Virginia:
In the Circuit Court of the City of Richmond, John Marshall Courts Building

CONNIE CLAY,	)	
	)	
Plaintiff,	)	**Case No.: CL24-929**
	)	
v.	)	
	)	
CITY OF RICHMOND,	)	
	)	
and	)	
	)	
PETULA BURKS,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

On February 18, 2026, came the parties, both by counsel, on Defendants' "Motion for Attorneys' Fees Related to Defendants' Motion *in Limine* to Exclude Plaintiff's Economic Expert, Robert W. Cook" filed on December 10, 2025, Plaintiff's "Motions for Spoliation under Va. Code § 8.01-379.2:1 and Plaintiff's Third Motion to Compel under Rule 4:12(b)" filed on November 11, 2025, Plaintiff's "Motion to Reschedule Continuation of Deposition of Petula Burks" filed on November 12, 2025, Plaintiff's "Motion for Entry of a Pretrial Scheduling Order" filed on February 2, 2026, and Plaintiff's "Motion to Compel Attendance at Settlement Conference" filed February 2, 2026. Having considered the arguments of the parties, the Court rules as follows:

I. Plaintiff's Motion for Entry of a Pretrial Scheduling Order

On September 18, 2025, and November 18, 2025, the Court ordered the parties to file two new agreed pretrial scheduling orders, one for the liability phase and one for the remedies phase,

in light of the continuance and bifurcation of the trial. Because the parties have now submitted two agreed pretrial scheduling orders and the Court has entered both[1], this motion is **MOOT**.

II. Defendants' Motion for Attorneys' Fees Related to Defendants' Motion *in Limine* to Exclude Plaintiff's Economic Expert, Robert W. Cook

On December 10, 2025, came Defendants on their Motion for Attorneys' Fees Related to Defendants' Motion *in Limine* to Exclude Plaintiff's Economic Expert, Robert W. Cook. The underlying Motion *in Limine* was brought before the Court on September 18, 2025, and in the Court's Order of September 18, 2025, the Motion was denied in light of the Court's *sua sponte* continuance of the trial. In doing so, the Court left open the option for Defendants to move for attorneys' fees incurred in the bringing of that motion based upon Plaintiff's delayed disclosure of her economic expert's report. Because Plaintiff failed to make this disclosure within the deadlines set forth in the original pretrial scheduling order, and that required the bringing of these motions, the Court **FINDS** that sanctions are appropriate under Rule 4:12(b)(2). Although there was partial disclosure of the expert by Plaintiff prior to the passing of the disclosure deadline, "[a] [p]arty is not relieved from its disclosure obligation regarding expert testimony simply because other party has some familiarity with expert witness or has had opportunity to depose expert." *John Crane, Inc. v. Jones*, 274 Va. 581, 592 (2007). Furthermore, "[t]here is little point in issuing such orders [pretrial scheduling orders] if they amount to nothing more than a juristic bluff, obeyed faithfully by conscientious litigants, but ignored at will by those willing to run the risk of unpredictable enforcement." *Rahnema v. Rahnema*, 47 Va. App. 645, 658, 626 S.E.2d 448, 455 (2006).

Accordingly, Defendant's Motion for Attorneys' Fees is **GRANTED**.

[1] The pretrial scheduling orders were entered on February 18, 2026.

Defense counsel submitted their affidavits in support of the reasonableness of their fees, the total amount of which was $13,216.00. Rule 4:12(b)(2), requires that the Court "must require the party failing to obey the order or the attorney advising him or both to pay the *reasonable* expenses..." (emphasis added) The Supreme Court of Virginia has identified seven, non-exclusive, factors for courts to consider when weighing the reasonableness of an award of attorney's fees, and those include:

> (1) the time and effort expended by the attorney, (2) the nature of the services rendered, (3) the complexity of the services, (4) the value of the services to the client, (5) the results obtained, (6) whether the fees incurred were consistent with those generally charged for similar services, and (7) whether the services were necessary and appropriate. *Lambert v. Sea Oats Condo. Ass'n, Inc.*, 293 Va. 245, 254, 798 S.E.2d 177, 183 (2017) (internal alterations omitted).

Denton v. Browntown Valley Assocs., 294 Va. 76, 88 (2017).

Ultimately, the Court has discretion in determining whether the amount of attorney's fees sought is reasonable and if it would otherwise be unjust to grant them. *Ingram v. Ingram*, 217 Va. 27, 29 (1976). The Court having considered the underlying motion and memorandum in support and the above listed factors, **FINDS** that based upon the nature of services rendered, the relative simplicity of the issues involved, and the value of the services to the clients in light of all of the circumstances of this case, that a significantly reduced award is reasonable. Accordingly, the Court hereby **ORDERS** that Plaintiff's counsel shall pay Defendants' attorneys' fees in the amount of $2,350.00.

