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,

and

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

Intervenor-Defendants.

STATE BOARD DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTION TO MAGISTRATE JUDGE'S ORDER

NOW COME Defendants Alan Hirsch, Jeff Carmon, III, Stacy "Four" Eggers, IV, Kevin N. Lewis, and Siobhan O'Duffy Millen in their official capacities as Members of the State Board of Elections (collectively "the State Board Defendants") to respond to Plaintiffs' Objection to the Magistrate Judge's Ruling. [D.E. 210, 211].

NATURE OF THE MATTER BEFORE THE COURT

Plaintiffs are again requesting to reopen discovery three years after it has closed. However, in this version of their request they now claim for the first time that State Board Defendants' voluntary production of the record from the related state court action,

Holmes, et al. v. Moore, et al., 19-CVS-15292 (Wake Cty. Super. Ct.) (hereinafter "*Holmes*"), created an obligation under Rule 26(e) to supplement the *Holmes* record with additional evidence after discovery has closed.

This request was never raised to the Magistrate Judge, and the Objection fails to address the issues ruled upon in the order challenged. This request also mischaracterizes the agreement between the parties and the scope of what was produced. Finally, to the extent any obligation does exist arising out of Rule 26(e), the duty to supplement ends with production of the *Holmes* record and does not extend to any and all similar evidence that may have been created since the close of that record.[1] For these reasons, Plaintiffs' objection should be overruled and the Magistrate Judge's ruling affirmed.

STATEMENT OF RELEVANT PROCEDURAL HISTORY

State Board Defendants incorporate by reference the Magistrate Judge's ruling detailing the history of this action and the many reasons why the motion to reopen discovery was denied as if set forth fully herein. [D.E. 210].

QUESTION PRESENTED

Whether the opinion by this Court, as entered by U.S. Magistrate Judge Auld, correctly denied Plaintiffs' request to reopen discovery long after the discovery deadline had passed.

[1] State Board Defendants remain willing to voluntarily produce the *Holmes* record as agreed. To the extent any portion of the *Holmes* record is not in Plaintiffs possession, State Board Defendants will produce it.

LEGAL ARGUMENT

Properly asserted objections seeking review of a Magistrate Judge's ruling by the assigned District Judge are reviewed *de novo*. Fed. R. Civ. P. 72(b)(3).

1. Plaintiffs' Efforts to Present a New Request to the Court through an Objection Should be Rejected.

Instead of explaining why they believe the Magistrate Judge's ruling to deny Plaintiffs' request to reopen discovery was incorrect, Plaintiffs are attempting to present a new request to this Court. Specifically, Plaintiffs are asking that the Court find State Board Defendants owe a duty to supplement the production of the *Holmes* record with evidence not produced in that action, as if that action were still ongoing. Not only is this an entirely novel request that was not previously raised, but it also seeks to silently amend the motion that was ruled upon by the Magistrate Judge.

The motion before the Magistrate Judge was a motion to reopen discovery after the deadline had passed, and the issue to be resolved was whether Plaintiffs could demonstrate excusable neglect to justify that request. [D.E. 210, pp. 13-14, and n.8]. Plaintiffs did not address that issue, either before the Magistrate Judge or in their objection to that order. [D.E. 203, 208, 211]. Instead, without previously filing a motion, Plaintiffs are now seeking to compel State Board Defendants to supplement initial disclosures because those initial disclosures reference the ongoing voluntary production of the record from the *Holmes* litigation. [D.E. 211, pp. 1-2].

These are not the same requests made before Magistrate Judge Auld, and Plaintiffs' attempt to swap horses in the middle of the race should not be permitted.

Plaintiffs present this new request as if it was before the Magistrate Judge, and something he made part of his ruling, by mischaracterizing that order as one "absolving the State Board Defendants from their duty to supplement," and requesting that this Court overrule that particular part of the decision. [D.E. 211, p. 2]. But the Magistrate Judge's order contains no such decision because there was no issue raised before the Magistrate Judge regarding the duty to supplement. [D.E. 210].

