IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

INITIAL SCHEDULING ORDER	)
	)
[Entered pursuant to the Standing Order	)
Governing Civil Case Management Before	)
the Honorable Frank D. Whitney,	)
Misc. No. 3:07-MC-47 (Doc. No. 2)]	)

THIS MATTER has been assigned to the docket of the Honorable Frank D. Whitney. Pursuant to the Standing Order Governing Civil Case Management Before the Honorable Frank D. Whitney, Misc. No. 3:07-MC-47 (Doc. No. 2), the Court hereby sets the following requirements and deadlines for service, pleading and motions practice, conference activities, initial disclosures, and submission of the parties' certification and report of initial attorneys' conference.

1. PRELIMINARY

a. **Service.** Plaintiff(s) (including defendants in the capacity of third-party plaintiffs) shall be responsible for serving a copy of this Order on the defendants along with service of the pleadings and summons. (In removed actions, the removing party shall be responsible for the service of this Order along with the notice of removal.) If service of the relevant pleading has already been obtained prior to the docketing of this Order, a copy must be served on the required parties within the next five (5) calendar days.

b. **Scope.** This Initial Scheduling Order is intended to apply to adversarial civil cases in which all parties are represented by counsel and traditional discovery will be sought. Cases involving review of a previously developed record, such as habeas corpus, bankruptcy appeals, social security appeals, certain ERISA benefits cases, *et*

cetera, are not subject to this Order. If counsel believe that this Order was filed in this case in error they should immediately notify the Court. In addition, no provision of this Order is intended to supersede any contrary statute or rule applicable to certain specialized forms of civil action (*e.g.*, adequate notice and claim periods in *in rem* suits; an automatic stay in certain securities and class/derivative actions, or where a party is in bankruptcy, *et cetera*), and parties should promptly seek relief from, or clarification of, any provision of this Order in the event that an apparent conflict arises.

2. OUT OF STATE COUNSEL

a. ***Pro Hac Vice* Admission.** Out of state counsel may apply for admission *pro hac vice* provided that out of state counsel are affiliated with a local attorney who is responsible for signing documents filed with the Court. In so signing, local counsel shall be held accountable for the substance of such submissions under Rule 11(b) of the Federal Rules of Civil Procedure. Local counsel must attend all pre- and post-trial hearings, but upon request may be excused by the Court from attendance at trial.

b. **Special Admission.** Special admission without affiliation of local counsel shall not be allowed except upon a showing of exceptional hardship, or in cases where the United States or one of its officers or agencies is a party.

3. PLEADING & PRELIMINARY MOTIONS

a. **Pleading.** Except as hereinafter provided, pleadings shall be served at such times and under such circumstances as required by Rules 4 and 12-14 of the Federal Rules of Civil Procedure. Extensions of time to serve pleadings shall not be granted except

by leave of court for good cause shown (consent of opposing counsel alone is not sufficient). Absent extraordinary circumstances, no party shall receive more than one extension of time to serve a pleading, with any such extension being no more than twenty (20) days in duration.

b. **Preliminary Motions – How Presented.**

i. For purposes of the following paragraphs, "preliminary motion" means any motion (dispositive or otherwise) made in advance of the start of discovery, including motions made pursuant to Rule 12 of the Federal Rules of Civil Procedure, motions to remand, motions for change of venue, and motions for interim relief pursuant to Rule 65.

ii. Motions to dismiss based on any of the defenses set forth in Rule 12(b), if contained in the answer, shall be construed by the Court as placeholders which preserve the defense for future adjudication (*e.g.*, at summary judgment or trial). See (Proposed) Local Civil Rule 7.1(C)(1). If a defendant desires preliminary adjudication of a Rule 12(b) defense, subject to the limitations described below, a motion along with a supporting memorandum of law must be filed separately from the answer.

iii. Every preliminary motion shall be made in writing and include, or be accompanied by, a brief statement of the factual and legal grounds on which the motion is based. A memorandum of law shall always state the "Bottom Line Up Front" – that is, the introductory paragraph(s) shall: (i) identify with particularity each issue in dispute; (ii) concisely (*i.e.*, in one or two sentences)

state why the party should prevail on the issue, directing the Court's attention to what the party believes to be the controlling legal authority or critical fact in contention; and (iii) if applicable, state the remedy or relief sought.

