STATE OF NORTH CAROLINA

COUNTY OF WAKE

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426, 21 CVS 500085

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al.,

Plaintiffs,

REBECCA HARPER, et al.,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants.

NCLCV PLAINTIFFS' MOTION FOR PROTECTIVE ORDER QUASHING NOTICE OF DEPOSITION DIRECTED TO NCLCV COUNSEL OF RECORD SAM HIRSCH AND DIRECTING LEGISLATIVE DEFENDANTS TO STRIKE SAM HIRSCH FROM THEIR WITNESS LIST FOR TRIAL

Pursuant to Rule 26(c), the NCLCV Plaintiffs respectfully move the Court to issue a protective order prohibiting the Legislative Defendants from deposing NCLCV Plaintiffs' litigation counsel of record, Sam Hirsch, and further directing Legislative Defendants to strike Mr. Hirsch from their witness list for trial. Mr. Hirsch is not a fact witness. He has no knowledge whatsoever of "the facts in controversy" with respect to the Enacted Plans. Instead, Legislative Defendants apparently are seeking to depose Mr. Hirsch and call him as a witness at trial because of the role he played with respect to the computerized creation of the NCLCV Plaintiffs' demonstrative maps.

As an initial matter, the Legislative Defendants' notice of deposition is procedurally defective. Mr. Hirsch is not a party to this case and his deposition cannot simply be noticed. In any event, seeking the deposition of opposing litigation counsel is an extraordinary intrusion into the attorney-client and work-product privileges and is not permitted under North Carolina law

except where the information is critical to the case and cannot possibly be obtained in any other way. That is not the case here.

Even more inappropriate than seeking Mr. Hirsch's deposition is Legislative Defendants' listing of Mr. Hirsch as a potential witness at trial. This raises serious issues under the Rules of Professional Conduct and would cause distraction and disruption to the orderly process that will be necessary to try three consolidated complex cases of significant public interest in just three days, with over a dozen witnesses, beginning just five days from now. *See* Case Management Order at 3-4 (describing the challenges of resolving this litigation in an extremely limited timeframe). Mr. Hirsch is the lawyer who will be putting on NCLCV's expert witness and participating in cross-examining Legislative Defendants' expert witnesses. He should not be required to leave counsel table to sit in the witness box. The NCLCV Plaintiffs respectfully request that this Court issue a protective order prohibiting Legislative Defendants from deposing Mr. Hirsch or attempting to call him as a witness at trial.

BACKGROUND

The issue in this case is whether the Legislative Defendants' Enacted Plans deprive the NCLCV Plaintiffs of the rights guaranteed to them by the North Carolina Constitution. The Legislative Defendants' primary defense to this violation of rights is to assert that the Enacted Plans were not drawn with the intent to dilute the votes of NCLCV Plaintiffs and other Democratic and Black voters. Instead, they argue, the partisan bias and racial vote dilution present in the Enacted Plans is the inevitable result of the Legislative Defendants' adherence to traditional neutral districting principles as applied to the geography and demographics of North Carolina. In their Verified Complaint and Motion for a Preliminary Injunction, the NCLCV Plaintiffs showed that this defense does not hold water. The NCLCV Plaintiffs offered demonstrative congressional and

legislative redistricting plans (which they called the "Optimized Maps") to show that it is possible to draw redistricting plans that adhere to all traditional neutral districting principles without producing an extreme partisan skew and without diluting the voting strength of Black citizens.

In their Motion for Preliminary Injunction, the NCLCV Plaintiffs did not rely on the fact that the plans were produced through computational redistricting (though they did describe the computational redistricting process in their Verified Complaint). Rather, the Tufts University mathematics professor, Dr. Moon Duchin, who offered an affidavit in support of the Motion for Preliminary Injunction, opined only on the objective features of the NCLCV Plaintiffs' demonstrative maps and how those objective features compared with the objective features of the Enacted Plans. Dr. Duchin's testimony was thus fully consistent with Rule 702 as it was provided "to assist the trier of fact to understand the evidence or determine a fact in issue." Dr. Duchin did not consider, and did not opine on, anything related to the method and means of formulating or producing the NCLCV Plaintiffs' demonstrative maps, including the source code, source data, and input parameters. She considered, and opined, on only how the demonstrative maps objectively achieved various traditional redistricting criteria and how they did so without creating the extreme partisan bias of the Enacted Plans. *See* Ex. A, Duchin Report.

