STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
School District of Horry County and Horry County, Plaintiffs, vs. City of Myrtle Beach and Myrtle Beach Air Force Base Redevelopment Authority, Defendant.	)	CIVIL ACTION NO. 2018-CP-26-07249 **CITY OF MYRTLE BEACH'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL AND TO AMEND SCHEDULING ORDER**

Defendant City of Myrtle Beach ("City") submits the within Memorandum in Opposition to Plaintiffs' Motion to Compel and to Amend the Scheduling Order ("Motion"). For the reasons set forth below, as well as those provided in written communications with the Court and during the October 17, 2019, status conference, this forecasted Motion is frivolous and advanced solely for the purposes of delay. Plaintiffs' motion reveals itself to be little more than a salacious attempt to litigate this meritless case in the press. Although the Motion claims "remarkable information" that purportedly demonstrates "millions of misused taxpayer dollars," those allegations are revealed to be categorically false and advanced in this filing without factual support, first-hand knowledge, or identifiable "good ground to support it." Mot. at 3-4. As such, the Motion does not comply with Rule 11, of the South Carolina Rules of Civil Procedure ("SCRCP" or "Rules").

Pursuant to Rules 11 and 37, SCRCP, the Motion should be denied, and Plaintiffs should be sanctioned in the form of an award of the substantial expenses the City has unnecessarily incurred in responding to the communications leading up to and opposing this Motion, as well as responding to Plaintiffs' transparent efforts to delay the inevitable dismissal of this meritless lawsuit.

I. The documents sought by this Motion were produced to Plaintiffs on September 16, 2019.

This Motion fails for a very simple and straightforward reason: it seeks to compel the City to re-produce in a new format documents which were provided to Plaintiffs six weeks ago, and, contrary to the Rules, in a format which the documents are not maintained by the City. Despite that unavoidable fact, the Motion points to no identifiable reason for this frivolous exercise other than transparent delay, Plaintiffs' own convenience, and a desire to force the City, at substantial time, effort, and cost, to undertake efforts that are not required by the Rules. In making this motion, Plaintiffs level extraordinarily false and malicious allegations against the City that are borne solely out of Plaintiffs' ignorance of the law and a stubborn unwillingness and lack of diligence, effort, and good faith to self-educate.

Having been apprised on multiple occasions of the fact that they are and have been in possession of the documents they seek for weeks, Plaintiffs have spent the intervening time period doing their best to concoct successive reasons to delay the deadline[1] set forth in this Court's August 19, 2019, Order, in an effort to prejudicially avoid resolution of this case and foreclose the Defendants' ability to follow the law. As Plaintiffs' own exhibits to the Motion demonstrate, Plaintiffs' efforts at delay have taken on ever-changing themes and increasingly desperate tactics and assertions.

[1] Although the Motion is captioned as a Motion to Amend Scheduling Order, no scheduling order exists in this case. Instead, Plaintiffs seek to avoid the deadline imposed by the Court's August 19, 2019, Order, which held in abeyance the Court's decision on Defendants' joint motion to dismiss the Complaint for a period of 90 days to allow Plaintiffs to attempt to discover facts sufficient to support a cause of action. As this Court is aware from the September 17, 2019, status conference, delay of these proceedings is not warranted and the requested extension of time to prolong Plaintiffs' fishing expedition should be denied.

A. Plaintiffs first argued that the City had produced too many responsive documents.

First, Plaintiffs derisively accused the City of "dump truck discovery" in producing over 39,000 pages of documents responsive to Plaintiffs' overbroad and unduly burdensome discovery requests, *see* Plfs' Mot. Ex. 8 at 5-6, feigning surprise that their requests for detailed, expense level review of a large infrastructure redevelopment area over the course of twenty years would yield something other than a few odd illustrations. The City responded the following day elucidating the fact that, had the Plaintiffs bothered to conduct even the most rudimentary of reviews of the production, they would have found the documents to be organized and categorized in eight separate PDF files corresponding to the categories of requested documents. *Id.* at 4-5. The City also clarified that the documents were produced as they are maintained by the City in the normal course of business, with the exception that a substantial number of documents, which are kept in paper hard copy format only, were scanned at substantial time, effort and expense by the undersigned's staff in order for them to be easier for Plaintiffs to access, search, and organize. *Id.* at 4.

B. Plaintiffs next argued that they were burdened by having to review the responsive documents and instead wanted the City to label each of the documents it produced.

