SHUTE, MIHALY & WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA 94102
T: (415) 552-7272 F: (415) 552-5816
www.smwlaw.com

ANDREW W. SCHWARTZ
Attorney
schwartz@smwlaw.com

October 6, 2017

Hon. William Alsup
Judge of the U.S. District Court
Northern District of California

Re: Deposition of City's Facilities Manager, Dionne Early: *USPS v. City of Berkeley*, Case No. 3:16-cv-04815-WHA

Dear Judge Alsup:

This letter responds to the Postal Service's September 29, 2017 letter about the deposition of the City's Facilities Manager, Dionne Early. The City designated Ms. Early to testify on Topic 4 of the Service's Revised 30(b)(6) Notice: "[t]he City's negotiations or agreements with its own tenants, renters or lessees in properties subject to the Zoning Ordinance." The Service mistakenly impugns Ms. Early's competence, and mischaracterizes counsel's well-founded objections. Its allegations misrepresent the facts and the law.

A. Meet and Confer. As an initial matter, the Service failed to meet and confer in good faith before seeking the Court's resolution of a discovery dispute.[1] *See* Fed. R. Civ. P. 37(a)(1); LCR 37-1; Dkt. 10 at ¶ 25. The Service neglects to mention that it terminated the Early deposition without attempting to resolve the dispute or explaining the basis for allegations about Ms. Early's competence. *See* Ex. 1 at 53:11-54:16. The failure to conduct a good faith meet-and-confer precludes the requested relief. *See* Fed. R. Civ. P. 37(a)(5)(A)(i); *Oakley, Inc. v. Neff, LLC*, 2015 U.S. Dist. LEXIS 121534, *13-14 (S.D. Cal. Sept. 11, 2015).

B. Ms. Early's Qualifications. Topic 4 appears relevant, if at all, to the Service's intergovernmental discrimination claim that the Overlay "effectively discriminates against the [Service] and those with whom it deals" because its "only effect is to frustrate" the Service's attempts to sell the Post Office. Dkt. 43 at 8. Here, the Overlay applies to nine properties, only one of which is owned by the Service and five of which are City-owned. Dkt. 1-1 § 23E.98.010. The only issue possibly pertinent to the discrimination claim is whether the City permits nonconforming uses of its properties while the Overlay would limit future private uses of the Service's property.

The Service did not specify "with reasonable particularity" which aspects of agreements with its tenants the Service wished to inquire about. Fed. R. Civ. P. 30(b)(6). Ms. Early is the

[1] The Service's October 5, 2017 letter goes beyond the Court's instruction to indicate whether the parties met and conferred. The Service has thereby circumvented the Court's three-page limitation on requests for discovery relief. Dkt. 10 at ¶ 25.

City employee most knowledgeable about the relevant issue: uses of City-owned buildings by tenants, renters or lessees. If the Service wanted testimony on a different subject, it should have so specified.

As the City's Real Property Manager, Ms. Early has direct, personal knowledge of uses of City property, including the City's leases and licenses. Ex. 1 at 12:1-7, 27:4-28:11, 30:3-22, 32:1-23, 39:15-41:3; 54:2-13. Yet the Service *failed to question Ms. Early about tenants' uses, with one exception*. After Ms. Early testified to uses of the Veterans Building by Dorothy Day House, the Service, ignoring key details of her response, abruptly terminated the deposition without inquiring into any of the other eight tenants.

The Service claims Ms. Early "was not even able to confirm the current tenants in the subject properties." Dkt. 73 at 1. Not so. Ms. Early testified to occupants of all three City-owned properties about which she was questioned. Indeed, she corrected the Service's representation that six Veterans Building tenants listed in a staff report were its sole occupants by volunteering information about a seventh tenant. Ex. 1 at 35:10-18. The Service selectively cites a portion of Ms. Early's testimony indicating she had not read an entire license agreement between the City and one of those tenants. Dkt. 73 at 1. But Ms. Early testified she was familiar with the portions of the agreement specifying the tenant's uses and other pertinent information. Ex. 1 at 39:15-40:11. And Ms. Early testified in detail about those uses going back to 2008. *Id.* at 40:12-41:3.

