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

SANDRA LITTLE COVINGTON, *et al.*, Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	**PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO MODIFY THE SCHEDULING ORDER**

Pursuant to Local Rule 7.2, Plaintiffs, by and through their undersigned counsel, submit the following response brief in opposition to Defendants' Motion to Modify the Scheduling Order. (D.E. 67).

INTRODUCTION

There are four pending suits challenging the legislative and congressional districts enacted by the North Carolina General Assembly in 2011. There is no third party controlling this case and any other pending lawsuit. Defendants seek to re-open discovery so that they may pursue their imagined hypothesis that some non-party person or entity is controlling four separate lawsuits brought by a diverse group of citizens residing across the state. There is no legal or factual basis for this imagined hypothesis, and the motion to re-open discovery should be denied.

Plaintiffs in this action are 31 individual North Carolina residents. None of the Plaintiffs are plaintiffs in any of the three other pending lawsuits. Defendants first sought to deny Plaintiffs their day in court when they filed a motion to stay, abstain or defer this

action on November 9, 2015. (D.E. 31). On November 25, this Court denied that motion, stating that Defendants' arguments were "unconvincing." This Court rejected Defendants' claims that "one or more of the Plaintiffs in this action may be bound by the judgment in *Dickson* under the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion)." (D.E. 39). Three months of discovery and dozens of depositions later, nothing has changed. Defendants still cannot establish any privity between these Plaintiffs and those individual and organizational (NC State Conference of NAACP Branches, League of Women Voters of NC, Democracy NC, NC A. Philip Randolph Institute) plaintiffs in the state cases of *Dickson v. Rucho* and *NC NAACP v. NC* or the individual plaintiffs in the federal case of *Harris v. McCrory*. Instead, they seek to expand the discovery period, without good cause, to engage in a fishing expedition for non-existent facts to support their theory of attenuated privity of which Defendants cannot offer one case in support.

STATEMENT OF FACTS

Plaintiffs are a diverse group of citizens residing in communities across the state, including students, small business owners, and retirees. *See, e.g.*, Crystal Johnson Dep. p. 34 (student); Mark Englander Dep. p. 9 (entrepreneur who owns electric bicycle business); Juanita Rogers Dep. p. 11 (retired school librarian) (excerpts of the depositions of Crystal Johnson, Mark Englander and Juanita Rogers are attached hereto as Exhibits A, B, and C). These ordinary citizens are united by a common concern: they believe that

assigning citizens to electoral districts based on the color of their skin is a threat to democracy and to the communities they live in.

Plaintiffs articulated that common concern in their depositions. For example, Sandra Covington, the lead plaintiff in this action, explained her opposition to the redistricting plan on the basis that "it unfairly reasons that black people will only vote for a black candidate, and white people the same; and that is -- to me, that's an unfair judgment about a racial group." Sandra Covington Dep. p. 22 (attached hereto as Exhibit D). Plaintiff Milo Pyne, a Durham ecologist, explained,

> Well, I believe that all the people of the state of North Carolina are harmed when we're provided with unconstitutional districts and I believe these districts are unconstitutional because they pack African-American voters -- they unnecessarily pack African-American voters in certain districts as opposed to others and that deprives the African-American community of its political influence in these other districts in which they are not the majority.

Milo Pyne Dep. pp. 23-24 (attached hereto as Exhibit E). Plaintiff Antoinette Mingo described the stigma of the maps as follows: "What I do know is that I don't like the idea of lines, so to speak, being drawn that engineers a movement of a lot of black people in one district. It just doesn't sit well with me, and I don't like being discriminated against, and it is discrimination." Antoinette Mingo Dep. pp. 26-27 (attached hereto as Exhibit F). Even if they cannot precisely articulate the intricacies of the Voting Rights Act and federal constitutional law, Plaintiffs understand well the harm wrought upon them and others by the state's racial gerrymandering scheme.[1]

[1] Each Plaintiff was provided a copy of the complaint in this case, though some of them do not recall that fact. The reasons for their lapse of memory are understandable. Every

Extensive discovery has been conducted in this case since December 2015. The discovery period has already once been extended to allow depositions to be conducted until February 19, 2016. To date, more than 40 depositions have been conducted in this case, including the depositions of all 31 plaintiffs.[2] Trial is scheduled to commence on April 11, 2016.

