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http://www.utd.uscourts.gov/attorney-planning-meeting-and-report

# Attorney Planning Meeting and Report

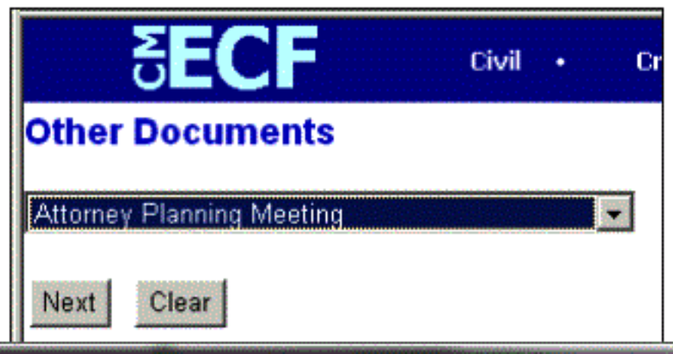
## Attorney Planning Meeting and Report, Scheduling Order, Initial Pretrial Scheduling Conference and Amendment to Schedule

As soon as practicable, counsel in a civil case should conduct an Attorney Planning Meeting under Fed. R. Civ. P. 26(f). The **Attorney Planning Meeting Report** form should be completed and filed with the court promptly thereafter (and no later than 42 days after any defendant has been served or 28 days after any defendant has appeared, whichever is earlier). A draft **Proposed Scheduling Order** in word processing format should be simultaneously submitted via e-mail as described later with the exception of Judge Jenkins and Judge Sam. (Judge Jenkins and Judge Sam handle their own civil scheduling.)

The standard forms on the court's web site should be used. Consult the web site to obtain the most recent forms.

| | | |
|---|---|---|
| Attorney Planning Meeting Form<br>Also download and submit Proposed Scheduling Order (below) | PDF | WORD |
| Proposed Scheduling Order | | WORD |

Please use the Attorney Planning Meeting event in CM/ECF to docket the Attorney Planning Meeting Report form.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

| | |
|---|---|
| Click here to enter text.,<br><br>Plaintiff,<br>v.<br><br>Click here to enter text.,<br><br>Defendant. | **ORDER TO PROPOSE SCHEDULE**<br><br>Case No. Click here to enter text.<br><br>District Judge David Nuffer |

Because "the court and the parties [are] to secure the just, speedy, and inexpensive determination of every action and proceeding" and to fulfill the purposes of Rules 16 and 26 of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED:

1. **Plaintiff must propose a schedule to defendant** in the form of a draft Attorney Planning Meeting Report within the earlier of fourteen (14) days after any defendant has appeared or twenty-eight (28) days after any defendant has been served with the complaint.

2. Within the earlier of twenty-eight (28) days after any defendant has appeared or within forty-two (42) days after any defendant has been served with the complaint (or such other time as may be ordered), **the parties shall meet and confer and do one of the following**:

a. **File a jointly signed Attorney Planning Meeting Report and also email a stipulated Proposed Scheduling Order** in word processing format to ipt@utd.uscourts.gov and a stipulated Motion for Initial Scheduling Conference; or

b. If the parties cannot agree on a Proposed Scheduling Order, plaintiff must **file a jointly signed Attorney Planning Meeting Report detailing the nature of the**

**parties' disputes** and must also file a stipulated Motion for Initial Scheduling Conference; or

c. If the parties fail to agree on an Attorney Planning Meeting Report or on a stipulated Motion for Initial Scheduling Conference, **plaintiff must file a Motion for Initial Scheduling Conference**, which must include a statement of plaintiff's position as to the schedule. Any response to such a motion must be filed within seven days.

3. **Recommended Schedule:** The parties are urged to propose a schedule providing for:

a. Fact discovery completion no more than six months after the filing of the first answer.

b. Expert reports from the party with the burden of proof on that issue 28 days after the completion of fact discovery, and responsive reports 28 days thereafter.

c. Expert discovery completion 28 days after filing of an expert's report.

d. Dispositive motion filing deadline no more than 10 months after the filing of the first answer.

4. **Initial Scheduling Conference:** Even if a stipulated scheduling order is submitted, an Initial Scheduling Conference will be set. The parties must be prepared to address the following questions, in addition to those raised by the Attorney Planning Meeting Report:

a. In 5 minutes or less, each party should be able to describe the crucial facts, primary claims, and primary defenses.

b. Are all claims for relief necessary or are they overlapping? Can any claim for relief be eliminated to reduce discovery and expense?

c. Are all pleaded defenses truly applicable to this case? Can any be eliminated?

d. What 2-3 core factual or legal issues are most likely to be determinative of this dispute?

e. Who are the 1- 3 most important witnesses each side needs to depose? Is there any reason these witnesses cannot be deposed promptly?

f. What information would be most helpful in evaluating the likelihood of settlement? Is there any reason it cannot be obtained promptly?

g. What could be done at the outset to narrow and target the discovery in the case?

h. What agreements have the parties reached regarding limitations on discovery, including discovery of ESI?

i. Have the parties presented an order for protection under Fed. R. Evid. 502?

j. Is there a need to schedule follow-up status conferences?

