

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

AMERICAN ASSOCIATION OF PEOPLE  
WITH DISABILITIES;  
FEDERATION OF AMERICAN WOMEN'S  
CLUBS OVERSEAS, INC.;  
NEW MEXICO PUBLIC INTEREST  
RESEARCH GROUP EDUCATION FUND;  
and SOUTHWEST ORGANIZING PROJECT,

Plaintiffs,

v.

MARY HERRERA, in her capacity as  
Secretary of State,

Defendant.

No. CV 08-702

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**MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

American Association of People with Disabilities, Federation of American Women's Clubs Overseas, Inc., New Mexico Public Interest Research Group Education Fund, and Southwest Organizing Project (together, "Plaintiffs") hereby move the Court pursuant to Federal Rule of Civil Procedure 34 and 37 for an order compelling Defendant Mary Herrera, in her capacity as Secretary of State, ("Defendant") to produce documents responsive to Plaintiffs' First Set of Requests for Production of Documents, (Exhibit A), including, but not limited to, all documents listed in Appendix A to this motion ("the listed documents").

There is no dispute over the discoverability of the listed documents. Defendant agrees that the listed documents are responsive, not subject to any privilege, and must be produced.

Although the parties have been diligently working on resolving all discovery issues without Court intervention, today marks the deadline for filing discovery motions. Moreover,

summary judgment filing deadlines are just a few weeks away and Plaintiffs will be disadvantaged if they are not provided with the outstanding documents in advance of the briefing deadlines. Therefore, Plaintiffs have no choice but to bring the present motion to compel and ask the Court to compel Defendant to produce the listed documents and all other documents responsive to its Requests for Production.

### **BACKGROUND**

Plaintiffs filed their First Set of Requests for Production of Documents on October 15, 2009. After Defendant produced 163 pages of responsive documents, the parties commenced the deposition phase of discovery. During depositions of County Clerk and Secretary of State Office employees, it became apparent that numerous responsive documents had not been produced by Defendant.

Accordingly, while depositions were ongoing and before conducting three of the final scheduled depositions (including the deposition of the Secretary of State herself), Plaintiffs identified a list of twenty-eight categories of documents responsive to Plaintiffs' requests for production mentioned in various depositions. On February 9, 2010, Plaintiffs sent the Defendant a deficiency letter detailing those documents and other deficiencies in the Secretary's Response. (Exhibit K). While waiting for Defendant to respond to Plaintiffs' February 9, 2010 deficiency letter, Plaintiffs continued to take the remaining depositions. On March 5, 2010, Defendant replied to Plaintiffs' February 9, 2010 deficiency letter, agreeing to produce the majority of the categories of documents Plaintiffs had identified. (Exhibit L).

As these documents had still not been produced, on March 22, 2010, Plaintiffs met and conferred with Defendant. During that conversation, Defendant agreed to produce all but one of the categories of documents listed in Plaintiffs' February 9, 2010 deficiency letter. Defendant

assured Plaintiffs that the documents she had agreed to produce in Defendant's March 5, 2010 letter would be forthcoming, in addition to any other responsive documents uncovered by the Defendant's recent efforts.

Defendant also agreed to ensure the Secretary, her employees, and agents, including the County Clerks, undertook to find all documents responsive to Plaintiffs' requests. Moreover, after acknowledging Plaintiffs' concerns over the necessity of obtaining these documents in order to be prepared for upcoming dispositive motions practice, Defendant stated that the documents could be produced by April 1, 2010.<sup>1</sup>

Following that conversation, Plaintiffs subsequently identified additional responsive documents that were never produced. Plaintiffs immediately notified defendant of the additional missing documents in a letter on March 31, 2010. (Exhibit N). Since that time, Plaintiffs have uncovered additional responsive documents that have never been produced by Defendant. As such, Plaintiffs are attaching as an appendix the updated list of all relevant documents uncovered in any of the ten depositions conducted by the Plaintiffs.

