STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Charleston Carriage Works, LLC, Plaintiff, v. Charleston Animal Society, Ellen Harley, and Charleston Carriage Horse Advocates, Inc. Defendants.	IN THE COURT OF COMMON PLEAS C/A NO: 2018-CP-10-04083 **ORDER DENYING MOTION FOR SANCTIONS**

This matter is before the Court on Plaintiff's Motions for Sanctions. The motion was heard on September 29, 2021. The Court has carefully reviewed the memoranda, exhibits, affidavits, and deposition testimony submitted by the parties. For the reasons stated below, Plaintiff's Motion is denied.

I. Background of Plaintiff's motion for sanctions

A few hours before a motion to compel hearing on June 16, Trey Thompson, attorney for Charleston Carriage Horse Advocates, Inc. ("CCHA") and Ellen Harley ("Harley"), sent the following email to Plaintiff: "I am confirming that we will provide the CCHA monthly bank statements (to the extent that either CCHA physically possess them or to the extent the bank can produce same) **to show cash in, cash out** of CCHA bank accounts." (emphasis added). In the subsequent hearing that same day, Mr. Thompson made the following statement: "So in short, Your Honor…[Plaintiff] is seeking at this point in time…bank statements from CCHA, the monthly bank statements just as they would be delivered to the client from the bank. We are going

to present those, Judge." Judge Price then asks: "So -- so are y'all consenting to the bank statement?" Mr. Thompson replied: "Yes, Your Honor." Mr. Thompson goes on to tell the court the following: "[O]bviously we can produce whatever we have. But to go to the bank [,] if we don't have those statements [,] we will have to request them from the bank to get them…[but] we will make it an expedited effort." Plaintiff never objected to receiving "cash in, cash out" bank statements during the hearing, despite knowing what Mr. Thompson was referring to when he said, "bank statements". Judge Price's subsequent order states: "The Plaintiff's motion to compel discovery against Defendants is granted. The Defendants will produce the bank statements."

Despite having received what it understood it would receive, Plaintiff submitted a motion for sanctions under Rule 37, which contains the provisions governing failure to comply with a court order. Rule 37(b)(1)-(2)(A)-(E), SCRCP. In its motion, Plaintiff asks the Court to strike both CCHA's Answer and Harley's Answer, because of the failure to cooperate, and to set the case for a damages hearing. Rule 37(b)(2)(C), SCRCP. Plaintiff also seeks to compel CCHA and Harley to produce their computers for forensic inspection. Rule 37(b)(2), SCRCP (a court may make orders "as are just"). Finally, Plaintiff asks for an award of reasonable attorney's fees. Rule 37(b)(2), SCRCP ("the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees.").

On December 2, 2020, counsel for CCHA and Harley, and counsel for the Plaintiff agreed by telephone to resolve the dispute regarding the bank statements by the production of these very same bank statements in their entirety, redacting only the portion of the deposit tickets which could indicate the pledge source of the deposit. On December 12, 2020, the counsel for the Defendants produced the redacted bank statements as agreed.

After the July hearing, counsel for the Defendants retained Rosen Litigation Technology and Consulting, Inc to image CCHA's hard drive and to search it and the CCHA's email accounts for terms provided by Plaintiff's counsel. Shortly thereafter, counsel for CCHA began requesting search terms from Plaintiff to run through CCHA's hard drive and any email accounts Plaintiff wanted searched. On October 6, 2020, the counsel for Defendant CCHA followed up by email on previous discussions with counsel for the Plaintiff, explaining "I just need search terms you want our expert to search on CCHA's computer". Not receiving search terms, counsel for the Defendant CCHA followed up again with Plaintiff's counsel on October 26, 2020:

> Tommy,
> I'm following up again to see if you have a list of search that you want run through CCHA's computer. I cannot conduct a search unless and until have that. This is akin to a discovery request – it comes from the lawyer, not the expert. Certainly if you want to consult with your expert regarding the terms to be search [sic], I understand. If that's the case, please do so this week and get back to me.
>
> **I need to memorialize that I've been asking your for this list of search terms now for several months and repeatedly telling (as below) that I'm prepared to respond to your request for information off of CCHA's computer (and any other databases you tell me you us to search, if any) as soon as you tell me what it is to look for and where you want us to look.**
>
> I remain concerned that this is an issue you don't want to resolve because you want to argue that you don't have document or information to defeat summary judgment 2+ years into this case because of a failure by CCHA and Harley to respond to your discovery requests. …

