

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

FAIR FIGHT ACTION, INC, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

Civ. Act. No. 18-cv-5391 (SCJ)

**PLAINTIFFS’ STATUS UPDATE PURSUANT TO
THE COURT’S JANUARY 9, 2020 ORDER (ECF No. 194)**

On January 14, 2020, defense counsel notified Plaintiffs’ counsel that Defendants would be producing—on Wednesday, January 15, 2020—over 238,000 pages of documents. According to Defendants, these new documents are training documents responsive to Request No. 14 from Plaintiffs’ First Request for Production.

Before Defendants’ January 15, 2020 production, Defendants had produced at most 15,000 pages of training materials (“State-Defendants 0000001-00009070” plus a smattering of other documents scattered through the production). Now, two months after the original close of fact discovery and after an extensive Rule 30(b)(6) deposition that included “training materials” as a topic, Defendants inexplicably produce an additional 238,000 pages of training materials.

This delayed production is only one of Defendants' discovery deficiencies. Another deficiency (among many) is Defendants' failure to conduct their own diligent and thorough search of the files belonging to Secretary of State personnel whom Defendants believe likely to possess responsive documents. Since the parties' earliest exchanges about discovery, Plaintiffs have been clear: Defendants had this search obligation notwithstanding Plaintiffs' agreement to identify (as Defendants requested) search terms and individuals whose files should be searched. *See, e.g.*, Letter from L. Bryan to J. Belinfante (Aug. 30, 2019) (“[Plaintiffs’] provid[ing] search terms, . . . , does not relieve Defendants of their obligation under the Federal Rules to conduct a ‘diligent search’ for responsive documents”) (citation omitted) (attached as Exhibit 1 hereto). During the December 23, 2019, telephone conference with the Court, Defendants committed to expand their search to include additional custodians’ documents. As of the filing of this status report, however, Defendants have produced no such documents. Plaintiffs thus have no confidence that Defendants’ document production is complete and, as discussed below, believe they will need to seek relief from the Court to ensure that Defendants obtain documents from custodians whose documents Defendants should have searched at the outset of fact discovery.

I. Plaintiffs do not know whether the January 17, 2020 document production goal will be met.

Because Plaintiffs are filing this status report the day before the January 17, 2020, production goal date, Plaintiffs do not know whether Defendants will be producing additional documents on January 17, 2020. If Defendants do not, then Defendants will have failed to produce documents which are not only responsive to Plaintiffs' document requests, but which were also documents that this Court ordered be produced no later than November 27, 2019 (i.e., the date by which the Court directed Defendants to produce all voter complaints). (*See* ECF No. 146).

II. Expert discovery is at various stages of completeness.

The status for each of Plaintiffs' experts is divided into three categories: (1) experts whose reports have been filed and who have been deposed; (2) experts whose reports have been filed and whose depositions are scheduled; and (3) experts whose reports have not yet been filed and who have not been deposed.

A. These experts submitted reports and Defendants have taken depositions.

- Dr. Khalilah Brown-Dean
- Dr. Adrienne Jones
- Dr. Lorraine Minnite

B. These experts have submitted reports and their depositions are scheduled.

- Dr. Stephen Graves – deposition scheduled for February 6, 2020
(awaiting confirmation from Defendants)

- Mr. Kevin Kennedy – deposition scheduled for January 23, 2020¹
- Dr. Dan Smith – deposition scheduled for January 28, 2020

C. There are experts whose reports have not yet been filed and who have not been deposed

Largely due to Defendants’ lack of compliance with their discovery obligations, some of Plaintiffs’ experts have been unable to complete their reports. Additional reports will be forthcoming shortly.

III. There is additional information that needs to be brought to the Court’s attention for purposes of a new scheduling order.

As discussed in more detail below, Plaintiffs have already brought to the Court’s attention several profound deficiencies in Defendants’ document production. Briefly, Defendants have failed to carry out their most basic discovery obligations to gather documents, produce documents, and supply the metadata and other information this Court’s Order Governing Discovery of Hard Copy and Electronically Stored Information (ECF No. 107, entered 10/09/19) (“Discovery Order”) requires. Those same deficiencies remain as of the date of this status report and have impeded and delayed Plaintiffs’ ability to develop and prepare their case

¹ Mr. Kennedy, a former Wisconsin election official, offers opinions about Defendants’ training efforts and training materials. Assuming the just-produced 238,000 pages of documents are training materials (as Defendants have represented), Mr. Kennedy will need to review these documents, which will require his deposition to be rescheduled.

and the ability of Plaintiffs' experts to complete their reports. Plaintiffs have repeatedly, but unsuccessfully, attempted to resolve these persistent issues with Defendants informally.²

As this Court has acknowledged repeatedly, the upcoming November 2020 election renders time of the essence. Given the magnitude of the deficiencies in Defendants' compliance with this Court's orders and in Defendants' basic discovery obligations, coupled with the flimsiness of Defendants' proffered excuses for these deficiencies, Plaintiffs anticipate having to file not only a motion to compel but also, regrettably, a motion seeking sanctions.³

Here are Defendants' continuing deficiencies: Defendants have not adequately identified and searched the files of individuals in the Secretary of State's Office likely to have responsive documents despite Defendants' obligation to do so; Defendants have not produced voter complaints received before 2018 despite this Court's order they be produced by November 27, 2019;⁴ Defendants

² The parties have exchanged well over 100 letters and emails, most addressing these deficiencies and have met at least four times.

