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.	**PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO DEPOSE COUNSEL FOR PLAINTIFFS**

Pursuant to Local Rule 7.2 Plaintiffs submit the following response brief in opposition to Defendants' Motion for Leave to Depose Counsel for Plaintiffs.

INTRODUCTION

The plaintiffs in this public interest litigation are ordinary citizens from across the state who, similar to plaintiffs in *Shaw v. Reno*, and more recently in *Harris v. McCrory*, *Dickson v. Rucho*, and *NAACP v. State*, are offended by racially-segregated redistricting schemes. They believe that "by assigning voters to certain districts based on the color of the skin, states risk engaging in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests and will prefer the same candidate at the polls.'" *Harris v. McCrory*, 2016 U.S. Dist. LEXIS 14581, at *2 (M.D.N.C. Feb. 5, 2016) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). Plaintiffs' counsel here are lawyers at the Southern Coalition for Social Justice (SCSJ) and Poyner Spruill. As plaintiffs have testified, counsel is representing the plaintiffs at no cost to the plaintiffs. *See, e.g., Dep. of Antoinette Mingo*, p. 19, lines 9-11 (Q: "And

are you responsible for paying any portion of the legal fees." A: "No, I'm not.") (copy attached as Exhibit A). As expressly permitted by the Rules of Professional Conduct, third parties are providing some financial support for this public interest litigation. As required by the Rules of Professional Conduct, the plaintiffs and third party funders have been advised that the plaintiffs are the clients, the plaintiffs control and direct the litigation, and counsel's loyalties are only to them and not to third party funders.[1]

There are, as the Court is aware, related cases pending in both state and federal courts also contesting the constitutionality of redistricting legislation enacted by the General Assembly in 2011. In the related federal litigation, *Harris*, cited above, Poyner Spruill is local counsel with Perkins Coie for the two citizens who are plaintiffs in that case; SCSJ is not counsel in the *Harris* litigation. As defendants know, the costs of that litigation are supported by a third party, not the individual plaintiffs. In the related state court public interest litigation, *Dickson* and *NAACP*, the fifty-one individual plaintiffs in *Dickson* are represented by Poyner Spruill and the forty-six individual and four institutional plaintiffs in *NAACP* are represented by SCSJ. No plaintiff in either case is responsible for paying the costs in those cases. To the extent the costs of those lawsuits have been paid, those costs have been paid through grants and donations by third parties. Similarly, in *Dickson* and *NAACP*, the plaintiffs and third party funders were both

[1] SCSJ and Poyner Spruill each have retainer letters that were prepared on their respective letterhead. If the Court so directs, counsel would submit copies of their respective engagement letters to the Court for in camera review. *See Raymond v. Police Benevolent Association*, 365 N.C. 94, 94, 721 S.E.2d 923, 924 (2011) (in camera review is "proper mechanism").

advised that plaintiffs are the clients and counsel's representational duties were solely to the plaintiffs and not to third-party funders.

Recognizing that the redistricting maps challenged in this litigation were built on a foundation of sand, Defendants now seek to salvage those maps by making plaintiffs' counsel witnesses. Their theory is that "a common force financing and controlling the *Dickson* litigation is financing and controlling the instant case such that Plaintiffs' claims are barred." (Defs' Br. at 9, D.E. #59). Lacking any evidence to support this vast conspiracy theory, they seek to depose the undersigned counsel about the following broad topics:

> 1. The identities of any individual(s), group(s), and/or organization(s), including any plaintiffs, responsible for paying the legal fees and costs in [*Dickson, et al. v. Rucho, et al.*, Nos. 11 CVS 16898 and 11 CVS 16940 ("*Dickson*") / *North Carolina State Conference of Branches of the NAACP v. North Carolina*., Nos. 11 CVS 16896 and 11 CVS 16940 ("*NC NAACP*")].
>
> 2. The identities of any individual(s), group(s), and/or organization(s), including any plaintiffs, responsible for paying the legal fees and costs in the instant action ("*Covington*").
>
> 3. The identities of any individual(s), group(s), and/or organization(s), including plaintiffs, responsible for raising funds or assisting to raise funds to pay legal fees and costs in [*Dickson*/*NC NAACP*].
>
> 4. The identities of any individual(s), group(s), and/or organization(s), including plaintiffs, responsible for raising funds or assisting to raise funds to pay legal fees and costs in *Covington*.
>
> 5. The method(s) used to solicit individual contributions to pay for legal fees and costs in [*Dickson*/*NC NAACP*] and the identities of any individual(s), group(s),

and/or organization(s), including plaintiffs, responsible for making these solicitations.

6. The method(s) used to solicit individual contributions to pay for legal fees and costs in *Covington* and the identities of any individual(s), group(s), and/or organization(s), including plaintiffs, responsible for making these solicitations.

7. The identities of any individual(s), group(s), or organization(s) recruited and/or solicited to participate as a plaintiff in [*Dickson*/*NC NAACP*] and if so the individual(s), group(s), or organization(s) involved with recruiting and/or soliciting the identified parties.

8. The identities of any individual(s), group(s), or organization(s) recruited and/or solicited to participate as a plaintiff in *Covington* and if so the individual(s), group(s), or organization(s) involved with recruiting and/or soliciting the identified parties.

9. The identities of all plaintiffs in [*Dickson*/*NC NAACP*] that initiated communications with [Poyner Spruill/SCSJ] seeking to retain [Poyner Spruill/SCSJ] as counsel, and identities of all NC NAACP plaintiffs with whom [Poyner Spruill/SCSJ] and/or some other individual(s), group(s), or organization(s) initially contacted for purposes of the lawsuit.

10. The identities of all plaintiffs in *Covington* that initiated communications with [Poyner Spruill/SCSJ] seeking to retain [Poyner Spruill/SCSJ] as counsel, and identities of all *Covington* plaintiffs with whom [Poyner Spruill/SCSJ] and/or some other individual(s), group(s), or organization(s) initially contacted for purposes of the lawsuit.

11. Whether the plaintiffs in [*Dickson*/*NC NAACP*] were responsible for paying fees and costs and if not who was responsible.

12. Whether the plaintiffs in *Covington* are responsible for paying fees and costs and if not who will be responsible.

(Defs' Br. Ex. 5, D.E. # 59-5).

The theory relied on by defendants to depose plaintiffs' counsel, which would subvert practices authorized by State Bar Rules and practices broadly used to support public interest litigation, has been expressly discredited by the U.S. Supreme Court. Defendants' motion should be denied.

STATEMENT OF FACTS

The thirty-one voters who are plaintiffs in this action are individuals who reside in the districts challenged as unconstitutional racial gerrymanders. Plaintiffs filed this lawsuit following the U.S. Supreme Court's decision in *Alabama Legislative Black Caucus v. Alabama*, 525 U.S. ___ , 135 S. Ct. 1257 (2015). No plaintiff in this action has served as a plaintiff in the redistricting lawsuits referenced by defendants and only one plaintiff was a party in an unrelated voting rights lawsuit.[2]

Plaintiffs in this action are represented by SCSJ, a 501(c)(3) organization based in Durham and lawyers from Poyner Spruill, LLP, based in Raleigh. SCSJ partners with communities of color and economically-disadvantaged communities to defend and advance their political, social, and economic rights. SCSJ does this through three primary activities: (1) community organizing and coalition building; (2) policy advocacy and research; and (3) litigation and pre-litigation legal advocacy. Per its requirements under federal law and to maintain its 501(c)(3) status, SCSJ makes available for public

[2] Plaintiff Julian Pridgen, Sr. responded to defendants' eighth interrogatory, which inquired as to involvement in previous lawsuits, as follows: "Intervenor in Laroque v. Holder, approximately 2008-2012, dealt with doing away of partisan voting in Kinston, N.C…the system of elections went from candidates identifying party choice to candidates not being able to identify party affiliations."

inspection its 990 forms from the last three years (which are also freely available online at https://www.guidestar.org/profile/26-0688375). Those forms indicate the organization's annual income and expenses and summarize its fundraising activities.

