NEW YORK STATE-FEDERAL JUDICIAL COUNCIL

Report on the Coordination of Discovery Between New York Federal and State Courts

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ADVISORY GROUP TO THE NEW YORK STATE-FEDERAL JUDICIAL COUNCIL

Report on the Coordination of Discovery Between New York Federal and State Courts

Introduction

This Report examines the opportunities for New York State and federal courts to coordinate with each other on discovery issues when plaintiffs bring "related cases" in both courts (i) against one or more of the same defendants, and (ii) allege claims involving a "single event" (or transaction) or "common course of conduct."[1] Cases that are prime candidates for joint coordination include mass tort (products liability, mass disasters, and mass toxic torts) and commercial cases.[2] This Report seeks to encourage such coordination.

The potential benefits of discovery coordination are significant. Fact and expert witnesses can avoid sitting for repetitive depositions in multiple jurisdictions, saving all parties time and money and reducing the burden on courts from uncoordinated proceedings. Coordinated document production allows for development of shared document databases, which reduces duplicative document production, allows for cost-sharing, and enables parties to use discovery material obtained in related State and federal matters. Coordination among State and federal judges ensures consistency as to the same or similar discovery issues (thus preventing

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[1] William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State & Federal Courts*, 78 VA. L. REV. 1689, 1690 (1992); *see also* Manual for Complex Litigation § 20.31 (4th ed.) (discussing "innovative efforts to coordinate" discovery, and thus "reduce the costs, delays, and duplication of effort," in "related cases brought in both federal and state courts" that involve either "numerous claims arising from a single event, confined to a single locale" or claims that "arise from widespread exposure to harmful products or substances dispersed over time and place").

[2] *See* Helen E. Freedman, *Coordination of Litigation Within New York & Between Federal & State Courts*, in 3 Robert L. Haig, *Commercial Litigation in New York State Courts* 55-56 (4th ed. 2015).

gamesmanship that might impede settlement).[3] By engaging in such coordination, New York State and federal courts also can make New York a more attractive center for all types of litigation, especially commercial litigation.

In 1992, Judge Jack Weinstein of the Eastern District of New York observed that "[j]oint federal-state cooperation" on discovery and other issues was "still in its infancy."[4] That same year, retired federal Judge William Schwarzer, director of the Federal Judicial Center, published a law review article, in which he and his co-authors identified just one set of cases where New York courts had engaged in federal-state discovery coordination. In that litigation, Judge Weinstein and New York Supreme Court Justice Helen Freedman (i) "required litigants to inform each other of related actions pending in the other system, and provided for joint listing of and attendance at depositions"; (ii) "designated a federal magistrate to settle discovery disputes for both courts"; and (iii) "sat together on numerous occasions" to resolve such disputes.[5]

Since then, there have been other instances of discovery coordination involving New York State and federal courts. This Report identifies eight examples of such coordination, four of which are detailed below in Section I and the remainder of which may be found in Appendix A. Although several of the examples concern coordination between New York State or federal courts and non-New York State or federal courts, such examples provide helpful guidance as to how New York judges can coordinate with each other (and with other courts).

As discussed in Section II, the increase in federal-state discovery coordination may be attributed, in part, to steps taken by New York State courts (at least in the Commercial

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3 James G. Apple, et al., *Manual for Cooperation Between State & Federal Courts*, Federal Judicial Center, at 16 (1997), *available at* https://bulk.resource.org/courts.gov/fjc/stfedman.pdf.

4 *In re DES Cases*, 789 F. Supp. 552, 563 (E.D.N.Y. 1992).

5 Schwarzer, *supra* note 1, at 1709-12.

Division) to conform certain discovery rules with federal discovery rules. This report recommends that those rules be extended beyond the Commercial Division to other State courts, and that individual judges and courts, both federal and State, implement relatively modest additional rulemaking and practical changes in order to remove certain remaining challenges and facilitate greater coordination with their federal or State counterparts on discovery issues.[6] For example, federal and State court judges in related matters should consider coordinating discovery by, *inter alia*, implementing parallel case management orders, sharing rulings, and holding joint hearings. Federal and New York State courts should consider adopting rules that would require parties to disclose any related cases at the outset of discovery and require judges in related matters to consult with one another. Finally, federal and State courts can implement discrete changes to common law to harmonize existing differences between federal and State discovery law where appropriate and necessary to coordinate discovery.

I. Recent Examples of Federal-State Discovery Coordination

Recently, more New York courts have endeavored to coordinate discovery efforts with their federal or State counterparts. Common methods of discovery coordination include:

- *Joint or Parallel Scheduling or Case Management Orders*: Scheduling and case management orders provide a basic vehicle for coordination. By issuing such orders jointly or in parallel, federal and State court judges in related cases can ensure that they are on the same page as to the timing of discovery and procedures for written discovery and depositions.

- *Joint Discovery Hearings*: Federal and State court judges can hold joint hearings to address discovery motions and other issues, ordinarily if the issue arises in both

[6] Formal legislation that would require federal-state discovery coordination has repeatedly failed. *See* Freedman, *supra* note 2, at 1047. Accordingly, this Report focuses on non-legislative changes that the courts can make to help facilitate coordinated discovery.

federal and State court. Those hearings are a useful forum to discuss guidelines for depositions, privilege, and confidentiality designations. Judges also can hold joint *Frye-Daubert* hearings to determine the admissibility of expert testimony.[7] Joint hearings can be in person or via videoconference or teleconference,[8] involve joint or separate deliberation, and result in issue joint or separate (but consistent) rulings.

- *Sharing of Rulings:* As a basic practice, to avoid conflicts in rulings on the same discovery issues, judges in related cases can share orders in advance of their issuance to ensure that they are aligned as much as possible as to those issues.

- *Special Masters*: Federal and State courts, through joint or parallel orders, can appoint the same special master to establish standards and procedures for discovery as well as to resolve discovery disputes in related cases. Special masters, among other things, may serve as a natural bridge between those courts and help to minimize duplication and conflict over the same discovery issues.

- *Document Depositories*: Judges can direct that parties in their cases maintain depositories of discovery materials that other judges (and parties) in related cases may easily access, either physically or electronically.

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[7] *See, e.g.*, *infra* Appendix A at 6-7. Judges have found that parallel *Frye-Daubert* "diffused some of the natural tension that can exist between the state and federal courts where there are concurrent proceedings" and were "vastly more efficient than having substantially similar hearings in multiple jurisdictions." Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 DRAKE L. REV. 621, 634 (2006).

[8] The location and technological facilities of the federal and State courthouses where the judges involved in the hearing sit may dictate the judges' choice of what type of hearing to hold. For example, if the federal and state courthouses are located in the same city, the judges may choose to hold a joint, in-person hearing. Conversely, if the courthouses are located outside the same city, the judges may choose to hold the hearings via telephone, or via videoconference if the courthouses' technology permits.

The following examples illustrate how, in recent years, federal and State courts have implemented those and other methods of discovery coordination.[9]

A. MBIA Insurance Restructuring Litigation

In 2009, a putative class of MBIA Insurance policyholders sued parent company, MBIA Inc., and other MBIA entities in federal court over the February 2009 restructuring of MBIA Insurance, which the policyholders alleged was a fraudulent conveyance.[10] Several banks brought a similar lawsuit against those defendants in New York State court.[11] Judge Richard Sullivan of the Southern District of New York and Justice Barbara Kapnick of the New York Supreme Court Commercial Division presided over the federal and State cases and coordinated on various aspects of discovery.

For scheduling, Judge Sullivan issued a scheduling order directing that "[d]iscovery and discovery scheduling in this case shall be coordinated with discovery in the state plenary action . . . so as to avoid duplication between the cases."[12] (A copy of Judge Sullivan's scheduling order is appended hereto as Appendix B.)[13] Justice Kapnick, in turn, issued a parallel scheduling order providing the same direction.[14] The parallel scheduling orders

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9 The examples cited in this Report are limited to coordination on discovery issues and do not address opportunities for coordination on substantive, non-discovery issues.

10 *Aurelius Capital Master* v. *MBIA Ins. Corp.*, No. 09-CV-2242 (S.D.N.Y.).

11 *ABN AMRO Bank N.V.* v. *MBIA Inc.*, No. 601475/2009 (N.Y. Sup. Ct.).

12 Amended Case Management Plan & Scheduling Order at 1, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. July 27, 2011), ECF No. 65.

13 Appended to this Report as Appendices B-F is a selection of sample court orders reflecting various methods of discovery coordination.

14 Scheduling Order at 1, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Aug. 15, 2011), NYSCEF No. 117.

also set the same deadlines for, among other things, document requests and depositions.[15]

For document discovery, both judges also coordinated their rulings and, at one point, held a joint discovery hearing. Judge Sullivan, for instance, limited the scope of the plaintiffs' requests for post-May 2009 documents and set a March 2010 cutoff date for such documents.[16] Justice Kapnick noted that her scheduling order had "directed that discovery in the instant cases be coordinated with discovery in the Federal Action," and thus issued an order adopting Judge Sullivan's order as to the same category of documents.[17]

Later on, in March of 2012, both judges held a joint discovery hearing in Judge Sullivan's courtroom to address the separate issue of a subpoena for documents from a third-party (the New York Department of Financial Services).[18] As Judge Sullivan said of the hearing with Justice Kapnick, "our goal is to be on the cutting edge" of federal-state discovery coordination.[19] Following the hearing, the judges rendered the same ruling in parallel orders, addressing issues of the scope and burden of the subpoena, the response time for the subpoena,

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15 *See* Amended Case Management Plan & Scheduling Order at 2-3, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. July 27, 2011), ECF No. 65; Scheduling Order at 1-3, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Aug. 15, 2011), NYSCEF No. 117.

16 Order at 1, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. Aug. 13, 2010), ECF No. 57.

17 *See* Order at 3-4, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Feb. 16, 2012), NYSCEF No. 148 ("With respect to the post-May 2009 document requests, defendants are directed to make the same document production to the plaintiffs in this case as they made to the plaintiffs in the Federal Action. Plaintiffs are directed to make a reciprocal production . . . .").

18 *See* Order at 2, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Mar. 5, 2012), NYSCEF No. 157; *see also* Transcript of Hearing at 118:5-7, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. Mar. 9, 2012), ECF 100 ("Let me thank Justice Kapnick and her staff for coming over. Next time we'll return the favor and go over there if we do this again.").

19 *See* Transcript of Hearing at 5:21-22, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. Mar. 9, 2012), ECF 100.

and the privilege log to accompany the subpoena responses.[20]

As to depositions, Judge Sullivan and Justice Kapnick also endeavored to coordinate their discovery efforts. For example, both judges permitted the plaintiffs to conduct a maximum of "two-day depositions" of MBIA's chief executive officer and chief financial officer as well as "one-day depositions" of two other MBIA executives, before April 15, 2012.[21] Neither judge, however, required that the plaintiffs depose those individuals only once for purposes of the separate federal and State cases.

B. Madoff "Feeder Funds" Litigation

Starting in 2009, after the collapse of Bernie Madoff's Ponzi scheme, various federal and State enforcement actions as well as private lawsuits were brought against so-called "feeder funds," which invested with Madoff on behalf of their clients.[22] These enforcement actions and private class action lawsuits were litigated in the Southern District of New York. In addition, related private derivative and individual lawsuits against the feeder funds (and an accounting firm) were brought in Florida and New York State courts.[23]

As directed by Justice Stephen Bucaria of the New York Supreme Court Commercial Division and Magistrate Judge Andrew Peck of the Southern District of New York, parties to the principal derivative lawsuit in New York State court agreed to coordinate discovery

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[20] *See* Order 1-2, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. Mar. 13, 2012), ECF No. 96; Order 2-3, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Mar. 13, 2012), NYSCEF No. 163.

[21] *See* Order at 2, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. Mar. 13, 2012), ECF. No. 97; Order at 2, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Mar. 13, 2012), NYSCEF No. 162.

[22] *See In re Beacon Assocs. Litig.*, No. 09-cv-777, 2013 WL 2450960, at *1 (S.D.N.Y. May 9, 2013).

[23] *See id.*

in their case with the *In re Beacon Associates Litigation* in the Southern District of New York.[24] Under their stipulation and proposed order, parties in New York State court adopted the same schedule as the one in federal court and committed to "the avoidance of multiple depositions of the same witnesses or duplicative document requests, requests for admission and interrogatories."[25]

For purposes of written discovery, the New York State court plaintiff agreed not to serve document requests on any parties that also were defendants in federal court, until that plaintiff had reviewed "documents produced as initial disclosures by parties to *Beacon*"; and that such requests would only include "specific documents not found in the initial disclosures in *Beacon*."[26] The New York State court plaintiff also agreed only to serve interrogatories and requests for admission that "do not duplicate interrogatories or requests for admission already served by the plaintiffs in *Beacon*."[27]

For depositions, the New York State court plaintiff also agreed to "confer with the plaintiffs in *Beacon* regarding a method of coordinating the taking of depositions," and that such coordination would address issues including "the allocation of time among counsel for the parties in *Beacon* and in [the State court case]."[28]

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[24] *See generally* Stipulation And [Proposed] Order Governing Disclosure, *In Re Beacon*, No. 1:09-cv-00777 (S.D.N.Y. Mar. 9, 2011), ECF No. 253. The available record reflects no attempt to coordinate discovery with the Florida State court case, *Glicker* v. *Ivy Asset Management Corporation*, No. 502010CA029643XXXXMB (Fla. Cir. Ct.). Whereas *Beacon* and the New York State court case were filed in 2009, the Florida State court case was not filed until end of 2010 and, thus, likely had not yet reached the discovery stage.

[25] Stipulation And [Proposed] Order Governing Disclosure at 1-2, 5-6, *In Re Beacon*, No. 1:09-cv-00777 (S.D.N.Y. Mar. 9, 2011).

[26] *Id.* at 2-3.

[27] *Id.* at 3.

[28] *Id.* at 4.

C. Litigation Relating to WorldCom's Collapse

Starting in April 2002, after the collapse of WorldCom, numerous individual and class action lawsuits were filed against WorldCom executives and others associated therewith.[29] In August 2002, after WorldCom filed for bankruptcy, the defendants were able to remove many of the cases in State court to federal court as related to WorldCom's bankruptcy proceedings.[30] Over 100 cases were consolidated and then transferred to the Southern District of New York as federal multidistrict litigation, but six cases were remanded back to various State courts, including Alabama, Illinois, and Pennsylvania.[31]

At the outset of discovery, Judge Denise Cote of the Southern District of New York reached out to judges in three of the State court cases that were "nearing the discovery phase," attaching her scheduling order and notifying those judges of her plan to issue an "order for the coordination of discovery" in the federal multidistrict litigation.[32] To "avoid[] unnecessary duplication of discovery while fully preserving the rights of all litigants," Judge Cote proposed to coordinate discovery with the State courts,[33] which those courts generally

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29 *See In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d 527, 530 (S.D.N.Y. 2004), *rev'd sub nom. Ret. Sys. of Alabama v. J.P. Morgan Chase & Co.*, 106 F. App'x 754 (2d Cir. 2004).

30 *Id.* at 530.

31 *Id.* at 530-31, 531 n.3.

32 *In re WorldCom, Inc. Sec. Litig.*, No. 02-cv-3288, 2003 WL 22962509, at *1 (S.D.N.Y. Dec. 17, 2003).

33 *Id.*

agreed to do.[34] Thereafter, Judge Cote released a proposed discovery coordination order and gave all parties an opportunity to comment on the proposal before she issued the final order.[35]

Judge Cote's final discovery coordination order,[36] appended hereto as Appendix C, gave guidance on all aspects of discovery for the cases proceeding in both federal and State courts. In terms of written discovery, the order permitted documents and responses to interrogatories and requests for admission produced in the federal multidistrict litigation to be used in the State court cases as long as the parties in State courts adhered to Judge Cote's confidentiality order with respect to such discovery.[37] At the same time, the discovery coordination order provided that, after examining the information produced in the federal multidistrict litigation, parties in State courts could "serve non-duplicative supplemental document requests, interrogatories, and requests for admission."[38]

In terms of depositions, Judge Cote's discovery coordination order required parties to make "every effort" to take depositions once and stated that each deposition should last no longer than three eight-hour days.[39] Furthermore, pursuant to the order, counsel for the lead plaintiffs in the federal multidistrict litigation would take the lead in deposing the defendants'

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[34] *See In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d at 536 (in response to Judge Cote's proposal, "[t]he judges presiding over each of those [State court] actions have generally coordinated the discovery in those actions with the discovery in the *Securities Litigation*"), *rev'd sub nom. Ret. Sys. of Alabama v. J.P. Morgan Chase & Co.*, 106 F. App'x 754 (2d Cir. 2004).

[35] *See In re WorldCom, Inc. Sec. Litig.*, 2003 WL 22962509, at *1-2.

[36] *In re Worldcom, Inc. Sec. Litig.*, No. 02-cv-3288, 2004 WL 817355, at *2 (S.D.N.Y. Jan. 30, 2004).

[37] *Id.* at *1-2.

[38] *Id.*

[39] *Id.* Under Federal Rule of Civil Procedure 30(d)(1), the presumptive duration of depositions is "1 day of 7 hours," but district courts are permitted to order longer depositions. In this case, the duration of depositions, as specified by Judge Cote, exceeded the presumptive duration.

witnesses; the plaintiffs in State courts, however, would have additional time at the end "to conduct non-repetitive questioning on topics not covered."[40]

Not all efforts at coordination succeeded, however. The State courts agreed to coordinate their discovery, including the scheduling thereof, with Judge Cote's federal multidistrict litigation. But, in a self-professed effort to secure a larger settlement, the plaintiffs in the remanded Alabama State court case sought to thwart such coordination by requesting an earlier trial date than the one in the federal multidistrict litigation.[41] Even though the Alabama State court judge had agreed to coordinate discovery with Judge Cote, that judge also accepted the earlier trial date.[42] Judge Cote responded by enjoining the case in Alabama State court under the exception to the Anti-Injunction Act, 28 U.S.C. § 2283, citing, among other things, the fact that "the schedule in the Alabama Action will derail the schedule in [the federal multidistrict litigation]."[43] But, on appeal, the Second Circuit overturned the injunction, holding that the exception to the Anti-Injunction Act "does not permit a district court . . . to enjoin state court proceedings simply to preserve its trial date."[44]

D. Manhattan Investment Fund Fraud Litigation

In 2000, investors in the Manhattan Investment Fund sued the manager of the fund, along with the fund's broker-dealer and accounting firms, in both federal court and New

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40 *In re Worldcom, Inc. Sec. Litig.*, 2004 WL 817355, at *1-2.

41 *In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d at 538.

42 *Id.* at 536, 547 n.28.

43 *Id.* at 541, 545, 551.

44 *See Ret. Sys. of Alabama* v. *J.P. Morgan Chase & Co.*, 106 F. App'x 754 (2d Cir. 2004); *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 421, 431 (2d Cir. 2004). The Alabama State court case settled shortly after the issuance of the Second Circuit decision, instead of proceeding to trial. *See 3 Banks Settle Alabama Worldcom Suit*, BLOOMBERG NEWS, Oct. 2, 2004, at C4.

