DISPOSITIVE MOTIONS – CLE, JUNE 28, 2018

We're going to be talking about dispositive motions. We'll talk a little bit about the theory, and some practical tips for crafting opinions, from the court's perspective. If there's time, we can cover some tips for practitioners.

A. PRELIMINARY COMMENT for the Summer Interns

I'm giving general advice and my personal preferences. In the event of any contradictions, always follow your particular judge's practices, procedures and preferences.

B. GENERAL THEORY OF DISPOSITIVE MOTIONS

What is a "dispositive" motion? (It disposes of all, or part, of a case.)

What is the most commonly filed dispositive motion, by far? (Hint: how do most cases end?) **Rule 41**.

What dispositive motions exist under Fed. Rules of Civ Pro?

Rule 12

(b)(1) – subject matter jurisdiction

(b)(2) personal jurisdiction

(b)(3) venue

(b)(4) insufficient process (i.e., wrong name on complaint or summons)

(b)(5) insufficient service

(b)(6) failure to state a claim upon which relief can be granted

(b)(7) failure to join an indispensable party

(c) judgment on the pleadings (allows court to consider

(f) motion to strike

Rule 56 Summary Judgment

Rules 11, 37 (dismissal can be a sanction for misconduct)

Rule 50 Judgment as a matter of law at trial (after opposing party rests)

Rule 55 Default Judgment

Rule 41 (a) Voluntary

Rule 41(b) Involuntary

Federal courts are in the dispute-resolution business. The court's goals are set forth in Fed. R. Civ. P. 1: (1) just; (2) speedy; and (3) inexpensive determination of every action and proceeding. A lot of commentators have recognized that these goals are in tension – you can meet any two, but its hard to meet all three.

- Want the process to be fair and speedy? Have to add resources (judges, courtrooms, etc.) and it will be expensive
- Want it to be fair and inexpensive? It might take a while.

Federal courts are based on an adversarial model. You've got Plaintiffs. The plaintiff has been injured by the Defendant and presumably has not been able to achieve satisfaction informally. So, the Plaintiff is asking the Court to force the Defendant to do something (usually, pay $$$). Plaintiffs (and plaintiffs' attorneys) want to get their money as soon as possible.

Defendants have fundamental constitutional rights, such as due process, notice and the opportunity to be heard before the court can take away their property. Defendants are being

accused of harming the Plaintiff. Defendants either deny that they did anything wrong; and/or deny that they caused as much damage as Plaintiff claims. Defendants don't want to be in court, and they want the case to be over as soon as possible.

Our problem, as the court, is we're not omniscient. We don't know who's right/wrong. We don't know anything about what really happened. If we did, we couldn't act as the Court – we'd be a Witness or a Party and have to recuse. (example – defendant accused of forging a Judge's signature on an order; lawsuit between court reporters).

> Could you hold a jury trial in every case? That would be hugely time-consuming and expensive – not just to the litigants, but to the citizens who get dragged into court to serve as jurors.

So, how do you weed out the deserving cases from the meritless ones? Dispositive Motions. In the federal system, a Plaintiff has to clear three major hurdles to win the case: the Motion to Dismiss ("MTD") stage; the Summary Judgment ("SJ") stage; and Trial.

What is the difference between Motions to Dismiss and SJ? Testing the **allegations** in the Complaint (*Twombly/Iqbal* plausibility) vs. testing the admissible **evidence**.

MTD- look at the Complaint. Post-*Twombly*, there are now TWO ways to attack a Complaint:

1. Is there a viable legal theory? Can you sue your professor for giving you an "A" in the class? (No. How are you harmed?) Can you sue your professor for giving every student an "A" in the class? (Maybe – devalues your "A".)

2. Are there enough facts pled to make the theory "plausible"? What if you plead that there are 100 students in the class and you know the Professor gave you and your friend Suzy A's? (No. What about the other 98 students?) What if you plead that Suzy is really dumb, so if she got an A, everyone else must have? (Still No.) What if you plead that all 70 students you talked to got A's, and you haven't heard from the other 30? (Likely a plausible claim). Plausible is not the same as "likely" or "probable." It requires judgment from the court. If the court DENIES a motion to dismiss, the parties will engage in discovery. Time. Expense. What the court must decide is: Has Plaintiff pleaded enough facts to "open the door" to discovery?
3. If the court GRANTS a MTD, it can (and sometimes must) allow Plaintiff a chance to <u>amend</u>. The court's opinion is a roadmap for what the Plaintiff must plead to state a valid claim. If court GRANTS MTD and dismisses claims with prejudice, case is over.
4. Obviously, Defendant wants to win on a MTD. Case is over. Relatively speedy and inexpensive.
5. Less obviously, **<u>if</u>** a Plaintiff is going to lose, its better to lose on MTD than at trial. Why? Less time, $, energy invested in the case. Of course, losing a dispositive motion makes it a lot harder to settle the case. (P's leverage is chance of winning on appeal.)

SJ – time to "put up or shut up." Parties had their chance to take discovery. Look at the evidence that each party could present to a jury.

What types of evidence can the Court consider?

At MTD- Can look at documents if they are: (1) referenced in the complaint or attached; (2) authenticity is undisputed; and (3) the claim is based on the document. For example, a Plaintiff can't avoid a MTD in a breach of contract claim by mis-stating the contract and then simply failing to attach it. (D can submit the K, and the court can use it to rule on the MTD.)

At SJ- (documents, interrogatory responses, deposition transcripts, admissions, etc.) How do you turn your client's story into "evidence"? (Affidavit or Declaration). SJ must be based on admissible evidence. Fed. R. Civ. P. 56(c)(2). Thus, affidavits must be within the personal knowledge of the affiant. (*Exception – the Court can consider hearsay if it appears reasonably likely that such evidence can be presented in an admissible form at trial – i.e., by calling the declarant as a witness.)*

The parties have a duty to submit evidence to the Court in support of their respective positions. As a practitioner, it is important to provide well-organized exhibits and pinpoint citations so that the Court can easily find such evidence in the record.

Where does the "evidence" come from? What do litigators spend most of their daily lives doing? (Discovery). The Federal Rules of Civil Procedure provide for expansive discovery practices. Both sides have a full opportunity to learn all the evidence that exists. Effective SJ practice is the logical consequence of broad discovery rules. The Supreme Court has reiterated that SJ is not a disfavored shortcut that deprives parties of their constitutional right to a jury trial. Rather, SJ is "an integral part of the federal rules as a whole, which are designed

to secure the just, speedy, and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

What is the difference between SJ and trial? At SJ, the Court must draw all reasonable inferences in the light most favorable to the non-moving party. At trial, the factfinder (jury) resolves/decides which inferences to draw based on its assessment of credibility of the witnesses.

Many cases – no "real" fact disputes. Can have cross-motions for SJ.

Some cases – very clear disputes about what happened (ex: he said/she said "hostile work environment" case or police excessive force case). But, courts usually don't get SJ motions in those cases. Our task is usually more nuanced and difficult.

What is a "reasonable" inference?

Any baseball fans? I've been giving some version of this talk for a long time. My hypo used to be: Is it reasonable to believe the Pirates will make the playoffs? The answer, for almost 20 years was "NO." Then, there were a couple years when it was debatable. Then, they got good, made the playoffs 3 years in a row, and the answer was clearly "Yes." Unfortunately, I think it's a debatable question again. Is it reasonable to believe that the Pirates will make the playoffs this year? (Y- only 3.5 games out of wildcard, Jung Ho Kung coming back, young pitchers maturing; N – 4th place, no Cutch, no Garrett Cole, all the veterans will be traded).

An inference is a logical conclusion based on evidence. The Court must use logic, common sense, experience and judgment in drawing inferences from the facts in the record. The Court need not be willfully blind to the obvious explanation, or the "normal" causal connection of events.

Example: Fact: Cutch's batting average: 2014: .314; 2015: .292; 2016: .256. Reasonable Possible inferences: his 2017 batting average will be: .300? (yes, average of last 3 years); .200? (also yes, continue downward trend).

On one hand, a case based on pure speculation, conjecture, or with logical/evidentiary gaps should not go to the jury. On the other hand, the Court cannot grant SJ simply because the claim appears unlikely to succeed or because a very similar case lost at trial. Even if the Court thinks the case is a loser for plaintiff, a hypothetical "plaintiff-friendly" juror may think differently. Pirates management thought Cutch was going to keep getting worse; the Giants thought he would rebound. SJ can be granted only if no reasonable jury could decide in favor of the non-moving party. The Court must often decide what the limit of "reasonableness" is. This is the Court's most difficult task, and is not readily reducible to a mathematical formula.

Another cautionary tale: In the summer of 2015, my hypo was presidential candidates. Was it reasonable that Hillary would be elected president? Jeb Bush? Guess who my example of an Unreasonable candidate was? (Trump, also Bernie). Zero political experience, never held office, seemed to have too much "baggage." In hindsight, there was a chain of "logical" inferences that led to that result. Things look different with the passage of time and hindsight – which is how the Court of Appeals will be reviewing the district court's SJ decision. So, be very rigorous before granting summary judgment.

It is important (for the parties and the Court of Appeals) for the district court to clearly and explicitly explain in its opinion why the inference was/was not reasonable.

Does it matter which side files the SJ motion? Yes - a lot. Why? The Court must draw all reasonable inferences in favor of the non-moving party. Usually, but not always,

Defendants move for SJ because Plaintiffs have the burden of production/persuasion on their prima facie case. The clearest SJ motions are: "Plaintiff failed to produce any evidence of element X."

If there are cross-motions for SJ, the Court must analyze them separately. The law clerk must put on a "pro-Plaintiff" hat to consider Defendant's motion; then put on a "pro-Defendant" hat to consider Plaintiff's motion. Because different inferences must be drawn, the Court can deny both cross-motions. You can't grant SJ based on testimony of an "interested witness" that the jury could disbelieve.

The Essence of the Court's task. We act as a filter. The Court must ask: Do we need a jury to decide this case? Other ways of thinking about the task: "What is the specific factual question(s) we need the jury to answer – and can a reasonable jury decide that question(s) in favor of either side?" or "Would we grant a Rule 50 Motion for Judgment as a Matter of Law if the same evidence came in at trial?" The Court's role is to: (1) make wise use of judicial resources; (2) uphold parties' rights under the Federal Rules of Civil Procedure to entry of summary judgment when appropriate; (3) protect potential citizen-jurors from needless inconvenience from being called into Court unnecessarily; and (4) protect respect for the judicial system by not forcing citizens to sit as jurors when there is no real question for them to decide.

Per Fed. R. Civ. P. 56, the Court must <u>deny</u> a SJ motion if there is <u>even just one</u> "genuine" issue of "material" fact, and it must draw all "reasonable" inferences in favor of the non-moving party. And there is often subjectivity – what would a "reasonable" jury do? If in doubt, the Court should err on the side of denying the SJ motion.

Consequences. If we <u>deny</u> the SJ motion, the decision is not appealable. Then the

Court must conduct a trial (time, expense, inconvenience citizens to serve as jurors). If we grant SJ (in full), the parties lose their opportunity for their "day in court" (7th Amendment right to a jury trial) and our decision is appealable.

What standard of review? (de novo). **Why?** (because the Court of Appeals is equally well-positioned to review the record and determine if SJ is proper.)

Any Questions on Theory?

C. PRACTICAL SUGGESTIONS FOR DRAFTING

1. Know Your Audience(s). Who are you writing for?

a. Your Judge. It is not your name on the opinion. The law clerk has not been appointed by the President and confirmed by the Senate. The law clerk's role is to assist the Judge. (Interns – probably have to satisfy supervising law clerk before it goes to the Judge.) If you wouldn't put YOUR name on it, don't expect the Judge to.

b. The Losing Party. This is your toughest audience. The winning party will be happy, but the job of the attorney for the losing party is to find something wrong with the opinion so that he/she can take an appeal.

c. The Reviewing Court (when granting MTD or SJ). Remember that the standard of review is *de novo*. The purpose of the opinion is to explain to the Court of Appeals why your grant of dispositive motion was correct. Different type of advocacy.

d. Future lawyers who use it to advise clients. You should clearly set forth the rules, and the application of facts to law, so that similarly-situated parties can conform their future conduct accordingly.

e. The media. Be aware that media make take soundbites out of context. Avoid inflammatory language and personal aspersions.

f. The mirror and posterity. The opinion will be on Westlaw forever. So, put forth your <u>best</u> work EVERY TIME. Nobody will know, or care, that you were tired, overworked and/or had a time constraint. Re-read the opinion and re-check the case cites one more time before filing.

2. Opinion Drafting Thoughts.

i. Think first, write second, think again. One advantage of working for the Court is that there is no hard deadline by which the opinion must be issued. Read the briefs; look at it from the perspective of each side; and let it soak subconsciously. I figure out a lot of cases on bike rides, in the shower, in bed at night, etc.

ii. I usually read the briefs in reverse, starting from the last-filed (surrreply). The goal is to find out what the "real" disputes are and what issues are **<u>no longer</u>** in dispute. Often, claims are narrowed or abandoned.

iii. Expect edits. Law clerks are ghost-writers. Most judges would edit Shakespeare. Don't take it personally.

D. MOTIONS TO DISMISS

1. relatively straight-forward
2. well-known standard of review (cut and paste)
3. 3 steps:
    a. Identify elements of the cause of action
    b. Identify (and ignore) mere legal conclusions (i.e., defendant acted negligently)
    c. Determine whether the remaining facts plausibly entitle Plaintiff to relief, i.e., would support each element of the prima facie case.
4. If P set out sufficient facts – Deny MTD. If P failed, say how and Grant MTD. If it might be fixable, allow leave to amend Complaint.

E. SJ OPINIONS (MORE DIFFICULT)

3. The relevant legal rules:
    a. Fed. R. Civ. P. 56
    b. Supreme Court trilogy of cases – well-established standard of review. No need to reinvent the wheel. Study it closely the first time to master the principles, then cut and paste.
        i. Summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The movant must identify those portions of the record which demonstrate the

absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To withstand summary judgment, the non-movant must show a genuine dispute of material fact by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56(c)(1)(A); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). A dispute is "genuine" only if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

c. Local Rule 56 (W.D. Pa.). The Board of Judges can adopt Local Rules to supplement the Federal Rules of Civil Procedure. This Court's Local Rules establish a specific SJ procedure which requires Concise Statements of Material Fact (CSMFs) and responses thereto.

   i. The CSMF is an extra, stand-alone document. The general theory behind the rule is to separate Afact@ disputes from Alegal@ disputes and to highlight (for the Court) any genuine and material fact disputes that will defeat SJ. The Local Rule is sensible. In theory, if there is even just ONE disputed/denied fact, we must DENY SJ.

   ii. Responses to CSMF. The non-moving party has a burden to point to: (1) admissible (2) evidence (3) in the record to defeat the SJ motion. The non-movant must respond to each contention. Failure = Admission. It is also important for the non-movant to set forth any additional CSMFs that would defeat SJ.

   iii. **Practical Impact on Law Clerks**. The manner in which many

practitioners have implemented the Local Rule has created more work. Too often CSMFs turn into a side-litigation. We usually can't tell, just by looking at the CSMFs, if SJ is merited. One big problem is that attorneys don't limit the CSMFs to just "material" facts. The other big problem is that attorneys are afraid to "admit" to anything proposed by the other side and so they assert meritless denials. In other words, not all of the fact disputes are "genuine" or "material." Unfortunately, even if there are hundreds of allegedly "disputed" facts, you must often painstakingly consider each one by looking at the underlying record because SJ may still be warranted.

iv. Options for Non-Compliance. Improperly denied facts can be "deemed admitted"; a non-conforming document can be stricken with a deadline to re-file; or the Court may excuse the technical deficiency and decide the motion.

v. PRIVATE PRACTICE TIPS: Make your CSMF's as concise as possible; neutral statements; limited to material evidence needed for your legal argument; and facts (not spin). Eliminate (as much as possible) any opportunity for the other side to deny. In opposing a CSMF, make your denials concise; statements; material; and facts. Add additional information.

4. The Applicable Documents (work at a big table)

   a. Complaint – what counts are alleged/challenged

b. CSMFs and responses thereto

c. Briefs

d. Exhibits

    i. List/Outline all parties' contentions. Is the movant seeking SJ in whole or in part? Determine the elements of each cause of action/affirmative defense that is at issue.

    ii. Figure out what happened and whether any disagreements are genuine and material. Ideally, this should be easily done by going through the CSMF and Response. Often, the briefs will also apply the key facts to the relevant legal standard. I find it essential to go to the underlying documents (attached as exhibits) to verify that the CSMF and Response accurately reflect the actual record evidence. DON'T BLINDLY TRUST THE LAWYERS. If I have doubts about the credibility of one (or both) parties, I sometimes ignore the CSMFs and build the fact section of the opinion by quoting directly from the underlying documents.

    iii. Use an iterative process to develop the facts and the law. You need to know the facts to figure out what law will apply. Then you need to know the legal test to figure out which facts are material. I generally try to rough out the "facts" section first (in my initial review of the briefs and CSMF); then write the legal analysis; then re-write the facts to add everything necessary for the analysis and subtract facts that turn out to be extraneous.

iv. With rare exceptions, the only "material" facts are those that are necessary to that decision. EX: If the SJ theory is Statute of Limitations, only the facts about timing are material. There is no need to summarize the entirety of the information available in the record.

v. Characterize the parties' contentions accurately and fairly. Don't duck the tough issues. Don't distort the facts of this case to make it fit better with precedent. Use exact quotes from the record whenever possible.

vi. Don't become an advocate for the winning side – acknowledge if it is a close case. On the other hand, the opinion should be persuasive – you should explain WHY the Court reached the decision it did.

vii. The Court's most important asset is its moral authority and credibility. The losing party must accept and abide by the result. That is much more likely if losing parties feel that the Court understood their arguments and fully and fairly considered them.

viii. Use lots of headings to organize the opinion.

ix. Focus on the <u>reasoning</u> of the cases – avoid string cites. Explain WHY that case is important.

x. Try to simplify the case to its core legal issue(s). Your SJ opinion should be tied to an element of the cause of action or defense. What is the "cleanest" and clearest way to resolve that issue? If the claim fails under Theory A, you usually need not address Theory B, C and D.

xi. To the extent possible, use the CSMF language used by the "losing" party

and direct quotations from the record. Try to take away appellate issues based on nitpicks of language.

xii. Encourage the parties to submit a Joint Record/Appendix (it's realistic) and to provide courtesy copies of all voluminous materials to chambers.

