

Business Court Advisory Committee

Meeting Agenda

Friday, July 11, 2014

9:00 AM to 12:00 PM

State Courts Building * 1501 West Washington * Conference Room 230 * Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 8455

	Call to Order	
Item no. 1	Introductory comments	<i>Mr. Rosenbaum, Chair</i>
Item no. 2	Approval of June 6, 2014 meeting minutes [page 2 of Meeting Packet]	<i>Mr. Rosenbaum</i>
Item no. 3	Workgroup reports: A. Case eligibility [Page 8] B. Rules, procedures, forms [Page 46] C. Judge assignment and rotation ➤ Discussion of workgroup reports	<i>Ms. Stanton</i> <i>Ms. Refo</i> <i>Judge Rea</i> <i>All</i>
Item no. 4	Roadmap ➤ Confirmation of the next meeting date	<i>Mr. Rosenbaum</i>
Item no. 5	Call to the Public Adjourn	<i>Mr. Rosenbaum</i>

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Please make requests as early as possible to allow time to arrange accommodations.

Note: *The tentative date and time for the next meeting is August 29, 2014, 9 a.m. until noon.*

Business Court Advisory Committee

State Courts Building, Phoenix

Meeting Minutes: June 6, 2014

Members attending: David Rosenbaum (Chair), Michael Arkfeld, Ray Billotte, Andrew Federhar, Glenn Hamer, William Klain, Mark Larson, Lisa Loo, Judge John Rea, Marcus Reinkensmeyer, Stephen Tully, Steven Weinberger, Judge Christopher Whitten

Attending by phone: Judge Scott Rash, Mark Rogers

Absent: Judge Kyle Bryson, Patricia Refo, Nicole Stanton

Staff: Mark Meltzer, Theresa Barrett, Sabrina Nash, Nick Olm

1. Call to Order; Introductions; Preliminary Matters. The Chair called the meeting to order at 9:05 a.m. The Chair welcomed the members and introduced himself and the committee staff. The Chair then invited the members to introduce themselves. The Chair also asked the members to summarize their expectations regarding this committee, and those expectations included the following:

- To make Arizona a more favorable forum for resolving business disputes
- To improve access to justice
- To expeditiously resolve business cases
- To create something that works well for the court
- To improve the quality of justice
- To gain the business community's support for the State of Arizona's dispute resolution system

The Chair noted that while there are a variety of business court models already in existence in other jurisdictions nationwide, this committee is not bound to use any of those models, and the members can "think outside the box" for the structure of an Arizona business court. He also observed that other jurisdictions used Arizona's existing complex civil litigation court as a model for their commercial courts.

The Chair reminded the members that this committee is subject to the open meeting requirements provided by the Arizona Code of Judicial Administration. He referred the members to a page of proposed rules for conducting this committee's business that were included in the June 6 meeting packet. These rules establish policies for a quorum, decision-making, and proxies.

MOTION: A member moved to adopt the proposed rules, which was followed by a second and unanimously passed by the members. **BCAC: 2014-01**

The Chair also reviewed Administrative Order number 2014-48, which established this committee. He noted that the committee's scope is statewide. The Order allows the committee to recommend, if appropriate, a pilot business court.

2. The Need for a Business Court in Arizona. Would Arizona benefit from the establishment of a specialty business court? The Chair pointed out that this question was discussed generally at a "concept" meeting on March 28, 2014 (the notes from the

meeting also were included in the June 6 meeting packet), and the March 28 discussion led to the establishment of this committee. Members then made the following comments concerning the need for a business court in Arizona:

- Business clients generally want answers to two questions: how long will a case take, and how much will it cost? The current civil docket does not allow accurate answers to either question. For example, discovery and motion practice is “reactive.” Costs for discovery and motions are unknown because in large measure cost is dependent on what the opposing party requests or does. The option of having a simpler approach in some commercial cases would be useful for business clients.
- A business court should utilize judges who have commercial experience. A business court should have predictable procedures and a well-defined time line that would drive down the costs of litigation.
- If a business court had a sufficient volume of cases and a stable group of experienced business judges who published their significant decisions, it would further enhance predictability and possibly result in fewer business disputes. As an example, Arizona’s tax court has authority to publish its decisions.
- Having a bench of experienced commercial judges is the most important factor for predictability. Judges must understand the climate in which business is conducted, the transactional side of business, and how to interpret contracts.
- Regular judicial rotation inhibits judges from gaining specialization in business cases and fails to optimize valuable judicial resources. Rotation of the assigned judge also impairs predictability of the outcome. However, another member noted that regular judicial rotation should not be a significant factor because business cases should be resolved quickly, and in that circumstance, rotation would still permit the same judge to manage the case from inception to disposition.
- This committee should avoid sending a signal that business cases might obtain special judicial treatment that consumer cases, for example, may not receive. Another member observed that some Arizona counties have established benches for family, tax, and other specialized areas of the law, and it seems reasonable to have a dedicated business court too. Business is good for the community as a whole. The court that is envisioned would not be “pro-business” and anti-consumer. Rather, it would resolve disputes between businesses or within a business.
- Florida’s Ninth Judicial Circuit has a detailed list of cases it allows in its business court. The idea underlying a business court is to serve the business community. Consumer cases could remain in a general civil court rather than proceed in a business court.

- Attracting quality commercial litigators to become business court judges requires an increase in compensation and benefits from what is presently offered. Also, some qualified litigators may be dissuaded from applying for the bench because of a reluctance to assume a juvenile, criminal, or family law calendar.
- The size of the superior court bench in Maricopa County, and possibly in Pima County, should offer the flexibility to have dedicated business court judges, even if they are assigned on a part-time basis. In counties without a business court, statewide rules could still provide a process for management of business cases.
- Business judges need to exercise more oversight over their cases. Judges need to hold parties' "feet-to-the-fire" to control litigation costs. On the other hand, another member suggested that broad discovery motivates parties to settle, because discovery often reveals the most probable outcome of the litigation.
- Cases can be tried more quickly and efficiently with less discovery, although this may lead to less predictability. Before discovery became institutionalized, cases went to trial with little discovery. Criminal cases, even those where the stakes are high, generally are tried more quickly, and with less discovery, than comparatively straightforward civil cases.
- Parties might be amenable to trying a \$250K civil case with little discovery, but they would be reluctant to do so in a \$250M case. Parties involved in controversies with \$100-300K at issue are frustrated by the cost of litigation.
- Cases should be eligible for a business court based on subject matter rather than party status. But if cases are eligible based on case-type, would someone need to be a "gatekeeper" in order to admit a limited volume of cases? Would an Arizona business court be similar to its tax court, i.e., that every case statewide is heard in Maricopa County? Based on current data, how many Arizona cases would be eligible for a business court? **ACTION:** Mr. Billotte and Mr. Reinkensmeyer will attempt to obtain statistical information for this committee. They noted that there may be a large number of cases in "other" or "miscellaneous" categories.
- Pretrial disclosure and ADR contribute to a decrease in the number of jury trials, which is not necessary good for the judicial system. Jury trials are an essential and valuable feature of the court system. What could be done to increase the number of jury trials?
- A higher number of cases in arbitration proceed to a hearing because there is more certainty concerning the arbitrator, and less uncertainty because there is no jury. In addition, litigation costs in arbitration are more proportional to the amount in controversy. New York's accelerated business court procedure is

similar to arbitration, because it allows only limited discovery and a case proceeds to trial in a relatively short time.

- The most important consideration for businesses is the quality of judicial decision-making. Qualitatively better decision-making by more experienced federal judges can motivate a party to file in federal court rather than state court.
- An experienced commercial litigator has little incentive to apply to the bench because judges receive substantially lower compensation and benefits than well-paid attorneys. The majority of applicants for the superior court bench are attorneys from the public sector; in the most recent appointment cycle, only two of thirty applicants were from private practice. This is a matter that should be of concern to the business community. An exercise of political will is needed to assure that judges with solid civil experience are appointed to the bench.
- Attorneys from the public sector who are appointed to the bench may not appreciate the nuances of commercial cases. In jurisdictions such as Delaware, the prestige of the bench drives parties to that forum. If Arizona had an efficient and predictable business court it could, like Delaware, attract litigation from nearby states, such as California. Some business entities are now adopting forum selection clauses in their company charters.

3. Identifying Models and Solutions. The Chair outlined three core issues that this committee needs to address. He proposed workgroups for each of these three core issues:

- A. Judicial selection, including judicial appointments (and a need for the business community to have experienced jurists), judicial assignments, and judicial rotation

On this issue, the members agreed on the importance of retaining merit selection for business court judges, and the need for compensation and benefits that would be appealing to qualified applicants from the private sector. The members also discussed judicial rotation. The rationale for rotation is that judges over the course of ten years can acquire experience in criminal, juvenile, civil, and family departments; but rotation also appears to be driven by judges' preferences for relatively brief assignments to particular benches. The members discussed options that the Supreme Court, which has supervisory authority over the superior court, could exercise concerning assignments and rotations. Options that require changes to Arizona statutes or to the State Constitution would be less practical and more difficult to implement.

- B. Case eligibility, including criteria for a business court case, whether parties would need to opt-in or opt-out, and the process for determining eligibility (and who makes the determination)

Members discussed a range of dollar value criteria for business cases. Having no minimum amount might produce an overwhelming volume of business court-eligible cases, so selection criteria should establish a monetary floor, but not a ceiling. A party

may wish to have a declaratory action heard in business court even if the party is not seeking money damages. A member referred to an administrative order in Florida's Ninth Judicial District that specifies cases that are eligible for its business court by the type of action. The members also discussed modifications to Arizona's civil cover sheet that might facilitate screening of appropriate business cases.

C. Procedures for business court cases, including rules, discovery, electronic discovery, juries, and time frames

The discussion of this topic (as well as the prior subject of case eligibility) touched on whether waiver of a jury could be an element for admission to a business court, the form of waiver (whether a failure to request a jury would suffice as a waiver, or whether an affirmative waiver would be necessary), or whether waiver of a jury is a desirable requirement for a business court case. Members supporting a waiver noted that it would be more appropriate to have resolution of a business case by an experienced commercial judge than by a lay jury. Members also briefly discussed expedited procedures; discovery limits and checklists; electronic discovery, proportionality, predictive coding, and cost-shifting; and whether rules for a business court should be contained throughout the civil rules or be contained within a single rule. One member raised the scenario of a case that is initially ineligible for a business court, which subsequently becomes eligible because of a counterclaim. Another member suggested early identification of dispositive issues in a business case, as is done by a judge and the parties during a resolution management conference in a family court case.

Members present at the meeting expressed their preferences for serving on one or more of these workgroups. The Chair will finalize the workgroup assignments and staff will notify the members.

4. Roadmap. The Chair reminded the members that this committee will provide its report and recommendations at the December 11, 2014 meeting of the Arizona Judicial Council. Accordingly, and to accommodate logistics, the committee's report and recommendations should be finalized by the first of November. The Chair would like to have an initial draft report by early September.

The Chair confirmed July 11, 2014 as the next meeting date. Administrative staff will contact members concerning their availability for a meeting in August. The members expressed a preference for morning meetings (9 a.m. until noon).

5. Call to the Public; Adjourn. There was no response to a call to the public. The meeting adjourned at 11:40 a.m.

MEMORANDUM

To: The Business Court Advisory Committee
From: The Case Eligibility Workgroup
Date: June 27, 2014
Re: Preliminary Report

The Case Eligibility Workgroup (“CEW”) was tasked with studying existing business/commercial court case eligibility models, and recommending criteria qualifying cases for possible participation in a business court. Business court eligibility requirements from a number of jurisdictions were distributed to the CEW in advance of its first meeting.