York State court based on allegations of securities fraud.[45] Citing the "interest of judicial economy," Judge Cote and Justice Helen Freedman of the New York Supreme Court Commercial Division, who presided over the respective cases, resolved to coordinate discovery through parallel discovery orders.[46]

Judge Cote and Justice Freedman required counsel for the federal and State court plaintiffs to "propound joint discovery requests concerning those parties and issues common to the Federal Actions and the State Action."[47] The judges also opted to resolve any joint discovery disputes "pursuant to the procedures of the Federal Court" and to require parties to conduct depositions "pursuant to the Federal Rules of Civil Procedure and as ordered by Judge Cote."[48] At depositions, "in addition to the time afforded counsel in the Federal Actions," parties in the State court case would "be afforded a reasonable period of time to ask non-duplicative questions and to inquire as to issues specific to the State Action."[49]

At the same time, Justice Freedman permitted the State court plaintiff to "propound supplemental, non-duplicative discovery requests . . . that address[ed] issues and parties specific to the State Action."[50] Justice Freedman retained the power to resolve any issues pursuant to New York State court procedures with respect those supplemental requests.[51] Justice

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45 *Cromer Fin. Ltd.* v. *Berger*, 137 F. Supp. 2d 452, 460 (S.D.N.Y. 2001).

46 *See* Coordination and Pretrial Discovery Order at 1, *Scotia Nominees* v. *Berger*, No. 600320/2000 (N.Y. Sup. Ct. 2001); 2 N.Y. Prac., Com. Litig. In New York State Courts § 15:12 (3d ed.) (2014).

47 Coordination and Pretrial Discovery Order at 2, *Scotia Nominees*, No. 600320/2000 (N.Y. Sup. Ct. 2001).

48 *Id*. at 2-3.

49 *Id*. at 3.

50 *Id*. at 2.

51 *Id*.

Freedman also permitted the State court plaintiff "to notice additional depositions with regard to issues and parties specific to the State Action" which, if "conducted solely in the State Action," were to be "conducted pursuant to the rules of the State Court."[52]

II. Proposals for Change To Foster Greater Federal-State Discovery Coordination

The above examples demonstrate that federal-state discovery coordination works and should be encouraged. Even without any legislative changes, New York State and federal courts can and have achieved such coordination. Proactive judicial action has been crucial to achieving this goal. In particular, federal judges with authority over multi-district litigations often are in a prime position to take the lead on such coordination, as are judges overseeing consolidated actions within New York.[53] Federal and State judges should take additional strides towards coordinating cases, including requiring parties to inform the court of related cases, encouraging parties to negotiate and submit proposed federal-state coordination orders, reaching out to judges overseeing related cases, maintaining a constant dialogue with those judges throughout the course of the litigation, and issuing joint orders or orders consistent with those issued by judges in related matters.

As described below, in addition to these proactive measures by judges, slight changes in the rules and other minor practical changes will further encourage coordination of federal and State discovery.

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52 *Id*. at 3.

53 As encouraged in a 2013 report by ten current and former federal and state judges, "With mutual respect and two-way communication [between state and federal judges sitting on related cases], these challenges [concerning differing state and federal rules] can be overcome. The key is to keep apprised of the progress of the litigation as a whole. Doing so will enable [the judge] to conserve resources, exploit efficiencies in discovery, and avoid one or more parties taking an unfair advantage." Federal Judicial Center, *Coordinating Multijurisdictional Litigation A Pocket Guide for Judges* 13 (2013).

A. Harmonization of State and Federal Discovery Rules

The non-legislative harmonization of many of the courts' discovery rules has aided such coordination.[54] The basic standards for discoverable information, as applied by New York State and federal courts, are largely the same. New York's "material and necessary in the prosecution or defense of an action" standard for discovery under N.Y. C.P.L.R. § 3101(a) closely resembles the "relevant" and "proportional to the needs of the case" standard under recently amended Federal Rule of Civil Procedure 26(b). However, while Rule 26 lists a number of factors that federal courts should consider in assessing whether discovery is "relevant and proportional,"[55] the CPLR does not contain an analogous list of factors. Instead, New York trial courts have "broad discretion"[56] to determine whether discovery sought is "material and necessary," utilizing a test of "usefulness and reason."[57] New York courts should consider applying the factors listed in Rule 26 in assessing whether discovery is "material and necessary" in order to promote consistency between State and federal discovery rulings.[58]

As to specific discovery issues such as depositions, interrogatories, and privilege logs, certain differences between federal discovery rules and those of New York State courts no

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54 Even in 1992, Schwarzer and his co-authors observed that "[j]udges who coordinate proceedings find that state and federal discovery rules are usually compatible." Schwarzer, *supra* note 1, at 1712.

55 These factors include "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

56 *Geffner* v. *Mercy Med. Ctr.*, 83 A.D.3d 998, 998-99 (N.Y. App. Div. 2d Dep't 2011).

57 *Allen* v. *Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406-07 (N.Y. 1968).

58 This Council has already made extensive recommendations on how New York State and federal courts can harmonize differing rules concerning pre-litigation obligations to preserve electronically stored information. *See generally* Advisory Group to the New York-State Federal Judicial Council, *Harmonizing the Pre-Litigation Obligation to Preserve Electronically Stored Information in New York State and Federal Courts* (Sept. 2010).

longer exist, at least in the Commercial Division of the New York Supreme Court ("Commercial Division"). Indeed, in January 2006, the Commercial Division promulgated rules for the Division that eliminated most substantive differences that would otherwise impede federal-state discovery coordination.[59]

For example, the Commercial Division rules, like the federal rules, now typically limit depositions to a number of ten lasting only seven hours each.[60] For interrogatories, the Commercial Division rules similarly provide that a party may only make 25 interrogatory requests, absent a specification to the contrary in the preliminary conference order.[61] Under both the Commercial Division rules and Local Rules for the Southern and Eastern Districts of New York, privilege logs may group entries for documents together, rather than logging those documents individually.[62]

Mass tort cases, one of the main candidates for coordinated discovery,[63] typically do not fall under the Commercial Division's jurisdiction.[64] However, mass tort cases generally

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59 Commercial Division - N.Y. Supreme Court, NEW YORK STATE UNIFIED COURT SYSTEM, https://www.nycourts.gov/courts/comdiv/history.shtml (last accessed Jan. 19, 2016).

60 Fed. R. Civ. Pro. 30(a)(2), (d); N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70, Rule 11-d(a).

61 Fed. R. Civ. P. 33(a)(1); N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70, Rule 11-a(a).

62 S.D.N.Y. & E.D.N.Y. Local R. 26.2(c); N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70 Rule 11-b(b). Categorization of privilege log entries "can greatly reduce the cost of privilege review and logging." Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19, 54 (2009).

The U.S. District Courts for the Western and Northern Districts of New York should consider amending their local rules to similarly allow for a categorical approach to privilege log entries.

63 *See* Federal Judicial Center, *supra* note 3, at 16 (the type of litigation that presents opportunities for discovery coordination "[t]ypically . . . involves mass tort claims").

64 *See* Robert L. Haig, *New York State Creates a Commercial Division*, 64 Def. Couns. J. 17, 18, 20 (1997) (New York rejected the idea of having the Commercial Division accept

are governed by Case Management Orders that, like the Commercial Division rules, eliminate most substantive differences that would otherwise impede federal-state discovery coordination.

Nonetheless, for any cases that do not involve mass torts or are not governed by the Commercial Division rules,[65] differences in State and federal discovery rules persist that might frustrate efforts by New York State and federal courts to coordinate discovery. For example, the rules that apply in non-Commercial Division cases specify no limits on the number and length of depositions or the number of interrogatories, nor do those rules provide for the grouping of privilege log entries. At best, those rules provide that a trial court has "broad power to regulate discovery to prevent abuse" pursuant to N.Y. C.P.L.R. § 3103(a).[66] The CPLR's lack of any such limits in those cases can lead to differences with respect to the resolution of those discovery issues in federal and State courts.

Although the New York State constitution and laws prevent State courts from amending the CPLR,[67] there are two paths for harmonizing discovery rules between federal courts and non-Commercial Division State courts where the cases call for coordination. *First*, the New York Chief Administrative Judge has authority to adopt discovery rules similar to the

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"complex tort cases," and left the resolution of those cases to *non*-Commercial Division judges who are "best able to deal with them").

[65] The newly adopted Commercial Division rules clarify what actions may come before the Commercial Division. To qualify, the principal claims asserted in those actions must fall within a specified category (such as breach of contract, professional malpractice, and disputes relating to commercial banks or financial institutions) and, for most of those categories, meet a county-specific monetary threshold. This threshold varies from $50,000 in a few counties to $500,000 in New York County. Shareholder derivative suits and commercial class actions do not need to satisfy a monetary threshold to be assigned to the Commercial Division. *See* N.Y. Comp. Codes R. & Regs. tit. 22, §§ 202.70(a), (b).

[66] *See, e.g.*, *Samide* v. *Roman Catholic Diocese of Brooklyn*, 16 A.D.3d 482, 483 (N.Y. App. Div. 2d Dep't 2005).

[67] Vincent C. Alexander, *The CPLR at Fifty: A View from Academia*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 664, 677 (2013).

newly adopted Commercial Division rules that would apply to non-Commercial Division cases being coordinated with federal cases.[68] *Second*, as an alternative, individual State courts presiding over coordinated actions could apply the newly adopted Commercial Division rules through a case management order. Through either of these approaches, New York State courts could extend the Commercial Division rules for discovery to *all* cases that seem to be good candidates for coordinated discovery, thereby facilitating such coordination.

B. Notice of Related Cases and Discovery Orders

New York Supreme Court rules provide that Supreme Court justices "shall consult" with the judges in related cases "proceeding in Federal courts or in the courts of other states"; and, where appropriate, those justices "may require that discovery . . . proceed jointly or in coordination with discovery in the Federal or other states' actions."[69] But that requirement is limited, applying only where several related cases already have been filed and "coordinated" in New York State court.[70] And there is no analogous requirement for federal judges. Moreover, neither federal courts, nor New York State courts, require that judges notify their federal or State counterparts in related cases of discovery orders that they have entered.

The consequence is a dearth of information at the outset that otherwise would facilitate federal-state discovery coordination. Until now, the burden has been on proactive judges to request that parties notify the court of any related federal or State court cases, to reach

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68 The Chief Administrative Judge has the authority to issue administrative rules not inconsistent with the CPLR without prior legislative approval, a power on which the Chief Administrative Judge relied to promulgate the newly adopted Commercial Division rules. *Id.* at 677-78.

69 N.Y. Comp. Codes R. & Regs. tit. 22, § 202.69(c)(3).

70 *Id.* § 202.69(c).

out to the judges in those cases, and to share their discovery orders therewith. That burden is not properly placed on the courts, and might discourage judges from engaging in coordination.

Federal and New York State courts, therefore, should (i) educate judges of their inherent power to require litigants to notify the court of any related cases, and (ii) consider adopting rules that would require *parties* to disclose any related cases at the outset of discovery and, as the New York Supreme Court rules do now, require all judges to consult their federal or State counterparts in such cases.[71] There also should be a requirement that the judges of any related cases disclosed by parties be added to an automated distribution list or some other system[72] for receiving discovery orders in a given case.

C. Appointment of Special Masters

Under Federal Rule of Civil Procedure 53, federal courts may appoint a special master compensated by the parties to, *inter alia*, "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of

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[71] The Local Rules for the Southern District of New York impose a "continuing duty of each attorney appearing in any civil or criminal case to bring promptly to the attention of the Court all facts which said attorney believes are relevant to a determination that said case and one or more pending civil or criminal cases should be heard by the same Judge, in order to avoid unnecessary duplication of judicial effort." SDNY Local Rule 1.6; *see also* EDNY Local Rule 50.3.1. ("A civil case is 'related' to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge."). This rule, however, is limited for purposes of consolidating or coordinating cases filed within the federal district. Likewise, New York State case opening papers require parties to notify the court of any related actions so that the courts can determine whether such cases should be coordinated or consolidated under Section 202.69 of the Uniform Rules for New York State Trial Courts.

[72] In the *General Motors* litigation, for instance, Judge Jesse Furman of the Southern District of New York directed the parties to maintain a website with relevant information, including court orders, that would be accessible to State court judges in related cases. *See infra* at Appendix A.

the district."[73] Federal judges have utilized this rule to appoint special masters specifically to oversee discovery.[74] In contrast, New York State judges must obtain the parties' consent to appoint a referee (New York's term for a special master) compensated by the parties to oversee discovery.[75] This divergence hinders the ability of State and federal judges to appoint a single special master to oversee discovery in all related matters.

Amendment of the CPLR would permit New York State judges to appoint special masters absent consent of the parties. But even without formal legislative changes, in cases involving the same parties, federal and State judges can appoint the same special master, who would derive income from the parties in the federal action. If the parties in the federal and State action differ, judges can encourage the parties in the State action to accept and fund the special master by (i) educating the parties on the benefits of appointing a special master,[76] (ii) inviting the parties to nominate candidates for special master, or (iii) allowing the parties to provide input on the extent of the special master's duties and authority. Finally, even if the parties in the State

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73 Fed. R. Civ. P. 53(a)(1).

74 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 501-02 (S.D.N.Y. 2009) (appointing special master to oversee discovery); *In re AOL Time Warner, Inc. Sec. Litig.*, No. 06-cv-0695, 2006 WL 1997704, at *1 (S.D.N.Y. July 13, 2006) (same).

75 *Surgical Design Corp.* v. *Correa*, 309 A.D.2d 800, 800 (N.Y. App. Div. 2d Dep't 2003); *see also Csanko* v. *County of Westchester*, 273 A.D.2d 434 (N.Y. App. Div. 2d Dep't 2000).

The New York Code of Rules and Regulations does allow the Chief Administrator of the Courts to authorize the creation of a program for use of special masters in designated courts; however, all special masters must serve *pro bono*. 22 N.Y. C.R.R. § 202.14. Pursuant to this authority, Chief Judge Prudenti instituted a pilot program in the Commercial Division that allows complex discovery issues to be referred to special masters, upon consent of the parties. *See* Administrative Order of the Chief Administrative Judge of the Courts, dated August 4, 2014. The program began September 2, 2014 and lasts for 18 months. *Id*. at 1.

76 A special master can ensure consistency in discovery rulings and save the parties substantial time and money by resolving discovery disputes quickly and efficiently without the need to resort to expensive motions, letters, and hearings. David R. Cohen, *The Judge, the Special Master, and You*, 40 Litigation 32, 35 (2014).

court action do not consent to fund a special master, federal and State judges can nonetheless appoint a special master who agrees to serve *pro bono*.[77]

D. Privilege

Privilege is an important area in which federal and State courts should seek to coordinate rulings. Conflicting privilege rulings between federal and State courts could potentially render some rulings "meaningless," as a single ruling that a document is not privileged would allow "the contents of the documents [to] become known and available in all jurisdictions."[78] Fortunately, the federal and State approaches to attorney-client and work product are largely similar, thus facilitating coordinating of those issues.

There appears to be no practical difference between federal and State approaches to attorney-client privilege. In fact, because New York law is "substantially similar to the federal doctrine" on this topic,[79] New York courts have applied federal precedent when ruling on questions of attorney-client privilege under New York law.[80]

Similarly, federal and New York State law employ largely similar approaches to attorney work product. The CPLR distinguishes between "materials prepared by an attorney, while acting as an attorney, which contain his or her legal analysis, conclusions, theory, or

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[77] Freedman, *supra* note 2, at 1069 (noting that CPLR 4301 and 3104 "provide for the appointment of referees to supervise discovery or for other limited, purposes, but the state court cannot compel payment of these adjuncts).

[78] *Id*. at 1048.

[79] *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 70 n.6 (S.D.N.Y. 2009).

[80] *Charter One Bank, F.S.B.* v. *Midtown Rochester, L.L.C.*, 191 Misc. 2d 154, 165 n.10 (N.Y. Sup. Ct. 2002) ("The New York Court of Appeals described the attorney-client statute as a mere re-enactment of the common-law rule; thereby allowing federal precedent to be reviewed in assessing the application of this privilege." (internal quotation omitted)).

strategy," which are absolutely privileged,[81] and other documents generated for litigation, which may be disclosed "'only upon a showing that the party seeking discovery has [a] substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.'"[82] Federal courts employ a similar approach. Opinion work product, comprised of the "mental impressions, conclusions, opinions, or legal theories of an attorney," is subject to heightened protection.[83] Though such protection is not absolute like under New York law, opinion work product nonetheless "enjoys a near absolute immunity" under federal law and can only "be discovered only in very rare and extraordinary cases," such as where the work product is in aid of a criminal scheme or where the attorney's opinions themselves are at issue.[84] In contrast, "ordinary" or "fact" work product under federal law, like under State law, is subject to qualified privilege that may be overcome if a party demonstrates "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[85]

In contrast, State and federal courts do differ in their approach to bank examination privilege. New York has a broad *statutory* bank examination privilege belonging to the New York State Banking Department which prevents the disclosure of any information "concerning or arising out of" a bank examination, unless the Superintendent concludes that "the

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81 *Geffner* v. *Mercy Med. Ctr.*, 125 A.D.3d 802 (N.Y. App. Div. 2d Dep't 2015).

82 *Matter of New York City Asbestos Litig.*, 109 A.D.3d 7, 12-13 (N.Y. App. Div. 1st Dep't 2013) (quoting N.Y. C.P.L.R. § 3101(d)(2)).

83 *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007) (quoting *United States* v. *Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998)).

84 *P. & B. Marina, Ltd. P'ship* v. *Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff'd sub nom. P&B Marina Ltd.* v. *LoGrande*, 983 F.2d 1047 (2d Cir. 1992) (quoting *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977)).

85 Fed. R. Civ. P. 26(b)(3)(A); *Anilao* v. *Spota*, No. 10-cv-32, 2015 WL 5793667, at *11-12 (E.D.N.Y. Sept. 30, 2015).

ends of justice and the public advantage will be subserved by the publication" of that information.[86] The Superintendent's decision not to release such information is subject to an "arbitrary or capricious" standard of judicial review in New York State court.[87]

But the same information does not appear to be protected by New York's statutory privilege in federal courts. On the contrary, federal courts have refused to apply New York's statutory privilege, and instead have applied the bank examination privilege under federal common law.[88] Unlike New York's statutory privilege, the federal privilege may be subject to judicial review based on a multi-factored balancing test.[89] Indeed, in one case, a federal court applied that balancing test and permitted the discovery of New York State Banking Department materials, even though the banking department maintained that those materials were privileged.[90]

Without formal legislative changes to the federal rules, C.P.L.R., or New York banking law, there appears to be no way to entirely resolve differences in approach to bank examination privilege. Yet, even without fully harmonizing their approaches, courts still can coordinate their efforts by appointing a special master to resolve issues of bank examination privilege in related cases and by sharing rulings and, if possible, issuing parallel rulings on that issue.

Another area in which State and federal courts diverge in their approach to privilege is their ability to issue non-waiver orders that are binding in subsequent litigation.

