COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF MADEIRA,	:	**Case No. A-18-02415**
	:	
Plaintiff,	:	**Judge Shanahan**
	:	
v.	:	
	:	**DEFENDANT'S MEMORANDUM IN**
PHILIP DOUGLAS OPPENHEIMER,	:	**OPPOSITITION TO PLAINTIFF'S**
	:	**MOTION FOR RECONSIDERATION/**
Defendant.	:	**MOTION TO AMEND**
	:	

The CITY OF MADEIRA has not set forth any reason, let alone a significant and exceptional reason, why the extraordinary remedy of reconsideration or amendment should be employed in this case, as everything it now seeks to argue or otherwise put before the Court could have been and should have been tendered previously when the *Motion to Dismiss* was being considered.

> Far too often, litigants operate under the flawed assumption that any adverse ruling on a dispositive motion confers upon them license to move for reconsideration … or amendment as a matter of course, and to utilize that motion as a platform to criticize the judge's reasoning, to relitigate issues that have already been decided, to champion new arguments that could have been made before, and otherwise to attempt a "do-over" to erase a disappointing outcome. This is improper.

Garrett v. *Stanton,* 2010 WL 320492, at *2 (S.D. Ala. Jan. 18, 2010).

> This attempt to overturn an adverse ruling by a motion for reconsideration based on materials that counsel did not see fit to place before the Court in litigating the matter in the first place is improper. Plaintiffs were obliged to put their best foot forward in resisting the motion.

Faulkner v. National Geographic Society, 220 F.Supp.2d 237, 239 (S.D.N.Y. 2002); *accord Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc*., 904 F.Supp. 644, 669 (N.D. Ohio 1995) ("[m]otions for reconsideration are not substitutes for appeal nor are they vehicles whereby a party may present arguments inexplicably omitted in prior proceedings"); *Northeast Ohio Coalition for*

Homeless v. Brunner, 652 F.Supp.2d 871, 877 (S.D. Ohio 2009)("[m]otions for reconsideration are not intended to relitigate issues previously considered by the Court or to present evidence that could have been raised earlier").

In filing the *Motion to Dismiss Based upon the Filing of Complaint Without Legal Authority*, Defendant PHILIP DOUGLAS OPPENHEIMER raised a legitimate issue with the solemnity and professionalism that should attend any filing or proceeding in a court. But instead of responding to the *Motion* in a similar fashion and putting its best foot forward, the CITY OF MADEIRA elected to take a cavalier attitude towards the *Motion to Dismiss.* From summarily and condescendingly characterizing the *Motion to Dismiss* as "yet another meritless motion" and evidence of Mr. Oppenheimer's "already-voluminous vexatious conduct file" to the invocation of the movie *Mr. Smith Goes to Washington* (in an effort to ridicule Mr. OPPENHEIMER), the CITY OF MADEIRA elected to defend against the *Motion to Dismiss* by attacking the *bona fides* of the *Motion* itself and Mr. OPPENHEIMER personally, going so far as to characterize the *Motion to Dismiss* as consisting of "increasingly outlandish legal theories presented in increasingly frivolous pleadings". Having taken such a cavalier attitude towards the *Motion to Dismiss,* the CITY OF MADEIRA did so at its own risk and its own peril.

After engaging in its personal attacks on Mr. OPPENHEIMER and its dismissive attitude towards the *Motion to Dismiss*, the CITY OF MADEIRA ultimately did put forth some substantive arguments in opposition to the *Motion to Dismiss*; but this Court already considered and rejected those arguments. Now, having suffered a fatal and adverse ruling, the CITY OF MADEIRA has suddenly had a Road-to-Damascus moment concerning the gravity of the *Motion to Dismiss* and now seeks "to overturn an adverse ruling by a motion for reconsideration based on materials that counsel did not see fit to place before the Court in litigating the matter in the first place". But

everything the CITY OF MADEIRA now presents to the Court in support of the *Motion for Reconsideration/Motion to Amend* – from arguments to evidence – it readily could have and should have offered previously. Having failed to raise such matters previously and proceeding forward as it did without objection, the CITY OF MADEIRA has waived any objection or contention to the Court's consideration and ultimate disposition of the *Motion to Dismiss*.

