

DEPOSING THE VENTRILOQUIST'S DUMMY:

A DISCUSSION OF WHEN AND HOW TO TAKE
DEPOSITIONS OF ORGANIZATION REPRESENTATIVES

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Paul N. Gold

1. OVERVIEW:

A. The deposition of the organization representative (Fed. R. Civ. P. 30(b)(6)) is a relatively unused, but potentially very effective tool in making the discovery process more efficient and more effective. It allows the party seeking the discovery to obtain the composite knowledge of the organization on specific topics, while having the testimony bind the corporation.

B. Most state rules, including those of Texas and Louisiana, regarding the taking of depositions are patterned after Fed. R. Civ. P. 30, so this discussion will be based primarily on the cases interpreting the federal rule.

C. Fed. R. Civ. P. 30b(6) up to a few years ago was referred to as the “forgotten rule.”¹ There was a dearth of cases interpreting the rule because it was infrequently used and less frequently the source of controversy. The use of Fed. R. Civ. P. 30b(6) has escalated exponentially over the last 20 years and a clear body of law regarding its application has developed concomitantly.

D. As we all learned in law school, corporations are a legal fiction. They are designed to protect equity owners from liability. You can sue a corporation, obtain a judgment against it, and presumably make it pay a judgment. The question, however, remains “how do you talk with a corporation,” and, more particularly, “how do you bind a corporation to information that you obtain”?

E. We know that the goals and rules that pertain to discovery are different in many regards than those that pertain to evidence at trial.

.1 Discovery is relevant if it is designed to lead to admissible evidence, regardless of whether the materials and information obtained are themselves actually admissible. Evidence on the other hand has to be more probative of a material issue than prejudicial to be considered relevant and admissible.

.2 We, as trial lawyers, know that a witness (except for a retained expert) must have personal knowledge of a fact in order for testimony about that fact to be admissible. Similarly, in order for testimony of a corporate employee to be admissible against the corporation, the witness must either be authorized by the corporation to give the statement or the

¹ See, Mark A. Cymrot, *The Forgotten Rule*, Litig. Spring 1992, at 6. Cited in James C. Winton, *Corporate Representative Deposition in Texas—Often Used But Rarely Understood*, 55 Baylor L. Rev. 651 (2003), which is an excellent secondary source on this topic.

testimony must pertain to a matter within the scope of the agency or employment and made during the existence of the relationship. These testimonial rules **do not apply** to a corporate representative deposition.

F. The deposition of a corporate representative is the deposition of the corporation. The corporation appears vicariously through its designee. *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993).

.1 The representative does not have to have personal knowledge of the facts about which the representative is giving testimony. Indeed, you are not requesting the individual with the most knowledge or the most knowledgeable person on a particular topic. What you are requesting is for the corporation to select one or more individuals and impart to those individuals all the knowledge known or available to the corporation. The representative is virtually the ventriloquist's dummy.

.2 The corporation selects the representative, not the party seeking the deposition. The party seeking the deposition may depose a manager or director whose testimony will bind the corporation, but the downside is that the particular manager or director may not have all the knowledge known or available to the corporation. Furthermore, there is no duty on the corporation to educate that individual.

.3 The representative is to be prepared by the corporation to answer all questions relevant to the topic delineated in the notice. The representative is to be prepared the same as though the corporation were answering an interrogatory. The representative is testifying as to the composite knowledge of the corporation and thus is to be properly prepared regarding that composite knowledge.

.4 The deposing party is entitled to know the sources of the representative's knowledge. For instance, it has been held to be improper to name an attorney as a representative and assert attorney client privilege and core work product as to all inquiries.

.5 The representative's testimony on the topic "binds" the corporation the same way that admission binds the corporation. Indeed, the testimony effectively is an admission of the corporation. The same rules with regard to offering contraverting testimony and withdrawing admissions presumably apply to Fed. R. Civ. P. 30b(6) testimony.

.6 Since the testimony is not based on personal knowledge, it cannot be used offensively.

.7 The majority rule is that the representative's testimony binds the corporation only on the topics for which the representative is designated. However, the representative may be deposed simultaneously as a fact witness. The testimony of the representative as a fact witness (unless the witness is also a manager, agent or director) does not bind the corporation.

.8 If the representative testifies that the corporation does not know or that the corporation does not have any responsive documents or evidence on a point presumably the same rules regarding supplementation and potential exclusion of contravening evidence at trial will apply.

G. The corporate representative deposition is a very useful tool for a number of purposes and goals, including identifying the following information and materials:

- .1 Facts and beliefs held by the corporation;
- .2 Contentions and defenses;
- .3 Individuals with knowledge of relevant facts/ potential witnesses;
- .4 Terms the corporation uses to identify documents and/or processes;
- .5 Identification and authentication of documents and things;
- .6 Corporate structure and interrelationships;
- .7 Corporation organizational trees;
- .8 Risk management policies and procedures;
- .9 Data storage and retention policies;
- .10 Corporate policies and procedures;
- .11 Prior other similar incidents, claims and lawsuits; and
- .12 Net worth.

2. STRATEGY:

It is important early in the case to formulate a strategy for how and when the corporate representative deposition is to be used. The following are important considerations:

A. How many depositions are allowed in the particular case and how will corporate representative depositions be counted against this limitation?

B. Do you wish to set out all topics in one notice or have separate notices with discrete topics in each?

C. Should the topics be broad or very narrowly tailored?

D. Should the notice be for the representative also in the representative's individual capacity?

E. Is the deposition a predicate for attempting to take an Apex deposition (deposition of an executive officer)?

F. Should the deposition be noticed at the beginning of the case or at the end? Do you want to efficiently identify the individuals, documents or things relevant to the claims and defenses alleged or is it more important to obtain the corporation's binding testimony on particular issues?

G. Where do you wish to conduct the deposition? The deposition is considered that of a party so it may be taken in the forum in which the case is pending. No subpoena will be necessary because the deposition is of a party not an individual witness.

3. FORMS:

Attached as **Appendices A** and **B** are samples of corporate representative depositions. The author believes it is a good practice when dealing with non party organizations to set out the rules regarding the procedure that applies to the organization designating and preparing a witness, and the scope of the deposition.

4. DISCUSSION OF CASE LAW AND ISSUES:

A. *GTE Products Corporation v. Gee*, 115 F. R.D. 67 (D. Mass. 1987) points out that a party has two options when it comes to seeking a deposition from a corporation. It may notice a particular officer, director or managing agent pursuant to Fed. R. Civ. P. 30(b)(1) or it may notice the corporation and list ". . . with reasonable particularity [of] the matters on which examination is requested." Fed. R. Civ. P. 30(b)(6). While the testimony of the particular officer, director or managing agent may bind the corporation, the testimony is limited to the particular individual's knowledge. On the other hand, the corporate representative selected by the corporation to testify on behalf of the corporation on that topic must be prepared to provide all the information on the topic known to the corporation or available to it. The testimony of the representative will bind the corporation on the topic. What the opinion makes clear, however, is that it is not permissible to notice a corporation by a particular person who is not an officer, director or managing agent. The party seeking the deposition cannot in other words select the corporation's representative.

B. In *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D.121 (D. N.C. 1989), the Court outlined the basic procedure required by Fed. R. Civ. P. 30(b)(6):

[a] notice of deposition made pursuant to Rule 30(b)(6) requires the corporation to produce one or more officers to testify with respect to matters set out in the deposition notice or subpoena. A party need only designate, with reasonable particularity, the topics for examination. The corporation then must not only produce such number of persons as will satisfy the request, but more

importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation.

Marker, supra at 126.

C. *Reed v. Bennett*, 193 F.R.D. 689 (D.Ks.2000) discusses the threshold requirement that the notice delineate topics with “reasonable particularity.” The notice must set out discrete topics, which cannot be open-ended. In *Reed*, Plaintiff indicated that the topics were not exclusive, meaning that the witness might be required to respond on unspecified topics. Further, Plaintiff impermissibly broadened the scope of the designated topics by indicating that the areas of inquiry will “includ[e], but not [be] limited to” the areas specifically enumerated.” The Court held that “[a]n overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task... Where, as here, the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.” See also *Tri-State Hospital Supply Corp. v. U.S.*, 226 F.R.D. 118, (D.C.D.C. 2005)

D. Once the noticing party meets the reasonable particularity requirement, the corporate witness must designate one or more representatives to testify on the respective topics. The party seeking the deposition does not have the right to designate the corporate representative. It is the prerogative of the corporation to designate one or more representatives on each topic stated with reasonable particularity. *Cleveland v. Palmby*, 75 F.R.D. 654 (W.D.Ok.. 1977). See also *HCA v. Farrar*, 733 S.W.2d 393 (Tex. App. – Fort Worth 1987, no writ), interpreting Tex. R. Civ. P. 201(4), predecessor to Tex. R. Civ. P. 199.2 (b).

