IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

PAMELA MOSES,	)	
	)	
Plaintiff,	)	**Case No. CT-1579-19**
	)	**Division I**
v.	)	
	)	**Judge Felicia Corbin-Johnson**
MARK GOINS, TRE HARGETT, and JONATHAN SKRMETTI, in their official capacities,	)	**Judge Suzanne S. Cook**
	)	**Judge Barry Tidwell**
	)	
	)	
Defendants.	)	

REPLY IN SUPPORT OF MOTION TO COMPEL

In this discovery dispute, Defendants are taking a number of completely unprecedented positions: (1) one defendant has unilaterally decided that it will not participate in discovery and has outright refused to search for documents; (2) all defendants refuse to even discuss (let alone document) what efforts—if any—they made to search for and produce responsive documents; and (3) all defendants have refused to produce a privilege log. Simply put, Defendants are flouting their discovery obligations. When confronted with these realities, however, Defendants double down and blame *Plaintiff* for taking too long to see through the fog. The Panel cannot let this behavior stand. "The essential aim of our legal system is to seek truth in the pursuit of justice." *Harris v. Bd. of Pro. Resp. of Supreme Ct. of Tennessee*, 645 S.W.3d 125, 139 (Tenn. 2022) (quoting *In re Dixon*, 435 P.3d 80, 88 (N.M. 2019)). Defendants have obstructed this case long enough. The Panel should grant Plaintiff's Motion to Compel.

I. Defendants' Timeliness and Standing Arguments are Meritless Attempts to Distract the Panel

Tellingly, in a 24-page response, **nowhere do Defendants actually say what searches—if any—they conducted**. Instead, Defendants spin an incomplete and misleading narrative as to why *Plaintiff* is at fault for Defendants' refusal to participate in discovery. Defendants' behavior is not Plaintiff's fault, however. Rather, just like the defendant in *Potts* (discussed *infra*), Defendants have "engaged in a course of conduct that is designed to totally frustrate this trial from going forward." *Potts v. Mayforth*, 59 S.W.3d 167, 171–72 (Tenn. Ct. App. 2001). The Panel should not reward this behavior.

A. Defendants are the source of delay, not Plaintiff.

As to Defendants' timing argument, there are three key points:

(1) There is no operative scheduling order, and no deadline for filing a Motion to Compel. Defendants argue that Plaintiff was dilatory in bringing this motion but ignore that in the cases Defendants cite, there were discovery deadlines in place relative to such motions. No such deadlines exist here. Not only did the original scheduling order not contain a deadline for filing discovery motions, but Plaintiff has been forthright with Defendants and the Panel in repeatedly noting that additional discovery, and a reasonable amount of time to complete that additional discovery, was needed. That is why the Parties have long agreed that a new scheduling order with new deadlines is needed.[1] Defendants even submitted to the panel in March 2024 a proposed Amended Scheduling Order providing for discovery deadlines extending until August 2024. *See* Defs.' Proposed Scheduling Order (attached as **Exhibit A**). While Plaintiff does not agree with the

[1] *See* April 3, 2023 Unopposed Motion to Amend the Scheduling Order and/or For a Case Management Conference noting that the Parties had "been engaged in discovery, but [were] currently still in the midst of resolving issues with respect to written discovery, some of which may require motions briefing and an order from the Panel" and that "Plaintiff does not have the documents and information necessary to develop her expert proof"; *see also* August 31, 2023 Joint Motion to Amend the Scheduling Order (in essence, a renewal of the original April 3, 2023 motion).

parameters of Defendants' proposed schedule, Defendants' proposal certainly highlights the absurdity of Defendants' argument that the discovery period has closed and that Plaintiff must meet a "good cause" standard to prevail on her Motion. Moreover, trial is not set until March of 2025. Expert discovery and dispositive motions will not take 10 months; as discussed with the Panel, the time built into the schedule was meant to permit the parties time to finish discovery, including written discovery and depositions. Defendants' argument about a purported deadline for a motion to compel is nothing more than a red herring.

(2) **Defendants** have caused the delays in the discovery process. Plaintiff's First Discovery Requests were served on December 30, 2022, yet Defendants did not produce (what they considered to be) complete responses and document production until almost **seven months** later on June 23, 2023. Similarly, though Plaintiff's Second Discovery Requests were served on November 8, 2023, Defendants did not produce new responsive documents until over **four months** later on March 15, 2024. When Plaintiff sent a deficiency letter related to Defendants' responses on November 21, 2023, it took almost **two months** for Defendants to respond (on January 19, 2024), and the response largely just referred Plaintiff back to Defendants' prior objections. Defendants also filed a Motion to Stay discovery (during the pendency of which Defendants refused to respond to Plaintiff's discovery requests at all), a Motion for Interlocutory Appeal, and three separate Motions to Quash. Defendants' strategy here is simple: delay and prevent Plaintiff from obtaining all information relevant to her claims.

