STATE OF NORTH CAROLINA

COUNTY OF WAKE

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' OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION TO CLARIFY OR IN THE ALTERNATIVE TO COMPEL

The NCLCV Plaintiffs file this opposition to the Legislative Defendants' motion for clarification, or in the alternative, to compel the deposition and trial testimony of NCLCV Plaintiffs' litigation counsel of record, Sam Hirsch.[1] The NCLCV Plaintiffs likewise oppose the Legislative Defendants' extraordinary attempt to disqualify one of their lead attorneys from serving as their advocate on the eve of trial, which request appears at page seven of the Legislative Defendants' motion.

The NCLCV Plaintiffs' motion for a protective order already explains why the deposition and trial testimony of Mr. Hirsch is not permissible under North Carolina law given that the information the Legislative Defendants seek from Mr. Hirsch is (1) available from other means, including interrogatories the Legislative Defendants have chosen not to propound, (2) protected by the attorney-client and work-product privileges, and (3) not even relevant, let alone crucial to

[1] The NCLCV Plaintiffs address the Legislative Defendants' Motion to Seal by separate filing.

Legislative Defendants' preparation of their case. The Court should reject the Legislative Defendants' attempts to turn this trial into a sideshow about the NCLCV Plaintiffs' counsel. In further support of their motion for a protective order and in opposition to the Legislative Defendants' motion to clarify or compel, the NCLCV Plaintiffs state the following:

ARGUMENT

I. Mr. Hirsh's Deposition Testimony Cannot Be Procured by a Notice of Deposition.

Mr. Hirsch's deposition cannot go forward on Friday morning based on an improper notice of deposition. A party's lawyer is not a party and cannot be deposed without an enforceable subpoena. This is clear from *Blue Ridge Pediatric & Adolescent Medicine, Inc. v. First Colony Healthcare, LLC*, No. 11 CVS 127, 2012 WL 3249553 *7 (N.C. Super. Ct. Aug. 9, 2012), where the court concluded that legal counsel is not a party to the action and a subpoena duces tecum is appropriate to make discovery of documentary evidence held by counsel. There, the court also cited *Kelley v. Agnoli*, 695 S.E.2d 137, 147 (N.C. Ct. App. 2010), which discussed Rule 45's protections and held that a party's law firm was not itself a party. Indeed, *Kelley* stated that "service of a subpoena on the attorneys representing a party in the pending litigation is an extraordinary act that may warrant greater scrutiny and protection from the court and not less." 695 S.E. 2d at 147.

There is no legal basis for the Legislative Defendant's claim that they should be permitted to depose Mr. Hirsch simply because he has been admitted *pro hac vice* in this matter. The fact remains that Mr. Hirsch is an attorney, not a party. And under Rule 30 of the North Carolina Rules of Civil Procedure, a subpoena—not a deposition notice—is required to depose a non-party. *See* N.C. R. Civ. P. 30(a). Mr. Hirsch's admission *pro hac vice* does not transform him from litigation counsel into a party. The statute governing admission of out-of-state attorneys is clear: to be

admitted *pro hac vice*, the attorney "agrees to be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects *as if the attorney were a regularly admitted and licensed member of the Bar of North Carolina in good standing*." N.C. Gen. Stat. § 84-4.1(3) (emphasis added); *see Couch v. Priv. Diagnostic Clinic*, 146 N.C. App. 658, 670, 554 S.E.2d 356, 365 (2001) ("Under N.C. Gen.Stat. § 84–28, attorneys admitted to practice pro hac vice are subject to the same disciplinary jurisdiction of this State as are attorneys licensed to practice here."). In other words, when an out-of-state attorney is admitted to practice in North Carolina, he becomes subject to the jurisdiction of the Court to the same degree as a North Carolina attorney. This has nothing to do with whether he should be treated as a party under the Rules of Civil Procedure. If Mr. Hirsch was a North Carolina attorney, seeking to force him to appear for deposition by notice would be equally improper—because he is an attorney, not a party, a fact that has nothing to do with his admission to practice in this Court.

Indeed, the Legislative Defendants and their counsel well-know that they cannot proceed by notice of deposition here. One of the cases they rely on in their motion, *Ohio A. Philip Randolph Institute v. Smith*, No. 1:18-cv-00357, ECF No. 121 (W.D. Ohio, Dec. 15, 2018), concerned an attempt to obtain "nine emails" from E. Mark Braden, who is counsel to the Legislative Defendants here. *Id.* at 1. Mr. Braden was representing the Ohio government, which was a party to that case, just as he here is representing the North Carolina General Assembly. To try to obtain those documents, the *Ohio* Plaintiffs did not issue a ***document request***, as they could have issued to a party to the case. Instead, they sought "subpoenas" to "serve[] on third-party E. Mark Braden." *Id.* That was the proper mechanism. And the Legislative Defendants could have pursued that path here, as early as the evening of Thursday, December 23, 2021. The Legislative Defendants cannot

now complain about the need to undertake that process, when ***their own counsel*** has himself obtained the protections of that process.

