IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

Latasha Holloway, et al., **Plaintiffs,** **v.** **City of Virginia Beach, et al.,** **Defendants.**	**Civil Action No. 2:18-cv-0069**

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO SUPPLEMENTAL MOTION FOR ENTRY OF A PROTECTIVE ORDER

COME NOW the Defendants, City of Virginia Beach, Virginia Beach City Council, Louis Jones, James Wood, Jessica Abbott, Aaron Rouse, Robert Dyer, Barbara Henley, Shannon Kane, John Moss, David Nygaard, Sabrina Wooten, Rosemary Wilson, in their official capacities as members of the Virginia Beach City Council, David L. Hansen, in his official capacity as City Manager, and Donna Patterson, in her official capacity as Director of Elections/General Registrar for the City of Virginia Beach (collectively "Defendants"), by counsel, and in response to Plaintiffs' Response to Defendants' Memorandum of Law in Support of their Supplemental Motion for Protective Order, state as follows:

PRELIMINARY STATEMENT

Defendants maintain that the entry of a protective order in this case is appropriate and, assuming the Court enters an order granting protection from the broad scope of the Plaintiffs' First Requests for Production, the same restrictions should apply to any Rule 45 subpoenas issued by Plaintiffs. Specifically, this should include the recently served Rule 45 subpoenas that

are comprised of nothing more than a 'copy & paste' of the same thirty-two (32) overbroad topics in Plaintiffs' First Requests for Production.

At the time Defendants filed their Supplemental Motion for Protective Order along with a Memorandum of Law in Support of the Supplemental Motion, Defendants did not expect that a reply to Plaintiff's response brief would be necessary as the pending Motion was meant only to supplement an earlier motion filed with the Court. *See* ECF Nos. 75 and 76. Unfortunately, however, Plaintiffs have included in their response brief inaccurate and inappropriate references to a purported discovery dispute along with a request for attorney's fees and costs to which the Defendants are compelled to respond.

ARGUMENT

I. Plaintiffs Improperly Convert Their Responsive Brief into a Motion to Compel in Violation of the Local Rules.

Local Rule 37 governs motions to compel and sanctions. Local Rule 37(A) states in pertinent part that "[a]fter a discovery request is objected to, or not complied with, within time, and if not otherwise resolved, it is the responsibility of the party initiating discovery to place the matter before the Court by a proper motion pursuant to Fed. R. Civ. P. 37, to compel an answer, production, designation, or inspection." Defendants have made timely objections to Plaintiffs' discovery requests and filed a Motion for Protective Order from Plaintiffs' discovery requests in this matter. In response to these objections and Motion for Protective Order, Plaintiffs have not formally sought to challenge the appropriateness of Defendants' objections or the Motion for Protective Order other than by filing responsive briefings. Had Plaintiffs truly felt "seriously prejudiced" as they allege, Plaintiffs have methods under the Federal Rules of Civil Procedure and Local Rules to remedy this perceived prejudice. To date, they have not taken any such approach.

Plaintiffs have also failed to confer with Defendants prior to presenting their complaints with regard to the appropriateness of Defendants' objections to the Court. Local Rule 37(E) requires counsel to confer in advance of presenting a discovery dispute to the Court in order to "explore with opposing counsel the possibility of resolving the discovery matters in controversy" to decrease the possibility of presenting unnecessary discovery motions with the Court. Counsel for the Defendants have been – and continue to be – willing to discuss and attempt to resolve discovery disputes amicably and in good-faith. Local Rule 37(E) continues by stating that "the Court will not consider any motion concerning discovery matters unless the motion is accompanied by a statement of counsel that a good faith effort has been made between counsel to resolve the discovery matters at issue." Though Plaintiffs' statements are not specifically identified as a motion to compel, this Court's disfavor of considering discovery disputes without assurances that there has been discussion between counsel on the specific discovery issue is clear. Plaintiffs' presentation of this discovery dispute for the first time in their response brief is inappropriate.

