IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

DAWN CURRY PAGE, an individual; GLORIA PERSONHUBALLAH, an individual; JAMES FARKAS, an individual, Plaintiffs,

v.

CHARLIE JUDD, in his capacity as Chairman of the Virginia State Board of Elections; KIMBERLY BOWERS, in her capacity as Vice-Chair of the Virginia State Board of Elections; DON PALMER, in his capacity as Secretary of the Virginia State Board of Elections,

Defendant.

Civil Action No. 3:13-cv-678

PLAINTIFFS' SUR-REPLY MEMORANDUM IN OPPOSITION TO CHRISTOPHER MARSTON'S MOTION TO QUASH

TABLE OF CONTENTS

Page

I. LEGISLATIVE PRIVILEGE DOES NOT APPLY 2

A. Mr. Marston Is Not Entitled To Assert Legislative Privilege 2

B. Even if Mr. Marston Were Entitled To Assert Legislative Privilege, A Balancing of the Hardships Is Appropriate 6

II. ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY 8

III. PRIVILEGE HAS BEEN WAIVED OVER DOCUMENTS SHARED WITH THIRD PARTIES 10

IV. CONCLUSION 12

Plaintiffs Gloria Personhuballah and James Farkas ("Plaintiffs") submit this Sur-Reply in Opposition to Christopher Marston's Motion to Quash Plaintiffs' subpoena for documents ("Motion to Quash"). Rather than rest on the record supporting his Motion to Quash, Mr. Marston's reply in support of his motion -- for the first time -- adds new allegations and a supporting declaration, all in a breathless effort to somehow transform his work as a party-paid political consultant into the work of a supposed legislative aide who is covered by the legislative privilege. But the argument fares no better under this belated effort. Mr. Marston still has not provided the evidence required to meet his burden of proving application of the legislative privilege, and he has ignored altogether governing Virginia law that precludes him from assuming the self-declared status of a functionary of the General Assembly.

Mr. Marston's invocation of the attorney-client privilege is similarly unavailing. Despite his burden to substantiate these claims with specificity, he continues to make only broad and conclusory statements. Even Mr. Marston's belated declaration gives little more than a nod to his status as a working attorney. It is undisputed that Mr. Marston also worked as a redistricting consultant in a "non-legal" capacity, and he makes almost no effort to show why the communications at issue were anything other than strategic -- rather than legal --counsel. It is, of course, far too late in the day to claim "privilege" for non-legal communications simply because a lawyer was involved. Courts have consistently rejected such post-hoc attempts to cloak non-legal communications.

Moreover, even if this Court were to decide that Mr. Marston is entitled to claim legislative and attorney-client privilege, Mr. Marston has failed to show why those privileges have not been waived by the presence of multiple third parties on the privilege log who are neither legislators nor clients. For those communications, at the very least, no privilege applies.

I. LEGISLATIVE PRIVILEGE DOES NOT APPLY.

Mr. Marston's claim of legislative privilege rests on the assertions that he "functioned as staff of the Virginia House of Delegates" and was "effectively [ ] lead staff" for the House's redistricting efforts. Marston Declaration¶¶ 7, 12. But Virginia law specifically defines the staff that the General Assembly is permitted to employ and does not make any provision for the employment of political consultants. And, even if it were lawful for the General Assembly to employ a political consultant, Mr. Marston has fallen far short of proving that he had an agency relationship with the General Assembly and was not merely acting as an outside political consultant.

A. Mr. Marston Is Not Entitled To Assert Legislative Privilege.

It is telling that the only party that holds the legislative privilege -- the General Assembly -- has not appeared in this proceeding to assert the privilege or to support Mr. Marston's claim that he was a staff member. And for good reason: the Virginia Code specifically identifies the personnel the General Assembly may employ and does not authorize the General Assembly to employ consultants or counsel to party caucuses. The Code requires, for example, that the General Assembly provide for the employment of secretaries and administrative assistants to assist in the performance of duties incidental to the legislative process. Va. Code Ann. § 30-19.4. The Code also authorizes the General Assembly to "provide for the employment of such clerks, counsel and other staff personnel for each of the standing committees as are approved by the Rules Committee of the appropriate house." *Id.* Nothing in these provisions authorizes the General Assembly to employ consultants or counsel for the party caucuses.

