

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

SANDRA LITTLE COVINGTON, *et al.*,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, *et al.*,

Defendants.

No. 1:15-cv-399

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO PRESENT
WITNESSES**

Pursuant to this Court's order, ECF No. 228, Plaintiffs respond as follows to Defendants' Motion to Present Witnesses:

For each witness identified by Legislative Defendants, Plaintiffs request that any time Legislative Defendants spend presenting or examining witnesses be deducted from the one-hour time limit for oral argument. ECF 228. Likewise, any time Plaintiffs spend examining witnesses should be deducted from their allotted time.

Plaintiffs' other responses specific to the identified witnesses are as follows:

1. Douglas Johnson, Ph.D.

Because it appears that Legislative Defendants intend to present Dr. Johnson to testify as an expert witness, and in a manner that does not comply with Federal Rule of Civil Procedure 26(a)(2), Plaintiffs oppose the Motion to call Dr. Johnson. Under the Federal Rules, experts are required to prepare and produce a report, signed by the expert, which contains "a complete statement of all opinions the witness will express and the

basis and reasons for them.” Fed. R. Civ. P. 26(a)(2)(B); *see also Sss Enters. v. Nova Petroleum Realty, LLC*, 533 Fed. Appx. 321, 324 (4th Cir. 2013) (“The federal rules impose an ‘automatic sanction’ of exclusion of a party’s expert witness for failure to adhere to the requirements set forth in Rule 26(a).”); *Morris v. Bland*, 666 Fed. Appx. 233, 239 (4th Cir. 2016) (“Under Federal Rule of Civil Procedure 37(c)(1), a party who fails to provide information as required by Rule 26(a), including a Rule 26(a)(2)(B) expert report, is subsequently not allowed to use that information . . . at trial”) (internal quotations omitted). Because Legislative Defendants have not produced a report for Dr. Johnson, he should not be permitted to offer expert testimony on January 5. Should the Court allow him to testify, Plaintiffs request that he be ordered to produce a report and be made available for deposition prior to January 5.

2. Hank Henning

Plaintiffs do not object to the Legislative Defendants’ Motion with regard to calling Mr. Henning to testify so long as Plaintiffs are permitted an opportunity to depose Mr. Henning prior to the hearing on January 5. Counsel for Plaintiffs are available to conduct that deposition at any date between December 27 and January 4.

3. Michael C. Boose

Plaintiffs likewise do not object to Legislative Defendants’ Motion to call Mr. Boose as a witness, subject to an opportunity to depose Mr. Boose between December 27 and January 4.

4. Professor Nathaniel Persily

Should the Court so desire to allow Legislative Defendants to cross-examine the Special Master, Plaintiffs have no objection so long as they similarly would be allowed the opportunity to examine the witness, if they chose to do so.

5. Rebuttal Witnesses

Plaintiffs reserve the right to call rebuttal witnesses, and will designate those witnesses, if any, promptly upon completion of the deposition of the Legislative Defendants' witness whose testimony the rebuttal witness would be addressing.

Respectfully submitted this 18th day of December, 2017.

POYNER SPRUILL LLP

**SOUTHERN COALITION FOR
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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will provide electronic notification of the same to the following:

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This 18th day of December, 2017.

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