Questions/Comments?

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[redacted]

Petitioner,

v.

[redacted],

Respondent.

No. [redacted]

[redacted]'S FIRST REQUEST FOR PRODUCTION OF JURISDICTIONAL DOCUMENTS DIRECTED TO [redacted]

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and Order of Judge Peter Phipps dated April 4, 2019 (Dkt. 49), Petitioner, [redacted] ("[redacted]"), by and through its counsel, hereby propounds its First Request for Production of Jurisdictional Documents Directed to Respondent, [redacted] ("[redacted]").

DEFINITIONS

1. "[redacted]" shall mean Respondent [redacted], [redacted], [redacted] and [redacted], along with any successors, parent entities, members, limited partners, direct and indirect subsidiaries, affiliates, officers, directors, employees, agents, attorneys, consultants, representatives, and all other persons acting or purporting to act on its behalf or at its direction.

2. "[redacted]" shall mean Petitioner [redacted], including its officers, employees, agents, representatives, and all other persons acting or purporting to act on its behalf or at its direction.

3. "You" and "Your" shall refer to [redacted]

4. "Communication" or "communications" shall mean and include all inquiries, discussions, conversations, interviews, negotiations, agreements, correspondence, letters, cablegrams, mailgrams, telegrams, telexes, text messages, instant messages, discussions in computer chat programs, cables, electronically transmitted messages ("e-mail"), postings on Internet bulletin boards, or other forms of written, verbal or electronic intercourse, however transmitted, including drafts, facsimiles, and copies, as well as originals, as well as reports, notes, memoranda, lists, agenda, transcriptions and other documents and records of communications, and, when used, shall require a statement identifying (i) the individual(s) who made the communication, (ii) the recipient(s) of the communication, (iii) the date it was made and (iv) the form in which it was made.

5. "Document" or "documents" shall have the broadest meaning permitted under the Federal Rules of Civil Procedure, and are to be construed in a broad and liberal sense to mean all types of written, typed, printed, recorded or graphic information, however produced or reproduced, of any kind and description, and include, without limitation, all originals, copies (if the originals are not available), non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise) and drafts, whether maintained in paper or recorded through a sound, video or other electronic, magnetic or digital recording system, including but not limited to: personal e-mail; text messages; messages in computer chat programs; handwritten notes; journals; paper and electronic calendar entries; letters; correspondence; telegrams; telexes; memoranda; records; summaries of personal conversations or interviews; minutes or records or notes of meetings or conferences; note pads; notebooks; postcards; "Post-It" notes; stenographic notes; transcriptions; notes; opinions or reports of financial advisors or consultants; opinions or reports of experts; projections; financial or statistical statements or compilations; contracts; agreements; appraisals; analyses; purchase orders; confirmations; publications;

articles; books; pamphlets; circulars; microfilm; microfiche; reports; studies; logs; surveys; diaries; calendars; appointment books; maps; charts; graphs; bulletins; Photostats; speeches; data sheets; pictures; photographs; illustrations; blueprints; films; drawings; plans; tape recordings; videotapes; disks; diskettes; data tapes or readable computer-produced interpretations or transcriptions thereof; electronically transmitted messages ("e-mail"); voicemail messages; interoffice communications; advertising, packaging and promotional materials; and any other writings, papers, and tangible things of whatever description whatsoever, including, but not limited to, any information contained in any computer, external drive, USB device, tablet device, smart phone, blackberry, or cloud storage, even if not yet printed out, within your possession, custody, or control. Any copy containing or having attached thereto any alterations, notes, comments, or other materials not included in the originals shall be deemed a separate document within the foregoing definition.

6. "Person" shall mean any natural person or individual, or any firm, partnership (general or limited), proprietorship, corporation, limited liability company, unincorporated association, trust, joint venture, or any other legal or governmental entity, organization or body of any type whatsoever, as well as all agents, officers, directors, boards, partners, managers, committees, subcommittees, employees, consultants, representatives or instrumentalities thereof.

7. The terms "and" as well as "or" as used herein shall be read and applied as though interchangeable and shall be construed disjunctively or conjunctively so as to require the fullest and most complete disclosure of all requested information. The terms "any" or "all" shall mean "each and every" as well as "anyone and everyone." The singular includes the plural and the plural includes the singular. The present tense includes the past and future tenses. Words in feminine, masculine or neuter form shall include each of the other genders.

8. The terms "include" and "including" shall each be interpreted in every instance as being illustrative of the information requested, shall be read as meaning "including but not limited to," and shall not be interpreted to exclude any information otherwise within the scope of these requests.

9. The terms "concerning," "relating to," and "referring to" shall be read and applied as interchangeable and shall be construed in the broadest sense to mean discussing, supporting, describing, concerning, relating to, referring to, pertaining to, containing, analyzing, evaluating, studying, recording, memorializing, recording, reporting on, commenting on, reviewed or prepared in connection or conjunction with, evidencing, setting forth, contradicting, refuting, considering, recommending, or constituting, in whole or in part.

INSTRUCTIONS

1. These requests are continuing in character, and therefore require You to file timely supplemental responses if you obtain further or different information before trial.

2. In answering these requests, You must provide all information in their actual or constructive possession, custody, or control, including without limitation information that may be in the physical possession of another person or entity, such as Your advisors, attorneys, investigators, employees, agents, affiliates, representatives, officers, directors, officials, or employees. You must make a diligent search of their records and of other papers and materials in their possession or within their access and furnish all responsive information therefrom.

3. These requests are to be answered in detail. If the answer to all or any part of a request is that You lack knowledge of the requested information, set forth such remaining information as is known to You and describe all efforts made by You or by Your attorneys, account-

ants, agents, representatives and experts to obtain the information necessary to answer the request. If any approximation can reasonably be made in place of unknown information, You should set forth its best estimate or approximation, clearly designed as such, and describe the basis upon which the estimate or approximation is made.

4. If You at any time have had possession or control of information requested herein and if such information has been lost, destroyed, purged, or is not presently in its possession or control, then for each such item You shall:

(a) Identify who was in possession or control of such information;

(b) Identify the name, date, number of pages, subject matter, and other description of that information;

(c) State where the information was most recently located; and

(d) State the date and circumstances surrounding its loss, destruction, purge, or separation from possession or control.

5. If You object to a request on the grounds of any claim of attorney-client privilege, work product immunity, or other applicable privilege or immunity, You are instructed to provide such non-privileged answers as are responsive and shall:

(a) State the nature of the privilege or immunity which you claim;

(b) State the date of the communication or information;

(c) State the person(s) who (i) received the communication; (ii) authored, created, or made the communication; and (iii) were present during the communication;

(d) Set forth the basis for such claim of privilege or immunity; and

(e) Indicate, in a manner sufficient to permit a ruling by the Court, the nature of the information for which such privilege or immunity is claimed.

6. An objection based upon a claim of privilege or immunity directed to any part of a request does not constitute an excuse for failure to respond to the parts of the request for which no objection or claim of privilege or immunity is made.

8. If You properly and timely object to providing information to any portion of a request, You must set forth all reasons for their objections, and must answer all remaining portions of the request.

9. These requests are to be construed as broadly as possible under the Federal Rules of Civil Procedure.

10. The Definitions and Instructions set forth herein shall apply to each of the specific requests set forth below.

DOCUMENT REQUESTS

REQUEST NO. 1: All documents that concern, refer or relate to the limited partnership agreement of [redacted] dated as of March 24, 2015, as referenced in the Amended and Restated Limited Partnership Agreement entered as of December 19, 2018 (Exhibit 4 to Affidavit of [redacted] in Support of [redacted]'s Opposition to Request for Jurisdictional Discovery).

RESPONSE:

REQUEST NO. 2: All documents that concern, refer or relate to amendments to the limited partnership agreement of [redacted].

RESPONSE:

REQUEST NO. 3: All documents that concern, refer, or relate to any limited partnership interest of [redacted] in [redacted].

RESPONSE:

REQUEST NO. 4: All Schedule K-1 tax forms issued to the limited partners of [redacted].

RESPONSE:

REQUEST NO. 5: All documents that concern, refer or relate to Your answers to [redacted]'s First Set of Interrogatories.

RESPONSE:

Date: April 15, 2019

Respectfully submitted,

[redacted]

[redacted]

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and correct copy of [redacted] **'S FIRST REQUEST FOR PRODUCTION OF JURISDICTIONAL DOCUMENTS DIRECTED TO** [redacted] was served upon counsel as addressed below via U.S. First Class Mail and electronic mail on the 15th day of April 2019.

[redacted]

Attorneys for Respondent [redacted]

[redacted]

[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[redacted]

Petitioner,

v.

[redacted],

Respondent.

No. [redacted]

[redacted]'S FIRST SET OF JURISDICTIONAL INTERROGATORIES DIRECTED TO [redacted]

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DEFINITIONS

1. "[redacted]" shall mean Respondent [redacted], [redacted]., [redacted] and [redacted], along with any successors, parent entities, members, limited partners, direct and indirect subsidiaries, affiliates, officers, directors, employees, agents, attorneys, consultants, representatives, and all other persons acting or purporting to act on its behalf or at its direction.

2. "[redacted]" shall mean Petitioner [redacted], including its officers, employees, agents, representatives, and all other persons acting or purporting to act on its behalf or at its direction.

3. "You" and "Your" shall refer to [redacted]

4. "Communication" or "communications" shall mean and include all inquiries, discussions, conversations, interviews, negotiations, agreements, correspondence, letters, cablegrams, mailgrams, telegrams, telexes, text messages, instant messages, discussions in computer chat programs, cables, electronically transmitted messages ("e-mail"), postings on Internet bulletin boards, or other forms of written, verbal or electronic intercourse, however transmitted, including drafts, facsimiles, and copies, as well as originals, as well as reports, notes, memoranda, lists, agenda, transcriptions and other documents and records of communications, and, when used, shall require a statement identifying (i) the individual(s) who made the communication, (ii) the recipient(s) of the communication, (iii) the date it was made and (iv) the form in which it was made.

5. "Document" or "documents" shall have the broadest meaning permitted under the Federal Rules of Civil Procedure, and are to be construed in a broad and liberal sense to mean all types of written, typed, printed, recorded or graphic information, however produced or reproduced, of any kind and description, and include, without limitation, all originals, copies (if the originals are not available), non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise) and drafts, whether maintained in paper or recorded through a sound, video or other electronic, magnetic or digital recording system, including but not limited to: personal e-mail; text messages; messages in computer chat programs; handwritten notes; journals; paper and electronic calendar entries; letters; correspondence; telegrams; telexes; memoranda; records; summaries of personal conversations or interviews; minutes or records or notes of meetings or conferences; note pads; notebooks; postcards; "Post-It" notes; stenographic notes; transcriptions; notes; opinions or reports of

financial advisors or consultants; opinions or reports of experts; projections; financial or statistical statements or compilations; contracts; agreements; appraisals; analyses; purchase orders; confirmations; publications; articles; books; pamphlets; circulars; microfilm; microfiche; reports; studies; logs; surveys; diaries; calendars; appointment books; maps; charts; graphs; bulletins; Photostats; speeches; data sheets; pictures; photographs; illustrations; blueprints; films; drawings; plans; tape recordings; videotapes; disks; diskettes; data tapes or readable computer-produced interpretations or transcriptions thereof; electronically transmitted messages ("e-mail"); voicemail messages; interoffice communications; advertising, packaging and promotional materials; and any other writings, papers, and tangible things of whatever description whatsoever, including, but not limited to, any information contained in any computer, external drive, USB device, tablet device, smart phone, blackberry, or cloud storage, even if not yet printed out, within your possession, custody, or control. Any copy containing or having attached thereto any alterations, notes, comments, or other materials not included in the originals shall be deemed a separate document within the foregoing definition.

6. "Person" shall mean any natural person or individual, or any firm, partnership (general or limited), proprietorship, corporation, limited liability company, unincorporated association, trust, joint venture, or any other legal or governmental entity, organization or body of any type whatsoever, as well as all agents, officers, directors, boards, partners, managers, committees, subcommittees, employees, consultants, representatives or instrumentalities thereof.

7. The terms "and" as well as "or" as used herein shall be read and applied as though interchangeable and shall be construed disjunctively or conjunctively so as to require the fullest and most complete disclosure of all requested information. The terms "any" or "all" shall mean

"each and every" as well as "anyone and everyone." The singular includes the plural and the plural includes the singular. The present tense includes the past and future tenses. Words in feminine, masculine or neuter form shall include each of the other genders.

8. The terms "include" and "including" shall each be interpreted in every instance as being illustrative of the information requested, shall be read as meaning "including but not limited to," and shall not be interpreted to exclude any information otherwise within the scope of these Interrogatories.

9. The terms "concerning," "relating to," and "referring to" shall be read and applied as interchangeable and shall be construed in the broadest sense to mean discussing, supporting, describing, concerning, relating to, referring to, pertaining to, containing, analyzing, evaluating, studying, recording, memorializing, recording, reporting on, commenting on, reviewed or prepared in connection or conjunction with, evidencing, setting forth, contradicting, refuting, considering, recommending, or constituting, in whole or in part.

INSTRUCTIONS

1. These interrogatories are continuing in character, and therefore require You to file timely supplemental responses if you obtain further or different information before trial.

2. In answering these interrogatories, You must provide all information in their actual or constructive possession, custody, or control, including without limitation information that may be in the physical possession of another person or entity, such as Your advisors, attorneys, investigators, employees, agents, affiliates, representatives, officers, directors, officials, or employees. You must make a diligent search of their records and of other papers and materials in their possession or within their access and furnish all responsive information therefrom.

3. These interrogatories are to be answered in detail. If the answer to all or any part of an interrogatory is that You lack knowledge of the requested information, set forth such remaining information as is known to You and describe all efforts made by You or by Your attorneys, accountants, agents, representatives and experts to obtain the information necessary to answer the interrogatory. If any approximation can reasonably be made in place of unknown information, You should set forth its best estimate or approximation, clearly designed as such, and describe the basis upon which the estimate or approximation is made.

4. If documents are produced in lieu of answering an interrogatory, identify the documents in sufficient detail to allow [redacted] to locate and identify the documents and portions thereof from which the answer may be ascertained, including the Bates numbers of the documents.

5. If You at any time have had possession or control of information requested herein and if such information has been lost, destroyed, purged, or is not presently in its possession or control, then for each such item You shall:

(a) Identify who was in possession or control of such information;

(b) Identify the name, date, number of pages, subject matter, and other description of that information;

(c) State where the information was most recently located; and

(d) State the date and circumstances surrounding its loss, destruction, purge, or separation from possession or control.

6. If You object to an interrogatory on the grounds of any claim of attorney-client privilege, work product immunity, or other applicable privilege or immunity, You are instructed to provide such non-privileged answers as are responsive and shall:

(a) State the nature of the privilege or immunity which you claim;

(b) State the date of the communication or information;

(c) State the person(s) who (i) received the communication; (ii) authored, created, or made the communication; and (iii) were present during the communication;

(d) Set forth the basis for such claim of privilege or immunity; and

(e) Indicate, in a manner sufficient to permit a ruling by the Court, the nature of the information for which such privilege or immunity is claimed.

7. An objection based upon a claim of privilege or immunity directed to any part of an interrogatory does not constitute an excuse for failure to respond to the parts of the interrogatory for which no objection or claim of privilege or immunity is made.

8. If You properly and timely object to providing information to any portion of an interrogatory, You must set forth all reasons for their objections, and must answer all remaining portions of the interrogatory.

9. These interrogatories are to be construed as broadly as possible under the Federal Rules of Civil Procedure.

10. The Definitions and Instructions set forth herein shall apply to each of the specific interrogatories set forth below.

INTERROGATORIES

INTERROGATORY NO. 1: Identify all documents that concern, refer or relate to any limited partnership interest of [redacted] in [redacted]

RESPONSE:

INTERROGATORY NO. 2: Identify the person who prepared the limited partnership agreement dated March 24, 2015 and any amendments thereto for [redacted]

RESPONSE:

INTERROGATORY NO. 3: Identify each payment to [redacted] with respect to any limited partnership interest in [redacted]

RESPONSE:

INTERROGATORY NO. 4: Describe the circumstances surrounding each instance where a limited partner joined [redacted]

RESPONSE:

INTERROGATORY NO. 5: If the Amended and Restated Limited Partnership Agreement dated December 19, 2018 is the first written limited partnership agreement for [redacted] then explain in detail why there are no prior written agreements.

RESPONSE:

Date: April 15, 2019

Respectfully submitted,

[redacted]

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and correct copy of [redacted] **'S FIRST SET OF JURISDICTIONAL INTERROGATORIES DIRECTED TO** [redacted] was served upon counsel as addressed below via U.S. First Class Mail and electronic mail on the 15th day of April, 2019.

