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

Defendants submit this Reply in support of their Motion for Leave to Depose Counsel for Plaintiffs pursuant to Local Rule 7.2 and this Court's February 11, 2016 Order. (D.E. 61)

I. Despite Counsels' Claims to the Contrary, Plaintiffs' Deposition Testimony Does Not Support That They Direct and Control the Instant Litigation.

Plaintiffs' Counsel claim that the named Plaintiffs "control and direct the litigation, and [that] counsel's loyalties are only to them and not to third-party funders." (Pls. Br., D.E. 63, p. 2) This emphatic claim is not supported by Plaintiffs' deposition testimony. Specifically, the deposition transcripts that Defendants have received to date show that multiple Plaintiffs:

- **were recruited to participate in the litigation by Plaintiffs' Counsel, *Dickson* plaintiffs, or a combination of both** (*See e.g.* Ex. 1, Deposition Excerpts of Rosa Mustafa, 25:10-25:14, 25:17-26:11, 48:2-48:24; Ex. 2, Deposition Excerpts of Marshall Ansin, 15:5-16:19; Ex. 3, Deposition Excerpts of Antoinette Mingo,14:3-14:24,15:20-15:25; Ex. 4, Deposition Excerpts of David Mann, 15:3-16:21, 20:24-21:6, 22:17-22:19; Ex. 8, Deposition Excerpts of Viola

Figueroa,19:18-21:4; Ex. 9, Deposition Excerpts of Gregory Tucker, 17:2-17:10, 17:25-18:10, 18:19-18:22);

- **had not seen copies of the Complaint before it was filed on their behalf** (*See e.g.* Ex. 1, 55:5-55:13; Ex. 2, 21:10-21:19; Ex. 3, 31:17-32:4; Ex. 5, Deposition Excerpts of Herman Lewis, 24:16-25:9; Ex. 8, 30:5-31:8)

- **would not have filed this suit if they had not been recruited by a *Dickson* plaintiff or Plaintiffs' Counsel** (*See e.g.* Ex. 2, 16:20-16:25, 20:14-20:24; Ex.4, 45:15-45:18; Ex. 5, 39:16-39:21; Ex. 6, Deposition Excerpts of Mark Englander, 33:18-33:24);

- **were not shown or asked about Defendants' discovery requests** (*See e.g.* Ex. 4, 29:6-30:22; Ex. 5, 41:3-41:11; Ex.6,15:2-15:8; Ex. 8, 34:4-34:7, 35:7-36:6, 38:13-38:18, 40:6-40:12, 42:12-42:22; 44:22-44:23);

- **are not responsible for legal fees and costs incurred in the instant litigation** (*See e.g.* Ex. 1, 67:22-69:14; Ex. 2, 30:22-31:17; Ex. 3, 19:16-19:23; Ex. 4, 44:18-44:20, 47:6-47:8; Ex. 5, 39:22-40:4; Ex. 6, 31:10-32:3; Ex. 7, Deposition Excerpts of Susan Sandler Campbell, 15:24-16:14; Ex. 8, 23:11-23:25; Ex. 9, 20:1-20:13);

- **believe the litigation is challenging their United States Congressional District** (*See e.g.* Ex. 1, 31:20-32:6, 33:16-33:23; Ex. 3, 16:15-17:4)

- **were never told the aim or goal of the lawsuit** (*See e.g.* Ex. 1, 35:5-35:8, 42:5-42:7; Ex. 3, 20:19-20:23; Ex. 6, 14:8-14:12; Ex. 7, 14:19-15:15; Ex. 8, 22:12-22:20);

How can it be said that these individuals are "directing and controlling" the instant litigation when they have not been consulted about pleadings, discovery, or in some cases even informed about which districts the law suit is challenging? In addition to the above, one Plaintiff, Herman Lewis, learned for the first time that he was a Plaintiff in this

lawsuit when counsel called him a month ago to tell him about his upcoming deposition. (*See* Ex. 5, 23:5-23:16, 23:24-24:8)