III. Plaintiff's Motion to Reschedule Continuation of Deposition of Petula Burks

On November 12, 2025, came Plaintiff on her Motion to Reschedule Continuation of Deposition of Petula Burks. On October 17, 2025, the Court ordered that the deposition of Defendant Petula Burks would be continued for an additional four hours and take place on

November 17, 2025. Given Defendants' untimely disclosure of the fact that Defendant Petula Burks' City-issued work phone was lost, and the questions that such a fact raises, the Court **FINDS** that it is reasonable to continue the deposition to a later date. Accordingly, Plaintiff's Motion is **GRANTED**, and the parties are **DIRECTED** to contact chambers for the scheduling of a telephone conference to arrange an agreed upon time and date on which to schedule the continued deposition.

Further, pursuant to Rule 4:5(a1), the Court will permit Defendant Petula Burks to appear remotely, via video-conferencing software, for her continued deposition due to the expense and inconvenience of her appearance in the City of Richmond, as she is an out-of-state resident.

However, pursuant to Rule 4:5(g)(1), plaintiff's counsel's failure to appear for the Court-ordered continued deposition of Petula Burks and failure to obtain an order releasing the date warrants sanctions. While it is acknowledged that plaintiff's counsel tried to obtain a continuance of the deposition, no order was issued continuing or cancelling the deposition. The unilateral cancellation of the deposition by plaintiff's counsel was a violation of this Court's Order of October 17, 2025. Accordingly, the Court **ORDERS** that plaintiff's counsel shall pay Defendant Petula Burks' reasonable expenses incurred in traveling to Richmond for the deposition. Defendant Petula Burks, through counsel, is hereby **DIRECTED** to provide the Court and plaintiff's counsel, with proof of the costs incurred related to her round-trip flight or ground travel expenses and hotel accommodations related to the November 17, 2025, deposition appearance. Proof of expenses shall be tendered to the Court and plaintiff's counsel no later than close of business March 9, 2026. Plaintiff's counsel is **ORDERED** to pay such expenses no later than close of business on March 23, 2026.

IV. Plaintiff's Motion to Compel Attendance at Settlement Conference

On February 2, 2026, came Plaintiff on her Motion to Compel Attendance at Settlement Conference. In this motion, Plaintiff asserted that defense counsel failed to abide by the Court's order in several respects. Defense counsel vehemently denied those assertions in the pleadings and in oral argument at the February 18, 2026, hearing. At the request of counsel for both parties, the Court contacted the settlement conference judge to inquire about the disputed details of the conference logistics. In doing so the Court restricted its inquiry only to the logistics disputed by the parties and did not ask any questions about the substantive confidential negotiations. This discussion revealed the following:

1. The settlement judge did not, as defense counsel represented to this Court, agree to start the conference one hour later than the settlement conference judge had scheduled. As represented by Plaintiff's counsel, the judge informed defense counsel that he would agree to the late start *IF* Plaintiff's counsel agreed. Plaintiff's counsel did not agree. The exhibits to Defendants' own opposition brief establish as much[2]; and
2. The settlement judge was not, as defense counsel represented to this Court, aware that the representative of the City of Richmond, authorized to approve or disapprove a settlement, was available by phone or on the phone with defense counsel Jimmy F. Robinson, Jr. for portions of the settlement conference. In fact, the settlement judge emphasized to this Court that it is essential to the success of any settlement conference to have the client or an authorized agent thereof present. It was in recognition of this general principle that the Court had previously ordered defense counsel "to provide the name of the independent

[2] Plaintiff's counsel expressly objected to the delayed start time in an email sent to the settlement conference judge as well as defense counsel. *See* Defs' Opp'n to Pl.'s Mot. to Compel Settlement Conference, Ex. 4 ("...Plaintiff objects to moving the time. We were not consulted before that change was made.") Consequently, both the judge and plaintiff's counsel with their client, arrived on time and waited a full hour for defense counsel to arrive.

authorized agent of the City who will be *attending*[3] the December 11, 2025, Judicial Settlement Conference."[4] (emphasis added). Despite the Court's orders, and the unambiguous meaning of the word 'attending,' defense counsel did not provide notice that neither Defendant Burks, nor Odie Donald II would be attending the conference.