[redacted]

Attorneys for Respondent, [redacted]

[redacted]

[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[redacted],	No. [redacted]
Petitioner,	The Honorable Peter J. Phipps
v.	
[redacted], LLC,	
Respondent.	ELECTRONICALLY FILED

RESPONDENT [redacted], [redacted]'S
MEMORANDUM IN SUPPORT OF 12(b)(1) MOTION TO DISMISS

INTRODUCTION

[redacted] ("[redacted]") has filed a Petition to Vacate Arbitration Award ("Petition") that this Court does not have jurisdiction to entertain. [redacted] a Texas limited liability company, has alleged that Respondent [redacted] ("[redacted]") is a citizen of Delaware with its principal place of business in Colorado. However, [redacted] failed to accurately identify the citizenship of [redacted], because one of [redacted]'s underlying owners is a citizen of Texas. Under black letter law of the Supreme Court and the Third Circuit, [redacted]'s citizenship is determined by the citizenship of its members, and that citizenship includes Texas. Consequently, there is no diversity of citizenship between the parties. As there is no other basis for federal subject-matter jurisdiction, [redacted] respectfully requests the case be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

BACKGROUND

On September 14, 2018, a majority of a three-member arbitration panel (the "Panel") issued an award finding [redacted] liable to [redacted] for breach of a Facilities Agreement between the parties (the "Liability Award"). Petition ¶¶ 38, 41. The Panel did not provide a specific damage award, but instead requested the parties to determine the amount of damages owed, as the damages calculation is complex. *Id.* ¶ 42. [redacted] and [redacted] briefed the issue to the Panel, which issued a damages award ("Damage Award") on December 7, 2018, with an amount based on [redacted]'s calculations.

In the meantime, [redacted] filed the operative Petition in this matter on October 18, 2018, seeking to vacate the Liability Award on various grounds. In its Petition, [redacted] identified two bases for jurisdiction: "the Federal Arbitration Act (9 U.S.C. § 1, *et. seq.*) as well as 28 U.S.C. § 1332(a)." Petition ¶ 3. [redacted] is filing its answer to the Petition concurrently with this Motion. In

the course of preparing that pleading, it determined that [redacted]l's allegations regarding [redacted]'s citizenship were incorrect, resulting in the instant Motion.

ARGUMENT

This Court does not have subject-matter jurisdiction. However, the Federal Arbitration Act cannot provide standalone federal jurisdiction for vacatur of an arbitration award as a matter of law. Further, there is no diversity of citizenship under Section 1332(a) because both of [redacted]'s members and [redacted]'s member are residents of Texas. Consequently, this Court lacks subject-matter jurisdiction, and [redacted]'s Petition must be dismissed.

I. STANDARD OF REVIEW

A Rule 12(b)(1) motion may be treated either as a facial or a factual challenge to the court's subject-matter jurisdiction. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Where a motion mounts a "factual attack . . . the plaintiff [has] the burden of proof that jurisdiction does in fact exist," and "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* The court may also "go beyond the pleadings" in determining jurisdiction, as "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* A "12(b)(1) factual evaluation may occur at any stage of the proceedings, from the time the answer has been served until after the trial has been completed." *Id.* at 891-892.

II. THE FEDERAL ARBITRATION ACT DOES NOT PROVIDE STANDALONE FEDERAL SUBJECT-MATTER JURISDICTION FOR VACATUR OF AN ARBITRATION AWARD

[redacted] identifies the Federal Arbitration Act ("FAA") as providing jurisdiction for this Court. Petition ¶ 3. [redacted] is mistaken, because "[t]he FAA does not itself provide a federal cause of action for vacatur of an arbitration award." *Goldman v. Citigroup Glob. Markets Inc.*, 834 F.3d

242, 249 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 2159, 198 L. Ed. 2d 232 (2017). "Instead, as the Supreme Court has explained . . . 'there must be diversity of citizenship or some other independent basis for federal jurisdiction before [an] order can issue.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 25 n.32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). In short, "the FAA does not provide a federal cause of action to ground subject-matter jurisdiction for [redacted]'s] motion to vacate." *Id.*

[redacted] allegation that the FAA provides a basis for the Court's jurisdiction over this matter stands in direct contradiction to black letter law of the Third Circuit and the Supreme Court. The holdings and plain language in *Goldman* and *Moses H. Cone Memorial Hospital* make clear that the FAA cannot stand as a basis for federal jurisdiction, and [redacted]'s allegation to the contrary is in correct. This Court does not have jurisdiction over this controversy based on the FAA and, as explained below, it also does not have jurisdiction based on 28 U.S.C. Section 1332(a).

III. THE PARTIES ARE NOT DIVERSE UNDER 28 U.S.C. § 1332(A)

[redacted] alleges that, in addition to the FAA, federal subject-matter jurisdiction is provided by diversity of citizenship between the parties pursuant to 28 U.S.C. Section 1332(a). Petition ¶ 3. In support of this claim, [redacted] alleges that it is a Texas limited liability company whose two members are Texas corporations. *Id.* ¶ 1. [redacted] further alleges that [redacted] is a Delaware limited liability company, and that, "[u]pon information and belief, [redacted]'s sole member is a Delaware limited partnership." *Id.* ¶ 2. [redacted] allegations do not establish that the parties in this case are of diverse citizenship, and they are not. [redacted]'s citizenship includes Texas, as does [redacted]'s. *See* Aff. of [redacted] in Supp. Of Resp't. [redacted]'s Mot. to Dismiss, ¶¶ 3-6.

The Third Circuit has established that "the citizenship of an LLC is determined by the citizenship of its members. . . . *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir.

2010). Further, where an unincorporated entity—like an LLC—is owned by another unincorporated entity, "'the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be' to determine the citizenship of the LLC." *Id.* (quoting *Hart v. Terminex Int'l,* 336 F.3d 541, 543 (7th Cir. 2003)).

The Third Circuit's rule with respect to LLCs traces the same rules that were previously established by the Supreme Court with respect to other non-incorporated entities. Specifically, the Third Circuit applies the same rule for partnerships, holding "that courts are to look to the citizenship of all the partners (or members of other unincorported associations) to determine whether the federal district court has diversity jurisdiction." *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 182 (3d Cir. 2008) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196-97 (1990) (holding that for diversity purposes, all partners of a partnership entity must be diverse from all parties on the opposing side); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 n.1 (2005); *United Steelworkers of Am. v. Bouligny*, 382 U.S. 145, 151 (1965); *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 454-55 (1900); *Chapman v. Barney*, 129 U.S. 667, 682 (1889)).

Here, [redacted]'s allegation is correct that [redacted]'s sole member is a Delaware limited partnership. However, as the foregoing case law makes clear, this is not the end of the analysis. The owner entity of [redacted] is, in turn, owned by another Delaware limited partnership named [redacted]. [redacted] Aff. ¶ 4. The limited partners of that entity include an individual named [redacted], who is a permanent resident of Texas. *Id.* ¶ 5. As the Third Circuit made clear in *Zambelli*, the citizenship of this Texas resident " 'must be traced through however many layers of partners or members there may be' to determine the citizenship of the LLC." *Zambelli Fireworks Mfg. Co.*, 592 F.3d at 420 (quoting *Hart,* 336 F.3d at 543). Because one of the members up the chain of ownership for [redacted] is a Texas resident, [redacted]'s citizenship includes Texas. *Id.*

The presence of a citizen of Texas as both Plaintiff and Defendant defeats diversity of citizenship. 28 U.S.C. § 1332(a)(1). [redacted] is aware of no other basis for federal subject-matter jurisdiction in this case, and in any event, the Third Circuit has expressly ruled that it is improper to "look through" the Petition for potential federal questions on a Section 10 motion for vacatur. *Goldman*, 834 F.3d 242 at 254. Accordingly, the Petition must be dismissed for lack of federal subject-matter jurisdiction.

CONCLUSION

[redacted] requests that this Court dismiss [redacted]'s Petition for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) per the attached proposed order.

Dated: February 12, 2019

[redacted]

Attorneys for Respondent,
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Local Rule 5.6 of the United States District Court for the Western District of Pennsylvania, the foregoing Respondent [redacted]'s Memorandum in Support of 12(b)(1) Motion to Dismiss has been served by electronic means through the Court's transmission facilities on the following counsel of record:

[redacted]

Date: February 12, 2019 [redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[redacted] *Petitioner,* v. [redacted], *Respondent.*	Electronically Filed No. [redacted]

[redacted]'S (1) MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS; AND (2) REQUEST FOR JURISDICTIONAL DISCOVERY

Petitioner [redacted] ("[redacted]"), by and through counsel, submits this (1) Memorandum of Law in Opposition to Respondent [redacted]'s ("[redacted]") Motion to Dismiss; and (2) Request for Jurisdictional Discovery.

I. INTRODUCTION

[redacted] seeks a vacatur of three different Arbitration Awards involving fees for gathering natural gas for eventual transport on an interstate pipeline. The arbitration was conducted pursuant to a written agreement with [redacted] governing ownership and operation of a gas gathering system, including the assessment of gathering fees to gather gas produced from wells in which the parties have an ownership interest.[1]

On February 12, 2019, [redacted] filed a Motion to Dismiss ("Motion") pursuant to Federal Rule of Civil Procedure 12(b)(1) asserting that the Court does not have subject-matter jurisdiction because there is no diversity of citizenship under 28 U.S.C. Section 1332(a). (Doc. No. 31) [redacted] had previously filed a Motion to Stay on November 9, 2018 that did not advise of

[1] Since issuing an Award on September 14, 2018, the arbitration panel issued a second Award on December 7, 2018 and then a third Award on January 17, 2019. [redacted] will be amending its Petition to Vacate to address the subsequent two Awards.

any jurisdictional concerns. (Doc. No. 7) According to [redacted] "in the course of preparing" its Answer to the Petition to Vacate, [redacted] learned of a putative non-diverse limited partner in one of [redacted]'s upstream limited partnership owners. (Doc. No. 31-1, at 1-2)

Although [redacted] admits that [redacted] is a Texas limited liability company whose two members are Texas corporations, and that [redacted] and its sole member are Delaware entities (Doc. No. 31-1, at 3-4), [redacted] alleges that its sole member ([redacted]) is a limited partnership that in turn is owned in part by another limited partnership ([redacted]), which has a limited partner named "[redacted]" who is a Texas resident, thereby defeating diversity of citizenship. (*Id*. at 4) [redacted]'s only support for that allegation is an affidavit from [redacted], who allegedly is a limited partner of [redacted]. (Doc. No. 31-2, [redacted] Aff. at ¶ 2) The Affidavit does not identify the basis for Ms. [redacted]'s alleged knowledge or attach any documents in support thereof. For the following reasons, [redacted]'s Motion should be denied.

First, [redacted]'s Petition survives a facial challenge to subject matter jurisdiction as it properly and adequately alleged in good faith the existence of diversity jurisdiction. [redacted] determined that [redacted] and its sole member are Delaware entities, with [redacted] having a principal place of business in Colorado, thereby creating diversity jurisdiction. [redacted] agrees those allegations are accurate.

Second, [redacted] failed to present sufficient evidence establishing the absence of complete diversity. Although the crux of [redacted]'s argument is that [redacted]'s purported residence in Texas destroys diversity, [redacted] opted not to submit an affidavit from Mr. [redacted] to prove this contention or any corporate documentation substantiating Mr. [redacted]'s alleged limited partner interest. Instead, [redacted] submitted a conclusory affidavit from a different limited partner to

identify the purported ownership layers for [redacted] including that [redacted] is a limited partner and "permanent resident of Texas."

As explained more fully below, the [redacted] Affidavit falls short of establishing the requirements of citizenship by failing to provide sufficient evidence establishing that: (1) [redacted] owns [redacted]; (2) J[redacted] is one of the limited partners of [redacted]; and (3) [redacted] is domiciled in Texas *and* is a citizen of Texas.

Given the inadequacy of and questions raised by the [redacted] Affidavit, [redacted] requests that the Court permit jurisdictional discovery concerning [redacted]'s challenge to subject matter jurisdiction for a period of ninety (90) days.

II. LEGAL STANDARD

For purposes of diversity jurisdiction, "[d]iversity is to be determined at the time the complaint was filed." *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 414 n.2 (3d Cir. 1999) (citing *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957); *Krasnov v. Dinan*, 465 F.2d 1298, 1300 (3d Cir. 1972) ("it is the citizenship of the parties at the time the action is commenced which is controlling"). As [redacted] correctly notes in its Motion, the citizenship of a limited liability company is determined by the citizenship of each of its members. *See Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010). "And as with partnerships, where an LLC has, as one of its members, another LLC, the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be to determine the citizenship of the LLC." *Id.* (internal citation omitted).

"Mere residence in a state is not enough for the purposes of diversity. The concept of 'domicile' is controlling. A person's domicile is that place where he has his true, fixed and

permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom." *Michaelson v. Exxon Research and Eng'g Co.*, 578 F. Supp. 289, 290 (W.D. Pa. 1984)*; Blackwood, Inc. v. Ventresca*, Civil Action No. 00-3112, 2002 U.S. Dist. LEXIS 24745, at *24 (E.D. Pa. Dec. 19, 2002) (an allegation of residence alone does not properly allege facts to establish citizenship). "Although technically incorrect, it is not uncommon for the terms *domicile* and *residence* to be used interchangeably." *Blackwood, Inc.*, 2002 U.S. Dist. LEXIS 24745, at 24. "'Domicile,' however, means living in a locality with the intent to make it a fixed and permanent home, while 'residence' simply requires bodily presence of an inhabitant in a given place." *Id.* at *24 n.3 (quoting *Wolinsky v. Bradford Nat'l Bank*, 34 B.R. 702, 704 (D. Vt. 1983)). In fact, one can reside in one place but be domiciled in another. *Id.* at *24-25 (citing to *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989)).

As confirmed by the express wording of the [redacted] Affidavit, [redacted]'s evidence shows only that Mr. [redacted] is a "permanent resident of Texas" and that, "because Mr. [redacted] is a Texas resident, the domicile of [redacted] includes Texas." (Doc. No. 31-2, [redacted] Aff. at ¶¶ 5-6) Those allegations fail as a matter of law.

In order to determine a person's citizenship, the Court must examine "all the circumstances of the case," including such facts as "current residence, voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations, place of employment or business; driver's license and automobile registration; payment of taxes; as well as several others." *Avins v. Hannum*, 497 F. Supp. 930, 937 (E.D. Pa. 1980) (quoting 13 Wright, Miller & Cooper § 3612 (1975)); *McCann v. Newman Irrevocable Tr.*, 458 F.3d 281, 286 (3d Cir. 2006). The [redacted] Affidavit demonstrates that such an inquiry is necessary here.

III. ARGUMENT

A. The Petition Sufficiently Alleges Diversity of Citizenship To Withstand A Facial Challenge to Subject Matter Jurisdiction.

[redacted]'s Petition to Vacate sufficiently alleged the citizenship of [redacted] to withstand a facial challenge to diversity jurisdiction. [redacted] made reasonable inquiry to determine the identity and citizenship of [redacted] and its members, which is confirmed by the fact that [redacted] itself did not identify a purported basis to challenge jurisdiction until preparing its Answer to the Petition and despite previously filing a Motion to Stay. [redacted] pled that [redacted] is a Delaware limited liability company with its principal place of business located at [redacted], and that "upon information and belief, [redacted]'s sole member [[redacted]] is a Delaware limited partnership."[2] (Doc. No. 1, ¶ 2) Those allegations were accurate. [redacted] thus properly alleged that [redacted] is diverse from [redacted], and the allegations in the Petition therefore withstand a facial challenge to subject matter jurisdiction. "[I]f the plaintiff is able to allege in good faith, after a reasonable attempt to determine the identities of the members of the association, that it is diverse from all of those members, its complaint will survive a facial challenge to subject-matter jurisdiction." *Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 108 (3d Cir. 2015).

In *Lincoln Benefit Life Co.*, the Third Circuit analyzed the inherent problem of challenges to diversity of limited liability companies, especially where the membership of the defendant entity is not readily ascertainable.[3] The court recognized that LLCs are in the best position to

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[2] [redacted] alleged in its Demand for Arbitration filed against [redacted] that "[redacted] is a Delaware limited liability company with its principal place of business in Colorado." [redacted] did not provide any additional information regarding the citizenship of its members.

[3] Numerous courts around the nation acknowledge the difficulty of ascertaining the membership of LLCs due to the absence of publicly available information. *See Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1087 (9th Cir. 2014); *Rooflifters, LLC v. Nautilus*

ascertain their own membership based on the lack of publicly available information regarding their citizenship. *Id.* at 108. The court held that "a plaintiff need not affirmatively allege the citizenship of each member of an unincorporated association in order to get past the pleading stage." *Id.* at 102. As a result, because "membership of an LLC is often not a matter of public record," jurisdictional discovery is appropriate when a defendant disputes diversity of citizenship. Any other requirement "would effectively shield many LLCs from being sued in federal court without their consent. This is surely not what the drafters of the Federal Rules intended." *Id*. at 108. As explained below, jurisdictional discovery is necessary here.

