VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE, *et al.*, Plaintiffs, v. CITY OF CHARLOTTESVILLE, VIRGINIA, *et al.*, Defendants.	Case No.: CL17-000145-00

10/19/18 @ 3:20pm

DEFENDANTS' OPPOSITION TO PLAINTIFFS' PRETRIAL CONFERENCE MOTIONS

Defendants A. Michael Signer, Wesley J. Bellamy, Kathleen M. Galvin, and Kristin L. Szakos ("Defendants"), by their counsel, respectfully respond to the following pretrial conference motions filed by Plaintiffs: (1) Motion to Determine Sufficiency of Answers to Request for Admissions; (2) Motion for Judicial Notice; (3) Motion to Admit into Evidence Previous Testimony and Exhibits; (4) Motion to Amend the Complaint; (5) Motion in Limine; (6) Motion to Amend the August 13th Order; (7) Motion to Compel Discovery; and (8) Motion for a View.[1]

1. Motion to Determine Sufficiency of Answers to Request for Admissions

Defendants oppose Plaintiffs' motion regarding the sufficiency of Defendants' answers in response to Plaintiffs' request for admissions.

On July 24, 2018, Plaintiffs served 24 identical Requests for Admission ("RFAs") to each Defendant. Plaintiffs' RFAs do not attempt to narrow the issues for trial. Instead, Plaintiffs' RFAs relate to military history and minor issues regarding the statues at issue in this matter that do not

[1] Plaintiffs filed certain of these motions jointly in a single document and others as separate documents. In the interests of efficiency, Defendants have consolidated their responses.

shed light on the issues that will be the subject of the upcoming trial; they are confusing, duplicative, and in contravention of established rules. Further, they do not include a single defined term.

Despite all these shortcomings, Defendants timely responded to Plaintiffs' RFAs on August 14th to ensure compliance with their discovery obligations. Defendants' responses represent a good faith effort to answer each request with the specificity required by Rule 4:11. For example, in response to Requests Nos. 8 and 18, which pertain to the statues' horses, Defendants set forth specific objections and then specifically responded to each point in the requests admitting that: (1) "a statue at issue in this litigation depicts an individual riding a horse"; (2) the statues are located in what was previously known as "Lee Park" or "Jackson Park"; (3) the base of the statues contain the words "Robert E. Lee" or "Thomas Jonathan Jackson"; and (4) according to publically available information, Robert E. Lee used a horse named "Traveller" during his lifetime and Thomas J. Jackson used a horse named "Little Sorrel" during his lifetime. Defendants then specifically denied the "balance" of the requests. Defendants provided these responses even though it is unclear how these requests could possibly be relevant to any open issues.

Displeased with Defendants' responses, on August 22nd, Plaintiffs served Defendants with an ultimatum: Revise your responses and admit all 24 RFAs within three and a half business days, or Plaintiffs will file a motion with the Court demanding a declaration that all 24 responses are insufficient. Two days later, on August 24th, in an effort to keep this dispute off the Court's calendar, Defendants responded to Plaintiffs' ultimatum and explained that their responses were made in good faith and, where substantive responses were not provided, the reason was due in large part to Plaintiffs' refusal to provide definitions of critical terms in their RFAs—terms that may be deemed critical and decisive depending upon the Court's ultimate view of the evidence at

trial. Defendants appealed to Plaintiffs to define terms identified as vague and ambiguous so that Defendants could assess whether to revise their RFA responses. Unfortunately, Plaintiffs declined Defendants' invitation and, instead, filed their motion. To date, Plaintiffs have refused to define important terms in their RFAs.

Plaintiffs' motion should be denied for a number of reasons. Defendants respond to the various points raised in Plaintiffs' motion in turn.

With respect to paragraphs 1 and 2 of Plaintiffs' Motion, which complain that Defendants provided "largely identical objections, denials, and fragmented answers," Defendants are aware of no law that prevents litigants from submitting similar or identical responses when those are, in fact, common responses of multiple defendants. Indeed, the Rules of the Supreme Court of Virginia promote and encourage efficiency in discovery. Plaintiffs, in fact, have done the same in response to Defendants' various discovery requests: provided the same responses to discovery requests for each of the different Plaintiffs. Plaintiffs' complaint is nonsensical.

