IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

E-VENTURES WORLDWIDE, LLC,	:	
Plaintiff,	:	Civil Action No. 2:14-cv-646-FtM-PAM-CM
v.	:	
GOOGLE, INC.,	:	
Defendant.	:	

E-VENTURES' RULE 37 MOTION FOR SANCTIONS FOR GOOGLE'S FAILURE TO SIT A PREPARED CORPORATE REPRESENTATIVE FOR GOOGLE'S DEPOSITION UNDER FEDERAL RULE OF CIVIL PROCEDURE 30(b)(6)

Richard S. Gora (*pro hac vice*)
Sinead A. Rafferty (*pro hac vice*)
Gora LLC
9 W. Broad St., Suite 5550
Stamford, CT 06902

Matthew Wagoner (*pro hac vice)*
The Wagoner Firm, PLLC
8 Thurlow Terr.
Albany, NY 12203

Ian T. Holmes
David P. Fraser
Holmes Kurnik, PA
711 5th Ave S Ste 200
Naples, FL 34102-6628

Counsel for e-ventures Worldwide, LLC

Pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, plaintiff e-ventures Worldwide, LLC, through its counsel, respectfully moves for an order:

(i) striking Google's third and fourth defenses under the Communications Decency Act, 47 U.S.C. §§ 230(c)(1) and 230(c)(2) ("CDA") in Google's Answer to the Second Amended Complaint, dated May 26, 2016 (ECF 88);

(ii) precluding Google from admitting any evidence or making any argument that adds to or contradicts the testimony in its Rule 30(b)(6) deposition and further instructing the jury that certain facts shall be taken to be conclusively established;

(iii) awarding e-ventures' attorneys' fees, costs and expenses associated with Google's Rule 30(b)(6) deposition resulting from Google's failure to produce a corporate designee prepared to testify as to properly noticed topics for its Rule 30(b)(6) deposition; and

(iv) awarding e-ventures' attorneys' fees associated with the filing of this motion.

By this motion, e-ventures does not seek to extend remaining discovery deadlines, and is prepared to comply with the Third Amended Case Management and Scheduling Order, dated October 5, 2016 (ECF 109), so that the case remains on the Court's March 1, 2017, trial calendar.

I. PRELIMINARY STATEMENT

This case of first impression seeks to remedy Google's unfair and deceptive policies and practices to manually remove 366 of e-ventures' websites from Google's search results because of so-called copied and pasted content. According to Google, its webmaster guidelines (the "Guidelines") provide nebulous suggestions to webmasters (*i.e.*, owners of websites) on how to get websites on Google's search results – and stay there. The Guidelines likewise provide even more nebulous suggestions as to how Google can designate a website as "pure spam," and then

effectively delete that website from Google's search index. In other words, if a Google user searches for the removed website on google.com, that website will never again show up on Google (unless Google changes its mind – which Google publicly acknowledges is "rare").

In addition to doling out pure spam sentences, REDACTED [redacted] Here, at every turn, Google has outright refused to provide e-ventures with *any* documents and deposition testimony about Google's algorithms.

Google keeps telling e-ventures that this case is not about the algorithms. But Google's repetition of its position over and over again does not make it so. The search, catch and penalize algorithms are vitally relevant because they will presumably identify whether or not e-ventures' websites violated the Guidelines, a major point of contention in this case. To justify the removal of e-ventures' websites in September and October 2014, Google is relying on the allegedly "lengthy history of e-ventures' misconduct" to. *See* Ex. 2, Declaration of Brandon Falls in Support of Defendant Google Inc.'s Opposition to Plaintiffs' [sic] Motion for Preliminary Injunction, dated November 26, 2014 (ECF 31). Information concerning the algorithms may test the veracity of the post-hoc justification. Moreover, by virtue of asserting an affirmative defense of unclean hands, Google has placed the algorithms squarely at issue. *see* Ex. 3, Google's Answer to the Second Amended Complaint, dated May 26, 2016 (ECF 88).

