UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

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

Plaintiffs,

v.

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

Defendants,

and

PHILIP E. BERGER, *et. al.*,

Legislative Defendant Intervenors.

CASE NO. 1:18-cv-01034-LCB-LPA

LEGISLATIVE DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTION TO MAGISTRATE JUDGE'S SEPTEMBER 12, 2023 ORDER DENYING PLAINTIFFS' MOTION TO REOPEN DISCOVERY

Legislative Defendant Intervenors ("Legislative Defendants") respectfully submit this response to Plaintiffs' Objection to the Magistrate Judge's Order Denying Plaintiffs' Motion to Reopen Discovery, Doc. 211 (Sep. 26, 2023). As Magistrate Judge Auld noted in his Order, this case was commenced over five years ago, and during that time the Court adopted a scheduling order for this case with dates selected by the Plaintiffs and State Defendants that set deadlines, including the closing of fact and expert discovery on March 15, 2020 and May 8, 2020, respectively. *See* Doc. 210 at 2–3 (Sept. 12, 2023). Having failed to conduct the fact and expert discovery Plaintiffs now contend they need prior to the discovery deadlines they agreed to, Plaintiffs are seeking the Court's intervention to save them for their own tactical litigation choices. Judge Auld's Order appropriately rejects Plaintiffs' request to reopen discovery holding that "the record [does not] support a finding of excusable neglect." *Id.* at 15. Nothing in Plaintiffs' current

submission demonstrates that Judge Auld's conclusion that Plaintiffs have failed to demonstrate excusable neglect was clearly erroneous.

Further, Plaintiffs' submission to this Court ignores Judge Auld's recognition that Plaintiffs' request that the Court reopen discovery "risk[s] a delay in the resolution of this case beyond the next major election season." *Id.* at 30. That is an outcome, as Judge Auld points out, that Plaintiffs previously opposed. *Id.* at 29–30 (noting Plaintiffs "disdain for delay" and declaration that " '[t]he rights of North Carolina voters are too important to leave . . . unadjudicated before[] the upcoming federal and statewide elections' ") (internal citations omitted). Ensuring that this case is resolved before the 2024 election cycle, which is unlikely if discovery is reopened as Plaintiffs are seeking, is yet another reason for the Court to overrule Plaintiffs' Objection and affirm Judge Auld's Order.

I. THE RECORD FULLY SUPPORTS JUDGE AULD'S FINDING THAT PLAINTIFFS HAVE FAILED TO DEMONSTRATE EXCUSABLE NEGLECT IN NOT SEEKING DISCOVERY SOONER

As Judge Auld explained in exhausting detail in his Order, Plaintiffs utterly failed to demonstrate excusable neglect that would warrant reopening discovery. To the contrary, Judge Auld noted that Plaintiffs failed to develop any argument for the Court to find excusable neglect in either their opening brief or reply brief, which "failures alone warrant denial of Plaintiffs' request to demand discovery from the Elections Board after the discovery deadline." Doc. 210 at 14–15. Judge Auld nevertheless considered each of the factors the Fourth Circuit has said a Court should consider in determining whether excusable neglect existed, *see Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530, 534 (4th Cir. 1996), and correctly found that each factor weighed against the Plaintiffs. Judge Auld found that reopening discovery "would lead to additional delay and expense . . . [which are] recognized source[s] of prejudice to the opposing party." Doc. 210 at 16 (citing *Plotkin v. Assoc. of Eye Care Ctrs., Inc.*, 710 F.Supp. 156, 159

