Perkins Coie

1201 Third Avenue, Suite 4900
Seattle, Washington 98101
PHONE: 206.359.8000
FAX: 206.359.9000
www.perkinscoie.com

Kevin J. Hamilton
PHONE: (206) 359-8741
FAX: (206) 359-9741
EMAIL: KHamilton@perkinscoie.com

June 17, 2014

The Honorable Thomas O. Rice
United States District Court
PO Box 1493
Spokane, WA 99210

Re: Montes v. City of Yakima, No. CV-12-3108-TOR
Defendants' Motion to Exclude Evidence

Dear Judge Rice,

The Court has set a June 18, 2014, hearing to consider Defendants' request that the Court exclude two witnesses identified by Plaintiffs through supplemental initial disclosures (Michael Morales and Daniel Sheehan), as well as certain photographs of parks in the City of Yakima ("City") produced by Plaintiffs during discovery. The Court requested that the parties submit letters to the Court in advance of the hearing. This letter outlines Plaintiffs' position with respect to this dispute.

Both witnesses, and the photographs at issue were disclosed during the course of discovery. During the parties' Rule 37 conference, Defendants could not identify a single rule that Plaintiffs' disclosures supposedly violated. Rather, Defendants simply asserted that—although Plaintiffs disclosed the witnesses and documents in question prior to the close of discovery—it was "too late" for Plaintiffs to have done so. Defendants have ignored Plaintiffs' offer to make Mssrs. Morales and Sheehan available for depositions.

Defendants' request that this Court exclude relevant evidence disclosed by Plaintiffs during discovery is baseless. Plaintiffs have complied fully with the Federal Rules of Civil Procedure and the Court's scheduling order. Plaintiffs respectfully submit that the Court should deny Defendants' motion.

A. Background

1. Lawsuit and Discovery

In this action, Plaintiffs claim that the City of Yakima's at-large system for electing City councilmembers violates Section 2 of the Voting Rights Act, as amended. 42 U.S.C. § 1973(a). Under the current electoral scheme, no Latino has ever been elected to the City Council, although approximately 42% of the total population of Yakima is Latino.

The scope of discovery in a Section 2 case is necessarily broad. In support of their case, Plaintiffs will rely on expert testimony regarding demographical and electoral data. Plaintiffs will also present lay witnesses who will testify to their own experiences in the City, including the lack of responsiveness on the part of elected officials to the needs of members of the Latino minority and Yakima's climate of prejudice toward Latinos.

This lawsuit's subject matter—the political status of Latinos in Yakima—is sensitive. Many potential witnesses who Plaintiffs approached expressed significant concerns that giving testimony on Plaintiffs' behalf would subject them to retaliation by City officials or private citizens. As a result, some were not willing to be disclosed publicly as witnesses. From the outset of this lawsuit, Plaintiffs committed to potential witnesses that they would only rely on the testimony of witnesses who agreed to appear voluntarily. As a result, Plaintiffs have chosen to forgo the testimony of many persons with knowledge that would support Plaintiffs' claims.

Both parties have found it necessary to continue to supplement their initial disclosures as discovery progressed. For Defendants' part, they have served no fewer than seven supplemental witness disclosures, most recently on April 22, 2014. Many of the individuals disclosed by Defendants, including witnesses disclosed in 2014, were known to Defendants from the outset of the lawsuit, such as City Manager Tony O'Rourke. Plaintiffs, meanwhile, have promptly supplemented their initial disclosures as the case has developed.

Both parties served significant requests for production of documents. Plaintiffs' last set of requests for production were served on January 10, 2014. After the prior discovery deadline of February 25, 2014 was continued, Defendants continued to produce a significant volume of documents responsive to earlier discovery requests. Indeed, between March 31, 2014 and the new discovery deadline, June 10, Defendants produced more than 320,000 pages of documents. Some of these documents were responsive to January 2014 requests. Others were responsive to discovery requests served as long ago as 2012. Defendants continued to produce documents until the final day of discovery.

