UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al., Plaintiffs, v. RUTH JOHNSON, in her official Capacity as Michigan Secretary of State, et al., Defendants.	Case No. 2:17-cv-14148 Hon. Eric L. Clay Hon. Denise Page Hood Hon. Gordon J. Quist **CORRECTED VOTERS' MOTION FOR DETERMINATION OF THE EXISTENCE OF PRIVILEGE CLAIMS UNDER F.R.E. 104**

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Corrected[1] Voters' Motion for Determination of the Existence of Privilege Under Federal Rule of Evidence 104

Parties with no common legal interest, no attorney, and no agreement in place were repeatedly involved in meetings and communications that have now been hidden under the guise of attorney-client privilege. This results in a subject-matter waiver of the topics addressed during those meetings and communications. Separately, any privilege claims were waived due to a grossly inadequate privilege log. Pursuant to Federal Rule of Evidence 104, this Court should answer in the negative the preliminary question of "whether… a privilege exists" in these circumstances.

For the reasons set forth in the accompanying brief, the Voters respectfully request that this Court find the attorney-client privilege inapplicable to the topics, testimony, and documents withheld by the opposing parties.

Local Rule 7.1(a) Statement

Pursuant to Local Rule 7.1(a), counsel for Voters exchanged emails with counsel for the Secretary and for Intervenors and explained the nature of Voters' motion pursuant to Federal Rule of Evidence 104. Counsel stated that neither the Secretary nor the Intervenors were willing to concur in the relief sought in this motion.

[1] The Local Rule 7.1(a) statement in the previous filing inadvertently misstated the means of the communication between counsel for this motion. It has been corrected in this brief.

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LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al., Plaintiffs, v. RUTH JOHNSON, in her official Capacity as Michigan Secretary of State, et al., Defendants.	Case No. 2:17-cv-14148 Hon. Eric L. Clay Hon. Denise Page Hood Hon. Gordon J. Quist **VOTERS' BRIEF IN SUPPORT OF CORRECTED MOTION FOR DETERMINATION OF THE EXISTENCE OF PRIVILEGE CLAIMS UNDER F.R.E. 104**

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CONCISE STATEMENT OF THE ISSUE PRESENTED

Should this Court find that repeated inclusion of unrepresented and unaffiliated parties in meetings and communications effects a subject-matter waiver of any attorney-client privilege that may otherwise have applied, and that any privilege claims were waived by failure to properly prepare a privilege log?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Rules

Fed. R. Evid. 104(a).

Fed. R. Civ. P 26(b)(5).

Cases

United States v. Zolin, 491 U.S. 554, 562 (1989).

I. Introduction.

In its recent denial of Defendants' motions for summary judgment, this Court noted the "profound extent to which partisan political considerations played into [Defendants'] redistricting efforts." Opinion and Order, ECF No. 143 at 5 (Nov. 30, 2018). Throughout the discovery process, Defendants and non-parties have improperly invoked the attorney-client privilege to obfuscate the full extent of those partisan political considerations. They have invoked privilege to shield two key sources of relevant evidence: (1) testimony regarding weekly meetings among map-drawers, politicians, and GOP operatives; and (2) the documents and communications of Jeffrey Timmer, who drew the Congressional maps at issue here.

Pursuant to the Court's authority to determine, under Federal Rule of Evidence 104, "whether … a privilege exists," the League of Women Voters of Michigan, Roger J. Bradak, Frederick C. Durhal, Jr., Jack E. Ellis, Donna E. Farris, William "Bill" J. Grasha, Rosa L. Holliday, Diana L. Ketola, Jon "Jack" G. LaSalle, Richard "Dick" W. Long, Lorenzo Rivera, and Rashida H. Tlaib (collectively, "Voters") respectfully move the Court for an order preventing Defendants and various non-parties (as identified below) from shielding highly relevant evidence behind specious claims of attorney-client privilege.

