

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

TABATHA BARNES, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CIV-16-184-HE
	)	
THE CITY OF OKLAHOMA CITY	)	
a municipal corporation, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**DEFENDANT CITY’S OBJECTION TO PLAINTIFFS’ MOTION TO COMPEL  
RULE 30(b)(6) DEPOSITION OF DEFENDANT CITY OF OKLAHOMA CITY  
AND BRIEF IN SUPPORT**

Defendant, the City of Oklahoma City (“City”), by and through counsel of record, Richard N. Mann, respectfully objects to the motion to compel by Plaintiffs. In support hereof Defendant City states as follows:

1. Plaintiffs filed this case on February 25, 2016 (Doc.# 1) Most of the operative facts for this case occurred in 2015, and some potentially as early as 2014.
  
2. According to Plaintiffs themselves, in their motion to compel, they never sought a FRCP 30(b)(6) deposition before February of 2020. (Doc. #332, paragraph 6). In fact, there is nothing in the record on the docket sheet for this case that Plaintiffs ever filed a notice for a 30(b)(6) deposition before the first one they reference in paragraph 7 of the motion to compel which was on July 6, 2020. (Doc. # 267)
  
3. Therefore, Plaintiffs filed their suit in 2016 and waited over four (4) years before pursuing a deposition of a City representative. In the meantime, Plaintiffs took

eleven (11) depositions by their own count which were all employees of the City of Oklahoma City, assigned to the police department, as well as Daniel Holtzclaw. All of the ten depositions were ranking OCPD officers and included three majors, one captain, three lieutenants, one of the lead detectives in this case, as well as that of Chief of Police, Bill Citty, on February 19, 2020, after he had retired. Plaintiffs also took the deposition of Deputy Chief Johnny Kuhlman on September 19, 2020, who was also retired at the time of the deposition and was the Federal Marshall for this District when he was deposed.

4. These eleven depositions taken by Plaintiffs span a period of 17 months, from September 2018 to February 2020. Additionally, it appears that Plaintiffs made a strategic decision to take the depositions of two defendants first, then take the depositions from lower ranking personnel at the time of the incident to higher ranking as follows:

- September 19, 2018 – Defendant Lt. Brian Bennett
- January 17, 2019 – Defendant Det. Rocky Gregory
- February 28, 2019 – Lt. Arthur Gregory (now Captain Gregory)
- March 26, 2019 – Lt. Timothy Muzny
- March 27, 2019 – Captain Ron Bacy (now Deputy Chief Bacy)
- April 23, 2019 – Major Brian Jennings (now Deputy Chief Jennings)
- April 25, 2019 – Major Mike Hoskins (retired at time of depo)
- April 29, 2019 - Major Denise Wenzel (retired at time of depo)
- Sept. 19, 2019 – Deputy Chief Johnny Kuhlman (retired at depo)
- February 19, 2020 – Chief Bill Citty (retired at time of depo)

5. Plaintiffs also, as they reference in paragraph 5 of their motion, participated in 16 other depositions, including one of the lead detectives in this case, Kim Davis, as well as another OCPD investigator, Det. Valari Homan. Both Det. Davis and Det. Homan were retired at the time of their depositions.

6. All of the officers deposed were involved in the investigation, discipline and subsequent prosecution of Holtzclaw. Almost all of them were intimately familiar with the policies and procedures of any relevancy to the Daniel Holtzclaw case, especially Chief Citty, Deputy Chief Johnny Kulman, Major Wenzel, Major Hoskins and Major Jennings. In fact, many of them were asked questions about policies, procedures, protocols, investigations, discipline, complaints and any other area of inquiry now proposed by Plaintiffs for inquiry again.

7. Not only has Citty, Wenzel, Hoskins and Kulman, retired from the City or moved on, the lead counsel for the City, namely Richard Smith, who had a vast amount of institutional knowledge from representing the City and primarily the police department for 35 years, retired in July 2020 and moved out of state.

