COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES

and its

RULE 30(b)(6) SUBCOMMITTEE

On Behalf of

NATIONAL CONSUMER LAW CENTER, INC. AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

August 9, 2017

The National Consumer Law Center ("NCLC") and the National Association of Consumer Advocates ("NACA") respectfully summit this Comment to the Advisory Committee on Civil Rules and its Rule 30(b)(6) Subcommittee ("Subcommittee") pursuant to its Invitation for Comment on Possible Issues Regarding Rule 30(b)(6) published on May 1, 2017.

The members of the National Association of Consumer Advocates ("NACA") are private and public sector attorneys, legal services attorneys and law professors whose primary practice or areas of specialty involve the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members, as well as consumers, in the ongoing struggle to curb unfair and abusive business practices.

The National Consumer Law Center, Inc. ("NCLC") is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed and elderly consumers. NCLC is a nationally recognized expert on consumer credit issues and it has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for over 48 years. NCLC publishes a twenty-volume Consumer Credit and Sales Legal Practice Series.

I. IT IS NOT NECESSARY TO INCLUDE SPECIFIC REFERENCE TO RULE 30(b)(6) AMONG THE TOPICS FOR DISCUSSION AT THE RULE 26(f) CONFERENCE OR IN THE REPORT TO THE COURT UNDER RULE 16.

The discovery plan conference occurs too early in the litigation for plaintiffs to know their Rule 30(b)(6) deposition needs at that time. Rule 30(b)(6) notices and initial disclosures that comport with the Rules give defendants sufficient notice to select and prepare their witnesses. The content of the pretrial conference and the scheduling order should remain primarily in the discretion of the trial judge, who is best suited to resolve discovery disputes based upon the specific circumstances of each unique case. Rule 30(b)(6) depositions already can be discussed with the court at any point in the litigation process and there is no need, or benefit, to requiring such discussions at the preliminary stages of a case.

A. Plaintiffs Do Not Have Enough Information Before the Start of Discovery to Anticipate Their 30(b)(6) Needs.

Depositions "rank high in the hierarchy of pre-trial, truth-finding mechanisms." *Founding Church of Scientology, Inc. v. Webster*, 802 F.2d 1448, 1451 (D.C. Cir. 1986). A "crucial component of the tools of justice in civil litigation", the deposition is often the best way to get to the truth. *Id.* The corporate defendant's Rule 30(b)(6) representative frequently is an extremely important source of proof of liability for the plaintiff, especially where the defendant corporation has sole knowledge of the events that gave rise to the lawsuit and of its own practices. Because of this information asymmetry, a plaintiff frequently will be unable to learn the appropriate scope of their Rule 30(b)(6) needs until discovery has begun. For this reason, it would be unfair to require disclosure of anticipated Rule 30(b)(6) depositions at the Rule 26(f), or discovery plan, conference, which comes before the start of discovery.

At the discovery plan conference, counsel and unrepresented parties "consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan." Fed. R. Civ. P. 26(f). Parties should discuss "how discovery can be conducted most efficiently and economically" at this meeting. Fed. R. Civ. P. 26(f), advisory comm. note (1993).

The Rules recognize the difficulties created by the inherent information asymmetry, however, specifically directing parties to consider "the parties' relative access to relevant information" among other things when planning for discovery. Fed. R. Civ. P. 26(b)(1). Disagreements concerning the discovery plan, such as differing estimates over timing, are noted in the joint discovery plan for later resolution by the court at the Rule 16 case management conference. Fed. R. Civ. P. 26(f), advisory comm. note (1993). Form 35, added to the Rules in 1993 as a "checklist" for the discovery plan, makes no reference to Rule 30(b)(6), although courts are free to address it. *Id.*; Fed. R. Civ. P. App'x of Forms, Form 35.

Significantly, Rule 30(b)(6) should not be amended in any way that would limit the discretion of the trial judge on managing discovery issues, which have traditionally been their purview. *See Hastings v. N.E. Indep. Sch. Dist.*, 615 F.2d 628, 631 (5th Cir. 1980) (discovery orders evaluated on abuse of discretion standard); *Florsheim Shoe Co., Div. of Interco, Inc. v. United States*, 744 F.2d 787, 797 (Fed. Cir. 1984) ("Questions of the scope and conduct of discovery are, of course, committed to the discretion of the trial court.")

Proponents of requiring discussion about 30(b)(6) issues at the discovery plan conference claim that it will promote early cooperation between the parties and reduce the overall costs of litigation. The opposite actually is true however. Since the contents of initial disclosures, the

extent of claims and defenses, and the location and form of most discoverable material will not be known to the parties until after the discovery plan conference, the ensuing uncertainty will incentivize litigants to reserve broader and more numerous topics for the Rule 30(b)(6) deposition. Contrary to the judicial economy its proponents predict, discussion of Rule 30(b)(6) issues too early will lead to more protracted litigation as parties navigate discovery topics which, later in the process, may prove irrelevant. Discovery plans will become more contentious, burdening the trial court with more disputes at the Rule 16 case management conference or with satellite litigation and discovery disputes.

