VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CULPEPER

MICHAEL V. McCLARY, and CHRISTINA STOCKTON, Plaintiffs, v. SCOTT H. JENKINS, in his official capacity as Sheriff of Culpeper County, and BOARD OF SUPERVISORS OF CULPEPER COUNTY, Defendants.	**Case Number CL 18-1373**

PLAINTIFFS' OPPOSITION TO
DEFENDANT BOARD OF SUPERVISORS' MOTION CRAVING OYER

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DEPUTY
_____, **CLERK**

INTRODUCTION

This Court should deny Defendant Board of Supervisors of Culpeper County's motion craving oyer for five reasons. First, the motion is so vague and broad that there is no practical way for the Court to grant it. Second, the categories of documents the Board references do not form the basis of and are not essential to Plaintiffs' claims. Third, the documents the Board targets are simple evidentiary material, much of which the Board selectively chose to support only its theory of the case. Fourth, the type of documents discussed in the Board's motion are improper for oyer. Finally, the Board cannot crave oyer for documents it already has—yet it craves oyer for only those types of documents.

Plaintiffs Michael McClary and Christina Stockton ask the Court to deny the Board's motion on any of these grounds.

LEGAL STANDARD

Craving oyer permits a defendant to add documents to the record that give rise to a plaintiff's claim, but that a plaintiff did not attach to its complaint. *Horne v. Browder*, 91 Va. Cir. 77, 2015 WL 12588941, at *2 (Prince George County Aug. 4, 2015). "Craving oyer compels a plaintiff to provide the defendant with a true copy of the document being sued on." *Id.* The "practical effect of successfully craving oyer is that a court in ruling on a demurrer may properly consider the facts alleged [in a complaint] as amplified by any written agreement added to the record on the motion." *Antigone v. Taustin*, 98 Va. Cir. 213, 2018 WL 6794671, at *1 (Fairfax Cty. Cir. Ct. Mar. 2, 2018) (quoting *Ward's Equipment v. New Holland North America*, 254 Va. 379, 382 (1997)).

Courts cautiously approach motions craving oyer. Many authorities agree that craving oyer is "archaic and should be avoided." *Glass v. Trafalger House Prop.*, 58 Va. Cir. 437, 2002 WL

31431524, at *2 (Loudoun County Apr. 15, 2002) (citing Costello, Virginia Remedies § 7-9(g) (2d ed. 1999)). This is because notice pleading and open discovery are hallmarks of the practice of Virginia law. *See CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24 (1993) (holding that the trial court erred by sustaining a demurrer and thus "incorrectly . . . short-circuited litigation pretrial and . . . decided the dispute without permitting the parties to reach a trial on the merits.").

ARGUMENT

I. The Board's motion is overly broad and does not identify specific documents.

The Board's motion is so broad and vague that this Court should not grant it. Even before addressing the legal reasons for denial, the Court should consider which documents, exactly, the Board seeks to place in the record. Motions craving oyer exist to append to the record a single document or a select few documents underlying the plaintiff's claim, like a deed underlying a real estate cause of action. *See e.g., Ward's Equipment v. New Holland North America*, 254 Va. 379, 382 (1997) (granting oyer for contract between the parties that was the subject of litigation); *Ragone v. Waldvogel, Poe & Cronk Real Estate Group, Inc.*, 54 Va. Cir. 581, 2001 WL 1262392, at *1 (Roanoke March 6, 2001) (granting oyer for the contract over which parties were disputing and denying oyer for evidentiary documents). Here, the Board wants to crave oyer for a universe of documents that is breathtaking in its breadth and ambiguity.

The Board craves oyer for:

- "the governing/controlling instruments/documents, namely all of the appropriation resolutions, or legally mandated recorded votes of any such actions as maintained by the Honorable Clerk of the Circuit Court – or the relevant collateral documents which are necessary to Plaintiffs' claim,"
- "the actual appropriations of the [Board], and the relevant collateral documents," and
- "the appropriation resolutions, and/or legally mandated recorded votes upon which Plaintiffs rely, along with the relevant collateral documents which are necessary to Plaintiffs' claim (specifically the attendant budget resolutions)."

Motion at 4-5.

These requests are vague and difficult to parse. For instance, the Board uses the conjunctive and disjunctive in a confusing way. On page four, the Board uses the disjunctive when listing its broad categories of documents, but then later on that same page it uses the conjunctive. On page five, it uses both. When the Board uses the disjunctive, which set of documents on each side of the "or" is it targeting for oyer? And does the conjunctive-disjunctive dual use mean that the documents are interchangeable, so that "appropriation resolutions" are a substitute for "the legally mandated recorded votes"? The Board does not clear up the confusion its motion creates.