8. Upon the undersigned advising Plaintiffs' counsel that the City could not comply with Plaintiffs' first notice of 30(b)(6) deposition with topic areas of such complexity, which had been covered in previous depositions, by the notice date of July 22<sup>nd</sup>, 2020, which was within 8 days from discovery cutoff of August 1, 2020, (See: Doc. # 263, Revised Scheduling Order), to counsel's credit, they withdrew the notice. (Doc.# 276).

9. Thereafter, the undersigned sent correspondence to Plaintiffs' counsel on August 27, 2020, advising the reasons that the City could not comply with their request at this late date and that almost all of the areas of inquiry had been previously addressed. (See: Exhibit "1" letter from Richard Mann). Furthermore, the letter addressed topic areas that had also been inquired upon and at least one area that the court had already ruled was irrelevant in an earlier discovery dispute. (ie., use of force investigations and screening committee reviews from 2011 to 2014). The letter ended by stating that the City could not comply but that the undersigned would be happy to discuss.

10. Notwithstanding the letter of August 27, 2020, and what is recalled as phone calls discussing the requested 30(b)(6) deposition, Plaintiffs' counsel filed the identical notice and topic areas (Doc. # 290) on September 16, 2020, with a deposition date on September 30, 2020, the day before the discovery cutoff of October 1, 2020. (see: Doc.#279, Rev'd Scheduling Order). The undersigned cannot locate a document indicating that the notice was withdrawn but recalls that Plaintiffs' counsel agreed to strike the notice when the undersigned again complained.

11. Thereafter, during another phone conference attempting to resolve the parties' differences about the deposition, the undersigned and his co-counsel, Sherri Katz, understood that Plaintiffs' counsel, at the City's suggestion, were going to submit a list of questions for review by them and potential police officials that could address the topic areas with much less imposition and burden and expenditure of time on the part of the City. However, instead of receiving a series of questions that the City could attempt to answer, Plaintiffs filed another notice of deposition with 22 areas of inquiry. (Doc. # 326). That

notice, filed on May 18, 2021, had a date of June 1, 2021 for the deposition. That was the final day of discovery from yet another scheduling order. (Doc. # 324). There have been some intermittent extensions of the dates for other reasons in the meantime.

12. Plaintiffs withdrew this notice after correspondence with the undersigned that included that the City could not produce a witness, again, but that it was agreeable to another extension of time to allow Plaintiffs to seek a court order.

### **BRIEF IN SUPPORT**

As Plaintiffs' counsel, DaMario Solomon-Simmons stated at the start of former Chief Bill Citty's deposition, "...he wanted to exhaust his [Citty's] knowledge about this particular case, and therefore, I will be asking you a series of questions about a whole host of topics..." As the letter of August 27, 2021, pointed out to Plaintiffs' counsel, the deposition of Citty, as well as those of all the other administrative officials of the police department covered every topic of concern referenced in Plaintiffs' 30(b)(6) notices.

It is important to note that Plaintiffs started their depositions of police employees at the ground floor and worked their way up to administrative officials, concluding with Chief Bill Citty. Understanding that the 30(b)(6) deposition is not a uniquely new addition to the federal rules of civil procedure, Plaintiffs could have availed themselves of its purpose while there were still officers familiar with the topics employed at the City in 2015 *and not five to six years later*. Additionally, Plaintiffs have already inquired and deposed those individuals who most certainly were in a position to bind the City at the time they were deposed, including Lieutenants, Captains, Majors, Deputy Chiefs and the Chief of Police.

It makes little sense to suggest that the City can somehow come into court whenever

this matter comes before the court on summary judgment or at a trial, and conveniently announce that the policies and procedures announced by serving officials, most notably the Chief and Deputy Chief, at their depositions were in error. Any individual who could give testimony today at a 30(b)(6) deposition would be required to guess or speculate at policies and other topic areas of inquiry for events that occurred almost 6 years ago.

