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 Governor of North Carolina, *et al.*, Defendants.	)	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV861

DEFENDANTS' RESPONSE TO
***NAACP* PLAINTIFFS' MOTION IN LIMINE TO**
EXCLUDE DEFENDANTS' UNTIMELY DISCOVERY MATERIALS

STATEMENT OF RELEVANT FACTS

On June 6, 2015, defendants supplemented their prior discovery responses by serving on plaintiffs a report prepared by Kim Westbrook Strach, Executive Director of the North Carolina State Board of Elections ("State Board") concerning mail verification rates for voters utilizing same-day registration ("SDR") during the 2012 election cycle. Although substantially the same data used by Ms. Strach to prepare this report was either available to the public, including plaintiffs, on the State Board's file transfer protocol ("FTP") website[1] and/or had been previously provided to plaintiffs in the course of discovery, defendants provided the data used by Ms. Strach to prepare the report to plaintiffs when defendants served the report on plaintiffs. Although the data used for this report was dated April 17, 2015, the data changed only marginally since the November 4, 2014 snapshot, which was available to plaintiffs. Over 99.98% of the records involved in the calculations in the report remained unchanged when compared to records in the November snapshot. Consequently, a substantially identical report would have been generated using the November 4, 2014 snapshot from SEIMS.

On June 12, 2015, defendants supplemented their prior discovery responses by serving on plaintiffs a declaration by Ms. Strach concerning data on provisional ballots cast during the 2014 general election. Again, substantially the same data used by Ms. Strach to prepare this report was either available to the public, including plaintiffs, on the State Board's file transfer protocol ("FTP") website and/or had been previously provided to plaintiffs in the course of discovery. The one exception to this was that Ms. Strach

---

[1] ftp://alt.ncsbe.gov/

used a "snapshot" of the voter registration table contained in the State Board's database as of March 3, 2015. This "snapshot" had not previously been created. However, data available to plaintiffs either through the State Board's FTP site or that had been provided as discovery responses, including a January 1, 2015, "snapshot" of the voter registration table that was provided to plaintiffs as part of defendants' responses to the *USDOJ* Plaintiffs' Fifth Set of Requests for Production Documents," could be used by plaintiffs to substantially replicate the analysis described in Ms. Strach's June 12, 2015, declaration. In addition, the data used in the analysis described in the declaration, including the March 3, 2015, "snapshot" of the voter registration table, was provided to plaintiffs with the declaration itself.

The *NAACP* plaintiffs' motion also seeks to exclude two other affidavits served on them by defendants: the June 15, 2015, affidavit of Kelly J. Thomas and the June 15, 2015, affidavit of Dr. Janet Thornton. As both of these affidavits relate to claims concerning the photo identification requirement of the legislative act challenged in this action, which claims will not be tried in July 2015, defendants do not intend to introduce those affidavits at trial.[2]

---

[2] The motion also states that "Defendants show no sign of stopping their steady stream of supplemental productions" and seeks to have the Court prohibit "any future untimely productions that Defendants may offer." (Motion at 3 and 6). The *NAACP* plaintiffs offer no support at all for their suggestion that defendants will continue to make supplemental productions.

ARGUMENT

The *NAACP* plaintiffs' motion as to the June 6 Report and the June 12 Declaration, neither of which constitute expert testimony, is predicated almost completely on the assertion that because the Court set March 24, 2015, as the deadline for the close of discovery (*NAACP* D.E. 244 and 255), and because the June 6 Report and the June 12 Declaration were not served until after that date, they must be excluded. The *NAACP* plaintiffs' argument fails to recognize the significance of the March 24, 2015, as well as the continuing obligation of all parties under Rule 26(e)(1) of the Federal Rules of Civil Procedure to supplement disclosures and discovery responses.[3]

The deadline for close of written discovery is a deadline for discovery requests and responses to those requests; it is not a deadline that forecloses further supplementation as may be necessary or appropriate. "The requirement that discovery be completed within a specified time means that adequate provisions must be made for interrogatories and requests for admission to be answered, for documents to be produced, and for depositions to be held within the discovery period." LR26.1(c). The deadline does not also foreclose any further required or appropriate supplementation of disclosures or discovery responses. *See Morris v. Long*, 2012 U.S. Dist. LEXIS 112368, *27 (E.D. Cal. Aug. 8, 2012) (holding supplementation of expert medical testimony was proper "even if it occurred after the close of global discovery").

