STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF DORCHESTER	)	
John Trenton Pendarvis,	)	
	)	Civil Action No. 2021-CP-18-1486
Plaintiff,	)	
	)	
v.	)	
	)	**NOTICE OF MOTION AND MOTION TO ALTER OR AMEND ORDER AND/OR MOTION TO RECONSIDER**
L.C. Knight, in his official capacity as Dorchester County Sheriff; Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division; Hugh E. Weathers, in his official capacity as the South Carolina Commissioner of Agriculture; and John Doe(s),	)	
	)	
Defendants.	)	
	)	

TO: THE HONORABLE MAITE MURPHY

PATRICK MCLAUGHLIN AND C. BRADLEY HUTTO,
COUNSEL FOR PLAINTIFF

G. WADE COOPER AND GEORGE B. SMYTHE,
COUNSEL FOR DEFENDANT KNIGHT

WILLIAM H. DAVIDSON, II,
COUNSEL FOR DEFENDANT WEATHERS

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division (hereafter referred to as "Defendant SLED"), will move before the Honorable Maite Murphy, at such time and place as may be set by the Court, for an Order, pursuant to Rule 59(e), SCRCP, reconsidering, altering and/or amending the Order on Plaintiff's Motion to Compel

Discovery from Defendant Keel and Plaintiff's Motion to Determine Sufficiency of Defendant Keel's Responses to Plaintiff's Requests for Admission as filed on February 28, 2023. The Defendant Keel's counsel received written notice of entry of the Order on February 28, 2023.

The Defendant SLED's motion is based on the following:

1. As a threshold point, the Court is requested to alter or amend its Order filed February 28, 2023, by clarifying the correct party against which that Order is addressed. The Plaintiff sued Mark Keel, in his official capacity as Director of the South Carolina Law Enforcement Division, for claims brought exclusively under the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-70(c) provides: "when bringing an action against a governmental entity under the provisions of this chapter, shall name as a party defendant only the agency or political subdivision for which the employee was acting." S.C. Code Ann. § 15-78-70(c). Thus, the proper Defendant would be the South Carolina Law Enforcement Division. In his Complaint, the party-defendant is identified in the caption as "Mark Keel, in his official capacity as Director of the South Carolina Law Enforcement Division." Throughout the body of the Complaint, the Plaintiff refers to the Defendant as the "Defendant SLED." In actuality, under S.C. Code Ann. § 15-78-70(c), the proper defendant is SLED. Clearly, the Plaintiff has not sued Director Keel individually. Yet, throughout the Court's February 28, 2023 Order, the Court refers to the defendant only as "Keel" which is incorrectly suggestive that Mark Keel individually has been sued and that the Court's Order and findings are directed against Mark Keel individually or personally. To accurately reflect who the proper party is and against whom the Order is directed, the Court is respectfully requested to alter the Order to reflect the proper party as the Defendant SLED and to make it clear that this Order is not directed at Mark Keel individually. Mark Keel individually was not personally or directly involved in the discovery process, and as a result, the

Order creates the misconception, or at the very least is misleading, to suggest that the Order, its findings, and the sanctions are directed against Mark Keel individually or personally. That misconception was created by the manner in which the Order was prepared initially by Plaintiff's counsel, and respectfully, should be corrected by an amended order.

2. In its February 28, 2023 Order, the Court makes the following finding: "Keel's conduct regarding discovery in this case has been dilatory, prejudicial, willful, intentional, and in bad faith and that his responses have been false, misleading, and incomplete." (Order, p. 21). Respectfully, the evidence in the record does not support such a harsh finding. The record reflects that the Defendant SLED timely responded to the Plaintiff's sets of interrogatories, requests for production, and requests for admissions. Those discovery requests were served with the Complaint on September 1, 2021.[1] The Defendant SLED had 45 days to serve responses. Those responses were due by October 15, 2021. The Defendant SLED timely served the Responses to Requests for Admissions on October 15, 2021. By email dated October 15, 2021, counsel for the Defendant SLED requested and was granted a 21-day extension to provide responses to the sets of interrogatories and requests for production. On November 5, 2021, the Defendant SLED timely served its responses to the sets of interrogatories and requests for production, along with documents Bates-numbered SLED-001 through SLED-168 and three body-worn camera videos.