Defendants' conduct is akin to that of other defendants described by Tennessee courts as "uncooperative at best." In *Potts*, the Court of Appeals found that it was "apparent that defendant Potts' conduct in the case was uncooperative at best" and upheld the trial court's finding that "Potts had 'engaged in a course of conduct that is designed to totally frustrate this trial from going

forward.'" 59 S.W.3d at 171-72. *Shahrdar v. Global Housing, Inc.* is equally instructive. 983 S.W.2d 230 (Tenn. Ct. App. 1998), perm. app. denied (Tenn. Oct. 19, 1998). In that case, the plaintiff repeatedly sought adequate responses to his discovery requests from the defendants, starting from when the complaint was filed. *Id.* at 233. Approximately eighteen months after the complaint was filed, the plaintiff moved for relief, which was granted. *Id.* at 234. The Tennessee Court of Appeals affirmed the trial court's ruling, noting that "the defendants' conduct in this case can be described as uncooperative at best," *id.* at 236, and specifically acknowledged that, despite the trial court's ordering the defendants to fully comply with discovery, they either did not fully answer the interrogatories and requests for production or answered them with "boilerplate objections." *Id.*

(3) **Defendants** have attempted to block any other discovery. When faced with the meritless objections and obstructionism of Defendants, Plaintiff attempted to take the straightest path to getting the documents and data she needs so that this case can proceed to trial: third-party subpoenas. As the Panel knows, Defendants—in addition to refusing to search for and produce documents—have *also* attempted to fully block this third-party discovery, without demonstrating any standing to do so, or attempting to demonstrate any burden or prejudice to Defendants. Defendants' efforts to block third-party discovery, even though they could not articulate to the Panel any prejudice imposed by the subpoenas, were another avenue that Defendants have pursued to prevent Plaintiff from obtaining the documents and data she needs to prove her case.

B. The Attorney General cannot unilaterally decide not to participate in litigation.

Defendants have doubled down on a truly unprecedented argument that would upend Tennessee law: if a defendant unilaterally decides that he or she is not a proper party in litigation, (s)he can simply refuse to participate at all (with or without revealing that fact to either the court

or the opposing party). If this were the case, no defendant in *any* litigation would ever participate in discovery without a court ordering them to do so. If the Attorney General believes he is not a proper party, it is his responsibility to move to dismiss on those grounds and it is the province of the Panel, on proper motion, to decide.[2]

II. Defendants' Substantive Arguments are Meritless

As outlined in Plaintiff's Memorandum of Law, Defendants have largely failed to participate in discovery. Most importantly, Defendants continue to hide what—if any—searches they have conducted, despite agreeing to inquire into search terms, custodians, time frames, etc. as far back as March of 2023. Whether this inquiry happened or not, Plaintiff does not know because, despite repeatedly raising this issue via written discovery request, email, telephonic meet and confer discussions, multiple formal discovery deficiency letters, and now via motion, Defendants have categorically refused to discuss any such matters. This is in contradiction to the Tennessee Rules of Civil Procedure, Tennessee case law, and the general obligations of counsel as officers of the court. *See, e.g., SpecialtyCare IOM Servs., LLC v. Medsurant Holdings, LLC*, No. M201700309COAR3CV, 2018 WL 3323889, at *12 (Tenn. Ct. App. July 6, 2018) (reversing default judgment based on discovery misbehavior in part because non-moving party actually participated in discovery process, including discussing and sharing search terms, search methodology, producing additional documents, etc.).

[2] In any case, the Attorney General is a proper party and has filed an Answer to the Second Amended Complaint. For standing purposes, a plaintiff need only show that her injury is "fairly traceable" to the conduct of the party at issue. *See City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) ("While the causation element is not onerous, it does require a showing that the injury to a plaintiff is 'fairly traceable' to the conduct of the adverse party."); *see also, e.g., Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 713 (6th Cir. 2015). In *City of Memphis v. Hargett* (a constitutional declaratory judgment case), the Tennessee Supreme Court found that the Attorney General was a proper party (and that Plaintiffs had standing) because the constitutionality and enforcement of the voter ID law was "fairly traceable" to the Attorney General, Secretary of State, and Coordinator of Elections.

In fact, the Attorney General's Office itself has recently moved for an order against a non-compliant defendant on very similar grounds. In *In re Wall & Assocs., Inc.*, the Attorney General argued successfully that the defendant "had produced very limited information, including internal manuals, training documents, advertising information, and documents related to only thirteen selected Tennessee consumers; however, the AG alleged that Wall continued to withhold significant information, including documents related to the remaining Tennessee consumers along with certain financial information . . . ." No. M202001687COAR3CV, 2021 WL 5274809, at *1 (Tenn. Ct. App. Nov. 12, 2021). In that case, the Attorney General negotiated specific search terms and custodians that the defendant would use to conduct searches and successfully defended against the defendant's motion to limit those search terms and custodians. *Id.*

The Tennessee Rules also clearly contemplate this kind of collaborative and open (rather than unilateral and secret) discovery negotiation process:

> The volume of - and the ability to search – much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

Tenn. R. Civ. P. 26.02, Advisory Commission Comment [2009] (emphasis added).

