

**From:** [Karyn Rotker](#)  
**To:** [Kawski, Clayton P.](#)  
**Cc:** [Larry Dupuis](#); [Ulin, John C.](#); [Curtis, Jr., Charles G.](#); [Nadler, Carl S.](#); [Gibson, Charlotte J.](#); [Lazar, Maria S.](#); [Neil Steiner](#); [Diane Princ](#); [Laughlin McDonald](#); [Dale Ho](#); [Jeremy Rosen](#); [Craig Falls](#); [Sean Young](#); [Lennington, Daniel P.](#)  
**Subject:** Re: Frank v. Walker/Jones v. Deininger - follow up from yesterday's call  
**Date:** Thursday, August 22, 2013 9:33:21 AM

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Clay:

I am following up on the email you sent yesterday.

In our call Tuesday, we informed you that we will not object to your recent disclosure of two witnesses who work at the Wisconsin DMV, Janet Turja and Edgar Rosado. Although they were not on a prior list, we agree that the fact that they became known through discovery and have been deposed is sufficient to permit either party to use them as witnesses at trial.

However, we also made it clear that we object to Defendants' extremely belated disclosure of four witnesses: Michael Sandvick, Sue Ertmer, Jeanette Merten, and Bruce Landgraf. As we indicated in that call, Defendants posited no good reason, much less any substantial justification, for the failure to disclose these witnesses in compliance with Rule 26, either in your mandatory initial disclosures of witnesses you may use to support your defenses or by making such information known to Plaintiffs during the discovery process. Rather, your disclosure occurred more than 17 months after your initial Rule 26(a) disclosures, more than a year after the cutoff of discovery, and less than three months before the start of trial in this case.

As we also explained, your belated disclosure is prejudicial. Had you timely disclosed these witnesses, Plaintiffs would have conducted document and deposition discovery of them. Your purported solution to this situation - last minute discovery or depositions - does not resolve these concerns. Had your new witnesses been timely disclosed and deposed during the discovery period, their testimony may well have led us to conduct additional fact discovery and may also have provided additional information for our experts to consider and for us to question your experts about during depositions. Hence, your strategic decision to wait to disclose these new witnesses only after a trial date was set cannot be remedied simply by taking a few additional depositions now.

Moreover, as we also indicated on Tuesday's call, it appears from your disclosures that these new witnesses would have little, if any admissible testimony. Rather, Defendants appear to be planning to use these witnesses to give thinly veiled expert opinions, without having to qualify those witnesses as experts or serve (untimely) expert disclosures in accordance with Rule 26. For example, your assertion that Ms. Merten has information on "whether a voter photo identification requirement would improve the integrity of elections and instill confidence in voters" is clearly opinion evidence not within the lay opinion provisions of Rule 701. Without in any way conceding that these witnesses could qualify as experts, we are sure you are aware that your expert disclosure deadline passed well over a year ago. Again, the unjustified and belated disclosure is unjustified and prejudicial.

On Tuesday's call, we asked that you withdraw these four individuals as witnesses. You declined to do so and agreed that we had reached an impasse. Should you be willing to reconsider that decision, please let us know by noon Friday. Otherwise we will have no

choice but to seek relief from the Court. In the meantime, we continue to await your draft stipulation for our consideration on the issues for which a compromise might be possible, such as our willingness to have those Plaintiffs we anticipate will testify at trial answer your belated interrogatories.

Karyn

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On 8/21/2013 10:38 AM, Kawski, Clayton P. wrote:

Hi Larry,

I am writing to follow up on yesterday's conference call between the parties in *Frank and Jones*.

As you are aware, on August 12, 2013, Defendants served supplemental disclosures on Plaintiffs. The Court has set a deadline of October 14, 2013, for the parties to prepare and file pretrial reports in the form set forth in Rule 16(c), which will include identifying witnesses for trial. *See* Fed. R. Civ. P. 16(c)(2)(G). Defendants' counsel suggested during conference calls with Plaintiffs' counsel that the parties should agree to an earlier date to identify the witnesses that they plan to call to testify at trial. Plaintiffs' counsel did not seem amenable to that proposal.

Defendants are willing to stipulate to Plaintiffs conducting discovery only as to Sue Ertmer, Jeanette Merten, Bruce Landgraf, and Michael Sandvick if Plaintiffs will stipulate that these four witnesses may be called by Defendants to testify at trial. (This offer applies in *Jones*, too, although it does not seem that the *Jones* Plaintiffs are protesting any witnesses testifying at trial.) Since Defendants' counsel does not represent these four individuals, you are welcome to contact them informally absent any stipulation.

The parties do not seem to disagree that Edgar Rosado and Janet Turja may be called to testify at trial by Defendants or Plaintiffs, but we may want to enter a written stipulation to that effect.

Please let us know your thoughts.

Thank you,

Clay

**Clayton P. Kawski**

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