

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

**REVISED CONSENT ORDER REGARDING DISCOVERY OF DOCUMENTS
AND ELECTRONICALLY STORED INFORMATION**

Pursuant to Federal Rules of Civil Procedure 26 and 34, the parties will adhere to the following methods of production of documents and electronically stored information (“ESI”) and enter into this stipulation to govern discovery obligations in this action:

A. Provisions for the Production of Documents and ESI

1. Form and Manner of Production. With the exception of the items specified in paragraphs 10-18, below, the parties agree that documents and ESI that can be accurately represented in black and white shall be scanned or converted to single page Tagged Image File Format (“TIFF” or “.tiff format”) files, using CCITT Group IV compression. All images shall be scanned or converted at a resolution of at least 300 d.p.i. and reflect, without visual degradation, the full and complete information contained on the original document. Photographs, color brochures, or other like documents that cannot be accurately represented in black and white or documents that are primarily in color shall be scanned or converted to JPEG files using a high quality setting. The parties will honor reasonable requests for either the production of the original document for inspection and copying or production of any color image of the document, thing, or ESI. All images shall be saved in a directory named IMAGES. Spreadsheets (e.g., Excel, Quattropro, or .csv) and presentations (e.g., Powerpoint) shall be produced in native form. Native files shall be saved with the proper Windows-associated extension in a directory named NATIVE.

2. Bates Numbering. The parties agree to produce all imaged documents with a legible, unique page identifier (“Bates Number”) electronically “burned” onto the image in the lower right hand corner or—if placement in the lower right hand corner would obliterate, conceal, or interfere with any information from the source document—another blank portion of the TIFF image. The Bates numbering convention shall be in the format “XXX#####” where “XXX” represents the short character abbreviation for the producing party and “#####” represents the eight-digit sequential number of the page being produced by that party. Documents produced by the parties shall be abbreviated as follows: United States of America = USA, League of Women Voters, et al. = LWV, North Carolina State Conference of the NAACP, et al. = NCSC, and Defendants = NC. For example, the first Bates labeled document produced by the United States should be labeled “USA00000001.” Images shall be named as the [Bates Number].tif or [Bates Number].jpg. Native files shall be named as [Bates Number].ext, where “ext” denotes the native file extension.

3. Production Media. The parties agree to produce documents on CD-ROM, DVD, or external hard drive (the “Production Media”), depending on the size of the production. Each piece of Production Media shall be identified with a production number corresponding to a numbered production “wave” and a numbered volume of material in the wave. For example, if the first production wave by a party comprises document images on three hard drives, the party shall label each hard drive in the following manner in numeric sequence: “001.001”; “001.002”; “001.003.” If the second production

comprises three DVDs, the party shall label each DVD in the following manner in numeric sequence: “002.001”; 002.002”; “002.003.” The following additional information shall also be identified on the physical Production Media: (1) the case number, (2) the producing party’s name, and (3) the production date. Where practicable, the type of materials on the media (e.g., “Documents”, “OCR Text”, etc.) and the Bates Number range of the materials on the Production Media shall also be denoted thereon; where such material cannot reasonably be listed on the Production Media, they shall be provided in an accompanying letter.

4. No Production to FTP, SFTP or Other Hosted Locations Without Written Notification. The parties agree not to produce documents or ESI using FTP, SFTP, or other hosted locations without notifying all parties in writing. All such productions must include a single archive file per production wave (e.g., .zip, .rar, or .cab), labeling of such archives in numerical sequence in accordance with paragraph 3, supra, and immediate notice to all parties after a new archive has been uploaded to a hosted location. All requirements of this agreement shall apply to any production using FTP, SFTP, or other hosted locations.

5. Image Cross Reference File. The parties shall produce an “image cross reference file” in Concordance Opticon .log format to accompany produced images. The image cross reference file shall provide Bates Numbers, relative paths to images, and document break indicators. The image cross reference file shall be provided in a directory named DATA.

6. Load File. The parties shall produce a “load file” containing the fields specified in Attachment A. The load file shall be provided in a directory named DATA, in a Concordance .DAT file format with standard delimiters. The parties agree not to include OCR/extracted text in the .DAT file.

