

*Frank v. Walker, 11-CV-1128 (E.D. Wis.)*

**FIFTH DECLARATION OF CLAYTON P. KAWSKI**

**EXHIBIT C**

**From:** Kawski, Clayton P.  
**To:** "Sean Young"  
**Cc:** [Ulin, John C.](mailto:Ulin,John.C.); [Curtis, Jr., Charles G.](mailto:Curtis, Jr., Charles G.); [Nadler, Carl S.](mailto:Nadler, Carl S.); [ldupuis@aclu-wi.org](mailto:ldupuis@aclu-wi.org); [krotker@aclu-wi.org](mailto:krotker@aclu-wi.org); [JRosen@nichp.org](mailto:JRosen@nichp.org); [Steiner, Neil](mailto:Steiner, Neil); [Laughlin McDonald](mailto:Laughlin McDonald); [Dale Ho](mailto:Dale Ho); [Gibson, Charlotte J.](mailto:Gibson, Charlotte J.); [Lazar, Maria S.](mailto:Lazar, Maria S.); [Lennington, Daniel P.](mailto:Lennington, Daniel P.); [Princ, Diane](mailto:Princ, Diane); [Kawski, Clayton P.](mailto:Kawski, Clayton P.)  
**Subject:** RE: Frank Plaintiffs' Proposed Stipulation re Various Pretrial Matters  
**Date:** Wednesday, September 11, 2013 3:00:00 PM  
**Attachments:** [image003.png](#)

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Hi Sean,

It is relevant and material if the survey data is now unreliable because some participants have a qualifying ID. We fail to see how a desire to keep the survey participants anonymous should prejudice Defendants' ability to reasonably question the efficacy of the survey, which was conducted over one year ago and is based upon stale data that does not reflect whether its participants currently have qualifying ID. Federal Rule of Civil Procedure 26(a)(2)(B)(ii) requires Plaintiffs to produce "the facts or data considered by the witness in forming [his opinions]." Plaintiffs have not complied with this rule, which does not provide an exception for anonymous survey data. We are confident that the Court will find these facts relevant; therefore, we are asking Plaintiffs for the un-redacted data.

Furthermore, with a November 2012 presidential election having occurred *after* the survey was completed, it is possible that the survey data no longer accurately reflect qualifying ID possession rates. (Keep in mind that the "free state ID" program was in effect after the survey and is still in effect.) Concealing the un-redacted survey data prejudices Defendants because it prevents our expert witness from developing his opinion fully as to the efficacy of the survey and whether its conclusions as to possession rates are accurate.

We again renew our request for the un-redacted survey data, which should have been produced last year with Plaintiffs' Rule 26(a)(2) expert disclosures. Plaintiffs' dilatory conduct is inexcusable and prejudicial to Defendants, and it may be grounds to have Professor Barreto's testimony and report excluded in whole or in part. There may be an alternative whereby the parties enter into a stipulated protective order that the un-redacted data can be shared with Defendants and their expert. Will Plaintiffs agree to this option?

Setting aside the possibility of a protective order, we believe that, having reached an impasse on this issue, the parties adequately met and conferred under Civil Local Rule 37.

Thank you for providing some information regarding which Plaintiffs have a qualifying ID. However, Plaintiffs are under an obligation to inform Defendants whether *any* Plaintiffs have a qualifying ID, so discovery responses should address the facts as to *all* Plaintiffs. Although Plaintiffs' counsel may not want to elicit testimony from some Plaintiffs that now have qualifying ID, Defendants' counsel may want to call these witnesses to testify at trial. Accordingly, Plaintiffs' desire to unilaterally conceal relevant and material information

regarding which Plaintiffs have a qualifying ID is prejudicial to Defendants' case. Please inform us of *all* Plaintiffs that have a qualifying ID immediately.

