UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, ROGER J. BRDAK, FREDERICK C. DURHAL, JR., JACK E. ELLIS, DONNA E. FARRIS, WILLIAM "BILL" J. GRASHA, ROSA L. HOLLIDAY, DIANA L. KETOLA, JON "JACK" G. LASALLE, RICHARD "DICK" W. LONG, LORENZO RIVERA and RASHIDA H. TLAIB,

Plaintiffs,

v.

RUTH JOHNSON, in her official capacity as Michigan Secretary of State,

Defendant.
_____/

Case No. 17-cv-14148

Hon. Eric L. Clay
Hon. Denise Page Hood
Hon. Gordon J. Quist

Defendant Ruth Johnson's Motion to Compel Full And Complete Discovery Responses

Joseph H. Yeager, Jr. (IN 2083-49)
Harmony A. Mappes (IN 27237-49)
Jeffrey P. Justman (MN 390413)
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: (317) 237-0300
Fax: (317) 237-1000
Jay.Yeager@FaegreBD.com
Harmony.Mappes@FaegreBD.com
Jeff.Justman@FaegreBD.com
Counsel for Plaintiffs

Mark Brewer (P35661)
GOODMAN ACKER P.C.
17000 West Ten Mile, Second Floor
Southfield, MI 48075
Telephone: (248) 483-5000
Fax: (248) 483-3131
MBrewer@goodmanacker.com
Counsel for Plaintiffs

Dickinson Wright PLLC
Peter H. Ellsworth (P23657)
Ryan M. Shannon (P74535)
Special Assistant Attorneys General
215 S. Washington Sq., Suite 200
Lansing, MI 48933
(517) 371-1700
PEllsworth@dickinsonwright.com
RShannon@dickinsonwright.com
Attorneys for Defendant

_____/

DEFENDANT RUTH JOHNSON'S MOTION TO COMPEL FULL AND COMPLETE DISCOVERY RESPONSES

Defendant Ruth Johnson ("Defendant"), by and through her attorneys, Dickinson Wright PLLC, moves this Court pursuant to FED. R. CIV. P. 33, 34, and 37 for full and complete responses to her First Set of Interrogatories and Document Requests to Plaintiffs.

In support of this Motion, Defendant relies upon and incorporates by reference the facts, arguments, and legal authority set forth in the accompanying Brief in Support, as well as the pleadings on file with the Court.

Pursuant to FED R. CIV. P. 37 and E.D. Mich. LR 7.1, concurrence in the instant relief was requested from opposing counsel, but no such concurrence was obtained. The parties engaged in a telephonic meet and confer on July 17, 2018 and were subsequently able to narrow their discovery disputes, but were not able to resolve the discovery disputes set forth in this Motion.

For the foregoing reasons, Defendant respectfully requests that this Honorable Court enter an order compelling Plaintiffs to provide full and complete responses to Interrogatory No. 1 and Document Request No. 4.

Respectfully submitted,
DICKINSON WRIGHT PLLC

Dated: July 23, 2018

/s/ Ryan M. Shannon
Ryan M. Shannon
Attorneys for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, ROGER J. BRDAK, FREDERICK C. DURHAL, JR., JACK E. ELLIS, DONNA E. FARRIS, WILLIAM "BILL" J. GRASHA, ROSA L. HOLLIDAY, DIANA L. KETOLA, JON "JACK" G. LASALLE, RICHARD "DICK" W. LONG, LORENZO RIVERA and RASHIDA H. TLAIB,

Plaintiffs,

v.

RUTH JOHNSON, in her official capacity as Michigan Secretary of State,

Defendant.
_____/

Case No. 17-cv-14148

Hon. Eric L. Clay
Hon. Denise Page Hood
Hon. Gordon J. Quist

Defendant Ruth Johnson's Brief in Support of Her Motion to Compel Full And Complete Discovery Responses

Joseph H. Yeager, Jr. (IN 2083-49)
Harmony A. Mappes (IN 27237-49)
Jeffrey P. Justman (MN 390413)
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: (317) 237-0300
Fax: (317) 237-1000
Jay.Yeager@FaegreBD.com
Harmony.Mappes@FaegreBD.com
Jeff.Justman@FaegreBD.com
Counsel for Plaintiffs

Mark Brewer (P35661)
GOODMAN ACKER P.C.
17000 West Ten Mile, Second Floor
Southfield, MI 48075
Telephone: (248) 483-5000
Fax: (248) 483-3131
MBrewer@goodmanacker.com
Counsel for Plaintiffs