B. [redacted]'s Affidavit Fails to Establish The Absence of Diversity Jurisdiction.

[redacted] challenges diversity jurisdiction by tracing the putative layers of [redacted]'s ownership and associated partners and limited partners. First, [redacted] admits that [redacted] is correct that [redacted]'s sole member is a Delaware limited partnership – [redacted], [redacted]. (Doc. No. 31-1, at 4) It then states that [redacted], [redacted] is owned by another Delaware limited partnership named [redacted]. (*Id.*) [redacted] then asserts that one of the limited partners of [redacted] is [redacted], a "permanent resident" of Texas. (*Id.*)

Although Mr. [redacted] is the lynchpin to its diversity analysis, [redacted] does not attach an affidavit from Mr. [redacted] verifying his domicile and thus citizenship in Texas, namely that "he

Ins. Co., No. 13 C 3251, 2013 U.S. Dist. LEXIS 107936, 2013 WL 3975382, at *4 (N.D. Ill. Aug. 1, 2013); *WMCV Phase, LLC v. Tufenkian Carpets Las Vegas, LLC*, No. 2:12-cv-01454-RCJ, 2013 U.S. Dist. LEXIS 34352, 2013 WL 1007711, at *3 (D. Nev. Mar. 12, 2013); *Pinson v. 45 Dev., LLC*, No. 2:12-CV-02160, 2012 U.S. Dist. LEXIS 135303, 2012 WL 4343494, at *3 (W.D. Ark. Sept. 21, 2012); *Chesapeake Louisiana, LP v. Creamer Prop. Mgmt., LLC*, Civil Action No. 09-cv-0370, 2009 U.S. Dist. LEXIS 19468, 2009 WL 653796, at *1 (W.D. La. Mar. 11, 2009); *Ypsilanti Cmty. Utils. Auth. v. MeadWestvaco Air Sys., LLC*, No. 07-CV-15280, 2008 U.S. Dist. LEXIS 44715, 2008 WL 2397651, at *3 (E.D. Mich. June 9, 2008).

has the intention of returning whenever he is absent therefrom." *Michaelson*, 578 F. Supp. at 290. Instead, [redacted] attaches a general, conclusory affidavit from [redacted], a different limited partner in [redacted], that fails to disclose the basis for her alleged knowledge or attach any corporate documentation to support the hearsay assertions in her Affidavit. [redacted]'s Motion, including the [redacted] Affidavit, fails to sufficiently establish the corporate tree of [redacted]'s ownership, Mr. [redacted]'s limited partnership interest, and his alleged Texas citizenship (which ultimately involves Mr. [redacted]' intent).

First, [redacted] failed to provide any corporate disclosures or public records substantiating the claims that: (1) [redacted] owns [redacted]; and (2) Mr. [redacted] is one of the limited partners of [redacted]P. Publicly filed or other records (such as limited partnership agreements, limited partner certificates, and tax documents) should exist that identify its general and limited partners. The [redacted] Affidavit did not identify the basis for its assertions, and [redacted] cannot verify the accuracy and reliability of these assertions without jurisdictional discovery.

Second, the [redacted] Affidavit's assertion that Mr. [redacted] is a "permanent resident of Texas" plainly is inadmissible hearsay under Federal Rule of Evidence 802 without any foundation to show that an exception to the hearsay rule applies. Nor does the Affidavit contain sufficient evidence "to support a finding that the witness has personal knowledge of the matter[s]" described in the Affidavit. Fed. R. Evid. 602.

Third, [redacted] failed to present sufficient evidence establishing the basic elements of Mr. [redacted]' citizenship. Instead, [redacted] relies only on the bare, unsubstantiated allegation that Mr. [redacted] is a "permanent resident" of Texas. (Doc. No. 31-1, at 4; Doc. No. 31-2, at ¶5) Setting aside that Ms. [redacted]'s statement regarding Mr. [redacted]'s residency is hearsay and should be

disregarded, allegations of mere residence in a state do not adequately establish citizenship. *See Blackwood, Inc.*, 2002 U.S. Dist. LEXIS 24745, at *24. Thus, in order for [redacted] to establish Mr. [redacted]'s citizenship in Texas, [redacted] must present admissible, properly authenticated evidence demonstrating his limited partnership interest and of his citizenship, such as his current residence, voting registration and voting practices, location of personal and real property, place of employment or business, driver's license and automobile registration, and payment of taxes. *See Avins*, 497 F. Supp. at 937. [redacted] provided none of this information.

Simply put, the Court cannot determine on this record whether Mr. [redacted] is, in fact, a citizen of Texas who is also a limited partner of an upstream owner of [redacted] For instance, Mr. [redacted] may own a house in Texas, but actually be considered "domiciled" in another state based on information not presented by [redacted] Under this scenario, complete diversity still exists, and [redacted] Motion fails as a matter of law. [redacted] also failed to demonstrate that Mr. [redacted] was a citizen of Texas and a limited partner of [redacted] at the time [redacted] filed its Petition to Vacate in October 2018. Establishing those facts is significant, as Mr. [redacted] may not have been a citizen of Texas and a limited partner in October 2018 and instead adopted citizenship and gained partnership since that time. In sum, [redacted] failed to prove the absence of diversity jurisdiction.

C. [redacted] Is Entitled to Jurisdictional Discovery.

When a defendant mounts a factual challenge to jurisdiction, "the District Court must permit jurisdictional discovery in order to ascertain whether complete diversity exists." *Lincoln Benefit Life Co.*, 800 F.3d at 111; *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 177 (3d Cir. 2000) (when a defendant contests any jurisdictional allegations in the pleadings by presenting evidence, including by affidavit, "the court must permit the plaintiff to respond with evidence supporting jurisdiction. The court may then determine jurisdiction by weighing the evidence

presented by the parties. However, if there is a dispute of a material fact, the court must conduct a plenary trial on the contested facts prior to making a jurisdictional determination.") Indeed, courts freely grant jurisdictional discovery unless the claim is "clearly frivolous." *Bissell*, 2016 U.S. Dist. LEXIS 80308, at *20 (citing *Anthony v. Small Tube Mfg. Corp*., 535 F. Supp. 2d 506, 512 (E.D. Pa. 2007). *See also Swiger v. Allegheny Energy Supply Co., LLC*, 2006 U.S. Dist. LEXIS 32059, at *13 (E.D. Pa. May 22, 2006) ("Given that it is the general rule in the Third Circuit that jurisdictional discovery should be allowed unless the plaintiff's claim is clearly frivolous, we flatly reject the defendants' argument that no jurisdictional discovery is necessary and that this matter should be dismissed with prejudice.")

For the reasons set forth above, jurisdictional discovery is appropriate, and the Court should permit [redacted] to conduct discovery to respond to [redacted]'s Motion, including as to [redacted] ownership structure and the limited partnership and citizenship of [redacted]. *See Bissell,* 2016 U.S. Dist. LEXIS 80308, at *20*; Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (granting jurisdictional discovery where information was solely in defendant's possession); *Mass. Sch. of Law at Andover, Inc. v. ABA*, 107 F.3d 1026, 1042 (3d Cir. 1997) (denying motion to dismiss and granting discovery); *Local 336, American Fed'n of Musicians v. Bonatz*, 475 F.2d 433, 437 (3d Cir. 1973) ("[E]ven on [issues of jurisdictional fact] the record must clearly establish that after jurisdiction was challenged the plaintiff had an opportunity to present facts by affidavit or by deposition, or in an evidentiary hearing, in support of his jurisdictional contention.").

[redacted]'s Notice of Supplemental Authority (Doc. No. 35) does not obviate the need for discovery as [redacted] seeks to proceed with its federal action. Because [redacted] Motion alleged the absence of subject matter jurisdiction based on facts that are unverified and unknown, [redacted]

initiated a state-court action only as a precaution to avoid any possible assertion that [redacted] challenge to the defective Awards is untimely. [redacted] has not yet served the state-court petition. [redacted] seeks discovery so that it can remain in federal court.

[redacted] requests a period of ninety (90) days for discovery because its lead counsel is attached for trial in McKean County, Pennsylvania from March 11-20, 2019, representing the defendant. *Bob Cummins Constr. Co. v. Bradford Sanitary Auth.*, 199 CD 2016 (C.C.P. McKean County) (Hauser, J.).

IV. CONCLUSION

For the foregoing reasons, the Court should deny [redacted] Motion to Dismiss. [redacted] respectfully requests that the Court permit [redacted] to conduct jurisdictional discovery to meet its burden of establishing subject matter jurisdiction. [redacted] submits that ninety (90) days would be sufficient to accomplish jurisdictional discovery.

Date: March 1, 2019

Respectfully submitted,

[redacted]

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and correct copy of [redacted] **'S (1) MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS; AND (2) REQUEST FOR JURISDICTIONAL DISCOVERY** was served this 1st day of March, 2019, on all counsel of record via the Court's CM/ECF E-Filing System:

[redacted]

Attorneys for [redacted]

[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[redacted], husband and wife, Plaintiffs, v. [redacted]; and B[redacted], Defendants.	:	ELECTRONICALLY FILED No. [redacted] (Judge Arthur J. Schwab)

MOTION FOR ADMISSION *PRO HAC VICE* OF [redacted]

[redacted], undersigned counsel for Plaintiffs [redacted] and [redacted], hereby moves that [redacted] be admitted to appear and practice in this Court in the above-captioned matter as counsel *pro hac vice* for Plaintiffs [redacted] and [redacted] in the above-captioned matter pursuant to LCvR 83.2, LCvR 83.3, and this Court's Standing Order Regarding *Pro Hac Vice* Admissions dated May 9, 2019.

In support of this motion, undersigned counsel attaches the Affidavit for Admission *Pro Hac Vice* of [redacted] filed herewith, which, it is averred, satisfies the requirements of the foregoing Local Rules and Standing Order.

Respectfully Submitted,

Dated: September 17, 2019

[redacted]
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this day, September 17, 2019, I filed a true and correct copy of the above document with the Clerk of the Court in accordance with the Court's Rules on Electronic Service, which caused notification of filing to be sent to all counsel of record.

[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[redacted] and [redacted], husband and wife, Plaintiffs, v. [redacted]; and [redacted], Defendants.	:	ELECTRONICALLY FILED No. [redacted] (Judge Arthur J. Schwab)

AFFIDAVIT OF [redacted] IN SUPPORT OF MOTION FOR ADMISSION *PRO HAC VICE*

I, [redacted], make this affidavit in support of the motion for my admission to appear and practice in this Court in the above-captioned matter as counsel *pro hac vice* for Plaintiffs [redacted] and [redacted] in the above-captioned matter pursuant to LCvR83.2 and LCvR83.3 and this Court's Standing Order Regarding *Pro Hac Vice* Admissions dated May 9, 2019.

I, [redacted], being duly sworn, do hereby depose and say as follows:

1. I am an Associate of the law firm [redacted].

2. My business address is [redacted].

3. I am a member in good standing of the bars of the Supreme Court of Kentucky and the United States District Court for the Western District of Kentucky.

4. My bar identification number is [redacted].

5. A current certificate of good standing from the Supreme Court of Kentucky is attached to this Affidavit as Exhibit 1.

6. I have never been the subject of any previous disciplinary proceedings concerning my practice of law, and have never been sanctioned by disciplinary authority of any state or any United States Court.

7. I attest that I am a registered user of ECF in the United States District Court for the Western District of Pennsylvania

8. I attest that I have read, know and understand the Local Rules of Court for the Western District of Pennsylvania.

9. Based upon the foregoing, I respectfully request that I be granted *pro hac vice* admission in this matter.

I certify and attest that the foregoing statements made by me are true. I am aware that if any of the statements made by me are false, I am subject to punishment.

Further, the Affiant sayeth naught

[redacted]

State of Kentucky

County of Jefferson

The foregoing instrument was acknowledged before me this 17 day of September 2019 (year), by

_____ (name of person acknowledged).

5-B659

KENTUCKY BAR ASSOCIATION

514 WEST MAIN STREET
FRANKFORT, KENTUCKY 40601-1812
(502) 564-3795
FAX (502) 564-3225
www.kybar.org

THIS IS TO CERTIFY THAT

[redacted]

Membership No. [redacted]

is an active member in good standing with the Kentucky Bar Association as required by the Rules of the Supreme Court of Kentucky. Dated this 7th day of June, 2019.

JOHN D. MEYERS
REGISTRAR

By: Michele Mogrotsky
Michele M. Pogrotsky, Deputy Registrar

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

[redacted], for itself and on behalf of [redacted],

Plaintiff and Relator,

v.

[redacted]., et al.,

Defendants.

: CIVIL DIVISION – THE COMMERCE AND COMPLEX LITIGATION CENTER

: No. [redacted]

: **MOTION FOR ADMISSION *PRO HAC VICE* OF ATTORNEY** [redacted]

: Filed on behalf of Defendants:

[redacted]

: Counsel of record for this Defendant:

[redacted]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

[redacted], for itself and on behalf of [redacted],	:	CIVIL DIVISION – THE COMMERCE AND COMPLEX LITIGATION CENTER
	:	No. [redacted]
Plaintiff and Relator,	:	
v.	:	
[redacted]., et al.,	:	
Defendants.	:	

NOTICE OF PRESENTMENT

PLEASE TAKE NOTICE that the within Motion for P*ro Hac Vice* Admission shall be presented to the Special Motions Judge, the [redacted], on Friday, June 1, 2018 at 2:00 p.m. or as soon thereafter as suits the convenience of the Court in Room [redacted] of the City-County Building, Pittsburgh, Pennsylvania.

Date: May 23, 2018

Respectfully Submitted,

/s/ [redacted]

Counsel for Defendants [redacted]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

[redacted], for itself and on behalf of [redacted],	:	CIVIL DIVISION – THE COMMERCE AND COMPLEX LITIGATION CENTER
	:	No. [redacted]
Plaintiff and Relator,	:	
v.	:	
[redacted], et al.,	:	
Defendants.	:	

MOTION FOR ADMISSION *PRO HAC VICE* OF ATTORNEY [redacted]

Defendants [redacted] and [redacted], by and through counsel, submit this Motion for *Pro Hac Vice* Admission of [redacted]:

1. I, [redacted], in accordance with Pennsylvania Rule of Civil Procedure 1012.1 and Rule 301 of the Pennsylvania Bar Admission Rules, move the court to admit [redacted] *pro hac vice* in this case on behalf of Defendants [redacted], [redacted], [redacted], and [redacted].

2. The information required by Section 81.504 of the Interest on Lawyers Trust Account ("IOLTA") Regulations has been provided to the IOLTA Board.

3. The fee required by Section 81.504 of the IOLTA Regulations has been paid to the IOLTA Board, and proof of payment is attached at Exhibit A.

4. The Verified Statement of candidate, [redacted], required by Pa. R. Civ. P. 1012.1(c), is attached at Exhibit B.

5. The Verified State of the sponsor, [redacted], undersigned counsel, required by Pa. R. Civ. P. 1012.1(d), is attached at Exhibit C.

WHEREFORE, Defendants [redacted], [redacted], and [redacted]. request that this Honorable Court grant their Motion for *Pro Hac Admission*, and enter the proposed Order of Court presented with this Motion.

Date: May 23, 2018

Respectfully Submitted,

[redacted]

EXHIBIT A

SUPREME COURT OF PENNSYLVANIA
PENNSYLVANIA INTEREST ON
LAWYERS TRUST ACCOUNT BOARD

May 23, 2018

[redacted]

SENT TO [redacted] VIA Email: [redacted]

Dear Attorney [redacted]:

This letter serves as the fee payment certification referenced in 204 Pa Code §81.503 and acknowledges receipt of the $375.00 fee paid by Online Payment on this date related to your pursuit for admission *pro hac vice* in the case identified as [redacted], filed in Court of Common Pleas of Allegheny County.

You should refer to Pa Rule of Civil Procedure 1012.1, local court rules, and other regulations of 204 Pa Code §81.501 et. seq. concerning additional requirements related to seeking *pro hac vice* admission.

Sincerely,

[redacted]

cc: [redacted]

[redacted]

Pennsylvania Judicial Center
601 Commonwealth Ave., Ste. 2400
PO Box 62445, Harrisburg, PA 17106-2445
717/238-2001 · 888/PA-IOLTA (724-6582) · 717/238-2003 FAX
paiolta@pacourts.us · www.paiolta.org

EXHIBIT B

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

[redacted], for itself and on behalf of [redacted],	:	CIVIL DIVISION – THE COMMERCE AND COMPLEX LITIGATION CENTER
	:	No. [redacted]
Plaintiff and Relator,	:	
v.	:	
[redacted], et al.,	:	
Defendants.	:	

VERIFIED STATEMENT OF CANDIDATE [redacted]

1. I, [redacted], am an Attorney and Partner practicing with the law firm of [redacted] in [redacted].

2. I am licensed to practice law in the following jurisdictions:

JURISDICTION	LICENSE NO.	DATE ADMITTED
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

3. I have never been suspended, disbarred, or otherwise disciplined in any of the jurisdictions identified in Paragraph 2, above.

4. I am also not currently subject to any disciplinary proceedings in any of the jurisdictions identified in Paragraph 2, above.

5. I am not currently admitted to practice *pro hac vice* in any other Pennsylvania case.

6. I have not had any *pro hac vice* admission denied in any action in Pennsylvania.

7. I will comply with, and be bound by, the applicable statutes, case law, and procedural rules of the Commonwealth of Pennsylvania, including the Pennsylvania Rules of Professional Conduct.

8. I will submit to the jurisdiction of the Pennsylvania Courts and the Disciplinary Board with respect to acts and omissions occurring during my appearance in this action.

9. I have consented to the appointment of [redacted] as sponsor for my admission in this action, and consented to Mr. [redacted] as agent upon which service of process shall be made for all actions, including disciplinary actions, that may arise out of the practice of law for which this *pro hac vice* admission is sought.

Date: May 22, 2018

[redacted]

DISTRICT OF COLUMBIA: SS

Subscribed and Sworn to me, in my presence, this 22nd day of May, 2018.

WITNESS my hand and official seal.

[redacted]

[redacted]

EXHIBIT C

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

[redacted], for itself and on behalf of [redacted],	:	CIVIL DIVISION – THE COMMERCE AND COMPLEX LITIGATION CENTER
	:	No. [redacted]
Plaintiff and Relator,	:	
v.	:	
[redacted], et al.,	:	
Defendants.	:	

VERIFIED STATEMENT OF SPONSOR [redacted]

I, [redacted], in accordance with Pennsylvania Rule of Civil Procedure 1012.1 and Rule 301 of the Pennsylvania Bar Admission Rules, hereby move the Court to admit [redacted], *pro hac vice* on behalf of Defendants, [redacted], in the above-captioned matter.

