

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

**CHRISTOPHER FAIN; ZACHARY  
MARTELL; and BRIAN MCNEMAR,  
individually and on behalf of all others similarly  
situated,**

**Plaintiffs,**

vs.

**Case No.: 3:20-cv-00740  
Judge Robert C. Chambers**

**WILLIAM CROUCH, in his official capacity as  
Cabinet Secretary of the West Virginia  
Department of Health and Human Resources;  
CYNTHIA BEANE, in her official capacity as  
Commissioner for the West Virginia Bureau for  
Medical Services; WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN  
RESOURCES, BUREAU FOR MEDICAL  
SERVICES; TED CHEATHAM, in his official  
capacity as Director of the West Virginia Public  
Employees Insurance Agency; and THE  
HEALTH PLAN OF WEST VIRGINIA, INC.,**

**Defendants.**

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

Defendant Ted Cheatham, in his official capacity as Director of the West Virginia Public Employees Insurance Agency ("this Defendant"), by and through counsel, Perry W. Oxley, David E. Rich, Eric D. Salyers, Christopher K. Weed, and the law firm of Oxley Rich Sammons, PLLC, hereby submits his Response to Plaintiffs' Motion for Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(D) Clawback Order, and Order Regarding Virtual Depositions. *See* ECF 77. In support of his Response, the Defendant states the following:

1. The Stipulation for Virtual Depositions (ECF 89), Protective Order (ECF 90), and 502(D) Clawback Order (ECF 91) have all been filed with the Court. Thus, the only issues that remain are the ESI protocol and the Deposition Protocol Order.

2. With respect to the Deposition Protocol Order (ECF 77-5), the Defendant is in agreement with the content, except for the limitation of 5 depositions without seeking leave of Court.

3. The Defendant, at this early stage in the litigation, sees no reason to depart from the normal limit of 10 depositions without leave of Court. *See* Fed. R. Civ. P. Rule 30(a)(2)(A)(i). The Defendant believes it is improper to limit him to 5 depositions in a class action case. Other than that limitation, the Defendant does not oppose the protocol.

4. With respect to the ESI Protocol, the Defendant believes that the same is overly broad and not necessary in this case.

5. This Defendant is the Director of the West Virginia Public Employees Insurance Agency (“PEIA”). PEIA is a state agency created by statute. *See* W. Va. Code §§5-16-1 et seq.

6. There are several issues PEIA would encounter in trying to navigate the production of certain ESI materials. For example, another state agency, the West Virginia Office of Technology, houses PEIA’s emails. Thus, PEIA has to request any email production through the West Virginia Office of Technology and will rely on the West Virginia Office of Technology to conduct the search and produce the emails.

7. Plaintiffs’ proposed ESI protocol (ECF 77-3) seeks to establish a global format of production for every document request they make in this case.

8. “Clearly, Rule 34 contemplates that upon a parties request to produce ESI, the responding party must produce it organized and labeled to correspond to the categories in the request unless the responding party can produce it as it is maintained in the ordinary course of its

business.” *F.D.I.C. v. Baldini*, No. CIV.A. 1:12-7050, 2014 WL 1302479, at \*8 (S.D.W. Va. Mar. 28, 2014).

9. Defendant Cheatham will aspire to produce documents in good faith in the native format of the document, however, such a broad overarching global order overseeing production is completely unnecessary in this case.

10. For example, Defendant Cheatham has responded to discovery already in this case, producing documents in PDF, word, and excel.

11. If the Plaintiffs’ have an issue with the format of production in response to a specific request, they can indicate such an issue pursuant to the Federal Rules of Civil Procedure.

12. Furthermore, pursuant to LR Civ P 26.5, such a process is only needed when the “party in possession of ESI reasonably anticipates, or should anticipate, that its ESI will play a *significant* role.” (emphasis added).

13. This case involves the question of whether the PEIA’s written policies violate the Plaintiffs’ constitutional rights. The Defendant believes the discovery will be focused on the Plaintiffs’ claims for insurance benefits and the policies themselves, which will not involve significant ESI discovery.

14. The parties should address any ESI issues on a case by case basis, as such a global process is clearly unnecessary in this case.

**TED CHEATHAM, in his official  
capacity as Director of the West Virginia  
Public Employees Insurance Agency,**

**BY COUNSEL**

s/Perry W. Oxley

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

Phone: (304) 522-1138

Fax: (304) 522-9528

[poxley@oxleylawwv.com](mailto:poxley@oxleylawwv.com)

[drich@oxleylawwv.com](mailto:drich@oxleylawwv.com)

[esalyers@oxleylawwv.com](mailto:esalyers@oxleylawwv.com)

[cweed@oxleylawwv.com](mailto:cweed@oxleylawwv.com)

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**Defendants.**

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing “**Defendant Ted Cheatham’s Response to Plaintiffs’ Motion for Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(D) Clawback Order, and Order Regarding Virtual Depositions**” on this 3<sup>rd</sup> day of **September, 2021**, with the Clerk of the Court using the CM/ECF system, which will send notification of filing, and a copy of the same, to the following CM/ECF participants:

Walt Auvil, WVSB No. 190  
THE EMPLOYMENT LAW CENTER,  
PLLC  
1208 Market Street  
Parkersburg, WV 26101  
Phone: 304-485-3058  
Facsimile: 304-485-6344  
[auvil@theemploymentlawcenter.com](mailto:auvil@theemploymentlawcenter.com)  
*Counsel for Plaintiffs*

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](mailto:asmithcarrington@lambdalegal.org)  
*Counsel for Plaintiffs*

Anna P. Prakash, Visiting Attorney  
Nicole J. Schladt, Visiting Attorney  
NICHOLS KASTER, PLLP  
IDS Center, 80 South 8th Street  
Suite 4600  
Minneapolis, MN 55402  
Phone: 612-256-3200  
Facsimile: 612-338-4878  
[aprakash@nka.com](mailto:aprakash@nka.com)  
[nschladt@nka.com](mailto:nschladt@nka.com)  
*Counsel for Plaintiffs*

Tara L. Borelli, Visiting Attorney  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
730 Peachtree Street NE, Suite 640  
Atlanta, GA 30308  
Phone: 470-225-5341  
Facsimile: 404-897-1884  
[tborelli@lambdalegal.org](mailto:tborelli@lambdalegal.org)  
*Counsel for Plaintiffs*

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](mailto:sbuchert@lambdalegal.org)  
*Counsel for Plaintiffs*

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](mailto:nhuppert@lambdalegal.org)  
*Counsel for Plaintiffs*

Lou Ann S. Cyrus, Esquire  
Roberta F. Green, Esquire  
Caleb B. David, Esquire  
Kimberly M. Bandy, Esquire  
Shuman McCuskey Slicer PLLC  
Post Office Box 3953  
Charleston, West Virginia 25339  
(304) 345-1400  
Fax: (304) 343-1826  
[lcyrus@shumanlaw.com](mailto:lcyrus@shumanlaw.com)  
[rgreen@shumanlaw.com](mailto:rgreen@shumanlaw.com)  
[cdavid@shumanlaw.com](mailto:cdavid@shumanlaw.com)  
[kbandy@shumanlaw.com](mailto:kbandy@shumanlaw.com)

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

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

Aaron C. Boone  
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](mailto:aboone@bowlesrice.com)

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

s/Perry W. Oxley

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Perry W. Oxley (WVSB #7211)  
David E. Rich (WV Bar #9141)  
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