IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

GREGORY D. COUNTRYMAN, SR., individually and as Elected Marshal of Muscogee County, Georgia and, VIVIAN BISHOP, individually and as Elected Clerk of the Municipal Court of Columbus, Georgia,

Plaintiffs,

v.

COLUMBUS, GEORGIA, TERESA P. TOMLINSON, individually and as Mayor, JERRY "POPS" BARNES, individually and as District 1 Councilor, GLENN DAVIS, individually and as District 2 Councilor, BRUCE HUFF, individually and as District 3 Councilor, EVELYN TURNER PUGH, individually and as District 4 Councilor, MIKE BAKER, individually and as District 5 Councilor, GARY ALLEN, individually and as District 6 Councilor, EVELYN "MIMI" WOODSON, individually and as District 7 Councilor, JUDY THOMAS, individually and as District 9 Councilor, and BERRY "SKIP"' HENDERSON, individually and as District 10 Councilor, ISAIAH HUGLEY, individually and as City Manager, PAMELA HODGE, individually and as Finance Director, and CLIFTON C. FAY individually and as City Attorney,

Defendants.

CIVIL ACTION FILE NO. SU14CV3468-94

DEFENDANTS' CONSOLIDATED RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

COME NOW, Defendants COLUMBUS, GEORGIA, TERESA P. TOMLINSON, individually and as Mayor, JERRY "POPS" BARNES, individually and as District l Councilor, GLENN DAVIS, individually and as District 2 Councilor, BRUCE HUFF, individually and as District 3 Councilor, EVELYN TURNER PUGH, individually and as District 4 Councilor, MIKE BAKER, individually and as District 5 Councilor, GARY ALLEN, individually and as District 6 Councilor, EVELYN "MIMI" WOODSON, individually and as District 7 Councilor, JUDY THOMAS, individually and as District 9 Councilor, and BERRY "SKIP"' HENDERSON, individually and as District l0 Councilor, ISAIAH HUGLEY, individually and as City Manager, PAMELA HODGE, individually and as Finance Director, and CLIFTON C. FAY, individually and as City Attorney, (collectively, "Defendants") and through their counsel file this their Response to Plaintiffs' Motion for Temporary Restraining Order and request denial of the Motion in its entirety. Defendants also rely on the defenses raised in their Motion to Dismiss Plaintiffs' Complaint under O.C.G.A. §9-11-12(b)(6), which is filed contemporaneously herewith.[1] Defendants respectfully show this Court as follows:

INTRODUCTION

Plaintiffs filed their Motion for Temporary Restraining Order at the same time as their Complaint, seeking an improper procedural vehicle to have all of their claims heard by the Court on an emergency basis, despite the fact that no emergency exists. Plaintiffs are the Marshal and the Municipal Court Clerk, elected officials operating within the Defendant Columbus, Georgia Consolidated Government (hereinafter "Defendant CCG"). The offices held by the Plaintiffs were established by local legislation of 1915, which created the Columbus Municipal Court. (Complaint ¶28). As Plaintiffs' counsel has already confirmed to this Court, neither the Marshal,

[1] The defenses raised in Defendants' Motion to Dismiss include the application of both sovereign and government/legislative immunity, both of which are fatal to Plaintiffs' claims in their entirety. For purposes of efficiency and brief space, those arguments are adopted here, but not fully restated.

nor the Municipal Court Clerk are constitutional officers. *See* O.C.G.A. §45-9-21. This is a critical fact of this case, as it renders their claims for the prepayment of this litigation through taxpayer-funded attorneys erroneous. Plaintiffs' offices are provided funds through the appropriations deliberated upon by the legislative arm of the Defendant CCG, the Columbus Council, in its annual budget process. (Complaint ¶48, ¶52, ¶53 and ¶57).

