STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, et al.,

Defendants.

PLAINTIFFS' RESPONSE TO LEGISLATIVE DEFENDANTS' MOTION FOR DIRECTION

INTRODUCTION

As this Court has found, the files recovered from Dr. Hofeller's devices related to North Carolina contain significant evidence of unconstitutional conduct by Legislative Defendants, as well as "troubl[ing]" representations to federal courts and the public concerning redistricting. Judgment ¶ 704 (Sept. 3, 2019). Legislative Defendants previously sought to conceal the Hofeller files from public view, and this Court refused in part because Legislative Defendants had sat on their rights. Undeterred, Legislative Defendants have returned to this Court, two and half months later, again seeking to conceal the North Carolina-related Hofeller files from public view. Indeed, Legislative Defendants expressly seek an order directing Plaintiffs to "destroy" documents of immense public import, Mot. 1, the vast majority of which are public records under North Carolina law. For a multitude of reasons, Legislative Defendants' motion for direction should be denied.

ARGUMENT

I. Legislative Defendants' Motion Is Barred by a Prior Order of this Court

This is not the first time Legislative Defendants have argued that certain of the files recovered from Dr. Hofeller's electronic storage devices are protected by the attorney-client privilege or work-product doctrine. As the Court will recall, on June 6, 2019, Plaintiffs moved for an order directing Legislative Defendants to refrain from further pursuing the return or destruction of the files produced to Plaintiffs by Stephanie Hofeller in response to a lawful subpoena. In their response, filed on June 17, 2019, Legislative Defendants argued that thousands of documents produced to Plaintiffs by Ms. Hofeller "are protected by attorney-client and work-product privileges." Leg. Defts.' Response at 45 (June 17, 2019). Legislative Defendants requested an order directing Plaintiffs "to disclose the extent of their review of the Legislative Defendants' [supposedly] privileged materials" and requiring that Plaintiffs "be

divested of all materials obtained from Ms. [Hofeller]." *Id.* at 5. In their reply, Plaintiffs pointed out that Legislative Defendants had waived any privilege or work-product protection multiple times over and that all documents Dr. Hofeller prepared in developing the 2017 Plans are public records under Dr. Hofeller's contract and N.C. Gen. Stat. § 120-133(a). *See* Pltfs.' Reply (June 27, 2019).

The Court unequivocally rejected Legislative Defendants' arguments and requests for relief. In its July 12, 2019 Order on Plaintiffs' Motion for Direction, the Court held that all "documents necessary for the administration of justice in this case" were "not subject to any assertions of privilege" and "likely fall under the public record designation provided by N.C.G.S. § 120-133." 07/12/19 Order on Pltfs.' Mot. for Direction at 2. "As to Legislative Defendants' request that Plaintiffs disclose the extent of their review of the files produced by Stephanie Hofeller," the Court "note[d] that the delay in bringing these concerns before the Court has contributed to any prejudice Legislative Defendants claim to have suffered," and "denie[d] Legislative Defendants' requested relief at this late stage of the litigation." *Id.* The Court also declined Legislative Defendants' request to order Plaintiffs to be divested of any materials produced by Ms. Hofeller. *See id.*

In the instant motion for direction, Legislative Defendants again repeat the same arguments from their June 17 brief and make some of the same requests for relief. They again claim that files produced by Ms. Hofeller are privileged or protected work product, and again seek to divest Plaintiffs of those files. But Legislative Defendants do not even mention that this Court previously rejected materially identical arguments and requested relief, let alone explain why this Court now should reconsider and reach a different conclusion.

Even worse, this Court previously rejected Legislative Defendants' arguments based on their "delay in bringing these concerns before the Court" and the "late stage of the litigation." *Id.* That was more than two months ago. Now, Legislative Defendants have delayed even longer, and this case is at an even later stage. Denying Legislative Defendants' requested relief as untimely was amply warranted in July, and it is all the more warranted today.