5. Each party shall make **initial disclosures** within 42 days after the first answer is filed. This deadline is not dependent on the filing of an Attorney Planning Meeting Report, the entry of a Scheduling Order, or the completion of an Initial Scheduling Conference.

Signed May 2, 2018.

BY THE COURT

_____

David Nuffer
United States District Judge

Counsel Submitting and Utah State Bar Number
Attorneys for
Address
Telephone
E-mail Address

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

| | |
|---|---|
| _____,<br>Plaintiff,<br>v.<br>_____,<br>Defendant. | **ATTORNEY PLANNING MEETING REPORT**<br>Case No. _____<br>District Judge _____ |

**1. PRELIMINARY MATTERS**:

a. Describe the nature of the claims and affirmative defenses:

b. This case is _____ not referred to a magistrate judge

_____ referred to magistrate judge _____

_____under 636(b)(1)(A)

_____under 636(b)(1)(B)

_____ assigned to a magistrate judge under General Order 07-001 and

____ all parties consent to the assignment for all proceedings or

____ one or more parties request reassignment to a district judge

c. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on _____(*specify date)* at _____ (*specify location).*

The following attended:

_____*name of attorney,*

counsel for _____*name of party*

_____*name of attorney*,

counsel for _____*name of party*

d. The parties _____ have exchanged or _____ will exchange by ___/___/___ the initial disclosures required by Rule 26(a)(1).

e. Pursuant to Fed. R. Civ. P. 5(b)(2)(D), the parties agree to receive all items required to be served under Fed. R. Civ. P. 5(a) by either (i) notice of electronic filing, or (ii) e-mail transmission. Such electronic service will constitute service and notice of entry as required by those rules. Any right to service by USPS mail is waived.

**2. DISCOVERY PLAN**: The parties jointly propose to the Court the following discovery plan: *Use separate paragraphs or subparagraphs as necessary* ***if the parties disagree.***

a. Discovery is necessary on the following subjects: *Briefly describe the subject areas in which discovery will be needed.*

b. Discovery Phases
*Specify whether discovery will (i) be conducted in phases, or (ii) be limited to or focused on particular issues. If (ii), specify those issues and whether discovery will be accelerated with regard to any of them and the date(s) on which such early discovery will be completed.*

c. Designate the discovery methods to be used and the limitations to be imposed.

(1) *For oral exam depositions, (i) specify the maximum number for the plaintiff(s) and the defendant(s), and (ii) indicate the maximum number of hours unless extended by agreement of the parties.*

Oral Exam Depositions

Plaintiff(s) _____

Defendant(s) _____

Maximum number of hours per deposition _____

(2) *For interrogatories, requests for admissions, and requests for production of documents, specify the maximum number that will be served on any party by any other party.*

Interrogatories _____

Admissions _____

Requests for production of documents _____

(3) Other discovery methods: *Specify any other methods that will be used and any limitations to which all parties agree.*

d. Discovery of electronically stored information should be handled as follows: *Brief description of parties' agreement.*

e. The parties have agreed to an order regarding claims of privilege or protection as trial preparation material asserted after production, as follows: *Brief description of provisions of proposed order.*

f. Last day to file written discovery __/__/__

g. Close of fact discovery __/__/__

h. *(optional)* Final date for supplementation of disclosures under Rule 26(a)(3) and of discovery under Rule 26(e) __/__/__

**3. AMENDMENT OF PLEADINGS AND ADDITION OF PARTIES**:

a. The cutoff dates for filing a motion to amend pleadings are: *specify date*

Plaintiff(s) ___/___/___ Defendant(s) ___/___/___

b. The cutoff dates for filing a motion to join additional parties are: *specify date*

Plaintiff(s)___/___/___ Defendants(s) ___/___/___

***(NOTE: Establishing cutoff dates for filing motions does not relieve counsel from the requirements of Fed. R. Civ. P. 15(a))***.

**4. EXPERT REPORTS**:

a. The parties will disclose the subject matter and identity of their experts on (*specify dates):*

Parties bearing burden of proof ___/___/___

Counter Disclosures ___/___/___

b. Reports from experts under Rule 26(a)(2) will be submitted on (*specify dates):*

Parties bearing burden of proof ___/___/___

Counter Reports ___/___/___

**5. OTHER DEADLINES**:

a. Expert Discovery cutoff: ___/___/___

b. Deadline for filing dispositive[1] or potentially dispositive motions including motions to exclude experts where expert testimony is required to prove the case.

____/___/___

c. Deadline for filing partial or complete motions to exclude expert testimony

___/___/___

[1] Dispositive motions, if granted, resolve a claim or defense in the case; nondispositive motions, if granted, affect the case but do not resolve a claim or defense.

