UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

BIDDEFORD INTERNET CORPORATION D/B/A GREAT WORKS INTERNET and GWI VERMONT, LLC, Plaintiff, v. F.X. FLINN, Defendant.	)	Civil Action No. 2:25-cv-00354

DEFENDANT'S OPPOSITION TO PLAINTIFFS' EXPEDITED MOTION FOR LEAVE TO SERVE THIRD-PARTY SUBPOENAS DUCES TECUM

Defendant, F.X. Flinn, by and through his attorneys, Cooley, Cooley & Foxx, Inc., moves in opposition to Plaintiffs' *Expedited Motion for Leave to Serve Third-Party Subpoenas Duces Tecum*. (Doc. 9). In support of the Opposition, Defendant submits the following memorandum of law.

MEMORANDUM OF LAW

I. Background

This lawsuit arises from Plaintiffs' efforts to silence, intimidate and oust F.X. Flinn from his position as Chairman of the Governing Board for the East Central Vermont Telecommunications District (the "District"), whose internet service provider business is known by the trade name ECFiber.[1] For over ten years, Mr. Flinn, a retired information technology professional, has worked tirelessly on a voluntary basis to bring broadband technology to

[1] Plaintiffs' Complaint is a Strategic Lawsuit Against Public Participation that would be barred under Vermont's anti-SLAPP statute, 12 V.S.A. 1041. Plaintiffs originally filed this lawsuit in State Court but voluntarily dismissed that Complaint (Exhibit A) and refiled in Federal Court. Mr. Flinn contends Plaintiffs' decision to dismiss the State Court action was done to avoid application of the statute.

Vermont. He has done this primarily in his role as the Town of Hartford's representative to the District's Governing Board. In 2014, he was part of the board committee which drafted Vermont's Title 30, Ch. 82 "Communications Union Districts" which took effect in 2015 and enabled the District to access the municipal revenue bond market to finance a more rapid buildout of ECFiber. He was elected Vice Chair in 2017 and Chair in 2020, He actively assisted in drafting legislation (1) in 2019 that established the CUD approach as the new state strategy for solving Vermont's rural broadband crisis, (2) in 2020 for the broadband portion of the CARES act that distributed federal Covid Relief Funds, and (3) in 2021 for the creation of the Vermont Community Broadband Board and its distribution of federal American Recovery Program Act monies. Mr. Flinn was instrumental in the creation of the Vermont Communications Union Districts Association and served as its first President. He was also a founding director of Equal Access for Broadband, Inc., a 501(c)3 intended to serve as a way for ECFiber to offer subsidized service to households in need with school age children. Like his role as a delegate, these activities were undertaken on a voluntary basis, and far from being alone, he was just one of hundreds of other volunteers throughout the state of Vermont who banded together to solve the failure of the marketplace to bring modern broadband to rural Vermont.

The gist of Plaintiffs' theory is simple: they claim that, starting in October 2024, Mr. Flinn engaged in a scheme with a GWI Vermont, LLC ("GWI") employee to establish a pretextual basis for ECFiber not to renew its operating agreement with GWI. The scheme allegedly involved Mr. Flinn having the "GWI employee…furnish him [with] a surreptitiously recorded confidential meeting of GWI personnel in order to gain access to GWI's proprietary information and to falsely contend that GWI was in breach of the Operating Agreement." (*Compl*., Doc. 1, ¶ 15). The recording itself establishes GWI's intent to use ECFiber's staff to service other entities and to eliminate a number of ECFiber staff in favor of a regional call center

approach. Neither action is permitted under the terms of the District's operating agreement without prior approval of the District. Plaintiffs aver that Mr. Flinn used this information as the basis for the District to terminate its relationship with GWI (Compl., Doc. 1 ¶ 18, 19) and hire a company that he formed - Vermont ISP Operating Company ("VISPO").

Plaintiffs' allegations have no basis in law or fact. GWI's lawyers could have easily verified that there was no scheme had they done an iota of due diligence before signing and filing the Complaint.[2] Suffice it to say, there was no scheme. The truth is that by its own terms, the existing operating agreement will expire on December 31, 2025. In the midst of negotiations over a new operating agreement, or alternatively, the extension of the existing agreement, a whistleblowing employee, who had never discussed with Mr. Flinn the District's relationship with GWI before the two spoke on February 11, 2025, contacted the District's leadership on her own initiative due to her genuine concerns about GWI's plans. Moreover, the whistleblower did not even contact Mr. Flinn initially. She first reported GWI's plans to Jeff Brand, Secretary of the Governing Board for ECFiber. Mr. Brand, however, recommended that she speak with Mr. Flinn.

Mr. Flinn, who prior to February 11, 2025, had very few interactions with the whistleblowing employee, called her to learn more. During their call, the whistleblowing employee asked whether Mr. Flinn knew about GWI's plans, which apparently included having GWI employees work on other CUD projects. Mr. Flinn denied being aware of GWI's plans and notified the whistleblowing employee that ECFiber's Governing Board had not approved of them, and that in fact this was not something GWI could do without the prior approval of the Governing Board. The whistleblowing employee also indicated that she had recorded the meeting where this was discussed and forwarded a copy of that video to Mr. Flinn.

[2] On February 19, 2025, in no uncertain terms, ECFiber lawyers warned Plaintiffs' attorneys to verify Plaintiffs' false allegations before signing their names to any pleadings.