A. Defendants and non-parties have improperly asserted privilege in this case.

Documents and testimony establish that Defendants and their allies created a dark-money clearinghouse they called the Michigan Redistricting Resource Institute ("MRRI"). MRRI collected money (from corporations[2] that Defendant's counsel refuses to let witnesses identify,[3] but that presumably wanted to "ensure a solid 9/5 [Republican/Democrat] delegation in 2012 and beyond"[4]) to pay "consultants"[5] who drew the Congressional districts at issue here, and lawyers[6] hired to veil the whole partisan enterprise with a façade of privilege.

That enterprise was straightforward. Despite being formed as a nonprofit entity forbidden from engaging in partisan activities,[7] MRRI hired consultants at the Sterling Corporation, "Michigan's premier conservative public affairs firm."[8] The Sterling consultants drew maps.[9] Then, the "map drawers" and other stakeholders[10] held

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[2] *See* ECF. No. 129-44, LaBrant Dep. 84:8-16 ("Were [the donors] generally corporations and/or labor unions? Yes. Any labor unions? No.").

[3] *See id* 79:23-80:9 ("MR. GORDON: Yes. The contributors were to a 501(c)(4) fund. They were – the money was contributed with the understanding that their identities would be private, as set forth in the IRS code, that to disclose them at this point would be objectionable because we think it would violate the code. They contributed the money with the understanding [that] their identities would be private. It implies or implicates the First Amendment freedom of association of rights [sic] of all these people, and it's absolutely irrelevant to whether or not the redistricting plans that you're attacking are constitutional or unconstitutional.").

[4] *Id.* 184:5-7

[5] *See id.* 140:9-25.

[6] *See id.* 37:14-25.

[7] Ex. 1 (MRRI Organizational Documents).

[8] *See* About Our Company, Sterling Corporation, *available at* http://sterlingcorporation.com/about-our-company (last accessed Nov 26, 2018).

[9] *See* ECF-129-7 (Sterling Proposal).

[10] Ex. 2 (Timmer000659 email; from Steve Linder stating that no maps have been shown).

"weekly redistricting meeting[s]"[11] organized and attended by Michigan Republican Party leaders[12] and held at the Dickinson Wright law firm (which MRRI also hired.)

On information and belief, the "stakeholders"— legislators, party apparatchiks,[13] map-drawers, lawyers, and anonymous donors—in the redistricting process would "work[] as one team" at those "weekly redistricting meeting[s]" to effect a "successful outcome" that kept "Republicans … in majority."[14] Voters are forced to rely on "information and belief" because when Robert LaBrant, who in 2011 was President and a Director of MRRI, was asked "what was said to [him] and what [he] said to other folks that [he could] recall in those meetings," Mr. LaBrant was instructed not to answer because his answer would reveal "communications with lawyers present in a meeting that advice was being sought."[15] Other key deponents have received and followed similar instructions.[16]

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[11] *See* ECF No. 129-41, Began Dep. 200:7-8 (Stating that he "attended meetings at Dickinson Wright" where non-lawyer attendees included the "map drawers.")

[12] ECF. No 129-44, LaBrant Dep. 108:23-109:9; *see also* Ex. 3 (Deposition Exhibit 312 email showing republican party meeting organization).

[13] Ex. 3 (Deposition Exhibit 312) (listing the chairman of the Michigan Republican Party as an attendee).

[14] *See* Ex. 2 (Timmer000659); *see also* ECF No. 129-41, Began Dep. 143:3-10 ("The fact that Republicans are still in the majority, that would be saying it [the map-drawing process] was a success, the conditions worked out where Republicans are in majority."). *See also* ECF No. 143 at 3-4.

[15] *See* ECF No. 129-44, LaBrant Dep. 188:20-2.