Unsatisfied by the City's straightforward identification of the documents produced, Plaintiffs next implored the City to label its production to correspond with each discovery request, despite the documents having been produced as they are kept in the usual course of business. *Id.* at 3; *but see* Rule 34(b), SCRCP ("[a] party who produces documents for inspection shall produce them as they are kept in the usual course of business **or** shall organize and label them to correspond with the categories in the request.") (emphasis supplied). The City again referred Plaintiffs to its prior explanation of the express organization and categorization of the produced documents. *Id.* at 2-3. The City also reiterated, for the third time, its willingness to

allow the District to conduct a "forensic audit"[2] of the TIF expenditures. *Id.* at 3. A full week later, and more than three weeks after the City first offered, Plaintiffs finally began to act on the City's willingness to participate in a "forensic audit" by the District. *Id.* at 2.

C. Plaintiffs then decided the City had not produced enough documents.

Demonstrating conclusively that Plaintiffs still had not bothered to review the document production of the City, Plaintiffs claimed to need additional information for its auditors in the form of "transaction level detail of all receipts and expenditures for the 'Air Base Tax Increment Revenue Fund' from inception of the Fund to present." *Id.* The problem with this claim was that Plaintiffs were already in possession of that information and had been for two and a half weeks, as the City thereafter reminded Plaintiffs. *Id.* at 1. Demonstrating a further willingness to cooperate and "go the extra mile," the City identified by reference to specific Bates number in its prior production all of the information requested by Plaintiffs on behalf of its auditor.

D. Plaintiffs subsequently claimed that they were incapable of reviewing—or unwilling to review—the produced documents in a timely manner.

Having been provided all of the requested information, with specific identification as to location, to conduct a forensic audit, Plaintiffs needed to go back to the drawing board for a new excuse for failing to move forward with the audit and to delay resolution of the still pending motion to dismiss. Four days later, on October 7, 2019, and nearly a full month after having received the production, Plaintiffs first contacted the Court claiming an inability to "confirm that

[2] As noted in previous submissions to this Court **under oath**, this forensic audit was threatened by representatives of the District if the City would not agree to allow the District to forego compliance with its statutory obligation to transfer to the Horry County Treasurer sums of money representing a portion of the State's reimbursement to Horry County for capped property tax revenues required by S.C. Code Ann. § 11-11-156(D) to be deposited in the Special Tax Allocation Fund created under S.C. Code Ann. § 31-12-270(A)(2)(b). The statement under oath in this regard has not even been addressed by plaintiffs, much less refuted by a responsive affidavit. This is further discussed at p. 8, *infra*.

all responsive information that is necessary for an accounting review of TIF expenditures has been produced." *See* Ex. 1, Motion Correspondence.[3] As pointed out in the City's October 11, 2019, responsive letter, this assertion was misleading in several respects. *See* Ex. 2, Oct. 11, 2019 City Ltr. For the first time, Plaintiffs attempted to confuse discovery issues with the City's separate agreement to allow the District to conduct a forensic audit. As this Court is aware, the Rules do not require a party to submit itself to a forensic audit, or to produce documents sufficient for the requesting party to conduct same. Nor did Plaintiffs' pending discovery requests reference its desire to conduct a forensic audit, or even request "information that is necessary for an accounting review." Plaintiffs statement to the Court thus conveyed a misleading red herring that was wholly irrelevant to this case or any associated discovery dispute. *See* Ex. 3, Oct. 15, 2019 City Ltr.

E. Plaintiffs' attempt to manufacture a "gotcha" moment regarding an alleged improper use of TIF funds was demonstrated to be categorically false and failed spectacularly.

Similar to its claims as to the insufficiency of the document production, Plaintiffs' attempt to spring the idea of an improper use of redevelopment funds during the October 17, 2019, status conference with the Court was a bust. Plaintiffs' "gotcha" moment related to RDA donations to the Horry-Georgetown Technical College was, much like the baseless Complaint in this matter, a clear misapprehension of the facts and law confirming a tendency of Plaintiffs to

[3] The Court may take judicial notice of the fact that counsel for the District, which has been the primary agitator in these discovery discussions, is far from a sole practitioner that might legitimately be able to argue an incapability to catalogue and review responsive documents of this size. Instead, it is a large multi-national law firm with more than 1,000 lawyers working in 27 offices in the United States and the United Kingdom. In fact, Womble Bond has its own e-discovery division, named BullDox, which purports to be an industry-leading e-discovery litigation support service that "employ[s] the latest technology, including artificial intelligence, to deliver comprehensive eDiscovery and information management services, all with the goal of helping you to work smarter, not harder." Just not in this litigation.
See https://www.womblebonddickinson.com/us/services/wbd-advance/bulldox

speak first and hope for/fish for facts later. Only, the facts in the case of the RDA's donation demonstrated that Plaintiffs "gotcha" was utterly baseless. And so, the Plaintiffs have moved on to its next stall tactic.

F. Plaintiffs now claim that the documents have not been produced in the correct format to conduct a forensic audit, which is not required by the Rules and is therefore not properly the subject of a motion to compel.