SCSJ is funded by grants and contributions from many sources to support its public service activities including litigation. None of those funds are earmarked for this specific lawsuit. SCSJ in turn asked Poyner Spruill to serve as co-counsel for the *Covington* plaintiffs. To the extent funds are available Poyner Spruill will be paid for those services.

As of the date of this filing, defendants have deposed twenty-nine out of the thirty-one plaintiffs in this case. They have asked each plaintiff how that plaintiff came to be involved with the lawsuit, who is responsible for the payment of legal fees, and whether each plaintiff has any association or relationship with any plaintiff in *Dickson*, *NAACP*, or *Harris*.

On Tuesday, February 9, 2016, ten days before the deposition cut-off date and after the written discovery period had passed, counsel for defendants notified plaintiffs' counsel that it intended to depose a 30(b)(6) representative of both SCSJ and Poyner Spruill. Counsel for plaintiffs replied promptly that they would not consent to such a deposition. The next day, Defendants filed the instant motion that seeks extraordinary relief, unsupported by precedent or the ethics rules of this state. Defendants' motion also continues to mischaracterize the procedural posture of the *Dickson*/*NAACP* cases as a

loss when defendants know that plaintiffs in that action will be filing a petition for certiorari in the U.S. Supreme Court.

ARGUMENT

I. DEFENDANTS SEEK TO DEPOSE PLAINTIFFS' COUNSEL ABOUT PRACTICES AUTHORIZED BY RULES OF THE N.C. STATE BAR, RECOGNIZED AS A PART OF THE PUBLIC POLICY OF THE STATE, AND PROTECTED BY THE U.S. CONTSITUTION

A. The Practices About Which Defendants Seek to Depose Plaintiffs' Counsel Are Authorized by The Rules Of Professional Conduct of the State Bar

Plaintiffs' counsel's loyalties are to the clients, the individual plaintiffs from across the state in this action, not to any third parties providing financial contributions. Defendants imply that any third party who may be paying attorneys' fees or in any way funding SCSJ's or Poyner Spruill's public interest litigation efforts must also be exerting control sufficient to establish privity. This is tantamount to accusing plaintiffs' counsel of violating the North Carolina Rules of Professional Conduct. Rule 1.8 of the Rules of Professional Conduct dictates "[a] lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Rule 5.4(c) also provides that a third party may not interfere with a lawyer's independent professional judgment. Consistent with the ethics rules, the fact that a third party might be covering the cost of litigation has no bearing on who is "controlling" the litigation, as

plaintiffs' counsel is bound to act, and is acting, on behalf of their clients' best interests without control or direction from third parties.

There is nothing sinister about third-party funding of public interest litigation. In 98 Formal Ethics Opinion 14, the State Bar determined that a lawyer may participate in the solicitation of funds from third parties to finance litigation, so long as the lawyer is honest in her dealings. Importantly, the State Bar determined that a contributor may remain anonymous if the disclosure is not otherwise required by law. *Id.* at Op. 8. The N.C. Bar 2006 Formal Ethics Opinion 12 explores the circumstances under which a lawyer may obtain litigation funding from a financing company. The State Bar determined that a lawyer may do so, and, in fact, Rule 1.8 specifically allows attorneys to advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. *See also In re S.E. Hotel Props. Ltd. P'ship*, 151 F.R.D. 597 (W.D.N.C. 1993) (recognizing same).

