

HURRICANE SANDY CASE MANAGEMENT ORDER NO. 1

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**1. Applicability of the HSCMO**

This Hurricane Sandy Case Management Order No. 1 ("HSCMO") governs all Hurricane Sandy cases involving standard flood insurance policies sold and administered by participating Write Your Own ("WYO") Program insurance companies in accordance with the National Flood Insurance Program ("NFIP"), a Federal insurance program administered by the Federal Management Agency ("FEMA") pursuant to the National Flood Insurance Act ("NFIA"), 42 U.S.C. §§ 4001-4084 ("WYO action"), in addition to direct claims against the Federal Emergency Management Agency ("FEMA") pursuant to the NFIA ("direct suit"). The HSCMO shall supersede all prior orders concerning NFIP and/or direct suit actions. If a party requests to be exempted from the application of the HSCMO, the party shall submit an informal letter application to the Magistrate Judge within fourteen (14) days of entry of the HSCMO, setting forth, with specificity, good cause to warrant the requested exemption, and a statement of whether the

adversary consents to the requested exemption. The HSCMO shall govern the action unless otherwise ordered by the Court. In the event an individual action sets forth claims for damages caused by sources other than flooding (to include, without limitation, wind, fire, or any combination thereof), but pertaining to the same property, the cases shall be reassigned to the same District Judge and Magistrate Judge and consolidated for discovery purposes, as set forth in the HSCMO.

## **2. Federal Rule of Civil Procedure 16**

The HSCMO constitutes the scheduling order contemplated by Federal Rule of Civil Procedure 16(b), in order to ensure "the just, speedy, and inexpensive" resolution of each NFIP and direct suit action in accordance with Federal Rule of Civil Procedure 1, and in recognition of the Court's commitment to the prompt, fair, and efficient resolution of these actions.

## **3. Automatic Dismissals of Certain Claims**

- a. The following claims are hereby dismissed from any WYO action or direct suit:
  - i. Jury demands, see Lehman v. Nakshian, 453 U.S. 156, 160-61 (1981) (noting that, "[i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government"); Van Holt v. Liberty Mut. Fire Ins. Co., 163 F.3d 161, 165-67 (3d Cir. 1998) (noting that, "only FEMA bears the risk" of standard flood insurance policies issued by WYO companies and that "a lawsuit against a WYO company is [therefore], in reality, a suit against" the federal government because "the United States treasury funds [ultimately] pay off the insureds' claims"); Robinson v. Nationwide Mut. Ins. Co., No. 12-5065, 2013 WL 686352, at \*6 (E.D. Pa. Feb. 26, 2013) (finding "no Constitutional right to a jury trial" for plaintiffs' WYO claims);
  - ii. State law claims, see C.E.R. 1988, Inc. v. Aetna Cas. & Sur. Co., 386 F.3d 263, 268 (3d Cir. 2004) (noting that "state-law claims are preempted by the NFIA" whether contractual in nature or "'sounding in tort[,]' but 'intimately related to the disallowance of

- [an] insurance claim") (citing Van Holt, 163 F.3d 161, 167);
- iii. Punitive damages claims, see Messa v. Omaha Prop. & Cas. Ins. Co., 122 F. Supp. 2d 513, 522-23 (D.N.J. 2000) (dismissing plaintiffs' "extra-contractual" punitive damages claim "because federal law does not provide for" such remedies in NFIP cases); 3608 Sounds Ave. Condo. Ass'n v. S.C. Ins. Co., 58 F. Supp. 2d 499, 503 (D.N.J. 1999) (finding plaintiff's state "common law claims of punitive damages and attorney's fees" not cognizable in suits "brought pursuant to the NFIA"); Dudick v. Nationwide Mut. Fire Ins. Co., No. 06-1768, 2007 WL 984459, at \*5 (E.D. Pa. Mar. 27, 2007) (dismissing plaintiff's punitive damage claims because such claims "contravene the National Flood Insurance Program's purpose of reducing fiscal pressure on federal flood relief efforts")
- b. The following parties are hereby dismissed from any WYO action:
- i. FEMA; and/or
- ii. Directors and/or officers of FEMA.
- c. The following parties are hereby dismissed from any direct suit:
- i. Officers and/or directors of FEMA.
- d. Any counsel seeking to reinstate any such dismissed claims must file within thirty (30) days from the entry of the HSCMO a letter request to the Magistrate Judge for reinstatement. Any request to reinstate the dismissed claims shall set forth the specific legal basis for the requested relief (including, without limitation, all jurisdictional issues) with citations to relevant authority. The adversary shall thereafter have seven (7) days to file opposition.

