

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA)	
)	
)	
Plaintiff,)	CIVIL ACTION NO. 4:05-cv-33 (TSL/LRA)
)	
v.)	
)	
IKE BROWN, individually, and in his)	
official capacities as Chairman of Noxubee)	
County Democratic Executive Committee)	
and Superintendent of Democratic Primary)	
Elections; NOXUBEE COUNTY)	
DEMOCRATIC EXECUTIVE)	
COMMITTEE; CARL MICKENS,)	
individually, and in his official capacities)	
as the Circuit Clerk of Noxubee County,)	
Superintendent of Elections, Administrator)	
of absentee ballots and Registrar of voters;)	
the NOXUBEE COUNTY ELECTION)	
COMMISSION; NOXUBEE COUNTY,)	
MISSISSIPPI; and those acting in concert,)	
)	
Defendants.)	
_____)	

MEMORANDUM OF THE UNITED STATES
IN SUPPORT OF PLAINTIFF’S MOTION IN LIMINE

I. Summary

The United States seeks an order excluding evidence and witnesses at trial that have not been previously disclosed to the United States by Defendants, Ike Brown and the Noxubee County Democratic Executive Committee (“Brown Defendants”) and the Noxubee County Election Commission (“Defendant Commission”).

II. Procedural history

Initial disclosures were due to be exchanged by July 12, 2005 pursuant to Fed. R. Civ. P. 26. The Defendant Commission never provided the Plaintiff any Rule 26 initial disclosures whatsoever, either before the deadline or since. The Brown Defendants provided handwritten and incomplete documents purporting to be initial disclosures on August 1, 2005. The Plaintiff filed a motion seeking sanctions and compelling compliant disclosures.

On January 25, 2006, the Court granted the United States' motion for sanctions and ordered Brown Defendants to reimburse the United States the sum of \$500.00 for failure to submit compliant Rule 26 disclosures. The monetary sanction and complaint initial disclosures were to be provided on or before February 14, 2006. On March 23, 2006, the Court denied Defendants' Motion for Reconsideration. Brown Defendants have yet to comply with the January 25 Order imposing sanctions both by failing to remit the monetary sanction and by failing to provide compliant Rule 26 disclosures.

By agreement of the parties, the Plaintiff was to provide to all Defendants their portions of the pretrial order and exhibits by November 20, 2006. (Attachment A). No modification of this agreement was timely communicated to the Plaintiff. The Plaintiff met the obligations of the agreement on November 20, 2006 and provided Defendants a list of all witnesses, copies of all exhibits and a draft pre-trial order. The Defendants were to provide to the Plaintiff their portions of the pretrial order by November 28, 2006, so that those portions could be included in a joint pre-trial order filed with this Court.

Two days after the agreed upon deadline, on November 30, Counsel for Brown Defendants communicated "We will not have our portion of the pretrial order complete until next week. . . . Nevertheless, we will forward our portion to you and the other defendants as soon as

it can be completed; *hopefully* prior to the Dec. 11th conference.” (Attachment B)(emphasis added). Previously, on November 28, 2006, the Plaintiff received word that one of the two attorneys for Brown Defendants was in the hospital and could not comply with the deadline to provide their portion of the pretrial order and exhibits that day.¹ Defendant Commission provided its portion of the pretrial order on November 29, 2006 and exhibits soon thereafter.

III. Argument

Witnesses and exhibits included by Defendant Commission in the pretrial order which were not previously disclosed to Plaintiff should be excluded from trial. These witnesses include: Essie Brooks, Percy L. Reece, Sylvester Tate and Willie Matt Smith Miller. Had these witnesses been disclosed, either in initial disclosures or pursuant to other discovery requests, the United States likely would have conducted depositions of them. Instead, November 29, 2006, was the first time that these witnesses were made known to the United States. Because the Defendant Commission did not comply with disclosure obligations regarding the names of these witnesses, they should not be permitted to testify at trial.²

Similarly, the Defendant Commission never disclosed Exhibits DNEC-1, DNEC-2, DNEC-3 or DNEC-8 until November 29, 2006. Because the United States has never seen these documents before, it cannot now conduct discovery as to their relevance, authenticity or origin.

¹ On November 30, Brown Defendants served a nine-page pleading seeking reconsideration of the Magistrate Judge’s Order striking a re-designation of their expert witness.

² Defendant Commission also includes in the pretrial order the names of three other witnesses. They are Ike Brown, Carl Mickens and John Bankhead. Because the United States has conducted depositions of these witnesses, no objection to their being called at trial.

The Brown Defendants face a more serious defect. This Court sanctioned them and ordered them to provide compliant initial disclosures of witnesses. The Brown Defendants never supplemented any initial disclosure. Compounding the problem, the Plaintiff does not know the names of the witnesses the Brown Defendants intend to call at trial. No draft pretrial order has been provided by the Brown Defendants naming their witnesses. Worse, no trial exhibits have been provided to the United States by Brown Defendants. The Plaintiff therefore is placed in the unusual position of having to decide whether to seek the exclusion of exhibits and witnesses the existence of which is not yet known. Still worse, the Brown Defendants have informed the United States the list of their exhibits and witnesses will be available “*hopefully* prior to the Dec. 11th conference.” (Attachment B) (emphasis added). As such, the United States seeks a broad prophylactic remedy which excludes any witness or exhibit proffered by the Brown Defendants from trial which has not yet been disclosed to the United States in discovery.³

