

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE  
WAKE COUNTY SUPERIOR COURT DIVISION

FILED  
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COMMON CAUSE, *et al.* WAKE CO., S.S.C.

Plaintiffs, )

v. )

ORDER ON PLAINTIFFS'  
THIRD MOTION TO COMPEL

Representative DAVID R. LEWIS, )

in his official capacity as Senior )

Chairman of the House Select )

Committee on Redistricting, *et al.*, )

Defendants. )

THIS MATTER comes before the undersigned three-judge panel upon Plaintiffs' Third Motion to Compel requesting that non-party North Carolina Republican Party be compelled to respond to a subpoena pursuant to Rules 37 and 45 of the North Carolina Rules of Civil Procedure.

*Factual and Procedural Background*

On March 8, 2019, Plaintiffs issued a subpoena to non-party North Carolina Republican Party (hereinafter "NC GOP") pursuant to Rule 45 of the North Carolina Rules of Civil Procedure. The subpoena requested in nine specific, but lengthy requests that the NC GOP produce a number of documents in its possession, custody, or control relating to redistricting from the past ten years. The subpoena was issued in accordance with Rule 45(a) and identified April 8, 2019, as the date on which to produce responsive documents at the designated place.

Non-party NC GOP did not provide any documents responsive to the subpoena, move to quash or modify the subpoena, or otherwise object in writing to the subpoena prior to April 8, 2019.

Plaintiffs filed the present motion to compel on April 17, 2019, and on May 9, 2019, requested by way of a supplemental brief that the matter be heard. On May 30, 2019, a telephonic hearing was held on Plaintiffs' motion to compel, with counsel for NC GOP telephonically in attendance.

Plaintiffs' counsel has acknowledged, and counsel for non-party NC GOP has confirmed, that shortly prior to the hearing of Plaintiffs' motion, non-party NC GOP provided Plaintiffs with a flash drive containing approximately ten gigabytes (10 GB) worth of responsive documents. Counsel for non-party NC GOP represented at the hearing that no documents were withheld on the basis of privilege. Counsel also informed the Court that the delay in production was due to a number of factors, including: that the NC GOP is not a party to the litigation or directly-involved in redistricting; that the NC GOP does not have a formal document retention policy and the structure of the organization is not conducive to a search of its documents; that, consequently, the NC GOP needed to hire a vendor to access former employees' hard drives in order to conduct the requested search and produce the responsive electronic documents; and, that the vendor was needed to conduct a comprehensive search of present employees' emails. Counsel for non-party NC GOP represented that search terms provided by Plaintiffs were used in the vendor's electronic search, along with additional terms suggested by counsel. Counsel also informed the Court that an extensive search of physical documents in the possession of non-party NC GOP was conducted.

Following the hearing of Plaintiffs' third motion to compel, the matter was taken under advisement.

After considering Plaintiffs' third motion to compel, the matters contained therein, as well as Plaintiffs' supplemental brief and the arguments on the motion by those in attendance, and having reviewed the record proper, the Court, in its discretion, rules upon Plaintiff's motion as follows:

*Plaintiff's Third Motion to Compel*

The law has long-recognized the right of a subpoenaed witness "to refuse to produce documents which are not material to the issue or which are of a privileged character." *Vaughan v. Broadfoot*, 267 N.C. 691, 696, 149 S.E.2d 37, 41 (1966). But to do so under Rule 45 of the North Carolina Rules of Civil Procedure, the person in receipt of the subpoena must do so within ten days of receiving the subpoena. N.C.G.S. §§ 1A-1, Rule 45(c)(3) (serving the issuing party a written objection within ten days) and Rule 45(c)(5) (filing with the court a motion to quash or modify the subpoena within ten days). And when a non-party fails to respond to a lawfully-issued subpoena, Rule 45 provides that the failure to obey the subpoena "without adequate excuse" may be deemed a contempt of court. N.C.G.S. § 1A-1, Rule 45(e)(1); *First Mount Vernon Indus. Loan Ass'n v. ProDev XXII, Ltd. Liab. Co.*, 209 N.C. App. 126, 132, 703 S.E.2d 836, 840 (2011). Whether a person "has a reasonable excuse for failing to respond to a subpoena *duces tecum* is to be judged by the court and not by the witness." *Vaughan*, 267 N.C. at 696, 149 S.E.2d at 41 (quotation and citation omitted).



While non-party NC GOP's failure to timely obey Plaintiffs' subpoena may lack an adequate excuse, the Court is satisfied that non-party NC GOP has since made a sufficient, good-faith attempt to remedy its failure. As such, the Court, in its discretion, declines to hold non-party NC GOP in contempt of court at this time. Plaintiffs, however, are given leave to further seek relief on this matter after reviewing the materials recently received from non-party NC GOP. In the event Plaintiffs determine that the recent production of materials is insufficient, Plaintiffs may renew their request that non-party NC GOP be compelled to fully respond to Plaintiffs' subpoena and otherwise be held in contempt of court. Plaintiffs may also renew their request to take or otherwise re-open the deposition of the NC GOP's representative should Plaintiffs deem it necessary after reviewing the materials recently received from non-party NC GOP.

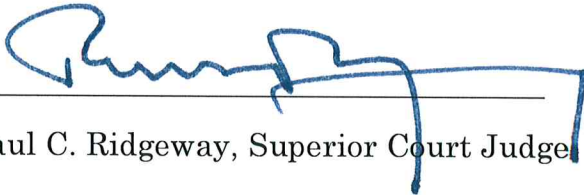
Plaintiffs have also requested an award of attorneys' fees pursuant to Rules 45(e) and 37(a) of the North Carolina Rules of Civil Procedure. The Court notes that Rule 45(e) "does not authorize an award of attorneys' fees" when an unresponsive recipient of a subpoena likewise fails to object to or otherwise move to quash or modify the subpoena. *First Mount Vernon Indus. Loan Ass'n*, 209 N.C. App. at 135, 703 S.E.2d at 842. As to an award of attorneys' fees pursuant to Rule 37(a), the Court, in its discretion, declines to award Plaintiffs attorneys' fees and costs at this time but will reconsider the matter at Plaintiffs' request after Plaintiffs have reviewed the materials recently received from non-party NC GOP.

*Conclusion*

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS that Plaintiffs' third motion to compel is HELD IN ABEYANCE in part and DENIED in part as follows:

1. Plaintiffs' request that non-party NC GOP be compelled to respond to Plaintiffs' subpoena is held in abeyance, per the terms of this Order.
2. Plaintiffs' request that the Court hold non-party NC GOP in contempt is held in abeyance, per the terms of this Order.
3. Plaintiffs' request for attorneys' fees pursuant to Rule 37(a)(4) is held in abeyance, per the terms of this Order.
4. Plaintiffs shall have until 5:00 p.m. on Thursday, June 13, 2019, to file any additional motions or briefing as to the issues held in abeyance.
5. Plaintiffs' request for attorneys' fees pursuant to Rule 45 is denied.

SO ORDERED, this the 7<sup>th</sup> day of June, 2019.

  
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Paul C. Ridgeway, Superior Court Judge

**/s/ Joseph N. Crosswhite**

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Joseph N. Crosswhite, Superior Court Judge

**/s/ Alma L. Hinton**

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Alma L. Hinton, Superior Court Judge

**Certificate of Service**

The undersigned certifies that the foregoing was served upon all parties by electronic mail, addressed as follows:

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This the 7<sup>th</sup> day of June, 2019.

  
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