

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
GEOGRAPHIC STRATEGIES'
RESPONSE TO COURT ORDER
OF 7/12/19**

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INTRODUCTION

This Court gave Geographic Strategies a chance to review the Hofeller files and identify specific documents in which Geographic Strategies claims ownership and a confidentiality interest. Geographic Strategies squandered the opportunity. Disregarding the Court's direction, Geographic Strategies claims to own virtually every substantive document in the Hofeller files, including a vast number of documents that it could not conceivably own. Geographic Strategies further claims that all of these documents warrant confidential treatment, even though many of them are not conceivably confidential. Geographic Strategies seeks confidential treatment, for instance, of documents that Plaintiffs introduced as exhibits at the public trial of this case. Geographic Strategies claims to own over 100,000 documents pertaining to Dr. Hofeller's work before Geographic Strategies even existed. Geographic Strategies claims to own documents that, based on the company's own statements, pertain to Dr. Hofeller's work for jurisdictions that never hired Geographic Strategies but rather retained Dr. Hofeller in his individual capacity. Geographic Strategies also conceal to designate many thousands of documents that constitute public records under the laws of North Carolina and other jurisdictions. For these and many other reasons set forth below, Geographic Strategies' August 30 submissions make a mockery of the review-and-itemization process established by this Court's July 12 Order.

To assist the Court, attached as Exhibits A and B are Plaintiffs' objections to Geographic Strategies' Logs 1 and 2, respectively. Plaintiffs have reordered the documents based on certain categories described below, and Plaintiffs have listed their specific objections in the far-right columns of the exhibits. Other than 950 documents that Plaintiffs have identified in Exhibit B, for which Plaintiffs have no objection to confidential treatment, the Court should reject Geographic Strategies' request to designate hundreds of thousands of other documents as Confidential and thereby hide them from public view.

ARGUMENT

I. Geographic Strategies' Indiscriminate Listing of Nearly Every Substantive Document in the Hofeller Files Alone Warrants Rejection of the Requested Relief

In its original motion, Geographic Strategies asked this Court to designate “all of the Hofeller files” as Highly Confidential under the Consent Protective Order. 6/15/19 Geographic Strategies Mot. at 1. The Court refused that vastly overbroad request. Instead, the Court directed Geographic Strategies to review the documents and itemize *only* the individual documents “in which Geographic Strategies [1] claims ownership or other claim of right and [2] contends ought to continue to be treated as confidential.” 7/12/19 Order at 4. The Court emphasized that Geographic Strategies could seek confidential treatment only for specific documents that are “*demonstrably proprietary.*” *Id.* at 3 (emphasis added).

Geographic Strategies' August 30 submissions brazenly flout this Court's directives. Rather than designate documents over which the company can demonstrate a proprietary interest, Geographic Strategies has taken a sweeping, blanket approach to claim ownership and confidentiality over virtually every substantive document in the Hofeller files. As a result of this blunderbuss approach, Geographic Strategies' logs include more than 160,000 documents over which Geographic Strategies has no conceivable claim of any ownership interest based on its own representations, both in the prior briefing and in its August 30 brief.

The following are some of the most egregious examples of documents that Geographic Strategies included as its supposedly proprietary and confidential information:

- Geographic Strategies tagged many of the 35 of the Hofeller files that Plaintiffs' experts relied upon in this case, even though “Geographic Strategies, in open court, has specifically stipulated that as to those documents, it has no claim of ownership, privilege, or proprietary interest, and has waived any claim as to those files,” and

even though the Court specifically stated that its July 12 Order “does not apply” to those files. 7/12/19 Order at 5.¹ Most remarkably, Geographic Strategies tagged files that Plaintiffs admitted into evidence as exhibits at the public trial of this case. (And contrary to Geographic Strategies’ repeated erroneous assertions, this was many more than four files.)

- Geographic Strategies tagged all of the documents from the Hofeller files that were publicly filed with federal courts in the census litigation, along with other documents related to Dr. Hofeller’s same 2015 study concerning CVAP, even though Geographic Strategies previously acknowledged that it has no proprietary interest in any of these documents. *See* Ex. B at Rows 10581-92, 10539-40, 10749-60, 11019, 14291-92, 16166, 16744-45, 16650-51, 17361, 17363-69, 17410-12.
- Geographic Strategies tagged documents that were produced in discovery in other lawsuits, including the Ohio partisan gerrymandering case last year. *Compare Ohio A. Philip Randolph Inst. v. Smith*, 2018 WL 65915622, at *4 (S.D. Ohio Dec. 15, 2018) (compelling production of files titled “4-WAY_SPLIT_9-6.zip” and

¹ *See* Ex. B at Row 4135, Ex. A at Rows 32514-32533 32574-32585 32596-32601, 33189-33217, 33670-33689, 33707-33708, 33877-33888, 33891-33894, 33909-33910, 35392-35393, 35430-35431, 35454-35355, 36274-36275, 36417, 36432, 36441, 36653-36654, 36685-36686, 36711-36712, 36952-36953, 36987-36988, 37011-37012, 37930, 37945, 37954, 39440, 39810, 39825, 39834, 40188-40189, 40232-40233, 40286-40287, 40624-40625, 40670-40671, 40722-40723, 40854, 40865, 40938, 41600-41612, 41952-41964, 42633-42645, 45335-45350, 45360, 46429-46441, 46793-46805, 47644-49755, 49771, 49782, 50625-50637, 51364-51376, 52138-52150, 55126, 55141, 55151, 56436-56448, 56827-56839, 57269-57281, 60668, 60683, 60694 61913-61925, 62409-62421, 62750-62762, 66511-66518, 66522-66526, 66552-66559, 66575-66578, 66599, 66627, 66635, 66649, 66696-66700, 66722-66724, 66808, 66819, 66835-66840, 66856-66860, 66883-66884, 66922, 66927-66930, 66958, 66961-66965, 66986, 67008, 67119-67122, 67143-67146, 67160-67162, 67164-67165, 67229, 67373-67375, 67389-67391, 66247-66256, 66263-66265, 66302-66307, 66418-66430, 66470-66477, 66483, 66497-66500, 66506-66510, 66981-66983, 66985, 66987, 67011.

“Ohio_Congressional_Map-as_of_9-9.zip”), with Ex. A at Rows 116858-116871 and 117436-117476 (listing the identical files on Geographic Strategies’ Log 1).

- Geographic Strategies tagged over 38,000 files from Dr. Hofeller’s redistricting and other work in North Carolina this decade, even though Geographic Strategies previously represented that it has no claim of ownership to any North Carolina records from this decade, and even though this Court has already determined that most, if not all, of these materials are public records under North Carolina law.
- Geographic Strategies tagged over 37,000 documents pertaining to Dr. Hofeller’s work in numerous jurisdictions—namely, Virginia, Missouri, Arizona, Nassau County (New York), Nueces County (Texas), Galveston County (Texas)—even though Geographic Strategies admits that it performed no work for these jurisdictions and Dr. Hofeller instead worked for them in his individual capacity.
- Geographic Strategies tagged 34,855 documents that pre-date the company’s very existence. In other words, in Geographic Strategies’ indiscriminate tagging of virtually every substantive document, it has claimed a “proprietary” interest in a vast number of documents that Dr. Hofeller created before the company was even formed.

The issue here is not just that Geographic Strategies tagged documents that do not belong to it.

The categories above undermine any faith in whether Geographic Strategies has a proprietary interest in *any* of the documents it tagged, or whether it even looked at the documents before tagging them. In these circumstances, the Court simply cannot accept Geographic Strategies’ logs as a legitimate designation of the company’s proprietary and confidential documents.

Geographic Strategies’ blunderbuss approach is most apparent in Log 1, which appears to tag *every* mapping file on the storage devices—more than 251,000 files. Geographic Strategies

does not claim that Dr. Hofeller actually created all of these files in his capacity as a member of Geographic Strategies. Nor could it, because the vast majority of these files were created by Dr. Hofeller either before Geographic Strategies existed or as part of work that Dr. Hofeller did in his individual capacity, as Geographic Strategies has previously admitted. Instead, Geographic Strategies claims that these mapping files belong to Geographic Strategies because Dr. Hofeller purportedly added them to some “data library.” Geographic Strategies provides no proof that any such “data library” ever existed, and it would not matter anyway. If Dr. Hofeller created mapping files before Geographic Strategies existed, or while working for a jurisdiction that had retained Dr. Hofeller personally rather than Geographic Strategies, those files cannot conceivably be Geographic Strategies’ “proprietary” information.

Additionally, an enormous volume of the mapping files that Geographic Strategies tagged are public records under the laws of North Carolina and other states. *See infra*. Geographic Strategies even tagged some mapping files in Log 1 as its own property, while admitting in Log 2 that the same exact files (with either the same or different file extensions) are *not* its property. *Compare, e.g.*, Ex. B at Row 59941 (Log 2 admitting that Nassau County owns file “NASSAU MINORITY DISTRICT AREAS.DBF”) with Ex. A at Row 90747 (Log 1 claiming that Geographic Strategies owns file “NASSAU MINORITY DISTRICT AREAS.DBF”). Geographic Strategies’ indiscriminate approach to tagging every mapping file directly contradicts the process this Court ordered. Because Geographic Strategies made no serious effort to itemize mapping files for which it could plausibly claim a proprietary interest, the Court should categorically reject its attempt to designate the mapping files in Log 1.