II. Legislative Defendants' Logged Files Include Numerous Public Records

Even apart from this Court's prior order and Legislative Defendants' repeated waiver of their rights as described *infra*, Legislative Defendants' privilege claims independently fail because the vast majority of the files listed on their logs are public records. These public records fall into two categories.

First, consistent with N.C. Gen. Stat. § 120-133(a), Dr. Hofeller's contracts with the General Assembly to draw both the 2017 state House and state Senate plans and the 2016 congressional plan expressly state that "all drafting and information requests to [Dr. Hofeller] and documents prepared by [Dr. Hofeller] concerning redistricting *shall no longer be confidential and shall become public records* upon the act establishing the relevant districting plan becoming law." Exs. Q, P to Pltfs.' Reply (June 27, 2019) (emphasis added). Dr. Hofeller's work in drawing the 2011 state legislative plans and the 2011 congressional plan likewise are public records under N.C. Gen. Stat. § 120-133(a). Thus, "drafting and information requests to" Dr. Hofeller and "all … documents prepared by" him in developing North Carolina's state legislative and congressional plans this decade lost any confidentiality and became public records upon the passage of those plans. All such documents belong to the people of North Carolina and should have been made public years ago.

Indeed, this Court has already held as much. In its September 3, 2019 Judgment in this case, the Court held that the Hofeller files introduced into evidence at trial "are public records

pursuant to N.C. Gen. Stat. § 120-133(a) and Dr. Hofeller's contract with the General Assembly to draw the 2017 Plans." Judgment ¶ 56 (Sept. 3, 2019). The rationale for that ruling plainly applies to all documents related to Dr. Hofeller's work in developing redistricting plans in North Carolina. They are all public records.

Remarkably, however, Legislative Defendants seek to conceal and destroy thousands upon thousands of such public records. Based on Legislative Defendants' logs, it appears that nearly *all* of the files listed on Exhibit A to Legislative Defendants' motion are public records. With the possible exception of a few files that appear from the file names to be draft expert reports and declarations, all of the files listed on Exhibit A appear to be spreadsheets, maps, and other documents Dr. Hofeller prepared in drawing the 2017 state legislative and 2016 congressional plans. As for Exhibit B, any emails and accompanying attachments related to the 2017 state legislative plans from before August 31, 2017 are public records, as are any emails and attachments related to the 2016 congressional plan from before February 19, 2016 (the dates of passage of the plans). It is clear that Exhibit B contains many such documents. *See, e.g.*, Leg. Defts.' Ex. B at p. 84 of PDF. In their motion, Legislative Defendants do not even mention, let alone try to distinguish, Dr. Hofeller's contract, section 120-133(a), or this Court's prior holding that files documenting Dr. Hofeller's redistricting work in North Carolina are public records.

Second, all of Dr. Hofeller's work in North Carolina in various other litigation, including non-redistricting litigation, are public records and exempt from any attorney-client or work product privilege under N.C. Gen. Stat. § 132-1.1(a). That statute provides that "written communications (and copies thereof) to any public board, council, commission or other governmental body of the State … made within the scope of the attorney-client relationship" related to any litigation or claim against the State "*shall become public records* as defined in

G.S. 132-1 three years from the date such communication was received." N.C. Gen. Stat. § 132-1.1(a) (emphasis added). Thus, all of Dr. Hofeller's work on behalf of state agencies in the *NAACP v. McCrory* litigation challenging the 2013 omnibus elections bill—where no legislators were defendants—qualifies as public records under § 132-1.1, without regard to any attorney-client or work product privilege. The same is true of Dr. Hofeller's work in *Harris v. McCrory* and the *United States v. North Carolina*. Legislative Defendants purport to file their motion and make privilege claims on behalf of "Legislative Defendants" in a variety of cases, including the three just listed, in which there *were* no legislative defendants, just state and state agency defendants, and in which public records laws make clear that no privilege remains. Mot. 1. Legislative Defendants' Exhibit B contains many communications that are public records under section 132-1.1(a).

