

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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SENATE PERMANENT SUBCOMMITTEE)	
ON INVESTIGATIONS,)	
)	
Applicant,)	
)	
v.)	Misc. Action No. 16-621 (RMC)
)	
CARL FERRER,)	
)	
Respondent.)	
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ORDER

On August 5, 2016, this Court ordered Carl Ferrer, Chief Executive Officer of Backpage.com, LCC to comply with requests 1, 2, and 3 of a subpoena *duces tecum* issued by the Senate Permanent Subcommittee on Investigations to investigate the use of the Internet for illegal sex trafficking and the need for potential legislation to address that problem. *See* Mem. Op. and Order [Dkt. 17 & 18]; Mem. Op. *available at Senate Permanent Subcomm. v. Ferrer*, No. MC 16-MC-621 (RMC), 2016 WL 4179289 (D.D.C. Aug. 5, 2016). Mr. Ferrer had ten days from the date of the Court’s Order to comply. On August 8, 2016, Mr. Ferrer filed a notice of appeal and moved for a stay of the Court’s Order pending appeal. This Court denied Mr. Ferrer’s motion to stay because it was unlikely that Mr. Ferrer could succeed on the merits and a stay would “undermine the public interest” and “further delay the Subcommittee’s efforts, interfere with the investigation, and reward Mr. Ferrer’s dilatory conduct” in failing to comply with the subpoena. Order [Dkt. 23] at 6.

On August 12, 2016, Mr. Ferrer sought an emergency stay pending appeal from the D.C. Circuit, which was denied after consideration of full briefing. The D.C. Circuit ordered

Mr. Ferrer to comply with this Court's Order no later than September 12, 2016. *See* Order, *Senate Permanent Subcomm. on Investigations v. Ferrer*, No. 16-5232 (D.C. Cir. Sept. 2, 2016). On September 6, 2016, Mr. Ferrer sought another stay from the Chief Justice of the Supreme Court. The Chief Justice imposed a temporary stay to allow the Subcommittee to respond to Mr. Ferrer's request. *See Ferrer v. Senate Permanent Subcomm. on Investigations*, No. 16A236, 2016 WL 4625560, at *1 (U.S. Sept. 6, 2016). The Chief Justice referred the request to the full Court and, on September 13, 2016, the Supreme Court vacated the temporary stay and denied Mr. Ferrer's application for a stay. *Id.*, No. 16A236, 2016 WL 4740416 (U.S. Sept. 13, 2016).

On September 13, 2016, Mr. Ferrer produced to the Subcommittee a total of 39,000 responsive documents (totaling 110,000 pages). Now seeking more time to comply, he describes in detail his recent undertakings to ensure compliance with the Court's August 5, 2016 Order. *See* Mot. [Dkt. 26]. Specifically, Mr. Ferrer asks the Court to extend the time to September 26, 2016 for him to produce certain documents and until October 28, 2016 to produce any remaining "non-privileged" responsive materials. Mr. Ferrer also requests an order from this Court stating that he does not have to produce a subset of responsive documents unless the Subcommittee indicates "in writing by October 1, 2016 that it desires those additional documents." *Id.* at 12. The Subcommittee filed a timely opposition, to which Mr. Ferrer promptly replied.

Mr. Ferrer indicates that "upon issuance of the Court's Order [on August 5, 2016] rejecting [his] legal arguments, Backpage immediately began taking steps to comply with the Order." Mot. at 4 (citation omitted). In fact, Mr. Ferrer mentions that he completed a "substantial production of documents to the [Subcommittee] from key custodians and corporate records on September 13, 2016," once the Supreme Court rejected his application for a stay. *Id.*

