



Super Storm Sandy Litigation

Comments

Public Meeting
March 6, 2014

Comments From:

Nicholas A. Vytell, Esq.

Carroll, McNulty & Kull LLC

Nicholas A. Vytell, Esq.
Direct Dial 908.848.1231
nvytell@cmk.com

January 31, 2014

VIA EMAIL & FEDEX OVERNIGHT

Hon. Jerome B. Simandle, Chief U.S.D.J.
United State District Court for
the District of New Jersey
Mitchell H. Cohen Building
& United States Courthouse
4th & Cooper Streets, Ctrm. 4A
Camden, New Jersey 08101

**RE: Hurricane Sandy Related Cases Seeking Benefits Under
the National Flood Insurance Program Pending before the
United States District Court for the District of New Jersey**

Dear Chief Judge Simandle,

In accordance with Your Honor's letter of January 24, 2014, enclosed please find a draft Case Management Order for the Court's consideration in connection with the proposed uniform handling of the above-referenced actions. A copy of a similar proposed order was also submitted today for consideration by the District Courts in New York.

Also enclosed is correspondence from the law firm of Nielsen, Carter & Treas, LLC, lead counsel for many of the Write-Your-Own ("WYO") Program insurance carriers participating in the federal government's National Flood Insurance Program ("NFIP"). We hope the Court will find the correspondence instructive and useful in considering this matter.

In hopes of continuing the collaborative effort, we have copied all of the attorneys that participated in the discussions regarding this proposal on this correspondence. We understand that there may be some unresolved issues and that others may submit alternative plans, but are hopeful that this will continue us towards a single, uniform solution.

We have also again copied the Magistrate Judges of the Trenton Vicinage and the Chief Deputy of Operations. Unfortunately, we do not have email addresses for all of the Judges within the District, but welcome Your Honor to share this correspondence as you deem appropriate. We will further forward an electronic copy of the proposed Case Management Order in accessible format under separate cover.

Finally, we respectfully request that the public meeting in connection with this matter, as proposed in Your Honor's January 24th letter, be set for a week other than the week of March 3rd. The Mardi Gras holiday falls on March 4th and the attorneys of Nielsen, Carter & Treas, LLC will be on vacation from March 3rd through 10th. Given their experience in these matters, we believe their appearance at the meeting would be invaluable.

We thank Your Honor for your continued attention to this matter.

Respectfully Submitted,

CARROLL MCNULTY & KULL LLC



Nicholas A. Vytell, Esq.

Cc: Hon. Douglas E. Arpert, U.S.M.J.
Hon. Tonianne J. Bongiovanni, U.S.M.J.
Hon. Lois H. Goodman, U.S.M.J.
Mr. Jack O'Brien, Chief Deputy of Operations
All Counsel on Enclosed Exhibit A

NIELSEN, CARTER & TREAS, LLC

GERALD J. NIELSEN
JOHN D. CARTER
WILLIAM T. TREAS

3838 NORTH CAUSEWAY BOULEVARD
SUITE 2850
METAIRIE, LOUISIANA 70002
PHONE (504) 837-2500
FAX (504) 832-9165
E-MAIL: GJNielsen@nct-law.com

KIM TRAN BRITT
JOSEPH J. AGUDA JR.
ALLEN D. KINCANNON
CHRISTOPHER J. BELL
MICHAEL D. BREININ
DEANI BEARD MILANO
JASON M. VERDIGETS
KRISTIE LUKE MOUNEY
KEITH M. DETWEILER

WILLIAM R. DEJEAN
GINO R. FORTE
HEATHER W. BLACKBURN
KENNETH M. WAGUESPACK, JR.
B. MARIANNE WISE
JADE C. McKEOUGH
SHANNON C. BURR
MEGAN E. SNIDER
SEAN P. SULLIVAN
DAVID A. POTE
KRISTINA J. FONTE
RICHARD J. WOLFF
DUSTIN L. POCHE

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United States District Court for
the District of New Jersey
Mithcell H. Cohen Building
& United States Courthouse
4th & Cooper Streets, Courtroom 4A
Camden, New Jersey 08101

RE: Explanation of Certain WYO Carrier Defendants' Proposed NFIP Case Management Order

Dear Chief Judge Simandle:

In response to your letter of January 24, 2014, this letter is submitted on behalf of the defendant, National Flood Insurance Program (“NFIP”)¹ Write-Your-Own (“WYO”)² Insurance Carriers listed below.³ These defendants have appeared in this Court in Hurricane Sandy NFIP Cases now pending in this District in their role as the “fiscal agent”⁴ and “fiduciary”⁵ of the United States, and at the expense of the United States.⁶ It is the purpose of this letter to provide the

¹ 42 U.S.C. §4001 *et seq.*

² 44 C.F.R. Pt. 62.23 *et seq.*

³ Allstate Insurance Company, American Bankers Insurance Company, American Reliable Insurance Company, American Strategic Insurance Company, Fidelity National Insurance Company, Fidelity National Indemnity Insurance Company, Fidelity National and Property, Casualty Insurance Company, Foremost Insurance Company, Hartford Insurance Company, High Point Preferred Insurance Company, Liberty Mutual Insurance Company, Lancer Indemnity Company f/k/a North Sea Insurance Company, Met-Life Auto and Home Insurance Company, New Hampshire Insurance Company, New Jersey Re-Insurance, New York Central Mutual Insurance Company, Philadelphia Contributorship Insurance Company, Philadelphia Insurance Company, Philadelphia Indemnity, Selective Insurance Company, Utica First Insurance Company, Wright Insurance Company f/k/a Fidelity National Indemnity Insurance Company.

⁴ 42 U.S.C. §4071(a)(1).

⁵ 44 C.F.R. Pt. 62.23(f).

⁶ 42 U.S.C. §§4018 and 4081(a) and 44 C.F.R. Pt. 62, App. A, Art. III(D)(1) and (2).

Court an explanation of the attached proposed Case Management Order (“CMO”) submitted herewith on behalf of the listed defendants.

Prior Efforts at Outreach

Prior to the submission of the proposed CMO to this Court, these defendants sought the input of as many different counsel as possible. Attached hereto as Exhibit A is a spreadsheet showing the large number of counsel - - plaintiff, defendant and governmental - - who have participated in an exemplary effort to try to achieve a consensus submission to this Court, regarding how best to manage the impending volume of NFIP WYO cases. All said counsel participated in lengthy telephone conferences to work upon the CMO, one occurring on January 22, 2014, and a second occurring on January 29, 2014.

The starting point for the parties’ efforts to confect a CMO for submission to this Court was the Honorable Judge Martin Feldman’s CMO for his Hurricane Katrina cases arising from Hurricane Katrina in New Orleans. This is the CMO plaintiff’s counsel Tracey Bryan, of the Gauthier Houghtaling firm, submitted to Magistrate Judge Pollack in the *Downs v. Liberty Mutual* matter on December 20, 2013. See Docket No. 1:13-cv-05957-CBA-CLP, at doc 20-1. Certain sections of Judge Feldman’s CMO have been removed by mutual agreement, such as that section pertaining to “liaison counsel.” The use of liaison counsel after Katrina proved to be counterproductive.

Based upon the two long telephone conferences and numerous email exchanges, undersigned counsel believes that during the expected in-person conference with the Court in March, that there will be substantial agreement amongst most counsel on most sections of the CMO. There are a few sections on which there definitely remains legitimate disagreement, and those will be highlighted for the Court later herein. Also, please note that there are a few counsel who have signaled that they disagree with virtually everything in the proposal.

Applicability

This proposed CMO is intended to apply only with regard to the NFIP WYO cases that include claims for federal benefits under an NFIP Standard Flood Insurance Policy (“SFIP”).⁷ This proposed CMO is not intended to provide a plan for handling wind cases. There exists no reason why wind and flood cases cannot be handled in a complimentary manner. However, this effort has focused itself exclusively upon the NFIP cases, given differences between how wind and flood cases are normally handled.

Judicial Resources

Undersigned counsel most respectfully points out that there are other federal courts with in depth knowledge of what does work - - and what does not work - - in the handling of NFIP cases at volume. The Honorable Judges Martin Feldman, Sarah Vance, Eldon Fallon and Carl Barbier, all of the United States District Court for the Eastern District of Louisiana, each handled high

⁷ 44 C.F.R. Pt. 61, App. A(1), (2) or (3).

volumes of NFIP cases post-Katrina. In addition, each of the United States Magistrate Judges in New Orleans possess in depth knowledge of how to “move” large volumes of cases of this type, within the regulatory structure of the NFIP.

Further, the Honorable Magistrate Judge John Froeschner of the Southern District of Texas personally supervised approximately 300 NFIP cases that arose in Houston and Galveston after Hurricane Ike in 2008. In addition, the Honorable Judge Peter Messitte of the District of Maryland has had significant experience in the context of attempting to handle NFIP cases in the “mass joinder” format.

What Does Not Work

The undersigned most respectfully submits, based upon consultation with the large group of plaintiff, defendant and governmental counsel that participated in the collaborative efforts listed above, as well upon his firm’s own experience handling NFIP cases at volume for almost three decades, that the following activities do little to advance the moving of dockets of NFIP cases:

- Individual Rule 16 Scheduling Conferences at the beginning of each case. A far more efficient use of the Court’s time, as well as the time of counsel, is to agree upon an across the board set of practical and reasonable deadline dates, ending with an initial telephone status conference to be scheduled once most discovery is completed, but before the deadline for dispositive motions is reached.
- Stays. Lawyers, like most human beings, need deadlines. While some might suggest that an administrative stay of all of these cases would be useful to allow the parties to review their respective files, the setting of practical, realistic and achievable deadlines actually works far better towards the goal of getting NFIP cases moving. In that same vein, attempts to achieve so-called “rocket dockets” normally prove just as unworkable. There is simply too much to do in the NFIP cases to complete needed discovery rapidly. The dockets will move fast, but not as fast as some would like.
- Early orders of arbitration, mediation or other forms of ADR. In NFIP cases, a WYO carrier cannot resolve such disputes amicably without collecting needed documentation, and taking basic depositions. It is thus, with great respect, pointless for the parties to incur the time and expense of attempting to resolve these cases until both sides have exchanged all material documentary information, and needed depositions are completed. (This does not mean that the Court faces the prospect of numerous trials. It doesn’t, as will be explained later herein.)
- Groupings of cases. Each claimant’s situation is unique. The sooner that it is accepted that the involved counsel will simply need to “roll up their sleeves” and work these cases individually, the sooner the cases will begin to move. In past major events, every insured whose case was placed into some type of mass joinder or within some type of “group,” saw their case end up getting bogged down, and actually ended up

waiting until the very last to see their case get resolved. Individual NFIP cases move far more quickly than do NFIP cases grouped together.

- Refusal to abide FEMA's rules. The defendants are bound by the terms of their Arrangement with FEMA to abide, and to enforce, FEMA's rules. 44 C.F.R. Pt. 62.23(f), and Pt. 62, App. A, Art. II(G)(1). With all respect, that rule applies to this Honorable Court as well. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990). Departures from FEMA's rules requires that a WYO carrier dig in its heels, and proceed to trial and an appeal, if necessary. See e.g., *Jacobsen v. Metropolitan*, 672 F.3d 171, 175 (2nd Cir. 2012), where the district court was reversed after refusing to enforce FEMA's proof of loss requirement, and improperly utilizing FEMA's appraisal clause, and refusing to allow the defendant WYO carrier to conduct needed discovery.

What Does Work

Based upon in depth consultation with all participating counsel, (again, plaintiffs, defendants and government), it is believed that most of the attorneys involved in the NFIP cases will support the following proposals:

- In lieu of normal Rule 16 Disclosures, the proposed CMO asks this Court to order identification and mutual exchanges of specific documents held in the files of either the parties or their counsel. (These exchanges do not seek documents contained in third parties' files. That will be sought through normal written discovery.) The proposed CMO seeks prompt production of all material documentation possessed by the parties and their counsel, so that the process of evaluation of files can commence as soon as possible. This will also lead to an earlier start to normal discovery.⁸
- In lieu of normal Rule 16 Scheduling Conferences, the proposed CMO asks this Court to impose an across the board schedule of dates for all cases, with the understanding and proviso that in some cases, extensions will legitimately be needed. As to the dates that the defendants have proposed, the defendants sought to defer to plaintiffs' counsel for the crafting of a workable schedule of cut-off dates. Said counsel were unable to agree upon a schedule as of the date of this filing, and so these defendants have taken the liberty of proposing a schedule, to at least provide a starting point for discussions of this topic with the Court. Defendants are not married to the proposed dates, but do believe they accurately reflect the minimum amount of time that should be allotted, if trials on the merits are to be avoided.
- Steps are also taken in the proposed CMO to avoid unnecessary motion practice. Most (but not all) counsel agree that in the NFIP cases, there can be no successful claim for state law based recoveries, or for interest, or for a jury. The CMO provides a

⁸ Plaintiffs prefer that these initial exchanges be more limited than what is being proposed by these Defendants. As will be explained later herein, the Court's decision here will impact how fast - - or slow - - these cases actually begin to move.

procedure for removing all such claims and demands without the need to file a motion in each individual case. At the same time, the right of any plaintiff desiring to be heard upon these questions is fully preserved. Without some such procedure, the defendants would have to file motions upon each of these three topics, individually, in several hundred cases.

- The first actual contact with the Court is proposed to occur at a telephone status conference that would be set to occur after an agreed upon discovery cut-off date, but before the deadline for filing dispositive motions. This proposed timing would allow the parties to both get a clear understanding of the facts of that particular case, and, would require the parties to talk with a Magistrate Judge before filing potentially avoidable motions. The proposed CMO also requires the parties to file a detailed report with the Court regarding the cases' status one week before the occurrence of that telephone status conference. At this Conference, the Court would likely set dates for a settlement conference with a Magistrate, a pretrial Conference with the Court, and, if deemed appropriate, a trial date.

Trials

Trials of NFIP cases are exceptionally rare. After Hurricane Katrina, of the more than 2,000 NFIP cases filed in the Eastern District of Louisiana after that event, less than twenty NFIP cases actually had to be tried. Through skillful cooperation between plaintiffs, defendants, the government and the courts, and through strict respect for all of the applicable NFIP rules, 99% of the post-Katrina NFIP cases were resolved either via motion practice or settlements, without the need of a trial on the merits. There is no reason why that cannot happen here.

As NFIP cases begin to approach their trial dates, a telephonic settlement conference with a Magistrate is the most effective tool to get a stalled NFIP case moving. There are several reasons for this: First, a U.S. Magistrate can assist by using his or her "good offices" to direct the parties to finish needed work so that the odds of a settlement increase. A private mediator's "suggestions" simply won't carry the same weight. Second, a Magistrate will have a better handle on the complex and strict FEMA rules and regulations the parties are working within, than will a private mediator. This helps to bring "reasonableness" to the table. Third, as we are all handling U.S. Treasury funds, it is simply safer for the WYO carriers to make agreements under the watchful eye of the Court.

Points of Agreement and Disagreement in the Proposed CMO

The proposed CMO has 11 sections. It is undersigned counsel's current understanding that most, but not all, counsel agree with what is proposed in Sections I, II, III, IV, VI, X and XI. Disagreement does exist concerning Sections V, VII and XIII, and concerning just one sentence of Section IX. An explanation of those disagreements is as follows.

Section V of the proposal concerns initial exchanges. Defendants have agreed to produce all that has been sought by the plaintiffs. However, plaintiffs object to production of Items 6, and

8-12 of the proposed Section V.A. Regarding these items, these defendants respectfully submit the following:

- Item 6. This information must be obtained by a WYO carrier to evaluate any further claim payments against the SFIP Loss Settlement Clause. WYO carriers will not be able to even begin the process of making settlements, until this information is received. Candidly, all of the money being spent on what the carriers contend is often inflated estimates, becomes completely immaterial in all cases where the repair work upon the property has already been performed. The conflict is this: The plaintiffs do not want to produce information showing the actual cost of repairs; and the defendants must have this information to settle cases.
- Item 8. This was in Judge Feldman's CMO. All that this item asks is for the plaintiff to provide a clear statement of what is being sought. This is necessary, because almost none of the currently filed Sandy complaints provide any information, and constitute the exact sort of "boiler plate" pleadings now precluded by *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Either the defendants must file *Twombly* and *Iqbal* Motions to Dismiss in virtually every single NFIP case, or they need the plaintiffs to provide a clear statement of what is in dispute.
- Item 9. This too was in Judge Feldman's CMO. As is made clear by the appellate decisions in *Soupy's*, *DeCosta*, *Jacobson* and *Dickson*, *infra*, no WYO carrier can resolve one of these disputes without first testing the claim against FEMA's proof of loss requirement. By requiring the plaintiffs to identify exactly what they are relying upon as constituting their proof of loss, the Court will speed the process of evaluation. And, this will aid the Court later in motions if it must become involved in any disputes upon this topic.
- Item 10. This too was in Judge Feldman's CMO. As with the proof of loss requirement, it is a material part of a WYO carrier's legal responsibility to verify that pre-suit, the insured submitted detailed documentation actually supporting the amounts being claimed in the proof of loss. (See cases cited later herein.) A plaintiff's refusal to simply identify what documents constitute that which the plaintiff claims are those documents relied upon in satisfaction of this federal rule, simply slows things down.
- Item 11. Curiously, plaintiffs have sought this exact same information from the defendants via Section V.B.5. of the proposed CMO. Defendants consented to that request, but are now being told by the plaintiffs that they will not exchange the exact same information that they have successfully sought from the defendants.
- Item 12. As is made clear by the Fifth Circuit's decision in *Bradley* to be cited later herein, where one property owner is seeking damages from both a wind and a flood policy, that property owner cannot recover between the two policies, an amount that exceeds the value of the insured's structure. As such, a WYO carrier's responsibilities

require it to learn if any other wind lawsuits are pending, so that these calculations can be made before federal funds are expended.⁹ The WYO carrier can certainly ask for these obviously necessary items later during formal discovery. However, if this, and all of the other items noted above are included within the initial disclosures, the NFIP cases will move faster.