II. The Cases Cited by Legislative Defendants Demonstrate that a Deposition of Mr. Hirsch Is Neither Necessary Nor Appropriate.

The NCLCV Plaintiffs already showed in their motion for a protective order that Legislative Defendants cannot meet their burden to show that a deposition of the NCLCV Plaintiffs' litigation counsel is necessary or appropriate under the three prongs set forth in the seminal case of *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). The cases the Legislative Defendants cite in support of their argument that they should be permitted to depose Mr. Hirsch provide no support for their claim that North Carolina courts have permitted depositions of litigation counsel in circumstances remotely like those presented here.

For example, they cite *Green v. Moog Music, Inc.*, No. 121CV00069MOCWCM, 2021 WL 4130530, at *2 (W.D.N.C. Sept. 10, 2021). This decision is an unpublished ruling by a federal magistrate, currently being appealed in the Fourth Circuit. More importantly, it did not involve an attorney like Mr. Hirsch, who had absolutely no involvement with the facts of this litigation prior to his engagement as litigation counsel. *Green* involved a sex discrimination claim brought by Hannah Green against the Moog Music company. Her lawyer was also her fiancé or husband—and one of only four people present at an event where she was allegedly victimized. *Id.* at *2. He was also, by virtue of their relationship, in a "unique position to testify regarding Plaintiff's allegations of emotional distress." Accordingly, when the magistrate disqualified her counsel, it was because he was a necessary witness to the factual events that formed the basis for her subsequent complaint—a situation that bears no relation to the issues here.

Blue Ridge Pediatric & Adolescent Med., Inc. v. First Colony Healthcare, LLC, No. 11 CVS 127, 2012 WL 3249553, at *6 (N.C. Super. Aug. 9, 2012), directly supports the position

taken by the NCLCV Plaintiffs, not that of the Legislative Defendants. In *Blue Ridge*, a party sent a subpoena—not a deposition notice—to the firm that was serving as plaintiff's counsel. The case states that discovery on a non-party, including counsel, should be sought through a subpoena. *See id*. at *7 ("The Harris Firm represents Plaintiffs as legal counsel and, thus, is not a party to the action."). *Blue Ridge*, like *Green*, involved attempts to take discovery on counsel with knowledge of the underlying facts of the case. The law firm, in addition to representing the Plaintiffs, was directly involved in the real estate transactions at issue in the litigation, including reviewing a lease and operating agreement ***four years*** prior to the filing of the complaint. *Id.* at *2. Notwithstanding these facts, the Court *granted* the firm's motion for a protective order and ***refused to allow a deposition of opposing litigation counsel***. *See id.* at *11 (finding "good cause for entry of a protective order prohibiting Defendants from seeking the deposition of Thomas M. Ward regarding any matter in this case, absent authorization by the Court").

Finally, the Legislative Defendants cite *Edison v. Acuity Healthcare Holdings, Inc.*, No. 15 CVS 2745, 2016 WL 6518800 (N.C. Super. Nov. 2, 2016), in support of their request to depose Mr. Hirsch and examine him at trial. Once again, that case could hardly be more different from this one. In *Edison*, the plaintiff in an employment discrimination suit sought to depose the defendant's in-house counsel. *Id.* at *1. As in *Green* and *Blue Ridge*, the lawyer had personal knowledge of the underlying facts of the case—she was an in-house lawyer whose "responsibilities may include involvement in [defendant's] business affairs." *Id.* Indeed, she had been identified by the defendant's Rule 30(b)(6) witness as having relevant knowledge of the facts. *Id.* But just as important, the lawyer to be deposed in *Edison* was not serving as trial counsel; to the contrary, there was "no evidence showing that Ms. Babson has been substantially involved with overseeing the litigation in this matter." *Id.* at *6. Under these circumstances, the Court decided not to bar

her testimony because "the deposition is *not targeted solely at eliciting information relating to [defendant's] litigation strategy*." *Id.* By contrast, Mr. Hirsch has no such personal knowledge. Instead, unlike the deposition in *Edison*, the Legislative Defendants' efforts can only be "targeted solely at eliciting information relating to [plaintiffs'] litigation strategy." Indeed, they frankly admit that the ***entire basis*** of their request is to probe Mr. Hirsch's "thought process." Mot. 7. That is improper.

