

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.

**PLAINTIFFS' OPPOSITION TO MOTION FOR PROTECTIVE ORDER FOR
MANATEE COUNTY SUPERVISOR OF ELECTIONS ROBERT SWEAT**

Plaintiff unions, the AFL-CIO, AFSCME, Council 79, and SEIU ("Plaintiffs"), respectfully submit this opposition to the Motion for Protective Order for Manatee County Supervisor of Elections Robert Sweat.

Supervisor Sweat has unique firsthand experience with one of the central factual issues of this case -- the feasibility of implementing a voter registration grace period after the close of books. As the Supervisor of Elections for Manatee County in 2004, Supervisor Sweat interpreted the Florida election code to allow the acceptance of corrections after the book closing deadline. For approximately two weeks following the registration deadline, Supervisor Sweat's office processed corrections to at least forty to fifty incomplete voter registration applications and added those applicants to the voter roles.

These events are highly relevant to the central issues in this case. *See* Pre-Trial Stipulation, D.E. No. 304 ¶ 17 (an issue of fact that remains to be litigated at trial is “[t]he precise interests put forward by the State as justifications for the burden imposed by the lack of grace period, and the legitimacy and strength of those interests.”). Manatee County, under Supervisor Sweat’s supervision, implemented a grace period in 2004. His testimony will describe how his staff implemented this policy. Supervisor Sweat has submitted a declaration in this case, declaring that “[m]y practice of processing corrections to incomplete applications during the two week period after the registration deadline did not interfere with the administration of elections in Manatee County or, to my knowledge, result in the submission of fraudulent voter registration applications.” (Pl.’s Opp’n to Def.’s Mot. for Summ. J., D.E. No. 293, Ex. 14 ¶ 6). He has not, however, been deposed. At trial, Supervisor Sweat’s testimony will add much needed detail to his declaration. It is therefore essential for the Court to hear his testimony.

Supervisor Sweat should be compelled to give testimony at trial. He is not excused from the subpoena simply because he lives more than 200 miles from this Courthouse. The Federal Rules of Civil Procedure provide that a subpoena must be quashed if it requires a non-party witness to travel more than 100 miles “*except that*, subject to rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held.” Fed. R. Civ. P. 45(c)(3)(A)(ii); *see Chung v. Chrysler Corp.*, 903 F.Supp. 160, 164-65 (D.D.C. 1995); 9A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2463.1 (3d ed. 2008); Fed. R. Civ. P. 45 advisory committee’s notes (1991) (“Under the revised rule, a federal court can compel a witness to come from any place in the state to attend trial . . .”).

The rule of 45(c)(3)(A)(ii) is subject only to the qualification that the Court may quash or modify a subpoena if it requires a non-party to “incur substantial expense to travel more than 100 miles to attend trial.” Rule 45(c)(3)(B)(iii). Manatee County is a reasonable distance from Miami and traveling there will not require a substantial expense. Nor does attending the trial does not subject Mr. Sweat to an “undue burden.” The Presidential Preference Primary is over. Plaintiffs are not aware of an order for a recount. To be sure, Supervisor Sweat has responsibilities going forward, but he can take time from his schedule to testify in this trial, which is of the utmost importance to the voters of Florida. *See* Order Granting Motion to Quash Trial Subpoenas, D.E. No. 316 at 2 (denying Richard Carlberg’s Motion to Quash Trial Subpoenas because Mr. Carlberg – also residing more than 100 miles from the courthouse – had not been deposed and Plaintiffs’ counsel had not agreed to release him from the subpoena).

Accordingly, Plaintiffs respectfully request that the Court deny the Motion of Robert Sweat for a Protective Order.

Dated: Miami, Florida
January 30, 2007

RESPECTFULLY SUBMITTED,

/s/ Robert Harris
Robert Harris, Esq.
Florida Bar No.: 0817783
Stack Fernandez Anderson & Harris, P.A.
1200 Brickell Avenue, Suite 950
Miami, Florida 33131
Telephone: 305-371-0001
Fax: 305-371-0002
E-mail: rharris@stackfernandez.com

*Thomas Abt
*Michael Halberstam
*Sarah Kroll-Rosenbaum
*Sarah Nolan
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Phone: 212-373-3000
Fax: 212-757-3990
E-mail: tabt@paulweiss.com

Attorneys for Plaintiffs
*Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent electronically as an email attachment this 30th day of January, 2008, to counsel for the parties listed in Exhibit A, attached hereto.

Dated: Miami, Florida
January 30, 2008

By: /s/ Robert Harris
Robert Harris, Esq.
Florida Bar No.: 0817783
Stack Fernandez Anderson & Harris, P.A.
1200 Brickell Avenue, Suite 950
Miami, Florida 33131
Telephone: 305-371-0001
Fax: 305-371-0002
E-mail: rharris@stackfernandez.com

EXHIBIT A
SERVICE LIST

Counsel for Defendants

Peter Antonacci
Allen C. Winsor
GrayRobinson, P.A.
301 South Bronough Street, Suite 600
P.O. Box 11189
Tallahassee, Florida 32302-3189
Phone: 850-577-9090
Fax: 850-577-3311
email: pva@gray-robinson.com,
awinsor@gray-robinson.com
Attorneys for Secretary of State

Counsel For Plaintiffs

Mary Jill Hanson
Hanson, Perry & Jensen, P.A.
400 Executive Center Drive, Suite 207
West Palm Beach, Florida 33401
Tel: (561) 686-6550
Fax: (561) 686-2802
Email: mjhanson@hpjlaw.com

Robert Harris, Esq.
Stack Fernandez Anderson
& Harris, P.A.
Suite 950, 1200 Brickell Avenue
Miami, Florida 33131
Phone: 305-371-0001
Fax: 305.371.0002
E-mail: rharris@stackfernandez.com

* Judith A. Browne
* Elizabeth S. Westfall
Advancement Project
1730 M. Street, NW, Suite 910
Washington, DC 20036
Phone: 202-728-9557
Fax: 202-728-9558
email: ewestfall@advancementproject.org

* Thomas P. Abt, Esq.
* Michael Halberstam, Esq.
* Sarah Kroll-Rosenbaum, Esq.
* Sarah A. Nolan, Esq.
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Phone: 212-373-3000
Fax: 212-492-0111
email: mhalberstam@paulweiss.com

** Jonathan P. Hiatt
AFL-CIO
815 Sixteenth Street, NW
Washington, DC 20006
Phone: 202-637-5053
Fax: 202-637-5323
email: jhiatt@aflcio.org

Manny Anon, Jr.
Florida Public Employees Council 79
3064 Highland Oaks Terrace
Tallahassee, Florida 32301
Phone: 850-222-0842
Fax: 850-224-6926
email: m_anon@afscmeffl.org

** David Becker
People for the American Way Foundation
2000 M Street, Suite 400
Washington, DC 20036
Phone: 202-467-2360
Fax: 202-293-2672
email: dbecker@pfaw.org

** Judith A. Scott
** John J. Sullivan
SEIU
1313 L. Street, NW
Washington, DC 20005
Phone: 202-898-3453
Fax: 202-898-3323
email: sullivaj@seiu.org

* Admitted pro hac vice.

** Pro hac vice motion to be filed.