

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
Case No. 18 CVS 014001

COMMON CAUSE; *et al.*

*Plaintiffs,*

v.

DAVID R. LEWIS, *et al.*

*Defendants.*

**LEGISLATIVE DEFENDANTS’  
RESPONSE TO PLAINTIFFS’  
MOTION FOR DIRECTION**

Plaintiffs’ motion for direction is the latest in a troubling series of actions they and their counsel have taken in this case. In the motion and the attached letter, they make inflammatory allegations that North Carolina state legislators made “false statements and material omissions to the federal district court in *Covington*.”<sup>1</sup> One might expect that, with such a bald allegation of misconduct by elected leaders, Plaintiffs would have some strong support for it, some smoking gun, or admission.

But, in fact, they have nothing of the sort. They present no email or other correspondence between Dr. Thomas Hofeller, the legislature’s map-drawing consultant, and any legislator indicating that any legislator knew of Dr. Hofeller’s map-drawing activities as of June 2017. And that was all Representative Lewis said to the *Covington* court at that time: he “does not know if Dr. Hofeller has drawn” a draft map.<sup>2</sup> Evidence that Dr. Hofeller may have been drawing draft

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<sup>1</sup> Mot. for Direction Ex. C (“Jones Letter”), at 6 (Letter from Stanton Jones, Attorney, Arnold & Porter, to Phillip Strach, Attorney, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., (June 5, 2019)).

<sup>2</sup> Ex. 1, Joint Stipulation on Withdrawal of Subpoena (“*Covington* Stipulation”), at ¶ 5, *Covington v. North Carolina*, 1:15-cv-399, (M.D.N.C. July 26, 2017), ECF No. 178.

maps does not contradict the Legislative Defendants’ representation that they did not know of his activities one way or the other. The *Covington* court itself said that the Legislative Defendants have not “offered any evidence that they have not begun to evaluate what the revised districts might look like.”<sup>3</sup> There was no affirmative assertion that Dr. Hofeller was not drawing maps.

Thus, the mere fact that Dr. Hofeller may have been drawing maps, even if it is true—which is in serious doubt—is unremarkable. The Legislative Defendants said in *Covington* that they did not know one way or the other, so there is nothing inconsistent with the “evidence” Plaintiffs purport to offer. Moreover, Plaintiffs’ assertion of overlap between Dr. Hofeller’s maps and the enacted plans—which they suggest means the enacted plans were being drawn in June 2017—is false and grossly inflated. Plaintiffs’ starting numbers are wrong, and many districts were the same in Dr. Hofeller’s drafts and the enacted plans because those districts were unaffected in *Covington*. Many other districts were the same because the county-grouping rule dictated the lines, and high overlap is always necessary given the North Carolina Constitution’s highly constraining rules. Thus, Plaintiffs have zero support—none—for their assertion that the Legislative Defendants committed this conduct, they fail even to cite the relevant assertions in *Covington*, and their accusations of misconduct are reckless.

What’s more, any inconsistency would have little to no relevance to this case, since the question here is whether the 2017 plans violate the North Carolina Constitution, not whether statements in a different case were true. Plaintiffs, however, opportunistically dropped their false allegations into a filing with this Court and promptly circulated the allegations to the national media for the transparent purpose of scoring political points. None of this was necessary because

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<sup>3</sup> *Covington v. State*, 267 F. Supp. 3d 664, 667 (M.D.N.C. 2017).

the motion itself is procedurally improper. Plaintiffs should have raised their confidentiality dispute in a meet-and-confer session, and they are obligated to treat the materials as designated under the protective order—which does not restrict parties’ ability to designate material produced by non-parties, *see* Consent Protective Order ¶ 13 (Apr. 5, 2019)—until the dispute was resolved. Plaintiffs have ignored their obligations under the protective order on the view that their political ends justify any means, whether or not prohibited by law.

Plaintiffs did all this in an apparent effort to divert the Court’s attention from their own potential misconduct. They appear to have obtained all the computer files of the late Republican redistricting consultant Dr. Thomas Hofeller. Dr. Hofeller, of course, would not have willingly handed all his files to his political and legal opponents. But his files were taken from his surviving spouse, Kathleen Hofeller, by their estranged daughter Stephanie Lizon after he died. There are serious doubts about Kathleen Hofeller’s capacity to gift those materials to anyone. Evidence presented in a recent competency proceeding indicates that Mrs. Hofeller was fraudulently induced to wire large sums of money to India and was subject to undue influence by Ms. Lizon herself. But, in any event, most of the documents were not Mrs. Hofeller’s to give. Dr. Hofeller created and possessed them as an agent for his clients, so even he lacked the authority to turn them over without their authorization.

Presumably, if one of the lawyers in this case suddenly died, the opposing set of lawyers would know better than to obtain the lawyer’s files from a confused family member who happened upon them in settling the estate. That would plainly be unethical. But, after Dr. Hofeller died, Plaintiffs and their counsel conferred with Ms. Lizon, a non-lawyer, apparently on multiple occasions and actively encouraged her to hand over, not only files related to North Carolian

redistricting, but all of Dr. Hofeller’s files. Their legal advice to Ms. Lizon was that she should not review or cull the materials in any way, but rather transfer *everything*.

That was bad advice to someone desperately in need of good advice. As shown below, handing over materials belonging to Dr. Hofeller’s clients could create or exacerbate civil claims by Dr. Hofeller’s clients against Ms. Lizon, and Ms. Lizon’s taking of the materials from someone lacking competency may amount to larceny. No one concerned about Ms. Lizon’s best interests would have told her to give all the files to a third party. Under the rules of ethics, the *only* thing Plaintiffs’ counsel should have told Ms. Lizon was to seek her own counsel. Plaintiffs’ counsel said much, much more.

Plaintiffs’ lawyers also told Ms. Lizon that “only files that were explicitly, obviously North Carolina redistricting during this period of time related would even be looked at.”<sup>4</sup> That was false. Plaintiffs actively reviewed all the material, promptly used some of it—unrelated to North Carolina—in another case, and actively disseminated it to national media. Further, it was a promise Plaintiffs knew they could not keep. They knew all parties in the litigation are entitled to receive documents from a subpoena under North Carolina Civil Procedure Rule 45. They had no way to control what other parties would do, and their representations otherwise to Ms. Lizon were simply wrong.

Yet, through this back channel, Plaintiffs have obtained (by the Legislative Defendants’ best estimate at this time) nearly 1,300 emails expressly containing an assertion of “privilege,” “confidential,” “work product,” or the like related to Dr. Hofeller’s work on behalf of the North Carolina legislature. It is unknown how many additional privileged, confidential, or trade-secret

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<sup>4</sup> Mot. for Direction Ex. A (“Lizon Dep.”) 129:7–10.

materials exist in this production that are property of Dr. Hofeller's other clients. The Legislative Defendants (and, presumably, Dr. Hofeller's other clients) were unaware that Ms. Lizon was in possession of this material, nor were they aware of this extensive interaction between Plaintiffs, their counsel, and Ms. Lizon until Ms. Lizon's recent deposition. Rather than disclose any of this, Plaintiffs' counsel withheld the documents from the other litigants in violation of Rule 45, requiring the Legislative Defendants to obtain an order from this Court enforcing the plain language of that Rule. Only quite recently did the Legislative Defendants understand the nature of Plaintiffs' actions.

It is the Court's role to take charge of this proceeding and the lawyers practicing before it. The Legislative Defendants therefore agree that direction is appropriate. Plaintiffs are using this proceeding as a platform for baseless political invective. And they are in possession of documents belonging to others and containing express privilege designations through apparently unethical means. Under such circumstances, courts have dismissed complaints; disqualified counsel; and, as a minimum remedial effort, ordered return and destruction of documents and payment of attorneys' fees. The Court here should order Plaintiffs to disclose the extent of their review of the Legislative Defendants' privileged materials to assess the degree of harm present in this case. It should also order that Plaintiffs be divested of all materials obtained from Ms. Lizon. After the record has been developed further, it should allow briefing on whether some or all of Plaintiffs' attorneys should be disqualified.

## **FACTUAL BACKGROUND**

### **A. Dr. Thomas Hofeller and His Work**

Dr. Thomas Hofeller was among the nation's foremost redistricting experts. By 2016, he had been involved in the redistricting process for over 46 years. Ex. 2, Declaration of Thomas Hofeller ("Hofeller Decl."), at ¶ 5, *Covington v. North Carolina*, No. 1:15-cv-399 (M.D.N.C. Oct.

31, 2016), ECF No. 137-1. He “drafted and analyzed plans in most states including, but not limited to, California, Nevada, Arizona New Mexico, Colorado, Texas, Oklahoma, Kansas, Missouri, Minnesota, Wisconsin, Illinois, Indiana, Ohio, Arkansas, Mississippi, Louisiana, Alabama, Georgia, Florida, South Carolina, North Carolina, Virginia, New York, New Jersey and Massachusetts.” *Id.* ¶ 9. Additionally, Dr. Hofeller served as Staff Director for the U.S. House Subcommittee on the Census. *Id.* ¶ 7.

Over the decades, Dr. Hofeller also served as an expert witness. *See, e.g., Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 535-36 (E.D. Va. 2015) (discussing expert testimony of Dr. Hofeller); *Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 747 (Va. 2018) (same); *Ketchum v. Byrne*, 740 F.2d 1398, 1409 n.9 (7th Cir. 1984) (same); *Black Political Task Force v. Connolly*, 679 F. Supp. 109, 116 n.13 (D. Mass. 1988) (same); *Mississippi v. United States*, 490 F. Supp. 569, 572 (D.D.C. 1979) (discussing Dr. Hofeller’s role as an expert redistricting consultant). Dr. Hofeller was involved in some of the nation’s most significant voting-rights litigation, including the case that eventually became *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See Gingles v. Edmisten*, 590 F. Supp. 345, 367 n.29 (E.D.N.C. 1984) (discussing testimony of Dr. Hofeller). In *Gingles*, Dr. Hofeller was retained by the State of North Carolina; one of North Carolina’s attorneys at the time was Edwin Speas, who represents the Plaintiffs in this lawsuit. More recently, Mr. Speas has been adverse to Dr. Hofeller in redistricting litigation. *See, e.g., Harris v. McCrory*, 159 F. Supp. 3d 600, 603, 607 (M.D.N.C. 2016). Plaintiffs and their counsel are well aware of Dr. Hofeller’s career as a redistricting consultant and expert witness.

Although Dr. Hofeller worked for varying political interests, his work was predominantly for the Republican National Committee and other organizations or individuals affiliated with Republican interests or representatives. This too was a matter of public knowledge. *See, e.g., Reid*

Wilson, Pioneer of Modern Redistricting Dies, The Hill (Aug. 18, 2018) (“For more than four decades, when Republicans needed strategic advice drawing political boundaries, the party turned to a small cadre of expert cartographers, trained in the rare art of redistricting. At the heart of that group was Tom Hofeller.”)<sup>5</sup>; Wendy Underhill, In Memoriam: Redistricting Pioneer Tom Hofeller, National Conference of State Legislatures: The NCSL Blog (Aug. 21, 2018).<sup>6</sup>

Dr. Hofeller conducted much of his work in his capacity as a partner in a limited-liability corporation, Geographic Strategies, LLC, in Columbia, South Carolina, which he owned with his partner Dale Oldham, an attorney. Hofeller Decl. ¶ 3. Geographic Strategies served various clients in the various states listed above, and either Dr. Hofeller or Geographic Strategies served as agents for those clients.

One of Dr. Hofeller’s clients was the North Carolina General Assembly. He served as the expert to the General Assembly during this most recent cycle of redistricting. In that capacity, he worked with lawyers before and during litigation, and he was considered an agent of the General Assembly qualified to receive privileged material and work product.

## **B. The Hofeller Family Tragedy**

On August 16, 2018, Dr. Hofeller passed away after a long struggle with cancer. He was survived by his wife, Kathleen, who lived with him in his North Carolina residence.

Dr. Hofeller was also survived by his estranged daughter, Stephanie Lizon, who sometimes still goes by Stephanie Hofeller. (“Lizon” is used here for clarity to distinguish Stephanie from Kathleen Hofeller.)

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<sup>5</sup> <https://thehill.com/homenews/state-watch/402489-pioneer-of-modern-redistricting-dies-at-75>.

<sup>6</sup> <http://www.ncsl.org/blog/2018/08/21/in-memoriam-redistricting-pioneer-tom-hofeller.aspx>.

At her deposition, Ms. Lizon testified that the last time she spoke with her father was in July 2014, more than four years before Dr. Hofeller's death. Lizon Dep. 41:21–23. Ms. Lizon learned of her father's death from a news article. *Id.* 169:3–10. Even a cursory review of publicly available information shows that Ms. Lizon's relationship with her father was strained if not outright contentious. Public records show that Ms. Lizon's and her father's political views were opposed. Whereas Dr. Hofeller had built a career working with the Republican National Committee and Republican legislatures on redistricting and Voting Rights Act issues, his estranged daughter, was arrested for destroying Bush/Cheney presidential campaign posters. Laura Cadiz, Allegations in Sign Destruction Dismissed, *The Baltimore Sun* (Dec. 17, 2004).<sup>7</sup> Adding to the strained relationship, Ms. Lizon's parents in December 2013 obtained legal custody of Ms. Lizon's child due to concerns that the grandchild's father, Stephanie Lizon's then husband, was abusive and dangerous. Couple In W.Va Torture Case Accused Of Taking Son, *The Herald Dispatch* (May 1, 2013).<sup>8</sup>

After Dr. Hofeller and Kathleen Hofeller obtained custody of their grandchild, in late April 2013, Ms. Lizon and her then husband, Peter Lizon, were arrested for violating the custody order for their son. *Id.* Stephanie Lizon was charged with felony child concealment and her then husband was charged with obstruction for allegedly lying about his wife and son's whereabouts. *Id.*; *see also* Travis Crum, Mother Takes Toddler From Legal Guardians, *Charleston Gazette Mail* (Apr. 30, 2013).<sup>9</sup>

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<sup>7</sup> <https://www.baltimoresun.com/news/bs-xpm-2004-12-17-0412170426-story.html>.

<sup>8</sup> [https://www.herald-dispatch.com/news/recent\\_news/couple-in-w-va-torture-case-accused-of-taking-son/article\\_c501a7ff-d873-5792-ac95-695fa083dd3b.html](https://www.herald-dispatch.com/news/recent_news/couple-in-w-va-torture-case-accused-of-taking-son/article_c501a7ff-d873-5792-ac95-695fa083dd3b.html).

<sup>9</sup> [https://www.wvgazettemail.com/news/cops\\_and\\_courts/mother-takes-toddler-from-legal-guardians/article\\_710d1828-e0e0-5c7b-966e-c1e979575060.html](https://www.wvgazettemail.com/news/cops_and_courts/mother-takes-toddler-from-legal-guardians/article_710d1828-e0e0-5c7b-966e-c1e979575060.html).

This criminal charge against Ms. Lizon is not an isolated incident. Ms. Lizon most recently, on

Stephanie Lizon stopped speaking with her parents, and when Dr. Hofeller passed away, her mother, Kathleen Hofeller did not contact Ms. Lizon to inform her. Lizon Dep. 169:25–170:13. Ms. Lizon did not attend her father’s funeral. *Id.* 169:3–10.

**C. Questions Regarding Mrs. Hofeller’s Competency**

After Dr. Hofeller’s death, it quickly became apparent that Mrs. Hofeller was having trouble managing her affairs. According to public records, Mrs. Hofeller was the victim of “a fraudulent scheme involving the purchase of gift cards.” Ex. 3, Report of the Guardian *ad Litem* (“Guardian Report”), at 1, *In re Kathleen Hofeller*, No. 18-sp-2634 (N.C. Super. Ct. Feb. 7, 2019). She also nearly became the victim of a fraudulent scheme inducing her to wire large sums of cash to India, where Mrs. Hofeller has no ties. *Id.* at 1–2; Ex. 4, Pet. for a Guardian (“Petition”), at ¶ 5, *In re Kathleen Hofeller, supra*, (Oct. 29, 2018). Concerns also arose that Ms. Lizon had been exercising undue influence over Mrs. Hofeller. Petition ¶ 5 (asserting that Mrs. Hofeller “is believed to be under influence of previously estranged child” (i.e. Ms. Lizon)). A financial assistant employed by Mrs. Hofeller “quit her employment upon concerns for personal safety based on the actions of” Ms. Lizon. *Id.*

These allegations were presented in October 2018 to the General Court of Justice, Superior Court Division, Wake County, in a petition for a guardian to be appointed for Mrs. Hofeller. *See* Petition. The evidence was found sufficiently credible that the court granted a motion for an interim guardian. In that order, the court adopted “all statements contained in the motion for appointment, to include [Mrs. Hofeller’s] transferring large amount of money pursuant to ‘scam’ gift card reimbursement to unknown parties..., *estranged daughter recently involved now accompanied her*

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May 9, 2018, pleaded guilty to theft by unlawful taking in the Clark District Court, Kentucky. District Court News for May 19, 2018, Winchester Sun (May 19, 2018), <https://www.winchestersun.com/2018/05/19/district-court-news-for-may-19-2018/>.

to change her power of attorney in possible attempt to reroute money back into other accounts to enable daughter to access it, multiple missed appointments for medical procedures and preliminary diagnosis of dementia along with reports of memory loss.” Ex. 5, Order on Mot. for Appointment of Interim Guardian, at ¶ I, *In re Kathleen Hofeller, supra*, (Nov. 6, 2018) (emphasis added). In other words, one of the key goals of the competency proceeding was to protect Mrs. Hofeller from Ms. Lizon.

An interim report prepared by the court-appointed guardian *ad litem* concluded that Kathleen Hofeller’s medical records “from a 2017 evaluation on the [Kathleen Hofeller] performed by Dr. Paul Peterson with Duke Neurology, include a diagnosis of mild cognitive disorder. These records also indicated that Dr. Peterson suspected early Alzheimer’s dementia, progressive type, and [Kathleen Hofeller] was recommended for a full neuropsychological evaluation,” and that evaluation had not occurred. Ex. 6, Interim Report of the Guardian *ad Litem* (“Interim Report”), at 3, *In re Kathleen Hofeller, supra*, (Nov. 6, 2018).

But Mrs. Hofeller was understandably resistant to the appointment of a guardian, and the parties reached a settlement in an effort to protect Mrs. Hofeller’s interests without court intervention. The guardian *ad litem* recommended the settlement—even while observing that Mrs. Hofeller was diagnosed with a “mild cognitive disorder and possible onset of early Alzheimer’s dementia” and that “there were deficiencies in her short-term memory”—because “the protection of [Mrs. Hofeller’s] estate from exploitation” appeared to have been prevented by an agreement that a guardian would “help manage her finances.” Ex. 3, Guardian *ad Litem* Report, at 3–4. Mrs. Hofeller agreed to have her financial assets placed into an irrevocable trust and to undergo “full neuropsychological evaluation.” Ex. 7, Mot. to Dismiss, at ¶ 1.j., *In re Kathleen Hofeller, supra*;

*Id.* at ¶ 1.a-f. (discussing trust). This appeared to ensure that Ms. Lizon and others would not exploit Mrs. Hofeller.

**D. Ms. Lizon Takes Possession of Dr. Hofeller’s Files**

At her deposition, Ms. Lizon testified that on October 11, 2018, she visited the apartment at the Springmoor Retirement Community where her mother was living and took from her father’s room the external hard drives and thumb drives that she ultimately produced to Common Cause in this litigation. Lizon Dep. 22:4–7; 23:10–24:11; 52:6–10. Ms. Lizon asked Mrs. Hofeller if she could take the drives because she was looking for pictures and other documents of hers that she thought might be on the drives. *Id.* 25:11–26:10; 50:12–20. When she took the external hard drives and thumb drives from her late father’s room, she assumed that there would be work files on the devices, and she was not surprised when she found such work materials on the drive: Dr. Hofeller “always had information related to his work on the personal hard drive.” *Id.* 55:3–18. Moreover, upon plugging the drives into her own laptop, Ms. Lizon found information pertinent to Dr. Hofeller’s business work with his partner Dale Oldham, co-owner of Geographic Strategies, LLC. *Id.* 30:18–23; 54:23–55:18.

This occurred roughly two weeks before the petition for a guardian was filed in the General Court of Justice. As explained, this was the time period when Ms. Lizon was accused of being physically threatening to Mrs. Hofeller’s book keeper and taking advantage of her mother, who had been diagnosed with a cognitive disorder with suspected early Alzheimer’s dementia, to obtain money from her bank account.

**E. Ms. Lizon Brings the Documents to the Attention of Common Cause, a Plaintiff in This Case**

On November 13, 2018, Common Cause, the North Carolina Democratic Party, and several individuals filed their initial complaint in this case. The complaint names Dr. Hofeller numerous

times and posits him as a bad actor who conspired with the North Carolina legislative leadership to violate the civil rights of North Carolina Democratic voters and interest groups.

At some point, Ms. Lizon began discussing her discovery of the documents with Common Cause and its counsel in this litigation. The record is contradictory as to how that occurred.

Ms. Lizon testified that she first spoke with Common Cause in October or November of 2018, soon after she took possession of Dr. Hofeller's files. She testified that she approached Common Cause to obtain a lawyer for her mother in the competency proceedings, Lizon Dep. 31:12–19, and then “I simply quipped that, I have—I have some hard drives.” *Id.* 34:6–7. She did so because she had read an article by David Daley, a senior fellow at Common Cause, sometime prior to October 2018. That David Daley article stated that, now that Tom Hofeller is dead, somewhere there is a trove of his documents on a hard drive that could be a gift for some state legislators. *Id.* 32:14–25. As she later confirmed during her testimony, “I think I might have quipped about that David Daley article way back in October when I was looking at those hard drives recalling that comment, somewhere out there on a hard drive.” *Id.* 59:20–23.

Ms. Lizon testified that she originally spoke with Bob Phillips at Common Cause in early November, 2018 by phone. *Id.* 89:8–23. Mr. Phillips then put Ms. Lizon in touch with Jane Pinsky, another employee of Common Cause. *Id.* 31:24–32:3. Pinsky explained to Ms. Lizon that there was a current litigation case about state legislative districts that would be accepting new evidence. *Id.* 33:20–35:15. In response, Ms. Lizon told Ms. Pinsky “well, I think this [her father's external hard drives and thumb drives] might be pertinent.” *Id.* 35:6. Ms. Lizon went on to praise Common Cause for their “progress” in that this was “the furthest [she had] ever seen a plaintiff get with anything [her] father drew.” *Id.* 35:25–36:23.

On the other hand, David Daley stated publicly that Ms. Lizon was in January 2019 “at a Common Cause conference in North Carolina that I was speaking at, and I mentioned...what a treasure trove there must be of documents on Hofeller’s computer.” Stand Up And Be Counted: The 2020 Census, The 1A, at 5:40–7:35 (June 3, 2019).<sup>10</sup> According to Mr. Daley, Ms. Lizon went to Common Cause afterward, stating “are you interested in this? I need legal help.” *Id.* Bob Phillips, meanwhile, claims that Ms. Lizon called him on the phone and offered the documents. What Next: The GOP Operative Haunting Republicans From the Grave, Slate Daily Feed (June 4, 2019).<sup>11</sup>

**F. Plaintiffs’ Counsel Advises Ms. Lizon To Turn Over All Materials Without Restriction or Review and Advise Her That Only North Carolina-Related Documents Would Be Reviewed**

In any event, it is undisputed that Ms. Lizon was directed to Eddie Speas and Caroline Mackie, outside counsel for Common Cause in this litigation. Lizon Dep. 38:10–17. Mr. Speas texted Ms. Lizon shortly after her conversation with Ms. Pinsky in December 2018. *Id.* 107:8–108:2. Ms. Lizon then spoke with Mr. Speas and Ms. Mackie. *Id.* 38:10–20; 108:22–110:10; 115:8–117:8. At the time of these conversations, Mr. Speas and Ms. Mackie were aware that there were issues regarding Mrs. Hofeller’s competency. *Id.* 118:18–119:3.

In those calls, Ms. Lizon indicated that she had material that might be relevant to the case, specifically external storage devices, and that she wanted to provide the storage devices to them. *Id.* 111:3–16; 38:21–39:1. She also disclosed that these drives contained information regarding personal data for herself and her parents in addition to the work data. *Id.* 127:15–128:21. Some of

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<sup>10</sup><https://the1a.org/audio/#/shows/2019-06-03/stand-up-and-be-counted-the-2020-census/117884/>.

<sup>11</sup> <https://podcasts.apple.com/ca/podcast/what-next-gop-operative-haunting-republicans-from-grave/id75089978?i=1000440577816>.

this personal data included personal health information about both Tom and Kathy Hofeller as well as Stephanie Lizon’s children. *Id.* 149:14–150:7.

Rather than advise Ms. Lizon to seek the advice of an attorney for herself or her mother, Plaintiffs’ attorneys told her that for the integrity of the process it would be better to turn over the data in its entirety rather than piecemeal. *Id.* 115:8–20. They told Ms. Lizon this in response to her concern that “I was getting ready to potentially turn over data that was personal to me as well so I really wanted to find out what the intentions were.” *Id.* 116:2–23. Ms. Mackie and Mr. Speas encouraged Ms. Lizon to hand over *all* the material on this basis: “And it was explained to me that—that this was quite clear—that anyone, either the—the legislative defendants or the plaintiffs, were only properly entitled to even look at the content of files that were explicitly and obviously related to this case.” *Id.* 116:17–23.

Although Mrs. Hofeller had an interim guardian over her person and her estate from November 6, 2018 through February 7, 2019, Ms. Lizon never spoke with Mrs. Hofeller’s guardians at all, let alone regarding her intention to turn over the external hard drives and thumb drives that contained her father’s business records as well as the personal financial and medical files of her parents. *Id.* 188:12–189:11.

When asked whether Ms. Lizon engaged in any sort of review to determine whether the files on the drives contained privileged information, she testified that counsel for Plaintiffs told her that the best way to “preserve the integrity” of the data was not to pick and choose and to leave everything as it was—and to produce *all* of the files to Plaintiffs’ counsel. *Id.* 64:9–65:3. Specifically, “in the discussion that [she] had with the attorneys Caroline Mackie and Eddie Speas, there was discussion on how it would be best recognized in court as...a good chain of custody, transparency. There would be no accusation of picking and choosing, of keeping some things

secret and some things not if the media were turned over to a third party in its exact state.” *Id.* 67:7–18; *see also Id.* 79:19–25.

Ms. Lizon further testified that Plaintiffs’ counsel was aware that documents unrelated to the North Carolina litigation, including purely private information, were to be exchanged. *Id.* 127:15-128:21. Ms. Lizon testified again that it was “obvious” from her discussion with Plaintiffs’ counsel that the review and use of documents she produced would be limited to North Carolina:

Ms. Lizon:....I wouldn’t expect to see a lot of personal data suddenly appearing in this matter because their understanding of the directive to them was that only files that were explicitly, obviously North Carolina redistricting during this period of time related would even be looked at, much less entered into evidence. That was their understanding at the time.

Q: And when you say that was their understanding—

Ms. Lizon: That’s what they told me their understanding was.

*Id.* 129:3–13.

Ms. Lizon followed the advice of Plaintiffs’ counsel and agreed to turn over all of the documents in her possession, without regard to their content or relevance to this case. Based on advice of Plaintiffs’ counsel, Ms. Lizon did not conduct any review of the documents for relevance to this litigation or for privilege protection. Ms. Lizon also did not communicate with any other persons, such as Dr. Hofeller’s partner Dale Oldham, regarding the files she intended to turn over. *Id.* 75:3–76:7.

#### **G. Plaintiffs Subpoena Ms. Lizon**

Apparently, it was only after Ms. Lizon agreed to hand over all documents that Plaintiffs prepared and served a subpoena to Ms. Lizon. At the time, the Legislative Defendants were unaware that Ms. Lizon had any documents belonging to the North Carolina General Assembly or covered by privilege protection. The subpoena was carefully crafted to avoid signaling the scope

of documents Ms. Lizon intended to hand over, the prior discussions, or Plaintiffs' advice to Ms. Lizon of what to do with the documents.

The subpoena was addressed care of Tom Sparks, Esq., who represented Ms. Lizon in her mother's incompetency proceedings. Ex. 8, Subpoena to Lizon. Ms. Lizon testified, however, that she did not consult with an attorney regarding the subpoena and the decision to turn over the external hard drives and thumb drives. Lizon Dep. 67:19-68:7. She also testified Mr. Sparks was not representing Ms. Lizon as to her communications with Plaintiffs; the scope of his representation of Ms. Lizon was the competency proceeding. *Id.* 190:4–191:15. The subpoena was addressed care of Mr. Sparks only because “he was kind enough to allow [Ms. Lizon] to use his office address as a service address where [she] could receive service.” *Id.* 191:12–15.

The subpoena contained three requests limited on their face to North Carolina: (1) “[a]ll documents of, created by, or held by Thomas Hofeller in your possession custody, or control relating to or concerning the redistricting of the North Carolina State Senate and State House in 2011 or 2017...”; (2) “[a]ll documents, notes, or correspondence reflecting any instructions, criteria, or requests of members of the North Carolina General Assembly regarding the redistricting of the North Carolina State Senate and State House in 2011 or 2017”; and “[a]ll documents...relating to, or evidencing the first version and each subsequent version of any redistricting maps and/or proposed redistricting maps...for the purposes of the redistricting of the North Carolina State Senate or State House in 2011 or 2017....” Subpoena, Attachment ¶¶ 1–3.

The subpoena's fourth request was carefully worded to cover “[a]ny storage device in your possession, custody, or control that contains, or may contain” information “requested in the preceding paragraphs.” *Id.* ¶ 4. Notwithstanding the limitation to information “requested in the preceding paragraphs,” Plaintiffs have taken the position that this language put the Legislative

Defendants and third parties on notice that Plaintiffs expected non-North Carolina documents, that they knew were beyond the scope of discovery, to be produced in response to the subpoena. Jones Letter 4. Ms. Lizon produced over a terabyte of data from her father’s devices.<sup>12</sup>

**H. Plaintiffs Decline To Turn Over the Documents to Other Parties in This Case**

Plaintiffs’ counsel represented to the Court that they came into possession of materials from Ms. Lizon on March 13, 2019, when they received a package of four external hard drives and eighteen thumb drives. They informed the Court that they gave notice to the other parties of receipt of the information. Although the other parties requested copies under Rule 45, Plaintiffs declined to provide copies to those parties.

Instead, Plaintiffs asserted that “certain files and folders contained sensitive personal information not relevant to this case, such as medical or family information or tax returns of the late mapmaker and his family.” Pls’ Mot. for Clarification 2 (April 4, 2019) (“Mot. for Clarification”). Plaintiffs represented that they “have not looked at any of these files and have no intention of doing so.” *Id.* Plaintiffs accused the other parties of “refus[ing] to consent to any filtering process”—which is not provided for by the rules—and of demanding “medical, tax, and other sensitive personal information of the late mapmaker and his family.” *Id.*

Plaintiffs, however, did not notify the Court or the other parties that it was because of Plaintiffs’ attorneys’ own advice to Ms. Lizon not to limit the range of production that such files were produced. In accusing the Legislative Defendants of desiring to possess irrelevant documents,

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<sup>12</sup> A terabyte is 1 trillion bytes. This equals 200,000 five-minute songs, 310,000 pictures, or 500 hours of film. By comparison the Hubble Space Telescope produces about 10 terabytes of data every year. Brady Gavin, How Big Are Gigabytes, Terabytes, and Petabytes?, How-To Geek (May, 25, 2018), <https://www.howtogeek.com/353116/how-big-are-gigabytes-terabytes-and-petabytes/>.

it was highly material that Plaintiffs themselves had advised that irrelevant documents be produced. Nor did Plaintiffs notify the Court or the Legislative Defendants that documents related to other litigation—past and present—were in the disclosure or that North Carolina documents were only a sliver of the material produced. The Legislative Defendants had no way to know that Plaintiffs had those files because they asked for them or that Plaintiffs had promised Ms. Lizon—having no ability to bind the other parties or waive their Rule 45 rights—that only North Carolina-related documents would be produced.