Nor did Geographic Strategies make any real attempt to justify its sweeping and baseless designation of so many documents in Log 2. In the column stating the supposed “basis for claim

of ownership” of 17,000-plus non-mapping files, Geographic Strategies merely asserts either “Geographic Strategies document” or “Geographic Strategies document concerning redistricting.” Geographic Strategies provides no substantiation for these vague assertions, other than pointing to the “source path” and Mr. Oldham’s affidavit. But the source path in nearly all cases bears no indication of Geographic Strategies ownership, and Mr. Oldham’s affidavit simply points back to the logs themselves, which is circular. (As a clarification, the source path for many documents includes “Geo.” This was added by Geographic Strategies’ vendor and was not part of the original source path for any of these documents.) As explained below, moreover, a substantial portion of the documents in Geographic Strategies’ Log 2 do not belong to Geographic Strategies based on its own admissions.

Geographic Strategies’ approach to confidentiality is no less absurd. For every single one of the 251,295 files in Log 1, Geographic Strategies simply writes, “Attorney Work Product,” with no further explanation. Nowhere in its brief or logs does Geographic Strategies attempt to substantiate that any lawyer even had any connection to these documents. For every document that Geographic Strategies claims to own in Log 2, the log simply states, “Privilege / Immunity” and “Confidential,” again without any further explanation. This is obviously insufficient, and it highlights Geographic Strategies’ disregard for this Court’s directives.

This case is not the first time that Mr. Oldham has attempted to conceal harmful documents by improperly and falsely making sweeping claims of privilege or confidentiality. In response to a subpoena to the RNC in the Ohio gerrymandering case last year, Mr. Oldham submitted a declaration attesting that “he believes every communication he reviewed marked ‘work-product’ on the privilege log to have been created in anticipation of partisan gerrymandering (or other) litigation.” *Ohio A. Philip Randolph Inst. v. Smith*, 360 F. Supp. 3d

681, 693 (S.D. Ohio 2018) (quotation marks and brackets omitted). The court held that “[t]his conclusory, sweeping statement pertaining to every document marked ‘work product’ is not the kind of specific and detailed evidence required to invoke the privilege.” *Id.* (quotation marks omitted). The court went further, finding that “[t]he breadth of Mr. Oldham’s conclusory assertion that all documents marked ‘work product’ (i.e., every single document on the RNC privilege log) were prepared in anticipation of litigation is troubling.” *Id.* at 693 n.8. The court concluded: “That [the subpoenaed entities] withheld this document pursuant to the work-product doctrine, but failed to set forth any argument at all as to why the doctrine would apply, gives the Court reason to question the veracity of Mr. Oldham’s broad, conclusory claim.” *Id.* The same is true here.

While Geographic Strategies’ across-the-board designation of nearly every substantive document in the Hofeller files should foreclose any relief here, Plaintiffs have nonetheless made a good-faith attempt to identify the small number of documents in which Geographic Strategies could claim a proprietary interest and potential confidentiality. Those documents are labeled “No objection” in rows 1 through 950 of Plaintiffs’ Exhibit B. Beyond designating those 950 documents as Confidential, this Court should reject Geographic Strategies’ requests.

II. Geographic Strategies Has Not Established an Ownership or Other Proprietary Interest in the Overwhelming Majority of Documents It Claims to Own

To properly seek confidential treatment of files under the Court’s July 12 Order, Geographic Strategies must “demonstrably” establish its “ownership or other claim of right” as to each document. 7/12/19 Order at 3-4. The following are categories of documents that Geographic Strategies claims as its own even though Geographic Strategies did not—and in many instances cannot—establish any ownership or other claim of right.

A. Documents Pre-Dating the Company’s Existence

Geographic Strategies obviously has no ownership or other cognizable interest in documents that pre-date the company’s existence. Geographic Strategies was incorporated on June 15, 2011, *see* 6/26/19 Pls.’ Response to Geographic Strategies Mot. for Leave, Ex. O, and thus the company cannot claim a right to documents preceding that date. Geographic Strategies seems to admit this: Mr. Oldham’s affidavit states that only “work produced by Dr. Hofeller and [himself] for the RNC *from June 2011 through July 2018 . . .* is property belonging to Strategies.” 8/23/19 Oldham Aff. ¶ 10 (emphasis added).

And yet, Geographic Strategies has sought to designate 34,855 files pre-dating June 15, 2011 as its own property on its logs—31,917 files in Log 1 and 2,938 files in Log 2. While Geographic Strategies listed the “File Datetime” on its logs, those dates reflect the date the file was *copied* onto the storage devices, not the date the file was *last modified*, which in nearly all cases was earlier in time. The sixth-to-last columns in Exhibits A and Exhibit B list the last modified date of files that were last modified before June 15, 2011. Geographic Strategies cannot claim ownership of any of these files last modified before the company was formed. In addition to these files, there are numerous other files for which Plaintiffs do not have the last modified dates, but the “File Datetime” listed by Geographic Strategies pre-dates June 15, 2011. Geographic Strategies cannot claim to own these files either, since Dr. Hofeller copied them onto the storage devices before the company existed.

The files last modified or copied onto the storage devices before June 15, 2011 are listed in Rows 1-31917 of Exhibit A and Rows 951-3888 of Exhibit B.

B. North Carolina Documents

In Geographic Strategies’ original motion and at the subsequent hearing on July 2, 2019, Geographic Strategies expressly disclaimed having any ownership or other interest in files from

the storage devices related to Dr. Hofeller’s work in North Carolina this decade. Geographic Strategies’ counsel stated at the July 2 hearing that in “North Carolina[] . . . this decade, Dr. Hofeller was hired independently of Geographic Strategies.” Ex. C at 119; *see also* 6/28/19 Geographic Strategies Reply Br. at 2-3 (asserting that “Maptitude files for the North Carolina 2017 redistricting” and files “located in folders labeled “NC 2017 Redistricting” or “2017 Redistricting . . . do not belong to Geographic Strategies”). Even in its most recent filing, Geographic Strategies does not list North Carolina as one of the states in which Dr. Hofeller worked on behalf of Geographic Strategies, *see* 8/23/19 Oldham Aff. ¶ 17, and concedes that Dr. Hofeller was hired in his individual capacity for all work in the state, *id.* ¶ 14.

Without even acknowledging these prior representations to the Court, Geographic Strategies has attempted to designate at least 38,646 files relating to Dr. Hofeller’s work in North Carolina as its purported property—37,986 files in Log 1 and 660 files in Log 2. Given its prior representations, Geographic Strategies should be held to have waived any claim to North Carolina-related documents or be estopped from asserting any such claims.

Waiver and estoppel aside, Geographic Strategies obviously has no legal claim to these North Carolina records, which fall into two buckets: (1) documents, including but not limited to draft maps, related to Dr. Hofeller’s drawing of redistricting plans in North Carolina (including the 2011 state legislative and congressional plans, the 2016 congressional plan, and the 2017 state legislative plans); and (2) documents derived from Dr. Hofeller’s work as an expert witness in North Carolina litigation this decade (the relevant cases are listed in the chart in Exhibit D).

With respect to the first category, as Mr. Oldham stated in his original June 15, 2019 affidavit, when Dr. Hofeller was retained as a “plan drafter,” he was hired in his “individual[]” capacity and not “under the auspices of Geographic Strategies.” 6/15/19 Oldham Aff. ¶ 6. Dr.

Hofeller's contracts with the North Carolina General Assembly confirm that this was the case in North Carolina. The contracts to draw the 2016 congressional plan and the 2017 state legislative were signed by Dr. Hofeller in his individual capacity. *See* 6/26/19 Pls.' Response to Geographic Strategies Mot. for Leave, Exs. R, S. And while Plaintiffs are not aware of any written contract to draw the 2011 plans, Geographic Strategies has not disputed (and indeed has conceded) that Dr. Hofeller also performed this work in his individual capacity. Dr. Hofeller also testified under oath in *Dickson* that public funds, and not funds from the RNC, were used to compensate him for his work on the 2011 plans. 6/28/12 Hofeller Dep. 38:13-19.

More importantly, as this Court has now held, all of Dr. Hofeller's files relating to his drawing of redistricting plans in North Carolina—whether it be draft maps, emails, or any other files—are public records under N.C. Gen. Stat. § 120-133(a) and Dr. Hofeller's contracts with the General Assembly. 9/3/19 Judgment, FOF ¶ 56. Geographic Strategies remarkably has claimed ownership over roughly 36,000 such public records and seeks to have these public records “destroyed.” Geographic Strategies Br. at 27. That is not an option— North Carolina law in fact makes it a crime to “destroy” public records, N.C. Gen. Stat. §§ 121-5(b), 132-3(a)— and the fact that Geographic Strategies has claimed ownership over these documents speaks volumes. These public records belong to the people of North Carolina, not Geographic Strategies, and cannot lawfully be subject to any confidentiality restrictions. Most of the North Carolina public records over which Geographic Strategies has improperly claimed ownership are listed in Rows 31,918-67,422 of Exhibit A and Rows 3,889-4,285 of Exhibit B. There are additional such records in earlier rows where these records pre-date Geographic Strategies' existence.²

² Geographic Strategies tagged other documents that likely constitute public records as well, including emails with people using state or federal government email addresses.

As for records relating to Dr. Hofeller’s work as an expert witness in North Carolina litigation, those records do not belong to Geographic Strategies either. Mr. Oldham again admitted as much in his prior affidavit, where he confirmed that “[n]o expert work [by Dr. Hofeller] was done under the auspices of Geographic Strategies.” 6/15/19 Oldham Aff. ¶ 6. Dr. Hofeller’s work as an expert witness in North Carolina litigation was in his individual capacity, and Geographic Strategies cannot claim ownership over any of these files. Most of the files relating to Dr. Hofeller’s work as an expert witness in North Carolina litigation are listed among Rows 67,423-67,835 of Exhibit A and Rows 3,889-4517 of Exhibit B, and there are additional such files in earlier rows where the files also fall into other relevant categories.

