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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	92081595
Party	Defendant Honest History Co.
Correspondence address	ERICA VAN LOON NIXON PEABODY LLP 300 SOUTH GRAND AVENUE, SUITE 4100 LOS ANGELES, CA 90071-3151 UNITED STATES Primary email: <a href="mailto:evanlann@nixonpeabody.com">evanlann@nixonpeabody.com</a> Secondary email(s): <a href="mailto:kmorrison@nixonpeabody.com">kmorrison@nixonpeabody.com</a> , <a href="mailto:sftm@nixonpeabody.com">sftm@nixonpeabody.com</a> , <a href="mailto:SF.managing.clerk@nixonpeabody.com">SF.managing.clerk@nixonpeabody.com</a> 213-629-6031
Submission	Opposition/Response to Motion
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Signature	/KPM/
Date	03/26/2024
Attachments	Honest History response and opposition to Motion to Declassify - redacted.pdf(601261 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE  
TRADEMARK TRIAL AND APPEAL BOARD**

Mercury One, Inc.,	)	
	)	
	)	
v.	)	Cancellation No. 92081595
	)	
Honest History Co,	)	
	)	
Respondent	)	
	)	

**RESPONDENT HONEST HISTORY CO.’S OPPOSITION AND RESPONSES TO  
PETITIONER’S MOTION TO DECLASSIFY DEPOSITION TRANSCRIPTS AND  
MOTION FOR SANCTIONS**

Respondent Honest History Co. (“Respondent” or “Honest History”) hereby responds as follows in opposition to Petitioner Mercury One’s (“Petitioner”) motion to Declassify Six Deposition Transcripts From Attorney’s Eyes Only Highly Confidential Designation Under Protective Order (the “Motion”). *Dkt. 13*.

The Motion filed by Petitioner on March 6, 2024, in this Cancellation Proceeding is premature, moot, and an unnecessary waste of the Board’s resources, just like the entirety of this proceeding.<sup>1</sup> Furthermore, the Motion violates the Trademark Trial and Appeal Board’s (“TTAB” or “Board”) Standard Protective Order (the “Protective Order”) by publicly disclosing documents marked confidential and attorneys’ eyes only without filing them under seal.

This Cancellation Proceeding is frivolous on its face. Petitioner is seeking to cancel Respondent’s Registrations but at the same time has filed its own application seeking to protect a mark containing the *identical* and exact wording contained in Respondent’s registrations. Petitioner’s case has no merit and is an obvious attempt by Petitioner and its counsel to bully

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<sup>1</sup> This is not the first instance where Petitioner’s counsel has ignored the rules and failed to work amicably with Respondent’s counsel. Earlier in this proceeding, Petitioner’s counsel unilaterally selected a date to depose a third-party witness (Karen Dougherty) on which Respondent’s counsel was unavailable and proceeded with the deposition on that date over the objections of counsel. On March 25, 2024, United States Magistrate Judge Rebecca Rutherford of the Northern District of Texas issued an order granting Respondent the opportunity to depose Ms. Dougherty for two hours.

Respondent, a small business who provides children's magazines and related educational materials, into giving up its trademarks. Petitioner's repugnant behavior should not be countenanced.

Through this Motion and earlier emails Petitioner prematurely and repeatedly requests, amounting to undue, unrelenting harassment, that Respondent amend the classification of the six discovery depositions taken in this matter from Attorney's Eyes Only or Confidential *before* the allotted thirty (30) days provided under the Board's Protective Order to review the official deposition transcripts and exhibits. Petitioner may believe portions of the transcripts and certain exhibits do not need a protective designation under the Protective Order, but Petitioner has not articulated any legitimate or constructive reason as to why the transcripts should not be *at least* confidential in order to be protected from public display. Under the Protective Order, documents designated as confidential may be shared with the parties and all of their attorneys. There is no legitimate purpose for entirely de-designating the transcripts as anything other than confidential. Not only was sensitive and non-public information discussed during the depositions but Respondent has genuine concerns that Petitioner's campaign to de-designate the transcripts from Attorneys' Eyes Only or Confidential is so they may be posted online to further harass Respondent, a small business with the sole mission of being able to continue to provide their educational materials to kids around the world.

