IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ALBIN MELI, CHARLIE MELI,
and JEREMIE MELI;

PLAINTIFF,

vs.

CITY OF BURLINGTON, VERMONT,
BRANDON DEL POZO,
JASON BELLAVANCE, and
CORY CAMPBELL,

DEFENDANTS.

Civil Actions No. 2:19-CV-71

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

MABIOR JOK,

PLAINTIFF,

vs.

CITY OF BURLINGTON, VERMONT,
BRANDON DEL POZO,
JASON BELLAVANCE, and
JOSEPH CORROW,

DEFENDANTS.

Civil Actions No. 2:19-CV-70

PLAINTIFFS CONSOLIDATED MOTION FOR PUNITIVE SANCTIONS AND DEFAULT JUDGEMENT AGAINST DEFENDANTS BRANDON DEL POZO AND CITY OF BURLINGTON

NOW COMES, Plaintiffs, Albin, Charlie and Jeremie Meli (hereafter referred to as the "Meli brothers"), as well as Plaintiff Mabior Jok, and move the Court to issue sanctions against Defendants, Brandon del Pozo and the City of Burlington, and seek judgment and/or other relief to be entered in their favor pursuant Fed. R. Civ. P. 37(c), Fed. R. Civ. P. 60(b)(3) and the inherent powers of this Court under *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991).

In support of their position Plaintiffs submit the following:

Procedural History:

On December 12, 2019 Seven Days reported that Burlington Police Chief Brandon del Pozo admitted that on July 4, 2019, he created an anonymous Twitter Account "@WinkleWatchers". Burlington Police Chief Admits He Used an Anonymous Twitter Account to Taunt a Critic, *Courtney Lamdin*, Seven Days, December 12, 2019. See Exhibit 3 attached hereto.

According to Seven Days, Chief del Pozo used this Twitter account to send messages to a Burlington resident, Charles Winkleman.

Chief del Pozo subsequently deleted the Twitter account acknowledging to Vtdigger.org in an article dated December 13, 2019 that…. "I realized pretty quickly this was foolish and wrong, and I erased the tweets and deleted the account." Burlington police chief and mayor defend response to del Pozo's fake Twitter account, *Aidan Quigley and Grace Elletson*, Vtdigger.org, December 13, 2019. See Exhibit 4 attached hereto.

According to Vtdigger.org, based on Chief del Pozo's admissions to Mayor Weinberger in July, 2019, Eileen Blackwood, the attorney for the City of Burlington, conducted an internal investigation where Chief del Pozo was relieved of his badge and gun, ordered not to use social media and placed on administrative leave on or about August 2, 2019.

Chief del Pozo returned to duty as Chief of Police on or about September 10, 2019. See Exhibit 4.

On or about September 26, 2019, the Meli brothers, through Counsel, transmitted to Defendants' Counsel their First Interrogatories and Requests to Produce.

On or about October 11, 2019, Mabior Jok through Counsel, transmitted to Defendants his First Interrogatories and Requests to Produce.

On October 30, 2019 Chief del Pozo responded to the Meli brothers Interrogatories under oath. See Exhibit 1 attached.

Contained in Chief del Pozo's answers were:

Interrogatory #1; "Please identify all individuals who are answering or assisting in the answer of these interrogatories and requests to produce."

Chief del Pozo's response to Interrogatory #1 was; "[R]esponse: Chief Brandon del Pozo, Deputy Chief Jan Wright, Office of the City Attorney for the City of Burlington, Counsel for Defendants."

Interrogatory #6; "Identify all chat rooms, blogs, online forums, or social media or networking websites, applications, or services (including, but not limited to, video sharing, blogging, or messaging platforms) for which you have or had an account, or for which you have used someone else's account to conduct activity for the last 2 years. For each website, application, or service you identify, list:

A. The name of the website, application or service.

B. If applicable, the website address.

C. The name of the account holder.

D. The user name or handle for the account.

E. The email address(es) associated with the account, if any.

a. (sic) If the account has since been deleted, identify the account deleted and explain the rationale and basis for deletion.

