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October 10, 2018

Hon. Thomas R. Vena, J.S.C.
Historic Courthouse
470 Martin Luther King Jr. Blvd
Fourth Floor
Newark, New Jersey 07102

**Re: M.F. and J.F. v. The Pingry School, et al.
Docket No. ESX-L-001607-18**

Dear Judge Vena:

Our firm represents Plaintiffs M.F. and J.F. (“Plaintiffs”) in this matter. Please accept this letter, in lieu of a more formal brief, in support of Plaintiffs’ motion to compel discovery from Defendant, the Pingry School (“Pingry” or “Defendant”). The relief sought in this application is an order requiring Pingry to produce: (1) certified answers to interrogatories; (2) un-redacted witness interview summaries; and (3) sworn statements or depositions of other alleged victims of sexual abuse taken by Pingry or its agents.

PRELIMINARY STATEMENT

In a March 28, 2016 letter the current Pingry School leadership sent a letter to Pingry Alumni announcing that they “recently learned. . . that students were sexually abused by Thad Alton (Alton),” a teacher, sports coach, and scout troop leader during the 1970s. M.F. was one of Alton’s victims.

In March of 2017, Pingry issued an apology to the victims and released a 44-page report that Pingry had commissioned by a private firm, T&M Protection Resources, that detailed the abuse and belied Pingry’s position that it only “recently learned” of the abuse. More

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specifically, the T&M report uncovered a pervasive problem of sexual abuse at Pingry and Pingry's affiliated Scout Troop 64. As far back as September of 1979, members of the Troop 64 Committee, who also sat on the Board of Trustees of Pingry and whose troop was comprised primarily of Pingry students, wrote to parents of the troop members advising them of "allegations. . . [of] sexual indiscretions between [Alton] and some members of the troop." The letter goes on to state that the Troop committee did not know the identity of the children involved, described the nature of the allegations as serious sexual abuse, advised that the resignation of Alton was effectuated and recommended that parents discuss the matter with their child's doctor if their child was victimized.

Incredibly, a contemporaneous letter was not sent to parents of Pingry students. Had this been done, the nearly thirty (30) known victims of his abuse may have received immediate medical treatment minimizing the lifelong effect that childhood sexual abuse has on its victims. One significant claim advanced by plaintiff J.F., M.F.'s father, is that as a result of Pingry's concealment of Alton's abuse he was deprived of the opportunity to properly parent M.F., to remove M.F. from the Pingry school and to get M.F. proper professional care. In short, Pingry's active concealment of Alton's abuse severely damaged his relationship with M.F.

In the letter accompanying the T&M Report, Pingry assured the Pingry community that it was committed "to providing an environment that promotes safety, candor, and transparency." About a year following the release of the T&M report, Pingry, in April 2018, publicly announced that it had reached a settlement with a group of 21 victims, which included a pool of counseling funds available to victims, a variety of safety initiatives, and a confidential amount of compensation for the group of survivors. Pingry disclosed all of this information to the public in furtherance of portraying itself as being compassionate and transparent. In this case, there has

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been no transparency and Pingry has refused to comply with even the most basic discovery requests.

Plaintiffs served document demands and interrogatories upon Pingry months ago. It refuses to fully comply with those requests. Pingry partially responded to Plaintiffs' document demands and indicated that it would produce redacted versions of "non-confidential witness statements" from T&M's investigation. Despite repeated follow-up communications, it has failed to do so. Plaintiff is entitled to those witness statements in un-redacted form, as they identify potential key witnesses and provide information about Alton's sexual abuse of students and Pingry's knowledge of the pervasive sexual abuse.

With regard to the interrogatories, Plaintiff has twice reminded Pingry that the responses are overdue and yet Pingry has failed to respond at all. The interrogatories seek, among other things, copies of any depositions that Pingry has conducted of other victims of sexual abuse at Pingry, including the 21 victims who entered into a global settlement with Pingry in or about April 2018. It is imperative that Plaintiff gain access to this testimony, as well as other victim statements in the possession and control of Pingry, as it sheds light on what Pingry knew about Alton's sexual abuse of students and when Pingry knew it. Pingry had a duty to disclose Alton's abuse to the parents of children who were current and former students of Alton, yet it failed to do so until 2016. And, despite Plaintiffs' request for admissions, Pingry refuses to admit that it knew about the abuse in the summer of 1979, as the T&M Report concluded. It even refuses to admit that Alton abused at least 27 students, stating that "Pingry demands strict proof thereof at trial." Yet, by refusing to respond to Plaintiffs' discovery demands, Pingry is seeking to hide pertinent evidence and to evade its discovery obligation.

