STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION Case No. 18 CVS 014001
COMMON CAUSE, *et al.* *Plaintiffs*, v. DAVID R. LEWIS, *et al.* *Defendants*.	)

LEGISLATIVE DEFENDANTS' RESPONSE TO PLAINTIFFS' FIRST AND SECOND MOTIONS TO COMPEL

INTRODUCTION

Plaintiffs' first motion to compel should be denied.

First, plaintiffs' motion is premature. Most if not all of the discovery demanded by plaintiffs will be moot depending on the resolution of legislative defendants' assertion of legislative privilege. Legislative defendants have asserted legislative privilege at every step of the discovery process in this case and their discovery obligations will be dictated by this court's analysis of that issue. Plaintiffs' breathless and hyperbolic rhetoric in their motion is therefore inappropriate and premature.

Second, plaintiffs have only themselves to blame for any delay in the discovery process. Legislative defendants, through counsel, have repeatedly conferred with plaintiffs in good faith and supplemented responses on multiple occasions. Where legislative defendants could not meet plaintiffs' arbitrary production deadlines, they informed plaintiffs and continued to work diligently to explain or supplement responses. Plaintiffs waited until February 19, 2019 to file a motion to

compel, and then inexplicably waited more than a month before taking any steps to calendar a hearing on it. Any delay rests squarely with plaintiffs.

Finally, and in any event, legislative defendants have adequately responded to plaintiffs' requests where they do not have remaining privilege objections. Accordingly, plaintiffs' first motion to compel is without merit and should be denied.

FACTUAL BACKGROUND

Plaintiffs served their initial discovery requests on November 13, 2018 on the same day they filed their complaint.

On December 14, 2018, prior to the due date of any response to the discovery, legislative defendants removed the case to federal court. On January 2, 2019, the federal court issued an order of remand. Doc. 44, *Common Cause v. Lewis*, No. 18-589 (E.D.N.C.). Out of an abundance of caution, prior to the state court regaining jurisdiction, legislative defendants served responses to plaintiffs' first set of discovery requests on January 4, 2019. In this production, legislative defendants produced over 1800 pages of records responsive to the requests while maintaining their legislative privilege and other objections.

Plaintiffs did not allege any deficiencies in these initial responses until January 15, 2019, to which legislative defendants promptly responded on January 22, 2019. The parties then engaged in an informal series of meet-and-confers designed to narrow the issues. Plaintiffs for their part agreed to issue several new interrogatories to replace prior interrogatories legislative defendants deemed too vague and ambiguous to answer among other objections. Legislative defendants for their part agreed to supplement or investigate supplementing multiple discovery requests.

On January 24, 2019, while these discussions were occurring, plaintiffs served numerous deposition notices and/or subpoenas for the legislative defendants and others covered by legislative

privilege. On February 4, 2019, in addition to the legislative privilege objections they had raised in response to plaintiffs' first set of discovery requests, legislative defendants served a motion for protective order regarding the deposition notices issued by plaintiffs. The non-parties also served objections to the deposition and document subpoenas on the same day.

After the motion for protective order was served, the parties thereafter began discussions and negotiations regarding a resolution to the privilege issue. In the meantime, legislative defendants were also preparing responses to the several new discovery requests by plaintiffs, including their Third Set of Interrogatories, which replaced some of the vague and ambiguous First Set of Interrogatories objected to by legislative defendants. Even though legislative defendants could have taken thirty days to answer these new interrogatories, legislative defendants agreed to, and did, respond to them well before thirty days.

While the parties were discussing the legislative privilege issue, plaintiffs filed their first motion to compel on February 19, 2019.[1] Notably, the motion does not discuss the privilege objections raised by legislative defendants in their responses to that discovery, or the ongoing negotiations to resolve that issue. In any event, plaintiffs apparently allowed the motion to sit in the court file for nearly a month before taking appropriate action to have it heard by the court.

