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INDIVIDUAL PRACTICES AND PROCEDURES
JUDGE COLLEEN McMAHON

Courtroom
United States District Court
Southern District of New York
500 Pearl Street, Room 24A
New York, New York 10007

Chambers
United States District Court
Southern District of New York
500 Pearl Street, Room 2550
New York, New York 10007
Tel: (212) 805-6325
Fax: (212) 805-6326
Email: ChambersNYSDMcMahon@nysd.uscourts.gov

Deputy Clerk: Civil
Mariela De Jesus
(212) 805-6325

Senior Law Clerk: Criminal
James O'Neill
(212) 805-6329

Table of Contents

I. COMMUNICATIONS WITH CHAMBERS 4
A. Routine Communications with Chambers 4
B. Emergency Communications with Chambers 4
C. Faxes 4
D. Requests for Adjournments or Extensions of Time 5
1. Timing of Request 5
2. Form of Request 5
3. Court Practice 5
II. PRO SE CASES 5
III. INITIAL PRETRIAL CONFERENCES (CIVIL) 6
A. Scheduling 6
B. Effect of a Case Management Plan 6
C. Appearances 7
IV. SPECIAL RULES FOR SPECIFIC TYPES OF CASES 7

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A. Diversity Jurisdiction Cases 7
B. Cases Removed from State Court 7
C. Related and Consolidated Cases 7
D. Section 1983 Cases against the City of New York 8
E. RICO Cases (Civil) 8
F. Patent Cases 8
G. Fair Labor Standards Act Cases 8
1. Cases Pleaded as Collective Actions 8
2. Cases Not Pleaded as Collective Actions 8
H. Personal Injury and Medical Malpractice Cases 9
I. ERISA Cases 9
J. Individuals with Disabilities in Education Act (IDEA) Cases 9
K. Admiralty Rule B Attachment Cases 9
L. Appeals from Administrative Orders and Petitions to Confirm Arbitration Awards 9
M. Cases Governed by the Private Securities Litigation Reform Act (PSLRA) 9

V. PLEADINGS AND MOTIONS 10

A. Courtesy Copies 10
B. Pre-Motion Conferences in Civil Cases 10
C. Discovery Disputes 10
D. Motion Papers 10
E. Memoranda of Law 11
F. Rules for Specific Motions 11
1. Default Judgment Motions 11
2. Summary Judgment Motions (Generally) 12
3. Motions to Exclude Testimony of Experts 12
4. Motions for Summary Judgment on the Basis of Qualified Immunity 13
5. Motions for Reconsideration 15
6. Motions for Preliminary Approval of Settlements 15
G. Time to Respond 15
H. Oral Argument on Motions 15
I. Letter Motions & Notice of Rulings and Calls 15

VI. STIPULATION AND CONFIDENTIALITY ORDERS 17

VII. PRETRIAL AND TRIAL RULES AND PROCEDURES 18

A. Discovery Schedule 18
B. Pretrial Order; Other Trial Filings 18
C. Motions *In Limine* 19
D. Final Pretrial Conference; Exhibits 19
E. Jury Selection 19
F. Special Rules and Submissions for Bench Trials 20
1. Form of Statement 21
2. Use of Statements 21
3. Exception to Use of Statement 21
G. Evidentiary Hearings in Civil Matters 21

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H. Interpreters Provided in Civil Matters 22
I. Conduct of Trial 22
J. Courtroom Technology 22
K. Post-Trial Motions 22

ANNEX A – FORM OF PRETRIAL ORDER 23

ANNEX B – INITIAL DISCOVERY PROTOCOLS 26

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UNLESS OTHERWISE ORDERED, MATTERS BEFORE JUDGE MCMAHON SHALL BE CONDUCTED IN ACCORDANCE WITH THE FOLLOWING PRACTICES:

I. Communications with Chambers

A. Routine Communications with Chambers

All communications with Chambers on any subject must be in writing and filed via ECF, with copies delivered simultaneously to all counsel or *pro se* parties. Do not send copies of correspondence between counsel to the Court. Courtesy copies of all pleadings and motions. Sealed documents should be electronically filed in accordance with Part V.A, *infra*. Do not send courtesy copies of other documents to Chambers.

Do not send emails to any email address in chambers. Any email sent to a chambers email address will be ignored.

Telephone calls to Chambers are not permitted, except in the case of a real emergency. Judge McMahon's deputy clerk and law clerks will not discuss cases or clarify rules over the telephone. Any requests for clarification should be submitted in writing.

B. Emergency Communications with Chambers

As a general matter, materials filed via ECF are reviewed by the Court the business day after they have been filed. If a submission requires more immediate attention, please notify Chambers by telephone after you file your submission on ECF.

In case of a real emergency, the attorney for a represented party in a civil matter may call (212) 805-6325, and should include opposing counsel on the call. An attorney with a pressing issue in a criminal matter may call (212) 805-6329.

A party who does not have an attorney should not call Chambers. The Court has an office dedicated to parties without attorneys, called the Pro Se Intake Unit. It may be reached at (212) 805-0175 during normal business hours, 8:30 a.m. to 5:00 p.m., Monday through Friday (except federal holidays).

C. Faxes

Courtesy copies of motions and supporting papers may not be faxed to Chambers unless the Court specifically directs that fax be used. If the Court has specifically directed parties to communicate with Chambers via fax, do not follow with a hard copy.

No document longer than 10 pages may be faxed without prior authorization.

Under no circumstances will Chambers accept faxes from *pro se* litigants. **If *pro se* litigants send faxes to Chambers, the faxes will be ignored.** *Pro se* litigants must instead file all papers that they want Judge McMahon to read with the Pro Se Clerk's Office. See Part M, *infra*, for more information.

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D. Requests for Adjournments or Extensions of Time

1. Timing of Request

Any requests for an adjournment of a court appearance must be made at least **48 hours** prior to the scheduled appearance. Any request for an extension of time must be filed at least **two days** prior to the original deadline sought to be extended. Applications made late will not be entertained except in case of a true emergency.

All date and hour calculations are governed by Federal Rule of Civil Procedure 6, in civil matters, or Federal Rule of Criminal Procedure 45, in criminal matters.

2. Form of Request

Any request for an adjournments or an extension of time must be by ECF letter motion, and must include:

- The original deadline that the party wishes to adjourn or extend;
- The number of previous requests for adjournment or extension;
- Whether these previous requests were granted or denied;
- Whether the adversary consents, and, if not, the reasons given by the adversary for refusing to consent; and
- Whether the requested adjournment or extension affects any other scheduled dates. If so, a proposed Revised Scheduling Order must be attached.