B. Existing Requirements, Such as Well-Drafted 30(b)(6) Notices and Initial Disclosures, Are Adequate and Sufficient Safeguards

As currently enacted, nothing in the Rules prohibits parties from discussing Rule 30(b)(6) deposition plans early in the litigation. It usually will be beneficial for both parties for the deposing party to disclose any plans for the Rule 30(b)(6) deposition as early as possible. Schenkier, supra at 21 (noting that "the sooner the better" approach benefits both parties). This could occur at the discovery plan conference or some other point in the litigation whenever it would be most appropriate.

Any concerns that the 30(b)(6) deposition topics will be noticed late in the discovery process, will be over broad or will have short deadlines, are best addressed by existing mechanisms. For example, eleventh hour Rule 30(b)(6) requests for information that should have been found by other discovery may be denied by the ruling judge as untimely. *See* Sidney Schenkier, *Turning the Table, Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6)*, 29 Litig. 20, 21. The court also is free to impose sanctions under Rule 37 or deny motions to compel Rule 30(b)(6) motions that give the corporation insufficient time to prepare. *See, e.g., EEOC v. Tepro, Inc.*, 2014 WL 12562856 at *12-13 (E.D. Tenn. Aug.

29, 2014) (denying motion to compel 30(b)(6) deposition when it was "unreasonably duplicative," made less than two weeks from the close of discovery, and would have been "overly broad and burdensome.")

The Rule 30(b)(6) deposition notice identifies the interrogating party, gives the time and place of the deposition and a list of specific topics to be discussed at the deposition. Fed. R. Civ. P. 30(b)(1); 30(b)(6). The topics to be discussed must be put forth with "reasonable particularity" and the time frame of the notice must be "reasonable." Id. Since a party may seek a protective order within 14 days of notice to prevent a deposition from proceeding, 14 days' notice is by implication general guidance for what is reasonable. *See* Fed. R. Civ. P. 32(a)(5)(A). Where documents are requested from a party, 30 days' notice is required. Fed. R. Civ. P. 30(b)(2); 34(b)(2)(A). Although the exact timing of the Rule 30(b)(6) deposition notice requirement is not prescribed by the Rules, sanctions have been imposed on requesting parties who provided inadequate time for the corporate entity to prepare its designee. *See, e.g*. *Sullivan v. Dollar Tree Stores, Inc*., 2008 WL 706698, at *2 (E.D. Wash. Mar. 14, 2008) (four days "not reasonable for purposes of Rule 30(b)(1)", setting new discovery timeline of ten days to prepare 30(b)(6) witness).[1]

A key underlying purpose of Rule 30(b)(6) is:

> [T]o give a requesting party the means to obtain testimony efficiently from the corporation when the requesting party does not know who the appropriate witnesses are, or when one witness may not be able to provide the desired information. The interests of the requesting party are rarely advanced by being kept in the dark about this information until the end of discovery.

[1] Additionally, since Rule 30(b)(6) expressly requires the corporation to select its own witness(es), the corporation can begin preparing witnesses it anticipates to be called at trial even before the Rule 30(b)(6) deposition notice arrives. The Rule gives the corporation "control" by allowing it to designate and prepare its own witness. QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676, 687–88 (S.D. Fla. 2012).

Schenkier, *supra* at 20. Completing Rule 30(b)(6) depositions early allows the requesting party to follow up with additional depositions of witnesses identified during the Rule 30(b)(6) deposition or investigate documents identified during the deposition. *Id.* It is important for both parties for the corporate witness to be adequately prepared, so it rarely will serve the plaintiff to issue surprise Rule 30(b)(6) deposition notices with short timelines; and in the unlikely event that such short timelines occurs, the Rules already provide adequate and sufficient remedies for the defendant.

C. The Scheduling Order and Rule 16 Conference Should Remain in the Judge's Discretion.

Once the parties issue their joint report under Rule 26(f), the court must issue a scheduling order within the earlier of 90 days of service of the complaint or 60 days after any defendant has entered an appearance. Fed. R. Civ. P. 16(b)(2). The judge has broad discretion to use the order to manage the case and might include "provisions modifying the extent of discovery [such as] number and length of depositions." Fed. R. Civ. P. 16(b), advisory comm. note (1993). The Court's discretion is explicitly preserved in Fed. R. Civ. P. 16(b)(3)(vii) which empowers the judge to "include other appropriate matters" in the scheduling order.

As currently drafted, Rule 16 includes four components which the scheduling order "must" include and seven things it "may" include, broadly encompassing "other appropriate matters." The Rule 16 conference is guided entirely by discretionary language, including sixteen topics the court may consider at a pretrial conference. Fed. R. Civ. P. 16(c)(2). A pretrial (or Rule 16) conference is discretionary and should be used for:

> (1) expediting disposition of the action;
> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
> (3) discouraging wasteful pretrial activities;
> (4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

Fed. R. Civ. P. 16(a).

Should a judge find that including Rule 30(b)(6) matters in the pretrial conference will achieve any of the listed goals, the Court already has the discretion to facilitate that discussion or issue orders relating to the scope or timing of Rule 30(b)(6) depositions. Adding additional requirements to the scheduling order or pretrial conference is inconsistent with the broad discretion granted to the judge by Rule 16's permissive language.

Including Rule 30(b)(6) depositions in scheduling orders or discovery conferences should remain within the discretion of the court as already permitted. No changes should be made to Rule 26 or Rule 16 in order to mandate the timing or scope of Rule 30(b)(6) depositions earlier in the litigation.

