STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 015426
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al., REBECCA HARPER, et al., Plaintiffs, vs. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants.	*Consolidated with* 21 CVS 500085

LEGISLATIVE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' JOINT MOTION FOR DISCOVERY SANCTIONS

NOW COME President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Ralph E. Hise, Senator Paul Newton, Speaker Timothy K. Moore, and Representative Destin Hall (collectively, "Legislative Defendants"), by and through undersigned counsel, and hereby respond in opposition to *Common Cause* and *Harper* Plaintiffs' Joint Motion for Discovery Sanctions ("Joint Motion") as follows:

INTRODUCTION

Plaintiffs, without conferring with Legislative Defendants seek drastic and unwarranted relief on a premature record and through misrepresenting the record evidence. Plaintiffs are not entitled to redefine the burden of proof and establish findings of fact regarding legislative intent across multiple Committees and multiple Enacted Plans on the possibility of a negative inference. Even where applicable, North Carolina law at best permits a negative inference for spoliation of

evidence that a factfinder can accept or reject. Plaintiffs' request, on the other hand, asks the Court to shift the burden of proof at trial, prevent evidence from being introduced, and conclusively establish certain facts before the Court weighs anything. While couched as a discovery motion, this motion is more focused on trial evidence and should be heard at trial. Legislative Defendants respectfully request to be heard on this issue at trial and that the Court defer its consideration of the motion until then.

BACKGROUND

Common Cause and *Harper* Plaintiffs' Joint Motion distorts the factual and procedural history underlying Plaintiffs' push for extreme and unwarranted relief from this Court.

Legislative Defendants were served with the interrogatories and requests for production underlying this Motion on December 21, 2021. Legislative Defendants never refused to respond, as Plaintiffs now allege. Rather, Legislative Defendants merely stated that they had no obligation under North Carolina law or order of this Court to respond within two days, which was the timeline demanded by *Harper* Plaintiffs, given their failure to seek leave of the court for an expedited response deadline under the N.C. Rules of Civil Procedure. *Harper* Plaintiffs filed a Motion to Compel.

On December 27, 2021, the Court, *on its own motion*, ordered Legislative Defendants to respond to *Harper* Plaintiffs' discovery requests by 9:00 a.m. the following morning. Immediately following issuance of the Court's Order, Legislative Defendants began, consistent with their good faith understanding of the Order, to provide as complete of a response to *Harper* Plaintiffs' discovery requests as possible within the approximately 15 hours they had to do so. Notably, contrary to *Harper* Plaintiffs' repeated suggestions that Legislative Defendants withheld information, this new, Court-issued deadline was the first time in the litigation that Legislative

Defendants had any obligation to *Harper* Plaintiffs to respond to discovery requests regarding concept maps.[1]

Consistent with his deposition testimony, at the time of the Court's Order, Representative Hall had no personal or actual knowledge about the status or location of the concept maps beyond what he had testified about in his deposition. Thus, Representative Hall promptly called Mr. Reel to inquire about the concept maps following the Court's Order. As Plaintiffs concede in their Motion, Dylan Reel is no longer an employee of the North Carolina General Assembly, or even of the State of North Carolina. Accordingly, Legislative Defendants had no authority to demand his response to questions or (assuming the time to do so) to perform forensic discovery on his personal smartphone or other computing devices. On the call, Mr. Reel stated that he had not saved the concept maps that he had created and that that they were lost and no longer existed. Accordingly, Legislative Defendants included a statement in their supplemental discovery responses reflecting Mr. Reel's representation about the current status of the concept maps, namely, that Representative Hall "called Dylan Reel and Mr. Reel stated that the concept maps that were created were not saved, and currently lost and no longer exist."

Legislative Defendants served their discovery responses by 9:00 a.m. on Thursday, December 30, 2021. All that day, and all the next morning, the last two days of discovery, Plaintiffs made no attempt to approach counsel about any perceived deficiencies, no effort to ask the questions now raised for the first time in their Motion at pages 6-7, and no known effort to subpoena, or otherwise contact, Mr. Reel said about the concept maps—nothing. Rather than attempt to resolve or narrow the dispute, *Harper* Plaintiffs spent their time drafting a hyperbolic and extraordinary motion fit for the press. Wholly failing to acknowledge the extreme time and

[1] Under the N.C. Rules of Civil Procedure, without an order expediting discovery, Legislative Defendants' response to the Harper Plaintiffs' requests was due by January 20, 2022. N.C. R. Civ. P. 33(a).

resource constraints facing the parties, Plaintiffs waited to file this extraordinary motion amidst numerous other pre-trial filing obligations on a state holiday.

