

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

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' REPLY IN
SUPPORT OF MOTION FOR
A ONE-WEEK EXTENSION
OF TIME FOR REBUTTAL
EXPERT REPORTS**

Plaintiffs submit this reply brief in support of their motion for a one-week extension of time to serve their rebuttal expert reports.

Legislative Defendants' opposition to the requested extension flies in the face of representations they made to the Court at the April 30th hearing on Legislative Defendants' request for an extension for their own expert reports. At that hearing, counsel for Legislative Defendants stated, on the record:

“We don't think this is necessarily a zero-sum issue. Obviously the plaintiffs are concerned that if we get additional two weeks on our reports, then that then shaves two weeks off of their rebuttal time. That's certainly a um, certainly a valid point. But we believe that if the plaintiffs find that they need more time on their rebuttal reports, we believe that the case management order has some flexibility built into it that some other dates could be rearranged without jeopardizing the trial date, so that they could have more time. We could get the expert witness depositions done and still do the trial preparations that is contemplated by the case management order. So we don't see this issue as a zero-sum issue to give up time and take time away from them. We think that issue could be dealt with, frankly, I think the parties could probably agree on that in some regard.”

4/30/2019 Hr'g Audio at 59:40-1:00:51. In light of these representations, Legislative Defendants

should be estopped from opposing Plaintiffs' request for the same one-week extension that Legislative Defendants received, and at a minimum Legislative Defendants' opposition is highly unreasonable.

In their e-mail to the trial administrator, Legislative Defendants now state that they consent only to an extension for Plaintiffs' experts "to respond to anything contained in the supplemental reports of Legislative Defendants' experts that were served May 7," but not for Plaintiffs' experts to respond to Legislative Defendants' reports that were served on April 30. This position is untenable for multiple reasons. First, Plaintiffs' experts did not begin working on their rebuttal reports in earnest until after May 7, because they did not know whether and to what extent Legislative Defendants' reports would change or be replaced entirely. Indeed, on May 3, Plaintiffs specifically asked Legislative Defendants whether they "will be serving any further expert reports between now and the extended deadline of May 7, as this affects whether [Plaintiffs] may seek an extension for our expert rebuttal reports per the Court's order." Ex. A (5/3/19 e-mail from Jones to McKnight). Legislative Defendants refused to answer that question. They responded that they "understand Plaintiffs would like to know whether Legislative Defendants plan to serve any additional expert reports on the extended deadline," but did not provide that information. *Id.* (5/6/19 e-mail from McKnight to Jones).

Second, Legislative Defendants' suggestion that Plaintiffs' experts should have to serve two separate rounds of rebuttal reports—one on May 31 and another on June 7—is entirely unworkable. The "supplemental" reports that three of Legislative Defendants' experts served on May 7 overlap in substance with those same experts' reports from April 30, and with the other four expert reports served by Legislative Defendants and Intervenor Defendants on April 30. Plaintiffs' experts each plan to submit one, streamlined rebuttal report responding to all of the

relevant defense-side experts. It would be inefficient, costly, and prejudicial to Plaintiffs to force their experts to parcel out two sets of rebuttal reports responding to different pieces of different reports. Plaintiffs should not be made to bear the burden of the situation that has arisen due to Legislative Defendants' discovery misconduct and the one-week extension they received. Having a single set of streamlined rebuttal reports will also be more efficient for this Court in its ultimate review and adjudication of the merits.

Intervenor Defendants' position is untenable for the same reasons. It would be inefficient and burdensome for Plaintiffs' experts to have to respond to Intervenor Defendants' expert on May 31 and then later respond separately to Legislative Defendants' experts on June 7. There is substantial overlap between the work of Intervenor Defendants' expert and Legislative Defendants' experts, and it would not make sense to have separate rebuttals. In any event, Intervenor Defendants should not be heard to complain when the reason they did not receive an extension is that they failed to disclose that they would have an expert in response to an interrogatory posing that precise question.

Finally, this Court should reject Legislative Defendants' request (made via their e-mail to the trial administrator) that "if the court grants in whole or in part Plaintiffs' request for additional time to serve their rebuttal reports, . . . the court also extend the date for expert depositions by the same number of days that Plaintiffs are allowed to serve their rebuttal reports." Legislative Defendants have provided no legitimate reason—or legal authority—for why their experts cannot begin to sit for depositions the week of June 3 even if Plaintiffs' rebuttal reports are not due until June 7. That would allow the parties to complete expert depositions by the agreed-upon deadline of June 14. Moving that June 14 deadline would necessitate moving other deadlines in the Stipulated Case Management Order, such as the

deadlines for motions *in limine*. While Plaintiffs certainly will confer with Defendants regarding such changes to the case schedule if the Court so directs, Plaintiffs do not believe that any such changes are warranted or needed. Legislative Defendants received an extension of time for their expert reports, and should now have to accept the consequences.