2. The Specific Disclosures At Issue Here

On May 29, Plaintiffs served on Defendants a supplemental disclosure pursuant to Rule 26(a)(1), disclosing Michael Morales and Daniel Sheehan as individuals likely to have discoverable information that Plaintiffs may use to support their claims. On May 30, Plaintiffs served Defendants with certain photographs of City parks taken by Mr. Sheehan.

Michael Morales is a former City employee who held various positions with the City between 1997 and 2012. Of particular note, at various times between 2011 and 2012, Mr. Morales served as Acting/Interim City Manager and Assistant City Manager. Defendants obviously have long been aware of Mr. Morales and his knowledge of information relevant to this lawsuit. Indeed, in response to Plaintiffs' discovery requests, Defendants themselves disclosed thousands of pages of emails between Mr. Morales and others.

In 2013, Plaintiffs met with Mr. Morales to discuss his experiences with the City. During these meetings Plaintiffs asked Mr. Morales whether he would be willing to testify as a witness. Mr. Morales declined, and specifically requested that Plaintiffs not identify him as a witness because he feared economic retaliation from the City and that being identified as a witness for Plaintiffs would be fatal to his career in municipal government.

On May 20, 2014, without outreach from Plaintiffs and of his own accord, Mr. Morales contacted Plaintiffs and indicated that he was now interested in being involved in this lawsuit. Plaintiffs met with Mr. Morales on May 22, 2014. Mr. Morales expressed interest in being a witness, but requested time to think further and discuss his participation in the litigation with his family and current employer. On May 28th, Mr. Morales agreed to be a witness in this matter, notwithstanding his continuing concerns about retaliation, because he believes that it is important for him to come forward and share his knowledge and experience with the Court. The next day, on May 29, 2014, Plaintiffs disclosed Mr. Morales as a potential witness.

Daniel Sheehan is a Seattle-based photographer. Mr. Sheehan has taken photographs of various City parks. Plaintiffs only very recently reviewed the photographs taken by Mr. Sheehan and determined that they may use some photographs to support their claims. Plaintiffs made this determination only after deposing various employees of the City Parks & Recreation Department, and reviewing the 320,000 pages of documents produced by Defendants between March 31 and June 10. Upon determining that they may rely on the photographs taken by Mr. Sheehan at trial, Plaintiffs decided to disclose Mr. Sheehan as a potential witness. They did so out of an abundance of caution, as they do not anticipate relying on Mr. Sheehan's testimony at trial (other than for purposes of rebuttal).

On May 30, Defendants responded to Plaintiffs' disclosure by letter, conveying their intent to "move to strike these potential fact witnesses." Defendants did not explain the basis of their threatened motion to strike.

The parties held a Rule 37 conference on June 4, 2014. Plaintiffs explained they disclosed Mssrs. Morales and Sheehan as a supplement to Plaintiffs' initial disclosures, doing so promptly upon determining that Plaintiffs may potentially use information known to these individuals to support their claims. Plaintiffs offered to make both witnesses available for deposition at Defendants' convenience, either before or after the close of discovery. Plaintiffs explained that they disclosed the photographs as supplemental initial disclosures as soon as they had determined they may rely on such photographs to support their claims.

The parties were unable to reach an agreement. Defendants have not requested to take depositions of either Mr. Morales or Mr. Sheehan.

B. Argument

1. The Court Should Deny Defendants' Motion: Plaintiffs Have Fully Complied With Their Discovery Obligations

Federal Rule of Civil Procedure 26(a)(1)(A)(i) sets out the parties' obligations with regard to initial disclosures. Early in a case, a party must make an initial disclosure of individuals "likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Parties have similar obligations with respect to documents that a party "may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(ii). Such disclosures are made "based on the information then reasonably available to [the party]." Fed. R. Civ. P. 26(a)(1)(B)(E). A party must supplement or correct its initial disclosures if, during the course of the case, it determines that "in some material respect that the disclosure . . . is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e).

