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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

IN RE: ESTABLISHMENT OF SOUTHERN REGION OF CENTRAL DIVISION	**SECOND AMENDED GENERAL ORDER (March 23, 2018)** No. 18-01

Background. The Court has two divisions established by statute. The statute also defines locations of holding court for each division.[1]

A Southern Region of the Central Division has become necessary to fulfill the Court's mission. Many factors compel this conclusion, including:

- the growing population of Southern Utah;
- the fact that Utah has only one full-service federal court location in Salt Lake City;
- the distance between Salt Lake City and Southern Utah areas;
- the District of Utah's successful handling of bankruptcy, felony, and misdemeanor cases in St. George for the past 22 years;
- the convenience of parties, witnesses, victims, defendants, and their families; and
- the convenience and cost savings for attorneys and staff; and
- the presence of many federal agencies in Southern Utah.

Establishment of the Southern Region. IT IS HEREBY ORDERED that the Southern Region of the Central Division of the District of Utah with locations of holding court in St. George and Salt Lake City is established effective March 1, 2018. The Clerk of Court shall assign case numbers to civil and criminal cases arising in the Southern Region of the Central Division based on the county in which the case arises.

Case Number Prefixes	Counties	Current Locations of Holding Court
1. Northern	Box Elder, Cache, Davis, Morgan, Rich, and Weber.	Salt Lake
2. Central	Carbon, Daggett, Duchesne, Juab, Salt Lake, Summit, Tooele, Uintah, Utah, and Wasatch.	Salt Lake St. George
4. Southern Region	Beaver, Emery, Garfield, Grand, Iron, Kane, Millard, Piute, San Juan, Sanpete, Sevier, Washington, and Wayne.	Salt Lake St. George

[1] 28 U.S.C. § 125.

IT IS FURTHER ORDERED that until local rules on these subjects are adopted, the following procedures are established for cases in the Southern Region:

Motion to change location of holding court for civil cases in the Southern Region: The location of holding court for civil cases in the Southern Region is presumptively St. George. A party to a civil case assigned to the Southern Region who desires hearings to be held in Salt Lake City may, after meeting and conferring with other counsel, file a motion identifying the reasons for changing location. Hearings should proceed in the location most convenient for disposition of the action. Video conferencing is available in the Salt Lake City and St. George courthouses. A motion for change of location is not governed by rules and case law for change of venue. A change of judge is not presumed with a change of location for proceedings.

Motion to change location of holding court for criminal cases in the Southern Region: Criminal cases are assigned a case number on the basis of the Place of Offense as listed in the AO257 form "Defendant Information Relative to a Criminal Action," but the location of holding court for criminal cases in the Southern Region may be designated in the "Comments" field of that form, and the location will be entered on the docket.

A defendant in a criminal case arising in the Southern Region who desires hearings to be held in a different location may, after meeting and conferring with the prosecution, file a motion identifying the reasons for change of location. Fed. R. Crim. P. 18 provides, "The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice." Considerations such as resources of counsel, investigating agencies, and court facilities and security may be appropriate. Video conferencing is available in the Salt Lake City and St. George courthouses. Change of location is not governed by rules and case law for change of venue. A change of judge is not presumed with a change of location for proceedings.

Judge assignment in the Southern Region cases: Until a district judge is based in St. George, a district judge based in Salt Lake City will be assigned to cases in the Southern Region. Random assignment under DUCivR 83-2 is not used in the Southern Region to minimize travel expense, to ensure proceedings are actually held in St. George, to provide centralized management for cases in the Southern Region, and to satisfy the factors identified above in this Order.

Currently, all criminal cases in the Southern Region with St. George designated as the location of holding court are assigned to District Judge Ted Stewart. Criminal cases in the Southern Region with Salt Lake City designated as the location of holding court and all Southern Region civil cases are assigned to Chief District Judge David Nuffer. After December 31, 2018, all criminal cases in the Southern Region will be assigned to Judge Nuffer.

In the event that Judge Nuffer recuses or a party sends a Request for Change of Judge (as provided in the next paragraph), the case shall be reassigned to District Judge Dee Benson, or if he is unable to take the reassignment, the case shall be reassigned to District

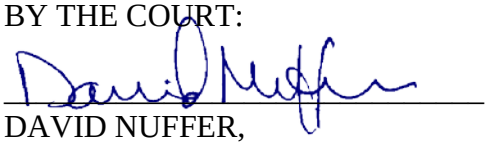
Judge Ted Stewart. Generally, proceedings in a case will be held in the location of holding court designated for that case.

Change of district judge in Southern Region cases: Any party may change the assigned district judge for a case in the Southern Region by sending a Request for Change of Judge to intake@utd.uscourts.gov. The request must be made within 28 days after the first defendant's appearance but cannot be made after a scheduling order has been entered in a civil case. The request shall not specify any reason for the change of judge, shall not be filed on the docket, and shall not be served on other parties. The assigned district judge shall not be notified which party sent the request. If a timely request is received, the clerk shall reassign the case as provided in this Order. Only one change of judge in an action is allowed under this procedure, though other means of challenging an assigned judge are available.[2]

Cases filed before March 1, 2018, that arose in the Southern Region area: Any party to a case filed before March 1, 2018, which after that date would have been assigned to the Southern Region, may move for change of location of holding court to St. George. If the motion is granted, the case will be reassigned to the judge who handles that type of case in the Southern Region, unless otherwise directed by the court. The judge currently presiding in the case shall determine the motion.

It is SO ORDERED this 23rd day of March 2018.

BY THE COURT:



DAVID NUFFER,
Chief United States District Judge

[2] DUCivR83-2; 28 USC § 144; 28 USC § 455.

Designation of Case Numbers and Locations for Holding District Court

Purpose: To provide increased service to the Southern Utah area, the U.S. District Court for the District of Utah has created the Southern Region of the Central Division under General Order 18-01. This document governs the designation of case numbers and locations for holding court in cases arising in the counties identified in the General Order. This document may be modified as experience is gained.

The District of Utah has two active locations for holding court: Salt Lake City and St. George. Cases arising anywhere in the District of Utah may be heard in Salt Lake City or in St. George.

Primary location for each Division and Region: The Salt Lake City location is the primary place of holding court for cases arising in the Northern and Central Divisions. Case numbers for these divisions start with "1" (Northern) and "2" (Central). The place of holding court for civil cases arising in the Southern Region is presumptively St. George. Case numbers for the Southern Region of the Central Division have a prefix number "4."

Case number assignment: Case numbers are assigned based on the following criteria:

Civil cases are assigned case numbers based on information on the JS44 Civil Cover Sheet considered in the following order:

- The location of the land involved in an eminent domain case;
- "County of Residence of First-Listed Plaintiff" if that plaintiff resides in the District of Utah; or
- If the plaintiff is the United States or the first-listed plaintiff does not reside in the District of Utah, then "County of Residence of First Listed Defendant" if that defendant resides in the District of Utah.

If the proper case-number assignment is not apparent from the Civil Cover Sheet, the complaint will be examined to determine where the claim arose and will be assigned the case number accordingly.

Civil cases removed from State Court are assigned a case number based on the county from which the case was removed.

Criminal cases are assigned a case number based on the "Place of Offense" as listed in the AO257 form "Defendant Information Relative to a Criminal Action," but the location of holding court for cases in the Southern Region of the Central Division may be designated in the "Comments" field of that form, and the location will be entered on the docket.

Clerk of Court

D. Mark Jones

Dated: February 14, 2018

Announcement and Request for Comment
Southern Region of the United States Courts for the District of Utah

To better serve the citizens of Southern Utah, the United States District Court for the District of Utah has formed a Southern Region within its Central Division. Please see the Southern Region page on the court website for more information. Send comments on the Southern Region to southernutahplan@utd.uscourts.gov.

Purpose of Creating Southern Region: The Federal Court has created a Southern Region of its Central Division to better serve the citizens who live in Southern Utah to:

- Provide all Utah citizens equal access to the federal judiciary to resolve disputes;
- Address the growing need for services due to increased population and business activity;
- Reduce inconvenience, time, and expense for residents of Southern Utah who are involved in federal court proceedings; and
- Accommodate community and cultural differences within the varied populations of the District of Utah.

Federal Court Divisions and Regions in Utah: Federal law currently divides the District of Utah into two divisions, the Northern Division and the Central Division. The Court has created a Southern Region within the Central Division. Public comment may result in changes to the counties assigned to the Southern Region.

Divisions and Region	Counties	Current Places of Holding Court
Northern	Box Elder, Cache, Davis, Morgan, Rich, and Weber.	Salt Lake
Central	Carbon, Daggett, Duchesne, Juab, Salt Lake, Summit, Tooele, Uintah, Utah, and Wasatch.	Salt Lake St. George
Southern Region	Beaver, Emery, Garfield, Grand, Iron, Kane, Millard, Piute, San Juan, Sanpete, Sevier, Washington, and Wayne.	Salt Lake St. George

Judicial Staffing: Currently, one **district judge** in Salt Lake City will have principal responsibility for cases arising in the Southern Region. Other district judges may on occasion take case assignments. Eventually, a district judge may reside in St. George. The **current magistrate judge,** who is based in St. George, will continue to handle misdemeanor matters and pretrial matters in felony cases until mid-2019. After that time, another magistrate judge based in St. George will assume those duties and will also handle civil pretrial matters and civil cases on consent of the parties. A **bankruptcy judge** based in Salt Lake City will continue to hold regular hearings in St. George, using video conferencing when needed.

Hearings and Trials in Southern Utah: With these changes, parties, witnesses, and counsel in most Southern Region civil, criminal, and bankruptcy cases will be able to appear in St. George. Juries will be called from the Southern Region. Cases arising in the Southern Region will usually be heard in St. George but may be heard in Salt Lake on motion, for the convenience of parties. Video conferencing is available for many matters.

Other Federal Court Services: For the foreseeable future, St. George will not have a full-service clerk's office. A courtroom deputy will support civil, criminal, and bankruptcy hearings and trials. Paper filings by pro se litigants and by counsel in sealed cases, mail, passport surrender, and payments must be handled in Salt Lake City. Probation Officers and Deputy U.S. Marshals will continue to support the Court in St. George. These services complement the existing federal law-enforcement services in St. George provided by Immigration and Customs Enforcement, the Federal Bureau of Investigation, the Drug Enforcement Agency, and others.

Frequently Asked Questions
Southern Region of the Central Division
of the U.S. Courts for the District of Utah

How were the boundaries of the Southern Region selected? Considerations in determining the proposed boundaries include distance from Salt Lake City; boundaries of state court districts; rural vs. urban composition; and current practices of the Court, U.S. Attorney and other federal entities in handling Southern Utah case. The boundaries of the Southern Region may be changed after comment and experience.

If the Court has no courthouse in the Northern Division, why does the division exist? Court divisions develop statistical information for planning purposes. Due to space reduction initiatives, the Court ended its lease of space in Ogden a few years ago. But even though Northern Division cases are heard in Salt Lake City and randomly assigned to all judges, separate statistics assist the Court and the Administrative Office of the U.S. Courts. The development of the Southern Region will permit development of statistics for Southern Utah.

If most of Utah's population is along the Wasatch Front, why have a Southern Region? Southern Utah residents who may be parties to cases, jurors, witnesses, victims, defendants, or families of any of these individuals are inconvenienced by the time and expense of travel to Salt Lake City for federal court services. Attorneys in Southern Utah are sometimes unable, due to distance and expense, to file civil cases in federal court. The Court and federal agencies expend considerable funds for travel between Southern Utah and Salt Lake City. Also, Utah is one of the few federal court districts to have only one courthouse. A second courthouse could also help continuity of operations in the event of a disaster in Salt Lake City.

When will we be able to file federal court documents in St. George? Paper document filing is increasingly rare in the District of Utah since electronic filing was introduced in 2005. Attorneys are required to file electronically. And now that attorneys can file most sealed documents electronically, paper filing is even less common. Until experience supports additional staffing, St. George will not have a full-service clerk's office. Paper filings by pro se litigants and by counsel in sealed cases, mail, passport surrender, and payments must still be handled in Salt Lake City.

When will the Court have resident judges in St. George? A half-time magistrate judge has been based in St. George since 1995. Most preliminary felony and all misdemeanor matters are handled by this judge, and after May 2019, all preliminary civil matters and even civil trials (on parties' consent) will be handled by a newly appointed magistrate judge based in St. George. Assignment of one district judge to Southern Region cases may eventually result in a district judge residing in St. George

Where will court proceedings be held after 2024 when the federal court lease for the courtroom and associated offices at the Fifth District State Courthouse expires? In 2024, the State Court will need the space now leased by the Federal Court in St. George. The Court is actively working on a plan for replacement space in St. George but needs statistical evidence that will be developed through the creation of the Southern Region.

How long are comments accepted? Comments on the plan and court operations are always welcome.

More information on these topics is on the Southern Region page on the court website.
Please submit comments and questions to southernutahplan@utd.uscourts.gov.

UNITED STATES DISTRICT COURT

District of Utah

Honorable David Nuffer, Chief Judge | D. Mark Jones, Clerk of Court

Search

http://www.utd.uscourts.gov/southern-region-district-utah

Southern Region – District of Utah

A CLE discussion about the Southern Region was held in St. George on March 8, 2018.
Click here for the PowerPoint Slides.

A CLE presentation in St. George on Thursday, May 10, 2018 will discuss "Handling the Utah Federal Civil Case from Start to Finish."

Civil and criminal cases arising in the Southern Region counties listed below (shown in yellow) will be designated with a case number beginning with a "4" prefix.

> Beaver, Emery, Garfield, Grand, Iron, Kane,
> Millard, Piute, San Juan, Sanpete, Sevier,
> Washington, and Wayne.

Trials and hearings may be held in Salt Lake City or St. George. More information is found in these documents:

Amended General Order 18-01 establishes the Southern Region of the Central Division of the District of Utah and, for cases arising in the Southern Region, defines procedures for assigning a judge, requesting a change of judge, and requesting a change of location for court proceedings.

Designation of Case Numbers and Locations outlines the Clerk's procedure for assigning case numbers and the location of holding court.

Announcement, Request for Comment, and FAQ gives public notice about the Southern Region and answers some frequently asked questions. The boundaries of the Southern Region may change as a result of public comments.

UNITED STATES DISTRICT COURT

District of Utah

Honorable David Nuffer, Chief Judge | D. Mark Jones, Clerk of Court

Chief Judge David Nuffer

http://www.utd.uscourts.gov/chief-judge-david-nuffer

Chambers Staff

David Nuffer

Anndrea Sullivan-Bowers, Case Manager

Notice: Judge Nuffer is currently assigned all civil cases in the Southern Region of the Central Division of the District of Utah. After January 1, 2019, he will also be assigned all criminal cases in the Southern Region.

Case Assignments

Law Clerk	Cases ending with:	Law Clerk Flag:
Alex Jacobson	0, 2 and 6	LC3
Andrew Munson	3 and 4	LC4
Michael Thomas	1 and 5 and All Patent Cases	LC1
Melina Shiraldi	7, 8 and 9	LC2

Please e-mail inquiries to dj.nuffer@utd.uscourts.gov

If your question is on a specific case, please put the case name and number in the Subject line. Your e-mail should show a copy sent to all counsel.
Find lawyers' e-mail addresses at the Utah Bar, Lawyers.com or by using the 'Mailing Info For a Case Utility' in CM/ECF (under Utilities).

Our goal is 1 working day response to all e-mail.

Journalists who desire to use electronic devices in the courtroom should use this form.

Contact Information, Practices & Procedures and **Resources**

Contact Information	Motions Ready for Decision	Trial Information and Forms
Suggestions for Writing	Hearings On Motions	Professionalism & Civility

UNITED STATES DISTRICT COURT

District of Utah

Honorable David Nuffer, Chief Judge | D. Mark Jones, Clerk of Court

Judge Nuffer's Resource Materials

http://www.utd.uscourts.gov/judge-nuffers-resource-materials

Q&A, Computer Information and CLE Materials

return to Judge Nuffer's Main Page

Technical/Technology		Substantive
Hyperlinks and E-Research	Multiple Monitor / Large Monitor Computer Systems How to get a large virtual desktop.	**Questions and Answers about Magistrate Judges**
Redaction and Metadata	Useful Computer Skills in the CM/ECF Environment Settings and skills for Windows, Lotus Notes, Acrobat, Westlaw and CM/ECF that are useful with the CM/ECF.	**Civil Motion Referral and Unreferral**
PDF Skill and Help Files		**Who Hears the Motion?** This flow chart may reduce confusion about which judge will hear a motion when a district judge refers parts of a case to a magistrate judge.
Liberty Player for Court Audio		**CLE Materials Archive**

Hyperlinks and E-Research

- Attorney Guide to Hyperlinking in the Federal Courts - Word
- Attorney Guide to Hyperlinking in the Federal Courts - WordPerfect
- Federal Court Hyperlinking website - a site to promote the use of hyperlinks by attorneys

Learn all about Cross-Document Hyperlinks in CM/ECF that let your court papers refer to other court papers in the CM/ECF docket. When the judge reads a memorandum reference to a declaration or deposition, a cross-document hyperlink in the memorandum can take the judge to that declaration

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

DEFENDANTS

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ❒ 2 U.S. Government Defendant
- ❒ 3 Federal Question *(U.S. Government Not a Party)*
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 835 Patent - Abbreviated New Drug Application
- ❒ 840 Trademark

OTHER STATUTES
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- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
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- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ❒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State Statutes

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

CIVIL RIGHTS
- ❒ 440 Other Civil Rights
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ❒ 463 Alien Detainee
- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

V. ORIGIN *(Place an "X" in One Box Only)*

- ❒ 1 Original Proceeding
- ❒ 2 Removed from State Court
- ❒ 3 Remanded from Appellate Court
- ❒ 4 Reinstated or Reopened
- ❒ 5 Transferred from Another District *(specify)*
- ❒ 6 Multidistrict Litigation - Transfer
- ❒ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ❒ Yes ❒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE 13

Print Save As... Reset

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. Origin. Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Civil Nature of Suit Code Descriptions
(Rev. 06/17)

Contract

Code	Title	Description
110	Insurance	Action alleging breach of insurance contract, tort claim, or other cause related to an insurance contract, except for maritime insurance contracts.
120	Marine	Action (Admiralty or Maritime) based on service, employment, insurance or other contracts relating to maritime vessels and other maritime contractual matters.
130	Miller Act	Action based on performance and payment bonds agreed to by contractors on federal construction projects as required under the Miller Act, 40 U.S.C. § 3131-3134.
140	Negotiable Instrument	Action relating to an agreement to pay a specific amount of money, including promissory notes, loan agreements and checks.
150	Recovery of Overpayment & Enforcement Judgment	Action to recover debt owed to the United States, including enforcement of judgments, based on overpayments and restitution agreements involving matters other than Medicare benefits, student loans and veterans' benefits.
151	Medicare	Action relating to Medicare payments, including actions for payments of benefits, to recover overpayments, and for judicial review of administrative decisions.
152	Recovery of Defaulted Student Loans (Excludes Veterans)	Action to recover debt owed to the United States from defaulted student loan.
153	Recovery of Overpayment of Veterans' Benefits	Action relating to payments of veterans' benefits, primarily including actions to recover overpayments.
160	Stockholders' Suits	Action brought by stockholder(s) of a corporation (including both stockholder derivative suits and direct actions based on plaintiff's rights as a stockholder), usually alleging claims based on contract and/or tort law and/or fiduciary obligations.
190	Other Contract	Action primarily based on rights and obligations under a contract not classifiable elsewhere under the specific natures of suit under "Contract."
195	Contract Product Liability Actions primarily alleging personal injury or property damage caused by a defective product should be classified under the appropriate nature of suit code under "TORTS."	Action concerning damages caused by a defective product, not primarily involving personal injury or property damage, and based primarily on breach of contract, breach of warranty, misrepresentation, and/or violation of consumer protection laws.
196	Franchise	Action arising from a dispute over a franchise agreement, typically alleging breach of contract, misrepresentation or unfair trade practices.

Civil Nature of Suit Code Descriptions
(Rev. 06/17)

Real Property

Code	Title	Description
210	Land Condemnation	Action by a governmental entity to take privately-owned real property (land or buildings) for public use for compensation.
220	Foreclosure	Action to enjoin foreclosure on real property by mortgage lender.
230	Rent Lease & Ejectment	Action for rental or lease payments owed on real property and/or to eject a party occupying real property illegally.
240	Torts to Land	Action alleging trespass to land, nuisance, contamination or other unlawful entry on or interference with real property possessed by another.
245	Tort Product Liability	Action alleging harm by an unsafe product based on negligence, breach of warranty, misrepresentation, and strict tort liability.
290	All Other Real Property	Action primarily based on unlawful conduct relating to real property that cannot be classified under any other nature of suit.

Torts/Personal Injury

Code	Title	Description
310	Airplane (Excludes airplane product liability claims)	Action alleging personal injury or wrongful death from an air crash or other occurrence involving an airplane.
315	Airplane Product Liability	Action alleging personal injury or death from an air crash or other occurrence involving an airplane and caused by a defective product.
320	Assault, Libel & Slander (Excludes a government employee)	Action alleging intentional acts of assault, libel, trade libel or slander by a private party.
330	Federal Employers' Liability	Action for personal injury or wrongful death brought by a railroad employee or his survivors under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, et. seq.
340	Marine (Excludes marine product liability claims)	Action (Admiralty and Maritime) alleging personal injury or death from an accident involving a water vessel or harbor/dock facilities, including suits brought under the Jones Act and the Limitation of Liability Act.
345	Marine Product Liability	Action (Admiralty and Maritime) alleging personal injury or wrongful death from an accident involving a water vessel or harbor/dock facilities and caused by a defective product.
350	Motor Vehicle	Action alleging personal injury or wrongful death from negligence involving a motor vehicle but not caused by a defective product.
355	Motor Vehicle Product Liability	Action alleging personal injury or wrongful death involving a motor vehicle and caused by a defective product.
360	Other Personal Injury	Action primarily based on personal injury or death caused by negligence or intentional misconduct, including suits brought against the United States under the Federal Tort Claims Act, and which cannot be classified under any other nature of suit.
362	Personal Injury - Medical Malpractice	Action alleging personal injury or wrongful death caused by negligence in medical care provided by a doctor or other health care professional.
365	Personal Injury - Product Liability (Excludes a marine or airplane product)	Action alleging personal injury or death resulting from a defective product.
367	Health Care/Pharmaceutical Personal Injury Product Liability	Action alleging personal injury or death caused by a defective medical or pharmaceutical product.
368	Asbestos Personal Injury Product Liability	Action alleging personal injury or death caused by exposure to asbestos products.

Civil Nature of Suit Code Descriptions
(Rev. 06/17)

Personal Property

Code	Title	Description
370	Other Fraud (Excludes any property that is not real property)	Action primarily based on fraud relating to personal property that cannot be classified under any other nature of suit.
371	Truth in Lending Actions relating to fraud or misrepresentation in the transfer of real property should be classified under nature of suit 290, "All Other Real Property," or, if foreclosure is involved, under nature of suit 220, "Foreclosure."	Action alleging violation of the federal Truth in Lending Act arising from consumer loan transactions involving personal property including automobile loans and revolving credit accounts.
380	Other Personal Property Damage	Action primarily based on damage to personal property caused by harmful conduct such as negligence, misrepresentation, interference with business relationships or unfair trade practices.
385	Property Damage Product Liability	Action alleging damage to personal property caused by a defective product.

Civil Rights

Code	Title	Description
440	Other Civil Rights (Excludes claims against corrections officials)	Action alleging a civil rights violation other than the specific civil rights categories listed below or a violation related to prison. Example: Action alleging excessive force by police incident to an arrest.
441	Voting	Action filed under Civil Rights Act, 52 U.S.C. § 10101, and Voting Rights Act, 52 U.S.C. § 10301
442	Employment	Action filed under Age Discrimination in Employment Act 29:621:634, Equal Employment Opportunity Act (Title VII) 42:2000E, Performance Rating Act of 1950 5:4303
443	Housing/Accommodations	Action filed under the Fair Housing Act (Title VII), 42 U.S.C. § 3601 & 3602.
445	Americans With Disabilities - Employment	Action of discrimination against an employee with disabilities of any type in the work place, filed under 42 U.S.C. § 12117
446	Americans With Disabilities - Other	Action of discrimination against an individual with disabilities in areas other than employment, filed under 42 U.S.C. § 12133 (exclusion or discrimination in provision of services, programs or activities of a public entity) or 42 U.S.C. § 12188 (public accommodations)
448	Education	Action filed under the Individuals with Disabilities Educations Act, 20 U.S.C. § 1401 and Title IX of the Education Amendment of 1972, 20 U.S.C. § 1681 et seq.

Civil Nature of Suit Code Descriptions
(Rev. 06/17)

Prisoner Petitions
Habeas Corpus

Code	Title	Description
463	Alien Detainee	Immigration habeas petition under 28 U.S.C. § 2241. All cases filed with this nature of suit code are restricted to case participants and public terminals. Petition is filed by an alien detainee.
510	Motions to Vacate Sentence	Action by a prisoner to vacate or modify a sentence imposed in federal court, other than a death sentence, under 28 U.S.C. § 2255.
530	General	Action by a federal or state prisoner currently in custody challenging the legality of confinement or other punishment. This includes claims alleging illegalities that occurred in trial (for example, ineffective assistance of counsel), sentencing (including fines and restitution orders), or disciplinary proceedings in prison (for example, loss of good time credits). Habeas petition under 28 U.S.C. § 2254 or prisoner habeas under 28 U.S.C. § 2241.
535	Death Penalty	Action by a federal or state prisoner challenging a death sentence.

Other
Prisoner Petitions

Code	Title	Description
540	Mandamus & Other	Action by prisoner currently in custody for a writ of mandamus to compel action by a judge or government official relating to the prisoner's confinement, including conditions of confinement. This category also includes any actions other than mandamus brought by a prisoner currently in custody, whether or not it relates to his confinement, if it is not classifiable under any other nature of suit category under Prisoner Petitions (for example, action by prisoner to recover property taken by the government in a criminal case).
550	Civil Rights	Action by current or former prisoner alleging a civil rights violation by corrections officials that is not related to a condition of prison life.
555	Prison Condition	Action by current prisoner, or former prisoner or their families alleging a civil rights, Federal Tort Claims Act, or state law claim with respect to a condition of prison life, whether general circumstances or particular episodes. Examples: inadequate medical care or excessive force by prison guards. Includes non-habeas actions by alien detainees alleging unlawful prison conditions.
560	Civil Detainee - Conditions of Confinement (Excludes actions by alien detainees)	Action by former prisoner who was involuntarily committed to a non-criminal facility after expiration of his or her prison term alleging unlawful conditions of confinement while in the non-criminal facility. This category includes, for example, an action by a former prisoner classified as a Sexually Dangerous Person or Sexually Violent Predator alleging civil rights violations during his detention in a medical facility.

Civil Nature of Suit Code Descriptions
(Rev. 06/17)

Forfeiture/Penalty

Code	Title	Description
625	Drug Related Seizure of Property 21 U.S.C. § 881	Action (Forfeiture) by which property itself is accused of wrongdoing and is forfeited to the government as a result.
690	Other	Action primarily based on Acts or Bills that cannot be classified under any other nature of suit, such as: Endangered Species Act, Federal Hazardous Substance Act 15:1261, Game & Wildlife Act 15:256C et seq. (Penalty), Federal Trade Commission Act 15:41-51 (Penalty), Federal Coal Mine Health & Safety Act 30:801 et seq. (Penalty), Load Line Act 46:85-85G, McGuire Bill (Federal Fair Trade) 15:45L Penalty, Marihuana Tax Act 50 STAT 551, Motorboat Act 46:526-526T, National Traffic & Motor Vehicle Safety Act penalty 49:1655, Veterans' Benefit Act, Title 38 Penalty.

Labor

Code	Title	Description
710	Fair Labor Standards Act (Non-Union)	Action relating to non-union workplace related disputes filed under the Fair Labor Standards Act, 29 U.S.C. § 201 including but not limited to wage discrimination, paid leave, minimum wage and overtime pay.
720	Labor/Management Relations (Union)	Action relating to disputes between labor unions and employers as well as all petitions regarding actions of the Nation Labor Relations Board (NLRB)
740	Railway Labor Act	Action relating to disputes filed under the Railway Labor Act, 45 U.S.C. § 151 including labor disputes, individual claims, and response to sanctions.
751	Family and Medical Leave Act	Action filed under the Family Medical Leave Act, 29 U.S.C. § 2601
790	Other Labor Litigation	Action primarily based on labor disputes not addressed by other NOS codes (includes Labor/Management Reporting and Disclosure Act)
791	Employee Retirement Income Security Act	Action filed under the Employee Retirement Income Security Act, 29 U.S.C. § 1132 by individuals and labor organizations.

Immigration

Code	Title	Description
462	Naturalization Application	Action seeking review of denial of an application for naturalization [8 U.S.C. § 1447(b)] or alleging failure to make a determination regarding an application for naturalization [8 U.S.C. § 1421(c)].
465	Other Immigration Actions	Action (Immigration-related) that do not involve Naturalization Applications or petitions for Writ of Habeas Corpus, such as complaints alleging failure to adjudicate an application to adjust immigration status to permanent resident.

Civil Nature of Suit Code Descriptions
(Rev. 06/17)

Bankruptcy

Code	Title	Description
422	Appeal 28 USC § 158	All appeals of previous bankruptcy decisions filed under 28 U.S.C. § 158
423	Withdrawal of Reference 28 USC § 157	Action held in bankruptcy court requesting withdrawal under the provisions of 28 U.S.C. § 157

Property Rights

Code	Title	Description
820	Copyright	Action filed in support or to dispute a copyright claim.
830	Patent	Action filed in support or to dispute a patent claim.
835	Patent – Abbreviated New Drug Application (ANDA)	Action filed in support or to dispute a patent claim involving an Abbreviated New Drug Application (ANDA). These cases are also known as "Hatch-Waxman" cases.
840	Trademark	Action filed in support or to dispute a trademark claim

Social Security

Code	Title	Description
861	HIA (1395ff)	Action filed with regard to social security benefits associated with Health Insurance Part A Medicare
862	Black Lung (923)	Action filed with regard to social security benefits provided for those who contracted Black Lung or their beneficiaries
863	DIWC/DIWW (405(g))	Action filed with regard to social security benefits provided to disabled individuals: worker or child, or widow
864	SSID Title XVI	Action filed with regard to social security benefits provided to Supplemental Security Income Disability under Title XVI
865	RSI (405(g))	Action filed with regard to social security benefits provided for Retirement, Survivor Insurance under 42 U.S.C. § 405

Federal Tax Suits

Code	Title	Description
870	Taxes (U.S. Plaintiff or Defendant)	Action filed under the Internal Revenue Code (General)
871	IRS-Third Party 26 USC 7609	Action filed under the Internal Revenue Code - Tax Reform Act of 1976 (P.L. 94-455) Third Party

Civil Nature of Suit Code Descriptions
(Rev. 06/17)

Other Statutes

Code	Title	Description
375	False Claims Act	Action filed by private individuals alleging fraud against the U.S. Government under 31 U.S.C. § 3729.
376	Qui Tam (31 U.S.C. § 3729(a))	Action brought under the False Claims Act by private persons (also known as "whistleblowers") on their own behalf and on behalf of the United States to recover damages against another person or entity that acted fraudulently in receiving payments or property from, or avoiding debts owed to, the United States Government, 31 U.S.C. § 3730
400	State Reapportionment	Action filed under the Reapportionment Act of 1929 Ch. 28, 46 Stat. 21, 2 U.S.C. § 2a.
410	Antitrust	Action brought under the Clayton Act 15 U.S.C. § 12 - 27 alleging undue restriction of trade and commerce by designated methods that limit free competition in the market place amongst consumers such as anti-competitive price discrimination, corporate mergers, interlocking directorates or tying and exclusive dealing contracts.
430	Banks and Banking	Action filed under the Federal Home Loan Bank Act 12:1421-1449, Home Owners Loan Act 12:1461 or Federal Reserve Acts 12:142 et seq.
450	Commerce	Action filed under the Interstate Commerce Acts 49:1 et seq., 49:301
460	Deportation	Action filed under the Immigration Acts (Habeas Corpus & Review) 8:1101/18:1546
470	Racketeer Influenced and Corrupt Organizations	Racketeer Influenced and Corrupt Organization Act, RICO 18:1961-1968
480	Consumer Credit	Action filed under the Fair Credit Reporting Act, 15 U.S.C. 1681n or 15 U.S.C. 1681o, and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k
490	Cable/Satellite TV	Action filed involving unauthorized reception of cable/satellite TV service under 47 U.S.C. § 553 (unauthorized reception of cable/satellite TV), or 47 U.S.C. § 605 (e)(3) (unauthorized use or publication of a communication)
850	Securities/Commodities/Exchange	Action filed under Small Business Investment Act 15:681, Securities Exchange Act 15:78, Securities Act 15:77, Investment Advisers Act 15:80B(1-21)
890	Other Statutory Actions	Action primarily based on Statutes that cannot be classified under any other nature of suit, such as: Foreign Agents Registration Act 22:611-621, Klamath Termination Act 25:564-564W-L, Federal Aid Highway Act 23:101-142, Federal Corrupt Practices Act 2:241-256, Federal Election Campaign Act, Highway Safety Act 23:401 Immigration & Nationality Act 8:1503, Natural Gas Pipeline Safety Act 49:1671-1700, Naturalization Acts 8:1421/18:911, 1015, 1421, et seq., 3282 or Federal Aviation Act 49:1301 et seq.
891	Agricultural Acts	Action filed under the Federal Crop Insurance Act 7:1501-1550, Commodity Credit Corporation Act 15:713A-L & 4.
893	Environmental Matters	Action filed under Air Pollution Control Act 42:1857-57L, Clean Air Act 42:1857:57L, Federal Environment Pesticide Control Act, Federal Insecticide, Fungicide & Rodenticide Act 7:135, Federal Water Pollution Control Act 33:1151 et seq., Land & Water Conservation Fund Act 16:4602,460 1-4, Motor Vehicle Air Pollution Control Act 42:1857F-1-8, National Environmental Policy Act 42:4321, 4331-35G, 4341-47, River & Harbor Act penalty 3:401-437, 1251.

Civil Nature of Suit Code Descriptions
(Rev. 06/17)

Other Statutes (Continued)

Code	Title	Description
895	Freedom of Information Act	Action filed under the Freedom of Information Act 5:552.
896	Arbitration	Action involving actions to confirm or modify arbitration awards filed under Title 9 of the U.S. Code.
899	Administrative Procedure Act/Review or Appeal of Agency Decision	Action filed under the Administrative Procedures Act, 5 U.S.C. § 701, or civil actions to review or appeal a federal agency decision.
950	Constitutionality of State Statutes	Action drawing into question the constitutionality of a federal or state statute filed under (Rule 5.1). Rule 5.1 implements 28 U.S.C. §2403.

Note: The statutes listed above are not all-inclusive, and other statues might be applicable to each nature of suit. Statutes that are included in the descriptions should be viewed as examples.

JURISDICTIONAL CHECKLIST

1. JURISDICTION PROPERLY ALLEGED?

2. FEDERAL QUESTION? (TWG CH. 6)

- ☐ **"**Arising under" jurisdiction (not defensive or referential use of federal law)
- ☐ State claims involving a "substantial" federal question
- ☐ Private right of action
- ☐ Wholly insubstantial federal claim

3. DIVERSITY JURISDICTION? (TWG CH. 7)

- ☐ Complete diversity
- ☐ Dual citizenship of corporations
- ☐ Citizenship of all partners, association members, etc.
- ☐ Nondiverse or Third-party defendants joined by plaintiff disallowed
- ☐ Amount in controversy (in excess of $75,000)
- ☐ Indispensable parties

4. REMOVAL JURISDICTION? (TWG CH. 8)

- ☐ Federal question; diversity or "separate and independent" to federal question claim
- ☐ Non-removable claims (*e.g.,* FELA)
- ☐ Waiver by conduct or agreement
- ☐ Removal limited to defendants
- ☐ Artful pleading/complete preemption
- ☐ Special removal statutes (*e.g.,* federal officers)
- ☐ Procedural defects:
    - ☐ 1. Removal within 30 days of service
    - ☐ 2. Joinder by all served defendants
    - ☐ 3. Other procedural requirements (attach papers, notices, etc.)
    - ☐ 4. Resident defendant removal (diversity)
    - ☐ 5. Removal more than 1 year after commencement (diversity)
- ☐ Post-removal destruction of jurisdiction

5. SUPPLEMENTAL JURISDICTION (TWG CH. 9)

- ☐ Do state claims derive from "common nucleus of operative fact"

- ☐ Does joinder of supplemental party destroy complete diversity (*i.e.*, added by plaintiff, intervenor as plaintiff, indispensable party)

- ☐ Are there reasons to decline supplemental jurisdiction (*i.e.*, novel/complex state claims, federal claims dismissed, or other compelling reasons for dismissal/remand)

6. OTHER LIMITATIONS

- ☐ Venue (TWG Ch. 12)

- ☐ Timely and proper service (TWG Ch. 11)

- ☐ Personal Jurisdiction (TWG Ch. 10)

- ☐ Jurisprudential limitations (standing, abstention, mootness, ripeness, etc.) (TWG Ch. 24)

- ☐ Eleventh Amendment (TWG Ch. 24)

- ☐ Failure to exhaust administrative remedies (*e.g.*, EEOC), notice requirements, etc.

- ☐ Iqbal, Twombly, Celotex and other Home Run Motions (TWG Ch. 22, 23, 25, 39, 43 and 44)

REMOVAL CHECKLIST

Removal Jurisdiction (TWG Ch. 8)

A. Diversity

- ☐ Is there complete diversity?
- ☐ Does removal notice show *citizenship* (not mere residence) of each party?
- ☐ Does notice allege citizenship both at time of commencement of action and at time of removal?
- ☐ If there is a *corporate* party, does notice of removal show *both* its principal place of business and state of incorporation?
- ☐ Does notice of removal allege citizenship of all members/partners of artificial entity parties (partners, LLC's)
- ☐ Are there any resident defendants (who have been served), thus preventing removal?
- ☐ Does the notice of removal allege specific facts demonstrating that the amount in controversy exceeds $75,000?

B. Federal Question

- ☐ Does state court complaint plead a claim "arising under" federal law?
- ☐ If not, does "artful pleading" doctrine apply (claim under state law *completely preempted by* a federal claim)?
- ☐ Is there any express prohibition against removal of the federal claim?

C. Waiver

- ☐ Did defendant contractually waive the right to remove?
- ☐ Did defendant waive the right to remove by conduct in state court?

Removal Procedure

A. Removal Notice

- ☐ Did all defendants (who were served) join in the removal notice?
- ☐ Were copies of all state court pleadings attached?
- ☐ Was notice of removal given to state court and adverse parties?

B. Timeliness of Removal

- ☐ Did *initial pleadings* reveal removal jurisdiction? If so, was removal effected within 30 days after defendant was properly served with such pleadings?
- ☐ If initial pleadings did not show removability, when was defendant put on notice that removal jurisdiction existed (e.g., through dismissal of nondiverse party, or addition of federal claim)? Was removal effected within 30 days thereafter?

In diversity case, has more than one year passed since commencement of actions?

Home Run Motions

JAMES WAGSTAFFE

March 16, 2018

THE WAGSTAFFE GROUP
PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL (LEXISNEXIS 2018)

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HOME RUN JURISDICTIONAL MOTIONS - 2018

JIM WAGSTAFFE
The Wagstaffe Group Prac. Guide: Fed. Civ. Proc. Before Trial (LN 2018))
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Jurisdiction v. Element

- **Statutory Time Limits:** Statutory time limitations are generally not jurisdictional. [*Hamer v. Neighborhood Housing Serv. Of Chi.* (2017) 138 S.Ct. 13—FRAP 4(a)(5)(c)'s provision for appellate extensions not jurisdictional; *United States v. Kwai Fun Wong* (2015) 135 S.Ct. 1625—time for filing administrative claims and a subsequent lawsuit under the FTCA (28 U.S.C. § 2401(b) not jurisdictional, and hence subject to equitable tolling since no clear statement from Congress time limit is jurisdictional; *Herr v. U.S. Forest Service* (6th Cir. 2016) 803 F.3d 809 -- § 2401(a) also non-jurisdictional; *Sec't United States DOL v . Preston* (11th Cir. 2017) 873 F.3d 877--ERISA's statute of repose for fiduciary duty, 29 U.S.C. § 1131(1), is not jurisdictional; *Montford and Co. v. SEC* (DC Cir. 2015) 793 F.3d 76 --time for filing SEC enforcement actions not jurisdictional; *but see Duggan v. 4100 15 L Comm'r of Internal Revenue*, ---F.3d----, 2018 U.S. App. LEXIS 886 (9th Cir. Jan. 12, 2018)--review of levy jurisdictional, as time limit was within jurisdiction-granting section of 26 U.S.C. §6330(d)(1); *Rubel v. Rubel* (3d Cir. 2017) 856 F.3d 301--ex-spouse challenge to tax liability is jurisdictional per statute]

- **Exhaustion of remedies?:** Courts are split as to whether and under what circumstances exhaustion of remedies requirements are jurisdictional. [*Grand Canyon Skywalk Develop., LLC v. 'Sa' Nyu Wa, Inc.* (9th Cir. 2013) 715 F.3d 1196, 1200--tribal court remedies is a prerequisite to a federal court's exercise of its jurisdiction; *Chevron Mining, Inc. v. NLRB* (D.C. Cir. 2012) 684 F.3d 1318, 1329—first raising issue before NLRB must be exhausted to raise issue on appeal; *compare Payne v. Peninsula School Dist.* (9th Cir. 2010) 653 F.3d 863, 869-871--exhaustion under IDEA not jurisdictional; *Acosta-Ramirez v. Banco Popular De Puerto Rico* (1st Cir. 2013) 712 F3d 14, 19—failure to exhaust FIRREA remedy jurisdictional; *Stewart v. Waco Independent Sch. Dist.* (5th Cir. 2013) 711 F3d 513, 527-528—noting, but not resolving, split on jurisdictional nature of exhaustion; *Allen v. Highlands Hosp. Corp.* (6th Cir. 2008) 545 F3d 387, 401-402—pre-lawsuit requirement to file discrimination charge with EEOC not jurisdictional; *EEOC v. CRST Van Expedited, Inc.* (8th Cir. 2014) 774 F.3d 1169—same; *Acha v. Dept. of Agriculture* (10th Cir. 2016) 841 F.3d 878—whistleblower exhaustion to Office of Special Counsel is jurisdictional; *NFL Players Ass'n v. NFL*, 874 F.3d 22 (5th Cir. 2017)--exhaustion of grievance requirements under LMRA jurisdictional]

- **Statutory Elements:** Generally, whether a complaint satisfies the elements of a claim set forth in a statute is a non-jurisdictional defect to be raised by a Rule 12(b)(6), not a Rule 12(b)(1) motion. [*See Montes v. Janitorial Partners* (D.C. Cir. 2017) 859 F.3d 1079—failure to opt-in in FLSA case not jurisdictional; *see also Patchale v. Zinke, cert. granted 2017*—determining if Gun Lake restrictions are jurisdictional; *Yagman v. Pompeo* (9th Cir. 2017) 868 F.3d 1065--FOIA requirement that party submit request to agency that "reasonably" describes records sought is not

jurisdictional]

- **ERISA**: Whether a claim involves an ERISA "plan" is a non-jurisdictional defect giving rise to a FRCP 12(b)(6) motion only. [*Smith v. Regional Transit Authority* (5th Cir. 2014) 756 F.3d 340, 344-346; *Dahl v. Charles F. Dahl Defined Benefit Pension* (10th Cir. 2014) 744 F.3d 623, 629; whether a plaintiff is a "plan participant" within the meaning of ERISA is a non-jurisdictional defect treated as a missing element of the claim. *North Jersey Brain & Spine Center* (3rd Cir. 2015) 801 F.3d 369; *Leeson v. Transamerica Disability Income Plan* (9th Cir. 2012) 671 F.3d 969, 979]

- **False Claims Act:** The original source requirement has been held to be jurisdictional. [*Rockwell Int'l Corp. v. U.S.* (2007) 127 S.Ct. 1397, 1405-1406; *Amphastar Pharm. v. Aventis Pharma* (9th Cir. 2017) 856 F.3d 656-- same; *U.S. ex rel Antoon v. Cleveland Clinc Found.* (6th Cir. 2015) 788 F.3d 605, 614—same; but see *United States v.AT&T* (D.C. Cir. 2015) 791 F.3d 112--first to file rule (31 USC § 3730(b)(5)) does not raise jurisdictional defect; *United States v. Allstate Ins. Co.* (2nd Cir. 2017) 853 F.3d 80--same; *U.S. ex rel Ambrosecchia v. Paddock Labs* (8th Cir. 2017) 855 F.3d 949--public disclosure bar for FCA not jurisdictional; *U.S. v. Majestic Blue Fisheries* (3rd Cir. 2016) 812 F.3d 294—same; *U.S. v. Humana* (11th Cir. 2015) 776 F.3d 805, 810—same; *Bates v. Mortgage Electronic Regulation System, Inc.* (9th Cir. 2012) 694 F.3d 1076, 1081-- contra]

Other Elemental Defects

- Foreign Sovereign Immunities Act (FSIA) and immunities thereunder are jurisdictional. *Bolivarian Republic of Venezuela v. Helmerich & Payne* (2017) 137 S.Ct. 1312.

- Extraterritorial reach of antitrust laws is not jurisdictional. [*Lotes Co. v. Hon Hai Precision Industry Co.* (2nd Cir. 2014) 753 F3d 395, 405-406; see also *Geophysical Service, Inc. v. TGS-Nopec Geophysical Co.* (5th Cir. 2017) 850 F.3d 785 --extraterritorial reach of copyright laws not jurisdictional; *Morrison v. National Australia Bank* (2010) 561 U.S. 247]

- The "use in commerce" requirement of Lanham Act is not jurisdictional. [*La Quinta Worldwide, LLC v. QRTM* (9th Cir. 2014) 762 F.3d 867]

- Even mandatory rule requiring that objections to EPA interpretation of rule be made with "reasonable specificity" as prerequisite to legal challenge is not jurisdictional. [*EPA v. EME Homer City* (2014) 134 S.Ct. 1584]

- Whether a claim actually comes under a collective bargaining agreement is not jurisdictional under §301. [*Tackett v. M& G Polymers* (6th Cir. 2009) 561 F.3d 478; *Pittsburgh Mack Sales & Serv. V. Int'l Union of Operating Engineers* (3rd Cir. 2009) 580 F.3d 185; *contra ABF Freight System v. Int'l Broth. Of Teamsters* (8th Cir. 2011) 645 F.3d 954]

- Statutory requirement to pursue pre-lawsuit arbitration is not jurisdictional. [*Commonwealth of Kentucky v. United States* (6th Cir. 2014) 759 F.3d 588, 599; *Dist. No. 1 v. Liberty Maritime* (D.C. Cir. 2016) 815 F.3d 834- -failure to submit CBA labor claim to arbitration not jurisdictional]

- Minimum age requirement to qualify for age discrimination lawsuit under ADEA is not jurisdictional. [*Day v. AT&T Disability Income Plan* (9th Cir. 2012) 685 F3d 848, 855-856; *Arbaugh v. Y & H Corp.* (2006) 546 U.S. 500—Title VII's numerosity requirement not jurisdictional]

- Bond requirement under Miller Act (federal construction claims) is jurisdictional, but one-year statute of limitations is not jurisdictional. [*Arena v. Graybar Elec. Co., Inc.* (5th Cir. 2012) 669 F.3d 214, 221-222; *U.S. ex rel. Air Control Tech., Inc. v. Pre Con Indus., Inc.* (9th Cir. 2013) 720 F.3d 1174, 1177]

- The requirement for habeas petitioners to plead specifically a violation of their constitutional rights in order to obtain a certificate of appealability is not jurisdictional. [*Gonzalez v. Thaler* (2012) 132 S.Ct. 641, 654]

Federal Question Jurisdiction

No Hypothetical Jurisdiction

- The court is acting "ultra vires" if it reaches the merits before determining it has statutory and constitutional jurisdiction over the controversy. [*Friends of the Everglades v. U.S. EPA* (11th Cir. 2012) 699 F.3d 1280]

Presumption of Concurrent Jurisdiction

- In actions arising under federal law, there is a presumption that state courts have concurrent jurisdiction, rebuttable only if Congress "affirmatively ousts" state court jurisdiction. [*Mims v. Arrow Financial Services, LLC* (2012) 132 S.Ct. 740—concurrent state court jurisdiction exists over claim under Telephone Consumer Protection Act]

Court's jurisdiction over extr-territorial acts

- Federal courts do not have jurisdiction over acts of foreign corporations outside the United States (i.e., allowing victims of human rights violations to sue foreign entities accused of aiding such atrocities) except where the claims "touch and concern the territory of the United Sates. [*Kiobel v. Royal Dutch Petroleum* (2013) 133 S.Ct. 1659]

"Arising Under" – General Rules

- **State law claim with "substantial" federal question:** In certain circumstances "arising under" jurisdiction exists if there is a substantial federal claim. [*State of New York ex rel Jacobson v. Wells Fargo* (2nd Cir. 2016) 824 F.3d 308--state false claims act raises substantial federal question since proving false statement required proof of violation of federal tax laws; *Evergreen Square of Cudahy v. Wisconsin Housing* (7th Cir. 2015) 776 F.3d 463, 467—jurisdiction found over breach of contract action related to provisions of federal-subsidized housing payments

obligated by HUD and Section 8 Housing; *Severe Records, LLC v. Rich* (6th Cir. 2011) 658 F.3d 571, 581—claims to establish copyright ownership arise under federal law; see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning* (2016) 136 S.Ct. 1562; *Mays v. City of Flint* (6th Cir. 2017) 871 F.3d 437—no substantial federal question over tainted drinking water case simply because state officers working with EPA; *Bd. of Comm'rs v. Tenn. Gas Pipeline Co.* (5th Cir. 2017) 850 F.3d 714–suit by local flood protection authority alleging oil companies' activities damaged coastal lands raises substantial federal question since federal law provides standard of care; *Turbeville v. Financial Industry Regulatory Authority* (11th Cir. 2017) 874 F.3d 1268—removal jurisdiction existed over case against FINRA for defamation based on its federally regulated disclosure and investigation]

- **Compare—mere reference to federal law insufficient:** Merely because a state law claim makes a reference to federal law generally does not equal "arising under" federal question jurisdiction in federal court. See *Moore v. Kansas City Pub. Schs.* (8th Cir. 2016) 828 F.3d 687, 692—damages claim brought on behalf of special education student referencing federal Individual with Disabilities Education Act; *NeuroRepair, Inc. v. Nath Law Grp.* (Fed Cir. 2015) 781 F.3d 1340, 1342—malpractice claim arising out of federal patent infringement claim]

- **Jurisdiction over federally chartered corporation:** Generally, if a federally chartered corporation has a charter that provides that the entity may "sue and be sued" in federal court, federal jurisdiction exists. [*Federal Home Loan Bank of Boston* (1st Cir. 2016) 821 F.3d 102, 109; however if the charter provides that the entity can sue or be sued in "any court of competent jurisdiction, State or Federal" there is no arising under jurisdiction because the language constitutes "a reference to a court with an existing source of subject-matter jurisdiction". – Fannie Mae's federal charter does not confer federal jurisdiction. *Lightfoot v. Cendant Mortgage Corp.* (2017) 137 S.Ct. 553--Fannie Mae's charter does *not* provide for federal jurisdiction]

"Arising Under" – Native American Rights

- Cases relating to Native American rights are said to "arise under" federal common law due to the need for uniform federal policies to govern Indian affairs. [*Cook Inlet Region, Inc. v. Rude* (9th Cir. 2012) 690 F.3d 1127, 1131—claims by corporation formed under Alaska Native Claims Settlement Act against its shareholders for violations of Act' *see also Gilmore v. Weatherford* (10th Cir. 2012) 694 F.3d 1160-, 1173—discussing whether state law accounting claims asserted by tribal members constitute "substantial federal question"]

- ***Compare--intratribal disputes:*** Disputes between tribal members regarding tribal affairs do not arise under federal law and must be resolved by tribal, not federal, courts. [*Longie v. Spirit Lake Tribe* (8th Cir. 2005) 400 F3d 586, 590-591]

- ***Compare state law claims:*** No jurisdiction over state law claims relating to contract to provide energy and mineral services to Indian tribe. [*Becker v. Ute Indian Tribe of the Unitah and Ouray Reservation* (10th Cir. 2014) 770 F.3d 944; compare *Michigan v. Bay Mills Indian Community* (2014) 134 S. Ct. 2024, 2030-2035--courts do not have jurisdiction in suits against *tribes* for acts on land outside the Native American reservation because such suits are barred by tribal sovereign immunity]

- ***Compare—scope of tribal immunity*:** If a lawsuit arises from personal conduct of the defendant and not from the official duties of a tribal official, there is no sovereign immunity. [*Lewis v. Clarke* (2017) 137 S.Ct. 1285—no sovereign immunity for limo driver sued for injuries from a traffic accident occurring while transporting customers to an Indian casino, even if the tribe indemnified him from the liability]

Bivens cases and effect of alternative state tort law remedy

- Courts will not imply a *Bivens* remedy if the claim falls within the scope of traditional state tort law that provides an alternative (even if not perfectly congruent) existing procedure capable of protecting the constitutional issues at stake. [*Minneci v. Pollard* (2012) 132 S.Ct. 617, 623-624-- federal prisoner has no implied right of action against private employees of privately operated federal prison for conduct that is typically governed by state tort law]

Diversity Jurisdiction

Domicile of individuals

- The domicile of individuals is determined by where the person is domiciled and intends to remain permanently. [*See, e.g., Haiti, Inc. v. Kendrick* (1st Cir. 2017) (Souter, J.)—missionary from Iowa is domiciled in Haiti (and hence no diversity) since living there for 20 years and a permanent resident despite being registered to vote and having driver's license in Iowa; *Eckerberg v. Inter-State Studio & Publishing Co.* (8th Cir.2017) 860 F.3d 1079 – that military person assigned to various places did not change his original Florida domicile]

Status of state as real party in interest (defeating diversity)

- Where statutory fees are payable to counties and not to the state, diversity is not defeated in a false claim act case. [*Bates v. Mortgage Electronic Registration System, Inc.* (9th Cir. 2012) 694 F.3d 1076, 1080]

- State, not citizens thereof, was the real party in interest of *parens patrae* consumer protection suit against mortgage lenders, despite possibility of restitution for thousands of state citizens. [*Nevada v. Bank of Am. Corp.* (9th Cir. 2012) 672 F.3d 661, 671-672; *AU Optronics Corp. v. South Carolina* (4th Cir. 2012) 699 F.3d 385, 391-392—same]

- Under "mass action" provision in CAFA, a state attorney general's action asserting restitution claims under state law on behalf of thousands of private purchasers was not a "mass action" under CAFA and was accordingly not removable to federal court. [*Misissippi ex rel. Hood v. AU Optronics Corp.* (2014) 134 S.Ct. 736; *In re Fresenius Granuflo/Naturalyte Dialsysate Prod. Liab. Litig.* (D. Mass. 2015) F.Supp.3d --if state is real party to action, it is "jurisdictional spoiler" for diversity]

Bar on Diversity in Suits Between Aliens

- If there is otherwise no complete diversity of citizenship, if there is an alien plaintiff suing an alien defendant, there is no diversity or alienage jurisdiction. [*Vantage Drilling Co. v. Su* (5th Cir. 2014) 741 F.3d 535; *Peninsula Asset Mgt. v. Hankouk* (6th Cir. 2007) 509 F.3d 271, 272-273—same; *Balay v. Etihad Airways* (7th Cir. 2018) F.3d --no diversity when alien plaintiff sues citizens and alien]

- ***Compare citizen domiciled abroad*** – If any of the parties are citizens but domiciled abroad, then there can be no diversity jurisdiction. [*Louisiana Municipal Police Employees Retirement System v. Wynn* (9th Cir. 2016) 829 3d 1048--finding jurisdiction lacking but dismissing nondiverse, dispensable party to preserve jurisdiction]

Pleading Diversity

- There are no heightened pleading requirements for alleging a corporate party's principal place of business (e.g. pleading where the entity has its nerve center). [*Harris v. Rand* (9th Cir. 2012) 682 F.3d 846, 850-851]

- If complete diversity is disputed, party invoking federal jurisdiction must submit actual evidence to support allegation. [*See Purchasing Power, LLC v. Bluestem Brands, Inc.* (11th Cir. 2017) 851 F.3d 1218; *compare Carolina Casualty Ins. Co. v. Team Equipment, Inc.* (9th Cir. 2014) 741 F.3d 1082--allegation of LLC's members on information and belief authorized if jurisdictional facts within defendant's possession and not reasonably available to plaintiff—jurisdictional issue to be resolved post-filing on defendant's motion and giving plaintiff leave to amend]

Corporation's Principal Place of Business

- Under *Hertz* test, a corporation's principal place of business for diversity purposes is the center of its overall direction, control and coordination, i.e., its "nerve center" where officers make significant corporate decisions and set corporate policy (in contrast to where it conducts its day-to-day activities). [*Hoschar v. Appalachian Power Co.* (4th Cir. 2014) 739 F.3d 163; *Gu v. Invista Sarl* (5th Cir. 2017) 739 F.3d 163*; Harrison v. Granite Bay Care, Inc.* (1st Cir. 2016) 811 F.3d 36; *Johnson v. SmithKline Beecham* (3rd Cir. 2013) 724 F.3d 337, 352—corporate holding company (as member of LLC) has principal place of business where it, not UK parent company, makes corporate decisions; *3123 SMB LLC v. Horn* (9thCir. 2018 F.3d --newly formed holding company's nerve center is location where board meetings to be held; see *CostCommand, LLC v. WH Administrators* (D.C. Cir. 2016) 830 F.3d 19—single director controlled corporate decisions; *Harrison v. Granite Bay Care, Inc.* (1st Cir. 2016) 811 F.3d 36, 40]

Citizenship of Dissolved Corporations

- Dissolved corporation has no principal place of business such that only its place of incorporation is used for determining diversity jurisdiction. [*Holston Investments, Inc. v. LanLogistics Corp.* (11th Cir. 2012) 677 F.3d 1068, 1071]

Citizenship of Foreign Corporations

- All corporations are considered citizens of both the place of incorporation and the principal place of business. Thus, this results in denial of diversity jurisdiction for plaintiffs who are citizens of either the principal place of business or the place of incorporation of a corporation irrespective of whether it is within or outside of the U.S. [28 USC §1332(c)(1) (amended 2012)]

Citizenship of LLC's

- The citizenship of each member of an LLC is critical not only because if *any* LLC member is a citizen of the same state as an opposing party diversity is lacking, but also because if one of the LLC's members is a "stateless alien" courts also will not have diversity jurisdiction. [*Purchasing Power, LLC v. Bluestem Brands, Inc.* (11th Cir. 2017) 851 F.3d 1218; *Settlement Funding LLC v. Rapid Settlements, Limited* (5th Cir. 2017) 851 F.3d 530; *D.B. Zwirn Special Opportunities Fund, L.P. v. Mehrotra* (1st Cir. 2011) 661 F.3d 124, 126-127; *Johnson v. SmithKline Beecham* (3rd Cir. 2013) 724 F.3d 337, 348; *Siloam Springs Hotel LLC v. Century Surety Co.* (10th Cir. 2015) 781 F.3d 1233]

Citizenship of Trusts and Trustees

- The citizenship of a real estate investment trust (REIT) is treated as a non-corporate entity taking on the citizenship, not of its trustee, but of each of its members (including its shareholders). [*Americold Realty Trust v. ConAgra Foods, Inc.* (2015) 136 S.Ct. 1012, 1015; *RTP LLC v. Orix Real Estate Capital* (7th Cir. 2016) 827 F.3d 689; *Zoroastrian Center v. Rustam Guiv Found.* (4th Cir. 2016) 822 F.3d 739, 748-750]

- The rule may well be different if the case involves a "traditional" trust in the sense that a fiduciary duty has been created by the private creation of a trust; in such cases courts have looked solely to the citizenship of the trustee as the trust has no standing to sue or be sued. [*Raymond Loubier Irrevocable Trust v. Loubier* (2nd Cir. 2017) 858 F.3d 719; *see also Crews & Assocs. v. Nuveen High Yield Mun. Bond Fund* (D. Ark. 2011) 783 F. Supp. 2d 1066, 1069—split as to citizenship of trusts in states where the entity is permitted to sue and be sued as unincorporated association; see also *SGK Properties LLC v. U.S. Bank Nat'l Ass'n* (5th Cir. 2018) F.3d --when Bank sued in capacity of trustee, look only to citizenship of trustee]

Amount in Controversy

- **Petitions re Arbitration:** There is a split of authority as to calculating the a]mount in controversy in actions to confirm or vacate arbitration results, with some courts following the award approach and others looking at the amount of the demand. [*Ford v. Hamilton Invs., Inc.* (6th Cir. 1994) 29 F.3d 255, 260—award; *Pershing, LLC v. Kiebach* (5th Cir. 2016) 819 F.3d 179, 182-183 – demand]

- **Future attorney fees?**: There is a split of authority as to whether future attorneys fees are included in calculating the amount in controversy.

