

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

THE CHRISTIAN MINISTERIAL ALLIANCE,
et al.,

Plaintiffs,

v.

ASA HUTCHINSON, et al.,

Defendants.

Civil Case No. 4:19-cv-402-JM

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO TAKE DEPOSITIONS
AFTER THE CLOSE OF FORMAL DISCOVERY**

Plaintiffs hereby respond to Defendants' motion to take depositions after the close of formal discovery due to purportedly "newly identified fact witnesses."

Plaintiffs are, and always have been, willing to negotiate a reasonable mutual agreement to take post-cutoff depositions and have no objection to the Court permitting a fair and equitable opportunity for both sides to take the depositions of witnesses who may testify at trial while otherwise maintaining the Court's deadlines. However, it is important that the Court's determination be based on accurate facts:

1. Of the three witnesses identified in Defendants' motion, two were known to Defendants for months in that they were referenced in Plaintiffs' export reports filed in May 2021 or included in materials produced by Defendants themselves. Plaintiffs note that Defendants have repeatedly refused to update their deficient Rule 26 disclosures as required by the rules, and have instead taken the position that Plaintiffs should be deemed to be on notice that *any* person named in *any* document produced by *any* party

may be a fact witness. *See* August 3, 2021 Email from J. Merritt to R. Mossman attached as Exhibit A.

2. Plaintiffs have repeatedly attempted to confer with Defendants concerning a mutual exchange of witness lists so that both parties are able to adequately prepare for trial in this matter. Specifically, Plaintiffs have asked Defendants to supplement their initial disclosures or provide a witness list so that Plaintiffs also may take depositions in advance of trial of Defendants' potential fact witnesses, but Defendants have rebuffed those requests. *See* July 12, 2021 Letter from R. Mossman to J. Merritt attached as Exhibit B; August 18, 2021 Letter from N. Merle to J. Merritt attached as Exhibit C. Instead, Defendants have insisted that they will not provide such information until the very last day of discovery, without offering or agreeing to allow Plaintiffs to take depositions after that date of any newly disclosed witness.
3. Today, Plaintiffs requested that Defendants share whether they have additional witnesses that Plaintiffs have not deposed that they intend to rely upon. However, rather than provide that information today so that the parties could reach an agreement with full information, Defendants refused to provide it, insisting once again that they would not share the information until the final day of discovery. Defs. Exhibit 2 (ECF-80-2), Aug. 20, 2021 Email from J. Merritt to R. Mossman.
4. Instead, Defendants preferred to burden the Court with needless motion practice rather than provide information necessary to resolve the dispute one business day before they plan to do so.

Indeed, Plaintiffs agree that no party should be surprised by witness testimony at trial, and only sought to confer with Defendants on a global agreement that would address all outstanding depositions. Defs. Exhibit 2 (ECF 80-2), Aug. 20, 2021 Email from R. Mossman to J. Merritt.

Accordingly, Plaintiffs request that, should the Court be willing to grant Defendants' motion, it provide the same opportunity to Plaintiffs to take a limited number of post-cutoff depositions of any fact witness identified by Defendants in any remaining discovery responses or disclosures. Alternatively, Plaintiffs request that the Court bar Defendants from offering any testimony by or through a witness they have not identified and allowed Plaintiffs an opportunity to depose during the discovery period.

Dated: August 20, 2021

Respectfully submitted,

Natasha Merle
Kristen Johnson
Victoria Wenger
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
Phone: (212) 965-2200
Fax: (212) 226-7592
nmerle@naacpldf.org
kjohnson@naacpldf.org
vwenger@naacpldf.org

Philip Urofsky
Rachel Mossman
SHEARMAN & STERLING LLP
401 9th Street, NW, Suite 800
Washington, DC 20004
Phone: (202) 508-8000
Fax: (202) 508-8100
philip.urofsky@shearman.com
rachel.mossman@shearman.com

Arkie Byrd
MAYS, BYRD & ASSOCIATES, PA.
212 Center Street
Suite 700
Little Rock, AR 72201
Phone: (501) 372-6303
Fax: (501) 399-9280
abyrd@maysbyrdlaw.com

Counsel for Plaintiffs

Exhibit A

From: Natasha Merle <nmerle@naacpldf.org>
Sent: Wednesday, August 18, 2021 5:11 PM
To: Jennifer Merritt; Rachel Mossman; Keisha James; Vincent Wagner; Toni Hamp; Asher Steinberg; Michael Mosley
Cc: Philip Urofsky; Jonathon Greenblatt; Nina Sheth; Alicia Bello; Arkie Byrd; Kristen A. Johnson; Neil R. Lieberman; Eileen Monaghan DeLucia; Victoria Wenger; Kaydene Grinnell; Demian Alexander Ordway
Subject: RE: CMA, et al. v. John Thurston, et al., Case No. 4:19-cv-0402
Attachments: 2021.08.18 N.Merle to Defendants .pdf

Jennifer,

Please see attached correspondence from Plaintiffs.

