STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 014001
COMMON CAUSE, *et al.* *Plaintiffs,* v. Representative DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al., *Defendants.*	ORDER

THIS MATTER comes before the Court upon its own Motion pursuant to its inherent authority and discretion to manage proceedings before the Court, Rule 42 of the North Carolina Rules of Civil Procedure, and the Local Rules for Civil Superior Court, Tenth Judicial District (as amended in 2015).

In this litigation, Plaintiffs challenged certain North Carolina Senate and House of Representative districts established by an act of the General Assembly in 2017, N.C. Sess. Laws 2017-207 (Senate Bill 691) and 2017-208 (House Bill 927), seeking to enjoin the future use of the 2017 districts. This action is presently in the remedy phase of the litigation following the Court's September 3, 2019, entry of Judgment wherein the Court granted Plaintiffs' requested relief and declared the 2017 House and Senate plans unconstitutional, permanently enjoining Legislative Defendants and State Defendants, and their respective agents, officers, and employees, from preparing for or administering the 2020 primary and general elections for House and Senate districts in certain county groupings. The Court is currently proceeding with its review of the General Assembly's enacted Remedial Maps for the House and Senate legislative districts for the 2020 election.

During the course of the litigation of Plaintiffs' action challenging the validity of the acts of the General Assembly in 2017 that apportioned or redistricted State legislative

districts, an issue now wholly separate from Plaintiffs' claims has developed that will in all likelihood outlast the full resolution of Plaintiffs' action: a dispute as to proper ownership and possible protection of what is now referred to as the Hofeller files.

Procedural History of the Hofeller Files in this Action

On February 13, 2019, Plaintiffs issued a subpoena to Stephanie Hofeller Lizon c/o Tom Sparks, Esq. of Fiduciary Litigation Group (hereinafter "Ms. Hofeller") daughter of the late Dr. Thomas Hofeller, requesting the production of various documents and storage devices in her possession relating to Dr. Hofeller's work on redistricting. No objection to or motion to quash the subpoena was filed by any party to this action or Ms. Hofeller. On March 13, 2019, Plaintiffs' counsel received from Ms. Hofeller four external hard drives and eighteen thumb drives responsive to the subpoena containing what is now referred to as the "Hofeller files." On May 1, 2019, the Court entered an order designating 1,001 of the Hofeller files as Highly Confidential[1] because they contained Dr. Hofeller's private information (e.g., medical and tax records) and further ordering Plaintiffs to produce the entirety of the files to the other parties in this case for copying and inspection.

Geographic Strategies, LLC[2] filed a motion on June 15, 2019, to protect its confidential and proprietary information contained within the Hofeller files. Geographic Strategies sought to designate the files as Highly Confidential pursuant to the terms of the Consent Protective Order. On July 12, 2019, the Court entered an Order wherein the Court agreed Geographic Strategies could seek protection of its files because it was a party "affected by" the subpoena under Rule 45(c)(7). The Court temporarily designated the

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[1] On April 5, 2019, a Consent Protective Order was entered in this case wherein the parties agreed to a process for a producing party in discovery to designate files as "Confidential" or "Highly Confidential/Attorneys' Eyes Only."

[2] Geographic Strategies is an LLC founded by Dr. Hofeller and Dalton Oldham in 2011. Mr. Oldham is now the sole owner of Geographic Strategies.

Hofeller files as Confidential, as defined under the Consent Protective Order, while Geographic Strategies could review the files to make a specific claim of ownership or right of protection. The Court noted in its Order that Plaintiffs had designated specific Hofeller files they intended to introduce into evidence at trial,[3] Geographic Strategies in open court specifically stipulated that it had not claimed an ownership, privilege, or proprietary interest as to those files, and the Court's Order did not apply to those files.