Moreover, Plaintiffs summarily dismiss Defendants' inquiry into the possible existence of privity between the two sets of plaintiffs as nothing more than a "vast conspiracy theory." (D.E. 63, p.3) However, there is nothing theoretical about the fact that Doug Wilson, a *Dickson* Plaintiff, recruited at least four (4) Plaintiffs, and possibly more, to join this litigation. (*See* Ex. 1, 25:10-25:24; Ex. 3, 14:3-14:24; Ex. 8, 19:18-20:5, 20:25-21:9; Ex. 9, 17:25-18:10) It is now irrefutable that Mr. Wilson has been actively involved in both lawsuits. When he recruited Plaintiff Rosa Mustafa, according to her testimony, he told her could just "put her name in" and that after she joined "there was nothing else [for her] to do." (Ex. 1, 47:18-48:1) Further still, David Mann only became a Plaintiff after he was contacted by Plaintiffs' Counsel who had received his information from Margaret Dickson−the lead plaintiff in the *Dickson* redistricting litigation. (Ex. 4, 22:17-22:19) After Mr. Mann informed Plaintiffs' Counsel that he wanted to join the lawsuit, Plaintiffs' Counsel told him he needed to again contact Margaret Dickson to let her know that he was now involved. (*Id.* 46:3-46:17) If Margaret Dickson was not involved in any way with the instant litigation, why would Plaintiffs' Counsel direct Mr. Mann to have further contact with her? Mr. Mann also admitted that he discussed this lawsuit with Ms. Dickson and even prepared for his deposition with her. (*Id*. 21:20-22:19) This testimony simply does not support that these Plaintiffs are the ones directing and controlling the litigation and more than entitles Defendants to inquire about possible

privity through the discovery process.[1] There is no question now that Defendants' inquiry is relevant to the subject matter of this case. Plaintiffs had no right to refuse to produce responsive and nonprivileged information when it was requested through traditional discovery methods. Since they have so refused, Defendants must be allowed to depose Plaintiffs' Counsels.

II. Defendants Are Not Seeking to Show Privity of Parties By Way of "Virtual Representation" as Plaintiffs Claim.

Defendants are not seeking to show privity, as Plaintiffs claim, through "virtual representation." (D.E. 63, p. 11) The Supreme Court acknowledged several other acceptable exceptions to the general rule against nonparty preclusion−including situations where a non-party "assumed control" over litigation or situations involving litigation through a proxy. *Taylor v. Sturgell*, 553 U.S. 880, 893-95 (2008). It is under these legal theories, fully recognized by the U.S. Supreme Court, that Defendants seek to prove that Plaintiffs claims are precluded.

A nonparty is bound by a judgment if he "'assume[d] control' over the litigation in which that judgment was rendered." *Id.* at 895 (citing *Montana v. U.S.*, 440 U.S. 147, 154 (1978) ("*Montana*")). This is because such a person is a real party in interest who has had

[1] Plaintiffs' Counsel also claim that all of the Plaintiffs in this litigation are "ordinary citizens from across the state who [joined the suit because they] … are offended by racially-segregated redistricting schemes." (D.E. 63, p. 1) However, the deposition testimony of several Plaintiffs does not even support this cursory contention. Multiple Plaintiffs testified that they were opposed to the redistricting schemes, not on the basis of race, but because it diluted the power of the Democratic Party or resulted in a Republican-controlled General Assembly. (*See e.g.* Ex. 1, 40:4-40:6, 41:2-41:13; Ex. 2, 19:10-19:17; Ex. 3, 25:4-25:10)

"the opportunity to present proofs and argument," and has already "had his day in court even though he was not a formal party to the litigation." *Id.* Further, a real party in interest, "bound by a judgment may not avoid its preclusive force by relitigating through a proxy." *Id*. at 895. "Preclusion is thus in order when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication." *Id*. (citing *Chicago, R.I. & P.R. Co. v. Schendel*, 270 U.S. 611, 620, 623 (1926)). The *Taylor* Court opined that it "seems clear that preclusion is appropriate when a nonparty later brings suit as an agent for a party who is bound by a judgment." *Id*. Through discovery, Defendants seek to establish: (1) that a non-party entity assumed sufficient control over the *Dickson* litigation such that they are bound by its judgment and (2) that the same entity is now attempting to relitigate the same issues using nominal plaintiffs as its proxies. Sufficient case law supports Defendants' *res judicata* defense should these questions be affirmatively answered in Plaintiffs' Counsel's depositions.