Best,
Natasha

[Natasha Merle](#)

■ 646.630.5362 (c) ■ 212.965.2234 (o) ■ nmerle@naacpldf.org

From: Jennifer Merritt <jennifer.merritt@arkansasag.gov>
Sent: Tuesday, August 3, 2021 3:04 PM
To: Rachel Mossman <Rachel.Mossman@Shearman.com>; Keisha James <keisha.james@shearman.com>; Vincent Wagner <vincent.wagner@arkansasag.gov>; Toni Hamp <toni.hamp@arkansasag.gov>; Asher Steinberg <asher.steinberg@arkansasag.gov>; Michael Mosley <michael.mosley@arkansasag.gov>
Cc: Philip Urofsky <Philip.Urofsky@shearman.com>; Jonathon Greenblatt <greenblatt@ilawjg.com>; Nina Sheth <Nina.Sheth@Shearman.com>; Alicia Bello <Alicia.Bello@Shearman.com>; Arkie Byrd <abyrd@maysbyrdlaw.com>; Natasha Merle <nmerle@naacpldf.org>; Kristen A. Johnson <kjohnson@naacpldf.org>; Neil R. Lieberman <nlieberman@hsgllp.com>; Eileen Monaghan DeLucia <edelucia@hsgllp.com>
Subject: RE: CMA, et al. v. John Thurston, et al., Case No. 4:19-cv-0402

[Caution: EXTERNAL EMAIL]

Rachel,

Plaintiffs have propounded interrogatories upon each of the defendants requesting the identity of trial witnesses, the responses to which are not due until August 23. Defendants will respond to plaintiffs' pending interrogatories within the time provided by the Federal Rules of Civil Procedure and the Court's scheduling orders. Defendants do not understand Plaintiffs' position regarding the official-capacity defendants' depositions. None of those officials has been identified as a person with relevant knowledge in this case, and each of their 30(b)(6) designees has already been deposed. Defendants reserve all rights pursuant to Fed. R. Civ. P. 30(a)(2)(A)(i)-(ii).

Thanks,
Jennifer

Jennifer L. Merritt
Senior Assistant Attorney General
Office of Arkansas Attorney General Leslie Rutledge

From: Rachel Mossman <Rachel.Mossman@Shearman.com>

Sent: Friday, July 30, 2021 1:54 PM

To: Jennifer Merritt <jennifer.merritt@arkansasag.gov>; Keisha James <Keisha.James@Shearman.com>; Vincent Wagner <vincent.wagner@arkansasag.gov>; Toni Hamp <toni.hamp@arkansasag.gov>; Asher Steinberg <asher.steinberg@arkansasag.gov>; Michael Mosley <michael.mosley@arkansasag.gov>

Cc: Philip Urofsky <Philip.Urofsky@Shearman.com>; Jonathon Greenblatt <greenblatt@ilawjg.com>; Nina Sheth <Nina.Sheth@Shearman.com>; Alicia Bello <Alicia.Bello@Shearman.com>; Arkie Byrd <abyrd@maysbyrdlaw.com>; Natasha Merle <nmerle@naacpldf.org>; Kristen A. Johnson <kjohnson@naacpldf.org>; Neil R. Lieberman <nlieberman@hsgllp.com>; Eileen Monaghan DeLucia <edelucia@hsgllp.com>

Subject: RE: CMA, et al. v. John Thurston, et al., Case No. 4:19-cv-0402

EXTERNAL EMAIL

Thanks Jennifer. Please do let us know as soon as you can next week.

