

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
Case No. 18 CVS 014001

COMMON CAUSE; <i>et al.</i>	)
	)
<i>Plaintiffs,</i>	)
	)
v.	)
	)
DAVID R. LEWIS, <i>et al.</i>	)
	)
<i>Defendants.</i>	)
	)
	)
	)

---

Legislative Defendants respectfully submit this motion to amend the case management order to allow Legislative Defendants’ an additional fourteen (14) days to submit their expert reports. As explained more fully below, Plaintiffs prejudicial and dilatory discovery practices have substantially hindered Legislative Defendants’ ability to prepare expert reports.

**BACKGROUND**

The Case Management Order currently in effect was entered by the Court on February 15, 2019.

Under the Case Management Order, Plaintiffs’ expert reports were originally due March 22, 2019. Well prior to the initial due date for Plaintiffs’ expert reports, a dispute arose between Plaintiffs and Legislative Defendants regarding legislative privilege and Legislative Defendants’ discovery responses. On February 4, 2019, in addition to the legislative privilege objections they had raised in response to Plaintiffs’ first set of discovery requests, Legislative Defendants filed and served a motion for protective order. While the parties were discussing the legislative privilege issue, Plaintiffs filed their first motion to compel on February 19, 2019.

Plaintiffs inexplicably waited nearly a month before apparently pressing for a hearing and

resolution of the pending motions. Under Local Civil Rule 3.2 (Wake County Superior Court), Plaintiffs could have attempted to calendar for hearing their motion to compel or the motion for protective order any time after those motions were filed. Plaintiffs did not.

Plaintiffs finally pressed for a hearing on the pending motions and the Court heard the motions on March 12, 2019. That same day, the Court *sua sponte* extended the deadline for Plaintiffs' expert reports to April 1, 2019. On March 25, 2019 the Court entered an order partially granting Plaintiffs' first motion to compel and granting in full Legislative Defendants' motion for protective order. Notwithstanding Plaintiffs' delay in seeking relief, the Court in that same order extended Plaintiffs' expert witness deadline to April 8, 2019. The expert witness deadline for Legislative Defendants remained April 30, 2019.

Legislative Defendants served Interrogatories and Requests for Production of Documents on Plaintiffs on February 15, 2019. Plaintiffs served written responses on Legislative Defendants on March 18, 2019, but failed to produce any documents. Instead, Plaintiffs indicated when serving written responses for Common Cause and Individual Plaintiffs that "Plaintiffs" in general would "begin a rolling document production...this week" without specifying which Plaintiffs would begin a rolling production, a date expected for the beginning of the rolling production, the time intervals for the rolling production, or an estimated end date for the rolling production. (See email attached as Exhibit A).

#### **A. Common Cause and Individual Plaintiff Productions**

Two days later on March 20, 2019, Legislative Defendants received productions from 10 Individual Plaintiffs (out of 37 Individual Plaintiffs). These were not complete productions as Legislative Defendants received supplemental productions for two of the Individual Plaintiffs on March 27, 2019 and April 2, 2019. On March 21, 2019, Legislative Defendants received

productions for nine Individual Plaintiffs and Common Cause. None of these productions contained information about a rolling schedule, but the production for Common Cause was supplemented on April 1, 2019, and the production for another Individual Plaintiff was supplemented on April 2, 2019. On March 26, 2019, Legislative Defendants received productions from three Individual Plaintiffs. The next day on March 27, Legislative Defendants received a production for one new Individual Plaintiff and a supplemental production for yet another Plaintiff. On March 29, Legislative Defendants received documents from two additional Individual Plaintiffs. On April 11, nine days after receiving the last production from Plaintiffs, Legislative Defendants received a production for another Individual Plaintiff.

#### **B. North Carolina Democratic Party Productions**

Legislative Defendants received no word from counsel for the North Carolina Democratic Party (“NCDP”) regarding production of their documents on March 18, despite numerous written responses referring Legislative Defendants to a “document production being served contemporaneously with these requests.” Twelve days later on March 30, in response to a deficiency letter from Legislative Defendants, counsel for the NCDP indicated that documents were being withheld on the basis that no protective order had been entered in the case.