But beyond the impropriety of the present efforts of the CITY OF MADEIRA, the newly-posited arguments and evidence which the CITY now offers does not justify this Court revisiting its prior dispositive decision. For "[r]econsideration of a previous order is an 'extraordinary remedy to be employed sparingly.'" *United States v. Gumbaytay*, 757 F.Supp.2d 1142, 1154 (M.D. Ala. 2010)(quoting *Groover v. Michelin N. Am., Inc*., 90 F.Supp.2d 1236, 1256 (M.D. Ala. 2000).

As to the substance of its now-presented arguments, the CITY OF MADEIRA maintains at the outset that "the City was properly before the Court in the first instance and should be provided the opportunity to present evidence that such was the case." *Motion for Reconsideration/ Motion to Amend, at 2.* Of course, in the context of a motion for reconsideration, new evidence "does not refer to evidence that a party…submits to the court after an adverse ruling. Rather, new evidence…means evidence that a party could not earlier submit to the court because that evidence was not previously available." *Blystone v. Horn,* 664 F.3d 397, 415-416 (3d Cir. 2011)(quoting *Howard Hess Dental Laboratories, Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 251-52 (3d Cir. 2010)). Thus, the time for the CITY OF MADEIRA to put forth its evidence was in opposition to the *Motion to Dismiss*, not now, after the adverse ruling. And clearly, at the time of the hearing on the *Motion to Dismiss*, the CITY OF MADEIRA could have readily identified who authorized the filing of this lawsuit. *See Transcript of Hearing, at 9-10* ("I would ask the Court when Mr. Fox or Mr. Goodin gets up to put clearly on the record unequivocally at the outset who [authorized]

the filing of this lawsuit and when"). But having elected not to put forth such evidence (or even identify who authorized this lawsuit), the CITY OF MADEIRA cannot not now seek to offer evidence that could have been offered previously.

Furthermore, at the hearing on the *Motion to Dismiss*, when Mr. OPPENHEIMER sought to put on testimonial evidence as to "when did the City of Madeira authorize the filing of this lawsuit", the CITY OF MADEIRA objected to such testimony. *Hearing Transcript, at 3-4.* Having objected to the presentation of such evidence earlier, it is all the more improper for the CITY OF MADERIRA to now seek offer evidence on that subject.

The CITY OF MADERIA also claims that the challenge to the authorization to file this lawsuit constitutes an affirmative defense, asserting that "[a]ny defense *grounded in* the *ultra vires* doctrine must, as a matter of law, be an affirmative defense." *Motion for Reconsideration/Motion to Amend, at 3.* But the CITY OF MADEIRA takes great liberty as to what constitutes an affirmative defense and to expand the concept beyond its proper limits. An affirmative defense is a defense which "admits the essential facts of a complaint and sets up other facts in justification or avoidance." *Will v. Richardson-Merrell, Inc.*, 647 F.Supp. 544, 547 (S.D. Ga. 1986); *accord Hudson v. Ernst & Young, L.L.P.*, 2010-Ohio-2731 ¶37, 189 Ohio App.3d 60, 937 N.E.2d 585 (10th Dist. 2010)("the definition of 'affirmative defense' set forth in Black's Law Dictionary (7th Ed.1999): '[a] defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's…claim, even if all the allegations in the complaint are true"). But "[a] defense which points out a defect in the plaintiff's *prima facie* case is not an affirmative defense." *In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988). Thus, "[a]n affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff

can prove his case by a preponderance of the evidence." *Wright v. Southland Corp.*, 187 F.3d 1287, 1303 (11th Cir. 1999).