---

[3] The *NAACP* plaintiffs' position is also squarely contradicted by their own actions, given that on June 9, 2015, they served on defendants the Supplemental Report of Allan Lichtman Regarding Public Assistance Voter Registrations. This supplemental expert report addressed matters not previously addressed in *any* expert report. As with written discovery, the deadline for sur-rebuttal expert reports was March 24, 2015. (*NAACP* D.E. 244)

Here, the June 6 Report and the June 12 Declaration are nothing more than Ms. Strach's summaries and explanations of data that have been available to plaintiffs for months, with the sole caveat that the datasets that Ms. Strach analyzed have a different date of extraction. This will have an insignificant impact, if any impact at all, on Ms. Strach's analysis. Nothing has prevented plaintiffs or their experts from performing exactly the same or similar analyses of the data as those described by Ms. Strach. Indeed, the deposition testimony of Ms. Strach attached to the *NAACP* plaintiffs' motion shows that plaintiffs were well aware that the State Board staff was engaged in but had not completed analysis such as is described in the June 6 Report and the June 12 Declaration.[4]

The June 6 Report and the June 12 Declaration are essentially summaries of data maintained by the State Board as part of its official responsibilities. There is no question that, as Executive Director of the State Board, Ms. Strach could testify, and be cross-examined, at trial concerning data maintained by the State Board, or that she could use a summary to explain or illustrate that data, so long as the summary has been made available to other parties "at a reasonable time and place." *See* Rule 1006 of the Federal Rules of Evidence. Defendants complied with their duty to supplement, as well their

[4] The NAACP plaintiffs, however, mischaracterize Ms. Strach's deposition testimony when they state that "Ms. Strach stated that no further analysis would be forthcoming from the State Board of Elections regarding mail verification data for new registrants in the 2012 election cycle." (Motion at 4) Rather, the deposition testimony attached to the motion shows that Ms. Strach stated she had not, as of the date of the deposition, specifically requested that a report be prepared. (March 24, 2015, Strach dep., p. 202, line 11–p. 203, line 5) As the NAACP plaintiffs acknowledge in their motion, however, defendants made clear at the deposition that further testimony on the topic might be forthcoming. (March 24, 2015, Strach dep., p. 203, lines 12–18)

duty to make the summary available "at a reasonable time," by providing plaintiffs with the substance of such testimony and the content of the summaries when they became available and in advance of trial. The *NAACP* plaintiffs' motion in limine, then, is not well-founded.

The cases cited by the *NAACP* plaintiffs are unavailing to their motion. In *Reaves v. Ragin*, 2011 WL 2579755 (D. Md. June 23, 2011), at issue were a medical log that had clearly been in existence but not discovered during the discovery period and two newly-identified witnesses. In Sou*thern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 593 (4th Cir. 2003), at issue was new expert testimony, while *Bowling v. Hasbro, Inc*., 2007 WL 3274328 (D.R.I. Nov. 5, 2007), involved, as the court described it, "[o]pening the doors of discovery to *new theories* and new evidence at [a] late stage of the proceedings." *Id*. at *6 (emphasis added). While the holding in *Sherwin-Williams* and *Bowling* might be applicable to the Supplemental Report of Allan Lichtman Regarding Public Assistance Voter Registrations served by the NAACP plaintiffs on June 9, 2015, they are not applicable to the June 6 Report and the June 12 Declaration, which describe and summarize data long available to all parties.

Finally, it should be noted that this is a bench trial. Since the judge sits both as trier of fact, the "district court's evidentiary gatekeeping function [is] relaxed." *United States v. Wood*, 741 F.3d 417, 425 (4th Cir. 2013). "There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005). The *NAACP* plaintiffs have not really articulated any specific prejudice to them other than their alleged inability to have their

experts consider the June 6 Report and the June 12 Declaration. Such allegations lose their potency in light of the fact that plaintiffs' experts have long had substantially the same data as is summarized in the June 6 Report and the June 12 Declaration, and given that plaintiffs can cross-examine Ms. Strach about her summaries of the data. But to the extent that there is any danger of prejudice, the Court, as both gatekeeper and trier of fact, can certainly allow evidence in and then consider only the evidence the Court deems proper and worthy of consideration.

