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SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STACY IRWIN and KIMBERLY FERREIRO,

Plaintiffs,

v.

CITY OF SEATTLE, a municipal corporation
under the laws of the State of Washington,

Defendant.

NO. 21-2-11739-9 SEA

**CITY OF SEATTLE’S OPPOSITION
TO PLAINTIFFS’ MOTION TO
COMPEL CURRENT ADDRESS OF
FORMER MAYOR JENNY DURKAN
OR A PERSON DESIGNATED TO
ACCEPT SERVICE OF PROCESS ON
BEHALF OF JENNY DURKAN**

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I. INTRODUCTION

Plaintiffs filed a motion against the City to: (1) compel the City to designate someone to accept service of a deposition subpoena on former Mayor Jenny Durkan, who is not a party to this case and who is not a current City official or employee; or (2) compel the City to provide a physical address for former Mayor Durkan. There is no basis for Plaintiffs’ motion and the Court should deny it.

First, Plaintiffs’ motion is moot. The City has no obligation to designate someone to accept service of a deposition subpoena on a former elected official. Regardless, the City facilitated Plaintiffs’ request and provided information regarding an agent authorized to accept service on former Mayor Durkan’s behalf. Plaintiffs have the information they seek.

Second, Plaintiffs’ motion is based on the flat misrepresentation that they have been “trying to schedule the deposition of now former Mayor Durkan since September 2022 without success”. This is incorrect. In late September 2022, the parties discussed scheduling the depositions of several witnesses. Plaintiffs raised that they sought to depose former Mayor Durkan and demanded the City provide service information for former Mayor Durkan, who was no longer with the City. Although not required to do so, the City agreed to look into facilitating Plaintiffs’ request. But then Plaintiffs took the position that *no* deposition should proceed until they received the City’s privileged information at issue in the City’s pending Privilege Motions.¹ So, nothing further happened on this.

Meanwhile, both parties identified former Mayor Durkan as a potential third-party witness in their October 24 witness disclosures. Neither party provided any address information for her. Plaintiffs did not raise any issue regarding the City’s witness disclosure or otherwise reach out regarding any address information for former Mayor Durkan. Indeed, they said nothing about seeking any deposition until **February 6** – after the Court of Appeals denied

¹ “Privilege Motions” means the City’s Motion for Return of Documents Subject to Privilege Claims, filed July 1, 2022; and the City’s Motion for Privilege Determination, filed July 1, 2022.

1 their motion to stay these proceedings and all discovery. This is not surprising, given Plaintiffs
2 had taken the position during this time that no depositions should proceed.

3 Finally, Plaintiffs' motion violates CR 26(i). On February 9, Plaintiffs asked the City
4 for service information for former Mayor Durkan. The City promptly responded the same day
5 that it had initiated outreach in this regard and would be back with an update shortly. Plaintiffs
6 did not respond to the City. Instead, Plaintiffs filed the instant motion to compel two and a half
7 business days later. Plaintiffs did so without reaching out to the City at all – let alone meeting
8 and conferring as required by CR 26(i). Had Plaintiffs abided by the Civil Rules (or even
9 simply responded to the City's email), the City could have and would have provided more
10 details about when it anticipated receiving service information. Indeed, the City was able to
11 confirm that information the same day Plaintiffs filed their motion, and promptly provided it to
12 Plaintiffs.

13 The City asked Plaintiffs to remove their motion from the calendar, to avoid wasting
14 judicial and party resources. Plaintiffs refused. The Court should therefore award the City its
15 reasonable attorneys' fees and costs having to respond to Plaintiffs' motion.