In support of this Motion, I certify and verify the following:

1. After reasonable investigation, undersigned believes that [redacted] is a reputable and competent attorney, and undersigned recommends [redacted]'s admission.

2. I am not currently sponsoring any candidates for *pro hac vice* admission in this Commonwealth.

3. The proceeds from the settlement of a cause of action in which Mr. [redacted] is granted *pro hac vice* admission shall be received, held, distributed, and accounted for in accordance with Rule 1.15 of the Pennsylvania Rules of Professional Conduct, including the IOLTA provisions thereof, if applicable.

Date: May 23, 2018

Respectfully Submitted,

[redacted]

STATE OF PENNSYLVANIA)
) ss.
COUNTY OF ALLEGHENY)

On this 23rd day of May, 2018 before me, [redacted], Notary Public, personally appeared [redacted], personally known to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

[redacted]

Notary Public

[redacted]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

[redacted], for itself and on behalf of [redacted],	:	CIVIL DIVISION – THE COMMERCE AND COMPLEX LITIGATION CENTER
	:	
	:	No. [redacted]
Plaintiff and Relator,	:	
	:	
v.	:	
	:	
[redacted], et al.,	:	
	:	
Defendants.	:	

[PROPOSED] ORDER

AND NOW, this ___ day of _____, 2018, upon consideration of the Motion for Admission *Pro Hac Vice* of Attorney [redacted] by Defendants [redacted], [redacted], and [redacted], it is hereby ORDERED, ADJUDGED, and DECREED that said Motion is GRANTED, and Attorney [redacted] is specially admitted in the above-captioned matter *pro hac vice* with the right to actively participate in the conduct of any proceeding before this Court concerning this case on behalf of the above-mentioned Defendants.

BY THE COURT:

_____ J.
The Honorable [redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served on May 23, 2018, via electronic mail upon the following:

[redacted]

[redacted]

squire

[redacted]	[redacted]
[redacted]	

[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[redacted],	No. [redacted]
Petitioner,	The Honorable Peter J. Phipps
v.	
[redacted],	
Respondent.	ELECTRONICALLY FILED

RESPONDENT [redacted]'S MOTION TO DISMISS

Respondent [redacted] respectfully moves this Court to dismiss the above-captioned action pursuant to Federal Rule of Civil Procedure 12(b)(1). A memorandum in support of the instant motion are attached and filed simultaneously herewith. As explained more thoroughly in the Memorandum, this action should be dismissed because this Court lacks subject matter jurisdiction; the Federal Arbitration Act does not create a federal basis for jurisdiction, and both Petitioner and Respondent share Texas citizenship, defeating diversity jurisdiction under 28 U.S.C. § 1332(a). [redacted] respectfully requests that this Court dismiss this action per the attached proposed order.

Dated: February 12, 2019

[redacted]

[redacted]

Attorneys for Respondent,
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Local Rule 5.6 of the United States District Court for the Western District of Pennsylvania, the foregoing Respondent's Motion to Dismiss has been served by electronic means through the Court's transmission facilities on the following counsel of record:

[redacted]

Date: February 12, 2019 [redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[redacted],	No. [redacted]
Petitioner,	The Honorable Peter J. Phipps
v.	
[redacted],	
Respondent.	ELECTRONICALLY FILED

RESPONDENT [redacted]'S
MEMORANDUM IN SUPPORT OF 12(b)(1) MOTION TO DISMISS

INTRODUCTION

[redacted] ("[redacted]") has filed a Petition to Vacate Arbitration Award ("Petition") that this Court does not have jurisdiction to entertain. [redacted], a Texas limited liability company, has alleged that Respondent [redacted] ("[redacted]") is a citizen of Delaware with its principal place of business in Colorado. However, [redacted] failed to accurately identify the citizenship of [redacted], because one of [redacted]'s underlying owners is a citizen of Texas. Under black letter law of the Supreme Court and the Third Circuit, [redacted]'s citizenship is determined by the citizenship of its members, and that citizenship includes Texas. Consequently, there is no diversity of citizenship between the parties. As there is no other basis for federal subject-matter jurisdiction, [redacted] respectfully requests the case be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

BACKGROUND

On September 14, 2018, a majority of a three-member arbitration panel (the "Panel") issued an award finding [redacted] liable to [redacted] for breach of a Facilities Agreement between the parties (the "Liability Award"). Petition ¶¶ 38, 41. The Panel did not provide a specific damage award, but instead requested the parties to determine the amount of damages owed, as the damages calculation is complex. *Id.* ¶ 42. [redacted] and [redacted] briefed the issue to the Panel, which issued a damages award ("Damage Award") on December 7, 2018, with an amount based on [redacted]'s calculations.

In the meantime, [redacted] filed the operative Petition in this matter on October 18, 2018, seeking to vacate the Liability Award on various grounds. In its Petition, [redacted] identified two bases for jurisdiction: "the Federal Arbitration Act (9 U.S.C. § 1, *et. seq.*) as well as 28 U.S.C. § 1332(a)." Petition ¶ 3. [redacted] is filing its answer to the Petition concurrently with this Motion. In

the course of preparing that pleading, it determined that [redacted]'s allegations regarding [redacted]'s citizenship were incorrect, resulting in the instant Motion.

ARGUMENT

This Court does not have subject-matter jurisdiction. However, the Federal Arbitration Act cannot provide standalone federal jurisdiction for vacatur of an arbitration award as a matter of law. Further, there is no diversity of citizenship under Section 1332(a) because both of [redacted]'s members and [redacted]'s member are residents of Texas. Consequently, this Court lacks subject-matter jurisdiction, and [redacted]'s Petition must be dismissed.

I. STANDARD OF REVIEW

A Rule 12(b)(1) motion may be treated either as a facial or a factual challenge to the court's subject-matter jurisdiction. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Where a motion mounts a "factual attack . . . the plaintiff [has] the burden of proof that jurisdiction does in fact exist," and "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* The court may also "go beyond the pleadings" in determining jurisdiction, as "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* A "12(b)(1) factual evaluation may occur at any stage of the proceedings, from the time the answer has been served until after the trial has been completed." *Id.* at 891-892.

II. THE FEDERAL ARBITRATION ACT DOES NOT PROVIDE STANDALONE FEDERAL SUBJECT-MATTER JURISDICTION FOR VACATUR OF AN ARBITRATION AWARD

[redacted] identifies the Federal Arbitration Act ("FAA") as providing jurisdiction for this Court. Petition ¶ 3. [redacted] is mistaken, because "[t]he FAA does not itself provide a federal cause of action for vacatur of an arbitration award." *Goldman v. Citigroup Glob. Markets Inc.*, 834 F.3d

242, 249 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 2159, 198 L. Ed. 2d 232 (2017). "Instead, as the Supreme Court has explained . . . 'there must be diversity of citizenship or some other independent basis for federal jurisdiction before [an] order can issue.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 25 n.32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). In short, "the FAA does not provide a federal cause of action to ground subject-matter jurisdiction for [[redacted]'s] motion to vacate." *Id.*

[redacted]'s allegation that the FAA provides a basis for the Court's jurisdiction over this matter stands in direct contradiction to black letter law of the Third Circuit and the Supreme Court. The holdings and plain language in *Goldman* and *Moses H. Cone Memorial Hospital* make clear that the FAA cannot stand as a basis for federal jurisdiction, and [redacted]'s allegation to the contrary is in correct. This Court does not have jurisdiction over this controversy based on the FAA and, as explained below, it also does not have jurisdiction based on 28 U.S.C. Section 1332(a).

III. THE PARTIES ARE NOT DIVERSE UNDER 28 U.S.C. § 1332(A)

[redacted] alleges that, in addition to the FAA, federal subject-matter jurisdiction is provided by diversity of citizenship between the parties pursuant to 28 U.S.C. Section 1332(a). Petition ¶ 3. In support of this claim, [redacted] alleges that it is a Texas limited liability company whose two members are Texas corporations. *Id.* ¶ 1. [redacted] further alleges that [redacted] is a Delaware limited liability company, and that, "[u]pon information and belief, [redacted]'s sole member is a Delaware limited partnership." *Id.* ¶ 2. [redacted]'s allegations do not establish that the parties in this case are of diverse citizenship, and they are not. [redacted]'s citizenship includes Texas, as does [redacted]'s. *See* Aff. of [redacted] in Supp. Of Resp't. [redacted] [redacted]'s Mot. to Dismiss, ¶¶ 3-6.

The Third Circuit has established that "the citizenship of an LLC is determined by the citizenship of its members. . . . *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir.

2010). Further, where an unincorporated entity—like an LLC—is owned by another unincorporated entity, "'the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be' to determine the citizenship of the LLC." *Id.* (quoting *Hart v. Terminex Int'l,* 336 F.3d 541, 543 (7th Cir. 2003)).

The Third Circuit's rule with respect to LLCs traces the same rules that were previously established by the Supreme Court with respect to other non-incorporated entities. Specifically, the Third Circuit applies the same rule for partnerships, holding "that courts are to look to the citizenship of all the partners (or members of other unincorported associations) to determine whether the federal district court has diversity jurisdiction." *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 182 (3d Cir. 2008) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196-97 (1990) (holding that for diversity purposes, all partners of a partnership entity must be diverse from all parties on the opposing side); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 n.1 (2005); *United Steelworkers of Am. v. Bouligny*, 382 U.S. 145, 151 (1965); *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 454-55 (1900); *Chapman v. Barney*, 129 U.S. 667, 682 (1889)).

Here, [redacted]'s allegation is correct that [redacted]'s sole member is a Delaware limited partnership. However, as the foregoing case law makes clear, this is not the end of the analysis. The owner entity of [redacted] is, in turn, owned by another Delaware limited partnership named [redacted] [redacted] Aff. ¶ 4. The limited partners of that entity include an individual named [redacted] who is a permanent resident of Texas. *Id.* ¶ 5. As the Third Circuit made clear in *Zambelli*, the citizenship of this Texas resident " 'must be traced through however many layers of partners or members there may be' to determine the citizenship of the LLC." *Zambelli Fireworks Mfg. Co.*, 592 F.3d at 420 (quoting *Hart,* 336 F.3d at 543). Because one of the members up the chain of ownership for [redacted] is a Texas resident, [redacted]'s citizenship includes Texas. *Id.*

The presence of a citizen of Texas as both Plaintiff and Defendant defeats diversity of citizenship. 28 U.S.C. § 1332(a)(1). [redacted] is aware of no other basis for federal subject-matter jurisdiction in this case, and in any event, the Third Circuit has expressly ruled that it is improper to "look through" the Petition for potential federal questions on a Section 10 motion for vacatur. *Goldman*, 834 F.3d 242 at 254. Accordingly, the Petition must be dismissed for lack of federal subject-matter jurisdiction.

CONCLUSION

[redacted] requests that this Court dismiss [redacted]'s Petition for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) per the attached proposed order.

Dated: February 12, 2019

[redacted]

Attorneys for Respondent,
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Local Rule 5.6 of the United States District Court for the Western District of Pennsylvania, the foregoing Respondent [redacted]'s Memorandum in Support of 12(b)(1) Motion to Dismiss has been served by electronic means through the Court's transmission facilities on the following counsel of record:

[redacted]

Date: February 12, 2019 [redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[redacted],	No. [redacted]
Petitioner,	The Honorable Peter J. Phipps
v.	
[redacted],	
Respondent.	ELECTRONICALLY FILED

AFFIDAVIT OF [redacted] IN SUPPORT OF RESPONDENT [redacted]'S MOTION TO DISMISS

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

BEFORE ME, the undersigned authority, personally appeared [redacted], Esq., who duly sworn, states the following:

1. I am a member of the Colorado Bar and have been licensed to practice law in the State of Colorado.

2. I am one of the individual limited partners of [redacted]. One of the subsidiary entities indirectly owned by [redacted] is [redacted], LLC.

3. [redacted] is limited liability company, formed in Delaware.

4. [redacted] is 100% owned by a Delaware limited partnership named [redacted]. [redacted], in turn, is partially owned by another Delaware limited partnership, [redacted].

5. One of the individual limited partners of [redacted] is [redacted]. Mr. [redacted] is a permanent resident of Dallas, Texas.

6. Because [redacted] is a Texas resident, the domicile of [redacted] includes Texas. This Texas domicile traces back to [redacted], which is partly owned by [redacted]. This Texas domicile also traces back to [redacted], which is owned by [redacted].

[redacted]

The foregoing statement was acknowledged before me this 11th day of February, 2019, by [redacted].

[redacted]

Notary Public

My commission expires:

November 8, 2022

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Local Rule 5.6 of the United States District Court for the Western District of Pennsylvania, the foregoing Affidavit of [redacted] in Support of Respondent [redacted]s Motion to Dismiss has been served by electronic means through the Court's transmission facilities on the following counsel of record:

[redacted]

Date: January [XX], 2019 [redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[redacted],	No. [redacted]
Petitioner,	The Honorable Peter J. Phipps
v.	
[redacted],	
Respondent.	ELECTRONICALLY FILED

ORDER

AND NOW, this ____ day of _____, 2019, upon consideration of Respondent [redacted]'s ("[redacted]") Motion to Dismiss, it is hereby ORDERED that the Motion is GRANTED. It is hereby ORDERED that this action is dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1).

BY THE COURT:

_____, J.

G.D. No. [redacted]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

[redacted], a minor, by [redacted], parents and natural guardians and individually,

Plaintiffs,

v.

[redacted], a Pennsylvania corporation; [redacted], a Pennsylvania corporation; and [redacted],

Defendants.

CIVIL DIVISION

G.D. No. [redacted]

BRIEF IN SUPPORT OF FRYE MOTION TO EXCLUDE EXPERT TESTIMONY REGARDING CRANIAL COMPRESSION ISCHEMIC ENCEPHALOPATHY

AND NOW, come the defendants, [redacted], by and through their attorneys, Dickie, McCamey & Chilcote, P.C., John C. Conti, Esquire, Lisa D. Dauer, Esquire, and Justin M. Gottwald, Esquire, and file the within Brief in Support of Frye Motion to Exclude Expert Testimony Regarding Cranial Compression Ischemic Encephalopathy:

I. INTRODUCTION

This medical malpractice action was commenced via the filing of a Complaint on February 23, 2017. Certificates of Merit were filed as to all defendants on the same day. The allegations are that the defendants failed to appropriately manage mother-plaintiff's

labor, delayed in performing a cesarean section and failed to appropriately treat minor-plaintiff's condition upon delivery, allegedly resulting in permanent brain damage.

On September 4, 2018, plaintiffs produced the expert reports of Scott B. Berger, M.D., and Stephen J. Thompson, M.D. Please see expert report of Scott B. Berger, dated June 28, 2018, and expert report of Stephen J. Thompson, M.D., dated August 31, 2018, attached hereto as Exhibits A and B, respectively. In their respective reports, Dr. Berger and Dr. Thompson both opine that minor-plaintiff's neurologic injury resulted from exposure to severe head compression during delivery caused by mother-plaintiff's contractions. Please see Exhibits A and B.

Though plaintiffs' experts do not refer to it as such, this theory of birth injury has been referred to as cranial compression ischemic encephalopathy ("CCIE"). The CCIE theory of injury is based on a hypothesis that extracranial pressures, such as uterine contractions or maternal pushing, can result in neurological injury to the fetus due to compression of the arteries. Because CCIE is not generally accepted in the medical community, plaintiffs should be barred from presenting any expert testimony regarding CCIE at trial.

II. LEGAL ANALYSIS AND ARGUMENT

A. Plaintiffs' theory of injury must meet the *Frye* test.

Under Pennsylvania Rule of Evidence 702, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;

> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
>
> **(c) the expert's methodology is generally accepted in the relevant field.**

Pa. R.E. 702 (emphasis added). Rule 702(c) is the codification of the holding in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), decided by the United States Court of Appeals for the District of Columbia Circuit which applies the "general acceptance" test for the admissibility of scientific, technical or other specialized knowledge testimony.

Pennsylvania formally adopted the Frye standard in Grady v. Frito-Lay, Inc., 83 A.2d 1038 (2003). A primary reason that the Frye test was adopted in Pennsylvania was to assure that "judges would be guided by scientists when assessing the reliability of a scientific method." Grady, 839 A.2d at 1044-1045. The Frye standard is more likely to yield "uniform, objective and predictable results" than the opposing Daubert standard adopted by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., which takes into account several factors to determine the admissibility of a scientific theory. 509 U.S. 579 (1993).

The Frye test "sets forth an exclusionary rule of evidence that applies only when a party wishes to introduce novel scientific evidence obtained from the conclusions of an expert scientific witness." Trach v. Fellin, 817 A.2d 1102, 1108 (Pa. Super. 2003) (emphasis added). The Frye rule applies to the expert witness' methods, not his conclusions. Grady, 839 A.2d at 1047. It is the burden of the party seeking to introduce such evidence who must demonstrate to the court that "the relevant scientific community has reached general acceptance of the principles and methodology

employed by the expert witness before the trial court will allow the expert witness to testify regarding his conclusions." Trach, 817 A.2d at 1108-1109, 1112.

B. Plaintiffs' theory should be excluded pursuant to Pennsylvania Rule of Civil Procedure 207.1.

Pursuant to Pennsylvania Rule of Civil Procedure 207.1, a party may challenge an opposing party's expert's testimony which relies upon novel scientific evidence as inadmissible under Rule 702 by way of a pre-trial motion. Motions to exclude expert testimony under Rule 207.1 must include the following information: (1) the name and credentials of the expert witness whose testimony is sought to be excluded, (2) a summary of the specific testimony of the expert witness that the movant seeks to exclude, (3) the specific basis for excluding the evidence, (4) the evidence upon which the movant relies and (5) copies of all relevant curriculum vitae and expert reports. Pa. R.C.P. 207.1(a)(1)(i)-(v).