E. While a party has the right under Fed. R.Civ.P. 30(b)(1)² to notice an officer, director or managing agent whose testimony will bind the corporation, the witness can only bind the corporation to the extent of the *witness*’ personal knowledge. There also is a limitation on the scope of this rule to the extent it butts up against the apex witness doctrine.

.1 An "apex" deposition is a deposition of a corporate officer at the apex of the corporate hierarchy. The Texas Supreme Court has held that, subject to a motion for protection, certain criteria must be met before an apex deposition may be taken. *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995). In *Crown Cent. Petroleum Corp. v. Garcia*, the Texas Supreme Court adopted the following guidelines for depositions of persons at the apex of the corporate hierarchy.

a) When a corporate president or other high level corporate official (or the corporation) **files a motion** for a protective order to prohibit a party from deposing him or her, the trial court should first determine whether the party seeking the deposition has arguably shown that the official has **any unique or superior personal knowledge** of discoverable information.

² Texas arguably has not adopted Fed. R. Civ. P. 30(b)(1). There is not a similar provision in Tex. R. Civ. P. However, if so, the relevance of the wording in Tex. R. Civ. P. 215 (b) which discusses sanctions for failing to produce “an officer, director, or managing agent of a party. . . ” is called into question.

b) If the party seeking the deposition cannot show that the official has any unique or superior personal knowledge of discoverable information, the trial court should issue the protective order and require the party seeking the deposition to attempt to **obtain the discovery through less intrusive methods**. The Court suggested that less intrusive methods could include taking the depositions of lower level employees or the corporation itself, through designated representatives, and directing a request for production of documents to the corporation. *See also AMR Corp. v. Enlow*, 926 S.W.2d 640 (Tex. App.--Fort Worth 1996, n.w.h.)

c) After making a **good faith effort** to obtain the discovery through less intrusive methods, the party seeking the deposition may attempt to show (1) that the official's deposition is reasonably calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate. If the party seeking the deposition cannot make this showing, the trial court should leave the protective order in place.

.2 The federal procedure with respect to apex depositions is similar to the procedure recently adopted by the Texas Supreme Court in *Garcia, supra*. As a witness with personal knowledge of facts relevant to the lawsuit, a corporate president is subject to being deposed;³ however, a court may require that interrogatories first be served. This was the case in *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D. R.I. 1985) where the plaintiffs sought the deposition of Lee Iacocca. The *Mulvey* order allowed the plaintiffs to take an oral deposition at a later time if answers to the interrogatories warranted it. This ruling was given primarily because Iacocca had signed an affidavit professing ignorance of the information that the plaintiffs sought. *Mulvey* was relied on by the district court in *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D. Ala. 1991). There the court ordered that interrogatories be served on the top executive of General Motors' Buick division before resorting to a deposition. The court noted that several other cases have focused on the "unique personal knowledge" requirement, and have required that resort first be made to interrogatories, deposition of a designated spokesperson, or deposition of lower level employees.

F. A corporation has a duty to prepare the representative to give testimony on behalf of the corporation on specified topics to the full extent of the corporation's knowledge or the knowledge available to the corporation. The corporation "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the interrogator] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed by [the interrogator] as to the relevant subject matters." *Mitsui & Co. v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 67 (D.P.R.1981); *see also S.E.C. v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y.1992). If it becomes obvious during the course of a deposition that the designee is deficient, the corporation is obligated to provide a substitute. *See Marker*, 125 F.R.D. at 126. However, if it becomes clear that the corporation simply does not have any information to provide a representative, then the corporation has fulfilled its duty. *Davo Corp. v. Liberty Mutual Insurance Co.*, 164 F.R.D. 70, 76 (D. Neb.1995). This requirement also has been applied by Texas courts interpreting the Texas rule. *See Allstate Texas Lloyds v. Johnson*, 784 S.W.2d 100 (Tex. App. – Waco 1989) and *In re Fina Oil and Chemical Company*, 1999 WL 33589153 (Tex.App.-Corpus Christi, unreported)

³*CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984).

G. The corporation may not avoid the deposition by claiming a lack of knowledge on the topic. The noticing party is entitled to take the deposition of a representative to test this claim. See *Ierardi v. Lorillard*, 1991 WL 158911 (E.D. Pa. 1991) (unreported).

H. The question of whether a representative must be designated to provide the factual basis for contentions is unsettled. *Ierardi v. Lorillard*, *supra*, stands for the proposition that a party may through the corporate representative obtain the factual knowledge of the corporation regarding alleged contentions. *Ierardi v. Lorillard*, *supra* at 1. A party may further obtain the “subjective beliefs and opinions” of the corporation. *Lapenna v. The Upjohn Co.*, 110 F.R.D.15, 20 (E.D.Pa.1986). A party also may also learn the corporation’s interpretation of documents. *Ierardi v. Lorillard*, *supra* at 2. However, there is other authority for the proposition that in a particular case, contention interrogatories may be more appropriate than a 30(b)(6) deposition. *Exxon Research and Engineering Co. v. U.S.*, 44 Fed. Cl. 597 (U.S. Ct of Fed Claims, 1999). The analysis in *Exxon* is instructive. *U.S. v. Taylor*, 166 F.R.D.356 (M.D.N.C.1996) holds that the determination should be made on a case by case basis:

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.... Whether a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate will be a case by case factual determination.

U.S. v. Taylor, *supra* at 362, n. 7. The court in *Exxon* adopted the reasoning of the court in

McCormick-Morgan, Inc. v. Teledyne Industries, Inc., 134 F.R.D. 275, at 286 (N.D.Cal.1991):

the question to which [the Court] now turn[s] is: which of the available devices is most appropriate, i.e., which device would yield most reliably and in the most cost-effective, least burdensome manner information that is sufficiently complete to meet the needs of the parties and the court in a case like this?

The court in *SEC v. Morelli* found that a 30(b)(6) deposition was inappropriate to require a party to marshal its evidence. It found that contention interrogatories were a more appropriate tool for exploring contentions under the facts of that case. *SEC v. Morelli*, *supra* at 48 (S.D.N.Y 1989).

Interestingly, the *Exxon* court found that if the answer to the contention interrogatory was inadequate that the next alternative would be for the corporation to designate an in-house attorney as the representative on the contentions. See *Exxon*, *supra* at 602. There is great risk in designating an attorney as a corporate representative.

I. Designating an attorney as a representative has been held to constitute a waiver of the attorney/client and attorney work product privileges. *State of W. Va. v. Bedell*, 484 S.E.2d 199 (W.Va. 1997). A corporation may not designate an attorney as a representative and then object to all questions on the basis that it would waive attorney client privilege or attorney core work product. Similarly, it has been held improper and sanctionable for an insurance carrier

to designate an investigator as its representative and through the investigator assert various privileges preventing discovery on the topics specified in the notice. *Allstate Texas Lloyds v. Johnson*, 784 S.W.2d 100 (Tex. App. – Waco 1989). See also *SEC v. Morelli*, 143 F.R.D. 42 46, at fn. 1 (S.D.N.Y 1992).

J. However, where the corporation can demonstrate that it has produced all the facts available to it on a particular topic and that the only purpose of the deposition would be to obtain the core work product of the corporation's litigation team, then the court has been found not to abuse its discretion in denying the 30(b)(6) deposition. *State of New York v. Solvent Chemical Co.*, 214 F.R.D. 106, 112 (W.D.N.Y. 2003). Further, courts are very reluctant to allow depositions of attorneys. See *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir.1986) Where it appears that the person seeking the deposition is seeking the deponent's legal theories and to have the deponent marshal its evidence, the court is likely to quash the 30(b)(6) deposition to the extent it tacitly seeks the deposition of the deponent's attorneys. In other words, if the representative can only testify about information provided by attorneys, the court predictably will not let the party seeking the deposition have indirectly what the court would restrict or refuse directly. See, *SEC v. Buntrock*, 217 F.R.D. 441, 444-446 (N.D. Ill. 2003) ("Here, we are dealing with the results of an attorney-conducted and directed law enforcement investigation." at 444).

