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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Clarice Leota Hardy,

Plaintiff,

v.

City of Nome, and John Papasodora and
Nicholas Harvey in their individual
capacities,

Defendants.

No. 2:20-cv-00001 (HRH)

**PLAINTIFF'S MOTION TO
FILE SUPPLEMENTAL BRIEF
AND PLAINTIFF'S
PROPOSED SUPPLEMENTAL
BRIEF**

PLAINTIFF’S MOTION

Pending before the Court is Plaintiff’s Motion to Hold Defendant City of Nome in Contempt of Court and For Sanctions (Docket 74) filed September 9, 2021. On October 15, 2021, the parties filed a joint motion for a stay of proceedings (Docket 81) in which Plaintiff noted that she would seek leave to file a supplemental brief in support of the sanctions motion if the stay were lifted. The Court lifted the stay on January 5, 2022. (Docket 91).

For reasons set forth below, pursuant to L.Civ.R. 7.1(d)(2), Plaintiff now respectfully requests the Court’s leave to file a Supplemental Brief on her motion for sanctions. The argument contained in the Supplemental Brief could not have been made earlier because it is based entirely on documents produced by the City of Nome *after* all briefing on Plaintiff’s motion had ended, documents that bear significantly on the substance and merits of Plaintiff’s motion for sanctions.

PLAINTIFF’S BRIEF

On July 19, 2021, the Court resolved Plaintiff’s motion to compel (Doc. 64) and ordered the Defendant City of Nome (“City”) to produce several categories of documents. (Docket 72) When the City largely defied the order, Plaintiff filed a motion (Docket 74) seeking to hold the City in contempt and requesting that the Court impose sanctions. Plaintiff’s motion was filed on September 9, 2021, the City’s response was filed on September 20 (Docket 75), and Plaintiff’s reply was filed on October 4. (Docket 80)

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Two days after all briefing had ended, the City produced 154 pages of additional documents. *See* Email from Riza Smith, October 6, 2021, attached as Exhibit 1. The City’s sudden production proves two things: (1) the City had indeed been withholding numerous documents that Plaintiff had requested in discovery, exactly as Plaintiff had alleged in her Motion to Compel *and* in her Motion for Sanctions, and (2) by withholding these (very self-incriminating) documents, the City significantly prejudiced the Plaintiff.

The documents withheld by the City—all of which should have been produced nearly a year ago in response to Plaintiff’s discovery requests—are so incriminating to both the City and the two other defendants that they would have altered the way the Plaintiff pursued further discovery and presented this case. Here are three examples.

1. The City withheld documents demonstrating that Harvey was a malfeasant, underperforming employee, and had resigned under a cloud of suspicion. For instance, attached as “Exhibit 2” are CON 012455 and 012456. The first document is a Memorandum dated March 2, 2019, from Harvey’s supervisor notifying Harvey that he had been placed on administrative leave “while an internal audit and review of a number of past cases in which you were involved is completed.” The second document, sent four days later by the same supervisor, notified Harvey that he was being accused of violating five Nome Police Department (NPD) Policies, including such malfeasance as engaging in

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unprofessional and improper conduct, disobeying orders, failing to submit reports in a timely manner, failing to conform his behavior to the law, and engaging in conduct that harmed the reputation and effectiveness of the Police Department. Harvey was ordered to surrender his gun and badge “until this investigation is resolved.” Harvey resigned immediately thereafter.

Had Plaintiff received this highly incriminating evidence sooner, as she should have, it would have impacted the nature of her discovery and the prosecution of this case. Plaintiff would have requested, for instance, all evidence relied upon by the NPD that formed the basis of their decision to suspend Harvey. For this reason alone, the City’s long delay in producing these highly relevant documents was grossly unfair and clearly prejudicial to Plaintiff’s case.

2. Another set of incriminating documents withheld from the Plaintiff (attached as “Exhibit 3”) places a spotlight on how badly the NPD was managed during Chief Papasodora’s tenure. For instance, CON 12392 is an email from Police Chief Robert Estes (the man who replaced Defendant Chief John Papasodora) dated September 29, 2021, to other law enforcement agencies advising them that “we inherited stage 4 cancer that took years to develop and will take years to correct without additional support.” *See also* CON 012437 (containing an email from Estes referencing the prior administration’s “years of neglect.”). Here again, by withholding this very incriminating evidence, the City prevented the Plaintiff from learning in a timely manner about Chief Estes’

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extremely low regard for the shape of the Department he inherited from Papasodora, from submitting follow-up discovery designed to obtain the factual grounds for Estes’ statements, and from providing the Plaintiff with an opportunity to ask Estes about these statements when Plaintiff deposed Estes on September 1, 2021.

