

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 1:08-21243-CIV-ALTONAGA

LEAGUE OF WOMEN VOTERS OF FLORIDA,
FLORIDA AFL-CIO, and MARILYNN WILLS,

Plaintiffs,

vs.

KURT S. BROWNING, in his official capacity
as Secretary of State of the State of Florida, and
DONALD L. PALMER in his official capacity as
Director of the Division of Elections within the
Department of State for the State of Florida,

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STRIKE DIAZ
TESTIMONY AND FACTUAL FINDINGS FROM DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Defendants Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida, and Donald L. Palmer, in his official capacity as Director of the Division of Elections, file this response to Plaintiffs' Motion to Strike *Diaz* Testimony and Factual Findings from Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (doc. 57).

Plaintiffs' Motion betrays their continued misunderstanding of the difference between a trial on the merits and a preliminary injunction hearing. A preliminary injunction hearing simply allows the Court to determine whether to maintain the status quo pending a final resolution of the case, and it is much more limited than a trial on the merits. "Given this limited purpose, and given the haste that is often necessary if those

positions are to be preserved,” preliminary injunction determinations are generally made “on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). And because of these relaxed procedures, “[a]t the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding.” *Levi Strauss & Co. v. Sunrise Int’l Trading*, 51 F.3d 982, 985 (11th Cir. 1995) (marks omitted).

Citing a string of cases that generally state that testimony from other cases generally may not be considered for the truth of the matters asserted, Plaintiffs seem to suggest that the Court’s consideration of facts at the upcoming hearing must formally be guided by the Federal Rules of Evidence as though this were a trial on the merits. That formality, of course, would likewise preclude consideration of the affidavits Plaintiffs have already filed. *See* Fed. R. Evid. 801, 802 (generally precluding hearsay evidence absent exception). That is not the case, as this Court has already ruled that affidavits may be admitted if the affiants have been made available for deposition. (Doc. 45).¹

By providing that any affiants be available for deposition, the Court has eliminated any risk of any prejudice arising from Plaintiffs’ inability to cross-examine witnesses live at the hearing. And Plaintiffs have, in fact, already deposed all but one of

¹ The Court’s ruling on this issue is consistent with the Federal Rules of Civil Procedure, which contemplate the admission of evidence at the preliminary injunction stage that would not be admissible at trial. Rule 65(a) provides that “evidence that is received on the [preliminary injunction] motion *and that would be admissible at trial* becomes part of the trial record and need not be repeated at trial.” Fed. R. Civ. P. 65(a) (emphasis added). If the standard for admissibility at trial and a preliminary injunction hearing were identical, the Rule’s “that-would-be-admissible-at-trial” qualifier would be superfluous.

the witnesses whose testimony is excerpted in Exhibit C to Defendants' response— excerpts they now seek to strike.² Even before Defendants filed the Exhibit at issue, Plaintiffs declared their intent to depose these same witnesses. On May 23, 2008, Plaintiffs subpoenaed for deposition:

- Buddy Johnson (current Hillsborough County Supervisor of Elections);
- Evan Kolodny (former deputy to Broward County Supervisor of Elections);
- Ivy Korman (current deputy to Miami-Dade County Supervisor of Elections);
- Dr. Brenda Snipes (current Broward County Supervisor of Elections);
- Robert Sweat (current Manatee County Supervisor of Elections); and
- Linda Tanko (current deputy to Orange County Supervisor of Elections).

They also noticed for deposition Sarah Jane Bradshaw, the Assistant Director for Florida Division of Elections, as well as a Rule 30(b)(6) deposition for the Division of Elections. Plaintiffs went forward with all but one of these depositions. (Plaintiffs abruptly cancelled Linda Tanko's out-of-town deposition the morning they had scheduled it to begin.) Despite their insistence that the *Diaz* testimony is irrelevant, (doc. 57 at 1), Plaintiffs spent substantial time in each of these depositions asking the witnesses specific questions about their *Diaz* testimony—in some instances even attaching *Diaz* transcripts or declarations as deposition exhibits.