at 4-5 (citation omitted). In his briefs to the D.C. Circuit and the Supreme Court, Mr. Ferrer stated that this Court erroneously concluded that Mr. Ferrer had failed to conduct a comprehensive search for responsive documents. *See* Application for Stay at 33 n.25, No. 16A236 (S. Ct., filed Sept. 6, 2016); Reply on Emergency Mot. to Stay at 7, No. 15-5232 (D.C. Cir., filed Aug. 24, 2016). However, the Court did not make this finding out of thin air. Mr. Ferrer's counsel told the Subcommittee that Backpage "had not conducted a 'complete search' and that 'to be required to conduct such a search and review in light of the significant overbreadth and First Amendment infirmities of the Subpoena would in itself be constitutionally inappropriate.'" *Ferrer*, No. MC 16-MC-621 (RMC), 2016 WL 4179289, at *10 (quoting Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 16, 2015 [Dkt.1-13] at 2). Moreover, Mr. Ferrer's recent assurances that "upon the issuance of the Court's Order" he "immediately began taking steps to comply" with the subpoena shows that no complete search for requests 1, 2, and 3 was ever conducted prior to August 5, 2016. *See* Mot., Ex. 1 [Dkt. 26-2] (Merriman Decl.) ¶ 2, 5-6 (explaining when Backpage's general counsel contacted the law firm in charge of conducting the search for responsive documents and handling the production of such documents).

There are two distinct issues in Mr. Ferrer's motion: (1) whether Mr. Ferrer asserted any common law privileges (*i.e.*, attorney-client privilege and work-product) to withhold the production of responsive materials; and (2) whether an extension of time is justified to allow completion of document review and production. The Court will address each issue separately.

With respect to the first issue, the Court notes that, despite numerous opportunities, Mr. Ferrer did not properly invoke any common law privilege to refuse production

of responsive materials to requests 1, 2, and 3 of the Subcommittee's October 1, 2015 documentary subpoena. Mr. Ferrer refers to one letter on November 15, 2015, in which his counsel made clear to the Subcommittee that certain documents were "withheld on the basis of an attorney-client and/or attorney work product privilege" and that the production of information was "not intended, and should not be taken, as a waiver of . . . any . . . privilege that might be asserted in any other forum or proceeding." Reply [Dkt. 28] at 5 (quoting Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 13, 2015 [Dkt.1-12] at 1, 5). However, these references are insufficient in detail and do not constitute a valid assertion of a common law privilege.¹

The October 1, 2015 subpoena required Mr. Ferrer to file a privilege log. *Ferrer*, No. MC 16-MC-621 (RMC), 2016 WL 4179289, at *3. Specifically, it "directed Mr. Ferrer to 'assert any claim of privilege or other right to withhold documents from the Subcommittee by October 23, 2015, the return date of the subpoena, along with a complete explanation of the basis of the privilege or other right to withhold documents' in a privilege log." *Id.* (quoting Letter and Subpoena to Carl Ferrer from Chairman and Ranking Member of PSI, Oct. 1, 2015 [Ex. 1-7] at 3). This was not a suggestion or a recommendation. The filing of a privilege log in response to a documentary subpoena is required by courts and the Federal Rules of Civil Procedure. Failure to do so constituted a waiver of the claimed privileges. *See In re Grand Jury Subpoena*, 274 F.3d

¹ In fact, although Mr. Ferrer raised multiple arguments to oppose partial enforcement of the Subcommittee's subpoena, none of Mr. Ferrer's briefs before this Court (or before the D.C. Circuit and the Supreme Court) asserted a common law privilege. *See Ferrer*, No. MC 16-MC-621 (RMC), 2016 WL 4179289, at *5 (arguing that: (1) this Court lacked subject matter jurisdiction; (2) the subpoena lacked a valid legislative purpose that falls within the scope of the Subcommittee's authority; (3) the subpoena violated his First Amendment rights, was overly broad, and punitive in nature; and (4) the subpoena violated his due process rights).

563, 575-76 (1st Cir. 2001) (“The operative language [of Federal Rule of Civil Procedure 45] is mandatory A party that fails to submit a privilege log is deemed to waive the underlying privilege claim.”). Rule 45(e)(2)(A) provides that anyone “withholding subpoenaed information under a claim that it is privileged . . . must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.” Mr. Ferrer failed to do this.

In fact, the only privilege he ever asserted, albeit in a perfunctory manner, was based on the First Amendment of the Constitution. There, too, failure to file a privilege log was fatal to Mr. Ferrer’s First Amendment claim. *See Ferrer*, No. MC 16-MC-621 (RMC), 2016 WL 4179289, at *10 (“At the outset, the Court rejects Mr. Ferrer’s argument that, as CEO of Backpage, he has a First Amendment right not to conduct a full and comprehensive search for responsive documents and not to file a privilege log.”); *Perry v. Schwarzenegger*, 264 F.R.D. 576, 580-81 (N.D. Cal. 2009).² The same can be said, if not more forcefully, of Mr. Ferrer’s newly claimed assertions of attorney-client privilege and work product. A privilege log “is a *necessary* condition to preservation of *any* privilege” and the failure to comply with this requirement “could be fatal to any assertion of a privilege.” *Perry*, 264 F.R.D. at 580-81 (citing *Burlington North. & Santa Fe Ry. v. Dist. Ct., Mt.*, 408 F.3d 1142, 1149 (9th Cir. 2005)) (emphasis added); *see also Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991);

