No. _____

IN THE

Supreme Court of the United States

LEOPOLDO MENDOZA-GOMEZ,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, INDIVIDUALLY AND SUCCESSOR-IN-INTEREST TO SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 7, 2022

QUESTION PRESENTED

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.,* expressly provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void:
>
> * * *

45 U.S.C. § 55. Despite this statutory language, this Court has held that railroads may settle claims and obtain a release from injured railroad workers "[w]here controversies exist as to whether there is liability, and if so for how much." *Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 631 (1948). The question presented is:

Whether a release of an "existing controversy" that also purports to exempt a railroad from future liability for legally distinct claims for diseases that have not yet manifested violates 45 U.S.C. § 55 with respect to those future claims.

PARTIES TO THE PROCEEDINGS

1. Leopoldo Mendoza-Gomez ("Mendoza"), petitioner on review, was the plaintiff in the trial court and the appellant in the court of appeals.

2. Union Pacific Railroad Company, Individually and Successor-in-Interest to Southern Pacific Transportation Company ("Union Pacific"), respondent on review, was the defendant in the trial court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Leopoldo Mendoza-Gomez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit's opinion (App. 1-9) is unpublished but appears at 2022 WL 1117698. The district court's order and opinion (App. 10-22) appears at 2021 WL 3469998.

JURISDICTION

The Fifth Circuit entered judgment on April 14, 2022, and denied rehearing on May 10, 2022. On August 3, 2022, Justice Alito extended the time for petition to file a petition for writ of certiorari to September 7, 2022. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.,* expressly provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void:

> *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.[1]

45 U.S.C. § 55.

STATEMENT OF THE CASE

1. Mendoza worked for Union Pacific Railroad as a laborer from 1969 to 1989. He subsequently filed a claim for exposure to asbestos during his years working for the railroad.

2. Union Pacific categorized asbestos claims as "non-malignant" or "malignant," depending on whether the claimant had received a diagnosis of cancer at the time of settlement. (App. 50). Union Pacific typically paid several multiples more to settle a malignant claim based on lung cancer, as compared to a "non-malignant" claim based on asbestos exposure, other factors being similar. (App. 38 & 51). In connection with the settlements, Union Pacific's attorneys drafted releases and insisted that these release forms be used. (*See* App. 37).

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[1] The actual statutory section consists of a single paragraph. Petitioner has quoted the statutory section in its entirety, but has separated the two provisions in quoting it here for ease of reference. Only the first provision is at issue in this petition.

3. On February 6, 2012, Mendoza settled his claim and executed a release. (App. 25-33).[2] His injuries were non-malignant at the time he executed the release, as he had not been diagnosed with cancer. Nonetheless, the release was drafted broadly, and purported to release not only the present, non-malignant claim for exposure to asbestos but also any claim for cancers that might develop in the future.

4. In 2019, Mendoza was diagnosed with lung cancer. He subsequently filed a complaint in federal court against Union Pacific based on his development of cancer. Because he brought his complaint under FELA, jurisdiction in the district court was based on 45 U.S.C. § 56 and 28 U.S.C. § 1331.

5. Union Pacific moved for summary judgment based, *inter alia*, on the release Mendoza had executed seven years before his cancer was diagnosed. Despite Mendoza's assertion that the portion of the release purporting to release claims based on cancer was an impermissible attempt to exempt Union Pacific from future liability, and thus void under 45 U.S.C. § 55, the trial court granted summary judgment in favor of Union Pacific based on

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[2] The Release, as produced by Union Pacific and attached to its summary judgment materials, had the amount of the settlement redacted. In converting this document to meet this Court's requirements for the appendix, the redaction was replaced by blanks. (App. 27, 33). The version actually signed by Mendoza contained the actual amount of the settlement. With the exception of the settlement amount, which was not included in the summary judgment materials, the Release is a true and correct copy.

the release. (App. 10-22). The court of appeals affirmed (App. 1-9), and denied rehearing (App. 24).

REASONS THE PETITION SHOULD BE GRANTED

The Court should grant this petition because there is a split in the courts of appeals as to the permissible scope of a release of claims under FELA. This Court's prior decision recognizing the legal distinction between malignant and non-malignant claims based on asbestos exposure makes this an ideal vehicle for analysis and resolution of the issue.

A. The Courts of Appeals Have Reached Different Interpretations as to the Permissible Scope of a Release of FELA Claims, and the Circuit Split Has Persisted for Almost 25 Years. While 45 U.S.C. § 55 prohibits a contract that limits a railroad's liability under FELA, this Court has drawn a distinction between a release that resolves an existing controversy on the one hand and one that attempts to exempt the railroad from future liability on the other. Railroad workers and railroads may settle FELA claims "[w]here controversies exist as to whether there is liability, and if so for how much." *Callen, supra,* 332 U.S. at 631. Absent a bona fide controversy, however, "[t]he Act expressly prohibits covered carriers from adopting any regulation, or entering into any contract, to limit their FELA liability." *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 561 (1987).

Thus, a railroad can resolve an existing controversy and obtain a release of claims within that existing controversy without violating 45 U.S.C. § 55.

But the Court has not directly addressed the proper *scope* of the statutory prohibition in the context of a release, i.e., how far an "existing controversy" extends when settling a claim under FELA. "Although the Supreme Court in *Callen* refused to void the releases executed in compromise of an employee's claims, the Court has not had occasion to explain how wide a net its ruling casts." *Wicker v. Consolidated Rail Corp.,* 142 F.3d 690, 698 (3d Cir. 1998).

The federal circuits have fashioned at least three different interpretations. The Sixth Circuit has interpreted section 55 and *Callen* to allow only the release of an existing, specific injury. "To be valid, a release must reflect a bargained-for settlement of *a known claim for a specific injury*, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." *Babbitt v. Norfolk & W. Ry. Co.,* 104 F.3d 89, 93 (6th Cir. 1997) (italics added).

A year after *Babbitt*, the Third Circuit considered the enforceability of a general release in light of section 55, acknowledging that "[s]ome courts . . . have held that general releases do not contravene the purposes of FELA and may bar a subsequent claim," while "[o]thers [including *Babbitt*] have refused to allow a defendant to use a previously executed general release to block a subsequent FELA claim." *Wicker*, 142 F.3d at 699. While acknowledging the predictability provided by the bright-line test in *Babbitt, id*. at 700, the Third Circuit rejected the Sixth Circuit's approach, focusing not on "known injuries," but on "known risks." The court held that parties may permissibly release any claims related to the known *risks* involved in the existing controversy, whether or

not those risks had manifested in a present injury. *Id.* at 701. Courts have continued to struggle with the differing tests under *Babbitt* and *Wicker* in the almost 25 years since these opinions were issued. *E.g.*, *Ribbing v. Union Pac. R.R. Co.,* 484 F. Supp. 3d 676, 680 (D. Neb. 2020) ("There is a split in authority as to the validity of a release of future claims under the FELA.").

To complicate matters further, the Fifth Circuit has taken its own road in the present case. The court cites neither *Babbitt* nor *Wicker*, but reads *Callen* to hold broadly that section 55 imposes no limits at all on general releases of FELA claims. (App. 8) (holding that this Court has rejected the "precise argument" that 45 U.S.C. § 55 "prohibits common carriers from exempting themselves from liability through contractual agreements."). With respect to the Fifth Circuit, this is a misreading of both the statute and of *Callen*, and further contributes to the confusion concerning the permissible scope of a release of FELA claims that has persisted for more than two decades in the *Babbitt*-*Wicker* dichotomy.

The case at bar presents an opportunity for the Court to resolve the circuit split and to address the permissible scope of a release of future claims under 45 U.S.C. § 55. The facts of this case underscore the importance of defining the permissible scope. Union Pacific resolved Mendoza's non-malignant claim based on asbestos exposure, paying multiples less than it would have paid to settle the claim if he had had a diagnosis of lung cancer. But it attempted to achieve the same exemption from liability through its contractual language. It required him to sign a release that purported to eliminate its liability not

only as to the situation as it existed at that time but also as to any subsequent development of cancer. In other words, Union Pacific attempted to exempt itself from future liability for Mendoza's lung cancer, even though his lung cancer would not be diagnosed for another seven years.