Local Rule 26 (C) governs objections to the discovery process in the Norfolk Division of the United States District for the Eastern District of Virginia. It states that:

> Unless otherwise ordered by the Court, an objection to any interrogatory, request, or application under Fed. R. Civ. P. 26 through 37, shall be served within fifteen (15) days after the service of the interrogatories, request, or application; or, in a case removed or transferred to this Court after discovery was served, within fifteen (15) days after the date of removal or transfer. The Court may allow a shorter or longer time. Any such objection shall be specifically stated. Any such objection shall not extend the time within which the objecting party must otherwise answer or respond to any discovery matter to which no specific objection has been made.

(emphasis added). Defendants have and will—consistent with Local Rule 26(C)—continue to respond timely to discovery matters to which no specific objection has been made. Plaintiffs

complain that Defendants are "refusing to provide any responsive answers, citing pending motions for bifurcation" and that the Defendants have "refused to respond to any pending discovery requests, other than to cherry-pick what they think relates only to the *Gingles* preconditions, and not to the 'totality of the circumstances' that must be evaluated under Section 2." Plaintiffs' Response Brief, ECF No. 92, pgs. 1-2.

Plaintiffs' accusations are inaccurate and taken out of context. Defendants have provided responses by email to all requests to which no specific objection was made for Exhibit A to Plaintiffs' Response Brief as of July 12, 2019.[1] Notably, Plaintiffs never attempted to meet and confer over their complaints regarding this discovery issue despite having received by email Defendants' objections pursuant to Local Rule 26(c) on June 28, 2019. In addition, on June 4, 2019, Defendants provided by mail (and a hard copy by expedited mail) responses and corresponding documents to each of Plaintiffs' Requests for Production for which no specific objection was made. Once again, Plaintiffs have not attempted to meet and confer over their apparent dissatisfaction with the manner and form of Defendants' objections in this discovery response.

Having failed to meet the requirements of the Local Rules, Plaintiffs seek to circumvent them by inaccurately and improperly including discovery disputes in their response brief to the Defendants' motion. Defendants view this as an effort by Plaintiffs to transform their responsive brief into their own motion to compel. Such a tactic is improper and Defendants take pointed exception to the manner in which Plaintiffs have chosen to address this discovery issue. Defendants note the plain language of Local Rule 37(G) that states "any unwarranted opposition

[1] Additionally, pursuant to an agreement amongst counsel, Plaintiffs were provided complete responses to their Rule 45 subpoenas from eight members of the Virginia Beach City Council on July 12, 2019 and no documents were withheld on the basis of Defendants' pending motions—despite many of the responsive documents being related only to the 'totality' inquiry.

to proper discovery proceedings, will subject such party to appropriate remedies and sanctions, including the imposition of costs and counsel fees."

For these reasons, the Defendants respectfully request that as the Court addresses Defendants' Motion for Protective Order and Supplemental Motion for Protective Order (ECF Nos. 75 and 90), it not consider the improper arguments of Plaintiffs' counsel, which attempt to convert or subvert the pending Motion into their own Motion to Compel, for which the Plaintiffs have failed to comply with the requirements of the Local Rules.

II. Defendants Motions are Justified and an Award of Attorney's Fees and Expenses Would be Unjust.

The Defendants ask this Court—regardless of how it rules on Defendants' Supplemental Motion—to deny Plaintiffs' request for attorneys' fees and expenses. Plaintiffs did not to make a request for attorney's fees in their opposition to Defendants' Motion for Entry of a Protective Order (ECF No. 78) yet they have included such a request now in response to Defendants' pending Motion that was meant only to supplement the original motion. Rule 37(a)(5)(B) provides that, in the event that a motion is denied, "the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust." In their memoranda, Plaintiffs have argued why the Court should not grant Defendants' supplemental motion (and original Motion for Entry of a Protective Order). They have not, however, refuted or tried to rebut Defendants' core contention that the tri-partite coalition theory upon which Plaintiffs' claim is predicated has no precedent of success. Given the substantial obstacles Plaintiffs face in satisfying the preconditions established in *Thornburg v. Gingles*, 478 U.S. 30 (1986), Defendants are justified in their endeavor to limit taxpayers' expense with regard to the thirty-two (32) overbroad (and potentially moot) topics in Plaintiffs' First Requests for Production.