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86 N.Y. Banking Law § 36(10).

87 *Clark* v. *Flynn*, 9 A.D.2d 249, 251 (N.Y. App. Div. 1st Dep't 1959)

88 *Rouson ex rel. Estate of Rouson* v. *Eicoff*, No. 04-cv-2734, 2006 WL 2927161, at *4 (E.D.N.Y. Oct. 11, 2006).

89 *See, e.g.*, *In re Franklin Nat. Bank Sec. Litig.*, 478 F. Supp. 577, 582-83 (E.D.N.Y. 1979); 11 Am. Jur. 2d Banks and Financial Institutions § 1156.

90 *Eicoff*, 2006 WL 2927161, at *2-8.

Under Federal Rule of Evidence 502(d), if parties enter into an agreement providing that the intentional production of privileged information shall not constitute a waiver of that privilege, and a federal court incorporates that agreement into a court order, that order binds not only parties to the instant litigation, but also non-parties in any subsequent actions brought in either federal or State court.[91] Unfortunately, there is no equivalent to Rule 502(d) in New York State courts.[92] New York judges may enter non-waiver agreements into an order, but that order would not be controlling in other actions.

Even without a State equivalent to Rule 502(d), judges overseeing coordinated litigation can nonetheless enter joint orders providing that a disclosure in any one of the related actions does not waive any privilege in any other related action, either federal or State. Moreover, parties in State actions may choose to produce documents in a related federal action, pursuant to a Rule 502(d) order issued by a federal judge. Those documents could be produced into a central document depository, which is made accessible to parties in the State action. In the *General Motors* litigation, for example, plaintiffs in a State action moved to compel production of certain potentially privileged documents from defendants (who were also defendants in the federal MDL).[93] Defendants agreed to produce certain of those documents into a central document depository created in the MDL "expressly conditioned on the entry of a Rule 502(d)

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[91] Federal Rule of Evidence 502(d) has also been utilized effectively by judges to help to avoid inconsistent rulings in coordinated litigation. In the *General Motors* litigation, Judge Furman noted that under Federal Rule of Evidence 502(d), his ruling "on the question of waiver is binding on other courts throughout the country" and therefore "will help prevent inconsistent rulings in related actions." *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 526 (S.D.N.Y. 2015); *see infra* Appendix A at 3-4.

[92] *New York State Bar Association: Best Practices in E-Discovery in New York State and Federal Courts*, dated July 2011, at 24, *available at* http://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/Ediscovery_Final5_2013_pdf.html.

[93] *In re Gen. Motors*, 80 F. Supp. 3d at 525.

order," which Judge Furman granted.[94] Plaintiffs were able to access the documents via the MDL document depository, and defendants were able to secure the protections of a Rule 502(d) order.

A final area in which State and federal rules on privilege and work product diverge concerns inadvertent disclosure of privileged or work product material. Federal Rule of Evidence 502(b) provides that disclosure of otherwise privileged or protected information in a federal case does not constitute a waiver in federal or state proceeding if "(1) the disclosures was 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 . . . ."[95] Although the CPLR does not have a similar rule providing that inadvertent disclosure in state court does not constitute a waiver in state court proceedings, State Courts involved in coordinated actions could require similar non-waiver provisions in case management orders or in court-executed confidentiality orders.[96]

E. Interrogatories

Although, at least in the Commercial Division, the New York State rules on interrogatories are now similar—if not identical—to the federal rules, one difference remains

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[94] *See* Letter to the Honorable Jesse M. Furman and the Honorable Kathryn J. Tanksley, dated Nov. 12, 2014, *In re: General Motors LLC Ignition Switch Litigation*, No. 14-md-2543 (S.D.N.Y. Nov. 12, 2014) (ECF No. 397); *In re Gen. Motors*, 80 F. Supp. 3d at 525.

[95] Federal Rule of Evidence 502(c) provides that "[w]hen 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."

[96] The New York State-Federal Judicial Council has previously recommended that New York adopt a law codifying the federal rules applicable to inadvertent waivers of privilege. *See* New York State-Federal Judicial Council, *Report on the Discrepancies between Federal and New York State Waiver of Attorney-Client Privilege Rules* at 12-13 (Jan. 2014).

that could frustrate efforts to coordinate this form of discovery. In the Southern District of New York, interrogatories may not be used except for specified purposes unless a party demonstrates that interrogatories are "a more practical method of obtaining the information sought than a request for production or a deposition."[97] In contrast, New York State courts have held that a trial court's preference for other forms of discovery over interrogatories may constitute reversible error.[98]

There is a potential solution: when related federal and State cases are involved, New York trial courts should expressly consider the value of coordinating discovery when evaluating whether to issue orders preferring other forms of discovery over interrogatories. In turn, New York appellate courts should weigh the value of coordinating discovery as a factor in reviewing such decisions. By taking that factor into account, New York State courts can adjust on a case-by-case basis their approach to interrogatories to foster coordination with federal courts.

F. Confidentiality

Federal and New York State court rules on confidentiality differ in two ways. The first difference is merely superficial. Federal rules authorize courts to protect parties from "annoyance, embarrassment, oppression, or undue burden or expense" and provide specific protection against the disclosure of "a trade secret or other confidential research, development, or

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[97] S.D.N.Y. Local R. 33.3(b). Pursuant to S.D.N.Y. Local R. 33.3(a), parties are permitted to serve interrogatories "seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature." After the conclusion of other discovery, parties are permitted to serve "interrogatories seeking the claims and contentions of the opposing party." S.D.N.Y. Local R. 33.3(c).

[98] *See, e.g.*, *Barouh Eaton Allen Corp.* v. *Int'l Bus. Machines Corp.*, 76 A.D.2d 873, 874 (N.Y. App. Div. 2d Dep't 1980).

commercial information."[99] New York rules only expressly protect parties from "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."[100] In practice, however, New York courts have interpreted their rules to cover trade secrets and otherwise confidential information.[101] Although this apparent difference likely has no real effect on discovery coordination, it can easily be resolved by New York State courts adopting a rule that formalizes their existing practice of recognizing the protection of trade secrets and otherwise confidential information.

The second difference is more significant. Although federal and New York State court rules both require parties seeking protective orders to show that they are entitled to protection,[102] the burdens of such a showing vary, depending on whether the requests relate to trade secrets and otherwise confidential information. Federal courts generally require the movant to show a "particular need for protection," but "ultimately weigh[] the interests of both sides in fashioning an order."[103] New York State courts likewise "balance the parties' competing interests."[104] But, if the requests relate to trade secrets and otherwise confidential information, New York State courts employ a burden-shifting framework. Once the movant has shown that the information constitutes a trade secret or otherwise confidential information, New York State

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99 Fed. R. Civ. P. 26(c).

100 N.Y. C.P.L.R. § 3103.

101 *See* Patrick M. Connors, McKinney's C.P.L.R. Practice Commentary C3103:4 ("The need for [the] concealment [of trade secrets] is not categorized anywhere in the CPLR, but rather left to the ad hoc protection of the court by protective order under CPLR 3013(a)."); *see also Mann ex rel. Akst* v. *Cooper Tire Co.*, 33 A.D.3d 24, 27-28 (N.Y. App. Div. 1st Dep't 2006).

102 *See Duling* v. *Gristede's Operating Corp.*, 266 F.R.D. 66, 71 (S.D.N.Y. 2010); *Mann*, 33 A.D.3d at 30-31.

103 *Duling*, 266 F.R.D. at 71.

104 *Accent Collections, Inc.* v. *Cappelli Enter., Inc.*, 84 A.D.3d 1283, 1283 (N.Y. App. Div. 2d Dep't 2011).

courts require the non-movant to "show that the information appears to be indispensable and cannot be acquired in any other way,"[105] and only then do the courts "balance" the parties' competing interests.[106]

To eliminate differences in the burden of obtaining a protective order, federal courts, in cases involving coordinated discovery, should consider applying a burden-shifting rule that requires the non-movant to show that a trade secret or otherwise confidential information is indispensable and could not be acquired in any other way and, thus, conform the federal rule to the existing New York rule.[107]

G. Preservation of Electronically Stored Information

Federal and New York courts diverge on the state of mind necessary to impose sanctions for spoliation of electronically stored information. Under recently amended Federal Rule of Civil Procedure 37, severe sanctions against the party who spoliates (such as an adverse inference jury charge, a presumption that the lost information was unfavorable to the party, or dismissal of the action), may be imposed "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation."[108] In contrast, the New York Court of Appeals recently ruled that sanctions such as an adverse inference may be imposed upon a finding of simple negligence, so long as the party seeking sanctions establishes that the

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105 *Mann*, 33 A.D.3d at 30-31; *see also Conley & Son Excavating Co., Ltd.* v. *Delta Alliance, LLC*, 120 A.D.3d 1604, 1605 (N.Y. App. Div. 4th Dep't 2014).

106 *Mann*, 33 A.D.3d at 33.

107 There is no Second Circuit precedent that would prohibit federal courts from adopting the New York burden-shifting rule. *See Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984) ("Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.").

108 Fed. R. Civ. P. 37(e)(2).

destroyed documents are relevant.[109] This divergence could potentially lead to inconsistent repercussions for spoliation of evidence in related federal and State cases.

In order to promote consistency among rulings in related actions, State judges should be cognizant of this divergence when ruling on spoliation motions for electronically stored information, at least in instances in which related federal cases are pending. Though New York permits sanctions in instances of ordinary negligence, State judges should nonetheless exercise their "broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence"[110] to limit the imposition of severe sanctions to instances in which the party controlling the evidence intentionally deprived the opposing party of the use of the evidence.

H. Costs

The "general rule" in New York State courts has long been that "the party seeking discovery should bear the cost incurred in the production of discovery material." *Waltzer* v. *Tradescape & Co., L.L.C.*, 31 A.D. 302, 304 (N.Y. App. Div. 1st Dep't 2006). This rule contrasts the federal rule, under which the "presumption is that the responding party must bear the expense of complying with discovery requests." *Zubulake* v. *UBS Warburg, LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003). Both federal and State courts have broad discretion to alter these default rules to prevent undue burden or expense. *See id.* at 316 (noting that the responding party may "invoke the district court's discretion under Rule 26(c) to grant orders protecting it from undue burden or expense") (internal quotations and alterations omitted); CPLR 3103(a) (the court may "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" in order to "prevent unreasonable annoyance,

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109 *Pegasus Aviation I, Inc.* v. *Varig Logistica S.A.*, No. 603076/2008, 2015 WL 8676955 (N.Y. Sup. Ct. Dec. 15, 2015).

110 *Id.*

expense, embarrassment, disadvantage, or other prejudice"). But the differences between the default rule for federal and State courts could present a barrier to coordination between courts under the different regimes. For example, the scope of discovery under the federal system expressly considers "whether the burden or expense of the proposed discovery outweighs its likely benefit," Fed. R. Civ. P. 26(b)(1), a factor not mentioned in CPLR 3101. Some courts have opined that such considerations are not necessary under a requester-pays system, because a litigant that must pay for the productions it requests "has a strong incentive to formulate its discovery requests in a manner as minimally burdensome as possible." *T.A. Ahern Contractors Corp.* v. *Dormitory Auth.*, 875 N.Y.S.2d 862, 868 (N.Y. Sup. Ct. 2009).

This conflict has been removed in the First Department, which has expressly adopted the federal rule. *See U.S. Bank Nat'l Ass'n* v. *GreenPoint Mortg. Funding, Inc.*, 94 A.D.3d 58, 63-64 (N.Y. App. Div. 1st Dep't 2012) (adopting a rule "consistent with the Federal Rules of Civil Procedure" that "the producing party [will] bear the initial cost of searching for, retrieving and producing discovery") (citing *Zubulake*, 217 F.R.D. at 317-18). Of course, to the extent that other courts follow the First Department, this issue will evaporate. But for now, the prevailing law in other departments is the traditional New York rule. *See, e.g.*, *Rubin* v. *Alamo Rent-A-Car*, 190 A.D.2d 661, 663 (N.Y. App. Div. 2d Dep't 1993) (holding that "it is the party seeking discovery of documents who should pay the cost of their reproduction") (alteration omitted). Federal and State courts seeking to coordinate discovery who encounter this conflict will likely be required to compromise between the values reflected in each system. But in most cases, it is likely that an acceptable and equitable solution lies within the discretion granted to both courts. New York State courts in the Second, Third, and Forth Departments should

consider following the First Department in adopting the federal rule when coordinating with federal courts.

III. Conclusion

The authors of this Report do not purport to identify all issues with respect to federal-state discovery coordination, but have attempted to highlight some of the main issues, including ways in which such coordination may be achieved and potential rule-based and/or practical changes to foster more coordination in the future. The authors recommend that the following modest changes be implemented in order to foster federal-state discovery coordination:

Changes Implemented by Individual Judges

- Federal and State court judges should require litigants to notify the court of any related cases, regardless of where the cases are filed.

- In related matters, federal and State judges should consider implementing joint or parallel scheduling or case management orders, sharing rulings, holding joint discovery hearings, holding joint *Frye-Daubert* hearings, appointing special masters to establish procedures for discovery and resolve discovery disputes, ordering the creation of joint document depositories, and encouraging depositions to be taken only once for purposes of both State and federal litigation.

- Judges should consider entering joint orders providing that a disclosure in any one of the related actions does not waive any privilege in any other related actions, either federal or State. Likewise, in coordinated cases, State Court judges should also consider adopting, though a case management or so-ordered confidentiality

order, Federal Rule of Evidence 502(b)'s protections for inadvertent disclosure of privileged or protected materials. Judges should also consider directing parties in State actions to produce documents into a central document depository in a related federal action, in order to avail themselves of the protections of an order under Federal Rule of Evidence Rule 502(d).

Changes in Rules

- The New York Chief Administrative Judge should consider extending the recently adopted Commercial Division rules eliminating most substantive differences that would otherwise impede federal-state discovery coordination to other New York State courts hearing cases that are good candidates for coordinated discovery. (Non-Commercial Division judges could also extend the Commercial Division rules to coordinate cases through case management orders.)

- Federal and New York State courts should consider adopting rules that would require parties to disclose any related cases at the outset of discovery, require all judges to consult their federal or State counterparts in related matters, and provide for the creation of an automated distribution list or other system for receiving discovery orders in related cases.

- New York State courts should consider adopting a rule that formalizes their existing practice of recognizing the protection of trade secrets and otherwise confidential information in discovery in order to mirror federal standards of confidentiality.

- The U.S. District Courts for the Northern and Western Districts should consider amending their local rules to align with the Commercial Division and Southern and Easter District Rules of allowing litigants to group entries for documents together, rather than logging those documents individually.

Changes in Common Law

- In determining whether information is "material and necessary" and therefore discoverable, New York State courts should consider applying the factors listed in Federal Rule of Civil Procedure 26.

- In reviewing trial court decisions favoring certain forms of discovery other than interrogatories, New York State courts should weigh as a factor the value of coordinating discovery when related federal and State cases are involved.

- In fashioning protective orders in cases involving coordinated discovery, federal courts should consider applying a burden-shifting rule that mirrors the existing New York rule and requires the non-movant to show that a trade secret or otherwise confidential information is indispensable and could not be acquired in any other way.

- In deciding spoliation motions for electronically stored information, State courts should consider imposing severe sanctions only in instances in which the party controlling the evidence intentionally deprived the opposing party of the use of the evidence—the standard under federal law.

- In allocating costs of discovery between the parties, coordinating State Courts should consider adopting the federal rule generally requiring the producing party to bear the costs of their productions.

By identifying these discrete issues, the authors hope that federal and State courts in New York increasingly will come to view coordinated discovery as an achievable goal, if not the norm, in related cases involving multiple jurisdictions.

APPENDICES

APPENDIX A

OTHER EXAMPLES OF FEDERAL-STATE DISCOVERY COORDINATION

A. General Motors Ignition-Switch Litigation

After recalling vehicles based on an ignition-switch defect in 2014,[1] General Motors was sued in both federal and State courts (*e.g.*, Kentucky,[2] California,[3] Tennessee[4]).[5] Most of the federal cases were transferred to the Southern District of New York for a multidistrict litigation ("MDL") before Judge Jesse Furman.[6]

To "further the just and efficient disposition of each proceeding," Judge Furman issued a Joint Coordination Order,[7] appended hereto as Appendix D, which directed coordinated discovery with related cases, including the ones in State court. Among other things, the order provided for the "dissemination of information and Orders" between and among that proceeding and related cases, by requiring the creation of a website which would contain "Court Orders, Court opinions, Court minutes, Court calendars, frequently asked questions, [C]ourt transcripts, the MDL docket, current developments, information about leadership in the MDL, and appropriate contact information."[8] Judge Furman also required the website to have a section accessible only to judges in related cases.[9]

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1 *See In re Gen. Motors*, No. 14-md-2543, 2015 WL 221057, at *1 (S.D.N.Y. Jan. 15, 2015).

2 *In re Gen. Motors*, No. 14-md-2543, 2015 WL 3776385 (S.D.N.Y. Jun. 17, 2015).

3 *In re Gen. Motors*, No. 14-md-2543, 2014 WL 6655796 (S.D.N.Y. Nov. 24, 2014).

4 *In re Gen. Motors*, No. 14-md-2543, 2014 WL 4636459 (S.D.N.Y. Sept. 17, 2014).

5 Joint Coordination Order at 1, *In re Gen. Motors*, No. 14-md-2543 (S.D.N.Y. Sept. 24, 2014), ECF No. 315.

6 *In re Gen. Motors*, 26 F. Supp. 3d 1390, 1390-91 (J.P.M.L. 2014).

7 Joint Coordination Order at 2, *In re Gen. Motors*,No. 14-md-2543 (S.D.N.Y. Sept. 24, 2014), ECF No. 315.

8 *Id.* at 7.

9 *Id*. at 7-8.

In terms of document discovery, the Joint Coordination Order directed lead counsel to create an "electronic document depository" accessible to counsel in coordinated cases.[10] Recognizing that creating such a depository would be costly, Judge Furman provided for the entry of an "order for the equitable spreading of depository costs among users."[11]

As for non-document discovery, the Joint Coordination Order encouraged witnesses to be deposed only once for both federal and State litigation by permitting witnesses in a deposition to be questioned by counsel from all related actions.[12] Judge Furman instructed that any depositions beyond those taken in the MDL may be taken in a coordinated action "only upon leave of the court in which the Coordinated Action is pending" and only upon a showing of good cause as to "why the discovery sought could not have been obtained in coordinated discovery in the MDL Proceeding."[13] Likewise, Judge Furman prohibited MDL counsel from re-deposing any witness deposed in a coordinated action without a showing of good cause and permission from the court.[14] The Joint Coordination Order permitted counsel in the MDL proceeding to use depositions taken in coordinated cases "as if they had been taken under the applicable discovery rules of the MDL Court," and correspondingly provided that counsel in the coordinated cases should be permitted to use depositions taken in the MDL proceeding "as if they had been taken under the applicable civil discovery rules of the respective jurisdictions."[15] Thus far, the Joint Coordination Order has successfully ensured that witnesses are deposed only once for purposes of both State and federal litigation.

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10 *Id*. at 3.

