

UNITED STATES DISTRICT COURT  
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING

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

Plaintiffs,

vs.

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

Defendants.

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**SECRETARY OF STATE'S MOTION IN LIMINE TO  
EXCLUDE TESTIMONY OF WITNESSES NOT TIMELY DISCLOSED**

Kurt S. Browning, in his official capacity as Secretary of State of the State of Florida (the "Secretary"), and pursuant to Federal Rules of Civil Procedure 26 and 37, files this Motion in Limine to exclude testimony of witnesses not timely disclosed.

**I. INTRODUCTION**

1. At approximately 10:30 p.m. on the last day of the discovery period, Plaintiffs amended their Interrogatory responses to disclose numerous witnesses for the first time. Such disclosure is untimely, prejudicial to the Secretary, and amounts to nothing more than

gamesmanship. As a result, Plaintiffs should be precluded from relying on the newly and untimely disclosed witnesses at trial.

## II. FACTS

2. On March 5, 2007, this Court entered its Scheduling Order (doc. 202) setting the discovery cutoff for October 3, 2007 and trial for January 22, 2008. (By separate order, the Court rescheduled trial for February.)

3. Around 10:30 p.m. on October 3, 2007, less than two hours before the expiration of the discovery period, SEIU and AFSCME served their Second Supplemental Responses and Objections to Secretary's First Set of Interrogatories. These Supplemental Responses are attached as Exhibits "A" and "B". The exhibits to the Supplemental Responses included several lists of individuals who "may" have been injured.

4. On October 4, 2007, Council 79 and the AFL-CIO served their Second Supplemental Responses and Objections to Secretary's First Set of Interrogatories, which were substantially identical to those submitted by SEIU and AFSCME. These Supplemental Responses are attached as Exhibits "C" and "D". The exhibits to these Supplemental Responses appear to be identical to the exhibits to SEUI and AFSCME's Supplemental Responses.

5. All four Supplemental Responses included a supplemental response to the Secretary's Interrogatory of April 24, 2007, which asked the Union Plaintiffs to "[i]dentify all persons whom you intend to call as witnesses at trial." The Plaintiffs objected, stating that they "need not provide a list of witnesses it intends to call at trial" until the pretrial stipulation. Exhibits A-D ¶ 5. They then went on to state that they may call Robert Sweat, Buddy Johnson, Chuck Smith, Richard Carlberg, Patricia Anne Benvenuto, Deval Brown, Jr., Bladamir Hernandez, Marie Olive Gayle Kirlew, Ramon Rodriguez, Hubert Elie, and Joan Stephenson-

Coke. *Id.* Of these, only Richard Carlberg was disclosed on Plaintiffs' initial disclosures, which they never supplemented. *See* Exhibit E (initial disclosures). They also state that they might call one or more of the *thousands* of individuals listed on their various lists of persons "who may have been harmed." *See* Exhibits A-D ¶ 5. Their lists of thousands of individuals do not state whether the listed individuals are Union Members.

6. Disclosure of thousands of new potential witnesses ninety minutes before midnight on the night discovery closed is untimely and prejudicial to the Secretary. Therefore, the Plaintiffs should be precluded from relying on these new witnesses at trial.

### III. MEMORANDUM OF LAW

7. Federal Rule of Civil Procedure 26 requires a party to provide certain initial disclosures automatically, including (i) 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 (ii) a copy of all documents that the disclosing party may use to support its claims or defenses. *See* Fed. R. Civ. P. 26(a)(1)(A)-(B). Rule 26 also requires that a party supplement its initial disclosures throughout the course of litigation at appropriate intervals whenever it learns that the information originally provided turns out to be incomplete or incorrect. *See* Fed. R. Civ. P. 26(e)(1). Finally, Rule 26 requires that a party *seasonably* amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect. *See* Fed. R. Civ. P. 26(e)(2); *Neothermia Corp. v. Rubicor Med., Inc.*, 345 F. Supp. 2d 1042, 1045 (N.D. Cal. 2004) (supplements to initial disclosures under Rule 26(e) must be made promptly); Fed. R. Civ. P. 26 Advisory Committee's Note (supplementations should be made with special promptness as the trial date approaches).

8. To ensure compliance with Rule 26, Rule 37 provides that any party that:

[W]ithout substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed.