Instead of participating in the discovery process in good faith, however, Defendants have continued to make meritless arguments about their boilerplate objections, the scope of relevant documents, and whether their sparse document production is sufficient. Plaintiff reiterates her arguments from her Memorandum of Law on these points, but notes that the production of the

handful of tables and the voting data is not in any way a fulsome production (*see* Resp. at 16) and that a privilege log is required because Defendants have made a unilateral decision as to what documents are relevant, what custodians (if any) should be searched, what time frame (if any) should be used, and what search terms (if any) should be used. As the Panel is aware, "[r]elevancy is to be construed liberally and with common sense instead of 'narrow legalisms.'" *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 605 n.3 (Tenn. Ct. App. 2004) (citing Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2008, p. 107 (1994)).[3]

Defendants' hair-splitting as to what documents may be relevant and what documents may not be is simply a fig leaf meant to cover the fact that Defendants have refused to properly participate in discovery. In any case, the Panel should not make a decision without knowing what—if anything—Defendants have done to comply with their discovery obligations.

CONCLUSION

Even now, Defendants continue to obstruct and delay this case. Having raised meritless objection after meritless objection, roadblock after roadblock, Plaintiff finally—and only recently—discovered the breadth of Defendants' failure to participate in discovery. As such, the Panel should GRANT Plaintiff's motion to compel and order Defendants as follows:

> (1) Each Defendant shall be compelled to produce a list of the searches they have conducted heretofore, including the document repositories searched, the custodians searched, the search terms used, and the time frames applied;
>
> (2) Each Defendant shall be compelled to conduct searches for responsive documents and information in accordance with the Tennessee Rules of Civil Procedure;

[3] *See also Johnson*, 146 S.W.3d at 605 (Tennessee law generally allows for broad discovery, as "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."); *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 525 (Tenn. 2010) ("Tennessee's discovery and evidentiary rules reflect a broad policy favoring discovery of all relevant, non-privileged information."); *Johnson*, 146 S.W.3d at 605 n. 3 ("While "a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action," discovery of information that has no conceivable bearing on the case should not be allowed." (emphasis added)).

(3) Each Defendant shall be compelled to produce responsive documents and data, including appropriate metadata (which will require re-producing documents previously produced);

(4) Each Defendant shall be compelled to produce supplemental discovery responses fully responding to the discovery requests, removing meritless objections, and specifying an answer for each request from each Defendant; and

(5) Each Defendant shall be compelled to fully answer all of Plaintiff's interrogatories under oath.

The Panel cannot reward such "uncooperative at best" behavior. A starting point is ordering Defendants to reveal what, if anything, they have done so far; once that is done, the Parties can move swiftly forward with the completion of discovery so as not to delay this case any longer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served via email and the Court's electronic filing system on May 23, 2024, as follows:

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EXHIBIT A

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

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	)	
Plaintiff,	)	
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	)	**Judge Barry Tidwell**
	)	
	)	
Defendants.	)	

[proposed] AMENDED SCHEDULING ORDER

THIS CAUSE came before the Three-Judge Panel on February 22, 2024, for a status conference to set scheduling deadlines. In this matter, Plaintiff seeks declaratory and injunctive relief, contending that her inability to restore her right to vote upon conviction of an infamous crime pursuant to Tenn. Code Ann. §§ 40-29-105 and 40-29-204 violates various provisions of the Tennessee Constitution. Attending the status conference were John E. Haubenreich, Seth Engel, and Matthew Peterson for Plaintiff and Robert W. Wilson for Defendants.[1] The Panel hereby establishes the following deadlines:

I. Discovery

(1) Plaintiff's Expert Disclosures: May 8, 2024

[1] Defendants Tennessee Secretary of State Tre Hargett and Coordinator of Elections Mark Goins state that this submission should not constitute a waiver of their defense that Plaintiff has provided them with insufficient service of process. (Defs.' February 20, 2024 Answer, p. 26.)

(2)	Defendants' Expert Disclosures:	June 24, 2024
(3)	Completion of party depositions:	July 29, 2024
(4)	Completion of expert depositions:	August 23, 2024

II. Dispositive Motions

(1)	Dispositive motions filed by:	September 23, 2024
(2)	Responses to dispositive motions filed by:	October 23, 2024
(3)	Replies to responses to dispositive motions filed by:	November 7, 2024
(4)	Hearing on dispositive motions:	_____, 2024

III. Trial

(1) This matter is set for trial on March 17, 2025, at 9:00 AM CT in the Supreme Court Room at the Shelby County Courthouse. The trial is scheduled to continue through March 22, 2024.

IT SO ORDERED, this the ____ day of _____, 2024.

_____
FELICIA CORBIN-JOHNSON
Chief Judge
Circuit Court Judge for the 30th Judicial District of Tennessee

_____
SUZANNE S. COOK
Circuit Court Judge for the 1st Judicial District of Tennessee

_____
BARRY TIDWELL
Circuit Court Judge for the 16th Judicial District of Tennessee