

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

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COURT CLERK
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COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR
CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON
REDISTRICTING, et al.,

Defendants.

**PLAINTIFFS' THIRD
MOTION TO COMPEL
(SUBPOENA TO
NORTH CAROLINA
REPUBLICAN PARTY)**

BACKGROUND

Pursuant to North Carolina Rules of Civil Procedure 37 and 45, Plaintiffs respectfully move to compel a response to the subpoena they issued to the North Carolina Republican Party (“NC GOP”). On March 8, 2019, Plaintiffs issued a subpoena to the NC GOP requesting relevant documents regarding the redrawing of the North Carolina House and Senate districts and related communications with Defendants. *See* Ex. A. The subpoena called for the NC GOP to produce the requested materials by April 8, 2019. *Id.*

The NC GOP did not respond at all to the subpoena by the return date of April 8. The NC GOP never contacted Plaintiffs regarding the subpoena or otherwise communicated any objection or other response. Having no received response, on April 10, Plaintiff contacted an attorney who has represented the NC GOP in another pending matter, and that attorney indicated that another attorney, John Lewis, was representing the NC GOP in connection with this case. Plaintiffs then contacted Mr. Lewis, who confirmed that the NC GOP had received the subpoena and had not responded by the return date. Mr. Lewis indicated that the NC GOP was now conducting a search for responsive materials and would get back to Plaintiffs this week.

Earlier today (April 17), Plaintiffs spoke with Mr. Lewis, who indicated that the NC GOP was continuing its search for documents but would not be able to produce materials by today. Plaintiffs notified Mr. Lewis that, because April 17 is the deadline for the close of written fact discovery, Plaintiffs would file a motion to compel out of an abundance of caution.

ARGUMENT

As mentioned, Plaintiffs are filing this motion to compel because, although the NC GOP has indicated its intention to produce materials responsive to Plaintiffs’ subpoena, today is the close of written fact discovery under the stipulated scheduling order, and Plaintiffs seek to ensure that they preserve their right to compel production from the NC GOP. Plaintiffs will notify the

Court if this motion becomes moot after the NC GOP's production of materials responsive to the subpoena. Nonetheless, Plaintiffs note that the NC GOP has waived its right to assert any privilege or other objections to the subpoena by failing to respond within the required time. See *Harrington Mfg. Co. v. Powell Mfg. Co.*, 26 N.C. App. 414, 415, 216 S.E.2d 379, 380 (1975).

WHEREFORE, Plaintiffs request that the Court grant this motion to compel if the NC GOP does not provide complete responses to Plaintiffs' subpoena.

Respectfully submitted this the 17th day of April, 2019

POYNER SPRUILL LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by email, addressed to the following persons at the following addresses which are the last addresses known to me:

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This the 17th day of April, 2019.



Caroline P. Mackie

EXHIBIT A

STATE OF NORTH CAROLINA

File No.

18-CVS-014001

WAKE County

In The General Court Of Justice
District Superior Court Division

Common Cause, et al.,

Additional File Numbers

VERSUS

SUBPOENA

David Lewis, in his Official Capacity as Senior Chairman of the House Select Committee on Redistricting, et al.

G.S. 1A-1, Rule 45; 8-59, -61, -63; 15A-801, -802

Party Requesting Subpoena

State/Plaintiff Defendant

NOTE TO PARTIES NOT REPRESENTED BY COUNSEL: Subpoenas may be produced at your request, but must be signed and issued by the office of the Clerk of Superior Court, or by a magistrate or judge.

Name And Address Of Person Subpoenaed

North Carolina Republican Party
1506 Hillsborough St

Alternate Address

Raleigh NC 27605

Telephone No. (919) 828-6423

Telephone No.

YOU ARE COMMANDED TO: (check all that apply)

- appear and testify, in the above entitled action, before the court at the place, date and time indicated below.
appear and testify, in the above entitled action, at a deposition at the place, date and time indicated below.
produce and permit inspection and copying of the following items, at the place, date and time indicated below.
See attached list. (List here if space sufficient)

For a list of documents to produce, see the attachment to this Subpoena.

