The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' INITIAL DISCLOSURES

NOTE ON MOTION CALENDAR:
March 9, 2018

NEWMAN DU WORS LLP

2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

INTRODUCTION

Federal Rule of Civil Procedure 26(a)(1) and this Court's Scheduling Order required Defendants by February 9, 2018 to disclose the individuals, documents, and information that they may use to support their defenses. In response, Defendants served two-sentence Initial Disclosures without any substance. Plaintiffs promptly requested that Defendants supplement their disclosures to fully comply with Rule 26. The parties met and conferred on February 14, and Defendants served Amended Initial Disclosures on February 16. Like their original Initial Disclosures, Defendants' Amended Initial Disclosures provide insufficient identifications and are tantamount to no disclosures at all. Accordingly, Defendants should be required to serve meaningful and complete Initial Disclosures as required by the Scheduling Order and Rule 26.

BACKGROUND

Pursuant to the Order Regarding Initial Disclosures, Joint Status Report, and Early Settlement (the "Scheduling Order") entered January 5, 2018 (Dkt. No. 124), Plaintiffs served their initial disclosures on February 9, 2018. Plaintiffs' initial disclosures comprehensively listed 32 individuals likely to have discoverable information that Plaintiffs may use to support their claims. (*See* Pls.' Initial Discl., Declaration of Vanessa Barsanti ("Barsanti Decl."), Ex. 1.) Defendants, by contrast, served only a two-sentence document that—although styled as "Defendants' Initial Disclosures"—contained no disclosures at all:

> Pursuant to Federal Rule of Civil Procedure 26(a)(1)(A), Defendants make the following initial disclosures based on the information reasonably available as of this date.
>
> The Department of Defense is currently undertaking a study of policies concerning transgender service members and upon completion of that study, and the development of any new policies resulting from that study, Defendants will supplement these disclosures as appropriate consistent with Federal Rule of Civil Procedure 26(e).

(Defs.' Original Initial Discl., Barsanti Decl., Ex. 2.) The parties met and conferred about Defendants' Initial Disclosures on February 14. (Barsanti Decl., ¶ 4.) When Plaintiffs asked Defendants to correct their deficiencies, Defendants claimed that they will not know their defenses regarding the Government's Ban on transgender military service until the

Government's "new policy" on transgender service is "released" on February 21.[1] (Barsanti Decl. ¶ 4.)

Defendants served "Amended Initial Disclosures" on February 16. The Amended Initial Disclosures merely gave lip-service to supplementing the Initial Disclosures and included the same two sentences as in the Initial Disclosures. (Defs.' Am. Initial Discl., Barsanti Decl., Ex. 3.) The only supplemental information Defendants provided was a list of the *Plaintiffs* in this case—yet still no information about *Defendants'* defenses—or the individuals with knowledge of those defenses or documents in support thereof. The names and contact information of everyone listed in Defendants' Amended Initial Disclosures were provided to Defendants in Plaintiffs' and the State of Washington's Rule 26(a) disclosures. (*See* Pls.' Initial Discl., Barsanti Decl., Ex. 1, at 2-6.) Defendants' Amended Initial Disclosures still do not provide any actual disclosures, making Defendant's Amended Initial Disclosures just as inadequate as their Initial Disclosures.

Notably, February 21 has now come and gone, and Defendants have not supplemented their disclosures or provided Plaintiffs with the so-called "new policy" or implementation plan. Nor are Plaintiffs aware of any public disclosure of the implementation plan and related policies – the very policies upon which Defendants purportedly "intend to rely upon" in this case. (Defs.' Am. Initial Discl., Barsanti Decl., Ex. 3.) Defendants assert that they will "assess" whether or not they will supplement their amended disclosures following completion of the study and implementation plan, and provide no date as to when this "completion" or "implementation plan" will occur or be provided to Plaintiffs. *Id*.

LEGAL STANDARD

Federal Rule of Civil Procedure 26(a)(1) requires that a party "must, without awaiting a discovery request," identify "each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses" and provide a copy or description of "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may

[1] Plaintiffs requested that Defendants consent to resolve this dispute via the Expedited Joint Motion Procedure (L.R. 37(a)(2)), but Defendants declined. (Barsanti Decl., ¶ 7.)

use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i), (ii). Initial disclosures are to be made based on the information "then reasonably available" to the party, and a party is not excused from this obligation simply because "it has not fully investigated the case." *Id.* 26(a)(1)(E); *Sharma v. City of Vancouver*, No. C06-5688, 2007 WL 4376177, at *1 (W.D. Wash. Dec. 13, 2007). The purpose of initial disclosures is for parties to provide "basic information that is needed . . . to prepare for trial or make an informed decision about settlement." Fed. R. Civ. P. 26(a)(1), advisory committee's note (1993 Amendment § (a)).