II. RULE 30(b)(6) DEPOSITION FACTUAL TESTIMONY IS BINDING ON THE CORPORATION AND SHOULD NOT BE PERMITTED TO BE SUBSEQUENTLY SUPPLEMENTED ABSENT A SHOWING OF GOOD CAUSE.[2]

A finding that a party has failed to prepare its witness adequately for a Rule 30(b)(6) deposition justifies foreclosing the use of evidence that should have been provided earlier. A corporation cannot testify to its own memory or practices, so it is critical that a corporate representative be adequately prepared to answer any questions that the fictitious corporate person would know. Because relevant information is asymmetrically distributed between an individual plaintiff and a corporate defendant, Rule 30(b)(6) deposition factual testimony should be subject to a burden-shifting framework, foreclosing admission of any additional or contradictory evidence about the subject matter absent a showing that the evidence was not available to the

[2] NCLC and NACA recognize that most courts do not consider Rule 30(b)(6) deposition testimony to be equivalent to judicial admissions, see, e.g. *Keepers v. City of Milford*, 807 F.3d 24, 35 (2nd Cir. 2015), but do not take a position on that issue in these Comments.

organization earlier. Subsequent supplementation absent good cause would weaken the organization's duty to prepare its witness and should therefore not be permitted.

A. <u>Factual 30(b)(6) Testimony Is Binding.</u>

Rule 30(b)(6) factual testimony is subject to a burden-shifting framework, foreclosing the defendant from offering any additional or contradictory evidence about the subject matter absent a showing that the evidence was not available to the organization earlier. The information asymmetry between the plaintiff and corporate defendant justifies this rule. The case law is unequivocal when it comes to factual statements. Corporate deponents must prepare their witnesses adequately in order to avoid being prohibited from presenting factual evidence that should have been provided at the 30(b)(6) deposition. [3]

Rule 30(b)(6) is designed to "prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case." *Rainey*, 26 F. Supp. 2d at 95. Binding the corporation with its testimony accomplishes this goal. Binding deposition testimony shifts the burden to the defendant to explain why its position has changed, in accordance with Fed. R. Civ. P. 37(c)(1), which provides:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Typically, "if a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, it cannot argue for a contrary position at trial

[3] It may be the case that *legal* conclusions or contentions of a 30(b)(6) designee do not bind the corporation. *See, S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013); *R&B Appliance Parts*, 258 F.3d at 787; *AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213, 229 n.9 (3d Cir. 2009); *but see Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 432-34 (5th Cir. 2006). Fed. R. Evid. 704 renders unsupported legal conclusions as to the ultimate issue inadmissible. However, any admissions against the party's interest are binding on the corporation in the sense that such statements override a hearsay objection. Fed. R. Evid. 804(b)(3). Courts should continue to conduct discretionary balancing tests to determine whether legal conclusions are admissible and binding.

without introducing evidence explaining the reasons for the change." *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996). Sufficient explanation for the change must show that "the information was not known or was inaccessible, [otherwise,] a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition." *Rainey*, 26 F. Supp. 2d at 94-95.

This approach creates the proper incentives for all parties. It encourages early and complete disclosure, streamlines the litigation process and aids the factfinder in their pursuit of the truth. The corporation is estopped from ambushing the plaintiff at trial with surprise evidence and positions that could have been produced during discovery, avoiding what the *Rainey* court described as an "eleventh hour alteration[,] inconsistent with Rule 30(b)(6) and precluded by it." 26 F. Supp. 2d at 95; *See generally* Fed. R. Civ. P. 1 (The Rules "should be construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding."). Rightfully, this approach creates a real risk for the crafty "corporation whose Rule 30(b)(6) witness testifies incorrectly or says 'I don't know' on an important matter the corporation should know." Schenkier, *supra,* at 25.

When Rule 30(b)(6) was introduced, the Advisory Committee was "aware of the burdens it could impose" on an organization, but ultimately concluded that "[t]he burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge." Fed. R. Civ. P. 30(b)(6) advisory comm. note (1970); *see* Wright, *supra* at § 2103. The corporate entity controls most of the discoverable information in the case. Furthermore, it has the power to select its own 30(b)(6) witnesses. Fed. R. Civ. P. 30(b)(6); *QBE*, 277 F.R.D. at 687–88. To codify a rule that no individual may by their testimony bind the corporation would encourage

designation of Rule 30(b)(6) witnesses who are not knowledgeable, then "return[ing] home and plan[ning] artful responses." *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992). Such a result would obfuscate the truth and is unacceptable. *Taylor*, 166 F.R.D. at 361.

B. <u>Supplementation Should Not Be Permitted Beyond What Is Already in the Rules</u>

Depositions may be changed for 30 days under Fed. R. Civ. P. 30(e). Additional supplementation beyond that limitation should not be permitted absent an extraordinary showing of good cause. Allowing unfettered supplementation would encourage bandying and sham affidavits.

Rule 30(b)(6) and the majority interpretation of the obligations it creates are designed to avoid "bandying," the practice whereby organizations produce deposition witness after deposition witness, each disclaiming knowledge of facts that, obviously, someone in the organization has to know.[4] Fed. R. Civ. P. 30(b)(6) advisory comm. note (1970). Stopping this practice was, according to the Official Advisory Committee Notes, one of the purposes behind the drafting of Rule 30(b)(6). *Id*; *See generally* Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 Ala. L. Rev. 651 (1999). To truly curb bandying, supplementation of corporate deposition

[4] A federal judge describes this frustrating process:

> The project manager for Dalkon Shield explains that a particular question should have gone to the medical department. The medical department representative explains that the question was really the bailiwick of the quality control department. The quality control department representative explains that the project manager was the one with the authority to make a decision on that question.

