STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED
2019 JUN 21 P 2:22
WAKE CO., C.S.C.
BY

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' MOTION IN LIMINE TO ADMIT CERTAIN FILES OF DR. THOMAS B. HOFELLER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

Other Authorities

Plaintiffs respectfully submit this motion *in limine* to establish the admissibility of certain files of Dr. Thomas B. Hofeller that Plaintiffs obtained in this case through a lawful subpoena to his daughter, Stephanie Hofeller, and that Plaintiffs' experts relied upon in their rebuttal expert reports. Plaintiffs anticipate that Legislative Defendants may raise various objections to the introduction of these files into evidence, including objections on authentication, hearsay, or privilege grounds. Plaintiffs address and rebut each of these potential objections through this motion *in limine*, so that the Court will have fulsome briefing on the issues in advance of trial. Plaintiffs ask the Court to declare that, if Plaintiffs adequately establish chain of custody at trial, the relevant Hofeller files relied upon by Plaintiffs' experts are admissible.

BACKGROUND

As this Court is aware, on February 13, 2019, Plaintiffs issued a third-party subpoena pursuant to Rule 45 to Stephanie Hofeller, the daughter of the late mapmaker Dr. Thomas Hofeller who created the state House and state Senate plans at issue in this case (the "2017 Plans"). The subpoena requested all documents in Ms. Hofeller's possession, custody, or control relating to Dr. Hofeller's work on the 2017 Plans, as well as "[a]ny storage device" in Ms. Hofeller's possession, custody, or control that may contain such documents or any information "relating to" such documents. Plaintiffs emailed a copy of the subpoena to all parties in this case, including Legislative Defendants, on the same day the subpoena was served. Neither Legislative Defendants nor any other party or non-party moved to quash or otherwise objected to the subpoena.

In mid-March 2019, in response to the subpoena, Ms. Hofeller produced four external hard drives and eighteen thumb drives containing over 75,000 files (the "Hofeller files"). Plaintiffs received these storage devices on March 13, 2019, and emailed notice to all Defendants

on March 20, 2019, pursuant to Rule 45(d1). On April 9, 2019, Plaintiffs sent all Defendants a searchable index listing the files names and files paths of over 75,000 files on the devices.[1] On April 18, while Plaintiffs' motion for clarification regarding the treatment of 1,001 specific files containing personal sensitive information remained pending, Plaintiffs offered to immediately provide all Defendants with copies of all the Hofeller files other than those 1,001 files pending the Court's resolution of the motion. Legislative Defendants never responded to this offer. In early May, pursuant to the Court's order concerning the treatment of the 1,001 specified files, Plaintiffs provided complete copies of all of the Hofeller files to all three sets of Defendants.

On May 17, Plaintiffs took a trial-preservation deposition of Ms. Hofeller, with her own counsel defending the deposition. Counsel for each set of Defendants was present and afforded the opportunity to examine Ms. Hofeller. (Legislative Defendants' counsel examined Ms. Hofeller for many hours, and Intervenor Defendants also examined Ms. Hofeller.) Ms. Hofeller testified that she found the storage devices at issue on a shelf in her father's room while visiting her parents' home in Raleigh on October 11, 2018. Ex. A at 23:14-25:10. Ms. Hofeller explained that she had seen some of the devices previously while visiting her parents in their prior home in Virginia. *Id.* at 23:14-25:10. Ms. Hofeller testified that her mother expressly approved of her taking the devices. *Id.* at 20:3-26:10; 52:6-10; 81:8-82:2; 110:17-111:24. For example, Ms. Hofeller testified that she asked her mother, "Can I take these [devices]," and her mother "said absolutely" and in fact "encouraged" Ms. Hofeller to take them. *Id.* at 21:6-11, 26:3-10. Ms. Hofeller testified that "[her] mother gave to [her] unconditionally" "everything on those hard drives that [her] father had left in his room." *Id.* at 81:8-82:2.

Ms. Hofeller was shown photographs—taken by Plaintiffs' computer forensics vendor, Stroz Friedberg—of the FedEx package that she had sent to Plaintiffs' counsel and of the devices

[1] This PDF-searchable index was the complete index that Plaintiffs had at the time.

included in the package. *Id.* at 13:15-18:16. Ms. Hofeller confirmed that the photographs reflected the package and the devices that she had sent to Plaintiffs in response to the subpoena. *Id.* Ms. Hofeller further confirmed that she had not altered, deleted, or otherwise manipulated any of the files on the devices between the time she acquired the devices from her parents' home and when she sent them to Plaintiffs. *Id.* at 18:21-19:22, 30:24-31:6.

On April 30, 2019, Legislative Defendants filed their expert reports. Legislative Defendants' experts offered two sets of opinions of relevance here. First, several of Legislative Defendants' experts opined on the question of partisan intent. One of these experts, Dr. Brunell, opined that "[d]ivining the intent of the map-maker is extraordinarily difficult because the process of redistricting is complex." Ex. B at 7. Another expert for Legislative Defendants, Dr. Hood, stated that he did not believe there was proof that "the General Assembly was engaged in an effort to engage in extreme partisan gerrymander." Ex. C at 9. Dr. Hood further opined that the "map drawer[]"—*i.e.*, Dr. Hofeller—was "quite constrained" in his "ability . . . to create districts where partisan motives predominate." *Id.* at 10. A third expert for Legislative Defendants, Dr. Johnson, asserted that the "county groupings' requirement significantly limits the legislature's ability to draw lines based exclusively on partisanship." Ex. D at 13.

The second set of opinions that Legislative Defendants' experts offered of relevance here relates to the 2017 Plans' purported adherence to the criteria adopted by the House and Senate Redistricting Committees on August 10, 2017 (the "Adopted Criteria"). The central focus of Dr. Hood's report was to establish that the 2017 Plans comply with the Adopted Criteria. Dr. Hood presented pages of analysis in support of this claim, and concluded that "[t]he 2017 House and Senate plans met the goals stated in the adopted redistricting criteria." Ex. C at 9. Another expert for Legislative Defendants, Dr. Thornton, asserted that the Adopted Criteria reflect "the

actual criteria utilized by those who constructed the enacted [2017] map." Ex. E ¶ 42. Dr. Thornton predicated much of her analysis on this assumption.

