

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ASSOCIATION OF COMMUNITY
ORGANIZATIONS FOR REFORM NOW, *et al.*,

Plaintiffs,

v.

CATHY COX, *et al.*

Defendants.

CIVIL ACTION NO.
1:06-CV-1891-JTC

PLAINTIFFS' MOTION FOR LEAVE TO SUBMIT
PRIOR COMMUNICATIONS OF COUNSEL
REGARDING PENDING DISCOVERY DISPUTES

In its July 17, 2007 Order [Doc. 79] setting a hearing on Defendants' motion to compel [Doc. 66] and Plaintiffs' cross-motion for protective order [Doc. 72], the Court directed the parties to confer in an attempt to resolve the discovery dispute raised in the pending motions, and also indicated an intent to consider whether sanctions were appropriate to address any party's "unreasonable conduct during the discovery process." (Order of Jul. 17, 2007.)

As the Court may or may not have been aware, prior to the parties' joint certification on July 19 [Doc. 80], the parties had previously conferred extensively regarding these discovery issues, "via an exchange of letters, several emails, and several telephone calls." [Doc. 80] All of these previous communications were

pursuant to the parties' duty, under both Rule 26(c) and Rule 37(a)(2)(A), to confer in good faith in an attempt to resolve discovery disputes without court intervention.¹

As indicated in the parties' joint certification, the bulk of Plaintiffs' good-faith efforts to resolve the pending discovery issues are reflected in detailed letter and e-mail communications between undersigned lead counsel for Plaintiffs and Defendants' lead counsel. These communications often followed or were followed by extensive telephone conferences among Plaintiffs' counsel (including co-counsel) and Defendants' lead counsel. Although the Local Rules of this Court generally provide that copies of communications among counsel regarding disputed matters are not to be submitted to the Court, *see* N.D. Ga. L.R. 7.4, such communications are essential, in this instance, to establish the nature and extent of Plaintiffs' good-faith efforts to resolve these discovery issues in advance of presenting them to this Court.

¹ To the extent they have not done so specifically heretofore, undersigned Plaintiffs' counsel hereby specifically certify that they have complied with their duties, under Rules 26(c) and 37(a)(2)(A) of the Federal Rules of Civil Procedure, to confer with Defendants' counsel in a good-faith attempt to resolve the pending discovery issues without the necessity of court action. Despite the diligent efforts of Plaintiffs' counsel, there remain issues necessary for the court to resolve with respect to the pending discovery disputes.

The communications are particularly relevant here, given the Court's specific statement in its July 17 Order that it intends to consider whether the imposition of sanctions is appropriate in connection with this dispute. (*See* Order of July 17, 2007, at 2.) Although the Court is always required, under Fed. R. Civ. P. 37(a)(4), to consider whether sanctions are appropriate whenever a motion to compel or a motion for protective order is granted in whole or in part, Plaintiffs respectfully submit that this is not a case where sanctions would be appropriate, even if Defendants' motion to compel is granted in whole or in part, because (as the correspondence among counsel shows) Plaintiffs' conduct in the discovery process has not been unreasonable in any way.

The test for avoiding the imposition of sanctions for resisting discovery under Rule 37(a)(4)(A) is whether the resistance was "substantially justified," meaning that there is a "genuine dispute" among the parties, such that reasonable people could differ as to whether the contested discovery is appropriate. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). *Accord Maddow v. Proctor & Gamble Co.*, 107 F.3d 846, 853 (11th Cir. 1997) (reversing trial court's imposition of discovery sanctions where genuine dispute existed among the parties about which reasonable minds could disagree); *Neumont v. Monroe County*, 225 F.R.D. 266, 268 (S.D. Fla. 2004) (same).

The extensive communications among the parties' counsel prior to this dispute unquestionably reveal a "genuine dispute" as to which reasonable minds could in good faith differ. Therefore, irrespective of where the Court ultimately comes out on the pending discovery motions, the imposition of sanctions against Plaintiffs or their counsel would be wholly inappropriate.

To clarify the nature and extent of their good-faith efforts in this process, and specifically to support their claim that the imposition of discovery sanctions would be inappropriate in connection with this dispute, Plaintiffs seek leave to include the following correspondence among counsel relative to the disputed issues raised in the pending discovery motions:

ATTACHMENT	DESCRIPTION
1	Email Communications between B. Heard and S. Ritter dated 02/12/2007 to 02/27/2007 Regarding Defendants' Grant of an Extension of Time to Plaintiffs Until 03/27/2007 to Respond to Discovery
2	Letter from S. Ritter to B. Heard dated 03/30/2007 Regarding Discovery Disputes
3	Letter from B. Heard to S. Ritter dated 04/04/2007 Regarding Discovery Disputes
4	Letter from B. Heard to S. Ritter dated 04/14/2007 Regarding Discovery Disputes
5	Emails among B. Heard, S. Ritter, and D. Schrepfer dated 05/08/2007 to 05/10/2007 Regarding Discovery Disputes
6	Letter from B. Heard to S. Ritter dated 05/14/2007 Regarding Discovery Disputes

Wherefore, Plaintiffs respectfully state that their motion for leave to submit the foregoing evidence should be granted.

Respectfully submitted this 23rd day of July, 2007.

s/ Bradley E. Heard, Esq.

Georgia Bar No. 342209
Counsel for All Plaintiffs

THE HEARD LAW OFFICES, LLC
3695-F Cascade Road, SW, Suite 1371
Atlanta, GA 30331-2105
Tel.: 404-344-9255
Fax: 404-344-7578
Email: bheard@heardlawoffices.com

s/ Brian W. Mellor, Esq.*

Massachusetts Bar No. 543072
Counsel for ACORN, Project Vote, and Dana Williams

196 Adams Street
Dorchester MA 02122
Tel.: 617-282-3666
Fax: 617-436-4878
Email: electioncounsel1@projectvote.org

s/ Elizabeth S. Westfall, Esq.*

D.C. Bar No. 458792
Counsel for ACORN, Project Vote, and Dana Williams

ADVANCEMENT PROJECT
1730 M Street, NW, Suite 910
Washington, DC 20036
Tel.: 202-728-9557

Fax: 202-728-9558

Email: ewestfall@advancementproject.org

** Admitted Pro Hac Vice*

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

The undersigned hereby certifies that the foregoing document has been prepared in accordance with the font type and margin requirements of Local Rule 5.1 of the Northern District of Georgia, using a font type of Book Antiqua and a point size of 13.

/s Bradley E. Heard, Esq.
Georgia Bar No. 342209

CERTIFICATE OF SERVICE

This will certify that I have this day electronically filed the within and foregoing Plaintiffs' Motion for Leave to Submit Prior Communications of Counsel Regarding Pending Discovery Disputes with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

Stefan E. Ritter, Esq.
sritter@law.ga.gov

Brian W. Mellor, Esq.
electioncounsel1@projectvote.org

Elizabeth S. Westfall, Esq.
ewestfall@advancementproject.org

This 23rd day of July, 2007.

Respectfully Submitted,

	<u>s/ Bradley E. Heard, Esq.</u> Georgia Bar No. 342209
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