11 *Id.*

12 *Id*. at 9.

13 *Id*. at 10.

14 *Id*.

15 *Id*. at 5.

Judge Furman encouraged the parties to engage in joint, coordinated written discovery by permitting counsel in coordinated actions to submit requests for documents, interrogatories, depositions on written questions, and requests for admission "to be propounded in the MDL."[16] Any additional written discovery in the coordinated actions would be permitted "only upon leave of the court" for good cause shown, "including [a showing as to] why the discovery sought could not have been obtained in the MDL Proceeding."[17] Judge Furman also permitted counsel to receive interrogatories, requests for admission, document requests, and responses thereto from related cases.[18]

As for privilege issues, Judge Furman, at one point, cited Federal Rule of Evidence 502(d)[19] in addressing the issue of whether the defendant's disclosure of an otherwise privileged document in the federal multidistrict litigation waived its attorney-client and work product privilege as to other materials for use in that litigation and related cases.[20] In resolving this specific privilege waiver issue in favor of the defendant, Judge Furman commented that since "Rule 502(d) provides that this Court's ruling on the question of waiver is binding on other courts throughout the country," his ruling "will help prevent inconsistent rulings in related actions."[21]

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16 *Id*. at 11-12.

17 *Id*. at 12.

18 *Id*. at 4-5.

19 Fed. R. Evid. 502(d).

20 *In re Gen. Motors*, 2015 WL 221057, at *3.

21 *Id.* Among other things, the rule, adopted in 2008, provides that the federal court's resolution of a privilege waiver issue relating to "disclosure *connected with the litigation pending before the court*" is binding on "any other federal or state proceeding." Fed. R. Evid. 502(d) (emphasis added). The federal court may also resolve a privilege waiver issue relating to disclosure "made in a state proceeding," but only if such disclosure "is not the subject of a state-court order concerning waiver." *Id.* at 502(c).

B. ReNu with MoistureLoc Litigation

In and around 2006, purchasers of ReNu with MoistureLoc contact lens solution sued manufacturer Bausch & Lomb for alleged defects relating to that product, claiming, among other things, breach of warranty, deceptive trade practices, and strict products liability.[22] The federal lawsuits brought by various purchaser classes proceeded as multidistrict litigation before Judge David Norton of the District of South Carolina.[23] Separately, other purchasers brought a set of lawsuits in New York State court which came before Justice Freedman.[24]

As a general matter, Judge Norton and Justice Freedman issued parallel (and sometimes joint) orders, committing to "full cooperation" on discovery issues in their respective cases "to conserve scarce judicial resources, eliminate duplicative discovery, serve the convenience of the parties and witnesses, and promote the just and efficient conduct of this litigation."[25] The judges not only ordered the same discovery schedule,[26] but also provided for the reciprocal use of any discovery produced in federal and New York State court.[27]

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22 *See In re Bausch & Lomb Contact Lens Solution Prod. Liab. Litig.*, No. 06-mn-77777 (D.S.C.); *In re New York Renu with MoistureLoc Prod. Liab. Litig.*, No. 766000/2007 (N.Y. Sup. Ct.).

23 *See In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C.).

24 *See In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct.).

25 Case Management Order at 10, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Dec. 21, 2006), ECF No. 20; *see also* Case Management Order at 1, *In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct. Aug. 31, 2007), NYSCEF No. 20 ("Plaintiffs and defendants in this litigation shall work to coordinate to the extent practicable depositions and document discovery with the MDL proceeding involving ReNu® with MoistureLoc© . . . .").

26 *See* Case Management Order at 1-2, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Nov. 14, 2007), ECF No. 74; Case Management Order at 1-2, *In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct. Nov. 15, 2007), NYSCEF No. 7.

27 *See* Case Management Order at 10, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Dec. 21, 2006), ECF No. 20 ("[A]ll discovery conducted in these proceedings may be utilized in any related state court action, in accordance with that state's laws and rules of evidence, and vice versa . . . .").

In terms of document discovery, Judge Norton and Justice Freedman designated plaintiffs' steering committees and directed the committees to create and administer document depositories "available to plaintiffs in any other related litigation."[28] Additionally, the judges held joint discovery hearings (in both South Carolina and New York) with all parties to discuss issues relating to "electronic discovery," and to adopt "uniform rules to govern redaction of documents produced in discovery as well as claims of privilege with respect to documents sought to be obtained in discovery by plaintiffs."[29] Those judges also appointed a New York law professor as special master to supervise "document discovery with respect to claims of confidentiality, privilege, and the redaction of documents," and to issue related rulings subject to *de novo* review by both judges.[30] (A copy of the joint order appointing the special master is appended hereto as Appendix E.)

Judge Norton and Justice Freedman also held a joint hearing and issued orders and supplemental protocols to address depositions. Among other things, the judges directed parties in the federal and New York State court cases to (i) cross-notice their depositions of fact

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[28] Case Management Order 3, *In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct. Aug. 31, 2007), NYSCEF No. 20; *see also* Case Management Order at 8, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Dec. 21, 2006), ECF No. 20 (requiring the "Plaintiffs Steering Committee" to make a document depository that is available to plaintiffs in any state court litigation"). The federal plaintiffs were directed to bear their own costs with respect to the document depository, but the New York State court plaintiffs were permitted to shift such costs through an "appropriate cost-sharing provision." *Id*. at 8-9.

[29] Minute Entry, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Apr. 19, 2007), ECF No. 51; Notice of Hearing, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Aug. 28, 2007), ECF No. 66; Joint Order Appointing Special Master, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Nov. 26, 2007), ECF No. 77.

[30] Joint Order Appointing Special Master, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Nov. 26, 2007), ECF No. 77. Although N.Y C.P.L.R. 3014 "does not specify that review shall be undertaken *de novo*," parties agreed that this standard would apply to review of the special master's rulings in New York State court as well. *Id.*

witnesses "to avoid such witnesses being deposed more than once";[31] (ii) put "dual captions (NY and MDL)" on deposition notices and transcripts;[32] (iii) produce all discovery 30 days prior to the depositions;[33] and (iv) limit depositions to no longer than 14 hours over 2 days.[34] (A copy of the joint supplemental deposition protocol is appended hereto as Appendix F.)

In July 2008, the consolidated state cases were transferred to Justice Shirley Werner Kornreich, who continued the efforts at coordination first implemented by Justice Freedman. Judge Norton and Justice Kornreich jointly presided over a *Frye-Daubert* hearing in June 2009. Although Judge Norton followed the federal *Daubert* standard,[35] while Justice Kornreich followed the state *Frye* standard,[36] both judges held that plaintiffs' expert witnesses should be excluded.[37]

C. Zyprexa Litigation

Starting in and around 2004, users of the drug Zyprexa brought thousands of lawsuits against Eli Lilly & Company relating to alleged injuries from using the company's drug Zyprexa. Many of those cases were consolidated into federal multidistrict litigation before

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31 Case Management Order, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Feb. 9, 2007), ECF No. 31; Case Management Order, *In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct. Aug. 31, 2007), NYSCEF No. 20.

32 Minute Entry, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Apr. 19, 2007), ECF No. 51; *see also* Supplemental Deposition Protocols (Joint Order), *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. May 4, 2007), ECF No. 53; Supplemental Deposition Protocols (Joint Order), *In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct. May 7, 2007), NYSCEF No. 22.

33 *Id.*

34 *Id.*

35 *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

36 *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

37 *In re Bausch & Lomb Contact Lens Sol. Prod. Liab. Litig.*, 906 N.Y.S.2d 778 (Sup. Ct. 2009) *aff'd*, 87 A.D.3d 913 (N.Y. App. Div. 1st Dep't 2011); *In re Bausch & Lomb, Inc. Contact Lens Solution Prods. Liab. Litig.*, No. 06-mn-77777, 2009 WL 2750462 (D.S.C. Aug. 26, 2009).

Judge Weinstein.[38] Other cases proceeded in at least the following states: Alabama, California, Georgia, Indiana, Maine, Mississippi, Missouri, New Jersey, New York, Ohio, Pennsylvania, Texas, Virginia, and West Virginia.[39]

In light of the sprawl of state court cases, Judge Weinstein took initial steps to coordinate discovery across the board by directing parties in the federal multidistrict litigation to "send a letter to the litigants in, and judges for, each of the state court cases indicating that this court intends to provide for coordinated discovery on the underlying scientific and related issues."[40] The letter proposed that State court parties and judges consider stipulating to being "bound by discovery in the MDL cases," to "receive notice of any discovery in the MDL cases," and/or to "participate in any discovery in [the MDL] cases."[41]

It is unclear from the available record whether any of those parties or judges ever responded to Judge Weinstein's proposals. Nonetheless, Judge Weinstein continued in discovery coordination efforts to whatever extent he could on his end. For one, Judge Weinstein directed parties and a court-appointed special master[42] in the federal multidistrict litigation (i) to share with the State court judges copies of discovery-related orders from that litigation, and (ii) to provide Judge Weinstein with similar orders from those judges.[43]

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38 *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596 (E.D.N.Y.).

39 *See, e.g.*, Letter, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. June 18, 2004), ECF No. 17; Letter, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. Jan. 17, 2006), ECF No. 356.

40 Order at 2, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. Apr. 19, 2004), ECF No. 2.

41 *Id.*

42 Order at 1, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. Dec. 10, 2004), ECF No. 119.

43 *See, e.g.*, Letter at 1, 3, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. Oct. 19, 2006), ECF No. 853 (defendant sharing protective order); Letter at 1, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. Apr. 28, 2006), ECF No. 453 (special master sharing "two discovery orders I have recently issued" and a "final discovery schedule").

As for document discovery, Judge Weinstein directed the federal MDL plaintiffs' steering committees to maintain a "depository in Mount Pleasant, South Carolina" of "documents, deposition exhibits, and deposition transcripts" to be made "available free of charge to litigants in state cases," provided those litigants adhered to Judge Weinstein's protective order and other orders with respect to such discovery.[44] Judge Weinstein noted that, "[g]iven the 'touch of a button' nature of today's advanced technology," the discovery in that depository could be accessible electronically.[45]

As for depositions, Judge Weinstein directed that "[n]o witness should be deposed on the same subject more than once in MDL 1596," which should "extend[] to state court Zyprexa personal injury actions."[46] The special master's "Deposition Guidelines" also provided for the cross-noticing of "[a]ny deposition in this MDL . . . by any party in any Zyprexa-related action pending in state court" (and vice versa), and ordered that:

> Counsel for plaintiffs in the MDL shall use their best efforts to *coordinate the scheduling of depositions* with counsel for state court plaintiffs in order to minimize the number of times that a witness shall appear for a deposition. In a coordinated deposition, the Special Master expects counsel for plaintiffs in the MDL and counsel for state court plaintiffs to *cooperate in selecting the primary examiners*. . . . It is the intent of this Order that counsel for MDL plaintiffs shall be the primary examiners in a deposition coordinated with a state court proceeding, but that *counsel in the state court proceeding have sufficient opportunity to question the deponent so that the deposition may be used in the state proceeding* for all purposes consistent with the state's procedure.[47]

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44 *In re Zyprexa Prods. Liab. Litig.*, 239 F.R.D. 316, 316 (E.D.N.Y. 2007).

45 *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 264 (E.D.N.Y. 2006).

46 *In re Zyprexa Prods. Liab Litig.*, No. 04-md-1596, 2004 WL 3520248, at *5 (E.D.N.Y. Aug. 18, 2004) (noting, however, that the order "does not bind any state court litigant for who this Court does not have jurisdiction").

47 Case Management Order No. 15 (Deposition Guidelines) at 5; *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. May 15, 2006), ECF No. 527 (emphasis added).

D. Rezulin Litigation

In 2000, after Warner-Lambert Company withdrew its diabetes drug Rezulin due to reports of liver failure caused by that drug, the company faced a class action and hundreds of individual lawsuits in federal court and thousands more in various State courts brought on behalf of Rezulin users.[48] The federal cases were consolidated and transferred as multidistrict litigation to Judge Lewis Kaplan of the Southern District of New York.[49]

Judge Kaplan, in turn, issued a deposition protocol which, among other things, lay the groundwork for coordination between the federal multidistrict litigation and the State court cases. The deposition protocol provided for the cross-noticing of depositions in the federal multidistrict litigation in any "coordinated proceeding pending in a state court."[50] The deposition protocol also established procedures for "any counsel in any related federal or state action and/or state court coordinated proceeding" (i) to "suggest matters for inquiry" for the depositions, and (ii) to further examine deponents on "non-redundant matters," after the principal examination had ended.[51] Finally, the deposition protocol permitted the use in the federal multidistrict litigation of "depositions previously or subsequently taken in any other Rezulin litigation in federal or state courts."[52] Although indicating that the use in the State court cases of depositions taken in the federal multidistrict litigation was "reserved to each individual state court," the

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48 *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 62, 69 (S.D.N.Y. 2002).

49 *See In re Rezulin Prods. Liab. Litig.*, No. 00-cv-2843, 2000 WL 1530005, at *1 (S.D.N.Y. Oct. 16, 2000).

50 *In re Rezulin Prods. Liab. Litig.*, No. 00-cv-2843, 2001 WL 123729 (S.D.N.Y. Feb. 14, 2001).

51 *Id.* at *2.

52 *Id.* at *11.

deposition protocol also indicated that parties in the federal multidistrict litigation would not otherwise object to such use.[53]

[53] *Id.* at *11-12.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AURELIUS CAPITAL MASTER, LTD., AURELIUS CAPITAL PARTNERS, LP, FIR TREE VALUE MASTER FUND, L.P., FIR TREE CAPITAL OPPORTUNITY MASTER FUND, L.P., and FIR TREE MORTGAGE OPPORTUNITY MASTER FUND, L.P., individually, and on behalf of a class of similarly situated persons pursuant to Fed. R. Civ. P. Rule 23, Plaintiffs, –against– MBIA INC., MBIA INSURANCE CORPORATION, and MBIA INSURANCE CORPORATION OF ILLINOIS, Defendants.	No. 09-Civ-02242 (RJS) [redacted] AMENDED CASE MANAGEMENT PLAN AND SCHEDULING ORDER

RICHARD J. SULLIVAN, District Judge:

Pursuant to Rules 16-26(f) of the Federal Rules of Civil Procedure, the Court hereby adopts the following Case Management Plan and Scheduling Order:

1. All parties do not consent to disposition of this case by a Magistrate Judge, pursuant to 28 U.S.C. § 636(c).

2. This case is to be tried to a jury.

3. Additional parties may be joined until a responsive pleading is filed or with leave of the Court.

4. Amended pleadings may be filed until a responsive pleading is filed or with leave of the Court.

5. Initial disclosures pursuant to Rule 26(a)(1) shall be completed no later than March 22, 2010.

6. Discovery and discovery scheduling in this case shall be coordinated with discovery in the state plenary action, *ABN AMRO Bank v. MBIA* (Index No. 601475/ 09) so as to avoid discovery duplication between the cases.

7. All *fact* discovery, except for responses to Requests to Admit, is to be completed no later than April 27, 2012.

8. The parties are to conduct discovery in accordance with the Federal Rules of Civil Procedure and the Local Rules of the Southern District of New York. The following interim deadlines may be extended by the parties on consent without application to the Court, provided that the parties meet the deadline for completing fact discovery set forth in ¶ 6 above.

   a. Initial requests for production of documents in addition to the requests for production served by Plaintiffs on May 19, 2009 shall be served by the earlier of March 30 or 15 days after entry of this Order.

   b. All documents responsive to initial requests (including documents the Court ordered produced by Order of August 13, 2010) shall be produced on a rolling basis in accordance with interim schedules agreed to by the parties, with production to be complete by October 1, 2011.

   c. The cut-off for supplemental document requests shall be March 16, 2012.

   d. Plaintiffs' motion for class certification shall be filed on or before November 15, 2011. A briefing schedule and fact/ expert discovery schedule, if any, shall be proposed by the parties to the Court within 7 days of the filing of the motion, but counsel shall meet and confer in good faith prior to the filing of the motion to try to work out a schedule for briefing and any discovery.

   e. Fact Depositions shall be completed by April 27, 2012.

      i. September 1, 2011 -- Custodial/organizational 30(b)(6)/Corp. Rep. depositions, including concerning custodians (and their responsibilities), document retention issues, electronic/e-mail systems, organizational structure (including custodians/departments/desks responsible for certain tasks) may begin.

      ii. November 1, 2011- Fact witness depositions and substantive 30(b)(6)/Corp. Rep. depositions may begin, if all document productions are complete.

      iii. There is no priority in deposition by reason of a party's status as a plaintiff or a defendant.

      iv. Absent an agreement between the parties or an order from the Court, non-party depositions shall follow initial party depositions.

   f. Requests to Admit shall be served no later than March 16, 2012.

9. All *expert* disclosures, including reports, production of underlying documents, and depositions shall be completed pursuant to the following deadlines. The Parties recognize that it is difficult to plan precisely the period for expert discovery because it is not known at this point (1) how many experts each side will use, (2) the extent to which the Plaintiffs in the state and federal cases may be able to share the same experts and thus reduce the number of experts overall and (3) the experts' schedules at the time. Accordingly, it is envisioned that some or all of the Parties may move the Court for additional time to complete some or all of the expert discovery segments below.

    a. Service of Plaintiffs' expert reports: June 1, 2012

    b. Depositions of Plaintiffs' experts completed: July 10,2012

    c. Service of Defendants' expert reports: August 10, 2012

    d. Depositions of Defendants' experts completed: September 14, 2012

    e. Service of Plaintiffs' expert rebuttal reports: October 12, 2012

    f. Depositions of Plaintiffs' rebuttal experts completed: November 9, 2012

10. All discovery shall be completed no later than: November 9, 2012.

11. The Court will conduct a post-discovery conference on November 30, 2012 at 11:00 a.m.

12. If either party contemplates a motion, the post-discovery conference will function as a pre-motion conference. Pre-motion letters are to be submitted by November 9, 2012. Pursuant to Rule 2.A of the Court's Individual Practices, responses to pre-motion letters are to be submitted within three business days from the date of service of the initial pre-motion letter. Pre-motion letters and responses shall be submitted to the chambers' email address at sullivannysdchambers@nysd.uscourts.gov.

13. If neither party contemplates a dispositive motion, the post-discovery conference will function as a pre-trial conference at which a trial date will be set.

14. Counsel for the parties will confer with respect to an appropriate mediator for settlement discussions.

15. Parties have conferred and their present best estimate of the length of trial is three weeks.

SO ORDERED.

DATED: July 27, 2011
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

2004 WL 817355
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

In re WORLDCOM, INC.
SECURITIES LITIGATION
STATE COURT CAPTION

No. 02 Civ. 3288(DLC).
|
Jan. 30, 2004.

ORDER

COTE, J.

***1** This Document Relates to: ALL ACTIONS
By a Memorandum Opinion and Order of December 17, 2003, this Court ordered that counsel to the parties to the consolidated multi-district securities litigation before this Court ("Securities Litigation") arising from the collapse of WorldCom, Inc. ("WorldCom") should submit proposals for an Order coordinating discovery in the actions before this Court with discovery in any actions that were remanded to state court. On January 13 and 14, proposed Orders were submitted to the Court by the Underwriter Defendants with the consent of counsel to all other defendants and Milberg Weiss Bershad Hynes & Lerach LLP, counsel to certain Individual Action plaintiffs.

