VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

CHRISTOPHER HORNER,	)	
Et al.	)	
	)	
Petitioners,	)	
	)	
v.	)	**CASE NO.: CL18-5666**
	)	
MARK R. HERRING,	)	
ATTORNEY GENERAL OF VIRGINIA,	)	
	)	
Respondent.	)	

BRIEF IN SUPPORT OF MOTION TO STRIKE PLEADING AND MOTION FOR DEFAULT JUDGMENT

COME NOW the Plaintiffs, by counsel, and file this memorandum in support of their previously filed Motion to Strike Pleading and Motion for Default Judgment.

I. Introduction

On January 28, 2019, this Court overruled defendant's previously filed Demurrer and instructed him "to file an Answer to the Petitioner's Petition within 21 days of the date of entry of this Order", or by February 18, 2019. Attached hereto and incorporated herein as "Exhibit 1" is a copy of the Court January 28, 2019 Order.

Instead of filing an Answer, the defendant renewed its overruled Demurrer and filed an artful pleading, styled as a "Plea" of nulla bona.

In response, Petitioner has filed a Motion to Strike this Pleading and a Motion for Default, and as a remedy asks that this Court rule defendant has waived any ability to

claim privilege for any documents that might otherwise be privileged.

II. Defendant's "Plea of Nulla Bona" is an Invention

The defendant's artful "plea of nulla bona" not only flouted this Court's own Order that the defendant "file an Answer," but also violates the Rules of the Virginia Supreme Court. Rule 3:8 (b) of the Virginia Supreme Court Rules ("the Rules") states, "When the court has entered its order overruling all motions, demurrers and other pleas filed by a defendant, such defendant **shall**, unless the defendant has already done so, file an answer within 21 days after the entry of such order, or within such shorter or longer time as the court may prescribe" (emphases added). Va. S. Ct. R. 3:8(b).

In Virginia, and in every other jurisdiction where we have looked, nulla bona is simply a *post-judgment* ministerial filing made by a local constable who is attempting to levy on a judgment (or serve a writ of fieri facias) on behalf of a judgment creditor against the property of a judgment debtor and the officer finds no property to be sold in satisfaction of the judgment. Safety Cas. Ins. V. CG Mitchell, 601 S.E.2d 633, 268 Va. 340 (2004); Mann v. Osborne, 153 Va. 190, 149 S.E. 537 (1929); Martin v. South Salem Land Co, 33 S.E. 600, 97 Va. 349 (1899); Canada v. Barksdale, 84 Va. 742, 6 S.E. 10 (1888).

III. This Dilatory Plea Cannot Serve as an Answer

Petitioner cannot locate a single Virginia case supporting the notion that a "Plea" of nulla bona can be an Answer pursuant to Rule 3:8(a). In fact, no published case suggests that "nulla bona" is a recognized "plea" at all. Here, it appears that the Attorney General is attempting to use a "plea of nulla bona" as a general denial of all Petitioners'

allegations, or as a plea to the general issue of the case not only in lieu of, but in order to avoid, filing the required Answer. This is prohibited by the Rules. It provides, in part, that, ".... An answer shall respond to the paragraphs of the complaint. A general denial of the entire complaint or plea of the general issue shall not be permitted." (emphasis added) Va. S. Ct. R. 3:8(a).

As regards the plea of the general issue, a plea of the general issue at common law "was a traverse, a general denial of the plaintiff's whole declaration or an attack upon some fact the plaintiff would be required to prove in order to prevail on the merits. It had the effect of challenging the plaintiff to go to trial and prove his case." Stockbridge v. Gemini Air Cargo, Inc., 269 Va. 609, 617-18 (2005). Put another way, a "plea amounts to the general issue when it traverses matter which the plaintiff avers, or must prove, to sustain his action; whether such traverse be direct or argumentative." Baltimore ORR Co. v. Polly, Woods & Co., 55 Va. 447, 453 (1858).

As regards the Attorney General's "plea," here, the Attorney General seeks to short-circuit the prescribed litigation process of responding to a complaint's numbered paragraphs with numbered admissions, denials, or affirmative defenses, and instead attempting to generally state that Petitioner is entitled to no relief.[1] This cannot be

[1] The Attorney General vacillates between reasons Plaintiffs are entitled to no relief. On the "Plea of Nulla Bona" pages 2, 4 and 6, the Attorney General suggests that there are no responsive documents. Then, on page 6, the Attorney General posits in the alternative that responsive documents might be exempt from production and suggests there are records the Attorney General would claim as exempt – but, having not yet Answered, has avoided claiming– as "working papers". The Attorney General did this in its Demurrer as well, e.g., pages, 4-5. Counsel similarly suggested an effort to avoid expressly identifying and claiming exemption for "working papers", as is required, at the January 28, 2019 hearing (e.g., "I would also bring to the

permitted under Virginia law. On a practical level, Petitioners cannot try their case without knowing which of the factual assertions in their Petition are admitted or denied by the Attorney General, or which affirmative defense(s) the Attorney General might attempt to raise. The pleadings filed to date, rather than putting the parties on an expeditious path towards resolving the instant litigation, have only muddied the waters. For example, neither Petitioners nor this Court can yet tell whether Defendant's various hints buried in these delaying actions and effort to circumvent the prescribed litigation process are due to some closely held view about the meaning of "disclose", a desire to not identify and claim exemption for purported working papers, or a preference to raise affirmative defenses without actually stating them, for reasons of optics if in violation of Rule 3:19. All of which Petitioners could then address, if only Defendant would proceed according to the Rules, Virginia Code and this Court's Order of January 28, 2019.

