APPEAL DOCKET NO. 06-13508-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LIONEL GUSTAFSON, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	**ORAL ARGUMENT REQUESTED**
	)	
ADRIAN JOHNS, et al.	)	
	)	
Appellees.	)	

On Appeal from the United States District Court
For the Southern District of Alabama, Southern Division
Case No. 05-00352-CG-C

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies, pursuant to 11th Circ. R. 26.1-1, that the following persons and organizations have an interest in the outcome of this case:

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested by Appellants. Due to the complex nature of the facts and law at issue in this appeal, Appellants believe the Court would be significantly aided by oral argument.

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STATEMENT OF JURISDICTION

The judgment dated May 22, 2006 dismissing Appellants' Complaint was a final, appealable order under 28 U.S.C. § 1291. On June 20, 2006, Appellants timely filed their Notice of Appeal. Appellants incorporated herein their Statement Regarding Jurisdiction, which was filed with this Court on July 20, 2006.

STATEMENT OF THE ISSUES

I. WHETHER THE PANEL ERRED BY DETERMINING THAT JERRY LATHAN, MARTY CONNORS AND STEVE FRENCH WERE "*DE FACTO*" PLAINTIFFS IN THIS ACTION?

II. WHETHER THE PANEL ERRED BY DETERMINING THAT THE "*DE FACTO*" PLAINTIFFS WERE VIRTUALLY REPRESENTED BY THE PLAINTIFFS IN *MONTIEL*?

STATEMENT OF THE CASE

The Plaintiffs, 19 Alabama citizens, (hereinafter, the "Plaintiffs" or "*Gustafson* Plaintiffs"), commenced this action challenging the 2001 State Legislative Plans, *i.e.*, the state redistricting plans. The *Gustafson* Plaintiffs assert that the Plans (1) violate the constitutional guarantee of one person, one vote; (2) constitute illegal, partisan gerrymandering; and (3) violate Plaintiffs' First Amendment right to freedom of association.

Proceedings and Disposition in Court Below

The *Gustafson* Plaintiffs filed their Complaint on June 16, 2005, and amended the Complaint on June 27, 2005. (Doc. 1, 9) Defendants are Alabama probate judges, sued in their official capacity. *Id.* On September 30, 2005, the Three-Judge Panel (the "Panel") granted the intervention request of Governor Bob Riley as well as the intervention requests of Senator Lowell Barron, Senator Hank Sanders, and Representative Seth Hammett. (Doc. 118) The Defendants filed a motion for judgment on the pleadings, and the Defendant-Intervenors filed motions to dismiss. (Doc. 84, 121, 130) On November 22, 2005, the Panel ordered a bench trial on the issue of *res judicata*. (Doc. 144) The parties conducted discovery and subsequently requested that briefs be submitted in lieu of a bench trial. (Doc. 214) Thereafter, the parties filed their respective briefs. (Doc. 233, 234, 236, 238, 239, 240, 241) On May 22, 2006, the Panel entered its order and judgment finding

that Plaintiffs' Complaint was barred by *res judicata*. (Doc. 242, 243) On June 20, 2006, Plaintiffs timely filed their notice of appeal. (Doc. 248)

Statement of the Facts

Of the three 2001 redistricting cases argued by Defendants as *res judicata*, the Panel determined that only *Montiel v. Davis*, CA No. 1:01-cv-447-BH-S (S.D. Ala.) had preclusive effect. (Doc. 242) at 32-33. Nevertheless, the Panel's order contains numerous references to the other two 2001 redistricting cases, *i.e., Barnett v. State*, Case No. 1:01-cv-00433-BH-S (S.D. Ala.) and *Rice v. English*, Case No. 2001-2311 (Cir. Ct. of Montgomery County, Alabama). Accordingly, Plaintiffs will briefly summarize the relevant facts of *Barnett, Rice* and *Montiel*.

The *Barnett* litigation was commenced by plaintiffs Les Barnett, Terry Lathan and Percy Johnson, all residents of Mobile County. Case No. 01-433 (*Barnett* Doc. 1). The *Barnett* plaintiffs alleged that the Alabama Legislature failed to redraw Alabama's districting plan after the 2000 decennial census. *Id.* The case was strictly an impasse case, *i.e.,* the *Barnett* plaintiffs did not challenge the 2001 State Legislative Plans. *Id.* On November 7, 2001, the Court dismissed the *Barnett* case as moot after the Department of Justice pre-cleared the 2001 State Legislative Plans. Case No. 01-433 (*Barnett* Doc. 40) at 2. Thus, the *Barnett* Court never rendered a decision adjudicating the constitutionality of the 2001 Legislative Plans. The *Barnett* plaintiffs did not appeal the judgment.

Of the four redistricting cases at issue, the Alabama Republican Party (the "Party") actively funded and controlled only the *Barnett* case. (Doc. 224, Ex. 27) at 23-25. The *Barnett* plaintiffs were represented by Benjamin L. Ginsberg, Matthew F. Stowe, Paul Wesch, Algert S. Agricola, and Bert Jordan. *See* Case No. 01-433 (*Barnett* Doc. 1 and 15). None of these attorneys represent the *Gustafson* Plaintiffs in the instant case, and there is no evidence that any of them have had any involvement in or control of this action. Attorney Paul Wesch, who briefly represented the plaintiffs and the Party in the *Barnett* litigation, had no knowledge of the contemporaneously filed *Montiel* litigation discussed below. (Doc. 225, Ex. 33) at 26-29. Similarly, the undisputed testimony of attorney Bert Jordan, established that he was not involved in the *Montiel* case and did not attempt to strategically manipulate the *Barnett* or *Montiel* litigation to avoid future issue or claim preclusion. (Doc. 224, Ex. 28) at 142-44.