Section VII of the proposed CMO concerns cut-off dates. Defense counsel did seek to defer to the large number of plaintiffs' counsel, and to ask them to propose cut-off dates that would be workable. Agreement could not be reached as of this filing, and so undersigned counsel has proposed a set of dates, solely as a starting point for discussion. Defendants are not in any sense married to the proposed dates, and fully understand that the Court will inform the parties of what actual dates will be used.

Proposed Section VII.C., concerns providing this Court a status report at a point between the discovery cut-off date, and the cut-off date for filing dispositive motions. Such would allow this Court to examine detailed information about the case in advance of the telephone status conferences proposed in the CMO. Defendants are unaware of why there is an objection to providing this information.

Section VIII of the proposed CMO seeks to avoid the filing of potentially hundreds of motions upon the topics of (1) NFIP preemption of state law based claims, (2) the preclusion of awards of interest against the United States Treasury, and (3) the inability of NFIP claimants to have their case heard before a jury. There is a plethora of NFIP case law upon these topics already. Defendants are simply attempting to propose a mechanism whereby those counsel who wish to be heard upon these issues will be heard, but all other counsel who are willing to voluntarily dismiss these claims, can do so without requiring defendants to file potentially unnecessary motions. Again, it is unclear why plaintiffs are opposed to adopting such a procedure.

Concerning Section X.A., the only disagreement between the defendants and plaintiffs concerns the second sentence. That second sentence reads, "The parties are advised that their diligence in conducting discovery will be the primary consideration of the Court in determining whether a good cause exists to modify the Scheduling Order." This language was borrowed by undersigned counsel from a Rule 16 Scheduling Order entered in a Sandy case in New Jersey. It seems a fair statement, and one which would signal to all parties that while it is to be expected that extensions of time will be needed in some of these cases, part of the test of the Court for granting same will be whether the parties are using their time wisely. Again, defendants are unaware of why this sentence is objectionable.

In closing as to these points, all counsel, both plaintiff and defendant have worked together in an exemplary fashion, knowing full well that their role is that of officers of the Court. All counsel of course await the Court's instructions.

⁹ In most instances, the wind carrier and the flood carrier are different companies.

Faster Moving Cases

Nothing in the proposed CMO is designed to slow down cases that could move faster. If in any case the plaintiff and defendant choose to agree upon faster cut-off dates, that can be done. If either a plaintiff or a defendant would like to file an early dispositive motion, that can be done. The dates are designed to set outside deadlines, and to not slow down anything that could move more quickly.

Legal Issues Common to All NFIP Cases

While each individual NFIP claim is unique, each NFIP claim is subject to the same nationally uniform federal rules and regulations of FEMA, adopted on authority of 42 U.S.C. §4013(a) and 4019. NFIP-WYO Program carriers are not legally authorized to pay monies absent strict compliance with FEMA's rules and regulations. While it is true that a WYO carrier has no financial incentive to either "lowball" or to resist paying a valid claim, the carriers are legally responsible to the Government, as its "fiduciary," to "assure that any taxpayer funds are accounted for and appropriately expended." 44 C.F.R. Pt. 62.23(f). And, it is critical that NFIP cases be handled uniformly, regardless of whether they arise in New York, New Jersey, Missouri, or Texas.¹⁰

Please also note that post-Hurricane Katrina, Congress revised the Improper Payments Information Act ("IPIA").¹¹ In accordance with FEMA's interpretation of that Act, WYO Carrier litigation files are also audited, just as are the claims files. A WYO Program carrier cannot simply settle NFIP cases based upon a format of "split the baby," or in any other manner other than through compliance with FEMA's rules. Because of the IPIA, the WYO carrier's file must contain an appropriate basis for any settlements made.

Among the many legal issues a WYO carrier must examine before considering resolution of any NFIP lawsuit, are the following:

1. Is the suit time barred? FEMA did extend its regulatory deadline for the filing of a proof of loss from 60 days to 18 months for Hurricane Sandy claims. 44 C.F.R. Pt. 61, App. A(1), Art. VII(J)(4). However, this extension of a regulatory rule has no impact upon, or relation to, the statutory deadline for filing NFIP lawsuits established by Congress at 42 U.S.C. §4072, and incorporated into both FEMA's regulations and each

¹⁰ As the courts routinely recognize, there exists a "compelling interest in assuring uniformity in cases involving the NFIP." *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 390 (9th Cir. 2000).

¹¹ Improper Payments Information Act of 2002 ("IPIA"), Pub. L. No. 107-300, 116 Stat. 2350 (Nov. 26, 2002), as amended by the Improper Payments Elimination and Recovery Act of 2010 ("IPERA"), Pub.L. No. 111-204, 124 Stat. 2224 (July 22, 2010), 112-248, 126 Stat. 2390 (Jan. 10, 2013) (codified as a "note" to 31 U.S.C. 3321 regarding the disbursing authority in the executive branch).

plaintiffs' SFIP. See 44 C.F.R. Pt. 61, App. A(1) Art. VII(R), and 62.22(a). FEMA Bulletin W-13069 upon this exact topic is attached hereto as Exhibit B.

2. Were all damages from Hurricanes Irene and Lee, for which an NFIP claim was paid, completely repaired? A currently unknown number of the Sandy litigants also had NFIP claims from Hurricanes Irene and/or Lee. NFIP rules concerning paying for the same damage twice require the WYO carrier to determine whether prior repairs were in fact completed in these situations.
3. Did the plaintiff comply with all conditions precedent to the filing of the lawsuit, before filing that lawsuit? See 44 C.F.R. Pt. 61, App. A(1), Art. VII(R). The most notable of these requirements is FEMA's proof of loss rule. An explanation of the strictness with which this rule is enforced by the courts is to be found in the following cases: *DeCosta v. Allstate*, 736 F.3d 76, 81-86 (1st Cir. 2013); *Jacobsen v. Metropolitan*, 672 F.3d 171, 175 (2nd Cir. 2012); *Suopys v. Omaha*, 404 F.3d 805 (3rd Cir. 2005), *Dickson v. American Bankers Ins. Co. of Florida*, 739 F.3d 397 (8th Cir. 2014).
4. Coupled with the proof of loss requirement, is FEMA's documentation requirement found at 44 C.F.R. Pt. 61, App. A(1), Art. VII(J)(3) and IV(F) and (I). As numerous courts have held, the pre-suit documentation submitted with the proof of loss as its support, must be sufficiently detailed that it genuinely allows the WYO carrier to perform its job as the Government's fiduciary, to determine the underlying basis of the claim. See e.g., *Sun Ray Village Owners Association v. Old Dominion Ins. Co.*, 546 F.Supp. 2d 1283 (N.D.Fla. 2008); *Trosclair v. State Farm*, 2008 WL 5157715, *3 (EDLA 2008); *Treme Cottages, Inc. v. Fidelity*, 2008 WL 4974660, *1 (EDLA 2008); and *Wells v. Fidelity*, 2008 WL 2781539, *3-4 (EDLA 2008).
5. Coverage restrictions. The NFIP/SFIP is a "single risk" insurance policy. *Wagner v. Dir., FEMA*, 847 F.2d 515, 521 (9th Cir. 1988). It only covers "direct physical loss by or from flood." 44 C.F.R. Pt. 61, App. A(1), Art. II(B)(12). And, because of numerous restrictions, conditions and exclusions contained throughout the SFIP, many of which are designed to facilitate and bolster FEMA's mitigation initiatives, there are many instances where damages that can indeed be traceable to a "but for" causal relationship to the flood, are nevertheless not covered by this federal program. See e.g., the basement and earth movement exclusions of the SFIP.
6. The Loss Settlement Clause. 44 C.F.R. Pt. 61, App. A(1), Art. VII(V). Recognizing the standard insurance law doctrine that no one should "profit" from insurance, FEMA's loss settlement clause provides that a claimant may only receive the lesser of policy limits, or the actual cost of repairs, or the estimated cost of repairs. See e.g., *Mathews v. State Farm*, 2007 WL 2127581, *2 (E.D.La. 2007). In many instances, given the amount of time that has passed since Hurricane Sandy, repairs will have already been completed. In those situations, the cost of repairs is a far more relevant indicator of the proper value of the claim, than are professional estimators' estimates. In similar fashion, wherever a claim was also made for wind damage, no insured may

recover from both their wind and flood policies, an amount that exceeds the value of their structure. *Bradley v. Allstate*, 620 F.3d 509, 523 (5th Cir. 2010).

7. Mass produced estimates. It does happen that on occasion, some public adjusters, and some attorneys (meaning absolutely no disrespect to anyone), mass produce estimates and proofs of loss where policy limits are claimed in every single claim, and inflated costs are included for repair items on every single claim, regardless of need, and without any individual consideration of whether or not that repair would actually occur in that particular home. These efforts do not reflect the individualized judgment required by the SFIP at 44 C.F.R. Pt. 61, App. A(1), Art. VII(J)(5). In some cases, the repair estimates are almost double the entire value of the building. Given the Court's interest in moving cases, and in early resolution, undersigned counsel believes it necessary to point out at this early juncture, that there will be a fairly large number of cases that will bog down because of these types of issues. There is indeed a plan for obtaining resolution of these. However, such cases will be slower. Examples of this type of problem resulting in the dismissal of the insured's lawsuit, include *Donovan v. Fidelity Nat'l Property & Casualty Co.*, 2014 WL 50811 (S.D.Tex.) and *Charnock v. Fidelity*, Docket #3:10-mc-07015 (S.D.Tex. 01/07/14) (Attached as Exhibit C).
8. Appraisal. 44 C.F.R. Pt. 61, App. A(1), Art. VII(P). Via the appraisal clause, FEMA has adopted by regulation its own form of ADR. *Id.* The process works exceedingly well, when its standards are adhered to. *See Jacobsen, supra.* Prior to appraisal, the parties must achieve agreement on all issues of claims, presentment, coverage and scope. *De La Cruz v. Bankers*, 237 F.Supp.2d 1370, 1374 (S.D.Fla. 2002). Only pricing disputes may be presented on appraisal. And, the parties must actually submit "qualified" and "disinterested" appraisers. Where the process is used appropriately, it is very effective at moving files. FEMA Bulletin W-13029 which explains the process in detail, is attached as Exhibit D.

FEMA Waivers

The defendant WYO Program carriers have no more power to waive or not enforce a rule of this Program than do the courts. The sole power of waiver of the regulations rests with FEMA. 44 C.F.R. Pt. 61, App. A(1), Art. VII(D). FEMA is known to grant waivers of the timeframe for compliance with its proof of loss requirement in certain circumstances, provided all parties have at all times acted in good faith, provided that the parties achieve a complete agreement as to all matters in litigation such that after the waiver is granted, the lawsuit is promptly dismissed, and provided, the waiver request comes early, before FEMA is put to the expense of having to pay both a large litigation bill, and the claim itself. In the past, FEMA officials have expressed their disdain for being asked to pay for both a large litigation bill, and then the claim. Understandably, they would rather just pay one or the other.

In closing and for the purpose of making clear that no WYO Program defense attorney ever actually speaks "for the Government," undersigned counsel desires to make clear here that his attorney/client relationship is solely with the WYO carrier for whom he is signing a pleading, and

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January 31, 2014

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not with FEMA. He can explain FEMA's regulations or past positions, but he is not actually representing the United States Government itself.

CONCLUSION

It is prayed that this Honorable Court will find these explanation useful.

Respectfully submitted,

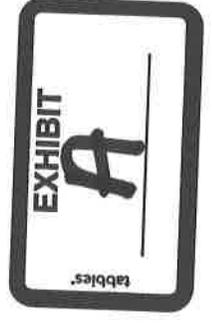
NIELSEN, CARTER & TREAS, LLC


Gerald J. Nielsen

GJN/tp

Exhibit A

Counsel Type	Atty. Name	Firm Name	Address	City/State/Zip	Phone #	Email
Plaintiffs	Samuel Bearman	Bearman Law	820 North 12th Avenue	Pensacola, FL 32501	850-438-1000	sbearman@bearmanlaw.com
Plaintiffs	Daniel Ballard	Claims Worldwide	435 N. Main Street	Doylstown, PA 18901	215-230-0800	dballard@claimsworldwide.com
Plaintiffs	Lisa Fittipaldi	DiFrancesco Bateman Coley Yospin Kunz	15 Mountain Blvd.	Warren, NJ 07059	908-757-7800	littipaldi@newjerseylaw.net
Plaintiffs	Rich Guss	DiFrancesco Bateman Coley Yospin Kunz	15 Mountain Blvd.	Warren, NJ 07059	908-757-7800	rguss@newjerseylaw.net
Plaintiffs	Andrew Miller	DiFrancesco Bateman Coley Yospin Kunz	15 Mountain Blvd.	Warren, NJ 07059	908-757-7800	amiller@newjerseylaw.net
Plaintiffs	Verne Pedro	Ellis, Ged & Boddan, PA	1101 Richmond Ave, #201	Pt. Pleasant, NJ 08742	732-451-3608	vpedro@ellisandged.com
Plaintiffs	Cate Biggs	Gauthier Houghtaling and Williams	2323 S. Shepard, Suite 1002	Houston, TX 77019	713-343-1614	cate@ghwlegal.com
Plaintiffs	Fred Bradley	Williams	3500 North Hullen Street	Metairie, LA 70002	504-456-8614	fred@ghwlegal.com
Plaintiffs	Tracey Bryan	Gauthier Houghtaling and Williams	2323 S. Shepard, Suite 1002	Houston, TX 77019	713-343-1614	tracey@ghwlegal.com
Plaintiffs	Andrea Butler	Gauthier Houghtaling and Williams	2323 S. Shepard, Suite 1002	Houston, TX 77019	713-343-1614	andrea@ghwlegal.com
Plaintiffs	Sean Greenwood	Gauthier Houghtaling and Williams	2323 S. Shepard, Suite 1002	Houston, TX 77019	713-343-1614	sean@ghwlegal.com
Plaintiffs	Earl Perry	Williams	2323 S. Shepard, Suite 1002	Houston, TX 77019	713-343-1614	earl@ghwlegal.com
Plaintiffs	Audwin Levasseur	Harbatkin & Levasseur, PA Law Offices of Jonathan Wheeler, PC	2400 Lemoine Ave., Suite 207	Fort Lee, NJ 07024	973-908-8529	audwinl@hladvocates.com
Plaintiffs	Jonathan Wheeler	Wheeler, PC	1617 JFK Blvd., Suite 1270	Philadelphia, PA 19103	856-874-1447	jwheeler@jwheelerlaw.com
Plaintiffs	Daniela F. Henriques	Leav & Steinberg, LLP	140 Broadway, Suite 3601	New York, NY 10005	212-766-5222	henriquesd@lstmilaw.com
Plaintiffs	Martin Mayo	Martin L. Mayo & Associates	8901 Gaylord, Suite 110	Houston, TX 77024	713-358-2140	mmayo@martinmayolaw.com
Plaintiffs	William "Chip" Merlin, Jr.	Merlin Law Group, PA	777 S. Harbour Island Blvd., Suite 950	Tampa, FL 33602	813-229-1000	wmerlin@merlinlawgroup.com
Plaintiffs	Mary Fortson	Merlin Law Group, PA	Suite 950	Tampa, FL 33602	813-229-1000	mfortson@merlinlawgroup.com
Plaintiffs	Ashley Smith	Merlin Law Group, PA	777 S. Harbour Island Blvd., Suite 950	Tampa, FL 33602	813-229-1000	asmith@merlinlawgroup.com
Plaintiffs	Jack Palmeri	The Rain Law Firm	77 Water Street, 8th Floor	New York, NY 10005	855-330-7246	jackpalmeri@palmerilawfirm.com
Plaintiffs	Matthew Kotzen	The Rain Law Firm	1920 E. Hallandale Beach Blvd., Ste. 704	Hallandale Beach, FL 33009	855-330-7246	mkotzen@therainlawfirm.com