As the foregoing timeline reflects, the Defendant SLED provided timely responses. To recap, the responses to the requests for admissions were timely served on October 15, 2021, and the responses to the interrogatories and requests for production were timely served on November

[1] The filed affidavit of service makes no mention of the Plaintiff's Requests for Admissions being served; however, upon information and belief, they were received with the Complaint.

5, 2021, based on the 21-day extension. The Defendant SLED also produced 168 pages of documents including the Dorchester case file and bodycam videos. The Defendant SLED objected to the production of personnel files for unnamed persons and alternatively requested that those personnel files, if required to be produced, be subject to a confidentiality order to protect non-parties. That was a reasonable and typical request in addressing personnel records, which typically include financial, insurance, and personal information. The Defendant SLED also objected to producing the Insurance Reserve Fund's claims file based on the privilege established by S.C. Code Ann. § 1-11-140(G), but the Defendant SLED also indicated that "there are likely no documents responsive to this request" because "IRF's first notice of this claim was receipt of the lawsuit from SLED on August 31, 2021, and it was assigned to the undersigned counsel on September 1, 2021." Both of the objections were legitimate and reasonable ones to assert. The privilege based on S.C. Code Ann. § 1-11-140(G) has not previously been addressed by the appellate courts but, as discussed further below, does protect the claims files of the IRF while litigation is pending.

In sum, this history does not support the Court's finding that the Defendant SLED's conduct in discovery has been "dilatory, prejudicial, willful, intentional, and in bad faith." The Defendant SLED served timely responses. There are only two objections at issue. Importantly, the Defendant SLED has not violated any court order – either in this litigation or in the Marion County litigation. The Court was not presented any other history of the Defendant SLED's conduct in discovery. Likewise, the Court's finding that the Defendant SLED's "responses have been false, misleading, and incomplete" is also without an evidentiary basis on this record. While the Court found that the two requests for admissions should have been admitted, a fair reading of those requests does not exhibit great clarity and the Defendant SLED did provide

qualified responses, as permitted under Rule 36, SCRCP. There are no other discovery responses – except for the two objections – with which the Court found any issue. The broad and generalized finding that the responses have been "false, misleading, and incomplete" is unfair and not supported by the record. The Court is respectfully requested to reconsider its findings in this regard.

3. Based on the extension granted on October 15, 2021, the Court ruled that "failures to fully and adequately respond waives his objections to Plaintiff's initial interrogatories and requests for production." (Order, p. 27). The Court found that the Plaintiff's counsel conditioned the extension on "receipt of full and complete answers" by the end of the 21-day extension which was November 5, 2021. As discussed above, on that date, the Defendant SLED did serve the responses to the interrogatories and requests for production, but did raise the two objections addressed in the Court's Order. The Court then determined that "[b]y failing to meet the condition of the extension, Keel's responses are untimely." (Order, p. 27). In order for there to be a waiver, the relinquishment of the right must be knowing and voluntary. The so-called condition stated in the October 15, 2021 email from Brad Hutto makes no mention of a waiver of any objections. If that were intended to be a condition for the 21-day extension, it should have been specifically and clearly articulated. The Court is therefore respectfully requested to reconsider the waiver issue and address the fact that the "condition" by Plaintiff's counsel made no explicit mention of a waiver of objections where they may be appropriately asserted. The Court is also asked to reconsider the finding that the responses served on November 5, 2021 were "untimely" in that that is the date that the 21-day extension expired. There is no basis for finding that the responses were untimely.

