

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

EILEEN JANIS and KIM COLHOFF,)
)
Plaintiffs,)
)
vs.)
)
CHRIS NELSON, in his official 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,)
)
Defendants.)

Civil Action No. 09-5019

Honorable Karen E. Schreier
U.S. District Court Judge

Honorable Roger L. Wollmore
U.S. District Court Judge

Honorable Lawrence L. Piersol
U.S. District Court Judge

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION
TO COMPEL DISCOVERY FROM DEFENDANT SUE GANJE**

Plaintiffs respectfully submit this brief in support of their motion for an order compelling Defendant Sue Ganje to respond to all of Plaintiffs' First Set of Interrogatories and Requests for Production of Documents. See Ex. A. Defendant Ganje has made general objections to Plaintiffs' discovery requests, claiming they are outside the scope of the litigation, can be obtained from other sources, and would result in an undue burden and expense on her part. See Ex. B. Defendant Ganje's position is untenable given that she has no legitimate basis for failing to provide any of the information Plaintiffs seek. Therefore, an order compelling her to produce the discovery is warranted.

I. BACKGROUND

Plaintiffs filed this lawsuit on February 18, 2009, challenging the defendants' removal of their names from the statewide and county voter registration rolls based on their felony convictions even though they were sentenced only to probation and South Dakota law allows probationers to vote. [Docket Entry (D.E.) 1]. See S.D.C.L. § 23A-27-35 (suspending the right to vote only during a term of imprisonment in the state penitentiary). Plaintiffs further allege that: (1) they were denied the right to cast provisional ballots based on their felony convictions; (2) Defendants have been denying voting rights to other people convicted of felonies regardless of the sentence imposed; (3) Defendants' actions have a disparate and negative impact on Native Americans, given their disproportionate representation in the criminal justice system, and thus results in the denial of their voting rights based on their race, color, or membership in a language minority group in violation of Section 2 of the Voting Rights Act (42 U.S.C. § 1973); and (4) Defendants' actions constitute a change in the county and State's voting practices and procedures for which they have not sought preclearance as required under Section 5 of the Voting Rights Act (42 U.S.C. § 1973c). [D.E. 1, ¶¶ 17, 23, 25, 26-27, 29].

Plaintiffs served Defendant Ganje with their First Set of Interrogatories and Requests for Production of Documents on July 22, 2009, and Defendant Ganje submitted partial responses on August 20, 2009. Citing general objections, Defendant Ganje refused to provide information regarding the following three subject matter areas: (1) the distribution, counting, and rejection of provisional ballots; (2) information related to the felony convictions of Shannon County residents over the last seven years, which is how long South Dakota's current felon disfranchisement law has been in effect; and (3) racial

statistics of Shannon County residents. See Ex. B, Responses to Interrogatory Nos. 16-

21. She also objected to the following requests for production of documents:

6. For each year since 2002, produce all correspondence between Shannon County officials and the Secretary of State's office and/or the State Board of Elections regarding the removal of individuals from state and county voter registration lists.
7. For each year since 2002, produce all documents related to statewide and countywide policies, procedures, and/or practices regarding the removal of individuals with felony convictions from the state and county voter registration lists.
8. 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.
9. 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.
10. Produce copies of all submissions to the U.S. Department of Justice and/or the U.S. District Court for the District of Columbia regarding any proposed changes to voting practices, policies, or procedures related to the voting rights of people with felony convictions.

All of Plaintiffs' discovery requests are directly related to the allegations and legal claims in their lawsuit. Defendant Ganje has failed to present this Court with any reasonable basis, let alone good cause, for why she should not produce the information. Thus, this Court should grant Plaintiffs' motion to compel.

II. DISCUSSION

Rule 37(a) of the Federal Rules of Civil Procedure provides that "[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if . . . a party fails to answer an interrogatory

submitted under [Fed. R. Civ. P 33].” Fed. R. Civ. P. 37(a)(3)(B). See generally, 8A Charles Alan Wright et al., Federal Practice and Procedure § 2285 (2d ed. 1994 & Supp. 2004). This rule, which applies equally to non-responses and incomplete responses,¹ allows a court to compel a defendant to respond and to impose monetary sanctions directly on a defendant who has disregarded her obligation under the discovery rules. In this case, Defendant Ganje has refused to respond to basic discovery requests related to the manner in which Shannon County conducts its election process, with a particular focus on people with felony convictions. Without providing Plaintiffs with any specificity, she contends that the information sought is outside the scope of this litigation, that the information can be obtained through other means, and that complying with her obligations under the discovery rules will cause her an undue burden and expense. All of these objections are without merit.

