

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JARROD STRINGER, ET AL.,
Plaintiffs,

v.

CARLOS H. CASCOS, IN HIS OFFICIAL CAPACITY
AS THE TEXAS SECRETARY OF STATE AND
STEVEN C. McCRAW, IN HIS OFFICIAL CAPACITY
AS THE DIRECTOR OF THE TEXAS DEPARTMENT OF
PUBLIC SAFETY,
Defendants.

§
§
§
§
§
§
§
§
§
§
§

No. 5:16-cv-00257

DEFENDANTS’ MOTION FOR PROTECTIVE ORDER

Pursuant to Federal Rules of Civil Procedure 26(c) and 30(d)(3), Defendants, Carlos H. Cascos, in his official capacity as Texas Secretary of State, and Steven C. McCraw, in his official capacity as Director of the Texas Department of Public Safety (“Defendants”), hereby move for a protective order limiting the scope of depositions.

FACTUAL & LEGAL BACKGROUND

1. Plaintiffs accuse Defendants of violating the “motor voter” provisions of the National Voter Registration Act (“NVRA”), 52 U.S.C. §§20501-20511. Compl. ¶1.
2. Defendants—the Texas Secretary of State (“SOS”) and Director of the Texas Department of Public Safety (“DPS”)—each play a part in implementing the NVRA in Texas. TEX. ELEC. CODE §31.001(a) (SOS is chief election officer); *id.* §§20.061 *et seq.* (DPS is a voter registration agency).
3. The NVRA requires that each State “establish procedures to register to vote in elections for Federal office by application made simultaneously with an application for a motor vehicle driver’s license pursuant to [§]20504 of this title.” 52 U.S.C. §20503(a)(1). This also applies to driver license renewals and address changes. *Id.* §§20504(a)(1) (changes of address); 20504(d) (renewals).

4. The four Plaintiffs in this cause of action—Benjamin Hernandez, Jarrod Stringer, Totysa Watkins, and John Woods—assert that they are “eligible Texas voters.” Compl. ¶16.

5. Each Plaintiff claims to have changed their driver license information online with the belief that doing so also updated their voter registration information. In particular, Plaintiffs Hernandez and Stringer claim that, after moving from one Texas county to another, each “updated his driver’s license address online, and believed that his voter registration records were updated as well.” Compl. ¶¶46, 47. Plaintiffs Watkins and Woods claim that, after moving from one Texas county to another, each “changed his [or her] driver’s license address online, and believed that his [or her] voter registration records were updated as well.” Compl. ¶¶48, 49.

6. No Plaintiff seeks relief based upon a change of address or attempted change that was conducted in person at a DPS office. *See generally*, Compl.

7. No Plaintiff seeks relief based upon a renewal or attempted renewal, either online or in person at a DPS office. *See generally*, Compl.

8. Thus, the relevant NVRA provision is 52 U.S.C. §20504(d), governing “any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver’s license.”¹

9. Plaintiffs seek discovery from SOS and DPS under Federal Rule of Civil Procedure 30(b)(6), which allows a party to serve a deposition notice directed to an organization. “The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify.” FED. R. CIV. P. 30(b)(6). Additionally, “[t]he persons designated must testify about information known or reasonably available to the organization.” *Id.*

¹ Under 52 U.S.C. §20504(d), such form “shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.”

10. Plaintiffs have noticed a Rule 30(b)(6) deposition of SOS for September 20, 2016. A true and correct copy of that notice is attached hereto as **Exhibit 1**.

11. Plaintiffs have noticed a 30(b)(6) deposition of DPS for October 4 and October 11, 2016. A true and correct copy of that notice is attached hereto as **Exhibit 2**.