In paragraphs 3, 4, and 10 of their Motion, Plaintiffs take issue with Defendants' objection to undefined terms used in their RFAs. Defendants' objections, however, are proper, are made in good faith, and are reasonable in light of the Virginia Supreme Court's mandate that a requesting party "has a ... duty ... to phrase his requests with *clarity and fairness*, so that the other party can *safely* 'specify so much of [a request] as is true' without conceding away a disputed point." *Erie Ins. Exch. v. Jones*, 236 Va. 10, 14 (1988) (internal quotations omitted). Defendants cannot safely respond to an RFA seeking a legal admission which includes undefined terms that carry potentially dispositive legal significance in this case, such as: "War Between the States," "uniform and accoutrements of a Confederate officer," "veteran," "monument," "memorial," or "rededicated." Indeed, Defendants have consistently objected to characterizations of the statues at

issue as "monument[s]," "memorial[s]," "war memorial[s] and monument[s]," "Confederate monument[s]," "memorial[s] to the War Between the States," and "memorial[s] to war veterans of the War Between the States." *See, e.g.*, Answer Am. Compl. ¶¶ 4, 10, 21A, 21C, 21D, 22.

Because key issues in this matter relate to what constitutes a "war memorial/monument" or "memorial/monument to a war veteran" or what it means for a statue to be "encroached upon," Defendants are within their rights to decline to adopt any meaning Plaintiffs may impute to these terms, when Plaintiffs refuse to provide definitions of the disputed terms. The casual use of terms in correspondence and other documents when describing the Robert E. Lee and Thomas Jackson statues (collectively the "statues") at issue does not remove the burden on Plaintiffs to clearly and fairly define terms when seeking legal admissions.

Despite the known disputes between the parties, as evidenced by the parties' expert reports, the different expert views concerning the reason and purpose behind the erection of the statues, and the different expert opinions concerning the meaning and significance of certain historical terms and facts, Plaintiffs continue to refuse to define a single term in their RFAs. As an example of the problem posed by Plaintiffs' refusal to define terms used in their RFAs, the Court need only look to the term "war between the states." Plaintiffs likely will argue that everyone knows what that term means and therefore Plaintiffs do not need to define it. And, of course, it is true that, generally speaking, Defendants *generally* understand what set of events Plaintiffs are referring to when they use that term. But, *specifically* what Plaintiffs mean when they use that term in this litigation is one of the critical issues in this case. How that term is defined ultimately will be relevant to the Court's decision about whether the statues are covered by Va. Code §§ 15.2-1812 and 15.2-1812.1. Because Plaintiffs provide no definition, the Councilors are left to speculate whether Plaintiffs intend, for example, an encyclopedia definition. For instance, the Encyclopedia

Britannica defines "war between the states" as follows: "American Civil War, also called War Between the States, four-year war (1861-65) between the United States and 11 Southern states that seceded from the Union and formed the Confederate States of America. ... The secession of the Southern states ... in 1860-61 and the ensuing outbreak of armed hostilities were the culmination of decades of growing sectional friction over slavery." But the meaning of that term is contested. *See* Expert Designation of Sarah Beetham, at 3 ("Dr. Beetham will also testify and opine to the meaning of the Civil War memory tradition of the 'Lost Cause,' will opine that it is related to the distorted and inaccurate history of the 'War Between the States,' and will opine that this distortion was harmful to African Americans in the South.").

The law is clear on this issue. The proponent of an RFA has the duty to define the terms used in the RFA. Plaintiffs failure to do so, and to continue to do so after Defendants objected should not be countenanced by the Court.

Regarding paragraph 5, in which Plaintiffs take issue with Defendants' refusal to admit that the statues at issue are war memorials, Plaintiffs misstate Rule 4:11. Defendants have the right to object on the ground that a request "presents a genuine issue for trial," so long as Defendants do not object "on that ground alone." Defendants never objected on that ground alone. *See* Defendants' responses to Requests Nos. 6, 9, 10, 11, 12, 13, 16, 19, 20, 21, and 22 (in which Defendants also objected on grounds that the RFAs called for irrelevant information, legal conclusions, and expert testimony). Moreover, as the Virginia Supreme Court has explained, "if there is any dispute ... the Court cannot require [an] admission." *Walker v. Bon Secours Health Sys., Inc.*, 56 Va. Cir. 532, 533 (2001) (quoting *DeRyder v. Metropolitan Life Ins. Co.*, 206 Va. 602, 611 (1965)). Defendants' objections that an RFA "presents a genuine issue for trial" follows this instruction. Plaintiffs cannot use their motion to avoid litigating a genuine issue at trial and

deprive Defendants of an opportunity to present evidence in their defense. And there is no dispute that this issue is one of the key issues at trial.