- ***View not counting future fees*:** Some courts hold that since future legal expenses can be avoided by defendant's prompt satisfaction of plaintiff's demand, they are not considered when assessing whether the amount "in controversy" is satisfied when the suit is filed. [*Gardynski-Leschuck v. Ford Motor Co.* (7th Cir. 1998) 142 F.3d 955, 959--"Hatfields suing McCoys" could run up $50,000 legal fees in dispute over $10 garden rake, but that won't confer federal jurisdiction].

- ***View counting future fees*:** In contrast, other courts hold reasonably recoverable future attorneys fees are properly considered in calculating the requisite amount in controversy. Rationale: future legal fees should count just as future damages. [*Miera v. Dairyland Ins. Co.* (10th Cir. 1998) 143 F.3d 1337, 1340; *Manguno v. Prudential Prop. & Cas. Ins. Co.* (5th Cir. 2002) 276 F.3d 720, 723; *Feller v. Hartford Life and Acc. Ins. Co.* (S.D. Iowa 2010) 817 F. Supp. 2d 1097, 1107—citing cases]

- **Aggregation**

  Aggregation of claims (in non-CAFA cases) is allowed to satisfy the amount in controversy requirement only when the plaintiffs have a "common and undivided interest" in the recovery such as an undivided interest in a common fund. [*Travelers Property Casualty v. Good* (7th Cir. 2012) 689 F.3d 714, 718—no aggregation in claims for insurance proceeds sought under separate policies]

- **Domestic Relations Exception:** In diversity cases, courts generally will not have jurisdiction over domestic relations cases, i.e., cases in which the relief sought is for status of the marriage, support or child custody. [See *Ankenbrandt v. Richards* (1992) 504 U.S. 689, 704; *Alexander v. Rosen* (6th Cir. 2015) 804 F.3d 1203, 1206—does not apply where party challenges constitutionality of procedures in domestic relations case]

Removal Jurisdiction

DIVERSITY REMOVAL:

Realignment of parties

- Remand will be denied if, after a proper realignment of the parties to their true interests, diversity jurisdiction exists. [*City of Vestavia Hills v. Gen. Fid. Ins. Co.* (11th Cir. 2012) 676 F.3d 1310, 1314; *see also Cascades Dev. v. Nat. Specialty Ins.* (8th Cir. 2012) 675 F.3d 1095, 1098-99—removal proper if assignment to nondiverse party is valid; *Scotts Co. LLC v. Seeds, Inc.* (9th Cir. 2012) 688 F.3d 1154, 1157-1158—in considering realignment, court considers primary matter in dispute]

Fraudulent Joinder

- Fraudulent joinder upheld and removal allowed when negligent misrepresentation claim against law firm barred by established immunity from suit state law protection. [*Murphy v. Aurora Loan Services, LLC* (8th Cir. 2012) 699 F.3d 1027, 1032; *see also Couzens v.*

Donahue (8th Cir. 2017) 854 F.3d 508--defendant not properly sued in individual capacity; *Alviar v. Lilllard* (5th Cir. 2017) 854 F.3d 286 --no evidence of required willful intent for agent's individual liability for tortious interference]

- Employee brought wrongful termination claim against diverse corporate employer and nondiverse manager. Because manager did not actively participate in the termination decision, he was not subject to liability under state law. He thus was not to be counted for diversity purposes. [*Casias v. Wal-Mart Stores, Inc.* (6th Cir. 2012) 695 F.3d 428, 433]

Bar on Removal by Served Local Defendants

- Even if there is complete diversity, if one of the properly joined and served defendants is local (citizen of forum state sued by an out-of-state plaintiff), removal is statutorily barred (28 U.S.C. § 1441(b)(2)). There is a split, however, over whether the bar applies if the local defendant voluntarily appears before formal service and then removes. [*Gentile v. Biogen Idec, Inc.* (D. Mass. 2013) 934 F.Supp.2d 313, 317-318 (collecting cases)]

Bar on Removal by Third Party Defendants

- Third party defendants cannot remove the action to federal court even if subjected to a federal claim by the original defendant. [*Static Control Components, Inc. v. Lexmark Int'l, Inc.* (6th Cir. 2012) 697 F.3d 387, 399]

FEDERAL QUESTION REMOVAL:

No Removal Simply Due to Parallel Action

- The mere fact that there are parallel actions pending (one in state and the other in federal court) does not authorize removal of the state action that includes only state law claims, even if the claims in the two suits are transactionally related. [*Energy Mgt. Services, LLC v. City of Alexandria* (5th Cir. 2014) 739 F.3d 255; *see also American Airlines, Inc. v. Sabre, Inc.* (5th Cir. 2012) 694 F.3d 539, 543]

Removal Based on Well Pleaded Complaint

Removal on federal question allowed if well pleaded complaint contains federal claim for relief as evidenced by incorporation of EEOC charge under Title VII attached to state court complaint. [*Davoodi v. Austin Independent School Dist.* (5th Cir. 2014) 755 F.3d 307]

- By comparison, if the state court complaint is uncertain and does not clearly refer to a federal claim for relief removal cannot take place until and if the claims are clarified by amendment or otherwise more certainly as arising under federal law. [*Quinn v. Guerrero* (5th Cir. 2017) 863 F.3d 353, 359--ambiguous references to excessive force and U.S. Constitution do not convert state law assault and battery claims into ones removable to federal court]

No Complete Preemption

- Without a federal cause of action which in effect replaces a state law claim (e.g. LMRA, ERISA), there is an exceptionally strong presumption against complete preemption and removal under the artful pleading doctrine. [*Johnson v. MFS Petroleum Co.* (8th Cir. 2012) 701 F.3d 243, 249—no complete preemption under Petroleum Marketing Practices Act in class action by gas consumers for misrepresentation of grade of gasoline; *Sheehan v. Broadband Access Services, Inc.* (D. R.I. 2012) 889 F.Supp. 2d 284—no complete preemption of claims of violation of state drug testing laws under Federal Omnibus Transportation Employee Testing Act]

Labor Law Preemption

- Claims for money had and received, unjust enrichment and conversion brought by union employee essentially were ones for unpaid wages, hinging on an interpretation of the CBA. Thus, removal authorized. [*Cavallaro v. UMass Mem'l Healthcare, Inc.* (1st Cir. 2012) 678 F.3d 1, 5]

- On the other hand, if a workplace safety claim depends on an independent and non-negotiable state right, it is not completely preempted. This may be true even if CBA also speaks to safety standards, so long as the claim does not rely on a construction of the CBA for recovery. [*McKnight v. Dresser, Inc.* (5th Cir. 2012) 676 F.3d 426, 434]

ERISA Preemption

- No complete preemption if party would lack standing under ERISA or would not otherwise have a colorable claim to benefits contemplated by the statute. [*McCulloch v. Orthopaedic* (2nd Cir. 2017) 857 F.3d 141—no removal under ERISA over promissory estoppel claim by out-of-state provider who lacked standing under ERISA; *McCulloch Orthopaedic v. Aetna* (2d Cir. 2017) 875 F.3d 141—no complete preemption if plaintiff has no standing under ERISA]

- A written agreement promising early pension plan eligibility was not a separate and independent promise from the plan itself. The agreement made clear that benefits arose from and were governed by the plan. Because the plan allowed for modification of benefits at any time, no cause of action arose from pension freeze. [*Arditi v. Lighthouse Intern.* (2nd Cir. 2012) 676 F.3d 294, 300]

- Where severance benefit rights arose under an employment agreement referencing an ERISA plan solely to assign value to benefits, was independent of ERISA plan for preemption purposes. [*Dakota, Minnesota & Eastern R.R. Corp. v. Schieffer* (8th Cir. 2013) 711 F.3d 878, 882; *see also Gardner v. Heartland Industrial Partners, LP* (6th Cir. 2013) 715 F.3d 609, 614—tortious interference with pension plan contract claim did not require interpretation of ERISA plan terms]

Removal by Foreign Sovereigns

- Unlike U.S. states, foreign sovereigns do not waive sovereign immunity upon removal. [*Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida* (11th Cir. 2012) 692 F.3d 1200]

Federal Officer Removal

- If a defendant's allegations in removing an action under the federal officer removal statute (28 U.S.C. § 1442) are factually challenged, the defendant must produce factual support to meet its burden in proving the existence of removal jurisdiction. [*Leite v. Crane Co.* (9th Cir. 2014) 749 F.3d 1117; *Zeringue v. Crane Co.* (5th Cir. 2017) 846 F.3d 785—federal officer removal over asbestos claim against government contractor supplying product to Navy; *but see Mays v. City of Flint* (6th Cir. 9/11/17) F.3d - rejecting federal officer removal when state officials not acting under supervision of federal agency; *Cuomo v. Crane Co.* (2nd Cir. 2014) F.3d , 2014 WL 5859099]

CAFA AND MASS ACTIONS REMOVAL:

- Restitution action brought by State to benefit consumers in state does not qualify as "mass action" (28 U.S.C. § 1332(d)) for removal purposes since it does not satisfy the "100 or more persons" requirement. *Mississippi v. AU Optronics* (2014) 134 S.Ct. 736]

- Federal jurisdiction *cannot* be exercised in "mass actions" removed from state court where all claims arise from a single event or occurrence in the state where the action was filed and that resulted in injuries in that state or contiguous states. [28 U.S.C. § 1332(d)(11)(B)(ii); *Nevada v. Bank of Am. Corp.* (9th Cir. 2012) 672 F3d 661, 668—action did not result from a single occurrence where complaint alleged widespread fraud involving thousands of borrower interactions]

- CAFA removal in a not-yet-certified class action is not defeated by plaintiff's counsel's stipulation that the amount in controversy does not exceed $5 million, if absent the stipulation, defendant establishes the amount is in excess of the jurisdictional minimum

for CAFA removal. *Standard Fire Insurance Co. v. Knowles* (2013) 133 S.Ct. 1345, 1348; *see also Walker v. Trailer Transit, Inc.* (7th Cir. 2013) 727 F.3d 819; if plaintiff's pleading ambiguous, defendant may wait to remove until receipt of pleading or paper providing clarity; *Rea v. Michaels Stores, Inc.* (9th Cir. 2014) 742 F.3d 1234--same; *Cutrone v. Mortgage Electronic Registration Systems, Inc.* (2nd Cir. 2014) 749 F.3d 137; *Romulus v. CVS Pharmacy, Inc.* (1st Cir. 2014) 770 F.3d 67, 74—removal can await receipt of email information from plaintiff]

- Parens patriae suit brought by State on behalf of its citizens is not a "class action" within the meaning of CAFA. [*Purdue Pharma L.P. v. Kentucky* (2nd Cir. 2013) 704 F.3d 208, 217; *Erie Ins. Exchange v. Erie Indem. Co.* (3rd Cir. 2013) 722 F.3d 154, 158-159—same as to state-authorized right of members of unincorporated association to bring suit on its behalf]

- Amount in controversy as to individual claims cannot be aggregated for CAFA purposes in Private Attorney General Act case for wages. [*Urbino v. Orkin* (9th Cir. 2013) 726 F.3d 1118, 1123--and State is not real party in interest under parens patriae theory]

- The amount in controversy on removal of an action under CAFA must be shown by a preponderance of the evidence. [*Dart Cherokee Basin Operating Co., LLC v. Owens* (2014) 134 S.Ct. 1788—notice of removal need include only plausible allegation of CAFA amount in controversy and defendant can later provide evidence to meet preponderance burden; *Dudley v. Eli Lilly & Co.* (11th Cir. 2014) 778 F3d 909--CAFA amount not satisfied because defendant failed to identify specifc number of class members who did not receive promised compensation; *Hartis v. Chicago Title Ins. Co.* (8th Cir. 2012) 694 F.3d 935, 944—allegation of average remedy of $12 for approximately 1.2 million class members supported CAFA removal; *Frederick v. Hartford Underwriters Ins. Co.* (10th Cir. 2012) 683 F.3d 1242, 1247-1248—same; *Judon v. Travelers Property Casualty Co. of America* (3rd Cir. 2014 773 F.3d 495--conjecture as to CAFA amount in controversy insufficient]

- "Any defendant" language in CAFA does not allow a third party defendant to remove the case to federal court. [*In re Mortgage Electronic Registration Systems, Inc.* (6th Cir. 2012) 680 F.3d 849, 854; *Westwood Apex v. Contreras* (9th Cir. 2011) 644 F.3d 799, 806—same]

- Thirty day deadline to make motion to remand for non-jurisdictional defects does not apply to motion based on CAFA's "local controversy" exception. [*Graphic Communications Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.* (8th Cir. 2011) 636 F.3d 971, 975]

REMOVAL PROCEDURE:

Time to Remove

- If an action is properly removable (e.g. presence of a federal claim), it does not become "more removable" because further grounds emerge supporting removability (e.g. CAFA). [*Ramos-Arrizon v. JP Morgan Chase Bank, N.A.* (S.D. Cal. 2012) 2012 WL 3762455]

- An in-court, off-the-record oral statement is not an "other paper" triggering the time to remove. [*Mackinnon v. IMVU, Inc.* (N.D. Cal. 2012) 2012 WL 95379; compare *Romulus v. CVS Pharmacy, Inc.* (1st Cir. 2014) 770 F.3d 67, 74—removal based on information in plaintiff's email; *Morgan v. Huntington Ingalls* (5th Cir. 2018) 879 F.3d 602—"other paper" rule runs from receipt of removal disclosing deposition transcript, not upon testimony; *Hoffman v. Saul Holdings* 10th Cir. 1999) 194 F.3d 1072--contra]

- Time to remove is not triggered by service on statutory agent, but rather when defendant actually receives copy of complaint. [*Elliott v. America States* (4th Cir. 2018) F.3d]

- Time to remove action does not begin until defendant has "solid and unambiguous" information that case is removable (e.g. calculating amount in controversy based on class size from defendant's records). [*Gascho v. Global Fitness Holdings, LLC* (S.D. Ohio 2012) 863 F.Supp. 2d 677; *see also Harris v. Bankers Life & Cas. Co.* (9th Cir. 2005) 425 F.3d 689—no duty to investigate and removal timely upon receipt of paper from plaintiff first allowing ascertainment of removal; *Graiser v. Visionworks* (6th Cir. 2016) 819 F.3d 277, 283--CAFA removal time not triggered until defendant receives sufficient information from plaintiff]

- The 30-day removal deadline in a CAFA case is not triggered simply because the data as to the requisite $5 million amount in controversy is contained in defendant's own files. [*Kuxhausen v. BMW Fin'l Services NA LLC* (9th Cir. 2013) 707 F.3d 1136, 1139; *see also Walker v. Trailer Transit, Inc.* (7th Cir. 2013) 727 F.3d 19, 824-826]

Unanimity Requirement

- Generally, all served defendants must unanimously agree to the notice of removal, although such joinder can be evidenced within a timely filed motion to dismiss filed in federal court by a co-defendant. [*Christiansen v, West Branch Community School Dist.* (8th Cir. 2012) 674 F.3d 927]

- If a served co-defendant has signed a valid forum selection clause that prohibits removal (e.g. by agreeing to a mandatory clause placing exclusively selecting state court only), then it cannot consent to removal as would be required. [*Autoridad de Energia v. Vitol, S.A.* (1st Cir. 2017) 859 F.3d 140]

Remand Motions

- Error in notice of removal (misstating county from where case originated) was obvious and did not preclude amending the notice to preclude a remand to state court [*Emeldi v. Univ. of Oregon* (9th Cir. 2012) 698 F.3d 715, 731]

No Sua Sponte Remand for Procedural Defects

- If the defect on removal is procedural and not one of jurisdiction, the court may not sua sponte remand. [*Coronoa-Contreras v. Gruel* (9th Cir. 2017) 857 F.3d 1025; *City of Albuqerque v. Soto Enterp.* (10th Cir. 2017) 864 F.3d 1089]

Waiver of Right to Remove

- A defendant waives the right to remove by clearly and unequivocally waiving the right to a federal forum. *Grand View v. Helix Electric*, 847 F.3d 255 (5th Cir. 2017)—forum selection clause consenting to "sole and exclusive jurisdiction of the courts of Harris County, Texas" waives right of removal; *Autoridad de Energia v. Vitol, S.A.* (1st Cir. 2017) 859 F.3d 140—removal waived if co-defendant's forum selection clause vests exclusive jurisdiction in "courts of Commonwealth of Puerto Rico"; *City of Albuqerque v. Soto Enterp.* (10th Cir. 2017) 864 F.3d 1089—filing motion to dismiss on the merits in state court waives removal; *Kenny v. Wal-Mart Stores, Inc.* (9th Cir. 2018) F.3d --no waiver by seeking dismissal of state court complaint that does not yet disclose right to remove; *see generally Stone Surgical,LLC v. Stryker Corp., 858 F.3d 383 (6th Cir. 2017)*

Supplemental Jurisdiction

Supplemental Jurisdiction over third party complaints

Courts have supplemental jurisdiction over transactionally related third party complaints. [*Watson v. Cartee* (6th Cir. 2016) 817 F.3d 299, 303]

Retention of supplemental jurisdiction

- Courts disagree as to whether the federal court retains original or supplemental subject matter jurisdiction after the federal corporation is no longer a party. [See *Pena v. Commonwealth of Puerto Rico* (D. P.R. 2012) __F. Supp. 2d__, 2012 WL 2103621—reflecting circuit split over type of jurisdiction that the federal courts retain after FDIC is no longer a party]

- Federal courts typically will decline continuing jurisdiction over supplemental state law claims once the federal claims are dismissed or resolved. [*RWJ Management Co. v. BP Products North America, Inc.* (7th Cir. 2012) 672 F.3d 476, 479-480; *compare Thomas v. United Steelworkers Local 1938* (8th Cir. 2014) 743 F.3d 1134—plaintiff's unilateral abandonment of federal claim without motion to amend does not deprive court of supplemental jurisdiction; *Wilber v. Curtis* (1st Cir. 2017) 872 F.3d 15—when federal claims dismissed abuse of discretion to retain state claims unless doing so would serve interests of fairness, judicial economy, convenience and comity]

- ***Factors*:** Factors that lean in favor of continuing to exercise supplemental jurisdiction are whether:
    - the statute of limitations has run on the state law claims;
    - subsequent filing in state court will result in a substantial duplication of effort and waste of judicial resources; or

- when it is absolutely clear how the state law claims can be decided. [*RWJ Management Co., Inc. v. BP Products North America, Inc.* (7th Cir. 2012) 672 F.3d 476, 481]

Loss of Supplemental Jurisdiction

- If the anchor federal question claim is dismissed for lack of subject matter jurisdiction, supplemental jurisdiction may not be exercised over a related state law claim as such jurisdiction is lost. [*Cohen v. Postal Holdings, LLC* (2d Cir. 2017) 873 F.3d 394; *Arena v. Graybar Electric Co.* (5th Cir. 2012) 669 F.3d 214, 222]

- Similarly, if the Court finds that there is no *personal* jurisdiction over the anchor federal question claim, then there can be no supplemental jurisdiction at all over included state law claims – even if they are transactionally related. [*NexLearn v. Allen Interactions, Inc.*, (Fed. Cir. 2017) 859 F.3d 1371, 1381]

Tolling Statute Upon Dismissal of Supplemental Claims

- After dismissal of federal claims, the statute of limitations is tolled for 30 days pending the refiling of the claims in state court. *Actis v. Dist. of Columbia* (2018) 138 S.Ct. 594.

Minton loses federal patent suit

Minton sues attorney Gunn for malpractice

Question: How Should the Court Rule on the Motion to Dismiss for lack of Subject Matter Jurisdiction?

Grant

- See Gunn v. Minton 568 U.S. 251 (2013)
- Malpractice claim does not “arise under” federal law

See Palkow v. CSX Transp. (6th Cir. 2005) 431 F.3d 543—state perjury claim based on testimony in federal criminal trial

Dismiss for lack of jurisdiction?

Homeowners Ass'n Member wants to place satellite dish on roof in common area despite CC&R's.

Homeowners Ass'n disagrees and files Dec. Relief action in Federal Court.

Premises Jx on Fed. Comm. Act regulating placement of such dishes and D's assertion it "completely preempts" state contract claim.

D moves to dismiss: (i) no private right of action; (ii) preemption is simply a defense.

Answer: DISMISS

- **No private right of action**
- **Defense of federal preemption does not support "arising under" jurisdiction.**

Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang (9th Cir. 2004) 376 F.3d 831

Diversity Juridiction

Defamation Action (Portland, ME, $14.5M verdict)

Plaintiff

Hearts with Haiti, Inc. (NC)

Michael Geilenfeld

- **Iowa**: born & raised; driver's license; voter's registration; bank account
- **Haiti** – missionary for 20+ years; permanent resident

Defendant

Paul Kendrick

Freeport, ME

Holding – Diversity Absent

- Geilenfeld is a citizen domiciled abroad
- Diversity jurisdiction is lacking and could be raised for first time on appeal
- No Rule 21 dismissal (G's presence in trial gave significant tactical advantage)

*Hearts with Haiti, Inc. v. Kendrick (*1st Cir. 2016) 856 F.3d 1; see also *Eckerberg v. Inter-State Studio & Pub. Co. (8th Cir. 2017) 860 F.3d 217*

Diversity Algebra:
Principal Place of Business

Plaintiff

Hoschar v. W. VA.

Toxic Tort Claim

Local Employment

Defendant

Apco, Inc.

- W. VA. – 5 officers, manage day-day activities; listed as HQ on corp. website

- OHIO – 22 officers, set corp. policy and make corp. decisions

Holding – Diversity Exists

- APCO's principal place of business is in OH, where it controls, coordinates and directs corporate activities ("nerve center").

- Diversity Jurisdiction is proper

Hoschar v. Appalachian Power Co. (4th Cir. 2014) 739 F.3d 163; see also Hertz Corp. v. Friend (2010) 559 U.S. 77 – PPB not where majority of business done

Diversity Digging

Plaintiff:

Settlement Funding LLC

???

???

Defendant:

Rapid Settlement Ltd.

5th Circuit Ruling:

- We are not happy that jurisdiction is a late show-up in this case. Nevertheless, plaintiffs failed to establish diversity jurisdiction.

Funding LLC v. Rapid Settlements (5th Cir. 2017) 851 F.3d 530; see also *Purchasing Power LLC v. Bluestem Brands, Inc. (11th Cir. 2017) 851 F.3d 1218*

FED. R. CIV. P. 4(d)

(d) Waiving Service.
(1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:
(A) be in writing and be addressed:
(i) to the individual defendant; or
(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;
(B) name the court where the complaint was filed;
(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;
(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;
(E) state the date when the request is sent;
(F) give the defendant a reasonable time of at least 30 days after the request was sent--or at least 60 days if sent to the defendant outside any judicial district of the United States--to return the waiver; and
(G) be sent by first-class mail or other reliable means.
(2) ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:
(A) the expenses later incurred in making service; and
(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

UNITED STATES DISTRICT COURT

for the

_____ *Plaintiff*	)	
v.	)	Civil Action No.
_____ *Defendant*	)	

WAIVER OF THE SERVICE OF SUMMONS

To: _____
(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: _____

_____
Signature of the attorney or unrepresented party

_____
Printed name of party waiving service of summons

_____
Printed name

_____
Address

_____
E-mail address

_____
Telephone number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 89. District Courts; Removal of Cases from State Courts (Refs & Annos)

28 U.S.C.A. § 1441

§ 1441. Removal of civil actions

Currentness

(a) Generally.--Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal based on diversity of citizenship.--(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Joinder of Federal law claims and State law claims.--(1) If a civil action includes--

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) Actions against foreign States.--Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without

jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) Multiparty, multiforum jurisdiction.--(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if--

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) [1] has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) Derivative removal jurisdiction.--The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 937; Pub.L. 94-583, § 6, Oct. 21, 1976, 90 Stat. 2898; Pub.L. 99-336, § 3(a), June 19, 1986, 100 Stat. 637; Pub.L. 100-702, Title X, § 1016(a), Nov. 19, 1988, 102 Stat. 4669; Pub.L. 101-650, Title III, § 312, Dec. 1, 1990, 104 Stat. 5114; Pub.L. 102-198, § 4, Dec. 9, 1991, 105 Stat. 1623; Pub.L. 107-273, Div. C, Title I, § 11020(b)(3), Nov. 2, 2002, 116 Stat. 1827; Pub.L. 112-63, Title I, § 103(a), Dec. 7, 2011, 125 Stat. 759.)

Notes of Decisions (3688)

Footnotes

1 So in original. Section 1407 of this title does not contain a subsec. (j).

28 U.S.C.A. § 1441, 28 USCA § 1441

Current through P.L. 115-140. Also includes P.L. 115-158 to 115-160. Title 26 includes updates from P.L. 115-141, Divisions M, T, and U (Titles I through III).

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 89. District Courts; Removal of Cases from State Courts (Refs & Annos)

28 U.S.C.A. § 1446

§ 1446. Procedure for removal of civil actions

Currentness

(a) Generally.--A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) Requirements; generally.--(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) Requirements; removal based on diversity of citizenship.--(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that--

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks--

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an "other paper" under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

(d) Notice to adverse parties and State court.--Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) Counterclaim in 337 proceeding.--With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

[**(f)** Redesignated (e)]

(g) Where the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section 1455(b) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 939; May 24, 1949, c. 139, § 83, 63 Stat. 101; Pub.L. 89-215, Sept. 29, 1965, 79 Stat. 887; Pub.L. 95-78, § 3, July 30, 1977, 91 Stat. 321; Pub.L. 100-702, Title X, § 1016(b), Nov. 19, 1988, 102 Stat. 4669; Pub.L.

102-198, § 10(a), Dec. 9, 1991, 105 Stat. 1626; Pub.L. 103-465, Title III, § 321(b)(2), Dec. 8, 1994, 108 Stat. 4946; Pub.L. 104-317, Title VI, § 603, Oct. 19, 1996, 110 Stat. 3857; Pub.L. 112-51, § 2(c), Nov. 9, 2011, 125 Stat. 545; Pub.L. 112-63, Title I, §§ 103(b), 104, Dec. 7, 2011, 125 Stat. 760, 762.)

Notes of Decisions (2242)

28 U.S.C.A. § 1446, 28 USCA § 1446
Current through P.L. 115-140. Also includes P.L. 115-158 to 115-160. Title 26 includes updates from P.L. 115-141, Divisions M, T, and U (Titles I through III).

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THE WOMAN ADVOCATE
ABA Section of Litigation

How to Remove a Case to Federal Court

Hillary Chinigo Campbell – March 2, 2017

While a plaintiff is the master of her complaint (and decides the forum in which she will file a lawsuit), the defendant is not without any say in the matter. The procedure for removal allows a defendant to remove certain cases filed in state court to federal court. In some circumstances, your client's litigation position may be significantly enhanced by the opportunity to litigate in federal court. For instance, removing a case from state court to federal court may alleviate concerns about possible prejudice or bias against an out-of-state-defendant. It may allow a defendant to take advantage of federal procedural rules, including, for example, rules governing expert testimony. Or it may provide a defendant with an avenue to consolidate mass litigation through the multidistrict litigation procedures. Whatever reason your client may have for wanting to litigate in federal court, it is critical that you be able to analyze efficiently the potential bases for removal in a complaint and that you also be well versed in the requirements for doing so. District courts will strictly analyze removals. A failure to comply with substantive and procedural requirements is likely to result in the remand of your client's case.

Deadline for Removal

One of the first things to do after receiving a complaint is to determine the deadline for removal. By the time you are retained to represent a client, there may be little time to remove the case, underscoring the importance of your ability to quickly discern the potential avenues for removal. A notice of removal must be filed within 30 days after the defendant's receipt of the initial pleading "through service or otherwise" or within 30 days after service of the summons on the defendant, if the initial pleading is not required to be served on the defendant, whichever period is shorter. 28 U.S.C. § 1446(b)(1).

However, just because a case is not initially removable does not mean it may never become so. It is, therefore, important to stay alert to developments in litigation that may make a case removable. If a case is not initially removable, a notice of removal may be filed within 30 days after the defendant's receipt, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it first may be ascertained that the case is one that is or has become removable. 28 U.S.C. § 1446(b)(3). While the meanings of "pleading," "motion" and "order" seem clear, the definition of "other paper" has been the subject of litigation, and the courts are not always consistent in interpreting that term's meaning. This second chance at removal will not always exist in diversity cases, however. A case that is removable solely on the basis of diversity jurisdiction may be removed based on an amended pleading, motion, order, or other paper only within one year of the commencement of the lawsuit, unless the district court

finds that the plaintiff has acted in bad faith to prevent the defendant from removing an action. 28 U.S.C. § 1446(c)(1).

A failure to timely file a notice of removal will result in remand back to state court, so careful attention should be paid to these strict jurisdictional deadlines.

Where to Remove

In order to determine whether removal will benefit your client, you must know to which district court the case will be removed. If a case is removable, it may be removed to the district court for the district and division in which the state court action is pending. 28 U.S.C. § 1446(a). Once you have determined the district to which you will remove, you should review the local rules governing removal in your jurisdiction and become familiar with the judges presiding in that district.

Common Bases for Removal

Next, you must determine whether your case is removable. While there are many avenues for removal, *see, e.g.*, 28 U.S.C. §§ 1442, 1443, 1444, and 1446, the most common bases for removal are pursuant to the federal court's jurisdiction provided through either 28 U.S.C. section 1331 or 1332. This article focuses on jurisdiction provided by sections 1331 and 1332.

When analyzing the possibility of removal, first review the complaint to determine whether federal question jurisdiction exists. In other words, determine whether the action arises under the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 1331. The determination of whether a claim "arises under" federal law must be made by reference to the "well-pleaded complaint." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986). The vast majority of cases brought under federal question jurisdiction are those cases in which federal law creates the cause of action. *See id.* A defense that raises a federal question, however, will not confer federal jurisdiction. *See id.*

If federal question jurisdiction does not exist, you must next determine whether the court has diversity jurisdiction. Diversity jurisdiction exists where the plaintiff(s) on the one hand and the defendant(s) on the other hand are citizens of different states, and where the amount in controversy exceeds $75,000, exclusive of interest and costs. 28 U.S.C. § 1332. Section 1332 also deals with circumstances involving citizens of foreign states, as well as the unique rules governing diversity jurisdiction as it pertains to class actions. This article focuses on diversity jurisdiction involving citizens of different states.

The first step in this analysis is to determine whether complete diversity exists between the plaintiff(s) and the defendant(s). This may be as simple as determining the citizenship of each of the parties and finding complete diversity exists. In other cases, there may be a defendant who destroys diversity. Before deciding that removal is not possible, you should consider whether the nondiverse defendant has been fraudulently joined. A defendant is considered fraudulently joined when the plaintiff has not stated or cannot state a claim for relief against the nondiverse defendant under the applicable substantive law or does not intend to secure a judgment against that particular defendant. *See* 14B Charles A. Wright et al., *Federal Practice and Procedure* § 3723 (4th ed. 2009). As a practical matter, you can think about this analysis much as you

would if you were filing a motion to dismiss on behalf of the nondiverse defendant. A removing defendant may also establish fraudulent joinder by establishing that there has been outright fraud in the plaintiff's pleading of the jurisdictional facts. *See id.* Establishing fraudulent joinder can be difficult, though, as "there need only be a *possibility* that a right to relief exists under the governing law to avoid a court's finding of fraudulent joinder." *Id.* (emphasis added). You should counsel your client accordingly.

After you determine the citizenship of each of the parties, you must consider whether any of the defendants is a citizen of the state in which the action was brought. An action is not removable on the basis of diversity jurisdiction if any defendant who has been properly joined and served is a citizen of the state in which the plaintiff brought the action. 28 U.S.C. § 1441(b)(2).

Next, you must consider whether the amount in controversy exceeds $75,000, exclusive of interest and costs. When the plaintiff seeks more than $75,000 in the complaint, the complaint generally is determinative on this issue. Like the citizenship analysis, however, the amount in controversy may not always be determinable from the face of the complaint. For instance, a complaint may contain an unspecified damages demand. In that case, the defendant will bear the burden of proving by a preponderance of the evidence that the amount in controversy exceeds $75,000. You might support such an assertion by offering evidence of the monetary value of the damages sought—e.g., the amount of a plaintiff's earnings in a claim for lost wages or the amount of a plaintiff's medical bills in a claim asserting personal injury. You might also rely on jury verdicts in factually similar cases exceeding $75,000. Because punitive damages are included in calculating the jurisdictional amount, you should highlight that punitive damages are being sought where the plaintiff has made a demand for such damages. In other instances, the plaintiff may be seeking equitable relief. In an action seeking declaratory or injunctive relief, you should establish that the value of the object of the litigation exceeds $75,000. One practical advantage of making an amount in controversy argument is that it may cause the plaintiff to disclaim damages in excess of $75,000, if the plaintiff wishes to avoid removal to federal court.

These are not the only bases for removal, and care should be taken to analyze other potential bases for removal.

Procedural Requirements for Removal

Once you have determined that your case is removable, it is critical to understand the procedural requirements for removal. The failure to comply with them may result in remand.

To effectuate a removal, the defendant must file a short and plain statement of the grounds for removal, which shall be signed pursuant to Federal Rule of Civil Procedure 11. 28 U.S.C. § 1446(a).

The defendant shall also file with the notice of removal "a copy of all process, pleadings, and orders served upon" the defendant(s). 28 U.S.C. § 1446(a). Practically speaking, attaching the entire state court file to the notice of removal will satisfy this requirement. The state court clerk's office can be a helpful resource in ensuring you have all necessary processes, pleadings, and orders, even in jurisdictions maintaining an online docket. Depending on the complexity of the case and when in the course of litigation the case is removed, it can be time consuming to collect

such documents from the state court. It is therefore important to start the removal process with ample time to complete these procedural tasks.

For actions removed solely under 28 U.S.C. section 1441, all defendants who have been properly joined and served must join in or consent to the removal. 28 U.S.C. § 1446(b)(2). It can be difficult to coordinate obtaining such consent among your codefendants, providing another reason to start the removal process early.

Finally, the removing defendant must provide written notice of the removal to all adverse parties and must file a copy of the notice with the clerk of the state court in which the action was brought. 28 U.S.C. § 1446(d). It is prudent to attach a copy of the notice of filing to your notice of removal. Reference should be made to the local rules to determine whether a file-stamped copy must be attached to the notice of removal.

Most importantly, while this article attempts to set out some of the standard jurisdictional bases for removal, as well as some of the requirements for removal, it is imperative to review and understand the procedural and substantive law governing the district to which you will remove your case, as well as the governing local rules.

RODNEY R. PARKER (4110)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000

Attorneys for Defendant Beretta U.S.A. Corp.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

JACOB SEAN BARBEN, Plaintiff, vs. BERETTA U.S.A. CORP., a Delaware Corporation; FEDERAL CARTRIDGE COMPANY, a Minnesota Corporation. Defendants.	)	NOTICE OF REMOVAL OF A CIVIL ACTION FROM STATE COURT TO FEDERAL COURT No. 1:16-cv-00094-BCW

Pursuant to 28 U.S.C. §§ 1441 and 1446, Defendant Beretta U.S.A. Corp. hereby gives notice of removal of the civil action pending against it in the Second Judicial District Court of Weber County, State of Utah to this Court. The grounds for removal are as follows:

1. This action was commenced by the filing of a Complaint in the Second Judicial District of Weber County, State of Utah on or about August 6, 2015 and duly served on all parties defendant thereafter. On September 25, 2015, plaintiff filed a Second Amended Complaint, and said document constitutes the most recent complaint

setting forth plaintiff's claims. A copy of plaintiff's Second Amended Complaint is attached hereto as Exhibit A.

2. Plaintiff Jacob Sean Barben represents in his complaint that he is a citizen of the State of Utah. Second Amended Complaint at ¶ 2.

3. Beretta U.S.A. Corp. is a corporation organized under the laws of the State of Maryland with its principal place of business outside the State of Utah.

4. Federal Cartridge Company is a corporation organized under the laws of the State of Minnesota with its principal place of business outside the State of Utah.

5. At the time of filing of the action in Weber County, Sportsman's Warehouse, Inc., a Utah corporation, was also a defendant. The state court entered its order dismissing plaintiff's claims against Sportsman's Warehouse with prejudice on June 15, 2016. (A copy of said order is attached hereto as Exhibit B.) Accordingly, as of June 15, 2016, the diversity of citizenship requirements of 28 U.S.C. §§ 1332(a) and 1441(b) 2343 are satisfied.

6. The Second Amended Complaint states, "The value of Plaintiff's claims is greater than $300,000." (Second Amended Complaint, ¶ 9.) According, the amount in controversy requirement of 28 U.S.C. § 1332(a) is satisfied. *See* 28 U.S.C. § 1446(c)(2).

7. Removal of this action is timely under 28 U.S.C. § 1446(b)(3) because less than 30 days have elapsed since entry of the state court's June 15, 2016 order dismissing plaintiff's claims against the non-diverse defendant, which order established for the first time that the case had become removable.

8. Written notice of this removal is being served this date on counsel for plaintiff.

9. Defendant Federal Cartridge Company, through its counsel Tyler V. Snow, has consented to removal. *See* Consent attached hereto as Exhibit C.

10. A true and correct copy of this Notice of Removal is being filed this date with the Clerk of the Second Judicial District Court, Weber County, State of Utah.

11. This Court has original jurisdiction of the above-entitled action, pursuant to 28 U.S.C. § 1332, and hence, this action may be removed to this Court pursuant to 28 U.S.C. §§ 1441(a).

WHEREFORE, Beretta U.S.A. Corp. hereby submits notice that the above-entitled matter is removed from the Second Judicial District Court in and for Weber County, State of Utah, to the United States District Court for the State of Utah, Northern Division, in accordance with the provisions of 28 U.S.C. § 1446.

DATED: June 29, 2016.

SNOW, CHRISTENSEN & MARTINEAU

By_____
Rodney R. Parker
Attorneys for Defendant
Beretta U.S.A. Corp.

C:\NRPORTBL\IDOCS\RRP\3755018_1.DOCX:6/29/16

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing NOTICE OF REMOVAL OF A CIVIL ACTION FROM STATE COURT TO FEDERAL COURT was served by U.S. Mail on June 29, 2016 as follows:

DUSTIN LANCE
JESSICA A ANDREW
LANCE ANDREW PC
15 W SOUTH TEMPLE STE 1650
SALT LAKE CITY UT 84111

SCOTT T EVANS
TYLER V SNOW
CHRISTENSEN & JENSEN PC
257 E 200 S STE 1100
SALT LAKE CITY UT 84111

s/ Rodney R. Parker

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

ANGELA K. NIELSON, individually and on behalf of THE ESTATE OF BRETT W. NIELSON; RYLEE NIELSON; ERIC NIELSON; and LINDA NIELSON, Plaintiffs, v. HARLEY DAVIDSON MOTOR COMPANY GROUP, LLC; GOODYEAR DUNLOP TIRES NORTH AMERICA, LTD.; THE GOODYEAR TIRE & RUBBER CO.; SUMITOMO RUBBER USA, LLC; and BELLINGHAM HARLEY DAVIDSON, INC., Defendants.	**ORDER TO SHOW CAUSE** Case No. 4:18-cv-00013-DN-DBP District Judge David Nuffer

A federal court has a duty to consider *sua sponte* whether it has subject matter jurisdiction whenever a question arises as to the existence of federal jurisdiction.[1] If the court determines that it lacks subject matter jurisdiction, it must dismiss the case.[2]

Plaintiffs allege diversity under 28 U.S.C. § 1332(a)(1) as the basis for federal subject matter jurisdiction in this case.[3] "To invoke the power of the court pursuant to § 1332, allegations of diversity must be pleaded affirmatively."[4] This requires a plaintiff's complaint to include allegations showing that "all parties on one side of the litigation are of a different

[1] *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977).

[2] FED. R. CIV. P. 12(h)(3).

[3] Complaint ¶ 13, docket no. 2, filed Apr. 11, 2018.

[4] *Martinez v. Martinez*, 62 Fed. App'x 309, 313 (10th Cir. 2003).

citizenship from all parties on the other side of the litigation."[5].And when a party is an unincorporated business association—such as a limited liability company—the complaint's allegations of citizenship for that party must include the citizenship of "all the entities' members."[6]

Harley Davidson Motor Company Group, LLC and Sumitomo Rubber USA, LLC are named defendants in Plaintiffs' Complaint.[7] By name, these defendants are limited liability companies. However, the Complaint's allegations of citizenship identify these defendants as corporations:

- Harley Davidson Motor Company Group, LLC is a Wisconsin corporation doing business in the State of Wisconsin with its principal place of business located at 3700 West Juneau, Milwaukee, Wisconsin, 53208.[8]
- Sumitomo Rubber USA, LLC is an Ohio corporation doing business in the State of Wisconsin with its principal place of business located at 10 Sheridan Drive, Tonawanda, NY 14150.[9]

This potential inconsistency—limited liability company versus corporation—prevents evaluation of subject matter jurisdiction in this case. If these defendants are, in fact, limited liability companies, the Complaint's allegations of citizenship are insufficient because the citizenship of all the entities' members are not identified.[10] Therefore,

IT IS HEREBY ORDERED that by no later than Wednesday, May 2, 2018, Plaintiffs must file a notice identifying whether Haley Davidson Motor Company Group, LLC and Sumitomo Rubber USA, LLC are limited liability companies or corporations. And if either of

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[5] *Depex Reina 9 P'ship v. Texas Int'l Petroleum Corp.*, 897 F.2d 461, 463 (10th Cir. 1990).

[6] *Mgmt. Nominees, Inc. v. Alderney Invs., LLC*, 813 F.3d 1321, 1325 (10th Cir. 2016) (internal citations omitted).

[7] Complaint ¶¶ 8, 10.

[8] *Id*. ¶ 10.

[9] *Id*. ¶ 8.

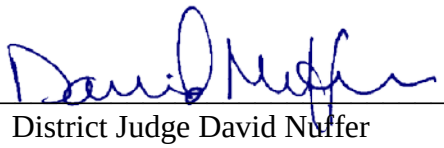
[10] *Mgmt. Nominees, Inc.*, 813 F.3d at 1325.

these entities are limited liability companies, Plaintiffs' notice must identify—at least upon information and belief—the names and citizenship of all the entity's members.

If Plaintiffs are otherwise unable to provide this information, or believe it unnecessary to the jurisdictional analysis, Plaintiffs must file by no later than Wednesday, May 2, 2018, a response to this Order stating the reason the information could not be provided, or the basis for this court's exercise of subject matter jurisdiction in this case.

Signed April 18, 2018.

BY THE COURT



District Judge David Nuffer

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

STAKER & PARSON COMPANIES, INC., d/b/a WESTERN ROCK PRODUCTS, a Utah Corporation, Plaintiff, v. SCOTTSDALE INSURANCE COMPANY, an Ohio corporation; COLORADO CASUALTY INSURANCE COMPANY, a New Hampshire corporation; HANCOCK-LEAVITT INSURANCE AGENCY, INC., an Arizona corporation; DOE INDIVIDUALS 1-10, unknown individuals; and ROE ENTITIES 1-10, unknown entities, Defendants.	**AMENDED ORDER TO SHOW CAUSE** Case No. 4:18-cv-00014-DN-DBP District Judge David Nuffer

A federal court has a duty to consider *sua sponte* whether it has subject matter jurisdiction whenever a question arises as to the existence of federal jurisdiction.[1] If the court determines that it lacks subject matter jurisdiction, it must dismiss the case.[2]

This case was originally filed in the Fifth Judicial District Court, Washington County, State of Utah.[3] The case was removed to this court on April 16, 2018, by Defendant Colorado

[1] *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977).

[2] FED. R. CIV. P. 12(h)(3).

[3] Notice of Removal of Action to United States District Court ("Notice of Removal") at 1, docket no. 2, filed Apr. 16, 2018.

Casualty Insurance Company ("Colorado").[4] As the removing party, Colorado has the burden of establishing federal subject matter jurisdiction.[5]

Colorado alleges diversity, under 28 U.S.C. § 1332(a), as the basis for federal subject matter jurisdiction.[6] "[D]iversity jurisdiction attaches only when all parties on one side of the litigation are of a different citizenship from all parties on the other side of the litigation."[7] And in the case of corporations, the corporation is "a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ."[8]

It is not clear that complete diversity, the only basis stated for federal subject matter jurisdiction, is present. Plaintiff's First Amended Complaint alleges that Defendant Hancock-Leavitt Insurance Agency, Inc. ("Hancock-Leavitt") "is an Arizona corporation that transacts business in the State of Utah and maintains its corporate offices in the State of Utah."[9] Prior to Colorado's removal of the case to this court, Hancock-Leavitt filed a Motion to Dismiss for lack of personal jurisdiction in the state court.[10] In opposing the Motion to Dismiss, Plaintiff argued and presented evidence that while Hancock-Leavitt is incorporated in Arizona, its principal place of business is located in Cedar City, Utah.[11] Plaintiff also filed a motion seeking jurisdictional

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[4] *Id*.

[5] *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002).

[6] Notice of Removal at 2.

[7] *Depex Reina 9 P'ship v. Texas Int'l Petroleum Corp.*, 897 F.2d 461, 463 (10th Cir. 1990).

[8] *Id*. (quoting 28 U.S.C. § 1332(c)).

[9] First Amended Complaint and Jury Demand ("First Amended Complaint") ¶ 6, docket no. 2-6, filed Apr. 16, 2018.

[10] Motion to Dismiss, docket no. 2-9, filed Apr. 16, 2018. The Motion to Dismiss has since been refiled on this court's docket as docket no. 13.

[11] Memorandum Opposing Motion to Dismiss ("Opposition") at, 5-8, 10-11, docket no. 2-10, filed Apr. 16, 2018.

discovery.[12] The docket reflects that Hancock-Leavitt has not filed a reply in support of its Motion to Dismiss or a response to Plaintiff's Motion for Jurisdictional Discovery. The docket also reflects that Colorado has not filed briefing regarding either motion.

The location of Hancock-Leavitt's principal place of business may be dispositive to both the question of whether complete diversity exists to invoke federal subject matter jurisdiction and Hancock-Leavitt's Motion to Dismiss. If Hancock-Leavitt's principal place of business is in Utah, then complete diversity is lacking and this court lacks federal subject matter jurisdiction. However, if Hancock-Leavitt's principal place of business in not located in Utah, then complete diversity and federal subject matter jurisdiction exist, but additional considerations will be necessary to determine whether Utah may exercise personal jurisdiction over Hancock-Leavitt. Therefore,

IT IS HEREBY ORDERED that:

1) Plaintiff's Motion for Jurisdictional Discovery[13] is GRANTED. The deadline for the parties to conduct jurisdictional discovery is Thursday, May 24, 2018. The jurisdictional discovery is limited to information relevant to the determination of the location of Hancock-Leavitt's principal place of business and whether Utah may exercise personal jurisdiction over Hancock-Leavitt. Plaintiff and Colorado may each propound written discovery consisting of no more than five interrogatories; five requests for production; and ten requests for admission. Responses shall be due within 14 days. The parties shall meet and confer immediately to schedule no more than two depositions taken by Plaintiff and Colorado related to Hancock-

[12] Motion for Jurisdictional Discovery, docket no. 12-15, filed Apr. 18, 2018. The Motion for Jurisdictional Discovery has since been refiled on this court's docket as docket no. 14, filed Apr. 16, 2018.

[13] Docket no. 14, filed Apr. 16, 2018.

Leavitt's principal place of business and whether Utah may exercise personal jurisdiction over Hancock-Leavitt.

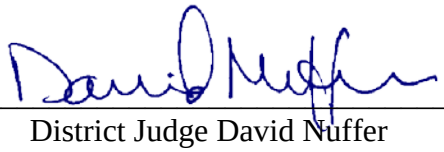
2) By no later than June 1, 2018, Colorado must file a response to this Order. Colorado's response must identify the basis for federal subject matter jurisdiction in this case, or lack thereof. The response must attach and include citation to supporting evidence.

3) By no later than June 1, 2018, Plaintiff and Hancock-Leavitt must file responses to this Order. Plaintiff and Hancock-Leavitt's responses must identify the basis for federal subject matter jurisdiction in this case, or lack thereof, as well as argument regarding whether Utah may exercise personal jurisdiction over Hancock-Leavitt. The responses must attach and include citation to supporting evidence. No further briefing will be permitted.

4) Oral argument on whether federal subject matter jurisdiction exists in this case and Hancock-Leavitt's Motion to Dismiss[14] will be held at the scheduling conference currently scheduled for Wednesday, June 15, 2018, at 9:00 a.m. in courtroom 2B (St. George).

Signed April 24, 2018.

BY THE COURT



District Judge David Nuffer

[14] Docket no. 13, filed Apr. 16, 2018.

UNITED STATES DISTRICT COURT
District of Utah

Honorable David Nuffer, Chief Judge | D. Mark Jones, Clerk of Court

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Welcome

Welcome to the official website for the United States District Court for the District of Utah.