3. The settlement conference judge did not, as defense counsel represented to this Court, tell defense counsel that the pre-conference brief, required of the parties by the Settlement Conference program, as well as this Court's Order of Designation and Referral to Settlement Conference entered October 17, 2025, was "not necessary." In fact, the settlement judge noted to this Court that such pre-conference submissions are essential to the process given the high demand for judicial settlement conferences and the need for efficiency in preparation by the conference judge.

The Court **FINDS** the failure of defense counsel to abide by this Court's orders regarding the Judicial Settlement Conference, as well as the Settlement Conference Program rules, justifies a second referral to the Settlement Conference Program. The Court is in complete agreement with Plaintiff's contention that Defendants "demonstrated a lack of good faith participation" in the settlement conference.[5]

Given the parties previous inability to agree on a conference judge, this Court will make that selection. Counsel are directed to obtain contact information for the settlement judge from chambers and contact that judge no later than March 9, 2024 to schedule a conference date.

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[3] The Court gives words their ordinary meaning, and attending, per its dictionary definition means: "to be present at: to go to..." ATTENDING, Merriam Webster, https://www.merriam-webster.com/dictionary/attend.

[4] Order of November 18, 2025. In response to that Order, Defense counsel disclosed the name of the authorized agent by letter sent to chambers on November 21, 2025, wherein, Jimmy F. Robinson, Jr. stated that Odie Donald, II, would be "available [*attending* remotely] ..." (emphasis added).

[5] Of particular concern to the Court is defense counsel, Jimmy F. Robinson, Jr.'s apparent lack of candor to this Court regarding his compliance with the settlement judge's expectations and this Court's orders of October 17, 2025 and November 18, 2025, in both his pleadings and oral argument made during the hearing of February 18, 2026.

Further, Counsel are **ORDERED** to:

1. Arrive on time for the conference as scheduled by the settlement judge; and
2. Secure the timely attendance of their respective clients *in person* for the entire duration of the conference. To be more specific, Defendant Petula Burkes and an authorized representative of Defendant City of Richmond with approval authority, and Plaintiff Connie Clay must appear in person for the entire conference period.

The Court, having considered the representations and arguments of the parties as well as the information provided by the settlement conference judge further **FINDS** Defendant's cross-motion for sanctions pursuant to Va. Code Section 8.01-271.1, to be without merit and therefore that motion is **DENIED**.

V. Plaintiff's Motions for Spoliation under Va. Code § 8.01-379.2:1 and Plaintiff's Third Motion to Compel under Rule 4:12(b)

On November 5, 2025, came Plaintiff on her Motion for Spoliation under Va. Code § 8.01-379.2:1 and Plaintiff's Third Motion to Compel under Rule 4:12(b). Defendants responded on December 10, 2025, with their Cross Motion for Sanctions and Opposition to Plaintiff's Motions. After the hearing of February 18, 2026, the Court took these motions under advisement. Having considered the arguments of the parties, both oral and written, the Court finds and rules as follows:

a. Motion for Spoliation

Plaintiff's Motion for Spoliation under Va. Code § 8.01-379.2:1, relates to Defendants' failure to preserve Defendant Petula Burks' City-issued work cell phone and the messages and other data contained therein. Defendant Burks' City-issued work cell phone has been the subject of numerous discovery requests and disputes, which the Court has been heavily involved in

resolving as a result of numerous motions to compel, hearings, orders, and even an *in-camera* review of the City-issued work cell phones of both parties. Throughout the course of these repeated requests for production and subsequent disputes, which have spanned at least eight months, Defendants failed to disclose that Defendant Burks' City-issued work cell phone had been lost at some point in June 2024. It was only in the hearing held on September 24, 2025, that defense counsel made mention, offhandedly, that the phone had been lost in an airport in June 2024 and was not recovered but had been replaced with a new phone. Thus, the phone that the Court performed an *in-camera* review of in August 2025, which was found to contain only nine days of message,s all of which were from dates long past the relevant period (June 25, 2024 – July 3, 2024), was not the original phone, but a replacement not containing any of the original data or messages from the relevant time period. Defendant Burks' City-issued work cell phone was subject to a litigation hold beginning on March 6, 2024, only days after Plaintiff filed suit, and yet no efforts were made to preserve the messages and data contained therein through any form of back-up, imaging, transcribing, or removal/physical possession of the phone. Thus, when the phone was lost in June 2024, and not retrieved, the information contained on the phone was lost. Until very recently, no efforts have been made to recover the phone by Defendant Burks or the City of Richmond, while defense counsel were engaged to represent the defendants in this matter on March 13, 2024, that counsel has only very recently begun to attempt to track down the phone.[6] It is this set of circumstances that gives rise to Plaintiff's Motion for Spoliation of Evidence.