In response to paragraph 6, Defendants are at a loss as to how their response to Request No. 24, which requested that Defendants admit certain costs estimated by Doug Ehman, is "insufficient." In response to this RFA, Defendants made specific and general objections. However, Defendants also provided a document *directly responsive* to Plaintiffs' request that includes a statement by Mr. Ehman regarding costs for installing the coverings.

Regarding paragraphs 7 and 8, which refer generally to all of the RFAs, Defendants disagree with Plaintiffs' statement that Defendants have "denied what they have previously admitted." Defendants have never responded to any allegations regarding Thomas J. Jackson or the statue located in what was previously known as "Jackson Park." Furthermore, Defendants' responses to RFAs that pertain to Robert E. Lee are in line with their previous representations. For example, in response to Request No. 1, Defendants admitted that "Robert E. Lee ... was an officer in the Confederate army." In response to multiple other requests, Defendants admitted that a statue at issue in this litigation depicts an individual on a base that contains the words "Robert E. Lee." These responses, while not verbatim from Defendants' Answer to the Amended Complaint, follow Defendants' earlier representations and are adequate responses to RFAs aimed at attaching legal significance to Defendants' responses. Moreover, the fact that Plaintiffs posed RFAs that they believed were already admitted and refused to resolve their discovery dispute without the Court's involvement suggests that these RFAs do not represent a genuine effort to narrow the issues prior to trial, but rather an effort to propound duplicative requests that increase litigation costs.

Defendants also disagree with Plaintiffs' contention in paragraph 9 that Defendants' responses do not meet the standard prescribed by Rule 4:11. As outlined in the paragraphs above,

Defendants' responses meet the standard prescribed by Rule 4:11. Defendants responded to each point raised in each request, set forth specific objections, admitted what they could, and specifically denied the remaining balance of each request. That Defendants declined to adopt undefined terminology preferred by Plaintiffs does not render the responses insufficient.

Finally, Defendants disagree with paragraph 11 and Plaintiffs' related rhetoric alleging that Defendants seek to evade their prior admissions with "captious carping." Defendants' responses and objections to the RFAs were made in good faith and in accordance with the text and purpose of Rule 4:11 and Virginia case law.

This dispute between the parties centers around Plaintiffs' continued refusal to define critical terms in their RFAs. As stated above, the specific terms or phrases that defendants object to because they are undefined include: "War Between the States," "uniform and accoutrements of a Confederate officer," "veteran," "monument," "memorial," or "rededicated." Based upon Defendants' understanding of Plaintiffs' theories in this case, as described in pleadings, statements to the Court, and their experts' reports, defendants have a foundation for believing that Plaintiffs ascribe meanings to these terms with which Defendants, and Defendants' experts, might disagree. Plaintiffs brought this litigation and issued the RFAs; thus, the burden is on them to define the terms they want Defendants to review and to admit or deny as used in the RFAs. Once Plaintiffs define the terms, then Defendants can review the RFAs with the understanding of the meaning of the terms, and admit or deny them. Finally, Defendants note that they have tried to resolve this issue outside the Court's purview in an attempt to minimize the burden on this Court, but Plaintiffs refused. Even at this late juncture, Defendants invite Plaintiffs to define the terms Defendants identified as vague and ambiguous and further revise their requests to address Defendants' objections. Once this occurs, Defendants will be in a position to supplement their responses.

For these reasons, Plaintiffs' motion should be denied and Defendants' answers deemed sufficient.