Dickinson Wright PLLC
Peter H. Ellsworth (P23657)
Ryan M. Shannon (P74535)
Special Assistant Attorneys General
215 S. Washington Sq., Suite 200
Lansing, MI 48933
(517) 371-1700
PEllsworth@dickinsonwright.com
RShannon@dickinsonwright.com
Attorneys for Defendant

_____/

DEFENDANT RUTH JOHNSON'S BRIEF IN SUPPORT OF HER MOTION TO COMPEL FULL AND COMPLETE DISCOVERY RESPONSES

TABLE OF CONTENTS

Contents

STATEMENT OF ISSUES PRESENTED

Should the Court compel Plaintiffs to respond to Defendant's discovery, where the requested discovery is relevant to the claims and defenses in this litigation, and Plaintiffs have asserted no valid objections thereto?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 26, 37

I. INTRODUCTION AND STATEMENT OF FACTS

A. Introduction

On June 12, 2018, Defendant served upon Plaintiffs her First Set of Interrogatories and Document Requests (sometimes, the "Discovery"). *See* Exhibit 1. As pertinent to this Motion, and because this Court has already ruled that Plaintiffs must engage in a district-by-district challenge, Defendant sought from Plaintiffs the identification of each Michigan House district, each Michigan Senate district, and each Congressional district alleged by Plaintiffs to constitute an impermissible partisan gerrymander. *Id*. at Interrogatory No. 1. Defendant also requested, *inter alia*, the facts which support the claim as to each such challenged district (including the identification of the particular portion of any expert report that relates to each challenged district), and the identification of the persons with knowledge as to the facts pertaining to each such challenged district. *Id*. Defendant also sought a summary of the substance and scope of the anticipated testimony of any trial witnesses, and the specific challenged district(s) as to which that testimony would pertain. *Id*.

On July 10, 2018, Plaintiffs served their Objections and Responses to Defendant Ruth Johnson's First Set of Interrogatories and Document Requests to Plaintiffs (sometimes, the "Responses"). *See* Exhibit 2. As to Interrogatory No. 1, Plaintiffs objected based upon "overbreadth and undue burden." *Id*. at p. 3.

Plaintiffs also claimed that "[c]ontention discovery is premature given the very early stage of discovery." *Id.* at p. 4.[1] Plaintiffs further objected to the extent the Interrogatory "seeks information that is publicly available, is a matter of public record, or duplicates the information provided in Plaintiffs' mandatory disclosures . . . ." *Id.* And finally, Plaintiffs raised privilege and work product objections. *Id.* at pp. 4-5.

B. Interrogatory No. 1

As to their substantive response to Interrogatory No. 1, Plaintiffs generally referenced their expert reports and the opinions therein. Ex. 2; Response at pp. 5-6. Plaintiffs referenced six documents, and explained that "Michael Vatter will testify *inter alia* to several instances of Republican staff acknowledging political motives in the drawing of districts," and that "Fred Durhal will . . . testify about retaliation against African-American State House representatives from Detroit who refused to vote for the Republican gerrymander." *Id.* at pp. 8-9. Completely absent from the Response, however, is the identification of *specific districts* Plaintiffs claim to have been impermissibly gerrymandered, and to which (if any) of the specifically identified challenged districts the documents and witness testimony pertain.

[1] Given that discovery is presently set to close on August 24, 2018, the parties are actually at the very *end* stage of that discovery window.

C. Document Request No. 4

In her Discovery, Defendant also sought production of "any source code, software, or electronic programs/applications used by any of [Plaintiffs'] experts in connection with this litigation." *See* Exhibit 1; Discovery at Document Request No. 4. In their Response, Plaintiffs raised objections, asserting that Defendant is seeking "draft reports" and "expert-counsel communications" that are protected by FRCP 26(b)(4)(B) & (C), and that the request exceeds the scope of disclosure required by FRCP 26(a)(2)(B). Ex. 2, Response at p. 20. Plaintiffs also asserted privilege and work product objections. *Id*. at pp. 20-21.

For their substantive response, Plaintiffs stated simply that they "have previously produced computer data and code responsive to this Request." Ex. 2; Response at p. 21. While it is true that Plaintiffs previously produced "bytecode" – which is very different from "source code" – Plaintiffs have refused to produce their experts' (and particularly, Dr. Jowei Chen's) *source* code.

II. ARGUMENT

A. Legal Standard

Discovery under the Federal Rules of Civil Procedure ("FRCP") "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Under this standard,

the Rules envision and require open, far-reaching discovery. *See Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998) (*citing Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 501 (6th Cir. 1970)).

