IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

EURKERT BOARDLEY, *et al.*,	*	
Plaintiffs,	*	
v.	*	**Case No.: PWG-12-3009**
HOUSEHOLD FINANCE CORPORATION III, *et al.*,	*	
Defendants.	*	

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MEMORANDUM OPINION

Plaintiffs Eurkert Boardley and Senta Boardley's complaint in this suit, which challenges the actions of Defendants Household Finance Corp. III ("Household") and HSBC Holdings Inc., plc ("HSBC") with regard to the loan agreement through which Plaintiffs financed their home, has been through three iterations and been pared down from thirteen counts to two properly pleaded counts. Plaintiffs seek leave to amend for a third time to reintroduce seven of the claims dismissed in the August 14, 2014 Memorandum Opinion and Order, ECF Nos. 36 & 37.[1] ECF No. 42. Because Plaintiffs already have had two opportunities to correct any deficiencies in their pleadings, I will deny their request as to all but one claim, for the reasons discussed below.[2]

Whether to grant a motion for leave to amend is within this Court's discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Pursuant to Rule 15, "[t]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). But, the Court should deny leave to

[1] I discussed the facts at length in that Memorandum Opinion and will not restate them now.

[2] The parties fully briefed the motion. ECF Nos. 42, 43, 44. A hearing is not necessary. *See* Loc. R. 105.6.

amend if doing so "would prejudice the opposing party, reward bad faith on the part of the moving party, or . . . amount to futility." *MTB Servs., Inc. v. Tuckman-Barbee Constr. Co.*, No. RDB-12-2109, 2013 WL 1819944, at *3 (D. Md. Apr. 30, 2013). Notably, for purposes of this case, "repeated failure to cure deficiencies by amendments previously allowed" also is a reason to deny leave to amend. *Foman*, 371 U.S. at 182; *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006).

Here, Plaintiffs filed their first Motion for Leave to Amend, ECF No. 17, in response to Defendants' first Motion to Dismiss, ECF No. 11, which alerted Plaintiffs to possible deficiencies in their pleadings. Indeed, Plaintiffs repeatedly stated that the motion to amend incorporated "the facts and arguments in the Opposition to Defendants' Motion to Dismiss." Pls.' First Mot. to Am. 2, 3, 4. Additionally, they specifically asked to amend to "cure deficiencies pertaining to Defendants' arguments about pleading an enterprise and racketeering activity," and asserted three times that the amendments were not futile because "they serve[d] to cure any alleged deficiency of pleading posed by vagueness." *Id*. at 4.

After I granted Plaintiffs' first motion to amend, ECF No. 20, Plaintiffs filed their Amended Complaint, ECF No. 21, and Defendants moved to dismiss the Amended Complaint, ECF No. 24. Plaintiffs filed their second Motion for Leave to Amend, ECF No. 33, again to address deficiencies specifically identified in Defendants' motion to dismiss. As in their first motion to amend, Plaintiffs contended that the proposed amendments "serve[d] to cure any alleged deficiency of pleading posed by Defendants" and "to clarify the violations." *Id*. at 2, 3; *see also id.* at 2 ("The proposed amendments [were] made in good-faith in response to alleged deficiencies in pleading proffered by Defendants."). And, once again, Plaintiffs incorporated

"the facts and arguments in the Opposition to Defendants' Second Motion to Dismiss." *Id*. at 2, 3. I granted that motion in part and denied it in part as futile. Aug. 14, 2014 Order 1.

Now, Plaintiffs seek leave to amend for a third time, insisting that they "are endeavoring in good faith to comply with guidance from this court as indicated in its memorandum opinion issued August 14, 2014, pertaining to Defendants' motion to dismiss." Pls.' Third Mot. to Am. 3. Citing *Foman*, 371 U.S. at 182, Plaintiffs acknowledge that the Court may "deny an amendment where there has been undue delay, bad faith, dilatory motive or repeated failure to cure deficiencies by amendments previously allowed; where allowing amendment would cause undue prejudice to the opposing party; or where the amendment would be futile." *Id.* Yet, when they "submit that none of the factors listed under *Foman* . . . are present here," they acknowledge only "undue delay, dilatory motive, bad faith, undue prejudice, or futility." *Id.* Tellingly lacking is the very reason why this motion to amend must be denied: "repeated failure to cure deficiencies by amendments previously allowed." *See Foman*, 371 U.S. at 182.