2. Motion for Judicial Notice

Defendants respectfully oppose Plaintiffs' Request for Judicial Notice. In their Request, Plaintiffs ask the Court to take judicial notice of the inflation adjusted cost of the Robert E. Lee and Thomas J. Jackson statues, calculated by the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index calculator. Defendants oppose this request on the basis of relevancy, and in the alternative, Defendants oppose the use of the calculated numbers to determine the value of the statues or any alleged damages.

The Court should deny Plaintiffs' Request because the record for which Plaintiffs seeks judicial notice is not relevant to the case. To be relevant, and thus admissible, evidence must have a "tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Va. R. Evid. 2:401; *Payne v. Commonwealth*, 65 Va. App. 194, 217 (2015). Here, the inflation adjusted costs of the Lee and Jackson statues have no bearing on the cost of this litigation, because the only alleged "damages" in this case are litigation costs. *See* June 13, 2018, Letter Ruling 8–9 ("So far there has been no actual damage and no evidence or allegation of the need for rebuilding, repair, or restoration, so there would be no need or use for damages other than 'preservation.' And there has been no allegation that there has been any money spent or any financial loss related to the 'encroachment' on the statues or the preservation of them, other than the cost of litigation, which is covered by a separate section of the statute."). Although Defendants dispute that litigation costs constitute proper standalone damages, it is clear, at a minimum, that the inflated cost of the statues is not a fact in issue.

In this action, damages may be awarded "for the purposes of rebuilding, repairing, preserving and restoring such memorials or monuments to preencroachment condition." Va. Code Ann. § 15.2-1812.1(A)(2). The prevailing party is entitled to the cost of the litigation, including reasonable attorney's fees. *Id.* § 15.2-1812.1(C). This Court has already held that "Defendants could be liable for the costs of the litigation, but not for any damages for physical harm to the statute, or for repair, rebuilding, restoration, or preservation, as no such damage or cost of preservation has been alleged." June 13, 2018, Letter Ruling 9. Even under the terms of that ruling, to which Defendants object, the inflated cost of the statues relate solely to damages for physical harm to the statue, and is thus irrelevant.

In the alternative, if the Court finds that the inflated cost of the statues relates to the cost of litigation, Defendants respectfully request the Court limit judicial notice to the numbers themselves. Defendants acknowledge that the Consumer Price Index calculator computes an inflation cost of $504,292.00 in August 2018 when the cost was $35,000 in October 1921 and an inflation cost of $519,124.12 in August 2018 when the cost was $35,000 in May 1924. Defendants, however, take issue with the use of these calculations to determine the value of the statues or any alleged damages, topics that Defendants are entitled to address upon cross-examination. *See Basham v. Terry*, 199 Va. 817, 824 (1958) ("[C]ross-examination on a matter relevant to the litigation and put in issue by an adversary's witness during a judicial investigation is not a privilege but an absolute right."); Va. R. Evid. 2:705.

For these reasons, the Motion for Judicial Notice should be denied, or in the alternative, limited to the extent it recognizes the numbers as computed by the Consumer Price Index calculator.

3. Motion to Admit into Evidence Previous Testimony and Exhibits

Defendants respectfully oppose, in part, Plaintiffs' October 3, 2018, motion to admit into evidence previous testimony and exhibits. Plaintiffs seek to admit into evidence the prior testimony, and related exhibits, of two individuals: Lloyd Smith and former City Manager Maurice Jones, provided at previous hearings on May 2, 2017, October 4, 2017, and February 5, 2018.[2] Defendants oppose Plaintiffs' motion to admit the previous testimony of Lloyd Smith into evidence, but do not oppose Plaintiffs' motion to admit Maurice Jones' previous testimony.

Virginia Supreme Court Rule 2:804 excludes from the hearsay rule the former testimony of an individual who is deceased or otherwise unavailable as a witness, if that testimony was given under oath or subject to penalties of perjury and is offered in a reasonably accurate form. Even if such testimony is excepted from the hearsay rule, however, it must still be relevant to be admissible. *See* Va. R. Evid. 2:402(a). Relevant evidence "means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Va. R. Evid. 2:401.