The CITY OF MADEIRA incorrectly relies upon two, nearly-century old cases for the proposition that "[a]ny defense grounded" in *ultra vires* always constitutes an affirmative defense. But those cases involved *ultra vires* as a defense or avoidance to a contract at issue in the case and, if *ultra vires* was established, then it would require judgment for the defendant on the merits; thus, in that context, it is an affirmative defense. But it is different and the case upon which the CITY OF MADEIRA relies do not treat the lack of authority to even file a lawsuit as being in the nature of an affirmative defense because, even if the filing of a lawsuit was *ultra vires*, it would not require judgment for the defendant on the merits. Despite the claim of the CITY OF MADEIRA, "any defense grounded" in *ultra vires* is not automatically an affirmative defense; the true nature of the defense vis-à-vis the merits of the claim or issue at hand must be considered. The claim that the lawsuit was filed without legal authority does not go to the merits of the claims within the *Complaint*; therefore, it is not an affirmative defense.

Even if, *arguendo*, the issue raised by the *Motion to Dismiss* was an affirmative defense, such an objection has been waived by the CITY OF MADEIRA as they proceed to address the merits of the *Motion to Dismiss* without objection. Furthermore, as is well-established, "Civ.R. 15(B) provides that issues not raised in the pleadings, to wit: an affirmative defense, will be treated as if they had been raised when those issues are tried by the express or implied consent of the parties." *Mayer v. Medancic*, 2001-Ohio-8784 (11th Dist.); *see Eddy v. Virgin Islands Water & Power Auth.*, 256 F.3d 204, 209 (3d Cir. 2001)(failure to plead affirmative defense of qualified immunity in answer did not preclude defendant from raising defense on motion for summary judgment).

In this case, the CITY OF MADEIRA clearly recognized the specific and discrete issue raised by the *Motion to Dismiss*, it had a fair and adequate opportunity to address the issue and to present evidence thereon (but it elected not to offer evidence), and it has not claimed substantial prejudice in its ability to defend the issue in the *Motion to Dismiss*. *See Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1374 (3d Cir. 1993)(allowing unpled affirmative defense when opposing party did not claim prejudice). Thus, to now claim – after an adverse ruling – that the entire issue raised by the *Motion to Dismiss* was not properly before the Court is a red herring and without merit.

Continuing their *modus operandi* of raising issues and arguments that could have and should have been raised before an adverse ruling against it, the CITY OF MADEIRA next contends that "the Court should have converted [the *Motion to Dismiss*] to a summary judgment motion and allowed the City to present rebuttal evidence." *Motion for Reconsideration/Motion to Amend, at 3.* Firstly, no objection was made by the CITY OF MADEIRA as to the process being engaged in by the Court until after the issuance of the adverse ruling against the CITY OF MADEIRA; thus, this contention has been waived (and, if error – which it is not –it is invited error). Furthermore, the CITY OF MADEIRA had plenty of opportunity to present evidence going to the granting of authority to file this lawsuit but elected not to do so and, in fact, when the effort was made for testimonial evidence, the CITY OF MADEIRA objected to the presentation of evidence, furthering constituting a waiver of the issue. And Civil Rule 12(B) simply requires a party be given a "reasonable opportunity" to present materials in such a situation – opportunities which the CITY OF MADEIRA repeatedly had but elected not to do until after an adverse ruling.[1]

[1] The CITY OF MADEIRA alternatively calls upon the Court to still consider the post-adverse ruling *Affidavit of Tom Moeller* which it has attached. *Motion for Reconsideration/Motion to Amend, at 4.* The tendering of such a matter is too late in the day. In response to the *Motion to*