On February 12, 2025, counsel for the District sent a letter to GWI's CEO Kerem Durdag demanding that GWI cease and desist from implementation of any such plan. Instead of discussing the issue, GWI replied through counsel, and has attempted to intimidate and silence Mr. Flinn through filing a lawsuit (twice), and at least five attorney letters—one after essentially every communication Mr. Flinn has made related to GWI—threatening Mr. Flinn with various dire consequences if he continues to carry out his duties to the District.

More fundamentally, it was the municipality itself, not Mr. Flinn, who opted to terminate negotiations with GWI. This decision was made on April 8, 2025, following a duly noticed meeting of the District's Governing Board. The meeting was attended by delegates from the 31 member towns that make up the District. These delegates unanimously voted not to renew the operating agreement with GWI and to approve a Memorandum of Understanding between the District and VISPO that tasked VISPO with developing transition plans and preparing itself to become the ECFiber operator. The reason for the termination was simple – GWI and the District could not reach an agreement on the financial terms for an operating agreement – they were millions of dollars apart – and because GWI intended to terminate many GWI employees that service ECFiber's network and immediately move its customer service office, based in South Royalton, to a regional call center. GWI's conduct made it all too apparent that GWI's for-profit mission is entirely incompatible with the District's Vermont community service focus.

Finally, Mr. Flinn has no financial stake in VISPO. Indeed, no person does. It is a public benefit corporation set up to provide essential services to a municipality exempt from taxation under Section 115 of the IRS code, similar to how a city owning its own electric utility would set up a corporation to manage the business activities of the utility. The company is not even operating yet. Moreover, Mr. Flinn has no intention of deriving income from VISPO. The simple fact is Mr. Flinn and two other ECFiber officers – Daniel Leavitt and Alessandro Iuppa – formed

VISPO with the full support of the District's leadership for the sole purpose of setting the groundwork for returning ECFiber to its roots – having its internet service provider business operated by a local non-profit entity. Having accomplished that plain ministerial goal, Mr. Flinn has turned over direction of VISPO and in no way stands to recoup a dollar for his time spent ensuring the continued level of service ECFiber customers expect and to ensure that it is a local Vermonter who will pick up the phone when that customer calls.

With that background in mind, and for the reasons set forth below, this Court should deny Plaintiffs' *Expedited Motion for Leave to Serve Third-Party Subpoenas Duces Tecum* ("*Motion*").

II. Argument

A. The circumstances do not warrant pre-answer discovery.

For starters, Mr. Flinn has nothing to hide. Plaintiffs' document requests will only support his defense. Notwithstanding, there is no basis to allow pre-answer discovery. In support of their motion, Plaintiffs aver that they are entitled to pre-answer discovery to determine "whether injunctive relief and/or amendment of Complaint is warranted." (Doc. 9, p. 3). As set forth below, neither rationale offers a plausible justification for pre-answer discovery.

In assessing whether a party can engage in pre-answer discovery, the Second Circuit generally applies the standard for whether to grant a preliminary injunction or the more flexible standard of reasonableness and good cause. *Klymn v. Monroe County Supreme Court*, No. 21-CV-6488-JLS-LGF, 2023 WL 10354316, at *9 (W.D.N.Y. 2023). "The majority of courts in the Second Circuit apply the more flexible 'good cause' standard when evaluating motions for expedited discovery." *Id*.

> [I]n assessing good cause a court may take into account the standard necessary to establish entitlement to a preliminary injunction, including for instance whether there is some connection between the request for expedited discovery and the avoidance of irreparable injury and any burdens

> associated with the expedited discovery in comparison to the potential injury to the moving party in the absence of expedited discovery.

Id. (citing *R.R. Donnelley & Sons Company v. Marino*, 505 F.Supp.3d 194, 209 (W.D.N.Y. 2020) (internal quotations omitted).

Plaintiffs cannot satisfy this standard for three reasons. First, there are no exigent circumstances. On April 8, 2025, the District's delegates, representing the 31 member Towns, voted unanimously not to renew contract negotiations with GWI and to enter into a Memorandum of Understanding with VISPO. Given the District's unequivocal decision and right not to renew its operating agreement with GWI, GWI cannot credibly argue that discovery should proceed so that it can obtain a restraining order to prevent the District from terminating its relationship with GWI.

Second, Plaintiffs' other proffered explanation – that it needs pre-answer discovery to assess whether to amend its complaint – also falls short of the mark. The standard for allowing an amendment is liberal under Fed. R. Civ. P. 15 (a)(2), and leave to amend shall be freely granted. If this case proceeds to discovery, and information uncovered during discovery provides a good faith basis to amend the Complaint, Plaintiffs will be able to do so then. Thus, waiting to proceed with discovery in the ordinary course – after the pleadings close and after the parties enter into a discovery schedule and order – will not prejudice the Plaintiffs.

Finally, Mr. Flinn has not answered the Complaint. When he does, he anticipates filing a motion that calls into question whether this Court has jurisdiction to hear this case. Thus, permitting discovery may require the District, a non-party, to participate in discovery in a case that is not properly before this Court. In that respect, granting Plaintiffs' motion may impose an undue burden on the District and Mr. Flinn, the chair of its Governing Board.

II. Conclusion.

In sum, it is clear from Plaintiffs' pretextual justification for filing this lawsuit that they failed to do their due diligence and verify that their Complaint allegations had factual and legal merit. Now they seek discovery because they are second guessing the underpinnings of their lawsuit and to further harass Mr. Flinn. *See* FN1. This Court should not reward Plaintiffs in pursuing this strategy and should therefore deny Plaintiffs' motion and allow this case to proceed in the ordinary course.

Dated at Burlington, Vermont, this 21st day of April 2025.

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