Other Notices

Court Security - Please be advised that the courthouse is a Level 4 security building. There is a 100% ID check for all persons entering the facility. Also, it is against the law to bring any type of weapon on the property. This includes guns, knives, and OC/pepper spray. Please leave these items at home. **Courthouse Firearms Policy**

Permitted Electronic Devices - Cellular phones, laptops, tablets, and other devices with wireless communications capability may be brought into the courthouse, but may only be used subject to the **Electronic Devices in the Courthouse Policy**.

Application for Use of Electronic Device in the Courtroom

Judges Electronic Device Preferences

- Assisting Reentry to our Communities (ARC) Programs
- eVoucher
- Employment Opportunities
- Mobile Calendar and Directory
- Pro Se Filing Information (without an attorney)
- U-ACT Utah Alternatives to Conviction Track

Court News & Announcements

Thu, 04/12/2018

eJUROR

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Wed, 04/11/2018

U-ACT Applications Deadline

Application submissions due by Friday May 25 at close of business.Please submit applications to Judge Shelby's chambers. More »

Wed, 02/14/2018

Establishment of Southern Region of the Central Division

The U.S. District Court for the District of Utah has created the Southern Region of the Central Division. More »

Wed, 12/06/2017

UNITED STATES DISTRICT COURT

District of Utah

Honorable David Nuffer, Chief Judge | D. Mark Jones, Clerk of Court

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Attorney Admissions

Regular Admission **Admission Pro Hac Vice** **Law Student Admissions**

The attorney admissions process is governed by DUCivR 83-1.1. Attorneys who wish to practice in the U.S. District Court or U.S. Bankruptcy Court for the District of Utah, must be active members in good standing of the Bar of the District Court or be approved by the Court to appear pro hac vice on a case-by-case basis.

Admission to the Bar of this Court

As set forth in DUCivR 83-1.1(b)(1), an attorney must be an **active** member in good standing of the Utah State Bar to be eligible to become a member of the Federal Bar.

All Applicants:

To apply for admission to the Bar of the Federal Court, resident and non-resident applicants must seek a sponsoring attorney who is an active member in good standing of this Court's Bar to move for the applicant's admission. A written motion and proposed order will need to be emailed or mailed* to the clerk's office prior to scheduling a time for the attorney to be sworn in. It is not necessary for the sponsor to appear. The sponsoring attorney may accompany the applicant to the attorney admission proceeding and make an oral motion to the Court; however, the oath will need to be administered by a District Judge and arrangements will need to be made in advance with the Attorney Admissions Clerk. Applicants will also need to complete a registration card, sign the attorney roll book and pay a $181 registration fee at the time of admission. Once the motion is reviewed and the order is signed by the judge, the Clerk will contact the attorney to schedule a time to be sworn in.
Please call the Admissions Clerk at (801)524-6616 or the Intake Office at (801)524-6100 with any additional questions.

Resident Attorneys:

Link to Resident Attorney Motion and Order (WordPerfect)

Movant's Name & Utah State Bar #
Movant's Law Firm
Movant's Street Address
City, State & ZIP
Movant's Phone Number

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

In re:	:	
Application of	:	**MOTION FOR ADMISSION OF**
Applicant's Name	:	**RESIDENT ATTORNEY**
	:	

Movant, the undersigned, being an active member of the Bar of this Court, hereby moves this Court for the admission of Applicant to the Bar of the United States District Court for the District of Utah. Applicant has been an active member in good standing of the Utah State Bar since date.

This motion is made pursuant to Rule 83-1.1(b)(2)(B) of the Court's Local Rules of Civil Procedure.

RESPECTFULLY SUBMITTED this _____ day of _____, _____.

By: _____
Movant

Applicant's Name & Utah State Bar #
Applicant's Firm
Applicant's Street Address
City, State & ZIP
Applicant's Phone Number

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

In re:	:	
Application of	:	**ORDER**
NAME	:	
	:	

This matter is before the Court on Sponsoring Attorney's Name Motion for Applicant Admission to the United States District Court for the District of Utah.

IT IS HEREBY ORDERED, that Applicant be admitted to the Bar of the United States District Court for the District of Utah upon taking the oath prescribed in DUCivR 83-1(b)(2)(D). The clerk of court is authorized to administer the oath.

Dated this ____ day of _____, _____.

_____
Chief U.S. District Judge

FEDERAL BAR REGISTRATION CARD

UTAH STATE BAR ID:_____/_____/_____/_____ /_____

NAME:_____/_____/_____
Last First Middle Name or Initial

CONTACT INFORMATION:

FIRM NAME:_____

STREET ADDRESS:_____ SUITE/ROOM#:_____

CITY:_____ STATE:_____ ZIP:_____

WORK TELEPHONE #:_____/_____

MOTION FOR ADMISSION MADE BY:_____

ADMISSION DATE:_____/_____/_____

Admission Pro Hac Vice
Instructions and Forms

Attorneys who are not members of this Court's Bar may practice before this Court only after having been admitted pro hac vice pursuant to DU.Civ. Rule 83-1.1 (d). Non-resident attorneys who wish to be admitted must associate local counsel to sponsor their temporary admission. Local counsel shall move the admission of the pro hac counsel, and substitute in court if required. Local Counsel must file the following with the court:

1. Motion by local counsel for admission of the pro hac vice attorney
   This should be filed electronically and the $250.00 fee paid on Pay.gov

2. Attached to the motion as an exhibit is the completed application for admission pro hac vice completed by the attorney seeking admission

3. Also attached as an exhibit should be a proposed order admitting the attorney.

Local counsel shall encourage pro hac vice attorneys to submit their electronic filing registration form as an exhibit to the application, noting that, if the pro hac vice attorney is a registered electronic filer in any other federal court, he or she will be given a Utah login and password upon the order granting the application.

The forms and fees must be paid for each case to which the attorney seeks admission. Attorneys for the United States from other districts are exempt from the payment of the $250.00 fee but must comply with the other requirements of the rule.

HOURS: The Clerk's Office business hours are 8:30 a.m. to 4:30 p.m., Mountain Standard/Mountain Daylight Time.

PHONE: Call the Clerk's Office at 801-524-6100

WEBSITE: Visit the court's web page at **http://www.utd.uscourts.gov** for basic information on the court, local rules, and forms.

FILINGS: The Court does not accept faxed filings. Affidavits submitted as separate original filings must bear an original signature.

E-FILING: The Court mandated e-filing for all cases on May 1, 2006.
The court will e-mail rather than mail orders, judgments and notices.

COPIES: Orders for copies of case documents must be prepaid. The Clerk's Office accepts MasterCard, Visa, Discover and American Express.

DOCKETS: Case dockets are now accessible through PACER at http://ecf.utd.uscourts.gov. Charges are based on the number of pages accessed at $.10 per page. To access it, you may register online at http://pacer.psc.uscourts.gov or call the PACER Service Center at 800-676-6856.

Updated: October 31, 2016

Counsel Submitting and Utah State Bar Number
Attorney For
Address
Telephone

UNITED STATES DISTRICT COURT
District of Utah _____ Division

_____	*	Motion for Pro Hac Vice Admission and
Plaintiff	*	Consent of Local Counsel
	*	
v.		*
_____	*	Case No.
Defendant.	*	

Pursuant to D.U. Civ Rule 83-1.1(d), I move the admission of _____ as pro hac vice counsel for _____ (Plaintiff/Defendant) and consent to serve as local counsel. The application for pro hac vice admission is attached as exhibit A to this motion, an Electronic Case Filing Registration Form as exhibit B, and the admission fee, if required, has been paid to the court with the submission of this motion.

Dated

_____
Signature of local counsel

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPLICATION FOR ADMISSION PRO HAC VICE

Name of Attorney: _____ Telephone:_____
Firm Name: _____
Business Address: _____
_____
_____

Current bar memberships and date of admission:

Jurisdiction	Bar Number	
_____	_____	Admitted on_____
_____	_____	Admitted on_____
_____	_____	Admitted on_____
_____	_____	Admitted on_____

Have you ever been the subject of disciplinary action by any bar to which you have been admitted?
____ No ____Yes (provide additional information)

Prior pro hac vice admissions in the District of Utah: _____ none

Case Name:_____
Case Number:_____
Admission Date:_____

(Attach list of other cases separately if more space is needed.)

I certify that I am a member in good standing of all bars to which I have been admitted. I further agree to read and comply with the Utah Rules of Professional Conduct and the Utah Standards of Professionalism and Civility. This certification that the foregoing is true and correct is made under penalty of perjury.

_____ _____
Signature Date

Non resident United States attorneys and attorneys employed by agencies of the federal government are exempt from the pro hac vice fee. All other attorneys must pay a fee of $250.00 concurrent with this application. This application must be filed as an attachment to a motion for admission and consent filed by local counsel.

If you have not previously registered for CM/ECF in the District of Utah, please attach a completed Electronic Case Registration Form with this application to receive your login and password.

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

_____,	:	
Plaintiff	:	
	:	ORDER FOR PRO HAC VICE ADMISSION
v.	:	
	:	
_____,	:	
Defendant	:	Case Number

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission pro hac vice of _____ in the United States District Court, District of Utah in the subject case is GRANTED.

Dated: this_____day of _____, 20_____.

_____
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

ELECTRONIC CASE FILING REGISTRATION FORM

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-I waive my right to service by USPS mail;
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☐ I have an ECF account in the Utah Bankruptcy Court or in another Federal District or Bankruptcy Court.
☐ I have attended CMECF Training given by the Court.

Date: _____ **Signature:_____**

Please complete this form, and submit it by one of the following methods:
1. Mail the form to: **United States District Court, Office of the Clerk, ATTN: CM/ECF Registration, 351 S. West Temple, Salt Lake City, Utah 84101, or**
2. Scan and email to **ut_support@utd.uscourts.gov**, or
3. Include this form as a pdf attachment with your Application for Pro Hac Vice.

After this Court processes this form, you will receive by email your user ID and password that will enable you to access the system. The User Guide and administrative procedures for system use may be downloaded at: http://www.utd.uscourts.gov/cmecf-electronic-case-filing. Please call the Clerk's Office Help Desk at (801) 524-6851 if you have questions concerning registration, training, or use of the electronic filing system.

Rev. 6/14/17

Utah Chapter

http://www.fedbar.org/Chapters/Utah-Chapter.aspx

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January 30, 2018

Happy New Year FBA Members:

We have a number of terrific events planned for 2018, including the Southern Utah Law Symposium which will be held May 11-13th in St. George, Utah, the Annual Criminal Law Seminar (also held in May), and the Annual Ronald N. Boyce Seminar (held in October), an event where most, if not all, of the federal judges present.

Additionally, this year, the Tri-State Seminar will be held at The Lodges at Deer Valley, Utah, on September 20-22nd, bringing attorneys and judges from Utah, Wyoming, and Idaho together to discuss topics important to practitioners in these states. During the Tri-State Seminar, a Friday night banquet will be held at the Utah Olympic Park (UOP) while Olympic hopefuls and prior Olympians, known as the "Flying Aces," perform aerials into the UOP pool.

As always, FBA members receive discounted pricing when registering for these events. We are once again planning a one-hour, members' only CLE which will be free to all FBA members. Information regarding this CLE will be provided in the coming months.

The FBA has a long-standing tradition of community service and engagement. Our Chapter is now participating in the SOLACE (Support of Lawyers All Concerned Encouraged) program which provides support and assistance to members of the legal community nationwide. We'll also continue to strongly support civics education and provide another Classroom to Courtroom event in April where high school students spend a day at the courthouse learning about the federal court system.

With all of this in mind, we look forward to serving you this year and look forward to seeing you in federal court. Have a wonderful, productive year.

Sincerely,

Amber M. Mettler	Kristen R. Angelos	David L. Mortensen
President	President-Elect	Treasurer

UNITED STATES DISTRICT COURT

District of Utah

Honorable David Nuffer, Chief Judge | D. Mark Jones, Clerk of Court

http://www.utd.uscourts.gov/local-civil-rules

Local Civil Rules

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

RULES OF PRACTICE

December 1, 2017

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TABLE OF CIVIL RULES

DUCivR 83-1.5 ATTORNEYS - DISCIPLINE OF ATTORNEYS

DUCivR 83-1.5.1 GENERAL PROVISIONS

(a) Standards of Professional Conduct.

All attorneys practicing before this court, either as members of the bar of this court by pro hac vice admission, must comply with the rules of practice adopted by this court and with the Utah Rules of Professional Conduct as revised, amended, and interpreted by this court.

(b) Grounds for Discipline.

Any attorney who appears in this court or is a member of the bar of the court is subject to the disciplinary jurisdiction of the court. Disciplinary proceedings may be initiated in this court against an attorney who has been:

(1) disciplined by the Utah State Bar, the Tenth Circuit Court of Appeals, or other jurisdictions;

(2) convicted of a serious crime, which includes, without limitation, any felony or any misdemeanor which reflects adversely on the attorney's honesty, trustworthiness or fitness as an attorney;

(3) referred for discipline by a judicial officer of the court;

(4) the subject of an attorney misconduct complaint; or

(5) otherwise charged with violation of an ethical or professional standard of conduct.

(c) Disciplinary Panel.

The Chief Judge will designate three judges as the Disciplinary Panel (Panel) for the court. The Panel members may be active or senior district judges, magistrate judges, or bankruptcy court judges. The Chief Judge will designate one Panel member as Panel Chair. If a Panel member must recuse from a disciplinary matter, the

remaining members have authority to proceed without the participation of that judge, and one of them will act as Panel Chair. Further, the Chief Judge may appoint a judge to act as a pro tem member of the Panel.

(d) Disciplinary Committee.

The Panel must appoint five members of the court's bar to serve as a Committee on the Conduct of Attorneys and must designate one member to serve as Chair. The members will serve staggered three-year terms and may be reappointed. Members will not be compensated but may be reimbursed for incidental expenses.

(e) Clerk of Court.

The clerk will receive attorney discipline complaints and referrals and maintain them in confidential files. If a public disciplinary order is entered, the clerk will transmit the notice thereof to any bar association to which the attorney may belong and to the American Bar Association's National Discipline Data Bank.

(f) Confidentiality.

If an attorney has been publicly disciplined by another jurisdiction or convicted of a serious crime as defined in (b)(2), the discipline file will be a public record. The file of other disciplinary matters will remain confidential until the Panel orders the file or parts of the file to be publicly available. All suspension and disbarment orders, including interim
suspension orders, shall be distributed to the judges of the court by the clerk of court.

(g) Waiver and Consent.

Any attorney who is the subject of an ongoing disciplinary action may file a waiver with the clerk and consent to have discipline entered. An attorney may also, with the approval of the Panel, resign his or her membership in the bar of the court.

(h) Interim Suspension.

The Panel may order interim suspension of an attorney who has been convicted of a serious crime or is suspended or disbarred from the Utah State Bar or other jurisdictions pending final adjudication of disciplinary proceedings in this court. In disciplinary matters originating with a judicial referral or private complaint, the Panel may suspend the attorney during the disciplinary process if the attorneyâ€™s ability to practice in the interim may pose a substantial threat of irreparable harm to the public.

(i) Reinstatement from Interim Suspension.

Any attorney under interim suspension for having been convicted of a serious crime as defined in (b)(2) may apply to the Panel for reinstatement upon the filing of a certificate demonstrating that the conviction has been reversed. This reinstatement will not, in and by itself, terminate the pending disciplinary proceeding.

(j) Participant Immunity.

Participants in disciplinary proceedings under these rules shall be entitled to the same protections for statements made in the course of the proceedings as participants in judicial proceedings. Committee members, neutral hearing examiner, investigators and attorneys who prosecute complaints shall be immune from suit for conduct committed in the course of their official duties including those undertaken in the investigatory stage. There is no immunity from civil suit for intentional misconduct.

DUCivR 83-1.5.2 RECIPROCAL DISCIPLINE

(a) Notice to the Court.

Any member of the bar of this court who has been disciplined by another jurisdiction must notify the clerk of that discipline by sending a copy of the disciplinary order to the clerk. The clerk may also receive notice of disciplinary action from the disciplining jurisdiction. The clerk will assign the matter a disciplinary case number, review the order, review the attorneyâ€™s membership status with the court, and transmit the matter to the Panel Chair for review and action pursuant to section (b) of this rule.

Pursuant to the provisions of DUCiv R 83-1.1 (b)(l) the Chair of the Disciplinary Panel will enter an automatic order of disbarment or suspension upon receipt of notice of an order disbarring or suspending an attorney from the Utah State Bar. The attorney may challenge the discipline by filing a motion and demonstrating good cause as to why the suspension or disbarment should not be imposed in this court.

(b) Procedure.

In cases in which the discipline is imposed by another jurisdiction, the Panel Chair will issue an order to show cause why reciprocal discipline should not be imposed by this court. The clerk must serve the order to show cause on the attorney by certified mail, return receipt requested, to the attorney at the last known address as found in the court's records. The attorney will have twenty (20) days to respond.
At the conclusion of the response period for the order to show cause, the Panel will review any response received from the attorney. The Panel may then

(1) impose different or no discipline;
(2) impose reciprocal discipline;
(3) refer the matter to the Committee for review and recommendations; or
(4) set the matter for hearing before a neutral hearing examiner, a judicial officer designated by the Chief Judge upon recommendation by the Panel, or before the Panel itself.

Similar discipline will be imposed unless the attorney clearly demonstrates or the Panel finds that the other jurisdiction's procedure constituted a deprivation of due process, the evidence establishing the misconduct warrants different discipline, or the imposition of discipline would result in a grave injustice.

DUCivR 83-1.5.3 CRIMINAL CONVICTION DISCIPLINE

(a) Notice to the Court.

Any member of the bar of this court must notify the clerk of any conviction of a serious crime as defined by DUCivR 83-1.5.1 (b)(2). The clerk may also receive notice of conviction from other sources. The clerk will assign the matter a disciplinary case number, review the conviction, review the attorney's membership status, and transmit the matter to the Panel Chair for review and action pursuant to section (b) of this rule.

(b) Procedure.

The Panel Chair will issue an order to show cause why discipline should not be imposed by this court and a notice that the attorney will be subject to interim suspension under DUCivR 83-1.5.1 (h). The clerk must serve the order to show cause and notice of suspension on the attorney by certified mail, return receipt requested, to the attorney at the last known address as found in the court's records. The attorney will have twenty (20) days to respond to the order to show cause.

At the conclusion of the response period for the order to show cause, the Panel shall review any response received from the attorney. The Panel may then

(1) impose no discipline;
(2) impose discipline;
(3) refer the matter to the Committee for review and recommendations; or
(4) set the matter for hearing before the Panel, a neutral hearing examiner or a judicial officer designated by the Chief Judge upon recommendation by the Panel.

(c) Sanctions.

The Panel may impose sanctions which include but are not limited to

(1) disbarment;
(2) suspension;
(3) imposition of conditions for continuing to practice law in this jurisdiction;
(4) mandatory continuing legal education;
(5) public reprimand;
(6) private reprimand; or
(7) other discipline as deemed appropriate.

DUCivR 83-1.5.4 REFERRAL BY A JUDICIAL OFFICER

(a) Referral.

A judicial officer may make a referral in writing to the Panel recommending that an attorney be subject to discipline. The referral must be forwarded to the clerk who will assign a disciplinary case number and refer the matter to the Panel chair for review and action pursuant to section (b) of this rule.

(b) Procedure.

The Panel Chair must review the referral with other Panel members. With the concurrence of the Panel members, the Panel Chair must issue an order to show cause why discipline should not be imposed by this court. The clerk will serve the judicial referral and order to show cause on the attorney by certified mail, return receipt requested, to the attorney at the last known address as found in the court's records. The attorney will have twenty (20) days to respond.

At the conclusion of the response period for the order to show cause, the Panel will review any response received from the attorney. The Panel may then

(1) dismiss the referral;
(2) impose discipline;
(3) refer the matter to the Committee for review and recommendations; or
(4) set the matter for hearing before the Panel, a neutral hearing examiner or a judicial officer designated by the Chief Judge upon recommendation by the Panel.

(c) Sanctions.

The Panel may impose sanctions which include but are not limited to

(1) disbarment;
(2) suspension;
(3) imposition of conditions for continuing to practice law in this jurisdiction;
(4) mandatory continuing legal education;
(5) public reprimand;
(6) private reprimand; or
(7) other discipline as deemed appropriate.

DUCivR 83-1.5.5 ATTORNEY MISCONDUCT COMPLAINT

(a) Complaint.

Any person with a complaint based upon conduct directly related to practice in this court against an attorney who is either a member of the bar of this court or has been admitted to practice pro hac vice, must sign and submit the complaint in writing and under oath. The complaint must be in the form prescribed by the court and available from the clerk. The clerk will review the complaint, review the attorney's membership status, and transmit the matter to the Panel Chair for review and action pursuant to section (b) of this rule.

(b) Procedure.

The Panel will review the complaint and determine whether the complaint should be served or should be dismissed as frivolous or for asserting a claim which is not disciplinary in nature. If the complaint is dismissed, the complainant will be informed by mail. The Panel must issue an order to show cause for other complaints. The clerk will serve the complaint and order to show cause on the attorney by certified mail, return receipt requested, to the attorney at the last known address as found in the court's records. The attorney will have twenty (20) days to respond.

At the conclusion of the response period for the order to show cause, the Panel must review any response received from the attorney. The Panel may then:

(1) dismiss the complaint;
(2) impose discipline;
(3) refer the matter to the Committee for review and recommendations; or
(4) set the matter for hearing before the Panel, neutral hearing examiner or a judge designated by the Chief Judge upon recommendation by the Panel.

(c) Sanctions.

The Panel may impose sanctions which include but are not limited to

(1) disbarment;
(2) suspension;
(3) imposition of conditions for continuing to practice law in this jurisdiction;
(4) mandatory continuing legal education;
(5) public reprimand;
(6) private reprimand; or
(7) other discipline as deemed appropriate.

DUCivR 83-1.5.6 COMMITTEE ON THE CONDUCT OF ATTORNEYS

(a) Procedure.

The Committee Chair will review the original complaint or referral and the response of the attorney. The Chair may then refer the matter to one or more Committee members to investigate and prepare a recommendation to the Committee as a whole.

(b) Investigation.

The Committee may request further information from the clerk concerning court records. In addition, the Committee or one or more members of the Committee may contact the complaining party and/or the attorney for further information and can interview persons with information regarding the alleged misconduct.

(c) Report and Recommendation.

The Committee must review the recommendation of the investigating member(s) and prepare a report and recommendation to the Panel which may contain recommendations for possible sanctions or for dismissal. The report and recommendation will contain the factual basis for the misconduct allegation and the response of the attorney and other information which has been considered by the Committee. A majority of Committee members must sign the report and recommendation. A member or members of the Committee in the minority may file a dissenting report. The Committee Chair will transmit the report and recommendation and any dissenting reports to the clerk who will serve the attorney and the complaining party, and will also transmit a copy of the report and recommendation and any dissenting report to the Panel. The attorney may file objections to the report and recommendation within ten (10) days of the date of service.

(d) Recommendation for Evidentiary Hearing.

If the Committee finds that the facts underlying the complaint or referral are in dispute, or that there are questions of law about the application of the ethical standards to the conduct alleged, the Committee may include a recommendation that the matter be referred by the Panel for an evidentiary hearing.

DUCivR 83-1.5.7 EVIDENTIARY HEARING

(a) Appointment of Hearing Examiner.

If the Panel determines that the matter will be best resolved by appointment of a neutral hearing examiner to conduct an evidentiary hearing, the Panel will select a member of the court's bar to conduct the hearing.

(b) Appointment of a Judicial Officer.

If the Panel determines that the matter will be best resolved by the appointment of a judicial officer to conduct a hearing, the Panel will consult with the Chief Judge who will appoint a judicial officer to conduct the hearing.

(c) Appointment of Prosecutor.

The panel may appoint a member of the Committee or another attorney to prosecute the complaint at the hearing.

(d) Panel Hearing.

The Panel may, in an appropriate case, conduct the hearing sitting as a three-judge panel. If the Panel conducts the hearing, the Panel will issue a final order at the conclusion of the hearing.

(e) Hearing Process.

All hearings will be recorded verbatim by electronic or non-electronic means. The examiner or judicial officer may issue subpoenas for witnesses, production of documents, or other tangible things. Testimony will be taken under oath. Disciplinary
proceedings are administrative rather than judicial in nature. Accordingly, the Federal Rules of Evidence will not be applicable in the evidentiary hearing unless otherwise ordered by the hearing examiner or appointed judicial officer. Evidentiary rules that are commonly accepted in administrative hearings will apply. The burden of establishing the charges of misconduct will rest
with the prosecutor, who must prove the misconduct by a preponderance of the evidence.

(f) Report and Recommendation.

After the hearing has been concluded, the examiner or judicial officer shall prepare a report including findings of fact and conclusions of law with a recommendation regarding the imposition of sanctions to the clerk who will serve it on the attorney and the complainant and transmit it to the Panel. The attorney may file objections to the report and recommendation within ten (10) days of the date of service. The Panel will enter the final order.

(g) Fees and Costs.

The Panel may authorize payment of attorney's fees and expenses to an investigator or prosecutor or to an appointed hearing examiner. The Panel may tax the costs of disciplinary proceedings under these rules to the attorney subject to discipline or the attorney petitioning for reinstatement. All costs and reimbursements will

be deposited in the Court's Bar Fund. Other expenses of disciplinary proceeds may be paid by the clerk from the Court's Bar Fund when approved by the Panel or Chief Judge.

DUCivR 83-1.5.8 REINSTATEMENT

(a) Reinstatement from Reciprocal Discipline Matters.

Reinstatement in this court is not automatic upon reinstatement in the court which initially imposed the discipline. An attorney who has been disciplined under DUCivR 83-1.5.2 may petition the court for reinstatement after having been reinstated by the initial disciplining jurisdiction.

(b) Reinstatement from Other Disciplinary Orders.

An attorney who has been suspended by this court for a period of less than three months must be reinstated upon notification to the clerk that the suspension period is complete. An attorney who has been suspended for a period longer than three months must file a petition for reinstatement and may not practice until the petition has been reviewed and approved by the Panel. An attorney who has been disbarred may not petition for reinstatement until five years after the effective date of the disbarment.

(c) Contents of the Petition.

An attorney seeking reinstatement must demonstrate to the Panel that the conditions for reinstatement have been fully satisfied and that the resumption of the attorney's practice will not be detrimental to the integrity of the bar of this court, the interests of
justice, or the public.

(d) Procedure.

The Panel will review petitions for reinstatement. If the Panel needs further information, it may refer the petition to the Committee for further investigation. The Committee will proceed as provided in DUCivR 83-1.5.6.

17-04

Opinion No. 17-04

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

September 26, 2017

ISSUE

1. When a Utah attorney acts as local counsel, what are the Utah attorney's duties under the Utah Rules of Professional Conduct where the lead attorney is not licensed in Utah and is admitted pro hac vice, and the client and/or the pro hac vice attorney want local counsel to do as little as possible so that the client incurs the minimum amount of fees for local counsel's work?

OPINION

2. Acting as local counsel for a pro hac vice attorney is not a minor or perfunctory undertaking. Local counsel violates the Utah Rules of Professional Conduct when local counsel acts as nothing more than a mail drop or messenger for the pro hac vice attorney. All attorneys admitted to the Utah State Bar are required to comply with all of the Utah Rules of Professional Conduct, including when they are acting as local counsel. Under Rule 5.1 of the Utah Rules of Professional Conduct, local counsel has a general duty to adequately supervise pro hac vice counsel and to provide expertise regarding Utah law, statutes, cases, rules, procedures, and customs in Utah. Local counsel is responsible to the client and responsible for the conduct of the Utah court proceedings. Under Rule 1.2 of the Utah Rules of Professional Conduct, local counsel may be able to limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Regardless of any limited scope representation agreement, if local counsel determines that the pro hac vice attorney is engaging in conduct that is likely to seriously prejudice the client's interests, or the administration of justice, local counsel must communicate local counsel's independent judgment to the client, and, if necessary, to the court or tribunal.

BACKGROUND

3. Rule 14-806 of the Utah Rules of Judicial Administration sets forth the requirements for admission of attorneys pro hac vice who are not admitted to the Utah State Bar but are admitted to practice in another state or a federal court. Rule 14-806 provides that local counsel, who must be a resident of Utah, shall move "to admit the applicant pro hac vice" and shall "file a written consent to appear as associate counsel." Utah R. Jud. Admin. 14-806(e), (f)(3). Local counsel must "sign the first pleading filed, ... continue as one of the counsel of record in the case unless another member of the [Utah State] Bar is substituted as associate counsel," and "be available to opposing counsel and the court for communication regarding the case and the service of papers." *Id.* 14-806(f)(4)-(6). Further, the "court may require Utah counsel to appear at all hearings. Utah counsel shall have the responsibility and authority to act for the client in all proceedings if the nonresident attorney fails to appear or fails to respond to any order of the court." *Id.* 14-806(g). Rule 14-806 requires a pro hac vice attorney to comply with and be subject to "Utah statutes, rules of the Supreme Court, including the Rules of Professional Conduct and Article 5, Lawyer Discipline and Disability, the rules of the court in which the attorney appears, and the rules of the Code of Judicial Administration." *Id.* 14-806(h).

4. In the federal district court for the District of Utah, nonresident attorneys may be admitted pro hac vice if they associate with "an active member of the bar of [the] court with whom opposing counsel and the court may communicate regarding the case and upon whom papers will be served." DUCivR 83-1.1(d)(2)(b). Further, DUCivR 83-1.1(g) provides:

All attorneys practicing before this court, whether admitted as members of the bar of this court, admitted pro hac vice ... are governed by and must comply with the rules of practice adopted by this court, and unless otherwise provided by these rules, with the Utah Rules of Professional Conduct, as revised and amended and as interpreted by this court. The court adopts the Utah Standards of Professionalism and Civility to guide attorney conduct in cases and proceedings in this court.

5. The Ethics Advisory Opinion Committee has been asked to opine as to what a Utah attorney acting as local counsel must do, at a minimum, to fulfill local counsel's obligations under the Utah Rules of Professional Conduct, regardless of what the client or pro hac vice attorney want local counsel's level of involvement to be in the case.

ANALYSIS

6. A Utah attorney serving as local counsel is sometimes encouraged to be, or thought of, as a mere mail drop or messenger for pro hac vice attorney in a matter. There is nothing in the Utah Rules of Professional Conduct, however, that limits the duties of an attorney admitted to the Utah State Bar who happens to be acting as local counsel for a pro hac vice attorney. In fact, Rule 5.5 provides, in

pertinent part:

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and *who actively participates in the matter*....

Utah R. Prof. Conduct 5.5(c)(1) (emphasis added).

7. All attorneys admitted to the Utah State Bar are required to comply with the Utah Rules of Professional Conduct, including when they are acting as local counsel. These Rules include, but are not limited to, Rule 1.1, which states that "a lawyer shall provide competent representation to a client," meaning the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Utah R. Prof. Cond. 1.1. They also include Rule 1.3 that provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." Utah R. Prof. Cond. 1.3. Local counsel must also follow Rule 1.4's mandates, which require a lawyer to:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Utah R. Prof. Cond. 1.4(a). Rule 1.4 also dictates that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Utah R. Prof. Cond. 1.4(b).

8. While local counsel must comply with Rules 1.1, 1.3, and 1.4 governing a lawyer's competence, diligence, and client communication, local counsel does not have to duplicate the work already performed by the pro hac vice attorney so long as the pro hac vice attorney is complying with the Utah Rules of Professional Conduct. Indeed, such duplication would be unnecessary and unduly expensive, and would be to the client's detriment. *See* Utah R. Prof. Cond. 1.5(a) ("A lawyer shall not make an arrangement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.").

9. Local counsel has a duty, however, to take reasonable steps to ensure that the pro hac vice attorney follows the Utah Rules of Professional Conduct, even if that entails some duplication of efforts. Rule 5.1(b) states that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure the other lawyer conforms to the Rules of Professional Conduct." Rule 8.4(a) states that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through acts of another...." Utah R. Prof. Cond. 8.4(a). Local counsel should thus advise the pro hac vice attorney of pertinent law, rules, procedures, and customs in Utah applicable to the matter at hand and monitor the pro hac vice attorney closely enough to know whether the pro hac vice attorney is following them. An efficient way for local counsel and the pro hac vice attorney to minimize the added expense of local counsel's involvement in the case while still ensuring that both lawyers comply with the Utah Rules of Professional Conduct would be for the pro hac vice attorney and the client to copy local counsel on all substantive written communications and to include local counsel in substantive attorney client meetings, perhaps with local counsel appearing by telephone to save on costs.

10. In some circumstances, the client and/or the pro hac vice attorney do not want local counsel to have any direct contact with the client and want all communications with the client to go through the pro hac vice attorney only. Rule 1.2 allows a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Utah R. Prof. Cond. 1.2(c). Comment 3 to Rule 1.2 provides: "At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such advance authorization." It may thus be possible for the client (as opposed to the pro hac vice attorney) to give informed consent that the pro hac vice attorney shall alone communicate directly with the client about the matter and that local counsel may rely upon the representations of the pro hac vice attorney as to the substance of those communications. *See* Utah R. Prof. Cond. 1.2(a) ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."). This informed consent would commonly be encompassed in the engagement letter between local counsel and the client at

the outset of the representation.

11. Where local counsel is retained in a contingency fee case, and/or if a contingency fee agreement already exists between the pro hac vice attorney and the client, local counsel should ensure that an (amended) fee agreement is entered into with the client that explains local counsel's role in the case and the portion of the contingency fee to which local counsel is entitled. That percentage may vary depending upon the extent of local counsel's involvement, the scope of which, if limited, should be explained in the agreement and signed by the client. *See* Utah R. Prof. Cond. 1.5(e).

12. Only an attorney who is a member of the Utah State Bar and counsel of record is both required and allowed to electronically file documents with the Utah district courts. Utah R. Jud. Admin. 4-503(1), (3). Local counsel must therefore file all documents with the court under local counsel's electronic signature, including those that are prepared by the pro hac vice attorney. Rule 11 of the Utah Rules of Civil Procedure provides:

(b) By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney ... is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Utah R. Civ. P. 11(b); *see also* Utah R. App. P. 40(a) ("Every motion, brief, and other document must be signed by at least one attorney of record who is an active member in good standing of the Bar of this state or by a party who is self-represented."). Likewise, Rule 3.1 of the Utah Rules of Professional Conduct states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...." *See also* Utah R. Prof. Cond. 3.3 & 3.4. Local counsel must therefore investigate the merits of the case to the extent necessary to be satisfied that the substance of the documents, both legal and factual, prepared by the pro hac vice attorney complies with Rule 11 and Utah law generally before filing them with the district court. *See, e.g., Lewis v. Celina Fin. Corp.*, 655 N.E.2d 1333, 1338 (Ohio Ct.App. 1995) (holding that local counsel had personal, nondelegable duty to determine that pleadings complied with Rule 11 and could not rely on the pro hac vice attorney who forwarded pleadings for filing by local counsel under local counsel's signature to fulfill that duty). The pro hac vice attorney should give local counsel an opportunity to review all documents to be filed with the court far enough in advance of the filing deadline that local counsel can advise the client and the pro hac vice attorney about any revisions that need to be made to the documents to comply with Utah law before local counsel files them with the court or they are served on the other parties.

13. Along these same lines, because Utah Rule of Judicial Administration 14-806 requires local counsel to "be available to opposing counsel and the court for communication regarding the case and the service of papers," local counsel has a duty to keep reasonably informed about the case as it progresses and to take reasonable measures to ensure that the pro hac vice attorney appears at hearings and complies with court orders. *See* Utah R. Prof. Cond. 5.1(b).

14. Some violations of the Utah Rules of Professional Conduct by the pro hac vice attorney may require local counsel to take remedial action to fulfill local counsel's duties to the court and to other counsel or parties. If local counsel becomes aware that the pro hac vice attorney is violating or has violated such rules as Rule 3.3 (Candor towards the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 3.5 (Impartiality and Decorum of the Tribunal), or Rule 8.4 (Misconduct) of the Utah Rules of Professional Conduct, local counsel must take remedial action to prevent the avoidable consequences of the misconduct. Rule 5.1 states, in pertinent part:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Utah R. Prof. Cond. 5.1(c). Local counsel might first address the matter directly with the pro hac attorney, but if

the pro hac attorney does not or will not take appropriate action, then local counsel must do so. *See, e.g.,* Utah R. Prof. Cond. 5.1 Cmt. [5] ("A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.").

15. Similarly, if local counsel determines that the pro hac vice attorney is engaging in conduct that is likely to seriously prejudice the client's interests, such as failing to respond to discovery, local counsel has a duty to advise the client of local counsel's independent judgment that differs from that of the pro hac vice attorney and to take action to protect the client's interests, even where local counsel has agreed not to have any direct contact with the client. Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, or political factors that may be relevant to the client's situation." Utah R. Prof. Cond. 2.1; *see* Utah R. Prof. Cond. 5.1(c)(1) (stating that a lawyer is responsible for another lawyer's violation of the Utah Rules of Professional Conduct where the lawyer, "with knowledge of the specific conduct, ratifies the conduct involved"); Utah R. Prof. Cond. 8.4(d) ("It is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice.") Regardless of the extent of the pro hac vice attorney's involvement, local counsel remains responsible to the client for the conduct of the case before the Utah court. Depending upon the severity of the misconduct and the pro hac vice attorney's willingness or ability to rectify it, local counsel may also decide to withdraw from the representation of the client or to have the pro hac vice attorney's admission revoked. Local counsel would need to discuss either of those options with the client before pursuing them, assuming local counsel could reach the client, and would need to comply with Rule 1.16 of the Utah Rules of Professional Conduct governing the conditions under which an attorney may withdraw from representation of a client.

UNITED STATES DISTRICT COURT

District of Utah

Honorable David Nuffer, Chief Judge | D. Mark Jones, Clerk of Court

Search

Court Reporters / Transcripts
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http://www.utd.uscourts.gov/cmecf-electronic-case-filing

CM/ECF – Electronic Case Filing

- Login to CMECF/PACER
- Register for E-Filing (PDF Form)

Help Desk

Hours: M-F
8:30 am - 4:30 pm - (801) 524-6100
Judge's Docket Clerk

General Information

- CM/ECF and E-Filing Administrative Procedures Manual (PDF)
- Court email addresses
- Preparing Effective PDF Documents for E-filing
- Downtime Log for CMECF/PACER
- Electronic Summons
- General Information on CM/ECF
- Help with CM/ECF
- Initiating a new Civil Case (PDF)
- Judge's E-Filing Preferences (PDF)
- Pro Hac Vice Forms and Procedures
- Register for a PACER Login
- Update your email address with the Court

Training

- Training Information
- Computer Based Training modules
- CMECF Training Database

Rules and Reference Materials

- Cross-Document Hyperlinking w/ Word Macro (LinkBuilder)
  - (LinkBuilder information)
  - (LinkBuilder download)
- Attorney Guide to Hyperlinking in the Federal Courts - Word
- Attorney Guide to Hyperlinking in the Federal Courts - WordPerfect
- Federal Court Hyperlinking website - a site to promote the use of hyperlinks by attorneys
- Exhibits - How to Properly Identify (PDF)
- Judge Nuffer's Resource Materials
- Motions to Join - How to File (PDF)
- Paper Filings - How to Properly Submit
- Privacy Policy
- Sample Documents
- Sealed Documents - How to E-File (PDF)
- Sealed Documents - How to File Paper Documents (PDF)

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

ELECTRONIC CASE FILING REGISTRATION FORM

Attorneys who are active or current pro hac vice members of the District of Utah's Bar may register for the District of Utah Electronic Filing System by (i) completing the required training and (ii) signing and returning this form to the Court. Please review carefully the registration conditions set forth below before signing.

_____ _____
Name - First Middle Last **Firm Name**

_____ _____
Mailing Address **City, State, Zip**

_____ _____
Utah State Bar # (if applicable) **Telephone Number**

By signing this form, I understand and consent to the following:

- Pursuant to Fed. R. Civ. P. 5(b)(2)(E), I will receive all items required to be served under Fed.R.Civ.P. 5(a) and 77 (d) and Fed. R. Crim P. 49 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;
- I waive my right to service by USPS mail;
- I will abide by all Court rules, orders, and procedures governing the use of the electronic filing system;
- The combination of user ID and password issued by this Court will serve as the equivalent of my signature when I e-file documents with the Court;
- I will carefully examine all documents prior to e-filing them to either (i) redact sensitive and private information pursuant to DUCiv R , or (ii) move that the filing be sealed; and
- I will secure and protect my Court-issued password against unauthorized use or compromise.

Email Address(es):

Primary E-mail address _____

Up to two additional e-mail addresses 1)_____ ,

2) _____

To receive a login, you must complete one of these four options. Please check appropriate box.

☐ I have completed the CMECF Online Computer-Based Training modules on the court website at http://www.utd.uscourts.gov/online-computer-based-training-cmecf
☐ I have attended CMECF Training given by the Court.
☐ I have completed the CMECF Training for Attorneys given by an in-house trainer in my firm.
☐ I have an ECF account in the Utah Bankruptcy Court or in another Federal District Court.

Date: _____ **Signature:**_____

Please complete this form, and submit it by one of the following methods:

1. Mail the form to: **United States District Court, Office of the Clerk, ATTN: CM/ECF Registration, 351 S. West Temple, Salt Lake City, Utah 84101, or**
2. Scan and email to **ut_support@utd.uscourts.gov**, or
3. Include this form as a pdf attachment with your Application for Pro Hac Vice.

After this Court processes this form, you will receive by email your user ID and password that will enable you to access the system. The User Guide and administrative procedures for system use may be downloaded at: http://www.utd.uscourts.gov/cmecf-electronic-case-filing. Please call the Clerk's Office Help Desk at (801) 524-6851 if you have questions concerning registration, training, or use of the electronic filing system.

DUCivR 5-2 FILING CASES UNDER COURT SEAL

(a) General Rule.

The records of the court are presumptively open to the public. The sealing of new and pending civil cases is highly discouraged. Unless restricted by statute or court order, the public shall have access to all documents filed with the court and to all court proceedings. On motion of a party and a showing of good cause, a judge may order a case to be sealed.

(b) Sealing of New Cases.

(1) On Ex Parte Motion. In extraordinary circumstances, and only upon a judge's order granting an ex parte motion of the plaintiff or petitioner, an entire case may be sealed at the time it is filed. A motion to file a case under seal must be filed contemporaneously with the complaint. The complaint will remain under seal unless and until the motion is denied.
(2) Civil Actions for False Claims. When an individual files a civil action on behalf of the individual and the government pursuant to 31 U.S.C.§ 3729, the clerk will seal the complaint for a minimum of sixty (60) days. Extensions may be approved by the court on motion of the government.

(c) Sealing of Pending Cases.

A pending case may be sealed at any time upon a judge's sua sponte order or the granting of a motion by any party.

(d) Procedures for Filing Sealed Cases and Documents in Sealed Cases.

Documents initiating or filed in a sealed case must be submitted to the clerk's office in paper along with an electronic PDF-formatted copy of the document(s) on CD, DVD, or other digital storage device, consistent with the procedures outlined in the court's CM/ECF and E-Filing Administrative Procedures Manual.

(e) Access to Sealed Cases Dockets and Documents.

The clerk will not provide access to or information contained in case dockets or provide copies of sealed documents unless otherwise by the court.

DUCivR 5-3 FILING DOCUMENTS UNDER COURT SEAL

(a) General Rule.

(1) The records of the court are presumptively open to the public. The sealing of pleadings, motions, memoranda, exhibits, and other documents or portions thereof (hereinafter, "Documents") is highly discouraged. Unless restricted by statute or court order, the public shall have access to all Documents filed with the court and to all court proceedings. On motion of a party and a showing of good cause, a judge may order that a Document be sealed. A stipulation or a blanket protective order that allows a party to designate documents as sealable will not suffice to allow the filing of Documents under seal.

(2) To prevent the overdesignation of sealed Documents in the court record, counsel shall:

(A) refrain from filing motions or memoranda under seal merely because an attached exhibit contains protectable information;
(B) redact personal identifiers, as set forth in DUCivR 5.2-1, and publicly file the Document;
(C) redact the confidential portions of a Document when they are not directly pertinent to the issues before the court and publicly file the Document; and
(D) if the protectable information is pertinent to the legal issues before the court, redact the protectable information from the Document and publicly file the Document. Follow the procedure below to file a sealed version of the Document.

(b) Procedure for Filing Under Seal.

(1) Unless otherwise ordered by the court, a party must first publicly file a redacted version of the Document. A Motion for Leave to File Under Seal must be filed contemporaneously with the proposed sealed Document. The motion and proposed sealed Document must be filed as separate docket entries and both linked to the redacted version of the Document. The motion, which may be filed under seal if necessary, and the proposed sealed Document must be electronically filed. The portion(s) of the Document sought to be filed under seal shall be highlighted to identify the specific information that is sought to be sealed.

(2) The Motion for Leave to File Under Seal must specify why the Document is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. Specifically, the motion must:

(A) be narrowly tailored to seek protection of only the specific information that the party alleges is truly deserving of protection; and
(B) state the duration of the seal; and
(C) state the statute, rule, case law, or reason supporting the sealing of the Document; or

(i) If the sole basis for proposing that the Document be sealed is that another party designated it as confidential or for attorneys eyes only, then so state that reason in the motion. If the designating party seeks to have the Document sealed, the designating party must file a Motion for Leave to File Under Seal in accordance with DUCivR 5-3(b)(2) within seven (7) days of

service of the motion. If the designating party does not file a motion within seven (7) days, the original motion may be denied, and the Document may be unsealed without further notice.

(3) The court may make an independent determination as to whether the Document will be sealed, regardless of the parties' agreement or a party's decision not to oppose a Motion for Leave to File Under Seal.

(4) Subsequent Documents containing information that has already been the subject of an order allowing a sealed filing, must state on the caption page, directly under the case number: "FILED UNDER SEAL PURSUANT TO COURT ORDER (DOCKET NO. ____)."

(5) A Document filed under seal pursuant to section (b)(1) above will remain sealed until the court either denies the Motion for Leave to File Under Seal or enters an order unsealing it.

(6) The court may direct the unsealing of a Document, with or without redactions, after notice to all parties and an opportunity to be heard, with the exception set forth above in (b)(2)(C)(i).

(7) The requirements of Rule 5-3(b) may be modified by the court upon a showing of good cause.

(c) Access to Sealed Documents.

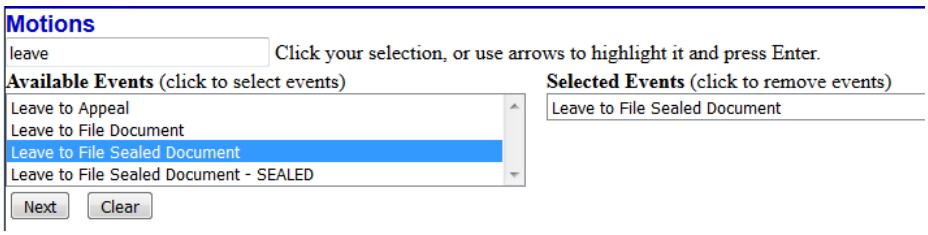
Unless otherwise ordered by the court, the clerk will not provide access to or make copies of sealed documents.

United States District Court
District of Utah

ELECTRONIC SUBMISSION OF SEALED DOCUMENTS

1. Pursuant to local rule DUCivR 5-3, e-filing of sealed documents by registered e-filers is limited to only civil cases. Documents in sealed civil cases, criminal cases, and motions to proceed *in forma pauperis* (IFP) will continue to be filed in paper, following the procedure outlined in section "G. Conventional Filing/Courtesy Copies" of this manual.
2. A proposed sealed document may be maintained under seal only upon the filing of a redacted version of the document first and an order of the court granting a motion for leave to file under seal. The caption page of the redacted document must state REDACTED VERSION. The redacted version will be considered the operative document in terms of briefing and calculating deadlines.
3. The caption for sealed versions must clearly state FILED UNDER SEAL
   a. Documents filed under seal per statute and without motion must so indicate in the document caption.
4. PDF images of sealed filings must include highlighting of the redacted portions of the previously filed redacted copy.
5. Sealed documents may be unsealed at any time upon order of the court.
6. E-Filing Procedure:
   a. Filing the REDACTED version.
      i. Select CIVIL on the blue toolbar at the top of the screen.
      ii. Choose the appropriate document type/event (motion, memorandum, exhibit, affidavit, etc).
      iii. Add "REDACTED" to the final docket text and submit the filing.
   b. Filing the Motion for Leave to File Under Seal.
      i. Select CIVIL on the blue toolbar at the top of the screen.

ii. Select MOTIONS and choose the **Leave to File Sealed Document** motion relief.



(*Use the **Leave to File Under Seal – SEALED** only if the motion must be filed under seal.)

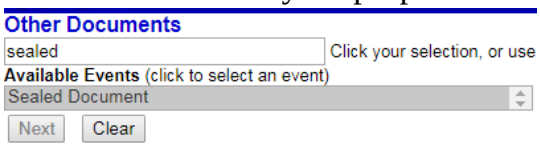
iii. Link the document to the REDACTED version of the document.

iv. NOTE: this motion may be filed under seal without leave of court, if necessary. Use the event called "Sealed Motion for Leave to File Under Seal."

c. Filing the SEALED version.

i. Select CIVIL on the blue toolbar at the top of the screen.

ii. Sealed documents are filed using the **Sealed Document** event found under **Other Documents** in the CIVIL filing menu. Do not use the motion event even if your proposed sealed document is a motion.



iii. NOTE: as you proceed, a caution message will alert you that only the document will be sealed and not the entry on the docket. A NEF will be sent to the parties on the case without access to the document. **Filers must continue to provide copies to all other parties with a copy of the NEF attached.** A certificate of service should reflect the method of service.

iv. Filers must link the sealed document to the original REDACTED version and any related motions.

United States District Court
District of Utah

CONVENTIONAL FILING/ COURTESY COPIES

1. The Court will permit conventional filing in the following instances:
   a. Pleading and other papers filed pro se;
   b. Documents in sealed civil cases, motions for leave to proceed in forma pauperis, and sealed documents in all criminal cases;
   c. All charging documents in criminal cases (including the complaint, information, and indictment);
   d. All documents signed by a defendant in a criminal case;
   e. Documents that exceed twenty-five (25) megabytes (MB) when converted to PDF that cannot be separated into smaller than twenty-five megabyte segments. These documents must be submitted in PDF format on a disk or other electronic medium. Documents and exhibits must be individually divided as separate PDFs on the medium e.g. main document, Exhibit A, Exhibit B, etc. Each PDF filename on the disk must be titled with a sufficient description so that they may be readily identified.

2. Documents presented to the Court for conventional filing may be docketed. The scanned PDF image will become the official court record.

3. Attorneys or parties filing conventionally will continue to provide courtesy copies at the time of filing as requested by chambers. Courtesy copies should be clearly identified as such in capital letters on the face sheet of the courtesy copy.

4. A registered e-filer may file exhibits to a pleading conventionally if the exhibits are photographs or other material which cannot be easily viewed or submitted in electronic format. See paragraph E 6 above.

5. A registered e-filer must electronically file a **Notice of Conventional Filing** if a filing cannot be entered electronically due to size limitation, if it contains an audio or video file, or if it cannot be scanned. **(Notices of Conventional Filing are NOT necessary for documents that are required to be filed conventionally listed in paragraph 1a-d above.)** If the subject of a conventional filing is a physical object, such as a CD, DVD, USB drive, or other storage device, that

cannot be scanned and/or entered on the docket, the filer will place the object in a paper sleeve or envelope and attach a coversheet formatted in compliance with DUCivR 10-1. The coversheet must state in the caption what the filing is and why it is being filed conventionally, e.g. "Exhibit B to Motion to Dismiss Consisting of [Video, Audio, or Extremely Oversized File]."

6. Attorneys filing civil complaints in paper must also submit the opening document(s) and cover sheet on a disk in PDF format.

7. Parties filing sealed documents conventionally must deliver the documents to the court in the following manner:
   a. Original Document. The original document must be unfolded in an envelope with a copy of the document's cover page affixed to the outside of the envelope. The cover page must include a notation that the document is being filed under court seal, and in civil cases, must indicate that the document is being filed in a case that the court has ordered sealed.

   b. Disk. The sealed filing must be accompanied by a disk or other tangible electronic media containing separate PDF files of the main document and any attachments being filed, along with an index of exhibits. The disk shall be placed in the same envelope as the original document and shall be marked with the case name, case number, and the date of delivery,
   c. Courtesy Copies. Courtesy copies of both the document and the disk, prepared in the manner described above, shall be delivered at the same time as the originals. Individual chambers may also notify counsel that an electronic version of the sealed document should be delivered to chambers via email or other method of secured electronic delivery.

United States District Court
District of Utah

INSTRUCTIONS FOR ELECTRONICALLY FILING SEALED DOCUMENTS

REMINDERS

- Redacted Versions – redacted versions of any sealed document must be electronically filed before entering the sealed version. The caption page must state REDACTED VERSION beneath the judge's name on the document.
- Electronic access to sealed filings will remain with court staff only. CM/ECF will send a Notice of Electronic Filing (NEF) to other registered e-filers on that case upon filing a sealed document that will state the name of the document, but it will not contain a link to the document.
- The filing attorney will be responsible for serving sealed documents with a copy of the NEF attached. Certificates of Service must reflect the method of service.
- PDF images of sealed filings must display the redacted portions as highlighted text.
- The caption for sealed versions must clearly state FILED UNDER SEAL PURSUANT TO ORDER DATED _____.
- Sealed documents may be unsealed at any time upon order of the court.
- Applications for Leave to Proceed Without Prepayment of Fees (IFP) will continue to be filed in paper with the clerk's office.

FILING

1. **The Redacted Document**
    a. Select CIVIL on the blue toolbar at the top of the screen.
    b. File the REDACTED version of the document using the appropriate event, i.e., motion must be e-filed using the "Motion" filing event, oppositions to motions are to be e-filed using the "Memorandum in Opposition to Motion" filing event, etc.;
    c. Select the filer and attach the PDF document.
    d. Link the document to any related entries, i.e., if this document relates to a motion, link it to the motion.
    e. Proceed through the entry until you reach the docket text box. Add "REDACTED" to the final docket text.
    f. Submit the entry and verify completion with the NEF.
2. **Motion for Leave to File Under Seal***
    a. Select CIVIL on the blue toolbar.
    b. Select the Motions link under the Motions and Related Filings heading.

c. Select **Leave to File Sealed Document** motion relief.
d. Select the filer and attach the PDF document.
e. Link the motion to the REDACTED version of the proposed sealed document.
f. Modify docket text, if necessary.
g. Submit the entry and verify completion with the NEF.

3. Proposed Sealed Document**

a. Select **Other Documents** under the Other Filings heading.
b. Select **Sealed Document** from the dropdown box.
c. Enter the civil case number.
d. Click Next on the case verification screen.
e. Click Next after reviewing the notice re: text-only NEF.
f. Attach PDF image(s) of the sealed document (including any attachments), following the guidelines outlined in the CM/ECF and E-Filing Administrative Procedures Manual.
g. Select the filing party(s). (If this is a joint filing, pick only the party(s) you represent.)
h. Click the box next to the question **Should the document you are filing link to another document in this case?** Enter the filing date or document number of the redacted version if known. If not known, then leave blank. Click Next.
i. Click the box next to the REDACTED version of the document and the Motion for Leave to File Under Seal.
    - If this is a sealed version of a response, reply, or other document relating to a motion, select the related motion as well so the sealed document appears as part of the briefing on that motion.
j. Click Next when all relevant documents have been selected.
k. Modify docket text, if necessary. Click Next.
l. Verify final docket text and filename of PDF. If correct, click Next.
m. Send copies of the NEF verification and the document to all other parties.

