IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

Latasha Holloway, et al.,

Plaintiffs,

v. **Civil Action No. 2:18-cv-0069**

City of Virginia Beach, et al.,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO BIFURCATE TRIAL

In their latest motion, Defendants once again ask the Court to limit discovery and bifurcate this case—this time, on the grounds that it would "promote a more efficient, cost effective, and expedient outcome." Doc. 79 ("Mot."), at 5. But Defendants appear to seek efficiency in name only. To be sure, it is not an efficient use of the Court's time for there to be two separate discovery periods and two trials. By filing duplicative motions with identical requests for relief, Defendants continue to resist the efficient resolution of this case. This Court should decline Defendants' invitation to further delay adjudication of this matter and deny Defendants' motion for the reasons stated in Plaintiffs' recent brief in opposition to Defendants' motion for a protective order, *see* Doc. 78, and the reasons stated below.

INTRODUCTION

Defendants' motion to bifurcate contravenes the purpose and plain text of Rule 42(b) by dividing the case into two phases despite substantial overlap in the legal analysis and factual evidence relevant to each proposed phase. Rather than expedite or economize the resolution of this case, bifurcation would prolong it. Bifurcation would also contradict the purpose and plain text of Section 2 of the Voting Rights Act, which compels courts to examine the "totality of the

circumstances" when determining whether an election system is lawful. Even in their second motion, Defendants have not yet identified a single Section 2 case in which discovery was bifurcated in the manner they propose. Granting Defendants' requests would upend the schedule set in this case just two months ago—a schedule to which Defendants agreed without once raising the issue of bifurcation.

Tellingly, Defendants' latest motion fails to state clearly whether Defendants are requesting bifurcation of only the trial, or rather, of the entire case—*i.e.*, whether they are asking to proceed on discovery, dispositive motions, and trial on only the *Gingles* factors, and then to proceed with discovery, dispositive motions, and trial on the overall Section 2 claim. Though the motion is initially styled as a "Motion to Bifurcate Trial" and cites Federal Rule of Civil Procedure 42(b), it proceeds to discuss discovery burdens, *see* Mot. at 7-10, ask the Court to bifurcate the creatively construed "*Gingles* precondition *inquiry*" from the "totality of the circumstances *inquiry*," *id.* at 10 (emphases added), and ply the Court to "bifurcate this *claim*" altogether, *id.* at 11 (emphasis added). And the arguments in Defendants' latest motion are nearly identical to those in the motion for a protective order, inviting likewise nearly identical responses by Plaintiffs. In short, Defendants have simply restyled their "motion for entry of a protective order" and refiled it as a "motion to bifurcate trial." Remarkably, they did so before the previous motion was even fully briefed, let alone resolved by the Court. In other words, Defendants have filed *two* separate motions making the same request—asking the Court to override the scheduling order that all parties agreed to and that this Court entered on April 2. Not only are these delay tactics a waste of the Court's and parties' time and resources, they are a drain on taxpayer dollars.

Defendants' gambit would also put Virginia Beach citizens' voting rights in jeopardy. Bifurcation would only advance the resolution of the case *if* Defendants were to win on the three

Gingles preconditions. But Defendants have proffered no meaningful evidence that they will prevail, nor could they reasonably do so at this early stage. If the Court takes the bet that Defendants are offering, and Defendants do *not* prevail, Defendants nonetheless will have successfully doubled the duration of this case and afforded themselves a second bite at the apple. In other words, Defendants' proposal risks extraordinary inefficiencies for everyone involved for the mere possibility of expediency for Defendants during discovery. The steep costs of litigating this case twice would not only be financial: the extensive time it would take to litigate the case twice would effectively preclude any potential relief for Plaintiffs in advance of the 2020 elections. In other words, even if the Court were to conclude that Virginia Beach's electoral system is discriminatory and violates the Voting Rights Act, Plaintiffs would be left without a timely remedy if the case were needlessly bifurcated early on. Thus, the Court should deny this motion and decline Defendants' renewed plea to limit discovery and further postpone adjudication of this case.

ARGUMENT

I. Bifurcation in This Section 2 Case Would Thwart the Purposes of Federal Rule of Civil Procedure 42(b) and Unnecessarily Prolong Its Resolution.

