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September 6, 2017

Honorable John D. Bates
Senior United States Judge
Chair, Advisory Committee on Civil Rules
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue N.W.
Washington, D.C. 20001

Administrative Office of the United States Courts
Advisory Committee on Civil Rules of the U.S. Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Comments on Proposed Changes to FRCP Rule 30(b)(6)

To Whom It May Concern:

Please allow this submission to present our Firm's joinder in the position of the American Bar Association regarding proposed changes to FRCP 30(b)(6). While most attorneys use Rule 30(b)(6) for the purpose for which it was intended, there are some unscrupulous attorneys who exploit the current Rule to shift all of the burdens of discovery upon the other party, and to obtain an unfair litigation advantage. Therefore, it is our Firm's position that FRCP Rule 30(b)(6) should be changed to prevent the types of misuse of the Rule that our Firm encounters on an intermittent but recurring basis.

As an example of the type of problems that our Firm routinely encounters, you will find attached a Rule 30(b)(7)[1] Notice that was recently served upon our Firm in a pending employment litigation case. As you can see, this Notice contained 49 separate deposition topics seeking to elicit with a Rule 30(b) deposition each and every fact and legal contention that would be at issue in the case. This Notice was served prior to any written discovery and essentially served as Plaintiff's tactical ploy to shift the burden of building a factual case from himself to the Defendant. Through the Notice, Plaintiff sought to force the Defendant to spoon feed him every fact, theory and contention in the case. This particular case involves a former associate at a

[1] West Virginia Rule of Civil Procedure 30(b)(7) is substantively identical to Federal Rule of Civil Procedure 30(b)(6).

medium sized law firm. The nature of his claims implicate numerous personal conversations and interactions between lawyers and staff, and which in no way related to firm functions or activities. Instead of deposing the individuals actually involved, propounding counsel has asked our client to present 30(b)(6) witnesses to relate the substance of all such conversations and interactions. This is the type of abuse of the rule regularly utilized by some attorneys we frequently encounter.

Notices such as the one attached are becoming more routine and are nothing more than an abuse of the Rule and its underlying intent. The Rule was created to address the problem of "bandying". This was a laudable intent, and our Firm does not dispute that the Rule should be used to obtain information from a corporation regarding normal corporate functions such as product design and testing, services provided, internal corporate activities, training, and even HR functions and corporate investigations. However, the use to which certain attorneys now put the Rule has nothing to do with banding, and everything to do with shifting all the inconveniences and work of discovery onto the party forced to respond to overly broad and all-inclusive notices. For example, in the attached notice, plaintiff's demand that our client present a corporate witness who can summarize for him several months of employee conversations and interactions has nothing to do with preventing corporate "bandying" as the Rule was intended. While this may be exactly what the propounding party desires, it is a perversion of the reason why the Rule was enacted in the first place.

In addition, these types of notices drive up the costs of litigation for the responding party as they must spend inordinate amounts of time preparing corporate witnesses, who may or may not be able to recall the relevant information, and who may end up binding the responding party to inaccurate testimony. Overly broad notices which do not present reasonably particular subjects makes it very difficult to adequately prepare witnesses, and even if one painstakingly prepares witnesses in an attempt to address such overly broad subjects, there remains both the possibility that the witness will be unnecessarily overly prepared resulting in a waste of time and effort, or that the area on which the witness is prepared is still not the subject matter actually sought by the propounding party.

The Rule was never created to allow wily attorneys to utilize the Rule to play a game of "gotcha" seeking to obtain conflicting testimony between Rule 30(b)(6) deponents and Rule 30(b)(1) deponents. When a deponent has been educated regarding a subject of questioning, rather than actually participating in the subject of the questioning, there are invariably gaps in knowledge. Counsel who serve notices like the one attached, seek to exploit such innocent gaps in knowledge in order to create a supposed insidious conflict of testimony among corporate witnesses. When the true reason simply would be that when a witness must be programmed with information prior to an overly broad 30(b)(6) deposition notice, it is nearly impossible for the human mind to remember every detail of the information that must be imparted.

Moreover, the Rule was never intended to allow a propounding party to seek information beyond "facts". Nevertheless, Rule 30(b)(6) is routinely used to attempt to obtain corporate positions as to legal theories and items such as affirmative defenses, contentions and legal interpretations. Such questions have a great potential to invade the work product doctrine and constitute an abuse of the purposes for which the rule was established. To the extent discovery of a party's contentions should be permitted at all, there are other discovery devices for this purpose.

All of these areas have great potential to invade the work product doctrine and attorney/client protections. For example, when preparing a witness for a deposition, it is likely that corporate counsel will go over documents believed to be important with the witness. The deposing party will then ask the witness what documents were reviewed in preparation for the deposition. The corporate attorney's strategy, focus, and case theory may all potentially be learned by simply determining what portions of the case file his opponent found noteworthy enough to provide to the corporate designee for review before the deposition.

Because of these, and other, recurring problems, our Firm would join with the American Bar Association in its submission and request that Rule 30(b)(6) be revised in the following manners:

- To provide for objections to the notice and suspending the obligation to respond until such are resolved;
- Limiting the number of matters upon which examination may be sought;
- Forbidding questioning beyond the matters listed in the notice;
- Clarifying the meaning of "reasonably particularity" in designating subject matters for the deposition;
- Forbidding contention questions during Rule 30(b)(6) depositions;
- Clarify that the rule is intended to address factual matters related to corporate or organizational activities
- Providing in the Rule that work-product protections apply in Rule 30(b)(6) depositions.

While some counsel do indeed work out their differences regarding Rule 30(b)(6) notices, a substantial number are not mindful of their duty to cooperate in securing the "just, speedy and inexpensive determination of every action and proceeding" as specified by Rule 1. As you can see from the letters in our submission, our recent dispute over the scope of the proposed deposition, just in the type of correspondence that was generated, has been everything but "just, speedy and inexpensive." Moreover, the current dispute has not yet been resolved, and the

parties are facing yet additional expense in the creation of motions for protective orders and in the accompanying court appearances.

It is our experience that some attorneys simply utilize the Rule as nothing more than a weapon to gain an advantage. That some would do so should not be surprising given that balancing out the laudable goal of "just, speedy and inexpensive" litigation is the temptation to seek every possible advantage for one's client. This is particularly the case when there is a concomitant financial incentive, and when the expenses and burdens fall on someone other than oneself.

Therefore, our Firm would request that the Committee make changes to FRCP 30(b)(6) to address these concerns, as they do in fact exist amongst the practicing bar and appear on a recurring basis. Our Firm appreciates the Advisory Committee's consideration of our views.

Respectfully,

Thomas E. Scarr

TES/maf

FILED
2017 APR -6 AM 9:15
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

[redacted]

Plaintiff,

v.

Civil Action No. 17-C-483
Judge: Bailey
Jury Trial Demanded

[redacted] and [redacted]

Defendants.

COMPLAINT

1. Plaintiff is a resident of the State of California. At all times relevant to the issues set forth herein below, Plaintiff was a resident of Monongalia County, West Virginia.

2. Defendant [redacted] is a Limited Liability Partnership organized and existing under the laws of the State of West Virginia with its principal place of business in Charleston, Kanawha County, West Virginia.

3. Defendant [redacted] is, and at all times relevant hereto, has been, a partner in the Defendant [redacted]. Defendant [redacted] is, and at all times relevant hereto, has been a resident of Monongalia County, West Virginia.

4. Plaintiff was employed by Defendants from January 2, 2014 until his resignation effective May 15, 2015.

5. Plaintiff was employed by Defendants in the Morgantown, West Virginia, office of Defendants. Defendant [redacted] was a partner employed in that office.

6. During January 2014, Defendant [redacted] entered the Plaintiff's office and inquired as to whether the Plaintiff wished to go to a gay bar. When the Plaintiff expressed his lack of interest

in attending a gay bar with Defendant [redacted], Defendant [redacted] replied that gay people liked to be ridiculed and made fun of.

7. In the same conversation in January of 2014 between the Plaintiff and Defendant [redacted] described in Paragraph 6 above, Defendant [redacted] inquired of the Plaintiff regarding Arab men and Arab culture. Defendant [redacted] inquired about how close the relationships were between Arab men and Arab culture and whether or not the relationships between Arab men in Arab culture were strictly "from the neck up."

8. In late January 2014, Plaintiff was assigned to work on a legal project with Defendant [redacted]. [redacted] provided Plaintiff little guidance on the project and made several changes in direction which required the project to be restarted frequently. At the conclusion of the project, Defendant [redacted] complained that Plaintiff's billable hours for the project were excessive. [redacted] unilaterally changed Plaintiff's billable hours without notifying him.

9. Plaintiff complained to his direct supervisor, [redacted], Managing Partner of the Morgantown office of Defendant [redacted], to [redacted], General Partner of [redacted], and to [redacted], a partner in [redacted], Plaintiff's assigned mentor, about Defendant [redacted]'s actions toward Plaintiff regarding this project. [redacted], [redacted] and [redacted] told the Plaintiff that the situation was not handled correctly by [redacted] and that he should not have unilaterally altered Plaintiff's billable hours.

10. In February 2014 after the Plaintiff complained about his unilateral alteration of his billable hours, Defendant [redacted] entered Plaintiff's office and stated that if he ([redacted]) "was acting like an asshole, its because I am an asshole."

11. From February through the summer of 2014, Defendant [redacted] came to the Plaintiff's office and made a series of statements without Plaintiff's invitation regarding the subjects including the Jewish and Palestinian conflict. [redacted] told the Plaintiff that "all Arabs are crazy." [redacted] also stated that "all Christians are crazy" and that "all religious people are crazy."

12. On one occasion, [redacted] stood outside the Plaintiff's office in the hallway and remarked regarding some entity or client not wanting a "Lebanese guy on their team."

13. Defendants [redacted] and [redacted] were aware that Plaintiff was a Christian of Lebanese descent.

14. Plaintiff reported the comments and statements by [redacted] to his direct supervisor [redacted] to [redacted], partner in [redacted], to [redacted], Executive Director of [redacted], and to [redacted]. In response, Plaintiff was informed by Ms. [redacted] that Defendant [redacted] was "certifiable" and that [redacted] was an "abused dog." [redacted] informed the Plaintiff that "if they woke up the next day hearing that [redacted] had blown his head off, no one would be surprised."

15. Plaintiff explained to his direct supervisor [redacted] and to [redacted] partners [redacted] and [redacted], that he had experienced stress due to the recent death of his father and a serious illness suffered by his mother and his sister and that he was having difficulty dealing with those issues while at the same time dealing with the intrusive and unwelcome comments from Defendant [redacted] Wilson responded that he knew that Defendant [redacted] would eventually cause [redacted] to be sued and that such a lawsuit was "inevitable." In response to Plaintiff's complaints regarding [redacted]'s intrusions and comments, [redacted] responded that "nobody should have to put up with [redacted] antics."

16. During March and April of 2014, while speaking with one of the secretaries in the Morgantown [redacted] office about construction being conducted at Plaintiff's home, the secretary noted that there were several vehicles parked outside of Plaintiff's home and that construction work was underway there. Defendant [redacted] came by during the conversation and interjected that the cars parked at Plaintiff's home must have belonged to Plaintiff's wife's different boyfriends. Plaintiff reported [redacted]'s remark to his direct supervisor [redacted] and [redacted] partner [redacted], as well as with [redacted] Executive Director [redacted]. [redacted] responded that the comments were harmless and nothing to be upset about.

17. During the summer and fall months of 2014, Defendant [redacted] continued political, religious and sexual comments described in Paragraphs 6 through 15 above. In addition, however, Defendant [redacted]'s comments began to include more explicit references to sexual practices. Defendant [redacted] referred to the Plaintiff as a "pervert." Defendant [redacted] asked the Plaintiff whether or not he masturbated a lot.

18. Plaintiff related the sexual conversations and comments by Defendant [redacted] to [redacted], a partner with [redacted] Shortly after Plaintiff's conversation with [redacted], he was informed by an associate in the firm that it was the Plaintiff's fault that Defendant [redacted] referred to him as a pervert because Plaintiff was "airing out your dirty laundry." When Plaintiff inquired of the associate as to what "dirty laundry" he was referring to, the associate refused to respond. Plaintiff informed his direct supervisor [redacted] of this exchange and requested that [redacted] get to the bottom of the situation and require the associate to inform him what he was referring to. [redacted] instructed the Plaintiff to stay away from the associate and, upon information and belief, took no further action.

19. In September 2014, Defendant [redacted] photographed the Plaintiff while Plaintiff was attending a West Virginia University home football game at Mylan Puskar Stadium. Plaintiff was seated in the [redacted] seats in Touchdown Terrace where [redacted] entertains clients. Defendant [redacted] emailed the photograph which he had taken of the Plaintiff in the [redacted] seats to members of the [redacted] firm with a comment that the picture of the Plaintiff in the firm's seats offended him.

20. During the fall of 2014, Defendant [redacted] told Plaintiff that he took pictures of West Virginia University collegiate wrestlers' groins and sent them to an attorney employed by Defendant [redacted] with the purpose of making the attorney uncomfortable.

21. During the fall of 2014, Plaintiff was speaking to [redacted] partner [redacted] who was visiting the firm's Morgantown office. Defendant [redacted] came by and stated to [redacted] "Now, we don't like [redacted]" and told [redacted] that she was "not to be nice to" Plaintiff.

22. In November 2014, Defendant [redacted] came to the Plaintiff's office and informed the Plaintiff that Defendant [redacted] believed the Plaintiff was "sabotaging" his (Plaintiff's) marriage. When Plaintiff responded that he had no idea what Defendant [redacted] was talking about, Defendant [redacted] explained that he meant that Plaintiff had cheated on his wife. Plaintiff told [redacted] that this was incorrect and that he had not cheated on his wife.

23. In response to the exchange set forth in Paragraph 22 above, Plaintiff immediately contacted his direct supervisor [redacted] as well as [redacted] and [redacted] Plaintiff explained the exchange that had just occurred and that he had had enough of Defendant [redacted] and that he did not want to be located anywhere near [redacted]'s office. Plaintiff and [redacted] went to another floor of the Morgantown office and selected another work location for the Plaintiff. On this

same occasion, [redacted] partners [redacted] and [redacted] came to the Plaintiff's office and apologized for Defendant [redacted]'s behavior. Ms. [redacted] referred to Defendant [redacted] as "an asshole." Mr. [redacted] requested that the Plaintiff forgive [redacted] for Defendant [redacted]'s behavior.

24. In January 2015, Plaintiff's assigned mentor [redacted] called the Plaintiff and requested that he share with her everything that had occurred between the Plaintiff and Defendant [redacted] to that point. Plaintiff proceeded to provide to [redacted] a detailed response regarding the harassment and discrimination he had been experiencing during the preceding year. After listening to the Plaintiff's detailed recitation of his treatment by Defendant [redacted] Ms. [redacted]'s first response was "please promise me you are not going to sue us." However, Ms. [redacted] made no suggestion as to how or in what way remedial action would be taken to correct the situation under which Plaintiff had been working. Rather, Ms. [redacted] stated that at the right time, she would "get" Defendant [redacted] for what he had said and done to the Plaintiff.

25. From January 2015 until Plaintiff's resignation in May of 2015, Plaintiff consistently received less and less assigned work from Defendant [redacted].

26. In late February or early March 2015, Plaintiff was removed from the office that he and [redacted] had selected to escape from Defendant [redacted] and placed by [redacted] into another office which was functioning at the time as the [redacted] Morgantown office's maintenance room. The room included recycling bins and other accumulated materials. Plaintiff's new office did not have a fourth wall, so there was no privacy when the Plaintiff was initially assigned to the office. When Plaintiff inquired as to why he was being moved to this new office location, Mr. [redacted] informed him that his office was needed for another attorney.

27. During the period between Plaintiff's January 2015 report to [redacted] and his May 15, 2015 resignation, [redacted] steered potential legal work and opportunities to acquire additional clients away from the Plaintiff and toward other [redacted] attorneys.

28. As a result of the conduct of the Defendants described in Paragraphs 6 through 27 above, Plaintiff inquired of his assigned mentor [redacted] as to why he was being retaliated against by Defendant [redacted] He inquired specifically as to whether he had done anything improper or incorrect as a [redacted] employee. [redacted] responded that Plaintiff had done nothing wrong and that he was "beyond reproach."

29. When Plaintiff complained to his mentor [redacted] as described in Paragraph 28 above, [redacted] requested the Plaintiff meet with [redacted], a [redacted] employee who would be handling an internal investigation on behalf of [redacted] regarding Plaintiff's complaints of harassment, discrimination and reprisal. Plaintiff complied with [redacted]'s request by driving to Charleston in March 2015 to meet with [redacted].

30. The day after Plaintiff's meeting with [redacted], Plaintiff's secretary entered his office and informed him that [redacted] partner [redacted] had made disparaging comments regarding "Mexicans" and "Arab/Muslin people" and further made a comment about Plaintiff's secretary being friends with the Plaintiff.

31. Plaintiff informed [redacted] of the information he had been provided by his secretary regarding the comments made by [redacted] Plaintiff declined to identify [redacted] because he did not want his secretary to be identified as the source of the information. [redacted] responded to Plaintiff's report of the disparaging comments about Mexicans, Arabs and Muslin

people by noting that [redacted] had "defecated" on itself and that he ([redacted]) had been assigned to "wipe up the mess."

32. In early April 2015, Plaintiff met with [redacted] and [redacted] in the [redacted] Morgantown offices to discuss the findings of [redacted]'s investigations. The only response Plaintiff received regarding the investigation was that they were sorry about what happened and that Defendant [redacted] "actually likes [Plaintiff] and your wife." [redacted] also expressed that [redacted] was "sorry that this had happened." [redacted] further informed Plaintiff that he had found no evidence of retaliation. Plaintiff responded that he did not believe the results of the Defendants' investigation and that he did not trust them any longer. In response to Plaintiff's comments that he did not believe or trust the Defendants any longer, [redacted] responded that she knew that the Plaintiff would "do the right thing by forgiving" them.

33. During April 2015, Plaintiff again met after the initial April 2015 meeting described in Paragraph 32 above, Plaintiff, [redacted], [redacted] and [redacted] met again in April to discuss Plaintiff's continued employment with Defendants. In this meeting, Plaintiff and [redacted] were in Morgantown and [redacted] and [redacted] were in Charleston connected by video conference. During that meeting, Plaintiff was informed that he would no longer be working on the banking work which he had been assigned to for the preceding year Defendants expressed the view that it was possible that Plaintiff could find other replacement work doing title opinions. Defendants were aware that doing title opinion work was legal work which Plaintiff was not initially employed to perform and which he did not enjoy performing.

34. In a conversation in May 2015, Plaintiff and [redacted] discussed his belief that he would never be fairly considered for partnership at [redacted] Plaintiff expressed his

view that the work environment which he was experiencing was hostile and was starting to impact Plaintiff's health and his family relationships. [redacted] responded to the Plaintiff by stating that Plaintiff should not have suggested that he might sue [redacted] and that if Plaintiff's family was upset it was the Plaintiff's fault because he was the one upsetting them. Based upon this response, Plaintiff expressed to [redacted] that he was not longer willing to be employed by [redacted] under the conditions currently existing as he did not believe those to be acceptable and that they could not reasonably be tolerated.

35. During May 2015, [redacted] informed the Plaintiff that, with regard to potential legal claims against [redacted], Plaintiff had a "slam dunk" but threatened that if Plaintiff sued Defendants it was going to get "messy."

36. In a conversation with [redacted] regarding Plaintiff's departing from [redacted] in light of the environment in which he was forced to work by Defendants, [redacted] commented to the Plaintiff "you finally gave up, huh?"

COUNT I - SEXUAL HARASSMENT

37. The actions of the Defendants, as set forth above, constitute sexual harassment of the Plaintiff and a sexually hostile working environment against the Plaintiff which unreasonably interfered with Plaintiff's performance of his duties, all of which Defendants knew existed and to which Defendants failed and refused to take effective action.

38. A sexually hostile work environment is in violation of the West Virginia Human Rights Act, West Virginia Code § 5-11-1 et seq.

COUNT II - RELIGIOUS DISCRIMINATION

39. The actions of the Defendants as set forth above constitute discrimination against the Plaintiff based upon his religion, Christian, and harassment of the Plaintiff based upon his religion, Christian.

40. The actions of the Defendants as set forth above in discriminating against the Plaintiff based upon his religion, Christian, and harassment of the Plaintiff based upon his religion, Christian, constitute a violation of West Virginia Human Rights Act, West Virginia Code § 5-11-1.

COUNT III - NATIONAL ORIGIN DISCRIMINATION

41. The actions of the Defendants as set forth above, constitute discrimination against the Plaintiff based upon Plaintiff's ancestry, Lebanese, and harassment of the Plaintiff based upon his ancestry, Lebanese.

42. Discrimination and harassment of the Plaintiff based upon his ancestry, Lebanese, is a violation of West Virginia Human Rights Act, West Virginia Code § 5-11-1 et seq.

COUNT IV - REPRISAL AND RETALIATION

43. The actions of the Defendants as set forth above constitute reprisal and retaliation against the Plaintiff for his opposition to actions of Defendants which discriminated against the Plaintiff and harassed the Plaintiff based upon Plaintiff's rejection of Defendant Prunty's sexual overtures, Plaintiff's complaints about the sexually hostile work environment created by Defendant [redacted], Plaintiff's complaints about the religions discrimination and religious harassment Plaintiff suffered and Plaintiff's complaints about the discrimination against the Plaintiff based upon his national origin as set forth above.

44. Retaliation and reprisal against the Plaintiff due to his opposition to the Defendants' harassing, discriminatory conduct as described herein above is a violation of West Virginia Human Rights Act, West Virginia Code § 5-11-1, et seq.

WHEREFORE, Plaintiff demands against the Defendants, and each of them, damages for mental and emotional distress, the value of lost wages and lost benefits, punitive damages, costs and attorney's fees, injunctive relief, and such other and further relief as may upon the premises be appropriate.

[redacted]
Plaintiff by Counsel,

Respectfully submitted,

[redacted]

State Bar No. [redacted]
Counsel for Plaintiff

[redacted]

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

[redacted],

Plaintiff,

VS. Civil Action No. 17-C-483

Judge: Bailey

[redacted] and [redacted],

Defendants.

ANSWER ON BEHALF OF DEFENDANTS [redacted] AND [redacted] TO PLAINTIFF'S COMPLAINT

Defendant [redacted] and Defendant [redacted], by and through their attorney, Thomas E. Scarr and Jenkins Fenstermaker, PLLC, answer and respond to Plaintiff's Complaint as follows:

FIRST DEFENSE

Plaintiff's name was legally changed to [redacted] on March 16, 2015. Accordingly, Plaintiff has filed suit using a name which is not and has not been his legal name for over two years, and therefore, Plaintiff's Complaint should be dismissed.

SECOND DEFENSE

West Virginia Code Section 48-25-105 provides that following entry of a Name Change Order, the person is "thenceforth" required to use his new name in place of his former name, and therefore, Plaintiff's Complaint violates West Virginia law and should be dismissed.

THIRD DEFENSE

Rule 17 of the West Virginia Rules of Civil Procedure provides that every civil action must be prosecuted in the name of the real party in interest, and since Plaintiff failed to file suit

in the name of the real party in interest, Plaintiff's Complaint must be dismissed.

FOURTH DEFENSE

Plaintiff's Complaint against Defendants should be dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure on the grounds and to the extent that it fails to state a claim or cause of action upon which relief can be granted.

FIFTH DEFENSE

At all times relevant hereto Plaintiff was an "employee-at-will", who as such had the right to resign his employment, and Defendant [redacted] had no obligation to continue to employ Plaintiff, but rather had a similar right to discharge the Plaintiff at any time with or without notice, cause or compensation.

SIXTH DEFENSE

Plaintiff was not terminated nor actually or constructively discharged, but voluntarily resigned his employment with [redacted].

SEVENTH DEFENSE

Plaintiff cannot sustain a claim for constructive discharge since he was not subject to disciplinary action, demotion, probation or a reduction in pay, benefits or title, or any other working conditions which would justify a constructive discharge, but rather voluntarily resigned his employment when it became apparent that his work performance was inadequate and he was unwilling to invest the necessary time and effort to improve his work performance.

EIGHTH DEFENSE

Plaintiff's claims for constructive discharge should be dismissed because Plaintiff's working conditions and environment were not intolerable or otherwise such that, applying the

required objection standard, a reasonable person in Plaintiff's position would feel compelled or forced to resign, but rather Plaintiff voluntarily resigned his employment.

NINTH DEFENSE

Plaintiff was not constructively discharged because he had been planning on leaving the employment of [redacted] for over six (6) months before he did so, and months before his resignation, he put his house up for sale and eventually gave advance notice of his intent to resign, and chose the date, time and manner of his voluntary resignation.

TENTH DEFENSE

Plaintiff's claims of constructive discharge should be dismissed because there is no evidence that [redacted] intentionally imposed any working conditions upon Plaintiff with the hope, intent or reasonable expectation that they would compel or force the Plaintiff to resign his employment.

ELEVENTH DEFENSE

Plaintiff's claims of constructive discharge should be dismissed because the undisputed evidence indicates [redacted] responded to Plaintiff's concerns and issues raised by him and took prompt and appropriate remedial steps in response thereto, and in furtherance of Plaintiff's successful integration into [redacted] and development of his legal practice, evidencing its apparent lack of intent to compel Plaintiff's resignation.

TWELFTH DEFENSE

In many, if not all of the instances about which Plaintiff now complains, he willingly initiated, raised, invited and/or encouraged many of the topics and conversations, and/or was a willing and active participant in the conversations, and therefore he cannot now claim them as the basis for his claims of harassment, discrimination, and/or hostile work environment.

THIRTEENTH DEFENSE

Plaintiff willingly initiated, promoted, participated and engaged in on-again, off-again pattern of consensual work place banter with his co-workers concerning religion, ethnicity and sex, conduct of which he now complains and he is therefore estopped from maintaining this action.

FOURTEENTH DEFENSE

In many, if not all, of the instances about which Plaintiff now complains, he raised, initiated and/or expressly or tacitly encouraged the topics and conversations, and/or actively participated in them, suggesting and/or signaling that the discussions, exchanges, and responses by others, including Defendant [redacted], concerning those topics were welcome.

FIFTEENTH DEFENSE

In many, if not all, of the instances upon which Plaintiff now claims that he was the subject of harassment, discrimination, and/or hostile work environment, certain words and/or phrases were used and/or statements were made in obvious sarcasm, in jest and in an effort at humor, which Plaintiff misinterpreted and/or misperceived, apparently lacking the normal ability to recognize and discern sarcasm and irony.

SIXTEENTH DEFENSE

During the course of his employment, it became apparent that Plaintiff was overly sensitive and dramatic, prone to obsess over and exaggerate past events, to take things said by lawyers, staff and clients out of context, to misinterpret obvious sarcasm and attempts at humor, to apply different standards of behavior for himself and others, and to link unrelated and at times random, events and circumstances to support his unfounded suspicions and paranoia. In many of the instances upon which Plaintiff bases his claims that he was subject to harassment,

discrimination and/or hostile work environment, these habits and personality traits are on display as he attempts to create alternative facts and an alternative reality.

SEVENTEENTH DEFENSE

The Defendants specifically deny all allegations contained in Plaintiff's Complaint that allege or imply any fault on the part of either or both of the Defendants that allege or imply any responsibility; failure to meet any responsibility, duty or violation of duty; or that allege or imply that either or both Defendants violated any agreements, contracts, applicable statutes, rules, regulations or standards whatsoever with respect to this matter.

EIGHTEENTH DEFENSE

In response to the specific allegations in Plaintiff's Complaint, Defendants respond as follows:

1. Based on information and belief, Defendants admit the allegations contained in Paragraph 1 of Plaintiff's Complaint.
2. Defendants admit the allegations contained in Paragraph 2 of Plaintiff's Complaint.
3. Defendants admit the allegations contained in Paragraph 3 of Plaintiff's Complaint.
4. Defendants admit that Plaintiff was employed by Defendant [redacted] from January 2, 2014 until his resignation effective May 15, 2015 but denies that Plaintiff was ever employed by Defendant [redacted].
5. Defendants admit that Plaintiff was employed by Defendant [redacted] and worked out of its Morgantown, West Virginia Office, and further admits that Defendant [redacted] was a partner of [redacted] and worked out of its Morgantown office, but denies that Plaintiff was ever employed by Defendant [redacted].
6. Defendants deny the allegations contained in Paragraph 6 of Plaintiff's Complaint.

7. Defendants deny the allegations contained in Paragraph 7 of Plaintiff's Complaint.

8. Defendants admit that in late January, 2014, Plaintiff indicated to Defendant [redacted] that he needed work and asked if he could work with [redacted] on a specific project. [redacted] agreed and assigned Plaintiff a specific, very limited part of the overall project, and during the project [redacted] advised Plaintiff that his billable hours on his part of the project were excessive and could not be billed to the client, but deny the remaining allegations contained in Paragraph 8 of Plaintiff's Complaint.

9. Defendants admit that at various separate times, over the course of approximately eleven (11) months, Plaintiff complained in separate conversations, to [redacted], [redacted] and [redacted] about Defendant [redacted], the billing attorney on the particular legal matter, transferring some of Plaintiff's time from billable to nonbillable in March 2014, as he had previously advised Plaintiff he intended to do, because the time was excessive and could not reasonably be billed to the client, but deny as stated the remaining allegations contained in Paragraph 9 of Plaintiff's Complaint.

10. Defendants admit that in February or March of 2014, Plaintiff complained about Defendant [redacted] transferring some of his time from billable to nonbillable but deny as stated the remaining allegations contained in Paragraph 10 of Plaintiff's Complaint.

11. Defendants deny that Defendant [redacted] made a series of statements without Plaintiff's invitation regarding "the Jewish and Palestinian conflict", but admit that, in response to comments made by Plaintiff who expressed his own mixed feelings about

the conflict, Defendant [redacted] made a joking comment in a joking manner to the effect that "Arabs are crazy, Christians are crazy, and religious people are crazy."

12. Defendants deny the allegations contained in Paragraph 12 of Plaintiff's Complaint.

13. Defendants admit the allegations contained in Paragraph 13 of Plaintiff's Complaint.

14. Defendants admit that at various separate times over the course of an extended period of time, Plaintiff reported to [redacted], [redacted] and [redacted], in separate conversations, certain limited comments and statements allegedly made by Defendant [redacted], but deny the remaining allegations contained in Paragraph 14 of Plaintiff's Complaint.

15. Defendants admit that at various separate times in 2014 and 2015, Plaintiff indicated to and shared with [redacted], [redacted] and [redacted], in separate conversations, that he was experiencing stress due to the "recent" death of his father two years earlier, and illnesses of his mother and sister, and indicated that he was having difficulty dealing with those and other issues, but deny the remaining allegations contained in Paragraph 15 of Plaintiff's Complaint.

16. Defendants admit that a conversation similar to that described in Paragraph 16 of Plaintiff's Complaint occurred, and that Defendant [redacted] made the comment referenced in apparent sarcasm, in jest and in a fairly obvious effort at humor, although Defendants are without knowledge or information sufficient to form a belief as to the timing of the conversation, but further admit the remaining allegations contained in Paragraph 16 of Plaintiff's Complaint.

17. Defendants admit that at various times during the summer and early fall months of 2014, the Plaintiff and Defendant [redacted] engaged in voluntary, consensual banter

regarding various subjects, including religion, ethnicity and sex, at times both exchanged off color humor, occasionally with others present and/or participating, and further admit that at times Plaintiff openly boasted as to his sexual prowess and frequency of his sexual relations and related benefits of a Lebanese wife, but deny the remaining allegations contained in Paragraph 17 of Plaintiff's Complaint.

18. Defendants deny that Plaintiff related the alleged sexual conversations and comments to [redacted], denies that Plaintiff informed [redacted] about an alleged exchange with an associate where the associate accused Plaintiff of "airing out (his own) dirty laundry" and that he requested that [redacted] "get to the bottom of the situation and require the associate to inform him" to what he was allegedly referring, and further denies [redacted] instructed the Plaintiff to stay away from the associate, and is currently without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 18 of Plaintiff's Complaint.
19. Defendants admit that Defendant [redacted] photographed Plaintiff and various other individuals attending a WVU football game while they were sitting in a box reserved by various [redacted] lawyers in which [redacted] often entertains clients, but denies the remaining allegations contained in Paragraph 19 of Plaintiff's Complaint.
20. Defendants deny the allegations contained in Paragraph 20 of Plaintiff's Complaint.
21. Defendants admit that a conversation similar to the one described in Paragraph 21 of Plaintiff's Complaint did take place and that Defendant [redacted] made the comment in jest and apparent sarcasm since, in response to an occasional question by Plaintiff as to whether he was liked by [redacted], [redacted] had stated several times previously how much he liked Plaintiff, and Defendant [redacted] and others had gone out of their way to

welcome Plaintiff, to give him work, to assist him in his transition to private practice of law and with development of his practice, and to provide support and encouragement to Plaintiff as he dealt with various personal issues and difficulties which Plaintiff shared with Defendant [redacted] and others.

22. Defendants deny the allegations contained in Paragraph 22 of Plaintiff's Complaint.

23. Defendants admit that in November, 2014, Plaintiff contacted [redacted], [redacted] and [redacted] and complained about certain conduct of Defendant [redacted] and admit that in response thereto Plaintiff was given the opportunity to and did move to another office, located on another floor of [redacted] Morgantown office, that both Plaintiff and Defendant [redacted] were counselled and steps were taken to limit their future interaction, but deny the remaining allegations contained in Paragraph 27 of Plaintiff's Complaint.

24. Defendants admit that in January, 2015, Plaintiff had a telephone conversation with [redacted] partner [redacted] in which he discussed with her some things he had complained to others about previously, but when she indicated she would investigate the matter, he informed her that he had already raised the issues with others, that they had been fully and adequately addressed, that it was behind him now, that he wanted to move on and that he did not want her to do or say anything, but deny the remaining allegations contained in Paragraph 24 of Plaintiff's Complaint.

25. Defendants deny the allegations contained in Paragraph 25 of Plaintiff's Complaint, and state that as time progressed, Plaintiff took action to limit the internal referral sources of work and types of work that he would accept.

26. Defendants admit that sometime after Plaintiff, at his request, was moved from an upstairs office to a downstairs office, [redacted] discussed with Plaintiff his willingness to move to another office on the same floor to accommodate another lawyer who was relocating to [redacted] Morgantown office. Plaintiff was given the option to stay where he was already located or move to one of a couple of other offices. Plaintiff indicated he was willing to move and that he did not care where he was located as long as he was not near Defendant [redacted] Plaintiff himself selected the office to which he was subsequently relocated. That office had previously been a storage and work area but was modified into a lawyer office and at the time of his relocation, Plaintiff told several other lawyers that he had no problem with the move, the office, its furniture, its equipment or décor, but the Defendants deny the remaining allegations contained in Paragraph 26 of Plaintiff's Complaint.

27. Defendants deny the allegations contained in Paragraph 27 of Plaintiff's Complaint.

28. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28 of Plaintiff's Complaint.

29. Defendants admit that Plaintiff was advised that [redacted] attorney [redacted] would be conducting an investigation into Plaintiff's allegations and complaints and that thereafter, Plaintiff met with [redacted], but Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 29 of Plaintiff's Complaint.

30. Defendants deny that [redacted] made the comments attributed to him in Paragraph 30 of Plaintiff's Complaint, but are without knowledge and information

sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 30 of Plaintiff's Complaint.

31. Defendants admit that Plaintiff informed [redacted] of the comments referenced by Plaintiff in Paragraph 31 of his Complaint but refused to identify for [redacted] the person that allegedly made the comments, making it difficult if not impossible to investigate the allegations, and Defendants deny the remaining allegations contained in Paragraph 31 of Plaintiff's Complaint.

32. Defendants admit that Plaintiff met with [redacted] and [redacted] sometime in early April 2015 to discuss the findings of [redacted] investigation and to develop a plan to help Plaintiff further expand and develop his practice, and further admit that among other things discussed were: that Plaintiff was told that Defendant [redacted] actually likes the Plaintiff and his wife and was sorry if Plaintiff was offended by anything he may have said, that [redacted] indicated he found no evidence of retaliation or a freeze out, that Plaintiff did not accept the results of the investigation and could not move on, [redacted] asked Plaintiff to consider forgiving others for what he perceived as harassment so he could move on, but Plaintiff indicated something to the effect that he did not trust [redacted] any longer, and further indicated he had consulted an attorney and might file a lawsuit against [redacted], but Defendants deny the remaining allegations contained in Paragraph 32 of Plaintiff's Complaint.

33. Defendants admit that nevertheless, Plaintiff subsequently met in April 2015 with [redacted], [redacted] and [redacted] to discuss Plaintiff's work load and how to get him busy and productive, and that during that meeting Plaintiff and [redacted]

[redacted] were located in [redacted] Morgantown office and [redacted] and [redacted] were located in [redacted] Charleston Office and that they were all connected by video conferencing, and further admit that Plaintiff indicated he did not want to do "title opinion work" but deny the remaining allegations contained in Paragraph 33 of Plaintiff's Complaint.

34. Defendants admit that in a conversation with [redacted] in April or May 2015, Plaintiff discussed his belief that he would not be fairly considered for partnership at [redacted] and expressed his view that the work environment he was experiencing was hostile and was affecting his health and his relationships with his family, and that he was no longer willing to be employed by [redacted] Defendants admit that [redacted] suggested to Plaintiff that he had a role and some responsibility if his family was upset, but Defendants are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 34 of Plaintiff's Complaint.

35. Defendants deny the allegations contained in Paragraph 35 of Plaintiff's Complaint.

36. Defendants deny the allegations contained in Paragraph 36 of Plaintiff's Complaint.

37. Defendants deny that the conduct and comments attributed to the Defendants as described by Plaintiff in Plaintiff's Complaint occurred and further deny that Plaintiff was subjected to sexual harassment and/or a sexually hostile work environment and denies the remaining allegations contained in Paragraph 37 of Plaintiff's Complaint.

38. Paragraph 38 of Plaintiff's Complaint does not contain factual allegations but rather contains a broad, general conclusion of law to which a response is not required. To the extent a response is necessary, Defendants admit that depending upon what is

meant by "sexually hostile work environment", and depending upon specific conduct and factual circumstances at issue, that they may in a particular case constitute a violation of the West Virginia Human Rights Act, but Defendants deny that any such violation ever occurred.

39. Defendants deny that the conduct and comments attributed to Defendants as described by Plaintiff in his Complaint occurred and further deny that Plaintiff was subjected to discrimination and/or harassment based on his religion.

40. Defendants deny the allegations contained in Paragraph 40 of Plaintiff's Complaint.

41. Defendants deny that the conduct and comments attributed to Defendants as described by Plaintiff in his Complaint occurred and further deny that Plaintiff was subjected to discrimination and/or harassment based upon his ancestry.

42. Paragraph 42 of Plaintiff's Complaint does not contain factual allegations but rather contains a broad, general conclusion of law to which a response is not required. To the extent a response is necessary, Defendants admit that, depending upon the specific conduct and factual circumstances at issue discrimination and harassment based on ancestry, may in a particular case constitute a violation of the West Virginia Human Rights Act, but Defendants deny that any such discrimination and/or harassment ever occurred.

43. Defendants deny that the conduct and comments attributed to Defendants as described by Plaintiff in his Complaint occurred and further deny that Plaintiff was subjected to any reprisal and/or retaliation for any reason.

44. Paragraph 44 of Plaintiff's Complaint does not contain factual allegations but rather contains a broad, general conclusion of law to which a response is not required. To

the extent a response is necessary, Defendants admit that, depending upon the specific conduct and factual circumstances at issue, retaliation and/or reprisal against an employee may in a particular case constitute a violation of the West Virginia Human Rights Act, but Defendants deny that any such retaliation and/or reprisal ever occurred.

NINETEENTH DEFENSE

Defendants deny any allegations contained in Plaintiff's Complaint not specifically admitted.

ADDITIONAL AFFIRMATIVE DEFENSES

The following additional affirmative defenses are raised to the extent that discovery reveals the same to be appropriate. If discovery should reveal the same to be inapplicable, they will be abandoned prior to the trial of this matter.

TWENTIETH DEFENSE

Plaintiff's claims may be barred by the applicable statutes of limitation, statues of repose and/or laches. Plaintiff's claims may also be barred by the doctrines of waiver, estoppel, and/or unclean hands.

TWENTY-FIRST DEFENSE

Plaintiff by his actions has waived and/or is estopped from maintaining this action against the Defendants.

TWENTY-SECOND DEFENSE

Defendants hereby invoke any and all affirmative defenses applicable in the defense of claims asserted against them in Plaintiff's Complaint as may be relevant, prudent or justified and established by the facts and circumstances hereof, and as may be justified and established by the

factual information obtained during the discovery in this action. Such affirmative defenses are as contemplated and/or set forth in Rules 8, 9, and/or 12 of the West Virginia Rules of Civil Procedure.

TWENTY-THIRD DEFENSE

Neither Plaintiff's ethnicity, ancestry nor religion were factors or considerations in how he was treated at [redacted] or by Defendant [redacted].

TWENTY-FOURTH DEFENSE

Plaintiff was hired by [redacted] with knowledge of at least some of the decision makers at [redacted] and many of the people with whom he subsequently worked of Plaintiff's ethnicity, ancestry and religion, which provides an inference of non-discrimination under the "same actor" principle and defense.

TWENTY-FIFTH DEFENSE

Plaintiff's claim against Defendants should be dismissed in that the Plaintiff is unable to establish "but for" the Plaintiff's being part of a protected class, he would have been treated any differently than he was treated.

TWENTY-SIXTH DEFENSE

Plaintiff's claims and causes of action against the Defendants should be dismissed because the Plaintiff has failed and is unable to establish a prima facie case of discrimination in that the Plaintiff is unable to establish that he was subject to illegal discrimination, harassment and/or retaliation, based on religion and/or ancestry.

TWENTY-SEVENTH DEFENSE

Plaintiff's claims against Defendants should be dismissed in that Plaintiff is unable to show that any legitimate, nondiscriminatory reason stated for any of his treatment is actually pretextual.

TWENTY-EIGHTH DEFENSE

Defendants exercised reasonable care to prevent and promptly correct any alleged improper behavior, and responded appropriately and in a timely manner to address issues and concerns raised and/or expressed by Plaintiff, including those related to Defendant [redacted] and to Plaintiff's work load and practice development.

TWENTY-NINTH DEFENSE

[redacted] conducted thorough investigation into the allegations and complaints raised by Plaintiff and that investigation did not support or substantiate Plaintiff's claims of discrimination, harassment, hostile work environment or retaliation or reprisal.

THIRTIETH DEFENSE

Plaintiff's claim of hostile work environment and sexual harassment should be dismissed because Plaintiff is unable to establish that the conduct and comments relied upon were unwelcome, based on Plaintiff's sex, or sufficiently severe or pervasive to alter Plaintiff's conditions of employment and create an abusive or hostile work environment.

THIRTY-FIRST DEFENSE

Plaintiff's claims, or some of them, are barred in that Defendants have complied with all local, state and federal laws, rules and regulations, and generally accepted practices and customs.

THIRTY-SECOND DEFENSE

Plaintiff's alleged damages were not caused by Defendants.

THIRTY-THIRD DEFENSE

The alleged damages claimed by Plaintiff, if any, were not proximately caused by any improper or illegal act or omission of Defendants.

THIRTY-FOURTH DEFENSE

The damages, if any, allegedly suffered by Plaintiffs were not reasonably foreseeable, and, in any event, are speculative, conjectural, and not susceptible to proof to a reasonable degree of certainty.

THIRTY-FIFTH DEFENSE

Defendants invoke the doctrine of mitigation of damages and allege that to the extent that Plaintiff has failed to mitigate any damages allegedly caused by Defendants, if any, either while employed by Defendant [redacted] or after, Plaintiff's recovery, if any, should be reduced by the amount of damages that might have been avoided through mitigation.

THIRTY-SIXTH DEFENSE

Plaintiff cannot prove the necessary predicates or conditions in order to establish the threshold requirements for the recovery of exemplary or punitive damages.

THIRTY-SEVENTH DEFENSE

Plaintiff's claims for punitive damages violate Defendants' right to procedural and substantive due process as provided by the Fifth and Fourteenth Amendments to the United States Constitution, and Article III, Section 10, and all other applicable provisions of the Constitution of the State of West Virginia.

THIRTY-EIGHTH DEFENSE

Plaintiff's claims for punitive damages violate Defendants' rights to equal protection under the law and are otherwise unconstitutional under the Fourteenth Amendment to the United States Constitution, and Article II, Section 1, and all other applicable provisions of the Constitution of the State of West Virginia, including but not limited to, the protection from "excessive fines" and to proportional penalties as provided in Article III, Section 5 of the Constitution of the State of West Virginia.

THIRTY-NINTH DEFENSE

Defendants reserve the right to amend their answer and to assert additional defenses, affirmative or otherwise, and/or any counterclaims or third party claims, as may be identified through further investigation and discovery.

WHEREFORE, Defendants request that Plaintiff have and recover nothing, that Plaintiff's claims against them be dismissed with prejudice and that they recover all costs and expenses, including reasonable attorney's fees, expended in connection with the defense of this action and such other and further relief as justice may require.

[redacted]

By Counsel

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JENKINS FENSTERMAKER, PLLC
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Phone: (304) 523-2100
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Counsel for Defendants

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

[redacted],

Plaintiff,

v. **Civil Action No.** [redacted]
Judge Bailey

[redacted] **and**
[redacted],

Defendants.

PLAINTIFF'S FIRST NOTICE OF VIDEOTAPED 30(b)(7) DEPOSITION

Comes now the Plaintiff, by and through her counsel, and, pursuant to Rule 30(b)(7) of the West Virginia Rules of Civil Procedure, does hereby respectfully request that Defendant, [redacted] LLP, designate one or more officers, directors or managing agents or other persons to testify on the matters designated below. The person or persons so designated shall testify to matters reasonably known or reasonably available to Defendants, on the ____ **day of** _____**, 2017, at the hour of 10:00 a.m.**, at [redacted], [redacted], West Virginia, and give binding testimony with regard to the following subjects:

1. All facts upon which the Defendants base their Sixth Affirmative Defense that: "Plaintiff was not terminated nor constructively discharged, but voluntarily resigned his employment with [redacted]."

2. All facts upon which Defendants base their Seventh Affirmative Defense that Plaintiff was "not subject to disciplinary action, demotion, probation, or a reduction in pay, benefits or title, or any other working conditions which would justify a constructive discharge, but rather voluntarily resigned his employment when it became apparent that his work performance was inadequate and he was unwilling to invest the necessary time and effort to improve his work performance."

3. All facts upon which Defendants base their Ninth Affirmative Defense that Plaintiff "had been planning on leaving the employment of [redacted] for over six (6) months before he did

so, and months before his resignation, he put his house up for sale" as set forth in Defendants' Ninth Affirmative Defense.

4. All facts upon which Defendants base their Tenth Affirmative Defense that "there is no evidence that [redacted] intentionally imposed any working conditions upon Plaintiff with the hope, intent or reasonable expectation that they would compel or force the Plaintiff to resign his employment."

5. All facts upon which Defendants base their Eleventh Affirmative Defense that "[redacted] responded to Plaintiff's concerns and issues raised by him and took prompt and appropriate remedial steps in response thereto, and in furtherance of Plaintiff's successful integration into [redacted] and development of his legal practice."

6. All facts upon which Defendants base their contention as set forth in their Twelfth Affirmative Defense that "many, if not all of the instances about which Plaintiff now complains, he willingly initiated, raised, invited and/or encouraged many of the topics and conversations, and/or was a willing and active participant in the conversations, and therefore he cannot now claim them as the basis for his claims of harassment, discrimination, and/or hostile work environment."

7. All facts upon which Defendants base their Thirteenth Affirmative Defense that "Plaintiff willingly initiated, promoted, participated and engaged in on-again, off-again, pattern of consensual work place banter with his co-workers concerning religion, ethnicity and sex, conduct of which he now complains."

8. All facts upon which Defendants base their Fourteenth Affirmative Defense that Plaintiff "raised, initiated and/or expressly or tacitly encouraged the topics and conversations, and/or actively participated in them, suggesting and/or signaling that the discussions, exchanges, and responses by others, including Defendant [redacted], concerning those topics were welcome."

9. All facts in Defendants' possession upon which Defendants base their Fifteenth Affirmative Defense that "many, if not all, of the instances upon which Plaintiff now claims that he was the subject of harassment, discrimination, and/or hostile work environment, certain words and/or phrases were used and/or statements were made in obvious sarcasm, in jest and in an effort at humor, which Plaintiff misinterpreted and/or misperceived, apparently lacking the normal ability to recognize and discern sarcasm and irony."

10. All facts in Defendants' possession upon which they rely to support their Sixteenth Affirmative Defense that "During the course of his employment, it became apparent that Plaintiff was overly sensitive and dramatic, prone to obsess over and exaggerate past events, to take things said by lawyers, staff and clients out of context, to misinterpret obvious sarcasm and attempts at humor, to apply different standards of behavior for himself and others, and to link unrelated and at times random events and circumstances to supported his unfounded suspicions and paranoia."

11. All facts in Defendants' possession upon which Defendants base their claim that Plaintiff has "habits and personality traits" through which he "attempts to create alternative facts and an alternative reality."

12. All facts upon which Defendants base their denial of the allegations set forth in Paragraph 6 of Plaintiff's Complaint:

"During January 2014, Defendant [redacted] entered the Plaintiff's office and inquired as to whether the Plaintiff wished to go to a gay bar. When the Plaintiff expressed his lack of interest in attending a gay bar with Defendant [redacted], Defendant [redacted] replied that gay people liked to be ridiculed and made fun of."

13. All facts upon which Defendants base their denial of the allegations set forth in Paragraph 7 of Plaintiff's Complaint:

"In the same conversation in January of 2014 between the Plaintiff and Defendant [redacted] described in Paragraph 6 above, Defendant [redacted] inquired of the Plaintiff regarding Arab men and Arab culture. Defendant [redacted] inquired about how close the relationships were between Arab men

and Arab culture and whether or not the relationships between Arab men in Arab culture were strictly "from the neck up."

14. All facts upon which Defendants base their denial of the allegations of Paragraph 8 of the Complaint to the extent the same were denied:

"In late January 2014, Plaintiff was assigned to work on a legal project with Defendant [redacted]. [redacted] provided Plaintiff little guidance on the project and made several changes in direction which required the project to be restarted frequently. At the conclusion of the project, Defendant [redacted] complained that Plaintiff's billable hours for the project were excessive. [redacted] unilaterally changed Plaintiff's billable hours without notifying him."

Answer: "Defendants admit that in late January, 2014, Plaintiff indicated to Defendant [redacted] that he needed work and asked if he could work with [redacted] on a specific project. [redacted] agreed and assigned Plaintiff a specific, very limited part of the overall project, and during the project [redacted] advised Plaintiff that his billable hours on his part of the project were excessive and could not be billed to the client, but deny the remaining allegations contained in Paragraph 8 of Plaintiff's Complaint."

15. All facts upon which Defendants base their denial of the allegations of Paragraph 9 of the Complaint to the extent the same are denied:

"Plaintiff complained to his direct supervisor, [redacted], Managing Partner of the Morgantown office of Defendant [redacted], to [redacted], General Partner of [redacted], and to [redacted], a partner in [redacted], Plaintiff's assigned mentor, about Defendant [redacted]'s actions toward Plaintiff regarding this project. [redacted], [redacted] and [redacted] told the Plaintiff that the situation was not handled correctly by [redacted] and that he should not have unilaterally altered Plaintiff's billable hours."

Answer: "Defendants admit that at various separate times, over the course of approximately eleven (11) months, Plaintiff complained in separate conversations, to [redacted], [redacted] and [redacted] about Defendant [redacted], the billing attorney on the particular legal matter, transferring some of Plaintiff's time from billable to nonbillable in March 2014, as he had previously advised Plaintiff he intended to do, because the time was excessive and could not reasonably be billed to the client, but deny as stated the remaining allegations contained in Paragraph 9 of Plaintiff's Complaint.

16. All facts upon which Defendants base their denial of the allegations of Paragraph 10 of the Complaint to the extent the same are denied:

"In February 2014 after the Plaintiff complained about his unilateral alteration of his billable hours, Defendant [redacted] entered Plaintiff's office and stated that if he ([redacted]) "was acting like an asshole, its because I am an asshole."

Answer: "Defendants admit that in February or March of 2014, Plaintiff complained about Defendant [redacted] transferring some of his time from billable to nonbillable but deny as stated the remaining allegations contained in Paragraph 10 of Plaintiff's Complaint.

17. All facts upon which Defendants base their denial of the allegations of Paragraph 11 of the Complaint to the extent the same are denied:

"From February through the summer of 2014, Defendant [redacted] came to the Plaintiff's office and made a series of statements without Plaintiff's invitation regarding the subjects including the Jewish and Palestinian conflict. [redacted] told the Plaintiff that "all Arabs are crazy." [redacted] also stated that "all Christians are crazy" and that "all religious people are crazy."

Answer: "Defendants deny that Defendant [redacted] made a series of statements without Plaintiff's invitation regarding "the Jewish and Palestinian conflict", but admit that, in response to comments made by Plaintiff who expressed his own mixed feelings about the conflict, Defendant [redacted] made a joking comment in a joking manner to the effect that "Arabs are crazy, Christians are crazy, and religious people are crazy."

18. All facts upon which Defendants base their denial of the allegations of Paragraph 12 of the Complaint:

"On one occasion, [redacted] stood outside the Plaintiff's office in the hallway and remarked regarding some entity or client not wanting a "Lebanese guy on their team."

19. All facts upon which Defendants base their denial of the allegations of Paragraph 14 of the Complaint to the extent the same are denied:

"Plaintiff reported the comments and statements by [redacted] to his direct supervisor [redacted], to [redacted], partner in [redacted], to [redacted], Executive Director of [redacted], and to [redacted]. In response, Plaintiff was informed by [redacted] that Defendant [redacted] was "certifiable" and that [redacted] was an "abused dog." [redacted] informed the Plaintiff that "if they woke up the next day hearing that [redacted]] had blown his head off, no one would be surprised."

Answer: "Defendants admit that at various separate times over the course of an extended period of time, Plaintiff reported to [redacted], [redacted] and [redacted], in separate conversations, certain limited comments and statements allegedly made by Defendant [redacted], but deny the remaining allegations contained in Paragraph 14 of Plaintiffs Complaint."

20. All facts upon which Defendants base their denial of the allegations of Paragraph 15 of the Complaint to the extent the same are denied:

"Plaintiff explained to his direct supervisor [redacted] and to [redacted] partners [redacted] and [redacted], that he had experienced stress due to the recent death of his father and a serious illness suffered by his mother and his sister and that he was having difficulty dealing with those issues while at the same time dealing with the intrusive and unwelcome comments from Defendant [redacted]. [redacted] responded that he knew that Defendant [redacted] would eventually cause [redacted] to be sued and that such a lawsuit was "inevitable." In response to Plaintiff's complaints regarding [redacted]'s intrusions and comments, [redacted] responded that "nobody should have to put up with [redacted] antics."

Answer: "Defendants admit that at various separate times in 2014 and 2015, Plaintiff indicated to and shared with [redacted], [redacted] and [redacted], in separate conversations, that he was experiencing stress due to the "recent" death of his father two years earlier, and illnesses of his mother and sister, and indicated that he was having difficulty dealing with those and other issues, but deny the remaining allegations contained in Paragraph 15 of Plaintiffs Complaint."

21. All facts upon which Defendants base their denial of the allegations of Paragraph 16 of the Complaint to the extent the same are denied:

"During March and April of 2014, while speaking with one of the secretaries in the Morgantown [redacted] office about construction being conducted at Plaintiff's home, the secretary noted that there were several vehicles parked outside of Plaintiff's home and that construction work was underway there. Defendant [redacted] came by during the conversation and interjected that the cars parked at Plaintiff's home must have belonged to Plaintiff's wife's different boyfriends. Plaintiff reported [redacted]'s remark to his direct supervisor [redacted] and [redacted] partner [redacted], as well as with [redacted] Executive Director [redacted]. Wilson responded that the comments were harmless and nothing to be upset about."

Answer: "Defendants admit that a conversation similar to that described in Paragraph 16 of Plaintiffs Complaint occurred, and that Defendant [redacted] made the comment referenced in apparent sarcasm, in jest and in a fairly obvious effort at humor, although Defendants are without knowledge or information sufficient to form a belief as to the timing of the conversation, but further admit the remaining allegations contained in Paragraph 16 of Plaintiffs Complaint."

22. All facts upon which Defendants base their denial of the allegations of Paragraph 17 of the Complaint to the extent the same are denied:

"During the summer and fall months of 2014, Defendant [redacted] continued political, religious and sexual comments described in Paragraphs 6 through 15 above. In addition, however, Defendant [redacted]'s comments began to include more explicit references to sexual practices. Defendant [redacted] referred to the Plaintiff as a "pervert." Defendant [redacted] asked the Plaintiff whether or not he masturbated a lot."

Answer: "Defendants admit that at various times during the summer and early fall months of 2014, the Plaintiff and Defendant [redacted] engaged in voluntary, consensual banter

regarding various subjects, including religion, ethnicity and sex, at times both exchanged off color humor, occasionally with others present and/or participating, and further admit that at times Plaintiff openly boasted as to his sexual prowess and frequency of his sexual relations and related benefits of a Lebanese wife, but deny the remaining allegations contained in Paragraph 17 of Plaintiff's Complaint."

23. All facts upon which Defendants base their denial of the allegations of Paragraph 18 of the Complaint to the extent the same are denied:

"Plaintiff related the sexual conversations and comments by Defendant [redacted] to [redacted], a partner with [redacted]. Shortly after Plaintiff's conversation with [redacted], he was informed by an associate in the firm that it was the Plaintiff's fault that Defendant [redacted] referred to him as a pervert because Plaintiff was "airing out your dirty laundry." When Plaintiff inquired of the associate as to what "dirty laundry" he was referring to, the associate refused to respond. Plaintiff informed his direct supervisor [redacted] of this exchange and requested that Wilson get to the bottom of the situation and require the associate to inform him what he was referring to. Wilson instructed the Plaintiff to stay away from the associate and, upon information and belief, took no further action."

Answer: "Defendants deny that Plaintiff related the alleged sexual conversations and comments to [redacted], denies that Plaintiff informed [redacted] about an alleged exchange with an associate where the associate accused Plaintiff of "airing out (his own) dirty laundry" and that he requested that [redacted] "get to the bottom of the situation and require the associate to inform him" to what he was allegedly referring, and further denies [redacted] instructed the Plaintiff to stay away from the associate, and is currently without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 18 of Plaintiff's Complaint."

24. All facts upon which Defendants base their denial of the allegations of Paragraph 19 of the Complaint to the extent the same are denied:

"In September 2014, Defendant [redacted] photographed the Plaintiff while Plaintiff was attending a West Virginia University home football game at Mylan Puskar Stadium. Plaintiff was seated in the [redacted] seats in Touchdown Terrace where [redacted] entertains clients. Defendant [redacted] emailed the photograph which he had taken of the Plaintiff in the [redacted] seats to members of the [redacted] firm with a comment that the picture of the Plaintiff in the firm's seats offended him."

Answer: "Defendants admit that Defendant [redacted] photographed Plaintiff and various other individuals attending a WVU football game while they were sitting in a box reserved by various [redacted] lawyers in which [redacted] often entertains clients, but denies the remaining allegations contained in Paragraph 19 of Plaintiff's Complaint."

25. All facts upon which Defendants base their denial of the allegations of Paragraph 20 of the Complaint:

"During the fall of 2014, Defendant [redacted] told Plaintiff that he took pictures of West Virginia University collegiate wrestlers' groins and sent them to an attorney employed by Defendant [redacted] with the purpose of making the attorney uncomfortable."

26. All facts upon which Defendants base their denial of the allegations of Paragraph 21 of the Complaint to the extent the same are denied:

"During the fall of 2014, Plaintiff was speaking to [redacted] partner [redacted] who was visiting the firm's Morgantown office. Defendant [redacted] came by and stated to [redacted] "Now, we don't like [redacted]" and told [redacted] that she was 'not to be nice to" Plaintiff."

Answer: "Defendants admit that a conversation similar to the one described in Paragraph 21 of Plaintiff's Complaint did take place and that Defendant [redacted] made the comment in jest and apparent sarcasm since, in response to an occasional question by Plaintiff as to whether he was liked by [redacted], [redacted] had stated several times previously how much he liked Plaintiff, and Defendant [redacted] and others had gone out of their way to welcome Plaintiff, to give him work, to assist him in his transition to private practice of law and with development of his practice, and to provide support and encouragement to Plaintiff as he dealt with various personal issues and difficulties which Plaintiff shared with Defendant [redacted] and others."

27. All facts upon which Defendants base their denial of the allegations of Paragraph 22 of the Complaint:

"In November 2014, Defendant [redacted] came to the Plaintiff's office and informed the Plaintiff that Defendant [redacted] believed the Plaintiff was "sabotaging" his (Plaintiff's) marriage. When Plaintiff responded that he had no idea what Defendant [redacted] was talking about, Defendant [redacted] explained that he meant that Plaintiff had cheated on his wife. Plaintiff told [redacted] that this was incorrect and that he had not cheated on his wife."

28. All facts upon which Defendants base their denial of the allegations of Paragraph 23 of the Complaint to the extent the same are denied:

"In response to the exchange set forth in Paragraph 22 above, Plaintiff immediately contacted his direct supervisor [redacted] as well as [redacted] and [redacted]. Plaintiff explained the exchange that had just occurred and that he had had enough of Defendant [redacted] and that he did not want to be located anywhere near [redacted]'s office. Plaintiff and [redacted] went to another floor of the Morgantown office and selected another work location for the Plaintiff. On this same occasion, [redacted] partners [redacted] and [redacted] came to the Plaintiff's office and apologized

for Defendant [redacted]'s behavior. [redacted] referred to Defendant [redacted] as "an asshole." [redacted] requested that the Plaintiff forgive [redacted] for Defendant [redacted]'s behavior."

Answer: "Defendants admit that in November, 2014, Plaintiff contacted [redacted], [redacted] and [redacted] and complained about certain conduct of Defendant [redacted] and admit that in response thereto Plaintiff was given the opportunity to and did move to another office, located on another floor of [redacted] Morgantown office, that both Plaintiff and Defendant [redacted] were counselled [sic] and steps were taken to limit their future interaction, but deny the remaining allegations contained in Paragraph 27 [sic] of Plaintiff's Complaint."

29. All facts upon which Defendants base their denial of the allegations of Paragraph 24 of the Complaint to the extent the same are denied:

"In January 2015, Plaintiff's assigned mentor [redacted] called the Plaintiff and requested that he share with her everything that had occurred between the Plaintiff and Defendant [redacted] to that point. Plaintiff proceeded to provide to [redacted] a detailed response regarding the harassment and discrimination he had been experiencing during the preceding year. After listening to the Plaintiff's detailed recitation of his treatment by Defendant [redacted], [redacted] first response was "please promise me you are not going to sue us." However, [redacted] made no suggestion as to how or in what way remedial action would be taken to correct the situation under which Plaintiff had been working. Rather, [redacted] stated that at the right time, she would "get" Defendant [redacted] for what he had said and done to the Plaintiff."

Answer: "Defendants admit that in January, 2015, Plaintiff had a telephone conversation with [redacted] partner [redacted] in which he discussed with her some things he had complained to others about previously, but when she indicated she would investigate the matter, he informed her that he had already raised the issues with others, that they had been fully and adequately addressed, that it was behind him now, that he wanted to move on and that he did not want her to do or say anything, but deny the remaining allegations contained in Paragraph 24 of Plaintiff's Complaint."

30. All facts upon which Defendants base their denial of the allegations of Paragraph 25 of the Complaint to the extent the same are denied:

"From January 2015 until Plaintiff's resignation in May of 2015, Plaintiff consistently received less and less assigned work from Defendant [redacted]."

Answer: "Defendants deny the allegations contained in Paragraph 25 of Plaintiff's Complaint, and state that as time progressed, Plaintiff took action to limit the internal referral sources of work and types of work that he would accept."

31. All facts upon which Defendants base their allegation as set forth in Paragraph 25 of their Answer that "as time progressed, Plaintiff took action to limit the internal referral sources of work and types of work that he would accept."

32. All facts upon which Defendants base their denial of the allegations of Paragraph 26 of the Complaint to the extent the same are denied:

"In late February or early March 2015, Plaintiff was removed from the office that he and [redacted] had selected to escape from Defendant [redacted] and placed by [redacted] into another office which was functioning at the time as the [redacted] Morgantown office's maintenance room. The room included recycling bins and other accumulated materials. Plaintiff's new office did not have a fourth wall, so there was no privacy when the Plaintiff was initially assigned to the office. When Plaintiff inquired as to why he was being moved to this new office location, [redacted] informed him that his office was needed for another attorney."

Answer: "Defendants admit that sometime after Plaintiff, at his request, was moved from an upstairs office to a downstairs office, [redacted] discussed with Plaintiff his willingness to move to another office on the same floor to accommodate another lawyer who was relocating to [redacted] Morgantown office. Plaintiff was given the option to stay where he was already located or move to one of a couple of other offices. Plaintiff indicated he was willing to move and that he did not care where he was located as long as he was not near Defendant [redacted]. Plaintiff himself selected the office to which he was subsequently relocated. That office had previously been a storage and work area but was modified into a lawyer office and at the time of his relocation, Plaintiff told several other lawyers that he had no problem with the move, the office, its furniture, its equipment or decor, but the Defendants deny the remaining allegations contained in Paragraph 26 of Plaintiff's Complaint."

33. All facts upon which Defendants base their denial of the allegations of Paragraph 27 of the Complaint:

"During the period between Plaintiff's January 2015 report to [redacted] and his May 15, 2015 resignation, [redacted] steered potential legal work and opportunities to acquire additional clients away from the Plaintiff and toward other [redacted] attorneys."

34. If Defendants possess any information which would support the denial of the allegations of Paragraph 28 of the Complaint, then, all such facts in Defendants' possession:

"As a result of the conduct of the Defendants described in Paragraphs 6 through 27 above, Plaintiff inquired of his assigned mentor [redacted] as to why he was being retaliated against by Defendant [redacted]. He inquired specifically as to whether he had done anything

improper or incorrect as a [redacted] employee. [redacted] responded that Plaintiff had done nothing wrong and that he was 'beyond reproach.'"

35. All information in Defendants' possession as to [redacted] interactions with the Plaintiff regarding whether the Plaintiff had done anything improper or incorrect as a [redacted] employee.

36. All facts upon which Defendants base their denial of the allegations of Paragraph 29 of the Complaint to the extent the same are denied:

"When Plaintiff complained to his mentor [redacted] as described in Paragraph 28 above, [redacted] requested the Plaintiff meet with [redacted], a [redacted] employee who would be handling an internal investigation on behalf of [redacted] regarding Plaintiff's complaints of harassment, discrimination and reprisal. Plaintiff complied with [redacted]'s request by driving to Charleston in March 2015 to meet with [redacted]."

Answer: "Defendants admit that Plaintiff was advised that [redacted] attorney [redacted] would be conducting an investigation into Plaintiff's allegations and complaints and that thereafter, Plaintiff met with [redacted], but Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 29 of Plaintiff's Complaint."

37. If Defendants possess any information which would support the denial of the allegations of Paragraph 29 of the Complaint, then all such facts.

38. If Defendants are in possession of any information which would support the denial of the allegations of Paragraph 30 of the Complaint, then all such facts:

"The day after Plaintiff's meeting with [redacted], Plaintiff's secretary entered his office and informed him that [redacted] partner [redacted] had made disparaging comments regarding "Mexicans" and "Arab/Muslin [sic] people" and further made a comment about Plaintiff's secretary being friends with the Plaintiff.

39. The identity of all support staff assigned to perform work for the Plaintiff during Plaintiff's employment with Defendants.

40. All facts in Defendants' possession upon which the Defendants base their denial of the allegations of Paragraph 31 of the Complaint to the extent the same are denied:

"Plaintiff informed [redacted] of the information he had been provided by his secretary regarding the comments made by [redacted]. Plaintiff declined to identify [redacted] because he did not want his secretary to be identified as the source of the information. [redacted] responded to Plaintiff's report of the disparaging comments about Mexicans, Arabs and Muslin [sic] people by noting that [redacted] had "defecated" on itself and that he [redacted]) had been assigned to 'wipe up the mess.'"

Answer: "Defendants admit that Plaintiff informed [redacted] of the comments referenced by Plaintiff in Paragraph 31 of his Complaint but refused to identify for [redacted] the person that allegedly made the comments, making it difficult if not impossible to investigate the allegations, and Defendants deny the remaining allegations contained in Paragraph 31 of Plaintiff's Complaint."

41. All facts in Defendants' possession upon which the Defendants base their denial of the allegations of Paragraph 32 of the Complaint to the extent the same are denied:

"In early April 2015, Plaintiff met with [redacted] and [redacted] in the [redacted] Morgantown offices to discuss the findings of [redacted]'s investigations. The only response Plaintiff received regarding the investigation was that they were sorry about what happened and that Defendant [redacted] "actually likes [Plaintiff] and your wife." [redacted] also expressed that [redacted] was "sorry that this had happened." [redacted] further informed Plaintiff that he had found no evidence of retaliation. Plaintiff responded that he did not believe the results of the Defendants' investigation and that he did not trust them any longer. In response to Plaintiff's comments that he did not believe or trust the Defendants any longer, [redacted] responded that she knew that the Plaintiff would "do the right thing by forgiving" them."

Answer: "Defendants admit that Plaintiff met with [redacted] and [redacted] sometime in early April 2015 to discuss the findings of [redacted] investigation and to develop a plan to help Plaintiff further expand and develop his practice, and further admit that among other things discussed were: that Plaintiff was told that Defendant [redacted] actually likes the Plaintiff and his wife and was sorry if Plaintiff was offended by anything he may have said, that [redacted] indicated he found no evidence of retaliation or a freeze out, that Plaintiff did not accept the results of the investigation and could not move on, [redacted] asked Plaintiff to consider forgiving others for what he perceived as harassment so he could move on, but Plaintiff indicated something to the effect that he did not trust [redacted] any longer, and further indicated he had consulted an attorney and might file a lawsuit against [redacted], but Defendants deny the remaining allegations contained in Paragraph 32 of Plaintiff's Complaint."

42. All facts upon which Defendants base their denial of the allegations set forth in Paragraph 33 of the Complaint:

"During April 2015, Plaintiff again met after the initial April 2015 meeting described in Paragraph 32 above, Plaintiff, [redacted], [redacted] and [redacted] met again in April to discuss Plaintiff's continued employment with Defendants. In this meeting, Plaintiff and [redacted]

[redacted] were in Morgantown and [redacted] and [redacted] were in Charleston connected by video conference. During that meeting, Plaintiff was informed that he would no longer be working on the banking work which he had been assigned to for the preceding year Defendants expressed the view that it was possible that Plaintiff could find other replacement work doing title opinions. Defendants were aware that doing title opinion work was legal work which Plaintiff was not initially employed to perform and which he did not enjoy performing."

Answer: "Defendants admit that nevertheless, Plaintiff subsequently met in April 2015 with [redacted], [redacted] and [redacted] to discuss Plaintiff's work load and how to get him busy and productive, and that during that meeting Plaintiff and [redacted] were located in [redacted] Morgantown office and [redacted] and [redacted] were located in [redacted] Charleston Office and that they were all connected by video conferencing, and further admit that Plaintiff indicated he did not want to do "title opinion work" but deny the remaining allegations contained in Paragraph 33 of Plaintiff's Complaint."

43. All facts upon which Defendants base their denial of the allegations set forth in Paragraph 34 of the Complaint:

"In a conversation in May 2015, Plaintiff and [redacted] discussed his belief that he would never be fairly considered for partnership at [redacted]. Plaintiff expressed his view that the work environment which he was experiencing was hostile and was starting to impact Plaintiff's health and his family relationships. [redacted] responded to the Plaintiff by stating that Plaintiff should not have suggested that he might sue [redacted] and that if Plaintiff's family was upset it was the Plaintiff's fault because he was the one upsetting them. Based upon this response, Plaintiff expressed to [redacted] that he was not longer willing to be employed by [redacted] under the conditions currently existing as he did not believe those to be acceptable and that they could not reasonably be tolerated."

Answer: "34. Defendants admit that in a conversation with [redacted] in April or May 2015, Plaintiff discussed his belief that he would not be fairly considered for partnership at [redacted] and expressed his view that the work environment he was experiencing was hostile and was affecting his health and his relationships with his family, and that he was no longer willing to be employed by [redacted]. Defendants admit that [redacted] suggested to Plaintiff that he had a role and some responsibility if his family was upset, but Defendants are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 34 of Plaintiff's Complaint."

44. All facts in Defendants' possession upon which the Defendants base their denial of the allegations of Paragraph 35 of the Complaint to the extent the same are denied:

"During May 2015, [redacted] informed the Plaintiff that, with regard to potential legal claims against [redacted], Plaintiff had a "slam dunk" but threatened that if Plaintiff sued Defendants it was going to get 'messy.'"

Answer: "Defendants deny the allegations contained in Paragraph 35 of Plaintiff's Complaint."

45. All facts upon which Defendants base their denial of the allegations of Paragraph 36 of the Complaint:

"In a conversation with [redacted] regarding Plaintiff's departing from [redacted] in light of the environment in which he was forced to work by Defendants, [redacted] commented to the Plaintiff 'you finally gave up, huh?'"

46. All facts in Defendants' possession upon which Defendants rely to support their Twenty-Third Affirmative Defense that:

"Neither Plaintiff's ethnicity, ancestry nor religion were factors or considerations in how he was treated at [redacted] or by Defendant [redacted]."

47. All facts in Defendants' possession upon which Defendants rely to support their Twenty-Eighth Affirmative Defense that:

"Defendants exercised reasonable care to prevent and promptly correct any alleged improper behavior, and responded appropriately and in a timely manner to address issues and concerns raised and/or expressed by Plaintiff, including those related to Defendant [redacted] and to Plaintiff's work load and practice development."

48. All facts in Defendants' possession upon which Defendants reply to support their Twenty-Ninth Affirmative Defense that:

"[redacted] conducted thorough investigation into the allegations and complaints raised by Plaintiff and that investigation did not support or substantiate Plaintiffs claims of discrimination, harassment, hostile work environment or retaliation or reprisal."

49. Cost to the Defendants of providing all benefits other than W-2 wage benefits payable to the Plaintiff as of his resignation from Defendants, including cost on a monthly and yearly basis of all such non-W-2 wage benefits to the Defendant [redacted].

Respectfully submitted,

[redacted]

Counsel for Plaintiff

[redacted]

[redacted]

Parkersburg, WV 26101

[redacted]

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2145.0004

June 22, 2017

[redacted]

Re: [redacted] v. [redacted] and [redacted]
Circuit Court of Kanawha County, West Virginia Case No. [redacted]

Dear Walt:

I write in regards to Plaintiff's First Notice of Videotaped 30(b)(7) Deposition (hereinafter "Notice"). After reviewing your proposed Notice, I must object to the Notice in its current form as the topics contained therein are overly broad, unduly burdensome, and would encroach upon attorney client privilege and work-product privileges. While I am happy to discuss these matters with you in an effort to develop a mutually satisfactory set of topics, I do not believe that the current proposed Notice comports with either the spirit, or the express requirements, relating to the taking of depositions of corporate representatives.

By my calculation the proposed Notice contains forty-nine (49) different subject matters for which Plaintiff demands that [redacted] prepare and present a corporate representative to testify. Of these forty-nine (49) different topics, forty-six (46) request "all facts" upon which [redacted] has denied a particular paragraph of the Complaint, or "all facts" supporting [redacted] affirmative defenses. On its face, these topics, and the requirement that [redacted] produce an individual knowledgeable about "all facts" are plainly overbroad and unduly burdensome. Plaintiff's Notice is essentially asking [redacted] to compile all the information relevant to the entire case, and all the facts supporting legal contentions, and impart a corporate representative with all such knowledge for the Plaintiff's convenience. Rule 30(b)(7) does not place such burden on [redacted] This is particularly true given that Plaintiffs claims cover numerous areas involving multiple alleged events, conversations and conduct covering a sixteen (16) months period.

Rule 30(b)(7) requires that the notice "describe with reasonable particularity the matters for examination." A request for a representative who can testify as to "all facts" fails to meet the "reasonable particularity" standard. Retyping the allegations of the Complaint and the corresponding paragraph in [redacted] Answer also does not meet the requirement of setting

forth particularized subjects of inquiry for the deposition. By simply doing so, Plaintiff has essentially requested a 30(b)(7) deposition regarding every conceivable fact, and every legal defense, in the case. This is simply impossible for [redacted] to comply with such a request, particularly so since this case has just started. Plaintiff's generic request for "all facts" is not appropriate because a party "may not serve a Rule 30(b)(6)[1] notice for the purpose of requiring [the opposing party] to marshal all of its factual proof and prepare a witness to be able to testify on a particular defense." *CSX Transp., Inc. v. Vela*, 2007 WL 3334966 at 4 (S.D. Ind. 2007).

By asking [redacted] to broadly provide "all facts" and "all information" that supports each affirmative defense, and each of its refutations of Plaintiff's allegations, Plaintiff is also necessarily asking [redacted] to compile all the factual information that it personally deems relevant in this case, providing insight into [redacted] [redacted] defense plan and attorney work product, which is an inappropriate discovery method for seeking that type of information. Numerous federal cases have so held. *See Fidelity Mgt. & Research Co. v. Actuate Corp.*, 275 F.R.D. 63 (D. Mass. 2011)(a 30(b)(6) deposition is an improper method to discover facts related to affirmative defenses as they are drafted by attorneys and makes it hard to distinguish between facts and protected information); *In re Independent Svc. Org. Antitrust Lit.*, 168 F.R.D. 651 (D. Kan. 1996) (corporation not required to produce witness in response to request for facts related to affirmative defenses); *Am. Nat. Red Cross v. Travelers Indem. Co. of Rhode Island*, 896 F.Supp. 8, 14 (D.D.C. 1995) (facts underlying affirmative defenses intrudes upon protected attorney work product and the defense plan). As the *Independent* court noted, while a party has the right to discover facts upon which a corporation will rely for its defenses, the attempt to discover such facts through a 30(b)(6) deposition "is overbroad, inefficient, and unreasonable...[and] implicates serious privilege concerns". *Independent*, 168 F.R.D. at 654. This is true because affirmative defenses set forth legal theories about which a 30(b)(7) deponent cannot and should not be required to testify. Defendant's representative(s) cannot be required to testify in regards to defense counsel's purely legal theories or its communications with counsel regarding the strategies and interpretations of facts underlying the assertion of the particular defense.

Additionally, given the infancy of discovery in this case, Defendant has yet to learn many of the facts in this case as it has yet to receive responses to its discovery requests. Defendant's corporate representatives cannot possibly testify to matters outside its present knowledge and about which Plaintiff has the required information. By definition, requiring Defendant to put up a corporate representative to testify regarding evidence it may have not yet acquired, again given the very early stage of discovery, is premature and a needless waste of time and resources. This is particularly true since Plaintiff has recently served written discovery which overlaps many of the subject areas in the Notice rendering it duplicative in certain areas.

It is our position that the proper manner for Plaintiff to obtain "contention" information is to inquire by contention interrogatories, deposition upon written questions, or simply taking the

[1] As you are aware, Fed. R. Civ. P. 30(b)(6) is the federal counterpart to W.Va. R. Civ. P. 30(b)(7).

depositions of the individuals who were actually involved in the incidents and circumstances forming the basis of this dispute. Given the number of factual and legal issues in this case, there is a need to manage discovery in a way that minimizes inconvenience, burdens and expenses imposed upon the parties in this case. With regard to corporate defendants such as [redacted], exercise of Rule 30(b)(7) should be limited to those situations where such depositions are truly useful and unavoidable. At this juncture of the case, there are many other vehicles by which Plaintiff can obtain factual information that would be more convenient, less burdensome, or less expensive." Rule 26(b)(1)(A). By no means are we arguing that written discovery is a substitute for a [redacted] obligation to provide a thoroughly educated Rule 30(b)(7) deponent, but the current form of the notice would preclude [redacted] from doing just that.

In regards to depositions, we will certainly work with you to schedule as many factual depositions as are required to allow Plaintiff to obtain the discovery information that he seeks. This is not a case where "bandying" is an issue. In his Complaint, Plaintiff singles out specific individuals involved in conversations and acts that he claims were discriminatory. It certainly makes more sense for you to depose these specific individuals who were actually involved in the circumstances and alleged actions giving rise to this suit than that a corporate representative trying to repeat what he had learned. While it might be possible for [redacted] to "educate" a 30(b)(7) witness regarding a certain conversation or action, such representative would nevertheless still be limited by the extent of the knowledge that he has been imparted rather than the full knowledge of the circumstances an actual actor would possess. Taking the actual participant's testimony first would allow you the opportunity to conduct follow-up questioning that would not be available through written discovery or through the deposition of a non-participant corporate representative. Moreover, this is simply not a situation involving a sprawling corporate entity making it impossible for a Plaintiff to determine the identity of the individuals actually possessing knowledge. Plaintiff obviously knows the identity of most, if not all, of the relevant individuals given that several are specifically identified in his Complaint.

It is our opinion that such depositions, along with initial written discovery, is the proper avenue to obtain the information sought. The proper method is not to notice a 30(b)(7) deposition where there is simply too much information for a corporate representative to sufficiently learn, and more importantly, remember. The persons in the best position to accurately remember and testify as to the sought for information are the people who were actually involved in the circumstances – not a corporate representative who was potentially not involved trying to recall the exact sequence and timing of events that occurred over a period of Plaintiff's employment spanning sixteen (16) months. In this case, a 30(b)(7) deposition would reflect nothing more than [redacted] [redacted] corporate representative's ability to regurgitate information that he accumulated during a preparation period. It is inarguable that whoever is chosen as the representative, they will not be able to fully testify on certain topics simply because they could not have been involved in every aspect of the complained of events, and will not be able to recall all of the information learned during preparation. This is highly prejudicial to [redacted] as the Firm will be presumed to know whatever that representative recalled, and will be presumed to not know whatever that individual could not recall.

Once written discovery has been conducted, and the depositions of the individuals who were actually involved in the circumstances complained of are taken, then if a 30(b)(7) deposition is still required, the scope of the deposition will certainly be much smaller in scope, and much more focused on the areas of information that Plaintiff has been unable to obtain through other methods. At that time, we will certainly work with you to facilitate a streamlined and efficient 30(b)(7) deposition regarding any issues still unaddressed by other discovery methods.

Please consider the above and then share with me your thoughts on this matter. I look forward to your response.

Very Truly Yours,

Thomas E. Scarr /MF

Thomas E. Scarr

TES/MAF

July 14, 2017

Thomas E. Scarr
Jenkins Fenstermaker PLLC
325 Eighth Street
P.O. Box 2688
Huntington, WV 25726-2688

Re: [redacted] v. [redacted] and [redacted]
Civil Action No. [redacted]

Dear Mr. Scarr:

Thank you for your letter of June 22, 2017, responding to the draft notice forwarded by email of June 6, 2017.

Defendants object generally to the notice and argue that it does not comply with the letter or spirit of Rule 30(b)(7). Among other grounds, Defendants object to the notice based upon an alleged lack of "reasonable particularity" which is required by the rule.

Additionally, Defendants cite CSX Transp., Inc. v. Vela, 2007 WL 3334966 (S.D. Ind. 2007); Fidelity Mgt. & Research Co. v. Actuate Corp., 275 F.R.D. 63 (D. Mass. 2011); In re Independent Svc. Org. Antitrust Lit., 168 F.R.D. 651 (D. Kan. 1996); Am. Nat. Red Cross v. Travelers Indem. Co. of Rhode Island, 896 F. Supp. 8 (D.D.C. 1995). The cases cited either represent a distinct minority position or do not support Defendants' position regarding the scope of 30(b)(7).

Defendants' observation that the case is in its infancy in terms of discovery is accurate, but not pertinent to the discovery sought by the Plaintiff through this notice of deposition. It is not pertinent because the notice seeks the factual basis for a pleading (the answer) filed by Defendants. Plaintiff is certain that there is a factual basis for each assertion in Defendants' pleading and seeks to discover what that basis is. This is proper discovery and 30(b)(7) is the most efficient means of accomplishing it.

Of course, in the course of discovery Defendants may become aware of additional facts supporting their positions. Defendants are able to supplement responses to the deposition either through updated interrogatory responses or through an errata sheet to the 30(b)(7) deposition. As I am sure you are aware, it is not at all uncommon for parties to supplement information supporting their positions up to the point of trial, as such information becomes available to the parties.

Defendants' position regarding the difficulty of preparing a designee to respond to the notice is not persuasive. Defendants have chosen the corporate forum to conduct business and have presumably obtained advantages from this form of organization. As I am sure you know, Defendants may designate more than one designee to respond to the notice, so there is no requirement that one person respond on its behalf on all topics.

As the United States District Court for the District of Kansas noted in Fleischer v. Resolution Trust Corporation, Case No. 92-4018-DES (D. Kan. April 19, 1994), "[t]he Court finds no authority under applicable case law supporting Defendant's position that a Rule 30(b)(6) deposition is to be used only after other discovery methods have failed to provide the desired evidence. Rather the Rule offers an additional method of discovery. The Notes of the Advisory Committee on Rules state: 'This procedure supplements the existing practice . . . the new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process'."

Similarly, the argument that because designations in a 30(b)(6) notice relate to affirmative defenses - obviously developed with the assistance of counsel - they would be inappropriate has been rejected. This argument is discussed by the United States District Court for the District of Kansas in Fleischer:

> The RTC argues that as to inquiry related to affirmative defenses, the defenses were developed by counsel, not determined by any individual witness, and that evidence of such defenses will be developed at trial, piecemeal, through witnesses and documents. It contends, therefore, that one can not expect a witness to elaborate, in deposition, upon the theories behind the defenses. The RTC suggests that interrogatories were submitted directed to the identified defenses and that answers have been served. The plaintiffs are entitled to discovery of facts supporting affirmative defenses by means of a 30(b)(6) deposition. In Re: Texas Eastern Transmission Corporation TCB Contamination Insurance Coverage Litigation, 1990 Wl. 21120 (E.D.Pa. 1990); Schwarzkopf Technologies Corporation v. Ingersoll Cutting Tool Company 142 F.R.D. 420 (D.C. Del. 1992).

Id. at pages 5-6.

Defendants argue that to require them to specify the factual basis for their affirmative defenses and their denial of allegations in the complaint would create the possibility of unfair prejudice at trial - the thrust being that they may not know a fact now upon which they may later wish to rely at trial. The position ignores three points:

> (1) The fact that something is learned later than a deposition by any party may be pointed out at trial by that party and - if that position is plausible - would not necessarily give rise to an adverse inference;

(2) The Court retains the power to admit or exclude evidence based on relevance and probative value at trial - discoverability not equaling admissibility - and may protect against the unfair use of any discovery material at trial; and

(3) A 30(b)(7) notice may require a corporate party to provide the information, even if that information is in the possession of its attorneys. United States of America v. J.M. Taylor, 166 F.R.D. 356, 362-364; 1996 U.S. Dist. LEXIS 5491 (M.D.N.C. 1996).[1]

The broad reading of the purposes and scope of 30(b)(6) enunciated in the numerous cases cited in the articles provided to Defendants, and which is supported by the comments on the adoption of Rule 30(b)(6) in the Advisory Committee Notes, is continued in the most recent statements of the American Bar Association Section of Litigation on this matter. In its Civil Discovery Standards, released in May of 1999 and approved by the American Bar Association at its August, 1999, annual meeting the ABA commented on the duties of a corporation responding to a notice of 30(b)(6) deposition. Civil Discovery Standards Section 19. As noted therein, the corporation responding to the notice is required "to make a diligent inquiry to determine what individual(s) is (are) best suited to testify." Additionally, the Civil Discovery Standards impose a duty upon the responding corporation to communicate with the inquiring party regarding any uncertainty about the scope of the designations "in a timely manner . . . so that depositions may

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[1]As the Court noted in United States of America v. J.M. Taylor, 166 F.R.D. 356, 362-364; 1996 U.S. Dist. LEXIS 5491 (M.D.N.C. 1996):

"UCC does not fulfill its obligations at the Rule 30(b)(6) deposition by stating it has no knowledge or position with respect to a set of facts or area of inquiry within its knowledge or reasonably available, and then at the trial argue a different position. UCC seems now to concede that it could not take such a position at the deposition and then use its own documents or personnel to so testify at trial. However, it claims a right to deny knowledge or position now, but then at trial to rely on the documents and testimony of others or to at least present argument that the evidence presented by others does not reflect the state of facts as contended by those parties.

This suggested procedure assumes that the attorneys can directly represent UCC's interest on their own as opposed to merely being a conduit of the party. This, of course, is not true. If a corporation has knowledge or a position as to a set of alleged facts or an area of inquiry, it is its officers, employees, agents or others who must present the position, give reasons for the position, and, more importantly, stand subject to cross-examination. A party's trial attorney normally does not fit that bill. (Footnote omitted) Therefore, if a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, it cannot argue for a contrary position at trial without introducing evidence explaining the reasons for the change. (Footnote omitted)(Citation omitted) Otherwise, it is the attorney who is giving evidence, not the party."

go forward as scheduled." Finally, the Standards strongly reaffirm the obligation of counsel to "prepare the designated witness to be able to provide meaningful information about any designated area(s) of inquiry."

Additionally, it is required by both the West Virginia and Federal Rules of Civil Procedure that each and every claim existing in a pleading have support in fact and law. Filing a pleading for which any party does not possess a reasonable good faith basis in fact and law is a violation of the Rules of Civil Procedure and the ethical obligations of counsel.

Plaintiff has no doubt that the Defendants possess a reasonable good faith factual basis to make each and every claim set forth in their answer. All the Plaintiff seeks, by means of the 30(b)(7) notice of deposition, is to discover the factual basis underlying the defendants' claims and assertions in the pleading which they filed. The notice is carefully tailored to do exactly that - that is to discover what the factual basis is for each and every claim which the defendants made in their responsive pleading in this case. Certainly if they possess such a basis, which the plaintiff believes that they do, then the plaintiff is entitled to discover that before flailing about in a morass through other discovery means, obviously incurring unnecessary expense and wasting the time of all parties involved. Why not hone the issues as quickly and expeditiously as possible?

"Corporations, partnerships, and joint ventures have a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unevasively answer questions about the designated subject matter." Starlight Int'l Inc. v. Herlihy, 186 F.R.D 626, 639 (D. Kan. 1999), citing Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995); accord, In Re: Analytical Systems, Inc., Debtor, 71 B.R. 408, 412 (N.D. Ga. 1987); Mitsui & Co. (USA), Inc. v. Puerto Rico Water Resources Authority, 93 F.R.D. 62, 66-67 (D.P.R. 1981). Thus, the corporation must (1) designate a person or persons who are knowledgeable on the noticed subjects and (2) prepare that person or those person to give complete, knowledgeable, and binding answers. Commodity Futures Trading Commission v. Midland Rare Coin Exchange, Inc., Case No. 97-7422-CIV, 1999 U.S. Dist. LEXIS 16939, at *12 (S.D. FL. July 28, 1999); Alexander v. FBI, 186 F.R.D. 137, 141 (D.D.C. 1998); Bank of New York v. Meridien Baio Bank Tanzania Ltd., 171 F.R.D. 135, 150 (S.D.N.Y. 1997); Marker v. Union Fidelity Life Ins. Co, 125 F.R.D. 121, 126 (M.D.N.C. 1989); Mitsui, 93 F.R.D. at 67.

Rule 30(b)(6) places an affirmative duty on the responding corporation to provide an individual or individuals who can answer questions regarding the noticed subject matters. Quantachrome Corp. v. Micromeritics Instrument Corp., 189 F.R.D. 697, 699 (S.D. Fla. 1999); King, 161 F.R.D. at 465. The corporation may not merely present "a human body to speak on the corporation's behalf." Quantachrome, 189 F.R.D. at 699. The corporation should conduct an investigation and identify the most appropriate designee for each listed subject area. Poole ex. rel. Elliott v. Textron, Inc., 192 F.R.D. 494, 504 (D. Md. 2000). The spokesperson must be

informed. Dravo, 164 F.R.D. at 75. As such, the 30(b)(6) explicitly requires a company to have persons testify on its behalf as to all matters known or reasonably available to it, the corporation has an affirmative duty to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are known or reasonably available to the corporation. Starlight, Int'l, 186 F.R.D. at 638, citing United States v. Taylor, 166 F.R.D. 356, 362 (M.D. N.C. 1996), add'd 166 F.R.D. 367 (M.D.N.C. 1996). Thus, the rule implicitly requires designated persons to review all matters known or reasonably available to the corporation in preparation for the 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the "sandbagging" of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial, which would totally defeat the purpose of the discovery process. Calzaturficio S.C.A.R.P.A., 201 F.R.D. at 36.

In addition to the deponent's obligation to educate himself or herself, the corporation itself must ensure that each designated individual is prepared to testify competently as to his or her designated subject matter. "A party cannot 'wait and see' what areas the designee might be able to cover as defendants did here. Such an approach results in delay and expense. By virtue of the investigation, counsel should know in what subject areas a particular designee is competent to testify." Hayes v. Mazda Motor Corp., Civil No. WMN-97-4378, 2000 LEXIS 20002, at *14 (D. Md. Aug. 4, 2000). If the persons designated do not have personal knowledge of or were not personally involved in the noticed matters, the corporation must prepare them so that they can respond to the extent the corporation has knowledge. Taylor, 166 F.R.D. at 361; Poole, 192 F.R.D. at 504; Dravo, 164 F.R.D. at 75 (citing Marker, 125 F.R.D. at 126; Buycks-Roberson v. Citibank Fed. Savings Bank, 162 F.R.D. 338, 343 (N.D. Ill. 1995); SEC v. Morelli, 143 F.R.D. 42, 45 (S.D.N.Y. 1992); Mitsui, 93 F.R.D. at 67. In so doing, the corporation must seek out reasonably available sources of information, including documents, prior depositions, and past employees. See e.g., id.; Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 639 (D. Minn., 2000) (citing Taylor, 166 F.R.D. at 361); Bank of New York, 171 F.R.D. at 151 (deponent must be prepared "to the extent matters are reasonably available, whether from documents, past employees, or other sources."). Even if the documents are voluminous and the review of those documents would be burdensome to be deposed. See Prokosch, 193 F.R.D. at 638. Any burden in preparing a witness for a Rule 30(b)(6) deposition is merely the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business. Calzaturficio S.C.A.R.P.A., 201 F.R.D. at 36.

A company designated representative does not fulfill the corporation's obligations at the Rule 30(b)(7) deposition be stating that it has no knowledge with respect to a set of facts or area of inquiry within the corporation's knowledge or reasonably available to the corporation. Taylor, 166 F.R.D. at 362. If the designated deponent cannot answer, then the entity has failed to comply with its obligations and may be subject to sanctions. King, 161 F.R.D. at 476; Reilly v. NatWest Mkts. Group, Inc., 181 F.3d 253, 268 (2nd Cir. 1999), cert. denied, 120 S. Ct. 940 (2000).

Having failed to move for a protective order *prior to the deposition*, a party is estopped from narrowing its response concerning the noticed topics. BCI Communications Systems, Inc., v. Bell Altanticoms Systems, Inc., 112 F.R.D. 154, 159 (N.D. Al. 1986) (party seeking to invoke restrictions on attendees at 30(b)(6) deposition must "go before the court via motion for protective order *before the deposition begins*") (emphasis in original), aff'd without opin., 995 F.2d 236 (11th Cir. 1993); Quantachrome Corp., v. Micromeritics Instrument Corp., 189 F.R.D. 697, 700-701 (S.D. Fla. 1999); King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (counsel seeking to challenge scope of notice of 30(b)(6) deposition "followed proper procedure by promptly seeking a protective order"); Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989) (party seeking not to respond or to respond inadequately to Rule 30(b)(6) deposition "must first obtain a protective order"); see also 8A Wright & Miller § 2113; 6 Moore's Federal Practice - Civil, § 26.102 ("In the case of a deposition, a . . . protective order should be sought before the deposition begins.")

Such a motion would be ill-founded, as discussed in EEOC v. Albertson's, LLC, 207 U.S. Dist. LEXIS 32003 (D. Co. 2007). Therein, the United States District Court for the District of Colorado dealt with a request for protective order by the EEOC stemming from the 30(b)(6) deposition notice filed by the Defendant Albertson's. The EEOC's objection mirrors closely the objections raised by the Defendants in your correspondence. The EEOC relied upon the attorney work product doctrine and the deliberative privilege doctrine to resist broad 30(b)(6) designations, including the following:

> "19. Factual information which supports the relief sought by the EEOC in this action, including but not limited to punitive and injunctive relief.
>
> 20. Factual information that supports or rebuts the claim of any potential claimant in this action."

The Court denied the EEOC's motion for protective order regarding these broad designations. Id., p. 6-7.

Likewise, the District Court in EEOC v. Albertson's, LLC, rejected the EEOC's contention that broad designations requiring the EEOC to produce a witness to testify about communications between the agency and potential claimants was rejected. Id., p. 13-14. The Defendant's reliance upon the attorney-client privilege was rejected although, the EEOC was permitted to assert attorney-client privilege on an individual question by question basis "if such an objection is warranted." Id., p. 16.

Additionally, I enclose an article published by the American Bar Association co-authorized by Eric Kinder and myself addressing the scope of the rule. Plaintiff's draft notice is within both the letter and intent of the rule as described therein.

Nevertheless, in an effort to resolve this dispute without motion practice, I offer to defer the designations directed to affirmative defenses until we have conducted the initial portion of the 30(b)(7) deposition and Defendants have had an opportunity to conduct their initial discovery.

Very truly yours,

[redacted]

WA/jd

cc: [redacted] (via email)

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July 26, 2017

File No: 2145.0004

Thomas E. Scarr
tes@jenkinsfenstermaker.com

VIA E-MAIL and U.S. MAIL

[redacted]
Parkersburg, WV 26101

Re: [redacted] v. [redacted] and [redacted]
Circuit Court of Kanawha County, West Virginia Case No. [redacted]

Dear [redacted]

I write in reply to your July 14, 2017 correspondence addressing our objections and concerns regarding your proposed Rule 30(b)(7) Notice. In your response, you agree that discovery in this case is in its "infancy". While we are in agreement that discovery remains in its preliminary stages, since our prior correspondence, on July 10th, [redacted] provided you with its initial answers to your first set of discovery requests. These responses contain detailed information related to the individuals in this case who possess knowledge of relevant facts and includes their respective categories of knowledge. Additionally, [redacted] produced certain documents and identified a substantial number of documents that address various contested issues that will be produced to you upon entry of an agreed protective order. Therefore, the primary reasons for the existence of Federal Rule 30(b)(6) and West Virginia Rule 30(b)(7) the identification of witnesses having knowledge without "bandying" and the identification of relevant documents have already been fulfilled.

Nevertheless, from my review of your responsive letter, it appears that you continue to believe that a 30(b)(7) deposition is required to provide you needed factual information. From my reading of your correspondence, rather than initially deposing the individuals with first-hand knowledge of the facts, you believe that a 30(b)(7) deposition would instead be the "most efficient means of accomplishing it". While you are certainly entitled to information regarding relevant facts in the case and those underlying [redacted] defenses, the appropriate and most effective way to obtain it would be simply to take the depositions of the individuals who directly participated in these events. I would hope that you would agree with me that obtaining the information proverbially "straight from the horse's mouth" would be more efficient, and would provide you with a more accurate account of the events, than would a report from an individual not directly

involved and who was only recounting to you third-hand information that he had been provided during a deposition preparation session.

As the author of articles on Federal Rule 30(b)(6), I trust that you are well aware of the precipitating reason for the initial development of the rule – to provide a mechanism to obtain information concerning corporate conduct and knowledge and to prevent "bandying" whereby a litigants would receive the "runaround" from a corporate entity who continually pointed the finger to someone else in possession of the sought after information. Here, you clearly do not have that issue. Most of the relevant topics you identified do not involve corporate conduct or knowledge but rather involve personal conversations and interactions between Mr. [redacted] and others and in which Mr. [redacted] was directly and personally involved. Therefore, simply by asking your client who you should depose, you could obtain first-hand information to address nearly all relevant topics from and through the individuals he identifies. Moreover, in [redacted] recent discovery responses, we provided you with a detailed categorical listing of all individuals who possess information relevant to this case and which further informs you the specific topics on which these individuals would be able to testify. These identified individuals should be more than sufficient to address the vast majority of the factual assertions in [redacted] "pleading" given that such assertions generally fall within the following categories:

- Conversations and Events Allegedly Occurring Between Plaintiff and Defendant [redacted]
- Conversations and Events Allegedly Occurring Between Plaintiff and Other Individuals at [redacted]
- Conversations Between [redacted] Employees Allegedly Overhead By Plaintiff
- Complaints Made By Plaintiff to [redacted]
- Investigatory and Corrective Actions Taken By [redacted]
- Plaintiff's Work Assignments
- Plaintiff's Resignation from Employment

Therefore, between your client's own personal knowledge as a participant in these events, and [redacted] discovery responses, which identified approximately 25 witnesses of which only 12 would be considered "key", you possess all that you need in order to directly obtain the information from those involved and that covers the vast majority of topics you have identified. Deposing the individuals who actually participated in the events, and who have first-hand knowledge, is inarguably the most efficient manner of providing you a mechanism for obtaining [redacted] version and Mr. [redacted]'s version of the facts of the case, rather than attempting to require [redacted] to designate corporate representatives to relate to you second-hand information that had been in turn related to them.

Once you have taken the depositions of the individuals with direct knowledge of the matters at issue, if additional factual areas have yet to be developed, then a Rule 30(b)(7) deposition can serve a laudable purpose. However, conducting a Rule 30(b)(7) corporate knowledge deposition regarding the underlying facts of the case, and then turning around and

taking the depositions of the individuals once again regarding their own personal knowledge, would do nothing more than create superfluous and duplicative discovery.

In your letter you quote several cases that you believe support your position. First, I note that I have not been afforded an opportunity to review the case of *Fleisher v. Resolution Trust Corporation*, Case No. 92-4018-DES (D.Kansas April 19, 1994) upon which you initially rely. That is an unreported Memorandum Order that is not available on either Westlaw or Pacer. Therefore, I cannot address your arguments based upon that case.

In regards to your reliance that the Rules Committee and the ABA have approved a broad reading of Fed.R.Civ.P. 30(b)(6), and by analogy, West Virginia's Rule 30(b)(7), I will point out that the Advisory Committee on Civil Rules of the U.S. Courts has recently appointed a Subcommittee to address numerous complaints with Rule 30(b)(6) and its current operation. In its May 1, 2017, Invitation for Comment on Possible Issues Regarding Rule 30(b)(6), the Subcommittee praised the rule's ability to prevent "bandying" but noted that "some lawyers may be asking the rule to bear more weight that it was meant to bear, and that some who use the rule impose extremely heavy burdens on opposing parties (and perhaps sometimes on nonparties as well)."

Moreover, in the Agenda Book for the April 25, 2017 Meeting of the Advisory Committee on Civil Rules, the Committee noted that Rule 30(b)(6) has become a "flash point for litigation, having been cited in more than 8,000 decisions." Rule 30(b)(6) Subcommittee Report at Pg.239. The Subcommittee noted again that the purpose of the Rule was a "way to deal with 'bandying', an avoidance behavior reportedly used by some organizational litigants to make it more difficult for their litigation opponents to identify persons with knowledge and nail down organizational information." *Id.* at 241. I think you will agree that [redacted] has provided thorough information in regards to the identities of persons with knowledge of the issues in this case to render "bandying" a non-issue. The Subcommittee expressly stated that Rule 30(b)(6) "was adopted to solve a particular problem, *and was not envisioned as an all-purpose method of extracting every last piece of information from organizations.*" *Id.* (emphasis added). The Subcommittee goes on to note that the rule's adoption in "1970 was a high water point for broad discovery", that since that time numerous limitations on such breadth have been instituted, and that Rule 30(b)(6) "might also be viewed as something of a potential 'end run' around some of them." *Id.* So while the rule "can be a critical method of early discovery of essential information" it also can be "used in a manner that is overreaching." *Id.*

In addressing "contention questions", which make up a significant portion of the topics in your proposed 30(b)(7) Notice, the Subcommittee stated:

> Contention interrogatories are allowed, but given the concern about bandying that lies behind Rule 30(b)(6), it is odd that contention questions would crop up under that rule. Such questions seem to stray from efforts to identify people with knowledge and the location of documents. The [proposed amended] rule could say that such questioning is not allowed.

Id. at 243.

Given the comments of the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules made just three months ago, and the numerous cases which I have cited in my prior correspondence, I cannot concur with your assessment that I am presenting a minority position at best, that the Rules Committee endorses your view of the Rule, and that the Rule provides you essentially carte blanche to force [redacted] to designate corporate representatives in regards to disgorge every fact in this case.

In your letter to also cite to the ABA's asserted endorsement of your interpretation of the Rule in its 1999 Civil Discovery Standards. However, it was a group of attorneys from the American Bar Associations Section of Litigation's Federal Practice Task Force that recently requested that the Advisory Committee consider amending Rule 30(b)(6). *See Rule 30(b)(6) Subcommittee of the Civil Rules Advisory Committee Research Memorandum* contained in Agenda Book at Pg. 249.

The *ABA Section of Litigation Federal Practice Task Force Report of Rule 30(b)(6) Depositions of Organizations* cited by the Subcommittee identified a number of problems with the current application of Rule 30(b), most of which are similarly created by Plaintiff's proposed Rule 30(b)(7) Notice. These include: notices that include voluminous lists of topics which the Task Force considered an abuse of the rule; the costs and burden imposed by requiring a party to adequately prepare corporate witnesses to respond to a voluminous number of topics; overly broad subject areas not described with reasonable particularity; and the improper use of contention subject matters.

On that last point, while you assert in your response that [redacted] position is in the "minority view" and has been rejected by numerous courts, there are just as many courts that have sided with [redacted] position and have held that notice topics asking for the basis of "all defenses" and for "all facts" is an improper use of Rule 30(b)(6). ABA Task Force Report cites many of these including *SEC v.Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (rejecting 30(b)(6) contention topics on the ground that they are invasive of attorney work product doctrine). Courts have also found improper topics focusing on discovery responses, *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986); *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 U.S. Dist. LEXIS 667, at *27-32 (N.D. Ill. Jan. 21, 2000); *McGarrah v. Bayfront Med. Ctr. Inc.*, 889 S. 2d 923, 926 (Fla. Dist. Ct. App. 2004), factual basis of defenses, *Krasney v. Nationwide Mut. Ins. Co.*, No. 3:06 CV 1164 (JBA), 2007 U.S. Dist. LEXIS 90876, at *9-10 (D. Conn. Dec. 11, 2007); *In re Indep. Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651, 654 (D. Kan. 1996) (stating that the company has a right to get the factual basis but not through a 30(b)(6) deposition); *Northup v. Acken*, 865 So. 2d 1267, 1272 (Fla. 2004), and information obtainable from other sources, such as a request for production of documents. *Smithkline Beecham Corp.*, 2000 U.S. Dist. LEXIS 6687, at *27-32 (denying a 30(b)(6) deposition on certain topics because the information could be obtained through less intrusive means). This has led the ABA Task Force to recommend to the Rules Advisory Committee that "30(b)(6) depositions should be confined to factual matters and not permitted to extend to contentions, defenses, opinions or legal interpretations." Id. at 13. The ABA Task Force went on to state:

> The purpose of such depositions is to establish facts available to the organization. We believe the purpose is undermined if witnesses are required to address legal theories, contentions, etc. Such questions have a great potential to invade the work product doctrine and constitute an abuse of the purposes for which the rule was established. To the extent discovery of a party's contentions should be permitted at all, there are other discovery devices for this purpose.

These exact reasons are the ones cited by [redacted] in its prior correspondence objecting to your proposed Notice.

Similarly, [redacted] has objected to the overly broad nature of your Notice. As noted by the ABA Task Force "an overly broad notice 'subjects the noticed party to an impossible task,' because where it is not possible to 'identify the outer limits of the areas of inquiry noticed. compliant designation is not feasible.'" *Id. citing Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan.2000). There is a significant difference between subject matters based upon and related corporate conduct and subject matters based upon personal conduct. If your Notice would limit Rule 30(b)(7) topics to areas such as [redacted] investigation and actions in response to your client's complaints, then those would be certainly acceptable subjects. Similarly, a topic such as [redacted] actions to attempt to assist your client in regards to generation of work would be one where a corporate representative could be identified. However, the number of topics in the current notice which merely involve reciting the facts of myriad personal interactions and activities of various co-employees is simply too broad to allow a compliant designation and would force [redacted] into trying to meet an impossible task.

I am certainly willing to work with you on scheduling fact witness depositions so that you can obtain the facts underlying [redacted] position regarding your client's claims. However, if you continue to insist on the overly broad categories currently proposed and are not willing to narrow these topics and articulate reasonably particular subject areas, then I will prepare a Motion for Protective Order for presentation to the Court. In the event that such is required, it would not be necessary to formally serve your Rule 30(b)(7) notice upon [redacted] as we can consider your request served by virtue of your prior correspondence, and we would work with you to schedule a hearing.

I hope that we are able to resolve this issue without the Court's involvement, and that we can move forward with an agreed schedule of depositions in this case. I look forward to your response.

Very truly yours,

JENKINS FENSTERMAKER, PLLC

Thomas E. Scarr

TES/cgd