On June 23, 2014, the CEW met in an effort to discuss potential models for use in determining eligibility criteria, and develop the preliminary recommendations to the BCAC. The following summarizes that discussion:

- I. Broadly, consensus was achieved with respect to:
 - A. *Amount in Controversy Requirement* – Case eligibility should be determined through a bifurcated system which, depending upon the subject matter of the suit, may or may not require satisfaction of some threshold amount in controversy;
 - B. *Cases not Eligible for Inclusion* – Certain types of cases (personal injury suits, medical malpractice suits, etc.) should be specifically identified as ineligible for assignment to the business court;
 - C. *Gate-keeper Function* - Case eligibility should be determined by the judges assigned to the business court, perhaps with rotating “duty” judges making a conclusive determination;

D. Potential Categorical Subject Matter Eligibility:

1. *Types of Cases in which a Minimum Amount in Controversy must be met:*
 - a. Actions arising from transactions governed by the Uniform Commercial Code;
 - b. Actions involving the sale, merger, purchase, or combination of a business enterprise;
 - c. Actions involving the sale or provision of services by or to a business enterprise;
 - d. Actions arising from commercial real estate transactions;
 - e. Actions relating to surety bonds;
 - f. Actions arising from franchisee/franchisor relationships;
 - g. Actions involving malpractice claims of non-medical professionals in connection with provision of services to a business enterprise;
 - h. Actions involving insurance coverage disputes, bad faith suits, and third party indemnity claims against insurers arising under policies issued to businesses, such as claims arising under a commercial general liability policy or commercial property policy;
 - i. Actions arising from the purchase or sale of securities;
 - j. Actions arising from the purchase or sale of businesses or substantially all of the assets of businesses;
 - k. Actions involving claims under state antitrust law; and

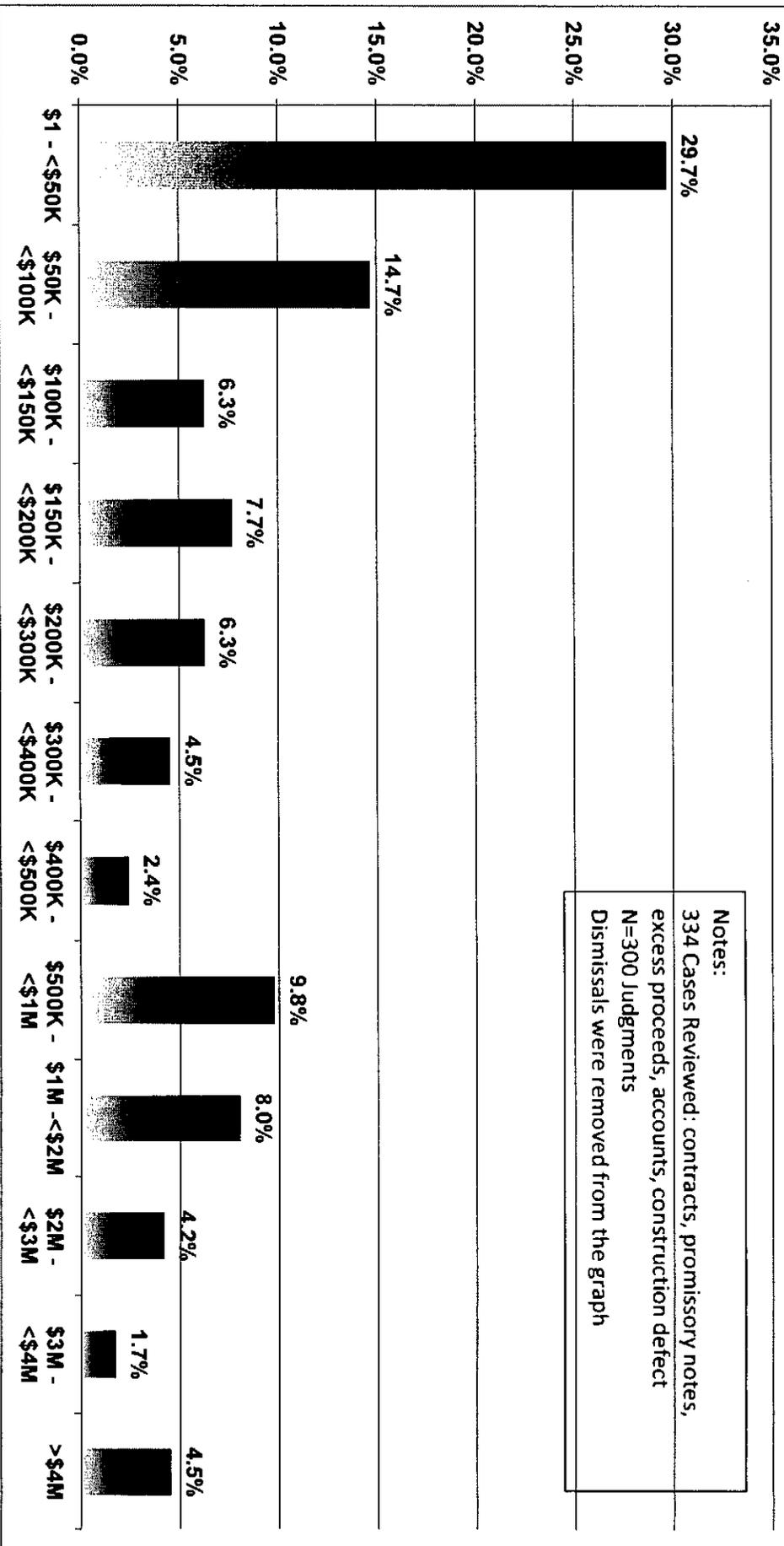
1. Actions involving claims arising out of contractual agreements or other business dealings, including unfair competition, tortious interference, intellectual property, or such other subject matter as the Court may deem proper for inclusion.
2. *Types of Cases Eligible Without Regard to Amount in Controversy:*
 - a. Actions relating to the internal affairs or governance, dissolution or liquidation rights or obligations between or among owners (shareholders, members, partners), or liability or indemnity of managers (officers, directors, managers, trustees or members of partners acting as managers) of corporations, partnerships, limited partnerships, limited liability companies or partnerships, professional associations, business trusts, joint ventures or other business entities.
 - b. Actions relating to trade secrets, or arising from non-solicitation agreements, non-compete agreements, or non-disclosure agreements; and
 - c. Shareholder derivative actions.

II. Issues requiring direction from the BCAC were identified as follow:

- A. What should be the monetary jurisdictional threshold for eligibility for those cases requiring an amount in controversy requirement?
- B. Should matters involving claims of consumer fraud be eligible for business court assignment?

Sample of Civil Business Judgments

June 24, 2014
 Cases Resolved in 2012, 2013, 2014



Notes:
 334 Cases Reviewed: contracts, promissory notes,
 excess proceeds, accounts, construction defect
 N=300 Judgments
 Dismissals were removed from the graph

**FOR THE NINTH JUDICIAL CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA**

SECTION 1 – PHILOSOPHY, SCOPE AND GOALS

- 1.1 - Citation to Procedures
- 1.2 - Purpose and Scope
- 1.3 - Goals
- 1.4 - Integration with Other Rules

SECTION 2 - CASE FILING, ASSIGNMENT, TRACKING AND IDENTIFICATION

- 2.1 - Cases Subject to Business Court
- 2.2 - Case Identification Numbers

SECTION 3 – VIDEOCONFERENCING AND TELEPHONE APPEARANCES

- 3.1 - By Agreement
- 3.2 - Responsibility for Videoconferencing Facilities
- 3.3 - Allocation of Videoconferencing Costs
- 3.4 - Court Reporter
- 3.5 - Exchange of Exhibits and Evidence to be Used in Videoconference Hearing
- 3.6 – Telephone Appearances

SECTION 4 - CALENDARING, APPEARANCES AND SETTLEMENT

- 4.1 - Preparation of Calendar
- 4.2 - Appearances
- 4.3 - Notification of Settlement

SECTION 5 - MOTION PRACTICE

- 5.1 - Form
- 5.2 - Content of Motions
- 5.3 - Certificate of Good Faith Conference
- 5.4 - Motions Decided on Papers and Memoranda
- 5.5 - Delivery of Materials for Oral Argument
- 5.6 - Response to Motion and Memorandum
- 5.7 - Reply Memoranda
- 5.8 - Extension of Time for Filing Supporting Documents and Memoranda
- 5.9 - Font and Spacing Requirements
- 5.10 - Suggestion of Subsequently Decided Authority
- 5.11 - Motions Not Requiring Memoranda
- 5.12 - Failure to File and Serve Motion Materials
- 5.13 - Submission of Orders
- 5.14 – Short Matters and Ex Parte
- 5.15 - Determination of Motions Through Oral Argument Without Briefs
- 5.16 - Motions to Compel and for Protective Order
- 5.17 - Motions to File Under Seal
- 5.18 - Emergency Motions



SECTION 6 - CASE MANAGEMENT NOTICE, MEETING, REPORT, CONFERENCE AND ORDER

- 6.1 - Notice of Hearing and Order on Case Management Conference
- 6.2 - Case Management Meeting
- 6.3 - Joint Case Management Report
- 6.4 - Case Management Conference
- 6.5 - Case Management Order

SECTION 7 - DISCOVERY

- 7.1 - Presumptive Limits on Discovery Procedures
- 7.2 - Depositions
- 7.3 - Electronic Discovery
- 7.4 - General and Special Magistrates
- 7.5 - No Filing of Discovery Materials
- 7.6 - Discovery with Respect to Expert Witnesses
- 7.7 - Completion of Discovery
- 7.8 - Extension of the Discovery Period or Request for Additional Discovery
- 7.9 - Trial Preparation After the Close of Discovery
- 7.10 - Confidentiality Agreements

SECTION 8 - ALTERNATIVE DISPUTE RESOLUTION

- 8.1 - Alternative Dispute Resolution Mandatory in All Cases
- 8.2 - Non-Binding Arbitration
- 8.3 - Mediation

SECTION 9 - JOINT FINAL PRETRIAL STATEMENT

- 9.1 - Meeting and Preparation of Joint Final Pretrial Statement
- 9.2 - Contents of Joint Final Pretrial Statement
- 9.3 - Coordination of Joint Final Pretrial Statement

SECTION 10 - TRIAL MEMORANDA AND OTHER MATERIALS

- 10.1 - Trial Memoranda
- 10.2 - Motions in Limine

SECTION 11 - FINAL PRETRIAL CONFERENCE

- 11.1 - Mandatory Attendance
- 11.2 - Substance of Final Pretrial Conference

SECTION 12 - SANCTIONS

- 12.1 - Grounds

SECTION 13 - TRIAL

- 13.1 - Examination of Witnesses
- 13.2 - Objections



SECTION 14 - COURTROOM DECORUM

14.1 - Communications and Position

14.2 - Professional Demeanor

SECTION 15 - JURIES

15.1 - Jury Instruction Conference

15.2 - Objections to Instructions

SECTION 16 - TRIAL DATES AND FINAL PRETRIAL PREPARATION

16.1 - Trial Date

SECTION 17 - WEB SITE AND PUBLICATION

17.1 - Web Site

SECTION 1 - PHILOSOPHY, SCOPE AND GOALS

1.1 - Citation to Procedures. These Procedures shall be known and cited as the Business Court Procedures. They may also be referred to in abbreviated form as “BCP” or “Business Court Procedures,” e.g., this section may be cited as “BCP 1.1.”

1.2 - Purpose and Scope. The Business Court Procedures are designed to facilitate the proceedings of cases in the Ninth Judicial Circuit Business Court. The Business Court Procedures shall apply to all actions in the Business Court Subdivision of the Civil Division of the Ninth Judicial Circuit Court of Florida.

1.3 - Goals. The Business Court Procedures are intended to provide better access to court information for litigants, counsel and the public; increase the efficiency and understanding of court personnel, counsel and witnesses; decrease costs for litigants and others involved in the court system; and facilitate the efficient and effective presentation of evidence in the courtroom. These procedures shall be construed and enforced to avoid technical delay, encourage civility, permit just and prompt determination of all proceedings and promote the efficient administration of justice.

1.4 - Integration with Other Rules. These procedures are intended to supplement, not supplant, the rules adopted by the Supreme Court of Florida. Should any conflict be deemed to exist between the Business Court Procedures and the rules, then the rules shall control.

SECTION 2 - CASE FILING, ASSIGNMENT, TRACKING AND IDENTIFICATION

2.1 - Cases Subject to Business Court. The principles set out in Amended Administrative Order 2003-17-5, which is located on the Business Court Web Site at <http://www.ninthcircuit.org/about/divisions/civil/complex-business-litigation-court.shtml> shall govern the assignment of cases to Business Court.

2.2 - Case Identification Numbers. On assignment of any matter to the Business Court, the matter shall retain the civil action number assigned to it by the Clerk of Courts.

SECTION 3 – VIDEOCONFERENCING AND TELEPHONE APPEARANCES

3.1 - Videoconference by Agreement. By mutual agreement, counsel may arrange for any proceeding or conference to be held by videoconference by coordinating a schedule for such hearing that is convenient with Business Court. All counsel and other participants shall be subject to the same rules of procedure and decorum as if all participants were present in the courtroom.

3.2 - Responsibility for Videoconferencing Facilities. The parties are responsible for obtaining all communications facilities and arranging all details as may be required to connect and interface with the videoconferencing equipment available to Business Court. Business Court will endeavor to make reasonable technical assistance available to the parties, but all responsibility for planning and executing all technical considerations required to successfully

hold a videoconference shall remain solely with the parties wishing to attend by videoconference.

3.3 - Allocation of Videoconferencing Costs. In the absence of a contrary agreement among the parties, the parties participating by videoconference shall bear their own costs of participating via this method.

3.4 - Court Reporter. Where any proceeding is held by videoconference, the court reporter transcribing such proceeding will be present in the same room as the judge presiding over the proceeding.

3.5 - Exchange of Exhibits and Evidence to be Used in Videoconference Hearing. Any exhibits or evidence to be used in a videoconference hearing must be provided to opposing counsel and to the court three business days prior to the hearing. All exhibits or evidence so provided shall bear exhibit tags marked with the case name, case number, identity of the propounding party and an identification number. Any objections to any exhibit or evidence must be provided to the court in writing at least one day in advance of the hearing and reference the appropriate exhibit tags.

3.6 – Telephone Appearances. Counsel or parties may appear by telephone when allowed by the court. No prior authorization for telephone appearances is necessary for the court’s regularly scheduled Short Matters and Ex Parte times. The court has only one telephone line into each courtroom so all persons who wish to attend any matter telephonically have the responsibility for arranging a conference call to the courtroom at the time set for the hearing. The responsibility for planning and executing all technical considerations to appear telephonically shall remain solely with the parties wishing to appear telephonically. The procedures for appearing telephonically can be found by selecting the applicable division

under Policies and Procedures on the Complex Business Litigation Court page at <http://www.ninthcircuit.org/about/divisions/civil/complex-business-litigation-court.shtml>.

SECTION 4 - CALENDARING, APPEARANCES AND SETTLEMENT

4.1 - Preparation of Calendar. The calendar for Business Court shall be prepared under the supervision of the Business Court Judge and published on the Complex Business Litigation Court page on the court's web site.