That said, Plaintiffs' Joint Motion is generally correct on one thing: the very limited extent of Representative Hall's reliance on the concept maps at issue in its Motion. Representative Hall testified that he may have somewhat relied on concept maps for possibly only five county clusters. Rough Transcript of Rep. Hall Deposition ("Rep. Hall Tr.") at 125:1-129:21.

ARGUMENT

I. Legislative Defendants complied with the Court's December 29, 2021 Order.

This Court's December 29, 2021 Order ("December 29 Order") required Representative Hall to "request and obtain the information, documents, and data from his former staffer on demand." In compliance with the December 29 Order, Representative Hall called Mr. Reel immediately to request production of the concept maps. Mr. Reel represented to Representative Hall that "that the concept maps that were created were not saved, are currently lost and no longer exist." *See* Joint Motion, Ex. A at 4. The December 29 Order did not require Representative Hall to cross-examine Mr. Reel, especially with regards to his personal smartphone that was not provided or paid for by the General Assembly. *Cf.* Joint Motion, p 6–7.

Upon learning this information, Legislative Defendants served supplemental discovery responses, as ordered by the court, reflecting the same. *See id.* Legislative Defendants also timely produced many documents, beyond what is already in the public record, on December 30, 2020 with less than a 24-hour turn-around time. This included electronic copies of almost the entirety of the documents relevant to the enactment of the 2021 Plans maintained on the General Assembly's website, the Maptitude files created on the public terminals while the House and Senate Redistricting committees were engaged in drawing plans following the return of the federal

decennial Census in House Room 643 and Senate Room 544, and reports containing the public comments submitted to the General Assembly through its online portal.

Plaintiffs argue that Legislative Defendants failed to comply with the third paragraph of the December 29 Order, requiring "Legislative Defendants [to] identify the lost or destroyed material with specificity." However, as previously stated in Legislative Defendants' original interrogatory responses, Legislative Defendants are not in possession of the "concept maps." The best description of the "concept maps" that Legislative Defendants could provide is the deposition testimony of Representative Hall—which was under oath and provided for over an hour of testimony as to the concept maps. See, e.g., Hall Tr. 116:15-159:6. Representative Hall did not copy the maps and only referred to them to consider options for how to draw complicated areas of the map in the compressed timeframe.[2] Further, Representative Hall is the *only* Legislative Defendant to look at the "concept maps." Legislative Defendants complied with the December 29 Order, especially to the extent possible under the expedited case schedule. For these and the reasons set forth below, sanctions are unwarranted under Rule 37(b)(2) of the North Carolina Rules of Civil Procedure.

II. Legislative Defendants did not engage in spoliation.

[2] Hall Tr. 116:15-23; 120:22-122:3; 122:14-123:15 ("Well, I think generally, but I, you know, what I did was essentially, you know, we would have, I would talk to staff about, you know, whatever grouping we were going to work on and, you know, if it was one that was going to be difficult or, you know, we were just running out of time, they would maybe work on, again, a concept, and but I, you know, it wasn't that I, you know, went in and just simply copied, you know, whatever could be September they had. You know, I just generally had in mind, you know, where the towns were and where the population might be in a given grouping, gave me some frame of reference to work off of and I, I think for anybody who's ever sat down and used the Maptitude software they'll understand that it is really difficult to go in in some of these groupings and just sit down and just draw from scratch without any sort of plan in place, and what can happen is you can easily sort of just get the map get the districts so jumbled up that they're not exact they're splitting municipalities and, you know, you're trying to obviously create the ideal population size. So it is a, it's a time-consuming process and especially when you're wanting to do it right and follow the criteria that we put forth."); 148:11-18 ("it wasn't something that I was going to go in and copy. It was just a general idea of what districts may look like.").

