UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88:2406-CIV-MORENO

MICHAEL POTTINGER, PETER CARTER, and BERRY YOUNG,

Plaintiffs,

v.

CITY OF MIAMI,

Defendant.
_____/

PLANTIFFS' MOTION FOR LEAVE TO CONDUCT PREHEARING DISCOVERY AND FOR SCHEDULE TO ACCOMMODATE IT, OR IN THE ALTERNATIVE FOR EXPEDITED DISCOVERY, WITH INCORPORATED MEMORANDUM OF LAW

Plaintiffs, by and through undersigned counsel, pursuant to Local Rule 7.1(a), move this court for leave to conduct prehearing discovery pursuant to the timetable established by the federal rules and this court's local rules. This motion sets forth with particularity the matters for which Plaintiffs require discovery to enable them to defend the Pottinger Settlement Agreement against the City's Rule 60(b) Motion; and why the lack of any period for discovery would severely prejudice the Plaintiffs' ability to represent the interests of the class and defend the Agreement against the City's factual allegations.

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Plaintiffs require the discovery to test factual assertions the City makes in its Motion (DE 464), its Reply (DE 485), its Motion for Judicial Notice (DE 488 and the accompanying exhibits), and in various affidavits (DE 492, DE 493, and DE 494, and the accompanying exhibits). As grounds for conducting prehearing discovery, Plaintiffs state:

1. On September 11, 2013, defendant City of Miami filed its Motion for Limited Modification of the Pottinger Settlement Agreement. (DE 464). Plaintiffs filed a response in opposition (DE 477) to which the City of Miami filed a reply. (DE 484). The City also filed three affidavits, with multiple exhibits, on the afternoon and early evening of October 22, 2013, the day before the hearing. (DE 492, DE 493, DE 494). Plaintiffs filed a Motion to Strike those affidavits as untimely, improper, and in violation of the Rules of Evidence. (DE 496).

On October 29, 2013, following the October 23 hearing, this court issued its Order Requiring Evidentiary Hearing setting dates for the Plaintiffs and defendant to file witness and exhibit lists and requesting a joint notice identifying dates in December for the evidentiary hearing. (DE 502). The Court also denied Plaintiffs' Motion to Strike. (DE 501).

2. The City's request to modify the Pottinger Agreement is of monumental constitutional and practical importance to the plaintiffs. The settlement protects their most fundamental rights to exist – sleep, eat, sit, and congregate – on the streets of

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Miami as they are forced to by virtue of their homelessness, having no other place to engage in these life-sustaining activities. This settlement has been in existence for 15 years and has effectively protected the plaintiffs' right not to be jailed based on their homeless status. By its proposed modifications, the City seeks substantially greater policing authority to do what it previously has been prohibited from doing. As the plaintiffs argued in their response, taken in their entirety, the City's proposed changes would eviscerate the settlement agreement, eliminating most of the protections it has provided for 15 years.

3. To fairly litigate these extensive proposals, Plaintiffs require an opportunity for meaningful discovery. Without discovery, Plaintiffs have no access to necessary information, and have fewer than 30 days to do what the City has had years to do. As the City itself noted, the "City, including undersigned counsel, spent *years* discussing the issues raised in its Motion with many community leaders," including nine proposed witnesses." (DE 485:2) (emphasis added). Plaintiffs, on the other hand, only became aware of the City's plans in April 2013. Given the complexity of the settlement agreement and the underlying factual issues, the lack of discovery will severely prejudice the Plaintiffs' ability to contest the City's proposed changes.

In ***Hickman v. Taylor***, 329 U.S. 495, 507 (1947), the Court held that "[d]eposition-discovery rules are to be accorded a broad and liberal treatment --

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mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation"; stated differently, "discovery is one of the working tools of the legal profession." *Id.* at 515 (Jackson, concurring). To present the most comprehensive defense of the critical constitutional rights at issue for the plaintiff class, Plaintiffs' counsel must be able to avail themselves of this "working tool" to fulfill their duties and responsibilities to the class.