Following the plain language of Rule 45, the Court ordered Plaintiffs to turn over all materials. The materials were not made available to the Legislative Defendants until Friday, May 3—nearly two months after Plaintiffs claim to have received them. As noted, the volume of material is enormous. It therefore took weeks for the Legislative Defendants to upload even the files apparently relevant to North Carolina. An index of the files was not available until May 15, and the Legislative Defendants could not even begin reviewing them until June 1.

**I. Plaintiffs Review Documents Unrelated to North Carolina, Use Them in Other Cases, and Disseminate Them Liberally to the Press**

Plaintiffs did not restrict their review to North Carolina-related documents. Now that they were in the possession of privileged and confidential information of their political and litigation opponents, they apparently conducted an expeditious review of all files.

They promptly found a document they deemed relevant to an entirely unrelated case concerning the 2020 census and filed it in unredacted form on the public docket. The document (and Plaintiffs' baseless argument about what it means) stirred an immediate media frenzy as literally dozens of news outlets picked it up and republished it. *See, e.g.*, Ian Millhiser, A Dead

Man Just Revealed The Trump Administration’s Plans To Rig Elections For White Republicans, Think Progress (May 30, 2019).<sup>13</sup>

**J. When Approached About Their Conduct, Plaintiffs Respond With Inflammatory Allegations With No Evidentiary Support**

After reviewing the index of files and Ms. Lizon’s deposition, it became apparent to the Legislative Defendants the scope of materials Plaintiffs had obtained and that at least some were privileged. The Legislative Defendants acted promptly on that information. On May 31, 2019, before the Legislative Defendants were even able to begin reviewing the files, they wrote to Plaintiffs’ counsel a letter expressing concern that files identified on the Legislative Defendants’ index were privileged. Mot. for Direction Ex. B (“Strach Letter”), at 1–2.<sup>14</sup> Files present on the index contained such headings as “expert report,” indicating work-product status. As noted, however, the Legislative Defendants even at this point were unable to review the files and to this day are trying to assess the scope and nature of documents Plaintiffs have obtained.

In addition to observing that privileged documents appear to be in Plaintiffs’ possession, the Legislative Defendants observed that they also have documents owned by parties not represented in this case. Further, they expressed concern about Plaintiffs’ advice to Ms. Lizon, Ms. Lizon’s potential wrongdoing in taking the documents, and the events under which Plaintiffs took possession of the documents. Finally, they expressed concern that Plaintiffs’ representations to the parties and the Court prior to turning over Dr. Hofeller’s materials were misleading and under-represented the scope of materials in Plaintiffs’ possession. *Id.* at 2–4.

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<sup>13</sup> <https://thinkprogress.org/thomas-hofeller-trump-census-racist-rigging-5ab9f81864bd/>.

<sup>14</sup> Letter from Phillip Strach, Attorney, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., to Stanton Jones, Attorney, Arnold & Porter, (May 31, 2019).

The Legislative Defendants therefore recommended remedial action. First, they designated the production “Highly Confidential” under the Court’s protective order (i.e. Consent Protective Order ¶ 13 (Apr. 5, 2019) (providing that “[t]he terms of this order are applicable to information produced by a non-Party in the litigation and designated as ‘CONFIDENTIAL’ or ‘HIGHLY CONFIDENTIAL/OUTSIDE ATTORNEYS’ EYES ONLY,’” without limiting persons authorized to designate)). *Id.* at 2. Second, they advised that Plaintiffs cease reviewing the information. Third, they advised that the information be returned to its rightful owner(s). Fourth, they advised that Plaintiffs disclose the extent to which the information had been disseminated to others. And fifth, they advised that any copies be destroyed. *Id.* at 4–5.

On June 5, Mr. Stanton Jones, counsel to Plaintiffs, sent an 18-page response. In relevant part, he accused the Legislative Defendants of attempting to hide “false statements made by Legislative Defendants to federal courts.” Jones Letter 1. Mr. Jones alleged that statements that the Legislative Defendants lacked knowledge of whether or not Dr. Hofeller was drawing remedial maps for North Carolina prior to July 2017 were “false.”

Mr. Jones, however, failed to identify the relevant representations. After the *Covington* court invalidated large portions of North Carolina’s 2011 plans, and after the Supreme Court affirmed that order—but vacated the *Covington* court’s order for special elections—the question arose how much time the North Carolina legislature should have to prepare a remedial map. The *Covington* plaintiffs, represented by counsel representing Plaintiffs here, sought to subpoena Representative David Lewis to assess whether Dr. Hofeller had been engaged in map-drawing, and Rep. Lewis responded with an assertion of legislative privilege. Ex. 9, Pls’ Response to Mot. to Quash, at 3–4, *Covington v. North Carolina*, 1:15-cv-399, (M.D.N.C. July 26, 2017), ECF No. 177. The parties settled that dispute with a stipulation between counsel for both parties. The

stipulation affirmed Rep. Lewis's right not to testify. The stipulation represented on behalf of all parties that Rep. Lewis lacked knowledge either way on what Dr. Hofeller had done:

Rep. Lewis has not assigned Dr. Hofeller to fill in the House and Senate grouping maps filed with the Court on October 31, 2016 (D.E. 137-1) with district lines, nor has he seen or approved such a map and *does not know if Dr. Hofeller has drawn such a map.*

Ex. 1, *Covington* Stipulation ¶ 5 (emphasis added). Mr. Jones's letter presented no evidence that the Legislative Defendants were aware of any map-drawing activities by Dr. Hofeller in that time frame. Nevertheless, Mr. Jones accused the Legislative Defendants of demanding return and destruction of material to hide such information. Jones Letter 2–3, 13.

Mr. Jones also asserted that the Legislative Defendants may not designate materials produced by Ms. Lizon under the protective order, since they are not the producing party. Mr. Jones also asserted that the Legislative Defendants waived any objection to Plaintiffs' reviewing the General Assembly's privileged files by not objecting when the files were produced, and that Plaintiffs have a right to the documents and to use them without limitation, notwithstanding their assertion to Ms. Lizon that only North Carolina-related documents would be reviewed. As to the Legislative Defendants' concern about the advice Plaintiffs' lawyers gave Ms. Lizon, Mr. Jones asserted that "[w]e are aware of no obligation of a lawyer to advise a non-adverse third party like Ms. [Lizon] to obtain counsel in these circumstances...." Jones Letter 15. Mr. Jones did not deny that Plaintiffs' legal team gave Ms. Lizon legal advice.

The next morning, Plaintiffs filed the motion now before the Court. Almost immediately, the New York Times had reported that the Legislative Defendants, elected officials, lied in federal

court. Michael Wines, Deceased Strategist’s Files Detail Republican Gerrymandering in North Carolina, *Advocates Say*, N.Y. Times (June 6, 2019).<sup>15</sup>

## **ARGUMENT**

This “motion for direction” implicates several responsibilities of this Court. One of those is to ensure that this proceeding maintain its integrity as a forum for resolving legal matters, not as a political platform from which baseless, ideologically driven messages are disseminated to the nation as vetted fact. To that end, the Legislative Defendants will take the space here to respond to Plaintiffs’ baseless accusations of perjury. This is no casual matter. The Legislative Defendants are public officials, elected to office in North Carolina, and accusations of criminal conduct are serious, especially when, as here, they are baseless. Although the Legislative Defendants would prefer to save these issues for trial, they have no choice but to answer what amounts to defamatory statements actively circulated in the national news media.

The Court should also ensure that its protective order is enforced. To that end, the Legislative Defendants defend their designation of materials produced by a non-party under the protective order. Plaintiffs have, quite remarkably, decided that they alone determine the applicability of the order and, rather than confer with the Legislative Defendants, summarily announced that the Legislative Defendants’ designations are improper and chose to ignore them.

The Court should also ensure that counsel practicing before it adhere to professional standards. *Matter of Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977) (“This Court has not only the inherent power but also the duty to discipline attorneys, who are officers of the court, for unprofessional conduct.”); *In re License of Delk*, 336 N.C. 543, 551, 444 S.E.2d 198, 202

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<sup>15</sup> <https://www.nytimes.com/2019/06/06/us/north-carolina-gerrymander-republican.html>.

(1994) (“The superior court has the inherent power to discipline members of the bar.”). To that end, the Legislative Defendants have laid out what they understand to be the facts of the conduct of Plaintiffs’ counsel above, and below are set forth the Legislative Defendants’ ethical concerns related to these actions. This is an obligation of the Legislative Defendants’ counsel. *See* N.C. R. Prof’l Conduct (“N.C. RPC”) 8.3(a). As discussed below, the Court should conduct a thorough investigation to assess the harm inflicted by Plaintiffs’ apparently unethical conduct and select an appropriate remedy to mitigate that harm. At the very least, the documents Ms. Lizon produced should all be labeled “Confidential” or “Highly Confidential” under the protective order.

## **I. Plaintiffs’ Allegations of Wrongdoing Are Baseless**

### **A. Plaintiffs Misrepresent the Statements to the *Covington* Court**

Plaintiffs assert that Dr. Hofeller’s files “reveal evidence of false statements and material omissions to the federal district court in *Covington*, which will be highly relevant to the merits of Plaintiffs’ claims as well as any remedial process.” Jones Letter 6. But they mischaracterize what was represented to the *Covington* court, asserting: “Legislative Defendants repeatedly stated that no work on remedial plans had yet begun, and that Legislative Defendants therefore needed a long period of time to draft new plans.” *Id.* at 7. But Plaintiffs tellingly neglect to cite the document where the Legislative Defendants’ representation appears, and their assertions are false.

As noted above, this matter was litigated in *Covington*, and Plaintiffs ignore that litigation history entirely. The *Covington* plaintiffs sought to subpoena Representative David Lewis to assess whether Dr. Hofeller had been engaged in map-drawing, and Rep. Lewis asserted privilege. *See* Ex. 9, Pls’ Response to Mot. to Quash, at 3–4, *Covington, supra* (July 26, 2017). As noted, the parties settled that dispute with this stipulation:

Rep. Lewis has not assigned Dr. Hofeller to fill in the House and Senate grouping maps filed with the Court on October 31, 2016

(D.E. 137-1) with district lines, nor has he seen or approved such a map and *does not know if Dr. Hofeller has drawn such a map.*

*Covington* Stipulation at 1–2 (emphasis added). The parties, the counsel (including Plaintiffs’ counsel here), and the *Covington* court was well aware, then, that Rep. Lewis and the other Legislative Defendants’ position was that they did not know what, if anything, Dr. Hofeller had done. This was a stipulation signed by the *Covington* plaintiffs’ counsel. Moreover, in its final order, the *Covington* court stated:

Legislative Defendants have offered no evidence to support their contention that they need three-and-a-half more months to remedy the constitutional violations identified by this Court almost a year ago, nor have they offered any evidence that they have not begun to evaluate what the revised districts might look like.

*Covington v. State*, 267 F. Supp. 3d 664, 667 (M.D.N.C. 2017) (emphasis added). The notion that the *Covington* court believed that there was an ironclad, affirmative assertion that Dr. Hofeller had not engaged in map-drawing contradicts what that court itself said on the matter.

Rep. Lewis has been consistent on this. At the legislative hearings, when asked whether Dr. Hofeller had drawn maps other than the remedial maps, Rep. Lewis responded: “None that I know of.” Notice, *Covington*, *supra*, ECF No. 184-7 (Ex. 7 at 11:19–12: 2). The other statements Plaintiffs reference are statements about the legislative process, not Dr. Hofeller’s activities. There is a difference between a career map-drawer tinkering on a computer and a legislature deliberating over a redistricting plan with the intent of enacting one into law. The representations Plaintiffs identify all pertain to the latter. *See* Jones Letter 7–10 (quoting representations about the legislative process).<sup>16</sup>

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<sup>16</sup> Plaintiffs claim that the Legislative Defendants’ interrogatory responses in this case are inaccurate. For reasons stated here, they were accurate as of the time they were made. Any updates in light of new information will be made in due course, consistent with the North Carolina Rules of Civil Procedure.

So the record before the *Covington* court was quite clear. The Legislative Defendants represented (1) lack of knowledge one way or the other on Dr. Hofeller’s map-drawing activities prior to July 2017 and (2) no legislative processes prior to July 2017. The *Covington* court never indicated that it believed the Legislative Defendants had certified that Dr. Hofeller had drawn no maps before that point, it expressly stated that there was not “any evidence” one way or the other on whether “they have...begun to evaluate what the revised districts might look like,” and the *Covington* court made its decision based on that information. *Covington*, 267 F. Supp. 3d at 667.

**B. Plaintiffs Identify No Contradiction, Let Alone Falsehood**

To show that the Legislative Defendants’ statements “are false or misleading,” Plaintiffs would need evidence either that the legislative processes had begun prior to July 2017 or that the Legislative Defendants were aware that Dr. Hofeller had been drawing maps prior to that time. They do not attempt to show the former. And their effort on the latter falls flat.

Plaintiffs assert that Dr. Hofeller was in fact drawing maps prior to July 2017. The Legislative Defendants are still working to assess these assertions. Their initial analysis suggests that even this may not be true. Some of the files apparently at issue appear not to have been drawn on Dr. Hofeller’s computer and likely were not drawn by Dr. Hofeller. Thus, it is entirely unclear at this time even to what degree Dr. Hofeller was engaged in map-drawing in June 2017.<sup>17</sup>

But assume it is true that Dr. Hofeller was working on maps, that is irrelevant to showing that Rep. Lewis or other legislators made “false or misleading” statements *unless* Plaintiffs have

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<sup>17</sup> As explained above, the Legislative Defendants were in a position to begin reviewing documents only quite recently. Plaintiffs’ choice to withhold the documents and delay the other parties’ receipt of them for nearly two months has prejudiced the Legislative Defendants’ ability even to vet Plaintiffs’ inflammatory claims.

evidence that Rep. Lewis or other legislators knew of such alleged work—since their representation was that they did not know one way or the other.

Plaintiffs present nothing to show this. Although they apparently have all Dr. Hofeller's computer files, they fail to adduce any communication between Rep. Lewis and Dr. Hofeller during the relevant time period. The Legislative Defendants' own investigation has, at this time, turned up nothing. So as far as direct evidence goes, there is Rep. Lewis's statement against nothing at all.

Plaintiffs appear to rest their entire bald assertion of perjury on the assertion "that Dr. Hofeller had already completed *over 97%* of the new Senate plan and *over 90%* of the new House plan by June 2017." Jones Letter 10 (emphasis in original). Those numbers are both wrong and irrelevant.

### **1. Plaintiffs' Assertion of Overlap Is Wrong**

Plaintiffs have no substantiation for these numbers, and it is not clear what they even mean. Do they mean Dr. Hofeller had as of June 2017 completed over 90% of the plans he was drawing or that there is over 90% overlap between those plans and the plans eventually adopted?

If it is the latter, the numbers are both wrong and inflated. Although the Legislative Defendants are still investigating Plaintiffs' claims, it appears from an initial review that there is a comparatively low degree of overlap between the districts in Dr. Hofeller's files and the enacted plans. For starters, taking all districts in the plans, it appears that there is an average of about 82% overlap between the House districts on Dr. Hofeller's computer and those eventually enacted and about 92% percent overlap between the Senate districts on Dr. Hofeller's computer and those eventually enacted.

But that, too, is misleading, because it includes districts that did not need to be drawn after the *Covington* order. That is, approximately 15 (out of 50) Senate districts and 41 (out of 120) House districts are 100% identical between the 2017 plans and Dr. Hofeller's plans for the simple reason that they were unaffected by the *Covington* litigation. They did not need to be re-drawn.

Furthermore, in both the House and Senate plans, there are districts whose configurations are entirely dictated by North Carolina's strict whole-county rules, such as districts that contain one county or set of counties simply by operation of math. Indeed, the lines in nearly 60 North Carolina counties are dictated entirely by the county-grouping rules, meaning that there will be 100% overlap between *any* two lawful plans. Dr. Hofeller disclosed the county groupings to the *Covington* court in October 2016. *See* Ex. 2, Hofeller Decl. (disclosing county groupings). So by June 2017, Dr. Hofeller knew what those groupings would be, and it was well known that the districts would need to be molded to fit those groupings.

As a rough estimate, 90 counties in the Senate map and 70 in the House map were drawn into districts because of the whole-county rule or the traversal rule, creating a very limited range of discretionary options. By the same token, this creates a very high overlap between any two lawful North Carolina maps. It appears that the maps on Dr. Hofeller's computer have approximately the same overlap with maps proposed by the *Covington* special master as with the enacted plans. No one would seriously contend that Dr. Hofeller actually drew the special master's proposals.

But Plaintiffs apparently compared whole plans to whole plans, without accounting for districts that, by necessity, were 100% identical or those that contained, by necessity, a high overlap. In doing so, Plaintiffs falsely and substantially inflated these similarity percentages. Further, there are districts where only very limited discretion is available around the county-

grouping rule, creating the inevitability of a very high percentage of overlap in any set of maps complying with the North Carolina Constitution. Indeed, *all* districts are heavily impacted by the county-grouping principles, so, in *all* districts, it is highly likely that a meaningful degree of overlap will result in *any* two legal maps.

So Plaintiffs' assertion has no grounding in reality. The overlap in *discretionary* choices is well below their false percentages. And to have any meaningful sense of how much Dr. Hofeller's discretionary choices match the General Assembly's choices one would need an intelligent method, which Plaintiffs did not employ, and competing expert testimony, which is not available. No matter, Plaintiffs rendered baseless accusations and actively disseminated them in the national media based on percentages and inferences that are entirely indefensible.

## **2. Plaintiffs' Allegations Do Not Establish a Material Falsehood**

Setting aside their errors as to the degree of overlap, Plaintiffs' assertions are baseless for the additional reason that even a high degree of overlap would not establish knowledge of Rep. Lewis of Dr. Hofeller's efforts prior to July 2017. The *Covington* court was well aware that Dr. Hofeller had been engaged to redraw the maps, since the parties stipulated to this. Ex. 1, *Covington* Stipulation ¶ 5 (stipulating that Dr. Hofeller was retained to draw the 2017 plans). So it would not be surprising that, once Dr. Hofeller had received instructions from the legislature as to his task, he would rely on his prior work. It is, further, unremarkable that his decisions would be similar to those advised by the legislature. Dr. Hofeller had worked with the General Assembly throughout the cycle and had decades of redistricting experience in North Carolina. He clearly knew how to comply with the North Carolina whole-county rule and surely had a sense of what the legislature would request. That he may have been able to rely on his prior work does not establish that Rep. Lewis or other legislators knew of that work.

Plaintiffs' assertions to the contrary are reckless and evidently intended to turn this litigation into a platform of political invective and defamation. The Legislative Defendants respectfully submit that Plaintiffs should save their assertions for trial and stick to what they can support with evidence.

### **C. Plaintiffs' Other Assertions Are Baseless**

Plaintiffs' other assertions of perjury depend entirely on their false assumption that maps they found on Dr. Hofeller's computer are in fact the enacted plans, but they have no evidence for this. Consequently, their other assertions are equally baseless.

For example, Mr. Jones's letter accuses the Legislative Defendants of falsely stating that racial data was not "loaded into the computer" Dr. Hofeller used to draw the 2017 maps. Jones Letter 12–13. The North Carolina Legislature's statement is demonstrably true. The North Carolina legislature provided Dr. Hofeller with a state-owned computer and instructed him to use that computer to draw the 2017 plans. That was the computer over which the Legislative Defendants have control, and Plaintiffs have had all the files from that computer for some time. Plaintiffs do not (and cannot) represent that racial data was loaded into that computer. Thus, as to what the Legislative Defendants could and did control, their statements were entirely correct.

Mr. Jones's representations that Dr. Hofeller had racial data on his personal computer—assertions yet to be vetted—are simply recycling a dispute in the *Covington* case as to whether Dr. Hofeller should have been involved at all in the remedial processes. The *Covington* plaintiffs asserted that Dr. Hofeller had knowledge of racial data from his prior experience and could not be trusted. If the *Covington* court believed this was a concern, it could have instructed the legislature not to use Dr. Hofeller. It did no such thing.

**D. Plaintiffs' Assertions Are Irrelevant and Designed to Score Political Points**

Plaintiffs' effort to relitigate matters fully and adequately litigated in *Covington*—by the same lawyers—is nothing but an effort to score political points in litigation that substantially lacks merit. The question here is whether the 2017 plans violate North Carolina law. If Plaintiffs believe the 2017 plans were improperly drawn with racial intent, they need to amend their complaint and agree to a delay in the trial date for more discovery. Plaintiffs' efforts to relitigate *Covington* here are an effort to divert this Court's attention from the matter before it.

It is quite clear why Plaintiffs would want that diversion. On the merits, Plaintiffs have a terrible case for reasons that should now be clear. North Carolina's whole-county and transversal rules are highly restrictive and limit the discretion of the legislature in redistricting. Just as those rules render any map Dr. Hofeller drew similar with the enacted plans and, in turn, similar with any plans anyone else would draw, those rules prevent the legislature from controlling election results through alleged gerrymandering. Even a legislature that desires partisan gain is highly restricted, and Plaintiffs' expert reports reveal only minor changes—and sometimes *no* changes—in election results based on political motive.

Thus, Plaintiffs wage a smear campaign designed to turn this forum into a stage for political disputes. They complain that politicians behaved politically and attempt to steer the Court's attention in every direction *except* the objective qualities of the map and the election results—all to achieve their own highly partisan ends. The objective evidence has shown and will show that North Carolina's restrictive rules had a far greater impact on the map than anyone's political goals and that Plaintiffs' electoral problem (if there is one, which is doubtful) is due to factors other than partisanship.

## II. Plaintiffs Have Violated the Court’s Protective Order

Plaintiffs’ have shown not only reckless disregard for the truth, but also reckless disregard for the Court’s protective order. In their May 31 letter, the Legislative Defendants designated the production from Ms. Lizon “Highly Confidential” based on their concern that it contained proprietary and privileged information, much of it pertaining to non-parties. Plaintiffs unilaterally decided that the designation was ineffective and have continued to treat the information as not designated.<sup>18</sup>

Plaintiffs assert that only a “producing party” may designate materials confidential, but they conflate portions of the protective order governing productions of parties with the provision governing productions from *non*-parties. There is no limitation on who may designate material produced by *non*-parties in the protective order:

The terms of this order are applicable to information produced by a non-Party in the litigation and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL/OUTSIDE ATTORNEYS’ EYES ONLY,” as applicable. Such information produced by non-Parties in connection with this litigation is protected by the remedies and relief provided by this Agreement.

Consent Protective Order ¶ 13 (Apr. 5, 2019). Thus, although provisions governing productions by parties contemplate a designation “by the Party producing the material,” the provision governing productions by non-parties contains no such restriction. And there is a good reason for that, which applies here: non-parties may produce information subject to confidentiality claims by parties, so placing the parties’ confidentiality claims solely in the hands of non-parties, who may

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<sup>18</sup> The Legislative Defendants re-designated some material “Confidential” after it became apparent that Plaintiffs shared it with their experts. Given the inflammatory allegations of perjury, the Legislative Defendants had no choice but to allow their own experts to review the bases of these false allegations. Nevertheless, Plaintiffs’ sharing “Highly Confidential” information with their experts was improper.

lack incentive to rigorously defend the rights of parties, makes little sense. The protective order commonsensically allows any party to designate such materials. In fact, Plaintiffs themselves designated 1,001 files produced by Ms. Lizon “Highly Confidential.”

Nevertheless, even if Plaintiffs were right, they would be obligated to treat the information as protected under the order, since the order provides that a designation is operative until a party challenges the designation and obtains an order from the Court that it is improper. *See* Consent Protective Order ¶¶ 7(e), 13 (Apr. 5, 2019). Moreover, under the Court’s case-management procedures, Plaintiffs should have attempted to confer with the Legislative Defendants to resolve the matter without Court intervention. Plaintiffs, however, decided to play the role of the Court, decided that the Legislative Defendants’ confidentiality designation was inoperative, and proceeded to serve expert “rebuttal” reports containing large amounts of information with a “Highly Confidential” designation. They are therefore in violation of the protective order.

### **III. Plaintiffs’ Counsel Appear To Have Violated the Rules of Ethics in Advising Ms. Lizon To Hand Over Material Against Her Interests, Taking Possession of Privileged Information That Was Likely Stolen, and Concealing Relevant Facts from the Court**

Plaintiffs have also been reckless in their actions in guiding Ms. Lizon and taking possession of property she likely had no right to possess. Counsel for the Legislative Defendants have an obligation to inform the Court of concerning conduct, and this brief serves that purpose. N.C. RPC 8.3(a). The Legislative Defendants, however, believe that the factual record is not sufficiently developed to assess what sanction is appropriate. As explained below, Plaintiffs are in possession of nearly 1,300 emails and corresponding attachments of the North Carolina General Assembly containing some objective assertion of privilege or work-product protection. If Plaintiffs’ counsel have reviewed that information, they may be subject to disqualification. In all events, because the conduct of Plaintiffs’ counsel is primarily a matter between them and the Court, the Court should investigate further and take whatever action it deems appropriate.

**A. Plaintiffs' Counsel Apparently Gave Legal Advice to Ms. Lizon Against Her Legal Interests**

North Carolina Rule of Professional Conduct 4.3 provides that, “[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not... (a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.” Thus, there are two questions here: (1) whether Plaintiffs’ counsel know or have reason to know that Ms. Lizon’s interests were *possibly* adverse to their client’s interests, and (2) whether Plaintiffs’ counsel gave legal advice. The answer to both appears to be yes.

**1. Ms. Lizon’s Interests Were Potentially Adverse**

Whether she knew it or not, Ms. Lizon was in a legal conundrum when she took possession of materials from Mrs. Hofeller’s residency. This was true both as to Mrs. Hofeller and as to Dr. Hofeller’s clients.

**a. Ms. Lizon’s Interests as to Mrs. Hofeller and the State**

Only two weeks after she took possession of all Dr. Hofeller’s files, purportedly with Mrs. Hofeller’s consent, Ms. Lizon was accused in public court filings of taking advantage of her mother to obtain money from her. The court subsequently ruled on a provisional basis that these allegations had merit. In appointing an interim guardian for Mrs. Hofeller, the court cited the fact that “estranged daughter recently involved now accompanied [Mrs. Hofeller] to change her power of attorney in possible attempt to reroute money back into other accounts to enable daughter to access it.” Ex. 5, Order on Mot. for Appointment of Interim Guardian, *In re Kathleen Hofeller, supra* ¶ I.

In other words, the guardianship proceedings, the interim order, and the settlement were designed to protect Mrs. Hofeller from Ms. Lizon.

Any lawyer confronted with Ms. Lizon in these circumstances—and being informed, as Plaintiffs’ counsel were, of the legal proceedings—would be concerned that Ms. Lizon’s taking and retaining possession of materials from her mother was a legally dubious course of conduct. Taking personal property from someone lacking capacity to give it is larceny. *See State v. Marks*, 178 N.C. 730, 101 S.E. 24, 25 (1919) (“Consent by insane persons and young children incapable of assenting is no bar [to conviction]. In cases of rape this has been frequently adjudicated, and the same reasoning holds good in cases of larceny.”); *People v. Schlick*, 846 N.Y.S.2d 128, 129 (N.Y. App. Div. 2007) (affirming larceny conviction for continuing to withdraw money from account of someone no longer having mental capacity to consent); *People v. Camiola*, 639 N.Y.S.2d 35, 36 (N.Y. App. Div. 1996) (similar). Furthermore, Ms. Lizon may have obtained permission from Mrs. Hofeller under false pretenses. *State v. Kelly*, 75 N.C. App. 461, 463–64, 331 S.E.2d 227, 230 (1985) (discussing the crime). And, even absent sufficient criminal intent, the course of action could constitute civil conversion or a similar tort. *See Clements ex rel. Batten v. Clements*, 232 N.C. App. 336, 757 S.E.2d 524 (2014) (table) (remanding civil conversion action between spouse estate and spouse due to questions of fact surrounding competency).

Thus, a lawyer looking out for Ms. Lizon’s interests would recognize that a close look into whether she should continue to retain the materials was in order. The Court need not decide that Ms. Lizon committed any of these offenses. What matters is that Ms. Lizon’s legal situation was murky and, quite frankly, dangerous. She has at least one prior conviction for larceny, she had been arrested for violating a child custody order, and—as of the time she was having discussions with Plaintiffs’ counsel—she was accused of taking advantage of Mrs. Hofeller. Similarly, she

was accused of being physically threatening to an accountant employed by Mrs. Hofeller. Ms. Lizon desperately needed sound legal advice as to her rights and obligations and as to the course of conduct to best avoid or mitigate liability. She stated at her deposition that she knew she needed legal counsel and she shared that concern with Plaintiffs' counsel.

It should have been obvious to Plaintiffs' counsel that they were not the right lawyers to give that advice. Plaintiffs' interests were at least potentially adverse to Ms. Lizon's. As Mr. Daley of Common Cause stated publicly: "at a Common Cause conference in North Carolina that I was speaking at, and I mentioned...what a treasure trove there must be of documents on Hofeller's computer." Stand Up And Be Counted: The 2020 Census, The 1A, at 5:40–7:35 (June 3, 2019).<sup>19</sup> The interests of Common Cause, therefore, was in maximizing disclosure of Dr. Hofeller's files. That interest had a high probability, if not a certainty, of being in conflict with Ms. Lizon's legal interests in minimizing exposure to liability for taking possession of the documents.

Plaintiffs' counsel, however, approached this ethical issue from a bizarre perspective. They assert that Ms. Lizon's interests were not adverse because she "proactively contacted Common Cause, raised the fact that she had the electronic storage devices, and affirmatively offered to provide the devices to Common Cause." Jones Letter 15. It is not true, however, that she came with her mind made up to hand over all the files—she expressed concern that handing them all over may infringe her "privacy." Lizon Dep. 116:2–23. More fundamentally, a person's *legal* interests are not identical to the person's *subjective desires*. Attorneys frequently give advice to dissuade people from taking actions they would otherwise take for non-legal reasons. Had an attorney evaluated the context (*e.g.*, the accusations against her in the competency proceeding and

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<sup>19</sup><https://the1a.org/audio/#/shows/2019-06-03/stand-up-and-be-counted-the-2020-census/117884/>.

the property and privilege rights of Dr. Hofeller's clients) from the perspective of *Ms. Lizon's* interests, and had she been advised that maintaining possession and disseminating the material would potentially subject her to criminal or civil liability, Ms. Lizon may have had a different view. That will never be known because Ms. Lizon was not told to get separate counsel *prior* to negotiating with Plaintiffs' counsel.

Plaintiffs also play tricks with the timing of the competency proceeding. They note that the competency proceeding was not commenced until after Ms. Lizon took Dr. Hofeller's files and that Ms. Lizon did not transfer them to Common Cause until after a settlement was reached, bringing those proceedings to a close. But this places form over substance. As the above-cited cases indicate, questions of competency can be decided outside North Carolina's statutory competency-proceeding framework. A criminal or civil case can be brought and competency determined within that case irrespective of ancillary competency proceedings. *See Clements*, 757 S.E.2d at \*8 (discussing litigating competency by "retrospective evaluations" for time period years before competency proceedings). Competency can be shown lacking with evidence of "the measure of capacity," i.e., the subject's "ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences." *Ridings v. Ridings*, 55 N.C. App. 630, 633, 286 S.E.2d 614, 616 (1982) (quoting *Sprinkle v. Wellborn*, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905)). Here, there was powerful evidence that Mrs. Hofeller did not understand "the nature of the act" in which she was engaged. She was only fortuitously prevented from wiring a large sum from her bank account to total strangers in India, and she agreed to a guardian over her finances precisely to protect her finances from Ms. Lizon. A prosecutor or civil plaintiff could make out at least a colorable claim of incompetency in a civil proceeding, and it would in no way be hampered by the competency-proceeding settlement. Indeed, the competency proceeding

resulted in a settlement subjecting Mrs. Hofeller's most important affairs to be handled by and through an independent Trustee, not a finding that Mrs. Hofeller was competent.

Importantly, Rule 4.3 does not require actual adversity, only "a reasonable possibility of" adversity. Even if Plaintiffs' counsel believed that there were counter-arguments, arguments that Mrs. Hofeller had capacity to make a gift, they should have understood the *possibility* of claims against Ms. Lizon, especially given the highly confidential nature of the materials they knew they were seizing from legislatures and Republican Party-affiliated groups around the United States. This element is met.

