

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
18 CVS 014001

**Common Cause; et al**

**Plaintiffs,**

v.

**Representative David R. Lewis, in his  
official capacity as senior chairman of the  
House Select Committee on Redistricting,  
et al**

**Defendants.**

REPLY IN SUPPORT OF GEOGRAPHIC  
STRATEGIES LLC'S RESPONSE TO  
COURT ORDER OF 7/12/19 AND, IN THE  
ALTERNATIVE, MOTION FOR  
REFERENCE UNDER RULE 53

Geographic Strategies, LLC (“Strategies”) hereby submits this Reply in support of its response to this Court’s order issued July 12, 2019, which allowed Strategies to assert claims of ownership and confidentiality to its data obtained by the Plaintiffs, and alternative Rule 53 Motion for Reference of the discovery dispute to a special master to determine the protections that should be afforded to individual documents.

1. The dispute stems from a series of motions for relief under Rules 45 and 26 of the North Carolina Rules of Civil Procedure in which Strategies and other claimants, including the Legislative Defendants, have requested the Court enforce its Consent Protective Order regarding the so-called “Hofeller Files” and designate some of the Files as Confidential (or Highly Confidential) such that they will be destroyed when the litigation ends.

2. The legal standard by which parties can utilize discovery matters like the Hofeller Files has three distinct phases. During the discovery phase, Plaintiffs were able to obtain documents which could

lead to discoverable evidence. During the trial period, Plaintiffs are able to selected from discovery files relevant and probative to their case. In this trial Plaintiffs selected only a few of the over 300,000 files discovered to introduce into evidence. These are public documents. Now that the trial has concluded, Plaintiffs have minimal, if any, legitimate adjudication needs or rights to retain *any unfiled* discovery material owned by others.

3. The Court gave Strategies 45 days to review nearly a terabyte of data and mark for ownership and protection hundreds of thousands of files. Strategies began this herculean task as soon as it received the documents on July 17, 2019. After a rigorous document-by-document review process and hundreds of hours of work by over 20 attorneys and consultants, Strategies filed detailed document-by-document itemization logs as required by the Court, as well as a brief which detailed the codes of ownership placed on the itemization log. Strategies also went beyond what was required by this Court's ordered and noted documents that were protected by attorney-client privilege or work-product immunity.<sup>1</sup> In addition, Strategies itemized other claimants' interests in the files and additional files which should be marked Personal which Plaintiffs previously failed to identify. Strategies has also offered to allow the Court to use its document system to examine contested documents. Strategies' response has caused Strategies to expend over \$200,000.

4. In finalizing its itemization logs, Strategies ran searches to remove the thirty-five North Carolina documents and census documents referenced during the July 2<sup>nd</sup> hearing over which Strategies disclaimed ownership. Unfortunately, it appears that some of those files remained in the itemization

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<sup>1</sup> In their brief, Plaintiffs seem to believe, incorrectly, that this Court required Strategies to provide a privilege log, complaining about the detail provided in support of Strategies' privilege and work-product claims. This Court did not require a privilege log, nor would a privilege log serve any purpose as Plaintiffs already have copies of the documents. Thus, the purpose of a privilege log—to provide a party with enough information to challenge the assertion of privilege when another party refuses to produce documents—is not implicated here.

logs by mistake and should be removed. This is a minor mistake, particularly in the context of this massive undertaking done over such a short period of time, and it is deeply disappointing that Plaintiffs would revert to allegations of bad faith as a result. *See, e.g.*, Plaintiffs' Response to Geographic Strategies' Response of Court Order of 7/12/19 ("Plaintiffs' Response") at 6 (contending that Strategies "has attempted to conceal harmful documents by improperly and falsely making sweeping claims of privilege or confidentiality" (emphases added)). Furthermore, Plaintiffs' assertion Strategies waived any claim to any North Carolina documents is factually unsupported due to finding 7 of the Court's Order of July 12<sup>th</sup> that Strategies' waiver was limited to documents to be introduced at trial. Indeed, beyond the documents identified in the Plaintiffs' motion *in limine*, Strategies did not know the identity of the exact files produced by Ms. Hofeller and could not have knowingly waived its rights to any of those unidentified files.

5. Strategies claims, as described in Ms. Blankenship's and Mr. Oldham's sworn affidavits, that thousands of documents and files are privileged and *owned* by Strategies or other claimants. Notwithstanding the needlessly accusatory tone of their brief, Plaintiffs have not provided this Court with *any* sworn evidence which contradicts Strategies' evidence, and Plaintiffs concede some of the documents which are contained in the Hofeller Files are proprietary and confidential.<sup>2</sup> For example, Plaintiffs argue that Strategies "obviously has no ownership or other cognizable interest in documents that pre-date the company's existence." Plaintiffs' Response at 8. But Strategies introduced un rebutted evidence that much of the work product created by Strategies' principals was incorporated into "a data library to enhance Strategies' ability to service its clients," thereby rendering it Strategies' proprietary information. *See* Dalton L. Oldham's Affidavit in Support of Geographic Strategies LLC's Motion to

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<sup>2</sup> Tellingly, these files are mostly financial records of no political significance to Plaintiffs.