Chief del Pozo's response was; "Response: Facebook, Twitter, Linkedin, Instagram. I am the account holder for each of these accounts. I also manage the Burlington Police Department's Twitter account. My handle for all of them is Brandon del Pozo. The Burlington Police Department's handle for twitter is @onenorthavenue. My email associated with these accounts is brandondelpozo@gmail.com Burlington Police Department's email is bdelpozo@bpdvt.org. None of the accounts have been deleted (emphasis added)."

Interrogatory #7: "For each legal action, whether a civil, criminal, or administrative proceeding in which you have been involved as either a party or a witness (other than this litigation), state the date and place such action was filed, and the name of the court; the name and address of each party involved; the docket number of such action; the name and address of each attorney involved; the nature of the legal action; and the disposition of the case.

Chief del Pozo answered with an objection but stated that he would provide an answer for the last two years which was as follows: "I was named as a witness and noticed for deposition in *Croteau v. The City of Burlington,* 5:17-CV-207 (D. Vt.). That case is currently pending and I never sat for the deposition…" Nowhere in this answer does Chief del Pozo reference the administrative investigation and suspension he received in July for his use of the "WinkleWatchers" Twitter account and his subsequent false statements to a Seven Days reporter in July, 2019.

On the final page of the Interrogatories and Requests to Produce Chief del Pozo signed his responses in front of a notary public where "he swore to the truth of the information contained in the foregoing."

On November 6, 2019 in the matter of *Jok v. City of Burlington et al*, Chief del Pozo answered Plaintiff's interrogatories and requests to produce as follows:

Interrogatory #1; "Please identify all individuals who are answering or assisting in the answer of these interrogatories and requests to produce."

Chief del Pozo's response to Interrogatory #1 was; "[R]esponse: Chief Brandon del Pozo, Deputy Chief Jan Wright, Office of the City Attorney for the City of Burlington, Counsel for Defendants."

In Interrogatory #4, which is identical to Meli Interrogatory #6, Chief del Pozo answered with the same response as his response in Meli's interrogatory #6. See Exhibit 2 attached hereto.

In Interrogatory #5 Plaintiff, Mabior Jok, asked: "For each legal action, whether a civil, criminal proceeding in which you were a defendant or force was used in detaining the defendant, or administrative proceeding in which you have been involved as either a party or a witness (other than this litigation), state the date and place such action was filed, and the name of the court; the name and address of each party involved; the docket number of such action; the name and address of each attorney involved; the nature of the legal action; and the disposition of the case."

Chief del Pozo answered Jok's Interrogatory #5 with the same answer he gave in the Meli brother's Interrogatory #7. Exhibit 1 and Exhibit 2.

On November 6, 2019 on the final page of the Interrogatories and Requests to Produce Chief del Pozo signed his responses in front of a notary where "he swore to the truth of the information contained in the foregoing." Exhibit 2.

At no time after providing his answers to Plaintiffs in either of these two actions did Chief del Pozo or the City of Burlington supplement Chief del Pozo's responses. It is only through the reporting of Seven Days and other news outlets that Plaintiffs became aware of Chief del Pozo and the City of Burlington's actions surrounding the Twitter account and Chief del Pozo's August, 2019 administrative suspension by the City of Burlington.

GENERAL LEGAL STANDARDS

Inherent Authority of the Court and Fed. R. Civ. P. 37: A district court has inherent power to sanction a party who "has willfully abused the judicial process or otherwise conducted litigation in bad faith." *Secrease v. Western & Southern Life Ins. Co.*, 800 F.3d 397 (7th Cir. 2015); *Salmeron v.Enterprise Recovery Systems, Inc.*, 579 F.3d 787, 793 (7th Cir.2009); see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 48-49 (1991); *Greviskes v. Universities Research Ass'n*, 417 F.3d 752, 758-59 (7th Cir.2005). A district court may also dismiss a case for discovery violations or other egregious conduct in litigation under Federal Rule of Civil Procedure 37 or under the inherent authority of the district court. See *Greviskes*, 417 F.3d at 758-59; *White v. Williams,* 423 Fed.Appx. 645 (7th Cir. 2011)("Dismissal may be appropriate when a party has shown a lack of respect for the court or proceedings.").

