STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, et al.,

Defendants.

PLAINTIFFS' SUPPLEMENTAL BRIEF CONCERNING THEIR PENDING MOTIONS TO COMPEL AND LEGISLATIVE DEFENDANTS' PENDING MOTION FOR A PROTECTIVE ORDER

Plaintiffs respectfully submit this supplemental brief concerning the three discovery motions now pending before the Court—namely Plaintiffs' First and Second Motions to Compel, and Legislative Defendants' Motion for a Protective Order. In their March 18 submissions to the Court concerning these motions, Legislative Defendants purported to change their positions and otherwise confused the issues. In an effort to streamline a hearing on the three motions, Plaintiffs submit this brief to clarify the issues and Plaintiffs' own positions.

I. Legislative Defendants' Motion for a Protective Order

On January 24, 2019, Plaintiffs served notices of depositions on all four Legislative Defendants, and also served subpoenas for documents and depositions on eight current and former legislators and legislative staffers. With respect to Legislative Defendants Lewis and Hise, Plaintiffs noticed their depositions for March 5 and March 7 respectively.

On February 4, Legislative Defendants and the non-party legislators and staff filed a motion for a protective order to block all of their depositions. The pendency of that motion precluded Plaintiffs from taking the depositions of Defendants Lewis and Hise on the noticed dates, and Legislative Defendants also apparently have been withholding written fact discovery—documents and interrogatory responses—on the ground that Defendants Lewis and Hise were asserting legislative privilege over information and documents within their possession.

On March 11, Plaintiffs filed a response to the motion for a protective order asserting that Plaintiffs will not oppose the entry of the requested protective order so long as the order specifies that Legislative Defendants are precluded from offering certain evidence and testimony at trial under the well-settled principle that a privilege may not be used as both a sword and a shield.

A week later, on March 18, Legislative Defendants purported to "withdraw" the motion for a protective order as to Representative Lewis and Senator Hise. Legislative Defendants

purported to take such action just two days before the close of written fact discovery from Legislative Defendants and just four days before Plaintiffs' expert reports are due.

This Court should not tolerate such gamesmanship. If Legislative Defendants did not want to rely on legislative privilege as to Defendants Lewis and Hise, they should never have moved for a protective order to block their depositions. Allowing Legislative Defendants to withdraw the motion now would be highly prejudicial to Plaintiffs. By filing their motion for a protective order, Legislative Defendants prevented Plaintiffs from obtaining timely discovery from Defendants Lewis and Hise—their depositions noticed for March 5 and March 7 were canceled, and Plaintiffs have received virtually no non-public documents or information from Defendants Lewis and Hise. Had Plaintiffs received timely discovery responses from Defendants Lewis and Hise and deposed them on the originally scheduled dates, the information obtained may have led Plaintiffs to seek discovery from additional persons or on additional topics, and more importantly, would likely have been pertinent to Plaintiffs' expert reports. But now, written fact discovery from Legislative Defendants ends on March 20 and Plaintiffs' expert reports are due on March 22. Plaintiffs thus will be unable to incorporate any discovery obtained from Defendants Lewis and Hise in Plaintiffs' opening expert reports.

Legislative Defendants offered no explanation for the sudden withdrawal of their motion as to Defendants Lewis and Hise, nearly a month-and-a-half after they filed the motion. There is no explanation other than gamesmanship. Legislative Defendants filed a motion seeking relief from this Court, obtained substantial benefits from filing the motion, and now are trying to selectively withdraw the motion in a way that is maximally prejudicial to Plaintiffs. This Court should hold that Legislative Defendants are judicially estopped, equitably estopped, or otherwise barred from taking such action. Judicial estoppel exists to "prevent litigants from playing 'fast

and loose' with the courts and deliberately changing positions . . . as a means of obtaining unfair advantage." *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (quotation marks omitted); *see also Health Mgmt. Assocs., Inc. v. Yerby*, 215 N.C. App. 124, 129, 715 S.E.2d 513, 517 (2011). That is exactly what Legislative Defendants have sought to do here.