[16] *See, e.g.*, ECF No. 129-43, Hune Dep. 145:3-10 ("MR. SHANNON: I'm going to object on the basis of attorney-client privilege. General topics is fine, but I'm going to instruct any client not to answer any questions that go beyond the very general topics on the basis of attorney-client privilege for an meetings in which attorneys were present and in which you were seeking and discussing legal advice for redistricting."); ECF No. 129-48, Schostak Dep. 18:14-21 ("MR. KNAPP: Objection. These meetings are privileged.") ECF No. 129-44, LaBrant Dep. 188:20-2 ("MR. ELLSWORTH: Well, I'm gonna object to the extent that it would ask for communications with lawyers present in a meeting that advice was being sought.").

Nothing "privileged" occurred at these meetings because discussions included those who were outside the privilege that defendants purport to invoke.[17] Yet at every turn, Defendants have fought to prevent Voters from learning *anything* about what the "stakeholders" did and discussed during the critical time period. The presence of persons who were not even arguably part of the attorney-client relationship, and who did not even arguably share a common legal interest with those who were—such as Michigan GOP Chairman Bobby Schostak—destroys privilege and/or effects a full subject-matter waiver. Mr. Schostak's presence was not necessary for lawyers to render legal advice to their clients; indeed, Senator Joe Hune (who chaired the Senate Redistricting Committee) readily admitted that any involvement by Mr. Schostak in the redistricting process was purely for "political gain."[18] Mr. Schostak was also privy to at least 35 communications that have been withheld, according to a privilege log produced by Jeffrey Timmer, who drew the Congressional maps at issue here.[19]

As explained below, despite requests from Voters for more information,[20] Mr. Timmer's privilege log provides only the most cursory descriptions of the bases for withholding **727** documents. (*E.g.*, the purported basis for withholding one document on which Mr. Schostak was copied was "Document(s) providing, containing, reflecting, or discussing confidential legal advice from counsel concerning redistricting

[17] ECF 129-8, (Agendas for Meetings) ("Proposed Legislative Schedule" was a non-privileged topic discussed in these meetings").
[18] ECF No. 129-43, Hune Dep. 71:19-21.
[19] *See, e.g.,* Ex. 4 (Timmer privilege log) at 3, 10, 19, 31, 32, 33, 43, 44, 52.
[20] Ex. 5 (August 3, 2018 H. Mappes letter to R. Shannon).

due diligence, investigation, drafting, and/or planning"; the basis for withholding another was "Document(s) providing, containing, reflecting, or discussing confidential legal advice from counsel concerning map drawing.").

And so, in a case where Voters must prove "intentional discrimination against an identifiable political group," *see Davis v. Bandemer*, 478 U.S. 109, 127 (1986), Defendants and their allies invoke the attorney-client privilege to prevent Voters from obtaining highly relevant documents and testimony about the objectives and execution of the GOP's redistricting agenda.

II. This Court should find that neither the conversations that occurred at the "weekly redistricting meeting[s]," nor the documents withheld by Mr. Timmer, are privileged.

"The court must decide any preliminary question about whether … a privilege exists[.]" Fed. R. Evid. 104; *see also Colo. Nat. Bank v. First Nat. Bank & Tr. Co.*, 459 F. Supp. 1366, 1368 (W.D. Mich. 1978) ("The court has the authority to issue a preliminary ruling on the admissibility of evidence under F.R.E. 104."). "Questions of privilege that arise in the course of the adjudication of federal rights are 'governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'" *United States v. Zolin*, 491 U.S. 554, 562 (1989) (citing Fed. R. Evid. 501); *see also United States v. Pensinger*, 549 F.2d 1150, 1151 (8th Cir. 1977) (courts use normal privilege analyses when examining privilege claims under Fed. R. Evid. 104). As "[n]either attorney-client nor work-product privilege is absolute," this Court should find that Defendants have failed to

establish that privilege applies, or, in the alterative, that they have waived any privilege that might have existed. *In re Grand Jury Subpoenas*, 454 F.3d 511, 520 (6th Cir. 2006).

Here, preliminary—but fundamental— privilege questions must be decided with respect both to the weekly mapmaker meetings and to communications with the principal Congressional mapmaker. In each case, the presence of unnecessary third parties who do not share any sufficient legal interest means that any privilege that *might* have applied to the subject matter of the communications has been waived.

