

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

DAWN CURRY PAGE, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 3:13-cv-00678
)	
)	
CHARLIE JUDD, <i>et al.</i> ,)	
)	
Defendants.)	

**OBJECTION TO PLAINTIFFS' THIRD-PARTY
SUBPOENAS FOR THE PRODUCTION OF DOCUMENTS**

COME NOW third-parties upon whom, or which, the Plaintiffs have served a Third Party Subpoena for the Production of Documents: the Clerk of the Virginia Senate; the Clerk of the Virginia House of Delegates; the Virginia Division of Legislative Services; and former-Delegate William Robert Janis, (collectively, “the non-parties”), pursuant to Rule 45(d)(2)(B) of the Federal Rules of Civil Procedure, and hereby object to said subpoena upon the grounds that the timing and scope of the subpoena, and the expense of attempting to comply therewith, is unreasonable and unduly burdensome in several respects, and in support thereof states as follows:

1. The Clerk of the Virginia Senate (“Senate Clerk”) is a public office within the Commonwealth of Virginia, elected by the Senate and tasked with a complex and numerous array of official duties, delineated in Virginia Code §§ 30-12, and 30-15 through 30-15.1:1, and by Part IV, Rules 8 through 14 the Rules of the Senate, (available at <http://sov.state.va.us/SOV%20Portal/PDFs/RulesoftheSenate.pdf>), to support the institution and

members of the Virginia Senate, a chamber of the General Assembly of Virginia. *See* Va. Const. art. IV, § 1.

2. The Clerk of the Virginia House of Delegates (“House Clerk”) is a public office within the Commonwealth of Virginia, elected by the House of Delegates and tasked with a complex and numerous array of official duties, delineated in Virginia Code §§ 30-12 through 30-14.4, and by Part I, Rules 6 through 9 the Rules of the House of Delegates, (available at <http://hodcap.state.va.us/publications/20122013HouseRulesText.pdf>), to support the institution and members of the Virginia House of Delegates, a chamber of the General Assembly of Virginia. *See* Va. Const. art. IV, § 1.

3. The Division of Legislative Services (“DLS”) is a public office within the Commonwealth of Virginia, appointed by committees of both houses of the General Assembly, tasked with a complex array of official duties, which are delineated in Virginia Code §§ 30-28.12 through 30-28.18, which are performed under the oversight of both houses, Virginia Code § 30-19.5, to support the institution and members of the General Assembly of Virginia.

4. William Robert (Bill) Janis (“Janis”) currently is a private citizen of the Commonwealth of Virginia, having served formerly as a member of the Virginia House of Delegates from January, 2002, until January, 2012, duly elected from the 56th House District of Virginia, comprising portions of Henrico, Louisa and Spotsylvania, and all of Goochland Counties.

5. Each of the non-parties was served on or about Friday, December 20, 2013 with the plaintiffs' Third Party Subpoena for the Production of Documents (“the subpoena”), a representative copy, as served on the Clerk of the Virginia Senate, is attached hereto as Exhibit A. The subpoena contains seven paragraphs in its Documents to Produce section, pertaining generally to legislation enacted by the Virginia General Assembly in 2012 that set the boundaries

of Virginia's eleven congressional districts, Virginia Code § 24.2-302.2, and became effective following the pre-clearance of said district boundaries by the United States Department of Justice pursuant to the then-applicable provisions of the Voting Rights Act of 1965.

6. The scope of the subpoena's document production demands is immensely broad, and imposes a heavy compliance burden upon the non-parties. Each of the seven document production demands in the subpoena's Documents to Produce section, seeks "all" of the documents in each topical category. Pursuant to the terms of the subpoena, the non-parties are required to respond on or before Friday, January 3, 2014.