In sum, although the Legislative Defendants lead with the broad assertion that "North Carolina courts have ruled that litigation counsel may be deposed under certain circumstances," none of the cases they cite bears any resemblance to this case. None of the three prongs of *Shelton* are met here. First, the Legislative Defendants have not even attempted to propound interrogatories to the NCLCV Plaintiffs or otherwise obtain the information they seek through less intrusive means. Second, as further described below, the information they seek is clearly privileged as the concede they are looking for testimony on an attorney's "thought process" about litigation strategy and remedy. Mot. 7. Third, the information they seek is not relevant, let alone crucial to the case.

III. The Suggestion that Mr. Hirsch Should Be Disqualified on the Eve of Trial Should Be Rejected.

Buried on page seven of their motion is the Legislative Defendants' suggestion that Mr. Hirsch is subject to disqualification under Rule 3.7 of the North Carolina Rules of Professional Conduct because he cannot serve as both a fact witness and an advocate. This extraordinary attempt to disqualify one of the NCLCV Plaintiffs' lead trial attorneys should be rejected as it threatens to deprive the NCLCV Plaintiffs of their chosen counsel just five days before trial begins. *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"). Mr. Hirsch is the attorney who will put on the NCLCV Plaintiffs' witness, Dr. Duchin, and will cross-examine some of the Legislative Defendants' witnesses. Disqualifying him from serving in that role at trial would be extremely prejudicial to the NCLCV Plaintiffs and violate their substantial rights. *See Harris & Hilton, P.A. v. Rassette*, 252 N.C.App. 280, 282-83 (2017) (holding that a trial court's order disqualifying a party's chosen trial counsel affects a substantial right that would otherwise be lost in the absence of an immediate appeal); *Robinson & Lawling, L.L.P. v. Sams*, 161 N.C. App. 338, 339 n.3 (2003) ("an order disqualifying counsel is immediately appealable because it affects a substantial right").

For the reasons previously explained in their motion for a protective order, Mr. Hirsch clearly is not a "necessary" witness under Rule 3.7 and therefore disqualification is impermissible. *See, e.g.*, *Cole v. Champion Enterprises, Inc.*, No. 1:05CV415, 2006 WL 8447925, at *7 (M.D.N.C. Aug. 25, 2006) (refusing to disqualify plaintiff's counsel as a "necessary witness" because the testimony defendants sought to obtain from counsel was available from other sources and protected by privilege); *Ohio Cas. Ins. Co. v. Firemen's Ins. Co. of Washington, D.C.*, No. 5:07-CV-149-D, 2008 WL 441840, at *2 (E.D.N.C. Feb. 13, 2008) (denying motion to disqualify under Rule 3.7 because counsel was not a necessary witness given that "there [were] others, in addition to [counsel], who can testify regarding [the subject matter]"). Indeed, as the NCLCV Plaintiffs have already explained, Mr. Hirsch is not a "witness" at all. Whatever information he could offer about how the NCLCV demonstrative plans were drawn would shed no light on how the *Enacted Plans* were drawn. The Legislative Defendants' attempts to make this case about Mr.

Hirsch's thought processes in preparing a proposed remedy for their egregious gerrymander should be rejected.

IV. Legislative Defendants Seek Privileged Information.

Legislative Defendants claim that the information they seek from Mr. Hirsch is not privileged because (1) the NCLCV Demonstrative Maps were not made in the course of Mr. Hirsch delivering legal advice; and (2) the NCLCV Plaintiffs have waived any privilege by referencing their maps in their filings. They are wrong on both counts.

First, the Legislative Defendants claim that there is a "redistricting" exception to the attorney-client privilege and that anyone who "assist[s] in drawing redistricting maps" is acting as a "consultant," not a lawyer. Mot. 8-9. Their cases, however, do not support that argument. The individual at issue in *Baldus v. Brennan* was "not an attorney." *Baldus v. Brennan*, No. 11-CV-1011 JPS-DPW, 2011 WL 6385645, at *1 (E.D. Wis. Dec. 20, 2011). Moreover, although that individual argued that he provided services in conjunction with legal representation, the court found that he "was consulted by the [state] Legislature independently … as opposed to [the law firm] Michael Best" having hired him." *Id.* And yet more fundamentally, the consultant there was hired by the state Legislature in order to help draw its 2011 redistricting maps in the first instance. *Baldus v. Brennan*, No. 11-CV-1011 JPS-DPW, 2011 WL 6122542, at *1 (E.D. Wis. Dec. 8, 2011), *order clarified*, No. 11-CV-1011 JPS-DPW, 2011 WL 6385645 (E.D. Wis. Dec. 20, 2011). It should not be a surprise that Courts have permitted discovery into the process a ***legislature*** uses in redistricting. That is the ***very opposite*** of this case. Here, Mr. Hirsch was retained to challenge—that is, to litigate against—the maps the General Assembly enacted, which were widely expected to be (and in fact were) egregiously unfair maps that gerrymandered by party and diluted the voting strength of Black voters. Mr. Hirsch undertook his work to create the NCLCV

