

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JAMES T. VAUGHN, JR.
PRESIDENT JUDGE

**KENT COUNTY COURTHOUSE
38 The Green
Dover, Delaware 19901**

**ADMINISTRATIVE DIRECTIVE
OF THE
PRESIDENT JUDGE OF THE SUPERIOR COURT
OF THE STATE OF DELAWARE**

NO. 2010-3

COMPLEX COMMERCIAL LITIGATION DIVISION

Effective May 1, 2010.

IT IS DIRECTED THAT:

1. A new division is created in New Castle County known as the Complex Commercial Litigation Division (“CCLD”).
2. Any case commenced hereafter which (1) includes a claim asserted by any party (direct or declaratory judgment) with an amount in controversy of One Million Dollars or more (designated in the pleadings for either jury or non-jury trials), or (2) involves an exclusive choice of court agreement or a judgment resulting from an exclusive choice of court agreement, or (3) is so designated by the President Judge, qualifies for assignment to the CCLD (hereinafter “qualifying case(s)”); except the following, which are excluded: any case containing a claim for personal, physical or mental injury; mortgage foreclosure actions; mechanics’ lien actions; condemnation proceedings; and any case involving an exclusive choice of court agreement where a party to the agreement is an individual acting primarily for personal, family, or

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household purposes or where the agreement relates to an individual or collective contract of employment; .

3. Identification of a qualifying case shall be made by any party by stating the letters CCLD for the Civil Case Code and Complex Commercial Litigation for the Civil Case Type on the Case Information Statement (CIS).

4. Unless specially assigned by the President Judge, a case identified as a qualifying case shall be assigned, on a rotating basis, to a Judge on the panel of the CCLD (hereinafter the "Panel"). The Panel shall be appointed by the President Judge from among the Judges of the Superior Court, and each judge on the Panel shall serve a term of three (3) years unless earlier replaced by the President Judge. If a case is assigned initially to a Judge of the Court under another case category and is subsequently identified as a qualifying case by a CIS filed by a responding party, it shall be reassigned to a Judge of the Panel.

5. A party opposing identification of a case as a qualifying case shall do so by motion filed before the Rule 16 scheduling conference referred to below, or at such other time as the assigned Panel Judge may direct. The filing of such a motion shall not affect the time for filing any pleading, motion, or required response under the Court's rules. If the assigned Panel Judge determines that the case is not a qualifying case, the Judge shall notify the Prothonotary who will reassign the case within the appropriate Civil Case Type Category as determined by the Prothonotary.

6. The following principles shall govern the administration of cases assigned to the CCLD:

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a. The case will remain assigned to the same Panel Judge for all purposes through final disposition. If the assigned Judge rotates off the Panel, the case will remain with that Judge through final disposition.

b. The Panel shall establish uniform procedures and Case Management forms for the handling of qualifying cases. The assigned Panel Judge will hold an early Rule 16 scheduling conference after all responsive pleadings have been filed. At such conference the parties shall meet and confer with the Panel Judge concerning the progression of the case through trial and preparation of a case management order. A sample case management order is attached as Exhibit A. Unless otherwise ordered by the Judge after conferring with the parties at the Rule 16 scheduling conference, the case management order shall:

(i) establish a procedure for handling discovery disputes and dispositive motions which may include the handling of such disputes by the Panel Judge or a particular Commissioner or appointed Special Master;

(ii) require early mandatory disclosures such as those contemplated by Federal Rule of Civil Procedure 26(a);

(iii) establish procedures for electronic discovery and other matters relevant to the case (e.g. appropriate protective orders and alternative

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dispute resolution procedures). A sample E-Discovery Plan is attached as Exhibit B; and

(iv) address other matters set forth in Rule 16 and any other matters appropriate in the circumstances of the case.

c. Firm pretrial and prompt trial dates will be established which will not be continued due to scheduling conflicts with other civil cases. Trials will be scheduled during the Panel Judge's scheduled civil rotation on the soonest practicable date given the pretrial complexities of the case and will be given priority as among the Panel Judge's other trial assignments. Prior to trial, the Court will:

(i) establish procedures for the conduct of the trial as a bench trial, should the parties agree to a bench trial, including procedures to streamline the presentation of evidence, to efficiently present legal issues in pre- and/or post-trial briefs, and to ensure prompt and effective post-trial decision(s) on the merits; and

(ii) establish appropriate special procedures for the selection of the jury and the conduct of the trial before a jury should the parties elect a jury trial.