iv. Unless prior permission has been granted in compliance with the requirements of Paragraph 3(b)(vi), memoranda of law in support of or in opposition to any preliminary motion contemplated by this Order shall not exceed 4,500 words, and reply memoranda shall not exceed 1,500 words. Headings, footnotes, quotations and citations do count toward the page and word limitation. The case caption, table of contents, table of authorities, and any certificates of counsel do not count toward the limitation. The memorandum of law shall include a certificate by the attorney (or the party if unrepresented), subject to Rule 11, that the submission complies with the foregoing word limitation. Non-complying briefs will be stricken summarily from the record.

v. The briefing schedule set forth in current Local Civil Rule 7.1(B) [(Proposed) Local Civil Rule 7.1(E)] is hereby incorporated by reference and shall control unless otherwise ordered by the Court. Upon request of a party or on its own motion, however, the Court reserves the right to set abbreviated briefing schedules in particular cases.

vi. Any motion to extend the foregoing time and/or word limitations shall be filed immediately upon counsel learning of the need for the same and in any event no fewer than three (3) business days in advance of the filing deadline

sought to be modified.[1] The moving party must show consultation with opposing counsel regarding the requested extension and must inform the Court of the views of opposing counsel on the request. If a party fails to make the requisite showing, the Court will summarily deny the request for extension. Any motion for an extension must also be accompanied by a separately submitted proposed form of order.[2] Motions for extensions shall not be granted except upon a showing of good cause (consent of opposing counsel alone is not sufficient). Truly exceptional circumstances must exist to modify deadlines that impact a scheduled motions hearing or trial date, which extensions may only be granted by Order of the presiding district judge.

c. **Preliminary Motions – Effect Of Filing.**

i. The filing of a pre-answer motion to dismiss for one or more of the reasons set forth in Rule 12(b)(1), 12(b)(2), 12(b)(4), or 12(b)(5), or a motion for more definite statement pursuant to Rule 12(e), will toll the time required to plead responsively until ten (10) days following disposition of the motion. See Fed. R. Civ. P. 12(a)(4). The time in which to hold a Rule 26(f) initial attorneys' conference and to commence with discovery will likewise be tolled unless the party opposing the motion petitions the Court for limited fact

[1] Any motion filed outside this deadline will be considered only upon a showing of excusable neglect in addition to good cause.

[2] Proposed orders shall be submitted to Chambers electronically, in WordPerfect (WPD) or Rich Text (RTF) format, utilizing the CyberClerk feature of CM/ECF.

discovery and demonstrates that such discovery is necessary to adjudicate the preliminary motion.

ii. The filing of any other preliminary motion – including motions made pursuant to Rules 12(b)(3), 12(b)(6), and 12(b)(7) – will NOT presumptively toll the time required to plead an answer, counterclaims, and/or third-party complaint. Pursuant to Rule 12(d), the Court may elect to defer ruling on issues raised in Rule 12 and similar motions until the close of discovery,[3] consider evidence extrinsic to the pleadings, and dispose of the issues presented as provided in Rule 56. Accordingly, a defendant who contemplates filing a Rule 12(b)(6) motion must still serve and file a timely responsive pleading and prepare to commence with discovery as provided below. Such defendant may, however, file concurrent with its answer a Rule 12(b)(6) or 12(c) motion together with a request for preliminary hearing, pursuant to Rude 12(d), for good cause shown. Examples of good cause include, without limitation: (i) the claims set forth in the complaint are facially frivolous; (ii) the claims are subject to preclusion or are otherwise barred by the absence of a necessary condition precedent; (iii) the defendant asserts the defense of immunity from suit; or (iv) the defendant asserts the availability of a defense under the Federal Arbitration Act. An Order denying

[3] While motions to remand and motions concerning venue typically will be decided as early in the case as practicable, the Court includes them in the group of preliminary motions that do not stay the pleading schedule and commencement of discovery in recognition of the fact that the litigation is likely to go forward in some forum even if not the United States District Court for the Western District of North Carolina.