Plaintiffs have had two previous opportunities to amend, in response to alleged deficiencies identified by Defendants, and they only succeeded in curing one deficient claim, the alleged violation of the Maryland Consumer Protection Act ("MCPA"), Md. Code Ann., Com. Law § 13-101 *et seq*. There must come a time in a lawsuit when a party, having had prior opportunities to amend to address pleading deficiencies identified by the Court or adverse party, must proceed with the claims that have withstood challenge. Otherwise, the issues would never be joined, discovery would remain open indefinitely, and, like the common law pleaders of former times, the suit would devolve into an endless series of complaints, demurrers, and responsive complaints. There is a reason why modern rules of pleading rejected the practices of former times, and in this case, the Plaintiff has had more than a fair opportunity to draft a viable

complaint. For this reason, Plaintiffs' pending motion to amend is denied insofar as Plaintiffs seek leave to amend any claim other than the MCPA claim. *See Foman*, 371 U.S. at 182; *see also Kiraly v. Bd. of Educ. of Prince George's Cnty*., No. DKC-11-2845, 2013 WL 4495792, 3 (D. Md. Aug. 20, 2013) ("[I]n permitting Plaintiff leave to file her second amended complaint, the court provided a detailed account of the pleading requirements for the claims she attempted to raise. Plaintiff's counsel failed to take advantage of that opportunity, however, and there is no reason to believe that a different result would obtain upon the filing of a third amended complaint."). Inasmuch as Plaintiffs' proposed amendments to the MCPA claim appear to be made in good faith and do not appear to prejudice Defendants or to be futile, Plaintiffs' motion is granted as to those limited amendments. *See Foman*, 371 U.S. at 182.

ORDER

Accordingly, it is, this 1st day of June, 2015, hereby ORDERED that

1. Plaintiffs' Motion for Leave to Amend, ECF No. 42, IS GRANTED IN PART AND DENIED IN PART. Plaintiffs may amend their MCPA claim only.
2. **A Rule 16 conference call IS SCHEDULED for Tuesday, June 23, 2015, at 1:00 p.m. Plaintiffs' counsel shall initiate the call to my chambers.**

The Scheduling Order and Discovery Order are attached to this Memorandum Opinion and Order.

Dated: June 1, 2015

/S/
Paul W. Grimm
United States District Judge

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SCHEDULING ORDER

This scheduling order is being entered pursuant to Local Rule 103.9. Any inquiries concerning the schedule should be directed to my chambers, not to the Clerk's Office. Any party who believes that any deadline set forth in this Scheduling Order is unreasonable may request in writing a modification of the Order or that a conference be held for the purpose of seeking a modification of the Order, and any such request must be made on or before the first date set forth in Paragraph I below. **Thereafter, the schedule will not be changed except for good cause.**

Electronic filing is required in this case. *See* Elec. Filing Reqs. & Procs. for Civ. Cases I(A) (D. Md. Apr. 2013), www.mdd.uscourts.gov/publications/DisplayForms.asp. Please familiarize yourself with those procedures. You must use the electronic filing system for filing documents with the Clerk and for sending case-related correspondence to chambers.[1] When you electronically file a document that, including attachments, is 15 pages or longer, you also must provide a paper copy of the document and a paper copy of the notice of electronic filing. *Id.* § III(B)(4). The paper copy should be sent to the Clerk's Office, not directly to my chambers.

I. DEADLINES

June 16, 2015:	Deadline for disclosure of damages and relief sought, as required by the Discovery Order
June 23, 2015 @ 1:00 p.m.:	**Fed. R. Civ. P. 16 Telephone Conference Call**

[1] There is an exception for self-represented parties who are not registered users of CM/ECF. The self-represented party is not required to file electronically. *See* Instructions for Filing a Civil Action on Your Own Behalf II(A) (D. Md. May 2013), www.mdd.uscourts.gov/publications/forms/InstructionsFilingCivilAction.pdf.