In Plaintiffs' rebuttal reports served on June 7, two of Plaintiffs' experts relied upon some of the files produced by Ms. Hofeller to rebut the above claims by Legislative Defendants' experts. With respect to the claims regarding a purported lack of evidence of partisan intent (and the related claims that Dr. Hofeller was purportedly constrained by other criteria in acting with partisan intent), Plaintiffs' expert Dr. Jowei Chen presented and relied upon Microsoft Excel spreadsheets from Dr. Hofeller that provided partisanship scores for his draft districts, that compared the partisanship scores of specific districts to the scores of the same districts under the prior 2011 plans, that analyzed "Pressure Points for GOP incumbents," and that analyzed whether certain draft districts from maps that had been prepared by Campbell Law students at an event organized by Common Cause were favorable to Republicans and could be cherrypicked from the Campbell Law maps into the 2017 Plans. Ex. F at 51-76.[2]

In addition, Dr. Christopher Cooper, another expert for Plaintiffs, presented and analyzed screenshots from several of Dr. Hofeller's "Maptitude" files containing drafts of the 2017 Plans. Ex. G at 5-22. Maptitude is the software program that Dr. Hofeller used in drawing districts. The screenshots from the Maptitude files that Dr. Cooper analyzed demonstrate that Dr. Hofeller measured and displayed on his screen the partisan leanings of individual Voting Tabulation Districts (VTDs) in North Carolina while drawing the 2017 Plans. *Id.* Dr. Cooper's rebuttal report explains how the VTD-level partisanship statistics that Dr. Hofeller displayed on his screen reveal the partisan intent behind the boundaries of specific districts in the draft maps, which closely resembled or were identical to the final versions of those districts. *Id.*

[2] Legislative Defendants introduced Dr. Chen's and Dr. Cooper's rebuttal reports as exhibits at their respective depositions.

In response to the assertions of Legislative Defendants' experts that the Adopted Criteria reflect the actual criteria used to draw the 2017 Plans, and that the 2017 Plans in fact comply with the Adopted Criteria, Dr. Chen presented and analyzed files showing that Dr. Hofeller had already substantially completed the 2017 Plans by June 2017, a month-and-a-half before the Adopted Criteria were developed. Using files produced by Ms. Hofeller in response to the subpoena, Dr. Chen provided statistics on how much of the state House and state Senate plans had already been drawn statewide by June 2017, and Dr. Chen presented maps and statistics illustrating the drafts of specific county clusters that existed as of June 2017. Ex. F at 2-38. Dr. Chen also presented screenshots from several of Dr. Hofeller's Maptitude files showing that, contrary to the Adopted Criteria, Dr. Hofeller in fact did have data on the racial composition of the draft districts, and that he sorted the districts based on their racial composition (from most to least African American) and displayed the black voting age population ("BVAP") of each district on his screen. *Id.* at 39-47.

At trial, Plaintiffs intend to introduce into evidence the specific Hofeller files that Plaintiffs' experts relied upon in their rebuttal reports. To establish chain of custody and authenticity, Plaintiffs will introduce the deposition testimony of Stephanie Hofeller (who resides outside the subpoena range of the Court), and the testimony of a representative from Plaintiffs' vendor, Stroz Friedberg. The Stroz Friedberg representative will testify, among other things, that Stroz received the unopened package that Ms. Hofeller sent in response to the subpoena, that all of the files that Plaintiffs seek to introduce at trial come from the devices inside the package that Ms. Hofeller sent, and that Stroz sent each of those files directly to Plaintiffs' experts.

ARGUMENT

Once Plaintiffs establish chain of custody through testimony at trial, all of the Hofeller files relied upon by Plaintiffs' experts are admissible as evidence. Plaintiffs anticipate that Legislative Defendants may raise authentication, hearsay, or privilege objections to the introduction of these files, but none of those objections would have merit. Ms. Hofeller's testimony and circumstantial evidence from the files, including metadata from the relevant files, provide more than sufficient evidence to make a prima facie showing of authenticity. And to the extent the relevant files contain assertions offered for the truth of the matter, those assertions fall under multiple hearsay exceptions, including the admissibility of public records, statements of party opponents, the residual exception for unavailable witnesses, and statements against interest. Lastly, Legislative Defendants have no conceivable claim of privilege over the specific files that Plaintiffs will introduce. These files contain no legal advice or mental impressions of lawyers, but rather only facts, data, and maps prepared by a non-lawyer. Moreover, for many of the files, Legislative Defendants and their counsel have expressly disclaimed having knowledge that Dr. Hofeller was creating the files, foreclosing any possible privilege claim by Legislative Defendants over such files.

I. The Hofeller Files Are All Authentic

The Hofeller files that Plaintiffs will introduce into evidence at trial are all authentic. "[T]he burden to authenticate under Rule 901 is not high—only a prima facie showing is required." *State v. Ford*, 245 N.C. App. 510, 519, 782 S.E.2d 98, 105 (2016) (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)). "Indeed, the prima facie showing may be accomplished largely by offering circumstantial evidence that the documents in question are what they purport to be." *Id.* The circumstantial and other evidence that the proponent may offer to authenticate materials include "[t]estimony that a matter is what it is claimed to be," and

"[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." N.C. R. Evid. 901(b)(2),(4).

For numerous independent reasons, Plaintiffs can easily make a prima facie showing that the relevant Hofeller files are what Plaintiffs claim them to be—files that Dr. Hofeller possessed and that reflect his work on the 2017 Plans. First, Stephanie Hofeller testified that she found the devices containing all of these files on a bookshelf in her father's room in his home following his death. Ex. A at 24:6-11. Ms. Hofeller further testified that she recognized the devices, having previously seen them while visiting her parents at their prior home in Virginia. *Id.* at 24:16-24. Ms. Hofeller even explained that one of the devices had an especially distinctive appearance—a "blue rubber lining around it"—that she "recognized immediately" when she saw it on her father's bookshelf. *Id.* at 24:16. All of this testimony is unrebutted and establishes that the storage devices containing the relevant Hofeller files belonged to Dr. Hofeller.

The "contents, substance, internal patterns, or other distinctive characteristics" of the files further establish that the devices contain Dr. Hofeller's records. N.C. R. Evid. 901(b)(4). The over 75,000 files on the devices contain a combination of Hofeller family files and documents aligning with Dr. Hofeller's work over the last 20 years that only Dr. Hofeller could have possessed. By way of example only, the files contain backups of Dr. Hofeller's emails from his personal email address, numerous iterations of his resume, documents that appear based on the file names to be personal financial files (which Plaintiffs have not opened), and files reflecting drafts of North Carolina's state legislative and congressional plans that align exactly with the time periods when Dr. Hofeller was developing those plans. Additionally, Stephanie Hofeller confirmed in her testimony that before sending any files to Plaintiffs' counsel, she reviewed

