IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:13-CV-00949

DAVID HARRIS & CHRISTINE BOWSER,

Plaintiffs,

v.

PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MEMORANDUM REGARDING CONSIDERATION OF EXPERT REPORT

Plaintiffs submit this Response in Opposition to Defendants' Memorandum Regarding Consideration of Expert Report of Barry Burden (ECF No. 129) ("Defendants' Memorandum").

ARGUMENT

The Court should reject Defendants' contention that this Court should admit into evidence and consider an expert report from different litigation, which addressed different issues and was not timely disclosed pursuant to either the deadlines established by the Federal Rules of Civil Procedure or this Court's scheduling orders.

Defendants' Memorandum concerns Defendants' Trial Ex. 121, which is the March 24, 2015 Sur-Rebuttal Expert Report of Barry C. Burden, Ph.D. (the "Sur-Rebuttal

Expert Report"), which Dr. Burden prepared during the course of entirely separate litigation involving challenges to voting restrictions imposed by the State of North Carolina (hereinafter, the "Voting Rights Cases").[1] Dr. Burden was never identified—at any time—as an expert witness in this case. Defendants nonetheless propose that the Court take "judicial notice" of two pages of Dr. Burden's Sur-Rebuttal Expert Report filed in the Voting Rights Cases, apparently on the theory that it constitutes a "public record" (by virtue of its filing in the Voting Rights Cases), or by analogy to a "law review article." Neither argument can withstand scrutiny, and both should be rejected.

First, it is undisputed that Dr. Burden was not disclosed as an expert *in this litigation.* Rule 26 provides that a "party must make [expert] disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: (i) at least 90 days before the date set for trial or for the case to be ready for trial; or (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure." Fed. R. Civ. P. 26(a)(2)(D). This Court, by Order dated May 7, 2015, specifically directed the parties to disclose any

[1] The Voting Rights Cases consist of three civil actions, namely *North Carolina State Conference of the NAACP, et al. v. McCrory, et al.,* Case No. 1:13-CV-00658-TDS-JEP (M.D.N.C.); *League of Women Voters, et al. v. The State of North Carolina, et al.*, No. 1:13-CV-660 (M.D.N.C.); and *United States of America v. State of North Carolina*, Case No. 1:13-cv-861 (M.D.N.C.), which were consolidated for purposes of discovery and trial and were tried before the Hon. Thomas Schroeder of this Court in July 2015. The Voting Rights Cases are entirely separate from the North Carolina state-court redistricting litigation (*Dickson v. Rucho*) that was discussed during the course of the *Harris* trial. *Dickson* involved many of the same underlying facts as *Harris*; in contrast, the Voting Rights Cases involved challenges to an entirely different statute (the Voter Information Verification Act, N.C. Sess. L. 2013-381 and involved substantially different causes of action predicated upon different underlying facts.

supplemental expert reports by no later than June 1, 2015. ECF No. 91 (Order of May 7, 2015), at 1 ("It is further ordered that Plaintiffs and Defendants shall file any supplemental expert reports by June 1, 2015. All discovery in this case shall be completed by July 1, 2015.").

Defendants did not identify Dr. Burden as an expert in this litigation, a point that Plaintiffs explicitly raised at trial in objection to Defendants' Trial Ex. 121, as noted by the Court. Rule 37 imposes an "automatic sanction" of exclusion of a party's expert witness for failure to adhere to the requirements set forth in Rule 26(a).[2] *SSS Enterprises, Inc. v. Nova Petroleum Realty, LLC*, 533 F. App'x 321, 324 (4th Cir. 2013) (district court did not abuse its discretion in excluding plaintiffs' expert witness reports filed three days after the due date set in parties' pretrial conference schedule) (citing *S. States Rack And Fixture, Inc. v. Sherwin-Williams Co*, 318 F.3d 592, 595 n.2 (4th Cir. 2003)). Defendants do not even acknowledge their failure to disclose Dr. Burden as an expert witness, let alone attempt to justify that failure. Defendants' silence on the point in their Memorandum speaks volumes. And the prejudice to Plaintiffs is obvious and palpable—Plaintiffs had no prior notice during discovery that Defendants would seek to introduce Dr. Burden's Sur-Rebuttal Expert Report into evidence and no opportunity to respond to it. For this reason alone, the report should be rejected.

[2] Rule 37 provides that "[i]f 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." Fed. R. Civ. P. 37(c)(1).

