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

FAIR FIGHT ACTION, INC., *et al*., Plaintiffs v. BRAD RAFFENSPERGER, in his official Capacity as Secretary of State of Georgia; *et al*., Defendants.	Civil Action File No. 1:18-cv-05391-SCJ

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' REQUEST FOR A THIRD 30(b)(6) DEPOSITION OF DEFENDANT SECRETARY OF STATE

Plaintiffs filed a motion seeking an out-of-time deposition of the Secretary of State ("Plaintiffs' Motion"). If granted, it would be the **third 30(b)(6) deposition** of the Secretary's Office in this litigation. Because the Parties have twice agreed to discovery protocols, another deposition is not only unnecessary, it will doubtlessly delay the resolution of the case. Instead of expanding the current discovery, or allowing Plaintiffs to conduct discovery to support their threatened sanctions motion, this Court should allow the current process — which this Court approved in November and December — to run its course.

Contrary to Plaintiffs' purported need to "ascertain the extent and the source of the problems in the [Secretary's] productions," Plaintiffs know exactly how the Secretary is and has been conducting discovery. [Doc. 217-1 at 2]. The Secretary made this clear at least: (1) twice in writing in November; (2) once in Court in November; (3) once in Court in December; (4) once in writing in December; (5) once on a telephonic conference with the Plaintiffs and the Court in December; and (6) once in Court in January. There is no mystery to be solved by taking another deposition; Plaintiffs simply seek to continue discovery on the limited issues of Governor Kemp's emails, voter complaints, and polling location consolidation.

Plaintiffs have already had numerous opportunities to obtain the information they seek in other depositions. Plaintiffs have deposed: (1) a 30(b)(6) representative of the Secretary of State twice; (2) the Secretary's General Counsel; (3) the Secretary's Deputy Elections Director and Deputy General Counsel; (4) the Elections Division Director (also the main 30(b)(6) representative); (5) three members of the State Election Board; (6) the Director of the Center for Elections; and even (7) the current Governor of Georgia.

Throughout the entire process, the Secretary has been more than accommodating. After objecting to Plaintiffs' broad and burdensome discovery requests, the Secretary agreed to use Plaintiffs' search terms and identified

custodians to move things along. Defendants continued to appease Plaintiffs by twice expanding the number of custodians (in November and December), and by producing documents that Plaintiffs requested for their expert (who has not filed a report) as late as January 2020. As a result of Plaintiffs' requests and the Secretary's efforts to proceed amicably, millions of documents have been produced to the Plaintiffs at great financial cost to state taxpayers. Given the size of Defendants' production, some of Plaintiffs' concerns may be alleviated by a more thorough review of the documents they have. While Plaintiffs later acknowledged the error of claiming Defendants had not produced documents since January 29, 2020, that the mistake was made at all suggests Plaintiffs may not be aware of the documents.[1] [Doc. 220 at 1].

Under these circumstances, Plaintiffs cannot reasonably claim that they have been deprived of the opportunity to obtain evidence to prove their case: their requests have resulted in more than half of all emails of all custodians being flagged as responsive. Thus, there is no need for another 30(b)(6) deposition of the Secretary's office; there is a need to let the discovery process continue as the parties have already agreed.

[1] True and accurate copies of defense counsel's email regarding Production 28 and Productions 25–27 are attached as **Exhibit 1** and **Exhibit 2**, respectively.

INTRODUCTION

Despite Plaintiffs' rhetoric, the issues about which there remains disagreement are relatively small: Plaintiffs' search terms and Plaintiffs' expanded custodians. [Docs. 206, 214 (Exhibits 3–13)]. Plaintiffs have not identified specific requests for production of documents where the production has been deficient. Instead, Plaintiffs devote the bulk of their Motion to a generalized grievance with the discovery process. Such complaints are common in large-scale litigation, but they do not show a specific need for another deposition of the Secretary's Office or how such a deposition would move the lawsuit forward.