A. The common-interest doctrine does not apply to absolve the waivers of privilege that occurred at the weekly redistricting meetings and via the Timmer emails.

"Both the attorney-client privilege and work-product protection are waived by voluntary disclosure of private communications to third parties." *New Phx. Sunrise Corp. & Subsidiaries v. Comm'r*, 408 F. App'x 908, 918 (6th Cir. 2010). When Voters' counsel raised this issue, Defendants' counsel claimed that the parties to the communications at issue share a "commonality of interest … to produce legal and defensible redistricting plans pursuant to Michigan and federal law."[21] Their argument, then, is that the common-interest doctrine excuses what would otherwise be a clear waiver of attorney-client privilege. It does not.

The common-interest doctrine "is not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party." *Broessel v. Triad Guar. Ins. Corp.*,

[21] Ex. 6 (August 8, 2018 G. Gordon email to D. Kelley).

238 F.R.D. 215, 219 (W.D. Ky. 2006). The common-interest exception can apply only where parties (1) share the same counsel, (2) share a common defense, or (3) share a common *legal* interest. *Id.* at 220 (emphasis added).

"[T]he burden to establish the [common interest] privilege rests with the Defendants." *John B. v. Goetz*, 879 F. Supp. 2d 787, 898 (M.D. Tenn. 2010) (citing *United States v. Moss*, 9 F.3d 543, 550 (6th Cir.1993)). "The Defendants must prove an agreement among its members to share information arising out of a common legal interest in litigation." *Goetz*, 879 F. Supp. 2d 898 (emphasis added). The privilege *might* shield communications between co-defendants made outside of the presence of attorneys—but only if the communications were made according to specific instructions of the attorneys. *Id.* (citing *United States v. Mikhel*, 199 Fed. App'x 627, 628 (9th Cir.2006)).

Here, the common-interest waiver exception cannot apply because (1) there is no cognizable shared legal interest; and (2) even if there were, the presence of unnecessary third parties in communications that might otherwise be privileged destroys the subject matter of those communications.

1. There is no cognizable shared legal interest.

The *sine qua non* of the common-interest exception is a common legal interest.[22] Voters have no doubt that all of the meeting attendees, and all of the correspondents

[22] Another requirement for application of the common-interest exception is joint action taken by the parties who share the purported joint interest to advance a litigation goal. As noted, MRRI was

on Mr. Timmer's emails, shared a common *political* goal: maximizing Republican advantage in the redistricting process, and minimizing the Democrats' prospects.[23] That the players viewed their redistricting activities as a partisan endeavor is evident from their use of personal email addresses to conduct their redistricting activities. Then-Senate Majority Leader Randy Richardville agreed that his "practice was, if [a communication] was going to be political, then [he'd] want to be sure to use non-

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created to pay for the consultants who drew the maps, and the lawyers who would defend them. *See* ECF No. 129-44, LaBrant Dep. 74:25-75:5. Simply having a common goal, however, isn't enough; both parties must take action to pursue that goal. *See, e.g.*, *King Drug Co. v. Cephalon*, 2011 WL 2623306, at *4 (E.D. Pa. July 5, 2011) (holding that, despite the fact that the defendant had a joint-defense agreement with the third party at issue, the common interest doctrine did not apply because "nothing in the record . . . reflects that any actual, concrete, tangible steps were taken to effectuate or implement that joint defense"). But, so far as Voters have been allowed to understand, MRRI did not actually do anything to participate in any legal strategy. Instead, MRRI is essentially a passive litigation funder, not a real party in interest. *See* MRRI's Mot. to Quash, ECF No. 76 at 3 ("With regard to MRRI, the only documents in its possession are privileged invoices received from law firms retained to provide legal advice to the House and Senate Republican caucuses and expert consultants, on information and belief, who were retained the law firms [sic] to consult with regarding issues related to redistricting."). As such, neither MRRI nor its officials (such as Mr. LaBrant, MRRI's President) may partake in the clients' privileged communications. *See, e.g.*, *Miller UK Ltd. v. Caterpillar, Inc.,* 17 F. Supp. 3d 711 (N.D. Ill. 2014) (holding that there was no common interest between the party and its litigation funder because the common-interest doctrine "will only apply where the parties *undertake a joint effort* with respect to a common legal interest") (emphasis added); *see also Snap-On Bus. Solutions, Inc. v. Hyundai Motor Am.*, 2011 U.S. Dist. LEXIS 150688, *8 (N.D. Ohio Feb. 3, 2011) ("[T]he Common Interest Privilege adheres only if [the parties] formulated a joint legal strategy to deal with [their concern about prospective litigation].").