First, in *Montana*, which was cited by the Court in *Taylor*, the State of Montana levied a tax against public but not private contractors. 440 U.S. at 149-50. The public contractor, who was being directed and financed by the U.S. government, sued Montana to contest the tax and lost on appeal before the Montana Supreme Court. *Id*. at 151. The government then filed its own lawsuit in federal court. After the decision by the Montana Supreme Court, the State contended that the U.S., although not a party to the state litigation, was precluded by collateral estoppel from pursing its federal case. *Id*. at 152-53. The U.S. Supreme Court agreed, opining: "[o]ne who prosecutes or defends a suit in

the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own…is as much bound…as he would be if he had been a party of record." *Id.* at 154.

Similar preclusion occurred in *U.S. v. Des Moines Valley R. Co.,* 84 F. 40 (8th Cir. 1897), a decision quoted with approval by the Supreme Court on several occasions.[2] *Des Moines Valley* was a quiet title action in which the named plaintiff was the U.S. government. The suit, in the name of the government, was brought to enforce the right of a private party who had had previously received an adverse adjudication in state court. *Id*. at 42. The court found that the previous judgment was available to estop the government's suit and opined that the U.S. "should be held estopped by previous adjudications against the real party in interest in the state court. The subject-matter and the issue to be tried being the same in this proceeding as in the former actions, the losing party on the former trials ought not to be permitted to renew the controversy in the name of a merely nominal plaintiff, and thereby avoid the effect of the former adjudications." *Id*. at 44-45.

Plaintiffs' erroneously contend that Defendants are trying to establish privity solely on the basis of common financing between the redistricting cases, which alone would be insufficient to estop their claims. (D.E. 63, p. 13) This is not true. Defendants are seeking discovery of whether a common nonparty force is both financing *and*

[2] *See Chicago, R.I. & P.R. Co. v. Schendel*, 270 U.S. at 619-20; s*ee also Taylor*, 553 U.S. at 899-900 ("properly understood…*Des Moines Valley* is simply an application of the fifth basis for nonparty preclusion…A party may not use a representative or agent to relitigate an adverse judgment").

directing the two litigations. (*See* Defs' Br., D.E. 59, pp. 4, 9-10, 13); *Des Moines Valley Co.*, 84 F. at 45. It is evident from the Plaintiffs' lack of knowledge regarding the subject matter of their suit and their lack of participation in its prosecution that they are not the ones directing the current litigation. (*See supra* Part I) As a result, Defendants must first determine if there is an entity common to both litigations, like a financier, that would have an interest in directing the lawsuits. If that "common donor" exists and has retained the same counsel in both litigations for purposes of prosecuting the case through nominal plaintiffs to "aid in some interest of his own," sufficient privity can be established and Plaintiffs' claims precluded. *Montana*, 440 U.S. at 154; *Des Moines Valley*, 84 F. at 44-45. Plaintiffs have stonewalled Defendants at every turn in their attempt to definitively put this issue to rest. (D.E. 59, pp 4-5) This is likely because the information sought supports Defendants' theory.[3]

III. Despite Counsel's Claims, the Information Sought Regarding Potential Privity of Parties is Not Privileged and is Relevant to Defendants' *Res Judicata* Defense.