State Board Defendants acknowledge that in addressing objections to a magistrate judge's ruling, a district court considers all arguments directed at that issue, even arguments not raised before the magistrate judge. *See United States v. George*, 971 F.2d 1113, 1118 (4th Cir. 1992). However, Plaintiffs are not simply raising a new argument here, but an entirely new issue: a request for relief based upon a duty to supplement under Rule 26(e), even though the matter before the Court was a request to reopen discovery under Rule 6(a). This is not permitted. *See Hubbard v. Stirling*, No. 8:19-cv-01314-SAL, 2020 U.S. Dist. LEXIS 161443, at *4-5 (discussing the distinction in Fourth Circuit precedent between raising new arguments and raising new issues in an objection to a magistrate judge's ruling, and comparing *George*, 917 F.2d at 1117-1118, with *Samples v. Ballard*, 860 F.3d 266, 272 (4th Cir. 2017)).

Again, the decision issued by the Magistrate Judge resolved whether Plaintiffs demonstrated excusable neglect to justify their motion to reopen discovery after the deadline has passed. [D.E. 210, pp. 13-14]. Plaintiffs failed to address that issue in their initial moving papers (D.E. 203), failed to address it in their reply (D.E. 208) even after it

was raised by State Board Defendants (D.E. 205, p. 3), and have chosen to ignore it in this filing. [D.E. 211].

Because Plaintiffs have failed to demonstrate any error in that ruling and should not be permitted to raise a new issue and make a new request in their objection, the objection should be overruled and the Magistrate Judge's order affirmed.

2. Plaintiffs are Mischaracterizing the Agreement Between the Parties to Create a New Obligation for State Board Defendants.

As a threshold matter, contrary to Plaintiffs' assertions, the parties did not enter into an agreement in the Joint Rule 26(f) Report. [D.E. 211, p. 2]. As indicated by the September 23, 2019 Joint Rule 26(f) Report, "Defendants have volunteered to provide and have been providing a large number of discovery exchanges from [the *Holmes* litigation]." [D.E. 77, p. 2]. This was not an agreement made in the Rule 26(f) Report, but rather one previously agreed between the parties.

More to the point, in an effort to support an argument for an expanded view of State Board Defendants' prior disclosures, Plaintiffs have mischaracterized the agreement as if it was an agreement to produce the same categories of evidence that was requested in the *Holmes* litigation, rather than simply reproducing the record from that related action. [D.E. 211, pp. 2-4]. However, the agreement was never based on some category of evidence Plaintiffs might find relevant. Rather, what the parties agreed to was for the State Board to produce the record from the *Holmes* litigation and nothing more. This is precisely how it is framed in the parties' Joint Rule 26(f) Report:

> Defendants have volunteered to provide and have been providing a large number of discovery exchanges from a pending state court case challenging

> the same law, *Holmes v. Moore*, 19 CVS 15292 (Wake Cty. Super. Ct.). **Plaintiffs agreed to review that production before making any new discovery requests on Defendants**, to protect the parties' and judicial resources, to promote the efficiency of the litigation, and to avoid unnecessary duplication of effort or expense.

[D.E. 77, p. 2 (emphasis added)].

And, of course, this makes sense. In order to avoid the burdens of protracted discovery in this Court, especially when the State Board was already litigating a state court case over the same issues involving multiple rounds of written discovery and countless depositions, the State Board was offering to immediately provide everything produced in that state court litigation. If, after reviewing what the State Board produced, the Plaintiffs had additional requests that were not already covered in the *Holmes* files, they could seek that information through the ordinary discovery process. In other words, the State Board entered into this agreement precisely to avoid having to relive the expensive and burdensome discovery process in *Holmes*, but to allow Plaintiffs the ability to identify anything beyond the *Holmes* record that they felt the need to make a request for. To interpret that voluntary-production agreement as creating an obligation to supplement the *Holmes* discovery after the case had closed would undermine the very purpose of the agreement.

