MAGGS MCDERMOTT & DICICCO, LLC

ATTORNEYS AT LAW
ALLAIRE CORPORATE CENTER
3349 HIGHWAY 138
BUILDING C, SUITE D
WALL, NEW JERSEY 07719
(732) 223-9870 TELEPHONE
(732) 223-7367 FAX

JAMES A. MAGGS***
JOHN J. MCDERMOTT **
MICHAEL M. DICICCO***

** NJ & NY BAR
***NJ BAR
++NJ & PA BAR

JAIMEE M. NADELL **
VICTORIA J. ADORNETTO**
STEPHANIE L. DELUCA++
KYLE R. TOGNAN++
CHARLES R. MATHIS IV++
BETHANNA M. SCOTT***
JUAN C. CERVANTES++

July 17, 2023

The Honorable Anthony V. D'Elia, J.S.C.
W. J. Brennan Courthouse
583 Newark Ave., 2nd Floor
Jersey City, NJ 07306

RE: Ross v. City of Bayonne, et al.
Docket No.: HUD-L-1625-20
Our File No.: 5820.0003

Dear Judge D'Elia:

With regard to the above-entitled matter, this office represents the Plaintiff, **Sincerrae Ross.** Please accept this Letter Brief and accompanying Certification of Services in lieu of a more formal Brief in response to Defendants' Cross-Motion for to Reinstate their Answer and Enter a Protective Order.

LEGAL ARGUMENT

I. PLAINTIFF HAS MET STANDARD NEEDED TO STRIKE PLEADINGS WITH PREJUDICE.

A Court may strike the pleadings of a party with prejudice and enter a judgment by default against a party that fails to obey and order to provide discovery. Rule 4:23-2(b)(3). The striking of pleadings with prejudice is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation of the cause of action or where the refusal to comply is deliberate and contumacious. Abtrax Pharms, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514 (1995). "Since dismissal with prejudice is the ultimate sanction, it will normally be ordered

only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, or when the litigant rather than the attorney was at fault." Id.

a. Defendants Have Willfully and Contumaciously Failed to Comply with the Court Order dated December 5, 2022.

For Defendants to assert that they have fully complied with the Court's previous Order, dated December 5, 2022, and that they should have their Answer reinstated is completely devoid of candor. While it is admitted that three Defendants sat for deposition, and a fourth began her deposition before it was suspended after an alleged medical emergency, there are three additional Defendants who were provided with notice for depositions that still have yet to be produced. While the undersigned is certainly sympathetic to Defendant Vanderweeden's medical emergency preventing her deposition from being resumed on two noticed dates since, absolutely no exceptional circumstances have been offered excusing the other individual defendants who have yet to be deposed despite being noticed for deposition on three different occasions since the prior Order was entered on December 5, 2022.

Defendants have conveniently asserted their sudden availability during the time period which this motion has been pending, despite never communicating any availability prior to the undersigned's filing of the instant motion, and despite never attempting to coordinate rescheduling of their missed depositions with the undersigned. Indeed, it seems the only objective coordinated by Defendants is to inconvenience Plaintiff and counsel as much as possible, waiting until late in the afternoon to adjourn depositions on the most recently noticed occasions.

The undersigned admits that Defendants have been served with depositions notices for August 2-4, 2023; however, such notices have only been served as a safeguard should Plaintiff's

instant application be denied. Plaintiff has seen nothing to indicate that Defendants intend to sit for such depositions, and further Plaintiff believes that the mere act of encouraging their scheduling is nothing more than an attempt of Defendants to feign cooperation prior to this motion's return date.

It is respectfully submitted that the actions of Defendants in routinely avoiding their scheduled depositions have been willful, contumacious, and, perhaps most egregiously, calculated in an effort to continually try to avoid additional sanctions. Notably, Defendants have taken advantage of the undersigned's continued willingness to cooperate (the Court may notice Defense counsel's repetition of the phrase "mutually agreed;" it is submitted that same represents the undersigned's hope that discovery issues could have been amicably resolved, but unfortunately that is not the case). Defendants should not be awarded for their blatant disregard for the discovery process. Defendants Answer should not be reinstated; indeed, Defendants' Answer should be stricken with prejudice as a result of their conduct.

b. All Lesser Sanctions Have Been Utilized in Plaintiff's Efforts to Compel Defendants' Depositions.

Plaintiff agrees that striking Defendants' Answer with Prejudice is the ultimate sanction only to be sought when no lesser sanction can be used. Plaintiff has clearly documented that it has utilized every available lesser sanction in its effort to obtain the deposition testimony of Defendants, and therefore the only action left is for their Answer to be stricken with Prejudice. Notably, Plaintiff previously obtained a Court Order compelling deposition of Defendants. See Cert. of Counsel (previously submitted with the instant Notice of Motion), **Exhibit B**. Thereafter, Plaintiff obtained a Court Order striking Defendants' Answer without Prejudice. See Cert. of Counsel, **Exhibit A**. Despite these lesser sanctions, Defendants have continued to

willfully and contumaciously avoid providing deposition testimony. It is respectfully submitted that no other lesser sanction exists, and Defendants' Answer and Affirmative Defenses should be stricken with prejudice.

c. Defendants' Refusal to Sit for Depositions Greatly Prejudices Plaintiff.