Finally, after additional follow ups, by letter on November 4, 2020, Plaintiff provided Defendant CCHA with the terms it wanted searched. CCHA thereafter produced its computer to Rosen Litigation Technology Consulting, Inc. who conducted a search of those terms and de-duplication of the responses, a process that, with the holidays, took approximately four months.

CCHA has thereafter reviewed the massive data compilation for privilege and work product and has produced thus far in excess of 10,000 responsive, non-privileged documents to the Plaintiff.

II. Standard of Review

As the Court of Appeals has made clear, "[i]n 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." Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 457, 814 S.E.2d 643, 656 (Ct. App. 2018) (citation omitted), reh'g denied (June 21, 2018), cert. denied (Nov. 9, 2018). Sanctions should punish the specific conduct of the party "and not go beyond the necessities of the situation to foreclose a decision on the merits of a case." Id., 423 S.C. 432, 457, 814 S.E.2d 643, 656-57 (citation omitted). When the sanctions essentially result in a judgment by default, "the moving party must show bad faith, willful disobedience [,] or gross indifference to its rights to justify the sanction." Id., 423 S.C. 432, 457, 814 S.E.2d 643, 657 (citation omitted). More fundamentally, "there must be an order of the Court before sanctions are imposed under subdivision (b) [of Rule 37] …." Richardson on Behalf of 15th Circuit Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry, 430 S.C. 594, 599, 846 S.E.2d 14, 16 (Ct. App. 2020) (citation omitted).

III. Analysis

Based on the June 16 email confirmation, Plaintiff received what it understood it would receive from CCHA and Harley. If Plaintiff objected to receiving cash in, cash out bank statements, it should have done so during the motion to compel hearing. Plaintiff cannot allege, in the face of its previous understanding, the willful disobedience or bad faith necessary for the Court to strike

the Defendants' respective Answers and to set the case for a damages hearing. Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 457, 814 S.E.2d 643, 657.

Perhaps realizing this, Plaintiff also asks the Court, in the alternative, to order CCHA and Harley to turn over their computers for forensic inspection. Plaintiff has multiple problems here. First, "there must be an order of the Court before sanctions are imposed under subdivision (b)…." Richardson on Behalf of 15th Circuit Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry, 430 S.C. 594, 599, 846 S.E.2d 14, 16 (citation omitted). As demonstrated, neither CCHA nor Harley violated Judge Price's June 17 Form Four Order. Plaintiff received exactly what Defendants said they would provide and what Plaintiff knew they would provide. Second, nothing in the order requires production of computers or responsive documents to search terms. Third, physical access to the computers is unnecessary because CCHA and Harley have nonetheless run the proposed search and provided Plaintiff in excess of 10,000 responsive documents. The delay in running the search, moreover, is due to Plaintiff's refusal to send search terms. Fourth and finally, the court indicated that Plaintiff should return for another motion to compel hearing if physical access to the computers could not be worked out. Rather than seek a court order via a motion to compel, Plaintiff is hoping the Court will bypass this step and award access as a sanction under Rule 37(b). Again, this cannot be done. See Richardson on Behalf of 15th Circuit Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry, 430 S.C. 594, 598–600, 846 S.E.2d 14, 16–17 (discussing when sanctions are appropriate under Rule 37).

IV. Conclusion

A violation of a court order is a prerequisite for sanctions. Neither CCHA nor Ellen Harley violated Judge Price's order. IT IS THEREFORE ORDERED that Plaintiff's Motion for Sanctions is DENIED.

AND IT IS SO ORDERED

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Mikell R. Scarborough
Master-In-Equity

Charleston, South Carolina
May 5, 2022

Charleston Common Pleas

Case Caption: Charleston Carriage Works L L C VS Charleston Animal Society , defendant, et al

Case Number: 2018CP1004083

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062