**b. Ms. Lizon's Interests as to Dr. Hofeller's Clients**

A separate set of legal problems arises from Ms. Lizon's knowingly taking documents belonging to Dr. Hofeller's clients. She testified that she was aware that Dr. Hofeller's business partner might have an interest in the documents, and Plaintiffs' counsel was well aware because it was Dr. Hofeller's work on behalf of clients that most interested them.

But Dr. Hofeller created and possessed these files as an agent for other parties. As discussed above, Dr. Hofeller's redistricting work spanned well over 40 years and entailed work for dozens of clients, whom Dr. Hofeller served as part of his partnership, Geographic Strategies, LLC. Thus, Dr. Hofeller himself would have been prohibited from handing the information over without their consent—or at least after providing notice and an opportunity to assert their rights. *See, e.g., Estate of Graham v. Morrison*, 168 N.C. App. 63, 68–69, 607 S.E.2d 295, 299–300 (2005) (restating well-established rules that an agent cannot transfer a principal's property without permission or at least full disclosure). Additionally, Dr. Hofeller had no authority to waive privilege on any

privileged documents, since privilege belonged solely to his clients. *See In re Miller*, 357 N.C. 316, 339, 584 S.E.2d 772, 788 (2003).

Ms. Lizon’s seizing possession over documents owned by an array of persons thus was itself a legal quagmire. It may constitute larceny, and civil tort actions of various kinds may exist as well. Again, the Court need not sort out all those possibilities; Rule 4.3 requires lawyers to tread with utmost caution at the mere “reasonable possibility” of a conflict. The possibility is readily plain here.

**c. Ms. Lizon’s Interests as to Plaintiffs**

Ms. Lizon and Plaintiffs were also adverse for the simple reason that Plaintiffs issued a subpoena to her for production of documents. That is formal legal process, and Plaintiffs were on one side and Ms. Lizon was on the other. In that proceeding, then, their interests were directly adverse.

**2. Plaintiffs’ Counsel Gave Legal Advice**

When faced with an unsophisticated individual asking for a lawyer and offering documents in questionable circumstances, the obligation on Plaintiffs’ counsel was very clear: say nothing except “secure counsel.” N.C. RPC 4.3(a). Plaintiffs’ counsel here did much more. They advised Ms. Lizon on what information she should hand over and how—and they gave remarkably bad advice. Their advice was that the best way to “preserve the integrity” of the documents was not to review the files but rather to provide them all to Common Cause. Lizon Dep. 64:9–65:3. Specifically, “in the discussion that [she] had with the attorneys Caroline Mackie and Eddie Speas, there was a discussion on how it would be best recognized in court as...a good chain of custody, transparency. There would be no accusation of picking and choosing, of keeping some things secret and some things not if the media were turned over to a third party in its exact state.” *Id.*

67:7–18; *see also id.* 79:19–25. This advice was solicited based on concerns Ms. Lizon raised about privacy. *Id.* 116:2–23.

Plaintiffs’ counsel also gave legal advice about the scope of obligations of the parties to the case. They (falsely) told Ms. Lizon that only North Carolina-related documents would be reviewed and that the parties were prohibited from reviewing personal information:

Ms. Lizon:....I wouldn’t expect to see a lot of personal data suddenly appearing in this matter because their understanding of the directive to them was that only files that were explicitly, obviously North Carolina redistricting during this period of time related would even be looked at, much less entered into evidence. That was their understanding at the time.

Q: And when you say that was their understanding—

Ms. Lizon: That’s what they told me their understanding was.

Lizon Dep. 129:3–13. Importantly, Mr. Jones’s letter does not deny that Plaintiffs’ counsel gave legal advice, but rather denies only adversity. *See* Jones Letter 15 (“We are aware of no obligation of a lawyer to advise a non-adverse third party like Ms. [Lizon] to obtain counsel in these circumstances, and your letter does not identify any such obligation.”). But, as shown above, the potential for adversity was plain.

By comparison, the North Carolina Bar opined that a statement by a lawyer to a non-represented adverse party asserting that a proposed settlement “would avoid litigation and would avoid even the possibility that you might have personal exposure for payment of part of a judgment” and that the person’s insurance company “will hire a lawyer to defend the claim” but that “his or her responsibility will be divided between you and the insurance company” amounted to legal advice—in two respects, (1) “about the effect of a settlement on his personal liability” and (2) “about a possible conflict of interest on the part of any lawyer who may be retained by the

insurance carrier.” Op. RPC 194 (“Op. RPC 194”),<sup>20</sup> N.C. State Bar (Jan. 13, 1995)<sup>21</sup>; *see also* *People v. Mascarenas*, 103 P.3d 339, 345 (Colo. O.P.D.J. 2003) (finding lawyer gave legal advice by telling non-represented person “that the documents were ‘legal’ and ‘ok’”). The communications of Plaintiffs’ counsel are no different. They informed Ms. Lizon (1) about the scope of what she should produce to them, observing that courts would prefer that she hand over everything to preserve the documents’ “integrity,” and (2) about the duties of other parties in reviewing the materials, observing that they would not be permitted to review private information.

Worse, both sets of advice were plainly wrong. The advice to hand over all documents in one’s possession without reviewing them to preserve their “integrity” is just bizarre. Lawyers routinely tell their clients the opposite: have the documents reviewed and turn over only what is relevant. Justice Jackson observed that “any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.” *Watts v. State of Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting). Similarly, no competent lawyer tells a client to hand over all files without review or limitation to another party’s lawyers—or anyone else. One wonders whether Plaintiffs’ counsel advises their own clients, such as Common

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<sup>20</sup> “RPC opinions are [N.C. State Bar] ethics opinions promulgated under the Rules of Professional Conduct that were in effect from January 1, 1986, until July 23, 1997.” Suzanne Lever, CPR - RPC - FEO - WTH?, N.C. State Bar (June 2015), <https://www.ncbar.gov/for-lawyers/ethics/ethics-articles/cpr-rpc-feo-wth/>. “Although the RPCs were adopted under the superseded (1985) Rules of Professional Conduct, they still provide guidance on issues of professional conduct except to the extent that a particular opinion is overruled by a subsequent opinion or by a provision of the Revised Rules of Professional Conduct.” Adopted Opinions, N.C. State Bar, <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/> (last visited June 16, 2019). Here, State Bar RPC 194 opines on then Rule 7.4(b), which directly aligns with current Rule 4.3(a). *See* Op. RPC 15, N.C. State Bar (Oct. 24, 1986) (“Rule 7.4(b) prohibits a lawyer from giving advice to a person not represented by a lawyer, other than advising that person to secure counsel, where the interests of the person have a reasonable possibility of being in conflict with the interests of the lawyer's client.”).

<sup>21</sup> <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-194/>.

Cause and the Democratic Party of North Carolina, to allow others full access to their files or to send multiple hard drives of unreviewed material in response to a subpoena.

The statement that the parties would be allowed to review only North Carolina-related materials was equally false. They knew they were obligated to hand over all files and had no ability to restrict other parties' review of those files. Worse, the statement appears to have been a bald lie. Plaintiffs promptly reviewed material not "explicitly, obviously North Carolina redistricting" related and disseminated that material to the national press.

Thus, aside from giving legal advice to a person with potentially adverse interests, Plaintiffs' counsel failed to make their statements to an unrepresented party materially accurate. N.C. RPC 4.1 ("In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."). Furthermore, they were encouraging her to persist in a course of potentially criminal or tortious conduct by retaining materials to which her claim of right was legally dubious and exacerbating the harm by giving copies to others. *See* N.C. RPC 8.4(a)–(d).

#### **B. Plaintiffs' Counsel Stated or Implied a Disinterested Status**

A second, interrelated problem is that Plaintiffs' counsel apparently implied a disinterested status by stating that the use and review of documents would be restricted. As noted, Rule 4.3(b) provides that no lawyer may "state or imply that the lawyer is disinterested."

Plaintiffs' counsel did just that in informing Ms. Lizon that they would take care of reviewing the documents, that the parties would use only the documents relevant to the case, and otherwise respect Ms. Lizon's and others' interests in the process. Lizon Dep. 129:1–13. As noted, this was improper legal advice. It also implied both a disinterested status and made a promise

Plaintiffs' counsel could not keep: they knew they were obligated to hand over all files and had no ability to restrict other parties' review of those files.

By comparison, the North Carolina Bar opined that a letter from a lawyer to an adverse party recommending a settlement to avoid a suit and offering benefits to the adverse party from the settlement was unethical. The opinion observed:

More problematic is the general tenor of the letter which, through numerous statements such as “nothing personal is intended by this action,” implies that Attorney is not only disinterested but he is actually concerned about and protecting the interests of Defendant. This is a clear violation of Rule [4.3(b)]....

Op. RPC 194.<sup>22</sup> So too here: there was a “general tenor” that Ms. Lizon should turn over all documents—over her privacy qualms—that Plaintiffs' counsel would protect her interests, that the parties would restrict use to relevant material, and that it would ultimately benefit her. Implying this status of disinterest was improper.

**C. Plaintiffs Obtained and Continue To Review and Use Materials in Violation of the Rights of Third Parties**

The Legislative Defendants' ethical concerns go beyond Plaintiffs' dealings with Ms. Lizon and go directly to Plaintiffs' obtaining and keeping documents under a highly dubious claim of legal right. Rule 4.4(a) provides that “a lawyer shall not...use methods of obtaining evidence that violate the legal rights of” a “third person.” N.C. RPC 4.4(a). Accordingly, it is well established that “a district court may sanction a party for wrongfully obtaining the property or confidential information of an opposing party.” *Glynn v. EDO Corp.*, 2010 WL 3294347, at \*3 (D.

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<sup>22</sup> Op. RPC 194 opined here on then Rule 7.4(c), the direct precursor to current Rule 4.3(b). Rule 7.4(c) provided “in dealing on behalf of a client with a person who is not represented by counsel, [a lawyer shall not] state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.” Op. RPC 194.

Md. Aug. 20, 2010) (collecting cases). For example, the North Carolina Bar has advised lawyers not to review documents obtained by clients under dubious claims of legal right. 2012 N.C. Formal Ethics Op. 5, at #6 (advising counsel not to review emails a company obtained by surreptitiously reading employee emails on private email accounts)<sup>23</sup>; *see also* ABA Formal Op. 06-440, n.8 (July 5, 1994) (“If the sender of privileged or confidential material has engaged in tortious or criminal conduct, a lawyer who receives and uses the materials may be subject to sanction by a court.”).

Courts have repeatedly condemned efforts by lawyers to circumvent the rights of parties and non-parties through deceptive evidence-gathering methods, and a prime example is to seek information from someone who has improperly obtained it. For example, the U.S. Court of Appeals for the Tenth Circuit found that a litigant “acted willfully, in bad faith, and with fault” by obtaining internal documents from a corporation the litigant intended to sue (and eventually sued) from a shareholder of that company rather than from the company directly through discovery. *Xyngular v. Schenkel*, 890 F.3d 868, 872 (10th Cir. 2018). This allowed the party to obtain confidential documents against multiple “potential opponents” outside the discovery process and with the help of someone who should not have had the materials. *Id.* at 874. The Tenth Circuit upheld various sanctions, including the dismissal of claims, for this act of misconduct. This case is hardly an anomaly. *See, e.g., Oliver v. Bynum*, 163 N.C. App. 166, 170, 592 S.E.2d 707, 711 (2004) (finding effort to record confidential conversation by opposing counsel to be civil conspiracy and support disqualification); *Jackson v. Microsoft Corp.*, 211 F.R.D. 423, 431 (W.D. Wash. 2002), *aff’d*, 78 F. App’x 588 (9th Cir. 2003) (dismissing the claim of a party that “received 10,000 e-mails from an unknown source,” including an adverse party’s “proprietary secrets” and

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<sup>23</sup> <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-5/>.

“attorney-client work product, and confidential information” regarding internal business affairs); *Glynn*, 2010 WL 3294347, at \*5 (imposing a \$20,000 sanction for acquiring “internal” documents of another party “surreptitiously” and “outside of the normal discovery channels”); *Perna v. Elec. Data Sys., Corp.*, 916 F. Supp. 388, 399–402 (D.N.J. 1995) (dismissing the claim of a party who photocopied documents belonging to an attorney that the party stumbled upon in a law office and withheld sanctions to the attorney because the attorney promptly took action to correct the unethical conduct and did not retain or review the wrongfully obtained documents); *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992) (forbidding use of documents obtained from party with no lawful access to them).

This case fits squarely within this line of authority. Plaintiffs’ counsel plainly could not have obtained the entirety of Dr. Hofeller’s files, including privileged documents and those reflecting the internal strategies of potential adversaries, in a direct manner. Had Dr. Hofeller been alive, he would have produced only what was legally required. He would not have produced privileged materials or materials outside the scope of discovery. Had Plaintiffs subpoenaed any of Dr. Hofeller’s clients directly, they too would have withheld irrelevant and privileged documents.

Rather than seek materials through legitimate means, Plaintiffs worked through a back channel, obtaining them from Ms. Lizon who was at the time subject to accusations of exercising undue influence over Mrs. Hofeller and, in any event, had no legal right to the documents owned by Dr. Hofeller’s clients. As discussed above, any reasonable third party dealing with Ms. Lizon would have been concerned that she had stolen the documents. This case is no different from

*Xyngular*, where working through a sympathetic corporate insider to obtain information that would not otherwise have been accessible to an adverse party was roundly condemned as unethical.<sup>24</sup>

Plaintiffs therefore acted in violation of the rights of others in several ways.

**Violation of Privilege.** Plaintiffs' counsel was well aware that many documents in the trove they obtained and affirmatively recommended be disclosed are privileged. As a result they now have in their possession, by the Legislative Defendants' current best estimate, 1,300 emails containing another 3,600 North Carolina-related documents that on their face assert some type of privilege claim.<sup>25</sup> Plaintiffs knew that was the result of their effort because they knew Dr. Hofeller acted at the direction of attorneys, provided information to attorneys to assist their legal advice, and acted during and in anticipation of litigation. Plaintiffs' counsel, especially Mr. Edwin Speas, have been representing Democratic Party interests in redistricting litigation for decades and were aware that Dr. Hofeller was an expert witness against them in many cases, assisted in map-drawing activities challenged in others, and consulted general on Republican Party redistricting strategy at the national, state, and local levels. They knew that Dr. Hofeller worked with and for attorneys and that documents in his possession are protected by attorney-client and work-product privileges, including privileges applicable in other litigation and likely in this litigation.<sup>26</sup> Fed. R. Civ. P. 26(b)(4)(C).

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<sup>24</sup> Indeed, obtaining possession of materials that one knows or has reason to know are stolen is itself a crime in North Carolina. N.C. Gen. Stat. § 14-72.

<sup>25</sup> Apart from these emails and attachments, there are a staggering 56,110 documents containing either "NC" or "North Carolina" in the file path names on Dr. Hofeller's drives. Legislative Defendants believe that many of these documents are work product for various cases over the previous decade. Legislative Defendants' review of these documents is ongoing.

<sup>26</sup> As just one example, Plaintiffs are represented by the law firm of Perkins Coie, which is adverse to the Virginia House of Delegates in *Bethune-Hill v. Va. State Board of Elections*, in the Eastern District of Virginia. Dr. Hofeller was an expert witness in that case, so in pursuing all his documents, they knew full well that they were seeking documents protected by the work-product

Plaintiffs assert that any claim of privilege is waived, since the Legislative Defendants did not raise it in response to the subpoena. But the subpoena was not directed at them, and the Legislative Defendants had no reason to think Ms. Lizon was in possession of their privileged information. “Waiver is defined simply as the intentional relinquishment of a known right.” *Disc. Auto Mart, Inc. v. Bank of N. Carolina*, 45 N.C. App. 543, 544, 263 S.E.2d 41, 42 (1980). The Legislative Defendants could not have waived privileged protection on documents they did not know Ms. Lizon had. Moreover, there can be no waiver of unethical conduct. As the Tenth Circuit explained, “the inquiry that was essential to the imposition of sanctions was not whether the documents were confidential, privileged, or trade secrets—but rather, whether [the party] acted willfully, in bad faith, and with fault in a way that abused the judicial process in collecting them.” *Xyngular*, 890 F.3d at 874. Plaintiffs obtained the Legislative Defendants’ confidential documents through unethical means, taking them from someone without a legal right to have them with full knowledge that they would contain privileged information. That is unethical and merits sanctions.

**Property Rights of Mrs. Hofeller.** As described above, Plaintiffs knew that Ms. Lizon’s possession of the documents was pursuant to a highly questionable claim of right. Plaintiffs knew that Mrs. Hofeller was the subject of competency proceedings, that Ms. Lizon was alleged to be a bad actor in those proceedings, and that the settlement was designed to protect Mrs. Hofeller from Ms. Lizon. Taking Ms. Lizon’s assertions about Mrs. Hofeller’s consented as true was reckless—at best—as to the rights of others. Plaintiffs at least should have known that any assertion by Ms. Lizon that she lawfully obtained them from Mrs. Hofeller was under a cloud of questions. Yet

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privilege that they could not obtain in that case. *Bethune-Hill* is just one of the many cases in which Dr. Hofeller was an expert and one of the many in which the partisan interests are adverse to the partisan interests Plaintiffs’ counsel represent.

Plaintiffs' counsel proceeded, not only to accept the documents, but to actively urge Ms. Lizon to turn them all over. This, again, encouraged a course of conduct that may have been tortious or even criminal.

**Property and Confidentiality Interests of Third Parties.** Plaintiffs were aware that, even if Mrs. Hofeller had the capacity to give her own property to Ms. Lizon (and, in turn, to Common Cause), that Mrs. Hofeller does not have a property interest in everything handed over. Much of the information was created by Dr. Hofeller in his capacity as an agent for other parties. Thus, Dr. Hofeller himself would have been prohibited from handing the information over without their consent—or at least after providing notice and an opportunity to assert their rights. *Estate of Graham*, 168 N.C. App. at 68–69, 607 S.E.2d at 299–300. Indeed, the information Mrs. Hofeller did *not* own was precisely the information Plaintiffs *wanted*.

**Political Party Materials.** Plaintiffs' counsel was aware that Dr. Hofeller would be in possession of many documents germane to Republican Party interests and strategy. That is clear not only because Plaintiffs' counsel is familiar with Dr. Hofeller and the Republican Party, but also because Plaintiffs in this very case have asserted First Amendment privilege over their strategic information. What they obtained through Ms. Lizon is well beyond what they seek to protect and involves 40 years of Republican Party strategy in many, perhaps every, state and at the national level. The very First Amendment privilege they assert here was, they knew full well, applicable to at least some of the documents they sought.

**The Bad-Faith Subpoena.** By working through Ms. Lizon, Plaintiffs circumvented the rights of the Legislative Defendants and others and obtained information well beyond their discovery rights in this case, providing no opportunity for those third parties to have any role in asserting their interests. And Plaintiffs' use of a subpoena does nothing to extenuate their

misconduct. Nor does the absence of an objection to it. The subpoena “was a piece of paper masquerading as legal process.” *Theofel v. Farey-Jones*, 359 F.3d 1066, 1074 (9th Cir. 2004) (finding failure to object in that context “immaterial”). Because “[t]he discovery process is not meant to be supplemented by the unlawful conversion of an adversary’s proprietary information,” *Herrera v. Clipper Grp., L.P.*, 1998 WL 229499, at \*2 (S.D.N.Y. May 6, 1998), it is no defense that Plaintiffs actively encouraged Ms. Lizon’s unlawful conversion and issued formal discovery only after securing her agreement to give them the stolen documents.

The subpoena “‘transparently and egregiously’ violated the [North Carolina] Rules, and [Plaintiffs] acted in bad faith and with gross negligence in drafting and deploying it.” *Theofel*, 359 F.3d at 1074. It appeared to seek only North Carolina-related documents in a North Carolina redistricting case, but Plaintiffs have interpreted it to include everything in Dr. Hofeller’s files. *See Jones Letter 4* (suggesting that request for “[a]ny storage device” covered every item of Dr. Hofeller’s in Ms. Lizon’s possession). If Plaintiffs’ interpretation is correct, that does not help them because a lawful subpoena “would request only e-mail related to the subject matter of the litigation”; if Plaintiffs did in fact ask—quite deceptively—for all information “with no limitation as to time and scope,” that itself would be a basis for them to be “soundly roasted.” *Theofel*, 359 F.3d at 1071; *see also id.* at 1074–75 (criticizing counsel for obtaining privileged and irrelevant materials from blatantly overbroad subpoena, over the argument that no objection was lodged against it). “The subpoena power is a substantial delegation of authority to private parties, and those who invoke it have a grave responsibility to ensure it is not abused.” *Id.* at 1074. If Plaintiffs are right that their subpoena sought documents plainly irrelevant to this case as well as privileged materials, then they abused that power. *Id.* at 1075–77 (finding that blatantly overbroad subpoena could form the basis of a Stored Communications Act claim).

Moreover, the subpoena targeted someone who no one had reason to think possessed the entirety of Dr. Hofeller's life work (or any of it at all). The subpoena did not state that there was a preexisting agreement that all of Dr. Hofeller's files would be produced without review or notice to interested parties. Nor did the subpoena state that Ms. Lizon had improperly obtained the documents. If anything, the subpoena is further evidence of misconduct because the face of the subpoena itself is misleading—suggesting a routine effort to obtain at arms length a limited quantity of documents within Plaintiffs' claim of right from a party represented by counsel with limited information and an incentive to object. The record here reveals that it was nothing of the sort.

**D. Plaintiffs Acted With Questionable Candor to the Court**

Rule 3.3(a)(1) provides that “A lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” This applies to both affirmative statements and material omissions. *See* Cmnt. 3, N.C. RPC 3.3 (“There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”).

Here, Plaintiffs failed to disclose the extensive discussions their counsel had with Ms. Lizon prior to issuing the subpoena, including their having secured her agreement to produce all information on Dr. Hofeller's devices and their express understanding that this included sensitive personal information. The duty to disclose this was triggered, at a minimum, by Plaintiffs' representations that they had received files that “appear to contain highly sensitive personal information” and that they “do not believe it is in the interest of any party to copy and further disseminate such information.” Mot. for Clarification 1, 5. This created the impression that Plaintiffs had received the information entirely through the choice of Ms. Lizon and, moreover,

did not anticipate such a response to their subpoena. It sounded as if Plaintiffs were surprised to find themselves in the custody of this information. And that was what the Legislative Defendants believed.

But, in fact, the reason Plaintiffs have information that they asserted “plainly are irrelevant to the merits of this lawsuit,” *id.* at 5, is that they expressly asked Ms. Lizon for it. It would have been highly relevant to tell the Court that the information they claimed they had no interest in possessing or reviewing, and therefore wanted to withhold from other parties in violation of the plain text of Rule 45(d1)<sup>27</sup> was information they actively sought from Ms. Lizon. It would also have been highly relevant to tell the Court that, as discussed above, they apparently were asking to return the property and keep it out of the hands of other litigants based on an (entirely improper) assurance to Ms. Lizon that they were disinterested and would only review what was relevant to the case. Lizon Dep. 129:1–13.

It would have further been relevant to tell the Court that other information “plainly...irrelevant to the merits of this lawsuit,” Mot. for Clarification 5, had been obtained (again, because they verbally told Ms. Lizon to turn it over) and that Plaintiffs’ counsel were actively reviewing that information with the intent of filing it in other cases and disseminating it publicly. Thus, their request created the impression that what they had identified as “irrelevant” and “sensitive” was the full scope of what was actually irrelevant and sensitive and that the Court had no need to take further action on those other irrelevant and sensitive items.

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<sup>27</sup> “A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of material produced in compliance with the subpoena...upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party.” N.C. R. Civ. P. 45(d1).

#### **IV. The Court Has a Variety of Options for Addressing This Situation, Depending on the Facts It Ultimately Finds**

As discussed, the Court has inherent power and duty to regulate the behavior of counsel and the parties before it, to enforce the North Carolina Rules of Professional Conduct, and to issue sanctions and remedial measures. *In re License of Delk*, 336 N.C. 543, 551, 444 S.E.2d 198, 202 (1994). The conduct of Plaintiffs' counsel is therefore primarily a matter between them and the Court. The Legislative Defendants' role is to apprise the Court of their concerns. N.C. RPC 8.3(a).

If the Court shares these concerns, it has many options for remedying the situation. Sanctions for ethical violations have included revoking *pro hac vice* status of out-of-state attorneys, *Sisk v. Transylvania Community Hosp., Inc.*, 364 N.C. 172, 695 S.E.2d 429 (2010), and dismissing claims, *see, e.g., Jackson*, 211 F.R.D. at 431. Relevant factors include:

- (1) the degree of the wrongdoer's culpability;
- (2) the extent of the client's blameworthiness if the wrongful conduct is committed by its attorney, recognizing that we seldom dismiss claims against blameless clients;
- (3) the prejudice to the judicial process and the administration of justice;
- (4) the prejudice to the victim;
- (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, and deterring similar conduct in the future; and
- (6) the public interest.

*Glynn*, 2010 WL 3294347, at \*3 (quoted source omitted). The Legislative Defendants believe that the record is not sufficiently developed to assess the scope of a remedy at this time and recommend that the Court conduct further investigation. It is not clear which lawyers were involved, the degree of misconduct, the degree of knowledge, or the prejudice involved. Indeed, Plaintiffs have not responded to the Legislative Defendants' inquiries on many of these matters. But those facts will become clear if the Court investigates.

The minimum sanction appropriate to remedy a party's improperly obtaining materials is an order requiring that the party not review the materials and return them. *See In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992). For example, in *Ashman v. Solectron Corp.*, 2008 WL

5071101, at \*4 (N.D. Cal. Dec. 1, 2008), the court found that dismissal of a claim for improperly obtaining another party's confidential documents was too severe given the degree of the violation and so, instead, simply ordered return of the documents and shift attorneys' fees for litigating over the issue. *See also id.* (citing *Herrera v. Clipper Group, L.P.*, 1998 WL 229499, at \*3 (S.D.N.Y. May 6, 1998), which imposed a similar remedy). This follows from a lawyer's duty not to review documents that the provider may lack a legal right to obtain. 2012 N.C. Formal Ethics Op. 5, at #6. The Court should also exclude the use of the documents at trial. *See Fayemi v. Hambrecht & Quist, Inc.*, 174 F.R.D. 319, 326 (S.D.N.Y. 1997). At a bare minimum, all documents produced by Ms. Lizon should be designated "Confidential" or "Highly Confidential" under the protective order.

Disqualification of some or all of Plaintiffs' attorneys may also be appropriate. Because they improperly obtained at minimum 1,300 emails and corresponding documents, some related to this case and covered by a self-evident privilege assertion, Plaintiffs' counsel may be unable to continue their work in this case, since it is improper for them to review the materials. If they have already reviewed them, there is no way to erase the information from their memories. *See Maldonado v. New Jersey ex rel. Admin. Office of Courts-Prob. Div.*, 225 F.R.D. 120, 141 (D.N.J. 2004) (finding disqualification appropriate, even though dismissal of the complaint was not, because of counsel's possession of privileged materials). Plaintiffs' counsel have made some, albeit oblique, assertion of not having reviewed privileged materials, so it is currently unclear the extent to which they have somehow steered around these 1,300 emails and corresponding documents. The Court should investigate this as well.

## **CONCLUSION**

The Court should conduct a hearing to investigate the conduct of Plaintiffs and their counsel and issue any appropriate remedy to protect the rights of third parties and the integrity of this proceeding. The Court should allow opportunity for further briefing and motions once the factual record is clear on these issues.

This the 17th day of June, 2019.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,

SMOAK & STEWART, P.C.

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**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this day served the foregoing in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile transmittal;
- By email transmittal;
- Depositing a copy here of, first class postage pre-paid in the United States mail, properly addressed to:

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*Counsel for Common Cause and the Individual Plaintiffs*

This the 17<sup>th</sup> day of June, 2019.

By:   
Phillip Strach, NC Bar No. 29456

# **EXHIBIT 1**



legislative remedial maps; Rep. Lewis has not assigned Dr. Hofeller to fill in the House and Senate grouping maps filed with the Court on October 31, 2016 (D.E. 137-1) with district lines, nor has he seen or approved such a map and does not know if Dr. Hofeller has drawn such a map. Neither Rep. Lewis nor any other legislative defendant waives legislative privilege with regard to the remedial redistricting process for the state legislative districts and does not do so by or through this stipulation.

This the 26<sup>th</sup> day of July, 2017.

OGLETREE, DEAKINS, NASH  
SMOAK & STEWART, P.C.

/s/ Phillip J. Strach  
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*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing **PLAINTIFFS' AND LEGISLATIVE DEFENDANTS' JOINT STIPULATION OF WITHDRAWAL OF SUBPOENA AND MOTION TO QUASH OR MODIFY SUBPOENA** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 26<sup>th</sup> day of July 2017.

OGLETREE, DEAKINS, NASH  
SMOAK & STEWART, P.C.

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30659408.1

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
NO. 1:15-CV-00399

SANDRA LITTLE COVINGTON, *et al.*, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 STATE OF NORTH CAROLINA, *et al.* )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

**PLAINTIFFS AND LEGISLATIVE  
DEFENDANTS' JOINT  
STIPULATION ON WITHDRAWAL  
OF SUBPOENA AND MOTION TO  
QUASH OR MODIFY SUBPOENA**

Plaintiffs and the legislative defendants enter into the following stipulation:

1. On July 20, 2017, plaintiffs issued a subpoena to Representative David Lewis (“Rep. Lewis”) directing Rep. Lewis to appear as a witness at the hearing scheduled for July 27, 2017 (the “Subpoena”).
2. On July 25, 2017, the legislative defendants filed a Motion to Quash or Modify the Subpoena (“Motion”).
3. On July 26, 2017 the plaintiffs filed a Response to the Motion to Quash.
4. Through this joint stipulation, plaintiffs agree to withdraw the Subpoena and the legislative defendants agree to withdraw the Motion.
5. The legislative defendants stipulate that (1) between February 5, 2016 and February 19, 2016, Dr. Tom Hofeller was retained to redraw the North Carolina congressional map (consisting of 13 congressional districts), a redistricting committee was appointed, public hearings held, written criteria adopted and a new map enacted; and (2) Dr. Hofeller has been retained by the legislative leadership to consult on the

legislative remedial maps; Rep. Lewis has not assigned Dr. Hofeller to fill in the House and Senate grouping maps filed with the Court on October 31, 2016 (D.E. 137-1) with district lines, nor has he seen or approved such a map and does not know if Dr. Hofeller has drawn such a map. Neither Rep. Lewis nor any other legislative defendant waives legislative privilege with regard to the remedial redistricting process for the state legislative districts and does not do so by or through this stipulation.

This the 26<sup>th</sup> day of July, 2017.

OGLETREE, DEAKINS, NASH  
SMOAK & STEWART, P.C.

/s/ Phillip J. Strach  
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*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing **PLAINTIFFS' AND LEGISLATIVE DEFENDANTS' JOINT STIPULATION OF WITHDRAWAL OF SUBPOENA AND MOTION TO QUASH OR MODIFY SUBPOENA** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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Raleigh, NC 27602

This the 26<sup>th</sup> day of July 2017.

OGLETREE, DEAKINS, NASH  
SMOAK & STEWART, P.C.

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30659408.1

# **EXHIBIT 2**

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
NO. 1:15-CV-00399

SANDRA LITTLE COVINGTON, *et al.*, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
STATE OF NORTH CAROLINA, *et al.* )  
 )  
Defendants. )  
\_\_\_\_\_ )

**CORRECTED DECLARATION OF THOMAS B. HOFELLER, PH.D.**  
**(October 31, 2016)**

Thomas Brooks Hofeller, under penalty of perjury, declares the following:

1. I am a recognized expert in the fields of districting and reapportionment in the United States. I have been retained, as an independent consultant, through counsel by Intervenor-Defendants to provide expert testimony in this case. My hourly rate is \$300 per hour.

**QUALIFICATIONS**

2. I set forth here a summary of my experience that is most relevant to this testimony. The full range of my professional qualifications and experience is included in my resume, which is attached as Appendix 1.

3. I am a Partner in Geographic Strategies, LLC, located in Columbia, South Carolina. Geographic Strategies provides redistricting services including database construction, strategic political and legal planning in preparation for actual line drawing, support services and training on the use of geographic information systems (GIS) used in redistricting, analysis of

plan drafts, and actual line-drawing when requested. The corporation and its principals also provide litigation support.