The Virginia Code's omission of such personnel is significant under the maxim *expressio unius est exclusio alterius* - "the expression of one thing is the exclusion of another" - which is a fundamental principle of statutory construction in Virginia. This principle presumes that

“'omitted terms were not intended to be included within the scope of the statute.'" See, e.g. *Conkling v. Commonwealth*, 45 Va. App. 518, 522, 612 S.E.2d 235, 237 (2005) (quoting *Commonwealth v. Brown*, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000)). The General Assembly has, in this case, contemplated the personnel needs of the legislature, and has elected not to devote the Commonwealth’s resources to funding partisan caucus staff.

Relatedly, if Mr. Marston had been employed as counsel or a staffer to the Redistricting Committee, his employment would have to have been approved by the Rules Committee of the House of Delegates. Virginia Code Ann. § 30-19.4. But Mr. Marston has provided no evidence that the Rules Committee ever approved his employment in any capacity. Without that approval, Mr. Marston cannot qualify as either counsel or a staff member to the Redistricting Committee.

And the final blow for Mr. Marston comes through his admission that he was paid by a partisan political committee, not by the General Assembly, which confirms that he was nothing more than an outside political consultant. The Virginia Code directly addresses the employment and compensation of General Assembly personnel. Specifically, the Code authorizes each chamber to set the compensation of its personnel by resolution, and instructs that “the personnel shall be paid from the contingent fund of each house, respectively.” § 30-19.20. The law does not exempt independent contractors or any other categories of personnel from this requirement. Accordingly, the fact that Mr. Marston was paid by a partisan political committee, rather than from the statutorily-designated funds for compensating personnel, directly undermines his contention that he was on “staff of the Virginia House of Delegates” during the relevant period. If he were, in fact, a bona fide legislative staffer, the Code instructs that he would have been compensated from the contingent fund of the House of Delegates.

Mr. Marston's argument must therefore ultimately rest on the claim that the legislative privilege extends to outside consultants. But he has not cited, nor have Plaintiffs found, any Fourth Circuit precedent extending (or for that matter, denying) legislative privilege to an outside political consultant, irrespective of the relationship with the legislature. The Fourth Circuit has addressed legislators, *see, e.g.*, *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996), as well as other government officials acting in coordination with the legislative branch, *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cnty*., 684 F.3d 462, 471 (4th Cir. 2012); *Baker v. Mayor & City Council of Balt*., 894 F.2d 679 (4th Cir.1990), *overruled on other grounds by Berkley v. Common Council of the City of Charleston*, 63 F.3d 295, 303 (4th Cir.1995). *See also Gravel v. United States*, 408 U.S. 606, 616-17 (1972) (extending Speech and Debate clause to "aides and assistants" because their "day-to-day work . . . is so critical to the Members' performance that they must be treated as the latter's alter egos."). Neither the Supreme Court nor the Fourth Circuit has extended legislative privilege to lobbyists and private consultants. Nor have these courts had occasion to address a situation like Mr. Marston's -- a political party's employee acting in coordination with members of the legislature -- but there is ample reason to conclude that the legislative privilege does not extend this far.

Other courts to consider analogous situations have rejected the extension of legislative privilege to people like Mr. Marston. In *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 11 C 5065, 2011 WL 4837508 at *10 (N.D. Ill. Oct. 12, 2011), for example, the court rejected claims of legislative privilege with regard to redistricting consultants, finding that where the legislature "relied on reports or recommendations generated by outside consultants to draft the 2011 Map, they waived their legislative privilege as to these documents." The court explicitly held that no legislative privilege could extend to "lobbyists, members of Congress and

the Democratic Congressional Campaign Committee ("DCCC")." *Id.* "Although these groups may have a heightened interest in the outcome of the redistricting process, they could not vote for or against the Redistricting Act, nor did they work for someone who could. As such, the legislative privilege does not apply." *Id.; see also Baldus v. Brennan*, 11-CV-562 JPS-DPW, 2011 WL 6122542 at*2 (E.D. Wis. Dec. 8, 2011) *order clarified*, 11-CV-562 JPS-DPW, 2011 WL 6385645 (E.D. Wis. Dec. 20, 2011) ("The Legislature has waived its legislative privilege to the extent that it relied on such outside experts for consulting services."); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003) ("[A] conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation [is] a session for which no one could seriously claim privilege.").