On August 30, 2019, Geographic Strategies submitted its privilege log, along with a request that it be considered a producing party under the Consent Protective Order and the files be designated as "personal." On the same date, additional motions were filed or submitted as follows: 1) the Republican National Committee filed a motion similar to Geographic Strategies's motion to protect certain files using designations defined by the Consent Protective Order; 2) Nueces County, Texas, filed a motion requesting to inspect files involving the County and that none of its files contained within the Hofeller files be destroyed; and, 3) Legislative Defendants submitted a motion for the Court to direct Plaintiffs to destroy privileged files within their possession and control. Plaintiffs submitted briefs in response to these motions on September 13, 2019, and on September 16, 2019, Geographic Strategies filed a reply brief, alternatively requesting the appointment of a referee pursuant to Rule 53 of the North Carolina Rules of Civil Procedure. These matters remain pending before the Court.

[3] By separate Order entered on July 12, 2019, the Court found that there were adequate grounds for admitting the specific Hofeller files relied upon by Plaintiffs' experts on the basis of authenticity and chain of custody, provided it was shown at trial those files were relevant and not subject to exclusion by other rules of evidence.

On September 6, 2019, Plaintiffs submitted a notice regarding the Hofeller files after an article was published by *The New Yorker*.[4] On September 9, 2019, Geographic Strategies filed an emergency motion stating Plaintiffs' counsel had informed Geographic Strategies's counsel that Ms. Hofeller had provided the Hofeller files to *The New Yorker*. Geographic Strategies requested an order from the Court that all copies of the Hofeller files be destroyed, other than those excepted from the Court's July 12, 2019, Order. Geographic Strategies further requested that Plaintiffs and Plaintiffs' counsel be required to prove they did not violate the Court's July 12, 2019, order, that Stephanie Hofeller and her counsel be held in contempt, and that Plaintiffs, Ms. Hofeller, her attorney, and *The New Yorker* be enjoined from using, distributing, or publishing the Hofeller files until a hearing can take place. Plaintiffs submitted a brief in response to the emergency motion on September 13, 2019. This matter remains pending before the Court.

On September 12, 2019, Plaintiff Common Cause filed a motion in this action for leave to comply with a subpoena *duces tecum* served on Plaintiff Common Cause by the plaintiffs in *Holmes, et al. v. Moore, et al.*, No. 18 CVS 15292 (N.C. Super. Ct.) because the subpoena covers documents and communications contained within the Hofeller files in Plaintiff Common Cause's possession. On September 13, 2019, Geographic Strategies filed a brief in opposition to Plaintiff Common Cause's motion and further requested to extend the date on which the temporary Confidential designation on all Hofeller files will expire. This matter remains pending before the Court.

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[4] David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, THE NEW YORKER (September 6, 2019), https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering.

Finally, the Court notes that multiple motions for leave to file an amicus brief relating to the disposition of the Hofeller files have been filed in this matter and remain pending before the Court.

On September 17, 2019, the Court on its own motion extended the date on which the temporary Confidential designation would expire to 11:59 p.m. on September 27, 2019.

Separation of Claims in this Action from Issues involving the Hofeller Files Dispute

There is a long-standing principle that trial judges have the inherent authority and discretion to manage proceedings before them. *See State v. Ward*, 364 N.C. 157, 158, 694 S.E.2d 729, 730 (2010); *Bumgarner v. Reneau*, 332 N.C. 624, 630, 422 S.E.2d 686, 689 (1992); *Williams v. United Cmty. Bank*, 218 N.C. App. 361, 372, 724 S.E.2d 543, 551 (2012). Indeed, "the court possesses broad discretionary powers sufficient to meet the circumstances of each case." *In re Will of Hester*, 320 N.C. 738, 741, 360 S.E.2d 801, 804 (1987) (citations omitted).

Rule 42 of the North Carolina Rules of Civil Procedure "expressly preserve[s] these inherent supervisory powers" with regard to separating claims and issues within an action. *Id.* at 742, 360 S.E.2d at 804. Rule 42 provides, in relevant part, that "[t]he court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." N.C.G.S. § 1A-1, Rule 42(b)(1). "The legislative commentary to this rule notes that the power of [separating claims and issues] is an indispensable safety valve to guard against the occasion where a suit of unmanageable size is thrust on the court. . . . The discretion reposed in the trial judge by the rule is extremely broad." *In re Will of Hester*, 320 N.C. at 742, 360 S.E.2d at 804 (quotation omitted). Moreover, an order

to separate claims and issues pursuant to Rule 42 may be entered by the trial court *sua sponte*. *See Marshall v. Williams*, 153 N.C. App. 128, 132-33, 574 S.E.2d 1, 4 (2002).

