

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA,

Plaintiff,

CIVIL ACTION

v.

NO. 3:12-CV-30051-MAP

SCOTT LIVELY, individually and as
President of Abiding Truth Ministries,

Defendant.

**PLAINTIFF’S MOTION FOR LEAVE TO FILE
A SUR-REPLY IN FURTHER OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 7(b) and Local Rule 7.1, Plaintiff Sexual Minorities Uganda (“SMUG”) respectfully moves the Court for leave to file a short sur-reply in further opposition to Defendant’s Motion for Summary Judgment (“Sur-Reply”)¹ to address arguments first raised in Lively’s reply brief in support of his Motion for Summary Judgment (the “Lively Reply”). In support thereof, SMUG represents as follows:

1. On July 5, 2016, Defendant Scott Lively (“Lively”) filed his Motion for Summary Judgment, which included a memorandum of law of 175 pages (dkt. 248-253).
2. On August 8, 2016, SMUG filed its Opposition to Lively’s Motion for Summary Judgment (dkt. 270-293).
3. On September 1, 2016, Lively filed the Lively Reply (dkt. 305). The Lively Reply includes arguments advanced for the first time by Lively and requests for sanctions. *See*,

¹ A copy of SMUG’s proposed sur-reply is attached hereto as Exhibit A.

e.g., Lively Reply at 74-84 (arguing, for the first time, that a book published by SMUG contradicts certain of SMUG's allegations and seeking sanctions).

4. Because the Lively Reply includes arguments raised for the first time by Lively, SMUG respectfully requests leave to file the Sur-Reply (Exhibit A hereto) to respond to those arguments. The Sur-Reply totals 7 pages and addresses only those arguments advanced for the first time by Lively in the Lively Reply.

RELIEF REQUESTED

WHEREFORE, for good cause shown, SMUG respectfully requests that this motion be granted, and that the Court grant SMUG leave to file a sur-reply in further opposition to Defendant's Motion for Summary Judgment.

September 9, 2016

Respectfully submitted,

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CERTIFICATE OF CONFERRAL

Pursuant to L.R. D. Mass. 7.1(a)(2) and 37.1(b), I certify that, on September 8, 2016, I conferred in good faith with counsel for Lively prior to filing this motion. Counsel for Lively stated that Lively opposed the motion.

/s/ Kaleb McNeely
Kaleb McNeely
Attorney for Plaintiff
Sexual Minorities Uganda

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on September 9, 2016. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Pamela C. Spees

Pamela C. Spees

Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
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SEXUAL MINORITIES UGANDA,

Plaintiff,

CIVIL ACTION

v.

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Defendant.

**PLAINTIFF’S SUR-REPLY IN FURTHER OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Defendant improperly raises three issues for the first time in the Reply Memorandum of Law in Support of Defendant Scott Lively’s Motion for Summary Judgment, dkt. 305 (“Reply Brief”). First, Defendant seeks sanctions for imagined misconduct of Plaintiff and its counsel during discovery in failing to produce a particular book. Reply Br. 82-84. In addition to being substantively meritless, this is procedurally improper. *See* Fed. R. Civ. P. 11(c)(2) (“A motion for sanctions must be made *separately* from any other motion and must describe the specific conduct that allegedly violates Rule 11(b).” (emphasis added)). Second, Defendant claims that Plaintiff’s Rule 30(b)(6) witness and interrogatory responses failed to catalogue Defendant’s own documents that support its case, and seeks exclusion of those documents. Third, even after failing to compel production of the information he believes should have been earlier produced, Defendant seeks to preclude at this summary judgment stage any evidence of all forms of damages.¹

¹ Defendant also moves to strike Plaintiff’s Statement of Omitted Facts. Reply Br. 5. Plaintiff’s Statement of Omitted Facts is not only not improper, but is required to meet Plaintiff’s burden in

At the heart of the first issue is a book edited by Dr. Sylvia Tamale, a Professor of Law and former dean of Makerere University School of Law in Kampala, Uganda. Dkt. 289 ¶ 1. The book, “Homosexuality: Perspectives from Uganda,” is a collection of previously published and publicly available news articles and opinion pieces originally printed in Ugandan newspapers. *See* dkt. 306-6 at ix. Defendant argues that Plaintiff failed its obligation to produce this book which he believes “dismantles” Plaintiff’s theory of liability. Reply Br. 74-87. He is wrong on all counts. Defendant knew about the book at the very latest by November 10, 2015 when his counsel questioned Plaintiff’s witness about it, *see* dkt. 250-6 at 221:12-222:20, yet he never asked Plaintiff to provide a copy of the book in discovery, *see id.* and dkt. 250-7 at 258:17-20. Defendant offers no explanation for this inaction. Whether Defendant made a tactical decision not to obtain the book, which is publicly available,² or simply decided not to even ask Plaintiff to produce it, he cannot now seek sanctions at summary judgment for what he failed to do.³

Substantively, Defendant suggests that the book establishes certain facts that vitiate Plaintiff’s theory of the case. Nothing about the book could have that effect. Assuming, *arguendo*, that the book is admissible, its contents do nothing to contradict, and indeed confirm,

response to a motion for summary judgment. *See American Steel Erectors v. Local Union No. 7, Intern. Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 815 F.3d 43, 71 (1st Cir. 2016) (“Plaintiffs bear the ultimate burden of proving their claims, and on summary judgment must identify some evidence on which a jury could reasonably find in their favor...”).

² A look on the Internet could have led Defendant to copies available in libraries in the United States. *See, e.g.*, WorldCat Libraries at http://www.worldcat.org/title/homosexuality-perspectives-from-uganda/oclc/231624902&referer=brief_results.

³ The sanctions sought here were ordered in the cases Defendant cited only after the party failed to produce the document following court orders to do so. *See Valley Eng’rs Inc. v. Electric Eng’rg Co.*, 158 F.3d 1051, 1054 (9th Cir. 1998); *Freddie v. Martin Transport, Ltd.*, 428 Fed. App’x 801, 802 (10th Cir. 2011).

Plaintiff's theory of the case that Uganda was a soft target for Defendant's homophobic agenda, *see* First Amended Complaint, dkt. 27, ¶ 12, and that while homophobia and a penal code provision criminalizing same-sex sexual conduct existed prior to 2002, the active, coordinated, and sustained use of multiple public institutions to deprive LGBTI Ugandans of their fundamental rights had not fully begun at that time. *Compare* Reply Br. 79-80 with dkt. 270 at ¶¶ 21-22 and dkt. 292 at 15-27, 65-85.⁴

On the second issue, Defendant argues that Plaintiff is precluded from relying upon evidence not identified by Plaintiff's Rule 30(b)(6) witness or its officers in depositions. Remarkably, however, the evidence Defendant seeks to exclude is his *own* – i.e. documents, statements, and communications produced by Defendant from his possession. Reply Br. 13-26, 29.⁵ Moreover, Defendant's counsel repeatedly asked Plaintiff's witnesses to testify specifically

⁴ Defendant's mischaracterizations of articles aside, *see, e.g.*, Reply Br. 77 (suggesting that a statement condemning "homosexuality, child rape, and child sacrifice" is equating homosexuality with pedophilia), *id.* at 78 (referring to article entitled "Homosexuality is a time bomb in schools" as an example of a "headline[] on recruitment of children and promotion of homosexuality," where the article discusses prevalence of same-sex sexual activity among youth in schools, *see* dkt. 306-7 at 86-87), even pre-2002 articles using the phrase "promotion of homosexuality" do not reflect Defendant's strategies. For example, one article's warning against the "cultural promotion of homosexuality as a moral and normal activity" is on its face distinct from Defendant's calls for the criminalization of so-called promotion of homosexuality by LGBTI rights activists. *Compare* dkt. 306-7 at 68 with dkt. 292 at 72.

⁵ In each of the cases cited by Defendant, the Rule 30(b)(6) witness was unable to testify as to the corporate party's knowledge of its *own* operations, actions, or intent that the corporate party later attempted to rely on at summary judgment. *See, e.g., Spicer v. Universal Forest Products, Eastern Div., Inc.*, Civil Action No. 7:07cv462, 2008 WL 4455854, at *6 (W.D. Va. Oct. 1, 2008) (deponent failed to testify as to corporation's nondiscriminatory reasons for terminating plaintiff); *Strategic Decisions, LLC v. Martin Luther King, Jr. Center for Nonviolent Social Change, Inc.*, No. 1:13-cv-2510-WSD, 2015 WL 2091714, at *6, 8 (N.D. Ga. May 5, 2015) (deponent failed to testify as to organization's knowledge of plaintiff's services rendered to the organization and the organization's own actions and decisions); *Chapman v. Ourisman Chevrolet Co., Inc.*, Civil Action No. AW-08-2545, 2011 WL 2651867, at *3-4 (D. Md. July 1, 2011) (deponent failed to testify about an investigation with which another corporate employee was involved); *Aldridge v. Lake County Sheriff's Office*, No. 11 C 3041, 2012 WL 3023340, at *1

as to their knowledge *apart* from their views on Defendant’s own documents. *See, e.g.*, dkt. 250-7 at 371:13-25, 433:13-17; dkt. 250-3, 97:6-11; 99:13-16; 171:10-13; 188:12-15; 189:8-12; 214:17-20. In addition, nearly all of the “I don’t knows” elicited from Plaintiff’s witnesses were with regard to assertions not made by Plaintiff in establishing its claims. Defendant’s counsel’s questions sought knowledge of facts demonstrating Defendant’s personal involvement in specific instances of persecution, such as the raids of Plaintiff’s workshops. *See, e.g.*, dkt. 250-7 at 294:21-298:8. As explained in Plaintiff’s opposition brief, its theory of Defendant’s liability does not turn on the extent of his personal involvement in individual instances of persecution, and no plaintiff needs to prove its case exclusively based on personal knowledge, particularly in conspiracy cases. *See* dkt. 292 at 66-84. Ultimately, Plaintiff’s Rule 30(b)(6) witness explained Defendant’s role in the persecution conspiracy as it was described in Plaintiff’s opposition brief. *See* dkt. 250-7 at 387:20-390:20.

Separately, *Trustees of Boston Univ. v. Everlight Electronics Co LTD.*, Civil Action Nos. 12-cv-11935-PBS, 12-cv-12326-PBS, 12-cv-12330-PBS, 2014 WL 5786492, *3 (D. Mass Sept. 24, 2014), cited by Defendant, makes clear that a Rule 30(b)(6) witness is not required to list all relevant evidence, let alone evidence produced by the opposing party. There, this Court noted, “Even under the present-day liberal discovery rules, [the recipient of a Rule 30(b)(6) request] is not required to have counsel marshal all of its factual proof and prepare a witness to

(N.D. Ill. July 24, 2012) (deponent failed to testify about the entity’s operations, policies, and procedures); *Ierardi v. Lorillard, Inc.*, Civ. A. No. 90-7049, 1991 WL 158911, at *1 (E.D. Pa. Aug. 13, 1991) (deponent failed to testify about its own corporate records); *Calzaturificio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 37 (D. Mass. 2001) (same). While both *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996), and *Corus Eng’g Steels Ltd. v. M/V Atlantic Forrest*, No. Civ. A. 01-2076, 2002 WL 31308335, at *1 (E.D. La. Oct. 11, 2002), discuss the corporate witness’ obligation to testify as to information from third parties, the third parties in both cases are former employees or subsidiaries of the testifying party, and thus, well “within the corporate rubric.” *Aldridge*, 2012 WL 3023340, at *4 n.18.

be able to testify on a given defense or []claim.” *Id.* at *4 (internal quotations omitted).

Furthermore, answers by a lay Rule 30(b)(6) witness about issues of law are not binding on the party who designated the witness. *Town of Lexington v. Pharmacia Corp.*, No. 12–CV–11645, 2015 WL 1321457, at *6 (D. Mass. Mar. 24, 2015).⁶

Defendant also contends now at summary judgment that Plaintiff’s interrogatory responses were similarly deficient, for failing to identify Defendant’s own documents. Reply Br. 26-30. Federal Rule of Civil Procedure 37 provides the remedy for any such asserted failure. Under this rule, the party must meet and confer over the disputed responses and if no agreement is reached, file a motion to compel. Defendant opted not to take this step, even though Plaintiff objected to the relevant interrogatory on the grounds that it sought information already in Defendant’s possession, custody, or control. *See* dkt. 306-3 at 29. Defendant offers no authority for his argument that a defendant can choose not to avail himself of the remedies provided under Rule 37 and then wait until after his dispositive motion is filed to seek a draconian sanction. Nearly all of the cases Defendant cites were decided on motions to compel.⁷

⁶ Plaintiff served objections to Defendant’s 30(b)(6) topics to the extent they sought legal contentions or attorney work product, or were unduly burdensome by failing to meet Rule 30(b)(6)’s requirement that the topics of inquiry for the deposition of an organizational witness be articulated with “reasonable particularity.” *See* Declaration of Pamela C. Spees, dated Sept. 9, 2016, Ex. 1. Defendant asserts that because Plaintiff never sought a protective order, it waived any objection. Reply Br. 14-15. This Court has already held that “[w]hile under some circumstances a protective order may have been the appropriate procedure, this court will not fault [an entity] for preserving its objections to certain topics, producing a witness who addressed the large majority of designated topics without objection, and waiting until after the deposition to see if any remaining issues could be resolved without court intervention.” *Trustees of Boston Univ.*, 2014 WL 5786492, at *5.

⁷ In one instance, the complaining party sought to strike the opposing party’s interrogatory responses, but in that case, the complaining party had previously secured a favorable ruling on a motion to compel and the opposing party only filed the supplemental interrogatory responses for the first time after the deadline for dispositive motions had passed. *AVX Corp. v. Cabot Corp.*,

Defendant cites no case in which a defendant's own documents produced in discovery were excluded because the document was not identified in a plaintiff's supplementary responses. See Reply Br. 28-29 (citing *King v. E.F. Hutton & Co., Inc.*, 117 F.R.D. 2, 6 (D.D.C. 1987) (seeking information from plaintiffs that was "personal to the plaintiffs themselves"); *Walt Disney Co. v. DeFabiis*, 168 F.R.D. 281, 284 (C.D. Cal. 1996) (describing party's failure to specify documents in its own production containing information responsive to the interrogatories); *Hitachi, Ltd. v. AmTRAN Technology Co. Ltd.*, No. C 05-2301 CRB (JL), 2006 WL 2038248, at *3 (N.D. Cal. July 18, 2006) (seeking information from defendant found in communications between defendant and plaintiff's agent); *AVX Corp. v. Cabot Corp.*, 252 F.R.D. 70, 78 (D. Mass. 2008) (seeking information regarding plaintiff's damages, compelled by court order, but not provided until after deadlines for dispositive motions had passed); *Klonoski v. Mahlab*, 156 F.3d 255 (1st Cir. 1998) (precluding use of letters in defendants' possession that defendants failed to produce during discovery)).

Finally, Defendant likewise improperly attempts to preclude any evidence of all forms of damages sought by Plaintiff.⁸ As with the foregoing, Defendant's attempt is procedurally

252 F.R.D. 70, 76 (D. Mass. 2008). Similarly, in another, the complaining party only learned of the evidence at trial. *Klonoski v. Mahlab*, 156 F.3d 255 (1st Cir. 1998).

⁸ Among the misstatements in Defendant's Reply Brief is his suggestion that Plaintiff is only now seeking damages for non-economic harm. Reply Br. 98. In fact, categories of non-economic harm were set out in Plaintiff's Supplemental Rule 26 disclosure. See dkt. 249-7. Defendant's ensuing argument that parties are required to compute and disclose a monetary sum for non-economic damages ignores the great weight of authority holding to the contrary for categories of damages which are "vague and may not be amen[a]ble to the type of calculation disclosure contemplated by Rule 26(a)(1)(C)." See, e.g., *Sandoval v. Am. Bld. Maint. Indus.*, 267 F.R.D. 257, 282-283 (D. Minn. 2007); *EEOC v. Wal-Mart stores, Inc.*, 276 F.R.D. 637, 639-40 (E.D. Wash. 2011); *Williams v. Trader Pub. Co.*, 218 F.3d 481, 486 n. 3 (5th Cir. 2000). See also *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306-309 and n.11 (1986) (for violation of First Amendment rights, compensatory damages may include not only monetary harms, but also non-economic harms, and even where no actual injury is shown, nominal damages are

improper and should be rejected as he similarly never sought to address through appropriate means the discovery issues he now raises. As above, the decisions cited by Defendant for this proposition, Reply Br. 95, involved situations where there had been a previous motion to compel and order, *AVX Corp. v. Cabot Corp.*, 251 F.R.D. 70 (D. Mass. 2008), or motions *in limine* with respect to trial, *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10 (1st Cir. 2001) (excluding expert trial exhibits) and *Pena-Crespo v. Puerto Rico*, 408 F.3d 10 (1st Cir. 2005) (excluding expert trial testimony due to failure to provide a written report).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendant's motion for summary judgment and allow this case to proceed to trial.

September 9, 2016

Respectfully submitted,

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/s/ Pamela C. Spees

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appropriate); *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 566 (1st Cir. 2003) (translating legal damage into money damages – especially in cases which involve few significant items of measurable economic loss – is a matter particularly within the jury's ken); *Saunders v. General Services Corp.*, 659 F. Supp. 1042, 1061 (E.D. Va. 1987) (finding fair housing organization entitled to non-economic damages for frustration to its mission).

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SCOTT LIVELY, individually and as
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Defendant.

DECLARATION OF PAMELA C. SPEES

I, PAMELA C. SPEES, declare and state as follows:

1. I am an attorney with the Center for Constitutional Rights and represent Plaintiff Sexual Minorities Uganda in the above-captioned matter.

2. Attached hereto as Exhibit 1 is a true and correct copy of Plaintiff's Objections To Defendant's Rule 30(b)(6) Deposition Notice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 2016, at New York, New York.

/s/ Pamela C. Spees

Pamela C. Spees

Exhibit 1

in this action nor reasonably calculated to lead to the discovery of admissible evidence and is protected by the associational privilege.

Deposition Topic (b):

SMUG's claims in this lawsuit and evidence regarding: (i) persecution in Uganda, including without limitation the specific persecutory acts alleged by SMUG in its Amended Complaint (Dkt. No. 27) and discovery responses; (ii) wrongful conduct by Lively, including without limitation acts or omissions undertaken by Lively in Uganda, in the United States, or elsewhere; (iii) wrongful conduct by any of the alleged co-conspirators of Lively; (iv) the specifics of any alleged conspiracy in which Lively participated; and (v) specific damages incurred or claimed by SMUG.

Objections to Topic (b):

SMUG objects to subtopics (i) and (ii)'s use of the phrase "including without limitation" on the ground that it is overbroad and unduly burdensome and fails to meet Fed. R. Civ. P. 30(b)(6)'s requirement that the topics of inquiry for the deposition of an organizational witness be articulated with "reasonable particularity."

SMUG further objects to subtopic (i) to the extent it seeks information about any and all "persecution in Uganda" on the ground that it is vague, overbroad, and unduly burdensome and any persecution beyond that alleged in SMUG's Amended Complaint (Dkt. No. 27) and described in SMUG's response to Defendant's Interrogatory No. 2 is neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence. Furthermore, SMUG objects that it is not reasonable to expect any witness(es) designated by SMUG to remember and testify about every fact within SMUG's knowledge about any and all persecution in Uganda, even if limited to any and all persecution of the LGBTI community in Uganda.

Deposition Topic (c):

The murder of David Kato, including without limitation SMUG's statements, knowledge, investigation, and evidence regarding the same.

Objections to Topic (c):

SMUG objects to topic (c) on the ground that it mischaracterizes the allegations in Plaintiff's Amended Complaint (Dkt. No. 27) and is unduly burdensome because it seeks information that is neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence. As SMUG explained in its response to Defendant's Interrogatory No. 10, SMUG included the death of David Kato in paragraphs 10 and 222 of the Amended Complaint in order to present a complete narrative of a SMUG staff member who had been subject to the persecution alleged in the Amended Complaint and subsequently died. SMUG is not relying on the death of David Kato to show Defendant's liability for the events alleged in the Amended Complaint.

SMUG further objects to this topic's use of the phrase "including without limitation" because it is overbroad and unduly burdensome and fails to meet Fed. R. Civ. P. 30(b)(6)'s requirement that the topics of inquiry for the deposition of an organizational witness be articulated with "reasonable particularity."

Deposition Topic (d):

Proposed, enacted, or repealed legislation in Uganda regarding homosexuality, and SMUG's involvement, advocacy, and activities regarding the same.

Objections to Topic (d):

SMUG objects to this topic on the ground that it is vague, overbroad, and unduly burdensome since this topic does not specify the legislation for which it is seeking SMUG's testimony, but instead refers to any legislation "regarding homosexuality" at any point in time. It is not reasonable to expect any witness(es) designated by SMUG to remember and testify about every fact within SMUG's knowledge about any "[p]roposed, enacted, or repealed legislation in Uganda regarding homosexuality" at any point in time.

Deposition Topic (e):

Each topic covered by Lively's sixteen interrogatories to SMUG (incorporated herein by reference), as well as SMUG's responses thereto and SMUG's evidence as to those topics.

Objections to Topic (e):

SMUG objects to this topic on the ground that it seeks information that is unreasonably cumulative or duplicative of SMUG's prior responses to Defendant's discovery requests. SMUG further incorporates herein by reference its objections to Defendant's sixteen interrogatories to SMUG. SMUG further objects to Interrogatory Nos. 6 and 15 incorporated by reference in this topic on the ground that they seek information protected by the associational privilege.

SMUG also objects to this topic to the extent that it includes inquiries regarding SMUG's contentions because a Fed. R. Civ. P. 30(b)(6) deposition is an overbroad and unreasonable means of discovering a party's factual and legal basis for its claims and such inquiries would reveal privileged attorney work product.

Deposition Topic (f):

SMUG's discovery responses, disclosures, and document production.

Objections to Topic (f):

SMUG objects to this topic on the ground that it is vague, overbroad, and unduly burdensome and to the extent that it seeks information that is unreasonably cumulative or duplicative of SMUG's prior responses to Defendant's discovery requests.

Deposition Topic (g):

All other allegations and contentions in SMUG's Amended Complaint, including SMUG's evidence to support them.

Objections to Topic (g):

SMUG objects to this topic on the ground that it is vague, overbroad, and unduly burdensome and fails to meet Fed. R. Civ. P. 30(b)(6)'s requirement that the topics of inquiry for

the deposition of an organizational witness be articulated with “reasonable particularity.” Furthermore, SMUG objects to this topic to the extent it includes inquiries regarding SMUG’s contentions because a Fed. R. Civ. P. 30(b)(6) deposition is an overbroad and unreasonable means of discovering a party’s factual and legal basis for its claims and would reveal privileged attorney work product.

Dated: June 8, 2015

By: /s/ Pamela C. Spees
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by e-mail on the following counsel of record for Defendant this June 8, 2015:

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