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*."[1] 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.[2] Evidence that Dr. Hofeller may have been drawing draft

[1] 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)).

[2] 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."[3] 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

[3] *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."[4] 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

[4] 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.")[5]; Wendy Underhill, In Memoriam: Redistricting Pioneer Tom Hofeller, National Conference of State Legislatures: The NCSL Blog (Aug. 21, 2018).[6]

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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[5] https://thehill.com/homenews/state-watch/402489-pioneer-of-modern-redistricting-dies-at-75.
[6] 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).[7] 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).[8]

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 Gazzette Mail (Apr. 30, 2013).[9]

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[7] https://www.baltimoresun.com/news/bs-xpm-2004-12-17-0412170426-story.html.
[8]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.
[9]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*

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).[10] According to Mr. Daley, Ms. Lizon went to Common Cause afterword, 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).[11]

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

[11] 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 preceeding paragraphs." *Id.* ¶ 4. Notwithstanding the limitation to information "requested in the preceeding 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.[12]

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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[12] 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).[13]

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.[14] 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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[13] https://thinkprogress.org/thomas-hofeller-trump-census-racist-rigging-5ab9f81864bd/.

[14] 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).[15]

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

[15] 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).[16]

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[16] 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.[17]

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

[17] 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 by 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.[18]

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

[18] 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).[19] 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

[19]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"),[20] N.C. State Bar (Jan. 13, 1995)[21]; *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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[20] "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.").

[21] 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.[22] 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.

[22] 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)[23]; *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

[23] 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.[24]

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.[25] 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.[26] Fed. R. Civ. P. 26(b)(4)(C).

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[24] 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.

[25] 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.

[26] 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)[27] 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.

[27] "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,

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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;

[X] 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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This the 17th day of June, 2019. By: _____
Phillip Strach, NC Bar No. 29456