June 26, 2015:	Deadline for request for modification of initial Scheduling Order.
June 26, 2015:	Joint request for early settlement/ADR conference. (This request will not postpone discovery unless otherwise ordered.)
June 26, 2015:	Deadline for conference about discovery of electronically stored information. (If either or both parties intend to take such discovery, before the conference counsel should review the Suggested Protocol for Discovery of Electronically Stored Information prepared by a Joint bench/bar committee published on the court's website.)
July 27, 2015:	Moving for joinder of additional parties and amendment of pleadings.
August 10, 2015:	Plaintiff's Rule 26(a)(2) expert disclosures.
September 8, 2015:	Defendant's Rule 26(a)(2) expert disclosures.
September 22, 2015:	Plaintiff's rebuttal Rule 26(a)(2) expert disclosures.
October 22, 2015:	Rule 26(e)(2) supplementation of disclosures and responses.
November 16, 2015:	Discovery deadline; submission of status report.
November 23, 2015:	Requests for admission.
December 7, 2015:	Dispositive pretrial motions deadline.

II. DISCOVERY

The Court has entered a separate Discovery Order that will govern in this case. This Scheduling Order supplements that Discovery Order.

Initial Disclosures

Except as provided in the Discovery Order also issued in this case, this is an action in which Fed. R. Civ. P. 26(a)(1) disclosures need not be made.

Discovery Conference

This action is exempted from the requirements of the first sentence of Fed. R. Civ. P. 26(d) and from Fed. R. Civ. P. 26(f). However, you are encouraged to confer with one another immediately in order to: (a) identify the issue(s), (b) set a discovery plan, (c) determine if the case can be resolved before your clients incur further litigation expense, and (d) establish a cordial professional relationship among yourselves.

Procedure

All the provisions of Local Rule 104 apply, including the following:

a. All discovery requests must be served in time to assure that they are answered before the discovery deadline. An extension of the deadline will not be granted because of unanswered discovery requests.

b. The existence of a discovery dispute as to one matter does not justify delay in taking any other discovery. The filing of a motion to compel or a motion for a protective order will not result in a general extension of the discovery deadline.

c. No discovery materials, including Rule 26(a)(1) and Rule 26(a)(2) disclosures, except as provided in the Discovery Order issued in this case, should be filed with the court.

d. When a motion to compel is permitted by the Discovery Order, the motion shall be filed in accordance with Local Rule 104.8 and applicable CM/ECF procedures.

e. Please be familiar with the Discovery Guidelines of this Court which are Appendix A to the Local Rules. Appendix D contains guidelines for form discovery requests and confidentiality orders that may be helpful to you.

Deposition Hours

Deposition hours are set forth in the Discovery Order separately issued in this case.

III. STATUS REPORT

The parties shall file on the day of the discovery deadline a status report covering the following matters:

a. Whether discovery has been completed;

b. Whether any motions are pending;

c. Whether any party intends to file a dispositive pretrial motion;

d. Whether the case is to be tried jury or non-jury and the anticipated length of trial;

e. A certification that the parties have met to conduct serious settlement negotiations; and the date, time and place of the meeting and the names of all persons participating therein;

f. Whether each party believes it would be helpful to refer this case to another judge of this court for a settlement or other ADR conference, either before or after the resolution of any dispositive pretrial motion;

g. Any other matter which you believe should be brought to the court's attention.

IV. DISPOSITIVE PRETRIAL MOTIONS

If more than one party intends to file a summary judgment motion, the provisions of Local Rule 105.2.c apply.

After motions and responses thereto have been filed, I will advise you if a hearing is to be scheduled.

V. SEALED MATTERS

Local Rule 105.11 governs the sealing of all documents filed in the record. This Rule provides:

> Any motion seeking the sealing of pleadings, motions, exhibits or other documents to be filed in the Court record shall include (a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protection. The Court will not rule upon the motion until at least fourteen (14) days after it is entered on the public docket to permit the filing of objections by interested parties. Materials that are the subject of the motion shall remain temporarily sealed pending a ruling by the Court. If the motion is denied, the party making the filing will be given an opportunity to withdraw the materials. Upon termination of the action, sealed materials will be disposed of in accordance with L.R. 113.

Failure to comply with this Rule will result in the denial of the motion to seal. In addition to compliance with Local Rule 105.11, counsel moving to seal court filings should be guided by the Fourth Circuit's decision in *Doe v. Pub. Citizen*, 749 F.3d 246 (4th Cir. 2014). All motions to seal should contain direct reference to *Doe* and should include specific factual representations allowing the court to make the requisite findings.

VI. STATUS AND PRETRIAL CONFERENCES

I will set a scheduling conference after the status report has been filed, unless that report indicates that one or more of you intends to file a dispositive pretrial motion. In the latter event I will not set a scheduling conference until after I have ruled upon the motion (or the dispositive pretrial motion deadline passes without the anticipated motion being filed).