3. Court Practice

Judge McMahon does not automatically grant adjournments or extensions of time, even if stipulated by counsel.

II. Pro Se Cases

Parties who appear before the Court *pro se* must comply with the applicable Federal Rules of Civil Procedure, the Southern District of New York's Local Rules (available at http://nysd.uscourts.gov/courtrules.php), and Judge McMahon's Individual Rules.

Pro se litigants are encouraged to review the resources made available by the Court (including instructions on how to access ECF, how to locate an attorney, and sample forms), available at http://nysd.uscourts.gov/courtrules_prose.php.

All hard-copy filings by *pro se* litigants must be submitted to the Pro Se Intake Unit (not to Chambers), at:

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United States District Court of the Southern District of New York
Pro Se Intake Unit
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 200
New York, New York 10007

Pro se litigants may not contact Chambers by phone, fax or email, but must direct all communications through the Pro Se Intake Unit, which can be reached at (212) 805-0175 during normal business hours, 8:30 a.m. to 5:00 p.m., Monday through Friday (except federal holidays). We will not respond to communications from pro se litigants who try to contact chambers by any other means.

III. Initial Pretrial Conferences (Civil)

A. Scheduling

When a civil case is assigned to Judge McMahon, Chambers will automatically schedule an initial pretrial conference pursuant to Federal Rule of Civil Procedure 16. These conferences will be held by phone unless the parties specifically request one in person. Counsel will be notified of the time of the conference and the dial-in number via ECF; all counsel and *pro se* parties must assure that they are registered to receive notifications via that system.

In certain types of cases (*e.g.*, civil RICO actions), the order scheduling the initial conference will include additional scheduling rules that must be observed by the parties. For additional information, see Part IV., *infra*.

B. Effect of a Case Management Plan

The primary purpose of the initial pretrial conference is to enter a case management plan. If the parties can agree to a case management plan in the form found online at http://nysd.uscourts.gov/judge/Mcmahon, they should submit it to Chambers by filing it via ECF no later than **two days** prior to the scheduled initial conference.

If the Court approves the plan, the initial conference will be canceled. Where these conditions are met, the Court normally will **not** send a notice canceling the conference. The Court's signature on the case management plan is your notice that the conference has been cancelled.

However, if there is a pending motion that has been fully briefed, the conference will not be automatically cancelled, even if counsel submit a stipulated case management plan. If a motion has been filed but is not fully briefed, the Court may choose to hold the conference to discuss the motion, or to adjourn the conference until the motion is fully briefed. Counsel should be prepared to discuss pending motions at the Initial Conference, whether they are fully briefed or not. A decision on a fully-briefed motion may be announced at the conference, or a case management plan may be entered pending resolution of the motion.

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C. Appearances

If the parties fail to agree upon a case management plan or fail to submit the plan to the Court, the parties must appear for a pretrial conference on the scheduled date.

Parties must appear at the conference prepared to discuss their case with the Court.

An extension of time to file a pleading granted pursuant to Part D, *supra*, does not adjourn or postpone any scheduled conference unless specifically stated by the Court.

Requests to appear at a conference by telephone must be made by ECF at least **two days** before the scheduled conference date, in accordance with Judge McMahon's rules for telephonic appearances, available at http://nysd.uscourts.gov/judge/Mcmahon. Such requests will be considered on a case-by-case basis.

IV. Special Rules for Specific Types of Cases

A. Diversity Jurisdiction Cases

In any action in which subject matter jurisdiction is founded on diversity of citizenship pursuant to 28 U.S.C. § 1332, the party asserting the existence of such jurisdiction shall, prior to the Initial Pretrial Conference or any dispositive motion, submit to the Court a letter no longer than two pages explaining the basis for that party's belief that diversity citizenship exists. Where any party is a corporation, the letter shall state both the place of incorporation and the principal place of business. In cases where any party is a partnership, limited partnership, limited liability company, union, trust, business trust, or other unincorporated organization, the letter shall state the citizenship of each of the entity's members, shareholders, partners, and/or trustees.

B. Cases Removed from State Court

Counsel for the party or parties that removed the case, in addition to providing a copy of all process, pleadings, and papers served upon the defendants pursuant to 28 U.S.C. § 1446(a), shall provide the Court with a courtesy copy of any pleading filed or served while the case remained in State court.

C. Related and Consolidated Cases

After an action has been accepted as related to a prior filing, all future court submissions must contain the docket number of the new filing as well as the docket number of the case to which it is related (e.g. 19 Civ. 1234 [rel. 18 Civ. 5678]); if two or more actions have been consolidated for all purposes under a single docket number pursuant to Federal Rule of Civil Procedure 42(a)(2), all future court submissions should be filed only in the docket under which the cases have been consolidated and should reference only that docket number.

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D. Section 1983 Cases against the City of New York

Counsel for plaintiffs in suits against the City of New York, the NYPD, or its employees, alleging causes of action under 42 U.S.C. § 1983 must observe Local Civil Rule 83.10, which is available on the Southern District of New York's website: http://nysd.uscourts.gov/courtrules.php.

E. RICO Cases (Civil)

Counsel in RICO cases must attend the Rule 16 pretrial conference. Counsel should not fill out Judge McMahon's standard case management order, but should instead come to the initial conference prepared to discuss the case.

In all matters in which the complaint contains a RICO claim, the plaintiff(s) must file a RICO Case Statement, in accordance with the Court's RICO Case Standing Order, which is available on the Court's website (http://nysd.uscourts.gov/judge/Mcmahon), within **30 days** of filing the complaint. No discovery may proceed in any case in which a RICO claim is asserted until the defendant(s) on the RICO claim(s) have either filed an answer or a motion to dismiss. If the defendant(s) move to dismiss, all discovery is stayed until resolution of the motion.

F. Patent Cases

Counsel must attend the Rule 16 pretrial conference in patent cases. Counsel should not fill out Judge McMahon's standard case management order, but should instead come to the initial conference having already conferred about scheduling. Counsel should be prepared to discuss all preliminary issues including, if the patent holder is not the inventor, the nature of plaintiff's ownership and the chain of title.

Judge McMahon first assesses claim construction in patent cases, absent some compelling reason to do otherwise. She requires papers limited to intrinsic evidence before she allows any discovery. Keep that in mind when discussing a proposed schedule.

G. Fair Labor Standards Act Cases

1. Cases Pleaded as Collective Actions

Counsel in FLSA cases must attend the Rule 16 pretrial conference. Counsel in FLSA cases should not fill out Judge McMahon's standard case management form. They should instead come to the conference prepared to discuss both the merits and conditional certification. Most of the time, the filing of an FLSA complaint will be deemed a motion for conditional certification of the class denominated in the pleading.