A. The Discovery Plaintiffs Seek is Within the Scope of This Litigation.

A party “may discover any relevant, unprivileged information that is admissible at trial or is reasonably calculated to lead to admissible evidence.” Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000). See also Simon v. G.D. Searle & Co., 816 F.2d 397, 404 (8th Cir. 1987) (Accord). The discovery requests to which Defendant Ganje has objected are all directly related to the allegations in the complaint. The requests focus on issues that are central to the claims Plaintiffs have brought against Defendant Ganje; namely, that she and the county have been systematically removing people with felony convictions from the voter registration rolls, that Native Americans, including Plaintiffs, are disproportionately affected by these actions in violation of the

¹ Incomplete or evasive responses are to be treated as a failure to respond. See Fed. R. Civ. P. 37(a)(4).

Voting Rights Act, and the county is violating laws related to provisional ballots. The particular documents Plaintiffs seek are important because they will reveal the manner in which Shannon County and Defendant Ganje have been enforcing the state's felon disfranchisement law and will lead to admissible evidence at trial. Because all of these requests are based on subject matter which is part of the lawsuit, there is no plausible basis for Defendant Ganje to argue the requests are outside the scope of litigation.

B. Defendant Ganje is the Best Source for Obtaining the Information Plaintiffs Seek.

Plaintiffs seek information regarding: (1) the distribution, counting, and rejection of provisional ballots in Shannon County; (2) Shannon County's process for removing residents from its voter registration rolls, including the information upon which Shannon County relies when purging someone based on a felony conviction; and (3) the racial composition of Shannon County residents, particularly those with felony convictions. Because all of the requested information relates to Shannon County, the county, through Defendant Ganje, is the best source for obtaining this information. It is disingenuous for Defendant Ganje to imply that another government agency or entity is better versed in the practices, policies, and procedures of the county, or maintains better records regarding the county's activities. For example, Defendant Ganje, through one of her discovery responses, acknowledges that her office receives a weekly list of residents in Shannon County who have been convicted of a felony. See Ex. B, Response to Interrogatory No. 11. Therefore, this information is readily available to Defendant Ganje and there is no valid reason for her not to produce it. The same is true with respect to the county's maintenance of voter registration rolls, the purging of registered voters, and the mechanics of the election process such as provisional ballots. Thus, Defendant Ganje

possesses all of the information Plaintiffs seek and she should fully and completely respond to the discovery requests without further delay.

C. Defendant Ganje Has Not Established That Providing Plaintiffs With the Information They Seek Will Cause Her Undue Burden or Expense.

Under the federal rules, a person who seeks protection against producing certain evidence on the grounds of undue burden or expense must first establish that good cause exists for such a measure. Fed. R. Civ. P. 26(c); In re Remington Arms Co., Inc., 952 F.2d 1029, 1032 (8th Cir. 1991). Absent a showing of good cause, the objector must produce the evidence requested. Giebink v. Giebink, 2009 WL 1350805 *6 (D. S.D. May 12, 2009) (The party seeking a protective order “must articulate a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.”) (internal citations omitted). Defendant Ganje, in making such a general objection without any specificity as to each request, does not even come close to meeting her burden under the law. She has failed to provide Plaintiffs with any legitimate or reasonable basis for why responding to certain discovery requests will result in an undue burden or expense on her part. As stated above, all of the information Plaintiffs seek is within Defendant Ganje’s grasp and easily could have been produced along with her other responses if she had acted in good faith and with due diligence. Instead, Defendant Ganje unnecessarily has prolonged the discovery period and it is Plaintiffs who have incurred an unnecessary expense by having to file this motion to compel.

III. CONCLUSION

For the reasons set forth above, Plaintiffs ask this Court to: (1) enter an order compelling Defendant Ganje to produce responses to Interrogatory Nos. 16-21 and Requests for Production of Documents Nos. 6-10; (2) extend the time for Plaintiffs to identify and provide the reports of retained experts until thirty (30) days after Defendant Ganje complies with this Court's order; and (3) require Defendant Ganje to pay Plaintiffs' reasonable expenses in bringing this motion, and impose such other sanctions as are appropriate and just.

Respectfully submitted,

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