Petitioner acknowledges that the 2012 release was valid as to the circumstances that existed at that time, i.e., as to the "existing controversy." That existing controversy included his claim for exposure to asbestos during two decades working for the railroad, as well as his fear of eventually developing cancer. "Fear of cancer" is an element of damage in an asbestos exposure claim, as discussed below. The actual development of cancer is a separate, legally distinct claim. Thus, the expansion of the release to include legally distinct claims that did not exist in 2012 facially violates 45 U.S.C. § 55.

This portion of the release would be void under *Babbitt*. It would give rise to a question of fact as to the parties' intent under *Wicker*. *See Wicker,* 142 F.3d at 701 ("we conclude that a release may be strong, but not conclusive, evidence of the parties' intent"). But it is valid *as a matter of law* under the Fifth Circuit's analysis in this case. The Court should grant the petition to resolve this circuit split.

B. The Recognized Legal Distinction Between Non-Malignant and Malignant Claims Dictates That An "Existing Controversy" Concerning Asbestos Exposure Cannot Include Future Claims Based on Cancer That Has Not Yet Developed. This case presents a particularly appropriate fact situation in which to analyze the

proper scope of a release of FELA claim because this Court has previously addressed the contours of an "existing controversy" in the context of asbestos exposure. Specifically, the Court has recognized the "separate disease rule," which establishes that non-malignant claims for asbestos exposure and claims for malignancies, i.e., cancer, that subsequently develop, are legally distinct claims. *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 152 (2003). This rule has developed because of the "special problem posed by latent-disease cases," striking an appropriate balance between a plaintiff's right to compensation when exposed to toxic substances and a defendant's burden in not having to defend the entire spectrum of what might or might not develop as a result of this exposure. *Id.* at 152 n. 12. The acknowledged legal distinction makes this case an ideal vehicle in which to address the release of claims for existing injuries as compared to claims for existing risks that an injury will develop at some point in the future.

Railroads and asbestos manufacturers have helped to establish this legal distinction. *See id.* at 152, 156 (observing that this Court has "sharply distinguished exposure-only plaintiffs from 'plaintiffs who suffer from a disease'"). Courts have accepted this distinction based on the argument that railroads and asbestos manufacturers should not have to defend the against risk of cancer in cases involving only occupational exposure, in which cancer might or might not ever develop. *See*, *e.g., Childs v. Haussecker,* 974 S.W.2d 31, 38 (Tex. 1998) ("Likewise, we agree with amici Owens–Illinois, Inc., and the American Board of Trial Advocates that requiring courts and defendants to expend their limited

resources on premature litigation of speculative claims is neither efficient nor desirable.").

The Association of American Railroads ("AAR")[3] emphasized this legal distinction in its amicus brief in *Ayers*. "It is well-established that the same asbestos exposure can cause different diseases, both non-malignant (asbestosis and pleural thickening) and malignant (mesothelioma, lung cancer, and 'certain "other cancers"')." Brief of the Association of American Railroads as Amicus Curiae in Support of the Petitioner at 6, *Norfolk & W. Ry. Co. v. Ayers,* 538 U.S. 135, 152 (2003) (No. 01-963).[4] The AAR characterized the separate nature of malignant and non-malignant diseases as beyond dispute. "Courts dealing with asbestos cases have uniformly concluded, based on unrefuted medical and scientific evidence, that each of the many asbestos-related diseases, although it may develop from the same exposure, is separate and distinct." *Id.* The AAR concluded that non-malignant and malignant diseases are so completely distinct that they cannot be considered together for legal purposes. "The recognition of the pathological distinctions between

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[3] Unsurprisingly, Union Pacific is a member of AAR. *See* https://www.aar.org/about-us/aar-members/.

[4] A copy of this brief is available at:

https://1.next.westlaw.com/Document/Ic2aeeffd6bef11d8adaf826bd578063f/View/FullText.html?navigationPath=%2FRelatedInfo%2Fv4%2Fkeycite%2Fnav%2F%3Fguid%3DIc2aeeffd6bef11d8adaf826bd578063f%26srh%3D%26kw%3Dt&listSource=RelatedInfo&list=Filings&rank=12&docFamilyGuid=Idf63e5b0725d11d7ab54daa4035d65fa&ppcid=b4732a4e12484763b8a7657d7e5d0511&originationContext=filings&transitionType=FilingsItem&contextData=%28sc.UserEnteredCitation%29.

these diseases has led to widespread application of a 'separate-injury' analysis, which provides that each disease which results from asbestos exposure—*even the same exposure—is a separate injury for statute of limitations and/or issue preclusion purposes.*" *Id.* (italics added).

This distinction is dispositive in this case. At the time of the 2012 release, there was an existing, bona fide controversy as to Union Pacific's liability for Mendoza's exposure to asbestos during his 20 years working for the railroad. Union Pacific was entitled to resolve that existing controversy without violating 45 U.S.C. § 55. That existing controversy included exposure to asbestos and to the fear of cancer associated with that exposure.

In this regard, this Court has carefully distinguished between the *fear* of developing cancer -- which is an element of damage in an exposure claim -- and the actual development of cancer, which is a different claim entirely. *Ayers*, 538 U.S. at 153. Under this Court's interpretation, the 2012 release could validly release a claim for the fear of developing cancer, as that was part of the existing controversy in 2012. But Union Pacific attempted to go far beyond the scope of the existing controversy in 2012, seeking to morph the valid release of "fear of cancer" into an opportunity to exempt itself from liability for every conceivable manifestation of that fear, up to and including the worker's death. This is contrary to the Court's analysis in *Ayers*. The actual development of cancer in the future cannot be part of an existing controversy that concerns only exposure to asbestos.

The bottom line is that there was an existing controversy in 2012 as to asbestos exposure, including fear of cancer. There was not an existing controversy as to the actual development of lung cancer until that cancer was diagnosed in 2019. According to the long-established recognition that malignant and non-malignant asbestos diseases are legally separate injuries, vigorously advocated by the AAR and its members and recognized by this Court, Mendoza could not have had a claim based on his lung cancer in 2012, thus precluding the existence of a "controversy" as to lung cancer seven years before it was diagnosed. The portion of the 2012 release that purported to release claims based on the future development of cancer is void pursuant to 45 U.S.C. § 55.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-20397
Summary Calendar

[Filed April 14, 2022]

Leopoldo Mendoza-Gomez,
***Plaintiff—Appellant*,**

versus

Union Pacific Railroad, Individually and Successor-in- Interest to Southern Pacific Transportation Company,
Defendant—Appellee.

On Appeal from the United States District Court for the Southern District of Texas
(DC No. 4:19-CV-4742)
District Judge: Honorable Vanessa D. Gilmore

Before Smith, Stewart, and Graves, Circuit Judges.

Per Curiam:*

Plaintiff-Appellant Leopoldo Mendoza-Gomez ("Mendoza- Gomez") appeals the district court's summary judgment in favor of his former employer, Defendant-Appellee Union Pacific Railroad Company

("Union"). Because we agree with the district court's conclusion that Mendoza-Gomez's claims are barred by a release agreement between the parties, we AFFIRM.

I. FACTUAL & PROCEDURAL BACKGROUND

Mendoza-Gomez worked for Union as a laborer from 1969 to 1989. He alleges that, while working for Union, he was exposed to various toxic substances including asbestos, silica sand, diesel fumes, and secondhand cigarette smoke. According to Mendoza-Gomez, he was diagnosed with cancer and asbestosis in 2019.

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

Shortly thereafter, he filed this suit against Union in federal district court alleging personal injury claims under the Federal Employers' Liability Act ("FELA") and the Locomotive Inspection Act ("LIA"). Union filed an answer and amended answer to Mendoza- Gomez's complaint asserting that his claims were "barred by the applicable statute of repose, and/or under the doctrines of release, waiver, laches, and/or estoppel." More specifically, Union alleged that in 2012, Mendoza- Gomez pursued an occupational tort claim against Union through a toxic tort litigation firm. To resolve the claim, the parties entered into a release agreement on February 6, 2012, containing the following language:

> [Mendoza-Gomez] agrees to accept said sum as full and complete compromise of

> any and all Claims which have accrued or which may hereafter accrue in favor of [Mendoza-Gomez] and against [Union] as a result of [Mendoza- Gomez's] alleged illnesses, injuries, cancers, future cancers, diseases, and/or death, or any fears or psychological disorders relating to contracting same, as a result of Alleged Exposures while [Mendoza-Gomez] was employed by [Union]. This release not only includes Claims which are presently existing or known, but also Claims which may develop or become known in the future. [Mendoza-Gomez] hereby acknowledges receipt of payment by execution of this Release, and agrees that such consideration is being paid and will be accepted in full, final and complete compromise and settlement of all Claims, demands, actions, injuries, damages, costs and compensation of any kind or nature whatsoever arising out of the subject matter of this Release, being any Alleged Exposure, whether known or unknown, whether or not ascertainable at the time this Release is executed.

