

**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. )

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**DEFENDANTS’  
MEMORANDUM IN SUPPORT  
OF MOTION FOR LEAVE TO  
MODIFY SCHEDULING  
ORDER AND TO EXPEDITE**

Defendants submit this memorandum of law in support of their Motion to Modify the Scheduling Order entered in this matter on October 9, 2015 (D.E. 25) and amended by the Court on December 18, 2015 (D.E. 46) to allow Defendants to issue subpoenas to and take the depositions of two witnesses identified for the first time during depositions on Friday, February 19, 2016. Defendants further request that the court expedite consideration of and briefing on this motion. Defendants accordingly show the Court:

**FACTUAL BACKGROUND**

On Friday, Feb. 19, 2016, Defendants took depositions of two individuals, former state Senator Margaret Dickson and Douglas A. Wilson, pursuant to subpoenas served on them. Though both Senator Dickson and Mr. Wilson were among 46 individual plaintiffs named in *Dickson v. Rucho*, No. 11-CVS-16896 (Wake County Superior Court) (“*Dickson*”), Defendants were not aware of their involvement in this action until multiple Plaintiffs testified in depositions that began on February 4, 2016 that they had been asked by either Senator Dickson or Mr. Wilson if they were interested in joining this action as

plaintiffs. During their depositions last Friday, both Senator Dickson and Mr. Wilson acknowledged their respective roles in identifying plaintiffs in this action.

For her part, Senator Dickson acknowledged that she had asked David Mann if he would be interested in being a plaintiff in this lawsuit. (Deposition of Margaret Dickson, p. 17)<sup>1</sup> Senator Dickson testified that she asked Mr. Mann about his interest in being a plaintiff in this lawsuit after having a conversation with Plaintiffs' Counsel Eddie Speas "about identifying people who lived in the district." (*Id.*)

Mr. Wilson, who is the Deputy Executive Director of the North Carolina Democratic Party ("NCDP"), testified that he had contacted at least seven people including Marvin Arrington, Viola Figueroa, John Verdejo, Dedreana Freeman, Susan Campbell, Antionette Mingo, and Ruth Sloane, who ultimately became Plaintiffs in this lawsuit. (Deposition of Douglas A. Wilson, pp. 38-59)<sup>2</sup> Though he could not recall doing so, at least two additional plaintiffs in this case, Rosa Mustafa and Gregory Turner, testified in their depositions that Mr. Wilson had also contacted them about joining the lawsuit. (*See* D.E. 64-1, Mustafe Dep. p. 25; D.E. 64-9, Turner Dep. pp.17-18)

Mr. Wilson testified that he was recruited to join the *Dickson* lawsuit by Jay Parmley who, at the time, was the Executive Director of the NCDP. (Wilson Dep. at 15-16) Mr. Wilson learned about this case from Scott Falmlen, another former NCDP Executive Director and currently a consultant with Nexus Strategies. (*Id.* at 30-31) Mr.

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<sup>1</sup> A copy of cited excerpts from the deposition of Margaret Dickson are attached as Exhibit 1.

<sup>2</sup> A copy of cited excerpts and exhibits from the deposition of Douglas A. Wilson are attached as Exhibit 2.

Falmlen held a meeting with Mr. Wilson and Patsy Kever, the chair of the NCDP, in April 2015 in which Mr. Falmlen asked Mr. Wilson and Ms. Kever to assist in identifying Plaintiffs for this lawsuit. (*Id.* at pp. 30-35) They committed to help Mr. Falmlen. (*Id.* at 34)

Following this meeting, Mr. Falmlen sent Mr. Wilson and Mr. Kever an email thanking them for their time, stating that “I hope I was able to recap everything that’s been going on in the redistricting effort over the past three [and] a half years,” and providing them with criteria to use when identifying plaintiffs for this action. (*Id.* at pp. 63-64; Wilson Dep. Ex. 4) At his deposition, Mr. Wilson produced a series of emails pursuant to the subpoena Defendants served on him reflecting some of the contacts he made to identify plaintiffs in this action. In one such email, written to prospective plaintiff Kristi Tally, Mr. Wilson wrote that, “I am touching base to see if you would be interested in being part of a redistricting federal lawsuit *that Democracy Partners is bringing against the state. They along with our Democratic Legislators* have targeted key State House and Senate Distircts [sic].” (*Id.* at pp. 77-84; Wilson Dep. Ex. 7) (emphasis added) Mr. Wilson further told Ms. Tally in an email that he was trying to “identify one African-American and one white plaintiff in each district” and that if she was interested in being a plaintiff, “*the attorneys with Democracy Partners* will be in touch with you to explain more details.” (*Id.*) (emphasis added)

Despite making these statements to Mr. Tally, Mr. Wilson testified that he didn’t know anything about Democracy Partners, their relationship with Mr. Falmlen, or their involvement in any other lawsuits in the state, including *Dickson*. (*Id.* at 80-81) Mr.