K. While a corporation is entitled to protect attorney client privilege and attorney core work product during the deposition, the decision as to who will be the representative and the preparation of the representative has been held not to be protected as attorney client communication:

Although plaintiff contends that "the decision as to who will be the Rule 30(b)(6) designee is, of necessity, a legal decision made with the advice of counsel[]", the communication is not intended to be, and is not in fact, kept confidential as the identified individual becomes the Rule 30(b)(6) designee. The identification of the individual who authorized the designation of the Rule 30(b)(6) witness, likewise, would not be subject to the attorney-client privilege as a response to that limited inquiry would not reveal the substance of confidential communications. Any further inquiry into such decision-making process, however, is privileged, and Rule 30(d)(1) provides plaintiff's counsel with an appropriate objection to a question that would "[compel] the client to reveal what was said."

Veritas – Scalable Investment Products Fund v. FB Foods, Inc., 2006 WL 1102757 (D.Conn.) (unreported).

L. An individual may be both a fact witness and be designated as a corporate representative. Simply because a witness has been deposed as a fact witness in his or her individual capacity does not preclude the party seeking a Rule 30b(6) deposition from deposing that witness again, if that individual is designated as a representative on a particular topic. The witness is not to be presented again as a fact witness but as the voice of the corporation on a particular topic. See *Ireardi v. Lorillard*, *supra* at 2. However, where the fact witness is a director or officer in a privately held corporation, the court might attempt to find an equitable

alternative to a rehash of the deposition. See *AIA Holdings S.A. v. Lehman Bros. Inc.*, 2002 WL 1041356 (S.D.N.Y.) (unreported). Similarly, the rule particularly provides that simply because an individual has been presented as a corporate representative on one or more topics, does not preclude the opposing party from taking the individual's deposition in her individual capacity. "This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules."

M. One of the major controversies involving Rule 30b(6) depositions involves the scope of the interrogation. Provided the noticing party sets forth with reasonable particularity the topics on which the corporation is to designate one or more representatives, is the party conducting the deposition limited to asking questions solely on the delineated topics? There are two primary positions on this matter. The first, represented by the *Paparelli* (see below) case, holds that the party conducting the deposition is entitled to obtain testimony solely on the topics delineated and that the party offering the representative is entitled to instruct the witness not to respond to questions outside the scope of the topics, subject to filing and obtaining a ruling on a motion for protection. The other position, represented by the *King v. Pratt & Whitney* case, 161 F.R.D.475 (S.D. Fla.1995), aff'd, 213 F.3d 646(11th Cir.2000)(unpublished table decision). This case holds that the party conducting the deposition may ask the witness questions about facts outside the scope of the topics just as any other fact witness. The testimony of the witness outside the scope of the topics will not bind the corporation provided that the witness is not an officer, agent or director. The majority opinion and opinion followed by most current decisions is the position staked out in *King v. Pratt & Whitney* which holds that the questioner is not confined to asking questions solely on the topics delineated in the notice.

.1 *Paparelli v. Prudential Insurance Co. of America*, 108 F.R.D. 727(D. Mass 1985) is the leading case for the proposition that a deposing party is limited to the topics delineated in the notice. The Magistrate in *Paparelli* found that two of the primary goals of Rule 30(b) (6) would be frustrated if broader questioning were allowed. The court could not see why a corporation should have to produce the individual with the most knowledge on a subject only to have the deposing attorney ask question beyond the topic on which the individual had been designated. Similarly, the court could not see why a corporation should have to prepare a witness on a particular topic only to have the witness questioned on other areas, presumably on which the witness has not been prepared. The Magistrate's holding in *Paparelli* appears to ignore one very important consideration. The testimony of the representative only binds the corporation on the topic[s] for which the representative is designated. Thus the only issue is one of efficiency. It would appear more efficient for the parties to have the witness deposed only once rather than having the witness produced first as a representative and then as a fact witness. This basically is the analysis adopted by the court in *King v. Pratt & Whitney*.

.2 Ten years after the holding in *Paparelli*, the same issue was addressed in *King v. Pratt & Whitney*, which declined to follow *Paparelli's* rationale. The Court staked out what it described as a better procedure:

Rule 30(b)(6) should not be read to confer some special privilege on a corporate deponent responding to this type of notice. Clearly, Plaintiff could simply re-notice a deponent under the regular notice provisions and ask him the

same questions that were objected to. However, Plaintiff should not be forced to jump through that extra hoop absent some compelling reason. Rather, the Rule is best read as follows:

1) Rule 30(b)(6) obligates the responding corporation to provide a witness who can answer questions regarding the subject matter listed in the notice.

2) If the designated deponent cannot answer those questions, then the corporation has failed to comply with its Rule 30(b)(6) obligations and may be subject to sanctions, etc. The corporation has an affirmative duty to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are "known or reasonably available" to the corporation. Rule 30(b)(6) delineates this affirmative duty.

3) If the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern (i.e. Fed.R.Civ.P. 26(b)(1)), so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6).

4) However, if the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem.

This interpretation does not render the "describe with reasonable particularity" language "superfluous"; rather, it imposes an obligation on a corporation to provide someone who can indeed answer the particular questions presaged by the notice. Rule 30(b)(6) does not limit what can be asked at deposition.

The holding in *King v. Pratt & Whitney* has been followed by most courts that have written on the issue since 1995. See *Overseas Private Investment Corporation v. Mandelbaum*, 185 F.R.D. 67 (D.C.D.C. 1999); *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, (N.D.Ca. 2000); *New World Network, Ltd. v. M/V Norwegian Sea*, 2007 WL 1068124 (S.D.Fla.)

N. *U.S. v. Taylor*, 166 F.R.D.356 (M.D.N.C.1996) is both a very prominent and controversial opinion on the topic of 30(b)(6). The case stands for the proposition that a corporation is obliged to prepare one or more representatives to give deposition testimony even if the corporation no longer employs any individual with knowledge of the events at issue. The opinion highlights the phrase "knowledge reasonably available" to the corporation. The witness is not testifying based on his/her personal knowledge, but on the composite knowledge of the corporation. If the witness testifies that he/she has no knowledge or recollection, it is with jeopardy to the corporation on this topic:

Of course, just like in the instance of an individual deponent, the corporation may plead lack of memory. However, if it wishes to assert a position based on testimony from third parties, or their documents, the designee still must present an opinion as to why the corporation believes the facts should be so construed. 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. *U.S. v. Taylor*, supra at 361-362.

O. A deponent may move to quash a 30(b)(6) deposition on the basis that the deposition is duplicative of other discovery,⁴ invades attorney client privilege or attorney core work product, or the topics are irrelevant. However, where the deposition is sought on material issues that are core to the deposing party's case, it has been found that it would be an abuse of discretion to quash the deposition. See *In re Garza*, 2007 WL 1481897 (Tex.App.-San Antonio) (unreported).

P. The consequences may be severe for the party who does not timely and properly move to quash the deposition or seek protection from it,⁵ but instead chooses not to produce a representative, instructs the witness not to answer questions relevant to the delineated topics, or fails to properly prepare the witness to answer questions on the delineated topics.

.1 In *Resolution Trust Corp. v. Southern Union Co.* 985 F.2d 196 (5th Cir. 1993) the Fifth Circuit affirmed the actions of the trial judge in awarding attorneys fees and expenses for the corporate defendants failure to produce a properly prepared corporate witness to give testimony on behalf of the corporation in response to specific delineated topics. The corporation produced two witnesses who could not answer the questions. In response to a motion for sanctions, the corporation produced the deposition of an earlier deposed witness and relevant documents. The court observed that this individual obviously had information relevant to the topics but was not designated as a representative, nor was his information shared with the designated representatives. This constituted effectively a failure to produce a representative, which was sanctionable under Fed. R.Civ. P. 37:

When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent. If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all.

Resolution Trust Corp. v. Southern Union Co., supra at 197

.2 *U.S. v. Taylor*, 166 F.R.D.356 (M.D.N.C.1996) is the leading authority on appropriate sanctions at trial for a corporations failure to properly comply with Rule

⁴ See, Tex. R. Civ. P. 192.4.

⁵ See, *Bregman v. District of Columbia*, 182 F.R.D. 352, 354-355 (D.D.C.1998) and *Ferko v. N.A.S.C.A.R.*, 218 F.R.D. 125, 141-145 (E.D. Tex. Sherman Div. 2003).