The signatures of Mendoza-Gomez and Maria Mendoza-Gomez are on the final pages of the release, along with language indicating that they received the advice of counsel prior to signing. The release was notarized and signed by Mendoza-Gomez's attorney the same day.

Mendoza-Gomez then moved for judgment on the pleadings as to Union's affirmative defense of

release. Therein, Mendoza-Gomez argued that Union's amended answer alleging the affirmative defense of release was legally deficient and failed to provide him fair notice of the defense asserted. Union responded and then moved for summary judgment. In July 2021, the district court denied Mendoza-Gomez's motion for judgment on the pleadings and granted summary judgment in favor of Union.

In its order, the district court explained that because Mendoza-Gomez was a party to the release agreement and the agreement related to the claims asserted in his complaint, he had fair notice of what was encompassed in Union's affirmative defense of release. The district court then concluded that Union had sufficiently pled the affirmative defense of release and denied Mendoza-Gomez's motion for judgment on the pleadings. Turning to Union's motion, the district court determined that the plain language of the release barred all of Mendoza-Gomez's claims and granted summary judgment in favor of Union. Mendoza-Gomez filed this appeal.

II. STANDARD OF REVIEW

We conduct a de novo review of a district court's ruling on a Rule 12(c) motion for judgment on the pleadings. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). "The standard for deciding such a motion is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Id.* Our inquiry is whether "in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Id.*

We also conduct a de novo review of a district court's grant of summary judgment. *Sanders v. Christwood*, 970 F.3d 558, 561 (5th Cir. 2020). "Summary judgment is proper '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.'" *Id.* (citing FED. R. CIV. P. 56(a)). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Conclusional allegations and unsubstantiated assertions may not be relied on as evidence by the nonmoving party." *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). "A panel may affirm summary judgment on any ground supported by the record, even if it is different from that relied on by the district court." *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 438 (5th Cir. 2012) (internal quotation marks and citation omitted).

III. DISCUSSION

On appeal, Mendoza-Gomez argues that: (1) Union waived the affirmative defense of release by failing to provide fair notice of the defense in its answer to the motion for judgment on the pleadings; (2) Union has failed to establish all of the elements of its affirmative defense of release; and (3) the release is void under § 5 of FELA. We disagree.

"Generally, under Rule 8(c) affirmative defenses must be raised in the first responsive pleading." *Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009); FED. R. CIV. P. 8(c). Nevertheless, "[w]here the matter is raised in the trial court in a manner that does not result in unfair surprise . . . technical failure to comply precisely with Rule 8(c) is not fatal." *Id.* (citation omitted). This court has acknowledged that "an affirmative defense is not waived if the defendant raised the issue at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond." *Id.* (internal quotation marks and citation omitted). The Supreme Court has explained that the purpose of Rule 8(c) "is to give the opposing party notice of the affirmative defense and a chance to argue why it should not apply." *Id.* at 577–78. "Where the movant bears the burden of proof on an affirmative defense such as release, the movant must establish beyond peradventure *all* of the essential elements of the defense to warrant judgment in his favor." *Addicks Servs., Inc. v. GGP-Bridgeland, LP*, 596 F.3d 286, 293 (5th Cir. 2010) (internal quotation marks and citation omitted).

A release such as the one between Mendoza-Gomez and Union is considered a contract. *See BP Expl. & Prod., Inc. v. Claimant ID 100281817*, 919 F.3d 284, 287 (5th Cir. 2019). Under Texas law, "[t]o establish contract formation, a party must prove an offer and acceptance and a meeting of the minds on all essential terms." *Ibe v. Jones*, 836 F.3d 516, 524 (5th Cir. 2016) (internal quotation marks and citation omitted). "In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself." *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 689 (5th Cir. 2018). To do so, we "examine and consider the entire writing in an effort to harmonize and give effect

to all the provisions of the contract so that none will be rendered meaningless." *Id*. Our analysis begins and ends with the contract's express language. *Id*.

As a preliminary matter, Mendoza-Gomez complains that Union failed to provide sufficient notice of the affirmative defense of release and has thus waived the defense. As the district court observed, however, Mendoza- Gomez signed the release that Union references in its affirmative defense before a notary and pursuant to the advice of counsel. Consequently, Mendoza-Gomez's argument that he did not receive notice of the release or its contents is belied by the record.

Likewise, we reject Mendoza-Gomez's argument that "[b]ecause [Union] redacted the amount of consideration paid from the Release document, it failed, not only on the pleadings, but also in its summary judgment proof." Although Union produced a redacted copy of the release during these proceedings to protect the parties' privacy, the unredacted copy of the release that Mendoza-Gomez signed upon the advice of counsel and before a notary in 2012 provided the settlement amount that he agreed to receive in exchange for signing the release. Union's use of a redacted copy of the release in the district court proceedings does not negate the release's validity as competent summary judgment evidence. Moreover, the express language of the release clearly provides that Mendoza-Gomez accepted the settlement amount as consideration in exchange for his full and complete release of any and all claims, accruing then and in the future, against Union as a consequence of any "alleged illnesses, injuries, cancers, future cancers, diseases, and/or death" that purportedly

resulted from Mendoza-Gomez's exposure to toxic chemicals while working for Union. This language is clear and unambiguous and Mendoza-Gomez's arguments to the contrary are without merit.

We are equally unpersuaded by Mendoza-Gomez's assertion that the release is void under § 5 of the FELA on grounds that the Act prohibits common carriers from exempting themselves from liability through contractual agreements. *See* 45 U.S.C. § 55 ("Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void[.]"). As the Supreme Court has explained in rejecting this precise argument, "[i]t is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." *Callen v. Pa. R. Co.*, 332 U.S. 625, 631 (1948).

In sum, we agree with the district court that the release between the parties constitutes a valid and enforceable contract that bars the claims that Mendoza-Gomez alleges against Union in this suit.[1] *See Huckaba*,

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[1] In a recently filed Rule 28j letter, Mendoza-Gomez draws this court's attention to a recent district court opinion involving a similar release to the one here. *See Hartman v. Ill. R.R. Co.*, No. 20-1633, 2022 WL 912102 (E.D. La. Mar. 29, 2022). There, Hartman (a former railroad employee) had previously suffered an injury to his thumb and ultimately settled his claims with the railroad company. *Id.* at *1. In doing so, Hartman signed a release covering future claims of

892 F.3d at 689. The district court did not err in denying Mendoza-Gomez's motion for judgment on the pleadings, *see In re Katrina Canal Breaches Litig.*, 495 F.3d at 205, nor did it err in granting summary judgment in favor of Union. *See Sanders*, 970 F.3d at 561.

IV. CONCLUSION

For the foregoing reasons, the district court's judgment is AFFIRMED. All pending motions are DENIED.

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any type against the company, including claims involving alleged exposure to toxic chemicals. *Id.* Years later, Hartman was diagnosed with cancer and filed suit against the railroad. *Id.* The railroad company moved for summary judgment arguing that Hartman's claims were barred by the release. *Id.* The district court disagreed and denied summary judgment. *Id.* at *2. It explained that the release contained "a boilerplate list of hazards to which [the plaintiff] may have been exposed. The Release does not discuss the 'scope and duration of the known risks' or list the 'specific risks' that he faced. The Release therefore does not evince a clear intent by the parties to release Defendant from liability for Plaintiff's cancer." *Id.*

As a preliminary matter, we note that we are not bound by the district court's holding in *Hartman*. Moreover, the facts and circumstances in Mendoza-Gomez's appeal are distinguishable from those in *Hartman*. Unlike Hartman, Mendoza-Gomez's original claim against the railroad company involved his alleged exposure to toxic chemicals—not a thumb injury. Consequently, the release Mendoza-Gomez signed was specific to the types of injuries involved in his original complaint against Union, as well as those he claimed he suffered years later—including "cancers" and "future cancers." In other words, the list of claims Mendoza-Gomez released was not a boilerplate list of hazards unrelated to his current claims and he cannot now claim that the release did not evince his clear intent to release Union from liability for his alleged cancer in this suit. For these reasons, we conclude that *Hartman*, even if controlling, would have no bearing on Mendoza-Gomez's appeal.