4.2 - Appearances. An attorney who is notified to appear for any proceeding before Business Court must, consistent with ethical requirements, appear or have a partner, associate or another attorney familiar with the case present.

4.3 - Notification of Settlement. When any cause pending in Business Court is settled, all attorneys or unrepresented parties of record must notify the Business Court Judge or the Judge's designee within twenty-four (24) hours of the settlement and must advise the court of the party who will prepare and present the judgment, dismissal or stipulation of dismissal and when such filings will be presented. The court will not abate cases for extended time periods to facilitate settlement.

SECTION 5 - MOTION PRACTICE

5.1 - Form. All motions, unless made orally during a hearing or a trial, shall be accompanied by a memorandum of law, except as provided in BCP 5.10. Any memorandum of law shall be filed in support of one motion only and shall not exceed twenty-five (25) pages in length. Each motion shall be filed separately containing its own supporting memorandum of

law. Motions that are inextricably intertwined and either substantively related or in the alternative may be filed together.

5.2 - Content of motions. All motions shall: (1) state with particularity the grounds for the motion; (2) shall cite any statute or rule of procedure relied upon; and (3) shall state the relief sought. Factual statements in a motion for summary judgment shall be supported by specific citations to the supporting documents. The parties shall not raise issues at the hearing on the motion that were not addressed in the motion and memoranda in support of and in opposition to the motion. The practice of offering previously undisclosed cases to the court at the hearing is specifically disallowed.

5.3 - Certificate of Good Faith Conference. Before filing any motion in a civil case, the moving party shall confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion and shall file with the motion a statement certifying that the moving party has conferred with opposing counsel and that counsel have been unable to agree on the resolution of the motion (the “Certificate”).

a. The term “confer,” as used herein, requires a substantive conversation between the attorneys *in person or by telephone* in a good faith effort to resolve the motion without court action and does not envision an exchange of ultimatums by fax or letter. Counsel who merely attempt to confer have not conferred. Counsel must respond promptly to inquiries and communications from opposing counsel. The court will sua sponte deny motions that fail to include an appropriate and complete Certificate under this section.

b. The Certificate shall set forth the date of the conference, the names of the participating attorneys, and the specific results achieved. It shall be the responsibility of counsel for the movant to arrange for the conference.

c. No conference, and therefore no Certificate, is required in motions for injunctive relief without notice, for judgment on the pleadings, summary judgment, or to permit maintenance of a class action.

d. A party alleging that a pleading fails to state a cause of action shall confer with counsel for the opposing party before moving to dismiss, and, upon request of the other party, will stipulate to an order permitting the filing of a curative amended pleading in lieu of filing a motion to dismiss.

5.4 - Motions Decided on Papers and Memoranda. Motions shall be considered and decided by the court on the pleadings, admissible evidence, the court file, and memoranda, without hearing or oral argument, unless otherwise ordered by the court. Any party seeking oral argument shall file a separate motion setting forth the reasons oral argument should be granted and shall send a proposed order granting oral argument to the court with service copies and stamped envelopes. A party who believes a matter requires an evidentiary hearing must file a motion for oral argument. Motions for oral argument must contain a separate certificate of good faith conference under BCP 5.3, *supra* and must set forth the length of time needed for oral argument.

If the court grants oral argument on any motion, it shall either order the parties to coordinate a hearing or give the parties at least five (5) business days' notice of the date and place of oral argument. The court, for good cause shown, may shorten the five (5) day notice period. All papers relating to the issues to be argued at the hearing shall be delivered to opposing counsel and the court at least five (5) business days before the hearing. Service and receipt of the papers less than five days before the hearing is presumptively unreasonable and may result in the hearing being cancelled by the court.

5.5 - Delivery of Materials for Oral Argument. Parties may, but are not required to, deliver copies of materials to the court in preparation for oral argument. Materials may include, but not be limited to, copies of the motion, response and reply, cases cited therein, and exhibits which will be referenced in the oral argument. If such materials exceed 50 pages in total, then the party shall deliver the materials only on a USB drive. Counsel must insure that the electronic copy of the materials is indexed and that the index contains a hyper-link to the document/exhibit/case indexed. For an example of this format, see <http://www.ninthcircuit.org/about/divisions/civil/downloads/Example-of-electronic-courtesy-copy.pdf>.

5.6 - Response to Motion and Memoranda. The respondent, if opposing a motion, shall file a memorandum in opposition within twenty (20) days after service of the motion or within thirty (30) days of service if the motion is for summary judgment. The response memorandum shall clearly identify the title and date of filing of the motion to which it responds. Memoranda in opposition shall not exceed twenty-five (25) pages in length. If supporting documents are not then available, the respondent may move for an extension of time to file a response. For good cause appearing therefore, a respondent may be required by the court to file any response and supporting documents, including a memorandum, within such shorter period of time as the court may specify.

5.7 - Reply Memorandum. The movant may file a reply memorandum within ten (10) days of service of the memorandum in opposition to the motion. A reply memorandum is limited to discussion of matters raised in the memorandum in opposition and shall not exceed ten (10) pages in length. The reply memorandum must clearly identify the titles and dates of filing of the original motion and the response memorandum.

5.8 - Extension of Time for Filing Supporting Documents and Memoranda.

Upon proper motion accompanied by a proposed order, the court may enter an order, specifying the time within which supporting documents and memoranda may be filed, if it is shown that such documents are not available or cannot be filed contemporaneously with the motion or response. The time allowed to an opposing party for filing a response shall not run during any such extension.

5.9- Font and Spacing Requirements. All motions and memoranda shall be double-spaced and in Times New Roman 14-point font or Courier New 12-point font. Page margins shall not be less than 1 inch.

5.10 - Suggestion of Subsequently Decided Authority. A suggestion of controlling or persuasive authority that was decided after the filing of the last memorandum may be filed at any time prior to the court's ruling and shall contain only the citation to the authority relied upon, if published, or a copy of the authority if it is unpublished, and shall not contain argument.

5.11 - Motions Not Requiring Memoranda. Memoranda are not required by either the movant or the opposing party, unless otherwise directed by the court, with respect to the following motions:

a. discovery motions, if the parties have agreed to have the matter heard by the general magistrate (discovery motions to be heard by the circuit judge must be fully briefed unless excused from this requirement by the presiding judge);

b. extensions of time for the performance of an act required or allowed to be done, provided that the request is made before the expiration of the period originally prescribed or extended by previous orders;

c. to continue a pre-trial conference, hearing, or the trial of an action;

- d. to add or substitute parties;
- e. to amend the pleadings;
- f. to file supplemental pleadings;
- g. to appoint a next friend or guardian ad litem;
- h. to stay proceedings to enforce judgment;
- i. for pro hac vice admission of counsel who are not members of The Florida Bar;
- j. relief from the page limitations imposed by these Procedures; and
- k. request for oral argument.

The above motions must state good cause therefore and cite any applicable rule, statute or other authority justifying the relief sought. If the motion is agreed upon by all parties, then these motions must be accompanied by a cover letter indicating that the opposing counsel has reviewed and approved the proposed order, a proposed order, together with copies for all parties and stamped, addressed envelopes. If the motion is contested and can be heard in 20 minutes or less without the taking of evidence, then the moving party may set the motion for hearing at the court's short matter hearing time.

5.12 - Failure to File and Serve Motion Materials. The failure to file a memorandum within the time specified in this section shall constitute a waiver of the right thereafter to file such memorandum, except upon a showing of excusable neglect. A motion unaccompanied by a required memorandum may, in the discretion of the court, be summarily denied. Failure to timely file a memorandum in opposition to a motion may result in the pending motion being considered and decided as an uncontested motion.

5.13 - Submission of Orders. When a motion is fully briefed, either by the filing of response and reply or by virtue of the time passing for the filing of those pleadings, the moving

party shall prepare and file a Notice of Fully Briefed Motion. The form and content of the Notice is available on the Business Court page of the court's website at <http://www.ninthcircuit.org/about/divisions/civil/complex-business-litigation-court.shtml>. The Notice of Fully Briefed Motion, the checklist for the Notice, and a proposed order copies and envelopes for all parties shall be sent to the court when the motion is fully briefed and ready for the court to rule upon it. The order must also be emailed to the court in accordance with Notice of Changes found on the Complex Business Litigation Court section of the court's website at <http://www.ninthcircuit.org/about/divisions/civil/complex-business-litigation-court.shtml>. No agreed order will be entered unless the party proffering such an order represents to the court in writing that he or she has provided copies to the opposing parties in advance, and they have no objection to the form of the order. In proposing an order entering a final judgment of default, the party must contemporaneously provide the court with sufficient information establishing that the motion for entry of a final judgment by default should be granted. If the court has directed that a party prepare a proposed order following a hearing on the motion, the party preparing the order must provide a copy of the proposed order to opposing counsel. The court will not accept "dueling orders" unless specifically requested by the court. If an agreement among the parties cannot be reached on a proposed order, the parties must convene a hearing at the court's short matter hearing time to address any objections to the proposed order.

5.14 – Short Matters and Ex Parte. The court will hear ex parte matters and short matters (contested hearings of 20 minutes or less where no testimony or evidence is required) on a schedule to be published on the court's website at <http://www.ninja9.org/jacsatt/availableslotframe.asp>. [To find information for Division 32 or

43, you must use the Select Calendar feature and then by selecting the down arrow to go to the respective divisions.]

5.15 - Determination of Motions Through Oral Argument Without Briefs. The parties may present motions and the court may resolve disputes regarding the matters described in BCP 5.10 through the use of an expedited oral argument procedure, if such procedure is agreed upon by all parties with an interest in the outcome of the motion who are also present for the oral argument. Applicable motions are those that are limited to matters which can be argued and determined in twenty minutes or less and may be heard on the court's short matters docket, which requires coordination with counsel, but not the reservation of a specific time through the judicial assistant. The dates and times of short matters hearings will be posted on the Complex Business Litigation Court section at the court's web site at <http://www.ninja9.org/jacsatt/availableslotframe.asp>. [To find information for Division 32 or 43, you must use the Select Calendar feature and then by selecting the down arrow to go to the respective divisions.]

5.16 - Motions to Compel and for Protective Order. Any party seeking to compel discovery or to obtain a protective order with respect to discovery must identify the specific portion of the material that is directly relevant and ensure that it is filed as an attachment to the application for relief.

5.17 - Motions to File Under Seal. Whether documents filed in a case may be filed under seal is a separate issue from whether the parties may agree that produced documents are confidential. Motions to file under seal are disfavored. The court will permit the parties to file documents under seal only upon a finding of extraordinary circumstances and particularized need. A party seeking to file a document under seal must file an appropriate motion in

accordance with Florida Rule of Judicial Administration 2.420(d), together with a proposed order thereon. The motion, whether granted or denied, will remain in the public record.

5.18 - Emergency Motions. The court may consider and determine emergency motions at any time. Counsel should be aware that the designation “emergency” may cause a judge to abandon other pending matters in order to immediately address the emergency. The court will sanction any counsel or party who designates a motion as an emergency under circumstances that are not true emergencies. It is not an emergency when counsel has delayed discovery until the end of the discovery period.

SECTION 6 - CASE MANAGEMENT NOTICE, MEETING, REPORT, CONFERENCE AND ORDER

6.1 - Notice of Hearing and Order on Case Management Conference. Within 30 days of filing or transfer of a case to Business Court, the court will issue an Order Setting Case Management Conference (the “Notice”). Plaintiff’s counsel shall immediately thereafter serve a copy of the Notice on all Defendants. Defendants shall immediately serve a copy of the Notice on all Third Party Defendants.

6.2 - Case Management Meeting. Regardless of the pendency of any undecided motions, Lead Trial Counsel shall meet no less than 30 days in advance of the Case Management Conference (“CMC”) and address the following subjects, along with other appropriate topics, including those set forth in Florida Rule of Civil Procedure 1.200(a), some of which subjects and topics will be incorporated into a Case Management Order prepared by the court:

- a. Pleadings issues, service of process, venue, joinder of additional parties, theories of liability, damages claimed and applicable defenses;
- b. The identity and number of any motions to dismiss or other preliminary or pre-discovery motions that have been filed and the time period in which they shall be filed, briefed and argued;
- c. A discovery plan and schedule including the length of the discovery period, the number of fact and expert depositions to be permitted and, as appropriate, the length and sequence of such depositions;
- d. Anticipated areas of expert testimony, timing for identification of experts, responses to expert discovery and exchange of expert reports;
- e. An estimate of the volume of documents and computerized information likely to be the subject of discovery from parties and nonparties and whether there are technological means that may render document discovery more manageable at an acceptable cost;
- f. The advisability of using special master(s) for fact finding, mediation, discovery disputes or such other matters as the parties may agree upon;
- g. The time period after the close of discovery within which post-discovery dispositive motions shall be filed, briefed and argued and a tentative schedule for such activities;
- h. The possibility of settlement and the timing of Alternative Dispute Resolution, including the selection of a mediator or arbitrator(s);
- i. Whether or not a party desires to use technologically advanced methods of presentation or court-reporting and, to the extent this is the case, a determination of the following:

- i. Fairness issues, including but not necessarily limited to use of such capabilities by some but not all parties and by parties whose resources permit or require variations in the use of such capabilities;
- ii. Issues related to compatibility of court and party facilities and equipment;
- iii. Issues related to the use of demonstrative exhibits and any balancing of relevance and potential prejudice that may need to occur in connection with such exhibits;
- iv. The feasibility of sharing the technology resources or platforms amongst all parties so as to minimize disruption at trial; and
- v. Such other issues related to the use of the court's and parties' special technological facilities as may be raised by any party, the court or the court's technological advisor, given the nature of the case and the resources of the parties.
- j. A good faith estimate by each party based upon consultation among the parties of the costs each party is likely to incur in pursuing the litigation through trial court adjudication;
- k. A preliminary listing of the principal disputed legal and factual issues;
- l. A preliminary listing of any legal principle and facts that are not in dispute;
- m. Any law other than Florida law which applies to the issues in the case;
- n. A good faith estimate by each party of the length of time to try the case;
- o. Whether a demand for jury trial has been made;
- p. The track to which the case will be assigned. The Business Court typically employs the following management tracks: Business Expedited (Target Trial Date within 13 months of filing of complaint); Business Standard (Target Trial Date within 18 months of filing of complaint); and Business Complex (Target Trial Date within two years of filing of complaint).
- p. Such other matters as the court may assign to the parties for their consideration.