**6. ADR/SETTLEMENT**:

*Use separate paragraphs/subparagraphs as necessary if the parties disagree.*

a. The potential for resolution before trial is: ___ good ___ fair ____ poor

b. The parties intend to file a motion to participate in the Court's alternative dispute resolution program for: settlement conference (with Magistrate Judge): _____ arbitration: _____ mediation: _____

c. The parties intend to engage in private alternative dispute resolution for: arbitration: _____ mediation: _____

d. The parties will re-evaluate the case for settlement/ADR resolution on (*specify date):* __/___/___

**7. TRIAL AND PREPARATION FOR TRIAL:**

a. The parties should have _____ days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3) (if different than the 14 days provided by Rule).

b. This case should be ready for trial by: *specify date* ___/___/___

*Specify type of trial*: Jury _____ Bench _____

c. The estimated length of the trial is: *specify days* _____

_____ Date: ___/___/___

Signature and typed name of Plaintiff(s) Attorney

_____ Date: ___/___/___

Signature and typed name of Defendant(s) Attorney

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## NOTICE TO COUNSEL

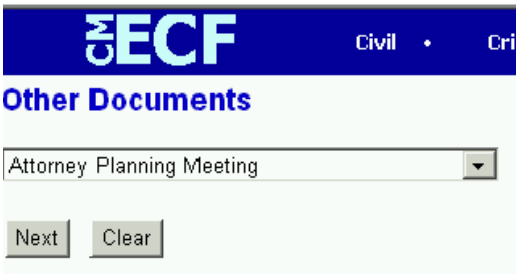
The Report of the Attorney Planning Meeting should be completed and filed with the Clerk of the Court. A copy of the Proposed Scheduling Order on the Court's official form should be submitted in word processing format by email to ipt@utd.uscourts.gov. If counsel meet, confer, and stipulate to a schedule they should:

(i) file a stipulated Attorney Planning Meeting Report *and*

(ii) email a draft scheduling order in word processing format by email to ipt@utd.uscourts.gov

The Court will consider entering the Scheduling Order based on the filed Attorney Planning Meeting Report.

In CM/ECF, this document should be docketed as Other Documents - Attorney Planning Meeting.




If the parties are unable to stipulate to a schedule, the parties will file a **Motion for Initial Scheduling Conference**. The assigned district or referred magistrate judge may hold a hearing. If a hearing is held, counsel should bring a copy of the Attorney Planning Meeting Report to the Hearing.

More information is available at http://www.utd.uscourts.gov/documents/ipt.html

**PROPOSED SCHEDULING ORDER**
**INSTRUCTIONS ON THE USE OF THIS FORM**

Please remove this page and email this form to ipt@utd.uscourts.gov when the Attorney Planning Meeting Report is filed with the Court.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

| | |
|---|---|
| *Plaintiff*,<br>Plaintiff,<br>v.<br>*Defendant*,<br>Defendant. | **SCHEDULING ORDER**<br><br>Case No. *Case No.*<br>District Judge *District Judge*<br>Magistrate Judge *Magistrate Judge* |

Pursuant to Fed. R. Civ. P. 16(b), the Court received the Attorney Planning Meeting Report filed by counsel. The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause pursuant to Fed. R. Civ. P. 6.

****ALL TIMES 4:30 PM UNLESS INDICATED****

| | | **PRELIMINARY MATTERS** | **DATE** |
|---|---|---|---|
| | | Nature of claims and any affirmative defenses: | |
| | a. | Date the Rule 26(f)(1) conference was held? | *00/00/00* |
| | b. | Have the parties submitted the Attorney Planning Meeting Report? | *00/00/00* |
| | c. | Deadline for 26(a)(1) initial disclosures? | *00/00/00* |
| **2.** | | **DISCOVERY LIMITATIONS** | **NUMBER** |
| | a. | Maximum number of depositions by Plaintiff(s): | *10 or #* |
| | b. | Maximum number of depositions by Defendant(s): | *10 or #* |
| | c. | Maximum number of hours for each deposition (unless extended by agreement of parties): | *7 or #* |
| | d. | Maximum interrogatories by any party to any party: | *25 or #* |
| | e. | Maximum requests for admissions by any party to any party: | *#* |

f. Maximum requests for production by any party to any party: *#*

g. The parties shall handle discovery of electronically stored information as follows:

h. The parties shall handle a claim of privilege or protection as trial preparation material asserted after production as follows: *Include provisions of agreement to obtain the benefit of Fed. R. Evid. 502(d).*

i. Last day to serve written discovery: *00/00/00*

j. Close of fact discovery: *00/00/00*

k. (*optional)* Final date for supplementation of disclosures and discovery under Rule 26(e): *00/00/00*

