IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-cv-00399

SANDRA LITTLE COVINGTON, *et al*., Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al*., Defendants.	**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO ENFORCE SCHEDULING ORDER**

NOW COME Plaintiffs by and through their undersigned counsel, and pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure and Local Rules 7.2 and 16.2, submit this memorandum in support of their Motion to Enforce Scheduling Order.

NATURE OF THE MATTER

Defendants have ignored the requirements of the Federal Rules of Civil Procedure and the scheduling order entered by the Court in this case. Defendants served deposition subpoenas for two expert witnesses, Dr. Stephen Ansolabehere and Dr. Barry Burden: experts who were neither disclosed by Defendants under Rule 26 and experts who have not been retained by Defendants. Plaintiffs bring this motion to bar Defendants from taking two expert depositions by enforcing the existing scheduling order.

A "'scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Halpern v. Wake Forest Univ. Health Sciences*, 268 F.R.D. 264, 274, 2010 U.S. Dist. LEXIS 65386, *35 (M.D.N.C. 2010) (quoting *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987)). Defendants cannot

obtain expert testimony by experts who were not retained in this case nor timely disclosed to Plaintiffs, and this Court should bar their attempts to do so.

STATEMENT OF FACTS

In this action, Plaintiffs have challenged as unconstitutional racial gerrymanders a number of State Senate and House districts enacted by the North Carolina General Assembly in 2011. Following the decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (Mar. 25, 2015), Plaintiffs filed suit on May 19, 2015. (D.E. # 1). This Court entered a scheduling order on October 9, 2015, which established discovery and motion deadlines and set a trial date for April 11, 2016. (D.E. # 25). On October 7, 2015, Plaintiffs moved for a preliminary injunction to enjoin elections under the challenged districts. That motion was denied on November 25, 2015. (D.E. # 39).

The scheduling order established November 30, 2015 as the deadline for Defendants to disclose all expert reports. (D.E. # 25). Discovery closes on February 11, 2016. (D.E. # 25).

On November 30, Defendants disclosed the following experts: Thomas Hofeller, Trey Hood, and Sean Trende. Dr. Stephen Ansolabehere and Dr. Barry Burden were not mentioned or listed. Plaintiffs never received expert reports from Dr. Ansolabehere or Dr. Burden. To Plaintiffs' knowledge, these experts have not been retained or compensated by Defendants in this case.

Two weeks after their disclosure deadline, Defendants' counsel notified Plaintiffs on December 16, 2015 that Defendants intended to introduce a portion of the expert

testimony of Dr. Ansolabehere from the *Harris v. McCrory* case, 1:13-cv-949 (M.D.N.C.). Plaintiffs' counsel responded that they would oppose such an effort. *See* Exhibit A.[1] In response, Defendants' counsel stated they would be noticing Dr. Ansolabehere and Dr. Barry Burden for depositions.[2] Plaintiffs' counsel told Defendants' counsel that any depositions would be opposed as neither expert had been designated in this case, to which Defendants' counsel responded, "[y]ou can hereby consider our designations as amended."

On January 6, 2016, Defendants' counsel served on Plaintiffs' counsel deposition notices and subpoenas to Dr. Stephen Ansolabehere and Dr. Barry Burden. *See* Exhibit B. The notices and subpoenas were not served on Dr. Burden until January 13, 2016, and, to the best knowledge of Plaintiffs' counsel, have not yet been served on Dr. Ansolabehere. The depositions are scheduled for February 11, 2016 for Dr. Burden in Milwaukee, Wisconsin and February 18, 2016 for Dr. Ansolabehere in Boston, Massachusetts.

[1] Defendants attempted to introduce a portion of Dr. Burden's report in the *Harris* case, which the plaintiffs in that case opposed for similar reasons as this motion. That court took the dispute under advisement, and has not yet ruled.

[2] Dr. Burden served as an expert for one set of plaintiffs in a voting rights case in the Middle District, *North Carolina State Conference of the NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C.).