United States District Court
for the Southern District of Texas
Houston Division

LEOPOLDO MENDOZA-GOMEZ, Plaintiff
v.
UNION PACIFIC RAILROAD, COMPANY, Defendant.

Civil Action No. 4:19-cv-4742

ORDER

Pending before the Court is Plaintiff Leopoldo Mendoza-Gomez's Motion for Judgment on the Pleadings, (Instrument No. 26), and Union Pacific Railroad Company's Motion for Summary Judgment, (Instrument No. 30).

I.
A.

This suit is a Federal Employers' Liability Act ("FELA") and Locomotive Inspection Act ("LIA") personal injury case. This case arises from Plaintiff Leopoldo Medoza-Gomez's ("Plaintiff's")[2] exposure to various toxic substances during his employment at Union Pacific Railroad Company ("Defendant" or "Union Pacific"). (Instrument No. 30 at 8-9).

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[2] Throughout the Complaint, Plaintiff is referred to as "Leopoldo," "Leopold," and "Rodolfo." (Instrument No. 1). The Court notes that these names all refer to the same plaintiff.

Plaintiff was Defendant's employee from 1969 to 1989. (Instruments No. 1 at 10; No. 30 at 9). Plaintiff worked as a mechanical laborer and claims that he was exposed to asbestos, silica, diesel fumes, secondhand cigarette smoke, and other toxic substances. (Instrument No. 1 at 10). In 2019, Plaintiff was diagnosed with lung cancer and asbestosis. (Instrument No. 1 at 10).

B.

On December 5, 2019, Plaintiff filed his Original Complaint. (Instrument No. 1). Plaintiff brings a negligence claim under PELA and a claim for violating the Locomotive Inspection Act. (Instrument No. 1 at 11-13). On January 31, 2020, Defendant filed its Answer. (Instrument No. 6). On April 23, 2020, Defendant filed its Amended Answer. In its Amended Answer, Defendant asserted that Plaintiff's claims are "barred by the applicable statute of repose, and/or under the doctrines of release, waiver, laches, and/or estoppel." (Instrument No. 9 at 12).

On March 30, 21, Plaintiff filed his Motion for Judgment on the Pleadings regarding Defendant's affirmative defense of "release." (Instrument No. 26). On April 20, 2021, Defendant filed its Response. (Instrument No. 38).

On April 1, 2021, Defendant filed its Motion for Summary Judgment. (Instrument No. 30). On April 19, 2021, Plaintiff filed his Response. (Instrument No. 37).

II.

Under Rule 8 of the Federal Rules of Civil Procedure, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint need not contain "detailed factual allegations," but it must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

A Rule 12(c) motion considers dismissal after the pleadings are closed. Fed. R. Civ. P. 12(c). "The standard for Rule 12(c) motions for judgment on the pleadings is identical to the standard for Rule 12(b)(6) motions to dismiss for failure to state a claim." *Waller v. Hanlon,* 922 F.3d 590, 599 (5th Cir. 2019). To survive a motion to dismiss, the complaint must articulate "the plaintiff's grounds for entitlement to relief-including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor,* 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly,* 550 U.S. at 555). Stated otherwise, in order to withstand a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 570); *Turner v. Pleasant,* 663 F.3d 770, 775 (5th Cir. 2011). A claim for relief is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678; *Montoya*

v. FedEx Ground Package Sys., Inc., 614 F.3d 145, 148 (5th Cir. 2010).

When ruling on a 12(c) motion, the Court may consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Wolcott v. Sebelius,* 635 F.3d 757, 763 (5th Cir. 2011) (internal citations and quotations omitted); see also *Tellabs, Inc. v. Makar Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007). The Court does not resolve any disputed fact issues. *Smith v. Reg'! Transit Auth.,* 756 F.3d 340, 347 (5th Cir. 2014). Instead, the Court assumes all well-pleaded facts contained in the complaint are true. *Wolcott,* 635 F.3d at 763. The Court will not, however, "accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions. " *Great Lakes Dredge & Dock Co. LLC v. La. State,* 624 F.3d 201, 210 (5th Cir. 2010) (internal quotation omitted). Similarly, legal conclusions masquerading as factual conclusions need not be treated as true. *Blackburn v. City of Marshall,* 42 F.3d 925, 931 (5th Cir. 1995); see also *Iqbal,* 556 U.S. at 678. Although all well-pleaded facts are viewed in the light most favorable to the plaintiff, *Turner,* 663 F.3d at 775; *Gonzalez v. Kay,* 577 F.3d 600, 603 (5th Cir. 2009), the Court "will not strain to find inferences favorable to the plaintiff." *Dorsey v. Portfolio Equities, Inc.,* 540 F.3d 333, 338 (5th Cir. 2008) (internal citations and quotations omitted). Therefore, to avoid a dismissal for failure to state a claim, a plaintiff must plead specific facts. *Dorsey,* 540 F.3d at 338.

III.

Plaintiff moves for judgment on the pleadings regarding Defendant's affirmative defense of "release." (Instrument No. 26 at 1). Plaintiff argues that Defendant's Amended Answer is (1) legally deficient; (2) precluded by Federal Rule of Civil Procedure 37(c); and (3) likely invalid. *See generally* (Instrument No. 26).

Plaintiff first argues that Defendant's Amended Answer is legally deficient and fails to provide Plaintiff "fair notice" of the defense asserted. (Instrument No. 26 at 3). Under the Federal Rules of Civil Procedure, an affirmative defense must be pleaded, or else it is waived. *See* Fed. R. Civ. P. 8(c); *Trinity Carton Co. v. Falstaff Brewing Corp.,* 767 F.2d 184, 194 (5th Cir. 1985). A defendant must plead affirmative defenses with "enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced." *Woodfield v. Bowman,* 193 F.3d 354, 362 (5th Cir. 1999). A plaintiff is provided adequate "fair notice" if the defendant "sufficiently articulated the defense so that the plaintiff [is] not a victim of unfair surprise." *Id.* at 362. In some instances, merely pleading the affirmative defense may be sufficient. *See id.; see, e.g., American Motorists Ins. Co. v. Napoli,* 166 F.2d 24, 26 (5th Cir. 1948) (holding that simply pleading "contributory negligence" in a negligence action arising from a car collision, without more, was sufficient). Consequently, determining if defendant provided "fair notice" is a fact-specific inquiry. *Woodfield,* 193 F.3d at 362.

Here, Defendant's Amended Answer asserted that Plaintiffs claims were "barred by the applicable statute of repose, and/or under the doctrines of release, waiver, laches, and/or estoppel." (Instrument No. 9 at 12). Plaintiff contends that this language is impermissible "boilerplate defensive pleading." (Instrument No. 26 at 5). However, Defendant proffers evidence that Plaintiff and Defendant entered into a release agreement, titled "RELEASE." (Instrument No. 38-3) (emphasis in original). Because Plaintiff was a party to the release agreement and the agreement related to the claims asserted in Plaintiffs Complaint, Plaintiff had fair notice of what was encompassed in Defendant's affirmative defense of release and was not the victim of unfair surprise. Accordingly, Defendant sufficiently pleaded this affirmative defense.

Plaintiff also argues that Defendant's evidence related to the release agreement violates Federal Rule of Civil Procedure 37 and the release agreement is invalid. (Instrument No. 26 at 5- · 11). A Rule 12(c) motion is designed to dispose of cases where a judgment on the merits can be rendered on the substance of the pleadings and judicially noticed facts. *See Garza* v. *Escobar,* 972 F.3d 721, 727 (5th Cir. 2020). A Rule 12(c) motion only considers "the complaint, its proper attachments, documents incorporated into the complaint by reference and matters of which a court may take judicial notice." *Wolcott* v. *Sebelius,* 635 F.3d 757, 763 (5th Cir. 2011). Here, the parties look at evidence on the record not referenced in or attached to the Amended Answer. The parties also raise these same arguments in Defendant's Motion for Summary Judgment and Plaintiffs Response to the Motion for Summary

Judgment. *See* (Instruments No. 30; No. 37). Consequently, the Court finds that the arguments are better analyzed under Defendant's Motion for Summary Judgment.

Accordingly, Plaintiff's Motion for Judgment on the Pleadings is DENIED. (Instrument No. 26).

IV.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 312, 322 (1986); *Warfield v. Byron,* 436 F.3d 551, 557 (5th Cir. 2006).