[23] Were the interest at stake truly the anodyne one of creating "legal and defensible" legislative maps, as each witness apparently was coached to repeat, *see* ECF No. 129-43, Hune Dep. 145:3-10; ECF No. 129-48, Schostak Dep. 18:14-21; ECF No. 129-44, LaBrant Dep. 188:20-2, that interest would be shared by all Michigan citizens, and certainly by the Republican legislators' Democratic comrades. As counsel has pointed out, MRRI was organized as a 501(c)(4) entity. *See* ECF No. 129-44, LaBrant Dep. 79:23-80:9 ("MR. GORDON: Yes. The contributors were to a 501(c)(4) fund."). 501(c)(4) organizations must be non-partisan, *see* Social Welfare Organizations, Internal Revenue Service, *available at* https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations (last accessed Dec. 4, 2018), and indeed, MRRI's organic documents state that the organization is to be non-partisan and devoted to social welfare. *See* Ex. 10. To the extent that MRRI's position is that its purported interest in producing "fair and legal" maps precludes Democrats from knowing what their consultants did to advance that goal, Voters respectfully submit that MRRI may have problems with the IRS.

governmental emails[.]"[24] Likewise, Senator Joe Hune, who chaired the Senate Redistricting Committee, used a personal Hotmail.com account and agreed that he "[p]robably" "primarily communicate[d] via email in connection with the redistricting through that account."[25] If these state legislators and staffers truly believed that they were being provided legal advice in their legislative capacities, and the advice was simply to comply with legal requirements/Apol standards, there would have been no need to use personal, rather than official, email addresses. Thus, the use of personal email undercuts any privilege claim now.

Shared political or commercial interests do not suffice under the Sixth Circuit's common-interest jurisprudence. *See Libbey Glass, Inc. v. Oneida Ltd.,* 1999 U.S. Dist. LEXIS 4558 at *21 (N.D. Ohio Mar. 16, 1999) ("The parties were formulating not a 'common legal' strategy, but a joint commercial venture."). The Court should not be lenient with respect to finding a common legal interest in partisan redistricting activities, because, as the court in *Baldus v. Brennan* held, allowing politicians and their donors to hide partisan gerrymandering activities behind the privilege "would be a

[24] Ex. 7, Richardville Dep. 100:2-5 (discussing Ex. 8, Dep. Ex. 281, which was an invitation to one of the meetings held at Dickinson Wright that was sent to the personal email addresses of seven invitees); *see also* Richardville Dep. 169:14-18 (explaining that "whenever there was the possibility of talking about something that wasn't directly related to official business, … we erred in the direction of a personal [email address] versus the State [email address]," and discussing Ex. 3, Dep. Ex. 312 (Apr. 27, 2011 email exchange between executive assistant to Michigan GOP Chairman Robert Schostak and Jordan Hankwitz, Chief of Staff to Majority Leader Richardville, sent to Mr. Hankwitz's personal email address)).