In fact, in one email correspondence about the requested 30(b)(6) deposition, plaintiffs' counsel has suggested just that: that a City representative, prior to the deposition, attest, or stipulate to the truth of witnesses who have already testified in this case. However, in the same correspondence the City would still have to offer witnesses on the same topic. (See: Exhibit 2, correspondence from Kymberli Heckenkemper) This request that the City present witness(es) to pass on the truth of prior deposed witnesses suggests Plaintiffs seek a veritable discovery crap shoot where Plaintiffs get to depose a City witness to critique the truthfulness of City officials about events from six years ago.

Pursuant to FRCP 30(b)(6) a party must “. . .describe with reasonable particularity the matters” for inquiry. The noticed party must designate individuals to respond on those areas that have been described as “reasonable particularity.” However, these areas and testimony must still be consistent with other discovery concepts such as relevancy and privilege. (See: FRCP 26(b) “. . .parties may obtain discovery regarding any nonprivileged matter, that is relevant to any party's claim or defense and proportional to the needs of the case . . . and whether the burden or expense of the proposed discovery outweighs its likely benefit...”). The rule requires a balancing between importance of the discovery in resolving the issues and “. . .whether the burden or expense. . .outweighs its

likely benefit. . .”.

Rule 26 (c) on “Protective Orders” provides that a party may move for a protective order where the parties cannot resolve their differences. The Court may enter an order to protect a party or person from “. . .annoyance, harassment, embarrassment, oppression or undue delay, burden or expense, including one or more of the following:

(A) Forbidding the discovery. . .

. . .

C) Prescribing a discovery method other than the one selected by the party..

D) Forbidding inquiry into certain matters, or limiting the scope of the disclosure or discovery to certain matters. . .

The party seeking the deposition of a corporate representative must "describe with *reasonable particularity* the matters for examination." (emphasis added). The "reasonable particularity" requirement will be enforced by the court and a generic notice of deposition is not sufficient. *See, e.g., Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1058 (7th Cir. 2000). "[T]he requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and ***that are relevant to the issues in dispute.***" *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000) (emphasis added); *see also Alexander v. Federal Bureau of Investigation*, 188 F.R.D. 111, 114 (D. D.C. 1998) (rejecting notice to depose on "any matters relevant to this case" as not meeting the "reasonable particularity" requirement).

Fed. R. Civ. P. 30(b)(6) was intended to cut through the tactics of bandying by introducing the concept of an organizational deposition: while a human would testify, that

human was appearing not in his or her individual capacity but as the voice of the corporation or partnership or whatever form the deposed organization took. Although Rule 30(b)(6) does not expressly limit the subject matter or number of topics that may be questioned in the deposition, the discovery protections available to an individual deponent are also available to a corporate representative. *See* Fed. R. Civ. P. 26(c) (permitting the court to make certain rulings "necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense").

In determining whether a subpoena, or a notice such as in this case, is unduly burdensome and unreasonable, the Court must consider the facts of the case, "such as the party's need for the documents and the nature and importance of the litigation." *WIWA v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004). Six factors are considered in making this determination, including "(1) **relevance** of the information requested; (2) the need of the party for the documents; (3) the **breadth** of the document request; (4) the **time period** covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the **burden** imposed." *Id.* (emphasis added). Furthermore, when non-parties are subpoenaed for documents, the court also considers "the expense and inconvenience to the non-party." *Id.*

One of the fundamental rules of discovery is that it should seek relevant evidence or evidence that could lead to relevant evidence. In this case, the Plaintiffs have waited 5 years to pursue a deposition of a City representative. While the City could present a representative for its *current* policies, they are not of particular relevancy to the way the department handled its matters 5 years ago. In any event, any changes by the City to any



of the topics that Plaintiffs seek to inquire about would be barred by subsequent remedial measures of the FRE 407. The deposition of a City representative could require the attendance of many/several City witnesses and would result in a completely unnecessary waste of time and resources. That alone makes the proposed 30(b)(6) deposition an undue and overly burdensome event for the City that the Court should deny.