³ Appropriate sanctions here could include allowing an inference that certain facts are established; preventing Defendants from asserting certain claims or defenses; striking pleadings; rendering a default judgment; or treating the failure to comply as contempt. *See* Fed. R. Civ. P. 37(b)(2)(A)(i)-(iii), (vi-vii).

⁴ Plaintiffs searched Defendants' documents using the terms "stopvoterfraud OR electioncomplaintalerts," which yielded 2,016 "hits." Of those hits, five predate May 22, 2018.

have not complied with this Court's Discovery Order requiring Defendants to identify the custodians of various documents; Defendants' productions are incomplete, even regarding the searches Defendants have conducted; and Defendants' privilege log does not meet the Federal Rule of Civil Procedure 26(b)(5)(A) requirement to provide the information necessary to allow the Court and Plaintiffs to assess Defendants' assertions of privilege, which appear to be sweeping and overbroad. Each deficiency requires the Court's attention unless Defendants cure them all on January 17, 2020, which seems highly unlikely given Defendants' track record.

A. Plaintiffs anticipate filing a motion for sanctions.

Federal Rule of Civil Procedure 37(b) allows sanctions to be awarded when a party violates a discovery order. Here, Defendants have violated two of this Court's discovery orders.

- 1. Defendants have violated this Court's Order Governing Discovery of Hard Copy and Electronically Stored Information (ECF No. 107).*

This Court entered its Discovery Order (ECF No. 107) on October 9, 2019. The parties negotiated the Discovery Order before presenting it to the Court, with Defendants proposing the very provisions of the Discovery Order Defendants now violate. When confronted with these violations, Defendants have either feigned

ignorance or claimed that technical difficulties prevented them from complying. Neither excuse justifies Defendants' violation of the Discovery Order.

- a. Defendants' production does not include custodial information.

The Discovery Order is unambiguous about how electronically stored information must be produced: the production must include the metadata fields listed in Table A (which was attached) if the fields exist. (Discovery Order at B.9 and Attachment A, ECF No. 107). Among the metadata fields that must be included is a field that identifies the custodian, requiring a “[s]pecific description of who provided the document. Multiple custodians will be separated by a semi-colon.” (Discovery Order at Attachment A, ECF No. 107).

Knowing the identity of the custodians, *i.e.*, the individuals in possession of the documents produced, is important because that information allows the party to whom the documents are produced to search documents written or received by particular people—information critical to identifying key witnesses, preparing for those witnesses' depositions, and establishing evidentiary foundations. Despite the Discovery Order's mandate to specify the custodian or custodians for each document produced, Defendants have not done so. As the attached list of custodians (attached hereto as Exhibit 2) demonstrates,⁵ Defendants have identified

⁵ This list of custodians derives from the metadata included in Defendants' production and is maintained in the eDiscoveryPoint database that Plaintiffs are

only five individuals as custodians—Brian Kemp, Chris Harvey, and three of the State Election Board members. Those human custodians, however, are identified with respect to only 2,437 of the 35,905 documents as to which custodians have been identified. And, Defendants identify Brian Kemp as a custodian of only 26 documents (with the custodian stated as “Kemp Social Media”) and Chris Harvey (whom this Court described as having “vast knowledge” relevant to this case (*see* ECF No. 154, p. 18)) as a custodian of only two documents. That Messrs. Kemp and Harvey had so few of the documents Defendants produced is inconceivable.⁶

The custodians Defendants identify for the remaining documents are not the people who provided the documents, but are instead entities (*e.g.*, “State Election Board”); document categories (*e.g.*, “Discovery-other parties” or “Pleadings”); or, apparently, document requests issued by Congress (*e.g.*, Request 1-3a).⁷ For

using to manage electronically stored information. If the database of 35,917 documents (the number before the latest 238,000 page production) is filtered by custodian, only 15 documents do not have any custodian (which makes sense given the nature of the 15 documents that include, among other things, an exchange of letters between counsel), leaving 35,902 custodians for 35,902 documents. In other words, there is no overlap of custodians.

⁶ Notably, in their Initial Disclosures, Defendants identified three people “with knowledge.” Of those three—Messrs. Beaver, Barnes, and Harvey—only Mr. Harvey is identified as a custodian for any documents and, even then, only for two documents.