Demonstrative Maps ***in order to*** challenge the General Assembly's maps—to show that their partisan gerrymandering and racial vote dilution did not flow from North Carolina's political geography, and to identify for North Carolina's courts a remedy for the General Assembly's unconstitutional actions.

The Legislative Defendants' sole additional case, *Ohio A. Philip Randolph Institute v. Smith*, No. 1:18-cv-00357, ECF No. 121 (W.D. Ohio, Dec. 15, 2018), is even farther afield. That case did not involve an attempt to depose or call as a witness a lawyer who participated in challenging redistricting maps as unlawful. Rather, it concerned "subpoenas" for "nine emails." *Id.* at 1. And it turned on the basic principle that documents "contain[ing] only facts, data and maps … are not protected by the attorney client privilege" and do not become privileged "simply because they are attached to an email on which a lawyer." *Id.* at 6-7. This case, again, is the very opposite: The Motion expressly premises its requests for a deposition and trial testimony on the claim that the Legislative Defendants wish to explore Mr. Hirsh's "thought process." Mot. 7. The *Ohio* plaintiffs never sought to explore Mr. Braden's thought processes—and properly so, given how clearly such processes are protected by attorney-client privilege and work-product doctrines.

In sum, Sam Hirsch has never had any involvement in the creation of the redistricting maps being challenged in this case. Discovery on the maps he was involved in creating—demonstrative maps create to support the NCLCV's legal arguments in this litigation—will not reveal any information going to the "heart of the dispute." To the contrary, it is a sideshow, and one that has already consumed an inordinate amount of the parties' time on the eve of trial. The Legislative Defendant's efforts to depose Mr. Hirsch and examine him at trial because of the efforts he has made in this litigation, as counsel to the NCLCV Plaintiffs, should end. In any event, to the extent the Legislative Defendants are taking the position based on the caselaw discussed above that legal

advice offered in connection with redistricting is not privileged, the NCLCV Plaintiffs assume that the Legislative Defendants' counsel will have no objection to sitting for depositions and being called as witnesses at trial themselves given the Legislative Defendants' admission in their response to interrogatories that "Attorneys at Nelson Mullins and Baker Hostetler provided legal advice in connection with the 2021 redistricting." Legislative Defendants' Interrogatory Responses at 5 (Dec. 28, 2021).

Second, the Legislative Defendants fare no better with the claim that the "timing of Hirsch's involvement" renders attorney-client privilege and the work-product doctrine inapplicable. They speculate that Mr. Hirsch's work on the maps at issue could not have come in the course of providing legal advice or in anticipation of litigation because the "General Assembly passed the Enacted Plans on November 4, 2021"; because "NCLCV Plaintiffs filed their Verified Complaint and Motion for Preliminary Injunction" a "mere twelve (12) days later"; and it is supposedly "almost impossible to complete such detailed analysis within that time." Mot. 9.

That argument, however, presumes that Mr. Hirsch could not have been acting as a lawyer or pursuing litigation until November 4. And that argument is obviously wrong. Many North Carolinians predicted that the maps the General Assembly would enact would be unlawful. For example, as this Court well knows, one of the *Common Cause* Plaintiffs filed a lawsuit on October 29, 2021, whose basis was that the General Assembly was likely to enact unlawful maps. *See generally NAACP v. Berger*, No. 21-CVS-014476 (suit filed Oct. 29, 2021). It is hardly surprising that those plaintiffs were not alone in anticipating that the General Assembly's maps would be unlawful. Indeed, here Mr. Hirsch was retained to potentially challenge the General Assembly's maps before November 4—although it was only after November 4 that the maps that became the

NCLCV demonstrative maps were produced. Mr. Hirsch's work concerning these maps thus falls within the heartland of the work-product doctrine and the attorney-client privilege.[2]