#### 4. Automatic Discovery Procedure<sup>2</sup>

In recognition of the issues generally implicated in NFIP and direct suit actions, the Court shall require the automatic disclosure of certain information in an expedited manner. This requirement is intended to facilitate the necessary evaluation of each action prior to the Court's initial case management conference. The following discovery protocol shall therefore govern the initial phase of discovery in lieu of the initial disclosures set forth by Federal Rule of Civil Procedure 26(a).

The discovery protocol generally requires that all pretrial discovery be completed within one hundred and twenty (120) days from entry of the HSCMO. The Hurricane Sandy Case Management Discovery Schedule, available on the Court's website for Hurricane Sandy litigation, generally summarizes the time frames within which the parties shall exchange, produce, and/or conduct necessary discovery.

Nothing in the HSCMO, however, shall be construed to preclude a party from exchanging additional information that a party reasonably considers to be helpful in evaluating the legal and factual contentions at issue in the litigation.

Each party must simultaneously serve Automatic Disclosures as set forth herein within thirty (30) days from entry of the HSCMO. Counsel should not file these Automatic Disclosures on the CM/ECF system.

a. Automatic Disclosures by the Plaintiff:

- i. Plaintiff shall provide the following disclosures with respect to each property set forth in the Complaint:

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<sup>2</sup> The Court notes that the Eastern District of New York entered a Case Management Order concerning certain litigation arising out of Hurricane Sandy. In re Hurricane Sandy Cases, 14-mc-41, Case Management Order No. 1 (E.D.N.Y. Feb. 21, 2014), available at <https://www.nyed.uscourts.gov/sites/default/files/general-ordes/14mc41cmo01.pdf>. The Court adopted in part the Eastern District of New York's Case Management Order in the Court's Case Management Order No. 1, particularly with respect to Automatic Disclosures.

1. The current address of each plaintiff property owner;
  2. The address of each affected property;
  3. The name of each insurer and all policy numbers for each insurance policy held by or potentially benefitting plaintiff and/or the property on the date of the loss, including relevant claim numbers for any claims;
  4. A detailed itemized statement of claimed damages, including content claims if in dispute;
  5. A statement of any amounts paid or offered to be paid under the policy and a detailed itemization of those items for which plaintiff claims underpayment with citation to the supporting documentation;
  6. In the event of nonpayment, the basis upon which defendant denied coverage;
  7. A statement setting forth prior attempts at arbitration or mediation, if any; and
  8. The identification of any other Hurricane Sandy related lawsuits filed or contemplated for that particular property or plaintiff.
- ii. Plaintiff shall provide the following documents with respect to each property set forth in the Complaint:
1. All documents supporting or evidencing the claimed loss, including, without limitation, loss estimates from other insurers, any adjuster's reports, engineering reports, contractor's reports or estimates; photographs, claim log notes, and any other documents relating to repair work

performed as a result of Hurricane Sandy, including contracts, bids, estimates, invoices or work tickets for completed work repair documentation at issue;

2. All documents reflecting any payments received to date from any insurer, FEMA, or from any other federal, state, or local governmental program including, without limitation, the United States Small Business Association;
3. All documents relied upon by plaintiff in accordance with the applicable proof of loss requirements and documents required by the standard flood insurance policy, including documents relied upon by plaintiff to satisfy the detailed line item documentation requirement of the standard flood insurance policy;
4. Any written communications exchanged between the insured or insurer concerning the claimed loss; and
5. To the extent in plaintiff's custody, control, or possession, the entire nonprivileged file of any expert, estimator or contractor hired by the plaintiff or counsel to inspect the property and/or render a report, estimate, or opinion.

b. Automatic Disclosures by Defendant:

- i. Defendant shall provide the following disclosures with respect to each property set forth in the Complaint:
  1. In the event no payment on the policy has been made and/or offered, an explanation or statement setting forth the grounds for declination of

coverage, including, without limitation:

- a. Any applicable policy exclusions;
  - b. Whether non-payment of premiums resulted in the denial of coverage;
  - c. Whether the dispute and/or declination concerns the nature of the damage incurred and its coverage under the policy;
  - d. Whether the dispute and/or declination concerns the value of the claimed losses; and
  - e. Whether the dispute and/or declination concerns any other legal basis;
2. In the event payment on the policy has been made and/or offered, defendant's position concerning the remaining amount of loss disputed; and
  3. A statement setting forth prior attempts at arbitration or mediation, if any.
- ii. Defendant shall provide the following documents with respect to each property set forth in the Complaint:
1. All non-privileged documents contained in the claims file concerning the policy, including any declination letters and notices of nonpayment of premiums;
  2. Any documentation relating to an assessment of the claimed loss, including all loss reports and damage assessments, adjuster's reports, engineering reports, contractor's reports, photographs taken of the

damage or claimed losses, and any other evaluations of the claim;

3. The names and addresses of the adjusters for each claim;
  4. All claim log notes;
  5. Records of payments made to the insured pursuant to the policy;
  6. All expert reports and/or written communications that contain any description or analysis of the scope of loss or any defenses under the policy;
  7. All emails contained within the claim file or specific to that claim; and
  8. To the extent in defendant's custody, control, or possession, the entire nonprivileged file of any expert, estimator or contractor hired by the defendant or its counsel to inspect the property and/or render a report, estimate, or opinion.
- c. Production: The attorneys shall meet and confer by telephone or in person in good faith concerning the method and format of any production, including whether the production shall occur through electronic means within ten (10) days from entry of the HSCMO. All documents produced shall be Bates-stamped.
- d. Electronically-stored information ("ESI"): To the extent ESI is implicated in an individual action, the parties shall first meet and confer concerning any ESI issues. Thereafter, any disputes may be presented to the Magistrate Judge by way of informal letter application. Any requests for electronically-stored information shall address, with specificity, whether "the burden or expense of the proposed discovery outweighs its likely benefit," in light "of the issues at stake in the litigation," as set forth

in Federal Rule of Civil Procedure 26(b)(2)(C)(iii).

- e. Failure to Disclose: To the extent any party asserts that the adversary has failed to make appropriate disclosures, the party shall first make a written request setting forth, with specificity, the documentation and/or other information the party believes has not been disclosed. The adversary shall provide a written response within five (5) days from receipt of the initial correspondence. The parties shall then meet and confer, either in person or by telephone. Thereafter, any dispute shall be brought to the Magistrate Judge by way of informal letter application, which shall include counsel's certification that counsel have first met and conferred in person or by telephone concerning the dispute.
  
- f. Privilege Log: Any documents required to be produced pursuant to the HSCMO, but withheld on the basis of privilege, shall be identified in a privilege log in accordance with Federal Rule of Civil Procedure 26(b)(5). When the inadvertent or mistaken disclosure of any information, document or thing protected by privilege or work-product immunity is discovered by the producing party and brought to the attention of the receiving party, the receiving party's treatment of such material shall be in accordance with Federal Rule of Civil Procedure 26(b)(5)(B). Such inadvertent or mistaken disclosure of such information, document or thing shall not by itself constitute a waiver by the producing party of any claims of privilege or work-product immunity. However, nothing herein restricts the right of the receiving party to challenge the producing party's claim of privilege if appropriate within a reasonable time after receiving notice of the inadvertent or mistaken disclosure.

## **5. Statements of Contentions**

Within forty-five (45) days from entry of the HSCMO, the parties shall exchange written statements of contentions.

The statements of contentions shall specifically address, without limitation, each party's legal, factual, and/or monetary contentions with respect to the litigation. Counsel should not file these Statements of Contentions on the CM/ECF system.

## **6. Additional Written Discovery**

In addition to the Automatic Disclosures, the parties may conduct the following discovery following submission of the Statement of Contentions. All such additional discovery shall be served no later than sixty (60) days from entry of the HSCMO (fifteen (15) days after submission of the Statement of Contentions).

- a. Interrogatories: Each party may serve no more than one set of interrogatories limited to ten (10) interrogatories pursuant to Federal Rule of Civil Procedure 33.
- b. Requests for the Production of Documents: Each party may serve no more than one set of requests for the production of additional documents limited to ten (10) requests pursuant to Federal Rule of Civil Procedure 34.
- c. Requests for Admissions: Each party may serve no more than twenty (20) requests for admissions pursuant to Federal Rule of Civil Procedure 36.

Any responses, answers, and objections to initial written discovery requests shall be served in accordance with the Federal Rules of Civil Procedure and the Local Civil Rules.

## **7. Depositions of Fact Witnesses**

- a. Each party may take no more than three (3) depositions pursuant to Federal Rules of Civil Procedure 30 and 31 without leave of Court. Such depositions shall conclude no later than one hundred and twenty (120) days from entry of the HSCMO.
- b. All depositions are to be conducted in accordance with the provisions of Appendix R to the Local Civil Rules.