The former testimony of Lloyd Smith is inadmissible because it is irrelevant to the resolution of this case. Plaintiffs seek to admit into evidence the testimony of Mr. Smith taken during a hearing in this case on May 2, 2017. That testimony pertains to an effort by certain Charlottesville residents to refurbish the statues of Robert E. Lee and Thomas J. Jackson during the 1990s, and alleged agreements with the City. This testimony is not relevant to this dispute. Plaintiffs initiated this action on the allegation that, in 2017, the Charlottesville City Council took actions in violation of Va. Code §§ 15.2-1812 and 15.2-1812.1. Thus, by their own Complaint,

[2] Plaintiffs' motion refers to hearings on May 2, 2018, October 4, 2017, and February 5, 2017. In fact the hearings occurred on May 2, 2017, October 4, 2017, and February 5, 2018.

Plaintiffs have made irrelevant any evidence regarding the refurbishment of the statues in the 1990s, as that evidence has no bearing on determining whether the City Council took actions in 2017 in violation of Va. Code § 15.2-1812 or § 15.2-1812.1. Mr. Smith's testimony regarding the refurbishment of the statues more than fifteen years ago is not probative evidence in evaluating the City Council's actions and the application of Va. Code §§ 15.2-1812 and 15.2-1812.1. Even if such testimony is not excluded under the hearsay rule, it should be excluded as irrelevant.

For these reasons, Plaintiffs' Motion to Admit into Evidence Previous Testimony and Exhibits should be denied with respect to Mr. Smith.

4. Motion to Amend the Complaint

Plaintiffs move, for a third time, to amend the Complaint to (1) account for the death of former Plaintiff Lloyd Smith and (2) change the costs associated with the installation and re-installation of the shroud coverings on the statues. As an initial matter, Plaintiffs move to amend the Second Amended Complaint, but this Court has not yet granted Plaintiffs leave to file the Second Amended Complaint, so the First Amended Complaint remains operative. In any event, Plaintiffs' motion to amend the Complaint does not comply with Rule 1:8 of the Rules of the Supreme Court of Virginia and should be denied on procedural grounds.

Plaintiffs' request that the Court "simply deem the Complaint amended, and this amended text denied by all Defendants" ignores the procedural requirement for filing an amended pleading. Virginia Supreme Court Rule 1:8 requires that any motion for leave to file an amended complaint "be accompanied by a properly executed proposed amended pleading, in a form suitable for filing." If the motion is granted, "the amended pleading accompanying the motion shall be deemed filed in the clerk's office as of the date of the court's order permitting such amendment." *Id.* Although Plaintiffs assert that "[f]iling a new revised Complaint and Answer for these small changes adds

surplus paper to an already overfull file," Pls.' Pretrial Mot. at 3 (Oct. 3, 2018), they ignore the obvious utility of filing amended pleadings.

The trial scheduled to take place in this case will revolve around Plaintiffs' claims as set forth in the operative complaint. So will review by the Virginia Supreme Court. It is imperative that the parties and the Court rely on the same, single document in prosecuting, defending, and deciding this case. Plaintiffs' concerns about surplus paper do not outweigh the interests of accuracy and fidelity of the record and proper preservation of the issues for appellate review. Because Plaintiffs failed to include a properly executed proposed amended pleading with their motion to amend, the Court should deny the motion. In the event the Court grants the motion, however, it should, pursuant to Rule 1:8, require Plaintiffs to file an amended pleading within 21 days after leave to amend is granted or in such time as the Court may prescribe.

On the substance of Plaintiffs' motion: *First*, Defendants agree that Lloyd Smith, who passed away since the filing of the original Complaint in this case, should be removed as a Plaintiff. But Defendants do not agree that the Complaint should be amended to include a sentence acknowledging Mr. Smith's death and his expired interest in this case. Any reference to Mr. Smith should simply be struck from the Complaint entirely in order to promote efficiency and to properly identify the Plaintiffs in this case. Plaintiffs have not identified any reason to keep references to Mr. Smith in the Complaint.

Second, Plaintiffs move to amend the Second Amended Complaint to change the dollar figure associated with the cost of installing and re-installing shroud coverings on the Lee and Jackson statues from $6,245.51 to $18,616.77. If the Court grants Plaintiffs leave to file the Second Amended Complaint, Defendants do not oppose this change. As a threshold matter, however, Defendants deny that the money spent on installing and maintaining the shroud coverings is

relevant to this case because Plaintiffs did not pay those costs. Defendants deny also that this amount accurately reflects the costs incurred in maintaining the shroud coverings. Further, Defendants maintain that, if the Second Amended Complaint is accepted for filing, Plaintiffs bear the burden of proving this amount at trial and the relevance of this cost to Plaintiffs' claims.