Name And Location Of Court/Place Of Deposition/Place To Produce

Poyner Spruill LLP
301 Fayetteville St., Suite 1900
Raleigh, NC 27601

Date To Appear/Produce, Until Released

The date to produce requested items is 4/08/2019.

Time To Appear/Produce, Until Released

5:00 PM AM PM

Date

03/08/2019

Name And Address Of Applicant Or Applicant's Attorney

Edwin M. Speas, Esq.
Poyner Spruill LLP
301 Fayetteville St., Suite 1900
Raleigh, NC 27601

Signature

Edwin M. Speas, Jr. /perm with permission

- Deputy CSC Assistant CSC Clerk Of Superior Court
Magistrate Attorney/DA District Court Judge
Superior Court Judge

Telephone No. Of Applicant Or Applicant's Attorney
919-783-2881

RETURN OF SERVICE

I certify this subpoena was received and served on the person subpoenaed as follows:

- personal delivery registered or certified mail, receipt requested and attached.
telephone communication by Sheriff (use only for a witness subpoenaed to appear and testify).
telephone communication by local law enforcement agency (use only for a witness subpoenaed to appear and testify in a criminal case).
NOTE TO COURT: If the witness was served by telephone communication from a local law enforcement agency in a criminal case, the court may not issue a show cause order or order for arrest against the witness until the witness has been served personally with the written subpoena.
I was unable to serve this subpoena. Reason unable to serve:

Service Fee Paid Date Served Name Of Authorized Server (type or print) Signature Of Authorized Server Title/Agency

NOTE TO PERSON REQUESTING SUBPOENA: A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party. This does not apply in criminal cases.

NOTE: Rule 45, North Carolina Rules of Civil Procedure, Subsections (c) and (d).

(c) Protection of Persons Subject to Subpoena

- (1) **Avoid undue burden or expense.** - A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.
- (2) **For production of public records or hospital medical records.** - Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.
- (3) **Written objection to subpoenas.** - Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or tangible things may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:
- The subpoena fails to allow reasonable time for compliance.
 - The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
 - The subpoena subjects a person to an undue burden or expense.
 - The subpoena is otherwise unreasonable or oppressive.
 - The subpoena is procedurally defective.
- (4) **Order of court required to override objection.** - If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.
- (5) **Motion to quash or modify subpoena.** - A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.
- (6) **Order to compel: expenses to comply with subpoena.** - When a court enters an order compelling a deposition or the production of records, books, papers, documents, electronically stored information, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, electronically stored information, or tangible things specified in the subpoena.
- (7) **Trade secrets: confidential information.** - When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.
- (8) **Order to quash: expenses.** - When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties In Responding to Subpoena

- (1) **Form of response.** - A person responding to a subpoena to produce records, books, documents, electronically stored information, or tangible things shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.
- (2) **Form of producing electronically stored information not specified.** - If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it ordinarily is maintained or in a reasonably useable form or forms.
- (3) **Electronically stored information in only one form.** - The person responding need not produce the same electronically stored information in more than one form.
- (4) **Inaccessible electronically stored information.** - The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, after considering the limitations of Rule 26(b)(1a). The court may specify conditions for discovery, including requiring the party that seeks discovery from a nonparty to bear the costs of locating, preserving, collecting, and producing the electronically stored information involved.
- (5) **Specificity of objection.** - When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, electronically stored information, or other tangible things not produced, sufficient for the requesting party to contest the objection.

INFORMATION FOR WITNESS

NOTE: If you have any questions about being subpoenaed as a witness, you should contact the person named on Page One of this Subpoena in the box labeled "Name And Address Of Applicant Or Applicant's Attorney."

DUTIES OF A WITNESS

- Unless otherwise directed by the presiding judge, you must answer all questions asked when you are on the stand giving testimony.
- In answering questions, speak clearly and loudly enough to be heard.
- Your answers to questions must be truthful.
- If you are commanded to produce any items, you must bring them with you to court or to the deposition.
- You must continue to attend court until released by the court. You must continue to attend a deposition until the deposition is completed.

