UNITED STATE 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. 2:17-cv-14148

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

NONPARTIES' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION FOR CIVIL CONTEMPT

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INTRODUCTION

Plaintiffs' request for the Court to enter an order of civil contempt is unnecessary, improper, and appears designed exclusively to harass nonparties and increase their cost of responding to subpoenas. The nonparty Legislators, Legislative Staff, and Legislative Bodies[1] (the "Nonparties") have complied with every aspect of the Court's May 23 order, spending weeks reviewing hundreds of thousands of documents from hundreds of employees created in over a decade timespan. The Court's order did not set a deadline for production, but the Nonparties have nonetheless worked diligently through nights, weekends, holidays, and vacations to produce documents as quickly as possible. The Nonparties' counsel has provided regular updates to Plaintiffs' counsel regarding document production and has worked to schedule depositions for numerous individuals.

[1] These non-parties include (a) Legislators: Senator Dave Hildenbrand, Senator Joe Hune, Senator Rick Jones, Senator Jim Marleau, Senator John Proos, Senator Randy Richardville, Representative Jase Bolger, Representative Marty Knollenberg (now serving as Senator), Representative Pete Lund, Representative Ed McBroom, Representative Rick Outman, Representative Al Pscholka; (b) Legislative Staff: William Carney, Jeff Cobb (now serving as Secretary of the Senate), Scott Jones, James Kinsey, Terry Marquardt, Brian Began, Ralph Fiebig, J. Lohrstorfer, Daniel McMaster, Gary Randall (now serving as Clerk of the House, and Sharon Tyler; (c) Legislative Attorneys: Shelly Edgerton and Fredrick Hall; and (d) Legislative Bodies: Michigan House Business Office, Michigan Senate Business Office, Michigan Senate Republican Caucus, Michigan Senate Republican Communications Office, Michigan Senate Republican Policy Office, Michigan House Republican Caucus, Michigan House Republican Communications Office, Michigan House Republican Policy Office, Clerk of the Michigan House, Secretary of the Michigan Senate, and Legislative Personnel.

Unfortunately, rather than working with the Nonparties while the Nonparties undertake document production in good faith, Plaintiffs seem intent on picking discovery fights to harass the Nonparties.[2]

The Nonparties are already facing the difficulty of applying the Court's definition of legislative privilege across hundreds of personnel and a decade-long period. Although Plaintiffs are seemingly never satisfied with the Nonparties' pace or the quantity of documents produced, their disappointment appears less about the Nonparties' pace of production and more about their unrealistic desire to find a non-existent "smoking gun" in a 10-year old email.[3] Simply put, the Nonparties cannot produce what they do not possess, even if that result does not fit Plaintiffs' narrative.

[2] For example, Plaintiffs consistently demand a hard date for the end of document production. The Nonparties respond that they are moving as fast as possible, and due to the overwhelming number of documents required to be reviewed based on the Plaintiffs discovery demands, there is no way to guarantee a hard date. The statistics of documents reviewed and produced were provided to Plaintiffs, but Plaintiffs chose to ignore the Nonparties efforts in favor of headline-garnering motion practice.

[3] Plaintiffs demand that the Nonparties prove a negative. They seek an order that the Nonparties certify "that to the extent that they believe responsive documents existed and can now no longer be located, the reason those documents no longer exist or cannot be located." So, the Plaintiffs seek an order that the Nonparties explain why documents do not exist and if they do not exist, where they might not be found. Such an order would create investigative burdens that current Fed. R. Civ. P. 26(b)(1) would reject as disproportionate to the needs of a case.

In any event, the Nonparties have nearly completed searching, sorting through, reviewing, and otherwise accounting for over 430,000 documents and are finalizing production of all of the responsive documents in the Nonparties' possession. That the Nonparties possessed fewer responsive documents than Plaintiffs hoped is not a reason to hold the Nonparties in contempt. This is especially true given that the Court's order did not place a deadline for document production and the Nonparties have expended tremendous effort over the past six weeks to rapidly review and produce scores of documents.

Plaintiffs' claims and legal contentions are not warranted by existing law and are frivolous. Because the nonparties have complied, and will continue to comply, with the Court's May 23 order, the Court should deny Plaintiffs' motion.