In their far-reaching fishing expedition involving the deposition of all Plaintiffs and two *Dickson* plaintiffs, Defendants have not yet established any evidence of privity between Plaintiffs in this case and the plaintiffs in *Dickson*. By and large, Plaintiffs do not even know any of the plaintiffs in the other pending suits. To the limited extent that any Plaintiff does know another plaintiff, Plaintiffs testified under oath that they did not consult, collaborate, or even discuss the redistricting plans or litigation. *See, e.g.*, Juanita Rogers Dep. pp. 36-40 (Ex. C); Mark Englander Dep. pp. 29-31 (Ex. B); Viola Figueroa Dep. pp. 49-52 (attached hereto as Exhibit G); Bryan Perlmutter Dep. pp. 31-37 (attached

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citizen faces daily demands on their time and attention. For example, Ms. Johnson testified that at the time the complaint was filed, she had recently lost her father, was on the verge of finishing clinicals for her degree, and her son was diagnosed with leukemia. Crystal Johnson Dep. pp. 28, 34 (Ex. A). Ms. Mingo testified that she does not recall the initial paperwork she received because it was "a minor thing" to her and because she is 70 years old. Antoinette Mingo Dep. p. 20 (Ex. F). In addition, most Plaintiffs in this case have never been involved in a lawsuit before, and none are attorneys. Thus, their experience with litigation, let alone lengthy pleadings, is limited.

[2] Defendants stated that they have agreed to take two Plaintiffs' depositions out of time "as an accommodation to Plaintiffs." Defs' Mem. in Supp. of Mot. for Leave to Modify Sched. Order (D.E. 68) at 4, n. 3. One of those Plaintiffs could not be deposed because she fell in the lobby of Defendants' counsel's office building on her way to the deposition and had to be transported by ambulance to the hospital. She has now been deposed. The other Plaintiff could not make it to her first-scheduled deposition because winter weather created childcare issues for her, but she has since been deposed.

hereto as Exhibit H). Defendants are no closer to establishing the kind of privity that would give rise to claim or issue preclusion than they were in November 2015.

Furthermore, contrary to Defendants' portrayals, Plaintiffs are an exceptional group of civically-engaged residents of this state, who recognize the harms wrought upon them and others by Defendants' unconstitutional redistricting scheme. *See, e.g.*, Crystal Johnson Dep. pp. 28-29 (Ex. A) (involved in the Coalition Against Racism in Pitt County); Milo Pyne Dep. pp. 8-9 (Ex. E) (involved in the People's Alliance political action committee in Durham); Claude Dorsey Harris Dep. pp. 31-32 (attached hereto as Exhibit I) (founded member-at-large chapter of the League of Women Voters in 2014 for northeastern counties "to empower people with better knowledge of politics"). They are no puppets. They understand what has been done to them, and are determined to fight it. *See* Antoinette Mingo Dep. p. 15 (Ex. F) ("Let me say this: I am known for fighting for what is right. So a lot of people know me. And I will fight an issue to the last iota.").

Even though each Plaintiff has legal standing to pursue the vindication of his or her constitutional rights with respect to the particular district in which he or she resides, no Plaintiff, individually or collectively, has the financial resources to challenge the State with its vast resources represented both by the Attorney General and a large private law firm with offices around the world.[3] *See* Juanita Rogers Dep. p. 17 (Ex. C) ("Q: If no one

[3]News reports indicate that the state has already paid the private firm defending it millions for their services. Gary Robertson, *NC lawmakers' distrust of AG means big legal bills*, Associated Press (Sept. 27, 2014), http://legacy.wcnc.com/story/news/politics/2014/09/27/nc-lawmakers-distrust-of-ag-means-big-legal-bills/16330869/; *Republicans*

had asked you, do you think you would have taken it upon yourself to sue the State of North Carolina? A: Probably eventually."); *but cf. id.* at 41 (describing her inability to pay legal fees for this case).

