

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

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

**DEFENDANTS’ REPLY IN
SUPPORT OF MOTION FOR
LEAVE TO MODIFY
SCHEDULING ORDER**

Defendants submit this reply in further support of their motion to modify the Scheduling Order entered in this matter on October 9, 2015 (D.E. 25) and amended by the Court on December 18, 2015 (D.E. 46) and show the Court:

ARGUMENT

I. The Depositions of Scott Falmlen and Democracy Partners are Relevant to Defendants’ Defense of this Case and Should be Permitted.

Contrary to plaintiffs’ claims, defendants have uncovered ample circumstantial evidence of privity between the *Dickson* plaintiffs and the plaintiffs in this action that warrants modifying the scheduling order to allow the depositions of Scott Falmlen and Democracy Partners. Plaintiffs’ claim that the discovery period should not be extended for this reason because defendants have “adduced zero evidence” of possible privity, is plainly not true. (D.E. 70, pp. 4, 12-13) As stated in its Motion, and in previous filings, *Dickson* plaintiff Doug Wilson recruited at least nine plaintiffs in this case. (D.E. 64; 68, p. 2) This directly contradicts plaintiffs’ assertion that plaintiffs “did not consult,

collaborate, or even discuss” the litigation with anyone connected to *Dickson*. (D.E. 70, p. 4)¹

Mr. Wilson testified that he was instructed to recruit plaintiffs by Mr. Falmlen. (D.E. 68-3, pp. 7-8) Mr. Wilson even produced emails in which Mr. Falmlen provided the criteria for selecting plaintiffs and implied that he, or an organization he was a part of, had been behind the *Dickson* and *Harris* cases as both occurred within the three-year window referenced in Mr. Falmlen’s email. (D.E. 68, p. 3; D.E. 68-3, pp. 47-48) (stating that, “I hope I was able to recap everything that’s been going on in the redistricting effort over the past three [and] a half years . . .”) Other emails documented Mr. Wilson’s own personal recruiting efforts, one of which stated that an organization named Democracy Partners was bringing this case with the help of “Democratic Legislators” who had “targeted key State House and Senate Districts.” (*Id.* at 3; D.E. 68-3, pp. 49-50) At a minimum, this information supports the possibility that a third party is controlling both *Dickson* and this case and is sufficient to warrant modifying the scheduling order to permit these two depositions.

¹ Plaintiffs brief contains multiple inaccuracies about plaintiffs’ deposition testimony. For instance, plaintiffs reiterate a cursory contention that plaintiffs are ordinary citizens who *all* joined this lawsuit because they believed they were harmed by racial gerrymandering. (D.E. 70, p. 2-3; *cf.* D.E. 63, p.1) However, as defendants have already shown in previous filings, this is not supported by the testimony given. (*See* D.E. 64, p. 4 fn. 1) Likewise, plaintiffs’ counsel claims that each plaintiff was provided a copy of the complaint in this case. (D.E. 70, p.1 and fn. 1) Despite this claim, multiple plaintiffs—including several who did not testify to exigent personal circumstances like the two plaintiffs featured in their brief—testified under oath that they had never been provided with one. (*See* D.E. 64, p. 2)

Plaintiffs argue the fact that Mr. Wilson only allegedly contacted nine plaintiffs refutes any theory that Mr. Falmlen, the North Carolina Democratic Party (“NCDP”), or some other third party are the real parties in interest here and in *Dickson* and, as a result, that further depositions are not necessary. (D.E. 70, pp. 11-12) But just yesterday, lead counsel for defendants received an email from Senate Democratic Leader Dan Blue and House Democratic Leader Larry Hall soliciting donations for a group called “The Democracy Project II” to “help us win this fight” in both this case and the *Harris* matter. (See Exhibit 1) In the email, Senator Blue and Representative Hall state that, “[s]imply put, *we* need your help...[c]arrying this fight to the courts is an expensive proposition...*we can win* this battle.” (*Id.*) (emphasis added) Based on this and the myriad evidence uncovered in this action demonstrating that third parties, rather than the named plaintiffs, are controlling this action, defendants should be entitled to question Mr. Falmlen and Democracy Partners about their involvement in this case and *Dickson*. If their testimony supports plaintiffs’ allegation that this defense is an “imagined hypothesis” and “fanciful theory,” then allowing these depositions will serve the interests of judicial economy by foreclosing the need for evidence on this defense to be presented at trial. As a result, the Court should allow these depositions.