C. Virginia, Arizona, Missouri, Nassau County, Nueces County, and Galveston County Documents

In Paragraph 17 of his most recent affidavit, Mr. Oldham does *not* list the following jurisdictions as ones which Dr. Hofeller “advised through Geographic Strategies”: Virginia, Arizona, Missouri, Nassau County, Nueces County, and Galveston County. Geographic Strategies Br. ¶ 17. To the contrary, Mr. Oldham confirms in Paragraph 14 of the Affidavit that Dr. Hofeller was “separately retained” by these jurisdictions. *Id.* ¶ 14. Dr. Hofeller’s work in these jurisdictions included, but appears not to have been limited to, his participation as an expert witness in litigation. *See* Ex. D (listing all of the lawsuits since 2010 in which Dr. Hofeller served as an expert witness).

Again, despite disclaiming ownership over documents relating to these jurisdictions, Geographic Strategies has claimed ownership of 37,374 documents across these five jurisdictions: 12,237 related to Arizona; 10,350 related to Virginia; 5,640 related to Missouri; 635 related to Nassau County; 1,334 related to Nueces County; and 7,178 related to Galveston County. It again speaks volumes about Geographic Strategies’ entire approach to this process

that it has listed these documents as its own, and this Court should reject Geographic Strategies' attempted ownership designations of all of these records. Most of the files relating to these jurisdictions are listed in Rows 67,836-100,421 of Exhibit A and Rows 4,518-7,343 of Exhibit B. There are other files from these jurisdictions in earlier rows where the files pre-date Geographic Strategies' existence.

D. Maryland, Tennessee, and Mississippi Expert Witness Documents

In addition to Dr. Hofeller's work as an expert witness in the above jurisdictions, Dr. Hofeller served as an expert in litigation this decade in Maryland, Tennessee, and Mississippi. Specifically, Dr. Hofeller served as an expert witness in: *In re: 2012 Legislative Districting*, No. 5-2012, Md. Ct. App.); *Moore v. Tennessee*, No. 120402-III (Tenn. Chancery Ct.); *Mississippi State Conference of the NAACP v. Barbour*, 3:11-cv-159 (S.D. Miss.); *see also* Ex. D (listing all cases this decade in which Dr. Hofeller served as an expert witness).

Dr. Hofeller's work as an expert in these cases, like all of his other expert engagements, was performed in his individual capacity and not "under the auspices of Geographic Strategies." 6/15/19 Oldham Aff. ¶ 6. Geographic Strategies thus has no rights over Dr. Hofeller's documents related to these lawsuits, but nevertheless it has erroneously claimed ownership over 10,774 files related to Dr. Hofeller's work on these cases: 4,946 related to the Maryland case, 4007 related to the Tennessee case, and 1,821 related to the Mississippi case. Many of these files are listed in Rows 100,422-107,035 of Exhibit A and Rows 7,344-8,403 of Exhibit B, and the Court should reject Geographic Strategies' attempted designations of all of these documents.

E. Ohio and Florida Documents

The Court also should reject Geographic Strategies' attempted designations of documents that relate to Dr. Hofeller's drawing and reviewing of redistricting plans in Ohio and Florida. Geographic Strategies has waived any claim over documents relating to Dr. Hofeller's role in the

redistricting in these states this decade, and in any event, the evidence strongly suggests that Dr. Hofeller performed his work in these states in his individual capacity, and that these records are public records of Ohio or Florida.

In a recent partisan gerrymandering challenge to Ohio's congressional districts, the plaintiffs subpoenaed various third parties who were involved in the redistricting process, including the RNC, Mark Braden, and Adam Kincaid (a Republican mapmaker). The subpoenas to these third parties ultimately led to the production of many emails and files for which Dr. Hofeller was a custodian, and which revealed that Dr. Hofeller played a central role in developing and drawing the congressional plan. *See generally Ohio A. Philip Randolph Inst. v. Householder*, No. 1:18-cv-00357, ECF No. 251-1, at ¶¶ 24-35, 139-45, 246, 1015-16 (describing evidence uncovered showing Dr. Hofeller's role); *see also Ohio A. Philip Randolph Inst. v. Smith*, 2018 WL 6591622, at *5 (S.D. Ohio Dec. 15, 2018) (describing emails involving Dr. Hofeller); *Ohio A. Philip Randolph Inst. v. Smith*, 360 F. Supp. 3d 681, 692 nn.6, 8 (S.D. Ohio 2018) (similar). These subpoenas were subject to various objections, but Geographic Strategies never appeared to claim that Dr. Hofeller's documents were its property, let alone its "proprietary" information or "trade secrets." Indeed, Mr. Oldham filed an affidavit in the case on behalf of the RNC, and neither Mr. Oldham nor anyone else ever mentioned Geographic Strategies at all. *See Ohio A. Philip Randolph Inst.*, ECF Nos. 96-1. Geographic Strategies has waived any claim that Dr. Hofeller's work on the Ohio congressional plan purportedly constitutes its "proprietary methods of analysis" and "trade secrets," Geographic Strategies Br. at 14, where Geographic Strategies never sought to protect such documents on these grounds in the Ohio case. *See, e.g., Fail-Safe, LLC v. A.O. Smith Corp.*, 674 F.3d 889, 893 (7th Cir. 2012) ("[O]ne who claims a trade secret must exercise eternal vigilance in protecting its

confidentiality.”) (citation omitted); *Future Plastics, Inc. v. Ware Shoals Plastics, Inc.*, 340 F. Supp. 1376, 1382 (D.S.C. 1972) (similar).

Even if Geographic Strategies had not waived its claims with respect to the Ohio documents, it appears that Dr. Hofeller did not perform his work on the Ohio plan in his Geographic Strategies capacity and that these records are public records. At a minimum Geographic Strategies has not met its burden to show otherwise. As mentioned, the evidence uncovered in the Ohio gerrymandering case showed that Dr. Hofeller served as one of the primary drafters of the Ohio congressional plan. Mr. Oldham has admitted that, when Dr. Hofeller served “as a plan drafter,” he did not do so “under the auspices of Geographic Strategies.” 6/15/19 Oldham Aff. ¶ 6.

Moreover, records of the Ohio legislature are public records under Ohio law. *See* Ohio Rev. Code § 149.43; *see also State ex rel. Petty v. Wurst*, 550 N.E.2d 214, 216 (Ohio Ct. App. 1989) (“In construing R.C. 149.43, public policy requires a liberal construction of the provisions defining public records and a strict construction of the exceptions”). And the Ohio Supreme Court has expressly held that records held by a private consultant are public records where a state government body has outsourced or delegated government functions to that private consultant. *See State ex rel. Gannett Satellite Info. Network v. Shirey*, 678 N.E.2d 557, 561 (Ohio 1997); *accord Hurt v. Liberty Twp., Delaware Cty.*, 97 N.E.3d 1153, 1169 (Ohio Ct. App. 2017). Drawing congressional districts is obviously a “uniquely public duty,” *Shirey*, 678 N.E.2d at 561, and thus Dr. Hofeller’s files relating to his work in developing the Ohio congressional plan are public records of Ohio. Geographic Strategies again has provided no evidence or argument to show otherwise.

There are 6,046 files relating to Dr. Hofeller's work on the Ohio congressional map, which are listed in Rows 116,824-121,850 of Exhibit A and Rows 8,404-8,527 of Exhibit B.

Dr. Hofeller's files regarding Florida are similar to those from Ohio. As in Ohio, there was litigation challenging Florida's congressional plan in which the plaintiffs issued subpoenas to non-parties, including a handful of Republican consultants, which led to the production of certain communications with Dr. Hofeller. *See, e.g.*, Ex. E. Neither Geographic Strategies nor anyone else ever asserted that Geographic Strategies had a proprietary interest in Dr. Hofeller's work on the Florida congressional plan, and thus Geographic Strategies has again waived any claim to a protectable interest in such documents.

As with Ohio, Geographic Strategies cannot claim to own these documents because they reflect Dr. Hofeller's work as a plan drafter, which Mr. Oldham has asserted was not performed on behalf of Geographic Strategies. 6/15/19 Oldham Aff. ¶ 6. These Florida records are also public records. The Florida Constitution provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, *or persons acting on their behalf*," and this provision "specifically includes the legislative [branch]." Fla. Const. art. I, § 24 (emphasis added). "Florida courts construe the public records law liberally in favor of the state's policy of open government." *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. Dist. Ct. App. 2009). "If there is any doubt about the application of the law in a particular case, the doubt is resolved in favor of disclosing the documents." *Id.*

Consistent with these principles, and with the plain text of the state constitutional provision, Florida courts have held that documents "in the hands of a private party" constitute public records where those documents either were created by a government body and sent to the

private party, or were “prepared and maintained by a private organization” but viewed by a government body and “used in connection with public business.” *NCAA v. Associated Press*, 18 So. 3d 1201, 1207-10 (Fla. Dist. Ct. App. 2009) (documents prepared and maintained by NCAA constituted Florida public records); *accord Times Pub. Co. v. City of St. Petersburg*, 558 So. 2d 487, 492 (Fla. Dist. Ct. App. 1990) (same with respect to records created and held by Chicago White Sox); *Tober v. Sanchez*, 417 So. 2d 1053, 1055 (Fla. Dist. Ct. App. 1982) (documents created by public body but sent to outside person were still public records).