7. The subpoena's Definitions and Instructions section contains sixteen separate, prolix, and sometimes internally conflicting paragraphs, spanning a queried time frame of three calendar years, 2010, 2011, and 2012. For example, it includes a statement in paragraph 5 thereof that, at first, recites that the definition of the word "documents is used in its customary broad sense." It then goes on for more than 280 words, comprising 24 separate lines of text, to putatively define the word "documents." It even demands documents "whether or not now in existence." Three of that section's paragraphs, numbers 13 through 15, insist that the non-parties convert all of the documents to be produced, regardless of their current hard-copy or electronic format, to the Tagged Image File Format ("TIFF"), and then contains over 200 more words instructing the non-parties on the details of making that conversion.

8. The time for the documents' production, especially in light of the time of year involving numerous State holidays and official office closings, renders timely production of any documents essentially impossible. For example, State offices were, or will be, closed on December 23, 24 (Christmas Eve), 25 (Christmas Day), and 31 (New Years Eve), 2013, as well on January 1 (New Years Day), 2014. *See* Va. Code Ann. § 2.2-3300. Each of these dates, but for the holidays and

related office closings, would have been, or would be, a business day. The loss of these business days, with most State employees entitled to absent work on each of them, represents a significant loss of staff resources for the Senate Clerk, House Clerk and DLS, and thus poses a substantial impediment to any measure of compliance with the subpoenas' demands.

9. Moreover, the non-parties' available time is reduced all the more by the impending legislative session. The 2014 Session of the General Assembly is set to commence on Wednesday, January 8, 2014, Va. Const. art. IV, § 6, and the Inauguration of Virginia's Governor-elect, Lieutenant Governor-elect, and Attorney General-elect is set for Saturday, January 11, 2013. Va. Const. art. V, § 1, § 13, § 15. The Senate Clerk, House Clerk and DLS, including the offices' leaderships and staffs, currently are performing many pre-Session duties required by Virginia statutes and the Rules of the Senate and Rules of the House of Delegates. The Senate Clerk and House Clerk leaderships also must participate in the preparations for the ceremonial and other events associated with Inauguration Day. These duties also substantially hinder these entities' ability to attempt to research and gather the demanded documents.¹

10. The Senate Clerk, House Clerk and DLS each has commenced physical and electronic searches for the demanded documents and communications and, at present, their leaderships collectively estimate that the broad search terms necessitated by the scope of the subpoena will yield tens of thousands, and perhaps hundreds of thousands, of e-mails as well as other materials. Many of these communications may properly be subject to an exemption from disclosure on the basis of legislative privilege. This privilege from evidentiary disclosure by State legislators, their staffs and supporting personnel and agencies, long has been recognized in the Fourth Circuit. *Schlitz v. Virginia*, 854 F.2d 43, 45-46 (4th Cir. 1988); accord *Baker v. Mayor & City*

¹ The 2014 legislative calendar for the General Assembly may be viewed at http://dls.virginia.gov/pubs/calendar/cal2014_2.pdf.

Council of Baltimore, 894 F.2d 679, 682 (4th Cir. 1990); *see also EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181-82 (4th Cir. 2011) (affirming that legislative privilege extends to "compulsory evidentiary process" "covers all those acting in a legislative capacity, not just actual officeholders," and, "[b]ecause litigation's costs do not fall on named parties alone, . . . applies whether or not the legislators themselves have been sued"); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 301-02, 304-05 (D. Md. 1992). Moreover, it has been applied by Federal courts in redistricting cases raising many of the same, or similar, issues to those raised by the plaintiffs in this litigation. *Favors v. Cuomo*, 285 F.R.D. 187, 209-10, 213-21 (E.D.N.Y. 2012) (collecting and reviewing cases). The privilege may be asserted only on a document-by-document basis, and some courts have held that its applicability turns on a relatively complex legal balancing test, *id.* at 209-10, 217-21, 221-25, though others have adopted a more categorical approach. *See Backus v. South Carolina*, No. 3:11-cv-03120, 2012 U.S. Dist. LEXIS 37055, at *2 (D.S.C. Feb. 8, 2012) (referencing Doc. 79, filed Jan. 23, 2012). The sheer breadth of the subpoenas' demands respecting communications would defeat the non-parties' ability to claim the privilege even when it lawfully and properly may be asserted, due to the extraordinary burden to review each of the tens, or hundreds, of thousands of e-mail communications.