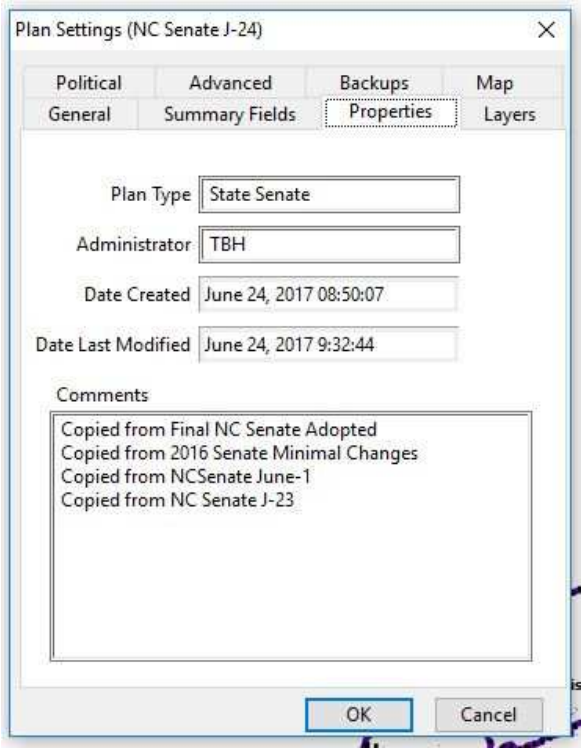
them to make sure that "they were my father's." Ex. A at 47:1-11, 48:23-49:5. There can be no serious dispute that the files reflect Dr. Hofeller's files and work product.

Metadata from the specific files that Plaintiffs will introduce at trial provide yet more confirmation of the authenticity of the files. All of the Excel files that Dr. Chen analyzed were saved in two folders with the following names (emphases added):

- "C\Users\toshiba\Documents**Tom**\NC 2017 Redistricting;" and
- "C\Users\toshiba\Documents**Tom**\2017 Redistricting"

The "Tom" in this folder names clearly refers to Dr. Hofeller, indicating that the files saved in these folders were his files and work product.

As for the Maptitude files, all of the Maptitude files containing draft Senate plans that Dr. Chen and Dr. Cooper analyzed contain metadata listing Dr. Hofeller as the "Administrator" of the files, using his initials "TBH." The below screenshot is an example from one of these Maptitude files; the rest are provided in Exhibit H.



The Administrator field is left blank for the Maptitude files analyzed by Dr. Chen and Dr. Cooper that contain draft House plans, but all of those Maptitude files containing draft House plans are saved in the exact same format, using the same folder structure, as the Maptitude files containing the Senate plans.

In short, through Ms. Hofeller's testimony and copious circumstantial evidence, Plaintiffs have made more than "a prima facie showing" that the relevant Hofeller files are what Plaintiffs claim them to be. *Ford*, 245 N.C. App. at 519, 782 S.E.2d at 105.

II. None of the Relevant Hofeller Files Can Be Excluded as Hearsay

None of the specific Hofeller files that Plaintiffs will seek to admit into evidence at trial are inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C–1, Rule 801(c). Even if the files contain "assertions" that could constitute hearsay (and most do not), and even if Plaintiffs were offering the files for the truth of the matter asserted (which is not necessary for many of the files), all of the relevant Hofeller files are admissible under multiple well-recognized exceptions to the hearsay rule.

A. All of the Relevant Hofeller Files Are Admissible as Public Records

All of the Hofeller files that Plaintiffs seek to introduce at trial are admissible as public records. North Carolina Rule of Evidence 803(8) provides that "Public Records and Reports" are "not excluded by the hearsay rule." N.C. R. Evid. 803(8). The Rule defines public records and reports to include any "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth … the activities of the office or agency." *Id.*

All of Dr. Hofeller's work in developing the 2017 Plans constitute public records under the plain terms of his contract with Legislative Defendants. The contract provides that "all . . . documents prepared by [Dr. Hofeller] concerning redistricting shall no longer be confidential

and *shall become public records* upon the act establishing the relevant district plan becoming law." Ex. I at 1879 (emphasis added). This provision contains no time limitation or exceptions: it provides that "all . . . documents prepared by Dr. Hofeller concerning" the 2017 Plans "shall become public records" upon the passage of the 2017 Plans. *Id.* Consequently, as soon as the General Assembly enacted the 2017 Plans in August 2017, all of Dr. Hofeller's work product in creating the 2017 Plans became public records, including all of Dr. Hofeller's draft maps and analyses of draft maps that Plaintiffs will introduce at trial. These public records are "[r]ecords, reports, statements, or data compilations" of the General Assembly that set forth the activities of the General Assembly, and thus are admissible under Rule 803(8). *See, e.g., In re J.S.B.*, 644 S.E.2d 580, 584, 183 N.C. App. 192, 198 (2007) (admitting medical examiner's report under public records exception, and explaining that "[t]he fact that the report contains a medical examiner's opinion as to[the] cause of death, in addition to objective observations of … physical injuries, does not detract from the report's admissibility.").

B. Any Statements in the Hofeller Files Are Statements of a Party Opponent

The relevant Hofeller files independently are all admissible as statements of party opponents. "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is … a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." N.C. R. Evid. 801(d). To satisfy this exception, the principal need not have provided "specific authorization" to the agent to make the statement. *Salami v. N.C. Agr. & Tech. State Univ.*, 394 F. Supp. 2d 696, 705 (M.D.N.C. 2005) ("evidence establishing the existence of the agency must be adduced, but to speak need not be shown"), *aff'd*, 191 F. App'x 193 (4th Cir. 2006). Rather, the question is whether the statement is "related to a matter" within the agency relationship. N.C. R. Evid. 801 comment note; *see also, e.g., Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 294, 401 S.E.2d

837, 839 (1991); *Ada Liss Grp. (2003) Ltd. v. Sara Lee Corp.*, 2014 WL 4370660, at *3 (M.D.N.C. Aug. 28, 2014). Moreover, a declarant need not be formally employed by a principal to be his agent: the test is instead one of common law agency. *See Brown v. Novartis Pharm. Corp.*, 2012 WL 3066588, at *12 (E.D.N.C. July 27, 2012); David F. Binder, Hearsay Handbook § 35:5 (4th ed. 2018).

All of the relevant Hofeller files that were last modified after June 27, 2017 indisputably are statements of a party opponent. On June 27, 2017, Dr. Hofeller executed the aforementioned written agreement with Legislative Defendants providing that Dr. Hofeller would "produce a map of 120 House districts and a map of 50 Senate districts in North Carolina." Ex. I at 1879. Thus, any draft maps and analyses of draft maps that Dr. Hofeller worked on after June 27, 2017 plainly are within the scope of, and in furtherance of, Dr. Hofeller's agency relationship with Legislative Defendants. Relevant Hofeller files that fall into this category include all of the Maptitude files from 2017 analyzed by Dr. Cooper (Ex. G at 5-22), the June 28, 2017 draft House map analyzed by Dr. Chen to determine how much of that draft overlapped with the final House map (Ex. F at 3-24), and the July and August 2017 Maptitude and Excel files analyzed by Dr. Chen showing that Dr. Hofeller had statistics on the racial demographics of the draft districts (Ex. F at 39-48).