[1] On February 22, 2019, plaintiffs filed a Second Motion to Compel regarding the production by legislative defendants of the "home addresses" of incumbent legislators in 2011 and 2017. In response to the request, legislative defendants provided the "home addresses" maintained by the legislative defendants. When plaintiffs complained that some of the "home addresses" provided by legislators did not include a physical address, legislative defendants agreed to search for any other sources of physical addresses provided by legislators in 2011 and 2017. In the course of that search, legislative defendants discovered that the nonpartisan staff of the General Assembly maintained a physical address list of legislators from 2011 and 2017. This information was maintained by the central staff and would ordinarily be required to be subpoenaed from that distinct entity within the General Assembly. Nonetheless, central staff provided the list to legislative defendants and that list was recently produced to plaintiffs. Accordingly, plaintiffs' second motion to compel is moot.

ARGUMENT

I. Plaintiffs' First Motion to Compel is Premature

Plaintiffs' motion fails to discuss the impact of legislative defendants' privilege objections on their first set of discovery requests. Legislative defendants have asserted privilege objections to each set of discovery requests lodged by plaintiffs. See Pl. Mtn. Exs. C, D, I, J. Moreover, in responding to plaintiffs' first set of document requests, legislative defendants produced thousands of pages of documents all outside the scope of the privilege. Legislative defendants' assertion of the privilege to these requests has been no secret.

It is self-evident that the determination of the scope of the privilege will dictate the legislative defendants' document production obligations. See N.C. Gen. Stat. § 120-9; *Northfield Development Co., Inc. v. City of Burlington*, 136 N.C. App. 272, 281-83 (2000), *aff'd*, 352 N.C. 671 (2000). The scope of the privilege in North Carolina is broad and may preclude most if not all of the discovery sought by plaintiffs in their first set of discovery requests. Indeed, plaintiffs' response to the legislative defendants' motion for a protective order states that they "do not oppose entry of the requested protective order". Pl. R. Mtn. Pr. Order at 3. If the court does in fact enter the protective order as originally requested, most of plaintiffs' document requests will be rendered moot. Moreover, most if not all of the interrogatories will be mooted as well.

Accordingly, legislative defendants request that the court resolve the legislative privilege issues first and then provide the parties with a period of time to discuss and determine a production schedule for any documents or information determined not to be subject to legislative privilege. Resolving plaintiffs' motion to compel puts the cart before the horse. The court should determine the scope of discovery the privilege allows, if any, and the parties should then proceed from that baseline.

II. Plaintiffs have only themselves to blame for any delay.

Plaintiffs' attempt to lay the blame of their delay at the feet of legislative defendants is meritless. When plaintiffs finally followed up on legislative defendants' initial discovery responses on January 15, 2019 (a delay of at least 11 days), legislative defendants responded to their concerns within a week. Legislative defendants then made themselves available for a meet and confer within three days after submitting their response to plaintiffs' concerns. Following the meet and confer, legislative defendants worked as diligently as possible to respond to those concerns. Where legislative defendants could not meet the arbitrary deadlines set by plaintiffs, legislative defendants so informed the plaintiffs and attempted to accommodate plaintiffs as much as possible.

If plaintiffs were frustrated with the speed with which legislative defendants were working to respond to their concerns, they were free to file a motion to compel and calendar it for hearing at the earliest convenience of them and the court. Plaintiffs failed to do so. They waited until February 19, 2019 to file the motion, even as the parties were discussing a resolution of the legislative privilege issue, which itself could resolve all of the outstanding issues. Then plaintiffs inexplicably waited nearly a month before apparently pressing for a hearing and resolution of their motion. The local rules of this court make it clear that any party requesting a matter be heard must submit a calendar request. Local Civil Rule 3.2 (Wake County Superior Court). Thus, plaintiffs could have attempted to calendar for hearing their motion to compel or the motion for protective order any time after those motions were filed. Plaintiffs did not, and have offered no explanation to this court for their failure to do so. The court should reject plaintiffs' attempt to shift the blame for their one-month delay to the legislative defendants.

III. In any event, legislative defendants' responses to plaintiffs' discovery requests are adequate.

Legislative defendants have adequately responded to plaintiffs' requests at this stage of the case.