6.3 - Joint Case Management Report. No less than ten (10) days in advance of the CMC, the Parties shall file the Joint Case Management Report addressing the matters described above. All counsel and parties are responsible for filing a Joint Case Management Report in full compliance with these Procedures. Contemporaneous with filing the Joint Case Management Report, Plaintiff's counsel shall email a copy of the report to the division email addresses: div32copies@ocnjcc.org for Division 32 and div43copies@ocnjcc.org for Division 43. Plaintiff's counsel shall have the *primary* responsibility to coordinate the meeting between the parties and the filing of the Joint Case Management Report. If a non-lawyer plaintiff is proceeding pro se, defense counsel shall coordinate compliance and service of the copy to the court. If counsel is unable to coordinate such compliance, counsel shall timely notify the court by written motion or request for a status conference.

6.4 - Case Management Conference. The attendance by Lead Trial Counsel for all parties is mandatory. All parties must attend the Case Management Conference unless excused by the court upon a timely motion and order thereon. At the Case Management Conference, the court will hear the views of counsel on such issues listed in BCP 6.2 above as are pertinent to the case or on which there are material differences of opinion.

6.5 - Case Management Order. Following the CMC, the court will issue a Case Management Order. The provisions of the Case Management Order may not be deviated from without notice, an opportunity to be heard, a showing of good cause and entry of an order by the court. The Case Management Order may also specify a schedule of status conferences, when necessary, to assess the functioning of the Case Management Order, assess the progress

of the case, and enter such further revisions to the Case Management Order as the court may deem necessary or appropriate.

SECTION 7 – DISCOVERY

7.1 - Presumptive Limits On Discovery Procedures. Presumptively, subject to stipulation of the parties and order of the court for good cause shown, each party is limited to the following:

- a. Fifty (50) interrogatories (including sub-parts);
- b. Fifty (50) requests for admission on each opposing party;.
- c. Twelve (12) depositions (not including depositions of testifying experts) taken by the plaintiffs, twelve (12) depositions taken by the defendants, and twelve (12) depositions taken by the third-party defendants, regardless of the number of separate parties designated as plaintiffs, defendants, and third-party defendants.

The parties may agree by stipulation on other limits on discovery within the context of the limits and deadlines established by these Procedures and the court's Case Management Order, but the parties may not alter the limitations provided by these Procedures without leave of court.

7.2 - Depositions. The court expects counsel to conduct discovery in good faith and to cooperate and be courteous in all phases of the discovery process. Depositions shall be conducted in accordance with the following guidelines:

a. All parties or employees will be made available for deposition on five days' notice to counsel.

b. Counsel shall not direct or request that a witness not answer a question, unless counsel has objected to the question on the ground that the answer is protected by privilege or a limitation on evidence directed by the court.

c. Counsel shall not make objections or statements that might suggest an answer to a witness. Counsel's statements when making objections should be succinct, stating the basis of the objection and nothing more.

d. Counsel and their clients shall not engage in private, off-the-record conferences during the client's deposition, except for the purpose of deciding whether to assert a privilege.

e. Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about the documents.

f. When the deponent or any party demands that the deposition be read and signed, the failure of the deponent to read and sign the deposition within thirty days from the date the transcript becomes available to the deponent shall be deemed to ratify the entire deposition.

g. The court will entertain telephonic hearings regarding issues raised during depositions then in progress.

7.3 – Electronic Discovery. Upon agreement by the parties and stipulated order or by order of the court, Mediators or Special Masters may be utilized to facilitate the resolution of disputes related to electronically stored information.

7.4 – General or Special Magistrates. The court may, at any time, on its own motion or on the motion of any party, appoint a general or special magistrate in any given case pending in Business Court in accordance with Florida Rule of Civil Procedure 1.490. Unless otherwise ordered, the parties shall bear equally the cost of proceeding before a special magistrate, and such fees may be taxed as costs.

7.5 - No Filing of Discovery Materials. Depositions and deposition notices, notices of serving interrogatories, interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless the court so orders or unless the parties will rely on such documents in a pretrial proceeding. All discovery materials must be served on other counsel or parties. The party taking a deposition or obtaining any material through discovery (including through third party discovery) is responsible for the preservation and delivery of such material to the court when needed or ordered in the form specified by the court.

7.6 - Discovery with Respect to Expert Witnesses. Discovery with respect to experts must be conducted within the discovery period established by the Case Management Order. In complying with the obligation to exchange reports relating to experts, the parties shall disclose all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition or affidavit within the preceding four years.

Each party offering an expert witness shall provide three alternative dates for the deposition of the expert in the following 30 days.

7.7 - Completion of Discovery. The requirement that discovery be completed within a specified time mandates that adequate provisions must be made for interrogatories and requests for admission to be answered, for documents to be produced, and for depositions to be held within the discovery period. The court does not anticipate entertaining motions relating to discovery conducted after the close of the discovery period as set forth in the court's Case Management Order.

7.8 - Extension of the Discovery Period or Request for Additional Discovery. Motions seeking an extension of the discovery period or permission to take more discovery than is permitted under the Case Management Order must be presented prior to the expiration of the time within which discovery is required to be completed. Such motions must set forth good cause justifying the additional time or additional discovery and will only be granted upon such a showing of good cause and that the parties have diligently pursued discovery. The court usually will only permit additional depositions upon a showing of exceptionally good cause.

7.9 - Trial Preparation After the Close of Discovery. Ordinarily, the deposition of a material witness not subject to subpoena should be taken during discovery. However, the deposition of a material witness who agrees to appear for trial, but later becomes unavailable or refuses to attend, may be taken at any time prior to or during trial.

7.10 - Confidentiality Agreements. The parties may reach their own agreement regarding the designation of materials as confidential. There is no need for the court to endorse the confidentiality agreement. The court discourages unnecessary stipulated motions for protective orders. The court will enforce signed confidentiality agreements. Each

confidentiality agreement shall provide or shall be deemed to provide that no party shall file documents under seal without having first obtained an order granting leave of court to file documents under seal based upon a showing of particularized need.

SECTION 8 - ALTERNATIVE DISPUTE RESOLUTION

8.1 - Alternative Dispute Resolution Mandatory in All Cases. Alternative Dispute Resolution (“ADR”) is a valued tool in the resolution of litigated matters. An appropriate mechanism for ADR shall be discussed by the court and counsel at the Case Management Conference. The Case Management Order shall order the parties to a specific ADR process, to be conducted either by a court-assigned or an agreed-upon facilitator and shall establish a deadline for its completion.

8.2 - Non-Binding Arbitration. The parties may agree to submit to non-binding arbitration or it may be ordered upon motion of any party. The rules governing arbitration shall be selected by the parties or failing agreement, the court will order use of all or a part of the arbitration rules common to the Ninth Judicial Circuit, the American Arbitration Association or other available rules.

8.3 - Mediation.

a. Case Summaries - Not less than ten business days prior to the mediation conference, each party shall deliver to the mediator a written summary of the facts and issues of the case.

b. Identification of Business Representative - As part of the written summary, counsel for each corporate party shall state the name and general job description of the employee or agent who will *attend and participate with full authority to settle* on behalf of the business entity.

c. Attendance Requirements and Sanctions - Lead Trial Counsel and each party (including, in the case of a business party, a business representative, and in the case of an insurance company, the insurance company representative as set forth in Florida Rule of Civil Procedure 1.720(b)(3) with full authority to settle *shall* attend and participate in the mediation conference. In the case of an insurance company, the term “full authority to settle” means authority to settle up to the amount of the party’s last demand or the policy limits, whichever is less, without further consultation. The court will impose sanctions upon Lead Trial Counsel and parties who do not attend and participate in good faith in the mediation conference.

d. Authority to Declare Impasse - Participants shall be prepared to spend as much time as may be necessary to settle the case. No participant may force the early conclusion of mediation because of travel plans or other engagements. Only the mediator may declare an impasse or end the mediation.

e. Rate of Compensation - The mediator shall be compensated at an hourly rate stipulated by the parties in advance of mediation. Upon motion of the prevailing party, the party’s share may be taxed as costs in this action.

f. Settlement and Report of Mediator - A settlement agreement reached between the parties shall be reduced to writing and signed by the parties and their attorneys in the presence of the mediator. Within ten business days of the conclusion of the mediation conference, the mediator shall file and serve a written mediation report stating whether all required parties were present, whether the case settled, and whether the mediator was

forced to declare an impasse.

SECTION 9 - JOINT FINAL PRETRIAL STATEMENT

9.1 - Meeting and Preparation of Joint Final Pretrial Statement. On or before the date established in the Case Management Order, Lead Trial Counsel for all parties and any unrepresented parties shall meet together in person for the purpose of preparing a Joint Final Pretrial Statement that strictly conforms to the requirements of this section. The case must be fully ready for trial when the Joint Final Pretrial Statement is filed. Lead Trial Counsel for all parties, or the parties themselves if unrepresented, shall sign the Joint Final Pretrial Statement. The court will strike pretrial statements that are unilateral, incompletely executed, or otherwise incomplete. Inadequate stipulations of fact and law will be stricken. Sanctions may be imposed for failure to comply with this section, including the striking of pleadings. At the conclusion of the final pretrial conference, all pleadings are deemed to merge into the Joint Final Pretrial Statement, which will control the course of the trial.

9.2 - Contents of Joint Final Pretrial Statement.

a. Stipulated Facts. The Parties shall stipulate to as many facts and issues as possible. To assist the court, the parties shall make an active and substantial effort to stipulate at length and in detail as to agreed facts and law, and to limit, narrow and simplify the issues of fact and law that remain contested.

b. Exhibit List. An exhibit list containing a description of all exhibits to be introduced at trial and in compliance with the approved form located on the Business Court web site at <http://www.ninja9.org/court/business/index-BC.htm>, must be filed with the Joint Final Pretrial Statement. Each party shall maintain a list of exhibits on disk or CD to allow a final list of

exhibits to be provided to the Clerk of Court at the close of the evidence. Unlisted exhibits will not be received into evidence at trial, except by order of the court in the furtherance of justice. The Joint Final Pretrial Statement must attach each party's exhibit list on the approved form listing each *specific* objection ("all objections reserved" does *not* suffice) to each numbered exhibit that remains after full discussion and stipulation. Objections not made – or not made with specificity – are waived.

c. Witness List. The parties and counsel shall prepare a witness list designating in good faith which witnesses will likely be called and which witnesses may be called if necessary. Absent good cause, the court will not permit testimony from unlisted witnesses at trial over objection. This restriction does not apply to rebuttal witnesses. Records custodians may be listed, but will not likely be called at trial, except in the event that authenticity or foundation is contested. Notwithstanding the Business Court Procedures regarding videoconferencing, for good cause shown in compelling circumstances the court may permit presentation of testimony in open court by contemporaneous transmission from a different location.

d. Depositions. The court encourages stipulations of fact to avoid calling unnecessary witnesses. Where a stipulation will not suffice, the court permits the use of videotaped depositions at trial. At the required meeting, counsel and unrepresented parties shall agree upon and specify in writing in the Joint Final Pretrial Statement the pages and lines of each deposition (except where used solely for impeachment) to be published to the trier of fact. The parties shall include in the Joint Final Pretrial Statement a page-and-line description of any testimony that remains in dispute after an active and substantial effort at resolution, together with argument and authority for each party's position. The parties shall prepare for submission and consideration at the final pretrial conference or trial edited and marked copies of any depositions or deposition

excerpts which are to be offered into evidence, including edited videotaped depositions. Designation of an entire deposition will not be permitted except on a showing of necessity.

e. Joint Jury Instructions, Verdict Form. In cases to be tried before a jury, counsel shall attach to the Joint Final Pretrial Statement a copy and an original set of jointly-proposed jury instructions, together with a single jointly-proposed jury verdict form. The parties should be considerate of their juries, and therefore should submit short, concise verdict forms. The court prefers pattern jury instructions approved by the Supreme Court of Florida. A party may include at the appropriate place in the single set of jointly-proposed jury instructions a contested charge, so designated with the name of the requesting party and bearing at the bottom a citation of authority for its inclusion, together with a summary of the opposing party's objection. The parties shall submit a USB drive or CD in Word format containing the single set of jury instructions and verdict form with the Joint Final Pretrial Statement.