11. The individual non-party, former-Delegate Janis, also bears the burdens of attempting to research personal records over this family-oriented holiday season, and wrestle with the same overreaching, and conflicting, definitions and instructions respecting the subpoena's demanded documents. He also intends to claim the legislative privilege for certain of his communications, consistent with the position of the Senate Clerk, House Clerk and DLS.

12. Counsel for the non-parties has attempted, in good faith, to confer with counsel for the plaintiffs; however, the issues of the unreasonableness of scope and time constraints, and the undue burdens and expense of compliance with the subpoena, remain unresolved. *See* Exhibit B (December 27, 2013 e-mail communication to Pls.' Counsel).

Therefore, the non-parties hereby object to the Third Party Subpoenas for the Production of Documents, served upon each of them on or about December 20, 2013, seek the protection of the Court, and respectfully maintain that they should not be required or compelled to respond to the unreasonable and unduly burdensome demands.

_____/s/_____
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William R. Janis*

Kenneth T. Cuccinelli, II
Attorney General of Virginia

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Assistant Solicitor General
mbrady@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a copy to counsel of record, including John M. Devaney, Esq., the attorney designated in the subpoena, in accordance with the service requirement of Fed. R. Civ. P. 45(d)(2)(B).

/s/
Norman A. Thomas

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

DAWN CURRY PAGE, et al,

Plaintiffs,

v.

CHARLIE JUDD, in his capacity as
Chairman of the Virginia State Board of
Elections; KIMBERLY BOWERS, in her
capacity as Vice-Chair of the Virginia State
Board of Elections; DON PALMER, in his
capacity as Secretary of the Virginia State
Board of Elections,

Defendants,

v.

CONGRESSMEN ERIC CANTOR,
ROBERT WITTMAN, BOB GOODLATTE,
FRANK R. WOLF, RANDY FORBES,
MORGAN GRIFFITH, SCOTT RIGELL,
and ROBERT HURT

Intervenor-Defendants.

Civil Action No. 3:13-cv-678-REP-LO-AKD

**THIRD PARTY SUBPOENA FOR
THE PRODUCTION OF DOCUMENTS**

TO: Clerk of the Virginia Senate

AND TO: Mike Melis, attorney for Defendants, and Michael Anthony Carvin, John
Matthew Gore, Jonathan Andrew Berry, attorneys for Intervenor-Defendants

THIRD PARTY SUBPOENA TO THE CLERK OF
THE VIRGINIA SENATE (3:13-CV-678) – 1

LEGAL28764153.1

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Phone: 202.654.6200
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On behalf of Plaintiffs Dawn Curry Page, Gloria Personhuballah, and James Farkas (“Plaintiffs”), the Clerk of the Virginia Senate is hereby commanded pursuant to Federal Rule of Civil Procedure 45 to produce the documents described below at the offices of 700 13th St NW #600, Washington, DC 20005, on January 3, 2014, at 12:00 pm, or at another agreed time.

DOCUMENTS TO PRODUCE

1. All maps and draft maps related to the 2012 Virginia Redistricting.
2. All communications sent or received by members of the General Assembly related to the 2012 Virginia Redistricting, including without limitation all communications with General Assembly members, staff members, agents, employees, consultants, advisors, experts, and personnel.
3. All communications between the General Assembly and members of Congress related to the 2012 Virginia Redistricting, including without limitation all communications by or to General Assembly members, members of Congress, their staff members, agents, employees, consultants, advisors, experts, and personnel.
4. All communications between the General Assembly and the Republican National Committee related to the 2012 Virginia Redistricting, including without limitation all communications by or to General Assembly members, Republican National Committee members, and their staff members, agents, employees, consultants, advisors, experts, and personnel.
5. All communications between the General Assembly and the National Republican Congressional Committee related to the 2012 Virginia Redistricting, including without limitation all communications by or to General Assembly members, National

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Republican Congressional Committee members, and their staff members, agents, employees, consultants, advisors, experts, and personnel.