At a conference on January 22, 2004, the Court outlined its conclusions from a review of the draft orders about the governing principles for such coordination. There was general agreement as to those principles from all counsel, including the plaintiffs and defendants in the Individual Actions which have been consolidated with the class action for pretrial purposes. The Underwriter Defendants agreed to submit another proposed Order incorporating those principles. On January 26, the Underwriter Defendants submitted a draft which was revised by the Court and provided on that day to the parties for further comment. Counsel were required to submit any objections or comments by January 28.

On January 28, the Court received suggestions for the Court's January 26 draft from Lead Plaintiff and from the defendants. These changes have been incorporated into the attached Discovery Coordination Order. No party has made any objection to the draft Order circulated on January 28.

Accordingly, the attached Discovery Coordination Order is adopted as the proposal by all parties in this Securities Litigation, including all plaintiffs and defendants in the scores of Individual Actions before this Court, and by this Court for the basis upon which discovery in the Securities Litigation should, if possible, be coordinated with the remanded actions pending in state court. It is recognized that the judges supervising the actions pending in state court must make their own independent judgments about what is appropriate in their cases.

SO ORDERED:

DISCOVERY COORDIATION ORDER

WHEREAS on May 28, 2003, the United States District Court for the Southern District of New York entered an order consolidating for pretrial purposes the securities class actions (the "Class Action") relating to WorldCom, Inc. ("WorldCom") and the lawsuits that allege individual rather than class claims (the "Individual Actions") that have been assigned to it (collectively, the "Consolidated Actions"); and

WHEREAS there are actions pending in state courts (the "State Court Actions") that share questions of law and fact, and defendants with the Consolidated Actions; and

WHEREAS there currently are pending more than sixty Individual Actions, and six State Court Actions; and

***2** WHEREAS the United States District Court for the Southern District of New York has entered two Scheduling Orders (Annexed hereto as Exhibit A) setting certain pre-trial discovery rules and deadlines for the Consolidated Actions, and has set the Class Action for trial to begin on January 10, 2005; and

WHEREAS, in the interests of justice and judicial efficiency, the United States District Court for the Southern District of New York and the State Courts in the State Court Actions that have entered orders substantially in the form annexed hereto as Exhibit B (the "State Court Coordination Order") have determined to coordinate the pre-trial discovery in connection with the pending WorldCom litigation in the Consolidated Actions and the State Court Actions;

IT IS HEREBY ORDERED:

Principles of Coordination

The United States District Court for the Southern District of New York and the State Courts in the State Court Actions that have entered State Court Coordination Orders agree to conduct coordinated discovery pursuant to the following principles:

1. Discovery and trial in the Individual Actions and the State Court Actions shall not delay or interfere with discovery in and trial of the Class Action. Accordingly, the first trial in the WorldCom securities litigation shall be the Class Action trial, which is scheduled to commence on January 10, 2005.

2. The stays of discovery or proceedings imposed by the Court in the Consolidated Actions as to one or more parties shall be effective in the State Court Actions.

3. Discovery in the State Court Actions shall be coordinated so that it is not more expedited than the expert and fact discovery schedule in the Consolidated Actions, the current schedule for which is set forth in the Scheduling Orders annexed hereto as Exhibit A.

4. The parties in the State Court Actions will use documents, interrogatory responses and responses to requests for admission made or produced in the Consolidated Actions, provided however that no discovery produced in the Consolidated Actions may be used in any State Court Action until all counsel for any party in a State Court Action executes and agrees to be bound by a confidentiality order that is substantially similar to the Stipulated and Agreed Confidentiality Order entered by the United States District Court for the Southern District of New York on October 24, 2003, so long as such order is permitted by relevant state law. The parties in the State Court Actions may serve non-duplicative supplemental document requests, interrogatories, and requests for admission in the State Court Actions after reviewing the production of documents, interrogatory responses and responses to requests for admission made in the Consolidated Actions to determine that such supplemental requests are necessary.

5. Every effort shall be made to depose witnesses common to one or more of the Consolidated Actions and State Court Actions only once. To that end, there shall be coordination as to time and place of depositions so that an individual noticed for deposition in both the Consolidated Actions and the State Court Actions is deposed once. The party responsible for providing notice of deposition in the Consolidated Actions or State Court Actions, as the case may be, shall include all parties in both the Consolidated Actions and the State Court Actions in any notices of deposition. For coordinated depositions of defense witnesses, representatives for the plaintiffs in the State Court Actions shall each have the right to conduct additional examination following any examination by Lead Counsel for the Plaintiffs in the Class Action and Liaison Counsel for the Individual Actions or his designee so long as the additional examination is non-repetitive and meets any conditions imposed in the State Court Actions. Where there are issues or claims in a State Court Action that are not present in the Consolidated Actions, the plaintiff in such State Court Action shall have such additional deposition time as may be ordered by the Court in the State Court Action to conduct non-repetitive questioning on topics not covered by Lead Counsel, Liaison Counsel, or plaintiffs' counsel in other State Court Actions. In the event plaintiffs in one or more of the State Court Actions conduct examination of witnesses in addition to the examination of Lead Counsel and Liaison Counsel, counsel for the defendants shall have an equal time to examine such witnesses without counting such time against their allotted time under the Scheduling Order in the Consolidated Actions. Absent consent of the parties or leave of the Court for good cause shown, no single witness shall be required to sit for deposition for a period longer than three eight-hour deposition days.

***3** 6. In the event any party in a State Court Action wishes to participate in settlement discussions that may be taking place in the Consolidated Actions, the parties in the State Court Action may contact the Court in the Consolidated Actions to gain such participation.

Limitations on Scope of this Order

7. Nothing herein shall operate to lift or interfere with any stay of discovery or proceedings that may apply in any of the Consolidated Actions or the State Court Actions by virtue of the provisions of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z–1(b)(1), Court order in the Consolidated Actions or in the State Court Actions, or otherwise.

8. Nothing herein shall have the effect of making any person, firm or corporation a party to any action in which the person or entity has not been named, served, or added as such;

9. Nothing herein shall affect the defenses of the parties in the Consolidated Actions or the State Court Actions, including any defenses for lack of jurisdiction.

10. Nothing herein or in any order entered in any State Court Action shall be construed as (a) limiting the ability of Lead Plaintiff to conduct discovery in the Class Action or (b) imposing any obligation on Lead Plaintiff.

SO ORDERED:

COORDINATION ORDER

WHEREAS this action shares common issues of law and fact with the cases now pending in the United States District Court for the Southern District of New York (the "Consolidated Actions") relating to WorldCom, Inc. ("WorldCom");

WHEREAS there are actions pending in other state courts (the "State Court Actions") that involve (i) common questions of law or fact as the complaints in the Consolidated Actions and (ii) many of the same defendants as in the Consolidated Actions and this action;

WHEREAS the United States District Court for the Southern District of New York with jurisdiction over the Consolidated Actions has entered a Discovery Coordination Order to enable the Courts in the State Court Actions, including this Action, to determine whether and under what terms discovery in the State Court Actions will be coordinated with discovery in the Consolidated Actions;

WHEREAS, in the interests of justice and judicial economy, this Court has determined that pre-trial discovery in this action shall be coordinated with pre-trial discovery in the Consolidated Actions under the terms set forth below:

IT IS ORDERED:

This Court hereby adopts the Discovery Coordination Order entered in *In re WorldCom. Inc. Securities Litigation,* United States District Court for the Southern District of New York, Case No. 02 Civ. 3288(DLC) as the order of this Court.

All Citations

Not Reported in F.Supp.2d, 2004 WL 817355

End of Document

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

GENERAL MOTORS LLC IGNITION SWITCH LITIGATION

This Document Relates to All Actions

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14-MD-2543 (JMF)
14-MC-2543 (JMF)

ORDER NO. 15

JESSE M. FURMAN, United States District Judge:

[Joint Coordination Order]

WHEREAS, a federal proceeding captioned *In re General Motors LLC Ignition Switch Litigation*, MDL Docket No. 2543 (the "MDL Proceeding"), is pending before the Hon. Jesse M. Furman in the United States District Court for the Southern District of New York (the "MDL Court");

WHEREAS, several other actions involving the same subject matter as the MDL Proceeding have been filed in the courts of a number of states and in federal courts (the "Related Actions");[1]

WHEREAS, the MDL Proceeding and the Related Actions involve many of the same factual allegations and circumstances and many of the same parties, and discovery in those various proceedings will substantially overlap;

WHEREAS, in order to achieve the full benefits of this MDL proceeding, the MDL Court has and will continue to encourage coordination with courts presiding over related cases, to the extent that those courts so desire, up to and including issuance of any joint orders that might allow full cooperation as between and among the courts and the parties. As the MDL Court indicated at the initial case management conference, and has been reiterated thereafter, the MDL Court intends to work actively to reach out to any court that is interested in coordinating discovery activities. The MDL Court expects counsel for parties in the MDL

[1] "Related Actions" shall not include shareholder derivative suits and securities class actions.

proceeding to help ensure that such coordination is achieved wherever it is practicable and desired by a given court or courts;

WHEREAS, coordination of pretrial proceedings in the MDL Proceeding and the Related Actions will likely prevent duplication of discovery and undue burden on courts, parties, and nonparties in responding to discovery requests, save substantial expense by the parties and nonparties, and produce substantial savings in judicial resources;

WHEREAS, each Court adopting this Order (collectively, the "Courts") finds that coordination of discovery and pretrial scheduling in the MDL Proceeding and the Related Actions will further the just and efficient disposition of each proceeding and believes that the circumstances presented by these proceedings warrant the adoption of certain procedures to manage these litigations;

WHEREAS, the Courts and the parties wish and anticipate that other courts in which Related Actions are now pending may join this Joint Coordination Order (this "Order");

WHEREAS, a Related Action in which this Order has been entered by the Court in which the action is pending is referred to herein as a "Coordinated Action" or, collectively as the "Coordinated Actions"; and

WHEREAS, each Court entering this Order is mindful of the jurisdiction of each of the other Courts in which other Coordinated Actions are pending and does not wish to interfere with the jurisdiction or discretion of those Courts.

NOW, THEREFORE, IT IS ORDERED that the parties are to work together to coordinate discovery to the maximum extent feasible in order to avoid duplication of effort and to promote the efficient and speedy resolution of the MDL Proceeding and the Coordinated Actions and, to that end, the following procedures for discovery and pretrial proceedings shall be adopted:

A. Discovery and Pretrial Scheduling

1. All discovery and pretrial scheduling in the Coordinated Actions will be coordinated to the fullest extent possible with the discovery and pretrial scheduling in the MDL Proceeding. The MDL Proceeding shall be used as the lead case for discovery and pretrial scheduling in the Coordinated Actions. This Order does not operate to vacate discovery or pretrial scheduling in a Coordinated Action that predates its entry; such is left to the judgment and discretion of the Court in that Action.

2. Lead Counsel shall create a single electronic document depository for use of all MDL counsel as well as counsel in Coordinated Actions, subject to provision by the MDL Court of an order for the equitable spreading of depository costs among users.

3. New GM shall apprise the MDL Court, Lead Counsel, Plaintiff Liaison Counsel and Federal-State Liaison Counsel every two weeks of matters of significance (including hearings, schedules, deadlines, and trial dates) in Related Actions to enable the MDL Court and the parties to effectuate appropriate coordination, including discovery coordination, with these cases.

4. Plaintiffs in the Coordinated Actions and their counsel shall be entitled to participate in discovery in the MDL Proceeding as set forth in this Order and in accordance with the terms of the MDL Order No. 10 Protecting Confidentiality and Privileged Materials (ECF No. 294), the MDL Order No. 11 Regarding Production of Documents and Electronic Data ("ESI Order") (ECF No. 295), and any subsequent order entered in the MDL Proceeding governing the conduct of discovery (collectively, the "MDL Discovery Orders"), copies of which are attached hereto as Exhibit A or shall be made available pursuant to the terms of this Order. Each Court that adopts this Joint Coordination Order thereby also adopts the MDL Discovery Orders which, except as amended by separate order of the Coordinated Action Court, shall govern the use and dissemination of all documents and information produced in

coordinated discovery conducted in accordance with the terms of this Order. Discovery in the MDL Proceeding will be conducted in accordance with the Federal Rules of Civil Procedure and the Local Rules and Orders of the MDL Court, including the MDL Discovery Orders, all as interpreted by the MDL Court. Parties in the MDL Proceeding and their counsel may also participate in discovery in any Coordinated Action as set forth in this Order. Counsel in any Coordinated Action may, at the appropriate time and following the appropriate Orders, submit time and expenses expended for the common benefit pursuant to the MDL Order (ECF No. 13 (14-MD-2543, Docket No. 304)).[2] Specifically, and not by way of limitation, any lawyer seeking recovery of time or expenses as common benefit work in this MDL for time or expenses spent on work in a Related Case must contact the MDL Lead Counsel before conducting such work or incurring such expenses, and must comply with the authorization and reporting requirements set forth in this Order. Should there be an assessment in a Coordinated Action, any attorney will be subject to only one assessment order. MDL Lead Counsel should work with counsel in a Coordinated Action to resolve any issue related to multiple jurisdictions' assessments.

5. The parties in a Coordinated Action may take discovery (whether directed to the merits or class certification) in a Coordinated Action only upon leave of the Court in which the Coordinated Action is pending. Such leave shall be obtained on noticed motion for good cause shown, including why the discovery sought could not have been obtained in coordinated discovery in the MDL Proceeding.

B. Use of Discovery Obtained in the MDL Proceeding

6. Counsel representing the plaintiff or plaintiffs in a Coordinated Action will be entitled to receive all discovery taken in the MDL Proceeding, provided that such discovery

[2] Nothing herein is intended to presume that any judgment of liability shall be entered now or in the future against any defendant or that any common benefit fund shall ever be created. Defendants expressly reserve all rights in this regard.

responses and documents shall be used or disseminated only in accordance with the terms of the MDL Discovery Orders. Counsel representing a party in the MDL Proceeding shall be entitled to receive all discovery taken in any Coordinated Action; any such discovery responses and documents shall be used or disseminated only in accordance with the terms of the MDL Discovery Orders.

7. Requests for documents, interrogatories, depositions on written questions, and requests for admission propounded in the MDL Proceeding will be deemed to have been propounded and served in the Coordinated Actions as if they had been propounded under the applicable civil discovery rules of the respective jurisdictions. Requests for documents, interrogatories, depositions on written questions, and requests for admission propounded in the Coordinated Actions will be deemed to have been propounded and served in the MDL Proceeding as if they had been propounded under the applicable discovery rules of the MDL Court. The parties' responses to such requests for documents, interrogatories, depositions on written questions, and requests for admission will be deemed to be made in the MDL Proceeding and in the Coordinated Actions and may be used in the MDL Proceeding and in the Coordinated Actions, subject to and in accordance with the terms of the MDL Discovery Orders, as if they had been taken under the applicable civil discovery rules of the respective jurisdictions.

8. Depositions taken in the MDL Proceeding may be used in the Coordinated Actions, subject to and in accordance with the terms of the MDL Discovery Orders, as if they had been taken under the applicable civil discovery rules of the respective jurisdictions. Depositions taken in a Coordinated Action may be used in the MDL Proceeding, subject to and in accordance with the terms of the MDL Discovery Orders, as if they had been taken under the applicable discovery rules of the MDL Court.

C. Service and Coordination Among Counsel

9. The MDL Court has previously appointed Lead Counsel for Plaintiffs, Plaintiff Liaison Counsel, and Federal/State Liaison Counsel in the MDL Proceeding (those counsel are identified in the attached Exhibit B). Defendants shall file with the MDL Court and serve upon Lead Plaintiff Counsel, Plaintiff Liaison Counsel, and Federal/State Liaison Counsel in the MDL Proceeding copies of all Complaints, Coordination Orders, Protective Orders, ESI Orders or other Discovery Orders, and Orders designating plaintiffs' liaison counsel that are entered in the Coordinated Actions on the first of every month. Service may be made by electronic means.[3]

10. Any Court in a Coordinated Action wishing to grant the parties before it access to coordinated discovery may do so by joining this Order pursuant to paragraph 32 and appointing one Plaintiffs' Liaison Counsel or designating one plaintiffs' counsel from the Coordinated Action to work with Plaintiff Liaison Counsel and Federal/State Liaison Counsel to facilitate coordination of discovery in the Coordinated Action and discovery in the MDL Proceeding.

11. Plaintiffs' Federal/State Liaison Counsel in the MDL Proceeding shall promptly serve upon Plaintiffs' Liaison Counsel (if any) or designated plaintiffs' counsel in each Coordinated Action all discovery requests (including requests for documents, interrogatories, depositions on written questions, requests for admission, and subpoenas *duces tecum*), responses and objections to discovery requests; deposition notices; correspondence or other papers modifying discovery requests or schedules; and discovery motions (*i.e.*, motions under Rules 26 through 37 or Rule 45 of the Federal Rules of Civil Procedure) or requests for hearing on discovery disputes regarding coordinated discovery matters that are served upon the parties

[3] All forms of service made under this Joint Coordination Order shall be deemed mailed in accordance with Rule 6 of the Federal Rules of Civil Procedure.

in the MDL Proceeding. Service may be made by electronic means upon Plaintiffs' Liaison Counsel in each Coordinated Action. Deposition notices shall be served by e-mail, facsimile or other electronic means. Plaintiffs' Liaison Counsel in the Coordinated Actions shall be responsible for distributing such documents to other counsel for plaintiffs in their respective actions.

12. Plaintiffs' Federal/State Liaison Counsel in the MDL Proceeding shall maintain a log of all Orders entered in the MDL Proceeding and all discovery requests and responses sent and received in the MDL Proceeding and shall transmit a copy of said log by e-mail or other electronic means to Plaintiffs' Liaison Counsel in each Coordinated Action by the seventh (7th) day of each month, or on a more frequent basis upon written request. Plaintiffs' Federal/State Liaison Counsel in the MDL Proceeding will promptly transmit a copy of each Order entered in the MDL Proceeding to Plaintiffs' Liaison Counsel in the Coordinated Actions.

13. In order to facilitate the dissemination of information and Orders in the MDL, the MDL Court — or the parties if the MDL Court so prefers — will create and maintain a website devoted solely to this MDL.[4] The site will contain sections through which the parties, counsel, and the public may access Court Orders, Court opinions, Court minutes, Court calendars, frequently asked questions, court transcripts, the MDL docket, current developments, information about leadership in the MDL, and appropriate contact information.