Yours truly,
Rachel

From: Jennifer Merritt <jennifer.merritt@arkansasag.gov>

Sent: Thursday, July 29, 2021 8:50 AM

To: Rachel Mossman <Rachel.Mossman@Shearman.com>; Keisha James <Keisha.James@Shearman.com>; Vincent Wagner <vincent.wagner@arkansasag.gov>; Toni Hamp <toni.hamp@arkansasag.gov>; Asher Steinberg <asher.steinberg@arkansasag.gov>; Michael Mosley <michael.mosley@arkansasag.gov>

Cc: Philip Urofsky <Philip.Urofsky@Shearman.com>; Jonathon Greenblatt <greenblatt@ilawjg.com>; Nina Sheth <Nina.Sheth@Shearman.com>; Alicia Bello <Alicia.Bello@Shearman.com>; Arkie Byrd <abyrd@maysbyrdlaw.com>; Natasha Merle <nmerle@naacpldf.org>; Kristen A. Johnson <kjohnson@naacpldf.org>; Neil R. Lieberman <nlieberman@hsgllp.com>; Eileen Monaghan DeLucia <edelucia@hsgllp.com>

Subject: RE: CMA, et al. v. John Thurston, et al., Case No. 4:19-cv-0402

Good morning, Rachel,

I am out of the office this week in depositions in another matter. I will be back in the office next week and will get with my team and circle back on this.

Thanks,
Jennifer

Jennifer L. Merritt

Senior Assistant Attorney General

Office of Arkansas Attorney General Leslie Rutledge

From: Rachel Mossman <Rachel.Mossman@Shearman.com>

Sent: Monday, July 26, 2021 12:53 PM

To: Jennifer Merritt <jennifer.merritt@arkansasag.gov>; Keisha James <Keisha.James@Shearman.com>; Vincent Wagner <vincent.wagner@arkansasag.gov>; Toni Hamp <toni.hamp@arkansasag.gov>; Asher Steinberg <asher.steinberg@arkansasag.gov>; Michael Mosley <michael.mosley@arkansasag.gov>

Cc: Philip Urofsky <Philip.Urofsky@Shearman.com>; Jonathon Greenblatt <greenblatt@ilawjg.com>; Nina Sheth <Nina.Sheth@Shearman.com>; Alicia Bello <Alicia.Bello@Shearman.com>; Arkie Byrd <abyrd@maysbyrdlaw.com>; Natasha Merle <nmerle@naacpldf.org>; Kristen A. Johnson <kjohnson@naacpldf.org>; Neil R. Lieberman

<nlieberman@hsgllp.com>; Eileen Monaghan DeLucia <edelucia@hsgllp.com>

Subject: RE: CMA, et al. v. John Thurston, et al., Case No. 4:19-cv-0402

EXTERNAL EMAIL

Jennifer –

We disagree with Defendants' position on the disclosures, and continue to believe that Defendants have an ongoing duty to supplement incomplete disclosures with any persons or documents upon which they intend to rely to support their defenses.

Defendants seem to suggest that supplementing their disclosures is not required as Plaintiffs are on notice that any person who appears in discovery productions may be called on to testify in support of Defendants' defenses. To avoid surprise at trial, then, Plaintiffs would need to depose many more individuals. Plaintiffs believe this would be inefficient and is in neither party's interest. Defendants' position would require the depositions of, at a minimum, Governor Hutchinson, Attorney General Rutledge, and Secretary Thurston themselves. Plaintiffs understand that though these elected officials, and others, appear in the discovery, they may not testify at trial and their depositions may be unnecessary. However, without more information from Defendants, Plaintiffs may be required to notice the depositions of these officials to avoid unfair surprise.

Plaintiffs simply wish to ensure that the parties have an opportunity to depose any witnesses that may be called at trial. As Plaintiffs noted in their responses to Defendants' requests for production and interrogatories on July 12, we propose the parties agree on a date to exchange trial witness lists that affords both parties time to depose any witnesses who may testify at trial, and would propose that we do so no later than 5 PM CT on July 30 to provide ample time to take any necessary additional depositions before the August 23, 2021 close of discovery.

Please let us know if Defendants will agree to such an exchange of witness lists by Wednesday so that Plaintiffs may similarly be prepared to exchange.