Following the Court's directive to Plaintiffs to complete their forensic audit, Plaintiffs' "expert" auditor[4] submitted a letter to Michael W. Shelton, Chief Financial Officer of the City, requesting information that it requires to conduct the contemplated forensic audit. Plfs' Mot. Ex. 1. Mr. Shelton responded in due course, providing several documents which were not requested in Plaintiffs' discovery requests and therefore not among the documents previously produced. Plfs' Mot. Ex. 2. For the vast majority of documents requested by the auditor, Mr. Shelton once again identified where those documents are located among the documents produced by the City five weeks prior. *Id.* Finally, Mr. Shelton indicated that the City did not maintain the requested information in Excel format, as the auditor indicated would be preferred.[5] This was the third time the City had identified by specific Bates number documents Plaintiffs were unwilling to search for in the discovery production.

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[4] Plaintiffs repeatedly reference the third-party accounting firm which purported to contact the Court in reference to this matter as its "accounting/auditing experts" in this matter. *See* Motion, *passim*. The City would note, however, that despite Plaintiffs' willingness to freely criticize the City's responses to Plaintiffs' overbroad and unduly burdensome initial discovery requests, Plaintiffs both objected to the City's request that they identify any expert witnesses on whom either would seek to rely in this case, a further demonstration of the impropriety of Plaintiffs seeking pigeon hole a forensic audit under the Rules. Having failed to comply with the Rules themselves, the complaints emanating from Plaintiffs' glass houses should be met with silence.

[5] Plaintiffs have, understandably, not included in their motion their request for documents in Excel format, as that request is not a part of any discovery request made in this case, and no such documents exist in Excel format in any event.

However, and unsurprisingly, even this identification did not satisfy Plaintiffs, as it did not serve the purpose of delay. Plaintiffs' tactic thus changed from claiming that the City had not produced the required documents, to their claim that the City did not produce the documents in the correct format. And that is where we find ourselves today with this meritless motion to compel.[6] In sum, Plaintiffs have been in possession of the documents they now seek to compel the City to provide again, this time in a different format, since September 16, 2019. This Motion is therefore frivolous and punitive and should be denied.

II. The Rules do not contemplate requiring the City to create responsive documents in a new electronic format requested by a non-party so that it can conduct a "forensic audit" not required by the Rules.

The Rules require a party to produce responsive documents that actually exist; they do not require a party to create new documents at the whim and desire of opposing counsel. *See*, *generally*, Rule 34, SCRCP. Further, documents must be produced in the form or forms in which they are maintained by the party, or in a form or forms that are reasonably usable. *Id.* The City has not only complied with these requirements, they have bent over backwards accommodating Plaintiffs' repetitive and burdensome requests. No response or document production has been or will be sufficient to satiate Plaintiffs' unreasonable and ever-changing demands. That's because the goal of Plaintiffs' exercise is not to gain access to any identifiable information or document, but to use this litigation as a weapon of delay that effectively prevents the City and the RDA from exercising its statutory authority for a sufficient period of time to run out the clock on

[6] Plaintiffs suggestion that the City somehow does not want Plaintiffs' frivolous conduct to be on the record in a formal proceeding is specious. Like the rest of Plaintiffs' unsubstantiated claims in this lawsuit, this suggestion is false and deflective of the point: that Plaintiffs had sought to avoid filing a formal motion to compel because they had no good faith basis for such a motion and would subject themselves to sanctions that this Court should now impose.

Defendants' ability to issue additional debt for the redevelopment of the TIF district—which will happen if additional debt is not issued on or before December 13, 2020.

The Motion before the Court is two-fold. First, it seeks to compel the City to formally update its written discovery responses to include references to specific categorizations of the documents that it produced with reference to the corresponding request of Plaintiffs. To be clear, the City does not believe the Rules require the level of spoon-feeding of information that Plaintiffs apparently require; however, **the information Plaintiffs seek to compel in the form of updated discovery responses has been explicitly provided to Plaintiffs in consultation communications leading up to this frivolous motion**. *See* Plfs' Mot. Ex. 2 at 1-3; Ex. 4 at 1; and Ex. 8 at 1 and 4.

Secondarily, Plaintiffs seek through this Motion to force the City to create new documents in formats that it does not maintain in the normal course of business, at substantial hardship, time, effort and expense to the City and its staff, for the purpose of a duplicative production to serve the interests of Plaintiffs to conduct a forensic audit that is beyond the scope of the Rules. Plaintiffs already have the documents in PDF format. But that reality is not conducive to delay. Now, under the guise of a need for formatting specific to their third-party auditor, Plaintiffs demand that the City re-create **the same documents** from scratch in a **new** PDF document. The discovery rules of this State do not require a party to submit to a forensic audit in the course and scope of discovery litigation. Nor did Plaintiffs even make such an ill-advised request in this case. In order to demonstrate that it has nothing to hide with respect to the TIF fund expenditures, the City called Plaintiffs' **threatened bluff of a forensic audit**, when it refused the **District's improper request that it ignore the plain language of the TIF statute to avoid a statutorily-required payment to the Special Tax Allocation Fund**. *See* Exs. 2 and

3. Plaintiffs are now attempting to convert the City's agreement to submit to the threatened "forensic audit" into a requirement of the discovery process in this case. The Rules do not support Plaintiffs' attempt, and this secondary relief sought by Plaintiffs is likewise meritless.