30(b)(6). The decision is very informative on this topic and therefore the opinion will be quoted at length:

If a corporation has knowledge or a position as to a set of alleged facts or an area of inquiry, it is its officers, employees, agents or others who must present the position, give reasons for the position, and, more importantly, stand subject to cross-examination. A party's trial attorney normally does not fit that bill. [FN7] Therefore, 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 without introducing evidence explaining the reasons for the change. [FN8] See *Ierardi v. Lorillard, Inc.*, *supra*, at *3. Otherwise, it is the attorney who is giving evidence, not the party.

U.S. v. Taylor, *supra* at 362-363 Footnote 8 reads as follows:

FN8. This does not mean that such a party could not argue against the factual conclusions asserted by an opponent from the opponent's evidence. What the corporation cannot do is have the attorney assert that the facts show a particular position on a topic when, at the Rule 30(b)(6) deposition, the corporation asserts no knowledge and no position. At trial, UCC will be required to make an evidentiary showing to support such a change in position. *Ierardi v. Lorillard, Inc. supra*, at *3 (timely notice of correction required.) This Order merely reduces the chance of such a disruptive situation by making the corporation do a thorough investigation before the deposition, and not just before the trial.

The following orders were issued relevant to the 30(b)(6) depositions:

10. UCC may choose not to designate a deponent to testify at its Rule 30(b)(6) deposition on one or more particular areas of inquiry in Attachment A. However, for each area of inquiry or sub-area of inquiry in Attachment A as to which UCC does not designate a deponent to testify and thereby takes the position that it has no corporate knowledge and position on that area, UCC will not, without extremely good cause shown, be allowed to introduce evidence consisting of documents prepared, sent or received by UCC, or of testimony of current or former UCC employees to affirmatively support or oppose a designated claim or defense with respect to the area of inquiry, and in addition, it may be prohibited from introducing any evidence as to such area of inquiry, pursuant to Fed.R.Civ.P. 37(b)(2)(B). All claims of newly discovered evidence to support an exception to this portion of the Order will be strictly scrutinized.

11. If UCC intends at trial to introduce deposition exhibits, documents or prior fact witness deposition testimony as its corporate knowledge of facts concerning the same topics that are described as areas of inquiry in Attachment A, UCC must, at its Rule 30(b)(6) deposition, designate a deponent who will testify about UCC's corporate knowledge and opinion with respect to testimony, facts

and factual assertions in those deposition transcripts, deposition exhibits and documents, or portions thereof, including, but not limited to, whether or not UCC adopts or refutes testimony, facts and factual assertions in those deposition transcripts, deposition exhibits and documents, or portions thereof, as its corporate knowledge or position with respect to particular areas of inquiry.

15. The parties are forewarned that the Court may impose sanctions under Fed.R.Civ.P. 37, including contempt of court for any further violations of their obligations under Rule 30(b)(6), or of this Court's orders or decisions concerning the conduct of the Rule 30(b)(6) deposition of UCC.

.3 Sometimes a witness is apparently knowledgeable about the topics on which he/she is designated, but the representative is unable to answer all the questions propounded on the delineated topics. In such an instance are sanctions warranted? Probably not in the 5th Circuit. Such an instance was at issue in *Boland Marine & Manufacturing v. M/V Bright Field, ETC.*, 1999 WL 280451 (E.D.La.) (unreported). The district court refused to sanction the corporation, referring to and adopting the rationale in *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, No. 94CIV1942, 1995 WL 686715, at 5, 8 (S.D.N.Y. Nov. 17, 1995).

In order for the court to impose sanctions, the inadequacies in a deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas." *Id.* at *8 (citing *RTC, 985 F.2d at 197*; *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 78 (S.D.N.Y.1991); *Thomas v. Hoffman-Laroche, Inc.*, 126 F.R.D. 522, 524 (N.D.Miss.1989)). Some memory loss by a witness can be expected when he is deposed two years after an incident.

.4 There is precedent in Texas courts for entering sanctions against corporations for failing to produce appropriately prepared representatives. *Allstate Texas Lloyds v. Johnson*, 784 S.W.2d 100 (Tex. App. — Waco 1989. orig. proceeding). *See also* Tex. R. Civ. P. 215.2(b) In *Allstate Texas Lloyds*, the defendant insurance company designated its investigator who investigated the cause of a fire that consumed the plaintiff's home, despite the fact that the plaintiff "gave exhaustive notice of the matters upon which she expected to question Allstate" *Allstate Texas Lloyds*, supra at 103. When the plaintiff asked questions concerning what Allstate knew or what facts it had, Allstate's counsel repeatedly objected on the basis of privilege, claiming that the investigator could only know the answers by having conferred with Allstate's counsel or having received privileged communications. The court upheld the trial court's ordering of sanctions against Allstate for its failure "to do just what the notice and the rule [Rule 201(4)] require: produce one or more persons able to testify as to the matters which were described with reasonable particularity in the notice." *Allstate Texas Lloyds*, supra at 104. The court found that the trial judge could reasonably have concluded that Allstate's failure to prepare its representative or produce a competent one was "cavalier or even in bad faith." The trial court as sanctions imposed costs of the deposition on the offending party and struck the offending party's pleadings. The appellate court upheld both sanctions, however, held that the striking of pleadings would be reviewed on appeal. It is probably safe to say that any sanction in a Texas court striking pleadings would presently need to conform to the criteria of *Transamerican Natural Gas Corporation v. Powel*, 811 S.W.2d 913 (Tex. 199).

Q. What is the effect of the representative's testimony at trial? The testimony on the properly delineated topics binds the corporation as would admissions of the corporation. The admissions, however, do not constitute judicial admissions:

When the Court indicates that the Rule 30(b)(6) designee gives a statement or opinion binding on the corporation, this does not mean that said statement is tantamount to a judicial admission. Rather, just as in the deposition of individuals, it is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered. *W.R. Grace & Co. v. Viskase Corporation*, No. 90C5383, 1991 WL 211647 (N.D.Ill. Oct. 15, 1991). However, the designee can make admissions against interest under Fed.R.Evid. 804(b)(3) which are binding on the corporation. *Ierardi v. Lorillard, Inc.*, Civ. A. No. 90-7049, 1991 WL 158911, at *3 (E.D.Pa. Aug. 13, 1991).

U.S. v. Taylor, *supra* at 363, fn.6.

.1 *W.R. Grace & Co. v. Viskase Corp.*, No. 90C5383, 1991 WL 211647 (N.D. Ill. Oct. 15, 1991) (unreported) expands upon the general statement contained in *U.S. v. Taylor* holding that the testimony of the corporate representative may be explained or contradicted at trial:

Deposition testimony is simply evidence, nothing more. Evidence may be explained or contradicted. Judicial admissions, on the other hand, may not be contradicted. *Brown & Root, Inc. v. American Home Assur. Co.*, 353 F.2d 113 (5th Cir.1965), *cert. denied*, 384 U.S. 943 (1966). Viskase ignores the differences between evidentiary testimony and judicial admissions.

If a Grace trial witness makes a statement that contradicts a position previously taken in a Rule 30(b)(6) deposition, then Viskase may impeach that witness with the prior inconsistent statement.

W.R. Grace & Co. v. Viskase Corp., *supra*, at 2 See also, *A & E Products Group v. Mainetti SA, Inc.*, 2004 WL 345841 (S.D.N.Y.) (unreported).

.2 *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416 (5th Cir. 2006), stands for the proposition that a corporate witness' testimony may be used at trial by an adversary to bind the corporation on the topics for which the representative was designated and gave trial testimony:

Although there is no rule requiring that the corporate designee testify "vicariously" at trial, as distinguished from at the rule 30(b)(6) deposition, if the corporation makes the witness available at trial he should not be able to refuse to testify to matters as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge. This conclusion

rests on the consideration that though Federal Rule of Civil Procedure 32(a)(2) "permits a party to introduce the deposition of an adversary as part of his substantive proof regardless of the adversary's availability to testify at trial," *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 308 (5th Cir.1978), [footnote omitted] district courts are reluctant to allow the reading into evidence of the rule 30(b)(6) deposition if the witness is available to testify at trial, and such exclusion is usually deemed harmless error. [footnote omitted] Thus, if a rule 30(b)(6) witness is made available at trial, he should be allowed to testify as to matters within corporate knowledge to which he testified in deposition.

