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August 24, 2022

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street
Room 5063
Raleigh, NC 27603

Re: In the Matter of
Village of Bald Head Island v. Bald Head Island Transportation, Inc.
and Bald Head Island Limited, LLC
NCUC Docket No. A-41, Sub 21
Motion to Compel Response of Complainant to Second Data Requests

Dear Ms. Dunston:

On behalf of Bald Head Island Transportation, Inc. and Bald Head Island Limited, LLC, I herewith submit the attached Motion to Compel Response of Complainant to Second Data Requests.

Thank you in advance for your assistance with this filing. If you should have any questions concerning this submittal, please contact me.

Sincerely,

A handwritten signature in black ink that reads 'Brad Risinger'.

Brad M. Risinger

pbb

A Pennsylvania Limited Liability Partnership

California Colorado Delaware District of Columbia Florida Georgia Illinois Minnesota
Nevada New Jersey New York North Carolina Pennsylvania South Carolina Texas Washington

Ms. A. Shonta Dunston
Page Two
August 24, 2022

Enclosure

cc: All Parties and Counsel of Record
Zeke Creech – NC Public Staff
Lucy Edmondson – NC Public Staff
Jessica Heironimus – NC Public Staff

OFFICIAL COPY

Aug 24 2022

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. A-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

VILLAGE OF BALD HEAD ISLAND,)	MOTION TO COMPEL RESPONSE OF COMPLAINANT TO SECOND DATA REQUESTS
)	
Complainant,)	
v.)	
)	
BALD HEAD ISLAND)	
TRANSPORTATION, INC. and)	
BALD HEAD ISLAND LIMITED,)	
LLC,)	
Respondents.)	

Respondents Bald Head Island Transportation, Inc. (“BHIT”) and Bald Head Island Limited, LLC (“BHIL” and collectively, “Respondents”), by and through undersigned counsel, and pursuant to the Order Scheduling Hearing and Establishing Procedures, hereby move the North Carolina Utilities Commission (“Commission”) to compel Complainant to provide a full response to Data Requests 2-1, 2-2, 2-3 in their Second Data Request.

Data Requests 2-1, 2-2 and 2-3 are as set forth below:

2-1. With reference to Right of First Refusal agreement discussed in Complainant’s Motion to Join Necessary Party at page 2, fn 1, please admit that the Right of First Refusal agreement has never been approved by the North Carolina Utilities Commission.

2-2. With reference to Right of First Refusal agreement discussed in Complainant’s Motion to Join Necessary Party at page 2, fn 1, please admit that the Village has not sought approval by the North Carolina Public Utilities

Commission of the Right of First Refusal agreement at any time since its execution on or about August 21, 1999.

2-3. With reference to Right of First Refusal agreement discussed in Complainant’s Motion to Join Necessary Party at page 2, fn 1, and the Village’s assertion that it “expressly reserves and does not waive its rights under the ROFR,” please admit that any rights to purchase real property that the Village asserts the ROFR affords it were not subject to an expiration date as of the agreement’s August 21, 1999 creation date.

Complainant provided only an identical set of objections to Data Requests 2-1, 2-2 and 2-3, as set forth below:

RESPONSE: The Village objects to this Data Request on the grounds that:

- **It is not reasonably calculated to lead to the discovery of evidence that will or should be admissible in this proceeding;**
- **It is submitted for the improper purpose of seeking evidence for anticipated future litigation between the Village and Respondents, is not subject to the protections of G.S. § 1A-1, Rule 36(a), which provides that responses to requests for admissions are for the purpose of the pending action only; and**
- **It seeks or may be construed to seek attorney work product and the mental impressions, conclusions, opinions or legal theories of the Village’s attorneys or other representatives in this proceeding.**

ARGUMENT

The North Carolina Rules of Civil Procedure entitle a party to obtain “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action” N.C. Rule of Civ. P. 26(b)(1). “The discovery rules should be liberally construed in order to accomplish the important goal of ‘facilitating the disclosure *prior to trial* of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial.” *Williams v. North Carolina Dept. of Correction*, 120 N.C. App. 356, 358, 462 S.E.2d 545,

547 (N.C. Ct. App. 1995) (quoting *Telegraph Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888 (N.C. Ct. App. 1979) (emphasis in original)). “It is not ground for objection that the information sought will be inadmissible at the time of trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought.” N.C. Rule of Civ. P. 26(b)(1).