9.3 Coordination of Joint Final Pretrial Statement. All counsel and parties are responsible for filing a Joint Final Pretrial Statement in full compliance with these Procedures at least ten days prior to the pretrial conference. Plaintiff's counsel shall have the *primary* responsibility to coordinate the meeting of Lead Trial Counsel and unrepresented parties and the filing of a Joint Final Pretrial Statement and related material. If a non-lawyer plaintiff is proceeding pro se, then defense counsel shall coordinate compliance. If counsel is unable to coordinate such compliance, counsel shall timely notify the court by written motion or request for a status conference.

SECTION 10 - TRIAL MEMORANDA AND OTHER MATERIALS

10.1 - Trial Memoranda. In the case of a non-jury trial, no later than ten days before the first day of the trial period for which the trial is scheduled, the parties shall file and serve Trial Memoranda with proposed findings of fact and conclusions of law, together with a USB drive or CD in Word format. In the case of a jury trial, no later than ten days before the first day of the trial period for which the trial is scheduled, the parties may file and serve Trial Memoranda, together with a USB drive or CD.

10.2 - Motions in Limine. Motions in Limine may be filed for the purpose of seeking an advance ruling on the admissibility of specific evidence at trial. Each motion in limine must attach, or specify in detail, the document, item or statement at issue. The court may strike as superfluous any motion in limine requesting a broad order that a rule of evidence, procedure or professional conduct should be followed at trial. Motions in limine shall not be used as a procedural vehicle to circumvent the passing of the deadline to file dispositive motions.

SECTION 11 - FINAL PRETRIAL CONFERENCE

11.1 - Mandatory Attendance. Lead Trial Counsel and local counsel for each party, together with any unrepresented party, *must* attend the final pretrial conference in person unless previously excused by the court.

11.2 - Substance of Final Pretrial Conference. At the final pretrial conference, all counsel and parties must be prepared and authorized to address the following matters: the formulation and simplification of the issues; the elimination of frivolous claims or defenses; admitting facts and documents to avoid unnecessary proof; stipulating to the authenticity of

documents; obtaining advance rulings from the court on the admissibility of evidence; settlement and the use of special procedures to assist in resolving the dispute; disposing of pending motions; establishing a reasonable limit on the time allowed for presenting evidence and argument; and such other matters as may facilitate the just, speedy, and inexpensive disposition of the actions.

SECTION 12 – SANCTIONS

12.1 - Grounds. The court will impose sanctions on any party or attorney: 1) who fails to attend and to actively participate in the meeting to prepare the Joint Final Pretrial Statement or refuses to sign or file the Joint Final Pretrial Statement; 2) who fails to attend the final pretrial conference, or who is substantially unprepared to participate; 3) who fails to attend the mediation and actively participate in good faith, or who attends the mediation without full authority to negotiate a settlement, or who is substantially unprepared to participate in the mediation; or 4) who otherwise fails to comply with the Business Court Procedures. Sanctions may include, without limitation, any, some or all of the following: an award of reasonable attorneys' fees and costs, the striking of pleadings, the entry of default, the dismissal of the case, or a finding of contempt of court.

SECTION 13 – TRIAL

13.1 - Examination of Witnesses. When several attorneys are employed by the same party, the examination or cross-examination of each witness for such party shall be conducted by one attorney, but the examining attorney may change with each successive witness or, with leave of the court, during a prolonged examination of a single witness. The examination of witnesses is limited to direct, cross and re-direct. Parties seeking further examination shall request a bench

conference to discuss the reasons therefor, and, upon the articulation of good cause, may be allowed further examination.

13.2 - Objections. Speaking objections are not permitted. A party interposing an objection shall state the legal basis for the objection only. No response from the interrogating party will be permitted unless requested by the court.

SECTION 14 - COURTROOM DECORUM

14.1 - Communications and Position. Counsel are at all times to conduct themselves with dignity and propriety. All statements and communications to the court shall be clearly and audibly made from a standing position behind the counsel table or the podium. Counsel shall not approach the bench except upon the permission or request of the court. Abusive language, offensive personal references, colloquies between opposing counsel and disrespectful references to opposing counsel are all strictly prohibited. Witnesses and parties must be treated with fairness and due consideration. The examination of witnesses and jurors shall be conducted from behind the podium, except as otherwise permitted by the court. Counsel may only approach a witness with the court's permission and for the purpose of presenting, inquiring about, or examining that witness with respect to an exhibit, document, or diagram. Except in extraordinary circumstances, and then only with leave of court and permission of the witness, all witnesses shall be addressed by honorific and surname (*e.g.*, Mrs. Smith, Reverend Jones, Dr. Adams), rather than by first names.

14.2 - Professional Demeanor. The conduct of the lawyers before the court and with other lawyers should be characterized by consideration, candor and fairness. Counsel shall not knowingly misrepresent the contents of documents or other exhibits, the testimony of a witness,

the language or argument of opposing counsel or the language of a decision or other authority; nor shall counsel offer evidence known to be inadmissible. In an argument addressed to the court, remarks or statements may not be interjected to improperly influence or mislead the jury.

SECTION 15 – JURIES

15.1 - Jury Instruction Conference. At the close of the evidence (or at such earlier time as the judge may direct) in every jury trial, the judge shall conduct a conference on instructions with the parties. Such conference shall be out of the presence of the jury and shall be held for the purpose of discussing the proposed instructions.

15.2 - Objections to Instructions. The parties shall have an opportunity to request any additional instructions or to object to any of those instructions proposed by the judge. Any such requests, objections and rulings of the court thereon shall be placed on the record. At the conclusion of the charge and before the jury begins its deliberations (and out of the hearing, or upon request, out of the presence of the jury), the parties shall be given an opportunity to object on the record to any portion of the charge as given, or omission therefrom, stating with particularity the objection and grounds therefor.

SECTION 16 - TRIAL DATES AND FINAL PRETRIAL PREPARATION

16.1 - Trial Date. Trial shall commence on the date established by the court, normally through the Case Management Order or amendments thereto, or in such other manner as the court shall deem appropriate. The court will consider a request to continue a trial date only if the request is signed by both the party and counsel for the party.

SECTION 17 - WEB SITE AND PUBLICATION

17.1 - Web Site. The Business Court shall maintain a site on the World Wide Web for ready access to members of the bar and public. The web site shall be located at the uniform resourcelocator<http://www.ninja9ninthcircuit.org/court/business/index-BC.htm>. The web site will store for ready retrieval basic information about the Business Court, including but not limited to these Procedures and the procedure for Complex Business Case designation. In addition, the web site will store, in the sole discretion of the Business Court Judge:

- a. the court's docket;
- b. papers filed with the court;
- c. motions filed with the court;
- d. briefs filed with the court; and
- e. the opinions of the court.

To: Business Court Advisory Committee

From: **Rules, Procedures, and Forms Workgroup**

Date: July 8, 2014

Re: Preliminary Report

The Rules, Procedures, and Forms Workgroup [Mr. Federhar (coordinator), Judge Rea, Mr. Klain, Mr. Arkfeld, Ms. Refo, and Mr. Rosenbaum] met today to discuss procedures following admission of a case to the proposed Arizona Business Court. The workgroup planned to address three subjects (the process of designating a case for the business court (such as a cover sheet), who would serve as a “gatekeeper,” and rules of case management.) However, the third subject, case management, was the focal point of the workgroup’s two-hour discussion. Case management items included how to make the most effective use of time, litigation costs, and who would serve as decision maker. The workgroup members discussed the following subjects.

1. **Jury trial.** The workgroup had differences of opinion about mandating a waiver of trial by jury (assuming it is constitutionally permissible) as a condition of admission to the business court. Some strongly opposed a waiver of jury and felt that the waiver would be “advantaging” a party. Others members felt that a judge has specialized knowledge of applicable commercial law and practices, and should therefore be the sole decision-maker. These members believe that a jury in a commercial case is far less predictable than a judge.

The members reached no agreement on this issue.

2. **Case management.** The members reached consensus on a number of case management issues.
 - a. The members agreed that the business court should stay discovery pending disposition of a Rule 12(b) motion to dismiss.

The members considered whether a partial motion to dismiss would stay discovery concerning causes of action not addressed by the motion; this will require further discussion. The advantage of a stay following the filing of a partial motion is to allow the court and the parties to “sort things out.” In addition, some jurisdictions permit

limited discovery (e.g., requests for production) while a motion to dismiss is pending.

- b. The BCAC should propose a standard form of protective order. The BCAC needs to consider whether the order would be presumptively entered in every commercial case. Alternatively, or in addition, the parties should attempt to stipulate regarding customized protective order provisions. If there is no agreement, the court should enter the order following foundational findings.
- c. Early judicial intervention in a commercial case is essential for effective case management. Judge Rea suggested an early conference that would be similar to a resolution management conference in a family case. Among the subjects that would be considered at an early conference are: protective orders, a protocol for discovery of electronically stored information (“ESI”), early filing of dispositive motions, discovery stays, and identification of the primary or most important issues in the case.

Early judicial intervention must be meaningful. A 15-minute status conference may not be meaningful. Although recently amended Rule 16(d) makes “scheduling conferences” optional, an early judicial conference in a commercial case should be mandatory, or presumptive, or mandatory upon request of one party. Consideration should be given to changing the Rule 16(b) requirement that the parties “confer” in the course of preparing a joint report to one that would require them to “meet.”

The members generally agreed that principles of differentiated case management (e.g., expedited, standard, and complex tracks) would apply to cases in a business court.

- d. The workgroup discussed how counsel are more likely to reach productive, cost-saving agreements during pretrial proceedings when they engage one another professionally. Many litigators have difficulty when opposing counsel “don’t play well.” One member suggested videotaping judicial conferences as a reminder to attorneys to conduct themselves professionally, but the members generally opposed this idea. The take-away, however, was that effective judicial management of business cases requires a professional and cooperative culture among business litigators.

One member proposed adding COA judges to the BCAC to share their views of superior court culture. The members agreed that changing rules of procedure, without also changing the underlying culture, will not produce the maximum benefit of having a business court.

- e. The members considered whether the Rule 16(b) report in a commercial case should include additional specific topics. The workgroup generally agreed that it should. Among the topics that might be added are discovery of ESI, discovery that is targeted to key issues, early judicial resolution of critical issues, narrowing issues, and motion practices.

One topic the members discussed for inclusion in a joint report was the parties' estimated litigation budgets for the procedures they wished to undertake. But some felt that sharing a litigation budget would be like offering a sword to the opposing side

The members considered, but were not supportive of, "letter" motions, or mandatory conferences with opposing counsel before filing a motion.

3. Discovery. Virtually all commercial cases involve ESI. The members agreed that the most costly aspect of commercial litigation involves discovery, and particularly discovery of ESI.

- a. The workgroup members agreed that the BCAC should propose a standard ESI protocol for adoption by the Arizona Supreme Court.

Whether provided in the protocol or otherwise understood, discovery of ESI is not a perfect process, i.e., even a large volume of ESI may not capture everything.

- b. The members were split on the use of a single special master for ESI issues. Some felt that the parties would feel more comfortable with retaining their own consultants concerning management and discovery of ESI.
- c. The members expressed cautious interest in fashioning a protocol that would address preservation of ESI.
- d. The topic of ESI will be discussed at a future BCAC meeting.

Action:

- Solicit from other BCAC members their suggestions for adding topics that would be productive for a business court version of Rule 16(b) [“Joint Report and Proposed Scheduling Order”].
- Mr. Arkfeld will draft an ESI protocol for consideration at a future BCAC meeting.
- Staff will contact the NCSC regarding a consultant with specialized knowledge in business courts who might agree to review and comment on the BCAC’s work product.
- Consider inviting Bob Haig (a NYC commercial litigator) to participate in a future BCAC meeting via conference call.

//

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In re: Pilot Project Regarding Case Management :
Techniques for Complex Civil Cases in the :
Southern District of New York :

STANDING ORDER

M10-468

: **11 MISC 00388**

-----X

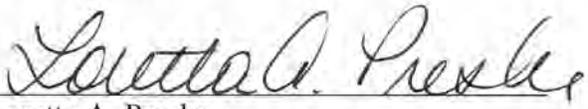
1. This case is hereby designated for inclusion in the Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York (the "Pilot Project"), unless the judge to whom this case is assigned determines otherwise.

2. This case is designated for inclusion in the Pilot Project because it is a class action, an MDL action, or is in one of the following Nature of Suit categories: 160, 245, 315, 355, 365, 385, 410, 830, 840, 850, 893, or 950.

3. The presiding judge in a case that does not otherwise qualify for inclusion in the Pilot Project may nevertheless designate the case for inclusion in the Pilot Project by issuing an order directing that the case be included in the Pilot Project.

4. The description of the Pilot Project, including procedures to be followed, is attached to this Order.

SO ORDERED:


Loretta A. Preska
Chief United States District Judge

Dated: October 31, 2011

New York, New York

**REPORT OF THE
JUDICIAL IMPROVEMENTS COMMITTEE
PILOT PROJECT REGARDING CASE MANAGEMENT
TECHNIQUES FOR COMPLEX CIVIL CASES**

October 2011

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PREFACE

Beginning in early 2011, the Judicial Improvements Committee of the Southern District of New York (“JIC”),¹ chaired by Judge Shira A. Scheindlin, began to consider a pilot project to improve the quality of judicial case management. The impetus for this project was the “Duke Conference” sponsored by the Judicial Conference Advisory Committee on Civil Rules. Judge John G. Koeltl, a member of the Advisory Committee, was Chair of the Planning Committee for the Duke Conference. The JIC decided to focus on complex cases and to develop procedures that would be implemented by the judges of the Court for an eighteen-month trial period. To assist in this effort the Chair of the JIC appointed an Advisory Committee of experienced attorneys, representing a broad diversity of the bar to develop proposals. The Advisory Committee, joined by members of the JIC, formed four subcommittees to consider and recommend best practices for the management of complex civil cases. Each of the four subcommittees submitted a report to the JIC which was adopted in substance by the JIC. The JIC then presented its proposal to the Board of Judges. On September 28, the Board of Judges approved the proposal, albeit with some suggestions for implementing the final version of the pilot project. The following report is the pilot project that the Court has adopted. It will take effect on November 1, 2011. The Court is deeply grateful to all of the JIC Members and Advisory Committee members who worked so hard to bring this project to fruition.