² This Court went beyond Mr. Ferrer’s failure to file a privilege log to reject his First Amendment objections to the partial enforcement of the Subcommittee’s subpoena to emphasize the unsubstantiated and general nature of his First Amendment objection, as well as his failure to identify and balance the competing interests under applicable constitutional scrutiny. *See generally id.*

Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 542 (10th Cir. 1984). Moreover, “the prejudicial failure to assert the privilege timely, and without a showing of good cause, constitutes a waiver of the privilege.” *Rynd v. Nationwide Mut. Fire Ins. Co.*, No. 8:09-CV-1556-T-27TGW, 2010 WL 5161838, at *3 (M.D. Fla. Dec. 14, 2010) (citing *Banks v. Office of Senate Sergeant-at-Arms*, 233 F.R.D. 1, 9 (D.D.C.2005)); *see also Shelton v. United States*, 404 F.2d 1292, 1299-1300 (D.C. Cir. 1968).

Mr. Ferrer has not made a showing of good cause as to why he did not file a privilege log identifying which documents were withheld on the basis of attorney-client and/or work-product privilege. His motion and his reply brief are silent on this matter. Aside from the unsupported argument that he had a First Amendment right not to search for responsive documents,³ there is no good reason for the Court to find that Mr. Ferrer was justified in waiting over a year to identify and log privileged documents. Moreover, Mr. Ferrer’s contradictory statements as to whether a comprehensive search was ever conducted prior to August 5, 2016 and whether responsive documents had been identified undermine any showing of good cause for the relief sought. Mr. Ferrer “had numerous opportunities to assert [his] claims of privileges and produce an adequate privilege log *before* the Court entered its order compelling production, and [he] failed to do so. Thus, [he has] waived [his] claims to privilege.” *Walker v. Ctr. for*

³ Mr. Ferrer reiterates this argument in his reply brief. *See* Reply at 9 n.5 (“It was this *search* that Backpage argued violated its First Amendment rights.”) (emphasis added). The crux of Mr. Ferrer’s position is not based on an argument that the production or disclosure of information would violate his First Amendment rights, but rather that the mere act of searching for documents would violate the Constitution. As the Court already noted, this argument is “untenable and without legal support.” *Ferrer*, No. MC 16-MC-621 (RMC), 2016 WL 4179289, at *13.

Food Safety, 667 F. Supp. 2d 133, 138 (D.D.C. 2009) (citations omitted) (emphasis added). The Court rejects Mr. Ferrer's efforts to further delay the long overdue production of responsive materials on the basis of privileges that were not properly asserted in the numerous exchanges between Backpage counsel and the Subcommittee.⁴

With respect to Mr. Ferrer's request for an extension of time to complete production, the Court notes his recent efforts to comply with the Court's August 5, 2016 Order. Given Mr. Ferrer's recent undertakings and the production of documents made on September 13, 2016, the Court finds that good cause has been shown to grant an extension. Mr. Ferrer claims that it would be impossible to complete the "collection, processing, logging, review, and redaction of all responsive documents from all custodians by September 26, 2016." Reply at 3. However, since Mr. Ferrer waived his claims to non-First Amendment privileges, the Court finds that the process should be much simpler than what he anticipated. Similarly, the Court reminds Mr. Ferrer that the only acceptable redactions are those based on privileged statements arising from, or related to, the litigation of this case, *see supra* at 7 n.4, as well as "any personally identifying information on subscribers and advertisers," *Ferrer*, No. MC 16-MC-621 (RMC), 2016 WL 4179289, at *13.

Any refusal or failure to obey this Court's orders "may be held by [this Court] to be a contempt thereof." 28 U.S.C.A. § 1365.

Accordingly, it is hereby

⁴ Mr. Ferrer may withhold responsive documents on the basis of attorney-client and/or work-product privilege arising from, or related to, this litigation, namely, Case No. 16-mc-621.

