

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

**CASE NO. 04-22572-Civ-King**

EMMA YAIZA DIAZ *et al.*,

Plaintiffs,

v.

SUE M. COBB, Secretary of State of Florida,  
*et al.*,

Defendants.

**PLAINTIFFS' MOTION TO COMPEL DEFENDANTS  
TO PRODUCE INITIAL DISCLOSURES**

Pursuant to Federal Rules of Civil Procedure 26(a) and 37, and Local Rule 26.1, Plaintiffs respectfully request that the Court compel Defendants to produce initial disclosures. Defendants have refused to confer with Plaintiffs pursuant to Federal Rule 26(f). Further, Defendants have expressly stated that they will not comply with the requirement, pursuant to Federal Rule 26(a) and Local Rule 26.1(A), that they produce initial disclosures. Accordingly, Plaintiffs request that the Court enter the attached proposed order requiring Defendants to produce initial disclosures.

**PROCEDURAL BACKGROUND**

On March 6, 2006, Defendant Secretary of State filed a motion requesting a status conference pursuant to Fed. R. Civ. P. 16. On March 10, 2006 the Court ordered that the parties appear before the Court on March 27, 2006 for a scheduling conference pursuant to Local Rule 16.1B.

On March 27, 2006, counsel appeared before this Court for a Rule 16.1.B conference. During the conference, Plaintiffs' counsel indicated that they would file their

amended complaint on April 6, 2006. In response, defense counsel expressed concern about the timing of Plaintiffs' amended complaint relative to Florida's federal primary elections and the need for prompt resolution of Plaintiffs' claims. Although Plaintiffs' counsel provided the Court and defense counsel with a proposed scheduling order during the conference, Plaintiffs did not move for its entry, nor did counsel or the Court confer about the proposed order.<sup>1</sup> At the conclusion of the conference, the Court ordered counsel to appear for a subsequent Rule 16.1.B conference on April 10, 2006.

At the April 10, 2006 scheduling conference, the Court queried counsel about the claims set forth in the First and Second Amended Complaints and case management issues. Further, the Court made clear that the parties could proceed with discovery pending the resolution of any motions that Defendants might file. Defense counsel reiterated the need for expeditious resolution of Plaintiffs' claims in light of Florida's upcoming federal elections.

On April 26, 2006, Plaintiffs' counsel requested via electronic mail that counsel schedule a Rule 26(f) teleconference for April 27th or May 1st and attached a proposed Rule 26(f) joint discovery report. (*see* Westfall Declaration attached hereto ("Westfall Decl."), Tab 1).<sup>2</sup> When defense counsel failed to respond to this email, on May 1, 2006 Plaintiffs' counsel reiterated her request for a Rule 26(f) conference. (Westfall Decl. Tab 2). On May 1, 2006, counsel for the Secretary of State, on behalf of all Defendants,

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<sup>1</sup> Plaintiffs' proposed scheduling order is not part of the record and does not appear in the Court's docket.

<sup>2</sup> Due to the timing and procedural posture of this scheduling conference, the parties were unable to confer twenty-one days in advance of the scheduling conference on March 27, 2006 as required by Fed. R. Civ. P 26(f).

telephoned Plaintiffs' counsel and stated that defense counsel would not confer with Plaintiffs' counsel under Rule 26(f), on the ground that the Court had not issued a scheduling order, and that Defendants therefore were not obligated to confer with Plaintiffs or produce initial disclosures until the Court ruled on their pending motions. In response, Plaintiffs' counsel advised counsel for the Secretary of State that Plaintiffs would file a motion to compel production of initial disclosures.

On May 3, Plaintiffs' counsel sent an email to all defense counsel asking them to confirm in writing by the end of that day that his or her client would neither confer with Plaintiffs' counsel, pursuant to Fed. R. Civ. P. 26(f), nor produce initial disclosures, pursuant to Fed. R. Civ. P. 26(a)(1) and Local Rule 26.1(A), pending the Court's consideration of Defendants' motions to dismiss and for a more definite statement. (Westfall Decl. Tab 3). Counsel for the Secretary sent an email confirmation on behalf of all Defendants. (Westfall Decl. Tab 4).

In light of Defendants' refusal to produce initial disclosures, Plaintiffs have served document and interrogatory requests on Defendants pursuant to Federal Rules 33 and 34. On May 3, 2006 Defendant Supervisor of Elections for Miami-Dade moved for a protective order. On May 4, 2006 counsel for the Supervisor for Orange County advised Plaintiffs' counsel that his client would file a similar motion.<sup>3</sup>

Plaintiffs now move that the Court order Defendants to produce initial disclosures, as required by Federal Rule 26(a) and (f) and Local Rule 26.1(A).

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<sup>3</sup> Counsel for the Secretary of State agrees with Plaintiffs, contrary to Miami-Dade's position, that in light of Defendants' position on initial disclosures, it is appropriate for Plaintiffs to serve discovery requests. (Westfall Decl. Tab 5).