7. Judges assigned to the Panel are expected to collaborate to promote uniformity in case management.

8. Judges assigned to the Panel may establish standing orders and protocols.

9. A CCLD section will be created on the Court's Web site which will include,

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inter alia, sample case management orders, standing orders or protocols, recent opinions, sample jury instructions and other pertinent information.

Dated: April 26, 2010

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotaries
cc: Superior Court Judges
Superior Court Commissioners
Court Administrator
Margaret Derrickson
Law Libraries
File

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Plaintiff,)
) C.A. No.
 v.)
)
Defendants.)

CASE MANAGEMENT ORDER

After consideration of the proposals of the parties, as well as the interests of justice, the Court hereby enters this Case Management Order.

I. GENERAL

A. Application

This Case Management Order shall apply to the presently pending action entitled: _____.

B. Service of Case Management Order on New Parties

Upon the addition of any party to the Action, the party adding the new party to the Action shall serve a copy of this Case Management Order at the same time that it serves a copy of the pleading joining such new party.

C. Applicable Court Rules

Unless otherwise provided by the Initial Case Management Order, the Superior Court Civil Rules shall apply.

D. Discovery Master

Upon application of any party, the Court may issue an Order of Reference to a Special Master or Commissioner, who shall thereafter handle all matters referred to in that Order of Reference.

II. LEXIS/NEXIS E-FILING PROCEDURES

The filing and service of documents shall be in accordance with Rule 79.1 of the Superior Court Civil Rules and the Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2007-6, E-File Administrative Procedures, dated December 13, 2007, published by the Prothonotary, except that documents initiating discovery requests (interrogatories, requests for production of documents, and requests for admission) and responses to such discovery requests (excluding the actual production of documents) shall be served electronically through LEXIS/NEXIS.

III. DISCOVERY SCHEDULE

A. Document Production

1. Requests for production of documents shall be served on or before _____ with all documents to be produced on or before _____.

2. Privilege logs shall be produced in accordance with the Superior Court Civil Rules and Rule 502 of the Delaware Uniform Rules of Evidence so as to be completed on or before _____.

3. Inadvertent Production of Documents. In the event a party discovers that it has inadvertently produced a document that it considers privileged or confidential, or receives a document that it believes was inadvertently produced on the ground that it is privileged or confidential, the parties shall undertake to resolve the inadvertent disclosure issue through the Protective Order entered in this case or, in the absence of such an Order, in the Protocol for the Inadvertent Production of Documents

attached as Exhibit A.1 hereto. The Court will determine any issues not resolved by the parties.

B. Fact Depositions

1. Each party will be limited to taking _____ fact depositions, unless the Court for good cause extends that limit. Each deposition shall be limited to seven hours unless extended by agreement or Court order.

2. Depositions shall proceed as follows: (a) depositions of document records custodians may be noticed for deposition on and after _____ so as to be completed by _____ and (b) all other non-expert depositions may be noticed for deposition on or after _____ so as to be completed by: _____.

C. Fact Discovery Cut-off

The parties shall conduct fact discovery so that it is completed on or before _____.

D. Expert Discovery

Expert Discovery shall commence on _____ and shall be completed no later than _____. Exhibit A.2 hereto shall govern expert discovery.

IV. DISPOSITIVE MOTIONS

Dispositive motions may be filed on or before _____.

V. PRETRIAL STIPULATION AND ORDER; TRIAL

A. Trial Date and Jury Selection

The trial of this Action shall begin on _____ at ____ a.m., and continue for _____, if necessary. Jury selection will be conducted on _____ at _____ a.m.

B. Jury Questionnaire

To expedite the selection of jurors who will be able to serve for as long as ___ weeks, the parties will exchange proposed jury questionnaires on or before _____. The parties shall confer immediately upon the exchange of the questionnaires and submit a joint agreed upon questionnaire or a joint questionnaire that reflects areas of disagreement to the Court no later than _____.