While the corporate representative should be able to testify on behalf of the corporation regarding the matters on which the representative was designated, the remaining question is whether the corporate representative could be used at trial on behalf of the corporation to advance these positions in direct examination. Unless it could be shown that the witness was testifying from personal knowledge as opposed to the composite knowledge of the corporation, such testimony would be hearsay. The testimony may be used against the corporation because it is an admission. The inference from *Brazos River Authority v. GE Ionics, Inc.*, *supra* at 434 is that the testimony also could be used affirmatively:

Grigsby acts as the agent for the corporation, he should be able to present Cajun'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 Cajun personnel. Cajun argues that Grigsby had no personal knowledge of this matter under rule 602 and that rule 701 prohibits lay witnesses from testifying as to issues that are not within their personal perception. But Grigsby does not testify as to his personal knowledge or perceptions; as explained in *Resolution Trust*, he testifies "vicariously," for the corporation, as to its knowledge and perceptions.

The answer to this last question is not clear.

APPENDIX A

CORPORATE REPRESENTATIVE NOTICE

TRUCKWRECK

DAVID PAUL WINGFIELD
and KIMBERLY WINGFEILD

VS.

JIMMY W. HUFFMAN,
YELLOW TRANSPORTATION, INC.
YELLOW ROADWAY CORP.,
YELLOW FREIGHT SYSTEM,
YELLOW FREIGHT LINES, INC.,
YELLOW TRANSPORT, JR. and
OVERNITE TRANSPORTATION
COMPANY

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IN THE DISTRICT COURT

298TH JUDICIAL DISTRICT

DALLAS COUNTY, TEXAS

**PLAINTIFFS' FIRST SUPPLEMENTAL NOTICE OF INTENTION TO TAKE
ORAL/VIDEOTAPED DEPOSITIONS
[PARTIES]**

This is to give notice of the Plaintiffs' intention to take the oral/videotaped depositions of the following witnesses, pursuant to Rule Tex. R. Civ. P. 199, as described below:

1. **SCHEDULE OF WITNESSES:** The witnesses identified below are to be presented for deposition as stated:

WITNESS	TIME	DATE	PLACE
Designated Corporate Representative for Yellow Transportation ⁶	1:00 p.m. ⁷	December 21, 2006	

Each deposition is to begin at the time designated and will continue from day to day until completed. Each deposition is being taken for all purposes allowed by the Texas Rules of Civil Procedure and the Texas Rules of Civil Evidence.

2. **DESIGNATION OF ORGANIZATION EPRESENTATIVE(S):**

⁶ Defendants are referred to paragraph 2, below.

⁷ This deposition is being scheduled on this date and at this time in reliance upon Mr. Dickinson's representation that he will only need approximately 2 hours to complete the deposition of David Wingfield, which is to begin at 10:00 a.m.

.1 Plaintiffs intend to take the deposition of Defendants, **Yellow Transportation Inc., Yellow Roadway Corp., Yellow Freight System, Yellow Freight Lines, Inc., Yellow Transport, Jr.**,⁸ pursuant to Tex. R. Civ. P. 199.2(b) (1), through one or more representatives testifying on behalf of each of these defendants on the following subjects:

A. The relationship between each of the Yellow Transportation Entities on the date in question, including the terms of the relationship, the respective rights and obligations of the parties to the agreement, the relationship specifically with regard to the operation of the Yellow Transportation vehicle Huffman was operating at the time of the incident in question, and responsibility and accountability for Huffman's conduct in operating the Yellow Transportation vehicle at the time of the incident in question;

B. Yellow Transportation's relationship with all unions relative to Huffman operating the Yellow Transport vehicle at the time of the incident in question, including all communications, meetings and agreements between such unions and Yellow Transportation prior to and after the incident in question regarding Huffman's employment by Yellow Transportation;

C. What rights and authority Yellow Transportation retained and/or exercised to assure that Huffman operated the Yellow Transportoin vehicle in question properly and safely at the time of the incident in question;

D. All individuals with knowledge of facts relevant to the claims and defenses alleged in this case including the individuals with Yellow Transportation with responsibility for the hiring and evaluation of Huffman as a driver, and entrustment of the Yellow Transportation vehicle in question to Huffman relevant to the incident in question;

E. The individuals in the chain of command or organization chart, above Huffman, with responsibility or accountability within Yellow Transport for entrustment of the Yellow Transportation vehicle to Huffman, Huffman's continued employment prior to and after the incident in question, and responsibility and accountability for the way in which Huffman operated the Yellow Transportation vehicle at the time of the incident in question;

F. Yellow Transportation's liability insurance coverage (primary and excess) for the incident in question and the claims of injury alleged by Plaintiffs arising from the incident in question;

⁸ Plaintiffs are interested in taking the deposition of the corporate representative(s) for the real Yellow Transportation entity in interest. In this regard, Plaintiffs propose that an agreement be reached in advance of the deposition regarding the actual Yellow Transport entity or entities that potentially have responsibility for the incident in question and Plaintiffs' alleged injuries. As to the other entities, Plaintiffs can agree to abate their action against them, subject to re-adding them to the lawsuit if evidence of their culpability or responsibility is developed in the prosecution of the claim.

G. Yellow Transportation's decision-making in hiring Huffman, including its investigation of his competency to drive a commercial truck safely, Yellow Transportation's evaluation of Huffman's performance as a driver during his employment with Yellow Transport up until the date of the incident in question, Yellow Transportation's evaluation and decision-making with regard to Huffman's competency to continue operating commercial vehicles for Yellow Transportation following the incident in question.

H. All Yellow Transportation's policies and procedures relevant to the operation of the Yellow Transportation vehicle in question in effect at the time of the incident in question, including all orientation, training, proficiency testing drivers such as Huffman were to undergo and pass, and all policies and procedures regarding Federal Motor Carrier Safety Act log compilation and maintenance, record-keeping, and record retention.

I. Huffman's history while employed at Yellow Transportation with regard to maintenance of logs and Huffman's log keeping relevant to the route he was driving at the time of the incident in question. Huffman's logs relevant to the incident in question;

J. Yellow Transportation's ability to track drivers on route such as Huffman in the instance in question, including all satellite tracking, QUALCOMM tracking, data recorder devices, etc.

K. All tracking that Yellow Transportation conducted with regard to Huffman and his activities on the route he was on at the time of the incident in question. Yellow Transportation's knowledge regarding Huffman's activities on the date in question during the twelve hours prior to the incident in question. This includes all expenses Huffman incurred and/or reported relevant to the route in question and/or during the 72 hour period prior to the incident, whichever is longer.

L. Yellow Transportation's policies and procedures regarding investigating incidents such as the one giving rise to the instant lawsuit, including the identity of the individuals who are to participate in the investigation, when the investigation is to be conducted, what information is to be obtained and to whom the information is to be delivered. When Yellow Transportation first anticipated litigation in this instance and the factual basis for the belief. Yellow Transport's investigation conducted in the ordinary course of business relevant to the incident in question, including all statements, testing (drug and alcohol) and photographs obtained by or on behalf of Yellow Transportation. This includes all preventability assessments and findings and all root cause analyses and reports;

M. All discussions between Yellow Transportation and Huffman relative to the route Huffman was taking at the time of the incident in question, his destination, and what commerce he was to transport to and/or receive at that location;

N. Huffman's employment history with Yellow Transportation, including his medical history and DOT medical evaluations.

O. All performance evaluations of Huffman conducted by or on behalf of Yellow Transportation during Huffman's employment, particularly during the thirty six months prior to the incident in question;

P. Yellow Transportation's policies and procedures for drug/alcohol testing of drivers following incidents such as the one in question, the findings of the drug and alcohol testing performed on Huffman following the incident in question, and/or the reasons why drug and alcohol testing were not performed

Q. All reporting Yellow Transportation has done or submitted regarding the incident in question to governmental agencies or in compliance with governmental regulations;

R. All damage appraisals obtained by or on behalf of Yellow Transportation regarding each of the vehicles involved in the incident in question;

S. The reasons for Huffman's separation from Yellow Transportation and all post employment claims filed by Huffman against Yellow Transportation;

T. The ownership or title holders for the tractor and trailer Huffman was operating at the time of the incident in question, and Yellow Transport's assessment of the vehicles before and after the incident in question with regard to whether there were any dysfunctional systems and if so whether they played a role in the incident in question.