BRIBING OR THREATENING A WITNESS

It is a violation of State law for anyone to attempt to bribe, threaten, harass, or intimidate a witness. If anyone attempts to do any of these things concerning your involvement as a witness in a case, you should promptly report that to the district attorney or the presiding judge.

WITNESS FEE

A witness under subpoena and that appears in court to testify, is entitled to a small daily fee, and to travel expense reimbursement, if it is necessary to travel outside the county in order to testify. (The fee for an "expert witness" will be set by the presiding judge.) After you have been discharged as a witness, if you desire to collect the statutory fee, you should immediately contact the Clerk's office and certify your attendance as a witness so that you will be paid any amount due you.

**ATTACHMENT TO MARCH 8, 2019 SUBPOENA TO NORTH CAROLINA
REPUBLICAN PARTY**

INSTRUCTIONS

For the purposes of this Subpoena, the following instructions shall apply as set forth below except as otherwise required by context:

1. **BE ADVISED** that under Rule 37 of the North Carolina Rules of Civil Procedure, if you fail to respond to a request made herein under Rule 30, or if you give an evasive or incomplete response, the Plaintiffs may move for a court order compelling you to respond. If such motion is granted, the court may require you to pay the reasonable costs incurred in obtaining the order, including attorneys' fees. Failure to comply with such a court order may result in further sanctions or in contempt of court.
2. **Electronically-stored information:** This Subpoena includes requests to permit the forensic copying and examination of electronically stored information ("ESI"), as well as for the production of ESI. The purpose of obtaining ESI from you is to obtain all metadata, residual data, file fragments, and other information that is not reasonably accessible for forensic examination of authenticity. Any storage device that contains, or may contain, ESI requested shall be produced for forensic copying and examination. Forensic copying usually may be done on-site, without taking possession of your computing devices, at minimal inconvenience, cost, or interruption to you. The forensic copying will eliminate the need for you to search all storage devices or sift through a vast amount of information. Once forensic copies are made, the parties may agree on search terms to reduce costs and to preserve privacy of non-discoverable information.
3. Words used in the singular number shall include the plural number, and words used in the plural number shall refer to the singular number as well.
4. **If any documents, communications, ESI, or responses are withheld on the ground of any privilege, identify the following:**
 - A. the names and addresses of the speaker or author of the communication or document;
 - B. the date of the communication or document;
 - C. the name and address of any person to whom the communication was made or the document was sent or to whom copies were sent or circulated at any time;
 - D. the type of document or communication (e.g., letter, memorandum, invoice, contract, etc.);
 - E. the name and address of any person currently in possession of the document or a copy thereof; and

F. the privilege claimed and specific grounds therefor.

DEFINITIONS

For purposes of this Subpoena, the following definitions shall apply except as otherwise required by context:

1. "2011 Plans" mean the 2011 redistricting plans for the North Carolina House of Representatives and the North Carolina Senate that were passed by the North Carolina General Assembly in November 2011, including all drafts thereof.
2. "2017 Plans" mean the 2017 redistricting plans for the North Carolina House of Representatives and the North Carolina Senate that were passed by the North Carolina General Assembly in August 2017, including all drafts thereof.
3. "2011 Unchanged Districts" means the state legislative districts enacted by the General Assembly under the 2011 Plans that were not altered under the 2017 Plans, including all drafts thereof.
4. The "2017 Plans Criteria" refer to the criteria that the North Carolina House and Senate Redistricting Committees adopted for the 2017 Plans.
5. "HB 927" shall refer to North Carolina House Bill 927 and Session Law 2017-208, enacted on August 30, 2017 (and may also be referred to as the "2017 House Plan").
6. "SB 691" shall refer to North Carolina Senate Bill 691 and Session Law 2017-207, enacted on August 31, 2017 (and may also be referred to as the "2017 Senate Plan").
7. "HB 937" shall refer to North Carolina House Bill 937 and Session Law 2011-404, enacted on July 28, 2011, text corrected by Session Law 2011-416 on November 7, 2011.
8. "SB 455" shall refer to North Carolina Senate Bill 455 and Session Law 2011-402, enacted on July 27, 2011, text corrected by Session Law 2011-413 on November 7, 2011.
9. "SB 453" shall refer to North Carolina Senate Bill 453 and Session Law 2011-403, text corrected by Session Law 2011-414 on November 7, 2011.
10. "SB 2" shall refer to North Carolina Senate Bill 2 and Session Law 2016-1 enacted on February 19, 2016.
11. "You" and "Your" refers to all branches of your organization, including departments, agencies, committees, and subcommittees, as well as attorneys, representatives, members, employees, agents, and others acting on behalf of the North Carolina Republican party and its affiliates.