C. Pre-Trial Stipulation and Order, Jury Instructions, Special Interrogatories, and Pre-Trial Conference

1. On or before _____, the parties collectively shall:
 - a. exchange drafts of a Pre-Trial Stipulation and Order that shall address the items set forth in Superior Court Civil Rule 16(c) to the extent not previously resolved; and
 - b. exchange proposed jury instructions and special interrogatories.

2. Immediately following the exchange of the proposed Pre-Trial Stipulation and Order, the parties shall meet and confer in an attempt to reach an agreement on a final Pre-Trial Stipulation and Order, jury instructions and any special interrogatories. On or before _____, the parties shall submit to the Court a proposed Pre-Trial Stipulation and Order. In the event the parties cannot reach agreement on all the terms of the Pre-Trial Stipulation and Order, jury instructions and special interrogatories, a single proposed order shall be filed and any areas of disagreement shall be appropriately noted in the one proposed order submitted and plaintiff shall submit a set of jury instructions and special interrogatories that contain any party's proposal.

3. The Pre-Trial Conference with the Court shall take place on _____

at _____ .m.

D. Motions In Limine

All motions in limine shall be filed no later than _____ and all responses to those motions shall be filed no later than _____.

VI. MOTIONS

A. All motions shall be heard at the Court's convenience.

B. All motions shall be accompanied with an opening brief supporting the motion. Subject to the requirements of this Order, any defendant may file a separate joinder or brief adopting or supporting a motion or opposition of another defendant provided it is served within three (3) business days after service of the motion or opposition and does not exceed three (3) pages, exclusive of appendices.

C. Subject to the requirements of this Order, any party may file an answering brief to a motion. Unless an alternative schedule has been agreed to by the parties or ordered by the Court, such answering brief shall be filed and served the later of _____ () days after any service of the motion, or _____ () days after any defendant files a separate joinder or brief adopting or supporting a motion or opposition of another defendant.

D. Reply briefs may be filed ten (10) days after responses are received, but no later than three (3) days before any hearing on the motion.

E. All briefs shall conform to the requirements of Superior Court Civil Rule 107, except that in the case of discovery motions, whether handled by the Court or the Special Discovery Master in the first instance, the timing of such discovery motion practice and the length of the briefs on discovery motions shall comport with the requirements in the Order of Reference to Special Discovery Master, dated

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_____. The Court may set page limitations that differ from Superior Court Civil Rule 107.

This Case Management Order may be amended by the Court or supplemented by additional Case Management Orders as deemed appropriate by the Court. Nothing herein shall prevent any party from seeking relief from any provision for good cause shown.

IT IS SO ORDERED this ___ day of _____, 200__.

Judge

EXHIBIT A.1
PROTOCOL FOR THE
INADVERTENT PRODUCTION OF DOCUMENTS

In the absence of a Protective Order governing inadvertent production of documents, in the event a party discovers that it has inadvertently produced a document that it considers privileged or confidential, or received a document that it believes was inadvertently produced on the ground that it is privileged or confidential, the parties will undertake to resolve the issue by complying with the following protocol:

1. If a party produces privileged or confidential information or documents ("Privileged Material") that the recipient believes were produced inadvertently, the recipient immediately shall either return such Privileged Material to the producing party or notify the producing party of the apparent inadvertent production.

2. If a producing party discovers that it inadvertently produced information or documents that it considers Privileged Material, in whole or in part, it may retrieve such Privileged Material or parts thereof as follows:

a. During the period within one hundred twenty (120) days after the date of the inadvertent production, the producing party may give written notice to all parties that the producing party claims said document, in whole or in part, to be privileged material and must state the nature of the privilege.

b. Upon receipt of such notice, all parties who have received copies of the produced documents shall promptly return them to the producing party or destroy them and shall certify that all copies of the documents in their possession, and in the possession of anyone who receives copies from them, have either been

returned or destroyed. Moreover, all parties who have received copies of the produced documents shall not make any use of the contents of the allegedly Privileged Material, unless and until a party challenges the privileged claim and the court determines the claim of the producing party is not well founded. In the event that only parts of documents are claimed to be Privileged Material, the producing party shall furnish redacted copies of such documents, removing only the part(s) thereof claimed to be Privileged Material, to all parties within ten (10) days of their return to the producing party or their destruction by the receiving party.