It is simply stunning that Legislative Defendants—who are senior government officials of the State of North Carolina—are seeking the destruction of public records that belong to the citizens whom these officials are duty-bound to serve. North Carolina law in fact makes it a crime to "destroy" public records. N.C. Gen. Stat. §§ 121-5(b), 132-3(a). This Court obviously cannot direct any such course of action.

III. Legislative Defendants Have Repeatedly Waived Any Attorney-Client Privilege or Work-Product Protection

Even if some of the records listed in Legislative Defendants' Exhibit B conceivably could be subject to a claim of attorney-client privilege or work-product protection, Legislative Defendants have waived any privilege or protection *four times over*—by failing to object to Plaintiffs' subpoenas, demanding that Plaintiffs transmit complete copies of the Hofeller files to third parties, failing to restrict use of the files by Ms. Hofeller, and delaying bringing their privilege and work-product claims to the Court.

A. Legislative Defendants Waived any Privilege or Protection by Failing To Object to Plaintiffs' Subpoenas

Legislative Defendants waived any privilege or work-product protection when they did not object to any of the subpoenas Plaintiffs served on Ms. Hofeller, Ms. Hofeller's mother, or the Estate of Dr. Hofeller. All of these subpoenas sought materials related to Dr. Hofeller's work for Legislative Defendants, and Legislative Defendants did not object to any of them. "Where a party is aware" that a subpoenaed third party may possess the party's privileged information, "the burden falls on that party to take affirmative steps to prevent the disclosure in order [to] preserve the privilege as to itself." *Am. Home Assur. Co. v. Fremont Indem. Co.*, 1993 WL 426984, at *4 (S.D.N.Y. Oct. 18, 1993). "The failure to act to prevent or object to the disclosure of confidential communications when a party knows or should know that privileged documents may be disclosed by another party waives the privilege with respect to the party failing to act." *Id.*; *see also Ravenswood Inv. Co., L.P. v. Avalon Corr. Servs., Inc.*, 2010 WL 11443364, at *2 (W.D. Okla. May 18, 2010) ("Because Defendant did not state its claim of privilege within fourteen days of service of the subpoena on [a third party], the Court concludes Defendant has waived any such claim."); *Patterson v. Chi. Ass'n for Retarded Children*, 1997 WL 323575, at *3 (N.D. Ill. June 6, 1997) ("By failing to object" to third-party subpoena, party "essentially waived her claim to privilege, and the information gleaned via the subpoena may be used.").

Legislative Defendants have previously argued that they did not waive privilege in failing to object because they "did not know Ms. [Hofeller] had" the materials. Leg. Defts.' Response at 46 (June 17, 2019). But Plaintiffs' subpoenas to Ms. Hofeller and other third parties asked for all documents, or devices containing documents, related to Dr. Hofeller's work on the challenged state House and Senate plans. Legislative Defendants have argued that those materials would necessarily contain privileged information. *See id.* at 45-49. If Legislative Defendants believed

that to be the case, then the "scope of [the] subpoena[s]" "should reasonably should have alerted" Legislative Defendants "to the possibility" that one of the subpoenaed third parties, including Ms. Hofeller, "might produce the [allegedly] privileged documents." *Am. Home Assur.*, 1993 WL 426984, at *4. A party must "jealously guard" its privileged materials. *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 45 (D.D.C. 2009). Legislative Defendants' "failure to take any steps to prevent the disclosure of [allegedly] privileged documents waived the privilege they seek to assert." *Am. Home Assur.*, 1993 WL 426983, at *4.