In *Montiel*, plaintiffs Gonzalo Montiel, Sheldon Day, John Lang, Camilla Rice, John Rice and Bobby Humphryes, residents in Alabama Senate districts 34, 22, 24, 28 and 5, and Alabama House districts 101, 68, 70, 83, 15 and 79, essentially alleged one claim-- racial gerrymandering. Case No. 01-447 (*Montiel* Doc. 63) Mark Montiel was the sole attorney representing the *Montiel* plaintiffs. *Id.* *Montiel* plaintiff John Rice testified that neither Marty Connors, Steve French nor Jerry Lathan supported the *Montiel* litigation. (Doc. 231, Ex. 18) at 110.

Connors, who was the Party Chairman at the time, likewise confirmed that he never spoke with Rice about the *Montiel* litigation and was unaware that Rice was involved in any redistricting litigation. (Doc. 224, Ex. 27) at 111-12. Connors further testified that, other than a single $1,500 contribution, he declined Mark Montiel's request for assistance from the Party; that the Party was never solicited in advance to support the *Montiel* litigation; that he did not know any details about the case; and that the Party was not represented in the action. (Doc. 224, Ex. 27) at 32-33, 47-48, 53-54. Notwithstanding the $1,500 Party contribution, Connors exercised ***no*** control over the *Montiel* litigation either individually, or in his capacity as Party chairman. (Doc. 224, Ex. 27) at 97-99.

In *Rice v. English*, Case No. 2001-2311 (Cir. Ct. of Montgomery County, Alabama), plaintiffs John W. Rice, William McCall Harris, Jr., and Patricia Christine N. Wood, residents of Alabama Senate districts 25, 28 and 30, respectively, challenged the 2001 Senate districts based solely on state constitutional grounds. (Doc. 201-2) at 85-102. Mark Montiel was the sole attorney representing the *Rice* plaintiffs. *Id.* The trial court entered summary judgment in favor of the Defendants, and the Supreme Court of Alabama affirmed the judgment on appeal. *Rice v. English*, 835 So. 157 (Ala. 2002).

The Plaintiffs in the instant *Gustafson* litigation are 19 Alabama citizens, none of whom were parties to the 2001 redistricting cases. There is no evidence

that any of the named *Gustafson* Plaintiffs had any role in, or otherwise participated, in the conduct of *Barnett*, *Montiel*, or *Rice*. In fact, most of the *Gustafson* Plaintiffs were completely unaware of the cases. (Doc. 238, Ex. A) The *Gustafson* case is managed by a Litigation Management Committee authorized by the Plaintiffs to direct the day-to-day litigation. (Doc. 242) at 10 The Committee includes Jerry Lathan, Steve French and Marty Connors. *Id.* All members of the Committee have acted in their individual capacities as private citizens and have been primarily responsible for raising money to fund this litigation, for recruiting some of the Plaintiffs, and for locating and recommending attorneys to represent the named plaintiffs. (Doc. 224, Ex. 27) at 49-50, 79, 118-21; (Doc. 224, Ex. 29) at 15-18. Although the *Gustafson* Plaintiffs authorized the Committee to make recommendations and facilitate the daily prosecution of the case, they retained sole authority regarding all major decisions in the case, *e.g.*, hiring counsel, dismissing or settling the case, *etc.* *See, e.g.*, (Doc. 226, Ex. 3) at 77, 91-92; 95-96. (Doc. 226, Ex. 6) at 115-16, 119-20; (Doc. 226, Ex. 8) at 87-90, 100-01; (Doc. 226, Ex. 9) at 56-57, 67-68, 71-73; (Doc. 231, Ex. 12) at 53-56, 58; (Doc. 231, Ex. 15) at 62-65, 74-75. Furthermore, although some of the *Gustafson* Plaintiffs were solicited to join this action, others had individual concerns regarding the 2001 redistricting legislation and actively sought their roles in this case. (Doc. 226, Ex. 3) at 15, 30-34; (Doc. 226, Ex. 10) at 11-17; (Doc. 226, Ex. 11) at 19-31, 66-67;

(Doc. 226, Ex. 1) at 17-21. It is undisputed, however, that the Party has not contributed to this litigation and has had no role whatsoever in its prosecution. (Doc. 224, Ex. 26) at 22-24, 42, 44-54. Furthermore, at the time this action was commenced, Marty Connors was no longer the Party chairman, but rather has acted solely in his individual capacity as a member of the Litigation Management Committee. (Doc. 224, Ex. 27) at 49-50, 79, 118-21.

Statement of the Standard of Review

"Barring a claim on the basis of res judicata is a determination of law. [Therefore, the] standard of review is *de novo*." *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999) (citations omitted).

SUMMARY OF ARGUMENT

The Panel erred by applying a hybrid *res judicata* analysis which improperly combined elements of the "control" test for privity and the doctrine of virtual representation. First, the Panel misapplied the "control" test for privity, finding that the members of the Litigation Management Committee (Connors, French and Lathan) were "*de facto*" plaintiffs in *Gustafson*. Second, after finding that they were "*de facto*" *Gustafson* Plaintiffs, the Panel determined that Connors, French and Lathan were "virtually represented" by the *Montiel* plaintiffs. There is no controlling case law, however, endorsing this clearly expansive, "hybrid" *res judicata* analysis. In fact, at least one court has specifically rejected this hybrid approach. *See Becherer v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 193 F.3d 415, 423 (6th Cir. 1999) (reversing a district court that "employed a hybrid analysis of 'control' and 'adequate representation' [*i.e.*, virtual representation] aspects of privity in ruling that *res judicata* barred the Florida plaintiffs' action").