[6] Defense counsel, W. Ryan Waddell, represented to the Court during the February 18, 2026, hearing, that he has recently begun making efforts to locate the lost phone by contacting the airline, the airport in the city where the phone was lost (which was apparently Philadelphia), and the local government regarding potential recovery of the phone. It is unclear what, if any, information he has gleaned from these phone calls.

Virginia Code § 8.01-379.2:1 codifies the standard for spoliation of evidence and states in relevant part:

> A. A party or potential litigant has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. In determining whether and at what point such a duty to preserve arose, the court shall include in its consideration the totality of the circumstances, including the extent to which the party or potential litigant was on notice that specific and identifiable litigation was likely and that the evidence would be relevant.
>
> B. If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, or is otherwise disposed of, altered, concealed, destroyed, or not preserved, and it cannot be restored or replaced through additional discovery, the court (i) upon finding prejudice to another party from such loss, disposal, alteration, concealment, or destruction of the evidence, may order measures no greater than necessary to cure the prejudice, or (ii) only upon finding that the party acted recklessly or with the intent to deprive another party of the evidence's use in the litigation, may (a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was unfavorable to the party, or (c) dismiss the action or enter a default judgment.

Here, Plaintiff has met her burden under Va. Code § 8.01-379.2:1. Defendants were aware of the lawsuit pending against them, with the City having been served on March 5, 2024, and Defendant Burks being served on March 14, 2024. Moreover, it is clear that the City-issued work cell phone of Defendant Burks, a named defendant in this matter, Plaintiff's former immediate supervisor and former Director of the Office of Strategic Communications and Civic Engagement for the City, and the person who allegedly wrongfully terminated Plaintiff's employment with the City of Richmond, would very likely be material to the pending litigation. *See* Va. Code § 8.01-379.2:1(A).

Thus, Defendants had a duty to preserve Defendant Burks' City-issued work cell phone based upon the litigation hold and IT audit that the City of Richmond imposed on March 6, 2024. The litigation hold was imposed only days after suit was filed on March 1, 2024. Likewise, the

City has independent duties to maintain public records under the Virginia Freedom of Information Act ("VFOIA") and under Virginia records retention laws.[7] Despite their duty to preserve the phone and its data, neither Defendant Burks nor the City of Richmond took any affirmative steps to ensure that the information and messages contained on the phone would be preserved in the event of loss or damage to the phone. It is not the City's usual practice to back up their employees' phones to any form of cloud-based storage.[8] This omission, along with the failure to preserve the messages and other data through imaging either of the phone or through screenshots, nor any effort to transcribe messages, or remove the phone from Defendant Burks's possession, is nothing short of a reckless failure to preserve the evidence contained on the phone.

Although Defendants have argued that text messages are by nature, bidirectional, and thus would be preserved on other phones, that would require Plaintiff to know each and every person with whom Defendant Burks could have exchanged texts during Plaintiff's term of employment and would require the assumption that each of those phones still contains all such messages.[9] This argument assumes that the standard for discovery requests is substantially higher than the Rules have set forth. Rule 4:1(b)(1), states that parties may obtain discovery:

> regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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[7] *See* Va. Code §§ 42.1-85, 42.1-86.1, and the 2020 Code of the City of Richmond, Virginia, §§ 2-1319 – 2-1325.
[8] *See* Declaration of W. Ryan Waddell, ¶ 11.
[9] This is why Plaintiff's Request for Production of Documents No. 4, is worded as it is, "all…text messages (meaning all messaging platforms)… using the below Initial List of Search Terms created or modified during the time period of January 1, 2023 to March 1, 2024." Pl. Mot. to Compel of Sept. 4, 2025, Ex. E.

Rule 4:9(b)(i) adds that items sought must be described with reasonable particularity. The justification underlying that requirement is that the other party should be reasonably able to recognize what the party is being asked to produce. Likewise, the reasonable particularity requirement prevents blanket requests for production. But inherent in the reasonable particularity requirement is the understanding that the requesting party cannot be expected to know the precise nature of every item sought. 1 Virginia Civil Procedure § 12.11(B). Here, Plaintiff cannot be expected to know each and every person Defendant Burks exchanged texts with over the course of Plaintiff's term of employment and thus be expected to reconstruct lost evidence through such means. Nor can Plaintiff be expected to know what Defendant Burks's messages would have said. Similarly, Defendants have suggested that the best evidence of what Defendants Burks and any other custodians of records discussed regarding Plaintiff's termination would be through deposition. Certainly, deposition testimony can be valuable, but after two years, it is unlikely that Defendant Burks nor any other deponent will recall their exact text message conversations. Also, should Defendant Burks or other custodians deny ever texting about issues related to Plaintiff's VFOIA compliance, discovery of such texts could produce powerful impeachment material as well as relevant evidence beyond witness testimony. As such, there is no ability for Plaintiff to "replace through additional discovery" what was on Defendant Burks's City-issued work phone. Va. Code § 8.01-379.2:1.

