

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 015426

NORTH CAROLINA LEAGUE, OF
CONSERVATION VOTERS, INC., *et*
al.,

Plaintiffs,

v.

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

Defendants.

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 500085

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.

ORDER ON LEGISLATIVE DEFENDANTS' MOTION TO COMPEL

THIS MATTER came before the undersigned three-judge panel upon Legislative Defendants' Motion to Compel both Harper Plaintiffs and NCLCV Plaintiffs (collectively "Plaintiffs") to produce source code, source data, input parameters, and outputted data

pertaining to the expert reports produced during the preliminary-injunction phase of this litigation.

Procedural and Factual Background

In this litigation, Plaintiffs seek a declaration that the Congressional, North Carolina Senate, and North Carolina House of Representatives districts established by an act of the General Assembly in 2021, N.C. Sess. Laws 2021-174 (Senate Bill 750), 2021-173 (Senate Bill 739), and 2021-175 (House Bill 976), violate the rights of Plaintiffs under the North Carolina Constitution. Plaintiffs seek to enjoin the future use of the 2021 congressional and state legislative districts.

Plaintiffs collectively assert causes of action in their operative complaints under multiple provisions of the North Carolina Constitution, alleging that the challenged districts violate: 1) the North Carolina Constitution's free elections clause, N.C. Const. art. I, § 10; 2) the North Carolina Constitution's rights of association clauses, namely freedom of speech and freedom of assembly, N.C. Const. art. I, §§ 12, 14; 3) the North Carolina Constitution's equal protection clause, N.C. Const. art. I, § 19; and 4) the North Carolina Constitution's whole county provisions, N.C. Const. art. II, §§ 3, 5.

On December 8, 2021, after receiving an order from the Supreme Court of North Carolina directing this Court to resolve all Plaintiffs' claims on the merits by January 11, 2022, this Court requested that all parties submit proposed scheduling orders by December 10, 2021. In these submissions, Harper Plaintiffs stated that they had "separately agreed to produce by Monday, December 13, certain source code and backup data from their experts' initial reports at the preliminary injunction phase" so long as Legislative Defendants provided "the home addresses of all the incumbent legislators and members of Congress." Also in these submissions, both sets of Plaintiffs proposed to produce the source code, source data, input parameters, and output data for each expert witness report submitted.

On December 13, 2021, this Court entered a Case Scheduling Order giving the parties until December 23, 2021, to exchange evidence, including expert witness reports. Paragraph 4 of the Case Scheduling Order further provided that “[e]xpert reports produced to an opposing party shall be accompanied by all source code, source data, input parameters, and all outputted data.” On December 14, 2021, Legislative Defendants filed the present Motion to Compel seeking this very information for the expert reports produced by Plaintiffs during the preliminary-injunction phase of this litigation.

On December 15, 2021, at the Court’s direction, Plaintiffs submitted written responses stating their position on the Motion to Compel. NCLCV Plaintiffs contend that Legislative Defendants’ motion is premature and requests the production of documents that “were not provided to, were never in the possession of, and were not considered by” their expert, Professor Moon Duchin and therefore not subject to production pursuant to Rule 26(b)(4) of the North Carolina Rules of Civil Procedure. Harper Plaintiffs additionally submitted a Motion for Protective Order with their response to Legislative Defendants’ Motion to Compel and, in their response to Legislative Defendants’ Motion, submit that they do not object to producing the requested materials subsequent to the entry of the requested protective order. The parties have fully briefed their respective positions on the Motion, and the matter is now ripe for resolution by the Court.

After considering Legislative Defendants’ motion to compel and the matters contained therein, as well as the parties’ responses and submissions, and having reviewed the record proper, the Court, in its discretion, rules upon Legislative Defendants’ motion as follows:

Legislative Defendants’ Motion to Compel

The Court finds and concludes that three reasons exist to grant Legislative Defendants’ Motion to Compel Plaintiffs’ production of source code, source data, input

parameters, and outputted data pertaining to their expert reports produced during the preliminary-injunction phase of this litigation.

a. The Requested Data are Discoverable

“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” N.C.G.S. § 1A-1, Rule 26(b)(1). “The test for relevance for discovery purposes only requires that information be ‘reasonably’ calculated to lead to the discovery of admissible evidence.” *Lowd v. Reynolds*, 205 N.C. App. 208, 214, 695 S.E.2d 479, 483 (2010) (quoting N.C.G.S. § 1A-1, Rule 26(b)(1)). “[O]rders regarding discovery are within the discretion of the trial court.” *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 448, 271 S.E.2d 522, 523 (1980).