Even assuming, *arguendo*, that it was proper to combine elements of each test in order to find preclusion, the Panel erred in its application of the elements. In finding that Connors, French and Lathan should be considered "*de facto*" plaintiffs, the Panel erred by: (1) improperly applying the "control" test to activities related to ongoing litigation, whereas all other cases applying the "control" test do so for purposes of determining whether a nonparty should be

considered a "*de facto*" party to a ***prior*** lawsuit; (2) prematurely determining that Connors, French and Lathan controlled this litigation; (3) applying a "real party in interest" standard in order to find "*de facto*" status of the nonparties; and (4) concluding that a finding of "control" supported claim preclusion (*res judicata*) when, in fact, such control only supports issue preclusion (collateral estoppel).

Further, assuming *arguendo* that the Panel properly found that Connors, Lathan and French were *de facto* parties in this action, its finding that they were virtually represented by the *Montiel* plaintiffs is unsupported by the evidence. More importantly, the Panel made no finding that there existed an express or implied legal relationship in which the *Montiel* plaintiffs were legally accountable to the *Gustafson* Plaintiffs or to Connors, French or Lathan. This fact standing alone justifies reversal.

ARGUMENT

I. THE PANEL ERRED IN FINDING THAT CONNORS, FRENCH AND LATHAN WERE "*DE FACTO*" PLAINTIFFS IN *GUSTAFSON*.

Under certain circumstances, a nonparty who sufficiently participates in and controls prior litigation can be found to be a "*de facto*" party to that previous case. *See, e.g., Montana v. U.S.*, 440 U.S. 147 (1979); s*ee also,* 18 Wright, Miller and Cooper *Federal Practice & Procedure,* Jurisdiction § 4451; *Restatement (Second) Judgments,* § 39. As noted by this Court, this "control" analysis is distinct from a finding of virtual representation, *i.e.,* a party may still be found in privity with private parties in a previously litigated case if it effectively controlled the earlier litigation. *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1290 (11th Cir. 2004). In the instant case, however, the Panel's finding that Connors, Lathan and French sufficiently "controlled" this litigation so as to be considered "*de facto*" parties has no legal or evidentiary basis.

First, the "control" analysis traditionally has only been applied retroactively, *i.e.,* applied to a nonparty's activities in a previously concluded case. *See, e.g.,* 18 Wright, Miller & Cooper, *Federal Practice & Procedure,* Jurisdiction § 4451, p. 427 ("The most direct basis for applying preclusion against a nonparty rests on actual participation in ***prior*** litigation.") (emphasis added). In the present case, however, the Panel reversed the order of the "control" analysis by first analyzing the role of nonparties Connors, Lathan and French in the present *Gustafson*

litigation, finding that they sufficiently controlled *Gustafson* for purposes of establishing the *res judicata* effect of a prior lawsuit. The Panel's reversal of the "control" analysis is particularly problematic because the most important factor for determining whether a nonparty sufficiently controlled previous litigation for preclusion purposes is whether that nonparty had "the effective choice as to the legal theories and proofs to be advanced on behalf of the party to the action" and "control over the opportunity to obtain review." *See, e.g., Becherer v. Merrill Lynch Pierce Fenner Smith, Inc.*, 193 F.3d 415, 423 (6th Cir. 1999) (citation omitted). *See also Restatement (Second) of Judgments*, § 39, Comment c, at 384 (control, for purposes of issue preclusion, refers to the right to exercise "effective choice as to the legal theories and proofs to be advanced," as well as "control over the opportunity to obtain review"). Thus, any finding at this early stage of the litigation that Connors, Lathan and French sufficiently controlled this litigation so as to become *de facto* Plaintiffs is wholly premature. Decisions related to evidence and legal theories to be advanced on the merits or whether to obtain review of any adverse decision on this action have not been made. In sum, it is simply impossible to declare Connors, French and Lathan "controlling" parties of this litigation for *res judicata* purposes since the litigation has not developed to the point where such a legal determination can be made.

Moreover, the Panel's determination that Connors, French and Lathan exercised sufficient control in this action to render them *de facto* parties is factually unsupported. At best, the facts merely show that the Litigation Management Committee assisted in hiring counsel, identifying some of the Plaintiffs, and facilitating the fundraising. Courts routinely refuse to find substantial control merely because a nonparty retains the attorney who represented a party to the earlier action; assists in financing the earlier action; testifies as a witness in the earlier action; procures witnesses or evidence; furnishes his attorneys assistance; or closely monitors the earlier litigation.[1] Furthermore, as previously established, many of the *Gustafson* Plaintiffs unequivocally testified at deposition that, although they authorized the Committee to make recommendations and facilitate the daily prosecution of the case, they retained sole authority regarding all major decisions in the case, *e.g.*, hiring counsel, dismissing or settling the case, etc.

