

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

18 CVS 014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR  
CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON  
REDISTRICTING, et al.,

Defendants.

**PLAINTIFFS' RESPONSE  
TO REPUBLICAN  
NATIONAL COMMITTEE'S  
MOTION TO APPEAR FOR  
A LIMITED PURPOSE TO  
PROTECT ITS  
CONFIDENTIAL AND  
PRIVILEGED  
INFORMATION UNDER  
RULE 45**

The Republican National Committee's motion is at best six months too late and transparently offered for the purpose of delay. The RNC has waived any conceivable claim of privilege over the Hofeller files.

As the Court is aware, Plaintiffs served their subpoena on Stephanie Hofeller on February 13, 2019, and provided notice to all parties the same day. *See* 5/1/2019 Order at 1. On March 13, 2019, Plaintiffs received from Ms. Hofeller four hard drives and 22 thumb drives (the "Hofeller Files"). On March 20, 2019, Plaintiffs timely notified all parties of their receipt of the documents. 5/1/2019 Order at 2. The RNC learned of the receipt of the documents at this time, because it is represented by Mark Braden of Baker Hostetler, who also represents the Legislative Defendants here. On April 9, 2019, Plaintiffs sent a partial index of the files (representing the complete index Plaintiffs had at the time) to counsel for Legislative Defendants. On May 3, 2019, Plaintiffs sent the complete set of files to counsel for Legislative Defendants.

Nearly a month later, on May 28, 2019, Mr. Braden sent a letter to Plaintiffs' counsel in his capacity as "counsel for the Republican National Committee (RNC) concerning the production of documents that was recently made by Stephanie Hofeller." RNC Mot., Ex. B at 1 (Letter from M. Braden to Counsel). That letter asserted that, "based on [Legislative Defendants'] counsel in the [*Common Cause*] matter's initial review" of the Hofeller Files, "it is apparent that those produced materials contain privileged information concerning Dr. Hofeller's work for and on behalf of the RNC." *Id.* The letter asked Plaintiffs to "cease reviewing" the files, to "return" the files "to the Estate of Dr. Hofeller," and to certify that Plaintiffs' copies of the files were destroyed. *Id.* at 2.

On June 4, 2019, Plaintiffs' counsel responded via letter. RNC Mot., Ex. C. Plaintiffs' letter observed that, "although you have had access to a partial index of the files since April 9,

and although you have had access to all of the files themselves since May 3, you do not identify a single specific file or files that you assert is privileged.” *Id.* at 2. Plaintiffs also advised the RNC that it had waived any privilege because its lawyers had demanded that Plaintiffs transmit complete sets of the Hofeller files to various third parties that held no privileged relationship with the RNC. *Id.* Nonetheless, Plaintiffs invited the RNC to identify with specificity any files over which it claimed an ownership interest and a privilege. *Id.* at 3.

The RNC did not do so. It did not respond to Plaintiffs’ letter. It did not seek relief in this Court. It did nothing to preserve its purported privilege for the next 3 months.

Then, on August 30, the RNC filed the instant motion asking the Court to “take essentially the same actions the Court previously allowed Geographic Strategies to take.” RNC Mot. 1. The RNC asked the Court to “maintain” the confidentiality designation over the Hofeller Files for an additional 60 days, purportedly to allow the RNC time to “review the RNC documents contained within the Hofeller Files and itemize files in which the RNC claims ownership or asserts any other claim of right.” *Id.*

The Court should deny the motion. It is untimely and abusive of the process of this Court. The RNC has had access to an index of the Hofeller files since April 9 and to the complete set of the Hofeller files since May 3.<sup>1</sup> The RNC advised Plaintiffs on May 28 that it believed that the Hofeller files contained privileged RNC documents. None of these documents were subject to any confidentiality designation until this Court’s July 12 order, meaning that counsel for Legislative Defendants were free to describe the contents of the files to the RNC, which is also their client. Not only that, counsel for Legislative Defendants *did* describe the

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<sup>1</sup> The RNC repeats the false claim made in the Geographic Strategies submission that Plaintiffs only used “four” Hofeller documents at trial. RNC Mot. at 3.

contents of the files to their client the RNC, as the RNC acknowledged in its letter on May 28 to Plaintiffs' counsel, drafted by counsel for Legislative Defendants. *See* RNC Mot, Ex. B at 1 (“Based on defense counsel in the Lewis matter’s initial review” of the Hofeller files, “it is apparent that those produced materials contain privileged and proprietary information concerning Dr. Hofeller’s work for and on behalf of the RNC.”). The RNC’s claim that it filed this motion at this time because it was “informed by *Geographic Strategies* that the Hofeller Files contain documents over which the RNC likely has claims of ownership, confidentiality, and privilege” is simply a lie. RNC Mot. 3 (emphasis added).

The RNC has waived any privilege. “Where a party is aware” that a subpoenaed third party may possess the party’s privileged information, “the burden falls on that party to take affirmative steps to prevent the disclosure in order [to] preserve the privilege as to itself.” *Am. Home Assur. Co. v. Fremont Indem. Co.*, 1993 WL 426984, at \*4 (S.D.N.Y. Oct. 18, 1993). “The failure to act to prevent or object to the disclosure of confidential communications when a party knows or should know that privileged documents may be disclosed by another party waives the privilege with respect to the party failing to act.” *Id.*; *see also Ravenswood Inv. Co., L.P. v. Avalon Corr. Servs., Inc.*, 2010 WL 11443364, at \*2 (W.D. Okla. May 18, 2010) (“Because Defendant did not state its claim of privilege within fourteen days of service of the subpoena on [a third party], the Court concludes Defendant has waived any such claim.”); *Patterson v. Chi. Ass’n for Retarded Children*, 1997 WL 323575, at \*3 (N.D. Ill. June 6, 1997) (“By failing to object” to third-party subpoena, party “essentially waived her claim to privilege, and the information gleaned via the subpoena may be used.”).

“Courts have emphasized that claw back requests should be made immediately, with delays of even a few weeks determined to be too long.” *Window World of Baton Rouge, LLC v.*

*Window World, Inc.*, 2019 WL 3995941, at \*12 (N.C. Super. Aug. 16, 2019) (quotation marks omitted) (citing cases). “Courts have held that twelve days, even six days, are too long to wait to avoid waiving privilege.” *In re Grand Jury Subpoena Dated Mar. 20, 2013*, 2014 WL 2998527, at \*13 (S.D.N.Y. July 2, 2014).

The RNC waited 6 months. It was aware that Plaintiffs received the Hofeller documents in March 2019. It even sent a letter to Plaintiffs asserting privilege, months ago. After Plaintiffs informed the RNC that they did not believe the documents were privileged, it was incumbent on the RNC to take steps to preserve its purported privilege upon pain of waiver. The RNC did not. Not only that, the RNC was obviously aware that this Court on July 12 issued a temporary confidentiality designation to allow Geographic Strategies 6 weeks to review the Hofeller documents and assert any claim of privilege. If the RNC wanted the opportunity to review the documents and assert privilege, it could have asked the Court to allow the RNC to obtain a copy during that same period. Instead, the RNC decided to wait until the temporary confidentiality order was set to expire and then request a 60-day extension that would have been completely unnecessary had the RNC asserted its purported rights back in May when it sent Plaintiffs a letter.

Enough is enough. The Court should deny the RNC’s motion.

Respectfully submitted this the 13th day of September, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to the following persons at the following addresses which are the last addresses known to me:

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This the 13th day of September, 2019.

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