IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, et al., Defendants.	Civil Action No. 1:13-CV-658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Civil Action No. 1:13-CV-660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Civil Action No. 1:13-CV-861

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION REGARDING ORDER ON ELECTRONICALLY STORED INFORMATION

The United States respectfully submits the following response in opposition to Defendants' Brief in Support of Motion Regarding Order on Electronically Stored Documents filed on January 2, 2014 (ECF No. 34, Case No. 1:13-CV-861).

On November 19, 2013, the United States circulated to all parties a proposed consent order regarding discovery of documents and electronically stored information ("ESI").[1] Defendants circulated edits and comments to the draft proposed ESI order on December 17, 2013. On December 18 and 19, the parties met and conferred to discuss all proposed edits, but despite diligent efforts, were unable to reach full agreement on all provisions of the ESI order. On December 19, 2013, all Plaintiffs filed a joint motion for entry of an order regarding discovery of documents and ESI together with a proposed consent ESI order (ECF No. 32, Case No. 1:13-CV-861) and Defendants filed a motion seeking entry of an ESI order (ECF No. 33, Case No. 1:13-CV-861), both of which set forth the parties' differing proposals with respect to the following three provisions:

(1) Defendants proposed paragraph 9A, which provides that documents created after August 12, 2013, are presumed to be unresponsive and not relevant. All Plaintiffs oppose inclusion of paragraph 9A;

[1] The parties reached an agreement on a consent protective order, a revised version of which was entered by the Court on January 3, 2014. *See* ECF No. 36, Case No. 1:13-CV-861.

(2) Paragraph 33, which sets forth certain communications that are exempt from the requirement of a privilege log. Plaintiffs and Defendants have proposed differing versions of paragraph 33; and

(3) Paragraph 40, which states that each party shall bear the costs of producing its own documents. All Plaintiffs agree to inclusion of paragraph 40, and Defendants are opposed to its inclusion.

ARGUMENT

A. The United States Opposes Inclusion of Defendants' Proposed Paragraph 9A

The United States continues to oppose inclusion of Defendants' proposed paragraph 9A. First, negotiation of a generally-applicable discovery agreement is not the proper forum to litigate questions of relevance under Rule 26 of the Federal Rules of Civil Procedure. "[T]he burden of showing that . . . requested discovery is not relevant to the issues in the case is on the party resisting discovery." *United States v. Duke Energy Corp.*, No. 1:00-CV-1262, 2012 WL 1565228, at *8 (M.D.N.C. Apr. 30, 2012) (quoting *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978)). If Defendants contend any specific discovery request is improper, Defendants may object under Federal Rule of Civil Procedure 34 or move for a protective order under Rule 26(c).

Second, post-enactment discovery relating to HB 589 is relevant to the United States' claims under Section 2 of the Voting Rights Act and therefore falls within the scope of Rule 26. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."). "[D]iscovery

under the Federal Rules of Civil Procedure is broad in scope and freely permitted." *Morris v. Lowe's Home Centers, Inc.*, No. 1:10-CV-388, 2012 WL 5347826, at *3 (M.D.N.C. Oct. 26, 2012) (quoting *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003)) (internal quotation marks and emphasis omitted). The concept of relevance, at the discovery stage, is also broadly defined. *See* Fed. R. Civ. P. 26(b)(1) ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."); *Elkins v. Broome*, No. 1:02-CV-305, 2004 WL 3249257, at *2 (M.D.N.C. Jan. 12, 2004) ("At discovery, relevancy is more properly considered synonymous with 'germane,' as opposed to competency or admissibility."); *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977) (deposition questions were "germane to the subject matter of the pending action and therefore properly within the scope of discovery").

In its Complaint, the United States alleged, among other things, that "HB 589 was enacted with the purpose of denying or abridging the right of African Americans to vote on account of race or color," Compl. ¶ 80 (ECF No.1, Case No. 1:13-CV-861), and that implementation of HB 589 "will have the result of denying or abridging the right of African Americans to participate equally in the political process," Compl. ¶ 68, both in violation of the Voting Rights Act, *see* 42 U.S.C. § 1973(a). Under the "totality of the circumstances" test, the Court must determine, based on a "searching practical evaluation of the 'past and present' reality, whether the political process is equally open to minority voters." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (internal citation omitted). This

determination requires a fact-intensive "appraisal of the design and impact" of HB 589's challenged provisions. *Id.* Post-enactment communications and information relating to implementation of HB 589 are relevant to this inquiry, particularly to determining the effect of HB 589 on African-American voters' ability to participate equally in the political process.