The relevancy of Google's algorithms could not be any clearer. Algorithms have everything to do with this case. Google is all about algorithms. Search is about algorithms. Penalizing a website is about algorithms. For instance, Mr. Falls testified that REDACTED [redacted]

[redacted]. *See* Ex. 4, Transcript of Deposition of Brandon Falls, dated October 28, 2016 ("Falls Tr.") at 34:14-20. [redacted]. Mr. Falls testified that [redacted]. Falls Tr. 38:23-25. He also testified that [redacted]. Falls Tr. 39:1-3. Therefore, information concerning the algorithm itself and how it works may prove useful in determining (i) whether e-ventures' websites violated the Guidelines; and (ii) whether Google acted in bad faith – both of which are the subject of Google's affirmative defenses under the CDA, unclean hands and mitigation. *See* Ex. 3 at 17-18.

Mr. Brian White (Mr. Falls' boss) confirmed that [redacted]." *See* Ex. 5, Transcript of Deposition of Brian White, dated November 2, 2016 ("White Tr.") at 35:12-15; 37:25; 38:4-10; and 39:22-40:2-4.

Mr. Cody Kwok, (Mr. White's boss) confirmed that [redacted]. *See* Ex. 6, Transcript of Deposition of Cody Kwok, dated November 3, 2016 ("Falls Tr.") at 9:11-12 ("[redacted]").

Yet, Google – which self-professes its mission "to organize the world's information," *see* https://www.google.com/about/company/ – [redacted]

[redacted]. That evidence may or may not be available on Google's algorithms. e-ventures needs to confirm that fact. Even more egregious, Google refuses to allow e-ventures to inspect its algorithms. *See* Ex. 7, Request for Inspection, dated October 14, 2014; Ex. 8, Objection to Request for Inspection, dated November 14, 2016. To support refusal of the inspection, Google resorts to bad faith conduct: (i) "[redacted]," *see* Ex. 9, Letter, dated November 9, 2016, from Brian Willen, Esq., to Richard S. Gora, Esq.; and (ii) the "[redacted]" *see* Ex. 8 at 2.

To further obstruct the production of information on algorithms asked during Google's deposition, Google hid behind a woefully unprepared corporate representative. Mr. Falls was unprepared to testify about simple and vital facts, such as [redacted]. "[redacted]," [redacted]," that was [redacted]" and that's an "[redacted]" were the canned answers given by Mr. Falls to e-ventures' probing questions.

This being a case about why e-ventures' websites were removed from Google's search results, Google did not sit a corporate representative to answer fundamental questions about the violative content on each removed website: "[redacted]" Google Tr. 131:5-16. This being a case about why Google removed e-ventures' websites from Google's search results, Google should particularize the basis to remove each of e-ventures' 366 websites. Instead of testifying as to facts supporting removal, Google copped out: "[redacted]. Google Tr. 134:22-135:1.

Further evidence of deposition unpreparedness comes from the lack of complete awareness by Mr. Falls about whether or not Google's REDACTED [redacted]. Google Tr. 209:7-11; 210:7-15; 212:20-23. REDACTED [redacted]. Google Tr. 206:22-24; 207:1; 212:3-7. REDACTED [redacted]. Google Tr. 206:22-24; 207:1. So, those questions were proper. REDACTED [redacted]" Google Tr. 211:17-18.

Follow up questions to determine Google's position on that hotly contested issue were met with stern, lawyerly objections. To fix the incalcitrant Mr. Falls, Google's attorneys suggested answers[1] REDACTED [redacted] Google Tr. 213:13-15.[2] In a fleeting instance of honesty, Mr. Falls REDACTED [redacted] Google Tr. 213:18-19. But, Mr. Falls testified just moments earlier to REDACTED [redacted]. Tr. 209:7-11;

[1] REDACTED [redacted] Google Tr. 21:17-19; 15:19-21.

[2] Google has been giving e-ventures the runaround throughout discovery. Google's attorneys have REDACTED [redacted] *See* Ex. 9, Letter dated November 9, 2016, from Brian Willen, Esq., to Richard S. Gora, Esq.

([redacted] Tr. 209:18-210:15 ([redacted] and Tr. 212:20-23 ([redacted]). Par for the course, Google is wrong.

When Mr. Falls was not obstructive and unprepared, he pretended to be a politician by refusing to answer the question that was asked and, instead, resorted to nonresponsive talking points. For example, on something so simple as identifying e-ventures' alleged violations of Google's Webmaster Guidelines, [redacted] Google Tr. 38:13; 38:22; 42:13; 42:10-12; 42:19-43:3. e-ventures naturally sought clarification as to Mr. Falls' [redacted] Google Tr. 37:21-44:14. In response, Mr. Falls robotically testified that [redacted]:

[redacted]

[3] [redacted].