Thus, State Board Defendants only agreed to voluntarily reproduce the record from the *Holmes* litigation, and it was then Plaintiffs obligation to make their own discovery requests, if necessary. *Id.* Consistent with that understanding, the Joint Rule 26(f) Report anticipated a standard amount of discovery requests, including 25 interrogatories, 25 admissions, seven depositions, and expert disclosure deadlines. *Id.*,

pp. 3-4. Plaintiffs chose not to utilize the discovery tools available to them and should not now be permitted to redefine the agreement to avoid the consequences of that decision.

This distinction is important. Under Plaintiffs' misinterpretation of the agreement, State Board Defendants would be required to supplement responses to *all* discovery propounded in the *Holmes* litigation as if it was served by Plaintiffs in this action. Again, in reality, the agreement was only to provide the *Holmes* record and that obligation ends when the entirety of the *Holmes* record is produced. It does not create an ongoing obligation to produce similar evidence, as Plaintiffs would have it.

To be clear, State Board Defendants remain willing to voluntarily produce records from the *Holmes* action to ensure Plaintiffs have everything from that record, but that should not be misconstrued as some form of an admission of a duty to supplement. [D.E. 211, p. 1]. State Board Defendants agreed to voluntarily produce any as-yet unproduced documents from the *Holmes* action, as well as a voter file based upon Plaintiffs' informal request for same so that Plaintiffs' expert can prepare an expert report.[2] This is consistent with the prior voluntary agreement, and Plaintiffs' attempts to mischaracterize that as an acknowledgement of some obligation to supplement prior productions is misplaced. [D.E. 211, pp. 1-2].

[2] State Board Defendants maintain that Plaintiffs failed to properly disclose experts during the discovery period. Thus, any such report should be barred. Nonetheless, in an effort to avoid any prejudice to Plaintiffs if the Court disagrees with that position, State Board Defendants have agreed to provide a recent version of the voter file to Plaintiffs.

In further support of their effort to portray these productions as a categorical production subject to supplementation, rather than simply a reproduction of the *Holmes* record, Plaintiffs attach and cite to State Board Defendants' Initial Disclosures and Supplemental Disclosures. [D.E. 211, pp. 2-4 (citing to Exhibits A and B appended directly to Plaintiffs' Objection, D.E. 211, pp. 14-26 and 27-38, respectively)]. However, a review of what was actually produced with those disclosures demonstrates that the production was limited to the record from *Holmes*, and not some categorical production of certain types of evidence that would create an ongoing obligation to supplement. [D.E. 211, pp. 20-26 and 34-37].

Specifically, both sets of disclosures included a list of the files produced that contain the prefix "Holmes" in the file name. *Id.* This reflects the understanding between the parties, as indicated in the Joint Rule 26(f) Report, that State Board Defendants would produce the *Holmes* record, and if Plaintiffs required more, they would serve their own discovery requests, which they did not. [D.E. 77, p. 2]. The only documents produced that do not contain the "Holmes" prefix are folders entitled "CONFIDENTIAL – Acknowledgements of no Photo ID before VIVA implement" (D.E. 211, p. 21), and "Reasonable_Impediment_Forms" (*Id.*, p. 23), both of which were also part of the *Holmes* record. It is not clear if the final document entitled "Voter Inquiry Report" (*Id.*, p. 38), was part of the record in *Holmes*; however, the Supplemental Disclosure to which it is attached indicates that it is not a document from the State Board Defendants but from NCDOT/DMV records. *Id.*, pp. 29-30, 38.