Thank you,

Clay

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**From:** Kawski, Clayton P. [<mailto:kawskicp@doj.state.wi.us>]  
**Sent:** Tuesday, September 10, 2013 4:12 PM  
**To:** Princ, Diane  
**Cc:** Ulin, John C.; Curtis, Jr., Charles G.; Nadler, Carl S.; [ldupuis@aclu-wi.org](mailto:ldupuis@aclu-wi.org); [krotker@aclu-wi.org](mailto:krotker@aclu-wi.org); [JRosen@nichp.org](mailto:JRosen@nichp.org); Steiner, Neil; Laughlin McDonald; Dale Ho; Gibson, Charlotte J.; Lazar, Maria S.; Lenington, Daniel P.; Sean Young  
**Subject:** RE: Frank Plaintiffs' Proposed Stipulation re Various Pretrial Matters

Hi Diane,

To address the points in your e-mail below:

1. Please produce the un-redacted survey data immediately. It should have been produced last year, and Defendants are prejudiced by Plaintiffs' dilatory conduct. If you refuse, we will have no remedy but to consider moving Judge Adelman to order Plaintiffs to produce the data. We will consider our exchange of e-mails a meet and confer under Civil Local Rule 37.
2. I contacted DOT and GAB today about your updated data request and will let you know what I hear from them.
3. I apologize for my error regarding Ms. Wilde's deposition. You are correct that she was deposed and that Attorney Benedon had notice of the deposition. We hope to address the issue of the use of her deposition testimony at trial in a counter-proposal to the draft discovery stipulation that Attorney Young circulated on September 4.
4. Please immediately inform Defendants which Plaintiffs have a qualifying ID, if you know of them. There is no reason for you to withhold this material information if you know it, and we have asked for it several times. We will

consider our exchange of e-mails a meet and confer under Civil Local Rule 37.

5. Thank you for your willingness to accept service. We will get back to you about whether we will accept service of trial subpoenas on behalf of Defendants.

6. We intend to circulate a counter-proposal to the draft stipulation that Attorney Young circulated.

Finally, and this is directed to the *Jones* attorneys, too, does Friday the 13<sup>th</sup> at 10 a.m. central work for a joint conference call?

Thank you,

Clay

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**From:** Princ, Diane [<mailto:Diane.Princ@dechert.com>]  
**Sent:** Tuesday, September 10, 2013 11:11 AM  
**To:** Kawski, Clayton P.; Sean Young  
**Cc:** Ulin, John C.; Curtis, Jr., Charles G.; Nadler, Carl S.; [ldupuis@aclu-wi.org](mailto:ldupuis@aclu-wi.org); [krotker@aclu-wi.org](mailto:krotker@aclu-wi.org); [JRosen@nlchp.org](mailto:JRosen@nlchp.org); Steiner, Neil; EXT Laughlin McDonald; Dale Ho; Gibson, Charlotte J.; Lazar, Maria S.; Lennington, Daniel P.  
**Subject:** RE: Frank Plaintiffs' Proposed Stipulation re Various Pretrial Matters

Hi, Clay –

Thank you for your email.

First, the fact that some survey respondents might have later obtained an ID is irrelevant. Barreto's report looked at the rate of ID possession, which meant that his survey had to look at the rate of ID possession for a sample population at a particular moment of time. Looking at what happens to a select few members of that sample population later, outside of that slice-of-time sample, is irrelevant to the estimate of the relevant population's rate of ID possession at the time of the survey. Just because some survey participants may have later gotten IDs does not mean the rate of ID possession has changed because other participants may have lost IDs, new persons may have entered the population and lack IDs, etc. Moreover, as we explained last year and you did not dispute, there are serious anonymity concerns with disclosing the identifying information of survey participants, whose participation was premised on the understanding that their identities would be kept secret.