Similarly, all of the draft maps from 2011 that Dr. Cooper analyzed are clear statements of a party opponent. *See* Ex G at 23-35. Dr. Hofeller created these 2011 draft maps after being formally retained by Legislative Defendants to draw new state House and state Senate districts. Dr. Hofeller thus created these 2011 draft maps pursuant to, and in furtherance of, his agency relationship with Legislative Defendants.

The remaining files that Plaintiffs will seek to use at trial are Maptitude and Excel files last modified by Dr. Hofeller between November 1, 2016 and June 27, 2017. These files are also admissible in full as statements by a party opponent. Regardless of when Dr. Hofeller executed his formal contract with Legislative Defendants to draw the 2017 Plans, he clearly was acting in furtherance of his agency relationship with them in creating draft plans during this time period. Dr. Hofeller had been retained by Legislative Defendants not only to draw the 2011 Plans, but also to draw a revised congressional plan in 2016 after a different federal court had struck down that plan on racial gerrymandering grounds. Ex. J. As soon as the *Covington* court issued its merits decision in August 2016 striking down the state House and state Senate plans as racial gerrymanders, both Legislative Defendants and Dr. Hofeller undoubtedly knew that Legislative Defendants would retain Dr. Hofeller to draw new state legislative plans, just as they had done in the congressional case. In fact, in October 2016, Legislative Defendants had Dr. Hofeller determine the revised county groupings that would be required for the new plans, as well as all of the districts that would have to be redrawn. *See Covington v. North Carolina*, No. 15-cv-399, ECF No. 136-1, ¶¶ 17-23 & Tables 1-3.

Dr. Hofeller thus was in an agency relationship with Legislative Defendants at all relevant times, and any work he did in developing the 2017 Plans prior to June 27, 2017 was in furtherance of that agency relationship. Indeed, Legislative Defendants have previously asserted that Dr. Hofeller was "very fluent in being able to help legislators translate their desires" into district lines. Ex. K at 36:16-19 (8/28/2017 House floor session hearing). The work that Dr. Hofeller performed on the 2017 Plans prior to June 27, 2017 was to do just that—to "translate" Legislative Defendants' "desires" into new state House and state Senate plans. Dr. Hofeller knew and intended that Legislative Defendants would rely upon his pre-June 27, 2017 work

product in adopting new plans, and that is exactly what happened. For instance, as Dr. Chen explained in his rebuttal report, Dr. Hofeller's June 24, 2017 draft Senate plan is a near-identical match to the final Senate plan enacted by Legislative Defendants. Ex. F at 25-38. To the extent they contain "statements" at all, *see infra* pp. 16-20, the pre-June 27, 2017 files reflect statements by Dr. Hofeller an agent of Legislative Defendants for purposes of Rule 801(d).

C. The Files Fall Within the Residual Exception for Statements of an Unavailable Witness

To the extent the relevant Hofeller files contain "statements" for hearsay purposes, those statements are also all admissible under the so-called "residual" exception for statements of unavailable declarants. Dr. Hofeller is an unavailable declarant for purposes of Rule 804 because he is deceased. N.C. R. Evid. 804(a)(4). For statements by an unavailable declarant, the residual exception of Rule 804(b)(5) provides for the admission of:

> A statement not specifically covered by any of the [other] exceptions [in Rule 804] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. R. Evid. 804(b)(5).

The relevant Hofeller files readily meet these requirements. To the extent that any data in the files such as partisanship statistics constitute "statements," those statements have "circumstantial guarantees of trustworthiness." *See State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). Dr. Hofeller was a seasoned mapmaker and, perhaps more than anyone at the time, could be trusted to reliably incorporate data on partisanship and race when drawing district lines. Indeed, given his partisan goals, he had every incentive to assign accurate partisanship scores to the districts in his draft maps.

The files also meet each of the three factors under Rule 804(b)(5). They are extraordinarily probative of Plaintiffs' claims, including to establish the "material fact[s]" of the mapmaker's intent in drawing the districts and the extent to which he was following the Adopted Criteria. The files are "more probative" on these issues than "any other evidence which [Plaintiffs] can procure through reasonable efforts." Because Dr. Hofeller is unavailable for questioning, there is no other evidence that could so directly speak to Dr. Hofeller's intent and considerations in drawing the 2017 Plans. *State v. Triplett*, 316 N.C. 1, 8–9, 340 S.E.2d 736, 741 (1986) ("Since under the requirements of Rule 804(b)(5) the declarant must be unavailable, the necessity for use of the hearsay testimony often will be greater than in the cases involving Rule 803(24)."). And the admission of the files will serve the purposes of the Rules and the interests of justice. The ultimate aim of the hearsay rule is to exclude unreliable evidence, and these files are reliable evidence of Dr. Hofeller's activities for the reasons already explained. Excluding this evidence could only serve to impede the truth in a case of undeniable public import.[3]

D. Any Statements in the Files Are Against the Interests of Dr. Hofeller

Many of the relevant Hofeller files relied on by Plaintiffs' experts are admissible for the additional reason that, to the extent the files contain "statements," those statements are against the interests of Dr. Hofeller. Rule 804(b)(3) allows for the admission of statements by an unavailable declarant where the "statement . . . was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or

[3] Rule 804(b)(5) requires "written notice" stating the party's "intention to offer the statement and the particulars of it, including the name and the address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement." This motion serves as that notice. *See State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988) (notice sufficient even if given during trial). The name of the declarant is Dr. Thomas Hofeller, who is deceased.

criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true."

At a minimum, any reasonable person in Dr. Hofeller's shoes would understand that the use of racial data would tend to subject Dr. Hofeller or the Legislative Defendants, as his principal, to civil liability. Dr. Hofeller drafted the 2017 Plans in light of *Covington*, where a federal district court invalidated all of the challenged districts in the 2011 Plans as unlawful racial gerrymanders. 316 F.R.D. at 176-78. The district court gave the General Assembly until September 1, 2017 to enact new redistricting plans that would "cure the unconstitutional racial gerrymanders." *Covington*, 267 F. Supp. 3d 664, 667 (M.D.N.C. 2017). The House and Senate Redistricting Committees—led by Legislative Defendants Lewis and Hise—adopted a set of criteria expressly mandating that racial data not be used or even included in Dr. Hofeller's database. Any reasonable person in Dr. Hofeller's shoes would understand that maintaining racial data on the new districts was against his own interest and the interest of his principals, *i.e.*, Legislative Defendants. N.C. R. Evid. 804(b)(3). The same goes for the predominant use of partisanship in drawing the new plans. *See, e.g.*, *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) ("It is well settled in this State that the right to vote on equal terms is a fundamental right.").