On April 2, 2010, Plaintiffs again met and conferred with Defendant regarding the listed documents. Defendant again re-affirmed that such documents were discoverable and responsive, but stated that Defendant was unable to provide such documents at this time. Plaintiffs have accordingly filed this motion to compel with the Court.

### **ARGUMENT**

It is well established that a party is obligated to produce all documents that are (i) in a party's possession, custody or control and (ii) relevant to any party's claims or defenses, so long as it is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P.

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<sup>1</sup> (On March 25, 2010, Plaintiffs sent the Defendant a letter memorializing that conversation, which is attached as Exhibit M).

Rule 26(b)(1). Moreover, if a disclosing party learns that its responses are incomplete or incorrect, Rule 26(e)(1)(a) requires the party to supplement and correct such responses in a timely manner. *See, e.g., Beller v. United States*, 221 F.R.D. 696, 701 (D.N.M. 2003) (“[A] party is under a duty to supplement at appropriate intervals any disclosures made if it learns that in some material respect the information previously disclosed was incomplete or incorrect.”). In this case, despite Defendant’s repeated agreement that the listed documents are responsive and should therefore be produced, the deadline for production has passed without Defendant providing a single supplementing document to her original deficient production. *See, e.g., Arthur v. Atkinson Freight Lines Corp.*, 164 F.R.D. 19, 20 (S.D.N.Y. 1995) (“A party may not free itself of the burden to fully comply with the rules of discovery by attempting to place a heretofore unrecognized duty of repeated requests for information on its adversary.”).

Further, Plaintiffs are concerned that given the sheer volume of responsive unproduced documents uncovered in the depositions, Defendant has systematically failed to comply with her discovery obligations under Federal Rules of Civil Procedure 34 and 26(e)(1)(a), including specifically her duty to seek responsive documents from the County Clerks. Thus, it is possible, if not likely, that there is a substantial body of responsive documents of which the Plaintiffs are presently unaware.

Therefore, considering that Defendant has agreed to produce the documents uncovered in the depositions, but has failed to actually do so, this Court should compel production of both the listed documents and any additional relevant documents uncovered after the Defendant conducts another search—both within her offices and those of her agents—for responsive material. As the parties are preparing for summary judgment, it is vital that Plaintiffs are immediately provided with all of these documents, especially as the relevance of these documents is not in dispute.

**CONCLUSION**

For the reasons set forth above, Plaintiffs respectfully request that the Court compel the Defendant to produce all materials responsive to Plaintiffs' First Set of Requests for Production of Documents including, but not limited to, all documents listed in the appendix to this motion. In addition, given the April 19, 2010 deadline for Plaintiffs to file a summary judgment motion, Plaintiffs request that the Court order the Defendant to comply without delay.

Respectfully Submitted,  
RODEY, DICKASON, SLOAN, AKIN & ROBB,  
P.A

s/ Edward Ricco

By \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I certify that on April 5, 2010, I filed the foregoing electronically through the CM/ECF system, which caused parties or counsel in this matter to be served by electronic means as more fully reflected on the Notice of Electronic Filing.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