[1] *See, e.g.*, *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) (common attorney to the cases); *Rumford Chem. Works v. Hygienic Chem. Co.*, 215 U.S. 156, 159-60 (1909) (plaintiff assisted in financing the earlier action); *Benson & Ford, Inc. v. Wanda Petroleum* Co., 833 F.2d 1172, 1174-75 (5th Cir. 1987) (plaintiff testified as a witness in the earlier action); *Ponderosa Development Corp. v. Bjordahl*, 787 F.2d 533, 536-37 (10th Cir. 1986) (same); *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 864 (5th Cir. 1985) (common attorney to the cases); *McKeown v. Wheat*, 231 F.2d 540, 543 (5th Cir. 1956) (same); *Ramey v. Rockefeller*, 348 F. Supp. 780, 785 (E.D.N.Y. 1972) (common attorney to the cases); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 921 (S.D.N.Y. 1968) (procured witnesses or evidence), *modified*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971); *Cofax Corp. v. Minn. Mining & Mfg. Co.*, 79 F. Supp. 842, 844 (S.D.N.Y. 1947) (furnished his attorney's assistance).

Thus, the Panel's conclusion that this case is "controlled" by Connors, French and Lathan is not only premature, it is unsupported by the evidence.

The Panel also erred when it found that Connors, French and Lathan were *de facto* parties based on its conclusion that they were "real parties in interest" to this case.[2] (Doc. 242), pp. 20-21. First, the Panel erred by applying a "real party in interest" standard for determining *de facto* status rather than the accepted "control" test. As set forth in Fed. R. Civ. P. 17(a), a "real party in interest," merely identifies the person who possesses the right sought to be enforced in the action. *See Greer v. O'Dell*, 305 F.3d 1297 (11th Cir. 2002); *Seckler v. Star Enterprise*, 124 F.3d 1399, 1406 (11th Cir. 1997). The inquiry under the "control" test, however, is substantially different; it focuses on the nonparty's right to participate and control the litigation.[3] *See Becherer v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 193 F.3d 415, 420 (6th Cir. 1999) (reversing district court's finding that members of an association were barred in second lawsuit based upon the

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[2] The Panel expressly disavowed conducting any "control" analysis. (Doc. 242) at 15.

[3] *See Rumford Chem. Works v. Hygienic Chem. Co of N.J.*, 215 U.S. 156, 160 (1909) (substantial control refers to "the right to intermeddle in any way in the conduct of the case"*); Hy-Lo Unit & Metal Products Co. v. Remote Control Mfg. Co.*, 83 F.2d 345, 350 (9th Cir. 1936) (substantial control means the "right to participate and control such prosecution or defense"); *see generally Restatement (Second) of Judgments* § 39, comment c, at 384 (control, for purposes of issue preclusion, refers to the right to exercise "effective choice as to the legal theories and proofs to be advanced," as well as "control over the opportunity to obtain review").

district court's finding that the association was the "real party in interest" to first action).

Finally, even if this Court were to find that the Panel properly determined that Connors, Lathan and French were *de facto* parties, such a conclusion supports only a finding of collateral estoppel (*i.e.*, issue preclusion) and not a finding of *res judicata* (*i.e.*, claim preclusion). *See Restatement (Second) of Judgments,* § 39, comment b. *See also Montana v. U.S.*, 440 U.S. 147, 154 (1979) ("Preclusion of such nonparties falls into the rubric of collateral estoppel rather than *res judicata* because the latter doctrine presupposes identity between causes of action.")

In sum, the Panel plainly erred in finding that Connors, French and Lathan are *de facto* plaintiffs in *Gustafson*. Since the Panel made no finding that any of the 19 named Plaintiffs were "virtually represented" by the plaintiffs in *Montiel*, this error alone justifies reversal of the Panel's order and judgment.

II. THE PANEL ERRED IN FINDING THAT THE "*DE FACTO*" *GUSTAFSON* PLAINTIFFS (CONNORS, FRENCH AND LATHAN) WERE VIRTUALLY REPRESENTED BY THE *MONTIEL* PLAINTIFFS.

The Panel also erred in finding that Connors, French and Lathan were virtually represented by the *Montiel* Plaintiffs. As set forth in *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1285 (11th Cir. 2004), *res judicata* applies only if each of the following four factors are established: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on

the merits in the preceding case; (3) both cases involve the same parties or their privies; and (4) both cases involve the same causes of action. Parties from one case not in privity with parties from another case cannot be bound by a judgment in the other case "*no matter how identical the claims or similar the evidence may have been*." *Pemco*, 383 F.3d at 1285 (emphasis added). Thus, the level of participation required to establish privity by virtual representation is substantial and specifically focuses on the plaintiff's authority in the successive action to direct, control, or otherwise influence the prosecution of the earlier-filed action. This preclusion standard "reflect[s] the long-standing and deep-rooted principle of American law that a party cannot be bound by a judgment in a prior suit in which it was neither a party nor in privity with a party. *Id.* at 1286. As noted by the First Circuit, "contemporary case law has placed the theory of virtual representation on a short tether, significantly restricting its range." *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 760 (1st Cir. 1994). In the present case the Panel found that the "*de facto*" plaintiffs (*i.e.*, Connors, French and Lathan) were in privity with the *Montiel* plaintiffs based on a theory of virtual representation.

This Court explained in *Pemco* that virtual representation is "a term of art that we have defined as applying 'when the respective interests are closely aligned and the party to the prior litigation adequately represented those interests.'" *Pemco, 383 F.3d* at 1287 (citations omitted). For purposes of virtual

representation the Court considers four factors in determining whether the respective interests of the parties are closely aligned: (1) whether there was participation in the first litigation; (2) apparent consent to be bound; (3) apparent tactical maneuvering; and (4) close relationships between the parties and nonparties. *Id*. at 1287. In the instant case, the Panel erroneously applied this standard because none of these factors was present.