Moreover, if Legislative Defendants' position is that Dr. Hofeller was not "authorized" to work on the 2017 Plans between November 1, 2016 and June 27, 2017, and that he was not acting as their agent during that time, *see* 4/2919 Leg Defs. Br. at 1-2, then Dr. Hofeller's work drafting the 2017 Plans in that period was against his own personal interests and could have subjected him to liability. Legislative Defendants formally retained Dr. Hofeller on June 27, 2017 to draw the 2017 Plans, and Legislative Defendants paid Dr. Hofeller $50,000 in taxpayer

money for purportedly "construct[ing] . . . new North Carolina State Senate and State House of [R]epresentatives redistricting plans . . . *during August of 2017*." Ex. I at 1881 (emphasis added). The fact that Dr. Hofeller had already "constructed" and analyzed nearly all of the districts well before August 2017 was clearly against his interests, particularly if that earlier work was unauthorized by Legislative Defendants. Hence, if the files that were last modified between November 1, 2016 and June 27, 2017 are not admissible as statements of party opponents, then they are admissible as statements against interest under 804(b)(3).

D. Data in the Hofeller Maptitude and Excel Files Do Not Contain "Statements"

As just explained, all of the data in the Maptitude and Excel files that Dr. Chen and Dr. Cooper analyzed (*see* Ex. F at 3-76; Ex. G at 5-35) are admissible under an exception to the hearsay rule. But even were that not true, the data are independently admissible because they are in fact not "statements" for hearsay purposes.

Evidence is not "hearsay" unless it contains a "statement," and a statement, in turn, is an "assertion … of a person." N.C. R. Evid. 801 (a), (c); *see also id.* 801(b) ("A 'declarant' is a *person* who makes a statement." (emphasis added)). It is blackletter law that "machine statements aren't hearsay." *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015) (citing consensus of federal courts of appeals). That is true even if the machine statements are based on human inputs. *See id.* The Ninth Circuit has held, for example, that when a person types GPS coordinates into a computer program, and the program generates "a digital 'tack' at the appropriate spot on the map, labeled with the coordinates," the "tack" is not hearsay. As that court explained:

> [T]he relevant assertion isn't made by a person; it's made by the … program. Though a person types in the GPS coordinates, he has no role in figuring out where the tack will be placed. The real work is done by the computer program itself. The program analyzes the GPS coordinates and, without any human intervention, places a labeled tack on the satellite image. Because the program

> makes the relevant assertion—that the tack is accurately placed at the labeled GPS coordinates—there's no statement as defined by the hearsay rule.

Lizarraga-Tirado, 789 F.3d at 1110. The Tenth Circuit has likewise held that Excel spreadsheets containing "machine-generated transaction records … created at the point of sale" are not hearsay because "the declarant is not a person." *United States v. Channon*, 881 F.3d 806, 811 (10th Cir. 2018).

Under a straightforward application of these principles, nearly all of the Maptitude and Excel files' contents are not "statement[s]" and therefore not hearsay. With respect to the Maptitude files analyzed by Dr. Cooper, most of the files depict VTDs that are color-coded based on historical voting data for that VTD. Ex. G at 7-24, 31-34. This VTD-level color coding is auto-generated by the Maptitude program based on underlying elections data loaded into Maptitude. Thus, "[t]he real work" in generating these color-coded images is "done by the computer program itself," *Lizarraga-Tirado*, 789 F.3d at 1110, and the VTD-level color coding does not constitute "statements" for hearsay purposes.

The same is true for the Maptitude data that Dr. Chen presents in his rebuttal report. Dr. Hofeller had underlying Census data on the racial demographics in each Census block, and from that data, Maptitude auto-calculated district-level statistics on the African-American voting age population of each state House and state Senate district in Dr. Hofeller's draft plans. Ex. F at 39-47. These district-level statistics were not manually calculated by Dr. Hofeller (although he could have disabled them had he wanted, and he did sort the districts from highest to lowest BVAP), and thus again do not constitute assertions that could qualify as hearsay.

The data in Dr. Hofeller's Excel spreadsheets are of the same character. The spreadsheets depict the average Republican vote shares in Dr. Hofeller's draft House and Senate districts using various combinations of historical voting data. Ex. F at 51-75. Dr. Hofeller

obviously did not manually generate these statistics; rather, they are computer-generated figures based on the contours of the draft districts. The partisanship data in the Excel files accordingly do not constitute "assertions."

E. The Files Can Be Admitted For Purposes Other than Establishing the Truth of Their Contents

To the extent that any of the Hofeller files contain hearsay statements that do not fall under another hearsay exception, the files could be admitted to show Dr. Hofeller's intent or for other purposes besides showing the truth of the matter asserted. "An out-of-court statement offered for a purpose other than to prove the truth of the matter asserted is not considered hearsay." *State v. Shepherd*, 156 N.C. App. 69, 74, 575 S.E.2d 776, 779 (2003). And North Carolina Rule of Evidence 803(3) provides an exception to the hearsay rules for statements of "the declarant's then existing state of mind," including the declarants' "motives." *N.C. Dep't of Public Safety v. Ledford*, 786 S.E.2d 50, 66, 247 N.C. App. 266, 390 (2016).

While Plaintiffs believe that the Hofeller files are admissible for all purposes, at minimum the files can be admitted to show Dr. Hofeller's intent and state of mind in drawing the 2017 Plans, to show the data the he possessed, viewed, and relied upon in drawing the 2017 Plans, or to merely show that certain draft maps existed as of a certain date.

For example:

- Dr. Hofeller's draft Senate map as of June 24, 2017 and his House map as of June 28, 2017, both of which Dr. Chen analyzed, can be admitted to show the mere fact that the draft maps existed in the contours and forms that they did. Ex. F at 2-38.

- The draft Hofeller maps from July and August 2017 that Dr. Chen analyzed can be admitted to show the fact that Dr. Hofeller possessed and viewed data on the racial composition of the proposed districts, regardless of the "truth" of whether the racial data on the proposed districts was accurate. *Id.* at 39-47.

- Dr. Hofeller's Excel files showing partisanship statistics for his draft districts, counting the number of draft districts that were above a 53% Republican vote share threshold, and

analyzing "Pressure Points for GOP Incumbents" all show his intent and state of mind in developing the 2017 Plans, regardless of whether his statistics or analysis were accurate. *Id.* at 50-75.

- Dr. Hofeller's Excel files analyzing draft maps prepared by Campbell Law students at an event organized by Common Cause can be admitted to show that Dr. Hofeller analyzed the partisanship of the districts under the Campbell Law students' plans, that he evaluated whether it would be "possible" for Republicans to do "better" than each of the Campbell Law Students' districts. *Id.* at 70-76. This evidence can again be admitted for the fact that Dr. Hofeller did the analysis, regardless of whether his analysis was correct.