Nonetheless, Legislative Defendants repeatedly sought discovery with respect to how the "Optimized Maps" were created. On December 20th, this Court ordered that by 5:00 p.m. on December 23rd, the NCLCV Plaintiffs produce to the Legislative Defendants "the method and means by which the Optimized Maps were formulated and produced, including, but not limited to all source code, source data, input parameters, and all outputted data associated with the Optimized Maps." Order on Legislative Defendants's Motion to Compel at 4 (Dec. 20, 2021). The Court

further ordered the NCLCV Plaintiffs to "identify any and all persons who took part in drawing or participated in the computerized production of the Optimized Maps." *Id.*

The NCLCV Plaintiffs fully complied with that Order (and the Legislative Defendants have not claimed otherwise). The letter accompanying the NCLCV Plaintiffs' voluminous production described the method and means by which the demonstrative maps were formulated and further described all the files being produced, including the maps' source code, source data, input parameters, and all outputted data. The letter also explained (consistent with the NCLCV Plaintiffs' position in moving for a preliminary injunction) that the NCLCV Plaintiffs do not intend to offer any evidence at trial about how the maps were created. Instead, the NCLCV Plaintiffs intend to rely on these demonstrative maps to rebut the Legislative Defendants' argument that the Enacted Plans' extreme partisan bias was inevitable. In other words, although the NCLCV Plaintiffs provided the Legislative Defendants with *all* the information about how their plans were created through a computerized multi-objective optimization process—including all source code, source data, input parameters, and outputted data—the NCLCV Plaintiffs will not offer at trial any evidence or argument about these issues. To avoid needless controversy, the NCLCV Plaintiffs will refrain from calling their plans the "Optimized Maps" and will instead refer to them simply as the "NCLCV demonstrative maps."

As is also described in the letter NCLCV Plaintiffs provided to Legislative Defendants on December 23rd, the person who directed the creation of the NCLCV Plaintiffs' demonstrative maps was NCLCV Plaintiffs' attorney, Sam Hirsch, who is a partner in the Washington, D.C. office of Jenner & Block LLP and one of the lead counsel in this case. The letter explained that Mr. Hirsch was assisted in this process by non-testifying consulting experts. On December 27th, presumably in response to the disclosure that Mr. Hirsch directed the creation of the NCLCV Plaintiffs'

demonstrative maps, the Legislative Defendants noticed the deposition of Mr. Hirsch for Friday, December 31st, at 9:00 a.m. *See* Ex. B, Deposition Notice of Sam Hirsch (Dec. 27, 2021). Later that same day, the Legislative Defendants provided their witness list for trial, listing Mr. Hirsch as a witness they may call at trial. *See* Ex. C, Legislative Defendants' Witness List (Dec. 27, 2021).

The NCLCV Plaintiffs subsequently informed the Legislative Defendants that their noticed deposition of Mr. Hirsch was improper and requested that they strike Mr. Hirsch from their witness list or the NCLCV Plaintiffs would be forced to seek appropriate relief from the Court. *See* Ex. D, Email from Z. Schauf (Dec. 28, 2021). Legislative Defendants chose not to respond, thus necessitating this motion.

ARGUMENT

Depositions of opposing counsel are not permitted unless (1) no other means exists to obtain the information, (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case. Here, none of these circumstances is present. The information Legislative Defendants apparently are seeking is not relevant to any issue before the Court. And as to the issues that are before the Court, the Legislative Defendants already have everything they need to analyze the NCLCV Plaintiffs' demonstrative maps and can seek any other information through less intrusive means, such as interrogatories. In any event, the deposition notice is procedurally deficient. Mr. Hirsch is not a party to the case and his testimony can be obtained only by subpoena.