4. I hold a Ph.D. from Claremont Graduate University, where my major fields of study were American political philosophy, urban studies and American politics. I hold a B.A. from Claremont McKenna College with a major in political science.

5. I have been involved in the redistricting process for over 46 years, and have played a major role in the development of computerized redistricting systems, having first supervised the construction of such a system for the California State Assembly in 1970-71.

6. I have been active in the redistricting process leading up to and following each decennial census since 1970. I have been intimately involved with the construction of databases combining demographic data received from the United States Census Bureau with election information which is used to determine the probable success of parties and minorities in proposed and newly enacted districts. Most of my experience has been related to congressional and legislative districts, but I have also had the opportunity to analyze municipal and county-level districts.

7. I served for a year and one half as Staff Director for the U. S. House Subcommittee on the Census in 1998-99.

8. I was Staff Director of the Subcommittee when the Census Bureau was proposing to substitute the American Community Survey (ACS) for the use of the decennial long form questionnaire in the 2000 and previous decennial Censuses. The long form was not used in the 2010 Decennial Census.

9. I have drafted and analyzed plans in most states including, but not limited to, California, Nevada, Arizona, New Mexico, Colorado, Texas, Oklahoma, Kansas, Missouri,

Minnesota, Wisconsin, Illinois, Indiana, Ohio, Arkansas, Mississippi, Louisiana, Alabama, Georgia, Florida, South Carolina, North Carolina, Virginia, New York, New Jersey and Massachusetts.

10. In this decennial round of redistricting, I have already been intensely involved in Texas, Alabama, North Carolina, Virginia and Massachusetts. As much of my consulting activities involve work in states subject to the provisions of Section 5 of the Voting Rights Act. I am very familiar with the data used to analyze the expected performance of redrawn and newly created minority districts. Although I am not an attorney, I regularly advise clients about the characteristics of minority districts in their plans, and whether or not they are meeting the requirements of both Sections 2 and 5 of the Voting Rights Act.

11. I have given testimony as an expert witness in a number of important redistricting cases including, but not limited to, Gingles v. Edmisten, 590 F. Supp. 345 (N.D.N.C. 1984), *aff'd in part and rev'd in part* Thornburg v. Gingles 478 U.S. 30 (1986); State of Mississippi v. United States, 490 F. Supp. 569 (D.C.D.C. 1979); Shaw v. Hunt, 92-202-CIV-5-BR, U.S. District Court for the Eastern District of North Carolina, Raleigh Division (1993-4); Ketchum v. Byrne, 740 F.2d 1398, *cert. denied* City Council of Chicago v. Ketchum, 471 U.S. 1135 (1985), *on remand*, Ketchum v. City of Chicago 630 F. Supp. 551 (N.D. Ill. 1985); and Arizonans for Fair Representation v. Symington, CIV 92-0256, U.S. District Court Arizona (1992), *aff'd mem. sub nom.* Arizona Community Forum v. Symington, 506 U.S. 969 (1992), David Harris v. Patrick McCrory, Civil Action No. 1:13 CV-00949 (United States District Court, Middle District of North Carolina Durham Division 2013), North Carolina State Conference of the NAACP v. Patrick Lloyd McCrory, 1:13 CV-658 (United States District Court, Middle District of North

Carolina 2013) and *Sandra Little Covington v. State of North Carolina* 1:15-CV-00399 (United States District Court, Middle District of North Carolina 2016),

12. I have done considerable work regarding compactness as a criterion in redistricting maps, including but not limited to a work I coauthored in *The Journal of Politics*, “Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering.” *Id.*, Vol. 52, No. 4 (Nov., 1990), pp. 1155-1181 (with Richard G. Niemi, Bernard Grofman, and Carl Carlucci).

13. In that work, my co-authors and I discussed the advantages and limitations of various measures of compactness as well as differing definitions. As we stated in the article, “disputes about compactness will be numerous... there are those who would dismiss it outright as well as those who believe in it passionately.” We further noted that “whatever turns out to be its utility as a districting standard, we hope that we have sufficiently clarified the concept so as to stimulate more rational, enlightened discussion of its merits and faults as well as further study of its supposed effects.”

14. Both prior and subsequent to my co-authorship of the *Journal of Politics* article, I have regularly advised state legislatures and others regarding the concept of compactness and regarding the compactness of specific districts and districting plans.

#### **DATA AND SOFTWARE**

15. Census Data used in this report comes from the United States Bureau of the Census’ 2010 Redistricting Data File and the 2010 Decennial Census TIGER File, both released following the 2010 Decennial Census. No data containing election results or voter registration was used to prepare this report.

16. All the information I used has been incorporated into a geographic information system called "Maptitude for Redistricting", a product which is offered by Caliper Corporation, based in Newton, Massachusetts. The maps included in this report have all been produced using Maptitude, and tables were produced using census and election data extracted from Maptitude and reformatted using Microsoft Excel. Other reports, such as compactness reports and core constituency reports were also produced using Maptitude.

### OBJECTIVES OF DECLARATION

17. I have been asked by Defendants to compare the Whole County Groups (WCGs) used to draft the current legislative districts for North Carolina, known as the "Rucho Senate 2" Plan, enacted as Session Law 2011-402 on July 27<sup>th</sup>, 2011 (2011 Enacted Senate Plan), and "Lewis-Dollar-Dockham 4" Plan (Lewis-Dollar-Dockham 3, as amended), enacted as Session Law 2011-404 on July 28<sup>th</sup>, 2011 (2011 Enacted House Plan), with the Optimal<sup>1</sup> WCGs mandated by the North Carolina Supreme Court's *Stephenson* decisions handed down prior to this redistricting cycle. These would be the Optimal WCGs used for any new General Assembly plans drafted subsequent to the Court's 2016 decision in the *Covington* case. This analysis will identify the 2011 Enacted Plan's WCGs for both the North Carolina House and Senate which will be replaced with new Optimum WCGs, along with the districts which will require redrafting as a result of such a switch. Furthermore, this analysis will also identify districts in WCGs which will remain the same but will require redrafting because these WCGs contain districts which the court has judged to be illegal. In summary, 35 out of 50, or 75 percent of the Senate

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<sup>1</sup> The term "Optimal", used in reference to WCGs, refers to the grouping of counties determined by strict application of the North Carolina Supreme Court's order on how whole counties must be grouped together for purposes of legislative redistricting in conformance with the *Stephenson* decision, without modifications in order to comply with the requirements for construction of majority-minority districts in compliance with the U. S. Supreme Court's order in *Bartlett v. Strickland*.

districts must be redrafted and 81 out of 120, or 67.5 percent, of the House districts must be redrafted.

### **NORTH CAROLINA'S LEGISLATIVE REDISTRICTING RULES ARE UNIQUE**

18. The North Carolina Constitutional Amendment and the North Carolina Supreme Court's Stephenson decision are an anti-gerrymandering provision which severely limits the General Assembly's discretion in the construction of legislative maps. Most redistricting decisions are made by mechanical application of the formula to individual county populations from the Decennial Census. The maps provided in this report represent an application of formula result using the 2010 Decennial Census. Unlike most redistrict line-drawing decisions, where there are many ways to draft the line, there is only one correct solution to the use of the Whole County Provision.

### **WHOLE COUNTY GROUP NAMING CONVENTION**

19. On both the tables and maps contained in this report I have assigned names to WCGs which contain three two-digit numbers separated by hyphens. The first number is the unique WCG number. The second number is the number of whole counties contained in the WCG. The third number is the number of legislative districts which must be drawn with that group.

### **SENATE WHOLE COUNTY GROUPS**

20. Map 1 shows the location of the 29 WCGs which must be used to conform to the Optimum WCG structure. Map 2 shows the location of the 26 WCGs which were used in the 2011 Enacted Senate Plan. Map 3 divides the Senate Optimum into three classes. The first class of WCGs, colored green, will remain unchanged and also contain no districts determined to be illegal by the court. The second class of WCGs, colored yellow, will also remain unchanged but

the districts within them must be redrafted because the court has found some of the districts within the group to be illegal. The third class of WCGs, colored white, have been changed from the WCGs used in the 2011 Enacted Plan requiring that all the districts within them must be redrafted.

21. Table 1 lists all the Senate Optimum WCGs with additional information. The color coding on Table 1 is the same as the found on Map 3. The Group name, or ID, has also been parsed into 3 columns showing the group number, the number of counties in that group, and the number of districts in the group. A summary of the information contained on the table appears at the bottom.

#### **HOUSE WHOLE COUNTY GROUPS**

22. Map 4 shows the location of the 41 WCGs which must be used to conform to the Optimum WCG structure. Map 5 shows the location of the 36 WCGs which were used in the 2011 Enacted House Plan. Map 6 divides the House Optimum into three classes. The first class of WCGs, colored green, will remain unchanged and also contain no districts determined to be illegal by the court. The second class of WCGs, colored yellow, will also remain unchanged but the districts within them must be redrafted because the court has found some of the districts within the group to be illegal. The third class of WCGs, colored white, have been changed from the WCGs used in the 2011 Enacted Plan requiring that all the districts within them must be redrafted.

23. Table 2 lists all the House Optimum WCGs with additional information. The color coding on Table 2 is the same as the found on Map 6. The Group name, or ID, has also been parsed into 3 columns showing the group number, the number of counties in that group, and

the number of districts in the group. A summary of the information contained on the table appears on page 2 of the table.

#### **NUMBER OF COUNTIES – COMPARING ENACTED TO OPTIMUM WCGs**

24. Table 3 shows, for each General Assembly Chamber, the degree to which the 2011 Enacted Plans' WCGs compare to the Optimum WCGs in conformance to the dictates of the North Carolina Supreme Court's *Stephenson* decision. This table lists the number of counties per WCG from 1 to 20 for each Chamber's two grouping plans (Enacted and Optimal). For each grouping plan, the number of 1-county groups, 2-county groups, 3-county groups, and so on, are listed for each of the four WCGs discussed in this report (House Optimum, 2011 House Enacted, Senate Optimum and 2011 Senate Enacted). For example the table shows that there are 12 one-county groups, 17 two-county groups and 4 three-county groups in the new Optimum whole county grouping structure. In contrast, there were 11 one-county groups, 15 two-county groups, and 4 three-county groups in the 2011 Enacted Plan whole county grouping structure. The Optimum grouping structure is in greater conformance with the strict mandate of the *Stephenson* decision.

#### **GENERAL CONCLUSIONS**

25. While considerable complexity exists in drawing within the multi-district groupings, many of the districts in rural areas are entirely contained within single-district groupings and are self drawing. In the Senate map most of the districts in the rural eastern part of the state are in this category. All three of the Senate districts currently held by African-American incumbents are in this category. The three districts in question are the only districts within WCGs 15-03-01, 23-06-01 and 12-02-01. WCG 15-03-01 (2011 SD 4) becomes 47.46% BVAP and 46.15% NHWVAP. WCG 23-06-01 (2011 SD

3) becomes 44.36% BVAP and 51.04% NHWVAP. WCG12-02-01 (2011 SD 5) becomes 32.94% BVAP and 59.81% NHWVAP.

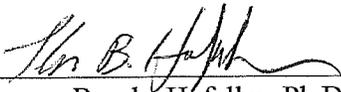
26. Similarly for the House of Representatives a number of single district groupings self draw in the rural eastern part of the state. This includes two districts which existed in their same configuration in the enacted plan, 17-02-01 and 40-02-01, both of which are majority minority districts. One of these districts, 17-02-01 (2011 HD 27) is currently represented by a NHW incumbent. Other districts currently held by African-American incumbents in the House in the rural eastern part of the state are more severely affected. Wilson County, which is adjacent to the districts mentioned above (and which is included in 2011 HD 24), also self draws as grouping 41-01-01 and has a BVAP of 38.11% and a NHWVAP 51.26%. In several other groupings in the eastern rural part of the state, application of the county line traverse rule within the groupings, the exact rule that was the subject of the *Pender County* case, reductions in the BVAP similar to those for Wilson County will occur. These groupings are 15-02-03, 14-02-02, 04-07-07, 18-02-02 and 19-03-03. The changes in these county groups will impact 2011 HDs 5, 7, 12, 21, and 48. Because the *Stephenson* case requires a drawing formula there is no way to avoid these results under the North Carolina Constitution.

27. Significant changes will have to be made in the whole county groupings to bring the new General Assembly Plans into maximum conformity with the *Stephenson* decision.

28. The two-week period which was given by the court to redraft the 2016 Congressional Plan only required redrafting of 13 districts, which also did not require the affirmative votes of the congressional incumbents affected by the new plan. In contrast, the

drafting of 36 new Senate districts and 81 new House districts, in strict conformity to the *Stephenson* whole county grouping criterion, is a far more complicated task facing the General Assembly than when it redrew the congressional map in early 2016.

Stated and signed under penalty of perjury on October 31, 2016.

  
\_\_\_\_\_  
Thomas Brooks Hofeller, Ph.D.

**Table 1**  
**NORTH CAROLINA STATE SENATE**  
**Optimum County Groups for 2016 Districts**  
**Tabular Summary of Map 3**

Group ID	Group Number	Counties In Group	Districts in Group	Group Type	Group Population	Total Group Deviation	Avg. Group Deviation	Avg. %Group Dve.
01-01-05	1	1	5	S-VRA	919,628	(33,922)	(6,784)	-3.56%
02-03-02	2	3	2	NEW	382,429	1,009	505	0.26%
03-02-01	3	2	1	SAME	191,556	846	846	0.44%
04-02-02	4	2	2	NEW	391,910	10,490	5,245	2.75%
05-03-04	5	3	4	NEW	781,289	18,449	4,612	2.42%
06-02-02	6	2	2	SAME	379,303	(2,117)	(1,059)	-0.56%
07-02-01	7	2	1	SAME	190,676	(34)	(34)	-0.02%
08-02-01	8	2	1	SAME	197,306	6,596	6,596	3.46%
09-02-02	9	2	2	S-VRA	366,383	(15,037)	(7,519)	-3.94%
10-02-01	10	2	1	SAME	192,266	1,556	1,556	0.82%
11-02-01	11	2	1	SAME	187,925	(2,785)	(2,785)	-1.46%
12-02-01	12	2	1	NEW	189,510	(1,200)	(1,200)	-0.63%
13-02-01	13	2	1	NEW	182,118	(8,592)	(8,592)	-4.51%
14-03-01	14	3	1	SAME	183,118	(7,592)	(7,592)	-3.98%
15-03-01	15	3	1	NEW	192,477	1,767	1,767	0.93%
16-02-01	16	2	1	NEW	199,013	8,303	8,303	4.35%
17-08-02	17	8	2	NEW	397,291	15,871	7,936	4.16%
18-03-02	18	3	2	SAME	378,148	(3,272)	(1,636)	-0.86%
19-04-02	19	4	2	SAME	397,505	16,085	8,043	4.22%
20-03-02	20	3	2	NEW	366,967	(14,453)	(7,227)	-3.79%
21-03-01	21	3	1	NEW	191,738	1,028	1,028	0.54%
22-06-01	22	6	1	SAME	187,477	(3,233)	(3,233)	-1.70%
23-06-01	23	6	1	NEW	182,039	(8,671)	(8,671)	-4.55%
24-06-03	24	6	3	NEW	559,198	(12,932)	(4,311)	-2.26%
25-02-05	25	2	5	S-VRA	961,612	8,062	1,612	0.85%
26-04-01	26	4	1	NEW	197,991	7,281	7,281	3.82%
27-07-01	27	7	1	SAME	194,102	3,392	3,392	1.78%
28-11-01	28	11	1	NEW	196,665	5,955	5,955	3.12%
29-02-01	29	2	1	NEW	197,843	7,133	7,133	3.74%

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**SUMMARY OF TABLE INFORMATION**

Group Group Classification	Number of Counties	Number of Districts
County Groups Same as 2011, But With NO Court VRA Disapproved Districts	35	14
County Groups Same as 2011, But With Court VRA Disapproved Districts	5	12
2016 Enacted County Groups Different From 2011 Enacted Groups	60	24
All 2016 County Groups	100	50

**Table 2**  
**NORTH CAROLINA HOUSE OF REPRESENTATIVES**  
**Optimum County Groups for 2016 Districts**  
**Tabular Summary of Map 6**

Group ID	Group Number	Counties In Group	Districts in Group	Group Type	Group Population	Total Group Deviation	Avg. Group Deviation	Avg. %Group Dve.
01-01-12	1	1	12	S-VRA	919,628	(33,916)	(2,826)	-3.56%
02-01-01	2	1	1	SAME	83,029	3,567	3,567	4.49%
03-01-01	3	1	1	SAME	78,265	(1,197)	(1,197)	-1.51%
04-07-07	4	7	7	NEW	584,028	27,794	3,971	5.00%
05-01-02	5	1	2	SAME	154,358	(4,566)	(2,283)	-2.87%
06-01-02	6	1	2	SAME	159,437	513	257	0.32%
07-01-02	7	1	2	SAME	162,878	3,954	1,977	2.49%
08-01-06	8	1	6	S-VRA	488,406	11,634	1,939	2.44%
09-01-02	9	1	2	SAME	151,131	(7,793)	(3,897)	-4.90%
10-01-04	10	1	4	S-VRA	319,431	1,583	396	0.50%
11-01-11	11	1	11	S-VRA	900,993	26,911	2,446	3.08%
12-02-04	12	2	4	NEW	331,092	13,244	3,311	4.17%
13-02-01	13	2	1	SAME	76,622	(2,840)	(2,840)	-3.57%
14-02-02	14	2	2	NEW	151,264	(7,660)	(3,830)	-4.82%
15-02-03	15	2	3	NEW	227,643	(10,743)	(3,581)	-4.51%
16-02-03	16	2	3	NEW	236,277	(2,109)	(703)	-0.88%
17-02-01	17	2	1	SAME	76,790	(2,672)	(2,672)	-3.36%
18-02-02	18	2	2	S-VRA	156,459	(2,465)	(1,233)	-1.55%
19-03-03	19	3	3	NEW	244,483	6,097	2,032	2.56%
21-02-01	21	2	1	NEW	83,109	3,647	3,647	4.59%
22-02-03	22	2	3	SAME	228,240	(10,146)	(3,382)	-4.26%
23-06-06	23	6	6	NEW	492,701	15,929	2,655	3.34%
24-02-05	24	2	5	NEW	389,076	(8,234)	(1,647)	-2.07%
25-02-04	25	2	4	SAME	304,164	(13,684)	(3,421)	-4.31%
26-02-02	26	2	2	SAME	158,722	(202)	(101)	-0.13%
27-02-01	27	2	1	SAME	78,360	(1,102)	(1,102)	-1.39%
28-02-02	28	2	2	NEW	157,520	(1,404)	(702)	-0.88%
29-03-01	29	3	1	SAME	78,372	(1,090)	(1,090)	-1.37%
30-03-02	30	3	2	SAME	160,340	1,416	708	0.89%
32-04-01	32	4	1	SAME	80,814	1,352	1,352	1.70%
33-04-02	33	4	2	S-VRA	165,774	6,850	3,425	4.31%
34-04-01	34	4	1	NEW	76,421	(3,041)	(3,041)	-3.83%
35-06-04	35	6	4	NEW	332,410	14,562	3,641	4.58%
36-05-02	36	5	2	SAME	151,870	(7,054)	(3,527)	-4.44%
37-01-03	37	1	3	SAME	238,318	(68)	(23)	-0.03%
38-06-01	38	6	1	NEW	77,143	(2,319)	(2,319)	-2.92%
39-02-04	39	2	4	SAME	310,098	(7,750)	(1,938)	-2.44%
40-02-01	40	2	1	SAME	81,057	1,595	1,595	2.01%
41-01-01	41	1	1	NEW	81,234	1,772	1,772	2.23%
42-02-03	42	2	3	SAME	229,999	(8,387)	(2,796)	-3.52%
43-03-01	43	3	1	NEW	77,527	(1,935)	(1,935)	-2.44%

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### SUMMARY OF TABLE INFORMATION

County Group Classification	Number of Counties	Number of Districts
County Groups Same as 2011, But With No Court VRA Disapproved Districts	40	39
County Groups Same as 2011, But With Court VRA Disapproved Districts	10	37
2016 Enacted County Groups Different From 2011 Enacted Groups	50	44
All 2016 County Groups	100	120

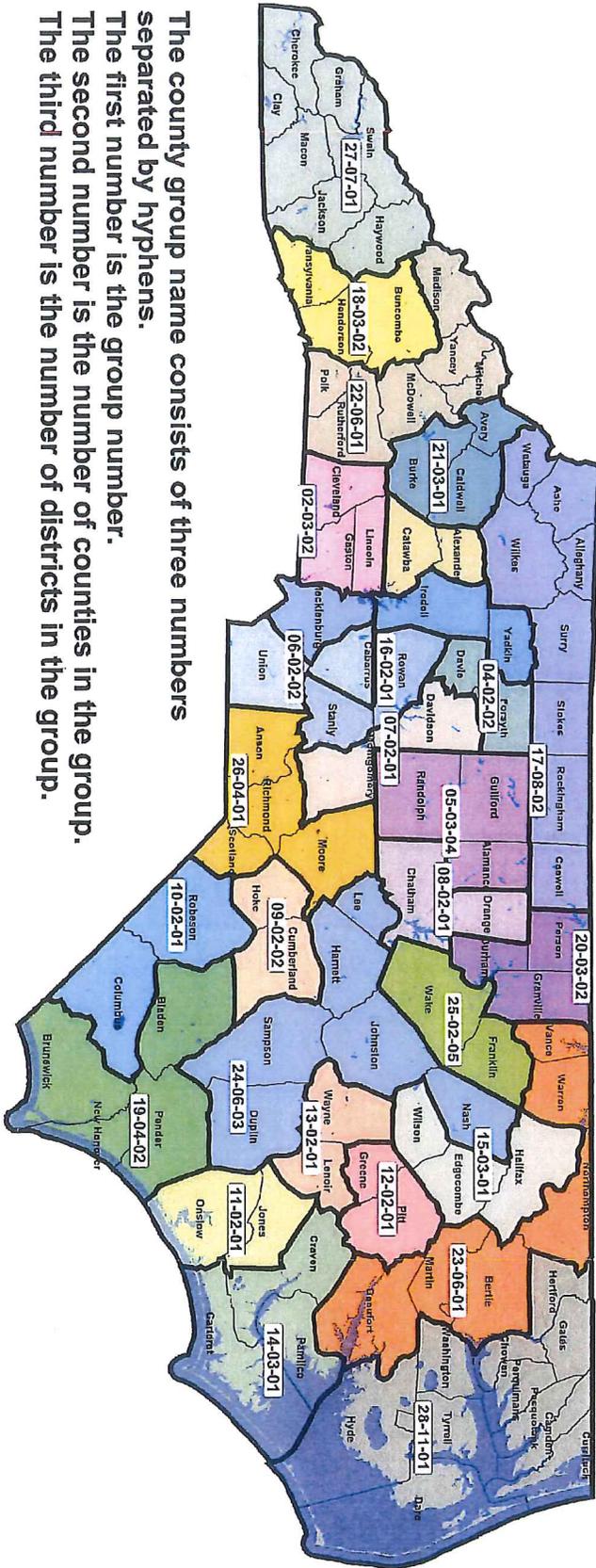
**TABLE 3**  
**STATE OF NORTH CAROLINA**  
**North Carolina General Assembly**  
**Analysis of 2011 Enacted and 2016 Optimum County Groups**  
**Count of Numbers of Counties in Groups by Plan**

Number of Counties in Group	House Optimum Groups	House Enacted Groups	Senate Optimum Groups	Senate Enacted Groups
1	12	11	1	1
2	17	15	13	11
3	4	4	7	4
4	3	2	2	3
5	1	2		1
6	3		3	1
7	1		1	1
8			1	2
9		1		1
10				1
11			1	
12				
13				
14				
15				
16				
17				
18				
19				
20		1		
<b>Total Groups</b>	<b>41</b>	<b>36</b>	<b>29</b>	<b>26</b>

Note: The word "group" refers to whole county groups.

Note: The changes in the number of groups from between the 2016 Optimum and Enacted groups is due to the harmonization process between the Whole County Requirement and VRA requirements followed in the 2011 Plans.

# MAP 1 Optimum County Groups For Senate



The county group name consists of three numbers separated by hyphens.  
 The first number is the group number.  
 The second number is the number of counties in the group.  
 The third number is the number of districts in the group.



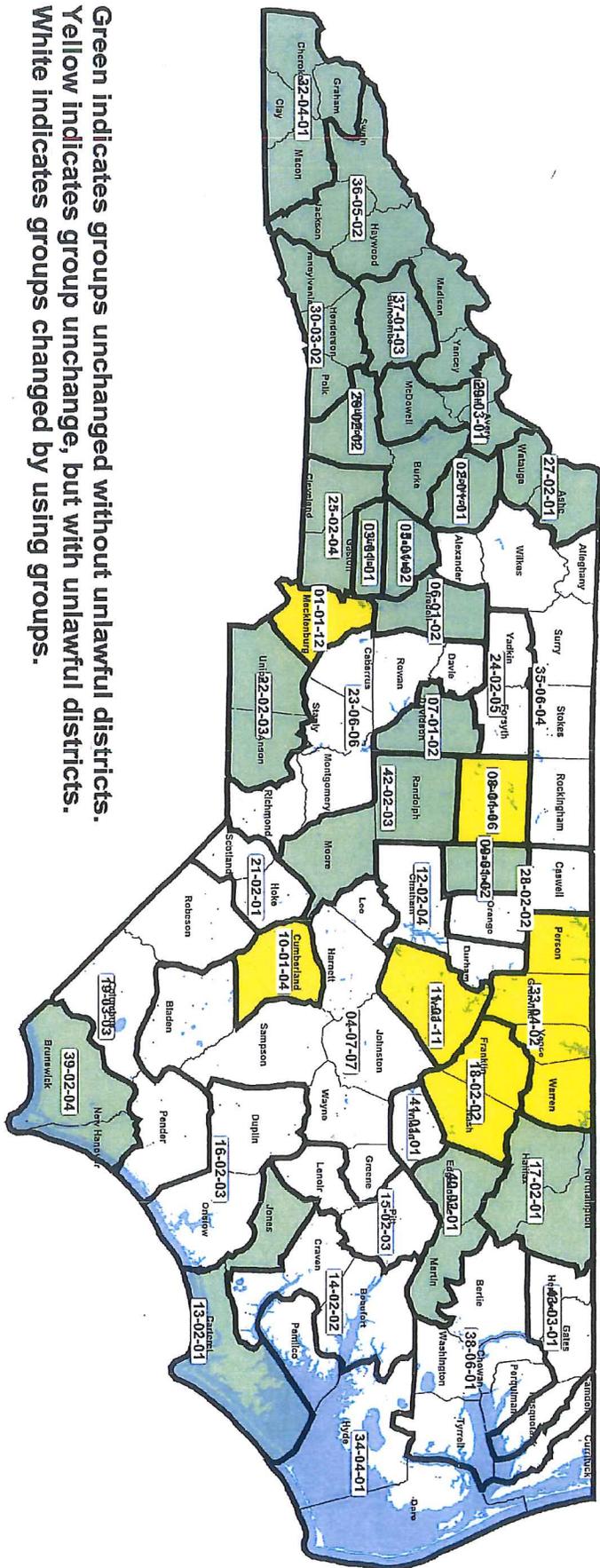






# MAP 6

## Comparison of 2011 Enacted to Optimum House County Groups



Green indicates groups unchanged without unlawful districts.  
 Yellow indicates group unchanged, but with unlawful districts.  
 White indicates groups changed by using groups.

# Appendix 1

## RESUME

### **Thomas Brooks Hofeller, Ph.D.**

6701 Pointe Vista Circle, Raleigh, North Carolina 27615

Home: (984) 202-5193 – Cell: (703) 623-0764

### ***Qualifications:***

**A varied career in government, business, academia and politics. Positions of significant responsibility, requiring intelligence, scholarship, communications skills, creativity and leadership include**

- ◆ Successful completion of a Doctorate in Government requiring research and writing skills and the ability to communicate in an academic setting. Also includes a firm grounding in the philosophical and political roots of the American Governmental System.
- ◆ Litigation support and courtroom experience as a qualified expert witness in federal court. Clear presentation of difficult demographic and statistical concepts – making them understandable to non-technical audiences.
- ◆ Strategic and tactical analysis of political and demographic data for campaigns and political organizations. Understanding of survey design and interpretation, political resource targeting, list development and use of direct mail.
- ◆ Experience in management and information systems – including database construction, geographic information systems and creation of user interfaces that allow access by persons without extensive computer skills.
- ◆ Senior executive management of an office within a large government agency, planning and directing operations of a staff with a diverse number of missions while coordinating activities ranging across an entire agency.
- ◆ Setting up a new U. S. House subcommittee and conducting oversight, developing legislation and interacting with leadership. Experience in statistical, demographic and budgetary analysis.
- ◆ Creating and managing small businesses, including budgeting, human resources, facilities management, accounting and shareholder interface.

### ***Areas of Expertise:***

- ◆ **Redistricting:** Over 50 years of experience in the redistricting field. Development of computerized redistricting systems. Analysis of census and political data used for redistricting. Drafting of plans for congressional, legislative and local districts in multiple states. Submission of numerous expert reports and trial testimony as an expert witness.
- ◆ **Operations:** Recruiting, training and directing staffs for existing and newly instituted projects in government and national political organizations. Private sector experience as a business owner and CAO. Proven ability to organize and direct multiple projects with

effective use of delegation. Able to function as a team player in both management and support positions.

- ◆ **Communications:** Ability to develop and deliver engaging and informative presentations involving difficult concepts and issues to decision-makers, the public and press. Effective in preparation of affidavits and exhibits as well as giving depositions and delivering courtroom testimony.
- ◆ **Information Technology:** Expertise in analysis of complex technical problems involving large amounts of data – both for analysis and practical use in business, government and politics. Able to break down information and develop effective solutions. Ability to interface between highly technical personnel and management.
- ◆ **GIS:** Considerable experience in integration of mapping and data (geographic information systems).
- ◆ **Budget & Programs:** Experience in budget formulation and managing accurate accounting systems in the private and public sectors.

### ***Education:***

- ◆ **Claremont Graduate University**, Claremont, CA – Ph.D. in Government - 1980
- ◆ **Claremont McKenna College**, Claremont CA – B. A. in Political Science - 1970
- ◆ **U. S. Navy, Electronics School**, Treasure Island, CA, Graduate -1966

### ***Publications:***

- ◆ Thomas S. Engeman, Edward J. Erler and Thomas B. Hofeller (1980). **The Federalist Concordance**. Chicago: University of Chicago Press.
- ◆ Grofman, Bernard and Hofeller, Thomas B (1990). “**Comparing the Compactness of California Congressional districts Under Three Different Plans**”. In Bernard Grofman (ed) *Political Gerrymandering and the Courts*. New York: Agathon.
- ◆ Richard Niemi, Bernard Grofman, Thomas Hofeller, and Carl Carlucci (1990). **Measuring the Compactness and the Role of a Compactness Standard in a Test for Partisan Gerrymanderings**”. *Journal of Politics*.
- ◆ **Reports and affidavits prepared for, and testimony in, numerous court cases** (listed below).

### ***References:***

Current and recent employer references are available and will be furnished upon request.

***Experience:***

**Geographic Strategies LLC**  
**7119 Marine Drive**  
**Alexandria, Virginia 22307**

**Partner**

**May 2011 – present**

- Geographic Strategies provides redistricting services clients including database construction, strategic political and legal planning in preparation for actual line drawing, support services and training on the use of geographic information systems (GIS) used in redistricting, analysis of plan drafts, and actual line-drawing when requested. The corporation and its principals also provide litigation support.

**State Government Leadership  
 Foundation**  
 1800 Diagonal Road, Suite 230

**Redistricting Consultant    April 2011 – April 2012**

**Alexandria, VA 22314**

**Contracting Officer:** J. Christopher Jankowski  
 Executive Director  
 (571-480-4861)

- Retained as a consultant to state legislatures and statewide elected officials in all aspects of their work on the 2011-2012 redistricting process.

