The Honorable Suzanne R. Parisien
Noted for Hearing: January 3, 2023

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 REPLY IN SUPPORT OF MOTION TO CHANGE TRIAL DATE**

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Plaintiffs do not oppose the propriety of extending the trial date and the case schedule, although they wrongfully seek to blame the City for the need for a modest extension. Instead, without making any motion themselves, they seek to transform their opposition to the City's motion into a request for a massive and unnecessary extension of the trial date by almost a year, until early 2024. They may not do so, and there is no basis for an outlandish extension or the increased costs and the inevitable prejudice that attend such a long delay.

A. The Court should not entertain Plaintiffs' belated request to delay the trial.

The deadline for submitting a motion for Change of Trial Date was December 19, 2022. (Sub. No. 12.)

Prior to the December 19 deadline, the City contacted Plaintiffs to assess whether the parties might agree on a modest extension of the case schedule. Plaintiffs stated that they would agree only to a trial date in early 2024; the City advised that was too long and not acceptable. When the deadline came to move to change the trial date, Plaintiffs declined to file any motion. Instead, Plaintiffs decided only to oppose the City's motion, apparently to criticize the City's request for a short extension and to try to blame the need on the City. The tactic has consequences. Plaintiffs may oppose the City's motion. But, having declined to move for an extension themselves, they may not turn their opposition into a disguised motion for a year-long delay of the trial date.

CR 7(b)(1) requires that "application[s] to the court for an order shall be made by motion." *See also* KCLR 40(e)(2) (requiring that requests to change the trial date be made by motion). Accordingly, "[t]rial courts must certainly pay careful attention to the relief that the movant requests. That helps give meaning to the rule requiring that motions 'state with particularity the grounds therefor, and *shall set forth the relief or order sought*.'" *Beauregard v. Wash. State Bar Ass'n*, 197 Wn.2d 67, 80, 480 P.3d 410 (2021) (citing CR 7(b)(1), emphasis in original).

Consequently, a request for affirmative relief made by response or opposition should be denied. For example, in *Beauregard*, the Washington Supreme Court held that the trial court

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abused its discretion in entering injunctive relief, the terms of which were not requested by the moving party. *Id.* at 69, 80-81. In *Varshock v. Ephrata Farms*, No. 19-2-22918-7 SEA, 2020 Wash. Super. LEXIS 8109, *7 (King Co. Super. Ct. Aug. 18, 2020), the trial court denied a request to compel arbitration made in opposition to a motion to change the trial date. In its order changing the trial date, the trial court "informed defendants that a request for affirmative relief must be in the form of a motion rather than a response." *Id*. And in *Segal v. Quadrant Corp.*, No. 17-2-10472-8 SEA, 2019 Wash. Super. LEXIS 13463, *4-5 (King Co. Super. Ct. Jan. 18, 2019), the trial court declined to consider plaintiff's requests to continue the trial and to sanction defendants for alleged discovery abuse, because "[p]laintiff did not note the motions in compliance with Court Rules."

Federal Rule of Civil Procedure 7(b)(1) is virtually identical to Washington's. Federal courts similarly hold that a request for affirmative relief on opposition is improper and shall not be considered. *E.g., Davis v. Schneider*, No. 2:18-cv-01910-VBF (MAA), 2020 U.S. Dist. LEXIS 252898, at *16 n.4 (C.D. Cal. Dec. 18, 2020) (denying request for relief made in opposition and citing FRCP 7(b)(1) that such requests must be made by motion); *Pessoa v. Invesco Inv. Servs*., No. 8:18-cv-266-T-JSS, 2019 U.S. Dist. LEXIS 86244, at *8 (M.D. Fla. May 3, 2019) (FRCP 7(b)(1) requires that requests for affirmative relief be made by motion and not in response or opposition); *Doe v. Univ. of Wash.*, No. C16-1212JLR, 2020 U.S. Dist. LEXIS 127482, at *41 (W.D. Wash. July 20, 2020) (declining to consider requests for affirmative relief raised on opposition); *Kobayashi v. McMullin*, No. 2:19-cv-06591-SSS (MAA), 2022 U.S. Dist. LEXIS 141922, at *28 (C.D. Cal. July 8, 2022) (same).

Having failed to seek more time, Plaintiffs' request for a ten-month continuance is not before this Court and should be rejected. Further, the deadline to file a motion to change the trial date has now passed. (Sub. No. 12.) Any motion by Plaintiffs to change the trial date would be untimely, and in all events subject to a different and more stringent standard that must be satisfied before an extension may be granted. *See, e.g., Paglia v. Done*, No. 17-2-03302-2SEA, 2017 Wash. Super. LEXIS 18041, *2-3 (King Co. Super. Ct. Dec. 29, 2017) (denying

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motion to compel discovery as untimely under case schedule order); KCLR 40(e)(2) (a "motion [after the deadline to change the trial date] will not be granted except under extraordinary circumstances where there is no alternative means of preventing a substantial injustice").