2. Cases Not Pleaded as Collective Actions

Initial Discovery Protocols. Initial Discovery Protocols supersede the parties' obligation to make initial disclosures under FRCP 26(a)(1) for FLSA Claims. This discovery must be provided by both sides within **30 days** after the defendant responds to the complaint or files a motion to dismiss, regardless of the pendency of any dispositive motion. This discovery is intended to encourage the

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parties and their counsel to exchange information and documents early in the case, help frame the issues to be resolved, and plan for more efficient and targeted discovery. If any party believes that there is good cause why a case should be exempted, in whole or in part, from the Protocols, that party may raise its concerns with the Court.

Counsel should become familiar with these protocols, included as annex B to these rules, before the Initial Conference.

H. Personal Injury and Medical Malpractice Cases

In all matters involving personal injury and medical malpractice, plaintiff's counsel must provide medical authorizations to defendant's counsel as soon as counsel identifies him/herself. Plaintiff's counsel should obtain authorizations from their clients before they file the complaint. Do not wait for the initial pretrial conference to be held or for the court to direct the exchange of authorizations.

I. ERISA Cases

In cases involving (1) a denial of benefits under an employee or union benefits plan governed by ERISA, or (2) failure to make a contribution to a Health and Welfare or similar benefit fund, counsel should not fill out Judge McMahon's standard case management form. Instead, they should either (1) send the Court a stipulated schedule for making a motion for summary judgment, which Judge McMahon will "so order," or (2) attend the scheduled Rule 16 pretrial conference, at which time the Court will impose such a schedule.

J. Individuals with Disabilities in Education Act (IDEA) Cases

Counsel in IDEA cases should not fill out Judge McMahon's standard case management form. Instead, they should stipulate to a schedule for briefing summary judgment motions.

K. Admiralty Rule B Attachment Cases

In an Admiralty Rule B Attachment case, counsel should not fill out Judge McMahon's standard case management form. Instead, they should inform Chambers by letter that the case is a Rule B case, at which point the initial Rule 16 conference will be cancelled.

L. Appeals from Administrative Orders and Petitions to Confirm Arbitration Awards

Counsel in these cases should not fill out Judge McMahon's standard case management form. Instead, they should attend the Rule 16 pretrial conference to obtain a briefing schedule.

M. Cases Governed by the Private Securities Litigation Reform Act (PSLRA)

In cases governed by the PSLRA there will be NO Rule 16 conference and NO filing of a case management statement until Judge McMahon directs that one be filed. Instead, in accordance with the provisions of 15 USC Sec. 78u-4(a)(3)(A)(i)(II), no later than the 60th day following the publication of notice in accordance with Sec. 78u-4(a)(3)(a)(i), any person who wishes to serve

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as lead plaintiff must file a motion seeking appointment to that status, together with appointment as lead counsel. Opposition to each such motion must be filed separately and must be received by the court no later than fourteen (14) business days following the date on which such motions are due. NO EXTENSIONS WILL BE GRANTED. The court will rule expeditiously on any lead plaintiff/lead counsel motions. In that decision the court will set a schedule for the filing or a consolidated amended complaint and the making of motions to dismiss. The parties should not bother negotiating a schedule for these matters; the court will set the schedule.

V. Pleadings and Motions

A. Courtesy Copies

One courtesy hard copy of pleadings and motion papers, marked as such, must be submitted to Chambers as soon as practicable after filing. Pleadings and motion papers include, but are not limited to: supporting memorandum, memorandum in opposition, reply, and any other supporting papers.

Please do not submit digital courtesy copies. **Do not send documents on CD-ROM or thumb drive unless they are audio or video files.**

Sealed documents are to be filed electronically on CM/ECF.

Pre-Motion Conferences in Civil Cases

Judge McMahon does not require pre-motion conferences for substantive motions. Do not send letters asking for permission to make a motion. Just make the motion.

B. Discovery Disputes

When the first discovery dispute arises, file a letter to Chambers via ECF and ask for an order of reference to the Magistrate Judge. Thereafter, take all discovery disputes directly to the Magistrate Judge.

Should either party file Objections to an order of the Magistrate Judge pursuant to Fed. R. Civ. P. 72, that party should also file a letter addressed to Judge McMahon to notify her that Rule 72 Objections were filed. Please include the docket number of the filing in the letter.

C. Motion Papers

Motion papers must be filed promptly after service. Do not hold motion papers until all submissions are complete.

All exhibits must be tabbed and indexed. Documents under 35 pages should be stapled, not bound. Exhibits to legal memoranda must not be bound to the brief. Please bind them separately and submit them to the Court along with the brief.

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Do not docket anything except the actual Notice of Motion as a "Motion." In all ECF cases, supporting documents should be docketed as what they are (*i.e.*, "Brief," "Memorandum," "Affidavit") – not as a "Motion."

D. Memoranda of Law

Unless prior permission has been granted, memoranda of law in support of and in opposition to motions are limited to 25 pages, and reply memoranda are limited to 10 pages. All memoranda shall be page numbered, and shall contain both a table of contents and a table of cases.

Requests to file memoranda exceeding the page limits set forth herein must be made in writing **five days** prior to the due date, except with respect to reply briefs, in which case the time is **one day** prior to the due date.

You can save pages by not including citations to unofficial reporters. Citations to New York and United States Supreme Court cases shall contain citations to the official reporter. Citations to unreported cases not available on Westlaw or Lexis should be accompanied by a copy of the case cited.

You can also save pages by not telling the Court the obvious – there is no need to recite the standards for granting, *e.g.*, a motion to dismiss, a motion for summary judgment, a motion for reconsideration.

Memoranda must utilize a 12-point serif font (*e.g.*, Times New Roman) and must be double-spaced with margins of at least one inch all around. Footnotes should be avoided. If any footnotes are included, they must be in 12-point font.

Parties shall not attempt to circumvent the above page limits by attaching an affidavit or declaration in lieu of a fully developed statement of the facts in the brief. The fact section of the brief must include all the facts that you will discuss or rely upon for purposes of the motion under consideration.

If you are submitting an appendix to your brief of more than five pages, you must bind the appendix separately. Do not affix the appendix to your brief.

Failure to comply with any of these guidelines will result in the brief's being stricken.

E. Rules for Specific Motions

1. Default Judgment Motions

Any party wishing to obtain entry of a judgment by default must proceed as follows:

- Wait at least 30 days after service is effected to allow for the receipt of an appearance by mail; then

- Apply for a certificate of default from the Office of the Clerk of the Court in accordance with Local Rule 55.1.