Moreover, vague adjectives like "governing/controlling" or "relevant" put the cart before the horse. Plaintiffs dispute that the documents appended to the Board's motion govern, control, or have any relevance. And by using this qualifier, the Board suggests that some documents within the scope of its motion *are not* "governing/controlling" or "relevant," and thus the Court will need to weed them out of any order granting oyer. Taken together, the Board would thus force additional litigation at the pre-demurrer stage about which documents are "governing/controlling" or "relevant" so that the Court will grant oyer for only *those* materials. While this type of dispute might be appropriate for trial, the Board should not be able to litigate these merits issues in its procedural oyer motion at the very beginning of litigation.

Finally, the breadth of the Board's motion renders it unworkable. The Board craves oyer for all "governing/controlling instruments/documents" and "relevant collateral documents which are necessary to Plaintiffs' claim." *Id.* at 5. This description reads like an overly broad discovery request, not a motion to amplify the pleadings to support a dispositive motion. When a "motion craving oyer is overly broad," it should be "overruled." *Smith v. Sullivan*, 92 Va. Cir. 182, 2015 WL 13373578, at *2 (Chesapeake June 12, 2015). This Court should do precisely that.

II. The documents the Board targets do not form the basis of this case.

The Board appears to want the Court to find that these documents form the basis of Plaintiffs' claim. They do not. The Court should deny the Board's motion on this basis as well.

Plaintiffs sued the Board for appropriating their Virginia taxpayer money to fund Sheriff Jenkins' enforcement of federal civil immigration law. Documents about the budget allotted by the Board to the Sheriff may help the Board formulate its defense—although Plaintiffs dispute that the documents do anything to advance the Board's position. But the Board can point to no analysis that shows these documents are essential to Plaintiffs' complaint.

To start, the Court can quickly dispense with any argument about what is and is not in the complaint. Plaintiffs never pleaded facts about the documents targeted by the Board. Had Plaintiffs done so, that still would not permit oyer. Even "simple mention of the document in the pleading does not justify its incorporation into the pleadings." *Colinsky Consulting*, 2002 WL 31425705, at *2; *see also Sjolinder v. American Enterprise Solutions, Inc.*, 51 Va. Cir. 436, 2000 WL 33259895, at *1 (Charlottesville Mar. 28, 2000) ("The mere fact that [a document] is referenced in their pleadings does not justify incorporating it in its entirety into their pleadings.").

Rather, "[a] document for which oyer is craved must serve as more than mere evidence—the document must be essential to the complaint." *Station #2, LLC v Lynch*, 75 Va. Cir. 179, 2008 WL 8083417, at *2 (Norfolk Apr. 30, 2008). This makes sense. Oyer does not test the truth of a complaint's allegations. Instead, oyer properly supplements the record when a plaintiff has tried to frame a cause of action based on a few documents not before the court.

The Board moves to crave oyer for documents that perform the opposite function. They go "to the truth of the allegations" and the ultimate question of liability, "not to the question of whether the Complaint states a cause of action." *Fielder's Choice Enterprise, Inc. v. Augusta County*, 92 Va. Cir. 66, 2015 WL 13567446, at *4 (Augusta County March 25, 2015). Oyer is not

the machete the Board wants it to be. It is a set of sewing scissors, designed to cut the last thread of a barely-there complaint.

What's more is that the Board asks the Court to append any "relevant" documents to the record. *See* Motion at 4-5. The Board improperly uses oyer to try to incorporate into the record a slew of budget-related documents. Plaintiffs do not allege that the Board's general allocation of funds to the Sheriff is illegal. The Board violates Virginia law by *unconditionally* appropriating funds that the Sheriff then uses to enforce federal civil immigration law. The documents referenced by the Board, which deal exclusively with general allocations to the Sheriff, are not essential to the complaint. *See, e.g.*, *Horne*, 2015 WL 12588941, at *2 (denying oyer of a contract when plaintiff did "not allege that the contract had any impact on her decision").

The documents the Board references in its motion do not form the basis of Plaintiffs' complaint. That fact is fatal to the Board's motion. The Court should deny oyer.

III. Craving oyer is not appropriate for general, cherry-picked evidentiary material.

The Court should also deny the Board's motion because the documents it targets are merely evidentiary material, hand-picked by the defendant to support its theory of the case.