The "movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.,* 485 F.3d 253,261 (5th Cir. 2007) (citing *Celotex,* 477 U.S. at 322-25). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.,* 560 F.3d 316, 326 (5th Cir. 2009). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242,248 (1986).

If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by "showing - that is, pointing out to the

district court - that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp. Co.,* 402 F.3d 536, 540 (5th Cir. 2005) (citation omitted). "If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *United States v. $92,203.00 in US. Currency,* 537 F.3d 504, 507 (5th Cir. 2008) (quoting *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (en bane)).

After the moving party has met its burden, in order to "avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." *Thomas v. Price,* 975 F.2d 231, 235 (5th Cir. 1992). The party opposing summary judgment cannot merely rely on the contentions contained in the pleadings. *Little,* 37 F.3d at 1075. Rather, the "party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim," *Ragas v. Tennessee Gas Pipeline Co.,* 136 F.3d 457, 458 (5th Cir. 1998); *Baranowski v. Hart,* 486 F.3d 112, 119 (5th Cir. 2007). Although the court draws all reasonable inferences in the light most favorable to the nonmoving party, *Connors v. Graves,* 538 F.3d 373, 376 (5th Cir. 2008), the nonmovant's "burden will not be satisfied by some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of

evidence." *Boudreaux,* 402 F.3d at 540 (quoting *Little,* 37 F.3d at 1075). Similarly, "unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment." *Clark v. Am.'s Favorite Chicken,* 110 F.3d 295, 297 (5th Cir. 1997).

V.

Defendant moves for summary judgment for four reasons: (1) Plaintiff's claims are barred by Plaintiff's release agreement; (2) Plaintiff has no admissible causation evidence; (3) Plaintiff's asbestosis claim is untimely; and (4) Plaintiffs Locomotive Inspection Act ("LIA") claim fails as a matter of law. *See generally* (Instrument No. 30). As a preliminary matter, Plaintiff concedes that his LIA claim is not a viable claim. (Instrument No. 37 at 1). Accordingly, Plaintiff's LIA claim is DISMISSED.

Defendant contends that Plaintiffs claims are barred by the release agreement. (Instrument No. 30 at 11). Plaintiff argues that Federal Rule of Civil Procedure 37 precludes Defendant's evidence in support of its affirmative defense of release and asserts that the release agreement is invalid. (Instruments No. 26 at 5-11; No. 37 at 3-8).

The Court first turns to Plaintiffs procedural objection. Plaintiffs arguments related to Rule 37(c)(l) were already made in Plaintiffs Motion to Strike Defendant's supplemental discovery. (Instrument No. 36). On May 25, 2021, the Court denied Plaintiffs Motion and noted that it would entertain any request

from Plaintiff to conduct additional discovery based on the late disclosure. (Instrument No. 54). Accordingly, the Court finds Defendant's evidence to be admissible.

Plaintiff also argues that the release agreement is not valid. (Instrument No. 37 at 6). Section 55 of the FELA prohibits contracts that exempt common carriers from any liability. 45 U.S.C. § 55. Under Section 55, the acceptance of benefits from a railway relief department does not preclude an employee's recovery under the FELA. *See Philadelphia, Baltimore & Washington R.R. Co. v. Schubert,* 224 U.S. 603, 610-11 (1912). Additionally, a contract restricting choice of venue for a FELA action is also rendered void under this statute because it prevents the right of a FELA plaintiff to "secure the maximum recovery if he should elect judicial trial of his cause." *Boyd v. Grand Trunk Western R. Co.,* 338 U.S. 263, 266 (1949). However, contracts exempting common carriers from liability are distinguishable from a "full compromise" under a release agreement. *See Callen v. Pennsylvania R. Co.,* 332 U.S. 625, 631 (1948). A release agreement "is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility." *Callen,* 332 U.S. at 631. Agreements that allow parties to settle their claims without litigation is a permissible "full compromise" under Section 55. *See id* at 631; *Boyd,* 338 U.S. at 265.

Here, the release agreement, signed on February 6, 2012, indicates that Defendant paid some amount to Plaintiff, which was agreed to be the:

> full and complete compromise of any and all Claims which have accrued or which may hereafter accrue in favor of [Plaintiff] and against Union Pacific as a result of [Plaintiff's] alleged illnesses, injuries, cancers, future cancers, diseases, and/or death . . . as a result of Alleged Exposures while [Plaintiff] was employed by Union Pacific.

(Instrument No. 38-3 at 2). This release agreement is similar to the release agreement in *Callen,* which was found to not contravene the PELA. *See Callen,* 332 U.S. at 626-31 (holding that a release employee signed in exchange for $250 did not violate the PELA because it constituted a permissible full compromise). Consequently, the Court finds the release agreement to be valid under the PELA.

Plaintiff further contends that the release agreement is invalid because there is no evidence of legally adequate consideration. (Instrument No. 37 at 6). Plaintiff contends that the consideration is inadequate because Defendant segregated its asbestos claims into "malignant" and "non-malignant" categories. (Instrument No. 37 at 6). Plaintiff asserts that the release agreement between Defendant and Plaintiff involved a very small settlement for a "non-malignant" claim even though Plaintiff was ultimately diagnosed with lung cancer. (Instruments No. 26 at 11; No. 37 at 6-7). Plaintiff relies on *Babbitt v. Norfolk & Western Ry. Co.,* 104 F.3d 89 (6th Cir. 1997) and distinguishes the Sixth Circuit case from *Wicker v. Consolidated Rail Corp.,* 142 F.3d 690 (3rd Cir. 1998). (Instrument No. 37 at 5). However, neither of these

cases is binding authority and this Court declines to adopt either of their holdings. Moreover, the release agreement clearly states, "This release not only includes Claims which are presently existing or known, but also claims which may develop or become known in the future." (Instrument No. 38- 3 at 2). Even though the amount paid under the release agreement is redacted, (Instrument No. 38-3 at 2), the parties were permitted to settle their PELA claims without litigation and they both signed the release agreement with the terms above. Thus, this Court finds that the release agreement is valid and governs Plaintiffs claims in this suit.

Plaintiff also asserts that the release agreement only mentions asbestos and silica, and, therefore, the PELA claims based on diesel fumes and secondhand cigarette smoke should survive summary judgment. (Instrument No. 37 at 5-6). However, this argument ignores the full text of the release agreement. The agreement defines "Alleged Exposure" as "any and all exposures by breathing, touching, ingesting, or otherwise, to any toxic materials, asbestos, dusts, fumes, gases, metals or chemicals, alleged to be caused or contributed to by ... Union Pacific." (Instrument No. 38-3 at 1). Because "Alleged Exposure" includes "dusts, fumes, [and] gases" arising from Defendant's operations, Plaintiffs PELA claims related to diesel fumes and secondhand cigarette smoke have also been released by the release agreement.

Since Plaintiffs claims are barred by the release agreement, the Court need not analyze the other bases upon which Defendant moves for summary judgment.

Accordingly, Defendant's Motion for Summary Judgment is GRANTED. (Instrument No. 30).

VI.

For the foregoing reasons, **IT IS HEREBY ORDERED** that Plaintiff's Motion for Judgment on the Pleadings is **DENIED, (Instrument No. 26),** and Defendant's Motion for Summary Judgment is **GRANTED, (Instrument No. 30).**

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on the 27th day of July, 2021, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

United States District Court
for the Southern District of Texas
Houston Division

LEOPOLDO MENDOZA-GOMEZ, Plaintiff
v.
UNION PACIFIC RAILROAD, COMPANY, Defendant.

Civil Action No. 4:19-cv-4742

FINAL JUDGMENT

Pending before the Court is Plaintiff Leopoldo Mendoza-Gomez's ("Plaintiff's") Motion for Judgment on the Pleadings, (Instrument No. 26), and Union Pacific Railroad Company's Motion for Summary Judgment, (Instrument No. 30). For the reasons stated in this Court's Order of July 27, 2021, Plaintiff's Motion is **DENIED** and Defendant's Motion is **GRANTED**.

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 27th day of July, 2021, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-20397

[Filed May 10, 2022]

Leopoldo Mendoza-Gomez,
***Plaintiff—Appellant*,**

versus

Union Pacific Railroad, Individually and Successor-in- Interest to Southern Pacific Transportation Company,
Defendant—Appellee.

Appeal from the United States District Court for the Southern District of Texas
USDC No. 4:19-CV-4742

ON PETITION FOR REHEARING

Before Smith, Stewart, and Graves, Circuit Judges.