U. Yellow Transportation's disclosures including the factual basis for Yellow Transport's claims that Plaintiffs, some other entities or conditions are responsible for the incident in question and/or Plaintiffs' claims of injuries.

.2 A reasonable time before the above noticed depositions, the Defendant is obligated to designate one or more individuals to testify on its behalf, on each of the listed topics, as to matters that are known or reasonably available to it, pursuant to Rule 199.2(b)(1). Plaintiffs' counsel requests Defendant's cooperation in providing this notification, *in writing*, no less than three (3) business days before the scheduled deposition.

3. COURT REPORTER: The depositions will be stenographically recorded by a certified court reporter affiliated with and/or associated by the firm of **Keais Records Service, 1010 Lamar Suite 300, Houston, Texas 77002.**

4. **NON-STENOGRAPHIC RECORDING:** The undersigned may cause this deposition to be videotaped, pursuant to Rule 203.6 Tex. R. Civ. P., in addition to stenographic recordation, employing an employee and or agent of **Keais Records Service, 1010 Lamar Suite 300, Houston, Texas 77002.**

5. **REQUESTS FOR PRODUCTION:**

.1 Pursuant to Rules 199.2 (5), 196 and 203.4 Tex. R. Civ. P., each DEFENDANT is requested to produce for inspection at the time and place of the above-referenced respective depositions the existing **originals** in his possession of **all** documents and things that have been requested by parties to this litigation in **earlier requests for production** propounded to each DEFENDANT.

.2 Each Yellow Transport defendant is to produce all the documents and things in its possession relevant to each of the topics outlined above. In this regard, refer to Exhibit B, attached. With regard to such requests, if any, the Yellow Transportation Defendants are requested to produce such things, in their original form, at the time and place of the above-referenced deposition(s);

.4 The definitions and instructions attached as **Exhibit A** are applicable to all document requests pertinent to this notice.

.5 Regardless of when the above-referenced depositions take place, and/or regardless of subsequent modifications of this notice, this constitutes also a **Rule 196 Request for Production** to **YELLOW TRANSPORTATION**, for which written responses to each of the requests in **Exhibit B** should be served no later than 30 days after the date the original notice for these depositions was served, on October 30, 2006.

Respectfully submitted,

AVERSANO & GOLD

By:

PAUL N. GOLD

State Bar No. 08069700

DONNA M. AVERSANO

State Bar No. 00783573

3310 Katy Fwy., Suite 110

Houston, Texas 77007

Tel: 713/426-5600

Fax: 713/426-5601

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon attorneys of record of all parties to the above cause via hand-delivery, facsimile, electronic mail, and/or via certified mail, return receipt requested, as indicated below, on the ____ day of _____, 2006.

Via Electronic E-Mail/Via Facsimile

PAUL N. GOLD

EXHIBIT "A"
DEFINITIONS AND INSTRUCTIONS

- A. **"YOU", "YOURS" AND "THIS WITNESS"** refers to the witness his/its agents, employees, insurance carriers, representatives and attorneys.
- B. **"PLAINTIFF"** refers to **DAVID AND KIMBERLY WINGFIELD**.
- C. **"HUFFMAN"** refers to **JIMMY W. HUFFMAN**
- D. **"YELLOW TRANSPORT" and/or "YELLOW TRANSPORTATION ENTITIES"** refers to **"YELLOW TRANSPORTATION, INC., YELLOW ROADWAY CORP., YELLOW FREIGHT SYSTEM, YELLOW FREIGHT LINES, INC., and YELLOW TRANSPORT, JR.**
- E. **"YELLOW TRANSPORTATION VEHICLE"** refers to the vehicle HUFFMAN reportedly was operating at the time of the incident in question, which reportedly was a 2003 Orange Freightliner Truck Tractor, vehicle ID # 1FUBAHCG63LLO7584.
- F. **"DATE(S) IN QUESTION"**: means on or about **OCTOBER 27, 2003**;
- G. **"INCIDENT OR OCCURRENCE" IN QUESTION**: refers to the motor vehicle collision between a YELLOW TRANSPORTATION vehicle driven by HUFFMAN and a vehicle operated by DAVID WINGFIELD that reportedly occurred on the date in question in McLennan County, Texas at I-H 35. This allegedly resulted in personal injury to DAVID WINGFIELD. For more details refer to the Statement of Facts in Plaintiff's live petition, which is incorporated by reference.
- H. **"PERSON" OR "PERSONS"**: include natural persons, firms, partnerships, associations, joint ventures, and corporations.
- I. **"IDENTIFY"**: In those instances where the word "identify," is used in these requests for discovery, it should be interpreted as requiring with respect to **individuals**, the person's complete name, last known residence address and telephone number. With respect to **documents or things**, it should be interpreted as requiring sufficient information regarding the item so that the party seeking discovery can locate and identify the object as readily as the party from whom it is being sought, including the title or subject matter of the document, the author, the recipients and the date of generation and/or transmittal.
- J. **"DOCUMENTS"**: include, but are not limited to, all paper material of any kind, whether written, typed, printed, punched, filmed or marked in any way, including all non-identical copies; and all electronic data.
- K. **"ELECTRONIC and/or MAGNETIC DATA"**: means all information stored on, mechanical, electrical or chemical forms or media, including films, discs, transcriptions, graphic depictions and other data compilations.

- L. REFERENCE TO DOCUMENTS:** In those instances where the responding party chooses to answer a request for information by referring to a specific document or record, it is requested that such specification be in such sufficient detail to permit the requesting party to locate and identify the records and/or documents from which the answer is to be ascertained, as readily as can the party served the request. It is further requested that the defendant specifically identify what discrete documents and things are responsive to the particular request.
- M. DOCUMENT DESTRUCTION:** It is requested that all documents, electronic data and/or other data compilations that might substantially bear on the subject matter of this litigation be preserved and that any ongoing process of document/data destruction involving such documents and/or data cease. In those instances where document destruction has already taken place, it is requested that the destroyed and/or purged documents and/or electronic data information that would have been relevant to the following discovery requests but for their destruction be “identified” (see definition **J**) as well as the date of destruction and the individual authorizing, ordering, and/or carrying out the destruction. This request similarly pertains to all relevant documents that come into your possession after this date this request is served.
- N. DESIGNATED TIME PERIOD:** As used in these requests, *unless otherwise specified*, refers to the time period twenty four (24) month prior to and including the date in question, through the present.
- O. POSSESSION, CUSTODY AND CONTROL:** As used in these requests, means possession, custody and control, including *constructive possession*, such that the witness need not have actual physical possession of the document or thing, as long as the witness has a right (superior to that of the requesting party) to compel the production from a third party entity (including an agency, subsidiary, division, authority or representative) having physical possession of the item.
- P. SUBPARTS:** In those instances in which a request is subdivided into subparts, it is requested that the responding party respond specifically to each subpart.

EXHIBIT "B"
REQUEST FOR PRODUCTION

1. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) for the designated time period relevant to the relationship between HUFFMAN, YELLOW TRANSPORTATION, INC., YELLOW ROADWAY CORP., YELLOW FREIGHT SYSTEM, YELLOW FREIGHT LINES, INC., **and/or YELLOW TRANSPORT, JR.** on the date in question, including the terms of the relationship and the respective rights and obligations of the parties to the agreement;

2. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to the relationship between each of the YELLOW TRANSPORTATION ENTITIES on the date in question, including the terms of the relationship, the respective rights and obligations of the parties to the agreement, the relationship specifically with regard to the operation of the Yellow Transportation vehicle Huffman was operating at the time of the incident in question, and responsibility and accountability for Huffman's conduct in operating the Yellow Transportation vehicle at the time of the incident in question;

3. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to the Yellow Transportation's relationship with all unions relative to Huffman operating the Yellow Transportation vehicle at the time of the incident in question, including all communications, meetings and agreements between such unions and Yellow Transportation prior to and after the incident in question regarding Huffman's employment by Yellow Transport, including all grievance disputes;

4. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to the what rights and authority Yellow Transportation retained and/or exercised to assure that Huffman operated the Yellow Transportation vehicle in question properly and safely at the time of the incident in question;

5. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to all individuals with knowledge of facts relevant to the claims and defenses alleged in this case including the individuals with (agents and employees) Yellow Transportation with responsibility for the hiring and evaluation of Huffman as a driver, and entrustment of the Yellow Transportation vehicle in question to Huffman relevant to the incident in question;

6. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to the individuals in the Yellow Transportation chain of command or organization chart, above Huffman, with responsibility or accountability within Yellow Transportation for entrustment of the Yellow Transportation vehicle to Huffman, Huffman's continued employment prior to and after the incident in question, and responsibility and accountability for the way in which Huffman operated the Yellow Transportation vehicle at the time of the incident in question;

7. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to Yellow Transportation's liability insurance coverage (primary and excess) for the incident in question and the claims of injury alleged by Plaintiffs arising from the incident in question;

8. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to Yellow Transportation's decision-making in hiring Huffman, including its investigation, if any, of his competency to drive a commercial truck safely, Yellow Transport's evaluation of Huffman's performance as a driver during his employment with Yellow Transportation up until the date of the incident in question, Yellow Transport's evaluation and decision-making with regard to Huffman's competency to continue operating commercial vehicles for Yellow Transport following the incident in question.