This was gamesmanship. The March 30 email from counsel was the first time the NCDP alleged it was withholding documents for lack of a protective order. In fact, none of NCDP’s written responses to Legislative Defendants’ discovery requests indicated that the organization would not produce documents until a protective order entered with the court. Instead, NCDP responded to numerous document requests by stating that “Plaintiff will produce non-privileged, responsive documents within its possession, custody, and control” and referred Legislative Defendants to a contemporaneous document production in responses to Interrogatories. Nothing

in these responses indicated that NCDP was waiting on Legislative Defendants to sign a protective order to produce documents. In fact, as discussed above, Common Cause and numerous other Plaintiffs had already begun producing documents.

Legislative Defendants promptly signed the protective order on Monday April 1, 2019. But despite having had an extra two weeks, NCDP did not produce all of their documents on April 1, 2019. Instead, NCDP produced 1455 documents on April 1 and then proceeded to what can only charitably be described as dribble out documents thereafter. NCDP produced 30 documents on April 2, then waited until April 4 to produce another 1313 documents. NCDP then waited another week and produced 969 documents on April 12. NCDP did not complete its document production until April 16. Its April 16 production contained 2409 documents, thus saving the largest production for the last production.

## **ARGUMENT**

### **A. The Court Should Extend Legislative Defendants' Expert Witness Deadline in Light of Plaintiffs' Two Extensions.**

When the Court extended the deadline for Plaintiffs' expert reports it did not make a corresponding extension for expert reports of the other parties. Under the original Case Management Order, Plaintiffs' reports were due March 22, 2019 with Legislative Defendants' reports due April 30, 2019. This schedule was negotiated among the parties and provided Legislative Defendants' experts at least five weeks to prepare reports and respond to Plaintiffs' expert reports. That time has now been shortened to essentially three weeks.

This shortened time period is significantly prejudicial to Legislative Defendants. On April 8, 2019 Plaintiffs served four expert reports. These reports are a combined hundreds of pages long and come with a massive amount of backup data. The amount of data itself has been a challenge for Legislative Defendants and their experts. For instance, it took over twelve hours for counsel

simply to download the data to be able to send it to the experts. The data for Plaintiffs' expert Dr. Chen was alone 13GB. This is an incredible amount of data to download and analyze.

Downloading and analyzing the data alone is a monumental task. But then the experts have to formulate a response to the Plaintiffs' experts' reports. This does not include time needed for the experts to develop their own reports. Accordingly, Legislative Defendants respectfully request that the Court amend the Case Management Order to set the deadline for Defendants' expert reports to May 14, 2019.

**B. Plaintiffs' Dilatory Discovery Responses Warrant the Requested Extension.**

Plaintiffs' discovery responses, including their document production, were due March 18, 2019. Rather than seek an extension of time or file a motion for protective order, Plaintiffs unilaterally began slow rolling productions of a few Plaintiffs at a time with no indication of when the production would be complete. Plaintiffs did not complete the entire production until April 17, 2019, which included a document dump of over 2400 documents from NCDP on April 16. In addition, Plaintiffs have also failed to comply with Local Civil Rule 5.7 requiring the disclosure of search terms used in compiling electronic communications.

Legislative Defendants' experts need additional time to analyze this information for their reports. There has not been enough time to review all of the documents, much less consider how the information may be used in their reports. Plaintiffs' delay in producing this information alone warrants an extension. An extension is doubly warranted when considering the fact that Legislative Defendants' experts did not receive Plaintiffs' reports until April 8, 2019.

Finally, Plaintiffs' conduct with regard to one of their experts in particular, Dr. Chen, further supports an extension. Dr. Chen's report and backup data were served on April 8, 2019. However, as Legislative Defendants' experts were reviewing the data, they were able to discover

that Plaintiffs did not disclose multiple files critical to the opposing experts' work. The missing files were necessary to create the intermediate files that are required to run Dr. Chen's simulations and to verify his simulation results. By letter dated April 18, 2019, sent by email to counsel for Plaintiffs at 2:41 p.m., Legislative Defendants requested these files. (See attached Exhibit B) Less than two hours later, at 4:27 p.m., Plaintiffs produced the files, which suggests that Plaintiffs had the files all along and simply did not produce them. (See attached Exhibit C)