Plaintiffs will learn nothing from the third 30(b)(6) deposition that they do not already know, which raises a seminal question when deciding whether to allow an out-of-time deposition: to what ends? Specifically, if Plaintiffs are not satisfied with the discovery protocols they have twice agreed to, what do they intend to do with the information gained in the deposition? Do they plan to seek permission to propound even more discovery requests? Is the deposition more about Plaintiffs' promised motion for sanctions? [Doc. 197]. Those alternative considerations are irrelevant to ongoing discovery and will not advance the issues before this Court.

To be sure, Defendants' production has not been perfect, but few efforts in a case of this magnitude are. Defendants' discovery processes have been

unquestionably substantial and thorough, however. When issues have arisen, like the data "indexing" dilemma (a key cause of delay that Plaintiffs know of but did not mention in Plaintiffs' Motion), Defendants have been forthright with this Court and Plaintiffs. When Plaintiffs sought to expand discovery — by adding custodians and search terms — Defendants did not stand on their objections. Instead, Defendants gave Plaintiffs virtually everything they have sought, because Defendants have nothing to hide and want this case to move forward. In return, Plaintiffs have continued to move the goalposts.

This is further demonstrated by Plaintiffs' request for documents the Secretary produced to the United States House of Representatives Committee on Oversight and Reform. Those documents contain thousands of pages responsive to Plaintiffs' other requests (about which Plaintiffs appear to be unaware). Even presuming Plaintiffs have reviewed all the documents produced, Plaintiffs' unhappiness with discovery speaks far less of Defendants' production than it does to Plaintiffs' meritless allegations of hundreds of thousands disenfranchised voters. See [Doc. 41 ¶¶ 81, 93, 205]. Indeed, Plaintiffs' own proffered evidence, at face value, amounts to a little over 300 declarations, [Doc. 221, p. 5], of the 3.95 million votes cast in the 2018 general election. Of that 300, 100 or so have been deposed, and less than a dozen have withstood cross-examination.

Rather than letting the continued production under agreed upon protocols finish, Plaintiffs seek to move the goalposts again. However, in light of the history of discovery in this case, Plaintiffs cannot carry their burden of showing good cause. There is simply no need for another 30(b)(6) deposition of the Secretary, but there is need to allow continued adherence to agreed-upon discovery protocols.

STATEMENT OF FACTS

A chronology demonstrates how this discovery process has been plagued by Plaintiffs' refusal to adhere to compromises reached to prevent the Defendants from standing on their objections to Plaintiffs' discovery requests.

A. The Two Agreed-Upon Discovery Protocols

The Early Stages of Discovery – 30(b)(6) One and Search Terms.

Plaintiffs served their First Requests for Production of Documents on July 15, 2019. [Doc. 82]. Defendants objected to many of the document requests as overly broad and unduly burdensome. [Doc. 90]. The Parties engaged in a meet-and-confer to discuss limiting the discovery requests, and the Parties agreed that Plaintiffs would identify custodians and provide search terms for many of the document requests. Before providing that information, however, Plaintiffs were given the opportunity to depose the 30(b)(6) witnesses of the Secretary of State.

On August 16, 2019, the Secretary's Chief Information Officer, Merritt Beaver, and the Elections Division Director, Chris Harvey, both sat for the first 30(b)(6) deposition of the Secretary's office. The deposition lasted about seven hours, including numerous questions about individuals in the Secretary's office who may have knowledge of the facts alleged in the Amended Complaint. See generally Dep. of C. Harvey, Tr. August 16, 2019. Answers identified the Secretary's General Counsel, Ryan Germany; the Deputy Elections Director and Deputy General Counsel, Kevin Rayburn; the Deputy Secretary of State, Jordan Fuchs; former Deputy Secretaries of State Tim Fleming and Lorri Smith; Elections System Manager, John Hallman; Training Administrator, Melanie Frechette; and county liaisons. Id. at Tr. 22:13-16 (Frechette); 24:11-14 (Barnes); 32:18-21 (county liaisons); 63:10-25 (Rayburn, Germany, Hallman); 109:16-18 (Fuchs); 110:16 (Fleming); 153-54 (Smith).