BACKGROUND

In February and March 2018, Plaintiffs served the Nonparties with nonparty subpoenas, seeking documents related to the 2012 Michigan redistricting process. The Nonparties filed a Motion to Quash which the Court granted and denied in part on May 23, ordering the Nonparties to conduct discovery and produce certain documents nearly fully as Plaintiffs requested.

On June 29, Plaintiffs filed a motion for contempt, arguing that the Nonparties were ignoring both the Court's May 23 order and the February subpoenas. On July 3, the nonparties responded, explaining that, although they

had already begun to process documents, they were bogged down by the volume and complexity of the documents, the nearly decade-long timespan of the request, and the hundreds of individuals included in broad categories of subpoena recipients, such as "Michigan House Republican Caucus" (which arguably includes hundreds of people in the past decade). Upon understanding the efforts the Nonparties had expended, on July 6, Plaintiffs asked the Court to defer ruling on the motion.

Since then, the Nonparties have expended immense time and resources to comply with the Court's order.[4] First, the Michigan House and Senate Information Technology departments conducted a series of searches using search terms agreed upon by the parties to develop several terabytes of potentially responsive raw data, which translated to approximately 430,000 documents.[5] The Nonparties also conducted "hard copy" searches in various Legislative offices and asked current and former members of the Legislature and staff to search their personal emails, files, computers and communications devices for responsive documents. The Nonparties' counsel culled all duplicate documents and eliminated documents that were clearly news articles or similar mass mailings with no connection to the

[4] On three occasions the Nonparties requested that Plaintiffs share the costs incurred by Michigan taxpayers in this massive effort. Plaintiffs have flatly refused.

[5] This included inter-office emails, memoranda, constituent communications, etc.

subpoena,. As mentioned in the Nonparties' July 3 response, the Nonparties used Plaintiffs' proposed search terms and timing parameters to further narrow the list to approximately 85,000 potentially-responsive documents for review.[6]

Then began the heavy lifting. To review those 85,000 documents in accordance with the Court's instructions, and to prepare production sets and privilege logs, the Nonparties' counsel assigned 26 attorneys to review material over the course of the past six weeks: nine of the Nonparties' counsel's own attorneys—both partners and associates; 15 contract attorneys; and two paralegal litigation support specialists employed by the Nonparties' counsel.[7] Many of these attorneys worked nights, weekends, holidays, and during summer vacations to expedite the process and were supported and assisted by various other staff members. And, of course, this does not include the efforts of current and past legislative staff who have put aside personal business to search for documents.

As a result of this "all-hands-on-deck" effort, the Nonparties' counsel has now finished reviewing those 85,000 documents. Within a few days, the Nonparties expect to finish reviewing the remaining documents and complete a privilege log.

[6] Executing the search alone resulted in about 73,000 documents. This increased to 85,000 when contextualizing, "family" documents were considered. For example, many of the 73,000 documents were email attachments that contained a search term; in such cases, instead of marking only the attachment for review, both it and the email text would marked.

[7] Counsel supervised the contract attorneys and litigation specialists.

That notwithstanding, Plaintiffs now renew their motion for contempt, requesting that the Court order the Nonparties to make three productions: (1) "all documents responsive to the Court's order denying their motion to quash" by August 8, 2018; (2) "a privilege log"; and (3) affidavits/declarations from the "Legislative Bodies and Legislative Personnel" detailing the "steps that each took to collect, review, and produce responsive documents, and to the extent that they believe responsive documents existed and can now no longer be located, the reason those documents no longer exist or cannot be located." Pls.' Am. Req. for a Ruling, ECF No. 68, p. 3. Such relief is unnecessary and inappropriate.[8]

ARGUMENT

I. Law

Although a federal court may hold a party in contempt for failure to comply with a subpoena under Federal Rule of Civil Procedure 45(g), such a sanction

[8] The precise posture of Plaintiffs' requests is unclear. A week after Plaintiffs filed their "Motion for Civil Contempt," Plaintiffs asked the Court to "defer" ruling on it until Plaintiffs asked the Court to. Now they have filed a "Request for a Ruling" on their motion. The Nonparties object to this kind of litigation. If Plaintiffs do not wish the Court to consider a specific motion, they can withdraw it or subsequently file an amended version; the Nonparties are not aware of any authority suggesting that a party can unilaterally delay consideration of their motion. This stop-and-start approach has caused confusion regarding which filing the Nonparties' briefing should address. Additionally, the Nonparties have already satisfied some of the original motion's requests. Yet Plaintiffs' request resurrects their now-outdated motion requests, meaning that a significant portion of Plaintiffs' briefing is moot. Plaintiffs' approach wastes the Nonparties' and the Court's resources.

