

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,)

No. 2:17-cv-14148

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

Plaintiffs,)

v.)

RUTH JOHNSON, in her official)
Capacity as Michigan)
Secretary of State,)

Defendant.)

**JOINT STATUS REPORT
ON DISCOVERY**

In its August 17, 2018 “Order Granting in Part and Denying in Part Defendant’s Motion to Compel” (Dkt. No. 95)(“Contention/Chen Order”), the Court instructed the parties to submit a joint status report by August 27, 2018 at 5:00 PM. The parties jointly report as follows.

DOCUMENT DISCOVERY

Plaintiffs have received production of documents in response to subpoenas served on non-parties and requests for production served on Defendant. Legislative

Personnel and Legislative Bodies¹ have represented that their productions comply with the Court's August 17th "Order on Plaintiffs' Motion for Contempt" ("Legislative Order"), but the productions were only recently completed and Plaintiffs are still reviewing documents and also working to resolve already-evident significant technical issues with the productions.

Defendant, Legislative Personnel and Legislative Bodies have withheld certain documents based on claims of attorney-client privilege. Those documents include communications not only among Legislative Personnel and their alleged counsel, but also communications including what Plaintiffs believe to be outside consultants such as Michigan Redistricting Resource Institute ("MRRI"), Sterling Corporation, Robert LaBrant, and Jeff Timmer. Defendant, conversely, asserts that the common interest privilege applies to shared communications of Legislative Personnel and MRRI (whose principal is Mr. LaBrant) with their legal counsel, as well as their agents like Jeff Timmer of the Sterling Corporation who, Defendant asserts, was engaged to provide technical expertise in the map-drawing process.

Certain witnesses have also refused to testify about such communications. Plaintiffs intend to move to compel production of such documents, as well as follow-up deposition testimony, arguing that these communications are not privileged and

¹ As defined in Docket No. 58 at page I.D. #985, footnotes 1-2.

that no common interest sufficient to support the privilege exists between all these parties. Defendant intends to oppose such motion.

Plaintiffs have also served subpoenas on the Republican National Committee (“RNC”) and the Republican State Leadership Committee (“RSLC”). The RNC and RSLC have produced certain documents and counsel for those subpoena recipients have consulted with counsel for Plaintiffs regarding the appropriate scope of production.

DEPOSITIONS

Defendant has to date deposed two of Plaintiffs’ expert witnesses. Plaintiffs have deposed ten fact witnesses, including Jeff Timmer, who Defendant has also identified as an expert witness. Due to scheduling issues, the parties have previously agreed to additional depositions of specific fact and expert witnesses (as described below) between August 31 and September 13, 2018, on a schedule that the parties anticipate will not interfere with the Court’s summary judgment motion deadline of Friday, September 21. The witnesses to be deposed between August 31 and September 13 include three expert witnesses identified by Defendant, one expert witness identified by Plaintiffs, and plaintiff League of Women Voters of Michigan pursuant to Fed.R.Civ.P. 30(b)(6). The parties have worked to agree on a proper scope for the Rule 30(b)(6) deposition. The parties also intend to complete the deposition of fact and expert witness Jeff Timmer, which was interrupted before

completion on its scheduled August 21st date by an unforeseen emergency beyond the control of counsel.

The parties do not presently anticipate seeking Court assistance with regard to these depositions.

Finally, as ordered in the Court's Order of August 14, 2018 (Dkt. No. 92) the parties are discussing the dates and subject matter for Peter Ellsworth's deposition. The parties have not reached agreement as to the topics for that deposition. On Friday August 24th, Plaintiffs filed with the Court a list of topics on which the parties failed to agree. Plaintiffs, in their filing, also sought Court assistance as to the timing and proper scope of Mr. Ellsworth's deposition. Defendant will respond within seven days as directed by the August 14, 2018 Order.

INTERROGATORIES

Each party has responded to multiple sets of interrogatories.

As required in the Court's August 17, 2018 Order (the "Contention/Chen Order"), Plaintiffs will on or before August 31, 2018 serve a second supplemental response to Defendant's Interrogatory No. 1. The parties have discussed the parameters of that response. The parties will as ordered meet and confer this week (the week of August 27, 2018) to determine whether any additional discovery requests warrant supplementation and will otherwise comply fully with the Contention/Chen Order.

PROFESSOR CHEN

The August 17th Contention/Chen Order required immediate production of information described in Defendant's Document Request No. 4 "to the extent that such information exists." That information was "source code" used by Plaintiffs' expert Professor Jowei Chen in production of his report in this case.

On August 11, 2018, while the motion giving rise to the Contention/Chen Order was pending, Plaintiffs produced to Defendant what they assert to be the substantively closest drafts of Professor Chen's "source code," for the .JAR code already produced, that Professor Chen can locate and believes exist. Plaintiffs represented to Defendant that Dr. Chen did not save or maintain the final version of his source code that was compiled into the .JAR code used in his report. Plaintiffs' counsel also advised Defendant that information concerning differences between the draft source code as produced and the final source code could be probed during Dr. Chen's deposition, which is scheduled for September 7, 2018.

Plaintiffs believe that production satisfies Defendant's Document Request No. 4 referred to in the Order, and the requirements of the Contention/Chen Order. Defendant agrees that Plaintiffs cannot produce that which no longer exists and thus that Plaintiffs have no further obligation to produce final source code under the requirements of the Contention/Chen Order. However, Defendant believes review of final source code to be of critical importance to evaluating Dr. Chen's report, and

reserves the right to move to strike Dr. Chen's report or seek other appropriate relief related to the unavailability of final source code for the software used in his report.

By /s/ Joseph H. Yeager, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 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
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