The fact that Plaintiffs originally made what Judge Auld appropriately characterized as a motion to reopen discovery demonstrates that this was also their understanding of the agreement between the parties. In seeking to reopen discovery, Plaintiffs were forced to acknowledge that they needed to do so in order to serve additional discovery on State Board Defendants. [D.E. 203, pp. 3-4, 10]. This was because the parties understood the *Holmes* production to be part of a voluntary agreement and not part of the formal discovery process creating an obligation to supplement. Stated differently, if a duty to supplement with similar categories of discovery actually existed, as Plaintiffs now suggest, they would not have needed to seek to reopen discovery to serve additional discovery. They could have simply demanded supplementation or sought relief from the Court for same.

In sum, the procedural history of the case demonstrates that it was the parties' mutual understanding that State Board Defendants would voluntarily reproduce the record from the *Holmes* litigation and that it was then incumbent upon Plaintiffs to seek further discovery if they deemed it necessary. [D.E. 77, p. 2]. As the Magistrate Judge aptly concluded, Plaintiffs made certain litigation choices in this action, including not making discovery requests, and should not now be able to redefine prior agreements to create new obligations in order to revisit those choices. [D.E. 210, pp. 20-21].

For these reasons, and for those stated in the Magistrate Judge's order, this Court should overrule Plaintiffs' objection and affirm that order.

3. Even if Prior Productions Created a Duty to Supplement, that Duty Extends No Further Than to the *Holmes* Record.

Rule 26(e) requires a party to "supplement or correct its disclosure or response in a timely manner if the party learns in some material respect the disclosure or response is incomplete or incorrect …" Fed. R. Civ. P. 26(e)(a)(A). Thus, even if it is assumed that producing the *Holmes* record with initial and supplemental disclosures subjected those productions to supplementation pursuant to Rule 26(e), that duty extends only to ensuring the production of the *Holmes* record is complete. It did not create an obligation extending to similar evidence that may have been created after the close of the *Holmes* litigation.

Plaintiffs would like the previous production by State Board Defendants to encompass the same *categories* of information produced in the *Holmes* litigation in order to create a duty to supplement with similar evidence as time goes by. [D.E. 211, pp. 3-4, 6-8]. However, the documents voluntarily produced by the State Board Defendants was limited to a direct reproduction of the record in the *Holmes* litigation.

Again, that distinction is important. State Board Defendants did not agree to a production of impact evidence, implementation evidence, DMV records, or any other category of evidence Plaintiffs might deem relevant to this action. The agreement was always limited to the record in the *Holmes* litigation. The same agreement required Plaintiffs to make further requests of their own if they required additional information and documents. But Plaintiffs did not do so.

Thus, if State Board Defendants have an obligation under Rule 26(e), it is a duty to ensure the production of the *Holmes* record is complete and correct. The *Holmes* record is now closed. To the extent any part of the Holmes record is not in Plaintiffs' possession, State Board Defendants have already agreed to produce it. Thus, any obligation to supplement that prior production, if it exists, can go no further than the records produced in the *Holmes* action.

This same logic applies to the voter file to the extent it falls within a duty to supplement. State Board Defendants voluntarily produced it without any formal request from Plaintiffs. It is State Board Defendants' position that they are under no obligation to produce a new version of that file either now or when previously produced in late 2021. This is especially true because Plaintiffs failed to disclose an expert that could utilize that data, such that its use now by an expert should be barred. Nonetheless, State Board Defendants previously informed Plaintiffs they would voluntarily provide this document, not due to any obligation, but in an effort to avoid any prejudice to Plaintiffs if the Court finds they are entitled to use their experts at trial. State Board Defendants have again voluntarily agreed to provide this document. Therefore, to the extent that prior voluntary productions of the voter file created an obligation to supplement, State Board Defendants have already agreed to do so.

CONCLUSION

For the foregoing reasons, State Board Defendants respectfully request that the Court overrule Plaintiffs' objection and affirmed the Magistrate Judge's ruling.

Respectfully submitted this 10th day of October, 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 10th day of October, 2023.

/s/ Terence Steed
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Special Deputy Attorney General