This motion is akin to a Federal Rule of Civil Procedure 56(f) motion that permits the non-movant in a summary judgment proceeding to seek additional discovery to "present facts essential to justify its position." The Eleventh Circuit has explained that "[t]he whole purpose of discovery in a case in which a motion for summary judgment is filed is to give the opposing party an opportunity to discover as many facts as are available and he considers essential to enable him to determine whether he can honestly file opposing affidavits." ***Snook v. Trust Co. of Ga. Bank of Savannah, N.A.***, 859 F.2d 865, 870 (11th Cir.1988) (quoting ***Parrish v. Bd. of Comr's of Ala. State Bar***, 533 F.2d 942, 948 (5th Cir.1976)). Accordingly, district courts in the Eleventh Circuit should grant requests under Rule 56(f) "when the party opposing the [summary judgment] motion has been unable to obtain responses to his discovery requests" and the discovery sought would be essential to opposing summary judgment and "relevant to the issues presented by the motion for summary

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judgment." ***Snook***, 859 F.2d at 870 (citation omitted); *see* ***Porter v. Ray***, 461 F.3d 1315, 1324 (11th Cir.2006).

The need is even greater here than in the summary judgment context: if additional time for necessary *pre-judgment* discovery may be granted to a non-moving party, then additional time for necessary pre-evidentiary hearing discovery should likewise be provided when, as here, plaintiffs are defending an agreed-to settlement that has governed the City's conduct for 15 years. For that reason, Plaintiffs request the Court to grant them leave to proceed with discovery forthwith.

Even if the Court's timetable for producing evidence lists, witness lists and proffers of those witnesses' testimony were to remain in effect, the Court's Order does not provide the parties with the opportunity to depose proposed witnesses. Should the parties disclose *expert* witnesses, there is neither leeway in the Court's schedule for production and analysis of expert reports, nor time to depose the experts to test their qualifications and methodology. The Order therefore does not provide the parties with any meaningful opportunity before the evidentiary hearing to challenge experts under Fed. R. Evid. 702 and ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993).

4. Discovery is vital because of the depth and breadth of the issues raised by the City's motion, and the truncated schedule leading to a December hearing that the Court intends to set. The issues on which Plaintiffs require discovery from the

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City to mount a meaningful factual defense of the Pottinger Agreement include the following:

(a) *Changes in demographics and residential, business, employment, and commerce growth within the City of Miami throughout the last 15 years.*

Plaintiffs anticipate that the information sought through discovery will establish that the City and its agencies were aware of the commercial, residential, and cultural development they now cite as unanticipated changes in circumstances. That evidence will establish that the City is not entitled, as a matter of law, to the relief it seeks in its Rule 60(b) motion.

(b) *The City's planning for these changes from the time this case was filed through the 1998 settlement approval.*

This information will demonstrate that the City planned and then actively sought to effect the commercial, residential, and cultural development they now cite as unanticipated changes in circumstances. That evidence will establish that the City is not entitled, as a matter of law, to the relief it seeks in its Rule 60(b) motion.

(c) *Statistics and demographics regarding the presence of homeless persons throughout the last 15 years since the settlement was approved.*

This information will establish that the overall homeless population in the City of Miami has dropped since 1998 rather than risen, and that there is no significant change in circumstances sufficient to modify the Pottinger Agreement.

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(d) *Current Shelter and services available to homeless persons.*

This information will establish that despite improvements, there are not sufficient shelter beds within the City.

(e) *City contacts with and arrests of homeless persons during this time.*

This information will establish that the City has consistently misinterpreted the scope of the Pottinger Agreement and that the City in fact has the authority under the current Agreement to address many of the incidents it raised in its filings.