ARGUMENT

I. DEFENDANTS FAILED TO TIMELY DISCLOSE DR. ANSOLABEHERE AND DR. BURDEN AS EXPERTS AND ARE NOT ENTITLED TO RELY ON THEIR OPINIONS

Rule 26(a)(2) requires a party to disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. The disclosure must be accompanied by a written report if the "witness is one retained or specially employed to provide expert testimony in the case." If the witness is not one required to provide a report, the party must still disclose the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which the witness is expected to testify. Rule 26(a)(2)(D) requires a party to "make these disclosures at the time and in the sequence that the court orders." This Court's Scheduling Order established a deadline of November 30, 2015 for Defendants to disclose all expert reports. (D.E. # 25). Plaintiffs are prejudiced by Defendants' failure to timely disclose experts. *See Saudi v. Northrop Grumman Corp*., 427 F.3d 271, 278-79 (4th Cir. 2005) ("Rule 26 disclosures are often the centerpiece of discovery in litigation that uses expert witnesses. A party that fails to provide these disclosures unfairly inhibits its opponent's ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court's management of the case.").

Defendants did not timely identify Dr. Ansolabehere or Dr. Burden in their expert disclosures on November 30. Under Rule 37, Defendants are not entitled to rely upon the opinions of Dr. Ansolabehere and Dr. Burden. Rule 37(c) states that if "a party fails to

provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." The court may also order additional sanctions, such as the payment of reasonable expenses caused by the failure, informing the jury of the party's failure, and any other appropriate sanctions, including those listed in Rule 37(b)(2)(A)(i)-(vi). Finally, though Rule 37(c)(1) authorizes other sanctions "in addition to or instead of" excluding undisclosed witnesses, the rule itself nevertheless is self-executing and requires the exclusion of Rule 26 information that is not timely disclosed, unless the failure to disclose is either substantially justified or is harmless. As the Fourth Circuit has noted, "[t]he federal rules impose an 'automatic sanction' of exclusion of a party's expert witness for failure to adhere to the requirements set forth in Rule 26(a)." *Sss Enters. v. Nova Petroleum Realty, LLC*, 533 Fed. Appx. 321, 324 (4th Cir. 2013). The failure to disclose here is neither justified nor harmless.

Defendants' failure to identify Drs. Burden and Ansolabehere by the deadline in the scheduling order is not substantially justified. The Fourth Circuit, in considering whether to permit the testimony of an expert following a party's untimely disclosure, considers five factors: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence, and (5) the non-

disclosing party's explanation for its failure to disclose the evidence. *Southern States Rack and Fixture, Inc. v. Sherwin Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003).

The decision is within the discretion of the trial court. *See Wilkins v. Montgomery,* 751 F.3rd 214, 220 (4th Cir. 2014) ("We review the district court's exclusion of a plaintiff's expert witness … for abuse of discretion."). Moreover, the party seeking to offer the late-disclosed testimony bears the burden of proving that their failure to abide by the scheduling order was justified and harmless. "Under Rule 37(c)(1), the plaintiffs had the burden of justifying their noncompliance by showing that it 'was either substantially justified or harmless.'" *Sss Enters. v. Nova Petroleum Realty, LLC*, 533 Fed. Appx. 321, 324 (4th Cir. Va. 2013) (citing *Carr v. Deeds*, 453 F.3d 593, 602 (4th Cir. 2006)).

The opinion testimony that Defendants apparently seek to elicit was known to Defendants well in advance of the November 30 deadline, as subject matter sought from Dr. Burden, according to the deposition notice, relates to his work in *NC NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C.), the trial which ended in July of 2015. Nor is the failure to disclose harmless, because the addition of two expert witnesses would require substantial time and expense from Plaintiffs, well after expert disclosure deadlines, to ensure that such new testimony was reviewed by and responded to by Plaintiffs' experts. Finally, under the Fourth Circuit's rubric for determining whether to exclude untimely expert testimony, this expert testimony is not important. First, it is redundant to expert testimony that Defendants did timely disclose on racially polarized voting and

compactness. Second, and equally important, whatever their testimony, that information was not available to the North Carolina General Assembly before they enacted the 2011 redistricting plan at issue in this case. Thus, the testimony is irrelevant to prove any disputed issue of fact regarding whether the challenged districts are narrowly tailored to a compelling government interest. *See Shaw v. Hunt,* 517 U.S. 899, 910 (1996) (where expert reports were not before the legislature when it enacted the redistricting plan, they cannot demonstrate that legislature had a compelling interest to take race into account).

