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.	Case No. 1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Case No. 1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Case No. 1:13CV861

PLAINTIFFS' MOTION FOR CLARIFICATION OF MARCH 3, 2014 ORDER

Plaintiffs seek the Court's intervention to require the Defendants to actually produce emails and electronic documents — emails and electronic documents of the

Defendants that the Plaintiffs agreed to review in the first instance. Under this burden shifting, the burden is on the Plaintiffs to review and identify responsive documents. After having agreed to this arrangement, which shifts both the burden and cost to the Plaintiffs, the Defendants have sought to further delay production of documents by attempting to interpret this Court's Order — an agreed upon proposal submitted by the parties — in a fashion that further delays the production of responsive documents. Accordingly, the Plaintiffs seek the Court's expedited assistance.

As a result of a dispute that has arisen with respect to the interpretation of Section 2(b)(2) of the Court's March 3, 2014 Order, and specifically as to the time period provided for Defendants' review of the documents identified by Plaintiffs as responsive before those documents are produced to Plaintiffs, Plaintiffs respectfully request that the Court clarify the Order as follows: For any list of responsive documents provided by the Plaintiffs, Defendants have five business days to review the first 3,000 documents on the list and to identify any documents that Defendants maintain are privileged or non-responsive. After the fifth day, any document in the first 3,000 documents on the list not identified by Defendants shall be deemed released to the Plaintiffs for production. Defendants shall have one additional day for every additional 1,000 documents to review and identify any privileged or non-responsive documents. After each additional day, any documents on Plaintiffs' list not identified by the Defendants as non-responsive or privileged for that increment of documents shall be deemed released to the Plaintiffs for production.

DISCUSSION

On March 3, 2014, in response to Plaintiffs' Motion to Compel the production of documents, this Court issued an order incorporating the parties' Joint Proposal for Defendants' Discovery. 3/3/2014 Order (Rec. Doc. 72) at 6. As the Court is aware, Defendants had not produced a single email or electronic document by the time the Court held its February 21, 2014 hearing on the matter, Plaintiffs agreed to undertake the initial review of the electronic records of the State Board of Elections ("SBOE").

On March 5, 2014, Defendants transferred almost 150,000 records to Plaintiffs for review. (*See* 3/4/2014 Email from P. Strach to B. O'Connor (attached as Exhibit A).) With the expert report deadlines looming, a 30(b)(6) deposition of the SBOE's representative scheduled for April 7, 2014, and the Preliminary Injunction Motion deadline approximately one month away, Plaintiffs have promptly and diligently undertaken to review the SBOE database materials and have provided two lists of responsive documents to Defendants for production pursuant to the March 3 Order. (*See* 3/14/2014 Email from J. Wu to P. Strach (attached as Exhibit B) and 3/21/2014 Email from K. Rancour to P. Strach (attached as Exhibit C).) Six business days after Plaintiffs provided their first list of documents, Defendants communicated their interpretation of the March 3 Order as allowing Defendants to withhold their identification of any non-responsive or privileged documents—and hence the production of any documents—until the end of a period of five days plus any additional days for each additional 1,000 documents on the list. (*See* 3/24/2014 Email from A. Peters to K. Rancour (attached as Exhibit D).)

Section 2(b)(2) of the Order provides as follows:

> Upon notification of Plaintiffs' identification of responsive materials, the first of which will occur no earlier than 7 March 2014 ***Defendants shall have five business days to identify any of those emails or other electronic records*** that they may believe are not responsive or protected by the attorney-client privilege, the work product doctrine or legislative privilege or immunity (subject to the Court's ruling on that issue). ***If Plaintiffs identify more than 3,000*** emails or other electronic records, at any one time, ***Defendants will be afforded one extra day for every 1,000 documents in excess of the 3,000 to make the identification described above.***

3/3/2014 Order at 8, Sec. 2(b)(i)(2) (emphasis added).

Thus, instead of complying with the five business day period set forth in the Order for identifying any non-responsive or privileged documents from the first 3,000 documents on the list, and thus producing the rest of the documents promptly on a rolling basis, Defendants continue to engage in delay and obstruction of discovery at every opportunity. To date, Defendants ***still have not produced a single electronic document from the SBOE***, even though the 30(b)(6) deposition of the SBOE representative is less than two weeks away. Under Defendants' interpretation, the first possible date upon which ***any document*** would possibly be produced from the SBOE databases would be Friday, March 28, 2014 and any documents identified in Plaintiffs' second list would be produced on April 8, 2014. Defendants' interpretation would deny Plaintiffs a significant amount of relevant discovery prior to the submission of Plaintiffs' expert reports on April 1, 2014 and the deposition of the 30(b)(6) SBOE representative on April 7, 2014.

Defendants' position is particularly unreasonable in light of the fact that Plaintiffs have taken on the lion's share of the burden in reviewing the Defendants documents for production, and the number of documents identified for the Defendants to review to release for production is a fraction of that being reviewed by the various Plaintiffs' teams.

CONCLUSION

In light of the looming expert report deadlines, SBOE depositions, and preliminary injunction briefing deadlines, Plaintiffs respectfully request that the Court enter an order clarifying Section 2(b)(2) of the March 3 Order as to the time permitted for Defendants' review of documents identified as responsive and for the production of responsive, non-privileged documents.

Dated: March 26, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 37.1

In accordance with Middle District of North Carolina Local Rule 37.1, Plaintiffs certify that the parties were not able to reach agreement on this matter after personal consultation and diligent attempts to resolve their differences. The parties have discussed these issues via email, including emails exchanged on March 24, 2014. The parties also held a meet-and-confer telephone conference on this matter on March 24, 2014. In attendance were, among others, Bridget K. O'Connor, counsel for the NAACP Plaintiffs; Julie A. Ebenstein, counsel for the LWV Plaintiffs; Catherine Mezza, counsel for the DOJ; and Alexander Peters and Phillip J. Strach, counsel for Defendants. During that meeting, the parties were unable to reach agreement on the issues discussed in this motion.

Per the Court's request at the February 21, 2014 hearing, the following is a summary of the parties' positions as to the issues raised in this Motion, which have been reviewed and approved by both Plaintiffs and Defendants:

Plaintiffs interpret Section 2(b)(2) to require Defendants to identify "within five business days" any emails or other electronic records that they believe are not responsive or privileged from the first 3,000 documents on the list. For every 1,000 documents in excess of the first 3,000 documents on Plaintiffs' list, Defendants have one additional day to identify, on a rolling basis, nonresponsive or privileged documents as to that additional increment. Each of the Plaintiff groups, NAACP, League of Women Voters, Department of Justice and the Intervenors, support the filing of this Motion and the request for expedited resolution of this Motion.

Defendants interpret Section 2(b)(2) to require them to identify "within five business" days any emails or other electronic records identified by plaintiffs that defendants believe are not responsive or privileged, unless plaintiffs identify "more than 3,000 emails or other electronic records, at any one time." If plaintiffs identify "more than 3,000 emails or other electronic records, at any one time," the defendants are to be "afforded one extra day for every 1,000 documents in excess of the 3,000 to make the identification" required by Section 2(b)(2). Defendants do not oppose plaintiffs' request for expedited treatment of this motion, but do request an opportunity to file a brief of no more than 5 pages within 1 business day of any order allowing such a brief or to have a telephone hearing on this issue so as to address the practical impact that each interpretation has on the actual review of documents.

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2014, I served Plaintiffs' Motion for Clarification of March 3, 2014 Order to the Clerk of Court using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which on the same date sent notification of the filing to the following:

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