First, to the extent plaintiffs' claim that legislative defendants have not produced responsive but privileged documents, then that should not be surprising in light of legislative defendants' assertion of legislative privilege. As explained above, resolution of the privilege issue will provide guidance to the legislative defendants as to their document production obligations and any contrary issues raised by the motion to compel by plaintiffs are premature.

Next, to the extent plaintiffs' complain that legislative defendants have not produced a privilege log of such communications, it is not clear what communications, if any, will need to be logged outside of resolution of the privilege issue. In any event, plaintiffs have not demonstrated that a privilege log of legislatively privileged communications "is any less intrusive than immediate production. The purposes of legislative privilege — avoiding interference with the legislative process and promoting frank deliberations among legislative decisionmakers — appear equally applicable to requests for a legislator to produce a log of all documents (and then to litigate whether to produce certain of those documents) as it would to requests for direct production of the documents." *NCNAACP v. McCrory*, 2015 WL 12683665, at *6 (M.D.N.C. Feb. 4, 2015) (collecting cases). Requiring a privilege log here would "undermine the very purpose and function of legislative privilege, unduly intruding into legislative affairs and imposing significant burdens on the legislative process." *Id.* Plaintiffs here have made no argument to the contrary.

To the extent plaintiffs claim that legislative defendants have not disclosed the names of lawyers regarding the process leading to the enactment of the 2017 plans, that is not correct. Plaintiffs ignore that the 2017 plans were drawn as part of the remedial phase of the *Covington v.*

North Carolina litigation. The legal advice provided to the legislative defendants was part and parcel of the representation of the legislative defendants in that case. Plaintiffs have not cited any authority for the proposition that opposing parties are entitled to a list of lawyers working in opposition to them in a litigation matter. But that is what they are requesting in asking for a list of lawyers working on the *Covington* matter. In any event, in a good faith effort to resolve the matter, legislative defendants disclosed that the lawyers advising them on the 2017 plans were the counsel of record in the *Covington* matter. This is more information than plaintiffs are entitled to and legislative defendants have adequately answered any discovery requests on this issue.

Moreover, plaintiffs' complaint that legislative defendants referred them to documents to answer interrogatories is baseless. Rule 33(c), N.C.R. Civ. P. allows a party to refer another party to records to ascertain the answer to an interrogatory. Legislative defendants' use of this rule was appropriate. For instance, plaintiffs' Interrogatory No. 1 in their Third Set of Interrogatories asked legislative defendants to identify any individual who had anything at all to do with the 2017 plans. The request was so broad it would be impossible to name every individual potentially responsive to it. Accordingly, legislative defendants referred plaintiffs to the legislative record and the record in *Covington* and specifically stated that in "light of the breadth of this interrogatory, all names that appear" in these documents were potentially responsive to the request. Plaintiffs' attempt now to spin legislative defendants' overabundance of caution in answering an overbroad interrogatory as inadequate is baseless and should be rejected.

In other instances, legislative defendants referred plaintiffs to specific documents in the legislative or litigation record where answers to interrogatories could be found. For instance, when plaintiffs requested legislative defendants to describe the criteria that were used in the 2011 plans, legislative defendants referred them specifically to the deposition transcripts of defendants Lewis

and Rucho, and the mapdrawer Dr. Hofeller. These responses fully answer the interrogatory and plaintiffs' request should therefore be denied.

Finally, plaintiffs complain about other answers to interrogatories that are based on legislative defendants' best knowledge and belief, especially about alleged political data used in drawing various maps. Legislative defendants have provided the information to their best current recollection. Moreover, arguably, legislative defendants are not even required to answer these interrogatories based on legislative privilege. Accordingly, these complaints should be rejected.

CONCLUSION

For the foregoing reasons, plaintiffs' motion should be denied.

Respectfully submitted this the 18th day of March, 2019.

OGLETREE, DEAKINS, NASH,
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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing document to be served on all counsel of record by electronic mail in accordance with the agreement of the parties to serve documents in this matter electronically.

This the 18th day of March, 2019.

By: _____
Phillip J. Strach

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