4. The Court is also respectfully requested to reconsider its reliance on discovery in the Marion County litigation over which this Court has no jurisdiction and where a motion to compel was withdrawn by the Plaintiff. With respect to the Marion County litigation, the Court references a "March 19, 2019 motion to compel hearing in the Marion case" and a "November 9, 2019 Rule 11 letter." (Order, p. 6). The Marion County lawsuit was not filed until September 26, 2019, and the Plaintiff did not file his motion to compel in that case until March 12, 2021. In addition, that motion to compel was fully resolved when it was learned that the Plaintiff's counsel contended that he did not receive the initial 79 pages of that document production. In the Marion County litigation, the Defendant SLED produced on July 28, 2020, a total of 186 pages of documents which were Bates-numbered SLED-001 through SLED-186. In the responses to the requests for production, the documents produced were identified as follows:

> SLED file (Bates Number SLED-001 through SLED-079)
> Investigative Report of Glenn Wood (Bates Number SLED-080 to SLED-185)
> Documents/video/audio compiled by Glenn Wood on CD (Bates Number SLED-186)

Thus, the Plaintiff was aware of what was being produced. If indeed the initial 79 pages were "missing" from the production, which was made electronically as permitted by the Supreme Court orders that governed discovery during the height of the COVID-19 State of Emergency which was ongoing in July 2020, the Plaintiff's counsel could have simply asked for that production to be re-sent or to be mailed in paper format. That was not requested. The motion to compel does not state that the Plaintiff was missing the documents Bates Numbered SLED-001 through SLED-079. If that had been clarified, it could have been easily rectified. That is ultimately what occurred prior to a motion hearing scheduled for March 10, 2022. The Plaintiff's counsel was ultimately re-sent the full 168 page production on that date. That fully resolved the Plaintiff's motion to compel in the Marion litigation. This Court is mistaken in

suggesting that there were any other issues in resolution of the motion to compel in the Marion litigation. The Plaintiff ultimately withdrew his motion, and no hearing was held before Judge Craig Brown. Consequently, there was no order ever issued by Judge Brown addressing that motion to compel.

The discovery in the Marion litigation should have had no bearing on the Court's analysis, findings, and conclusions in the case at bar. In addition, the Marion litigation is and has been stayed by a pending appeal before the Court of Appeals. A Notice of Appeal was filed November 6, 2019, and that appeal is still pending before the Court of Appeals. Therefore, the Marion County litigation was subject to a stay at any rate, although the Defendant SLED did proceed in good faith to provide responses to discovery in July 2020, despite that stay. Certainly, the Defendant SLED's actions in the conduct of discovery in the Marion County litigation should not have been considered by this Court, and even if appropriately considered, does not support the Court's findings, conclusions, and sanctions in the case at bar.

The Court is also mistaken in other findings made with respect to the Marion County litigation. In particular, the Court in footnote #2 is critical that the Defendant SLED did not produce email correspondence to and from Judge Diane Goodstein and her law clerk in the Marion County litigation. However, Judge Goodstein had no dealings with the Marion County litigation or the allegations in the Marion County Complaint. The preliminary injunction motion in that case was heard and adjudicated by Judge William Seals. The Defendant SLED objected to producing records pertaining to the Dorchester dispute in answers to interrogatories, and those objections have not been adjudicated by the court in the Marion County litigation as improper. With respect to the Judge Goodstein-related emails, the Court also made a finding that "these emails, responsive to discovery requests in this case, were never actually provided to the Plaintiff

until they were turned over in the Marion case just prior to the motion to compel there." (Order, p. 7). That finding is mistaken. The Judge Goodstein-related emails were not part of the so-called "missing 79 pages" in the Marion County litigation (documents Bates-numbered SLED-001 to SLED-079 in that case). In fact, those emails were actually part of the document production in the Dorchester litigation; those emails are Bates numbered SLED-095 to SLED-101 and SLED-140 and were produced in *this case* on November 5, 2021.

In its February 28, 2023 Order, the Court also makes a finding as follows: "The record shows that the 79-missing pages of discovery originally identified in the Dorchester County case, was not actually produced until it was produced in response to the Marion County motion to compel hearing." (Order, p. 8). This finding is also mistaken in several respects. First, the so-called "missing 79 pages" in the Marion County litigation (documents Bates-numbered SLED-001 to SLED-079 in that case), were never referenced, identified, or produced in the Dorchester litigation, although many of those records are duplicative of documents that were also produced in the Dorchester litigation. Second, there was no "motion to compel hearing" held in the Marion County case. The hearing scheduled for March 10, 2022 was cancelled by the Plaintiff's counsel. Additionally, the Court writes: "Keel's own actions have 'intertwined' the discovery conduct of the two cases." (Order, p. 8). That is not correct. The Defendant SLED did not reference the discovery in the Marion case as being responsive to the Dorchester case. To the contrary, the Defendant SLED attempted to keep the two lawsuits separate because they involve two different plots of hemp, raised separate and distinct factual and legal issues, and were handled differently. Thus, contrary to the Court's finding, the Defendant SLED did not "intertwine" the two cases. Instead, the Plaintiff did so, and the Court adopted that approach in error.