The Court and the parties should have the benefit of all relevant information that develops on the question of whether the provisions of HB 589 will result in unequal access to the political process. This will include information on implementation procedures for the various challenged provisions of HB 589, along with the most current voter registration and election data, all of which will develop after the date on which HB 589 became law, and must be subject to discovery in this case. It is the routine practice in Voting Rights Act cases to evaluate the legal issues in light of the most recent available information. *See, e.g.*, *United States v. Osceola Cnty.*, 475 F. Supp. 2d 1220, 1224-25, 1232-33 (M.D. Fla. 2006) (considering data from elections occurring after the County adopted the challenged at-large election system); *Dillard v. Baldwin Cnty. Bd. of Elections*, 686 F. Supp. 1459, 1467-68 (M.D. Ala. 1988) (to prove discriminatory intent under Section 2, plaintiffs must show that racial discrimination was a motivating factor "behind the enactment *or maintenance*" of a challenged electoral system and that "the system *continues today* to have some adverse racial impact") (emphasis added); *cf. City of Port Arthur v. United States*, 517 F. Supp. 987, 1014 (D.D.C. 1981) (three-judge court) (explaining that "we attempt to respond to the current situation" by looking at the "most current available" data), *aff'd*, 459 U.S. 159 (1982).

B. The United States is Amenable to the Inclusion of Defendants' Proposed Paragraph 33(a)-(d)

All parties agree that, for purposes of this litigation, any document exchanged solely among counsel, staff working directly on behalf of counsel, or supervisory staff of the United States Department of Justice or the Office of the North Carolina Attorney General, is privileged. Accordingly, for ease of administration, avoidance of burden, and convenience to the parties, Plaintiffs' proposed paragraph 33 relieves the parties' obligation to produce a privilege log for such documents. Defendants' proposed paragraph 33(a)-(d) is consistent with Plaintiffs' proposed paragraph 33; therefore, the United States is amenable to inclusion of Defendants' proposed paragraph 33(a)-(d) in the ESI order. [2]

[2] Defendants' proposed Paragraph 33 states:

33. The parties shall provide sufficient information in privilege logs to establish the elements of each asserted privilege. *See, e.g., Kelly v. United States*, 281 F.R.D. 270, 277 (E.D.N.C. 2012). However, for documents created in connection with this litigation, the parties need not produce a privilege log for any privileged or protected documents that were created or exchanged by:

(a) attorneys or staff of the United States Department of Justice;
(b) attorneys or staff of the United States Department of Justice and other federal agencies;
(c) attorneys or staff of the Office of the North Carolina Attorney General, its co-counsel Ogletree Deakins and its staff, counsel for the Speaker of the North Carolina House of Representatives ("Speaker"), counsel for the President Pro Tem of the North Carolina Senate ("President Pro Tem"), and counsel for defendant McCrory and his staff; and
(d) counsel for the plaintiffs and their staff and co-counsel and their staffs.

C. The United States Opposes Inclusion of Defendants' Proposed Paragraphs 33A(a)-(b) and 33B

The language of Defendants' next proposed paragraph, 33A(a)-(b), is partly duplicative of the Defendants' proposed paragraph 33(a)-(d). To the extent that 33A(a)-(b) is not duplicative, it is overbroad, and the United States therefore opposes its inclusion in the ESI order. Defendants contend that paragraph 33A covers "documents exchanged between counsel for the parties and their respective clients once the litigation was initiated (August 12, 2013)." Defendants' Brief at 7. By its terms, however, proposed paragraph 33A(a) covers documents exchanged between counsel and "any of the defendants in the case including the State of North Carolina and *all of its agencies and officials*." (emphasis added). This language encompasses an unknown number of individuals and entities with whom defense counsel have not specifically asserted an attorney-client relationship. Indeed, apart from the named defendants, Defendants' counsel have only asserted the existence of an attorney-client relationship between defense counsel and the Speaker of the North Carolina House of Representatives ("Speaker"), the President Pro Tempore of the North Carolina Senate ("President Pro Tempore"), and any legislator who seeks to be represented by the State. *See In re Grand Jury Subpoena*, 341 F.3d 331, 335 (4th Cir. 2003) ("The proponent [of the attorney-client privilege] must establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived.") (quoting *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982)).