A. Plaintiffs’ Contention that Defendants’ Res Judicata Defense Has No Legal Basis is False.

In their brief, plaintiffs essentially contend that defendants must first be able to successfully prove their asserted defense on the merits as a prerequisite to being allowed to take further discovery to develop it. (D.E. 70, pp. 8-15). Defendants know of no

authority which requires this. Whether defendants can prevail in their defense by meeting every prong of the *Lassiter* exception is not something which should be determined in a non-dispositive discovery motion. Regardless, the evidence already uncovered shows that defendants can possibly satisfy the exception and the cases plaintiffs cite are distinguishable from the current litigation.

1. Defendants will likely be able to show a single entity controls both *Dickson* and the instant case.

First, plaintiffs claim that defendants should not be allowed to take further discovery because they “cannot show a single person or entity controls...[the] redistricting case[s].” (D.E. 70, p. 9) But Mr. Wilson’s testimony makes it likely that Scott Falmlen and Democracy Partners—or some person or entity associated with them—is the controlling party here. Defendants should be allowed to take their depositions to determine if this is true and the extent of their involvement in this case.

Plaintiffs argue that *Carolina Power* is “instructive” on this point. (D.E. 70, p. 10) However, in that case, the court found there was not sufficient privity because “there [was] no *allegation* that...other claimants...either directly [or indirectly] participated” in the prior case or that other claimants “openly and actively, and with respect to some interest of their own, assumed and managed” the previous case. *Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co.*, 238 N.C. 679,693, 79 S.E.2d 167, 176 (1953) (emphasis added). The court further opined that there was no *allegation* “that any one exercised control over [the previous plaintiff’s] lawsuit, save himself and the counsel whom he had employed.” *Id.* at 693, 79 S.E.2d at 177 (emphasis added). Here,

defendants have made those allegations. As a result, the *Carolina Power* Court's reasoning actually supports defendants' argument for privity.

Further, in *Williams v. Peabody*, the North Carolina Court of Appeals found control sufficient to establish privity under *Lassiter* when a corporation was merely an "alter ego" of its sole proprietor who had previously received an adverse adjudication. *Williams v. Peabody*, 217 N.C. App. 1, 10, 719 S.E.2d 88, 95 (2011). The evidence suggests that plaintiffs here, who clearly are not controlling the litigation, are proxies for Mr. Falmlen, Democracy Partners, the NCDP, or some other person or entity, in the same way the *Peabody* corporation was for its sole proprietor.

Moreover, *Lassiter* itself likely supports defendants' defense. In *Lassiter*, the court found that a father, acting as an agent on behalf of his son, "took every action he could have taken as if he had been a defendant himself." 246 N.C. 34, 39-40, 97 S.E.3d 492, 497 (1957). In doing so, the Court stated that he was "necessarily...defending [the case]...as much for his own protection as for that of his son." *Id.* at 40, 97 S.E.2d at 497. The Court found that the father was precluded from later bringing his own action because, during the original case, "all [of the] rights and privileges [of his son, the original plaintiff] were not only available to, but exercised by" him in the previous litigation. *Id.* If Mr. Falmlen, Democracy Partners, or someone aligned with them, directed or controlled *Dickson* and are directing the current litigation, the same reasoning applies here and plaintiffs' claims should be barred.

Plaintiffs also contend that defendants cannot establish sufficient control because, unlike in *Cline v. McCullen*, "there has been no suggestion that Plaintiffs were involved

in strategizing the earlier *Dickson* litigation.” (D.E. 70, p. 14); *Cline*, 148 N.C. App. 147, 151, 557 S.E.2d 588, 591 (2001) But defendants’ contention has always been that the parties who “strategized” this litigation are likely the same parties who are controlling and directing *Dickson*. (D.E. 59, p. 9; D.E. 64, pp. 6-7) Mr. Falmlen’s statement to Mr. Wilson about the “redistricting effort over the past three [and] a half years” supports this contention and it is logical to assume that he was also involved in *Dickson*. Defendants should be allowed to depose him and Democracy Partners to find out the nature of their involvement.

2. At this stage of litigation, defendants are not required to prove the existence of a proprietary interest, nonetheless sufficient proprietary interests exist to establish privity.

Plaintiffs also claim that defendants cannot establish privity because they have not identified “any non-party against whom preclusion is sought [that] has a proprietary interest in both cases.” (D.E. 70, p. 14) As an initial matter, it is illogical to expect defendants to establish the precise proprietary interests that Mr. Falmlen or Democracy Partners might have in this case and *Dickson* without first deposing them.