Miles W. Lord, *The Dalkon Shield Litigation: Revised Annotated Reprimand by Chief Judge Miles W. Lord*, 9 Hamline L. Rev. 7, 11 (1986).

testimony must be prohibited except under stringent circumstances and subject to explicit procedural requirements.

One flagrant example of Rule 30(b)(6) abuse by corporate entities occurs when the corporate defendant attempts to defeat a plaintiff's motion for summary judgment by filing a supplemental affidavit that conflicts with the testimony of its designee. Courts consistently have held that this practice is not allowed. *See, e.g., Rainey*, 26 F. Supp. 2d at 94-95 (refusing to allow corporate party to submit an affidavit whose "qualitative assertion works a substantial revision of defendant's legal and factual positions."). The "sham affidavit rule" precludes a party from creating a factual issue to defeat summary judgment by simply submitting an affidavit that, by omission or addition, contradicts the affiant's previous deposition testimony. *See* Moore, *supra*, at § 30.25 (stating that the sham affidavit rule as applied to Rule 30(b)(6) depositions "is in accord with the general norms of summary judgment practice."). Many courts have held that the sham affidavit rule applies to binding 30(b)(6) depositions. *See Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc*., 839 F.3d 1251, 1259 (10th Cir. 2016); *Hyde*, 107 F. Supp. 2d at 992-93; *Dorsey v. TGT Consulting, LLC*, 888 F. Supp. 2d 670, 685 (D. Md. 2012); *Daubert v. NRA Grp., LLC*, 189 F. Supp. 3d 442, 458 (M.D. Pa. 2016); *MKB Constructors v. American Zurich Ins. Co*., 49 F. Supp. 3d 814, 829 n.11 (W.D. Wash. 2014).

Judges are adept at recognizing this kind of abuse and administering sanctions when warranted. For example, the Second Circuit has addressed the potential for abuse of Rule 30(b)(6), including "situations in which a deponent intentionally offered misleading or incomplete responses the deponent later wished to supplement or correct." Martin Flumenbaum & Brad S. Karp, *Second Circuit Clarifies Procedure for Supplementing Rule 30(b)(6) Testimony,* N.Y.L.J., Vol. 254, No. 125 (Dec. 31, 2015) (discussing *Keepers*, 807 F.3d at 35).

If the designee made an honest mistake, the Rules already provide redress for the organization. Rule 30(b)(6) testimony can be reviewed and changed by the witness for 30 days after the transcript becomes available. Fed. R. Civ. P. 30(e). If, however, the changes are substantial, the opposing party should be able to reopen a deposition to inquire about the changes. Although earlier interpretations of Rule 30(e) "allowed a deponent to make any change whatsoever to the deposition transcript, recent decisions . . . have limited the changes to matters of form and not the substance of the testimony given under oath." Peltz & Weill, *supra*, at 418.

As one court found, and others have repeated:

> The purpose of Rule 30(e) is obvious. Should the reporter make a substantive error, i.e., he reported 'yes' but I said 'no,' or a formal error, i.e., he reported the name to be 'Lawrence Smith' but the proper name is 'Laurence Smith,' then corrections by the deponent would be in order. The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. **A deposition is not a take home examination.**

Greenway, 144 F.R.D. at 325 (emphasis added). Because depositions provide a unique opportunity to get the organization's position from its 'mouth' with candor, allowing an organization to rewrite its Rule 30(b)(6) testimony renders the deposition almost useless.

Existing safeguards prevent the corporate entity from "continu[ing its] preparation after the depositions by being allowed to dribble in its final positions through Fed. R. Civ. P. 26(e) supplementations and Rule 26(a)(3) disclosures thirty days prior to trial, or else releas[ing] them in a final deluge at trial." *Taylor,* 166 F.R.D. at 366. Such a strategy, combined with inadequate preparation of the witness, would "severely prejudic[e]" the adverse party and "severely disrupt" the "orderly scheduling of a case for discovery and trial." *Id.* at 367; *see also SEC v. Parkersburg Wireless L.L.C.*, 156 F.R.D. 529, 535-36 (D.D.C. 1994) ("Defendant Gerstner argues that Rule 30(e) allows her to make any substantive change she so desires. While older cases appear to

support this position, later cases have often limited this blank check; perhaps because of the potential for abuse.").

C. Subsequent Supplementation Would Weaken the Duty to Prepare the Witness.

Although the corporate entity need not offer the most knowledgeable person, pursuant to Rule 30(b)(6) the designee must be able to testify as to matters "known or reasonably available to the organization." This requirement obliges the corporation to prepare its designee(s) to testify fully about the subject matters raised by the Rule 30(b)(6) notice. Schenkier, *supra* at 24.