This case involves expansive litigation and justice does not demand the Defendants be made to bear the costs of Plaintiffs' opposition to the Defendants' good-faith efforts to secure the just, speedy, and inexpensive determination of this action. *See* Fed. R. Civ. P. 1. Relying upon the weighty arguments set forth in their memoranda of law (ECF Nos. 76, 80, 81, and 91) offered in support of this and other related motions, Defendants ask this Court to find that Defendants' motion is substantially justified and that the circumstances of this case make any award of attorney's fees and expenses unjust.

CONCLUSION

WHEREFORE, for all the reasons set forth above and those previously submitted by the Defendants, it is hereby respectfully requested that the Court enter a protective order limiting the scope of discovery and subpoenas issued pursuant to Rule 45 at this time to requests related to the *Thornburg v. Gingles* preconditions, deny Plaintiffs' request for attorney's fees and expenses, and for all other relief as the Court deems appropriate.

Respectfully submitted,

CITY OF VIRGINIA BEACH, VIRGINIA BEACH CITY COUNCIL, LOUIS JONES, JAMES WOOD, JESSICA ABBOTT, AARON ROUSE, ROBERT DYER, DAVID NYGAARD, BARBARA HENLEY, SHANNON KANE, JOHN MOSS, SABRINA WOOTEN, and ROSEMARY WILSON, in their official capacity as members of the Virginia Beach City Council, DAVID L. HANSEN, in his official capacity as City Manager, and DONNA PATTERSON, in her official capacity as Director of Elections/General Registrar for the City of Virginia Beach

By: _____/s/_____
Of Counsel

Mark D. Stiles (VSB No. 30683)
City Attorney
Christopher S. Boynton (VSB No. 38501)
Deputy City Attorney
Gerald L. Harris (VSB No. 80446)
Associate City Attorney
Joseph M. Kurt (VSB No. 90854)
Assistant City Attorney
Attorneys for the City of Virginia Beach
Office of the City Attorney
Municipal Center, Building One
2401 Courthouse Drive
Virginia Beach, Virginia 23456
(757) 385-4531 (Office)
(757) 385-5687 (Facsimile)
mstiles@vbgov.com
cboynton@vbgov.com
glharris@vbgov.com
jkurt@vbgov.com

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2019, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Joseph Gerald Hebert
Danielle Marie Lang
Christopher Lamar
Annabelle Harless
Ruth Merewyn Greenwood
Campaign Legal Center
1411 K Street, NW
Suite 1400
Washington, DC 20005
(202) 736-2200 (telephone)
(202) 736-2222 (facsimile)
ghebert@campaignlegal.org
dlang@campaignlegal.org
clamar@campaignlegalcenter.org
aharless@campaignlegal.org
rgreenwood@campainlegal.org

/s/
Gerald L. Harris

Mark D. Stiles (VSB No. 30683)
City Attorney
Christopher S. Boynton (VSB No. 38501)
Deputy City Attorney
Gerald L. Harris (VSB No. 80446)
Associate City Attorney
Joseph M. Kurt
Assistant City Attorney (VSB No. 90854)
Attorneys for the City of Virginia Beach
Office of the City Attorney
Municipal Center, Building One, Room 260
2401 Courthouse Drive
Virginia Beach, Virginia 23456
(757) 385-8803 (Office)
(757) 385-5687 (Facsimile)
mstiles@vbgov.com
cboynton@vbgov.com
glharris@vbgov.com
jkurt@vbgov.com