*If the motion itself must also be filed under seal, select the **Motion for Leave to File Under Seal - SEALED** filing event and follow the motion-filing procedure outlined above.

**Follow these instructions even if your proposed sealed document is a motion. Do not use the motion event.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CHECKLIST FOR FILING DOCUMENTS UNDER SEAL

HAVE YOU:

- ☐ Placed your document in an unfolded envelope with a copy of the cover page of the document affixed to the outside of the envelope.

- ☐ Placed a notation on the coverpage affixed to the outside of the envelope that the document is "SEALED."

- ☐ Prepared a separate envelope and copy for the Judge as noted above.

- ☐ Differentiated the envelopes as to "original" and/or "copy".

- ☐ Used no staples or tabs in the "original" document.

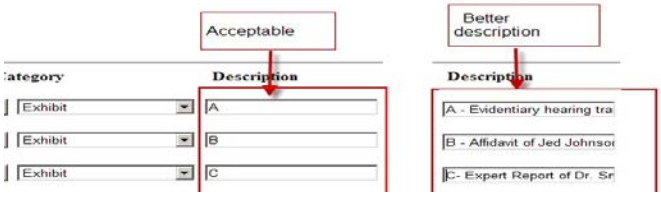
No document may be sealed unless accompanied by an order sealing the document, it is being filed in a case already under seal or it contains material under a protective order (if under an existing protective order, coverpage & document should be clearly marked: "CONFIDENTIAL, SUBJECT TO A COURT PROTECTIVE ORDER").

Unless otherwise ordered, the clerk will provide access to a sealed case or document only on court order.

TOP TEN
HELP DESK PROBLEMS

10. **SELECTING WRONG OR ALL PARTIES –** Select appropriate parties (i.e. filing Complaint against the Plaintiffs), holding Control key to select multiple roles ; avoid using "All Plaintiffs" or "All Defendants" unless filing for a group over 50 parties. If party listed more than once, select original role. In multi-defendant cases, select only your party.

9. **DESCRIBE EXHIBITS –** When attaching exhibits add specific descriptions (see Administrative Procedures for guidelines).



8. **WRONG EVENT –** Choose most specific type of filing event. (Motion for Extension of Time v. Motion for Extension of Time to Answer)

7. **MOTIONS**
   - Any request/petition seeking action by the court should be filed as a Motion.
   - Stipulations should be filed as Motions and "Stipulated" entered in text.
   - If requesting multiple or alternative reliefs, select all applicable motion types.

6. **FOLLOW INSTRUCTIONS –** Read each screen carefully, follow blue prompts.

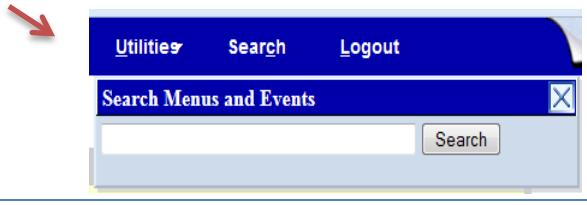
5. **REVIEW INFORMTION BEFORE SUBMITTING –** Don't submit filing until certain correct event selected, correct documents attached, and correct parties selected.

4. **APPEARANCES –** Must enter individual appearance at beginning of case. One attorney cannot enter an appearance for another. Must file Motion to Withdraw, Notice of Withdrawal, or Request to be Removed from Service List if no longer on the case or no longer wish to receive notices.

3. **DOUBLE PAYMENT –** If prepay in the clerk's office or completed the Pay.gov process during e-filing, do not complete Pay.gov process again, only enter receipt number.

2. **SEALED/REDACTED FILINGS** – Sealed documents may be e-filed in civil cases per local rule DUCivR 5-3. A redacted version of the document must be filed first followed by the motion to for leave to file under seal and then the sealed filing using the event Sealed Document.

1. **USE SEARCH OR CALL HELP DESK –** If unsure where to find the proper event, use the Search tab on the blue CM/ECF toolbar. Or else call the Clerk's Office (801-524-6100) for guidance.



United States District Court
District of Utah

Initiating a New Civil Case

Because initiating a new civil case involves entry of parties into CM/ECF, it is not possible to initiate a civil case and file a complaint electronically without preparatory contact with the District of Utah clerk's office. If the party chooses not to e-file, the opening document and cover sheet must be brought to the clerk's office in paper (original and copy) with a disc in PDF format. All documents on the disc must include an *electronic signature or the /s/ signature*. A complaint may be e-filed through CM/ECF, which will temporarily re-direct the filer to pay.gov to pay the filing fee. If a party prefers to pay the filing fee by check, at the clerk's office, the party may still e-file the complaint.

The filing is not complete until the fee is paid and the complaint e-filed or filed by the clerk.

- E-mail PDF version of the civil cover sheet and the complaint or initiating document (i.e. notice of removal) to : utdecf_clerk@utd.uscourts.gov
- The e-mailed complaint is for informational purposes only and will not be filed by the clerk's office. The complaint must be filed by counsel as later indicated.
  NOTE: *e-mailing* the complaint is NOT considered *e-filing* the complaint.
- New cases will be processed until 4:00 p.m. Monday – Friday. New cases received after this time will be processed the following morning. Please keep this in mind when a deadline for filing a new case is approaching.
- A case number and judge will be assigned to the case.
- The clerk's office will enter the case information into CM/ECF and add the parties.
- The clerk's office will enter a "Remark – New Case" on the docket and a notice of electronic filing (NEF) will be e-mailed to counsel. The docket text will include the judge assigned to the case and direct counsel what CM/ECF filing event should be used to e-file the complaint or initiating document and to pay the filing fee by the end of the business day.
  Those attorneys who have elected to receive the Daily Summary instead of individual NEFs will need to contact the clerk's office to find out if their case has been entered since they will not receive notification until the following day.
- The attorney must file the initiating document(s)* and pay the fee on the same day that he/she receives notification that the case has been opened.
- The court will not have jurisdiction until the opening document is electronically filed and the filing fee paid in the CM/ECF system.
- Once the complaint has been e-filed, any prepared PDF summons may be e-mailed to utdecf_clerk@utd.uscourts.gov for issuance electronically.

The summons shall include: 1) the case number, 2) the judge's initials, and 3) the appropriate 21 or 60 day response time. A PDF summons will be issued electronically and entered on the docket. Attorneys may then print the summons from the NEF to use for service.

*Miscellaneous cases: once case information is placed into CM/ECF, counsel will be directed to file "Miscellaneous Case Filing Fee" to pay the filing fee. Once the filing fee has been successfully submitted, counsel will then file the initiating document, i.e. "Motion to Quash."

Electronic filings that will allow you to pay by credit card or ACH are:

1. Notice of Appeal…..……$505
2. Notice of Cross Appeal……$505
3. Notice of Interlocutory Appeal……$505
4. Amended Notice of Appeal…….$505
5. Complaint……$400
6. Notice of Removal……...$400
7. Motion for Writ of Mandamus…….$400
8. Motion to Vacate (Arbitration Award)……$400
9. Motion to Compel (Arbitration Award)……..$400
10. Petition for Writ of Habeas Corpus…….$5
11. Registration of Foreign Judgment……...$47
12. Notice of Receivership……$47
13. Miscellaneous Case Filing Fee……$47

    for: Motion to Quash
    Motion to Compel
    Motion for Letters Rogatory
    Petition for Writ (of Attachment)
    Motion (petition) for Return of Property

NOTE: All other types of civil cases must be filed with the clerk's office in paper.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

, Plaintiff, v. , Defendant.	**ORDER** Case No. 4:18-cv-00075-DN District Judge David Nuffer

Signed April 30, 2018.

BY THE COURT

_____

District Judge David Nuffer

Sample Docket Text of Fee Payment Process

04/04/2018	1	Case has been indexed and assigned to Judge David Nuffer. Defendant Tristar Products is directed to E-File the Notice of Removal and cover sheet (found under Complaints and Other Initiating Documents) and pay the filing fee of $ 400.00 by the end of the business day. NOTE: The court will not have jurisdiction until the opening document is electronically filed and the filing fee paid in the CM/ECF system. (tlh) (Entered: 04/04/2018)

Sample Docket Text of Summons and Return of Service

04/30/2018	9	****RESTRICTED DOCUMENT**** RETURN OF SERVICE Executed for Personally served by process server served on Wingate Wilderness Therapy, LLC by Ricki Stevens on April 16, 2018, filed by Plaintiff Jacob M. Scott. (Truman, Ronald) (Entered: 04/30/2018)
04/13/2018	6	****RESTRICTED DOCUMENT****Summons Issued Electronically as to Wingate Wilderness Therapy. Instructions to Counsel: 1. Click on the document number. 2. If you are prompted for an ECF login, enter your 'Attorney' login to CM/ECF. 3. Print the issued summons for service. (tlh) (Entered: 04/13/2018)

Response to TRO request if no service has been made:

When contacted by counsel:

NOTICE FROM THE COURT: Plaintiffs' counsel contacted Judge Nuffer's chambers requesting a setting for a TRO hearing on the 2 Motion for TRO filed today, May 2, 2013. Service of the Complaint and TRO motion has not been completed on any of the named Defendants. When Plaintiffs' counsel has provided proof of service on all Defendants and provided the court with the contact information for each Defendant's counsel, the court will then set a hearing date and provide notice to all parties. (lcl) (Entered: 05/02/2013)

When reviewed sua sponte:

NOTICE FROM THE COURT: Following the 6 Order of Recusal of Judge Stewart, this case was reassigned to Judge Nuffer. A review of the docket revealed that Plaintiff filed 3 Motion for Order Directing Issuance of Writ of Replevin; for Temporary Restraining Order and Preliminary Injunction; and for Order to Show Cause. Service of the 2 Complaint and 3 Motion has not been completed on any of the named Defendants. When Plaintiff's counsel has filed proof of service on all Defendants and provided the court with the contact information for each Defendant's counsel, Plaintiff may request that a hearing be set and the court will provide notice to all parties. (apm) (Entered: 11/14/2016)

Utah Standards of Professionalism and Civility Excerpts

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

11. Lawyers shall avoid impermissible ex parte communications.

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

Consent Cases Closed
2013 - 2017

Judge	2013	2014	2015	2016	2017	Total Closed by MJs
Warner	48	57	57	40	53	255
Wells	42	36	33	31	58	200
Furse	38	49	49	39	51	226
Pead	45	42	41	43	66	237
TOTAL	**173**	**184**	**180**	**153**	**228**	**918**
Total Civil Filings	1343	1134	1092	1490	1527	
% of Total Civil Filings	13%	16%	16%	9%	15%	

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

PLAINTIFF,	**CASE NO.**
VS.	**NOTICE OF ASSIGNMENT TO A UNITED STATES MAGISTRATE JUDGE AND CONSENT/ REQUEST FOR REASSIGNMENT**
DEFENDANT.	

In accordance with United States District Court for the District of Utah General Order 11-001, and Fed. R. Civ. P. 73, you are notified that the above entitled action has been assigned to a United States Magistrate Judge to conduct all proceedings in this case, including trial, entry of final judgment, and all post-judgment proceedings. Exercise of this jurisdiction by a United States Magistrate Judge is permitted only if all parties file a written consent. **Indicate below whether you consent to the assignment or request the case be reassigned to a district court judge.**

Consent ☐ **Reassignment** ☐

Party(s) represented **Party(s) represented**

Attorney Signature **Date** **Attorney Signature** **Date**

Return this form within 15 days of receipt. After completing this form, counsel are required to **e-mail** this form in PDF format by sending it to consents@utd.uscourts.gov. Alternatively, the form may be mailed to the following address: U.S. District Court, 351 S. West Temple Street, Salt Lake City, Utah 84101, Attention: Consent Clerk. **Do not e-file this document.**

No judge will be informed of a party's response to this notification, unless all parties have consented to the assignment of the matter to a United States Magistrate Judge

An appeal from a judgment entered by a United States Magistrate Judge will be made directly to the United States Court of Appeals for the Tenth Circuit in the same manner as an appeal from any other judgment of this district. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73.

Sample Consent Docket Text

Consent Docket Flag:

CONMAGTRL,JURY,OPEN_MJ
Email All Attys
Email All Attys and Secondary Emails

US District Court Electronic Case Filing System
District of Utah (Central)
CIVIL DOCKET FOR CASE #: 2:16-cv-00250-DBP
Internal Use Only

Marcantel v. Stewart Title Guaranty Company et al
Assigned to: Magistrate Judge Dustin B. Pead
Demand: $745,000
Cause: 28:1332 Diversity-Insurance Contract

Date Filed: 03/29/2016
Jury Demand: Plaintiff
Nature of Suit: 110 Insurance
Jurisdiction: Diversity

CONMAGTRL,JURY,OPEN_MJ
Email All Attys
Email All Attys and Secondary Emails

Consent Docket Text:

05/25/2016	20	JOINT STATEMENT OF PARTIES/ CONSENT to Jurisdiction by US Magistrate Judge under 28 U.S.C. 636(c) by Defendants Coalition Title Agency, Michael and Sonja Saltman Family Trust, Michael A. Saltman, Sonja Saltman, Stewart Title Guaranty Company, Plaintiff Curt A. Marcantel. (Attachments: # 1 Consent, # 2 Consent, # 3 Consent)(las) (Entered: 05/25/2016)

Wine and Cheese:
Magistrate Judge and District Judge Pairings

Hon. Dustin Pead
Hon. Robert Shelby
Hon. David Nuffer
Anne Morgan

Southern Utah Federal Law Symposium
May 8, 2015

Wine and Cheese:
Magistrate Judge and District Judge Pairings

I. Magistrate Judge Authority

Magistrate judges receive cases by referral from the district court under one of two alternative statutory provisions. Magistrates can also receive cases when parties consent to have their case decided, in whole or in part, by a magistrate judge.

a. Referrals pursuant to 28 U.S.C. § 636(b)(1)(A)

First, under an "A" referral (so called for the Section of the US Code authorizing it, 28 U.S.C. § 636(b)(1)(A)), labor is divided between the district court who handles dispositive matters and the magistrate judge who decides all "nondispositive" matters. While the Federal Rules use the term nondispositive, this term is somewhat imprecise regarding the range of matters involved in an "A" referral. The statute allows the magistrate to decide:

> any pretrial matter . . . except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

28 U.S.C. § 636(b)(1)(A). Likewise, this provides only the statutory authority. District judges differ somewhat with respect to motions they might prefer to handle and your experience in a particular case may vary. If you have a case that has been referred under Section 636(b)(1)(A), you can very likely expect to go before the assigned magistrate judge on any discovery or scheduling matter. This division of labor may change as the matter moves closer to trial. Even though many nondispositive motions may be filed, the litigants may find themselves before the district court as it decides evidentiary matters that will govern the trial. Finally, the Rules of Civil Procedure require the magistrate judge to "promptly conduct the required proceeding" and issue an appropriate order. Fed. R. Civ. P. 72(a). Thus, matters referred to a magistrate judge should be resolved relatively quickly consistent with the court's role to assist the district court.

b. Referrals pursuant to 28 U.S.C. § 636(b)(1)(B)

Next, under a "B" referral, the magistrate considers all motions (including dispositive motions); however, when deciding any dispositive matter identified above, the magistrate judge issues a report and recommendation, rather than an order. The report and recommendation is not final until the district court enters an order adopting it. The statute also authorizes magistrate judges to "conduct hearings, including evidentiary hearings" that might be necessary in deciding any matters before the court. 28 U.S.C. § 636(b)(1)(B). As with "A" referrals, magistrate judges are required to "promptly conduct the required proceedings" necessary to issue a report and recommendation on a matter on a "B" referral. Fed. R. Civ. P. 72(b)(1).

c. Consent pursuant to 28 U.S.C. § 636(c)

Finally, the parties in any case pending before the district court may consent to jurisdiction of a magistrate pursuant to Section 636(c). The statutory provision allows magistrate judges to preside over all aspects of a civil case, "when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c). The District of Utah allows magistrates to exercise authority to the full extent granted by the statute. *See* D.U. Civ. R. 72-2(g) ("magistrate judges may be authorized to adjudicate civil case proceedings, including the conduct of jury and non-jury trials and entry of a final judgment."). The parties can also consent to magistrate jurisdiction for less than the full case. For example, the parties could consent to a magistrate for discovery only, thus expediting the process by eliminating opportunities to object to the district court. *See* Morton Denlow, *Should You Consent to the Magistrate Judge? Absolutely, and Here's Why*, Litigation, Winter 2011, at 3, 6 (discussing partial consent in cases involving complex discovery and other discrete matters).

II. Challenging a magistrate's decision

Litigants may challenge a magistrate judge's decision in a referral case in one of two ways. The type of challenge available to a litigant depends on whether the magistrate judge issued an order, or a report and recommendation.

a. Objections to report and recommendation

If a party elects to object to a magistrate judge's report and recommendation, such objection must be filed within 14 days after service. Fed. R. Civ. P. 72(b)(2). The district court will review *de novo* portions of the report to which a party objects and "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3). While the review is *de novo*, challenges to a magistrate judge's report and recommendation are unlikely to succeed without some demonstration of significant error. *See* Christina L. Boyd and Jacqueline M. Sievert, *Unaccountable Justice? The Decision Making of Magistrate Judges in the Federal District Courts*, 34 Just. Sys. J. 3, 262 (2013) (concluding that "nearly all magistrate recommendations are adopted by the assigned district judge.").

b. Objections to orders on nondispositive matters

If a party objects to a magistrate judge's order, the objection must be filed within 14 days after service of the order. Fed. R. Civ. P. 72(a). It is important to note that the procedure for objecting to a magistrate judge's order remains the same whether the case is an "A" referral or a "B" referral. The procedure for challenging a magistrate judge's decision depends on the type of decision and whether it is an order, or a report and recommendation. When considering an objection to a magistrate judge's order, the district court will modify or set aside only those portions of the order that are "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). A party challenging a magistrate's order bears a heavy burden to convince the district court that the magistrate judge committed error.

Also, there is no automatic stay of a magistrate's order while an objection is pending. The objecting party needs to seek a stay, if one is necessary, and applications for a stay are decided in the first instance by the magistrate judge. D.U. Civ. R. 72-3(a).

c. Appeal to the Tenth Circuit

Any challenge to a magistrate judge's decision in a consent case lies with the appropriate court of appeals and proceeds as "any other appeal from a district-court judgment." Fed. R. Civ. P. 73(c); *see* 28 U.S.C. § 636(c)(3).

III. Advantages of consent under 28 U.S.C. § 636(c)

- Likely to receive a more firm early trial date
  - Magistrates do not try felony criminal trials, with Speedy Trial concerns
  - Magistrates generally have more flexibility in their calendars, subject to criminal duty rotation.

- Avoid duplication of efforts
  - One judge is familiar with both discovery motions and substantive motions
  - Objections to the district court slow down litigation and increase expense
  - Consent thus results in value for the client

- Eliminate legal limbo while a report and recommendation is pending

- Social Security cases as an example
  - Anyone practicing in this area knows how long these can take, but consent has proven effective for speedy consideration
  - Court of appeals reviews cases de novo
  - The notion of a second bite of the apple before the District Court is illusory: "nearly all magistrate recommendations are adopted by the assigned district judge." Christina L. Boyd and Jacqueline M. Sievert, *Unaccountable Justice? The Decision Making of Magistrate Judges in the Federal District Courts*, 34 Just. Sys. J. 3, 262 (2013).

- Employment discrimination cases could provide another opportunity for speedy resolution before a magistrate

- Consent in discovery-intensive case cuts down on delays from potential objections to the district court, and magistrate judges have extensive discovery experience

IV. Local rules and standard practice employed to speed case resolution

The court regularly seeks to expedite consideration and determination of pretrial issues through the local rules and standard practice. Two often-employed methods for expediting a case are the Short Form Discovery Procedure and orders to expedite briefing.

a. Short-form discovery

With increasing frequency, judges order parties to comply with the Short Form Discovery Motion Procedure. *See* www.utd.uscourts.gov/documents/ShortFormDiscoveryMotion.pdf. As with any discovery dispute, the parties are required to attempt to resolve the dispute without Court intervention, though the Short Form Discovery Procedure lays out a specific method for the meet and confer. Motions are frequently denied as a result of the parties' failure to make meaningful efforts to narrow their dispute(s).

If these attempts at resolution prove unsuccessful, the parties may file, individually or jointly, a short motion (500 words or fewer) describing the dispute and seeking resolution. The parties must attach the request and response at issue to the motion. Each party should also submit a proposed order to chambers via email. Finally, all staff and attorneys should be trained to request expedited treatment when filing the motion through CM/ECF so the court is made aware that there is a pending short-form discovery motion. The court will take action as soon as practicable and in most cases will decide the motion or set a hearing to resolve it. If the court finds additional briefing is necessary, it will request it and set briefing deadlines. The best way to avoid a request for additional briefing is to narrow the issues during the required conference.

b. Orders expediting briefing

Additionally, judges commonly order expedited briefing on various pretrial matters, as authorized by the Local Rules: "The court may order shorter briefing periods and attorneys may also so stipulate." D.U. Civ. R. 7-1(b)(3). Shortened briefing is a common occurrence in matters in which parties seek a decision in advance of a deadline, or where the court seeks completed briefing to preserve a trial or discovery cutoff date. As the rule indicates, the parties do not need to wait for the court to order expedited briefing. They are free to stipulate to it and encouraged to do so. Particularly where a dispute involves a purely legal question without a great detail of nuance, this process can help streamline civil litigation.

APPENDIX OF RELEVANT STATUTES AND RULES

I. Statutes

a. 28 U.S.C. § 636(b)(1)(A)

Notwithstanding any provision of law to the contrary . . . a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

b. 28 U.S.C. § 636(b)(1)(B)

Notwithstanding any provision of law to the contrary . . . a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

c. 28 U.S.C. § 636(c)(1)

Notwithstanding any provision of law to the contrary . . . Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

II. Rules of Civil Procedure

Rule 72. Magistrate Judges: Pretrial Order

(a) NONDISPOSITIVE MATTERS. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The

district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.
(b) DISPOSITIVE MOTIONS AND PRISONER PETITIONS.
(1) *Findings and Recommendations.* A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.
(2) *Objections.* Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.
(3) *Resolving Objections.* The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Rule 73. Magistrate Judges: Trial by Consent; Appeal
(a) TRIAL BY CONSENT. When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial. A record must be made in accordance with 28 U.S.C. § 636(c)(5).
(b) CONSENT PROCEDURE.
(1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.
(2) *Reminding the Parties About Consenting.* A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.
(3) *Vacating a Referral.* On its own for good cause—or when a party shows extraordinary circumstances—the district judge may vacate a referral to a magistrate judge under this rule.
(c) APPEALING A JUDGMENT. In accordance with 28 U.S.C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.

III. District of Utah Local Rules

DUCivR 72-1 MAGISTRATE JUDGE AUTHORITY

Magistrate judges in the District of Utah are authorized to perform the duties prescribed by 28 U.S.C. § 636 (a)(1) and (2), and they may exercise all the powers and duties conferred upon magistrate judges by statutes of the United States and the Federal Rules of Civil and Criminal Procedure.

DUCivR 72-2 MAGISTRATE JUDGE FUNCTIONS AND DUTIES IN CIVIL MATTERS

(a) General Authority.

Unless otherwise directed by the court, magistrate judges are authorized to:

(1) grant applications to proceed without prepayment of fees;
(2) authorize levy, entry, search, and seizure requested by authorized agents of the Internal Revenue Service under 26 U.S.C. § 6331 upon a determination of probable cause;
(3) conduct examinations of judgment debtors and other supplemental proceedings in accordance with Fed. R. Civ. P. 69;
(4) authorize the issuance of postjudgment collection writs pursuant to the Federal Debt Collection Act;
(5) conduct initial scheduling conferences under Fed. R. Civ. P. 16, enter stipulated scheduling orders, and grant or deny stipulated motions to amend scheduling orders and
(6) conduct all pretrial proceedings contemplated by 28 U.S.C. §636(b) and Fed. R. Civ. P. 72 in cases assigned to them under General Order 11-001.

(b) Authority Under Fed. R. Civ. P. 72(a).

On order of reference and under Fed. R. Civ. P. 72(a), magistrate judges are authorized to hear and determine any procedural motion, discovery motion, or other non-dispositive motion.

(c) Authority Under Fed. R. Civ. P. 72(b).

On order of reference and under the provisions of Fed. R. Civ. P. 72(b), magistrate judges are authorized to prepare and submit to the district judge a report containing proposed findings of fact and recommendations for disposition of motions:

(1) for injunctive relief including temporary restraining orders and preliminary and permanent injunctions, (2) for judgment on the pleadings;
(3) for summary judgment;
(4) to dismiss;
(5) under Fed. R. Civ. P. 12(b);
(6) for default judgments; and
(7) for judicial review of administrative agency decisions, including benefits under the Social Security Act, and awards or denials of licenses or similar privileges.

Magistrate judges may determine any preliminary matter and conduct any necessary evidentiary hearing or other proceeding arising in the exercise of the authority under this section.

(d) Authority Under 42 U.S.C. § 1983.

On an order of reference in prisoner cases filed under 42 U.S.C. § 1983, magistrate judges are authorized to:

(1) review prisoner suits for deprivation of civil rights arising out of conditions of confinement, issue preliminary orders as appropriate, conduct evidentiary hearings or other proceedings as appropriate, and prepare for submission to the court appropriate reports containing proposed findings of fact and recommendations for disposition of the matter;
(2) take depositions, gather evidence, and conduct pretrial conferences;
(3) conduct periodic reviews of proceedings to ensure compliance with prior orders of the court regarding conditions of confinement, and
(4) review prisoner correspondence.

(e) Authority Under 28 U.S.C. §§ 2254 and 2255.

On an order of reference in a case filed under 28 U.S.C. §§ 2254 and 2255, magistrate judges are authorized to perform any or all of the duties set forth in the Rules Governing Proceedings in the United States District Courts under §§ 2254 and 2255 of Title 28, United States Code, including issuing of preliminary orders, conducting evidentiary hearings or other proceedings as appropriate, and preparing for submission to the court a report of proposed findings of fact and recommendations for disposition of the petition.

(f) Authority to Function as Special Master.

In accordance with the provisions of 28 U.S.C. § 636(b)(2) and Fed. R. Civ. P. 53, magistrate judges may be designated by the court to serve as special masters with consent of the parties.

(g) Authority to Adjudicate Civil Cases.

In accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, and on consent of the parties, magistrate judges may be authorized to adjudicate civil case proceedings, including the conduct of jury and non-jury trials and entry of a final judgment.

DUCivR 72-3 RESPONSE TO OBJECTION TO NONDISPOSITIVE PRETRIAL DECISION

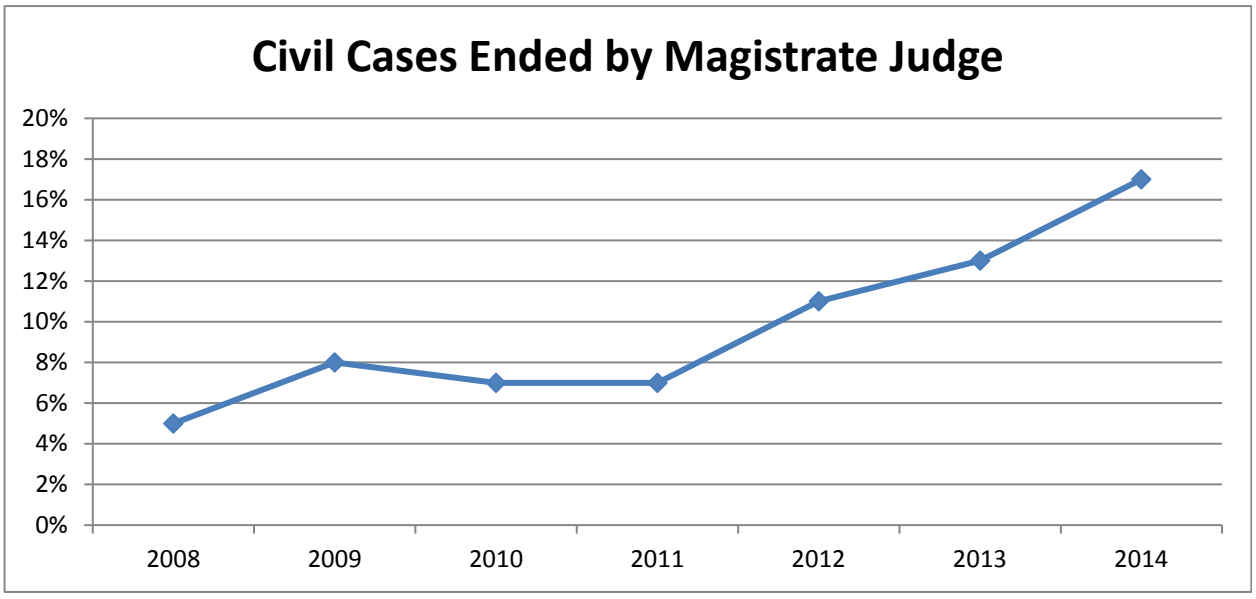
(a) Stays of Magistrate Judge Orders.

Pending a review of objections, motions for stay of magistrate judge orders shall be addressed initially to the magistrate judge who issued the order.

(b) Ruling on Objections.

Unless otherwise ordered by the assigned district judge, no response need be filed and no hearing will be held concerning an objection to a magistrate judge's order pursuant to Fed. R.Civ. P. 72(a) and 28 § 636 (b)(1)(A). The district judge may deny the objection by written order at any time, but may not grant it without first giving the opposing party an opportunity to brief the matter. If no order denying the motion or setting a briefing schedule is filed within 14 days after the objection is filed, the non-moving party shall submit to the judge a proposed order denying the objection.

	2008	2009	2010	2011	2012	2013	2014
Cases Ended w/MJ Presider	57	89	92	108	167	174	215
Total Civil Cases Ended	1064	1112	1350	1443	1488	1356	1271
Percent Magistrate Judge Dispositions	5%	8%	7%	7%	11%	13%	17%



District Judges

- Chief Judge David Nuffer
- Judge Clark Waddoups
- Judge Robert J. Shelby
- Senior Judge Bruce S. Jenkins
- Senior Judge David Sam
- Senior Judge Dale A. Kimball
- Senior Judge Tena Campbell
- Senior Judge Dee Benson
- Senior Judge Ted Stewart

Magistrate Judges

- Chief Magistrate Judge Brooke C. Wells
- Magistrate Judge Paul M. Warner
- Magistrate Judge Robert T. Braithwaite
- Magistrate Judge Evelyn J. Furse
- Magistrate Judge Dustin B. Pead

DUCivR 37-1 DISCOVERY: MOTIONS AND DISPUTES; REFERRAL TO MAGISTRATE JUDGE

(a) **Discovery Disputes**.

(1) The parties must make reasonable efforts without court assistance to resolve a dispute arising under Fed. R. Civ. P. 26-37 and 45. At a minimum, those efforts must include a prompt written communication sent to the opposing party:

(A) identifying the discovery disclosure/request(s) at issue, the response(s) thereto, and specifying why those responses/objections are inadequate, and;

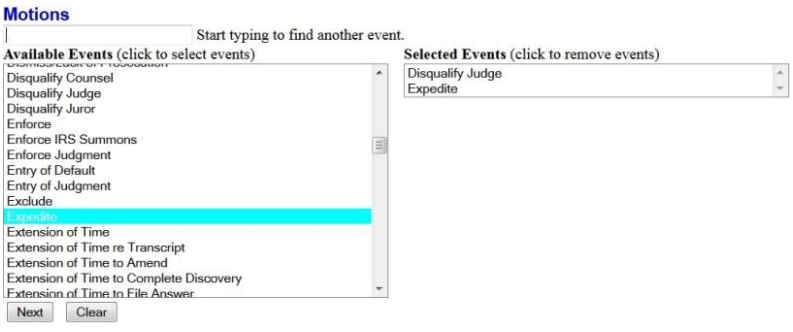
(B) requesting to meet and confer, either in person or by telephone, with alternative dates and times to do so.

(2) If the parties cannot resolve the dispute, and they wish to have the Court mediate the dispute in accordance with Fed. R. Civ. P. 16(b)(3)(v), the parties (either individually or jointly) may contact chambers and request a discovery dispute conference.

(3) If the parties wish for the court to resolve the matter by order, the parties (either individually or jointly) must file a Short Form Discovery Motion, which should not exceed 500 words exclusive of caption and signature block.

(4) The Short Form Discovery Motion must include a certification that the parties made reasonable efforts to reach agreement on the disputed matters and recite the date, time, and place of such consultation and the names of all participating parties or attorneys. The filing party should include a copy of the offending discovery request/response (if it exists) as an exhibit to the Short Form Motion. Each party should also e-mail chambers a proposed order setting forth the relief requested in a word processing format.

(5) The parties must request expedited treatment as additional relief for the motion in CM/ECF to facilitate resolution of the dispute as soon as practicable. (After clicking the primary event, click Expedite.)



(6) The opposing party must file its response five business days[5] after the filing of the Motion, unless otherwise ordered. Any opposition should not exceed 500 words exclusive of caption and signature block.

(7) To resolve the dispute, the court may:

(A) decide the issue on the basis of the Short Form Discovery Motion after hearing from the parties to the dispute, either in writing or at a hearing, consistent with DUCivR 7-1(f);

(B) set a hearing, telephonic or otherwise, upon receipt of the Motion without waiting for any Opposition; and/or

(C) request further briefing and set a briefing schedule.

(8) If any party to the dispute believes it needs extended briefing, it should request such briefing in the short form motion or at a hearing, if one takes place. This request should accompany, and not replace, the substantive argument.

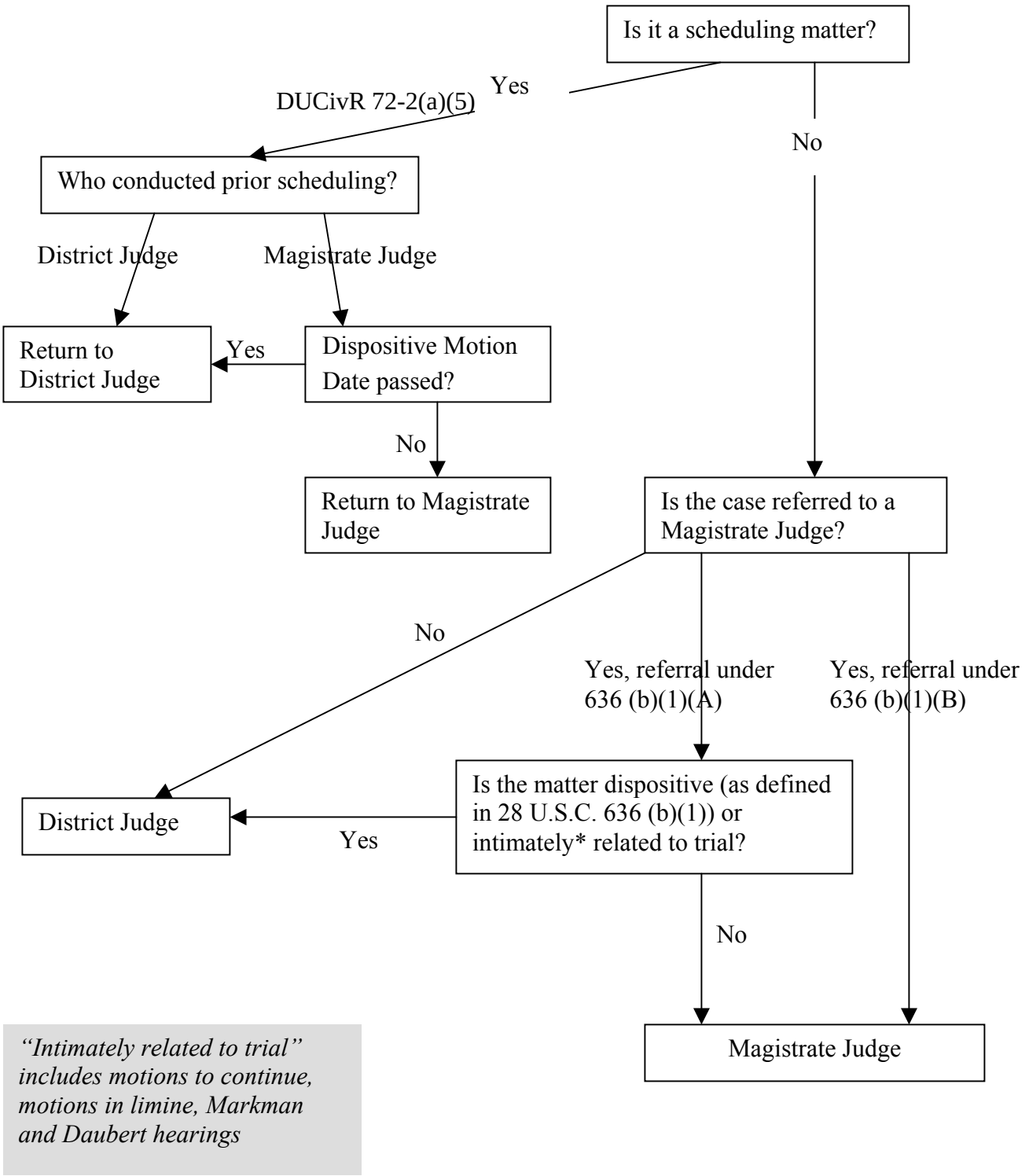
(9) A party subpoenaing a non-party must include a copy of this rule with the subpoena. Any motion to quash, motion for a protective order, or motion to compel a subpoena will follow this procedure.

(10) If disputes arise during a deposition that any party or witness believes can most efficiently be resolved by contacting the Court by phone, including disputes that give rise to a motion being made under Rule 30(d)(3), the parties to the deposition shall call the assigned judge and not wait to file a Short Form Discovery Motion.

(11) Any objection to a magistrate judge's order must be made according to Federal Rule of Civil Procedure 72(a), but must be made within fourteen (14) days of the magistrate judge's oral or written ruling, whichever comes first, and must request expedited treatment. DUCivR 72-3 continues to govern the handling of objections.

[5] This provision is not subject to the addition of three (3) days provided by Fed. R. Civ. P. 6(d).

Which Judge should hear this motion?



"Intimately related to trial" includes motions to continue, motions in limine, Markman and Daubert hearings

Civil Scheduling Matters Handled by Magistrate Judge Furse and the IPT Clerk

	Setting IPTs	Preparing Initial Scheduling Orders	Preparing Amended Scheduling Orders
District Judges			
David Nuffer	YES	YES	YES
Clark Waddoups	YES	YES	NO
Robert J. Shelby	YES	YES	NO
Bruce S. Jenkins	NO	NO	NO
David Sam	NO	NO	NO
Dale A. Kimball	YES	YES	NO
Tena Campbell	YES	YES	NO
Dee Benson	YES	YES	YES
Ted Stewart	YES	YES	NO
Magistrate Judges			
Brooke C. Wells	YES	YES	NO
Paul M. Warner	YES	YES	NO
Dustin B. Pead	YES	YES	NO
Evelyn J. Furse	YES	YES	YES

See http://www.utd.uscourts.gov/documents/ipt.html for much more information on civil scheduling.

Civil Motion Referral and Unreferral

District Judge refer cases (and sometimes individual motions) to magistrate judges. Then, CM/ECF computer logic takes over and, based on the type of motion filed, indicates whether a motion is referred or not. CM/ECF logic is not always consistent with the actual needs of a case because CM/ECF does not understand all court operations and cannot correctly categorize every motion.

Attorneys will sometimes see that a motion is referred, and then the referral is withdrawn. This paper describes the CM/ECF process of motion referral and unreferral, and the reasons for unreferral. It is intended to provide a guide for attorneys to understand the allocation of responsibilities between district judges and magistrate judges and the interplay of those responsibilities with CM/ECF. Direct communication with judges' chambers can always help clarify what CM/ECF might confuse. Judges chambers attempt to communicate with each other as well.

Glossary:

CM/ECF – Case Management – Electronic Case Files – the current case filing system in the District of Utah

Referral – the process by which the presiding district judge directs a magistrate judge to handle a portion of a case.

"**A" Referral** – referral of all pretrial, non dispositive matters. "A" refers to the statute, 28 U.S.C. §636(b)(1)(A). A magistrate judge resolves these matters by a direct order. *See also* Fed R. Civ. P. 72(a).

"**B" Referral** – referral of all matters in a case, including dispositive matters. "B" refers to the statute, 28 U.S.C. §636 (b)(1)(B). A magistrate judge resolves these matters by Report and Recommendation. *See also* Fed R. Civ. P. 72(b).

Dispositive – referring to case dispositive matters. This term is not used in the statute, but it is used in Rule 72. The statute contains an illustrative list of matters[1] for which a referred magistrate judge can only issue a report and recommendation, not a direct order.

CM/ECF Motion Referral Tracking:
An important feature of CM/ECF is its ability to designate (in referred cases) which motions are to be decided by magistrate judges and which motions are to be decided by district judges.

CM/ECF internal logic automates designations of motions as referred or not referred. This logic is different for cases referred under 28 U.S.C. §636(b)(1)(A) and cases referred under 28 U.S.C. §636(b)(1)(B). For example, dispositive motions such as motions to dismiss and motions for summary judgment would be referred in cases under a "B" referral but not in cases under an "A" referral. Motions related to discovery, such as motions to compel, or motions for scheduling would be referred in a case under an "A" referral as well as under a "B" referral.

[1] The statute lists "motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action." 28 U.S.C. §636 (b)(1)(A).

CM/ECF referral logic can be customized by the court. For example, when CM/ECF was first installed in this court, CM/ECF automatically referred Motions in Limine to magistrate judges in "A" referral cases. Because these are trial-related motions, the logic was changed to no longer automatically show referral for Motions in Limine in "A" referral cases.

CM/ECF logic is not accurate for all motions in all cases. Because CM/ECF does not understand all court operations and cannot correctly categorize every motion, CM/ECF has Utility Events which permit modification of referrals which are made by the CM/ECF logic.

Summary of CM/ECF Logic and Local Practices. The following is a list of the motions CM/ECF in the District of Utah will refer in "A" referral cases and in "B" referral cases. The list of the motions commonly referred in "A" referral cases also denotes those that may be *automatically unreferred* by the magistrate judge and those which are *often unreferred* after consultation between the magistrate judge and the district judge. Generally matters which are "trial-related" are decided by the district judge in "A" referral cases.

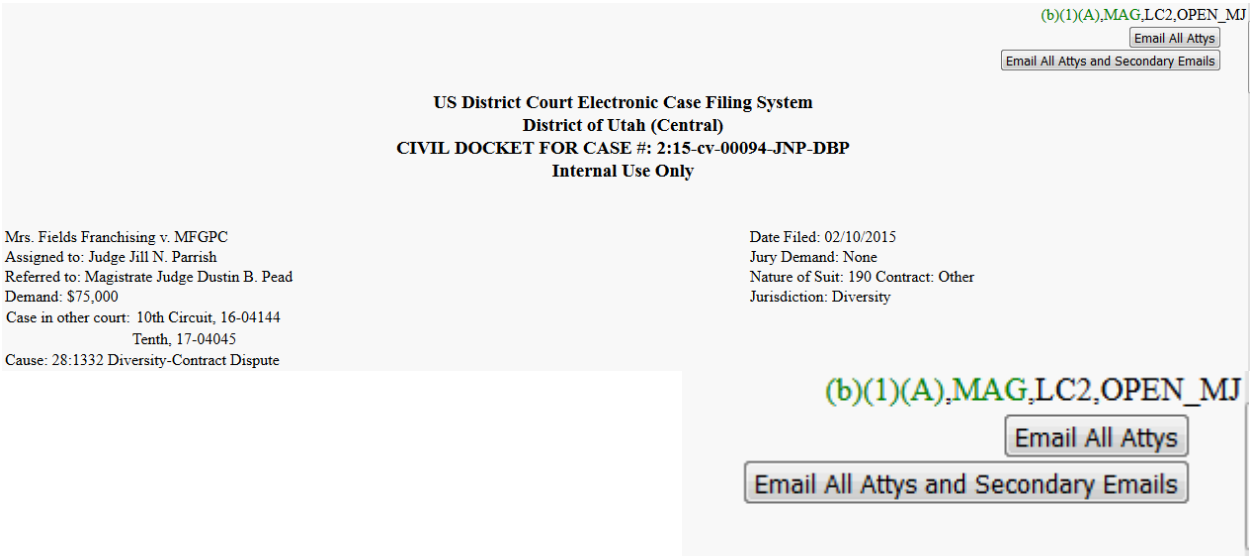
Motions Referred by CM ECF Logic

"A" Referral Cases	"B" Referral Cases
Properly Referred	
Motion for Scheduling Conference Motion to Add Parties** Motion to Unseal Motion to Substitute Party Motion for Service of Process Motion for More Definite Statement Motion to Compel Motion for Sanctions (discovery) Motion to Enforce Discovery Order Motion to Appoint Counsel *If not pertaining to trial or dispositive motion:* Motion for Extension of Time Motion to Continue Motion to Strike Motion to Amend Complaint** ** these motions can potentially be dispositive and consultation may be needed	***All "A" Referral Case Motion Types plus these and related motions:*** Motion to Dismiss Motion for Judgment on the Pleadings Motion for Summary Judgment
Automatically unreferred by Mag. J.	
Motion to Consolidate Motion under Rule 56(f) Motion to Amend Judgment Motion for Markman Hearing Motion to Enforce Settlement Motion to Certify Class Motion to Change Venue Motion to Bifurcate Trial Motion in Limine *If pertaining to trial or dispositive motion close to trial or motion hearing:* Motion for Extension of Time Motion to Continue Motion to Strike Motion to Amend Complaint	
District Judge and Mag. J. consultation needed	
Motion to Remand to State Court, Agency Motion for Joinder Motion to Sever Motion to Stay Motion for ADR Motion to Compel Arbitration Motion to Strike expert or expert report Motion for Daubert hearing Motion to Withdraw* Motion to Disqualify Counsel* *(if close to trial or while dispositive motion is pending on "A" Referral case)	

Rev. 042815

Sample “A” Referral Docket Text

Docket Flag:



Referral Docket Text:

04/17/2018	9	DOCKET TEXT ORDER REFERRING CASE to Magistrate Judge Dustin B. Pead under 28:636 (b)(1)(A), Magistrate to hear and determine all nondispositive pretrial matters. So ordered by Judge David Nuffer on 4/17/18 (docket text only - no attached document) (alt) (Entered: 04/17/2018)

Unreferral Docket Text:

04/20/2018	18	Motions No Longer Referred: 14 MOTION for Discovery will be addressed by the District Court. (jag) (Entered: 04/20/2018)

Nondispositive v. Dispositive Motions

Whether a motion is "nondispositive" or "dispositive" under Federal Rule of Civil Procedure 72 implicates a relatively large body of case law interpreting 28 U.S.C. § 636. The table below reflects the common practice you should expect to see in the Southern Region of Utah's Central Division, though it is subject to change based on any change in Tenth Circuit law.

"Nondispositive" motions handled by the magistrate judge

- Motion for scheduling conference
- Motion to seal or unseal
- Motion to substitute a party
- Motion for service of process
- Motion for more definite statement
- Motion to compel
- Motion for sanctions (discovery)
- Motion to enforce discovery order
- Motion to appoint counsel
- Motion for extension of time or continuance (unless related to trial or dispositive motion)
- Motion to strike impertinent or scandalous material

Dispositive motions handled by the district judge in a case referred under 28 U.S.C. § 636(b)(1)(A).[1]

- Motion to dismiss
- Motion to remand to state court or agency
- Motion for judgment on the pleadings
- Motion for summary judgment
- Motion under Rule 56(f)
- Motion to consolidate
- Motion to amend judgment
- Motion for Markman Hearing
- Motion to enforce settlement
- Motion to certify a class
- Motion to change venue
- Motion to bifurcate trial
- Motion for extension of time or continuance related to trial or dispositive motion

[1] In a case referred pursuant to 28 U.S.C. 636(b)(1)(B) the magistrate judge will handle all motions, including dispositive motions, until trial begins or sometime shortly before trial.

Motions evaluated on a case-by-case basis

- Motion for joinder
- Motion to sever
- Motion to stay
- Motion for ADR
- Motion to amend complaint
- Motion to compel arbitration
- Motion for sanctions (contempt or Rule 11)
- Motion to withdraw
- Motion to disqualify counsel
- Motion *in limine*
- *Daubert* motions

As the case gets closer to trial, the district judge is more likely to address these motions. As a practical matter, motions *in limine* and *Daubert* motions are almost always decided by the district judge because the district judge is responsible for enforcing the order at trial.

Sample “B” Referral Docket Text

Docket Flag:

(b)(1)(B),MAG,LC1,PROSE

Email All Attys

Email All Attys and Secondary Emails

US District Court Electronic Case Filing System
District of Utah (Southern Region)
CIVIL DOCKET FOR CASE #: 4:18-cv-00001-DN-DBP
Internal Use Only

Nadal et al v. United States of America
Assigned to: Judge David Nuffer
Referred to: Magistrate Judge Dustin B. Pead
Cause: 28:2201 Declaratory Judgment

Date Filed: 03/01/2018
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

(b)(1)(B),MAG,LC1,PROSE

Email All Attys

Email All Attys and Secondary Emails

Referral Docket Text:

03/05/2018	3	DOCKET TEXT ORDER REFERRING CASE to Magistrate Judge Dustin B. Pead under 28:636 (b)(1)(B), Magistrate to handle case up to and including R&R on all dispositive matters. So ordered by Judge David Nuffer on 3/5/18 (docket text only - no attached document) (alt) (Entered: 03/05/2018)

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

PRIMER FOR PARTIES AND ATTORNEYS PARTICIPATING IN THE DISTRICT OF UTAH'S MEDIATION PROGRAM

As a prerequisite to participating in a mediation conference, the Court requests that attorneys review this primer and discuss it with their clients. It is designed to familiarize the parties with the process and to review what they should do to prepare for it.

MECHANICS AND PROCEDURES

WHAT IS MEDIATION? Mediation is a private, voluntary process in which an impartial third person, the mediator who is appointed by the Court, assists the parties to settle their dispute. Mediators have no authority to rule on issues or determine a settlement. Their function is to facilitate a productive exchange of issues and views with the goal of reaching settlement. An effective mediator acts as a settlement catalyst by asking questions, defining the issues, encouraging communication, and assisting the parties to propose and evaluate alternative settlement proposals or solutions. In a successful mediation, all parties participate in forging a settlement agreement. In essence, the parties -- rather than a judge or jury -- are in charge and control the results.

DO WE GO TO COURT? Mediation conferences are held at the U.S. Courthouse, but no judge is present. The mediator opens the conference, then provides each party -- or party's attorney -- time to present its position with a statement of relevant facts and points of law. Because mediation is an assisted negotiation and not a trial, opening statements are addressed to the other party. After the opening session, each party is assigned a private room in which to meet to caucus. During these caucuses, the mediator typically circulates among the parties, meeting separately with each one in an attempt to facilitate settlement. If the parties reach agreement, they reconvene and, with the assistance of the mediator, discuss the details of the agreement. If the parties cannot reach a settlement, they can agree to (i) continue to work on a settlement agreement, (ii) schedule another mediation conference after exploring additional options, or (iii) return the dispute to litigation.

ATTENDING THE CONFERENCE

WHO IS REQUIRED TO ATTEND AND FOR HOW LONG? Under the Court's program, all parties and their attorneys are required to participate in the entire mediation conference. A typical mediation conference will run anywhere from four to eight hours. Parties must remain at the mediation conference until it is completed. Moreover, the Court expects all parties and their attorneys to participate in the process in good faith. Achieving success depends on the parties' willingness to engage in settlement negotiations in a spirit of cooperation, open-mindedness, and flexibility.

SHOULD SOMEONE WITH AUTHORITY TO SETTLE BE PRESENT? The Court's program requires that every party participating in the mediation conference must have present a representative who has the authority to approve any settlement agreement that is reached. For the defendant, settlement authority means a representative who is authorized to make an offer, financial or other, to the plaintiff. Settlement authority for the plaintiff means a representative who is authorized to accept an offer, financial or other, from the defendant.

PREPARING FOR THE CONFERENCE

DO WE NEED TO PREPARE ANYTHING IN WRITING? Under the Court's program, each party is required to provide the mediator with a written pre-conference memorandum at least ten days before the mediation conference. The memorandum should (i) assess the party's position, including strengths and weaknesses; (ii) summarize the relevant facts and evidence; (iii) list the party's needs and interests by priority; and (iv) describe and assess some desirable outcomes that could resolve the dispute. These memoranda need not be exchanged between the parties unless the mediator so requires. In addition, some court-appointed mediators may ask you to draft your memorandum according to their own format. If you have any questions, ask the mediator about the information the mediator needs you to provide.

HOW SHOULD WE EVALUATE OUR POSITION? Each party, ideally with the assistance of its attorney, should carefully review and realistically assess the relative strengths and weaknesses of its case. Based on this assessment, each party should make a preliminary determination of how flexible it can be in forging a settlement agreement. Each parties should also evaluate what resources they possess and/or need to accomplish a desirable outcome to the dispute. Where the dispute involves damages, each party should specify and calculate in advance what those damages are. When a party asks for time to return to the office to review financial statements, prepare spreadsheets, or otherwise regroup, the momentum of the process is lost. The length of a mediation conference frequently is inversely proportional to the amount of time the parties have spent preparing for it. Moreover, where one party is well prepared but the other poorly prepared, the mediation process is inappropriately drawn out and, in some cases, stifled. Parties and their attorneys should bear in mind that preparing for a mediation conference is as important as preparing to appear before a judge.

COURT-APPOINTED MEDIATORS

WHO ARE THE COURT-APPOINTED MEDIATORS? All members of the Court's ADR Panel are highly experienced and qualified attorneys who have agreed to serve as mediators in the Court's program at a reduced cost or voluntary basis. Because the time they devote to serve as mediators is valuable, the Court asks that all parties and their attorneys make every effort to be cooperative throughout the mediation process and to take the time to carefully prepare for the mediation conference.

WHO PAYS THE MEDIATORS? The court authorizes mediators to collect fees for their services at an hourly rate set by the mediator. The parties should discuss payment arrangements with the mediator before the mediation conference. Unless the parties agree otherwise, the compensation fee for the mediator is split evenly between the parties. Parties who are unable to pay their portion of the mediator’s fee may motion the court to waive their portion of the fee.

QUESTIONS OR ADDITIONAL INFORMATION

If you have questions about the mediation process or would like more information about it, please call Elizabeth Toscano at 801/524-6196.

ATTY NAME & BAR NO
Attorney for [PLAINTIFF/DEFENDANT]
ADDRESS
PHONE NO.