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- Once a certificate of default has been obtained, serve a copy of the Motion for Entry of a Default Judgment on the defaulting defendant in the same manner as prescribed for service of process. The Motion should be accompanied by a notice stating as follows:

- THE ATTACHED LEGAL PAPERS ARE BEING SERVED ON YOU BECAUSE YOU HAVE FAILED TO APPEAR IN A LAWSUIT BROUGHT AGAINST YOU. IF YOU DO NOT ENTER AN APPEARANCE IN THE LAWSUIT ON OR BEFORE **[INSERT DATE NO EARLIER THAN 20 DAYS FROM THE DATE OF SERVICE OF THE NOTICE AND MOTION]**, THE COURT WILL ENTER A DEFAULT JUDGMENT AGAINST YOU. IF YOU ARE A CORPORATION, YOU CAN ONLY APPEAR THROUGH AN ATTORNEY. IF YOU ARE AN INDIVIDUAL, YOU MAY APPEAR BY AN ATTORNEY OR PRO SE. IN EITHER EVENT, YOU MUST TAKE SOME ACTION OR A JUDGMENT WILL BE ENTERED AGAINST YOU. ENTRY OF A JUDGMENT MAY RESULT IN A LEVY AGAINST YOUR PROPERTY.

- File the Motion for Entry of a Default Judgment, together with proof of service of the Motion and the Notice, with the Office of the Clerk of the Court. The Clerk's Office will process the filing and transmit it to Chambers, as necessary, in accordance with Local Rule 55.2.

- If no appearance is entered for the defendant by the date specified in the Notice, the Clerk or the Court (as appropriate) will decide the motion in accordance with Local Rule 55.2 and Federal Rule of Civil Procedure 55.

2. Summary Judgment Motions (Generally)

On motions for summary judgment, do not attach complete deposition transcripts as exhibits. Attach only pages containing relevant testimony (to which citation is made in the briefs or affidavits). Each entry must be separately tabbed and indexed.

When drafting the Statement of Material Facts Pursuant to Local Rule 56.1, opposing parties much reproduce each entry in the moving party's Rule 56.1 Statement, and set out the opposing party's response directly beneath it. If the opposing party wishes to file their own, additional statements of material fact, it shall begin numbering each entry where the moving party left off. To streamline the summary judgment briefing process, the Court strongly encourages the parties to also negotiate and submit, prior to or along with the movant's Rule 56.1 statement, a Joint Rule 56.1 Statement setting out all facts on which the parties agree.

3. Motions to Exclude Testimony of Experts

Unless the Court orders otherwise, motions to exclude testimony of experts, pursuant to Rules 702-705 of the Federal Rules of Evidence and the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) line of cases, must be made by the deadline for dispositive motions and should not be treated as motions *in limine*.

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4. Motions for Summary Judgment on the Basis of Qualified Immunity

The United States Supreme Court has indicated that the issue of qualified immunity should be decided, if possible, prior to subjecting a defendant to discovery. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). Although the *Saucier* procedure is no longer mandatory, it is, in the view of this Court, prudent and will be followed in all cases.

- Pre-Answer/Discovery Motion for Summary Judgment on the Ground of Qualified Immunity

Prior to the taking of discovery, the only appropriate basis for a qualified immunity motion is (1) to admit, for purposes of the motion, that the plaintiff's non-conclusory allegations of fact are true, and (2) to argue that no reasonable officer who did what the plaintiff alleges would have understood that s/he was committing a constitutional tort, because the law on the point has never been settled by the United States Supreme Court. Qualified immunity shields a municipal officer from liability, not because s/he did nothing wrong, but because s/he could not possibly have known that what s/he was doing was wrong, due to the unsettled state of the law relating to those facts. The Court "look[s] to Supreme Court and Second Circuit precedent existing at the time of the alleged violation to determine whether the conduct violated a clearly established right." *Garcia v. Does*, 779 F.3d 84, 92 (2d Cir. 2015) (quoting *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 433 (2d Cir. 2009)); *Moore v. Vega*, 371 F.3d 110, 114 (2d Cir. 2004); *Charles v. City of N.Y.*, No. 12 Civ. 6180 (SLT)(SMG), 2017 WL 530460, at *23 (E.D.N.Y. Feb. 8, 2017).

A motion alleging that the plaintiff's non-conclusory allegations of fact, presumed true, do not rise to the level of a constitutional violation is *not a qualified immunity motion.* It is, rather, a motion to dismiss because the plaintiff's allegations are insufficient as a matter of settled law. Qualified immunity depends for its force on the law's being unsettled. Therefore, pre-answer/pre-discovery qualified immunity motions that rest on the argument that the officer's conduct was lawful (because there was probable cause, because the force used was not excessive, etc.) will be summarily denied.

Defendants who believe they have a basis for moving to dismiss on the ground of qualified immunity prior to any discovery should file a bare notice of motion under qualified immunity at the earliest opportunity. Normally, qualified immunity may be one of several grounds asserted in a pre-answer notice of motion to dismiss. If qualified immunity is raised in a pre-answer motion to dismiss, defendants should simply file a notice of motion listing all grounds on which the motion is being made. Do not file a brief in support of that motion (on any ground) until after completion of the deposition described in the next paragraph.

In order to avoid wasting time with pre-answer qualified immunity motions that are likely to prove meritless, this Court requires the defendant(s) to depose the plaintiff before briefing a pre-discovery motion for qualified immunity. That way the plaintiff's side of the story, including all of the plaintiff's allegations about what the defendants did, will be fixed and known. The deposition must be taken within 30 days after filing the notice of motion that raises the issue of qualified immunity. Absent extraordinary circumstances (decided upon application to the Court), this will be the only deposition of the plaintiff during the lawsuit. Plaintiff's counsel, prepare your client accordingly. Defense counsel, ask all your questions.

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After the plaintiff's deposition, the defendant(s) has/have thirty days to file a brief in support of the motion to dismiss (order your deposition transcript accordingly, please). If the defendant(s) decide(s) to proceed with the issue of qualified immunity at this stage, brief it. If the defendant(s) decide(s) **not** to proceed with the qualified immunity issue at the pre-answer/pre-discovery stage, simply notify the Court of that decision and do not address that issue in the brief. Withdrawal of a bare qualified immunity motion prior to answer and discovery is without prejudice to revisiting the issue of qualified immunity after discovery has been completed.

The plaintiff will have 30 days from the filing of the brief in support of the motion to file its response. **Do not submit affidavits from any of the defendants or third parties**; they will be stricken and not considered. **Do not submit evidence supporting a view of the facts that is not identical to the plaintiff's view of the facts**; the defendant(s) cannot obtain pre-answer dismissal on the ground of qualified immunity if they are asserting that the plaintiff's version of the facts is not true. A pre-answer, pre-discovery motion is not the right time for the defendants to tell their side of the story. **Evidence from the defendants will not be considered until discovery has concluded.**

Within 14 days of the filing of the plaintiff's brief, the defendant(s) should file an omnibus reply brief addressing both qualified immunity and other asserted grounds for dismissal.