Regardless, Petitioner is owed an Answer, which this Court has ordered, and as Defendant acknowledged at this Court's January 28, 2019 hearing.[2] Defendant has instead determined to expend resources in its effort to resist this obligation, also causing Petitioner and this Court to expend further resources as a result.

Court's attention -- this is in the demurrer that was filed -- pursuant to 2.2-3705.7, the Attorney General's working papers aren't the subject of FOIA, nor are the Governor's or certain other papers. They are explicitly excluded from the Act, such that that request is not a proper request under FOIA." These inconsistencies further amplify the need for the required Answer in this case, which will respond to the factual allegations in the petition and raise any affirmative defenses the Attorney General believes he may rely on at trial.

[2] For example, "MS. MOORE: I still have 21 days to answer this petition for writ."

IV. Affidavits Submitted in Support of Defendant's Plea are Inadmissible

Rule 2:704 provides that opinions as to the ultimate issue in a case are admissible only insofar as they are otherwise admissible and constitute factual, rather than legal, determinations. Thus, while the Attorney General takes the unusual step of introducing affidavits to support a defensive pleading, his affidavits cannot be accepted for what they purport to say: that the Attorney General's office properly complied with VFOIA (a legal conclusion). Indeed, Ms. O'Brien's Affidavit employs passive language seemingly not to convey information, but to obscure it. Instead, at most, proper testimony at trial will prove what certain agents or employees of the Attorney General have or have not done to comply with VFOIA. The final legal determination of the sufficiency of the Attorney General's response is the province of this Court alone.

V. Default may be granted under 3:19

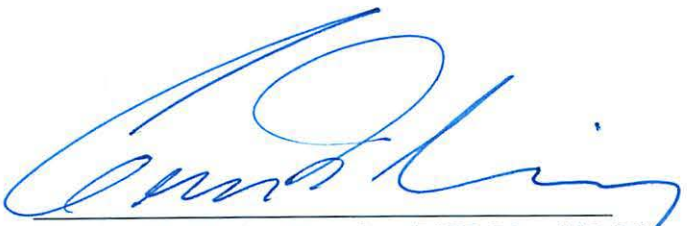
This Court has the power to find Defendant in default pursuant to Rule 3:19(a), "A defendant who fails timely to file a responsive pleading as prescribed in Rule 3:8 is in default." Although this Court has the inherent power to find the defendant in default, what Petitioners seek is the Answer they are owed: an Answer. This Court can grant relief from default under Rule 3:19(b) and permit leave for a late responsive pleading, "conditioned by the court upon such defendant reimbursing any extra costs and fees, including attorney's fees, incurred by the plaintiff solely as a result of 1he delay in 1he filing of a responsive pleading by the defendant." Plaintiffs respectfully suggests that this Court Order Defendant to Answer Petitioners' petition within seven (7) days from the date of the upcoming hearing, with notice that an Order of Default will be entered on the

8th day if no Answer is forthcoming, and prescribing the schedule for the process of obtaining the evidence relevant to Petitioners' requested relief.

WHEREFORE, your Plaintiffs, Christopher Horner and Competitive Enterprise Institute, pray that this Court enter an Order consistent with this Motion, and for such other and further relief as this Court may deem appropriate.

Respectfully submitted,
Christopher Horner & Competitive Enterprise Institute

By counsel



Graven W. Craig, Esquire (VSB No. 41367)
CraigWilliams, PLC
P.O. Box 68
202 W. Main Street
Louisa, VA 23093
(540) 967-9900 telephone
(540) 967-3567 facsimile
graven@callnow.law e-mail

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Motion to Strike Pleading and Motion for Default Judgment* was sent by U.S.P.S., postage prepaid on this 24th day of April 2019, to the Circuit Court Clerk's Office for the City of Richmond, with a copy, via electronic mail to:

E. Scott Moore (VSB No. 36045)
Assistant Attorney General
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Phone: 804-786-3804
Facsimile: 804-371-2087
Email: EMoore@oag.state.va.us
Counsel for Mark R. Herring,
Attorney General of Virginia

Graven W. Craig, Esquire

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

CHRISTOPHER HORNER, et al.,

Petitioners,

v.

MARK R. HERRING
ATTORNEY OF GENERAL OF VA

At Law No. CL18-5666

Respondents.

ORDER DENYING DEMURRER

CAME this 28th day of January 2019, the parties, by counsel, for hearing on defendant's demurer filed herein; and, after hearing the arguments and cited authorities of the parties, the defendant's demurrer is hereby denied. The defendant is directed to file an Answer to the Petitioner's Petition within 21 days of the date of entry of this Order.

Entered this 28th Day of January 2019.

Theodore J. Markow, Judge

A Copy
Teste: EDWARD P. JEWETT, CLERK
BY: Catherine White

I ASK FOR THIS:

Graven W. Craig, Esquire (VSB #41367)
Counsel for Christopher Horner and Competitive Enterprise Institute

SEEN ~~AND~~ Objected to for the reasons stated at hearing and in pleadings

E. Scott Moore (VSB # 36045)
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
Counsel for Mark R. Herring, Attorney General for Virginia

EXHIBIT 1