Counsel Type	Atty. Name	Firm Name	Address	City/State/Zip	Phone #	Email
Plaintiffs	Valerie Peters	The Rain Law Firm	1920 E. Hallandale Beach Blvd., Ste. 704	Hallandale Beach, FL 33009	855-330-7246	vpeters@therainlawfirm.com
Plaintiffs	Ben Rajotte	Touro Law Center	225 Eastview Drive	Central Islip, NY 11722	631-761-7024	brajotte@tourolaw.edu
Plaintiffs	Adam Derman	Wolff & Samson, PC	One Boland Drive	West Orange, NJ 07052	973-325-1500	aderman@wolffsamson.com
Plaintiffs	Christopher Gerold	Wolff & Samson, PC	One Boland Drive	West Orange, NJ 07052	973-325-1500	gerold@wolffsamson.com
Defense	Nicholas Vytell	Carroll & McNulty & Kull LLC	120 Mountain View Blvd	Basking Ridge, NJ 07920	908-848-6300	nyvtell@cmk.com
Defense	John J. Donnelly	Donnelly & Associates, PC	One West First Ave., Ste. 450	Conshohocken, PA 19428	610-828-2222	donnelly@donnellvandassociates.com
Defense	Michael Lorenz	Donnelly & Associates, PC	One West First Ave., Ste. 450	Conshohocken, PA 19428	610-828-2222	mlorenz@donnellvandassociates.com
Defense	Christian Labietta	Donnelly & Associates, PC	One West First Ave., Ste. 450	Conshohocken, PA 19428	610-828-2222	clabietta@donnellvandassociates.com
Defense	Mark Walters	Donnelly & Associates, PC	One West First Ave., Ste. 450	Conshohocken, PA 19428	610-828-2222	mwalters@donnellvandassociates.com
Defense	Kevin Frey	Law Offices of Gordon P. Serou, Jr., LLC	650 Poydras Street, Suite 1002	New Orleans, LA 70130	504-299-3421	kmf@seroulaw.com
Defense	Gordon Serou	Law Offices of Gordon P. Serou, Jr., LLC	650 Poydras Street, Suite 1002	New Orleans, LA 70130	504-299-3421	gps@seroulaw.com
Defense	James P. Lajos	Isaman, Cunningham, Riester & Hyde, LLP	9 Thurlow Terrace	Albany, NY 12203	518-462-3000	jlajos@icrh.com
Defense	Kristin Muir Mykulak	Montgomery McCracken Walker & Rhoads, LLP	Liberty View, 457 Haddonfield Rd. Ste. 600	Cherry Hill, NJ 08002	856-488-7746	kmykulak@mmwr.com
Defense	James Benjamin	Pessin & Katz Law, PA	901 Dulaney Valley Rd., #400	Towson, MD 21204	410-938-8800	jbenjamin@pklaw.com
Defense	Craig Blackman	Stradley Ronon Stevens & Young, LLP	2005 Market Street, Suite 2600	Philadelphia, PA 19103	215-564-8041	cbblackman@stradley.com
Defense	Sam Arena	Stradley Ronon Stevens & Young, LLP	2005 Market Street, Suite 2600	Philadelphia, PA 19103	215-564-8041	sarena@stradley.com
Defense	Gerald Nielsen	Nielsen Carter & Treas	3838 N. Causeway Blvd., Suite 2850	Metairie, LA 70002	504-837-2500	ginielsen@nct-law.com
Defense	John Carter	Nielsen Carter & Treas	3838 N. Causeway Blvd., Suite 2850	Metairie, LA 70002	504-837-2500	jcarter@nct-law.com
Defense	William Treas	Nielsen Carter & Treas	3838 N. Causeway Blvd., Suite 2850	Metairie, LA 70002	504-837-2500	wtreas@nct-law.com
Defense	Joe Aguda	Nielsen Carter & Treas	3838 N. Causeway Blvd., Suite 2850	Metairie, LA 70002	504-837-2500	jaguda@nct-law.com
Government	Ramoncito DeBorja	FEMA				Ramoncito.DeBorja@fema.dhs.gov
Government	Paul Blaine	USDOJ/AUSA/Civil Chief NJ				paul.blaine@usdoj.gov
Government	Irene Dowdy	USDOJ/AUSA/Civil Chief NJ				irene.dowdy@usdoj.gov
Government	Thomas McFarland	USDOJ/AUSA/Civil Chief EDNY				thomas.mcfarland@usdoj.gov

Counsel Type	Atty. Name	Firm Name	Address	City/State/Zip	Phone #	Email
Government	Artemis Lekakis	USDOJ/AUSA/NYE				artemis.lekakis@usdoj.gov

Exhibit B



FEMA

W-13069



November 21, 2013

MEMORANDUM FOR: Write Your Own (WYO) Principal Coordinators and the National Flood Insurance Program (NFIP) Direct Servicing Agent

A handwritten signature in black ink, appearing to read "James A. Sadler".

FROM: James A. Sadler, CPCU, AIC
Director of Claims
National Flood Insurance Program

SUBJECT: **Interplay Between the Extension of the Proof of Loss Deadline for NFIP-Insureds Damaged By Meteorological Event Sandy and the 1-Year Statute of Limitations in 42 U.S.C. § 4072 (VII,R, Suit Against Us)**

Questions have been presented to FEMA concerning how the granting of the extension of the Proof of Loss deadline for National Flood Insurance Program (NFIP) policyholders damaged by Meteorological Event Sandy (ME Sandy) established by FEMA by regulation in the Standard Flood Insurance Policy (SFIP) interplays with the 1-year statute of limitations for an insured to bring a lawsuit established by Congress in 42 U.S.C. § 4072. FEMA is providing this Bulletin as an explanation to insurers of how the extended Proof of Loss deadline interacts with the 1-year statute of limitations established by statute. A brief review of the factual background is provided to put FEMA's guidance in context.

The SFIP is itself a Federal regulation promulgated by FEMA, which has three forms. The Dwelling form is found at 44 C.F.R. § 61, Appendix A(1); the General Property form is found in Appendix A(2); and the Residential Condominium Building Association Policy (RCBAP) form is found in Appendix A(3). In these regulations, FEMA established the 60-day Proof of Loss deadline. See Section VII(J) of the Dwelling and General Property forms and Section VIII(J) of the RCBAP form. The Associate Administrator of the Federal Insurance and Mitigation Administration (FIMA, a division of FEMA) has the authority to grant waivers of and extend the Proof of Loss deadline pursuant to 44 C.F.R. § 61.13(d). See also 44 C.F.R. § 61, Appendices A(1) and A(2), Section VII(D), and Appendix A(3), Section VIII(D).

Congress, in enacting the National Flood Insurance Act of 1968, as amended, (42 U.S.C. § 4001, *et seq.*) enacted a 1-year statute of limitations for an NFIP policyholder to bring a lawsuit after denial/disallowance or the partial denial/disallowance of the policyholder's claim. See 42 U.S.C. §

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4072. This 1-year statute of limitations was incorporated into the SFIP by FEMA. See 44 C.F.R. § 61, Appendices A(1) and A(2), Section VII(R), and Appendix A(3), Section VIII(R).

On November 12, 2012, FEMA issued Bulletin w-12092. Bulletin w-12092 did several things, but two items are primarily relevant for this Bulletin.

First, Bulletin w-12092 granted a limited waiver of the Proof of Loss requirement to allow payment of an undisputed amount based solely on an adjuster's report and insurer's approval without the SFIP-required Proof of Loss. In the event the insured disagreed with the payment received, the policyholder was (and is) required to send a Proof of Loss meeting the requirements of the SFIP with documentation supporting the additional amounts sought.

Second, Bulletin w-12092 waived the 60-day deadline to submit the SFIP-required Proof of Loss and granted a 1-year extension from the date of loss to send the Proof of Loss for the additional dollar amount(s) sought to the insurer. The insurer then evaluates the Proof of Loss and documentation and may pay the entire amount, partially pay and partially disallow/deny the amount, or entirely disallow/deny the amount sought for the items submitted in the Proof of Loss. The denial or disallowance, in whole or in part, must be in writing from the insurer. The insurer's letter should clearly state it is denial or disallowance and alert the insured of the remedies available, including litigation within 1 year from the date of the letter.

More recently, in FEMA Bulletin w-13060a, FEMA issued an additional extension of the Proof of Loss deadline, allowing an additional 6 months for an insured to submit the SFIP-required Proof of Loss with supporting documentation for any additional amounts sought. In total, FEMA extended the Proof of Loss deadline from 60 days to 1 ½ years for ME Sandy. This is an unprecedented action by FEMA that reflects FEMA's commitment to facilitating the ability of individuals insured by the NFIP to seek payment.

Unlike the SFIP Proof of Loss deadline, which is a regulation created by FEMA, FEMA cannot extend the time limit for NFIP-insureds to bring a lawsuit. The applicable time limit to file a lawsuit was set by statute, not FEMA. Although FEMA has the administrative authority to extend the Proof of Loss deadline it established by regulation, FEMA lacks the authority to extend the time limit to file a lawsuit established by statute. This statute of limitations has never been extended.

It is important to understand that the Proof of Loss is not the claim. The claim is the assertion by the insured that they are entitled to be paid for a covered loss under their SFIP (i.e., the demand for money). An NFIP policyholder whose insured property is damaged by an event such as ME Sandy only has one claim arising from that event, regardless of the number of Proofs of Loss that the insured may submit in support of that claim.

Even in the instance of an Increased Cost of Compliance (ICC) claim under Coverage D of the SFIP (which is not an indemnity claim because the coverage is not triggered by the physical loss from the flood but by a determination by the NFIP community that the building has been substantially damaged and must be brought up to the community's current floodplain management guidelines),

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there is only one claim that arises from that substantial damage determination regardless of the number of Proofs of Loss submitted by the insured.

The SFIP sets forth the process that the insured has to follow in supporting his or her claim in the General Conditions section of each form of the SFIP (which is Section VII for the Dwelling and General Property SFIP forms and Section VIII for the Residential Condominium Building Association Policy or "RCBAP" SFIP form). For example, Section VII(J)(1) of the SFIP requires prompt written notice of the loss. Also, Section VII(J)(4) and its subparts set forth what information must be included for the Proof of Loss (which is the policyholder's statement of the amount of money demanded and submitted in support of their claim) and indicate that it must be sent within 60 days after the loss.

NFIP court rulings hold that if the insured does not comply with "all" of the terms and conditions of the SFIP prior to filing a lawsuit (including the Proof of Loss requirements), then the necessary conditions for the insured to be able to bring a lawsuit have not been met. What this means is that, in those instances in which a denial letter has been issued such that the statutory 1 year to bring the lawsuit will run before the Proof of Loss extended deadline runs, the insured has to both file the lawsuit and have the required Proof of Loss requirements completed within 1 year of the date of the denial or partial denial of the claim. This situation will typically arise when the insurer has determined that the insured has not suffered a "direct physical loss by or from flood" and there is no coverage under the SFIP. For example, if the insurer has determined that flood waters did not reach the insured building, a denial letter will be sent because there is no insured loss and no coverage under the SFIP.

In any event, FEMA requires NFIP insurers to continue to work with their insureds. The Program can pay additional amounts if properly supported, even if the formal Proof of Loss deadline has passed. FEMA does this through the granting of the insured's request of an individual waiver of the Proof of Loss deadline through the insurance company. The NFIP makes every possible effort to insure that a proper claims payment and resolution of the claim are achieved in every instance.

The limited waiver and extension of the Proof of Loss deadline recognizes the difficulties insureds damaged by ME Sandy experienced evaluating damage and supporting their flood insurance claim. The typical dispute arises after an insured has received payment based on an adjuster's report and the insurer's approval and later believes there is additional uncompensated damage. The 1 year to sue typically will not be triggered until the required Proof of Loss for the additional amount sought is submitted and there is a complete or partial disallowance/denial of the amount sought. However, as discussed above, there are instances when the claim may be denied for reasons that do not require an adjuster's report or Proof of Loss from the insured. Even in those claims where a denial letter was issued within the first 6 months after ME Sandy, the insured still had a full year from the date of that denial letter to collect all required documentation, file the proof of loss, and then file a lawsuit if such is believed necessary.

Interplay Between the Extension of the Proof of Loss Deadline for NFIP-Insureds Damaged By Meteorological Event Sandy and the 1-Year Statute of Limitations in 42 U.S.C. § 4072 (VII,R, Suit Against Us)

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The extended time to file the Proof of Loss is an effective mechanism that allows insureds to fully present their claims. For the majority of claims, disputes will not arise until after the submission of the Proof of Loss and formal denial of the amount sought. While FEMA does the most it can to assist NFIP insureds, it cannot and does not waive or extend the applicable statute of limitations.

Conclusion:

We ask for your full support. Any questions or comments should be directed to Russell Tinsley, Claims Examiner for the National Flood Insurance Program. Mr. Tinsley may be reached by email at Russell.Tinsley@fema.dhs.gov.

cc: Vendors, IBHS, and Government Technical Representative

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

PETER CHARNOCK §
V. § MISCELLANEOUS NO. G-10-mc-7015
FIDELITY NATIONAL PROPERTY and § (Lead Case No. G-10-cv-450)
CASUALTY INSURANCE COMPANY §

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court with the consent of the Parties pursuant to 28 U.S.C. §636(b)(1)(c). Having considered and reviewed the evidence in a trial on March 27, 2013, the Court now issues the following Findings of Fact and Conclusions of Law.

1. Plaintiff, Peter Charnock, a licensed building contractor since 1984, is the owner of an elevated home at 1140 Sailfish, located within the City of Bayou Vista in Galveston County, Texas. He purchased the home in 1972 for \$66,000.00.
2. At all times relevant to this case, Charnock's home was insured under a Standard Flood Insurance Policy (SFIP) issued by Defendant, Fidelity National Property and Casualty Insurance Company, a WYO carrier under the National Flood Insurance Program. The SFIP provided coverage in the amounts of \$250,000.00 for the building and \$10,500.00 for contents.
3. In early September 2008, Charnock's home was significantly damaged by flooding caused during Hurricane Ike.



4. Charnock notified Fidelity of his claim and following an adjuster's visit, Fidelity, on October 3, 2008, issued preliminary checks in the amount of \$10,000.00 for building damage and \$5,000.00 for contents damage.
5. On November 2, 2008, Charnock filed a pro se proof of loss which included a detailed list of the damages to his building in the amount of \$84,411.00 and its contents in the amount of \$32,949.76, for a "total loss due to Hurricane Ike" of \$117,360.76.
6. On December 8, 2008, the adjuster assigned to the claim issued his report which assessed the building loss at \$53,429.08 and the contents loss as "in excess of the policy limits." On January 15, 2009, Fidelity issued additional checks in the amounts of \$42,429.00 for building damage and \$5,500.00 for contents damage.
7. On June 4, 2009, Fidelity issued its final check in the amount of \$14,408.59 for recoverable depreciation on the building.
8. In total, by June 4, 2009, Fidelity had paid Charnock a total of \$66,837.67 for damage to his home.
9. Unhappy with Fidelity's payments, Charnock signed a sworn Proof of Loss, dated July 22, 2009, claiming a net amount of \$258,500.00, the policy limits. Apparently, Charnock sent the Proof of Loss to their attorney, Samuel Bearman, who then sent it to Fidelity. Included with the Proof of Loss was a detailed Flood Repair Estimate prepared by Halley Lovato, of Top Construction, Inc., which set the repair/replacement cost of Charnock's damages at only \$90,750.00. Charnock testified that he did not recall ever seeing Lovato's report. He testified he probably would have remembered

it because he would have disagreed with it. He further testified that the Proof of Loss he swore to exceeded his actual damages, a fact he referred to as a “technicality.” On October 19, 2009, Fidelity sent a letter to Charnock’s attorney, Samuel Bearman, acknowledging receipt of “*your* Proof of Loss in the amount of \$258,00.00” and explaining why Fidelity was denying any further payments. Since the letter specifically referred to the “enclosed” estimate the Court assumes, without finding, that Bearman, acting as counsel for Charnock, included Lovato’s estimate with Charnock’s Proof of Loss and submitted both to Fidelity. Regardless, Charnock is bound by the acts of his attorney. Callip v. Harris County Child Welfare Dept., 757 F.2d 1513, 1522 (5th Cir. 1985) (citing Link v. Wabash R. Co., 370 U.S. 626, 633 (1962))

10. On April 27, 2011, Charnock, through current counsel, Martin Mayo, sued Fidelity for breach of contract.
11. Ultimately, Charnock, using his own construction company, completely repaired his home, restoring it to its pre-Ike condition, for a total cost, including labor and profit, of \$133,269.13. At trial, Charnock testified that he had calculated this figure “last night.”
12. The Standard Flood Insurance Policy contains numerous mandatory provisions addressing a Proof of Loss. Among others, the Proof of Loss must state the amount the insured is claiming under the policy and be sworn to by the insured. In completing the Proof of Loss, the insured is required to “use your own judgment concerning the

amount of loss and justify that amount” and must not misrepresent any material facts or include false statements. See SFIP §§ VII. J.5 and VII.B.1.