Specifically as to expert witness discovery, Rule 26 provides that expert reports are to include “[a] complete statement of all opinions the witness will express and the basis and reasons for them,” and “[t]he facts or data considered by the witness in forming them.” N.C.G.S. § 1A-1, Rule 26(b)(4). As such, parties are not entitled to more discovery than Rule 26 permits and cannot compel production of materials never received or considered by an opposing party’s expert.

Plaintiffs have indicated their intent to rely upon expert reports in order to support their claims that the congressional and state legislative redistricting legislation violates the North Carolina Constitution. As such, the source code, source data, input parameters, and outputted data pertaining to these expert reports are clearly relevant. Similarly, Plaintiffs relied on certain expert reports during the preliminary injunction phase of this litigation in order to prove a likelihood to success on the merits of their claims. While this Court, in reaching a final judgment, will not be bound by any findings made during the preliminary injunction phase, the data underlying these expert reports plainly relates to Plaintiffs’ claims

and Legislative Defendants' likely defenses such that the information can be reasonably calculated to lead to the discovery of admissible evidence.

This conclusion, however, does not require the production of any documents or information that NCLCV Plaintiffs' expert, Professor Moon Duchin, did not consider or receive.

b. Agreement between Harper Plaintiffs and Legislative Defendants

As discussed above, Harper Plaintiffs have already agreed to produce the source code and backup data requested by Legislative Defendants if Legislative Defendants produce the home addresses of all incumbent state legislators and members of Congress. Legislative Defendants submit that they produced the requested addresses on the morning of Tuesday, December 14, 2021. Accordingly, Harper Plaintiffs cannot now claim that Legislative Defendants have no right to the source code and backup data.

c. December 13, 2021 Scheduling Order

The information requested by Legislative Defendants has already been ordered produced by this Court. The Case Scheduling Order commands that “[e]xpert reports produced to an opposing party shall be accompanied by all source code, source data, input parameters, and all outputted data.” Plaintiffs must therefore produce the source code for expert reports already produced during the preliminary injunction phase of this litigation.

Protective Order

In response to Legislative Defendants' Motion to Compel, Harper Plaintiffs filed a Motion for Protective Order pursuant to Rule 26(c) of the North Carolina Rules of Civil Procedure, claiming that their experts' source code is proprietary and should be labeled confidential. As Harper Plaintiffs note in their Motion, academics serving as expert witnesses often treat their underlying source code as confidential.

The Court recognizes Plaintiffs' desire to protect the sensitive and proprietary nature of the source code used by their experts. When limiting discovery, a court may order that discovery only be had on specified terms and conditions, that discovery be had by a particular method, or that "confidential research . . . be disclosed only in a designated way." See N.C.G.S. § 1A-1, Rule 26(c). Protective orders, such as the one proposed by Harper Plaintiffs, are "essential to the efficient functions of the discovery process" in cases involving confidential information. See *Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 333 (M.D.N.C. 1999).

This Court is satisfied that producing these materials while also marking them confidential will sufficiently protect their proprietary value. Indeed, Harper Plaintiffs do not object to producing the requested materials subsequent to the entry of the requested protective order. Additionally, materials produced during discovery and source material for trial exhibits are not automatically a part of the public record. As such, it is appropriate to allow discovery of these materials under the protection of a protective order. Harper Plaintiffs' Motion for Protective Order will be granted by separate order entered contemporaneously with this order.

Conclusion

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS that Legislative Defendants' motion to compel is GRANTED in part and DENIED in part as follows:

1. Plaintiffs shall produce to Legislative Defendants by 3:00 PM EST on December 16, 2021, all source code, source data, input parameters, and all outputted data pertaining to the expert reports produced to Legislative Defendants during the preliminary injunction phase of this litigation.
2. NCLCV Plaintiffs are not required to produce any documents or information that Professor Moon Duchin did not consider or receive.
3. The materials shall be produced in accordance with the contemporaneously filed protective order.

SO ORDERED, this the 15th day of December, 2021.


A. Graham Shirley, Superior Court Judge

/s/ Nathaniel J. Poovey

Nathaniel J. Poovey, Superior Court Judge

/s/ Dawn M. Layton

Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 15th day of December 2021.



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