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' REPLY BRIEF IN SUPPORT OF MOTION TO ENFORCE SCHEDULING ORDER**

Pursuant to Local Rule 7.2 and this Court's text order dated February 5, 2016, the Plaintiffs, by and through their undersigned counsel, submit the following reply brief in support of their Motion to Enforce Scheduling Order. (Doc. 47).

I. DEFENDANTS' RESPONSE INACCURATELY CHARACTERIZES THE ISSUES RELEVANT TO PLAINTIFFS' MOTION

Plaintiffs seek an order from this Court enforcing its scheduling order and applying the "automatic sanction" of exclusion of a party's expert witness for failure to adhere to the requirements set forth in Rule 26(a). *See SSS Enterprises, Inc. v. Nova Petroleum Realty, LLC,* 533 F. App'x 321, 324 (4th Cir. 2013) (district court did not abuse its discretion in excluding plaintiffs' expert witness reports filed three days after the due date set in scheduling order). Defendants respond that they "did not intend to call these two witnesses as experts on behalf of the defendants." Defendants' Opposition in Response to Plaintiffs "Motion to Enforce Scheduling Order" at 8 (Doc. 52) (hereinafter "Defs' Opp."). At the same time, they maintain that such testimony "would benefit the

court and the record in this case." *Id.* By seeking to offer this testimony in support of their case, the Defendants are indeed offering expert testimony. They cannot evade the requirements of the Rules of Civil Procedure and the Court's scheduling order in this case by mischaracterizing the nature of the evidence[1] as something other than expert testimony that they are offering to the Court.

Indeed, by conducting depositions of Drs. Ansolabehere and Burden, the Defendants are seeking to convert into admissible testimony otherwise inadmissible expert opinions. In *Harris v. McCrory*, the defendants (Governor McCrory, North Carolina State Board of Elections and its Chairman, Joshua Howard), sought the admission of the very same report by Dr. Burden that the Defendants here seek to rely on in this case. *See Harris v. McCrory,* No. 1:13-cv-949 (M.D.N.C.) Order Addressing Objections, Feb. 5, 2016 at 3, 13-14. (Dk. #141) (copy attached as Exhibit A). There, because the report was not disclosed in accordance with Rule 26(a)(2), and because it was not appropriately the subject of judicial notice, the court held it would not be admitted. *Id.* Similarly, neither Dr. Burden nor Dr. Ansolabehere has been disclosed as an expert by any party in this case. Therefore, their testimony should not be permitted to be used in this case, whether it comes in the form of their written reports in other cases or deposition testimony elicited in depositions conducted in this case.

[1] Defendants incorrectly characterize the *Dickson* state court litigation as a loss; however, the action is still pending as plaintiffs have filed a Petition for Rehearing with the North Carolina Supreme Court.

II. THE EXPERT TESTIMONY DEFENDANTS SEEK TO ELICIT IS NOT AN ADMISSION BY ANY PARTY TO THIS LITIGATION

Defendants' response advances the novel proposition that through a complex web of privity hypotheses, whereby virtually everyone who has ever sued the State of North Carolina would be in privity with each other, all expert testimony in any case involving voting rights is admissible as an admission by these plaintiffs. It is not necessary to unravel the complex web of interrelationships presupposed by the Defendants to be clear that Rule 801(d)(2) of the Federal Rules of Evidence does not apply in these circumstances. First, not one of the cases cited by Defendants in support of their argument, *see* Defs' Opp. at 6, involves a court finding that statements of an expert witness offered in one lawsuit constitute an admission by completely different parties in a second lawsuit because they are tied by being in privity with each other.

More significantly, the cases Defendants rely on do not establish that in the Fourth Circuit, a retained expert becomes the party's agent, making his statements admissible under Rule 801(d)(2). In *Sure-Safe Indus. Inc. v. C&R Pier Mfg.*, 851 F. Supp. 1469 (S.D. Cal. 1993), the expert whose testimony was at issue was an attorney retained by the plaintiff to express an opinion on patent infringement. He subsequently was found guilty of engaging in dishonesty, fraud, deceit and misrepresentation by an Administrative Law Judge in a disciplinary proceeding before the Patent and Trademark Office and on that basis the plaintiffs sought leave of the court to replace him with a different expert. The court denied that motion, but not on the ground that the expert was the plaintiff's agent

and therefore his opinions were admissions. *See Sure-Safe Indus. Inc.*, 851 F. Supp. at 1474.