- c. Scheduling of depositions shall be agreed upon by counsel and shall not be set unilaterally.

#### **8. Motions to Amend**

Any motions to amend the pleadings or to join new parties shall be filed no later than sixty (60) days from entry of the HSCMO.

#### **9. Expert Witnesses**

- a. All expert reports and expert disclosures pursuant to Federal Rule of Civil Procedure 26(a)(2) on behalf of plaintiff shall be served upon counsel for defendant not later than one hundred and fifty (150) days from entry of the HSCMO, and shall be accompanied by the *curriculum vitae* of any proposed expert witnesses.
- b. All expert reports and expert disclosures pursuant to Federal Rule of Civil Procedure 26(a)(2) on behalf of defendant shall be served upon counsel for plaintiff no later than one hundred and eighty (180) days from entry of the HSCMO, and shall be accompanied by the *curriculum vitae* of the proposed expert witness.
- c. Depositions of proposed expert witnesses pursuant to Federal Rule of Civil Procedure 26(b)(4)(A) shall be concluded no later than two hundred and ten (210) days from entry of the HSCMO.
- d. The parties shall also exchange, in accordance with the HSCMO, written statements identifying all opinion testimony counsel that the parties anticipate will be presented at trial pursuant to Federal Rule of Evidence 701 and Teen-Ed v. Kimball International, Inc., 620 F.2d 399 (3d Cir. 1980).

#### **10. Discovery Applications and Motions**

In light of the Court's requirement that the parties meet and confer prior to filing an informal discovery application or motion, the Court does not anticipate significant discovery motion practice.

To the extent necessary, any modifications to the schedule and/or scope of the discovery shall be directed to the Magistrate Judge, and shall be filed in accordance with Local Civil Rule 37.1. Counsel shall first meet and confer in good faith by telephone or in person concerning any need to modify the schedule and/or scope of the discovery. This meet and confer shall proceed any informal application or motion, and all informal applications and motions shall contain a statement certifying counsels' compliance with the meet and confer obligations set forth herein and in Local Civil Rule 37.1.

All factual discovery motions and applications shall be made returnable prior to the expiration of the one hundred and twenty (120) day pretrial discovery period.

#### **11. Extensions of Time**

Any enlargement of the deadlines set forth herein shall be directed to the Magistrate Judge, and shall be granted only upon a showing of good cause. Counsel shall confer telephonically prior to applying to the Magistrate Judge to extend a deadline, and any application shall state whether the adversary consents or opposes the requested extension. However, applications that state that counsel have either too many cases, or are otherwise too busy to meet the deadlines prescribed herein, will fail to establish the requisite good cause. In the event counsel of record claims to be too pressed with other cases, the Court may require substitution of new counsel.

#### **12. Initial Case Management Conference**

Within one hundred and twenty (120) days from entry of the HSCMO (at which time the parties shall have substantially, if not entirely, completed the pretrial discovery process), the parties shall appear telephonically for an initial case management conference before the Magistrate Judge on a date to be set by the Court. In the event the parties have not received a case management conference date upon expiration of the one hundred and twenty (120) day period, the parties shall submit a letter request to the Magistrate Judge, setting forth joint proposed dates.

In anticipation of the initial case management conference, the parties shall meet and confer by telephone or in person, and shall submit a joint status report to the Court five (5) days prior to the scheduled conference. The joint status report shall be submitted to the Magistrate Judge and shall not

be electronically filed on the CM/ECF system. The joint status report shall address, without limitation: (1) the discovery completed to date; (2) any additional and/or outstanding discovery; (3) the timeline for the completion of any additional and/or contemplated discovery; (4) an explanation as to why the discovery has not been completed; (5) a statement of the disputed factual and/or legal contentions, and the remaining amount in controversy; (6) any other Hurricane Sandy related lawsuits filed or contemplated for that particular property or plaintiff (including, without limitation, claims related to wind damage, flood damage, fire damage, or any combination thereof); and (7) a statement setting forth the status of settlement discussions (including the propriety of mediation, arbitration, and/or a settlement conference).

At the conference with the Court, all parties who are not appearing *pro se* shall be represented by counsel who are familiar with the file and have full authority to bind their clients in all pre-trial matters. Counsel shall also be prepared to discuss settlement.

The Court shall issue in each case a scheduling order after the initial case management conference, which shall address, without limitation, time periods within which to complete any remaining discovery, a referral to arbitration and/or mediation, if appropriate, a date for the final pretrial conference, and/or a time period within which to submit dispositive motions (except with respect to motions contemplated pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(2)).