Va. Code § 8.01-379.2:1(B) states that "the court (i) upon finding prejudice … *or* (ii) only upon a finding that the party acted recklessly or with the intent to deprive another party of the evidence's use in the litigation…" (emphasis added). As such, either finding can support remedial action. Here, the Court finds that there is sufficient evidence of both prejudice to Plaintiff and reckless action on the part of Defendants.

Plaintiff has shown significant prejudice caused by the loss of Defendant Burks' phone and the failure of Defendants to disclose that loss. Plaintiff has been required to appear for eight discovery hearings, each with multiple discovery motions, in order to determine that the evidence that she seeks no longer exists. That loss was not disclosed until September 2025. The loss and failure to take steps to preserve the evidence related to Burks's phone is of great concern, but so is Defendants' failure to disclose this fact. Between the time when the phone was lost in June 2024 and September 24, 2025, when the fact of the phone's loss was finally mentioned to the Court, Defendants appeared before this Court no less than nine times.[10] During that timeframe the parties have been engaged in discovery, and at no time did Defendants disclose that Defendant Burks phone had been lost, not recovered, and the information contained therein not preserved. Throughout that time, Defendants knew these facts and failed to disclose them to either plaintiff's counsel or the Court. Defendants went so far as to tender a phone for *in-camera* review on August 27, 2025, that Defendants knew was a new/replacement phone, not containing any of the relevant messages or data, and still did not disclose these facts. Thus, requiring yet more discovery motions and hearings by Plaintiff and yet more orders by the Court. As a result of the protracted discovery disputes in this matter, much of which related to Defendant Burks's phone, the Court *sua sponte* continued the trial on this matter from September 23 – September 26, 2025, to June 2026. As such, the Court **FINDS** that Plaintiff suffered prejudice from the loss of Defendant Burks' City-issued work cell phone and Defendants' failure to disclose that fact.

Although Plaintiff need only show either prejudice suffered or reckless or intentional action to get remediation, Plaintiff has shown both. Defendants' conduct in this case

[10] 11/22/2024, 1/20/2025, 4/29/2025, 5/27/2025, 6/30/2025, 7/30/25, 8/25/2025, 9/18/2025, and 9/24/2025.

demonstrates reckless action with regard to their duty to preserve Defendant Burks' City-issued work cell phone. Despite having a litigation hold and IT audit imposed on March 6, 2024, neither Defendant Burks nor the City, took any steps to preserve the phone, nor the information contained therein. These failures created the circumstance under which Defendant Burks was able to lose her work phone in an airport (alternatively, the phone was left in the seat pocket of an airplane) and was either unretrievable because it could not be found or it was found and maintained securely in the airport (which is alternatively a New York airport or potentially Philadelphia's airport).[11] Upon receiving information of the phone's whereabouts, neither Defendant Burks, nor any agent of the City of Richmond retrieved the phone. The City of Richmond knew that the phone had been lost, as is reflected in an incident report from the Department of Information Technology ("DIT").[12] That report stated that the phone was found in the airport and was being held in a secure location for retrieval. Moreover, DIT was able to remotely enter the phone and lock it for security purposes. Despite that knowledge and ability, the phone was never retrieved, and Defendant Burks was issued a new phone which she would have through the remainder of her employment with the City. This course of conduct, paired with the subsequent months long failure to disclose these facts, demonstrates Defendants' conscious disregard of their duties to preserve evidence that is relevant to this litigation. Furthermore, it is reckless to know that the phone was lost in June 2024, to proceed in discovery, respond to multiple discovery requests for all texts messages from identified custodians (which included

[11] The Court has still not received a complete, consistent, and definitive story regarding how exactly the phone was lost, where it was lost, when precisely it was lost, and where it is now.

[12] The incident report which was lodged in or issued by Defendant City of Richmond was only obtained and subsequently brought to the Court's attention after it was requested through FOIA by a member of the press and published by that journalist, and later attached as an exhibit to Plaintiff's Reply in Support of Motion for Spoliation filed on January 9, 2026.