On November 13, 2014, some four months after the adoption of the FY2015 budget, Plaintiffs filed a claim for extraordinary equitable relief. Through the mere adoption of their Complaint in its entirety, with no other facts to justify an alleged "emergency", they also filed a motion seeking a temporary restraining order upon Defendants in order to demand, contrary to law, that their attorneys may be hired and paid through Defendant CCG funds. (Plaintiffs' Motion for TRO, Prayer for Relief, subsections (e) and (f)). Essentially, Plaintiffs seek this Court's extraordinary intervention to order the following: (a) reinstate access to the credit card provided by CCG; (b) restrain Defendants from any collection or other action, including criminal prosecution, for their misuse of those credit cards; (c) restore to their budgets a line item code for litigation expenses and attorneys' fees; (d) declare a legal conflict between the Plaintiffs and the City Attorney; (e) authorize the retention and hiring of Christopher D. Balch and Charles W. Miller as counsel for Plaintiffs; (f) pay an interim award of attorneys' fees from the City's general fund for the need of bringing this action; and (g) that the City "cease and desist" any interference with Plaintiffs' budget expenditures. (Plaintiff's Motion for TRO, Prayer for Relief, subsections (a)-(h)).

Although most of Plaintiffs' Motion seeks temporary, emergency relief to ensure this Court orders payment for their attorneys, they have failed to meet any of the prerequisites demonstrating such extraordinary relief is required, much less even authorized by law. As such,

the Motion fails to state a claim for relief and is due to be denied in its entirety. *See* O.C.G.A. §9-11-12(b)(6) and O.C.G.A. §9-11-65.

ARGUMENT AND CITATION OF AUTHORITY

(A) STANDARD OF REVIEW:

The law provides injunctive relief, in the form of a temporary restraining order, when a plaintiff is able to demonstrate an "immediate or irreparable injury". *See* O.C.G.A. §9-11-65(b). This type of extraordinary relief is disfavored, and Georgia law has recognized that injunctive relief "should not be granted except in clear and urgent cases". O.C.G.A. §9-5-8. "Where the court concludes that a final judgment for the plaintiff is unlikely, it may be justified in denying the temporary injunction because of the inconvenience and harm to the defendant if the injunction was granted." Ledbetter Bros., Inc. v. Floyd County, 237 Ga. 22 (1976).

(B) NO RIGHTS TO RELIEF REQUESTED:

(1) Neither Plaintiff is a constitutional officer, and as such, neither is entitled to the retention of outside counsel to be paid for by Defendant CCG.

Plaintiffs cannot demonstrate any viable harm has occurred through the denial of their attempts to retain outside counsel and use CCG funds for this litigation. Plaintiffs ask for authority to retain counsel, funds for those expenses, as well as budget line items to ensure their CCG budgets may be used for attorneys. (Motion for TRO, Subsections (c),(e), and (f)). Plaintiffs have no authority for this request, as they are not constitutional officers, and as such, are not authorized by law to have a lawyer assigned and paid for by Defendant CCG. *See* O.C.G.A. §45-9-21(e).

Specific to Columbus, the Charter in section 4-312 provides that "the City Attorney shall: (1) Act as the legal adviser to and attorney and counsel to the consolidated government and **all**

its officers in matters relating to their official duties." In short, using CCG funds to obtain outside counsel to sue the CCG is not within Plaintiffs' legally delegated powers. The General Assembly has not expressly granted this authority, nor is there any other statutory or common law authority to justify their request for prepayments for this litigation. *See* Stephenson v. Board of Comm'rs of Cobb County, 261 Ga. 339, 400 (1991) and Ward v. City of Cairo, 276 Ga. 391, 395 (2003), (noting that an elected officer, a Judge, is not a "county officer" and therefore may not be awarded attorneys fees under that provision.).

Plaintiffs' attempts to convince this Court that an emergency exists is fundamentally flawed and is more likely stemming from a desire to have their past misconduct with CCG funds excused. The only harm arising from this situation has been shouldered by the taxpayers of Defendant CCG, a harm which Plaintiffs seek to perpetuate. Id. Because Plaintiffs have breached their cardholder agreements and have spent taxpayer funds on a prohibited purchase, allowing Plaintiffs to continue access to such credit cards poses greater harm to CCG than potential benefit to Plaintiffs. For those reasons, this extraordinary relief is unwarranted. O.C.G.A. §9-11-65.