Plaintiffs in this action are represented by the Southern Coalition for Social Justice ("SCSJ"), a 501(c)(3) organization based in Durham, NC, and Poyner Spruill, LLP, a law firm based in Raleigh, NC. Lawyers at SCSJ and Poyner Spruill agreed to take on the cause so eloquently described by Plaintiffs at no cost to Plaintiffs. Compensation for the attorneys' services is dependent on the generosity of citizens and entities concerned about the race-based decision making by their elected representatives in the General Assembly. There is no single funder of this lawsuit. Indeed, as a non-profit legal services organization, SCSJ performs almost all of its work on a pro bono basis in every case. In order to comply with its obligation as a 501(c)(3) organization, SCSJ does not engage in partisan political activities.

Defendants seek to continue an irrelevant line of questioning after the close of discovery and as against two non-parties to this case. For the reasons that follow, Defendants' motion should be denied.

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at General Assembly set aside $8M for litigation, Associated Press (Nov. 24, 2015), http://www.jdnews.com/article/20151124/news/151129524.

ARGUMENT

I. DEFENDANTS' THEORY OF PRIVITY IS LEGALLY UNSUPPORTED AND DOES NOT WARRANT EXPANDING THE DISCOVERY PERIOD

In seeking to expand the discovery period, Defendants explicitly rely on the legal arguments they articulated in seeking to depose Plaintiffs' counsel. Defs' Mem. in Supp. of Mot. for Leave to Modify Sched. Order (D.E. 68) at 5. Defendants described their theory of privity as follows: "(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." Defs' Reply Mem. in Supp. of Mot. for Leave to Depose Counsel for Pls. (D.E. 64) at 5. This attenuated theory of privity,[4] whereby Defendants seek to preclude Plaintiffs from seeking relief in this court because of some alleged third-party control over both the prior action and the instant action, is a scenario in which no court has ever found a privity relationship and is simply not supported by the facts. This Court has already denied the motion to depose Plaintiffs' counsel that was based on that same legal argument. There is no third party controlling this case or any other redistricting case. As such, extending discovery to pursue this fanciful theory is not warranted.

[4] As stated in their Reply, this theory assumes that a non-party entity controlled not only the individual plaintiffs in Dickson, but also the organizational plaintiffs in the consolidated state court case *NAACP v. NC*, and the individual plaintiffs in Harris. Thus, as articulated by Defendants, this theory requires proof that the NAACP, League of Women Voters of North Carolina, the A. Philip Randolph Institute and Democracy North Carolina, all non-profit, non-partisan organizations, are in fact simply the puppets of some other non-party entity, a theory for which there is no factual basis whatsoever in any evidence produced in any of the cases. See Defs' Reply Mem. in Supp. of Mot. for Leave to Depose Counsel for Pls. (D.E. 64) at 5.

Specifically, Defendants' theories of *res judicata* and privity are inconsistent with state law standards on these issues. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (holding that a federal court must look first to state preclusion law in determining the preclusive effects of a state court judgment). Under state law, *res judicata* and collateral estoppel only apply if the prior action involved the same parties or those in privity with the parties and the same issues. *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E. 2d 799, 805 (1973). In the context of collateral estoppel and *res judicata*, the term privity indicates a mutual or successive relationship to the same property rights. *Moore v. Young*, 260 N.C. 654, 133 S.E.2d 510 (1963). In the instant situation, the parties in the two prior state court cases (*Dickson v. Rucho* and *NC NAACP v. North Carolina*) and the prior federal case (*Harris v. McCrory*) are not the same parties as Plaintiffs in this case. There also is no evidence of privity as understood under North Carolina law in this case.

However, under state law, there is an exception to the general rule requiring shared identity or privity of parties, known as the *Lassiter* exception:

> [A] person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party **if** he has a proprietary interest or financial interest in the judgment or in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions; if the other party has notice of his participation, the other party is equally bound.

Thompson v. Lassiter, 246 N.C. 34, 39, 97 S.E.2d 492, 496 (1957) (emphasis added); *see also Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 491-92 (2005); *Smoky Mountain Enterprises, Inc. v. Rose*, 283 N.C. 373, 196 S.E.2d 189 (1973);

Williams v. Peabody, 217 N.C. App. 1, 719 S.E.2d 88 (2011). In such a case, the one who was not a party to the prior action is bound by the previously-litigated matters as if he had been a party to that action. *Lassiter*, 246 N.C. at 39, 97 S.E. 2d at 496.