Accordingly, to avoid prejudice to Plaintiffs, the Court should enter the protective order as to all twelve individuals originally named in the motion for a protective order, specifying that Legislative Defendants—having invoked privilege to block timely discovery—will be precluded from offering certain evidence and testimony at trial under baseline sword/shield principles.[1]

If, however, the Court were to permit Legislative Defendants to withdraw their motion as to Defendants Lewis and Hise, then Plaintiffs do not consent to a protective order as to legislative employee Mark Coggins (a staff member for Representative Lewis) and former legislative employee Jim Blaine (a former staff member for Senator Berger). Under N.C. Gen. Stat. § 120-133(a), "[p]resent and former legislative employees may be required to disclose information otherwise protected by G.S. 120-132 concerning redistricting the North Carolina General Assembly . . . upon the act establishing the relevant district plan becoming law." The statute provides that, "[n]otwithstanding any other provision of law, all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting the North Carolina General Assembly . . . are no longer confidential and become public records upon the act establishing the relevant district plan becoming law." Given this clear statutory text, Coggins and Blaine have no colorable claim that

[1] As outlined in Plaintiffs' response to the motion for a protective order, the protective order should specify that Legislative Defendants may not offer (1) testimony from any of the twelve individuals who have asserted privilege, (2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data.

legislative privilege shields them from depositions, or providing documents responsive to Plaintiffs' subpoenas, regarding their work on the 2011 and 2017 plans.[2]

Further, if the Court permits Legislative Defendants to withdraw their motion as to Defendants Lewis and Hise, Plaintiffs request that the Court specify that (1) Plaintiffs will be able to seek additional written discovery and supplement their expert reports based on any new information obtained from Defendants Lewis and Hise in discovery, and (2) any such new discovery requests or expert supplementations will not provide a basis for Defendants to delay the case schedule. Plaintiffs' utmost priority is ensuring that this case proceeds without delay under the stipulated case schedule, to enable relief in time for the next elections. Plaintiffs should not be forced to forfeit their rights in pursuit of that objective, and Legislative Defendants should not be able to bootstrap their gamesmanship into a reason for delay.

II. Plaintiffs' First Motion to Compel

Plaintiffs filed their First Motion to Compel on February 19, seeking to compel Legislative Defendants to provide responses to discovery that Plaintiffs served on November 13, with responses due on January 4. As explained in the motion, Plaintiffs delayed seeking judicial intervention for weeks because Legislative Defendants repeatedly promised to supplement their original deficient responses if given more time, only to provide essentially no new information.

In their opposition, Legislative Defendants contend that the First Motion to Compel "will be rendered moot" if the Court enters the requested protective order. Opp. 4. That is wrong for several reasons. First, Legislative Defendants' opposition to the First Motion to Compel ignores that they have purported to withdraw the motion for a protective order as to Defendants Lewis and Hise. If this is permitted, Defendants Lewis and Hise cannot invoke legislative privilege as a

[2] Of course a person may invoke attorney-client privilege separate from any question of legislative privilege.

basis for withholding any written discovery. A legislator may not "selectively waive" legislative privilege in the context of litigation. *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012). Under the sword/shield doctrine, "once the privilege is invoked, the Court should not later allow the proponent of the privilege to strategically waive it to the prejudice of other parties." *Id.* If Defendants Lewis and Hise waive legislative privilege to testify at a deposition and at trial, they cannot assert privilege to limit written discovery from them or their agents.

Second, Legislative Defendants' motion for a protective order did not even seek to limit written discovery from Legislative Defendants. On its face, the motion for a protective order sought only to: (1) block the depositions of Legislative Defendants; and (2) block the depositions and documents subpoenas to the non-party legislators and staff. The motion for a protective order sought no relief with respect to Plaintiffs' written discovery requests to Legislative Defendants, and therefore that motion cannot render these discovery requests moot.

Third, Legislative Defendants cannot conceivably assert legislative privilege over much of the discovery sought in the First Motion to Compel—either because they did not even assert legislative privilege over the requested information or because the information is obviously non-privileged. With respect to the Interrogatories covered by the First Motion to Compel, Legislative Defendants still refuse to provide:

- The identities of persons involved in the 2017 redistricting process, or with whom Legislative Defendants communicated about the redistricting during discrete periods of time, as requested in Interrogatory Nos. 1-4, 5, and 7 of the First Set of Interrogatories and Nos. 1-4 of the Third Set of Interrogatories. Legislative Defendants' opposition offers no explanation for their refusal to provide this information, and the mere identities of such persons (which would include not just counsel but also staff members, consultants, and other persons) is not privileged.