¹ The members of the Judicial Improvements Committee include: Judge Denise Cote, Judge Thomas Griesa, Judge Kenneth Karas, Judge John Koeltl, Judge Victor Marrero, Judge Shira Scheindlin, Judge Sidney Stein, Judge Robert Sweet, Judge James Cott, Judge Theodore Katz, Judge Henry Pitman and Judge Lisa Smith.

JIC ADVISORY COMMITTEE ROSTER

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Steven Bennett
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Foley & Lardner LLP

SUBCOMMITTEE ROSTERS

Initial Pretrial Case Management Subcommittee

Co-Chairs:

Amy Schulman, Paul Saunders

Committee Members:

Judge John Koeltl, Judge Sidney Stein, Judge Henry Pitman, John Boston, Marilyn Kunstler, Sara Moss, Andrew Schilling, Penny Shane, Kent Stauffer, Sam Abernethy

Also participating:

Judge Shira Scheindlin

Discovery Subcommittee

Co-Chairs:

Greg Joseph, Debra Raskin

Committee Members:

Judge Thomas Griesa, Judge James Cott, Judge Lisa Smith, Jim Batson, Steven Bennett, Mei Lin Kwan-Gett, Maura Grossman, Jon Pines, Theodore Rogers, Scott Rosenberg, Kent Stauffer, Ariana Tadler

Also participating:

Judge Shira Scheindlin

Motions Subcommittee

Co Chairs:

Susan Saltzstein, James Bernard

Committee Members:

Judge Victor Marrero, Judge Robert Sweet, Gregg Kanter, Tai Park, Guy Struve, Dale Cendali, Susanna Buerger, Melanie Cyganowski, Lorna Schofield

Also participating:

Judge Shira Scheindlin

Final Pretrial Conference Subcommittee

Co-Chairs:

Steve Susman, Mary Kay Vyskocil

Committee Members:

Judge Denise Cote, Judge Kenneth Karas, Judge Theodore Katz, Vernon Broderick, Peter Wang, Guy Struve, Andrew Schilling, Paul Saunders

Also participating:

Judge Shira Scheindlin

I. Initial Pretrial Case Management Procedures

- A. Initial Report of Parties before Pretrial Conference.** No later than 7 days before the initial pretrial conference, the parties shall file an Initial Report that includes the following:
1. The parties' positions on the applicable topics of the "Initial Pretrial Conference Checklist" (*see* Exhibit A, annexed hereto) including whether initial disclosures pursuant to Rule 26(a)(1) should be made in whole or in part and whether there is some readily identifiable document or category of documents that should be produced immediately in lieu of initial disclosures.
 2. The parties' proposed schedule for fact and expert discovery including:
 - a. Any recommendations for limiting the production of documents, including electronically stored information.
 - b. Any recommendations for limiting depositions, whether by numbers or days of depositions,² and by the elimination of expert depositions.
 - c. A protocol and schedule for electronic discovery, including a brief description of any disputes regarding the scope of electronic discovery.
 - d. Whether the parties recommend that expert discovery precede or follow any summary judgment practice.
 - e. Whether the parties agree to allow depositions preceding trial of trial witnesses not already deposed.
 3. Whether the parties propose to engage in settlement discussions or mediation and, if so, when would be the best time to do so. The parties should also identify what discovery should precede such discussions.
- B. Pretrial Conference Procedures.** The Court shall make its best effort to hold an in-person, initial pretrial conference within 45 days of service on any defendant of the complaint. If the Government is a defendant, the Court shall make its best effort to schedule the initial conference within 60 days of service. If a motion to dismiss is pending, the Court may consider postponing the initial pretrial conference until the motion is decided.

² Note: In some complex cases the parties have limited depositions by agreeing on a maximum number of days a party may depose witnesses. The party may use those days to take two half-day or one full-day deposition per witness.

1. Lead counsel for each party must attend.
2. The Court should address the contents of the Initial Report and the applicable topics contained in the “Initial Pretrial Conference Checklist” (*see* attached Exhibit A) with the parties.
3. The parties shall provide the Court with a concise overview of the essential issues in the case and the importance of discovery in resolving those issues so that the Court can make a proportionality assessment and limit the scope of discovery as it deems appropriate. The Court may also wish to consider the possibility of phased or staged discovery.
4. The Court should consider setting a deadline for any amendments to the pleadings and joinder of additional parties.
5. The Court should set a schedule for the completion of fact discovery, the filing of the Joint Preliminary Trial Report, the Case Management Conference (*see* Final Pretrial Conference Procedures), and the exchange of expert reports. If appropriate, the Court should also consider setting dates for the filing of dispositive motions and the filing of the Joint Final Trial Report.
6. If appropriate, the Court should set a trial-ready date or a trial date contingent on the resolution of dispositive motions.
7. If appropriate, the Court should schedule any motion for class certification and associated discovery.
8. The Court should consider setting a maximum limit for any adjournment requests, both as to length and number, whether or not the parties jointly request an adjournment.
9. If the parties agree, the Court should confirm that prior to trial the parties will be permitted to depose any trial witnesses who were not deposed prior to the filing of the Joint Final Pretrial Report. If the parties cannot agree on this procedure, the Court should consider whether to issue such an order.
10. The District Judge shall advise the parties if it will be referring the case to a Magistrate Judge and, if so, for what purposes. If the District Judge makes such a referral for the purpose of pretrial supervision (as opposed to settlement or the disposition of dispositive motions), the District Judge and the Magistrate Judge are encouraged to communicate and coordinate regarding the pretrial progress of the case.

11. The Court shall determine whether and when additional pretrial conferences should be held to address the issues raised in items 4 through 8 above.

II. Discovery Procedures

A. Stay of Certain Discovery upon Service of Dispositive Motion. Unless the Court orders otherwise, following service of a motion to dismiss pursuant to Rule 12(b)(6) or 12(c) (if made immediately after the filing of an answer) of the Federal Rules of Civil Procedure, discovery of documents, electronically stored information and tangible things may proceed pursuant to Rule 34 but all other discovery with respect to any claim that is the subject of the motion is stayed pending the Court's decision on the motion.

B. Discovery Disputes Not Involving Assertion of Privilege or Work Product. Unless the Court determines otherwise, any discovery dispute — other than a dispute arising in the course of a deposition or involving invocation of a privilege or work product protection — will be submitted to the Court by letter as follows:

1. The movant will submit to the Court, in a manner permitted by the Judge's Individual Practices, and to opposing counsel by hand delivery, fax or email, a letter of not more than 3 single-spaced pages setting forth its position and certifying that the movant has in good faith conferred or attempted to confer with the party or person failing to make discovery in an effort to obtain it without court action. All disputes that the movant intends to raise at that time must be submitted in a *single* letter.
2. The responding party or person may submit a responsive letter of no more than 3 single-spaced pages within 3 business days with a copy to opposing counsel.
3. If the Court permits a reply, it should not exceed 2 single-spaced pages and should be submitted within 2 business days of the responding letter.
4. The Court will make its best effort to render a decision no later than fourteen days from its receipt of the final letter. The Court may resolve the dispute prior to its receipt of the responsive letter if it has otherwise provided the person or party an opportunity to be heard.

C. *In Camera* Sampling of Assertions of Privilege. A party or person who raises a question as to the assertion of a privilege or work product protection with respect to documents (including electronically stored information) may request a ruling from the Court as follows:

1. The requesting party or person will submit to the Court, in a manner permitted by the Judge's Individual Practices, and to opposing counsel by hand delivery, fax or email, a letter of not more than 3 single-spaced pages (a) setting forth its position, (b) certifying that it has in good faith conferred with the opposing party or person in an effort to resolve the issues without court action, and (c) indicating whether there is consent to *in camera* inspection.
2. If the requestor is the party or person invoking privilege or work product protection, it may attach to its letter to the Court no more than 5 representative documents that are the subject of its request. The documents are to be attached only to the copy of the letter directed to the Court, for *in camera* review, and not to the copy of the letter directed to the opposing party or person.
3. Any opposing party or person may submit a responsive letter of no more than 3 single-spaced pages within 3 business days with a copy to opposing counsel.
4. If the Court permits a reply, it should not exceed 2 single-spaced pages and should be submitted within 2 business days of the responding letter.
5. Unless the Court requires a more extensive submission, within fourteen days from its receipt of the responsive letter or, if later, its receipt of the documents, the Court will make its best effort to determine whether the submitted documents must be produced. The Court may issue its decision prior to its receipt of the responsive letter if it has otherwise provided any opposing party or person an opportunity to be heard.

D. Documents Presumptively Not to Be Logged on Privilege Log. The following documents presumptively need not be included on a privilege log:

1. Communications exclusively between a party and its trial counsel.
2. Work product created by trial counsel, or by an agent of trial counsel other than a party, after commencement of the action.³
3. Internal communications within (a) a law firm, (b) a legal assistance organization, (c) a governmental law office or (d) a legal department of a corporation or of another organization.
4. In a patent infringement action, documents authored by trial counsel for an alleged infringer even if the infringer is relying on the opinion of other counsel to defend a claim of willful infringement.⁴

E. Privilege Log Descriptions of Email Threads. For purposes of creation of a privilege log, a party need include only one entry on the log to identify withheld emails that constitute an uninterrupted dialogue between or among individuals; provided, however, that disclosure must be made that the e-mails are part of an uninterrupted dialogue. Moreover, the beginning and ending dates and times (as noted on the emails) of the dialogue and the number of emails within the dialogue must be disclosed, in addition to other requisite privilege log disclosure, including the names of all of the recipients of the communications.

3

See D. Conn. Local Rule 26(e) (“This rule requires preparation of a privilege log with respect to all documents *** except the following: *** the work product material created after commencement of the action”). D. Colo. Local Rule 26.1(g)(3)(c), S.D. Fla. Local Rules Gen Rule 26.1(g)(3)(C), E.D. Okla. Local Rule 26.2(b), and N.D. Okla. Local Rule 26.2(b) are substantively identical D. Conn. Local Rule 26(e). Note that this proposal is more limited than these local rules because it does not exempt from logging documents created by the client at counsel’s suggestion, to avoid abuse.

4

See In re Seagate Tech., 497 F.3d 1360 (Fed. Cir. 2007) (en banc) (reliance on opinion of counsel does not waive the privilege or work product protection of trial counsel on the same subject matter); N.D. Cal. Local Patent Rule 3-7(c) (“Serve a privilege log identifying any other documents, except those authored by counsel acting solely as trial counsel, relating to the subject matter of the advice which the party is withholding on the grounds of attorney-client privilege or work product protection.”). D.N.J. Local Patent Rule 3.8(c), E.D. Mo. Local Patent Rule 3-9(c), W.D. Wash. Local Patent Rule 140, S.D. Tex. Patent Rule 3-8, E.D. Tex. L. Patent Rule 3-7(b), D. Idaho L. Patent Rule 3.8, S.D. Cal. Local Patent Rule 3.8(b) and other local patent rules are substantively identical to N.D. Cal. Local Patent Rule 3-7(c).

- F. Requests for Admission.** Unless otherwise stipulated or ordered by the Court, a party may serve on any other party no more than 50 requests for admission pursuant to Federal Rule of Civil Procedure 36(a)(1)(A); no such request for admission may exceed 25 words in length; except that no limit is imposed on requests for admission made pursuant to Rule 36(a)(1)(B) relating to the genuineness of any described documents.
- G. Subpoenaed Material.** Unless the Court orders otherwise, whenever documents, electronically stored information, or tangible things are obtained in response to a subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure, the party responsible for issuing and serving the subpoena shall promptly produce them to, or make them available for inspection and copying by, all parties to the action.
- H. Joint Electronic Discovery Submission.** A joint electronic discovery submission and proposed Order is annexed as Exhibit B. Among other things, it includes a checklist of electronic discovery issues to be addressed at the Rule 26(f) conference.
- I. Revised Order of Reference to Magistrate Judge.** A revised form of Order of Reference to Magistrate Judge is annexed as Exhibit C. Among other things, it provides that in the case of urgent discovery disputes — *e.g.*, in mid-deposition — litigants may approach the assigned Magistrate Judge when the District Judge is unavailable.