B. The Practices About Which Defendants Seek to Depose Plaintiffs' Counsel are Protected by the United States Constitution

Defendants' expeditions into the source of funding of this suit, if successful, would likely chill or deter the future associational rights of those who have donated to or fundraised for SCSJ (and future donors) in support of this litigation. While defendants are correct in asserting that usually any relevant, non-privileged matter is discoverable to support their defense under Fed. R. Civ. P. 26(b)(1), the U.S. Supreme Court held in *NAACP v. Alabama* that compelling disclosure of information that would infringe upon

one's constitutional freedom to associate and maintain "*privacy in one's associations*" must be held to a higher standard. 357 U.S. 449, 462 (1958) (emphasis added). *See also In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 479 (10th Cir. 2011) ("[T]he Supreme Court has recognized a privilege, grounded in the First Amendment right of association, not to disclose certain associational information when disclosure may impede future collective expression.").

While *NAACP v. Alabama* addressed the disclosure of membership lists, the existence of a First Amendment privilege "turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities." *Perry v. Schwarzenegger*, 591 F.3d. 1147, 1162 (9th Cir. 2010) (holding that disclosure of internal campaign communications would constitute a substantial intrusion on First Amendment interests). It is consistent with Supreme Court jurisprudence, then, that disclosure of the identity of persons who have participated in funding this litigation and the funding methods they used should not be compelled. Requiring such a disclosure would potentially subject the donors to inconvenience through subpoenas and exposure, leading to unwillingness by funders and potential funders to provide support in the future. Anonymous donations to non-profit organizations are permitted under IRS regulations. Those donors will stop contributing if they cannot protect the confidentiality of their associations.

Because the discovery requested by defendants infringes upon the associational freedoms of plaintiffs, persons, and entities who support SCSJ, the lenient standard of Fed. R. Civ. P. 26(b)(1) does not apply; rather, defendants "must show that the information sought is *highly* relevant to the claims or defenses in the litigation." *Perry*, 591 F.3d at 1161 (emphasis added). As discussed below, the identity of individuals responsible for financing the instant litigation has no bearing on whether there is privity between the current plaintiffs and different plaintiffs in previous redistricting litigation. The information sought by defendants, therefore, is too "attenuated from the issue" to overcome the asserted intrusion on First Amendment interests. *Id.; see also Tree of Life Christian Schools v. City of Upper Arlington*, 2012 U.S. Dist. LEXIS 32205, at *9 (S.D. Ohio Mar. 12, 2012) (district court denied defendants' attempt to depose the confidential donor of plaintiffs as "the disclosure Defendant seeks will have a chilling effect on Plaintiff's *First Amendment* associational rights.").

C. Third Party Funding of Public Interest Litigation Is A Recognized Part of North Carolina's Public Policy

In *Raymond v. N.C. Police Benevolent Ass'n*, 365 N.C. 94, 721 S.E.2d 923 (2011), the N.C. Supreme Court considered whether agreements between an association of police officers and an attorney to represent a police officer in an employment dispute were discoverable.

> Recognizing an attorney-client relationship in this context is essential to the role of advocacy and benevolent associations like the SSPBA. Without such a relationship confidential statements

> made by individuals seeking assistance from advocacy organizations would be unprotected and discoverable in litigation. The possibility of disclosure of such communications would chill the flow of information to these groups and hinder their purpose of promoting and protecting the interests of members and individuals.

Id. at 100, 721 S.E.2d at 927.

Similarly, here, requiring plaintiffs' counsel to reveal the identity of third party funders or their methods of fundraising would chill the flow of information to these groups and hinder their goal of promoting justice. Such disclosure would violate public policy.

II. DEFENDANTS' THEORY FOR SEEKING TO DEPOSE PLAINTIFFS' COUNSEL HAS BEEN REJECTED BY THE U.S. SUPREME COURT

Defendants seek to depose plaintiffs' counsel on the theory that some unknown person or entity is funding and thereby controlling the *Dickson* and *NAACP* litigation and this litigation so that the non-final decision of the N.C. Supreme Court in *Dickson* and *NAACP* bars the *Covington* litigation even though no plaintiff in this litigation is a plaintiff in *Dickson* or *NAACP*. In other words, defendants postulate that this unknown person or entity is the "virtual plaintiff" and indeed the only plaintiff in *Dickson*, *NAACP*, and *Covington*.