Moreover, without putting too fine a point on it, (and was pointed out in its letter of August 27, 2020), the Plaintiffs have been dilatory in pursuing a deposition of a City representative. The fact that they have deposed many of the top police officials with relevant testimony about the time frame which is at the heart of this case, and could have caused the City to designate one or more of them by simply noticing them for a 30(b)(6) deposition should prevent them from taking one now. Additionally, Plaintiffs have, by their own admission, taken eleven (11) depositions to date. (Doc. #332, paragraph 4)1. Federal Rule of Civil Procedure 30(a)(2)(A)(i) requires Plaintiffs to obtain leave of court to take more than ten depositions as Defendant City has not stipulated to Plaintiffs taking more than ten depositions.

As was suggested by the City in at least one conversation, if the court is inclined to grant Plaintiffs' motion to compel, it should require the Plaintiff to provide written questions in lieu of a deposition at this late date, as provided for in either FRCP 31, or as

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1 Plaintiffs have actually only taken ten depositions, although Plaintiffs have participated in all depositions to date. The deposition of Det. Rocky Gregory was actually noticed and taken by Defendant Holtzclaw.

interrogatories at FRCP 33 to make this process less burdensome and expensive on the City.

FRCP 26(b)(2)(B) provides:

...On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or...

Accordingly, the Court should deny the Plaintiffs' Motion to Compel as they have had more than ample opportunity to take the proposed deposition at any time during the first four-year period of time that this lawsuit was on file.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that the Court denies the Plaintiffs' motion and any and all other relief the Court deems appropriate.

Respectfully Submitted,

Kenneth Jordan  
MUNICIPAL COUNSELOR

/s/ Richard N.Mann  
Sherri R. Katz, OBA # 14551  
Richard N. Mann, OBA # 11040  
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Attorneys for Defendant City

CERTIFICATE OF SERVICE

I hereby certify that on the 19<sup>th</sup> day of July 2021, I electronically transmitted the above document to the Clerk of the Court using ECF filing system. Based on the records currently on file in this case, the Clerk of the Court will transmit Notice of Electronic filing to those registered participants of the Electronic Case Filing System.

/s/ Richard N. Mann  
Assistant Municipal Counselor



The City of  
**OKLAHOMA CITY**  
OFFICE OF THE MUNICIPAL COUNSELOR  
KENNETH JORDAN  
Municipal Counselor

August 27, 2020

Damario Solomon-Simmons  
601 Boulder Ave., Suite 600  
Tulsa, Oklahoma 74119

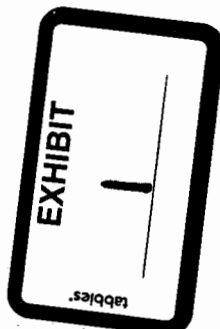
Kymerli Heckenkemper  
502 West 6<sup>th</sup> Street  
Tulsa, OK 74119

Re: **Proposed 30(b)(6) Deposition**  
*Barnes, et al. v. City, et al.*  
U.S. District Court for the Western District of Oklahoma  
Case No. CIV-16-184-HE

Counsel:

Generally, the Plaintiffs have taken fourteen (14) depositions in these cases. Those have included various officers of the Oklahoma City Police Department from patrol officers to majors, Deputy Chief Kuhlman and now retired Chief Bill City. Every facet of relevant police work or activity proposed in the former FRCP 30(b)(6) (Doc. # 130) has been examined, or touched upon, by Plaintiffs and their counsel. (Doc. # 130 was withdrawn by Plaintiff's counsel). To present a witness(es) to answer the proposed topics would be redundant to say the least, and amount to unduly annoying and burdensome under the FRCP 30(d)(3) and should not be required.

More specifically, Major Denise Wenzel, now retired, was deposed in this matter, as well as then Deputy Chief Johnny Kuhlman. Retired Police Chief William City, who was the chief of the police department from 2003 until his retirement in 2019 was deposed by Plaintiff's counsel for a full 7-hour day and addressed almost every topic referenced in the notice. In fact, Plaintiff's counsel, Damario Solomon-Simmons, started off the City deposition with a comment that he "...wanted to exhaust his knowledge about this particular case, and therefore, I will be asking you a series of questions about a whole host of topics..." True to his word, he did just that.