12. "Document" is used in its broadest sense and is intended to be comprehensive and to include, without limitation, a record, in whatever medium (*e.g.*, paper, computerized format, e-mail, photograph, audiotape) it is maintained, and includes originals and each and every non-identical copy of all writings of every kind, including drafts, legal pleadings, brochures, circulars, advertisements, letters, internal memoranda, minutes, notes or records of meetings, reports, comments, affidavits, statements, summaries, messages, worksheets, notes, correspondence, diaries, calendars, appointment books, registers, travel records, tables, calculations, books of account, budgets, bookkeeping or accounting records, telephone records, tables, stenographic notes, financial data, checks, receipts, financial statements, annual reports, accountants' work papers, analyses, forecasts, statistical or other projections, newspaper articles, press releases, publications, tabulations, graphs, charts, maps, public records, telegrams, books, facsimiles, agreements, opinions or reports of experts, records or transcripts of conversations, discussions, conferences, meetings or interviews, whether in person or by telephone or by any other means and all other forms or types of written or printed matter or tangible things on which any words, phrases, or numbers are affixed, however produced or reproduced and wherever located, which are in Your possession, custody or control. The term "Document" includes electronic mail and attachments, data processing or computer printouts, tapes, documents contained on floppy disks, hard disks, computer hard drives, CDs, and DVDs, or retrieval listings, together with programs and program documentation necessary to utilize or retrieve such information, and all other mechanical or electronic means of storing or recording information, as well as tape, film or cassette sound or visual recordings and reproduction for film impressions of any of the aforementioned writings.
13. "Communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between or among two or more persons, by any means or mode of conveying information including, but not limited to, telephone, television, or telegraph or electronic mail.
14. A request seeking production of communications between you and an individual or entity includes communications between you and the individual or entity's agents, officers, members, employees, consultants, or representatives.

LIST OF DOCUMENTS AND THINGS TO BE PRODUCED
PURSUANT TO THIS SUBPOENA

1. All documents in your possession, custody, or control regarding or relating to the redrawing of district lines for the North Carolina House of Representatives or the North Carolina Senate from January 1, 2009 to the present. This requests includes, but is not limited to, copies of any maps, statistical reports, analyses, or other documents prepared by you or on your behalf or received by you regarding or relating to the redrawing of

district lines for the North Carolina House of Representatives or the North Carolina Senate.