Per Curiam:

IT IS ORDERED that the petition for rehearing is DENIED.

RELEASE

THIS document constitutes a Release of Union Pacific Railroad Company ("Union Pacific") by **LEOPOLDO MENDOZA** and **MARIA MENDOZA,** their insurers, successors, assigns, and attorneys (collectively **"MENDOZA").**

DEFINITIONS

i. "Union Pacific", as used herein, shall mean and include Union Pacific Railroad Company, Missouri Pacific Railroad Company, St. Louis Southwestern Railway Company, Chicago & Northwestern Transportation Company, Southern Pacific Transportation Company, and all of their predecessors-in-interest, successors, employees, agents, representatives, related companies, subsidiaries, affiliates, leased and operated lines and insurance companies.

ii. **"MENDOZA",** as used herein, shall mean and include **LEOPOLDO MENDOZA** and **MARIA MENDOZA,** their insurers, successors, assigns and attorneys.

iii. "Claimant", as used herein, shall mean and include **LEOPOLDO MENDOZA.**

iv. "Alleged exposures," as used herein, shall mean and include any and all exposures by breathing, touching, ingesting, or otherwise, to any toxic materials, asbestos, dusts, fumes, gases, metals or chemicals, alleged to be caused or conttibuted to by,

or in any way the legal responsibility of any company or person within the above definition of Union Pacific

v. "Claims", as used herein, shall mean and include any and all suits, actions, causes of action, claims and demands of every nature whatsoever for Alleged Exposures, **WHICH ARE KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN,** for any illnesses, injuries, cancers, future cancers, diseases, and/or death, or any fears or psychological disorders relating to contracting same, arising out of **MENDOZA'S** Alleged Exposures at Union Pacific.

RECITALS

A. **MENDOZA** filed an Alleged Exposure related claim against Union Pacific seeking compensation as a result of alleged pneumoconiosis illness, pneumoconiosis disease, asbestos-related or silica-related cancers, any future asbestos-related cancers or future silica- related cancers, and injury, from his/her alleged exposures.

B. Union Pacific, without in any way admitting liability, and **MENDOZA** desire to fully and finally compromise **MENDOZA'S** claims.

C. **MENDOZA** represents that no person or insurance company has any right or has asserted any lien or right of subrogation, under any policy of insurance or otherwise, on account of any medical, hospital, nursing, or other expenses for or on account of alleged pneumoconiosis illness, pneumoconiosis disease, asbestos-related or silica-related cancers, asbestos-related or silica-related potential future

cancers, injury, and potential death, from **MENDOZA'S** alleged exposures. Union Pacific relied upon this representation in entering into this Release.

THEREFORE, in consideration of their mutual covenants and obligations, the parties agree as follows:

AGREEMENT

1. Union Pacific is paying **MENDOZA** the sum of _____ Dollars ($_____). Union Pacific Railroad Company is hereby expressly authorized to transmit the net payment of _____ ($_____) via Electronic Funds Transfer ("EFT") to my attorney of records, Hissey Kientz, L.L.P., 9442 Capital of Texas Highway, Suite 400, Austin, TX 78759, individually and as my representative to be held in trust on my behalf, as full consideration for this settlement and release. Plaintiff acknowledges that Union Pacific has satisfied the consideration in support of this Release upon the initiation of the EFT payment to the bank account identified above. **MENDOZA** agrees to accept said sum as full and complete compromise of any and all Claims which have accrued or which may hereafter accrue in favor of **MENDOZA** and against Union Pacific as a result of **LEOPOLDO MENDOZA'S** alleged illnesses, injuries, cancers, future cancers, diseases, and/or death, or any fears or psychological disorders relating to contracting same, as a result of Alleged Exposures while **LEOPOLDO MENDOZA** was employed by Union Pacific. This release not only includes Claims which are presently existing or known, but also Claims which may develop

or become known in the future. **MENDOZA** hereby acknowledges receipt of payment by execution of this Release, and agrees that such consideration is being paid and will be accepted in full, final and complete compromise and settlement of all Claims, demands, actions, injuries, damages, costs and compensation of any kind or nature whatsoever arising out of the subject matter of this Release, being any Alleged Exposure, whether known or unknown, whether or not ascertainable at the time this Release is executed.

2. **MENDOZA** expressly agrees to cause the dismissal with prejudice of the above described Alleged Exposure related claim against Union Pacific, and to indemnify and defend and to hold forever harmless Union Pacific against any and all claims, demands, actions, damages, costs and compensation of any kind brought at any time by any person or party against Union Pacific for any Alleged Exposure related claims resulting from **MENDOZA'S** Alleged Exposures, including but not limited to any Alleged Exposure related claims asserted by heirs or devisees of **MENDOZA.**

3. **MENDOZA** releases any and all claims, demands, actions, damages, costs and compensation of any kind against Union Pacific, accruing as a result of **MENDOZA'S** Alleged Exposures, including alleged pneumoconiosis illness, pneumoconiosis disease, asbestos-related or silica-related cancers, asbestos-related or silica-related potential cancers, injury, and potential death, from **MENDOZA'S** alleged exposures. **MENDOZA** further agrees and covenants not to institute any action at law or in equity against

Union Pacific for any claim, demands, actions, damages, costs, and compensation of any kind as a result of **MENDOZA'S** Alleged Exposures, or their consequences, including but not limited to any Alleged Exposure related claim for medical bills or health care, lost earning power, loss of consortium, mental anguish, pain and suffering, wrongful death, contribution and/or indemnity, and any other Alleged Exposure related claims now or later existing. Union Pacific may plead this Release as a complete defense to any action or proceeding brought by **MENDOZA** in breach of this covenant.

4. Pursuant to 42 USC §1395(y), 22CFR §411.11 et al, the Medicare Intermediary Manual, and the Medicare Carriers Manual, the parties to this settlement warrant and represent that any rights or interests Medicare may have in this settlement have been adequately considered and protected by Claimant confirming that Medicare does not have a lien for conditional payments made by Medicare for Claimant's medical care related to the injuries set forth in this Release. However, if it is determined that Medicare does have a lien for conditional payments made by Medicare for medical care received by Claimant up to and including the date of this Release related to the injuries set forth in this Release, Claimant will assume the complete and total responsibility and liability to satisfy any lien asserted by Medicare for such conditional payments. Claimant acknowledges the existence of the Medicare Secondary Payer statute and its associated regulations and agrees to comply with all obligations and duties imposed thereby. Claimant agree to assume the complete and total

responsibility and liability to pay any liens that Medicare may assert for medical care received by Claimant after the date of this Release for the injuries set forth in this Release. Claimant agrees that Union Pacific has no responsibility or liability to pay for any medical care received by Claimant after the date of this Release. Should Medicare amend the published Medicare criteria triggering the need for formal Medicare approval of a Medical Set Aside in this case, Claimant agrees to satisfy the Medicare Set-Aside submission and approval requirements set forth by the Centers for Medicare and Medicaid Services. Claimant agrees that if Claimant is required to set aside or repay any portion or all of this settlement to reasonably protect Medicare's interest under the MSP, Claimant will be solely responsible for setting aside or repaying such monies from their own funds. Claimant also agree to defend, indemnify and hold harmless Union Pacific and Union Pacific's attorneys for the consequences of Claimant's loss of Medicare benefits or for any recovery the Centers for Medicare and Medicaid Services may pursue against Union Pacific or Union Pacific's attorneys. In addition, Claimant waives and releases any right to bring any action against Union Pacific or Union Pacific's attorneys under§1395(y) of the Medicare Secondary Payer Statute (MSP).

5. **MENDOZA** consulted with their attorney in making this release, and is relying upon their collective judgment, belief and knowledge, of the nature, extent, effect, duration, and progression and other possible consequences of any alleged exposures, injuries, illnesses, conditions and any

liability therefore, and **MENDOZA** is not relying upon any statement or promise by Union Pacific, except for the payment described above.