[redacted]

Google Tr. 38:25-40-16 (emphasis added). Mr. Falls made it crystal clear the [redacted]. Google Tr. 38:13, 22; 40:6-9; 41:24-42:6; 42:16-23; 43:10-11; 43:21-44:4; 84:10-85:2; and 194:8-12. But the questions did not call for Mr. Falls to testify about [redacted]." *See id.* Mr. Falls would not break from the never-ending loop.

His preparation was even worse. In a case involving 366 removed websites, three weeks of investigation, and, according to Google, at least 18,000 scraped articles, 46,000 scraped press releases, and 28,126 scraped job listings, [redacted] Google Tr. 16-26. If that were not bad enough, [redacted]. *See, e.g.,* Google Tr. 209:13-17; 210:17-211:18. [redacted]. Google Tr. 9:5.

All in all, Google provided a woefully unprepared witness for deposition. Google refused to answer questions probative of its affirmative defenses under the CDA and about e-ventures' alleged violations under the Guidelines relevant to its unclean hands defense. Google's strategy for the Rule 30(b)(6) was obvious: offer the unprepared, know-nothing designee, so that Google could get a dry-run of deposition questions to prepare Mr. Falls for his deposition scheduled for

the next day.[4]

By this motion, e-ventures asks the Court to level the playing field by preventing Google from offering any contrary testimony or evidence to the deposition topics set forth in the Rule 30(b)(6) Notice of Deposition for Google, and by finding that certain facts are no longer in dispute.

II. BACKGROUND FACTS

Google failed to follow its public-facing Webmaster Guidelines in removing e-ventures' websites from Google's search results in September and October 2014. In and prior to 2014, e-ventures maintained independent websites providing online publishing and advertising services for its clients. In its simplistic form, e-ventures provides rankings of companies in certain verticals similar to how Consumer Reports® provides product ratings and reviews. e-ventures' clients pay e-ventures to be reviewed and ranked on e-ventures' rating lists for certain verticals. Those clients paid a premium to be ranked by e-ventures because e-ventures' websites were highly ranked on Google's organic search results – typically among the most valuable results (if not, the first result) on Google's organic search results. In other words, e-ventures' websites are found immediately beneath Google's AdWords advertisements – the precious listings by which Google generated nearly $60 billion in revenue in 2014.

Each dollar earned by e-ventures was a dollar not earned by Google. Specifically, e-

4 REDACTED

ventures specialized in ranking companies in the search engine optimization ("SEO") vertical. The companies in the SEO vertical drive revenue away from Google because those companies facilitate a website's higher placement on Google's organic search results. That is, more money driven away from Google's paid advertising services (e.g., Google AdWords). Put simply, e-ventures provides the same service as Google. For that reason, e-ventures competes with Google.

Google targets the SEO vertical because those companies threaten Google's $60 billion money train. Google testified, [redacted] Google Tr. 153:4-6. Google confirmed that [redacted] Google Tr. 65:12-15. That is why Google [redacted] .[5] Google Tr. 66:20-67:7.

[redacted]

[redacted]

[5] [redacted]

[6] [redacted]

REDACTED [redacted]

[redacted]

[redacted]

7 REDACTED [redacted]

8 REDACTED [redacted]

REDACTED

III. DEPOSITION TOPICS FOR WHICH GOOGLE WAS UNPREPARED

Google was unprepared to testify as to the following properly noticed topics:

1. Google algorithm to detect violations of Google's Webmaster Guidelines, Google's Quality Guidelines and/or any Google policy or guideline on search engine manipulation.

