STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. A-41, Sub 21

VILLAGE OF BALD HEAD ISLAND, Complainant,	)	
v.	)	**THE VILLAGE'S RESPONSE TO RESPONDENTS' MOTION TO COMPEL RESPONSE TO SECOND DATA REQUESTS**
BALD HEAD ISLAND TRANSPORTATION, INC., BALD HEAD ISLAND LIMITED, LLC, and SHARPVUE CAPITAL, LLC, Respondents.	)	

Pursuant to Rule R1-7 and the Commission's Order Scheduling Hearing and Establishing Procedures issued June 17, 2022 in this proceeding, the Village of Bald Head Island (the "Village"), responds Respondents' Motion to Compel filed August 24, 2022.

INTRODUCTION

Respondents, seizing on a sentence in a footnote of a procedural motion, ask that the Commission force the Village to disclose its legal strategy, attorney-client communications, and work product. Respondents' requests, which are not reasonably calculated to lead to the discovery of admissible information, are improper. Respondents' motion to compel should be denied.

Notably, Respondents' motion to compel fails to disclose that, separate from this proceeding, the Village and Respondents have discussed potential litigation over the Village's right of first refusal to purchase the ferry system. Those negotiations are ongoing, and the Village has not yet initiated litigation. Rather than allow the right-of-first-refusal litigation to proceed in the normal course, Respondents attempt to secure an advantage over the Village by forcing it to disclose its legal strategy in this matter.

To be clear, this proceeding is about the regulatory status of the parking facilities and barge owned and operated by Limited. The key factual questions before the Commission are whether the parking facilities are integral to Bald Head Island Transportation, Inc.'s ("BHIT") ferry services and whether the barge carries household goods or people such that the Commission should exercise its statutory authority to regulate the parking facilities and the barge.

The Village's right to purchase the ferry system has no bearing on the Commission's regulatory authority. Nonetheless, Respondents claim that the Village's passing reference to its right of first refusal in the Village's motion to join SharpVue as a necessary party opens the door to invasive discovery on the topic.

Respondents are not entitled to this information. The requests were made for the improper purpose of forcing the Village to disclose its legal strategy in a separate matter. Further, the requests would require the Village to disclose attorney-client communications and work product. Respondents' motion to compel should thus be denied.

ARGUMENT

I. Respondents' requests are not relevant to this matter.

A heading of Respondents' motion asserts that their requests "are reasonably calculated to lead to the discovery of admissible evidence." Motion to Compel at 4. Their motion then goes on to recite several general tenets of discovery. *Id.* at 5-6. What Respondents do not do is answer the key question on which their motion and their entitlement to this discovery depend: "Why is this information relevant?" *Id.* That gap is telling and alone is sufficient to merit denial of Respondents' motion.

a. *The Village's passing reference to the right of first refusal did not open the door to discovery.*

Respondents mistakenly state that "the Complaint itself expressly states" that the Village has a right of first refusal. Mot. at 4. It does not. Indeed, the Complaint does not once mention the Village's right of first refusal. *Compare* Mot. at 4 *with* Complaint.

Rather, in seeking to join SharpVue in this matter, the Village noted—in a footnote—that although SharpVue and Limited had announced their agreement to purchase the parking facility and barge, the Village reserved its rights under the Right of First Refusal Agreement between the Village, BHIT, and Limited. *See* Motion to Join at 2 n.1. As stated in the Motion to Join, although the Village was seeking to join SharpVue as a necessary party to this action because of its agreement to purchase the parking facility and barge, the Village noted its right of first refusal agreement to make clear that it was not waiving its own rights.

By reserving its rights, the Village did not raise the right of first refusal as an issue in this case. As alleged in the Complaint, this case is about the Commission's authority to regulate the parking facilities and barge. Whether the Village has an agreement to purchase those assets has no bearing on the Commission's authority. Otherwise put, even if the parking facility and barge were never sold—to the Village, SharpVue, or any other purchaser—the Commission would still have authority to regulate these assets.

