

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:18-cv-01034

NORTH CAROLINA STATE
CONFERENCE OF THE NAACP, et al.,

Plaintiffs,

v.

ALAN HIRSCH, in his official capacity as
Chairmen of the North Carolina State Board
of Elections, et al.,

Defendants,

PHILIP BERGER, in his official capacity as
President of the North Carolina Senate, et
al.,

Intervenor-Defendants.

**STATE BOARD DEFENDANTS’
RESPONSE TO PLAINTIFFS’
MOTION TO REOPEN
DISCOVERY**

NATURE OF THE MATTER BEFORE THE COURT

This matter comes before the Court on Plaintiffs’ motion to lift the stay and hold a status conference. [D.E. 202]. Plaintiffs have not filed a motion seeking an extension of the discovery period, but that is effectively what they seek with this request. Therefore, the State Board respectfully requests that this motion be treated as a motion to extend the discovery deadline after the time has expired pursuant to Rule 6(b)(1)(B). Because Plaintiffs have failed to demonstrate “excusable neglect,” as Rule 6(b)(1)(B) requires, the motion should be denied.

STATEMENT OF RELEVANT PROCEDURAL HISTORY

On September 23, 2019, the parties submitted, and the Court later adopted, a Joint Report Pursuant to Rule 26(f), which called for Plaintiffs' expert disclosures to be served by April 15, 2020, and for discovery to close on June 1, 2020. [D.E. 77, 87; *see also* Oct. 1, 2019, Text Only Order]. On April 14, 2020, Plaintiffs and State Board Defendants filed an amended 26(f) Report seeking to extend the discovery deadlines. [D.E. 135]. The Court denied the requested extension. *See* Apr. 15, 2020, Text Only Order. The parties filed a joint motion for reconsideration of that order on April 15, 2020. [D.E. 138].

On May 4, 2020, the Court denied the motion for reconsideration. [D.E. 140]. On May 18, 2020, Plaintiffs filed a Consent Objection to Magistrate Judge's April 15, 2020, Order Declining to Adopt the Joint Rule 16(f) Report. [D.E. 143]. On May 27, 2020, the Court denied the objection and affirmed the Magistrate Judge's Order. [D.E. 148].

On April 15, 2020, the deadline for Plaintiffs to make expert disclosures passed without any such disclosures. Discovery closed on June 30, 2020.

On July 15, 2021, the State Board moved for leave to file a late motion for summary judgment, which Plaintiffs opposed. [D.E. 163, 164, 165]. The Court denied the State Board's request. *See* Aug. 25, 2021, Text Only Order. The Court noted that Defendants were free to file an untimely motion pursuant to Local Rule 56.1(g), but it would not be reached if the Court determined that it would delay proceedings. *See id.* On October 2, 2021, Defendants filed a summary judgment motion, supported by an amicus brief by Legislative Defendants, and Plaintiffs opposed. [D.E. 177, 182, 183, 187].

After the U.S. Supreme Court granted certiorari in this case on November 24, 2021, State Board Defendants filed a Motion to Stay, Continue the Trial, or Allow Permissive Intervention. [D.E. 192]. On December 30, 2021, this Court chose to stay this action pending the Supreme Court’s decision or until further order of the Court. [D.E. 194].

Six months later, on June 23, 2022, the Supreme Court issued its ruling allowing Legislative Defendants to intervene in this action. [D.E. 196, 200]. A year later, on June 9, 2023, Plaintiffs filed the pending motion to lift the stay before the Court. [D.E. 202].

LEGAL ARGUMENT

Pursuant to Rule 6(b)(1)(B), to obtain an extension of an expired discovery deadline, Plaintiffs must show that they failed to act due to “excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B). “‘Excusable neglect’ is not easily demonstrated, nor was it intended to be.” *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 534 (4th Cir. 1996). In considering excusable neglect, court’s consider [1] “the danger of prejudice to the [opposing party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993). While State Board Defendants do not question whether Plaintiffs have acted in good faith, Plaintiffs nevertheless cannot establish the factors required to reopen discovery.

1. Prejudice to the State Board

State Board Defendants will be prejudiced by Plaintiffs' request to reopen discovery. When the Court stayed this case on December 30, 2021, it noted that the risk of prejudice to the litigants was lessened because "[s]taying the case [would] not reopen discovery, require additional litigation, or require the parties to change litigation strategies." [D.E. 194, p. 2]. Now, however, Plaintiffs seek to use the fact that this case has been on hold for twenty months as a basis for reopening discovery, a strategy that will likely produce the precise consequences that this Court was specifically trying to avoid.