a defendant a preliminary hearing on a Rule 12 defense will in no way prejudice the party from raising the same arguments at summary judgment.

d. **Preliminary Motions – Disposition.**

i. Pursuant to 28 U.S.C. § 636(b) and the Court's Standing Order governing Referrals to Magistrate Judges, Misc. No. 3:06-MC-83, preliminary motions may be referred to a United States Magistrate Judge for recommended disposition by memorandum and recommendation (M&R), or, if appropriate, for full disposition by memorandum and order (M&O).

ii. Any party aggrieved by the magistrate judge's decision on any motion may, within ten (10) days thereafter, appeal to the district judge for *de novo* review of a M&R, or for clear error review of a M&O, by filing specific objections. Unless prior permission has been granted, the objections (inclusive of any memorandum of law) shall not exceed 2,000 words, stating with particularity those aspects of the decision asserted to be erroneous and a perspicuous factual or legal basis supporting that position. Within ten (10) days after service of the objections or motion, a response not to exceed 2,000 words may be filed. Unless otherwise ordered by the Court, no further briefing will be allowed and district court review will be conducted on the record as developed more fully before the magistrate judge.

4. INITIAL ATTORNEYS' CONFERENCE

a. Within fourteen (14) calendar days following joinder of the issues (as defined herein), the parties or their counsel shall confer as provided by Rule 26(f) and

conduct an Initial Attorneys' Conference ("IAC"). "Joinder of the issues" occurs when the last responsive pleading is filed, as set forth in Paragraph 3(c), regardless of whether a preliminary motion is pending.

b. Protocol for Discovery of Electronically Stored Information. In order to assist the parties in preparing for and conducting discovery of electronically stored information ("ESI"), the Court has issued the Standing Order on Protocol for Discovery of Electronically Stored Information in Civil Cases Before the Honorable Frank D. Whitney, which is available for reference at Misc. No. 3:07-MC-47 (Doc. No. 4). The purpose of the Protocol is to facilitate the just, speedy, and inexpensive conduct of discovery involving ESI in civil cases, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention. The parties shall review the Protocol, carefully consider its immediate impact on initial disclosures, the joint proposed discovery plan, and the retention of data, and follow its guidelines accordingly.

c. Within five (5) calendar days after the IAC, the parties shall file a Certification of Initial Attorneys' Conference ("CIAC") and a joint proposed discovery plan conforming to the requirements set forth below. The template CIAC and Discovery Plan provided by the Clerk's office shall be disregarded to the extent that it is inconsistent with the mandates of this Order.

d. Within fourteen (14) calendar days after the IAC, the parties must exchange initial disclosures required by Rule 26(a)(1). If the parties choose to stipulate out of or object to the mandatory initial disclosure procedure, they must so indicate in their

proposed discovery plan.

5. CASE MANAGEMENT TRACKS

a. Civil cases will be assigned to one of three case management tracks: **Simple/Fast Track**; **Standard Track**; or **Complex/Extended Track**. Cases involving *pro se* litigants presumptively will be assigned to the **Simple/Fast Track**, and all other cases presumptively will be assigned to the **Standard Track**, unless the parties demonstrate to the satisfaction of the judicial officer presiding over the initial scheduling conference that a different case management track is more appropriate for just and expedient adjudication of the case.

b. With due regard given to the fact that not every case will fall cleanly into a pre-defined category, the following general deadlines and limitations (or close approximations thereof, subject to modification by leave of court for good cause shown) will apply depending on which case management track the case is assigned:

	Simple/ Fast Track	Standard Track	Complex/ Extended Track[4]
Initial Disclosures (α)	14 days after IAC	14 days after IAC	14 days after IAC
Motion to Amend the Pleadings Deadline	4 weeks after **α**	6 weeks after **α**	8 weeks after **α**
Completion of Discovery Deadline (δ)	12 weeks after **α**	24 weeks after **α**	36 weeks after **α**
Discovery Guidelines Written discovery requests allowed (per party per method of written discovery): Total hours of oral deposition allowed (per party, excluding experts):	20 20	25 30	30 50
Expert Reports Plaintiff: Defendant: Rebuttal:	3 weeks before **δ** 3 weeks before **δ** None anticipated	8 weeks before **δ** 4 weeks before **δ** Any time before **δ**	10 weeks before **δ** 6 weeks before **δ** 2 weeks before **δ**
ADR Deadline	14 days after **δ**	14 days after **δ**	14 days after **δ**
Dispositive Motions Deadline	28 days after **δ**	28 days after **δ**	28 days after **δ**
Word Limits (Briefs on Dispositive Motions) Memo in support or opposition: Reply Memo:	4,500 words 1,500 words	6,000 words 2,000 words	9,000 words 3,000 words

c. Irrespective of the case management track to which this matter ultimately is assigned, counsel should expect that oral arguments on dispositive motions will be heard on the first available motions calendar after dispositive motions are expected to ripen, and counsel should be ready for trial during the next available trial calendar following a motions hearing. The Court's Standing Order Governing the

[4] In cases complex enough to warrant bifurcation of discovery, the parties may propose, instead of a single 36-week discovery period, separate phases (*e.g.*, of 12- and 24-weeks), with or without an intermediate motions deadline.

Calendaring of Hearings and Trials Before the Honorable Frank D. Whitney is available for reference at Misc. No. 3:07-MC-47 (Doc. No. 1).

d. Case management tracks and corresponding discovery limits will be determined and assigned primarily with regard to the anticipated nature and complexity of the case. However, where counsel anticipate extended conflicts of time during the period in which the case will be litigated (*e.g.*, due to personal or professional obligations, family or medical leave, or vacation that has been secured in advance, *et cetera*), the deadlines may be extended by a period of not more than eight (8) weeks beyond that which otherwise would be justified based solely on the nature and complexity of the case.

6. JOINT SUBMISSION OF A PROPOSED DISCOVERY PLAN

a. Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, the parties shall submit a CIAC and joint proposed discovery plan, which will guide the Court in issuing a case management order as provided by Rule 16(b). The parties are required to follow the guidelines set forth below and may not merely follow the template provided by the Clerk's office.

b. The parties' joint proposed discovery plan shall contain:

i. A thorough discussion of the anticipated nature and complexity of the case;

ii. The parties' preference as to which case management track the case should be assigned, along with adequate justification if the parties seek permission to opt out of the default case management track (see Paragraph 5(a)). Where there is disagreement the parties shall state the basis of such disagreement,

with the burden being principally on the party seeking more expansive discovery limits to justify the need for the same;

iii. Any requests for specific modifications from the suggested deadlines and limitations set forth in the above table, along with adequate justification for the proposed modification. For example, an ADR deadline of fourteen (14) days after the deadline for completion of discovery is typically the latest date that the Court will consider allowing the parties to submit to ADR. However, if the parties believe that the case would benefit from early mediation, an earlier deadline may be proposed in the parties' joint discovery plan;

iv. Whether or not there is unanimous and voluntary consent of all parties to the exercise of jurisdiction by a United States magistrate judge pursuant to 28 U.S.C. § 636(c);

v. Whether or not the parties request that an initial pretrial conference be held prior to the entry of a comprehensive Case Management Order. Initial pretrial conferences (and subsequent oversight of discovery) typically will be conducted by a magistrate judge except in more complex cases (*e.g.*, patent, MDL, class and derivative actions).

7. COMPUTATION OF TIME

a. The time periods prescribed by Court Order or Local Rule shall be computed as provided in Rule 6 of the Federal Rules of Civil Procedure, unless otherwise directed by the Court.

b. If an Order of the Court specifies a time period in terms of "calendar days:"

i. Intervening weekends and holidays shall be counted in the computation even if the specified time period is shorter than eleven (11) days in duration; and

ii. The time period prescribed by the Court shall be deemed to be inclusive of any additional three (3) day allowance for service provided by Fed. R. Civ. P. 6(e) and (Proposed) Local Civil Rule 7.1(E).

IT IS SO ORDERED.

Frank D. Whitney
United States District Judge