

## **FINAL PRETRIAL and TRIAL MANAGEMENT ORDER**

Pursuant to Fed.R.Civ.P. 16 and unless otherwise ordered by the court,

IT IS ORDERED as follows:

### **1. Pretrial Conference and Pretrial Order:**

The Scheduling Order in this case and Local Rule 16 establish the procedures for preparing, exchanging and filing a draft of the proposed pretrial order. The final pretrial order operates as the blueprint for trial. Therefore, the court will use the final pretrial order in ruling on objections during trial, including objections to arguments and to the relevance and admissibility of evidence.

a. General Information: Names, addresses and telephone numbers of counsel for the parties, a brief description of the nature of the action involved (e.g., breach of contract, patent, personal injury) and the basis for the jurisdiction of the court, including cites of the applicable statutes are to be included in the draft order.

b. Uncontested Facts: Included in the draft order is a comprehensive stipulation or statement of all uncontested facts, which will be part of the evidentiary record of the case and may be read to the jury by the court or any party. Counsel for plaintiff and for any counter-, cross- or third-party complainant is responsible for preparing the initial draft of the proposed stipulation or statement dealing with the allegations in their respective party's complaint. If the admissibility of any uncontested fact is challenged, the party objecting and the basis for the objection must be provided.

c. Issues of Fact and Expected Proof: Under Local Rules 16.3(c), each party is required to identify the facts in issue, with a brief statement of what it intends to prove in support of its claims and defenses. These summaries should be sufficient to

identify for the court the essential facts in issue and to fairly notify the other parties of what counsel expects to prove at trial. The court will use these sections in the final pretrial order and the jury instructions in ruling on relevance and admissibility of evidence. Where a party has served contention interrogatories, the responding party will not be allowed to include in the final pretrial order new issues or new facts not fairly disclosed in the answers to those interrogatories.

d. Issues of Law: Pursuant to Local Rule 16.3, the court will preclude a party from seeking relief based on claims and defenses not described in the draft pretrial order. Counsel will stipulate to those claims and defenses waived by any party.

e. Witnesses: In addition to the requirements under Local Rule 16.3(c), during the pretrial conference, the court will review with counsel the trial schedule for witnesses, any request not to sequester witnesses, whether or not certain witnesses may need to be subpoenaed and the expected scope of direct and cross examination for witnesses who may be called by more than one party. Any witness not listed will be precluded from testifying absent good cause shown, except that each party may reserve the right to call rebuttal witnesses who are not presently identifiable, as may be necessary.

Any objection to a witness will briefly state the basis for the objection and where applicable, include the supporting Federal Rule of Evidence.

f. Opinion Testimony: Included in the draft order, in addition to the provisions of Local Rule 16.3(c)(7) and 1(e) of this Order, will be a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony. Regarding experts, either a stipulation or statement setting forth the expert's qualifications in a form

that can be read to the jury will also be included. The court prefers to limit the number of expert witnesses to one expert for each subject matter for each party, unless good cause is shown.

g. Exhibits: Except for rebuttal exhibits and in addition to the provisions of Local Rule 16.3(c), the list of exhibits to be offered by each party at trial will contain the identification number of the exhibit. Included in each party's exhibit list will be a description of the demonstrative evidence or experiments that the party intends to use at trial. Exhibits not listed will not be admitted unless good cause is shown. Cumulative documents will be omitted. Duplicate exhibits will not be scheduled by different parties, but may be offered as joint exhibits. All parties will stipulate to the authenticity of the exhibits, or shall identify those that have not been stipulated to with the specific reasons for the failure to so stipulate. Copies of exhibits shall be made available to opposing counsel prior to the pretrial conference.

Any objection to and any response to an objection to an exhibit will provide the identification number and otherwise be consistent with the requirements of Local Rule 16.3(c). Exhibits not objected to will be received into evidence through witness(es) by the operation of this order and the final pretrial order without the need for additional foundation testimony.

h. Depositions: Counsel should confer prior to the pretrial conference to determine which testimony will be offered by deposition (including video tape depositions), to agree on the designation of those portions of the depositions to be offered into evidence, and to identify objections. If there are objections that will need to be resolved, counsel will submit the transcript and a summary of the objections with the

draft pretrial order. Any video tape deposition to which an objection is raised will be made available to the court to review during the pretrial conference.