The majority rule is that "[a] corporation served with a Rule 30(b)(6) notice of deposition has a duty to 'produce such number of persons as will satisfy the request and more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation." Cont'l Cas. Co. v. Compass Bank, 2006 WL 533510, at *18 (S.D. Ala. Mar. 3, 2006) (citing Marker, 125 F.R.D. at 126). Importantly, the corporation cannot designate an unknowledgeable witness to "stonewall legitimate discovery requests by repeatedly saying 'I don't know' in response to questions about the designated subjects when in fact the information is known or reasonably available to the corporation. Such a tactic would undermine the purpose of Rule 30(b)(6) and is sanctionable." *Id.; see, e.g., Reilly v. Natwest Mkts. Group, Inc.*, 181 F.3d 253, 268-69 (2d Cir. 1999) (affirming sanction); *Resolution Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1995) (affirming sanctions).

A party which "does no more than produce a live body in the deposition room" to disclaim any knowledge of the topic of the deposition has "in effect not appeared at the deposition". Sinclair & Fendrich, *supra* at 672; *see Resolution Trust Corp.*, 985 F.2d at 197 (finding that corporation's production of a 30(b)(6) witness with no knowledge of the topic at hand was "tantamount to a complete failure of the corporation to appear.") Naturally, just as if a

person who was scheduled for a deposition failed to appear, the corporation is subject to sanctions for failure to provide a knowledgeable witness. *See, Thomas v. Hoffman-La Roche, Inc.*, 126 F.R.D. 522, 524-25 (N.D. Miss. 1989); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 78 (S.D.N.Y. 1991).

The factors regularly considered by courts in deciding if a witness is adequately prepared "include: conferences by the witness with predecessors or co-workers, checking with outside offices such as governments or regulatory officials, contacting appropriate branches of the enterprise, and contacting senior executives." Sinclair & Fendrich, *supra* at 696 (internal citations omitted). Although it is possible some information may be truly undiscoverable, for example, details of events many years into the corporation's past, these situations are rare and not, as Sinclair and Fendrich would have us believe, "a frequent occurrence". *supra* at 688; *c.f. Taylor*, 166 F.R.D. at 367 (calling the "impracticality" of such a position "evident" and that "irrespective of the age of matters involved," the same concerns for prejudice and orderly case resolution prevail.) Surely, the corporation does not have to answer deposition questions if it truly has no knowledge of the topic, but it is at least counterintuitive and at most manipulative for it to offer evidence about that topic later. *See Taylor*, 166 F.R.D. at 359 (barring such evidence). If the law "entertains the fiction that corporations are 'persons'," it must hold them to the same epistemological standards: they know what they know, and they do not know that which they do not know. Schenkier, *supra* at 20.[5]

[5] The preparation required can be burdensome or even "onerous." QBE, 277 F.R.D. at 689 (quoting Great Am. Ins. Co., 251 F.R.D. at 541). Courts have recognized that Rule 30(b)(6) "imposes burdens on both the discovering party and the designating party" because the former must describe the matters on which testimony is sought with reasonable particularly, while the latter must produce at least one designee with knowledge about the subject matter contained in the deposition notice. Great Am. Ins. Co., 251 F.R.D. at 539. However, "this consequence is merely an obligation that flows from the privilege of using the corporate form to do business." QBE, 277 F.R.D. at 689 (quoting Great Am. Ins. Co., 251 F.R.D. at 541); see also Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc., 201 F.R.D. 33, 38 (D. Mass. 2001) (review required even if "documents are voluminous and the review of those documents would be burdensome").

D. If Supplementation Were Permitted, It Must Be Done in Writing and Be a Ground For Re-Opening the Deposition

While we do not believe it is necessary or advisable to amend Rule 30(b)(6) regarding supplementation, if the Subcommittee elects to recommend explicitly permitting supplementation of Rule 30(b)(6) testimony, a provision similar to Rule 26(e)(2) should be added to Rule 30(b)(6) to specify clearly that such supplementation must be done in writing and is a ground for re-opening the deposition to explore the supplemental information.

Rule 26(e) requires a party to amend a prior discovery response to include information later acquired or when the party learns that the response is incomplete or incorrect in some material respect. A failure to make a timely amendment to discovery responses can lead to the exclusion of the undisclosed information at trial. *See,* Fed. R. Civ. P. 37(e).

However, the scope of the duty to supplement discovery set forth in Rule 26(e)(2) is specific only to interrogatories, requests for production and requests for admissions. There is no current comparable provision for depositions. In fact, the 1993 Committee Notes to Rule 26(e) state that the duty to supplement will not "ordinarily" apply to deposition testimony. Fed. R. Civ. P. 26(e) advisory comm. note (1993). Some courts have nonetheless seemed to apply Rule 26(e) to 30(b)(6) depositions. *See, e.g. Ierardi v. Lorillard, Inc.*, 1991 WL 158911 at *3 (E.D. Pa. Aug. 13, 1991) ("The court further notes that Rule 26(e)(2) imposes a duty upon a party to amend its response [to 30(b)(6) deposition questions] if: (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.")

Rule 30(b)(6) should be amended to clarify that only upon a showing of good cause or if the corporate party learns that in some material respect the disclosure or response is incomplete

or incorrect, and the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing, supplementation may be ordered by the court. Should the Subcommittee create a right to supplement corporate testimony, it must fashion a concomitant duty to do so in writing in every case where new relevant information is discovered. Otherwise, the corporate entity merely will use the supplementation rule to edit unfavorable testimony, "planning artful responses" as the *Greenway* court feared. 144 F.R.D. at 325. This would shift the balance of power further toward the corporate defendant who already controls nearly all of the discoverable information in the litigation.