1. The name and credentials of the expert witness whose testimony is sought to be excluded and summary of the specific testimony that defendants seek to exclude.

Dr. Berger is board certified in radiology and neuroradiology and is the Director of Neuroradiology at Caremount Health. Please see curriculum vitae of Scott B. Berger, M.D., Ph.D., attached hereto as Exhibit C. In his expert report, dated June 28, 2018, Dr. Berger opines that minor-plaintiff's neurological injuries are a result of the compression of the cranium during labor due to defendants' failure to appropriately monitor the intensity of mother-plaintiff's contractions. Please see Exhibit A, p. 4. According to Dr. Berger, the unchecked compression of the cranium transmitted intracranial pressure to the brain and the middle cerebral arteries which led to ischemic perinatal strokes and other permanent neurological injury. Please see Exhibit A, p. 4.

Dr. Thompson is an Associate Professor and Medical Director in the Division of Pediatric Neurology at the University of Maryland School of Medicine. He is board certified in pediatrics as well as psychiatry and neurology. Please see curriculum vitae of Stephen J. Thompson, M.D., attached hereto as Exhibit D. Dr. Thompson also sets forth a theory of injury wherein minor-plaintiff's strokes and other neurological injuries were a result of "severe head compression, leading to compression of the middle cerebral arteries and subsequent strokes." Please see Exhibit B, p. 2. Dr. Thompson opines that the delay in performing a cesarean section exposed minor-plaintiff to severe head compression as evidenced by prominent molding, caput and significant bruising. The head compression stemmed from "in utero pressures." Please see Exhibit B, p. 2.

2. The specific bases for excluding the evidence.

Expert testimony regarding CCIE should be excluded because no peer-reviewed medical literature supports the validity of the theory, other jurisdictions have excluded it under Daubert or Frye and the American College of Obstetricians and Gynecologists ("ACOG") and the American Medical Association ("AMA") have vehemently opposed the introduction of the theory into the legal arena because it lacks scientific credibility.

First, medical literature has been published disproving the causation theory set forth by plaintiffs. Barry Schifrin, M.D. (maternal fetal medicine) is one of the leading expert witnesses who frequently offers CCIE as a theory of injury. Medical literature indicates that Dr. Schifrin was an early proponent of the theory and helped it achieve the level of notoriety it currently enjoys today. He frequently testifies as an expert witness on behalf of plaintiffs asserting CCIE as a mechanism of injury. Yet, Dr. Schifrin himself has testified that the theory is not supported in the medical community. Dr.

Schifrin coauthored a chapter of a book titled "Cranial compression ischemic encephalopathy: Fetal neurological injury related to the mechanical forces of labor and delivery."[2] In the chapter, Dr. Schifrin proposes the concept of CCIE and notes that the condition is difficult to establish, requires epidemiological studies to adjust for the role of potentially mitigating factors and **is not accepted in the scientific community**. See Smith v. Braswell, 804 S.E.2d 709, 712 (Ga. Ct. App. 2017) (stating that Dr. Schifrin explains in his chapter that "the prevailing monolithic view is that . . . contractile force[s] cannot be 'excessive'").

He has also testified to this effect in various cases. In Ellis v. Fortner, Dr. Schifrin testified at his deposition that he could not point to any medical literature that describes CCIE and he "[couldn't] even imagine the study that's going to" prove that CCIE has been tested. No. CV-2016-07-2898 (Summit County, Ohio 2016). In Newlin v. Miami Valley Hospital, Dr. Schifrin testified that, as of the summer of 2016, CCIE had never been the subject of any peer-reviewed articles, journals or other publications. No. 2014-CV-02321 (Montgomery County, Ohio 2014).

Other physicians agree. In 2017, Kent D. Heyborne, M.D., conducted a systematic review of medical literature to address the validity of the hypothesis that intrapartum fetal head compression may result in isolated cerebral ischemia and brain injury. Please see Kent D. Heyborne, M.D., *A Systematic Review of Intrapartum Fetal Head Compression: What Is the Impact on the Fetal Brain?*, AM. J. PERINATAL REP. 2017;7:e79-e85 (2017) attached hereto as Exhibit E. Dr. Heyborne is a physician in the Department of Obstetrics and Gynecology at the Denver Health and Hospital Authority

[2] Schifrin, Barry S.; Deymier, Pierre; Cohen, Wayne R., "Cranial compression ischemic encephalopathy: Fetal neurological injury related to the mechanical forces of labor and delivery," *Stress and Developmental Programming of Health and Disease: Beyond Phenomenology*, 2014. pp. 651-688.

and at the University of Colorado. He is board certified in maternal fetal medicine and obstetrics and gynecology. Three questions formed the basis for his review:

1. What is the effect of external forces (contractions and maternal pushing) on extracranial pressure?

2. Does extracranial pressure transmit across the cranium resulting in increased fetal intracranial pressure?

3. How would increased intracranial pressure impact the fetal brain?

Id. at p. 80. Dr. Heyborne searched "fetal head compression," "fetal head pressure," "fetal cranial pressure," "fetal cranial compression," and "fetal extracranial pressure" in the NCBI PubMed portal and included all publication dates and languages available. Resulting articles included an abstract, animal studies, case series, cohort studies and case-control studies which he separated into categories based on their relevance to the three questions that formed the basis of his search. Id.

After reviewing the data, Dr. Heyborne concluded that, while extracranial pressure does occur, the intracranial pressure, blood flow and function appear well-protected from the increased extracranial forces that occur during labor and pushing. The fetal head accommodates for such pressures, most likely indicated by the molding of the fetal head. Id. at 83. Dr. Heyborne concludes his review as follows:

> Although (head compression as a cause of brain injury) has become a popular legal theory, there remains no scientific basis for the notion that cerebral ischemia caused by the pressures of labor and in the absence of fetal hypoxia, is a cause of cerebral palsy.

Id. at p. 84.

Additionally, CCIE as a theory of injury is not taught in medical schools or residency programs as explained by the lack of peer-reviewed medical literature establishing CCIE as a legitimate medical theory.

During his deposition in this case, Dr. [redacted], a board certified maternal fetal medicine specialist, testified that he is not familiar with a phenomenon where infants are severely depressed at birth because of decreased blood flow to parts of the brain from head compression during labor and that head compression is not a risk of Pitocin that he tries to avoid. Please see transcript of deposition of [redacted], pp. 102-103, 106-107, attached hereto collectively as Exhibit F. Drs. Schramm and Sassani testified at their depositions that external monitors do not measure contraction intensity and they are not aware of any teachings or studies indicating that overly intense contractions can place an infant at risk for fetal distress. Please see transcript of deposition of Margaret Schramm, M.D., pp. 42, 45, and transcript of deposition of Jessica Sassani, M.D., pp. 56-57, attached hereto as Exhibits G and H, respectively.

Physicians simply cannot avoid a risk that is unknown. Necessarily, such a risk is not detectable, not preventable and not treatable. Indeed, it is inconceivable and illogical to hold that, as a matter of law, a physician must avoid a causal connection that is not known to exist and is not an accepted part of training in medical schools, residency programs and continuing medical education. In short, there is no known standard of care to prevent CCIE because it is not a recognized caused of injury.

Second, though the admissibility of this theory has not been adjudicated under the Frye standard in Pennsylvania, several appellate courts have held that the theory advanced by plaintiffs is not generally accepted in the medical community. In Smith v.

Braswell, decided in 2017 by the Georgia Court of Appeals, the minor-plaintiff began having seizures after his birth and a head CT scan indicated ischemic injuries to his brain. 804 S.E.2d at 710. Minor-plaintiff and his parents sued the midwife and health group alleging that they were negligent in the management of mother-plaintiff's labor and delivery. Id.

Plaintiffs' expert witness, Dr. Schifrin, opined that minor-plaintiff's injury was the result of ischemia caused by "mechanical compressive forces" on this head during labor which included the use of Pitocin, excessive uterine activity, malposition of minor-plaintiff while pushing and fundal pressure. Id. at 711. Defendants moved to exclude the expert testimony regarding this mechanism of injury pursuant to Georgia statute and the less stringent Daubert factors. Id. The trial court agreed, holding that this theory had not been reliably tested, subject to peer review and publication, was not generally accepted in the scientific community and had not been clinically diagnosed in other patients. Id. at 712. The American College of Obstetricians and Gynecologists submitted an amicus brief to the court, discussed infra.

The Georgia Court of Appeals affirmed the exclusion of Dr. Schifrin's testimony, citing to his statements in "Cranial compression ischemic encephalopathy: Fetal neurological injury related to the mechanical forces of labor and delivery," discussed supra. Id. Thus, the court upheld the exclusion and also affirmed the lower court's grant of summary judgment. Id.

CCIE or severe head compression theory has been debunked across the country. See Terks v. Trest, 246 So. 3d 956, 962 (Miss. Ct. App. 2018) (holding that the trial court did not abuse its discretion in finding that plaintiffs' expert testimony "was

unreliable, and as a result, inadmissible"); S.S. v. Bellevue Med. Ctr. LLC, 2015 U.S. Dist. LEXIS 68387, *10-11 (D. Neb. May 27, 2015) (granting defendants a Daubert hearing because the court was not persuaded that plaintiffs had met their burden of demonstrating that the CCIE theory can be and has been tested, has been subjected to peer review and publication, has known or potential error rates and standards or is generally accepted in the medical community); Cumberbatch v. Blanchette, 825 N.Y. S.2d 744, 745 (N.Y. 2006) (affirming the lower court's holding that plaintiff's theory of causation was unreliable and inadmissible because plaintiff's expert could cite to no relevant scientific data or studies to support the theory and could cite no instance when this type of injury had previously occurred).

Lastly and importantly, the theory has been categorically disavowed by ACOG. In 2004, ACOG, in conjunction with the American Academy of Pediatrics, assembled a task force of 16 physicians to review and summarize the scientific and clinical knowledge about the mechanism and timing of fetal and neonatal brain injuries. Please see Amicus Brief of the American College of Obstetricians and Gynecologists, the Georgia Obstetrics and Gynecology Society and the Medical Association of Georgia, dated June 1, 2016, p. 8, attached hereto as Exhibit I. In 2014, the Task Force issued a 236-page report that was supported and endorsed by 12 women's and children's health organizations from across the world. In the report, the CCIE theory of injury is not described anywhere as a mechanism of injury causing neonatal brain injury. Please see Exhibit I, p. 9. Further, ACOG has submitted amicus briefs in support of the exclusion of CCIE in medical malpractice cases, arguing that CCIE is unknown in practice, not

reported in medical literature and not verified by adequate studies or tests. Please see Exhibit I, p. 9.

Indeed, deeming the theory "courtroom science," the organizations emphasized that plaintiffs' inability to point to "a single reported instance of this kind of injury occurring in the way they proposed in actual clinical practice (i.e., outside of litigation)" highlights the "complete lack of clinical validation" which "cannot be overstated." Please see Exhibit I, p. 10 (emphasis added). The theory is "particularly worrisome" given its potential applicability to almost any birth in which a trial of vaginal delivery is made because all such deliveries "naturally feature some degree of cranial compression as the fetus descends through the birth canal." Thus, any case involving a neurologically-impaired infant born after trial of labor could assert the theory and, "**with no science behind the theory, there is no accepted method for defending against it**." Please see Exhibit I, p. 20.

According to ACOG, expert testimony regarding CCIE should be excluded because:

> In short, the methodology behind the theory that forces of labor can cause ischemic injury to the fetal brain through cranial compression is fatally flawed, as it assumes several factors not supported by medical evidence. The authors of the theory acknowledge that a fetus has natural compensatory mechanisms that allow it to withstand compression forces exerted on the fetal head during labor. They admit that it is not possible to measure fetal intracranial pressure during labor and, besides, the maximum intracranial pressure that a fetus can withstand without ischemic injury is not known. And yet, they conclude — without evidence of a single occurrence of such injury in practice -- that "excessive" uterine activity and fetal positioning can cause cranial compression and resulting intracranial pressures sufficient to overcome the fetus' natural compensatory mechanisms and cause ischemic

injury. Plaintiffs' theory is no more than an unsupported and untested hypothesis.

Please see Exhibit I, p. 16-17.

Accordingly, because CCIE is not supported by medical literature, other jurisdictions or ACOG, plaintiffs should be precluded from offering CCIE as a mechanism of injury at trial.

3. The evidence upon which the movant relies.

In contesting the admission of expert testimony regarding CCIE at trial, defendants rely on the reasons discussed supra as well as the defense expert reports which refute plaintiffs' experts' scientifically deficient theory which may be summarized as follows:

a. **Keith Eddleman, M.D., Obstetrician/Gynecologist, Maternal Fetal Medicine** – Dr. Eddleman opines that Dr. Berger's theory that minor-plaintiff suffered ischemic perinatal stroke from physical compression of his middle cerebral arteries "is not supported by any evidence in the medical literature." Please see expert report of Keith Eddleman, M.D., dated September 13, 2018, attached hereto as Exhibit J.

b. **Yvonne Wu, M.D., Pediatric Psychiatrist/Neurologist** – Dr. Wu opines that "perinatal ischemic strokes [occurring] because of excessive head compression" has "absolutely no scientific basis. There is no evidence in the scientific literature that links excessive head pressure to perinatal ischemic stroke . . . . There is also no evidence that excessive head pressure can compress the middle cerebral arteries (MCA) to cause strokes." Please see expert report of Yvonne Wu, M.D., dated September 13, 2018, attached hereto as Exhibit K. Of note, Dr. Wu is one of the Task Force physicians appointed by ACOG and the American Academy of Pediatrics to study the mechanism and timing of fetal and neonatal brain injuries.

c. **David Bearden, M.D., Pediatric Neurologist** – Dr. Bearden opines that "there is no scientific basis" for Dr. Berger's contention that head compression caused minor-plaintiff's neurological injury. He, too, cites the Heyborne review to support the fact that "there is no evidence that fetal head compression can cause perinatal

strokes" and even conducted his own literature search to determine whether any articles may have been missed by the review. Finding none, Dr. Bearden concluded that "there are no scientific articles that would support plaintiffs' theory of head compression." Please see expert report of David Bearden, M.D., dated September 16, 2018, attached hereto as Exhibit L.

d. **Gordon Sze, M.D., Neuroradiologist** – In response to the conclusions of Dr. Berger and Dr. Thompson that the defects in the middle cerebral arteries were caused by prolonged compression of minor-plaintiff's head, Dr. Sze opines that "this hypothesis is not considered a typical or even generally accepted mechanism for infarctions discovered at or near the time of birth." Please see expert report of Gordon Sze, M.D., dated September 14, 2018, attached hereto as Exhibit M.

Moreover, Dr. Berger, plaintiffs' expert, appears to understand that the theory he proposes is not generally accepted. He reaches his tentative conclusions using conjecture and speculation. First, he admits that 75% or more of ischemic perinatal strokes occur before birth, thus conceding that minor-plaintiff would be in the clear minority if we are to believe that he was injured "at birth." Please see Exhibit A, p. 4 ("IPS is thought to be one of the leading causes of death in infants, and some reports have suggested that up to 25% of all cases occur at birth"). Second, and more importantly, his reasoning then relies on a series of unlikely possible scenarios: "if the compression of the cranium is unchecked, it is possible to transmit pressure through the cranium to the brain and its arteries, the largest of which are the MCAs." Please see Exhibit A, p. 4 (emphasis added).

Indeed, Dr. Berger deems the proposed mechanism of injury the "most likely etiology." Please see Exhibit A, p. 5. Dr. Berger's opinions lack the required "reasonable degree of medical certainty" and his failure to support his opinions with established

scientific principles highlights the fact that the mechanism of injury he relies on is not generally accepted in the medical community.

Accordingly, based on the expert testimony set forth by defendants, defendants challenge the CCIE theory as not generally accepted in the medical community.

III. CONCLUSION

The mechanism of birth injury proposed by plaintiffs in this case simply does not exist in clinical medicine, it has no support in the medical literature and it has not been scientifically tested or proven. For the foregoing reasons, expert testimony regarding CCIE or contraction-caused strokes should be precluded because the theory has not gained general acceptance in the medical community and thus does not meet the standard set in Frye.

DICKIE, MCCAMEY & CHILCOTE, P.C.

By _____
John C. Conti
Lisa D. Dauer
Justin M. Gottwald

Attorneys for Defendants,
[redacted]

G.D. No. [redacted]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

[redacted], a minor, by [redacted], parents and natural guardians and individually,

Plaintiffs,

v.

[redacted], a Pennsylvania corporation; [redacted], a Pennsylvania corporation; and [redacted],

Defendants.

CIVIL DIVISION

G.D. No. [redacted]

ORDER OF COURT

AND NOW, to wit, this _____ day of October, 2018, upon consideration of the within Frye Motion to Exclude Expert Testimony Regarding Cranial Compression Ischemic Encephalopathy filed on behalf [redacted], it is hereby ORDERED, ADJUDGED and DECREED that said Motion is GRANTED and plaintiffs are precluded from offering any expert testimony regarding CCIE at trial.

BY THE COURT:

_____, J.

G.D. No. [redacted]

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Justin M. Gottwald, Esquire

Signature: _____

Name: Justin M. Gottwald, Esquire

Attorney No. (if applicable): 92847

G.D. No. [redacted]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

[redacted], a minor, by [redacted], parents and natural guardians and individually,

Plaintiffs,

v.

[redacted], a Pennsylvania corporation; [redacted], a Pennsylvania corporation; and [redacted],

Defendants.

