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.	No. 2:17-cv-14148 Hon. Eric L. Clay Hon. Denise Page Hood Hon. Gordon J. Quist **REPORT FROM RULE 26(F) CONFERENCE AND DISCOVERY PLAN**

JOINT REPORT FROM RULE 26(F) CONFERENCE AND DISCOVERY PLAN

Pursuant to Federal Rule of Civil Procedure 26, 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, Lorenzo Rivera and Rashida H. Tlaib (the "Plaintiffs") and Ruth Johnson, in her official capacity as Michigan Secretary of State (the "Defendant," together with Plaintiffs, the "Parties") conferred by counsel via telephone conference on February

16, 2018. Counsel discussed the nature of the case, the potential for settlement, initial disclosures, the case schedule, and the Parties' respective views on a discovery plan. During and following the conference, the Parties worked together to prepare the following discovery plan. The Parties were able to reach a consensus on many issues. The Parties' respective positions are outlined below where agreement could not be reached.

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(A) What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made?

The parties agree that initial disclosures will be made in accord with Rule 26(a) on March 2, 2018.

(B) What are the subjects on which discovery may be needed, when should discovery be completed, and should discovery be conducted in phases or be limited to or focused on particular issues?

The Parties discussed both fact discovery and expert discovery. The Plaintiffs previewed that they planned to serve numerous third party subpoenas as soon as possible, initially focused primarily on "intent" evidence. The Parties also anticipate significant expert discovery. Defendant will require discovery concerning the redistricting plans attached to the Complaint, and plan to depose Plaintiffs concerning the harms alleged in the Complaint. Defendant further intends to take discovery as to plans considered by the Legislature or by individual legislators. The Parties discussed a discovery schedule but were unable to reach a consensus largely due to differing views about the overall timeline to trial.

Plaintiffs' Position: Plaintiffs seek relief in this case in time to have new redistricting plans in place for the 2020 election cycle. As a practical matter this means new districts must be set by March of 2020.[1] Accounting for the time it may

[1] The basis for this March 2020 deadline is outlined more fully on page 7 of Plaintiffs' Response to Defendant's Motion to Stay and to Dismiss. (Doc. No. 15.)

take to create new districts as well as the possibility that this Court's decision may be appealed directly to the United States Supreme Court, Plaintiffs propose a trial date no later than early 2019. A later trial date will jeopardize Plaintiffs' ability to obtain the relief they seek. Plaintiffs also believe that, unlike some cases, the expert work will be largely independent of the fact discovery and, thus, can proceed in parallel. Against that backdrop, Plaintiffs propose the following specifics:

- Fact discovery to begin immediately
- Preliminary witness and exhibit lists exchanged on April 2, 2018
- Plaintiffs' expert disclosures due on May 1, 2018
- Defendant's expert disclosures due on June 1, 2018
- Plaintiffs' rebuttal expert on June 25, 2018
- Summary judgment motions due on August 1, 2018
- Discovery cutoff 45 days prior to trial
- Final witness and exhibit lists filed 14 days before the final pretrial conference
- All pre-trial motions due 14 days before the final pretrial conference
- Final pretrial conference one week prior to trial
- Trial briefs due one week before trial
- Trial no later than January of 2019
- Proposed findings and conclusions due two weeks after trial

Defendant's Position: Defendant desires that this matter come to a resolution in a speedy manner that will afford the Michigan Legislature an opportunity to develop remedial plans should they be required. Assuming a 2020 remedial plan must be in place by no later than March of 2020 to be effective for the November 2020 election, there are more than two years-- 25 months-- yet remaining for the parties to engage in discovery, the court to reach a decision, and any appeal and remedy to be addressed.

Defendant has moved for a stay of proceedings until the Supreme Court issues its decisions *Whitford v. Gill* and *Benisek v Lamone*, as the decisions in those cases are likely to narrow issues for discovery, simplify these proceedings by providing standards by which claims for partisan gerrymandering are to be measured (assuming such claims are cognizable), or prove dispositive of Plaintiffs' claims altogether. Defendant takes the position that the discovery and trial schedules in this matter should account for the impact of these decisions and afford ample time for post-decision discovery and expert report development.

In no event should the Parties be required to name experts or submit expert reports until after the Supreme Court has announced standards in Whitford and Benisek.

Defendant has set forth in its Reply brief, filed February 20, the reasons a stay will benefit the court and parties without jeopardizing Plaintiffs' potential for relief before the 2020 cycle.

Additionally, much of this case is likely to be addressed to the analysis of elections data and outcomes under the district maps presently in place. While this case is pending, the State of Michigan will vote in November of 2018. That election may have significant impact on this litigation, including, but not limited to, affording additional data that *both* parties' experts will require time to analyze and incorporate into their reports.

To account for *Whitford* and *Benisek*, as well as the impact of the 2020 election, Defendant proposes trial no earlier than April of 2019, which would leave approximately 10 months for any appeal and remedy stages (including remedial action by the Legislature) of this litigation.

- All proceedings to be stayed pending the Supreme Court's imminent decisions in *Whitford* and *Benisek* (both decisions are anticipated no later than June), with fact discovery to commence thereafter.
- Preliminary witness and exhibit lists exchanged on October 15, 2018
- Plaintiffs' expert disclosures due on December 14, 2018
- Defendant's expert disclosures due on February 1, 2019
- Plaintiffs' rebuttal expert due on February 15, 2019
- Summary judgment motions due on February 15, 2019
- Discovery cutoff 45 days prior to trial
- Final witness and exhibit lists filed 14 days before the final pretrial conference
- All pre-trial motions due 14 days before the final pretrial conference
- Final pretrial conference one week prior to trial
- Trial briefs due one week before trial
- Trial no earlier than April of 2019
- Proposed findings and conclusions due two weeks after trial

(C) Are there any issues about disclosure, discovery, or preservation of electronically stored information and in what the form or forms should it be produced?