(E.D.N.C. 1989)). He found that the inevitable delay caused by reopening discovery "would negatively impact judicial proceedings." *Id.* at 19. He appropriately recognized that "[t]he specter of the 2024 elections on the horizon strongly supports [keeping the case on track for trial] and concomitantly counsels against any 'delays [that] could [] jeopardize the Court's ability to reach final judgment in advance of the impending election cycle' (Docket Entry 56 at 21) . . ." *Id.* at 20. He rejected Plaintiffs' asserted "reason for the delay" in seeking the proposed discovery from the State Board, finding "Plaintiffs made a tactical choice not to timely serve the proposed (or apparently any) discovery demands on the Elections Board, *id.* at 20–21, and concluded that "[t]here is no doubt that the reason for the delay was completely in Plaintiffs' control." *Id*. at 26 (citing *Yeoman v. Ikea U.S.A. W., Inc.*, No. 11CV701, 2013 WL 3467410, at *8 (S.D. Cal. July 10, 2013) (unpublished)). Finally, Judge Auld found with respect to the final factor of "whether Plaintiffs acted in good faith," in which he laid out in detail "the shifting nature of Plaintiffs' positions regarding delay" that "[e]ven adopting the most generous reading of the foregoing events, 'the Court cannot say that [Plaintiffs'] conduct was in good faith,'" *Id.* at 27-30 (citing *Yoeman*, 2013 WL 3467410, at *8)..

A. Selectively Reopening Discovery Would be Highly Prejudicial and Inequitable to Legislative Defendants

Focusing on just a few of these factors makes clear the prejudice and inequity that would follow if Plaintiffs' request to re-open discovery was allowed. Discovery in this case closed over three years ago, on June 1, 2020 – a date agreed to by Plaintiffs and reflected in the order entered by the Court on October 1, 2019. *See* Joint Rule 26(f) Report, Doc. 77 (Sept. 23, 2019); Joint Add. to Joint Rule 26(f) Report, Doc. 87 (Sept. 30, 2019); and Text Order dated October 1, 2019 (adopting Joint Rule 26(f) Report). While discovery was open, Plaintiffs steadfastly refused to allow the participation of Legislative Defendants, opposing their intervention by arguing, in part,

that doing so would cause harmful delays. *See e.g.*, Pls.' Opp'n to Mot. to Intervene, Doc. 38 at 2 (Feb. 19, 2019) (claiming allowing intervention would "unduly delay and prejudice the adjudication of the original parties' rights."); Prop. Intervenors' Resp. to Pls.' Mot. for Scheduling Conf. and Order, Doc. 55 at 2 (May 1, 2019) (noting Plaintiffs' refusal to include Legislative Defendants in discussions of scheduling issues). Consequently, Legislative Defendants have not had the opportunity to engage in *any* discovery or to contribute to the existing evidentiary record. Plaintiffs, conversely, have had a full and fair opportunity to seek the discovery they deemed necessary to develop the existing record, including but not limited to the opportunity to identify fact and expert witnesses and submit expert reports. Now, years later, Plaintiffs, apparently recognizing the deficiencies in their case, having failed to obtain a preliminary injunction and having failed to identify experts by the April 15, 2020 deadline they agreed to, *see* Doc. 77 at 3, seek to reopen discovery to correct their past errors. It would be entirely inequitable to Legislative Defendants to allow Plaintiffs to alter the existing evidentiary record and obtain and introduce new evidence, when Legislative Defendants, at the insistence of Plaintiffs, had no opportunity to conduct discovery, depose Plaintiffs' witnesses, or submit rebuttal expert reports of their own. Judge Auld was correct in not permitting this inequitable result to happen.

B. Reopening Discovery Will Cause Substantial Delay

Judge Auld was entirely correct that Plaintiffs' attempt to reopen discovery will cause delay. Indeed, it will cause substantial delay. Legislative Defendants are willing to stand on the existing preliminary injunction record and to proceed with obtaining a decision on the pending summary judgment papers to bring an end to this litigation. Plaintiffs, who had a full and complete opportunity to obtain discovery and develop the existing record and who decried the prejudice that would result from any delay in a resolution, are ironically the ones asking the Court to proceed

down a path destined to create this substantial delay. Substantial delay is inevitable because there is no equitable way to permit Plaintiffs to reopen discovery and add to the existing evidentiary record without giving Legislative Defendants a full and complete opportunity for discovery as well. In short, if Plaintiffs are not bound by the record they have developed, then neither should Legislative Defendants be so bound.