Dr. Hofeller’s Florida-related documents meet these criteria. In a challenge to Florida’s congressional plan, the state trial court found—in an opinion affirmed by the Florida Supreme Court—that a “group of Republican political consultants or operatives . . . conspire[d] to manipulate and influence the redistricting process,” that these consultants entered that conspiracy with leadership of the Florida legislature, and that this conspiracy “made a mockery of the Legislature’s proclaimed transparent and open process of redistricting by doing all of this in the shadow of that process.” *Romo v Detzner*, No. 2012-CA-000412, 2014 WL 3797315, at *11 (Fla. Cir. Ct. July 10, 2014); *see also League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 381 (Fla. 2015) (Florida Supreme Court opinion affirming). The trial court found that the transfer of records between the legislature and the Republican consultants ran in both directions. The evidence showed that the legislative leadership sent the consultants “copies of various draft maps of the Legislature well before they were disclosed to the public,” and even sent the consultants “draft maps that were never released to the public.” 2014 WL 3797315, at *15. The consultants, meanwhile, made modifications to the draft maps “to increase the Republican performance of the districts,” and some of the modifications were later adopted by the legislature. 172 So. 3d at 381. But critically for present purposes, the full evidence of this

conspiracy was incomplete because the “the Legislators and the political operatives systematically deleted almost all of their e-mails and other documentation relating to redistricting.” *Id.* at 378; *see also id.* at 390-91.

While it was previously known that Dr. Hofeller was one of the consultants who participated in these scheme, it now appears, based solely on the metadata in the logs that Geographic Strategies submitted, that Dr. Hofeller played a much larger role than previously known and that his files may expose more facts regarding the “conspiracy” that the state court found but for which much evidence was thought to have been destroyed. There is an undeniable public interest in preserving these records, and at a minimum, the records constitute records over which Geographic Strategies cannot claim an ownership or confidentiality interest.

There are 11,705 relevant files relating to Dr. Hofeller’s work on the Florida congressional plan, which are listed in Rows 107,306-116,824 of Exhibit A and Rows 8,528-10,357 of Exhibit B.

F. Texas Documents

Although Plaintiffs cannot disclose the details because the Hofeller files are currently deemed Confidential, Plaintiffs have strong reason to believe that Dr. Hofeller worked as an expert in his individual capacity for the State of Texas in *Perez v. Abbott*, 5:11-cv-360 (W.D. Tex.), a redistricting lawsuit regarding Texas’ congressional and state legislative plans that has lasted many years. Plaintiffs can provide the basis for this assertion under seal, if the Court so requests. But for purposes of the present controversy, it suffices that Geographic Strategies has provided no evidence that Dr. Hofeller’s work for the State of Texas in relation to the *Perez* case or otherwise was done on behalf of the RNC or RSLC—the “only clients of [Geographic] Strategies”—in Dr. Hofeller’s capacity as a Geographic Strategies partner. Geographic Strategies Br. at 14.

There are 16,915 files that Geographic Strategies has sought to designate that appear to relate to Dr. Hofeller's work on the *Perez* case, and these documents are listed in Rows 121,851-134,053 of Exhibit A and Rows 10,358-11,180 of Exhibit B.

G. Other Documents Lacking Substantiation That Work Was Performed for the RNC or RSLC

Geographic Strategies asserts that “[a]ll of Strategies’ work was done on behalf of two clients, the RNC and the RSLC.” Geographic Strategies Br. at 13. Despite admitting that the RNC and RSLC were its “only clients,” *id.* at 14, Geographic Strategies has designated roughly 100,000 files beyond those already described for which there is no evidence based on the information provided in Geographic Strategies’ privilege logs that the files have any connection to the RNC or RSLC.

These files include, but are not limited to, Dr. Hofeller’s apparent work in drawing redistricting plans in states such as Alabama, California, Georgia, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, and New Hampshire. Geographic Strategies has produced no contracts, invoices, emails, or any other documentary evidence to demonstrate that Dr. Hofeller’s work related to these jurisdictions (or the jurisdictions described in the prior sections) was done for the RNC or the RLSC pursuant to Geographic Strategies’ contracts with those organizations. The only substantiation that Geographic Strategies has sought to provide is Mr. Oldham’s assertion that “these states were serviced through Strategies.” 8/23/19 Oldham Aff. ¶ 9. This type of bald assertion devoid of evidentiary support is insufficient as a matter of law to meet Geographic Strategies’ burden to justify a protective order. And Mr. Oldham’s assertion should receive particularly little weight given how many documents Geographic Strategies demonstrably has sought to falsely designate as its own property, and given Mr. Oldham’s history of falsely claiming privilege or confidentiality in this case and others.

There are 260,711 relevant files for which Geographic Strategies has provided insufficient substantiation of any connection to the RNC or the RSLC.

* * *

The following table summarizes the files over which Geographic Strategies either patently lacks any ownership interest or has failed to substantiate such an interest:

Jurisdiction or Category	Log 1	Log 2	Total
Documents Pre-Dating Geographic Strategies' 6/15/11 Incorporation	31,917	2,938	34,855
North Carolina	37,986	660	38,646
Arizona	11,905	332	12,237
Galveston County, TX	7,093	85	7,178
Missouri	5,026	614	5,640
Nassau County, NY	628	7	635
Nueces County, TX	1,319	15	1,334
Virginia	9,555	795	10,350
Maryland (<i>In re: 2012 Legislative Districting</i> , No. 5-2012, Md. Ct. App.)	4,134	812	4,946
Mississippi (<i>Miss. State Conf. of NAACP v. Barbour</i> , 3:11-cv-159 (S.D. Miss.))	1,693	128	1,821
Tennessee (<i>Moore v. Tennessee</i> , No. 120402-III (Tenn. Chancery Ct.))	3,786	221	4,007
Florida	9,864	1,841	11,705
Ohio	5,861	185	6,046
Texas	15,952	963	16,915
Documents Lacking Substantiation That Work Was Done For RNC or RSLC	251,206	9,505	260,711

III. Geographic Strategies Has Not Established That the Files Are Privileged or Confidential

In addition to establishing its ownership or other claim of right, Geographic Strategies must establish that the documents on its logs “ought to be treated as confidential.” 7/12/19 Order at 4. “[T]he burden of proving confidentiality never shifts from the party asserting that claim.” *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc.*, 121 F.R.D. 264, 268-69 (M.D.N.C. 1988). To “overcome the presumption” that materials produced in discovery are not subject to restriction, “the party seeking the protective order must show good cause by

demonstrating a particular need for protection” as to every document. *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); *United States v. Idema*, 118 F. App’x 740, 744 (4th Cir. 2005) (right or privilege at issue must be “personal” to the objecting party).

A. The Files Are Not Protected by the First Amendment Privilege

After failing even to mention any “First Amendment privilege” in its original June 15, 2019 motion, Geographic Strategies now asserts that “all” of the “documents owned by Strategies are subject to First Amendment privilege.” Geographic Strategies Br. at 11, 14. Geographic Strategies thus asserts that the First Amendment privilege protects each of 17,553 documents identified in its Log 2 as a “Geographic Strategies document.”

To establish First Amendment privilege, Geographic Strategies “must demonstrate . . . a prima facie showing of arguable first amendment infringement.” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2009) (quotation marks omitted). That means that Geographic Strategies must show that disclosure “will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or ‘chilling’ of, the members’ associational rights.” *Id.* “The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities.” *Id.* at 1141.

Geographic Strategies does not remotely substantiate application of any First Amendment privilege. Moreover, the Court’s July 12 order required Geographic Strategies to identify with specificity the documents it claimed were privileged, but Geographic Strategies has disregarded that order by purporting to claim a blanket First Amendment privilege over every single document in which Geographic Strategies claims an ownership interest, on the theory that all RNC/RSLC documents are First Amendment-privileged. Geographic Strategies Br. at 16. The blanket assertion clearly fails. Many of the documents do not even involve communications with

the RNC/RSLC. As for the ones that do, the mere fact that the documents involve the RNC/RSLC does not make them *per se* protected. But Geographic Strategies makes no effort on its log to identify or tag which documents involve the RNC/RSLC, or—as to those that do—to identify any document or category-specific concerns under the First Amendment. In short, Geographic Strategies has made it impossible for this Court to issue any relief under the First Amendment.

1. Non-RNC and RSLC documents

Geographic Strategies contends that “a large portion of the Data constitutes either communications between Strategies and its clients, the RNC and RSLC, or are internal communications of the RNC.” Geographic Strategies Br. at 16. Geographic Strategies argues that such documents are privileged under the First Amendment.

As an initial matter, and as described above, large portions of the documents on Log 2 are *not* communications between “Strategies and ... the RNC and RSLC,” and are *not* “internal communications of the RNC.” For example, Row 99 of Log 2 is an email from Dr. Hofeller to a number of government officials in the U.S. Census Bureau, subject line “[redistrict-I] proposed “2020 Census Residence Rule and Residence Situations”; Row 149 of Log 2 is a PDF document entitled “Obama, Holder to lead post-Trump redistricting campaign - POLITICO.pdf”; Row 508 is an email Hofeller sent to the nonpartisan Kansas Legislative Research Department with the subject line “RE: [redistrict-I] Question: redistricting litigation based on state law only”; Row 3362 is a “Linked In” invitation; Row 4485 is a document in a folder labeled “Tom” entitled “Kansas CD [Congressional Districts] 1941.pdf”; Row 4867 is a document entitled “CO CD Enacted Map.pdf”; Row 5107 is a document entitled “Wisconsin Incumbents.xls”; Row 9053 is a document entitled “Census Prison Adjustment Comments.docx”; and Row 15130 is a document entitled “Kansas CD 1965.pdf.” None of these are communications with or among the

RNC or RSLC. These are just examples; there are thousands of other documents on Log 2 that are not communications with or among the RNC or RSLC either.