7. OCR/Extracted Text. For documents that exist natively in electronic format and that have not been redacted, the parties shall produce extracted text files reflecting the full text that was electronically extracted from the original native file. For all scanned hard-copy documents, any electronic documents that require redaction prior to production, and native files for which native text is not available (e.g., graphic files and some PDFs), the parties will produce corresponding Optical Character Recognition (“OCR”) text files. The OCR and extracted text files shall be produced in ASCII text format and shall be labeled and produced on Production Media in accordance with the provisions of paragraph 3, above. These text files will be named with the unique Bates Number of the first page of the corresponding document followed by the extension “.txt.” The OCR and extracted text files shall be produced in a manner suitable for importing the information into Concordance. OCR and extracted text files shall be saved in a directory named TEXT. All documents should have an accompanying text file, even if that file is of zero size.

8. Irrespective of which party issued the requests for production of documents, tangible things, and ESI, the producing party shall serve a copy of responsive productions to each of the other parties.

9. The parties will produce documents, tangible things, and ESI on a rolling basis.

B. Format for the Production of ESI

10. Format for Production of Electronic Documents. E-mail will be produced as image files with related searchable text and available metadata as described in Attachment A.

11. All spreadsheets, e.g., Excel or Quattropro, should be produced only in native format with related searchable text and available metadata as described in Attachment A. Spreadsheets should not be imaged, but a placeholder image must be included to represent the spreadsheet.

12. All presentations, e.g., Powerpoint, should be produced only in native format with related searchable text and available metadata as described in Attachment A. Presentations should not be imaged, but a placeholder image must be included to represent the presentation.

13. The parties will meet and confer regarding the production of video, audio, and any other file stored in a proprietary format (*i.e.*, formats that are not Microsoft or Corel Suite compatible files). Any such conference shall be held within seven (7) days of identification of such materials in initial disclosures, a direct request for the production of such materials, or a determination by a producing party that such materials are responsive to a broader request, and any such conference shall include the technicians with sufficient knowledge to explain the content and format of the material at issue.

14. The parties will meet and confer regarding the production of records or data from systems of record, databases, or federal agency comparisons in an agreed upon format. Any such conference shall be held within fourteen (14) days (unless the parties agree to a later date) of identification of databases in initial disclosures, a direct request for the production of databases, or a determination by a producing party that databases are responsive to a broader request, and any such conference shall include the technicians with sufficient knowledge to explain the content and format of the databases.

15. Other electronic documents not specifically discussed elsewhere will be produced as image files with related searchable text and available metadata as described in Attachment A. If said documents in their original form cannot be converted to TIFF as described above, the parties will promptly meet and confer concerning the form of such production.

16. Where produced documents have children (e.g., email with attachments, archive files, and files with embedded documents), parent and child documents shall be treated as separate documents. Each document (parent and child) shall have the same attachment range as a way of identifying the group, as specified in the Attachment Range field of Attachment A.

17. In the event that a party needs to redact a portion of a document for which only a native file is produced (e.g., Excel and PowerPoint), the parties will meet and confer regarding production of the redacted document.

18. Encryption or password protection of any file is to be removed or the passwords provided. If proprietary software is required to open encrypted files, the party producing the encrypted files must provide the proprietary software, if it is not generally available to the non-producing party.

C. Search of Electronically Stored Information

19. Search Process and Criteria. The parties agree to meet and confer regarding the identification of custodians, date ranges, and key words in responding to requests for ESI. The parties will also meet and confer prior to the use of any advance culling or technology assisted review methodologies.

20. The parties agree that the use of an agreed-on search process or set of search criteria shall not be construed as a waiver of any party's right to request subsequent searches and productions, where there is a showing that the agreed-to search process and criteria have resulted in inadequate productions or failed to identify relevant materials. The parties also reserve their right to object to any additional requests or subsequent searches.

21. The parties agree that documents identified by search terms may be reviewed for privilege, confidentiality, relevance, or responsiveness prior to production.

D. Deduplication

22. Use of Deduplication Software. The parties agree to use MD-5 hash values to deduplicate exact duplicate documents for individual custodians. As noted in

Attachment A, MD-5 hash values will be calculated at the time of collection or processing for all categories of ESI.

E. Paper Documents

23. Format for Production of Paper Documents. The parties agree to produce hard-copy documents as TIFF or JPEG files, as described in paragraphs 1-3, above.