**3. AMENDMENT OF PLEADINGS/ADDING PARTIES**[1] **DATE**

a. Last day to file Motion to Amend Pleadings: *00/00/00*

b. Last day to file Motion to Add Parties: *00/00/00*

**4. RULE 26(a)(2) EXPERT DISCLOSURES & REPORTS** **DATE**

**Disclosures (subject and identity of experts)**

a. Part(ies) bearing burden of proof: *00/00/00*

b. Counter disclosures: *00/00/00*

**Reports**

a. Part(ies) bearing burden of proof: *00/00/00*

b. Counter reports: *00/00/00*

**5. OTHER DEADLINES** **DATE**

a. Last day for expert discovery: *00/00/00*

b. Deadline for filing dispositive or potentially dispositive motions: *00/00/00*

c. Deadline for filing partial or complete motions to exclude expert testimony: *00/00/00*

[1] Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).

| | | | |
|---|---|---|---|
| **6.** | **SETTLEMENT/ALTERNATIVE DISPUTE RESOLUTION** | | **DATE** |
| a. | Likely to request referral to a Magistrate Judge for settlement conference: | *Yes/No* | |
| b. | Likely to request referral to court-annexed arbitration: | *Yes/No* | |
| c. | Likely to request referral to court-annexed mediation: | *Yes/No* | |
| d. | The parties will complete private mediation/arbitration by: | | *00/00/00* |
| e. | Evaluate case for settlement/ADR on: | | *00/00/00* |
| f. | Settlement probability: | | |

***Specify # of days for Bench or Jury trial as appropriate.***
***The Court will complete the shaded areas.***

| | | | |
|---|---|---|---|
| **7.** | **TRIAL AND PREPARATION FOR TRIAL** | **TIME** | **DATE** |
| a. | Rule 26(a)(3) pretrial disclosures[1] | | |
| | Plaintiff(s): | | *00/00/00* |
| | Defendant(s): | | *00/00/00* |
| b. | Objections to Rule 26(a)(3) disclosures (if different than 14 days provided in Rule) | | *00/00/00* |
| c. | Special Attorney Conference[2] on or before: | | *00/00/00* |
| d. | Settlement Conference[3] on or before: | | *00/00/00* |
| e. | Final Pretrial Conference: | ___:__ _.m. | *00/00/00* |

[1] The Parties must disclose and exchange any demonstrative exhibits or animations with the 26(a)(3) disclosures.

[2] The Special Attorneys Conference does not involve the Court. During this conference, unless otherwise ordered by the Court, counsel will agree, to the extent possible, on voir dire questions, jury instructions, and a pretrial order. They will discuss the presentation of the case, and they should schedule witnesses to avoid gaps and disruptions. The parties should mark exhibits in a way that does not result in duplication of documents. The pretrial order should include any special equipment or courtroom arrangement requirements.

[3] The Settlement Conference does not involve the Court unless the Court enters a separate order. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

| f. | Trial | Length | |
|---|---|---|---|
| | i. Bench Trial | *# days* | ___:__ _.m. *00/00/00* |
| | ii. Jury Trial | *# days* | ___:__ _.m. *00/00/00* |

**8. OTHER MATTERS**

Parties should fully brief all Motions in Limine well in advance of the pretrial conference.

Signed May 2, 2018.

BY THE COURT:

_____

U.S. Magistrate Judge

# Scheduling Order Deadline Procedures

## Overview

### Scheduling Order Review and Drafting

When the IPT Clerk starts a draft Scheduling Order or when reviewing a draft submitted by counsel, **check the assigned judges** on the docket. Reassignment may have occurred, or the parties may have mis-designated the judges. Parties often make the mistake of showing the judge holding the IPT on the caption of the case. Only presiding and referral judges should appear on the caption.

If counsel do not specify the **numbers for discovery devices**, the defaults in the Federal Rules of Civil Procedure are used.

| | **Default under Rules** | **Default Text in Order** |
|---|---|---|
| Depositions | 10 | 10 |
| Duration of depositions | 7 hours | 7 |
| Interrogatories | 25 | 25 |
| Request for Admissions | no stated limit | [blank] |
| Request for Production | no stated limit | [blank] |

Usually counsel will designate **scheduling deadlines**, but unworkable deadlines should not be set. Unreasonable deadlines in an Attorney's Meeting Planning Report may indicate the IPT hearing must be held.

### Special instructions for ERISA cases

ERISA cases usually do not require or permit discovery. A special insert is used for those orders:

> **In the event there is a dispute as to the completeness of the administrative record and/or the necessity for or permissibility of discovery, a party may bring a motion with the court within 45 days of the production of initial**

**disclosures (which shall include the entire administrative record) to have such issues determined by the court.**

and only a few deadlines are truly necessary:

Administrative Record filed by:
Dispositive Motion Deadline:

It may be helpful to set the trial and related deadlines just so a date is set.

