Cir. 2006) (expert report excluded because appellants served nearly three months after the deadline).

The standard in the Eleventh Circuit for exclusion of evidence in these circumstances is well established and involves a factor analysis of (1) the importance of the testimony, (2) the reasons for the failure to disclose the witness earlier, and (3) the prejudice to the opposing party if the witness is allowed to testify. *Cooley v. Great Southern Wood Preserving*, No. 04-15912, 2005 U.S. App. LEXIS 8932, at *32 (11th Cir. May 18, 2005). Even if a discovery violation occurred—which it clearly did not—the Secretary cannot establish these factors.

First, should this case proceed to trial, the testimony of union members and others who are likely injured will clearly be important. For example, Plaintiffs will

prove that they have standing. They should be afforded every opportunity to introduce evidence of all injuries, an essential element of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Further, Plaintiffs will be required to address the character and magnitude of their injuries under the *Anderson* standard. *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983). Again, it is only fair that Plaintiffs should not be denied the likely essential testimony of those who were denied the right to vote because of the lack of a grace period.

Second, Defendant Browning bears some of the responsibility for any purported delay in Plaintiffs' identification of the subject individuals. Defendants provided their data together with a document purportedly explaining the data produced. Those explanations were so ambiguous and confusing that the Secretary's own Bureau Chief could not understand them when questioned in depositions. (Roberts Dep. at 140, 144, Ex. 2). Plaintiffs requested to speak with someone at the Division of Elections who was knowledgeable about the file formats and contents of the files produced. (Roberts Dep. at 146-47, Ex. 2). The Secretary refused any additional depositions or any conversation with technical staff, but offered only a meet and confer with counsel, which did not resolve Plaintiffs issues with the data. Plaintiffs' counsel made numerous subsequent requests for information from the Division of Elections to Mr. Winsor, counsel for the Secretary, but to date have not received a reply.

Finally, Defendant Browning cannot claim that he will be prejudiced in any way if these witnesses are allowed to testify. Although he claims that he will be prejudiced because "he will not be able to examine the newly disclosed witnesses in preparation for trial," Defendant Browning was already aware of the supplemented names as they have already been disclosed through his own document production and the

document production of his former co-defendants. (*See supra* II.A.) Ultimately, Defendant Browning apparently considers the testimony of these individuals unimportant because he chose not to depose a single individual identified in Plaintiffs' August 31, 2007 supplemental interrogatory response. (*See supra* II.A.)

Because Defendant Browning had a full and fair opportunity to discover these witnesses' knowledge during the discovery period—and he chose not to—his motion to exclude their testimony should be denied. *See Cooley*, 2005 U.S. App. LEXIS 8932, at *32.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully submit that this Court should deny the Secretary of State's Motion in Limine to Exclude Witnesses Not Timely Disclosed.

Dated: Miami, Florida
October 25, 2007

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via CM/ECF this 25th day of October, 2007, to counsel for the parties listed in Appendix A, attached hereto.

By: /s/ Sarah Kroll-Rosenbaum

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APPENDIX A

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** Pro hac vice motion to be filed.

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** Pro hac vice motion to be filed.

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 04-22572-CIV-KING

EMMA YAIZA DIAZ, ET AL.,

Plaintiffs,

vs.

KURT S. BROWNING, SECRETARY
OF STATE OF FLORIDA, ET AL.,

Defendants.

DEPOSITION OF BUDDY JOHNSON

Taken on Behalf of the Plaintiffs

DATE TAKEN: OCTOBER 12, 2007
TIME: 10:37 a.m. - 11:17 a.m.
PLACE: Election Services Center
2514 North Falkenburg Road
Tampa, Florida 33619-0917

Examination of the witness taken before:

Joan L. Pitt
Registered Merit Reporter
Certified Realtime Reporter
Florida Professional Reporter

1 MR. ABT: Okay. I have nothing further. Any
2 questions?
3 Any other questions from anybody else?
4 CROSS-EXAMINATION
5 BY MR. ANTONACCI:
6 Q. Mr. Johnson, this is Pete Antonacci. A few
7 questions.
8 I take it that as you were testifying today you
9 don't know how many incomplete applications were
10 submitted after book closing in -- before the general
11 election in 2004?
12 A. Precisely, yes, you're correct.
13 Q. So with respect to the counsel's question about
14 the impact of accepting late registrations and
15 permitting corrections to late registrations --
16 MR. ABT: Objection. I didn't make any
17 statement regarding impact.
18 MR. ANTONACCI: I'm not done with my question.
19 Q. With respect to counsel's question regarding
20 the affect of accepting voter registration applications
21 after the book closing and allowing them to be
22 corrected, you can't say today what impact they had,
23 because you don't know how many you received and you
24 allowed corrected; is that correct?
25 A. That's correct.