A. Bifurcation is plainly inconsistent with the command of Rule 42(b).

As Plaintiffs previously explained, bifurcation is entirely inappropriate in this case. As an initial matter, bifurcating this case into two phases, as Defendants propose, would run counter to the purpose and text of Federal Rule of Civil Procedure 42(b). Under this Rule, a court may bifurcate the issues in a case into separate trials "[f]or convenience, to avoid prejudice, or to expedite and economize." Fed. R. Civ. P. 42(b). A trial court is afforded broad discretion in deciding whether a case should be bifurcated in light of the possibility that a case would be more expediently, but still fairly, resolved by ordering separate trials of different issues raised in the

case. *Bowie v. Sorrell*, 209 F.2d 49, 51 (4th Cir. 1953); *see also Dixon v. CSX Transp. Inc.*, 990 F.2d 1440, 1443 (4th Cir. 1993). However, "piecemeal trial of separate issues in a single lawsuit or the repetitive trial of the same issue is not to be the usual course." 9A Charles Alan Wright *et al*., *Federal Practice and Procedure* § 2388 (3d ed. 2019). "The major consideration, of course, must be which procedure is more likely to result in a just and expeditious final disposition of the litigation." *Id.*; *see also* Fed. R. Civ. P. 1 (directing that procedural rules should be employed "to secure the just, speedy, and inexpensive determination of every action and proceeding."). The party seeking bifurcation has the burden of proving its necessity. *Id.*; *see also Glass v. Anne Arundel Cty.*, No. CIV. WDQ-12-1901, 2013 WL 1120549, at *12 (D. Md. Mar. 14, 2013). Defendants have failed to do so.

Far from expediting the resolution of this case, bifurcation would hamper it. It would also conflict with the plain language and purpose of the Voting Rights Act.[1] The structure and text of the statute recognize what Defendants refuse to accept: bifurcation would complicate the case, not simplify it. It would not expedite the case to limit discovery on the three *Gingles* factors, conduct an initial round of summary judgment briefing, then reopen discovery into the remaining evidence that might bear on whether the election system is discriminatory, and finally, reintroduce the *Gingles* evidence all over again and redo summary judgment. Nor would it expedite the case to

[1] As Plaintiffs' brief in opposition to the previous motion for a protective order explains, Section 2 of the Act calls on the Court to examine the "totality of the circumstances" in determining whether an election system violates the voting rights of a locality's residents. 52 U.S.C. § 10301(b) (2012); *see* Doc. 78, at 3, 6-10. As the Supreme Court has stated, the three *Gingles* factors are meant to provide "some structure to [Section 2]'s 'totality of the circumstances' test in a case challenging multimember legislative districts." *Johnson v. De Grandy*, 512 U.S. 997, 1010 (1994). As the *Gingles* Court pointed out, two of the three *Gingles* factors are in the non-exhaustive list of factors deemed relevant to assessing the "totality of the circumstances" in the Senate Report accompanying the 1982 amendments to Section 2. *See* 478 U.S. 30, 44-45 (1986). Thus, the *Gingles* factors are meant to be relevant to the statutory inquiry, not to supplant it.

have two trials involving overlapping evidence that bears on both the *Gingles* inquiry and the totality of circumstances inquiry. And, discovery on the *Gingles* factors cannot be so neatly contained to expert evidence as Defendants claim. Bifurcation will only set up additional discovery disputes over what discovery is appropriate during the first "phase" of discovery. As the Court has said, Congress intended Section 2 determinations about "equality or inequality of opportunity" to "rest[] on comprehensive, not limited, canvassing of relevant facts." *De Grandy*, 512 U.S. at 1011 (quoting *Gingles*, 478 U.S. at 46 (O'Connor, J., concurring)).

Thus, discovery and trial in this action can and should be completed all at once. Defendants' motion fails to demonstrate how bifurcation would provide for a speedier and fairer resolution of the case than the schedule already agreed to by the parties and the Court. Defendants remain free to file a motion for summary judgment on the bases they identify in September and, if they are correct, that will end the case. Setting this case on two separate, consecutive tracks as Defendants propose is unnecessary, will result in duplication, and will delay the timely resolution of this case. The purpose of Rule 42(b) is to increase efficiency, not to serve as a bludgeon for Defendants eager to limit the scope of discovery. Plaintiffs, however, remain open and willing to discuss options for narrowing the requests for production, as Plaintiffs stated in their May 29 brief. *See* Doc. 78, at 6.

