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January 23, 2007

Honorable Richard D. Bennett  
United States District Court

Dear Judge Bennett:

This letter is respectfully submitted before the parties' January 24, 2007, 2:00 p.m. discovery conference call with your Honor in *Snyder v. Phelps, et al.*, Civ. No. RDB 06-1389

**PLAINTIFF'S PROPOSED STIPULATION AND CONSENT ORDER CONCERNING DISCOVERY.**

In response to Plaintiff's proposed stipulation and consent order concerning discovery, Defendants provided Plaintiff with a proposed substitute version on January 16, 2007, early on during the parties' phone conference on the matter. Plaintiff made no response to this proposed substitution other than his January 22, 2007, letter to the Court, even though the January 16 phone discussion made many provisions of Plaintiff's proposed order unnecessary (*e.g.*, the parties expect that, other than Fred W. Phelps, Sr., all remaining depositions of current defendants and any defendants successfully added to the Complaint, will be noted to take place in Maryland).

In support of the reasonableness of Defendants' suggested stipulation and consent order (attached to Plaintiff's January 22 letter at Exhibit B), Defendants state the following:

Defendants incorporates by reference the January 19, 2007, Affidavit of Timothy Phelps (attached hereto as Exhibit 1), who is both the Clerk of WBC, Inc., and WBC's corporate designee who executed WBC's very detailed and lengthy interrogatory answers that are being served this evening to Plaintiff. Timothy Phelps's Affidavit confirms that "none of the defendants and no member of WBC have any plan or intention of serving legal process of any kind on plaintiff's counsel while they are in Kansas," and that all defendants and WBC members "intend to treat plaintiff's counsel with the utmost courtesy in Kansas." Similarly, even though undersigned counsel has strong differences of opinion with many WBC views, he has met numerous WBC members, and has experienced their consistent courtesy firsthand.

Curiously, even though Plaintiff seeks a confidentiality agreement about matters including parties' health, his proposed Order, *e.g.*, at ¶ 2, discusses Fred W. Phelps's health situation. To the extent that Plaintiff's order seeks to limit lawyers at Phelps Chartered from filing any ethics complaints, Phelps Chartered – being a non-party to this lawsuit – would have limited recourse to challenge such an order in court. Moreover, to prohibit Phelps Chartered from

filing any ethics complaints raises the question whether that would run counter to any obligations of its lawyers under Kansas ethics rules to report violations of those ethics rules.

### **PLAINTIFF'S PROPOSED CONFIDENTIALITY AGREEMENT**

In his January 23, 2007, Plaintiff's counsel continues to vilify WBC, when the issue for the January 24 conference call is about a proposed protective order, and when the purpose of the trial, if summary judgment is denied, is limited to the counts in the Complaint, and not to stir up people's passions about WBC's views and actions.

In any event, WBC Clerk Tim Phelps's additional Affidavit, attached hereto as Exhibit 2, and incorporated hereto by reference, refutes the need for any confidentiality provision, but Defendants, nevertheless, are willing to entertain a much narrower agreement limiting Plaintiff Snyder's medical information to the four corners of this litigation.

In seeking a protective order, Plaintiff has the burden of demonstrating the material in question is confidential information, and that disclosure would cause an identifiable, significant harm. The showing requires specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of potential harm. *Deford v. Schmid Products Company*, 120 F.R.D. 648, 653 (D.Md. 1987). Here, however, Plaintiff's proposed order is vague (*e.g.*, in its definition of "defendants" and confidential information) and overbroad in such terms of preventing Defendants from knowing Plaintiff's medical information and in terms of not being limited to discovery information, even though such information is critical to Defendants in having an idea of their financial exposure if a Plaintiff's verdict is entered, and for making informed decisions about any settlement negotiations. Moreover, to grant Plaintiff's proposed order will be to impose cumbersome obligations on Defendants to contest and litigate inappropriate designations of certain material as confidential. Moreover, Shirley L. Phelps-Roper is both a lawyer at Phelps Chartered, and a likely new party to be listed in Plaintiff's proposed amended Complaint, which would create a conflict between ¶ 8(b) and 8(e) in Plaintiff's proposed order.

Plaintiff's counsel's general statements are not sufficient to override Tim Phelps's Affidavit (Exhibit 2) that dispells Plaintiff's insufficient efforts to besmirch Defendants' and WBC members' intentions with information obtained during discovery and this litigation. *Turnbull v. Topeka State Hospital*, 185 F.R.D. 645, 652 (D.Kan. 1999) ("Speculation does not constitute an adequate basis for a protective order.")

Before Defendants may be precluded from receiving discovery materials from counsel, the following test applies: 1) the harm posed by disclosure is substantial and serious, 2) the restraining order is narrowly drawn and precise, and 3) there must be no alternative means of protecting the public interest which intrudes less directly on the attorney-client relations. *Doe v. District of Columbia*, 697 F.2d 1115, 1119-20 (D.C.Cir. 1983).

Moreover, Plaintiff's proposed Order tramples on First Amendment rights to the free flow of information by improperly seeking to control a substantial universe of information. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499, *rehearing denied*, 467 U.S. 1267 (1984).

Respectfully,  
/s/ Jonathan L. Katz