At the scheduling conference:

a. I will set a deadline for submitting the pretrial order, motions in limine, proposed voir dire questions and proposed jury instructions;

b. I will set a pretrial conference date and a trial date; and

c. I will ask you whether a settlement or other ADR conference with a judicial officer would be useful. Please confer with your client about this matter before the conference so that you are in a position to respond.

VII. ATTORNEYS' FEES

In any case where attorneys' fees may be sought by the prevailing party, counsel must be familiar with the provisions of Local Rule 109.2 and the Rules and Guidelines for Determining Lodestar Attorneys' Fees in Civil Rights and Discrimination Cases which are Appendix B to the Local Rules.

VIII. COMPLIANCE WITH LOCAL RULES AND CM/ECF PROCEDURES

The court will demand compliance with the Local Rules and CM/ECF procedures. If you need to obtain a copy of the Local Rules or the CM/ECF procedures, they are available on our website at www.mdd.uscourts.gov. Additionally, all motions and requests that the court issue an order filed in cases before me must include a proposed order.

IX. COMPLIANCE WITH PRIVACY PROTECTION RULE

Counsel are reminded that the Federal Rules of Civil Procedure were amended, effective December 1, 2007, with the addition of a new Rule 5.2 which has detailed requirements requiring the redaction of filings with this court that contain an individual's social security number, tax payer identification number, or birth date, the name of an individual known to be a minor, or a financial account number. It is essential that counsel comply with this rule and with the revised version of the Judicial Conference Privacy Policy adopted in March 2008. For further information on the Judicial Conference Privacy Policy, see http://www.mdd.uscourts.gov/news/news/privacy_memo.pdf.

Dated: June 1, 2015

/S/
Paul W. Grimm
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES DISTRICT JUDGE

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DISCOVERY ORDER

Fed. R. Civ. P. 26(b)(2)(C) and 26(g)(1)(B)(iii) require that discovery in civil cases be proportional to what is at issue in the case, and require the Court, upon motion or on its own, to limit the frequency or extent of discovery otherwise allowed to ensure that discovery is proportional. This Discovery Order is issued in furtherance of this obligation. Having reviewed the pleadings and other relevant docket entries, the Court enters the following Discovery Order that will govern discovery in this case, absent further order of the Court or stipulation by the parties. This Discovery Order shall be read in conjunction with the Scheduling Order in this case, which provides discovery deadlines, and will be implemented in compliance with the Discovery Guidelines for the United States District Court for the District of Maryland (see paragraph 3, below). ***With respect to the limitations imposed in paragraphs 2a, 2b, 5, 6 and 8, counsel are encouraged to confer and propose to the Court for approval any modifications that are agreeable to all counsel.***

1. ***Disclosure of Damage Claims and Relief Sought.*** By the date set in the Scheduling Order, any party asserting a claim against another party shall serve on that party and provide to the Court the information required by Fed. R. Civ. P. 26(a)(1)(A)(iii) regarding calculation of damages. The party also shall include a particularized statement regarding any non-monetary relief sought. Unless otherwise required by the Scheduling Order, the disclosures required by Fed. R. Civ. P. 26(a)(1)(A)(i), (ii), and (iv) need not be made.

2. ***Scope of Discovery – Proportionality.*** Pursuant to Fed. R. Civ. P. 26(b)(2)(C) and 26(g)(1)(B)(ii)–(iii), the discovery in this case shall be proportional to what is at issue in the case. While the monetary recovery a party seeks is relevant to determining proportionality, other factors also must be considered, including whether the litigation involves cases implicating "public policy spheres, such as employment practices, free speech, and other matters [that] may have importance far beyond the monetary amount involved." Fed. R. Civ. P. 26(b) advisory committee's note to 1983 amendment. To achieve the goal of proportionality, and pursuant to Fed. R. Civ. P. 26(b)(1), discovery will be conducted in phases, as follows.

    a. ***Phase 1 Discovery.*** The first phase of discovery should focus on the facts that are most important to resolving the case, whether by trial, settlement or dispositive motion. Accordingly, the parties' Phase 1 Discovery may seek facts that are not privileged or work product protected, and that *are likely to be admissible* under the Federal Rules of Evidence and material to proof of claims and defenses raised in the pleadings. Phase 1 Discovery is intended to be narrower than the general scope of discovery stated in Rule 26(b)(1) ("discovery regarding any nonprivileged matter that is *relevant* to any party's claim or defense," even if not admissible, if "reasonably calculated to lead to the discovery of admissible evidence" (emphasis added)). Discovery sought during Phase 1