Finally, the failure to disclose is not harmless. The Defendants are taking the Plaintiffs on a tour of expert opinions around the country, wasting their valuable discovery and pre-trial preparation time, for evidence that is not relevant to any disputed issue of fact in this case. Plaintiffs are prejudiced in their ability to prepare their case by having to attend, and pay the transcript costs for, needless depositions conducted in Milwaukee, Wisconsin and in Boston, Massachusetts. There is indeed harm to the Plaintiffs from this late disclosure of irrelevant expert testimony.

This Court should exclude the testimony of and prevent the depositions of Drs. Burden and Ansolabehere. Numerous courts in analogous situations have enforced the automatic exclusion provision of the Rules of Civil Procedure and excluded expert testimony not disclosed in accordance with the court's scheduling order. *See, e.g., Wilkins v. Montgomery,* 751 F.3d at 221 (no abuse of discretion for trial court to exclude expert testimony disclosed after the deadline in scheduling order); *Sss Enters. v. Nova Petroleum Realty, LLC,* 533 Fed. Appx. at 321 (trial court properly excluded testimony of

plaintiffs' expert witness who was not disclosed by deadline in scheduling order even where result was dismissal of the case). *See also Flatiron-Lane v. Case Atl. Co.*, No. 1:12-cv-1234, 2015 U.S. Dist. LEXIS 102539, at *69-70 (M.D.N.C. Aug. 4, 2015) (excluding expert from testifying because the opposing party had no knowledge expert would express an expert opinion and there was no showing it could have cured the surprise); *Buckman v. Bombardier Corp.*, 893 F. Supp. 547 (E.D.N.C. 1995) (excluding experts from testifying at trial where they were not designated and had no personal knowledge of the matter); *Port Terminal & Warehousing Co. v. John S. James Co.*, 695 F.2d 1328 (11th Cir. 1983) (no abuse of discretion where district court excluded an expert on the basis that "firm deadlines for discovery are more than helpful to the Court in promoting the just and efficient administration of justice, they are essential").

Furthermore, Defendants may not rely on the testimony of Dr. Burden or Dr. Ansolabehere as lay witnesses. It is undisputed that neither was involved in the 2011 redistricting process in North Carolina. Neither has personal knowledge of the actions at the center of this litigation—the 2011 redistricting process—and thus may not give opinion testimony beyond their personal knowledge. It is clear from the subpoenas that Defendants are seeking to elicit opinion testimony and may not do so under F.R.E. 701. Accordingly, these witnesses should be excluded from testifying and relieved from appearing at depositions for a case they presumably know nothing about.

II. THIS COURT MAY, UNDER ITS EQUITABLE POWERS, ENFORCE THE SCHEDULING ORDER AND QUASH THE SUBPOENAS, ESPECIALLY IN LIGHT OF THE UNRETAINED EXPERTS' LIKELIHOOD OF SUCCESS IN QUASHING THE SUBPOENA THEMSELVES