Motion Procedures

A. Pre-Motion Conferences.

1. Pre-motion conferences should be held for all motions **except** motions for reconsideration, motions for a new trial, and motions *in limine*. For discovery disputes, see the procedures set forth at Part II. B, *supra*.
2. A party intending to file a motion governed by the preceding paragraph (other than Rule 12(b) motions) must request by letter no longer than 3 single-spaced pages, a pre-motion conference in advance of filing any such motion. The moving party's letter shall be submitted at least 7 business days prior to a proposed or scheduled conference date, or at any time if no such date has been proposed or scheduled. Within 3 business days of receipt of the letter, each opposing party may submit a written response of no more than 3 single-spaced pages in length. No further letters will be accepted by the Court. The Court will, as soon as possible thereafter, hold the pre-motion conference.
3. The filing of a pre-motion letter shall automatically stay the time by which the motion must be made. In the event the law imposes a filing deadline, the requirement of a pre-motion letter and conference will not apply, unless the Court extends the deadline for filing a motion.
4. Motions pursuant to Rule 12(b) are subject to a different procedure. The Court may consider one of the following options: (a) Not requiring a pre-motion conference; (b) requiring the parties to exchange letters (with or without a copy to the court) **prior to** filing a motion to dismiss, addressing any deficiencies in the complaint, in the hope that such deficiencies might be cured by the filing of an amended complaint; or (c) holding a conference **after** the motion is made at which the plaintiff will be given an opportunity to either amend the complaint or oppose the motion. If plaintiff does not choose to amend, the plaintiff shall be given no further opportunity to amend the complaint to address the issues raised by the pending motion. In the event there is no amendment, the Court will determine whether any discovery shall proceed during the pendency of the motion. The time for opposing the Rule 12(b) motion will be stayed until the conference, at which time the Court will schedule the further briefing of the motion.

- B. Page Length for Motions.** No memorandum of law in support of or in opposition to a motion may exceed 25 pages (double-spaced). Any memorandum in excess of 10 double-spaced pages shall also include a table of contents and table of authorities. Reply memoranda may not exceed 10 pages.

Any party may request additional pages by seeking leave of the Court after having sought the consent of the adverse party or parties.

- C. **Oral Argument.** Oral arguments should be held where practicable and in the Court's view useful, on all substantive motions, unless the parties agree otherwise. Five calendar days in advance of oral argument, the Court should consider notifying the parties of those issues of particular concern.

- D. **56.1 Statements (Statement of Material Fact).** At the request of the parties, and if approved by the Court, no Local Rule 56.1 Statement shall be filed in connection with motions made pursuant to Rule 56 of the Federal Rules of Civil Procedure. If the Court requires that the parties file Rule 56.1 statements, such statements shall not exceed 20 pages per party.

IV. Final Pretrial Conference Procedures

A. Joint Preliminary Trial Report on Close of Fact Discovery. Within 14 days after the completion of fact discovery, the parties shall file a Joint Preliminary Trial Report, unless the Court concludes that such a report is not necessary in a particular case, which shall include the following:

1. The full caption of the action.
2. The name, address, telephone number, fax number and email address of each principal member of the trial team, and an identification of each party's lead trial counsel.
3. A brief statement identifying the basis for subject matter jurisdiction, and, if that jurisdiction is disputed, the reasons therefore.
4. A list of each claim and defense that will be tried and a list of any claims and defenses asserted in the pleadings that are not to be tried.
5. An identification of the governing law for each claim and defense that will be tried and a brief description of any dispute regarding choice of law.
6. The number of days currently estimated for trial and whether the case is to be tried with or without a jury.
7. A statement indicating whether all parties have consented to trial by a magistrate judge, without identifying which parties do or do not consent.
8. A brief description of any summary judgment motion a party intends to file, including a statement identifying whether expert testimony will be offered in support of the motion.

B. Case Management Conference Procedure. Within 14 days of the filing of the Joint Preliminary Trial Report, the Court should make its best effort to hold a Case Management Conference to discuss the contents of the Joint Preliminary Trial Report and to finalize the schedule for the remainder of the litigation.

1. Lead trial counsel for each party must attend.
2. The parties should be prepared to discuss the substance of any summary judgment motion any party intends to file. During the

conference, the Court will determine whether any existing schedule should be modified, including whether the period for summary judgment motions will precede or follow expert disclosures and discovery.

3. If it has not already done so, the Court should set a schedule for expert disclosures and discovery, the briefing of any summary judgment motions, the briefing of any *Daubert* motions, the date for the filing of the Joint Final Trial Report and a firm trial date.
 - a. In the event summary judgment motions will be filed, the Court should consider providing the parties with its best estimate of the date by which it expects to render a decision on the motions and should advise the parties whether there will be a further opportunity for settlement discussions or mediation following the decision. The date that the Court selects during the Case Management Conference for the filing of the Joint Final Trial Report shall be no earlier than 28 days following the Court's decision on the summary judgment motions. Similarly, the firm trial date set by the Court at the Case Management Conference shall be no earlier than 8 weeks following the Court's decision on summary judgment motions.
4. The Court shall encourage (and, in appropriate cases, may order) the parties to participate in settlement discussions or mediation before a forum and by a date chosen by the Court based on its consultations with the parties during the conference. Such settlement discussions or mediation efforts shall not stay the schedule for the completion of the litigation.

C. Joint Final Trial Report. On the date set at the Case Management Conference, but in any event not later than 28 days preceding the date set for the commencement of the trial, the parties shall file a Joint Final Trial Report, unless the Court concludes that such a report is not necessary in a particular case, which shall include the following:

1. In the event that there has been a ruling on summary judgment motions, a list of any claims and defenses from the Joint Preliminary Trial Report that the parties had intended to try but that they will no longer try.
2. A list by each party of its trial witnesses that it, in good faith, presently expects to present. The list shall indicate whether the

witness will testify in person or by deposition, and the general subject matter areas of the witness's testimony. In the event that any such witness has not been deposed, and provided the Court has previously approved (*see* Initial Pretrial Case Management Procedures at 2 ¶ 9), the witness will be made available for deposition before the commencement of trial. The parties will also provide an agreement as to how and when they will give notice to each other of the order of their trial witnesses.

3. A list by each party of exhibits that it, in good faith, presently expects to offer in its case in chief, together with any specific objections thereto other than on grounds of relevancy. Any objection not included on this list will be deemed waived, other than for good cause shown. Prior to filing the Joint Final Trial Report the parties will meet and confer in order to eliminate or narrow disputes about the admissibility of exhibits, to agree upon exhibits that can be utilized during opening statements at the trial, and to facilitate the filing of any *in limine* motions.
4. In the case of bench trials, the parties' recommendation on whether the direct testimony of fact and expert witnesses who testify in person at trial will be submitted by affidavit to the Court in advance of trial.
5. The parties' recommendation on the time limits for the length of the trial, and, if appropriate, the division of time between or among the parties and the protocol for tracking the time.
6. All stipulations or statements of fact or law on which the parties have agreed and which will be offered at trial shall be appended to the Joint Final Trial Report as exhibits.
7. An agreed schedule by which the parties will exchange deposition designations and counter-designations, notify each other of objections to such designations, consult with each other regarding those objections, and notify the Court of any remaining disputes. In any event, the parties must notify the Court of any remaining dispute no later than 48 hours before the deposition testimony is offered at trial.
8. An agreed schedule by which the parties will exchange all demonstratives not otherwise listed in Paragraph C.3 that the parties intend to use at trial during opening statements or otherwise, notify each other of any objections thereto, consult

with each other regarding those objections and notify the Court of any remaining disputes.

9. The parties' recommendation on the number of jurors and any agreement on whether a verdict can be rendered by fewer than all jurors.
10. A brief report on whether the outcome of any settlement discussions or mediation ordered at the Case Management Conference impacts any of the claims or issues remaining to be tried.
11. All other matters that the Court may have ordered at the Case Management Conference or that the parties believe are important to the efficient conduct of the trial, such as bifurcation or sequencing of issues to be tried, or use of interim summations, etc.

D. Filings to Accompany Joint Final Trial Report. The Joint Final Trial Report shall be accompanied by the following documents:

1. In all bench trials, unless directed otherwise at the Case Management Conference, each party shall submit a trial memorandum.
2. Any motions *in limine*. An *in limine* motion does not include a motion for summary judgment or a *Daubert* motion, which must be filed pursuant to the schedule fixed under Paragraph B.3. Opposition to *in limine* motions must be filed within 7 days; no reply will be allowed absent leave of court.
3. Any proposed juror questionnaire.
4. Any requested questions to be asked by the Court during the voir dire.
5. A joint description of the case to be provided to the venire during the voir dire.
6. Any proposed substantive instructions on the issues to be tried to be given by the Court to the jury prior to opening statements.

E. Final Pretrial Conference Procedures. Subsequent to the filing of the Joint Final Trial Report, and in no event less than 7 days before the commencement of trial, the Court shall hold a Final Pretrial Conference which must be attended

by lead trial counsel for each party. At that Conference the Court shall take the following actions:

1. Determine the length of the trial and the division of time between or among the parties.
2. Determine the method by which the jury will be selected, including whether a juror questionnaire will be used and its contents.
3. Rule on any disputes among the parties identified in the Joint Final Trial Report.
4. Rule, if possible, on any motions *in limine* that remain outstanding.
5. Advise the parties of any substantive instructions it will give to the jury prior to opening statements.
6. Notify counsel of a schedule for submission of proposed final jury instructions.

EXHIBIT A

INITIAL PRETRIAL CONFERENCE CHECKLIST

Proportionality assessment of “the needs of the case, amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues” (see Rule 26(b)(2)(C) (iii))

1. Possible limitations on document preservation (including electronically stored information)
2. Appropriateness of initial disclosures pursuant to Rule 26(a)(1)
 - a. Is there some readily identifiable document or category of documents that should be produced immediately in lieu of initial disclosures?
3. Possibility of a stay or limitation of discovery pending a dispositive motion
4. Possibility of communication/coordination between the Magistrate Judge and District Judge with respect to pretrial matters
5. Preliminary issues that are likely to arise that will require court intervention
6. Discovery issues that are envisioned and how discovery disputes will be resolved
7. Proposed discovery including:
 - a. limitations on types of discovery beyond those in the Rules (i.e., waiver of interrogatories, requests for admission, expert depositions)
 - b. limitations on scope of discovery
 - c. limitations on timing and sequence of discovery
 - d. limitations on restoration of electronically-stored information
 - e. agreement to allow depositions of trial witnesses named if not already deposed
 - f. preservation depositions

19. Possible trial-ready date
20. Court logistics and mechanics (e.g., communication with the court, streamlined motion practice, pre-motion conferences, etc.)
21. The need for additional meet and confer sessions, to continue to discuss issues raised at the initial conference among counsel.

EXHIBIT B

**UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

_____,
Plaintiff(s)
-against-
_____,
Defendant(s)

No.: ____ CV ____
Joint Electronic Discovery Submission No.
___ and [Proposed] Order

One or more of the parties to this litigation have indicated that they believe that relevant information may exist or be stored in electronic format, and that this content is potentially responsive to current or anticipated discovery requests. This Joint Submission and [Proposed] Order (and any subsequent ones) shall be the governing document(s) by which the parties and the Court manage the electronic discovery process in this action. The parties and the Court recognize that this Joint Electronic Discovery Submission No. ___ and [Proposed] Order is based on facts and circumstances as they are currently known to each party, that the electronic discovery process is iterative, and that additions and modifications to this Submission may become necessary as more information becomes known to the parties.

- (1) **Brief Joint Statement Describing the Action, [e.g., “Putative securities class action pertaining to the restatement of earnings for the period May 1, 2009 to May 30, 2009”]:**

(a) **Estimated amount of Plaintiff(s)' Claims:**

- Less than \$100,000
- Between \$100,000 and \$999,999
- Between \$1,000,000 and \$49,999,999
- More than \$50,000,000
- Equitable Relief
- Other (if so, specify) _____

(b) **Estimated amount of Defendant(s)' Counterclaim/Cross-Claims:**

- Less than \$100,000
- Between \$100,000 and \$999,999
- Between \$1,000,000 and \$49,999,999
- More than \$50,000,000
- Equitable Relief
- Other (if so, specify) _____

(2) **Competence.** Counsel certify that they are sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery, or have involved someone competent to address these issues on their behalf.

(3) **Meet and Confer.** Pursuant to Fed. R. Civ. P. 26(f), counsel are required to meet and confer regarding certain matters relating to electronic discovery before the Initial Pretrial Conference (the Rule 16 Conference). Counsel hereby certify that they have met and conferred to discuss these issues.

Date(s) of parties' meet-and-confer conference(s): _____

(4) **Unresolved Issues:** After the meet-and-confer conference(s) taking place on the aforementioned date(s), the following issues remain outstanding and/or require court intervention: Preservation; Search and Review; Source(s) of Production; Form(s) of Production; Identification or Logging of Privileged Material; Inadvertent Production of Privileged Material; Cost Allocation; and/or Other (if so, specify) _____. To the extent specific details are needed about one or more issues in dispute, describe briefly below.

As set forth below, to date, the parties have addressed the following issues:

(5) **Preservation.**

- (a) **The parties have discussed the obligation to preserve potentially relevant electronically stored information and agree to the following scope and methods for preservation, including but not limited to: retention of electronic data and implementation of a data preservation plan; identification of potentially relevant data; disclosure of the programs and manner in which the data is maintained; identification of computer system(s) utilized; and identification of the individual(s) responsible for data preservation, etc.**

Plaintiff(s):

Defendant(s):

- (b) **State the extent to which the parties have disclosed or have agreed to disclose the dates, contents, and/or recipients of “litigation hold” communications.**

- (c) The parties anticipate the need for judicial intervention regarding the following issues concerning the duty to preserve, the scope, or the method(s) of preserving electronically stored information:

(6) Search and Review

- (a) The parties have discussed methodologies or protocols for the search and review of electronically stored information, as well as the disclosure of techniques to be used. Some of the approaches that may be considered include: the use and exchange of keyword search lists, “hit reports,” and/or responsiveness rates; concept search; machine learning, or other advanced analytical tools; limitations on the fields or file types to be searched; date restrictions; limitations on whether back-up, archival, legacy, or deleted electronically stored information will be searched; testing; sampling; etc. To the extent the parties have reached agreement as to search and review methods, provide details below.