E. PROPOSED RULE 30(b)(6) CHANGES REGARDING SUPPLEMENTATION

If the Subcommittee elects to recommend explicitly permitting supplementation of Rule 30(b)(6) testimony it should formalize the majority burden shifting rule regarding supplementation and amend Rule 30(b)(6) to comport with Rule 26(e)(2).

The new Rule 39(b)(6) would read:

> *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf, **producing such number of persons as will satisfy the request**; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify **in a complete and knowledgeable fashion** about information known or reasonably available to the organization. **The testimony is binding on the organization and may not be subsequently supplemented, including on topics of which the designee claimed no knowledge, absent a showing of good cause. When supplementation of deposition responses made under this subsection is required or permitted, such supplementation must be done in writing and is a ground for re-opening the deposition to explore the supplemental material.** This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(proposed amendments inserted and emphasis added).[6]

III. CONTENTION QUESTIONS SHOULD REMAIN AS PERMITTED IN 30(b)(6) DEPOSITIONS.

Contention questions are "deposition questions that ask a party deponent to state all facts, list all witnesses and identify all documents that support or pertain to a particular contention in that party's pleadings." *Rifkind v. Super. Ct.*, 27 Cal. Rptr. 2d 822, 824 (Ct. App. 1994). Courts currently determine the evidentiary value of such questions on a case by case basis. NCLC and NACA recommend that no change to the process that the Rules presently permit is necessary or required.

Critics of contention questions argue that contention questions should not be posed at depositions because contention interrogatory responses are written by lawyers who have legal expertise that most private parties do not. *See* Sinclair & Fendrich, *supra*, at 706. Some courts agree, finding that "some inquiries are better answered through contention interrogatories wherein the client can have the assistance of the attorney in answering complicated questions involving legal issues." *Taylor*, 166 F.R.D. at 362 n.7; *see also Lance, Inc. v. Ginsburg*, 32 F.R.D. 51, 53 (E.D. Pa. 1962) (finding that "the client presumably knows the facts . . . but he can hardly be expected to know their legal consequences. This is what lawyers are for.").

Other courts are in disagreement, finding that the corporation, not corporate counsel, must create the corporation's contentions. *See Twentieth Century Fox Film Corp.*, 2002 WL

[6] Rule 37 could also be amended to clarify that a corporate entity's failure to adequately prepare its witness is sanctionable, but this reading probably already is well-supported by the text of the existing Rule, which provides:

> A party seeking discovery may move for an order compelling an answer, designation, production, or inspection . . . if a deponent fails to answer a question asked under Rule 30 . . . [or] a corporation or other entity fails to make a designation under Rule 30(b)(6). . . . [A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

Fed. R. Civ. P. 37.

1835439, at *3 ("The attorney for the corporation is not at liberty to manufacture the corporation's contentions. Rather, the corporation may designate a person to speak on its behalf and it is this position which the attorney must advocate." (citation omitted)).

Similarly, contention questions should not be disallowed from Rule 30(b)(6) depositions on the grounds that the questions are duplicative. Whether a contention questions in a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate is a case-by-case factual determination made by the court. *Taylor*, 166 F.R.D. at 362 n.7. Contention interrogatories are not always sufficient, and Rule 30(b)(6) deposition contention questions are not necessarily cumulative or duplicative, because Rule 30(b)(6) deposition testimony uniquely offers the subjective views of the corporation. NCLC and NACA suggest to the Subcommittee that the current discretionary approach is the fairest and most appropriate approach for handling factual contentions in Rule 30(b)(6) depositions.

Legal as opposed to factual contention questions also are consistent with the kinds of discovery properly sought from a corporate defendant since its Rule 30(b)(6) designee can and must testify to the corporation's subjective beliefs and opinions, *Lapenna v. Upjohn Co*., 110 F.R.D. 15, 20 (E.D. Pa. 1986), and the corporation's interpretation of documents and events, *Ierardi*, 1991 WL 158911, at *2. Accordingly, the Rule 30(b)(6) witness is an appropriate vehicle to convey a corporation's legal contentions because they testify vicariously for the corporation. *See*, *Brazos River*, 469 F.3d at 434 (The Rule 30(b)(6) designee "should be able to present [the corporation's] subjective beliefs as to whether the products were in breach of warranty, as long as those beliefs are based on the collective knowledge of [corporate] personnel.").

In essence, whether a corporation will be bound by the legal contentions of a Rule 30(b)(6) designee is a fact-specific inquiry that depends on: (a) if the legal criteria behind the contention question and the witness's answer are specific enough to be admissible under Federal Rule of Evidence 704,[7] (b) if the question calling for a legal contention was on a noticed or unnoticed topic, and (c) if the presiding court deems that protecting the integrity of the judicial process requires estopping a party from offering evidence that contradicts or supplements that legal contention. *See R&B Appliance Parts*, 258 F.3d at 787. Continuing to allow case law to develop on a case by case basis is desirable and a rule change is unnecessary.

IV. NO PROVISION FOR OBJECTIONS NEED BE ADDED.

A provision for objections should not be added to Rule 30(b)(6) because the Rule as written provides sufficient protections for corporate counsel to limit the scope of a deposition. It goes against the values inherent in Rule 1 to allow parties to serve each other written lists of objections as a way to avoid responding meaningfully to a legitimate Rule 30(b)(6) notice and the duties of candor it carries.