**Areas of consultation:**

- ◆ Develop strategic and tactical plans for Legislatures and statewide elected officials to develop and defend redistricting plans for legislative and congressional districts.
- ◆ Providing assistance in actual redistricting plan drafting and analysis.
- ◆ Providing a linkage between complex legal standards and their practical application to plan drafting in difficult political and technical environments.
- ◆ Provide assistance in redistricting litigation
- ◆ Identification of specialized GIS software, database and hardware systems to be used by stakeholders.
- ◆ Ongoing strategic, technical and legal support to those involved in redistricting in all states.
- ◆ Development of a clearinghouse of redistricting activities throughout the nation and analysis of the effects of the process on future elections.

**REPUBLICAN NATIONAL  
COMMITTEE**

310 First Street, S.E.

**Washington, DC 20003**

**Redistricting Consultant**

**May 2009 – April 2011**

Contracting Officer: John Phillippe  
RNC Chief Counsel  
(202) 863-8638

□ Retained as a consultant to recreate a new department to coordinate the redistricting activities of the National Committee and the greater GOP community in preparation and execution of the 2011 redistricting Areas of responsibility and to support the Committee’s 2011 through 2012 re-districting efforts:

- ◆ Developed a strategic plan for the Committee to best position itself for maximum success in this highly competitive process.
- ◆ Liaison and training with members of Congress, legislators, key statewide officials, state parties and other divisions within the Committee to ensure a high level of political, technical and legal preparation.
- ◆ Recruitment and training of a technical and legal staff.
- ◆ Providing a linkage between complex legal standards and their practical application to plan drafting in difficult political and technical environments
- ◆ Identification of specialized GIS software, database and hardware systems to be used by the Committee and other stakeholders.
- ◆ Ongoing strategic, technical and legal support to members of congress and those involved in redistricting in all states, including plan drafting.
- ◆ Development of a clearinghouse of redistricting activities throughout the nation and analysis of the effects of the process on future elections.

**DEPARTMENT OF  
AGRICULTURE  
FARM SERVICE AGENCY**

1400 Independence Avenue

**Washington, DC 20250**

**Associate Administrator  
for Operations and  
Management**

**June 2004 – January 2009**

Supervisor: Teresa C Lasseter, Administrator  
Farm Service Agency  
(229) 890-9127

□ Associate Administrator providing management and oversight to staff with diverse missions supporting the activities of the entire Farm Service Agency (FSA).

Areas of responsibility:

- ◆ Provides oversight and guidance to the 1,100 person staff of the Deputy Administrator for Management. These functions include management services, human resources, financial management, budgeting, and information technology.

- ◆ Directs the activities of the Office of Civil Rights which performs all of the EEO functions for the Agency, as well managing FSA's diversity programs.
- ◆ Provides oversight and guidance to the Office of Business and Program Integration. This office supports a wide range of cross-cutting activities including economic policy analysis, strategic planning, outreach, state and county office review, county service center integration, emergency planning, county office reviews and audits, e-Government, and program appeals and litigation.
- ◆ Has primary oversight of the business realignment process underway in the Agency. This realignment includes such projects as Agency-wide enterprise architecture development, field office realignment, and concurrent changes to the Agency's business processes. This realignment is necessary to allow the Agency to meet the present and future challenges involved in providing the best possible customers service and implementation the President's Management Agenda.
- ◆ Spearheads the ongoing reform of the FSA county committee election system which included the drafting of guidelines just published in the Federal Register.

**DEPARTMENT OF  
AGRICULTURE  
FARM SERVICE AGENCY**  
1400 Independence Avenue

**Washington, DC 20250**

**Director, Office of  
Business and Program  
Integration**

**Apr. 2003 – June 2004**

Supervisor: Verle Lanier, Associate Administrator for  
Operations and Management (retired)  
(301) 424-5776

- Director of a senior level office directing the activities of subordinate staffs with diverse missions supporting the overall activities of the Farm Service Agency.

Areas of responsibility:

- ◆ Provided oversight and guidance to the 75-person staff of the Office of Business and Program Integration. This office supported a wide range of cross-cutting activities including economic policy analysis, strategic planning, outreach, state and county office review, county service center integration, emergency planning, county office reviews and audits, e-Government, and program appeals and litigation.
- ◆ Directed the development of administrative strategies essential to the successful management of e-Government initiatives. Coordinated citizen-centered eGovernment initiatives.
- ◆ Provided centralized direction for the Agency's strategic plan in compliance with the Government Performance and Results Act of 1993.
- ◆ Coordinated outreach efforts for all FSA programs to enhance participation of small or limited resource farmers and ranchers to provide equal access to programs striving to acquire and maintain economic viability for family farmers and ranchers.

- ◆ Directed the preparation of policies and dockets on national program determinations to be submitted for CCC Board consideration and Federal Register publications.

**REPUBLICAN NATIONAL  
COMMITTEE**

**Redistricting Director**

**Jul. '99 – Mar. 2003**

310 First Street, S.E.

**Washington, DC 20003**

Supervisor: Thomas Josefiak, former RNC Chief Counsel  
(703) 647-2940

- Hired to create a new department to coordinate the redistricting activities of the National Committee mandated by the release of data from the 2000 Decennial Census.

(See the description of present position.)

**U. S. HOUSE SUBCOMMITTEE  
ON THE CENSUS**

**Staff Director**

**Feb. '98 - Jul. '99**

Supervisor: Hon. Dan Miller, Chairman  
(202) 225-5015

- Staff Director at inception of this oversight subcommittee, created by the House in February of 1998, to monitor the preparations for and the execution of the 2000 Decennial Census. Directed all day-to day operations of the subcommittee including:
  - ◆ Recruitment and training of a staff for a new subcommittee.
  - ◆ Liaison with the Director and Senior Staff of the Census Bureau, the Department of Commerce, and U.S. Senate Staff involved in census oversight.
  - ◆ A complete examination of the preparations underway at the Census Bureau for conduct of the 2000 Decennial Census.
  - ◆ An examination of the proposed statistical methods proposed by the Bureau to improve coverage of the Census.
  - ◆ Reviewed and made recommendations to the Chairman and House Leadership regarding census policy.
  - ◆ Coordination with Government Accounting Office personnel involved in census oversight.
  - ◆ Preparation and support for oversight hearings conducted by the members of the Subcommittee.
  - ◆ Interface between the academic statistical community and the subcommittee in the development of census policy.
  - ◆ Liaison with census stakeholders in general, with particular attention to members of the Decennial Census Advisory Committees.

**U. S. HOUSE COMMITTEE  
ON HOUSE OVERSIGHT**

**Professional Staff**

**Nov. '97 - Feb. '98**

Supervisor: Hon. William M. Thomas, Chairman  
(202) 225-2915

- Involved in the oversight activities of the Committee that supervises the operations of the U.S. House of Representatives. Advised the Chairman and House Leadership on congressional policy with regard to all census operations prior to the establishment of the Subcommittee on the Census

**PARTES CORPORATION**

**Director of Administration Mar. '96 - Nov. '97**

Kirkland, Washington

Supervisor: Mark Schnitzer, Chairman

- Chief Administrator of a software development company specializing in the creation of databases used by investment professionals to analyze information on securities.

Information was downloaded, parsed, and reformatted from the Securities and Exchange Commission's EDGAR database and other relevant sources. Was responsible for all administrative functions of the corporation including:

- ◆ Procurement, renovation and management of facilities housing the company.
- ◆ All human resource activities.
- ◆ Accounting and payroll.
- ◆ Liaison with attorneys and shareholders.

**CAMPAIGN MAIL & DATA, INC**

**Professional Staff**

**Nov. '93 - Mar. '96**

Falls Church, Virginia

Supervisor: John Simms, President  
(703) 790-8676

- Supervised development and maintenance of geographic databases that were integrated with the company's various political and commercial lists. Created a new department that collected and converted voter lists from states, counties and towns.

**NATIONAL REPUBLICAN  
CONGRESSIONAL COMMITTEE**

**Redistricting Director**

**Mar. '89 - Nov. '93**

320 First Street, S.E.  
Washington, DC 20003

Supervisor: Maria Cino, Chief of Staff

- Created a new department to coordinate the redistricting activities of the NRCC and provide support to all GOP members of the U.S. House and their staffs.

Areas of responsibility:

- ◆ Recruitment and training of a technical staff.

- ◆ Development of specialized GIS software, databases and hardware systems to be used by the Committee and members of Congress.

**REPUBLICAN NATIONAL  
COMMITTEE**

**MIS Director**

**Jan. '82 – Mar. 89**

310 First Street, S.E.  
Washington, DC 20003

- Transformed the Committee's computer capabilities from a single mainframe system operated completely within a computer division into a building-wide network, utilized by all divisions and from remote locations. Supervised all the Committee's data processing activities, including database and software development. Directed research activities involving analyses of demographic and election data. Primary computer consultant to the GOP's state and county party organizations.

**ROSE INSTITUTE OF STATE  
AND LOCAL GOVERNMENT**

**Associate Director**

**1973 – 1981**

Claremont McKenna College  
Claremont, California

- Co-Founder of this Southern California research center specializing in the examination of current financial and political issues affecting California's state and local governments. Supervised staff and day-to-day operations, directed software and database development, managed research projects and assisted in fundraising.

**COMPASS SYSTEMS, INC.  
AND LOCAL GOVERNMENT**

**Vice President**

**1970 – 1973**

San Diego, California

- Part of the management team that developed the first computerized geographic mapping and data retrieval system used by the California State Assembly for redistricting and demographic analysis. Directly supervised programming and database development staffs.

**UNITED STATES NAVY**

**Petty Officer 2<sup>nd</sup> Class**

**1965 – 1969**

- Electronics Technician. Served on USS Porterfield, DD682, in Tonkin Gulf operations during Vietnam War. (Honorable Discharge)

***Summary of Participation in Lawsuits:***

Shaw v. Hunt, 92-202-CIV-5-BR, U.S. District Court for the Eastern District of North Carolina, Raleigh Division (1993-4)

This case was the second trial phase following the U.S. Supreme Court's reversal of the lower court in Shaw v. Reno (1993). Prepared alternative plans for presentation to the court. Prepared political and demographic analyses of the state's plans, along with numerous exhibits supporting the plaintiffs' complaints. Gave a deposition and served as plaintiffs' primary expert witness at trial.

Arizonans for Fair Representation v. Symington, CIV 92-0256, U.S. District Court Arizona (1992),  
aff'd mem. sub nom. Arizona Community Forum v. Symington, 506 U.S. 969 (1992)

Prepared an affidavit evaluating the three major plans submitted to court for redistricting of Arizona's six congressional districts. Plans were examined with regard to all major redistricting criteria. Also examined minority voting strength in proposed new sixth district in State Senate Plan. Gave expert testimony in trial phase. Drafted a new map for presentation in court that was adopted, with minor changes, by the three-judge panel.

De Grandy v. Wetherell, No 92-40015-WS, U.S. District Court Florida (1992)

Prepared model plans and submitted affidavits evaluating alternative plans for two of the parties in the congressional phase of the case and gave testimony on the political and voting rights implications of various other plans. Presented an affidavit and gave expert testimony in the legislative phase of the case for the De Grandy plaintiffs.

Good v. Van Straten, 800 F. Supp. 557, U.S. District Court Eastern & Western Michigan (1992)

Prepared compactness analysis of plans submitted to court to redistrict Michigan's congressional districts. Gave testimony on compactness theories and other relevant redistricting criteria.

Pope v. Blue, U.S. District Court Western District of North Carolina (1992)

Prepared an affidavit containing compactness analysis and political analysis of the plan passed by North Carolina Legislature and approved by U.S. Department of Justice.

Ketchum v. Byrne, 740 F.2d 1398, cert. denied City Council of Chicago v. Ketchum, 471 U.S. 1135 (1985), on remand, Ketchum v. City of Chicago 630 F. Supp. 551 (N.D. Ill. 1985)

Consultant to African-American plaintiffs (P.A.C.I.). Assisted in building Plaintiffs' political and demographic database, performed a racial and ethnic analysis of City of Chicago, gave a deposition, and testified in court. Participated in second remedy phase of case, gave a second deposition, was prepared to give testimony (the case was settled before retrial).

Carrillo v. City of Los Angeles, No. CV-85-7739 JMI-JRX (unreported) (C.D. Cal. 1986)

Consultant to Mexican American Legal Defense Fund (MALDEF). Constructed database, performed analysis of ethnic voter registration levels, analyzed various plans submitted by all parties, submitted affidavit to the court.

McNeil v. Springfield School District, 656 F. Supp. 1200, 66 F. Supp. 1208 (C.D. Ill 1987), 851 F.2d, 937 (7th Cir. 1988)

Consultant to counsel for Springfield School Board. Constructed demographic database, performed analyses on various proposed districts, gave deposition, presented affidavit to court. Prepared an analysis determining levels of African-American voting strength in proposed districts.

State of Mississippi v. United States, 490 F. Supp. 569 (D.C.D.C. 1979)

Principle consultant to Joint Reapportionment Committee of Mississippi State Legislature. Compiled databases, drew plans, prepared analysis for the legislature, and gave general redistricting advice to Committee Chairman and Counsel. Gave an extensive deposition and testified before the District Court in DC. Assisted in the preparation of all briefs.

Badham v. Eu, 568 F. Supp. 156; 721 F.2d 1170 (1983); -- F.Supp. -- (Apr. 21 1988), appeal docketed, No. 87-1818 56 U.S.L.W. 3791 (U.S. May 4 1988)

Principle technical consultant to counsel for Badham Plaintiffs and Republican National Committee. In charge of all database construction, development of sample court plans, analyses of Burton Plans and preparation of maps, charts and other materials for trial. Submitted affidavits.

Bandemer v. Davis, 478 U.S. 109 (1986)

Consultant to counsel for amicus, Republican National Committee. Prepared a demonstration plan for brief submitted to U.S. Supreme Court.

California Legislature v. Reinecke, 6 Cal. 3d595 99 Cal. Rptr. 481, 492 P.2d 385 (1972)

As consultant, drafted redistricting plan for California State Senate and Assembly that were subsequently accepted by California Redistricting Commission.

Jordan v. Winter, 541 F. Supp. 1135 (N.D. Miss. 1982)

Performed analyses and gave court testimony on behalf of the defendants.

Gingles v. Edmisten, 590 F. Supp. 345 (N.D.N.C. 1984), aff'd in part and rev'd in part Thornburg v. Gingles 478 U.S. 30 (1986)

Consultant to Attorney General. Performed demographic analysis of state with regard to creation of African-American districts for North Carolina General Assembly. Gave deposition and testified in court on behalf of Legislature.

City of Port Arthur v. United States, 459 U.S. 159 (1982)

Consultant to City Attorney. Performed analysis of racial content of City Council Districts. This was required for the case required because the 1980 Decennial Census data were not yet available. Analysis required extensive residential survey to determine racial characteristics of individual districts. Gave a deposition in the case.

Ryan v. Otto, 661 F.2d 1130 (7th Cir. 1981)

Consultant to Republican plaintiffs and Illinois Congressional Delegation. Drew alternative plans for presentation to Court, gave deposition and testimony.

Rybicki v. State Board of Elections, 584 F. Supp. 849 (N.D. Ill. 1984)

Principle technical consultant to State House of Representatives and the Senate Minority Caucus. Supervised construction of all political and demographic databases. Responsible for design and programming of House's computerized redistricting information system. Analyzed and drafted numerous redistricting plans. Gave depositions and testified at trial.

La Comb v. Growe, 541 F. Supp. 145 (D.Minn.), aff'd sub nom. Orwall v. La Comb, 456 U.S. 966 (1982)

Consultant to Minority members of Congressional Delegation. Drafted a plan for presentation to Court and submitted an affidavit.

Karcher v. Daggett, 462 U.S. 725 (1983), 467 U.S. 1222 (1984)

Participated in presentation of briefs on Republican side. Consultant to members of New Jersey Congressional Delegation.

Flanagan v. Gillmor, 561 F. Supp. 36 (S.D. Ohio 1982) Brown v. Brandon, (unreported), (S.D. Ohio Jan. 30, 1984), as modified (Feb. 13, 1984), aff'd 467 U.S. 1223 (1985)

Consultant to State Legislature. Modified 1981 congressional district redistricting plan to conform to "one person, one vote" standard imposed by decision of the Court.

Massachusetts Republican State Committee v. Connolly, 679 F. Supp. 109 (D. Mass. 1988)

Consultant to counsel for plaintiffs. Examined evidence submitted in regard to 1985 Massachusetts State Census (particularly for Boston), analyzed legislative redistricting plan, submitted affidavit, gave deposition.

Sinkfield v. Bennett, Civil Action CV 93-689-PR (Circuit Court of Montgomery County, Alabama)

Gave testimony supporting the replacement of the Alabama congressional plan drawn by the Federal Court with a plan drawn by the Circuit Court.

Mississippi State Conference of the NAACP v. Haley Barbour, Civil Action No. 3:11-ev-159 TSL-EGJ-LG (SD Mississippi, Jackson Division – 2011)

Prepared a declaration for the intervenors analyzing the compactness and deviations of various legislative plans submitted to the Court for consideration.

Dickson v. Rucho, Civil Action 11 CVS 16896 and North Carolina State Conference of the NAACP v. State of North Carolina, Civil Action 11CVS 16940 (General Court of Justice, Superior Court Division, Raleigh, North Carolina – 2011)

Submitted two affidavits and gave a deposition concerning my role as a consultant to the General Assembly with regard to the redistricting of North Carolina State Senate and State House of Repre-

sentative districts as well as the redistricting of that state's congressional districts. Testified at hearing before 3-judge panel.

Boone v. Nassau County Legislature, Civil Action CV 11-cv 02712 (Supreme Court of the State of New York, County of Nassau - 2011)

Prepared an affidavit evaluating the 2011 redistricting plan enacted by the Nassau County Legislature and other sample plans presented by the Plaintiffs, with particular attention to the efficacy of the use of the U.S. Census Bureau's American Community Survey for measuring compliance with the provisions of Section 2 of the Federal Voting Rights Act.

Petteway v. Henry, Civil Action CV 11-411 (SD Texas, Galveston Div. 2011)

Prepared and presented at trial an alternative redistricting plan Galveston County's commissioner districts to the court for defendant intervenors.

Pearson v. Koster, Civil Action 11AC-CC00624 (Circuit Court of Cole County, Missouri, Div. II - 2012)

Prepared an affidavit evaluating the compactness of Missouri's newly enacted congressional districts (2011) in light of the State Supreme Court's remand of this case for determination of whether or not, in light of Plaintiffs' alleged claims to the contrary, the districts reflected in H.B. 193 were sufficiently compact to meet the requirement contained in the Missouri Constitution that districts be "composed of territory as compact as may be." Served as the expert witness at trial for the defendant intervenors.

Bob Johnson v. State of Missouri, Civil Action 12AC-00056 (Circuit Court of Cole County, Missouri 2012)

Prepared an affidavit analyzing the compactness and deviations of the enacted State House of Representative districts.

Harris v. Arizona Independent Redistricting Commission, Civil Action cv-12-0894-PHX-ROS (United States District Court, District of Arizona 2012)

Prepared affidavits analyzing the state legislative districts enacted by the Arizona Independent Redistricting Commission concerning population deviations, ethnic and racial characteristics and adherence to other neutral redistricting criteria. Presented expert testimony at trial.

Cynthia Hauser v. Martin O'Malley, Civil Action September Term 2012, Misc. No 5 – 2012, (Maryland Court of Appeals)

Prepared a declaration analyzing the State Senate and State House of Maryland enacted by the Governor following the 2010 Census and comparing both plans to senate and house plans submitted by plaintiffs.. Conclusions were made concerning the integrity of county lines, and district deviations as well as adherence to the provisions of the federal Voting Rights Act.

Kermit L. Moore, Jr. v. State of Tennessee, In the Chancery Court Case No. 120402-III (2012)

Prepared an affidavit analyzing the State Senate redistricting plan enacted by the Legislature for the 2012 elections and compared it to a plan submitted as a bill by the opposition. Conclusions were made analyzing the compliance of both plans with the federal and state provisions of one-person/one vote.

David Harris v. Patrick McCrory, Civil Action No. 1:13 CV-00949 (United States District Court, Middle District of North Carolina Durham Division 2013)

Retained by Defendant's counsel to prepare a declaration in response to plaintiffs' expert report concerning the congressional redistricting plan enacted by the North Carolina General Assembly in 2011. Gave a deposition concerning the construction and characteristics of the congressional district contained in the enacted plan as well as other relevant congressional maps.

Terry Petteway v. Galveston County, Texas, Civil No. 3:-cv-00308, (United States District Court, Southern district of Texas, Galveston Division 2013)

Retained by Defendant's counsel to prepare a redistricting map for Galveston County's Justice of the Peace Precincts, prepared a declaration in response to plaintiffs' experts' reports and gave testimony at trial.

North Carolina State Conference of the NAACP v. Patrick Lloyd McCrory, 1:13 CV-658 (United States District Court, Middle District of North Carolina 2013)

Retained by Defendant's counsel to prepare an expert report summarizing a study of information from the voter files of North Carolina's State Board of elections as compared to the North Carolina Department of Motor Vehicles' (DMV) customer file as well as locations of DMV offices proximity to potential registered voters who do not appear to have drivers licenses or DMV ID,s Performed and analyses of demographics and registration information with regard to this information. Analyzed the locations and hours of one-stop voting centers. Testified as a witness at the trial of the case.

Golden Bethune-Hill v. Virginia State Board of Elections, Civil Action No. 3:14-cv-00852 (United States Court for the Eastern District of Virginia – Richmond Division 2015)

Retained by Defendant Intervenors to prepare an expert report determining whether H.B. 5005, which the Virginia General Assembly enacted to redistrict the Virginia House of Delegates, was compact and contiguous, and also to comment on other factors which are relevant to such a determination. Offered testimony at the trial in July of 2015.

Sandra Little Covington v State of North Carolina, Civil Action No. 1:15-cv-00399 (United States District Court for the Middle District of North Carolina – 2015)

Retained by Defendant Intervenors to prepare an expert report explaining the relationship between exemplar districts identifying compact areas of minority voting strength and the actual 2011 enacted redistricting plans for both chambers of the North Carolina General Assembly. Testified at trial

# **EXHIBIT 3**

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

WAKE COUNTY

2018 FEB -7 A 9:15

18 SP 2634

IN THE MATTER OF

KATHLEEN HARTSOUGH HOFELLER )  
)  
)  
)

REPORT OF THE  
GUARDIAN *AD LITEM*

NOW COMES Erin B. Riddick, Guardian *ad litem* for Respondent Kathleen Hartsough Hofeller in this matter and reports as follows:

**PROCEDURAL HISTORY**

The undersigned is the appointed Guardian *ad litem* under N.C.G.S. §35A-1107 charged with representing the best interest of Respondent. The undersigned was appointed Guardian *ad litem* by the Wake County Clerk of Superior Court on October 29, 2018.

The Respondent in this incompetency proceeding is Kathleen Hartsough Hofeller, hereto referred to as "Respondent." Respondent is an elderly female who resides at 2427 Springmoor Circle, in Springmoor Life Retirement Community, in Raleigh, North Carolina. A Petition for Adjudication of Incompetence and Application for Appointment of Guardian was filed on or around October 29, 2018, by Christopher S. Morden, Esq., Respondent's former estate planning attorney, hereinafter "Petitioner." An interim hearing in this matter was held on November 6, 2018, and Wake County Human Services was appointed as interim Guardian of the Person, and Everett Bolton was appointed as interim Guardian of the Estate.

The Guardian *ad litem* has interviewed Respondent and Petitioner. The undersigned visited Respondent's home in Wake County, North Carolina on November 28, 2018 and interviewed Respondent. The undersigned has also spoken with Nickolas B. Sherrill, attorney for Petitioner; Douglas Noreen, attorney for Respondent; Christopher Hartsough, brother of Respondent; William Smale, attorney in fact for Respondent; and Allison Weaver, caregiver of Respondent at Springmoor.

The Guardian *ad litem* has not requested a multidisciplinary evaluation for this proceeding.

**BACKGROUND**

Respondent is a seventy-two (72) year old female who resides in an independent apartment at Springmoor Life Care Retirement Community in Raleigh. Respondent's husband of over fifty (50) years passed away in August of 2018, and following his death, Respondent fell victim to a fraudulent scheme involving the purchase of gift cards. It is the understanding of the

undersigned that Respondent was also the intended victim of a fraudulent money-wiring scheme during this time. Petitioner filed the current Petition in response to these events, as well as out of concern for Respondent with the re-emergence of Respondent's estranged daughter and removal of her previously appointed attorney-in-fact. Shortly after being served with a copy of the Petition and notice of hearing, Respondent left the State of North Carolina with her daughter, leading Petitioner and other family members to believe she was at risk of financial exploitation and possible harm to her person.

An interim hearing was held on November 6, 2018. After a review of Respondent's medical records from a 2017 evaluation, which indicated a diagnosis of mild cognitive disorder and possible onset of early Alzheimer's dementia, and due to the court's inability to locate Respondent, the interim motion was granted. Wake County Human Services was appointed as Respondent's interim Guardian of the Person, and Everett Bolton, Esq., was appointed as Respondent's interim Guardian of the Estate. Soon after the interim hearing, Respondent returned to North Carolina, and retained Douglas Noreen, Esq., as her attorney in this matter. It is Respondent's position that she is competent and therefore not in need of guardianship.

Since Respondent's return to her home in North Carolina, the parties have been in communication regarding the possible settlement of this matter. It is the understanding of the undersigned that the parties have agreed that Respondent's Health Care Power of Attorney document will remain in place, and that Respondent will undergo a full neuropsychological evaluation in the near future. As to Petitioner's primary concern—the protection of Respondent's estate from exploitation--it is the understanding of the undersigned that an agreement was reached between the parties on February 6, 2019, whereby certain parameters have been enacted to ensure Respondent's funds are protected.

### JURISDICTION AND SERVICE

N.C.G.S. Chapter 35A defines the exclusive procedure for adjudicating an adult incompetent and the appointment of a guardian. N.C.G.S. §35A-1103 establishes that the clerk in each county shall have original jurisdiction over adjudication matters. Venue for an incompetency matter rests in the county of residence or domiciled or is an inpatient in a treatment facility. If the county of residence or domicile cannot be determined, venue shall be the county where the respondent is present.

Respondent is a resident of Wake County, North Carolina, and therefore jurisdiction before this court is proper.

N.C.G.S. §35A-1109 requires that Respondent be personally served by the sheriff of the county where Respondent is either a resident or domiciled. The statute also requires Petitioner to mail copies of the notice and petition to Respondent's next of kin or interested parties and that proof of such mailing or notice be filed with the Clerk. It appears that all parties, and all parties known to have an interest in this proceeding, have been served or have received actual notice of the proceedings.

## COMPETENCE

N.C.G.S. §35A-1101(7) defines an incompetent adult as “an adult or emancipated minor who lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family or property, whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury or similar cause or condition.” North Carolina courts have held that the meaning of competency depends on the context in which this issue arises. Competency must generally be determined in relation to the Respondent’s ability to perform or understand a specific act or function. Idiosyncrasies or the exercise of poor judgment do not exclusively prove incompetency. An adjudication of incompetency, and the appointment of a guardian, is required when an adult does not possess an awareness of his mental limitations and is thus unable to appreciate the natural consequences of his actions.

The undersigned’s inquiry and recommendations focused on Respondent’s reasoning ability; awareness of consequences; the ability to deliberate and weigh facts; the ability to understand benefits and consequences of behavior and choices; the ability to transact ordinary business; the ability to manage activities of daily living such as basic personal hygiene; and, the ability to recognize and react to danger.

The undersigned has had the opportunity to interview the Respondent as to the allegations contained in the Petition. During our interview she spoke candidly regarding her trip to Kentucky upon receiving the Petition, the harm done to her estate from the fraudulent gift card scheme, and her relationship with her previously estranged daughter. Respondent was adamant that she does not wish to have a guardian appointed, yet stated, that she would not be opposed to having someone help manage her finances, if she is provided some discretion in how her money is spent. While it was apparent from interviewing the Respondent that there were deficiencies in her short-term memory, Respondent was able to articulate her wishes in a cogent manner.

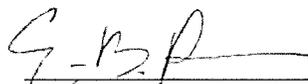
The undersigned has also had the opportunity to review Respondent’s medical records. Respondent underwent an evaluation at Duke Neurology in Raleigh in 2017, where she presented with memory issues. Testing indicated mild cognitive impairment, and her doctor ordered additional neurological testing, as he suspected Respondent may be suffering from “early Alzheimer’s dementia, progressive.” Respondent never submitted to a full neuropsychological evaluation as recommended, as she believed her scores would be affected by her grief at the loss of her husband. While Respondent has not received a full neuropsychological evaluation to date, she was evaluated using the Mini-Mental State Examination (MMSE), where she scored a 28 out of 30 on February 2, 2019. It is the understanding of the undersigned, that Respondent has agreed to undergo a full neuropsychological evaluation in the near future.

RECOMMENDATIONS

It is the understanding of the undersigned that Respondent and Petitioner have entered into an agreement that would protect both the Respondent's person and her estate from further harm. The undersigned is therefore of the opinion that an out of court resolution is in Respondent's best interest, and thus no formal adjudication of incompetence is needed in this matter.

This the 6th day of February, 2019.

By:



Erin B. Riddick, Guardian *ad litem* for Respondent  
The Walls Law Firm, PLLC  
5511 Capital Center Drive; Ste. 180  
Raleigh, NC 27606



# **EXHIBIT 4**

18 S 002039

STATE OF NORTH CAROLINA

File No.

Wake County

FILED

In The General Court Of Justice  
Superior Court Division  
Before The Clerk

IN THE MATTER OF

Name And Address Where Respondent Is Located

Kathleen Hartsough Hofeller  
2427 Springmoor Circle  
Raleigh, NC 27615

2018 OCT 29 PM 12:05

WAKE COUNTY, C.S.C.

BY

NOTICE OF HEARING ON  
 INCOMPETENCE  
 MOTION IN THE CAUSE  
AND  
ORDER APPOINTING GUARDIAN AD LITEM

County  
Wake

Name And Address Of Attorney Guardian Ad Litem

ERIN RIDDICK  
919 647 9599

G.S. 35A-1107, -1108, -1109, -1112, -1207

State Bar No.

NOTICE

You are notified to appear before the Clerk of Superior Court on the date and at the time and place specified below for a hearing on the attached Petition/Motion. You may file a written response in the office of the Clerk on or before the time set for the hearing.

A petition has been filed alleging that the respondent is incompetent and requesting that a guardian be appointed.

If, at the hearing, the Court finds by clear, cogent and convincing evidence that the respondent is incompetent, an adjudication of incompetence will be entered and a guardian of the person or a guardian of the estate or a general guardian or a limited guardian may be appointed.

A motion has been filed requesting that the existing guardianship in this matter

If, at the hearing, the Court finds that the guardianship should be modified, an order c

Wake County Courthouse  
316 Fayetteville Street  
Special Proceedings, 12th Floor  
Raleigh NC 27601

Date Of Hearing

12-13-2018

Time

3:00

AM

PM

Place To Appear

A motion for the appointment of an interim guardian has also been made (applies only for incompetence hearings).

You are further notified to appear before the Clerk on the earlier date and at the time and place specified below for a hearing on the motion for the appointment of an interim guardian contained in the attached petition (notice above is not checked.)

Wake County Courthouse  
316 Fayetteville Street  
Special Proceedings, 12th Floor  
Raleigh NC 27601

Date Of Hearing

11-6-2018

Time

3:00

AM

PM

Place To Appear

ORDER APPOINTING GUARDIAN AD LITEM

It is ORDERED that the attorney named above be and hereby is appointed as guardian ad litem to represent the respondent at all stages of this proceeding. The respondent has the right to retain his/her own attorney, at his/her own expense, and if he/she does so, the Court may discharge the guardian ad litem.

Date

10-21-18

Time

12:05

AM

PM

Signature

Sherril Roach

Assistant CSC

Clerk Of Superior Court

INSTRUCTIONS TO PETITIONER:

This Notice and a copy of the petition must be personally served on the respondent and must be served on the guardian ad litem by any method that complies with Rule 4 of the Rules of Civil Procedure. In addition, within five (5) days after filing the petition, you must mail this Notice and a copy of the petition, by first-class mail, to the respondent's next of kin named on the petition and any other person(s) the clerk may designate (except those person(s) who have accepted notice) and file with the Clerk an affidavit of that mailing or a certificate of acceptance of notice.