All irrelevant and redundant material including colloquy between counsel will be eliminated when the deposition is read or viewed at trial.

i. Motions in Limine: Motions in limine **shall not** be separately filed. Any in limine requests, as limited by the Scheduling Order, shall be set forth, with citations to authorities and brief argument, in the Proposed Pretrial Order. Briefing shall not be submitted with in limine requests, unless otherwise permitted by the Court. If the motion relates to the admissibility of documents, copies of those documents should be provided to the court during the pretrial conference.

j. Voir Dire [for jury trials]: In addition to Local Rule 47.1, the scheduling order in this case provides for the filing time and obligations of counsel regarding voir dire. The court will not ask voir dire that is not filed pursuant to that order. In preparing and filing proposed voir dire, no more than ten questions, including those jointly submitted, for each party will be considered during the pretrial conference. The court will ask questions as contained on the Court's website. Those questions are not included in the number limitation herein.

k. Jury Instructions [for jury trials]: In addition to Local Rule 51.1, the Scheduling Order in this case provides for the filing time and obligations of counsel regarding the **joint** jury instructions. All instructions and objections will include supporting authorities. Such supporting authorities may include appropriate and applicable standardized jury instructions from other jurisdictions and the Superior Court

of the State of Delaware. The failure to comply with this Order, Local Rule 51.1 and the Scheduling Order in this case relating to this rule will be treated by the court as a waiver of a claim for relief.

Any requests for supplemental instructions during trial or at the close of evidence will be considered by the court on the basis of whether the proposed instruction could have been reasonably anticipated at the time of the final pretrial conference.

l. Verdict Form [for jury trials]: In addition to Local Rule 51.1, the Scheduling Order in this case provides for the filing time and obligations of counsel regarding the verdict form or special interrogatories.

In addition to providing a courtesy copy to chambers of the proposed **joint** jury instructions, **joint** voir dire and **joint** verdict form or special interrogatories, plaintiff's counsel will provide the court on diskette/CD in WordPerfect 9.0 format these documents.

Counsel for plaintiff will prepare unmarked original sets of joint jury instructions and verdict forms or special interrogatories to the court for use by the jury during deliberations.

m. Damages: In addition to the requirements under Local Rule 16.3(c), an itemized statement of special damages will be included in the draft pretrial order.

n. Non-Jury trial: If the parties desire a detailed opinion from the court post-trial, counsel should include a proposed post-trial briefing schedule in the draft pretrial order. In their initial briefs, each party shall provide proposed *Findings of Fact and Conclusions of Law*. These shall be separately stated in numbered paragraphs.

The Findings of Fact should contain a detailed listing of the relevant material facts the party intends to prove in a simple narrative form. The Conclusions of Law should contain concise statements, with supporting citations, of the legal theories propounded by counsel. Reference to the trial transcript shall provide the docket index number, page number(s) and line(s).

o. Settlement status: In addition to the provisions of Local Rule 16.3(c), counsel should be prepared to discuss the status of settlement negotiations and whether court assistance in the settlement efforts would be helpful.

p. Other: Included in the draft pretrial order will be a statement that each party has completed discovery, including the depositions of expert witnesses, unless the court has previously ordered otherwise. In the rare event that discovery has not been completed, counsel shall identify the discovery remaining and the date on which it will be completed in the draft pretrial order.

## 2. Trial Procedures

a. Trial Schedule: Unless otherwise ordered by the court, the usual trial schedule will be from 9:00 a.m. to 4:30-5:00 p.m., with two 15-minute breaks (morning around 11:00 a.m. and afternoon around 2:45-3:00 p.m.) and a one hour lunch break, beginning around 1:00 p.m. If the first day of trial involves jury selection, that trial day will be from 9:30 a.m. to 4:30-5:00 p.m.