A. The *Gustafson* Plaintiffs Did Not Participate In The *Montiel* Case.

With respect to the first *Pemco* element, the evidence fails to support the Panel's conclusion that any *Gustafson* Plaintiffs (*de facto* or otherwise) participated in the *Montiel* case. As noted in *Pemco*, the level of participation necessary to support a finding of privity by virtual representation must be significant. *Pemco,* 383 F.3d at 1285. In the instant case, although the Panel found that Marty Connors contributed $1,500 of Party funds to attorney Mark Montiel in the *Montiel* litigation, Connors specifically testified that he made the Party contribution to mollify Montiel's repeated requests for Party assistance. (Doc. 224, Ex. 27) at 32-33, 96-99. More importantly, there is no evidence that this minor contribution provided Connors control over the litigation or that Connors exercised control in *Montiel*.[4] *See General Foods Corp. v. Massachusetts*

[4] Connors further testified that as Chairman, he did not want to spend Party money or time on litigation, but rather, he wanted to direct the Party's resources toward operations. (Doc. 224, Ex. 27) at 96-99.

Dept. of Pub. Health, 648 F.2d 784, 787-88 (1st Cir. 1981) (noting that merely helping to finance litigation will not bind a party) Additionally, it is undisputed that Connors made the contribution in his capacity as Party chairman, whereas in the instant litigation, he has acted solely in an individual capacity as a member of the Litigation Management Committee. (Doc. 224, Ex. 27) at 119. Therefore, his activities as Party chairman in *Montiel* cannot be imputed to him in this case. *See, e.g., Restatement (Second) Judgments* § 39, comment e ("A person who undertakes to control litigation on behalf of another is affected only in the capacity in which he does so.")

As for Mr. French, although he submitted an affidavit in support of the *Montiel* plaintiffs' position, the Court ignored the undisputed fact that he submitted the affidavit not as a *Montiel* plaintiff, but rather as a State Senator and member of the Legislature's Joint Reapportionment Committee to explain what factually transpired during the Committee meetings. Such participation is not "significant" for purposes of virtual representation. *See, e.g., Borzych v. Frank,* 2005 WL 1367212, at *3 (W.D. Wis. June 8, 2005) (rejecting application of virtual representation doctrine where plaintiff in subsequent case merely submitted an affidavit in an earlier filed case alleging the same claims).[5] The Panel made no

[5] Although suggesting that French had an ulterior motive to avoid becoming a named plaintiff in the *Gustafson* litigation, the Panel ignored French's undisputed testimony that he did not become a plaintiff in the *Gustafson* litigation because he

finding that Mr. Lathan participated in any way in the *Montiel* case.

Finally, the fact that Mark Montiel, who is one of several attorneys currently representing the *Gustafson* Plaintiffs, also represented the *Montiel* plaintiffs does not establish a close relationship necessary to establish virtual representation. S*ee, e.g., South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999). *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 864 (5th Cir. 1985); *Ramey v. Rockfeller*, 348 F. Supp. 780, 785 (E.D.N.Y. 1972). In fact, given the specialized nature of voting rights litigation, it is inconsequential that many of the same attorneys routinely appear in voting rights litigation, as they have for both Plaintiffs and Defendants in this action.

The Panel also found that Connors' and French's participation in *Barnett* established prior participation for virtual representation purposes notwithstanding the fact that that case had no preclusive effect. In particular, the Panel found that participation in *Barnett* was relevant to the present inquiry because the attorneys in the *Barnett* litigation (Bert Jordan) and in the *Montiel* litigation (Mark Montiel) engaged in a coordinated strategy to attack the 2001 Legislative Plans in 2001. (Doc. 242) at 23-24. Even assuming, *arguendo*¸ that the actions of attorneys can be imputed to individuals not represented by those attorneys, the undisputed

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did not reside in a Senate district with a population exceeding four percent (4%) of the ideal population for the district and for other personal reasons. Vol. I (Doc 224, Ex. 29) at 96-97; Vol. II at 70-71.

evidence contradicts the Panel's finding of a joint strategy between attorneys Bert Jordan and Mark Montiel. In particular, Jordan's undisputed testimony establishes that he did not coordinate case strategy with Montiel; that their discussions were limited to the fact that Montiel had filed a case. Wesch. Dep. (Doc. 225, Ex. 33) at 26-29; A. Jordan Dep. (Doc. 224, Ex. 28) at 59-69, 83-84, 142-44. More importantly, the Panel's conclusion is fundamentally flawed because neither Connors nor French were ever parties to the *Barnett* or *Montiel* litigation, nor were they ever represented by attorneys Jordan or Montiel.

In sum, the Panel apparently found that Connors and French were *de facto* parties to *Barnett*, then considered the actions of "their" alleged attorney in *Barnett* as "participation" in *Montiel*, and then considered that attorney's participation in *Montiel* to support a finding that the Plaintiffs in this case were virtually represented by the Plaintiffs in *Montiel*. Even assuming, *arguendo*, that the Panel applied the appropriate test for *res judicata*, this entire house of factual cards is unsupported by the evidence.

