CITY OF PHILADELPHIA	:	PHILADELPHIA COUNTY
	:	COURT OF COMMON PLEAS
Plaintiff	:	
	:	No. 230702394
v.	:	
	:	
TANNER OPERATIONS, ET AL.	:	
	:	
Defendants	:	

ORDER

AND NOW, this _____ day of _____, 2025, upon consideration of the Motion for Sanctions and Rule to Show Cause for Spoliation of Evidence, and the response in opposition thereto, it is hereby **ORDERED** that the Motion is **DENIED.**

BY THE COURT

_____
THE HONORABLE GWENDOLYN N. BRIGHT

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CITY OF PHILADELPHIA Plaintiff v. TANNER OPERATIONS, ET AL. Defendants	:	PHILADELPHIA COUNTY COURT OF COMMON PLEAS No. 230702394

RESPONSE TO MOTION TO IMPOSE SANCTIONS FOR SPOLIATION OF EVIDENCE AND FOR AN ORDER TO SHOW CAUSE

Defendant, Frank's Gun Shop & Shooting Range LLC ("Frank's") files this response to the city of Philadelphia's (the "City") Motion to Impose Sanctions for Spoliation and for an Order to Show Cause and avers as follows:

INTRODUCTION

On September 20, 2024, the Department of Justice, Bureau of Alcohol Tobacco & Firearms ("ATF") revoked Frank's federal firearm license ("FFL")[1] after it found and concluded that Frank's violated federal firearms laws and regulations. Accordingly, as the City admits, Frank's is no longer in business. When Frank's FFL

[1] Under federal law, FFL is needed to legally sell firearms.

was revoked - as Frank's understand is required by federal law - the ATF agents seized and removed all firearms records from Frank's former place of business. However, on or about April 30, 2024, months before the ATF issued its notice of intent to revoke Frank's FFL, Frank's arrange with Zimolong LLC to scan 430 pages of firearms records specifically requested by the City in its discovery request, **which Frank's has produced to the City**. (Additionally, Frank's communication with ATF about its FFL revocation and Frank's with other law enforcement officials.)

Yet, this has not stopped the City from filing and maintaining an outrageous and blatantly false Motion for Sanctions in which it alleges, among other things, that Frank's "handed over" its documents to the ATF and, worse, it did so as part of a deliberate "collaborative effort" between undersigned counsel, counsel for co-defendants, and the ATF to "destroy" all evidence and to keep the documents "beyond the City's and this Court's reach." Worse yet, the City knows its wild allegations are false but refuses to withdraw its motion or to correct its false statements to this Court.[2] The City's (ugly) Motion for Sanctions is utterly without factual or legal merit. Accordingly, the Court should deny the Motion.

First, the Court should deny the motion because Frank's and its attorneys did not lose, destroy, or altered evidence or any documents or evidence. Far from it, while the ***original*** documents the City seeks – federal transaction forms (ATF Form 4473), multiple handgun sale forms, and acquisition and disposition records – were ***removed***

[2] On April 3, 2025, pursuant to Rule 1023.2, undersigned counsel sent notice to Counsel for the City that it intends to seek sanctions against counsel for the City for making statements in the Motion for Sanctions that are untrue and lack any evidentiary support. A copy of undersigned counsel's 4/3//25 email to Counsel for the City and draft motion for sanctions is attached at Ex. "A."

from Frank's place of business ***directly*** by to the ATF, Frank's scanned over 430 pages of documents responsive to the City's discovery requests for the express purpose of preserving them for discovery. Frank's has produced those documents. While the City baselessly claims that Frank's engaged in a "calculated effort to obstruct discovery and destroy [] evidence" and that Frank's destroyed "*all* evidence," the City made no effort to determine the veracity of its specious claims before running to the Court. Instead, it "pieced together" its claims based on emails and a FOIA request.

Second, the Court should deny the City's motion because the City has not suffered any prejudice. The City claims Frank's handed over *all* evidence its needs to prove its claims against Frank's. Frank's is mystified as to what the City needs to prove. As the City admits, Frank's is now a bankrupt "non-entity" and it cannot face "future litigation" because the ATF found it violated federal firearms laws. The City further concedes that any nuisance Frank's created effectively abated. Still, Frank's has produced documents to the City regarding the transactions that the City claims were illegal and the cause of the nuisance. And Frank's has produced documents from the ATF detailing the ATF's allegations against Frank's. Yet, the City never explains how documents completely unrelated to the alleged illegal firearms sales are relevant to its claims or why those documents are needed to prove the unknown case or controversy that still involving Frank's.

Third, the City's requested sanctions are unwarranted and unprecedent. Frank's and undersigned counsel did not violate any Court orders or the Rules of Professional Conduct. Frank's has produced the documents the Court directed

Frank's to produce. While the City expresses frustration about the pace of discovery, the City fails to acknowledge its own actions that led to the delay. Nonetheless, frustration regarding the pace of discovery is not grounds for sanctions. The City cites and cannot cite to any precedent whereby a court issued the putative and cumulative sanctions of summary judgment, attorney fees, and the stripping of the attorney-client privilege because a party took longer than an adversary wished to produce documents. The only parties that should be sanctioned are each attorney for the City who filed a Motion for Sanctions filed with blatant falsehoods about undersigned counsel's conduct without first confirming whether anything alleged was true.

Frank's and its counsel did not destroy documents and evidence and the City has not suffered prejudice. Therefore, the Court should deny the Motion.

I. BACKGROUND

A. THE CITY'S REQUESTS FOR PRODUCTION AND THE DOCUMENTS AVAILABLE FOR PRODUCTION.

On March 5, 2024, the City served Frank's with its first set of Request for Production (the "Document Requests"). On May 2, 2024, Frank's served the City with answers and objections to the Document Requests. Frank's raised objections to the production of documents of certain categories of documents responsive to Documents Requests because documents the City requested, namely firearms transactions records, were exempt from disclosure pursuant to 18 Pa.C.S.A. § 6111(i) and 18 U.S.C. § 926. Notably, a person that violates 18 Pa.C.S.A § 6111(i) may faces to civil damages of $1,000 per occurrence, treble damages, and reasonable attorneys fees. 18 Pa.C.S.A. § 6111(i). Nonetheless, in the event the Court overruled those objections, on April 30,

2024, Frank's scanned certain firearms transactions records copied for production if so ordered. Specifically, Frank's copied documents responsive to requests for production 1, 3, 4, and 6. Those Document Requests ask for documents related to the so-called "Frank's Straw Purchasers," as defined in definition 10 of the Document Request.

B. THE ATF'S NOTICE OF INTENT TO REVOKE FRANK'S FFL.

On May 29, 2024, the Department of Justice, Bureau of Alcohol, Tabacco, Firearms, & Explosives ("ATF" issued to Frank's a notice of intent to revoke (the "Frank's-ATF Matter") its federal firearm's license ("FFL") and prohibited Frank's from removing any firearms transactions records from its place of business.[3] This prevented Frank's from making copies of the thousands of firearms transaction records it maintained at its place of business.

C. THE RESOLUTION OF FRANK'S OBJECTIONS AND APPEAL.

Over two months after Frank's served its answers and objections to the City's Document Request, on July 9, 2024, the City, for the first time, requested a meet and confer regarding Frank's answer and objections. The City falsely claims that undersigned counsel "ignored" this request. Mot., 5. To the contrary, undersigned counsel responded within a week, apologized for the delay in responding, and advised that undersigned counsel was traveling the next two weeks.

[3] Zimolong LLC and its attorney **did not** represent Frank's in Frank's-ATF Matter. As such, while it was ongoing, Zimolong LLC and its attorneys had no personal knowledge of the specifics of the Frank's – ATF Matter.

The parties were finally able to schedule a meet and confer on August 21, 2024, undersigned counsel and counsel for the City met and conferred about Frank's objections under to 18 Pa.C.S.A. § 6111(i) and 18 U.S.C. § 926. That meeting concluded without any resolution on Frank's objections. Therefore, the parties agreed that issue would need to be resolved by the Court. Accordingly, on September 5, 2024, the City filed a motion to compel Frank's to produce the records its firearms transaction records.

On September 26, 2024, the Court granted the City's motion to compel. On September 26, 2024, Frank's filed a motion for reconsideration because Frank's petition for interlocutory appeal regarding Frank's immunity from this litigation was still pending before the Commonwealth Court. As Frank's explained in its motion for reconsideration, it would be prejudiced if it were required to produce documents if the Commonwealth Court ultimately determined that Frank's was entitled to immunity. The motion for reconsideration was denied by the Court on October 24, 2024. And on November 4, 2024, the Commonwealth Court denied Frank's petition for interlocutory appeal.

D. THE ATF'S REMOVAL OF DOCUMENTS FROM FRANK'S AND FRANK'S AMENDED DISCOVERY RESPONSES.

On or about November 4, 2024, undersigned counsel learned that the Frank-ATF Matter had concluded with Frank's surrendering its FFL to the ATF and going out of business.[4] Undersigned counsel came to understand that pursuant to ATF

[4] As previously stated, undersigned counsel did not represent Frank's in the Frank-ATF Matter.

mandatory procedures the ATF physically removed all original firearms records.[5] Accordingly, as required by Rule 4007.4[6], undersigned counsel amended its responses to the City's Document Requests to include a statement that Frank's was no longer in the care, custody, or control of its documents.

On November 5, 2024, [7] Attorney Alla Lefkowitz emailed undersigned counsel and demanded that I "inform her within the next 24 hours where the requested records are." A copy of Attorney Lefkowitz's 11/5/24 is attached at Ex. "B."

Six days later, without ever meeting or conferring with undersigned counsel, on November 11, 2024, the City filed an emergency motion for a special and preliminary injunction. When undersigned counsel received the petition for special and preliminary injunction, undersigned counsel immediately emailed counsel for the city, Lydia Furst, and disclosed that all of Frank's documents were in the possession of the ATF and asked if Attorney Furst was available to speak to discuss the matter. A copy of the email from Walter S. Zimolong to Attorney Furst is attached Ex. "C."

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[5] As more fully set forth below, Frank's did not transfer, "turn-over," or "hand over" the documents to the ATF.

[6] Rule 4007.4(2)(b) requires a party to "seasonably amend" a prior discovery response if new information makes a previous response "though correct at the time no longer true." Pa. R. Civ. P. 4007.4(2)(b).

[7] November 5, 2024 was Election Day. As undersigned counsel had previously informed counsel for the City before Election Day, undersigned counsel was to Donald J. Trump for President 2024, Inc., the Republican National Committee, and the National Republican Senatorial Committee. As the Court is no doubt aware, the Commonwealth of Pennsylvania was a so-called "battle ground" state. On many occasions, undersigned counsel explained that as a small firm with those commitments it could not respond as quickly as the City had often demanded.

Moreover, late on Election Day, it became clear that the contest for United States Senate between David McCormick and (then) Senator Robert Casey would be headed for a mandatory statewide recount. Zimolong LLC and its lawyers were engaged to coordinate the statewide recount effort of the McCormick campaign, the RNC, and the NRSC. This required undersigned counsel to, among other things, assist in the coordination attorneys in all 67 counties as well as personally participating in emergency recount related litigation.

On November 13, 2024, undersigned counsel spoke via telephone with counsel for the Attorney Furst. During that call, undersigned counsel explained to Attorney Furst what undersigned counsel Frank's-ATF Matter, that Frank's had surrendered its FFL to the ATF, that the ATF had seized all documents from Frank's, and that Frank's was out of business.[8] Attorney Furst inquired about whether copies of documents were made. At the immediate time of the call, undersigned counsel did not realize that over six (6) months prior, Zimolong LLC had scanned documents the City requested for preservation. Undersigned counsel further explained to Attorney Furst that he was still predisposed with the Senate Recount effort and stated that he would check to see if Zimolong LLC had copies of documents and, if so, they would be produced to the City.[9] At the conclusion of the call, undersigned counsel emailed Attorney Furst and confirmed that he would inquire about whether copies of documents were made. A copy of the email from 11/13/24 email from Walter S. Zimolong to Attorney Furst is attached at Ex. "D." Undersigned counsel also reminded Attorney Furst that his time was consumed with the Senate Recount and asked for the City's patience. *Id.* Critical, during that undersigned counsel never stated that "handed over," "transferred," or failed to make copies of any documents.

E. THE COURT'S SPECIAL INJUNCTION AND STATUS CONFERENCE.

On November 15, 2024, the Court entered an *ex parte* special injunction: (a) enjoining Frank's from transferring out of care, custody, and control potentially

[8] The City omits any discussion of this phone call in its Motion for Sanctions.
[9] The recount did not conclude until November 22, 2024.

relevant evidence, (b) compelling Frank's to preserve all evidence, and (c) ordering argument on the petition for November 18, 2024.

On November 18, 2024, the Court held a status conference via zoom on the petition for a special injunction. During that conference, undersigned counsel explained to this Court what he knew about the Frank's-ATF Matter, his understanding that Frank's was out of business, and that the ATF had already removed all records from Frank's former place of business. At the time of the Court's November 18, 2024, status conference undersigned counsel had not yet determined that almost seven months before the call, Zimolong LLC had arranged to have 430 pages of Frank's firearms transaction documents scanned for production to the City.

F. Frank's Bankruptcy and This Court's Stay.

On November 21, 2024, Frank's resolved to file for Bankruptcy. On December 3, 2024, Frank's filed for Bankruptcy and the Court stayed this case. On January 21, 2025, the Bankruptcy Trustee informed the Court Frank's had no assets. On January 29, 2025, the Bankruptcy Court closed the bankruptcy.[10]

G. Frank's Locates the Copies of Documents And Produces Them.

On March 4, 2025, the City filed a notice with the Court that the Bankruptcy Court had closed Frank's bankruptcy. The City made no attempt to contact undersigned counsel before filing that notice to advise undersigned counsel that it intended to proceed against Frank's. Indeed, even after the City filed its notice,

[10] As with the Frank's-ATF Matter, Zimolong LLC and undersigned counsel did not represent Frank's in the bankruptcy, did not participate in the bankruptcy proceedings, and have no personal knowledge of the bankruptcy proceedings.

undersigned counsel was unaware that the City intended to pursue Frank's. Undersigned counsel presumed he would discover the City's intentions as to Frank at the status conference on March 21, 2025. On March 20, 2025, the night before a status conference, the City filed the instant motion for sanction. To respond to the outrageous, false, and defamatory allegations made against undersigned counsel, undersigned counsel conducted an inquiry about the location of Frank's documents.[11] Thereafter, undersigned counsel located 430 pages of documents that were scanned on April 30, 2024. Upon locating the copies, undersigned counsel immediately took steps to (1) notify the City, (2) to amend its previous answers to discovery to reflect that the documents were located, and (3) to produce the copies.

But the City did not make it easy for Frank's to produce the documents. Frank's first asked that it be included in the Confidentiality Order and Stipulative Protective Order entered by the Court on January 13, 2025. That order expressly excluded Frank's because Frank's was still in bankruptcy at the time. Remarkably, the City resisted Frank's request and required Frank's to file a Motion for a Protective Order. Ultimately, the City relented and agreed to amend the Confidentiality Agreement to include Frank's.

On April 2, 2025, after the City finally agreed to an Amended Confidential Agreement and Protective Order was filed with the Court to include Frank's, Frank's produced the scanned documents to the City. Additionally, Frank's produced to the

[11] The Motion for Sanctions was the first indication that the City was continuing to pursue claims against Frank's a defunct entity. Had the City simply called undersigned counsel and asked to discuss outstanding discovery, undersigned counsel would have located the documents as well.

City documents related to the Frank's-ATF matter, including the ATF's findings of fact and conclusions of law, the ATF's termination of Frank's FFL, and communication Frank's had with law enforcement.

II. ARGUMENT

"Spoliation of evidence" is the non-preservation or significant alteration of evidence for pending or future litigation. *Pyeritz v. Com.*, 32 A.3d 687, 692 (Pa. 2011). In *Schroeder v. Com., Dep't of Transp.*, 710 A.2d 23, 27 (Pa. 1998), the Pennsylvania Supreme Court adopted a three part test to determine if spoliation occurred: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. *Id.* at 27. The City fails each part of this test.

a. Frank's is not at fault because it did not alter or destroy any evidence.

For spoliation to be found, a party must first be found to be at fault. *Mount Olivet Tabernacle Church v. Edwin L. Wiegand Div.*, 781 A.2d 1263, 1270 (Pa. Super. Ct. 2001). "Fault has two components: responsibility, and the presence or absence of bad faith." *Id.* (citations omitted). The alleged-spoliating party's power "to exercise authority over the preservation or destruction of evidence is a relevant factor in determining responsibility." *Harkins v. Three Monkeys Croyden, Inc.*, 326 A.3d 408 (Pa. Super. Ct. 2024) (citing *Pia v. Perrotti*, 718 A.2d 321, 324 (Pa. Super. Ct. 1998)

Here, it is undisputed that neither Frank's nor its attorneys altered, destroyed, or so much as failed to make copies of relevant documents. The City falsely alleges

that Frank's "handed over," "transfer," and "gave" *all* firearms documents to the ATF in a "calculated effort to put them beyond the reach of the City." Mot,. 1. That is a boldfaced misrepresentation. Frank's scanned the documents the City requested in April 2024 and has since produced them. Also, the ATF seized the documents from Frank's because started an investigation into Frank's practices in November 2023. Frank's did ask the ATF to investigate, revoke its license, and take its documents to keep them "out of the reach" of the City and the Court. Certainly, undersigned counsel did not collaborate with the ATF to do that. The notion is outright absurd. The ATF physically came to Frank's place of business and took the firearms documents and Frank's was powerless to stop the ATF. While the City suggests that Frank's somehow should have stopped the ATF from retrieving certain documents "it did not need to turn over," it never explains how Frank's should have legally done so. [12]

The City also makes an outright false statement that "Frank's and its counsel ***did not take any steps to preserve this evidence [and] did not make copies***" and that Frank's did not preserve any documents and "transfered *all* its records to ATF." Mot., 1-2, 16. Undersigned counsel never made such a statement to the City and the City points to no portion of the record where this outright falsehood was made. To the contrary, the City made no attempt to determine if such an outrageous claim was true nor did it so much attempt to clarify undersigned counsel's statements. Instead, it admittedly ran to this Court based on facts it "pieced together" from emails.

[12] The City fails to acknowledge that if Frank's did try to stop the ATF from taking certain documents it would likely have several committed several crimes including, 18 U.S.C. §§ 1503, 1512 (Obstruction of Justice) and 18 U.S.C. § 1510 (Obstruction of a Criminal Investigation)

The City takes issue with Frank's objections to its discovery requests. But these objections were made in good-faith and made pursuant to established Pennsylvania and federal law. While this Court overruled those objections, it never determined they were made in bad-faith. Pursuant to the Rules of Professional Conduct, undersigned counsel has a duty and obligation to raise these valid defenses and there is nothing wrong with having done so.

In sum, Frank's and its attorneys to not destroy or alter documents. They also fail to preserve documents. Therefore, the City's has failed to demonstrate the first prong of the spoliation test.

b. The City has not demonstrated any prejudice.

The City has also not demonstrated prejudice. The City claims it cannot prove its case because the ATF removes all firearms records from Frank's former place of business. But Frank's has produced 430 pages of firearms transaction records related to the so-called "Frank Straw Purchasers," who the City alleges Frank's sold firearms to in violation of federal law. Additionally, Frank's has produced the documents sent to it during the Frank's-ATF Matter. Critically, those documents include the ATF's findings of fact and conclusions of law, which found that Frank's committed violations of federal firearms laws. The City does not explain why these documents are insufficient or what other unidentified documents it needs to prove its case.

Then there is the issue of what the City is seeking to prove. On one hand, the City admits that Frank's is out of business and lost its FFL rendering it a bankrupt "non-entity" immune from "future litigation." Mot., 19 ("as a non-entity, it will not

face [future litigation]"). On the other hand, it wants to impose liability on Frank's. The City appears to seek monetary damages and the "the relief requested in the City's Sanctions Motion." *See* email from James Miller to undersigned counsel, 3/31/25, at Exhibit "D." If so, the documents that the ATF seized are irrelevant to the harm that the City suffered or to the "relief requested in the City's Sanctions Motion."

The City is likely to argue it was prejudiced in having to file this motion because Frank's did not affirmatively disclose to the City or the Court the then on-going Frank-ATF Matter. Putting aside that undersigned counsel did not represent Frank's in that matter, the Rule of Professional Conduct 4.1 makes clear that a lawyer "has no affirmative duty to inform an opposing party of relevant facts." Pa. R. P. C. 4.1, cmt.

The City will also likely complain that it took almost a year to obtain the documents Frank's recently produced. But the City fails to acknowledge it self-inflicted delay in obtaining the documents. For starters, the City waited over two months before raising any issue with the completeness of Frank's answers to discovery. Frank's answered the City's discovery requests on May 2, 2024, but the City waited until July 9, 2024, to first raise an issue. Then, the City's fails acknowledge the three months this case was stayed because of Frank's bankruptcy.. The City further fails to acknowledge it waited over five weeks to notify this Court that the bankruptcy closed had closed. As the City acknowledges, the Bankruptcy Court closed its case on or about January 28, 2025 but it waited until March 4, 2025

to suggest it intended to proceed against Frank's. Then, the City waited two more weeks - March 20, 2025 - to notify Frank's it was seeking sanctions against it.

The City's delay tactics did not stop there. After Frank's offered to produce the documents the City falsely claims were not preserved or copied, the City resisted Frank's request to be included in the Confidentiality Agreement and Stipulated Protective Order that was entered while Frank's was still in bankruptcy and which expressly excluded Frank's. It was only after Frank's was forced to filed a motion for a protective order and request attorneys fees that the City finally relented and agreed to permit Frank's to be a party to that agreement. This saga caused a delay of several more weeks. Once that agreement was signed, Frank's produced the documents. The City should not be so sanctimonious especially when it has filed a motion replete with knowingly false statements that it refuses to correct.

Accordingly, the City has not articulated any prejudice and the Court should deny the Motion.

c. The Sanctions Requested by the City are Not Warranted.

When a party spoliates evidence, the Court exercise its discretion to impose a range of sanctions. *Pyeritz,* 32 A.3d at 692. The Superior Court has stated that sanctions available to a trial court under the spoliation doctrine are: dismissal; striking out pleadings or portions of pleadings; prohibiting the introduction of evidence; and, permitting the inference at trial that the destroyed evidence would have been harmful to the offending party. *King v. Pittsburgh Water & Sewer Auth.*, 139 A.3d 336, 345–46 (Pa. Commw. Ct. 2016). The "common penalty for spoliation,

however, is less severe. It does not result in declaring the non-offending party's allegation true, but merely permits an inference that the missing evidence would have been unfavorable to the party that destroyed it." *Troup v. Tri–Cnty. Confinement Sys., Inc.*, 708 A.2d 825 (Pa. Super. Ct 1998).

Here, the City does not request these common sanctions. Rather, it requests thermonuclear sanctions and client, attorneys fees, summary judgment, and an evidentiary session where it pries into confidential attorney-client deliberations between undersigned counsel and his client. The City cites no precedent whereby a Court imposed such unprecedented sanctions and ordered an evidentiary hearing where the attorney-client privilege is vitiated.

The City cites to *County of Fulton v. Secretary of the Commonwealth*, 292 A.2d 974 and *Sutch v. Roxborough Memorial Hospital*, 151 A.3d 241 (Pa. Super. Ct. 2016) in support of its claim for sanctions. But as the City concedes, in both cases the parties and counsel willfully violated a Court order. Here, there has been no violation of a Court order. The Court ordered Frank's to produce documents and Frank's has complied.

The City further posits that the Court should impose sanctions to moderate violations of the Rules of Professional Conduct. This argument is misplaced. The preamble to the Pennsylvania Rules of Professional Conduct expressly rebukes the City's attempt to weaponize the Rules of Professional Conduct:

> "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other non-disciplinary remedy, such as

> disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. **Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.** The fact that a Rule is a just basis for a lawyer's self assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule."

Pa. R. Prof. Conduct, at Preamble ¶ 19 (emphases added); see also *Molitoris v. Woods*, 618 A.2d 985, 990 n.5 (Pa. Super. Ct. 1992) ("[O]ur Supreme Court [has] reaffirmed the principle stated in the Preamble to the Rules of Professional Conduct, that neither the rules, nor the Code of Professional Responsibility previously in effect, per se create a legal cause of action in clients or other private parties for a violation thereof.").

Moreover, while it is true that the Court maintains discretion to fashion an appropriate sanction for spoliation, a trial court abuses it discretion exists when it renders a sanction that manifestly unreasonable, arbitrary, or capricious." *Harman ex rel. Harman v. Borah,* 756 A.2d 1116 (Pa. 2000). Respectfully, this Court would abuse its discretion if it imposed the cumulative sanctions that the City requests particularly were lesser sanctions would do.

III. CONCLUSION

Based on the foregoing, Frank's respectfully requests the Court to deny the City's motion.

Respectfully submitted,

Dated: April 6, 2025

By: */s/Walter S. Zimolong*
Walter S. Zimolong, Esquire
James J. Fitzpatrick, Esquire
Attorneys for Defendant
Frank's Gun Shop & Shooting Range, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, in accordance with Pa.R.Civ.P. 205.4(g)(1)(ii), the foregoing paper was electronically filed with the Philadelphia County Court of Common Pleas electronic filing system website and is available for review on the Philadelphia County Court of Common Pleas electronic filing system's website, which filing constitutes proper service upon counsel of record.

Dated: April 6, 2025 *<u>/s/ Walter S. Zimolong</u>*

EXHIBIT “A.”

From:	Wally Zimolong
To:	Alla Lefkowitz, Jed Miller, Melissa Medina, Laura Keeley, Eugene Nam, Bootstaylor, Chloe, Lydia Furst, Zagami, Drew
Cc:	Britain Henry, Jonathan Goldstein, John Benson
Subject:	City of Philadelphia v. WRT Mgmt.
Date:	03 April 2025, 09:45:53
Attachments:	image001.jpg motion to disqualify .pdf

Dear Counsel for the City:

Pursuant to Pa. R. Civ. P. 1023.2(b), I am writing that the City of Philadelphia (the "City") withdraw its Motion for Sanctions or take immediate steps to correct the false statements contained in that document. I am attaching a Motion for Sanctions under Rule 1023.2 that I will file if the City either fails to withdraw the Motion for Sanctions or fails to correct its false statements contained in the Motion for Sanctions within twenty-eight (28) days. Pursuant to Pa. R. Civ. P. 1023.2(b), the specific challenged portions of the Motion for Sanction are set forth in paragraph 8 of the draft Motion for Sanction against the City, which is attached hereto and incorporated by reference. A copy of this email will be annexed to the Motion if I am required to file it. Moreover, the demands in this email and the Motion for Sanctions are made without waiver to any other rights I may have to seek appropriate disciplinary sanctions in any forum or jurisdiction.

As with my prior demands, I am not making this demand to "threaten" or "harass" the City or the City's attorneys. I am making the demand and have prepared the Motion because I perceive a violation of the Rules of Civil Procedure and Rules of Professional Conduct, as set forth in the attached Motion. I have previously requested the City withdraw its Motion or at a minimum engage in discussions with me about the Motion. The City refused.

At no time before the City filed its Motion did the City make any effort to determine whether any of the challenged allegations were true or if they had evidentiary support. Indeed, the City admits that the challenged allegations were not made based on evidence rather were "pieced together" through snippets of conversation, cherry-picked emails, false innuendo, and a "FOIA" request. Mot., 6-7. The Rules require more. As stated in Rule 1023.2(b), written demand to correct or withdrawn or correct is required before filing a Motion for Sanctions. If the City's is relying on the discovery rules as the basis for its motion, Local Rules require a meet and confer. The City failed to follow either of these Rules, which would likely have avoided the City's Motion for Sanctions and the need for me to respond with my own Motion. In short, the City shot first and failed to so much as ask questions later.

Worse, the City's conduct is not cabined to the false statements made in its challenged Motion for Sanctions. Counsel for the City has a pattern of memorializing incorrect statements attributed to me. As the City acknowledges in its brief, I was forced to respond to one such incident when a "memorialization" of a telephone call from the City's attorneys was sent to me that was riddled with inaccuracies and outright falsehoods. *See* Mot., fn. 6.

Still, I remain willing to discuss any aspect of this case with any of the City's attorneys at any time. Please let me know if you have any questions.

Wally Zimolong, Esquire
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ZIMOLONG LLC

CITY OF PHILADELPHIA	:	PHILADELPHIA COUNTY
	:	COURT OF COMMON PLEAS
Plaintiff	:	
	:	No. 230702394
v.	:	
	:	
TANNER OPERATIONS, ET AL.	:	
	:	
Defendants	:	

ORDER

AND NOW, this _____ day of _____, 2025, upon consideration of the Motion for Disqualify Counsel for the City of Philadelphia of Defendant, Frank's Gun Shop & Shooting Range LLC, and any response in opposition thereto, it is hereby **ORDERED** that the Motion is **GRANTED** and Lydia Furst, Esquire; Melissa Media, Esquire; Ryan B. Smith, Esquire; Chloe Bootstaylor, Esquire; Drew Zagani, Esquire; Eric Tirschwell, Esquire; James E. Miller, Esquire; Eugene Nam, Esquire; Laura Kelley, Esquire; and Alla Lefkowitz, Esquire are DISQAULIFIED as counsel for the City of Philadelphia in this matter.

IT IS FURTHER ORDERED that pro hac vice admission of . Chloe Bootstaylor, Esquire; Drew Zagani, Esquire; Eric Tirschwell, Esquire; James E. Miller, Esquire; Eugene Nam, Esquire; Laura Kelley, Esquire; and Alla Lefkowitz, Esquire are **REVOKED**.

IT IS FURTHER ORDERED that the City of Philadelphia shall pay Zimolong LLC $10,000 in attorneys fees incurred in filing this Motion and its Response in Opposition to the Motion for Sanctions.

BY THE COURT

_____

THE HONORABLE GWENDOLYN N. BRIGHT

Walter S. Zimolong, Esquire
Attorney I.D. #89151
wally@zimolonglaw.com
James J. Fitzpatrick, Esquire
Attorney I.D. #320497
ZIMOLONG, LLC
P. O. Box 552
Villanova, PA 19085
(215) 665-0842

CITY OF PHILADELPHIA	:	PHILADELPHIA COUNTY
	:	COURT OF COMMON PLEAS
Plaintiff	:	
	:	No. 230702394
v.	:	
	:	
TANNER OPERATIONS, ET AL.	:	
	:	
Defendants	:	

MOTION TO DISQUALIFY COUNSEL

Defendant, Frank's Gun Shop & Shooting Range LLC ("Frank's") files this motion to disqualify counsel and avers as follows:

1. Under Rule 1023.1(b) "[e]very pleading, written motion, and other paper directed to the court shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party."

2. "By signing, filing, submitting, or later advocating such a document, the attorney . . . certifies that, to the best of [her] knowledge, information and belief, formed after an inquiry reasonable under the circumstances" that "it is not being presented for any improper purpose," and "the factual allegations have evidentiary

support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Pa.R.C.P. No. 1023.1(c)(1) and (3).

3. Furthermore, under Pennsylvania Rule of Professional Conduct 3.3(a)(1) "a lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Pa.R.P.C 3.3(a)(1).

4. A court may impose sanctions against attorneys who violate Rule 1023.1. Pa. R. Civ. P. 1023.2.

5. On March 20, 2025, the City of Philadelphia (the "City") filed a Motion for Sanctions against Zimolong, LLC and defendant, Frank's Gun Shop & Shooting Range ("Frank's"). A copy of the City's Motion for Sanctions (without exhibits) is attached at Ex. "A."

6. Lydia Furst, Esquire; Melissa Media, Esquire; Ryan B. Smith, Esquire; Chloe Bootstaylor, Esquire; Drew Zagani, Esquire; Eric Tirschwell, Esquire; James E. Miller, Esquire; Eugene Nam, Esquire; Laura Kelley, Esquire; and Alla Lefkowitz, Esquire (collectively "Counsel for the City") signed the Motion for Sanctions.

7. Chloe Bootstaylor, Esquire; Drew Zagani, Esquire; Eric Tirschwell, Esquire; James E. Miller, Esquire; Eugene Nam, Esquire; Laura Kelley, Esquire; and Alla Lefkowitz, Esquire are not admitted to practice law in the Commonwealth of Pennsylvania and are admitted to the Bar of this Court pro hac vice.

8. Under Rule 1023.2(b), the Motion for Sanctions contain the following factual allegations that lack any evidentiary support and are challenged :

a. "[Frank's] engaged in spoliation of evidence in its control which evidence is central and indispensable to the City's claims against Frank's," Mot., Proposed Order, ¶ 1;

b. "Frank's spoliation of evidence was intentional and conducted in bad-faith," Mot., Proposed Order, ¶ 2.

c. "There is prima facie evidence that Frank's solicited the support of its counsel Zimolong, LLC and Goldstein Law Partners, LLC in furtherance of its unlawful spoliation of evidence, deception of the tribunal and the opposing counsel, and fraud, including fraud on the court," Mot., Proposed Order, ¶ 5;

d. "Frank's has no responsive documents because it handed them all over to the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") in a calculated effort to put them beyond the City's and th Court's reach; Mot., 1;

e. "At some point in October 2024 – *after* this Court ordered Frank's to produce responsive documents to the City and approximately seven month after Frank's was first put on notice of the City's demand for these documents – Frank's instead sent them all to ATF," Mot., 1;

f. "Frank's and its counsel did not take any steps to preserve this evidence: they did not make copies," Mot., 1-2;

g. "By ensuring those records were permanently rendered inaccessible, Frank's has irreversibly prejudiced the City's ability to prove its claims and its right to a fair trial," Mot., 2;

h. "Frank's and its counsel move expeditiously to avoid accountability for its (sic) actions," Mot., 2;

i. "Zimolong, LLC . . . negligently failed to supervise discovery and ensure [its] client's preservation of evidence, [it] breached [its] duty of candor to the Court by failing to disclose both the likely and actual spoliation of evidence," Mot., 2-3;

j. Mr. Zimolong initially ignored the request [for a meet and confer]," Mot., 5;

k. "Frank's engaged in a calculated effort to obstruct discovery and destroy evidence," Mot., 12;

l. "Frank's transferred its books and records … to ATF without making copies," Mot., 12;

m. "Frank's handed over [records] to ATF," Mot., 13;

n. "Frank's affirmatively evaded its discovery obligations by engaging in a myriad of dilatory tactics before transferring relevant evidence in its possession to ATF, without making copies," Mot., 15;

o. "Neither Frank's nor its counsel disclosed any of this to the City or the Court," Mot., 15;

p. "Frank's transferred *all* of its records to ATF [without making any copies]," Mot., 16;

q. "Frank's has effectively destroyed *all* evidence of its own illegal conduct," Mot., 17;

r. "The records are gone. Frank's eliminated that evidence from this case," Mot., 19;

s. "Frank's has no documents to produce," Mot., 19;

t. "[Zimolong LLC] failed to prevent spoliation by properly (sic) supervising Frank's retention of records," Mot., 21;

u. "Zimolong LLC … did not preserve Frank's records," Mot., 23;

v. "Zimolong LLC initially ignored the City's first request to meet and confer on July 9, 2024," Mot., 23;

w. "Zimolong LLC failed in [its] duty to supervise Frank's preservation of evidence," Mot., 25; and

x. "Zimolong LLC … intentionally facilitated Frank's spoliation of evidence," Mot., 25;

9. These statements lacked evidentiary support at the time they were made.

10. Before filings the Motion for Sanctions, counsel for the City took no steps to confirm with undersigned counsel whether these allegations were true, if they had evidentiary support, or whether they were likely to have evidentiary support.

11. Indeed, Counsel for the City admits its allegations are "piece[d] together based on hearings and conversations with defense counsel that occurred after the spoliation occurred, as well as a Freedom of Information Act ("FOIA") request." Mot., 7.

12. The only conversation that undersigned counsel had with Counsel for the City after the alleged spoliation occurred on November 12, 2024, with Attorney Lydia Furst, whereby he disclosed the ATF investigation, the ATF seizure of the documents from Frank's, and committed to determining if copies had been made by Frank's. Undersigned counsel also asked Attorney Furst for her patience while he made the determination because the attorneys at Zimolong LLC were fully engaged in another matter.

13. In fact, counsel for the City steadfastly refuses to verbally discuss this matter with Attorney Zimolong, has rejected all effort by Attorney Zimolong to discuss this matter, and requires all communication with Attorney Zimolong to be in writing because they find Attorney Zimolong "threatening" and "vexatious."

14. After determining that Frank's had made copies of records **with the assistance and supervision of attorneys at Zimolong LLC,** undersigned counsel immediately took steps to notify Counsel for the City, to update its discovery responses, and to produce over 430 pages of documents that were copied and preserved.

15. Under Rule 1023.2(b), I certify that on April 3, 2025, served written notice and demand on Counsel for the City who signed the Motion for Sanctions. The

written demand attached a copy of this draft copy of this Motion which included the paragraph set forth above, that identifies, with specificity, the portions of the challenged document which violates Rule 1023.1. My April 3, 2025, included a demand that the challenged document be withdrawn or appropriately corrected within twenty-eight (28) days.

16. More than twenty-eight (28) days has passed, and Counsel for the City has failed withdraw or correct the Motion for Sanctions.

17. Under Rule 1023.2(b), Frank's respectfully request an award of attorneys fees and costs incurred in preparing and filing this motion.

WHEREFORE, defendant, Frank's Gun Shop & Shooting Range, LLC, respectfully requests that this Court grant its Motion for Sanctions and enter an Order disqualifying Counsel for the City in this matter. Frank's further requests that the Court enter an Order terminating the *pro hac vice* admissions of Chloe Bootstaylor, Esquire; Drew Zagani, Esquire; Eric Tirschwell, Esquire; James E. Miller, Esquire; Eugene Nam, Esquire; Laura Kelley, Esquire; and Alla Lefkowitz, Esquire and award Frank's any other appropriate relief.

Respectfully submitted,

Dated: April 3, 2025

By: */s/Walter S. Zimolong*
Walter S. Zimolong, Esquire
James J. Fitzpatrick, Esquire
Attorneys for Defendant
Frank's Gun Shop & Shooting Range, LLC

CERTIFICATE OF SERVICE

I, hereby certify that on the date set forth below, I serve a copy of the foregoing requests for admission via email on counsel for plaintiffs as follows:

Eric Tirschwell
James E. Miller
Eugene Nam
Laura Kelley
Alla Lefkowitz
Everytown Law
450 Lexington Avenue
P.O. Box #4184
New York, NY 10017

Lydia M. Furst
Melissa Media
Ryan B. Smith
City of Philadelphia Law Dept.
1515 Arch Street, 15th Floor
Philadelphia, PA 19102-1595

Chloe Bootstaylor
Drew Zagami
Kramer Levin Nartalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036

Dated: April 3, 2025 *<u>/s/ Walter S. Zimolong</u>*

EXHIBIT “B.”

From:	Alla Lefkowitz
To:	Wally Zimolong
Cc:	Melissa Medina, James Fitzpatrick, Lydia Furst, Bootstaylor, Chloe, Zagami, Drew, Eugene Nam, Jed Miller, Laura Keeley, Jonathan Goldstein, Britain Henry, John Benson
Subject:	Re: Philadelphia v. WRT et al: Frank's Discovery
Date:	05 November 2024, 12:39:59
Attachments:	image002.png image001.jpg image001.jpg

Mr. Zimolong,

As you are aware, gun stores are legally required to maintain transaction documents, and all litigants are required to preserve evidence that may be relevant to an ongoing litigation. The City requested in March, and the Court has ordered production of, a variety of transaction records and other documents from Frank's. Frank's new representation that it does not possess responsive documents is inconsistent with these obligations. Please inform us within the next 24 hours where the requested records are.

Best,
Alla

On Mon, Nov 4, 2024 at 3:32 PM Wally Zimolong <wally@zimolonglaw.com> wrote:

> Please see the attached.
>
> Wally Zimolong, Esquire
>
> **Main Office**
>
> 353 West Lancaster Avenue, Suite 300, Wayne, PA 19087
>
> **Mailing Address**
>
> P.O. Box 552, Villanova, PA 19085-0552
>
> **Office**: 215.665.0842| **Mobile**: 609.932.8836| **Email**: wally@zimolonglaw.com |
>
> **www.zimolonglaw.com**
>
> Image

EXHIBIT “C.”

From:	Wally Zimolong
To:	Lydia Furst
Subject:	FW: Notice of an E-Filing on Case #230702394
Date:	12 November 2024, 14:42:44
Attachments:	image001.jpg

Hi Lydia:

I received your client's motion for a special and preliminary injunction. Frank's is no longer in business. All documents you are requesting were transferred to the ATF well before your motion. Please give me a call to discuss.

Wally Zimolong, Esquire
Main Office
353 West Lancaster Avenue, Suite 300, Wayne, PA 19087
Mailing Address
P.O. Box 552, Villanova, PA 19085-0552
Office: 215.665.0842| **Mobile**: 609.932.8836| **Email**: wally@zimolonglaw.com |
www.zimolonglaw.com
ZIMOLONG LLC

From: cp-efiling@courts.phila.gov <cp-efiling@courts.phila.gov>
Date: Tuesday, November 12, 2024 at 10:57 AM
To: Wally Zimolong <wally@zimolonglaw.com>
Subject: Notice of an E-Filing on Case #230702394

Dear Walter S. Zimolong,

A legal paper has been filed electronically in connection with a Trial Division - Civil case in which you are counsel of record for a party, or you are an unrepresented party, and have consented to be served electronically with any pleading (other than original process) as provided in Pa.R.C.P. No. 205.4 and Philadelphia Civil *Rule No. 205.4.

Filed as noted below. The following information is provided for your records:

Caption:
CITY OF PHILADELPHIA VS TANNER OPERATIONS, LLC ETA
Case Number: 230702394

Date Reviewed and Accepted:
November 12, 2024 10:56 am EDT/DST

Date Presented to the Office of Judicial Records for Filing
and Date Deemed Filed:
November 12, 2024 10:32 am EDT/DST
Type of Pleading/Legal Paper:
PRELIMINARY INJUNCTION
E-File No.: 2411023235

To retrieve the legal paper filed and any related notice, order or legal paper, log in to the Electronic Filing Web Site at http://courts.phila.gov using the Court-issued User Name and Password. You may also go directly to the legal paper/document by copying and pasting the following web address(es) into your browser or by clicking the link(s) below to view the related document(s). Each link represents a separate document filed in connection with this matter. Utilizing the link(s) below will only take you to the actual document. You will not be logged into the court's electronic filing system.

Motion CoverSheet Form
https://fjdefile.phila.gov/efsfjd/zk_ealib.open_doc?h=O!SJw6PJA7N9YC7Il

2024.11.12 Emergency Petition re Franks FINAL.pdf
https://fjdefile.phila.gov/efsfjd/zk_ealib.open_doc?h=N!TKw5OJB8N8XC8Jk

THANK YOU,

ERIC FEDER
DEPUTY COURT ADMINISTRATOR
DIRECTOR, OFFICE OF JUDICIAL RECORDS

EXHIBIT “D.”

From:	Wally Zimolong
To:	Lydia Furst
Subject:	Re: Notice of an E-Filing on Case #230702394
Date:	13 November 2024, 12:55:25
Attachments:	image001.png image002.jpg image003.jpg

Lydia:

Nice speaking with you. I am completely swamped with the McCormick-Casey race (I represent Dave). But I am going to see if we have any information related to the ATF investigation. To be clear, I do not know if I have anything.

Wally Zimolong, Esquire
Main Office
353 West Lancaster Avenue, Suite 300, Wayne, PA 19087
Mailing Address
P.O. Box 552, Villanova, PA 19085-0552
Office: 215.665.0842| **Mobile**: 609.932.8836| **Email**: wally@zimolonglaw.com |
www.zimolonglaw.com

From: Lydia Furst <Lydia.Furst@Phila.gov>
Date: Tuesday, November 12, 2024 at 8:29 PM
To: Wally Zimolong <wally@zimolonglaw.com>
Subject: RE: Notice of an E-Filing on Case #230702394

Since when?

From: Wally Zimolong <wally@zimolonglaw.com>
Sent: Tuesday, November 12, 2024 8:09 PM
To: Lydia Furst <Lydia.Furst@Phila.gov>
Subject: Re: Notice of an E-Filing on Case #230702394

The ATF has the documents.

Wally Zimolong, Esquire
Zimolong LLC
353 West Lancaster Avenue, Suite 300
Wayne, PA 19087
www.zimolonglaw.com
O: (215) 665-0842
M: (609) 932-8836

EXHIBIT E

From:	Jed Miller
To:	Wally Zimolong
Cc:	Melissa Medina, Britain Henry, Jonathan Goldstein, Lydia Furst, Alla Lefkowitz, Laura Keeley, Eugene Nam, Zagami, Drew, Bootstaylor, Chloe, John Benson
Subject:	Re: City of Philadelphia v. WRT Mgmt.
Date:	31 March 2025, 18:28:19
Attachments:	image001.jpg

Mr. Zimolong,

Thank you for the above responses and documents. Your email indicates that you intended to attach a proposed amended confidentiality agreement and protective order, however those were not attached. Could you please send?

With respect to the remainder of your email, we agree with you that it is not typical for counsel to decline a phone conversation with opposing counsel in litigation. Unfortunately, this is the only reasonable position that the City can take at this time, in light of your pattern of harassing and threatening emails and vexatious filing. Frank's can communicate with the City through counsel via email. As I said previously, if Frank's wishes to initiate settlement negotiations, then it can do so in writing.

As for what the City wants from Frank's, please see the Prayer for Relief in the Amended Complaint (except for paragraphs A.1-6, which apply to ongoing businesses), as well as the relief requested in the City's Sanctions Motion and accompanying proposed sanctions order. It may make the most sense to have these communications once the court addresses the pending spoliation motion.

Finally, you asked my co-counsel in a separate email what the City's most recent document production was responsive to. It is responsive to Delia's RFP No. 1.

Thank you,

-Jed

On Sun, Mar 30, 2025 at 8:40 AM Wally Zimolong <wally@zimolonglaw.com> wrote:

> Mr. Miller:
>
> Attached please find the following:
>
> - Frank's answers and objections to the City's interrogatories – second set;
> - Frank's answers and objections to the City requests for production – second set;
> - Documents responsive to the City's requests for production – second set; and
> - Proposed Amended Confidentiality Agreement and Protective Order.
>
> Once we the amended confidentiality agreement and protective order is executed and filed, we can produce the copies that we recently found, and which are responsive to the City's first set of document requests.

Furthermore, after you review the documents attached hereto, I hope the city is assured that Frank's is truly out of business and will not return. My hope is that with this assurance, the city will consider sharing with me what it needs to resolve this litigation as to Frank's. I also hope the city reconsiders its antagonism to mere phone conversation to permit us to under the city's objectives that would help us form a reasonable settlement offer.

Please let me know if you have any questions.

Wally Zimolong, Esquire

Main Office

353 West Lancaster Avenue, Suite 300, Wayne, PA 19087

Mailing Address

P.O. Box 552, Villanova, PA 19085-0552

Office: 215.665.0842| **Mobile**: 609.932.8836| **Email**: wally@zimolonglaw.com |

www.zimolonglaw.com

ZIMOLONG LLC

--

JAMES E. MILLER | DEPUTY DIRECTOR, AFFIRMATIVE LITIGATION
JEDMILLER@EVERYTOWN.ORG 646-324-8220
PRONOUNS: HE/HIM/HIS

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