Similarly, *Glendale Fed. Bank, FSB v. U.S.*, 39 Fed. Cl. 422 (Fed. Ct. 1997) does not support Defendants' position. There, the Federal Claims Court held that the testimony of an expert retained by a party in that case would only be considered an admission of the party when the party offers the testimony at trial. *See Glendale Fed. Bank*, 30 Fed. Cl. at 423-424. The court explained that "[a]dmissions are allowed into evidence because they are or can be treated as the party's own statement." *Id.* (*citing* Edward J. Imwinkelried, Evidentiary Foundations 273, 282 (3d ed. 1995); 5 Weinstein's Federal Evidence 801-50 (2d ed. 1997); 2 McCormick on Evidence 140 (4th ed. 1992); Advisory Committee Note, Fed. R. Evid. 801(d)(2), 1972 Proposed Rules.) In deciding that an expert's deposition testimony may not be treated as the sponsoring party's own statement, the court concluded that "drawing the line at a deposition would unduly intrude on a party's ability to control its own case. It would, even more importantly, inhibit a party's attempt to fully explore and understand its own case. This is a serious threat to the adversary system and to settlement." *Glendale Fed. Bank*, 39 Fed. Cl. at 424. Moreover, the court was persuaded that "[t]he expert witness, testifying under oath, is expected to give his own honest, independent opinion. Even at the time of his deposition he remains autonomous. He is not the sponsoring party's agent at any time merely because he is retained as its expert witness." *Id.* Thus, even if the Plaintiffs here had, in fact, retained Drs. Burden and Ansolabehere, which everyone agrees they have

not done, under the rule in *Glendale Fed. Bank,* any reports or deposition testimony they might provide would not be admissions of the Plaintiffs under Rule 801(d)(2) unless Plaintiffs here called them to testify at the trial of this action.

The other two cases relied on by Defendants, *Collins v. Wayne Corp.,* 621 F.2d 777 (5th Cir. 1980), and *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986 (9th Cir. 2007) do not support the proposition Defendants' cite them for and are not applicable here. *Collins* involved the testimony of an individual employed by the defendant to investigate and analyze the cause of a bus accident, not an expert witness retained initially in litigation. *Collins*, 621 F.2d at 781-82. *See also Kirk v. Raymark Indus., Inc.,* 61 F.3d 147, 163-164 (3d Cir. 1995), *cert denied* 516 U.S. 1145 (1996) (distinguishing *Collins* on these grounds). In *In re Hanford Nuclear Reservation Litigation,* the issue was whether an expert called to the stand in trial could be cross-examined by his own prior trial testimony in that case, not whether an expert retained by a party allegedly in privity with the litigant could be deemed to be the agent of that litigant and therefore make admissions on their behalf. 534 F.3d at 1016.

In fact, this case is more analogous to the situation in *SanDisk Corp. v. Kingston Tech.* Co., 863 F. Supp. 2d 815, 819 (W.D. Wis. 2012), where the court held that:

> Unlike the testimony under consideration in *Glendale* and *In re Hanford*, Reed's deposition testimony was given in a separate case. Because SanDisk never proffered Reed's testimony in this case, it is neither reasonable nor fair to find that SanDisk authorized Reed's deposition testimony so that it can be deemed a party admission and used against SanDisk. Reed's deposition testimony is inadmissible hearsay in this case and will be excluded.

863 F. Supp. 2d at 819 (*citations omitted*). In fact, the general issue of when a party's own expert's testimony may be deemed an admission under Rule 801(d)(2) is unclear in the law: there is a split in the circuits and the Fourth Circuit has not taken a firm position. *See* Matthew D. Hardin, *Student Note and Comment: Three Evidentiary Approaches to Party "Admissions" by Experts*, 12 APPALACHIAN J. L. 227 (2013). To the extent other district courts in this circuit have ruled, they have followed the Third Circuit rule that such testimony is not an admission by a party. *See N5 Techs. LLC v. Capital One N.A.*, 56 F. Supp. 3d 755, 765 (E.D. Va. 2014) (holding that expert report from someone who was not an agent or employee of the defendant is not admissible under Rule 801(d)(2)). In short, there is no precedent for Defendants' position that Drs. Ansolabehere and Burden's testimony in another case involving different parties is an admission of the Plaintiffs in this case.

III. THE BURDEN ON PLAINTIFFS IS REAL

Defendants have noticed Dr. Burden's deposition in Milwaukee on February 11th, a day on which six other depositions of the Plaintiffs in this case are scheduled, and the day before Plaintiffs' witness Dr. Alan Lichtman is scheduled for deposition. It will certainly take away from Plaintiffs' case preparation to have to participate in Dr. Burden's deposition. Similarly, there is at least one other deposition scheduled on the date that Dr. Ansolabehere is scheduled to be deposed in Boston. Plaintiffs' position that these expert depositions are prejudicial to their efforts to fairly litigate this matter is genuine.