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF UTAH - [CENTRAL/NORTHERN] DIVISION

[PLAINTIFF]	:	
Plaintiff,	:	**MOTION TO REFER CASE TO ADR FOR [MEDIATION/ARBITRATION]**
vs.	:	
	:	**Case No. [CASE NO.]**
[DEFENDANT]	:	
Defendant.	:	

The [PLAINTIFF/DEFENDANT], by and through counsel, hereby move the Court to refer the above-captioned matter to the court-annexed Alternative Dispute Resolution Program for [MEDIATION/ARBITRATION], pursuant to DUCivR 16-2 and the Court's ADR Plan.

DATED this _____ of [MONTH], [YEAR].

By _____
[ATTORNEY]
Attorney for [PLAINTIFF/DEFENDANT]

Brent O. Hatch (5715)
Shaunda L. McNeill (14468)
Hatch, James & Dodge, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666
Email: bhatch@hjdlaw.com
smcneill@hjdlaw.com

Attorneys for Red Star Transportation Inc.

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

CRANNEY CORP, a Utah corporation, Plaintiff, vs. RED STAR TRANSPORTATION INC., a Utah corporation, Defendant.	**JOINT MOTION TO REFER CASE TO ADR FOR MEDIATION** Case No.: 2:15-cv-00182 Judge Bruce Jenkins

Plaintiff and Defendant, by and through counsel, hereby move the Court to refer the above-captioned matter to the court-annexed Alternative Dispute Resolution Program for mediation, pursuant to DUCivR 16-2 and the Court's ADR Plan.

DATED this 6th day of July, 2015.

TECHLAW VENTURES, PLLC

By: */s/ Benjamin D. Stanley*
Benjamin D. Stanley
Preston C. Regehr

Attorneys for Plaintiff,
CRANNEY CORP

(Signature added with written permission of Benjamin D. Stanley.)

HATCH, JAMES & DODGE, P.C.

By: */s/ Shaunda L. McNeill*
Brent O. Hatch
Shaunda L. McNeill

Attorneys for Defendant,
RED STAR TRANSPORTATION INC.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

[PLAINTIFF]	:	
Plaintiff,	:	**REFERRAL TO ADR PROGRAM FOR [MEDIATION/ARBITRATION]**
vs.	:	
[DEFENDANT],	:	**Case No. [CASE #]**
Defendant.	:	

The above-entitled matter is hereby referred to the court-annexed Alternative Dispute Resolution Program for [MEDIATION/ARBITRATION].

Further proceedings in this matter will be governed by the provisions of DUCivR 16-2 and the Court's ADR Plan.

IT IS SO REFERRED, this _____ day of [MONTH], [YEAR].

By _____
[JUDGE]
United States [DISTRICT/MAGISTRATE] Judge

Mediation Referral Docket Text Order

01/17/2018	121	ORDER REFERRING CASE to Magistrate Judge Dustin B. Pead under 28:636 (b)(1) for Settlement. Magistrate to conduct a settlement conference by the end of March 2018. No attached document. Signed by Judge Jill N. Parrish on 1/17/18. (ss) (Entered: 01/17/2018)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED SECURITY FINANCIAL CORPORATION, Plaintiff, v. FIRST MARINER BANK, et al., Defendants.	AMENDED MEDIATION ORDER Case No. 2:14-cv-00066-JNP-EJF District Judge Jill N. Parrish Magistrate Judge Evelyn J Furse Mediator: Magistrate Judge Dustin B. Pead

Pursuant to this matter being referred to the undersigned for settlement (ECF No. 121), this case is hereby scheduled for a Settlement Conference on **Thursday, March 29, 2018, from 1:30 p.m. to 5:00 p.m.** The parties will convene in Courtroom 7.100 at the U. S. District Courthouse located at 351 South West Temple, Salt Lake City, Utah.

IT IS HEREBY ORDERED:

Participation of Parties: The litigants are required to be personally present along with counsel if so represented. ***Counsel is required to have full and final settlement authority. A litigant with complete settlement authority must be physically present and participate in the settlement conference for the entire time period.***

Pre-Mediation Conference and Joint Submission to Mediator: At least one attorney representing each party must meet and confer regarding the topics discussed below. On or before **March 2, 2018**, counsel must jointly submit a document containing the following:

1. Identification of discrete issues which, if resolved, would aid in the settlement of the case. This must include identification of any pending motion(s) that either party feels

precludes meaningful negotiation.

2. A live settlement demand from the party asserting any claim (whether in a complaint, cross-claim, or counterclaim). This demand will be used as the opening demand to begin this mediation. The number may be presented as an aggregate to settle all of the party's claims or it may list the demand for each individual claim. **This demand shall be treated as a confidential mediation communication.**

3. Affirmation that all counsel has read this mediation order and will comply with its terms, particularly the requirement that all persons who may withhold settlement authority must be physically present during the entire mediation.

4. An honest estimate of the likelihood of settling the matter. The parties are expected to make good-faith efforts to compromise. If the parties believe mediation is impossible for any reason, they should so indicate.

This statement must be delivered directly to the Magistrate Judge's chambers or emailed to: utdecf_pead@utd.uscourts.gov. The joint submission will not be shared with the District Court. If the joint submission is not provided by the deadline, the mediation will be stricken.

Confidential Settlement Statement: On or before **March 15, 2018,** each party shall separately lodge with the Magistrate Judge a **confidential settlement statement** including:

1. A forthright evaluation of the party's likelihood of prevailing on the claims and defenses;

2. The party's position on settlement, including present demands and offers and history of past settlement discussions, offers and demands;

3. An estimate of the cost and time to be expended for further discovery, pretrial and trial; and

4. A certification that counsel engaged in a candid discussion with their respective client(s) about the risks of trial and the risk of negative outcomes at trial.

The **confidential settlement statement** must be delivered directly to the Magistrate Judge's chambers or emailed to chambers at: utdecf_pead@utd.uscourts.gov. Copies of the confidential settlement statement **shall NOT be filed with the Clerk of the Court, nor served**

upon the other parties or counsel. The Court and its personnel shall not permit other parties or counsel to have access to these confidential settlement statements.

Confidentiality: No report of proceedings, including any statement made by a party, attorney, or other participants in the settlement conference may be reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission unless otherwise discoverable. Pursuant to DUCivR 16-3(d), a written report for the purposes of informing the referring judge whether or not the dispute has been settled is the only permissible communication allowed with regard to the settlement conference. No party will be bound by anything agreed upon or spoken at the settlement conference except agreements placed on the record in open court or provided in a written settlement agreement. No participant in the settlement conference may be compelled to disclose in writing or otherwise, or to testify in any proceeding, as to information disclosed or representations made during the settlement process, except as required by law.

For questions related to the settlement conference, counsel may contact Judge Pead's Chambers at (801) 524-6155.

DATED this 30th day of January 2018.

BY THE COURT:

Dustin Pead
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
District of Utah
Honorable David Nuffer, Chief Judge | D. Mark Jones, Clerk of Court

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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 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., Plaintiff, v. Click here to enter text., Defendant.	**ORDER TO PROPOSE SCHEDULE** Case No. Click here to enter text. 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

_____, Plaintiff, v. _____, Defendant.	**ATTORNEY PLANNING MEETING REPORT** Case No. _____ 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

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, Plaintiff, v. *Defendant*, Defendant.	**SCHEDULING ORDER** Case No. *Case No.* District Judge *District Judge* 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****

1.		**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. 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**: 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, Plaintiff, v. FLYING SOFTWARE LABS INC., Defendant.	**ORDER DENYING MOTION TO STAY AND GRANTING EXTENSION OF TIME** Case no. 2:18-cv-00093-DN 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*.

DUCivR 37-1 DISCOVERY: MOTIONS AND DISPUTES; REFERRAL TO MAGISTRATE JUDGE

(a) Discovery Disputes.

(1) The parties must make reasonable efforts without court assistance to resolve a dispute arising under Fed. R. Civ. P. 26-37 and 45. At a minimum, those efforts must include a prompt written communication sent to the opposing party:

(A) identifying the discovery disclosure/request(s) at issue, the repsones(s) thereto, and specifying why those repsonses/objections are indequate, and;

(B) requesting to meet and confer, either in person or by telephone, with alternative dates and times to do so.

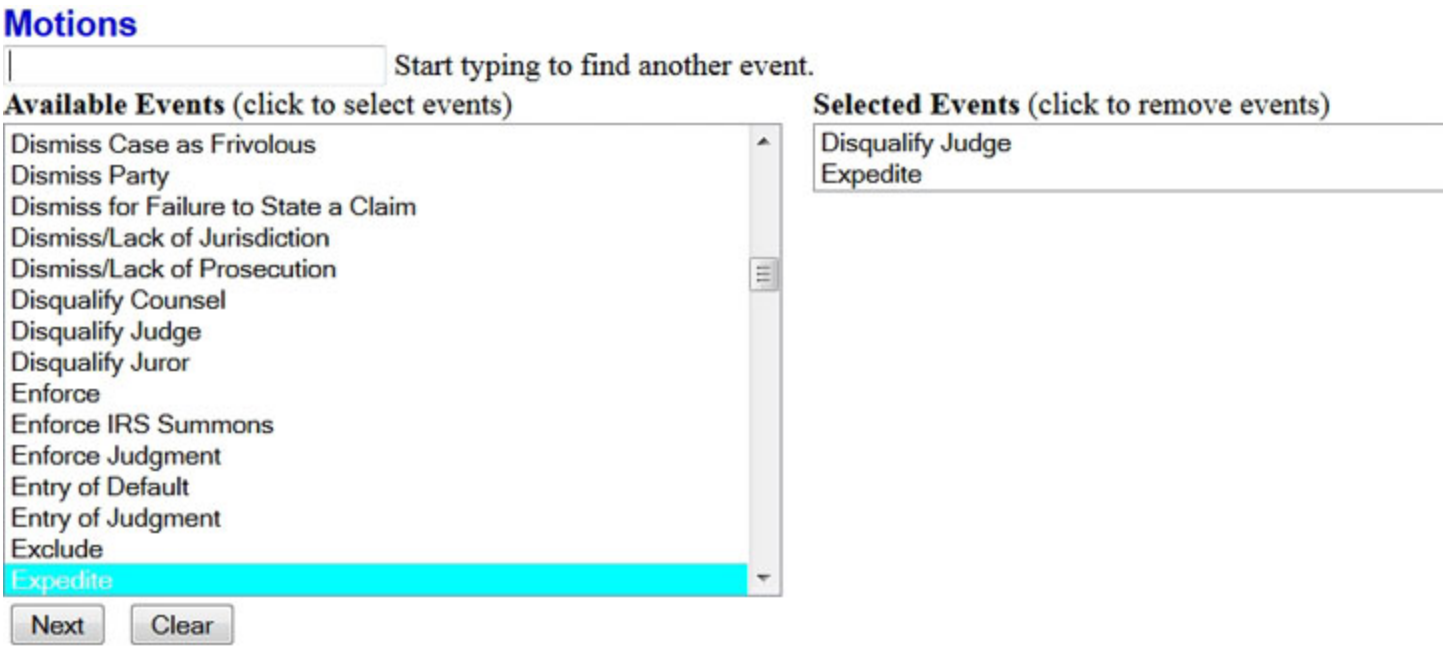
(2) If the parties cannot resolve the dispute, and they wish to have the Court mediate the dispute in accordance with Fed. R. Civ. P. 16(b)(3)(v), the parties (either individually or jointly) may contact chambers and request a discovery dispute conference.

(3) If the parties wish for the court to resolve the matter by order, the parties (either individually or jointly) must file a Short Form Discovery Motion, which should not exceed 500 words exclusive of caption and signature block.

(4) The Short Form Discovery Motion must include a certification that the parties made reasonable efforts to reach agreement on the disputed matters and recite the date, time, and place of such consultation and the names of all participating parties or attorneys. The filing party should include a copy of the offending discovery request/response (if it exists) as an exhibit to the Short Form Motion. Each party should also e-mail chambers a proposed order setting forth the relief requested in a word processing format.

(5) The parties must request expedited treatment as additional relief for the motion in CM/ECF to facilitate resolution of the dispute as soon as practicable. (After clicking the primary event, click Expedite.)

(6) The opposing party must file its response five business days [5] after the filing of the Motion, unless otherwise ordered. Any opposition should not exceed 500 words exclusive of caption and signature block.



(7) To resolve the dispute, the court may:

(A) decide the issue on the basis of the Short Form Discovery Motion after hearing from the parties to the dispute, either in writing or at a hearing, consistent with DUCivR 7-1(f);

(B) set a hearing, telephonic or otherwise, upon receipt of the Motion without waiting for any Opposition; and/or

(C) request further briefing and set a briefing schedule.

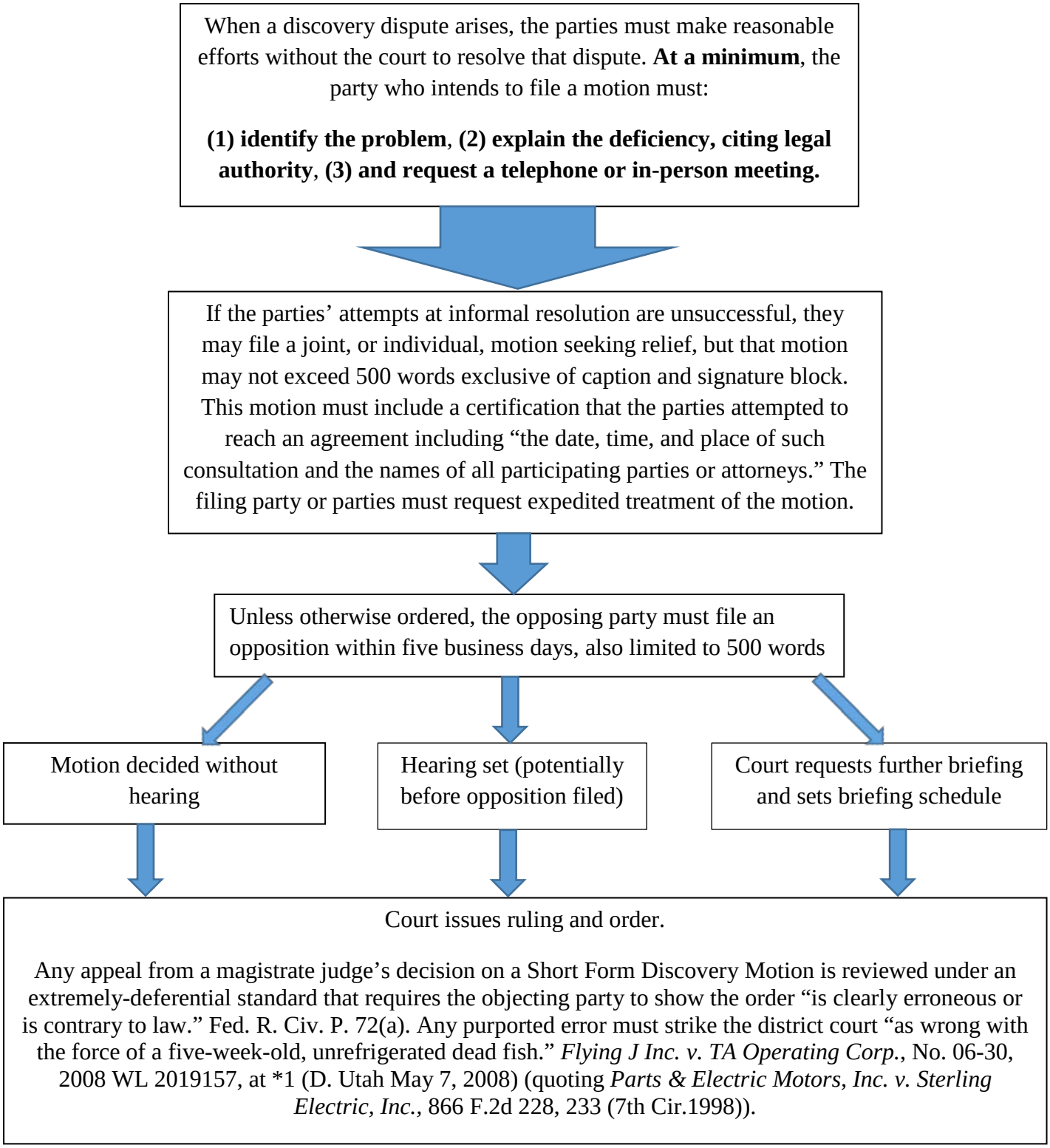
(8) If any party to the dispute believes it needs extended briefing, it should request such briefing in the short form motion or at a hearing, if one takes place. This request should accompany, and not replace, the substantive argument.

(9) A party subpoenaing a non-party must include a copy of this rule with the subpoena. Any motion to quash, motion for a protective order, or motion to compel a subpoena will follow this procedure

(10) If disputes arise during a deposition that any party or witness believes can most efficiently be resolved by contacting the Court by phone, including disputes that give rise to a motion being made under Rule 30(d)(3), the parties to the deposition shall call the assigned judge and not wait to file a Short Form Discovery Motion.

(11) Any objection to a magistrate judge's order must be made according to Federal Rule of Civil Procedure 72(a), but must be made within fourteen (14) days of the magistrate judge's oral or written ruling, whichever comes first, and must request expedited treatment. DUCivR 72-3 continues to govern the handling of objections.

Short Form Discovery Flow Chart



IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

B&D DENTAL, Plaintiff, v. KOD CO, Defendant.	MEMORANDUM DECISION Case No. 2:13-cv-00236-TS-DBP District Judge Ted Stewart Magistrate Judge Dustin B. Pead

This matter was referred to the Court under 28 U.S.C. § 636(b)(1)(A). (Docket No. 54.) This case is before the Court on B&D Dental Corporation's ("B&D") motion to compel production of documents from Defendant KOD Co., Ltd. ("KOD").

I. Dispute

B&D argues that KOD's objections to B&D's document requests are not valid because KOD did not articulate a sufficiently specific basis for those objections. (Dkt. 71 at 8–10.) B&D also argues that KOD failed to produce any responsive documents to certain requests and that KOD's production responsive to most of the remaining requests has been incomplete. (*Id.* at 10–11.) Finally, B&D takes particular issue with KOD's inability to produce an executed copy of a Confidential Disclosure Agreement that KOD claims exists between it and B&D. (*Id.* at 11.) B&D seeks its costs for bringing the motion to compel. (*Id.* at 11–12.)

KOD, on the other hand, argues that the motion to compel was filed without a proper attempt to meet and confer and in direct contradiction to B&D's counsel's email indicating that KOD could produce documents on a rolling basis. (Dkt. 74 at 2–6.). Further, KOD asserts that the motion was brought for purposes other than the present litigation. (*Id.* at 8–9.)

II. Analysis

It is within the Court's discretion to deny a motion to compel for failure to comply with the meet-and-confer requirements set forth in Rule 37 and corresponding local rules. *See Schulte v. Potter*, 218 F. App'x 703, 709 (10th Cir. 2007). Rule 37 requires certification that the moving party has "in good faith conferred" with the opposing party in an effort to obtain discovery without court intervention. Fed. R. Civ. P. 37(a)(1). Likewise, the District of Utah's local rule requires counsel to demonstrate "a reasonable effort to reach agreement with opposing counsel on the matters set forth in the motion." D.U. Civ. R. 37-1. "When the dispute involves objections to requested discovery, parties do not satisfy the conference requirements simply by requesting or demanding compliance with the requests for discovery." *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D. Kan. 1999).

Here, B&D has not sufficiently complied with the meet-and-confer requirements the local and federal rules. B&D states that the parties met to discuss KOD's discovery responses and B&D demanded compliance at various times, but this is insufficient. The last of counsels' discussions occurred on November 18, 2014. (Dkt. 71 at2.). Counsel reached an agreement that allowed KOD to provide discovery on a rolling basis. (Dkt. 71, Ex. L.) KOD sent its first partial production on December 1 and invited B&D's counsel to contact KOD's counsel with any questions. (Dkt. 71, Ex. M.) B&D responded to the production by email, indicating B&D's counsel would "let [KOD's counsel] know if we have any questions." (Dkt. 74, Ex. 2.) B&D's counsel expressed no dissatisfaction with KOD's attempts to provide rolling discovery prior to filing the present motion to compel on December 31, 2014.

B&D did not meet their obligation to meet and confer as required by the local and federal rules because their last communication with KOD's counsel was to express agreement to the

rolling production. Rules 37 and 37-1 set forth more than a requirement to hold a perfunctory meeting prior to filing a discovery motion. The rules require ongoing good faith and reasonable efforts to reach a resolution prior to filing a motion. Having a meeting, or multiple meetings, is only part of the process. Earnestly seeking a resolution is another.

The Court does not endeavor to be unduly formalistic in its enforcement of Rules 37 and 37-1, but the violation here caused problems attendant to parties not complying with their meet-and-confer obligations. The parties' briefing indicates the nature and extent of this dispute has not been well defined. Plaintiff seeks discovery responses, and attacks what it describes as boilerplate objections made by KOD. (Dkt. 71.) KOD does not appear to stand on the objections in question. Instead, KOD discusses difficulties in having records translated from Korean, difficulties shared by B&D. (Dkt. 74 at 7; Dkt. 72 at 2.) Additionally, KOD has provided a number of documents after B&D filed its motion. (Dkt. 75 at 5–6.) In some circumstances KOD's production after a motion to compel would be looked at unfavorably, but here, it does not appear inconsistent with the rolling production to which B&D agreed.

III. Ruling

Based on the foregoing, the Court **DENIES** Plaintiff's motion to compel without prejudice. The Court further finds that an award of costs is not justified. The parties are admonished to work together to find reasonable solutions. The Court will not set an artificial requirement regarding future conferences, but the parties should bear in mind the admonition of the District of Kansas on this subject:

> The parties need to address and discuss the propriety of asserted objections. They must deliberate, confer, converse, compare views, or consult with a view to resolve the dispute without judicial intervention. They must make genuine efforts to resolve the dispute by determining precisely what the requesting party is actually seeking; what responsive documents or information the discovering party

> is reasonably capable of producing; and what specific, genuine objections or other issues, if any, cannot be resolved without judicial intervention.

Cotracom Commodity Trading Co. v. Seaboard Corp., 189 F.R.D. 456, 459 (D. Kan. 1999).

Should these production issues remain unresolved after further discussion, the Court will entertain another motion. However, given the time and energy expended by both parties regarding the present discovery dispute, the Court will be more inclined to award costs and attorney fees in future motions. Both parties are encouraged to work together to make the discovery process as efficient and meaningful as possible.

IT IS SO ORDERED.

Dated this 3rd day of February, 2015.

By the Court:

Dustin B. Pead
United States Magistrate Judge

DUCivR 30-1 DEPOSITION OBJECTIONS

Objections during depositions to the form of the question must specifically identify the basis for the objection. Objections to the form may include, but are not limited to, the following objections:

- Ambiguous
- Vague or unintelligible
- Argumentative
- Compound
- Leading
- Mischaracterizes a witness's prior testimony
- Mischaracterizes the evidence
- Calls for a narrative
- Calls for speculation
- Asked and answered
- Lack of foundation
- Assumes facts not in evidence

If the basis for objection as to form is not timely made at the time of the question, the objection is waived. Objections that state more than the basis of the objection and have the effect of coaching the witness are not permitted and may be sanctionable.

MAKE DEPOSITIONS LESS STRANGE!

A PERSPECTIVE FROM THE (MOSTLY) ABSENT BUT INTERESTED JUDGE

ARE YOUR DEPOSITIONS EXPERIENCES BEST EXEMPLIFIED BY THE FORMER OR THE LATTER?

COMMON DEPOSITION FEELINGS (AS EXPRESSED BY SHAKESPEARE)

- "Wilt thou show the whole wealth of thy wit in an instant?" (Merchant of Venice)
- "Thou sodden-witted lord! Thou hast no more brain that I have in mine elbows!" (Troilus and Cressida)
- "You are idle shallow things: I am not of your element." (Twelfth Night)
- "Four of his five wits went halting off, and now is the whole man governed with one." (Much Ado About Nothing)
- "Thou art too base to be acknowledged." (The Winter's Tale)
- "Come, you are a tedious fool. To the purpose…" (Measure for Measure)
- "Pray you stand further away from me." (Anthony and Cleopatra)
- "Thou are the cap of all the fools alive." (Timon of Athens)
- "He hath out-villain'd villainy so far as that rarity redeems him." (All's Well That Ends Well)
- "Your affections are a sick man's appetite, who desires most that which would increase his evil." (Coriolanus)

GOAL = KEEP THE DEPOSITION "FLOWING" (NOT JUST "GOING")

- At District Court, we are occasionally tasked with a request for immediate intervention to address blatant attorney misconduct.
  - In egregious circumstances – which some of you have either seen firsthand or have read about – judicial intervention is the only alternative, with either accompanying or subsequent requests for sanction.
    - "Las Vegas lawyer accused of wielding handgun during deposition" (Las Vegas Review-Journal, October 5, 2016) (http://www.reviewjournal.com/crime/las-vegas-lawyer-accused-wielding-handgun-during-deposition)
    - Shortly after beginning the deposition of the plaintiff, the examining attorney "pulled the gun from its holster, preparing to point and shoot, all while gesturing me to come at him," reported the plaintiff.
    - Attorney response? "I always carry a gun because I'm an attorney and people don't like me."
    - Court reporter kept typing the whole time.

GOAL CONT.

- But assume the environment is not so toxic as to require judicial intervention or immediate suspension of the deposition, but is of such a level that things are "Breaking Bad." What should be done?
  - More specifically, where is the line between "zealous advocacy" on behalf of a client and abusive and improper tactics?
- The purpose of this discussion is to share with you some insight as to what types of misconduct a Magistrate Judge might commonly see, how such conduct is viewed by the judge, discuss possible remedies/sanction, and offer a few practical ideas to help you avoid as much trouble as you can.

COURT: GENERAL BUT CENTRAL CONCERN? "IMPROPER FRUSTRATION" OF DEPOSITIONS

- As you all know, a deposition is a powerful discovery mechanism but can present certain challenges, including interactions with attorneys (experience, reputation, actual conduct).
- The deposition's purpose is a question-and-answer conversation between the deposing attorney and the witness.
  - The defending attorneys role is, by design, intended to be limited.
  - Far-too-often reality? Defending attorneys occasionally impermissibly inject themselves by :
    - (1) making improper, frivolous, or speaking objections, including repetitive or long-winded objections designed to distract or disrupt,
    - (2) commanding deponents to not answer proper questions in the absence of a legitimate privilege claim, or
    - (3) attempting to influence the testimony of the deponent by making improper statements or commentary, including those that serve to mischaracterize or confuse the record, disguised as necessary to "protected the record."
    - All of these involve the same thing – the improper frustration of the deposing attorney's quest to obtain information.
  - The goal – stated or not – of some is to create such a scene that the deponent isn't sure who is in control.

START WITH THE FEDERAL RULES OF CIVIL PROCEDURE

- Practical solutions stem from the rules themselves.
- Fed.R.Civ.P. 30.
  - 30(c)(1): "[E]xamination and cross examination of a deponent [shall] proceed as they would at trial under the Federal Rules of Evidence."
  - 30(c)(2): All objections must be "noted for the record" and "stated concisely in a nonargumentative and non-suggestive manner." Even with the objection, "the examination still proceeds; the testimony is taken subject to any objection." The deponent must answer all questions except "when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)."
- Fed.R.Civ.P. 32.
  - 32(d)(3)(A): Objections to "the competence, relevance, or materiality of testimony" are "not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time."
  - 32(d)(3)(B): Objections not raised in a deposition are waived if "it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time."

VIOLATION #1 = IMPROPER OBJECTIONS

- Likely proper objections under 30(c)(1):
  - (1) Compound
  - (2) Asked and answered
  - (3) Overbroad/calls for narrative
  - (4) Argumentative
  - (5) Calls for speculation
  - (6) Vague/confusing
  - (7) Assumes facts not in evidence
  - (8) Misstates the record
  - (9) Lacks foundation/calls for opinion from unqualified witness
  - (10) Leading

- What about relevance?
  - While not an absolute rule, objections of relevance are generally not regarded as valid deposition objections and time is limited, so it is hoped that the utility of the moment will outweigh unreasonable fishing.

NEW LOCAL RULE 2017

- RULE ON DEPOSITION OBJECTIONS
- Objections at depositions to the form of the question must specifically identify the basis for the objection. Objections to the form may include, but are not limited to, the following objections:
  - 1. Ambiguous
  - 2. Vague or unintelligible
  - 3. Argumentative
  - 4. Compound
  - 5. Leading
  - 6. Mischaracterizes a witness's prior testimony
  - 7. Mischaracterizes the evidence
  - 8. Calls for a narrative
  - 9. Calls for speculation
  - 10. Asked and answered
  - 11. Lack of foundation
  - 12. Assumes facts not in evidence

- If the basis for objection as to form is not timely made at the time of the question, the objection is waived. Objections that state more than the basis of the objection and have the effect of coaching the witness are not permitted and may be sanctionable.

IMPROPER OBJECTIONS CONT., INCLUDING VIOLATION #2 – INCORRECTLY COMMANDING DEPONENT NOT TO ANSWER

- What is improper?
  - Detailed objections
  - Private consultations with the witness
  - Instructions not to answer or how to answer
  - Colloquies
  - Interruptions
  - Personal attacks
- What is the court most concerned with?
  - Conduct that improperly or unfairly impedes, delays, and/or frustrates the fair examination of the deponent.
- What about privilege?
  - A person may instruct a witness not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).

VIOLATION 3 – IMPROPER ATTEMPTS TO INFLUENCE THE DEPOSITION INCLUDING "COACHING THE WITNESS"

- Less subtle, but equally problematic conduct in depositions.
  - Recall James Fenimore Cooper's phrase of "horse-shedding the witness" (referring to attorneys who linger in carriage sheds near the courthouse to rehearse with their witnesses).
  - Problems arise when defending attorney acts as an intermediary, and the answers become influenced.
    - Model Rule of Professional Conduct 1.1 (competence) allows for – and requires – "adequate preparation" including "inquiry into and analysis of the legal elements of the problem."
    - Further, Model Rule 1.2(d) provides that counsel "may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."
    - This does not allow for knowingly offering evidence known to be false or assisting a witness to testify falsely.
      - Preparing a witness to give a rehearsed answer is improper if done for the purpose of misleading or frustrating the inquiring part from obtaining legitimate discovery.

VIOLATION #3 CONT.

- Some judges prohibit conferences between the witness and defending counsel during both the deposition and during any recess.
  - (1) Lawyers do not have an absolute right to confer during the course of the client's deposition and neither can initiate private conversations once deposition is underway.
  - (2) Lawyer may prepare a client for deposition, but once it begins in earnest, the witness is required to answer questions without intervention or advice of counsel.
  - (3) Witness should ask the deposing attorney – rather than his or her own – for clarification if the question is not understood.
- Others apply similar twists

VIOLATION #4 – FAILURE TO PREPARE COMPANY REPRESENTATIVE

- In 30(b)(6) depositions, a party identifies the topics it wants to the opposing party's company to discussion, and the witness then testifies on behalf of the company.
- The rule requires that the person designated to represent the organization "shall testify as to matters known or reasonably available to the organization."
  - If the person(s) designated does not possess personal knowledge of the matters set forth in the deposition notice, the corporation is required to prepare them to give knowledgeable and binding answers for the corporation.
  - Consequences for failure to do so may not only implicate rules of professional conduct, negatively impact a client's case, and result in other sanctions too.

VIOLATION #4 CONT.

- Court sees circumstances in which the witness is unquestionably unprepared (usually accompanied by an admission of not having seen or reviewed the deposition notice) or selecting witnesses are clearly not suited to speak on behalf of the corporation.
- Some claim that they want to walk a fine line between preparation and coaching (5th Circuit case sanctions lawyers 10K plus removal from the case for telling witness to use terms like "high crime area" and "retaliation" to establish probable cause for arrests on behalf of defendants). But the court expects that attorneys can help the witness understand what the case is about, why he/she has been called to testify, and what the opposing side's theory or arguments have been (or might be) to help the witness understand what counsel may try to elicit. The attorney may also share his or her own arguments.

SANCTION POSSIBILITIES

- Fed.R.Civ.P. 37(a)(5)(A) provides that the attorney advising the witness to not answer or to provide an evasive or incomplete answer may be subject to sanctions.
- Rule 30(d)(2) authorizes the court to "impose an appropriate sanction, including the reasonable expenses and attorney fees." Because "appropriate" is discretionary, courts may and often do require payment for costs incurred in preparing the motion, costs incurred with first deposition, and costs that would accompany the second deposition (including maybe travel costs)).
  - One firm who conducted recent research on the imposition of sanctions claims a near 700% increase of 30(d)(2) sanctions in the last 10 years.
- Note: a finding of bad faith is not required to impose sanctions. The rule only requires a showing that the conduct frustrated the fair examination of the deponent.
  - And, while tangential to our discussion today, consider that sanctions may be warranted for failing to prevent the deponent from similar conduct, although this is more challenging.

SANCTION POSSIBILITIES CONT.

- Most effective requests engage in a two-step request that (1) clearly identifies the behavior that impeded, delayed, or frustrated the fair examination and (2) makes specific requests for "appropriate" sanction.
- Usually monetary, coupled with a motion to compel further testimony under Rule 37(a). This will include costs and fees relating to having to depose the witness twice, as well has costs and fees that accompany the motion to compel.
- But remember, it can be far more serious, including censure or disbarment, as well as dismissal of claim or cause of action (courts consider variety of factors, including the policy favoring disposition on the merits and the suitability of less drastic sanctions).

COMBO-STYLE SANCTIONS

- Courts are increasingly willing to consider deposition misconduct as a collective problem.
  - In *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007), the lawyer taking the deposition engaged in conduct that would likely trigger suspension to pursue a protective order under Rule 30(d)(3). The defending attorney himself gave improper speaking objections and incorrectly instructed the deponent not to answer. Further, the deponent (an attorney) incredulously claimed a failure to understand or remember.
  - The District Court found all had behaved badly and denied requests for sanctions for all parties.
  - The Seventh Circuit reversed ruling that "mutual enmity does not excuse [a] breakdown in decorum" and that the district court should have used its authority to maintain standards of civility and professionalism. They censured three lawyers (including deponent) and warned that "repetition of this performance, in any court within this circuit, will lead to sterner sanctions, including suspension or disbarment."
- Another court remarked, in response to another instance of a collective failure that "loaded guns, sharp objects and law degrees should be kept out of the reach of children." *AG Equip. Co. v. AIG Life Ins. Co.*, 2008 WL 5205192 (N.D. Ok., Dec. 10, 2008) (unpublished).

RECENT EXAMPLE

- In a case from another district relating to a non-compete order, the judge found the defendant in contempt for failure to abide by that order. The Plaintiff issued notices of deposition for two individuals within the District of Utah on the matter of appropriate sanction for contempt.
- Attorney for defendant agreed to represent the two individuals (long story) and filed a Motion for a Protective Order the night before the depositions were to begin (long after the automatic staying provision). The depositions went forward as planned, but counsel instructed both witnesses not to answer several questions concerned that they involved trade secret privilege.
  - Attorney for Plaintiff offered to designate testimony attorney-eyes only, but it was rejected.

RECENT EXAMPLE CONT.

- Plaintiff filed a motion to compel seeking a new deposition for both witnesses and the court considered it in conjunction with the motion for protective order earlier filed.
- Court found unsubstantiated fears to support its request to protect information, particularly in light of the designation offer. Further, the questions asked were limited in scope and relevant to the underlying ruling by the District Judge. Even assuming some of the questions might have been better narrowed, the instructions not to answer were unjustified under the rule.
- Court denied motion for protective order, granted motion to compel new depositions (2 hours each), and awarded costs and expenses, including attorney fees despite no finding of bad faith. Denied those for motion to compel because of lack of bad faith, however.

CAPTURING THE MOMENT(S)

- The best way to capture misconduct depends on the manner in which it is being recorded.
- What should be done with nonverbal cues?
  - Any nonverbal conduct that could be sanctionable must be described contemporaneously on the record.
  - Consider verification from a witness (deponent or other person present).
- Video
  - If reputation precedes deposition, consider noticing a videotaped deposition which can both discourage and record misbehavior.
  - Rule 30 allows it without stipulation of counsel or court order (but not in contradiction to a protective order).
    - Video assists a judge in the determination as to what conduct occurred and whether it is sanctionable (and to what degree).
    - And video may assist in credibility determinations as well (demeanor, appearance), and words are often accompanied by physical expressions, intonation, and/or body language.

PRACTICAL CONSIDERATIONS DESIGNED TO KEEP THE DEPOSITION FLOWING

- (1) Know your case. You're less likely to fall victim to abusive tactics and will be able to meaningfully address them.
- (2) In the event of improper objections, know the rule and inform counsel that you expect them to comply in the future.
  - Reciprocation will not be viewed kindly, even if yours was not the initial blow.
- (3) Make a clear record. Have opposing counsel explain what he is doing and why he is doing it, followed by your understanding of the rule.
- (4) No matter your frustrations, keep your temper. Remember the purpose of the deposition – leave sanction for its time and place before the judge.
- (5) If you are unsure whether conduct is crossing the line, consider an emergency dispute resolution conference with the court.

DUCivR 26-2 STANDARD PROTECTIVE ORDER AND STAYS OF DEPOSITIONS

(a) Standard Protective Order

The court has increasingly observed that discovery in civil litigation is being unnecessarily delayed by the parties arguing and/or litigating over the form of a protective order. In order to prevent such delay and "to secure the just, speedy, and inexpensive determination of every action," the court finds that good cause exists to provide a rule to address this issue and hereby adopted this rule entering a Standard Protective Order.

(1) This rule shall apply in every case involving the disclosure of any information designated as confidential. Except as otherwise ordered, it shall not be a legitimate ground for objecting to or refusing to produce information or documents in response to an opposing party's discovery request (e.g. interrogatory, document request, request for admissions, deposition question) or declining to provide information otherwise required to be disclosed pursuant to Fed.R. Civ. P. 26 (a)(1) that the discovery request or disclosure requirement is premature because a protective order has not been entered by the court. Unless the court enters a different protective order, pursuant to motion or stipulated motion, the Standard Protective Order available on the Forms page of the court's website http://www.utd.uscourts.gov shall govern and discovery under the Standard Protective Order shall proceed. The Standard Protective Order is effective by virtue of this rule and need not be entered in the docket of the specific case.

(2) Any party or person who believes that substantive rights are being impacted by application of the rule may immediately seek relief.

(b) Motion for Protective Order and Stay of Deposition

A party or a witness may stay a properly noticed oral deposition by filing a motion for a protective order or other relief by the third business day after service of the notice of deposition. The deposition will be stayed until the motion is determined. Motions filed after the third business day will not result in an automatic stay.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

_____, Plaintiffs, vs. _____, Defendants.	STANDARD PROTECTIVE ORDER Civil No. Honorable Magistrate

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and for good cause,

IT IS HEREBY ORDERED THAT:

1. Scope of Protection

This Standard Protective Order shall govern any record of information produced in this action and designated pursuant to this Standard Protective Order, including all designated deposition testimony, all designated testimony taken at a hearing or other proceeding, all designated deposition exhibits, interrogatory answers, admissions, documents and other discovery materials, whether produced informally or in response to interrogatories, requests for admissions, requests for production of documents or other formal methods of discovery.

This Standard Protective Order shall also govern any designated record of information produced in this action pursuant to required disclosures under any federal procedural rule or local rule of the Court and any supplementary disclosures thereto.

This Standard Protective Order shall apply to the parties and to any nonparty from whom discovery may be sought who desires the protection of this Protective Order.

Nonparties may challenge the confidentiality of the protected information by filing a motion to intervene and a motion to de-designate.

2. Definitions

(a) The term PROTECTED INFORMATION shall mean confidential or proprietary technical, scientific, financial, business, health, or medical information designated as such by the producing party.

(b) The term CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall mean PROTECTED INFORMATION that is so designated by the producing party. The designation CONFIDENTIAL - ATTORNEYS EYES ONLY may be used only for the following types of past, current, or future PROTECTED INFORMATION: (1) sensitive technical information, including current research, development and manufacturing information and patent prosecution information, (2) sensitive business information, including highly sensitive financial or marketing information and the identity of suppliers, distributors and potential or actual customers, (3) competitive technical information, including technical analyses or comparisons of competitor's products, (4) competitive business information, including non-public financial or marketing analyses or comparisons of competitor's products and strategic product planning, or (5) any other PROTECTED INFORMATION the disclosure of which to non-qualified people subject to this Standard Protective Order the producing party reasonably and in good faith believes would likely cause harm.

(c) The term CONFIDENTIAL INFORMATION shall mean all PROTECTED INFORMATION that is not designated as "CONFIDENTIAL - ATTORNEYS EYES ONLY" information.

(d) The term TECHNICAL ADVISOR shall refer to any person who is not a party to this action and/or not presently employed by the receiving party or a company affiliated through common ownership, who has been designated by the receiving party to receive another party's PROTECTED INFORMATION, including CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, and CONFIDENTIAL INFORMATION. Each party's TECHNICAL ADVISORS shall be limited to such person as, in the judgment of that party's counsel, are reasonably necessary for development and presentation of that party's case. These persons include outside experts or consultants retained to provide technical or other expert services such as expert testimony or otherwise assist in trial preparation.

3. Disclosure Agreements

(a) Each receiving party's TECHNICAL ADVISOR shall sign a disclosure agreement in the form attached hereto as Exhibit A. Copies of any disclosure agreement in the form of Exhibit A signed by any person or entity to whom PROTECTED INFORMATION is disclosed shall be provided to the other party promptly after execution by facsimile and overnight mail. No disclosures shall be made to a TECHNICAL ADVISOR for a period of five (5) business days after the disclosure agreement is provided to the other party.

(b) Before any PROTECTED INFORMATION is disclosed to outside TECHNICAL ADVISORS, the following information must be provided in writing to the producing party and received no less than five (5) business days before the intended date of disclosure to that outside TECHNICAL ADVISOR: the identity of that outside TECHNICAL ADVISOR, business address and/or affiliation and a current curriculum vitae of the TECHNICAL ADVISOR, and, if not contained in the TECHNICAL ADVISOR's

curriculum vitae, a brief description, including education, present and past employment and general areas of expertise of the TECHNICAL ADVISOR. If the producing party objects to disclosure of PROTECTED INFORMATION to an outside TECHNICAL ADVISOR, the producing party shall within five (5) business days of receipt serve written objections identifying the specific basis for the objection, and particularly identifying all information to which disclosure is objected. Failure to object within five (5) business days shall authorize the disclosure of PROTECTED INFORMATION to the TECHNICAL ADVISOR. As to any objections, the parties shall attempt in good faith to promptly resolve any objections informally. If the objections cannot be resolved, the party seeking to prevent disclosure of the PROTECTED INFORMATION to the expert shall move within five (5) business days for an Order of the Court preventing the disclosure. The burden of proving that the designation is proper shall be upon the producing party. If no such motion is made within five (5) business days, disclosure to the TECHNICAL ADVISOR shall be permitted. In the event that objections are made and not resolved informally and a motion is filed, disclosure of PROTECTED INFORMATION to the TECHNICAL ADVISOR shall not be made except by Order of the Court.

(c) Any disclosure agreement executed by any person affiliated with a party shall be provided to any other party who, based upon a good faith belief that there has been a violation of this order, requests a copy.

(d) No party shall attempt to depose any TECHNICAL ADVISOR until such time as the TECHNICAL ADVISOR is designated by the party engaging the TECHNICAL ADVISOR as a testifying expert. Notwithstanding the preceding sentence, any party may depose a TECHNICAL ADVISOR as a fact witness provided that the party seeking such deposition has a good faith, demonstrable basis independent of the disclosure

agreement of Exhibit A or the information provided under subparagraph (a) above that such person possesses facts relevant to this action, or facts likely to lead to the discovery of admissible evidence; however, such deposition, if it precedes the designation of such person by the engaging party as a testifying expert, shall not include any questions regarding the scope or subject matter of the engagement. In addition, if the engaging party chooses not to designate the TECHNICAL ADVISOR as a testifying expert, the non-engaging party shall be barred from seeking discovery or trial testimony as to the scope or subject matter of the engagement.

4. Designation of Information

(a) Documents and things produced or furnished during the course of this action shall be designated as containing CONFIDENTIAL INFORMATION by placing on each page, each document (whether in paper or electronic form), or each thing a legend substantially as follows:

CONFIDENTIAL INFORMATION

(b) Documents and things produced or furnished during the course of this action shall be designated as containing information which is CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by placing on each page, each document (whether in paper or electronic form), or each thing a legend substantially as follows:

CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY

(c) During discovery a producing party shall have the option to require that all or batches of materials be treated as containing CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY during inspection and to make its designation as to particular documents and things at the time copies of documents and things are furnished.

(d) A party may designate information disclosed at a deposition as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by requesting the reporter to so designate the transcript at the time of the deposition.

(e) A producing party shall designate its discovery responses, responses to requests for admission, briefs, memoranda and all other papers sent to the court or to opposing counsel as containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY when such papers are served or sent.

(f) A party shall designate information disclosed at a hearing or trial as CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by requesting the court, at the time the information is proffered or adduced, to receive the information only in the presence of those persons designated to receive such information and court personnel, and to designate the transcript appropriately.

(g) The parties will use reasonable care to avoid designating any documents or information as CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY that is not entitled to such designation or which is generally available to the public. The parties shall designate only that part of a document or deposition that is CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, rather than the entire document or deposition. For example, if a party claims that a document contains pricing information that is CONFIDENTIAL – ATTORNEYS EYES ONLY, the party will designate only that part of the document setting forth the specific pricing information as ATTORNEYS EYES ONLY, rather than the entire document.

(h) In multi-party cases, Plaintiffs and/or Defendants shall further be able to designate documents as CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER PLAINTIFFS or CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER DEFENDANTS for documents that shall not be disclosed to other parties.

5. Disclosure and Use of Confidential Information

Information that has been designated CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be disclosed by the receiving party only to Qualified Recipients. All Qualified Recipients shall hold such information received from the disclosing party in confidence, shall use the information only for purposes of this action and for no other action, and shall not use it for any business or other commercial purpose, and shall not use it for filing or prosecuting any patent application (of any type) or patent reissue or reexamination request, and shall not disclose it to any person, except as hereinafter provided. All information that has been designated CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be carefully maintained so as to preclude access by persons who are not qualified to receive such information under the terms of this Order.

In multi-party cases, documents designated as CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER PLAINTIFFS or CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER DEFENDANTS shall not be disclosed to other plaintiffs and/or defendants.

6. Qualified Recipients

For purposes of this Order, “Qualified Recipient" means

(a) For CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY:

(1) Outside counsel of record for the parties in this action, and the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in the action, outside copying services, document management services and graphic services;

(2) Court officials involved in this action (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court);

(3) Any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;

(4) Any outside TECHNICAL ADVISOR employed by the outside counsel of record, subject to the requirements in Paragraph 3 above; and

(5) Any witness during the course of discovery, so long as it is stated on the face of each document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creation of the document. Where it is not stated on the face of the confidential document being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creation of the document, the party seeking disclosure may nonetheless disclose the confidential document to the witness, provided that: (i) the party seeking disclosure has a reasonable basis for believing that the witness in fact received or reviewed the document, (ii) the party seeking disclosure provides advance notice to the party that produced the document, and (iii) the party that produced the document does

not inform the party seeking disclosure that the person to whom the party intends to disclose the document did not in fact receive or review the documents. Nothing herein shall prevent disclosure at a deposition of a document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY to the officers, directors, and managerial level employees of the party producing such CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, or to any employee of such party who has access to such CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY in the ordinary course of such employee's employment.

(b) FOR CONFIDENTIAL INFORMATION:

(1) Those persons listed in paragraph 6(a);

(2) In-house counsel for a party to this action who are acting in a legal capacity and who are actively engaged in the conduct of this action, and the secretary and paralegal assistants of such counsel to the extent reasonably necessary;

(3) The insurer of a party to litigation and employees of such insurer to the extent reasonably necessary to assist the party's counsel to afford the insurer an opportunity to investigate and evaluate the claim for purposes of determining coverage and for settlement purposes; and

(4) Employees of the parties.

7. Use of Protected Information

(a) In the event that any receiving party's briefs, memoranda, discovery requests, requests for admission or other papers of any kind which are served or filed shall include another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, the papers shall be appropriately designated pursuant to paragraphs 4(a) and (b), and pursuant to DUCivR 5.2, and shall be treated accordingly.

(b) All documents, including attorney notes and abstracts, which contain another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall be handled as if they were designated pursuant to paragraph 4(a) or (b).

(c) Documents, papers and transcripts filed with the court which contain any other party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be filed in sealed envelopes and labeled according to DUCivR 5-2.

(d) To the extent that documents are reviewed by a receiving party prior to production, any knowledge learned during the review process will be treated by the receiving party as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY until such time as the documents have been produced, at which time any stamped classification will control. No photograph or any other means of duplication, including but not limited to electronic means, of materials provided for review prior to production is permitted before the documents are produced with the appropriate stamped classification.

(e) In the event that any question is asked at a deposition with respect to which a party asserts that the answer requires the disclosure of CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, such question shall nonetheless be answered by the witness fully and completely. Prior to answering, however, all persons present shall be advised of this Order by the party making the confidentiality assertion and, in the case of information designated as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY at the request of such party, all persons who are not allowed to obtain such information pursuant to this Order, other than the witness, shall leave the room during the time in which this information is disclosed or discussed.

(f) Nothing in this Protective Order shall bar or otherwise restrict outside counsel from rendering advice to his or her client with respect to this action and, in the course thereof, from relying in a general way upon his examination of materials designated CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, provided, however, that in rendering such advice and in otherwise communicating with his or her clients, such counsel shall not disclose the specific contents of any materials designated CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY.

8. Inadvertent Failure to Designate

(a) In the event that a producing party inadvertently fails to designate any of its information pursuant to paragraph 4, it may later designate by notifying the receiving parties in writing. The receiving parties shall take reasonable steps to see that the information is thereafter treated in accordance with the designation.

(b) It shall be understood however, that no person or party shall incur any liability hereunder with respect to disclosure that occurred prior to receipt of written notice of a belated designation.

9. Challenge to Designation

(a) Any receiving party may challenge a producing party's designation at any time. A failure of any party to expressly challenge a claim of confidentiality or any document designation shall not constitute a waiver of the right to assert at any subsequent time that the same is not in-fact confidential or not an appropriate designation for any reason.

(b) Notwithstanding anything set forth in paragraph 2(a) and (b) herein, any receiving party may disagree with the designation of any information received from the producing party as CONFIDENTIAL INFORMATION or CONFIDENTIAL

INFORMATION – ATTORNEYS EYES ONLY. In that case, any receiving party desiring to disclose or to permit inspection of the same otherwise than is permitted in this Order, may request the producing party in writing to change the designation, stating the reasons in that request. The producing party shall then have five (5) business days from the date of receipt of the notification to:

(i) advise the receiving parties whether or not it persists in such designation; and

(ii) if it persists in the designation, to explain the reason for the particular designation.

(c) If its request under subparagraph (b) above is turned down, or if no response is made within five (5) business days after receipt of notification, any producing party may then move the court for a protective order or any other order to maintain the designation. The burden of proving that the designation is proper shall be upon the producing party. If no such motion is made within five (5) business days, the information will be de-designated to the category requested by the receiving party. In the event objections are made and not resolved informally and a motion is filed, disclosure of information shall not be made until the issue has been resolved by the Court (or to any limited extent upon which the parties may agree).

No party shall be obligated to challenge the propriety of any designation when made, and failure to do so shall not preclude a subsequent challenge to the propriety of such designation.

(d) With respect to requests and applications to remove or change a designation, information shall not be considered confidential or proprietary to the producing party if:

(i) the information in question has become available to the public through no violation of this Order; or

(ii) the information was known to any receiving party prior to its receipt from the producing party; or

(iii) the information was received by any receiving party without restrictions on disclosure from a third party having the right to make such a disclosure.

10. Inadvertently Produced Privileged Documents

The parties hereto also acknowledge that regardless of the producing party's diligence an inadvertent production of attorney-client privileged or attorney work product materials may occur. In accordance with Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502, they therefore agree that if a party through inadvertence produces or provides discovery that it believes is subject to a claim of attorney-client privilege or attorney work product, the producing party may give written notice to the receiving party that the document or thing is subject to a claim of attorney-client privilege or attorney work product and request that the document or thing be returned to the producing party. The receiving party shall return to the producing party such document or thing. Return of the document or thing shall not constitute an admission or concession, or permit any inference, that the returned document or thing is, in fact, properly subject to a claim of attorney-client privilege or attorney work product, nor shall it foreclose any party from moving the Court pursuant to Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502 for an Order that such document or thing has been improperly designated or should be produced.

11. Inadvertent Disclosure

In the event of an inadvertent disclosure of another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY to a non-Qualified Recipient, the party making the inadvertent disclosure shall promptly upon learning of the disclosure: (i) notify the person to whom the disclosure was made that it contains CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY subject to this Order; (ii) make all reasonable efforts to preclude dissemination or use of the CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by the person to whom disclosure was inadvertently made including, but not limited to, obtaining all copies of such materials from the non-Qualified Recipient; and (iii) notify the producing party of the identity of the person to whom the disclosure was made, the circumstances surrounding the disclosure, and the steps taken to ensure against the dissemination or use of the information.

12. Limitation

This Order shall be without prejudice to any party's right to assert at any time that any particular information or document is or is not subject to discovery, production or admissibility on the grounds other than confidentiality.

13. Conclusion of Action

(a) At the conclusion of this action, including through all appeals, each party or other person subject to the terms hereof shall be under an obligation to destroy or return to the producing party all materials and documents containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY and to certify to the producing party such destruction or return. Such return or destruction

shall not relieve said parties or persons from any of the continuing obligations imposed upon them by this Order.

(b) After this action, trial counsel for each party may retain one archive copy of all documents and discovery material even if they contain or reflect another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. Trial counsel's archive copy shall remain subject to all obligations of this Order.

(c) The provisions of this paragraph shall not be binding on the United States, any insurance company, or any other party to the extent that such provisions conflict with applicable Federal or State law. The Department of Justice, any insurance company, or any other party shall notify the producing party in writing of any such conflict it identifies in connection with a particular matter so that such matter can be resolved either by the parties or by the Court.

14. Production by Third Parties Pursuant to Subpoena

Any third party producing documents or things or giving testimony in this action pursuant to a subpoena, notice or request may designate said documents, things, or testimony as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. The parties agree that they will treat CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY produced by third parties according to the terms of this Order.

15. Compulsory Disclosure to Third Parties

If any receiving party is subpoenaed in another action or proceeding or served with a document or testimony demand or a court order, and such subpoena or demand or court order seeks CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION –

ATTORNEYS EYES ONLY of a producing party, the receiving party shall give prompt written notice to counsel for the producing party and allow the producing party an opportunity to oppose such subpoena or demand or court order prior to the deadline for complying with the subpoena or demand or court order. No compulsory disclosure to third parties of information or material exchanged under this Order shall be deemed a waiver of any claim of confidentiality, except as expressly found by a court or judicial authority of competent jurisdiction.