Plaintiffs have served State Board Defendants with numerous new discovery demands, most of which are objectionable and all of which will have the effect of setting back this litigation by months, possibly longer. Plaintiffs' new requests can largely be broken down into three categories: (1) evidence related to how the State Board is implementing the voter ID law, (2) evidence related to how the law will impact certain racial groups, and (3) document requests seeking to supplement the documents exchanged in the state court matter, *Holmes v. Moore*, No. 18 CVS 15292. Each category is problematic.

First, Plaintiffs ask for information concerning the State Board's current implementation of the voter ID law. *See* Proposed Requests for Production of Documents 3, 4, 7, and 8 [D.E. 203-1]; Proposed Interrogatories 1, 2, 3, 4, 6, 7, 8, and 9 [D.E. 203-2]; and Proposed Rule 30(b)(6) Deposition Topics 8 of 11 [D.E. 203-3]. But information about how a law has been implemented is not relevant for purposes of

proving a facial claim, as the Fourth Circuit has already made clear in this very case. *See N.C. State Conference of the NAACP v. Raymond*, 981 F.3d 295, 310 (4th Cir. 2020).

Not only are these requests irrelevant, they are also extremely burdensome. Plaintiffs seek *all* implementation actions, trainings, and related communications to and from County Boards *with no end-date*. *See* Proposed Requests for Production 3, 4, 7 and 8 [D.E. 203-1]; and Proposed Interrogatories 1, 2, 3, 4, 7, 8, and 9 [D.E. 203-2]. These requests, as written, mean that *every* action taken by the State Board related to Voter ID would trigger an obligation to produce discovery, with no end in sight. While Plaintiffs have represented to State Board Defendants that they may be willing to add an end date to some requests, an end date is not contained in the proposed requests before the Court.

As for the second category of discovery sought, the impact evidence is both burdensome and equally available to Plaintiffs. For instance, interrogatory # 5 demands that the State Board identify every DMV location in the state that provides photo identification; the days and hours of operation; and the address, telephone number, and email address for each supervisor of each office. *See* Proposed Interrogatories 5 [D.E. 203-2]. These are public records from a non-party to which Plaintiffs have equal access, and which would impose a significant burden on the State Board to produce.¹

¹ Plaintiffs' proposed Notice for a Rule 30(b)(6) Deposition seeks the same implementation and impact evidence. [D.E. 203-3]. The same objections to the written requests for implementation and impact evidence apply to this request as it covers the same subject matter. *Id.*, p. 6. Moreover, it would likely take three or more days of deposition preparation to educate an agency witness to testify about all information known or reasonably known to the State Board for each of the subjects designated in this request.

As for the third category of requests—related to the state court *Holmes* case—those requests are also burdensome and overly broad. For example, Plaintiffs’ request for production of documents #20, seeks “[a]ll documents referred to, cited, and/or relied upon in responding to any Interrogatories propounded upon the State Board Defendants in the *Holmes* Litigation or this Litigation.” [D.E. 203-1, p. 13]. This sweeping request effectively asks for every document that is even tangentially related to two and half years’ worth of state court litigation.

Plaintiffs other “supplemental” requests related to *Holmes* are equally burdensome. Although State Board Defendants previously agreed to provide all documents exchanged in the state court matter,² Plaintiffs now seek discovery well beyond that. In addition to the *Holmes* record itself, Plaintiffs demand any documents that *would* have been responsive to the discovery requests in *Holmes*, even if those documents were created *after* the *Holmes* record closed.

Finally, any reopening of discovery will also prejudice State Board Defendants’ legal position. State Board Defendants’ summary judgment motion remains pending based on the previously settled record. Reopening discovery would have the effect of expanding the record, which could effectively nullify the State Board Defendants’ pending motion.

² State Board Defendants agreed to provide documents exchanged in the state court matter, with the understanding that any documents that are considered confidential, highly confidential, or privileged would require appropriate protective orders entered by this Court. Entrance of a protective order would necessarily require the input of Legislative Defendants, or other third parties, to the extent the protected documents sought are documents produced by those other parties.