The U.S. Supreme Court has rejected the notion of "virtual representation." "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that

everyone should have his own day in court.'" *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (citing *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)). The Court held "virtual representation" was a violation of the due process clause, creating "*de facto* class actions at will." *Id.* at 901.

Instead, the *Taylor* court delineated six specific, narrow circumstances under which nonparty privity exists, two of which apparently are asserted by defendants: adequate representation and control. *Id.* Defendants, however, fail to explain how plaintiffs fit either of these exceptions. Instead, they conflate the two to deliver an argument supported by decades-old, out-of-jurisdiction precedent equivalent to the lenient, outdated "virtual representation doctrine."

In order to demonstrate that a previous litigant adequately represented a party to a later suit, it must be shown not only that there was a commonality of interests, but also that the later party had notice of the previous case, and that the previous litigants "understood their suit to be on behalf of [the] absent." *Richards v. Jefferson Cnty., Ala.* 517 U.S. 793, 802 (1996). Defendants do not assert in their motion that the *Covington* plaintiffs had such notice of *Dickson* and *NAACP* to allow them to "choose for [themselves] whether to appear or default, acquiesce or contest," or that the plaintiffs in *Dickson* and *NAACP* understood themselves to be representing the interests of the *Covington* plaintiffs. *Id.* at 799.

Similarly, defendants cannot demonstrate that privity exists here through control. Though they repeatedly allege that financing a suit is the equivalent to control, this is not and cannot ethically be the case, as discussed above. Courts have also held that membership in the same organization and retention of the same counsel together are insufficient to demonstrate privity through control. *See Perez-Guzman v. Garcia*, 346 F.3d 229 (1st Cir. 2003) (allowing a federal challenge to an election-notarization requirement by an individual member of a political party to move forward, despite a previous challenge by the political party and where both suits were brought by the same attorney) ("appellants engage in a largely didactic exercise, asserting that *Cruz* stands for the proposition that *any* member of a political party has control over litigation brought by that party…We reject that notion."); *Gonzalez v. Banco Cent., Corp.*, 27 F.3d 751, 759 (1st Cir. 1994) (courts "have refused to find substantial control merely because a nonparty retained the attorney who represented a party in the earlier action"). While utilizing the same attorney may "create[] the impression that the interests represented are identical," *Conte v. Justice*, 996 F.2d 1398 (2d Cir. 1993), it does not tend to indicate that a nonparty had "the power – whether exercised or not – to call the shots." *Gonzalez*, 27 F.3d at 758.

Defendants' reliance on Second Circuit case law in support of their arguments on lack of "literal privity" is telling. (Defs' Br. at 8-9, D.E. # 59). Defendants' Second Circuit district court and circuit court cases were all decided *prior* to the Supreme Court's

decision in *Taylor*. *Taylor* unequivocally holds that the theory on which defendants seek to depose plaintiff's counsel is invalid, as it rejected any expansion of the privity doctrine based on the rule against nonparty preclusion. *Taylor*, 553 U.S. at 885.

Defendants' theory that common donor funding creates privity leads to an absurd result. If funding determined privity, then all clients and funders of any public interest law organization would be in privity with each other because foundations typically provide general support funding. Such organizations, under defendants' theory, would, in essence, be filing class actions any time they file a lawsuit.

As in *Tree of Life*, 2012 U.S. Dist. LEXIS 32205, permitting inquiries of the sort defendants seek here would have a chilling effect on the ability of donors to support public interest litigation. Moreover, defendants imply there is something improper about SCSJ's actions in seeking individual plaintiffs to pursue public interest litigation, but this practice has long been approved by the courts. *See, e.g.*, *In re Primus*, 436 U.S. 412 (1978) (attorney's solicitation of client on behalf of public interest organization was proper).

As indicated, even under proper analysis, no privity exists in the instant case. Because defendants fail to assert a cognizable exception to the general rule against nonparty preclusion, and instead attempt to employ an outdated and rejected doctrine to pursue confidential and burdensome discovery, their motion should be denied.