Although Plaintiffs may not have standing under F.R.C.P. 45 to move to quash the subpoenas, equitable concerns relating to the burden such subpoenas create on these unretained experts further suggest the scheduling order should be enforced and these unretained experts should not be compelled to sit for deposition when their expert testimony was not timely disclosed. This Court has the authority to act, regardless of Plaintiffs' standing with respect to third-party discovery requests, to issue an order enforcing the scheduling order and preventing discovery that violates the scheduling order. *See Dedmon v. Cont'l Airlines, Inc.*, No. 13-cv-0005, 2015 U.S. Dist. LEXIS 48807 (D. Colo. April 14, 2015) (granting motion to enforce scheduling order and quashing untimely subpoena because of the court's inherent power regardless of the moving party's standing to challenge a third-party subpoena); *Assoc. Elec. & Gas Ins. Servs. v. Nat'l Union Fire Ins. Co.*, No. 2:11-cv-368, 2014 U.S. Dist. LEXIS 10574 (D. Utah Jan. 28, 2014) (granting motion to enforce scheduling order and for a protective order under Fed. R. Civ. P. 16(f)(1)(C)); *Bare v. Brand Energy & Infrastructure Servs.*, No. 2:09-cv-807-DB-BCW, 2012 U.S. Dist. LEXIS 153881, at *3 (D. Utah Oct. 25, 2012) (unpublished) (reasoning that a court could "issue just orders if a party fail[ed] to obey a scheduling order," such as where a party issued a third-party subpoena after the fact discovery deadline); *Scherer v. GE Capital Corp.*, 185 F.R.D. 351, 352 (D. Kan.

1999) (ordering "that discovery by [] subpoenas served upon [] three non-parties not be had" where the plaintiff served such subpoenas after the discovery deadline).

The unretained experts in this case, upon information and belief, do not desire to be involved in this litigation. Defendants' attempt to depose them, despite their failure to disclose them as expert witnesses or retain them, will require these professors to retain private counsel to resist the improper subpoenas, at an enormous financial and time burden to themselves. Indeed, should Dr. Burden and Dr. Ansolabehere assume the cost of retaining private counsel to resist the subpoenas, they are likely to succeed in having the subpoenas quashed. This further weighs in favor of the Court granting Plaintiffs' motion.

Rule 45 of the Federal Rules of Civil Procedure provides that in order to protect a person subjected to a subpoena, a court may quash or modify a subpoena if it requires "disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party. F.R.C.P. 45(d)(3)(B)(ii). In notes to the 1991 Amendment, the advisory committee explained the need for the abovementioned provision, stating:

> A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts…The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required [under (d)(3)(C)].

F.R.C.P. 37, 1991 Amendment Advisory Committee Notes.

When considering the merits of a motion to quash or modify a subpoena of an unretained expert, a court may consider:

> [T]he degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference tween testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; the degree to which the witness is able to show that he has been oppressed by having continually to testify; and, undoubtedly, many others.

Chavez ex rel. Chavez v. Bd. of Educ. Of Tularosa Mun. Sch., No. 05-380 2007 WL 1306734, at *4 (D.N.M. 2007) (*citing Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976) (granting a motion to quash a deposition notice after noting that the noticing party had not shown that the putative expert witness was a unique witness or that no comparable witness would willingly testify).

The information sought by Defendants—in Dr. Burden's case, whether racially polarized voting was present as it relates to the Senate Factor inquiry in a vote denial case, *NC NAACP v. McCrory*, not whether it was legally sufficient to warrant the construction of majority black districts across the state of North Carolina—and in Dr. Ansolabehere's case, the compactness of two particular challenged congressional districts in the *Harris* case—"does not describe specific occurrences in dispute" and is not the result of research undertaken at the request of a party to the litigation. *See* F.R.C.P. 45(d)(3)(B)(ii). Neither unretained expert's testimony would relate to the 2011

redistricting of the North Carolina State House or State Senate. Neither unretained expert's testimony was the result of research undertaken at the request of a party to this litigation. As such, it is the burden of the party issuing the subpoena to establish (1) a substantial need; (2) the requested material's unavailability from other sources without undue hardship; and (3) that the expert would be reasonably compensated for responding to the subpoena. *See* F.R.C.P. 45(d)(3)(C)(i-ii).

All of the factors necessary to quash the subpoena are present here, and Defendants have not made the requisite showing for modification of the subpoena. Because of this, the Court should enforce the scheduling order and direct that Defendants may not conduct the noticed depositions.

Respectfully submitted, this the 27th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing Plaintiffs' Brief in Support of Motion to Enforce Scheduling Order, with service to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 27th day of January, 2016.

/s/ *Edwin M. Speas, Jr.*
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