

FILED

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

2019 MAR 25 PM 2:00
WAKE CO., C.S.C.

COMMON CAUSE, *et al.*
Plaintiffs, BY _____)

v.)

Representative DAVID R. LEWIS,
in his official capacity as Senior
Chairman of the House Select
Committee on Redistricting, *et al.*,
Defendants.)

ORDER GRANTING LEGISLATIVE
DEFENDANTS' MOTION FOR A
PROTECTIVE ORDER AND
PLAINTIFFS' FIRST MOTION TO
COMPEL

THIS MATTER comes before the undersigned three-judge panel upon Legislative Defendants' Motion for a Protective Order, Plaintiffs' First Motion to Compel discovery responses from Legislative Defendants, and Plaintiffs' Second Motion to Compel discovery responses from Legislative Defendants.

Procedural and Factual Background

On November 13, 2018, Plaintiffs served a first set of interrogatories and requests for production of documents on Legislative Defendants. On January 4, 2019, Legislative Defendants served initial responses to Plaintiffs' first discovery requests. On January 16, 2019, Plaintiffs served a second set of interrogatories on Legislative Defendants. On January 25, 2019, Plaintiffs served a third set of interrogatories on Legislative Defendants.

On January 24, 2019, Plaintiffs issued notices of deposition to Representative David R. Lewis ("Defendant Lewis"), Senator Ralph E. Hise ("Defendant Hise"), Speaker of the N.C. House Timothy K. Moore, and President Pro Tempore of the N.C. Senate Philip E. Berger, and subpoenas to Legislative Employee Mark

Coggins, Senator Trudy Wade, Representative Nelson Dollar, Senator Wesley Meredith, Senator John Alexander, Senator Robert Rucho, Former Legislative Employee Jim Blaine, and Senator Dan Bishop. On February 5, 2019, Legislative Defendants and the subpoenaed deponents filed a motion for a protective order in response to Plaintiffs' notices of deposition and subpoenas, claiming legislative immunity and privilege. Legislative Defendants did not calendar this motion for hearing.

On February 15, 2019, the parties entered into a stipulated proposed case management order setting forth deadlines for completion of discovery.

Also on February 15, 2019, Legislative Defendants served supplemental responses to Plaintiffs' initial discovery requests, along with initial responses to Plaintiffs' second and third sets of interrogatories. On February 19, 2019, Plaintiffs filed their first motion to compel. On February 22, 2019, Plaintiffs filed their second motion to compel. Neither party calendared these motions for hearing.

On March 13, 2019, the Court upon its own motion entered a case management order for the purposes of setting out an orderly process for the submission of filed papers to the Court and requests for hearings. The parties have since responded to or made their position known as to each motion in accordance with the March 13, 2019, case management order and requested a hearing on the motions.

In Legislative Defendants' email correspondence to the Court on March 18, 2019, stating their position on the motion for a protective order, Legislative

Defendants for the first time asserted that Defendants Lewis and Hise no longer wished to assert legislative privilege.

On March 21, 2019, a telephonic hearing was held on Legislative Defendants' motion for a protective order and Plaintiffs' first and second motions to compel. The matters were taken under advisement.

After considering the motions, the matters contained therein, and the parties' respective briefs, position statements, and arguments on the motions, and having reviewed the record proper, the Court in its discretion rules on the motions as follows:

Legislative Defendants' Motion for a Protective Order

Legislative Defendants' motion seeks to prohibit Plaintiffs from deposing four Legislative Defendants and eight current or former legislators and legislative staffers, on the grounds of legislative immunity and legislative privilege.

Plaintiffs disagree with Legislative Defendants' assertions of legislative privilege and immunity, but do not oppose the entry of the requested protective order so long as the order specifies that Legislative Defendants are precluded from offering certain evidence and testimony at trial under the principle that a privilege may not be used as both a sword and a shield. Plaintiffs oppose Legislative Defendants' request to withdraw the motion as to Defendants Lewis and Hise, and request that the Court enter the protective order as to all twelve individuals originally named in the motion.