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The witness statements and deposition transcripts are clearly relevant and will assist Plaintiffs in identifying key witnesses and in obtaining information to prove Pingry's responsibility, something that Pingry publicly acknowledged but refuses to admit in this case. This Court should compel Pingry to meet its discovery obligations and provide full disclosure.

FACTUAL BACKGROUND

This matter arises from the sexual assault of a young Pingry student, M.F., by his former teacher and coach Thad Alton over a period of several years in the mid to late 1970's. See Certification of Dennis T. Smith, Esq. ("Smith Cert."), Ex. A. In the fall of 1973, M.F.'s father, Plaintiff J.F., enrolled M.F. in the fourth grade at Pingry in Elizabeth. During M.F.'s 5th and 6th grade school years at Pingry's Short Hills Campus, Alton served as M.F.'s lacrosse coach, his Scoutmaster, and his teacher and advisor. Id. at ¶ 12. During this timeframe, Alton sexually abused M.F. and was otherwise sexually inappropriate toward him. Id. at ¶ 13.

A. The Extensive Sexual Abuse at Pingry

In late March 2017, Pingry released a 44-page investigative T&M report, which it had commissioned to investigate the scope and extent of Alton's sexual abuse of Pingry students. Id. at ¶ 18; See also Smith Cert., Ex. B. In graphic and disturbing detail, the T&M Report explains that Alton sexually abused 27 Pingry students in a manner that is consistent with the sexual abuse that M.F. experienced, including behind locked doors in Alton's school office. Smith Cert., Ex. A at ¶ 19. Pingry also sponsored a scouting troop for its students and appointed Alton its Scoutmaster. Thereafter, Alton repeatedly abused numerous Pingry students during Pingry sponsored scouting activities and camp sleepovers. Id. at ¶ 20.

The T&M Report also reveals significant evidence that Pingry should have known or engaged in willful blindness about the sexual abuse of students while it was occurring. Many

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former students who were interviewed by T&M stated that the abuse was widely known by the student body and that Pingry would have had to be “deaf, dumb and blind if they didn't see it.” Id. at ¶ 22. According to the T&M Report, some students “reported specific remarks made by faculty members as indicators that those Pingry employees possessed some level of knowledge about Alton's behavior.” The T&M Report does not detail what those remarks were or who made them. Id. at ¶ 25.

While many of the former teachers named by students were not interviewed because they allegedly did not respond to T&M's request for an interview or they are deceased, the T&M Report concludes that those who were interviewed supported a conclusion that there were “indicators of unusual behavior by Alton.” This included several former teachers saying they observed Alton in his office behind locked doors with boys either alone or in group. Id. at ¶ 28. Multiple former teachers told T&M that there were numerous conversations between teachers about the excessive amount of time that Alton spent with students behind locked doors or in after school activities. One said that there seemed to be a genuine feeling among teachers and students that there was “something inappropriate occurring” and that there was always an “aura of more than just friendliness” between Alton and students. Id. at ¶ 30.

Alton left Pingry at the end of the school year in 1978 to teach at the Peck School, though Pingry allowed him to remain its troop master and utilized the Pingry campus. Id. at Ex. C. After Alton left Pingry, he was criminally charged in 1979 with three counts of Private Lewdness and three counts of Impairing Morals of a Minor stemming from the sexual abuse in April of 1978 of three 12-year-old-boys who were Pingry students. Id. at Ex. D. Notably, these crimes were committed while he was employed by Pingry. Alton pleaded guilty to those charges and admitted that the three young male victims were from his fifth grade class at Pingry. Alton was

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subsequently convicted of and imprisoned, in or about 1990, for sexually abusing other young boys in the State of New York. Id. at ¶ 35.