Plaintiff(s):

Defendant(s):

- (b) **The parties anticipate the need for judicial intervention regarding the following issues concerning the search and review of electronically stored information:**

(7) Production

- (a) **Source(s) of Electronically Stored Information. The parties anticipate that discovery may occur from one or more of the following potential source(s) of electronically stored information [e.g., email, word processing documents, spreadsheets, presentations, databases, instant messages, web sites, blogs, social media, ephemeral data, etc.]:**

Plaintiff(s):

Defendant(s):

(b) Limitations on Production. The parties have discussed factors relating to the scope of production, including but not limited to: (i) number of custodians; (ii) identity of custodians; (iii) date ranges for which potentially relevant data will be drawn; (iv) locations of data; (v) timing of productions (including phased discovery or rolling productions); and (vi) electronically stored information in the custody or control of non-parties. To the extent the parties have reached agreements related to any of these factors, describe below:

Plaintiff(s):

Defendant(s):

(c) Form(s) of Production:

(1) The parties have reached the following agreements regarding the form(s) of production:

Plaintiff(s):

Defendant(s):

(2) Please specify any exceptions to the form(s) of production indicated above (e.g., word processing documents in TIFF with load files, but spreadsheets in native form):

(3) The parties anticipate the need for judicial intervention regarding the following issues concerning the form(s) of production:

(d) Privileged Material.

(1) Identification. The parties have agreed to the following method(s) for the identification (including the logging, if any, or alternatively, the disclosure of the number of documents withheld), and the redaction of privileged documents:

(2) Inadvertent Production / Claw-Back Agreements. Pursuant to Fed R. Civ. Proc. 26(b)(5) and F.R.E. 502(e), the parties have agreed to the following concerning the inadvertent production of privileged documents (e.g. “quick-peek” agreements, on-site examinations, non-waiver agreements or orders pursuant to F.R.E. 502(d), etc.):

(3) The parties have discussed a 502(d) Order. Yes __; No __

The provisions of any such proposed Order shall be set forth in a separate document and presented to the Court for its consideration.

- (e) **Cost of Production.** The parties have analyzed their client’s data repositories and have estimated the costs associated with the production of electronically stored information. The factors and components underlying these costs are estimated as follows:

- (1) **Costs:**

- Plaintiff(s):

- ---

- Defendant(s):

- ---

- (2) **Cost Allocation.** The parties have considered cost-shifting or cost-sharing and have reached the following agreements, if any:

- ---

The next scheduled conference with the Court for purposes of updating the Court on electronic discovery issues has been scheduled for _____. Additional conferences, or written status reports, shall be set every 3 to 4 weeks, as determined by the parties and the Court, based on the complexity of the issues at hand. An agenda should be submitted to the Court four (4) days before such conference indicating the issues to be raised by the parties. The parties may jointly seek to adjourn the conference with the Court by telephone call 48 hours in advance of a scheduled conference, if the parties agree that there are no issues requiring Court intervention.

Check this box if the parties believe that there exist a sufficient number of e-discovery issues, or the factors at issue are sufficiently complex, that such issues may be most efficiently adjudicated before a Magistrate Judge.

Additional Instructions or Orders, if any:

Dated: _____, 20__

SO ORDERED:

United States District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
Plaintiff, :
 :
 : **ORDER OF REFERENCE**
 v. : **TO A MAGISTRATE**
 : **JUDGE**
Defendant, :
 :
 : () ()
----- x

The above entitled action is referred to the designated Magistrate Judge for the following

purpose(s):

- | | |
|--|---|
| <input type="checkbox"/> General Pretrial (includes scheduling, discovery, non –dispositive pretrial motions, and settlement) | <input type="checkbox"/> Consent under 28 U.S.C. §636(c) for all purposes (including trial) |
| <input type="checkbox"/> Specific Non-Dispositive Motion/Dispute*

_____ | <input type="checkbox"/> Consent under 28 U.S.C. §636(c) for limited purpose (e.g., dispositive motion, preliminary injunction)
Purpose: _____ |
| <input type="checkbox"/> If referral is for discovery disputes for a specific period when the District Judge is unavailable, the time period of the referral: | <input type="checkbox"/> Habeas Corpus |
| <input type="checkbox"/> Referral for discovery disputes requiring prompt attention at any time when the District Judge is not immediately available (e.g. on trial or out of town) | <input type="checkbox"/> Social Security |
| <input type="checkbox"/> Settlement* | <input type="checkbox"/> Dispositive Motion (i.e., motion requiring a Report and Recommendation)
Particular Motion: _____
_____ |
| <input type="checkbox"/> Inquest After Default/Damages Hearing | <input type="checkbox"/> All such motions: _____ |

*Do not check if already referred for general pretrial.

Dated _____

SO ORDERED:

United States District Judge

**DEFAULT STANDARD FOR DISCOVERY,
INCLUDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION
("ESI")**

1. General Provisions

a. **Cooperation.** Parties are expected to reach agreements cooperatively on how to conduct discovery under Fed. R. Civ. P. 26-36. In the event that the parties are unable to agree on the parameters and/or timing of discovery, the following default standards shall apply until further order of the Court or the parties reach agreement.

b. **Proportionality.** Parties are expected to use reasonable, good faith and proportional efforts to preserve, identify and produce relevant information.¹ This includes identifying appropriate limits to discovery, including limits on custodians, identification of relevant subject matter, time periods for discovery and other parameters to limit and guide preservation and discovery issues.

c. **Preservation of Discoverable Information.** A party has a common law obligation to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control.

(i) Absent a showing of good cause by the requesting party, the parties shall not be required to modify, on a going-forward basis, the procedures used by them in the ordinary course of business to back up and archive data; provided, however, that the parties shall preserve the non-duplicative discoverable information currently in their possession, custody or control.

¹Information can originate in any form, including ESI and paper, and is not limited to information created or stored electronically.

(ii) Absent a showing of good cause by the requesting party, the categories of ESI identified in Schedule A attached hereto need not be preserved.

d. Privilege.

(i) The parties are to confer on the nature and scope of privilege logs for the case, including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged.

(ii) With respect to information generated after the filing of the complaint, parties are not required to include any such information in privilege logs.

(iii) Activities undertaken in compliance with the duty to preserve information are protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

(iv) Parties shall confer on an appropriate non-waiver order under Fed. R. Evid. 502. Until a non-waiver order is entered, information that contains privileged matter or attorney work product shall be immediately returned if such information appears on its face to have been inadvertently produced or if notice is provided within 30 days of inadvertent production.

2. Initial Discovery Conference.

a. **Timing.** Consistent with the guidelines that follow, the parties shall discuss the parameters of their anticipated discovery at the initial discovery conference (the "Initial Discovery Conference") pursuant to Fed. R. Civ. P. 26(f), which shall take place before the Fed. R. Civ. P. 16 scheduling conference ("Rule 16 Conference").

b. **Content.** The parties shall discuss the following:

(i) The issues, claims and defenses asserted in the case that define the scope of discovery.

(ii) The likely sources of potentially relevant information (i.e., the “discoverable information”), including witnesses, custodians and other data sources (e.g., paper files, email, databases, servers, etc.).

(iii) Technical information, including the exchange of production formats.

(iv) The existence and handling of privileged information.

(v) The categories of ESI that should be preserved.

3. **Initial Disclosures.** Within 30 days after the Rule 16 Conference, each party shall disclose:

a. **Custodians.** The 10 custodians most likely to have discoverable information in their possession, custody or control, from the most likely to the least likely. The custodians shall be identified by name, title, role in the instant dispute, and the subject matter of the information.

b. **Non-custodial data sources.**² A list of the non-custodial data sources that are most likely to contain non-duplicative discoverable information for preservation and production consideration, from the most likely to the least likely.

c. **Notice.** The parties shall identify any issues relating to:

(i) Any ESI (by type, date, custodian, electronic system or other criteria)

²That is, a system or container that stores ESI, but over which an individual custodian does not organize, manage or maintain the ESI in the system or container (e.g., enterprise system or database).

that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(C)(i).

(ii) Third-party discovery under Fed. R. Civ. P. 45 and otherwise, including the timing and sequencing of such discovery.

(iii) Production of information subject to privacy protections, including information that may need to be produced from outside of the United States and subject to foreign laws.

Lack of proper notice of such issues may result in a party losing the ability to pursue or to protect such information.

4. Initial Discovery in Patent Litigation.³

a. Within 30 days after the Rule 16 Conference and for each defendant,⁴ the plaintiff shall specifically identify the accused products⁵ and the asserted patent(s) they allegedly infringe, and produce the file history for each asserted patent.

b. Within 30 days after receipt of the above, each defendant shall produce to the plaintiff the core technical documents related to the accused product(s), including but not limited to operation manuals, product literature, schematics, and specifications.

c. Within 30 days after receipt of the above, plaintiff shall produce to each defendant an initial claim chart relating each accused product to the asserted claims each product allegedly infringes.

³As these disclosures are “initial,” each party shall be permitted to supplement.

⁴For ease of reference, “defendant” is used to identify the alleged infringer and “plaintiff” to identify the patentee.

⁵For ease of reference, the word “product” encompasses accused methods and systems as well.

d. Within 30 days after receipt of the above, each defendant shall produce to the plaintiff its initial invalidity contentions for each asserted claim, as well as the related invalidating references (e.g., publications, manuals and patents).

e. Absent a showing of good cause, follow-up discovery shall be limited to a term of 6 years before the filing of the complaint, except that discovery related to asserted prior art or the conception and reduction to practice of the inventions claimed in any patent-in-suit shall not be so limited.

5. **Specific E-Discovery Issues.**

a. **On-site inspection of electronic media.** Such an inspection shall not be permitted absent a demonstration by the requesting party of specific need and good cause.

b. **Search methodology.** If the producing party elects to use search terms to locate potentially responsive ESI, it shall disclose the search terms to the requesting party. Absent a showing of good cause, a requesting party may request no more than 10 additional terms to be used in connection with the electronic search. Focused terms, rather than over-broad terms (e.g., product and company names), shall be employed. The producing party shall search (i) the non-custodial data sources identified in accordance with paragraph 3(b); and (ii) emails and other ESI maintained by the custodians identified in accordance with paragraph 3(a).

c. **Format.** ESI and non-ESI shall be produced to the requesting party as text searchable image files (e.g., PDF or TIFF). When a text-searchable image file is produced, the producing party must preserve the integrity of the underlying ESI, i.e., the

original formatting, the metadata (as noted below) and, where applicable, the revision history. The parties shall produce their information in the following format: single page TIFF images and associated multi-page text files containing extracted text or OCR with Concordance and Opticon load files containing all requisite information including relevant metadata.

d. **Native files.** The only files that should be produced in native format are files not easily converted to image format, such as Excel and Access files.

e. **Metadata fields.** The parties are only obligated to provide the following metadata for all ESI produced, to the extent such metadata exists: Custodian, File Path, Email Subject, Conversation Index, From, To, CC, BCC, Date Sent, Time Sent, Date Received, Time Received, Filename, Author, Date Created, Date Modified, MD5 Hash, File Size, File Extension, Control Number Begin, Control Number End, Attachment Range, Attachment Begin, and Attachment End (or the equivalent thereof).

SCHEDULE A

1. Deleted, slack, fragmented, or other data only accessible by forensics.
2. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.
3. On-line access data such as temporary internet files, history, cache, cookies, and the like.
4. Data in metadata fields that are frequently updated automatically, such as last-opened dates.
5. Back-up data that are substantially duplicative of data that are more accessible elsewhere.
6. Voice messages.
7. Instant messages that are not ordinarily printed or maintained in a server dedicated to instant messaging.
8. Electronic mail or pin-to-pin messages sent to or from mobile devices (e.g., iPhone and BlackBerry devices), provided that a copy of such mail is routinely saved elsewhere.
9. Other electronic data stored on a mobile device, such as calendar or contact data or notes, provided that a copy of such information is routinely saved elsewhere.
10. Logs of calls made from mobile devices.
11. Server, system or network logs.
12. Electronic data temporarily stored by laboratory equipment or attached electronic

equipment, provided that such data is not ordinarily preserved as part of a laboratory report.

13. Data remaining from systems no longer in use that is unintelligible on the systems in use.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

, Plaintiff, v. , Defendant.	No. ORDER
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This matter having recently come before this Court,

IT IS ORDERED that motions pursuant to Fed. R. Civ. P. 12(b)(6) and 12(c) are discouraged if the defect can be cured by filing an amended pleading. Therefore, the parties must meet and confer prior to the filing of such motions to determine whether it can be avoided. Consequently, motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) must contain a certification of conferral indicating that the parties have conferred to determine whether an amendment could cure a deficient pleading, and have been unable to agree that the pleading is curable by a permissible amendment. In addition, parties shall endeavor not to oppose motions to amend that are filed prior to the Scheduling Conference or within the time set forth in the Rule 16 Case Management Order. Motions to dismiss that do not contain the required certification are subject to be stricken on the Court's motion.

IT IS FURTHER ORDERED that Plaintiff(s) serve a copy of this Order upon

Defendant(s) and file notice of service.