In the interest of resolving the dispute regarding Defendants' proposed paragraph 33A(a)-(b), the United States proposes the following alternative language, which limits the scope of the privilege log exemption to documents exchanged between counsel and *named* parties:

> 33A. The parties agree that for documents created after August 12, 2013, in connection with this litigation, the parties need not produce a privilege log for any privileged or protected documents that were exchanged between:
>
> (a) attorneys or staff of the Office of the Attorney General, its co-counsel Ogletree Deakins, or counsel for defendant McCrory, and any named defendant individual, organization, or agency in this case.[3]
>
> (b) counsel for the plaintiffs (including the United States Department of Justice) and their staff, plaintiffs' co-counsel, and their staffs, and any named plaintiff individual, organization, or agency.[4]

The United States also opposes the inclusion of Defendants' proposed paragraph 33B, which states:

> No privilege log shall be required for any documents created prior to or after August 12, 2013, in the possession, custody, or control of members of the General Assembly and their staff or legislative employees that are

[3] The following named Defendants are subject to this provision: Governor Patrick McCrory, Kim Westbrook Strach, Joshua B. Howard, Rhonda K. Amoroso, Joshua D. Malcolm, Paul J. Foley, Maja Kricker, and the North Carolina State Board of Elections.

[4] The following named Plaintiffs are subject to this provision: North Carolina State Conference of the NAACP, Emmanuel Baptist Church, New Oxley Hill Baptist Church, Bethel A. Baptist Church, Covenant Presbyterian Church, Clinton Tabernacle Ame Zion Church, Barbee's Chapel Missionary Baptist Church, Inc., Rosanell Eaton, Armenta Eaton, Carolyn Coleman, Baheeyah Madany, Jocelyn Ferguson-Kelly, Faith Jackson, Mary Perry, League of Women Voters of North Carolina, A. Philip Randolph Institute, Unifour Onestop Collaborative, Common Cause North Carolina, Goldie Wells, Kay Brandon, Octavia Rainey, Sara Stohler, and Hugh Stohler.

> covered by legislative privilege, legislative immunity, or legislative confidentiality.

Defendants contend that all legislative communications are protected under the doctrine of legislative immunity or legislative privilege, *see* Defendants' Brief at 13, and therefore, all such communications should be exempt from Federal Rule of Civil Procedure 26's requirement that a privilege log accompany privilege objections to discovery requests, *see* Fed. R. Civ. P. 26(b)(5)(A).

The United States disputes the overly broad description of legislative privilege that Defendants set out in their brief. *See* Defendants' Brief at 11-14. Because negotiation of a generally applicable discovery agreement, such as an ESI order, is not the appropriate forum to resolve such discovery disputes, and in light of the Court's request for brevity, this response brief does not further address the scope of any legislative privilege that members of the General Assembly may be entitled to assert in this case. At the appropriate point, the United States will contest the Defendants' sweeping view of legislative privilege. The United States will welcome the opportunity to fully set forth its position in substantive briefing on any motion for a protective order or motion to compel relating to particular discovery requests that may be made in this matter.

Putting aside the substantive merits of Defendants' position regarding legislative privilege, the inclusion of Defendants' proposed paragraph 33B in the ESI order is inappropriate for three reasons. First, Defendants have not stated that they represent any specific member of the General Assembly other than the Speaker and the President Pro Tempore, let alone established the existence of an attorney-client relationship between

defense counsel and any specific member of the General Assembly. Individual legislators may choose for the State to represent them in the future, but to date, Defendants have not identified any individual legislators who have retained defense counsel to represent them in connection to this litigation.[5]

Second, a blanket assertion of legislative privilege over all legislative communications and documents in the custody or control of all members of the General Assembly, as proposed by Defendants, is improper. The legislative privilege "is a personal one," to be "waived or asserted by each individual legislator." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992); *see also Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996); *A Helping Hand, LLC v. Baltimore Cnty.*, 295 F.Supp.2d 585, 590 (D. Md. 2003) (finding that a legislator must assert legislative privilege on his or her own behalf). Having failed to establish essential prerequisites to an assertion of privilege, Defendants cannot substantiate their request for inclusion of paragraph 33B.

Finally, by proposing inclusion of paragraph 33B in the parties' ESI order—a discovery agreement that is intended to set out the methods and format of production of documents and ESI—and raising disputed privilege issues in this context, Defendants are attempting to bypass their burdens under the rules governing discovery, including Rules

[5] During the parties' Rule 26(f) conferences on November 15 and 25, 2013, and in subsequent communications between the parties, defense counsel postponed responding to Plaintiffs' inquiries regarding whether they represented any members of the General Assembly. Not until the parties' conference calls on December 17 and 18, 2013, did defense counsel state that they represent the Speaker, the President Pro Tempore, and any individual legislator who explicitly requests representation.

