

STRAFFORD COUNTY

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

City of Dover et. al.

v.

David Scanlan, Secretary of State for New Hampshire et. al.

Docket No. 219-2022-CV-00224

**PLAINTIFFS' (1) OBJECTION TO DEFENDANTS' MOTION TO ADOPT CASE
STRUCTURING ORDER AND (2) REQUEST FOR EMERGENCY/EXPEDITED
STATUS CONFERENCE**

NOW COME the plaintiffs, City of Dover, New Hampshire (“Dover”), City of Rochester, New Hampshire (“Rochester”), Debra Hackett, Rod Watkins, Kermit Williams, Eileen Ehlers, Janice Kelble, Erik Johnson, Deborah Sugerman, Susan Rice, Douglas Bogen, and John Wallace, by and through their undersigned counsel, and object to the Defendants’ Motion to Adopt Case Structuring Order, stating in support as follows:

1. Months ago, defendants’ counsel agreed that this case appears to be one with little or no facts in dispute and is therefore a good candidate for resolution on the merits via summary judgment. Based on that agreement, the plaintiffs agreed to defer the deadline for responses to Dover’s interrogatories, which it had diligently served on the defendants on March 16, 2023. Beginning in April 2023, the plaintiffs and defendants began working on a stipulation of facts intended to be used as the basis for a motion for summary judgment. Although the parties were very close to agreement on the stipulation, the defendants have recently decided, apparently, to abandon this process without explanation. Now, taking a position opposite from the one on which the plaintiffs relied, the defendants advocate for an unnecessarily prolonged discovery and trial period that would guarantee that the current (unconstitutional) House redistricting map will

be used, once again, in the 2024 House election. The Court should reject the defendants' request.

2. The plaintiffs have been diligent and have attempted to move this case forward expeditiously. Not only did the plaintiffs work diligently on a fact stipulation as mentioned above, but on May 23, 2023, undersigned counsel emailed defendants' counsel and, among other things, attached a proposed case structuring Order with close of discovery on October 15, 2023 and trial end of November 2023. That email and the proposed structuring order attached to that email are attached hereto as Exhibit 1.

3. Defendants never engaged on the discussion of the May 2023 structuring Order (or any structuring Order), until months later, when—after plaintiffs' counsel again raised the subject—the defendants emailed a proposed structuring Order on September 11, 2023. A copy of the defendants' September 11th proposed structuring Order is attached as Exhibit 2.

4. Defendants have now filed with the Court a proposed structuring Order that not only lacks merit, but is far different than the one even they proposed on September 11th. Now, instead of discovery completing in December 2023 (as proposed by defendants on September 11th), the defendants propose a discovery period lasting into March 2024.

5. What is most troubling about the defendants' current proposal is its July 15, 2024 trial date, which (should this case go trial) guarantees the current House redistricting maps will be used in the November 2024 House election, as the candidate filing period will have already long since passed in early June (*see* RSA 655:14), and the federal 45-day requirement for distributing UOCAVA ballots will be fast approaching, *see* 52 U.S.C. § 20302(a)(8).

6. Under the defendants' current proposal, even summary judgment in plaintiffs' favor would likely come too late to remedy the State's constitutional violation. If the defendants

object to summary judgment before the close of discovery, as they appear to do in their objection to the plaintiffs' proposed summary judgment briefing schedule, then motions for summary judgment would be filed on March 15, 2024, responses on April 15, and replies on May 6. Because the filing period for House candidates opens on June 5, this would give the Court just 30 days to decide the motion for summary judgment and order a remedy.

7. This case can, and should, be resolved on the merits well before any date in 2024 that would otherwise result in the current House map being used in the 2024 election.