(2) Plaintiffs have no authority from which to ask this Court to deny CCG's requests for reimbursements of the unauthorized charges made for the payment of their attorneys.

Plaintiffs also ask this Court to enjoin Defendants from pursuing civil or criminal actions against Plaintiffs, in addition to requesting this Court to grant them emergency funding for the retention of their counsel in this suit.[2] This request would be a disservice to the public, in particular as it would ratify misconduct and enable the continued misuse of CCG property.

[2] As Defendants notified this Court in both the telephone conference and in the hearing on Monday, November 17, 2014, the Defendants have placed the issue of reimbursement of the Plaintiff's unauthorized charges before this Court in their Answer and Defendant CCG's Counterclaims. (Defendants' Consolidated Answer and CCG's Counterclaim ¶1-31).

Furthermore, this request is contrary to well-established law. Pursuant to O.C.G.A. §9-5-3, a court cannot enjoin criminal prosecution. ("Equity will take no part in the administration of the criminal law.") *See also* Thomas v. Mayor of Savannah, 209 Ga. 866, 866 (1953) (Equity "will neither aid criminal courts in the exercise of their jurisdiction, nor will it restrain or obstruct them."). Therefore, as a matter of law, this request must fail.

(3) Plaintiffs' requests for funding from a specific source of CCG are in error.

Georgia law recognizes the "exclusive and original" jurisdiction of the legislative body of a county government. Lovett v. Bussell, 242 Ga. 405 (1978). Plaintiffs' requests cannot require CCG to pay out funds beyond the budgeted amount. That remedy is purely legislative, as the Charter and law provide that Plaintiffs seek their remedies through the legislative body of the Council. As such, Plaintiffs cannot meet their burden to show that they are likely to succeed on the merits. *See* Jansen-Nichols v. Colonial Pipeline Co., 2014 WL 4958172 (Ga. Oct. 6, 2014) (holding that injunction was improper where plaintiff did not prove any of the four factors considered in issuing an injunction, such as success on the merits: "(1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest").

Success on the merits in the manner requested by Plaintiffs would require this Court to violate longstanding separation of powers doctrine and precedent, in order to reach into the legislative functions of the CCG. The relief requested is thereby overly broad and legally impermissible.

(4) Similarly, Plaintiffs can show no legal right to unfettered access to CCG funds, much less relief from specific sources of that funding.

Not one allegation demonstrates the Plaintiffs are facing any decision or action which would harm their offices or their duties. Although not specific in this emergency request, Plaintiffs' requests for unfettered access to CCG funds have ignored the authority of Defendant CCG to ensure its funds are being used appropriately. *See* O.C.G.A. §36-5-22.1. The Georgia Supreme Court has recognized that, while elected officials have discretion to expend the money designated in their budgets, such expenditures *must* be "within the sphere of [the officer's] legally delegated powers." Jennings v. McIntosh County Bd. Of Comm'rs, 276 Ga. 842, 845 (2003) (citing Griffies v. Coweta County, 272 Ga. 506, 509 (2000)).

(C) INSUFFICIENT HARM:

Despite having a concern that their attorneys be paid and their credit cards be reinstated, the Plaintiffs have not shown any threat of an immediate or irreparable injury. As this Court is aware, a temporary restraining order or interlocutory injunction is an "extraordinary remedy," and this Court must "prudently and cautiously" exercise its authority over such a remedy. Jansen-Nichols v. Colonial Pipeline Co., 2014 WL 4958172 (Ga. Oct. 6, 2014) (upholding a denial of injunctive relief and stating that trial courts must keep in mind that injunctive relief is "an extraordinary remedy, and the power to grant it must be prudently and cautiously exercised").

Whenever trial courts consider a motion for extraordinary relief in the form of temporary or interlocutory injunctive relief, the Georgia Supreme Court compels an assessment of whether the moving party has demonstrated the following four factors:"(1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the

threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of [his or] her claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest." *See* Holton v. Physician Oncology Services, 292 Ga. 864, 866 (2013). The only specific interests Plaintiffs contend constitute "emergencies" relate to their ability to finance of this litigation and to use a credit card despite admitted misuse in the past, none of which is sufficient to move forward with the extraordinary relief sought.