Discovery may not be withheld on the basis that the producing party contends that it is not admissible under the Federal Rules of Evidence, if it otherwise is within the scope of discovery permitted by Rule 26(b)(1), as modified by this Order. Rather, a party from whom discovery is sought ("Producing Party") by an adverse party ("Requesting Party") must produce requested Phase 1 Discovery subject to any evidentiary objections, which must be stated with particularity.

b. ***Phase 2 Discovery.*** Unless the parties stipulate otherwise, the Court, upon a showing of good cause, may permit discovery beyond that obtained under Phase 1 Discovery. In Phase 2 Discovery, the parties may seek discovery of facts that are not privileged or work product protected, are *relevant* to the claims and defenses pleaded or more generally to the subject matter of the litigation, and are not necessarily admissible under the Federal Rules of Evidence, but are likely to lead to the discovery of admissible evidence. A showing of good cause must demonstrate that any additional discovery would be proportional to the issues at stake in the litigation, taking into consideration the costs already incurred during Phase 1 Discovery and the factors stated in Rule 26(b)(2)(C)(i)–(iii). If the Court determines that additional discovery is appropriate, the Requesting Party will be required to show cause why it should not be ordered to pay all or a part of the cost of the additional discovery sought.

c. **Initial Discovery Protocols for Employment Cases**. For cases involving claims of employment discrimination, the parties are encouraged to follow the Initial Discovery Protocols for Employment Cases Alleging Adverse Action, which may be found at: http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf

3. ***Cooperation During Discovery.*** As required by Discovery Guideline 1 of the Discovery Guidelines for the United States District Court for the District of Maryland, D. Md. Loc. R. App. A (July 1, 2011), http://www.mdd.uscourts.gov/localrules/LocalRules-Oct2012Supplement.pdf, the parties and counsel are expected to work cooperatively during all aspects of discovery to ensure that the costs of discovery are proportional to what is at issue in the case, as more fully explained in *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 357–58 (D. Md. 2009). The failure of a party or counsel to cooperate will be relevant in resolving any discovery disputes, including whether the Court will permit discovery beyond Phase 1 Discovery and, if so, who shall bear the cost of that discovery. Whether a party or counsel has cooperated during discovery also will be relevant in determining whether the Court should impose sanctions in resolving discovery motions.

4. ***Discovery Motions Prohibited Without Pre-Motion Conference with the Court.***

a. No discovery-related motion may be filed unless the moving party attempted in good faith, but without success, to resolve the dispute and has requested a pre-motion conference with the Court to discuss the dispute and to attempt to resolve it informally. If the Court does not grant the request for a conference, or if the conference fails to resolve the dispute, then upon approval of the Court, a motion may be filed.

b. Unless otherwise permitted by the Court, discovery-related motions and responses thereto will be filed in letter format and may not exceed five, single-spaced pages, in twelve-

point font. Replies will not be filed unless requested by the Court following review of the motion and response.

5. ***Interrogatories.*** Absent order of the Court upon a showing of good cause or stipulation by the parties, Rule 33 interrogatories shall be limited to fifteen (15) in number. Contention interrogatories (in which a party demands to know its adversary's position with respect to claims or defenses asserted by an adversary) may be answered within fourteen (14) days of the discovery cutoff as provided in the Scheduling Order. All other interrogatories will be answered within thirty (30) days of service. Objections to interrogatories will be stated with particularity. Boilerplate objections (e.g., objections without a particularized basis, such as "overbroad, irrelevant, burdensome, not reasonably calculated to identify admissible evidence"), as well as incomplete or evasive answers, will be treated as a failure to answer pursuant to Fed. R. Civ. P. 37(a)(4). For that reason, boilerplate objections are prohibited.