13. While this Court would be inclined to take the more relaxed approach, urged by Plaintiff’s counsel, to the sufficiency of documentation submitted in support of the Proof of Loss and the need to pinpoint the expense of repairs and replacement items to make the amount of the Proof of Loss “match” the documentation amount, Cf. Sunray Village Owners’ Association v. Old Dominion Insurance Co., 546 F.Supp. 2d 1283 (N.D. Fla. 2008), as opposed to the more draconian approach favored by Fidelity, it cannot “turn a blind eye” to Charnock’s submission, under oath, of a known falsely inflated claim. Whether Charnock submitted the Proof of Loss out of anger, frustration, caution, or some other reason, he knew it was excessive at the time he signed it. The submission seems even more egregious since Charnock had the experience to calculate his loss with much more accuracy than most insureds, in fact, his original pro se proof of loss was much more accurate than the one pending when this suit was filed. It is clear to the Court that Charnock, in violation of the policy, swore to false statements in the Proof of Loss; did not use his best judgment concerning the amount of his claim; and did not justify the policy limit amount of \$258,500.00 he claimed was due.
14. It may be unrealistic to expect an insured to understand the potential pitfalls of the National Flood Insurance Program; however, as harsh as it may seem, federal law requires the Court to strictly construe and enforce the claims presentment rules of the

SFIP. Gowland v. Aetna Casualty and Surety Co., 143 F.3d 951, 954 (5th Cir. 1998)

The filing of a Proof of Loss sufficient to allow FEMA the opportunity to properly evaluate a claim is required. Foreman v. Federal Emergency Management Agency, 138 F.3d 543, 545 (5th Cir. 1998) Charnock's sworn Proof of Loss did not comply with this requirement. In the "best of all possible worlds" Charnock would be entitled to recover exactly the cost of restoring his house to its pre-hurricane condition, but in the "world" of the National Flood Insurance Program, any non-compliance not waived by FEMA can render an unfair result. Only FEMA can forgive an insured's noncompliance, Gowland v. Aetna Casualty and Surety Co., 143 F.3d 951, 954 (5th Cir. 1998), this Court cannot force it to do so. For whatever reason, FEMA will not forgive Charnock, even though it means he will not recover the amount it seems clear that he would be otherwise owed under the policy. As a result, on the facts in this case, Charnock is not entitled to recover any additional insurance benefits.

CONCLUSION

It is, therefore, **ORDERED** that the Amended Complaint of Peter Charnock, is **DISMISSED**.

DONE at Galveston, Texas, this _____7th_____ day of January, 2014.



John R. Froeschner
United States Magistrate Judge

Exhibit D



FEMA

W-13029



May 15, 2013

MEMORANDUM FOR: Write Your Own (WYO) Principal Coordinators and the
National Flood Insurance Program (NFIP) Direct Servicing Agent

A handwritten signature in black ink, appearing to read "James A. Sadler".

FROM: James A. Sadler, CPCU, AIC
Director of Claims
National Flood Insurance Program

SUBJECT: **Proper Invocation and Usage of the Appraisal Clause Provisions in
the Standard Flood Insurance Policy**

The Federal Emergency Management Agency (FEMA) administers the National Flood Insurance Program (NFIP) and promulgates all forms of the Standard Flood Insurance Policy (SFIP). There are three forms of the SFIP—the Dwelling Form, the General Property Form, and the Residential Condominium Building Association Policy (RCBAP)—which are promulgated and found at 44 C.F.R. § 61, Appendixes A(1), A(2), and A(3), respectively.

Each form of the SFIP contains an Appraisal clause in its General Conditions (Section VII (P) (in the Dwelling and General Property Forms), and Section VIII (P) in the RCBAP). FEMA is issuing this bulletin to provide guidance regarding when the Appraisal clause may be used, and what the necessary conditions are for invoking it.

The text of the Appraisal provision states the following:

P. Appraisal

If you and we fail to agree on the actual cash value or, if applicable, replacement cost of your damaged property to settle upon the amount of loss, then either may demand an Appraisal of loss. In this event, you and we will each choose a competent and impartial appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the State where the covered property is located. The appraisers will separately state the actual cash value, the replacement cost, and the amount of loss to each item. If the appraisers submit a written report of an agreement to us, the amount agreed upon will

Proper Invocation and Usage of the Appraisal Clause Provisions in the
Standard Flood Insurance Policy

May 15, 2013

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be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of actual cash value and loss.

Each party will:

1. Pay its own appraiser; and
2. Bear the other expenses of the Appraisal and umpire equally.

The SFIP Appraisal process is a mechanism for resolving only disputes regarding the dollar amounts to be paid for flood damages covered by the SFIP. The Appraisal process **cannot** be used as a method to determine scope of damage, coverage under the SFIP, or causation of damages. FEMA has had this rule in place in the Adjuster Claims Manual for many years. (See pp. V-33 (Dwelling Form commentary), V-71 (General Property Form commentary), and V-107 (RCBAP commentary) in the Adjuster Claims Manual.)

Further, FEMA believes that the Appraisal clause is one of the last resorts available for attempting to resolve a claim (initiating a lawsuit being the last resort) and it should not be used instead of the claims adjusting process. FEMA encourages the insured and the insurer to exhaust all other avenues available to determine the fair price for an agreed-to scope of loss. This includes the insured obtaining and providing all estimates (or if repairs or replacement has already occurred, actual receipts or invoices), photos, and any other relevant documentation or written narrative explanation that may support what the insured is claiming as a fair price of the agreed-to scope of loss.

For the Appraisal clause to be properly invoked, the following conditions must be met prior to the parties using the Appraisal process:

1. The named insured and the issuer of the SFIP must agree to the scope of loss and damages. This means that there must be a list of damaged items (the scope) that both parties agree were damaged by the flood event and covered by the SFIP. If the insured and insurer cannot agree on the scope of loss, then the Appraisal provision cannot be invoked. This means that a claim cannot be partially resolved by the Appraisal process and partially resolved by other means (such as an appeal to FEMA or through litigation). Appraisal can only be used when it will result in complete resolution of the entire claim.
2. The insured must have submitted a timely and complete Proof of Loss with supporting documentation for the items which the insured is seeking Appraisal. If an insured submitted a Proof of Loss for a dollar amount of damages and the insurer paid that amount in full, the Appraisal clause cannot be invoked because there is no dispute between the insured and insurer as to the scope of loss or pricing.

Proper Invocation and Usage of the Appraisal Clause Provisions in the
Standard Flood Insurance Policy

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3. Appraisal is available only when the dispute between the parties involves the price to be paid for an SFIP-covered flood-damaged item. No other dispute of any type (e.g., coverage, scope, or causation) can be submitted to Appraisal. If any issue other than pricing is attempted to be resolved through use of the Appraisal process, then the Appraisal provision has not properly been invoked and the Appraisal process is not valid.
4. The Appraisers and umpire selected for the Appraisal process must be competent and impartial. This means that the individuals nominated to serve as Appraisers by the parties, and the umpire to be selected by the Appraisers, cannot be in a position to profit from a higher claim(s) payment made to the insured. For example, if the insured has hired a public adjuster or attorney whose fee is based upon the insured securing a higher claims payment, no one employed, affiliated with, or related to the public adjuster or attorney could serve as the Appraiser or the umpire. The same rule applies to the insurer; no one employed, affiliated with or related to the adjuster or owner of the adjusting company who could receive a higher fee based upon the insured receiving a greater payment could serve as the Appraiser or umpire. The Appraisal process would not be valid if the Appraiser and/or umpire were not competent and impartial.

If possible, the Appraisal provision should be invoked prior to the insured filing a lawsuit. Appraisal is a means to avoid a lawsuit, and FEMA encourages the use of Appraisal as a viable alternative to litigation. However, nothing prohibits the Appraisal provision from being invoked after a lawsuit has been filed as a means of fully resolving the litigation. Appraisal cannot be used as a means to resolve some issues and not others because of the necessity of having an agreed-to scope of loss before invoking the clause. This means that Appraisal would only be available after a lawsuit is filed if it would result in a resolution of all claims of the insured and a dismissal of the lawsuit. If the insurer does not have the policyholder's complete Proof of Loss to support the amount of the Appraisal award, the insurer, upon the policyholder's request must seek a waiver from the Federal Insurance Administrator of the time period to submit a Proof of Loss in order for the Appraisal award to be valid.

Amounts payable as a result of a successful Appraisal should be paid within the 60 days allowed by Section VII (M) of the SFIP; however, nothing prevents the parties from agreeing to a longer period of payment. If a matter is in litigation and the parties consent to the Appraisal process or Appraisal award, the insurer would arrange for payment in accordance with the normal process of paying such disputed amounts (which is typically upon conclusion of all litigation or appeals).

Insurers should pay close attention to the time deadlines in the Appraisal provision with regard to appointing either an Appraiser and/or umpire. If the insured makes an inappropriate demand for an Appraisal (as described above), then a denial letter should be sent as soon as practicable

Proper Invocation and Usage of the Appraisal Clause Provisions in the
Standard Flood Insurance Policy

May 15, 2013

Page 4

explaining why the Appraisal provision cannot be invoked, citing any applicable terms of the SFIP which may be at issue. Not responding to the Appraisal demand at all is not a good practice, as the SFIP provides a process for having an umpire appointed by a court of record in the state where the insured property is located. (Because a lawsuit may be brought only in the United States District Court where the insured property is located, a “court of record” would only be the United States District Court, as a state court could not preside over a matter involving an SFIP).

Please note that if an insured invokes the Appraisal process, the insured cannot subsequently file an appeal to FEMA. Similarly, if an insured submits an appeal to FEMA, the insured cannot subsequently invoke the Appraisal clause. (*See* 44 C.F.R. § 62.20 (c).) It should also be noted that FEMA is not a proper party to the Appraisal process when the policy is issued by a Write Your Own (WYO) Program participating insurance company because FEMA is not a party to that SFIP. (*See* 44 C.F.R. § 62.23 (g).)

This bulletin does not supersede or invalidate any term or condition of the SFIP. It contains FEMA’s interpretation of the Appraisal clause, under what condition it may be invoked, and is provided only as guidance.

Conclusion:

We ask for your full support. Any questions or comments regarding the Appraisal process should be directed to Russell Tinsley, Claims Examiner for the National Flood Insurance Program. Mr. Tinsley may be reached by email at: Russell.Tinsley@fema.dhs.gov.

If a WYO Carrier issues a payment in accordance with the terms and conditions set forth in this bulletin, and has the required documentation for these payments, then FEMA will use these standards in all reviews or audits of files, including any reviews under the Arrangement or the Improper Payments Information Act of 2002 (Public Law 107-300, 33 U.S.C. §3321 note), as amended by the Improper Payment Elimination and Recovery Act of 2010 (Public Law 111-204). However, if a payment is incorrectly made to an insured who has not had flood damages or the claim is not properly documented, or if the WYO Company inappropriately used the Appraisal provision, the WYO Company will be responsible to FEMA for the erroneous payment.

Authority: 44 C.F.R. § 61.13(d); 44 C.F.R. §§ 61, Appendices A(1), A(2) and A(3), General Conditions (P) and (M); 42 U.S.C. § 4019.

cc: Vendors, IBHS, and Government Technical Representative

Required Routing: Claims, Underwriting

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

-----X

IN RE HURRICANE SANDY NFIP CASES

-----X

THIS DOCUMENT APPLIES TO:

ALL RELATED CASES

-----X

**CERTAIN DEFENDANTS’¹ PROPOSED CASE
MANAGEMENT ORDER FOR THE NFIP CASES**

WHEREAS, and upon conferring on March ____, 2014 with as many counsel as possible for the Hurricane Sandy NFIP² Cases, the United States District Court for the District of New Jersey has experienced the influx of hundreds of National Flood Insurance Program (“NFIP”) cases, and expects that many additional cases will soon be filed in this Court related to Hurricane Sandy, and in view of the multiple parties to the Hurricane Sandy litigation, and pursuant to Fed. R. Civ. Pro. 16 (b), the Court enters this Case Management Order to establish the management of documents and initial disclosures with the goal of facilitating orderly pretrial proceedings, avoiding duplication of effort and unnecessary expense, and addressing the expected duplication

¹ This proposed Case Management Order for the Hurricane Sandy NFIP cases is submitted on behalf of the following NFIP Program carriers: Allstate Insurance Company, American Bankers Insurance Company, American Reliable Insurance Company, American Strategic Insurance Company, Fidelity National Insurance Company, Fidelity National Indemnity Insurance Company, Fidelity National and Property Casualty Insurance Company, Foremost Insurance Company, Hartford Fire Insurance Company, High Point Preferred Insurance Company, Liberty Mutual Insurance Company, Lancer Indemnity Company f/k/a North Sea Insurance Company, Met-Life Auto and Home Insurance Company, New Hampshire Insurance Company, New Jersey Re-Insurance, New York Central Mutual Insurance Company, Philadelphia Contributorship Insurance Company, Philadelphia Insurance Company, Philadelphia Indemnity, Selective Insurance Company, Utica First Insurance Company, and Wright Insurance Company f/k/a Fidelity National Indemnity Insurance Company.

² National Flood Insurance Program. 42 U.S.C. §4001 et. seq.

of effort and unnecessary expense, and addressing the expected duration of all further proceedings in this Court relating to claims between NFIP insureds and insurers arising from NFIP claims presented after Hurricane Sandy.

Nothing in this Case Management Order is intended to slow the resolution of any case. For example, simple cases should not be delayed by cases with multiple issues.

I. APPLICABILITY OF THIS ORDER

The terms of this Case Management Order are effective as of the date of its filing, and shall apply without further order of this Court to any Hurricane Sandy³ case involving claims arising from an NFIP Standard Flood Insurance Policy (“SFIP”)⁴ which is currently filed, subsequently filed, transferred to, or removed to the United States District Court for the District of New Jersey, and which seeks a recovery under the NFIP for damages alleged to have occurred during Hurricane Sandy. It is ordered that this Order shall be filed into the record of each such case.

II. PRIVILEGE

Communications of any kind, whether written, oral, or electronic, between or among plaintiffs’ counsel and their respective clients shall be privileged. Communications of any kind, whether written, oral, or electronic between or among defendants’ counsel and their respective clients shall be privileged.

III. DOCUMENTS GENERALLY

A. Counsel shall develop and use a system for identifying by a unique number or symbol each document produced or referred to during the course of these cases. Briefs and other

³ No significance should be attached to a WYO Program carrier’s use of any particular moniker to refer to Sandy, such as hurricane, or super storm or meteorological event. Such designations are immaterial to NFIP cases.

⁴ 44 C.F.R. Pt 61, App.A.

communications among the parties or to the Court shall use these identifying features to refer with specificity to the documents. If the documents are produced by persons or entities who are not parties to this action, and those documents are not already identified by a unique numbering system when produced, then the party at whose request the production was made shall be responsible for numbering the documents. The numbering system shall include a prefix or other mark that will identify the party or third-party that produced the respective document.

B. While this litigation is pending, all parties will comply with the federal rules regarding preservation of evidence.

IV. PROTECTED DOCUMENTS

A. A party shall produce a privilege log for those documents it is not producing on the basis of privilege within fourteen (14) days of the completion of the production at issue. The log should include the author of the document, the recipient of the document, the type of document, the document date, and the privilege asserted. A party that inadvertently produces a document that it maintains is privileged shall, upon becoming aware of the inadvertent production, promptly file and serve a notice into the record identifying the document by its specific identifying characteristic, such as by Bates number. Any party that received the document inadvertently produced is to hold said document and not use it for any purpose whatsoever until such time as the producing party withdraws the claim of privilege or the Court determines that the document is not privileged. In the event that the Court rules that the document is privileged, the party receiving the document shall immediately destroy the document received and all copies thereof, unless it received the original, in which case it shall return the original to the producing party, and destroy all copies previously made.

V. INITIAL DISCLOSURES

The parties in each case to which this Order applies shall begin discovery as soon as possible, consistent with this Order, rather than waiting for the Court to schedule a Rule 16 conference. This Order shall take the place of the normal Rule 16 Scheduling Conference and Order.

Certain information should be disclosed in an expedited manner, so that the parties can evaluate their respective cases, and potentially assist the Court in identifying common legal and factual issues among the cases. Accordingly, the requirements for Rule 26(a)(1) initial disclosures are modified by this Order as set forth below:

Production of the initial disclosure is not an admission of relevancy or admissibility of the documents produced.

A. In lieu of Rule 26(a)(1) Initial Disclosures, plaintiffs shall disclose the following to their insurers:

- 1) The identity of each policy of insurance held by, or potentially benefitting, each plaintiff on the date of the loss (including without limitation flood and wind policies), against which any type of claim was made for damages from Hurricane Sandy. This identification must include the complete name of the insurer, all policy numbers and all claim numbers for claims made for loss(es).
- 2) The address of each property for which a loss is claimed.
- 3) Each plaintiff's current address.
- 4) To the extent in either plaintiff's or plaintiff's counsel's possession, all documents supporting the claimed covered loss including without

limitation, all estimates of loss from any source (including other insurers) and all receipts.