The Legislative Defendants' attempt to call Mr. Hirsch as a witness at trial is likewise impermissible and raises serious issues under the North Carolina Rules of Professional Conduct. Mr. Hirsch is not a necessary witness in this case, and the Legislative Defendants' listing Mr. Hirsch as a potential witness threatens to disrupt the orderly presentation of a case that already

presents tremendous challenges for counsel and the Court to resolve on the compressed timetable ordered by the North Carolina Supreme Court.

I. The Court Should Issue a Protective Order Prohibiting the Deposition of Mr. Hirsch.

The Court should issue a protective order prohibiting the deposition of Mr. Hirsch for at least two reasons: (1) the notice of deposition is procedurally deficient; and (2) the Legislative Defendants cannot meet their burden to show that a deposition of opposing counsel is necessary.

A. The Notice of Deposition Is Procedurally Improper.

As an initial matter, the notice of deposition is procedurally improper. The Legislative Defendants failed to comply with the basic requirements of Rules 30 and 45 of the North Carolina Rules of Civil Procedure in issuing their notice. As counsel to the NCLCV Plaintiffs, Mr. Hirsch is not a party to the litigation, but is instead a third-party who may be deposed, if at all, only upon proper service of an enforceable subpoena. *See* N.C. R. Civ. P. 30(a) (requiring a subpoena to compel the attendance of a witness at a deposition, "provided that no subpoena need be served on a deponent who is a party"); *Kelley v. Agnoli*, 205 N.C. App. 84, 100, 695 S.E.2d 137, 147 (2010) (Plaintiff "has cited no authority suggesting that a party's law firm is itself a party, and we know of none.") (citing *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000)); *Blue Ridge Pediatric & Adolescent Medicine, Inc. v. First Colony Healthcare, LLC*, No. 11 CVS 127, 2012 WL 3249553, at *6 (N.C. Super. Ct. Aug. 9, 2012) (citations omitted). Legislative Defendants have not issued any subpoena to Mr. Hirsch.

B. The Legislative Defendants Have Not Shown that the Deposition of Mr. Hirsch Is Necessary.

In any event, the Legislative Defendants cannot meet their burden to show that a deposition of the NCLCV Plaintiffs' litigation counsel is necessary. The seminal case on this issue is *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), which holds that depositions of

opposing counsel may take place only when the party seeking to take the deposition has met its burden of demonstrating that "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Id.* at 1327 (citation omitted). Although the North Carolina Supreme Court has not directly adopted *Shelton*, North Carolina state and federal courts, like courts around the country, have applied *Shelton*'s test. *See, e.g., Blue Ridge Pediatric & Adolescent Medicine, Inc.*, 2012 WL 3249553, at *10 (holding that the *Shelton* test was appropriate because it closely parallels the language of Rule 26, which allows a party to limit discovery where information sought is available from other less-burdensome sources which do not threaten to invade privileged information); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85 (M.D.N.C. 1987) (applying *Shelton* in granting motion forbidding party from deposing opponent's counsel and finding that because a "deposition of a party's attorney is usually both burdensome and disruptive, the mere request to depose a party's attorney constitutes good cause for obtaining a protective order unless the party seeking the deposition can show both the propriety and need for the deposition").

Under *Shelton*, eliciting testimony from an opponent's *litigation* counsel is especially disfavored. *Shelton*, 805 F.2d at 1327. Taking the testimony of litigation counsel inevitably risks invading the attorney-client privilege and opinion work product—both of which are unqualified, absolute protections. *See Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E.2d 191, 201 (1976) (no discovery "whatsoever" may be taken of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation). Thus, if there is a practical alternative means for obtaining information sought from counsel, a deposition of counsel should not go forward. *See, e.g., Asbury v. Litton Loan Servicing, LP*, 2009 WL 973095,

at *2 (S.D. W.Va. Apr. 9, 2009) (granting motion to quash subpoena seeking deposition of opposing counsel where other means, including interrogatories, would provide the information sought, and explaining that "courts have required exhaustion of those means before depositions of counsel are allowed"); *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 263 F.R.D. 1, 8 (D.D.C. 2009) ("when seeking to depose opposing counsel, the cards are stacked against the requesting party from the outset and they must prove the deposition's necessity").