INSTRUCTIONS TO MOVANT:

This Notice and a copy of the motion must be served on the respondent and must be served on the guardian ad litem by first-class mail or any other method that complies with Rule 5 of the Rules of Civil Procedure. In addition, you must mail this Notice and a copy of the motion, by first-class mail, to any person(s) the Clerk may designate, except those person(s) who have accepted notice, and file with the Clerk an affidavit of that mailing or a certificate of acceptance of notice.

(Over)

**STATE OF NORTH CAROLINA**

WAKE County

File No.

FILED

**NOTE TO PETITIONER: If you are petitioning the court to accept guardianship on transfer from another state, this is not an appropriate form to use.**

OCT 29 PM 12:05

In The General Court Of Justice  
Superior Court Division  
Before The Clerk

**IN THE MATTER OF**

Full Name Of Respondent  
Kathleen Hartsough Hofeller BY \_\_\_\_\_

Telephone No. Of Respondent  
919-848-7427

Address Of Respondent  
2427 Springmoor Circle  
Raleigh, North Carolina 27615

County Of Residence Of Respondent  
Wake Date Of Birth  
01/28/1947

Race\* Caucasian Sex\* Female \*Race and sex are collected so that this information may be transmitted to NICS in the event of a qualifying adjudication under G.S. 14-409.43(a)(6).

Respondent Indigent Respondent's Drivers License No. State

Name And Address Of Petitioner  
Christopher S. Morden  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Road, Suite 117  
Raleigh, North Carolina 27612

County Of Residence Of Petitioner  
Wake Telephone No. Of Petitioner  
919-876-1400

Petitioner's Relationship To Respondent Or Interest In Proceeding  
Attorney for Respondent

**PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN AND MOTION FOR APPOINTMENT OF INTERIM GUARDIAN (AOC-SP-198)**

G.S. 35A-1105, -1112, -1114, -1210; 35B-17, -18

Name And Address Of Attorney For Petitioner  
Nickolas B. Sherrill  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Road, Suite 117  
Raleigh, North Carolina 27612

Telephone No. Of Petitioner's Attorney  
919-876-1400 State Bar No.  
45521

Name And Address Of Treatment Facility If Respondent Is An Inpatient

The undersigned, being duly sworn, requests that the Court, after notice and hearing, adjudicate the respondent above to be incompetent, and also applies for the appointment of the person(s) named below to serve, in the capacity indicated, as guardian(s) of the respondent.

In support of this Petition, the undersigned states:

1. During the past twelve (12) months, the above-named respondent was physically present as follows:

Period of Physical Presence <small>(include up to the 12 months prior to the filing date of the petition; do not list periods of temporary absence)</small>		Address
From	To	
April 2018	Present	2427 Springmoor Circle, Raleigh, North Carolina 27615
October 2014	April 2018	6701 Pointe Vista Circle, Raleigh, North Carolina 27615

2. (check a. or check and complete b.) (NOTE: In both a. and b., "state" includes a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.)

- a. There is no other pending proceeding involving the respondent in any court or agency of a state or foreign country.  
 b. There is a pending proceeding(s) involving the respondent in the court or agency of a state or foreign country, as set forth below:

Location (County, State, and Country)	Type of Proceeding	File Number

3. A North Carolina court has jurisdiction to rule on this petition and application.

4. The respondent is

- a resident of this county.  
 domiciled in this county.  
 an inpatient in the facility named above.  
 present in this county, it being impossible to determine his/her county of residence or domicile.

(Over)

5. The respondent is incompetent in that he/she lacks sufficient capacity to manage his/her own affairs or to make or communicate important decisions concerning his/her person, family, or property, as shown by the following facts: (Set forth the facts which tend to show that the respondent is incompetent. Include cause of incompetence, which may be mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or other cause and give facts demonstrating lack of capacity. Be specific.)

Respondent's husband died in August 2018. Since husband's death:

1. Respondent was the victim of gift card payment scheme.
2. Respondent attempted to transfer large sum of money to India. Respondent has no connection with any person or entity in India.
3. Respondent is believed to be under influence of previously estranged child. Since appearance of child:
  - A. Financial assistant hired for Respondent quit her employment upon concerns for personal safety based on actions of previously estranged child.
  - B. Respondent removed appointed attorney-in-fact overseeing security of funds.
4. Respondent postponing neurological and cognitive testing by referred physicians.

2018 OCT 29 PM 1:17  
 COURT REPORTER  
 BY \_\_\_\_\_

6. The respondent's next of kin, if any, and other persons known to have an interest in this proceeding are:

<b>Name And Address</b> Stephanie Louise Hofeller Lizon 464 Miller Hollow Road PO Box 17 Le Roy, West Virginia 25252		<b>Name And Address</b> Edwin Giles Peterman PO Box 15832 Washington, D.C. 20003	
<b>County Of Residence</b> Jackson	<b>Telephone No.</b> unknown	<b>County Of Residence</b> Washington, D.C.	<b>Telephone No.</b> 202-335-4211
<b>Relationship To Respondent Or Interest In Proceeding</b> Child		<b>Relationship To Respondent Or Interest In Proceeding</b> Health Care Agent	
<b>Name And Address</b> Tracy William Smale 107 Kitakashiwa Park Homes Ichibankan 13-2 Kitakashiwa Dai Kashiwa-Shi, Chiba-Ken, Japan 277-0836		<b>Name And Address</b>  	
<b>County Of Residence</b> Chiba Prefecture	<b>Telephone No.</b> 520-568-1573	<b>County Of Residence</b>  	<b>Telephone No.</b>  
<b>Relationship To Respondent Or Interest In Proceeding</b> Attorney-in-fact		<b>Relationship To Respondent Or Interest In Proceeding</b>  	

7. General statement of respondent's assets and liabilities, including any income and receivables to which he/she is entitled:

<u>Assets</u>	<u>Liabilities</u>	<u>Income and Receivables</u>
Real Property           \$ _____	Mortgage Loans       \$ _____	Wages & Salaries     \$ _____
Tangible Personal Property   \$ _____	Other Secured Loans   \$ _____	Rents                   \$ _____
Other Personal Property   \$ _____	Unsecured Loans       \$ _____	Pensions               \$ _____
		Allowances             \$ _____
		Insurance & Compensation   \$ _____
		Other (including SSI/SSDI)   \$ _____

There is a representative payee for government benefits.    Yes    No  
 There is a Durable Power of Attorney in place.            Yes    No  
 There is a Healthcare Power of Attorney in place.        Yes    No  
 There is a special needs or other trust in place.          Yes    No  
 The respondent has health insurance through Medicaid, Medicare, or a private insurer.    Yes    No

(Over)

IN THE MATTER OF

File No.

Name Of Respondent

Kathleen Hartsough Hofeller

8. CAPACITY INFORMATION

20 OCT 27 2018

Check here if in a coma, persistent vegetative state, or non-responsive and move on to Item 9.

A. Language and Communication (understands/participates in conversations, can read and write, understands signs such as "keep out," "men," "women")

has capacity. lacks capacity. Comment:

B. Nutrition (makes independent decisions re: eating, prepares food, purchases food)

has capacity. lacks capacity. Comment:

C. Personal Hygiene (bathes, brushes teeth, uses proper hygiene when using the restroom)

has capacity. lacks capacity. Comment:

D. Health Care (makes and communicates choices re: medical treatment/caregivers, notifies others of illness, follows medication instructions, reaches emergency health care)

has capacity. lacks capacity. Comment:

E. Personal Safety (recognizes danger and seeks assistance as needed, protects self from exploitation/personal harm)

has capacity. lacks capacity. Comment:

F. Residential (makes and communicates decisions re: residence/roommates, maintains safe shelter)

has capacity. lacks capacity. Comment:

G. Employment (makes and communicates decisions re: employment, demonstrates vocational skills such as neatness and punctuality, writes or dictates application form)

has capacity. lacks capacity. Comment:

H. Independent Living (follows a daily schedule, conducts housekeeping chores, uses community resources such as bank, store, post office)

has capacity. lacks capacity. Comment:

I. Civil (knows to contact advocate if being exploited, understands consequences of committing a crime, registers to vote)

has capacity. lacks capacity. Comment:

J. Financial

1. Makes and communicates decisions about paying bills and spending discretionary money, and makes change for \$1, \$5, and \$20

has capacity. lacks capacity. Comment:

2. Makes and communicates decisions regarding management of a personal bank account, savings, investments, real estate, and other substantial assets

has capacity. lacks capacity. Comment:

3. Can resist attempts at financial exploitation by others

has capacity. lacks capacity. Comment:

(Over)

**9. RECOMMENDED GUARDIAN(S)**

Name And Address Of Recommended Guardian

Trudy J. Harris  
P.O. Box 510  
Newcastle, California 95658

Name And Address Of Recommended Guardian

LifeLinks  
4812 Six Forks Rd., Suite 110  
Raleigh, NC 27609

2018 OCT 29 7:12:05

Of The Estate

Of The Person

General Guardian

Of The Estate

Of The Person

General Guardian

**10. MOTION FOR APPOINTMENT OF INTERIM GUARDIAN**

**NOTE:** In certain circumstances, an interim guardian may be needed to intervene on a respondent's behalf prior to an adjudication hearing. To request that the Court appoint an interim guardian for the respondent, complete and attach form AOC-SP-198, Motion For Appointment Of Interim Guardian.

**VERIFICATION**

I, the undersigned petitioner, have read this Petition and state that its contents are true to my own knowledge except those matters stated on information and belief, which I believe are true.

**SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME**

Date **10/29/2018**

Date **10/29/18**

Signature Of Person Authorized To Administer Oaths

*Ellen Mohr*

Signature Of Petitioner

*Christopher Jordan*

Notary Public

Assistant CSC

Clerk Of Superior Court

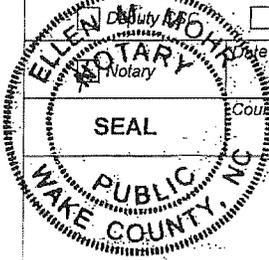
Date My Commission Expires

**6/17/18**

County Where Notarized

**Wake**

SEAL



**STATE OF NORTH CAROLINA**

File No.

WAKE County

In The General Court Of Justice  
Superior Court Division  
Before The Clerk

**IN THE MATTER OF**

Full Name Of Respondent  
Kathleen Hartsough Hofeller

Telephone No. Of Respondent  
919-848-7427

Name And Address Of Movant  
Christopher S. Morden  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Road, Suite 117  
Raleigh, North Carolina 27612

Petitioner For Adjudication Of Incompetence  Guardian Ad Litem

Telephone No. Of Movant  
919-876-1400

Name And Address Of Treatment Facility If Respondent Is An Inpatient

**MOTION FOR APPOINTMENT OF  
INTERIM GUARDIAN**

G.S. 35A-1114

Name And Address Of Attorney For Movant  
Nickolas B. Sherrill  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Road, Suite 117  
Raleigh, North Carolina 27612

Telephone No. Of Movant's Attorney  
919-876-1400

State Bar No.  
45521

**MOTION FOR APPOINTMENT OF INTERIM GUARDIAN**

**NOTE:** Do not complete unless an emergency requires immediate intervention. Do not complete if basis for the incompetency petition is special jurisdiction as set forth in G.S. 35B-18; interim guardian appointment is not available in cases of special jurisdiction.

- The movant moves that the Court appoint an interim guardian because there is reasonable cause, as shown by the following facts, to believe that the respondent is incompetent and needs an interim guardian to intervene on his/her behalf prior to the adjudication hearing in that: (Check all that apply)
  - he/she is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his/her physical well-being and requires immediate intervention.
  - there is or reasonably appears to be an imminent or foreseeable risk of harm to his/her estate that requires immediate intervention in order to protect the respondent's interest.

(Set forth the specific facts which demonstrate the need for immediate intervention. Continue on Side Two if additional space is needed.)

Respondent's husband died in August 2018. Since husband's death:

1. Respondent was the victim of gift card payment scheme.
2. Respondent attempted to transfer large sum of money to India. Respondent has no connection with any person or entity in India.
3. Respondent is believed to be under influence of previously estranged child. Since appearance of child:
  - A. Financial assistant hired for Respondent quit her employment upon concerns for personal safety based on actions of previously estranged child.
  - B. Respondent removed appointed attorney-in-fact overseeing security of funds.

(Over)

MOTION FOR APPOINTMENT OF INTERIM GUARDIAN - continued

BY \_\_\_\_\_

RECOMMENDED INTERIM GUARDIAN(S)

The undersigned, being duly sworn, requests that the Court, after notice and hearing, appoint the person(s) named below to serve, in the capacity indicated, as interim guardian(s) of the respondent.

Name And Address Of Recommended Interim Guardian  
 Trudy J. Harris  
 P.O. Box 510  
 Newcastle, California 95658

Name And Address Of Recommended Interim Guardian  
 LifeLinks  
 4812 Six Forks Rd., Suite 110  
 Raleigh, NC 27609

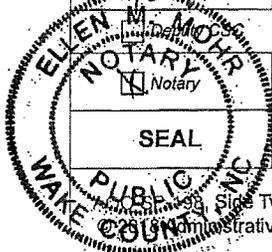
Of The Estate       Of The Person

Of The Estate       Of The Person

VERIFICATION

I, the undersigned movant, have read this Motion and state that its contents are true to my own knowledge except those matters stated on information and belief, which I believe are true.

<b>SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME</b>		Date	10/29/2018
Date	Signature Of Person Authorized To Administer Oaths	Signature Of Movant	
10/29/18	<i>Ellen Mohr</i>	<i>Christopher Warden</i>	
<input checked="" type="checkbox"/> Notary	<input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court		
	Date My Commission Expires		
	6/17/23		
	County Where Notarized		
	Wake		



# **EXHIBIT 5**

STATE OF NORTH CAROLINA

File No.

18 SP 2634

WAKE County

In The General Court Of Justice  
Superior Court Division  
Before The Clerk

FILED

IN THE MATTER OF

Name Of Respondent  
KATHLEEN HARTSOUGH HOFELLER

2018 NOV 6 5:25  
WAKE COUNTY, CSC

ORDER ON MOTION FOR  
APPOINTMENT OF  
INTERIM GUARDIAN

Name Of Movant (if applicable)  
CHRISTOPHER MORDEN

Petitioner For Adjudication of Incompetence  Guardian Ad Litem

G.S. 35A-1114

FINDINGS

I. On Movant's Motion For Appointment Of An Interim Guardian

1. A hearing on the movant's Motion for the Appointment of an Interim Guardian was held on this day. From the evidence presented at the hearing, the Court makes the following specific findings of fact: (Set forth facts which support conclusion that grounds for immediate intervention exist.)

COURT ADOPTS ALL STATEMENTS CONTAINED IN THE MOTION FOR APPOINTMENT, TO INCLUDE RESPONDENT TRANSFERRING LARGE AMOUNT OF MONEY PURSUANT TO "SCAM" GIFT CARD REIMBURSEMENT TO UNKNOWN PARTIES, CURRENTLY BEING INVESTIGATED BY RALEIGH P.D. AND APS INVOLVEMENT; ESTRANGED DAUGHTER RECENTLY INVOLVED NOW ACCOMPANIED HER TO CHANGE HER POWER OF ATTORNEY IN POSSIBLE ATTEMPT TO REROUTE MONEY BACK INTO OTHER ACCOUNTS TO ENABLE DAUGHTER TO ACCESS IT, MULTIPLE MISSED APPOINTMENTS FOR MEDICAL PROCEDURES AND PRELIMINARY DIAGNOSIS OF DEMENTIA ALONG WITH REPORTS OF MEMORY LOSS

- 2. Based on these specific findings of fact, the Court concludes that there is reasonable cause to believe that the respondent is incompetent, and that:
  - a. the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to the respondent's physical well-being, and there is immediate need for a guardian to provide consent or take other steps to protect the respondent.
  - b. there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate, and immediate intervention is required in order to protect the respondent's interest.
- 3. The Court does not find that grounds exist for the appointment of an interim guardian.

II. On Clerk's Own Motion

1. A hearing on a petition for adjudication of incompetence was held on this day and the Court on it's own motion considered the appointment of an interim guardian for the respondent. From the evidence presented at the hearing, the Court makes the following specific findings of fact: (Set forth facts which support the determination that appointment of an interim guardian is in the best interests of the respondent.)

(Over)

2. Based on these specific findings of fact, the Court concludes that there is reasonable cause to believe that the respondent is incompetent, and that:
- a. the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to the respondent's physical well-being, and there is immediate need for a guardian to provide consent or take other steps to protect the respondent.
  - b. there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate, and immediate intervention is required in order to protect the respondent's interest.

**ORDER**

It is ORDERED that:

1. the person named below is appointed interim guardian of the  person  estate for the respondent. Upon qualifying, the interim guardian shall have the powers and duties specifically set forth below. These powers and duties shall extend only so long as is necessary to meet the condition necessitating this appointment. In any event, this interim guardianship shall terminate on the earliest of the following: the expiration date specified below, if any; 45 days from the date of this Order; when any guardian is appointed following an adjudication of incompetence; or when the petition in this case is dismissed by the Court.
2. the motion for the appointment of an interim guardian is denied.

<i>Name And Address Of Interim Guardian</i> Wake County Human Services PO Box 46833  Raleigh NC 27620	<i>Relationship To Respondent</i> <p style="text-align: center;">Public Guardian</p> <hr/> <i>Telephone No.</i> <p style="text-align: center;">919-250-3830</p>
---	---

*Powers And Duties Of Interim Guardian*

EVERETT BOLTON, 227 WEST MARTIN STREET PO DRAWER 1429 RALEIGH NC 27602, 919-899-9892 is appointed as the Interim Guardian of the Estate for Respondent.

All those powers and duties contained in NC Gen. Stat. 35A for Guardian of the Person and Guardian of the Estate accordingly are granted to the Interim Guardian for 45 days, unless extended or until disposition of the Appointment of Guardian is heard.

<i>Date Of Order</i> 11/06/2018	<i>Signature</i> 
<i>Expiration Date</i>	<input checked="" type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court

**ORDER EXTENDING INTERIM GUARDIANSHIP**

- For good cause shown, it is further ORDERED that the period of interim guardianship set forth in the above Order is extended for as long as continues to be necessary to meet the conditions necessitating this appointment. In any event, this interim guardianship shall terminate on the earliest of the following: the expiration date specified below, if any; 45 days from the date of this Order; when any guardian is appointed following an adjudication of incompetence; or when the petition in this case is dismissed by the Court.

<i>Date Of Order</i>	<i>Signature</i>
<i>Expiration Date</i>	<input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court

**CERTIFICATION**

I certify that this Order On Motion For Appointment Of Interim Guardian is a true and complete copy of the original on file in this case.

<i>Date</i>	<i>Name Of Clerk (type or print)</i>	<i>Signature</i>	<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court
-------------	--------------------------------------	------------------	--

STATE OF NORTH CAROLINA

18-SP-2634

Wake

County

In The General Court Of Justice  
Superior Court Division  
Before The Clerk

IN THE MATTER OF:

Name Of Respondent

Kathleen Hartsough Hofeller

CERTIFICATE OF SERVICE  
(INCOMPETENT PROCEEDING)

G.S. 35A-1109

I, the undersigned, certify that I mailed by first class mail a copy of the Notice Of Hearing On Incompetence And Order Appointing Guardian Ad Litem (AOC-SP-201) and a copy of the Petition For Adjudication Of Incompetence And Application For Appointment Of Guardian (AOC-SP-200) to the respondent's next of kin named in the Petition and to other persons designated by the Clerk, at the addresses listed below. This Notice was mailed within five (5) days after the Petition was filed as required by law. The address given below is the last known address of the person listed.

Name And Address Of Person 1

Stephanie Louise Hofeller Lizon  
464 Miller Hollow Road  
P.O. Box 17  
Le Roy, West Virginia 25252

Name And Address Of Person 2

Edwin Giles Peterman  
P.O. Box 15832  
Washington, D.C. 20003

Name And Address Of Person 3

Tracy William Smale (Via Email)  
107 Kita Kashiwa Park Homes Ichiban Kan  
13-2 Kita Kashiwa Dai  
Kashiwa-Shi, Chiba-Ken, Japan 277-0836

Name And Address Of Person 4

Name And Address Of Person 5

Name And Address Of Person 6

Name And Address Of Person 7

Name And Address Of Person 8

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date

11/2/18

Date

11/2/18

Signature Of Petitioner Or Attorney

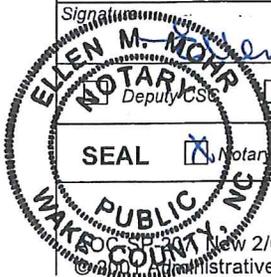
*Nickolas B. Sherrill*

Signature

*Ellen M. Mohr*

Name Of Petitioner Or Attorney (Type Or Print)

Nickolas B. Sherrill, Attorney for Petitioner.



Assistant CSC  Clerk Of Superior Court

Date My Commission Expires

6/17/18

SEAL

Notary

291624

18 S 002634 115

STATE OF NORTH CAROLINA

No.

Wake County

FILED

In The General Court Of Justice  
Superior Court Division  
Before The Clerk

IN THE MATTER OF

Name And Address Where Respondent Is Located

Kathleen Hartsough Hofeller  
2427 Springmoor Circle  
Raleigh, NC 27615

2018 OCT 29 PM 12:05

WAKE COUNTY, C.S.C.

BY

NOTICE OF HEARING ON  
 INCOMPETENCE  
 MOTION IN THE CAUSE  
AND  
ORDER APPOINTING GUARDIAN AD LITEM

G.S. 35A-1107, -1108, -1109, -1112, -1207

State Bar No.

County  
Wake

Name And Address Of Attorney Guardian Ad Litem

ERIN RIDDICK  
919 647 9599

NOTICE

You are notified to appear before the Clerk of Superior Court on the date and at the time and place specified below for a hearing on the attached Petition/Motion. You may file a written response in the office of the Clerk on or before the time set for the hearing.

A petition has been filed alleging that the respondent is incompetent and requesting that a guardian be appointed.

If, at the hearing, the Court finds by clear, cogent and convincing evidence that the respondent is incompetent, an adjudication of incompetence will be entered and a guardian of the person or a guardian of the estate or a general guardian or a limited guardian may be appointed.

A motion has been filed requesting that the existing guardianship in this matter

If, at the hearing, the Court finds that the guardianship should be modified, an order c

Wake County Courthouse  
316 Fayetteville Street  
Special Proceedings, 12<sup>th</sup> Floor  
Raleigh NC 27601

Date Of Hearing

10-13-2018

Time

3:00

AM  
 PM

Place To Appear

A motion for the appointment of an interim guardian has also been made (applies only for incompetence hearings).

You are further notified to appear before the Clerk on the earlier date and at the time and place specified below for a hearing on the motion for the appointment of an interim guardian contained in the attached petition (any above is not checked.)

Wake County Courthouse  
316 Fayetteville Street  
Special Proceedings, 12<sup>th</sup> Floor  
Raleigh NC 27601

Date Of Hearing

11-6-2018

Time

3:00

AM  
 PM

Place To Appear

ORDER APPOINTING GUARDIAN A

It is ORDERED that the attorney named above be and hereby is appointed as guardian ad litem to represent the respondent at all stages of this proceeding. The respondent has the right to retain his/her own attorney, at his/her own expense, and if he/she does so, the Court may discharge the guardian ad litem.

Date

10-21-18

Time

12:05

AM  
 PM

Signature

Sherrice Cochran

Assistant CSC

Clerk Of Superior Court

INSTRUCTIONS TO PETITIONER:

This Notice and a copy of the petition must be personally served on the respondent and must be served on the guardian ad litem by any method that complies with Rule 4 of the Rules of Civil Procedure. In addition, within five (5) days after filing the petition, you must mail this Notice and a copy of the petition, by first-class mail, to the respondent's next of kin named on the petition and any other person(s) the clerk may designate (except those person(s) who have accepted notice) and file with the Clerk an affidavit of that mailing or a certificate of acceptance of notice.

INSTRUCTIONS TO MOVANT:

This Notice and a copy of the motion must be served on the respondent and must be served on the guardian ad litem by first-class mail or any other method that complies with Rule 5 of the Rules of Civil Procedure. In addition, you must mail this Notice and a copy of the motion, by first-class mail, to any person(s) the Clerk may designate, except those person(s) who have accepted notice, and file with the Clerk an affidavit of that mailing or a certificate of acceptance of notice.

WAKE COUNTY SHERIFF'S OFFICE



RETURN OF SERVICE

I certify that this Notice and a copy of the Petition were received and served as follows:

RESPONDENT

Date Served 11/1/2018 Time Served 1550 [ ] AM [X] PM Name Of Respondent Kathleen Hofelber

[X] By delivering to the respondent named above a copy of the Notice and Petition.

Address Where Respondent Served

2427 Spring Moore Cir

[ ] Respondent WAS NOT served for the following reason:

GUARDIAN AD LITEM

Date Served Time Served [ ] AM [ ] PM Name Of Guardian Ad Litem

[ ] Service accepted by guardian ad litem.

Date Accepted

Signature Of Guardian Ad Litem

[ ] By delivering to the guardian ad litem named above personally a copy of the Notice and Petition.

[ ] By leaving a copy of the Notice and Petition at the guardian ad litem's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

Name Of Person With Whom Copies Left

Address Where Copies Delivered Or Left

[ ] Other manner of service: (specify)

[ ] Guardian ad litem WAS NOT served for the following reason:

Date Received OCT 29 2018 Signature Of Deputy Sheriff Making Return

Date Of Return 11/1/2018 Name Of Deputy Sheriff (type or print) M. Parrish

County Of Sheriff DONNIE HARRISON, SHERIFF

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
18 SP 2634

IN THE MATTER OF )  
KATHLEEN HARTSOUGH HOFELLER )  
)  
)

INTERIM REPORT OF  
THE GUARDIAN *AD LITEM*

---

NOW COMES Erin B. Riddick, Guardian *ad litem* for Respondent Kathleen Hartsough Hofeller in this matter and reports as follows:

**PROCEDURAL HISTORY**

The undersigned is the appointed Guardian *ad litem* under N.C.G.S. §35A-1107 charged with representing the best interest of Respondent. The undersigned was appointed Guardian *ad litem* by the Wake County Clerk of Superior Court on or around October 29, 2018.

The Respondent in this proceeding is Kathleen Hartsough Hofeller, hereto referred to as "Respondent." Respondent is an elderly female who resides at 2427 Springmoor Circle, in the Springmoor Life Care Retirement Community, in Raleigh, North Carolina. The Petition for Adjudication of Incompetence and Application for Appointment of Guardian was filed on or around October 29, 2018 by Christopher S. Morden, Esq., attorney for the Respondent, hereinafter "Petitioner."

The Guardian *ad litem* has interviewed Petitioner's attorney, Nickolas B. Sherrill, Esq., in regards to the allegations contained in the Petition. The undersigned has been unable to reach Respondent for an interview, as Respondent's whereabouts are unknown at this time. The undersigned has also spoken with Allison Weaver, caregiver of Respondent at Springmoor.

The Guardian *ad litem* has not requested a multidisciplinary evaluation for this proceeding.

**BACKGROUND**

Respondent is a seventy-one (71) year old female who resides in an independent apartment in the Springmoor Life Care Retirement Community in Raleigh. Since the death of Respondent's husband in August of 2018, Petitioner alleges that Respondent has been the victim of a gift card payment scheme, and has also attempted to transfer a large sum of money to India.

Petitioner also alleges that Respondent may be under the influence of her estranged daughter, Stephanie Lizon. On November 1, 2018, after being served with a copy of the Petition and Notice of Hearing, Respondent left the Springmoor Retirement Community. It is the understanding of the undersigned that Respondent was last seen by Springmoor staff, entering a vehicle with her daughter and another individual. Since leaving Springmoor, Respondent has not been located.

It is the understanding of the undersigned that Respondent has executed both a Health Care Power of Attorney and a Durable Power of Attorney. Neither of these documents name Respondent's daughter, Stephanie, as her agent.

### **JURISDICTION AND SERVICE**

N.C.G.S. Chapter 35A defines the exclusive procedure for adjudicating an adult incompetent and the appointment of a guardian. N.C.G.S. §35A-1103 establishes that the clerk in each county shall have original jurisdiction over adjudication matters. Venue for an incompetency matter rests in the county of residence or domiciled or is an inpatient in a treatment facility. If the county of residence or domicile cannot be determined, venue shall be the county where the respondent is present.

Respondent is a resident of Wake County, North Carolina, and therefore jurisdiction before this court is proper.

N.C.G.S. §35A-1109 requires that Respondent be personally served by the sheriff of the county where Respondent is either a resident or domiciled. The statute also requires Petitioner to mail copies of the notice and petition to Respondent's next of kin or interested parties and that proof of such mailing or notice be filed with the Clerk. It appears that all parties, and all parties known to have an interest in this proceeding, have been served or have received actual notice of the proceedings.

### **APPOINTMENT OF INTERIM GUARDIAN**

N.C.G.S. §35A-1114 (b) states that the appointment of an interim guardian is appropriate when the motion sets forth facts tending to show: (1) there is *reasonable cause* to believe that the Respondent is incompetent; and (2) the Respondent is in a condition that *reasonably appears* to constitute an imminent or foreseeable risk of harm to Respondent's physical well-being or estate. The undersigned would note that the burden required under this statute is "*reasonable cause*." It is the opinion of the undersigned that "*reasonable cause*" is a low burden of proof for the petitioning party. In essence, the statute is codifying a protective function to preserve the status quo and prevent injury. It is in this light, that the undersigned offers this report:

**(1) Reasonable Cause to Believe That The Respondent Is Incompetent**

The undersigned's inquiry and recommendation focused on Respondent's reasoning ability; awareness of consequences; the ability to deliberate and weigh facts; the ability to understand benefits and consequences of behavior and choices; the ability to transact ordinary business; the ability to manage activities of daily living, such as basic personal hygiene; and, the ability to recognize and react to danger.

Due to the unknown whereabouts of the Respondent, the undersigned has been unable to interview her to determine her ability to understand and appreciate issues related to language and communication, nutrition, personal hygiene, health care, personal safety, residential, employment, independent living, and civil and financial decisions. The undersigned has, however, reviewed the Respondent's medical records that were provided by Petitioner. Records from a 2017 evaluation on the Respondent, performed by Dr. Paul Peterson with Duke Neurology, include a diagnosis of mild cognitive disorder. These records also indicated that Dr. Peterson suspected early Alzheimer's dementia, progressive type, and Respondent was recommended for a full neuropsychological evaluation. It is the understanding of the undersigned that Respondent never followed up with this recommendation.

Based on the interview Petitioner's attorney and a review of Respondent's medical records, the undersigned believes that the Petitioner has met the burden to show reasonable cause to believe that the Respondent is incompetent.

**(2) An Imminent or Foreseeable Risk of Harm to Respondent's Person or Estate**

The undersigned is concerned that both Respondent's well-being and estate are at risk without the appointment of an interim guardian. It is the understanding of the undersigned, that until recently, Respondent has had an estranged relationship with her daughter, Stephanie Lizon. Petitioner alleges that since Stephanie's return to Respondent's life, there have been attempts to have Respondent revoke Power of Attorney document. Respondent was also seen leaving Springmoor Retirement Community with her daughter, and has since been unable to be located. It is the understanding of the undersigned that an Adult Protective Services investigation on the matter is currently ongoing.

Based on the above-mentioned facts, the undersigned believes that Petitioner has met the burden to show that Respondent is in a condition that reasonably appear to constitute an imminent or foreseeable risk to her well-being and estate.

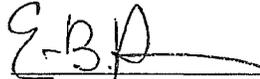
**RECOMMENDATION**

The Petitioner has the burden to prove that there is: (1) *reasonable cause* to believe that Respondent is incompetent, and (2) that Respondent is in a condition that reasonably appears to constitute an imminent or foreseeable risk of harm to her well-being or estate. The undersigned is persuaded that Petitioner has met this burden, and that it is in the best interest of Respondent

to have an interim guardian appointed, until this court can address the issue of incompetency and possible appointment of a guardian.

This the 5th day of November, 2018.

