

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCHOONER CREEK FARM,)
)
Plaintiffs,)
)
v.) Cause No. 1:20-cv-00518-RLY-DML
)
CITY OF BLOOMINGTON, INDIANA,)
)
And,)
)
JOHN HAMILTON, in his official capacity)
As Mayor of the City of Bloomington, Indiana and)
in his individual capacity,)
)
And,)
)
PAULA MCDEVITT, in her official capacity)
as Administrator of the Bloomington Parks and,)
Recreation Department in her individual capacity,)
)
And,)
)
MARCIA VELDMAN, in her official capacity)
As the Program Coordination for the Bloomington)
Community Farmers Market and in her individual)
capacity,)
)
Defendants.)

)
)
CITY OF BLOOMINGTON, INDIANA,)
)
And,)
)
JOHN HAMILTON, in his official capacity)
As Mayor of the City of Bloomington, Indiana and)
in his individual capacity,)
)
And,)
)
PAULA MCDEVITT, in her official capacity)
as Administrator of the Bloomington Parks and,)

Recreation Department in her individual capacity,)
)
 And,)
)
 MARCIA VELDMAN, in her official capacity)
 As the Program Coordination for the Bloomington)
 Community Farmers Market and in her individual)
 capacity,)
)
 Counter-claim Plaintiffs,)
)
 v.)
)
 SARAH DYE, and DOUGLAS MACKEY,)
)
 Counter-claim Defendants.)

BLOOMINGTON’S RESPONSE
TO SCF’S MOTION FOR ORAL ARGUMENT

Come now the City of Bloomington, John Hamilton, Paula McDevitt and Marcia Veldman (collectively, “Bloomington”), by counsel, and for their response to Schooner Creek Farm, Sarah Dye and Douglas Mackey’s (collectively, “SCF”) Motion for Oral Argument [Dkt. 81] state as follows:

1. Per Local Rule 7-5(a), a party’s request for oral argument must be filed and served with its supporting, response, or reply brief.
2. SCF’s Motion for Oral Argument [Dkt. 81] is untimely because it was filed and served 28 days after SCF filed and served its response in opposition to Bloomington’s motion for summary judgment [Dkt. 73]. Because SCF’s motion is untimely, it should be denied.¹

¹ SCF’s motion for oral argument filed at Docket No. 44 was filed and served 62 days after SCF filed and served its motion for partial summary judgment at Docket No. 38. That motion for oral argument [Dkt. 44] was also untimely and should be denied.

3. SCF's Motion for Oral Argument [Dkt. 81] should also be denied because SCF had a full and fair opportunity in its briefs filed at Docket Nos. 39 and 73 to address the issues before the Court on summary judgment.

4. SCF had the opportunity to file a reply brief in support of its motion for partial summary judgment filed at Docket No. 38, but it did not do so.

5. The Local Rules also allowed SCF 35 pages in which to present its response to Bloomington's motion for summary judgment and authorized SCF to seek leave to file an oversized brief if it thought it needed additional pages to present its arguments. [S.D. Ind. Local Rule 7-1(e)(1) & (2).] SCF, however, filed a response brief [Dkt. 73] that was only 31 pages in length. SCF had additional pages to further address the facts, Bloomington's legal arguments, and the case law that Bloomington cited in its brief, but SCF did not utilize the opportunity to do so.

5. To the extent that SCF now believes that its briefs did not adequately address the facts, parties may not present additional evidence at oral argument. [S.D. Ind. Local Rule 7-5(b).] There is no reason for the Court to hold an oral argument to allow SCF to present additional evidence.

6. To the extent that SCF's briefs failed to address several of Bloomington's legal arguments and/or did not discuss the case law cited by Bloomington in Bloomington's briefs, there is no reason for the Court to hold an oral argument to provide SCF with a second chance to do so. Arguments not made in response to a summary judgment motion are waived. *Nichols v. Michigan City Plant Planning Dep't.*, 755 F.3d 594, 600 (7th Cir. 2014).

6. Bloomington observes that the Court rarely holds oral argument on summary judgment motions and typically decides such motions on the parties' briefings. Of course, if the

Court has questions for the parties and believes that oral argument would be helpful, then Bloomington has no objection to the case being set for oral argument.

7. The case should not, however, be set for oral argument (much less for 3 hours of oral argument) at SCF's request to give SCF an opportunity to present additional evidence, recast or recharacterize the facts differently than it did in its briefings, address issues that it did not address in its briefings, attempt to revive waived claims, discuss the case law that it failed to discuss when it had the opportunity to do so, or debate issues that have been withdrawn and are not in contention.²

WHEREFORE, SCF has not offered any good reason that the pending motions should be set for oral argument. The Court should not set the pending motions for oral argument based on SCF's request.

Respectfully submitted,

STEPHENSON MOROW & SEMLER

s/Pamela G. Schneeman

Pamela G. Schneeman

Attorney No. 18142-53

Attorney for Defendants,

City of Bloomington, Mayor John Hamilton

Paula McDevitt and Marcia Veldman

² For example, SCF asserts that oral argument is necessary to address whether “a question asked by counsel in a discovery deposition can be a basis for determining the mindset of a party.” [Dkt. 81 at p. 3.] It is not clear to Bloomington what that even means, but SCF neither raised nor offered argument on that claimed issue its response brief filed at Docket No. 73. The argument is thus waived. SCF asserts that oral argument is needed to address whether “the indemnification clause in the Vendor Contract state[s] clearly and unequivocally that farm vendors would agree to first party indemnity,” but no oral argument is needed on that issue because Bloomington withdrew it. [Dkt. 43 at p. 6, n.2.] SCF asserts that oral argument is needed to discuss whether a “threat” “couched” as a “request” violates the constitution, but no oral argument is needed on that claimed issue because the judicial admissions in SCF's pleading removed any such issue from contention and foreclose SCF's argument in that regard. [Dkt. 79 at p. 3-11.]

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, a copy of the foregoing BLOOMINGTON'S RESPONSE TO SCF'S MOTION FOR ORAL ARGUMENT was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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