Because Plaintiffs have already deposed these individuals, they cannot assert prejudice. In fact, their Motion does not even argue the existence of prejudice. Instead, they rely on a form-over-substance argument—that the Court should permit only live

² The only witness whose testimony was excerpted in Exhibit C whom Plaintiffs have not deposed is Supervisor Lester Sola, the Supervisor of Elections for Miami-Dade County. Plaintiffs subpoenaed him for records, but elected not to depose him for reasons unknown.

testimony or affidavit evidence. It is unclear how Plaintiffs would be better served with an out-of-court written affidavit than with an in-court transcribed statement. This is particularly true when, in either event, Plaintiffs were permitted to depose the witnesses. At any rate, Defendants have served Plaintiffs with declarations from Sarah Jane Bradshaw, Buddy Johnson, Evan Kolodny, Ivy Korman, and Robert Sweat, each of which attaches the relevant excerpts from Exhibit C, and each of which attests to the excerpts' accuracy. *See* Notice of Filing Declarations (Doc. 61). By means of these declarations, the witnesses whose *Diaz* testimony was excerpted (except for Supervisor Sola) have restated that testimony in this case. This obviates Plaintiffs' purported concern that Defendants had "not submitted affidavits from the witnesses whose *Diaz* testimony they have submitted." (Doc. 57 at 5.)

All of the evidence submitted by Defendants in opposition to Plaintiffs' Motion for Preliminary Injunction is properly before the Court. Plaintiffs have had the opportunity to depose all of the witnesses whose testimony they wish to contradict. If this case eventually proceeds to a trial on the merits, the evidentiary standards will be different. But while operating on the expedited schedule Plaintiffs requested, the Court may consider a broad range of evidence under relaxed standards of admissibility. *See Patterson v. Masem*, 774 F.2d 251, 254 (8th Cir. 1985) ("The haste with which preliminary injunction motions proceed and their limited purpose customarily require the relaxation of procedural safeguards and the introduction of less than all the material evidence."); *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1379 (N.D. Ga. 2007) ("The Court acknowledges that in its previous Orders addressing the preliminary injunction motions, it concluded that the Photo ID requirement severely burdened voters.

It is important to note, however, that the preliminary injunction motions were made at an earlier stage of the litigation and were made under more relaxed evidentiary standards. Here, however, Plaintiffs must actually prove their contentions by a preponderance of the evidence, using evidence reduced to an admissible form. Plaintiffs have failed to do so here.”).

WHEREFORE, Defendants respectfully request entry of an order denying Plaintiffs’ Motion.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court’s CM/ECF system on all counsel or parties of record on the attached service list this 17th day of June, 2008.

/s/ Allen Winsor

PETER ANTONACCI
Florida Bar No. 280690
Email: pva@gray-robinson.com
ALLEN WINSOR
Florida Bar No. 016295
Email: awinsor@gray-robinson.com
ANDY BARDOS
Florida Bar No. 822671
Email: abardos@gray-robinson.com
GRAYROBINSON, P.A.
301 South Bronough Street, Suite 600
Post Office Box 11189 (32302)
Tallahassee, Florida 32301
Telephone: 850-577-9090
Facsimile: 850-577-3311
Attorneys for Defendants

SERVICE LIST

CASE NO. 1:08-21243-CIV-ALTONAGA

Gary C. Rosen
Becker & Poliakoff, P.A.
3111 Stirling Road
Fort Lauderdale, FL 33312
Telephone: 954-985-4133
Attorney for Plaintiffs

Wendy Weiser
Renée Paradis
Brennan Center for Justice
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Telephone (212) 998-6730
Attorneys for Plaintiffs

Elizabeth S. Westfall
ADVANCEMENT PROJECT
1730 M. Street, N.W., Suite 910
Washington, D.C. 20036
Telephone: (202) 728-9557
Attorney for Plaintiffs

James E. Johnson
S.G. Dick
Derek Tarson
Jessica Simonoff
Corey Whiting
Courtney Dankworth
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
Telephone: (212) 909-6000
*Of Counsel for Plaintiff League of Women
Voters of Florida*