By:



Erin B. Riddick, Guardian *ad litem* for Respondent  
The Walls Law Firm, PLLC  
5511 Capital Center Drive; Ste. 180  
Raleigh, NC 27606

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of November, 2018, the foregoing Interim Report of the Guardian *ad litem* was served by placing a copy in the United States mail in a postage paid envelope addressed to the following:

Kathleen Hartsough Hofeller  
Respondent  
2427 Springmoor Circle  
Raleigh, NC 27615

Edwin Giles Peterman  
Interested Party  
P.O. Box 15832  
Washington, D.C. 20003

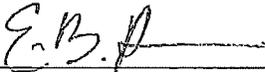
Christopher S. Morden, Esq.  
Petitioner  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Road, Ste. 117  
Raleigh, NC 27612

Stephanie Louise Hofeller Lizon  
Interested Party  
P.O. Box 17  
Le Roy, West Virginia 25252

Nickolas B. Sherrill, Esq.  
Attorney for Petitioner  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Road, Ste. 117  
Raleigh, NC 27612

Tracy William Smale  
Interested Party  
107 Kitakashiwa Park Homes Ichibankan  
13-2 Kitakashiwi Dai  
Kashiwa-Shi, Chiba-Ken, Japan 277-0836

By:

  
\_\_\_\_\_  
Erin B. Riddick, Esq.  
Guardian *ad litem* for Respondent  
5511 Capital Center Dr.; Ste. 180  
Raleigh, NC 27606



185 1102039

STATE OF NORTH CAROLINA

File No.

Wake County

In The General Court Of Justice  
Superior Court Division  
Before The Clerk

FILED

IN THE MATTER OF

Name And Address Where Respondent Is Located  
Kathleen Hartsough Hofeller  
2427 Springmoor Circle  
Raleigh, NC 27615

2018 OCT 29 PM 12:05  
WAKE COUNTY, N.C.  
BY \_\_\_\_\_

NOTICE OF HEARING ON  
 INCOMPETENCE  
 MOTION IN THE CAUSE  
AND  
ORDER APPOINTING GUARDIAN AD LITEM

County  
Wake

Name And Address Of Attorney Guardian Ad Litem  
  
ERIN RIDDICK  
919 647 9599

State Bar No.

G.S. 35A-1107, -1108, -1109, -1112, -1207

NOTICE

You are notified to appear before the Clerk of Superior Court on the date and at the time and place specified below for a hearing on the attached Petition/Motion. You may file a written response in the office of the Clerk on or before the time set for the hearing.

A petition has been filed alleging that the respondent is incompetent and requesting that a guardian be appointed.  
If, at the hearing, the Court finds by clear, cogent and convincing evidence that the respondent is incompetent, an adjudication of incompetence will be entered and a guardian of the person or a guardian of the estate or a general guardian or a limited guardian may be appointed.

A motion has been filed requesting that the existing guardianship in this matter  
If, at the hearing, the Court finds that the guardianship should be modified, an order c

Wake County Courthouse  
316 Fayetteville Street  
Special Proceedings, 12<sup>th</sup> Floor  
Raleigh NC 27601

Date Of Hearing 10-13-2018 Time 3:00  AM  PM Place To Appear

A motion for the appointment of an interim guardian has also been made (applies only for incompetence hearings).  
You are further notified to appear before the Clerk on the earlier date and at the time and place specified below for a hearing on the motion for the appointment of an interim guardian contained in the attached petition (if above is not checked.)

Wake County Courthouse  
316 Fayetteville Street  
Special Proceedings, 12<sup>th</sup> Floor  
Raleigh NC 27601

Date Of Hearing On Interim Guardian 11-6-2018 Time 3:00  AM  PM Place To Appear

ORDER APPOINTING GUARDIAN A

It is ORDERED that the attorney named above be and hereby is appointed as guardian ad litem to represent the respondent at all stages of this proceeding. The respondent has the right to retain his/her own attorney, at his/her own expense, and if he/she does so, the Court may discharge the guardian ad litem.

Date 10-21-18 Time 12:05  AM  PM Signature Sheri Coeck  Assistant CSC  Clerk Of Superior Court

INSTRUCTIONS TO PETITIONER:  
This Notice and a copy of the petition must be personally served on the respondent and must be served on the guardian ad litem by any method that complies with Rule 4 of the Rules of Civil Procedure. In addition, within five (5) days after filing the petition, you must mail this Notice and a copy of the petition, by first-class mail, to the respondent's next of kin named on the petition and any other person(s) the clerk may designate (except those person(s) who have accepted notice) and file with the Clerk an affidavit of that mailing or a certificate of acceptance of notice.

INSTRUCTIONS TO MOVANT:  
This Notice and a copy of the motion must be served on the respondent and must be served on the guardian ad litem by first-class mail or any other method that complies with Rule 5 of the Rules of Civil Procedure. In addition, you must mail this Notice and a copy of the motion, by first-class mail, to any person(s) the Clerk may designate, except those person(s) who have accepted notice, and file with the Clerk an affidavit of that mailing or a certificate of acceptance of notice.

(Over)

**STATE OF NORTH CAROLINA**

WAKE County

File No.

FILED

**NOTE TO PETITIONER: If you are petitioning the court to accept guardianship on transfer from another state, this is not an appropriate form to use.**

In The General Court Of Justice  
Superior Court Division  
Before The Clerk

OCT 29 PM 12:05

<b>IN THE MATTER OF</b>		<b>PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN</b>	
Full Name Of Respondent Kathleen Hartsough Hofeller		BY _____	
Telephone No. Of Respondent 919-848-7427		<input checked="" type="checkbox"/> <b>AND MOTION FOR APPOINTMENT OF INTERIM GUARDIAN (AOC-SP-198)</b>	
Address Of Respondent 2427 Springmoor Circle Raleigh, North Carolina 27615			
County Of Residence Of Respondent Wake	Date Of Birth 01/28/1947	G.S. 35A-1105, -1112, -1114, -1210; 35B-17, -18	
Race* Caucasian	Sex* Female	*Race and sex are collected so that this information may be transmitted to NICS in the event of a qualifying adjudication under G.S. 14-409.43(a)(6).	
<input type="checkbox"/> Respondent Indigent	Respondent's Drivers License No.	Name And Address Of Attorney For Petitioner Nickolas B. Sherrill Monroe, Wallace & Morden, P.A. 3225 Blue Ridge Road, Suite 117 Raleigh, North Carolina 27612	
Name And Address Of Petitioner Christopher S. Morden Monroe, Wallace & Morden, P.A. 3225 Blue Ridge Road, Suite 117 Raleigh, North Carolina 27612		Telephone No. Of Petitioner's Attorney 919-876-1400	State Bar No. 45521
County Of Residence Of Petitioner Wake	Telephone No. Of Petitioner 919-876-1400	Name And Address Of Treatment Facility If Respondent Is An Inpatient	
Petitioner's Relationship To Respondent Or Interest In Proceeding Attorney for Respondent			

The undersigned, being duly sworn, requests that the Court, after notice and hearing, adjudicate the respondent above to be incompetent, and also applies for the appointment of the person(s) named below to serve, in the capacity indicated, as guardian(s) of the respondent. In support of this Petition, the undersigned states:

1. During the past twelve (12) months, the above-named respondent was physically present as follows:

Period of Physical Presence <small>(include up to the 12 months prior to the filing date of the petition; do not list periods of temporary absence)</small>		Address
From	To	
April 2018	Present	2427 Springmoor Circle, Raleigh, North Carolina 27615
October 2014	April 2018	6701 Pointe Vista Circle, Raleigh, North Carolina 27615

2. (check a. or check and complete b.) (NOTE: In both a. and b., "state" includes a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.)

- a. There is no other pending proceeding involving the respondent in any court or agency of a state or foreign country.  
 b. There is a pending proceeding(s) involving the respondent in the court or agency of a state or foreign country, as set forth below:

Location (County, State, and Country)	Type of Proceeding	File Number

3. A North Carolina court has jurisdiction to rule on this petition and application.  
 4. The respondent is  
 a resident of this county.  
 domiciled in this county.  
 an inpatient in the facility named above.  
 present in this county, it being impossible to determine his/her county of residence or domicile.

(Over)

5. The respondent is incompetent in that he/she lacks sufficient capacity to manage his/her own affairs or to make or communicate important decisions concerning his/her person, family, or property, as shown by the following facts: (Set forth the facts which tend to show that the respondent is incompetent. Include cause of incompetence, which may be mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or other cause and give facts demonstrating lack of capacity. Be specific.)

Respondent's husband died in August 2018. Since husband's death:

1. Respondent was the victim of gift card payment scheme.
2. Respondent attempted to transfer large sum of money to India. Respondent has no connection with any person or entity in India.
3. Respondent is believed to be under influence of previously estranged child. Since appearance of child:
  - A. Financial assistant hired for Respondent quit her employment upon concerns for personal safety based on actions of previously estranged child.
  - B. Respondent removed appointed attorney-in-fact overseeing security of funds.
4. Respondent postponing neurological and cognitive testing by referred physicians.

BY \_\_\_\_\_  
 2018 OCT 29 PM 12:05  
 CLERK OF COURT

6. The respondent's next of kin, if any, and other persons known to have an interest in this proceeding are:

Name And Address Stephanie Louise Hofeller Lizon 464 Miller Hollow Road PO Box 17 Le Roy, West Virginia 25252		Name And Address Edwin Giles Peterman PO Box 15832 Washington, D.C. 20003	
County Of Residence Jackson	Telephone No. unknown	County Of Residence Washington, D.C.	Telephone No. 202-335-4211
Relationship To Respondent Or Interest In Proceeding Child		Relationship To Respondent Or Interest In Proceeding Health Care Agent	
Name And Address Tracy William Smale 107 Kitakashiwa Park Homes Ichibankan 13-2 Kitakashiwa Dai Kashiwa-Shi, Chiba-Ken, Japan 277-0836		Name And Address _____ _____ _____	
County Of Residence Chiba Prefecture	Telephone No. 520-568-1573	County Of Residence	Telephone No.
Relationship To Respondent Or Interest In Proceeding Attorney-in-fact		Relationship To Respondent Or Interest In Proceeding	

7. General statement of respondent's assets and liabilities, including any income and receivables to which he/she is entitled:

<u>Assets</u>	<u>Liabilities</u>	<u>Income and Receivables</u>
Real Property \$ _____	Mortgage Loans \$ _____	Wages & Salaries \$ _____
Tangible Personal Property \$ _____	Other Secured Loans \$ _____	Rents \$ _____
Other Personal Property \$ _____	Unsecured Loans \$ _____	Pensions \$ _____
		Allowances \$ _____
		Insurance & Compensation \$ _____
		Other (including SSI/SSDI) \$ _____

There is a representative payee for government benefits.  Yes  No  
 There is a Durable Power of Attorney in place.  Yes  No  
 There is a Healthcare Power of Attorney in place.  Yes  No  
 There is a special needs or other trust in place.  Yes  No  
 The respondent has health insurance through Medicaid, Medicare, or a private insurer.  Yes  No

(Over)

IN THE MATTER OF

File No.

Name Of Respondent

Kathleen Hartsough Hofeller

8. CAPACITY INFORMATION

2018 OCT 29 PM 12:05

Check here if in a coma, persistent vegetative state, or non-responsive and move on to Item 9.

A. **Language and Communication** (understands/participates in conversations, can read and write, understands signs such as "keep out," "men," "women")

has capacity.  lacks capacity. Comment: \_\_\_\_\_

B. **Nutrition** (makes independent decisions re: eating, prepares food, purchases food)

has capacity.  lacks capacity. Comment: \_\_\_\_\_

C. **Personal Hygiene** (bathes, brushes teeth, uses proper hygiene when using the restroom)

has capacity.  lacks capacity. Comment: \_\_\_\_\_

D. **Health Care** (makes and communicates choices re: medical treatment/caregivers, notifies others of illness, follows medication instructions, reaches emergency health care)

has capacity.  lacks capacity. Comment: \_\_\_\_\_

E. **Personal Safety** (recognizes danger and seeks assistance as needed, protects self from exploitation/personal harm)

has capacity.  lacks capacity. Comment: \_\_\_\_\_

F. **Residential** (makes and communicates decisions re: residence/roommates, maintains safe shelter)

has capacity.  lacks capacity. Comment: \_\_\_\_\_

G. **Employment** (makes and communicates decisions re: employment, demonstrates vocational skills such as neatness and punctuality, writes or dictates application form)

has capacity.  lacks capacity. Comment: \_\_\_\_\_

H. **Independent Living** (follows a daily schedule, conducts housekeeping chores, uses community resources such as bank, store, post office)

has capacity.  lacks capacity. Comment: \_\_\_\_\_

I. **Civil** (knows to contact advocate if being exploited, understands consequences of committing a crime, registers to vote)

has capacity.  lacks capacity. Comment: \_\_\_\_\_

J. **Financial**

1. Makes and communicates decisions about paying bills and spending discretionary money, and makes change for \$1, \$5, and \$20

has capacity.  lacks capacity. Comment: \_\_\_\_\_

2. Makes and communicates decisions regarding management of a personal bank account, savings, investments, real estate, and other substantial assets

has capacity.  lacks capacity. Comment: \_\_\_\_\_

3. Can resist attempts at financial exploitation by others

has capacity.  lacks capacity. Comment: \_\_\_\_\_

(Over)

**9. RECOMMENDED GUARDIAN(S)**

Name And Address Of Recommended Guardian  
 Trudy J. Harris  
 P.O. Box 510  
 Newcastle, California 95658

Name And Address Of Recommended Guardian  
 LifeLinks  
 4812 Six Forks Rd., Suite 110  
 Raleigh, NC 27609

Of The Estate     Of The Person     General Guardian     Of The Estate     Of The Person     General Guardian

2018 OCT 29 PM 12:05  
 WIT, C.S.C.

**10. MOTION FOR APPOINTMENT OF INTERIM GUARDIAN**

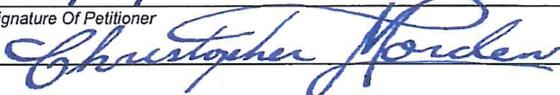
**NOTE:** In certain circumstances, an interim guardian may be needed to intervene on a respondent's behalf prior to an adjudication hearing. To request that the Court appoint an interim guardian for the respondent, complete and attach form AOC-SP-198, Motion For Appointment Of Interim Guardian.

**VERIFICATION**

I, the undersigned petitioner, have read this Petition and state that its contents are true to my own knowledge except those matters stated on information and belief, which I believe are true.

**SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME**    Date 10/29/2018

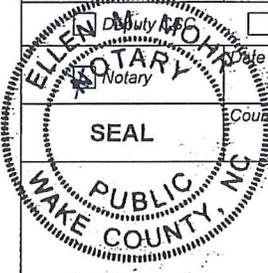
Date 10/29/18    Signature Of Person Authorized To Administer Oaths  


Signature Of Petitioner  


Assistant CSC     Clerk Of Superior Court

Date My Commission Expires 6/17/18

County Where Notarized Wake



8 S 002634

STATE OF NORTH CAROLINA

File No.

WAKE County

In The General Court Of Justice  
Superior Court Division  
Before The Clerk

IN THE MATTER OF

Full Name Of Respondent

Kathleen Hartsough Hofeller

Telephone No. Of Respondent

919-848-7427

Name And Address Of Movant

Christopher S. Morden  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Road, Suite 117  
Raleigh, North Carolina 27612

Petitioner For Adjudication Of Incompetence  Guardian Ad Litem

MOTION FOR APPOINTMENT OF  
INTERIM GUARDIAN

G.S. 35A-1114

Telephone No. Of Movant

919-876-1400

Name And Address Of Attorney For Movant

Nickolas B. Sherrill  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Road, Suite 117  
Raleigh, North Carolina 27612

Name And Address Of Treatment Facility If Respondent Is An Inpatient

Telephone No. Of Movant's Attorney

919-876-1400

State Bar No.

45521

MOTION FOR APPOINTMENT OF INTERIM GUARDIAN

**NOTE:** Do not complete unless an emergency requires immediate intervention. Do not complete if basis for the incompetency petition is special jurisdiction as set forth in G.S. 35B-18; interim guardian appointment is not available in cases of special jurisdiction.

- The movant moves that the Court appoint an interim guardian because there is reasonable cause, as shown by the following facts, to believe that the respondent is incompetent and needs an interim guardian to intervene on his/her behalf prior to the adjudication hearing in that: (Check all that apply)
  - he/she is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his/her physical well-being and requires immediate intervention.
  - there is or reasonably appears to be an imminent or foreseeable risk of harm to his/her estate that requires immediate intervention in order to protect the respondent's interest.

(Set forth the specific facts which demonstrate the need for immediate intervention. Continue on Side Two if additional space is needed.)

Respondent's husband died in August 2018. Since husband's death:

1. Respondent was the victim of gift card payment scheme.
2. Respondent attempted to transfer large sum of money to India. Respondent has no connection with any person or entity in India.
3. Respondent is believed to be under influence of previously estranged child. Since appearance of child:
  - A. Financial assistant hired for Respondent quit her employment upon concerns for personal safety based on actions of previously estranged child.
  - B. Respondent removed appointed attorney-in-fact overseeing security of funds.

(Over)

85 002634

MOTION FOR APPOINTMENT OF INTERIM GUARDIAN - continued

FILED  
2018 OCT 29 PM 12:05  
CARE COURT, NC  
BY \_\_\_\_\_

RECOMMENDED INTERIM GUARDIAN(S)

The undersigned, being duly sworn, requests that the Court, after notice and hearing, appoint the person(s) named below to serve, in the capacity indicated, as interim guardian(s) of the respondent.

Name And Address Of Recommended Interim Guardian

Trudy J. Harris  
P.O. Box 510  
Newcastle, California 95658

Name And Address Of Recommended Interim Guardian

LifeLinks  
4812 Six Forks Rd., Suite 110  
Raleigh, NC 27609

Of The Estate  Of The Person

Of The Estate  Of The Person

VERIFICATION

I, the undersigned movant, have read this Motion and state that its contents are true to my own knowledge except those matters stated on information and belief, which I believe are true.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date 10/29/2018

Date 10/29/18

Signature Of Person Authorized To Administer Oaths

*Ellen M. Moore*

Signature Of Movant

*Christopher Jordan*

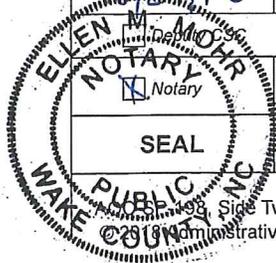
Assistant CSC  Clerk Of Superior Court

Date My Commission Expires

6/17/23

County Where Notarized

Wake



SEAL

STATE OF NORTH CAROLINA

File No.

Wake County

In The General Court Of Justice  
Superior Court Division  
Before the Clerk

FILED  
2018 OCT 29 PM 12:05

IN THE MATTER OF:

Name Of Respondent  
Kathleen Hartsough Hofeller

REQUEST AND ORDER  
FOR  
MULTIDISCIPLINARY EVALUATION

G.S. 35A-1111(a), (b)

Social Security No. Of Respondent (Last Four Digits Only)

Name And Address Of Counsel Or GAL For Respondent

Name And Address Of Petitioner In Incompetency Proceeding  
Christopher S. Morden  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Rd., Suite #117  
Raleigh, NC 27612

REQUEST

I, the undersigned, request that the Court order a multidisciplinary evaluation be performed on the respondent named above.

Name And Address Of Party Requesting Evaluation  
Christopher S. Morden  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Rd., Suite #117  
Raleigh, NC 27612

Date  
10/29/18

Signature  
*Michael Smith, Attorney for Petitioner*

FINDINGS

The Court finds

- in accordance with the above request OR  on its own motion
- that a multidisciplinary evaluation
- should  should not be performed on the respondent.

*\*will attempt appointment/Evaluation at Springmead First.*

ORDER

Based on these findings

- the request for multidisciplinary evaluation is denied.
- it is ORDERED that the following agency shall prepare and provide a current multidisciplinary evaluation of the respondent. The agency shall file the evaluation with the Clerk, and send copies to the petitioner and the counsel or guardian ad litem for the respondent not later than thirty (30) days after receipt of this order.

Name And Address Of Designated Agency

Date

Signature

Assistant CSC

Clerk of Superior Court

# **EXHIBIT 6**

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
18 SP 2634

IN THE MATTER OF )  
KATHLEEN HARTSOUGH HOFELLER )  
)  
)

INTERIM REPORT OF  
THE GUARDIAN *AD LITEM*

---

NOW COMES Erin B. Riddick, Guardian *ad litem* for Respondent Kathleen Hartsough Hofeller in this matter and reports as follows:

**PROCEDURAL HISTORY**

The undersigned is the appointed Guardian *ad litem* under N.C.G.S. §35A-1107 charged with representing the best interest of Respondent. The undersigned was appointed Guardian *ad litem* by the Wake County Clerk of Superior Court on or around October 29, 2018.

The Respondent in this proceeding is Kathleen Hartsough Hofeller, hereto referred to as "Respondent." Respondent is an elderly female who resides at 2427 Springmoor Circle, in the Springmoor Life Care Retirement Community, in Raleigh, North Carolina. The Petition for Adjudication of Incompetence and Application for Appointment of Guardian was filed on or around October 29, 2018 by Christopher S. Morden, Esq., attorney for the Respondent, hereinafter "Petitioner."

The Guardian *ad litem* has interviewed Petitioner's attorney, Nickolas B. Sherrill, Esq., in regards to the allegations contained in the Petition. The undersigned has been unable to reach Respondent for an interview, as Respondent's whereabouts are unknown at this time. The undersigned has also spoken with Allison Weaver, caregiver of Respondent at Springmoor.

The Guardian *ad litem* has not requested a multidisciplinary evaluation for this proceeding.

**BACKGROUND**

Respondent is a seventy-one (71) year old female who resides in an independent apartment in the Springmoor Life Care Retirement Community in Raleigh. Since the death of Respondent's husband in August of 2018, Petitioner alleges that Respondent has been the victim of a gift card payment scheme, and has also attempted to transfer a large sum of money to India.

Petitioner also alleges that Respondent may be under the influence of her estranged daughter, Stephanie Lizon. On November 1, 2018, after being served with a copy of the Petition and Notice of Hearing, Respondent left the Springmoor Retirement Community. It is the understanding of the undersigned that Respondent was last seen by Springmoor staff, entering a vehicle with her daughter and another individual. Since leaving Springmoor, Respondent has not been located.

It is the understanding of the undersigned that Respondent has executed both a Health Care Power of Attorney and a Durable Power of Attorney. Neither of these documents name Respondent's daughter, Stephanie, as her agent.

### **JURISDICTION AND SERVICE**

N.C.G.S. Chapter 35A defines the exclusive procedure for adjudicating an adult incompetent and the appointment of a guardian. N.C.G.S. §35A-1103 establishes that the clerk in each county shall have original jurisdiction over adjudication matters. Venue for an incompetency matter rests in the county of residence or domiciled or is an inpatient in a treatment facility. If the county of residence or domicile cannot be determined, venue shall be the county where the respondent is present.

Respondent is a resident of Wake County, North Carolina, and therefore jurisdiction before this court is proper.

N.C.G.S. §35A-1109 requires that Respondent be personally served by the sheriff of the county where Respondent is either a resident or domiciled. The statute also requires Petitioner to mail copies of the notice and petition to Respondent's next of kin or interested parties and that proof of such mailing or notice be filed with the Clerk. It appears that all parties, and all parties known to have an interest in this proceeding, have been served or have received actual notice of the proceedings.

### **APPOINTMENT OF INTERIM GUARDIAN**

N.C.G.S. §35A-1114 (b) states that the appointment of an interim guardian is appropriate when the motion sets forth facts tending to show: (1) there is *reasonable cause* to believe that the Respondent is incompetent; and (2) the Respondent is in a condition that *reasonably appears* to constitute an imminent or foreseeable risk of harm to Respondent's physical well-being or estate. The undersigned would note that the burden required under this statute is "*reasonable cause*." It is the opinion of the undersigned that "*reasonable cause*" is a low burden of proof for the petitioning party. In essence, the statute is codifying a protective function to preserve the status quo and prevent injury. It is in this light, that the undersigned offers this report:

(1) **Reasonable Cause to Believe That The Respondent Is Incompetent**

The undersigned's inquiry and recommendation focused on Respondent's reasoning ability; awareness of consequences; the ability to deliberate and weigh facts; the ability to understand benefits and consequences of behavior and choices; the ability to transact ordinary business; the ability to manage activities of daily living, such as basic personal hygiene; and, the ability to recognize and react to danger.

Due to the unknown whereabouts of the Respondent, the undersigned has been unable to interview her to determine her ability to understand and appreciate issues related to language and communication, nutrition, personal hygiene, health care, personal safety, residential, employment, independent living, and civil and financial decisions. The undersigned has, however, reviewed the Respondent's medical records that were provided by Petitioner. Records from a 2017 evaluation on the Respondent, performed by Dr. Paul Peterson with Duke Neurology, include a diagnosis of mild cognitive disorder. These records also indicated that Dr. Peterson suspected early Alzheimer's dementia, progressive type, and Respondent was recommended for a full neuropsychological evaluation. It is the understanding of the undersigned that Respondent never followed up with this recommendation.

Based on the interview Petitioner's attorney and a review of Respondent's medical records, the undersigned believes that the Petitioner has met the burden to show reasonable cause to believe that the Respondent is incompetent.

(2) **An Imminent or Foreseeable Risk of Harm to Respondent's Person or Estate**

The undersigned is concerned that both Respondent's well-being and estate are at risk without the appointment of an interim guardian. It is the understanding of the undersigned, that until recently, Respondent has had an estranged relationship with her daughter, Stephanie Lizon. Petitioner alleges that since Stephanie's return to Respondent's life, there have been attempts to have Respondent revoke Power of Attorney document. Respondent was also seen leaving Springmoor Retirement Community with her daughter, and has since been unable to be located. It is the understanding of the undersigned that an Adult Protective Services investigation on the matter is currently ongoing.

Based on the above-mentioned facts, the undersigned believes that Petitioner has met the burden to show that Respondent is in a condition that reasonably appear to constitute an imminent or foreseeable risk to her well-being and estate.

**RECOMMENDATION**

The Petitioner has the burden to prove that there is: (1) *reasonable cause* to believe that Respondent is incompetent, and (2) that Respondent is in a condition that reasonably appears to constitute an imminent or foreseeable risk of harm to her well-being or estate. The undersigned is persuaded that Petitioner has met this burden, and that it is in the best interest of Respondent

to have an interim guardian appointed, until this court can address the issue of incompetency and possible appointment of a guardian.

This the 5th day of November, 2018.

By:



Erin B. Riddick, Guardian *ad litem* for Respondent  
The Walls Law Firm, PLLC  
5511 Capital Center Drive; Ste. 180  
Raleigh, NC 27606

WLF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of November, 2018, the foregoing Interim Report of the Guardian *ad litem* was served by placing a copy in the United States mail in a postage paid envelope addressed to the following:

Kathleen Hartsough Hofeller  
Respondent  
2427 Springmoor Circle  
Raleigh, NC 27615

Edwin Giles Peterman  
Interested Party  
P.O. Box 15832  
Washington, D.C. 20003

Christopher S. Morden, Esq.  
Petitioner  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Road, Ste. 117  
Raleigh, NC 27612

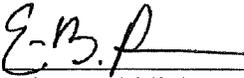
Stephanie Louise Hofeller Lizon  
Interested Party  
P.O. Box 17  
Le Roy, West Virginia 25252

Nickolas B. Sherrill, Esq.  
Attorney for Petitioner  
Monroe, Wallace & Morden, P.A.  
3225 Blue Ridge Road, Ste. 117  
Raleigh, NC 27612

Tracy William Smale  
Interested Party  
107 Kitakashiwa Park Homes Ichibankan  
13-2 Kitakashiwi Dai  
Kashiwa-Shi, Chiba-Ken, Japan 277-0836

2018 NOV 5 11 03 11  
U.S. MAIL

By:

  
Erin B. Riddick, Esq.  
Guardian *ad litem* for Respondent  
5511 Capital Center Dr.; Ste. 180  
Raleigh, NC 27606

# **EXHIBIT 7**

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF WAKE

BEFORE THE CLERK  
FILE NO. 18-SP-2634

IN THE MATTER OF KATHLEEN )  
HARTSOUGH HOFELLER )  
)

MOTION TO DISMISS

Christopher S. Morden, Petitioner in the above captioned action, by and through his undersigned attorney, moves the Court to dismiss the this matter and respectfully shows the Court:

1. On October 29, 2018, Petitioner filed a Petition for Adjudication of Incompetence against Respondent in the above captioned action.

2. On November 6, 2018, this Court found reasonable cause to believe Respondent is incompetent and appointed an interim guardian of the estate and guardian of the person.

3. The Parties have settled their differences by compromise and agreed upon an arrangement wherein the Parties are satisfied Respondent and her assets will be protected and cared for by appropriate individuals or entities.

4. The agreed upon settlement is in the process of being signed. A copy of the agreed upon settlement is attached hereto as Exhibit A and incorporated herein by reference.

WHEREFORE, Petitioner respectfully requests the Court dismiss the above captioned matter.

This the 7<sup>th</sup> day of February, 2019.

MONROE, WALLACE & MORDEN, P.A.  
Attorneys for Petitioner

By: *Nickolas B. Sherrill*  
Nickolas B. Sherrill  
3225 Blue Ridge Road, Suite 117  
Raleigh, NC 27612  
(919) 876-1400

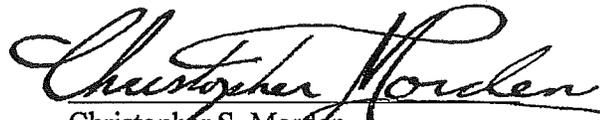


STATE OF NORTH CAROLINA

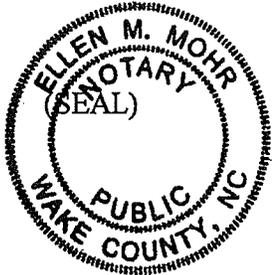
VERIFICATION

COUNTY OF WAKE

Christopher S. Morden, being first duly sworn depose and say: that he is the Petitioner in the above matter, and that he has read the foregoing motion, that the same is true of his own knowledge except as to those matters and things therein alleged upon information and belief and as to those he believes it to be true.

  
Christopher S. Morden

Sworn to and subscribed before me this the 7 day of February, 2019.



  
\_\_\_\_\_  
NOTARY PUBLIC  
Ellen M. Mohr  
Name of Notary (typed or printed)  
My Commission Expires: 6/17/23

## SETTLEMENT AGREEMENT

THIS AGREEMENT made and entered into as of the last day executed below by and between CHRISTOPHER S. MORDEN ("Petitioner") and KATHLEEN H. HOFELLER ("Respondent") and such agreement is approved and adopted by ERIN RIDDICK, EVERETT BOLTON, AND MARY WELLS IN THEIR RESPECTIVE CAPACITY AS COURT APPOINTED PARTIES (collectively with Petitioner and Respondent, "the Parties").

### RECITALS:

**WHEREAS**, on December 28, 1995, Respondent and her husband, Thomas Brooks Hofeller, entered into a Trust Agreement entitled The Hofeller Family Living Trust dated December 28, 1995, which was amended and restated on July 18, 2016 by a document entitled the First Amendment and Restatement of Trust Agreement ("the Hofeller Family Living Trust");

**WHEREAS**, Thomas Brooks Hofeller died August 16, 2018;

**WHEREAS**, pursuant to the terms of the Hofeller Family Living Trust, upon the death of Thomas Brooks Hofeller all the Trust Estate is to be distributed to The Surviving Spouse's Trust to be held, administered and distributed in accordance with the provisions of Article IX of the Hofeller Family Living Trust;

**WHEREAS**, Respondent is the current Trustee of the Hofeller Family Living Trust and, by extension, The Surviving Spouse's Trust under the terms of the Hofeller Family Living Trust;

**WHEREAS**, on October 29, 2018, Petitioner filed a Petition for Adjudication of Incompetence against Respondent in a case pending in the Superior Court of Wake County, North Carolina, bearing the file number 18-SP-2634; and

**WHEREAS**, the Parties have settled their differences by compromise and agreed upon an arrangement wherein the Parties are satisfied that Respondent and her assets will be protected and cared for; and

**NOW THEREFORE**, in consideration of the foregoing and in further consideration of the covenants, representations and warranties contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto agree to bind themselves as follows:

#### 1. SETTLEMENT.

- a. Respondent and Linda F. Johnson, as Trustee, shall execute The Kathleen H. Hofeller Irrevocable Trust dated February \_\_\_\_\_, 2019 ("the Irrevocable Trust") attached hereto as Exhibit A.
- b. Respondent shall cause all her personal assets which she has control or power of appointment over, except for those items described in Paragraphs c, d, e and f hereunder, to be transferred into the Irrevocable Trust. Such transfer shall happen as quickly as it can reasonably be done. However, for any assets which are subject to any waiting periods or

time periods for which there may be a penalty for their current transfer and/or liquidation (i.e. Certificates of Deposit which may be mid-term), Respondent may wait until they are able to be transferred without penalty.