Yours truly,
Rachel

From: Jennifer Merritt <jennifer.merritt@arkansasag.gov>

Sent: Friday, July 16, 2021 6:17 PM

To: Keisha James <Keisha.James@Shearman.com>; Vincent Wagner <vincent.wagner@arkansasag.gov>; Toni Hamp <toni.hamp@arkansasag.gov>; Asher Steinberg <asher.steinberg@arkansasag.gov>; Michael Mosley <michael.mosley@arkansasag.gov>

Cc: Philip Urofsky <Philip.Urofsky@Shearman.com>; Jonathon Greenblatt <greenblatt@ilawjg.com>; Rachel Mossman <Rachel.Mossman@Shearman.com>; Nina Sheth <Nina.Sheth@Shearman.com>; Alicia Bello <Alicia.Bello@Shearman.com>; Arkie Byrd <abyrd@maysbyrdlaw.com>; Natasha Merle <nmerle@naacpldf.org>; Kristen A. Johnson <kjohnson@naacpldf.org>; Neil R. Lieberman <nlieberman@hsgllp.com>; Eileen Monaghan DeLucia <edelucia@hsgllp.com>

Subject: RE: CMA, et al. v. John Thurston, et al., Case No. 4:19-cv-0402

Keisha and Rachel:

Thank you for reaching out regarding the Defendants' Initial Disclosures. As you know, Rule 26(e)(1)(A) only requires supplementation of initial disclosures if two circumstances exist: (1) the party who made the disclosure learns that in some material respect the disclosure is incomplete or incorrect, and (2) the additional or corrective information has not otherwise been made known to the other party during the discovery process or in writing.

In this matter, the names of individuals likely to have discoverable information that the defendants may use to support their claims and defenses, along with the subjects of that information, have already been disclosed to plaintiffs during

the course of exhaustive discovery. Therefore, there is no duty to supplement the disclosures under Fed. R. Civ. P. 26(e)(1)(A).

Thanks,
Jennifer

Jennifer L. Merritt

Senior Assistant Attorney General
Office of Arkansas Attorney General Leslie Rutledge

From: Keisha James <Keisha.James@Shearman.com>

Sent: Monday, July 12, 2021 7:07 PM

To: Jennifer Merritt <jennifer.merritt@arkansasag.gov>; Vincent Wagner <vincent.wagner@arkansasag.gov>; Toni Hamp <toni.hamp@arkansasag.gov>; Asher Steinberg <asher.steinberg@arkansasag.gov>; Michael Mosley <michael.mosley@arkansasag.gov>

Cc: Philip Urofsky <Philip.Urofsky@Shearman.com>; Jonathon Greenblatt <greenblatt@ilawjg.com>; Rachel Mossman <Rachel.Mossman@Shearman.com>; Nina Sheth <Nina.Sheth@Shearman.com>; Alicia Bello <Alicia.Bello@Shearman.com>; Arkie Byrd <abyrd@maysbyrdlaw.com>; Natasha Merle <nmerle@naacpldf.org>; Kristen A. Johnson <kjohnson@naacpldf.org>; Neil R. Lieberman <nlieberman@hsgllp.com>; Eileen Monaghan DeLucia <edelucia@hsgllp.com>

Subject: [EXTERNAL]CMA, et al. v. John Thurston, et al., Case No. 4:19-cv-0402

CAUTION: This email originated from outside of the organization. Do not click links, open attachments, or respond unless you recognize the sender and know the content is safe.

Jennifer,

Please see attached correspondence from Plaintiffs.

Best,
Keisha

Keisha James

Associate

D +1.202.508.8170
M +1.202.823.5669
Shearman & Sterling LLP
401 9th Street, NW
Washington, D.C. 20004-2128
Keisha.James@Shearman.com
Pronouns: she/her/hers

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Exhibit B

SHEARMAN & STERLING LLP

401 9th Street, NW
Washington, D.C. 20004-2128
+1.202.508.8000

Rachel E. Mossman
Shearman & Sterling, LLP
401 9th Street NW
Washington, D.C. 20004

Rachel.Mossman@shearman.com
202.508.8004

PRIVILEGED & CONFIDENTIAL

Via Email (w/o enclosure)

July 12, 2021

Jennifer Merritt
Senior Assistant Attorney General
Office of Arkansas Attorney General Leslie Rutledge
323 Center Street, Suite 200
Little Rock, Arkansas 72201

Re: Christian Ministerial Alliance, et al. v. John Thurston, et al., Case No. 4:19-cv-0402

Dear Jennifer,

We write on behalf of Plaintiffs to request Defendants supplement their initial disclosures pursuant to their obligations under the Federal Rules of Civil Procedure with sufficient time for Plaintiffs to depose any newly identified witnesses before the August 23, 2021 close of fact discovery, and no later than July 16, 2021.