s/ Edward Ricco

By \_\_\_\_\_  
Edward Ricco

## Appendix A

1. Prior versions of the Third Party Voter Registration Manual. Trujillo Dep. 55:16-19 (Exhibit B).
2. Agendas from “election schools” in years prior to 2008. Dominguez Dep. 146:18-20 (Exhibit C).
3. Documents related to a training session for a large group of third party registration agents that was conducted at the Santa Fe library in early 2008. Trujillo Dep. 17:9-25, 18:4-10 (Exhibit B).
4. A PowerPoint created by Ernie Marquez regarding Third Party Registration Agents given during the “2008 general election school.” Dominguez Dep. 152:6-8, 152:20 (Exhibit C).
5. A formal log sheet created by the Secretary of State’s Office for use by Third Party Registration Agents. Dominguez Dep. 167:16-168:4 (Exhibit C).
6. Agendas and documents related to periodic Voter Oversight Committee meetings that have been occurring since 2007. Trujillo Dep. 33:14-17 (Exhibit B).
7. Log of all phone calls Mr. Dominguez has received from Third Party Registration Agents. Dominguez Dep. 88:3 (Exhibit C.).
8. E-mail from Mr. Trujillo to all clerks requiring them to provide justifications for any requests for additional third party voter registration forms. Dominguez Dep. 100:8-18, 101:1-4 (Exhibit C).
9. Interoffice e-mails related to “voter registration agents” and other comparable communications to the county clerks. Fulgenzi Dep. 11:12 (Exhibit D).
10. E-mails sent to a “Google group” of County Clerks. Fulgenzi Dep. 57:3-25, 62:9-13, 63:15-64:9, 76:13-16; 83:12-17; 86:1-9; 112:11-113:21 (Exhibit D).
11. Data and/or reports from VREMS on the number of newly registered voters each year. Fulgenzi Dep. 136:2-16 (Exhibit D).
12. Data and/or reports compiled through VREMS on each state agency that registers voters, including, for instance, the New Mexico Department of Motor Vehicles. Dominguez Dep. 43:22-44: 5, 69:4-8 (Exhibit C).
13. Data and/or reports from the Database of Third Party Agents regarding: (1) the number of Third Party Registration Agents; (2) the number of forms each agent has; (3) the number of forms turned in by each agent; (4) which agents have registered the most voters; (5) which agents have outstanding forms they have not turned in; and (6) other information on individual agents or collective groups of agents. Dominguez Dep. 67:9-69:25 (Exhibit C).
14. Case files and a list of case numbers, dates, and descriptions of the substance of each complaint since the implementation of a formal complaint system in early 2009. Trujillo Dep. 49:11-13 (Exhibit B).
15. Complaints filed before the formal complaint system was implemented in 2009. Trujillo Dep. 51:10-13 (Exhibit B).
16. Complaint files related to an incident involving ACORN in 2008. Trujillo Dep. 51:17-25, 52:1-15, 52:17, 93:18 (Exhibit B).
17. Complaint files related to an incident in Bernalillo County involving almost 1,200 forms. Dominguez Dep. 127:3-9 (Exhibit C).