Finally, if the Court grants Plaintiffs' leave to file a Second Amended Complaint or any other amended pleading, Defendants reserve their right to file any and all appropriate responsive pleadings provided by the rules.

5. Motion in Limine

Defendants respectfully oppose Plaintiffs' October 3, 2018, Motion in Limine to exclude expert opinions regarding white supremacy, the Lost Cause, Jim Crow, segregation, and other Civil War memorials. Defendants oppose this request because the testimony regarding these topics is relevant to (1) whether the Robert E. Lee and Thomas J. Jackson statues are war memorials covered by Virginia Code § 15.2-1812 or § 15.2-1812.1 and (2) whether, as relevant to Defendants' equal protection defense, the statues were intended to convey a hostile message to racial minorities. *See Hubbard v. Commonwealth,* No. 2511-04-3, 2006 WL 461363, at *3 (Va. Ct. App. Feb. 28, 2006) ("To be admissible, 'expert testimony must be relevant. Evidence if relevant if it has any logical tendency, however slight, to establish a fact at issue in the case.'" (citation omitted)); *see also Tittsworth v. Robinson,* 252 Va. 151, 154 (1996) ("[E]xpert testimony is admissible in civil cases if it will assist the fact finder in understanding the evidence."); *Farley v. Commonwealth,* 20 Va. App. 495, 497 (1995) (reversing trial court when expert testimony was relevant and should have been admitted).

To be relevant, and thus admissible, evidence must have a "tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Va. R.

Evid. 2:401; *Payne*, 65 Va. App. at 217. The text of the statute at issue allows for the "erection of monuments or memorials for any war or conflict," Va. Code Ann. § 15.2-1812, or for "war veterans," *id.* at § 15.2-1812.1. Defendants' experts propose to offer directly relevant testimony by opining that the Lee and Jackson statues are not, and have never been, in fact "monuments or memorials for any war or conflict" or to "war veterans." *See, e.g.*, Expert Witness Designation of Louis Nelson, at 3 ("Professor Nelson will testify and opine that, when viewed in their specific historic and spatial context, these statues are not monuments to Charlottesville's veterans or to the Civil War."); Expert Witness Designation of Elizabeth Varon, at 2 ("Professor Varon will testify and opine that the cotemporaneous record at the time the statues were erected demonstrates that the statues were not memorials to the outcomes and consequences of the Civil War ... the statues were instead symbols of a divisive, contested, bigoted, exclusionary, and inherently political interpretation of Southern history."). Instead, the experts would testify, the Lee and Jackson statues are memorials to the Lost Cause narrative and symbols of white supremacy. *See, e.g.*, Expert Witness Designation of Sarah Beetham, at 2 ("She will opine that the statues were erected during the peak of the Jim Crow era and that they stand as monuments to white supremacy."); Expert Witness Designation of Grace Hale, at 2 ("She will opine that the statues were erected during the peak of Jim Crow and at one of the lowest moments for race relations in the United States, and that the statues stand as monuments to white supremacy."). Because the question of whether the statues are monuments or memorials to any of the wars or conflicts enumerated in Va. Code Ann. § 15.2-1812 remains an issue of fact for the Court, Defendants' expert opinions speak directly to that disputed issue, and are thus, relevant. Feb. 27, 2018, Hr'g Tr. 76:1–78:17.

Defendants' expert testimony is also relevant to Defendants' equal protection defense because it pertains to whether the Lee and Jackson statues sent a hostile message to racial