As Defendants are aware, we are fast approaching the end of discovery in this matter. Plaintiffs are now, and consistently have been, diligently pursuing discovery.

Defendants provided their initial disclosures on March 23, 2020. Plaintiffs responded on March 26, 2020 identifying deficiencies in Defendants' initial disclosures, including failure to identify individuals with discoverable information and failure to provide subject areas of information that any identified individuals are likely to possess. As you know, Federal Rule of Civil Procedure 26(a)(1)(A)(i) clearly requires the disclosure of such information. Yet Defendants failed to meaningfully respond to Plaintiffs' March 26 letter, prompting Plaintiffs to request supplemental disclosure twice more, on June 16, 2020 and again on August 21, 2020.

In each of the three letters, Plaintiffs have reiterated that Federal Rule of Civil Procedure 26(a)(1)(A)(i) requires parties to disclose “the name” and contact information for each individual likely to have discoverable information. Federal Rule of Civil Procedure 26(a)(1)(A)(ii) similarly requires Defendants disclose documents or electronically stored information used to support their defense. Despite these requests, Defendants have failed to identify a single name or document used to support their defense beyond “election data.” Instead, Defendants state generically that “their agents and employees may have information regarding the allegations” and have responded to further inquiries by identifying two people, Peyton Murphy and Shelby Johnson, saying they have nothing left to add.

Nearly a year has passed since Defendants made these representations, and the parties have engaged in substantial discovery in the meantime. If Defendants have identified any additional documents or individuals with information that they may use to support their defense, Defendants should have disclosed that information already. Defendants’ failure to do so has prejudiced Plaintiffs in their ability to prepare their case.

Today, Plaintiffs write to urge Defendants to comply with their obligations under Federal Rule of Civil Procedure 26(e)(1)(A), which requires parties supplement their initial disclosures in a timely manner if they learn they are incomplete or incorrect. With 45 days remaining in discovery, Plaintiffs will face serious prejudice if Defendants do not provide (1) the name and contact information of individuals likely to have discoverable information; (2) the subject of that information; and (3) a copy of all documents or electronically stored information used to support the defense of this matter this week.

Yours truly,

/s/ Rachel Mossman

Rachel E. Mossman

Exhibit C

National Office
40 Rector Street, 5th Floor
New York, NY 10006

T 212.965.2200
F 212.226.7592

www.naacpldf.org



Washington, D.C. Office
700 14th Street N.W., Suite 600
Washington, D.C. 20005

T 202.682.1300
F 202.682.1312

Via Email

August 18, 2021

Jennifer Merritt
Senior Assistant Attorney General Office of
Arkansas Attorney General Leslie Rutledge
323 Center Street, Suite 200
Little Rock, Arkansas 72201

Counsel,

This letter responds to your July 16, 2021 email stating that Defendants have “no duty to supplement the disclosures under Fed. R. Civ. P. 26(e)(1)(A),” as well as your August 3, 2021 email refusing a mutual exchange of witness lists prior to the last day of discovery. Respectfully, Defendants’ initial and supplemental disclosures have been insufficient and do not comply with Defendants’ duty to make known to Plaintiffs all individuals with relevant information.

“To satisfy the ‘made known’ requirement [under Fed. R. Civ. P. 26], a party’s collateral disclosure of the information that would normally be contained in a supplemental discovery response must [be] in such a form and of such specificity as to be the functional equivalent of a supplemental discovery response; merely pointing to places in the discovery where the information was mentioned in passing is not sufficient.” *L-3 Communications Corp. v. Jaxon Eng’g & Maint. Inc.*, 125 F. Supp.3d 1155, 1169 (D. Colo. 2015). Although Rule 26 recognizes that supplementation of initial disclosures can take various forms, alternative methods for supplementation must still be made “clear and unambiguous.” Disclosures that are “not facially apparent and require the drawing of further ‘inferences’ are insufficient to meet the requirements of Rule 26.” *Pfizer Inc. v. Teva Pharms. USA, Inc.*, No. CIV.A. 04-754 (JCL), 2006 WL 2938723, at *3 (D.N.J. Oct. 13, 2006).