Under Rule 37, the District Court may impose a wide range of remedies including dismissal and awarding of attorney's fees. See Fed. R. Civ. P. 37(b)(2) and (c). Although Rule 37 requires violation of a judicial order before a court imposes sanctions, "[c]ourts can broadly interpret what constitutes an order for purposes of imposing sanctions" and a formal order is not

required. *Quela v. Payco-General Amer. Credits, Inc.*, 2000 WL 656681, at *6 (N.D.Ill. May 18, 2000)(collecting cases).

As explained by Chief Judge Castillo in *Quela*:

> The order, or equivalent, serves as notice to a disobedient party that sanctions may be imposed. In this case, although there has been no specific court order, we believe such an order is not required to provide notice that parties must not engage in such abusive litigation practices as coercing witness testimony, lying to the court, and tampering with the integrity of the judicial system. Because all litigants are presumed to know that contumacious conduct of this sort is absolutely unacceptable, we can properly consider the sanctions available under Rule 37. *Quela*, 2000 WL 656681 at *6 citing *United States v. Golden Elevator, Inc* ., 27 F.3d 301, 302 (7th Cir.1994)("Lawyers and litigants who decide that they will play by rules of their own invention will find that the game cannot be won."); *Hal Commodity Cycles Management v. Kirsh*, 825 F.2d 1136, 1139 (7th Cir.1987)("The Federal Rules of Civil Procedure, as well as local rules of court, give ample notice to litigants of how to properly conduct themselves."). Id.

The reason for this broad interpretation of Rule 37 is that all offending parties are presumed to know that tampering with the integrity of the judicial system, lying to the court, or engaging in other deceptive or abusive practices are absolutely unacceptable regardless of the absence of a specific court order to the contrary. Id.; see also *Lightspeed Media Corp. v. Smith*, 2015 WL 3545253, *5 (S.D. Ill. 2015).

Finally, in assessing whether judgement is an appropriate sanction under the inherent powers of the Court, the Court need not find a party's misconduct caused its opponent any prejudice. See *Barnhill v. United States*, 11 F.3d 1360, 1368 (7th Cir. 1993)("We continue to eschew grafting a requirement of prejudice onto a district court's ability to dismiss or enter

judgment as a sanction under its inherent power."); *Raziev v. Compass Truck Sales, LLC*, 2016 WL 1449933, at *9 (N.D. Ill. Apr. 13, 2016).

Fed. R. Civ. P. 60(b)(3): Fed. R. Civ. P. 60(b)(3) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:...fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). In ascertaining whether a party has been prevented from fully and fairly litigating its case, the Court need not find that the fraud would necessarily have altered the outcome of the trial so long as the party is prejudiced in the presentation of its case. *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995)("[I]t is unnecessary for Lonsdorf to establish that the misrepresentation altered the outcome of the trial. It is sufficient that prejudice has occurred.").

Only the most serious sanctions will prohibit this type of conduct from being repeated.

Plaintiffs cannot find any legal rationale for the acts of Defendants Chief del Pozo and the City of Burlington in assisting Chief del Pozo in his false discovery responses. Based on the Defendants' own admissions, both the Chief and the City knew of Chief del Pozo's "WinkleWatch" Twitter account in July, 2019, knew that he had deleted the same, knew that Chief del Pozo had lied to a Seven Days reporter when he denied ownership of the account in July, 2019 and failed to disclose, that on or about August 2, 2019, when the City of Burlington had administratively suspended Chief del Pozo for his actions after an internal investigation by the City Attorney. However, on October 30, 2019 when asked direct questions regarding his social media accounts and whether he was subject to any administrative proceedings, del Pozo,

with the advice of counsel, including the same counsel who conducted the investigation in July, failed to identify the deleted Twitter account, lied when he stated that none of his social media accounts had been deleted, and failed to disclose his administrative investigation and suspension.

