

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:13-CV-00949**

DAVID HARRIS & CHRISTINE
BOWSER,

Plaintiffs,

v.

PATRICK MCCRORY, in his capacity
as Governor of North Carolina;
NORTH CAROLINA STATE BOARD
OF ELECTIONS; and JOSHUA
HOWARD, in his capacity as Chairman
of the North Carolina State Board of
Elections,

Defendants.

**PLAINTIFFS' REPLY
MEMORANDUM REGARDING
ADMISSION OF EXHIBIT 13**

Plaintiffs submit this reply memorandum in support of the admission of Plaintiffs' Exhibit 13 and in response to Defendants' Response to Plaintiffs' Memorandum in Support of Admission of Plaintiffs' Exhibit 13 ("Defendants' Response") (ECF No. 128).

Plaintiffs' Exhibit 13 is an email produced by Defendants during the course of discovery during the course of the state-court *Dickson v. Rucho* redistricting litigation (the record of which was filed with this Court as part of a joint filing on July 1, 2015 (ECF No. 95)). The email is neither privileged as an initial matter and, even if it were privileged, any such protection has been long ago waived by Defendants' failure to take reasonable steps to prevent its disclosure and, indeed, by their admitted submission or filing of the document with no fewer than *three separate courts*.

The burden of establishing the applicability of the attorney-client privilege rests on the proponent of the privilege. *Zeus Enterprises, Inc. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 244 (4th Cir. 1999) (“The proponent of the privilege must establish not only that an attorney-client relationship existed, but also that the specific communications at issue are privileged and that the privilege was not waived.”). Defendants do not meet their burden here.

First, there is nothing on the face of the email to suggest that it constitutes an attorney-client privileged communication, and Defendants do not explain why it is. Although it certainly involves a lawyer and a client, it is far too late in the day to contend, as Defendants implicitly do, that every communication between lawyer and client is automatically privileged. Indeed, the law is rather decidedly to the contrary. Only communications in which a client seeks, or a lawyer offers, *legal advice* in confidence are privileged. *See id.* (“The privilege does not protect all aspects of the attorney-client relationship; it only protects confidential communications between lawyer and client.”).

Where a lawyer assumes business functions or plays other non-legal roles, he or she most assuredly cannot cloak such communications in the veil of the privilege. *See In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997) (“[C]ommunications prepared in the ordinary course of business cannot be cloaked with the privilege merely by sending copies to . . . counsel.”) (citing *Brainware, Inc. v. Scan–Optics, Ltd.*, No. 3:11cv755, 2012 WL 2872812, at *3 (E.D. Va. July 12, 2012) (“The fact that an attorney is copied on these emails does not make them about ‘legal matters.’”)); *North Carolina Elec. Membership*

Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 514 (M.D.N.C. 1986) (“In order for the privilege to apply, the attorney receiving a communication must be acting as an attorney and not simply as a business advisor.”) (collecting cases). Here, counsel was—at best—playing a role as a *political* strategist in an inherently *public* process. The effort to hide such communications behind the privilege is as contrary to public policy as it is unsupported by the law. Thus, as a threshold matter, Exhibit 13 should be admitted because Defendants do not meet (or even attempt to meet) their burden of establishing that the privilege attaches to the email.

But even if the document had once been privileged, that privilege has been waived by Defendants’ submission of the document to the *Dickson* trial court. Defendants *concede* that the document was included in a set of compact discs prepared and submitted to the Court by Defendants in the *Dickson v. Rucho* state-court litigation. Defendants’ Response, at 2-3. Defendants attempt to minimize the import of that action by explaining that the filing was merely “for the convenience of the court and the parties” and that it was “‘to make life easier for everybody involved’ in the case.” *Id.* at 3. That may well be but it hardly diminishes the critical fact: *Plaintiffs’ Exhibit 13 was originally submitted or filed by Defendants in the state court lawsuit, and long after they knew that the document had been produced and was included in the compilation.*¹ Such an action waives the privilege as a matter of law. *Liss Grp. (2003) Ltd. v. Sara Lee Corp.*, No.

¹ As was explained in Plaintiffs’ mid-trial briefing (ECF No. 126), the same exhibit was *also* jointly filed in the North Carolina Supreme Court *and* with this Court. Defendants did not object to the inclusion of Plaintiffs’ Exhibit 13 in those filings. Those filings independently operated to waive the privilege.

1:06CV610, 2014 WL 4370660, at *2 (M.D.N.C. Aug. 28, 2014) (defendants waived privilege by failing to timely object to a memo plaintiffs filed with the court three years earlier).

Defendants argue, citing Rule 26(b)(5)(B), that their objection during Dr. Thomas Hofeller's deposition somehow protects the privileged status of the document, notwithstanding *their own* subsequent publication of the material. But the existence of a dispute over the attorney-client privilege hardly serves as an all-purpose remedy to the disclosure of the material. Defendants did not cite Rule 26(b)(5)(B), did not request sequestration, and utterly failed to do anything further to seek a return of the document. This is hardly taking "reasonable steps" to prevent disclosure. See *Martin v. State Farm Mut. Auto. Ins. Co.*, No. 3:10-CV-0144, 2011 WL 1297819, at *5 (S.D.W. Va. Apr. 1, 2011) (party waived privilege where it became aware during deposition that it had produced putatively privileged document and failed to promptly "request return of the" document); cf. *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Grp., Inc.*, 116 F.R.D. 46, 52 (M.D.N.C. 1987) (finding inadvertent disclosure waived privilege even where disclosing party did in "fairly quick" fashion discover the inadvertent disclosure and try to retrieve the documents because "when disclosure is complete" the disclosing party must make "a very strong showing" that the privilege should still attach). Indeed, the Defendants' subsequent *filing* of the document in the state court litigation is precisely the opposite.

Plaintiffs submit that Plaintiffs Exhibit 13 should be admitted into evidence. The document is not privileged and, even if it once was, any such privilege was long ago waived by virtue of Plaintiffs' own actions.

Respectfully submitted, this the 20th day of October, 2015.

PERKINS COIE LLP

/s/ Kevin J. Hamilton

Kevin J. Hamilton
Washington Bar No. 15648
Khamilton@perkinscoie.com
William B. Stafford
Washington Bar No. 39849
Wstafford@perkinscoie.com
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8741
Facsimile: (206) 359-9741

John M. Devaney
D.C. Bar No. 375465
JDevaney@perkinscoie.com
Marc E. Elias
D.C. Bar No. 442007
MElias@perkinscoie.com
Bruce V. Spiva
D.C. Bar No. 443754
BSpiva@perkinscoie.com
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Attorneys for Plaintiffs

POYNER SPRUILL LLP

/s/ Edwin M. Speas, Jr.

Edwin M. Speas, Jr.
N.C. State Bar No. 4112
espeas@poynerspruill.com
John W. O'Hale
N.C. State Bar No. 35895
johale@poynerspruill.com
Caroline P. Mackie
N.C. State Bar No. 41512
cmackie@poynerspruill.com
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Telephone: (919) 783-6400
Facsimile: (919) 783-1075

*Local Rule 83.1
Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **PLAINTIFFS' REPLY MEMORANDUM REGARDING ADMISSION OF EXHIBIT 13**, with service to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record who have appeared and consent to electronic service in this action.

This the 20th day of October, 2015.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.