6. All public statements made by the General Assembly related to the 2012 Virginia Redistricting.

7. All documents related to the 2012 Virginia Redistricting, including without limitation all emails, letters, notes, press releases, and other documents.

DEFINITIONS AND INSTRUCTIONS

1. Except as specifically defined below, the terms used in this Subpoena shall be construed and defined in accordance with the Federal Rules of Civil Procedure, wherever applicable. Any terms not defined shall be given their ordinary meaning.

2. "2012 Virginia Redistricting" means any activity relating to the Virginia General Assembly's efforts to draw and adopt state legislative and congressional districts in 2010, 2011, and 2012.

3. "General Assembly" means any current or former member of the Virginia General Assembly, the Virginia House of Delegates, the Senate of Virginia, and their current and former staff members, agents, employees, consultants, advisors, experts, and personnel, and including but not limited to employees of the Virginia Division of Legislative Services and their agents, consultants, advisors, experts, and personnel.

4. "Members of Congress" means any current or former member of Congress, the United States House of Representatives, the United States Senate, and their current and former staff members, agents, employees, consultants, advisors, experts, and personnel.

5. The word "documents" is used in its customary broad sense and includes all written, typed, printed, recorded or graphic statements, emails, communications or other matter, however produced or reproduced, and whether or not now in existence, in your

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possession, custody or control, including: writings; emails; bulletins; notices; maps; draft maps; Word documents; PDFs; spreadsheets; studies; analyses; tabulations; reports; reviews; agreements; contracts; communications, including intracompany communications, letters or other correspondence; messages; telegrams; telexes; cables; electronically stored information; memoranda; records; notes; reports; summaries; sound recordings or transcripts of personal or telephone conversations; meetings; conferences or interviews; telephone toll records; diaries; desk calendars; appointment books; forecasts; accountants' work papers; drawings; graphs; charts; diagrams; blueprints; tables; indices; pictures; photographs; films; phonograph records; tapes; microfilm; microfiche; charges; ledgers; accounts; cost sheets; financial statements or reports; statistical or analytical records; minutes or records of board of directors, committee or other meetings or conferences; reports or summaries of investigations; opinions or reports or summaries of investigations; opinions or reports of consultants; appraisals; reports or summaries of negotiations; books; brochures; pamphlets; circulars; trade letters; press releases; newspaper and magazine clippings; stenographic, handwritten or any other notes; notebooks; projections; working papers; checks, front and back; check stubs or receipts; invoice vouchers; tape data sheets or data processing cards and discs or any other written, recorded, transcribed, punched, taped, filed or graphic matter, however produced or reproduced; and any other document, writing or other data compilation of whatever description, including but not limited to any information contained in any computer although not yet printed out or the memory units containing such data from which information can be obtained or translated into reasonable usable form, and all drafts and non-identical copies of the foregoing.

6. The term "electronically stored information" means information stored in or on any electronic medium or device, including computers, network servers, computer hard

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drives, e-mails, voicemails, CDs, DVDs, tapes, websites, intranet, extranet, databases, Personal Digital Assistants (PDAs), mobile phones, smart phones, flash drives, thumb drives and USB drives, whether portable or not, regardless of the software or application used to generate or store the document, data, information or item.

7. The word “communication” means any transmission or exchange of information between two or more persons orally or in writing and includes, without limitation, any conversation or discussion, whether face-to-face or by means of any telephone, telegraph, telecopies, electronic, or other media, and any exchange of information or words by any electronic or written means.

8. The phrase “related to” shall mean, without limitation, directly or indirectly constituting, evidencing, concerning, regarding, mentioning, discussing, describing, commenting upon, referring to, pertaining to, being connected with or reflecting upon the stated subject matter.

9. “And” and “or” shall be construed conjunctively or disjunctively as necessary to bring within the scope of these requests information that might otherwise be construed as being outside their scope. The use of the words “including” shall be construed to mean “without limitations.”