Designate Documents Confidential or Highly Confidential and for Additional Requests for Relief, ¶¶ 18, 22, 24. Strategies' unrebutted evidence substantiates every claim that Plaintiffs argue is unsubstantiated. Plaintiffs' arguments also fail to address the fact that Strategies' clients have their own claims to many of the documents itemized on Strategies' logs, including many of the documents that pre-date the company's existence. *See id.* ¶¶ 4-7.

6. Strategies' motion should therefore be granted in its entirety, and all of the itemized files and documents should be permanently designated Confidential or Highly Confidential and destroyed when the case concludes pursuant to the Consent Protective Order. In addition, for the reasons provided in Strategies' Emergency Motion—which Plaintiffs barely address—all copies should be destroyed, and third parties in possession of the Files should be enjoined from describing or distributing them further. The Court is fully within its power to grant the relief requested. *See, e.g., In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 423–24 (E.D.N.Y. 2007), *judgment entered sub nom. In re Zyprexa Litig.*, No. 07-CV-0504, 2007 WL 669797 (E.D.N.Y. Mar. 1, 2007), and *aff'd sub nom. Eli Lilly & Co. v. Gottstein*, 617 F.3d 186 (2d Cir. 2010) (rejecting First Amendment concerns in response to enjoining dissemination of information obtained in violation of a protective order because injunction was (1) not content-based; (2) the least restrictive means of protecting the party; and (3) served important government interests such as “protect[ing] the privacy and property rights of litigants appearing before it, which is essential to a fair and efficient system of adjudication.”).

7. At the very least, even if the Court were to credit Plaintiffs' unsupported attacks on Strategies' claims, there are thousands of disputed documents, many of which are plainly the property of Strategies and its clients and outside the matters contained in the pleadings. As a result, if the Court is not willing to accept Strategies' unrebutted evidence and designations, there is substantial fact-finding and legal analysis that must occur on a document-by-document basis. Due process requires the examination of

individual documents by the Court, particularly because of Strategies' property rights under the North Carolina Constitution. Strategies has previously offered to provide the Court with access to its Relativity platform to resolve any individual document claims of right and will do so upon request.

8. In the alternative, given the substantial resources that a document-by-document review would entail, if the Court wishes to proceed in that manner, a reference or special master appointment would be appropriate and preserve scarce judicial resources. Complicating the task is a debate between the parties over what legal standards the Court should use to resolve the disputes. The task is also complicated based on the fact that clients of Dr. Hofeller and Mr. Oldham have sought relief seeking protection from this court. In addition, there is a large amount of "personal" documentation which was not captured by the Plaintiffs involving personal information regarding the Hofeller family which Strategies contends should be brought to the Court's attention and designated Highly Confidential. For example, the documents include graphic pictures of Ms. Stephanie Hofeller's wounds received from her husband in their litigation in West Virginia with the Department of Social Services regarding their termination of parental rights. Similarly, personal documents exist in the files which were not detailed earlier because counsel would have thought these would have been individually reviewed by Plaintiffs and marked "Highly Confidential" when Plaintiffs received them. Notwithstanding Plaintiffs failure to protect these documents, Plaintiffs now argue that this Court should allow these highly personal files to become public simply because they do not belong to Strategies. This Court should reject Plaintiffs' disregard for the interest of third parties and designate the documents which the reviewers marked personal as "Highly Confidential."

9. There are also important legal questions to be answered before this Court de-designates any of the Hofeller Files. For example, the Court of Appeals' ruling in *Crosmun et al. v. The Trustees of Fayetteville Technical Community College*, No. COA 18-1054, 2019 WL 3558764 (N.C. App. Ct.

2019), makes clear turning over discs and thumb drives for a party opponent to do a forensic study of is an abuse of discretion, and Strategies contends that *Crosmun* should apply here. It is clear from this ruling a party who has been subjected to a forensic examination of its entire database would be prejudiced. This ruling is unremarkable and follows well-established federal and state business court practice. In their filings, Plaintiffs are not able to distinguish why this precedential authority should not be followed here. As a result, Strategies contends disproportionate discovery obtained in this case should be remedied by blanket relief.