5. In its February 28, 2023 Order, the Court addressed the Defendant SLED's objection to the production of personnel files of SLED agents who are not parties to the case. The objections raised are not unusual, invalid, or unreasonable. Contrary to the Court's finding, the objections are not "boilerplate." The Defendant SLED raised a valid objection that the request for personnel records was "not proportional to the allegations in the Complaint" and are "not tailored to any specific types of information contained in personnel files nor is it limited in time and scope." The Court never addressed those objections. Moreover, given that the Court has ordered the production of personnel records, the Court is respectfully asked to amend the order to include language making those records confidential and allowing the Defendant SLED to redact personal identifiers, insurance information, financial information, and such personal information that has no pertinence to the litigation. The Supreme Court has issued orders requiring the redaction of personal identifiers and information.

6. In its February 28, 2023 Order, the Court overruled the Defendant SLED's objection as to the production of the IRF claims file. The response states that "there are likely no documents responsive to this request" because "IRF's first notice of this claim was receipt of the lawsuit from SLED on August 31, 2021, and it was assigned to the undersigned counsel on September 1, 2021." The Court disregarded that response. The Court also misconstrued the assertion of work-product privilege. As the Defendant SLED argued, the South Carolina General Assembly has provided for a statutory work-product privilege *specifically for the IRF's claims files*. S.C. Code Ann. § 1-11-140(G) provides: "Documentary or other material prepared by or for the Insurance Reserve Fund in providing any insurance coverage authorized by this section or any other provision of law which is contained in any claim file is subject to disclosure to the extent required by the Freedom of Information Act only after the claim is settled or finally concluded

by a court of competent jurisdiction." S.C. Code Ann. § 1-11-140(G).[2] In addressing that privilege, the Court writes: "the plain language of S.C. Code Ann. § 1-11-140(g) shows the provision Keel cites only provides protection from disclosure 'to the extent required by the Freedom of Information Act.'" (Order, pp. 17-18). The Court, however, did not consider the language stating "only after the claim is settled or finally concluded by a court of competent jurisdiction," which keeps the IRF's claims files privileged until after the litigation is settled or concluded. Here, the Plaintiff was asking for claims file information of litigation that had been filed simultaneously with the service of the requests for production. The litigation was not settled or finally concluded. Thus, the Court's ruling is in contravention of a statutory privilege created by statute by the General Assembly. The Court is respectfully asked to reconsider its ruling and to give full effect to the entirety of the language contained in S.C. Code Ann. § 1-11-140(G). The Court is also respectfully requested to conclude that the Defendant SLED's assertion of the statutory privilege under S.C. Code Ann. § 1-11-140(G) was not made in bad faith. There is no appellate authority construing the S.C. Code Ann. § 1-11-140(G) privilege, and accordingly, the Defendant SLED was not acting in bad faith or with some improper motive in asserting a privilege that the General Assembly specifically created to protect the IRF claims files from discovery during the course of ongoing litigation.

7. The Court is also asked to respectfully reconsider the Court's rulings on the two requests for admissions. The Court's ruling to declare the requests as admitted is not consistent with the evidence presented to the Court in the Plaintiff's attempt to prove the truth of the two requests for admissions at issue. The evidence reflects that Adam Whitsett, General Counsel for

[2] S.C. Code Ann. § 1-11-140(G) is part of the enabling legislation that created and established the Insurance Reserve Fund.