16 II. STATEMENT OF FACTS

17 A. The City Agreed to Facilitate Plaintiffs' Request Regarding Service Information

18 In late August and into September 2022, the parties exchanged correspondence
19 regarding discovery matters, including regarding depositions. (Declaration of Sarah Gohmann
20 Bigelow (“Gohmann Bigelow Decl.”, ¶2.) At that time, the City's counsel provided their
21 availability for depositions as requested by Plaintiffs, and made clear that they do not represent
22 former Mayor Durkan, who left the City at the end of 2021. (*Id.*, Exhibit A.) Plaintiffs wanted
23 the City to nonetheless either accept service of a deposition subpoena on former Mayor Durkan
24 or provide information for Plaintiffs to serve her. (*Id.* at Exhibit B, p. 3; Exhibit C, p. 3.)
25 Although not required to do so, the City agreed to explore means for service on former Mayor
26 Durkan to facilitate Plaintiffs' requests. (*Id.* at Exhibit C, p. 3.)

1 **B. Both Parties Identified Former Mayor Durkan as a Potential Witness**

2 On October 24, 2022, the parties exchanged their first witness disclosures. (Gohmann
3 Bigelow Decl., Exhibits D-E.) In them, both parties identified former Mayor Durkan as a
4 potential third-party witness in this case. (*Id.*, Exhibit D at 2:25-27, Exhibit E at 2:15-19.)
5 Neither party included any address or other contact information for her. (*Id.*) At no time since
6 the City served its witness disclosure have Plaintiffs asked to discuss or meet and confer
7 regarding that disclosure. (*Id.* at ¶6.)

8 **C. Plaintiffs Then Took the Position That No Depositions Should Proceed**

9 Instead, shortly thereafter, Plaintiffs took the position that *no* deposition should proceed
10 until they received the City’s privileged information at issue in the City’s Privilege Motions.
11 (Gohmann Bigelow Decl. at ¶8.) Plaintiffs took this position in their discussions with the City
12 at the end of October 2022, and in their subsequent court filings. (Gohmann Bigelow Decl., ¶8
13 *E.g.* Sub No. 80 at 6:2-9 (Plaintiffs arguing they are “unable to take depositions of City
14 officials until the privilege issues are resolved”); Sub No. 93 at 2:13-25 (Plaintiffs arguing that
15 the depositions of City officials “can only proceed after the resolution of attorney-client
16 privilege issues”). Plaintiffs maintained this position throughout the end of 2022 and into 2023.
17 (Gohmann Bigelow Decl. at ¶8; Sub No. 93 at 2:13-25.)

18 In late January 2023, Plaintiffs filed a motion for discretionary review of the Court’s
19 orders on the City’s Privilege Motions (“MDR”) and on Plaintiffs’ privilege motion (as well as
20 the Court’s order compelling Plaintiff Kimberly Ferreiro’s deposition). (Gohmann Bigelow
21 Decl. at ¶9, Exhibit F.) Plaintiffs noted their MDR for a hearing in April. (*Id.*, Exhibit F at p.
22 2.) With their MDR, Plaintiffs also filed a motion asking the Court of Appeals to stay these
23 proceedings and all discovery until after resolution of their MDR. (*Id.* at ¶9, Exhibit F.)
24 Before the Court of Appeals, Plaintiffs again reiterated their position that depositions could not
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1 proceed until they obtained the City’s privileged information that was the subject of this
2 Court’s Discovery Orders.² (*Id.* at Exhibit F, pp. 3, 27.)

3 Plaintiffs also took the position that they did not have to abide by the Court’s ruling in
4 its Discovery Orders requiring Plaintiffs to pay the fees the Court imposed as a sanction for
5 their refusal to produce Plaintiff Kimberly Ferreiro for a deposition because they had sought a
6 stay of these proceedings. (Sub No. 110). Thus, on January 27, the City moved for an order to
7 determine the fee amount and require Plaintiffs to pay it by a date certain. (*Id.*) The Court
8 issued an order setting the fee amount and requiring Plaintiffs to pay it by February 23. Sub
9 No. 119 at 2:8-10 (the Court recognizing that Plaintiffs’ position was not legally supportable).