## LEGAL STANDARDS

Federal Rule 26(f) requires that parties confer to consider the nature of the case and the possibility of a prompt settlement, to make or arrange for the initial required disclosures pursuant to Rule 26(a),<sup>4</sup> and to discuss any issues relating to preserving discoverable information. Rule 26(f) also obligates parties to develop a proposed discovery plan indicating the parties' views concerning the timing and subjects of discovery, the form in which certain types of discovery should be produced, issues relating to claims of privilege, any requested changes in the local rules of discovery, and other orders relating to discovery that will be requested by the parties. Under Rule 37(a)(2)(A), "if a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions." Fed. R. Civ. P. 37(a)(2)(A).

The Local Rules make clear that parties' compliance with Federal Rule 26(a) and (f) is mandatory in this jurisdiction. In particular, the Local Rules state that "a party must comply with the disclosure obligations imposed under Rule 26(a)(1), Fed. R. Civ. P., in

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<sup>4</sup> Rule 26(a) requires that a party must disclose where known the name, address, and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses and the subject of the information, unless used solely for impeachment; a copy or a description of, by category and location, all documents, data compilations, and tangible things in the control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment; a computation of any category of damages claimed by the disclosing party, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered and making available for inspection and copying any insurance agreement under which any person carrying on an insurance business may be liable to

the form prescribed by Rule 26(a)(4),” except in limited categories of cases that are wholly inapplicable to the case at bar. L.R. 26.1(A). Likewise, the Local Rules state that the parties must confer as required by Federal Rule 26(f). *See id.* at L.R. 26.1(F).

As explained in the Advisory Committee Notes to Rule 26, the parties’ Rule 26(f) report assists the court in tailoring the timing and scope of discovery to the circumstances of a particular case. *See* Advisory Committee Notes, Fed. R. Civ. P. 26. Absent a discovery report, the court is hindered in its ability to ensure that discovery is appropriate for the particular claims and issues in this case. *Id.* Similarly, the purpose of Rule 26(a) is to “accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information.” *See id.* Initial disclosures, like all mandatory disclosures under the Federal and Local Rules, are integral to the parties’ ability to move a case forward expeditiously. “The goal of the initial disclosure requirement is to get out basic information about the case at an early point.” *Stamps v. Encore Receivable Mgmt.*, 232 F.R.D. 419 (D. Ga. 2005) (quoting Wright, Miller, & Marcus, *Federal Practice and Procedure: Civil 2d* § 2053).

Federal Rule 37 provides that “[i]f a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.” Fed. R. Civ. P. 37(a)(2)(A).

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satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Fed. R. Civ. P. 26(a).

## ARGUMENT

Defendants have both undermined the Court's ability to manage discovery in this case and hampered Plaintiffs' ability to obtain basic discovery that is essential to their claims. Further, Defendants' refusal to produce initial disclosures has caused Plaintiffs to expend needless resources in drafting and serving document and interrogatory requests that seek discovery that Rule 26(a) requires Defendants to produce automatically. Finally, Defendants' unwarranted refusal to produce initial disclosures continues to delay resolution of Plaintiffs' claims and severely undermines the credibility of Defendants' purported concern about the need for swift resolution of Plaintiffs' claims.

In refusing to confer or produce initial disclosures, Defendants assert that the production of initial disclosures should be suspended pending consideration of their motions to dismiss and for a more definite statement. This argument runs contrary to this jurisdiction's discovery practices and the pronouncements of this Court and should be dismissed out of hand. The Discovery Practices Handbook, Appendix A to the Local Rules, states that "[n]ormally, the pendency of a motion to dismiss . . . will not justify a unilateral motion to stay discovery pending a ruling on the dispositive motion." *Id.* at I(D)(5). In accordance with this guidance, at the scheduling conference on April 10, 2006 the Court expressly stated that discovery could proceed even if Defendants' were to file motions on the pleadings, and that the pendency of such motions is not ordinarily grounds for suspending discovery. In light of Defendants' utter failure to set forth a reasonable basis for refusing to produce initial disclosures, Defendants should be ordered to produce initial disclosure at once.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the attached order requiring Defendants to produce initial disclosures.

RESPECTFULLY SUBMITTED,

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### **RULE 37 CERTIFICATION**

I hereby certify that on May 1, 2006, I conferred with Peter Antonacci, counsel for Secretary Cobb, via telephone and that I conferred with all other defense counsel on May 3, 2006 via electronic mail. In response, Mr. Antonacci confirmed via e-mail that defendants will not engage in the Rule 26(f) process or produce initial disclosures. After conferring about the subject of this motion, the parties are unable to agree on a resolution. I subsequently advised all defense counsel that Plaintiffs would file a motion to compel production of initial disclosures and asked whether counsel would reconsider their position. Defendants Secretary of State and the Supervisor of Elections for Miami-Dade County advised me by email that they would not reconsider their decisions. To date, I have not received a response from the other defendants. Therefore, the parties are unable to agree on a resolution to the subject of this motion.

/s/ Elizabeth S. Westfall

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**PROPOSED ORDER**

Having considered Plaintiffs' Motion To Compel Defendants To Produce Initial Disclosures and Defendants' responses thereto, it is hereby ORDERED that the parties must produce initial disclosures on or before May 22, 2006.

IT IS SO ORDERED this the \_\_\_\_ day of May 2006

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U.S. DISTRICT COURT JUDGE  
LAWRENCE KING

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent via U.S. mail and electronically as an email attachment this 10th day of May, to counsel for the parties listed in Exhibit A, attached hereto.

By: /s/Michael Halberstam  
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