18. Complaint files related to an incident in Doña Ana County involving ACORN making copies of forms. Dominguez Dep. 126:4-14 (Exhibit C).
19. Complaint files related to a 2003 incident in which the Democratic Party failed to turn in almost 90 forms. Dominguez Dep. 127:13-22 (Exhibit C).
20. Complaint files related to an incident involving a Third Party Registration Agent in Socorro County repeatedly submitting the same forms. Dominguez Dep. 70:25, 71:1-14 (Exhibit C).
21. An updated and complete sample voter registration form. Lamb Dep. 52:16-22 (Exhibit E).
22. A list of all other state agencies that accept voter registration forms. Trujillo Dep. 97:2 (Exhibit B).
23. Documents related to a complaint in early 2007 by Project Vote regarding the text used in the Voter Registration Manual. Vildasol Dep. 55:6-25, 58:14-17(Exhibit F).
24. Documents related to complaint by a County Clerk about a third-party voter registration agent's failure to turn in completed forms within the 48 hour deadline. Vildasol Dep. 79-81 (Exhibit F).
25. Drafts of the Voter Registration Manual. Vildasol Dep. 75:1-77:16 (Exhibit F).
26. Documents related to the cost savings achieved by changing the third-party voter registration form. Herrera Dep. 150:10-18 (Exhibit G).
27. Documents related to an incident where the Secretary of State stripped a third-party voter registration agent of their status due to misconduct. Herrera Dep. 120:1-21 (Exhibit G).
28. Documents related to an alleged incident of voter fraud described by Secretary Herrera occurring prior the enactment of the Challenged Laws. Herrera Dep. 39:18-40:13 (Exhibit G).
29. Documents related to an alleged incident of voter fraud by a woman working for ACORN occurring after the enactment of the Challenged Laws. Herrera Dep. 40:15-41:5, 42:12-20 (Exhibit G).
30. Documents related to an alleged incident involving the Republican Party's allegedly turning in over 200 voter registration forms with incorrect or fraudulent information. Herrera Dep. 44:2-18 (Exhibit G).
31. Documents related to a 2008 complaint involving a party helping prospective voters fill out federal voter registration forms and failing to turn those forms in to the state. Vildasol Dep. 120:10-121:25 (Exhibit G).
32. Documents connected to a fax cover sheet produced by Chaves County, dated Fe. 16, 2009, regarding "voting." Shaw Dep. 179:21-25, 180:16-181:11 (Exhibit H).
33. Documents connected to a fax cover sheet produced by Chaves County, dated March 10, 2010, regarding a letter from the Democratic Party, Roswell. Shaw Dep. 180:15-181:8 (Exhibit H).
34. Documents connected to a fax cover sheet produced by Chaves County, dated August 3, 2009, regarding a voter complaint. Shaw Dep. 181:15-182:5 (Exhibit H).
35. Documents related to a complaint regarding potentially fraudulent activity at the Mission Arch Nursing Home in 2009. Shaw Dep. 182:1-21 (Exhibit H).
36. Documents related to a message by John Howard at the Albuquerque FBI, on October 15 (no year provided). Shaw Dep. 185:3-186:5 (Exhibit H).

37. Documents connected to a fax cover sheet produced by Chaves County, dated October 31, 2008, regarding a voter incident report and John Howard at the Albuquerque FBI. Shaw Dep. 186:9-24 (Exhibit H).
38. Documents forwarded to the District Attorney's Office by Dona Ana County that the Deputy Clerk stated were responsive to a request for documents pertaining to "speculated or alleged voter registration fraud." Jimenez Dep. 12:8-19 (Exhibit I).
39. Documents the County Clerk of Dona Ana County provides to third party agents upon becoming agents. Jimenez Dep. 12:20-25 (Exhibit I).
40. Documents related to an individual who complained to the County Clerk of Dona Ana County that he had found his registration form in the trash in 2004. Jimenez Dep. 66:17-20 (Exhibit I).
41. Documents related to statements of complaints to the County Clerk of Dona Ana County in 200 and 2005 regarding voters stating that they had registered with somebody but were never officially placed on the registration lists. Jimenez Dep. 68:11-69:17 (Exhibit I).
42. Documents referring third party agents to the Secretary of State for violations of the 48-hour requirement from the County Clerk of Dona Ana County, which may have been kept by Kelli Fulgenzi. Jimenez Dep. 148:2-11, 149:22-25 (Exhibit I).
43. Documents related to a prospective voter in Dona Ana County who was never registered but retained a copy of the receipt from a registration form he had filled out with a third party agent. Jimenez Dep. 169:1-3 (Exhibit I).
44. Documents related to an incident in 2008 involving the alleged failure of a third party agent to turn in a registrant's completed voter registration form until after the registration deadline. Jimenez 181:18-182:4 (Exhibit I).
45. Documents related to regular reports submitted by Mr. Facio to the Clerk of Bernalillo County regarding upcoming registration drives and registration outreach efforts. Oliver Dep. 58:5-16 (Exhibit J).
46. Documents related to a letter sent from Congresswoman Wilson in 2008 to the U.S. Attorney and the Clerk of Bernalillo County regarding suspected voter fraud. Oliver Dep. 76:2-13 (Exhibit J).
47. Documents related to an incident in Bernalillo County where a third party agent allegedly failed to turn in voter registration forms completed in November of 2009 until January of 2010. Oliver Dep. 168:6-169:4 (Exhibit J).