Two weeks later, Plaintiffs identified custodians — Governor Kemp, Secretary Raffensperger, and Elections Division Director Harvey — and provided numerous search terms. [Doc. 206, Ex. 1]. Defendants then applied the search terms to the electronic mailboxes of the identified custodians, and documents were reviewed for responsiveness and privilege. Simultaneously, persons within the Secretary's Office identified other locations where potentially responsive

documents may be kept (including internal servers and the Firefly website used to share documents with counties) and produced or identified these documents.[2]

The parties met and conferred in September and October. Plaintiffs served their Third Request for Production of Documents on September 24, 2019, and there appears no issue with Defendants responses to them. [Doc. 214-11]. By then, Defendants had produced about 12.25 GB of information. Plaintiffs served the Fourth Request for Production of Documents on October 16, 2019. [Doc. 110].

Defendants Explain the Discovery Protocol.

As Plaintiffs were preparing for the deposition of the Secretary's General Counsel and Deputy Counsel, Ryan Germany and Kevin Rayburn, Plaintiffs complained about Defendants' production of documents responsive to Requests Nos. 4 and 12 from Plaintiffs' First Request for Production of Documents. [Doc. 206]. Defendants responded the next day and resolved the issue involving Request No. 4. [Doc. 214-7]. Defendants' response also addressed Request No. 12, which seeks complaints about elections that persons sent to the Secretary's Office. Id. Defendants explained that they applied Plaintiffs' search terms and parameters to

[2] Plaintiffs were provided a demonstration of firefly and an index of documents available on that web portal, (STATE-DEFENDANTS-00084462 and -00084463) with the understanding that Defendants would provide any documents requested. Plaintiffs have not requested those documents.

the custodians identified by Plaintiffs in August. Id. When Plaintiffs protested to the use of the custodians they identified, the Secretary voluntarily expanded the search to include Mr. Barnes, Mr. Germany, Mr. Rayburn, and former Secretary Crittenden. Id.

Plaintiffs responded with another lengthy letter on November 12, which demonstrates Plaintiffs' knowledge of Defendants' adherence to the agreed discovery protocols. [Doc. 206, Ex. 9]. Far from being unaware of what Defendants were doing, Plaintiffs again argued that Defendants' use of Plaintiffs' own search terms and custodians was inadequate and claimed Defendants should have engaged in additional searches.

Defendants responded by highlighting Plaintiffs' own discovery shortcomings and explaining (again) that none of the persuasive authority cited by the Plaintiffs involved parties overcoming discovery objections by using search terms. [Doc. 214-8 at 2]. Defendants also restated they "provided thousands of documents based on the search terms and identified custodians. [Defendants] are now expanding [the] searches" to include four new custodians. Id. at 3.

The November 20 Discovery Hearing.

The issue came to the Court on November 20 after the Parties addressed the unresolved issue of Governor Kemp's and Secretary Raffensperger's depositions.

That hearing is fatal to Plaintiffs' Motion, because it demonstrates that Plaintiffs knew — **months ago** — exactly how Defendants were conducting discovery, which precludes any need for another 30(b)(6) deposition.

At the hearing, Plaintiffs made several statements that simply ignored the November correspondence: "First of all, we need to know who the custodians are . . . . The second thing that we need to know is the search terms that have been applied." Tr. at pp. 54–55. Both of these questions were answered, in writing, on November 8 and 14. To remove any doubt, for the third time, Defendants explained: "those custodians were persons identified in the Plaintiffs' proposed search terms," and why Defendants adopted that protocol. Tr. at 63-64.