10. This subpoena shall be deemed continuing so as to require supplemental responses if you obtain further documents after the time your responses are served.

11. File folders with tabs or labels identifying documents responsive to these requests should be produced intact with the documents.

12. Documents attached to each other should not be separated.

13. Documents shall be produced in Tagged Image File Format (“TIFF”), single page, black and white (or in color, if necessary for any given document or its content to be

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readable), dithered (if appropriate), at 300 x 300 dpi resolution and 8½ x 11 inch page size, except for documents requiring different resolution or page size to make them readable. Each TIFF document shall be produced with an image load file in standard Opticon (*.log) format that reflects the parent / child relationship. In addition, each TIFF document shall also be produced with a data load file in Concordance delimited format (*.dat), indicating (at a minimum) appropriate unitization of the documents, including beginning and ending production numbers for (a) each document set, and (b) each attachment within each document set. The TIFF images shall also be accompanied by extracted text or, for those files that do not have extracted text upon being processed (such as hard copy documents), optical character recognition (“OCR”) text data; such extracted text or OCR text data shall be provided in document level form and named after the TIFF image. Documents that contain redactions shall be OCR’d after the redaction is applied to the image, and the OCR will be produced in place of extracted text at the document level. Notwithstanding the foregoing, the parties may negotiate a separate production format (including native format) for any documents that are not reasonably producible or readable as standard image files, such as audio files or large spreadsheets.

14. For documents produced in TIFF format that originated in electronic form, metadata shall be included with the data load files described above, and shall include (at a minimum) the following information: file name (including extension); original file path; page count; creation date and time; last saved date and time; last modified date and time; author; custodian of the document (that is, the custodian from whom the document was collected or, if collected from a shared drive or server, the name of the shared driver or server); and MD5 hash value. In addition, for email documents, the data load files shall also include the following metadata: sent date; sent time; received date; received time; “to”

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name(s) and address(es); “from” name and address; “cc” name(s) and address(es); “bcc” name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files must be named or put in folders in such a manner that all records can be imported without modification of any path or file name information.

15. If you contend that it would be unreasonably burdensome to obtain and provide all of the documents called for, then:

- a. Produce all such documents as are available to you without undertaking what you contend to be an unreasonable request;
- b. Describe with particularity the efforts made by you or on your behalf to produce such documents, including, without limitation, identification of persons consulted, description of files, records and documents reviewed, and identification of each person who participated in the gathering of such documents, with specification of the amount of time spent and the nature of work done by such person; and
- c. State with particularity the grounds upon which you contend that additional efforts to produce such documents would be unreasonable.

16. With respect to any document withheld from production on a claim of privilege or work product protection, please provide a written privilege log identifying each document individually and containing all information required by Rule 26(b)(5) of the Federal Rules of Civil Procedure.

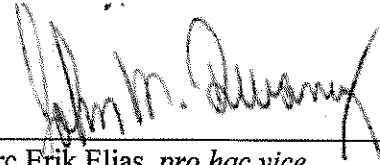
**THIRD PARTY SUBPOENA TO THE CLERK OF
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Dated: December 19, 2013

By:



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Attorneys for Plaintiffs

THIRD PARTY SUBPOENA TO THE CLERK OF
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CERTIFICATE OF SERVICE

On December 19, 2013, I caused to be served, at the address stated below, via the method of service indicated, a true and correct copy of the Subpoena to Produce Documents and above description of documents.

VIA HAND DELIVERY

Clerk of the Virginia Senate
Susan Clarke Schaar
Senate of Virginia State Capitol,
3rd Floor 1000 Bank Street
Richmond, Virginia 23219

VIA EMAIL AND U.S. MAIL

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Attorneys for Intervener-Defendants

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 19th day of December, 2013.



Christina Lewis

THIRD PARTY SUBPOENA TO THE CLERK OF
THE VIRGINIA SENATE (3:13-CV-678)- 9

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Brady, Michael H.