minorities when they were erected or send a hostile message to racial minorities today. Specifically, Defendants' expert opinions related to white supremacy, the Lost Cause, Jim Crow, segregation, and other Civil War memorials will show, *inter alia,* that (i) Lee and Jackson were, and remain, symbols of the Confederacy and white supremacy before and after their deaths, *see e.g.*, Expert Witness Designation of Elizabeth Varon, at 2 ("Professor Varon will testify and opine that Robert E. Lee had an important role in creating and perpetuating the 'Lost Cause' narrative and sought to restore the power of the Old South to white elites. ... Professor Varon will testify and opine to 'Stonewall' Jackson's image in the 'Lost Cause' narrative, and will opine that he has been historically linked to the defense of slavery and white power in the Old South."); (ii) the statues were intentionally placed in public space used and occupied by African Americans in an effort to intimidate them, *see e.g.*, Expert Witness Designation of Sarah Beetham, at 3 ("She will testify and opine that similar statues were intentionally erected in public spaces used and occupied by African Americans in an effort to intimidate them, just as the statues at issue in this case were erected in and around African American neighborhoods of Vinegar Hill and McKee's Row."); and (iii) those who participated in the erection and unveiling of the statues were associated with the Ku Klux Klan, *see, e.g.*, Expert Witness Designation of Grace Hale, at 2 ("She will also opine that the history of the KKK is intertwined with that of groups like, but not limited to, the Confederate Veterans, Song of Confederate Veterans, and the Daughters of the Confederacy.").

For these reasons, Plaintiffs' Motion in Limine should be denied.

6. <u>Motion to Amend August 13, 2018, Order</u>

Defendants oppose Plaintiffs' Motion to Amend the August 13 Order as it merely seeks to impose even further discovery burdens on the City Councilor Defendants. As Defendants have set out in the pending Motion for Reconsideration, Motion for a Protective Order to Stay the

Councilors' Depositions, and Opposition to Plaintiffs' Motion Compel, which is directly below, the Councilors are immune from suit and their communications regarding their legislative acts and functions are protected from disclosure by legislative privilege. Further, additional discovery is unnecessary, unduly burdensome, and serves no legitimate purpose, because Plaintiffs are already in possession of all non-privileged information relevant to this lawsuit. What the Councilors said about the statues at issue in this action, or what motivated them to vote the way they did, regardless of when such conversations or thoughts took place, is completely irrelevant to deciding whether Virginia Code §§ 15.2-1812 and 15.2-1812.1 applies to the statues. The Councilors' state of mind is relevant, if at all, only to this Court's statutory immunity ruling. *See* June 13, 2018, Letter Ruling 2–4 (discussing Virginia Code § 15.2-1405). But because the Councilors are entitled to common law legislative immunity, the question of statutory immunity is not relevant and need not be addressed.

Finally, the burden of expanding the time frame applicable to discovery is serious and will require the Court to amend the time for discovery and perhaps the date of the trial. Defendants will be required to conduct new searches for additional documents, to deploy teams to collect and review these additional documents to assess them for privilege and relevancy and to do this for each Councilor Defendant which will take a significant amount of additional time, thus throwing into question the current schedule for discovery, motions practice, and trial. The Court already set a reasonable timeframe for communications and there is no showing by Plaintiffs for the need to expand the scope set previously by the Court.

7. <u>Motion to Compel Discovery</u>

Plaintiffs' October 11, 2018, Motion to Compel Discovery should be denied because legislative privilege applies to the withheld documents and the Councilors should not be compelled

to turn over privileged materials. Plaintiffs' motion is misleading, cites no authority or argument to support the request to compel disclosure, and ignores the fundamental right of the Councilors to immunity for their votes and centuries-old protection from disclosure of documents related to their legislative actions. The Court should reject such attempts and enter a ruling recognizing that the Councilors are immune from suit regarding their votes and enjoy legislative privilege over documents relating to those votes.

At the outset, Plaintiffs' motion should be denied because the Councilors' assertions of legislative privilege are proper. As the Virginia Supreme Court has explained, the Speech or Debate Clause of the Virginia Constitution confers upon legislators an evidentiary privilege to protect the legislature from improper interference by the executive branch and the judiciary. *Edwards v. Vesilind*, 292 Va. 510, 524 (2016). The protections of the common law, which apply to local legislators like the Councilors, are at least as broad as those of the constitutional provision. *See Bd. of Supervisors of Fluvanna Cty. v. Davenport & Co.*, 285 Va. 580, 588 (2013); *Covel v. Town of Vienna*, 78 Va. Cir. 190, 201 (2009) ("As this privilege was rooted in the common law long before passage of the United States and Virginia Constitutions, its scope clearly extends beyond those elected representatives enumerated in the respective Constitutions."). This legislative privilege "protects against both compulsory testimony and *compulsory production of evidence*" so that legislators may "freely engag[e] in the deliberative process necessary to the business of legislating." *Edwards*, 292 Va. at 526 (emphasis added; citations omitted).