Under the Board's Standard Protective Order, "[d]uring discussion of any non-documentary protected information, the interested party shall make oral note on the record of the protected nature of the information." *TTAB Standard Protective Order, Section 8*. Counsel for Petitioner did so, at every opportunity.

The first instance of this issue was initiated by counsel for the Petitioner during Petitioner's discovery deposition of David Knight on January 31, 2024. Counsel for Petitioner entered into the record confidential settlement communications between the parties regarding the very issue at hand in this matter. He then proceeded to try and ask questions about those communications and the substance of the communications. Counsel for Respondent immediately objected to the exhibit being marked and any questioning related to the document. *See Exhibit A, D. Knight Deposition Page 235, Line 25 to Page 238, Line 18*. Later in the deposition, counsel for Respondent advised that due to this line of questioning and the marked exhibit, counsel for Respondent designated the entirety of the transcript and accompanying exhibits as attorneys' eyes only and advised that once

there had been a chance to review the transcript, counsel for Respondent would advise if sections would be de-designated to confidential. *See Exhibit A, D. Knight Deposition Page 261, Line 9-Page 262, Line 12.*

The inclusion of exhibits, questions, and discussion relating to confidential settlement communications, *on the record* and in direct defiance of the concerns raised by counsel for Respondent was so shocking that counsel determined all deposition transcripts in the matter should be protected until such time as counsel could thoroughly consider the matter, review the transcripts and exhibits, and make an informed decision as to how to respond and move forward. This proved warranted because during Respondent's depositions of Ms. Suzanne Grishman, Elijah O'Neal as the 30(b)6 designee on behalf of Petitioner, and Mr. David Barton, each of Petitioner's witnesses on their own volition brought up confidential, inadmissible settlement communications on the record. As such, counsel for Respondent felt it appropriate to designate the transcripts of David Knight, Suzanne Grishman, Elijah O'Neal, and David Barton as Attorneys' Eyes Only under the Protective Order, in order to protect the confidentiality of Honest History and to take the time allotted under the Protective Order to carefully review the official transcripts and give proper consideration to the matter, instead of being forced into an incorrect decision by counsel for the Petitioner, who seemed to want to make a same-day decision and was not inclined to wait for proper review of the transcripts. During each deposition, counsel for Honest History repeatedly advised counsel for the Petitioner that while they marked each deposition transcript and the accompanying exhibits as Confidential or Attorneys' Eyes Only, they intended to take the necessary and allotted time under the Federal Rules and Protective Order to review the official transcripts and would then be willing to discuss any appropriate de-designations. *See Exhibit B, Transcript for Brooke Knight, Pg. 118 Lines 21-25 ( [REDACTED] [REDACTED] [REDACTED] ); Exhibit C, Transcript for Heidi Coburn, Pg. 80, Lines 17-22 ( [REDACTED] [REDACTED] [REDACTED] ); Exhibit D, Transcript for Suzanne Grishman, Pg. 217-218, Lines 19-4 ("Mr. Pollack: Also, so I don't forget, we're going to designate the entirety of this deposition as attorneys' eyes only because there was discussion in part of it of*

[REDACTED]; *Exhibit E, Transcript for Elijah O’Neal, Pg. 231 Lines 3-7 (“I don’t think I’ve said this before. As with the other transcripts, we’re going to mark the entirety of this one as attorneys’ eyes only, and then after we have the final transcript, we will go over it and de-designate as appropriate.”); Exhibit F, Transcript for David Barton, Pg. 147, Lines 10-15 (“I’m going to designate the entire transcript as attorney’s eyes only, as we’ve indicated in prior depositions. Once we get the final transcript, we’ll take 30 days, review the transcript and then de-designate, as we think appropriate.”).*

After continuous emails from counsel for Mercury One, counsel for Honest History reiterated what it had advised counsel for Mercury One at each deposition, namely, that once the final transcript for each deposition was available counsel for Honest History would take the allotted thirty (30) days to review the transcripts and would then advise as to any changes in the level of protection for the transcripts. *See Exhibit 3 of Petitioner’s Motion.*

During the six depositions taken in the Cancellation Proceeding from January 31, 2024 to February 21, 2024, counsel for Honest History designated the transcripts and exhibits of David Knight, Suzanne Grishman, Elijah O’Neal, and Charles David Barton as Confidential – Attorneys’ Eyes Only because there was substantive discussion of inadmissible settlement agreements and exhibits regarding settlement discussions on the record. The depositions for Brooke Knight and Heidi Coburn were designated as Confidential for further review.