- Information regarding how elections data and partisanship measures were weighted or prioritized in drawing the 2017 Plans, and about partisanship scores or metrics used in drawing the 2017 Plans, as requested in Interrogatory Nos. 12-13. Legislative Defendants did *not* object to these Interrogatories on privilege grounds, but instead

objected solely on vagueness grounds. And Legislative Defendants' opposition offers no explanation for why they still refuse to answer these basic inquiries with the clarifications Plaintiffs have provided about the information sought.

- Information regarding districts created in 2011 that were not altered in 2017 (i.e., the "2011 Unchanged Districts"), as requested in Interrogatory Nos. 14-18. Legislative Defendants remarkably have provided no information to date in responses to these requests, which were issued more than four months ago. They have *not* asserted legislative privilege in response to these Interrogatories; their only response has been that Plaintiffs should discern the answers from the discovery in a separate lawsuit that did not involve partisan gerrymandering claims.

With respect to the document requests covered by the First Motion to Compel, Legislative Defendants have thus far produced a total of five pages of documents that were not already public. It is inconceivable that there are no other records relating to the redistricting that are not privileged, and in any event it is Legislative Defendants' burden to describe the documents being withheld to enable an assessment of their privilege claims. N.C. R. Civ. P. 26(b)(5). At this moment, Plaintiffs have no idea of the number of documents being withheld, the nature of the documents, or anything else about them. That is the case even though Plaintiffs issued these documents requests more than four months ago, in mid-November.

III. Plaintiffs' Second Motion to Compel

Plaintiffs' Second Motion to Compel sought to compel Legislative Defendants to produce the home addresses of the incumbents in place at the time the 2011 and 2017 state legislative plans were adopted. Legislative Defendants obviously had this basic information, because avoiding the pairing of incumbents was one of the official criteria for the 2017 plans, and to avoid pairing incumbents you need to know where the incumbents live—i.e., their home addresses. Plaintiffs served interrogatories seeking those home addresses on January 16. When Legislative Defendants responded 30 days later, however, they did not provide home addresses, but instead a list of "preferred mailing addresses," including many P.O. Boxes. (P.O. Boxes

where legislators prefer to receive constituent mail are irrelevant to redistricting.) After Plaintiffs immediately notified Legislative Defendants of the deficiency in their response, Legislative Defendants missed several agreed-upon dates by which they would provide Plaintiffs updated information, forcing Plaintiffs to file the Second Motion to Compel on February 22.

On March 14—nearly two months after Plaintiffs served the Interrogatories requesting this basic information, but mere hours after it became clear that the Court would hold a hearing on the motion—Legislative Defendants finally produced the requested information.

The substantive relief that Plaintiffs requested in the Second Motion to Compel is therefore moot, but Plaintiffs' request for fees and costs is not. Fees and costs are warranted under Rule 37(a)(4) given that Legislative Defendants conceded the substance of the motion to compel by producing the requested information, and Legislative Defendants cannot show any justification for previously withholding it. Legislative Defendants obviously had the incumbent legislators' home addresses, given that the those addresses were needed to avoid pairing incumbents in the 2017 plans. Indeed, Legislative Defendants' opposition asserts that the home addresses were "maintained by central staff" and that "staff provided the list to legislative defendants." Opp. 3 n.1. By withholding this information for as long as possible, Legislative Defendants jammed up Plaintiffs' experts, whose reports are due March 22. In these circumstances, an award of fees and costs is warranted.

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WHEREFORE, Plaintiffs request that the Court: (1) enter the protective order requested by Legislative Defendants as to all twelve individuals originally named in their motion, with the conditions described in Plaintiffs' response to the motion; (2) grant Plaintiffs' First Motion to Compel; and (3) award fees and costs in connection with the Second Motion to Compel.

Respectfully submitted this the 19th day of March, 2019

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CERTIFICATE OF SERVICE

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