Civil trials are timed. Counsel must complete presentation of their case, including opening statements, examination of witnesses and closing arguments, within the allotted time. The time that the parties take to present evidentiary disputes which require resolution by the court will be charged against the parties. If the court

determines that an evidentiary dispute raised by a party is abusive, frivolous or brought in bad faith, then that party will be charged for all the time dedicated to resolving the issue.

The courtroom deputy will keep a running total of trial time used by counsel. For depositions, time will be allocated according to the time required to read or play, in the case of videotaped depositions. Counsel should confirm with the courtroom deputy the allotted time used by counsel at the close of each trial day and immediately advise the court of any discrepancies.

b. Exchange of Witness and Exhibit Information: Unless otherwise agreed to by the parties, the exchange of final witness and exhibit lists shall occur no less than 72 hours before trial is scheduled to begin. With respect to the order of presentation, unless the parties agree otherwise (and so advise the court), a list of witnesses to be called and exhibits to be offered through a party's direct examinations shall be given to opposing counsel at least 48 hours before their proffer. Formal notice is not required regarding documents used for cross-examination.

**Note:** Surprises in the courtroom usually consume valuable time. It is suggested that the parties bring to the court's attention any expected controversies related to a document prior to its use on cross-examination.

c. Exhibit Lists and Exhibits: On or before the first day of trial, counsel will deliver to the courtroom deputy a completed AO Form 187 exhibit list for each party. If practicable, counsel are encouraged to mark their exhibits in chronological order. All exhibits shall be pre-marked.

Jury Trials: The "original exhibits" are given to the courtroom

deputy once they have been admitted.

Bench Trials: “Original exhibits” are maintained by the parties.

Only those exhibits discussed in the parties post-trial briefing shall be returned to the court with the initial round of post-trial papers. All others shall be deemed stricken from the record.

Demonstrative Exhibits: Unless otherwise agreed to by the parties, demonstrative exhibits are marked for identification but not admitted into evidence. If there is no agreement by the parties, such an exhibit may be admitted if it accurately reflects and illustrates a witness’ testimony and is useful to the court and jury to understand said testimony.

d. Documents: Generally documents may be used at trial if they are: (1) disclosed during discovery; or (2) not requested during discovery. Documents not in the possession or control of any of the parties may be used at trial if the nonparty custodian is disclosed during discovery and the documents are either disclosed or not requested. Documents shall not be admitted except through the testimony of a witness, and shall not be published to a jury until they are admitted exhibits.

e. Impeachment Documents: Documents which constitute extrinsic evidence of prior inconsistent statements may not be shown to the jury unless they are admitted exhibits pursuant to Fed. R. Evid. 613(b). If counsel believes that a trial witness has testified at trial inconsistently with his/her deposition testimony, the lawyer must (1) provide the witness and opposing counsel a copy of the deposition transcript; and (2) identify the alleged inconsistent statement/testimony for confirmation. If confirmed, counsel may then either read into the record or show through the use of an

approved electronic device, such as the ELMO, the identified statement.

f. Witnesses: Generally, those individuals whose names were disclosed by any party during discovery (even if they are not deposed during discovery) and disclosed in the Pretrial Order, may be called as trial witnesses. If not deposed during discovery, the party offering such a witness must provide a proffer of the witness' proposed testimony. If the witness was not deposed during discovery, the party offering the witness may be required to make the witness available for a short deposition prior to testifying at trial.

Sequestration: Unless otherwise ordered by the court or agreed to by the parties, sequestration of witnesses is required. Parties and corporate representatives who are identified before jury selection are exempt from sequestration.

Demeanor: On cross-examination, witnesses are expected to respond "Yes" or "No" first, and then may provide further explanation. Witnesses who abuse their opportunity to provide explanations by giving long, irrelevant answers will have their time charged to the party offering them.

g. Evidentiary Disputes: Before the witness takes the stand and/or the exhibit is offered, counsel are required to bring potential evidentiary disputes to the court's attention (prior to or at the end of a trial day). Failure to conform to this requirement shall result in having the objection denied without a hearing.

h. Testimony by Deposition: Unless otherwise agreed to by the parties, deposition designations shall be provided to opposing counsel at least 72 hours before their proffer. Counter designations shall be provided within the following 24 hours. Any disputes shall be brought to the court's attention before the deposition is offered.