Defendant Burks), and never disclose that such information cannot be produced, because it no longer exists. Thus, the Court **FINDS** that Defendants acted recklessly.

Having made these findings, the Court turns its attention to the issue of an appropriate remedy. A court may order measures "no greater than necessary to cure the prejudice" caused by the spoliation. Va. Code § 8.01-379.2:1(B)(i). Reckless or intentional spoliation can justify an adverse inference, adverse jury instruction, monetary sanctions, dismissal of the action, or default judgment. Va. Code § 8.01-379.2:1(B)(ii). The Court having found that each element of the statute has been met by Plaintiff, **FINDS** that the necessary remedial measure in this case is the imposition of an adverse jury instruction. That jury instruction shall read:

> Defendants, the City of Richmond and Petula Burks, had a duty to preserve Defendant Burks' City-issued work cell phone that was relevant for the pending litigation. Defendants failed to take reasonable steps to preserve the cell phone, and it cannot be replaced and restored. The jury may, but is not required to, presume that any evidence contained on the cell phone was unfavorable to the Defendants.

As such, the Court **GRANTS** Plaintiff's request for an adverse jury instruction as the remedy for the spoliation of Defendant Burks' City-issued work phone.

In conclusion, Plaintiff's Motion for Spoliation under Va. Code § 8.01-379.2:1 is **GRANTED**. Accordingly, Defendants' Cross-Motion for Sanctions pursuant to Va. Code § 8.01-271.1 is hereby **DENIED**.

b. <u>Third Motion to Compel</u>

Also on November 5, 2025, came Plaintiff on her Third Motion to Compel under Rule 4:12(b), filed with the Motion for Spoliation under Va. Code § 8.01-379.2:1. The Court took this motion under advisement after the February 18, 2026, hearing. Upon mature consideration, the Court rules as follows:

Plaintiff's Third Motion to Compel under Rule 4:12(b) requests sanctions against Defendants and defense counsel for their pattern of conduct during discovery regarding the lost work-issued phone of Defendant Burks, discrepancies in document productions through discovery as compared to VFOIA request productions, defense counsel's failure to perform and explain the results of Court-ordered searches for documents resulting from previous motions to compel, defense counsel's failure to make court ordered declarations, and the failure of Defendants to attach the oath and signatures verification to the answers to interrogatories and the supplements thereto as required by Rule 4:8(d).

As discussed above, there has indeed been a lengthy course of conduct on the part of Defendants in failing to disclose, despite the numerous opportunities to do so, the loss of Defendant Burks' City-issued work cell phone. Likewise, the Court has been heavily involved in related disputes dating back to May 2025, where the Court intervened on a motion to compel regarding Plaintiff's Request for Production No. 4 (among other matters). [13] Additionally, there have been ongoing failures to properly verify answers to interrogatories brought to the Court's attention in both the September 24, 2025, and February 18, 2026, hearings. Taken together, these failures have resulted in the partial violations of at least six discovery orders regarding prior motions to compel, which include the Orders of May 28, 2025, June 30, 2025, July 31, 2025, August 26, 2025, September 24, 2025, and September 25, 2025.

The Order of May 28, 2025, stated that "Plaintiff stipulates to Defendants conducting key word searches using the reduced search terms proposed by Mr. Waddell. Mr. Waddell shall perform the key word searches using the agreed search terms and remove only those documents

[13] Plaintiff's Request for Production No. 4 reads in relevant part: "All emails, text messages (meaning all messaging platforms), communications, notes or other documents, and all voicemails, videos or other recordings, returned from the electronic files of the following Custodians using the below Initial List of Search Terms created or modified during the time periods of January 1, 2023 to March 1, 2024: Custodians: 1. Petula Burks..."

that are clearly not responsive to Plaintiff's request. Any and all responsive documents shall be produced no later than close of business on June 9, 2025." Despite this clear order and the apparent agreement of the parties, there have only been searches of the custodians' inboxes and no production of texts messages, no less any timely disclosure that Defendant Burks' phone was missing.

The Order of June 30, 2025 stated that "... the Court ORDERS that Defendants file a written response on the key word searches performed; to include what documents were available (e.g., documents or materials authored or received by the custodians in Plaintiff's Request for Production No. 4, including Microsoft Teams communications and notes, emails in Outlook and Outlook folders, and text messages on City of Richmond issued work phones..." In response to this order, there was no disclosure regarding the loss of Defendant Burks' work phone, along with no response *filed*. Instead defense counsel only provided a response to Plaintiff. There, defense counsel states that "the cost of conducting this discovery is not proportional to the needs of this case..." and "none of these text messages do anything to advance her case."[14] Explaining further that "[g]iven that most of the other custodians seldom interacted with Plaintiff...they are unlikely to have information responsive to Plaintiff's proposed search terms. Moreover, like most professionals, these individuals communicated important information during meetings and via email."[15] Importantly, no additional documents were produced a result of this responsive

[14] Indeed, the messages that existed on Defendant Burks' replacement City-issued work phone that were all sent or received long after the relevant periods, would not be of great import to Plaintiff's case, overlooking the glaring issue of the missing messages from the relevant period.