Under the Board’s Standard Protective Order, “[t]he transcript of any deposition (whether for discovery or testimony purposes) and all exhibits or attachments shall be considered protected for 30 days following the date of service of the transcript by the party that took the deposition. During that 30-day period, either party may designate the portions of the transcript, and any specific exhibits or attachments, that are to be treated as protected, by electing the appropriate designation from paragraph 1.” *TTAB Standard Protective Order, Section 8.* Even without the designation by counsel for Honest History at the depositions, the transcripts and exhibits would still have been considered protected under the Protective Order for thirty (30) days from the date of service. However counsel for Petitioner disregarded the Protective Order and not only brought this unwarranted, premature motion but further publicly filed materials designated as Attorneys’

Eyes Only and Confidential, in clear violation of the Protective Order. Counsel for Petitioner filed the instant motion on March 6, 2024, just twenty-one (21) days after receiving the first official transcript on February 14, 2024 for the first deposition in this case, and only 14 days after the final discovery deposition of David Barton was conducted on February 12, 2024.

Petitioner's motion was premature when filed and is now an unnecessary use of the Board's resources. As promised, upon review and inspection, counsel for Respondent advised counsel for Petitioner on March 14, 2024 (one month after receiving just the first transcript) of a few amendments to the transcripts and de-designated the transcripts as follows:

- With regard to the transcript for David Knight's deposition, the transcript may be de-designated in its entirety to Confidential under the Protective Order, but the following shall remain **Confidential - Attorneys Eyes Only**:
  - Exhibit 29
  - Page 180, Line 15 to Page 206, Line 20
- With regard to the transcript for Brooke Knight's deposition, the transcript may be de-designated in its entirety to Confidential under the Protective Order.
- With regard to the transcript for Heidi Coburn's deposition, the transcript may be de-designated in its entirety to Confidential under the Protective Order.
- With respect to the designation of the transcript for Ms. Grishman's deposition, the following pages and lines shall be deemed Confidential and we object to the following content remaining in the transcript entirely:
  - Page 103, Line 6
- With respect to the designation of the transcript for Mr. O'Neal's deposition as the Mercury One 30(b)(6) designee, the following pages and lines shall be deemed Confidential and we object to the following content remaining in the transcript entirely:
  - Page 136, Lines 3-6
  - Page 138, Line 21
  - Page 229, Lines 18-25
  - Page 304, Lines 13-16
  - Page 313, Line 4
- With respect to the designation of the transcript for Mr. Barton's deposition, the following pages and lines shall be deemed **Confidential** and we object to the following content remaining in the transcript entirely:
  - Page 27, Line 23
  - Page 139, Line 25

*Exhibit G.* Counsel for Mercury One has indicated they still do not agree with these designations and have declined to withdraw this unnecessary motion. Counsel for Respondent recognizes the importance of properly designating the discovery materials in this Proceeding and is willing to further discuss certain sections of the transcripts and exhibits with counsel for Petitioner, without utilizing the time and resources of the Board. However, as noted above,

Respondent is very hesitant to de-designate large portions of the transcripts, when, as currently designated, they can already be viewed by all parties and their counsel. However, in the interest of compromise, Respondent is willing to de-designate the following Exhibits for the transcripts of David Knight, Brooke Knight, and Heidi Coburn as not-confidential:

- Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 39, 41, 42, and 43 to the transcript for David Knight;
- Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 17, 18, 19, and 20 to the transcript for Brooke Knight; and
- Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, and 19 to the transcript of Heidi Coburn.

These specific Exhibits solely consist of already public documents and may be de-designated without a protective designation.

In addition, after further review, Respondent designates the following as **Confidential**:

- Exhibit A to the Transcript for Suzanne Dougherty, specifically pages 303-312 of the Exhibit – Bates Numbered MERC 1098 – 1107.