From: Thomas, Norman A.
Sent: Monday, December 30, 2013 5:13 PM
Subject: Page v. Judd Litigation

Importance: High

From: Thomas, Norman A.
Sent: Friday, December 27, 2013 7:02 PM
To: 'jdevaney@perkinscole.com'
Cc: Brady, Michael H.
Subject: Page v. Judd Litigation
Importance: High

John,

You will recall that we spoke briefly on Monday about this litigation. At that time, Mike Brady and I represented only the Division of Legislative Services, as a non-party served on December 20th with the subpoena requesting documents (issued per Rule 45 F.R.C.P.). Since that time, we have undertaken to likewise represent the Office of the Clerk of the Senate, the Office of the Clerk of the House of Delegates, and former-Delegate William Janis. Our understanding is that each of these offices, and former-Delegate Janis, were served with an identical Rule 45 subpoena on or about Friday, December 20th. The due date for each subpoena is January 3, 2014.

When we spoke, I briefly described the need for, and requested, an extension of time for our response, in light of several factors. I also mentioned our intention to research whether some of the requested documents, and in particular, e-mail and other communications, potentially may be subject to a good faith claim of legislative privilege. Mike and I called your office this afternoon to follow-up that conversation, as we suggested on Monday, and, unfortunately, did not reach you. (A member of your law firm's staff very politely said that she'd send you an e-mail to let you know that we wanted to talk today, however, she also mentioned that you were out of the office and perhaps not returning there until next week.)

Respectfully, each of our clients need an extension of time to attempt to make a good faith effort to respond to the Rule 45 subpoena, or at least to some portions of it. The General Assembly Session of 2014 begins on January 8th, with Inauguration on January 11th, and the leadership and staffs of DLS and the Clerks' Offices are tasked with immense Session-related (and also some ceremonial) responsibilities. Due to the intervening holidays, and the attendant loss of staff resources, the time-related problems are exacerbated. State offices officially were, or will be, closed on December 23, 24, 25, and 31, 2013, as well as on January 1, 2014; each date, but for the holidays, would have been, or would be, a business day. Moreover, the subpoena itself is exceptionally broad in scope, with *very* lengthy definitions. Our position is that the scope is so broad, and the definitions so prolix and internally conflicting, that the Rule 45 subpoena represents to these non-parties an unreasonable and unduly burdensome demand upon them by the plaintiffs.

In addition, the searches for e-mails, necessarily driven by extremely broad search terms due to the scope of the Rule 45 subpoena, very well may produce tens of thousands, or maybe hundreds of thousands, of e-mail communications. Our research indicates that some considerable number of them will meet the legal requirements for a lawful claim of legislative privilege under applicable case law. Yet, with so many, it is impossible to review them individually to reasonably discern which of them are subject to this qualified privilege claim. Therefore, each client seeks a substantial narrowing of the Rule 45 subpoena's scope.

Also, the demanded TIFF formatting is not possible for most of the documents that might be produced, and a very burdensome conversion to make for others. It appears that a PDF format would be appropriate, and reasonable, for these non-parties to produce to the plaintiffs. Clearly, some negotiated compromise on the formatting of the documents would be proper for us to attempt, and we seek to do so. Indeed, our clients object at this point in time to having to invest the time, and other staff and information technology resources, necessary to convert any of the documents to a format other than that in which they currently exist.

Thus, in accordance with our obligations under the Federal Rules of Civil Procedure, and applicable Local Rules, and the good faith of counsel and our non-party clients, I ask that you, or an authorized attorney from your office, contact Mike Brady and me on Monday, December 30th, to discuss a response date/time extension, a substantial narrowing of the scope of the Rule 45 subpoena, a negotiated formatting solution, and other related matters, including issues associated with a potential claim legislative privilege for some of the documents. Hopefully, our efforts may avoid decisions to object to the Rule 45 subpoena served on each of our clients, and to seek to quash them.

Thank you, and I look forward to hearing back from you.

Norman

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