B. Legislative Defendants Waived any Privilege or Protection by Compelling Plaintiffs To Transmit Copies of the Hofeller Files to Third Parties

Legislative Defendants independently waived any privilege or work-product protection by demanding that Plaintiffs transmit complete copies of all of the Hofeller files to State Defendants and Intervenor Defendants. It is well-established that a party waives privilege where no "reasonable protective measures were employed in order to safeguard claims of privilege" or "ensure confidentiality" before documents are produced to another party. *Scott v. Glickman*, 199 F.R.D. 174, 179 (E.D.N.C. 2001). Here, at Legislative Defendants' own behest, Plaintiffs transmitted complete copies of the contents of the storage devices to State Defendants and Intervenor Defendants, neither of which has any privileged relationship with Legislative Defendants, and at least one of which (State Defendants) is not aligned with Legislative Defendants in this case. Legislative Defendants did so, moreover, even though weeks earlier, Plaintiffs had sent Legislative Defendants a searchable index of the file names and file paths, which made apparent that the devices contain files involving Dr. Hofeller's work for Legislative Defendants. *See* Reply in Support of Pltfs.' Mot. for Direction, Ex. E at 1 (June 27, 2019). Legislative Defendants could have requested limitations or protective measure before these files were provided to the State Defendants and Intervenor Defendants, but they did not.

Plaintiffs have raised this basis for waiver before, but tellingly, Legislative Defendants have not addressed it in their motion for direction or in any other submission to this Court. Legislative Defendants offer no argument or precedent for the notion that they maintained privilege over "documents [that] were revealed to third parties without objection," and indeed at their own insistence. *Durham Indus. Inc. v. N. River Ins. Co.*, 1980 WL 112700, at *2 (S.D.N.Y. May 8, 1980) (finding waiver); *see also Furniture, Inc. v. Kittinger/Penn. House Grp., Inc.*, 116 F.R.D. 46, 50 (M.D.N.C. 1987) ("the privilege may be lost" by failing "to take affirmative actions and institute reasonable precautions to ensure that confidentiality will be maintained").

C. Legislative Defendants Waived any Privilege or Protection by Failing To Restrict Use or Dissemination of the Files by Ms. Hofeller

Legislative Defendants independently waived any privilege or work-product protection in yet a third way by failing to take steps to restrict the use or dissemination of the files by Ms. Hofeller. For months, Legislative Defendants have been aware that the parties to this case are not the only ones who possess copies of the files recovered from Dr. Hofeller's devices. Stephanie Hofeller, who is not a Plaintiff or otherwise a party to this case, also possesses copies. On May 17, 2019, more than three months before Legislative Defendants filed this motion, Ms. Hofeller testified at her deposition that she made and retained copies of two backups from one of the hard drives that she turned over in response to Plaintiffs' subpoena. *See* PX781 at 146:8-148:6. When asked by Legislative Defendants' counsel: "Q. Did you retain copies of any of the hard drives and thumb drives that you produced to Arnold & Porter in response to the subpoena?," Ms. Hofeller answered "A: Yes." *Id.* at 145:8-11. Ms. Hofeller explained that there were "many, many backups of the same hard drive," that she "copied . . . the first one and the last one only knowing that was going to be redundant," and that she maintained these copies in a

drawer in her "home in Kentucky." *Id.* at 146:19-147:22. Ms. Hofeller further explained that she kept these copies to "preserve" her father's work "for posterity." *Id.* at 147:6-8.

Legislative Defendants clearly knew about Ms. Hofeller's deposition, since they took it. Yet despite submitting various filings to this Court attempting to restrict use of the files in question by *Plaintiffs*, Legislative Defendants have never—to Plaintiffs' knowledge—taken *any* step to restrict the use or distribution of the documents by Ms. Hofeller.

Again, "[t]he failure to act to prevent or object to the disclosure of confidential communications when a party knows or should know that privileged documents may be disclosed by another party waives the privilege with respect to the party failing to act." *Am. Home Assur.*, 1993 WL 426984, at *4. "Courts have emphasized that claw back requests should be made immediately, with delays of even a few weeks determined to be too long …." *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2019 WL 3995941, at *12 (N.C. Super. Aug. 16, 2019) (quotation marks omitted) (citing cases). "Courts have held that twelve days, even six days, are too long to wait to avoid waiving privilege." *In re Grand Jury Subpoena Dated Mar. 20, 2013*, 2014 WL 2998527, at *13 (S.D.N.Y. July 2, 2014). Here, Legislative Defendants have done nothing to restrict Ms. Hofeller's use of the files for nearly four months.