The T&M Report concluded that the “evidence gathered during the investigation suggests instead that Pingry first formally learned of allegations that Alton sexually abused male Pingry students and scouts in the summer of 1979.” Smith Cert., Ex. B at 34. It based that conclusion on the fact that a parent notified a Pingry Board Member of the charges, which resulted in Alton resigning from his Scoutmaster position at Pingry and a “meeting of parents and a psychiatrist at a Pingry Board Member’s home” took place. Id. At that meeting, an attorney acting on Pingry’s behalf advised parents not to take legal action because it would be traumatic for the children and they would likely forget about the abuse anyway. This collusive scheme was engaged in to conceal and prevent the public from learning about the abuse and sought to evade anyone from suing Pingry and holding them accountable for the extraordinary and on-going abuse. Id.

According to the T&M Report, the scout “troop committee,” which included two Pingry board members, wrote a letter on September 6, 1979 to parents of Alton’s scout troop that stated that Alton had resigned as a troop leader. Id. at ¶ 39. It is unclear how many parents received this letter, but Pingry produced it in response to Plaintiffs’ discovery demands. Smith Cert., Ex. E. The T&M Report identified another undated and unsigned document from the troop committee to parents disclosing the abuse, which Pingry also produced to Plaintiffs. That document states:

1. Why resignation?

Allegations have been made by some parents concerning sexual indiscretions between the Scoutmaster and some members of the troop. Due to the serious nature of these

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allegations, the Troop Committee felt obliged to request the resignation of the Scoutmaster.

2. Was my child involved?

The Troop Committee does not know the identity of the children who were involved in the alleged activities.

3. Legal action, if any.

The Committee has taken the only action available to it, namely the requested resignation of the Scoutmaster.

The Committee does not know what action the parents, who have made the allegations, plan to take.

4. What was the extent of the alleged activities?

The allegations are that several members of the troop were involved and the nature of the alleged activities were very serious.

5. What should I do?

If you feel it necessary, discuss the matter with your Doctor.

[Smith Cert., Ex E.]

The letter was signed by the Troop Committee, which included two members who were current Pingry Board members at the time: John P. Bent, Jr and Robert J. Stefani. Despite their clear knowledge of Alton's abuse at the time they wrote these documents and their role as current Board Members of Pingry, they took no action to notify the Pingry community at large, including parents of current and former students of Thad Alton.

Pingry has also produced an email dated September 18, 2003 from a former student to Pingry stating:

Hello. I studied at the Pingry School during grades 6-8 from 1977-1980. My name is [Redacted]. When I was a student there during the sixth grade, I witnessed my homeroom teacher, the Troop 64

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Scoutmaster and also Vice Principal Thad Alton while he sexually abused other boys in my class. I guess that I had sublimated this information but it has recently come back into my memory and is troubling me very much. I am writing to inquire if he still works at your school and/or if he was ever exposed for the disgusting pedophile that he is. Can someone please contact me to discuss this?

[Smith Cert., Ex F.]

Despite receiving this email in 2003, by its own admission Pingry did not notify anyone in the Pingry community until March 2016. Smith Cert., Ex. G, Ex. P at 2. It further states that it is unable to determine whether or not it even conducted an investigation after it received the email in 2003. Id. at Ex. P at 2. It is apparent that Pingry had no protocol, procedures or reporting requirements in place.

B. Pingry's Refusal to Cooperate in Discovery

On March 6, 2018, Plaintiffs filed the within action. On or around March 9, 2018, Plaintiffs propounded Document Requests upon Pingry. See Smith Cert., Ex. H. On or around June 1, 2018, Defendants responded to those Document Requests. See Smith Cert., Ex. I. Pingry, in response to Request Nos. 3, 4, and 11, stated:

Response: . . . Further answering, Pingry possesses T&M's non-confidential witness interview summaries; and is in the process of redacting identifying personal information from same for privacy reasons. Once redaction is complete, the records will be produced by supplement.