On a pre-answer/pre-discovery motion, the Court will convert the qualified immunity aspect of the motion to one for summary judgment and will consider the plaintiff's deposition – but no other evidence – in deciding that issue and that issue only.

- Post-Discovery Motion for Summary Judgment on the Ground of Qualified Immunity

If it is clear to counsel for the defendant(s) that a viable qualified immunity motion will require the presentation of evidence from the defendant(s) or a third party, please do not make a pre-discovery motion. Plead qualified immunity in your answer as an affirmative defense. Take your discovery and let the plaintiff take his/her discovery. Then move for summary judgment on the ground of qualified immunity – or, if relevant facts are in dispute, take the issue to trial.

Counsel are reminded that such post-discovery motions should be rare. If qualified immunity cannot be decided at the outset of the case, based solely on the plaintiff's allegations and on the law, the doctrine loses much of its force; the Supreme Court created qualified immunity to shield municipal officer(s) from the burden of going through discovery in the first place when the legality of their conduct was unsettled to the point that an officer could not have understood that what s/he did was, in fact, unconstitutional.

On a post-discovery qualified immunity motion, all relevant evidence may be submitted and will be considered by the Court. Post-discovery qualified immunity motions should be made and responded to on the schedule set for the making of motions for summary judgment.

Please do not invoke qualified immunity when you are really asserting that your client is entitled to judgment "because he did nothing wrong." *Stephenson v. Doe*, 332 F.3d 68 (2d Cir. 2003). If there was probable cause to arrest, then your client is not entitled to qualified immunity; s/he is entitled to dismissal on the merits. If your client did not participate in an incident of allegedly excessive force and undisputed evidence shows that s/he was not in a position to stop it, s/he is

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entitled to dismissal on the merits, not to qualified immunity. Invoke qualified immunity only when your client did something that was arguably unconstitutional, and when the United States Supreme Court or the Second Circuit has not yet settled the legality of the conduct in that particular factual context.

5. Motions for Reconsideration

Motions for reconsideration are to be served in the same manner as other motions. However, Judge McMahon reviews motions for reconsideration when they arrive, and decides whether a response is required or whether a motion can be denied *sua sponte*. The opposing party need not serve any responsive papers (including letters) unless specifically directed to do so by Judge McMahon.

6. Motions for Preliminary Approval of Settlements

For any motion seeking preliminary approval of a settlement and seeking to schedule a fairness hearing, the parties should include a schedule with proposed dates. In other words, do not simply say, "Fairness hearing to be held ninety (90) days after approval of this order." Include the actual proposed dates, *i.e.*, "Fairness hearing to be held Monday, July 29, 2019."

F. Time to Respond

Counsel are not to set a "return date." Answering papers or motions are to be served **fourteen days** after receipt of the moving papers. Reply papers, if any, are to be served **five days** later.

All date and hour calculations are governed by Federal Rule of Civil Procedure 6, in civil matters, or Federal Rule of Criminal Procedure 45, in criminal matters.

G. Oral Argument on Motions

Parties may request oral argument by letter at the time their moving, opposing, or reply papers are filed. However, Judge McMahon rarely hears oral argument on motions. The Court will decide on a case-by-case basis whether argument will be heard, and, if so, will advise counsel of the argument date.

H. Letter Motions & Notice of Rulings and Calls

Pursuant to the Clerk's "Text Only Orders" program, the Court accepts letter motions for all "Text Only" motions. Judge McMahon does not accept letter motions for any other type of motions. Follow the SDNY rules for letter motions.

Pursuant to the "Text Only Orders" program, the following types of requests must be made by motion filed on ECF. Requests made via fax or U.S. Mail will not be accepted. The types of request subject to this requirement are:

- Motion to Appoint Process Server

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- Motion to Request an Adjournment of a Scheduled Conference/Hearing
- Motion to Enforce Judgment
- Motion for a Hearing
- Motion for Judgment Debtor Examination
- Motion to Appeal *In Forma Pauperis*
- Motion to Serve Process
- Motion to Set Aside Default
- Motion to Appear *Pro Hac Vice*
- Motion for an Extension of Time to Amend
- Motion for an Extension of Time to Complete Discovery
- Motion for an Extension of Time to Answer
- Motion for an Extension of Time to File Document
- Motion for an Extension of Time to File Response/Reply
- Motion for Mediation
- Motion for Protective Order
- Motion for Recusal
- Motion to Redact Transcript
- Motion to Stay
- Motion to Take Deposition
- Motion to Set/Reset Deadlines

The "Text Only Orders" program and amendment simply clarifies that some motions that previously could be made via U.S. Mail or Fax may no longer be submitted using those methods.

Requests for relief **not** listed here **still must be made in writing through ECF and may not be made by letter motion**. Instead, requests for relief not listed here should be filed through a motion accompanied by a memorandum of law, together with any other submissions required by the

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Federal Rules of Civil Procedure or Local Rules (*e.g.*, a Local Rule 56.1 Statement in summary judgment motion practice).

To the extent that the "Text Only Orders" procedure conflicts with Judge McMahon's individual rules, the "Text Only Orders" procedure supersedes the individual rules with respect to "Text Only" motions.

Notice of most orders (other than scheduling orders), decisions, and stipulations may be accessed through the Court's website: http://www.nysd.uscourts.gov.

VI. Stipulation and Confidentiality Orders

The below addendum must be incorporated before Judge McMahon will sign a Stipulation and Confidentiality Order:

> THE FOLLOWING ADDENDUM IS DEEMED INCORPORATED INTO THE PARTIES' STIPULATION AND CONFIDENTIALITY ORDER
>
> The parties understand that the Court's "so ordering" of this stipulation does not make the Court a party to the stipulation or imply that the Court agrees that documents designated as "Confidential" by the parties are in fact confidential.
>
> It has been this Court's consistent experience that confidentiality stipulations are abused by parties and that much material that is not truly confidential is designated as such. The Court does not intend to be a party to such practices. The Court operates under a presumption that the entire record should be publicly available.
>
> The Court does not ordinarily file decisions under seal or redact material from them. If the Court issues a decision in this case that refers to "confidential" material under this stipulation, the decision will not be published for ten days. The parties must, within that ten-day period, identify to the Court any portion of the decision that one or more of them believe should be redacted, provide the Court with the purportedly confidential material, and explain why that material is truly confidential. The Court will then determine whether the material is in fact genuinely deserving of confidential treatment. The Court will only redact portions of a publicly available decision if it concludes that the material discussed is in fact deserving of such treatment. The Court's decision in this regard is final.
>
> If this addendum is acceptable to the parties, the Court will sign their proposed confidentiality stipulation, subject to the addendum. If this addendum is not acceptable, the Court will not sign

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the stipulation, and should allegedly confidential material be produced, the parties will be referred to the magistrate judge for a document by document review and decision on whether that document should be subject to confidential treatment.