Defendants' also explained, specifically, "what [Defendants] are doing . . . to make sure that it satisfies the Court and satisfies the opposing counsel." Tr. at 64. Defendants' counsel stated that adding the General and Deputy General Counsels as custodians for Request for Production No. 12 (while using Plaintiffs' search terms) led to about 5,000 potentially privileged emails (Mr. Germany and Mr. Rayburn are attorneys in the Secretary's office). Tr. at 64–65. The critical statements came next. First, from Defendants' counsel:

> That's only RPD 12. And if that's what we are limited to, I believe we can get that to them by the time they want . . . . **If they want us to rerun all of discovery and all of the search terms and adding** – and I think what we have

> agreed to add is Mr. Germany, Mr. Rayburn, Mr. Barnes, because there was already … Secretary Raffensperger, Governor Kemp and Elections Director Harvey. **That universe is going to be tremendous.**

Tr. at 65 (emphasis added). The Court then immediately asked the Plaintiffs if they were demanding Defendants, in fact, rerun the search terms with all of the new custodians. The Plaintiffs responded by stating that "I don't know that we need them to rerun all of the searches. I think that we are comfortable if they will just tell us what they did run." Tr. at 66. This Court and Defendants apparently heard the same thing:

> THE COURT: They don't want you to run all of them. Just tell them which ones you have run.
>
> MR. BELINFANTE: And we have done that . . . . It's their search terms. We ran that.

Tr. at 66. The hearing continued with some discussion of issues that have since been resolved, and the Court concluded by asking the Parties if there was "anything else" to discuss. Tr. at 80. Nothing was raised.

The next day, the Court entered an order memorializing the Defendants' discovery protocol: "In response to Plaintiffs' arguments concerning the custodians and searches production deficiencies, Defendants, through Counsel, stated that with respect to Plaintiffs' Request for Production (RFP) # 12 (which is crux of the discovery dispute), Defendants will provide an additional/expanded production

from three additional custodians by November 27, 2019." [Doc. 146 at 2–3]. From the hearing and the resulting order, Defendants reasonably believed (and still believe) that their obligation was to add additional custodians — Mr. Germany, Mr. Rayburn, and Mr. Barnes — and run the Plaintiffs' search terms for Request No. 12 from the First Requests for Production of Documents. To be sure, Plaintiffs left the door open to come back to the Court on whether "the production was sufficient," but the issue on process had been resolved. Id. at 3.

Defendants' Compliance with The December 21 Order and Plaintiffs' Second Disregard of Agreements Made.

Defendants proceeded to operate along the lines of the agreed-upon protocol for a few weeks, but Plaintiffs soon resumed their discovery letters. On December 18, Defendants responded to a lengthy December 11 letter from Plaintiffs. [Doc. 214-9]. Defendants' response reminded Plaintiffs of the various issues resolved and the relatively "small category of emails" that remained at issue. Id. at 2. Despite Defendants' prior explanation of the search terms and custodian protocol, Plaintiffs raised the issue again, as if nothing happened in November. So, Defendants then explained the protocol again: "Consistent with the Court's Order, Defendants searched for additional custodians for [Request No. 12] *only*." Id. (emphasis in original). Defendants also repeated the analysis of the same cases Plaintiff previously cited, and explained that Plaintiffs' reliance on the Sedona

Principles, is misplaced: if the document means anything, it does not address a situation where a discovery compromise resulted in the use of Plaintiffs' identified custodians and search terms. Id. at 3, n.1.

Defendants also explained that a technical issue — one related to "indexing" — led to the inadvertent omission of emails about voter complaints that predate January 1, 2018. [Doc. 214-9 at 5]. As with prior communications, numerous other specific issues were addressed and, it would seem, are now resolved. In sum, after the November 14 letter, the November 20 hearing, and the December 18 letter, Plaintiffs should have had zero questions about the process Defendants utilized to search for responsive, non-privileged documents.

The December 19 Hearing.

This Court considered Plaintiffs' Motion for Preliminary Injunction on December 19. [Doc. 180]. When this Court addressed discovery, Plaintiffs acted if nothing had happened in November: they repeated that they did not know "whose documents Defendants have searched in order to respond to our request for production." Tr. at 135:22–24. Plaintiffs even claimed that the Defendants "won't tell us what they did," which cannot be reconciled with the record. Tr. at 138:4–5.