8. The fact is that the defendants have now had over a year to conduct any discovery, having formally accepted service in September 2023, *see Super. Ct. R. 23(d)* (“Interrogatories may be served at any time after service of the action.”). But they have not yet served any discovery requests. Even if the defendants had waited for a decision on their meritless motion to dismiss (and subsequent motion for reconsideration rehashing the meritless arguments), they still could have served discovery on June 30, 2023, and the parties would be more than three months into any such discovery now. The defendants' lack of diligence in seeking discovery should not result in a schedule that would result in the use of an allegedly unconstitutional districting plan in 2024.

9. The defendants' insistence on extensive discovery before summary judgment is inconsistent not only with their prior representations but also the nature of this case. The plaintiffs have alleged that several towns and wards that are “within a reasonable deviation from the ideal population for one or more representative seats” have been unnecessarily been denied their constitutional right to their “own district of one or more representative seats.” N.H. Const., Part II, Article 11. The plaintiffs filed a comprehensive expert affidavit with their Complaint outlining the qualifications and methodology used to derive the Map-a-Thon plan (that map had

also been submitted to the legislature during the redistricting process). To say that discovery is necessary concerning this Map-a-Thon plan is akin to saying one needs to conduct discovery into a simple math exercise—it is objectively true (or is not).

10. The defendants’ proposal is unworkable and should be rejected. To recap, the defendants initially agreed to work on a stipulation that would permit the filing of a summary judgment motion without any discovery. The defendants then repudiated that position, proposing a structuring Order on September 11th that provided for three months of discovery. The defendants then apparently changed that position, now moving for entry of a structuring Order that provides for five months of discovery, and apparently claiming that a summary judgment motion would be premature before the entire discovery period expires.

11. Given the time-sensitive nature of this case, the Plaintiffs also request that the Court scheduled an emergency or expedited status conference to discuss scheduling.

WHEREFORE, the plaintiffs respectfully request and pray that this Court:

- A. Deny the Defendants’ Motion to Adopt Case Structuring Order;
- B. Schedule a status conference on an emergency or expedited basis;
- C. Grant such other relief as the Court deems just, equitable, and proper.

Respectfully submitted,

THE CITY OF DOVER, NEW HAMPSHIRE

Dated: October 5, 2023

By: /s/ Joshua M. Wyatt
Joshua M. Wyatt, Esquire
N.H. Bar No. 18603
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Office of the City Attorney
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Portsmouth, NH 03801
603-294-1591
hquillen@whatleykallas.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record through the Court's electronic filing system.

Dated: October 5, 2023

By: /s/ Joshua M. Wyatt
Joshua M. Wyatt, Esquire

Ex. 1, Plaintiffs' May 2023 Structuring Proposal

Wyatt, Joshua

From: Wyatt, Joshua
Sent: Tuesday, May 23, 2023 2:00 PM
To: 'Matteson, Myles'; 'Conley, Matthew'
Cc: 'Henry Quillen'; 'Terence O'Rourke'; Perez, Jennifer; 'Edwards, Anne'
Subject: RE: House redistricting case: draft stipulation
Attachments: COD's First Set of Interrogatories_0001.pdf; RE: City of Dover et al v. State et al; Structuring Order 5.22.23 to Defs.pdf

Myles, Matthew-

Recall that in March Dover had propounded interrogatories, after which we had a video call and discussed stopping the clock on the interrogatories in lieu of working on structuring and a stipulation of various facts. I sent a draft fact stipulation on April 14th, and have yet to receive any response, and I'm not sure why. We put time into that and held off on discovery based on the expectation of a collaborative effort. I emailed below over a week ago today to check in, and received no response. I placed a phone call later last week to Matthew, and my voicemail went unreturned. I called Myles yesterday and my voicemail went unreturned.

I know we are all busy, and I try to go out of my way to be flexible about deadlines and procedural accommodations, but as I had outlined in our call back in March, this case is (and is increasingly) time-sensitive. Given lack of progress, I feel I have to ask that Dover's interrogatories (reattached here) be back on the clock and answered within 30 days of this email. If it remains your intent not to answer discovery until an order on the motion to dismiss, please let me know as soon as possible.