Petitioner’s inclusion of the FRE 408 settlement communications, as well as portions of the transcripts that are clearly labeled ATTORNEYS’ EYES ONLY and CONFIDENTIAL in the public motion, not under seal, is a direct violation of the Protective Order and the long-standing policy that such communications should be kept confidential and protected from public disclosure in the interest of encouraging compromise and frank settlement communications between parties. The public disclosure of settlement communications is “inappropriate, irresponsible, contrary to well-accepted practice, and beneath the dignity of [] counsel...”. *Cambria Co. LLC v. Hirsch Glass Corp.*, 2023 U.S. Dist. LEXIS 175833, at \*10-11 (D.N.J. September 29, 2023). “Though Rule 408 governs evidence admissible at trial, courts have relied on the policy underlying the rule to prevent disclosure of confidential settlement discussions in pleadings.” *Id.* at \*12 citing *Philadelphia’s Church of Our Savior v. Concord Twp.*, Civ. No. 03-1766, 2004 U.S. Dist. LEXIS 15400, 2004 WL 1824356, at \*2 (E.D. Pa. July 27, 2004) (“While Rule 408 does not apply to pleadings directly, repeated decisions from this Court have held that allegations in a complaint may be stricken, under Rule 12(f), as violative of these policies.”); *Washington v. Pac. Summit Energy LLC*, Civ. No. 20-290, 2021 U.S. Dist. LEXIS 11841, 2021 WL 229653, at \*4 (S.D. Tex. Jan 21, 2023) (“Although

Rule 408 patently applies to evidence, the rationale for the exclusion of evidence equally applies to excluding confidential settlement discussion from being revealed in pleadings.”). Where confidential settlement communications should be kept from public disclosure in pleadings, they should likewise be kept from public disclosure in motions.

Accordingly, due to this intentional violation of confidentiality and disregard for the Protective Order and the Federal Rules of Evidence, pursuant to the Board’s authority under Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 527.01(a), Respondent requests the Board impose sanctions against Petitioner and Petitioner’s attorney for failure to comply with the Board’s Protective Order. Respondent requests the Board strike Petitioner’s motion from public record, or at the In least the Exhibits attached to Petitioner’s motion that are confidential settlement communications or otherwise marked at CONFIDENTIAL or ATTORNEY’S EYES ONLY, order Petitioner to comply with the Protective Order and the protective designations set by Respondent until the parties can come to an agreement on the designations, hold Petitioner, and its attorneys, in contempt of the Board for failure to obey and comply with the Protective Order, and any other sanctions the Board may deem appropriate to protect Respondent’s confidentiality.

Respectfully submitted,

**NIXON PEABODY LLP**

Dated: March 26, 2024

/Kaleigh P. Morrison/

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Joshua Pollack

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*Attorneys for Respondent*



**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing Respondent's Opposition and Responses to Petitioner's Motion to Declassify Deposition Transcripts were served on Petitioner's counsel, this 26<sup>th</sup> day of March, 2024, addressed to Scott Hemingway via email to [shemingway@hh-iplaw.com](mailto:shemingway@hh-iplaw.com) and [ehartman@hh-iplaw.com](mailto:ehartman@hh-iplaw.com) .

March 26, 2024

*/Kaleigh P. Morrison /*

# EXHIBIT D

1 THE REPORTER: Off the record.

2 (Break taken from 5:02 to 5:13 p.m.)

3 (Exhibit 22 marked.)

4 Q. (BY MR. POLLACK) All right. Ms. Grishman,  
5 you understand you're still under oath?

6 A. Yes, sir.

7 Q. And have you taken -- sorry. Did you discuss  
8 the substance of this deposition with Mr. Hemingway at  
9 all during this past break?

10 A. No, sir.

11 Q. By the way, have you been taking notes during  
12 the deposition? I couldn't quite tell if you've been  
13 marking things down.

14 A. I have taken some notes to make sure I  
15 remember your question.

16 Q. I'm just going to ask that those notes be  
17 produced to us when we're done with this deposition.

18 A. Sure.

19 MR. POLLACK: Also, so I don't forget,  
20 we're going to designate the entirety of this deposition  
21 as attorneys' eyes only because there was discussion in  
22 part of it of confidential settlement communications,  
23 including a particular settlement number.