The Court characterized Plaintiffs' concerns as follows: "your first argument is that they have not identified all the custodians," and Plaintiffs' counsel agreed

with that description. Tr. at 138:17–20. Defendants' counsel explained that the Defendants either searched the system or used the custodians identified by the Plaintiffs as the "result of a compromise, but also after [Plaintiffs] conducted the first 30(b)(6) of the Secretary of State." Tr. 139:8–12. Defendants' counsel also explained that when the additional, agreed-upon custodians were added (Mr. Germany, Mr. Rayburn, and Mr. Barnes), the "indexing" issue raised in the December 18 letter appeared to limit the number of responsive documents. Id.

Plaintiffs then raised issues from Request No. 5 (from the First Request for Production of Documents) which had not been specifically raised in prior correspondence. Tr. at 141, 142-43. Defendants' counsel reiterated that "this is what happens a lot of times, too, we think we've done what they want us to do and then it comes back and it's another one." Id. at 143. In response, the Parties agreed (and the Court ordered) to work through the issues that Defendants believed had been resolved, namely the protocols for document production.

The December 23 Agreement and Telephonic Hearing.

After a lengthy discovery meet-and-confer meeting, the Parties agreed to another protocol on December 23, 2019, which was memorialized in an email at 9:11am on December 23:

> For the first and second set of RPDs, we will be using the search terms you created earlier in the process.

> For the Fourth, we have requested them from you and reserve the right to object to their breadth (which, we did not do with the first two sets).
>
> I do not believe any of the third RPDs are at issue.

[Doc. No. 214-11]. The Parties explained the agreement in a telephonic conference with the Court the same day. [Doc. 182]. As Plaintiffs' counsel informed the Court: "we have reached agreement on certain areas. The Defendants have agreed that they will search all of the documents for additional custodians, including the Deputy Secretaries of State and including the local county liaison officers." Tr. of Dec. 23 Telephone Conference at 3:6–10.[3] Given the repeated nature of the dispute, Defendants' counsel repeated the process, which reiterated (again) that Defendants "would use the search terms that [Plaintiffs] had sent [Defendants] that govern [Defendants'] production under the First and Second set of RPDs, and that [Defendants] will run those search terms against the new custodians who[,] for [Defendants'] purposes[,] would be the county liaisons … [and] the Deputy Secretaries of State." Id. at 4. Plaintiffs' counsel also explained that Defendants would apply new search terms to various requests in the Fourth

[3] Some additional names were added, and Defendants did not object to their inclusion. Tr. at 3-4.

Request for Production of Documents. Id. at 5.[4] The agreement was memorialized in the Court's December 27 order on discovery. [Doc. 187].

The January 30 Hearing.

Once again, Defendants believed the issues involving discovery generally and search terms and custodians specifically had been resolved. Consequently, Defendants began implementing the protocols and retained an additional 20 attorneys to help conduct the additional document review.

As explained at the Court's January 30 hearing, Plaintiffs' search terms limit very little and approximately 320,000 documents needed to be reviewed before the Defendants' goal of completing productions by February 28. Still unsatisfied, Plaintiffs argued to change the protocol again (to move beyond their identified custodians and search terms) and conduct more discovery. At the time of this Brief, the Court is still considering Plaintiffs' requested to expansion of the December 23 protocol, which has Defendants applying **every search term to every custodian**.

B. Plaintiffs' Motion Raises Repetitive Complaints.

Plaintiffs' Motion raises issues that already have been addressed by Defendants and would not be aided by third 30(b)(6) deposition. Indeed, the issues Plaintiffs identify have either all been addressed or resolved. For example,

[4] Defendants' counsel also raised the issue of "indexing" again. Tr. at 7.

Plaintiffs complain that numerous documents were produced after the November 15, 2019 close of discovery, but this is, in large part, due to Defendants' voluntary agreement to expand the number of custodians before the November 20 hearing. [Doc. 217-1 at 3]. Plaintiffs' Motion raises the issue of hard copies, but the Defendants' filing on February 4 addresses this issue.[5] Plaintiffs even make the outrageous claim that Defendants "failed to tell Plaintiffs which custodians' documents they had searched," when that issue has been addressed more times than any other in this case.[6] [Doc. 217-1 at 4].