[15] Defendants' argument that professionals do not text about import information is belied by text messages already produced from Plaintiff's City-issued work cell phone. *See* BURKS00026-28 as recited in this Court's letter of August 27, 2025. That conversation reads:

> Burks: did you send the casino response | Clay: yes | Burks: When? | Clay: I forwarded both responses to you. | Burks: Got it. Thanks! | Clay: I never saw the FOIA request that Stanfield set (error in original) to Fire. | Burks: It's not the same one that deals with overtime? | Clay: No, Sandaled (as it appears in original) requested records about 911 calls in the area of the proposed casin (error in original). Do you want to pull FIRE into the meeting too? | Burks: Forwarded the

report, though as defense counsel Waddell's Declaration made clear, there were messages between the custodians and Burks that could have been produced in response to this request and were not.[16]

The Order of July 31, 2025, stated "… the Court ORDERS counsel for [Defendants] to conduct a manual key word search of Ms. Burks' City of Richmond-issued cell phone for any messages, documents, or materials responsive to Plaintiff's Request for Production No. 4. Defense counsel shall conduct the key word search of Ms. Burks' phone by searching the names of the following individuals: Petula Burks; Cynthia Richardson; Gerald Westry; Sabrina Joy-Hogg; and Sheila White and remove only those messages not responsive to Plaintiff's request." No additional text messages were produced as a result of this Court-ordered search. Defendants provided the Court (via email dated August 7, 2025) with a chain of custody form for Defendant Burks' City-issued work phone, and in that communication to the Court stated:

> There were no responsive text messages between Ms. Burks and four of the listed custodians. Notably, a search of text messages between Ms. Burks and Cynthia Richardson was not possible as Ms. Richardson did not have access to the City's issued cell phone after August 2023. Counsel for Defendants can secure a declaration from a City representative confirming the same if the Court deems necessary.
> As an additional measure, the undersigned counsel also reviewed Plaintiff's City-issued cellphone to determine whether any potentially responsive text messages between Ms. Clay and Ms. Burks had been deleted. There were none, and there were no responsive text messages from Plaintiff's City-issued cell phone and Ms. Burks' City-issued cell phone. Notwithstanding, there were text messages from Plaintiff's City-issued cell phone to Ms. Burks' private cell phone. Ms. Burks deleted none, and all text messages were produced to opposing counsel during the July 30, 2025, hearing (Burks000001-49).

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meeting link. | Clay: Great thanks. Is it okay if I mention the lawsuit in my FOIA training tomorrow.

[16] *See* Declaration of W. Ryan Waddell, ¶ 10 (discussing a text message that was produced through FOIA between Defendant Burks and another custodian, Sheila White.)

As was the case with the two previous orders, Defendants and defense counsel once again did not disclose the fact of the lost phone, which would aid in the explanation as to why there were no responsive texts messages.

As a result of these disputes regarding the City-issued work phone of Defendant Burks, on August 26, 2025, the Court ~~ORDER[ED]~~ ordered Plaintiff Connie Clay's City-issued work cell phone and Defendant Petula Burks' City-issued work cell phone to the custody of the Court, for an *in-camera* review to determine whether the phones contain discoverable information, no later than August 26, 2025." The Court performed an *in-camera* review of the phone and provided the parties with a letter outlining the text chains that existed on Plaintiff's City-issued work phone, and noted that only messages from June 25, 2024 to July 3, 2024 existed on Defendant Burks' City-issued work phone. This did not prompt any disclosure of the circumstances leading to Defendant Burks' City-issued work phone only having those nine days of messages on it. Likewise in that same Order, the Court ordered:

> …counsel for the Plaintiff to identify in writing specific documents, text messages, and other communications that have not been produced and are sought, no later than September 2, 2025. The Court further ORDERS that counsel for the City of Richmond and Petula Burks (collectively, "Defendants") respond to Plaintiff's requests in writing, and that those responses provide the requested materials, or state that every effort to comply with the request has been made, stating why the material is not being produced, or alternatively if the material does not exist. Such representations are to be made based on the best of defense counsel's knowledge and are to be filed no later than September 5, 2025.