The Board attached to its motion numerous budget-related documents—not consecutively numbered, but about a half-inch thick when printed—including appropriation resolutions, legal notices about budgets, and seven sets of meeting minutes from Board meetings. These documents do not form the basis of Plaintiffs' case. *See supra* Section II. They are mere evidentiary material. "[M]otions craving oyer are not appropriate for documents that are merely evidentiary material." *Bagwell v. City of Norfolk*, 59 Va. Cir. 205, 2002 WL 31989080, at *3 (Norfolk July 2, 2002); *see also Ragone v. Waldvogel, Poe & Cronk Real Estate Group, Inc.*, 54 Va. Cir. 581, 2001 WL 1262392, at *1 (Roanoke March 6, 2001).

The Board also self-selected documents to support its own version of the facts. The Board provides minutes from meetings on May 2, 2017; September 5, 2017; October 3, 2017; March 6, 2018; May 1, 2018; October 2, 2018; and November 7, 2018. The Board never explains why these minutes, and not those from the plenty other meetings during this time, are relevant—much less essential—to Plaintiffs' claims. A quick review of the missing details is illuminating. The Board does not attach the minutes from its December 5, 2017, meeting. That is the meeting where Sheriff Jenkins informed the Board about the 287(g) Agreement. *See* Compl. ¶¶ 32-33. The Board thus attempts to use oyer to put forth a biased version of the facts. The Board's use of oyer conflicts with its purpose to "prevent[] parties from restricting the court's knowledge to only such parts of the record as the litigant thinks tend to support his view." *Jackson v Middleton*, __ Va. Cir. Ct. __, 2015 WL 13215216, at *2 (Norfolk Jan. 9, 2015).

Whether because the Board wants to crave oyer for evidentiary material, or because the Board would use oyer to put before the Court selectively-chosen evidence that supports only its theory of the case, the Court should deny the Board's motion.

IV. A motion to crave oyer does not apply to these types of documents.

For more than one hundred years, the Supreme Court has explicitly limited motions craving oyer to a select few categories of documents. The Supreme Court has never "explicitly expanded the Oyer Doctrine beyond deeds or letters of probate and administration." *Antigone v. Taustin*, 98 Va. Cir. 213, 2018 WL 1220180, at *2 (Fairfax County March 2, 2018). The Court should thus deny the Board's motion that seeks to crave oyer for the wrong type of documents.

"As a general rule, the right to crave oyer of papers mentioned in a pleading, applies only to specialties and letters of probate and administration, not to other writings, and only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed." *Jackson v Middleton*, __ Va. Cir. Ct. __ , 2015 WL 13215216, at *1 (Norfolk Jan. 9, 2015) (quoting *Grubbs*

v. National Life Maturity Insurance Co., 94 Va. 589, 591 (1897)); *accord Colinsky Consulting, Inc. v. Holloway*, 57 Va. Cir. 403, 2002 WL 31425705, at *2 (Norfolk March 1, 2002) (holding that oyer applies only to sealed contracts, letters of probate and administration, and some deeds, but "*not to other writings*"); *Virginia Beach Rehab Specialists, Inc. v. Augustine Med., Inc.*, 58 Va. Cir. 379, 2002 WL 31431490, at *7 (Norfolk March 19, 2002) (same).

Although courts recognize that craving oyer for an "agreement [between] the parties" or "supplements to documents related to deeds or probate already attached to the complaint" are permissible, neither of those narrow exceptions is applicable here. *Antigone v. Taustin*, 98 Va. Cir. 213, 2018 WL 6794671, at *1 (Fairfax Cty. Cir. Ct. Mar. 2, 2018).

Assorted budget-related documents do not fall into any of these categories. They are not letters of probate or administration. They are not deeds. And they are not specialties. *See Colinsky*, 2002 WL 31425705, at *2 n.2 (explaining that a "specialty" is a "contract under seal," or a "writing sealed and delivered, containing some agreement or given as a security for the payment of a debt, in which such debt is specified"). And they are also not an agreement between the parties, nor do they supplement documents attached to the complaint. The Board's identified documents are not properly the subject of oyer.

The Board's motion seeks to crave oyer for the wrong type of documents. This Court should deny that motion.

V. The Board already has the documents it targets.

"A motion craving oyer is moot when the subject documents have been produced." *Williams*, 2013 WL 8118657, at *2; *see also Mason's Stores, Inc. v. National Union Insurance Co.*, 3 Va. Cir. 405, 1966 WL 88484, at *1 (Richmond Nov. 17, 1966) ("Instruments in the possession of the defendant need not be produced in answer to oyer."). The Board has, or can get, the documents that are the subject of its motion. In fact, it attached hundreds of (selectively chosen)

pages of these documents to its motion. Thus, the Court should deny the Board's motion on this basis as well.

CONCLUSION

The Court should deny the Board's motion and grant all other appropriate relief.

Dated: May 10, 2019

Respectfully Submitted,

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