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.	)	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO DEPOSE COUNSEL FOR PLAINTIFFS**

Defendants submit this Memorandum of Law in support of their Motion for Leave to Depose Counsel for Plaintiffs. In support of their Motion, Defendants show the Court as follows.

INTRODUCTION

Four essentially identical lawsuits have been filed against the State of North Carolina challenging redistricting plans enacted by the North Carolina General Assembly in 2011. These cases include: (1) *Dickson v. Rucho,* No. 11-CVS-16896 (Wake County Superior Court); (2) *NC NAACP v. State of North Carolina,* No. 11-CVS-16940 (Wake County Superior Court); (3) *Harris v. McCrory,* No. 1:13-CV-949 (M.D.N.C.); and (4) *Covington v. The State of North Carolina,* No. 1:15-CV-00399 (M.D.N.C.). The two federal cases were filed only after the plaintiffs in the state cases lost their cases at the North Carolina Superior Court level.

The plaintiffs in *Dickson* and *Harris,* like the Plaintiffs in the instant case, were represented by the law firm of Poyner and Spruill, LLP. The plaintiffs in *NC NAACP*

were represented by the Southern Coalition for Justice ("SCSJ") who is also representing the Plaintiffs in the instant case. Like the present litigation, the *Dickson*, *NC NAACP*, and *Harris* cases challenged as alleged racial gerrymanders nearly identical congressional and legislative districts. *Dickson* and *NC NAACP* were consolidated for trial (the "consolidated state cases" or "*Dickson*") and judgment was entered, and ultimately affirmed on appeal, on all claims for Defendants. Defendants in this case seek discovery on who paid fees charged by Poyner and Spruill and the SCSJ in the instant case and in the previous redistricting cases where they were counsel of record for the plaintiffs. (*See* Exhibit 1, Plaintiffs' First Supplemental Responses to Defendants' First Set of Interrogatories)

Defendants seek such information to determine the extent of any privity between the plaintiffs in the state court cases and the plaintiffs in the subsequent federal cases in support of their defense that the instant Plaintiffs' claims are barred by the doctrines of *res judicata* and collateral estoppel. (*See* D.E. 14, Defendants' Answer, Second and Third Defenses); *see also Ashton v. City of Concord*, 337 F. Supp. 2d 735, 741 (M.D.N.C. 2004) ("Under North Carolina law, a previous judgment will preclude a subsequent action if the first decision was a final judgment on the merits, involving the same parties or parties in privity with them, and the same cause of action"). However, Plaintiffs have refused to answer interrogatories seeking this information and they have failed to identify any party which can provide the requested information at a deposition. (*See* Exhibit 1)

Having exhausted traditional discovery methods and seeking the information from other sources, Defendants respectfully seek leave from the Court to depose Plaintiffs'

counsel on the narrow issues of who financed and controlled the litigation in *Dickson*, *Harris*, and in the present case. Permitting these depositions is the only way by which Defendants can obtain this information which is vital to their defense of this case. The people of the State of North Carolina and their elected representatives, and in fact any litigant, is entitled to know the identity of those who control a lawsuit that has been brought against them, especially where the litigant is forced to defend numerous lawsuits in succession over identical legal issues.

STATEMENT OF FACTS

The *Dickson* and *NC NAACP* cases both challenged several congressional districts enacted in 2011 (including the First and the Twelfth) as racial gerrymanders. These cases also challenged almost all of the legislative districts challenged in the instant case as racial gerrymanders. The *Dickson* and *NC NAACP* cases were later consolidated for trial. Judgment was entered on all claims for the defendants. Plaintiffs, represented by Poyner and Spruill and the SCSJ, appealed and the judgment was affirmed by the North Carolina Supreme Court. Plaintiffs filed a petition for *certiorari* with the United States Supreme Court. The United States Supreme Court granted *certiorari* and remanded the case for reconsideration by the North Carolina Supreme Court in light of its decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). Following a second oral argument, the North Carolina Supreme Court reaffirmed the judgment of the trial court for a second time. *Dickson v. Rucho*, ___ S.E. 2d ___, 2015 WL 9261836 (N.C. Dec. 18, 2015).