26 and 34. *See* Fed. R. Civ. P. 26 and 34; *Westchester Surplus Lines Ins. Co. v. Clancy & Theys Constr. Co.*, No. 5:12-CV-636, 2013 WL 6058203, at *3 (E.D.N.C. Nov. 15, 2013) ("The party resisting discovery bears the burden of establishing the legitimacy of its objections."); *Kinetic Concepts, Inc. v. Convatec Inc.*, 268 F.R.D. 226, 243 (M.D.N.C. 2010) ("Over the course of more than four decades, district judges and magistrate judges in the Fourth Circuit (including members of this Court) have repeatedly ruled that the party or person resisting discovery . . . bears the burden of persuasion.").

Pursuant to Rule 34, a party asserting any objection to discovery requests "must specify the part [to which it objects] and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2)(C). Further, under Rule 26, when the objection asserted is one of privilege, the party must "expressly make the claim" in response to a particular discovery request and serve with its discovery responses a privilege log in conformance with Rule 26(b)(5)(A). *Westchester*, 2013 WL 6058203, at *3; *Kinetic Concepts*, 268 F.R.D. at 241. Indeed, it is axiomatic that the proponent of a privilege bears the burden of proving that the privilege applies. *See In Re Grand Jury Subpoena*, No. 13-CV-1957, 2013 WL 5630943, at *1 (4th Cir. Oct. 16, 2013); *Byrnes v. Jetnet Corp.*, 111 F.R.D. 68, 71 (M.D.N.C. 1986) ("It is incumbent upon the proponent to specifically and factually support his claim of privilege . . . to satisfy this burden, and an improperly asserted privilege is the equivalent of no privilege at all."). A party cannot simply—like Defendants attempt to do through proposed paragraph 33B—claim a privilege and refuse to provide a privilege log. *See Miller v. Lincoln Fin. Group*, No. 1:10-CV-283, 2011 WL 4595803, at *2 (W.D.N.C. Oct. 3, 2011); *see also, Travelers Indem. Co. v. Allied Tube & Conduit, Corp.*, No. 1:08-

CV-548, 2010 WL 272579, at *1 (W.D.N.C. Jan. 15, 2010) (noting that "some courts have found that [simply claiming privilege and refusing to provide a privilege log] results in waiver of the privilege").

Defendants' conclusory assertion that all "legislative communications" are protected by legislative privilege does not and cannot meet the burden of proving the applicability of the privilege. Accordingly, the United States opposes the inclusion of Defendants' proposed paragraph 33B in the ESI order governing discovery in this case.

D. The United States Opposes Defendants' Proposal to Eliminate Paragraph 40

Defendants propose deleting paragraph 40 of Plaintiffs' proposed ESI order, which states, "Each party shall bear the costs of producing its own documents, things, and ESI." Paragraph 40 conforms with the general presumption under the rules of discovery that "the responding party must bear the expense of complying with discovery requests." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978); *see also Country Vinter of N.C., LLC v. E. & J. Gallo Winery, Inc*., 718 F. 3d 249, 261 (4th Cir. 2013). As noted by Defendants, Rule 26(c) permits a court, upon a finding of "good cause," to issue an order to protect a responding party from "undue burden or expense." *See* Fed. R. Civ. P. 26(c)(1); *Oppenheimer*, 437 U.S. at 358.

Paragraph 40 reflects a baseline agreement that each party will bear its own discovery costs. This provision does not preclude the parties from agreeing to share certain costs nor does it preclude any party from seeking a protective order pursuant to

Rule 26(c)(1). Thus, the United States requests that the Court adopt Plaintiffs' proposed ESI order, which includes paragraph 40.

CONCLUSION

For the reasons set forth above, the United States opposes inclusion of Defendants' proposed paragraphs 9A, 33A(a)-(b), and 33B in the ESI order, as well as Defendants' proposal to eliminate paragraph 40, and respectfully requests that the Court adopt Plaintiffs' proposed version of the ESI order filed on December 19, 2013 (ECF No. 32-1, case No. 1:13-CV-861). In the alternative, the United States is in agreement with Defendants' proposed paragraph 33(a)-(d), and consents to the inclusion of this paragraph in the proposed ESI order, and further, is amenable to the inclusion of a revised version of Defendants' proposed paragraph 33A(a)-(b).

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Respectfully submitted,

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CERTIFICATE OF SERVICE OF DISCOVERY

I hereby certify that on January 8, 2014, I electronically filed the foregoing **United States' Brief in Opposition to Defendants' Motion Regarding Order on Electronically Stored Documents** using the CM/ECF system in case numbers 1:13-CV-861, 1:13-CV-658, and 1:13-CV-660, which will send notification of such filing to all counsel of record.

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