This case is no different. There is little doubt that Mr. Marston's employer, the Virginia House Republican Campaign Committee, had an interest in the outcome of the redistricting process. Mr. Marston's declaration also makes clear that his assistance was welcomed by many Republican legislators. But Mr. Marston's contribution was merely that of an outside political consultant brought in to assist with redistricting. If it were otherwise and Mr. Marston had truly operated as a staffer of the General Assembly, surely the General Assembly itself would have provided a declaration or other evidence to support the Motion to Quash. Its silence is telling.

Legislative privilege does not -- and should not -- extend to political consultants. To decide otherwise would extend the privilege beyond the natural limits of those "acting in a legislative capacity," *Kensington Volunteer Fire Dep't*, 684 F.3d at 470, to any outsider seeking to influence the legislative process. It would transform a doctrine of legislative protection into a doctrine of legislative secrecy. *Accord Comm. for a Fair & Balanced Map*, 2011 WL 4837508 at *10 ("A contrary ruling would allow a legislator to cloak any communication with legislative

privilege by simply retaining an outsider in some capacity."). For this reason, this Court should not extend legislative privilege to cover Mr. Marston.

B. Even if Mr. Marston Were Entitled To Assert Legislative Privilege, A Balancing of the Hardships Is Appropriate.

Mr. Marston cites *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), for the proposition that legislative immunity should be absolute with respect to a request for documents. Yet *Brown & Williamson* concerns legislative immunity for federal legislators, which is guaranteed by the Speech and Debate Clause of the U.S. Constitution. *Id*. at 415. State legislatures, by contrast, are protected by a narrower immunity based on principles of comity. *United States v. Gillock*, 445 U.S. 360, 370 (1980) ("[F]ederal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch.").

Gillock recognized that legislative immunity was weaker for state legislatures, and that immunity must yield "where important federal interests are at stake, as in the enforcement of federal criminal statutes." *Id*. at 373. Redistricting is undeniably an important federal interest, and in this context at least, legislative privilege must not be absolute. *See Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011) ("Voting rights cases, although brought by private parties, seek to vindicate public rights. In this respect, they are akin to criminal prosecutions."). In this case, therefore, this Court should consider the interests at stake to determine whether Mr. Marston's claim of legislative privilege must yield to Plaintiffs' need for the documents.

Applying this balancing test, it is clear that the circumstances of this case weigh strongly in favor of disclosure. For starters, the issue before this Court involves political consultants -- not even the members of the General Assembly themselves. The Supreme Court has made clear

that legislative immunity is less important where non-legislators are concerned. *See Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S. Ct. 1425, 1427, 18 L. Ed. 2d 577 (1967) ("This Court has held, however, that this doctrine is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves."); *Tenney v. Brandhove*, 341 U.S. 367, 378, 71 S. Ct. 783, 789, 95 L. Ed. 1019 (1951) ("It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued . . . ."). Political consultants like Mr. Marston, if within the privilege at all, certainly are weighed differently in the calculus than the legislators themselves.

Moreover, the core concern of a state legislative privilege -- to protect legislative functioning -- is at its least pressing here, where Plaintiffs merely seek documents from a private citizen. *See Baldus v. Brennan*, 11-CV-562 JPS-DPW, 2011 WL 6122542 at *2 (E.D. Wis. Dec. 8, 2011) *order clarified*, 11-CV-562 JPS-DPW, 2011 WL 6385645 (E.D. Wis. Dec. 20, 2011) ("Allowing the plaintiffs access to these [documents or other items that were used by the Legislature in developing the redistricting plan] may have some minimal future 'chilling effect' on the Legislature, but that fact is outweighed by the highly relevant and potentially unique nature of the evidence."); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 305 n.23 (D. Md. 1992) (Murnaghan and Motz, JJ., concurring) ("[W]e deem it extremely unlikely that in the future private citizens would refuse to serve on a prestigious gubernatorial committee because of a concern that they might subsequently be deposed in connection with actions taken by the committee."). There is simply no reason to believe that disclosure of Mr. Marston's documents will have any serious effect on Virginia's future legislative functioning.