B. The *Gustafson* Plaintiffs Did Not Consent To Be Bound By The *Montiel* Decision.

With respect to the second element -- consent to be bound -- the Panel's conclusion that Connors, French and Lathan impliedly consented to be bound by the *Montiel* decision is likewise unsupported by the evidence. Absent an express agreement to be bound, an agreement cannot be inferred "except upon the plainest

circumstances." *Restatement (Second) of Judgments* §40 cmt. b; *see also Becherer v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 193 F.3d 415, 423 (6th Cir. 1999). The Panel's conclusion, however, appears to be based upon the unsupported finding that Connors, French and Lathan had significant involvement in *Barnett*, yet they failed to thereafter intervene in *Montiel*. (Doc. 242) at 24-25. Again, neither Connors, French nor Lathan were ever parties to the *Barnett* litigation, nor were they represented by any of the attorneys in *Barnett*.[6] Furthermore, the mere fact that they were aware of the proceedings and issues in *Montiel* does not establish that they played an active role in the case such that they can be bound by an adverse judgment in a case that did not even adjudicate the constitutional merits of the Plan. *See Holland v. Apfel*, 23 F. Supp. 2d 21 (D.D.C. 1998).

C. There Is No Significant Evidence Of Tactical Maneuvering

The Panel further erred in finding that Connors, French, Lathan and Mark Montiel engaged in tactical maneuvering as early as 2001 in order to allow this case to proceed. Tactical maneuvering has been described as "maneuvering to avoid preclusion." *Pemco*, 383 F.3d at 1288. The undisputed evidence establishes that this case was not filed as a continuation of a scheme hatched in 2001 to mount successive attacks on the 2001 plans, but rather was commenced pursuant to a

[6] The Panel once again confuses matters by finding that Mr. Connors contributed $1,500 toward *Montiel* when, in fact, it was paid by the Alabama Republican Party.

good faith belief that the Supreme Court's summary affirmance in *Cox v. Larios*, 124 S. Ct. 2806 (2004) changed the law applicable to this case. In particular, after the Supreme Court affirmed *Larios*, Marty Connors advised Jerry Lathan to contact the law firm representing the successful *Larios* plaintiffs to determine the viability of a potential challenge to the 2001 State Legislative Plans. (Doc. no. 224, Ex. 27) at 60-62; (Doc. No. 225, Ex. 32) at 19-23. During that same time period, Steve French had also reviewed the *Larios* decision and asked attorney Mark Montiel to review the decision and determine whether there was a viable challenge to the Plans. S. French Dep. (Vol. II) (Doc. no. 224, Ex. 30) at 62, 67, 90. French did not, however, discuss *Larios* with Marty Connors until much later, *id.* at 90, and Connors did not discuss a redistricting challenge with Montiel until the Spring of 2005. (Doc. no. 224, Ex. 27) at 69-71. In fact, Connors learned that Montiel was considering a challenge after reading an article to that effect in the Montgomery Advertiser. *Id.* at 58-61. Again, these facts are undisputed.

In November/December 2004, Lathan contacted the Atlanta firm and paid them out of his own pocket to review the viability of a possible challenge to the State Legislative Plans in light of the *Larios* decision. (Doc. 225, Ex. 32) at 19-22. It was only after the Atlanta counsel began discussing the selection of local counsel that Lathan suggested engaging Mark Montiel because of his general knowledge of the 2001 redistricting process and the fact that he had potentially helpful

documents and data in his possession. M. Connors Dep. (Doc. 224, Ex. 27) at 71-72; J. Lathan Dep. (Doc. 225, Ex. 32) at 78-79; C. Pringle Dep. (Doc. 225, Ex. 31) at 128-29. Ultimately, in the Spring of 2005, the *Gustafson* plaintiffs approved the recommendation of the Litigation Management Committee to hire the Atlanta law firm and Montiel (as local counsel) to pursue this action on their behalf. S. French Dep. (Vol. II) (Doc. 224, Ex. 30) at 7-8; R. Styles Dep. (Doc. 231, Ex. 15) at 78; L. Pearson Dep. (Doc. 231, Ex. 12) at 54-56; L. Moore Dep. (Doc. 226, Ex. 9) at 56-57; D. Hammonds Dep. (Doc. 226, Ex. 6) at 115-116; W. Meiers Dep. (Doc. 226, Ex. 8) at 86. In sum, there is no evidentiary support for the Panel's finding that Mark Montiel orchestrated this litigation or that this case was the product of some Machiavellian scheme hatched by the Alabama Republican Party in 2001 designed to ensure the viability of successive challenges.

D. There Is No Evidence Of A "Close Relationship" Between The *Montiel* And *Gustafson* Plaintiffs

With respect to the fourth *Pemco* factor, the Panel erred in finding that a close relationship existed between the *Montiel* and *Gustafson* Plaintiffs. In particular, contrary to the Panel's conclusion, a close relationship is not established merely because the parties have a "general identity of interests"[7] or are self-

[7] Even assuming that all participants in these cases are "Republicans," mere membership in a common organization is insufficient to establish "closely aligned" interests. *See Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1411 n.8 (D.C. Cir. 1985).

identified members of the same organization or are represented by common counsel. Rather, a close relationship requires a finding of "***an express or implied legal relationship in which parties to the first suit are accountable to nonparties who file a subsequent suit raising identical issues*** . . . and involving a significant degree of accountability by one party over another." *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (5th Cir. 1978). *See also Dills v. City of Marietta, Ga.*, 674 F.2d 1377, 1379 (11th Cir. 1982) (same). "[I]f the party to the prior litigation was not legally accountable to the party in the latter, then virtual representation cannot be present, ***regardless of any other factor***." *Pemco*, 383 F.3d at 1289 (emphasis added).[8]

In the instant case, the Panel rejected the controlling precedent of this Court and applied a significantly more lenient standard in its analysis of the relationship between the *Montiel* and *Gustafson* plaintiffs, specifically finding that the "legal accountability" standard embodied by *Pollard* and its Eleventh Circuit progeny applied only to private law cases. This Court, however, has never applied different standards in virtual representation analyses based solely on a public law versus private case distinction.