Where "a party fails to make a disclosure required by Rule 26(a)," any other party "may move to compel disclosure and for appropriate sanctions." Fed. R. Civ. P. 37(a)(3)(A); *Lim v. Franciscan Health Sys.*, No. C06-5191, 2006 WL 3544605, at *1 (W.D. Wash. Dec. 8, 2006) ("Where the response to discovery is unsatisfactory, the party seeking discovery may file a motion to compel discovery"). A party that fails to comply with disclosure obligations may be prohibited from relying on that evidence. *BWP Media USA Inc. v. Rich Kids Clothing Co., LLC*, No. C13-1975-MAT, 2015 WL 347197, at *4 (W.D. Wash. Jan. 23, 2015), *aff'd sub nom. BWP Media USA Inc. v. Urbanity, LLC*, 696 F. App'x 795 (9th Cir. 2017); *R & R Sails, Inc. v. Ins. Co. of ,Pa.*, 673 F.3d 1240, 1247 (9th Cir. 2012). "On a motion to compel responses to discovery requests, the party opposing discovery bears the burden of resisting disclosure." *Rookaird v. BNSF Ry. Co.*, No. C14-176, 2015 WL 11233670, at *1 (W.D. Wash. June 2, 2015).

Courts routinely grant motions to compel where a party fails to provide the disclosures required under Rule 26. *See, e.g., In re Park W. Galleries, Inc., Mktg. & Sales Pracs. Litig.*, No. MDL 09-2076, 2010 WL 1996600, at *2 (W.D. Wash. May 17, 2010) (compelling initial disclosure of damage calculations that "reflect a good faith effort to estimate the various categories of damage based on the information currently known to plaintiffs" where plaintiffs claimed they needed more discovery to calculate damages and promised to supplement their disclosures later); *Bonneville v. Kitsap Cty.*, No. C06-5228, 2007 WL 474373, at *2 (W.D. Wash. Feb. 8, 2007) (compelling supplemental initial disclosures in which "Plaintiff must describe as clearly and accurately as possible all information regarding the potential location and contact information of persons with discoverable information, even information that he believes

Defendants already possess."); *Int'l Bhd. of Teamsters v. Alaska Air Grp., Inc.*, No. C17-1327, 2017 WL 6034363, at *2 (W.D. Wash. Dec. 6, 2017) (Pechman, J.) (compelling disclosures where defendants claimed that their pending motion to dismiss entitled them to withhold discovery).

ARGUMENT

Defendants' Amended Initial Disclosures are manifestly inadequate and must be promptly supplemented based on Defendants' current knowledge. This Court should utilize its sound discretion to compel Defendants to provide supplemental Amended Initial Disclosures, for two reasons:

First, Defendants' failure to identify a single document or individual in support of its defense (other than listing the Plaintiffs) is facially inadequate under the Federal Rules of Civil Procedure. Defendants' Amended Initial Disclosures did not identify *any* individuals likely to have discoverable information about their defense, nor did they describe *any* documents. "[A]n evasive or incomplete disclosure […] must be treated as a failure to disclose." Fed. R. Civ. P. 37(a)(4); *Lim*, 2006 WL 3544605, at *1. As such, this Court should issue an order compelling Defendants to provide a complete disclosure based on their current knowledge of the facts.

Defendants suggest that they need not identify any individuals or documents supporting their defenses because Defendants are still "studying" President Trump's August 25, 2017 Transgender Service Member Ban for the purpose of generating a February 21, 2018 "implementation plan," and state that Defendants may "supplement" their Initial Disclosure once that plan is issued. Yet a party's obligation to timely supplement its disclosures does not discharge or excuse Defendants' *current* obligation to provide complete and correct initial disclosures, based on the information currently available to Defendants and supported by a reasonable inquiry. *See* Fed. R. Civ. P. 26(g)(1)(A) ("By signing [a disclosure], an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry […] *with respect to a disclosure, it is complete and correct as of the time it is made."* (emphasis added)); *Aecon Bldgs., Inc. v. Zurich N. Am.*, No. C07-832, 2008 WL 3927797, at *4 (W.D. Wash. Aug. 21, 2008) (stating that Rule 26 "requires that the attorney