Seeking to brush over these weaknesses, Mr. Marston cites to a one-page order granting a motion to quash. That case involved a Rule 30(b)(6) notice of deposition to the South Carolina Senate -- in other words, an organizational subpoena sent to the state legislature itself, and involved a deposition rather than document production. Dkt. #84-2, Ex. B, at 2. It was a direct challenge to the legislative institution itself through a demand that an institutional witness be produced for a deposition. That case is a far cry from the facts at bar. Mr. Marston is neither a legislator or legislative staff; he is an individual operating as a party-paid consultant. No deposition, much less an institutional 30(b)(6) deposition, is at issue. By contrast, and as detailed in the Opposition to the Motion to Quash, Mr. Marston's documents are directly probative on the issues before this Court. Plaintiffs respectfully submit that Mr. Marston's legislative privilege claim must yield.

II. ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY.

Mr. Marston's invocation of the attorney-client privilege similarly fails. Mr. Marston has claimed attorney-client privilege for over 88 documents, only 27 of which he claims are protected solely by attorney-client privilege and/or common-interest privilege. As with legislative privilege, however, it is Mr. Marston's burden to prove that the privilege applies. *See N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011) ("A party asserting privilege has the burden of demonstrating its applicability."). But he has failed almost entirely, even with the improper submission of additional materials and allegations in his reply memorandum, to carry that burden.

"It is incumbent upon the proponent to specifically and factually support his claim of privilege, usually by affidavit, to satisfy this burden, and an improperly asserted privilege is the equivalent of no privilege at all." *Byrnes v. Jetnet Corp.*, 111 F.R.D. 68, 71 (M.D.N.C. 1986). Mr. Marston's declaration and privilege log cannot meet this standard. At best, he has averred

that he is an attorney and that he gave some legal advice during his work with the Virginia House of Delegates in connection with his admittedly "non-legal" work as a redistricting consultant. See Dkt. #84-1, ¶¶ 13-14 (describing redistricting work as "non-legal"); ¶ 11 ("In 2010, the Virginia House Republican Caucus asked me to provide legal counsel regarding redistricting").

This showing does not come close to meeting Mr. Marston's burden. It is well established that when an attorney fills two roles -- one legal and one non-legal -- the attorney-client privilege serves to protect only those communications that seek or provide legal counsel. *See, e.g.*, *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 411 (D. Md. 2005) ("[T]he request for legal advice must be more than incidental to the business purpose; the primary purpose of the client's communication with the lawyer must be to obtain legal advice."); *United States v. Cohn*, 303 F. Supp. 2d 672, 683 (D. Md. 2003) ("When the legal advice is merely incidental to business advice, the privilege does not apply."); *Burroughs Wellcome Co. v. Barr Labs., Inc.*, 143 F.R.D. 611, 616 (E.D.N.C. 1992) (noting that the court has not extended "the privilege to communications made to an attorney in connection with business, rather than legal, advice.").

Yet neither Mr. Marston's declaration nor his privilege log suffice to show that he was acting in his capacity as an attorney for any of the communications over which he has asserted attorney-client privilege. Mr. Marston's declaration makes only general and conclusory statements that he provided legal counsel. On the log, the majority of documents for which Mr. Marston seeks to claim attorney-client privilege are described as "communications" between Mr. Marston and others "regarding redistricting." *See, e.g.*, 000364, 000366 ("Email communications between legal counsel to House Republicans and legal counsel to Senate Republicans regarding redistricting."); 000491, 000498, 000499 ("Email communication

between legal counsel to House Republicans regarding congressional redistricting."). The descriptions are therefore almost identical to the descriptions over which Mr. Marston does *not* claim any attorney-client privilege. *Cf.* 000020 ("Email communication between staff and consultant advising House Republicans regarding congressional redistricting.").

The only distinction is that Mr. Marston has styled himself as "counsel" in those communications he wishes to protect based on the attorney-client privilege. As detailed above, however, the courts have repeatedly emphasized that a communication to an attorney is not automatically protected. The log does not assert that legal advice was sought or given in any of the communications. *Cf. Adair v. EQT Prod. Co.*, 285 F.R.D. 376, 381 (W.D. Va. 2012) (privilege log insufficient where "[n]one of these entries makes any reference to seeking or providing legal advice" and proponent "stated only that the inquiries 'presented legal issues, and EQT anticipated that litigation could ensue.'"). Mr. Marston has simply failed to carry his burden to demonstrate the applicability of the attorney-client privilege.