24 We'll review the transcript once it's  
25 done and we'll probably de-designate portions of it, but

1 I can't make that determination until after we have the  
2 final transcript. So in the interim, we're going to  
3 mark it attorneys' eyes only, the entirety of the  
4 transcript.

5 MR. HEMINGWAY: Do you know when you  
6 might be able to get back to us on that?

7 MR. POLLACK: Not until we get a final  
8 transcript. And then once we have that, we can work out  
9 a reasonable time frame afterward.

10 MR. HEMINGWAY: Yeah, well, we may talk  
11 to you about that later.

12 MR. POLLACK: Okay. We don't have to do  
13 that right now.

14 MR. HEMINGWAY: But in the meantime,  
15 we'll have the same request that we had with respect to  
16 the transcripts last week, is that we be allowed to show  
17 the transcripts to our experts. And if you want me to,  
18 I'll send you an e-mail and include this transcript as  
19 well, if you wish.

20 MR. POLLACK: Okay. I mean, our response  
21 will be the same as we had last week so -- let's just --  
22 I don't want to keep more -- any more of Ms. Grishman's  
23 time than I need to, so if we have other things to  
24 discuss, we can do it separately.

25 Q. (BY MR. POLLACK) We've marked -- we've put up

1 we've been using it for years.

2 MR. HEMINGWAY: Can you read back his  
3 question for me, please?

4 THE REPORTER: Do what with it?

5 MR. HEMINGWAY: Read back his question.

6 (Requested portion read by the reporter.)

7 MR. POLLACK: Just give me a minute.

8 Okay. I have no further questions.

9 THE REPORTER: Anything else?

10 MR. HEMINGWAY: No, nothing. That's  
11 good.

12 MR. POLLACK: I'll thank you for a second  
13 time. I just want to reiterate because I was not aware  
14 of the conclusion of the deposition, number one, I do  
15 want all the notes that were taken by the witness today  
16 to be produced.

17 Two, I'm designating the entirety of the  
18 transcript and all of the exhibits as attorneys' eyes  
19 only, just so we're clear for the record.

20 Again, thank you for your time,  
21 everybody. I know it's late in Texas, and I appreciate  
22 your patience.

23 MR. HEMINGWAY: Just so we're clear, the  
24 deposition of Karen Dougherty was supposed to be  
25 tomorrow. Is there a status on that?

# EXHIBIT E

1 settlement discussions as inappropriately put into the  
2 record in this cancellation proceeding.

3 I don't think I've said this before. As  
4 with the other transcripts, we're going to mark the  
5 entirety of this one as attorneys' eyes only, and then  
6 after we have the final transcript, we will go over it  
7 and de-designate as appropriate.

8 Q. (BY MR. POLLACK) Mr. O'Neal, are there any  
9 other factual bases for your allegation in paragraph 17  
10 of your petition for cancellation?

11 MR. HEMINGWAY: So just so we move on,  
12 you're designating the entire -- the entirety of the  
13 transcript attorneys' eyes only because of the one  
14 portion of the statement that was just made in that last  
15 response?

16 MR. POLLACK: I'm designating it as I  
17 feel appropriate, and then as I said, we will revisit.  
18 It was something I should have said earlier, but this  
19 triggered it in my head that I should have said it  
20 earlier.

21 MR. HEMINGWAY: We don't believe that's  
22 appropriate under the protective order that you can  
23 designate a little bit narrower than that. But I think  
24 we can take that up.

25 MR. POLLACK: Yep.

# EXHIBIT F



1 done or done. I just want to go over my notes, and then  
2 I'll either be done or I might have a couple of just  
3 followup questions, but we're close.

4 THE WITNESS: Sure. No worries.

5 MR. POLLACK: Let's just take ten minutes,  
6 if that's okay.

7 (Break)

8 MR. POLLACK: Back on the record. I have  
9 no further questions of the witness.

10 I'm going to designate the entire  
11 transcript as attorney's eyes only, as we've indicated  
12 in prior depositions.

13 Once we get the final transcript, we'll  
14 take 30 days, review the transcript and then  
15 de-designate, as we think appropriate.

16 MR. HEMINGWAY: And is it the same basis as  
17 before, Josh, your designation?

18 MR. POLLACK: It is the same basis as we  
19 articulated in prior depositions.

20 MR. HEMINGWAY: Okay. Well, I don't want  
21 to have to rehash it. I just want to know if it's the  
22 same reasoning that you gave us before. So okay. Are  
23 we all done?