For the reasons stated in Defendants' Opening Brief, the information sought is relevant to a valid defense. (*See* D.E. 59, pp. 5-10) Plaintiffs argue that Defendants should not be allowed to take Plaintiffs' Counsel's deposition because the information is not sufficiently relevant to outweigh the "enormous burden [that] such a deposition creates." (D.E. 63, p. 17) This argument is circular. Plaintiffs cannot first refuse to

[3] Despite their arguments here, counsel to the Plaintiffs in *Harris v. McCrory* provided information identifying who is funding the litigation there. The reluctance on Plaintiffs' Counsel here to do so now begs the question of whether such information is being withheld because privity might be established between *Dickson* and the instant case if the information is disclosed.

provide information through traditional discovery on the basis of impermissible, nonspecific boilerplate relevance objections, only to argue now that the information, while admittedly relevant, is not relevant "enough" to outweigh burdens allegedly inherent in deposing Plaintiffs' Counsel. Plaintiffs created the need for these depositions and any alleged hardship incurred was not caused by Defendants.[4]

Plaintiffs also continue to argue that the identity of their nonparty financier is protected by attorney-client privilege. (D.E. 63, p. 18) (citing *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999)). However, *Chaudhry* does not stand for what Plaintiffs claim it does. In that case, the Fourth Circuit held that "bills, ledgers, statements, or time records" that reveal "specific research or litigation strategy" are protected from disclosure by the attorney-client privilege. *Id*. (citing *Clarke v. Am. Comm. Nat'l Bank*, 974 F.2d 127, 130 (9th Cir. 1992). Still, the *Chaudry* Court specifically noted that the "identity of the client…the identification of payment by case file name, and the general purpose of the work performed are usually not protected…by the attorney-client privilege." *Id.* (citing *Clarke*, 974 F.2d at 129). Plaintiffs have similarly argued that financier's identity is protected by the attorney-client privilege under North Carolina's public policy by citing *Raymond v. N.C. Police Benevolent* Ass'n, 365 N.C. 94, 721 S.E.2d 923 (2011). (D.E. 63, p. 10) *Raymond*, like *Chaudry*, stands for

[4] Plaintiffs' claim that information Defendants seek, at least for SCSJ counsel, is available through another source and can be ascertained by an "inspection [of] its 990 forms" on the website https://www.guidestar.org/profile/26-0688375. (D.E. 63, p. 6) However, overlooking the fact that Plaintiffs admit that the forms do not show whether funds are earmarked for specific litigation, the website only contains 990 forms through 2014. This litigation was commenced in 2015 and nothing regarding potential funding sources for the instant lawsuit can be learned by a review of these publicly-available forms.

the proposition that *communications* made by individuals are privileged. It does not hold that the *identity* of an individual is privileged information. *Id*. at 100, 721 S.E. 2d at 927 ("The possibility of disclosure of such *communications* would chill the flow of information") (emphasis added).

Here, Defendants have not sought, and do not intend to depose Plaintiffs' Counsel, about information related to client communications, "specific research," or "litigation strategy." (D.E. 63, pp. 3-4) Defendants only want to identify the person or persons that they believe to be the real party in interest here and in *Dickson*. Plaintiffs' own case law supports that Defendants are entitled to this information.

IV. The Identity of Plaintiffs' Financier is Not Protected From Disclosure By the First Amendment.

The identity of Plaintiffs' financier, and likely real party in interest, is not protected by the First Amendment. (D.E. 63, pp. 8-10) Plaintiffs cite *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) to argue that this Court cannot compel disclosure of his or her identity because such disclosure infringes upon one's freedom of association. However, SCSJ has not even alleged that its financier is a member of its association. Without such an allegation, this is not even a colorable argument. Regardless, *NAACP* is factually distinguishable. In that case, the government sought to compel disclosure of the NAACP's membership lists, which are not being sought here. *Id*. The Court also opined that it was "important to bear in mind that petitioner assert[ed] no right to absolute immunity from state investigation… [and] as shown by its substantial compliance with the production order, petitioner does not deny [the State's] right to obtain… information."

Id. at 463-64. Here, the SCSJ, unlike the NAACP, has not substantially complied and is in fact asserting absolute immunity from having to disclose who may be directing the instant litigation, which is not supported by that case.

Plaintiffs also claim that disclosing their financier's identity would chill associational freedom by "potentially subject[ing] donors to inconvenience through subpoenas and exposure." (D.E. 63, p. 9) Such theoretical inconvenience does not justify withholding discoverable information and pales in comparison to the inconvenience the State and People of North Carolina have suffered by having to defend four essentially identical lawsuits likely brought by a common real party in interest.

This the 18th day of February, 2016.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **REPLY 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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