In producing the files, Plaintiffs represented that the files could have been recreated from information Dr. Chen produced on April 8. That is misleading at best. Without the files that were provided last week by Plaintiffs, Legislative Defendants' experts would have had to take an enormous amount of time to create the intermediate files that are required to run Dr. Chen's simulations and to verify his simulation results. This is because Dr. Chen's R programs "enactedplan.R" that create the files the Plaintiffs' produced last week contain junk lines of extraneous information that prevents the program from actually running successfully. Moreover, the R programs and Java files are created for his computer with specific paths that have to be modified in order to run the programs. With only three weeks to complete their reports, Legislative Defendants' experts could not and should not have to incur the time cost of reproducing files that Plaintiffs apparently had at their fingertips all along.

### **CONCLUSION**

Legislative Defendants respectfully request that the Court amend the Case Management Order to reflect a deadline for Defendants' expert reports of May 14, 2019.

This the 22<sup>nd</sup> day of April, 2019.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.

By: 

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*Counsel for Legislative Defendants*

*\*admitted pro hac vice*

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this day served the foregoing in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile transmittal;
- By email transmittal;
- Depositing a copy here of, first class postage pre-paid in the United States mail, properly addressed to:

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P.O. Box 1801  
Raleigh, NC 27602-1801  
(919) 783-6400  
[espeas@poynerspruill.com](mailto:espeas@poynerspruill.com)

*Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Plaintiffs*

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*Counsel for Common Cause and the Individual Plaintiffs*

This the 22<sup>nd</sup> day of April, 2019.

By:   
Phillip J. Strach





**Strach, Phillip J.**

**From:** Jones, Stanton <Stanton.Jones@arnoldporter.com>  
**Sent:** Monday, March 18, 2019 7:03 PM  
**To:** Majmundar, Amar; Brennan, Stephanie; Cox, Paul; John Branch; dworrell@shanahanmcdougal.com; Nate Pencook; Strach, Phillip J.; McKnight, Michael D.; Riggins, Alyssa; Braden, E. Mark; Raile, Richard; Stanley, Trevor M.  
**Cc:** Speas, Edwin M.; Mackie, Caroline P.; AKhanna@perkinscoie.com; ABranch@perkinscoie.com; melias@perkinscoie.com; Theodore, Elisabeth; Jacobson, Daniel; Gersch, David P.; Konkel, Kaitlin  
**Subject:** Re: Common Cause v. Lewis - Common Cause and Individual Plaintiffs' Objections and Responses to Legislative Defendants' First Interrogatories and RFPs

As a follow up, we will begin a rolling document production from plaintiffs this week.

Sent from my iPhone

On Mar 18, 2019, at 5:48 PM, Jones, Stanton <[Stanton.Jones@arnoldporter.com](mailto:Stanton.Jones@arnoldporter.com)> wrote:

Counsel:

Attached is a zip file containing Common Cause's and each individual plaintiff's objections and responses to Legislative Defendants' first set of written discovery.

Regards,  
Stanton

<Plaintiffs' Discovery Responses (Mar. 18, 2019).zip>

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<http://www.arnoldporter.com>

**Strach, Phillip J.**

**From:** Jones, Stanton <Stanton.Jones@arnoldporter.com>  
**Sent:** Thursday, April 18, 2019 4:27 PM  
**To:** Strach, Phillip J.; Christine McCaffrey; rraile@bakerlaw.com; melias@perkinscoie.com; McKnight, Michael D.; Riggins, Alyssa; amajmundar@ncdoj.gov; pcox@ncdoj.gov; sbrennan@ncdoj.gov; tstanley@bakerlaw.com; mbraden@bakerlaw.com; Nate Pencook; John Branch  
**Cc:** cmackie@poynerspruill.com; Gersch, David P.; Theodore, Elisabeth; Jacobson, Daniel; espeas@poynerspruill.com; AKhanna@perkinscoie.com; ABranch@perkinscoie.com  
**Subject:** RE: Common Cause, et al. v. Representative David R. Lewis  
**Attachments:** Apr 18.zip

Phil:

In response to the letter you attached below, Dr. Chen's computer code that we sent you on April 8 shows exactly how the .txt files you request were created, and the computer code can be used to recreate these files. In any event, these files are attached to this email. As you'll see, the files titled "counties.txt" are simply lists of all 100 counties in North Carolina, along with the specific county grouping each county is within in the 2017 House and Senate enacted plans. The files titled "groups.txt" contain basic data on the county groupings in the enacted plans. None of this data describes or contains any information regarding any of Dr. Chen's simulations; it is merely basic information about the enacted plans.