B. Defendants' proffered cases provide no support for granting bifurcation here.

Defendants' case law in support of bifurcation is largely inapposite. *See* Mot. at 5-7. The only Section 2 case identified in support of Defendants' motion, *Rios-Andino v. Orange County*, 51 F. Supp. 3d 1215 (M.D. Fla. 2014), hardly stands for the proposition that courts routinely bifurcate Section 2 cases. Rather, the docket for *Rios-Andino* indicates that *neither* side in that case filed a motion to bifurcate discovery or trial. Instead, the court appears to have asked the parties to

present the evidence relevant to the *Gingles* factors first during the bench trial. Following the presentation of that evidence, the court entered judgment in favor of the defendants. As Plaintiffs' counsel can attest, this procedural approach was a departure from the usual course of action in Section 2 cases. Even so, the *Rios-Andino* court did not grant the kind of bifurcation motion that Defendants have filed here, requiring bifurcation before discovery, summary judgment, and trial. As the *Rios-Andino* court likely recognized, the evidence gathering and discovery necessary for Section 2 cases are too intertwined for this type of bifurcation to be appropriate. That said, Defendants' cherry-picked Section 2 case is itself an outlier—it appears to be the only case Defendants have identified in which a court even came close to separating the adjudication of the *Gingles* factors from the "totality of the circumstances" analysis. Plaintiffs are aware of no other Section 2 case in which a court bifurcated discovery or trial in the manner Defendants propose. *See* Doc. 78, at 6-7.

The other cases Defendants cite in support of their motion involve entirely different legal and factual contexts that have equally little bearing on this case. Insurance cases are frequently bifurcated when they involve both an underlying claim for breach of a contractual duty and a claim that the insurer's actions amounted to bad faith. *See* 17 Steven Plitt *et al.*, *Couch on Insurance* § 246:5 (3d ed. 2018). Often this is because of concerns that the earlier introduction of evidence about the insurer's bad faith will prejudice the jury's conclusions about the substantive cause of action or the question of insurance coverage. *See Saint John's African Methodist Episcopal Church v. GuideOne Specialty Mut. Ins. Co.*, 902 F. Supp. 2d 783, 787 (E.D. Va. 2012). Similarly, "Monell claims" are often bifurcated from other allegations of unconstitutional treatment under 42 U.S.C. § 1983, again often because of concerns about certain evidence prejudicing the jury. *See* 9A Wright, *supra*, § 2389. Patent infringement cases are also more likely to be bifurcated, particularly

when they involve complex litigation and a wide range of claims, as in the case cited by Defendants, *MPEG, Inc. v. Dell Inc.*, 254 F. Supp. 3d 798, 805-06 (E.D. Va. 2017). *See* 2 *Business and Commercial Litigation in Federal Courts* § 13:40 (4th ed. 2018). Thus, examined closely, Defendants' citations to cases in these specific contexts, in which bifurcation is more common than otherwise usual, is unavailing.

II. The Court Should Decline Defendants' Second Invitation to Bifurcate a "Totality of the Circumstances" Case into Two Separate Trials and Disrupt the Agreed-upon Schedule.

The Court should refuse to entertain Defendants' repeated attempts to delay discovery and circumvent the scheduling order that both sides agreed to just two months ago. Respectfully, Defendants' bifurcation motion is no more than a restyled and refiled version of their recent motion for a protective order. That previous motion was filed a mere sixteen days before the most recent one, and had not even been fully briefed when Defendants filed their latest motion seeking essentially the same relief from the Court. Both motions squarely contravene the scheduling order Defendants agreed to on March 20, and which the Court entered on April 2. Defendants' sudden about-face is, needless to say, discouraging.

Moreover, should Defendants' motion be granted, Plaintiffs will be prejudiced by their own adherence to the Court's scheduling order. Consistent with the current scheduling order, Plaintiffs disclosed their expert witness on the "totality of the circumstances" factors today. *See* Ex. A. If bifurcation is granted, Defendants will reap the benefits of Plaintiffs disclosing their experts, who are key to Plaintiffs' case about the discriminatory effects of Virginia Beach's electoral system, while dodging the discovery obligations to which they consented a few months ago.