**SETTING DEADLINES**

The suggested times below may help in setting deadlines when Attorneys fail to set deadlines. The more the deadlines affect the court, the less flexibility there is.

| **Event** | **Suggested time:** |
|---|---|
| Initial Disclosures | 30 days or less from Order date |
| Cutoff for Motion to Amend or add parties | half way through discovery period; 60-90 days from Order |
| Expert Reports | Must fall within a discovery time frame – may fall after a fact discovery deadline and before an expert discovery deadline.<br>Parties may suggest contemporaneous filing of initial expert reports, and later filing of rebuttal reports. |
| Discovery Cutoff | Must fall after expert reports, unless separate fact and expert discovery deadlines are set, in which case only the expert discovery deadline needs to come after expert reports. |
| *Note that a worksheet is available to make it easier to set the following dates.* | |
| Dispositive Motion Deadline | Must fall after discover deadline, but *may* fall after fact discovery deadline and before expert reports or discovery if no expert issues will be resolved on a dispositive motion. |
| Final Supplementation | If this rarely used date is supplied, it should be near the end of the discovery period, and not after any of the following dates. |
| Rule 26 (a)(3) Pre Trial Disclosures (lists of witnesses and exhibits) | Refer to Judges preferences |

| Event | Suggested time: |
|---|---|
| Settlement Conference | Refer to Judges preferences |
| Attorneys' Conference | Refer to Judges preferences |
| Final Pre Trial Date | Refer to Judges preferences |
| Final Pre Trial Time | Refer to Judges preferences |
| Trial Date | Refer to Judges preferences |
| Trial Time | Refer to Judges preferences |

## JUDGES PREFERENCES

*If your judges' civil scheduling preferences change email the changes to Jennifer Stout.

## DISTRICT JUDGES

### Judge Nuffer

Set trial date 5 months after dispositive deadline. Trials are set on Mondays at 8:00 am. Final Pretrial Conferences are set on Monday's 2-weeks before trial at 2:30 pm. The settlement and special attorney conferences are set for the same date on a Friday 3 weeks before the Final Pretrial Conference. Defendant's 26(a)(3) disclosure date is set on a Friday 2 weeks before Settlement and Special Attorney Conference date and Plaintiff's 26(a)(3) disclosures 2 weeks before the Defendant's.

Example:

Dispositive Deadline 1/26/2018
Plaintiff's 26(a)(3) disclosures: 4/27/2018
Defendant's 26(a)(3) disclosures: 5/11/2018
Settlement Conference and Special Attorney Conference: 5/25/2018
Final Pretrial: 2:30 pm 6/18/2018
Trial: 8:00 am 7/2/2018

### Judge Waddoups

Set a scheduling conference (language below) the week after dispositive deadline. Odd cases are set on Wednesdays, even cases on Thursdays both days set for 2:45 pm. Add this language under the dispositive deadline language.

No trial date set, use trial language below in place of trial dates. To calculate the quarter for trial count 5 months after dispositive deadline and add one more quarter.

Example:

Case: 2:17cv1282-CW Dispositive Deadline 1/26/2018

If the parties do not intend to file dispositive or potentially dispositive motions, a scheduling conference will be held for purposes of setting a trial date. 2/1/2018 at 2:45pm

At the time of argument on motions for summary judgment, the court will discuss the scheduling of trial. Counsel should come to the hearing prepared to discuss possible trial dates. If the schedule set forth herein is not extended, the parties can generally expect that trial will be set sometime during the 4th quarter of 2018.

**Judge Shelby**

Set a deadline for parties to request a scheduling conference (language below) a week after dispositive deadline. Add this language under the dispositive deadline language.

No trial date set, use trial language below in place of trial dates. To calculate the quarter for trial count 5 months after dispositive deadline and add one more quarter.

Example:

Case: 2:17cv1196-RJS Dispositive Deadline 1/22/2018

Deadline for filing a request for a scheduling conference with the district judge for the purpose of setting a trial date if no dispositive motions are filed. 1/29/2018

At the time of argument on motions for summary judgment, the court will discuss the scheduling of trial. Counsel should come to the hearing prepared to discuss possible trial dates. If the schedule set forth herein is not extended, the parties can generally expect that trial will be set sometime during the 3rd quarter of 2018.

**Judge Parrish**

Set a scheduling conference (language below) the week after dispositive deadline at 2:00 pm. Add this language under the dispositive deadline language.

No trial date set, use trial language below in place of trial dates. To calculate the quarter for trial count 5 months after dispositive deadline and add one more quarter.

Example:

Case: 2:17cv1191-JNP Dispositive Deadline 1/26/2018

If the parties do not intend to file dispositive or potentially dispositive motions, a scheduling conference will be held for purposes of setting a trial date. 2/2/2018 at 2:00 pm

At the time of argument on motions for summary judgment, the court will discuss the scheduling of trial. Counsel should come to the hearing prepared to discuss possible trial dates. If the schedule set forth herein is not extended, the parties can generally expect that trial will be set sometime during the 4th quarter of 2018.