III. THE *HARRIS* COURT REJECTED AN ESSENTIALLY IDENTICAL THEORY WHEN POSITED BY THE SAME DEFENSE COUNSEL AS IN THIS CASE

On February 11, 2014, the *Harris* defendants filed a Motion to Stay, Defer, or Abstain. *Harris v. McCrory*, 1:13-cv-949 (M.D.N.C.), D.E. #43. Their arguments focused mainly on federal abstention principles, but they further argued that:

> [I]t is likely that Defendants will be able to show, following discovery, that the interests of the plaintiffs in this litigation were aligned with and represented by the plaintiffs in [*Dickson*], particularly if any of the Plaintiffs here are members of any of the [o]rganizational [p]laintiffs that are plaintiffs in [*Dickson*].

The three-judge panel considered the motion, analyzed and rejected the defendants' main abstention argument, and characterized the defendants' other abstention arguments as "meritless." *Harris*, D.E. #65 at 8-10.

On September 17, 2015, the *Harris* defendants filed a Renewed Motion to Stay, Defer, or Abstain. (*Harris*, D.E. # 105). They included a lengthier section discussing principles of *res judicata* and collateral estoppel, in which their basic contention—just as in this case—was that "[w]hen the Court hears testimony in this case, it will understand that the [p]laintiffs' lawyers are directing this litigation, not [p]laintiffs, who were recruited to serve as nominal [p]laintiffs." *Harris*, D.E. # 106 at 10; *see generally id*. at 10-13. The court considered the motion and informed the parties during a final pretrial conference on October 9, 2015 that the court was denying the motion. Later that day, the oral ruling was memorialized in an ECF minute order (copy attached as Exhibit B).

IV. GRANTING THIS MOTION COULD RESULT IN PLAINTIFFS' COUNSEL BEING DISQUALIFIED FROM REPRESENTING PLAINTIFFS, WHICH WOULD BE MANIFESTLY UNJUST

Finally, defendants' request that they be permitted to depose plaintiffs' counsel implicates another rule of professional ethics, namely the prohibition on an attorney appearing as counsel in a trial for a party if they are likely to be a witness in the case. *See* N.C. Rules of Professional Conduct, Rule 3.7. Allowing defendants' motion would disqualify lead counsel for the plaintiffs from acting as an advocate at the trial of this matter. None of the exceptions to Rule 3.7 apply in these circumstances sufficient to avoid this outcome.

While depositions of opposing counsel may not be prohibited in every circumstance, courts are deeply skeptical of ordering such intrusions, and, in fact, this Court applies a four-part test to determine whether such a deposition will be permitted. *See Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431 (M.D.N.C. 2001). To be permitted to take the deposition of opposing counsel, the defendants must "demonstrat[e], among other considerations, that (1) there are no persons other than the attorney available to provide the information; (2) other methods, such as written interrogatories, would not be as effective; (3) the inquiry will not invade attorney-client privilege or work product; and (4) the information is of such relevance that the need for it outweighs the disadvantages and problems inherent in deposing a party's litigation

attorney." *Id.* at 434. In this case, Defendants cannot satisfy prongs three and four of the test.

There is a strong justification for applying this test stringently. As this Court has stated:

> [E]xperience teaches that countenancing unbridled depositions of attorneys constitutes an invitation to delay, disruption of the case, harassment, and perhaps disqualification of the attorney. In addition to disrupting the adversarial system, such depositions have a tendency to lower the standards of the profession, unduly add to the costs and time spent in litigation, personally burden the attorney in question, and create a chilling effect between the attorney and client.

N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D.N.C. 1987) (citations omitted).

As stated above, Rule 3.7 of the North Carolina Rules of Professional Conduct prohibits lawyers to testify in a trial for which they are acting as advocate. Exceptions to this rule are only to be granted under very specific circumstances. In fact, defendants cite cases that support the contention that deposing a party's litigation attorney is such an enormous burden that the typically stringent threshold to grant protective orders is lowered to virtually none. *See id.* at 434 ("this Court has determined that a request to depose a party's litigation counsel, by itself, constitutes good cause for obtaining a . . . protective order.").