24. Document Unitization. To the extent possible, the parties will endeavor to apply unitization practices consistent with the following description: Each page of a hard copy document shall be scanned into an image and if a document is more than one page, the unitization of the document and any attachments shall be maintained as it existed in the original when creating the image file. For documents that contain fixed notes, (e.g., post-it notes), the pages will be scanned both with and without the notes, and those pages will be treated as part of the same document. The relationship of documents in a document collection (e.g., cover letter and enclosures, email and attachments, binder containing multiple documents, or other documents where a parent-child relationship exists between the documents) shall be maintained through the scanning or conversion process. If more than one level of parent-child relationship exists, documents will be kept in order, but all will be treated as children of the initial parent document. Such information shall be produced in conformity with the Attachment Range field in Attachment A in a manner which enables the parent-child relationship among documents in a document collection to be reconstituted by the receiving party in Concordance.

F. Preservation Not Required for Certain Documents, Things, and ESI

25. ESI. The parties agree that except as provided in paragraphs 1 to 9, the parties need not preserve, continue to preserve, or provide a privilege log for (a) Deleted, slack, fragmented, or other data only accessible by forensics, (b) Random access memory (RAM), temporary files or other ephemeral data that are difficult to preserve without disabling the operating system, (c) Voicemail messages; (d) Electronic data (*e.g.*, email, calendars, contact data, notes, text messages, and other electronic data) sent to or from mobile devices (*e.g.*, iPhone, iPad, Android, and Blackberry devices) provided that a duplicate of all such electronic data is routinely saved in another reasonably accessible location; (e) Logs of calls made to or from cellular phones; (f) Temporary or cache files, including internet history, web browser cache and cookie files, wherever located; (g) Server, system or network logs; (h) Data from photocopiers or fax machines; (i) Autosaved copies of electronic documents; (j) Delivery or read receipts of electronic mail; or (k) Duplicate copies of an electronic message in the possession, custody, or control of a single custodian sent to multiple recipients so long as the copy retained accurately reflects all recipients of the email and the entire contents of the email, including all attachments.

26. Electronic Back-up Systems. Potentially relevant ESI, as that term is defined in Rule 26 of the FRCP, need not be preserved or described on a privilege log if: (a) It is stored in any electronic backup system for the purpose of system recovery or information restoration, including but not limited to, system recovery backup tapes,

continuity of operations systems, and data or system mirrors or shadows; and (b) It is routinely purged, overwritten or otherwise made not reasonably accessible in accordance with an established, documented, and routine system maintenance policy; and (c) It has been preserved on other, accessible electronic media.

27. Trial-Preparation Protection for Communication Between a Party's Attorney and Expert Witness. Communication between a Party's attorney and any witness required to provide a report under Rule 26(a)(2)(B) of the FRCP shall be protected from disclosure and shall not be produced in discovery regardless of the form of the communication, nor shall a privilege log be produced for such communications, except to the extent that the communications: (a) Relate to compensation for the expert's study or testimony; or (b) Identify facts or data that the Party's attorney provided and that the expert considered in forming the opinions to be expressed; or (c) Identify assumptions that the Party's attorney provided and that the expert relied on in forming opinions to be expressed.

28. No Discovery of Material Not Required To Be Preserved. The parties agree not to seek discovery of documents, things, and ESI that need not be preserved pursuant to paragraphs 25-27. If any discovery request is susceptible of a construction which calls for the production of ESI that need not be preserved pursuant to paragraphs 25-27, such items need not be provided or identified on a privilege log pursuant to Rule 26(b)(5) of the FRCP.

29. Other Preservation Obligations Not Affected. This Stipulation and Order in no way modifies, amends, limits, or obviates any of the parties' obligation to maintain and preserve documents, things, and ESI where required by law or as a result of litigation or anticipated litigation in this case or in any other matter except for the exemptions delineated in paragraphs 25-27. Also, nothing in this Stipulation and Order shall affect any other obligations of the parties to preserve documents, things, and ESI for other purposes, such as pursuant to court order, administrative order, statute, or in response to other anticipated litigation.

G. Preservation Does Not Affect Discoverability or Claims of Privilege

30. The parties agree that by preserving documents, things, and ESI for the purpose of this litigation, they are not conceding that such material is discoverable, nor are they waiving any claim of privilege. Except as otherwise provided in paragraphs 31-33, nothing in this Stipulation and Order shall alter the responsibilities or obligations of the parties to provide a privilege log for material withheld under a claim of privilege.