After the *Dickson* plaintiffs lost the state court case, two new plaintiffs represented by Poyner and Spruill filed the *Harris* case. There, plaintiffs−like the *Dickson* plaintiffs−challenged the First and Twelfth Congressional Districts as racial gerrymanders. Neither plaintiff in *Harris* had read the complaint before it was filed or was responsible for paying their own legal fees. (*See* D.E. 52-2 and 52-3, Deposition Excerpts of *Harris* plaintiffs Christine Bowser and David Harris). Both plaintiffs were solicited to be plaintiffs by affiliated organizations of the North Carolina Democratic Party. (*Id*.) This case was tried in October 2015 and on February 5, 2016 the court rendered its decision in favor of the *Harris* plaintiffs. *See Harris v. McCrory*, __ F. Supp. 3d __, 2016 WL 482052 (M.D.N.C. Feb. 5, 2016). Defendants have filed a notice of appeal of this decision.

Similarly, after definitively losing their claims related to legislative districts in the *Dickson* litigation, Poyner and Spruill and the SCSJ are counsel for the Plaintiffs in the instant litigation asserting nearly identical claims they unsuccessfully argued in the state court action. Based on the limited amount of discovery Defendants have been able to conduct on the privity issue in the instant case so far, it appears that like the *Harris* plaintiffs, the Covington Plaintiffs were recruited as plaintiffs, are not responsible for payment of legal fees, and largely had not read the claims in this action before they were filed. As a result, Defendants have sought additional discovery on whether privity exists between the present Plaintiffs and the *Dickson* and *Harris* plaintiffs and to determine whether the person, or entity, financing and controlling this litigation is the same person or entity financing and controlling the *Dickson* litigation. (*See* Exhibit 1)

To date, Plaintiffs have refused to answer interrogatories seeking this information and several Plaintiffs who have already been deposed have testified that they are not paying their own legal fees and that they have no knowledge regarding who in fact is paying for the litigation. (*See* Exhibit 1; *see also* Exhibits 2 & 3 Deposition Excerpts of *Covington* Plaintiffs Rosa Mustafa and Marshall Ansin) Defendants wrote a deficiency letter to Plaintiffs but did not receive any response related to their discovery on this point. (*See* Exhibit 4, 2/1/16 Deficiency Letter to Plaintiffs' Counsel) Defendants emailed Plaintiffs' counsel to advise them that they planned to file this Motion in order to obtain the sought after information. (*See* Exhibit 5, 2/9/16 E-mail Correspondence to Plaintiffs' Counsel) In the email, Defendants even suggested, that as an alternative to being deposed, Plaintiffs' counsel could simply identify a witness that could fully answer Defendants' questions. However, despite Defendants efforts to remedy the situation without the need for added litigation, Plaintiffs' counsel will not agree to be deposed nor will they identify a witness who can provide the same information. (*See* Exhibit 6, Plaintiffs' Counsel Responsive E-mail)

ARGUMENT

I. Defendants Are Entitled to Discover Information Relating to Potential Privity of Parties Between the Instant Plaintiffs and Plaintiffs in Prior Litigation Challenging North Carolina's 2011 Legislative Redistricting Plans.

Defendants are entitled to information related to possible privity between the instant Plaintiffs and plaintiffs in the previous redistricting law suits. If privity can be established, the Full Faith and Credit Clause requires this Court to apply *res judicata* and

give preclusive effect to the *Dickson* state court judgment. *See In re Genesys Data Tech., Inc.*, 204 F.3d 124, 129 (4th Cir. 2000).