In order to overcome the enormous burden such a deposition creates, the information must be "of such relevance that the need for it outweighs the disadvantages

and problems inherent in deposing a party's litigation attorney." *Static Control Components, Inc.*, 201 F.R.D. at 433. Because the Rules of Professional Conduct dictate that third-party payment cannot alter the attorney-client relationship, and since plaintiffs' counsel must, and does, act in accord with these rules, information relating to the payment of fees does not meet this court's relevance standard. Additionally, while "fees and expenses incurred" may be considered non-privileged information, *who* is paying those fees is a privileged matter in this context. (Defs' Br. at 11, D.E. # 59) (quoting *N.F.A. Corp.*, 117 F.R.D. at 85 n.2). Fees are privileged attorney-client information if disclosure would reveal the "motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided." *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999) (quoting *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992)).

Further, defendants' claim that the information sought in their motion is akin to the information sought in *Condon v. Petacque*, 90 F.R.D. 53, 55 (N.D. Ill. 1981), is incorrect. (Defs' Br. at 12-13, D.E. # 59). First, *Condon* was cited in a footnote in *N.F.A. Corp*. (referenced *supra*) and *N.F.A. Corp. denied* the attempt to depose the attorney at issue. 117 F.R.D. at 86. Second, the *Condon* court categorized the material sought, records from the attorney indicating the dates of representation, as "routine business records" that had direct relation to a statute of limitations defense which turned on the date of representation. *Condon*, 90 F.R.D. at 55. A review of the information

sought by defendants, consisting here of a dozen detailed inquiries into both privileged and confidential attorney-client information and private information of donors, is neither "routine" nor respectful of the perils in attempting to seek information from counsel. *See N.F.A. Corp.*, 117 F.R.D. at 85 ("However, absent an attorney's advice being made an issue in the case, courts should exercise great care before permitting the deposition of an attorney"). Forcing plaintiffs' attorneys to testify despite the privileged nature of the desired information, while it has such little relevance to the matter at hand, would be forcing plaintiffs' counsel to violate Rule 3.7 and First Amendment privileges. Denying defendants' motion will maintain the integrity of the public interest litigation process.

V. ALTERNATIVE SOURCES FOR REQUESTED INFORMATION

The Court has requested plaintiffs to identify potential alternative sources for the information defendants seek. As set forth above, the detailed information defendants seek about third-party funders in this and other litigation is not relevant or material to any legitimate issue in this case. Further, the information sought is confidential and protected by the First Amendment. To the extent that defendants are entitled to know information about SCSJ's funding and fundraising activities, that information has already been made available to them. *See infra* at pg. 6.

CONCLUSION

For the foregoing reasons, plaintiffs request that this Court deny Defendants' Motion for Leave to Depose Plaintiff's Counsel and award plaintiffs' counsel costs incurred in responding to this frivolous and harassing motion.

This the 17th day of February, 2016.

POYNER SPRUILL LLP

s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.
N.C. State Bar No. 4112
espeas@poynerspruill.com
John W. O'Hale
N.C. State Bar No. 35895
johale@poynerspruill.com
Caroline P. Mackie
N.C. State Bar No. 41512
cmackie@poynerspruill.com
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Telephone: (919) 783-6400
Facsimile: (919) 783-1075

Counsel for Plaintiffs

SOUTHERN COALITION FOR SOCIAL JUSTICE

Anita S. Earls
N.C. State Bar No. 15597
anita@southerncoalition.org
Allison J. Riggs
State Bar No. 40028
allisonriggs@southerncoalition.org
George E. Eppsteiner
N.C. State Bar No. 42812
George@southerncoalition.org
Southern Coalition for Social Justice
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380
Facsimile: 919-323-3942

Counsel for Plaintiffs

TIN FULTON WALKER & OWEN, PLLC

Adam Stein (Of Counsel)
N.C. State Bar # 4145
astein@tinfulton.com
Tin Fulton Walker & Owen, PLLC
1526 E. Franklin St., Suite 102
Chapel Hill, NC 27514

Telephone: (919) 240-7089

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing Plaintiffs' Brief in Opposition to Motion for Leave to Depose Counsel for Plaintiffs with service to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 17th day of February, 2016.