⁷ “Request 1-3a” apparently refers to a request contained in a letter from the Committee on Oversight and Reform of the United States House of

example, 20,377 of the 35,905 documents identify the “Secretary of State” as the custodian. In that instance, Defendants are clearly using the “Secretary of State” label to refer to the *office* of the Secretary of State, not to the person holding the title, given that Defendants separately identify Brian Kemp as a custodian for 26 documents. To state the obvious, identifying an entity or identifying a category of documents or identifying a document request number, does not, in the words of the Discovery Order, “specify who provided the document.”

b. There are impermissible gaps in the sequential numbers.

The Discovery Order prohibits gaps in the sequential Bates numbers. (ECF No. 107, B.13 and C.4). An analysis of Defendants’ production⁸ reveals 6,751 “gaps” or missing pages in Defendants’ production. Defendants have not explained the missing numbers.⁹

Representatives requesting the Secretary of State to produce documents. A copy of the Committee’s request is attached as Exhibit 3.

⁸ Plaintiffs’ “gap analysis” is attached hereto as Exhibit 4.

⁹ Plaintiffs acknowledge it is possible that the missing numbers may be documents subject to a claim of privilege. But, Defendants provided no Bates numbers on their privilege log—one of the deficiencies Plaintiffs have raised—so it is impossible to determine the nature of the missing numbers.

2. *The production of complaint files is incomplete.*

Request No. 12 from Plaintiffs' First Request for Production asks for "all documents relating to complaints that the Secretary of State has received about elections since January 1, 2012, including any investigations conducted by the Secretary of State as a result of such complaints." In a telephone conference on November 1, 2019, Plaintiffs alerted Defendants to the fact that Defendants' production did not contain complaints pertaining to elections before 2018.¹⁰ Defendants' failure to supplement their production of complaints forced Plaintiffs to raise this matter with the Court. After a hearing on this issue on November 20, 2019, the Court entered an order (ECF No. 146) requiring Defendants to produce responsive documents by November 27, 2019. Despite producing some additional documents on November 27, 2019, Defendants have not complied with the order because Defendants have produced only five complaints predating 2018. Chris Harvey testified, regarding the 2016 election, the Secretary of State's Office received about the same number of complaints received for the 2018 election (Harvey Dep. 151-52, 264-66 Dec. 5, 2019) (attached hereto as Exhibit 5), which

¹⁰ See Letter from L. Bryan to J. Belinfante at 2 (Nov. 6, 2019) (attached hereto as Exhibit 6). The Secretary of State's document retention policy requires emails to be retained for three years and letters to be retained for five years. (Harvey 30(b)(6) Dep. 124, 134-35 Aug. 16, 2019) (attached hereto as Exhibit 7). In addition, a litigation hold has been in place since at least November 20, 2018 (attached hereto as Exhibit 8). Therefore, the Secretary of State's Office should have responsive documents in its possession.

means there are still hundreds of complaint-related documents Defendants have not yet produced for elections before 2018.

These complaints are directly relevant to showing Defendants knew their training, supervision, regulations, and enforcement of election laws were deficient.

B. Defendants' privilege log is inadequate.

On January 9, 2020, Plaintiffs' sent a letter to defense counsel outlining deficiencies in Defendants' Privilege Log (a copy is attached hereto as Exhibit 9). The letter asked for a response by January 13, 2020. Defendants responded as this Status Report was being prepared for filing. While Plaintiffs have not yet reviewed and analyzed Defendants' response, Plaintiffs anticipate they will need to move to compel the production of at least some of the withheld documents.

C. Plaintiffs anticipate filing a motion to compel.

Plaintiffs will review Defendants' January 15, 2020 production (and any that may follow) to evaluate the need for a motion to compel. Defendants' history of violating their discovery obligations suggests a motion is inevitable.

D. Plaintiffs need to conduct a 30(b)(6) deposition of the Secretary of State on Defendants' document production.

Because of Defendants' violations of the Discovery Order, Plaintiffs told Defendants Plaintiffs that wanted to take a 30(b)(6) deposition of the Secretary of State regarding its document production. Defendants responded that they will not

agree to Plaintiffs' request. Plaintiffs anticipate this Court will need to resolve this issue.

CONCLUSION

Plaintiffs appreciate the opportunity to raise these matters with the Court.

Respectfully submitted this 16th day of January, 2020.

/s/ Leslie J. Bryan

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 16th day of January 2020, I electronically filed the foregoing **PLAINTIFFS' STATUS UPDATE PURSUANT TO THE COURT'S JANUARY 9, 2020 ORDER (ECF No. 194)** with the Clerk of Court using the CM/ECF system, which will automatically send notification of such filing to Counsel of Record:

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