Id. at 4 (emphasis added). In response, Plaintiffs, on June 14, 2018, sent a letter to Pingry asking it to “produce the redacted non-confidential witness interview summaries immediately.” See Smith Cert., Ex. J. On July 9, 2018, Plaintiffs once again sent Pingry a letter requesting “that [Pingry] produce those witness summaries immediately as they are needed for [Plaintiffs'] continued investigation in this case.” See Smith Cert., Ex. K. To date, Pingry has not provided

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the non-confidential witness interview summaries referenced above. Furthermore, given the nature of Pingry's answer, it is unclear whether there may be other witness statements that it deems to be confidential, but which are not and should be produced.

On June 14, 2018, Plaintiffs propounded Interrogatories upon Pingry's prior counsel, the Campbell Firm. Smith Cert., Ex. L. Pursuant to the court rules, Pingry's responses were due on August 13, 2018. On August 16, 2018, counsel for Plaintiffs spoke with Pingry's current counsel, Wiley Malehorn Sirota & Raynes, wherein the late responses were raised. Pingry's current counsel informed Plaintiffs' counsel that they would check on the status of Pingry's responses to the Interrogatories. See Smith Cert., Ex. M. On September 6, 2018, Plaintiffs sent a follow-up letter to Pingry's counsel, informing them that Pingry's responses to interrogatories were long overdue. See id. To date, Pingry has not provided answers to Plaintiffs' interrogatories.

Plaintiffs' interrogatories sought among other things, transcripts from depositions or other sworn statements that Pingry conducted and/or obtained when it mediated and entered into the settlements with the group of 21 abuse victims and possibly others. Access to these depositions and/or sworn statements is critical discovery, so that Plaintiffs can identify other potential key witnesses and establish at trial the widespread sexual abuse by Alton of students and exactly when Pingry knew or should have known about Alton's sexual abuse. This is particularly pertinent since Pingry refuses to admit any of the findings in the T&M Report which it commissioned.

C. Pingry's Disingenuous Response to Alton's Abuse of Pingry Students

In response to the abovementioned sexual allegations coming to light, Pingry created the website www.pingryresponse.org. It used this website to disseminate information regarding

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these allegations to former trustees, parents, alumni, and the general public. Pingry used the website to disseminate several letters to parents of its current study body, alumni, and its former Trustees. See Smith Cert., Ex. N. Each of these letters express a commitment to transparency, cooperation, and remorse. When it released the T&M Report, it promised that it was committed to “providing an environment that promotes safety, candor, and transparency.” See Smith Cert. Ex. O. However, as evidenced by the continuing refusal to comply even with Plaintiffs basic discovery requests, Pingry is being anything but transparent in this case. In fact, not only has Pingry failed to produce the witness statements or respond to the interrogatories. Pingry’s conduct directly contradicts its public proclamation on issues of understandably great concern. In the letters to the Pingry community, Pingry never disputes the findings in the T&M Report and instead repeatedly apologizes for the sexual abuse and insists that it has great remorse and compassion for the victims. However, in response to Plaintiffs’ requests for admissions, Pingry refuses to admit any of the findings in the T&M Report and merely says that the report speaks for itself but that “Pingry demands strict proof thereof at trial.” Smith Cert., Ex P.

Thus, while Pingry is representing itself publicly as being accountable for the rampant sexual abuse that occurred in the past, it is simultaneously refusing to take responsibility for that abuse in this litigation. It refuses to admit that Alton sexually abused at least 27 Pingry students and refuses to admit that it formally learned of the abuse in the summer of 1979 at the latest. Smith Cert., Ex P at 6, 7. Moreover, not only is it denying the findings of the T&M Report, it is also seeking to withhold pertinent documents and information by refusing to comply with Plaintiffs’ discovery requests. It is clear that despite its public statements to the contrary, Pingry is engaging in a coverup with no intention of being transparent or cooperating with the victims of Alton’s sexual abuse. Accordingly, it is necessary to seek the assistance of the Court to enforce

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Pingry's discovery obligations and to aid in the search for the truth and a full exploration of all pertinent facts and circumstances.

