

**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.

Case No. 2:18-cv-0069

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH SUBPOENAS

Defendants respectfully move the Court to quash subpoenas issued by Plaintiffs in this matter outside the time for discovery, without leave of court, in violation of this Court's order dated August 21, 2020, and without providing sufficient time to respond. On August 20, 2020, Plaintiffs joined Defendants in filing with the Court a proposed order allowing Plaintiffs leave *only* to conduct depositions of certain witnesses. Dkt. 171. Today, just hours before deposing those witnesses, Plaintiffs are in the process of serving document requests on those witnesses expecting production at the time of deposition, *i.e.*, within a matter of hours.¹ For the reasons detailed herein, these subpoenas *duces tecum* are being served outside the time for discovery, without leave of court, in violation of a court order, and without sufficient time for response. Plaintiffs' subpoenas "must" be quashed. Fed. R. Civ. P. 45(d)(3)(A) (emphasis added).

¹ Defendants are relying on communication from Plaintiffs' counsel that they intend to serve these subpoenas *duces tecum* prior to depositions scheduled for 2pm this afternoon and tomorrow morning and afternoon. Though counsel to Defendants have yet to receive confirmation from Plaintiffs that those subpoenas have been served, due to the exigency of the matter, Defendants are taking Plaintiffs at their word.

BACKGROUND

On September 3, 2019, discovery closed in this matter. On July 9, 2020, Plaintiffs filed a motion to exclude certain witnesses from trial and, on July 22, 2020, Defendants filed a motion to exclude supplemental reports by Plaintiffs' experts (the "Motions"). Dkt. 153 & 160. Between August 12 and August 20, 2020, Plaintiffs and Defendants worked in good faith to negotiate a resolution to the Motions so that the Court would not be burdened with resolving them. These negotiations included at least 18 e-mail communications between Plaintiffs' counsel and Defendants' counsel and several telephonic "meet and confer" conferences. Defendants prepared a proposed order for the Court to enter and received multiple rounds of edits by Plaintiffs. Defendants accepted all edits proposed by Plaintiffs. At all times, and related to resolving Plaintiffs' motion to exclude, the Parties were negotiating about the number of additional witnesses Defendants could designate for trial testimony and Defendants agreed to allow depositions of these witnesses. At *no* time did Plaintiffs seek leave to request documents from these new witnesses. Indeed, this record of the negotiations was clearly memorialized in the *joint* proposed order filed with the Court and ultimately issued by Judge Douglas E. Miller. Specifically, Plaintiffs were "GRANTED LEAVE to conduct up to three (3) depositions of these three (3) fact witnesses on or before September 9, 2020." Order at 1 (Dkt. 172). The depositions of the three witnesses are scheduled for today at 2pm, tomorrow at 9:30am and 1pm. On information and belief, Plaintiffs are in the process of serving subpoenas *duces tecum* on these witnesses today (the "Document Subpoenas") (attached as Exhibit A).

ARGUMENT

In civil actions, the Court must issue a scheduling order limiting the time to complete discovery. Fed. R. Civ. P. 16(b); E.D. Va. Loc. Civ. R. 16(B). The scheduling order "may be

modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); *see* E.D. Va. Loc. Civ. R. 16(B) ("The parties and their counsel are bound by the dates specified in any such orders and no extensions or continuance thereof shall be granted in the absence of a showing of good cause."). A court must quash or modify a subpoena that "fails to allow a reasonable time to comply." Fed. R. Civ. P. 45(d)(3)(A).

1. Plaintiffs do not have leave to serve the Document Subpoenas *one year* after the close of discovery.

Plaintiffs are serving their subpoenas *duces tecum* one year after the close of discovery. Dtk. 89. Plaintiffs do not have leave of Court to serve such discovery; the only leave Plaintiffs have—after substantial negotiation between the parties—is to *depose* certain witnesses.

Plaintiffs subpoena *duces tecum* are plainly served out of time and without leave of court. As a standalone matter, this is sufficient to merit quashing the subpoenas. A party seeking to subpoena documents after the close of discovery must seek leave of the court and demonstrate good cause. E.D. Va. Loc. Civ. R. 16(B) ("The parties and their counsel are bound by the dates specified in any such orders and no extensions or continuance thereof shall be granted in the absence of a showing of good cause."); *see also*, *McAfee v. Boczar*, 3:11CV646, 2012 WL 2499420, at *1–2 & *1 n.2 (E.D. Va. June 27, 2012) (quashing Rule 45 subpoena issued 13 days after close of discovery for untimeliness, reasoning movant had "not sought an extension of time in which to complete discovery and ha[d] not requested modification of the Court's Scheduling Order," nor "demonstrated good cause for modification" of the Scheduling Order).