16. Jurisdiction to Enforce Standard Protective Order

After the termination of this action, the Court will continue to have jurisdiction to enforce this Order.

17. Modification of Standard Protective Order

This Order is without prejudice to the right of any person or entity to seek a modification of this Order at any time either through stipulation or Order of the Court.

18. Confidentiality of Party's own Documents

Nothing herein shall affect the right of the designating party to disclose to its officers, directors, employees, attorneys, consultants or experts, or to any other person, its own information. Such disclosure shall not waive the protections of this Standard Protective Order and shall not entitle other parties or their attorneys to disclose such information in violation of it, unless by such disclosure of the designating party the information becomes public knowledge. Similarly, the Standard Protective Order shall not preclude a party from showing its own information, including its own information that is filed under seal by a party, to its officers, directors, employees, attorneys, consultants or experts, or to any other person.

SO ORDERED AND ENTERED BY THE COURT PURSUANT TO DUCivR 26-2 EFFECTIVE AS OF THE COMMENCE OF THE ACTION.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

_____, Plaintiffs, vs. _____, Defendant.	DISCLOSURE AGREEMENT Honorable Magistrate Judge

I, _____, am employed by _____. In connection with this action, I am:

_____ a director, officer or employee of _____ who is directly assisting in this action;

_____ have been retained to furnish technical or other expert services or to give testimony (a "TECHNICAL ADVISOR");

_____ Other Qualified Recipient (as defined in the Protective Order) (Describe:_____).

I have read, understand and agree to comply with and be bound by the terms of the Standard Protective Order in the matter of _____, Civil Action No. _____, pending in the United States District Court for the District of Utah. I further state that the Standard Protective Order entered by the Court, a copy of which has been given to me and which I have read, prohibits me from using any PROTECTED INFORMATION, including documents, for any purpose not appropriate or necessary to my participation in this action or disclosing such documents or information to

any person not entitled to receive them under the terms of the Standard Protective Order. To the extent I have been given access to PROTECTED INFORMATION, I will not in any way disclose, discuss, or exhibit such information except to those persons whom I know (a) are authorized under the Standard Protective Order to have access to such information, and (b) have executed a Disclosure Agreement. I will return, on request, all materials containing PROTECTED INFORMATION, copies thereof and notes that I have prepared relating thereto, to counsel for the party with whom I am associated. I agree to be bound by the Standard Protective Order in every aspect and to be subject to the jurisdiction of the United States District Court for the District of Utah for purposes of its enforcement and the enforcement of my obligations under this Disclosure Agreement. I declare under penalty of perjury that the foregoing is true and correct.

_____
Signed by Recipient

_____
Name (printed)

Date: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

_____, Plaintiffs, vs. _____, Defendants.	STANDARD PROTECTIVE ORDER Civil No. Honorable Magistrate

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and for good cause,

IT IS HEREBY ORDERED THAT:

1. Scope of Protection

This Standard Protective Order shall govern any record of information produced in this action and designated pursuant to this Standard Protective Order, including all designated deposition testimony, all designated testimony taken at a hearing or other proceeding, all designated deposition exhibits, interrogatory answers, admissions, documents and other discovery materials, whether produced informally or in response to interrogatories, requests for admissions, requests for production of documents or other formal methods of discovery.

This Standard Protective Order shall also govern any designated record of information produced in this action pursuant to required disclosures under any federal procedural rule or local rule of the Court and any supplementary disclosures thereto.

This Standard Protective Order shall apply to the parties and to any nonparty from whom discovery may be sought who desires the protection of this Protective Order.

Nonparties may challenge the confidentiality of the protected information by filing a motion to intervene and a motion to de-designate.

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2. Definitions

(a) The term PROTECTED INFORMATION shall mean confidential or proprietary technical, scientific, financial, business, health, or medical information designated as such by the producing party.

(b) The term CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall mean PROTECTED INFORMATION that is so designated by the producing party. The designation CONFIDENTIAL - ATTORNEYS EYES ONLY may be used only for the following types of past, current, or future PROTECTED INFORMATION: (1) sensitive technical information, including current research, development and manufacturing information and patent prosecution information, (2) sensitive business information, including highly sensitive financial or marketing information and the identity of suppliers, distributors and potential or actual customers, (3) competitive technical information, including technical analyses or comparisons of competitor's products, (4) competitive business information, including non-public financial or marketing analyses or comparisons of competitor's products and strategic product planning, or (5) any other PROTECTED INFORMATION the disclosure of which to non-qualified people subject to this Standard Protective Order the producing party reasonably and in good faith believes would likely cause harm.

(c) The term CONFIDENTIAL INFORMATION shall mean all PROTECTED INFORMATION that is not designated as "CONFIDENTIAL - ATTORNEYS EYES ONLY" information.

(d) For ~~purposes of~~ entities covered by the Health Insurance Portability

and Accountability Act of 1996 ("HIPAA"), the term CONFIDENTIAL INFORMATION shall include Confidential Health Information.~~, and be shall constitute a subset of CONFIDENTIAL INFORMATION, and shall be designated as "CONFIDENTIAL INFORMATION" and subject to all other terms and conditions governing the treatment of Confidential Information.~~ Confidential Health Information shall mean information supplied in any form, or any portion thereof, that identifies an individual or subscriber in any manner and relates to the past, present, or future care, services, or supplies relating to the physical or mental health or condition of such individual or subscriber, the provision of health care to such individual or subscriber, or the past, present, or future payment for the provision of health care to such individual or subscriber. Confidential Health Information includes ~~shall include, but is not limited to,~~ claim data, claim forms, grievances, appeals, or other documents or records that contain any patient health information required to be kept confidential under any state or federal law, including 45 C.F.R. Parts 160 and 164 promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (*see* 45 C.F.R. §§ 164.501 & 160.103), and the following subscriber, patient, or member identifiers:

(1) names;

(2) all geographic subdivisions smaller than a State, including street address, city, county, precinct, and zip code;

(3) all elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, age, and date of death;

(4) telephone numbers;

(5) fax numbers;

(6) electronic mail addresses;

(7) social security numbers;

(8) medical record numbers;

(9) health plan beneficiary numbers;

(10) account numbers;

(11) certificate/license numbers;

(12) vehicle identifiers and serial numbers, including license plate numbers;

(13) device identifiers and serial numbers;

(14) web universal resource locators ("URLs");

(15) internet protocol ("IP") address numbers;

(16) biometric identifiers, including finger and voice prints;

(17) full face photographic images and any comparable images; and/or any other unique identifying number, characteristic, or code.

(e) The term TECHNICAL ADVISOR shall refer to any person who is not a party to this action and/or not presently employed by the receiving party or a company affiliated through common ownership, who has been designated by the receiving party to receive another party's PROTECTED INFORMATION, including CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, and CONFIDENTIAL INFORMATION. Each party's TECHNICAL ADVISORS shall be limited to such person as, in the judgment of that party's counsel, are reasonably necessary for development and presentation of that party's case. These persons include outside

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experts or consultants retained to provide technical or other expert services such as expert testimony or otherwise assist in trial preparation.

3. Disclosure Agreements

(a) Each receiving party's TECHNICAL ADVISOR shall sign a disclosure agreement in the form attached hereto as Exhibit A ("Disclosure Agreement"). Copies of the Disclosure Agreement ~~in the form of Exhibit A~~ signed by any person or entity to whom PROTECTED INFORMATION is disclosed shall be provided to the other party promptly after execution by facsimile and overnight mail. No disclosures shall be made to a TECHNICAL ADVISOR until ~~for a period of~~ ~~five (5) business~~seven (7) ~~-~~days after the executed D~~d~~isclosure A~~a~~greement is ~~provided to~~served on the other party.

(b) Before any PROTECTED INFORMATION is disclosed to outside TECHNICAL ADVISORS, the following information must be provided in writing to the producing party and received no less than ~~five (5) business~~seven (7) days before the intended date of disclosure to that outside TECHNICAL ADVISOR: the identity of that outside TECHNICAL ADVISOR, business address and/or affiliation and a current curriculum vitae of the TECHNICAL ADVISOR, and, if not contained in the TECHNICAL ADVISOR's curriculum vitae, a brief description, including education, present and past employment and general areas of expertise of the TECHNICAL ADVISOR. If the producing party objects to disclosure of PROTECTED INFORMATION to an outside TECHNICAL ADVISOR, the producing party shall within ~~five (5) business~~seven (7) days of receipt serve written objections identifying the specific basis for the objection, and particularly identifying all information to which disclosure is objected. Failure to object within ~~five (5) business~~seven (7) days shall authorize the disclosure of PROTECTED INFORMATION to the TECHNICAL ADVISOR. As to any

objections, the parties shall attempt in good faith to promptly resolve any objections informally. If the objections cannot be resolved, the party seeking to prevent disclosure of the PROTECTED INFORMATION to the expert shall move within ~~five (5) business~~seven (7) days for an Order of the Court preventing the disclosure. The burden of proving that the designation is proper shall be upon the producing party. If no such motion is made within ~~five (5) business~~seven (7) days, disclosure to the TECHNICAL ADVISOR shall be permitted. In the event that objections are made and not resolved informally and a motion is filed, disclosure of PROTECTED INFORMATION to the TECHNICAL ADVISOR shall not be made except by Order of the Court.

(c) Any disclosure agreement executed by any person affiliated with a party shall be provided to any other party who, based upon a good faith belief that there has been a violation of this order, requests a copy.

(d) No party shall attempt to depose any TECHNICAL ADVISOR until such time as the TECHNICAL ADVISOR is designated by the party engaging the TECHNICAL ADVISOR as a testifying expert. Notwithstanding the preceding sentence, any party may depose a TECHNICAL ADVISOR as a fact witness provided that the party seeking such deposition has a good faith, demonstrable basis independent of the D~~d~~isclosure A~~a~~greement ~~of Exhibit A~~ or the information provided under subparagraph (a) above that such person possesses facts relevant to this action, or facts likely to lead to the discovery of admissible evidence; however, such deposition, if it precedes the designation of such person by the engaging party as a testifying expert, shall not include any questions regarding the scope or subject matter of the engagement. In addition, if the engaging party chooses not to designate the TECHNICAL ADVISOR as a testifying expert, the non-

engaging party shall be barred from seeking discovery or trial testimony as to the scope or subject matter of the engagement.

4. Designation of Information

(a) Documents and things produced or furnished during the course of this action shall be designated as containing CONFIDENTIAL INFORMATION, ~~including Confidential Health Information,~~ by placing on each page, each document (whether in paper or electronic form), or each thing a legend substantially as follows:

CONFIDENTIAL INFORMATION

(b) Documents and things produced or furnished during the course of this action shall be designated as containing information which is CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by placing on each page, each document (whether in paper or electronic form), or each thing a legend substantially as follows:

CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY

(c) During discovery, a producing party shall have the option to require that all or batches of materials be treated as containing CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY during inspection and to make its designation as to particular documents and things at the time copies of documents and things are furnished.

(d) A party may designate information disclosed at a deposition as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by requesting the reporter to so designate the transcript at the time of the deposition.

(e) A producing party shall designate its discovery responses, responses to requests for admission, briefs, memoranda, and all other papers sent to the court or to

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opposing counsel as containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY when such papers are served or sent.

(f) A party shall designate information disclosed at a hearing or trial as CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by requesting the court, at the time the information is proffered or adduced, to receive the information only in the presence of those persons designated to receive such information and court personnel, and to designate the transcript appropriately.

(g) The parties will use reasonable care to avoid designating any documents or information as CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY that is not entitled to such designation or which is generally available to the public. The parties shall designate only that part of a document or deposition that is CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, rather than the entire document or deposition. For example, if a party claims that a document contains pricing information that is CONFIDENTIAL – ATTORNEYS EYES ONLY, the party will designate only that part of the document setting forth the specific pricing information as ATTORNEYS EYES ONLY, rather than the entire document.

(h) In multi-party cases, Plaintiffs and/or Defendants shall further be able to designate documents as CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER PLAINTIFFS or CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER DEFENDANTS for documents that shall not be disclosed to other parties.

5. Disclosure and Use of Confidential Information

Information that has been designated CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be disclosed by the receiving party only to Qualified Recipients. All Qualified Recipients shall hold such information received from the disclosing party in confidence, shall use the information only for purposes of this action and for no other action, and shall not use it for any business or other commercial purpose, and shall not use it for filing or prosecuting any patent application (of any type) or patent reissue or reexamination request, and shall not disclose it to any person, except as hereinafter provided. All information that has been designated CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be carefully maintained so as to preclude access by persons who are not qualified to receive such information under the terms of this Order.

In multi-party cases, documents designated as CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER PLAINTIFFS or CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER DEFENDANTS shall not be disclosed to other plaintiffs and/or defendants.

~~In the event that any receiving party's briefs, memoranda, discovery requests, requests for admission or other papers of any kind which are served or filed shall include another party's CONFIDENTIAL INFORMATION, the papers shall be appropriately designated and shall be treated accordingly.~~

~~All documents, including attorney notes and abstracts, which contain another party's CONFIDENTIAL INFORMATION, shall be handled as if they were designated pursuant to paragraph 3.~~

~~Documents, papers and transcripts filed with the court that contain any other party's CONFIDENTIAL INFORMATION shall be filed under seal.~~

6. Qualified Recipients

For purposes of this Order, “Qualified Recipient" means

(a) For CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY:

(1) Outside counsel of record for the parties in this action, and the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in the action, outside copying services, document management services and graphic services;

(2) Court officials involved in this action (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court);

(3) Any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;

(4) Any outside TECHNICAL ADVISOR employed by the outside counsel of record, subject to the requirements in Paragraph 3 above; ~~and~~

(5) Any witness during the course of discovery, so long as it is stated on the face of each document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creation of the document. Where it is not stated on the face of the confidential document being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creation of the document, the party seeking disclosure may nonetheless disclose the confidential document to the witness, provided that: (i) the party seeking disclosure has a reasonable basis for believing that the

witness in fact received or reviewed the document, (ii) the party seeking disclosure provides advance notice to the party that produced the document, and (iii) the party that produced the document does not inform the party seeking disclosure that the person to whom the party intends to disclose the document did not in fact receive or review the documents. Nothing herein shall prevent disclosure at a deposition of a document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY to the officers, directors, and managerial level employees of the party producing such CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, or to any employee of such party who has access to such CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY in the ordinary course of such employee's employment; and.

(6) Any designated arbitrator or mediator who is assigned to hear this matter, or who has been selected by the parties, and his or her staff, provided that such individuals agree in writing, inpursuant to the Disclosure Agreementform attached at Appendix A, to be bound by the terms of this Order.

(b) FOR CONFIDENTIAL INFORMATION:

(1) Those persons listed in paragraph 6(a);

(2) In-house counsel for a party to this action who are acting in a legal capacity and who are actively engaged in the conduct of this action, and the secretary and paralegal assistants of such counsel to the extent reasonably necessary;

(3) The insurer of a party to litigation and employees of such insurer to the extent reasonably necessary to assist the party's counsel to afford the insurer an opportunity to investigate and evaluate the claim for purposes of determining coverage and for settlement purposes; and

(4) Representatives, officers, or employees of a party as necessary to assist outside counsel with this litigation.~~in the preparation and trial of this action~~~~Employees of the parties.~~

7. Use of Protected Information

(a) In the event that any receiving party's briefs, memoranda, discovery requests, requests for admission, or other papers of any kind that ~~which~~ are served or filed ~~shall~~ include another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, the papers must ~~shall~~ be appropriately designated pursuant to paragraphs 4(a) and (b)~~,~~ and governed ~~pursuant to~~by DUCivR 5-3.~~.2, and shall be treated accordingly.~~

(b) All documents, including attorney notes and abstracts~~,~~, that ~~which~~ contain another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall be handled as if they were designated pursuant to paragraph 4(a) or (b).

(c) Documents, papers, and transcripts that are filed with the court and ~~which~~ contain any other party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be filed in sealed envelopes and filed in accordance with DUCivR 5-3. ~~labeled according to DUCivR 5-2.~~

(d) To the extent that documents are reviewed by a receiving party prior to production, any knowledge learned during the review process will be treated by the receiving party as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY until such time as the documents have been produced, at which time any stamped classification will control. No photograph or any other means of duplication, including but

not limited to electronic means, of materials provided for review prior to production is permitted before the documents are produced with the appropriate stamped classification.

(e) In the event that any question is asked at a deposition with respect to which a party asserts that the answer requires the disclosure of CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, such question shall nonetheless be answered by the witness fully and completely. Prior to answering, however, all persons present shall be advised of this Order by the party making the confidentiality assertion and, in the case of information designated as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY at the request of such party, all persons who are not allowed to obtain such information pursuant to this Order, other than the witness, shall leave the room during the time in which this information is disclosed or discussed.

(f) Nothing in this Protective Order shall bar or otherwise restrict outside counsel from rendering advice to his or her client with respect to this action and, in the course thereof, from relying in a general way upon his examination of materials designated CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, provided, however, that in rendering such advice and in otherwise communicating with his or her clients, such counsel shall not disclose the specific contents of any materials designated CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY.

8. Inadvertent Failure to Designate

(a) In the event that a producing party inadvertently fails to designate any of its information pursuant to paragraph 4, it may later designate by notifying the

receiving parties in writing. The receiving parties shall take reasonable steps to see that the information is thereafter treated in accordance with the designation.

(b) It shall be understood however, that no person or party shall incur any liability hereunder with respect to disclosure that occurred prior to receipt of written notice of a belated designation.

9. Challenge to Designation

(a) Any receiving party may challenge a producing party's designation at any time. A failure of any party to expressly challenge a claim of confidentiality or any document designation shall not constitute a waiver of the right to assert at any subsequent time that the same is not in-fact confidential or not an appropriate designation for any reason.

(b) ~~Notwithstanding anything set forth in paragraph 2(a) and (b) herein, a~~Any receiving party may disagree with the designation of any information received from the producing party as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. In that case, any receiving party desiring to disclose or to permit inspection of the same otherwise than is permitted in this Order, may request the producing party in writing to change the designation of a document or documents, stating ~~the~~ with particularity the reasons for ~~in~~ that request, and specifying the category to which the challenged document(s) should be de-designated~~.~~ The producing party shall then have ~~five (5) business~~seven (7) days from the date of ~~receipt~~ service of the ~~notification~~ request to:

(i) advise the receiving parties whether or not it persists in such designation; and

(ii) if it persists in the designation, to explain the reason for the particular designation and to state its intent to seek a protective order or any other order to maintain the designation.

(c) If no response is made within ~~five (5) business~~seven (7) days after ~~receipt~~service of the request under subparagraph (b), the information will be de-designated to the category requested by the receiving party. If, however, the~~its~~ request under subparagraph (b) above is ~~turned down~~responded to under subparagraph (b)(i) and (ii), ~~or if no response is made within five (5) business~~seven (7) ~~days after receipt of notification, any~~ the producing party may then move the court for a protective order or any other order to maintain the designation. The burden of proving that the designation is proper shall be upon the producing party. If no such motion is made within ~~five (5) business~~seven (7) days after the statement to seek an order under subparagraph (b)(ii), the information will be de-designated to the category requested by the receiving party. In the event objections are made and not resolved informally and a motion is filed, disclosure of information shall not be made until the issue has been resolved by the Court (or to any limited extent upon which the parties may agree).

No party shall be obligated to challenge the propriety of any designation when made, and failure to do so shall not preclude a subsequent challenge to the propriety of such designation.

(d) With respect to requests and applications to remove or change a designation, information shall not be considered confidential or proprietary to the producing party if:

(i) the information in question has become available to the public through no violation of this Order; or

(ii) the information was known to any receiving party prior to its receipt from the producing party; or

(iii) the information was received by any receiving party without restrictions on disclosure from a third party having the right to make such a disclosure.

10. Inadvertently Produced Privileged Documents

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The parties hereto also acknowledge that regardless of the producing party's diligence an inadvertent production of attorney-client privileged or attorney work product materials may occur. In accordance with Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502, they therefore agree that if a party through inadvertence produces or provides discovery that it believes is subject to a claim of attorney-client privilege or attorney work product, the producing party may give written notice to the receiving party that the document or thing is subject to a claim of attorney-client privilege or attorney work product and request that the document or thing be returned to the producing party. The receiving party shall return to the producing party such document or thing. Return of the document or thing shall not constitute an admission or concession, or permit any inference, that the returned document or thing is, in fact, properly subject to a claim of attorney-client privilege or attorney work product, nor shall it foreclose any party from moving the Court pursuant to Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502 for an Order that such document or thing has been improperly designated or should be produced.

11. Inadvertent Disclosure

In the event of an inadvertent disclosure of another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY to a non-Qualified Recipient, the party making the inadvertent disclosure shall promptly upon learning of the disclosure: (i) notify the person to whom the disclosure was made that it contains CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY subject to this Order; (ii) make all reasonable efforts to preclude dissemination or use of the CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by the person to whom disclosure was inadvertently made including, but not limited to, obtaining all copies of such materials from the non-Qualified Recipient; and (iii) notify the producing party of the identity of the person to whom the disclosure was made, the circumstances surrounding the disclosure, and the steps taken to ensure against the dissemination or use of the information.

12. Limitation

This Order shall be without prejudice to any party's right to assert at any time that any particular information or document is or is not subject to discovery, production or admissibility on the grounds other than confidentiality.

13. Conclusion of Action

(a) At the conclusion of this action, including through all appeals, each party or other person subject to the terms hereof shall be under an obligation to destroy or return to the producing party all materials and documents containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY and to certify to the producing party such destruction or return. Such return or destruction

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shall not relieve said parties or persons from any of the continuing obligations imposed upon them by this Order.

(b) After this action, trial counsel for each party may retain one archive copy of all documents and discovery material even if they contain or reflect another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. Trial counsel's archive copy shall remain subject to all obligations of this Order.

(c) The provisions of this paragraph shall not be binding on the United States, any insurance company, or any other party to the extent that such provisions conflict with applicable Federal or State law. The Department of Justice, any insurance company, or any other party shall notify the producing party in writing of any such conflict it identifies in connection with a particular matter so that such matter can be resolved either by the parties or by the Court.

14. Production by Third Parties Pursuant to Subpoena

Any third party producing documents or things or giving testimony in this action pursuant to a subpoena, notice or request may designate said documents, things, or testimony as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. The parties agree that they will treat CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY produced by third parties according to the terms of this Order.

15. Compulsory Disclosure to Third Parties

If any receiving party is subpoenaed in another action or proceeding or served with a document or testimony demand or a court order, and such subpoena or demand or court order seeks CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION –

ATTORNEYS EYES ONLY of a producing party, the receiving party shall give prompt written notice to counsel for the producing party and allow the producing party an opportunity to oppose such subpoena or demand or court order prior to the deadline for complying with the subpoena or demand or court order. No compulsory disclosure to third parties of information or material exchanged under this Order shall be deemed a waiver of any claim of confidentiality, except as expressly found by a court or judicial authority of competent jurisdiction.

16. Jurisdiction to Enforce Standard Protective Order

After the termination of this action, the Court will continue to have jurisdiction to enforce this Order.

17. Modification of Standard Protective Order

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This Order is without prejudice to the right of any person or entity to seek a modification of this Order at any time either through stipulation or Order of the Court.

18. Confidentiality of Party's ~~O~~own Documents

Nothing herein shall affect the right of the designating party to disclose to its officers, directors, employees, attorneys, consultants or experts, or to any other person, its own information. Such disclosure shall not waive the protections of this Standard Protective Order and shall not entitle other parties or their attorneys to disclose such information in violation of it, unless by such disclosure of the designating party the information becomes public knowledge. Similarly, the Standard Protective Order shall not preclude a party from showing its own information, including its own information that is filed under seal by a party, to its officers, directors, employees, attorneys, consultants or experts, or to any other person.

SO ORDERED AND ENTERED BY THE COURT PURSUANT TO DUCivR 26-2

EFFECTIVE AS OF THE COMMENCE OF THE ACTION.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

_____,	DISCLOSURE AGREEMENT
Plaintiffs,	Honorable
vs.	Magistrate Judge
_____,	
Defendant.	

I, _____, am employed by _____. In connection with this action, I am:

_____ a director, officer or employee of _____ who is directly assisting in this action;

_____ have been retained to furnish technical or other expert services or to give testimony (a "TECHNICAL ADVISOR");

_____ Other Qualified Recipient (as defined in the Protective Order) (Describe:_____).

I have read, understand and agree to comply with and be bound by the terms of the Standard Protective Order in the matter of _____, Civil Action No. _____, pending in the United States District Court for the District of Utah. I further state that the Standard Protective Order entered by the Court, a copy of which has been given to me and which I have read, prohibits me from using any PROTECTED INFORMATION, including documents, for any purpose not appropriate or necessary to my participation in this action or disclosing such documents or information to

any person not entitled to receive them under the terms of the Standard Protective Order. To the extent I have been given access to PROTECTED INFORMATION, I will not in any way disclose, discuss, or exhibit such information except to those persons whom I know (a) are authorized under the Standard Protective Order to have access to such information, and (b) have executed a Disclosure Agreement. I will return, on request, all materials containing PROTECTED INFORMATION, copies thereof and notes that I have prepared relating thereto, to counsel for the party with whom I am associated. I agree to be bound by the Standard Protective Order in every aspect and to be subject to the jurisdiction of the United States District Court for the District of Utah for purposes of its enforcement and the enforcement of my obligations under this Disclosure Agreement. I declare under penalty of perjury that the foregoing is true and correct.

_____
Signed by Recipient

_____
Name (printed)

Date: _____

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) PROTECTIVE ORDERS.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

DUCivR 7-1 MOTIONS AND MEMORANDA

(a) Motions.

All motions must be filed with the clerk of court, or presented to the court during proceedings. Refer to the court's CM/ECF and E-filing Administrative Procedures manual for courtesy copy requirements.

(1) No Separate Supporting Memorandum for Written Motion.
The motion and any supporting memorandum must be contained in one document, except as otherwise allowed by this rule. The document must include the following:

(A) an initial separate section stating succinctly the precise relief sought and the specific grounds for the motion; and

(B) one or more additional sections including a recitation of relevant facts, supporting authority, and argument.

Specific instructions regarding Motions for Summary Judgment are provided in DUCivR 56-1. Failure to comply with the requirements of this section may result in sanctions, including (i) returning the motion to counsel for resubmission in accordance with the rule, (ii) denial of the motion, or (iii) any other sanction deemed appropriate by the court.

(2) Exceptions to Requirement That a Motion Contain Facts and Legal Authority.
Although all motions must state grounds for the request and cite applicable rules, statutes, case law, or other authority justifying the relief sought, no recitation of facts and legal authorities beyond the initial statement of the precise relief sought and grounds for the motion shall be required for the following types of motions:

(A) to extend time for the performance of an act, whether required or permitted, provided the motion is made prior to expiration of the time originally prescribed or previously extended by the court;
(B) to continue either a pretrial hearing or motion hearing;
(C) to appoint a next friend or guardian ad litem;
(D) to substitute parties;
(E) for referral to or withdrawal from the court's ADR program;
(F) for settlement conferences; and
(G) for approval of stipulations between the parties.

For such motions, a proposed order shall be attached as an exhibit to the motion and also emailed in an editable format to the chambers of the assigned judge.

(3) Length of Motions.

(A) Motions filed Pursuant to Rules 12(b), 12(c), and 65 of the Federal Rules of Civil Procedure:
Motions filed pursuant to Fed. R. Civ. P. 12(b), 12(c), and 65 must not exceed 6,500 words, or in

the alternative, twenty-five (25) pages. If the document exceeds the page limit, then the party must certify the compliance with the word-count limit. This limitation excludes the following items: face sheet, table of contents, table of authorities, signature block, certificate of service, and exhibits.

(B) Length of Motions Filed Pursuant to Rule 56 of the Federal Rules of Civil Procedure:
Motions filed pursuant to Fed. R. Civ. P. 56 are governed by DUCivR 56-1(g).

(C) All Other Motions:
All motions that are not listed above must not exceed 2,500 words, or in the alternative, ten (10) pages. If the document exceeds the page limit, then the party must certify compliance with the word-count limit. this limitation exludes the following items: face sheet, table of contents, table of authorities, signature block, certificate of services, and exhibits.

(4) Motions Seeking Relief Similar to Another Party's Motion.
Each party seeking relief from the court must file its own motion stating the relief sought and the basis for the requested relief. A party may incorporate by reference the arguments and reasons set forth in another party's motion or memorandum to the extent applicable to that party. [1]

(b) Response and Reply Memoranda.

(1) Motions Are Not to Be Made in Response or Reply Memoranda; Evidentiary Objections Permitted.

(A) No motion, including but not limited to cross-motions and motions pursuant to Fed. R. Civ. P. 56(d), may be included in a response or reply memorandum. Such motions must be made in a separate document. A cross-motion may incorporate the briefing contained in a memorandum in opposition.

(B) For motions for which evidence is offered in support, the response memorandum may include evidentiary objections. If evidence is offered in opposition to the motion, evidentiary objections may be included in the reply memorandum. While the court prefers objections to be included in the same document as the response or reply, in exceptional cases, a party may file evidentiary objections as a separate document. If such an objection is filed in a separate document, it must be filed at the same time as that party's response or reply memorandum. If new evidence is proffered in support of a reply memorandum, any evidentiary objection must be filed within seven (7) days after service of the reply. A party offering evidence to which there has been an objection may file a response to the objection at the same time any responsive memorandum, if allowed, is due, or no later than seven (7) days after the objection is filed, whichever is longer. Motions to strike evidence as inadmissible are no longer appropriate and should not be filed. The proper procedure is to make an objection. See Fed. R. Civ. P. 56(c)(2).

(2) Length of Response and Reply Memoranda.

(A) Memoranda Filed Regarding Motions Made Pursuant to Rules 12(b), 12(c), and 65 of the Federal Rules of Civil Procedure: Memoranda in opposition to motions made pursuant to Fed. R.

Civ. P. 12(b), 12(c), and 65 must not exceed 6,500 words, or in the alternative, twenty-five (25) pages. Reply memoranda must not exceed 2,500 words, or in the alternative, ten (10) pages and must be limited to rebuttal of matters raised in the memorandum in opposition. If memoranda in opposition or reply exceed page limit, then the party must certify compliance with the word-count limit. These limitations exlude the following items: face sheet, table of contents, table of authorities, signature block, certificate of service, and exhibits. No additional memoranda will be considered without leave of court.

(B) Length of Response and Reply Memoranda Filed Regarding Motions Made Pursuant to Rule 56 of the Federal Rules of Civil Procedure:
Memoranda filed pursuant to Fed. R. Civ. P. 56 are governed by DUCivR 56-1(g).

(C) All Other Motions: Opposition and reply memoranda related to all motions that are not listed above must not exceed 2,500 words, or in the alternative, ten (10) pages. If opposition or reply memoranda exceed the page limit, then the party must certify compliance with the word-count limit. These limitations exclude the following items: face sheet, table of contents, concise introduction, table of exhibits, and exhibits. Reply memoranda must be limited to rebuttal of matters raised in the opposition memoranda. No additional memoranda will be considered without leave of court.

(3) Filing Times.

(A) Motions Filed Pursuant to Rules 12(b), 12(c) and 56 of the Federal Rules of Civil Procedure: A memorandum opposing motions filed pursuant to Fed. R. Civ. P. 12(b), 12(c), and 56 must be filed within twenty-eight (28) days after service of the motion or within such time as allowed by the court. A reply memorandum to such opposing memorandum may be filed at the discretion of the movant within fourteen (14) days after service of the opposing memorandum. The court may order shorter briefing periods and attorneys may also so stipulate.

(B) All Other Motions, Including Motions Filed Pursuant to Rule 65 of the Federal Rules of Civil Procedure: A memorandum opposing any motion that is not a motion filed pursuant to Fed. R. Civ. P. 12(b), 12(c) and 56 must be filed within fourteen (14) days after service of the motion or within such time as allowed by the court. A reply memorandum to such opposing memorandum may be filed at the discretion of the movant within fourteen (14) days after service of the memorandum opposing the motion. The court may order shorter briefing periods and attorneys may also so stipulate.

(4) Citations of Supplemental Authority.

When pertinent and significant authorities come to the attention of a party after the party's memorandum has been filed, or after oral argument but before decision, a party may promptly file a notice with the court and serve a copy on all counsel, setting forth the citations. There must be a reference either to the page of the memorandum or to a point argued orally to which the citations pertain, but the notice must state, without argument, the reasons for the supplemental citations. Any response must be made, filed promptly, and be similarly limited.

(c) Supporting Exhibits to Memoranda Other Than Memoranda Related to Summary Judgment Motions.

If any memorandum in support of or opposition to a motion cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum when it is filed with the court and served on the other parties. For exhibits relating to summary judgment memoranda, see DUCivR 56-1(b)(5) and (c)(6).

(d) Failure to Respond.

Failure to respond timely to a motion, other than for summary judgment, may result in the court's granting the motion without further notice.

(e) Leave of Court and Format for Overlength Motions and Memoranda.

If a motion or memorandum is to exceed the page or word limitations set forth in this rule, leave of court must be obtained. A motion for leave to file overlength motion or memorandum must include a statement of the reasons why additional pages or words are needed and specify the number required. The court will approve such requests only for good cause and a showing of exceptional circumstances that justify the need for an extension of the specified page limitations. Absent such showing, such requests will not be approved. A lengthy motion or memorandum must not be filed with the clerk prior to entry of an order authorizing its filing. Motions or memoranda exceeding page limitations, for which leave of court has been obtained, must contain a table of contents,with page references, listing the titles or headings of each section and subsection.

(f) Oral Arguments on Motions.

The court on its own initiative may set any motion for oral argument or hearing. Otherwise, requests for oral arguments on motions will be granted on good cause shown. If oral argument is to be heard, the motion will be promptly set for hearing. Otherwise, motions are to be submitted to and will be determined by the court on the basis of the written memoranda of the parties.

See DUCivR 56-1 for specific provisions regarding summary judgment motions and related memoranda.

DUCivR 56-1 SUMMARY JUDGMENT: MOTIONS AND SUPPORTING MEMORANDA

(a) Summary Judgment Motions and Memoranda.

A motion for summary judgment and the supporting memorandum must clearly identify itself in the case caption and introduction.

(b) Motion; Requirements and Supporting Evidence.

A motion for summary judgment must include the following sections and be supported by an Appendix of Evidence as follows:

(1) Introduction and Relief Sought:A concise statement of each claim or defense for which summary judgment is sought, along with a clear statement of the relief requested. The parties should endeavor to address all summary judgment issues in a single motion. If a party files more than one motion, the court may strike the motion and that require the motions be consolidated into a single motion.

(2) Background (Optional):Parties may opt to include this section to provide background and context for the case, dispute, and motion. If included, this section should be placed between the Relief Sought section and the Statement of Undisputed Material Facts section. Factual summaries in the background section need not be limited to undisputed facts and need not cite to evidentiary support.

(3) Statement of Undisputed Material Facts: A concise statement of the undisputed material facts that entitle the moving party to judgment as a matter of law. Only those facts necessary to decide the motion should be included in this section. The moving party must cite with particularity the evidence in the Appendix of Evidence that supports each factual assertion.

(4) Argument: An explanation for each claim or defense, of why, under the applicable legal principles, the moving party is entitled to judgment as a matter of law. The arguments should include a statement of each claim or defense on which the party is seeking summary judgment and supporting authorities. Any factual citations must cite to the Appendix of Evidence, not the Statement of Undisputed Material Facts.

(5) Appendix of Evidence: All evidence offered in support of the motion must be submitted in an attached appendix. The appendix should be proceeded by a captioned cover-page index that lists each exhibit by number, includes a description or title, and if the exhibit is a document, identifies the source of the document. The appendix should include complete copies of all exhibits, including complete copies of depositions, to the extent possible. In cases where lengthy depositions are relied upon, the moving party need not submit the entire deposition. However, the moving party must submit at least four (4) pages before and four (4) pages after the cited deposition transcript pages(s), for a total of at least nine (9) [7].

(c) Opposition Memorandum Requirements and Supporting Evidence.

A memorandum in opposition to a motion for summary judgment must include the following sections and, if applicable, be supported by an Appendix of Evidence as follows:

(1) Introduction: A concise summary explaining why summary judgment should be denied.

(2) Background (Optional): Parties may opt to include this section to provide background and context for the case, dispute, and motion. If included, this section should be placed between the Introduction section and the Response to Statement of Undisputed Material Facts section. Factual summaries in the background
section need not be limited to undisputed facts and need not cite to evidentiary support.

(3) Response to Statement of Undisputed Material Facts: A restatement of each fact the opposing party contends is genuinely disputed or immaterial, a concise statement explaining why the fact is disputed or immaterial, and a citation with particularity to the evidence upon which the non-moving party relies to refute that fact [8]. Any factual citations must reference the appropriate party's Appendix of Evidence, rather than either party's factual statements or responses. The nonmoving party should not restate all of the moving party's statement of facts and should only respond to those facts for which there is a genuine dispute of material fact.

(4) Statement of Additional Material Facts (if applicable): If additional material facts are relevant to show that there is a genuine dispute of material fact, state each such fact and cite with particularity the evidence that supports the factual assertion from the appropriate party's Appendix of Evidence.

(5) Argument: An explanation for each claim or defense of why, under the applicable legal principles, summary judgment should be denied. Any factual citations must cite to the appropriate party's Appendix of Evidence, rather than either party's factual statements or responses.

(6) Appendix of Evidence: All evidence offered in opposition to the motion must be submitted in an appendix, utilizing the same procedure set out in DUCivR 56-1(b)(5). Counsel must make every effort not to duplicate evidence submitted by the other party. The appendix should be preceded by a cover page index that lists each exhibit by number, includes a description or title and, if the exhibit is a document, identifies the source of the document.

(d) Reply.

The moving party may file a reply memorandum. In the reply, a moving party may cite only additional evidence not previously cited in the opening memorandum to rebut a claim that a material fact is in dispute. Otherwise, no additional evidence may be cited in the reply memorandum, and if cited, the court will disregard it.

(e) Citations of Supplemental Authority.

When pertinent and significant authorities come to the attention of a party after the party's memorandum in support of or in opposition to a summary judgment motion has been filed, or after oral argument but before decision, a party may promptly file a notice with the court and serve a copy on all counsel, setting forth the citations. There must be a reference either to the page of the memorandum or to a point argued orally to which the citations pertain, but the notice must state, without argument, the reasons for the supplemental citations. Any response must be made, filed promptly, and be similarly limited.

(f) Failure to Respond.

Failure to respond timely to a motion for summary judgment may result in the court's granting the motion without further notice, provided the moving party has established that it is entitled to judgment as a matter of law.

(g) Length of Memoranda and Filing Times.

(1) A motion for summary judgment and a memorandum in opposition must not exceed 10,000 words, or in the alternative, forty (40) pages. A reply brief cannot exceed 5,000 words, or in the alternative, twenty (20) pages. If the document exceeds the page limit, then the party must certify compliance with the word-count limit. This limitation includes the following items: introduction, relief sought, background, statement of undisputed material facts, response to statement of undisputed material facts, statement of additional material facts, argument, and conclusion. This limitation excludes the following items: face sheet, table of contents, table of authorities, signature block, certificate of service, and appendix. Motions to file an overlength brief are discouraged and will be granted only upon a showing of good cause and exceptional circumstances, as set forth in DUCivR 7-1(e).

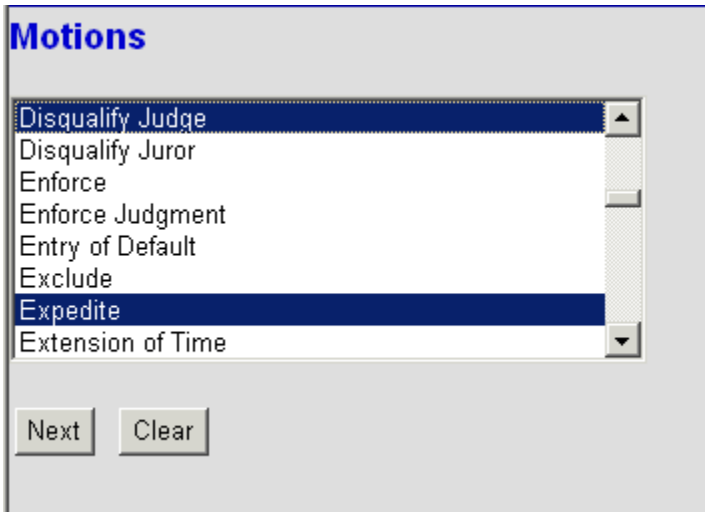
(2) Filing times and length of memoranda are governed by DUCivR 7-1.

See DUCivR 7-1 for guidelines regarding motions and memoranda in general, and DUCivR 7-2 for guidelines on citing unpublished decisions.

Expedited Treatment of Motions

If expedited treatment of a motion is desired, counsel should secure consent of counsel to an expedited schedule or move for an expedited schedule, submitting a proposed order for expedited treatment. Orders for Expedited Treatment of Motion Sample 1 Sample 2

In CM/ECF, be sure to specify that the motion seeks to Expedite, as well as seeks the relief sought. (Control-click to select all applicable types of relief.)



DUCivR 6-1 FILING DEADLINES WHEN COURT IS CLOSED

When the court is closed by administrative order of the chief judge, any deadlines which occur on that day are extended to the next day that the court is open for business.

See DUCivR 77-2 for the clerk's authority to extend time.

DUCivR 77-2 ORDERS AND JUDGMENTS GRANTABLE BY THE CLERK OF COURT

(a) Orders and Judgments.

The clerk of court is authorized to grant and enter the following orders and judgments without direction by the court:

(1) orders specifically appointing a person to serve process under Fed. R. Civ. P. 4(c);

(2) orders extending once for fourteen (14) days the time within which to answer, reply, or otherwise plead to a complaint, crossclaim, or counterclaim if the time originally prescribed to plead has not expired;

(3) orders for the payment of money on consent of all parties interested therein;

(4) if the time originally prescribed has not expired, orders to which all parties stipulate in civil actions extending once for not more than thirty (30) days the time within which to answer or otherwise plead, to answer interrogatories, to respond to requests for production of documents, to respond to requests for admission, or to respond to motions;

(5) orders to which all parties stipulate dismissing an action, except in cases governed by Fed. R. Civ. P. 23 or 66;

(6) entry of default and judgment by default as provided for in Fed. R. Civ. P. 55(a) and 55(b)(1); and

(7) any other orders which, under Fed. R. Civ. P. 77(c), do not require leave or order of the court.

Any proposed order submitted to the clerk under this rule must be signed by the party or attorney submitting it and will be subject to the provisions of Fed. R. Civ. P. 11. In addition, with the exception of proposed orders for extensions of time, all other proposed orders under this rule are subject to the requirements of DUCivR 54-1. Any proposed order submitted to the clerk for an extension of time under subsections (2) or (4) of section (a) of this rule must state (i) the date when the time for the act sought to be extended is due; (ii) the specific date to which the allowable time for the act is to be extended; and (iii) that the time originally prescribed has not expired. Second and successive requests for extensions of time must be by motion and proposed order to the court and must include a statement of the unusual or exceptional circumstances that warrant the request for an additional extension. In addition to the requirements (i) through (iii), above, such motions and proposed orders must specify the previous extensions granted.

(b) Clerk's Action Reviewable.

The actions of the clerk of court under this rule may be reviewed, suspended, altered, or rescinded by the court upon good cause shown.

Utah Standards of Professionalism and Civility Excerpts

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

Telephone Conference Instructions
utmj Nuffer to:
Sent by: Anndrea Sullivan-Bowers
08/26/2016 10:28 AM

Counsel,

Judge Nuffer has set a telephone conference for [DAY OF THE WEEK], [DATE], TIME (MST/MDT), to discuss [ISSUE/MOTION].

Please plan to participate on a land line rather than a cell phone and to avoid the use of a speaker phone. During the call, announce your name each time you speak and pause regularly during any statements to allow the judge to maintain control.

For participants, the conference instructions are as follows:

1. **Dial 877-402-9757.**
2. Enter the **Access Code 9839573**, followed by the # key.
3. To join as a participant, press # key. You will be placed on hold until the host (Judge Nuffer) activates the call.
4. You will be asked to enter the **Participant Security Code [DIVISION-YEAR-LAST 3 DIGITS OF CASE NUMBER, i.e. 21010]**, followed by the # key. The system will confirm the number entered and then ask to either accept (press 1) or re-enter (press 2). All participants must enter the security code, followed by the # key and accept (press 1), to be entered into the meeting. The security code needs to be entered only once unless it is entered incorrectly the first time.

If you have any questions, please call us at 801-524-6150.

Anndrea Bowers
Case Manager
Hon. David Nuffer's Chambers
801-524-6150
anndrea.sullivan-bowers@utd.uscourts.gov
dj.nuffer@utd.uscourts.gov

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

, Plaintiff, v. , Defendant.	Case No. District Judge David Nuffer

Signed January 22, 2011.

BY THE COURT

_____

District Judge David Nuffer

Instructions to counsel preparing an order for summary judgment

[Case Name] Case No. [_____] – Motion[s] [_____]

Prepare a Memorandum Decision in Microsoft Word format with the statement of undisputed material facts as specified in the hearing and conclusions of law as announced at the end of the hearing. Consider as examples docket no. 397, 2:13-cv-00729, filed August 4, 2014; docket no. 60, 2:11-cv-00971, filed August 7, 2014; docket no. 62, 1:12-cv-00119, filed February 2, 2015; and docket no. 36, 2:13-cv-00865, filed March 26, 2015. Consider using the Order template found at http://www.utd.uscourts.gov/judges/nuffer.html#Orders. The proper template is http://www.utd.uscourts.gov/forms/order3.dotm.

Undisputed facts should be as used at the hearing. The **analysis** should discuss the applicable law for each issue presented in turn, reference the factual support from the undisputed facts, and be written as the decision of the court. Any reference to a hearing transcript must be footnote referenced to the page and line of the transcript in this format:

> Transcript [date if more than one day hearing] [page] [line]
> Transcript 342:12–14.
> Transcript 3/21/15 12:15–25.

- Use headings and subheadings. The recommended template includes these styles.
- Case citations should be footnoted rather than in the text. String citations are discouraged. Discuss a case or don't cite it.
- If the document is 10 pages or longer, generate a Table of Contents.

The party preparing the order should email the Word document to opposing counsel and the court at dj.nuffer@utd.uscourts.gov, and file a PDF version under the event "Notice of Filing."

Opposing counsel should open the Word document and turn on Track Changes. Edit the order as to form, not substance. Email the Word document to the drafter and the court at dj.nuffer@utd.uscourts.gov, and file a PDF version under the event "Notice of Filing."

Draft due ____/____/____

Response due ____/____/____

Meet and confer ____/____/____

Submit drafter's version with accepted changes ____/____/____. Email the Word document version to the court at dj.nuffer@utd.uscourts.gov, and file a PDF version under the event "Notice of Filing" in CM/ECF.

Opposing party submits redline with remaining requested changes ____/____/____. Email the Word document version to the court at dj.nuffer@utd.uscourts.gov, and file a PDF version under the event "Notice of Filing" in CM/ECF.

See example document attached.

If you have a paper copy of this document, download a copy with working links at http://www.utd.uscourts.gov/rad

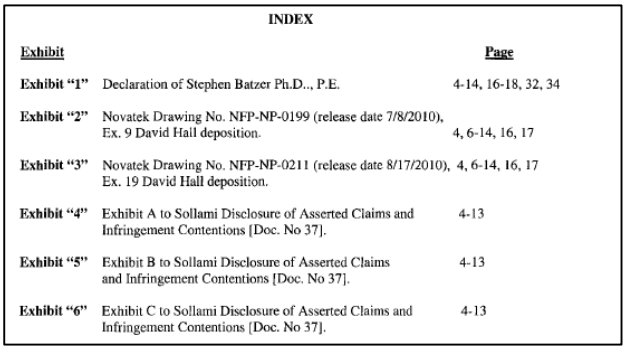
Suggestions for Creating a Really Accessible Document

These are *suggestions*—and should be relatively easy to implement. After learned, they should not add significant time or expense to any project. Start with one, move to another. Tips are listed in the sequence of document preparation and filing.

1. **Finished PDF documents filed in CM/ECF should be entirely text-based to facilitate searching, copying, and highlighting.**
   Because we read almost all submissions on computer or iPad, we really appreciate it if they are entirely text-based PDF documents. A text based PDF can be word-searched, highlighted as read, and copied into an order. Computer created documents (such as motions with memoranda) will be text based if output from the computer to PDF format, but all scanned documents should have text recognition through Optical Character Recognition (OCR) before submission to the court. Recognize Text in Adobe Acrobat.

2. **Begin with an outline that becomes a Table of Contents.**
   An outline creates organization but it also makes navigation tools available in Microsoft Word while you are drafting, and can automate a table of contents that has hyperlinks to locations in the document. The outline feature is built in to all word processors, and the table of contents will survive the conversion to PDF format. Outline in Word.
   Table of Contents in Word 2010.

3. **Create a List of Exhibits**
   An exhibit list included with the memorandum (as a separate attachment) helps locate exhibits. The importance of exhibits is clarified if the exhibit list includes pages on which references to exhibits are made.



INDEX

Exhibit		Page
Exhibit "1"	Declaration of Stephen Batzer Ph.D., P.E.	4-14, 16-18, 32, 34
Exhibit "2"	Novatek Drawing No. NFP-NP-0199 (release date 7/8/2010), Ex. 9 David Hall deposition.	4, 6-14, 16, 17
Exhibit "3"	Novatek Drawing No. NFP-NP-0211 (release date 8/17/2010), Ex. 19 David Hall deposition.	4, 6-14, 16, 17
Exhibit "4"	Exhibit A to Sollami Disclosure of Asserted Claims and Infringement Contentions [Doc. No 37].	4-13
Exhibit "5"	Exhibit B to Sollami Disclosure of Asserted Claims and Infringement Contentions [Doc. No 37].	4-13
Exhibit "6"	Exhibit C to Sollami Disclosure of Asserted Claims and Infringement Contentions [Doc. No 37].	4-13

4. **Use Photos and Diagrams**
   Graphics clarify the written discussion. This is particularly true if tangible objects are at issue, such as in patent cases.

5. **Use Permissible Hyperlinks**
   Hyperlinks may be internal to the document, such as table of contents; to the record, to other documents already filed in the case; and to research resources. *See* DUCivR 7-5. *See* Attorney Guide to Hyperlinking at http://federalcourthyperlinking.org. WestInsertLinks, part of West BriefTools or Link to Cites in Lexis for Microsoft Office automate research links. A LinkBuilder Add-in for Microsoft Word is also available to automate creation of links to documents already in the record. It is also possible to create links to exhibits filed simultaneously, but this can be complicated and not worth the effort.

6. **Attach deposition excerpts and other exhibits in text-based PDF format**
   If deposition excerpts and other exhibits are in text-based PDF format (see point no. 1) the document is easier to search and annotate and it is easier to copy text. Deposition transcript attachments should be created by output to PDF format from a word processing or text file provided by the reporter. Use full page deposition transcripts, not mini four pages-to-a-sheet transcripts. If the deposition excerpts or exhibits are scanned, Optical Character Recognition should be run to recognize text. Recognize Text in Acrobat X.

7. **Attach opinions in single column format (text based)**
   West and Lexis allow download of cases in single-column format, which is easier to read on an iPad or computer than the traditional dual column format. Make sure the cases you attach are text based PDF documents, which Lexis and Westlaw also allow you to download – or you may convert to PDF from a

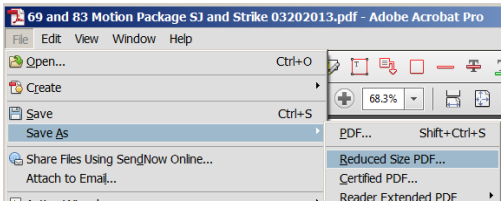
word processing version. *It should never be necessary to scan an opinion for attachment to a brief.* If you use research hyperlinks (see point no. 5 above) no opinion attachments may be needed.

8. **Convert the document to PDF in a way that preserves hyperlinks**
   It is a shame to put a table of contents and research links in your Word document and then lose them because you Print to PDF, which may not not save links. Save As PDF in Word 2010 and later, or the Acrobat Create PDF Ribbon in Word 2007 and later will preserve links. After you convert to PDF, verify that the document links still work. Preserving Hyperlinks in PDF Conversion.

9. **Change the properties of the PDF document so that the Initial View will show Bookmarks and the Page at the same time.**
   Most PDF creation programs have the ability to force the PDF document to open with the Bookmarks Panel showing. In Adobe Acrobat Standard and Pro, this is found on the File menu, Properties item, Initial View tab, Bookmarks Panel and Page.

10. **Consider additional manual changes.**
    It is possible and appropriate to add internal links manually, and to add additional bookmarks. If you do not have access to the West and Lexis tools to create links to research links automatically, links may be created manually by using Word's tools. Create, format or delete a hyperlink in MS Word 2010. Attorney Guide to Hyperlinking. Adding Bookmarks in Adobe Acrobat.

11. **Save As Reduced Size PDF**
    As a last step before distribution of any PDF document, reduce its size by using Save As Reduced Size PDF. You may accomplish a 50% or more size reduction.



12. **Attach a proposed order in PDF format – and email in word processing format to chambers.**
    "Proposed orders . . . shall be (i) prepared as word processing documents; (ii) saved in WordPerfect or Word format, and (iii) transmitted to the assigned judge via email. . . .
    An additional copy . . . shall be saved as a PDF file and filed electronically as an attachment to the motion . . . ." Admin E-Filing Procedures II. G. 1. The draft order makes clear what you want.

13. **File attachments individually, with full descriptions**
    When filing in CM/ECF, take advantage of the ability to name your exhibits specifically rather than using generic names. This helps chambers identify and locate your exhibits and provides a cross- check to the index you included in the motion. (See point no. 3 above.) Cover pages for exhibits really are not of much help. Instead, consider a text box on the first page of the exhibit that labels the exhibit with its number and description. Don't group exhibits in one attachment.

Document Number: 36		32 pages	190 kb
Attachment	**Description**		
1	Appendix Exhibits	1 page	9 kb
2	Exhibit "A"	18 pages	339 kb
3	Exhibit "B"	14 pages	319 kb
4	Exhibit "C"	9 pages	204 kb
5	Exhibit "D"	5 pages	111 kb
6	Exhibit "E"	3 pages	18 kb
7	Exhibit "F"	4 pages	35 kb

Document Number: 19		6 pages	17 kb
Attachment	**Description**		
1	Exhibit 1 - Lawsuits for Asserted Patents	26 pages	97 kb
2	Exhibit 2 - Complaint AT&T, Verizon and EarthLink case	39 pages	1.1 mb
3	Exhibit 3 - Order Severing Claims	5 pages	52 kb

Send comments, suggestions, corrections to dj.nuffer@utd.uscourts.gov
Rev. 032015

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, [CENTRAL/NORTHERN] DIVISION

, Plaintiff, v. , Defendant.	**TRIAL ORDER** Case No. District Judge David Nuffer

The final pretrial conference in this matter is scheduled for **[about seven – ten days before trial][day of week] [month] [day], [year] at [time]__. m. in Room [room].** Counsel who will try the case must attend.