“Litigants in this state are required to respond to pleadings, interrogatories, and requests for admission with timely, good faith answers.” *National Financial Partners Corp. v. Ray*, 2014 WL NCBC 49, * 14 (N.C. Super. Ct. Oct. 13, 2014)

“When a party fails to answer interrogatories or produce documents in response to a proper request for discovery under the rules of civil procedure, the proponent of the discovery request may move for an order compelling an answer or production of documents.” *Graham v. Rogers*, 121 N.C. App. 460, 462, 466 S.E.2d 290, 292 (N.C. Ct. App. 1996) (citing N.C. R. Civ. P. 37(a)(2)). “[A]n evasive or incomplete answer is to be treated as a failure to answer. *Id.* (citing N.C. R. Civ. P. 37(a)(3)). “Whether or not the party’s motion to compel discovery should be granted or denied is within the trial court’s sound discretion and will not be reversed absent an abuse of discretion.” *Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318-19 (N.C. Ct. App. 2007) (citation omitted).

Moreover, with respect to requests for admission, North Carolina allows them to be propounded “in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute.” *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981). An admission provides an important efficiency function in

litigation because it “serves to remove the admitted fact from the trial by formally conceding its existence.” *Id. See also National Financial Partners*, *14 (admissions serve “vital purposes” that are “designed to reduce trial time.”).

**RESPONDENTS’ DATA REQUESTS ARE REASONABLY
CALCULATED TO LEAD TO
THE DISCOVERY OF ADMISSIBLE EVIDENCE**

In Data Requests 2-1, 2-2 and 2-3, Respondents ask the Complainant to admit facts about a matter that Complainant introduced into the docket.

The Complainant initiated this proceeding before the Commission by requesting that the Commission exert regulatory authority over the parking and barge operations operated by BHIL. The Complaint itself expressly stated that “[i]t bears noting that [the] Village possesses contractual rights with respect” to those assets, and others, **as a result of a Right of First Refusal Agreement (“ROFR”)**. *Complainant’s Motion to Join Necessary Party*, at 2, fn. 1. The data requests that Complainant has refused to answer seek to elicit facts that bear on the ROFR issue broached by the Village.

Requests 2-1 and 2-2 seek factual information about whether events relevant to the ROFR have occurred. Request 2-3 seeks factual information about whether the ROFR on which Complainant relies to assert “contractual rights” over the parking and barge operations at issue in the docket contains certain features.

These straight-forward requests are easily within the ambit of Rule 36’s allowance for a party to seek an admission “of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact[.]” In a docket in which Complainant has asked the Commission to exert regulatory authority over certain BHIL activities, and also asserted it possesses

“contractual rights” in the assets that underlie those activities, Respondents have asked Complainant to admit relevant, related facts.

Under *Outer Banks Contractors*, Respondents were permitted to seek admission of information “for the purpose of withdrawing a particular fact from the realm of dispute.” Complainant has asserted “contractual rights” in the parking and barge operations at issue in the docket, and Respondents are entitled, by rule, to seek admissions of fact that address whether Complainant’s assertion can be removed from the issues in dispute in the docket.

Complainant advances a misplaced objection to these data requests as “not reasonably calculated to lead to the discovery of evidence *that will or should be admissible* in this proceeding.” (emphasis added). Of course, an objection of that nature is expressly barred by Rule 26:

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence[.]