**Judge Jenkins**

Chambers handles their own scheduling.

**Judge Sam**

Chambers handles their own scheduling.

**Judge Kimball**

Set trial date 5 months after dispositive deadline. Trials are set on Mondays at 8:30 am. No Final Pretrial Conference is set. The settlement and special attorney conferences are set for the same date on a Friday 5 weeks before the Trial Date. Defendant's 26(a)(3) disclosure date is set on a Friday 2 weeks before Settlement and Special Attorney Conference date and Plaintiff's 26(a)(3) disclosures 2 weeks before the Defendant's.

Example:

Dispositive Deadline: 1/26/2018

Plaintiff's 26(a)(3) disclosures: 4/27/2018
Defendant's 26(a)(3) disclosures: 5/11/2018
Settlement Conference and Special Attorney Conference: 5/25/2018
Final Pretrial: Not set at this time
Trial: 8:30 am 7/2/2018

**Judge Campbell**

Set trial date 5 months after dispositive deadline. Trials are set on Mondays at 8:30 am. Final Pretrial Conference is set 3 weeks before trial at 3:00 pm. DO NOT set any trials in December. . The settlement and special attorney conferences are set for the same date on a Friday 3 weeks before the Final Pretrial Conference. Defendant's 26(a)(3) disclosure date is set on a Friday 2 weeks before Settlement and Special Attorney Conference date and Plaintiff's 26(a)(3) disclosures 2 weeks before the Defendant's.

Example:

Dispositive Deadline 1/26/2018

Plaintiff's 26(a)(3) disclosures: 4/27/2018
Defendant's 26(a)(3) disclosures: 5/11/2018
Settlement Conference and Special Attorney Conference: 5/25/2018
Final Pretrial 3:00 pm 6/11/2018
Trial 8:00 am 7/2/2018

**Judge Benson**

Set trial date 5 months after dispositive deadline. Trials are set on Mondays at 8:30 am. Final Pretrial Conference is set 2 weeks before trial at 2:30 pm. . The settlement and special attorney conferences are set for the same date on a Friday 3 weeks before the Final Pretrial Conference. Defendant's 26(a)(3) disclosure date is set on a Friday 2 weeks before Settlement and Special Attorney Conference date and Plaintiff's 26(a)(3) disclosures 2 weeks before the Defendant's.

Example:

Dispositive Deadline: 1/26/2018

Plaintiff's 26(a)(3) disclosures: 4/27/2018
Defendant's 26(a)(3) disclosures: 5/11/2018
Settlement Conference and special Attorney Conference: 5/25/2018
Final Pretrial: 2:30 pm 6/18/2018
Trial: 8:30 am 7/2/2018

**Judge Stewart**

Set trial date 5 months after dispositive deadline. Trials are set on Mondays at 8:30 am. Final Pretrial Conference is set 2 weeks before trial at 2:30 pm. . The settlement and special attorney conferences are set for the same date on a Friday 3 weeks before the Final Pretrial Conference. Defendant's 26(a)(3) disclosure date is set on a Friday 2 weeks before Settlement and Special Attorney Conference date and Plaintiff's 26(a)(3) disclosures 2 weeks before the Defendant's.

Example:

Dispositive Deadline: 1/26/2018

Plaintiff's 26(a)(3) disclosures: 4/27/2018
Defendant's 26(a)(3) disclosures: 5/11/2018
Settlement Conference and special Attorney Conference: 5/25/2018
Final Pretrial: 2:30 pm 6/18/2018
Trial: 8:30 am 7/2/2018

**MAGISTRATE JUDGES**

**Judge Warner**

Set a deadline for parties to request a scheduling conference (language below) a week after dispositive deadline. Add this language under the dispositive deadline language.

No trial date set, use trial language below in place of trial dates. To calculate the quarter for trial count 5 months after dispositive deadline and add one more quarter.

Example (same as RJS):

Case: 2:17cv1196-PMW Dispositive Deadline 1/22/2018

Deadline for filing a request for a scheduling conference with the district judge for the purpose of setting a trial date if no dispositive motions are filed. 1/29/2018

At the time of argument on motions for summary judgment, the court will discuss the scheduling of trial. Counsel should come to the hearing prepared to discuss possible trial dates. If the schedule set forth herein is not extended, the parties can generally expect that trial will be set sometime during the 3rd quarter of 2018.

**Judge Wells**

Set a scheduling conference (language below) the week after dispositive deadline. Odd cases are set on Wednesdays, even cases on Thursdays both days set for 2:00 pm. Add this language under the dispositive deadline language.

No trial date set, use trial language below in place of trial dates. To calculate the quarter for trial count 5 months after dispositive deadline and add one more quarter.