This case is set for a [days] day jury trial to begin on **[day of week] [month] [day], [year] at [time]__. m. in Room [room].** The attorneys must **appear in court at 8:00 a.m.** on the first day of trial for a brief pre-trial meeting.

Counsel are instructed as follows:

1. Court-Imposed Deadlines

The deadlines described in this order cannot be modified or waived in any way by a stipulation of the parties. Any party that believes an extension of time is necessary **must** make an appropriate motion to the court and that motion may be joined by any other party.

2. Preparation for Final Pretrial

The court has adopted its own standard general jury instructions and standard voir dire questions in the form of a questionnaire, copies of which are posted on the court's website.

Standard Civil Jury Instructions

Civil Juror Questionnaire Optional Supplemental Questionnaire

Civil Advance Juror Questionnaire

Note also the Jury Selection Procedures and Courtroom Seating Chart.

The procedure for submitting proposed jury instructions and additional voir dire questions is as follows:

(a) The parties must serve their proposed jury instructions, special verdict and voir dire questions on each other by **twenty-eight days before the final pretrial**. These shall not be filed with the court. The parties must then confer in order to agree on a single set of instructions to the extent possible. The use of a questionnaire submitted to the jury in advance of trial (beyond the standard questionnaire used during the in-court jury selection and the optional supplemental questionnaire) may be advisable. Counsel shall meet and confer with the other parties and must file notice of any request for an advance questionnaire *with the proposed joint questionnaire* by **forty-two days before the final pretrial**.

(b) If the parties cannot agree upon one complete set of final instructions, special verdict and voir dire questions, they must file separately those instructions, special verdict and voir dire questions that are not agreed upon. However, it is not enough for the parties to merely agree upon the general instructions and then each submit their own set of substantive instructions. The court expects the parties to meet, confer, and agree upon the wording of the substantive instructions, special verdict and voir dire questions for the case.

(c) The joint proposed instructions, special verdict and voir dire questions (along with the proposals upon which the parties have been unable to agree) must be filed with the court by **at least twenty one days before the final pretrial**. Each instruction must be labeled and numbered at the top center of the page to identify the party submitting the instruction (e.g., "Joint Instruction No. 1" or "Plaintiff's Instruction No. 1"). Include citation to the authority that forms the basis for the instruction.

(d) A copy of the joint proposed instructions, special verdict and voir dire questions must be emailed to dj.nuffer@utd.uscourts.gov as a Word or WordPerfect document **at least three weeks before the final pretrial**. Include the case number and case name in the email subject line. Any party unable to comply with this requirement must contact the court to make alternative arrangements.

(e) Each party must file its objections, if any, to jury instructions, the special verdict and voir dire questions proposed by any other party by **no later than fourteen days before the final pretrial**. Any objections must recite the proposal in its entirety and specifically highlight the objectionable language contained therein. Objections to instructions must contain both a concise argument why the proposed language is improper and citation to relevant legal authority. Where applicable, the objecting party **must** submit an alternative instruction covering the pertinent subject matter or principle of law. A copy of the proposed alternative instruction must be emailed to dj.nuffer@utd.uscourts.gov as a Word or WordPerfect document. Include the case number and case name in the email subject line. Any party may, if it chooses, submit a brief written response in support of its proposed instructions **no later than one week days before the final pretrial**.

(f) All instructions must be short, concise, understandable, and *neutral* statements of law. Argumentative instructions and voir dire questions are improper and will not be given.

(g) Modified versions of statutory or other form jury instructions (*e.g.*, Federal Jury Practice and Instructions) may be acceptable. A modified jury instruction must, however,

identify the exact nature of the modification made to the form instruction and cite authority, if any, supporting such a modification.

3. Motions in Limine

All motions in limine are to be filed with the court by **at least fourteen days before the final pretrial**, unless otherwise ordered by the court. A separate motion must be filed for each preliminary ruling sought. Each motion must specifically identify the relief sought, and must contain the memorandum of law in the same document. (*See* DUCivR 7-1(a)(1)). A proposed order should be emailed to dj.nuffer@utd.uscourts.gov as a Word or WordPerfect document. Opposition memoranda must be filed by **at least seven - ten days before the final pretrial**. No memorandum in support of, or in opposition to, a motion may be longer than three (3) pages in length.

4. Courtroom Equipment and Recorded Testimony

If counsel wish to use any courtroom equipment, such as the evidence presentation system, easels, projection screens, etc., they must so state in the final pretrial order and at the final pretrial. Trial counsel and support staff are expected to familiarize themselves with any equipment they intend to use in advance of trial.

Any party desiring to present testimony of a witness by recorded means, whether video, audio or paper, must serve a designation of the testimony **twenty one days before the final pretrial.** This shall not be filed with the court. The designation shall be made using the Deposition Designation Form on Judge Nuffer's web page. Any objection must be served by **fourteen days before the final pretrial**, and shall use the same form. The parties must meet and confer (with at least one in-person meeting) to resolve any disputes. The designating party shall file the completed Deposition Designation Form by **seven days before the final pretrial** and any motion regarding this subject must be filed by **seven days before the final pretrial.** Disputes evident in the Deposition Designation Form do not require a motion. The completed Deposition Designation Form shall be emailed to dj.nuffer@utd.uscourts.gov on that date.

A party intending to use recorded testimony is strongly encouraged to display the deposition text as the deposition is presented, and if read, to use a professional reader who has rehearsed the reading with the attorney.

5. Pretrial Order

At the pretrial conference, plaintiff must present a joint proposed pretrial order which has been approved by all counsel, noting any areas of dispute. The pretrial order must conform generally to the requirements of DUCivR 16-1 and to the approved form of pretrial order which is reproduced as Appendix IV to the Rules of Practice for the U.S. District Court for the District of Utah. A copy of the proposed pretrial order must be emailed to dj.nuffer@utd.uscourts.gov as a Word or WordPerfect document.

In addition to the provisions in the final pretrial order thus called for, the following special provisions will apply:

(a) The pretrial order must contain an additional subparagraph (d) Statement of the Case which will be used to describe the case to the jury.

(b) The statement of uncontroverted facts called for in Section 3 of the General Form of the Pretrial Order must be in narrative form. Such facts shall be considered substantive evidence in the case and shall be marked as Exhibit 1. Upon commencement of the trial, Exhibit 1 shall be read into evidence. No further evidence as to the agreed facts may be entered into the record at trial.

(c) In reference to Section 7 of the General Form of the Pretrial Order, regarding all witnesses that propose to be expert witnesses, the parties are directed to append to Exhibit 1 copies of the curriculum vitae of each such expert. Absent specific leave of Court, the expert may not present more than five (5) minutes of professional qualification. In most cases, the parties will stipulate to qualification, although in appropriate cases, voir dire or cross-examination of an expert's qualification may be permitted and this examination may go beyond the scope of direct oral testimony as to qualification.

6. Trial Briefs

Each party must file a Trial Brief **no later than seven days before trial**. Each brief must include a list of all witnesses to be called and a short statement as to the substance of that witness's testimony. Plaintiff's trial brief must contain an outline of the elements of each cause of action, with the facts supporting that element listed under each element. Defendant's trial brief must contain a similar outline of the elements and facts for each cause of action in any counterclaim or third-party claim. Any party raising an affirmative defense must outline the elements of such defense and the facts supporting that element.

7. Exhibit Lists/Marking Exhibits

(a) Parties must meet and confer to avoid marking the same exhibit twice.

(b) After eliminating duplicate exhibits, each party must prepare an exhibit list in Word or WordPerfect format for the court's use at trial. Standard forms of exhibit lists are available from the court's website, and questions regarding the preparation of these lists may be directed to the case manager, Anndrea Bowers, at 801-524-6150.

(c) All parties are required to pre-mark their exhibits to avoid taking up court time during trial for such purposes.

(d) Plaintiff must mark exhibits by number starting at "1." Defendant must mark exhibits by letter unless defendant anticipates using more than twenty (20) exhibits, in which case counsel must agree on number ranges to accommodate numbering all exhibits. Examples of alternative methods would be assigning numbers 1 – 99 to plaintiff and 100 to 199 to defendant. In a case with multiple parties who require separate exhibit numbers, counsel must agree on number ranges to accommodate numbering all exhibits.

(e) Pages of documentary exhibits must retain bates stamps used when the documents were produced in discovery.

(f) Original exhibits must be stapled.

(g) Exhibit lists, marked exhibits, and courtesy copies must be submitted to the court three (3) business days before trial. The exhibit list must be emailed as a Word or WordPerfect document to dj.nuffer@utd.uscourts.gov.

(h) Courtesy copies of exhibits on a CD/DVD Rom in PDF format are preferred. Optical Character Recognition (OCR) must be run on the PDF files to enable text searching of the exhibits. If a party marks more than ten (10) exhibits, courtesy copies of exhibits **must** be provided in PDF format on a CD/DVD Rom. The naming of PDF format exhibit data files must enable sorting by exhibit number.

(i) If a CD/DVD Rom with courtesy copies of exhibits in PDF format is not provided (because the party is marking less than ten exhibits and has elected not to provide courtesy copies of exhibits on a CD/DVD Rom in PDF format) two (2) paper courtesy copies of exhibits in a tabbed binder must be delivered to the court.

8. Witness Lists

All parties are required to prepare a separate witness list for the court's use at trial. The list contained in the pretrial order will not be sufficient. Standard forms of witness lists are available from the court's website, and questions regarding the preparation of these lists may be directed to the case manager, Anndrea Bowers, at 801-524-6150. Witness lists must be emailed as a Word or WordPerfect document to dj.nuffer@utd.uscourts.gov three (3) business days before trial.

Each afternoon of trial, by no later than 6:00 p.m. counsel anticipating examination of witnesses the next day shall provide the names of witnesses anticipated to be examined to all counsel and to dj.nuffer@utd.uscourts.gov, and by no later than 8:00 p.m. shall by the same means provide the list of exhibits anticipated to be used with each witness.

9. In Case of Settlement

Pursuant to DUCivR 41-1, the court will tax all jury costs incurred as a result of the parties' failure to give the court actual notice of settlement less than one (1) full business day before the commencement of trial. Leaving a voice mail message or sending a notice by fax or email is not considered sufficient notice to the court. If the case is settled, counsel must advise the jury administrator and a member of this chamber's staff by means of a personal visit or by person-to-person telephonic communication at least one full business day before the commencement of trial.

10. Courtroom Conduct

In addition to the rules outlined in DUCivR 43-1, the court has established the following ground rules for the conduct of counsel at trial:

(a) Please be on time for each court session. In most cases, trial will be conducted from 8:00 a.m. until 1:30 p.m. or 2:30 p.m., with two (2) short (fifteen minute) breaks. Trial engagements take precedence over any other business. If you have matters in other courtrooms, arrange in advance to have them continued or have an associate handle them for you. Any motions or matters that need to be addressed outside the jury will be heard at 8:00 a.m. or after the trial day has recessed. Usually, the court has other hearings set after 2:30 p.m.

(b) Stand as court is opened, recessed or adjourned.

(c) Stand when the jury enters or retires from the courtroom.

(d) Stand when addressing, or being addressed by, the court.

(e) In making objections and responding to objections to evidence, counsel must state the legal grounds for their objections with reference to the specific rule of evidence upon which they rely. For example, “Objection . . . irrelevant and inadmissible under Rule 402” or “Objection . . . hearsay and inadmissible under Rule 802.”

(f) Sidebar conferences are discouraged. Most matters requiring argument must be raised during recess. Please plan accordingly.

(g) Counsel need not ask permission to approach a witness in order to **briefly** hand the witness a document or exhibit.

(h) Address all remarks to the court, not to opposing counsel, and do not make disparaging or acrimonious remarks toward opposing counsel or witnesses. Counsel must instruct all persons at counsel table that gestures, facial expressions, audible comments, or any other manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.

(i) Refer to all persons, including witnesses, other counsel, and parties, by their standard salutation (Mr., Ms., Mrs., Dr., Officer, Detective, ect.) and their surnames, NOT by their first or given names.

(j) Only one attorney for each party shall examine, or cross-examine, each witness. The attorney stating objections during direct examination shall be the attorney recognized for cross examination.

(k) Counsel should not refer to other witnesses’ testimony in their questioning. For example, counsel should not ask “Witness A testified . . . would you agree?”

(l) Offers of, or requests for, a stipulation must be made outside the hearing of the jury.

(m) When not taking testimony, counsel will remain seated at counsel table throughout the trial unless it is necessary to move to see a witness. Absent an emergency, do not leave the courtroom while court is in session. If you must leave the courtroom, you do not need to ask the court's permission. Do not confer with or visit with anyone in the spectator section while court is in session. Messages may be delivered to counsel table provided they are delivered with no distraction or disruption in the proceedings.

(n) The same attorney must do initial and rebuttal closing arguments, and rebuttal closing argument may not take more time than the initial closing argument.

(o) Please review the guidelines for Creating the Best Transcript Possible with your entire trial team and witnesses before trial.

SIGNED this _____ day of May, 2018.

BY THE COURT:

David Nuffer
United States District Judge

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

, Plaintiff, v. , Defendant.	**TRIAL ORDER** Case No. District Judge David Nuffer

The final pretrial conference in this matter is scheduled for **[day of week] [month] [day], [year] at [time]__. m. in Room [room].** Counsel who will try the case must attend.

This case is set for a [days] day [jury bench] trial to begin on **[day of week] [month] [day], [year] at [time]__. m. in Room [room].** The attorneys are expected to **appear in court at 8:00 a.m.** on the first day of trial for a brief pre-trial meeting.

Counsel are instructed as follows:

1. Court-Imposed Deadlines.

The deadlines described in this order cannot be modified or waived in any way by a stipulation of the parties. Any party that believes an extension of time is necessary **must** make an appropriate motion to the court and that motion may be joined by any other party.

2. Motions in Limine

All motions in limine are to be filed with the court by **at least fourteen days before the final pretrial**, unless otherwise ordered by the court. A separate motion must be filed for each preliminary ruling sought. Each motion must specifically identify the relief sought, and must be accompanied by a memorandum of law and a proposed order. Opposition memoranda must be filed by **at least seven days before the final pretrial**. No memorandum in support of, or in opposition to, a motion may be longer than three (3) pages in length.

3. Courtroom Equipment and Recorded Testimony

If counsel wish to use any courtroom equipment, such as easels, projection screens, etc., they must so state in the final pretrial order and at the final pretrial conference. Trial counsel and support staff are expected to familiarize themselves with any equipment they intend to use in advance of trial.

Any party desiring to present testimony of a witness by recorded means, whether video, audio or paper, must file a designation of the testimony **twenty one days before the final pretrial.** The designation shall be made using the Deposition Designation Form on Judge Nuffer's web page. Any objection must be made by **fourteen days before the final pretrial**, and shall use the same form. The parties must meet and confer (with at least one in-person meeting) to resolve any disputes. Any motion regarding this subject must be filed by **seven days before the final pretrial.**

A party intending to use recorded testimony is strongly encouraged to display the deposition text as the deposition is presented, and if read, to use a professional reader who has rehearsed the reading with the attorney.

4. Pretrial Order.

At the pretrial conference, plaintiff must present a joint proposed pretrial order which has been approved by all counsel, noting any areas of dispute. The pretrial order must conform generally to the requirements of DuCivR 16-1 and to the approved form of pretrial order which is reproduced as Appendix IV to the Rules of Practice for the U.S. District Court for the District of Utah. A copy of the proposed pretrial order must be emailed to dj.nuffer@utd.uscourts.gov as a Word or WordPerfect document.

In addition to the provisions in the final pretrial order thus called for, the following special provisions will apply:

(a) The statement of uncontroverted facts called for in Section 3 of the General Form of the Pretrial Order must be in narrative form. Such facts shall be considered substantive evidence in the case and shall be marked as Exhibit 1. Upon commencement of the trial, Exhibit 1 shall be read into evidence. No further evidence as to the agreed facts may be entered into the record at trial.

(b) In reference to Section 7 of the General Form of the Pretrial Order, regarding all witnesses that propose to be expert witnesses, the parties are directed to append to Exhibit 1 copies of the curriculum vitae of each such expert. Absent specific leave of Court, the expert may not present more than five (5) minutes of professional qualification. In most cases, the parties will stipulate to qualification, although in appropriate cases, voir dire or cross-examination of an expert's qualification may be permitted and this examination may go beyond the scope of direct oral testimony as to qualification.

5. Proposed Findings of Fact and Conclusions of Law

Each party must file Proposed Findings of Fact and Conclusions of Law **no later than seven days before trial**. The Conclusions of Law must outline of the elements of each cause of action, or affirmative defense, and briefly summarize the supporting facts under each element.

6. Exhibit Lists/Marking Exhibits

(a) Parties must meet and confer to avoid marking the same exhibit twice.

(b) After eliminating duplicate exhibits, each party must prepare an exhibit list in Word or WordPerfect format for the court's use at trial. Standard forms for exhibit lists are available from the court's website, and questions regarding the preparation of these lists may be directed to the case manager, Anndrea Bowers, at 801-524-6150.

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(f) Original exhibits must be stapled.

(g) Exhibit lists, marked exhibits, and courtesy copies must be submitted to the court three business days before trial. The exhibit list must be emailed to dj.nuffer@utd.uscourts.gov.

(h) Courtesy copies of exhibits on a CD/DVD Rom in PDF format are preferred. Optical Character Recognition (OCR) must be run on the PDF files to enable text searching of the exhibits. If a party marks more than ten exhibits, courtesy copies of exhibits **must** be provided in PDF format on a CD/DVD Rom.

(i) If a CD/DVD Rom with courtesy copies of exhibits in PDF format is not provided (because the party is marking less than ten exhibits and has elected not to provide courtesy copies of exhibits on a CD/DVD Rom in PDF format) two paper courtesy copies of exhibits in a tabbed binder must be delivered to the court.

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8. In Case of Settlement

If the case is settled, counsel must jointly advise a member of this chamber's staff by means of a personal visit or by person-to-person telephonic communication at least one full

business day before the commencement of trial. Leaving a voice mail message or sending a notice by fax or email is not considered sufficient notice to the court.

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(b) Stand as court is opened, recessed or adjourned.

(c) Stand when addressing, or being addressed by, the court.

(d) In making objections and responding to objections to evidence, counsel must state the legal grounds for their objections with reference to the specific rule of evidence upon which they rely. For example, "Objection . . . irrelevant and inadmissible under Rule 402" or "Objection . . . hearsay and inadmissible under Rule 802."

(e) Counsel need not ask permission to approach a witness in order to **briefly** hand the witness a document or exhibit.

(f) Address all remarks to the court, not to opposing counsel, and do not make disparaging or acrimonious remarks toward opposing counsel or witnesses. Counsel must instruct all persons at counsel table that gestures, facial expressions, audible comments, or any other manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.

(g) Refer to all persons, including witnesses, other counsel, and parties, by their surnames and NOT by their first or given names.

(h) Only one attorney for each party shall examine, or cross-examine, each witness. The attorney stating objections during direct examination shall be the attorney recognized for cross examination.

(i) When not taking testimony, counsel will remain seated at counsel table throughout the trial unless it is necessary to move to see a witness. Absent an emergency, do not leave the courtroom while court is in session. If you must leave the courtroom, you do not need to ask the court's permission. Do not confer with or visit with anyone in the spectator section while court is in session.

Messages may be delivered to counsel table provided they are delivered with no distraction or disruption in the proceedings.

(j) Please review the guidelines for Creating the Best Transcript Possible with your entire trial team and witnesses before trial.

DATED this _____ day of May, 2018.

BY THE COURT:

David Nuffer
United States District Judge

Jaryl L. Rencher - #4903
D. Greg Anjewierden - #13135
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Attorney for the Defendants P.K Clark and Whitecap Institute

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

GAIL O'NEAL Plaintiff, v. P.K. CLARK; WHITECAP INSTITUTE; and JOHN AND JANE DOES 1-10. Defendants.	**DEFENDANTS' MOTION TO LIMIT GOLDEN RULE AND REPTILIAN ARGUMENTS (Motion 2)** Civil No. 2:14-cv-363-DN Judge David Nuffer

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Defendants request that the Court enter an order precluding Plaintiff from making any "Golden Rule" or "Reptilian" arguments at trial.

Memorandum in Support

Defendants request that the Court enter an order precluding Plaintiff from making any "Golden Rule" or "Reptilian" arguments at trial. Golden Rule arguments are those that ask the jury to put themselves in the shoes of the Plaintiff, rather than determining if Defendant caused Plaintiff any damage by acting negligently. Reptilian arguments are those that ask the jury to

make their decision for the safety of the community, rather than determining any level of Defendant's negligence. Both types of arguments are improper and prejudicial, and the Court should preclude Plaintiffs from making these arguments at trial.

Plaintiff alleged in her complaint that Dr. Clark improperly performed a right maxillary sinus lift which allegedly caused a sinus perforation in the upper right area of Plaintiff's mouth. *See* Amended Complaint at ¶ 76, attached as Exhibit 1. The Court should enter an order precluding any "Golden Rule" or "Reptilian" arguments at trial regarding damages relating to the right maxillary sinus lift. "A golden rule argument is defined as a jury argument in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place of the injured plaintiff…" *Green v. Louder*, 29 P.3d 638, 647 n.13 (Utah 2001). In *Green*, the plaintiff made the following statements in closing arguments that the court cited as examples:

- "Look how close those cars are to having a head on collision and then ask yourself if you would do the same thing."
- "Before you impose standards on [plaintiff] higher than you pose [sic] on yourself, you must realize that he is only held to be the reasonable person, not the perfect person."
- "How many of you, the standard of the reasonable person, would stay that close to a head on collision with a car coming in your own lane without trying to get somewhere else."
- "[A] verdict that [plaintiff] was even partially at fault for this accident is to say in your heart, well I have never been seconds from an imminent head on collision." *Id.* at 648.

The Utah Supreme Court then gave the standard on disallowing golden rule arguments in Utah: the use of golden rule arguments is improper with respect to damages.[1] *Id.* The Tenth Circuit of the U.S. Court of Appeals also recognizes as well established law that a party may not exhort the jury to "place itself in a party's shoes with respect to damages."
S*hultz v. Rice*, 809 F.2d 643, 651–52 (10th Cir.1986). The Court should therefore enter an order precluding any "Golden Rule" arguments with respect to damages in this case.

The Court should also preclude "Reptilian" arguments. These are arguments that ask the juror to make a decision for the safety of the community in which the juror lives. This is a form of Golden Rule argument. The Court should preclude these types of damages arguments at trial. Since Golden Rule and Reptilian arguments attempt to sway a jury from the normal negligence standards, the Court should disallow them.

DATED this 5day of September 2017

RENCHER ANJEWIERDEN

_/s/ D. Greg Anjewierden_____
D. Greg Anjewierden
Attorney for Defendants

[1] Defendants acknowledge that the court in *Green* did not disallow the statements cited above, as they were not made with respect to damages. However, the holding still applies that the use of golden rule arguments is improper with respect to damages. Defendants included these citations as examples of Golden Rule arguments.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2017, a true and correct copy of the Defendants' Motion to Prohibit Reference to Liability Insurance and a copy of the foregoing Certificate of Service was served via U. S. mail to the following:

Alyson Carter McAllister
311 South State Street #240
SLC, UT 84111

_/s/__Paula Powell_____

Sample Docket Text Order on Motion in Limine

09/15/2017	77	DOCKET TEXT ORDER granting in part and denying in part 56 Motion in Limine. No "Golden Rule" or "Reptilian" arguments directed at the issue of damages will be permitted at trial. "Golden Rule" arguments are those in which the jury is exhorted to place itself in the party's shoes with respect to damages. "Reptilian" arguments were not defined by the parties, but apparently are those in which the jury is exhorted to make their decision on damages based on the safety of the community. Such arguments as to damages are improper and prejudicial. See Green v. Louder, 29 P.3d 638, 647-48 (Utah 2001) (citing Shultz v. Rice, 809 F.2d 643, 651-52 (10th Cir. 1986)). However, such arguments may be directed at the issue of ultimate liability. See Id. Signed by Judge David Nuffer on 09/15/2017. No attached document. (apm) (Entered: 09/15/2017)

09/15/2017	78	DOCKET TEXT ORDER denying 57 Motion in Limine. The 57 Motion does not identify any specific evidence Plaintiff may seek to admit which was responsive to discovery requests and was not provided in the responses. When the parties exchange exhibits before trial, a party must object to specific evidence which it believes was not properly disclosed so that these issues can be resolved out of the presence of the jury. At trial objections may be made to testimony which a party claims was not properly disclosed. Signed by Judge David Nuffer on 09/15/2017. No attached document. (apm) (Entered: 09/15/2017)

09/15/2017	81	DOCKET TEXT ORDER denying 62 Motion in Limine. Evidence of Plaintiff's oral hygiene is admissible at trial. Such evidence is relevant to the issue of causation, and its probative value is not substantially outweighed by any potential prejudicial effect. *See* Fed. R. Evid. 401, 402, 403. Signed by Judge David Nuffer on 09/15/2017. No attached document. (apm) (Entered: 09/15/2017)

*Case Name*_____ *Case Number*_____ *Deposition of* _____*taken* _____				
Plaintiff Designations – BLUE **Defendant Completeness—PURPLE** **Defendant Counter-Designations – RED (at end)**	**Defendant Designations – RED** **Plaintiff Completeness—PURPLE** **Plaintiff Counter Designations – BLUE (at end)**	**Defense Objections/Responses – RED** **Plaintiff Objections/Responses – BLUE**	**Exhibits**	**Ruling**
PLAINTIFF DESIGNATIONS	DEFENDANT -DESIGNATIONS			
DEFENDANT COUNTER-DESIGNATIONS	PLAINTIFF COUNTER-DESIGNATIONS			

Instructions: One form should contain all designations for a witness. Plaintiff Designations (column 1) and Defendant Designations (column 2) will show the full deposition text that the party proposes to read in its case-in-chief. Completeness designations are proposed by the other party, under Fed. R. Civ. P. 32(a)(6), to be read with the designations. Counter–designations are read following the designations and completeness designations, similar to cross examination. This form should be provided in word processing format to the other party, who then will continue to fill in the form. The form is then returned to the proposing party for review, resolution of disputes, and further editing. The parties should confer and file a final version in PDF format using the event "Notice of Filing" and also submit a final word processing copy to the court at dj.nuffer@utd.uscourts.gov, for ruling.

All objections which the objecting party intends to pursue should be listed, whether made at the deposition, as with objections as to form, or made newly in this form, if the objection is of a type that was reserved.

Case Name **O'Neal v. P.K. Clark/Whitecap Institute** ***Case Number*** **14-CV-363**
Deposition of **W. Davis Merritt, M.D.** ***taken*** **Tuesday, June 23, 2015**

Plaintiff Designations – BLUE **Defendant Completeness—PURPLE** **Defendant Counter-Designations – RED (at end)**	**Defense Objections/Responses – RED** **Plaintiff Objections/Responses – BLUE**	**Exhibits**	**Ruling**
·5· · · · A.· ·Correct. **·6· · · · Q.· ·And what was the purpose of ordering a** **·7· ·pathology report?** ·8· · · · A.· ·Primarily to rule out malignancy as a cause ·9· ·for the patient's sinusitis. **10· · · · Q.· ·In your opinion, the surgery that you** **11· ·performed for Ms. O'Neal, was it medically necessary** **12· ·and appropriate?** 13· · · · A.· ·Yes. **14· · · · Q.· ·Was it successful in getting rid of the sinus** **15· ·disease that she had?** 16· · · · A.· ·Yes. **17· · · · Q.· ·And thereafter, are you aware of whether her** **18· ·oral antral fistula was properly remedied?** 19· · · · A.· ·Hmm.· No.			
24:12-13; 24:14-19; 24:20-25:1 **12· · · · Q.· ·I'm not sure if I understood the testimony** **13· ·you gave just a minute ago.** **14· · · · · · ·Did you say that you did not think -- did you** **15· ·give an opinion about whether Dr. Stern's procedure** **16· ·that he performed to close the fistula was appropriate?** 17· · · · A.· ·The plan to close it or the results? **18· · · · Q.· ·His plan to close it.** 19· · · · A.· ·It was appropriate. **20· · · · Q.· ·Okay.· And -- and I just -- maybe I didn't** **21· ·understand what your answer was.· Were you aware of the** **22· ·results, whether he was successful in closing the** **23· ·fistula?** 24· · · · A.· ·I don't have correspondence or records 25· ·indicating it was successful.· And I don't recall a 1· ·phone conversation with Dr. Stern.· But I know him very 2· ·well, so if it wasn't successful, I'm sure he would 3· ·have told me.	25:1-3 1·phone conversation with Dr. Stern.·But I know him very ·2· ·well, so if it wasn't successful, I'm sure he would ·3· ·have told me. Defendant objects to Plaintiff's proposed completeness addition in 25:1-3. Dr. Merritt lacks foundation to testify as to what Dr. Stern would or wouldn't have said or done. Defendant also objects as this testimony calls for speculation. Allowing lines 24:20-25:1, without finishing the answer to the question is misleading. This suggests the closure was not successful, which is the opposite of what Dr. Merritt's understanding is given his history and pattern of dealings with Dr. Stern.		OVERRULED. The testimony is not speculative and is based on Dr. Merritt's personal knowledge of and prior experience with Dr. Stern.
DEFENDANT COUNTER-DESIGNATIONS			

Case Name **O'Neal v. P.K. Clark/Whitecap Institute** ***Case Number*** **14-CV-363**
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Plaintiff Designations – BLUE **Defendant Completeness—PURPLE** **Defendant Counter-Designations – RED (at end)**	**Defense Objections/Responses – RED** **Plaintiff Objections/Responses – BLUE**	**Exhibits**	**Ruling**
10:24-11:14 **24· · · · Q.· ·And beyond those letters between you and** **25· ·Dr. Stern, do you recall any other communication** **·1· ·between both of you?** ·2· · · · A.· ·I can't recall when the phone call was. I ·3· ·have this vague memory I spoke to him on the phone ·4· ·about it, but I can't recall when it was or what we ·5· ·said. **·6· · · · Q.· ·And so you recall one phone conversation** **·7· ·between both of you?** ·8· · · · A.· ·Uh-huh (affirmative). **·9· · · · Q.· ·Beyond that, all communication was via** **10· ·letter?** 11· · · · A.· ·Yes. **12· · · · Q.· ·Which is contained in Ms. O'Neal's chart,** **13· ·correct?** 14· · · · A.· ·Yes.			
13:16-18 **16· · · · Q.· ·Are you aware that Dr. Shane referred** **17· ·Ms. O'Neal to Dr. P.K. Clark in Heber, Utah?** 18· · · · A.· ·No.			
18:3-18 **3· · · · Q.· ·If she has sinusitis, would that exacerbate** **·4· ·an infection in the sinus?· In other words, if she has** **·5· ·a history of sinusitis before this infection that she** **·6· ·got in the upper right maxillary sinus, can that** **·7· ·somehow exacerbate it?· In other words, can that** **·8· ·increase or -- what's another word -- make the** **·9· ·infection worse?** 10· · · · A.· ·Well, it's -- it's -- the question doesn't -- 11· ·the question doesn't make sense because sinusitis is 12· ·both an inflammatory and infectious condition, and they 13· ·can coexist.· Infection and inflammation can coexist 14· ·for a long period of time.· So it's not possible to say 15· ·when one infection began and another -- and when it	Plaintiff objects to 18:3-18 pursuant to Rule 403 of the Federal Rules of Evidence. Plaintiff finds it difficult to determine what exactly the question is, and whether the answer is even responsive to the question or is complete. This testimony would be confusing to the jury and should be excluded. The question and answer are not confusing and should be allowed. This question asks that if Plaintiff has a history of sinusitis, will that exacerbate the eventual sinus infection she develops. The response from Dr. Merritt indicates that it's difficult to determine when one infection ends and another begins, which will tell the jury that it's difficult to determine if the infection she develops is a result of		OVERRULED. The testimony is relevant to causation and its probative value is not substantially outweighed by any potential prejudice.

Case Name O'Neal v. P.K. Clark/Whitecap Institute *Case Number* 14-CV-363 *Deposition of* W. Davis Merritt, M.D. *taken* Tuesday, June 23, 2015			
Plaintiff Designations – BLUE **Defendant Completeness—PURPLE** **Defendant Counter-Designations – RED (at end)**	**Defense Objections/Responses – RED** **Plaintiff Objections/Responses – BLUE**	**Exhibits**	**Ruling**
16· ·stopped -- **17· · · Q.· ·Okay.** 18· · · A.· ·-- in a patient who's disease is chronic.	treatment from Dr. Clark or her history of sinusitis. Defendant's interpretation of this answer proves Plaintiff's point. This answer says nothing about the causation of Plaintiff's infection, and more likely refers to the multiple infections Plaintiff suffered post surgery and the difficulty in telling if it was one ongoing infection that was not being effectively treated, or recurrent infections.		
19:13-20:1 **13 if Dr. Clark is going to** **14· ·perform a sinus augmentation prior to some dental work,** **15· ·do you think it would be relevant to discuss her** **16· ·history of sinusitis?** 17· · · A.· ·You know, that's really a question about 18· ·dental practice, and I'm not an expert in dentistry. **19· · · Q.· ·Perfect.· Thank you.** **20· · · · · ·In the next -- this is two sentences later.** **21· ·This is again on number 11.· She says -- at least your** **22· ·note says, "She lives with her daughter and son who** **23· ·help in the management of their ranch here in Lander."** **24· · · · · ·Do you recall any conversation about that,** **25· ·any details about that?** 1· · · A.· ·No, I don't.	Plaintiff objects to 19:13-18 based on Rules 702 and 703 of the federal rules of evidence. Dr. Merritt states he is not an expert in dentistry, and therefore cannot answer the question. See Plaintiff's MIL No. 64. This question is appropriate given the answer. It is important for the jury to understand that Dr. Merritt is not an expert in dentistry. And that his opinions can't be relied upon in a standard of care analysis. This question and answer will demonstrate that to the jury.		OVERRULED. The question is appropriate given the answer. The testimony is relevant to the scope of Dr. Merritt's opinions.
21:3-10 **3· · · Q.· ·So do you have any opinion as -- you** **·4· ·mentioned that she had a sinus disease in her upper** **·5· ·right maxillary, as well as I think you said the** **·6· ·anterior ethmoid right?** ·7· · · A.· ·That's correct. **·8· · · Q.· ·Do you have any opinion as to the etiology of** **·9· ·that sinus disease?** 10· · · A.· ·I don't.			
22:13-18 **13· · · Q.· ·At any point did Dr. Stern relay to you any** **14· ·opinion he had as to Dr. Clark's care?**	Plaintiff objects to 22:13-18 pursuant to Rules 702-703 and 403 of the Federal Rules of Evidence. First, it is not particularly relevant for the jury to know that		OVERRULED. The questions are appropriate given the

Case Name **O'Neal v. P.K. Clark/Whitecap Institute** ***Case Number*** **14-CV-363**
Deposition of **W. Davis Merritt, M.D.** ***taken*** **Tuesday, June 23, 2015**

Plaintiff Designations – BLUE **Defendant Completeness—PURPLE** **Defendant Counter-Designations – RED (at end)**	**Defense Objections/Responses – RED** **Plaintiff Objections/Responses – BLUE**	**Exhibits**	**Ruling**
15· · · A.· ·No. **16· · · Q.· ·Do you have any opinion as to Dr. Clark's** **17· ·care?** 18· · · A.· ·No.	Dr. Stern did not relay any opinions on defendant's care to Dr. Merritt (R. 402). Second, Dr. Merritt is not an expert in generally dentistry or an oral surgeon, and therefore has no basis to testify as to the standard of care in this case (R. 702-703). See Plaintiff's MIL No. 64. Further, it is likely that Dr. Merritt's testimony that he has no opinion on Dr. Clark's standard of care would be misconstrued to imply that he is not critical of Dr. Clark's care, which is misleading (R. 403). This is not misleading, as it doesn't state any opinion on Dr. Clark's care. Again, it is important for the jury to understand that Dr. Merritt is not an expert in dentistry and his opinions should not be relied upon in a standard of care analysis. The question about his opinions on Dr. Clark are therefore important to establish Dr. Merritt's lack of foundation. Otherwise, Plaintiff will use Dr. Merritt's testimony in arguments that his opinions should be used in a standard of care analysis. Only by using this testimony that Dr. Merritt is not qualified to testify on these issues or that he has no opinions on Dr. Clark's care will the jury understand that Dr. Merritt lacks the foundation. As for the testimony about Dr. Stern relaying information, it is important for the jury to know what information Dr. Stern passed along to Dr. Merritt. This is a fact regarding the treatment of Plaintiff, and should therefore be allowed.		answers. The testimony is relevant to the scope of Dr. Merritt's opinions.
23:20-24:6 **20· · · Q.· ·Do you have any other opinions as to** **21· ·Dr. Stern's care of Gail O'Neal?** 22· · · A.· ·No. **23· · · Q.· ·Do you have any other opinions of**	Plaintiff objects to 23:20-24:6 pursuant to Rules 702-703 and 403 of the Federal Rules of Evidence. First, it is not particularly relevant for the jury to know that Dr. Stern does not have any opinions on any other doctor's care of plaintiff, or on the etiology of her		OVERRULED. The questions are appropriate given the answers. The testimony is relevant to the scope

Case Name **O'Neal v. P.K. Clark/Whitecap Institute** *Case Number* **14-CV-363**
Deposition of **W. Davis Merritt, M.D.** *taken* **Tuesday, June 23, 2015**

Plaintiff Designations – BLUE **Defendant Completeness—PURPLE** **Defendant Counter-Designations – RED (at end)**	**Defense Objections/Responses – RED** **Plaintiff Objections/Responses – BLUE**	**Exhibits**	**Ruling**
24· ·Dr. P.K. Clark's treatment of Gail O'Neal? 25· · · A.· ·No. **1· · · Q.· ·Do you have any other opinions as to** **·2· ·Dr. Michael Shane's treatment of Gail O'Neal?** ·3· · · A.· ·No. **·4· · · Q.· ·And do you have any other opinions as to the** **·5· ·etiology of Gail O'Neal's sinus disease?** ·6· · · A.· ·No, I don't.	sinus disease (R. 402). Second, Dr. Merritt is not an expert in generally dentistry or an oral surgeon, and therefore has no basis to give expert opinion testimony about the treatment by dentists in this case (R. 702-703). See Plaintiff's MIL No. 64. As noted above, it is important for the jury to understand that Dr. Merritt lacks foundation to give opinions on the standard of care, and these questions will so demonstrate. Otherwise, Plaintiff can twist his testimony and confuse the jury into thinking that Dr. Merritt does indeed have opinions about the standard of care. This testimony will definitively state to the jury that Dr. Merritt is not qualified to testify about, and has no opinion on, the standard of care. In tregard to the etiology of the sinus disease, he has foundation to testify about sinus disease, as demonstrated by his credentials as an ear nose and throat specialist. His opinions (or lack thereof) on the etiology of Plaintiff's sinus disease is therefore important to the jury, and opinions (or lack thereof) on the etiology of Plaintiff's sinus disease is therefore relevant. That is a criticial issue in this case: how did the sinus disease develop and what impact did it have on the implant failure. His lack of opinions will assist the jury in making that determination.		of Dr. Merritt's opinions.

Instructions: One form should contain all designations for a witness. Plaintiff Designations (column 1) and Defendant Designations (column 2) will show the full deposition text that the party proposes to read in its case-in-chief. Completeness designations are proposed by the other party, under Fed. R. Civ. P. 32(a)(6), to be read with the designations. Counter–designations are read following the designations and completeness designations, similar to cross examination. This form should be provided in word processing format to the other party, who then will continue to fill in the form. The form is then returned to the proposing party for review, resolution of disputes, and further editing. The parties should confer and file a final version in PDF format using the event "Notice of Filing" and also submit a final word processing copy to the court at dj.nuffer@utd.uscourts.gov, for ruling.

All objections which the objecting party intends to pursue should be listed, whether made at the deposition, as with objections as to form, or made newly in this form, if the objection is of a type that was reserved.

Summary Judgment Order

Ctrl+S

Orders for Expedited Treatment of Motion Sample 1 Sample 2

Order Granting Motion to Amend

Order Caption Document

E-filing Proposed Orders without Motions

If you have any problem downloading these documents, try right clicking on the link and then "Save Target as."

Signature Line

BY THE COURT:

_____

David Nuffer
United States District Judge

Trial Information and Forms

Criminal Trial Order Criminal Juror Questionnaire Optional Supplemental Criminal Juror Questionnaire Standard Criminal Jury Instructions
Civil Jury Trial Order Civil Bench Trial Order Civil Advance Juror Questionnaire Civil Juror Questionnaire Sample Optional Juror Questionnaire
Standard Civil Jury Instructions
Final Instruction to Jurors at Discharge - Civil and Criminal Cases

Jury Selection Procedures Jury Courtroom Seating Chart Juror Contact Order

Deposition Designation Form

Closing Argument Pointers

Professionalism and Civility

Attorneys are encouraged to subscribe to and observe the Utah Standards of Professionalism and Civility.

Employment

Judge Nuffer's staff includes one career and three term law clerks. Please check with the Case Manager about position openings.

We welcome intern assistance at all times of the year. We have enjoyed full time or part time intern assistance. We limit intern positions to students who have completed their second year of law school. Please submit a letter, resume and writing sample to dj.nuffer@utd.uscourts.gov.

Updated 02/16/2017

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

Plaintiff, vs. Defendants.	**ORDER REGARDING JUROR CONTACT** Case No. District Judge David Nuffer

[From the time the prospective jury panel was notified of the nature of this case in connection with questioning starting in [insert date], the jury, which includes jurors and alternate jurors, has not been permitted access to any news information on the case. News media have reported many matters not admitted in evidence in the trial and many matters occurring outside the presence of the jury.]

[The empaneled jury has been serving since [insert date]. During selection they were told to expect a four to five week trial, but we are now concluding the seventh week of their full time service.]

[The extended term of their service and their isolation from external sources of information recommends that members of the jury not be subjected to immediate and direct inquiry about their service. That would place additional demands on them not related directly to their important service, and would be unfair at this time as they try to resume normal life.]

Federal Rule of Evidence 606 imposes strict limitations on the admissibility of testimony by jurors. These limitations are intended to protect jurors from harassment; shield jurors from

prying questions; increase the certainty and finality of the jury's verdict; reduce the possibility of jury tampering and intimidation; and reduce the number of post-trial motions based on inadmissible evidence.

Juror contact is often sought by counsel to help improve trial skills and strategy, or by counsel and others to satisfy curiosity about the decision making process. These and other concerns are subordinate to the goals of the justice system – reaching a verdict based on admissible evidence – and to the policies expressed in the preceding paragraph.

This order imposes some limitations on jury contact as permitted by DUCivR 47-2, consistent with standing rules in many district courts.[1]

IT IS HEREBY ORDERED that:

a. No juror has an obligation to speak to any person about this case and may refuse all interviews or comments.

b. No person may make repeated requests for interviews or questions after a juror has expressed the desire not to be interviewed, or failed to respond to a request for direct contact under paragraph e.

c. No juror who consents to be interviewed may disclose any information with respect to the following:

1. The specific vote of any juror other than the juror being interviewed;
2. The opinions expressed by other jurors in deliberations;
3. Evidence of alleged improprieties in the jury's deliberation, other than whether
   (A) extraneous prejudicial information was improperly brought to the jury's attention;
   (B) an outside influence was improperly brought to bear on any juror; or
   (C) a mistake was made in entering the verdict on the verdict form.[2]

d. No person shall contact, interview, examine or question a juror, except as permitted in paragraph (e).

e. Any person wishing to direct a communication to a juror may do so by providing a copy in an unsealed envelope with a separate written statement that the person desires the

[1] Local Civil Rule 47, W.D. Wash.; Local Criminal Rule 31, W.D. Wash.; Local Rule 47.1 D. Kan.; LRCiv 39.2, D. Az,; D.C.Colo.LCivR 47.2.

[2] Fed. R. Evid. 606(b)(2).

communication be sent to a juror identified by juror number, and stating the reason such contact is desired. The communication may request an opportunity for direct contact, and provide contact information for the person initiating the communication. If the court determines that the content of the communication does not violate this order, the jury administrator shall mail the communication to the juror. The jury administrator shall enclose a copy of this order with the mailed communication.

f. Any person violating this order is subject to contempt of court and other possible sanctions.

g. Any person aware of a violation of this order may file a motion or notify the jury administrator at (801) 524-6285 or utah_jury@utd.uscourts.gov.

h. This order may be reviewed and revised on motion. Motions are most likely to be successful after some time has elapsed.

Dated [insert date].

BY THE COURT:

_____
David Nuffer
United States District Judge

POST-VERDICT INSTRUCTION

Your duty as jurors is complete. You are discharged from service. Thank you for your service. You have been extraordinarily diligent. Your attention, timeliness, and dedication are appreciated by all the parties, attorneys, court staff and public. You are now relieved of the instructions I have given you not to talk or read or research about the case. You may do so if you choose.

Just so you know, your **notes and jury instruction copies** must be left in the jury room to be destroyed.

You may be contacted by parties to the case, or their attorneys, or media representatives. You are under no obligation to speak to any of them. The court does not provide your contact information but people may find you and try to speak with you.

Consider carefully your obligation to and the feelings of your fellow jurors before speaking with anyone about your service here. **Because of the special relationship of jurors to each other, I strongly recommend you never disclose the vote, discussions or inclinations of a fellow juror.** The United States Supreme Court has stated that "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of lay people would all be undermined by a barrage of post-verdict scrutiny of juror conduct."[1]

The rules of evidence limit admission of any evidence about **jury deliberations** to evidence "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Nothing else about jury discussion or deliberation would be admissible in court, so I recommend

[1] *Tanner v. United States*, 107 S.Ct. 2739, 2748 (1989) *(citing* 96 Harv. L. Rev. at 888-892).

you not discuss jury discussions or deliberations, except you may discuss whether **outside information or influence** was improperly considered.

I have instructed you to make your decision only on the basis of the evidence presented in court and to ignore **outside information or influence**. So, as long as you kept your oath to consider only the evidence in this case, there is no reason to speak with anyone about your service here as a juror.

You may of course **discuss your own feelings or reactions to evidence presented or your reaction to jury service**. And so long as you do not indirectly reveal the statements or actions of any other juror, you will not impair that special relationship that exists between jurors.

You may want to be careful about reacting to questions about your reactions to evidence or ideas that were not presented to you in trial. Your duty was to consider the evidence presented at trial.

Again thank you very much for your service.

Judge Nuffer Jury Selection

The panel enters the courtroom after orientation. The panel consists of approximately 35 in civil cases, 50 in criminal cases.

They are seated according to the attached chart, and the jury administrator delivers a list of all jurors with name, residence city and county, and employment. Jurors are seated in the order listed.

The jury is informed of the trial schedule and the length of the case and asked if the schedule or medical or other personal issues present problems.

The case summary is read, and jurors are asked if they have heard or read anything about the case.

Jurors are asked if they are acquainted with court personnel, other potential jurors, attorneys, party representatives, or witnesses.

Each juror stands in turn to read the jury questionnaire. Follow up questions are asked.

Jurors are then asked case specific voir dire and asked to write down the number of any question to which they would answer "yes."

After all questions are read, then starting with Juror Number 1, the questions to which each juror has given YES answers are reviewed and clarified. If a juror feels that an answer is sensitive, the juror may so indicate. Those answers will be obtained later, in the jury room with counsel. Follow up questions are asked.

After all public responses are reviewed, the jury is put on break while those wishing to answer privately are taken one by one to the jury room. When all private responses are made, challenges for cause and peremptory challenges are taken while counsel and the court are still in the jury room.

Returning to court, the clerk reads the names of the jurors and the rest of the panel is excused.

Rev. 2/18/13

United States District Court for the District of Utah

Judge David Nuffer

JUROR QUESTIONNAIRE – CIVIL CASE

This is a supplemental questionnaire for a case in the United States District Court for the District of Utah. Your responses will **only** be used for jury selection purposes for this case.

IT IS HEREBY ORDERED BY THE COURT: that any recipient of this questionnaire shall not:

- Consult anyone or any source in preparation of answers.
- Disclose the contents of this questionnaire with any person.
- Research or investigate the subjects of this questionnaire.

After completing this questionnaire you will be asked to confirm your answers.

By clicking the **confirm button** at the end of the questionnaire, you are declaring under penalty of perjury and contempt of court that:

All my answers are true to the best of my knowledge and belief

I have not consulted anyone or any source in preparation of these answers

I will not disclose the contents of this questionnaire with any person

I will not research or investigate the subjects of this questionnaire

CURRENT CITY OF RESIDENCE: Please list your current city of residence and zip code.

CITIES YOU HAVE LIVED IN: Please list all the cities in Utah which you have lived, including our current city of residence. Also please include the years you lived in each city. (Example: Provo 1970-2002, Salt Lake City 2002-2017)

EDUCATION: Please tell us your highest level of education.

EDUCATION DEGREES: Please list any degrees, certificates or licenses you have received, including the year and the college or institution your received it from.

EMPLOYMENT: What is your current employment status?

EMPLOYER/SCHOOL INFORMATION: Please list the name of the business or individual that employs you and your employer's business address, if you are student please tells us where you attended school and your area of study.

WORK DUTIES: Please describe what you do at work. Does your employment experience include supervision of others? Does your employment experience include authority to hire and fire employees? If you are currently unemployed what is your customary work. If none of this applies to you just click next.

PREVIOUS EMPLOYMENT: You have already listed your current employment. If you have had previous employment what was your previous employment?

SPOUSE/PARTNER EMPLOYMENT: Please list your spouse/partner/former spouse's employment including if any, previous employment:

PRIOR JURY SERVICE: Have you ever served as a juror before?

PRIOR JURY SERVICE: If you have served as a juror previously in what year/years did you serve? If no prior jury service or experience click next.

PRIOR JURY SERVICE: If you have served as a juror previously what type of case did you serve on? Check all that apply. If no prior jury service or experience click next.

PRIOR JURY SERVICE: Please describe the case on which you served as a juror. If no prior jury service or experience click next.

PRIOR JURY SERVICE: If you served on a trial did you reach a verdict? If no prior jury service or experience click next.

PRIOR JURY SERVICE: Was your prior jury service a positive or negative experience? If no prior jury service or experience click next.

LAW ENFORCEMENT: Are you, or are any members of your family or close friends employed by a law enforcement agency?

LAW ENFORCEMENT: If you or any family members or close friends are employed by a law enforcement agency please list the agency and the years employed there. If you have no law enforcement affiliations click next.

LEGAL PROFESSION: Are you, or any members of your family or close friends employed in the legal profession?

LEGAL PROFESSION: If you or any members of your family or close friends are employed in the legal profession, please list the name of the law firm or court and their position at the firm or court. If you have no legal profession affiliations click next.

COURT EXPERIENCE: have you or any member of your family or close friends been involved in a court matter? It could have been a criminal case, civil case, divorce or

adoption. If so please describe the type of case, whether you, a family member or friend was involved in and the involvement (as a plaintiff, defendant, witness or victim).

LONG TRIAL HARDSHIP QUESTION: The trial you have been summoned for is anticipated to last four weeks. Jury selection will begin the week of September 5, 2017. The trial will begin as soon as the jury is chosen, and will last for four weeks. Are there any reasons why you would not be able to appear for jury selection on September 5th and potentially serve on a trial for four weeks? Only undue hardship or extreme inconvenience will be considered as an excuse from the obligation of serving on this trial. If you would indeed suffer an undue hardship or extreme inconvenience please indicate and explain your hardship on the next screen. The court may ask for additional documentation to support your excuse request.

Are there any reasons why you would not be able to appear for jury selection on September 5th and potentially serve on a trial for four weeks?

YES/No

HARDSHIP EXPLANATION

If you would not be able to serve on a trial lasting four weeks you must explain your hardship here:

If no hardship exists, click finish. TEXT ANSWER

United States District Court for the District of Utah
Judge David Nuffer
JUROR QUESTIONNAIRE - CIVIL CASE

(Please fill in and be prepared to orally present the portions in bold print to the Court.)

1. **My name is _____ and I am Juror Number _____.**

2. **I have lived in _____**(city)**, Utah since** _____(year).

3. **I am currently employed by _____.** (If you are self employed, please tell us what you do. If you are a homemaker, please so indicate. If you are retired, please tell us what your employment was when you retired).OR If you are a student, please tell us where you attend school. **I currently attend school at _____.**

4. **I am currently _____**(married/single/divorced/widowed/in a committed relationship/with a life partner).

5. **Those living with me at my home address include:**
Spouse/Partner _____ (name)
Children ___ (number)
Other: (specify number) _____

6. **My spouse** (or former spouse or life partner) **is employed by _____.** (If self employed, please describe. If homemaker/caregiver, please so indicate. If retired, please describe prior employment). If a student, please name the school.

7. **Others in my household, living with me are:**
(name) _____ (age)_____
(employment/school) _____
(name) _____ (age)_____
(employment/school) _____
(name) _____ (age)_____
(employment/school) _____
(name) _____ (age)_____
(employment/school) _____

8. **The ages and occupations of my children living outside my household are** (if applicable):

Age	Occupation
___	_____
___	_____
___	_____
___	_____
___	_____

9. **My highest level of education is _____** (high school, some college, college degree, post college degree - if you did not attend college, skip to question #11).

10. **My major in college is/was _____** (if applicable).

11. **My hobbies and interest are _____.**

12. **I belong to the following clubs or organizations or volunteer with _____** (excluding religious organizations).

13. **I like to read _____** (what books, magazines, newspapers, etc.).

14. **I have/have not served as a juror in a previous jury trial** (if you have not served on a jury before please skip to question #17).

15. (If you have served on a jury in a criminal trial before, please answer the following)
I served on a criminal jury trial in the year_____and the jury did/did not reach a verdict.
(If the jury reached a verdict) **The verdict was guilty/ not guilty. Generally speaking, my service on that jury was a ___positive/___negative experience.**

16. (If you have served on a jury in a civil trial before, please answer the following)
I served on a civil jury trial in the year _____ and the jury did/did not reach a verdict.
(If the jury reached a verdict) **The jury found for the plaintiff/defendant.**
Generally speaking, my service on that jury was a ___positive/___negative experience.

17. **I do/do not have a member of my immediate family who is, or know on a close personal basis, anyone in the legal profession.** (If you do have such a relative, or know such person)
The person I am related to or know is_____ and they are employed by _____ (the law firm they are with, the government agency they are employed by, or the type of judge they are).

THANK YOU

United States District Court for the District of Utah
Judge David Nuffer
SUPPLEMENTAL JUROR QUESTIONNAIRE – CIVIL CASE

Please read these statements.
Mark statements with which you agree.
The judge may later ask you to explain those statements.

A. I have served as a juror in a previous jury trial or as a member of a grand jury in either a federal or state court. *The judge will ask you if the trial was criminal or civil, whether the jury reached a verdict and what it was, and whether it was a positive or negative experience.*

B. I have a member of my immediate family who is, or know on a close personal basis, anyone in the legal profession. *The judge will ask you the name of this person, who they work for and what type of work they do.*

C. I have been involved, in any court, in a civil lawsuit (other than a divorce proceeding) that concerned myself, any member of my family, or a close friend, either as a plaintiff, a defendant, or a witness. *The judge will ask you about the case.*

D. A close friend or family member works in the insurance, real estate, title insurance, mortgage or escrow business. *The judge will ask you to explain the person and position and give the company's name*.