Because of Legislative Defendants' inaction, moreover, now it is not just Ms. Hofeller who possesses these supposedly privileged and confidential files. It appears that Ms. Hofeller has disclosed some unknown number of the files to major media outlets. On September 6, 2019, *The New Yorker* published an article describing numerous files recovered from Dr. Hofeller's devices in detail, stating that "at least seventy thousand files and several years of e-mails … were recently obtained … by *The New Yorker*." David Daley, *The Secret Files of the Master of Republican Gerrymandering*, The New Yorker, Sept. 6, 2019, http://bit.ly/2kESaQE. The next

day, on September 10, 2019, *The New York Times* published a similar article describing "highlights" from "files from the Hofeller backups recently made available to The New York Times." Michael Wines, *Republican Gerrymander Whiz Had Wider Influence Than Was Known*, N.Y. Times, Sept. 10, 2019, https://nyti.ms/2lHNB8t. After publication of the article by *The New Yorker*, Ms. Hofeller's counsel informed Plaintiffs that Ms. Hofeller was *The New Yorker*'s source for the files.

D. Legislative Defendants Waived any Privilege or Protection through Delay

Finally, Legislative Defendants independently waived any privilege or protection by sleeping on their rights. Plaintiffs served their subpoena on Ms. Hofeller, with notice to Legislative Defendants, on February 13, 2019. On March 20, 2019, Plaintiffs notified Legislative Defendants that Ms. Hofeller had responded to the subpoena by producing several external hard drives and thumb drives. On April 9, 2019, Plaintiffs sent Legislative Defendants a searchable index listing the file names and file paths for all of the Hofeller files. In early May, Plaintiffs provided Legislative Defendants copies of all of the actual files. On May 31—the day after plaintiffs in the census litigation notified the federal district court and the U.S. Supreme Court of evidence of potential government misconduct that Plaintiffs had discovered in the Hofeller files—Legislative Defendants sent Plaintiffs a letter asserting that the Hofeller files contained potentially privileged materials, but identified only five specific potentially privileged files. On June 5, in response to Legislative Defendants' letter, Plaintiffs invited Legislative Defendants to "identify each such file" they believed was privileged, "specify the privilege that you believe applies, and provide appropriate legal and factual support for your contention that the file is privileged." Pltfs.' Mot. for Direction, Ex. C at 13 (June 6, 2019).

Yet Legislative Defendants now have waited until August 30, 2019—nearly five months after receiving the searchable index of files names, nearly four months after receiving the files

themselves, and three months since Plaintiffs invited Legislative Defendants to provide an itemized list of purportedly privileged documents—to produce logs of the particular documents they claim are privileged or protected by the work-product doctrine. Again, "[c]ourts have emphasized that claw back requests should be made immediately, with delays of even a few weeks determined to be too long." *Window World*, 2019 WL 3995941, at *12 (quotation marks omitted). Legislative Defendants' "failure to timely serve privilege log waived any privilege that might otherwise be asserted." *Id.* at *33

IV. Legislative Defendants Have Not Established that the Logged Files Are Protected by the Attorney-Client Privilege or the Work-Product Doctrine

Even if this Court were to overlook its prior order, North Carolina public records law, and Legislative Defendants' repeated waiver of their rights, Legislative Defendants' motion would still fail because they have failed to substantiate their privilege and work-product claims.

A. Legislative Defendants Fail To Offer a Particularized Basis for Any of their Privilege or Work-Product Claims

Courts evaluate claims of attorney-client privilege and work-product protection on a particularized, document-by-document basis. In order for the attorney-client privilege to apply, a particular communication "must satisfy the five-factor *Murvin* test." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 240, 805 S.E.2d 664, 669 (2017). A communication thus is privileged only if: "(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose[,] although litigation need not be contemplated[,] and (5) the client has not waived the privilege." *Id.* "[I]f any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *Id.* (quotation marks

omitted). "The burden is always on the party asserting the privilege to demonstrate each of its essential elements." *In re Miller*, 357 N.C. 316, 336, 584 S.E.2d 772, 787 (2003).