Under the doctrines of *res judicata* and collateral estoppel, a final judgment on the merits in a prior action precludes the parties *or their privies* from relitigating issues that were, or could have been, raised in that action. *Lawson v. Toney*, 169 F. Supp.2d 456, 462 (M.D.N.C. 2001) (citing *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)) (emphasis added). The doctrines arose from the common law rule against claim splitting, which the North Carolina Supreme Court explained was "based on the principle that all damages incurred as the result of a single wrong must be recovered in one law suit." *Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993). This protects litigants from the burden of relitigating previously decided matters and promotes judicial economy by preventing repetitive litigation. *Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999).

The essential elements of *res judicata* "are: (1) a final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in both actions; and (3) an identity of parties or their *privies* in both actions." *Lawson*, 169 F. Supp. 2d at 462 (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 135, 337 S.E.2d 477, 482 (1985)). Privity can be established for a nonparty when the "nonpart[y] assume[s] control over litigation in which they have a direct financial interest and then seek to redetermine issues previously resolved." *Montana v. U.S.*, 440 U.S. 147, 154 (1979).

Here, based on the deposition testimony of Plaintiffs Rosa H. Mustafa and Marshall Ansin, it is clear that Plaintiffs' lawyers are directing this litigation and that

these individuals have been recruited by counsel, the North Carolina Democratic Party, or allied organizations to serve as nominal plaintiffs. Ms. Mustafa testified that she was "recruited" to the case by Doug Wilson, who was one of the *Dickson* plaintiffs and an employee of the Democratic Party. (*See* Exhibit 2, Excerpts of Deposition Testimony of Rosa Mustafa, pp. 20, 39) Specifically, Mr. Wilson asked her whether she "would be willing to participate" in a "court case that was coming up regarding" redistricting. (*Id.* at pp. 20, 25) Mr. Wilson did not even tell Ms. Mustafa what the goals of the lawsuit were or what they would specifically be challenging. (*Id*. at pp. 28, 32) Ms. Mustafa admitted that she had only seen the first five pages of Plaintiffs' 95 page complaint which was filed on her behalf. (*Id*. at pp. 45-46) Finally, she testified that she was not responsible for her legal fees and did not know who was responsible for their payment. (*Id.* at pp. 35-36)

Likewise, Mr. Ansin testified that the SCSJ called him directly and asked him to become involved in the lawsuit. (*See* Exhibit 3, Excerpts of Deposition Testimony of Marshall Ansin, pp. 11-12)[1] He testified that he never would have sued on his own, is only in this lawsuit because "he was asked," and had never seen the Complaint that was filed on his behalf. (*Id.* at pp. 12, 16, 17) Mr. Ansin, who is involved with Democrat Party organizations, specifically stated that it was his goal for the instant lawsuit to have redistricting done in a manner that did "not…enhance republican power." (*Id*. at pp. 15,

[1] Mr. Ansin testified that an individual named "Anita" called him on behalf of the SCSJ and asked him if he would want to participate.

20) Like Ms. Mustafa, he is also not responsible for paying his own attorneys' fees and has no knowledge regarding who is in fact financing his law suit. (*Id*. at pp. 24-26)[2]

This testimony, like the deposition testimony of the *Harris* plaintiffs, makes it very apparent that an unknown party or parties are the persons who have instigated, directed, financed, and are controlling the current litigation and the prior *Dickson* litigation. (*See* D.E. 52-2 and 52-3, Deposition Excerpts of *Harris* plaintiffs Christine Bowser and David Harris)

Courts have held that "literal privity" is not required in order for parties to a subsequent lawsuit to be precluded from relitigating issues that were adjudicated in a previous action. *See Alpert's Newspaper Delivery, Inc. v. N.Y. Times Co.*, 876 F.2d 266, 270 (2nd Cir. 1989). In *Alpert's*, the Court held that involvement of the same trade association−as the "admitted mastermind and financier" −behind two successive law suits brought by different individual members of the association precluded relitigation of previously litigated antitrust issues. *Id.* at 270. Thus, the presence of a common driving force behind multiple lawsuits, seeking to litigate the same issues, creates sufficient identity between the parties for *res judicata* and collateral estoppel to apply. *See Christopher D. Smithers Foundation v. St. Luke's-Roosevelt Hosp. Ctr.*, No. 00Civ.5502(WHP), 2003 WL 115234, at *3 (S.D.N.Y. Jan. 13, 2003); *Ellentuck v. Klein*, 570 F.2d 414, 425-26 (2nd Cir. 1978) (sufficient identity of parties for preclusion