Dismiss (filed on May16, 2019), the CITY OF MADIERA could have directly and succinctly tendered, in a timely manner, an affidavit in support of its new-found assertion that Mr. Moeller supposedly authorized this lawsuit; it elected not to do. With the CITY OF MADIERA failing to do so at that stage, the prayer for such identification was echoed in the *Reply Memorandum in Support of Motion to Dismiss, at 1* (filed June 4, 2019)("the CITY OF MADEIRA should identify forthwith the specific and particular individual who authorized the filing of this action on behalf of the CITY OF MADEIRA"). Then at the oral argument before this Court on July 2, 2019, the CITY OF MADEIRA still had the chance to identify, in a timely manner, who authorized the filing of this lawsuit and, not only failed to do so, but actually objected to the effort for the tendering of direct testimony on the subject. *Transcript, at 3* ("there's really nothing in the record that the plaintiffs have offered as to who authorized and when that person authorized the filing of this lawsuit"); *Hearing Transcript, at 3-4* (objection by CITY OF MADEIRA to testimony on the specific issue of "when did the City of Madeira authorize the filing of this lawsuit").

Instead, the CITY OF MADEIRA has done precisely what was predicted at the oral argument: "they're trying to let the Court say, well, if this one is authorized, or this person authorized it, it's okay. And then they'll say, oh, yeah, that's the person who authorized it." *Transcript, at 7*. Having now received the decision wherein the Court intimated (though did not decide or unequivocally declare) that the Madeira City Manager had the legal power to authorize this lawsuit, the CITY OF MADEIRA suddenly (though belatedly) produces an affidavit to that effect.

But, if the Court is going to allow the CITY OF MADEIRA another bite-of-the-apple after an adverse ruling, the Court must also reconsider its limited discussion of the Madeira City Charter relative to the responsibility (not the authority) of the City Manager. The CITY OF MADEIRA claimed the City Manager was empowered to authorize this lawsuit based selected phrases separated by ellipses in the Madeira City Charter: "[t]he Manager shall be responsible…for the proper administration of all the affairs of the municipality…." And it was this provision the Court quoted but then indicated the CITY OF MADEIRA did not even show the City Manager authorized the lawsuit (and, thus, the Court did not need to decide whether that provision of the Charter actually empowered the City Manager).

But in considering that provision of the Charter, it must be considered in its entirety:

> The Manager shall be responsible to Council for the proper administration of all the affairs of the municipality and the enforcement of all its laws and ordinances,…and to that end he shall have exclusive authority to make all appointments, suspensions, and removals of employees in the departments and offices under his control….

This aspect of concerning "the proper administration of all the affairs of the municipality" simply declares a *responsibility and to whom that responsibility is owed*; it *does not grant power or authority* to the City Manager for any and every aspect of the municipality's administration. The

But even on the merits of this argument, the Court did not convert the *Motion to Dismiss* into a summary judgment motion. Firstly, the CITY OF MADEIRA wrongfully treats the *Motion to Dismiss* as based upon Civil Rule 12(C), *i.e.*, a motion for judgment on the pleadings.[2] A judgment on the pleadings actually constitutes the adjudication of the merits of the claims themselves, the same as though a trial had occurred. *See Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988)(noting that judgment on the pleadings "is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings"); *Curran v. Cousins*, 509 F.3d 36, 43 (1st Cir. 2007)(a motion for judgment on the pleadings requires "assessment on the merits"). The *Motion to Dismiss* simply went to whether the lawsuit was filed on behalf of and in the name of the CITY OF MADEIRA with the appropriate legal authority; the *Motion to Dismiss* did not go to the merits of the claims in the *Complaint.*

Beyond that, the presentation of Proclamation No. 18-01 did not convert the *Motion to Dismiss* into a summary judgment motion. Firstly, comparable to a judgment on the pleadings,

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authority, i.e., power, granted to the City Manager is contained in the remaining portion of the sentence – "exclusive authority to make all appointments, suspensions, and removals of employees in the departments and offices under his control", none of which concerns authorizing the bringing of a lawsuit. Based upon the language in this more fully quoted charter provision, there is a distinction between "responsibility" and what "authority" the City Manager possesses in carry out those responsibilities. Thus, if the Court is going to revisit that which it already decided, then this aspect of the Court's decision would also need to be revisited and clarified.