14. To encourage communication between this Court and any Coordinated Action Court, one section of the website may be accessible only to judges in any Coordinated Action

[4] *See, e.g.,* Website for *In re Actos (Pioglitazone) Prods. Liab. Litig.*, MDL No. 2299, *available at* http://www.lawd.uscourts.gov/welcome-web-site-mdl-no-2299; Website for *In re Oil Spill by the Oil Rig "Deepwater Horizon"*, MDL 2179, *available at* http://www.laed.uscourts.gov/OilSpill/OilSpill.htm.

and Judge Furman. Additionally, each status conference will be open to the judge in any Coordinated Action, who will be provided a separate call-in number from the general public to allow Coordination Action judges to listen to, if not participate in, the status conference. Plaintiffs' Federal-State Liaison Counsel will notify all Coordinated Action Courts of each status conference and provide the appropriate call-in number. Plaintiffs' Federal-State Liaison Counsel will also promptly transmit a copy of each Order entered in the MDL Proceeding to the judges in all Coordinated Actions.

D. Participation in Depositions in the MDL Proceeding

15. All counsel are expected to cooperate with and be courteous to each other and deponents in both scheduling and conducting depositions. Counsel may agree to use videoconferencing or other technology to conduct depositions remotely, in order to reduce the time and cost burden of travel for the deponent and counsel. Lead Counsel and counsel for the Defendants shall further meet and confer in good faith to propose a more detailed deposition protocol for depositions in the Coordinated Actions. The detailed deposition deposition protocol shall be entered by separate Order.

16. Each deposition taken in the MDL Proceeding shall, absent leave of the MDL Court: (i) be conducted on reasonable written notice, to be served, electronically or otherwise, on Plaintiffs' Liaison Counsel in each Coordinated Action in accordance with the provisions of paragraph 9 above; (ii) be subject to the time limits prescribed by Rule 30(d)(1) of the Federal Rules of Civil Procedure; and (iii) be conducted pursuant to the Federal Rules of Civil Procedure and under the terms of the MDL Discovery Orders, all as interpreted by the MDL Court.

17. At least one Lead Counsel for the MDL Plaintiffs, or their designee, and MDL Plaintiffs' Federal/State Liaison Counsel or Plaintiffs' Liaison Counsel, shall confer with Plaintiffs' Liaison Counsel in the Coordinated Actions, or their designees, in advance of each

deposition taken in the MDL Proceeding, taking such steps to cooperate on selecting a mutually convenient date and location, and taking such steps as may be necessary to avoid multiple interrogatories and duplicative questions, and to avoid to the extent practicable additional depositions in the Coordinated Actions.

18. Counsel representing the plaintiff or plaintiffs in a Coordinated Action shall be permitted to attend any deposition scheduled in the MDL Proceeding. One Plaintiffs' Counsel from each Coordinated Action shall be permitted a reasonable amount of time to question the deponent in those depositions following questioning by Lead Counsel for the MDL Plaintiffs, or their designee, and shall be permitted to make objections during examination by other counsel, in accordance with the Federal Rules of Civil Procedure, the Local Rules of the Southern District of New York, and the Orders of the MDL Court entered in the MDL Proceeding, and in accordance with the terms and procedures set forth in subparts (a) through (c) below providing that:

(a) the court in which the Coordinated Action is pending has adopted the MDL Discovery Orders or has entered a Protective Order, ESI Order or other Discovery Order substantially similar to the MDL Discovery Orders;

(b) Plaintiffs' Counsel from the Coordinated Action shall make best efforts to ask questions that are non-duplicative of questions already asked at the deposition; and

(c) participation of Plaintiffs' Counsel from the Coordinated Actions shall be arranged so as not to delay discovery or other proceedings as scheduled in the MDL Proceeding.

19. Counsel representing any party to any Coordinated Action may obtain from the MDL 2543 Document Depository or directly from the court reporter, at its own expense, a

transcript of any deposition taken in the MDL Proceeding or in any other Coordinated Action. The transcript of any deposition taken in the MDL Proceeding shall not be used or disseminated except in accordance with the terms of this Order and the MDL Discovery Orders.

20. Depositions in addition to those taken in the MDL Proceeding (whether directed to the merits or class certification) may be taken in a Coordinated Action only upon leave of the court in which the Coordinated Action is pending, obtained on noticed motion for good cause shown, including why the discovery sought could not have been obtained in coordinated discovery in the MDL Proceeding. The transcript of any such deposition shall not be used or disseminated except in accordance with the terms of the MDL Discovery Orders.

21. If depositions in addition to those taken in the MDL Proceeding are permitted in a Coordinated Action, the noticing party shall provide reasonable written notice, by e-mail or other electronic means, to Plaintiff Liaison Counsel and Plaintiffs' Federal/State Liaison Counsel in the MDL Proceeding and all Liaison Counsel in the other Coordinated Actions. Counsel representing parties in the MDL Proceeding and counsel representing plaintiffs in each other Coordinated Action shall be entitled to attend the deposition of any witness whose deposition is taken in a Coordinated Action and, following questioning by Plaintiffs' Counsel in the Coordinated Action, one counsel representing the MDL Plaintiffs, one counsel representing each MDL Defendant, and one Plaintiffs' Counsel from each Coordinated Action shall each be permitted a reasonable amount of time to ask non-duplicative additional questions and shall be permitted to make objections during examination by other counsel.

22. If the MDL Plaintiffs, through Plaintiff Liaison Counsel or Plaintiffs' Federal/State Liaison Counsel, or the MDL Defendants have been provided with reasonable notice of and opportunity to participate in a deposition taken in any Coordinated Action, no MDL Plaintiff or MDL Defendant shall be permitted to re-depose that deponent without first obtaining an Order of the MDL Court upon a showing of good cause therefor. Any party or

witness receiving notice of a deposition which it contends is not permitted by the terms of this Order shall have seven (7) days from receipt of the notice within which to serve the noticing party with a written objection to the deposition. In the event of such an objection, the deposition shall not go forward until the noticing party applies for and receives an order from the MDL Court, if the notice was issued in the MDL proceeding, or in the Coordinated Action Court, if the notice was issued in a Coordinate Action, granting leave to take the deposition.

23. If the MDL Plaintiffs or MDL Defendants and their respective Counsel in any Coordinated Action have received reasonable notice of a deposition in either the MDL Proceeding or any Coordinated Action, such deposition may be used in the MDL Proceeding and each Coordinated Action for all purposes permitted under the jurisdiction's applicable rules without regard to whether any MDL Plaintiffs' Counsel or any MDL Defendants' Counsel or any counsel representing plaintiffs or defendants in any Coordinated Action attend or cross-examine at the noticed deposition.

E. Participation in Written Discovery in the MDL Proceeding

24. At least one Co-Lead Counsel for the MDL Plaintiffs, or their designee, and Plaintiffs' Federal/State Liaison Counsel, shall confer with Plaintiffs' Liaison Counsel in the Coordinated Actions, or their designees, in advance of the service of requests for written discovery in the MDL Proceeding, taking such steps as may be necessary to avoid additional interrogatories, depositions on written questions, requests for admission and requests for documents in the Coordinated Actions.

25. Plaintiffs' Liaison Counsel in any Coordinated Action may submit requests for documents, interrogatories, depositions on written questions and requests for admission to MDL Co-Lead Counsel for Plaintiffs and Plaintiffs' Federal/State Liaison Counsel for inclusion in the requests for documents, interrogatories, depositions on written questions,

and requests for admission to be propounded in the MDL Proceeding. Such requests shall be included in the requests propounded in the MDL Proceeding, provided that:

(a) the requests for documents, interrogatories, depositions on written questions and/or requests for admission are submitted to MDL Plaintiff Liaison Counsel and Plaintiffs' Federal/State Liaison Counsel within ten (10) calendar days after MDL Plaintiff Liaison Counsel have notified Plaintiffs' Liaison Counsel in the Coordinated Actions of MDL Plaintiffs' intent to serve such discovery; and

(b) the requests are non-duplicative of requests proposed by MDL Plaintiffs' Co-Lead Counsel.

The number of interrogatories permitted in the MDL Proceeding will be subject to such limitations as are imposed by Rule or Order of the MDL Court.

26. Requests for documents, interrogatories, depositions on written questions and requests for admission in addition to those served in the MDL Proceeding (whether directed to the merits or class certification) may be propounded in a Coordinated Action only upon leave of the court in which the Coordinated Action is pending, obtained on noticed motion for good cause shown, including why the discovery sought could not have been obtained in coordinated discovery in the MDL Proceeding. A motion for leave to serve additional document requests, interrogatories, depositions on written questions and/or requests for admission which were proposed by Plaintiffs' Liaison Counsel in a Coordinated Action in accordance with paragraph 25 and which were not included in the discovery requests served by Lead Counsel in the MDL Proceeding shall be filed in the court on notice within twenty-one (21) calendar days of service of the Lead Counsel's discovery request from which those requests for documents, interrogatories, depositions on written questions and/or requests for admission were omitted.

27. All parties to the MDL Proceeding shall be entitled to receive copies of responses to interrogatories, responses to depositions on written questions, responses to

requests for admission, and documents produced in any Coordinated Action. Any party or counsel otherwise entitled under this order to receive copies of discovery from other parties or counsel shall reimburse the producing party for actual out-of pocket costs incurred in connection with the copying and shipping of such discovery (including but not limited to document productions) and shall use such materials only in accordance with the terms of the MDL Discovery Orders.

28. Any counsel representing a plaintiff in a Coordinated Action shall, in accordance with any Orders of the MDL Court entered in the MDL Proceeding and subject to the terms of the MDL Discovery Orders, have access to any document depository that may be established by the parties to the MDL Proceeding.

F. Discovery Dispute Resolution

29. Prior to any party in the MDL filing a discovery motion, the parties must first attempt to resolve the dispute in good faith and in accordance with the procedures and requirements outlined in the Court's Individual Rules and Practices in Civil Cases and the Court's standard Case Management Plan and Scheduling Order, both of which are available at http://www.nysd.uscourts.gov/judge/Furman.

30. In the event that the parties are not able to resolve any disputes that may arise in the coordinated pretrial discovery conducted in the MDL Proceeding, including disputes as to the interpretation of the MDL Discovery Orders, such disputes will be presented to the MDL Court. Resolution of such disputes shall be pursuant to the applicable federal or state law, as required, and such resolution may be sought by any party permitted by this Order to participate in the discovery in question. In the event that additional discovery is sought in a Coordinated Action and the parties to that action are not able to resolve any discovery disputes that may arise in connection with that additional discovery, such disputes will be presented to the Court

in which that Coordinated Action is pending in accordance with that jurisdiction's rules and procedures.

31. Nothing contained herein shall constitute or be deemed to constitute a waiver of any objection of any defendant or plaintiff to the admissibility at trial, of any documents, deposition testimony or exhibits, or written discovery responses provided or obtained in accordance with this Order, whether on grounds of relevance, materiality or any other basis, and all such objections are specifically preserved. The admissibility into evidence in any Coordinated Action of any material provided or obtained in accordance with this Order shall be determined by the Court in which such action is pending.

G. Implementing This Order

32. Any court before which a Coordinated Action is pending may join this Order, thereby authorizing the parties to that Coordinated Action to participate in coordinated discovery as and to the extent authorized in this Order.

33. Each Court that joins this Order shall retain jurisdiction to modify, rescind, and/or enforce the terms of this Order.

SO ORDERED.

Date: September 24, 2014
New York, New York

JESSE M. FURMAN
United States District Judge

Attachments:

Exhibit A: MDL Discovery Orders
Exhibit B: MDL Co-Lead Counsel, Plaintiff Liaison Counsel, and Federal/State Liaison Counsel

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

GENERAL MOTORS LLC IGNITION SWITCH LITIGATION

This Document Relates To All Actions

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14-MD-2543 (JMF)
14-MC-2543 (JMF)

ORDER NO. 10

JESSE M. FURMAN, United States District Judge:

[Protecting Confidentiality and Privileged Materials]

Defendants and Lead Counsel for the Multidistrict Litigation ("MDL") 2543 Plaintiffs having consented thereto, and for good cause shown,

WHEREAS, the Court has advised all Parties that there is a presumption in favor of public access, particularly in a case of this nature, and that unless the Court determines — based on a written application — that there is a reason justifying something be filed in redacted form or under seal, any filings are public and publicly available to the press and the public alike; and

WHEREAS, it is the Court's sole province to authorize a pleading and/or document to be filed under seal; the Court grants this protective order recognizing that Defendants intend to include "blanket confidential designations" so as to immediately provide bulk production of millions of pages of documents. Plaintiffs will be allowed to challenge any specific document designation as discovery proceeds within the framework of this Order;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the documents and other information, including the substance and content thereof, designated by any party as confidential and proprietary, and produced by that party in response to any formal or informal request for discovery in any of the cases consolidated in the above-captioned MDL 2543, shall be subject to the terms of this Consent Protective Order ("Protective Order" or "Order"), as set forth below:

The purpose of this Order is to expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality and privilege, and protect material to be kept confidential or privileged, pursuant to the Court's inherent authority, its authority under Federal Rule of Civil Procedure 26(c) and Federal Rule of Evidence 502(d), and the judicial opinions interpreting such Rules.

I. CONFIDENTIALITY.

1. *Information.* "Information" includes the contents of documents and other data, any data and information associated with documents (whether physical or in electronic format), oral and written testimony, answers to interrogatories, admissions, and data and information derived from objects other than documents, produced or disclosed in these proceedings by any party to the above-captioned litigation or by any third party (the "Producing Party") to any other party or parties, subject to the provisions in Paragraphs 5 and 6 of this Order (the "Receiving Party").

2. *Confidentiality Designations.* This Order covers Information that the Producing Party designates "Confidential" or "Highly Confidential." Information may be designated as Confidential when (i) the Producing Party reasonably believes that the Information constitutes, reflects, discloses or contains Information subject to protection under Federal Rule of Civil Procedure 26(c) or other confidential, non-public information, or (ii) the Producing Party reasonably believes that the documents or information includes material protected by federal, state, or foreign data protection laws or other privacy obligations, including (but not limited to) consumer and third-party names, such as the first and last names of persons involved in an accident or of other individuals not directly involved in an accident but included in documents related to an accident; Social Security Numbers; health information relating to the past, present or future physical or mental health or condition of an individual; the provision of health care to an

individual, or the past, present or future payment for the provision of health care to an individual; driver's license or other identification numbers; personal financial information such as tax information, bank account numbers, and credit card numbers; insurance claim numbers; insurance policy numbers; VIN numbers; or the personal email addresses or other contact information of GM board members and employees ("Personal Information"). Information may be designated as Highly Confidential when: (i) the Producing Party reasonably believes that the documents or information contain competitively sensitive information regarding future product designs or strategies, commercial or financial information, or other sensitive information, the disclosure of which to third party competitors may result in commercial harm; or (ii) the Producing Party reasonably believes that the documents or information includes Personal Information. Subject to provisions of Paragraph 3(b), the parties shall make Confidential and Highly Confidential designations in good faith to ensure that only those documents that merit Confidential or Highly Confidential treatments are so designated.

3. *Procedure for Confidentiality Designations.*

(a) *Designation*. To designate Information as Confidential or Highly Confidential, a Producing Party must mark it or identify it on the record as such. Either designation may be withdrawn by the Producing Party.

(b) *Bulk Designation*. To expedite production of potentially voluminous materials — such as the productions referenced in Paragraph 11(d) — a Producing Party may, but is not required to, produce materials without a detailed confidentiality review, subject to the "clawback" procedures in Paragraphs 3(f) and 10 of this Order or as otherwise agreed to. In so doing, the Producing Party may designate those collections of documents that by their nature contain "Confidential" or "Highly Confidential"

Information with the appropriate designation notwithstanding that some of the documents within the collection may not qualify for such designation. The materials that may be so designated shall be limited to the types or categories of documents that the Producing Party reasonably believes may contain Highly Confidential Information, as defined in Paragraph 2 of this Order. Notwithstanding the foregoing, a Receiving Party may at any time challenge the designation of one or more particular documents as Confidential or Highly Confidential on the grounds that it does not or they do not qualify for such protection. If the Producing Party agrees, it must promptly notify all Receiving Parties that it is withdrawing or changing the designation.

(c) *Marking*. All or any part of a document, tangible object, discovery response, or pleading disclosed, produced, or filed by a Producing Party may be designated Confidential or Highly Confidential by marking the appropriate legend ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL") on the face of the document and each page so designated. With respect to tangible items or electronically stored Information produced in native format, the appropriate legend shall be marked on the face of the tangible item or media containing electronically stored Information, if practicable, or by written notice to the Receiving Party at the time of disclosure, production or filing that such tangible item or media is Confidential or Highly Confidential or contains such Information.

(d) *Redaction*. Any Producing Party may redact from the documents and things it produces any Highly Confidential Information, as defined in Paragraph 2, or any matter that the Producing Party claims is subject to attorney-client privilege, work-product protection, a legal prohibition against disclosure, or any other privilege or immunity. The

Producing Party shall mark each thing where matter has been redacted with a legend stating "REDACTED," "CBI," "PRIVACY," "PII," "NON-RESPONSIVE," "PRIVILEGED," or a comparable notice. Where a document consists of more than one page, each page on which Information has been redacted shall be so marked. The Producing Party shall preserve an unredacted version of each such document. The process for challenging the designation of redactions shall be the same as the process for challenging the designation of Confidential Material and Highly Confidential Material set forth in Paragraph 6. If counsel for the Producing Party agrees that Information initially redacted shall not be subject to redaction or shall receive alternative treatment, or if the Court orders that those materials shall not be subject to redaction or shall receive alternative treatment, and the Information is subsequently produced in unredacted form, then that unredacted Information shall bear the legend "Highly Confidential" and shall continue to receive the protections and treatment afforded to documents bearing the Highly Confidential designation.

(e) *Timing*. Subject to the provisions of Paragraphs 3(f) and 10, documents and other objects must be designated as Confidential or Highly Confidential, and redactions must be applied to Highly Confidential Information, before disclosure. In the event that a Producing Party designates some or all of a witness's deposition testimony as Confidential or Highly Confidential, the specific page and line designations over which confidentiality is claimed must be provided to the Receiving Party within thirty (30) days of receipt of the final transcript, provided, however, that the Receiving Party will consider reasonable requests for an extension of the deadline. Deposition testimony shall be treated as Highly Confidential pending the deadline.

(f) *Errors*. Disclosure of Confidential or Highly Confidential Information does not waive the confidential status of such Information. In the event that Confidential or Highly Confidential Information is disclosed without a marking or designation of it as such, the Producing Party may thereafter assert a claim or designation of confidentiality, and promptly provide replacement media. Thereafter, the Receiving Party must immediately return the original Confidential or Highly Confidential Information and all copies of the same to the Producing Party and make no use of such Information.

4. *Challenges to Confidentiality Designations.* Any party may object to the propriety of the designation of specific material as Confidential or Highly Confidential by serving a written objection upon the Producing Party's counsel. The Producing Party or its counsel shall thereafter, within ten calendar days, respond to such objection in writing by either: (i) agreeing to remove the designation; or (ii) stating the reasons for such designation. If the objecting party and the Producing Party are subsequently unable to agree upon the terms and conditions of disclosure for the material(s) in issue, the objecting party may move the Court for an order withdrawing the designation as to the specific designation on which the Parties could not agree. Counsel may agree to a reasonable extension of the ten-day period, if necessary. On such a motion, the Producing Party shall have the burden of proving that "good cause" exists for the designation at issue and that the material is entitled to protection as Confidential or Highly Confidential Information under applicable law. In the event a motion is filed by the objecting party, the Information at issue shall continue to be treated in the manner as designated by the Producing Party until the Court orders otherwise. A Receiving Party does not waive its right to challenge a Confidential or Highly Confidential designation by electing not to raise a challenge promptly after the original designation is disclosed and may challenge a designation at such time as the Receiving Party deems

appropriate. Each party shall bear its own fees and costs related to any challenges of confidentiality designations under this Protective Order.