CIVIL DIVISION

G.D. No. [redacted]

FRYE MOTION TO EXCLUDE EXPERT TESTIMONY REGARDING CRANIAL COMPRESSION ISCHEMIC ENCEPHALOPATHY; BRIEF IN SUPPORT; AND, PROPOSED ORDER OF COURT

Filed on behalf of Defendants, [redacted].

Counsel of record for these parties:

John C. Conti, Esquire
PA I.D. # 28071

Lisa D. Dauer, Esquire
PA I.D. # 63274

Justin M. Gottwald, Esquire
PA I.D. # 92847

Dickie, McCamey & Chilcote, P.C.
Firm #067
Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402

(412) 281-7272

JURY TRIAL DEMANDED

G.D. No. [redacted]

NOTICE OF PRESENTATION

To: Harry S. Cohen, Esquire
Harry S. Cohen & Associates, PC
Two Chatham Center, Suite 985
Pittsburgh, PA 15219
Attorneys for Plaintiffs

Kindly take notice that the within Frye Motion to Exclude Expert Testimony Regarding Cranial Compression Ischemic Encephalopathy will be presented before the Honorable Patrick M. Connelly of the Court of Common Pleas of Allegheny County, Pennsylvania on _____, 2018, at _____ a.m., or as soon thereafter as suits the convenience of the Court.

DICKIE, MCCAMEY & CHILCOTE, P.C.

By _____
Justin M. Gottwald

Attorneys for Defendants,
[redacted]

CERTIFICATE OF SERVICE

I, Justin M. Gottwald, Esquire, hereby certify that true and correct copies of the foregoing Frye Motion to Exclude Expert Testimony Regarding Cranial Compression Ischemic Encephalopathy; Brief in Support; and, Proposed Order of Court have been served this 15th day of October, 2018, by U.S. first-class mail, postage pre-paid, to counsel of record listed above.

DICKIE, MCCAMEY & CHILCOTE, P.C.

By _____
Justin M. Gottwald

Attorneys for Defendants,
[redacted]

G.D. No. [redacted]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

[redacted], a minor, by [redacted], parents and natural guardians and individually,

Plaintiffs,

v.

[redacted], a Pennsylvania corporation; [redacted], a Pennsylvania corporation; and [redacted],

Defendants.

CIVIL DIVISION

G.D. No. [redacted]

FRYE MOTION TO EXCLUDE EXPERT TESTIMONY REGARDING CRANIAL COMPRESSION ISCHEMIC ENCEPHALOPATHY

AND NOW, come the defendants, [redacted], by and through their attorneys, Dickie, McCamey & Chilcote, P.C., John C. Conti, Esquire, Lisa D. Dauer, Esquire, and Justin M. Gottwald, Esquire, and file the within Frye Motion to Exclude Expert Testimony Regarding Cranial Compression Ischemic Encephalopathy and, in support thereof, aver as follows:

I. INTRODUCTION

1. This medical malpractice action was commenced via the filing of a Complaint on February 23, 2017. Certificates of Merit were filed as to all defendants on the same day.

2. The allegations are that the defendants failed to appropriately manage mother-plaintiff's labor, delayed in performing a cesarean section and failed to appropriately treat minor-plaintiff's condition upon delivery, allegedly resulting in permanent brain damage.

3. On September 4, 2018, plaintiffs produced the expert reports of Scott B. Berger, M.D., and Stephen J. Thompson, M.D. Please see expert report of Scott B. Berger, dated June 28, 2018, and expert report of Stephen J. Thompson, M.D., dated August 31, 2018, attached hereto as Exhibits A and B, respectively.

4. In their respective reports, Dr. Berger and Dr. Thompson both opine that minor-plaintiff's neurologic injury resulted from exposure to severe head compression during delivery caused by mother-plaintiff's contractions. Please see Exhibits A and B.

5. Though plaintiffs' experts do not refer to it as such, this theory of birth injury has been referred to as cranial compression ischemic encephalopathy ("CCIE"). The CCIE theory of causation is based on a hypothesis that extracranial pressures, such as uterine contractions or maternal pushing, can compress a fetus' arteries resulting in neurological injury.

6. Because CCIE is not generally accepted in the medical community, plaintiffs should be barred from presenting any expert testimony regarding CCIE at trial.

II. LEGAL ANALYSIS AND ARGUMENT

A. Plaintiffs' theory of injury must meet the *Frye* test.

7. Under Pennsylvania Rule of Evidence 702, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
>
> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
>
> **(c) the expert's methodology is generally accepted in the relevant field.**

Pa. R.E. 702 (emphasis added).

8. Rule 702(c) is the codification of the holding in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), decided by the United States Court of Appeals for the District of Columbia Circuit which applies the "general acceptance" test for the admissibility of scientific, technical or other specialized knowledge testimony.

9. Pennsylvania formally adopted the Frye standard in Grady v. Frito-Lay, Inc., 83 A.2d 1038 (2003).

10. A primary reason that the Frye test was adopted in Pennsylvania was to assure that "judges would be guided by scientists when assessing the reliability of a scientific method." Grady, 839 A.2d at 1044-1045.

11. The Frye standard is more likely to yield "uniform, objective and predictable results" than the opposing Daubert standard adopted by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., which takes into account several factors to determine the admissibility of a scientific theory. 509 U.S. 579 (1993).

12. The Frye test "sets forth an exclusionary rule of evidence that applies only when a party wishes to introduce novel scientific evidence obtained from the conclusions of an expert scientific witness." Trach v. Fellin, 817 A.2d 1102, 1108 (Pa.

Super. 2003) (emphasis added). The Frye rule applies to the expert witness' methods, not his conclusions. Grady, 839 A.2d at 1047.

13. It is the burden of the party seeking to introduce such evidence who must demonstrate to the court that "the relevant scientific community has reached general acceptance of the principles and methodology employed by the expert witness before the trial court will allow the expert witness to testify regarding his conclusions." Trach, 817 A.2d at 1108-1109, 1112.

B. Plaintiffs' theory should be excluded pursuant to Pennsylvania Rule of Civil Procedure 207.1.

14. Pursuant to Pennsylvania Rule of Civil Procedure 207.1, a party may challenge an opposing party's expert's testimony which relies upon novel scientific evidence as inadmissible under Rule 702 by way of a pre-trial motion.

15. Motions to exclude expert testimony under Rule 207.1 must include the following information: (1) the name and credentials of the expert witness whose testimony is sought to be excluded, (2) a summary of the specific testimony of the expert witness that the movant seeks to exclude, (3) the specific basis for excluding the evidence, (4) the evidence upon which the movant relies and (5) copies of all relevant curriculum vitae and expert reports. Pa. R.C.P. 207.1(a)(1)(i)-(v).

1. The name and credentials of the expert witness whose testimony is sought to be excluded and summary of the specific testimony that defendants seek to exclude.

16. Dr. Berger is board certified in radiology and neuroradiology and is the Director of Neuroradiology at Caremount Health. Please see curriculum vitae of Scott B. Berger, M.D., Ph.D., attached hereto as Exhibit C.

17. In his expert report, dated June 28, 2018, Dr. Berger opines that minor-plaintiff's neurological injuries are a result of the compression of the cranium during labor due to defendants' failure to appropriately monitor the intensity of mother-plaintiff's contractions. Please see Exhibit A, p. 4.

18. According to Dr. Berger, the unchecked compression of the cranium transmitted intracranial pressure to the brain and the middle cerebral arteries which led to ischemic perinatal strokes and other permanent neurological injury. Please see Exhibit A, p. 4.

19. Dr. Thompson is an Associate Professor and Medical Director in the Division of Pediatric Neurology at the University of Maryland School of Medicine. He is board certified in pediatrics as well as psychiatry and neurology. Please see curriculum vitae of Stephen J. Thompson, M.D., attached hereto as Exhibit D.

20. Dr. Thompson also sets forth a theory of injury wherein minor-plaintiff's strokes and other neurological injuries were a result of "severe head compression, leading to compression of the middle cerebral arteries and subsequent strokes." Please see Exhibit B, p. 2.

21. Dr. Thompson opines that the delay in performing a cesarean section exposed minor-plaintiff to severe head compression as evidenced by prominent molding, caput and significant bruising. The head compression stemmed from "in utero pressures." Please see Exhibit B, p. 2.

2. The specific bases for excluding the evidence.

22. Expert testimony regarding CCIE should be excluded because no peer-reviewed medical literature supports the validity of the theory, other jurisdictions have

excluded it under Daubert or Frye and the American College of Obstetricians and Gynecologists ("ACOG") and the American Medical Association ("AMA") have vehemently opposed the introduction of the theory into the legal arena because it lacks scientific credibility.

23. First, medical literature has been published disproving the causation theory set forth by plaintiffs.

24. Barry S. Schifrin, M.D. (maternal fetal medicine) is one of the leading expert witnesses who frequently offers CCIE as a theory of causation. Medical literature indicates that Dr. Schifrin was an early proponent of the theory and helped it achieve the level of notoriety it currently enjoys today. He frequently testifies as an expert witness on behalf of plaintiffs asserting CCIE as a mechanism of injury.

25. Yet, Dr. Schifrin himself has testified that the theory is not supported in the medical community.

26. Dr. Schifrin coauthored a chapter of a book titled "Cranial compression ischemic encephalopathy: Fetal neurological injury related to the mechanical forces of labor and delivery." [1]

27. In the chapter, Dr. Schifrin proposes the concept of CCIE and notes that the condition is difficult to establish, requires epidemiological studies to adjust for the role of potentially mitigating factors and **is not accepted in the scientific community**. See Smith v. Braswell, 804 S.E.2d 709, 712 (Ga. Ct. App. 2017) (stating that Dr. Schifrin explains in his chapter that "the prevailing monolithic view is that . . . contractile force[s] cannot be 'excessive'").

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[1] Schifrin, Barry S.; Deymier, Pierre; Cohen, Wayne R., "Cranial compression ischemic encephalopathy: Fetal neurological injury related to the mechanical forces of labor and delivery," *Stress and Developmental Programming of Health and Disease: Beyond Phenomenology*, 2014. pp. 651-688.

28. He has also testified to this effect in various cases. In Ellis v. Fortner, Dr. Schifrin testified at his deposition that he could not point to any medical literature that describes CCIE and he "[couldn't] even imagine the study that's going to" explain the level of fetal perfusion pressure necessary to prevent ischemic injury. No. CV-2016-07-2898 (Summit County, Ohio 2016).

29. In Newlin v. Miami Valley Hospital, Dr. Schifrin testified that, as of the summer of 2016, CCIE had never been the subject of any peer-reviewed articles, journals or other publications. No. 2014-CV-02321 (Montgomery County, Ohio 2014).

30. Other physicians agree. In 2017, Kent D. Heyborne, M.D., conducted a systematic review of medical literature to address the validity of the hypothesis that intrapartum fetal head compression may result in isolated cerebral ischemia and brain injury. Please see Kent D. Heyborne, M.D., *A Systematic Review of Intrapartum Fetal Head Compression: What Is the Impact on the Fetal Brain?*, AM. J. PERINATAL REP. 2017;7:e79-e85 (2017) attached hereto as Exhibit E.

31. Dr. Heyborne is a physician in the Department of Obstetrics and Gynecology at the Denver Health and Hospital Authority and at the University of Colorado. He is board certified in maternal fetal medicine and obstetrics and gynecology.

32. Three questions formed the basis for his review:

1. What is the effect of external forces (contractions and maternal pushing) on extracranial pressure?

2. Does extracranial pressure transmit across the cranium resulting in increased fetal intracranial pressure?

3. How would increased intracranial pressure impact the fetal brain?

Id. at p. 80.

33. Dr. Heyborne searched "fetal head compression," "fetal head pressure," "fetal cranial pressure," "fetal cranial compression," and "fetal extracranial pressure" in the NCBI PubMed portal and included all publication dates and languages available. Resulting articles included an abstract, animal studies, case series, cohort studies and case-control studies which he separated into categories based on their relevance to the three questions that formed the basis of his search. Id.

34. After reviewing the data, Dr. Heyborne concluded that, while extracranial pressure does occur, the intracranial pressure, blood flow and function appear well-protected from the increased extracranial forces that occur during labor and pushing. The fetal head accommodates for such pressures, most likely indicated by the molding of the fetal head. Id. at 83.

35. Dr. Heyborne concludes his review as follows:

> Although (head compression as a cause of brain injury) has become a popular legal theory, there remains no scientific basis for the notion that cerebral ischemia caused by the pressures of labor and in the absence of fetal hypoxia, is a cause of cerebral palsy.

Id. at p. 84.

36. Additionally, CCIE as a theory of injury is not taught in medical schools or residency programs as explained by the lack of peer-reviewed medical literature establishing CCIE as a legitimate medical theory.

37. During his deposition in this case, Dr. [redacted], a board certified maternal fetal medicine specialist, testified that he is not familiar with a phenomenon where infants are severely depressed at birth because of decreased blood flow to parts

of the brain from head compression during labor and that head compression is not a risk of Pitocin that he tries to avoid. Please see transcript of deposition of [redacted], M.D., pp. 102-103, 106-107, attached hereto collectively as Exhibit F.

38. Drs. Schramm and Sassani testified at their depositions that external monitors do not measure contraction intensity and they are not aware of any teachings or studies indicating that overly intense contractions can place an infant at risk for fetal distress. Please see transcript of deposition of Margaret Schramm, M.D., pp. 42, 45, and transcript of deposition of Jessica Sassani, M.D., pp. 56-57, attached hereto as Exhibits G and H, respectively.

39. Physicians simply cannot avoid a risk that is unknown. Necessarily, such a risk is not detectable, not preventable and not treatable.

40. Indeed, it is inconceivable and illogical to hold that, as a matter of law, a physician must avoid a causal connection that is not known to exist and is not an accepted part of training in medical schools, residency programs and continuing medical education.

41. In short, there is no known standard of care to prevent CCIE because it is not a recognized caused of injury.

42. Second, though the admissibility of this theory has not been adjudicated under the Frye standard in Pennsylvania, several appellate courts have held that the theory advanced by plaintiffs is not generally accepted in the medical community.

43. In Smith v. Braswell, decided in 2017 by the Georgia Court of Appeals, the minor-plaintiff began having seizures after his birth and a head CT scan indicated ischemic injuries to his brain. 804 S.E.2d at 710. Minor-plaintiff and his parents sued the

midwife and health group alleging that they were negligent in the management of mother-plaintiff's labor and delivery. Id.

44. Plaintiffs' expert witness, Dr. Schifrin, opined that minor-plaintiff's injury was the result of ischemia caused by "mechanical compressive forces" on his head during labor which included the use of Pitocin, excessive uterine activity, malposition of minor-plaintiff while pushing and fundal pressure. Id. at 711.

45. Defendants moved to exclude the expert testimony regarding this mechanism of injury pursuant to Georgia statute and the less stringent Daubert factors. Id. The trial court agreed, holding that this theory had not been reliably tested, subject to peer review and publication, was not generally accepted in the scientific community and had not been clinically diagnosed in other patients. Id. at 712. The American College of Obstetricians and Gynecologists submitted an amicus brief to the court, discussed infra.

46. The Georgia Court of Appeals affirmed the exclusion of Dr. Schifrin's testimony, citing to his statements in "Cranial compression ischemic encephalopathy: Fetal neurological injury related to the mechanical forces of labor and delivery," discussed supra. Id.

47. Thus, the court upheld the exclusion and also affirmed the lower court's grant of summary judgment. Id.

48. CCIE or severe head compression theory has been debunked across the country. See Terks v. Trest, 246 So. 3d 956, 962 (Miss. Ct. App. 2018) (holding that the trial court did not abuse its discretion in finding that plaintiffs' expert testimony "was unreliable, and as a result, inadmissible"); S.S. v. Bellevue Med. Ctr. LLC, 2015 U.S. Dist. LEXIS 68387, *10-11 (D. Neb. May 27, 2015) (granting defendants a Daubert

hearing because the court was not persuaded that plaintiffs had met their burden of demonstrating that the CCIE theory can be and has been tested, has been subjected to peer review and publication, has known or potential error rates and standards or is generally accepted in the medical community); Cumberbatch v. Blanchette, 825 N.Y. S.2d 744, 745 (N.Y. 2006) (affirming the lower court's holding that plaintiff's theory of causation was unreliable and inadmissible because plaintiff's expert could cite to no relevant scientific data or studies to support the theory and could cite no instance when this type of injury had previously occurred).

49. Lastly and importantly, the theory has been categorically disavowed by ACOG.

50. In 2004, ACOG, in conjunction with the American Academy of Pediatrics, assembled a task force of 16 physicians to review and summarize the scientific and clinical knowledge about the mechanism and timing of fetal and neonatal brain injuries. Please see Amicus Brief of the American College of Obstetricians and Gynecologists, the Georgia Obstetrics and Gynecology Society and the Medical Association of Georgia, dated June 1, 2016, p. 8, attached hereto as Exhibit I.

51. In 2014, the Task Force issued a 236-page report that was supported and endorsed by 12 women's and children's health organizations from across the world. In the report, the CCIE theory of injury is not described anywhere as a mechanism of injury causing neonatal brain injury. Please see Exhibit I, p. 9.

52. Further, ACOG has submitted amicus briefs in support of the exclusion of CCIE in medical malpractice cases, arguing that CCIE is unknown in practice, not

reported in medical literature and not verified by adequate studies or tests. Please see Exhibit I, p. 9.

53. Indeed, deeming the theory "courtroom science," the organizations emphasized that plaintiffs' inability to point to "a single reported instance of this kind of injury occurring in the way they proposed in actual clinical practice (i.e., outside of litigation)" highlights the "complete lack of clinical validation" which "cannot be overstated." Please see Exhibit I, p. 10 (emphasis added).