In determining whether the exception to privity exists, courts employ a three part test: (1) does a non-party to the original action, against whom *res judicata* is being asserted, exercise "control" of the original lawsuit and the present lawsuit; (2) does the non-party to the original action have "a proprietary interest or financial interest in the judgment;" and (3) does the non-party to the original action have an interest "in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions?" *Id.* at 39, 97 S.E.2d at 496; *see also Peabody*, 217 N.C. App. at 10; 719 S.E.2d at 95. All three elements must be satisfied in order to establish the applicability of the *Lassiter* exception and therefore bar a second suit. *Peabody*, 217 N.C. App. at 14, 719 S.E.2d at 97-98.

Here, Defendants cannot satisfy the elements of this test, and deposing non-parties will not help them.

A. Defendants cannot show a single person or entity controls this case and any other redistricting case.

Neither Mr. Falmlen nor Democracy Partners exercises control of either lawsuit. North Carolina law sets a high standard for what constitutes "control." The North Carolina Supreme Court decision in *Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co.*, 238 N.C. 679, 79 S.E.2d 167 (1953), is instructive on this question. There, the court held that 20 property-damage claimants were not bound by a judgment against a

single claimant even where they agreed to allow the case of another claimant to proceed first and where all 21 claimants were represented by the same counsel. *Id*. at 686. Even though the claimants' insurance companies agreed to try the single test case first, there was no evidence that "these other claimants or any of them, either directly or through their respective insurance companies, participated in the trial of the Fleming case, or that they 'openly and actively,' and with respect to some interest of their own, 'assumed and managed' the prosecution of the Fleming case." *Id*. at 693. Thus, the court concluded that the later claimants could not have been said to have controlled the earlier litigation to which they were not parties. *Id*. at 688.

It is also important to understand that in the instant case, to satisfy the *Lassiter* exception, Defendants would have to prove that the alleged "puppeteer" controls not only this litigation, but also both state court actions. In the years of litigation in state court, there was never any suggestion or any facts tending to show that some non-party controlled the litigation. It is simply too late in the process for Defendants to be searching for information relevant to legally unsupported theories of privity or exceptions to privity.

More importantly, the *Lassiter* exception has never been extended to the position Defendants apparently are taking here: that a non-party to this case can bind these Plaintiffs to a prior decision. The parties in the instant case are not parties in the *Dickson*, *NC NAACP*, or *Harris* cases—that much even Defendants admit. Defs' Mem. in Supp. of Mot. for Leave to Depose Counsel (D.E. 59) at 4. Defendants do not even seem to

argue that Plaintiffs here are in direct privity with the plaintiffs in the two state court cases. Defs' Mem. in Supp. of Mot. for Leave to Modify Sched. Order (D.E. 68). Rather, they allege some intermediary controlled all three cases. That is, the parties against whom *res judicata* and collateral estoppel are being asserted in this case are not the parties who Defendants allege had control over the state court and instant litigation. Defendants' theory of privity is attenuated, and there is no case in North Carolina where a court has estopped a plaintiff from seeking relief because it found that a "puppeteer" of sorts was either controlling or financially supporting the estopped litigation and previous litigation. Given the tenuousness of this legal theory, no facts adduced from additional needless depositions would help Defendants.

The facts do not support Defendants' imagined hypothesis. From their various papers it seems that Defendants are imagining that the North Carolina Democratic Party ("NCDP") is the "force" controlling this lawsuit and the two state court lawsuits. It is true that Mr. Wilson is employed by the NCDP and that he was asked by Scott Falmlen, a political consultant, to help identify citizens who might want to become plaintiffs in this lawsuit. Mr. Wilson has only been employed with the NCDP since April 2012. Doug Wilson Dep. pp. 12-13 (attached hereto as Exhibit J). Mr. Wilson identified and contacted only seven of the 31 Plaintiffs. *Id.* at 23, 29, 45, 48-49, 55, 57. Importantly, Mr. Wilson testified that he did not know and had never talked to 24 out of the 31 plaintiffs in this suit, Doug Wilson Dep. pp. 38-39, 44-59 (Ex. J), thus refuting the theory that the NCDP is the "force" controlling this lawsuit. Mr. Wilson testified that he was the

only employee or representative of the NCDP to make any of the calls seeking to identify those who might want to be plaintiffs. Doug Wilson Dep. p. 49 (Ex. J). Additionally, although it is unclear how this would relate to Defendants' puppeteer theory, Defendants acknowledge Margaret Dickson spoke with only one Plaintiff, David Mann, about this case. Defs' Mem. in Supp. of Mot. to Modify Sched. Order (D.E. 68) at 2.