[8] *Pemco's* "close relationship" factor also requires that the successive lawsuit raise identical issues as the preceding action. In the instant case, however, the *Montiel* plaintiffs asserted racial gerrymandering claims involving only a few districts, and did not raise the partisan gerrymandering or First Amendment claims now asserted by the *Gustafson* Plaintiffs.

Although the Eighth Circuit's decision in *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996) is the primary genesis for the public law versus private case distinction, *Tyus* specifically and unequivocally rejects the "legal accountability" standard developed in *Pollard* and its Eleventh Circuit progeny. *See Tyus,* 93 F.3d at 454 (citing *Pollard* as a more limited, technical application of the virtual representation theory).[9] Furthermore, this Court has continued to follow *Pollard's* more restrictive approach requiring that the plaintiff in the prior litigation be legally accountable to the party in the latter even in cases involving issues of public law. Indeed, the "legal accountability" standard was applied in *Pollard* (successive challenges to a city ordinance) and in *Dills v. City of Marietta,* 674 F.2d 1377 (11th Cir. 1982) (successive constitutional challenges to provisions of a municipal sign ordinance), both public law cases. Thus, the Panel's failure to find any "legal accountability" between the *Montiel* and *Gustafson* Plaintiffs is contrary to the existing precedent of this Circuit.

Furthermore, although the public nature of the *Gustafson* case may be relevant in a virtual representation analysis, it is only one of many factors courts consider, and it is seldom dispositive in the absence of obvious tactical maneuvering. *See, e.g., Tyus v. Schoemehl,* 93 F.3d 449 (8th Cir. 1996) (finding

[9] At least one Court has noted that the *Tyus* court adopted a more expansive application of the virtual representation doctrine. *See Louisiana Seafood Mgmt. v. Foster,* 53 F. Supp. 2d 872, 877 (E.D. La. 1999).

that the "public law" factor was a factor, among others, that favored preclusion); *American Forest Council v. Shea*, 172 F. Supp. 2d 24, 32 (D.D.C. 2001) (citing *Tyus*, and finding the "public law" factor just one of seven factors considered when applying doctrine of virtual representation); *Abels v. Titan Intern., Inc.*, 85 F. Supp. 2d 924, 933-34 (S.D. Iowa 2000) (citing the seven *Tyus* factors, including "public law").[10]

The Panel's "close relationship" analysis is likewise unsupported by the evidence. In particular, the Panel determined that the fact that 19 named Plaintiffs

[10] Other cases relied upon by the Panel in its public law analysis are similarly distinguishable because they involve numerous significant equitable factors not present in the instant case. *See, e.g., Robertson v. Bartels*, 148 F. Supp. 2d 443 (D.N.J. 2001) (public law case in which there was evidence of obvious tactical maneuvering, and the same districts were challenged in both cases); *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840 (N.J. 2003) (plaintiffs had engaged in obvious tactical maneuvering by filing their state court case two days after an adverse ruling in a related federal case, and while another related federal case was pending); *American Forest Council v. Shea*, 172 F. Supp. 2d 24, 34 (D.D.C. 2001) (dismissing successive lawsuit challenging federal forest management plan where (1) there were common plaintiffs represented by the same counsel in simultaneously pending cases; (2) the plaintiffs in the successive challenge had notice of the earlier-filed case; (3) both cases were completely funded by the same trade association plaintiff; and (4) there was clear evidence of tactical maneuvering to avoid preclusion); *Louisiana Seafood Management v. Foster*, 53 F. Supp. 2d 872 (E.D. La. 1999) (finding virtual representation where plaintiffs in a successive federal case were members of a class challenging the same law in state court; they had notice of the state court case; the same lead plaintiff instituted both cases; both sets of plaintiffs sought to certify the same class asserting the same claims; and there was evidence of tactical maneuvering); *Thompson v. Smith*, 52 F. Supp. 2d 1364, 1370 (M.D. Ala. 1999) (dismissing plaintiffs' vote dilution and one-person-one-vote claims because the preceding lawsuit addressed the exact same claims, and the plaintiffs had notice of the case, but declined an invitation by the state court to intervene in the action).

had no "close relationship" with the *Montiel* case was unimportant because the Plaintiffs were not active decision makers and played no substantial role in this case, *i.e.*, they had delegated management of the lawsuit to the Litigation Management Committee and all but one of the Plaintiffs were recruited to join this case. (Doc. 242) at 20. As previously established, however, many of the *Gustafson* plaintiffs unequivocally testified at deposition that, although they authorized the Litigation Management Committee to make recommendations and facilitate the daily prosecution of the case, they retained sole authority regarding all major decisions in the case, *e.g.*, hiring counsel, dismissing or settling the case, *etc.*

Furthermore, the *Gustafson* Plaintiffs have made the decision to participate in this case, to represent their interests as well as the interests of citizens in their respective districts, to meet with counsel, to sit for depositions and provide testimony by affidavit and or other evidence, to cooperate with their counsel and attend any hearings or meetings requiring their presence and, to discharge their previous counsel. Moreover, given that this litigation is still in its infancy, their limited participation and control is entirely reasonable.