(D) OTHER REMEDIES EXIST:

Even, *assuming arguendo*, that Plaintiffs made the requisite showing of their likelihood to succeed on the merits in their request for attorneys' fees, their alleged harm could be completely redressed by an award of monetary damages in a court of law. Plaintiffs have failed to meet their burden by showing that their purported alleged harm is an urgent matter necessitating extraordinary injunctive action. The precedent and laws of this State clearly do not support Plaintiffs' position. O.C.G.A. §36-5-22.1(a)(1) and (7) ensures the monies of CCG are held by elected officers for the "use and benefit" of the governing authority and, though, those monies are to be spent at the legal discretion of the officer, the monies remain in the "original and exclusive jurisdiction" of CCG. These county funds have been assigned to them for the use and benefit of the citizens of CCG. Id. Plaintiffs' overbroad request fails to meet the "sufficiently detailed" standard set forth in Bearden v. Georgia Power Co, 262 Ga. App. 550, 553 (2003). (The Bearden Court required specificity and reasonable detail in order to issue an injunction.) Moreover, it would be "error for the court to grant an interlocutory injunction in a case where the plaintiff has an adequate remedy at law." Thomas v. Mayor of Savannah, *supra*, 209 Ga. at 867.

The central claim in Plaintiffs' request for injunctive relief is authorization of and payment for Plaintiffs' legal fees. *See* O.C.G.A. 23-1-4 ("Equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law"). Georgia courts have consistently held that if monetary damages are a full remedy to any potential harm complained of by the party seeking equitable relief, then an adequate remedy at law exists and the party should not be entitled to equitable relief. *See* Besser v. Rule, 270 Ga 473, 474 (1999) (The availability of money damages affords [plaintiff] an adequate and complete remedy, precluding the entry of injunctive relief."); Allen v. Hubcab Heaven, 225 Ga. App. 533 (1997) (finding that it was error for the trial court to grant an injunction where, *inter alia*, the party seeking injunctive relief failed to show that monetary damages could not be quantified with specificity to redress their alleged harm); Housing Authority v. MMT Enterprises, 267 Ga. 129 (1996) (holding that a trial court abused its discretion in ordering an injunction where the plaintiffs could have sought monetary damages as an adequate remedy at law).

Plaintiffs cannot argue that they were unaware that there was an appropriate mechanism for their legal fees to be paid. Prior to the case at bar, Plaintiffs had been investigated by the Georgia Bureau of Investigation ("GBI"). After the GBI declined to indict, Plaintiff Countryman made a request to the CCG, and the CCG Council voted to reimburse the Plaintiff Countryman because the Council, pursuant to their legislative discretion, classified the GBI's decision to decline to recommend the allegations for prosecution as a "success" for Plaintiff Countryman. Georgia law provides that the same process applies in the instant case. The Plaintiffs were informed by letter from the City Attorney to their personal legal counsel that CCG would not pay for said outside counsel as the Plaintiffs are not "county officials" as the law requires; yet,

Plaintiffs used their city issued credit cards to pay for professional services in violation of the City Attorney's specific direction.

CONCLUSION

Plaintiffs have incorrectly styled this action as urgent, where it is clear upon the law and facts that no urgency exists, and no extraordinary remedy is required. Plaintiffs have not shown a legal right to any of the relief requested, much less that any irreparable harm is likely to occur. Therefore, Plaintiffs have failed to meet the requisite showing to obtain a preliminary injunction, and all of these claims for relief should be dismissed and/or denied. O.C.G.A.§9-11-65.

Respectfully submitted this 8th day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER in the service manner agreed-upon by counsel, via electronic mail, addressed as follows:

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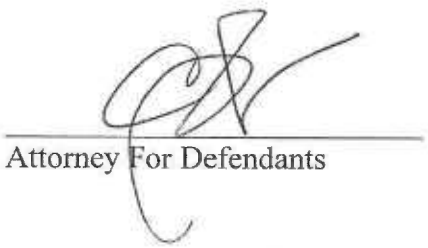
This 8th day of December, 2014.



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