The Legislative Defendants fail to demonstrate any one of the three requirements to depose Mr. Hirsch, let alone all three. ***First***, there are ample alternative means for obtaining the information that Legislative Defendants apparently are seeking from Mr. Hirsch. In compliance with the Court's December 20th Order, the NCLCV Plaintiffs already produced *all* the data and information that the Legislative Defendants legitimately need to analyze the NCLCV Plaintiffs' demonstrative maps. This included the method and means by which the demonstrative maps were formulated and produced, including, but not limited to, all source code, source data, input parameters, and all outputted data associated with them. To the extent Legislative Defendants believe they need any additional information, they may propound appropriate interrogatories. The Legislative Defendants have adduced no evidence that Mr. Hirsch's deposition is "essential" or that there are no alternative means to obtain what they believe they need. Indeed, they have not even identified to the NCLCV Plaintiffs what it is they want to depose Mr. Hirsch about.

Second, the information Legislative Defendants seek to obtain by deposing litigation counsel is inextricably interwoven with attorney-client communications and opinion work product. The NCLCV Plaintiffs' demonstrative maps were developed specifically for this litigation. All of Mr. Hirsch's work in this matter has been done in anticipation of litigation, and his substantive communications, including with non-testifying consulting experts, are protected by privilege.

Deposing Mr. Hirsch would invade privileged communications, litigation strategy, and the mental impressions, opinions, and conclusions of trial counsel. In contrast, if the Legislative Defendants were to propound appropriate interrogatories, as the NCLCV Plaintiffs suggested, this would enable the NCLCV Plaintiffs to disaggregate facts from communications and work product, and to provide the factual information sought without invading these privileges and protections.

Third, further information about how the demonstrative maps were created is not even relevant to this case and is certainly not "crucial" to the Legislative Defendants' defense. Although the Legislative Defendants apparently want to depose Mr. Hirsch on the method and means of creating the NCLCV Plaintiff's demonstrative maps, the NCLCV Plaintiffs do not intend to offer at trial any evidence or argument at all about how their demonstrative maps were created. This case—and the two others that will be tried together with it—is about the maps enacted by the General Assembly. The NCLCV Plaintiffs' demonstrative maps will be offered to demonstrate that the Legislative Defendants are wrong to claim that the extreme partisan bias in the Enacted Plans is a necessary byproduct of applying traditional neutral districting principles to North Carolina's geography and demographics. For this limited purpose, what matters—and what the NCLCV Plaintiffs will rely upon at trial—are the objective features of those maps. The Legislative Defendants have not shown, and cannot show, that anything Mr. Hirsch would testify about is "crucial" to their case. Indeed, that is especially true given all the information about the demonstrative maps' creation that the Legislative Defendants have *already* received. In short, the information the Legislative Defendants apparently seek to obtain—an attempt to rebut a rebuttal—does not justify the extraordinary departure from regular order involved in permitting a deposition of opposing trial counsel.

II. The Court Should Order the Legislative Defendants to Strike Mr. Hirsch from Their Witness List for Trial.

For similar reasons, the Court should order Legislative Defendants to strike Mr. Hirsch from their witness list and prohibit Legislative Defendants from calling Mr. Hirsch as a witness at trial. The North Carolina Supreme Court has adopted a formidable threshold a party must overcome before calling opposing counsel as a witness at trial: "The circumstances under which a court will permit a lawyer for a party, even a prosecuting attorney, to take the witness stand must be such that a compelling reason for action exists." *State v. Simpson*, 314 N.C. 359, 373, 334 S.E.2d 53, 62 (1985); *see also Restatement (Third) of the Law Governing Lawyers* § 108(d) ("A tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is a compelling need for the lawyer's testimony.").