Plaintiffs next argue that the productions do not match applicable search terms, addressing documents involving Governor Kemp and Plaintiffs' presumption that more responsive emails would exist. [Doc. 217-1 at 7, n.7]. Plaintiffs' presumptions notwithstanding, the search terms were run against Governor Kemp's Secretary of State mailbox, and the responsive documents were

[5] Despite numerous opportunities, Plaintiffs did not meaningfully raised any issue with hard copy documents until after the close of fact discovery. Plaintiffs' purported concern about hard copies — that the Secretary's Office maintains secret notes in Code books about how to flaunt election laws — is baseless and offensive.

[6] Plaintiffs' Motion also re-argues the issue of Defendants' purported obligation to ignore the compromise reached, which resulted in Plaintiffs submitting their own search terms and custodians. [Doc. 217-1, 9–10]. That issue has been addressed numerous times before (and discussed some in this Response). There is no need to repeat the arguments again, except to point out that Plaintiffs still have not found any authority that would compel Defendants to treat the agreed-upon search terms as irrelevant.

produced (and may still be produced based on continued application of Plaintiffs' search terms). Contrary to Plaintiffs' presumption, deposition testimony explained that most of then-Secretary Kemp's interactions with staff was limited to in-person meetings and phone calls. See, e.g., Harvey Dep. 15:13 – 16:13; First 30(b)(6) Dep. (Harvey) 136:2-20.

Plaintiffs' next complaint is that the documents produced include "irrelevant documents." [Doc. 217-1 at 9]. This is hardly surprising given the breadth of Plaintiffs' search terms. Plaintiffs know this, and they know that, to produce documents as reasonably fast as possible, Defendants have taken the position that any email containing agreed-upon terms is deemed responsive. Plaintiffs can make their own determination of whether the document is relevant to their case. Either way, the issue would not be resolved by another 30(b)(6) deposition about process.

Plaintiffs' next alleged need for a third 30(b)(6) deposition is to understand why some documents have not been produced. [Doc. 217-1 at 10-16.]. The topics appear limited to voter complaints (First Request for Production of Documents No. 12), and documents related to precinct closure and consolidation. [Doc. 217-1, pp. 10-16]. With regard to the voter complaints, Plaintiffs know there was a delay in getting responsive documents because of the "indexing" issue that Defendants raised in November and December. See supra at 13. That Plaintiffs chose not to

raise indexing to the Court is concerning, and it shows the lack of any legitimate need to conduct a third 30(b)(6) deposition. Regardless, Defendants have now produced all incoming complaints and continue to apply Plaintiffs' search terms to identify additional responsive documents.

The lack of documents for Plaintiffs' second identified issue — the polling closures — is easily explainable: the facts do not line up with Plaintiffs' legal theories.[7] For example, Plaintiffs wrongly contend that, the Secretary directs local governments to close or relocate polling precincts. [Doc. 41 at ¶¶ 41, 47, 108-10]. They have no evidence to support this claim, but they opine that the number of emails reflecting the Secretary's involvement are "far smaller than **would** be expected." [Doc. 217-1 at 14-15] (emphasis added). They also cite Elections Director Chris Harvey's individual deposition as evidence that emails must exist, when Mr. Harvey testified that there "**could**" be responsive emails, but that most communication with county governments on the topic took place at a conference, on the phone, or via the Firefly web portal. (Second 30(b)(6) Dep. (Harvey)

[7] "It is the rare case that a litigant does not allege some deficiency in the production … [but] I cannot find any authority in cases to date that permits a court to conclude that allegations of deficiencies in themselves automatically require a forensic search whenever a party claims that there are, for example, fewer e-mails from a person or about a subject or transmitted in a given time than the party expected to find." Wright & Miller, Federal Practice and Procedure § 2218 (3d ed.).

116:15 (emphasis added).) Plaintiffs have asked numerous witnesses about polling closure locations, and there is nothing to be gained by yet another 30(b)(6) deposition on the discovery process.