N. C. R. Civ. P. 26(b)(1). Complainant attempts to improperly constrain the ability of Respondents to conduct discovery about an issue it raised on the ground that any response it provides to Respondents would be inadmissible at trial. Such an approach runs contrary to the letter and spirit of North Carolina law. “The discovery rules should be liberally construed in order to accomplish the important goal of ‘facilitating the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial.’” *Williams v. North Carolina Dept. of Correction*, 120 N.C. App. 356, 359, 462 S.E.2d 545, 547 (1995) (citation omitted).

Of course, North Carolina courts have held that “one party’s need for information must be balanced against the likelihood of an undue burden imposed upon the other.” *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976) (citations omitted). Here, though, Respondents have asked direct questions that may be admitted or denied under Rule 36 without recourse to onerous document searches, extensive interviews of witnesses, or other disproportionately time-consuming steps.

The Data Requests are Submitted for a Proper Purpose

Complainant further objects to Data Requests 2-1, 2-2 and 2-3 on the contention that Respondents submitted them “for the improper purpose of seeking evidence for anticipated future litigation between the Village and Respondents[.]” Complainant’s position is unsupported. If conjecture and supposition were the standard for limiting the ability of an opposing party to challenge the factual basis of claims made in a proceeding, the guidepost that “[t]he discovery rules should be liberally construed” would be little more than a hollow consolation. *Williams*, 120 N.C. App. At 359, 462 S.E.2d at 547.

The Data Requests Seek Factual Information that is not Subject to Privilege

Complainant objects that the requests “seek[] or may be construed to seek attorney work product and the mental impressions, conclusions, opinions or legal theories of the Village’s attorneys or other representatives in this proceeding.” The requests seek factual information to which none of the asserted objections even arguably applies.

"Because work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose[.]" which is to "safeguard the lawyer's work in developing [the] client's case." *Evans v. United Services Auto. Ass'n*, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (N.C. Ct. App. 2001) (quoting

Suggs v. Whitaker, 152 F.R.D. 501, 505 (M.D.N.C. 1993)), *cert. denied* 353 N.C. 371 (2001). That narrow construction is reflected in the stringent test for asserting a work product privilege by showing "(1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent." *Id.* Information regarding the *facts* that underlie the document from which Complainant asserts its "contractual rights" arise meets none of these criteria. Indeed, it is impossible for the facts related to and relevant to the ROFR to have been "prepared in anticipation of litigation." The facts to which admissions are requested here existed before this docket was commenced. *See State v. Taylor*, 327 N.C. 147, 153, 393 S.E.2d 801 (N.C. 1990) ("We have previously held that our trial judges have inherent authority to order disclosure at trial of relevant facts, where it is in the interest of justice to do so.").

In North Carolina, it is well settled that an assertion of privilege cannot shield the "underlying facts" at issue in a dispute. *Banc of America Securities, LLC v. Evergreen Intern. Aviation, Inc.*, 2006 WL 401679 (N.C. Super. Jan. 25, 2006). *See also Addison Whitney, LLC v. Cashion*, 2020 WL 3096793 (N.C. Super. June 10, 2020) ("the work product immunity protects only the documents themselves and not the underlying facts") (quoting *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982)); *Standard Chartered Bank PLC v. Ayala Intern. Holdings (U.S.) Inc.*, 111 F.R.D. 76, 79 (1986) ("A fact is one thing and a communication concerning that fact is an entirely different thing.").

WHEREFORE, Respondents respectfully request that the Commission grant their Motion to Compel and award the following relief:

1. Grant Respondents' Motion to Compel; and
2. Require Complainant to provide responses complaint with Rule 36 to Data Requests 2-1, 2-2, 2-3 in Respondents' Second Data Request.

Respectfully submitted, this 24th day of August, 2022.

FOX ROTHSCHILD LLP



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*Attorneys for Bald Head Island
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the attached MOTION TO COMPEL RESPONSE OF COMPLAINANT TO SECOND DATA REQUESTS in the above-captioned case, which was filed on this day by electronic mail to the parties of record, counsel of record or by depositing a copy in the United States Postal Service in a postage-prepaid envelope, addressed as follows:

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This the 24th day of August, 2022.

Bradley M. Risinger