

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

FLORIDA STATE CONFERENCE OF  
THE NATIONAL ASSOCIATION FOR  
THE ADVANCEMENT OF COLORED  
PEOPLE, *etc., et al.*,

Plaintiffs,

v.

Case No. 4:07CV-402-SPM/WCS

KURT S. BROWNING, in his official  
capacity as Secretary of State for the State  
of Florida,

Defendant.

\_\_\_\_\_ /

**SECRETARY OF STATE'S RESPONSE TO  
PLAINTIFFS' MOTION FOR CLARIFICATION**

Defendant Kurt S. Browning, Secretary of State for the State of Florida (the "Secretary"), files this response to Plaintiffs' Motion for Clarification (Doc. 184).

1. Plaintiffs did not begin to take discovery until 81 days after the discovery period re-opened on November 21, 2008,<sup>1</sup> and 49 days before the deadline to complete discovery on March 31, 2009. As a result of their delay, Plaintiffs have no time to serve supplemental discovery requests. There is no bona fide reason to abandon the scheduling order entered by this Court and extend the discovery period to which all parties agreed.

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<sup>1</sup> Soon after the commencement of this case, the Court authorized discovery in connection with Plaintiffs' request for a preliminary injunction. (Doc. 20.) The deadline to serve discovery requests during this temporary discovery period was October 3, 2007.

2. On November 21, 2008, the parties conferred pursuant to Federal Rule of Civil Procedure 26(f). (Doc. 171 ¶ 1.) At their Rule 26(f) conference, the parties agreed that fact discovery would be completed by March 31, 2009. (Doc. 171 ¶ 2(b)).

3. Plaintiffs were entitled to serve discovery at any time on or after the date of the parties' conference on November 21, 2008. *See* Fed. R. Civ. P. 26(d)(1).

Plaintiffs, however, served no discovery on the Secretary until February 10, 2009.

4. On February 10, 2009, Plaintiffs served their Third Set of Interrogatories and their Third Request for Production of Documents. The Secretary's responses to these requests were due on March 12, 2009. *See* Fed. R. Civ. P. 33(b)(2) and 34(b)(2)(A).

5. On or about February 12, 2009, pursuant to Federal Rule of Civil Procedure 45, Plaintiffs caused subpoenas to be issued to seven Supervisors of Elections. In their subpoenas, Plaintiffs requested the production of documents by March 5, 2009.

6. The sole reason Plaintiffs are unable to conduct a second round of discovery is their own procrastination in beginning the first round. For nearly three months after the discovery period re-opened, Plaintiffs served no discovery. The timing of Plaintiffs' discovery requests allowed the Secretary until March 12 and the Supervisors until March 5 to respond. Any request for discovery served subsequent to either of these dates would require a response after the March 31 deadline to complete discovery—a deadline agreed to by the parties (Doc. 171 ¶ 2(b)) and adopted by this Court (Doc. 177). Plaintiffs offer no explanation for their procrastination and cannot assert that, through ordinary diligence, discovery might not have been completed within the prescribed period. Plain and simple, Plaintiffs waited too long and now want more time.

7. Plaintiffs<sup>2</sup> attempt to justify their request on two bases:

**First**, Plaintiffs argue that, under this Court’s Scheduling Order for Discovery, Mediation and Trial (Doc. 177), it is unclear whether the deadline for fact discovery is March 31 or June 1. It is not. The parties agreed that fact discovery will be concluded by March 31 (Doc. 171 ¶ 2(b)), and the Court’s Order adopted the parties’ agreement to the extent not in conflict with that Order. (Doc. 177 at 1 ¶ 1.) And the Order does not conflict with the parties’ agreement to conclude fact discovery by March 31. While the Court’s Order states that, for “purposes of deadlines computed based on the discovery deadline, the discovery deadline is **JUNE 1, 2009**,” (*Id.* at 1 ¶ 1), this provision does not supersede the parties’ agreement. Rather, it establishes a reference point from which to compute other, contingent deadlines: namely, the deadline to select a mediator (*id.* at 2 ¶ 4(a)), the deadline to conduct the first mediation conference (*id.* at 2 ¶ 4(c)), and the deadline for completion of mediation (*id.* at 4 ¶ 4(k)).