III. PRIVILEGE HAS BEEN WAIVED OVER DOCUMENTS SHARED WITH THIRD PARTIES.

Finally, even if Mr. Marston could show that he was rightfully entitled to assert either legislative or attorney-client privilege over the documents at issue, he has not shown why those privileges were not waived when the communications involved other non-legislators. Like other evidentiary privileges, both the legislative and attorney-client privileges are waived when the privileged information is disclosed to third parties. *See Trombetta v. Bd. of Educ., Proviso Twp. High Sch. Dist. 209*, 02 C 5895, 2004 WL 868265 at *5 (N.D. Ill. Apr. 22, 2004) (legislative); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (attorney-client).

Mr. Marston's privilege log is littered with these third-party disclosures. Numerous entries show correspondence shared with Paul Haughton, who is described as staff for the

Virginia House Republican Campaign Committee, *see, e.g.*, 000018; 000041, or Leslie Rutledge, counsel to the Republican National Committee, *see* 000051. There are also communications with Steve Ellis (Consultant, Virginia House of Delegates), *see, e.g.*, 000210; 000291, Clark Bensen (Consultant to Republican Members of Virginia House of Delegates), *see, e.g.*, 000245; 000306, and John Morgan (Consultant to Republican Members of Virginia House of Delegates), *see, e.g.*, 000306; B001279. Mr. Marston's privilege log also shows communications with staff for the Virginia Governor. *See, e.g.*, B000045; B000084.

As Plaintiffs argued in their Opposition to the Motion to Quash, other courts have found the presence of outside consultants in redistricting sufficient to waive legislative privilege. Dkt. #83, at 15. Even if this Court finds that Mr. Marston's late declaration could meet his burden to establish that *he* was covered by legislative privilege, Mr. Marston has barely even attempted to show how these other non-legislators and non-staff were anything other than third parties to the communications. As a result, this Court should order Mr. Marston to produce all documents previously withheld on the basis of legislative privilege to the extent those documents were shared with third parties.

Likewise, Mr. Marston has failed to justify why attorney-client privilege has not been waived. Although Mr. Marston has set forth that he was engaged to provide legal counsel to "members of the House Republican Caucus," Dkt. #84-1, ¶ 8, he makes no attempt to establish any kind of protected relationship with the political operatives, consultants, and Governor's staff who appear on the log. To establish attorney-client privilege, a proponent must show that the communications at issue were confidential. "Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege." *Jones*, 696 F.2d at 1072. The presence of so many third-parties on the redistricting

communications suggests that this subject was never truly intended to be confidential. To the extent it was applicable in the first instance (a dubious proposition), the privilege was nonetheless waived by numerous disclosures. *See id*. ("Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter.").

Nor can Mr. Marston protect these communications by invoking the common-interest privilege. *See, e.g*., 000364; 000366 (describing communications between Mr. Marston and "Counsel to Republican Members of the Virginia Senate"). To do so, he would be required to define explicitly "the nature and scope of the interest (identical or merely similar) [he] allegedly has in common" and not rely on "conclusory allegation[s]." *Byrnes v. Jetnet Corp*., 111 F.R.D. 68, 72 (M.D.N.C. 1986). Mr. Marston has fallen far short of this burden, as he has not offered any explanation at all for why any of these conversations with third parties and non-clients remain privileged.

IV. CONCLUSION

For all these reasons, Plaintiffs respectfully request that the Court deny the Motion to Quash and order Mr. Marston to turn over all documents withheld on the basis of legislative privilege and attorney-client privilege.

Dated: April 22, 2014

Respectfully submitted,

By________/s/____________

John K. Roche (VSB# 68594)
Marc Erik Elias (admitted *pro hac vice*)
John Devaney (admitted *pro hac vice*)
Perkins Coie, LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 434-1627
Fax: (202) 654-9106
Email: JRoche@perkinscoie.com
Email: MElias@perkinscoie.com
Email: JDevaney@perkinscoie.com

Kevin J. Hamilton (admitted *pro hac vice*)
Perkins Coie, LLP
1201 Third Avenue, Ste. 4800
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000
Email: KHamilton@perkinscoie.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to counsel of record.

Respectfully submitted,

By____/s/________________________

John K. Roche (VA Bar No. 68594)
Perkins Coie, LLP
700 13th St., N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 434-1627
Fax: (202) 654-9106
JRoche@perkinscoie.com

Attorneys for Plaintiffs