- The Hofeller's Maptitude files that Dr. Cooper analyzed can be admitted to establish that Dr. Hofeller was viewing VTD-level partisanship data when drawing the districts, and that the districts' boundaries tracked that partisanship data, regardless of whether the partisanship data was accurate. Ex. G at 5-35.

Introduced for these purposes—or for other purposes that are not proving the truth of the matter asserted—the evidence in these files would not depend on truth of the matter asserted through any statements contained in the relevant Hofeller files. *See Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 997 (S.D. Ohio 2019) (allowing admission, over hearsay objection, of email stating that Republicans were "trying to lock down 12 Republican seats" because it was a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan)" under Rule 803(3)).

III. Legislative Defendants Cannot Assert Privilege Over the Relevant Files

While Legislative Defendants have suggested that some of the Hofeller files may be subject to the attorney-client or attorney work-product privileges, Legislative Defendants cannot establish privilege over any of the relevant Hofeller files that Plaintiffs will introduce at trial.

"The burden is always on the party asserting the privilege to demonstrate each of its essential elements." *In re Miller*, 357 N.C. 316, 336, 584 S.E.2d 772, 787 (2003) (internal quotation marks omitted). A party asserting attorney-client privilege must establish each of the following five elements: "(1) the relation of attorney and client existed at the time the

communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege." *Miller*, 357 N.C. at 335, 584 S.E.2d at 786 (internal quotation marks omitted).

As for the attorney work product privilege, "the party asserting work product privilege bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (2001) (internal quotation marks omitted). A party asserting work product privilege must also demonstrate that the relevant materials relate to or reveal the opinions, legal theories, or mental impressions or counsel, as the work product doctrine is "designed to protect the mental processes of the attorney." *State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977).

Because the attorney-client privilege and attorney work product doctrines "may hinder an investigation into the true facts," both doctrines must be "narrowly construed," *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789, and a party cannot meet its burden to establish either privilege "by mere conclusory or ipse dixit assertions," *Miller*, 357 N.C. at 336, 584 S.E.2d at 787 (internal quotation marks omitted). "Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item." *Id.* (internal quotation marks omitted).

Legislative Defendants cannot meet their burden here to establish that either privilege applies to any of the relevant Hofeller files, and Legislative Defendants certainly cannot establish that either privilege provides a basis to prevent the files from being introduced at trial.

A. Legislative Defendants Cannot Establish Privilege Over Draft Maps and Related Statistical Analyses

Legislative Defendants could not plausibly establish privilege for any of the Hofeller files that Plaintiffs seek to introduce at trial. The attorney-client privilege could not apply for the simple reason that Dr. Hofeller was neither an attorney or client in relation to the files. Moreover, the attorney-client privilege does not apply to entirely factual information such as the contours of draft maps and statistical analyses of those maps prepared by Dr. Hofeller, a non-lawyer. A federal district court's recent order in another gerrymandering case, *Ohio A. Philip Randolph Institute v. Smith*, 2018 WL 6591622 (S.D. Ohio Dec. 15, 2018), is instructive in this regard. There, the plaintiffs challenged a different districting plan drawn by Dr. Hofeller, and they sought to compel production of communications between Dr. Hofeller and an attorney for the legislature that had attached draft maps and analyses of those maps. The district court held that because the attachments "contain only facts, data, and maps," they were "not protected by the attorney client privilege." *Id.* at *3. Here, unlike in the Ohio case, there is not even evidence that any of the relevant Hofeller files were communicated to an attorney. But even if they were, they would not be privileged given that they "contain only facts, data, and maps." *Id.*

The attorney work-product doctrine could not apply to any of the files for similar reasons. None of the files that Plaintiffs seek to introduce at trial reflect "the mental processes of [any] attorney." *Hardy*, 293 N.C. at 126, 235 S.E.2d at 841; *see also Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. Sec. 1782(a)*, 735 F.3d 1179, 1187 (10th Cir. 2013) ("[T]he work-product doctrine solely protects the inner workings of an attorney's mind."). They are just "data and maps." *Ohio*, 2018 WL 6591622, at *5 (holding that work-product doctrine also did not shield Dr. Hofeller's documents). What's more, Legislative Defendants have offered no evidence that Dr. Hofeller created any of these files for the primary purpose of using

them in litigation. The "driving force" behind Dr. Hofeller's creation of these files was to enable the General Assembly to pass *legislation* establishing new districting plans, in both 2011 and 2017. *Id.* Indeed, Dr. Hofeller's contract to draw and 2017 Plans specifically provided that all "documents prepared by [Dr. Hofeller] concerning redistricting shall no longer be confidential and shall become public records upon the act establishing the relevant district plan becoming." Ex. I at 1879.

B. Legislative Defendants Cannot Assert Privilege Over Any Files Last Modified Between November 1, 2016 and August 9, 2017

In addition, Legislative Defendants' own prior assertions preclude them from asserting privilege over any of the relevant Hofeller files that were last modified between November 1, 2016 and August 9, 2017. In Legislative Defendants' April 29, 2019 brief regarding Plaintiffs' First and Second Motions to Compel, Legislative Defendants suggested that certain materials may be privileged because Dr. Hofeller may have relied upon them for an October 31, 2016 declaration that he submitted in *Covington*. *See* 4/29/19 LD Br. at 3. That suggestion was erroneous, but in any event, Dr, Hofeller did not submit any affidavits or provide any other testimony in *Covington* after October 31, 2016. Nor have Legislative Defendants suggested that Dr. Hofeller's work after that date could be attorney-client or attorney work product privileged for any other reason.

To the contrary, Legislative Defendants and their counsel have expressly disclaimed having any knowledge of Dr. Hofeller's work on draft House and Senate plans between October 31, 2016 and August 9, 2017. Legislative Defendants asserted in an Interrogatory response in this case: "To the best recollection of [Legislative] Defendants, no drafts of the 2017 Plans existed prior to August 10, 2017." Ex. K at 9. Likewise, Defendant Lewis asserted at an August 4, 2017 legislative hearing: "I have not yet drawn maps nor have I directed that maps be drawn,

nor am I aware of any other entity operating in conjunction with the leadership that has drawn maps." *Covington*, No. 15-cv-399, ECF 184-8, at 72-73.

Legislative Defendants and their counsel have persisted in their representations that they did not direct, and were not aware of, Dr. Hofeller's work on the 2017 Plans after October 31, 2016 and into the summer of 2017. In the same April 29, 2019 filing in which they raised purported privilege issues, Legislative Defendants asserted that they were not "aware of any of the files" that Plaintiffs had included in a brief filed a few days prior, and that Legislative Defendants had no "knowledge" of Dr. Hofeller's work at all in developing new state plans before July 2017. *See* 4/29/19 LD Br. at 1-2. Rather, Legislative Defendants insisted, Dr. Hofeller must have been "work[ing] on concepts for districts . . . even when he was not retained to do so." *Id.* at 2. Legislative Defendants have doubled down on these assertions in recent weeks. In a June 6, 2019 press statement, Representative Lewis stated: "I had no input on or control of any play maps Dr. Hofeller may have drawn on his personal computer on his own time." Tim Elfrink, *Once-Secret Files from Gerrymandering Strategist Show GOP Misled Court, Watchdog Group Claims*, Wash. Post, June 7, 2019.

