

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

EILEEN JANIS and KIM COLHOFF,	)	Civ. No. 09-5019
	)	
Petitioners,	)	
	)	
v.	)	BRIEF IN SUPPORT OF
	)	STATE DEFENDANTS'
	)	MOTION FOR
CHRIS NELSON, in his official	)	PROTECTIVE ORDER
capacity as Secretary of State of	)	
South Dakota and as a member of	)	
the State Board of Elections;	)	
MATT McCAULLEY, CINDY SCHULTZ,	)	
CHRISTOPHER W. MADSEN,	)	
RICHARD CASEY, KAREN M. LAYHER,	)	
and LINDA LEA M. VIKEN, in their	)	
official capacities as members of the	)	
State Board of Elections; and	)	
SUE GANJE, in her official capacity	)	
as Auditor for Shannon County,	)	
	)	
Respondents.	)	

Chris Nelson, in his official capacity as Secretary of State of South Dakota and as a member of the State Board of Elections, and Matt McCaulley, Cindy Schultz, Christopher W. Madsen, Richard Casey, Karen M. Layher, and Linda Lea M. Viken, in their official capacities as members of the State Board of Elections ("State Defendants"), hereby submit this Brief in Support of Motion for Protective Order.

## **INTRODUCTION**

State Defendants have previously moved this Court both to dismiss and to toll discovery pending disposition of their motion to dismiss. (Doc. 55). The Court has not yet ruled on these motions. After thoroughly reviewing Plaintiffs' discovery requests, it is clear that Plaintiffs are seeking discovery regarding matters that are far beyond the scope of matters appropriate in this case. Therefore, State Defendants request a protective order under Federal Rule of Civil Procedure 26(c), limiting the scope of permissible discovery.

## **FACTS & PROCEDURAL BACKGROUND**

1. On February 18, 2009, Plaintiffs filed their Complaint in this matter. (Doc. 1).
2. On March 17, 2009, Defendant Sue Ganje ("Defendant Ganje") filed her Answer to Plaintiffs' Complaint. (Doc. 22).
3. On March 25, 2009, State Defendants filed their Answer to Plaintiffs' Complaint. (Doc. 23).
4. On July 28, 2009, Plaintiffs served their "First Set of Interrogatories and Requests for Production of Documents" upon State Defendants.<sup>1</sup>

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<sup>1</sup> For the Court's convenience, a true and correct copy of Plaintiffs' "First Set of Interrogatories and Request for Production of Documents to the State Defendants" is attached to "Brief in Support of Supplement to State Defendants' Motion to Dismiss and Supplement to State Defendants' Motion to Stay Discovery." (See Doc. 66, Exhibit B).

## LAW & ANALYSIS

### A. Scope of Discovery Under Rule 26

Federal Rule of Civil Procedure 26(b)(1) sets forth the standard governing the scope of discovery in civil cases.<sup>2</sup> The Advisory Committee's note to the 2000 amendments to Rule 26(b)(1) provides guidance on how courts should define the scope of discovery in a particular case:

Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. . . .

The rule change signals to the court that it has the *authority to confine discovery to the claims and defenses asserted in the pleadings*, and *signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings*. . . . When judicial intervention is invoked, the actual scope of discovery

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<sup>2</sup> Federal Rule of Civil Procedure 26(b)(1) provides:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(c).

should be determined according to the reasonable needs of the action. . . .

Fed.R.Civ.P. 26(b)(1) Advisory Committee's note (emphasis added). *See also Murphy v. Kmart Corp.*, 255 F.R.D. 497 (D.S.D., January 27, 2009).

The same Advisory Committee's note further clarifies that information is discoverable only if it is relevant to the claims or defenses of the case, or, upon a showing of good cause, to the subject matter of the case. Fed.R.Civ.P. 26(b)(1) Advisory Committee's note. The party seeking discovery must make a "threshold showing of relevance before production of information, which does not reasonably bear on the issues in the case, is required." *E.E.O.C. v. Woodmen of the World Life Ins. Society*, 2007 WL 1217919 at \*1 (D.Neb. March 15, 2007). "Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity, the information they hope to obtain and its importance to their case." *Id.* Limiting discovery to relevant information is a necessary restriction on otherwise liberal discovery rules:

While the standard of relevance in the context of discovery is broader than in the context of admissibility (Rule 26(b) clearly states that inadmissibility is no grounds for objection to discovery), . . . *this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery.* Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.

*Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8<sup>th</sup> Cir. 1992) (emphasis added).

## **B. Protective Orders Under Rule 26(c)**

Under Federal Rule of Civil Procedure 26(c), a court may order that disclosures or requested discovery not be allowed.<sup>3</sup> A protective order may be issued for good cause shown, where justice requires that a party or other person be protected from annoyance, embarrassment, oppression, or undue burden or expense. *Id.* Rule 26(c) applies to all types of discovery, including written discovery such as interrogatories and requests for production of documents. *Id.*

A party cannot use discovery for purposes unrelated to the lawsuit. *Jennings v. Peters*, 162 F.R.D. 120, 122 (N.D. Ill. 1995). Federal courts are empowered to issue protective orders upon good cause showing that a party intends to use the discovery for a purpose unrelated to settlement or trial

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<sup>3</sup> Federal Rule of Civil Procedure 26(c)(1) provides in relevant part:

### **(c) Protective Orders.**

**(1) In General.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (A) forbidding the disclosure or discovery;
- (B) specifying terms, including time and place, for the disclosure or discovery;
- (C) prescribing a discovery method other than the one selected by the party seeking discovery;
- (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters . . . .

preparation of the case in which the discovery is requested. *Id.* One common “unrelated” purpose is to gain information for use in a different action against the party or in a similar type lawsuit. 6 *Moore’s Federal Practice*, § 26.101(1)[b] (Matthew Bender 3d ed.). In other words, a protective order is justified if a federal action has been commenced primarily to exploit the federal discovery rules. *Id.*

**C. The Court Should Grant State Defendants’ Motion for Protective Order.**

Plaintiffs have failed to make adequate, plausible allegations against State Defendants under *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).<sup>4</sup> In *Iqbal* and *Twombly*, the Supreme Court recognized that government officials should not be subjected unnecessarily to “disruptive discovery.” Noting its “heavy costs” in terms of efficiency and expenditures of valuable time and resources, the Supreme Court made clear that discovery should not be permitted to bolster an insufficient complaint “armed with nothing more than conclusions.” *Iqbal*, 129 S.Ct. at 1950, 1953. Here such an attempt exists. Plaintiffs suggest, upon nothing more than “information and belief,” that State Defendants have “denied the right to vote to other people convicted of felonies regardless of the sentence imposed.” (Doc. 1, ¶ 25). Consequently, Plaintiffs assert that “people convicted of felonies who are not sentenced to imprisonment are being unlawfully denied the right to vote.” (Doc. 1, ¶ 25).

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<sup>4</sup> See State Defendants’ “Brief in Support of Motion to Dismiss or in the Alternative, Motion for Judgment on the Pleadings and to Toll Discovery Pending Disposition of State Motions.” (Doc. 56).

Plaintiffs further conclude, with no facts to support the allegation, that “Native Americans are disproportionately represented in the South Dakota criminal justice system.” (Doc. 1, ¶ 26). Plaintiffs also claim, with no facts, but on “information and belief,” that “Native Americans represent a disproportionate number of those who are sentenced to probation.” (Doc. 1, ¶ 26).

State Defendants have undoubtedly been named in this suit so that Plaintiffs have a source for massive and intrusive discovery. State Defendants should not be subjected to far reaching and time consuming discovery on the unfounded hope that the discovery process might reveal relevant evidence. This is exactly the type of discovery abuse the Supreme Court cautioned against in *Iqbal* and *Twombly*.

As such, State Defendants request that a protective order be granted regarding the specific matters set forth below, and Plaintiffs be prevented from inquiring into those matters. Narrowing the scope of Plaintiffs’ discovery is appropriate because Plaintiffs have requested information in the following areas, all of which are either not in State Defendants’ possession, or are well beyond the scope of matters appropriate in this case:

1. For each year since 2002, state, per year, how many residents of South Dakota have been convicted of a felony. In your answer, please state how many individuals have been convicted in: (a) A federal court conviction; (b) A South Dakota state court conviction; and/or (c) A conviction in another state. See Plaintiffs’ First Set of Interrogatories (Interrogatory No. 17).
2. For each year since 2002, state, per year, how many residents of South Dakota have been sentenced only to probation as a result of a felony conviction. In your answer, please state how

many individuals have received this sentence as a result of: (a) A federal court conviction; (b) A South Dakota state court conviction; and/or (c) A conviction in another state. See Plaintiffs' First Set of Interrogatories (Interrogatory No. 18).

3. For each year since 2002, state how many Native American residents of South Dakota have been convicted of a felony. In your answer, please state how many individuals have been convicted in: (a) A federal court; (b) A South Dakota state court; (c) A court of another state. See Plaintiffs' First Set of Interrogatories (Interrogatory No. 19).
4. For each year since 2002, state, per year, how many Native American residents of South Dakota have been sentenced only to probation as a result of felony conviction. In your answer, please state how many individuals have received this sentence as a result of: (a) A federal court conviction; (b) A South Dakota state court conviction; and/or (c) A conviction in another state. See Plaintiffs' First Set of Interrogatories (Interrogatory No. 20).
5. For each year since 2002, produce all documents related to criminal convictions of South Dakota residents received from: (a) The U.S. Department of Justice; (b) Any and all South Dakota state courts; and (c) Any and all other state courts. See Plaintiffs' First Set of Requests for Production of Documents (Request For Production No. 8).
6. For each year since 2002, produce all documents related to statewide and countywide policies or procedures regarding persons whose names were removed from the county and/or state voter registration database. See Plaintiffs' First Set of Requests for Production of Documents (Request For Production No. 9).

This requested information is not relevant or material to, does not relate to, and is not reasonably calculated to lead to the discovery of admissible evidence regarding any matters related to Plaintiffs' claims (which arise entirely in Shannon County). Indeed, Plaintiffs appear to be seeking a way in which to convert the focused objectives of this lawsuit into something entirely more expansive and unrelated to the alleged wrongs committed by local election

officials. There is simply no authority enabling Plaintiffs to demand extensive discovery from State Defendants in an effort to radically extend the scope of this lawsuit.

The information requested by Plaintiffs will unnecessarily complicate resolution of the alleged wrongs committed against Plaintiffs and subject State Defendants to undue burden, expense, and harassment. Whatever Plaintiffs' motive is for requesting this information, it is clear that production of this information will have no bearing on, will not assist the parties with the presentation of, nor assist the Court with its consideration and resolution of the precise matters at issue in this case.

#### **CONCLUSION**

For the foregoing reasons, State Defendants respectfully request that the Court issue a protective order pursuant to Federal Rule of Civil Procedure 26(c), prohibiting Plaintiffs from conducting discovery regarding the above-referenced matters.

Dated this 9<sup>th</sup> day of September, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9<sup>th</sup>, 2009, a true and correct copy of the

**Brief in Support of State Defendants' Motion for Protective Order** was

served electronically through the CM/ECF system upon the following persons:

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