Indeed, Plaintiffs complaints suggest that they have failed to review all of the 1.6 million pages of documents they have. [Doc. 215-2]. Further, Plaintiffs complaint that about 1.2 million of these pages were also provided to the House Oversight Committee, so the Court should discount this production.[8] Respectfully, the Court should not.[9] The House Oversight Committee request was strikingly similar to Plaintiffs' discovery requests and, as a consequence, many of those documents are also responsive to Plaintiffs' discovery requests, including information responsive to their requests for documents related to polling place closures. [Doc. 217-1, pp. 14-15]. The full story is that Plaintiffs have had over 1,500 pages of these documents since November (GA-00782831–GA-00784374).

[8] See Exhibit 2 (Email from C. Miller to L. Bryan).

[9] Plaintiffs have the temerity to also argue that the production related to the United States House Oversight Committee was "highly duplicative, repetitive, and largely unrelated to the claims that are being pursued here." [Doc. 217-1, p.3, n.3]. This assertion is nonsensical for two reasons. First, Plaintiffs are seeking *again* documents that were produced to them months ago. Second, they disingenuously claim the production was "duplicative [and] repetitive," but it was *specifically and particularly* identified in Plaintiffs' discovery request. See Pl's Renewed First Req. for Production of Documents, Request 20.

This is one example[10] of the overlap within Plaintiffs' Requests and the substantial overlap renders their overly broad requests unduly burdensome, as Defendants objected in the first instance. Nevertheless, Defendants are still complying with Plaintiffs' requests and search terms to move this case forward despite Plaintiffs' ever-evolving discovery complaints.

ARGUMENT AND CITATION TO AUTHORITY

Under these facts, Plaintiffs will gain nothing by conducting another 30(b)(6) deposition, and this Court would be well within its discretion to deny Plaintiffs' Motion. Josendis v. Wall to Wall Residence Repairs, Inc., 662 F.3d 1292, 1307 (11th Cir. 2011) (enforcing scheduling orders is not an abuse of discretion). The discovery process has been lengthy but transparent. Defendants have explained their protocols, and those protocols have been confirmed by this Court. The process just needs time to work without another expansion, change, or reorganization by the Plaintiffs.

Plaintiffs do not argue anything different. They do not claim they fail to understand the protocol, but instead, they want to test their theory that the

[10] Additionally, House Oversight Committee documents are also responsive to at least Plaintiffs' requests for documents concerning list maintenance, the purported compromise of the State's online voter registration system, and implementation of HAVA Match process.

Secretary has not "fulfilled [his] discovery obligations." [Doc. 217-1 at 17]. They claim that they need to know about seven repetitive topics that purport to address the methods by which Defendants conducted discovery. Id. at 18. All of this information has been provided to Plaintiffs, and whatever they seek to gain by the deposition will not advance the litigation at all.[11]

Plaintiffs' request implicates several Federal Rules of Civil Procedure. See Fed. R. Civ. P. 16(b)(4), 26(b)(2)(C), 30(a)(2)(A)(iii). Rule 16 requires a showing of "good cause" to modify a scheduling order. Rule 30 also requires leave to depose a party that has already been deposed, and leave may be granted only for "good cause." Federal Rule of Civil Procedure 26(b)(2)(C) empowers this Court to "limit the extent of discovery . . . if it determines that (i) the discovery sought is unreasonably cumulative or duplicative [or] (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action." Plaintiffs have not made this showing. Considering the posture of the case, the Parties' correspondence, the oral arguments, and this Court's orders, Plaintiffs have failed to meet their burdens.

[11] Plaintiffs suggest that the deposition they seek is not out of time, which is inconsistent with this Court's orders. On December 5, 2019, this Court entered an order amending "prior scheduling order, [Doc. 79], to allow continued fact discovery until January 10, 2020 for the limited purposes of re-deposing Harvey in a 30(b)(6) capacity and deposing Governor Kemp." [Doc. 154 at 21].