Legislative privilege specifically applies to "communications or functions integral to the legislative process." *Id.* at 526-28.[3] And, as stated above, it covers "documentary evidence,"

[3] This Court has already ruled that the Councilors' votes regarding the statues at issue in this action was a "legislative function." *See* June 13, 2018, Letter Ruling at 4.

including communications sent from a legislator to another legislator *and* a legislators' communications with constituents, staff, or third parties who have been engaged to assist the legislator in the performance of his or her legislative act or function. *Id.* at 526–27; 530–35. Furthermore, the privilege applies regardless of whether a legislator is a named party in the lawsuit. *See id.* at 526 ("Because litigation's costs do not fall on named parties alone, legislative privilege applies whether or not the legislators themselves have been sued." (quoting *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011))). That is to say, the shield of legislative privilege extends even where legislative immunity from suit itself does not. *See Covel*, 78 Va. Cir. at 199–204 (quashing subpoena sent to town councilmembers, who were not party to lawsuit, on legislative privilege grounds).

These decisions, and *Edwards* in particular, define the boundaries of legislative privilege in Virginia. The documents withheld by the Councilors fall well within those boundaries and, as a result, Plaintiffs' motion should be denied.

Documents withheld on account of legislative privilege include: (1) communications and documents sent between the Councilors discussing or relating to their legislative acts to vote to remove, relocate, dispose of, or shroud the statues at issue in this matter, or (2) communications and documents sent between a Councilor and constituents, staff, or third parties who were engaged to assist the Councilors' in the performance of their legislative acts. These documents are exactly the types of documents that are covered by legislative privilege.

Plaintiffs' motion should also be denied for the following independent reasons. *First*, it is misleading—the Court has never ruled on any assertions of legislative privilege. In fact, Plaintiffs fail to cite a single sentence from any ruling or order in which the Court discusses or mentions "legislative privilege." To be sure, this Court has ruled—incorrectly, in Defendants' view—that

the Councilors are not entitled to legislative immunity, *see* Aug. 27, 2018, Motion for Reconsideration of Denial of Legislative Immunity, and has stated that "if there's any information by or from the people who made the decision then I think they [Plaintiffs] should be entitled to that," June 19, 2018, Hr'g Tr. Vol. II 11:2–3. But those rulings do not extinguish the Councilors' right to assert legislative privilege over documentary evidence. *Second*, Plaintiffs' motion fails for the simple reason that Plaintiffs have not explained why legislative privilege does not apply to the Councilors' withheld documents. In fact, they have failed to cite a single legal authority that stands for the proposition that the Councilors do not have the right to invoke legislative privilege over documentary evidence in this matter. That failure is unsurprising, because, so far as Defendants are aware, *no such authority exists*. Moreover, Plaintiffs have made no showing as to why they need these privileged documents. Plaintiffs have not even identified any specific document that they believe to be improperly withheld. *And third*, Plaintiffs' motion should fail because the Councilors have already produced all non-privileged information relevant to this lawsuit. Indeed, to date, the Councilors have produced more than 1,000 documents totaling more than 2,200 pages of non-privileged, responsive material. Plaintiffs have no need for any additional discovery.

For these reasons, Plaintiffs' Motion to Compel Discovery should be denied.

8. <u>Motion for a View</u>

Defendants do not oppose Plaintiffs' Motion for a View of the Robert E. Lee and Thomas J. Jackson statues. However, if such a view is desired by the Court, Defendants request that Defendants' experts have the opportunity to attend the viewing and to address the Court during the viewing to the same extent as Plaintiffs' experts are permitted. Defendants welcome the opportunity for the Court to view the statues in person to understand the context in which the statues were erected and the perspective of those individuals negatively affected by them.

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CERTIFICATE OF SERVICE

I hereby certify pursuant to Rule 1:12 of the Rules of the Supreme Court of Virginia, that on October 19, 2018, the foregoing document was served by electronic mail and also by U.S. Mail, first-class, postage pre-paid, to the addresses given below:

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