Second, with respect to your e-mail to Larry concerning our request for updated data, our own investigation has left us more than little dubious about how difficult and time-consuming you say the export will be. Regardless, we now request that, at the earliest possible date, you produce:

(1) the most recent GAB voter data including, but not limited to, all of the same fields in the DVD-R disc produced to Plaintiffs last year, as well as any additional fields listed below. At a minimum, the fields should include, but not necessarily be limited to:

Administrative ID number  
First Name  
Middle Name  
Last Name  
Name Suffix  
DOB  
State ID  
Voter Registration Number  
Full Address (all 13 variables)  
Voter status (all 5 variables)  
Jurisdiction and district (all 23 variables) Phone Permanent Absentee Status Election participation history (all 22 variables)

(2) the most recent DMV ID data including, but not limited to, all of the same fields in the DVD-R disc produced to Plaintiffs last year, as well as any additional fields listed below. At a minimum, the fields should include, but not necessarily be limited to:

Run Time Stamp  
First Name  
Middle initial  
Last Name  
Gender  
DOB  
Race  
Zip Code  
County name  
Current DL or State ID number  
Date of issuance  
Date of expiration  
Current DL/State ID status  
Customer ID  
Former Name  
Moved out of state  
Deceased

Please produce this data at the earliest possible date, as any further delay is likely to seriously

hamper our ability to prepare for trial. If you still decline to promptly provide us with the data we have requested, we will have no choice but to ask the Court to preclude Defendants from asserting that our expert's conclusions are based on data that is not the most current data available. We also note that we reserve the right to request additional data fields should this production be insufficient for our purposes.

Third, Defendants had notice of Ms. Wilde's deposition; she was crossed by Ms. Benedon from the Wisconsin Department of Justice. I have attached a copy of her deposition transcript along with the exhibits.

Fourth, as I said previously, we have learned that some of the plaintiffs may have gotten ID's. Once we confirm, we will let you know in the form of an interrogatory response as indicated in the proposed stipulation, with respect to those whom we expect to testify at trial.

Fifth, Plaintiffs' counsel will accept service of trial subpoenas on our clients. Will Defendants' counsel do the same with theirs?

Sixth, as previously indicated, we are likely to take the depositions of Gerald Wilde, Marcella Althof, and Ruth Ann Obermeyer due to their unavailability at trial. We should add that Audrey Anderson will also be unavailable at trial (she is well over 100 miles away in Merrill). Given the fast-approaching trial, we would like to schedule depositions for these witnesses as soon as possible. Please let me know of your availability the next few weeks.

Lastly, regarding your e-mail to Jones Plaintiffs on September 6, we would be happy to have a joint call to discuss these issues. We are generally available Friday, September 13 or sometime next week.

Regards,  
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**From:** Kawski, Clayton P. [<mailto:kawskicp@doj.state.wi.us>]  
**Sent:** Thursday, September 05, 2013 10:04 AM  
**To:** Sean Young  
**Cc:** Ulin, John C.; Curtis, Jr., Charles G.; Nadler, Carl S.; [ldupuis@aclu-wi.org](mailto:ldupuis@aclu-wi.org); [krotker@aclu-wi.org](mailto:krotker@aclu-wi.org); [JRosen@nlchp.org](mailto:JRosen@nlchp.org); Steiner, Neil; Princ, Diane; EXT Laughlin McDonald; Dale Ho; Gibson, Charlotte J.; Lazar, Maria S.; Lennington, Daniel P.  
**Subject:** RE: Frank Plaintiffs' Proposed Stipulation re Various Pretrial Matters

Hi Sean,

Thank you for the e-mail below and the draft stipulation.

We are interested in Prof. Barreto's unredacted survey data because we believe that some of the survey participants that indicated that they lack a form of Act 23 ID now have such ID. Please promptly send the unredacted survey data, which should have been produced when Plaintiffs made their expert witness disclosures last year.

I do not believe that Nancy Lea Wilde was deposed, so there is no deposition testimony from her to offer at trial. If Ms. Wilde was deposed, Defendants were not given notice of the deposition, and it may not be used at trial.

We again request that you immediately inform us which Plaintiffs have a qualifying ID. Defendants are prejudiced by Plaintiffs' continuing failure to disclose this information. Also, will Plaintiffs' counsel accept service of trial subpoenas on your clients?