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the motion for a one-week extension of time, until June 7, for Plaintiffs to serve their rebuttal expert reports. Plaintiffs further respectfully request that the Court resolve this motion as soon as practicable so that Plaintiffs and their experts have clarity on the fast-approaching deadline for the reports.

Respectfully submitted this the 15th day of May, 2019

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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 15th day of May, 2019.

/s/Edwin M. Speas, Jr.
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EXHIBIT A

Jacobson, Daniel

From: McKnight, Katherine L. <kmcknight@bakerlaw.com>
Sent: Monday, May 6, 2019 9:34 PM
To: Jones, Stanton; Riggins, Alyssa; Nate Pencook; Majmundar, Amar; Brennan, Stephanie; John Branch; Cox, Paul; Strach, Phillip J.; McKnight, Michael D.; Raile, Richard; Stanley, Trevor M.; Braden, E. Mark
Cc: Speas, Edwin M.; Mackie, Caroline P.; melias@perkinscoie.com; zzz.External.AKhanna@perkinscoie.com; zzz.External.ABranch@perkinscoie.com; Gersch, David P.; Theodore, Elisabeth; Jacobson, Daniel
Subject: RE: Common Cause v. Lewis - Scheduling Expert Witness Depositions

External E-mail

Thank you, Stanton.

We understand Plaintiffs would like to know whether Legislative Defendants plan to serve any additional expert reports on the extended deadline of tomorrow, May 7, 2019, before working to schedule depositions. To that end, could we agree to exchange black out dates on Wednesday, May 8, 2019?

We can look at North Carolina and D.C. and let you know if those locations work by then, too. We see Plaintiffs may seek an extension but believe we should start at least penciling in dates.

Kind regards,

Kate

Katherine L. McKnight
Partner

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From: Jones, Stanton <Stanton.Jones@arnoldporter.com>
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Subject: RE: Common Cause v. Lewis - Scheduling Expert Witness Depositions

Thanks Kate, we will absolutely work together to schedule these depositions. To that end, please let us know whether Legislative Defendants will be serving any further expert reports between now and the extended deadline of May 7, as this affects whether we may seek an extension for our expert rebuttal reports per the Court's order, which in turn may affect the scheduling of depositions.

Also, given that the case is in North Carolina and all parties have counsel in North Carolina, we believe that the expert depositions should take place in North Carolina, especially in light of the compressed schedule and the likelihood that many of the depositions will occur on back-to-back days and some may even need to be double-tracked. Because both Plaintiffs and Legislative Defendants also have counsel in Washington, DC, we would not object to some of the expert depositions taking place in DC, if that is more convenient for your out-of-state experts. Let us know.

In the meantime, we are checking on black-out dates in the June 1-14 window and will let you know.

Regards,
Stanton

From: McKnight, Katherine L. <kmcknight@bakerlaw.com>

Sent: Friday, May 3, 2019 11:22 AM

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Subject: Common Cause v. Lewis - Scheduling Expert Witness Depositions

External E-mail

Dear Counsel,

We would like to begin the process of scheduling depositions for expert witnesses in the first two weeks of June. For reference, Plaintiffs' Rebuttal Reports are due May 31, 2019, and the expert witness deposition deadline is June 14, 2019.

By our count, we have 11 depositions to schedule with experts who live in different areas of the country. Here is an alphabetical list with what we understand to be the location for each expert:

1. Barber – Utah
2. Brunell – Texas
3. Chen – Michigan
4. Cooper – North Carolina
5. Hood – Georgia
6. Johnson – California
7. Lewis – California

8. Mattingly – North Carolina
9. Owen – Georgia
10. Pegden – Pennsylvania
11. Thornton – Florida

We suggest that these depositions take place in central locations on coordinated dates. We recommend for location Washington, D.C., Atlanta, Georgia, and Los Angeles, California.

Could we agree to exchange by **Monday, May 6**, any “black out” dates for experts between June 1 and 14?

Could we also agree to let each other know if these experts are capable of travelling to a central location for their deposition?

We would like to work together on scheduling these depositions for the ease of all involved.

Kind regards,

Kate

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