- 5) All photographs, to the extent possible, shall be produced in color, either in printed form or on a disk.
- 6) To the extent in either plaintiff's or plaintiff's counsel's possession, all documents relating any repair work performed after Hurricane Sandy, including but not limited to contracts, bids, estimates, payments or receipts.
- 7) To the extent in either plaintiff's or plaintiff's counsel's possession, all documents in any way reflecting payments received to date for losses from Hurricane Sandy from any source including other insurers and/or the Federal Emergency Management Agency ("FEMA"), documents in any way connected with a loan from the United States Small Business Association ("SBA"), and documents in any way connected with an application for and/or an award of a grant from any other governmental program, federal, state, or local.
- 8) An itemized statement of damages claimed for each plaintiff for dwelling; as well as for contents, including receipts (if available), value, brand, age, and any other identifying information. If the contents claim is no longer in dispute, a statement to this effect must be made.
- 9) Plaintiff shall identify (and produce, if necessary) within 30 days of the filing of defendant's Answer, each document or documents that the

plaintiff is relying upon as satisfying the Proof of Loss requirement of the SFIP at 44 C.F.R. Pt. 61, App.A(1), Art. VII(J)(4).

- 10) Plaintiffs shall also identify (and produce, if necessary) within 60 days of the filing of defendant's Answer, each document or documents that the plaintiff is relying upon as satisfying the detailed line item documentation requirement of the SFIP at 44 C.F.R. Pt. 61, App. A(1), Art. VII(J)(3) and (4)(f) and (i).
- 11) To the extent in plaintiff's or plaintiff's counsel's possession, the entire file of any expert, estimator or contractor hired by the plaintiff or counsel to inspect the property and/or to render a report, estimate or opinion.
- 12) Identify any other Sandy related lawsuits already filed by the plaintiff, or which are contemplated.

The purpose of ¶¶(9) and (10) above is to establish what the plaintiff considers to be his or her proof of loss. As to whether the proof of loss identified by the plaintiff complies with the law, that issue will be determined on a case-by-case basis in each individual proceeding.

B. In lieu of Rule 26(a)(1) Initial Disclosures, defendants shall disclose the following to plaintiffs:

- 1) The non-privileged portion of their claim files including, without limitation:
 - a) All loss reports and damage assessments, which include the names of the adjusters for each claim;
 - b) All photographs, to the extent possible, shall be reproduced in color, either in printed form or on a disk;

- c) All claim log notes;
 - d) Record of all payments on the claim;
 - e) All drafts, adjuster reports, and emails contained in the claim file or specific to that claim;
 - f) Insofar as they are in either defendant's or defendant's counsel's possession, the entire file, including reports from any and all vendors or independent companies who handled or reviewed the claim file;
 - g) Insofar as they are in either defendant's or defendant's counsel's possession, copies of engineering reports;
 - h) Insofar as it exists, a document that defines or describes the content of a claim file;
 - i) All documents sent to insurer/defendant by the insured/plaintiff regarding the claim;
 - j) All documents sent to insured/plaintiff by the insurer/defendant regarding the claim.
 - k) Any correspondence that the insurer/defendant contends is a denial of all or part of the claim submitted by plaintiff.
- 2) It is anticipated that the claims files will contain an explanation of any monies paid on the respective plaintiff's claim, if any. However, if upon receipt of the claim files, there is no explanation of monies paid on plaintiff's claims, defendant insurer will produce an explanation upon

plaintiff's informal request within 30 days or upon a time otherwise agreed upon by the parties.

- 3) All underwriting documents pertaining to the policy(ies) at issue upon request.
- 4) To the extent in defendant's or defendant's counsel's possession, the entire file of any expert, estimator or contractor hired by the defendant or its counsel to inspect the property and/or to render a report, estimate or opinion.

The time periods set forth in this Order shall commence as of the filing of defendant's Answer.⁵ The foregoing disclosures by both plaintiffs and defendants are due within 30 days of the filing of defendant's Answer, except for the underwriting documents, which will be due 30 days after a request is made. The identification of plaintiff's documentation required at Section V.A.10 above will occur 60 days after the filing of defendant's Answer, to allow plaintiff to first examine the defendant's claims file before making this identification.

VI. DEPOSITIONS

- A. Absent consent or a court order, the length of individual depositions shall not exceed seven (7) hours.
- B. Except for good cause shown, counsel are to be allowed to participate in depositions via telephone if they so choose.
- C. All depositions are to be scheduled such that they are complete before the applicable deadline date for their taking.

⁵ Using the date of the Answer upon which to start the running of deadlines does not foreclose the possibility that in any individual case, a defendant may file a Rule 12 or other responsive motion or pleading, other than an Answer. The deadlines of the Order will commence when an Answer is filed.

- D. Except for good cause shown, or by agreement of counsel, no deposition is to be set without at least two weeks advance notice with the required Notice of Deposition. Unilateral setting of depositions without cooperation as to calendaring is to be avoided to the fullest extent possible.

VII. CUT-OFF DATES

A. In lieu of an initial Rule 16 scheduling conference in each case, the Court sets the following cut-off dates, across the board, in all Sandy NFIP cases:⁶

1. Amendments to pleadings, and the addition of new parties: 30 days from the filing of defendant's Answer.
2. Plaintiff's Witness and Exhibit List, with expert designations in compliance with the federal rules: 90 days from the filing of defendant's Answer.
3. Defendant's Witness and Exhibit List, with expert designations in compliance with the federal rules: 120 days from the filing of defendant's Answer.
4. Plaintiff's Rule Compliant Expert Reports to be exchanged: 150 days from the filing of defendant's Answer.
5. Defendant's Rule Compliant Expert Reports to be exchanged: 180 days from the filing of defendant's Answer.
6. Discovery Cut-Off: 300 days from the filing of defendant's Answer.⁷

⁶ The parties are free to apply to the Court for different deadlines in particular cases (e.g., a commercial dispute), where good cause exists to show that different deadlines would be appropriate.

⁷ To be timely, a request for written discovery, deposition notice, or subpoena must be served in sufficient time for compliance to occur before the relevant deadline.

7. Dispositive Motion Cut-Off Date: 365 days from the filing of Defendant's Answer.

B. In every case, prior to the dispositive motion cut-off date, counsel shall participate in a telephone status conference with the magistrate judge to whom the case is assigned to discuss the matter's current status, whether a trial date is needed, or whether some other course of proceeding might be more appropriate. Counsel are instructed to contact the Magistrate Judge for the purpose of scheduling such conferences at least 120 days before the dispositive motion cut-off date, to allow time for conference scheduling.

C. One week prior to the parties' telephone status with the Court discussed in Section VII.B, above, they will jointly file a report providing the following information:

- 1) Discovery completed to date.
- 2) Additional discovery contemplated by each side, along with an anticipated completion date.
- 3) Each side's statement of the key issues in dispute.
- 4) A realistic assessment of when the case would be ready for trial, and the anticipated length of a trial.
- 5) A statement as to any pending or contemplated motions.
- 6) A statement as to whether either or both parties request an extension of any deadlines.
- 7) A statement of any other issues on which the parties believe input from the Court might be useful.

D. The Court will not examine the question of whether it should require the parties to participate in court ordered mediation until the time of the telephone status conference referenced in Section VIII, Par. B, above.

E. At the telephone status conference, the Court will, *inter alia*, assign to the parties a settlement conference date with a magistrate, a pretrial conference date with the district judge, and, if deemed advisable by the magistrate judge, set a trial date.

VIII. STATE LAW CLAIMS, INTEREST AND JURY DEMANDS

A. A fair number of the Hurricane Sandy NFIP cases include various state law based claims, as well as demands for interest and/or for a jury trial. Given the state of the case law upon these matters, and without pre-judging these questions in any way, the Court provides these instructions for the purpose of avoiding potentially unnecessary motion practice:

1) In every Sandy NFIP case where federal benefits under an NFIP/SFIP are sought, and counsel for the plaintiff intends to pursue a state law based claim against the defendant WYO carrier, and/or intends to seek either interest or a jury trial, a written statement to this effect must be filed of record in the case no later than 45 days after the defendant's Answer is filed.

2) If a defendant WYO carrier receiving such a written notification intends to file a dispositive motion upon these topics, said motion must be filed within 30 days of plaintiff's counsel's written notice to the Court.

3) The Court will consider all claims and pretrial motions upon these topics to have been abandoned where these procedures have not been followed.

IX. EXTENSIONS OF TIME

A. The deadlines in this order will be enforced and will be modified only upon a timely showing of good cause. See Fed. R. Civ. P 16(b). The parties are advised that their diligence in conducting discovery will be the primary consideration of the Court in determining whether a good cause exists to modify this Scheduling Order.

B. Any application for an extension of time beyond the deadlines set herein shall be made in writing to the applicable magistrate and served upon all counsel prior to expiration of the period sought to be extended, and shall disclose in the application all such extensions previously obtained, the precise reasons necessitating the application showing good cause under Fed. R. Civ. P. 16(b), and whether adversary counsel agree with the application. The schedule set herein will not be extended unless good cause is shown.

X. SEPARATE WIND/FLOOD LAWSUITS

A. Every plaintiff that has separate wind and flood lawsuits pending in this Court has 30 days from the entry of this order to associate/relate those filings pursuant to the requirements set by this Court.

XI. SETTLEMENT

A. The Court recognizes the value to the parties and the Court in attempting the early settlement of these matters. Accordingly, the Court encourages the parties to engage in settlement conferences with the magistrate judges, the appraisal process of the SFIP, and/or non-binding mediation, in order to attempt to resolve as many cases as possible.

B. In each case where the Proof of Loss and documentation requirements of the SFIP have already been satisfied, where one side believes that invoking the appraisal clause of the SFIP could expedite resolution of the plaintiff's lawsuit, this position should be communicated to

the opposing counsel as soon as possible. If the parties are in disagreement as to whether the appraisal clause is suitable in a given lawsuit, the parties are to contact the applicable Magistrate to attempt to resolve that dispute as soon as practicable.

It is so Ordered, this _____ day of _____, 2014.

United States District Court Judge

Comments From:
Adam K. Derman, Esq.
John F. Casey, Esq.
Wolff Samson

WOLFF & SAMSON

DAVID SAMSON
ARTHUR S. GOLDSTEIN*
ARMEN SHAHINIAN*
JEFFREY S. CHIESA
GAGE ANDRETTA*
DANIEL A. SCHWARTZ*
JOHN J. SCALLY, JR.*
KENNETH N. LAPTOOK*
FREDRIC P. LAVINTHAL
DAVID H. HYMAN*
DAVID L. SCHLOSSBERG
ROGER J. BREENE
BERNARD S. DAVIS
HOWARD J. SCHWARTZ*
PAUL M. COLWELL
ROBERT E. NIES
MORRIS BIENENFELD*
DENNIS M. TOFT
JEFFREY M. GUSOFF*
LAURENCE M. SMITH
WILLIAM E. GOYDAN*
PETER E. NUSSBAUM
LORI GRIFA*
ADAM K. DERMAN
JEFFREY M. WEINICK**
A. ROSS PEARLSON*
MICHAEL J. NAUGHTON*
GEORGE A. SPADORO*
JOHN F. CASEY

JAMES D. FERRUCCI
JOHN A. MCKINNEY JR.
DARRYL WEISSMAN*
MICHELLE A. SCHAA*
ADAM P. FRIEDMAN*
MITCHELL S. BERKEY*
CATHERINE P. WELLS
JONATHAN BONDY*
SEAN M. AYLWARD
JOHN G. VALERI JR.
ROBERT H. CRESPI*
JAMES P. RHATICAN*
JUNIE HAHN*
JILL D. ROSENBERG*
RONALD L. ISRAEL*
ROXANNA E. HAMMETT
MATTHEW E. BECK*
RHONDA CARNIOL*
ADAM B. CANTOR*
RICHARD WOOD*
DORIT F. KRESSEL*
THOMAS J. TRAUTNER JR.
ROBERT L. HORNBY*
STEPHEN A. KISKER*
TRICIA M. GASPARINE
NICOLE F. DIMARIA
KIRAN V. SOMASHEKARA*
TODD W. TERHUNE

COUNSEL

AARON D. BASSAN
JOSEPH ZAWILA
HOWARD K. UNIMAN
STEVEN S. KATZ*
JUNE S. MELLER*
ANDREW S. KENT*
ERIC J. LEVINE*
STEPHEN G. CORDARO*
WARREN BARROWS*
DONNA M. EREM
JOHN P. MALONEY*
MARC R. LEPELSTAT*
BRUCE D. ETTMAN*
CARLOS G. MANALANSAN*
DANIEL D. BARNES*
DIANA L. BUONGIORNO
CHRISTOPHER R. PALDINO
JOSHUA M. LEE
RICHARD PLUMPTON
DAVID M. DUGAN*
ELISA M. PAGANO
RACHEL C. SANTARLAS**
STEVEN M. DIPASQUO*
MELISSA A. SALIMBENE*

OF COUNSEL

THOMAS R. O'BRIEN*
CARL B. LEVY
MYRNA BLUME

ASSOCIATES

WILLIAM R. FINIZIO
ANDREW A. NOBLE**
DENISE J. PIPERSBURGH*
DANIEL T. McKILLOP
FARAHN ANSARI*
XAVIER M. BAILLIARD*
MARIE L. MATHEWS*
C. NICOLE SULLIVAN*
DARREN GRZYB*
BETH J. ROTENBERG*
BRIAN KANTAR*
JAMES M. VAN SPLINTER*
CHRISTOPHER W. GEROLD*
RAJESH V. FOTEDAR**
ELIZABETH C. YOO*
PATRICIA D. CLEARY*
MAURO G. TUCCI JR.*
ARI S. DAVIS*
MICHAEL R. CARUSO*
WILLIAM J. CANNICI JR.*
LAUREN R. DEMAURO

PATRICK O'REILLY*
LINDSAY A. DISCHLEY*
JOSEPH G. FENSKE*
MARISA A. RAUCHWAY*
MICHAEL K. PLUMB*
MICHAEL G. GORDON*
CELINE L. BARAKAT*
SCOTT C. HOLLANDER*
SCOTT W. LICHTENSTEIN*
KELLY E. BRAUNSTEIN*
RAFAEL E. ROSARIO, JR.*
SHEILA JAIN*
MELISSA A. BROWN
RYAN W. FEDERER*
MINDY P. FOX*
BRIAN P. O'NEILL*
OLEG A. MESTECHKIN**
MELISSA I. FALK WERNICK*
REBECCA VALENCIA*
RICHARD A. CHENG**
BRIGITTE M. GLADIS
BARRY S. SOBEL
CASEY A. MILIANTIA
DAVID FALK

PATENT AGENT

BRYMER H. CHIN
KINZA HECHT

JOHN F. CASEY
One Boland Drive
West Orange, NJ 07052
(973) 530-2017
Fax: (973) 530-2217
jcasey@wolffsamson.com

* MEMBER NJ AND NY BARS
* MEMBER NY BAR ONLY
* MEMBER MA BAR ONLY
* REGISTERED PATENT ATTORNEY
MEMBER NJ BAR ONLY UNLESS OTHERWISE DENOTED

February 24, 2014

Via Email and Regular Mail

William T. Walsh, Clerk
Clarkson S. Fisher United States Courthouse
402 E. State Street, Room 2020
Trenton, NJ 08608
Attn: John O'Brien, Chief Deputy

**Re: Hurricane Sandy Related Cases Seeking Benefits Under
the National Flood Insurance Program Pending before the
United States District Court for the District of New Jersey**

Dear Chief Deputy O'Brien:

Pursuant to the Notice of Public Meeting, and as a follow-up to this firm's prior correspondence, enclosed for the Court's consideration is a proposed Case Management Order for the administration and management of flood cases. The Order is being submitted not only on behalf of our firm, but on behalf of attorneys Martin Mayo and Chip Merlin, and the Law Offices of Samuel W. Bearman who have litigated thousands of flood cases on behalf of plaintiffs. We believe the Order provides the proper balance of moving the cases efficiently while providing the parties with necessary information at the outset of the case. We look forward to discussing this further at the public meeting on March 6, 2014.

WOLFF & SAMSON PC
One Boland Drive, West Orange, NJ 07052 • (973) 325-1500 • Fax: (973) 325-1501
140 Broadway, 46th Floor, New York, NY 10005 • (212) 973-0572
128 West State Street, Suite 3, Trenton, NJ 08608 • (609) 396-6645

www.wolffsamson.com

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February 24, 2014

Page 2

We thank you for your consideration.

Respectfully,



JOHN F. CASEY

JFC/ag

Enclosure

cc: All Counsel on attached service list, as well
as counsel identified on the Notice of Public
Meeting Email dated February 18, 2014(via email)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

IN RE HURRICANE SANDY NFIP CASES

Civil Action No.