Having taken the position that they had no knowledge of, and did not direct, Dr. Hofeller's work on new House and Senate plans between November 1, 2016 and August 9, 2017, Legislative Defendants cannot possibly assert privilege over any draft maps or analyses of draft maps that Dr. Hofeller prepared in this time period.

C. Legislative Defendants Have Waived Any Privilege Claim

Even if a privilege could somehow apply to any of the Hofeller files that Plaintiffs seek to use at trial, Legislative Defendants have waived any privilege they may have held over the files several times over.

First, Legislative Defendants waived any privilege they held over any of the Hofeller files by failing to move to quash or otherwise object to Plaintiffs' subpoena to Stephanie Hofeller. Plaintiffs sent Legislative Defendants' counsel written notice of the subpoena to Ms. Hofeller on February 13, 2019, the same day the subpoena was served. The subpoena sought "[a]ny storage device in [Ms. Hofeller's] possession, custody, or control that contains" either any documents relating to Dr. Hofeller's work on the challenged state House and state Senate Plans or any information "related to" any such documents. Legislative Defendants could have filed protective objections or a motion to quash, but they did not do so. As this Court has acknowledged: "No objection to or motion to quash the subpoena was filed by any party to this action or Ms. Hofeller." 5/1/19 Order at 1; *see also* S. Hofeller Dep. at 39:2-20. Indeed, Legislative Defendants not only failed to object to the subpoena to Stephanie Hofeller, but they also did not object to or move to quash the subpoenas that Plaintiffs issued contemporaneously to Ms. Hofeller's mother, the Estate of Dr. Hofeller,[4] Dr. Hofeller's former business partner Dalton Oldham, and Dr. Hofeller's former company Geographic Strategies. Legislative Defendants knew that Plaintiffs were attempting to obtain Dr. Hofeller's records and never raised any objection to anyone.

Legislative Defendants' failure to object to the subpoena to Ms. Hofeller or to move to quash it—even though the subpoena on its face sought materials related to Dr. Hofeller's work for Legislative Defendants—constitutes a clear waiver of any privilege. A party "waive[s] its privilege by its own inaction" when it "fail[s] to act to protect any privilege when served with copies of [a third-party] subpoena." *Am. Home Assur. Co. v. Fremont Indem. Co.*, 1993 WL 426984, at *3-4 (S.D.N.Y. Oct. 18, 1993). "Where a party is aware" that a subpoenaed third party may possess the party's privileged information, "the burden falls on that party to take

[4] Plaintiffs did not know at the time that there was no Estate of Dr. Hofeller.

affirmative steps to prevent the disclosure in order [to] preserve the privilege as to itself." *Id.* at *4. "The failure to act to prevent or object to the disclosure of confidential communications when a party knows or should know that privileged documents may be disclosed by another party waives the privilege with respect to the party failing to act." *Id.*; *see also Ravenswood Inv. Co., L.P. v. Avalon Corr. Servs., Inc.*, 2010 WL 11443364, at *2 (W.D. Okla. May 18, 2010) ("Because Defendant did not state its claim of privilege within fourteen days of service of the subpoena on [a third party], the Court concludes Defendant has waived any such claim."); *Patterson v. Chicago Ass'n for Retarded Children*, 1997 WL 323575, at *3 (N.D. Ill. June 6, 1997) ("By failing to object" to third-party subpoena, party "essentially waived her claim to privilege, and the information gleaned via the subpoena may be used."); *Scott v. Kiker*, 59 N.C. App. 458, 461, 297 S.E.2d 142, 145 (1982) ("Defendant . . . waived his privilege because he failed to object to the testimony.").

This waiver principle squarely applies here. "The broad scope of [the] subpoena" to Ms. Hofeller "should reasonably have alerted" Legislative Defendants "to the possibility that [Ms. Hofeller] might produce the [allegedly] privileged documents." *Am. Home Assur.*, 1993 WL 426984, at *4. Legislative Defendants' "failure to take any steps to prevent the disclosure of [allegedly] privileged documents waived the privilege they seek to assert." *Id.*

Second, Legislative Defendants independently waived any privilege by demanding that Plaintiffs transmit complete copies of all of the Hofeller files to State Defendants and Intervenor Defendants. It is well-established that a party waives privilege where no "reasonable protective measures were employed in order to safeguard claims of privilege" or "to ensure confidentiality" before documents are produced to another party. *Scott v. Glickman*, 199 F.R.D. 174, 179 (E.D.N.C. 2001). Here, at Legislative Defendants' behest, Plaintiffs transmitted complete copies

of the contents of the storage devices—without filtering out any of the files—to Intervenor Defendants and State Defendants, neither of which holds any privileged relationship with Legislative Defendants. Legislative Defendants successfully requested that the Court order Plaintiffs to transmit complete copies of the devices to all Defendants even though weeks earlier, on April 9, 2019, Plaintiffs sent Legislative Defendants a searchable index of file names and file paths that made apparent the devices contain files involving Dr. Hofeller's work for Legislative Defendants. Legislative Defendants could have requested protective measures before these files were provided to the State Defendants and Intervenor Defendants, but they did not.

Given that "the documents were revealed to third parties without objection"—at Legislative Defendants' request, no less—Legislative Defendants have waived any claim of privilege over them. *Durham Indus. Inc. v. N. River Ins. Co.*, 1980 WL 112700, at *2 (S.D.N.Y. May 8, 1980): *see also Furniture, Inc. v. Kittinger/Penn. House Grp., Inc.*, 116 F.R.D. 46, 50 (M.D.N.C. 1987) ("the privilege may be lost" by failing "to take affirmative action and institute reasonable precautions to ensure that confidentiality will be maintained").

Not only did Legislative Defendants demand that Plaintiffs disseminate the Hofeller files to the other Defendants, Legislative Defendants did so knowing that State Defendants have not been aligned with them in this litigation. *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir. 1988) (finding waiver where party disclosed documents to government actors who were "adverse during the proceedings at issue"); *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 48 (D.D.C. 2009) (finding waiver where a party placed allegedly privileged materials "in the hands of" a potentially adverse party).

Finally, any work-product protection over the relevant Hofeller files that Plaintiffs wish to use at trial is defeated by Plaintiffs' substantial need for the materials and the prejudice to Plaintiffs and the public interest that would ensue were they concealed.