Geographic Strategies does not offer any argument that *non*-RNC and RSLC documents are protected by the First Amendment privilege. *See* Geographic Strategies Br. at 15-19. Yet its Log does not distinguish between RNC/RSLC communications and non-RNC/RSLC communications. This is reason enough to deny the First Amendment privilege arguments in their entirety. This Court ordered Geographic Strategies to identify the documents over which it claimed privilege with specificity, but Geographic Strategies' Log would not permit this Court to adjudicate First Amendment privilege *even if* the Court agreed with Geographic Strategies that all RNC/RSLC documents are protected.

2. RNC and RSLC documents

As to the unspecified documents that may qualify as communications with or among the RNC and RSLC, Geographic Strategies also fails to satisfy its burden to establish First Amendment privilege. Consistent with its blunderbuss approach to asserting privilege more generally, Geographic Strategies simply asserts that every single communication involving the RNC/RSLC and Dr. Hofeller is protected by the First Amendment privilege and that disclosure of *any* communication, regardless of topic, would “necessarily” have the requisite chilling effect on the RNC/RSLC's associational rights. Geographic Strategies Br. at 16.

Geographic Strategies relies on *Democratic National Comm. v. Arizona Secretary of State's Office*, 2017 WL 3149914, at *2 (D. Ariz. July 25, 2017), but the Court there upheld First Amendment privilege over a limited set of 18 documents relating to voter protection, to analysis of likely voting behavior, and to the Arizona Democratic Party's proprietary modeling technology to locate and target Democratic voters. The Court observed that the party's advocacy efforts would be impeded if a political opponent knew where the party would focus its efforts in

future elections. *Id.* at *2. Likewise, in *Perry*, the Ninth Circuit upheld a First Amendment privilege claim over a specific set of documents relating to strategy for a ballot initiative campaign. And in *The Ohio Org. Collaborative v. Husted*, 2015 WL 7008530, at *1 (S.D. Ohio Nov. 12, 2015), the Ohio Democratic Party produced extensive discovery but successfully asserted privilege over certain “strategic plan[ning]” and “financial, donor, membership, and strategic information.” *Id.* at *2-3 & n.2.

None of these cases stand for the proposition that all communications involving a political organization are *per se* privileged under the First Amendment—which is the position Geographic Strategies asserts in this case. Geographic Strategies does not identify a single specific document, even by name or folder path, and attempt to explain how disclosure of that document would chill the associational rights of the RNC or RSLC’s members. Nor does Geographic Strategies describe or discuss any category of document and attempt to explain how disclosure of that category would chill the associational rights of the RNC or RSLC’s members. Instead, Geographic Strategies simply asserts that every single communication between a political party and a vendor is privileged under the First Amendment because disclosure would “chill[] strategic partners” from “associating” with the RNC, would “inhibit[] the free exchange of ideas,” and would “requir[e] the RNC and RSLC to change the way they operate and communicate going forward.” Geographic Strategies Br. at 18 (quoting *DNC*, 2017 WL 3149914, at *2) (brackets omitted). But Geographic Strategies does not substantiate these assertions or offer any explanation as to *why* or *how* disclosure of any specific Hofeller file, much less all the Hofeller files, would chill the RNC or RSLC’s associational rights.

And Geographic Strategies’ assertions make no sense on their face. Geographic Strategies is a for-profit entity that was *paid* by the RNC to help gerrymander maps around the

country. It strains credulity to assert that disclosure of the gerrymandered maps Geographic Strategies helped draw, or its analysis of those maps, would “chill” future paid vendors of the RNC from performing work for the RNC in exchange for money. Nor does Geographic Strategies explain (as opposed to assert) how disclosure of any document at issue would “inhibit[] the free exchange of ideas” or would require any “change” in RNC/RSLC communications. Geographic Strategies was not developing messaging for the RNC/RSLC or helping the party develop its platform or ideas. It was not identifying voters in particular areas for the purpose of targeting them with campaign mail. Rather, it was developing methods for gerrymandering. Indeed, as this Court has recently concluded, partisan gerrymandering *violates* the free speech and association guarantee of the North Carolina Constitution.

Geographic Strategies does not suggest that disclosure of the methods that Geographic Strategies use to analyze maps for partisan purposes would require a “change” in how those maps are analyzed within the RNC/RSLC for partisan purposes, and any such suggestion would make no sense. Geographic Strategies does not suggest that disclosure will “result in membership withdrawal,” “discouragement of new members,” or any other “consequences which *objectively* suggest an impact on ... the members’ associational rights.” *Husted*, 2015 WL 70008530, at *3 (quoting *Perry*, 591 F.3d at 1160). It does not suggest that any of the Hofeller files contain (1) donor lists, (2) information about any specific RNC or RSLC member who might withdraw or otherwise be chilled in associating with the RNC/RSLC, (3) information about particular Republican voters, (4) information about outreach efforts, (5) strategy discussions relating to Republican campaigns, or (6) any other of the types of information that courts have held to be protected by the First Amendment privilege. Geographic Strategies’

entire motion simply speaks in broad generalities and platitudes. That is insufficient to establish First Amendment privilege.

Geographic Strategies notes that the North Carolina Democratic Party asserted First Amendment privilege in this litigation over its “support scores.” Geographic Strategies Br. at 18. But the NCDP produced 6,176 documents totaling 39,343 pages in this case, without asserting any First Amendment privilege. The NCDP asserted a First Amendment privilege over a tiny subset of the discovery propounded upon it, because the NCDP relied on support scores in coordinating with campaigns, promoting the Democratic message, and in targeting and communicating with voters—core conduct protected by the First Amendment. *See Husted*, 2015 WL 7008530, at *2. This in no way lends support to Geographic Strategies’ assertion of a blanket First Amendment privilege over every communication between Geographic Strategies and the RNC/RSLC. Campaign-related communications are in the heartland of the First Amendment privilege; a paid vendor’s analysis of where to place voters in districts to advantage a particular party is not.

3. The Interest in Disclosure Outweighs Any Harm

Even if the Court found that some of the documents were covered by a First Amendment privilege—and again, the Court would have no basis on which to identify those documents—the significance of the interest in disclosure outweighs any burden on First Amendment association. *See Perry*, 591 F.3d at 1140.

As the Court is well aware, Dr. Hofeller’s files have immense public significance and value. They contain evidence that will be vital to voting rights litigation in North Carolina and across the country. By way of example:

- As the Court knows, Common Cause has already received a subpoena to produce documents relevant to Dr. Hofeller’s work on North Carolina voter ID issues.

- Common Cause also received a letter today from members of the United States Senate, “strongly request[ing]” that Common Cause “preserve and/or publicly release all” of the Hofeller files in light of “federal law related to the preservation of federal records, as well as the U.S. Senate’s significant role in conducting oversight to ensure that we have a fair and accurate decennial census.” The letter states that the files “likely contain and are related to federal records, and therefore they must be preserved under the *Federal Records Act*.”
- The Hofeller files played a major role in the hugely consequential litigation in federal courts over the addition of a citizenship question to the census.
- This Court’s decision in this case relies extensively on the Hofeller files, concluding that the files provided significant direct evidence of unconstitutional gerrymandering.
- The documents whose contents were recently revealed in *The New Yorker* and *The New York Times* indicate that Dr. Hofeller’s files may provide evidence of unconstitutional racial gerrymandering in Texas. See Michael Wines, *Republican Gerrymander Whiz Had Wider Influence Than Was Known*, N.Y. Times, Sept. 10, 2019, <https://nyti.ms/2IHNB8t> (describing Dr. Hofeller’s efforts to move voters into a Democratic Austin district based on their “Spanish surname”).
- Without disclosing any of the contents of the files that are currently covered by the temporary confidentiality designation, the files appear to contain evidence of potential significant misconduct by government officials in North Carolina other than Legislative Defendants.

The enormous public interest and public importance in the contents of the Hofeller files is further underscored by the *amicus curiae* briefs filed with this Court in response to Geographic

Strategies' August 30 submission, including by prominent national and state-based civil rights organizations, a pro-democracy group, a government watchdog, academics who study gerrymandering, and major national media outlets. Under the theory of First Amendment privilege advanced by Geographic Strategies, however, all of these documents would be privileged.

Geographic Strategies contends that Plaintiffs cannot show that an interest in disclosure outweighs the harm because the remaining files will not be used to adjudicate the merits of this case. Geographic Strategies Br. at 19. But the cases that require a showing that disclosure is important to the merits of a particular case all arose in a context where the court was being asked to *compel* the disclosure of documents. Here, the situation is reversed. The documents are already in the possession of the Plaintiffs and were produced without objection or confidentiality restriction by an individual with lawful possession of the documents. Plaintiffs are not seeking government action that must be justified by a compelling government interest; *Geographic Strategies* is asking the Court to impose a confidentiality restriction that would restrict dissemination of documents of significant public interest. Indeed, Geographic Strategies has not identified a single decision that has ever held that a non-party to litigation has a "First Amendment" privilege that it can wield to restrict dissemination of documents produced by somebody else. While it is not even clear that a "First Amendment privilege" applies at all in this context, the Court need not reach that issue: it can simply hold that Geographic Strategies has not met its burden to establish the privilege and that in any event the public interest in disclosure outweighs any privilege.