THIS DOCUMENT APPLIES TO:

ALL RELATED CASES

UNIFORM SCHEDULING ORDER

WHEREAS, hundreds of actions by insureds under the National Flood Insurance Program (“NFIP”) have been filed in the United States District Court for the District of New Jersey arising out of Hurricane Sandy, and numerous additional actions are expected to be filed;

WHEREAS, this Court desires to facilitate orderly pretrial proceedings, avoid duplication of effort and unnecessary expense, and expedite the resolution of claims between NFIP insureds and insurers arising from NFIP claims presented after Hurricane Sandy; and

WHEREAS, although customary to hold a Fed. R. Civ. P. (Rule) 16 Initial Conference at the commencement of a civil action, and recognizing that Rule 26(d)(1) allows parties to commence discovery once they have “conferred” as required by Rule 26(f), and using its broad discretion to control discovery and docket matters, in lieu of an Initial Conference, this Court is entering a Uniform Scheduling Order which shall apply to all Hurricane Sandy cases arising out of NFIP policies.

It is on this __ day of February, 2014,

ORDERED AS FOLLOWS:

1. **Applicability of this Order.** This Uniform Scheduling Order shall apply to and be entered in all actions filed in this Court seeking compensation for flood damage either

against a Write Your Own (WYO) carrier, FEMA (in regard to policies issued directly by the National Flood Insurance Program) or a private insurance carrier issuing either a force-placed policy or an excess policy. This Order shall be entered within twenty (20) days of the filing of any Answer or motion under Fed. R. Civ. P. 12.

2. **Discovery.** All fact and expert discovery shall be completed within 120 days from the entry of this Order.

3. **Pre-Discovery Disclosures:** Within twenty one (21) days after the date this Order is entered in each case, the parties shall exchange the information required by Fed. R. Civ. P 26(a)(1) as well as the following.

A. In addition to the disclosures required by Rule 26(a)(1), plaintiffs shall also disclose the following to the Defendant:

- 1) To the extent then available, the identity of each policy of insurance held by, or potentially benefitting each plaintiff on the date of the loss (including without limitation flood and wind policies), against which any type of claim was made for damages from Hurricane Sandy, including, if available, the complete name of the insurer, all policy numbers and all claim numbers for claims made for loss(es).
- 2) The address of each property for which a loss is claimed.
- 3) Each plaintiff's current address.
- 4) To the extent then available, all documents supporting the claimed covered loss including without limitation, estimates of loss from any source (including other insurers) and receipts. All photos to the extent possible shall be produced in color.
- 5) The entire file of any expert hired by the plaintiff (prior to the date when plaintiff retained counsel to represent it) to inspect the property and render a report or opinion to the extent any part of the file is in the physical possession of the plaintiff.
- 6) To the extent then available, documents in any way reflecting payments received to date for losses from Hurricane Sandy from any source including other insurers and/or the Federal Emergency Management Agency ("FEMA"), documents in any way connected

with a loan from the United States Small Business Association (“SBA”), and documents in any way connected with an application for and/or an award of a grant from any other governmental program: federal, state, or local.

B. In addition to the disclosures required by Rule 26(a)(1), defendants shall also disclose the following to plaintiffs:

- 1) The non-privileged portion of their claim files including, without limitation:
 - a) All loss reports and damage assessments, which include the names of the adjusters for each claim.
 - b) All photographs (reproduced in color).
 - c) All claim log notes.
 - d) Record of all payments on the claim.
 - e) All drafts, adjuster reports, and emails contained in the claim file or specific to that claim.
 - f) Insofar as they exist, reports from any and all vendors or independent companies who handled or reviewed the claim file.
 - g) Insofar as they exist, complete copies of engineering reports.
 - h) Insofar as it exists, a document that defines or describes the content of a claim file.
 - i) All documents sent to insurer/defendant by the insured/plaintiff regarding the claim.
 - j) All documents sent to the insured/Plaintiff by the insurer/defendant regarding the claim.
 - k) Any correspondence that the insurer/defendant contends is a denial of all or part of the claim submitted by plaintiff.
- 2) It is anticipated that the claim file will contain an explanation of any monies paid on the respective plaintiff's claim, if any. However, if upon receipt of the claim file, there is no explanation of the monies paid on plaintiff's claim, defendant/insurer will produce an explanation

upon plaintiff's informal request within 30 days or upon a time otherwise agreed upon by the parties.

- 3) All underwriting documents pertaining to the policy(ies) at issue upon request.
- 4) The entire file of any expert or contractor hired by the defendant (prior to the date when defendant retained counsel to represent it) to inspect the property and render a report or opinion to the extent any part of the file is in the physical possession of the defendant.
- 5) The entire file of any and all vendors or independent companies who handled or reviewed the claim file to the extent any part of the file is in the physical possession of the defendant.

4. **Discovery Plan.**

- A. The maximum number of interrogatories, including subparts, by each party to any other party shall be 25 .
- B. The maximum number of requests for admissions by each party to any other party shall be 25.
- C. The maximum number of depositions by Plaintiff (including experts) shall be 10. The maximum number of depositions by Defendant (including experts) shall be 10.
- D. Depositions of all witnesses would be limited to 7 hours, per Fed. R. Civ. P. 30(d)(2), unless extended by agreement of the parties. Except for good cause shown, counsel shall be allowed to participate by telephone.
- E. Rule 26(a)(2) disclosures of expert witnesses and their opinions shall be made by Plaintiff no later than forty five (45) days after the entry of this Order, and by Defendant no later than seventy five (75) days after the entry date of this Order.
- f. Supplementations under Rule 26 are due within thirty days after a party takes possession of evidence subject to disclosure under the rule and otherwise no later than thirty days before the discovery deadline.

5. **Discovery Disputes.** The attorneys for all parties are encouraged to meet together by agreement and confer with one another in an attempt to resolve any discovery disputes before bringing them to the attention of the Court. Any disputes which cannot be

resolved through the meet and confer process shall be submitted to the Court by letter as opposed to formal motion.

6. **Adding Parties & Amending Pleadings.** The parties shall join any additional parties and file any amendment to their pleadings within forty five (45) days of the entry of this Order.

7. **Telephone Conference:** A telephone conference will be held by the Court approximately ninety (90) days after the entry date of this Order. Plaintiff shall initiate the call. At such time, the Court will address, among other things, (a) whether additional time is expected to be needed for discovery; (b) whether any party intends to file a dispositive motion; and (c) whether it should require the parties to participate in court ordered mediation or other dispute resolution procedure. If the parties proceed to such dispute resolution procedure and if the case is not resolved, the parties stipulate that they will be ready for trial within ninety (90) days post-dispute resolution procedure. If the parties do not proceed to such dispute resolution procedure, the parties stipulate that they will be ready for trial within ninety (90) days of the telephone conference. The Court may, from time to time, schedule other conferences as may be required, either on its own motion or at the request of the parties.

8. **Dispositive Motions:** The parties shall file all potentially dispositive motions no later than thirty (30) days after the close of discovery.

9. **Pre-Trial Conference:** The Court will conduct a pretrial conference in each case at the appropriate time. In advance of the Pretrial Conference, the parties shall produce the information required by Fed. R. Civ. Proc. 26(a)(3) and any other requirements of the Pretrial Order.

10. **Settlement:** The Court recognizes the value to the parties and the Court in

attempting the early settlement of these matters. Accordingly, the Court encourages the parties to engage in voluntary nonbinding settlement discussions in order to attempt to resolve as many cases as possible.

WOLFF & SAMSON

DAVID SAMSON
ARTHUR S. GOLDSTEIN*
ARMEN SHAHINIEN*
JEFFREY S. CHIESA
GAGE ANDRETTA*
DANIEL A. SCHWARTZ*
JOHN J. SCALLY, JR.*
KENNETH N. LAPTOOK*
FREDRIC P. LAVINTHAL
DAVID M. HYMAN*
DAVID L. SCHLOSSBERG
ROGER J. BREENE
BERNARD S. DAVIS
HOWARD J. SCHWARTZ*
PAUL M. COLWELL
ROBERT E. NIES
MORRIS BIENENFELD*
DENNIS M. TOFT
JEFFREY M. GUSOFF*
LAURENCE M. SMITH
WILLIAM E. GOYDAN*
PETER E. NUSSBAUM
LORI GRIFA*
ADAM K. DERMAN
JEFFREY M. WEINICK¹
A. ROSS PEARLSON*
MICHAEL J. NAUGHTON*
GEORGE A. SPADORO*
JOHN F. CASEY

JAMES D. FERRUCCI
JOHN A. MCKINNEY JR.
DARRYL WEISSMAN*
MICHELLE A. SCHAAP
ADAM P. FRIEDMAN*
MITCHELL S. BERKEY*
CATHERINE P. WELLS
JONATHAN BONDY*
SEAN M. AYLWARD
JOHN G. VALERI JR.
ROBERT H. CRESPI*
JAMES P. RHATICAN*
JUNIE HAHN*
JILL D. ROSENBERG*
JOHN O. LUKANSKI*
ROXANNA E. HAMMETT
RONALD L. ISRAEL*
MATTHEW E. BECK*
RHONDA CARNIOL*
ADAM B. CANTOR*
MARGARET WOOD*
DORIT F. KRESSEL*
THOMAS J. TRAUTNER JR.
ROBERT L. HORNBY*
STEPHEN A. KISKER*
TRICIA M. GASPARINE
NICOLE F. DIMARIA
KIRAN V. SOMASHEKARA*
TODD W. TERHUNE

COUNSEL

AARON D. BASSAN
JOSEPH ZAWILA
HOWARD K. UNIMAN
STEVEN S. KATZ*
JUNE S. MELLER*
ANDREW S. KENT*
ERIC J. LEVINE*
STEPHEN G. CORDARO*
WARREN BARROWS*
DONNA M. EREM
JOHN P. MALONEY*
MARC R. LEPELSTAT*
BRUCE D. ETTMAN*
CARLOS G. MANALANSAN*
DANIEL D. BARNES*
DIANA L. BUONGIORNO
CHRISTOPHER R. PALDINO
JOSHUA M. LEE
RICHARD PLUMPTON
DAVID M. DUGAN*
ELISA M. PAGANO
RACHEL C. SANTARLAS²
STEVEN M. DIPASQUO³
MELISSA A. SALIMBENE*

OF COUNSEL

THOMAS R. O'BRIEN*
CARL B. LEVY
MYRNA BLUME

ASSOCIATES

WILLIAM R. FINIZIO
ANDREW A. NOBLE⁴
DENISE J. PIPERSBURGH*
DANIEL T. MCKILLOP
FARAHN ANSARI*
XAVIER M. BAILLIARD*
MARIE L. MATHEWS*
C. NICOLE SULLIVAN*
DARREN GRZYB*
BETH J. ROTENBERG*
BRIAN KANTAR*
JAMES M. VAN SPLINTER*
CHRISTOPHER W. GEROLD*
RAJESH V. FOTEDAR⁴
ELIZABETH C. YOO*
PATRICIA D. CLEARY*
MAURO G. TUCCI JR.*
ARI S. DAVIS*
MICHAEL R. CARUSO*
WILLIAM J. CANNICI JR.*

LAUREN R. DEMAURO
PATRICK O'REILLY*
LINDSAY A. DISCHLEY*
JOSEPH G. FENSKE⁵
MARISA A. RAUCHWAY*
MICHAEL K. PLUMB*
MICHAEL G. GORDON*
CELINE L. BARAKAT*
SCOTT C. HOLLANDER*
SCOTT W. LICHTENSTEIN*
KELLY E. BRAUNSTEIN*
RAFAEL E. ROSARIO, JR.*
SHEILA JAIN*
MELISSA A. BROWN
RYAN W. FEDERER*
MINDY P. FOX*
BRIAN P. O'NEILL*
OLEG A. MESTECHKIN⁴
MELISSA I. FALK WERNICK*
BRIGITTE M. GLADIS
BARRY S. SOBEL
CASEY A. MILIANTA
DAVID FALK

PATENT AGENT

BRYMER H. CHIN
KINZA HECHT

ADAM K. DERMAN
One Boland Drive
West Orange, NJ 07052
(973) 530-2027
Fax: 973-530-2227
aderman@wolffsamson.com

* MEMBER NJ AND NY BARS
¹ MEMBER NY BAR ONLY
² MEMBER MA BAR ONLY
³ REGISTERED PATENT ATTORNEY

February 7, 2014

Via Email and Federal Express

Honorable Jerome B. Simandle, Chief U.S.D.J.
United States District Court
District of New Jersey
Mitchell H. Cohen Building
and United States Courthouse
4th and Cooper Streets, Courtroom 4A
Camden, NJ 08101

Re: Hurricane Sandy Related Cases Seeking Benefits Under the National Flood Insurance Program Pending before the United States District Court for the District of New Jersey

Dear Judge Simandle:

This firm, as co-counsel with the Law Offices of Samuel W. Bearman of Pensacola, Florida, represents in excess of 125 plaintiffs or potential plaintiffs in claims for unpaid benefits of National Flood Insurance Program ("NFIP") policies. We are writing in response to the letter of Nielsen, Carter & Treas, LLC dated January 31, 2014 proposing a Uniform Scheduling Order. We disagree in form and substance with the proposed Order submitted by Mr. Nielsen and believe that his letter significantly overstates the consensus among plaintiffs' counsel to the Order submitted to Your Honor. In fact, none of the three plaintiffs' attorneys specifically identified in Mr. Nielsen's letter to Your Honor dated January 17, 2014 as possessing "in depth experience handling these types of cases in volume" (Messrs Martin Mayo, Sam Bearman (our co-counsel) and Chip Merlin) support the proposed Order being submitted by Mr. Nielsen.

WOLFF & SAMSON PC
One Boland Drive, West Orange, NJ 07052 • (973) 325-1500 • Fax: (973) 325-1501
140 Broadway, 46th Floor, New York, NY 10005 • (212) 973-0572
128 West State Street, Suite 3, Trenton, NJ 08608 • (609) 396-6645

www.wolffsamson.com

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The experience of these plaintiffs' counsel, combined with our firm's extensive experience in the District Courts in New Jersey, suggest that the proposed Order is unworkable in many respects. In fact, a close examination of Mr. Nielsen's letter reveals that the only sections agreeable to some (certainly not all) of plaintiffs' counsel are sections which we do not believe should even be in a Uniform Scheduling Order as they relate to issues of privilege, bates stamping and the notice requirements for scheduling depositions. Furthermore, we do not believe any of plaintiffs' counsel would have anticipated that the proposed Order would have been accompanied by an eleven page, single spaced letter like that submitted by Mr. Nielsen. Needless to say, we disagree with many of statements expressed by Mr. Nielsen, including his representation as to the import of the applicable law.

Notwithstanding the foregoing, we do believe a Uniform Scheduling Order should be entered, but it should be similar to the Orders already being generated by this Court in Hurricane Sandy related cases. We tried to work with the proposal being submitted by Mr. Nielsen, but with changes and modifications being added along the way, it became too cumbersome. We have, therefore, prepared a more simplified Uniform Scheduling Order, which we are in the process of circulating to the plaintiffs' counsel identified above as well as others. We expect to submit that alternative form to Your Honor within a week. We are hopeful this will be of assistance to the District Court in preparing a Uniform Scheduling Order which balances the interests of all parties.

We thank Your Honor for your kind consideration.