ARGUMENT

PINGRY SHOULD BE COMPELLED TO RESPOND TO PLAINTIFFS INTERROGATORIES AND TO PRODUCE ALL UNREDACTED WITNESS SUMMARIES/ STATEMENTS, SWORN STATEMENTS AND DEPOSITION TRANSCRIPTS OF OTHER VICTIMS PINGRY HAS DEPOSED

Pursuant to Rule 4:23-5(c), an application for an order compelling discovery may be granted where a party fails to respond to a demand for answers for interrogatories pursuant to Rule 4:17 or a demand for production of documents pursuant to Rule 4:18. As the law has long recognized, “[t]he discovery rules were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel.” Abtrax Pharmaceuticals, Inc. v. Elkins-Sinns, Inc., 139 N.J. 499, 512 (1995). The New Jersey Supreme Court has instructed that “discovery rules are to be construed liberally in favor of all pre-trial discovery.” Payton v. N.J. Turnpike Auth., 148 N.J. 524, 535 (1997). See also Jenkins v. Rainer, 69 N.J. 50, 56 (1976) (“Our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts.”). Here, the discovery sought is plainly contemplated by the New Jersey Court Rules.

A. All Unredacted Witness Summaries/Statements, Sworn Statements And Deposition Transcripts Should Be Ordered Produced To Plaintiffs

First, Pingry stated in its June 1, 2018 responses to Plaintiffs' Notice to Produce that it would produce redacted non-confidential witness interview summaries. Despite the fact that Plaintiffs requested that Pingry turnover the witness interview summaries twice and the fact that

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over four (4) months have elapsed since receiving the requests, Pingry has yet to produce the witness interview summaries. More significantly this application seeks production of all unredacted confidential and/or non-confidential witness interview summaries. If the Court deems necessary, these documents can be produced pursuant to an appropriate protective order. The information contained in the witness summaries, and victim deposition testimony goes to the core of plaintiffs' complaint and will shed light on the critical issues of: (1) what did Pingry know about Alton's abuse; (2) when did it know about the abuse; and (3) what was Pingry's response – to alert parents of children at the school or was it seeking to conceal disclosure. Pingry should not be allowed to cherry pick what it produces; everything should be produced in an unredacted form otherwise its public claims of empathy, compassion and cooperation are illusory and misleading.

A recent Appellate Division decision, G.A.-H v. K.G.G., 455 N.J. Super 294 (App. Div. 2018), supports production of all unredacted witness interviews and deposition transcripts. In that case a minor victim of sexual abuse brought a suit against the abuser's co-worker and employer alleging that they had a tort duty to report the suspected abuse. The trial court granted summary judgment in favor of the co-worker, in part, because the court found that the law imposed no duty on the co-worker (referred to under the pseudonym Arthur) to warn, to contact authorities, or to contact the employer about his co-worker's conduct.

On appeal, the court was called upon to consider the issue of whether tort liability may be imposed when one who remains silent and fails to warn a victim or alert authorities despite knowledge or a reason to suspect that a co-worker has engaged in the sexual abuse of a minor. The court determined that such a common law duty existed. The issue of whether to impose tort liability on the co-worker had to await further development of the facts relating to the

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relationship between the abuser and his co-worker, as well as the co-worker's awareness of the abuse which factual record was unduly limited by the trial court's failure to permit discovery of evidence in the prosecutor's possession relating to the underlying criminal matter. For example, the trial judge refused the plaintiff the opportunity to examine videotaped statements made by the co-worker to police; among other things.

Unlike Pingry, the prosecutor in the G.A.-H case:

expressed to us a willingness to turnover relevant materials so long as the trial judge remains involved and controls further dissemination. With entry of an appropriate protective order, the prosecutor may be assured that the sensitive materials in his possession will not be disseminated beyond what is necessary to allow the victim of the crime to prosecute this civil action. Consequently, we reject Arthur's opposition to the turnover of any further evidence in the prosecutor's possession. Id. at 299.

The G.A.-H's courts recognition of a common law duty of a person to report to authorities or warn a victim that his or her co-worker has engaged in a sexual abuse of a minor imposes a duty much narrower than the duty of a school to report known abuse to the parents of its student body when minor children who attend the institution have been the victims of abuse. Nor should this court entertain any notion that this type of duty is temporally triggered by passage of a statute or somehow was not the standard of care at a given point in time. Judge Fischer explained: "requiring one to speak or act even if that one was not the cause of a risk of harm to another is not inconsistent with the expectations of present-day society. Citizens are urged to speak out about their suspicions: 'if you see something, say something.'" Id. at 304.