2. All documents in your possession, custody, or control relating to the involvement of the Republican State Leadership Committee, the Republican National Committee, the National Republican Congressional Committee, the Republican Governors Association, the Redistricting Majority Project, James Arthur ("Art") Pope, Real Jobs NC, Tom Hofeller, John Morgan, Dale Oldham, Joel Raupe, Fair and Legal Redistricting North Carolina, Sen. Philip Berger, Sen. Ralph Hise, Sen. Dan Bishop, Sen. John Alexander, Former Sen. Trudy Wade, Rep. Tim Moore, Rep. David Lewis, Former Rep. Nelson Dollar, James Blaine, Brent Woodcox, or the State Government Leadership Fund in the redrawing or proposed redrawing of district lines for the North Carolina House of Representatives or the North Carolina Senate from January 1, 2009 to the present.
3. All documents in your possession, custody, or control regarding or relating to any consultant or other person or organization who provided assistance, whether paid or unpaid, relating to the redistricting or proposed redistricting of the North Carolina House of Representatives or North Carolina Senate from January 1, 2009 to the present, including but not limited to: (a) contracts and agreements, whether oral or written, and documents reflecting such contracts and agreements; (b) communications with such persons relating to any maps drawn or prepared or redistricting in general; (c) reports (draft or final) or analyses prepared regarding or relating to such reports or analyses; (d) information shared with such persons to assist the person in their work related to preparing or analyzing any maps; and (e) invoices or payments submitted to/from such persons.
4. All documents regarding or relating to the consideration of any factors in creating any draft or final versions of any map for the North Carolina House of Representatives or North Carolina Senate from January 1, 2009 to the present, including but not limited to: (a) compactness; (b) contiguity; (c) population equality; (d) incumbency protection; (e) competitiveness; (f) preservation of communities of interest; (g) likelihood of election outcomes; (h) past election outcomes, either collectively or singularly; (i) Voting Rights Act compliance; (j) location of political campaign contributors; (k) location of the home of any candidate or potential candidate for the North Carolina General Assembly; and (l) location of any county, municipal, or other political boundary.
5. All documents in your possession, custody, or control reflecting communications with any member, group of members, or prospective members of the North Carolina General Assembly regarding or relating to HB 927, SB 691, HB, 937, and/or SB 455.
6. All documents in your possession, custody, or control reflecting communications with any person or entity regarding the redistricting of the North Carolina House of Representatives or the North Carolina Senate from January 1, 2009 to present, including but not limited to the Republican State Leadership Committee, the Republican National Committee, the National Republican Congressional Committee, the Republican

Governors Association, the Redistricting Majority Project, James Arthur ("Art") Pope, Real Jobs NC, Tom Hofeller, John Morgan, Dale Oldham, Joel Raupe, Fair and Legal Redistricting North Carolina, Sen. Philip Berger, Sen. Ralph Hise, Sen. Dan Bishop, Sen. John Alexander, Former Sen. Trudy Wade, Rep. Tim Moore, Rep. David Lewis, Former Rep. Nelson Dollar, James Blaine, Brent Woodcox, the State Government Leadership Fund, or any of the defendants in this action.

7. All documents in your possession, custody, or control regarding or relating to any conference, meeting, or training concerning the topic of redistricting that occurred from January 1, 2009 to present, including but not limited to (a) agendas; (b) minutes or notes; (c) any documents provided to participants prior to, at or after the event; (d) invitations; (e) invoices or requests for reimbursement; (f) participation lists; and (g) communications relating to the meeting, conference, or training.
8. All documents in your possession, custody, or control reflecting communications with any member or group of members of the North Carolina General Assembly, regarding or relating to any reasons why any member or group of members of the North Carolina General Assembly voted in favor or of against HB 927, SB 691, HB, 937, and/or SB 455, SB 2, and SB 453.
9. All documents in your possession, custody, or control regarding or relating to payments or reimbursements to/from You, the Republican State Leadership Committee, the Republican National Committee, the National Republican Congressional Committee, the Republican Governors Association, the Redistricting Majority Project, James Arthur ("Art") Pope, Real Jobs NC, Tom Hofeller, John Morgan, Dale Oldham, Joel Raupe, Fair and Legal Redistricting North Carolina, Sen. Philip Berger, Sen. Ralph Hise, Sen. Dan Bishop, Sen. John Alexander, Former Sen. Trudy Wade, Rep. Tim Moore, Rep. David Lewis, Former Rep. Nelson Dollar, James Blaine, Brent Woodcox, the State Government Leadership Fund, or any of the defendants in this action, related to the redistricting of the North Carolina House of Representatives or the North Carolina Senate from January 1, 2009 to the present, or regarding or relating to aggregate finance expenditures in support of Republican legislative candidates in North Carolina from January 1, 2011 to present.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to the following persons at the following addresses which are the last addresses known to me:

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This the 8th day of March, 2019.



Caroline P. Mackie