Rule 30(b)(6) especially should not be amended to include a pre-deposition objection procedure that shifts the burden onto the deposing party to show why it needs the information it seeks in the Rule 30(b)(6) notice. Any pre-deposition objections that would "excuse performance

---

[7] The Fifth Circuit stated:

> Opinions [of the deponent] phrased in terms of inadequately explored legal criteria would be inadmissible. Advisory Committee's Note to Rule 704. The Advisory Committee explained that the question 'Did T have capacity to make a will?' would be excluded, but the question 'Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?' would be allowed.

Brazos River., 469 F.3d at 435 (citing *Torres v. Cty. of Oakland,* 758 F.2d 147, 150 (6th Cir. 1985) ("The problem with testimony containing a legal conclusion is in conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury.")).

absent a court order" should function like a motion for protective order, where the deponent seeking to not reveal certain information bears the burden of proving to the court why discovery should be limited in the way that it requests.

Corporate counsel already has the ability to file a motion for protective order based on the Rule 30(b)(6) notice under Rule 26(c). Rule 26(c) allows a court for good cause to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, in most relevant part, "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery." Fed. R. Civ. P. 26(c).

Corporate counsel also may file a motion to terminate or limit the deposition at any time under Rule 30(d)(3) "on the ground that it is being conducted in bad faith or in a manner that reasonably annoys, embarrasses, or oppresses the deponent or party." Fed. R. Civ. P. 30(d)(3); *See also Macario v. Pratt & Whitney Canada, Inc.*, 1990 WL 187049, at *3 (E.D. Pa. 1990) (holding that only the court, not counsel, may order the termination of a deposition under Fed. R. Civ. P. 30(d)). Similarly, they may move to limit the extent of discovery under Rule 26(b)(2)(C), *Lykins*, 2012 WL 3542016, at *3, or may note the objections for the record and seek to exclude the testimony at trial (but the deponent is still required to answer the question). *See Namoury v. Tibbetts*, 2007 WL 638436, at *1 (D. Conn. 2007).

Under the circumstances, a provision for objections should not be added to Rule 30(b)(6). The Rule as written provides sufficient protections for corporate counsel to limit the scope of a deposition and no further changes are needed or required to deal with the issue.

V. LIMITS ON THE DURATION AND NUMBER OF 30(B)(6) DEPOSITIONS ALREADY APPEARING IN THE COMMITTEE NOTES CAN BE CLARIFIED IN THE RULE, BUT NO NEW LIMITS SHOULD BE IMPOSED.

A Rule 30(b)(6) deposition counts as one deposition for the purpose of the 10-deposition limit imposed by Rule 30(a)(2)(A)(1), regardless of the number of witnesses the corporation chooses to designate to fulfill its obligations under the notice. Fed. R. Civ. P. 30(a) advisory comm. note (1993).

Furthermore, the seven hour deposition rule applies to each designee. Fed. R. Civ. P. 30(d) advisory comm. note (2000). This provision ensures that a defendant will not attempt to run out the clock by bringing out many different witnesses so that the plaintiff must use most of his allotted time asking each for their personal information and laying foundation for documents.

Implementing further limitations would not be beneficial because a corporation already has discretion in establishing the number of depositions that will be taken by way of designating however many witnesses it wants to testify on its behalf. Under Rule 30(b)(6), the corporation must make available such number of persons as will be able to give complete, knowledgeable and binding answers on its behalf, *SEC v. Morelli,* 143 F.R.D. 42, 45 (S.D.N.Y. 1992), but the number of designees is up to the corporation's discretion.

A. Other Proposed Limitations May Place an Even Greater Burden on the 30(b)(6) Designees and on the Corporation.

If, for example, the Rule 30(b)(6) depositions are limited to one deposition and one witness must speak to 40 noticed topics instead of dividing that work between three witnesses, the Rule would unnecessarily burden that individual with remembering a lot of information that may not be first-hand knowledge. Additionally, limiting the number of designees burdens the organization, which "must not only produce such number of persons as will satisfy the [30(b)(6)] request, but more importantly, prepare them so that they may give complete, knowledgeable and

binding answers on behalf of the corporation." *Sprint Commc'ns Co. v. Vonage Holdings Corp.*, 2007 WL 2333356, at *5 (D. Kan. Aug. 15, 2007) (quoting *T&W Funding Co. XII v. Pennant Rent-A-Car*, 210 F.R.D. 730, 735 (D. Kan. 2002)). As the rule stands, the corporation and potential deponents can agree on how many witnesses would most effectively and efficiently testify to the noticed deposition topics.

B. Disallowing an Individual from Testifying as Both a Rule 30(b)(6) Designee and an Individual Witness Would Likely Hinder Plaintiff's Discovery and Thus the Fact Finder's Pursuit of The Truth.

Having individuals testify on the corporation's behalf may complicate discovery because those individuals also may be subject to individual depositions in which they are not speaking for the organization. Yet, "any testimony provided by employees as individuals does not satisfy the need for Plaintiff to obtain binding testimony from the corporate entity." *Kelly v. Provident Life & Acc. Ins. Co.*, 2011 WL 2448276, at *4 (S.D. Cal. June 20, 2011).