We would also welcome a dialogue over structuring and getting a formal schedule in place. I have attached a draft structuring order for your consideration and comment. This draft assumes, of course, the attached interrogatories are answered in the next 30 days.

Joshua Wyatt
City Attorney
City of Dover, NH
288 Central Avenue
Dover, NH 03820-4169
e: j.wyatt@dover.nh.gov
p: 603.516.6520

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<http://www.dover.nh.gov>

From: Wyatt, Joshua
Sent: Monday, May 15, 2023 8:55 AM
To: 'Matteson, Myles' <Myles.B.Matteson@doj.nh.gov>; 'Conley, Matthew' <Matthew.G.Conley@doj.nh.gov>
Cc: 'Henry Quillen' <hquillen@whatleykallas.com>; 'Terence O'Rourke' <terence.orourke@rochesternh.gov>; Perez, Jennifer <J.Perez@dover.nh.gov>; Edwards, Anne <anne.m.edwards@doj.nh.gov>
Subject: RE: House redistricting case: draft stipulation

Myles, Matthew-

I am checking on the draft fact statement we sent over in April for your consideration (in lieu of answering the interrogatories at this time). I prepared but held off on sending a proposed structuring form, hoping to get some sense for where we are on any disputed facts beforehand. Can you let us know where things stand? Let me know if it'd be best to schedule a call.

Joshua Wyatt
City Attorney
City of Dover, NH
288 Central Avenue
Dover, NH 03820-4169
e: j.wyatt@dover.nh.gov
p: 603.516.6520

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From: Wyatt, Joshua
Sent: Friday, April 14, 2023 3:45 PM
To: 'Matteson, Myles' <Myles.B.Matteson@doj.nh.gov>; Conley, Matthew <Matthew.G.Conley@doj.nh.gov>
Cc: 'Henry Quillen' <hquillen@whatleykallas.com>; Terence O'Rourke <terence.orourke@rochesternh.gov>; Perez, Jennifer <J.Perez@dover.nh.gov>
Subject: House redistricting case: draft stipulation

Myles, Matthew-

Following up from our discussion in March, please find for your review/comment/editing an initial draft stipulation. As I envisioned it, the hope is to ultimately agree on the maximum we can, perhaps even on all facts. Also, I did not envision the ultimate stipulation foreclosing either party from submitting supplementary materials/facts/evidence. Of course, everyone reserves rights and doesn't stipulate to anything unless/until it's signed. This is just a discussion draft.

I will put together a proposed structuring order as well and send it along, but wanted to get this out first for your review.

Have nice weekend.

Best,

Josh

Joshua Wyatt
City Attorney
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p: 603.516.6520

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<https://www.courts.nh.gov>

Court Name: _____

Case Name: _____

Case Number: _____
(if known)

CASE STRUCTURING AND ADR ORDER
(See Superior Court Civil Rules 5 and 32)