6. ***Requests for Production of Documents.***

   a. Absent order of the Court upon a showing of good cause or stipulation by the parties, Rule 34 requests for production shall be limited to fifteen (15) in number. A response to these requests shall be served within thirty (30) days and any documents shall be produced within thirty (30) days thereafter, absent Court order or stipulation by the parties. Any objections to Rule 34 requests shall be stated with particularity. Boilerplate objections (*see* ¶ 5 above) and evasive or incomplete answers will be deemed to be a refusal to answer pursuant to Rule 37(a)(4).

   b. Requests for production of electronically-stored information (ESI) shall be governed as follows:

      i. Absent an order of the Court upon a showing of good cause or stipulation by the parties, a party from whom ESI has been requested shall not be required to search for responsive ESI:

         a. from more than ten (10) key custodians;

         b. that was created more than five (5) years before the filing of the lawsuit;

         c. from sources that are not reasonably accessible without undue burden or cost; or

         d. for more than 160 hours, ***inclusive*** of time spent identifying potentially responsive ESI, collecting that ESI, searching that ESI (whether using properly validated keywords, Boolean searches, computer-assisted or other search methodologies), and reviewing that ESI for responsiveness, confidentiality, and for privilege or work product protection. The producing party must be able to demonstrate that the search was effectively designed and efficiently conducted. A party from whom ESI has been requested must maintain detailed time records to demonstrate what was done and the time spent doing it, for review by an adversary and the Court, if requested.

      ii. Parties requesting ESI discovery and parties responding to such requests are expected to cooperate in the development of search methodology and criteria to achieve proportionality in ESI discovery, including appropriate use of computer-assisted search methodology, such as Technology Assisted Review, which employs advanced

analytical software applications that can screen for relevant, privileged, or protected information in ways that are more accurate than manual review and involve far less expense.

7. ***Duty to Preserve Evidence, Including ESI, that is Relevant to the Issues that Have Been Raised by the Pleadings.***

   a. The parties are under a common-law duty to preserve evidence relevant to the issues raised by the pleadings.

   b. In resolving any issue regarding whether a party has complied with its duty to preserve evidence, including ESI, the Court will consider, *inter alia*:

      i. whether the party under a duty to preserve ("Preserving Party") took measures to comply with the duty to preserve that were both reasonable and proportional to what was at issue in known or reasonably-anticipated litigation, taking into consideration the factors listed in Fed. R. Civ. P. 26(b)(2)(C);

      ii. whether the failure to preserve evidence was the result of culpable conduct, and if so, the degree of such culpability;

      iii. the relevance of the information that was not preserved;

      iv. the prejudice that the failure to preserve the evidence caused to the Requesting Party;

      v. whether the Requesting Party and Producing Party cooperated with each other regarding the scope of the duty to preserve and the manner in which it was to be accomplished; and

      vi. whether the Requesting Party and Producing Party sought prompt resolution from the Court regarding any disputes relating to the duty to preserve evidence.

8. ***Depositions.*** Absent further order of the Court upon a showing of good cause or stipulation by the parties, depositions of witnesses other than those deposed pursuant to Fed. R. Civ. P. 30(b)(6) shall not exceed four (4) hours. Rule 30(b)(6) depositions shall not exceed seven (7) hours.

9. ***Non-Waiver of Attorney–Client Privilege or Work Product Protection.*** As part of their duty to cooperate during discovery, the parties are expected to discuss whether the costs and burdens of discovery, especially discovery of ESI, may be reduced by entering into a non-waiver agreement pursuant to Fed. R. Evid. 502(e). The parties also should discuss whether to use computer-assisted search methodology to facilitate pre-production review of ESI to identify information that is beyond the scope of discovery because it is attorney–client privileged or work product protected.

   In accordance with Fed. R. Evid. 502(d), except when a party intentionally waives attorney–client privilege or work product protection by disclosing such information to an adverse party as provided in Fed. R. Evid. 502(a), the disclosure of attorney–client privileged or work product protected information pursuant to a non-waiver agreement entered into under Fed. R. Evid. 502(e) does not constitute a waiver in this proceeding, or in any other

federal or state proceeding. Further, the provisions of Fed. R. Evid. 502(b)(2) are inapplicable to the production of ESI pursuant to an agreement entered into between the parties under Fed. R. Evid. 502(e). However, a party that produces attorney–client privileged or work product protected information to an adverse party under a Rule 502(e) agreement without intending to waive the privilege or protection must promptly notify the adversary that it did not intend a waiver by its disclosure. Any dispute regarding whether the disclosing party has asserted properly the attorney–client privilege or work product protection will be brought promptly to the Court, if the parties are not themselves able to resolve it.

Dated: June 1, 2015

/S/
Paul W. Grimm
United States District Judge