Plaintiff made her requests[17], which were not substantively responded to in any meaningful way.

[17] "A document showing that the City preserved information on Clay's City-issued work cell phone so that it was not deleted following the filing of this Complaint on March 1, 2024."
"A document showing that the City presented information on Burks' City-issued work cell phone so that it was not deleted following the filing of this Complaint on March 1, 2024."
"A document showing any system update to Clay's or Burks' City-issued work cell phone that would delete or make less accessible text message data."

This led to another motion to compel filed on September 4, 2025, and resulted in the Court's Orders of September 24, 2025, and September 25, 2025. Both orders concerned the Court-ordered declaration of defense counsel, which was ordered to include the following:

> Defense counsel is also ORDERED to conduct searches of the work-issued cell phones of the remaining three custodians, Sheila White, Sabrina Joy-Hog, and Gerald Westry for messages between Defendant Burks and the custodians about Clay or messages to or from Clay and to disclose the results in a report. This report shall specifically describe how the search was performed, and what search terms were used.
> … defense counsel is hereby ORDERED to include in their declaration a description of the manner and method utilized by the City to search the cloud-based storage of Defendant Burks' work-issued cell phone that produced the January 19, 2024, message provided to Plaintiff in response to one of her FOIA requests.
> Further, Defendants are ORDERED to conduct a similar search using the same manner and method as described and produce all text messages relevant to this matter to or from Clay and to or from the other three named custodians.
> Defendants are to tender the results of this search to Plaintiff no later than October 29, 2025."

Defense counsel made a declaration but provided only scant explanations for why there is no cloud-based storage nor how they were able to access a text message from between Burks and Sheila White, but were unable to access any additional responsive information or documents.

The Court also ordered Defendants "to attach the oath and signatures verifying the answers to interrogatories and the supplements thereto as required by Rule 4:8(d)." While Defendants attached the oath and signature of Defendant Burks to their interrogatory answers and supplements thereto, no such oath or signature has been attached from any agent of the City of Richmond. Seeing as Rule 4:8(d) states that "[t]he answers must be signed by the person making them, and the objections signed by the attorney making them," and Defendant Burks is not the only defendant answering interrogatories, nor is she an authorized agent for the City of Richmond (and hasn't been since July 2024), this verification is insufficient and violative of the

Court's order and justifies Plaintiff's Motion to Compel under Rule 4:12. As such Plaintiff's Motion to Compel is **GRANTED**. Defendants are **ORDERED** to attach the oath and signatures of both Defendant Burks and an authorized agent of Defendant City of Richmond, verifying the answers to interrogatories and the supplements thereto as required by Rule 4:8(d).

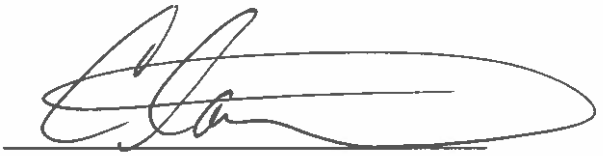
What this lengthy course of discovery conduct, statements, and orders demonstrates is a general lack of respect for the Court's orders and the discovery obligations of defendants under the Rules. Rule 4:12(b) provides for failures to comply with discovery orders and allows courts to issue sanctions pursuant to Rule 4:12(b)(2). Among the sanction options available are the payment of reasonable attorney's fees caused by the failure to comply with court orders. Based on the totality of the circumstances, the Court **FINDS** that payment of reasonable attorneys' fees is a justified sanction for the ongoing discovery order violations. Accordingly, the Court **GRANTS** Plaintiff's Third Motion to Compel filed on November 5, 2025. The Court **ORDERS** that Defendants shall pay Plaintiff's reasonable attorneys' fees incurred in the bringing of Plaintiff's Motions to Compel of April 2, 2025, July 22, 2025, August 11, 2025, September 4, 2025, and November 5, 2025, and any memoranda in support or supplements thereto, all of which resulted in the above discussed, partially violated orders. As such, the Court **ORDERS** that Plaintiff's counsel provide the Court and defense counsel with bills and affidavits in support of the attorneys' fees incurred in the bringing of the above listed motions no later than close of business March 9, 2026. Defendants shall pay Plaintiff's reasonable attorneys' fees no later than March 23, 2026.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the parties' endorsements of this Order.

The Clerk is directed to forward a certified copy of this Order to all the parties.

It is so **ORDERED**.

ENTER: 3/2/2026



Claire G. Cardwell, Judge