9. All documents and things (including all information and materials created and/or stored exclusively as electronic data) and films, relevant to training Huffman received while an employee of Yellow Transportation relevant to operating a commercial vehicle for Yellow Transport under conditions and circumstances that reportedly existed at the time and place of the incident in question.

10. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to all Yellow Transportation's policies and procedures relevant to the operation of the Yellow Transport vehicle in question in effect at the time of the incident in question, including all orientation, training, proficiency testing drivers such as Huffman were to undergo and pass, and all policies and procedures regarding Federal Motor Carrier Safety Act log compilation and maintenance, record-keeping, and record retention.

11. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to Huffman's history with regard to maintenance of logs and Huffman's log keeping while an employee of Yellow Transportation, and particularly with regard to the route he was driving at the time of the incident in question. Huffman's logs relevant to the incident in question;

12. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to Yellow Transportation's ability on the date in question to track drivers on routes such as Huffman in the instance in question, including all satellite tracking, QUALCOMM tracking, data recorder devices, etc.

13. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to all tracking that Yellow Transportation conducted with regard to Huffman and his activities on the route he was on at the time of the incident in question. Yellow Transport's knowledge regarding Huffman's activities on the date in question during the twelve hours prior to the incident in question. This includes all

expenses Huffman incurred and/or reported relevant to the route in question and/or during the 72 hour period prior to the incident, whichever is longer.

14. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to Yellow Transportation's policies and procedures regarding investigating incidents such as the one giving rise to the instant lawsuit, including the identity of the individuals who are to participate in the investigation, when the investigation is to be conducted, what information is to be obtained and to whom the information is to be delivered. When Yellow Transportation first anticipated litigation in this instance and the factual basis for the belief. Yellow Transportation's investigation conducted in the ordinary course of business relevant to the incident in question, including all statements, testing (drug and alcohol) and photographs obtained by or on behalf of Yellow Transportation. This includes all preventability assessments and findings and all root cause analyses and reports.

15. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to all discussions between Yellow Transportation and Huffman relevant to the route Huffman was taking at the time of the incident in question, his destination, and what commerce he was transporting to and/or receiving at that location;

16. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to all performance evaluations of Huffman conducted by or on behalf of Yellow Transportation during Huffman's employment, particularly during the thirty six months prior to the incident in question;

17. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to Yellow Transportation's policies and procedures for drug/alcohol testing of drivers following incidents such as the one in question, the findings of the drug and alcohol testing performed on Huffman following the incident in question, and/or the reasons why drug and alcohol testing were not performed

18. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to all reporting Yellow Transportation has done regarding the incident in question to governmental agencies or in compliance with governmental regulations.

19. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to all damage appraisals obtained by or on behalf of Yellow Transportation regarding each of the vehicles involved in the incident in question.

20. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to the reasons for Huffman's separation from Yellow Transportation and all post employment claims filed by Huffman against Yellow Transportation Entities.

21. Huffman's complete employment and/or human resources file regarding his employment with Yellow Transportation, including his medical history and DOT medical evaluations.

22. Huffman's complete payroll file for the twenty four months prior to the incident in question, through the date of his termination from Yellow Transportation.

23. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to the ownership or title holders for the tractor and trailer Huffman was operating at the time of the incident in question, and Yellow Transport's assessment of the vehicles before and after the incident in question with regard to whether there were any dysfunctional systems and if so whether they played a role in the incident in question.

24. All documents and things (including all information and materials created and/or stored exclusively as electronic data, in its native format) relevant to Yellow Transportation's disclosures including the factual basis for Yellow Transport's claims that Plaintiffs, some other entities or conditions are responsible for the incident in question and/or Plaintiffs' claims of injuries.

APPENDIX B

CORPORATE REPRESENTATIVE NOTICE

CAR/COMMERICAL VEHICLE COLLISION

DENA STEINWINDER
Plaintiff,

VS

DAVIS AIR
CONDITIONING &
HEATING, INC. and
WILLIAM ALEXANDER
SMITH
Defendants,

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IN THE DISTRICT COURT OF

BRAZORIA COUNTY, TEXAS

239TH JUDICIAL DISTRICT

PLAINTIFF'S SECOND SUPPLEMENTAL NOTICE OF INTENTION TO TAKE
ORAL/VIDEOTAPED DEPOSITION(S) DUCES TECUM
[DAVIS AIR CONDITIONING & HEATING, INC.]

This is to give notice of the Plaintiff's intention to schedule oral/videotaped deposition pursuant to Rules Tex. R. Civ. P. 199 and obtain documents and things, as stated below:⁹

1. SCHEDULE OF WITNESS:

WITNESS	TIME	DATE	PLACE
<i>DAVIS AIR CONDITIONING & HEATING, INC. 10</i>	11:30 a.m. or immediately following the hearing scheduled for 9:00 a.m. July 23, 2007, whichever occurs first	July 23, 2007	Gilbert & Gilbert 222 North Velasco St. PO Box 1819 Angleton, TX 77515 (979) 849-5741

Each deposition is to begin at the designated times and will continue from day to day until completed. Each deposition will be taken for all purposes allowed by the Texas Rules of Civil Procedure and the Texas Rules of Civil Evidence.

⁹ The Court previously has denied Defendant's Motion to Quash this notice. Plaintiffs requested dates for the deposition and Defendant announced that it was going to seek re-hearing of the Court's ruling. Subject to its Motion for Rehearing, Defendant has agreed to produce Don Davis, its designated representative on the topics delineated in this notice, for deposition following the hearing at the offices of Gilbert & Gilbert. While Plaintiff opposes the motion for re-hearing on the basis that the original order was correct and that there is no law or newly discovered evidence that warrants a re-hearing, reversal or modification of the original order, Plaintiff has agreed to the foregoing time-table.

¹⁰ See paragraph 2, below. Davis Air Conditioning & Heating, Inc. reportedly has designated Don Davis as its representative on all the topics listed in paragraph 2, below.

2. DESIGNATION OF REPRESENTATIVES:

Plaintiff intends to take the deposition of **DAVIS AIR CONDITIONING and HEATING, INC.** pursuant to Tex. R. Civ. P. 199.2(b)(1), through one or more representatives testifying on behalf of the witness on the following subjects:

.1 CONTENTIONS:

The factual basis for the contentions Defendant has alleged in its pleadings and/or in response to Requests for Disclosure. These include, but are not limited to the following contentions:

.1 Defendants, Davis Air Conditioning & Heating, Inc. and William Alexander Smith generally deny they were negligent in any way. Defendant, Davis Air Conditioning & Heating, Inc. denies it was negligent in the entrustment of a vehicle to William Alexander Smith.

.2 Defendants, Davis Air Conditioning & Heating, Inc. and William Alexander Smith further specifically denies its [sic: deny their] actions and/or inactions caused and/or contributed to the incident in question and the resulting alleged injuries.

.3 Defendants, Davis Air Conditioning & Heating, Inc. and William Alexander Smith further contend Plaintiff's medical treatment was, and in, not fair, reasonable, and necessary, in whole or in part.

.2 MODIFICATION OF POLICY REGARDING POST-INCIDENT DRUG TESTING:

.1 The decision-making process and implementation of the reported change in Defendant's post incident drug testing policy that reportedly was changed shortly before the incident in question, including the factors that went into the change, the individuals

involved in drafting the change, all communications with attorneys regarding the change (in terms of who was contacted, when, and by whom and who participated in the communications), the individuals involved in approving the change, the implementation of the change, the dissemination of notice regarding the change and dissemination of the new policy to management and to the employees.

.3 DEFENDANT'S NET WORTH:

Defendant's net worth now and at the time of the incident in question.