[2] Defendants are in the process of deposing the remaining Plaintiffs and can advise the Court that their testimony is very similar to that given by Ms. Mustafa and Mr. Ansin, except, coincidentally, some of the Plaintiffs deposed after Ms. Mustafa and Mr. Ansin do not remember who recruited them to be Plaintiffs in this civil action.

purposes where both suits were funded by same property owners' association). This is particularly so in cases against the government, where if claim preclusion is not applied "broadly…governmental defendants could be subject to an overwhelming number of suits arising out of the same series of transactions." *Ruiz v. Comm'r of the Dep't of Transp. of the City of N.Y.*, 858 F.2d 898, 902 (2nd Cir. 1988) (sufficient identity of parties where two groups of truck drivers used same attorneys, made identical allegations, and revealed industry-wide strategy challenging a New York vehicle weight regulation in parallel state and federal lawsuits).

Here, Defendants seek to obtain reasonable, relevant information which they believe will show that, like in *Alpert's* and *Ellentuck*, a common force financing and controlling the *Dickson* litigation is financing and controlling the instant case such that Plaintiffs' claims are barred. North Carolina courts have previously shown that, with regard to *res judicata* and collateral estoppel, they are willing to "look beyond the nominal party whose name appears on the record as plaintiff [in determining whether privity between parties exists] to consider the legal questions raised as they may [reveal] the real party or parties in interest." *Whitacre P'Ship v. Biosignia, Inc.*, 358 N.C. 1, 36,-591 S.E.2d 870, 893 (2004); *see also Int'l Telephone and Telegraph Corp. v. Gen. Telephone and Electronics Corp.*, 380 F. Supp. 976, 981 (M.D.N.C. 1974) (discussing, without disagreeing, cases in which courts found privity was established and opined that giving every member of a trade association the right to challenge a court order "would cause an excessive waste of judicial time and could lead to inconsistent decisions").

Defendants are entitled to discovery of "*any* non-privileged matter that is relevant to any party's claim *or defense*." Fed. R. Civ. P. 26(b)(1) (emphasis added). Since information regarding who is controlling and financing both the current litigation and the *Dickson* litigation is relevant to Defendants *res judicata* defense, the information must be produced.

II. Defendants Should Be Allowed Leave to Depose Plaintiffs' Counsel.

Defendants asked Plaintiffs to provide a witness who could answer questions regarding how Plaintiffs were recruited to become Plaintiffs and who is financing the current litigation. (*See* Exhibits 1, 4, 5, & 6) Plaintiffs declined to identify any such witnesses or answer interrogatories relevant to those issues. Therefore, Defendants should be allowed to depose both Poyner and Spruill and the SCSJ because they are unable to obtain information they seek by any other means. Depositions of an opposing counsel are certainly not something that is prohibited. *See* Fed. R. Civ. P. 30(a) (a party may take the deposition of "*any* person") (emphasis added). Circumstances where such depositions are allowed are limited to situations where the party seeking to take the deposition "has shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (internal citations omitted); *see also N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83 (M.D.N.C. 1987); *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431 (M.D.N.C. 2001).

This Court itself has recognized that there "are very legitimate reasons for deposing a party's attorney," including the fact that the "attorney may be the person with the best information concerning nonprivileged matters…[like] the nature…of ***services he rendered and the fees and expenses incurred***." *N.F.A. Corp.*, 117 F.R.D. at 85 and n.2 (citing *Condon v. Petacque*, 90 F.R.D. 53 (N.D. Ill. 1981)) (emphasis added). In seeking to depose a party's attorney, the "movant must demonstrate that the deposition is the only practical means available of obtaining the information. If there are other persons available who have the information, they should be deposed first [and] other methods, such as written interrogatories…should be employed." *Id*. at 86.