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Citty expressed that over his 41 years of a career with the Oklahoma City Police Department, he held various positions starting with patrol officer eventually rising to the Chief for his last 15 years. In the meantime he held a variety of positions such as an investigator in the narcotics, vice and homicide. He rose through the ranks as a sergeant, lieutenant, captain, major, and deputy chief to the chief position. He oversaw various units as a supervisor. As the Chief, he had ultimate authority over the internal affairs and discipline of officers. Notably, he was the police chief during the time frame which is the subject of this lawsuit.

At his deposition, Citty repeatedly provided testimony about policies and procedures of the police department and had good knowledge of them at least in part because of his various experiences in the police department. His testimony, included but was not limited to: describing the differences between policies and procedures and how they are in place to help hold officers accountable; a protocol to send sexual assault allegations to the sex crimes unit (item # 1); "call out" procedures(item # 18); utilization of lineups of suspects in this case and others; and report writing by officers and review of the same by supervisors.

He also discussed policies and procedures regarding: disciplining of officers(item # 3); field interview cards; "AVL" policy, (car locator); "putting an officer on the ground, i.e. administrative leave; citizen complaints and how they can obtain complaint forms.

Citty also discussed various topics such as training of officers specifically discussing training for officers who investigate other officers (item # 23). He was asked and discussed the difference between criminal investigation of officers as compared to administrative investigations. (Items # 2, and 17.) Citty was asked and discussed the training of officers in dealing with minority communities at least in part in the context of the concept of "proactive policing" and dealing with gang activity.

Citty commented on topics about the available computer systems and monitoring of officers. He was specifically asked about the "early intervention system," and described how the OCPD did not specifically monitor an officer's computer usage but the City does for all its personnel. He also discussed the "AVL" system and how its monitoring was impacted by the interaction by the FOP and the Collective Bargaining Agreement (CBA), to the extent that it prohibited random checking as opposed to complaint based. (Items # 22, 29, & 30.) Citty also testified about the police records system known as "VARUNA" which is specifically referenced in item # 4 of the notice.

Citty was specifically asked about policy 143.0 and could have been asked about "satisfactory disposition" if counsel had desired. (Item # 9.) Citty was asked about citizen complaints and how they go about making them and how they are followed up even to the point of describing how citizens can obtain forms. (Items # 7, 8, 10, 11, 12.)

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The difference between “calling out” an investigator in the Morris case as opposed to the Ligons complaint was discussed at length. (Item # 19.)

Items that have been addressed either in production, in discovery or otherwise, include:

# 5: there are no pool cars

# 20: there is no written policy telling officers not to have sex with offenders, suspects, or others in their employment as police officers.

On # 25, Plaintiffs have already been provided documentation on recruit class #128. The Defendant will not produce a witness to discuss this item as it is too broad and not narrowly tailored to address some specific training issue.

On # 26, the Court has already ruled that you’re not entitled to use of force investigations and screening committee reviews from 2011 to 2014. They are not relevant and the Defendant will not produce a witness to discuss them.

Similarly, on item # 27, Citty was asked about emails in regard to this case, specifically about emails from Major Wenzel to Kuhlman about a particular witness being a crackhead trading sex for drugs. In fact, it is apparent from the testimony that Major Wenzel was examined on this very topic. Plaintiff’s counsel could have asked any of these defense witnesses about email retention and accounts.

On item # 28, the right to resign employment is a voluntary endeavor and would not prevent the District Attorney from prosecuting an individual.

On item #29, Citty was asked about the early intervention system and why Holtzclaw was not interviewed earlier in the process. Defendant has already produced documents in regard to the Early Intervention Program.