"should not be used lightly." *Elec. Workers Pension Trust Fund of Local Union #58, IBEW v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003). In addition, the party seeking contempt must demonstrate by clear and convincing evidence that the individual "violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *M & C Corp. v. Erwin Behr GmbH & Co.*, 289 F. App'x 927, 935 (6th Cir. 2008) (internal quotations omitted). Moreover, any ambiguity in the Court's order should be resolved in favor of the party charged with contempt. *Id.*

The Court should be particularly reluctant to grant extraordinary relief against a non-party subpoena recipient who has undertaken herculean efforts to respond as directed by the Court. The Rules give nonparty subpoena recipients many protections—more so than a named party. *See generally* Rule 45. Indeed, the Rules specially protect nonparty subpoena recipients like this because they provide "involuntary assistance to the court." Rule 45 Advisory Committee Notes on the 1991 Amendment. *See also In re Modern Plastics Corp.*, 2015 Bankr. LEXIS 2525, *16 (Bankr. W.D. Mich. July 23, 2015) (noting that Rule 45 includes extra protections for nonparties specifically because they are nonparties); *Bell Inc. v. GE Lighting, LLC*, 2014 U.S. Dist. LEXIS 56170, *39 (W.D. Va. April 23, 2014) (holding that "Rule 45 provides additional protections to nonparties"); *Tech*

v. United States, 284 F.R.D. 192, 198 (M.D. Pa. 2012) ("In accordance with these concerns, federal courts have demonstrated willingness to protect the interests of non-parties who are the targets of discovery demands.").

II. Analysis

Here, Plaintiffs fail to establish that the Nonparties did not comply with the Court's May 23 order. Taking plaintiffs' three requests in turn:

A. Requests (1) and (2)

Plaintiffs first and second requests are that the Court order the Nonparties to produce all responsive documents by August 8, 2018, and create a privilege log. The Court should deny these requests for three reasons. First, they are moot. As outlined above, the Nonparties have been producing and will continue to produce responsive documents and will finish reviewing documents and creating a privilege log soon.

Second, Plaintiffs' motion for contempt is based on their own arbitrary, self-imposed deadline of August 8, 2018 (the Court's May 23 order had no specific production deadline). Thus, the Nonparties cannot have violated a definite and specific order of the Court by failing to complete production by August 8, a non-Court imposed deadline ***that is still in the future***.[9]

[9] Indeed, the only discovery deadline on the docket is in the Court's May 9 discovery schedule, and it says that discovery ends August 24, 2018.

Third, to the extent Plaintiffs' motion is based on a general dissatisfaction with the number of documents produced, the Nonparties note that, in the discovery context, producing a relatively small number of documents does not demonstrate noncompliance. *Hubbard v. Potter*, 247 F.R.D. 27, 29 (D.D.C. 2008) ("While plaintiffs may have their own ideas about how many documents a particular facility should have produced, that is simply of no moment."). Low production volume results not just from noncompliance, but also—as here—when the producing party possesses few responsive documents. Simply put, low production volume does not equate to obstinacy or recalcitrance. After all, a party can only produce what responsive documents it has—nothing more. Plaintiffs' disappointment does not justify requiring the Nonparties to conduct further discovery or face contempt for not producing documents they do not have. *See, e.g.*, *In re Jemsek Clinic*, 2013 Bankr. LEXIS 3120, *18–19 (Bankr. W.D.N.C. 2013) (stating that after a producing party undertakes a significant discovery task, being "simply dissatisfied with the results of their written discovery efforts and wish[ing] to cast their net again" is not enough to compel further discovery). This is especially true when, as here, the Nonparties have exhausted their options for obtaining more documents.

Furthermore, mere speculative belief about the existence of documents that have not been located does not establish that documents existed and were withheld.