As for the other specifics in your e-mail and draft stipulation, Defendants' counsel will confer and get back to you.

Thanks again,

Clay

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**From:** Sean Young [<mailto:syoung@aclu.org>]  
**Sent:** Wednesday, September 04, 2013 5:10 PM  
**To:** Kawski, Clayton P.; Gibson, Charlotte J.; Lazar, Maria S.; Lenington, Daniel P.  
**Cc:** Ulin, John C.; Curtis, Jr., Charles G.; Nadler, Carl S.; [ldupuis@aclu-wi.org](mailto:ldupuis@aclu-wi.org); [krotker@aclu-wi.org](mailto:krotker@aclu-wi.org); [JRosen@nlchp.org](mailto:JRosen@nlchp.org); [neil.steiner@dechert.com](mailto:neil.steiner@dechert.com); [diane.princ@dechert.com](mailto:diane.princ@dechert.com); Laughlin McDonald; Dale Ho  
**Subject:** Frank Plaintiffs' Proposed Stipulation re Various Pretrial Matters

Clay,

In response to your request that we do the first draft of a proposed stipulation, attached please find a proposed stipulation regarding the matters referenced in our e-mail correspondence, which includes the interrogatories issues you raised. As you will see in the proposed stipulation, we are offering to provide interrogatory responses for the plaintiffs we expect to testify at trial. The proposed stipulation also seeks to resolve the protective order issue that you have reached out to GAB about. And thank you for following up with DOT regarding the "customer ID" field. As for your request for Prof. Barreto's unredacted survey data, please explain why you need the redacted information.

Since we are discussing a proposed stipulation, we also thought that it might be efficient to go ahead

and try to resolve other pretrial matters in this stipulation as well, as follows:

First, we have learned that Nancy Lea Wilde has passed away. As a result, we propose stipulating to the use of her deposition testimony at trial pursuant to Rule 32(a)(4).

Second, we have also learned that Marcella Althof (early 80's) and Ruth Ann Obermeyer (early 70's) have been facing some serious medical issues, and it would create an undue burden on them to make the trek to Milwaukee to testify at trial (Althof also lives well over 100 miles away in Stoddard). Gerald Wilde is in his mid-80's and lives well over 100 miles away in Schofield. As a result, the proposed stipulation provides that they are unavailable to testify under Rule 32(a)(4), and that Plaintiffs may conduct their depositions before trial. In addition, Ruthelle Frank is elderly, facing some health issues, and lives more than 100 miles from Milwaukee, and may be unavailable to testify at trial. The proposed stipulation accordingly provides that we may also seek to use her deposition testimony at trial.

Third, we intend to rely on Lucille Berrien, Arvina Martin, and David Canon to testify to the same matters set forth in their respective Declarations, and nothing more. As you can see, their Declarations are short and concern solely the authenticity of certain documents (veteran ID, tribal ID, testimony to legislature). We think that it will be a waste of the Court's time (as well as the time of these third-party witnesses) for them to give short live testimony concerning such technical matters when we can simply stipulate to their Declarations. We hope that you agree.

Fourth, Civil L. R. 16(c)(1)(F) provides that reading or playing more than 5 pages from a deposition will not be permitted unless the judge finds good cause. We think that allowing more than 5 pages per deposition might make the trial more efficient and that, given the bench trial context, the ordinary preference for live testimony would not apply as strongly, at least for some witnesses. Perhaps we can also agree on a stipulation about relaxing this requirement.

Fifth, we have also learned that some of the plaintiffs may have gotten ID's, and as you can see in the proposed stipulation, we are prepared to update those plaintiffs' interrogatories if we intend to rely on their testimony at trial.

Lastly, we appreciate your suggestion for a joint stipulation. We are CCing our proposed stipulation to counsel for *Jones* Plaintiffs to explore that possibility. As for their letter, we have no objection to *Jones* Plaintiffs' requests for supplemental discovery and maintain our objection to Defendants' belated introduction of four new witnesses, as set forth in our motion.

We look forward to your response.

Sean

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