Defendants have not explained how expert reports produced at least two to three years after the redistricting plans challenged in this case, and testimony about election administration laws or congressional districts, are in any way relevant to the question of whether, in 2011, the General Assembly had a reasonable basis for believing that the districts they drew were compelled by the Voting Rights Act and narrowly tailored to comply with that Act.

IV. CONCLUSION

Because the Defendants have failed to comply with the Rule 26(a)(2) and 37 of the Federal Rules of Civil Procedure, this Court should grant Plaintiffs an Order that testimony by Drs. Ansolabehere and Burden, whether presented in expert reports or in deposition testimony, cannot be admitted in this action.

This the 8th day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing , 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 the following:

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This the 8th day of February, 2016.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DAVID HARRIS and CHRISTINE BOWSER,	)	
Plaintiffs,	)	
v.	)	1:13CV949
PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,	)	
Defendants.	)	

ORDER ADDRESSING OBJECTIONS

On October 13, 2015, this case was called for trial before a three-judge panel. During the course of the trial, several objections were raised, the ruling on which was deferred by the court. As to two of these issues, the parties submitted memoranda in support of their respective positions in accordance with this court's request. (Docs. 126, 128-131.) As the parties' respective objections and arguments now appear in both the transcript of the trial and the supplemental briefs filed as requested by the court, they will not be recited in detail again

EXHIBIT A

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here. For the reasons set forth herein, this court finds as follows:

1. Plaintiffs' objection to Dr. Hofeller's testimony regarding correlation between the 2008 presidential election and other elections is sustained in part and overruled in part. Dr. Hofeller's testimony factually detailing the steps that he took in preparing the 2011 Congressional District maps is admitted; his testimony as to any correlation between the 2008 presidential election and other elections that was given in response to Dr. Ansolabehere's testimony is excluded as Defendants did not include that opinion testimony in any expert reports as required by Fed. R. Civ. P. 26(a)(2)(B)(i).

2. Defendants' objection to Plaintiffs' Exhibit 13, an email chain, is overruled. The email chain is marked "attorney client privileged" and is addressed between and among several attorneys and individuals, including Dr. Hofeller. The parties submitted supplemental briefing on this issue. (See Docs. 126-128, 130.) Plaintiffs contend that, because this document was disclosed publicly by Defendants in a prior action, it is admissible in this case. Defendants have failed to demonstrate that the disclosure was inadvertent or that the document remains privileged, and as such, the document will be admitted.

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3. Plaintiffs' objection to a racial polarization study by Dr. Burden is sustained. The parties submitted supplemental briefing on this issue. (See Docs. 129, 131.) Defendants have not established that the court should take judicial notice of the study, and the report was not disclosed in accordance with Rule 26(a)(2) as an expert report. Furthermore, the evidence is cumulative, as Plaintiffs presented the undisputed testimony of Congressman G.K. Butterfield who, based upon his experience, described racially polarized voting in Congressional District 1 and other areas.

A. ANALYSIS

1. Dr. Hofeller's Testimony

Dr. Hofeller was hired by the North Carolina legislature in 2011 to draw the Congressional District map. (Trial Tr. (Vol. II) at 475:11-476:17.) He also testified as an expert in redistricting, cartography, and voting behavior. (Id. at 474:21-25.) This court finds his testimony to be both factual and expert. Dr. Hofeller testified in part as a fact witness in that he described his actions in updating the pertinent databases and drawing those maps which led to the districts at issue in this case. (Id. at 475:13-476:15.) In describing the work that he did, Dr. Hofeller also discussed what information

he relied upon and why he relied upon that information. Dr. Hofeller also testified as an expert witness, both explaining his own opinion as to the data and, most important here, in response to Plaintiffs' expert, Dr. Ansolabehere. It is Dr. Hofeller's relevant testimony that is in response to Dr. Ansolabehere which was not disclosed in an expert report and will be excluded.

Plaintiffs' objection to Dr. Hofeller's testimony initially arose at trial during the following exchange on direct examination:

> Q. So Dr. Hofeller, I want to follow up with a statement you made yesterday, and this – I'm asking you this question as a fact witness, not as an expert witness. You testified that when you decided to use the Obama/McCain race that it linked up with other races. Do you remember that?
>
> A. I do.
>
> Q. Can you explain to the Court what you meant by that.
>
> A. What I meant by that is that the other races, major races, correlate very strongly with the Obama race. So the presidential race and the gubinatorial [sic] races in the Senate –
>
> Mr. Hamilton: Objection, Your Honor, this is not contained in his expert report. There's no disclosure of any analysis about correlation or analysis of other elections, and I object.