### **13. Dispositive Motions**

To the extent contemplated by the Court's scheduling order issued after the initial case management conference, any dispositive motions shall be filed, served, and responded to in accordance with Local Civil Rules 7.1, 7.2, 56.1 and 78.1. No dispositive motions, except motions pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(2), shall be filed prior to the initial case management conference.

### **14. Alternative Dispute Resolution**

Arbitration pursuant to Local Civil Rule 201.1 remains a preferred option for NFIP and direct suit cases. The parties may stipulate to the referral of an action to arbitration, or

the Court may order arbitration if the contested issues appear arbitrable.

If the dollar value of loss constitutes the primary issue after the parties exchange their Statements of Contentions, the parties shall proceed to loss appraisal in accordance with the applicable standard flood insurance policy, or the Court shall refer the action to compulsory arbitration pursuant to Local Civil Rule 201.1. Any disputes concerning the scope, effect, and/or interpretation of the standard flood insurance policy with respect to the loss appraisal process shall be submitted to the Magistrate Judge by way of informal letter application.

#### **15. Joint Final Pretrial Orders**

In the event the Court sets a date for a final pretrial conference in a scheduling order after the initial case management conference, the proposed final pretrial order will be submitted in the standard form to be provided by the Court. In accordance with Federal Rule of Civil Procedure 16(d), trial counsel shall appear at the final pretrial conference unless expressly excused by the Court.

#### **16. Notice and Opportunity to Inspect**

Prior to the demolition of any existing real property during the course of the litigation, plaintiff shall provide to defendant sufficient written notice of plaintiff's intent to destruct, remediate, and/or demolish any relevant evidence. Defendant shall thereafter be afforded a full and fair opportunity to inspect the relevant evidence for a period not to exceed sixty (60) days.

#### **17. Discovery Confidentiality Orders**

Upon submission of a certification in accordance with Local Civil Rule 5.3(b), the discovery confidentiality order set forth in Appendix S to the Local Civil Rules shall be entered. No alternate form of discovery confidentiality order shall be permitted without prior approval from the Court. Any request to modify the discovery confidentiality order set forth in Appendix S shall set forth, with specificity, the grounds for any proposed changes.

#### **18. Motions to Appear *pro hac vice***

Local Civil Rule 101.1 shall continue to govern motions to appear *pro hac vice*. However, in the event an attorney has been admitted *pro hac vice* in one NFIP or direct suit action, any applications to appear *pro hac vice* in subsequent cases may be submitted to the Magistrate Judge by informal letter application setting forth whether the adversary consents, containing a statement certifying that no reportable events in accordance with Local Civil Rule 101.1(c) have occurred during the intervening period, appending a copy of the order granting counsel's *pro hac vice* appearance, and a proposed order in accordance with the form available on this Court's website for Hurricane Sandy litigation.

#### **19. Telephonic Appearances**

Counsel shall be permitted to appear telephonically at all conferences, unless the Court expressly orders an in-person appearance.

#### **20. Liaison Counsel**

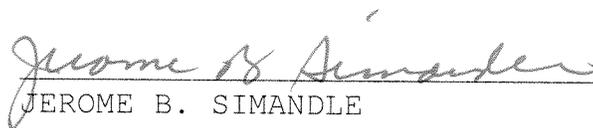
The Court finds no cause to necessitate the appointment of liaison counsel at this time.

#### **21. Consolidation with other Hurricane Sandy cases**

All claims pertaining to the same property or plaintiff (including, without limitation, wind, flood, fire, or any combination thereof) will be consolidated **for discovery purposes only** and assigned to the same District Judge and Magistrate Judge. In actions in which Plaintiff did not file all claims pertaining to the same property or plaintiff (including, without limitation, wind, flood, fire, or any combination thereof) in the same suit, the plaintiff shall advise the Magistrate Judge of all such cases as soon as practicable, but no more than thirty (30) days after entry of the HSCMO. Thereafter, any Judicial Officer may sign an order reassigning the related cases in accordance with Local Civil Rule 40.1(c) to the District Judge and Magistrate Judge assigned to the first pending action, in addition to an order consolidating the actions for discovery purposes only in accordance with Local Civil Rule 42.1.

IT IS on this 24<sup>th</sup> day of March 2014,

SO ORDERED.



JEROME B. SIMANDLE

CHIEF UNITED STATES DISTRICT JUDGE