See Fed. R. Civ. P. 37(c)(1). Exclusion is “automatic and mandatory” unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless. *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996).

9. Ninety minutes before the end of the discovery period is not an “appropriate interval” and is plainly not “seasonable.” See *J&J Celcom v. AT&T Wireless Servs.*, 215 Fed. Appx. 616, 621 (9th Cir. 2006) (affirming exclusion of expert report disclosed on the last day of discovery because delay was not substantially justified); *United States v. Dunn*, No. 04-C-50472, 2007 U.S. Dist. LEXIS 27089, at \*9-14 (N.D. Ill. Apr. 12, 2007) (holding that the testimony of witnesses improperly “sprung” on the plaintiff on the last day of fact discovery was barred from use at hearing or trial); *Schiller v. City of New York*, No. 04-Civ.-7921, 2007 U.S. Dist. LEXIS 16935, at \*8-15 (S.D.N.Y. 2007) (concluding that supplementing initial disclosures three days before the end of discovery was untimely); *Spina v. Forest Pres.*, No. 98-C-1393, 2001 U.S. Dist. LEXIS 19146, at \*33-35 (N.D. Ill. 2001) (excluding testimony of witnesses disclosed on the last day of discovery).

10. Here, the Secretary received the Second Supplemental Responses from two Union Plaintiffs at approximately 10:30 p.m. on the last day of discovery and, from the other two, the day after discovery ended. Such last-minute disclosures are untimely and prejudicial in that the Secretary will not be able to examine the newly disclosed witnesses in preparation for trial.

11. The Plaintiffs apparently recognized the disruptive nature of their last-minute disclosures. When they joined in the Secretary’s Motion to Extend the Motions Deadline,

Plaintiffs described recent discovery as “active” and noted that parties needed time to review “all recently-produced (sic) discovery materials.” (Doc. 279 ¶ 1.) Presumably, they were referring (at least in part) to the untimely disclosures they had produced late the previous night.<sup>1</sup>

12. Timely updates to Rule 26(a)(1) initial disclosures permit the other side to examine witnesses prior to trial. That is the entire purpose of Rule 26(e). Thus, for example, on September 6, the Secretary timely updated his disclosures to include Supervisor Pat Hollarn, on whom the Secretary may rely at trial. *See* Exhibit F (Secretary’s supplement to Rule 26(a)(1) disclosures). This provided the Plaintiffs opportunity to depose Ms. Hollarn, which they did on October 1, 2007. Therefore, the Plaintiffs will be prepared with respect to Ms. Hollarn’s trial testimony. By contrast, the Secretary had no notice that Plaintiffs planned to rely on testimony at trial of Robert Sweat, Buddy Johnson, Chuck Smith, Patricia Anne Benvenuto, Deval Brown, Jr., Bladamir Hernandez, Marie Olive Gayle Kirlew, Ramon Rodriguez, Hubert Elie, and Joan Stephenson-Coke, or any one of the thousands of individuals listed on Plaintiffs’ various exhibits.

13. Pursuant to Rule 37(c)(1), the Plaintiffs should be precluded from relying on the untimely disclosed witnesses at trial. They should not be rewarded for their delay. If parties were permitted to conduct themselves as Plaintiffs have, no litigant would make any disclosures until the last day of discovery (after business hours), thus ensuring that their adversaries have no opportunity to examine their witnesses. Rules 26 and Rule 37 do not permit this underhanded litigation tactic.

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<sup>1</sup> In the same joinder, they took the liberty of stating that “[t]he parties, *particularly the Secretary*, need additional time assess (sic) the impact of the Court’s Order upon their respective cases and revise any motions to be submitted accordingly.” *Id.* ¶ 2 (emphasis added). The Secretary has never made such a suggestion, and the basis of the Plaintiffs statement is unclear.

**WHEREFORE**, the Secretary respectfully seeks an Order that witnesses not timely disclosed by the Plaintiffs be excluded from trial.

Respectfully submitted, this 8th day of October, 2007.

*/s/ Allen Winsor*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing has been served electronically through the Court's CM/ECF system or by United States mail this 8th day of October, 2007 (with mail to post on October 9, 2007), to the following:

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*/s/ Allen Winsor*

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