Here, Plaintiffs disclosed Mssrs. Morales and Sheehan, and the photographs taken by Mr. Sheehan, nearly two weeks prior to the close of discovery on June 10, 2014. In the course of the parties' oral and written communications attempting to resolve this dispute, Defendants have failed to cite a single rule violated by the disclosures of the witnesses and documents in question. This is for good reason: Plaintiffs violated no such rule. Plaintiffs disclosed Mssrs. Morales and Sheehan on May 29 as a supplement to their initial disclosures, doing so promptly upon determining that Plaintiffs may potentially use information known to these individuals to support their claims. The witnesses were disclosed during the discovery period, and Plaintiffs offered to make them available for deposition at Defendants' convenience.

Indeed, with respect to Mr. Sheehan, Plaintiffs do not believe that Rule 26 required disclosure of Mr. Sheehan at all. Plaintiffs anticipate using Mr. Sheehan, if at all, only as a rebuttal witness. Plaintiffs would call Mr. Sheehan only if they introduce the photographs taken by Mr. Sheehan into evidence, and then only if necessary to rebut characterization of the photographs by Defendants' witnesses. Plaintiffs do not believe that the authenticity of photographs of City parks taken by Mr. Sheehan is subject to reasonable dispute. If Defendants will not stipulate to the authenticity of the photographs, any number of the other disclosed witnesses—such as City of Yakima Parks & Recreation Manager Kenneth Wilkinson—can testify that photographs are what they purport to be. Rather than following the letter of Rule 26, however, Plaintiffs chose instead to disclose Mr. Sheehan during discovery out of an abundance of caution and courtesy to Defendants.

Courts routinely reject parties' efforts to exclude relevant evidence in similar circumstances. *See, e.g., Wilbur v. City of Mount Vernon*, C11-1100RSL, 2013 WL 2422744, at *1 (W.D. Wash. June 3, 2013) (denying motion to exclude witnesses disclosed on final day of discovery: "Defendants argue that the disclosure of these witnesses was untimely, but they do not identify any rule or Court order that has been violated. . . . . To the extent defendants were truly surprised by the disclosure of these two individuals, they could have and should have sought leave of Court to depose them during the four months preceding trial rather than seeking to exclude evidence that is both relevant and timely disclosed."); *In re Washington Mut. Mortgage Backed Sec. Litig.*, C09-37 MJP, 2012 WL 2995046, at *7 (W.D. Wash. July 23, 2012) (same, where the defendants were aware of two potential witnesses who were their own corporate officers before the plaintiffs disclosed such witnesses, and granting the defendants leave to depose the witnesses "[t]o remedy any harm of which Defendants complain").

Finally, even assuming Mssrs. Morales and Sheehan were not timely disclosed, despite Plaintiffs' best efforts, the extreme sanction of depriving the trier of fact from hearing relevant evidence is unwarranted. Defendants can establish neither bad faith on the part of Plaintiffs nor prejudice on the part of Defendants. Again, Plaintiffs disclosed the witnesses and documents during the discovery period. Plaintiffs offered to make the witnesses available for deposition, either before or after the June 10 discovery deadline, well in time for a trial that is more than three months away. With respect to Mr. Morales, a former City employee, Defendants not only have all relevant documents in their possession, they produced thousands of those documents during the course of discovery. Excluding relevant evidence is not appropriate in these circumstances. *See, e.g., U.S. v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir.1980) (a court's use of sanctions for a party's failure to comply with discovery orders must be tempered by due process requirements, and exclusion of evidence is generally warranted only with evidence of willfulness or bad faith); *see also Amersham Pharmacia Biotech, Inc. v. Perkin-Elmer Corp.*, 190 F.R.D. 644, 649 (N.D. Cal. 2000) (requested sanction of excluding evidence was "wholly unwarranted in the absence of any indicia of bad faith") (citing 3 Moore, Federal

Practice and Procedure (3d Ed. 1998), ¶ 16.92[6][b] ("Preclusion of evidence or testimony is a grave step, and is by no means an automatic response to a delayed disclosure.")).

C. Conclusion

In sum, Defendants' request that the Court exclude Mssrs. Morales and Sheehan, and the photographs taken by Mr. Sheehan of Yakima parks, is unsupported by the facts and the law. Plaintiffs respectfully submit that the Court should deny the motion.

Very truly yours,

Kevin J. Hamilton

KJH:cma