In point of fact, Plaintiffs did not specifically request the City Project Transaction Report, that they now seek to compel, in their requests for production. Nor did Plaintiffs' requests specifically identify electronically stored information for requested documents or a particular type or format of documents to produce. That failure inures to Plaintiffs' detriment. Rule 34(b), SCRCP provides that "[i]f a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable." The City has complied expressly with this Rule. Because Plaintiffs did not specify the ESI form, the City produced the documents in its possession as they are maintained.[7] The reasonably usable requirement just means that a document should be searchable, or capable of being rendered searchable. Contrary to Plaintiffs' suggestion, a form that is "reasonably usable" does not mean "a form that is demanded by the non-party auditor accounting firm hired by the plaintiff to conduct a forensic audit outside the ambit and scope of discovery under the Rules," as Plaintiffs would have this Court believe. The City's production complies with the Rules, while Plaintiffs seek relief not contemplated by the Rules.

Further, Rule 26(b)(6), SCRCP provides that "[a] party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party as

[7] Even if Plaintiffs had specified a form, as they attempt to do in this Motion (but which they did not do before), the City is under no obligation to create a document in a different form than it maintains solely for the benefit of Plaintiffs or their unidentified "expert." This was observed by the Court in the status conference call it conducted on October 17th.

not reasonably accessible because of undue burden or cost." Rule 26 presumes that the documents exist in the first place, which they do not here, as the documents in the format specified by Plaintiffs do not exist and are not maintained by the City, but instead would require creation in the first instance, something not contemplated by the Rules. By sworn affidavit of Mr. Shelton, the City has indicated that undertaking to create the type of document requested by Plaintiffs, even if it were required under the Rules (which it is not), would cause a substantial hardship to the City's accounting staff during a critical time in its annual budget process. *See* Ex. 4, October 29, 2019 Affidavit of Michael Shelton; *see also* Rule 26(b)(6)(A) ("[T]he party from whom discovery is ought must show that the information is not reasonably accessible because of undue burden or cost."). For all of the reasons set forth in Rule 26(b)(6)(B), the discovery is cumulative and duplicative to documents already produced by the City, and Plaintiffs admit that they can obtain the information they seek from the documents they already possess. Rule 26(b)(6)(B)(i). Further, as demonstrated through the recitation of Plaintiffs' dilatoriness above, Plaintiffs' have had ample opportunity to discover and have, in fact, obtained the information sought through other means (*see* (B)(ii)), and the burden or expense to the City outweighs the likely benefit to Plaintiffs, who have demonstrated at every turn in this case that they fundamentally misapprehend the law and facts involved in this TIF and whose "shoot first" mentality has been proven false at every turn.

IV. CONCLUSION

Plaintiffs have been in possession of the documents they purport to seek the Court to compel since September 13, 2019. Meanwhile, additional documents which were not requested in discovery, but which were requested separately by Plaintiffs' third-party auditor were promptly provided by the City. This Motion seeks to compel the City to produce documents

which have already been provided and specifically identified multiple time to Plaintiffs in a new format that it does not maintain in the normal course of business, at substantial hardship, time, effort, and expense to the City and its staff. The Rules neither contemplate nor require such a request. Further, Plaintiffs attempt to pull the offered forensic audit under the ambit of the Rules and thereby involve this Court in its compulsion is improper. The Motion is frivolous and should be denied. Likewise, delay of the discovery period beyond that ordered by the Court is not warranted under these circumstances and Plaintiffs' request in that respect should also be denied. Finally, in light of the Motion's blatant and demonstrated frivolity, Plaintiffs should be sanctioned under Rules 11 and 37, SCRCP, and the City hereby respectfully requests the opportunity to submit documentation to the Court demonstrating the expenses incurred in responding to this frivolous exercise.

Respectfully submitted,

WILLOUGHBY & HOEFER, P.A.

By: *s/ Chad N Johnston*
John M. S. Hoefer, S.C. Bar No. 2549
Chad N. Johnston, S.C. Bar No. 73752
R. Walker Humphrey, II, S.C. Bar No.79429
930 Richland Street
Post Office Box 8416
Columbia, South Carolina 29202-8416
Telephone: (803) 252-3300
Facsimile: (803) 256-8062
jhoefer@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com
whumphrey@willoughbyhoefer.com

Attorneys for Defendant
City of Myrtle Beach

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