To establish a prima facie case of spoliation, a party must show that the spoliator (1) intentionally destroyed or failed to preserve; (2) potentially relevant materials; (3) while aware of the possibility of future litigation. *Arndt v. First Union Nat'l Bank*, 170, N.C. App. 518, 528, 613 S.E.2d 274, 281 (2005). An independent state law ground for preservation is not an element of the spoliation standard.[3]

Plaintiffs attempt to argue that litigation is always anticipated in redistricting claims. Joint Motion, p 9. However, redistricting is not, without more, done in anticipation of litigation. *Baldus v. Brennan*, No. 11-CV-1011 JPS-DPW, 2011 WL 6385645, at *2 (E.D. Wis. Dec. 20, 2011). And on this record there is certainly no evidence that anyone, much less Representative Hall or any other Legislative Defendants, intentionally destroyed or knowingly failed to preserve potentially relevant materials.

III. Even if there was a loss, Plaintiffs were not prejudiced and an adverse inference is not warranted.

Whether or not to impose sanctions for party discovery is within the discretion of the factfinder. *See McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 185, 527 S.E.2d 712, 716 (2000) "[B]efore the Court sanctions a party for discovery abuses related to ESI, it should consider the severity of the discovery abuse or failure and the prejudice, if any, suffered by the requesting party." *Tumlin v. Tuggle Duggins P.A.*, 2018 NCBC 49, 2018 WL 2327022, at *11 (N.C. Super. Ct. 2018). The "adverse interest" sanction applies "when the spoliator was on notice of the claim or potential claim at the time of destruction." *McLain*, 137 N.C. App. at 187, 527 S.E.2d 712. The burden is on Plaintiffs to show that Legislative Defendants were on notice of the claim at the time

[3] To the extent that Plaintiffs allege violations of N.C.G.S. 132-2, there is not enough information in the record for the Court to conclude that the concept maps were a public record. If as Plaintiffs suggest the maps were never saved then it is not clear they would have "become public records upon the act establishing the relevant district plan becoming law." N.C.G.S. § 120-133. And other than the fact that Mr. Reel told Rep. Hall the maps were not saved and don't exist, there is literally no evidence in the record as to what in fact happened to the maps.

the documents were destroyed. In North Carolina, "in order to qualify for the adverse inference, the party requesting it must ordinarily show that the 'spoliator was on notice of the claim or potential claim at the time of the destruction.'" *McLain*, 137 N.C. App. at 187, 527 S.E.2d 712. *See also Raleigh Radiology LLC v. N.C. Dep't of Health and Human Servs.*, 266 N.C. App. 504, 511, 833 S.E.2d 15 (2019).

No Legislative Defendant instructed Mr. Reel to destroy any public record. Further, Plaintiffs have ample testimony from Mr. Hall related to the concept maps, and could have sought information for the concept maps elsewhere or for any information about the concept maps that they think they lack.

IV. An adverse interest would, at best, affect five North Carolina House groupings.

When applicable, "spoliation of evidence gives rise to an inference as opposed to a presumption." *McLain*, 137 N.C. App. at 188, 527 S.E.2d 712. As such, the adverse interest test "does not take the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced." *Id.* Even if an adverse inference were appropriate, it would only apply to the House map and only for the groupings where Representative Hall testified that the concept maps may have been prepared. The Senate enacted map and what became the congressional map was drawn entirely separate from the House enacted map. It was drawn in a different legislative committee with different rules and procedures, in a different committee room, on different public terminals, on different days of the week and different times of the day. The Senate plan and the congressional plan were first presented to the Senate committee and first passed on the Senate floor before they were sent to the House for a vote. Under no circumstance does not the record developed by Plaintiffs warrant that such sanction against a

different plan. They have offered nothing to suggest it should, and evidence in the record expressly undermines that position. *See, e.g.*, Hise Depo. pp. 118:20 – 119:7 (Q: "Okay. Are you aware that Representative Hall and his staff were considering concept maps or template maps in drawing the House map, the State House map?" A: "I was not aware of that until someone told me that there's a consideration of that yesterday." Q: "Okay. Did you ever discuss concept maps or anything like that with Representative Hall?" A: "No." Q: "And you were not aware of any concept maps that were used by you or your staff during this entire process?" A: "That is correct.").

CONCLUSION

WHEREFORE, for the reason set forth above, Legislative Defendants respectfully request this court deny Plaintiffs' Joint Motion for Sanctions. Alternatively, Legislative Defendants request that the Court defer ruling on the motion until it can be heard at trial.

Respectfully submitted, this the 31st day of December, 2021.

/s/ Phillip J. Strach

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