Wilson admitted, however, that he understood from Mr. Falmlen that (1) Democracy Partners was the group responsible for bringing this lawsuit and (2) they had worked with unidentified Democratic legislators to target the districts to be challenged in the suit. (*Id.* at pp. 80-83)

After learning this information and pursuant to the Court's December 18, 2015 order allowing the parties to "modify provisions related to discovery scheduling by agreement and without court approval, so long as no deadlines related to court filings are affected and no delays in court proceedings will result" (D.E. 46), on Monday, February 22, counsel for Defendants contacted Plaintiffs' counsel to seek their consent to allow depositions of Mr. Falmlen and Democracy Partners to be taken beyond the February 19, 2016 discovery cut-off.<sup>3</sup> On Tuesday, February 23, 2016, Plaintiffs' counsel asked for additional time to consider the matter then proposed "putting this issue aside until the Court rules on your motion to depose plaintiffs counsel" because "[t]hat ruling may eliminate the need for the depositions you have proposed."

Because this matter is scheduled for trial starting April 11, 2016 and given that at least two weeks' time is needed to serve a subpoena and schedule depositions of third-party witnesses, including one (Democracy Partners) who Defendants believe is located out-of-state, Defendants believe that they need to move forward with making arrangements for the depositions of Mr. Falmlen and Democracy Partners before any

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<sup>3</sup> As an accommodation to Plaintiffs, Defendants have agreed to take the depositions of two Plaintiffs the week of February 29, 2016 because those Plaintiffs could not be scheduled before the February 19 discovery deadline.

ruling on their pending Motion for Leave to Depose Counsel for Plaintiffs (D.E. 58) is issued. Plaintiffs' counsel opposes this motion.

### ARGUMENT

The information Defendants seek to obtain through the depositions of Mr. Falmlen and Democracy Partners is needed by Defendants to prepare their asserted defenses of *res judicata* and collateral estoppel for trial. The legal basis and additional factual background regarding Defendants' need for discovery related to these defenses can be found in Defendants' Memorandum of Law in Support of their Motion for Leave to Depose Counsel for Plaintiffs (D.E. 59) and in Defendants' Reply Memorandum in support of that motion (D.E. 64). Although both Senator Dickson and Mr. Wilson were plaintiffs in *Dickson* and admitted contacting prospective plaintiffs regarding this action, both denied knowing who was responsible for paying the legal fees and costs in both *Dickson* and here. (Dickson Dep. p. 12; Wilson Dep. pp. 28-29, 116-17)

In light of Mr. Wilson's admissions that he (1) understood from Mr. Falmlen that Democracy Partners is the entity responsible for bringing this action and (2) the role of the NCDP in recruiting Mr. Wilson to be a plaintiff in *Dickson* and the NCDP's role in recruiting plaintiffs for this case, it is critical that Defendants be permitted to take the depositions of both Mr. Falmlen and Democracy Partners to determine their involvement in this action and *Dickson*, including whether they are responsible for the payment of any costs or fees in either case, and more importantly whether they, the NCDP, or some other persons or entities are directing the litigation in either matter.

If permitted to do so by the Court, Defendants intend to take the depositions of Mr. Falmlen and Democracy Partners<sup>4</sup> on the weeks of March 14 or 21 and do not believe that allowing either of these depositions would require any other modifications to the deadlines provided in the Scheduling Order in this matter, including any change in the trial date. Additionally, Defendants will schedule any depositions of Plaintiffs' counsel permitted by the Court after the depositions of Mr. Falmlen and Democracy Partners so long as such scheduling would not interfere with Defendants' ability to prepare for trial.

Defendants additionally request that the Court expedite its consideration of this matter and require Plaintiffs to file their response to this motion within five (5) days or no later than Monday, February 29, 2016<sup>5</sup> and allow any reply by Defendants to be filed no later than Tuesday, March 1, 2016.

### **CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court modify the Scheduling Order in this matter to permit them to issue subpoenas to and to take the depositions of Scott Falmlen and Democracy Partners.

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<sup>4</sup> In the subpoenas defendants intend to serve on Mr. Falmlen and Democracy Partners, Defendants also intend to seek relevant documents related to Mr. Falmlen's and Democracy Partners's involvement in this action and in *Dickson*.

<sup>5</sup> In their email correspondence regarding this matter, counsel for Plaintiffs stated that the five-day response timeframe proposed herein would be acceptable to them.

This the 24th day of February, 2016.

OGLETREE, DEAKINS, NASH  
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr

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**CERTIFICATE OF SERVICE**

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR LEAVE TO DEPOSE COUNSEL FOR PLAINTIFFS AND MOTION TO EXPEDITE** 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 24th day of February, 2016.

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