Respectfully,

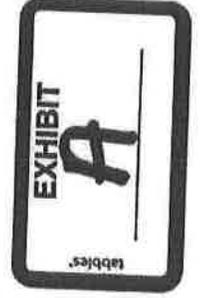


ADAM K. DERMAN

cc: John T. O'Brien, Chief Deputy Clerk (via email)
All Counsel on Enclosed Service list (via email)

AKD/ag

Counsel Type	Atty. Name	Firm Name	Address	City/State/Zip	Phone #	Email
Plaintiffs	Samuel Gearman	Gearman Law	820 North Fifth Avenue	Pensacola, FL 32501	850-435-1000	sgearman@gearmanlaw.com
Plaintiffs	Daniel Ballard	Claims Worldwide	435 N. Main Street	Doylestown, PA 18901	215-230-0800	dballard@claimsworldwide.com
Plaintiffs	Lisa Fitzpald	DiFrancesco Bateman Coley Yospin Kunz	15 Mountain Blvd.	Warren, NJ 07059	908-757-7800	lfitzpald@newrieverlaw.net
Plaintiffs	Rich Guss	DiFrancesco Bateman Coley Yospin Kunz	15 Mountain Blvd.	Warren, NJ 07059	908-757-7800	rguss@newrieverlaw.net
Plaintiffs	Andrew Miller	DiFrancesco Bateman Coley Yospin Kunz	15 Mountain Blvd.	Warren, NJ 07059	908-757-7800	amiller@newrieverlaw.net
Plaintiffs	Verne Pedro	Ellis, Ged & Boddien, PA	1101 Richmond Ave, #201	Pt. Pleasant, NJ 08742	732-451-3608	vpedro@ellisandged.com
Plaintiffs	Cate Biggs	Gauthier Houghtaling and Williams	2323 S. Shepard, Suite 1002	Houston, TX 77019	713-343-1614	cate@ghwlegal.com
Plaintiffs	Fred Bradley	Gauthier Houghtaling and Williams	3500 North Hullen Street	Metairie, LA 70002	504-456-8614	fred@ghwlegal.com
Plaintiffs	Tracey Bryant	Gauthier Houghtaling and Williams	2323 S. Shepard, Suite 1002	Houston, TX 77019	713-343-1614	tracey@ghwlegal.com
Plaintiffs	Andrea Butler	Gauthier Houghtaling and Williams	2323 S. Shepard, Suite 1002	Houston, TX 77019	713-343-1614	andrea@ghwlegal.com
Plaintiffs	Sean Greenwood	Gauthier Houghtaling and Williams	2323 S. Shepard, Suite 1002	Houston, TX 77019	713-343-1614	sean@ghwlegal.com
Plaintiffs	Earl Perry	Gauthier Houghtaling and Williams	2323 S. Shepard, Suite 1002	Houston, TX 77019	713-343-1614	earl@ghwlegal.com
Plaintiffs	Audwin Levasseur	Harbath & Levasseur, PA Law Offices of Jonathan Wheeler, PC	2400 LeMoine Ave., Suite 207	Fort Lee, NJ 07024	973-908-8529	audwin@hlaadvocates.com
Plaintiffs	Jonathan Wheeler	Harbath & Levasseur, PA Law Offices of Jonathan Wheeler, PC	1617 JFK Blvd., Suite 1270	Philadelphia, PA 19103	856-874-1447	lwheeler@wheelerlaw.com
Plaintiffs	Daniela F. Henriques	Leav & Steinberg, LLP	140 Broadway, Suite 9601	New York, NY 10005	212-766-5222	henriques@leavtriallaw.com
Plaintiffs	Martin Mayo	Martin L. Mayo & Associates	8901 Gayford, Suite 110	Houston, TX 77024	713-358-2140	mmayo@martinmayolaw.com
Plaintiffs	William "Chip" Merlin, Jr.	Merlin Law Group, PA	777 S. Harbour Island Blvd., Suite 950	Tampa, FL 33602	813-229-1000	wmerlin@merlinlawgroup.com
Plaintiffs	Mary Fortson	Merlin Law Group, PA	777 S. Harbour Island Blvd., Suite 950	Tampa, FL 33602	813-229-1000	mfortson@merlinlawgroup.com
Plaintiffs	Ashley Smith	Merlin Law Group, PA	777 S. Harbour Island Blvd., Suite 950	Tampa, FL 33602	813-229-1000	asmith@merlinlawgroup.com
Plaintiffs	Jack Palmeri	The Rain Law Firm	77 Water Street, 8th Floor	New York, NY 10005	855-330-7246	jackpalmeri@palmerilawfirm.com
Plaintiffs	Matthew Kotzen	The Rain Law Firm	1920 E. Hallandale Beach Blvd., Ste. 704	Hallandale Beach, FL 33009	855-330-7246	mktotzen@therainlawfirm.com



Counsel Type	Atty. Name	Firm Name	Address	City/State/Zip	Phone #	Email
Plaintiffs	Valerie Peters	The Rain Law Firm	1920 E. Hallandale Beach Blvd., Ste. 704	Hallandale Beach, FL 33009	855-330-7245	vpeters@therainlawfirm.com
Plaintiffs	Bén Rajotte	Tourol Law Center	225 Eastview Drive	Central Islip, NY 11722	631-761-9624	brajotte@toulaw.edu
Plaintiffs	Adam Derman	Wolff & Samson, PC	One Boland Drive	West Orange, NJ 07052	973-325-1500	aderman@wolffsamson.com
Plaintiffs	Christopher Gerold	Wolff & Samson, PC	One Boland Drive	West Orange, NJ 07052	973-325-9190	cgerold@wolffsamson.com
Defense	Nicholas Vytell	Carroll & McNulty & Kull LLC	120 Mountain View Blvd	Basking Ridge, NJ 07920	908-848-6300	nyvtell@cmk.com
Defense	John J. Donnelly	Donnelly & Associates, PC	One West First Ave., Ste. 450	Conshohocken, PA 19388	610-828-2222	donnelly@donnellyandassociates.com
Defense	Michael Lorenz	Donnelly & Associates, PC	One West First Ave., Ste. 450	Conshohocken, PA 19388	610-828-2222	mlorenz@donnellyandassociates.com
Defense	Christian Labelletta	Donnelly & Associates, PC	One West First Ave., Ste. 450	Conshohocken, PA 19388	610-828-2222	labelletta@donnellyandassociates.com
Defense	Mark Walters	Donnelly & Associates, PC	One West First Ave., Ste. 450	Conshohocken, PA 19388	610-828-2222	mwalters@donnellyandassociates.com
Defense	Kevin Frey	Law Offices of Gordon P. Serou, Jr., LLC	650 Prydzas Street, Suite 1002	New Orleans, LA 70130	504-299-3421	kmf@seroulaw.com
Defense	Gordon Serou	Law Offices of Gordon P. Serou, Jr., LLC	650 Prydzas Street, Suite 1002	New Orleans, LA 70130	504-299-3421	gds@seroulaw.com
Defense	James P. Lagios	Iseman, Cunningham, Rieker & Hyde, LLP	9 Thurlow Terrace	Albany, NY 12203	518-463-3000	lagios@icrh.com
Defense	Kristin Muir Mykulak	Montgomery McCracken Walker & Rhoads, LLP	Liberty View, 457 Haddonfield Rd. Ste. 600	Cherry Hill, NJ 08002	856-488-7745	kmykulak@mmwr.com
Defense	James Benjamin	Pessin & Katz Law, PA	901 Dulaney Valley Rd., #400	Towson, MD 21204	410-938-8800	jbenjamin@pklaw.com
Defense	Craig Blackman	Stradley Ronon Stevens & Young, LLP	2005 Market Street, Suite 2600	Philadelphia, PA 19103	215-564-8041	cblackman@stradley.com
Defense	Sam Arena	Stradley Ronon Stevens & Young, LLP	2005 Market Street, Suite 2600	Philadelphia, PA 19103	215-564-8041	sarena@stradley.com
Defense	Gerald Nielsen	Nielsen Carter & Treas	3838 N. Causeway Blvd., Suite 2850	Metairie, LA 70002	504-837-2500	ginielsen@nct-law.com
Defense	John Carter	Nielsen Carter & Treas	3838 N. Causeway Blvd., Suite 2850	Metairie, LA 70002	504-837-2500	jcarter@nct-law.com
Defense	William Treas	Nielsen Carter & Treas	3838 N. Causeway Blvd., Suite 2850	Metairie, LA 70002	504-837-2500	wtreas@nct-law.com
Defense	Joe Aguda	Nielsen Carter & Treas	3838 N. Causeway Blvd., Suite 2850	Metairie, LA 70002	504-837-2500	aguda@nct-law.com
Government	Ramoncito DeBorja	FEMA				Ramoncito.DeBorja@fema.dhs.gov
Government	Raul Blaine	USDOJ/AUSA/Civil Chief NJ				raul.blaine@usdoj.gov
Government	Irene Dowdy	USDOJ/AUSA/Civil Chief NJ				irene.dowdy@usdoj.gov
Government	Thomas McFarland	USDOJ/AUSA/Civil Chief EDNY				thomas.mcfarland@usdoj.gov

Comments From:
William F. Merlin Jr., Esq.
Merlin Law Group

MERLIN

LAW GROUP, PA

RED BANK, NJ
125 HALF MILE ROAD
SUITE 200
RED BANK, NJ 07701
TELEPHONE: (732) 933-2700
FAX: (732) 933-2702

ROBERT T. TRAUTMANN, ESQ.
LICENSED IN NJ AND NC

February 25, 2014

Via Email and Regular Mail

William T. Walsh, Clerk
Clarkson S. Fisher United States Courthouse
402 E. State Street, Room 2020
Trenton, NJ 08608
Attn: John O'Brien, Chief Deputy

**Re: Hurricane Sandy Related Cases Seeking Benefits Under the National
Flood Insurance Program Pending before the United States District
Court for the District of New Jersey**

Dear Chief Deputy O'Brien:

I am writing as a follow up to the letter sent yesterday by attorney John Casey on behalf of certain plaintiff attorneys, including me, who represent policyholders in Superstorm Sandy claims against their flood and wind insurance carriers.

In anticipation of the upcoming Public Meeting on March 6, 2014, I enclose a copy of Case Management Order No. 1, issued in the United States District Court, Eastern District of New York. This Order represents how the judges in that Court have chosen to handle cases pending in their jurisdiction.

We thank you for your consideration

Respectfully,



William F Merlin, Jr., Esquire
Merlin Law Group, P.A.
Signed in Absence to Avoid Delay

MEF/slb
Enclosure

cc: All Counsel identified on the Notice of Public
Meeting Email dated February 18, 2014 (via email)

www.merlinlawgroup.com

Blog: propertyinsurancecoveragelaw.com

Coral Gables, FL • West Palm Beach, FL • Tampa, FL • Houston, TX • Scottsdale, AZ • Denver, CO • Los Angeles, CA • New York, NY • Red Bank, NJ

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

IN RE HURRICANE SANDY CASES

-----X

ORDER

14 MC 41

THIS DOCUMENT APPLIES TO:

ALL RELATED CASES

-----X

CASE MANAGEMENT ORDER NO. 1

INTRODUCTION

On October 29, 2012, the weather event officially designated as Hurricane Sandy made landfall in southern New Jersey, causing severe damage to several states along the East Coast from Florida to Maine.¹ The storm surge struck New York City, causing property damage in excess of \$50 billion, leaving many people homeless and without power.

Currently, more than 800 actions have been filed by property owners in the United States District Court for the Eastern District of New York against various insurers and more cases are expected. The Board of Judges has appointed a committee, consisting of three magistrate judges (the "Committee"), to recommend procedures to ensure proper case filing and relation practices, to establish a plan for expedited discovery, and to facilitate the efficient resolution of these matters in a manner designed to avoid duplication of effort and unnecessary expense. Nothing in this Case Management Order is intended to slow the resolution of any case. Individual cases that are at an advanced stage should not be delayed needlessly as a result of this Order, and counsel are encouraged to employ their own resources in attempting to resolve these cases.

In an effort to explore possible ways in which these matters may be managed more

¹*Hurricane Sandy One Year Later*, FEMA, <http://www.fema.gov/hurricane-sandy>.

effectively, the Committee requested certain basic data about the pending cases from plaintiffs' counsel and obtained written submissions from both plaintiffs' and defendants' counsel setting forth their positions on the best ways to organize and streamline case management. On February 5, 2014, the Committee met with counsel representing all parties to these cases to solicit input and suggestions.

In entering this Case Management Order, the Committee is cognizant of the various interests that need to be balanced here. On the one hand, the Court must ensure that victims of the storm, many of whom were rendered homeless for a time and who may be left without the necessary records or access to qualified contractors to effect repairs, receive an expeditious review of their claims, while at the same time, safeguarding insurers from meritless or inflated claims. As the letters filed by counsel demonstrate, however, there is no universal approach that will facilitate a speedy and fair resolution to these cases. The Court has taken certain steps to ease the burden and expense upon the litigants and the Court. For example, the Court entered consolidated *pro hac vice* orders eliminating the need for out-of-district counsel to file such motions for every case. In addition, with the approval of the Board of Judges, the Court enters the following Order:

I. Appointment of Liaison Counsel

In order to conduct future case management activities more efficiently, the Committee hereby designates Liaison Counsel to assist the Court in coordinating the efforts of all parties.

A. Plaintiffs' Liaison Counsel - The Committee has designated Tracey Rannals Bryan of Gauthier Houghtaling & Williams, and Javier Delgado of Merlin Law Group as Plaintiffs' Liaison Counsel. Plaintiffs' Liaison Counsel shall forward to all plaintiffs' counsel any communication that is designated by the Court as non-case specific.

B. Defendants' Liaison Counsel - The Committee has designated Gerald J. Nielsen of

Nielsen, Carter & Treas, LLC, and Jared T. Greisman of White Fleischner & Fino, LLP as Defendants' Liaison Counsel. Defendants' Liaison Counsel shall forward to all defendants' counsel any communication that is designated by the Court as non-case specific.

II. Misjoinder of Plaintiffs

As an initial matter, the Committee's review of the cases that have been filed to date has revealed that there remain a number of "mass joinder" cases, where plaintiffs joined large groups of property holders in one complaint,² with the only common factor being that the property owners held insurance policies with the same insurance company. The Committee has identified a number of these misjoined cases that are listed in Exhibit A attached hereto. Several district judges, *sua sponte*, dismissed similar complaints without prejudice to refiling, based upon their determination that the plaintiffs were impermissibly joined. See, e.g., Funk v. Allstate Ins. Co., No. 13 CV 5933 (JS) (GRB) (E.D.N.Y. Dec. 13, 2013); Dante v. National Flood Ins. Program, No. 13 CV 6297 (NG) (RER) (E.D.N.Y. Nov. 21, 2013).

Accordingly, IT IS HEREBY ORDERED that within 14 days of the date of this Order, counsel shall dismiss all plaintiffs except the first named plaintiff in each misjoined action listed in Exhibit A hereto, without prejudice to refiling in accordance with this Order's Case Relation Rule set forth below.

IT IS FURTHER ORDERED that within 14 days of this Order, the parties shall provide the

²In its submission to the Committee, plaintiffs' counsel suggested that not only would it be "convenient and efficient" to proceed by joining the plaintiffs in this manner, but that "it would also result in a considerable savings to the parties in terms of filing fees." No. 14-MC-41, Entry 65. This Court has previously ruled that plaintiffs cannot avoid paying statutorily-mandated filing fees through improper mass joinder. See In re BitTorrent Adult Film Copyright Infringement Cases, Nos. 11 CV 3995, 12 CV 1147, 12 CV 1150, 12 CV 1154, 2012 WL 1570765, at *12-13 (E.D.N.Y. July 24, 2012), *report and recommendation adopted sub nom. Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012).

Committee with a list of any additional cases (not listed in Exhibit A) in which plaintiffs continue to be joined improperly solely because they share a common defendant, and dismiss all but the first named plaintiff in those cases in accordance with this Order.

III. Relation and Consolidation of Cases

In soliciting filings from counsel, the Committee directed counsel to “file a letter in accordance with Local Rule 50.3.1(d) (the “Case Relation Rule”), explaining how counsel proposes to group the cases.” To date, no attorney has proposed a comprehensive plan for relating the cases and several have specifically opposed relation or consolidation of any cases. Notwithstanding these positions, the Committee has determined that, based on the information available, one subgroup of cases will benefit from relation to a single judicial officer.

A. Cases Relating to the Same Property

In a number of instances, multiple cases have been filed relating to the same property, most often where the property is insured under separate policies, such as wind and flood damage policies (“Common Property Cases”). The Committee has compiled a preliminary list of Common Property Cases, attached as Exhibit B to this Order.

Although some counsel have opposed relation or consolidation of the Common Property Cases, the Committee, after careful consideration, has determined that there would be a significant savings of judicial resources if multiple cases relating to the same property were assigned to the same district judge and magistrate judge under the Case Relation Rule. Damages to a particular structure, edifice or property may involve common questions of fact which potentially could be resolved by joint inspections and experts. Relating the cases that deal with a single property to the same judges may also eliminate the risk of inconsistent determinations.

The Committee makes no recommendation with regard to the question of whether any of

the Common Property Cases should be otherwise consolidated for purposes of discovery and/or trial. That decision will be left to the assigned judges.

Accordingly, IT IS HEREBY ORDERED that within 14 days of the date of this Order, all cases relating to the same property, listed in Exhibit B hereto, shall be deemed related under the Case Relation Rule, and assigned to the district judge and magistrate judge currently assigned the lowest docket number.³

IT IS FURTHER ORDERED that within 14 days of this Order, the parties shall provide the Committee with a list of any other Common Property Cases (not listed in Exhibit B) that should be related in accordance with this Order.

B. Cases Subject to Certain Common Defenses

Counsel for defendants have identified several state law claims common to many of plaintiffs' cases, which defendants contend should be dismissed, including, *inter alia*, state law claims alleging bad faith or negligent claims handling, certain forms of relief, such as punitive damages, treble damages, and/or attorneys' fees, and requests for jury trial. A number of district judges have already dismissed such claims, finding that the allegations are not viable under New York law. See, e.g., Funk v. Allstate Ins. Co., No. 13 CV 5933 (JS) (GRB) (E.D.N.Y. Dec. 13, 2013); Dufficy v. Nationwide Mut. Fire Ins. Co., No. 13 CV 6010 (SJF) (AKT) (E.D.N.Y. Dec. 2, 2013).

Rather than require each judge to resolve motions to dismiss such claims, plaintiffs are ORDERED within 14 days of the Order to voluntarily withdraw such claims, or if not, submit a letter to the assigned judge, explaining the legal basis for continuing to pursue such claims in any

³Counsel should ensure that when relating cases, the cases are filed in the proper courthouse in accordance with the Eastern District Division of Business Rule, Local Rule 50.1(d).

particular action.

IV. Uniform Automatic Discovery Practices in Sandy Cases

The parties generally agree that a uniform, automatic discovery procedure should be adopted to speed resolution of these matters while also reducing costs for the parties and the burdens on the Court. Counsel advise that, in FEMA cases, insurers are compensated based upon the total payout such that as long as damages are properly documented, carriers have an incentive to pay. Accordingly, rather than waiting for the Court to schedule a Rule 16 conference, the parties are directed to disclose certain information in an expedited manner so that the parties can evaluate their respective cases. The following discovery schedule shall control the first phase of discovery in Hurricane Sandy cases in lieu of the initial disclosures required by Federal Rule of Civil Procedure 26 to avert the need for a Rule 16 conference in these cases and, in the absence of a showing to the contrary, the need to serve document requests and interrogatories.

