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February 22, 2007

Honorable Richard D. Bennett
United States District Court

Dear Judge Bennett:

Please permit and excuse the filing of this letter after the February 22, 2007, 5:00 p.m. filing deadline prior to our February 23 conference call. This week has been punishing, with daily court dates requiring so much after-hours preparation and energy that it was overoptimistic for me to have listed any day this week as available for a conference call with the concomitant obligation to submit a letter in advance. (Mr. Summers informed me on February 20 of the Friday conference call; in the meantime, I had an hours-long BZA hearing on February 20 preceded by several hours of final preparation therefor, a criminal trial date in Anne Arundel County on February 21, a criminal trial and criminal sentencing in two different counties on February 22, and in-depth preparation for a February 23 felony bond revocation hearing).

Defendants have done everything in good faith and without delay to reduce to writing everything that was agreed to for deposing Defendant Fred Phelps in Topeka, as discussed on the record with your Honor on January 24, 2007. Unfortunately, Plaintiff's counsel, in the end, waited two weeks to give me some take-it-or-leave-it provisions that went beyond the scope of the agreement reached during said January 24 conference call. By my attached February 16 e-mail (Exhibit 3 hereto), I encouraged Plaintiff's counsel for both of us to make the extra effort to resolve this matter without court intervention. Plaintiff's counsel refused, in very quick order sought a conference call with your honor, and submitted a conference call letter that casts further unfair and groundless aspersions on Defendants.

Here is a rundown of the parties' efforts to reduce to writing what was covered in the January 24 conference call. On January 26, Mr. Summers sent me a proposed stipulation that looked very similar to the one that became the subject of the January 24 conference call with your Honor (and which Mr. Summers attached to his letter for the January 24 conference call). (Exhibit 1 hereto). On the same day, I replied by e-mail as follows in pertinent part: "The resolution on this matter this past Wednesday, as I understand it, is to have no service of process on plaintiff and his counsel when they're in Kansas, and no use of the deposition visit to form any support or basis for any future jurisdiction or venue against them. Your draft seems possibly only to have made changes about who is being deposed, and that this is an agreement rather than an order." The next business day, I e-mailed Mr. Summers the attached proposed substitute stipulation, (Exhibit 2 hereto).

I heard silence from Mr. Summers about this stipulation for two weeks, until February 12 when he sent me the attached e-mail setting his own deadline of four days for him to seek Court intervention (Exhibit 3 hereto contains Mr. Summers' s February 12 e-mail, followed by mine from February 16). His e-mail included what amounted to circles on his previous draft

stipulation, with his accompanying e-mail saying the circled provisions were non-negotiable. (Exhibit 4 hereto).

My February 16 e-mail to Mr. Summers includes, in pertinent part: "Defendants agree to keep paragraphs 1, 3, 11, 12 and 13. - For paragraph 2, Defendants agree to amend it to: "Defendant Phelps, by and through counsel, represented to the Court that he is unable to travel to Maryland for a deposition." [Comment: Just as Plaintiff has sought confidentiality from the public about his health, Defendant Phelps seeks the same]. - Paragraph 5, 14, 16, 22, 23 and 24 are not agreed to. Defendants are without sufficient information to know what business Plaintiff and his counsel have done or not done in Kansas, so it is not reasonable for Defendants to agree about the extent of Plaintiff's and his counsels' activities in Kansas. Nor is it reasonable to bind anyone so broadly about the future. The language of these paragraphs appear to go beyond what was finally hammered out over the phone with Judge Bennett, except that Defendants' attached proposed stipulation already would bind Phelps Chartered upon Phelps Chartered's signature of a stipulated agreement. [February 23 update: On February 16, I told Mr. Summers that Phelps Chartered is willing to sign the same provisions that I agreed to sign for a stipulation for Fred Phelps' s deposition]. - Paragraph six duplicates paragraphs 2 and 3, so is not agreed to.

Consequently, Plaintiff' s counsel distorts the picture by saying that Defendants have done anything but work faithfully and diligently to memorialize in writing what had been agreed to on January 24. In contrast, Plaintiff on January 26 sent a proposed stipulation that looked very similar to the one that led to the January 24 conference call. Therefore, I diligently worked to get a proposed and faithful substitute stipulation to Mr. Summers the next business day. Mr. Summers waited two weeks to respond intransigently in pertinent part (Ex. 3): "At this point, I just need to know if you and Phelps Chartered will agree to be bound by the circled terms. I don't want to negotiate any further. Please speak with Mr. Phelps and someone at Phelps Chartered and let me know. If we do not have a signed agreement by this Friday, I will request that Mr. Phelps be deposed in Maryland. Please let me know. Sean."

Until receiving Mr. Summers' s attached February 12 e-mail, I had been preparing in good faith to go to Topeka on March 4 (and to be away from my family the entire Sunday, which I avoid as much as possible while my son is still a baby) to have enough time to prepare with Fred Phelps, took time with my clients to get me plane and hotel reservations, and cleared my March 5 calendar of subsequent competing obligations. Yet, despite his above-described foot-dragging and Defendants' good faith efforts, Mr. Summers' s letter to the Court inaccurately proclaims that "The Court and the parties have wasted enough time attempting to accommodate Defendant Phelps and it is clear that his deposition is being used as subterfuge so that a separate lawsuit can be filed against Plaintiff or his counsel in Kansas." The proof is in the pudding, and Mr. Summers tries to paint the Defendants as a radically different pudding flavor than they are.

If this matter cannot be resolved by conference call, I will wish to exercise my right to brief this matter. Moreover, even though Mr. Phelps calendared himself to be deposed in his hometown on March 5, that should not readily translate to his having less than two weeks notice to leave his own family and flock to fly to a Maryland deposition on the same date.

Respectfully,
/s/ Jonathan L. Katz