First, Plaintiffs have the information they would purportedly seek in the deposition. Plaintiffs' Motion cites broad platitudes about making sure the Secretary "fulfilled [his] discovery obligations," but that speaks more to a sanctions motion than a need for information. [Doc. 217-1 at 17]. Plaintiffs also speak to ensuring "the impediments to a complete production are removed and Plaintiffs obtain the discovery to which they are entitled." [Doc. 217-1 at 17]. But, they have not identified any problems with the protocol; in fact, they agreed to it and can state no reasonable claim of ignorance about the process.

Second, Plaintiffs' current knowledge begs the question of what Plaintiffs seek to do with the information obtained in a third deposition. They have already indicated they plan to file a motion for sanctions. [Doc. 197 at 5]. Presumably, Plaintiffs believe the deposition will assist them in that motion, but that is irrelevant to the current dispute and demonstrates a lack of good cause. Fact discovery is not for developing arguments for a sanctions motion that may be filed, especially when Plaintiffs may not have reviewed all of the produced documents.

Third, Plaintiffs could have raised the purported need for a 30(b)(6) deposition months ago when they learned of the Secretary's discovery protocol on at least November 8. See Lord v. Fairway Elec. Corp., 223 F. Supp. 2d 1270, 1277 (M.D. Fla. 2002) (finding a lack of diligence ends the inquiry). Courts have

routinely denied requests for discovery even when they are submitted much closer to the discovery deadline. See El-Saba v. Univ. of S. Ala., 738 F. App'x 640, 645-46 (11th Cir. 2018) (affirming denial of motion to compel as untimely when filed almost two weeks after discovery closed); Eli Research, LLC v. Must Have Info., Inc., 2015 WL 4694046 at *2 (M.D. Fla. Aug. 6, 2015) (denying motion to compel filed three days after discovery closed). Other district courts have recognized that even imperfect discovery, and specifically the lack of "produc[tion] of certain documents . . . does not allow Plaintiffs to ignore the discovery deadline." Stonebarger v. Union-Pac. Corp., 2014 WL 5782385 at *3 (D. Kan. Nov. 6, 2014).

Plaintiffs never even raised the possibility of a third 30(b)(6) deposition until January, months after the close of fact discovery and the implementation of two discovery protocols that were the result of compromises between the Parties. To disturb that protocol now — particularly when the completion is potentially weeks away — prejudices Defendants and imposes unnecessary public costs that tax the public treasury. The bottom line is that the Plaintiffs should have either never agreed to a compromise (and fought over their objectionable discovery) or, at the very least, raised the issue of another deposition sooner.

Fourth, Plaintiffs requested relief is incongruent. For example, they claim that they took Michael Barnes's deposition because they believed "they had all of

his responsive documents." [Doc. 217-1 at 20 n.20]. Plaintiffs' own statements belie that representation, as their brief acknowledges (but does not explain) that the indexing issue remained ongoing on December 16. [Doc. 217-1 at 12]. More importantly, the proper approach would have been to suspend Mr. Barnes's deposition, as Plaintiffs did with Mr. Harvey and former SEB Member Harp. Tr. of Dep. of S. Harp (Oct. 16, 2019) at 54:12- :23; Tr. of Dep. of C. Harvey (Dec. 5, 2019) at 367:21-368:3. Even still, the remedy for purported prejudice from new documents would not be another deposition of the Secretary on the topic of discovery, but a limited deposition regarding documents provided since.

CONCLUSION

Upsetting the apple cart at this stage of discovery will not move the ball forward; it will lead to additional distractions and repetitive complaints, and significantly delay any trial on the merits of this case. Defendants chose not to stand on their objections in exchange for Plaintiffs' submission of proposed custodians and search terms. Plaintiffs should live with their decision as well and let the protocol they agreed to finish.

Respectfully submitted this 10th Day of February, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' REQUEST FOR A THIRD 30(b)(6) DEPOSITION OF DEFENDANT SECRETARY OF STATE was prepared double-spaced in 14-point Times New Roman font, approved by the Court in Local Rule 5.1.

/s/ Josh Belinfante
Josh Belinfante