Defendants' half-hearted suggestion that the Court should either admit the report into evidence or take "judicial notice" of it should be soundly rejected. A court may take judicial notice of a fact that is "not subject to reasonable dispute" because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Expert reports from entirely separate litigation are hardly the sort of material of which courts take "judicial notice." *See North Carolina ex rel. North Carolina Dep't of Admin. v. Alcoa Power Generating, Inc.*, No. 5:13-CV-633-BO, 2015 WL 224740, at *3 (E.D.N.C. Jan. 15, 2015); *United States v. LaRouche*, 4 F.3d 987 (4th Cir. 1993) ("There may be no dispute among the parties that certain documents exist in the Smith case, but the same cannot be said for the content of those documents, and it is the content which the Defendants ask this Court to notice."). Indeed, on such a theory, a litigant could ignore disclosure requirements with impunity, pointing instead to third-party litigation reports. Such a theory not only badly misconstrues the concept of "judicial notice," but is fundamentally inconsistent with the disclosure requirements of Rule 26 (and this Court's pre-trial disclosure requirements).

Defendants' only remaining argument is that Dr. Burden's Sur-Rebuttal Expert Report, filed in a separate court proceeding, constitutes an admissible "public record," apparently under Federal Rule of Evidence 1005. This argument, too, should be rejected. Rule 1005 requires that several conditions be established before a public record may be admissible:

> The record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original.

Fed. R. Evid. 1005. But Dr. Burden's report fails both tests—it most certainly is not "otherwise admissible," and it has neither been certified as correct nor has it been the subject of testimony. Expert reports are classic hearsay and are most certainly not "otherwise admissible" absent a stipulation between the parties (as existed with respect to Dr. Ansolabehere's reports and Dr. Hofeller's reports in this litigation).

Nor does the mere filing of the Sur-Rebuttal Expert Report in other litigation make such report a "public record." Such a construction of Rule 1005 would make admissible anything filed by any party in any litigation simply by virtue of its existence in that court's file. Defendants offer no justification for such a decidedly odd reading of the rule, and the only two cases they cite are neither controlling, persuasive, nor remotely on point.

First, in *Baker v. Barnhart*, 457 F.3d 882 (8th Cir. 2006), the court *rejected* a request to take judicial notice of a published article that had been misclassified as being authoritative in nature. *Id.* at 891. Instead, court noted that because the article was published on a company's website in support of its product sales, it could not be treated as the sort of authoritative and trustworthy treatise that can appropriately be subject to judicial notice. *Id.* at 891. *Baker* is hardly authority for the proposition that the court should take judicial notice of a contested expert report in a different lawsuit involving

different claims. Defendants' reliance on *United States v. Eagleboy*, 200 F.3d 1137 (8th Cir. 1999), is similarly misplaced. There, the document at issue was a publicly-available policy statement of the Department of the Interior, a record entirely different from a contested expert report in third party litigation. *Id.* at 1140. Neither case provides support for Defendants' position.

Plaintiffs submit that Dr. Burden's Sur-Rebuttal Expert Report was properly excluded by the Court at trial and that nothing in Defendants' Memorandum offers any basis for reconsidering that decision.

Respectfully submitted, this the 20th day of October, 2015.

PERKINS COIE LLP

/s/ Kevin J. Hamilton
Kevin J. Hamilton
Washington Bar No. 15648
Khamilton@perkinscoie.com
William B. Stafford
Washington Bar No. 39849
Wstafford@perkinscoie.com
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8741
Facsimile: (206) 359-9741

John M. Devaney
D.C. Bar No. 375465
JDevaney@perkinscoie.com
Marc E. Elias
D.C. Bar No. 442007
MElias@perkinscoie.com
Bruce V. Spiva
D.C. Bar No. 443754
BSpiva@perkinscoie.com
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Attorneys for Plaintiffs

POYNER SPRUILL LLP

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.
N.C. State Bar No. 4112
espeas@poynerspruill.com
John W. O'Hale
N.C. State Bar No. 35895
johale@poynerspruill.com
Caroline P. Mackie
N.C. State Bar No. 41512
cmackie@poynerspruill.com
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Telephone: (919) 783-6400
Facsimile: (919) 783-1075

Local Rule 83.1
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' MEMORANDUM REGARDING CONSIDERATION OF EXPERT REPORT**, 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 20th day of October, 2015.

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