"The work product doctrine" is "a qualified privilege." *Hardy*, 293 N.C. at 126, 235 S.E.2d at 841-42 (1977). It does not protect materials if a party shows "a 'substantial need' for the document and 'undue hardship' in obtaining its substantial equivalent by other means." *Evans*, 142 N.C. App. at 28, 541 S.E.2d at 789 (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(3)).

As discussed *supra*, the Hofeller files that Plaintiffs seek to admit into evidence are extraordinarily relevant to the merits of Plaintiffs' claims—they are smoking gun evidence of the partisan intent behind the challenged plans, and they also conclusively demonstrate that the mapmaker was not following the legislature's adopted criteria in creating the plans. It is difficult to imagine more relevant and probative evidence in a partisan gerrymandering case.

Plaintiffs, moreover, have no means of obtaining this evidence from other alternative sources. That is especially so because Legislative Defendants produced essentially no substantive documents in this case, and repeatedly refused to answer basic interrogatories about their activities in creating the 2017 Plans. And not only did Legislative Defendants obstruct meaningful discovery, but as will be explained in Plaintiffs' forthcoming filing, Dr. Hofeller's business partner Dale Oldham—who took possession of Dr. Hofeller's computers—evaded service of process of subpoenas that Plaintiffs duly issued to him in this case.

In addition to the prejudice to Plaintiffs, concealing the relevant files would also be strongly contrary to the public interest. The Hofeller files that Plaintiffs seek to introduce at trial call into question certain statements made to the federal district court in *Covington*, all of which are highly relevant to the merits of Plaintiffs' claims and to any remedial process that will unfold

in this case. Specifically, a large number of the Hofeller files that Plaintiffs will seek to admit into evidence call into question three categories of statements made to the *Covington* court:

- In July 2017, Legislative Defendants convinced the federal district court in *Covington* not to order special elections under new remedial maps in 2017, based on Legislative Defendants' repeated statements that they had not yet started drawing new districts at all and needed sufficient time to develop criteria, draft the plans, receive public input, and deliberate. Ex. L at 7-10. Legislative Defendants told the *Covington* court that they met with Dr. Hofeller after July 31 to "discuss" "redistricting concepts" for the new plans. *Id.* at 10-11. The Hofeller files reveal that not only had work on the remedial plans begun well before July 2017, but that the new state House and state Senate plans were already substantially *complete* by the end of June 2017. Plaintiffs' expert Dr. Chen details in his rebuttal report how the Hofeller files show that, by June 2017, Dr. Hofeller had already finished assigning 95.6% of North Carolina's census blocks into their final Senate districts and 90.9% of census blocks into their final House districts. Ex. F at 2. The files illustrate exactly which state House and state Senate districts had already been entirely completed or almost entirely completed. *Id.* at 2-38.

- In a September 7, 2017 submission to the *Covington* court, Legislative Defendants purported to describe the "process" and "criteria" used to the draw the 2017 Plans. They stated that the process for drawing new plans began at the end of June 2017 and that the criteria used were the ones adopted on August 10, 2017. Ex. L at 11. The Hofeller files reveal that Dr. Hofeller had in fact already substantially completed drawing the 2017 Plans in June 2017, a month-and-a-half before the adopted criteria were even introduced and adopted. Ex. F at 2-38. This evidence will be enormously important in this case, as a central claim of several of Legislative Defendants' experts is that the enacted House and Senate Plans comply with the General Assembly's adopted criteria. *See, e.g.*, Ex. C at 9-10; Ex. E at 11-16.

- Legislative Defendants repeatedly stated to the *Covington* court and at public hearings that neither they nor Dr. Hofeller had any racial data on the new districts being developed. Ex. L at 12. They said that "data regarding the race of voters . . . *was not even loaded into the computer used by the map drawer to construct the districts.*" *Id.* (quoting *Covington*, ECF No. 192, at 28) (emphasis added). As Dr. Chen explains in his rebuttal report, the Hofeller files reveal that Dr. Hofeller had data on the racial composition of the proposed districts in his draft maps, including drafts prepared *after* the adopted criteria were passed on August 10, 2017 purporting to prohibit the consideration of racial data. Ex. F at 39-47. Some of the files even show that Dr. Hofeller sorted the data on his draft House and Senate districts from highest-to-lowest black voting-age population ("BVAP"), and that he went so far as to display the BVAP of his proposed districts in labels on the screen he was viewing. *Id.* This evidence will be highly pertinent both to Legislative Defendants' claims that they followed the adopted criteria, and to the question of whether Legislative Defendants should be permitted an opportunity to draw new plans in any remedial process in this case.

In short, any work-product protection that could conceivably apply to the files at issue is defeated by Plaintiffs' need for the materials and the inability of Plaintiffs and the public to obtain substantially equivalent evidence elsewhere. *Hardy*, 235 S.E.2d at 841-42.

IV. Plaintiffs' Experts May Offer Opinions Based on the Hofeller Files Regardless of Their Admissibility

Finally, while the relevant Hofeller files are admissible for all of the reasons stated above, in the event that the Court finds that one or more of the files are not admissible as standalone evidence, Plaintiffs' experts may still offer opinions based on such files. North Carolina Rule of Evidence 703 provides that, if documents are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence" for an expert to base an opinion on them.

V. Plaintiffs Properly Obtained the Hofeller Files Pursuant to a Lawful Subpoena

Plaintiffs anticipate that, in response to this motion, Legislative Defendants may assert that the Hofeller files should be excluded based on the manner in which they were obtained. In a June 17 filing with this Court, Legislative Defendants accused Plaintiffs of obtaining the Hofeller files improperly. Plaintiffs will respond to such arguments in detail next week. But to be clear, Legislative Defendants' accusations are baseless. Their June 17 filing makes a number of false, misleading, and reckless factual assertions about Plaintiffs, Plaintiffs' counsel, and Ms. Hofeller. As Plaintiffs will detail in their forthcoming filing, Plaintiffs and their counsel have acted ethically and otherwise appropriately at all times in obtaining, reviewing, and using the Hofeller files. And for all of their heated rhetoric, Legislative Defendants fail to grapple with the basic facts that: (1) Ms. Hofeller obtained the devices with the consent of her mother; (2) Ms. Hofeller then approached Plaintiffs and offered to provide the files; (3) rather than take direct custody of the files, Plaintiffs issued a subpoena to Ms. Hofeller and provided same-day notice to

Legislative Defendants; (4) neither Legislative Defendants nor anyone else objected to the subpoena; and (5) Ms. Hofeller complied with the subpoena after nobody objected. The Hofeller files were obtained through lawful process and are admissible in this Court.

CONCLUSION

For the reasons stated above, Plaintiffs request that the Court declare that, if Plaintiffs establish chain of custody at trial, all of the specific Hofeller files relied upon by Plaintiffs' experts are admissible as evidence.

Respectfully submitted this the 21st day of June, 2019

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