E. I, a close friend or family member, have used the services of a title insurance or escrow company recently. *The judge will ask you to explain the context and give the company's name.*

F. I, a close friend or family member, have had a negative experience with a title insurance or escrow company.

G. I have been accused of breaching a contract.

H. I, a close friend or family member have been involved in a serious dispute or lawsuit with an employer.

I. I now have or have had a written employment agreement or worked for a company with policies and procedures that imposed obligations of confidentiality, restrictions on my ability to compete with my employer after employment ended, or restrictions on my ability to solicit my employer's other employees after I leave my employment.

J. I, a close friend or family member, have been involved in a dispute or lawsuit concerning non-competition, non-solicitation, or confidentiality agreements.

K. I have strong opinions in favor of or against non-competition, non-solicitation, or confidentiality obligations imposed on employees by employers.

L. There is something else that I have not disclosed that might prevent me from being fair and impartial.

M. I have another reason that may mean I should not serve on this jury.

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

BIMBO BAKERIES USA, INC., Plaintiff, v. LELAND SYCAMORE and UNITED STATES BAKERY, Defendants.	**SPECIAL VERDICT** Case No. 2:13-cv-00749-DN-DBP District Judge David Nuffer

MEMBERS OF THE JURY:

When filling out this Special Verdict form, please follow the directions provided throughout the form. Read the questions and directions carefully. They explain the sequence in which the questions should be answered.

Your answer to each question must be unanimous.

Except where indicated, your findings are by a preponderance of the evidence.

Some of the questions contain legal terms that are defined and explained in the Jury Instructions. Please refer to the Jury Instructions if you are unsure about the meaning or usage of any legal term that appears in the questions.

FALSE ADVERTISING

1. **Has US Bakery engaged in false advertising by using the words "Fresh. Local. Quality." in connection with the advertising or promotion of its products?**

   Answer "Yes" or "No" yes

   If your answer is "Yes," then go to Questions No. 2 and 3. If your answer is "No," then continue to the questions under "Trade Secret Misappropriation."

2. **If you answered "Yes" to Question No. 1, did Bimbo Bakeries suffer actual damages as a result of the false advertising?**

   Answer "Yes" or "No" yes

3. **If you answered 'Yes" to Question No. 1, do you find that US Bakery's false advertising was willful?**

   Answer "Yes" or "No" yes

   If your answered "No" to Question No. 2 and to Question No. 3, then continue to the questions under "Trade Secret Misappropriation." If you answered "Yes" to either Question No. 2 or Question No. 3, then go to Question No. 4.

4. **If you answered "Yes" to either Question No. 2 or Question No. 3, what amount of profits did US Bakery receive as a result of its false advertising?**

   Amount $ 8,027,720

Continue on to answer the questions under Trade Secret Misappropriation.

TRADE SECRET MISAPPROPRIATION

1. **Does Bimbo Bakeries have a protectable trade secret?**

   Answer "Yes" or "No" yes

   If your answer is "Yes," then go to Question 2. If you answered "No," go to the Certification at the end of this form and have the foreperson sign and date this form.

2. **Have the defendants misappropriated a trade secret of Bimbo Bakeries?**

   Answer as to each of the defendants:

   US BAKERY

   Answer "Yes" or "No" yes

   LELAND SYCAMORE

   Answer "Yes" or "No" yes

   If your answer is "Yes" for any defendant, then go to Question No. 3. If you answered "No" for all defendants, go to the Certification at the end of this form and have the foreperson sign and date this form.

3. **What amount of damages, if any, has Bimbo Bakeries suffered as a result of the misappropriation of the trade secret?**

Amount $2,105,256

If you found Bimbo Bakeries has suffered damages as a result of the misappropriation of the trade secret, then go on to Question No. 4. If you found Bimbo Bakeries has not suffered damages as a result of the misappropriation of the trade secret, go to the Certification at the end of this form and have the foreperson sign and date this form.

4. **Of the total amount of damages, for how much is each defendant responsible?**

Do not fill in an amount for any defendant for which you answered "No" in Question No. 2.

US BAKERY

Amount $1,578,942

LELAND SYCAMORE

Amount $526,314

Go on to Question No. 5.

5. **For each defendant for which you answered "Yes" in Question No. 2, do you find *by clear and convincing evidence* that the trade secret misappropriation was willful and malicious?**

US BAKERY

Answer "Yes" or "No" yes

LELAND SYCAMORE

Answer "Yes" or "No" no

If your answer is "No" for any defendant for which you answered "Yes" in Question No. 2, then go to Question No. 6. Otherwise, go to the Certification at the end of this form and have the foreperson sign and date this form.

6. **For each defendant for which you answered "No" in Question No. 5, do you find *by the preponderance of the evidence* that the trade secret misappropriation was willful and malicious?**

US BAKERY

Answer "Yes" or "No" _____

LELAND SYCAMORE

Answer "Yes" or "No" yes

INSTRUCTIONS

After you have completed the questions as directed above, the Jury Foreperson is to date and sign this Special Verdict Form on behalf of the jury and notify the Court Security Officer that you have reached a verdict.

CERTIFICATION

We, the jury, unanimously agree to the answers to the foregoing questions and return this form as our verdict in this case.

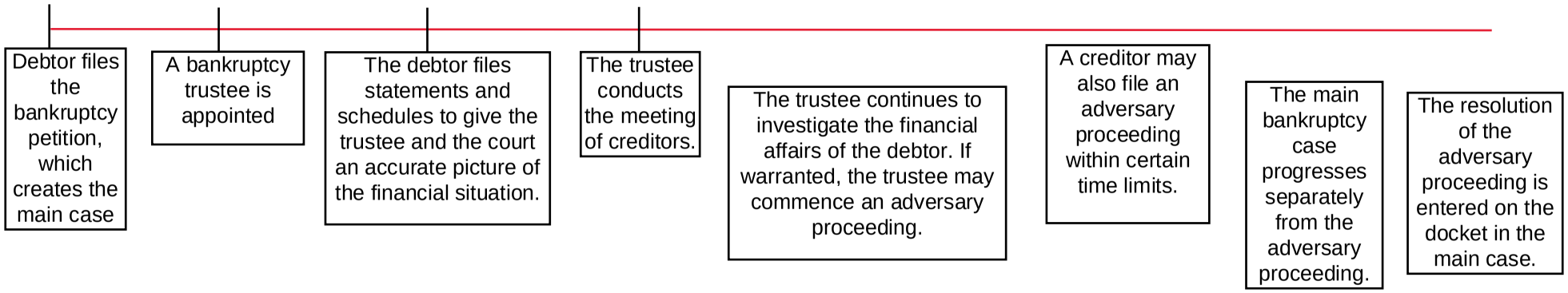
The verdict is not final until accepted by the court.

DATED this 6th of October 2017.

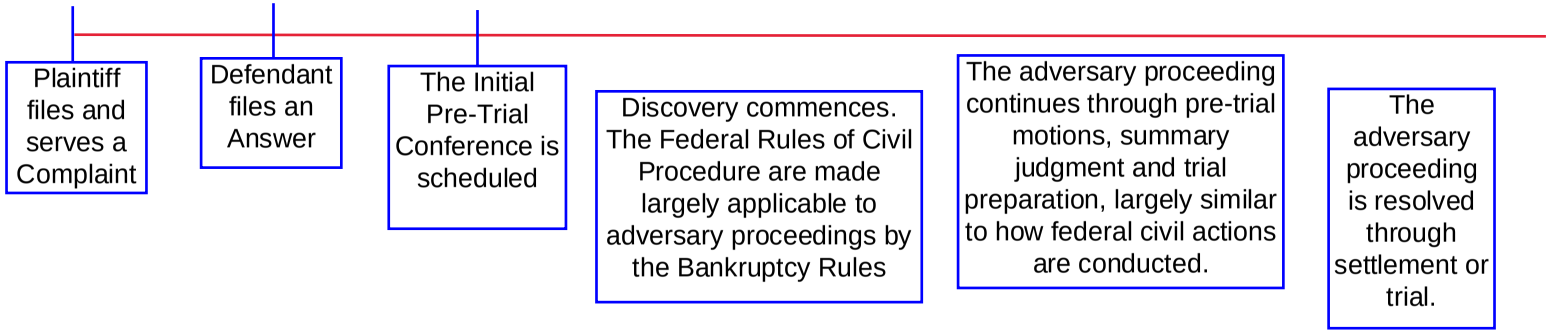
Mary M. Abbott
Jury Foreperson

The Adversary Proceeding in Bankruptcy

Main Bankruptcy Case (an adversary proceeding is filed while the main case is pending)



The Life of an Adversary Proceeding (concurrent with main case)



A few tips for working with the Bankruptcy Court:

Once an adversary proceeding is filed, Bankruptcy Rule 7001 et seq. (which correspond to the FRCP) govern the procedures for service, discovery, pre-trial matters, witnesses and evidence, summary judgment, and trial. Local Rules 7003-1 through 7069-1 are also applicable to adversary proceedings.

Use the forms specific to bankruptcy, found in the Forms and Local Rules link at www.utb.uscourts.gov.

Contact the scheduling clerk for a hearing date. No action will be taken on a motion until it is set for hearing or a pending order is filed.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

GUIDELINES FOR APPEAL PROCEDURES THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

Pursuant to Local Rules of the United States Bankruptcy Appellate Panel of the Tenth Circuit, the following guidelines should be used to facilitate the processing of an appeal. Further information can be obtained from the Bankruptcy Appellate Panel website at www.bap10.uscourts.gov. The forms mentioned below are accessible on the Bankruptcy Court's website www.utb.uscourts.gov.

1. Pursuant to U.S.C. § 158(c)(1), all appeals from Bankruptcy Courts in the Tenth Circuit are heard by the United States Bankruptcy Appellate Panel of the Tenth Circuit, unless the appellant at the time of filing the Notice of Appeal and Statement of Election elects to have the appeal heard by United States District Court District of Utah (District Court), OR any other party elects not later than 30 days after service of the Notice of Appeal and Statement of Election to have such appeal heard by the District Court. Other parties who elect to have the appeal heard by the District Court must file an Optional Appellee Statement of Election to Proceed in District Court with the Bankruptcy Appellate Panel.

2. Within 14 days after the filing of the Notice of Appeal and Statement of Election, the Appellant shall file a Designation of Record and Statement of Issues on Appeal with the Bankruptcy Court and serve a copy on the Appellee. The Appellee has 14 days after the service of Appellant's Designation of Record and Statement of Issues to file his/her own Designation of Record and Statement of Issues with the Bankruptcy Court and serve a copy on the Appellant. Pursuant to 10th Cir. BAP L.R. 8009-1, the designated items of the record on appeal for purposes of Fed. R. Bankr. P. 8009(a)(4) must be presented to the Bankruptcy Appellate Panel by the parties in the appendices as required by Fed. R. Bankr. P. 8018(b) and the 10th Cir. BAP L.R. 8018-1. Parties should not provide copies of the designated items to the bankruptcy court.

3. Timely Requests for Transcripts are necessary to ensure adequate time to reproduce the records. Any party must order the parts of the transcript that will be needed on appeal pursuant to Fed. R. Bankr. P. 8009(b). The Court will not bear the cost of requested transcripts. Please file the transcript order form with the Clerk of the Bankruptcy Court as proof of a timely request.

4. The Bankruptcy Court's Appeals Clerk, as required by 10th Cir. BAP L.R. 8010-1(a), has already transmitted copies of the Notice of Appeal and Statement of Election and other pertinent pleadings to the Clerk of the Bankruptcy Appellate Panel. A Bankruptcy Appellate Panel case number will be assigned, and further instructions to assist you will be forwarded, by the Bankruptcy Appellate Panel Clerk's office.

5. The Bankruptcy Court case docket may be obtained through PACER (https://www.pacer.gov/) or by contacting the Bankruptcy Court Clerk's office at 801-524-6687.

6. Contact information for the Bankruptcy Appellate Panel of the Tenth Circuit

U.S. Bankruptcy Appellate Panel of the Tenth Circuit
Office of the Clerk, Byron White U.S. Courthouse
1823 Stout Street, Denver, CO 80257
Tel: 303-335-2900, Fax: 303-335-2999

David A. Sime
Clerk of Court

Rev 4/16

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

GUIDELINES FOR APPEAL PROCEDURES TO UNITED STATES DISTRICT COURT

Pursuant to Fed. R. Bankr. P. 8001 through 8028, the following guidelines should be used to facilitate the processing of the recently filed appeal. The forms mentioned below are accessible on the Bankruptcy Court's website www.utb.uscourts.gov.

1. The Bankruptcy Court's Appeals Clerk, as required by DUCivR 83-7.9, has already transmitted copies of the Notice of Appeal and Statement of Election and other pertinent pleadings to the U.S. District Court Clerk's office. A District Court case number will be assigned. Within 14 days after the filing of the Notice of Appeal, the appellant shall file a Designation of Record and Statement of Issues on Appeal with the Bankruptcy Court and serve a copy on the Appellee. The Appellee has 14 days after the service of Appellant's Designation of Record and Statement of Issues to file his/her own Designation of Record and Statement of Issues with the Bankruptcy Court and serve a copy on the Appellant. All further documents shall be filed with the United States District Court for the District of Utah. Instructions to assist you will be forwarded by the District Court Clerk's office.

2. Timely Requests for Transcripts are necessary to ensure adequate time to reproduce the records. Any party must order the parts of the transcript that will be needed on appeal. The Court will not bear the cost of requested transcripts. Please file the transcript order form with the Clerk of the Bankruptcy Court and the U.S. District Court Clerk's office as proof of a timely request.

3. If the case is remanded to the Bankruptcy Court, counsel should obtain time on the Court's calendar for whatever proceedings are required. For further information see Fed. R. Bankr. P. 8001-8028.

4. As mentioned previously, forms may be obtained or referenced on the Bankruptcy Court website. In addition, copies of the docket may be obtained through PACER (www.pacer.gov) or by contacting the Bankruptcy Court Clerk's office at 801-524-6687.

David A. Sime

Clerk of Court

Rev. 4/16

SUING THE UNITED STATES, ITS AGENCIES, AND EMPLOYEES AND KEEPING THEM IN COURT

Jared C. Bennett
First Assistant United States Attorney
United States Attorney's Office District of Utah

I. SERVING THE UNITED STATES, ITS AGENCIES, AND EMPLOYEES

A. Fed. R. Civ. P. 4(i) governs service of process upon the United States, its agencies, and employees

B. Rule 4(i) is not subject to the waiver of service provisions. Fed. R. Civ. P. 4(d) (stating that only parties served under Rule 4(e), (f), or (h) are subject to waiver of service provisions)

C. Service on the United States:

1. Summons and complaint delivered "to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk"

OR

2. Registered or certified mail to the civil process clerk at the United States Attorney's Office. Fed. R. Civ. P. 4(i)(1)(A).

a. Civil Process Clerk for the District of Utah is Valerie Maxwell.

AND

3. Registered or certified mail to the Attorney General of the United States.

4. Service upon the United States Attorney is the start date for when the clock starts for the United States' responsive pleading or motion. Fed. R. Civ. P. 12(a)(2), (3).

D. If a federal agency or employee is being sued in an official capacity, you must:

1. Serve the United States (as explained above)

AND

2. Serve the federal agency or employee with the summons and complaint by registered or certified mail.

E. If a federal employee is being sued in his/her personal capacity, you must:

1. Serve the United States (as explained above)

AND

2. Serve the individual employee under Fed. R. Civ. P. 4(e), (f), or (g).

II. FEDERAL JURISDICTION GENERALLY

A. Unlike state courts, federal courts are of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

B. Federal court jurisdiction is so limited that courts "presume[] that a cause lies outside of this limited jurisdiction . . . ." *Id.*

C. The burden of establishing the federal court's jurisdiction over a matter "rests upon the party asserting jurisdiction." *Id.*

D. Against most parties, this jurisdictional burden can be resolved by establishing a federal question (28 U.S.C. § 1331) or diversity jurisdiction (28 U.S.C. § 1332) along with any supplemental jurisdiction (28 U.S.C. § 1367).

E. To have jurisdiction over the United States, however, mere federal question is not enough. The plaintiff must be able to show that the United States has waived its sovereign immunity. *See, e.g.*, *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) ("[J]urisdiction over a suit against the United States cannot be based upon 28 U.S.C. § 1331, because that statute does not waive the government's sovereign immunity[.]").

III. SOVEREIGN IMMUNITY

A. As a general rule, "'the United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

B. The United States' consent to be sued is "a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

C. In order for the United States to waive this sovereign immunity, the waiver "'cannot be implied but must be unequivocally expressed.'" *Id.* (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

D. The plaintiff bears the burden of establishing that the United States waived its sovereign immunity. *Mitchell*, 463 U.S. at 212.

IV. COMMON WAIVERS OF SOVEREIGN IMMUNITY

A. Federal Tort Claims Act ("FTCA")—28 U.S.C. §§ 1346(b)(1), 2401(b), 2671-80.

1. "The FTCA constitutes a limited waiver of the Government's sovereign immunity." *Cannon v. United States*, 338 F.3d 1183, 1188 n.10 (10th Cir. 2003).

2. FTCA grants "exclusive jurisdiction" to federal courts over:

a. "injury or loss of property, or personal injury or death caused by

b. the negligent or wrongful act or omission of any employee of the Government

c. while acting within the scope of his office or employment,

d. under circumstances where the United States, if a private person, would be liable to the claimant according to the law of the place where the act of omission occurred." 28 U.S.C. §§ 1346(b)(1); 2674.

3. Because the FTCA's waiver of sovereign immunity gives federal courts "exclusive jurisdiction," a tort case filed against the United States in state court will be dismissed even if removed to federal court because of doctrine of derivative jurisdiction. *Lopez v. Sentrillon Corp.*, 749 F.3d 347, 350 (5th Cir. 2014) (dismissing FTCA claims against United States that were removed from federal court because under derivative jurisdiction doctrine, federal court acquires jurisdiction to same extent as state court had prior to removal. Because state court had no jurisdiction over the United States, federal court did not either).

4. Congress established certain conditions on the FTCA's waiver of sovereign immunity:

a. Plaintiff must present tort claim to agency in writing within 2 years of claim's accrual. 28 U.S.C. § 2401(b).

--The SF-95 is the form to file with the agency to which you are presenting your client's tort claim.

--Failure to timely present claim to agency means that it is "forever barred," 28 U.S.C. § 2401(b), although equitable tolling may apply in limited cases. *United States v. Kwai Fun Wong*, 135 S.Ct. 1625, 1632-33 (2015).

b. To meet the FTCA's presentation requirements for purposes of sovereign immunity, a claim to the agency must contain "'(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim.'" *Bradley v. United States ex rel. Veterans Admin.*, 951 F.2d 268, 270 (10th Cir. 1991) (citation omitted).

c. If the agency denies a claim, the plaintiff has 6 months from the denial to file an action federal district court. 28 U.S.C. § 2401(b). This is also subject to equitable tolling. *Kwai Fun Wong*, 135 S.Ct. at 1633.

d. Plaintiff is limited to damages stated in administrative claim absent exceptional circumstances. 28 U.S.C. § 2675(b).

--Punitive damages not available. 28 U.S.C. § 2674.

--Pre-judgment interest not available. 28 U.S.C. § 2674.

5. Bench trial only in FTCA cases. 28 U.S.C. § 2402.

6. Under 28 U.S.C. § 2680(h), the FTCA does NOT waive sovereign immunity for:

a. Claims based on government employee's execution of a "discretionary function." 28 U.S.C. § 2680(a). For example,

--Firefighting activities

--Deciding not to have parking lot lighting in a National Park

b. Claim arising out of the loss, miscarriage, or negligent transmission of the mail. 28 U.S.C. § 2680(b).

c. Claims arising over seizure of goods. 28 U.S.C. § 2680(c).

d. Claims "arising out of" assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 2680(h).

--However, sovereign immunity is waived for claims of assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution where actions of law enforcement officer involved. 28 U.S.C. § 2680(h).

B. TAKINGS CLAIMS & CONTRACT CLAIMS

1. Tucker Act provides waiver of sovereign immunity for takings claims and contract claims. 28 U.S.C. § 1491.

2. However, Tucker Act's waiver of sovereign immunity requires takings and contract claims over $10,000.00 to be filed in the Federal Court of Claims not federal district court. *E. Enter. v. Apfel*, 524 U.S. 498, 520 (1998).

3. Caveat: There are times when Congress has withdrawn the requirement to file with the Federal Court of Claims for certain types of takings.

C. QUIET TITLE

1. 28 U.S.C. § 2409a: Waives sovereign immunity to file a quiet title action against the United States in which the United States claims an ownership interest.

a. It provides the federal district courts with "exclusive jurisdiction" over quiet title claims against the United States. 28 U.S.C. § 1346(f).

--Derivative jurisdiction applies if case filed in state court first.

b. Waiver of sovereign immunity precludes disturbing the United States in its possession of the land and preliminarily enjoining the United States as part of a quiet title action. 28 U.S.C. § 2409a(b), (c).

c. Complaint must state "with particularity" the "nature of the right, title, or interest in which the plaintiff claims in the real property, the circumstances under which

it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(d).

d. No jury trial. 28 U.S.C. § 2409a(f).

2. 28 U.S.C. § 2410: Waiver of sovereign immunity that allows plaintiff to bring United States into either federal or STATE COURT to quiet title to, foreclose a mortgage or lien, to partition, to condemn, or of interpleader on real or personal property "on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a). The United States can still remove to federal court under 28 U.S.C. § 1442.

a. This waiver of sovereign immunity requires pleading with particularity. 28 U.S.C. § 2410(b).

b. Rules regarding service on the United States and its response time are set out and preempt state law to the contrary. 28 U.S.C. § 2410(b).

D. INJUNCTIVE & DELCARATORY RELIEF

1. 5 U.S.C. § 702: Waives sovereign immunity to:

a. Seek judicial review of many executive agency final agency actions that do not already have a procedure for challenging them in a specific laws; and

b. Seek injunctive or declaratory relief, "other than money damages" for a claim that an agency or an officer/employee thereof acted or failed to act in an official capacity or under color of legal authority.

V. ETHICAL CONSIDERATIONS IN SUING THE UNITED STATES

A. Utah R. Prof. Conduct 4.2(a): In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.

B. How does this apply to government agencies that your client is suing?

1. Utah St. Bar Eth. Op. No. 115R, 1994 WL 579853 (approved July 29, 1994) (opining that a lawyer representing a government office or department may not prevent lawyer representing private party from contacting any employee of the government office or department outside presence of government attorney, whether or not the communication involves a matter in litigation. However, if counsel for a private party contacts an employee of a government agency about pending litigation against the agency involving the private party, counsel must inform the government employee (a) about the pending litigation or that the matter has been referred to agency counsel and (b) about his representation of a private party in that litigation.)

2. When an Assistant United States Attorney ("AUSA") is defending the United States, the AUSA represents the United States not the government employee UNLESS the government employee is being sued in his/her personal capacity. Consequently, contacting a represented government employee about a personal capacity matter against him/her in litigation will implicate Rule 4.2 as it would for any other individual.

Press Release

SEC Announces Its Largest-Ever Whistleblower Awards

FOR IMMEDIATE RELEASE
2018-44

Washington D.C., March 19, 2018 — The Securities and Exchange Commission today announced its highest-ever Dodd-Frank whistleblower awards, with two whistleblowers sharing a nearly $50 million award and a third whistleblower receiving more than $33 million. The previous high was a $30 million award in 2014.

"These awards demonstrate that whistleblowers can provide the SEC with incredibly significant information that enables us to pursue and remedy serious violations that might otherwise go unnoticed," said Jane Norberg, Chief of the SEC's Office of the Whistleblower. "We hope that these awards encourage others with specific, high-quality information regarding securities laws violations to step forward and report it to the SEC."

The SEC has awarded more than $262 million to 53 whistleblowers since issuing its first award in 2012. All payments are made out of an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards.

Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action.

Whistleblower awards can range from 10 percent to 30 percent of the money collected when the monetary sanctions exceed $1 million. As with this case, whistleblowers can report jointly under the program and share an award.

By law, the SEC protects the confidentiality of whistleblowers and does not disclose information that might directly or indirectly reveal a whistleblower's identity.

For more information about the whistleblower program and how to report a tip, visit www.sec.gov/whistleblower.

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Related Materials

- SEC Order
- SEC Whistleblower Program Info & Statistics

Office of the Whistleblower

Submit a Tip

To qualify for an award under the Whistleblower Program, you must submit information regarding possible securities law violations to the Commission in one of the following two ways:

(1) By submitting a tip electronically through the SEC's Tips, Complaints and Referrals Portal by clicking the button below.

Submit a Tip

**The TCR complaint form is compatible for use with Microsoft Internet Explorer (IE) version 11, Safari, Mozilla Firefox and Google Chrome (please note that use of the Chrome browser may result in some visual format issues including the display of instructional pop up boxes). **

(2) By mailing or faxing a Form TCR to:

SEC Office of the Whistleblower
100 F Street NE
Mail Stop 5631
Washington, DC 20549
Fax: (703) 813-9322

If you are submitting additional information relating to a previously submitted tip, please reference your original TCR submission number.

Important Notes

If you submit your information online through the SEC's Tips, Complaints and Referrals Portal, and would like to (1) be eligible to apply for a whistleblower award and/or (2) receive additional confidentiality protections (even if you do not wish to be considered for an award), you must answer "yes" to the question "Are you filing this tip under the SEC's whistleblower program?" on the "About You" page of the online questionnaire. You must also complete the whistleblower declaration at the end of the questionnaire.

The SEC treats all tips, complaints and referrals as confidential and nonpublic, and does not disclose such information to third parties, except in limited circumstances authorized by statute, rule, or other provisions of law. As a matter of practice, the whistleblower program provides additional confidentiality protections, consistent with the limitations on disclosure of information that could reasonably be expected to reveal the identity of a whistleblower set forth in Section 21F(h)(2) of the Securities Exchange Act of 1934 [15 U.S.C. § 78u-6(h)(2)] and Rule 21F-7 of the SEC's Whistleblower Rules [17 C.F.R. § 240.21F-7]. You should answer "yes" to the whistleblower program question if you wish to avail yourself of these additional confidentiality protections, even if you are not interested in being eligible for a whistleblower award.

Please note that if you choose to submit your information anonymously, i.e., without providing your identity or contact information, you must be represented by, and provide contact information for, an attorney in connection with your

submission in order to be eligible for an award.

Contact Us

100 F Street NE
Mail Stop 5631
Washington, DC 20549
Phone: (202) 551-4790
Fax: (703) 813-9322

Modified: April 12, 2018

Office of the Whistleblower

Frequently Asked Questions

The answers to these frequently asked questions represent the views of the staff of the Office of the Whistleblower. They are not rules, regulations or statements of the Securities and Exchange Commission. Further, the Commission has neither approved nor disapproved them. These FAQs provide short general summaries of certain key features of the SEC Whistleblower Program and do not purport to be a complete or comprehensive discussion of all of its provisions. For detailed information about the program, including eligibility requirements and certain limitations that apply, please see Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Final Rules implementing the program.

1. What is the SEC Whistleblower Program?

The Whistleblower Program was created by Congress to provide monetary incentives for individuals to come forward and report possible violations of the federal securities laws to the SEC. Under the program eligible whistleblowers (defined

below) are entitled to an award of between 10% and 30% of the monetary sanctions collected in actions brought by the SEC and related actions brought by certain other regulatory and law enforcement authorities.

The Program also prohibits retaliation by employers against employees who provide us with information about possible securities violations.

2. Who is an eligible whistleblower?

An "eligible whistleblower" is a person who voluntarily provides the SEC with original information about a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur. The information provided must lead to a successful SEC action resulting in an order of monetary sanctions exceeding $1 million. One or more people are allowed to act as a whistleblower, but companies or organizations cannot qualify as whistleblowers. You are not required to be an employee of the company to submit information about that company. *See* Rule 21F-2. In addition, to be eligible for an award, the information must be provided in the form and manner required under the whistleblower rules. See Rule 21F-9 and FAQ 9.

3. What information can I submit to the SEC?

The SEC conducts investigations into possible violations of the federal securities laws. In general, the more specific, credible, and timely a whistleblower tip, the more likely it is that the tip will be forwarded to investigative staff for further follow-up or investigation. For instance, if the tip identifies individuals involved in the scheme, provides examples of particular fraudulent transactions, or points to non-public materials evidencing the fraud, the tip is more likely to be assigned to Enforcement staff for investigation.

The SEC does not have jurisdiction to take action on information that is outside the scope or coverage of the federal securities laws. We may, in appropriate circumstances, refer your matter to another regulatory or law enforcement agency.

If you would like to provide the SEC with information about fraud or wrongdoing involving potential violations of the federal securities laws please follow the instructions provided in Rule 21F-9 and FAQ 9. Some examples of the kind of conduct the SEC is interested in include:

- Ponzi scheme, Pyramid Scheme, or a High-Yield Investment Program
- Theft or misappropriation of funds or securities
- Manipulation of a security's price or volume
- Insider trading
- Fraudulent or unregistered securities offering
- False or misleading statements about a company (including false or misleading SEC reports or financial statements)
- Abusive naked short selling
- Bribery of, or improper payments to, foreign officials
- Fraudulent conduct associated with municipal securities transactions or public pension plans
- Other fraudulent conduct involving securities

4. What does it mean to "voluntarily" provide information?

Your information is provided "voluntarily" if you provide it to us or another regulatory or law enforcement authority before (i) we request it from you or your lawyer or (ii) Congress, another regulatory or enforcement agency or self-regulatory organization (such as FINRA) asks you to provide the information in connection with an investigation or certain examinations or inspections. *See* Rule 21F-4(a).

5. What is "original information?"

"Original information" is information derived from your independent knowledge (facts known to you that are not derived from publicly available sources) or independent analysis (evaluation of information that may be publicly available but which reveals information that is not generally known) that is not already known by us. So if we received your information previously from another person, that information will not be original information unless you were the original source of the information that the other person submitted. *See* Rule 21F-4(b)(1).

6. How might my information "lead to" a successful SEC action?

Your information satisfies the "led to" criterion if your information causes us to open a new investigation, re-open a previously closed investigation or pursue a new line of inquiry in connection with an ongoing investigation, and we bring a successful enforcement action based at least in part on the information you provided. Additionally, you may still be eligible if your information relates to an ongoing examination or investigation, if the information you provide significantly contributes to the success of our resulting enforcement action. You may also be eligible if you report your information internally first to your company, and the company later reports your information to us, or reports the results of an internal investigation that was prompted by your information, as long as you also report directly to us within 120 days. *See* Rule 21F-4(c).

7. I work at a company with an internal compliance process. Can I report internally and still be eligible for a whistleblower award?

You may report internally at your company, but internal reporting is not required to be considered for an award. If you choose to report internally, but also report the information to us within 120 days of reporting it internally, then (i) we will consider your information to be reported to the SEC on the date you reported it internally, and (ii) if the company conducts an investigation based on your internal report and then reports the results to us, you will benefit from all the information the Company's investigation uncovers. Also your participation in your internal compliance program will be a positive factor when we are considering an award percentage. Please visit the retaliation section for more information regarding your retaliation protections when reporting internally. *See* Rules 21F-4(b)(7) and 21F-4(c).

8. I provided information to the SEC before the enactment of Dodd-Frank on July 21, 2010. Am I eligible for an award?

Awards are available only in connection with information submitted to the SEC after July 21, 2010. *See* Rule 21F-4(b)(1).

9. How do I submit information under the SEC whistleblower program?

In order to be considered for an award under the whistleblower program, you must submit your information either through our online Tips, Complaints and Referrals questionnaire and answer "yes" to the questions regarding participating in the whistleblower program or by completing our hardcopy Form-TCR and mailing or faxing it to the SEC Office of the Whistleblower, 100 F Street NE, Mail Stop 5631, Washington, DC 20549, Fax (703) 813-9322. In addition, you must personally execute the declarations under penalty of perjury on these forms in the sections provided. *See* Rule 21F-9.

Whistleblowers who use the online portal to submit a complaint receive a computer-generated confirmation of receipt with a TCR submission number. For those who submit a hard-copy Form TCR by mail or fax, the Office of the Whistleblower ("OWB") sends an acknowledgement letter, which includes a TCR submission number.

After submitting an initial tip, a whistleblower is free to submit additional information or materials. Unless otherwise instructed, additional information may be sent to OWB in hard-copy by mail or fax and should include the original TCR submission number. OWB will acknowledge receipt of additional information or materials by letter.

10. Can I submit my information anonymously?

Yes, you may submit anonymously. To be eligible for an award you must have an attorney represent you in connection with your submission. Your attorney must submit your information on your behalf either through our online Tips, Complaints and Referrals questionnaire, or by submitting hard copy Form TCR, in either case completing the required attorney certification. In addition, you must provide the attorney with a completed hard copy Form TCR signed under penalty of perjury at the time of your anonymous submission. *See* Rule 21F-9.

11. Will the SEC keep my identity confidential?

Whether or not you seek anonymity, the SEC is committed to protecting your identity to the fullest extent possible. For example, we will not disclose your identity in response to requests under the Freedom of Information Act. However, there are limits on our ability to shield your identity and in certain circumstances we must disclose it to outside persons or entities. For example, in an administrative or court proceeding, we may be required to produce documents or other information which would reveal your identity. In addition, as part of our ongoing investigatory responsibilities, we may use information you have provided during the course of our investigation. In appropriate circumstances, we may also provide information, subject to confidentiality requirements, to other governmental or regulatory entities. *See* Rule 21F-7.

12. What happens to my tip once it's received by the SEC?

All tips, complaints and referrals received by the SEC are fully reviewed by our Enforcement staff. During the evaluation process, the Office of Market Intelligence ("OMI") staff examines each tip to identify those with high-quality information that warrant the additional allocation of SEC resources. When OMI determines a complaint warrants deeper investigation, OMI staff assigns the complaint to one of the SEC's eleven regional offices, a specialty unit, or to an Enforcement group in the Home Office. Complaints that relate to an existing investigation are forwarded to the staff working on the matter. Tips that could benefit from the specific expertise of another Division or Office within the SEC generally are forwarded to staff in that Division or Office for further analysis.

The SEC may use information from whistleblower tips and complaints in several different ways. For example, the SEC may initiate an enforcement investigation based on the whistleblower's tip. A whistleblower tip may also prompt the SEC to commence an examination of a regulated entity or a review of securities filings, which may lead to an enforcement action. Even if the tip does not cause an investigation to be opened, it may still help lead to a successful enforcement action if the whistleblower provides additional information that significantly contributes to an ongoing or active investigation.

The SEC conducts its investigations on a confidential basis as a matter of policy. The purpose of this policy is to protect the integrity of any investigation from premature disclosure and to protect the privacy of persons involved in our investigations. The SEC generally does not comment on whether it has opened an investigation in a particular matter or the status of its investigations. While this can be frustrating, it is necessary to protect the integrity of the investigative process.

13. How will I learn about the opportunity to apply for an award?

We will post on this website Notices of Covered Action ("NoCA") exceeding $1 million in sanctions so that anyone who believes they may be eligible will have an opportunity to apply for a whistleblower award. In addition, if staff has been working with you, or if you inquired regarding a posting, we may contact you or your attorney directly to alert you to the opportunity to apply for an award. However, OWB contacting you or your attorney does not mean we have made any determination regarding your eligibility for an award. Additionally, the responsibility to apply for an award before the deadline passes lies solely with the whistleblower. *See* Rule 21F-10.

OWB sends email alerts to GovDelivery when the NoCA listing is updated. Whistleblowers and other members of the public may sign up to receive an update via email every time the list of NoCAs on OWB's website is updated. OWB typically posts new NoCAs on its website at the end of each month.

14. How do I apply for an award?

Once the case you believe your information led to is posted, you must complete and return Form WB-APP within 90 calendar days to the Office of the Whistleblower via mail to 100 F Street, NE, Mail Stop 5631, Washington DC 20549, or by fax (703) 813-9322. *See* Rule 21F-10. Section D of Form WB-APP requires that you provide the case name and notice number for the Covered Action for which you seek an award. If you do not identify a covered action, your application may be considered deficient and you may not be considered for an award. OWB acknowledges receipt of Form WB-APPs by letter. We will notify you when the Claims Review Staff issues a preliminary determination with respect to your award claim. *See* Rule 21F-10(d). OWB will not be able to give you status updates on your pending application for award.

15. How can I apply for an award in connection with a related action?

Individuals who provide information that leads to successful SEC actions resulting in monetary sanctions over $1 million may also be eligible to receive an award if the same information led to a related action brought by certain other authorities, such as a parallel criminal prosecution. You must complete and return Form WB-APP to the Office of the Whistleblower via mail to 100 F Street, NE, Mail Stop 5631, Washington DC 20549, or by fax (703) 813-9322. OWB acknowledges receipt of Form WB-APPs by letter.

If a final order imposing monetary sanctions has been entered in a related action at the time you submit your claim for an award in connection with SEC's action, you must submit your claim for an award in that related action on the same Form WB-APP that you use for the SEC action. If a final order imposing monetary sanctions in a related action has not been entered at the time you submit your claim for an award in connection with a SEC action, you must submit your claim on Form WB-APP within 90 calendar days of the issuance of a final order imposing sanctions in the related action. *See* Rule 21F-11.

16. What factors does the SEC consider in determining the amount of the award?

The Rules require that we consider many factors in determining the amount of an award based on the unique facts and circumstances of each case.

We may *increase* the award percentage based on the existence of these factors:

- The significance of the information you provided us to the success of any proceeding brought against wrongdoers.
- The extent of the assistance you provide us in our investigation and any successful proceeding.
- Our law enforcement interest in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of these laws.
- Whether, and the extent to which, you participated in your company's internal compliance systems, such as, for example, reporting the possible securities violations through internal whistleblower, legal or compliance procedures

before, or at the same time, you reported them to us.

We may *reduce* the amount of an award based on these factors:

- If you were a participant in, or culpable for the securities law violation(s) you reported.
- If you unreasonably delayed reporting the violation(s) to us.
- If you interfered with your company's internal compliance and reporting systems, such as, for example, making false statements to your compliance department that hindered its efforts to investigate possible wrongdoing. *See* Rule 21F-6.

17. Can I appeal the SEC's award decision?

You have two opportunities to appeal the award determination. First, OWB will notify you of the preliminary determination of the SEC's claims review staff to recommend that the SEC either grant or deny your award application, and if granted, the percentage amount of your award. You may request reconsideration of this preliminary determination by submitting your response to OWB within 60 days of the later of (i) the issuance of the preliminary determination or (ii) your receipt of the record that was relied upon in making the preliminary determination, if you requested the record within 30 days of the issuance of the preliminary determination. See Rule 21F-10. The claims review staff will consider your response and forward its proposed final determination to the Commission. If the Commission denies your application for an award, you may file an appeal in an appropriate United States Court of Appeals within 30 days of the Commission's final decision being issued. *See* Rule 21F-13. However, if you are granted an award and the Commission follows the factors described above and the total amount awarded is between 10% and 30% of the monetary sanctions collected in the action, then the Commission's decision is not appealable.

18. What rights do I have if my employer retaliates against me for submitting information to the SEC?

Employers may not discharge, demote, suspend, harass, or in any way discriminate against you because of any lawful act done by you in, among other things, (i) providing information to us under the whistleblower program, or (ii) assisting us in any investigation or proceeding based on the information submitted. If you believe that your employer has wrongfully retaliated against you, you may report your concerns to the SEC and we may, in appropriate circumstances, bring an enforcement action against a company.

You can find more information about the Dodd-Frank whistleblower protections, including the time period by which a whistleblower must file a private action in federal court, in Section 922 of the Dodd-Frank Act.

Also, under the Sarbanes-Oxley Act, you may be entitled to file a complaint with the U.S. Department of Labor if you are retaliated against for reporting possible securities law violations. For more details on filing whistleblower complaints under the Sarbanes-Oxley Act, please visit the Department of Labor's whistleblower website.

For more information about retaliation, please see the retaliation section of the website.

19. If I have more questions who can I call?

To help promote the agency's whistleblower program and establish a line of communication with the public, OWB operates a whistleblower hotline where whistleblowers, or would-be whistleblowers, their attorneys, or other members of the public with questions about the program may call. Individuals leave messages on the hotline, which are returned by OWB attorneys within 24 business hours. To protect the identity of whistleblowers, OWB will not leave return messages unless the caller's name is clearly and fully identified on the caller's voicemail message, or unless the caller gives their permission for us to leave a message. If OWB is unable to leave a message because the individual's name is not

identified or if it appears to be a shared voicemail system, OWB attorneys make two additional attempts to contact the individual.

If you would like to speak to an attorney in the Office please call 202-551-4790 and provide your TCR submission number (if you have one) when you leave a message.

Modified: March 23, 2018

Enforcement Cooperation Program

The SEC Enforcement Division's Cooperation Program includes various measures designed to encourage greater cooperation by individuals and companies in SEC investigations and enforcement actions. The program provides incentives to individuals and companies who come forward and provide valuable information to SEC investigators. The SEC uses an analytical framework to evaluate whether, how much, and in what manner to credit the cooperation by individuals and companies in its investigations and enforcement actions.

The Benefits of Cooperation

There is a spectrum of tools available to the Commission and its staff for facilitating and rewarding cooperation by individuals and entities. These benefits to cooperators can range from reduced charges and sanctions in enforcement actions to taking no enforcement action at all.

Cooperation by individuals and entities in SEC investigations and related enforcement actions can contribute significantly to the success of the agency's mission. Information obtained from cooperators helps detect violations of the federal securities laws, increase the effectiveness and efficiency of SEC investigations, and provide important evidence necessary to take enforcement actions. The program gives SEC investigators access to high-quality, firsthand evidence, resulting in stronger cases that can shut down fraudulent schemes earlier than otherwise would be possible.

Commission statements regarding cooperation

Cooperation by individuals

In January 2010, the Commission issued a issued a policy statement articulating a framework for evalua by individuals in the Commission's investigations and actions. This policy statement identified four general considerations to use in assessing cooperation:

1. Assistance provided by the cooperator. This includes considerations such as the value and nature of the cooperation;
2. Importance of the underlying matter. This includes considerations such as the danger posed to investors by the underlying misconduct;
3. Interest in holding the individual accountable. This includes considerations such as a cooperator's culpability relative to that of other violators; and

4. Profile of the individual. This includes considerations such as acceptance of responsibility for the misconduct.

Information concerning the circumstances under which individuals may receive credit as part of the SEC's cooperation initiative also is available in a litigation release, SEC Credits Former AXA Rosenberg Executive for Substantial Cooperation during Investigation.
March 19, 2012

Cooperation by entities

In October 2001, the Commission issued a Report of Investigation and Statement explaining its decision not to take enforcement action against a public company it had investigated for financial statement irregularities. In this report, commonly referred to as the Seaboard Report, the Commission articulated an analytical framework for evaluating cooperation by companies. The report detailed the many factors the Commission considers in determining whether, and to what extent, it grants leniency to investigated companies for cooperating in its investigations and for related good corporate citizenship. Specifically, the report identifies four broad measures of a company's cooperation:

1. Self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
2. Self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations;
3. Remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
4. Cooperation with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.

SEC Cases Utilizing Cooperation Tools

The SEC's cooperation program has proven valuable in a wide range of cases spanning the full spectrum of its enforcement program from insider trading and market manipulation to FCPA violations and financial fraud.

Here are some examples:

Cooperation Agreements

The Enforcement Division has signed many agreements under which it recommends to the Commission that a cooperator receive credit for cooperating in investigations or related enforcement actions if the cooperator provides substantial assistance such as full and truthful information and testimony.

Some cases involving cooperation agreements include:

- Reverse merger scheme involving China-based companies
- Coding error at money manager
- Accounting fraud at animal feed company
- Fraud on senior citizens who invested $75 million in purported charity
- Revenue recognition scheme
- Mismanagement of collateralized debt obligations
- Insider trading in shares of insurance company
- Subprime bond pricing scheme during credit crisis

Deferred Prosecution Agreements

These are agreements under which the Commission agrees to forego an enforcement action against a cooperator if the individual or company agrees to cooperate fully and truthfully and comply with express prohibitions and undertakings during a period of deferred prosecution.

Cases involving DPAs include:

- A corporate director
- An individual in an FCPA case
- Pricing information about residential mortgage-backed securities
- FCPA violations involving attempted bribes in Qatar
- Misclassification of impaired loans at a bank
- Former hedge fund administrator
- Non-profit fund for mortgages and construction
- FCPA violations involving bribes in Uzbekistan

Non-Prosecution Agreements

These agreements are entered into in limited circumstances in which the Commission agrees not to pursue an enforcement action against a cooperator if the individual or company agrees to cooperate fully and truthfully and comply with express undertakings.

Cases involving NPAs include:

- Two companies who promptly self-reported bribes paid to Chinese officials by foreign subsidiaries, cooperated extensively with the ensuing SEC investigations, and took swift remedial measures
- Insider trading in shares of e-commerce company
- FCPA violations involving bribes to Argentinian government officials
- Misstatements concerning mortgage exposure at Fannie Mae and Freddie Mac
- Financial fraud at children's clothing marketer

Email Updates

Signup for news about this topic.

Email address

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More Information

The SEC's Cooperation Program: Reflections on Five Years of Experience

Announcement to Begin Cooperation Program

Framework for evaluating cooperation by individuals

Framework for evaluating cooperation by companies

Enforcement Manual with Details of Tools for Fostering Cooperation

Contact the SEC's Division of Enforcement

Report a potential violation of the securities laws

Modified: Sept. 20, 2016

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https://www.sec.gov/whistleblower/submit-a-tip

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Office of the Whistleblower

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http://www.utfraud.com/

STOP FRAUD UTAH

#StopFraudUtah

VIEW WHITE COLLAR CRIME OFFENDERS IN UTAH

Stop Fraud Utah is a joint initiative by Federal, State, and Local law enforcement to educate consumers about financial fraud and how to avoid it.

Participating organizations include the U.S. Securities and Exchange Commission, U.S. Attorney's office, Utah Attorney General's Office, Financial Industry Regulatory Authority (FINRA), Utah Division of Securities, U.S. Commodity Futures Trading Commission, Utah Division of Consumer Protection, FBI, IRS and Salt Lake County/Utah County Attorneys offices.

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Find and connect with trusted financial service providers online.

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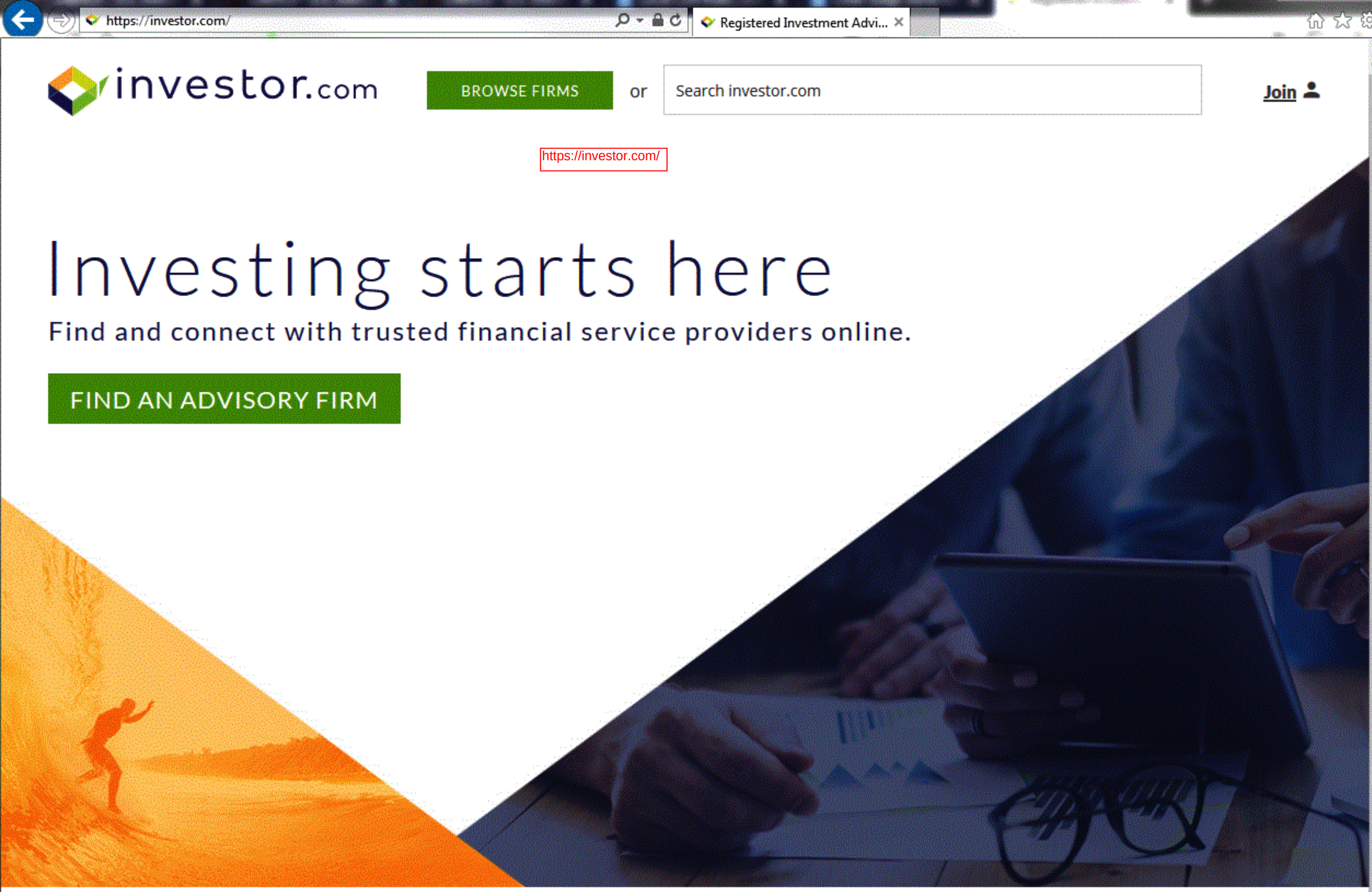

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Information for Longfin Corp. Investors

For details, read the article here.

SECURING FUTURES

The SEC enforces the securities laws to protect the more than 65 million American households that have turned to the securities markets to invest in their futures—whether it's starting a family, sending kids to college, saving for retirement or attaining other financial goals.

WE INFORM AND PROTECT INVESTORS

WE FACILITATE CAPITAL FORMATION

WE ENFORCE FEDERAL SECURITIES LAWS

WE REGULATE SECURITIES MARKETS

WE PROVIDE DATA

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Latest News

SEC Launches Additional Investor

Utah Standards of Professionalism and Civility Excerpts

11. Lawyers shall avoid impermissible ex parte communications.

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards

Maintaining the Public Trust – Ethics for Federal Judicial Law Clerks (4th ed., Federal Judicial Center 2013)

Dealing with attorneys

Dealing with attorneys can pose challenges. Attorneys often want an insider's view on how their cases are going and how they can improve their clients' prospects. They may call and try to argue their points, and lead you into a discussion of the case. Do not participate in these conversations. Some judges do not permit law clerks to talk with counsel at all. But even if your judge allows you to talk with attorneys under certain circumstances, never discuss or divulge confidential information.

If an attorney tries to continue the conversation, say, "If you made those points in your filing, the judge will read it and consider them." If the attorney tries to discern the judge's thoughts, say, "I'm sorry, but you'll have to wait until the opinion issues." Making these statements can be more difficult if you know the attorney from law school or through your family, or if the attorney has appeared in multiple cases before your judge. But your obligation to the court remains the same: to protect confidential information and the integrity of the court.

Information That's Confidential

- Statements, or even hints, about a judge's likely actions in a case
- The timing of a judge's decision or order, or any other judicial action
- The content of case-related discussions with a judge, including past cases
- Observations about a judge's decision-making process in specific cases
- Documents or other information related to a sealed case
- Information obtained in the course of a law clerk's work that is not available to the general public

Information That's Not Confidential

- Court rules
- Court procedures
- In general, information on how the court operates
- Court records, including the case docket available from the clerk's office
- Information disclosed in public court proceedings

An Attorney Calls Chambers . . .
(remember, we are here to help, but we just can't answer some questions)

An attorney calls chambers to give a reminder that a motion is pending and then asks: "When can I expect the judge's ruling?"

An attorney calls chambers yelling because the attorney doesn't understand how voluntary dismissals work under Rule 41. Then, after the law clerk refers to the Rule and general court procedures, the attorney proceeds to explain that case wasn't resolved earlier because opposing counsel doesn't know what she/he is doing.

An attorney calls chambers stating she/he has a "procedural question" and then spends several minutes explaining the case's facts and substantive issues, and finally asks: "What type of motion should I file? Is the judge looking for a summary judgment motion, a motion in limine, or something else?"

An attorney calls chambers shortly after a ruling is issued to ask: "What does this mean?" or "Why did the judge do that?" or "What does the judge want me to do now?"

An attorney calls chambers to explain that she/he will be filing a motion for extension of time, and then explains why the extension is needed and how unreasonable opposing counsel is for not stipulating.

An attorney calls chambers to propose that "things in this case need to be sorted out by telephone conference with the judge."

An attorney calls chambers to inquire whether the judge would be willing to reconsider the denial of the attorney's motion, and gives argument for why reconsideration is appropriate.

An attorney calls chambers to ask: "Does the judge usually grant motions for overlength briefs?"

An attorney calls chambers, knowing that requests for overlength briefs are rarely granted, to explain why the extra pages are really needed this time.

DUCivR 83-1.1 ATTORNEYS - ADMISSION TO PRACTICE

(b)(3) Pro Bono Service Requirement. Any attorney who is admitted to the bar of this court must agree, as a condition of such admission, to engage in a reasonable level of pro bono work when requested to do so by the court.

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

PRO BONO ENROLLMENT FORM

"Any attorney who is admitted to the bar of this court must agree, as a condition of such admission, to engage in a reasonable level of pro bono work when requested to do so by the court." (DUCiv R 83-1.1(b) (3).

_____
Name & Bar Number

_____
Firm Name

_____
Email Address & Telephone Number

I am willing to represent pro se litigants in the following geographical areas:
___ Southern Region ___ Northern Division ___Central Division (excluding Southern Region)

I am **not** willing to accept cases in the following areas:

___employment discrimination/wrongful termination (plaintiff)
___prisoner civil rights _____ non-prisoner civil rights
___social security disability appeals
___personal injury (plaintiff)
___medical malpractice (plaintiff)
___other (please specify): _____

I am willing (and trained) to be a guardian ad litem: ____ Yes ____ No

I represent defendants in the following categories, which would preclude me from taking cases against these categories of defendants (e.g., state or local governmental entities, law enforcement associations, etc.): _____

_____

Is there anything else you would like us to know? _____

_____

Please email/mail the completed form to:
Pro Bono Enrollment
United States District Court
Office of the Clerk – Anne Morgan
351 South West Temple
Salt Lake City, Utah 84101
Anne_morgan@utd.uscourts.gov