According to Fed. R. Civ. P. 26(a)(1)(A), “a party must, without awaiting a discovery request, provide to other parties the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses . . . identifying the subjects of the information.” Rule 26(a)(1)(B) further requires “a copy of . . . all documents, data compilations, and tangible things . . . that the disclosing party may use to support its claims or defenses. The parties must provide this information within 14 days after the Rule 26(f) conference.” Rule 26(a)(3) requires

³ Because of the Defendants’ extraordinary and recurring lack of diligence in this litigation, an *ad hoc* examination of each proffered witness and exhibit may be necessary. That is, at such time as the Brown Defendants produce or seek to introduce an exhibit or witness, scrutiny as to whether or not the witness or exhibit was disclosed would be in order. This is obviously not the process preferred by the Rules or Local Rules, but it may be the only recourse because of the Defendants’ absence of diligence, other than a blanket sanction preventing the introduction of any witness or exhibits.

the pre-trial disclosure of “the name . . . the address and telephone number of each witness” at least thirty days before trial, unless otherwise directed by the court. Lastly, Rule 26(e) imposes a duty to “a duty to supplement or correct the disclosure or response to include information thereafter acquired . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.”

Fed. R. Civ. P. 37(b)(2)(B) states, in pertinent part, that if a party “fails to obey an order to provide or permit discovery,” the court may “prohibit that party from introducing designated matters in evidence.” Therefore, Defendants should be prohibited from introducing as evidence the testimony of any witnesses or document not disclosed or identified in the initial disclosures required by Rule 26(a)(1) or in discovery. Rule 37(c)(1) further states that “[a] party without substantial justification fails to disclose information required by Rule 26(a) . . . is *not* . . . permitted to use as evidence at a trial, at a hearing, or on a motion *any witness or information not so disclosed.*” (emphasis added). Appropriate sanctions can range from requiring parties to pay reasonable expenses to prohibiting the use of such evidence at trial. Fed. R. Civ. P. 37(c).

Exhibits may be barred from use in the Defendants case in chief that were not disclosed in discovery. “Pursuant to the discovery rules, the plaintiff may not offer in their case-in-chief documents that she did not produce.” Beck v. Koppers, Inc., 2006 WL 924040, *1 (N.D.Miss. 2006).

Witness testimony may also be excluded if the witnesses were not disclosed. In BCE Emergis Corp. v. Cmty. Health Solutions of Am., Inc., No. 04-50367, 2005 WL 1903738, *15 (5th Cir. 2005), BCE wished to introduce evidence from a witness who would to testify about the company's profit margin on a specific contract. Defendants objected to the testimony on the

ground that BCE failed to file an adequate Rule 26(a)(1) disclosure. Since BCE failed to comply with the discovery orders and further failed to remedy the concerns repeatedly raised by the district court (during discovery, at the pretrial conference, and ultimately at trial) concerning damage calculations, the Fifth Circuit found that the district court did not abuse its discretion in prohibiting this testimony. Id. at 220. Just as the court prevented BCE from introducing testimony from a witness who was not listed in a timely manner, pursuant to the disclosure requirements of Rule 26, Defendants should also be barred from introducing evidence that was not previously disclosed.

Bouchard v. CSX Transportation, 2006 WL 2540799, *1 (W.D.Pa. 2006) provides circumstances analogous to this case. In denying a motion for reconsideration to the grant of a motion in limine, the “Court [found] it hard to fathom that it would take defendant almost two years after a successful appeal by plaintiff and until a few months before trial, to discover said witnesses and documents and disclose them to plaintiff.” Id. “[W]aiting until the pretrial filing to reveal these witnesses and documents” constituted bad faith supporting the motion in limine. Id. The Court also noted that defendant “was attempting to gain an unfair advantage over plaintiff by withholding the names of such witnesses and documents.” Id.; See also, Gandy Nursery v. United States, 2004 U.S. Dist. LEXIS 6285 (D. Tex. 2004)(Court restricted defendants to using only the testimony of witnesses which were previously disclosed.) The timely disclosure of witness names and evidentiary documents constitutes one of the fundamental obligations of a fair and efficient adversarial process. The Defendants seek to avoid these obligations while burdening the Plaintiff with the surprise of late disclosures six weeks before trial.

CONCLUSION

For these reasons and those others that may be presented to this Court after the Plaintiff receives the Brown Defendants' portion of the pre-trial order, the United States respectfully requests a motion in limine to prevent the Defendants from presenting evidence or witnesses that they have not disclosed.

Respectfully Submitted,

DUNN O. LAMPTON
United States Attorney,
Southern District of
Mississippi

JOHN K. TANNER
Chief, Voting Section

s/ J. Christian Adams
CHRISTOPHER COATES
Principal Deputy Chief, Voting Section

J.

J. CHRISTIAN ADAMS
JOSHUA L. ROGERS
Attorneys, Voting Section
Department of Justice
Civil Rights Division
Voting Section
950 Pennsylvania Ave. NW
Room 7255 - NWB
Washington, D.C. 20530
(202) 616-4227
(202) 307-2932 fax

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2006 I electronically filed the foregoing United States' Motion in Limine using the ECF system which sent notification of such filing to Wilbur O. Colom, Esq. of the Colom Law Firm, LLC, 200 6th Street, North, Suite 102, Columbus, Mississippi, 39701, Ellis Turnage, Esq., Post Office Box 216, 108 North Pearman Avenue, Cleveland, Mississippi, 38732, and, Christopher D. Hemphill, Esq., Dunn, Webb and Hemphill, P.A., 214 5th Street South, Columbus, Mississippi, 39701.

With delivery to take place by other means to:

DUNN O. LAMPTON
United States Attorney
Southern District of MS

s/ J. Christian Adams
J. Christian Adams