*See, e.g., Kincaid v. Wells Fargo Sec. LLC, 2012 U.S. Dist. LEXIS 6160, *4-5 (N.D. Okla. Jan. 19, 2012)* (such belief does not refute the possibility that everything has been produced); *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 427-428 (D.N.J. 2009) ("allegation[s] premised on nefarious speculation [do not support] burdensome discovery requests late in the game"); *Hubbard*, 247 F.R.D. at 29 (requiring information in the case to support a reasonable deduction that something existed and was not produced).

B. Request (3)

Plaintiffs next seek affidavits/declarations from each of the Nonparties detailing the "steps that each took to collect, review, and produce responsive documents, and, to the extent that they believe responsive documents existed and can no longer be located, the reason those documents no longer exist or cannot be located."

This constitutes "meta-discovery," or "discovery on discovery," and Federal courts consider this "collateral" discovery that is outside the scope of current Fed. R. Civ. P. 26(b)(1)'s requirement that information be relevant to some party's claims or defenses"A party should not be required to provide discovery about its e-discovery without good cause… A party seeking discovery on discovery ("meta discovery") must show a specific deficiency in the other party's production." *Brewer v. BNSF Railway Co.*, No. CV-14-65-GF-BMM-JTJ, 2018 U.S. Dist.

LEXIS 24402, *4 (D. Mo. Feb. 14, 2018) (quoting *The Sedona Conference Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process*, pp. 42, 118 (Sept. 2016)).

A "suspicion" based on production volume does not suffice to sanction a producing party. Instead, a requesting party must make a specific showing of bad faith or unlawful withholding. *See Edgewood Props.*, 257 F.R.D. at 427 ("[I]t is, in fact, the producing party who is the best position to determine the method by which they will collect documents. The producing party responding to a document request has the best knowledge as to how documents have been preserved and maintained."). As one federal court aptly explained: "I cannot compel what does not exist. If plaintiffs are speculating that documents responsive to these requests do exist, there must be a reasonable deduction that that is true, and not a mere hunch." *Harris v. Koenig*, 271 F.R.D. 356, 370 (D.D.C. 2010).

Plaintiffs have developed and presented no evidence that Nonparties are holding back documents or dragging their feet. Not only do they provide nothing to suggest violation of the Court's order, their suppositions about email also run contrary to common sense. Like most public bodies and private companies, the Nonparties do not keep emails and other electronic documents forever and that material is periodically purged by users. *Gentex Corp. v. Sutter*, 827 F. Supp. 2d 384, 390 (in the discovery context, inability to produce documents because they

were deleted or destroyed in the ordinary course of business should not be punished). Plaintiffs cannot reasonably expect that a significant percentage of 2012 emails still exist on the Nonparties' servers or anywhere else, if the assumed emails ever existed. *See, e.g.*, *Oldenkamp v. United American Ins. Co.*, 2008 U.S. Dist. LEXIS 84784, at *1 (N.D. Okla. Oct. 21, 2008) (noting that a party cannot be ordered to produce documents that do not exist). Such an expectation hinges on an unsupported (if not fanciful) idea that individuals keep all of their email for six or more years. Plaintiffs decry the lack of materials that may never have existed–or may have come and gone years before this litigation was commenced or the Nonparties received litigation-hold letters. The federal rules and federal court decisions do not provide a basis for sanctioning parties (and especially not nonparties) for not being able to produce information or documents, absent a litigation-related duty to preserve. *See generally* Fed. R. Civ. P. 37(e).

And regarding requiring every subpoenaed Nonparty to file an affidavit or declaration, Nonparty counsel represents to the Court that this would needlessly waste these Nonparties' time. Counsel's representation that reasonable inquiry and searches have been conducted should suffice. Federal courts have decried discovery on discovery on such burden grounds: "[I]n light of the danger of extending the already costly and time-consuming discovery process *ad infinitum*." *Winfield v. City of New York*, 15-cv-05236, 2018 U.S. Dist. LEXIS 22926, *12

(S.D.N.Y. Feb. 12, 2018). Not only have Plaintiffs failed to carry their burden of proof, the Nonparties are just that–nonparties.

CONCLUSION

Given the Nonparties' extraordinary and ongoing efforts to comply with the Court's order, Plaintiffs have not demonstrated by clear and convincing evidence that the Nonparties violated a definite and specific order of the court. Plaintiffs' motion for contempt should be denied.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: August 1, 2018

By: */s/ Gary P. Gordon*

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2018, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

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