Regardless, sufficient interests exist despite the fact that plaintiffs conflate proprietary and financial interest for purposes of their opposition. (D.E. 70, pp. 14-15) The *Lassiter* exception requires a person who is not a party, but controls an action, to have a “proprietary interest *or* financial interest in the judgment or in the determination of a question of fact or a question of law with reference to the same subject matter.” *Lassiter*, 246 N.C. at 39, 97 S.E.2d at 496 (emphasis added). The real party in interest in *Dickson* and the instant case likely has both. With regard to a financial interest,

“[s]ection 1988 makes the prevailing *party* [rather than the lawyer] eligible for a discretionary award of attorneys’ fees.” *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) (internal citations omitted) (emphasis in the original). Thus, defendants should have the right to discovery who the real party in interest is in this litigation. Further, Mr. Falmlen, Democracy Partners, the NCDP, and the unnamed “Democratic Legislators” arguably have a proprietary interest in electing more democrats to the North Carolina General Assembly by forcing a re-drawing of the current redistricting plans. This may further show that a non-party has a proprietary interest in this litigation sufficient to establish privity.

3. Plaintiffs’ remaining legal arguments are equally unpersuasive.

Plaintiffs also argue that defendants should not be allowed to take the depositions at issue here because they did not pursue discovery regarding privity “in the years of litigation in state court” and that it is now “simply too late in the process for Defendants” to seek such information. (D.E. 70, p. 10) Tellingly, plaintiffs do not explain how defendants should have anticipated during the discovery period in *Dickson* that they would be subjected to a second lawsuit in federal court involving the same claims and most of the same districts that are at issue here.

Plaintiffs’ contend that the depositions at issue should not be allowed because the *Lassiter* exception has never been analyzed in the context of defendants’ *res judicata* defense theory. (*Id.*)² While defendants are not aware of a North Carolina case involving

² To the extent that plaintiffs suggest in footnote 5 that defendants have changed theories in pursuing preclusion, that is not accurate. (D.E. 70, p. 13 n.5) In *Harris*, defendants

facts quite like this one, other circuits have dealt with analogous situations. The case law supporting defendants' theory is described in their previous filings seeking to depose counsel for plaintiffs. (D.E. 59, pp. 7-9; D.E. 64, pp. 4-7); *See Taylor v. Sturgell*, 553 U.S. 880, 893-95 (2008); *Montana v. U.S.*, 440 U.S. 147, 154; *Alpert's Newspaper Delivery, Inc. v. N.Y. Times Co.*, 876 F.2d 266, 270 (2nd Cir. 1989); *Ellentuck v. Klein*, 570 F.2d 414, 425-26 (2nd Cir. 1978).³ Plaintiffs' contention that defendants should not be allowed to gather evidence in support of a defense simply because no North Carolina court has dealt with the same factual scenario presented here, if taken to its logical conclusion, would prevent a court from ever deciding any cases of first impression.

II. Defendants Have Shown Good Cause to Modify the Scheduling Order.

Defendants have good cause in requesting leave to modify the scheduling order. “[T]he touchstone of good cause under Rule 16(b) is diligence.” *Davenport v. Elks*, No. 5:13-CT-3209-B, 2015 WL 7306446, at *2 (E.D.N.C. Nov. 19, 2015). “Thus, a court may modify the schedule on a showing of good cause if [the deadline] cannot be met despite the diligence of the party seeking the extension.” *Id.* Here, defendants have been

believe that *one* ground, of the several possible grounds, on which those plaintiffs' claims are barred is through associational privity. In *Dickson*, the NC NAACP argued that they had standing to sue on behalf of its membership. The *Harris* plaintiffs were both NAACP members. Since the NC NAACP purportedly sued on their behalf, the *Harris* plaintiffs should have been barred from re-litigating the same claims that were dismissed in *Dickson*. However, if *Harris* was also controlled and directed by Mr. Falmlen or Democracy Partners, or whoever controlled *Dickson*, their claims also could be barred on that basis.

³ North Carolina state courts may rely upon the decisions of federal courts, including the reasoning of federal decision, in construing and applying North Carolina law. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449-50, 385 S.E.2d 473, 479 (1989) (internal citations omitted).

diligent in their efforts to identify the parties who may have information reasonably related to their defenses in the discovery period allowed by the Court's Scheduling Order. Although there are 31 named plaintiffs in this case, it still proceeded on Court's standard discovery track with a four-month discovery period. (D.E. 25)

Defendants served written discovery requests on plaintiffs on November 17, 2015 but plaintiffs did not first serve responses to these discovery requests until January 8, 2016, after requesting an extension of time from defendants. After that and through February 10, 2016, plaintiffs supplemented their written discovery responses no less than five times, sometimes immediately before a plaintiff's deposition was taken. Defendants began taking plaintiffs' depositions on February 4, 2016, and continued taking them through the end of the discovery period on February 19, 2016. Two occurred after that date.