10 **D. Plaintiffs Filed Their Motion Without Conferring**

11 On Friday, February 3, the Court of Appeals denied Plaintiffs’ Motion to Stay
12 Proceedings. (Gohmann Bigelow Decl., Exhibit G.) On Monday, February 6, Plaintiffs asked
13 the City’s counsel for their availability for certain depositions. (*Id.*, Exhibit H.) In response to
14 that inquiry, the City initiated outreach to facilitate information for service of a potential
15 deposition subpoena on former Mayor Durkan. (Balanda Decl., ¶2.) A few days later, on the
16 afternoon of Thursday, February 9, Plaintiffs asked that the City provide a home address for
17 former Mayor Durkan or the name of someone authorized to accept service on her. (*Id.*,
18 Exhibit J.) The City responded the same day, letting Plaintiffs know they were “working on
19 outreach regarding service of a deposition subpoena and will get back to you shortly.” (*Id.*,
20 Exhibit K.) Plaintiffs did not respond. (*Id.*, ¶4.)

21 Also on February 9, the City reached out to Plaintiffs’ counsel and asked that they
22 schedule a time for a telephone call to meet and confer regarding deficiencies in Plaintiffs’
23 discovery responses. (Gohmann Bigelow Decl., Exhibit I.) Plaintiffs ignored the City’s
24 request and did not respond to this either. (*Id.* at ¶12.)

25
26 ² “Discovery Orders” means the November 16, 2022 Revised and Updated Order Granting City of Seattle’s
27 Motion for Privilege Determination; the December 2, 2022 Order Denying Motion to Reconsider Determination of
Privilege; the January 6, 2023 Order Denying Plaintiffs’ Motion to Compel, for In Camera Review, and a Special
Master; and the January 6, 2023 Order Granting Motion to Compel Ferreiro Deposition.

1 Instead, on Tuesday, February 14, Plaintiffs filed the instant motion to compel.

2 Had Plaintiffs actually conferred with the City as required by CR 26(i) (or responded to
3 the City's February 9 email), they would have learned that the City expected to receive further
4 information regarding former Mayor Durkan within the next day or so. (Balanda Decl., ¶5.)
5 Indeed, later that day the City was able to and did provide information to Plaintiffs regarding
6 who the City understood would be authorized to accept service for former Mayor Durkan. (*Id.*,
7 Exhibit L.)

8 **E. Plaintiffs Refused to Take their Motion Off Calendar**

9 The City tried to avoid further waste of judicial and party resources as a result of
10 Plaintiffs' improper motion filing. Given Plaintiffs did not confer with the City before filing
11 their motion, and that it was moot, the City asked that Plaintiffs withdraw it. (Balanda Decl.,
12 Exhibit L.) Plaintiffs refused, stating they would only do so if the City paid Plaintiffs an
13 unidentified amount of fees and costs to "fully compensate them" for having spent time on the
14 motion. (*Id.*, Exhibit M.) In response, the City pointed out that Plaintiffs did not comply with
15 CR 26(i) and that had they done so, Plaintiffs would have known their motion was unnecessary.
16 (*Id.*) The City also reiterated its request that Plaintiffs withdraw or strike the motion. (*Id.*)

17 Plaintiffs again refused to take their motion off calendar but stated they would
18 "compromise" by accepting a payment from the City of \$3,482.59. (Balanda Decl., Exhibit
19 M.) The City again asked Plaintiffs to strike or withdraw their motion given the issue was
20 moot, and that Plaintiffs' failure to comply with CR 26(i) had caused wasted resources all
21 around. (*Id.*) Plaintiffs ignored the City's request to do so, requiring the City to expend
22 unnecessary attorneys' fees and costs filing this opposition. (*Id.* at ¶7.)

23 **III. STATEMENT OF ISSUES**

24 Should the Court award the City its reasonable attorneys' fees and costs incurred having
25 to respond to Plaintiffs' motion where Plaintiffs filed their motion in violation of CR 26(i), and
26 refused to strike or withdraw it despite the motion being moot?