First, Defendants’ initial disclosures on March 23, 2020 were deficient to the extent they pointed broadly to, among others, individuals identified by Plaintiffs and “Defendants and their agents and employees [who] may have information regarding the allegations in Plaintiffs’ operative complaint and the defenses, denials, and affirmative defenses raised in Defendants’ Answer.” *See Rogers v. Bank of America*, No. 13-1333-CM-TJJ, 2014 WL 4681031, at *6 (D. Kan. Sept. 19, 2014) (finding that generic identification of individuals with terms such as “corporate representative” or “records custodian” that could apply to numerous employees is insufficient to satisfy initial disclosure obligations); *Lyon v. Bankers Life & Cas. Co.*, No. 09-5070-JLV, 2011 WL 124629, at *6 (D.S.D. Jan. 14, 2011) (“It is not a good faith response to the obligation of a party under [Rule 26 (a)] to simply identify those ‘individuals’ as corporate representatives, with no reference to the subject areas of their testimony...as doing so would defeat the automatic disclosure intent of [Rule 26(a)] and impair the ability of the other party to prepare appropriate interrogatories to develop testimony of those potential witnesses.”).

Defendants' supplemental disclosures were also inadequate. On August 28, 2020, Defendants supplemented their disclosures with the names of two individuals as having relevant information: (1) Peyton Murphy, as the "custodian of the election data that the Defendants produced previously and can authenticate and explain that data. He also has knowledge regarding the Secretary's recordkeeping practices and receipt of election data from the counties," and (2) Shelby Johnson, who has discoverable information regarding the GIS data Plaintiffs subpoenaed. Defendants have in essence disclosed two custodians of record and not a single individual who may have substantive information about Defendants' claims and defenses. Limiting your disclosures to such custodians of records is insufficient. *Rogers v. Bank of America*, No. 13-1333-CM-TJJ, 2014 WL 4681031, at *1 (D. Kan. Sept. 19, 2014).

Second, your July 16, 2021 email is not a proper supplement of Defendants' initial disclosures under the rules as it does not make known individuals who Defendants believe have relevant information. Defendants cursory reference to the discovery, specifically that the "names of individuals likely to have discoverable information . . . have already been disclosed to plaintiffs during the course of exhaustive discovery", does not satisfy Defendants' duty. Pointing broadly to documents produced and testimony taken in discovery does not provide Plaintiffs with the information necessary to develop the record and prepare for trial. *See Delany v. Ashcraft*, No. Civ. 05-6045, 2006 WL 2080023, at *3 (W.D. Ark. July 25, 2006) ("It is simply not sufficient for Respondents to use a blanket response such as 'any persons identified during discovery' or 'all relevant admissible documents furnished during discovery.'").

Indeed, Defendants have failed to even point to specific documents or testimony containing the information. Instead, you suggest Plaintiffs review at least 4,000 pages of documents and multiple depositions and guess who Defendants consider to have relevant information. Rule 26 disclosures, both initial and supplemental, should clearly reflect who the disclosing party believes has relevant information, which Defendants do not do here. *See Jama v. City and County of Denver*, 304 F.R.D. 289, 297 (D. Colo. 2014) ("[B]ecause the purpose of the disclosure under Rule 26(a) was to inform Denver of which individuals *the Plaintiffs* believed had pertinent information, what the information was and how to contact the individual, Denver's identification of individuals in response to discovery requests did not relieve the Plaintiffs of the obligation of disclosing the individuals *they thought* had useful information.") (emphasis added).

Defendants' positions with regard to discovery have undermined Plaintiffs' ability to discern who Defendants consider to have relevant information. When Plaintiffs raised the potential depositions of Governor Hutchinson, Attorney General Rutledge, and Secretary Thurston, Defendants responded that "[n]one of those officials has [sic] been identified as a person with knowledge in this case . . ." Yet, those officials appear numerous times in the discovery produced. Moreover, as you surely remember, Defendants refused Plaintiffs' request for the parties to be allowed more than 10 depositions in this case. Thus, Defendants' refusal to provide disclosures that would allow us to narrow the dozens of people noted in the discovery has placed Plaintiffs at a disadvantage. Plaintiffs would either have to request a substantial number of additional depositions or hope we correctly guessed who would testify at trial. *Sender v. Mann*, 225 F.R.D 645, 654 (D. Colo. 2004). Rule 26 supplementation requirement requires greater precision from the Defendants than this.

Given Defendants' failure to supplement their disclosures as required, Plaintiffs reserve all rights.

This includes the right to take the deposition of individuals who may later surface as having relevant information and/or moving to strike their testimony entirely.

Sincerely,

A handwritten signature in blue ink that reads "Natashe Merl". The signature is written in a cursive style with a large initial 'N' and a long, sweeping underline.