12. Defendants do not dispute that any discovery that is relevant and proportional to Plaintiffs' claims is proper under Rule 30(b)(6), and do not seek protection insofar as the Rule 30(b)(6) notices at Exhibits 1 and 2 identify such information.²

13. The parties have agreed to postpone the depositions noticed for September 20 and October 4 and 11 to allow the Court to rule upon the proper scope of discovery. **Exhibit 3**. The parties have agreed to extend the discovery period so that awaiting such ruling does not prevent the parties from having an adequate amount of time to obtain discovery. *Id.*

SCOPE OF DISCOVERY UNDER FEDERAL RULE OF CIVIL PROCEDURE 26

14. Both before and after the 2015 amendments to the Federal Rules of Civil Procedure, Courts have recognized that “the proportionality concept . . . has always limited overly burdensome discovery.” *XTO Energy, Inc. v. ATD, LLC*, No. 4-1021 JB/SCY, 2016 WL 130171, at *16 (D. N.M. Apr. 1, 2016). *See also id.* at 17 (noting that proportionality “was relocated to 26(b)(1) to address the ‘explosion’ of information that ‘has been exacerbated by the advent of e-discovery.’”) (quoting FED. R. CIV. P. 26(b) advisory comm. note (2015)).

15. Indeed, the 2015 amendment to Rule 26(b) “deleted from Rule 26 a party’s ability, for good cause, to obtain discovery of any information relevant to the subject matter of the case, and the notion that information is discoverable, even if not directly relevant, if it is reasonably calculated to lead to

² Defendants have a pending motion to dismiss for lack of jurisdiction and failure to state a claim. Doc. 9. Defendants do not concede that Plaintiffs have stated a claim over which the Court has jurisdiction, or upon which relief may be granted. Rather, they note that even if the Court has jurisdiction and Plaintiffs have stated any claim, discovery must be proportional to the claim asserted.

the discovery of admissible evidence.” *Yee v. Cliff Veissman, Inc.*, No. 14-cv-01531, 2016 WL 950948, at *2 (N.D. Ill. March 7, 2016). *See also Davita HealthCare Partners, Inc. v. United States*, 125 Fed. Cl. 394, 398 n.3 (2016); *McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, No. 3:14-CV-2498-B, 2016 WL 98603, *4 (N.D. Tex. Jan. 8, 2016).

16. Of course, the 2015 amendment to Rule 26(b) “does not change the existing responsibilities of the court and the parties to consider proportionality.” FED. R. CIV. P. 26(b)(1) advisory comm. note (2015). While “[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery,” the party claiming undue burden “ordinarily has far better information—perhaps the only information—with respect to that part of the determination.” *Id.* The party claiming that a discovery request is proportional “should be able to explain the ways in which the underlying information bears on the issues as that party understands them.” *Id.*

17. The objections raised by the defendants in *Sanders v. Howmedica Osteonics Corp.*, a case involving medical devices, mirror Defendants’ objections here. No. 1:14-cv-698-JA-GMB, 2016 WL 1337559 (M.D. Ala. Apr. 5, 2016). The court in *Sanders* cited pre-2015 case law, stating that objections under Rule 26 “must include a specific explanation describing why the request lacks relevance, and why the information sought will not reasonably lead to admissible evidence.” No. 1:14-cv-698-JA-GMB, 2016 WL 1337559 at *2 (M.D. Ala. Apr. 5, 2016) (quotation and citation omitted). The court held that a defendant’s “product-identification” objections to producing information about devices other than those at issue in the litigation were “precisely the type of objections contemplated by the Federal Rules of Civil Procedure.” *Id.* These are precisely the sort of objections Defendants raise here.

MOTION FOR PROTECTIVE ORDER

18. Federal Rule of Civil Procedure 30(d)(3) empowers a deponent to seek a protective order barring a deposition conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent.

19. Federal Rule of Civil Procedure 26(c)(1) authorizes the Court to “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including [...] forbidding the disclosure or discovery” and “forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery[.]” FED. R. CIV. P. 26(c)(1)(A), (D).

20. Defendants seek the following protections from the 30(b)(6) notice to SOS (**Exhibit 1**):

- a. “Definitions” at ¶4 defines “Driver’s License application” as “applications for a Texas driver’s license as well as applications to renew a Texas driver’s license and applications to change an address on a Texas driver’s license.”