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

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NO. 1:15-CV-00399

SANDRA LITTLE COVINGTON,)
et al.,)
)
Plaintiffs,)
)
vs.)
)
)
THE STATE OF NORTH CAROLINA,)
et al.,)
)
Defendants.)
_____)

DEPOSITION OF ANTOINETTE MINGO

(Taken by Defendants)

Charlotte, North Carolina

Friday, February 5, 2016

A. Yes.

Q. Now, did you ask Mr. Wilson about whether it would cost you anything to be involved in a lawsuit?

A. No, I didn't.

Q. And why not?

A. Because I was willing to pay whatever my portion was to be in it.

Q. And are you responsible for paying any portion of the legal fees?

A. No, I'm not.

Q. And how do you know that?

A. Because nobody has billed me, nobody has asked me for money and nobody has said anything to me about money.

Q. Has anyone told you that you're not responsible for paying any attorneys' fee or costs in this lawsuit?

A. Yes.

Q. Yes?

A. Yes.

Q. Who told you that?

A. Mr. O'Hale.

Q. And have you received any sort of document or contract or agreement that states that you are not

O'Hale, John W.

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North Carolina Middle District

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Case Name: HARRIS, et al v. MCCRORY, et al
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Docket Text:
Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR, JUDGE ROGER L. GREGORY and JUDGE MAX O. COGBURN in G-1: Final Pretrial Conference held on 10/9/2015. Attorneys Edwin Speas and John O'Hale present on behalf of the Plaintiffs. Attorney Kevin Hamilton participated via telephone conference call. Attorneys Thomas Farr, Phillip Strach and Alexander Peters present on behalf of the Defendants. Court denied [105] Defendants' Motion to Stay, Defer, or Abstain; Court will reserve ruling on the Motion in Limine. Bench Trial to commence October 13, 2015 at 9:00 a.m. in Greensboro, Courtroom 1. (Court Reporter Briana Nesbit.) (Welch, Kelly)

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ALEXANDER MCCLURE PETERS apeters@ncdoj.gov, cdixon@ncdoj.gov, dmazza@ncdoj.gov, efprice@ncdoj.gov

BRUCE V. SPIVA Bspiva@perkinscoie.com

CAROLINE P. MACKIE cmackie@poynerspruill.com, autodocket@poynerspruill.com, jking@poyners.com, klowell@poyners.com, lhill-larry@poyners.com

EDWIN M. SPEAS , JR espeas@poynerspruill.com, jking@poyners.com, serceg@poyners.com

JOHN M. DEVANEY JDevaney@perkinscoie.com, SYarborough@perkinscoie.com

JOHN WARD O'HALE johale@poynerspruill.com, eweston@poyners.com, jking@poyners.com

KEVIN J. HAMILTON khamilton@perkinscoie.com, canderson@perkinscoie.com, DocketSEA@perkinscoie.com

MARC E. ELIAS melias@perkinscoie.com, bming@perkinscoie.com, DocketWDC@perkinscoie.com

MICHAEL DOUGLAS MCKNIGHT michael.mcknight@odnss.com, melanie.mosier@odnss.com

PHILLIP JOHN STRACH phil.strach@ogletreedeakins.com, elena.diamond@ogletreedeakins.com, lisa.ostrander@odnss.com

THOMAS A. FARR thomas.farr@ogletreedeakins.com, kathleen.youngquist@ogletreedeakins.com

WILLIAM B. STAFFORD WStafford@perkinscoie.com

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KATHERINE A. MURPHY
N.C. DEPARTMENT OF JUSTICE
EDUCATION SECTION
POB 629
RALEIGH, NC 27602-0629