- c. Pursuant to Article IX, Paragraph (3) of the Hofeller Family Living Trust, Respondent shall exercise her power of withdrawal and direct any such debt as contemplated by Article IX(6)(B)(i) of the Hofeller Family Living Trust to be formally forgiven at the earliest convenience of the Trustee, Kathleen H. Hofeller, but no later than one hundred and eighty (180) days from the execution of this Agreement.
- d. Pursuant to Article IX, Paragraph (3) of the Hofeller Family Living Trust, Respondent shall exercise her power of withdrawal and direct the Trustee, Kathleen H. Hofeller, to distribute the properties located in West Virginia and considered in Article IX(6)(B)(ii) of the Hofeller Family Living Trust directly to Stephanie Louise Hofeller at the Trustee's earliest convenience, but no later than one hundred and eighty (180) days from the execution of this Agreement.
- e. Pursuant to Article IX, Paragraph (3) of the Hofeller Family Living Trust, Respondent shall exercise her power of withdrawal and direct the Trustee, Kathleen H. Hofeller, to distribute the property located in Cochise County, Arizona, and considered in Article IX(6)(B)(iii) of the Hofeller Family Living Trust directly to Tracy William Smale at the Trustee's earliest convenience, but no later than one hundred and eighty (180) days from the execution of this Agreement.
- f. Respondent shall gift to Christopher Hartsough the vehicle which she currently owns half of, and the other half being left to her through the Estate of Thomas Brooks Hofeller. Respondent shall take the steps necessary to make such filings as required with the Wake County Clerk of Superior Court in order to complete this transaction.
- g. Respondent agrees to retain legal counsel to assist her in completing the items listed above in articles a-f. Upon completion of same, Respondent and/or her Attorney shall confirm in writing with Petitioner and/or Counsel for Petitioner that all items have been completed, and that Linda F. Johnson has accepted the appointment as trustee of this Trust.
- h. Upon completion of the items described in Paragraphs c and d hereinabove, The Hofeller Family Living Trust shall be amended as follows:

- i. Article I is hereby revoked in its entirety.
- ii. Article IV is hereby revoked in its entirety and a new Article IV is substituted in lieu thereof, which shall read as follows:

#### **ARTICLE IV**

**Irrevocability.** This Trust shall be irrevocable.

- iii. Article IX is hereby revoked in its entirety and a new Article IV is substituted in lieu thereof, which shall read as follows:

#### ARTICLE IV

**The Surviving Spouse's Trust Introductory Provision.**  
The Surviving Spouse's Trust shall be held, administered and distributed as follows:

(1) **Direction to Pay All Trust Estate to The Kathleen H. Hofeller Irrevocable Trust dated February \_\_\_\_\_, 2019.** The Trustee shall pay any and all property which may remain in this Trust or may be added to this Trust in the future to The Kathleen H. Hofeller Irrevocable Trust dated February \_\_\_\_\_, 2019 immediately upon its receipt.

iv. Article X, Paragraph (1) is hereby revoked in its entirety and a new Article X, Paragraph (1) is substituted in lieu thereof, which shall read as follows:

(1) **Trustee Succession.** If **Kathleen Hartsough Hofeller** should for any reason should cease to act as Trustee, then the successor or substitute Trustee who shall also serve without bond shall be **Linda F. Johnson**, of Fuquay Varina, North Carolina. If **Linda F. Johnson** resigns the office of Trustee, and she is not incompetent or unable, she may designate in writing a successor trustee. If **Linda F. Johnston** is incompetent, unable or otherwise does not designate a successor trustee, **PNC Bank, National Association** is nominated as successor trustee.

v. The Hofeller Family Living Trust shall in all other respects remain in full force and effect.

- i. Upon completion of the items described in Paragraphs c and d hereinabove, Respondent shall immediately resign as Trustee of The Hofeller Family Living Trust.
- j. In 2017, Respondent was seen by Dr. Paul Peterson with Duke Neurology, who recommended Respondent follow up with a full neuropsychological evaluation. Within ninety (90) days of the execution hereof, Respondent shall have a full neuropsychological evaluation as contemplated by Dr. Peterson. Respondent shall provide her attorney, Douglas D. Noreen, and the Trustee, Linda F. Johnson, with a written copy of the results therefrom. Respondent shall not be required to share the results therefrom with any other individual, but may do so if she wishes.
- k. The Parties agree not to bring any subsequent or further petition challenging or questioning Respondents capacity unless there is some substantial change or event regarding her health. Should any party bring such challenge without any substantial change or event regarding her health, that standard to be determined by a court of law, the party bringing such action agrees and accepts that they shall be held liable for damages in an amount equal to four times the amount of the attorneys' fees incurred by Respondent.

1. Respondent shall abide by Springmoor's notification policy as outlined on page 16 of the Resident Manual, Part B. In summary, Respondent will notify the Reception Desk when anticipating being away overnight or longer, and leave information about where Respondent can be reached.
2. **RESOLUTION OF INCOMPETENCY PROCEEDING.** Upon execution of this Agreement, Petitioner shall inform the Court of an agreement and that Petitioner will no longer be proceeding with such petition. Should the Court require a hearing, Petitioner shall inform the Court of Petitioner's desire to no longer proceed with the Petition and shall be barred from presenting any evidence to the Court.
3. **MUTUAL RELEASE.** Following the execution of this Agreement and the performance and deliveries contemplated herein, the Petitioner and Respondent, for himself or herself, and for each of their respective heirs, beneficiaries, executors, administrators, personal representatives, parents, subsidiaries or affiliated corporate entities, current or former officers, directors, shareholders, employees, insurers, attorneys, legal representatives, agents, assigns, successors and other persons or entities acting on their behalf or claiming through or under them or any of them hereby fully release, discharge, quit and exonerate each other and their beneficiaries, executors, administrators, personal representatives, parents, subsidiaries or affiliated corporate entities, current or former officers, directors, shareholders, employees, insurers, attorneys, legal representatives, agents, assigns and successors, of and from any and all claims, causes of action, demands, rights, damages, costs, attorney fees, debts, contracts, losses of service, expenses, compensation and sums of money, which any Party now has or claims to have, on account of, relating to or growing out of any claim, however denominated, including, without limitation, any claim asserted as part of the controversy, and any claim, however denominated which could have been asserted as part of the controversy, and any claim, however denominated relating in any way, directly or indirectly, to the subject matter of the controversy, or any claim arising out of any transaction, occurrence, undertaking, agreement, event, status, act or omission from the beginning of time to the effective date of this Agreement. Notwithstanding the foregoing, the Parties do not release each other from their respective executory obligations under this Agreement.
4. **AUTHORITY.** Each party represents and warrants to the other that they have the power and authority to enter into this Agreement and to perform the obligations under this Agreement; that they have not assigned to any other person or entity nor pledged, encumbered, or granted any form of security interest in or to any of the claims, rights, actions, causes of action, or interests, including without limitation, any that are released and/or dismissed under this Agreement.
5. **NO ADMISSIONS.** The Parties acknowledge and agree that this Agreement is in compromise of disputed claims, that the compromises are not to be construed as admissions of liability on the part of any party and that said Parties deny liability and culpability of any type, and intend merely to avoid litigation and buy their peace.
6. **VOLUNTARY ACT.** The Parties acknowledge, represent and agree, each with the other, that they have read this Agreement and the documents referenced herein in their

entirety, have consulted their respective attorneys concerning the same, if desired, and have signed the same as their respective free and voluntary act.

7. **SURVIVAL AND BENEFITS.** The warranties, representations and covenants contained in this Agreement shall survive the closing anticipated herein. This Agreement shall be binding upon and inure to the benefit of the Parties and each of their respective successors, assigns, heirs, executors, administrators, personal representatives, beneficiaries, parents, subsidiaries, affiliated corporate entities, current or former officers, directors, shareholders, employees, insurers, attorneys, legal representatives, agents, assigns, successors and other persons or entities acting on their behalf or claiming through or under them.
8. **NO ORAL MODIFICATIONS.** This Agreement may not be altered, amended, modified or rescinded in any way except by written instrument duly executed by all of the Parties.
9. **ENTIRE AGREEMENT.** The Parties agree and acknowledge that this Agreement is not based upon any factual, legal, or other representation or promise made by or on behalf of either of the Parties not contained in this Agreement. The Parties acknowledge and agree that if the facts or law with respect to which this Agreement as executed are, or may be found hereafter to be, other than or different from the facts or law in that connection now believed by either of the Parties to be true, the Parties expressly accept and assume the risk of such possible difference and agree that all provisions of this Agreement shall be and remain effective notwithstanding any such difference. This Agreement contains the entire understanding between the Parties regarding the subject matter hereof and supersedes any prior understanding or agreement between the Parties respecting such subject matter. There are no representations, warranties, arrangements, understandings, or agreements, oral or written, relating to the subject matter of this Agreement, except as fully expressed herein. The terms of this Agreement are contractual and not a mere recital.
10. **FEES.** The Trustee of the Irrevocable Trust, Linda F. Johnson, shall be directed to pay the attorneys' fees incurred by Monroe, Wallace and Morden, P.A. on behalf of Petitioner, Howard, Stallings, From, Atkins, Angell, & Davis on behalf of Respondent, and Fiduciary Litigation Group on behalf of Stephanie Hofeller, an interested party, from the Irrevocable Trust upon the presentation of final bills.

Christopher Hartsough has, since the inception of the proceeding, visited and stayed with Respondent to act as an advisor and in addition covered certain expenses on behalf of Respondent when she was unable to access funds. He shall submit a request for reimbursement for his expenses and include copies of vouchers, account statements, or other supporting evidence of his personal expenses during his stay and those amounts advanced for Respondent. The Trustee shall reimburse such expenditures, which, in the sole discretion of the Trustee, are deemed appropriate upon review of said vouchers, account statements, or other supporting evidence.

11. **GOVERNING LAW.** All questions concerning this Agreement and performance

hereunder shall be governed by and resolved in accordance with the laws of the State of North Carolina.

12. **HEADINGS.** The headings in this Agreement are included only for convenience and reference, said headings are not to be used in construing this Agreement and have no binding effect upon the Parties hereto.
13. **EXECUTION IN COUNTERPARTS.** This Agreement may be executed in any number of counterparts and by the parties hereto in separate counterparts, each of which counterpart, when so executed and delivered, shall be deemed an original, and all of which counterparts, taken together, shall constitute one and the same Agreement. Any party's faxed and/or scanned signature on this Agreement shall be treated as an original.
14. **SEVERABILITY.** If, after the date of the execution of this Agreement, any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws effective during the term of this Agreement, such provision shall be fully severable. In lieu thereof, there shall be added a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and as may be legal, valid, and enforceable, provided that the new provision is approved in writing by the Parties before its addition.

IN WITNESS WHEREOF, the Parties, having read the foregoing Agreement and fully understanding it, voluntarily execute this Agreement effective as of the last date below written.

\_\_\_\_\_ [Seal]                      Date: \_\_\_\_\_  
**CHRISTOPHER S. MORDEN, PETITIONER**

\_\_\_\_\_ [Seal]                      Date: \_\_\_\_\_  
**KATHLEEN H. HOFELLER, RESPONDENT**

\_\_\_\_\_ [Seal]                      Date: \_\_\_\_\_  
**ERIN RIDDICK, GUARDIAN AD LITEM FOR KATHLEEN HOFELLER**

\_\_\_\_\_ [Seal]                      Date: \_\_\_\_\_  
**EVERETT BOLTON, COURT APPOINTED INTERIM GUARDIAN OF ESTATE FOR  
KATHLEEN HOFELLER**

\_\_\_\_\_[Seal] Date: \_\_\_\_\_  
MARY WELLS, WAKE COUNTY ATTORNEY FOR COURT APPOINTED INTERIM  
GUARDIAN OF PERSON

\_\_\_\_\_[Seal] Date: \_\_\_\_\_  
NICKOLAS B. SHERRILL, ATTORNEY FOR PETITIONER

\_\_\_\_\_[Seal] Date: \_\_\_\_\_  
DOUGLAS H. NOREEN, ATTORNEY FOR RESPONDENT

# **EXHIBIT 8**

STATE OF NORTH CAROLINA

File No.

18-CVS-14001

WAKE County

In The General Court Of Justice  
 District  Superior Court Division

COMMON CAUSE et al.,

Additional File Numbers

VERSUS

REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, ET AL.

SUBPOENA

G.S. 1A-1, Rule 45; 8-59, -61, -63; 15A-801, -802

Party Requesting Subpoena

State/Plaintiff  Defendant

NOTE TO PARTIES NOT REPRESENTED BY COUNSEL: Subpoenas may be produced at your request, but must be signed and issued by the office of the Clerk of Superior Court, or by a magistrate or judge.

TO Name And Address Of Person Subpoenaed  
 Stephanie Hofeller Lizon o/o Tom Sparks Esq.  
 Fiduciary Litigation Group  
 223 S. West St., Suite 900  
 Raleigh NC 27603  
 Telephone No. 919-229-0845

Alternate Address

Telephone No.

YOU ARE COMMANDED TO: (check all that apply)

- appear and testify, in the above entitled action, before the court at the place, date and time indicated below.
- appear and testify, in the above entitled action, at a deposition at the place, date and time indicated below.
- produce and permit inspection and copying of the following items, at the place, date and time indicated below.
- See attached list. (List here if space sufficient)

Name And Location Of Court/Place Of Deposition/Place To Produce  
 Edwin M. Speas, Jr. and Caroline P. Mackie  
 Poyner Spruill LLP  
 301 Fayetteville St., Suite 1900  
 Raleigh NC 27601

Date To Appear/Produce, Until Released  
 02/22/2019

Time To Appear/Produce, Until Released  
 9:00  AM  PM

Date

2/13/2019

Name And Address Of Applicant Or Applicant's Attorney  
 Edwin M. Speas, Jr. and Caroline P. Mackie  
 Poyner Spruill LLP  
 301 Fayetteville St., Suite 1900  
 Raleigh NC 27601

Signature

Caroline P. Mackie

- Deputy CSC
- Assistant CSC
- Clerk Of Superior Court
- Magistrate
- Attorney/DA
- District Court Judge
- Superior Court Judge

Telephone No. Of Applicant Or Applicant's Attorney

RETURN OF SERVICE

I certify this subpoena was received and served on the person subpoenaed as follows:

- By  personal delivery.  registered or certified mail, receipt requested and attached.
- telephone communication by Sheriff (use only for a witness subpoenaed to appear and testify).
- telephone communication by local law enforcement agency (use only for a witness subpoenaed to appear and testify in a criminal case).

NOTE TO COURT: If the witness was served by telephone communication from a local law enforcement agency in a criminal case, the court may not issue a show cause order or order for arrest against the witness until the witness has been served personally with the written subpoena.

I was unable to serve this subpoena. Reason unable to serve:

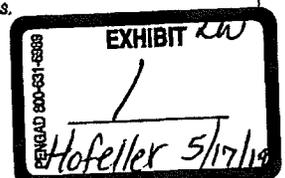
Service Fee \$ <input type="checkbox"/> Paid <input type="checkbox"/> Due	Date Served	Name Of Authorized Server (type or print)	Signature Of Authorized Server	Title/Agency
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NOTE TO PERSON REQUESTING SUBPOENA: A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party. This does not apply in criminal cases.

AOC-G-100, Rev. 2/18

(Please see reverse side)

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**NOTE: Rule 45, North Carolina Rules of Civil Procedure, Subsections (c) and (d).**

**(c) Protection of Persons Subject to Subpoena**

- (1) **Avoid undue burden or expense.** - A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.
- (2) **For production of public records or hospital medical records.** - Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.
- (3) **Written objection to subpoenas.** - Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or tangible things may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:
- The subpoena fails to allow reasonable time for compliance.
  - The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
  - The subpoena subjects a person to an undue burden or expense.
  - The subpoena is otherwise unreasonable or oppressive.
  - The subpoena is procedurally defective.
- (4) **Order of court required to override objection.** - If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.
- (6) **Motion to quash or modify subpoena.** - A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.
- (6) **Order to compel expenses to comply with subpoena.** - When a court enters an order compelling a deposition or the production of records, books, papers, documents, electronically stored information, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, electronically stored information, or tangible things specified in the subpoena.
- (7) **Trade secrets; confidential information.** - When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.
- (8) **Order to quash expenses.** - When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

**(d) Duties in Responding to Subpoena**

- (1) **Form of response.** - A person responding to a subpoena to produce records, books, documents, electronically stored information, or tangible things shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.
- (2) **Form of producing electronically stored information not specified.** - If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it ordinarily is maintained or in a reasonably useable form or forms.
- (3) **Electronically stored information in only one form.** - The person responding need not produce the same electronically stored information in more than one form.
- (4) **Inaccessible electronically stored information.** - The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, after considering the limitations of Rule 28(b)(1a). The court may specify conditions for discovery, including requiring the party that seeks discovery from a nonparty to bear the costs of locating, preserving, collecting, and producing the electronically stored information involved.
- (5) **Specificity of objection.** - When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, electronically stored information, or other tangible things not produced, sufficient for the requesting party to contest the objection.

**INFORMATION FOR WITNESS**

**NOTE: If you have any questions about being subpoenaed as a witness, you should contact the person named on Page One of this Subpoena in the box labeled "Name And Address Of Applicant Or Applicant's Attorney."**

**DUTIES OF A WITNESS**

- Unless otherwise directed by the presiding judge, you must answer all questions asked when you are on the stand giving testimony.
- In answering questions, speak clearly and loudly enough to be heard.
- Your answers to questions must be truthful.
- If you are commanded to produce any items, you must bring them with you to court or to the deposition.
- You must continue to attend court until released by the court. You must continue to attend a deposition until the deposition is completed.

**BRIBING OR THREATENING A WITNESS**

It is a violation of State law for anyone to attempt to bribe, threaten, harass, or intimidate a witness. If anyone attempts to do any of these things concerning your involvement as a witness in a case, you should promptly report that to the district attorney or the presiding judge.

**WITNESS FEE**

A witness under subpoena and that appears in court to testify, is entitled to a small daily fee, and to travel expense reimbursement, if it is necessary to travel outside the county in order to testify. (The fee for an "expert witness" will be set by the presiding judge.) After you have been discharged as a witness, if you desire to collect the statutory fee, you should immediately contact the Clerk's office and certify your attendance as a witness so that you will be paid any amount due you.

ATTACHMENT TO FEBRUARY 13, 2019 SUBPOENA TO STEPHANIE LIZON

DEFINITIONS

For purposes of this Subpoena, the following definitions shall apply except as otherwise required by context:

1. The term "document," whether singular or plural, is used herein in the broadest sense of the term and means each and every writing of whatever nature, and shall mean the original and any draft or copy that differs in any way from the original of any written or graphic matter, however produced or reproduced, and shall mean, without limitation, each and every tangible thing from which information can be processed or transcribed from disk, diskette, compact disc, tape or some other electronic media or data computations. The term includes, but it is not limited to, letters, electronic mail ("email")<sup>1</sup> and any attachments, messages, facsimile transmissions, telegrams, memoranda, telex messages, reports, books, agreements, correspondence, contracts, financial statements, instruments, ledgers, journals, accountings, minutes of meetings, payrolls, studies, calendar and diary entries, notes, charts, schedules, tabulations, maps, work papers, brochures, evaluations, memoranda of telephone conversations, audio and video tape recordings, internal communications, bills, tapes, computer printouts, drawings, designs, diagrams, exhibits, photographs, reproductions, any marginal comments appearing on any document and copies of documents which are not identical duplicates of the originals (e.g., because handwritten or "blind copy" notes or notations appear thereon or are attached thereto). The term "document(s)" includes the defined term "Electronically-Stored Information," which is defined below. The term "document" specifically seeks the production of Electronically-Stored Information in native format.
2. The term "Electronically-Stored Information" or "ESI" shall mean any and all electronic data or information stored on a computing device. Information and data is considered "electronic" if it exists in a medium that can only be read through the use of computing device. This term includes but is not limited to databases; all text file and word-processing documents (including metadata); presentation documents; spreadsheets; graphics, animations, and images (including but not limited to "JPG, GIF, BMP, PDF, PPT, and TIFF files); email, email strings, and instant messages (including attachments, logs of email history and usage, header information and "deleted" files); email attachments; calendar and scheduling information; cache memory; Internet history files and preferences; audio; video, and audiovisual recordings; voicemail stored on databases; networks; computers and computer systems; computer system activity logs; servers; archives; back-up or disaster recovery systems; hard drives; discs; CD's; diskettes; removable drives; tapes; cartridges and other storage media; printers; scanners; personal digital assistants; computer calendars; handheld wireless devices; cellular telephones; pagers; fax machines; and voicemail systems. This term includes but is not limited to on-screen information, system data, archival data, legacy data, residual data, and metadata that may not be readily viewable or accessible, and all file fragments and backup files.

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<sup>1</sup> One email address used by Dr. Hofeller at relevant times was [celticheal@aol.com](mailto:celticheal@aol.com). This subpoena covers responsive emails at that email address and any other email addressed used by Dr. Hofeller at relevant times.

3. This Subpoena further requests the forensic copying and examination of ESI, as well as for the production of ESI. The purpose of obtaining ESI from you is to obtain all meta-data, residual data, file fragments, and other information that is not reasonably accessible for forensic examination of authenticity. Any storage device that contains, or may contain, ESI requested shall be produced for forensic copying and examination. Forensic copying usually may be done on-site, without taking possession of your computing devices, at minimal inconvenience, cost, or interruption to you. The forensic copying will eliminate the need for you to search all storage devices or sift through a vast amount of information. Once forensic copies are made, the parties may agree on search terms to reduce costs and to preserve privacy of non-discoverable information. You are encouraged to comply reasonably and to confer immediately with the undersigned counsel for an agreement on each party's respective rights and responsibilities.
4. The term "redistricting," if not otherwise qualified, shall be construed to mean the redistricting of the North Carolina State Senate and State House districts in 2011 and 2017.

**LIST OF DOCUMENTS AND THINGS TO BE PRODUCED  
PURSUANT TO THIS SUBPOENA**

1. All documents of, created by, or held by Thomas Hofeller in your possession, custody, or control relating to or concerning the redistricting of the North Carolina State Senate and State House in 2011 or 2017, including but not limited to, all correspondence, reports, notes, memos, data, electronic files, maps, charts, and/or graphs relating to or concerning the redistricting of the North Carolina State Senate and State House in 2011 or 2017.
2. All documents, notes, or correspondence reflecting any instructions, criteria, or requests of members of the North Carolina General Assembly regarding the redistricting of the North Carolina State Senate and State House in 2011 or 2017.
3. All documents, notes, or correspondence containing, relating to, or evidencing the first version and each subsequent version of any redistricting maps and/or proposed redistricting maps, or any parts thereof, prepared by or consulted by Thomas Hofeller for purposes of the redistricting of the North Carolina State Senate or State House in 2011 or 2017, as well as any information (including but not limited to ESI) evidencing the date on which such maps (or parts thereof) were created and/or modified.
4. Any storage device in your possession, custody, or control that contains, or may contain: (1) any and all ESI requested in the preceding paragraphs; (2) and/or any ESI relating to any documents requested in the preceding paragraphs.

**CERTIFICATE OF SERVICE**

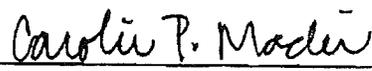
I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to the following persons at the following addresses which are the last addresses known to me:

Amar Majmundar  
Stephanie A. Brennan  
NC Department of Justice  
P.O. Box 629  
114 W. Edenton St.  
Raleigh, NC 27602  
amajmundar@ncdoj.gov  
sbrennan@ncdoj.gov  
*Counsel for the State of North Carolina and State Board of  
Elections and Ethics Enforcement and its members*

Phillip J. Strach  
Michael McKnight  
Alyssa Riggins  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.  
4208 Six Forks Road, Suite 1100  
Raleigh, NC 27609  
Phillip.strach@ogletree.com  
Michael.mcknight@ogletree.com  
Alyssa.riggins@ogletree.com

E. Mark Braden  
Richard B. Raile  
Trevor M. Stanley  
Baker & Hostetler, LLP  
Washington Square, Suite 1100  
1050 Connecticut Ave., N.W.  
Washington, DC 20036-5403  
rraile@bakerlaw.com  
mbraden@bakerlaw.com  
tstanley@bakerlaw.com  
*Counsel for the Legislative Defendants*

This the 13th day of February, 2019.

  
\_\_\_\_\_  
Caroline P. Mackie

# **EXHIBIT 9**

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
No. 1:15-cv-00399-TDS-JEP

SANDRA LITTLE COVINGTON, *et al.*,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, *et al.*,

Defendants.

**PLAINTIFFS' RESPONSE TO  
MOTION TO QUASH**

NOW COME SANDRA LITTLE COVINGTON, *et al.*, Plaintiffs herein, and respond to the Legislative Defendants' Motion to Quash or Modify Subpoena as follows:

1. This Court invited the parties to address four specific issues in connection with Plaintiffs' motions a) to establish a timeline for the adoption of remedial districts and b) to order special elections in the affected districts. Notice 3-4 (Doc. 153, June 9, 2017). Of particular relevance here, those issues included:

- Describing what steps, if any, the State of North Carolina has taken to satisfy its remedial obligations under this Court's August 15, 2016, Memorandum Opinion and Order; and
- If the State has failed to take any meaningful steps to satisfy its remedial obligations under this Court's August 15, 2016, Memorandum Opinion and Order, addressing whether the State is entitled to any additional time to comply with the Court's August 15, 2016, Memorandum Opinion and Order.

*Id.* at 4.

2. The Legislative Defendants ignored the Court's request in June, and instead opposed Plaintiffs' request to the U.S. Supreme Court to expedite the issuance of a certified copy of its opinion and judgment, asserting that they needed the full twenty-five days accorded by the Supreme Court Rules to determine if they intended to file a motion for reconsideration of the Court's unanimous summary affirmance of the trial court's judgment in this case. *See* Response to Application for Issuance of Mandate Forthwith, at 8, *North Carolina v. Covington*, No. 16A1202, 16A1203 (Doc. 156-1, June 13, 2017). No such motion for reconsideration was filed. Defendants' opposition was intended only to delay this Court resuming jurisdiction and to thereby further delay consideration of Plaintiffs' motions for additional relief.

3. In their statement filed on July 6, 2017, the Legislative Defendants indicate that they have appointed new redistricting committees and envision "completing the redistricting process no later than November 15, 2017." Leg. Defs. Position Statement 2 (Doc. 161). However, there is evidence in the record in this case to suggest that the Legislative Defendants have already drawn remedial districts and are using the ability to delay making those districts public to obtain a political advantage.

4. On October 28, 2016, a Declaration of Thomas B. Hofeller, Ph.D. [hereinafter "Hofeller Decl."] was filed with the Court, containing a "Map 3 Comparison of 2011 Enacted to Optimum Senate County Groups" and a "Map 6 Comparison of 2011 Enacted to Optimum House County Groups". Hofeller Decl. 18, 21 (Doc. 136-1, Oct. 28, 2016). (Copies attached hereto as Exhibit 1). Map 3 shows the whole county groupings "which must be used to conform to the Optimum WCG structure" divided into three

classes: those colored green “will remain unchanged”, those colored yellow “will also remain unchanged but the districts within them must be redrafted” and those colored white are changed groupings “requiring that all the districts within them must be redrafted”. Hofeller Decl. 6-7. In short, according to Dr. Hofeller, these are the county groupings that must be used in order to comply with the Whole County Provisions of the North Carolina Constitution. All that remains to be done is to subdivide those counties and groupings that contain more than one district.

5. Plaintiffs subpoenaed Representative Lewis to ask him to describe the 2016 redistricting process for drawing remedial congressional districts that was completed in two weeks, and to inform the court, based on his personal knowledge, about the extent to which Dr. Hofeller has already subdivided the county groupings containing multiple districts in the two maps that Defendants submitted to this court last October. The answers to those questions are relevant to both of the issues referenced above from the Court’s Notice. That is, if Dr. Hofeller has already drawn the remedial districts in the multi-district groupings shown in Map 3 and Map 6, it indicates what steps have been taken to comply with the Defendants’ remedial obligations and it is relevant to determining what additional time is needed to comply with a remedial order. Representative Lewis and the other legislative leaders in control of the redistricting process are, to the best of Plaintiffs’ knowledge, the only people who have this information.

6. Rather than a “blatant fishing expedition” designed to “chill the policymaking rights of Rep. Lewis and other legislators”, Plaintiffs sought information relevant to the issues currently before the court that only those legislators would know.

7. Plaintiffs’ most recent brief includes the legal authority for their contention that Representative Lewis cannot waive his legislative privilege concerning this matter in order to offer evidence defending the districts drawn by the legislature but then assert it when issues regarding an appropriate remedy arise. *See* Pls. Supplemental Br. on Remedy 8-9 (Doc. 173, July 21, 2017). Alternatively, these are circumstances in which the privilege should give way to the court’s need for the information. *Id.*

8. Given that Representative Lewis has asserted legislative privilege regarding what steps the legislature has taken to date and whether new districts have, in fact, already been drawn by Dr. Hofeller, thus denying this Court information relevant to the balancing test it is charged with performing, the court should draw the inference that completing those maps in two weeks is entirely possible. Indeed, given the fact that Map 3 and Map 6 demonstrate that the clusters for the remedial maps are already drawn, it would also be a reasonable inference to draw that the remedial maps are already completely drawn. Even if the Court grants the motion to quash, the Court is entitled to make any necessary inferences on the issue in question in favor of the party seeking disclosure. “[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.” *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972); *see also Dist. 65, Distributive Workers of Am. v.*

*NLRB*, 593 F.2d 1155, 1163-64, 1164 n.21 (D.C. Cir. 1978) (affirming an adverse inference against an employer alleged to have committed discriminatory discharge where the employer failed to put on testimony of the discharged employees' supervisors to bolster its defense that the discharges were the result of non-discriminatory performance issues). “[P]rivilege cannot be used both as a sword and as a shield.” *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 44 (D.D.C. 2009) (citation omitted); *Recycling Solutions, Inc. v. District of Columbia*, 175 F.R.D. 407, 408 (D.D.C. 1997); see also *United States v. Rylander*, 460 U.S. 752, 758 (1983). This rule derives from concerns for fundamental fairness and just judicial outcomes.

9. The assertion of privilege to shield information from discovery “poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth.” *United States v. 4003-4005 5th Ave, Brooklyn NY*, 55 F.3d 78, 82 (2d Cir. 1995) (quoting *SEC v. Greystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir. 1994)). Thus, because privilege assertions hinder courts’ truth-seeking goal, courts have prevented litigants from using privilege assertions as “a tool for selective disclosure”—that is, allowing in evidence from a resisting party that may be “helpful to his cause” but then allowing that resisting party to assert “privilege as a shield” to prevent meaningful inquiry on the subject matter in question to assess the truthfulness of the party’s limited public explanations. *Computer Network Corp. v. Spohler*, 95 F.R.D. 500, 502 (D.D.C. 1982).

10. While not required to do so, a court can properly draw an adverse inference against a party claiming a privilege to resist producing relevant evidence. For instance,

an inference will be drawn against a party to a civil suit that invokes the Fifth Amendment privilege against self-incrimination. *See Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976); *see also Int'l Chemical Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 497 (5th Cir. 2003). Thus, the Court here would be well within its discretion to draw an adverse inference from Rep. Lewis' invocation of legislative privilege, particularly where it impedes this Court's investigation of any potential burden on the state relating to special elections.

11. While Plaintiffs' subpoena is well-grounded in the facts and seeks highly relevant information, this Court still has ample evidence in the record before it that the legislature would not be unduly burdened by being required to produce remedial maps promptly.

Respectfully submitted this the 26th day of July, 2017.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date I have electronically filed the foregoing **PLAINTIFFS' RESPONSE TO MOTION TO QUASH** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 26th day of July, 2017.

/s/ Anita S. Earls  
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# EXHIBIT 1