B. The Files Are Not Protected by the Attorney-Client Privilege

Geographic Strategies claims that “[m]any of the documents itemized on Logs 1 and 2 are also protected by the attorney-client privilege.” Geographic Strategies Br. at 20. But Geographic Strategies offers no particularized basis why any specific document is privileged.

This blunderbuss approach contravenes not only this Court’s July 12 Order, but also settled law on the attorney-client privilege. As Geographic Strategies acknowledges, in order for the attorney-client privilege to apply, a communication “must satisfy the five-factor *Murvin* test.” *Id.* (quoting *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 240, 805 S.E.2d 664, 669 (2017)). A communication thus is privileged only if: “(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose[,] although litigation need not be contemplated[,] and (5) the client has not waived the privilege.” *Id.* “[I]f any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged.” *Friday Invs.*, 370 N.C. at 240, 805 S.E.2d at 669 (quotation marks omitted). “The burden is always on the party asserting the privilege to demonstrate each of its essential elements.” *In re Miller*, 357 N.C. 316, 336, 584 S.E.2d 772, 787 (2003).

“This burden may not be met,” moreover, “by mere conclusory or ipse dixit assertions, or by a blanket refusal to testify” or produce documents. *Id.* “Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item.” *Id.* And in determining whether these elements are satisfied, the trial court must conduct “a fact-sensitive inquiry” applied to each “specific communication.” *Raymond v. N.C. Police Benevolent Ass’n., Inc.*, 365 N.C. 94, 100, 721 S.E.2d 923, 927 (2011). Where

necessary, the trial court may “conduct an *in camera* review of the requested information, applying the *Murvin* test to determine whether the attorney-client privilege applies to the specific communications.” *Raymond*, 365 N.C. at 101, 721 S.E.2d at 928; *see also Miller*, 357 N.C. at 337, 584 S.E.2d at 787 (collecting cases).

Geographic Strategies’ broad-brush submissions do not remotely satisfy these particularized, document-by-document requirements.

1. Geographic Strategies Has Not Shown that the Files Involve Attorney-Client Communications Made in Confidence

To begin with, the attorney-client privilege is limited to attorney-client communications “made in confidence.” *Friday Invs.*, 370 N.C. at 240, 805 S.E.2d at 669 (quotation marks omitted). As a result, “[c]ommunications between attorney and client are not privileged where made in the presence of a third person [who is] not the agent of either party.” *State v. Brown*, 327 N.C. 1, 21, 394 S.E.2d 434, 446 (1990). As the party asserting privilege, Geographic Strategies “bore the burden of demonstrating” that each supposedly privileged communication “was not made in the presence of a third party.” *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 535, 645 S.E.2d 117, 122 (N.C. Ct. App. 2007).

Geographic Strategies has not carried that burden here. That is because Geographic Strategies never addresses the crucial fact that the documents at issue were recovered from Dr. Hofeller’s electronic storage devices, and Dr. Hofeller was not an attorney. Nor has Geographic Strategies identified Dr. Hofeller as a client of any attorney. The logged files thus could be privileged only if Dr. Hofeller were an agent of an attorney or client, but establishing such an agency relationship necessarily would contradict Geographic Strategies’ claim of ownership. Geographic Strategies is a for-profit, independent consulting company, and thus any work that

Dr. Hofeller performed on behalf of the company could not have been performed as a mere “agent” of another entity, by definition.

To be sure, while the settled general rule is that disclosure to a third party destroys any attorney-client privilege, some courts have recognized a limited exception when a consulting expert acts as a kind of translator, employing specialized expertise to “interpret” the client’s story “so that the lawyer may better give legal advice.” *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961). No North Carolina court has ever applied this exception. And regardless, Geographic Strategies has not remotely met the exception’s requirements. “What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining *legal advice from the lawyer* [I]f the advice sought is the [expert]’s rather than the lawyer’s, no privilege exists.” *Id.* (emphasis added). Geographic Strategies’ submissions make crystal clear that its clients were seeking Dr. Hofeller’s advice. The exception therefore does not apply.

Many of the allegedly privileged files also are not properly confidential for another, separate reason—they are public records. Any files this Court determines to be public records under the laws of North Carolina, Ohio, or Florida, *see supra*, obviously cannot be subject to any valid assertion of attorney-client privilege.

2. Geographic Strategies Has Not Shown that Files Involve Attorney-Client Communications at All

Geographic Strategies’ privilege claims independently fail because the attorney-client privilege is limited to “attorney-client communication[s].” *Friday Invs.*, 370 N.C. at 240, 805 S.E.2d at 669 (quotation marks omitted). But for the vast majority of the documents over which it appears to assert privilege, Geographic Strategies has not shown that the document involves any communication at all, much less one between a client and an attorney acting as such.

For the 250,000-plus mapping files on Log 1, Geographic Strategies has not shown that a single one involves a communication of any kind. Geographic Strategies offers no basis to conclude that any of these files was ever attached to an email, or was otherwise sent to or even seen by anyone other than Dr. Hofeller himself. Even if some unknown number of files had been attached to an email or other communication, moreover, that still would not suffice. “Attachments which do not, by their content, fall within the realm of the privilege cannot become privileged by merely attaching them to a communication with the attorney. To permit this result would abrogate the well-established rule that only the communications, not underlying facts, are privileged.” *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980). Attachments to protected communications must “independently earn ... protection.” *AM Gen. Holdings LLC v. Renco Grp., Inc.*, 2013 WL 1668627, at *3 (Del. Ch. Apr. 18, 2013). By their nature, mapping files at most convey facts, not advice, and thus cannot be privileged.

As for Log 2, of the 17,554 documents that Geographic Strategy logged with the notation “Privileged / Immunity,” only 2,110 are logged as “Emails” under the column labelled “File Type.” The remaining 15,443 documents are of various other files types—spreadsheets, images, Word documents, PowerPoint presentations, etc. Again, Geographic Strategies offers no basis to conclude that even a single one of these non-email files was ever attached to an email, or otherwise sent to or seen by anyone other than Dr. Hofeller.

Even for the emails, many do not involve communications with an attorney. As noted, Dr. Hofeller himself was not an attorney. And for many emails, Geographic Strategies offers no basis to conclude that any of the addresses included in the To, From, CC, or BCC belong to an attorney. For some emails, moreover, an attorney is included only in the CC or BCC fields. Emails are not privileged, however, “merely because a copy is also sent to counsel.” *EEOC v.*

BDO USA, L.L.P., 876 F.3d 690, 696 (5th Cir. 2017). Even for emails that do include known attorneys, almost all of these emails were with counsel in litigation in which Dr. Hofeller was serving as an expert witness, and for which Geographic Strategies has admitted Dr. Hofeller did not perform this work on behalf of the company. *See supra*.

Further, there are many emails where the only attorney included is Mr. Oldham. But when working on behalf of Geographic Strategies for Geographic Strategies' clients, Mr. Oldham cannot have been acting in his capacity as an attorney, because that would have constituted the unauthorized practice of law. Mr. Oldham is member of the South Carolina bar, and Geographic Strategies is a South Carolina LLC that was owned and controlled in part by Dr. Hofeller, who was not a lawyer. *See* 6/15/19 Oldham Aff. ¶¶ 2, 7. As explained by the attached Affidavit of Expert Opinion of Dr. Gregory B. Adams, South Carolina law prohibits a lawyer from (1) forming a partnership with a nonlawyer if the partnership's activities include the practice of law, (2) practicing law through an entity in which a nonlawyer owns any interest, or (3) practicing law through an entity in which a non-lawyer is a corporate officer. *See* Ex. F ¶ 2.B.i. By Geographic Strategies' and Mr. Oldham's own admission, Mr. Hofeller "jointly owned" the company (Geographic Strategies Br. at 1) and was a corporate officer, specifically the "Treasurer" (6/15/19 Oldham Aff. ¶ 2). This leaves two possibilities, either of which defeats any privilege claim. On the one hand, to the extent Mr. Oldham provided legal services through Geographic Strategies, he and Geographic Strategies engaged in the unauthorized practice of law, and this Court should not recognize any claim of privilege based on such misconduct. On the other hand, to the extent Mr. Oldham "did not provide legal advice and services to

[Geographic Strategies’] clients, there would be no basis for the attorney client privilege.” Ex. F ¶ 2.A.³

3. Geographic Strategies Has Not Shown that the Files Involve Legal Advice

Finally, Geographic Strategies’ privilege claims fail because it has not shown that any communication was made for the purpose of “giving or seeking legal advice.” *Friday Invs.*, 370 N.C. at 240, 805 S.E.2d at 669 (quotation marks omitted). The whole point of the attorney-client privilege lies in “facilitating competent legal advice and ultimately in furthering the ends of justice.” *Miller*, 357 N.C. 316, 333, 584 S.E.2d 772, 785 (2003). The two- and three-word notations included in Logs 1 and 2 do not remotely carry Geographic Strategies’ burden of establishing that each logged file involves actual legal advice. That failure is fatal to Geographic Strategies’ privilege claims.

C. The Files Are Not Protected by the Attorney Work Product Doctrine

Geographic Strategies also asserts that “there are many files itemized in the Logs that reflect the attorney work product of Mr. Oldham.” Geographic Strategies Br. 19. Again, however, Geographic Strategies offers no particularized basis why any specific document constitutes protected attorney work product, and indeed, does not specify which documents, or even how many documents, supposedly are protected on this basis.