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<sup>2</sup> Plaintiffs’ repeated professions of tender concern for the burden placed by them on election officials and the orderly administration of elections are, at best, comic. Though long aware of the statute at issue in this case, Plaintiffs filed this action mere months before the 2008 presidential preference primary election, directed extensive discovery at the Secretary and the Supervisors in the succeeding months while election preparations were underway, and litigated their request for a preliminary injunction the month before the election. Plaintiffs resumed their requests for discovery in September 2008, squarely between the primary and general elections. Then, only three days after the general election, even before the county canvassing boards had filed their election returns, Plaintiffs began to hector the Supervisors of Elections for Broward, Miami-Dade, Hillsborough, Orange, and Palm Beach Counties for public records disclosures on an “expedited basis.” For obvious reasons, none of the Supervisors was able to comply with Plaintiffs’ hard-charging schedule, and, on December 2, 2008, Plaintiffs demanded the production of responsive documents within eight days. Far from limiting the burdens on election officials as they conduct the people’s elections (Doc. 184 at 4 ¶ 7), Plaintiffs’ most vexatious demands have invariably coincided with the busiest election seasons.

**Second**, Plaintiffs suggest that a two-week extension of time afforded by them to the Secretary to respond to Plaintiffs' discovery requests "is likely to prejudice Plaintiffs' ability to acquire information essential to the resolution of their claims." (Doc. 184 at 6 ¶ 4.) This argument is disingenuous. Plaintiffs served these requests on February 10, and the Secretary's responses were due on March 12. Even *without* the two-week extension, therefore, Plaintiffs would have had no time to serve additional discovery after receipt of the Secretary's response. The same logic holds for discovery directed to the Supervisors. While the Secretary does not object to appropriate efforts by Plaintiffs after the March 31 deadline to enforce compliance with discovery requests which, under the Federal Rules, should have been answered by March 31, the Secretary's request for a brief extension of time to respond is clearly not to blame for Plaintiffs' inability to serve a second round of discovery.

8. This Court has ample authority to deny Plaintiffs' request. "District judges are accorded wide discretion in ruling upon discovery motions, and appellate review is accordingly deferential." *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 325 F.3d 1274, 1286 (11th Cir. 2003) (quoting *Harris v. Chapman*, 97 F.3d 499, 506 (11th Cir. 1996)). Thus, in *MedFirst Corp. v. Community Health Plan of the Rockies, Inc.*, 143 Fed. Appx. 146, 151 (11th Cir. 2005), the Court affirmed the denial of a joint motion to extend the discovery deadline on the ground that "the parties had not diligently pursued discovery." *A fortiori*, where, as here, one party fails diligently to pursue discovery and then unilaterally seeks an open-ended, two-month extension of the entire deadline for fact

discovery, without any specification of the nature and extent of the discovery it intends to conduct, the Court should adhere to the stipulated schedule and deny the request.

9. The discovery already taken by Plaintiffs has been extensive. Plaintiffs have served three sets of interrogatories and three requests for production of documents. They have taken thirteen depositions, in excess of the number authorized by Federal Rule of Civil Procedure 30(a)(2). They have served public records requests upon the Secretary and six Supervisors of Elections, and have caused seven subpoenas to be issued to seven Supervisors. Plaintiffs have had every opportunity to acquire the information they seek.

10. The requested extension of the discovery deadline will prejudice the Secretary because it will increase the expense associated with this litigation and, by advancing the discovery deadline almost to the eve of the dispositive motions deadline, threaten to frustrate the expeditious resolution of this matter. In light of the Plaintiffs' delay, if the Court grants Plaintiffs' request in whole or in part, it should direct Plaintiffs to bear the fees and costs incurred by the Secretary in connection with the additional discovery.

**WHEREFORE**, the Secretary respectfully requests that the Court deny Plaintiffs' Motion for Clarification of Scheduling Order (Doc. 184).

/s/ Andy Bardos

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been served by Notice of Electronic Filing this 23d day of March, 2009, to the following:

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