Moreover, characterizing Mr. Wilson's efforts relating to a small number of Plaintiffs as "recruiting" plaintiffs is not helpful to this analysis. The U.S. Supreme Court has long recognized the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transp. Union v. Michigan Bar*, 401 U.S. 576, 585 (1971). There is no case in North Carolina suggesting that engaging in that protected "collective activity" constitutes "control" over the litigation for purposes of the *Lassiter* exception. Mr. Wilson exercised his First Amendment rights to identify citizens who had been previously involved in political activities and ask if they would have an interest in becoming plaintiffs in a lawsuit challenging the race-based redistricting maps drawn by their elected representatives in the General Assembly.

Even if Mr. Wilson's and Ms. Dickson's testimony had not refuted the factual basis for defense counsel's imagined grounds for extending discovery, they have yet to explain how additional testimony might be relevant. In the course of months of discovery and over 40 depositions, there has been zero evidence adduced that any of the Plaintiffs in this case share identity or privity with the plaintiffs in either the *Dickson* case

or the *NAACP* case—in fact, all evidence adduced in Plaintiffs' depositions indicates the contrary. In over 40 depositions, no facts have come to light that would tend to show that the three preconditions necessary for the *Lassiter* exception apply in this case.[5] Even assuming, *arguendo*, that some donors who financially supported the other pending cases may have also made donations to support the *Covington* litigation, that fact, would not establish control over either case. Just as in *Troy Lumber Co. v. Hunt*, 251 N.C. 624, 112 S.E.2d 132 (1960), where a shareholder in a corporation could not be said to exert control over a case where the company in which he held shares was a party, neither can remote, and potentially numerous, donors be said to control either the instant litigation or the previous litigation.[6] Unlike in *Cline v. McCullen*, 148 N.C. App. 147; 557 S.E.2d 588

[5] Interestingly, in the *Harris v. McCrory* case, where a three-judge panel repeatedly rejected the same res judicata and collateral estoppel arguments, Defendants theorized that the NC NAACP was the "puppeteer" behind the federal litigation challenging two North Carolina congressional districts. They even took a 30(b)(6) deposition of the NC NAACP in the *Harris* case. *Harris v. McCrory*, 1:13-cv-949 (M.D.N.C), Defs' Mem. of Law in Supp. of Defs' Mot. for Summ. J. (D.E. 47) at 6. Nothing that emerged in that deposition supported Defendants' theory, and thus the court in *Harris* rejected Defendants' preclusion arguments. *Harris v. McCrory*, 1:13-cv-949 (M.D.N.C.), Order (D.E. 84).

[6] Additionally, as explained before in briefing on the denied motion to depose Plaintiffs' counsel, Defendants' theory of privity and control assumes that Plaintiffs' counsel would allow non-clients to control the litigation, which would be a violation of the North Carolina Rules of Professional Conduct. Plaintiffs vehemently reject such implications, and absolutely zero evidence has been adduced that would support Defendants' defamatory insinuations. Moreover, the fact that Plaintiffs' oppose Defendants' frivolous lines of inquiry does not imply that those inquiries have any merit, as suggested in Defendants' Reply in Support of their Motion to Depose Counsel. (D.E. 64) at 7. Rather, Plaintiffs have a real interest in ensuring that this case proceeds to trial as scheduled. Plaintiffs also have a substantial interest in ensuring that Defendants do not discourage

(N.C. App. 2001), described below, there has been no suggestion that Plaintiffs were actively involved in strategizing the earlier *Dickson* litigation. In fact, many Plaintiffs were not even aware that there had been other litigation relating to North Carolina's 2011 redistricting plans. *See, e.g.*, Mark Englander Dep. p. 36 (Ex. B); Marshall Ansin Dep. p. 29 (attached hereto as Exhibit K). There is no evidence that any attended the *Dickson/NC NAACP* or *Harris* trials.