Again, Geographic Strategies’ blunderbuss approach contradicts not only this Court’s order, but also settled law. Sometimes described as a “trial preparation immunity,” *Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E.2d 191, 201 (1976), the work-product doctrine is

³ To the extent Mr. Oldham refrained from providing legal services through Geographic Strategies, his presence on any of the emails in Log 2 does not support any claim of attorney-client privilege, but rather defeats it. If Mr. Oldham was not acting as an attorney providing legal advice, then he, like Dr. Hofeller, is a third party whose presence destroys any privilege.

codified in the North Carolina Rules of Civil Procedure and generally protects from discovery documents prepared “by or for” an attorney “in anticipation of litigation.” N.C. Rule of Civ. P. 26(b)(3). “Because work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose, which is to safeguard the lawyer’s work in developing his client’s case.” *Evans v. United Servs. Auto. Ass’n*, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (N.C. Ct. App. 2001) (quotation marks and alterations omitted). As Geographic Strategies’ only cited work-product case makes clear, moreover, work-product claims rise and fall based on “the nature of the document and the factual situation in the particular case.” *Crosmun v. Trustees of Fayetteville Tech. Cty. Coll.*, -- S.E.2d --, 2019 WL 3558764, at *10 (N.C. Ct. App. Aug. 6, 2019) (cited at Geographic Strategies Br. 19). Courts routinely adjudicate work-product claims by examining documents *in camera* one by one. See *Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E.2d 191, 201 (1976). And “[t]he party seeking ... work-product privilege bears the burden of proof.” *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (N.C. Ct. App. 2006).

Here, Geographic Strategies cannot satisfy that burden. To begin with, Geographic Strategies asserts that unspecified logged files “reflect the attorney work product of Mr. Oldham,” Geographic Strategies Br. 19, but makes no effort to establish that any particular file was actually “prepared ... by or for” Mr. Oldham, N.C. Rule of Civ. P. 26(b)(3). That failure alone dooms Geographic Strategies’ work-product claims. The work-product doctrine is “designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client’s case.” *State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977). The doctrine has no application when there is no basis to conclude that the attorney in question had any role in creating the document.

Mr. Oldham's affidavit also asserts that all of the mapping files on Log 1 are "Dr. Hofeller's work-product." 8/23/19 Oldham Aff. ¶ 18. But work-product protection does "no[t] ... extend to facts known by any party." *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. Mapping files encode factual information about a given area's geography and demography. Mapping files thus cannot contain anything protected by the work-product doctrine.

Geographic Strategies also fails to establish that any logged file was prepared "in anticipation of litigation." This requirement is not satisfied where the mere "possibility exists that litigation will result," *Evans*, 142 N.C. App. At 29, 541 S.E.2d at 789, or where a document was created with only "the general possibility of litigation in mind," *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir.1992). Similarly, "[m]aterials that are prepared in the ordinary course of business are not protected by the work product immunity." *Evans*, 142 N.C. App. At 28, 541 S.E.2d at 789. Instead, documents qualify as protected work product only if prepared "because of the prospect of litigation," such that litigation is the "driving force behind the preparation of each ... document." *Nat'l Union*, 967 F.2d at 984.

Geographic Strategies never demonstrates that *any* document on either of its Logs was prepared "because of" actual or prospective litigation. And many documents clearly were *not* prepared in anticipation of litigation. "The fact that redistricting litigation is virtually inevitable every ten years does not cloak every redistricting document with work-product protection." *Dickson v. Rucho*, 366 N.C. 332, 349, 737 S.E.2d 362, 374 (2013) (Hudson, J., dissenting). "Maps, tables, plans, and other materials and discussions related to the actual writing of the redistricting legislation are obviously prepared in the ordinary course of business of the legislature." *Id.* For that reason, "any documents that relate to the substance of the redistricting legislation (decisions on where to draw district lines, analysis of census data, etc.) should not be

covered by work-product protection.” *Id.* Geographic Strategies itself distinguishes between litigation counsel services Mr. Oldham provided in his individual capacity (which conceivably could result in work-product protection) and consulting services Mr. Oldham provided through Geographic Strategies (which could not). *See* Geographic Strategies Br. at 20; 8/23/19 Oldham Aff. ¶ 14.

This is not the first time Mr. Oldham has made vastly overbroad work-product claims in a partisan gerrymandering case. As noted, the federal district court in the Ohio partisan gerrymandering case rejected similar work-product claims by Mr. Oldham just last year. The court explained that Mr. Oldham’s “conclusory, sweeping statement pertaining to every document marked ‘work-product’ is not the kind of specific and detailed evidence required to invoke the privilege.” 360 F. Supp. 3d at 693 (quotation marks omitted). The court held that Mr. Oldham “simply failed to establish that ‘the driving force’ behind any particular document was the anticipation of litigation as opposed to the ordinary course of business.” *Id.* So too here.

Finally, courts have recognized that “a lawyer’s unprofessional behavior may vitiate the work product privilege.” *Moody v. I.R.S.*, 654 F.2d 795, 800 (D.C. Cir. 1981). Just last year, the Eleventh Circuit reaffirmed “that in cases of attorney misconduct there is no protection for the attorney’s work product.” *Drummond Co., Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1337 (11th Cir. 2018). This can be so even when the client is “innocent.” *Id.*⁴

⁴ In a single sentence, Geographic Strategies asserts that some unidentified documents are “protected from disclosure under Rule 26(b)(4)(e) of the North Carolina Rules of Civil Procedure,” Geographic Strategies Br. 20, which governs discovery of communications between attorneys and testifying expert witnesses. But again, “[n]o expert work [by Dr. Hofeller] was done under the auspices of Geographic Strategies.” 6/15/19 Oldham Aff. ¶ 6. And regardless, Geographic Strategies makes no effort to specify which documents are protected on this basis. Geographic Strategies also fails to show that these unspecified communications do not “relate to compensation for the expert’s study or testimony,” “[i]dentify facts and data” underlying the expert’s opinions, or “[i]dentify assumptions ... the expert relied upon in forming [his] opinions”—any of which would be sufficient to render the communications discoverable. N.C. Rule Civ. P. 26(b)(4)(3)(1)-(3).

D. The Files Are Not Trade Secrets or Otherwise Properly Protectable

Geographic Strategies also claims that “many files contained in the Data also embody [Geographic] Strategies’ ‘trade secrets’ under North Carolina law.” Geographic Strategies Br. 13. But again, Geographic Strategies does not specify which documents embody its trade secrets, how many documents do so, or what its purported “trade secrets” even consist of. Geographic Strategies instead vaguely asserts that “[a]llowing disclosure of the documents on Logs 1 and 2 would *potentially* reveal [Geographic] Strategies’ proprietary methods of analysis, which *the company considers* its trade secrets.” Geographic Strategies Br. 14 (emphases added). But the North Carolina Rules of Civil Procedure authorize this Court to protect *actual* “trade secrets,” N.C. Rule Civ. P. 26(c), not documents that “potentially” may shed light on what “the company considers” its trade secrets.

Geographic Strategies also conclusorily asserts that “[t]he documents and files ... listed in Logs 1 and 2 plainly qualify as ‘confidential’” under paragraph 2 of the Court’s Consent Protective Order. Geographic Strategies Br. 13. For many of the files on the logs, that is simply not true—the logs include files that were introduced into evidence at the public trial in this case, for instance. Regardless, under the Consent Protective Order, information is not protected merely because it is “confidential.” That is for good reason—otherwise, *any* documents obtained in discovery that were not already public automatically would be protected. That would contravene Rule 26(c), which requires “good cause” before a protective order may issue to shield discovered information from disclosure. For that reason, the Protective Order does not protect any and all “confidential” information, but instead protects “confidential, non-public *trade secrets*,” as well as “other information for which a good faith claim of need for protection from disclosure can be made.” Consent Protective Order ¶ 2 (emphasis added). But Geographic

Strategies has not shown that any document contains a *bona fide* trade secret, nor has it made any other “good faith claim of need for protection from disclosure.”

E. Geographic Strategies Has Repeatedly Waived any Privilege, Work-Product, or Other Confidentiality Interest in the Hofeller Files

Geographic Strategies’ entire Response to this Court’s July 12 Order independently fails because Geographic Strategies has waived any protective rights it may have had over the documents. That is because Geographic Strategies has failed to take even the most basic steps to prevent Stephanie Hofeller from possessing, reviewing, disclosing, and publicly disseminating the documents Geographic Strategies claims are privileged and confidential.

For months, Geographic Strategies has been aware—or reasonably should have been aware—that the parties to this case are not the only ones who possess copies of the files recovered from Dr. Hofeller’s devices. Stephanie Hofeller, who is not a Plaintiff or otherwise a party to this case, also possesses copies. On May 17, 2019, a month before Geographic Strategies first moved to designate the Hofeller files as confidential, Ms. Hofeller testified at her deposition that she made and retained copies of two backups from one of the hard drives that she turned over in response to Plaintiffs’ subpoena. *See* PX781 at 146:8-148:6. When asked by Legislative Defendants’ counsel: “Q. Did you retain copies of any of the hard drives and thumb drives that you produced to Arnold & Porter in response to the subpoena?,” Ms. Hofeller answered “A: Yes.” *Id.* at 145:8-11. Ms. Hofeller explained that there were “many, many backups of the same hard drive,” that she “copied . . . the first one and the last one only knowing that was going to be redundant,” and that she maintained these copies in a drawer in her “home in Kentucky.” *Id.* at 146:19-147:22. Ms. Hofeller further explained that she kept these copies to “preserve” her father’s work “for posterity.” *Id.* at 147:6-8.