Because none of the Plaintiffs claims to have renewed online, substantial discovery related to online renewal is not proportional to the claims in this case under Rule 26. Defendants request that the Court narrow the scope of Definitions, ¶4 to eliminate discovery not related to SOS’s NVRA implementation in connection with online changes of address that originate on the DPS website.

- b. Several deposition topics capture information unrelated to Plaintiffs’ claims. These are:
 - i. Topic 2, requesting information about “the organization and structure of [SOS].”
 - ii. Topic 3, requesting information about SOS’s “policies, practices, and procedures related to voter registration services.”
 - iii. Topic 5, requesting “[a]ll policies, practices, and procedures related to” SOS’s “driver’s license renewal and change-of-address application computer system(s).”
 - iv. Topic 7, requesting “[a]ny internal coding systems for tracking driver’s license renewal and change-of-address applications, voter registration, or records related to voter registration services.”

These topics are proportional to the claims in this case only insofar as they relate to NVRA implementation in connection with online changes of address that originate on the DPS website. Otherwise, they amount to an impermissible fishing expedition. Defendants request that the Court

enter a protective order limiting the scope of these topics to SOS's NVRA implementation responsibilities in connection with online changes of address that originate on the DPS website—the only types of transactions at issue here.

- c. Several deposition topics identify information about DPS, which DPS will address it in its 30(b)(6) deposition, to the extent appropriate under the Rules. These are:
- i. Topic 3(a), requesting “procedures by which voter registration materials and services are offered to applicants during any DPS driver’s license renewal or change-of-address process online at the DPS website and in-person at a DPS office.”
 - ii. Topic 6, requesting “[a]ll policies, practices, and procedures related to DPS’s driver’s license renewal and change-of-address application computer system(s).”

Preparing SOS’s 30(b)(6) witness to address these topics is duplicative, unduly burdensome, and does not provide the best evidence—which will be provided by DPS, to the extent the information is deemed relevant and proportional by the Court. Defendants therefore request a protective order eliminating these deposition topics from SOS’s 30(b)(6) deposition.

- d. Several deposition topics include confidential and/or classified information which could render internal systems vulnerable to outside interference. These are:
- i. Topic 3(d), requesting information about “how voter registration information aggregated from in-person and online driver’s license renewal and change-of-address applications that originate from the DPS website are transmitted to the Secretary of State and/or appropriate election officials.”
 - ii. Topic 5, requesting information about SOS computer systems.
 - iii. Topic 7, requesting “[a]ny internal coding systems for tracking driver’s license renewal and change-of-address applications, voter registration, or records related to voter registration services.”

Defendants request that the Court enter an order that such confidential and/or classified information shall be used solely for the purpose of preparation, trial, and appeal of this litigation and for no other purpose, and shall not be disclosed except in accordance with the terms of a joint protective order agreed to by the parties and entered by the Court.

- e. Finally, Defendants seek protection from all of the designated deposition topics to SOS to the extent they request personally identifying information protected under the NVRA or other applicable law.³

21. Defendants seek the following protections from the 30(b)(6) notice to DPS (**Exhibit 2**):

- a. “Definitions” at ¶4 defines “Driver’s License application” as “applications for a Texas driver’s license as well as applications to renew a Texas driver’s license and applications to change an address on a Texas driver’s license.”

Because none of the Plaintiffs claims to have renewed online, substantial discovery related to renewal transactions is not proportional to Plaintiffs’ claims under Rule 26, and Defendants request that the Court narrow the scope of Definitions ¶4 to eliminate all discovery not related to changes of address that originate on the DPS website. Moreover Texas issues many forms of driver licenses, including commercial licenses, occupational licenses, and minor restricted licenses. The Plaintiffs allege only that they have applied for Class C individual licenses. Thus, the definition of “driver’s license application” should further be limited to include only those licenses.

- b. Several deposition topics include information unrelated to Plaintiffs’ claims. These are:
 - i. Topic 2, requesting information about “the organization and structure of DPS.”