Legislative Defendants respectfully submit that if the Court is inclined to allow Plaintiffs to reopen the record and pursue additional discovery (which the Court should not), then Legislative Defendants must have an equal opportunity to seek discovery of Plaintiffs, to depose Plaintiffs' identified fact and expert witnesses, to submit rebuttal expert reports, and to develop their own evidence for summary judgment and trial. The first steps would be drafting a new Rule 26(f) Report, convening a new Rule 26(f) conference with the Court, and the Court entering a new case management schedule that affords Legislative Defendants the discovery opportunities they have not had to date and appropriate time to pursue those discovery opportunities, including time for written discovery, depositions of identified fact witnesses, identification of affirmative expert witnesses, depositions of affirmative expert witnesses, time for drafting expert rebuttal reports, depositions of any rebuttal experts, and time for new dispositive motions.

Further, as Judge Auld again correctly recognized, all of this must also take into account "the specter" of 2024 elections. To avoid voter confusion, the Court must avoid issuing opinions that could change election rules on the eve of an election. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (invoking its decision in *Purcell v. Gonzalez*, 549 U.S. 1, (2006) (per curiam), to emphasize "that lower federal courts should ordinarily not alter the election rules on the eve of an election."). Indeed, in *Purcell* the Supreme Court noted that court orders themselves can result in voter confusion and create a

disincentive to vote. *Purcell*, 549 U.S. at 4–5. When all of these considerations are taken into account, if summary judgment is not granted, it is almost inevitable that reopening discovery now will lead to a trial only after the 2024 election cycle in order to have sufficient time to allow for equitable discovery, avoid voter confusion, and not violate the teachings of *Purcell*.

This delay is entirely avoidable by affirming Judge Auld's Order, denying Plaintiffs' attempt to re-open discovery, and proceeding on the record as it existed at the preliminary injunction stage and as it stood when discovery closed. If Legislative Defendants, who have had no opportunity for discovery, are willing to proceed with the current evidentiary record, then Plaintiffs, who have claimed for years that they want this case resolved expeditiously and who have had every discovery opportunity, on a schedule they agreed to, have no basis for seeking a different result.

II. PLAINTIFFS' ARGUMENT THAT THEY ARE MERELY SEEKING SUPPLEMENTATION AND NOT NEW DISCOVERY DOES NOT ESTABLISH EXCUSABLE NEGLECT

Plaintiffs, in the face of Judge Auld's exhaustive and well-reasoned Order finding they had not established excusable neglect warranting the re-opening of discovery, have attempted to shift their arguments and, for the first time in their Opposition to Judge Auld's Order[1], are suggesting that they are merely seeking supplementation of prior discovery as required by Rule 26(e) and not

[1] The Court should exercise its discretion to not even entertain Plaintiffs' attempt to pin clear error on Judge Auld's alleged failure to require supplementation of the State Board's Initial Disclosures under Rule 26(e), because Plaintiffs failed to raise that supplementation argument to the Magistrate and thereby forfeited it. *See e.g.*, *Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000) (finding that a party's failure to raise an argument before the magistrate precludes presenting that argument to the District Court); *Dune v. G4s Regulated Sec. Sols., Inc.*, 2015 WL 799523 at *2 (D.S.C. Feb. 25, 2015) (same); *Keitt v. Ormond*, 2008 WL 4964770 at *2 (S.D.W. Va. Nov. 13, 2008) (same); *Jesselson v. Outlet Associates of Williamsburg, Ltd. P'ship*, 784 F.Supp. 1223, 1228–29 (E.D. Va. 1991) (finding that "a magistrate's decision should not be disturbed on the basis of arguments not presented to him."); *cf. Doe v. Chao*, 306 F.3d 170, 183 (4th Cir. 2002) (reviewing for abuse of discretion a district court's refusal to permit new evidence following a magistrate judge's recommendation).