Next the Service points out that Ms. Early was unfamiliar with a three-page staff report from October 2013 that she did not prepare. But the transcript portions the Service leaves out plainly document Ms. Early's personal familiarity with the City's tenants and their uses of the City property referred to in the report. Ex. 1 at 40:12-24. The City is obligated neither to produce a witness to testify about every City document nor to "'woodshed' or to 'educate'" Ms. Early by ensuring that she can testify about documents beyond her personal knowledge. Dkt. 10 at ¶ 23(c).

The Service misrepresents the facts when it asserts that the City only "days earlier" produced leases and licenses with its tenants. The City in fact produced most, if not all, of those documents in Spring 2017, and re-sent the complete set as a courtesy. *See* Ex. 1 at 16:2-9. The documents were from Ms. Early's own files, and she testified that she reviewed them to prepare for her deposition. *Id.* at 13:18-14:23. And contrary to the Service's accusations, Ms. Early testified to uses of City properties prior to and since the Overlay's 2014 adoption. *See, e.g.*, *id.* at 31:3-6 (testifying to uses of Old City Hall "for the last ten years"); 36:14-37:1 (testifying to tenants of Veterans Building "since 2008"). In any event, the Service's Notice failed to specify a time-period for Topic 4, and uses prior to the Overlay's adoption are irrelevant.

Finally, the Service asserts that Ms. Early identified a person more knowledgeable on Topic 4. Not so. Ms. Early testified there was no one more knowledgeable about changes in the uses of City-owned property as a result of the Overlay. *Id.* at 52:20-53:4. She referenced the director of Health, Housing and Community Services only as someone more competent to address "program level question[s]" about conduct of tenants under his office's jurisdiction, which is extraneous to the scope of Topic 4. *Id.* at 41:9-12.

C. Objections by Counsel for the City. The Postal Service has not identified any improper objections. Dkt. 73 at 2. Rule 30(c)(2) provides that "[a]n objection must be stated con-

cisely in a nonargumentative and nonsuggestive manner." None of the objections identified by the Service in the 55-page deposition violate that principle. For example, the Service's counsel asked whether a document was a "fair and accurate copy of the staff report," and the City's counsel unsurprisingly objected that the question was unclear, and asked for clarification. The Service also points to a portion of the transcript in which counsel made multiple objections, but without any elaboration. Dkt. 73-2 at 13. Interposing multiple objections to an objectionable question is not a speaking objection.

D. Remaining Topics in the Deposition Notice. The Postal Service also seeks to compel the City to produce additional 30(b)(6) witnesses on other topics in the deposition notice. Dkt. 73 at 3. The letter offers no argument or evidence in support of the request. The Service does not explain why the additional topics are relevant and properly subject to discovery as required to support a motion to compel. The Service neglects to mention the City has already produced a witness on Topic 3 (the City's appraiser, Peter Overton) and agreed to produce a witness on Topic 1, but the Service postponed that deposition.

The remaining topics, 5 through 10, are objectionable. *See* Ex. 2. Each topic seeks evidence of communications between the "City" and various parties. The definition of "City" includes "the City of Berkeley, and all of its [1,600] *current* [*employees*] *and former* councilmembers, commissioners, officers, directors, officials, managers, employees, staff, contractors, and subcontractors, including the staff and members of the Planning Commission." Dkt. 73-1 at 2-3 (emphasis added). The topics are therefore impermissibly overbroad, Dkt. 10 ¶ 23(a), and not "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). The communications of City officials and agents with third parties regarding the Property or the Overlay are irrelevant. Either these topics are designed to shed light on the City's intentions in adopting the Overlay—which is addressed in the pending motion for protective order—or they are otherwise irrelevant to claims before the Court: whether the Overlay *in its effect* (1) is inconsistent with federal law and thus preempted or (2) regulates or discriminates against the Service in violation of its intergovernmental immunity. The relevance, if any, that can be gleaned from the topics could not be proportional to the effort necessary to produce a witness: seeking information from every current or former City employee or agent about such communications.

Finally, the City is aware of no witness with knowledge of such communications. The City has asked City staff about such communications and has learned of none.

Very truly yours,

/s/

Andrew W. Schwartz
Counsel for City of Berkeley

Attachments