c. After timely service of such notice, no motion to compel the production of the inadvertently produced document may rely on an allegation that any protection as to the document was waived by its inadvertent production. Nothing in this paragraph shall preclude any recipient of such notice from promptly moving for an order compelling production of such document on the ground that the claim of privilege is not well founded.

d. During the period more than one hundred twenty (120) days after the inadvertent production, but in no event later than thirty (30) days prior to trial, the producing party may request the return of said document which it claims, in whole or in part, to be Privileged Material, pursuant to and in accordance with the following procedure:

- i. The producing party must give written notice to all parties that the producing party claims said document, in whole or in part, to be Privileged Material and must state the nature of the privilege;
- ii. Within ten (10) days of giving written notice pursuant to paragraph (i) above, the parties shall meet and confer to discuss the assertion of privilege. If the parties cannot reach agreement within ten (10)

days of the giving of such written notice, the producing party shall file a Motion for Protective Order in accordance with the Superior Court Civil Rules that seeks the return or destruction of the inadvertently produced privileged document(s).

e. Inadvertent production of privileged material, the return of which is requested in accordance with this section, shall not be considered a waiver of any claim of privilege.

EXHIBIT A.2

PROTOCOL FOR EXPERT DISCOVERY

Expert discovery in this Action shall be conducted pursuant to the following protocol:

A. Identification of Expert Witnesses

1. On or before _____ the parties shall identify expert witnesses and submit Superior Court Civil Rule 26(b) statements. On or before _____, any party may designate additional expert witness(es) whose function shall be solely to rebut an opinion taken by a designated expert witness. At the same time a party designates a rebuttal expert witness, the party designating the rebuttal expert witness shall produce corresponding Rule 26(b) statements for that witness.

2. Depositions of expert witnesses shall take place during the period of _____ through _____.

B. Depositions of Expert Witnesses

1. As soon as practicable, the party taking a deposition will advise the other side of its good faith estimate of the amount of time it is anticipated that the testifying expert's deposition will take.

2. Each party will pay its testifying experts' fees and expenses incurred in connection with the deposition of such experts. All costs incurred in the production of documents discussed herein shall also be borne by the party producing the documents.

3. The parties will make a good faith effort to schedule testifying expert depositions at locations convenient for counsel and the experts. In the absence of any agreement, each deposition will take place in Wilmington, Delaware. If the deposition is taken in Wilmington, Delaware, the deposition will be held at a location

to be selected by counsel for the party taking the deposition.

4. Testifying expert witnesses will appear for depositions without the necessity of subpoenas.

C. Document Identification And Production Of Documents Relied Upon By Experts

1. On or before fourteen (14) calendar days before the expert's deposition begins, the party proffering the testifying expert shall provide the other side with a list of the documents reviewed by each testifying expert in his capacity as a testifying expert in this case. The list will include the Bates numbers (if any) or a deposition exhibit number (if any), the date, and a brief description of each document, such as the names of the author and addressee and the title or line reference.

2. On or before fourteen (14) calendar days before each expert deposition begins, the party proffering a testifying expert will produce to the party taking the testifying expert's deposition the following documents relied upon by a testifying expert in his capacity as a testifying expert in this case:

a. Documents relied upon by a testifying expert in his capacity as a testifying expert in this case that were obtained by one side from third parties and not produced to the other side in this action;

b. Documents relied upon by a testifying expert in his capacity as a testifying expert in this case that were produced in this action for which there is no common Bates numbering or a deposition exhibit number;

c. Documents prepared by a non-testifying expert that were relied upon by a testifying expert in his capacity as a testifying expert in this case;

d. All publications of any type relied upon by a testifying expert in his capacity as a testifying expert in this case, including by way of example

only, documents considered to be "learned treatises" under D.U.R.E. 803(13). This subparagraph is not intended to include publications that merely form part of the basis of a testifying expert's education, training and experience in a particular field, but rather, only those on which a testifying expert is relying or about which he will testify at trial. Further, if a publication otherwise required to be produced pursuant to this subparagraph is shown by the party proffering a testifying expert to be readily accessible in its entirety from other sources, then only the relevant portions thereof must be produced;

e. Notwithstanding any of the provisions set forth herein, no communications between counsel for a party and the party's expert shall be produced; and

f. No party shall be required to produce any work product between the expert witness and the proffering party's counsel.