5. *Access to Confidential Information.* The Receiving Party may share Confidential Information with only the following persons and entities related to each of the cases consolidated in the above-captioned MDL 2543:

(a) The Court and its staff;

(b) Parties to any of the actions consolidated in the above-captioned MDL 2543;

(c) Parties' counsel;

(d) Counsel (and their staff) for parties to any of the federal or state court actions alleging injuries related to the ignition switch and/or other parts in vehicles recalled by General Motors LLC that are the subject of MDL 2543 ("Related Litigation"), provided that (i) the proposed recipient agrees to be bound by this Order and signs the certificate attached hereto as Appendix A; (ii) the proposed recipient agrees to be bound by any discovery-related or protective Orders, including Federal Rule of Evidence 502(d) Orders, that may be entered in MDL 2543; (iii) counsel for the party that supplies the Confidential Information to such recipient maintains copies of the certificates and a log identifying each such recipient; and (iv) upon a showing by a party that Confidential Information has been used in violation of this Order, counsel shall provide copies of the log and certificate to the Court for *in camera* review;

(e) Court reporters (including audio and video), interpreters, translators, copy services, graphic support services, document imaging services, and database or coding services retained by counsel, provided that these individuals or an appropriate company

official with authority to do so on behalf of the company executes a certification attached hereto as Appendix A;

(f) Special masters;

(g) Mediators;

(h) The direct staff of those identified in Paragraphs 5(c), 5(f), and 5(g);

(i) Deponents and trial witnesses during a deposition or trial who have a reasonable need to see the Confidential Information in order to provide testimony, provided such witness executes a certification in the form attached hereto as Appendix A;

(j) Any expert or consultant, and his, her or its staff, hired by a party for litigation purposes who agrees to be bound by this Order and signs the certificate attached hereto as Appendix A; and

(k) Any other person to whom the Producing Party, in writing, authorizes disclosure.

6. *Access to Highly Confidential Information*. The Receiving Party may share Highly Confidential Information with only the following persons and entities related to each of the cases consolidated in the above-captioned MDL 2543:

(a) The Court and its staff;

(b) Court reporters (including audio and video), interpreters, translators, copy services, graphic support services, document imaging services, and database or coding services retained by counsel, provided that these individuals or an appropriate company official with authority to do so on behalf of the company executes a certification attached hereto as Appendix A;

(c) Mediators and their staff, provided that such persons execute a certification attached hereto as Appendix A;

(d) Co-lead counsel, executive committee members, and liaison counsel in the above-captioned MDL 2543, as well as counsel for parties in Related Litigation, the Receiving Party's external counsel, and a Receiving Party's internal counsel whose primary responsibilities include overseeing litigation in the above-captioned MDL 2543, and their direct staff, provided that (i) the proposed recipient agrees to be bound by this Order and signs the certificate attached hereto as Appendix A; (ii) the proposed recipient agrees to be bound by any discovery-related or protective Orders, including Federal Rule of Evidence 502(d) Orders, that may be entered in MDL 2543; (iii) counsel for the party that supplies the Highly Confidential Information to such recipient maintains copies of the certificates and a log identifying each such recipient; and (iv) upon a showing by a party that Highly Confidential Information has been used in violation of this Order, counsel shall provide copies of the log and certificate to the Court for *in camera* review;

(e) Persons who prepared, received, or reviewed the Highly Confidential Information prior to its production and who execute a certification in the form attached hereto as Appendix A;

(f) A witness during a hearing, a deposition, or preparation for a deposition who is a current employee of the Party that produced the applicable document(s) or who appears, based upon the document itself or testimony in a deposition, to have specific knowledge of the contents of the documents designated "HIGHLY CONFIDENTIAL," provided such witness executes a certification in the form attached hereto as Appendix A;

(g) Outside experts, consultants, or other agents retained by a party for litigation purposes, provided such expert, consultant, or agent executes a certification in the form attached hereto as Appendix A; and

(h) Any other person to whom the Producing Party, in writing, authorizes disclosure.

7. *Use of Confidential and Highly Confidential Information*.

(a) *Restricted to This Proceeding and Related Litigation.* Confidential Information and Highly Confidential Information must be used only in this proceeding, or in any Related Litigation, except that nothing in this Protective Order shall be construed as limiting any party from disclosing a potential safety defect to an appropriate government agency.

(b) *Acknowledgement*. Subject to the restrictions contained in Paragraphs 5 and 6, the persons identified in Paragraphs 5 and 6 may receive or review Confidential or Highly Confidential Information. All persons specifically designated in Paragraphs 5 and 6 must execute the certificate attached hereto as Appendix A or affirm on the record that he or she will not disclose Confidential or Highly Confidential Information revealed during a deposition and will keep the transcript confidential.

(c) *Filings.* All parties shall make reasonable efforts to avoid requesting the filing of Confidential or Highly Confidential Information under seal by, for example, redacting or otherwise excluding from a submission to the Court any such Information not directly pertinent to the submission. Where not reasonably possible, any Party wishing to file a document or paper containing Confidential or Highly Confidential Information may request by motion that such Information be filed under seal.

(d) *Hearings.* In the event that a Receiving Party intends to utilize Confidential or Highly Confidential Information during a pre-trial hearing, such Receiving Party shall provide written notice no less than five days prior to the hearing, to the Producing Party and to the Court, except that shorter notice may be provided if the Receiving Party could not reasonably anticipate the need to use the document at the hearing five days in advance, in which event notice shall be given immediately upon identification of that need. The use of such Confidential or Highly Confidential Information during the pre-trial hearing shall be determined by agreement of the parties or by Order of the Court.

(e) *Trial.* The use of Confidential or Highly Confidential Information during the trial shall be determined by Order of the Court.

(f) *Subpoena by Other Courts or Agencies*. If another court or an administrative agency subpoenas or otherwise orders production of Confidential or Highly Confidential Information that any Party or other person has obtained under the terms of this Order, the Party or other person to whom the subpoena or other process is directed must notify the Producing Party in writing within five days of all of the following: (a) the discovery materials that are requested for production in the subpoena; (b) the date by which compliance with the subpoena is requested; (c) the location at which compliance with the subpoena is requested; (d) the identity of the party serving the subpoena; and (e) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the litigation, administrative proceeding or other proceeding in which the subpoena or other process has been issued. Confidential or Highly Confidential Information shall not be produced prior to the receipt of written notice by the Producing Party and after a reasonable opportunity to object has been offered. Further, the

party or person receiving the subpoena or other process will cooperate with the Producing Party in any proceeding related thereto. The Producing Party will bear the burden and all costs of opposing the subpoena on grounds of confidentiality.

8. *Return of Discovery Materials*. Within ninety days of the termination of any party from all proceedings in this proceeding, that party, its employees, attorneys, consultants and experts must destroy or return (at the election of the Receiving Party) all originals and/or copies of documents with Confidential Information or Highly Confidential Information, provided however, that the obligation to destroy or return such documents that is imposed on counsel, consultants and experts representing multiple parties shall not occur until the last of their represented parties has been terminated from the foregoing referenced proceedings. At the written request of the Producing Party, any person or entity having custody or control of recordings, notes, memoranda, summaries or other written materials, and all copies thereof, related to or containing discovery materials produced by the Producing Party (the "Discovery Materials") shall deliver to the Producing Party an affidavit certifying that reasonable efforts have been made to assure that all Discovery Materials (except for privileged communications, work product and court-filed documents as stated above) have been destroyed or delivered to the Producing Party in accordance with the terms of this Protective Order. A Receiving Party is permitted to retain a list of the documents by Bates Number that are produced by a Producing Party under this Protective Order.

II. PRIVILEGES.

9. *No Waiver by Disclosure*.

(a) This Order is entered, *inter alia*, pursuant to Rule 502(d) of the Federal Rules of Evidence. If a Producing Party discloses information in connection with the pending litigation that the Producing Party thereafter claims to be privileged or protected

by the attorney-client privilege or attorney work product protection ("Disclosed Protected Information"), the disclosure of the Disclosed Protected Information shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or work product protection that the Producing Party would otherwise be entitled to assert with respect to the Disclosed Protected Information and its subject matter in this proceeding or in any other federal or state proceeding.

(b) A Producing Party may assert in writing attorney-client privilege or work product protection with respect to Disclosed Protected Information. The Receiving Party must—unless it contests the claim of attorney-client privilege or work product protection in accordance with sub-paragraph (c)—within five business days of receipt of that writing, (i) return or destroy all copies of the Disclosed Protected Information, and (ii) provide a certification of counsel that all of the Disclosed Protected Information has been returned or destroyed. Within five business days of receipt of the notification that the Disclosed Protected Information has been returned or destroyed, the Producing Party must produce a privilege log with respect to the Disclosed Protected Information.

(c) If the Receiving Party contests the claim of attorney-client privilege or work product protection, the Receiving Party must — within five business days of receipt of the claim of privilege or protection — move the Court for an Order compelling disclosure of the Disclosed Protected Information (a "Disclosure Motion"). The Receiving Party must seek to file the Disclosure Motion under seal and must not assert as a ground for compelling disclosure the fact or circumstances of the disclosure, and may not disclose, rely on or refer to any of the Disclosed Protected Information. Pending resolution of the Disclosure Motion, the Receiving Party must sequester the Disclosed Protected Information and not

use the Disclosed Protected Information or disclose it to any person other than as required by law.

(d) The parties may stipulate to extend the time periods set forth in sub-paragraphs (ii) and (iii).

(e) Disclosed Protected Information that is sought to be reclaimed by the parties to this case pursuant to this Order shall not be used as grounds by any third party to argue that any waiver of privilege or protection has occurred by virtue of any production in this case.

(f) The Producing Party retains the burden of establishing the privileged or protected nature of the Disclosed Protected Information. Nothing in this paragraph shall limit the right of any party to petition the Court for an *in camera* review of the Disclosed Protected Information.

10. Receiving Party's Obligation. Nothing in this Order shall relieve counsel for any Receiving Party of any existing duty or obligation, whether established by case law, rule of court, regulation or other source, to return, and not to review, any privileged or work product materials without being requested by the Producing Party to do so. Rather, in the event a Receiving Party becomes aware that it is in possession of what appears to be privileged documents or materials, then counsel for the Receiving Party shall immediately: (i) cease any further review or use of that document or material and (ii) notify the Producing Party of the apparent production of Disclosed Protected Information, requesting whether the documents or materials are Disclosed Protected Information. In the event the Producing Party confirms the documents or material are Disclosed Protected Information, the Receiving Party shall (i) promptly return or destroy all copies of the

Disclosed Protected Information in its possession and (ii) take reasonable steps to retrieve all copies of the Disclosed Protected Information distributed to other counsel or non-parties.

11. *Privilege Log Production.*

(a) Unless otherwise provided in this Order, any document falling within the scope of any request for production or subpoena that is withheld on the basis of a claim of attorney-client privilege, work product, or any other claim of privilege or immunity from discovery is to be identified by the Producing Party on a privilege log, which the Producing Party shall produce in an electronic format that allows text searching. For administrative purposes, an e-mail thread contained within a single document need only be recorded once on the Producing Party's privilege log, even if a privilege is asserted over multiple portions of the thread. Redacted documents need not be logged as long as (a) for emails, the bibliographic information (i.e. to, from, cc, bcc, recipients, date and time) is not redacted, and the reason for the redaction is noted on the face of the document; and (b) for non-email documents, the reason for the redaction is noted on the face of the document. Documents that are redacted shall be identified as such in a "redaction" field in the accompanying data load file.

(b) Privilege log identification is not required for work product created by counsel, or by an agent of counsel other than a party, after January 31, 2014, or for post-January 31, 2014 communications exchanged between or among: (i) the Producing Party and their counsel; (ii) counsel for the Producing Party; (iii) counsel for Plaintiffs; and/or (iv) counsel for Defendants. Privilege log identification is also not required for: (i) communications between a Producing Party and its counsel in proceedings other than MDL 2543; (ii) work product created by a Producing Party's counsel, or by an agent or contractor

of counsel other than the Producing Party, in proceedings other than MDL 2543; (iii) internal communications within: (a) a law firm representing a party or (b) a legal department of a party that is a corporation or another organization.

(c) In order to avoid unnecessary cost, the parties are encouraged to identify categories of privileged information that may be logged categorically rather than document-by-document. (*See* Advisory Committee Note to Fed. R. Civ. P. 26(b)(5) (1993).) The parties shall meet and confer on this issue and raise with the Court either: (i) agreements reached with respect to documents that the parties have agreed to log by category, or (ii) proposals for logging other than document-by-document that have been proposed by one or more Producing Parties, but which have not been agreed to by the Receiving Parties. The parties should keep in mind that the Court's intention is to enable the parties to minimize the cost and resources devoted to privilege logging, while enabling the Court and Receiving Party to assess the assertions of privilege made by the Producing Party.

(d) The Defendants, where applicable, will post to the MDL 2543 Document Depository privilege logs relating to (i) the productions made in response to the plaintiffs' requests for production in any Related Litigation (as defined in Paragraph 5(d)) at the same time these logs are due in the Related Litigation; (ii) the productions made in response to the National Highway Traffic Safety Administration's pre-August 22, 2014 requests at the same time these logs are due in *Melton v. General Motors LLC*, No. 14A-1197-4 (Ga. Cobb Cnty. St.) ("*Melton*"); and (iii) certain productions made in response to Congressional Committees' pre-August 22, 2014 requests at the same time these logs are due in *Melton*. Thereafter, a Producing Party shall produce privilege logs no later than thirty (30) days

after withholding from production documents pursuant to a claim of privilege, but in any event the Defendants are not required to produce supplemental privilege logs any earlier than sixty (60) days after the initial document production deadline in *Melton*.

III. MISCELLANEOUS.

12. *Violations of the Protective Order by a Receiving Party*. In the event that any person or party violates the terms of this Protective Order, the aggrieved Producing Party should apply to the Court to obtain relief against any such person or party violating or threatening to violate any of the terms of this Protective Order. In the event that the aggrieved Producing Party seeks injunctive relief, it must direct the petition for such relief to this Court. To the extent the same document or categories of documents are at issue in both the above-captioned MDL 2543 and in any Related Litigation, the Parties will attempt first to resolve the issue in the MDL and before this Court. The parties and any other person subject to the terms of this Protective Order agree that this Court shall retain jurisdiction over it and them for the purpose of enforcing this Protective Order.

13. *Violations of the Protective Order by Disclosure of Personal Information*. In the event that any person or party violates the terms of this Protective Order by disclosing Confidential Personal Information or Highly Confidential Information relating to an individual third party, as defined in Paragraph 2 of this Order, or in the event that any person or party breaches the terms of the Protective Order in a manner that requires disclosure to a third party under pertinent privacy laws or otherwise, it shall be the responsibility of the breaching party to contact that third party and to comply with any laws or regulations involving breaches of Personal Information.

14. *Protective Order Remains In Force:* This Protective Order shall remain in force and effect until modified, superseded, or terminated by order of the Court made upon reasonable

written notice. Unless otherwise ordered, or agreed upon by the parties, this Protective Order shall survive the termination of this action. The Court retains jurisdiction even after termination of this action to enforce this Protective Order and to make such amendments, modifications, deletions and additions to this Protective Order as the Court may from time to time deem appropriate.

SO ORDERED.

Date: September 10, 2014
New York, New York

JESSE M. FURMAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:
GENERAL MOTORS LLC IGNITION SWITCH LITIGATION
This Document Relates to All Actions

14-MD-2543 (JMF)
14-MC-2543 (JMF)

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APPENDIX A TO PROTECTIVE ORDER - AGREEMENT

I hereby certify that I have read the Order Protecting Confidentiality ("Order") entered in the above-captioned action and that I understand the terms thereof. I agree to be bound by the Order. If I receive documents or information designated as Confidential or Highly Confidential, as those terms are defined in the Order, I understand that such information is provided to me pursuant to the terms and restrictions of the Order. I agree to hold in confidence and not further disclose or use for any purpose, other than as permitted by the Order, any information disclosed to me pursuant to the terms of the Order. I further agree to submit to the jurisdiction of this Court for purposes of enforcing the Order and agree to accept service of process in connection with this action or any proceedings related to enforcement of the Order by certified letter, return receipt requested, at my principal residence, in lieu of personal service or other methods of service.

I understand that these certifications are strictly confidential, that counsel for each party are maintaining the certifications without giving copies to the other side, and that the parties expressly agreed and the Court ordered that except in the event of a violation of this Order, the parties will make no attempt to seek copies of the certifications or to determine the identities of persons signing them. I further understand that if the Court should find that any disclosure is necessary to investigate a violation of this Order, the disclosure will be limited to outside counsel only, and outside counsel shall not disclose any information to their clients that could tend to identify any certification signatory unless and until there is specific evidence that a particular

signatory may have violated the Order, in which case limited disclosure may be made with respect to that signatory.

_____

(signature)

_____

(print name)

Sworn to and subscribed before me this ____day of _____, 2014.

_____

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

GENERAL MOTORS LLC IGNITION SWITCH LITIGATION

This Document Relates to All Actions

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14-MD-2543 (JMF)
14-MC-2543 (JMF)

ORDER NO. 11

JESSE M. FURMAN, United States District Judge:

[Regarding Production of Documents and Electronic Data]

WHEREAS, Defendants and Lead Counsel for the Plaintiffs have met and conferred on the procedures and format relating to the production of documents and things, and having agreed on a format for all such productions, it is SO ORDERED:

1. **General Format of Production.** The parties agree to produce documents (including Hard Copy scanned images) in the electronic format described herein. Production to the MDL 2543 Document Depository by a party (the "Producing Party") shall be deemed sufficient to constitute production to all parties (the "Receiving Party").

2. **Hard Copy Scanned Images**. To the extent practicable, Hard Copy scanned images shall be produced in the manner in which those documents were kept in the ordinary course of business. Where Hard Copy scanned images have identification spines, "post-it notes," or any other labels, the information on the label shall be scanned and produced to the extent practicable. The parties will utilize reasonable best efforts to ensure that Hard Copy scanned images in a single production are produced in consecutive Bates number order.

3. **Images**. Images will be produced as Single Page Group IV, 300 DPI, when reasonably practicable, Black and White TIF images named as the Bates number. Page level Bates numbers will be branded in the lower right of the image and additional legends applied to the lower

left or lower center (if applicable). If the Receiving Party encounters a document where color is needed to comprehend the content, the Producing Party will re-produce that document in a color format upon reasonable request. Common file types that will likely require color will be produced in native format as noted below. The following formatting will be applied to Microsoft Office documents:

(a) Word Documents will be imaged showing Track Changes.