(f) *Local, state, and national standards regarding the treatment of and assistance to homeless persons at the present time.*

This information will establish that the City's proposed modifications violate recognized standards and are against public policy, in addition to violating Plaintiffs' constitutional rights to be free from involuntary medical and mental health treatment outside the parameters of Florida's Baker and Marchman Acts, as plaintiffs argue in their response. (DE 477: 12-13).

5. Since April 2013, Plaintiffs have actively sought relevant public records from the City, its employees and its agencies. Specifically, Plaintiffs' counsel sent Public Record Act requests to, *inter alia*, (1) Miami City Commission Chairman Sarnoff; (2) Miami City Manager Martinez; (3) Miami City Mayor Regalado; (4) the City of Miami Homeless Assistance Program; (5) the Miami Downtown Development Authority; (6) and the Miami Police Department.

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The City's agents and agencies responded to most of these requests with estimates of very high fees to perform research necessary to fulfill the requests. The City's counsel, Tom Scott, notified Plaintiffs' counsel of the City's desire to seek formal modification of the settlement agreement in April 2013. During a mid-May meeting between Plaintiffs' counsel and the City's attorneys, Plaintiffs' counsel advised the City of the difficulties they were having getting their Public Record Act requests filled. Plaintiffs' counsel wrote the City's counsel a letter on May 22, 2013, narrowing and prioritizing their Public Record Act requests, requesting assistance in getting them fulfilled, and asking the City to identify the specific language it was proposing to add or delete from the settlement agreement. Letter from Waxman to City's counsels Scott and Solowsky, **Ex. 1**, attached. The City responded by letter dated July 11, 2013, advising that it would *not* assist the Plaintiffs in obtaining their Public Record Act requests and would *not* disclose the specific settlement modifications it was seeking until five days before any mediation. Letter from Scott to Plaintiffs' counsel Waxman, **Ex. 2**, attached. Counsel replied with a letter dated July 19, 2013, confirming the plaintiffs' agreement to mediate but pointing out the need to pursue their public record act requests before any mediation. **Ex. 3**, attached. The City's next formal contact with Plaintiffs' counsel consisted of service of the City's Rule 60(b) motion for modification.

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6. Plaintiffs have obtained some, but far from all, of the public records they have requested. Several of their requests remain outstanding. Although Plaintiffs' counsel's attention had been focused on the pleadings and preparing for the hearing that occurred two weeks ago on October 23, 2013, counsel are now refocused on obtaining the documents that have not yet been provided in response to their Public Record Act requests. Counsel are currently preparing discovery requests they intend to make under the Federal Rules of Civil Procedure, including requests for admissions, interrogatories, and requests for production of documents. Should the Court so order, Plaintiffs' counsel will file, as proffers, their discovery requests. Should the Court grant this Motion, Plaintiffs anticipate noticing depositions when the City identifies its witnesses.[1]

7. As a necessary corollary to this Motion for discovery, plaintiffs respectfully request that the forthcoming hearing on the City's motion be postponed for three to four months to accommodate reasonable discovery pursuant to the timetables established by the federal rules and this court's local rules. There does not appear to be, and no party has suggested that there is, any emergency requiring the evidentiary hearing to be set in a time frame that precludes discovery in the normal course.

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[1] Plaintiffs are contemporaneously seeking clarification of the scheduling of disclosures this Court mandated in DE 502.

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In the alternative, Plaintiffs request that this Court order the City to respond on an expedited basis to the discovery requests plaintiffs intend to serve so that plaintiffs are afforded a reasonable time to prepare for the upcoming hearing.

8. Undersigned counsel has spoken with defendant's counsels Tom Scott and Scott Cole who states that the City opposes this request for discovery.

WHEREFORE, the Plaintiffs request that this court grant them leave to conduct discovery as contemplated by the Federal Rules of Civil Procedure and set a hearing date allowing sufficient time to do so according to the time frames set forth in the rules or, alternatively, set an expedited but reasonable discovery schedule that allows discovery to be taken and completed before the currently contemplated December hearing date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of November, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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