3. No later than ten (10) days after a party's designation of a testifying expert, each party proffering a testifying expert will produce to the party taking the expert's deposition: (a) the testifying expert's curriculum vitae and (b) a list that will include, at a minimum, the cases, administrative matters or other proceedings in which the expert has given trial or other testimony in public within the last four (4) years, without prejudice to any party's right to request such information for a period not to exceed ten (10) years. If the request for information exceeding four (4) years is opposed, the party seeking such additional information may apply to the Court for relief. The list also will include the name of the matter, the name of the court or other public body, the names of the parties and their attorneys, whether the expert or the party for which he is testifying has a copy of the testimony, and a brief description of the nature of the proceeding.

4. The cost of producing documents, as required herein, for a party's testifying expert, shall be borne by the party designating the testifying expert.

APPENDIX B

E-DISCOVERY PLAN GUIDELINES

(a) *Meet and Confer Requirement.* Unless the parties otherwise agree or the Court otherwise orders, not later than 21 days before the first scheduling conference with the Court, all parties that have appeared in the proceeding shall hold a meet and confer session concerning discovery of electronically stored information ("ESI") that is reasonably likely to be sought in the proceeding, and if so the parties shall discuss:

- (1) any issues relating to preservation of ESI;
- (2) the form in which each type of ESI will be produced and any problems relating thereto;
- (3) the scope of production, including the custodians, time period, file types and search protocol to be used to identify which ESI will be produced;
- (4) the method for asserting or preserving claims of privilege or of protection of ESI as trial-preparation materials, including whether such claims may be asserted after production;
- (5) the method for asserting or preserving confidentiality and proprietary status of ESI relating to a party or a person not a party to the proceeding;
- (6) whether allocation among the parties of the expense of preservation and production is appropriate; and,
- (7) any other issue relating to the discovery of ESI.

(b) *e-Discovery Plan and Report to the Court.* The parties shall:

- (1) develop a proposed plan relating to discovery of ESI; and
- (2) not later than 14 days after the meet and confer session under subsection (a), submit to the Court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

(c) *Form of Court Order.* Following the submission of the discovery plan and any disputes over the plan, the Court will enter an order governing discovery of ESI that will address:

- (1) preservation of ESI;
- (2) the form in which each type of ESI is to be produced;
- (3) the scope of production, including the custodians, time period, file types and search protocol to be used to identify which ESI is to be produced;
- (4) the permissible scope of discovery of ESI;
- (5) the method for asserting or preserving claims of privilege or of protection of ESI as trial-preparation material after production;
- (6) the method for asserting or preserving confidentiality and the proprietary status of ESI relating to a party or a person not a party to the proceeding;
- (7) allocation of the expense of production; and
- (8) any other issue relating to the discovery of ESI.

(d) *Limitations On Discovery.*

In developing a discovery plan and in entering any discovery order, the plan or order shall provide that a party may object to discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or expense. In its objection the party shall identify the reason for such undue burden or expense. On a motion to compel discovery or for a protective order relating to the discovery of ESI, the objecting party bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.

The Court may order discovery of ESI that is from a source that is not reasonably accessible because of undue burden or expense if the need for proposed discovery outweighs the likely burden or expense, taking into account the amount in

controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

If the Court does order discovery of ESI under this subsection, it may set conditions for discovery of the information, including allocation of the expense of discovery.

The Court shall limit the frequency or extent of discovery of ESI, whether or not that ESI is from a source that is reasonably accessible, if the Court determines that:

(1) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;

(2) the discovery sought is unreasonably cumulative or duplicative;

(3) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(4) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(e) Safe Harbors.

The order governing e-discovery shall also provide that:

(1) A party that is subject to an order entered by the court to deal with e-discovery and who acts in compliance with the terms of that order may thereafter apply its regular document destruction procedures to any ESI that has not been ordered to be produced and shall not be subject to any sanction for the destruction of ESI that is not subject to its obligation to produce under such court order. The order entered by the Court may be modified upon application for good cause and shall thereafter be applicable to the preservation of ESI.

(2) The production of ESI shall not constitute a waiver of

attorney-client privilege or work-product protection if the disclosure was inadvertent and the party making the claim of privilege or protection shall promptly take reasonable steps to recover the ESI.