Finally, although it is true that some of the 19 *Gustafson* Plaintiffs were solicited to join this action, several had independent knowledge of problems with

the 2001 legislation redistricting maps and actively sought to challenge their districts and become plaintiffs in this action.[11]

E. The *Montiel* Plaintiffs Did Not Adequately Represent The *Gustafson* Plaintiffs.

Finally, the Panel erred in its finding that the *Montiel* plaintiffs adequately represented the interests the plaintiffs in the *Gustafson* litigation (whether named or *defacto* plaintiffs). Although adequacy of representation is not one of the four *Pemco* factors required to find virtual representation, courts have considered it in balancing the equities. *See Gonzalez v. Banco Central Corp.*, 27 F.3d 751, 762 (1st Cir. 1994). Even so, the *Montiel* plaintiffs did not adequately represent the interest of the *Gustafson* Plaintiffs. First, unlike the *Gustafson* Plaintiffs, the *Montiel* plaintiffs did not allege claims based on excessive partisanship or partisan gerrymandering or violations of their associational rights under the First Amendment. Rather, they asserted claims of racial discrimination resulting from racial gerrymandering. In contrast to the claims of the *Gustafson* Plaintiffs, race-based vote dilution claims, such as the claim asserted by the *Montiel* plaintiffs, require proof that a district has been intentionally created with an underpopulated black majority so as to dilute white voting strength or vice-versa. *See Thompson,* 52 F. Supp. 2d at 1371 (M.D. Ala. 1999).

[11] Although the Panel found that plaintiff George Oldroyd was not recruited like the other plaintiffs, the Panel never explained why Mr. Oldroyd should be precluded from pursuing his claims.

Moreover, with the exception of House districts 15 and 79 and Senate district 22, the *Gustafson* Plaintiffs' claims concern different districts which the *Montiel* plaintiffs lacked standing to challenge. *See Thompson*, 52 F. Supp. 2d at 1371 (plaintiffs lacked standing to assert claims on behalf of other plaintiffs who live in districts outside of those addressed in state court action). The Panel glossed over these important distinctions, faulting the *Gustafson* Plaintiffs for failing to present sufficient evidence to support the ***merits*** of their partisan gerrymandering claims. (Doc. 242) at 13-14. Clearly, the Panel erred in dismissing Plaintiffs' claims based upon their supposed failure to present evidence on the merits. Furthermore, Plaintiffs asserted claims based on their specific districts and will present evidence on these claims as the case proceeds beyond the initial pleading stage. (Doc. 9) at ¶¶ 8-26, 99, 111, 120, 129, 137. Moreover, the *Montiel* court previously found "abundant evidence" of partisan political motive in drawing of the 2001 lines and, in fact, partisan motive was asserted as a defense to the racial gerrymandering claim. (Doc. 234) at 15. *See also* Case No. 01-447 (*Montiel* Doc. 118) at 6.

Additionally, the Panel's finding of adequate representation is based almost entirely, and erroneously, on the fact that the *Montiel* plaintiffs pursued their case as a class action and on the Panel's conclusion that there was "no evidence that the *Montiel* plaintiffs failed" in their duty to protect the class interest. In essence, the

Panel determined that the *Montiel* case should be treated as a *de facto* class action for purposes of *res judicata*. At best, however, the *Montiel* case satisfies only one of the four factors required for the imposition of a *de facto* class under the guidelines of *Doe v. Bush*, 261 F.3d 1037 (11th Cir. 2001) to wit: that the *Montiel* complaint was brought on behalf of the plaintiffs and all others similarly situated. The other *Doe* factors are absent because the *Montiel* defendants objected to class certification; the court did not suggest or otherwise treat the case as a class action; and the judgment contained no relief aimed at a class of persons. *See Tice v. American Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998) ("There would be little point in having Rule 23 if courts could ignore its careful structure and create *de facto* class actions at will. . . .") *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 882 (6th Cir. 1997) Indeed, this Court emphasized in *Doe* that the *de facto* class analysis turns "on the district court's, and not the parties, treatment of the action as a class action." *Id.* at 1049-50 (citing *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979).[12]

[12] In its Memorandum Opinion and Order granting summary judgment to the *Montiel* defendants, the *Montiel* court ruled only against the six named plaintiffs who were elsewhere specifically identified in the opinion. Order dated July 8, 2002, Case No. 01-447 (*Montiel* Doc. 118) at ¶ 19 (attached as Exhibit B to Doc. 134-1). Thus, the court did not deny class relief; rather, it simply denied individual relief sought by the six *Montiel* plaintiffs.

In sum, to find that the *Montiel* plaintiffs somehow represented the interests of the *Gustafson* Plaintiffs, let alone represented them in a constitutionally adequate manner, would, in effect, be an end run around Rule 23 by extending class treatment when none was ever granted. *See Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 882 (6th Cir. 1997). As noted in *Tice*, 162 F.3d at 972-73, "[u]nless there is a properly certified class action, handled with the procedural safeguards both state and federal rules afford, normal privity analysis must govern whether nonparties to an earlier case can be bound to the result."

Given these undisputed facts, any presumption that the *Montiel* plaintiffs adequately represented the interests of the *Gustafson* plaintiffs would result in a denial of due process.

CONCLUSION

Based upon the foregoing, it is clear the Panel erred in finding that Connors, French and Lathan were *de facto* parties. In addition, the Panel erred by finding that the Plaintiffs were virtually represented by the *Montiel* plaintiffs. Thus, the Panel's order and judgment must be reversed.

Respectfully submitted,

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by depositing a copy of same in United States mail, first-class postage prepaid and properly addressed on this the 9th day of August, 2006.

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