SLED, contacted the law clerk of Judge Diane Goodstein on September 11, 2019, to request a meeting with Judge Goodstein to discuss a proposed order entitled "Hemp/Marijuana Seizure Order and Order of Destruction" as well as the "Sworn Application for Hemp/Marijuana Seizure Order and Order of Destruction" all of which was also provided to the law clerk with attachments. The proposed order did authorize the seizure and destruction of the Plaintiff's hemp crop, but the order also provided the opportunity for a post-seizure hearing. Thus, the proposed order, if signed by Judge Goodstein, would have given the Plaintiff a post-seizure hearing upon request. The evidence further reflects that the law clerk for Judge Diane Goodstein informed Adam Whitsett that Judge Goodstein was not willing to sign the proposed order. Contrary to this Court's ruling, Judge Diane Goodstein did not hear or adjudicate the merits of any matter.

8. The Court is also respectfully requested to reconsider the application of *Sessions v. Withers*, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997), in which the Court of Appeals addresses how and when a court may award attorney's fees under Rule 37, SCRCP. The Court of Appeals explained that attorney's fees may be awarded only after the requesting party is successful in providing the truth of the matter raised in the request for admission. That is not done by way of a pre-trial motion but rather after the requesting party proves the truth of the request for admission at trial or alternatively by a post-trial motion. There is no authority under Rule 37(c) to allow a court to determine the truth of disputed facts *prior to trial* or without there at least being a dispositive ruling by way of summary judgment. If the Court orders certain requests for admissions to be deemed admitted by way of a pre-trial Rule 37 motion, the Court is determining facts and is in essence granting partial summary judgment on those factual questions. That is clearly not consistent with the Court of Appeals' decision in *Sessions*.

9. The South Carolina Supreme Court has held that "in determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974). In awarding sanctions against the Defendant SLED, the Court respectfully has not made findings on each of those factors. As for the discovery posture, as previously discussed, the Plaintiff's Motion to Compel addressed initial written discovery that was served with the Complaint on September 1, 2021, and was timely answered by the Defendant SLED on October 15, 2021 and November 5, 2021 (the latter consistent with the 21-day extension granted). The Plaintiff has not demonstrated any significant degree of prejudice to warrant sanctions in that the motion pertains to two vaguely phrased requests for admissions, two objections that were asserted as to personnel files and the IRF claims file, and the absence of three of six verifications. Moreover, as discussed in detail in paragraph 2 above, the history of this litigation does not support the Court's finding that the Defendant SLED's conduct in discovery has been "dilatory, prejudicial, willful, intentional, and in bad faith." Moreover, there is no court order that has been violated by the Defendant SLED in either this litigation or the Marion litigation. As a result, the Court is respectfully requested to reconsider the finding that sanctions are warranted.

10. On the amount of the attorney's fees awarded, the Court outlined the factors to be considered in an award of attorney's fees, but the Court made no findings as to those factors. Additionally, the Court received no evidence and made no findings that the awarded $500 hourly rate for fees was a reasonable rate. Finally, the Court also requested and received an Amended Affidavit of Attorney's Fees on February 28, 2023, which is the same date the Order was issued.

The Court did not provide the Defendant SLED an opportunity to oppose or otherwise address that new affidavit.

11. During the October 31, 2022 hearing, the Plaintiff contended that the hearing addressed the Motion to Compel filed on April 11, 2022, as well as additional grounds that were not raised by any subsequent motions but rather by "memoranda" that were filed at later dates. There was only one Motion to Compel filed, and that was the only motion that was listed on the motions docket – that being the Motion to Compel filed April 11, 2022. When an objection was raised to the Court hearing new issues that were not raised by motion but rather were submitted in later filed "memoranda," the Court indicated that it was only adjudicating the issues actually raised in the April 11, 2022 Motion to Compel; yet, the Order went beyond what was raised by motion.

The Defendant SLED's motion is based upon the pleadings filed in this case; the Order on Plaintiff's Motion to Compel Discovery from Defendant Keel and Plaintiff's Motion to Determine Sufficiency of Defendant Keel's Responses to Plaintiff's Requests for Admission filed February 28, 2023; the rules of court; and such other matters as may be properly presented to the Court at the time of the hearing.

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March 10, 2023

ORAL ARGUMENT REQUESTED