Similarly, reopening fact discovery will also threaten to reopen expert discovery. Plaintiffs previously failed to disclose any experts or serve any expert reports. If discovery is reopened for the proposed discovery, however, Plaintiffs will likely argue that State Board Defendants are not prejudiced if expert discovery is also opened anew. But this outcome would still prejudice State Board Defendants as it would disrupt the settled record.

2. Length of Delay and Potential Impact on Judicial Proceedings

The length of Plaintiffs' delay in bringing this motion and the motion's potential impact on the judicial proceedings also favors denial.

This action was stayed in December 2021, "pending the resolution of the grant of certiorari by the U.S. Supreme Court or until further Order of this Court." [D.E. 194, p. 2]. Approximately six months later, in June 2022, the Supreme Court issued its ruling, and the mandate was filed with this Court. [D.E. 196, 200].

Plaintiffs could have sought to move forward with this case at that point. Had they done so, they would not have been able to obtain any discovery about implementation of S.B. 824, because the law was enjoined by the North Carolina state courts and, thus, had not yet been implemented in any meaningful way. Instead, however, Plaintiffs waited a year before filing a motion to lift the stay. [D.E. 202] Over the course of that year, the North Carolina state courts overturned the injunction that had halted implementation of S.B. 824. State Board Defendants should not bear the burden of Plaintiffs' delay. Plaintiffs should not be entitled to new discovery on implementation simply because they waited long enough to lift the stay in this case for implementation to actually begin.

With respect to the potential impact on judicial proceeding in this case, as discussed above, reopening discovery will assuredly affect State Board Defendants' pending motion for summary judgment. As the Court noted in its order denying the motion to file a late summary judgment request, Local Rule 56.1(g) states that the pending motion for summary judgment will not be reached prior to trial if doing so would delay proceedings. *See* Aug. 25, 2021, Text Only Order. But because no trial is currently scheduled, reaching the dispositive motion cannot delay proceedings. By contrast, reopening discovery can, and likely will, impact the Court's ability to reach the pending dispositive motion.

3. Reason for Delay

It appears from Plaintiffs' brief and their representations at the status conference that Plaintiffs believe they were required to wait until the state court matter was resolved before moving to lift the stay in this case. [D.E. 203, p. 2, (citing D.E. 193)]. State Board Defendants disagree. In the stay order, the Court raised the history of, and potential for, conflicting orders arising out of the state and federal cases as a factor. But ultimately, the order expressly stated that the case was stayed "pending the resolution of the grant of certiorari by the U.S. Supreme Court or until further Order of this Court." [D.E. 194]. Plaintiffs thus could have moved to lift the stay in June 2022, when the Supreme Court issued its opinion. At the least, Plaintiffs should have asked for clarification of the Court's order to see whether the Court might be amenable to a motion to lift the stay, particularly given the positions that Plaintiffs had previously taken on the

relevance of the state court case. [D.E. 193, ¶ 8 (arguing that delay would unduly prejudice Plaintiffs despite the existence of a state court injunction)].

4. Good Faith

State Board Defendants have no reason to question Plaintiffs' good faith in moving to reopen discovery or in these proceedings more generally.

* * *

When considering all the factors above, Plaintiffs have failed to demonstrate excusable neglect. This Court should therefore decline to extend the discovery deadline after it expired.

However, should the Court choose to extend discovery over Defendants' objections, State Board Defendants believe that the Court should direct Plaintiffs to further narrow the scope of that discovery, as Plaintiffs have previously represented that they are willing to do. In addition, if the reopening of discovery means that Plaintiffs are allowed to designate experts, State Board Defendants would request that a separate expert discovery period be added on to the limited window the Court permits for the current proposed discovery, which would allow all parties to engage in expert discovery. Defendants further request that any additional discovery period the Court may order be followed by an opportunity for the filing of dispositive motions.

CONCLUSION

For the foregoing reasons, State Board Defendants respectfully request that the Court deny Plaintiffs' request to extend the discovery end date.

Respectfully submitted this 16th day of August, 2023.

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CERTIFICATE OF WORD COUNT

I hereby certify that pursuant to Local Rule 7.3(d)(1), the foregoing has a word count of less than 6,250 words, and less than ten pages as ordered by the Court, not including the caption, signature block, and certification of word count. This document was prepared in Microsoft Word, from which the word count is generated.

This the 16th day of August, 2023.

/s/ Terence Steed
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Special Deputy Attorney General