"This burden may not be met," moreover, "by mere conclusory or ipse dixit assertions, or by a blanket refusal to testify" or produce documents. *Id.* "Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item." *Id.* And in determining whether these elements are satisfied, the trial court must conduct "a fact-sensitive inquiry" applied to each "specific communication." *Raymond v. N.C. Police Benevolent Ass'n., Inc.*, 365 N.C. 94, 100, 721 S.E.2d 923, 927 (2011).

The work-product doctrine is similar. Sometimes known as a "trial preparation immunity," *Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E.2d 191, 201 (1976), the work-product doctrine generally protects from discovery documents "prepared in anticipation of litigation." N.C. Rule of Civ. P. 26(b)(3). Work-product claims rise and fall based on "the nature of the document and the factual situation in the particular case." *Crosmun v. Trustees of Fayetteville Tech. Cty. Coll.*, -- S.E.2d --, 2019 WL 3558764, at *10 (N.C. Ct. App. Aug. 6, 2019). "The party seeking … work-product privilege bears the burden of proof." *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (N.C. Ct. App. 2006).

Here, Legislative Defendants' submissions are woefully inadequate to carry their particularized burden for each and every item on their logs. Exhibit A to Legislative Defendants' motion includes 7,632 mapping files for which, under the column labelled "Privilege," every document contains only a two-word notation: "Work Product." Nowhere do Legislative Defendants provide substantiation that any attorney even saw any of these documents, let alone that these *mapping files* somehow reflect an attorney's mental impressions or legal theories. Exhibit B contains even less information than Exhibit A—it lists an unnumbered quantity of

emails and attachments, with no privilege notation whatsoever. Legislative Defendants' motion does not fill this gap. The motion simply asserts, without elaboration, that "Exhibit A is an itemization of all files Legislative Defendants believe are protected by the Work Product Privilege" and that "Exhibit B is an itemization of all communications and corresponding attachments to those communications that Legislative Defendants[] believe are protected by the Attorney Client or Work Product Privileges." Mot. at 3. Those conclusory assertions do not provide a particularized basis for asserting attorney-client privilege or work-product protection.

B. Legislative Defendants Have Not Substantiated their Claims of Attorney-Client Privilege

Even if they had attempted to offer a particularized basis for each document they claim is privileged or protected, Legislative Defendants' attorney-client privilege claims would still fail because they have not shown that any communication involved giving or receiving legal advice.

The attorney-client privilege is limited to communications "made in the course of giving or seeking legal advice." *Friday Invs.*, 370 N.C. at 240, 805 S.E.2d at 669 (quotation marks omitted). The whole point of the attorney-client privilege lies in "facilitating competent legal advice and ultimately in furthering the ends of justice." *Miller*, 357 N.C. at 333, 584 S.E.2d at 785. Legislative Defendants' sparse privilege log and conclusory motion does not remotely demonstrate that each allegedly privileged file involves actual legal advice.

Even if an unknown number of the emails in Exhibit B involved legal advice, moreover, that would not suffice to protect the attachments. "Attachments which do not, by their content, fall within the realm of the privilege cannot become privileged by merely attaching them to a communication with the attorney. To permit this result would abrogate the well-established rule that only the communications, not underlying facts, are privileged." *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980). Attachments to protected communications must

"independently earn … protection." *AM Gen. Holdings LLC v. Renco Grp., Inc.*, 2013 WL 1668627, at *3 (Del. Ch. Apr. 18, 2013). Legislative Defendants' failure to show that each email and attachment involved giving or receiving legal advice dooms their privilege claims.