As the timing of Defendants' motion shows,[2] and as they openly admit in their brief, *see* Mot. at 3 n.2, Defendants' bid for bifurcation is no more than an attempt to avoid discovery to which they had agreed, and which they implicitly concede is relevant to the legal and factual questions at issue in this action. This is not a valid reason to request bifurcation. *See Creative Home Designs, Inc. v. Fred Francis Builders, L.P.*, No. 3:06-CV-0039, 2006 WL 2469379, at *2 (M.D. Tenn. Aug. 25, 2006) (concluding that the timing of defendants' bifurcation motion was "suspect" when it appeared that defendants were seeking to avoid responding to plaintiff's discovery requests, because "the idea that bifurcation may be appropriate was never mentioned during the Case Management Conference, even though there was extended discovery about the formulation of the discovery plan" and the motion was filed after the defendants objected to discovery that had been propounded).

Mirroring their motion for a protective order, Defendants make assertions that have no place in a request for bifurcation. Defendants argue, for instance, that "[n]owhere in the Amended Complaint do Plaintiffs allege that it is possible to draw a ten-district (or less) map with at least one district wherein either Blacks, Hispanics, or Latinos, or Asians alone comprise majority of the total [Citizen Voting Age Population]." Mot. at 2. This is an argument to be made either at the motion-to-dismiss stage (which Defendants bypassed by filing an answer) or at summary

[2] As laid out in prior Plaintiffs' brief in opposition, *see* Doc. 78, and summarized here for the Court's convenience, Defendants previously agreed to complete discovery by August 19, 2019, conduct summary judgment briefing in September 2019, and proceed to trial in January 2020. They first raised the issue of bifurcation on May 10, and only after Plaintiffs' propounded their First Request for Production on May 1. Given the unprecedented nature of such a request, and its impracticability under the current schedule and impending 2020 election, Plaintiffs did not agree to bifurcation. Defendants did not seek to confer with Plaintiffs about the scope of their requests except to demand complete bifurcation. Defendants subsequently sought to bifurcate discovery, and then, without waiting to complete briefing, much less for the Court's ruling, to obtain the same result by bifurcating trial.

judgment, not in a motion to bifurcate. Defendants also raise questions that will be answered during the ordinary course of discovery. *See, e.g.*, *id.* at 9 ("Defendants do not presently know what, if any, traditional districting principles Plaintiffs considered in drawing their proposed districts."); *id*. at 7-8 (arguing that "Defendants do not believe that Plaintiffs can succeed on a three-minority coalition based claim" based on case law that is squarely inapplicable, as Plaintiffs explained in their recently filed brief in opposition to Defendants' pending motion for a protective order). It is unclear why Defendants are raising these questions now instead of focusing on conducting timely discovery. It makes little sense that Defendants are arguing the merits of the case, with no facts yet uncovered through discovery, to demonstrate that bifurcation would somehow be convenient.

At a minimum, the Court should deny the motion to bifurcate as premature. At this stage, neither side has propounded meaningful discovery that will allow them to determine which issues will be most significant at summary judgment or trial. Bifurcation is rarely, if ever, appropriate this early in a case. "The issues of judicial economy and potential confusion at trial are better resolved at a date closer to trial, when the claims have been fully developed through discovery." *Actividentity Corp. v. Intercede Grp. PLC*, No. C 08-4577 VRW, 2009 WL 10691373, at *2 (N.D. Cal. Dec. 30, 2009). To the extent Defendants do not seek bifurcation of discovery and only ask for bifurcation of trial, that issue is better addressed after summary judgment when it is clearer which factual disputes will proceed to trial.[3]

[3] Two days ago, Defendants noted a request for hearing on the docket with respect to the pending motion for a protective order. *See* Doc. 82. Because the bifurcation issue will soon be briefed twice, once in connection with the motion for a protective order and once in connection with the motion to bifurcate, Plaintiffs do not believe that a hearing is strictly necessary but remain willing and ready to participate in such a hearing and any other proceedings the Court deems necessary to resolve these issues.

CONCLUSION

If there is anything that bears repeating, it is this: Defendants chose not to raise the issue of bifurcation when the schedule for this case was being set, and then, shortly after receiving Plaintiffs' First Requests for Production, filed two nearly identical motions seeking to stonewall the very discovery to which they had agreed. Both motions rely on unsupported assertions about the merits of Plaintiffs' case as grounds for dodging discovery, and both motions suggest that Defendants may not be as invested in the speedy resolution of this case as they claim. For the foregoing reasons, Defendants' motion to bifurcate should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 14, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to counsel of record, including:

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