Regards,  
Stanton

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Stanton Jones  
Partner

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**From:** Strach, Phillip J. <phil.strach@ogletree.com>  
**Sent:** Thursday, April 18, 2019 2:41 PM  
**To:** Jones, Stanton <Stanton.Jones@arnoldporter.com>; Christine McCaffrey <CMcCaffrey@shanahanlawgroup.com>; rraile@bakerlaw.com; melias@perkinscoie.com; McKnight, Michael D. <Michael.McKnight@ogletreedeakins.com>; Riggins, Alyssa <Alyssa.Riggins@ogletreedeakins.com>; amajmundar@ncdoj.gov; pcox@ncdoj.gov; sbrennan@ncdoj.gov; tstanley@bakerlaw.com; mbraden@bakerlaw.com; Nate Pencook <NPencook@shanahanlawgroup.com>; John Branch <JBranch@shanahanlawgroup.com>  
**Cc:** cmackie@poynerspruill.com; Gersch, David P. <David.Gersch@arnoldporter.com>; Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>; Jacobson,

Daniel <Daniel.Jacobson@arnoldporter.com>; espeas@poynerspruill.com; zzz.External.AKhanna@perkinscoie.com <AKhanna@perkinscoie.com>; zzz.External.ABranch@perkinscoie.com <ABranch@perkinscoie.com>  
**Subject:** RE: Common Cause, et al. v. Representative David R. Lewis

Stanton: please see the attached letter. Thanks. Phil

**Phillip J. Strach | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**

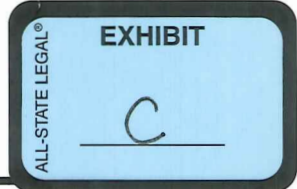
4208 Six Forks Road, Suite 1100 | Raleigh, NC 27609 | Telephone: 919-789-3179 | Fax: 919-783-9412  
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**Strach, Phillip J.**

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**From:** Strach, Phillip J.  
**Sent:** Thursday, April 18, 2019 2:41 PM  
**To:** 'Jones, Stanton'; Christine McCaffrey; rraile@bakerlaw.com; melias@perkinscoie.com; McKnight, Michael D.; Riggins, Alyssa; amajmundar@ncdoj.gov; pcox@ncdoj.gov; sbrennan@ncdoj.gov; tstanley@bakerlaw.com; mbraden@bakerlaw.com; Nate Pencook; John Branch  
**Cc:** cmackie@poynerspruill.com; Gersch, David P.; Theodore, Elisabeth; Jacobson, Daniel; espeas@poynerspruill.com; AKhanna@perkinscoie.com; ABranch@perkinscoie.com  
**Subject:** RE: Common Cause, et al. v. Representative David R. Lewis  
**Attachments:** Letter to S. Jones.pdf

Stanton: please see the attached letter. Thanks. Phil

**Phillip J. Strach | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**  
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April 18, 2019

**Via Email (stanton.jones@arnoldporter.com)**

R. Stanton Jones  
Arnold & Porter  
601 Massachusetts Ave., NW  
Washington, DC 20001

RE: *Common Cause, et al. v. David R. Lewis, et al.*  
*Wake County Superior Court Case No.: 18-cvs-014001*  
*Deficiency of Dr. Chen's Data*

Dear Stanton:

We have reviewed the backup data produced with Dr. Chen's expert report pursuant to our agreement to disclose expert data and code. We have found that the following files are missing from Dr. Chen's backup data:

1. 'NCH/base/groups.txt'
2. 'NCU/base/groups.txt'
3. 'NCS/base1/counties.txt'
4. '/NCU/base/counties.txt'

Please correct these deficiencies immediately as the failure of Dr. Chen to produce a complete backup file prejudices Legislative Defendants experts' ability to complete expert reports.

Sincerely,

/s/ Phillip J. Strach

Phillip J. Strach

PJS:amr

38210763.1