As explained above, there is no compelling need for Mr. Hirsch's testimony. Moreover, putting Mr. Hirsch on the witness list raises serious issues under Rule 3.7 of the North Carolina Rules of Professional Conduct. Under that Rule, a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Mr. Hirsch is the counsel who will be putting on the NCLCV's main witness and participating in the cross-examination of the Legislative Defendants' witnesses. This tactic of listing Mr. Hirsch as a potential trial witness creates the potential for an ethical conflict that would disrupt the trial and generate numerous issues for the Court to resolve during an already extraordinarily compressed timeframe. *Cf. Matter of R.D.*, 376 N.C. 244, 255 (2020) (upholding trial court's refusal to require attorney to testify because of "the existence of the potential for an ethical conflict pursuant to Rule 3.7 of the Rules of Professional Conduct").

To be clear, Mr. Hirsch clearly is not a "necessary" witness under Rule 3.7. Indeed, Mr. Hirsch is not a "witness" to the facts in controversy in this litigation at all. As the Court recently

stated, the "heart of the dispute in this redistricting litigation" is "the information and documentation pertaining to the *Enacted Plans*, including the identification of all persons who took part in the drawing of the *Enacted Plans* in any way, as well as all documents or data relied upon by those involved in the map drawing process [for the *Enacted Plans*]." Order on Harper Plaintiffs' Motion to Compel at 4 (Dec. 27, 2021) (emphasis added).

Mr. Hirsch has no first-hand factual knowledge whatsoever as to any of these issues about how the *Enacted Plans* were created. In fact, if anyone has such factual knowledge, it is Legislative Defendants' counsel. As Legislative Defendants stated in their response to an interrogatory requiring them to identify "any person" who "took part in the drawing of the 2021 Plan," including "providing input, directly or indirectly to any Legislative Defendant": "*Attorneys at Nelson Mullins and Baker Hostetler provided legal advice in connection with the 2021 redistricting.*" *See* Ex. E, Legislative Defendants' Interrogatory Responses at 5 (Dec. 28, 2021) (emphasis added). Yet the NCLCV Plaintiffs have not sought to call these attorneys—the Legislative Defendants' counsel in this litigation—as witnesses at trial.

Because Mr. Hirsch is not a fact witness, he cannot shed any light on the important issues the Court has been tasked with resolving. Mr. Hirsch's knowledge goes only to the process by which the NCLCV Plaintiffs' demonstrative maps were created with the assistance of non-testifying consulting experts, which is not a proper subject of discovery. *See* N.C. R. Civ. P. 26(b)(2) ("[A] party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial."). This

prohibition would be meaningless if the opposing party could simply examine opposing counsel on the same subjects, as the Legislative Defendants are attempting to do here.

The Legislative Defendants previously have claimed that inquiry into this process is relevant "given that the NCLCV Plaintiffs asked this Court to require North Carolina elections to be conducted under their maps as opposed to the Enacted Plans." Legislative Defendants' Response to Harper Plaintiffs Motion to Compel at 8 (Dec. 27, 2021). But a party's litigation counsel often participates in—and even directs—the creation of a proposed remedy that the party asks the Court to adopt. That does not make counsel a necessary witness at trial. Under that logic, a class-action defendant, for example, could put plaintiff's counsel on their witness list simply because counsel worked with a non-testifying expert on the creation of a damages remedy and then asked the Court to adopt it.

The Court should order the Legislative Defendants to remove Mr. Hirsch from their witness list and prohibit Legislative Defendants from calling Mr. Hirsch as a witness at trial.

CONCLUSION

For the foregoing reasons, the Court should grant the motion for protective order and order that the deposition of Mr. Hirsch cannot take place and that the Legislative Defendants must strike Mr. Hirsch from their witness list and may not call Mr. Hirsch as a witness at trial.

Dated: December 29, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon each of the parties to this action by electronic mail to counsel at the e-mail addresses indicated below, in accordance with North Carolina Rule of Civil Procedure 5(b)(1)(a):

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