B. A short extension is warranted.

Before filing its motion, the City contacted Plaintiffs' counsel to discuss potential trial dates and availability. Because Plaintiffs' counsel asserts a "schedule conflict" starting on June 12, 2023, and has other conflicts in July 2023, the City chose May 15, 2023 as a trial date that accommodates Plaintiffs' June 12 conflict. Even were trial to require three weeks (it should need only two), the May 15 trial date would accommodate Plaintiffs' schedule with room to spare. If there is some legitimate concern that a mid-May date does not provide enough time before Plaintiffs' June 12 conflict, then the City would agree to a May 8 trial date to accommodate Plaintiffs.

Plaintiffs do not dispute that the Court should continue the trial date. Justice requires a brief continuance so that depositions can be completed in a reasonable manner. Aside from Plaintiffs' dislike of the Court's rulings, there is no reason proffered why a May trial date is insufficient to permit both sides to complete their discovery. Good cause exists for the City's request because Plaintiffs' ongoing refusal to make themselves available for deposition has caused the City to lose substantial time during which it would have been completing discovery.

C. Even if Plaintiffs' request for a ten-month delay were before the Court, it is unjustified and should be denied.

The City strongly opposes Plaintiffs' request for the ten-month continuance. Not only is the request not before the Court, but it is unreasonable and prejudicial even if it were. Plaintiffs' suggestion that there is no prejudice from delay ignores the obvious, not only regarding witness recollections and availability, but also about the increases in costs that result from allowing the case to languish for so long. The City is entitled to reasonably prompt adjudication of Plaintiffs' claims.

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So we are clear: the City would withdraw its motion—the only motion to change the trial date actually before this Court—and make do with the existing deadlines, rather than be subjected to an unreasonable year-long delay.

Complaints about the City's document productions are misplaced—the City has been diligent and timely in its productions. *See* Sub. No. 81 at Section II.A.[1] It is Plaintiffs' own strategy that is the cause of delay about which they now complain. Plaintiffs chose to delay their wholesale challenge to the City's privilege claims by waiting until November to file their motion for *in camera* review. Given the nature of the motion, a blanket challenge to every post-8/1/2020 claim of privilege irrespective of content or context, Plaintiffs could have sought a ruling on their four objections at any point during the last year. And in fact, Plaintiffs did exactly that in July 2022 when they briefed the very same four objections.

Now, Plaintiffs assert that trial ought to be delayed for ten months because they might seek discretionary review of the Court's order affirming the City's privilege claims. A speculative ruling on a speculative motion is no grounds for nearly a year of delay. If Plaintiffs lose a motion for discretionary review, there will be no reason for the delay they seek. And, if they actually make their motion, and then were to win (unlikely given that the Court's privilege rulings are correct), a continuance could then be addressed. Furthermore, Plaintiffs offer no excuse for their delay in seeking discretionary review.

[1] Plaintiffs' assertion that the City produced "an additional 801 documents" on December 20, 2022, is knowingly false. The City took pain to explain precisely this point: the production is comprised of 87 documents, not 801, but some have lengthy attachments. Moreover, and again as Plaintiffs know, only 9 of the documents, totaling just 82 pages, contain *any information at all that has not previously been produced*. The rest duplicate documents previously produced. Furthermore, and again as Plaintiffs know, the City could not have made the production earlier. The modest production on December 20 comprises documents that the City previously sequestered upon Ms. Chen's assertion of privilege and privacy claims, as required by CR 26(b). Plaintiffs, the City, and Ms. Chen's counsel then agreed that Ms. Chen would provide a log to specify her claims of privilege/privacy so that the rest of the responsive and non-privileged sequestered documents could be produced. *See* Sub. No. 73 at Exs. D, F & G; Sub. No. 82 at Ex. 4. Ms. Chen completed her log on December 15 and the City promptly produced the sequestered documents over which Ms. Chen declined to assert privilege. In short: Plaintiffs' arguments about discovery seek to mask their year of delay and inactivity on the very privilege claims they now, belatedly, allege are crucial—a last ditch effort to try to salvage a case that has no merit on the substantial evidence that has long been available.

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Plaintiffs' position that discovery should be halted while they re-litigate and appeal their privilege objections is unfounded. Plaintiffs have proffered zero support for this position and it is contrary to the Civil Rules. *See* Sub. No. 86 at Section D.2. Had Plaintiffs honored their discovery obligations, *e.g*. by allowing depositions to proceed, discovery would be on track and a change of the trial date would not be necessary.

DATED: December 29, 2022.

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I certify that this memorandum contains 1,679 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

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

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DATED this 29th day of December, 2022 at Seattle, Washington.

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