FRCP 26(b)(1) provides that a party may obtain discovery "regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). FRCP 33 permits a party to serve interrogatories as to any matter that may be inquired into under Rule 26(b).

FRCP 34 permits a party to serve on another a party a request for production of documents. FRCP 34(B)(2)(b) states that the production of responsive documents "be completed no later than the time for inspection specified in the request or another reasonable time specified in the response."

FRCP 37 permits a party to move for an order compelling the answer to discovery requests and the production of responsive documents in accordance with FRCP 33 and 34. Rule 37 provides that a party may seek to compel discovery when, as here, a responding party fails to answer an interrogatory or refuses to provide requested documents or information. Fed. R. Civ. P. 37(a)(3)(B)(iii)-(iv).

B. Plaintiffs Should Be Required To Fully And Completely Respond to Interrogatory No. 1

So that she can conduct her *own* discovery, Defendant must be permitted to know what specific districts Plaintiffs seek to challenge as impermissible gerrymanders, and what proofs Plaintiffs intend to present, *before* the close of discovery.

On May 16, 2018, this Court dismissed Plaintiffs' statewide claims, agreeing that "Plaintiffs lack standing to bring their claims on a statewide basis," but permitted Plaintiffs to proceed on a district-by-district basis. (Dkt. #54. PageID 943.) Subsequently, on June 18, 2018, the Supreme Court issued its decision in *Whitford v. Gill*, 484 U.S. __ (2018). It held, in a gerrymandering case where vote dilution is the alleged harm (as is the case here), "that injury is district specific. … The boundaries of the district, the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. … And a plaintiff's remedy must be limited to the inadequacy that produced [his] injury in fact." *Id.* (Slip op. at 14. (citations and quotations omitted)).

The Court held that general claims that a plan as a whole is imbalanced are insufficient; the Court found, for example, that the lead plaintiff's admission that his district was likely to be heavily democratic under either the current Wisconsin plan or an alternative plan left him without standing. *Id.* (Slip op. at pp. 5, 17.) While

the Court found that four individual plaintiffs had pleaded a particularized burden (by asserting dilution of influence in their particular districts as a result of cracking and packing), the Court also found that the same four plaintiffs had failed to provide sufficient proofs at trial (as these plaintiffs relied instead on statewide data), and remanded their claims for further development. *Id.* (Slip op. at p. 17.)

Given this Court's May 19, 2018 Order, and the Supreme Court's decision in *Gill*, it is apparent that Plaintiffs will be required to mount a district-specific challenge, and to present district-specific proofs. Plaintiffs must further show that a Plaintiff in each challenged district, standing alone, has suffered harm under the current Apportionment Plan with respect to the lines drawn for *their* district.

Plaintiff served expert reports on June 1, 2018. Only one of the reports—that of Dr. Jowei Chen—identified a limited set of districts claimed to be "partisan outliers." This list was not, however, stated to be exclusive. In the meet and confer process, Plaintiffs' counsel suggested that this list contained *many* of the districts that were subject to challenge, but would not commit to the list being final or exclusive. Plaintiffs' counsel asserted that "until discovery is complete, we cannot waive claims as to any particular district," (including apparently even those Michigan House Districts in Detroit which would be heavily Democratic under any scenario and thus like the district of the lead plaintiff in *Gill*), and would not commit

to providing a final list of challenged districts until "probably post-discovery cutoff." (See Exhibit 3.)

Because Plaintiffs will not identify the districts they are challenging and state the proofs they intend to present as requested in Interrogatory No. 1, Defendant is left in an untenable position. Defendant must either *guess* as to which districts Plaintiffs will present proofs at trial, or must assume that Plaintiffs intend to challenge *all* 110 Michigan House Districts, all 38 Michigan Senate Districts, and all 14 Michigan Congressional districts, including those which would be heavily Democratic or Republican under any proposed plan.

Fact and expert discovery in this case must be completed by August 24, 2018. (PageID 939.) Motions for summary judgment must be filed less than a month later, by September 21, 2018. (PageID 940.) Defendant must be provided full responses to her Interrogatory No. 1, including a list of districts being challenged and associated proofs, *before* discovery closes, and with enough time remaining (or as may be added by this Court's order) to conduct meaningful discovery.[2]

[2] Plaintiffs' objections to Interrogatory No. 1 have no merit. Defendant is not seeking any information that is "public," and is not seeking any protected communications. Further, the discovery is neither premature nor does it impose an undue burden. Defendant is simply seeking to *understand* Plaintiffs' claims, and conduct discovery to be prepared to oppose those claims at trial.