6. The parties agree that this Release only affects obligations, duties and liabilities of Union Pacific and shall not affect the obligation:s, duties, and liabilities of any co-defendant or third party. This release is given in full consideration of Union Pacific's liability only, and is limited to the percentage or portion of liability for which Union Pacific is or may be found responsible in the event of a trial of any Alleged Exposure related claims brought by **MENDOZA.** If other parties are responsible to **MENDOZA** for any damages, execution of this release shall operate as a satisfaction of **MENDOZA'S** Alleged Exposure related claims against such other parties to the extent of the relative pro rata share of common liability of Union Pacific only. **MENDOZA** will satisfy any judgment, decree, or award in which there is a common liability involving Union Pacific as to Union Pacific, and **MENDOZA** will indemnify and hold harmless Union Pacific against loss or damage because of any and all claims, demands, or actions made by others on account of such decree, judgment, or award. It is the intent of this Release to release and bar any Alleged Exposure related claim for contribution or indemnity by any other party against Union Pacific.

7. **MENDOZA** agrees that any costs or attorney's fees incurred by **MENDOZA** arising out of or relating to the Alleged Exposure related claim

which has been made are their sole and separate responsibility and not that of Union Pacific.

8. This Release contains the entire agreement between **MENDOZA** and Union Pacific with regard to the matters set forth herein and is binding upon and inures to the benefit of the executors, administrators, personal representatives, heirs and successors and assigns of both **LEOPOLDO MENDOZA and MARIA MENDOZA** and Union Pacific.

9. **MENDOZA** represents that the Release has been completely read and/or explained by **MENDOZA'S** attorney and that its terms are fully understood and voluntarily accepted by **MENDOZA.**

10. **MENDOZA** agrees that the terms and conditions of the Release are confidential and shall not be disclosed to anyone, directly or indirectly, except by order of Court or as required by law. In such event, notice shall be given to Union Pacific not less than ten (10) days before disclosure.

11. Nothing in this document is intended to be construed as releasing any Alleged Exposure related claim that **LEOPOLDO MENDOZA'S** spouse may have in the future for her own personal injuries that she may have or develop in the future as a result of any inhalation of asbestos fibers.

EXECUTED in triplicate this 6 day of 2, 2012.

Leopoldo Mendoza
LEOPOLDO MENDOZA

Maria Mendoza
MARIA MENDOZA

TOTAL SETTLEMENT AMOUNT: $_____

STATE OF TEXAS)
)
COUNTY OF EL PASO)

On this 6 day of 2, 2012, before me personally appeared **LEOPOLDO MENDOZA** and **MARIA MENDOZA** to me known to be the persons named in and who executed the Release and acknowledged that the same was executed of their own free act and deed.

Witness my hand and notary seal the date aforesaid.

Notary Public
My Commission Expires: 2/22/2014

I hereby certify that I have read the foregoing and have counseled my client, **LEOPOLDO MENDOZA** and **MARIA MENDOZA** regarding the terms of this Release prior to their signing of the Release.

Attorney for **LEOPOLDO MENDOZA**

United States District Court
for the Southern District of Texas
(Galveston Division)

JAMES CHAPOY, Plaintiff
v.
UNION PACIFIC RAILROAD, INDIVIDUALLY, AND AS SUCCESSOR-IN-INTEREST TO SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant.

Civil Action No. 3:20-cv--169

[Filed April 16, 2021]

AFFIDAVIT OF BRUCE HALSTEAD

This Affidavit is made on personal knowledge. I am a lawyer with the FELA law firm of Jones Granger and have been for 34 years. My primary focus for many years has been in representing railroad worker clients who have personal injury or wrongful death claims arising from their occupational exposure to asbestos. This Affidavit is being provided to counsel for our law firm's former client James Chapoy to be used in response to a statute of limitations defense in his case, and, for convenience, in response to a "release" defense being asserted by the Union Pacific against other former Jones Granger clients who are pursuing "second injury/cancer" cases.

Our Firm is "designated union counsel." As such, our ethical responsibilities include advising union members of their legal rights and assist them in evaluating and pursuing same. By virtue of this, we

have hundreds of clients who have had personal injury cases against the Union Pacific Railroad.

I am a signatory to the October 31, 2001 Master Statute of Limitations Tolling Agreement. This Agreement was initiated by Bob Galley at the Union Pacific. He told me that Union Pacific wanted this Agreement so as to avoid the defense costs associated with hundreds of lawsuits involving asbestos claims and to resolve claims in a more timely and efficient manner.

Hundreds of our clients made claims that were "tolled" pursuant to this Agreement. Not once, until this case, has the Union Pacific ever suggested that any client's case was barred by limitations by virtue of not being resolved within one year of that client's addition to the list of Jones Granger claimants. Nor has the Union Pacific ever provided the written notice described in paragraph 5 withdrawing any client's case from the Tolling Agreement.

From time to time, as Mr. Cowan testified in his deposition in this case, I would provide a notice letter withdrawing one of our clients from the Tolling Agreement. One of the reasons for such a notice was that the client had decided to pursue litigation. I provided a similar notice with respect to Mr. Chapoy's case on July 14, 2020, which was actually a few weeks after this lawsuit was filed. A similar notice was also provided with respect to the case of Lawrence Hedgecock, whose lawsuit was filed in this Court and settled on the eve of trial.

Paragraph 3 of the Tolling Agreement provides for a one-year tolling period "subject to extension by agreement of the patties." Nothing in the Agreement requires that any such extension be formalized in writing, and, as a matter of practice, these matters were handled informally between me and Mr. Cowan. By contrast, however, paragraph 5 specifically requires a written notice if either party wanted to terminate the Tolling Agreement.

In my judgment, absent a formal notice of withdrawal under paragraph 5, both parties agreed to an "extension" of the one-year tolling period by actively pursuing hundreds and hundreds of cases for years and years, and ultimately settling the vast majority of them with no mention whatsoever of the statute of limitations or tolling.

In November of 2016, the Union Pacific modified our Tolling Agreement by advising me, informally through Mr. Cowan, that it would no longer accept any new claims under the ambit of the Master Tolling Agreement. There was no formal written amendment of the Agreement. The reason they did this was enabling both sides to control the universe of claims from Jones Granger clients and attempt to resolve them in a timely and efficient manner.

This goal was accomplished in December of 2017. At that time, we entered into a simultaneous settlement agreement of approximately 587 claims. Although Union Pacific was willing to settle these cases individually, it insisted on a 94% acceptance rate from our clients in order to go effectuate the agreed negotiated settlement. Regarding the 6% who might

choose not to settle, they would continue to be in the "tolled" category, unless/until either party provided the written 30-day notice under paragraph 5. I notified Mr. Cowan of nine clients who had decided not to accept the railroad's offer of settlement. By email dated December 13, 2017, Mr. Cowan acknowledged that these nine, which included both Larry Hedgecock and James Chapoy, would be excluded from the settlements. However, he did not provide the written notice under paragraph 5 withdrawing the agreement to toll with respect to these claimants.

Union Pacific lawyers drafted the boilerplate release documents and insisted that we use them all 587 cases. Only the names and other pertinent personal information differed. Our law firm agreed to allow our clients to sign these documents with this verbiage for three reasons. First, the Railroad insisted on this verbiage and the money being paid for most claims did not justify a protracted dispute with them. Second, under the prevailing case law interpreting section 55 of FELA and discussing the "second injury rule," we did not believe that these boilerplate documents would preclude any second injury claim for the clients, including a subsequent diagnosis of cancer. Third, the Union Pacific had historically resolved similar second injury claims where there had been prior releases with similar language without ever claiming that the prior boilerplate release precluded the claim.

As Mr. Cowan testified, both the Union Pacific and our law firm kept separate lists of pending and "tolled" claims, and periodically we would update and "reconcile" them. The 17-page document entitled

"UPRR Settlement Project - Claimant List", contained on pages CHAPOY 000247-263 is his reconciliation list as of that time. It was prepared by Union Pacific's lawyers. and it lists numerous Jones Granger claimants in alphabetical order. The information under "Column I" was inserted by Union Pacific's lawyers at Mr. Cowan's law firm. Our client Darrell Denney was one of the 587 cases.

One client on the list, "HY" was noted as being "removed from tolling agreement - to be removed from list." This is because I had provided Union Pacific with a written notice under paragraph 5 terminating the Tolling Agreement in accordance with specific instructions from that client to me.