C. Legislative Defendants Have Not Substantiated their Claims of Work-Product Protection

Legislative Defendants work-product claims fare no better. "Because work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose, which is to safeguard the lawyer's work in developing his client's case." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (N.C. Ct. App. 2001) (quotation marks and alterations omitted). In keeping with its narrow purpose, work-product protection does "no[t] … extend to facts known by any party." *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. Here, Legislative Defendants claim that all files listed on Exhibit A are protected work product, but with the possible exception of a few files that appear to be draft expert reports or declarations, the files in Exhibit A appear to be factual in nature. For example, Exhibit A appears to include historical North Carolina districting plans, spreadsheets of various categories of voters, and mapping files encoding geographic and demographic data. Many of the attachments listed on Exhibit B also appear to be factual in nature—elections data, invoices, lists of counties covered by the VRA, and data on compactness and precinct splits, for example. These types of documents are not protected by the work-product doctrine.

The work-product doctrine also is limited to documents "prepared in anticipation of litigation." N.C. Rule Civ. P. 26(b)(3). This requirement is not met where the mere "possibility exists that litigation will result," *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789, or where a document was created with only "the general possibility of litigation in mind," *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir.1992). Similarly, "[m]aterials

that are prepared in the ordinary course of business are not protected by the work product immunity." *Evans*, 142 N.C. App. at 28, 541 S.E.2d at 789. Instead, documents are protected work product only if prepared "*because* of the prospect of litigation," such that litigation was the "driving force behind the preparation of each … document." *Nat'l Union*, 967 F.2d at 984.

Here, with the possible exception of a few draft expert reports and declarations, Legislative Defendants offer no basis to conclude that *any* file in Exhibit A was prepared "*because* of" actual or prospective litigation. And many documents clearly were *not* prepared because of litigation. "The fact that redistricting litigation is virtually inevitable every ten years does not cloak every redistricting document with work-product protection." *Dickson v. Rucho*, 366 N.C. 332, 349, 737 S.E.2d 362, 374 (2013) (Hudson, J., dissenting). "Maps, tables, plans, and other materials and discussions related to the actual writing of the redistricting legislation are obviously prepared in the ordinary course of business of the legislature." *Id.* For that reason, "any documents that relate to the substance of the redistricting legislation (decisions on where to draw district lines, analysis of census data, etc.) should not be covered by work-product protection." *Id.* The federal court in the Ohio gerrymandering case specifically held that Dr. Hofeller's files in that case were not protected work product because they consisted solely of "data and maps" that were prepared as part of the legislature's "statutory duty to draft … [a] map." *Ohio A. Philip Randolph Inst. v. Smith*, 2018 WL 6591622, at *5 (S.D. Ohio Dec. 15, 2018). Here, essentially all of the documents in Exhibit A appear to "relate to the substance of the redistricting legislation." The same goes for many of the attachments in Exhibit B.[1]

[1] Legislative Defendants also assert that "to the extent that [some] documents constitute communications between Legislative Defendants' expert and counsel, they are also protected from disclosure by" North Carolina Rule of Civil Procedure Rule 26(b)(4)(e). Mot. 4. But Legislative Defendants do not assert that any documents actually *are* protected communications between expert and counsel, much less identify which documents those are. The burden of identifying documents and asserting protection over them rests with Legislative Defendants, not Plaintiffs or the Court. Legislative Defendants also fail to show that any unspecified attorney-expert communications do not "relate to compensation for the expert's study or testimony," "[i]dentify facts and data" underlying the expert's opinions, or

CONCLUSION

Legislative Defendants' Motion for Direction is barred by a prior order of this Court, contrary to North Carolina public records law, waived multiple times over, and baseless. For the reasons stated above, the Court should deny Legislative Defendants' motion and hold that none of the files recovered from Dr. Hofeller's devices is subject to any valid assertion of attorney-client privilege or work-product protection by Legislative Defendants.

"[i]dentify assumptions ... the expert relied upon in forming [his] opinions"—any of which would be sufficient to render the communications discoverable. N.C. Rule Civ. P. 26(b)(4)(e)(1)-(3).

Respectfully submitted this the 13th day of September, 2019

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CERTIFICATE OF SERVICE

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This the 13th day of September, 2019.

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