54. The theory is "particularly worrisome" given its potential applicability to almost any birth in which a trial of vaginal delivery is made because all such deliveries "naturally feature some degree of cranial compression as the fetus descends through the birth canal." Thus, any case involving a neurologically-impaired infant born after trial of labor could assert the theory and, "**with no science behind the theory, there is no accepted method for defending against it.**" Please see Exhibit I, p. 20.

55. According to ACOG, expert testimony regarding CCIE should be excluded because:

> In short, the methodology behind the theory that forces of labor can cause ischemic injury to the fetal brain through cranial compression is fatally flawed, as it assumes several factors not supported by medical evidence. The authors of the theory acknowledge that a fetus has natural compensatory mechanisms that allow it to withstand compression forces exerted on the fetal head during labor. They admit that it is not possible to measure fetal intracranial pressure during labor and, besides, the maximum intracranial pressure that a fetus can withstand without ischemic injury is not known. And yet, they conclude — without evidence of a single occurrence of such injury in practice -- that "excessive" uterine activity and fetal positioning can cause cranial compression and resulting intracranial pressures sufficient to overcome the fetus' natural compensatory mechanisms and cause ischemic

injury. Plaintiffs' theory is no more than an unsupported and untested hypothesis.

Please see Exhibit I, p. 16-17.

56. Accordingly, because CCIE is not supported by medical literature, other jurisdictions or ACOG, plaintiffs should be precluded from offering CCIE as a mechanism of injury at trial.

3. The evidence upon which the movant relies.

57. In contesting the admission of expert testimony regarding CCIE at trial, defendants rely on the reasons discussed supra as well as the defense expert reports which refute plaintiffs' experts' scientifically deficient theory and may be summarized as follows:

a. **Keith Eddleman, M.D., Obstetrician/Gynecologist, Maternal Fetal Medicine** – Dr. Eddleman opines that Dr. Berger's theory that minor-plaintiff suffered ischemic perinatal stroke from physical compression of his middle cerebral arteries "is not supported by any evidence in the medical literature." Please see expert report of Keith Eddleman, M.D., dated September 13, 2018, attached hereto as Exhibit J.

b. **Yvonne Wu, M.D., Pediatric Psychiatrist/Neurologist** – Dr. Wu opines that "perinatal ischemic strokes [occurring] because of excessive head compression" has "absolutely no scientific basis. There is no evidence in the scientific literature that links excessive head pressure to perinatal ischemic stroke . . . . There is also no evidence that excessive head pressure can compress the middle cerebral arteries (MCA) to cause strokes." Please see expert report of Yvonne Wu, M.D., dated September 13, 2018, attached hereto as Exhibit K. Of note, Dr. Wu is one of the Task Force physicians appointed by ACOG and the American Academy of Pediatrics to study the mechanism and timing of fetal and neonatal brain injuries.

c. **David Bearden, M.D., Pediatric Neurologist** – Dr. Bearden opines that "there is no scientific basis" for Dr. Berger's contention that head compression caused minor-plaintiff's neurological injury. He, too, cites the Heyborne review to support the fact that "there is no evidence that fetal head compression can cause perinatal

strokes" and even conducted his own literature search to determine whether any articles may have been missed by the review. Finding none, Dr. Bearden concluded that "there are no scientific articles that would support plaintiffs' theory of head compression." Please see expert report of David Bearden, M.D., dated September 16, 2018, attached hereto as Exhibit L.

d. **Gordon Sze, M.D., Neuroradiologist** – In response to the conclusions of Dr. Berger and Dr. Thompson that the defects in the middle cerebral arteries were caused by prolonged compression of minor-plaintiff's head, Dr. Sze opines that "this hypothesis is not considered a typical or even generally accepted mechanism for infarctions discovered at or near the time of birth." Please see expert report of Gordon Sze, M.D., dated September 14, 2018, attached hereto as Exhibit M.

58. Moreover, Dr. Berger, plaintiffs' expert, appears to understand that the theory he proposes is not generally accepted. He reaches his tentative conclusions using conjecture and speculation.

59. First, he admits that 75% or more of ischemic perinatal strokes occur before birth, thus conceding that minor-plaintiff would be in the clear minority if we are to believe that he was injured "at birth." Please see Exhibit A, p. 4 ("IPS is thought to be one of the leading causes of death in infants, and some reports have suggested that up to 25% of all cases occur at birth").

60. Second, and more importantly, his reasoning relies on a series of unlikely possible scenarios: "if the compression of the cranium is unchecked, it is possible to transmit pressure through the cranium to the brain and its arteries, the largest of which are the MCAs." Please see Exhibit A, p. 4 (emphasis added).

61. Indeed, Dr. Berger deems the proposed mechanism of injury the "most likely etiology. Please see Exhibit A, p. 5.

62. Dr. Berger's opinions lack the required "reasonable degree of medical certainty" and his failure to support his opinions with established scientific principles highlights the fact that the mechanism of injury he relies on is not generally accepted in the medical community.

63. Accordingly, based on the expert testimony set forth by defendants, defendants challenge the CCIE theory as not generally accepted in the medical community.

III. CONCLUSION

64. The mechanism of birth injury proposed by plaintiffs in this case simply does not exist in clinical medicine, it has no support in the medical literature and it has not been scientifically tested or proven.

65. For the foregoing reasons, expert testimony regarding CCIE or contraction-caused strokes should be precluded because the theory has not gained general acceptance in the medical community and thus does not meet the standard set in Frye.

WHEREFORE, the defendants, [redacted], respectfully request that this Honorable Court enter an Order granting defendants' Frye Motion to Exclude Expert Testimony Regarding Cranial Compression Ischemic Encephalopathy and precluding plaintiffs from introducing any expert testimony regarding CCIE.

DICKIE, MCCAMEY & CHILCOTE, P.C.

By _____
John C. Conti
Lisa D. Dauer
Justin M. Gottwald

Attorneys for Defendants,

[redacted]

BEST PRACTICES FOR LAW CLERKS: SUMMARY JUDGMENT MOTIONS

Analyzing and preparing draft opinions to resolve summary judgment motions is the largest task and time commitment in most clerkships. This outline condenses practical advice obtained from many people throughout the course of three federal clerkships spanning twenty years.

A. PRELIMINARY COMMENTS

1. This document contains general advice and personal preferences. In the event of any contradictions, always follow your particular judge's practices, procedures and preferences.

2. This document is influenced heavily by the Local Rules of the United States District Court for the Western District of Pennsylvania. In particular, Local Rule 56 requires parties to file a Concise Statement of Material Facts ("CSMF") and response thereto.

B. GENERAL THEORY OF SJ MOTIONS

In the federal system, a Plaintiff has three major hurdles to clear to win the case: the Motion to Dismiss ("MTD") stage; the Summary Judgment ("SJ") stage; and Trial.

What is the difference between SJ and Motions to Dismiss? Testing the **allegations** in the Complaint (*Twombly/Iqbal* plausibility) vs. testing the admissible **evidence**. SJ – time to "put up or shut up."

What types of evidence can the Court consider at SJ? (documents, interrogatory responses, deposition transcripts, admissions, etc.) How do you turn your client's story into "evidence"? (Affidavit or Declaration). SJ must be based on "admissible" evidence. Fed. R. Civ. P. 56(c)(2). Thus, affidavits must be within the personal knowledge of the affiant. (*Exception – the Court can consider hearsay if it appears reasonably likely that such evidence can be presented in an admissible form at trial – i.e., by calling the declarant as a witness.)*

The parties have a duty to submit evidence to the Court in support of their respective positions. As a practitioner, it is important to provide well-organized exhibits and pinpoint

citations so that the Court can easily find such evidence in the record.

Where does the "evidence" come from? What do litigators spend most of their daily lives doing? (Discovery). The Federal Rules of Civil Procedure provide for expansive discovery practices. Both sides have a full opportunity to learn all the evidence that exists. Effective SJ practice is a critical part of federal litigation – and is the logical consequence of broad discovery rules. The Supreme Court has reiterated that SJ is not a disfavored shortcut that deprives parties of their constitutional right to a jury trial. Rather, SJ is "an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

What is the difference between SJ and trial? At SJ, the Court must draw all reasonable inferences in the light most favorable to the non-moving party. At trial, the factfinder (jury) resolves/decides which inferences to draw based on its assessment of credibility of the witnesses.

Many cases – no "real" fact disputes. Can have cross-motions for SJ.

Some cases – very clear disputes about what happened (ex: he said/she said "hostile work environment" case or police excessive force case). But, courts usually don't get SJ motions in those cases. Our task is usually more nuanced and difficult.

What is a "reasonable" inference? An inference is a logical conclusion based on evidence. The Court must use logic, common sense, experience and judgment. The Court need not be willfully blind to the obvious explanation, or the "normal" causal connection of events.

On one hand, a case based on speculation, conjecture, or with logical/evidentiary gaps should not go to the jury. On the other hand, the Court cannot grant SJ simply because the claim appears unlikely to succeed or because a very similar case lost at trial. Even if the Court thinks the case is a loser for plaintiff, a hypothetical "plaintiff-friendly" juror may think differently. SJ

can be granted only if no reasonable jury could decide in favor of the non-moving party. The Court must often decide what the limit of "reasonableness" is. This is the Court's most difficult task, and is not readily reducible to a mathematical formula.

It is important (for the parties and the Court of Appeals) for the district court to clearly and explicitly explain in its opinion why the inference was/was not reasonable.

Does it matter which side files the SJ motion? Yes - a lot. Why? The Court must draw all reasonable inferences in favor of the non-moving party. Usually, but not always, Defendants move for SJ because Plaintiffs have the burden of production/persuasion on their prima facie case. If there are cross-motions for SJ, the Court must analyze them separately. The law clerk must put on a "pro-Plaintiff" hat to consider Defendant's motion; then put on a "pro-Defendant" hat to consider Plaintiff's motion. Because different inferences must be drawn, the Court can deny both cross-motions.

The Essence of the Court's task. We act as a filter. The Court must ask: "Do we need a jury to decide this case?" Other ways of thinking about the task: "What is the specific factual question(s) we need the jury to answer – and can a reasonable jury decide that question(s) in favor of either side?" or "Would we grant a Rule 50 Motion for Judgment as a Matter of Law if the same evidence came in at trial?" The Court's role is to: (1) make wise use of judicial resources; (2) uphold parties' rights under the Federal Rules of Civil Procedure to entry of summary judgment when appropriate; (3) protect potential citizen-jurors from needless inconvenience from being called into Court unnecessarily; and (4) protect respect for the judicial system by not forcing citizens to sit as jurors when there is no real question for them to decide.

Per Fed. R. Civ. P. 56, the Court must deny a SJ motion if there is even just one "genuine" issue of "material" fact, and it must draw all "reasonable" inferences in favor of the non-moving

party. And there is often subjectivity – what would a "reasonable" jury do? If in doubt, the Court should err on the side of denying the SJ motion.

Consequences. If we deny the SJ motion, the decision is not appealable. Then the Court must conduct a trial (time, expense, inconvenience citizens to serve as jurors). If we grant SJ (in full), the parties lose their opportunity for their "day in court" and our decision is appealable. **What standard of review?** (de novo). **Why?** (because the Court of Appeals is equally well-positioned to review the record and determine if SJ is proper.)

C. PRACTICAL SUGGESTIONS FOR DRAFTING SJ OPINIONS

1. The relevant legal rules:
    a. Fed. R. Civ. P. 56
    b. Supreme Court trilogy of cases – well-established standard of review. No need to reinvent the wheel. Study it closely the first time to master the principles, then cut and paste.
        i. Summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The movant must identify those portions of the record which demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To withstand summary judgment, the non-movant must show a genuine dispute of material fact by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56(c)(1)(A); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). A dispute is "genuine" only if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

c. Local Rule 56 (W.D. Pa.). The Board of Judges can adopt Local Rules to supplement the Federal Rules of Civil Procedure. This Court's Local Rules establish a specific SJ procedure which requires Concise Statements of Material Fact (CSMFs) and responses thereto.

   i. The CSMF is an extra, stand-alone document. The general theory behind the rule is to separate "fact" disputes from "legal" disputes and to highlight (for the Court) any genuine and material fact disputes that will defeat SJ. The Local Rule is sensible. In theory, if there is even just ONE disputed/denied fact, we must DENY SJ.

   ii. Responses to CSMF. The non-moving party has a burden to point to: (1) admissible (2) evidence (3) in the record to defeat the SJ motion. The non-movant must respond to each contention. Failure = Admission. It is also important for the non-movant to set forth any additional CSMFs that would defeat SJ.

   iii. **Practical Impact on Law Clerks**. The manner in which many practitioners have implemented the Local Rule has created more work. Too often CSMFs turn into a side-litigation. We usually can't tell, just by looking at the CSMFs, if SJ is merited. One big problem is that attorneys don't limit the CSMFs to just "material" facts. The other big problem is that attorneys are afraid to "admit" to anything proposed by the other side and so they assert meritless denials. In other words, not all of the fact disputes are "genuine." Unfortunately, even if there are hundreds of allegedly "disputed" facts, you must often painstakingly

consider each one by looking at the underlying record because SJ may still be warranted.

iv. Options for Non-Compliance. Improperly denied facts can be "deemed admitted"; a non-conforming document can be stricken with a deadline to re-file; or the Court may excuse the technical deficiency and decide the motion.

v. PRIVATE PRACTICE TIPS: Make your CSMF's as concise as possible; neutral statements; limited to material evidence needed for your legal argument; and facts (not spin). Eliminate (as much as possible) any opportunity for the other side to deny. In opposing a CSMF, make your denials and additional information concise; statements; material; and facts.

2. The Applicable Documents (work at a big table)
   a. Complaint – what counts are alleged/challenged
   b. CSMFs and responses thereto
   c. Briefs
   d. Exhibits

3. Know Your Audience(s). Who are you writing for?

   a. Your Judge. It is not your name on the opinion. The law clerk has not been appointed by the President and confirmed by the Senate. The law clerk's role is to assist the Judge.

   b. The Losing Party. This is your toughest audience. The winning party will be happy, but the job of the attorney for the losing party is to find something wrong

with the opinion so that he/she can take an appeal.

c. The Reviewing Court (when granting SJ). Remember that the standard of review is *de novo*. The purpose of the opinion is to explain to the Court of Appeals why your grant of SJ was correct.

d. Future lawyers who use it to advise clients. You should clearly set forth the rules, and the application of facts to law, so that similarly-situated parties can conform their future conduct accordingly.

e. The media. Be aware that media make take soundbites out of context. Avoid inflammatory language and personal aspersions.

f. The mirror and posterity. The opinion will be on Westlaw forever. So, put forth your <u>best</u> work EVERY TIME. Nobody will know, or care, that you were tired, overworked and/or had a time constraint. Re-read the opinion and re-check the case cites one more time before filing. If you don't want to put your name on it, don't expect a federal judge to put his/her name on it.

4. Opinion Drafting Thoughts.

    i. Think first, write second. One advantage of working for the Court is that there is no hard deadline by which the opinion must be issued. Read the briefs; look at it from the perspective of each side; and let it soak subconsciously. I figure out a lot of cases on bike rides, in the shower, in bed at night, etc.

    ii. Read the briefs in reverse, starting from the last-filed (surrreply). The goal is to find out what the "real" disputes are and what issues are **<u>no longer</u>** in dispute. Often, claims are narrowed or abandoned.

iii. List/Outline all parties' contentions. Is the movant seeking SJ in whole or in part? Determine the elements of each cause of action/affirmative defense that is at issue.

iv. Figure out what happened and whether any disagreements are genuine and material. Ideally, this should be easily done by going through the CSMF and Response. Often, the briefs will also apply the key facts to the relevant legal standard. I find it essential to go to the underlying documents (attached as exhibits) to verify that the CSMF and Response accurately reflect the actual record evidence. DON'T BLINDLY TRUST THE LAWYERS. If I have doubts about the credibility of one (or both) parties, I sometimes ignore the CSMFs and build the fact section of the opinion by quoting directly from the underlying documents.

v. Use an iterative process to develop the facts and the law. You need to know the facts to figure out what law will apply. Then you need to know the legal test to figure out which facts are material. I generally try to rough out the "facts" section first (in my initial review of the briefs and CSMF); then write the legal analysis; then re-write the facts to add everything necessary for the analysis and subtract facts that turn out to be extraneous.

vi. With rare exceptions, the only "material" facts are those that are necessary to that decision. EX: If the SJ theory is Statute of Limitations – only the facts about timing are "material." There is no need to summarize the entirety of the information available in the record.

vii. Expect edits. Law clerks are ghost-writers. Most judges would edit

Shakespeare. Don't take it personally.

viii. Characterize the parties' contentions accurately and fairly. Don't duck the tough issues. Don't distort the facts of this case to make it fit better with precedent. Use exact quotes from the record whenever possible.

ix. Don't become an advocate for the winning side – acknowledge if it is a close case. On the other hand, the opinion should be persuasive – you should explain WHY the Court reached the decision it did.

x. The Court's most important asset is its moral authority and credibility. The losing party must accept and abide by the result. That is much more likely if losing parties feel that the Court understood their arguments and fully and fairly considered them.

xi. Use lots of headings to organize the opinion.

xii. Focus on the reasoning of the cases – avoid string cites.

xiii. Try to simplify the case to its core legal issue(s). Your SJ opinion should be tied to an element of the cause of action or defense. What is the "cleanest" and clearest way to resolve that issue? If the claim fails under Theory A, you usually need not address Theory B, C and D.

xiv. To the extent possible, use the CSMF language used by the "losing" party and direct quotations from the record. Try to take away appellate issues based on nitpicks of language.

xv. Encourage the parties to submit a Joint Record/Appendix (it's realistic) and provide courtesy copies of all voluminous materials to chambers.