Again, Respondents do not even attempt to explain how the Village's right of first refusal is relevant to the Commission's authority. Rather, Respondents' argument is that

because the Village mentioned the right of first refusal, in passing, in a footnote, Respondents are entitled to discovery on that subject.[1]

Respondents' position, if adopted by the Commission, would have severe effects for future litigants. If a mere reference to a reservation of rights in a brief is enough to open the door to discovery, future litigants would be forced into the difficult position of choosing between reserving their rights and opening the door to disclosure of future litigation strategy and attorney-client communications, or foreclosing discovery but potentially waiving their rights.

b. *North Carolina law requires that discovery requests be reasonably calculated to lead to the discovery of relevant information.*

Respondents' position is not supported by North Carolina law. Respondents contend that Rule 26 bars the Village's objection that the requests are not reasonably calculated to lead to the discovery of evidence that would be admissible at trial. Mot. at 5.

Although courts interpret Rule 26 broadly, the rule is not without its limits. "The standard for determining relevance is less demanding with respect to discovery than it is for admissibility, but it is not nonexistent." *Aspen Specialty Ins. Co. v. Nucor Corp.*, No. 19 CVS 19887, 2022 NCBC 19 ¶ 8 (N.C. Super. Ct. Apr. 22, 2022).

The key inquiry is whether the information sought is "relevant." N.C. R. Civ. P. Rule 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." (emphasis added)). Information is deemed relevant only if it is "reasonably calculated to lead to the discovery

[1] That reference was included for the same reason the Village objected to Respondents' Second Data Requests—to avoid having Respondents argue in future civil litigation that the Village had somehow waived its rights by some action or inaction in this regulatory proceeding.

of admissible evidence." *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976). Otherwise put, because "evidence must be relevant to be admissible," a discovery request must by reasonably calculated to lead to the discovery of relevant information. *State v. Jennings*, 212 N.C. App. 422, 713 S.E.2d 793 (2011) (citing N.C. Gen. Stat. § 8C-1, Rule 402). Evidence is relevant only if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C–1, Rule 401.

Again, Respondents' utter silence on how this evidence has any tendency to make the existence of any fact of consequence to the determination of this action more or less probable reveals the complete lack of merit in their motion. Instead, they conceal the absence of any basis for their relevance assertion beneath a blanket of inapplicable authorities.

Courts disallow discovery into tangential matters with no bearing on the claims and defenses in the litigation because such requests are not reasonably calculated to lead to the discovery of admissible evidence. *See, e.g., Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd.*, No. 17 CVS 7086, 2018 NCBC 118 ¶¶ 19-20 (N.C. Super. Ct. Nov. 7, 2018) (finding requests seeking documents that may contain "purely subjective reasons for deciding to assert appraisal rights or vote against the Merger," overly broad, when court's "chief concern" was the fair value of defendants' shares immediately before the merger); *Wagoner v. Elkin City Sch.'s Bd. of Educ.*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123 (1994) (finding request for files related to whether plaintiff's replacement had had personnel issues was irrelevant to her claim that her employer had wrongfully discharged her); *Howlett v. CSB, LLC*, 164 N.C. App. 715, 722, 596 S.E.2d 899, 904 (2004) (finding

that business plan was not relevant to issue of whether bank had formed a contract with plaintiff).

Here, Respondents' requests seek admissions about the Village's right to purchase the ferry assets. These requests have no bearing on the Commission's statutory authority to regulate the parking facilities and barge.

Respondents cite no cases that support their overly broad view of Rule 26. Instead, they rely on *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 276 S.E.2d 375 (1981). *Outer Banks*, which does not cite Rule 26 much less analyze its application, considered whether a defendant made a judicial admission by entering into a consent order. The *Outer Banks* court did not consider the scope of requests for admission. Instead, it focused on the role of stipulations at trial. *Compare* Mot. at 5, *with Outer Banks*, 302 N.C. at 604, 276 S.E.2d at 379 (explaining that "[a] judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. . . . Stipulations are viewed favorably by the courts because their usage tends to simplify, shorten, or settle litigation, as well as save costs to litigants.").

Respondents' citation to *Williams v. North Carolina Department of Correction*, 120 N.C. App. 356, 462 S.E.2d 545 (1995), is likewise inapt. In *Williams*, an inmate sued the Department of Correction over a stabbing at the prison. The Department had denied several requests for admission, although it later became clear that those denials were false. The *Williams* court considered whether sanctions were appropriate. In admonishing the Department for its failure to accurately respond to requests for admission, the court briefly explained the purpose of requests for admission. *See* Mot. at 5 (quoting *Williams*). But

the court did not address the scope of Rule 26, the appropriateness of relevance objections, or any other matter bearing on this case.