Further, just a week later in the case of Jok v. City of Burlington, Chief del Pozo was again provided with an opportunity to provide an accurate account of his social media accounts and his involvement in administrative proceedings, yet again, he failed to disclose the administrative investigation and suspension, the existence of the "WinkleWatch"Twitter account and again lied about the deletion of any of his social media accounts.

Since serving the discovery answers to Plaintiffs on or about October 30, 2019, there have been zero attempts by Defendants to correct their responses as required under FRCP 26(e).

This troubling procedural history raises the question; what would have happened if Seven Days had not uncovered this information on their own? The New Mexico case of *Sandoval et al v. Martinez et al*, 780 P.2d 1152 (N.M.App. 1989) analyzes such a scenario:

> "...One whose false reports conceals the existence of discoverable information may expect to evade sanctions. It is not enough to say that such a party will gain no advantage if the lie is uncovered. The sanction must be harsh enough that despite the low probability of getting caught, the risk of punishment outweighs the prospect of competitive advantage through lying. Although the possibility of a prosecution for perjury could be a major deterrent, we doubt that busy prosecutors will be interested often enough to make that sanction effective in encouraging veracity in discovery responses. The court also might impose a fine or even imprisonment as punishment for contempt; but we do not see why that penalty is preferable to a dismissal. A dismissal is directed more precisely at the advantage the liar hoped to gain by his falsehood. In addition, contempt penalties may be inadequate to protect the party who received a false response; we must consider the possibility that the injured party, even though it has uncovered some falsehoods, may be disadvantaged by other lies still concealed by its adversary. "We are not only concerned with the constitutional right of thee defaulted party to an opportunity to be heard on the merits, but

> also, with the equally fundamental constitutional right of the party who seeks discovery to a hearing which is meaningful." *Sandoval* at 1158-1159 quoting *United Nuclear Corp. v. General Atomic Co.,* 629 P.2d. 231 (N.M. 1980).

It perverts justice when a party to a civil action provides incomplete and false responses to rationally based discovery requests. It is a fraud perpetrated on the Court when a chief law enforcement officer, with a masters degree in criminal justice and with assistance from counsel, including the City of Burlington legal department, knowingly provides false answers under oath to legitimate discovery questions. The discovery schedule has mediation set for February in the Meli case and subsequently in the Jok case. But for the work of Winkleman on his blog, and Seven Day's and Vtdigger.org reporting, the Plaintiffs would have entered into mediation operating under a false set of facts. Now, settlement discussions are irreparably damaged by the fact that Plaintiffs' counsel must question the honesty of Defendants, even under oath, as well as Defendants' legal team's dedication to providing the Plaintiffs with accurate information. There is no way now to restore the good faith and candor that should allow parties to uncover the facts necessary to fully prepare their case.

Given the facts set forth here, judgement for the Plaintiffs is the appropriate option in addition to monetary sanctions in both cases. The Court must sanction Defendant Brandon del Pozo and the City of Burlington for their deliberate and deceitful actions and send a message across the State of Vermont that the behavior by those who have violated the public's trust while they sit in a position of power, must be addressed by the most severe sanctions available.

WHEREFORE, Plaintiffs request the following relief:

1) Set a hearing in this matter to consider Plaintiff's motion and order Defendant's Chief del Pozo and the City of Burlington to appear.
2) That the Court grant default judgement for Plaintiffs against the City of Burlington and Chief Brandon del Pozo on the matter of liability leaving the sole issue of damages to the jury as it pertains to these two defendants;
3) That the Court award a punitive sanction against the City of Burlington and Brandon del Pozo in the amount of $50,000 in both dockets;
4) The Court award reasonable attorneys fees incurred in discovering, researching and enforcing Defendants' conduct in both cases; and
5) Such other relief as is just under the circumstances.

DATED at Brattleboro, Vermont, this 16th day of December, 2019.

ALBIN MELI, CHARLIE MELI, AND JEREMIE MELI

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DATED at Pittsford, Vermont, this 16th day of December, 2019.

MABIOR JOK

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