1 MR. ANTONACCI: I don't have any other
2 questions.
3 MR. ABT: Kathy?
4 MS. HARRIS: No, I don't have any other
5 questions.
6 MR. ABT: One second. I just need to look at
7 something.
8 (Discussion off the record.)
9 THE WITNESS: I have a comment for you before
10 we hang up.
11 MR. ANTONACCI: Why don't you hold your
12 comments.
13 MR. ABT: Yeah, let's not have any comments.
14 We can go -- all right, I think we're -- I think
15 we're finished.
16 MS. HARRIS: All right. Thank you.
17 THEREUPON, the deposition of BUDDY JOHNSON,
18 taken at the instance of the Plaintiffs, was concluded
19 at 11:17 a.m.
20
21
22
23
24
25

Exhibit 2

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 04-22572-CIV-KING/O'SULLIVAN

EMMA YAIZA DIAZ; JOHN LANMAN, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; AMERICAN FEDERATION OF STATE, COUNTY AND LOCAL EMPLOYEES, AFL-CIO, FLORIDA PUBLIC EMPLOYEES COUNCIL 79; AFSCME, AFL-CIO, AND SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Plaintiffs,

vs.

KURT S. BROWNING, Secretary of State of Florida; BRENDA SNIPES, Broward County Supervisor of Elections; JERRY HOLLAND, Duval County Supervisore of Elections; LESTER SOLA, Miami-Dade Supervisor of Elections; BILL COWLES, Orange County Supervisor of Elections; and ARTHUR ANDERSON, Palm Beach County Supervisor of Elections,

Defendants.

DEPOSITION OF: DONALD ROBERTS

TAKEN AT INSTANCE OF: The Plaintiffs

DATE: August 1, 2007

TIME: Commenced at 9:30 a.m.
Concluded at 3:56 p.m.

LOCATION: 301 S. Bronough Street, #600
Tallahassee, Florida

REPORTED BY: SANDRA L. NARGIZ
Certified Realtime Reporter
Certificate of Merit Holder

1 Roberts
2 Q. Just trying to get a sense of what's
3 in this file.
4 A. When I spoke with the employee, she
5 told me what she was doing, and it was my
6 assumption at the time that the file was
7 going to contain all incompletes, whether
8 they had subsequently become active or not.
9 Now like you say, adding those
10 numbers up, you do come up with 103,442. It
11 would make you think that that number then
12 is only those active or closed applications
13 and not incompletes, but that was not my
14 understanding of what was going to be in
15 here.
16 So I don't know if we are
17 interpreting this information correctly or
18 not. That's something I would have to go
19 and speak with the originator of the data.
20 Q. Would you be willing to talk to us
21 about this, if your counsel doesn't object,
22 to interpret -- would you help us out
23 interpreting your cover letter so that we
24 can understand what's in the data that you
25 sent us?

1 Roberts

2 application that is in some process within

3 the system.

4 Q. Who might we talk to who would know

5 for sure what these terms meant and how to

6 interpret what precisely is on the disk?

7 A. That would be Marcia Bassett. I

8 believe she created this.

9 Q. Okay.

10 A. I would want to go to the author.

11 Q. Okay. I would like to turn to the

12 next page of the document. It says: Diaz

13 audit master contains FVRS audit records for

14 incoming transactions per related data

15 applications.

16 Can you explain to me what this

17 means?

18 A. Well, I probably would need some

19 clarification from one of my employees. But

20 I believe the audit master, as it states

21 here, records any transaction that comes in

22 to either create or alter a record on the

23 database.

24 Q. Okay. And based on that, how would

25 you interpret the following sentence?

1 Roberts
2 them if they are changed interactively. So
3 that's -- so for changes or additions to the
4 voter registration table, you will have an
5 audit record created for any change or
6 addition that comes through.
7 That's what they are talking about
8 here.
9 Q. Okay.
10 A. And the types that can come through
11 are listed as RCID.
12 Q. And again, the person who would know
13 best how to interpret this would be Marsha
14 Bassett?
15 A. Marcia.
16 Q. Marcia, I apologize.
17 MR. HALBERSTAM: Counsel, I
18 prefer not to take up time during the
19 deposition, if you would agree to --
20 MR. ANTONACCI: We'll agree to
21 discuss it.
22 MR. HALBERSTAM: -- discuss it
23 and arrange a conversation with
24 someone who knows --
25 MR. ANTONACCI: No. We'll

1 Roberts

2 agree to discuss it with you.

3 MR. HALBERSTAM: So you don't

4 agree to arrange a conversation with

5 someone who can help us?

6 MR. ANTONACCI: No. We'll

7 agree to discuss it with you.

8 MR. HALBERSTAM: We've tried

9 that before and no one was

10 knowledgeable enough.

11 MR. ANTONACCI: There's lots

12 of discovery obligations outstanding

13 on both sides, so when we get around

14 to talking about it all.

15 MR. HALBERSTAM: Okay. Well,

16 then I think we have to continue on.

17 BY MR. HALBERSTAM:

18 Q. So I don't fully understand -- I

19 apologize to ask you to rephrase -- what's

20 in this file described? Is it any updates

21 to an existing transaction, to an existing

22 application?

23 A. Correct.

24 Q. Okay.

25 A. Update to voter records, registration