[25] ECF No. 129-43, Hune Dep. 23:15-19. *See also id.* at 87:21-92:24 (discussing Ex. 9, Dep. Ex. 250, which was an email sent by Sterling Corporation fundraiser Steve Linder to the personal addresses of Mr. Timmer, Senator Hune, and Scott Bean, chief of staff to Senator Tory Rocca, regarding a "meeting … with the [Michigan Redistricting Resource] Institute (Board of Directors) and potential fundraising on its behalf.").

slap in the face to [the state's] citizens." 2011 WL 6385645, at *2 (E.D. Wis. Dec. 20, 2011). In *Baldus*, the court rejected work-product claims asserted in connection with a challenge to Wisconsin's redistricting efforts, holding that it would be improper to allow the legislature to "obscure its legislative actions from the public eye … [by] retain[ing] counsel or other agent that it termed to be 'in anticipation of litigation.'" 2011 WL 6385645, at *2. The court explained that, while the nature of the legislative process "often involves contentious issues that the public may challenge as being unconstitutional," it would be improper to "conceal from the [voters] otherwise admissible evidence of allegedly unconstitutional motives affecting their voting rights." *Id.* (internal citations omitted). The court found that these factors "entitled the plaintiffs to whatever discovery… they may deem appropriate under the rules of evidence." *Id.* at 3. That analysis applies with equal force here.

This Court recently found that "[e]mails that the mapmakers exchanged illustrate the profound extent to which partisan political considerations played into their redistricting efforts."[26] Indeed, it is evident that partisan goals were paramount.[27] Just as the court in *Baldus* refused to allow a work-product claim to shield the

[26] ECF No. 143 at 5.

[27] *See, e.g.*, ECF No. 129-18 at PageID #3557 (a staffer wrote Timmer about "a glorious way that makes it easier to cram ALL of the Dem garbage in Wayne, Washtenaw, Oakland, and Macomb counties into only four districts."); ECF No. 129-30 at PageID #3606 (a Congressional staffer approved of one of Timmer's proposed maps, saying it was "perfect" because "it's giving the finger to [S]andy [L]evin,"); ECF No. 129-31 at PageID #3611 (Timmer remarked that a proposed district "is a bit less GOP, but not so much less so that it is in jeopardy of going south on us.").

Wisconsin legislature's partisan intent in its redistricting efforts, so too should this Court reject the Michigan legislature's parallel attempt.

In short, the interest shared by the meeting attendees and the Timmer correspondents is not a legal one that might suffice to shield communications under the common-interest doctrine, so the Court should find that no "privilege exists" to protect those communications. Fed. R. Evid. 104.

2. The presence of unnecessary third parties in communications that might otherwise be privileged destroys the attorney-client privilege vis-à-vis the subject matter of those communications.

The lawyers whose presence at the weekly redistricting meetings is being used to block testimony about those meetings are from the Dykema Gossett and Dickinson Wright law firms. To date, no one has been able to provide a clear, consistent answer to the fundamental question: who represents whom? For example, MRRI told the Court that it engaged law firms "to provide legal advice to the House and Senate Republican caucuses[.]"[28] But according to its engagement letter, Dykema was retained "to provide the Michigan Redistricting Resource Institution ("MRRI") with legal advice and to present testimony to a Michigan House of Representatives committee regarding legal issues related to legislative and congressional redistricting."[29] According to the Dickinson engagement letter, that firm also

[28] MRRI's Mot. to Quash, ECF No. 76 at 3.
[29] Ex. 10 (Dykema Gossett Engagement Letter).

represents MRRI.[30] Neither firm's engagement letter lists Republican operatives as clients, and MRRI insists that the only documents it has are legal invoices - which is inconsistent with the statement in Dykema's engagement letter that it was engaged to provide legal advice to MRRI.[31]

Confusion regarding which lawyers represent what clients continued during discovery.[32] For example, Mr. LaBrant was prepared for his deposition by lawyers from both Dickinson and Dykema, despite neither firm's having represented him personally, and he refused to answer any questions regarding this session.[33] On privilege grounds, Mr. Schostak refused to answer whether or not Mr. Timmer, a political consultant not represented by either firm, provided any advice about the political performance of various map iterations.[34]

The communications at issue here regularly included individuals who cannot reasonably be deemed to be clients of either law firm, and who do not share any legal interest (as opposed to political interests, which Voters readily admit are shared) with clients of those firms. In the most blatant example, Mr. Shostak—chairman of the Michigan Republican Party, whose only interest in the process was "political gain,"[35] —chaired several weekly redistricting meetings held at Dickinson Wright.[36] Mr.