make a reasonable inquiry into the factual basis of his response, request or objection."); *see also Dayton Valley Inv'rs, LLC v. Union Pac. R. Co.*, No. 2:08-CV-00127, 2010 WL 3829219, at *2 (D. Nev. Sept. 24, 2010) (finding that defendant did not comply with its Rule 26 obligations when there was "no indication" that the information in its supplemental disclosures "was not reasonably available" at the time the initial disclosures were due); *Winfield v. Wal-Mart Stores, Inc.*, 214CV01034, 2016 WL 1169450, at *3 (D. Nev. Mar. 22, 2016) ("[F]uture expert analysis does not relieve a plaintiff of the obligation to inquire and report the information reasonably available to her at the initial disclosure deadline.").

The fact that Defendants apparently have no defense to Plaintiffs' claims does not relieve them of their obligation to identify individuals and documents that are relevant to Plaintiffs' claims. In the parties' February 14 meet and confer, Defendants claimed that they cannot articulate any of their defenses because they are waiting for the implementation plan to be released on February 21. (Barsanti Decl., ¶ 4.) Yet Plaintiffs have alleged claims arising from the President's policy decision to ban transgender individuals from serving in the military "in any capacity," first announced via Twitter on July 26, 2017, and formalized as a memorandum to the Secretary of Defense and Secretary of Homeland Security on August 25, 2017. (Barsanti Decl., ¶ 5.) There is no conceivable justification for Defendants' failure to identity witnesses and documents related to the formation of that policy now. Nor is there any justification for Defendants not to disclose evidence presently known pertinent to the purported ongoing "study" Defendants claim to be conducting, such as the individuals who are involved in it, any documents on which those individuals have relied or intend to rely, and any policy recommendations currently being considered based on the study's results to date.

Second, Plaintiffs are prejudiced by Defendants' failure to timely disclose pursuant to Rule 26(a). Defendants' refusal to serve complete and accurate initial disclosures prejudices Plaintiffs' ability to litigate this case. Defendants' obfuscation materially impairs Plaintiffs' ability to investigate the individuals and documents Defendants ultimately choose to disclose. *See Moore v. Deer Valley Trucking, Inc.*, No. 4:13-CV-00046, 2014 WL 4956170, at *2 (D. Idaho Oct. 2, 2014) ("[O]ne of the obvious purposes of the initial disclosure rule is to provide

each party with enough information to make an informed decision as to whether they want to incur the substantial expense of deposing a disclosed witness or engaging in other types of discovery to determine the specifics of that witness's knowledge about the case."). Moreover, numerous depositions have already been scheduled in the related federal cases. Plaintiffs cannot adequately prepare to participate in those depositions without knowing the materials and information on which Defendants' witnesses would purport to rely.

CONCLUSION

For the foregoing reasons, the Court should issue an order compelling Defendants to make complete initial disclosures consistent with Federal Rule of Civil Procedure 26(a)(1) within three business days of the issuance of an order granting this Motion.

Respectfully submitted February 22, 2018.

NEWMAN DU WORS LLP

Derek A. Newman, WSBA #26967
dn@newmanlaw.com
Samantha Everett, WSBA #47533
samantha@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
Tara Borelli, WSBA #36759
tborelli@lambdalegal.org
Camilla B. Taylor (admitted pro hac vice)
Peter C. Renn (admitted pro hac vice)
Natalie Nardecchia (admitted pro hac vice)
Sasha Buchert (admitted pro hac vice)
Kara Ingelhart (admitted pro hac vice)
Carl Charles (admitted pro hac vice)

OUTSERVE-SLDN, INC.
Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP
James F. Hurst, P.C. (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)

Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Ben Tyson (admitted pro hac vice)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on February 22, 2018.

Samantha Everett, WSBA #47533
samantha@newmanlaw.com
Newman Du Wors LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

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DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

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Case No. 2:17-cv-01297-MJP

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' INITIAL DISCLOSURES

NOTE ON MOTION CALENDAR: March 9, 2018

This matter, having come before the Court on Plaintiffs Motion to Compel Defendants' Initial Disclosures, and good cause appearing therefore,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Compel Defendants' Initial Disclosures is hereby GRANTED. Defendants shall serve complete Rule 26 initial disclosures within three business days of this Order.

Dated this ___ day of _____, 2018.

_____
The Honorable Marsha J. Pechman
United States District Court Judge

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2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

Presented by: 

Samantha Everett, WSBA #47533