2. Google's Webmaster Guidelines.

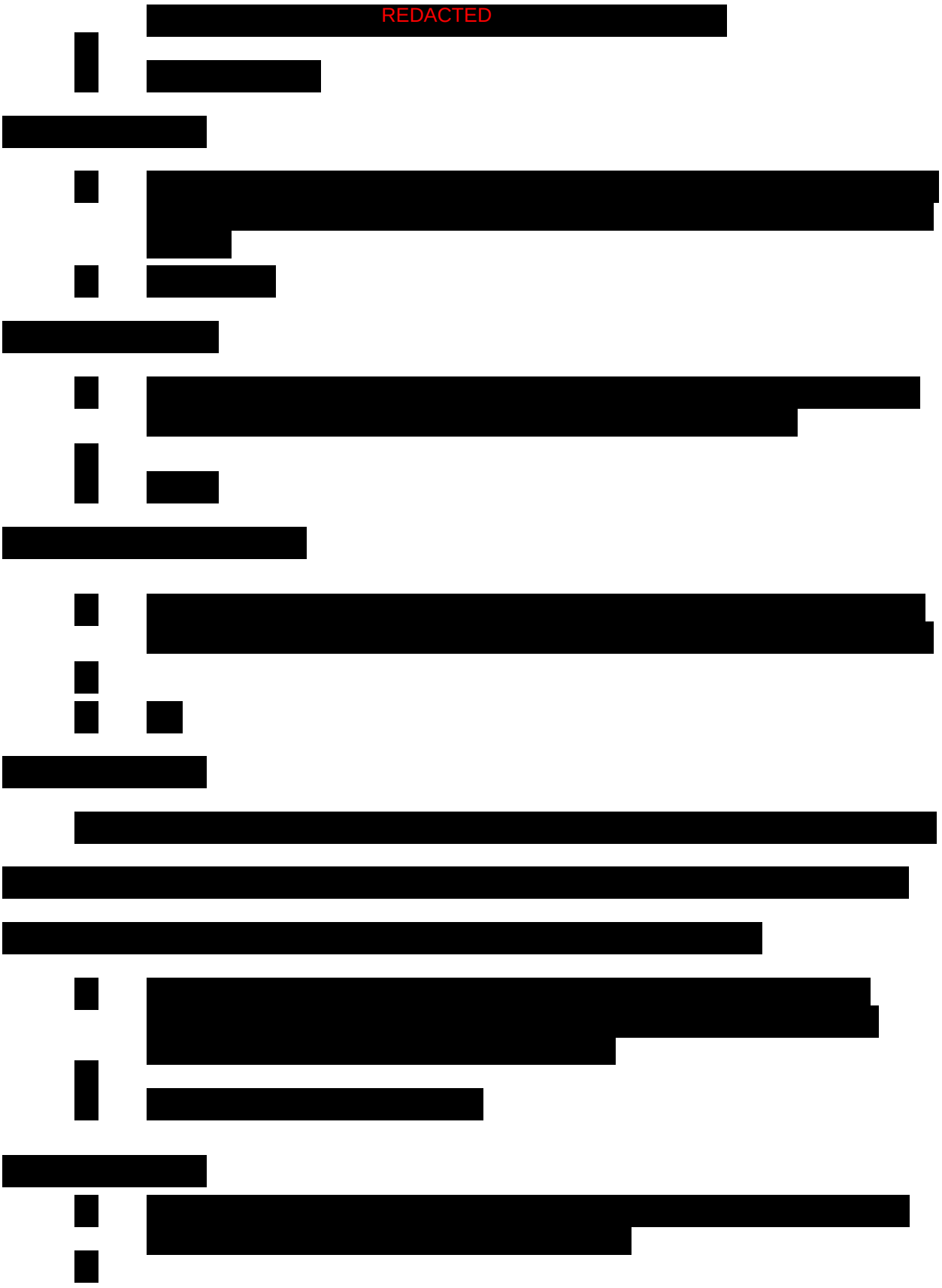
3. Google's review of content on each and every domain in the Google Webmaster Tools account associated with analytics@topseos.com, including the Removed Websites identified in Exhibit A hereto, prior to removing the domain from Google's search results.

4. Any penalty imposed on each and every domain in the Google Webmaster Tools account associated with analytics@topseos.com, including the Removed Websites identified in Exhibit A hereto, prior to removing the domain from Google's search results since 2004.

5. Google's decision to remove from search results websites that it believed were associated with e-ventures in or around September and October 2014.

See Ex. 11, Amended Google notice of deposition, dated October 24, 2016.

A. REDACTED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B. REDACTED

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C. REDACTED

ARGUMENT

I. GOOGLE WAS UNPREPARED FOR ITS RULE 30(b)(6) DEPOSITION

Rule 37 of the Federal Rules of Civil Procedure provides:

> (A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:
>
> (i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition.

FED. R. CIV. P. 37(d)(1)(A)(i).

The Court may sanction Google by: (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; or (iii) striking pleadings in whole or in part. FED. R. CIV. P. 37(d)(3).

If the Court does not award those sanctions, "the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's

fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." FED. R. CIV. P. 37(d)(3).