3. Another incriminating document contained in the City’s recent production was the “One Year Assessment” that Chief Estes submitted to the City Council on October 7, 2019 (attached as “Exhibit 4”). This Assessment should have been produced by the City nearly a year ago in response to both RFP. No. 19 and RFP. No 20, but it was not. RFP No. 19 requested “all communications between Robert Estes or other NPD law enforcement personnel and the City of Nome regarding the City of Nome’s resources for investigating reports of sexual assault.” RFP No. 20 requested “all documents pertaining to Robert Estes’ resignation from the NPD.” The reason why this Assessment is related to both RFPs is because when Estes submitted the Assessment—which discusses in detail the NPD’s inadequate resources—he told the Council that he would resign unless they appropriated more funds to help him investigate sexual assault cases. When the Council failed to appropriate sufficient funds, Estes resigned. Plaintiff was unaware of the existence of the Assessment at the time she filed her Motion to Compel and, therefore, did not refer to it by name. The Court’s order of July 19 directed the City “to respond to RFP No. 20.” *See* Docket 72 at 19. The City

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should have produced the One Year Assessment in response to the Order and, more correctly, should have produced it nearly a year earlier in response to RFP No. 19.¹

The City has offered no explanation for why it failed to produce these numerous documents when first requested to do so. Nor has the City explained why these 154 pages of documents were not produced in a timely fashion after the Court ordered the City to produce them on July 19. An employee of the City’s law firm simply sent them to Plaintiff’s counsel on October 6 without any explanation. It should be presumed, therefore, that these documents were in the City’s possession at the time they were first requested and that nothing outside of the City’s control prevented the City from producing them a year ago. *See Seward Property LLC v. Artic Wolf Marine, Inc.*, Civ. No. 3:18-CV-HRH, 2020 WL 7647469, at *2 (D. Alaska 2020) (noting that “disobedient conduct not shown to be outside the control of the litigant’ is all that is required to demonstrate willfulness, bad faith, or fault” sufficient to warrant sanctions for failing to comply with a court order compelling production of discovery) (quoting *Henry v. Gill*

¹ Mr. Estes was deposed by Plaintiff’s counsel on September 1, 2021. The evening before his deposition, Mr. Estes telephoned Plaintiff’s counsel to report that he had just found a draft of his One Year Assessment, and the draft was made an exhibit during his deposition. (*See* Estes deposition transcript at 152, attached as “Exhibit 5”). This is the first time Plaintiff’s counsel knew about this highly significant document.

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Industries, Inc., 983 F. 2d 943, 948 (9th Cir. 1993) (other citations and internal quotations omitted).

4. The City’s failure to cooperate in discovery is evident in other significant ways, too. On February 19, 2021, a story appeared on the website of Nome radio station KNOM, describing a June 2019 email former Chief Estes wrote to the city manager referencing “51 historical [sexual assault] cases with 100% native Alaskan women victims where there has been zero to poor follow-up at best.” Accessed at <https://www.knom.org/wp/blog/2021/02/19/part-4-seeking-justice-wanting-protection-disparities-in-sexual-assault-crimes-in-nome/>. Plaintiff sought this email from the City in a discovery request on June 4, 2021, specifically referencing the KNOM story that describes it:

REQUEST FOR PRODUCTION NO. 27: Please produce the June 2019 email from the NPD Chief of Police to the City Manager in which the Chief says there were “51 historical cases with 100% native Alaskan women victims where there has been zero to poor follow-up at best.” See <https://www.knom.org/wp/blog/2021/02/19/part-4-seeking-justice-wanting-protection-disparities-in-sexual-assault-crimes-in-nome/>.

Declaration of Stephen Koteff ¶ 2.

The City’s response was confounding. It stated that “the City of Nome does not believe it has any documents in its possession responsive to this request.” *Id.* ¶

3. But on August 23, 2021, Plaintiff’s counsel learned from Emily Hofstaedtler, the KNOM reporter who wrote the February 19 story, that the City *had* produced Estes’s June 2019 email to Ms. Hofstaedtler in response to a public record request,

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along with many other related emails regarding sexual assaults in Nome. *Id.* ¶ 4. Ms. Hofstaedtler no longer had possession of the documents but suggested that Plaintiff specifically request from the City “email records of conversations on sexual assault between Bob Estes, Paul Kosto, Mike Heintzleman, and John Handeland provided to KNOM reporter Emily Hofstaedter in a series of five emails over the winter of 2020-2021.” *Id.* ¶ 5.

Accordingly, on September 3, 2021, Plaintiff served the following request on the City:

REQUEST FOR PRODUCTION NO. 60: Please produce all email records between Bob Estes, Paul Kosto, Mike Heintzleman, and John Handeland that relate to the subject of sexual assault and that were provided to KNOM reporter Emily Hofstaedter in a series of five emails over the winter of 2020-2021.