(Trial Tr. (Vol. III) at 515:24-516:12.)

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Plaintiffs' expert, Dr. Ansolabehere, prepared two expert witness reports, both of which were introduced at trial as Plaintiffs' Exhibits 17 and 18. Defendants' expert, Dr. Hofeller, also prepared two expert witness reports, which were introduced at trial as Defendants' Exhibits 25.8 and 26.1. Dr. Hofeller's first report, (Defs.' Ex. 25.8), states that he was "asked to evaluate the Expert Report submitted by Dr. Stephan Ansolabehere on behalf of the Plaintiffs in which he concluded that race was the predominant factor in constricting [sic] CD's 1 and 12 . . ." (Id. at 5.) Similarly, in his second report, (Defs.' Ex. 26.1), Dr. Hofeller again responds to Dr. Ansolabehere's analysis stating "[f]or all these reasons, Dr. Ansolabehere's analyses are not sufficient to prove that race was the predominant factor . . . ." (Defs.' Ex. 26.1 at 13.)

Fed. R. Civ. P. Rule 26(a)(2)(A) requires that parties disclose to the opposing parties "the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." The rule further requires disclosure of, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them; the facts or data considered by the witness . . . ." Fed.

R. Civ. P. 26(a)(2)(B)(i) and (ii). The Federal Rules further provide that "[i]f a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

The Fourth Circuit has held that a district court, in determining whether a nondisclosure of evidence is substantially justified or harmless for purposes of Rule 37(c)(1),

> [S]hould be guided by the following factors: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

S. States Rack and Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003).

In Paragraph 31 of his second report, Dr. Ansolabehere states: "Registration is highly correlated with actual election results in the State of North Carolina. The correlation between Democratic share of party Registration and the Obama vote is .78. The correlations were even higher with respect to the other statewide elections in 2008 . . . ." (Pls.' Ex. 18.) Neither of the expert reports prepared by Dr. Hofeller contain

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an opinion as to the correlations of the 2008 presidential elections to other elections, nor does Dr. Hofeller challenge the correlation opinion of Dr. Ansolabehere.

This court finds the opinion testimony as to the correlation of the 2008 presidential race to other races by Dr. Hofeller should be excluded where offered as an expert witness. Turning to the factors to be considered, the testimony came as a surprise to Plaintiffs; the testimony was tendered following discovery, substantially limiting the ability of Plaintiffs to investigate and respond; to recess and permit additional discovery would substantially delay and disrupt the trial; the evidence goes to a significant part of Plaintiffs' expert's opinion; and, while Defendants contend that this is fact testimony only, the court finds that it is opinion testimony directly responsive to Plaintiffs' expert's opinion and, in the view of this court, should have disclosed in the report.

Dr. Hofeller's statements about analysis and correlation (see, e.g., Trial Tr. (Vol. III), at 516 and 660), including those statements responsive to Dr. Ansolabehere's analysis, shall be excluded as expert opinion which was not disclosed. However, Dr. Hofeller's testimony offered as a fact witness

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relating to the drafting of the maps, including his initial review of the 2008 presidential race and other races, (id. at 524), as well as his comments about general party preference within a given precinct, (id. at 525), are within his knowledge as a fact witness and are hereby admitted.

2. Plaintiffs' Exhibit 13

The parties agree that Plaintiffs' Exhibit 13 is an email first introduced as an exhibit in the deposition of Dr. Hofeller in Dickson v. Rucho. (See Declaration of John W. O'Hale (Doc. 127); Defs.' Resp. (Doc. 128) at 1-2.) That email was also introduced in the Superior Court of North Carolina in that same case. (See Doc. 127-2.) Defendants contend, and it does not seem disputed, that an initial objection to an exhibit containing the email was lodged during deposition and no further use, at least during the deposition, was made of the exhibit. (See Defs.' Resp. (Doc. 128) at 2; Docs. 128-1, 128-2.) Nevertheless, the email chain was also introduced in this case by Plaintiffs and objected to by Defendants in the pretrial disclosures as Attorney-Client privilege material. (See Doc. 117-1.)