CONCLUSION

For the foregoing reasons, the *NAACP* plaintiffs' Motion in Limine to Exclude Defendants' Untimely Discovery Materials should be denied.

This the 7th day of July, 2015.

ROY COOPER
ATTORNEY GENERAL OF NORTH CAROLINA

/s/ Alexander McC. Peters
Alexander McC. Peters
Senior Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov

/s/ Katherine A. Murphy
Katherine A. Murphy
Special Deputy Attorney General
N.C. State Bar No. 26572
kmurphy@ncdodoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
Counsel for Defendants North Carolina and State Board of Election Defendants

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
Phillip J. Strach
N.C. State Bar No. 29456
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Co-counsel for Defendants North Carolina and State Board of Election Defendants.

BOWERS LAW OFFICE LLC

By: /s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.*
Federal Bar #7716
P.O. Box 50549
Columbia, SC 29250
Telephone: (803) 260-4124
E-mail: butch@butchbowers.com
*appearing pursuant to Local Rule 83.1(d)
Counsel for Governor Patrick L. McCrory

By: /s/ Robert C. Stephens
Robert C. Stephens (State Bar #4150)
General Counsel
Office of the Governor of North Carolina
20301 Mail Service Center
Raleigh, North Carolina 27699
Telephone: (919) 814-2027
Facsimile: (919) 733-2120
E-mail: bob.stephens@nc.gov
Counsel for Governor Patrick L. McCrory

CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

***Counsel for United States of America*:**

T. Christian Herren, Jr.
John A. Russ IV
Catherine Meza
David G. Cooper
Spencer R. Fisher
Elizabeth M. Ryan
Jenigh Garrett
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
Room 7254-NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Gill P. Beck
Special Assistant United States Attorney
Office of the United States Attorney
United States Courthouse
100 Otis Street
Asheville, NC 28801

Counsel for NCAAP Plaintiffs:

Penda D. Hair
Edward A. Hailes, Jr.
Denise D. Liberman
Donita Judge
Caitlin Swain
ADVANCEMENT PROJECT
Suite 850
1220 L Street, N.W.
Washington, DC 20005
phair@advancementproject.com

Irving Joyner
P.O. Box 374
Cary, NC 27512
ijoyner@nccu.edu

Adam Stein
TIN FULTON WALKER & OWEN
312 West Franklin Street
Chapel Hill, NC 27516
astein@tinfulton.com

Thomas D. Yannucci
Daniel T. Donovan
Susan M. Davies
K. Winn Allen
Uzoma Nkwonta
Kim Knudson
Anne Dechter
Bridget O'Connor
Jodi Wu
Kim Rancour
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
tyannucci@kirkland.com

Counsel for League of Women Voter Plaintiffs:
Anita S. Earls
Allison J. Riggs
Clare R. Barnett
Southern Coalition for Social Justice
1415 Hwy. 54, Suite 101
Durham, NC 27707
anita@southerncoalition.org

Laughlin McDonald
ACLU Voting Rights Project
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
lmcdonald@aclu.org

Dale Ho
Julie A. Ebenstein
ACLU Voting Rights Project
125 Broad Street
New York, NY 10004
dale.ho@aclu.org

Christopher Brook
ACLU of North Carolina Legal Foundation
PO Box 28004
Raleigh, NC 27611-8004
cbrook@acluofnc.org

***Counsel for the Intervening Plaintiffs*:**
John M. Davaney
jdevaney@perkinscoie.com
Marc E. Elias
melias@perkinscoie.com
Kevin J. Hamilton
khamilton@perkinscoie.com
Elisabeth Frost
efrost@perkinscoie.com
PERKINS COIE, LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960

Edwin M. Speas, Jr.
espeas@poynerspruill.com
John W. O'Hale
johale@poynerspruill.com
Caroline P. Mackie
cmackie@poynerspruill.com
POYNER SPRUILL, LLP
301 Fayetteville St., Suite 1900
Raleigh, NC 27601

This the 7th day of July, 2015.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr

21721221.1

General Information

Court	United States District Court for the Middle District of North Carolina; United States District Court for the Middle District of North Carolina
Federal Nature of Suit	Civil Rights - Voting[441]
Docket Number	1:13-cv-00660

Bloomberg Law®

© 2015 The Bureau of National Affairs, Inc. All Rights Reserved. Terms of Service