Id. ¶ 6.

In response, the City engaged in further obfuscation, producing not the requested documents, but simply the emails between the City and KNOM *about* the public records request. *Id.* ¶ 7. On September 16, Plaintiff’s counsel informed the City that its response was inadequate, but got no reply. *Id.* ¶ 8. Plaintiff’s counsel followed up with the City on October 6, asking that the City answer the request with responsive documents. Although the City’s counsel informed Plaintiff that the City was working on further responses to the RFP, and that it would send the responsive documents that day, no further communication from the City has been forthcoming. *Id.* ¶¶ 8-9.

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On November 4, 2021, however, unbeknownst to Plaintiff or her counsel, Ms. Hofstaedtler resubmitted the same public records request to the City that she had sent before. *Id.* ¶ 10. In *less than an hour* of her submission, the City provided her with a full response to the same request that Plaintiff has been waiting well over three months to receive. *Id.* Ms. Hofstaedtler shared the documents with Plaintiff's counsel. *Id.*

This series of events reveals two significant things. First, it further demonstrates not only that the City has failed to timely cooperate in discovery, but also that the City has been proceeding in bad faith, withholding relevant documents to which it had easy access the entire time. *Id.* ¶ 11. Second, it shows that the City has improperly withheld numerous documents that are responsive to earlier discovery requests. Many of the documents received from Ms. Hofstaedtler are documents that are responsive to Plaintiff's RFP 12, and *should have* been produced months ago in response to that request. *Id.* It defies credulity to believe that the City proceeded in good faith in response to Plaintiff's discovery requests when the very documents that it has withheld from Plaintiff are so easily accessed by third parties.

Plaintiff's earlier briefing explains why the City should be held in contempt of court and why sanctions should be imposed. This supplemental brief provides

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compelling reinforcement of those arguments.² It is abundantly clear that the Defendants have subverted the discovery process. Defendants' handling of their responsibilities constitutes a miscarriage of justice and should be criticized in strong terms. If all parties behaved like the City did, litigation would become a farce and litigants could frustrate their opponent by the simple expedient of withholding relevant evidence. Here, the City prevented Plaintiff from pursuing timely discovery regarding central issues in the case. The City had to have known that its delays in producing incriminating evidence would cause actual prejudice.³

Plaintiff is entitled, for reasons explained in her earlier briefs, to an award of attorneys' fees for time reasonably spent in bringing both her original motion to compel and the subsequent motion to hold the City in contempt of court. This Court recently awarded reasonable attorneys' fees in a situation not dissimilar to this situation. *See Dutchuk v. Yesner*, Civ. No. 3:19-cv-0316 HRH (Nov. 19, 2021, Docket No. 126.) The award should include compensation for time spent on this supplemental brief. *See Harkey v. Beutler*, 817 Fed. Appx. 389, 391-92 (9th Cir.

²Plaintiff's earlier briefs also discuss the categories of Plaintiff's discovery that the City has yet to produce. The 154 pages of documents that the City produced on October 6 do not relate to the majority of those still-unaddressed categories.

³ To recover sanctions for a party's failure to produce court-ordered discovery, the moving party need not prove *mens rea*. But it is hard to imagine that the City was unaware that withholding these documents would prejudice Plaintiff's ability to prove her case.

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2020); *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1385 (9th Cir. 1988) (“Fed.R.Civ.P. 37(b)(2) provides for the award of reasonable expenses and attorney's fees ‘caused by the failure’ to obey a court order to provide or permit discovery.”); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980); *Seward Property LLC*, 2020 WL 7647469, at *2; *Smith v. Texas San Marcos Treatment Ctr., LP*, No. 3:09-CV-00141-TMB, 2010 WL 11508319, at *4 (D. Alaska Oct. 4, 2010).

Plaintiff also should be awarded attorneys’ fees for the fact that the City’s withholding of incriminating discovery has delayed the prosecution of this case and will require the Plaintiff to undertake *additional* discovery, that is, the Plaintiff must now invest more hours in an effort to undo the harm she suffered. *See Palaniappan v. Norton Health Sound Corp.*, No. 3:10-CV-00175-TMB, 2012 WL 13032959, at *9 (D. Alaska Mar. 7, 2012) (awarding sanction where the moving party “has suffered prejudice in the delay of completing discovery”). *See also North American Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447,1451 (9th Cir. 1986); *Lewis v. Ryan*, 261 F.R.D. 513, 519 (S.D. Cal. 2009).

CONCLUSION

Plaintiff respectfully requests that the Court enforce its decree and take whatever remedial measures it deems appropriate to ensure compliance with its Order. Plaintiff also respectfully requests an award of reasonable attorneys’ fees.

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Respectfully submitted this 14th day of January 2022.

/s/ Stephen Koteff

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