Courts in the Fourth Circuit have routinely quashed third-party subpoenas served outside of the time for discovery and without leave. *See, e.g., CSS, Inc. v. Herrington*, No. 2:16-cv-01762, 2018 WL 7131556, *3 (S.D.W.Va. Jan. 9, 2018) ("A Rule 45 subpoena seeking discovery served after the close of discovery is untimely"); *Fleetwood Transp. Corp. v.*

Packaging Corp. of America, No. 1:11MC45, 2011 WL 6151479, *2 (M.D.N.C. Dec. 12, 2011) (quashing third-party subpoena as untimely issued three months after close of discovery); *see also Dreyer v. GACS Inc.*, 204 F.R.D. 120, 123 (N.D. Ind. 2001) (“to allow a party to continue with formal discovery...whether in the guise of Rule 45, or any of the other discovery methods recognized by Rule 26(a)(5), after the discovery deadline unnecessarily lengthens [the] discovery process, and diverts the parties’ attention, from the post-discovery aspects of preparing a case for Trial”) (quotations omitted); *Modular Security Systems Inc. v. WWW.Turnstiles.US Inc.*, No. CV-16-00455-PHX-DJH, 2019 WL 7049013, *1 (D. Ariz. Sept. 5, 2019) (quashing third-party subpoenas that a party served after the close of discovery); *Fann v. City of Cleveland, Ohio*, 616 F. Supp. 305, 315 (N.D. Ohio 1985) (quashing notices of deposition scheduled after the discovery cutoff).

Plaintiffs had ample opportunity to negotiate with Defendants leave to serve subpoenas *duces tecum* during their discussions resolving the Motions and drafting the joint proposed order the Parties filed on August 20, Dkt. 171, and that was entered by Judge Miller on August 21, Dkt. 172. This is not a circumstance where Plaintiffs sought this leave in negotiations but were rejected (even then their subpoenas should be quashed), but a circumstance where Plaintiffs, on the eve of negotiated depositions surprised Defendants that they intend to seek discovery they never mentioned in any of their negotiations and was not part of the related court order. This is improper and Plaintiffs’ new discovery, the Document Subpoenas, should be quashed.

2. The Document Subpoenas—served with only hours of notice—do not provide sufficient time to respond.

Plaintiffs’ Document Subpoenas are being served today and seek production by the time of deposition. These depositions are scheduled for today and tomorrow. Plainly this fails to allow reasonable time to comply. Rule 45 is clear in its mandatory directive: “On timely motion,

the court for the district where compliance is required must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply[.]” Fed. R. Civ. P. 45(d)(3)(A). This motion is timely because it is filed the day Plaintiffs are effecting service of the Document Subpoenas and prior to the due date and time for response, which is this afternoon and tomorrow.

CONCLUSION

For these reasons, Plaintiffs subpoenas *duces tecum* served on three third-party witnesses should be quashed.

DATE: August 27, 2020

/s/ Katherine L. McKnight

Katherine L. McKnight (VSB No. 81482)
Richard B. Raile (VSB No. 84340)
BAKER & HOSTETLER, LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 861-1500
Facsimile: (202) 861-1783
kmcknight@bakerlaw.com
rraile@bakerlaw.com

Patrick T. Lewis (*pro hac vice*)
BAKER & HOSTETLER, LLP
127 Public Square, Suite 2000
Cleveland, OH 44114
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
plewis@bakerlaw.com

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
OFFICE OF THE CITY ATTORNEY
Municipal Center, Building One, Room 260
2401 Courthouse Drive
Virginia Beach, Virginia 23456
Telephone: (757) 385-4531
Facsimile: (757) 385-5687
mstiles@vbgov.com
cboynton@vbgov.com
glharris@vbgov.com
jkurt@vbgov.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2020, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of the filing to:

Ruth M. Greenwood
CAMPAIGN LEGAL CENTER
125 Cambridgepark Drive, Suite 301
Cambridge, MA 02140
rgreenwood@campaignlegal.org