(b) Excel files with redactions will be imaged un-hiding any hidden rows and/or columns and/or sheets.

(c) PowerPoint files will be imaged in Notes Pages.

4. **Native Files**. In addition to TIF images, native files will be provided for PowerPoint, and JPG when corresponding images and any embedded items are not redacted. For files that cannot be imaged (e.g., .wav, .mpeg and .avi) or become unwieldy when converted to TIF (e.g., source code, large diagrams, etc.), the producing party will produce a placeholder (a single-page TIF slipsheet indicating that the native item was produced) along with the file itself in native format. Excel and CSV files will only be provided in native format with a placeholder, unless they have redactions. Redacted documents will be produced in TIF format. The native file will be named as the first Bates number of the respective document. The corresponding load file shall include native file link information for each native file that is produced.

5. **Agreed File Types Other Than Database Records**. The Producing Party will process the file types listed in Appendix B, unless processing is disproportionate, or overly broad or unduly burdensome, in which case the parties will meet and confer. The Producing Party will also meet and confer in good faith with the Receiving Party regarding requests to modify the file types listed in Appendix B

6. **Metadata**. A standard Concordance delimited load file (.DAT), with field header information added as the first line of the file, will be provided with each production. Documents will be produced with related metadata (to the extent it exists) as described in the attached Appendix A specifications, unless as otherwise provided herein.

7. **Image Cross Reference**. A standard Opticon (.OPT) file will be provided with each production that contains document boundaries.

(a) Format:

<Bates Number>,<Not Required >,<Relative Path to TIF Image>,<Y if First Page of Document, Else Blank>,,,<If First Page of Document, Total Page Count>

(b) Example:

GM000000001,,\IMAGES\001\GM00000001.TIF,Y,,,,2
GM000000002,,\IMAGES\001\GM00000002.TIF,Y,,,,
GM000000003,,\IMAGES\001\GM00000003.TIF,Y,,,,1

8. **Text**. Document level text files (.TXT) will be provided for each document produced. Text files will be named the first Bates number of the respective document. Extracted text will be provided when it exists for non-redacted documents. OCR Text will be provided for documents when no extracted text exists or when the document is redacted.

9. **De-Duplication**. Data will be de-duplicated across custodians following industry standard de-duplication algorithms. Additional custodians who had a copy prior to de-duplication will be populated in the ALL_CUSTODIANS field.

10. **Related Documents**. Email attachments will be extracted and related back to the respective email via the ATTACH_BEGIN field referenced in Appendix A. Embedded ESI documents (e.g., a spreadsheet embedded within a word processing document) will be extracted and related back to the respective top level parent document (e.g., standalone file, email message,

etc.) via the ATTACH_BEGIN field referenced in Appendix A. Related documents will be produced within a continuous Bates range.

11. **Confidentiality Designations**. If a particular document has a confidentiality designation, the designation shall be stamped on the face of all TIF images pertaining to such document, in the lower left-hand corner of the document, or as close thereto as possible while preserving the underlying image. If the receiving party believes that a confidentiality stamp obscures the content of a document, then the Receiving Party may request that the document be produced with the confidentiality designation in a different position. No party may attach to any filing or any correspondence addressed to the Court (including the Magistrate Judge), or any adverse or third party, or submit as an exhibit at a deposition or any other judicial proceeding, a copy (whether electronic or otherwise) of any document produced by any Producing Party without ensuring that the corresponding Bates number and confidentiality legend, as designated by the Producing Party, appears on the document.

12. **Specialized Databases**. The parties agree to meet and confer regarding the production of reasonably accessible enterprise database-application files (e.g., SQL and SAP) and non-standard ESI responsive to the parties' requests to determine the most reasonable form of production based on the specific circumstances.

13. **Metadata Of Redacted Or Withheld Documents**. When a document or email is redacted or withheld, all metadata on a family level is excluded from the metadata DAT file.

14. **Encoding Format**. Text files, concordance load files, and Opticon image reference files will be provided in UTF-8 encoding.

15. **Search Terms**. Other than the document production referenced in the parties' proposed September 4, 2014 status conference letter (ECF No. 272 § 1), a Producing Party will

produce ESI in its possession according to agreed-upon search term criteria (including custodians and date ranges), except in instances where the parties agree that an alternative reasonable search would be more appropriate. Documents identified by search term criteria may be reviewed for privilege, confidentiality, redactions, and relevance or responsiveness prior to production.

16. **Not Reasonable Accessible Sources**. The parties have taken reasonable steps to identify and/or collect potentially relevant ESI stored on reasonably accessible sources. On or before October 1, 2014, the parties shall provide a description of sources of electronic data which may have potentially relevant information, but which the parties do not intend to search on the basis that such data is alleged to be not reasonably accessible due to burden or cost (in accordance with Rule 26(b)(2)(B)).

17. **ESI Discovery Dispute Resolution.** Prior to bringing any discovery dispute to the Court, the parties must attempt to resolve the dispute on their own, in good faith, and in accordance with the procedures and requirements outlined in the Court's Individual Rules and Practices in Civil Cases and the Court's standard Case Management Plan and Scheduling Order, both of which are available at http://www.nysd.uscourts.gov/judge/Furman.

18. **Disclosed Protected Information And/Or Otherwise Privileged Information**. Information produced pursuant to this Order that is subject to a claim of privilege shall be treated in a manner consistent with any order entered in this matter pursuant to Federal Rule of Civil Procedure 502(d).

19. **Costs of MDL 2543 Production**. The parties shall share the cost of the MDL 2543 Document Depository. Each party shall bear its own costs of production to the MDL 2543 Document Depository.

SO ORDERED.

Dated: September 10, 2014
New York, New York

JESSE M. FURMAN
United States District Judge

Appendix A

Field	Description	Hard Copy	Email	Attachment OR Standalone File
BATES_BEGIN	First bates number assigned to the first page of the document.	X	X	X
BATES_END	Last bates number assigned to the last page of the document.	X	X	X
ATTACH_BEGIN	First bates number assigned to parent.	X	X	X
ATTACH_END	Last bastes number assigned to the last child.	X	X	X
PAGE_COUNT	Number of images provided for the document	X	X	X
CUSTODIAN	Individual/Source assigned to the record at collection time	X	X	X
ALL_CUSTODIANS	Additional custodians who had a copy prior to de-duplication.		X	X
DOC_TITLE	File property Title			X
DOC_SUBJECT	File property Subject			X
CREATED_DATE	File system create date (YYYYMMDD) [Normalized to UTC]			X
CREATED_TIME	File system create time (24 HR) [Normalized to UTC]			X
LAST_MODIFY_DATE	File system last modify date (YYYYMMDD) [Normalized to UTC]			X
LAST_MODIFY_TIME	File system last modify time (24 HR) [Normalized to UTC]			X
LAST_SAVED_BY	File property Last Saved By			X
DOC_TYPE	Category of file (e.g. MSG, ATTACH, USERFILE)	X	X	X
FILE_TYPE	Type of file (e.g. Word, Excel)			X
FILE_NAME	Name of file.			X
FULL_PATH	Path to file as collected.			X
FILE_EXT	Extension of the file.			X
AUTHOR	Email FROM value.		X	
CC	Email CC value.		X	
BCC	Email BCC value.		X	
RECIPIENT	Email TO value.		X	
DATE_SENT	Date email sent (YYYYMMDD) [Normalized to UTC]		X	
TIME_SENT	Time email sent (24 HR) [Normalized to UTC]		X	
DATE_RECIEVED	Date email received (YYYYMMDD) [Normalized to UTC]		X	
TIME_RECIEVED	Time email received (24 HR) [Normalized to UTC]		X	
DATE_APPT_START	Date email calendar item start (24 HR) [Normalized to UTC].		X	
TIME_APPT_START	Time email calendar item end (24 HR) [Normalized to UTC]		X	
EMAIL_FOLDER	Folder where email resided within email container.		X	
SUBJECT	Email Subject value.		X	
TEXT_LINK	Relative path to the document level text file (e.g. \TEXT\0001\GM000000001.TXT)	X	X	X
NATIVE_LINK	Relative path to native file (if produced). (.e.g. \NATIVES\001\GM000000001.XLS)			X
MD5_HASH	Hash of native file.		X	X

APPENDIX B

123
7Z
ACCDB
ADP
ARJ
BAK
BMP
CSV (to be processed as Microsoft Excel)
DBF
DBX
DOC
DOCX
DOT
DOTM
DOTX
DWG
EML
EXE (only for self-extracting archives)
GIF (will only be processed if it is an attachment to a parent email)
GZ
GZIP
HTM
HTML
ID
JPG
MDB
MHT
MHTML
MPP
MSG
NSF
ODT
OTT
OTH
ODM
ODP
ODG
OTP
ODS
OTS
OST
PDF
PNG (will only be processed if it is an attachment to a parent email)
POT
POTX
POTM

PPD
PPS
PPSM
PPSX
PPT
PPTM
PPTX
PS
PSD
PST
PUB
RAR
RM
RTF
SDW
SHTML
SWF
TAR
TC
TIF
TXT
UOP
UOF
UOS
VMDK
VHD
VSD
WAV
WK1
WKS
WK3
WK4
WPC
WPD
XLS
XLW
XLSB
XLSM
XLSX
XLT
XLTM
XLTX
XPS
Z
ZIP

EXHIBIT B

Contact Information for Court-Appointed Counsel

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APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IN RE: NEW YORK RENU WITH MOISTURELOC PRODUCT LIABILITY LITIGATION	:	Index No. 766,000/2007
THIS DOCUMENT APPLIES TO ALL CASES	:	

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: BAUSCH & LOMB CONTACT LENS SOLUTION PRODUCT LIABILITY LITIGATION	:	MDL No.: 1785 C/A No. 2:06-MN-77777-DCN
THIS DOCUMENT APPLIES TO ALL CASES	:	

JOINT ORDER APPOINTING SPECIAL MASTER

The Hon. Helen E. Freedman, the presiding judge in the New York Coordinated ReNu with MoistureLoc Product Liability Litigation and the Hon. David C. Norton, presiding judge in Multidistrict Litigation No. 1785 held a joint conference with lead plaintiffs' and defendant's counsel in the ReNu with MoistureLoc Litigation on October 18, 2007. At the conference, the parties and the Courts addressed the adoption of uniform rules to govern redaction of documents produced in discovery as well as claims of privilege with respect to documents sought to be obtained in discovery by plaintiffs. It is hereby ORDERED as follows:

The respective Courts appoint Fordham University School of Law Professor Daniel Capra, Esq. as Special Discovery Master/Referee ("Special Master") in the New York coordinated ReNu with MoistureLoc Product Liability Litigation and in Multidistrict Litigation No. 1785.

Judge Norton hereby appoints Professor Capra as the Special Master pursuant to Fed. R. Civ. P. 53. That rule permits a federal court to appoint a Special Master to "perform duties consented to by the parties" or "to address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a)(1)(A); 53(a)(1)(C).

Justice Freedman hereby appoints Professor Capra as the Special Master pursuant to CPLR 3104. That rule allows a New York court to appoint a Referee to oversee disputes relating to discovery issues. *See* CPLR 3104(a).[1] The parties have consented to Professor Capra's appointment as the Special Master.

I. Duties of the Special Master

Pursuant to the Order of the Courts, Special Master Capra shall review privilege logs, privilege redaction logs, redaction logs and any documents identified to him by plaintiffs to the extent necessary to test and determine the propriety of redactions and to fairly resolve Bausch & Lomb Inc.'s privilege claims or for otherwise withholding and/or redacting such documents. Special Master Capra shall also review any challenges to the designation of documents as confidential.

The Special Master shall supervise document discovery with respect to claims of confidentiality, privilege, and the redaction of documents, and when necessary, make recommended rulings for the Courts' consideration on disputes that may arise in connection with redaction/privilege issues.

[1] Professor Capra will perform the same functions in both the MDL and New York proceedings.

II. Document Review Process

Defendant Bausch & Lomb, Inc. will provide any assistance required and/or requested by the Special Master to facilitate the review process including producing and arranging documents in a manner that will ease the burden of review. During the course of the review process the Special Master and his designee(s) shall have access to all materials to which Bausch & Lomb, Inc. has asserted privilege claims as well as all documents and information redacted or withheld for any other reason. .

III. Ex Parte Communications

Fed. R. Civ. P. 53(b)(2)(B) directs the Courts to set forth the circumstances in which the Special Master may communicate *ex parte* with the Courts or a party.[2] The Special Master may communicate *ex parte* with the Courts, without notice to the parties, regarding logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters. The Special Master may not communicate *ex parte* with any party or counsel without first providing opposing Liaison Counsel notice and an opportunity to be heard. Such notice shall indicate the general nature of the proposed communication.

IV. In Camera Review

The Special Master shall review all documents and information which is in dispute *in camera*. Counsel for the Parties shall designate an attorney or attorneys to be available to the Special Master to answer any questions that the Special Master may have regarding these documents. For purposes of this review effort, all such persons shall be deemed officers of the Court, such that their access will not give rise to a waiver of any privilege or confidentiality claims.

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[2] CPLR 3104 does not specifically address *ex parte* communications, but the parties have agreed that the provisions stated herein shall apply in the New York proceeding.

Because this process is necessarily *ex parte*, all oral communications shall be recorded by a court reporter. The parties shall share the expense of this recording equally, and all transcripts shall be filed under seal. If requested by the Special Master or the Courts, the parties may submit written briefing to supplement the *in camera* review process. All such written submissions shall be filed under seal.

V. Review of Special Master's Findings/Recommendations

Any party objecting to a ruling by the Special Master must notify the Special Master and all other interested parties of its intention to raise an objection (by facsimile or electronic mail) within three (3) business days after receiving the Special Master's written recommendation. Thereafter, said objection must be raised with the Courts within twenty (20) days of the receipt (by facsimile or electronic mail) of the Special Master's written recommendation. If notification of a party's intention to challenge the Special Master's written recommendation is not given within three (3) business days, the Courts may adopt the recommended ruling as its order on the disputed issue. The Courts shall review all objections to any finding, report, or recommendation of the Special Master *de novo*, as required by Fed. R. Civ. P. 53(g).[3] The Courts will set aside the Special Master's rulings on procedural matters only for abuse of discretion.

VI. Compensation of Special Master

The parties have agreed to compensate the Special Master at a rate of $500 per hour. The Special Master shall incur only such fees and expenses as may be reasonably necessary to fulfill his duties under this Order or such other Orders as the Courts may issue.

[3] CPLR 3104 does not specify that review shall be undertaken *de novo*, but the parties have agreed that review in the New York proceeding shall be *de novo*.

Within fourteen (14) days of this Order, the parties shall establish an initial operating account of $15,000. Plaintiffs and Bausch & Lomb, Inc. shall share this cost equally, with Plaintiffs' share being borne half by the New York Plaintiffs and half by the MDL Plaintiffs. The Courts will not order any additional payments until the retainer is fully earned.

The Special Master in this proceeding shall maintain normal billing records of time spent on this matter with reasonably detailed descriptions of his activities. Upon the Courts' request, the Special Master shall submit a written formal report of his activities for filing in these coordinated proceedings.

VII. Term of Appointment

The appointment of Daniel Capra, Esq. shall extend from the date of this order through October 31, 2008. The reappointment of the Special Master and the allocation of his fees among plaintiffs and defendant shall hereafter be reviewed and the subject of a subsequent order of these Courts.

VIII. Affidavit

Fed. R. Civ. P. 53(b)(3) requires a Special Master to submit an affidavit "disclosing any ground for disqualification under 28 U.S.C. § 455" before appointment. A copy of the Special Master's affidavit is attached to this Order. The Special Master and the parties shall notify the Courts immediately if they become aware of potential grounds for disqualification.

Hon. Helen E. Freedman
Supreme Court of the State of New York
County of New York

Hon. David C. Norton
United States District Judge
District of South Carolina

November 26, 2007

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

In re: Bausch & Lomb Contact Lens Solution Products Liability Litigation	MDL No: 1785
	C/A No. 2:06-MN-77777-DCN
This Order Relates To: All Cases	**PRETRIAL ORDER NO. 9**

IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In re: New York ReNu with MoistureLoc Product Liability Litigation	Index No. 766,000/07
This Order Relates To: All Cases	**Case Management Order re: Supplemental Deposition Protocols**

SUPPLEMENTAL DEPOSITION PROTOCOLS (Joint Order)

In order to further the goal of coordinating the MDL proceeding and the New York Coordinated Proceeding, the Honorable David C. Norton, presiding judge in MDL No. 1785, and the Honorable Helen Freedman, presiding judge in the New York Coordinated Proceeding, held a joint hearing with lead plaintiffs' and defendant's counsel in the Bausch & Lomb MoistureLoc litigation on April 19, 2007. At the hearing, the parties and the Courts addressed uniform rules to govern the conduct of depositions in the MDL proceeding and the New York coordinated proceeding, including: (1) captioning of depositions; (2) production of documents before depositions; (3) deposition

scheduling; and (4) deposition duration. The provisions listed below apply in both respective proceedings. It is hereby ORDERED that:

I. CAPTIONING OF DEPOSITIONS

Section V.B of Pretrial Order No. 7 is supplemented to include the following language: "All cross-noticed deposition notices and transcripts shall contain a co-caption indicating that the depositions are being taken in both the New York and MDL proceedings."

II. PRODUCTION OF DOCUMENTS RELATED TO DEPOSITIONS

Section X of Pretrial Order No. 6 is amended to include the following additional provisions:

A. Document Production Certification By Defendant

At least thirty (30) days prior to the deposition of persons currently or formerly employed by Bausch & Lomb, Bausch & Lomb shall provide Plaintiffs' Steering Committee with a written certification that it has completed production of that witness's custodial files.

B. Sharing Of Documents Prior To Depositions

Deposing counsel shall provide to opposing counsel a copy of all documents to be shown to a witness during a deposition, with the exception of those documents to be used for impeachment purposes, either before the deposition begins or contemporaneously with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least (3) business days before the deposition, then the witness and the witness's counsel shall not discuss the documents privately during the deposition. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to discuss the documents before the witness answers

questions concerning the document.

III. DEPOSITION SCHEDULING

A. Notice of Depositions

Section X.B.1 of Pretrial Order No. 6 is supplemented to include the following language: "Counsel shall provide at least sixty (60) days notice prior to all depositions, in an attempt to ensure that the date is convenient for all counsel."

B. Duration

Section VI.D of Pretrial Order No. 7 is replaced with the following: "The total amount of questioning time by New York and MDL plaintiffs' counsel for all cross-noticed depositions noticed by plaintiffs shall not exceed fourteen (14) hours. In the interests of coordination and minimizing duplicative depositions, the Court also encourages the MDL and New York Plaintiffs' Steering Committees to coordinate with counsel in other states in dividing their questioning time and formulating deposition questions such that counsel for all plaintiffs in MoistureLoc cases are able to complete their questioning of Bausch & Lomb witnesses in the allotted 14 hours."

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE
DISTRICT OF SOUTH CAROLINA

Helen E. Freedman

HELEN E. FREEDMAN
SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

May 4, 2007