C. Plaintiffs Should Be Required To Fully And Completely Respond To Document Request No. 4

1. Plaintiffs Should Be Required To Produce Dr. Chen's Source Code

As part of their expert disclosures, Plaintiffs produced the expert report of Dr. Jowei Chen. *See* Ex. 4 (excerpts). Dr. Chen purports to have developed an algorithm which generated "randomly drawn" districting maps, which allegedly show (by comparison) that certain districts in the enacted maps are impermissibly gerrymandered. *See, e.g.*, *id*. at p. 2.

Defendant retained Dr. Yan Liu to review, analyze and critique Dr. Chen's expert report. To conduct a comprehensive critique, Dr. Liu advised that he needed to review Dr. Chen's source code. Given the extraordinary time constraints,[3] Defendant informally sought from Plaintiffs Dr. Chen's source code (the rebuttal expert report deadline was shorter than the time allowed for responding to formal discovery). Plaintiffs refused to provide Dr. Chen's source code.

[3] Defendant notes in this regard that Plaintiffs retained Dr. Chen in February *2016*. *See* Ex. 2. Plaintiffs produced his report (along with two others) on June 1, 2018. Defendant then had 28 days to review and analyze Dr. Chen's report, locate a rebuttal expert, and serve a rebuttal report.

Source code is "code written by a programmer in a high-level language and readable by people but not computers."[4] "Source code must be converted to object code or machine language before a computer can read or execute the program."[5] The source code is thus the version of the instructions/code as it was written by Dr. Chen, *before* he compiled it into a binary file to be read by the computer. Code in such a form (i.e., source code) is necessary to understand the instructions given by the programmer to the computer; many prominent academic journals,[6] for example,

[4] The American Heritage Dictionary, "source code," (5th). To the extent compiling the code requires specialized instructions external to the java code file, such instructions would also be part of the "source code." Plaintiffs should be compelled to provide, in short, everything needed to both *read* Dr. Chen's program and to actually *operate* it in the same manner as Dr. Chen claims he did in preparing his report.

[5] *Id.*

[6] See Editorial, *Does your code stand up to scrutiny*?, NATURE, March 6, 2018 (Exhibit 5.) ("When relevant, *Nature Methods*, *Nature Biotechnology*, and most recently, journals including *Nature* and *Nature Neuroscience* encourage authors to provide the source code, installation guide and a sample data set, and to make this code available to reviewers for checking."). Dr. Chen purports on his academic website to provide the java source code files he used to run redistricting simulations for his 2013 article in the Quarterly Journal of Political Science (authored with John Rodden), entitled *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*. *See* http://www-personal.umich.edu/~jowei/UnintentionalGerrymandering/ (last accessed 7/20/2018). However, the link to his Code for such article downloads a zip file that contains only shape and map files for Duval County in Florida—no code. *See id.*

require or encourage authors of studies that make use of software to provide their source code to peer reviewers.

Java source code in particular should be easily and readily shared. Plaintiffs did not provide Java source code.

In his expert report, Dr. Liu (who holds a Ph.D from the University of Illinois in *Informatics,* a Masters in *Computer Science* from the University of Iowa, and serves as a Senior Research *Programmer* at the National Center for Supercomputing Applications) summarized that which Plaintiffs did provide and why it was inadequate for Dr. Liu's purposes:

> In this case, the Plaintiffs first provided machine-readable bytecode (also known as an executable file). We use these files to run a program, not to read and understand the algorithm behind the program. We cannot understand how an algorithm works from the executable file alone. This file is also not a human readable file. The Defendant, then, to my understanding, requested the production of source code. Plaintiffs then provided a text file, which was a machine-decompiled version of Dr. Chen's bytecode. This decompiled version is also not meant to be human-readable. These files also could not be compiled to produce Dr. Chen's executable file or any executable file. This was also not the source code.
>
> If I had received a copy of Dr. Chen's source code and been able to review and analyze it as he had personally drafted it, I would have been able to critique additional flaws as to his methodology, including any flaws that may exist with respect to his implementation of Michigan's redistricting criteria in his simulations.

See Ex. 6; Liu Report (excerpts) at p. 25; see also *Oracle America Inc. v. Google, Inc.*, 750 F.3d 1339, 1348 (Fed. Cir. 2014).[7]

Defendant also sought Dr. Chen's source code via formal Discovery. *See* Ex. 1; Discovery at Document Request No. 4. Plaintiffs have refused to produce it.