24 MR. POLLACK: I have nothing further.

25 MR. HEMINGWAY: Nothing for us.

# EXHIBIT G

## Morrison, Kaleigh

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**From:** Scott Hemingway <shemingway@hh-iplaw.com>  
**Sent:** Wednesday, March 20, 2024 8:27 PM  
**To:** Morrison, Kaleigh  
**Cc:** Docketing; Admin; Elizabeth Hartman; Van Loon, Erica; Pollack, Joshua  
**Subject:** RE: Response to Motion - Re-designation of transcripts - D. Knight and H. Coburn Errata sheets RE: Service Motion to De-Classify Six Deposition Transcripts from AEO Highly Conf. Mercury One v. Honest History (NP Ref. 099642-005986USCL)

Dear Everyone,

I have reviewed your de-classification of the deposition transcripts you previously designated as Confidential Attorney's Eyes Only under the Protective Order.

It appears that there is a single agreed position between the parties (see no. 2 below). Contrary to your email, your new positions on confidential designations under the Protective Order do not resolve entirely the motion filed by the Petitioner.

We respond to your positions as follows.

1. With respect to your classification of the deposition transcripts for Mr. Knight, Ms. Knight and Ms. Coburn as Confidential (from the prior AEO Highly Confidential designation), we do not understand or agree that these transcript pages or exhibits (apart from no. 2 above) merit a confidential designation under the Protective Order. By your "wholesale" confidential designation of these entire transcripts, you appear to be claiming that the entirety of these depositions, all their exhibits and all the information contained therein is not otherwise in the public domain, has not previously been disclosed to others, and/or merits a confidential protection under the Protective Order as sensitive business information. You know that these transcripts do not merit such a designation. I believe there must be some type of misunderstanding on your part about what constitutes "confidential" information under the Protective Order. Regardless, we do not understand how you could take that position, and we disagree with these blanket "confidential" designations.
2. With respect to Exhibit 29 and Tr. 180:15 to 206:20 in Mr. Knight's deposition transcript, I believe Petitioner acknowledged in its Motion to De-Classify that this portion of Mr. Knight's transcript and this exhibit could remain with the AEO Highly Confidential designation under the Protective Order.
3. With respect to your new position on the transcript for Ms. Grishman, Mr. Barton, and Mr. O'Neal, we disagree with your position that the demand for a [REDACTED] and/or a "final opportunity" threat of litigation from your client, is confidential under the Protective Order. Whether these communications are subject to Rule 408 is a separate issue that will depend on other things, but this Rule 408 issue appears to be unrelated to the Protective Order (which is meant to protect information that is confidential to your client's business in some manner and not otherwise or previously disclosed to the parties or the public). Further, we do not understand your position on "remaining in the transcript," which is not agreed by Petitioner.

For the reasons set forth above and the reasons set forth in our Motion to De-Classify, Petitioner will not be withdrawing its Motion to Declassify your improper designations under the Protective Order.

Yours, Scott Hemingway  
D. Scott Hemingway  
Hemingway & Hansen, LLP  
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**From:** Morrison, Kaleigh <[kmorrison@nixonpeabody.com](mailto:kmorrison@nixonpeabody.com)>  
**Sent:** Thursday, March 14, 2024 8:39 PM  
**To:** Scott Hemingway <[shemingway@hh-iplaw.com](mailto:shemingway@hh-iplaw.com)>  
**Cc:** Docketing <[docketing@hh-iplaw.com](mailto:docketing@hh-iplaw.com)>; Admin <[admin@hh-iplaw.com](mailto:admin@hh-iplaw.com)>; Elizabeth Hartman <[ehartman@hh-iplaw.com](mailto:ehartman@hh-iplaw.com)>; Van Loon, Erica <[evanloon@nixonpeabody.com](mailto:evanloon@nixonpeabody.com)>; Pollack, Joshua <[jpollack@nixonpeabody.com](mailto:jpollack@nixonpeabody.com)>  
**Subject:** Response to Motion - Re-designation of transcripts - D. Knight and H. Coburn Errata sheets RE: Service Motion to De-Classify Six Deposition Transcripts from AEO Highly Conf. Mercury One v. Honest History (NP Ref. 099642-005986USCL)