[2] Though it never raised the issue when the *Motion to Dismiss* was actually before the Court, the CITY OF MADEIRA wrongfully attempts to cram the *Motion* into the confines of Civil Rule 12. *See Motion for Reconsideration/Motion to Amend, at 4* (asserting the *Complaint* was "not afforded its proper Rule 12 deference"). The issue raised by the *Motion to Dismiss* went to the lack of a grant of authority for the municipal corporation to even file this action. That issue is antecedent to any of the potential motions to dismiss under Civil Rule 12. Regardless, though, having not raised the issue when the merits of the *Motion to Dismiss* were actually being briefed and argued, the CITY OF MADEIRA has waived this argument, too.

summary judgments go to the merits of the claims and disposition is with prejudice. And as the *Motion to Dismiss* did not go to the merits of the *Complaint*, it could not be converted to a summary judgment motion. Furthermore, even in the context of a 12(B)(6) motion (or a 12(C) motion), courts may consider matters of public records – such a proclamation issued by the city council – without converting the motion to one for summary judgment. *Henkel v. Aschinger*, 2012-Ohio-423 ¶8, 167 Ohio Misc.2d 4, 962 N.E.2d 395 (Franklin Cty. C.P. 2012)("in deciding a Civ.R. 12(B)(6) motion, it has been recognized that 'matters of public record…[and] items appearing in the record of the case…also may be taken into account'" (quoting *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554 (6th Cir. 1997)(quoting Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Section 1357 (2d ed. 1990))). Finally, Proclamation No. 18-01 was not a "material fact" establishing the authority by which the lawsuit was filed on behalf of the CITY OF MADEIRA; the CITY OF MADEIRA had the opportunity to identify and/or present evidence going to that issue and elected not to do so, and Proclamation No. 18-01 was not material.

Continuing their post-adverse ruling reactionary efforts, the CITY OF MADEIRA also seeks to now amend the *Complaint.* However, "[w]hen a party seeks to amend a complaint after an adverse judgment, it ... must shoulder a heavier burden. Instead of meeting only the modest requirements of Rule 15, the claimant must meet the requirements for reopening a case established by Rules 59 or 60." *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 615 (6th Cir. 2012)(quoting *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 616 (6th Cir. 2010)). Such a standard requires a showing (not just a claim that) "there was (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Michigan Flyer LLC v. Wayne County Airport Authority*, 860 F.3d 425, 431 (6th Cir. 2017). With respect to the *Motion for Reconsideration/Motion to Amend*, the CITY OF MADEIRA

has not posited, let alone actually demonstrated, any of these requirements exist so as to meet its heavier burden following an adverse ruling. *See Lawrence v. Lew*, 156 F.Supp.3d 149, 175 (D.D.C. 2016)("[a] motion to amend the complaint cannot be used as 'an effort to evade summary judgment'" (quoting *Key Airlines, Inc. v. National Mediation Bd.*, 745 F.Supp. 749, 752 n.9 (D.D.C. 1990))). According, amendment after the already-issued adverse ruling is improper.

Conclusion

As the Court in *Garrett* unequivocally declared, it is "improper" to seek reconsideration of an adverse ruling or to seek amendment of a pleading simply "to relitigate issues that have already been decided, to champion new arguments that could have been made before, and otherwise to attempt a 'do-over' to erase a disappointing outcome." And the Court in *Faulkner* recognized, parties are "obliged to put their best foot forward in resisting [a] motion" and, thus, it too is "improper" to "attempt to overturn an adverse ruling by a motion for reconsideration based on materials that counsel did not see fit to place before the Court in litigating the matter in the first place." Because it simply seeks to do that which has been repeatedly recognized as "improper", the CITY OF MADEIRA cannot and has not offered a sufficient legal basis by which this Court could reasonably reconsider its prior ruling or allow an amendment of a pleading. For those reasons, as well as for the other reasons set forth above, the *Motion for Reconsideration/Motion to Amend* must be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon counsel for Plaintiff, Brian Fox (*bfox@graydon.law*) and Steve Goodin (*sgoodin@gradon.law*), via e-mail on the 16th day of August 2019.

_/s/ Curt C. Hartman