B. Defendants cannot show the requisite proprietary interest in all of the cases.

Second, Defendants cannot show any non-party against whom preclusion is being sought has a proprietary interest in both cases. In *Cline*, the Court of Appeals found that a second action was barred because the plaintiff in *Cline* had a "substantial interest" in the prior case—a fifty-percent interest in the prior plaintiff's bail bond commissions, a financial stake that constituted a proprietary interest in the judgment. *Cline*, 148 N.C. App. at 151, 557 S.E.2d at 591. In addition, the plaintiff "was aware of Tindall's earlier lawsuit because he had attended a law office meeting with Tindall and defendant's counsel to discuss Tindall's case. The court further found that plaintiff was 'actively involved in the discussions that took place in that meeting.'" *Id.* at 150-51, 557 S.E.2d at 591. There is no similar evidence in this case, and Defendants will not find any such evidence by deposing Mr. Falmlen or Democracy Partners. There has not even been any allegation that any of the Plaintiffs has "a proprietary interest or financial interest in the

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public interest litigation by needlessly deposing non-parties, thus ratcheting up the costs of litigation seeking to vindicate constitutional rights.

[original] judgment." This is a necessary element, and in none of the four pending cases are plaintiffs seeking monetary damages.

Defendants are no closer to being able to establish privity, or an applicable exception thereto, than they were in November 2015. There is no basis for extending discovery in this case.

II. DEFENDANTS HAVE NOT SHOWN GOOD CAUSE FOR MODIFYING THE SCHEDULING ORDER

Defendants have offered no good cause for modifying the scheduling order to extend discovery at this late date. "A schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "A scheduling order represents the critical path chosen by the Court and the parties to fulfill the mandate of Federal Rule of Civil Procedure 1 in securing the just, speedy, and inexpensive determination of every action." *Alston v. Becton, Dickson & Co.*, No. 1:12-cv- 452, 2014 U.S. Dist. LEXIS 11370, 2014 WL 338804 (M.D.N.C. Jan. 30, 2014) (citing *Marcum v. Zimmer*, 163 F.R.D. 250, 253 (S.D. W. Va. 1995)) (internal brackets and quotation marks omitted); *see also Blue v. Hartford Life & Accident Ins. Co.*, 698 F.3d 587, 594 (7th Cir.) (reaffirming "that district courts have an interest in keeping litigation moving forward and that maintaining respect for set deadlines is essential to achieving that goal"); *Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, No. 1:03-cv-537, 2005 U.S. Dist. LEXIS 46201, 2005 WL 6043267, at *3 (M.D.N.C. July 7, 2005) (citing this Court's "history of strict adherence to discovery schedules").

In *Chalmers v. Petty*, 136 F.R.D. 399, 407 (M.D.N.C. 1991), this Court found that the plaintiff's motion to re-open discovery stemmed from an improper purpose warranting *sua sponte* sanctions where only "baseless allegations" supported the plaintiff's request for further discovery. As described above, Defendants' theory in seeking to take these additional depositions is baseless. Moreover, continuing to take depositions in this critical time of trial preparation for Plaintiffs diverts important time and resources from Plaintiffs' counsel's efforts and is prejudicial to Plaintiffs' interests.

Additionally, a party cannot seek additional testimony, even if relevant, outside of the discovery period simply because deponents in depositions already conducted did not provide information to support that party's legal theory. In *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002), the Court held that the desire to bolster an expert opinion with a second expert after initial testimony failed to yield what the party hoped did not constitute good cause for an out-of-time disclosure. Similarly, here, just because Defendants did not find what they were hoping for in the dozens of depositions they already conducted does not mean that they may keep conducting depositions *ad infinitum* until they find some tidbit they need to support their conspiracy theory. Rule 16 does not allow Defendants to do so.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny Defendants' Motion to Modify the Scheduling Order.

This the 2nd day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO MODIFY THE SCHEDULING ORDER 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 2nd day of March, 2016.

s/ Edwin M. Speas, Jr.
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