Mr. Hemingway:

As an initial matter, your Motion is not only pre-mature but entirely unnecessary because you know full well, as stated on the record in every deposition, and in subsequent email correspondence to you on February 22, 2024, that within 30 days from receipt of the final transcript for each deponent, we would review and approve the transcript and also determine de-designations, if any. 30 days is the standard time to do so under the FRCP 30(e) and Section 8 of the Protective Order, and there is simply no reason to waste the Board's time with your premature and unwarranted motion. To wit, we received the final transcript for David Knight from the court reporter on February 14, 2024, Brooke Knight on February 22, 2024, and Heidi Colburn on February 19, 2024.

Attached is the Errata sheet for David Knight and Heidi Colburn's transcripts. Brooke Knight had no changes to her transcript.

Now that we have had the opportunity to review the official transcripts, we are prepared to de-designate the deposition transcripts to Confidential under the Protective Order, with the exception of the following limitations set out below.

**David Knight**

With regard to the transcript for David Knight's deposition, the transcript may be de-designated in its entirety to Confidential under the Protective Order, but the following shall remain **Confidential - Attorneys Eyes Only**:

1. Exhibit 29
2. Page 180, Line 15 to Page 206, Line 20

Furthermore, we object to the following content remaining in the transcript entirely:

1. Page 236, Line 1 to Page 242, line 20
2. Exhibit 37

**Brooke Knight**

With regard to the transcript for Brooke Knight’s deposition, the transcript may be de-designated in its entirety to Confidential under the Protective Order.

**Heidi Coburn**

With regard to the transcript for Heidi Coburn’s deposition, the transcript may be de-designated in its entirety to Confidential under the Protective Order.

**Suzanne Grishman**

With respect to the designation of the transcript for Ms. Grishman’s deposition, the following pages and lines shall be deemed **Confidential** and we object to the following content remaining in the transcript entirely:

1. Page 103, Line 6

**Mercury One’s 30(b)(6) designee Mr. Elijah O’Neal**

With respect to the designation of the transcript for Mr. O’Neal’s deposition as the Mercury One 30(b)(6) designee, the following pages and lines shall be deemed **Confidential** and we object to the following content remaining in the transcript entirely:

2. Page 136, Lines 3-6
3. Page 138, Line 21
4. Page 229, Lines 18-25
5. Page 304, Lines 13-16
6. Page 313, Line 4

**David Barton**

With respect to the designation of the transcript for Mr. Barton’s deposition, the following pages and lines shall be deemed **Confidential** and we object to the following content remaining in the transcript entirely:

1. Page 27, Line 23
2. Page 139, Line 25

In light of the above re-designations which would appear to entirely resolve your concerns regarding the transcripts, please advise by no later than EOD Friday, March 15, 2024 if you will now withdraw your Motion as entirely moot and because it violates the Protective Order in this matter by including **confidential settlement** discussions in a public motion that was not filed under seal.

Regards,  
Kaleigh



**Kaleigh P Morrison**  
**Associate**

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**From:** Scott Hemingway <[shemingway@hh-iplaw.com](mailto:shemingway@hh-iplaw.com)>

**Sent:** Wednesday, March 6, 2024 6:21 PM

**To:** Morrison, Kaleigh <[kmorrison@nixonpeabody.com](mailto:kmorrison@nixonpeabody.com)>; Van Loon, Erica <[evanloon@nixonpeabody.com](mailto:evanloon@nixonpeabody.com)>; Pollack, Joshua <[jpollack@nixonpeabody.com](mailto:jpollack@nixonpeabody.com)>

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**Subject:** Service Motion to De-Classify Six Deposition Transcripts from AEO Highly Conf. Mercury One v. Honest History (NP Ref. 099642-005986USCL)

**[EXTERNAL E-MAIL]**

**Be Aware of Links and Attachments**

Everyone,

Please find attached our service copy of Petitioner Mercury One, Inc. Motion To Declassify Six Deposition Transcripts From Attorney's Eyes Only Highly Confidential Designation Under Protective Order. Please contact me if you have any questions or concerns.

Yours, Scott

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