Third, the NCLCV Plaintiffs have not waived any privilege simply by offering their maps in this litigation. No one would contend, for example, that a party who offers a damages remedy in litigation has waived the attorney-client privilege as to communications with counsel in creating that remedy. Or that counsel could be deposed about her thought process in crafting the proposed damages remedy. Indeed, the Legislative Defendants fundamentally misunderstand waiver doctrine. They argue that disclosure of the NCLCV Demonstrative waives the protections and privileges to all communications relating to the maps. That is wrong. The Legislative Defendants' waiver arguments relate to disclosure of privileged ***communications***. Mot. 10. The NCLCV Demonstrative Maps are not themselves privileged; they were prepared for use in this litigation. The underlying privileged communications and work product, however, ***have not*** been disclosed. Where the substance of an attorney-client communication has not been disclosed, there is no waiver. *See Roth v. Aon Corp.*, 254 F.R.D. 538, 541 (N.D. Ill. 2009) (Draft Form 10K sent to in-house counsel for legal advice was privileged even though the intention was to file the final Form 10K with the SEC; "Most courts have found that even when a final product is disclosed to the public, the underlying privilege attached to drafts of the final work product remains intact.").

Moreover, the Legislative Defendants also fail to address the separate and distinct protection that the work-product doctrine provides. When ***work product*** is disclosed in litigation, there is no subject-matter waiver; instead, the scope of waiver is limited to the work product actually disclosed and does not result in subject-matter waiver. *Pittman v. Frazer*, 129 F.3d 983,

[2] The NCLCV Plaintiffs stand ready to verify the facts stated in this motion via affidavit, which they have not submitted with this response simply because of the extraordinarily expedited schedule applicable here.

988 (8th Cir. 1997) (disclosure of documents to adversary generally waives work product only as to the documents disclosed); *Duplan Corp. v. Deering Milliken, Inc.*, 5409 F.2d 1215, 1222-23 (4th Cir. 1976) ("Broad concepts of subject matter waiver . . . are inappropriate when applied to Rule 26(b)(3).")

Finally, the Legislative Defendants ignore entirely the guiding principle that North Carolina courts "tread[] cautiously in the area of implied waiver," which "should not be applied cavalierly." *Ford v. Jurgens*, No. 20 CVS 4896, 2021 WL 4595673, at *6 (N.C. Super. Oct. 5, 2021). Even when—unlike here—a waiver has occurred, courts narrowly construe any waiver so that the "result is remedial, rather than punitive" so as to avoid one side receiving an "unfair advantage." *Id.* Here, far from suffering any unfairness, the Legislative Defendants have already received voluminous discovery concerning the NCLCV Demonstrative Maps, and they have passed up chances to seek additional information via interrogatories. Instead, they seek Mr. Hirsch's deposition and testimony to harass their adversary's litigation counsel on eve of trial. No principle of fairness supports the tactics they employ here.

Indeed, notwithstanding the Legislative Defendants' repeated attempts to confuse the issue, the NCLCV Plaintiffs were clear in their Verified Complaint about how they intended to use their Demonstrative Maps: They asked the Court to look to the "results" of those maps. Verified Compl. ¶ 7. And they explained that those results would show that it was possible to "avoid the partisan gerrymandering and racial vote dilution that mark the Enacted Plans, while also improving on the Enacted Plans' compliance with the laws and legitimate policies governing redistricting in North Carolina." *Id.* Nothing about that use of the maps waived attorney-client privilege or work-product protections, particularly given the stringent standard North Carolina courts apply to claims of implied waiver.

Finally, contrary to what Legislative Defendants claim, there is no "interests of justice" exception that overrides the attorney-client privilege. Defendants cite *Mims v. Wright,* 157 N.C. App. 139, 578 S.E.2d 606, 609 (2003), for the proposition that the interests of justice can sometimes outweigh a privilege. But as the court in *Mims* explained, the statute creating the physician-patient privilege expressly provides that this privilege is qualified and may be overridden by the interests of justice. In contrast, the attorney-client privilege established at the common law is absolute unless waived. *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981) (where the attorney-client privilege is established, communications "are privileged and may not be disclosed"). In any event, there is nothing here about the "interests of justice" that should require an attorney to testify about his own thought processes, mental impressions, and advice he provided to clients in connection with the NCLCV Demonstrative Maps.

CONCLUSION

For the foregoing reasons, the Court should deny the Legislative Defendants' motion for clarification or to compel, deny the Legislative Defendants' request to disqualify Mr. Hirsch from serving as NCLCV Plaintiffs' counsel at trial, 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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This 29th day of December, 2021.

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