Annabelle E. Harless
CAMPAIGN LEGAL CENTER
55 W. Monroe St., Ste. 1925
Chicago, IL 60603
Telephone: (312) 312-2885
aharless@campaignlegal.org

Joseph Gerald Hebert
Paul March Smith
Robert Weiner
Danielle Marie Lang
Christopher Lamar
CAMPAIGN LEGAL CENTER
1411 K Street, N.W.
Suite 1400
Washington, D.C. 20005
Telephone: (202) 736-2200
Facsimile: (202) 736-2222
ghebert@campaignlegal.org
psmith@campaignlegal.org
rweiner@campaignlegal.org
dlang@campaignlegal.org
clamar@campaignlegal.org

Counsel for Plaintiffs

/s/ Katherine L. McKnight

Katherine L. McKnight (VSB No. 81482)
Richard B. Raile (VSB No. 84340)
BAKER & HOSTETLER, LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 861-1500
Facsimile: (202) 861-1783
kmcknight@bakerlaw.com
rraile@bakerlaw.com

Patrick T. Lewis (*pro hac vice*)
BAKER & HOSTETLER, LLP
127 Public Square, Suite 2000
Cleveland, OH 44114
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
plewis@bakerlaw.com

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
OFFICE OF THE CITY ATTORNEY
Municipal Center, Building One, Room 260
2401 Courthouse Drive
Virginia Beach, Virginia 23456
Telephone: (757) 385-4531
Facsimile: (757) 385-5687
mstiles@vbgov.com
cboynton@vbgov.com
glharris@vbgov.com
jkurt@vbgov.com

Counsel for Defendants

Exhibit A

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT
for the
Eastern District of Virginia

Latasha Holloway et. al.
Plaintiff
v.
City of Virginia Beach et. al.
Defendant
Civil Action No. 2:18-cv-00069

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Nonato "Nony" E. Abrajano

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (By zoom, https://planetdepos.zoom.us/j/92787967944) and Date and Time (08/27/2020 2:00 pm)

The deposition will be recorded by this method: stenographic means

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: See attached Exhibit A

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 08/26/2020

CLERK OF COURT

OR

J. Gerald Hebert

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiffs
J. Gerald Hebert, 1101 14th Street NW, Suite 400, Washington, DC 20005, (202)736-2200, ghebert@campaignlegal.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 2:18-cv-00069

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material 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.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

EXHIBIT A

DOCUMENTS TO BE PRODUCED BY NONATO "NONY" ABRAJANO

On or before August 27, 2020 you or your representatives must produce the following documents, communications, electronically stored information, objects and/or materials (collectively "documents" or "materials") that are in your actual or constructive possession, custody or control, and permit the inspection, copying, testing, and/or sampling of the materials, that were created or used during the period January 1, 2008 and the present.

1. Provide any and all documents, communications, and things related to your testimony in the *Holloway v. City of Virginia Beach* case (2:18-cv-00069, E.D.Va.).
2. Provide any and all documents, communications, and things related to minority and majority voting patterns and practices in Virginia Beach, the system for electing members of the Virginia Beach City Council, the redistricting of City Council districts in 2011, and the responsiveness of the City of Virginia Beach to the needs and concerns expressed by minority residents in the City.
3. Provide any and all communications between you and City of Virginia Beach employees including, but not limited to, Gerald L. Harris, Christopher Boynton, and Joseph M. Kurt related to this litigation or on the issues of elections, specific city council members or candidates to city council, voting, civic engagement, race, ethnicity, the Black community, the Hispanic community, the Asian community, and/or the Filipino community.
4. Provide any and all communications between you and any employee of the firm Baker Hostetler, including but not limited to Katherine L. McKnight, Patrick T. Lewis, and/or Richard B. Raile related to this litigation or on the issues of elections, voting, civic engagement, race, ethnicity, the Black community, the Hispanic community, the Asian community, and/or the Filipino community.

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT
for the

Eastern District of Virginia

Latasha Holloway et al.

Plaintiff

v.

City of Virginia Beach et al.

Defendant

Civil Action No. 2:18-cv-00069

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Benito "Ben" Loyola

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action.