Rule 30(b)(6) of the Federal Rules of Civil Procedure requires that a deposition notice "must describe with reasonable particularity the matters for examination." *See* FED. R. CIV. P. 30(b)(6). "The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify." *Id.* "The persons designated must testify about information known or reasonably available to the organization." *Id.*

The organization's "duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee is personally involved. The [organization] must prepare the designee to the extent matters are reasonably available, whether from documents, past employees or other sources." *Brazos River Auth. v. GE Ionics*, Inc., 469 F.3d 416, 433 (5th Cir. 2006) (internal quotation marks and citations omitted). An organization has an affirmative duty to prepare its designees, "so that they may give complete, knowledgeable and binding answers on behalf of the corporation." *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C.1989). "If it becomes obvious that the deposition representative designated by the corporation is deficient, the corporation is obligated to provide a substitute." *Brazos River Auth.*, 469 F.3d at 433.

A district court has broad discretion in selecting sanctions under Rule 37 of the Federal Rules of Civil Procedure. *See Coquina Investments v. TD Bank, N.A.*, 760 F.3d 1300, 1319 (11th Cir. 2014) ("Our caselaw is clear that only in a case where the court imposes the most severe sanction—default or dismissal—is a finding of willfulness or bad faith failure to comply necessary.") (*quoting BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1049

(11th Cir. 1994)). Rule 37(d)(1)(A)(i) allows the Court to impose sanctions if a 30(b)(6) witness fails to appear for a deposition. *See* FED. R. CIV. P. 37(d)(1)(A)(i). If a 30(b)(6) witness "is not knowledgeable about relevant facts, and the [organization] 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. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993); *see also Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) ("When a witness is designated by a corporate party to speak on its behalf pursuant to Rule 30(b)(6), producing an unprepared witness is tantamount to a failure to appear that is sanctionable [as a nonappearance] under Rule 37(d)" of the Federal Rules of Civil Procedure.); *The Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997) ("'Producing an unprepared witness is tantamount to a failure to appear.'") (*quoting United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996)).

Permissible sanctions for failing to designate a witness knowledgeable about Rule 30(b)(6) categories include "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters into evidence." See FED. R. CIV. P. 37(b)(2)(A)(ii). "When the 30(b)(6) representative claims ignorance of a subject during the deposition, courts have precluded the corporation from later introducing evidence on that subject." *Function Media, LLC. v. Google, Inc.*, No. 2:07–CV–279–CE, 2010 WL 276093, *1 (E.D. Tex. Jan.15, 2010); *see also Wilson v. Lakner*, 228 F.R.D. 524, 529–30 (D. Md. 2005) ("... depending on the nature and extent of the obfuscation, the testimony given by the non-responsive deponent (e.g. 'I don't know') may be deemed 'binding on the corporation' so as to prohibit it from offering contrary evidence at trial") (citations omitted); *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) ("Unless it can prove that the information

was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.").

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Dated: November 14, 2016

Respectfully submitted,

By: /s/ Richard S. Gora

Richard S. Gora (admitted *pro hac vice*)
Sinead Rafferty (admitted *pro hac vice*)
Gora LLC
9 W. Broad St., Suite 550
Stamford, CT 06902
Tel.: (203) 424-8021
rich@goralaw.com
sinead@goralaw.com

Matthew Wagoner (admitted *pro hac vice)*
The Wagoner Firm, PLLC
8 Thurlow Terr.
Albany, NY 12203
Tel.: (518) 400-0955
matt@thewagonerfirm.com

Ian T. Holmes
Florida Bar No.: 44193
David P. Fraser
Florida Bar No.: 91085
Holmes Kurnik, PA
711 5th Ave S Ste 200
Naples, FL 34102-6628
Tel.: (239) 228-7280
iholmes@holmeskurnik.com
dfraser@holmeskurnik.com

Counsel for Plaintiff

LOCAL RULE 3.01(G) CERTIFICATION

Pursuant to Rule 3.01(g) of the Local Rules of the United States District Court for the Middle District of Florida, the undersigned counsel hereby certifies that counsel for plaintiff conferred with opposing counsel in a good faith effort to resolve the foregoing dispute without judicial intervention, but were unable to reach agreement.

/s/ Richard S. Gora
Richard S. Gora

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF system.

/s/ Richard S. Gora
Richard S. Gora