1. Plaintiff's Counsel: Trial _____ At conference _____
2. Defendant's Counsel: Trial _____ At conference _____
3. Causes(s) of action: _____ Counterclaims _____
4. Insurance carrier: _____ Disclosure of policy limits by: _____
5. The parties consent to this case being transferred to the Business and Commercial Dispute Docket. A motion requesting this transfer shall be filed with the Court within 30 days. Upon receipt, the Clerk will submit the motion to the Merrimack Superior Court for ruling.
6. If defendant claims that unnamed parties are at fault (see DeBenedetto v. CLD Consulting Engineers Inc., 153 N.H. 793 (2006)), defendant shall disclose the identity of every such party and the basis of the allegation of fault no later than _____. Plaintiff shall then have 30 days from the date of disclosure to amend the initiating pleading.
7. Is there an agreement to waive statutory expert disclosure requirements under RSA 516:29-b?
 Yes No
8. The parties have exchanged e-mail addresses and agree that the e-mail service of pleadings between the parties shall be considered in compliance with Superior Court Administrative Order 46.
9. Plaintiff's disclosure of experts and reports due: _____
Defendant's disclosure of experts and reports due: _____
10. The following deadlines apply:
All interrogatories propounded by _____
All depositions to be completed by _____
All dispositive motions to be filed: no later than 120 days prior to the trial
Completion of all discovery: _____
Deadline for filing all other pre-trial motions: 14 days prior to trial management conference
Deadline for filing of witness and exhibit lists: 14 days prior to trial management conference
11. Jury trial requested? Yes No
12. If jury trial previously demanded, is it now being waived? Yes No
13. Requested trial date: _____ Estimated trial length: _____
14. Jury trial assignment: Trial Mgt Conf.: _____ Jury Selection: _____
15. Bench trial assignment: Trial Mgt Conf.: _____ Week of: _____
16. Trial counsel and self-represented parties shall appear at the trial management conference and be prepared to address settlement potential. Parties represented by counsel shall be available for contact by telephone during the trial management conference. All pending pretrial motions shall be heard at the trial management conference, or as scheduled by the court. Failure to appear at the trial management conference or trial may result in dismissal, default or other sanctions.

Case Name: _____

Case Number: _____

CASE STRUCTURING AND ADR ORDER

Name of Filer

Signature of Filer Date

Law Firm, if applicable Bar ID # of attorney

Telephone

Address

E-mail

City State Zip code

Name of Filer

Signature of Filer Date

Law Firm, if applicable Bar ID # of attorney

Telephone

Address

E-mail

City State Zip code

Name of Filer

Signature of Filer Date

Law Firm, if applicable Bar ID # of attorney

Telephone

Address

E-mail

City State Zip code

SO ORDERED:

Date

Presiding Justice

Ex 2, Defendants' September 11, 2023 Structuring Proposal

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<https://www.courts.nh.gov>

Court Name: _____
Case Name: _____
Case Number: _____
(if known)

CASE STRUCTURING AND ADR ORDER
(See Superior Court Civil Rules 5 and 32)

1. Plaintiff's Counsel: Trial _____ At conference _____
2. Defendant's Counsel: Trial _____ At conference _____
3. Causes(s) of action: _____ Counterclaims _____
4. Insurance carrier: _____ Disclosure of policy limits by: _____
5. The parties consent to this case being transferred to the Business and Commercial Dispute Docket. A motion requesting this transfer shall be filed with the Court within 30 days. Upon receipt, the Clerk will submit the motion to the Merrimack Superior Court for ruling.
6. If defendant claims that unnamed parties are at fault (see DeBenedetto v. CLD Consulting Engineers Inc., 153 N.H. 793 (2006)), defendant shall disclose the identity of every such party and the basis of the allegation of fault no later than _____. Plaintiff shall then have 30 days from the date of disclosure to amend the initiating pleading.
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Defendant's disclosure of experts and reports due: _____
10. The following deadlines apply:
All interrogatories propounded by _____
All depositions to be completed by _____
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16. Trial counsel and self-represented parties shall appear at the trial management conference and be prepared to address settlement potential. Parties represented by counsel shall be available for contact by telephone during the trial management conference. All pending pretrial motions shall be heard at the trial management conference, or as scheduled by the court. Failure to appear at the trial management conference or trial may result in dismissal, default or other sanctions.

Case Name: _____

Case Number: _____

CASE STRUCTURING AND ADR ORDER

Name of Filer

Signature of Filer Date

Law Firm, if applicable Bar ID # of attorney

Telephone

Address

E-mail

City State Zip code

Name of Filer

Signature of Filer Date

Law Firm, if applicable Bar ID # of attorney

Telephone

Address

E-mail

City State Zip code

Name of Filer

Signature of Filer Date

Law Firm, if applicable Bar ID # of attorney

Telephone

Address

E-mail

City State Zip code

SO ORDERED:

Date

Presiding Justice