Geographic Strategies clearly knew about Ms. Hofeller’s deposition. Mr. Oldham has served as co-counsel with Legislative Defendants’ counsel, and Ms. Hofeller’s full deposition became public upon the filing of Plaintiffs’ June 6, 2019 Motion for Direction. Geographic Strategies even cited passages from Ms. Hofeller’s deposition transcript in both their initial June 15, 2019 motion for a protective order and their recent August 30, 2019 submission. Yet despite submitting multiple filings to this Court attempting to restrict use of the files in question by *Plaintiffs*, Geographic Strategies never—to Plaintiffs’ knowledge—took *any* step to restrict the use or distribution of the documents by Ms. Hofeller.

Through its inaction, Geographic Strategies has waived any and all protective rights it might have had. With respect to the attorney-client privilege, “[t]he 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.” *Am. Home Assur. Co. v. Fremont Indem. Co.*, 1993 WL 426984, at *4 (S.D.N.Y. Oct. 18, 1993). Indeed, Geographic Strategies has done nothing to restrict Ms. Hofeller’s use of the files for at least two months, but “[c]ourts have emphasized that claw back requests should be made immediately, with delays of even a few weeks determined to be too long, much less ... two months.” *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 same goes for First Amendment privilege, work-product immunity, and trade secret protection. Like the attorney-client privilege, “First Amendment privilege” can be “waived”

where a party “demonstrates ... inexcusable delay ... in asserting this qualified privilege.” *Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115, 1117 (Fla. 2014). Work-product immunity, too, “can be waived,” *State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977), where a party “fail[s] to timely assert work-product protection,” *Window World*, 2019 WL 3995941, at *34. North Carolina’s trade secret statute expressly provides that information loses trade secret protection if it is not “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” N.C. Gen. Stat. § 66-152(3). Logically, *any* claim of privilege, immunity, or confidentiality simply cannot be squared with allowing a third party to freely possess, review, and disseminate the information in question without restriction.

Because of Geographic Strategies’ inaction, moreover, now it is not just Ms. Hofeller who possesses these supposedly privileged and confidential files. It appears that Ms. Hofeller has disclosed some unknown number of the files to major media outlets. On September 6, 2019, *The New Yorker* published an article describing numerous files in detail, stating that “at least seventy thousand files and several years of e-mails ... were recently obtained ... by *The New Yorker*.” David Daley, *The Secret Files of the Master of Republican Gerrymandering*, *The New Yorker*, Sept. 6, 2019, <http://bit.ly/2kESaQE>. The next day, on September 10, 2019, *The New York Times* published a similar article describing “highlights” from “files from the Hofeller backups recently made available to The New York Times.” Michael Wines, *Republican Gerrymander Whiz Had Wider Influence Than Was Known*, *N.Y. Times*, Sept. 10, 2019, <https://nyti.ms/2IHNB8t>. After publication of the article in *The New Yorker*, Ms. Hofeller’s counsel informed Plaintiffs that Ms. Hofeller was *The New Yorker*’s source for the files.

On September 9, 2019, Geographic Strategies filed an emergency motion alleging that the article published by *The New Yorker* article evidenced an “apparent violation” of this Court’s

July 12, 2019 order temporarily designating the files recovered from Dr. Hofeller's devices as confidential under the Court's earlier Consent Protective Order, and seeking various forms of relief against Ms. Hofeller and *The New Yorker*. But that belated motion only highlights the degree to which Geographic Strategies has slept on its rights and therefore waived any privilege or confidentiality interest it might have had.

IV. Geographic Strategies' Attempt to Designate Thousands of Purported "Personal" Files Is Both Improper and Inaccurate

As stated above, this Court directed Geographic Strategies to itemize only documents "in which *Geographic Strategies* claims ownership or other claim of right." 7/12/19 Order at 4. For the reasons set forth above, Geographic Strategies claimed ownership of countless documents it demonstrably does not own or cannot show it owns. But beyond that, Geographic Strategies' Log 2 lists nearly 20,000 additional documents, despite the company's acknowledgement that it does *not* own them, because they supposedly contain "personal" information of Dr. Hofeller or his family. The Court should reject these purported confidentiality designations for two reasons.

First, this Court did not authorize Geographic Strategies to itemize Dr. Hofeller's "personal" documents. For good reason: Geographic Strategies has no standing to enforce Dr. Hofeller's supposed "personal" confidentiality interests. Under Rule 45, a party lacks standing to seek relief relating to a third-party subpoena unless the party establishes both a legal interest and a protectable confidentiality interest in each document for which the party seeks relief. *See Window World of Baton Rouge, LLC v. Window World, Inc.*, 2018 WL 3062191, at *3 (N.C. Super. June 19, 2018) (establishing privilege or trade secret protection is a limited exception to the rule that parties "typically lack standing to contest third-party subpoenas"); *Joiner v. Choicepoint Servs., Inc.*, 2006 WL 2669370, at *4 (W.D.N.C. Sept. 15, 2006) (citation omitted) (party "has no standing" to challenge a third-party subpoena "[a]bsent a specific showing of a

privilege or privacy”); *United States v. Idema*, 118 F. App’x 740, 744 (4th Cir. 2005) (right or privilege at issue must be “personal” to the objecting party). That is particularly true when the storage devices at issue were produced by Dr. Hofeller’s daughter, who obtained them from Dr. Hofeller’s widow.

Second, based on the file names alone, many of the documents Geographic Strategies tagged as “personal” are not personal at all—they clearly involve Dr. Hofeller’s redistricting and other work. By way of example, these include hundreds and likely thousands of documents related to Dr. Hofeller’s redistricting work in North Carolina, with names like “NC District 12 & Surrounding VTDs.bmp”; “NC Final house Adopted.bmp”; “NC Prior Congress Baseline.bmp”; “NC ACS County CVAP.xlsx”; “NC-HOUSE-LEWIS-V_110613.DBF”; “NC CONGRESS WHOLE PRECINCT 1ST.DBF”; “NC2011-CDS-W2-summary-basic.xls”; and so on. There are hundreds or even thousands of additional files related to Dr. Hofeller’s work in other jurisdictions, including Virginia (“VA Congress Enacted Compactness.pdf”); Nueces County, Texas (“NUECES COMMISSIONER3.DBF”); Arizona (“AZ Compactness Enacted.pdf”); Missouri (“MO Congress Prior Enacted.pdf”). There are many, many more examples, as Geographic Strategies would have discovered from skimming its own Log 2 for even a few minutes. It is not clear why Geographic Strategies tagged these thousands of work-related documents as “personal,” but of course none of them are “personal.”

In addition to the files that clearly pertain to Dr. Hofeller’s work rather than anything personal, even many of the non-work-related files tagged by Geographic Strategies do not conceivably warrant Confidential treatment under the Consent Protective Order. By way of example, Geographic Strategies tagged as “personal” such documents as emails from retailers transmitting e-coupons (*e.g.*, Log 2, Row 17584); an email from Blockbuster titled

“BLOCKBUSTER Online store return confirmation” (Log 2, Row 17592); an email from Microsoft titled “3 stubborn PC problems you can fix” (Log 2, Row 17598); an email offering “Complimentary Swiffer Samples” (Log 2, Row 17776); an email offering low mortgage rates (Log 2, Row 17777); and an email advertising “FREE Recliner need gone ASAP must pick up” (Log 2, Row 17778). The list could go on and on.

Because the files Geographic Strategies tagged as “personal” includes thousands upon thousands of work-related and other non-personal files, the Court should reject Geographic Strategies’ requested relief with respect to all of the files.

V. Geographic Strategies’ Recent Emergency Motion Is Baseless

As noted, On September 6, 2019, *The New Yorker* magazine published an article, titled “The Secret Files of the Master of Modern Republican Gerrymandering,” in which the author stated that he has obtained documents from Dr. Hofeller’s hard drives. Plaintiffs promptly advised the Court that they had not provided the files to the *New Yorker*. 9/6/19 Pls.’ Notice Concerning *New Yorker* Article. In response to a subsequent inquiry from Geographic Strategies’ counsel, Plaintiffs explained that, after *The New Yorker* published its article, Plaintiffs learned that Stephanie Hofeller had provided the files to *The New Yorker*. More recently, *The New York Times* also published an article indicating that the *Times* too has obtained documents from Dr. Hofeller’s hard drives.

On September 9, 2019, Geographic Strategies filed a motion asserting that *The New Yorker*’s article was in “apparent violation of the Confidentiality Order” and seeking extraordinary relief including the destruction of all of the Hofeller files, depositions and affidavits from Plaintiffs and others, and an order enjoining *The New Yorker* and others, presumably now including *The New York Times*, from “publishing the contents of the Hofeller Files.” 9/9/19 Geographic Strategies Emergency Mot. at 2.

Geographic Strategies' emergency motion has no merit. Plaintiffs and their counsel have scrupulously complied with the Consent Protective Order and this Court's July 12 Order, as with every order of the Court. Plaintiffs did not give any files to *The New Yorker* or anyone else. Any accusation to the contrary is scurrilous and irresponsible. And obviously this Court cannot prohibit major national news outlets from publishing newsworthy information. Doing so would violate the most basic principles of constitutional law, as the U.S. Supreme Court held in the Pentagon Papers case. *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

CONCLUSION

For the foregoing reasons, the Court designate the files at Rows 1-950 of Exhibit B as Confidential under the Consent Protective Order, and otherwise should deny Geographic Strategies' requested relief and allow the temporary confidentiality designation to expire as to the rest of the files on September 18, 2019.

Respectfully submitted this the 13th day of September, 2019

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