[30] *See* Ex. 11 (Dickinson Wright Engagement Letter).
[31] MRRI's Mot. to Quash, ECF No. 76 at 3.
[32] ECF No. 129-46, Marquardt Dep. 88:18-89:1; ECF No. 129-47, McMaster Dep. 110:13-111:13.
[33] ECF No. 129-44, LaBrant Dep. 23:1-25:1.
[34] ECF No. 129-48, Shostak Dep. 29:9.
[35] ECF No. 129-43, Hune Dep. 71:19-21.
[36] *See, e.g.*, ECF. 129-8.

Schostak's executive assistant organized many of these meetings on his behalf.[37] Mr. Schostak also exchanged with MRRI and related parties at least 35 emails that were withheld as privileged,[38] and Republican National Committee political operatives corresponded with mapmakers about the most politically advantageous way to draw the maps.[39]

Communications involving Mr. Schostak and other party officials are not within the letter, intent, or spirit of the attorney client privilege. They are nonparty politicians. They were not represented by the attorneys representing the Secretary, Legislature or Governor. And the subject matter of their discussions was politics, not legal advice. Including these individuals on communications "concerning map drawing" likewise waived the subject matter of *any* privilege.

C. Any privilege applicable to documents withheld by Mr. Timmer was waived due to insufficient descriptions on Mr. Timmer's privilege log.

Wholly independent of the reasons discussed above, Mr. Timmer has waived any claim of privilege with respect to the documents he withheld from production, because he failed and refused to provide anything more than tautological privilege descriptions on his privilege log. A true and accurate copy the privilege log that Mr. Timmer produced is attached as Exhibit 6.

[37] *Id.*; *See* ECF No. 129-48, Schostak Dep. 38:1-8.
[38] Ex. 4 (Timmer privilege log).
[39] ECF No. 129-44, LaBrant Dep. 153:1-25.

It is a withholding party's burden to provide sufficient detail on his privilege log for a court to determine that the documents withheld are properly withheld. *See, e.g., In re Search Warrant Executed at Law Offices of Stephen Garea*, 173 F.3d 429 (6th Cir. 1999). "Where, as here, a privilege log does not provide enough information to support the privilege claim, the assertion of privilege may be rejected on that basis." *Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 483 (W.D. Mich. 1997); *see also In re Gen. Instrument Corp. Sec. Litig.*, 527, 532 (N.D. Ill. 200) (holding that "sketchy, cryptic, often mysterious descriptions of subject matter" failed to meet the burden for establishing privilege, thus waiving the privilege); *Hi-Lex Controls, Inc. v. Blue Cross & Blue Shield of Mich.*, 2013 U.S. Dist. LEXIS 43955, at *9 (E.D. Mich. Mar. 28, 2018) (holding that "[a] privilege log must contain the basis for withholding discovery of the document and sufficient detail beyond conclusory allegations to demonstrate fulfillment of the legal requirements for application of privilege."); *McNamee v. Clemens*, 2013 WL 6572899, at *2 (E.D.N.Y. Sept. 18, 2013) (holding privilege was waived due to an insufficient privilege log that failed to sufficiently describe the bases for asserted privilege and protection). Further, "[m]erely . . . including an attorney on an email chain does not make it a document seeking legal advice. If this were allowed, almost every document would be privileged any time an attorney was included on an email." *Bridgestone Ams., Inc. v. IBM Corp.*, 2015 U.S. Dist. LEXIS 178771, at *6 (M.D. Tenn. Oct. 1, 2015).