seeking to reopen discovery. But that is clearly not so. First, among the new discovery sought by Plaintiffs is a Rule 30(b)(6) deposition, which is clearly not "supplementation" of prior discovery requests. Second, Plaintiffs apparently never served *any* written discovery on the State Board seeking the documents and information they now contend must be "supplemented" under Rule 26(e) as Plaintiffs cite only to the State Board's production of documents as part of the State Board's Initial Disclosures.

The supplementation requirements governing initial disclosures foreclose Plaintiffs' arguments. Rule 26(a)(1)(A)(ii), which governs initial disclosure requirements, only obligates a party to "provide to the other parties . . . a copy—***or*** a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control ***and may use to support its claims or defenses*** . . ." Doc. 211 at 6 (emphasis added). There is no evidence in this record that the State Board did not comply with its obligations under this Rule. As Plaintiffs acknowledge, the State Board did provide them documents through that initial disclosure production and subsequent supplementations. *See Id*. at 2–3. As importantly, through those productions and disclosures, the State Board provided Plaintiffs with the identification of information in the State Board's possession (by category and location) that would allow Plaintiffs to follow up with discovery requests, which as Judge Auld noted, Plaintiffs made the tactical decision not to do. *See* Doc. 210 at 22–23. Plaintiffs also did not question the accuracy or completeness of the State Board's Initial Disclosures before discovery closed, but only now, when they failed to convince Judge Auld to re-open discovery to allow them to serve new discovery requests.

Plaintiffs simply ignore that, with respect to initial disclosures and supplementation of those disclosures, the Rule only requires a party to produce or identify documents, information,

and tangible things that the party *may use to support its claims or defenses.* Rule 26(a)(1)(A)(ii). The State Board has made very clear its view (which Legislative Defendants share) that evidence related to implementation of the Voter ID law is not relevant for purposes of proving a facial claim. *See* State Board's Resp. to . Mot. to Reopen Discovery, Doc. 205 at 4 (Aug. 16, 2023). Thus, the State Board is clearly not relying on such information to support its claims or defenses, rendering such evidence outside the scope of Rule 26(a)(1)(A)(ii). Under these circumstances, and at this stage in the litigation with discovery having been closed for years, no further supplementation under the Rules of Civil Procedure is required, and Judge Auld did not commit clear error by not requiring it.

Again, as Judge Auld explained, "Plaintiffs made a tactical choice not to timely serve the proposed (or apparently any) discovery demands on the Elections Board and now regret that choice." Doc. 210 at 20–21.

> By eschewing that latter course [serving formal discovery demands], Plaintiffs saved time and money, which they could direct to other aspects of the litigation . . . , but Plaintiffs also thereby forfeited the protections afforded by formal discovery mechanisms, including the obligation the Federal Rules of Civil Procedure place on . . . .

supplementation. Id. (emphasis added). In short, Plaintiffs are not in fact seeking supplementation under the Rules but rather new discovery they failed to seek while discovery was ongoing. For the reasons described above and in Judge Auld's Order that request to reopen discovery should be denied.

CONCLUSION

Plaintiffs fail to demonstrate the clear error necessary to sustain their objection to Judge Auld's Order. Plaintiffs cannot overcome the compelling reasoning in that Order for why they have failed to demonstrate excusable neglect for not seeking this discovery sooner. Moreover, the

inevitable delay that will result from the new discovery Plaintiffs seek and the potential impact on the 2024 elections all support overruling Plaintiffs' objection and affirming Judge Auld's Order.

Dated: October 10, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on October 10, 2023, I electronically filed the foregoing response with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record in this matter.

s/ Nicole J. Moss
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