1 **IV. EVIDENCE RELIED UPON**

2 The City relies upon the files and records in this case, the attached Declaration of
3 Brandi Balanda and exhibits attached thereto, and the attached Declaration of Sarah Gohmann
4 Bigelow and exhibits attached thereto.

5 **V. ARGUMENT AND AUTHORITY**

6 **A. The Court Should Deny Plaintiffs’ Motion**

7 In their motion, Plaintiffs ask the Court to compel the City to produce service
8 information for former Mayor Durkan and to sanction the City by awarding them fees and costs
9 pursuant to CR 37(a). There is no basis to do either.

10 As discussed above, Plaintiffs’ motion is moot. Plaintiffs have service information for
11 former Mayor Durkan. (Balanda Decl., Exhibit L.)

12 Further, the record shows that the City promptly responded to Plaintiffs’ inquiries about
13 that service information. (*See* Section II(A)-(D).) It was Plaintiffs who set this issue aside and
14 instead insisted that depositions could *not* proceed in late October through early February. (*Id.*)
15 Then, when Plaintiffs raised the issue on February 9, the City answered the same day, had
16 initiated outreach, and said they could get back to Plaintiffs shortly. (*See* Section II(D).) The
17 City did so even though Plaintiffs had not identified any basis for their demand in any
18 discovery request or otherwise. (*Id.*)

19 Plaintiffs’ motion also violated CR 26(i). They did not even respond to the City’s
20 February 9 response to their request, let alone meet and confer before filing their motion.
21 (Section II(D)). CR 26(i) is expressly designed to avoid the exact situation Plaintiffs created:
22 the filing of a surprise “gotcha” motion on an issue that was easily resolved.

23 The Court should reject Plaintiffs’ attempt to distort the record to suggest that the
24 parties’ discussion in September somehow satisfied their obligation to meet and confer before
25 filing their motion. It does not. Plaintiffs’ September demand was not based on any discovery
26 request, and that conference could not have concerned the sufficiency of the parties’ witness

1 disclosures because the parties did not even exchange those disclosures until October 24.
2 (Section II(A)-(B).)

3 **B. The Court Should Award the City its Reasonable Attorneys' Fees and Costs**

4 The City respectfully asks the Court to order Plaintiffs to pay the City's reasonable
5 attorneys' fees and costs incurred having to respond to the motion. *See* CR 37(a)(4). Plaintiffs'
6 motion was unnecessary and filed in violation of CR 26(i). Further, Plaintiffs refused to
7 withdraw it or strike it from the Court's calendar after it was plainly moot. Plaintiffs' conduct
8 has wasted judicial and party resources. Rather than focusing on the merits of their claim,
9 Plaintiffs have again chosen to drive up costs by ignoring their obligations under the Civil
10 Rules. The City should not be forced to continually pay for unnecessary attorneys' fees and
11 costs as a result.

12 **VI. CONCLUSION**

13 The City respectfully asks the Court to deny Plaintiffs' motion and award the City its
14 reasonable attorneys' fees and costs incurred in having to respond to Plaintiffs' motion.

1 DATED: February 22, 2023.

2
3 **SAVITT BRUCE & WILLEY LLP**

4
5 By s/ Brandi B. Balanda

6 James P. Savitt, WSBA #16847

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16 *Attorneys for Defendant City of Seattle*

17 *I certify that this memorandum contains 2,245, in*
18 *compliance with the Local Civil Rules.*

1 **CERTIFICATE OF SERVICE**

2 I hereby declare under penalty of perjury under the laws of the State of Washington that
3 on this date, I caused a true and correct copy of the foregoing document to be served on the
4 following in the manner(s) indicated:

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21 *Attorney for Plaintiffs*

22 DATED this 22nd day of February, 2023 at Seattle, Washington.

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Meghan Parker