II. Respondents do not deny that they want to use the Village's responses for an improper purpose.

Respondents' motion to compel should also be denied because Respondents' requests improperly seek admissions for future litigation. Such requests are prohibited under North Carolina law. Once again, Respondents' true motives are revealed because they nowhere deny that they are doing exactly what the Village's objections say Respondents are doing—seeking admissions in this regulatory proceeding for use in an as-yet unfiled civil action. Mot. at 6.

Rule 36's plain language states that responses to requests for admission can be used "for purposes of the pending action only." North Carolina courts are clear that "admissions made in one action may not be used against the party who made them in any other proceeding outside of the one pending." *Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co.*, 124 N.C. App. 232, 240, 477 S.E.2d 59, 65 (1996), *on reh'g in part*, 127 N.C. App. 729, 493 S.E.2d 658 (1997).

Even if they do not seek to admit the Village's answers into evidence in a later proceeding, if the Village were forced to respond, its responses would give Respondents unfair insight into the Village's legal strategy. For example, Request 2-3 asks the Village to list all of its rights under the right of first refusal. In other words, Request 2-3 asks the Village to forecast its legal strategy for Respondents by disclosing its counsel's or representatives' mental impressions, opinions or legal theories, which are protected under Rule 26(b)(3). Similarly, Requests 2-1 and 2-2 seek to bolster Respondents' legal theories:

Respondents seek to force the Village to concede that the right of first refusal agreement has not been approved by the Commission.

By seeking a leg up in future litigation, Respondents' requests abuse the discovery process. If the right of first refusal dispute goes to litigation, Respondents will have ample opportunity to seek discovery in that action. Because the requests are not relevant to the Commission's authority to regulate the parking facilities and barge, and Respondents nowhere contend that they are, the Village should not have to answer Respondents' questions, which are relevant only to a future action, at this time.

III. Respondents' requests would be burdensome to the Village because they would require the Village to disclose privileged information.

Respondents claim that their requests are not burdensome because the Village will not be subjected to "onerous document searches, extensive interviews of witnesses, or other disproportionately time-consuming steps." Mot. at 6. But Respondents' view of burden is overly narrow. These requests would burden the Village significantly by forcing it to disclose its litigation strategy, attorney strategy, and attorney-client communications at this premature stage. Thus, for this additional reason, the motion to compel should be denied.

Federal courts interpreting the analogous federal rule have recognized that a party may decline to answer a request for admission if it seeks privileged information. "A request is improper when a valid objection of privilege would lie if the request, reformulated as a question, were put to the party at trial." 8B Charles A. Wright et al., Federal Practice and Procedure § 2262 (3d ed. Apr. 2022 Update).

Requests 2-1, 2-2, and 2-3, if reformulated as questions and asked during trial, would be impermissible because they seek privileged information. Because of the pending litigation, answers as to whether the right of first refusal was "approved" by the

Commission, whether the Village had sought approval, or whether the rights have expired would all be protected by the work product doctrine and attorney-client privilege because any answer would disclose the Village's legal strategy and attorney-client communications.

Respondents argue that the work product doctrine does not apply to facts known to a party. But in light of the pending litigation, the requests go beyond simple facts and, in any event, do not apply to facts relevant to this proceeding. This case is therefore distinct from Respondents' citations, which only concern the disclosure of facts in litigation that is already underway. If the right of first refusal matter were to go to litigation, Respondents may make arguments by way of defense regarding Commission approval of the agreement. Such approval and the right of first refusal agreement are not at issue in this proceeding. Regardless, the Village's response to Respondents' requests will have to take into account the effect of its response on potential, unrelated litigation—thus implicating its attorneys' theories and mental impressions.

WHEREFORE, the Village respectfully asks the Commission to deny Respondents' Motion to Compel.

This 25th day of August, 2022.

By: /s/ Craig D. Schauer

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY TO RESPONDENTS' RESPONSE TO THE VILLAGE'S MOTION TO JOIN NECESSARY PARTY has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

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This the 25th day of August, 2022.

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