Until Mr. Wilson's name surfaced repeatedly in the first depositions of plaintiffs taken, defendants had no reason to depose him. Defendants were limited in the Scheduling Order to five depositions beyond those of the named plaintiffs and did not have the ability to depose all of the *Dickson* plaintiffs to see what involvement, if any, they may have had in this action. Even if defendants could have done so, it would not have made sense, as a matter of judicial economy or otherwise, to take depositions of all *Dickson* plaintiffs absent evidence of their involvement in this case. In any event, as soon as defendants learned of Mr. Wilson's involvement in this case, on February 8, 2016, they served Mr. Wilson with a subpoena to appear for a deposition and produce related documents. Defendants took Mr. Wilson's deposition 11 days later on February

19, 2016, the last day of the discovery period. The names of Mr. Falmlen and Democracy Partners and information regarding their involvement in this case and other redistricting matters first surfaced in Mr. Wilson's deposition and were not mentioned in any depositions of plaintiffs.

Before engaging in any third-party discovery, defendants prudently waited until they had deposed a significant number of plaintiffs in this action to determine whether the information needed for their *res judicata* defense could likely be obtained from parties to this litigation. After it was clear that this information was not known by any of the plaintiffs in this case, they proceeded with Mr. Wilson's deposition. This case is not analogous to either *Akeva, LLC v. Mizuno Corp*, 212 F.R.D. 306, 310 (M.D.N.C. 2002) or *Chalmers v. Petty*, 136 F.R.D. 399 (M.D.N.C. 1991) because defendants have uncovered evidence in Mr. Wilson's deposition to support their theory that a third party, Democracy Partners—rather than the named plaintiffs—is “bringing” this litigation in conjunction with Mr. Falmlen and unnamed “Democratic Legislators” and may have been involved in *Dickson*. Plaintiffs have not—and cannot—show that defendants have been dilatory or less than diligent in pursuing discovery in this action. Further, allowing these depositions serves the interests of judicial economy as it will allow the parties to prepare for trial by knowing the full scope of defendants' *res judicata* defense and the involvement of Mr. Falmlen and Democracy Partners in this matter and *Dickson* in advance of trial.

This the 4th day of March, 2016.

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

/s/ Thomas A. Farr

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO MODIFY SCHEDULING ORDER** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 4th day of March, 2016.

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EXHIBIT 1

Farr, Thomas A.

From: Democratic Leaders Dan Blue and Larry Hall <DemocracyProjectNC@gmail.com>
Sent: Thursday, March 03, 2016 10:05 AM
To: Farr, Thomas A.
Subject: ICYMI: Important Redistricting Update

If you're having trouble viewing this email, you may [see it online](#).

Share this:   

The Democracy Project

Working for fair and legal redistricting maps in North Carolina

Dear Friend,

The Federal Courts have done what our hyper-partisan North Carolina Supreme Court would not do – interpret the Voting Rights Act and the United States Constitution in a way consistent with their meaning!

Earlier this month, a 3-judge Federal Court panel ruled that North Carolina's congressional districts were unconstitutionally drawn by the Republicans in the General Assembly. The Court found that the GOP illegally used race as the predominant factor in drawing the districts that packed minority voters into three of the thirteen districts.

Just as importantly, another 3-judge Federal Court will hear arguments beginning April 11th on the constitutionality of our state legislative districts. The facts in this case are exactly the same and we are confident that those districts will be ruled unconstitutional, as well.

Click here to help us win this fight and get sanity and fairness back into our redistricting process.

There is no question that we have the law on our side and have the evidence to show that these illegally drawn maps are not in the best interest of the people of North Carolina.

In fact, in the congressional district case, the 3-judge panel noted:

“There is strong, perhaps overwhelming direct evidence in this case that the general assembly prioritized a mechanical racial target above all other districting criteria...”

We need your help now to have the resources to be heard in court! Our fight requires retaining the best legal counsel and expert witnesses to show how the Republican maps do not comply with the law.

These illegal maps cannot stand. North Carolina has a history of making all the “best of” lists. Best place to live...best place to learn...best place for businesses to thrive. The progress that has been made in North Carolina...in public education...in our community colleges and universities...in building a state that leads rather than follows...has been put at risk.

As on so many issues, the GOP has simply over-reached – and they've broken both state and federal law. Tell the GOP that the Constitution and law still matter here in North Carolina.

Simply put, we need your help. Carrying this fight to the courts is an expensive proposition, but critical for the future of our state. Please give whatever you can today. We can win this battle for the people of North Carolina with your help.

Thank you in advance for your help.



Dan Blue
Senate Democratic Leader



Larry Hall
House Democratic Leader

PLEASE CLICK HERE TO GIVE TODAY

The Democracy Project II (TDP) is a 501(c)(4) organization whose purpose is to assist in the creation of legal electoral districting maps required to be drawn as a result of the 2010 census. TDP can receive funds from individuals, businesses/corporations, labor unions, and foundations. Contributions to TDP are not tax deductible.

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