Unless otherwise permitted by the court, the designated portions of deposition transcripts are read into the record or, in the case of videotaped depositions, played in order from the beginning of the transcript to the end, except that in a bench trial, such transcripts need not be read to the court. A copy of the designated excerpt should be provided to the court reporter.

i. Expert Testimony: If an objection is raised on the record to an expert's testimony based on claims that such testimony falls outside the scope of his/her expert report, such objection may be addressed during post-trial proceedings. If so addressed and the court determines that the expert's testimony was impermissibly broad, the party proffering such testimony shall be sanctioned (which may include assuming the costs of a new trial).

j. Jury Note Taking and Notebooks: For a jury trial, the court will provide jurors with pens/pencils and pads. Counsel are encouraged to prepared notebooks of key exhibits for each juror. Unless otherwise agreed to by counsel or ordered by the court, no documents should be included in a notebook provided to a juror until that document has been admitted into evidence.

k. Preliminary Instructions: For a jury trial, the court will give preliminary jury instructions prior to the opening statements.

l. Use of Lectern: The court prefers counsel to present the opening statement, conduct examination of witnesses and make the closing argument from the lectern. Counsel may move from the podium, but shall maintain a respectful distance from the jury box.

m. Opening Statement: Opening statement is not an argument. Counsel

may object to an improper opening statement. Should counsel feel that an objection is necessary, the court suggests that counsel stand and request to approach the bench. If the parties agree on exhibits, including demonstrative exhibits, to be used during opening statements, they may be used.

n. Order of Proof: The presentation of evidence will usually follow the pleadings and burden of proof. This means that typically plaintiff will go first on those issues for which it has the burden. Defendant will answer those issues and open as to the issues for which it has the burden. Plaintiff may reply on its claim for relief and answer defendant's claims. Defendant may then reply regarding its claims. The reply by either party will be limited to matters it could not have anticipated at the time it opened.

o. Examination of Witnesses: Examination of witnesses will usually be limited to direct, cross examination and re-direct. Cross examination will be limited to matters covered in direct and impeachment. Re-direct will be limited to matters covered in cross examination.

p. Objections and Side Bar: During trial, counsel should object by standing, announcing the objection and identifying the rule of evidence in support of the objection. Arguing objections in front of the jury or the witness shall be avoided. Sidebars will be kept to a minimum. In arguing that evidence is admissible, counsel should be prepared to identify: 1) the matter in issue, 2) the fact of consequence to the determination of that issue, and 3) how this evidence affects the probability of that fact.

q. Transition Statements: Counsel are strongly encouraged to make brief transitional statements, in the nature of an opening statement, to introduce witnesses

and their role in the litigation to the jury or the court in a bench trial.

r. Opinion Testimony: Counsel will not ask the court in the presence of the jury for a finding of whether a witness qualified to offer an opinion.

s. Counsel's Demeanor: In addition to the other provisions herein that address courtroom behavior, counsel may not approach opposing counsel's table or the witness stand without court permission. Counsel are required to conduct themselves consistent with proper courtroom decorum (for example, no pointing at opposing counsel, witnesses, the jury or others in the courtroom; no standing behind, rocking or turning opposing counsel's chair, etc.)

t. Instructions: The court will read the final instructions to the jury before closing argument.

u. Closing Arguments: During closing arguments, counsel may prepare and submit to the jury examples of how the verdict form should be filled out. Without court approval, no party's closing argument may exceed 90 minutes in total (for both opening and rebuttal arguments). To assist the jury, counsel shall identify evidence by exhibit number. Any objections during closing arguments should be handled as suggested for objections during opening statements.

v. Deliberations: During jury deliberations, each party is responsible to provide the courtroom deputy with a telephone number which allows counsel to be accessed quickly.

/s/ Mary Pat Thyng  
United States Magistrate Judge

Dated: