

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN,
individually and on behalf of all others
similarly situated, *et al.*,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

**PLAINTIFFS' MOTION FOR ENTRY OF A PARTIAL ESI PROTOCOL,
PROTECTIVE ORDER, DEPOSITION PROTOCOL ORDER, 502(D) CLAWBACK
ORDER, AND ORDER REGARDING VIRTUAL DEPOSITIONS**

Plaintiffs, through counsel, move the Court for an order granting entry of a partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(d) Clawback Order, and Order Regarding Virtual Depositions, attached hereto as Exhibits 1, 2, 3, 4, and 5, respectively. Plaintiffs further move the Court to set a deadline of August 27, 2021, for the Parties to file a more fulsome, agreed-upon ESI Protocol, or competing versions in the event they cannot agree. Plaintiffs move unilaterally due to Defendants' general unresponsiveness, despite the Parties' August 13, 2021, Stipulation in which they agreed to file the attached documents by August 20, 2021.

In conjunction with this request, Plaintiffs note that their proposed Protective Order departs slightly from the District's form Order and, accordingly, Plaintiffs further move for entry of their Protective Order as modified from the District's form Order. The modification is minor, adding a sentence about insurance requirements at the request of Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical

Services, and a parallel sentence to similarly benefit Plaintiffs. The overall purpose and protections of the form Order remain undisturbed and, thus, for good cause, the Court should enter the Protective Order attached hereto as Exhibit 2.

In support, Plaintiffs state the following:

1. On December 1, 2021, Plaintiffs mailed letters to Defendants regarding their duty to preserve documents related to this litigation. The letters included an attachment, titled “Exhibit A,” regarding the format of production Plaintiffs anticipated seeking for all ESI in this case. In other words, Exhibit A is a partial ESI protocol as it governs only the format of production. (Schladt Decl. ¶ 3.)

2. On June 21, 2021, the Parties held a meeting pursuant to Rule 26(f) of the Federal Rules of Civil Procedure. At this meeting, the Parties discussed several documents related to the Joint 26(f) Report they anticipated filing with the Court, including a format of production for ESI, a Protective Order, a Deposition Protocol Order, a Clawback Order, and an ESI Protocol. Prior to the June 21 meeting, Plaintiffs emailed Defendants another copy of Exhibit A for discussion. (*Id.* ¶ 4.)

3. On June 29, 2021, Plaintiffs emailed Defendants and attached an updated version of the Parties’ Joint 26(f) Report for Defendants’ review. The proposed Report included a deadline of August 13, 2021, for the Parties to file an agreed upon or positions on a Protective Order, an ESI Protocol, and a format of production for ESI. (*Id.* ¶ 5.)

4. On July 6, 2021, Plaintiffs emailed Defendants and included proposed attachments to the Parties’ Joint 26(f) Report for Defendants to review. The attachments included the Order Setting Deposition Protocol, a Stipulation for Virtual Depositions, an Agreed Order Governing the

Inadvertent Disclosure of Documents or Other Material Under Rule 502(d), and a Protective Order.

(*Id.* ¶ 6.)

5. On July 7, 2021, Plaintiffs emailed discovery requests to Defendants, attaching Exhibit A. Plaintiffs later served their discovery requests and Exhibit A by mail on July 20, 2021.

(*Id.* ¶ 7.)

6. On July 14, 2021, Plaintiffs emailed Defendants to ask their respective positions on the attachments. (*Id.* ¶ 8.)

7. On July 16, 2021, Plaintiffs emailed Defendants about the Joint 26(f) Report draft and its attachments. Plaintiffs included the attachments once again and requested that Defendants respond with their edits as soon as possible. (*Id.* ¶ 9.)

8. On July 16, 2021, counsel for Defendant The Health Plan emailed Plaintiffs and stated he aimed to get back to Plaintiffs on Monday. (*Id.* ¶ 10.)

9. On July 19, 2021, counsel for Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services emailed Plaintiffs and stated she would look at the documents attached and get back to Plaintiffs on Wednesday or Thursday. (*Id.* ¶ 11.)

10. On July 27, 2021, Plaintiffs emailed Defendants and asked them for their positions on the attachments. (*Id.* ¶ 12.)

11. On July 27, 2021, counsel for Defendant The Health Plan stated he was not ready to comment on the ESI language/amendment. Counsel for Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services responded with edits to the proposed Protective Order. Defendant Ted Cheatham and

Defendant The Health Plan agreed to these edits on July 27 and July 28, 2021, respectively. (*Id.* ¶ 13.)

12. On July 28, 2021, the Parties filed their Joint 26(f) Report. The Report included an agreed-upon August 13 deadline for filing agreed upon or positions on a Protective Order, an ESI Protocol, and a format of production for ESI. (*Id.* ¶ 14.)

13. On August 9, 2021, Plaintiffs emailed Defendants and requested edits to the attached Deposition Protocol Order, Stipulation for Virtual Depositions, Clawback Order 502(d), and Exhibit A. (*Id.* ¶ 15.)

14. On August 10, 2021, Plaintiffs accepted the edits to the Protective Order proposed by Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services. Plaintiffs then circulated new redlines to the Protective Order to all Defendants. Plaintiffs asked for a prompt response to the additional redlines to the Protective Order as well as the other attachments based on the quickly-approaching August 13 deadline. (*Id.* ¶ 16.)

15. On August 12, 2021, Plaintiffs emailed Defendants regarding the attachments and proposed a stipulation to a brief extension to August 20 due to Defendants' lack of communication. All Defendants agreed to the Stipulation, and the Parties filed it on August 13, 2021. (*Id.* ¶ 17.)

16. On August 12, 2021, Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services agreed to Plaintiffs' proposed Deposition Protocol Order, Stipulation for Virtual Depositions, and Clawback Order 502(d). (*Id.* ¶ 18.)

17. On August 16, 2021, Plaintiffs circulated their proposed ESI Protocol to Defendants. (*Id.* ¶ 19.)

18. On August 17, 2021, counsel for Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services agreed to Plaintiffs' proposed Protective Order and stated that, assuming all other counsel approve, her name may be attached to the Protective Order and e-filed. She further stated her clients were agreeable to complying with Plaintiffs' proposed format of production in Exhibit A, but that she wanted to ensure the decision was unanimous. To that end, she reserved her right to withdraw agreement if all counsel were unable to agree. She stated she was still reviewing Plaintiffs' proposed ESI Protocol with her clients. (*Id.* ¶ 20.)

19. No other Defendants responded regarding Plaintiffs' redlines to the proposed Protective Order, Exhibit A, or other attachments. (*Id.* ¶ 21.)

20. In light of Plaintiffs' numerous attempts to contact Defendants and obtain their positions on all of these attachments since June 29, and even earlier with respect to Exhibit A, Plaintiffs are filing their proposals with the Court in accordance with the Parties' Stipulation to Extend Case Deadlines. (ECF No. 76.)

21. Plaintiffs understand that Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services agree with their proposed partial ESI Protocol titled Exhibit A (with reservations), Protective Order (with reservations), Deposition Protocol Order, Stipulation for Virtual Depositions, and Clawback Order 502(d). No other Defendants have weighed in on these attachments.

22. Accordingly, for all of the reasons stated above, Plaintiffs respectfully request that the Court enter Plaintiffs' proposed versions of the partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(d) Clawback Order, and Order Regarding Virtual Depositions, attached hereto as Exhibits 1, 2, 3, 4, and 5, respectively. Plaintiffs further request that the Court

set a deadline of August 27, 2021, for the Parties to file an agreed-upon ESI Protocol, or competing versions for the Court's consideration if they cannot agree. In Plaintiffs' view, the Parties have not had a fulsome discussion on the ESI Protocol beyond the format of production, attached hereto as Exhibit 1.

Dated: August 20, 2021

Respectfully submitted,

/s/ Walt Auvil

Walt Auvil, WWSB No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058
Facsimile: 304-485-6344
auvil@theemploymentlawcenter.com

Avatara Smith-Carrington, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
Phone: 214-219-8585
Facsimile: 214-219-4455
asmithcarrington@lambdalegal.org

Tara L. Borelli, Visiting Attorney
Carl Charles, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
158 West Ponce De Leon Ave., Ste. 105
Decatur, GA 30030
Phone: 470-225-5341
Facsimile: 404-506-9320
tborelli@lambdalegal.org
ccharles@lambdalegal.org

Nora Huppert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.

4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
Phone: 213-382-7600
Facsimile: 213-351-6050
nhuppert@lambdalegal.org

Sasha Buchert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245
Facsimile: 202-429-9574
sbuchert@lambdalegal.org

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
NICHOLS KASTER, PLLP
IDS Center, 80 South 8th Street
Suite 4700
Minneapolis, MN 55402
Phone: 612-256-3200
Facsimile: 612-338-4878
aprakash@nka.com
nschladt@nka.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN,
individually and on behalf of all others
similarly situated, *et al.*,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

**DECLARATION OF NICOLE J. SCHLADT IN SUPPORT OF PLAINTIFFS’
MOTION FOR PARTIAL ESI PROTOCOL, ENTRY OF A PROTECTIVE ORDER,
DEPOSITION PROTOCOL ORDER, 502(D) CLAWBACK ORDER, AND ORDER
REGARDING VIRTUAL DEPOSITIONS**

I, Nicole J. Schladt, hereby declare:

1. I am an attorney at the law firm of Nichols Kaster, PLLP. I represent Plaintiffs in the above-referenced matter. I have personal knowledge of the facts set forth in this Declaration.
2. I submit this Declaration in support of Plaintiffs’ Motion for Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(d) Clawback Order, and Order Regarding Virtual Depositions.
3. On December 1, 2021, my law firm mailed letters to Defendants regarding their duty to preserve documents related to this litigation. The letters included an attachment, titled “Exhibit A,” regarding the format of production we anticipated seeking for all ESI in this case.
4. On June 21, 2021, my colleague Anna P. Prakash emailed Defendants another copy of Exhibit A for discussion at the Rule 26(f) Conference, held later the same day. At the Rule 26(f)

Conference, the Parties discussed Exhibit A and other anticipated attachments to the Joint 26(f) Report, including a Protective Order, a Deposition Protocol Order, a Clawback Order, and an ESI Protocol.

5. On June 29, 2021, I emailed Defendants and attached an updated version of the Parties' Joint 26(f) Report for Defendants' review. The proposed Report included a deadline of August 13, 2021, for the Parties to file an agreed upon or positions on a Protective Order, an ESI Protocol, and a format of production for ESI.

6. On July 6, 2021, I emailed Defendants and included proposed attachments to the Parties' Joint 26(f) Report for Defendants to review. The attachments included the Order Setting Deposition Protocol, a Stipulation for Virtual Depositions, an Agreed Order Governing the Inadvertent Disclosure of Documents or Other Material Under Rule 502(d), and a Protective Order.

7. On July 7, 2021, I emailed discovery requests to Defendants, attaching Exhibit A. My law firm later served these discovery requests and Exhibit A by mail on July 20, 2021.

8. On July 14, 2021, Ms. Prakash emailed Defendants to ask their respective positions on the attachments.

9. On July 16, 2021, Ms. Prakash emailed Defendants about the Joint 26(f) Report draft and its attachments. Ms. Prakash included the attachments once again and requested that Defendants respond with their edits as soon as possible.

10. On July 16, 2021, Aaron Boone, counsel for Defendant The Health Plan, emailed Plaintiffs and stated he aimed to get back to Plaintiffs on Monday.

11. On July 19, 2021, Lou Ann Cyrus, counsel for Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for

Medical Services, emailed Plaintiffs and stated she would look at the documents attached and get back to Plaintiffs on Wednesday or Thursday.

12. On July 27, 2021, Ms. Prakash emailed Defendants and asked them for their positions on the attachments.

13. On July 27, 2021, Mr. Boone stated he was not ready to comment on the ESI language/amendment. Ms. Cyrus responded with edits to the proposed Protective Order. Eric D. Salyers, counsel for Defendant Ted Cheatham, and Mr. Boone agreed to these edits on July 27 and July 28, 2021, respectively.

14. On July 28, 2021, the Parties filed their Joint 26(f) Report. The Report included an agreed-upon August 13 deadline for filing agreed upon or positions on a Protective Order, an ESI Protocol, and a format of production for ESI.

15. On August 9, 2021, I emailed Defendants and requested edits to the attached Deposition Protocol Order, Stipulation for Virtual Depositions, Clawback Order 502(d), and Exhibit A.

16. On August 10, 2021, I accepted Ms. Cyrus's edits to the Protective Order and circulated new redlines to all Defendants. I asked for a prompt response to my additional redlines to the Protective Order as well as the other attachments based on the quickly-approaching August 13 deadline.

17. On August 12, 2021, I emailed Defendants regarding the attachments and proposed a stipulation to a brief extension to August 20 due to Defendants' lack of communication. All Defendants agreed to the Stipulation, and the Parties filed it on August 13, 2021.

18. On August 12, 2021, Ms. Cyrus agreed to Plaintiffs' proposed Deposition Protocol Order, Stipulation for Virtual Depositions, and Clawback Order 502(d).

19. On August 16, 2021, I circulated Plaintiffs' proposed ESI Protocol to Defendants.

20. On August 17, 2021, Ms. Cyrus agreed to Plaintiffs' proposed Protective Order and stated that, assuming all other counsel approve, her name may be attached to the Protective Order and e-filed. She further stated her clients were agreeable to complying with Plaintiffs' proposed format of production in Exhibit A, but that she wanted to ensure the decision was unanimous. To that end, she reserved her right to withdraw agreement if all counsel were unable to agree. She stated she was still reviewing Plaintiffs' proposed ESI Protocol with her clients.

21. No Defendants other than those represented by Ms. Cyrus have responded regarding Plaintiffs' proposed Protective Order, Exhibit A, or other attachments.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: August 20, 2021

/s/ Nicole J. Schladt

Nicole J. Schladt

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN,
individually and on behalf of all others
similarly situated, *et al.*,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

**ORDER FOR ENTRY OF A PARTIAL ESI PROTOCOL, PROTECTIVE
ORDER, DEPOSITION PROTOCOL ORDER, 502(D) CLAWBACK ORDER, AND
ORDER REGARDING VIRTUAL DEPOSITIONS**

This Order comes before the Court on Plaintiffs' motion to enter a partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(d) Clawback Order and Order Regarding Virtual Depositions.

IT IS HEREBY ORDERED THAT:

1. The Parties file a joint ESI Protocol or competing versions by August 27, 2021;
2. The Court adopts and enters Plaintiffs' proposed partial ESI Protocol as attached to Docket 77 as Exhibit 1;
3. The Court adopts and enters Plaintiffs' proposed Protective Order as attached to Docket 77 as Exhibit 2;
4. The Court adopts and enters Plaintiffs' proposed Deposition Protocol as attached to Docket 77 as Exhibit 3;

5. The Court adopts and enters Plaintiffs' 502(d) Clawback Order as attached to Docket 77 as Exhibit 4, and;
6. The Court adopts and enters Plaintiffs' Virtual Deposition Protocol as attached to Docket 77 as Exhibit 5.

IT IS SO ORDERED.

Dated: _____

Honorable Robert C. Chambers
U.S. District Court Judge

EXHIBIT 1

EXHIBIT A

**Format for the Production of Documents
Including Electronically Stored Information**

Federal Rule of Civil Procedure 34(b)(1)(C) provides that a party requesting documents “may specify the form or forms in which electronically stored information is to be produced.” Pursuant to Rule 34(b)(1)(C), documents and Electronically Stored Information (“ESI”) should be produced in the forms described below.

A. Production Formats

As a general rule, the production format for all paper documents and ESI shall be single-page Group IV TIFF files with corresponding text and load files, as set forth in detail in Part C below (“the Default Rule”).

However, spreadsheets, presentation files, word processing files, digital images, audio/video files, and other file types that do not render to image well should be produced in their Native format (“Native Productions”). Native Productions shall be produced as they are maintained, with all formulas, redlines, comments, links, and metadata intact. Native Productions should include all ESI metadata fields set forth below in the load file.

It may sometimes be appropriate to produce partial or exported data, such as with information housed in applications, mobile devices, cloud services, social media sites, or databases containing more information than is relevant to the case. In these instances, the parties should confer and agree on an ESI protocol early on concerning the scope of, and methodology for, extracting the relevant data.

B. Handling of Paper Documents

Paper documents shall be scanned and produced according to the Default Rule. The documents should be unitized (not merged into a single record). The load file for paper documents shall contain the following fields, described in Section C.3 below:

BegBates	ProdVolume
EndBates	Record Type
BegAttach	Confidential
EndAttach	Redacted
Custodian	Extracted Text
Pgcount	

C. Default Rule: Specific Protocols for the Form of Production

The following specific protocols should be used for productions:

1. IMAGES:

A placeholder image that conforms to the TIFF specifications detailed below should be provided for Native Productions. The placeholder should contain the confidential designation, Bates number, and text stating that the document has been produced in native format.

Records not provided in native format should be as single-page, Group IV, 300 DPI, 1-bit, black-and-white TIFF images. If color is requested or necessary to understand the meaning of a document², the document should be produced as a single-page, 300 DPI, minimum quality level of 75, 24-bit color JPG images. An Images folder on the production deliverable should contain a separate TIFF or JPG file named with the corresponding Bates number. Images should show all information visible using native software. For example, images of email messages should include the BCC and Attachments lines.

2. LOAD FILES:

Load File	Format
Image Load File	Opticon .opt
Database Load File	Delimited .dat with field header information on the first line of the file. Concordance default delimiters should be used.

3. METADATA FIELDS:

Field Name	Description
BegBates	First Bates number
EndBates	Last Bates number
BegBatesAttach	First Bates number of the first document of a family
EndBatesAttach	Last Bates number of the last document of a family
Custodian ³	Custodian of a file when collected
PgCount	Number of pages of a document
ProdVolume	Name of an export volume
RecordType	Indicates type of ESI ("E-Mail", "E-Mail Attachment", "E-Doc", etc.) or "Hard Copy" for paper documents
Filesize	Size in bytes of the native file
MD5HashValue	MD5 hash value assigned to a document

² If a producing Party may rely on a color version of a document it produces, the color version will be provided. In addition, a receiving Party may request a color replacement of an image when the loss of color detracts from the usability or limits the ability to interpret information.

³ All Custodians, a field that identifies all custodians of a document, shall be provided when the producing party incorporates deduplication in their production workflow.

Field Name	Description
ExtractedText	Relative file path to the produced extracted text or OCR file of the document. A Text folder on the production deliverable should contain a separate text file for each document named with the corresponding BegBates. If a party OCRs documents for its own benefit, that OCR will be provided here. OCR text files shall be provided for documents with redactions.
Confidential	Populated for all documents with a confidentiality designation pursuant to any applicable Protective Order in addition to stamping of production images
Redacted	"Has Redactions" or "Yes" populated for all redacted documents
FileName	Original file name of a document
NativePath	Relative file path to the produced native file. A Natives folder on the production deliverable should contain a separate native file for each document named with the corresponding BegBates.
Title	Extracted title of a non-email document
Author	Extracted author of a non-email document
TimeZone	Time zone used for processing the data
Date/Time Created	Date and time the document was created
Date/Time Last Modified	Date and time the document was last modified
LastSavedBy	Last saved or modified by property of a document, representing the last user to save the document
From	Name (when available) and email address of the sender of an email message
To	Name (when available) and email address(es) of the recipient(s) of an email message
CC	The name(s) (when available) and email address(es) of the recipient(s) of the CC or Carbon Copy of an email message
BCC	The name(s) (when available) and email address(es) of the recipient(s) of the BCC or Blind Carbon Copy of an email message
EmailSubject	Subject of an email message
Date/TimeReceived	Date and time an email message was received
Date/Time Sent	Date and time an email message was sent
EmailFolder	Folder in which an email was stored within a custodian's mailbox
AttachmentList	File names for all attachments to an email message or child items in a family group
AttachCount	Number of files attached to an email message or parent document

EXHIBIT 2

L R Civ P 26.4 Form (06/08/2017)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST
VIRGINIA
AT HUNTINGTON**

CHRISTOPHER FAIN,
individually and on behalf of all others
similarly situated, *et al.*,

Plaintiffs,

v.

CIVIL ACTION: 3:20-0740

WILLIAM CROUCH, *et al.*,

Defendants.

PROTECTIVE ORDER

By signing this Protective Order, the parties have agreed to be bound by its terms and to request its entry by the presiding district or magistrate judge. It is hereby **ORDERED** as follows:

I. DISCOVERY PHASE

A. If a party, or a non-party producing information in this civil action, or an attorney for the party or non-party, has a good faith belief that certain documents or other materials (including digital information) subject to disclosure pursuant to a request or court order, are confidential and should not be disclosed other than in connection with this action and pursuant to this Protective Order, the party, non-party, or attorney shall clearly mark each such document or other material as “**CONFIDENTIAL**.” The individual or entity designating the document or materials as “**CONFIDENTIAL**” must take care to limit any such designation to specific documents or materials that qualify for protection under the appropriate standards. Mass, indiscriminate, or routine designations are prohibited. Designations that are shown to be clearly

unjustified or that have been made for an improper purpose (e.g. to unnecessarily encumber or delay the case development process or impose unnecessary expense and burden on another party) expose the designating individual or entity to sanctions. If it comes to the attention of the designating individual or entity that a document or other material has been improperly marked as “**CONFIDENTIAL**,” the designating individual or entity must promptly notify all parties that the erroneous designation is being withdrawn and must replace the improperly designated document or material with a copy that is not marked “**CONFIDENTIAL**”.

B. If a party or an attorney for a party disputes whether a document or other material should be marked “**CONFIDENTIAL**,” the parties and/or attorneys shall attempt to resolve the dispute with the designating individual or entity. If they are unsuccessful, the party or attorney challenging the “**CONFIDENTIAL**” designation shall do so by filing an appropriate motion.

C. No party or attorney or other person subject to this Protective Order shall distribute, transmit, or otherwise divulge any document or other material which is marked “**CONFIDENTIAL**,” or the contents thereof, except in accordance with this Protective Order. Court personnel are not subject to this Protective Order while engaged in the performance of their official duties.

D. Any document or other material which is marked “**CONFIDENTIAL**,” or the contents thereof, may be used by a party, or a party’s attorney, expert witness, consultant, or other person to whom disclosure is made, only for the purpose of this action. Nothing contained in this Protective Order shall prevent the use of any document or other material which is marked “**CONFIDENTIAL**,” or the contents thereof, at any deposition taken in this action.

E. If a party or attorney wishes to disclose any document or other material which is marked “**CONFIDENTIAL**,” or the contents thereof, to any person actively engaged in working on this action (e.g., expert witness, paralegal, associate, consultant), the person making the

disclosure shall do the following:

1. Provide a copy of this Protective Order to the person to whom disclosure is made;
2. Inform the person to whom disclosure is made that they are bound by this Protective Order;
3. Require the person to whom disclosure is made to sign an acknowledgment and receipt of this Protective Order;
4. Instruct the person to whom disclosure is made to return any document or other material which is marked “**CONFIDENTIAL**,” at the conclusion of the case, including notes or memoranda made from “**CONFIDENTIAL**” material; and
5. Maintain a list of persons to whom disclosure was made and the “**CONFIDENTIAL**” materials which were disclosed to that person.

II. POST-DISCOVERY PHASE

A. If any party, non-party, or attorney wishes to file, or use as an exhibit or as evidence at a hearing or trial, any “**CONFIDENTIAL**” document or material, they must provide reasonable notice to the party that produced the document or material. The parties and/or attorneys shall then attempt to resolve the matter of continued confidentiality by either (a) removing the “**CONFIDENTIAL**” marking, or (b) creating a mutually acceptable redacted version that suffices for purposes of the case. If an amicable resolution proves unsuccessful, the parties and/or attorneys may present the issue to the court for resolution. The proponent of continued confidentiality will have the burden of persuasion that the document or material should be withheld from the public record in accordance with (a) Local Rule of Civil Procedure 26.4, (b) the Administrative Procedures for Electronic Filing in the Southern District of West Virginia § 12, and (c) controlling precedent. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986); *Virginia Dep’t. of State Police v. Washington Post*, 386 F. 3d 567, 575 (4th Cir. 2004).

B. Within thirty days after the conclusion of the action, each party shall gather the

“**CONFIDENTIAL**” materials, copies thereof, and related notes and memoranda, including materials given by that party to any other individual, and shall return them to the party or attorney who originally disclosed them, with a certificate of compliance with the terms of this Protective Order, unless: (1) the document has been offered into evidence or filed without restriction as to disclosure; (2) the parties agree to destruction in lieu of return; or (3) as to documents bearing the notations, summations, or other mental impressions of a receiving party or the party’s expert witness or consultant, that party elects to destroy the documents and certifies to the producing party that it has done so. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product, including drafts of preliminary reports submitted by an expert or consultant, which includes information produced as “**CONFIDENTIAL**,” so long as that work product does not duplicate verbatim substantial portions or the text or images of confidential documents. Any such work product retained by an attorney shall continue to be “**CONFIDENTIAL**” and shall be subject to this protective order. The attorney may use their work product in other litigation provided that the attorney does not use or disclose the confidential documents. However, regarding documents containing “Confidential” information in the possession of the parties’ insurance carrier(s), if laws or regulations require such insurance carrier(s) to maintain files for specific periods of time, those insurance carrier(s) shall maintain the documents containing “Confidential” information protected by this Order as part of the files in question for the periods of time required by such laws or regulations. Upon the expiration of the longest such required retention period to which a specific insurance carrier is subject, that insurance carrier shall then comply with the provisions of this paragraph. The parties’ insurance carrier(s) shall continue to honor the confidentiality of the documents containing “Confidential” information protected by this Order during the pendency of such record

retention as required by laws or regulations.¹ Additionally, counsel may also retain information produced as “**CONFIDENTIAL**” to comply with any requirements for maintaining their malpractice insurance.

The Clerk is instructed to provide a copy of this Order to counsel of record and any unrepresented party.

ENTER:

Parties and Counsel:

Dated: August 20, 2021

Respectfully submitted,

/s/ Walt Auvil

Walt Auvil, WWSB No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058
Facsimile: 304-485-6344
auvil@theemploymentlawcenter.com

Avatara Smith-Carrington, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
Phone: 214-219-8585
Facsimile: 214-219-4455
asmithcarrington@lambdalegal.org

Lou Ann S. Cyrus, Esquire (WWSB #6558)
Roberta F. Green, Esquire (WWSB #6598)
Caleb B. David, Esquire (WWSB #12732)
Kimberly M. Bandy, Esquire (WWSB #10081)
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

***Counsel for Defendants William Crouch,
Cynthia Beane, and West Virginia***

¹ The Court recognizes that, under West Virginia law, W. Va. C.S.R. § 114-15-4.2(b) defines the required period of claim file retention for an insurance company. However, the Court also recognizes that the insurance company for Defendants the West Virginia Department of Health and Human Resources, Bureau for Medical Services, William Crouch, Cynthia Beane, Ted Cheatham and The Health Plan of West Virginia, Inc. are National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”), which was organized under the laws of the State of Pennsylvania. According to 41 Pa.B 5849, insurance companies are required to maintain each claim file for seven (7) years after that claim file is closed. Therefore, as to National Union, the applicable claim file retention period in this matter will be seven (7) years after the conclusion of this lawsuit.

Tara L. Borelli, Visiting Attorney
Carl Charles, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
158 West Ponce De Leon Ave., Ste. 105
Decatur, GA 30030
Phone: 470-225-5341
Facsimile: 404-506-9320
tborelli@lambdalegal.org
ccharles@lambdalegal.org

Nora Huppert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
Phone: 213-382-7600
Facsimile: 213-351-6050
nhuppert@lambdalegal.org

Sasha Buchert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245
Facsimile: 202-429-9574
sbuchert@lambdalegal.org

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
NICHOLS KASTER, PLLP
IDS Center, 80 South 8th Street
Suite 4700
Minneapolis, MN 55402
Phone: 612-256-3200
Facsimile: 612-338-4878
aprakash@nka.com
nschladt@nka.com

Attorneys for Plaintiffs

***Department of Health and Human Resources,
Bureau for Medical Services***

Perry W. Oxley (WVSB#7211)
David E. Rich (WVSB#9141)
Eric D. Salyers (WVSB#13042)
Christopher K. Weed (WVSB#13868)
OXLEY RICH SAMMONS, PLLC
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Counsel for Defendant Ted Cheatham

Aaron C. Boone (WVSB #9479)
BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, Post Office Box 49
Parkersburg, West Virginia 26102
(304) 420-5501
Fax: (304) 420-5587
aboone@bowlesrice.com

Stuart A. McMillan (WVSB #6352)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25301
(304) 347-1110
Fax: (304) 347-1746
smcmillan@bowlesrice.com

***Counsel for Defendant The Health Plan of
West Virginia, Inc.***

EXHIBIT 3

L R Civ P 26.1 Form (06/08/2017)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

CHRISTOPHER FAIN,
individually and on behalf of all others
similarly situated, *et al.*,

Plaintiffs,

v.

CIVIL ACTION: 3:20-0740

WILLIAM CROUCH, *et al.*,

Defendants.

ORDER SETTING DEPOSITION PROTOCOL

The parties have agreed to a protocol governing the taking of depositions in this case. Therefore, it is **ORDERED** that the following protocol shall be followed with all depositions conducted herein:

A. Deposition Notices

This Order applies to all depositions in this matter, which shall be noticed and conducted pursuant to Fed. R. Civ. P. 30 and this Order.

B. Number of Depositions Allowed

Consistent with the provisions of paragraph (D)(2) below, deposition limits will be applied per party group with Plaintiffs collectively constituting one party group; William Crouch, Cynthia Beane, and the West Virginia Department of Health and Human Resources, Bureau for Medical Services constituting a second party group; Ted Cheatham constituting a third party group; and The Health Plan of West Virginia, Inc. constituting a fourth party group. The parties agree that each party group will be permitted to take 5 depositions without seeking leave of court exclusive of depositions of any named party or any expert designated under Rule 26(a)(2). For the avoidance of doubt, the deposition of any named

party or any disclosed expert will not count against any party group's limit of 5 depositions. The Parties reserve the right to seek an order modifying these limits should good cause to do so arise.

C. Duration of Deposition

The presumptive time limitations on depositions imposed by Fed. R. Civ. P. 30(d)(1) shall apply in this litigation unless the parties agree to a different time limitation, or the court establishes a different time limitation upon good cause shown. Any agreement by the parties to alter the presumptive time limits shall be in writing and submitted to the court as a stipulation.

D. Scheduling of Depositions

1. The parties shall meet and confer to establish by mutual agreement a schedule for depositions in this litigation. The parties shall consider: (a) the availability of documents from among those produced by the parties and third parties; (b) the objective of not subjecting any person to repeated depositions; and (c) the need to preserve relevant testimony. The scheduling of depositions should be coordinated to the extent possible.

2. As a general rule, a witness should not be deposed on the same subject more than once. For the avoidance of doubt, no witness will be deposed twice, unless a witness is deposed both in their individual capacity and is designated as a witness by any defendant pursuant to Rule 30(b)(6). No expert will be deposed twice regarding the same expert report or written testimony unless the expert offers different opinions for different party groups. A party seeking to take a second deposition of a witness shall provide the opposing party the basis for its request. Second depositions shall be permitted only upon agreement of the parties or an order of this court issued for good cause shown. Second depositions should not be cumulative or repetitive. The parties agree that second depositions taken specifically for the purpose of admission at trial may be taken without leave of court, so long as the depositions are scheduled in accordance with the provisions of this Order and do not delay the scheduled trial date. Defendant may select as a corporate designee under Rule

30(b)(6) a witness who has or will also testify in his or her individual capacity. A witness testifying as a Rule 30(b)(6) designee is testifying in the place of the corporation and not in his or her individual capacity. Therefore, the fact that an individual has testified as a Rule 30(b)(6) corporate representative does not prohibit that individual from being deposed a second time in his or her individual capacity.

3. Each party shall be notified at least 21 days in advance of a deposition, unless the parties agree otherwise, or the Scheduling Order does not permit, or the court enters an order that alters the notice period. A notice of the deposition of a party or party's designated witness, which requires the deponent to bring documents to the deposition, shall be served at least 21 days in advance.

E. Location of Depositions

The parties shall endeavor to schedule all depositions at locations within a reasonable distance from the residence of the deponent, or at such location agreed upon by all counsel involved and the deponent. Remote depositions shall be allowed if consented to by all parties or upon order of the Court. The parties agree that the stipulation attached hereto as Exhibit 1 shall govern remote depositions.

F. Treatment of Confidential Information

1. A party may designate as confidential any portion of a witness's deposition testimony regarding, concerning, or revealing the contents of any document designated as "CONFIDENTIAL" under the Protective Order entered in this litigation, or any other subject that qualifies as confidential under the Protective Order. While a deponent is being examined about information subject to the Protective Order, persons to whom disclosure is not authorized shall be excluded. The terms of the Protective Order shall apply to that portion of any transcript or recording designated as confidential under this paragraph, as well as to any confidential document attached to the deposition transcript as

an exhibit. The confidentiality designation may be made by any party or their counsel either during the deposition or within the time period allowed under Fed. R. Civ. P. 30(e) for a witness to review and change the transcript or recording; the entirety of the affected transcript shall be maintained by all parties as “**CONFIDENTIAL**” during such period. This shall not limit the ability of a party to designate any portion of a transcript, recording, or document attached to a deposition transcript as “**CONFIDENTIAL**” after the time period allowed under Fed. R. Civ. P. 30(e) for a witness to review and change the transcript or recording. However, the parties understand and acknowledge that a party’s failure to designate material as protected under this Protective Order relieves the other parties of any obligation of confidentiality until such a designation is made. All material subsequently designated as “**CONFIDENTIAL**” will be thereafter treated as such in accordance with this Protective Order.

2. Before confidential portions of a deposition transcript or confidential exhibits are filed with the Court or used at a hearing or trial, the party or attorney wishing to file or use the confidential transcript portions or exhibits shall follow the directives contained in Section II of the Protective Order (entitled “Post-Discovery Phase”).

G. Conduct of Depositions

1. Each party should designate one attorney to conduct the principal examination of each deponent.

2. The attorney conducting a deposition must provide opposing counsel with at least one copy of each exhibit marked at such deposition, simultaneous with the marking of such exhibit.

H. Deposition Disputes

1. The parties shall meet and confer to resolve disputes concerning the timing or scheduling of depositions. If the parties are unable to resolve a dispute after good faith efforts, they may present the issue to the court for resolution.

2. Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule, require rescheduling of the deposition, or possibly result in the need to conduct a supplemental deposition, shall be presented to the presiding Magistrate Judge by telephone. In the event the Magistrate Judge is not available, then disputes may be presented to the presiding District Judge. In the event neither the Magistrate Judge nor the District Judge are available, all efforts shall be made to continue the deposition with full reservation of rights of the interrogation for a ruling at the earliest possible time.

The Clerk is hereby directed to send copies of this Order upon its entry to counsel of record.

ENTER:

Parties and Counsel:

Dated: August 20, 2021

Respectfully submitted,

/s/ Walt Auvil

Walt Auvil, WWSB No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058
Facsimile: 304-485-6344
auvil@theemploymentlawcenter.com

Avatara Smith-Carrington, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
Phone: 214-219-8585
Facsimile: 214-219-4455
asmithcarrington@lambdalegal.org

Tara L. Borelli, Visiting Attorney
Carl Charles, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
158 West Ponce De Leon Ave., Ste. 105
Decatur, GA 30030
Phone: 470-225-5341
Facsimile: 404-506-9320
tborelli@lambdalegal.org
ccharles@lambdalegal.org

Nora Huppert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
Phone: 213-382-7600
Facsimile: 213-351-6050
nhuppert@lambdalegal.org

Sasha Buchert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304

Lou Ann S. Cyrus, Esquire (WWSB #6558)
Roberta F. Green, Esquire (WWSB #6598)
Caleb B. David, Esquire (WWSB #12732)
Kimberly M. Bandy, Esquire (WWSB #10081)
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

***Counsel for Defendants William Crouch,
Cynthia Beane, and West Virginia Department
of Health and Human Resources, Bureau for
Medical Services***

Perry W. Oxley (WWSB#7211)
David E. Rich (WWSB#9141)
Eric D. Salyers (WWSB#13042)
Christopher K. Weed (WWSB#13868)
OXLEY RICH SAMMONS, PLLC
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Counsel for Defendant Ted Cheatham

Aaron C. Boone (WWSB #9479)
BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, Post Office Box 49
Parkersburg, West Virginia 26102
(304) 420-5501

Phone: 202-804-6245
Facsimile: 202-429-9574
sbuchert@lambdalegal.org

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
NICHOLS KASTER, PLLP
IDS Center, 80 South 8th Street
Suite 4700
Minneapolis, MN 55402
Phone: 612-256-3200
Facsimile: 612-338-4878
aprakash@nka.com
nschladt@nka.com

Attorneys for Plaintiffs

Fax: (304) 420-5587
aboone@bowlesrice.com

Stuart A. McMillan (WVSB #6352)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25301
(304) 347-1110
Fax: (304) 347-1746
smcmillan@bowlesrice.com

*Counsel for Defendant The Health Plan of
West Virginia, Inc.*

EXHIBIT 4

L R Civ P 26.4 - Rule 502(d) Form (06/08/2017)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

CHRISTOPHER FAIN,
individually and on behalf of all others
similarly situated, *et al.*,

Plaintiffs,

v.

CIVIL ACTION: 3:20-0740

WILLIAM CROUCH, *et al.*,

Defendants.

**AGREED ORDER GOVERNING THE INADVERTENT DISCLOSURE
OF DOCUMENTS OR OTHER MATERIAL UNDER RULE 502(d)**

Pursuant to Federal Rule of Evidence 502(d) and the agreement of the parties, the Court hereby **ORDERS** that the following procedures shall govern the inadvertent production of privileged or confidential documents:

I. CLAWBACK OF PRIVILEGED OR PROTECTED DOCUMENTS

A. Subject to the provisions of this Order, if a party discloses information (the “Disclosing Party”) in connection with the pending litigation that the Disclosing Party thereafter claims to be privileged or protected by the attorney-client privilege or work product protection (“Protected Information”), the disclosure of that Protected Information shall not constitute or be deemed a waiver or forfeiture—in this or any other action—of any claim of privilege or work

product protection that the Disclosing Party would otherwise be entitled to assert with respect to the Protected Information and its subject matter.

B. The Disclosing Party shall, within 7 days of the discovery of the inadvertent disclosure, notify the party receiving the Protected Information (“the Receiving Party”), in writing, that it has disclosed Protected Information without intending a waiver by the disclosure. The Disclosing Party must explain in the notification as specifically as possible why the Protected Information is privileged or protected. The Disclosing Party shall identify the Protected Information by Bates-stamped number. If the Protected Information is not Bates-stamped, the Disclosing Party shall identify the Protected Information in a manner that reasonably permits the Receiving Party to easily locate the Protected Information at issue.

C. Upon receiving notification of the inadvertent disclosure, the Receiving Party must—unless it contests the claim of attorney-client privilege or work product protection in accordance with Paragraph D—promptly (i) notify the Disclosing Party that it will make best efforts to identify and return, sequester, or destroy (or in the case of electronically stored information, delete) the Protected Information and any reasonably accessible copies it has, and (ii) provide a certification that it will cease further review, dissemination, and use of the Protected Information. For purposes of this Order, Protected Information that has been stored on a source of electronically stored information that is not reasonably accessible, such as backup storage media, is sequestered. If such data is retrieved, the Receiving Party must promptly take steps to delete or sequester the restored protected information.

D. Any challenge to the Disclosing Party’s claim of privilege or work product protection shall be made, in writing, by the Receiving Party within 7 days after being notified of the Disclosing Party’s request to clawback the Protected Information. The parties shall promptly

meet and confer, in person or by telephone, to determine if the challenge can be resolved without judicial intervention. If the parties are unable to resolve the dispute, the Disclosing Party shall move the Court for a Protective Order compelling the return or destruction of the information claimed to be Protected Information. The Motion for a Protective Order, response to the motion, and reply memorandum may be filed under seal, if appropriate. The Receiving Party may not assert as a ground for compelling disclosure of the information the fact or circumstance of its disclosure. Pending resolution of the Motion for a Protective Order, the Receiving Party must not use the challenged information in any way or disclose it to any person other than those required by law to be served with a copy of the sealed Motion for Protective Order.

E. The parties may stipulate to extend the time periods set forth in Paragraph B and D of this Order.

F. Nothing in this Order overrides any attorney's ethical responsibilities to refrain from examining or disclosing materials that the attorney knows, or reasonably should know, to be privileged and to inform the Disclosing Party that such materials have been produced.

G. The Disclosing Party retains the burden—upon challenge pursuant to Paragraph D—of establishing the privileged or protected nature of the Protected Information.

H. Nothing in this Order limits the right of any party to petition the Court for an *in camera* review of the Protected Information.

I. This Order does not preclude a party from voluntarily waiving the attorney-client privilege or work product protection. The provisions of Fed. R. Evid. 502(a) apply when the Disclosing Party uses or indicates that it may use information produced under this Order to support a claim or defense.

J. The provisions Fed. R. Evid. 502(b)(2) are inapplicable to the production of Protected Information under this Order.

II. DISCLOSURE OF DOCUMENTS INADVERTENTLY NOT DESIGNATED AS CONFIDENTIAL

In the event that a Disclosing Party mistakenly produces confidential information without a confidentiality designation as permitted by the Protective Order entered in this litigation, the following procedures shall apply:

A. The Disclosing Party shall, within 7 days of the discovery of the production, notify the Receiving Party in writing, identifying the confidential information by Bates-stamped number. If the confidential information is not Bates-stamped, the Disclosing Party shall identify the confidential information in a manner that reasonably permits the Receiving Party to easily locate the confidential information at issue. Within 7 days thereafter, the Disclosing Party shall provide a replacement copy of the confidential information, marked “**CONFIDENTIAL**” and properly Bates-stamped with the original number, if applicable. The Receiving Party shall promptly destroy or return the confidential information mistakenly produced without a confidentiality designation, including any copies it has, and replace it with the confidential information properly designated as confidential.

B. If a Receiving Party disputes the Disclosing Party’s claim of confidentiality, the Receiving Party may move the Court to challenge the confidential designation in accordance with the provisions of the Protective Order entered in this case. If a Receiving Party elects to file such a motion, the Receiving Party may retain possession of the confidential information, but shall treat it in accordance with the terms of the Protective Order pending resolution of the motion. If the Receiving Party’s motion is denied, the parties shall promptly comply with Paragraph II. A. of this Order.

C The production of such document does not constitute a waiver of any claim of confidentiality as set forth in the Protective Order in this matter, unless otherwise determined by the court.

The Clerk is hereby directed to send copies of this Order to counsel of record and any unrepresented party.

ENTER:

Parties and Counsel:

Dated: August 20, 2021

Respectfully submitted,

/s/ Walt Auvil

Walt Auvil, WWSB No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058
Facsimile: 304-485-6344
auvil@theemploymentlawcenter.com

Avatara Smith-Carrington, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
Phone: 214-219-8585
Facsimile: 214-219-4455
asmithcarrington@lambdalegal.org

Tara L. Borelli, Visiting Attorney
Carl Charles, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
158 West Ponce De Leon Ave., Ste. 105
Decatur, GA 30030
Phone: 470-225-5341
Facsimile: 404-506-9320
tborelli@lambdalegal.org
ccharles@lambdalegal.org

Lou Ann S. Cyrus, Esquire (WWSB #6558)
Roberta F. Green, Esquire (WWSB #6598)
Caleb B. David, Esquire (WWSB #12732)
Kimberly M. Bandy, Esquire (WWSB #10081)
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

***Counsel for Defendants William Crouch,
Cynthia Beane, and West Virginia Department
of Health and Human Resources, Bureau for
Medical Services***

Perry W. Oxley (WWSB#7211)
David E. Rich (WWSB#9141)
Eric D. Salyers (WWSB#13042)
Christopher K. Weed (WWSB#13868)
OXLEY RICH SAMMONS, PLLC
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)

Nora Huppert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
Phone: 213-382-7600
Facsimile: 213-351-6050
nhuppert@lambdalegal.org

Sasha Buchert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245
Facsimile: 202-429-9574
sbuchert@lambdalegal.org

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
NICHOLS KASTER, PLLP
IDS Center, 80 South 8th Street
Suite 4700
Minneapolis, MN 55402
Phone: 612-256-3200
Facsimile: 612-338-4878
aprakash@nka.com
nschladt@nka.com

Attorneys for Plaintiffs

poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Counsel for Defendant Ted Cheatham

Aaron C. Boone (WVSB #9479)
BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, Post Office Box 49
Parkersburg, West Virginia 26102
(304) 420-5501
Fax: (304) 420-5587
aboone@bowlesrice.com

Stuart A. McMillan (WVSB #6352)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25301
(304) 347-1110
Fax: (304) 347-1746
smcmillan@bowlesrice.com

*Counsel for Defendant The Health Plan of
West Virginia, Inc.*

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN,
individually and on behalf of all others
similarly situated, *et al.*,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

STIPULATION FOR VIRTUAL DEPOSITIONS

Plaintiffs Christopher Fain, Zachary Martell, and Brian McNemar (“Plaintiffs”), together with Defendants William Crouch; Cynthia Beane; West Virginia Department of Health and Human Resources, Bureau for Medical Services; Ted Cheatham; and The Health Plan of West Virginia, Inc. (“Defendants”) (collectively “the Parties”), stipulate and agree to the following parameters to govern all virtual depositions in above-captioned matter.

1. Depositions referred to herein as “virtual” are those in which all who intend to participate—the Parties, their attorneys, and the witness—will all appear electronically and separately on the court reporter’s preferred video-conferencing platform. In other words, the court reporter will not be physically present with the witness, the witness’s attorney (when applicable) will not be physically present with the witness, and the questioning attorney will not be physically present with the witness.

2. The deponent, court reporter, examining counsel, and deponent’s counsel (when applicable) shall be visible on the platform to all other participants.

3. The deponent, court reporter, examining counsel, and deponent's counsel (when applicable) shall attend unmuted at all times when on the record. All other persons attending the deposition shall make their presence known to all other participants, but they shall keep their microphones on mute unless they wish to speak, and after having spoken, they shall go back on mute.

4. No counsel shall engage in private communications, including through text message, email, or a chat feature inside or outside of the videoconferencing system, with any deponent while the deposition is on the record. In the event counsel intends to initiate a private communication with any deponent for the purpose of determining whether a privilege should be asserted, counsel shall state their intention on the record before initiating communication. Nothing in the paragraph is meant to alter any applicable rules governing communications with witnesses during a deposition.

5. Exhibits will be handled in one of the following ways.

- a. Option 1: Exhibits shall be shared with the witness, court reporter, and opposing counsel by publishing on the conferencing platform during the deposition. When possible on the platform used, at the witness's request, the witness shall be given control so that they may adequately review the document before questioning regarding the document. A copy of all marked exhibits will subsequently be sent to the court reporter by examining counsel, and carbon copied to the opposing party, in PDF format after the deposition concludes.
- b. Option 2: Exhibits shall be pre-marked by examining counsel and electronically transmitted in PDF format to the court reporter before the

Facsimile: 304-485-6344
auvil@theemploymentlawcenter.com

Avatara Smith-Carrington, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
Phone: 214-219-8585
Facsimile: 214-219-4455
asmithcarrington@lambdalegal.org

Tara L. Borelli, Visiting Attorney
Carl Charles, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
158 West Ponce De Leon Ave., Ste. 105
Decatur, GA 30030
Phone: 470-225-5341
Facsimile: 404-506-9320
tborelli@lambdalegal.org
ccharles@lambdalegal.org

Nora Huppert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
Phone: 213-382-7600
Facsimile: 213-351-6050
nhuppert@lambdalegal.org

Sasha Buchert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245
Facsimile: 202-429-9574
sbuchert@lambdalegal.org

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
NICHOLS KASTER, PLLP
IDS Center, 80 South 8th Street
Suite 4700

P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

***Counsel for Defendants William Crouch,
Cynthia Beane, and West Virginia Department
of Health and Human Resources, Bureau for
Medical Services***

Perry W. Oxley (WVSB#7211)
David E. Rich (WVSB#9141)
Eric D. Salyers (WVSB#13042)
Christopher K. Weed (WVSB#13868)
OXLEY RICH SAMMONS, PLLC
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Counsel for Defendant Ted Cheatham

Aaron C. Boone (WVSB #9479)
BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, Post Office Box 49
Parkersburg, West Virginia 26102
(304) 420-5501
Fax: (304) 420-5587
aboone@bowlesrice.com

Stuart A. McMillan (WVSB #6352)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25301
(304) 347-1110
Fax: (304) 347-1746

Minneapolis, MN 55402
Phone: 612-256-3200
Facsimile: 612-338-4878
aprakash@nka.com
nschladt@nka.com

Attorneys for Plaintiffs

smcmillan@bowlesrice.com

*Counsel for Defendant The Health Plan of
West Virginia, Inc.*