The detail provided on Mr. Timmer's privilege log does not carry the burden of establishing that privilege exists. For example, in ***415*** entries, Mr. Timmer describes documents as a "confidential attachment" but provides no further detail. There is no description of what the subject matter of the attachment is, how it might relate to attorney-client communications, or even who the parties involved were. In the cases where senders and recipients of emails are listed, the names listed are often unknown to Voters, and the lists often fail to indicate that all parties involved are attorneys or clients, as is required.[40] It is Mr. Timmer's burden to establish that everyone who received the documents was entitled to do so. Simply providing names, without explaining who a recipient is, is insufficient. *See In re Haynes*, 577 B.R. 711, 729 (Bankr. E.D. Tenn. 2017) (requiring the withholding party to provide a "cast list").

Voters wrote Mr. Timmer's counsel regarding these inadequacies.[41] But Mr. Timmer refused to amend his privilege log to address the problems.[42]

Because of Mr. Timmer's refusal to correct the severe inadequacies of his privilege log, this Court should find that Mr. Timmer has waived any privilege that may otherwise have been applicable to the documents listed on the log. *See, e.g.*, *Little Hocking Water Assn., Inc. v. E.I. Du Pont De Nemours & Co.*, 2013 WL 607969, at *18 (S.D. Ohio Feb. 19, 2013) (requiring the withholding party to produce previously withheld documents and redact only privileged information). Alternatively, the Court

[40] Ex. 4 (Timmer privilege log).
[41] Ex. 5 (Aug. 3, 2018 H. Mappes letter to R. Shannon).
[42] Ex. 12 (Aug. 10, 2018 R. Shannon letter to H. Mappes).

could conduct an *in camera* review to scrutinize whether the documents Mr. Timmer withheld are actually privileged. *See Zolin*, 491 U.S. 554, 568 (1989) (endorsing *in camera* review on motion pursuant to Federal Rule of Evidence 104). It is the Voters' position, however, that the Court should not be burdened with the task of reviewing all of the documents and attachments that Mr. Timmer withheld, as it was his burden to properly describe the bases for his decision to withhold the documents. Instead, the Court should hold, as the court did in *Glidden,* that Mr. Timmer's inadequate privilege descriptions constitute a waiver of privilege. 173 F.R.D. at 483.

D. The waiver extends to the entire subject matter of the communications at issue here.

Once privilege is waived by disclosure of privileged communications to a third party, "[t]hat waiver applies to the rest of the communications on the same subject matter." *In re Grand Jury Proceedings Oct. 12, 1995*, 78 F.3d 251, 255 (6th Cir. 1996). "Subject matter waiver of otherwise privileged and undisclosed information occurs when (1) there is an intentional waiver of the disclosed material; (2) the disclosed and undisclosed information concern the same subject matter; and (3) the disclosed and undisclosed information "ought in fairness to be considered together." *Mainstay High Yield Corp. Bond Fund v. Heartland Indus. Partners, L.P.,* 263 F.R.D. 478, 480 (E.D. Mich. 2009).

The details that *were* provided in testimony about the weekly meetings, and via Mr. Timmer's privilege log, make clear that communications regarding redistricting

included parties who do not share any common legal interest. That constitutes a waiver of any privilege otherwise applicable to those communications, and thus to their subject matter. In short, no conversation about "map drawing," "redistricting due diligence, investigation, drafting, and/or planning," or "anticipated litigation" can be maintained as privileged.[43]

Conclusion

For the reasons explained above, Voters respectfully request, pursuant to Federal Rule of Evidence 104, the Court to order production of those documents previously withheld under a claim of attorney-client privilege regarding the subject matters of any communications that occurred in the weekly map-drawer meetings or in emails sent to or received by Mr. Timmer has been waived. Further, the Court should order that the emails Mr. Timmer withheld on his privilege log should be immediately produced, and that Voters be allowed to examine witnesses about these communications at trial.

[43] Ex. 4 (Timmer privilege log).

Respectfully submitted,

Date: December 5, 2018

/s/ Joseph H. Yeager, Jr.

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Certificate of Service

I certify that December 5, 2018, I have electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of filing to all counsel of record in this matter.

Respectfully submitted,

/s/ Joseph H. Yeager, Jr.