In order to assess whether the co-worker breached the duty of care to impose tort liability the court expressly recognized plaintiff's right to discovery that the trial court unfairly withheld:

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Of course, recognizing a policy in favor of action is one thing. The process of imposing tort liability when a person fails to so act requires a further leap. Unfortunately, before taking that jump, we require a better understanding of what Arthur knew and when he knew it, as well as the extent of his relationship with Kenneth (the abuser), all of which was precluded by the limitations the judge placed on the turnover of evidence from the prosecutor and by his premature grant of summary judgment. Consequently, we cannot presently say whether a duty to act ought to be imposed on Arthur or, for that matter, on GEM (the employer). The record reveals far too little about the extent of his relationship to Kenneth or whether whatever he learned from Kenneth's braggadocio or Arthur's own observations justify the imposition of a tort duty. *Id.* at 304.

Here the information sought is pertinent and will assist in establishing that Pingry, at the very least, breached its common law duty to disclose Alton's abuse to the parents of minor children thereby depriving them of their ability to provide appropriate and kindly care to their children in order to minimize the damage resulting from the abuse. Unredacted witness statements, sworn statements, and/or deposition transcripts should be produced, without further delay and if the Court deems necessary, pursuant to an appropriate protective order. Practically speaking receipt of the sworn statements or deposition transcripts may do away or minimize the need to depose victims and cause them to relive their nightmare a second time over. If Pingry is truly empathetic and transparent they should stop evading its responsibility to provide full disclosure and discovery.

Moreover, to the extent Pingry objects to any request for the production of documents or Interrogatory on the grounds that confidentiality agreement(s) preclude production or response, its objection is misplaced; Such evidence is discoverable notwithstanding confidentiality agreements. In re Application of O'keeffe, No. 214CV01518RFBCWH, 2016 WL 2771697, at

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*4 (D. Nev. Apr. 4, 2016) (stating, “[c]onfidentiality agreements do not bar discovery, and a general interest in protecting confidentiality does not equate to privilege.”); See also Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co., No. CIV. CCB-03-3408, 2012 WL 628493, at *2 (D. Md. Feb. 24, 2012) (stating, “[t]here is no privilege for documents merely because they are subject to a confidentiality agreement, and confidentiality agreements do not necessarily bar discovery that is otherwise permissible and relevant.”); Sonnino v. Univ. of Kansas Hosp. Auth., No. CIV.A.02-2576-KHV-DJ, 2004 WL 769325, at *3 (D. Kan. Apr. 8, 2004) (“Parties cannot create a privilege against civil discovery by mere written agreement” and “litigants cannot shield otherwise discoverable information from disclosure to others by agreeing to maintain its confidentiality, and cannot modify the Federal Rules of Civil Procedure by agreement.”); Zoom Imaging, L.P. v. St. Luke’s Hosp. & Health Network, 513 F. Supp. 2d 411, 417 (E.D. Pa. 2007) (holding that confidentiality agreements do not preclude disclosure for purposes of discovery.); Grumman Aerospace Corp. v. Titanium Metals Corp. of Am., 91 F.R.D. 84, 87 (E.D.N.Y. 1981) (same).

Pingry should be ordered to immediately provide all unredacted witness interview summaries/statements, sworn statements, and deposition transcripts.

B. Pingry Should Be Required To Produce Certified Answers To Interrogatories Within Seven Days Of The Date Of The Court’s Order

Plaintiffs are up to date on their discovery obligations. See Smith Cert. Interrogatories were served on Pingry on June 14, 2018. Responses were due on August 14, 2018. Despite repeated requests for responses the responses are now almost two (2) months overdue. An order requiring that Pingry produce its responses within seven (7) days should be entered by this Court.

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Conclusion

For all the foregoing reasons, and those set forth in the accompanying certification of counsel, Plaintiffs respectfully request that its motion to compel discovery be granted.

Respectfully submitted,

/s/ Justin P. Walder
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