A reasonable time before the above noticed depositions, the party organization deponent is obligated to designate one or more individuals to testify on its behalf, on each of the listed topics, as to matters that are known or reasonably available to the organization, pursuant to Rule 199.2(b)(1).

3. COURT REPORTER:

The depositions will be stenographically recorded by a certified court reporter affiliated with and/or associated by the firm of **Keais Records Service, 1010 Lamar Suite 300, Houston, Texas 77002.**

4. SUPPLEMENTAL NON-STENOGRAPHIC RECORDATION:

Pursuant to Rule 203.6 Tex. R. Civ. P., Plaintiff hereby gives notice of her present intention to record videotape the above referenced depositions by **Paperless Trials, P.O. Box 7176, Spring, Texas 77387-7176.**

5. REQUEST FOR PRODUCTION:

.1 Pursuant to Rule 199.2(5) Tex. R. Civ. P., Plaintiff requests that DAVIS AIR CONDITIONING and HEATING, INC., at the time place of its representatives' depositions produce the items in its possession relevant to the topics set out in paragraph 2, above, in their

original form, for inspection and copying at the time of the respective depositions. For further clarification, the documents to be produced are delineated in **EXHIBIT B**, attached.

.2 The definitions and instructions attached as **Exhibit A** are applicable to all document requests pertinent to this notice.

.3 Plaintiff, pursuant to Tex. R. Civ. P. 193 and 196, is serving Defendant with a **Supplemental Request for Production, that supplements the requests** contained in the original notice for this deposition.¹¹ These requests are set out in **Exhibit B**, attached. Regardless of when the above-referenced depositions take place, and/or regardless of subsequent modifications of the original notice or this notice, Defendant is required to serve written responses to each of the requests and to produce the responsive documents and things Plaintiff at the offices of Aversano & Gold for inspection and copying no later than thirty (30) days after the original service of each of the respective Requests for Production.

.4 With regard to each of the requests set out in **Exhibit B**, Plaintiff is specifically requesting all responsive items created or maintained exclusively as electronic data.

Respectfully submitted,

AVERSANO & GOLD

By:

PAUL N. GOLD
State Bar No. 08069700
DONNA M. AVERSANO
State Bar No. 00783573
3310 Katy Fwy, Suite 110
Houston, Texas 77007
(713) 426-5600 - Telephone
(713) 426-5601 - Facsimile

ATTORNEYS FOR PLAINTIFF

¹¹ Request no. 3 has been supplemented and Request no. 4 has been added.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon attorneys of record of all parties in the above-referenced cause, by certified mail return receipt requested, verified telefax, and/or electronic mail return receipt requested, on the _____ day of July, 2007.

VIA FACSIMILE

PAUL N. GOLD

EXHIBIT A

DEFINITIONS AND INSTRUCTIONS

- A. **"WITNESS"**, refers to the deponents identified above, including each witness' representatives, insurance carriers, employers and attorneys.
- B. **"DEFENDANTS"** refers to **DAVIS AIR CONDITIONING and to WILLIAM ALEXANDER SMITH, their agents, representatives and attorneys.**
- C. **"PLAINTIFF"** refers to **DENA STEINWINDER.**
- D. **"DATE(S) IN QUESTION"** means: on or about **August 12, 2005.**
- E. **"INCIDENT OR OCCURRENCE" IN QUESTION** refers to the incident that occurred on the date in question between vehicles operated by Smith and Steinwinder, more particularly described in Plaintiff's live petition on file with the above referenced court.
- F. **"PERSON" OR "PERSONS"** include natural persons, firms, partnerships, associations, joint ventures, and corporations.
- G. **"IDENTIFY"**: In those instances where the word "identify," is used in these requests for discovery, it should be interpreted as requiring with respect to *individuals*, the person's complete name, last known residence address and telephone number. With respect to *documents or things*, it should be interpreted as requiring sufficient information regarding the item so that the party seeking discovery can locate and identify the object as readily as the party from whom it is being sought, including the title or subject matter of the document, the author, the recipients and the date of generation and/or transmittal.
- H. **"DOCUMENTS"** include, but are not limited to, **all paper material of any kind**, whether written, typed, printed, punched, filmed or marked in any way, including all non-identical copies; and all electronic data.
- I. **"ELECTRONIC DATA or ELECTRONICALLY STORED DATA (ESD)"** means all information stored on, **mechanical, electronic or chemical forms or media**, including films, discs, transcriptions, graphic depictions and other data compilations.
- J. **"REFERENCE TO DOCUMENTS"**: In those instances where the responding party chooses to answer a request for information by referring to a specific document or record, it is requested that such specification be in such sufficient detail to permit the requesting party to locate and identify the records and/or documents from which the answer is to be ascertained, as readily as can the party served the request. See, Tex. R. Civ. P. 197.2. It is further requested that the Defendant specifically identify what discrete documents and things are responsive to the particular request.

- K** **DOCUMENT DESTRUCTION:** It is requested that all documents, electronic data and/or other data compilations that might substantially bear on the subject matter of this litigation be preserved and that any ongoing process of document/data destruction involving such documents and/or data cease. In those instances where document destruction has already taken place, it is requested that the destroyed and/or purged documents and/or electronic data information that would have been relevant to the following discovery requests but for their destruction be "identified" as well as the date of destruction and the individual authorizing, ordering, and/or carrying out the destruction. This request similarly pertains to all relevant documents that come into your possession after this date this request is served.
- L** **DESIGNATED TIME PERIOD:** As used in these requests, *unless otherwise specified*, refers to the time period twenty four (24) months prior to and including the date(s) of the occurrence to present.
- M** **POSSESSION, CUSTODY AND CONTROL:** As used in these requests, means possession, custody and control, including *constructive possession*, such that the witness need not have actual physical possession of the document or thing, as long as the witness has a right (superior to that of the requesting party) to compel the production from a third party entity (including an agency, subsidiary, division, authority or representative) having physical possession of the item.
- N** **SUBPARTS:** In those instances in which a request is subdivided into subparts, it is requested that the responding party respond specifically to each subpart.

EXHIBIT B

1. CONTENTIONS:

All documents (excluding documents that meet the requirements of attorney/client communications and/or core work product) upon which Defendant relies in making the contentions Defendant has alleged in its pleadings and/or in response to Requests for Disclosure. These include, but are not limited to the following contentions:

.1 Defendants, Davis Air Conditioning & Heating, Inc. and William Alexander Smith generally deny they were negligent in any way. Defendant, Davis Air Conditioning & Heating, Inc. denies it was negligent in the entrustment of a vehicle to William Alexander Smith.

.2 Defendants, Davis Air Conditioning & Heating, Inc. and William Alexander Smith further specifically denies its [sic: deny their] actions and/or inactions caused and/or contributed to the incident in question and the resulting alleged injuries.

.3 Defendants, Davis Air Conditioning & Heating, Inc. and William Alexander Smith further contend Plaintiff's medical treatment was, and in, not fair, reasonable, and necessary, in whole or in part.

.2 MODIFICATION OF POLICY REGARDING POST-INCIDENT DRUG TESTING:

All documents, including electronically stored information, generated in the ordinary course of business, relevant to the decision-making process and implementation of the reported change in Defendant's post incident drug testing policy that reportedly was changed shortly before the incident in question, including the factors that went into the change, the individuals involved in drafting the change, all communications with attorneys regarding the change (in terms of who was contacted, when, and by whom and who participated in the

communications), the individuals involved in approving the change, the implementation of the change, the dissemination of notice regarding the change and dissemination of the new policy to management and to the employees. This request is limited to the time period January 1, 2005 through the date of response.

.3 DEFENDANT'S NET WORTH:

.1 All documents evidencing Defendant's net worth now and at the time of the incident in question, including all certified and/or audited financial statements provided to lending institutions or investors by or on behalf of defendant during the twelve months preceding this request.

.2 All certified and/or audited financial statements provided to lending institutions or investors by or on behalf of Defendant during the twelve months preceding this request.

.3 Defendant's most current certified and/or audited financial statement provided to a lending institution, investor, and/or potential purchaser;

.4 If Defendant does not have or does not voluntarily produce documents responsive to requests 1 – 3 above, produce Defendant's business tax returns for the following years: 2005, 2006.

.4 DOCUMENTS REVIEWED:

All documents reviewed by the representative in preparation for the deposition to obtain the composite knowledge or the organization witness on the delineated topics and/or to refresh the witness' personal recollection.