Table with 2 columns: Place (By zoom:https://planetdepos.zoom.us/j/93655594476) and Date and Time (08/28/2020 1:30 pm)

The deposition will be recorded by this method: stenographic means

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: See attached Exhibit A

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 08/26/2020

CLERK OF COURT

OR

/s/ J. Gerald Hebert

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiffs

J. Gerald Hebert, 1101 14th Street NW, Suite 400, Washington, DC 20005, (202)736-2200, ghebert@campaignlegal.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 2:18-cv-00069

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material 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.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

EXHIBIT A

DOCUMENTS TO BE PRODUCED BY BENITO "BEN" LOYOLA

On or before August 28, 2020 you or your representatives must produce the following documents, communications, electronically stored information, objects and/or materials (collectively "documents" or "materials") that are in your actual or constructive possession, custody or control, and permit the inspection, copying, testing, and/or sampling of the materials, that were created or used during the period January 1, 2008 and the present.

1. Provide any and all documents, communications, and things related to your testimony in the *Holloway v. City of Virginia Beach* case (2:18-cv-00069, E.D.Va.).
2. Provide any and all documents, communications, and things related to minority and majority voting patterns and practices in Virginia Beach, the system for electing members of the Virginia Beach City Council, the redistricting of City Council districts in 2011, and the responsiveness of the City of Virginia Beach to the needs and concerns expressed by minority residents in the City.
3. Provide any and all communications between you and City of Virginia Beach employees including, but not limited to, Gerald L. Harris, Christopher Boynton, and Joseph M. Kurt related to this litigation or on the issues of elections, specific city council members or candidates to city council, voting, civic engagement, race, ethnicity, the Black community, the Hispanic community, the Asian community, and/or the Filipino community.
4. Provide any and all communications between you and any employee of the firm Baker Hostetler, including but not limited to Katherine L. McKnight, Patrick T. Lewis, and/or Richard B. Raile related to this litigation or on the issues of elections, voting, civic engagement, race, ethnicity, the Black community, the Hispanic community, the Asian community, and/or the Filipino community.

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT
for the
Eastern District of Virginia

Latasha Holloway et al.

Plaintiff

v.

City of Virginia Beach et al.

Defendant

Civil Action No. 2:18-cv-00069

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Delceno C. Miles

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (By zoom: https://planetdepos.zoom.us/j/93655594476) and Date and Time (08/28/2020 9:30 am)

The deposition will be recorded by this method: stenographic means

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: See attached Exhibit A

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 08/26/2020

CLERK OF COURT

OR

/s/ J. Gerald Hebert

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiffs

J. Gerald Hebert, 1101 14th Street NW, Suite 400, Washington, DC 20005, (202)736-2200, ghebert@campaignlegal.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 2:18-cv-00069

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material 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.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

EXHIBIT A

DOCUMENTS TO BE PRODUCED BY DELCENO C. MILES

On or before August 28, 2020 you or your representatives must produce the following documents, communications, electronically stored information, objects and/or materials (collectively “documents” or “materials”) that are in your actual or constructive possession, custody or control, and permit the inspection, copying, testing, and/or sampling of the materials, that were created or used during the period January 1, 2008 and the present.

1. Provide any and all documents, communications, and things related to your testimony in the *Holloway v. City of Virginia Beach* case (2:18-cv-00069, E.D.Va.).
2. Provide any and all documents, communications, and things related to minority and majority voting patterns and practices in Virginia Beach, the system for electing members of the Virginia Beach City Council, the redistricting of City Council districts in 2011, and the responsiveness of the City of Virginia Beach to the needs and concerns expressed by minority residents in the City.
3. Provide any and all communications between you and City of Virginia Beach employees including, but not limited to, Gerald L. Harris, Christopher Boynton, and Joseph M. Kurt related to this litigation or on the issues of elections, specific city council members or candidates to city council, voting, civic engagement, race, ethnicity, the Black community, the Hispanic community, the Asian community, and/or the Filipino community.
4. Provide any and all communications between you and any employee of the firm Baker Hostetler, including but not limited to Katherine L. McKnight, Patrick T. Lewis, and/or Richard B. Raile related to this litigation or on the issues of elections, voting, civic engagement, race, ethnicity, the Black community, the Hispanic community, the Asian community, and/or the Filipino community.

**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.

Case No. 2:18-cv-0069

ORDER GRANTING DEFENDANTS' MOTION TO QUASH SUBPOENAS

This matter is before the Court upon Defendants' Motion to Quash Subpoenas (ECF No. ___) filed on August 27, 2020. In consideration of the arguments advanced, it is hereby

ORDERED that Defendants' Motion to Quash Subpoenas is **GRANTED**.

Date: _____

Entered: _____
United States District Judge