Disallowing an individual from testifying as both a Rule 30(b)(6) designee and an individual witness likely would hinder plaintiff's discovery and thus the fact finder's pursuit of the truth. For example, a corporation might designate a less knowledgeable witnesses to speak on its behalf during a Rule 30(b)(6) deposition because more knowledgeable witnesses have been named as individual deponents. Conversely, disallowing an individual from testifying as both a Rule 30(b)(6) designee and an individual witness could incentivize corporations to designate individuals to speak to its positions as a Rule 30(b)(6) witness if those individuals have first-hand knowledge of damaging information. Disallowing that individual from testifying in an individual capacity would thereby limit a plaintiff's potential to obtain that information. As it stands, plaintiffs that wish to also name the Rule 30(b)(6) designee as an individual deponent must pay the price of giving up one of their depositions to do so. This limitation is enough of a

disincentive to keep plaintiffs from harassing Rule 30(b)(6) designees by naming them all as individual deponents as well.

C. Judges Already Have the Authority to Shield Corporations from Unreasonably Burdensome Deposition Requests.

The existing limitations provided in Rules30(b)(6), chiefly that the corporation is only required to testify about "information known or reasonably available to the organization" and that deposing parties must "describe with reasonable particularity the matters for examination" already give judges discretion to limit unduly burdensome Rule 30(b)(6) deposition notices. *See Gen. Foods Corp.*, 1980 WL 30300, at *3 (quashing a deposition notice with 143 categories of questions that called for material extending back over 20 years on the grounds that it was too broad and burdensome); *see also Murphy v. Kmart Corp.*, 255 F.R.D. 497 (D.S.D. 2009) (finding that Plaintiff's 30(b)(6) notice lacked reasonable particularity and amended notice was required). The corporation may oppose the deposition notice by making a specific showing as to why the production sought would be unreasonably burdensome. *Pleasants v. Allbaugh*, 208 F.R.D. 7, 12 (D.D.C.2002) (citing *Pro-Football, Inc. v. Harjo*, 191 F. Supp. 2d 77, 80 (D.D.C. 2002)); *See also Fago v. M&T Mortg. Corp.*, 235 F.R.D. 11, 21 (D.D.C. 2006) (finding that having provided no supporting documentation or evidence regarding time or expense of complying with discovery was insufficient to show undue burden).

Limiting the number of deposition topics would cut against the emphasis in Rule 30(b)(6) on drafting notices with reasonable particularity by encouraging deposing parties to create broader topics that would not put the corporation on notice. The inevitable increased discovery disputes would drain time and judicial resources; for example, by requiring a judge to rule on the reasonable particularity of a 30(b)(6) notice. *See, e.g.*, *Murphy*, 255 F.R.D. at 497 (ruling on reasonable particularity requirement). Further, limiting the number or scope of deposition topics

would not advance the purposes of discovery because the legal complexity and intensiveness of fact discovery required varies between cases.

D. Amending the Rule to Include New Limitations Encourages the Kind of Evasion That the Rule Sought to Address.

Rule 30(b)(6) was implemented in part to curb the 'bandying' by which officers or managing agents of a corporation would each disclaim knowledge of facts that are clearly known by persons in the corporation, and thus by the corporation itself. Fed. R. Civ. P. 30(b)(6) advisory comm. note (1970); *see also Alexander v. FBI*, 186 F.R.D. 137, 141 (D.D.C. 1998). If the rule was amended to limit the number of 30(b)(6) depositions to two, for example, then the corporation could designate two witnesses that are not prepared to speak on all topics, and the deposing party would have to seek leave of court in order to notice another deposition. *Cf. Resolution Trust Corp.*, 985 F.2d at 197 (finding corporation made no meaningful effort to appoint knowledgeable 30(b)(6) witnesses where it knew of at least one witness knowledgeable on noticed topics but designated two individuals with no knowledge instead).

Limiting the duration or number of Rule 30(b)(6) depositions would not benefit either party in a manner that advances the fair and efficient administration of justice. The current structure and flexibility of Rule 30(b)(6) allows the deposing party to seek information, allows the corporation to provide that information in whatever way it deems most efficient, and gives judges discretion to restrict Rule 30(b)(6) notices that are too burdensome on the corporation. Amending Rule 30(b)(6) with new additional limitations likely would encourage the very kinds of potential mischief by corporations that the rule was intended to address.

E. Proposed Rule 30(b)(6) Changes Regarding Limitations

Rule 30(b)(6) should be amended to expressly incorporate the committee notes regarding limitations accompanying the 1993 and 2000 amendments to the Rule in order to reflect the

Subcommittee's continuing adherence to the policies contained therein. The new Rule 30(b)(6) would read:

> When a Deposition May Be Taken. . . (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):
> (A) if the parties have not stipulated to the deposition and:
> (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;
> **A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify.**

Fed. R. Civ. P. 30(a) (proposed amendments inserted and emphasis added).

> Duration; Sanction; Motion to Terminate or Limit. (1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. **For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition.**

Fed. R. Civ. P. 30(d) (proposed amendments inserted and emphasis added).

Respectfully submitted on behalf of the National Consumer Law Center and the National Association of Consumer Advocates.

Stuart T. Rossman
Director of Litigation
National Consumer Law Center
7 Winthrop Square, 4th Fl.
Boston, MA 02110
(617) 542-8010
srossman@nclc.org