The specific amounts of the settlements are confidential and, although neither our law firm nor our clients would object to a release of these amounts, unless/until the Union Pacific agrees to waive confidentiality, I am not willing to share specific settlement amounts. What I can tell the Court, however, is that the "non-malignant cases" settled for far less money than cases involving clients with similar work histories, smoking histories, etc., but who had a diagnosis of a cancer. For example, the average settlement of a case involving asbestos exposure and lung cancer (the easiest cancer to connect medically to asbestos exposure) and a history of smoking (the Railroad's strongest "contributory negligence" defense) settled for approximately 4x the amount that a "non-malignant" case would be paid, all other things being similar. With regard to all other forms of cancer, the average settlement for a "malignant" case would be approximately 3x the

settlement for a similarly situated client in the "non-malignant" category. Needless to say, mesothelioma cases, which involve a cancer that is caused solely by asbestos exposure, settled for far more than non-malignant cases. Thus, in my judgment, the "consideration" paid for settlement of any "non-malignant" case was not adequate to suppo1t a "full and final release" for a subsequent injury claim, including a diagnosis of cancer.

Further, Affiant sayeth not.

Bruce Halstead

SUBSCRIBED AND SWORN TO before me by Bruce Halstead on this 16th day of April 2021.

KARIN L. SHEPHERD
Notary Public, State of Texas
Comm. Expires 07-17-2023
Notary ID 3151895

Notary Public in and for
The State of Texas

United States District Court
for the Southern District of Texas
(Galveston Division)

JAMES CHAPOY, Plaintiff,
v.
UNION PACIFIC RAILROAD, INDIVIDUALLY, AND AS SUCCESSOR-IN-INTEREST TO SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant.

Civil Action No. 3:20-cv—169

[Taken on March 18, 2021]

ORAL AND VIDEOTAPED DEPOSITION OF TRACY COWAN

REPORTED REMOTELY DUE TO THE COVID-19 STATE OF DISASTER

ORAL AND VIDEOTAPED DEPOSITION OF TRACY COWAN, produced as a witness at the instance of the PLAINTIFF, and duly sworn, was taken in the above-styled and numbered cause on March 18, 2021, from 2:04 p.m. to 2:54 p.m., by machine shorthand before MICHELLE R. PROPPS, CSR, in and for the State of Texas, reported via Zoom videoconference, pursuant to the Federal Rules of Civil Procedure and the provisions stated in the record or attached hereto.

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A. Okay.

Q. Mr. Cowan, my name is Andy Vickery. I'm a lawyer in Houston, Texas. And I represent the plaintiff, James Chapoy, in this litigation against Union Pacific.

Do I understand correctly that for a fairly lengthy period of time, you were a lawyer who represented Union Pacific?

A. That is correct.

Q. Can you give me the approximate times or dates of your representation?

A. I have -- I started representing Union Pacific in 1994 and represented them till probably

2019. And then have been engaged -- or retained to appear on behalf -- or not on behalf, but in -- in my role as former counsel for this matter.

Q. Oh, for the deposition today?

A. Yeah.

Q. Other than that, have you had any representation of Union Pacific since, say, mid-2019?

A. No.

Q. In what capacity -- let's just look at the -- the period of time from, say, 2010 until 2019, that -- that decade.

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In what capacity did you represent the Union Pacific?

A. As counsel.

Q. Were you their national lead counsel for a certain segment of litigation?

A. Yeah. I -- yeah. I was trying to think whether that would be a privileged question or not.

But I've certainly made statements on the record in court about it, so it's -- I'd say it's not. Yeah, for a lengthy period of time.

Q. And was it just with regard to asbestos or other occupational exposures or was it broader scope?

A. It depended on the year. Primarily asbestos.

Q. Okay, sir. Now, would you look at Exhibit 1 that we've previously marked and provided to everyone.

(Exhibit No. 1 Marked.)

Q. (By Mr. Vickery) It's a two-page document entitled Master Statute of Limitations Tolling Agreement.

A. I have it in front of me.

Q. Are you the author of that agreement?

MR. HUDSON: And I'll just go ahead

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Q. Yes.

A. -- is -- was a confidential agreement between Jones & Granger and Union Pacific. So to the extent that there's any issues in terms of the -- the -- the dissemination of this deposition transcript or a protective order with respect to the substance of it, I -- the things that I am disclosing, I'm doing so with the understanding that

it is a confidential agreement and should be treated as such.

Q. Well, thank you for bringing that up. As I've already said, I don't intend to go into any of the financial details. I don't know if there's any other question of confidence beyond that, but if there is, Mr. Hudson and I will work that out, so --

A. Yeah. I -- I -- just for purposes of -- as I'm discussing these things and the process, I -- it just kind of made me think that -- that there's certainly -- there are confident- -- confidential aspects to this that for Mr. Chapoy, as a party, you know, it may not be an issue, but dissemination beyond that I think would be inappropriate.

Q. Okay. Let's back up if we can and --

and get a little understanding of the people you had

this relationship with, the Jones Granger law firm.

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Who was the lawyer at that firm with

whom you had, you know, the regular -- regular point

of contact, if you will?

A. Bruce Halstead.

Q. All right. And did you have a good

relationship over the years with Mr. Halstead?

A. Absolutely. I consider him a friend.

Q. Did you have any reason to ever question

his integrity or honesty?

A. No.

Q. Now, tell me about that law firm. What

did you know about the Jones & Granger law firm?

A. I mean, I've met Weldon Granger. I know -- I guess I know a fair amount because I've spent a lot of time with Bruce. I -- Norman Jones, who -- of Jones & Granger is from Macon, Missouri, which is where I'm from.

Q. Ah.

A. So there are a lot of stories about Norman that I heard over the years. I never got the opportunity to meet him. Bob Norton, who was also a member of the law firm, I went to high school with, Mizzou law school with. Bob was working at Thompson & Mitchell when I started at Thompson & Mitchell.

And then -- and was doing the Union Pacific work and

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correspondence from Jones & Granger to her directly

related to timing of the settlement fund

distributions is my recollection.

Q. Okay. Yeah. That -- that happened -- I

mean, it took y'all a year, year and a half to

finalize and fund all of these simultaneous

settlements. Right?

A. Correct.

Q. And you continued to be active in Union

Pacific's behalf throughout that period. True?

A. Correct.

Q. Okay. Let me just check here. Just

bear with me. I'm going down my checklist. That's

a good sign.

A. Yes.

Q. Oh, here's -- here's another question.

In terms, again, of your discussions with -- with Mr. Halstead, not with your own client in a privileged context, did y'all sort of distinguish between claims that were, quote, "malignant" and claims that were "non-malignant"?

A. I mean, I -- I think -- so the primary way that that would have been a distinction would have been that we would resolve groups of folks that were malignant or non-malignant sometimes. Like, he

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would say, Okay, let's resolve a group of malignant matters, or, Here's a group of non-malignant

matters.

The only other way that -- that it would be handled differently was that with respect to malignant claims, there was frequently a greater urgency in terms of taking a statement, attempting to resolve the claims because of the condition of the -- the claimant and the potential for them to, you know, decease.

Q. Right. And by "malignant," we're talking about people who had a medical diagnosis of a cancer. Right?

A. That is accurate.

Q. Okay, sir. And those cases -- it probably goes without saying, but let's make it clear on the record. Those cases, from a settlement

evaluation standpoint, were more costly to resolve than non-malignant cases. True?

A. Historically, that's accurate.

Q. Mr. Cowan, I have no further questions.

MR. VICKERY: And I will pass the witness.

MR. HUDSON: We'll reserve all questions for a later time.

United States District Court
for the Southern District of Texas
(Galveston Division)

JAMES CHAPOY, Plaintiff,
v.
UNION PACIFIC RAILROAD, INDIVIDUALLY, AND AS SUCCESSOR-IN-INTEREST TO SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant.

Civil Action No. 3:20-cv—169

REPORTER'S CERTIFICATION
ORAL DEPOSITION OF
TRACY COWAN

REPORTED REMOTELY DUE TO THE COVID-19 STATE OF DISASTER

I, MICHELLE R. PROPPS, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, TRACY COWAN, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

I further certify that pursuant to FRCP Rule 30 (f) (1) that the signature of the

deponent X was requested by the deponent or a party before the completion of the deposition and returned within 30 days from date of receipt of the transcript. If returned, the attached Changes and Signature Page contains any changes and the reasons therefore;

I further certify that I am neither attorney nor counsel for, related to, nor employed by any of the parties to the action in which this testimony was taken. Further, I am not a relative or employee of any attorney of record in this cause, nor am I financially or otherwise interested in the outcome of the action.

Subscribed and sworn to on this the 5th day of April, 2021.

MICHELLE PROPPS, CSR
Expiration Date 10-31-21
Hanna & Hanna, Inc.
Firm Registration No. 10434
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