Example (same as CW except hearing at 2:00 pm):

Case: 2:17cv1282-BCW Dispositive Deadline 1/26/2018

If the parties do not intend to file dispositive or potentially dispositive motions, a scheduling conference will be held for purposes of setting a trial date. 2/1/2018 at 2:00 pm

At the time of argument on motions for summary judgment, the court will discuss the scheduling of trial. Counsel should come to the hearing prepared to discuss possible trial dates. If the schedule set forth herein is not extended, the parties can generally expect that trial will be set sometime during the 4th quarter of 2018.

**Judge Furse**

Set trial date 5 months after dispositive deadline. Make sure trial is not set during a criminal rotation month. Trials are set on Mondays at 8:30 am. Final Pretrial Conference is set 2 weeks before trial at 2:30 pm. The settlement and special attorney conferences are set for the same date on a Friday 3 weeks before the Final Pretrial Conference. Defendant's 26(a)(3) disclosure date is set on a Friday 2 weeks before Settlement and Special Attorney Conference date and Plaintiff's 26(a)(3) disclosures 2 weeks before the Defendant's.

Example:

Dispositive Deadline: 1/26/2018

Plaintiff's 26(a)(3) disclosures: 4/27/2018
Defendant's 26(a)(3) disclosures: 5/11/2018
Settlement Conference and special Attorney Conference: 5/25/2018
Final Pretrial: 2:30 pm 6/18/2018
Trial: 8:30 am 7/2/2018

**Judge Pead**

Set a scheduling conference (language below) the week after dispositive deadline at 2:00 pm. Add this language under the dispositive deadline language.

No trial date set and no quarter set. Use trial language below in place of trial dates.

Example:

Case: 2:17cv1210-PMW Dispositive Deadline 1/22/2018

If the parties do not intend to file dispositive or potentially dispositive motions, a scheduling conference will be held for purposes of setting a trial date. 1/29/2018 at 2:00 pm

At the time of argument on motions for summary judgment, the court will discuss the scheduling of trial. Counsel should come to the hearing prepared to discuss possible trial dates. If the schedule set forth herein is not extended, The parties can generally expect that trial dates will be set within three to six months.

**For all judges:**
**Motions to Amend and Add Parties cutoff should be two months before the final date for written discovery.**
**Motions to Exclude Experts should be at least 60 days before final pretrial.**
**All case schedules should allow the case to be tried prior to three years from the date the case was filed. (Failure to do so ends up on CJRA report.)**

# Making A Clawback Agreement Effective Against Third Parties

**Federal Rule of Evidence 502** (amended effective December 2008)

**FRE Rule 502 permits a clawback agreement to be effective against privilege waiver in other litigation.**

> **Context:** Clawback agreements permit mass production of data not reviewed for privilege, with the right to "clawback" privileged information, with no waiver of privilege between parties to agreement.
>
> **Problem:** Clawback is effective between parties, but outsider view of privileged information may be a waiver as to other third parties in other litigation.
>
> **Solution:** Rule 502 permits a federal court *order* to make clawback effective as to all outsiders, so that there is no waiver of privilege.

**The District of Utah standard Attorney Planning Meeting Report template invites parties to propose a Rule 502 compliant order:**

> **STANDARD TEMPLATE:**
> e. The parties have agreed to an order regarding claims of privilege or protection as trial preparation material asserted after production, as follows:

**The following are actual provisions submitted by counsel:**

> **MISSED OPPORTUNITIES:**
> e. The parties have agreed to an order regarding claims of privilege or protection as trial preparation material asserted after production, as follows: *Per rules.*
>
> e. The parties have agreed to an order regarding claims of privilege or protection as trial preparation material asserted after production, as follows: *Any privileged documents that are inadvertently produced shall be returned to the producing party.*
>
> e. The parties have agreed to an order regarding claims of privilege or protection as trial preparation material asserted after production, as follows: *A party producing voluminous electronic data need not perform a privilege review on that data until such time as any other party specifically identifies data, among the produced data, which it intends to use. Within 14 days of such an identification the producing party shall assert any applicable privilege.*

**MAKING THE MOST OF RULE 502:**

e. The parties having agreed to a clawback agreement, and good cause appearing therefore, the Court hereby orders as follows:

i. For purposes of this Clawback Agreement, an "Inadvertently Produced Document" is a document produced to a party in this litigation that could have been withheld, in whole or in part, based on a legitimate claim of attorney-client privilege, work-product protection, or other applicable privilege.

ii. Inclusion of any Inadvertently Produced Document in a production shall not result in the waiver of any privilege or protection associated with such document, nor result in a subject matter waiver of any kind.

iii. A producing party may demand the return of any Inadvertently Produced Document, which demand shall be made to the receiving party's counsel in writing and shall contain information sufficient to identify the Inadvertently Produced Document. Within five (5) business days of the demand for the Inadvertently Produced Document, the producing party shall provide the receiving party with a privilege log for such document that is consistent with the requirements of the Federal Rules of Civil Procedure, setting forth the basis for the claim of privilege for the Inadvertently Produced Document. In the event that any portion of the Inadvertently Produced Document does not contain privileged information, the producing party shall also provide a redacted copy of the Inadvertently Produced Document that omits the information that the producing party believes is subject to a claim of privilege.

iv. Upon receipt of a written demand for return of an Inadvertently Produced Document, the receiving party shall immediately return the Inadvertently Produced Document (and any copies thereof) to the producing party and shall immediately delete all electronic versions of the document.

v. The receiving party may object to the producing party's designation of an Inadvertently Produced Document by providing written notice of such objection within five (5) business days of its receipt of a written demand for the return of an Inadvertently Produced Document. Any such objection shall be resolved by the Court after an *in camera* review of the Inadvertently Produced Document. Pending resolution of the matter by the Court, the parties shall not use any documents that are claimed to be Inadvertently Produced Documents in this litigation.

## Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

**(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver**

When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

1. the waiver is intentional;
2. the disclosed and undisclosed communications or information concern the same subject matter; and
3. they ought in fairness to be considered together.

**(b) Inadvertent disclosure.**

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

**(c) Disclosure Made in a State Proceeding**

When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

1. would not be a waiver under this rule if it had been made in a Federal proceeding; or
2. is not a waiver under the law of the State where the disclosure occurred.

**(d) Controlling effect of court orders.**

A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

**(e) Controlling Effect of a Party Agreement**

An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

**(f) Controlling Effect of This Rule**

Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

**(g) Definitions**

In this rule:

1. "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
2. "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."

# Explanatory Note on Evidence Rule 502 Prepared by the Judicial Conference Advisory Committee on Evidence Rules (Revised 11/28/2007)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. See, e.g., Hopson v. City of Baltimore, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation") .

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. See, e.g., Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); Ryers v. Burleson, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

**Subdivision (a).** The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig., 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject

matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b). The rule rejects the result in In re Sealed Case, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

**Subdivision (b).** Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. See generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

**Subdivision (c).** Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. See 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). See also Tucker v. Ohtsu Tire & Rubber Co., 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

**Subdivision (d).** Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. See generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. See Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable

protection from a court order — predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information "in connection with" a federal proceeding does not result in waiver. But subdivision (d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

**Subdivision (e).** Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

**Subdivision (f).** The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

**Subdivision (g).** The rule's coverage is limited to attorneyclient privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled selfincrimination. The definition of work product "materials" is intended to include both tangible and intangible information. See In re Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

**Sample Docket Text Postponing Scheduling Conference**

| | | |
|---|---|---|
| 04/20/2018 | 16 | ORDER granting 14 Stipulated MOTION to Continue Scheduling Conference: Scheduling Conference reset for 6/15/2018 at 10:00 AM in Room 2B (St George) before Judge David Nuffer. Signed by Judge David Nuffer on 4/20/18 (alt) (Entered: 04/20/2018) |
| 04/20/2018 | 15 | REPORT OF ATTORNEY PLANNING MEETING. (Attachments: # 1 Text of Proposed Order Scheduling Order)(Egan, Austin) (Entered: 04/20/2018) |
| 04/20/2018 | 14 | Stipulated MOTION to Continue Scheduling Conference and Memorandum in Support filed by Plaintiff Chelsey Suitter. (Attachments: # 1 Text of Proposed Order Proposed Order) Motions referred to Dustin B. Pead.(Egan, Austin) (Entered: 04/20/2018) |

| | | |
|---|---|---|
| 04/05/2018 | 8 | **NOTICE OF HEARING**:<br><br>Scheduling Conference set for Wednesday, 5/9/2018 at 11:00 AM in Room 2B (St George) before Judge David Nuffer. (asb) (Entered: 04/05/2018) |

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

| | |
|---|---|
| CRISTINA OCASIO,<br><br>Plaintiff,<br><br>v.<br><br>FLYING SOFTWARE LABS INC.,<br><br>Defendant. | **ORDER DENYING MOTION TO STAY AND GRANTING EXTENSION OF TIME**<br><br>Case no. 2:18-cv-00093-DN<br><br>District Judge David Nuffer |

Upon review and consideration of the parties' Motion to Stay All Proceedings While the Parties Attempt to Settle ("Motion"),[1]

IT IS HEREBY ORDERED that the parties' Motion[2] is DENIED.

IT IS FURTHER HEREBY ORDERED that an extension of time for Defendant to file its answer or otherwise respond to Plaintiff's Complaint[3] is GRANTED. The deadline for Defendant to file its answer or other respond to Plaintiff's Complaint[4] is Thursday, May 31, 2018.

SIGNED this 27th day of April, 2018.

BY THE COURT:

David Nuffer
United States District Judge

[1] Docket no. 7, filed Apr. 26, 2018.

[2] *Id*.

[3] Docket no. 2, filed Jan. 26, 2018.

[4] *Id*.