Separating the ongoing proceedings related to Plaintiffs' challenges to the validity of acts of the General Assembly that apportioned or redistricted State legislative districts from the proceedings related to the Hofeller files dispute satisfies Rule 42(b)(1). Separation of the claims and issues will further the convenience of the parties, non-parties, and the Court, and will avoid prejudice to parties, non-parties, and the Court from having to expend resources. Moreover, the Court notes that the issues involved in the Hofeller files dispute do not constitute either of the two actions necessitating a three-judge panel under N.C.G.S. § 1-267.1. Accordingly, the Court will separate the claims in this action, including all issues involving and relating to the remedy phase of the litigation in this action, from the issues involved in the Hofeller files dispute.

Designation of Resident Superior Court Judge to Preside Over Hofeller Files Dispute

As stated in Subsections 1-267.1(a) and (b) of our General Statutes, the three-judge panel in this case is a "a three-judge panel of the Superior Court of Wake County," and the Senior Resident Superior Court Judge of Wake County is the presiding judge of the three-judge panel. The Tenth Judicial District has promulgated Local Rules for Civil Superior Court pursuant to the authority granted Senior Resident Judges under Rule 2 of the General Rules of Practice for the Superior and District Courts which, in turn, were adopted and codified by our Supreme Court pursuant to its authority under N.C.G.S. § 7A-34. Rule 2.2 of the Local Rules for Civil Superior Court, Tenth Judicial District (as amended in 2015)[5] provides that the Senior Resident Superior Court Judge may designate a specific

[5] The Local Rules for Civil Superior Court, Tenth Judicial District (as amended in 2015) can be accessed here: https://www.nccourts.gov/assets/documents/local-rules-forms/112.pdf

judge to preside over the proceedings in a particular case. The Local Rules apply to the proceedings in this case and the undersigned Senior Resident Superior Court Judge of Superior Court, Wake County, in his discretion, will designate a Resident Superior Court Judge of Superior Court, Wake County, to preside over all proceedings involving the Hofeller files.

The Court hereby ORDERS the following:

1. Pursuant to the Court's inherent authority over its proceedings, the Court's discretion, and N.C.G.S. § 1A-1, Rule 42(b)(1), the claims in this action, including all issues involving and relating to the remedy phase of the litigation in this action, is hereby separated from the issues involved in the Hofeller files dispute.
2. Pursuant to Rule 2.2 of the Local Rules for Civil Superior Court, Tenth Judicial District (as amended in 2015), the undersigned Senior Resident Superior Court Judge of Superior Court, Wake County, in his discretion, hereby designates Resident Superior Court Judge Vince Rozier of Superior Court, Wake County, to preside over all proceedings involving the Hofeller files, including those identified above as pending before the Court; however, the three-judge panel in this case shall retain authority over any issue or claim arising in the Hofeller files dispute that will require an order or judgment to be entered affecting the validity of acts of the General Assembly that apportions or redistricts State legislative districts.
3. Judge Rozier has been provided all relevant and necessary materials, filings, and pleadings. The parties to this matter shall, in the same manner as has been previously done in this case pursuant to the Court's March 13, 2019, Case Management Order, direct any filings and submissions related to this matter to:

a. Tenth Judicial District Trial Court Administrator Kellie Myers (Kellie.Z.Myers@nccourts.org); and

b. North Carolina Judicial Fellow Chelsea Masters (Chelsea.A.Masters@nccourts.org).

So ORDERED, this the 23rd day of September, 2019.

/s/ Paul C. Ridgeway

Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite

Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton

Alma L. Hinton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below by electronic mail, addressed as follows:

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This the 23rd day of September, 2019.

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