³ *E.g.*, 52 U.S.C. §20504(b) (“No information relating to the failure of an applicant for a State motor vehicle driver’s license to sign a voter registration application may be used for any purpose other than voter registration.”)

- ii. Topic 3, requesting “DPS’s policies, practices, and procedures...for administering driver’s license applications that originated from the DPS website and driver’s license applications submitted in-person at a DPS office.”
- iii. Topic 4, requesting “DPS’s policies, practices, and procedures related to voter registration services.”
- iv. Topic 6, requesting “[a]ll policies, practices, and procedures related to DPS’s driver’s license renewal and change-of-address application computer system(s).”
- v. Topic 7, requesting, “DPS’s policies, practices, and procedures related to questions in its computer system(s) concerning voter registration.”
- vi. Topic 8, requesting “[a]ny internal coding systems for tracking driver’s license renewal and change-of-address applications, voter registration, or records related to voter registration services.”
- vii. Topic 9, requesting “policies, practices, and procedures regarding the training of DPS personnel on how to offer voter registration to applicants.”

These topics are proportional to Plaintiffs’ claims only insofar as they relate to NVRA implementation responsibilities in connection with online changes of address that originate on the DPS website. Otherwise, they amount to an impermissible fishing expedition. Defendants request that the Court enter a protective order limiting the scope of these topics to DPS’s NVRA implementation responsibilities in connection with online changes of address that originate on the DPS website—the only types of transactions at issue here.

- c. Several of the deposition topics include confidential and/or classified information which could render internal systems vulnerable to outside interference. These are:

- i. Topic 4(g), requesting “how voter registration information aggregated from driver’s license renewal and change-of-address applications submitted at a DPS office is transmitted to the Secretary of State and/or appropriate election officials.”
- ii. Topic 6, requesting “[a]ll policies, practices, and procedures related to DPS’s driver’s license renewal and change-of-address application computer system(s).”
- iii. Topic 8, requesting “[a]ny internal coding systems for tracking driver’s license renewal and change-of-address applications, voter registration, or records related to voter registration services.”

Defendants request that the Court enter an order that such confidential and/or classified information shall be used solely for the purpose of preparation, trial, and appeal of this litigation and for no other purpose, and shall not be disclosed except in accordance with the terms of a joint protective order agreed to by the parties and entered by the Court.

- d. Defendants seek protection from all deposition topics to DPS to the extent they request personally identifying information protected by the NVRA or other applicable law.⁴

22. Defendants have raised these issues to Plaintiffs, and to the extent possible, the parties have resolved their disputes out of Court. *See Exhibit 4*. Defendants move for protection only with respect to those areas upon which the parties were unable to agree.⁵ The parties have also agreed to extend the time for discovery to allow for disposition of this motion for protection without prejudicing any party’s ability to obtain such discovery that is proper under the Federal Rules of Civil Procedure.

⁴ *E.g.*, 52 U.S.C. §20504(b).

⁵ Plaintiffs agreed to clarify the notices in two respects, and to remove the phrase “including but not limited to.” Exhibit 4 at 4. *See also Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D.D.C. 2005) (noting that use of the phrase “including but not limited to” is improper in the Rule 30(b)(6) context, because “[l]isting several categories and stating that the inquiry may extend beyond the enumerated topics defeats the purpose of having any topics at all.”)

CONCLUSION & PRAYER

For the forgoing reasons, the Court should enter a protective order limiting Plaintiffs' discovery under Federal Rule of Civil Procedure 30(b)(6) as described above.

Dated this the 16th day of September, 2016.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

ANGELA V. COLMENERO
Chief, General Litigation Division

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Texas Bar No. 24078898
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 475-4080
(512) 320-0667 FAX
anna.mackin@texasattorneygeneral.gov

ATTORNEYS DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on this the 16th day of September 2016, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, causing service upon all counsel of record.

/s/Anne Marie Mackin
Assistant Attorney General