The import of the source code is obvious. Defendant is aware of Dr. Chen's purported conclusions, but is seeking to understand the *process* by which he derived them. By analogy, Dr. Chen has produced his "answers" to the complicated math problems, but Plaintiffs refuse to allow Defendant to analyze Dr. Chen's "equation."

Plaintiffs have advised Defendant that what has been produced (decompiled bytecode) "should be sufficient" for Defendant's expert. But that is quite obviously not their determination to make. The source code is relevant, it is easy (and routine) to produce, and the parties have agreed to protections for Dr. Chen's intellectual property. There thus exists no legitimate basis to refuse to produce that source code.

Plaintiffs' objections are specious, and should be overruled. Defendant is not seeking any "communications" at all. *A fortiori*, Defendant is not seeking "expert-

[7] The court in *Oracle America* described briefly the history of the Java programming language used by Dr. Chen here. In particular, it explained that the Java programming language itself "is the language in which a Java programmer writes source code, the version of a program that is in a human readable language. … For the instructions to be executed, they must be converted (or compiled) into binary machine code (object code) consisting of 0s and 1s understandable by the particular computing device." *Id.* at 1348.

counsel communications," nor any "attorney-client communications." Nor is Defendant seeking any "draft reports." Defendant is further not seeking earlier versions of the source code—just the final version of the source code as subsequently compiled and used by Dr. Chen in his report here. Ultimately, Defendant is seeking to understand *how* Dr. Chen reached his conclusions.

And lastly, to the extent Plaintiffs argue that FRCP 26(a)(2)(B) does not impose upon Plaintiffs the obligation to produce the source code along with the expert report, that Rule does not preclude Defendant from seeking information *other than* that enumerated by the Rule (provided that such information is relevant and not otherwise objectionable). And here the source code *is* relevant and not otherwise subject to objection.

Defendant's expert needs Dr. Chen's source code to understand Dr. Chen's methodologies, and thereafter to complete his rebuttal report. This Court should thus order Plaintiffs immediately to produce same to Defendant.

2. If Necessary, The Court Should Appoint An Expert Pursuant To FRE 706

It is anticipated – because Plaintiffs have previously made the assertion – that Plaintiffs will argue that the decompiled bytecode is "all Defendant's experts need," and that it is "as useful" as possessing the actual source code. It is also anticipated that Plaintiffs will argue that the source code is not capable of being produced

because Dr. Chen cannot save source code without compiling it. Defendant's expert vehemently disagrees. And Defendant's expert believes that any competent java programmer will readily agree with Defendant's expert.

Thus, should Plaintiffs argue that compiled and then de-compiled bytecode is functionally equivalent to actual source code, or that source code cannot be produced at all, Defendant requests that the Court appoint its own expert under FRE 706. That Rule of Evidence permits the Court (on motion or *sua sponte*) to appoint an expert to assist the Court. The inquiry of such a neutral expert would be relatively simple: If a computer programmer wanted to analyze all methods and processes of a computer program to understand the precise manner by which that program generated its output, would that computer programmer be aided by (and/or would the computer programmer *require*) a review of the actual source code? Further, is the bytecode or decompiled version of the code provided by Plaintiffs here sufficient for Defendant to analyze Dr. Chen's Code, or should Plaintiffs be able and required to provide source code?[8]

[8] Defendant would agree initially to pay for such an FRE 706 expert. However, should that expert conclude – as entirely expected – that what has been produced to Defendant is not the type of "code" from which Defendant's expert can most efficiently and accurately analyze the programmer's methods/processes, then such costs should be shifted to Plaintiffs as a discovery sanction.

III. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Honorable Court compel Plaintiffs to produce full and complete responses, including responsive documents, to Defendant's Interrogatory No. 1, and Document Request No. 4. Such production must include, among other things, identification of the specific districts being challenged, and production of Dr. Chen's source code (including any associated compiling instructions).

As discovery closes in this matter on August 24, 2018, and as Defendant should be afforded a reasonable opportunity to conduct district-specific discovery once Plaintiffs have identified those districts as to which they intend to present proofs, Defendant also requests relief in the form of an extension on the close of fact and expert discovery of one additional month, after production is made by Plaintiffs, for it to perform such discovery.

Defendant seeks such further and additional relief as deemed just by this Court.

Respectfully submitted,
DICKINSON WRIGHT PLLC

Dated: July 23, 2018

/s/ Ryan M. Shannon
Ryan M. Shannon
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2018, I caused to have electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record in this matter.

Respectfully submitted,

/s/ Ryan M. Shannon
Ryan M. Shannon