VII. Pretrial and Trial Rules and Procedures

A. Discovery Schedule

Parties must exchange the discovery required under Federal Rule of Civil Procedure 26(a) within **30 days** after service of the answer on the last plaintiff to be served or by the date specified in a Court-approved case management order.

Notices inviting the parties to stipulate to a discovery schedule will be sent to plaintiff's counsel (or, in the case of removed actions, defendant's counsel) shortly after the filing of the action. If the parties can agree upon a schedule providing for prompt completion of discovery, (*i.e.*, within six months of the commencement of the action) the Court ordinarily will incorporate the agreement in a Scheduling Order. Otherwise, the Court will impose a schedule at the initial pretrial conference, held approximately 90 days after the complaint is filed.

PLEASE NOTE: Judge McMahon does not routinely extend discovery deadlines. Do not wait until the end of the discovery period to serve discovery requests or schedule depositions, or you may be precluded from completing discovery. Delaying service of the complaint for 90 days after filing could result in having only one or two months to complete all discovery.

B. Pretrial Order; Other Trial Filings

Counsel are to file a joint pretrial order, with two courtesy copies for Chambers, on or before the date set by the Court via the scheduling order. The pretrial order shall be prepared in accordance with the outline attached as Annex A. Failure to submit the pretrial order on time may result in dismissal or default judgment, as appropriate. **The filing of a motion for summary judgment does not excuse or extend the time for filing the pretrial order unless the Court otherwise directs. Such applications are disfavored and will almost never be granted.**

Unless otherwise ordered by the Court, on the date the joint pretrial order is filed, each party shall also file:

In jury cases:

- Requests to Charge,
- Proposed voir dire questions, and
- A draft verdict form.

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You must submit one courtesy hard copy of these documents. Requests to charge need not include "pretrial charges" – such as instructions regarding internet usage – as the Court uses its own standard charge for such matters.

In non-jury cases:

- A statement of the elements of each claim or defense involving such party and
- A summary of the facts relied upon to establish each element of each claim.

You must submit one courtesy hard copy of these documents. Please also see Part VII.F, *infra*, for additional rules on submissions for bench trials.

C. Motions *In Limine*

In limine motions are not to be filed with the pretrial order. They must be filed no later than **five days** after the parties are noticed for final pretrial conference. Reponses are due **five days** later. No replies are accepted on *in limine* motions. Rulings on *in limine* motions will be made at the final pretrial conference, usually by oral order.

Every application for a ruling must be filed with a separate notice of motion, together with a brief of no more than five pages and a supporting affidavit that attaches a copy of any relevant testimony or exhibits. Please do not file a single omnibus motion seeking multiple rulings. Responses to *in limine* motions are also to be filed individually and must be no more than five pages.

D. Final Pretrial Conference; Exhibits

After the pretrial order is filed, the Court will notify the parties of the date of a final pretrial conference ("FPTC"). **Counsel trying the case must appear at the FPTC**, and only lawyers who appear at the conference will be allowed to try the case. Counsel must be prepared to proceed to trial on 24 hours telephone notice after the final pretrial conference. Any party with a scheduling problem should bring it to the Court's attention by letter.

At the FPTC, all evidentiary issues will be decided, including the admissibility of exhibits. Thus, counsel shall provide one pre-marked set of exhibits for the adversary and two for the Court at least **five days** before the final pretrial conference.

All exhibits must be pre-marked, using the form PX-1 through PX-n and DX-1 through DX-n. If possible, exhibits should be bound or collated in a binder. Each exhibit should be individually tabbed. Exhibits containing multiple documents (*e.g.*, more than one bank statement) are disfavored.

Counsel should be prepared to proffer, and argue for (or against) the admissibility of all evidence, including exhibits and proposed witness testimony, at the FPTC.

E. Jury Selection

Juries will be selected using the struck panel method.

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All of the prospective jurors in the venire will participate in the voir dire. For instance, in a civil case, if thirty jurors are brought into the courtroom, all thirty will be questioned; in a criminal case, if seventy jurors are brought into the courtroom, all seventy will be questioned. The Court will perform all questioning. If issues are raised that are better discussed outside the presence of the entire panel, Judge McMahon will follow up with the individual jurors, either at sidebar or in the robing room.

After voir dire is completed, the Court will entertain challenges for cause either at sidebar or in the robing room.

The Court will then ask the prospective jurors to wait outside the courtroom while the parties exercise peremptory challenges in the courtroom.

In most civil cases, the parties will have four peremptory challenges, which they will exercise in four rounds, alternating between the parties, beginning with the plaintiff. The eight jurors with the lowest numbers remaining after the parties have exercised their challenges will comprise the jury. (Federal Rule of Civil Procedure 47 has abolished the use of alternate jurors in civil cases.)

In most criminal cases, the Government will have six and the defendant will have ten peremptory challenges that they will exercise in six rounds of challenges, alternating between the parties, beginning with the Government. In the first four rounds, the Government will have one challenge and the defendant will have two. In the fifth and sixth rounds, the Government and the defendant will each have one challenge. The twelve jurors with the lowest numbers remaining after the parties exercise their challenges will compose the jury. The alternate jurors will then be selected in a similar fashion: the Government first and then the defendant will exercise one challenge each against the remaining jurors in the venire. The two prospective jurors with the lowest numbers remaining will be the alternate jurors. If the Court decides to empanel more than two alternates, the Court will allow the parties to exercise an additional peremptory challenge in a second alternate challenge round.

F. Special Rules and Submissions for Bench Trials

Unless otherwise instructed, counsel are required to submit and exchange **twenty days** before the final pretrial conference:

- Proposed findings of fact and conclusions of law;
- Trial memoranda of law that identify the issues, summarize the facts, and review the applicable law, not to exceed 25 double-spaced pages; and
- Sworn statements constituting the direct testimony of each witness to be presented.

In bench trials, counsel must prepare and exchange sworn statements containing the direct testimony of each witness they intend to call, other than hostile witnesses or witnesses outside of their control. These witness statements will be submitted and exchanged **ten days** before the final pretrial conference and shall be used at trial in accordance with the following procedure:

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1. Form of Statement

For each witness whose direct testimony will be presented in statement form, prepare a statement setting forth in declaratory form all of the facts to which that witness will testify. The facts should be stated in narrative, rather than question and answer, form. The statement must contain all of the relevant facts to which the witness would testify, including facts necessary to establish the foundation for the testimony. The statement need not be sworn or notarized.