Item # 31, Chief Citty specifically addressed this issue that if an individual declined to prosecute, the administrative investigation could still continue.

Item # 32, Citty testified that he was ultimately responsible for discipline of officers. Counsel could have asked him about the process and criteria for classifications.

I think this covers all the topics in the notice, with the exception of #'s 6, 13, 14, 15 & 16, although I think Citty probably addressed 6 on assignment of supervisors. Even if he didn’t, any of those items could have been addressed in the depositions of Kuhlman,

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and Wenzel, and probably Captain Bacy as well. The point of all this is that this case has been litigated for approximately 4 years and the individuals who were in the positions at the time who could have answered your topic areas were already either asked or could have been asked.

As you are aware City and Wenzel are both retired and Kuhlman has moved on to other employment. At this point in time, requesting a 30b6 deposition of a City representative appears to be nothing more than an inappropriate attempt to cause another document haul and search to enable a current police administrator to attempt to answer questions about police operations from five years ago or otherwise second guess earlier officials decisions. Notwithstanding the obvious irrelevancy of such speculation, anything that is the current standard would be subject to objections as subsequent remedial measures. I know of no way to accommodate your request to narrow the topics in way that could be answered regarding activities from five years ago, and don't believe its legally tenable to request someone to be a representative for an entity that no longer employs them.

I don't want to put too fine a point on it, but your delay in pursuing a 30(b)(6) until July 6, 2020, after the lawsuit was filed on January 12, 2016, for actions prior to that time, renders it unduly burdensome, oppressive, and unreasonable to try and comply. I will be happy to discuss with you if desired.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard N. Mann', with a horizontal line extending to the right.

Richard N. Mann  
Assistant Municipal Counselor

RNM/rp

**Katz, Sherri**

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**From:** Kymberli Heckenkemper <kheckenkemper@riggsabney.com>  
**Sent:** Tuesday, October 6, 2020 2:46 PM  
**To:** Mann, Richard N; Katz, Sherri; Tucker, Thomas L  
**Cc:** Damario Solomon-Simmons; Melvin Hall; Jessie Rosson; Jill York  
**Subject:** Barnes et al. v. City of OKC - 30(b)(6) deposition

Mr. Mann,

Regarding the Plaintiffs' request for a 30(b)(6) deposition, we propose the following compromise:

As to items 1-3, 7-12, 17-19, 21, 29-30, and 32 on the Plaintiffs' 30(b)(6) Notice, the City can submit verified statements by persons with the requisite knowledge adopting, stipulating to, and attesting to the truth of the testimony given by the witnesses that have already been deposed in this case regarding the matters listed in these items. The City would still produce witnesses to testify regarding these *topics*, but we will agree not to duplicate questions that have been asked and answered by deposition testimony already given and which will have been stipulated to by the City.

As to items 5 and 20, the City can submit verified statements by persons with the requisite knowledge stipulating to the factual statements you provided in your August 27 letter objecting to the 30(b)(6) notice.

As to item 25, we will agree to narrow the scope to the following subtopics: (1) field interviews; (2) voluntary contacts; (3) searches; (4) seizures; (5) investigative detentions; (6) use of department databases; (7) report writing and submission; and (8) preliminary investigations.

As to item 24, we will agree to limit the scope to the following subtopics: (1) the supervision of subordinate officers; (2) responding to citizen complaints and use of force investigations involving subordinate officers; (3) executing the Early Intervention Program; and (4) responding to allegations against OCPD officers reported as criminal reports rather than citizen complaints.

The City will present witnesses to testify regarding items 4, 23, 27, and 31.

I understand we likely will not be able to come to an agreement regarding the use of force investigations. Judge Heaton did rule that we were not entitled to production of documents relating to these investigations. However, he left open the possibility for us to submit another motion to persuade him that we should be entitled to this information. Accordingly, if necessary, we will make this argument to the court either in a motion to compel or in response to a motion for protective order.

Let us know if you'll accept this proposal and, if not, when you're available this week for a conference regarding these issues.

Thanks.