The Parties discussed document preservation and the form of production. The Parties agreed to produce ESI in native format (including providing metadata fields identified below where such information exists). To the extent materials are not easily produced in native format, the producing party will raise this issue with the requesting party prior to production. The Parties will then discuss and in good faith attempt to reach agreement about format, but in general the Parties expect to produce: 1.) Text, 2.) Images (Tiff/JPG), and 3.) Metadata (DAT and OPT). Each Category is described below. This form of production also applies to image-redacted documents. The Parties reserve the right to request something different or object to this format on a case by case basis. In the event the Parties are unable to agree about (i) whether information can in fact be produced natively, (ii) in what format it should be produced, or (iii) what metadata should be produced, the Parties will promptly seek a discovery conference with the Court.

TEXT: Extracted text or OCR'd (Optical Character Recognized) text will reflect what's viewed in the image, in a text format. A non-redacted document will have its text extracted, while a redacted document get OCR'd first then the results of the OCR will be provided in a text file.

IMAGES: TIFF/JPG. Every single record must have an image (or multiple images), even documents that are redacted or withheld as a part of a family member or slip-sheeted for native production (i.e. Excel produced natively) must have at least an image page.

Metadata/Load Files:

A. **DAT** File in Concordance delimited format, that contains following metadata where it exists:

1. Bates Beg
2. Bates End
3. Bates Beg Attach
4. Bates End Attach
5. Custodian
6. Email From
7. Email To
8. Email CC
9. Email BCC
10. Email Subject
11. File Name
12. File Size

13. Date Created
14. Date Modified
15. Date Sent
16. Date Received
17. Date Sort/Master
18. Date Accessed
19. Last Saved By
20. Document Extension
21. Document Subject
22. Author
23. MD5 Hash
24. Confidentiality Stamp
25. TextLink
26. NativeLink

B. **OPT** (Opticon) load file is a simple load file that doesn't contain any metadata above except for the bates and image links to load them in any platform (i.e Relativity) as needed.

It is Defendant's position that discovery on the issue of intent should be limited to communications and materials generated during the period after census data became available (around January 1, 2011) and up to the date on which the districting plans were signed into law by Governor Snyder, August 9, 2011.

Plaintiffs' disagree with limiting intent evidence in this way. It is reasonable to believe there may be relevant evidence outside the bounds of the Defendant's proposed timeframe. For example, there may have been discussions prior to the release of the census data. There may also have been communications after the plans were signed into law that would reflect the partisan intent with respect to the maps. The requests themselves will be sufficiently limiting based on the subject matter involved, and Plaintiffs' propose that any objections to scope should be taken up on a case-by-case basis as discovery proceeds.

(D) Are there any issues about claims of privilege or of protection as trial-preparation materials? Did the parties agree on a procedure to assert these claims after production? Are the parties asking the court to include their agreement in an order under Federal Rule of Evidence 502?

The Parties anticipate there may be privilege objections that arise during discovery, particularly, although not limited to, an assertion of legislative privilege. This objection, however, will most likely be raised, if at all, by the recipients of third-party subpoenas, thus the Parties could not reach agreement on a procedure to address these potential privilege claims. Both Dickinson Wright and Peter Ellsworth

have received subpoenas from Plaintiffs and will object or otherwise oppose those subpoenas on the basis of privilege.

The Parties agree to a "claw back" provision and request the Court to enter an order including the following language:

> In the event that a document protected by the attorney-client privilege, the attorney work product doctrine or other applicable privilege or protection is unintentionally produced by any party to this proceeding, the producing party may request that the document be returned. In the event that such a request is made, all parties to the litigation and their counsel shall promptly return all copies of the document in their possession, custody, or control to the producing party and shall not retain or make any copies of the document or any documents derived from such document. Any electronic copies will be deleted promptly. The producing party shall promptly identify the returned document on a privilege log. The unintentional disclosure of a privileged or otherwise protected document shall not constitute a waiver of the privilege or protection with respect to that document or any other documents involving the same or similar subject matter. This "claw back" provision will also apply to any non-parties who produce documents and electronically stored information in response to third-party discovery.

(E) What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or by local rule, and what other limitations should be imposed?

The Parties discussed potential limitations to discovery, including possible limits on the total number of depositions or the time limits for fact and expert depositions. The Parties concluded that no additional limitations beyond those imposed by the Federal Rules or local rules would be appropriate at this time. The Parties expressed a mutual desire to be efficient and agreed to cooperate in good faith with respect to scheduling. The Parties expressly reserve the right to revisit this issue and seek additional modifications to discovery limitations in the future, either by agreement or through motion practice.

(F) Are there any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c)?

The Parties request that the Court enter a scheduling order under Rule 16 following a telephonic pretrial conference. The Parties' initial positions with respect to scheduling are outlined above. The Parties anticipate trial will last approximately five to seven days.[2] The Parties do not believe any other discovery or pre-trial orders are necessary at this time.

[2] As a point of reference, the trial in *Whitford v. Gill* lasted five days. That case involved similar issues but challenged only one districting map, whereas this case challenges three independent maps.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 2, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Harmony A. Mappes