H. Privilege Logs

31. The parties agree that for each document, tangible thing, or ESI withheld based on an asserted claim of privilege or protection, the party asserting the privilege must produce a privilege log pursuant to Rule 26(b)(5)(a) of the Federal Rules of Civil Procedure. At minimum, the privilege log must contain a Bates range, the type of document or ESI, the title of the document or ESI, the date of the creation or transmission of the document or ESI, the author or authors of the document or ESI, the recipients of

the document or ESI (including individuals copied or blind-copied), whether the document or ESI contains attachments, the privilege or privileges claimed, and the basis for the assertion of privilege or protection.

31A. When identifying email strings, only the date, subject line, sender and recipients of the last email in the string need be identified in the first instance, provided there is a notation that the string includes multiple emails.

32. E-mail attachments must be separately identified and described if they are withheld based on an assertion of privilege or protection.

33. The parties agree to 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 by, and exchanged solely among:

- (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.

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.¹

(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.²

I. Inadvertent Production of Documents and Clawback

34. The parties agree that a disclosure of communications, documents, tangible things, and ESI covered by the attorney-client privilege, work product protection, or other applicable privileges does not operate as a waiver in this proceeding if (a) the disclosure is inadvertent and is made in connection with this litigation or any prior administrative

¹ 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.

² 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, Maria Teresa Unger Palmer, 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.

proceedings under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and (b) the holder of the privilege or protection took reasonable precautions to prevent disclosure and took reasonably prompt measures—once the holder knew or should have known of the disclosure—to rectify the error.

35. Any party receiving material it believes may have been inadvertently produced that contains privileged or protected information shall promptly notify the producing party upon learning of the production. Within fourteen (14) days after such notification, the producing party may request in writing that such materials be returned or destroyed. Upon such written request—and except in the event that the requesting party disputes the claim of privilege or protection—any materials that the producing party deems to contain inadvertently disclosed privileged or otherwise protected materials shall be promptly returned to the producing party or destroyed at the producing party's option. This includes all copies—electronic or otherwise—of any such materials, and the parties agree that no further copies of the inadvertently disclosed materials will be made. In the event that copies of inadvertently produced materials that are privileged or protected are captured on a party's back-up media used for disaster recovery, the parties will not access the materials and will over-write those copies according to their established back-up procedures. In the event the receiving party has provided copies of the inadvertently produced material claimed to be privileged to third parties, the receiving party shall use all reasonable efforts to obtain the return of the material claimed to be privileged.

36. If privileged or protected information is contained within an item of otherwise discoverable material, the parties recognize that the requesting party may not be able to destroy only the portion of the item of the disclosed material that is privileged or protected. Instead, the requesting party may need to destroy the privileged or protected information along with all of the otherwise discoverable material within that item. Whenever that is the case, the producing party—within fourteen (14) days of notification of the inadvertent disclosure—shall provide the requesting party with a replacement copy of the materials that are not privileged or protected and are otherwise discoverable.

37. In the event that the requesting party disputes the producing party's assertions with respect to the inadvertently disclosed material, such material shall be sequestered and retained by and under the control of the requesting party for the purpose of seeking determination of the issue from the Court. If the Court determines that privilege or protection has been waived or that the inadvertently disclosed material is not subject to any applicable privilege or protection, the requesting party may use the material for any purposes otherwise permitted by law or rule. If the Court determines that the inadvertently disclosed material is subject to an applicable privilege or protection, the requesting party must return or destroy the materials at issue, as provided above.

38. If the producing party does not request the return or destruction of material within a reasonable time, not to exceed thirty (30) days of notification by the receiving

party of the receipt of material it believes was inadvertently produced, the producing party waives any claim of privilege or protection as to the material.

J. Duty to Supplement Discovery Responses

39. The parties must supplement their disclosures and responses in a timely manner if a party learns that a disclosure was materially incorrect or incomplete, in accordance with Rule 26(e)(1)(A). Supplementation must be made at appropriate intervals during discovery and with special promptness as the trial date approaches.

K. Costs of Document Production

40. Each party shall bear the costs of producing its own documents, things, and ESI. Nothing in this provision prevents any party from seeking protection from the court pursuant to Federal Rule of Civil Procedure 26(c) or seeking to share costs.

L. Requirement to Confer

41. Before filing any motion regarding the terms of this Joint Stipulation and Order, compliance with this Joint Stipulation and Order, or any other discovery dispute, the parties will confer in a good faith attempt to resolve such disputes.

Agreed to by counsel for the parties on this 13th day of January, 2014:

For the United States:

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IT IS SO ORDERED:

DATE: _____

THE HONORABLE JOI ELIZABETH PEAKE
UNITED STATES MAGISTRATE JUDGE