Defendants rely upon Fed. R. Civ. P. 26(b)(5)(B) to contend they took reasonable steps to rectify any disclosure that was

made, and that the document has therefore remained protected throughout both this and the related state proceeding. Rule 26(b)(5)(B) provides:

> If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Fed. R. Civ. P. 26(b)(5)(B). While this rule does address the duty of a party placed on notice of a claim of privilege, the initial disclosure during discovery did not occur in this case, it occurred during the Dickson v. Rucho state proceedings. Thus, the rule itself may explain the relevant steps the parties are required to take to address a claim of privilege, but the rule does not address the ultimate question of whether any privilege has been waived – in other words, resolution of the claim of privilege. The question remains whether any attorney-client privilege has been waived in this case by production of documents containing this email.

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> The [attorney-client] privilege protects not only the giving of professional advice . . . but also the giving of information to the lawyer . . . . The purpose of the privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. But . . . the privilege is not favored by federal courts and is to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

United States v. Aramony, 88 F.3d 1369, 1389 (4th Cir. 1996) (internal citations omitted). Defendants, as the party claiming privilege, bear the burden of establishing that: (1) the attorney-client privilege applies; (2) the communications were protected by the privilege; and (3) the privilege was not waived. Sheet Metal Workers Int'l Ass'n v. Sweeney, 29 F.3d 120, 125 (4th Cir. 1994). Although Plaintiffs' Exhibit 13 was an email addressed to a number of different individuals, this court will assume without deciding the email was privileged when drafted and sent initially and proceed to address the issue of waiver.

Courts in this district have previously applied a balancing test in determining whether privilege has been waived. See, e.g., In re Grand Jury Investigation, 142 F.R.D. 276 (M.D.N.C. 1992); Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc., 116 F.R.D. 46 (M.D.N.C. 1987); Liggett Grp., Inc. v.

Brown & Williamson Tobacco Corp., 116 F.R.D. 205 (M.D.N.C. 1986). Those factors include: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document productions; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving a party of its error. Parkway Gallery, 116 F.R.D. at 50.

The number of inadvertent disclosures, the reasonableness of any disclosure in light of the number of documents, and the extent of the document productions weigh in favor of Defendants on these facts. This court is sympathetic to the possibility of an inadvertent disclosure, not intended to waive privilege, occurring in a case such as this one.

However, the number of inadvertent disclosures, the extent of the disclosures, and the delay in efforts to rectify the disclosure all lead this court to conclude privilege has been waived. In the present case, the email has been produced publicly, or at least produced such that it was disclosed beyond the scope of the original intended recipients on at least four different occasions – during Dr. Hofeller's deposition, as part

of the record in the Superior Court in the Dickson v. Rucho case, as part of the record in the North Carolina Supreme Court in that case, and then again as part of the record in this case. Although Defendants objected to introduction of the email on three of those occasions, an objection to the introduction of a document goes only to its admissibility; standing alone, it does not protect the confidentiality of a communication nor does it prevent continuing or future disclosure. The privilege protects disclosure of confidential communications from a court, opposing party, or anyone other than the client or intended recipient. Defendants never made any effort to rectify the disclosures by requiring that the document be sealed nor did Defendants take any steps to prevent further disclosure.

The failure to exercise reasonable efforts to protect an attorney-client privileged document once an inadvertent disclosure occurs is inconsistent with a continuing assertion of privilege. See Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 483 (E.D.V.A. 1991) (noting that failure to rectify an inadvertent disclosure weighed in favor of waiver of privilege when there were inadequate efforts to ensure that further disclosures would occur, and further copies of privileged material were disclosed after the initial discovery.)

For the foregoing reasons, this court finds the privilege has been waived as to Plaintiffs' Exhibit 13 and the objection is overruled.

3. Study by Dr. Barry Burden (Exhibit 121)

Dr. Burden submitted an expert report on behalf of the plaintiffs in North Carolina State Conference of the NAACP v. McCrory, 1:13CV658 (M.D.N.C.) describing racially polarized voting in North Carolina. (See 1:13CV658 (Doc. 289-6).) Defendants in this case ask that this court take judicial notice of the report and that it be admitted. Plaintiffs object.

Rule 201 of the Federal Rules of Evidence permits, but does not require, a court to take judicial notice of a fact "that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). This court does not find the report to be appropriate for introduction pursuant to judicial notice. The report addresses matters both inside and outside the territorial jurisdiction of this court, and the expert is not someone whose accuracy is known to or generally accepted by this court. Even assuming the expert might be known to and even generally

accepted by this court, this court declines substitute the rule of judicial notice for the rules relating to expert witnesses. See Fed. R. Civ. P. 26.

Because there is no stipulation and Fed. R. Civ. P. Rule 26 was not complied with as to the report, this court sustains Plaintiffs' objection.

This the 5th day of February, 2016.

FOR THE COURT:

William L. Osteen, Jr.

United States District Judge