STATE OF VERMONT
SUPERIOR COURT
CIVIL DIVISION

Lola Duffort,
Plaintiff

Rutland Unit
v. Docket No. 380-7-16 Rdcv

Vermont Agency of Education and
Vermont State Board of Education,
Defendants

Plaintiff's Reply in Support of Her Motion for a Partial Judgment on the Pleadings

Plaintiff Lola Duffort moved for a partial judgment on the pleadings in this lawsuit challenging the unlawful withholding by Defendants Vermont Agency of Education (AOE) and Vermont State Board of Education (SBE) of public records regarding hazing, harassment, and bullying in Vermont's public schools. The Defendants opposed the motion, arguing that substantial and material factual disputes preclude judgment. The Defendants are mistaken.

I.

The Defendants state that their "speaks for itself" denials "go beyond the requirements of Rule 8" by providing more information than would a simple "denied." But the Defendants could not have plausibly denied all of the allegations they responded to in this manner; instead, this "speaks for itself" response allows them to avoid admitting allegations that they cannot in good faith deny. Although the Defendants argue that these "speaks for itself" responses apprised Ms. Duffort

of the "allegations that are contested and will require proof to be established in order to enable the plaintiff to prevail," (Defs.' Opp. 1), these denials do not apprise her of whether the Defendants deny the substance of the allegation or the basis on which they can possibly challenge the "characterization" of exhibits where, for example, she did no more than quote directly from those exhibits. Rather than "expos[ing] the pertinent issues in the litigation at the earliest possible stage, so the parties can focus on the actual substance of the dispute as soon as practically possible," *Kortum v. Raffles Holdings, Ltd.*, No. 01 C 9236, 2002 WL 31455994, at *4 (N.D. Ill. Oct. 30, 2002), these evasive responses provide no information whatsoever. In addressing this type of response in the request-to-admit context, the District Court for the District of Columbia explained:

> The tautological "objection" that the finder of fact can read the document for itself to see if the quote is accurate is not a legitimate objection but an evasion of the responsibility to either admit or deny a request for admission, unless a legitimate objection can be made or the responding party explains in detail why it can neither admit or deny the request. It is also a waste of time, since the "objection" that the document speaks for itself does not move the ball an inch down the field and defeats the narrowing of issues in dispute that is the purpose of the rule permitting requests for admission.

Miller v. Holzmann, 240 F.R.D. 1, 4 (D.D.C. 2006) (citations omitted). The same is true of the Defendants' "speak for itself" responses to the allegations in Ms. Duffort's complaint.[1]

For these reasons, and for those set out in her opening memorandum, the Court should either deem these allegations admitted or order the Defendants to file

[1] These non-response responses also violate Vt. R. Civ. P. 8(b)'s requirement that, "[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder."

an amended answer that complies with Rule 8(b). In the alternative, the Court may look directly to the exhibits attached to the complaint and relied on in Ms. Duffort's motion to determine that there is no material factual dispute. *See, e.g.*, *Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009) (per curiam) (in ruling on motion for judgment on the pleadings, court may "rely on the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case"); *cf. Davis v. Am. Legion, Dep't of Vt.*, 2014 VT 134, ¶ 13 ("Where pleadings rely upon outside documents, those documents 'merge[ ] into the pleadings and the court may properly consider [them] under a Rule 12(b)(6) motion to dismiss.'" (quoting *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 10 n.4 (mem.))).

II.

There is no factual dispute whose resolution is material to the legal issues presented in this case. The questions presented are legal questions ripe for resolution by this Court; no further discovery or factual development will alter the legal analysis. The Defendants' assertion that no responsive record "exists" is a legal conclusion based on their claim that they would have to "create" a record to respond to Ms. Duffort's request. Ms. Duffort explained in detail in her opening memorandum why neither querying a database to retrieve public records stored therein nor extracting and compiling data from the database constitutes creation of a new record.

The Court can decide these issues even without consideration of any of Ms. Duffort's allegations to which the Defendants gave "speaks for itself" responses. The AOE admits that it "annually collects data regarding bullying, hazing, and harassment complaints that occur in Vermont's public schools from each school, school district, or supervisory union" (Compl. & Ans. ¶ 15[2]); that it "annually collects data regarding the responses to bullying, hazing, and harassment complaints that occur in Vermont's public schools from each school, school district, or supervisory union" (¶ 16); and that it "[a]nnually . . . collects the reported number of bullying, hazing, and harassment complaints from each of Vermont's public schools, school districts, or supervisory unions" (¶ 24). The AOE further admits that it "operates and manages" the Combined Incident Reporting Software (CIRS) (¶ 21); that "CIRS is an electronic data collection tool that enables Defendant AOE to electronically collect and record data sent by school, school districts, or supervisory unions" (¶ 22); and that the "CIRS is capable of searching, organizing, and producing a report from data contained in the Defendant AOE's electronic databases" (¶ 26). Finally, AOE admits that Ms. Duffort filed a public records request for "each data file sent annually 'by each reporting school district or supervisory union regarding that district or supervisory union's bullying incident data for the 2012-2013, 2013-2014, 2014-2015 school years'" (¶ 71) and that this request was denied (¶ 81).[3] This is enough to answer the legal question of whether

[2] All ¶ references in this Reply refer to the Complaint and Answer. As in Ms. Duffort's opening memorandum, paragraphs to which the Defendants have responded with "denied insofar as [the relevant Exhibit] speaks for itself" are marked with an asterisk (*e.g.*, ¶ 72*).

[3] Defendants responded to the allegation that, "[o]n March 4, 2016, the AOE's General Counsel, Greg Glennon,

the AOE had the obligation to retrieve those collected records from the database and produce them in response to Ms. Duffort's request.[4]

Should the Court determine that the admitted allegations do not provide a sufficient factual basis to grant Ms. Duffort's motion, she requests that the Court: (1) deem admitted the allegations the Defendants answered with "speaks for itself" responses; (2) look directly to the exhibits that were attached to the complaint and that Ms. Duffort cited in her complaint and motion to determine that there is no material factual dispute precluding a judgment on the pleadings; or (3) order the Defendants to file an amended answer that complies with Rule 8(b) and permit Ms. Duffort to move for a partial judgment on the amended pleadings.

III.

For the reasons that have been set forth above and in Ms. Duffort's opening memorandum, this Court should grant Ms. Duffort's Motion for a Partial Judgment on the Pleadings and enter judgment in her favor as to Counts I, II, and III of her complaint.

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denied Ms. Duffort's request" (¶ 72*) with a "speaks for itself" denial, but then went on the admit that "Ms. Duffort sent a letter to the Secretary of Education appealing Mr. Glennon's denial of her public records request" (¶ 77) and that the Secretary, "through AOE General counsel Greg Glennon, denied Ms. Duffort's appeal" (¶ 81). It is unclear what possible basis the Defendants have for challenging ¶ 72's characterization of the relevant exhibit in light of their subsequent admissions.

[4] The Defendants' admissions with respect to SBE, taken alone, do not provide a sufficient basis on which this Court can rule. They admitted only that Ms. Duffort appealed the denial of her request and that Mr. Glennon responded to her appeal (¶¶ 115-116). They answered the remaining allegations with "speak for itself" responses.

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February 10, 2017

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Certificate of Service

As counsel for the Plaintiff, Lola Duffort, I hereby certify that on February 10, 2017, I served Defendants, Vermont Agency of Education and Vermont State Board of Education, with *Plaintiff's Reply in Support of Her Motion for a Partial Judgment on the Pleadings* by emailing it to the Defendants' counsel at the following address:

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February 10, 2017