Deposing Plaintiffs' counsel is the only way to obtain the requested information. In both *Harris*, and the instant case, Defendants deposed named plaintiffs regarding who is financing their litigation. (*See* D.E. 52-2 and 52-3; *see also* Exhibits 2 & 3) No plaintiff has had any knowledge regarding this subject matter. Defendants have even emailed Plaintiffs' counsel and requested that they identify any other individual who could answer Defendants' questions, but Plaintiffs' counsel has declined to do so. (*See* Exhibits 5 & 6) Likewise, Defendants, as instructed by the holding in *N.F.A Corp.*, served written interrogatories on this subject, but Plaintiffs' similarly refused to respond even after being sent a deficiency letter. (*See* Exhibits 1 & 4) Since there are no "other persons available who have the information," and because written interrogatories have been ignored, Defendants should be allowed to depose Plaintiffs' counsel on the narrow issues outlined herein. *N.F.A. Corp.*, 117 F.R.D. at 86.

To the extent that Plaintiffs argue that the limited information that Defendants seek on this subject matter is protected by the attorney-client privilege or the work product doctrine, that argument is specious. *See N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511 (M.D.N.C. 1986) (billing records and attorney hourly statements which do not reveal client communications are not privileged); *In re Special Grand Jury No. 81-1*, 676 F.2d 1005 (4th Cir. 1982), *vac. on other grounds*, (payment of fees and expenses generally is not privileged information because such payments ordinarily are not communications made for the purpose of obtaining legal advice).

In *Condon*, a case cited by this Court in *N.F.A. Corp.*, the court held that "neither the attorney-client privilege nor the work product doctrine…constitutes an absolute ban on all discovery sought from an attorney simply because of his professional status…" *Condon*, 90 F.R.D. at 54. The privileges do not "foreclose inquiry into the fact of representation itself…as long as the substance of the attorney-client relationship is shielded from disclosure." *Id*. Thus, the "structural framework" of the attorney-client relationship may be discovered. *Id*.; *see also Upjohn Co. v. U.S.*, 49 U.S. 383, 395-96 (1981) (The attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney").

The *Condon* defendants were attempting to discover records and documents related to when a plaintiff first contacted his attorney in an effort to develop a statute of limitations defense. *Condon*, 90 F.R.D. at 53. The court held that all the information

sought was "closer in kind to routine business records than to the traditional work product of attorneys" and was "properly discoverable upon defendants' showing that they ha[d] substantial need for the material in conjunction with the preparation of their defense and that they would…be unable to obtain the information by other means." *Id*. at 54-55.

This is not a case where the Plaintiffs called counsel seeking legal representation. Instead, the Plaintiffs were actively recruited to join the instant lawsuit. In this case, Defendants seek only information related to the *fact* of Plaintiffs' counsels' representation itself−specifically how Plaintiffs were recruited and who is financing and controlling the representation−not any information related to the *substance* of Plaintiffs' counsels' relationship with their clients or their litigation strategy. The discovery aimed at obtaining this information is exactly the type of "structural framework" information that the *Condon* court held, and this Court agreed, is not privileged and open to discovery. *N.F.A. Corp.*, 117 F.R.D. at 85 and n. 2. As such, the Court should allow Defendants leave to depose counsel for Plaintiffs.[3]

[3] Moreover, the attorney-client privilege only protects communications with *clients*. *U.S. v. Duke Energ. Corp.*, 208 F.R.D. 553, 556 (M.D.N.C. 2002) (citing *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998)). If the third-party financing and controlling the current litigation, and the *Dickson* litigation, is not a client of Poyner and Spruill or SCSJ the privilege would not apply to *any* communication they had with Plaintiffs' counsel, much less communications regarding financing of the redistricting lawsuits.

This the 10th day of February, 2016.

OGLETREE, DEAKINS, NASH
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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO DEPOSE COUNSEL FOR PLAINTIFFS** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 10th day of February, 2016.

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