From Legislative Defendants' initial responses to Plaintiffs' first discovery requests on January 4, 2019 to March 18, 2019 – two days before the March 20 deadline (agreed to by all parties) for the completion of written discovery from the Defendants – Legislative Defendants have asserted legislative privilege. Although no privilege log has been provided, presumably Legislative Defendants have relied upon this privilege to withhold interrogatory responses and documents requested through discovery. Upon the filing of a motion for a protective order on February 5, 2019, Legislative Defendants formalized their assertion of legislative privilege for twelve named legislators and legislative staffers. The assertion of legislative privilege resulted in the cancellation of duly noticed and subpoenaed depositions of current and former legislators and legislative staffers, including Senator Hise and Representative Lewis.

Now, only two days before the deadline for completion of written discovery from Defendants and only four days before the deadline for submission of Plaintiffs' expert reports, Legislative Defendants have purported to waive legislative immunity and privilege for Representative Lewis and Senator Hise, but no others. The Court finds and concludes that to allow Legislative Defendants, who heretofore have used legislative immunity and privilege as a shield to prevent discovery by Plaintiffs, to now change positions with respect to this material matter would provide an unfair benefit to Legislative Defendants and impose an unfair detriment on Plaintiffs. Accordingly, the Court concludes that Legislative Defendants are estopped at this late stage in the discovery process from withdrawing their claim of

legislative privilege as to Defendants Lewis and Hise, and Legislative Defendants' motion for a protective order, as filed on February 5, 2019, must be granted in full.¹

Plaintiffs' First Motion to Compel

Plaintiffs' motion seeks to compel: 1) answers to interrogatories #1-4, #5, #7, #12-13, #14-18 from Plaintiffs' first set of interrogatories and #1-4 from Plaintiffs' third set of interrogatories; 2) production of a privilege log; and, 3) production of records responsive to Plaintiffs' requests for production. Legislative Defendants contend their answers to Plaintiffs' interrogatories and responses to Plaintiffs' requests for production of documents has been adequate thus far.

“Whether or not [a] party’s motion to compel discovery should be granted or denied is within the trial court’s sound discretion.” *Wagoner v. Elkin City Sch. Bd. of Educ.*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123 (1994). “When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must (i) expressly make the claim and (ii) describe the nature of the documents,

¹ The Court takes note of the authority provided by Plaintiffs that holds that a party cannot use a privilege both as a “shield” to prevent discovery and a “sword” to present evidence or claims that relate to the privileged information. *See, e.g. State v. Buckner*, 351 N.C. 401, 410 (2000); *Qurneh v. Colie*, 122 N.C. App. 553, 558 (1996). A party therefore may not “use [] an assertion of fact to influence a decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion.” *Favors v. Cuomo*, 285 F.R.D. 187, 199 (E.D.N.Y.) (2012). While it is premature for the Court to make rulings on evidentiary matters for trial, this Order in no way prejudices Plaintiffs from seeking to be heard at or prior to trial should Legislative Defendants offer (1) testimony from any of the twelve individuals who have asserted privilege (2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature’s intent in drawing the challenged district plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data.

communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” N.C.G.S. § 1A-1, Rule 26(b)(5)(a). Rule 5.7 of the Local Rules for Civil Superior Court, Tenth Judicial District (as amended in 2015)² governs electronic discovery and requires a party producing documents in an electronic format to disclose certain information regarding custodians, non-custodial data sources, date ranges, and search methodology.

The Court, in its discretion, grants Plaintiffs’ requests in the first motion to compel. Legislative Defendants shall respond in full, subject to *bona fide* assertions of privilege or immunity, to the following interrogatories and requests for production as follows:

- Third set of interrogatories, #1-4: Legislative Defendants must identify each person who was involved in developing the district boundaries for the 2017 plans, describe the nature of their involvement, provide their affiliations, and provide the names of any entities that paid their fees or expenses. Simply referring to the record is insufficient.
- First set of interrogatories, #5: Legislative Defendants must respond to Interrogatory #5. The identities of legal counsel and consultants that provided advice to Legislative Defendants is not privileged information protected by the attorney-client privilege.
- First set of interrogatories, #12-13: Legislative Defendants must respond to Interrogatories #12-13. Per Interrogatory #12, Legislative Defendants must identify what formulas or algorithms were used, if any. Per Interrogatory #13, Legislative Defendants must identify and describe the partisanship scores or estimates as requested. The terms “formulas or algorithms” and “partisanship scores or estimates” are not vague.
- First set of interrogatories, #14-18: Legislative Defendants must respond to Interrogatories #14-18. Legislative Defendants’ response that the information requested in these interrogatories “may be ascertained from a review of the documents produced” is insufficient.

² The Local Rules for Civil Superior Court, Tenth Judicial District (as amended in 2015) can be accessed here: <https://www.nccourts.gov/assets/documents/local-rules-forms/112.pdf?XAxLgDJvtvgbp9SN0USSfgoejNvF4gmF>

- Records responsive: Legislative Defendants must produce all records responsive to Plaintiffs' requests for production. If asserting a claim of privilege, then Legislative Defendants must produce a privilege log in accordance with N.C.G.S. § 1A-1, Rule 26(b)(5)(a).
- Electronic discovery: Legislative Defendants must disclose information regarding custodians, non-custodial data sources, date ranges, and search methodology of discovery produced in electronic format in accordance with Rule 5.7 of the Local Rules for Civil Superior Court, Tenth Judicial District.

Plaintiffs' Second Motion to Compel

Plaintiffs' second motion sought to compel the identification of the home addresses of the incumbents in place at the time the 2011 and 2017 state legislative plans were adopted. Legislative Defendants initially produced a list of preferred mailing addresses, including P.O. Boxes; however, on March 14, 2019, Legislative Defendants produced the requested information. The parties now agree Plaintiffs' request for the home addresses in the second motion to compel is moot; however, Plaintiffs request costs and fees.

For the foregoing reasons, the Court, in its discretion, denies as moot Plaintiffs' request in the second motion to compel that Legislative Defendants provide the information requested in Plaintiffs' second set of interrogatories.

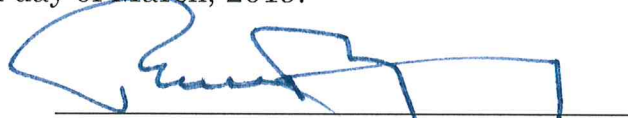
Conclusion

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS as follows:

1. Legislative Defendants' motion for a protective order is GRANTED in full.
2. Plaintiffs' first motion to compel is GRANTED in part as follows:

- a. Legislative Defendants shall provide Plaintiffs with complete answers to Interrogatories #1-4, #5, #12-13, and #14-18 by April 3, 2019;
 - b. Legislative Defendants shall provide Plaintiffs with complete responses to Plaintiffs' Requests for Production by April 3, 2019;
 - c. If withholding documents on a claim of privilege, Legislative Defendants shall provide a privilege log by April 3, 2019; and,
 - d. At this time, the Court will hold open the issue of Plaintiffs' request for attorneys' fees and costs to consider the matter if Legislative Defendants fail to comply with the terms of this Order.
3. Plaintiffs' second motion to compel is DENIED AS MOOT in part as follows:
- a. Plaintiffs' request that Legislative Defendants provide the information requested in Plaintiffs' second set of interrogatories is denied as moot; and,
 - b. At this time, the Court will hold open the issue of Plaintiffs' request for attorneys' fees and costs to consider the matter if Legislative Defendants fail to comply with the terms of this Order.
4. The parties' February 15, 2019, stipulated proposed case management order is amended as follows:
- a. Plaintiffs' expert witness reports are due April 8, 2019; and
 - b. All other deadlines shall remain unchanged.

SO ORDERED, this the 25th day of March, 2019.



Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite

Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton

Alma L. Hinton, Superior Court Judge

Certificate of Service

The undersigned certifies that the foregoing was served upon all parties by depositing the same in the custody of the of the United States Postal Service, First Class postage prepaid, and by email, addressed as follows:

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This the 25th day of March, 2019.

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