10. Without addressing this issue in detail, we also agree with the New York Times *amici*, there is no controlling law in North Carolina as to what rights should be given to third parties to “unfiled” civil discovery after a case is over. (Amicus Brief, pg. 5-6) Their brief suggests all movants have to do is to show “‘good cause’ under a protective order to meet this standard” in other states. *Id.* If that is the case, Strategies has easily met that standard here, especially given Plaintiffs’ failure to submit any evidence to contradict Strategies’ claims. Plaintiffs on the other hand suggest in their filings an insurmountable standard by which the party whose documents have *already been taken* has the burden to provide detailed evidence of ownership, First Amendment privilege, work-product privilege, attorney-client privilege, and confidentiality privileges. *Id.* This legal issue will need to be resolved when the Court makes its ruling so the parties and, if needed, any reviewing court will know which legal standard the Court used in evaluating the evidence.

11. The apparent coordinated release of some portion of the Hofeller Files to news organizations does not render this issue “moot”. The release of the documents by Ms. Hofeller could not have been foreshadowed by her ambiguous deposition, and in any event, it may violate this Court’s Order. Furthermore, Ms. Hofeller turned over the documents to Plaintiffs in a subpoena, but by using Strategies property in her limited release to press, Strategies’ view is that she, and her confederates, are converting

its property and acting tortiously . Regardless of the characterization of the legal issues in her release, there remain a large set of documents not released which are still at issue.

12. “Public interest” groups—many of which have no standing in this litigation now that judgment has been entered—contend the public has an interest in unfiled discovery of Strategies. We note Strategies is not a public official or governmental entity. None of the files at issue involves the health and welfare of citizens or reveals any criminal activity or fraud. The unevidenced assertions amount to a curiosity in what the Republican Party’s internal thought processes might be. To give any weight to these assertions would invalidate Strategies’ constitutionally-protected ownership interest and cripple Strategies’ clients First Amendment interest. These self-serving declarations do not meet the requirements of affidavits under North Carolina law. And in Strategies’ view, the public interest is served by following the North Carolina law by vindicating its property rights under the North Carolina Constitution, as well as its business confidences and privileges, and protecting its clients’ First Amendment interest. Respecting the confidentiality of proprietary business records also furthers the public interest by giving parties in litigation confidence in relying on protective orders when producing documents, which in turn supports the free flow of information that is vital to the truth-seeking function of the judiciary.

13. Other “public interest” groups ask this Court to decide issues for other courts in this and other jurisdictions. These requests are outside the scope of these pleadings and this Court’s jurisdiction. This court has already addressed and determined that other courts are not precluded from exercising their discretion to compel production of the Hofeller Files *from the owners of those files* in other cases. (Finding 9, July 12<sup>th</sup> Order). If the Court were to extend its jurisdiction to these other matters, then a referee would be needed. For instance, the issues raised regarding the voter identification case by the Coalition for Southern Justice are not within the pleadings. Furthermore another North Carolina court

has the jurisdiction arising from those pleadings to undertake this task. Similar requests made by the Plaintiffs to use the material in other courts in which they have had or might have litigation in the future, should be denied. There is a procedure in all of these state and federal courts to obtain this material through a regular discovery process.

14. In our view this Court should exercise its discretion, even if it were to have jurisdiction to do otherwise, to limit its ruling to this case and these parties and movants and not speculate what is relevant, material evidence in other courts. A judicially manageable standard exists to resolve these issues: if any discoverable material is produced in discovery and is not filed in the trial of the case, it should be returned to its true owner or destroyed subject to the terms of a protective order. This common-sense rule would discourage disproportionate discovery.

WHEREFORE, the Court should permanently designate the files identified by Strategies in its itemization logs as either Confidential or Highly Confidential and grant Strategies' request for emergency relief. In the alternative, Strategies prays for the appointment of a referee to hear and resolve all disputed claims of the parties or other movants under the Consent Protective Order which have been filed in this action and to report to the Court the findings of fact and conclusions of law no later than December 31, 2019 and to continue to designate the entirety of Hofeller Files Confidential until that date or a sooner date as the Referee or Special Master reports to the Court and the Court enters an order pursuant to that report.

Dated: September 15, 2019



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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing upon all parties to this matter by emailing counsel as per the Case Management Order as follows:

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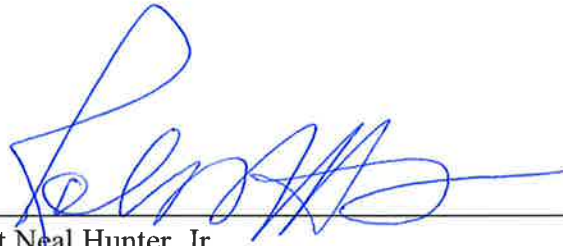
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