Defendants' argument that Plaintiff has not been prejudiced by their failure to sit for depositions is disingenuous. By not being afforded the opportunity to depose Defendants, who have factual knowledge of Plaintiff's allegations, Plaintiff's case has suffered severe prejudice and been severely impaired. Should this matter proceed without Defendants sitting for depositions, Defendants would be gifted an unfair advantage at trial, especially since Plaintiff has been deposed in this matter. Additionally, Defendants may be able to conceal relevant facts that would assist Plaintiff in the prosecution of her case should they not sit for deposition. The prejudice a party faces by not being afforded discovery to which it is entitled in the litigation process is inherent. With Plaintiff suffering from such prejudice, it is respectfully submitted that Defendants' Answer be stricken with prejudice.

II. DEFENDANTS ARE NOT ENTITLED TO RECONSIDERATION OF THE COURT'S DECEMBER 5, 2022 ORDER.

While not specifically requested by Defendants, their application to reinstate their Answer seems to be reliant, in part, that the Court Order Striking their Answers without prejudice, dated December 5, 2022, was entered in error. Notwithstanding the sound reasons for which the prior Order was entered, the Court should not entertain reinstating Defendants' Answer based upon reconsideration of same. Pursuant to Rule 4:49-2, a motion for reconsideration much be served not later than 20 days after service of the order. A motion for reconsideration is granted when the court's decision is based on plainly incorrect reasoning,

when the court failed to consider evidence, or there is good reason to reconsider new information. Cummings v. Bahr, 295 N.J. Super. 374, 384-85 (App. Div. 1996). Not only is Defendants' application for reconsideration grossly out of time, but they have not put forth a legitimate reason for any reconsideration to be granted. As a result, Defendants' application to reinstate their Answer should be denied.

III. ENTRY OF A PROTECTIVE ORDER IS INAPPROPRIATE AND WOULD OVERLY PREJUDICE PLAINTIFF.

Defendants seek to have the Court enter a protective order that would greatly prejudice Plaintiff based on a false account of Defendant, Linda Vanderweeden. Defendant Vanderweeden has alleged that Plaintiff stalked, followed, and harassed her on July 11, 2023; however, Defendant's own account demonstrates that Plaintiff did none of those things.

Plaintiff is a resident of the City of Bayonne where Defendant Vanderweeden works, so naturally the possibility exists that the two of them would encounter each other by happenstance, which is what occurred on July 11, 2023. To frame such an interaction as following, stalking, and harassing is irresponsible, given the likelihood of run-ins occurring. Moreover, the incident report drafted by Defendant Vanderweeden, submitted by Defendant as Exhibit A to her Certification, characterizes an incident wherein Plaintiff made recordings of Defendant with her cell phone, but does not allege that Plaintiff made any statements, attempted to assault Defendant, or made any effort to prevent Defendant from leaving the Subway, as defense counsel has alleged.

Even if Defendant's version of events is accepted, Plaintiff has not committed any act that would be in violation of the law, as New Jersey does not criminalize the use of recording devices for other purposes in areas to which the public has access or there is no reasonable

expectation of privacy, such as a Subway restaurant. See N.J.S.A. 2C:14-9. It is respectfully submitted that the alleged action of Plaintiff does not constitute the level of harassment or intimidation that would warrant a protective order.

Finally, if a protective order were entered against Plaintiff, it would subject her to great prejudice. Plaintiff's residency in Bayonne, where many individual defendants live and work, would leave her vulnerable to fabricated allegations of protective order violations given the inevitability that she would encounter any individual defendants in public or at City Hall. Given the impracticality of such a protective order along with its potential consequences, it would be far too prejudicial for one to be entered against Plaintiff, and Defendants' application for same should be denied.

IV. PLAINTIFF REQUESTS SANCTION OF COUNSEL FEES FROM DEFENDANTS.

Pursuant to Rule 4:23-2, the Court shall require the party failing to obey the prior Order to pay the reasonable expenses, including attorney's fees, caused by their failure in addition to or in lieu of the requested Order, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. As detailed above, Defendants cannot demonstrate justification that would render an award of expenses unjust. As such, Plaintiff requests that Defendants be compelled to remit counsel fees and costs, totaling $3,585.00 in accordance with the attached Certification of Services detailing Plaintiff's time spent on the instant application.

CONCLUSION

Based upon the facts and applicable case law, the Court should enter an Order striking Defendants' Answer with Prejudice. Additionally, the Court should deny Defendants' cross-motion to reinstate their Answer and enter a Protective Order.

Respectfully submitted,
MAGGS McDERMOTT & DICICCO, LLC

/s/ Juan C. Cervantes
Juan C. Cervantes, Esq.

cc: Stephen Boraske, Esq. via eCourts