Documents to be offered as exhibits shall not be attached to witness statements but shall be pre-marked and exchanged along with other proposed exhibits in the usual fashion.

2. Use of Statements

At the trial, each witness whose direct testimony previously has been submitted in statement form will take the stand and under oath shall adopt the statement as true and correct. The party offering that witness will then offer the statement as an exhibit, subject to appropriate objections by the opposing party on which the Court will then rule.

The witness then will be allowed to supplement his or her statement by any additional live direct testimony considered necessary by counsel, but may not repeat testimony covered by the written statement.

Thereafter, cross-examination and any redirect will proceed in the ordinary course.

3. Exception to Use of Statement

Statements are required of the parties and other witnesses under their control. They are not to be used for adverse parties or for persons whose attendance must be compelled by subpoena.

G. Evidentiary Hearings in Civil Matters

Evidentiary hearings in civil matters are conducted according to the Judge's rules for bench trials, Part VII.F, *supra*. Thus, no fewer than **ten days** before an evidentiary hearing, parties should submit (a) sworn witness statements, (b) memoranda of law, and (c) proposed findings of fact and conclusions of law.

In addition, and also no fewer than **five days** before an evidentiary hearing, **counsel shall provide one pre-marked set of exhibits for the adversary and one for the Court**. All exhibits must be pre-marked, using the form PX-1 through PX-n and DX-1 through DX-n. If possible, exhibits should be bound or collated in a binder. Each exhibit should be tabbed. Exhibits containing multiple documents (*e.g.*, multiple banks statements) are disfavored.

The copies provided to the Court will be for the Court's use only. Counsel should bring their own copies for use by witnesses.

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H. Interpreters Provided in Civil Matters

The Court's interpreters are available only for criminal matters. Should any party or witness require an interpreter in a civil matter, counsel for that party or the counsel calling that witness must arrange for an interpreter to be present.

I. Conduct of Trial

The Court conducts trials Monday through Thursday between 9:30 a.m. to 5:00 p.m. Parties should arrange to have enough witnesses available to fill the day, even if that means taking witnesses out of order. If a party is out of witnesses in the middle of the day, the party must rest. In personal injury cases, doctors and other experts will be permitted to testify out of order whenever they are available.

J. Courtroom Technology

The courtroom is equipped with outlets, microphones, an easel, and a screen. If you require any other technology, you must provide it yourself. You must also be able to operate it yourself.

The court does not permit cellular telephones, tablets, laptops, or other electronic devices into the courthouse without a court order specifically identifying the permitted device. To obtain such an order, visit the S.D.N.Y. website for a template and then submit it for signature to Chambers by filing a Letter addressed to Judge McMahon on the ECF with the form included as an attachment to the Letter. This rule applies to attorneys as well as non-attorneys.

K. Post-Trial Motions

Post-trial motions are treated in the same manner as motions for reconsideration. *See supra* Part V.5.

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Annex A – Form of Pretrial Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF NAME(S), Plaintiff(s), -against- DEFENDANT NAME(S), Defendant(s).	No. XX-cv-XXXX (CM) [PROPOSED] JOINT PRETRIAL ORDER

The parties having conferred among themselves and with the Court pursuant to Federal Rule of Civil Procedure 16, the following statements, directions and agreements are adopted as the Pretrial Order herein.

I. NATURE OF THE CASE

[Set forth a brief statement of the general nature of the action and the relief sought by each party.]

II. JURY/NON-JURY

[State whether a jury is claimed, whether there is any dispute as to whether the action should be tried to a jury, and the estimated length of the trial.]

III. STIPULATED FACTS

[Set forth any stipulated facts.]

IV. PARTIES' CONTENTIONS

The pleadings are deemed amended to embrace the following, and only the following, contentions of the parties:

Plaintiff's Contentions (Jury Trial)/Proposed Findings of Fact (Non-Jury Trial)

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[Set forth a brief but complete statement of the plaintiff's contentions as to all issues of fact and law, with citations to exhibits and anticipated testimony.]

Defendant's Contentions (Jury Trial)/Proposed Findings of Fact (Non-Jury Trial)

[Set forth a brief but complete statement of the defendant's contentions as to all issues of fact and law, *with citations to exhibits and anticipated testimony*.]

For bench trials only: proposed conclusions of law shall be submitted, with citation to supporting authority.

V. ISSUES TO BE TRIED

[Set forth an agreed statement of the issues to be tried.]

VI. PLAINTIFF'S EXHIBITS

VII. DEFENDANT'S EXHIBITS

No exhibit not listed below may be used at trial except (a) for cross-examination purposes or (b) if good cause for its exclusion from the pretrial order is shown.

[Each side shall list all exhibits it intends to offer on its case in chief. The list shall include a description of each exhibit. All exhibits shall be premarked.]

[In cases likely to involve substantial numbers of deposition exhibits, the parties are encouraged to agree at the outset of discovery to assign a unique exhibit number or letter to each exhibit marked at any deposition so that exhibit designations used in deposition transcripts may be used without change at trial. Absent use of such a system, plaintiff's trial exhibits shall be identified as PX-1, and defendant's as DX-1, D-Jones A, D-Smith C.]

VIII. STIPULATIONS AND OBJECTIONS WITH RESPECT TO EXHIBITS

Any objections not set forth herein will be considered waived absent good cause shown.

[The parties shall set forth any stipulations with respect to the authenticity and admissibility of exhibits and indicate all objections to exhibits and the grounds therefor.]

IX. PLAINTIFF'S WITNESS LIST

X. DEFENDANT'S WITNESS LIST

The witnesses listed below may be called at trial. No witness not identified herein shall be permitted to testify on either party's case in chief absent good cause shown.

[Each party shall list the witnesses it intends to call on its case in chief and, if a witness's testimony will be offered by deposition, shall designate by page and line numbers the portions of the

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deposition transcript it intends to offer. Each party shall set forth any objections it has to deposition testimony designated by the other and the basis therefore.]

XI. RELIEF SOUGHT

[The plaintiff shall set forth the precise relief sought, including each element of damages. If the plaintiff seeks an injunction, the proposed form of injunction shall be set forth or attached.]

Date:

_____

U.S. District Judge

[Signatures of counsel]

_____ _____

Date: Date:

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Annex B – Initial Discovery Protocols

The following **definitions** apply to cases proceeding under the Initial Discovery Protocols:

- ***Concerning***. The term "concerning" means referring to, describing, evidencing, or constituting.

- ***Document***. The terms "document" and "documents" are defined to be synonymous in meaning and equal in scope to the terms "documents" and "electronically stored information" as used in F.R.C.P. 34(a).

- ***Identify (Documents)***. When referring to documents, to "identify" means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document(or a copy) was to have been sent; or, alternatively, to produce the document.

- ***Identify (Persons)***. When referring to natural persons, to "identify" means to give the person's: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

- ***Defendant***. Any person or entity alleged to be an employer or joint employer of the plaintiff(s) in the operative Complaint, unless otherwise specified.

- ***Plaintiff***. Any named individual(s) alleging FLSA Claim(s) in the operative Complaint.

The following **instructions** apply to cases proceeding under the Initial Discovery Protocols:

- For this Initial Discovery, the relevant time period begins two years before the date the initial Complaint was filed, or, if willfulness is alleged, three years. If the Plaintiff alleges a shorter relevant time period, then that is the time period for Initial Discovery.

- For this Initial Discovery, the relevant time period continues through the last date for which the Plaintiff seeks recovery or relief.

- This Initial Discovery is not subject to objections except for the reasons under FRCP 26(b)(2)(B) or on the grounds of privilege or work product. Documents withheld based on a claim of privilege or work product are subject to the provisions of FRCP 26(b)(5).

- If a partial or incomplete answer or production is provided, the responding party must state the reason that the answer or production is partial or incomplete.

- This Initial Discovery is subject to FRCP 26(e) on supplementation and FRCP 26(g) on certification of responses.

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- This Initial Discovery is subject to FRCP 34(b)(2)(E) on form of production.

- This Initial Discovery will be subject to the attached Interim Protective Order unless the parties agree or the court orders otherwise. The Interim Protective Order will remain in place only until the parties agree to or the court orders a different protective order. Absent agreement by the parties, the Interim Protective Order will not apply to subsequent discovery.

- Prior to the production of documents by either Party to the other pursuant to the Initial Discovery Protocols, the Parties will meet and confer regarding the format (e.g. TIFF/text, searchable .pdf, Excel) for such production. This will not delay the timeframes for Initial Discovery absent ruling by the court.

Production by the Plaintiff. The Plaintiff's Initial Discovery must be provided within 30 days after the Defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

Documents that the Plaintiff must produce to the Defendant:

- Documents created or maintained by the Plaintiff This Initial Discovery is subject to FRCP 34(b)(2)(E) on form of production.

- Documents created or maintained by the Plaintiff recording time worked.

- Documents created or maintained by the Plaintiff recording wages or other compensation paid or unpaid by the Defendant. This Initial Disclosure does not include personal tax returns or tax informational documents.

- If the Plaintiff reported or complained internally to the Defendant (including but not limited to supervisors or administrative departments, such as human resources, payroll, timekeeping or benefits) about the FLSA Claim(s), the report(s) or complaint(s) and any response that the Defendant provided to the Plaintiff.

- Any offer letters, employment agreements, or compensation agreements for the Plaintiff.

- Any sworn statements from individuals with information relevant to the FLSA Claim(s).

- Documents that the Plaintiff relies on to support a claim of willful violation.

- All other documents that the Plaintiff relies on to support the Plaintiff's FLSA Claim(s).

Information that the Plaintiff must produce to the Defendant:

- All other documents that the Plaintiff relies on to support the Plaintiff's FLSA Claim(s)

- Identify persons the Plaintiff believes to have knowledge of the facts concerning the FLSA Claim(s) or defenses, and a brief description of that knowledge.

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- Identify the start and end dates for the FLSA Claim(s);
- The Plaintiff's title or position and a brief description of the Plaintiff's job duties for the relevant time period.
- Describe the basis for the FLSA Claim(s).
- A computation of each category of damages claimed by the Plaintiff, including a) applicable dates, b) amounts of claimed unpaid wages, and c) the method used for computation (including applicable rates and hours).
- The names of the Plaintiff's supervisors during the relevant time period.
- If the Plaintiff reported or complained about the FLSA Claim(s) to any government agency, the identity of each such agency, the date(s) or such reports or complaints, and the outcome or status of each report or complaint.
- If the Plaintiff reported or complained to the Defendant (including but not limited to supervisors or administrative departments such as human resources, payroll, timekeeping or benefits) about the any FLSA Claim(s), state whether the report or complaint was written or oral, when the report or complaint(s) was made, to whom any report or complaint(s) were made, and any response provided by the Defendant.

Production by the Defendant. The Defendant's Initial Discovery must be provided within 30 days after the Defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

Documents that the Defendant must produce to the Plaintiff.

- Time and pay records created or maintained by the Defendant for the Plaintiff.
- If the Plaintiff reported or complained internally to the Defendant (including but not limited to supervisors or administrative departments, such as human resources, payroll, timekeeping or benefits) about the FLSA Claim(s), the report(s) or complaint(s) and any response that the Defendant provided to the Plaintiff.
- Any sworn statements from individuals with information relevant to the FLSA Claim(s).
- Documents that the Defendant relies on to support a claim that any alleged violation was in good faith.
- Any offer letters, employment agreements, or compensation agreements for the Plaintiff.
- Collective bargaining agreement(s) applicable to the Plaintiff.
- The job description for the position(s) the Plaintiff held during the relevant time period(s), if the job duties are at issue in the FLSA Claim(s).

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- The Defendant's policies, procedures, or guidelines for compensation that are relevant to the FLSA Claim(s).

- The cover page, table of contents, and index of any employee handbook, code of conduct, or employment policies and procedures manual pertaining to compensation or time worked.

- Any other documents the Defendant relies on to support the defenses, affirmative defenses, and counterclaims to the FLSA Claim(s).

- Any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Information that the Defendant must produce to the Plaintiff.

- Provide the following information related to the Plaintiff: (1) start and end dates for work performed; (2) work location(s); (3) job title(s); (4) employee or contractor identification number; (5) in cases alleging the misclassification of the Plaintiff, the classification status of the Plaintiff (*i.e.*, exempt or non-exempt); and, (6) immediate supervisor(s) and/or manager(s).

- If the Defendant does not have a job description for the Plaintiff, a brief description of the Plaintiff's job duties for the relevant time period(s), if the job duties are at issue in the FLSA Claim(s).

- Identify persons the Defendant believes to have knowledge of the facts concerning the FLSA Claim(s) or defenses, and a brief description of that knowledge.

- If the Plaintiff reported or complained to the Defendant about the FLSA Claim(s), whether the report(s) or complaint(s) were written or oral, when the report(s) or complaint(s) were made, to whom any report(s) or complaint(s) were made, and any response(s) provided by the Defendant.