A. Automatic Disclosures by Plaintiffs

1. Within 60 days of the date of this Order (or in the case of subsequently filed cases, within 60 days of the filing of the Answer) unless such information has already been provided or appears on the face of the complaint, plaintiffs in all Hurricane Sandy cases shall provide the following information to defendants' counsel:
 - a. the complete name of each insurer and all policy numbers for each policy of insurance held by, or potentially benefitting each plaintiff and/or property on the date of the loss (including without limitation wind, flood, fire or a combination thereof), and all claims numbers for any claims made for losses relating to Hurricane Sandy;

- b. the address of each property for which a loss is claimed;
 - c. the current address of each plaintiff property owner;
 - d. an itemized statement of claimed damages for each property, including contents; if the contents claim is no longer in dispute, a statement to this effect must be made;
 - e. a statement as to whether there have been any amounts paid or offered to be paid under the policy, and if so, the difference claimed in this suit, including an itemization of those items for which plaintiff is making a claim of underpayment and any supporting documentation;
 - f. if no payments have been made or offered, a statement of the reasons provided by defendant;
 - g. whether there have been any prior attempts at arbitration or mediation; and
 - h. identify any other Hurricane Sandy related lawsuits filed or contemplated for that particular property or plaintiff.
2. Within 60 days of this Order (or in the case of subsequently filed cases, within 60 days of the filing of the Answer), plaintiffs shall produce to defendants' counsel the following documents:
- a. all documents supporting or evidencing the claimed loss, including loss estimates from other insurers, any adjuster's reports, engineering reports, contractor's reports or estimates; photographs, claim log notes, documents relating to repair work performed after Hurricane Sandy, including contracts, bids, estimates, invoices or work tickets

for completed work;

- b. all documents reflecting any payments received to date from any insurer, FEMA, or from any other governmental program federal, state or local;
- c. with respect to flood damage claims, all documents relied upon by plaintiff as satisfying Proof of Loss requirements and documentation required by SFIP 44 C.F.R. Pt. 61, App.A(1), Art. VII(J)(3),(4);
- d. any written communications exchanged between the insured or insurer relative to the claimed loss, including any proof of loss required by the applicable policy.

B. Automatic Disclosure by Defendants

- 1. Within 60 days of the date of this Order (or in the case of subsequently filed cases, within 60 days of the filing of the Answer), defendants in all Hurricane Sandy cases shall provide the following information to plaintiffs:
 - a. if no payment on the policy has been made or offered, an explanation for the declination of coverage, including but not limited to:
 - i. any policy exclusions that apply;
 - ii. whether coverage is denied due to non-payment of premiums;
 - iii. if there is a dispute as to the nature of the damage incurred and its coverage under the policy;
 - iv. if there is a dispute as to the value of the claimed losses, and
 - v. any other legal basis on which coverage has been denied.
 - b. if payment on the policy has been made or offered, defendant's understanding of the nature of the dispute;

- c. whether mediation or arbitration has been attempted in the case.
2. Within the same 60-day period, defendants are ORDERED to provide the following documents and information to plaintiffs' counsel:
 - a. all non-privileged documents contained in the claims file pertaining to the subject policy, including any letters of declination of coverage and notices of nonpayment of premiums;
 - b. 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;
 - c. the names and addresses of the adjusters for each claim;
 - d. all claim log notes;
 - e. records of payments made to the insured pursuant to the policy;
 - f. all expert reports and/or written communications that contain any description or analysis of the scope of loss or any defenses under the policy.

Nothing in this Order shall be construed to limit the information to be exchanged in any particular case. Counsel for each party is encouraged and expected to provide any information that would reasonably be helpful to their adversary in evaluating the case for mediation/arbitration purposes. Any information not exchanged during this period cannot be used in the mediation/arbitration process. The parties are strongly urged to meet and confer in good faith on the exchange of information.

C. Privilege

A party shall produce a privilege log for those documents that it is not producing on the basis of privilege 14 days prior to the completion of the production described in Section IV above. The log should include the author of the document, the recipient of the document, the date of the document, and the nature of the privilege asserted.

Documents for which a privilege is properly asserted include communications between counsel and client, documents created in anticipation of litigation, communications between or among plaintiffs' counsel, and communications between or among non-insurer defendants' counsel, insurer defendants' counsel and their respective clients. Documents routinely prepared in the ordinary course of business, including but not limited to adjusters' reports and other expert analyses, including draft reports, are not privileged and should be produced.

V. Alternative Dispute Resolution

Within 14 days of the completion of the expedited discovery procedure outlined above, the parties are Ordered to submit a Notice of Arbitration in accordance with Local Rule 83.7 in the form attached hereto as Exhibit C, or in the alternative, the parties may submit a stipulation in the form attached as Exhibit D, consenting to mediation. All arbitrations and mediations are to be concluded within three months of submission of the Notice of Arbitration or Consent to Mediation. Mediation may, at the discretion of the Court, be conducted by a magistrate judge rather than a mediator. Cases that are not resolved through arbitration, mediation, or voluntary settlement will be returned to the assigned district judge and magistrate judge for trial.

Within 14 days of the date of this Order, Defendants' Liaison Counsel is Ordered to confer with defendants' counsel and provide the Committee with a list of commonly occurring legal issues and defenses that defendants anticipate, from experience, may arise in a number of these cases,

along with relevant case law or other authority addressing these issues.

Within 7 days thereafter, Plaintiffs' Liaison Counsel is Ordered to confer with plaintiffs' counsel and provide the Committee with any contrary legal authority addressing the issues and defenses identified by Defendants' Liaison Counsel, and provide the Committee with any other issues that plaintiffs anticipate may arise in these cases.

While the ultimate determination of any such legal issue or defense may well be fact driven, and the outcome of any legal defense or issue will be determined by the individual judge assigned to each case, the Committee seeks this information in order to educate and fully prepare our mediators and arbitrators with the hope of expediting the settlement process. These submissions are intended to be summary in nature and may be made by letter; they are not intended to be full briefs on the issues.

SO ORDERED.

Dated: Brooklyn, New York
February 21, 2014

/S/ CHERYL L. POLLAK
Cheryl L. Pollak
United States Magistrate Judge

/S/ GARY R. BROWN
Gary R. Brown
United States Magistrate Judge

/S/ RAMON E. REYES, JR.
Ramon E. Reyes, Jr.
United States Magistrate Judge

Exhibit A

List of Misjoined Cases by Docket Number¹

Docket No.

13-5967 (DLI) (VMS)

13-5972 (PKC) (LB)

13-6008 (PKC) (RML)

13-6009 (CBA) (JMA)

13-6792 (ARR) (RER)

13-6873 (NGG) (JMA)

13-6876 (JS) (ARL)

13-7209 (ERK) (VVP)

13-5956 (BMC) (RML)

13-5962 (KAM) (RLM)

14-23 (JG) (VMS)

14-24 (ENV) (MDG)

13-6001 (ADS) (ARL)

13-6013 (JFB) (ARL)

13-6022 (JFB) (WDW)

13-6273 (LDW) (WDW)

13-5923 (ADS) (AKT)

14-110 (JS) (AKT)

¹This list was compiled from the spread sheet provided by plaintiffs to the court as of January 31, 2014 and may not reflect certain reassignments that may have occurred since that date.

Exhibit B

List of Related Cases^{1*}

<u>Plaintiff</u>	<u>Property</u>	<u>Defendants</u>	<u>Docket Nos.</u>
Israel	10 Suffolk Walk	Allstate Occidental Fire	13-6686 (KAM, JO) 14-23 (JG, VMS)
Wade	100 East Hudson	Nationwide Hartford	13-7000 (SJF, ARL) N/A
Maiorana	107 Cuba Ave.	Standard Fire Occidental	13-6926 (WFK, RER) 14-25 (DLI, CLP)
Halligan	11 Graham Pl.	FEMA Charter Oak	13-6596 (FB, MDG) 13-6013 (JFB, ARL)
Thomson	111 Hett Ave.	Narragansett Standard Fire	13-5968 (FB, VMS) 13-6934 (RRM, CLP)
Little	115 Oceanside Ave.	Narragansett FEMA	13-5968 (FB, VMS) 13-6603 (PKC, RML)
Buckley	12½ Neptune Walk	American Bankers Narragansett	13-6291 (JG, JMA) 13-5968 (FB, VMS)
Faulkener	125 Bedford Ave.	Narragansett Selective Ins.	13-5968 (FB, VMS) 14-170 (JFB, AKT)
Mastey	13008 Cronston Ave	Allstate Narragansett	13-6698 (FJ, RER) 13-5968 (FB, VMS)

¹This list was compiled from the spread sheet provided by plaintiffs to the court as of January 31, 2014 and may not reflect certain reassignments that may have occurred since that date.

^{*}To the extent that docket numbers on this list, including but not limited to 13-5914, 13-5964, 13-5968, 13-6291, 13-6818, 13-5995, and 13-7073, had misjoined plaintiffs as of January 31, 2014, and thereafter plaintiffs on those dockets were terminated and refiled under new docket numbers, counsel should ascertain that the newly filed cases have been properly related to any other cases relating to the same property.

Fugelsang	14 Ocean Ave.	FEMA Univ.No.Am.	13-6373 (JG, VMS) 13-7209 (ERK, VVP)
Erber	143-01 Rockaway Bch	FEMA Occidental	13-6592 (ILG, SMG) 13-6008 (PKC, RML)
Baldeo	1431 Pearl St.	FEMA Occidental	13-6579 (ERK, CLP) 13-6008 (PKC, RML)
Sears	156 Reid St	American Bankers Narragansett	13-6291(JG, JMA) 13-5968 (FB, VMS)
McDonnell	157 Blackheath Rd	Narragansett Standard Fire	13-5968 (FB, VMS) 13-6891 (ADS, GRB)
Arnella	16 Sutton Pl.	Farmington Cas. Travelers	14-190 (LDW, AKT) N/A
Moran	17 Deal Rd	FEMA Liberty Mutual	13-6587 (ADS, AKT) 13-7301 (NGG, JO)
Ryan	172 Reid Ave..	Foremost Mutual FEMA	13-5961 (DLI, RML) 13-6611 (JG, RLM)
Beaumont	174 Coronodo St	Wright Nsl Flood Ocean Harbor	N/A 13-7073 (SJF, AKT)
Gallagher	175 Beach 128 th St	Narragansett Am. Bankers	13-5968 (FB, VMS) 13-6291 (JG, JMA)
Ruggiero	178 Beach 133 rd St	Auto Ins. of Hartford Liberty Mut.	13-5962 (KAM,RLM) 13-7313(RRM,MDG)
Bennett	18 Beach 221 st St	Liberty Mut. Liberty Mut. Fire	13-6818 (KAM, CLP) 13-7302 (WFK,RML)
Connors	180 Beach 123 rd St	Ocean Harbor Allstate	13-7102 (DLI, JO) 13-6656 (FB, RML)
Downs	19 Doris Lane	Liberty Mut. Fire First Liberty	13-5957 (CBA, CLP) 13-6792 (ARR, RER)
McGovern	2Beach 219 th St	Standard Fire Occidental Fire	13-7019 (NG, JO) 14-23 (JG, VMS)

Cloos	203 Bayside Ave.	Wright Universal N.Am.	N/A 13-7242 (WFK,RLM)
Hadef	203 Beach 149 th St.	Occidental Fire Allstate	14-24 (ENV, MDG) N/A
Phillips	208 E. 8 th Rd	Liberty Mut. Liberty Mut.	13-7111 (LDW,GRB) N/A
Wernick	210 Sportsman Ave.	FEMA Narragansett	13-6590 (JFB, WDW) 13-5968 (FB, VMS)
Farr	21415 12 th Ave. 214-215 12 th Ave.	Occidental Fire Standard Fire	14-23 (JG, VMS) 13-6981 (SLT, JO)
Mellett	215 Beach 142d St	Amer. Bankers Narragansett	14-142 (MKB, RER) 13-5968 (FB, VMS)
Washington	21620 Rockaway Point	Amer. Bankers Narragansett	14-208 (MKB, VVP) 13-5968 (FB, VMS)
Leiner	237 Beach 118 th St	Everest Nsl Hartford Ins.	13-5975 (DLI, RLM) N/A
Ramey	24 Michigan St	Wright Fireman's Fund	N/A 13-5978 (JFB, WDW)
Stapleton	251 W. Fulton St	Narragansett Wright	13-5968 (FB, VMS) N/A
Arnella	2525 Cedar St	Auto Ins. of Hartford Travelers	14-110 (JS, AKT) N/A
Ferner	2653 Hewlett Lane	Allstate Standard Fire	13-6767 (JFB, AKT) 13-6904 (LDW,AKT)
Mingino	310 Beach 142 St	Farmington Cas. Standard Fire	13-5923 (ADS, AKT) 13-7024 (RRM, RER)
Szajt	310 E. Shore Dr.	Narragansett Allstate	13-5968 (FB, VMS) 13-6737 (LDW,AKT)
Fields	333 Beach 40 th St	Stillwater Wright	13-6994 (ILG, RLM) N/A

Memi	335 Beach 145 th St	Nationwide Mut. Fire Nationwide Prop & Cas.	13-6001(ADS, ARL) 13-6009 (CBA, JMA)
Curtis	336 Beach 148 th St	Allstate Occidental	13-6712 (BMC, VVP) 13-6008 (PKC, RML)
McKinney	36 Janet Lane	Allstate Narragansett	13-6702 (SLT, VVP) 13-5968 (FB, VMS)
Febrizio	365 W. Pine	Wright Stillwater	N/A 13-6999 (LDW,AKT)
Hamlet	378 West Pine	Great Lakes Reins. Wright	13-5941 (SJF, GRB) N/A
Murphy	413 Beach 134 th St	FEMA Narragansett	13-6606 (SLT, LB) 13-5968 (FB, VMS)
420 Tenants	420 Shore Rd	Standard Fire CHUBB	13-5909 (JFB, GRB) 14-10 (JS, WDW)
Grzegorski	426 Beach 138 th St	Narragansett Standard Fire	13-5968 (FB, VMS) 13-6984(RRM,MDG)
McDonnell	440 Beach 134 th St	American Security First Liberty	14-133 (ARR, RLM) 13-6792 (ARR, RER)
Rudden	454 Beach 124 th St	Standard Fire Universal No. Am	13-6897 (JFB, ARL) 13-7209 (ERK, VVP)
Lindon	457 Beach 124 th St	Liberty Mut. Fire Liberty Mut. Fire	13-7312 (FB, RML) 13-6873 (NGG, JMA)
Mastey	457 Beach 145 th St	Narragansett Standard Fire	13-5968 (FB, VMS) 13-7010 (RRM, CLP)
LaConti	463 E. Penn St.	Narragansett Wright	13-5968 (FB, VMS) N/A
King	487A Seabreeze Walk	Standard Fire Farmington Cas.	13-6951 (SLT, RER) 13-5923 (ADS, AKT)
Corbett	51 Waterford Rd	Liberty Mut. Fire American Security	13-6022 (JFB, WDW) 14-124 (SJF, GRB)

Rayner	52 California St	Narragansett Hartford of Midwest	13-5968 (FB, VMS) 14-173 (SJF, WDW)
Schlossberg	522 East Fulton St	Nationwide Mut. Fire Nationwide Mut. Fire	13-6001 (ADS, ARL) 13-7281 (JS, WDW)
Velez	53 Howard Ave.	Narragansett Wright	13-5968 (FB, VMS) N/A
Whelan	541 Beach 129 th St	Naragansett Standard Fire	13-5968 (FB, VMS) 13-6973 (JG, MDG)
Courtney	547 Beach 127 th St	Standard Fire Universal No. Ame	13-6959 (DLI, RLM) 13-7209 (ERK, VVP)
Jackson	551 So Ocean Ave.	Narragansett American Security	13-5968 (FB, VMS) 14-121 (JS, AKT)
Mason	561 Beach 67 th St	Allstate American Security Fed. Emerg. Mgmt.	13-7013 (PKC,MDG) 13-6884 (ERK,MDG) 14-30 (KAM, SMG)
Fraser	561 W. Bay Drive	Narragansett FEMA	13-5968 (FB, VMS) 13-6580 (JFB, GRB)
Wheellock	569 West Park Ave.	Merrimack Mut. Fidelity	13-5981 (JFB, ARL) 13-7004 (ADS, ARL)
Demic	60 Ocean Ave.	Allstate Liberty Mut.	13-6663 (NG, JO) 13-6873 (NGG, JMA)
Peterson	618 Beach 66 th St	Nationwide Underwriters at Lloyds	13-6009 (CBA, JMA) 13-7306 (MKB,MDG)
Wolken	68 W. 18 th Rd	Safeco Ins. Metro. Prop. & Cas.	13-5967 (DLI, VMS) 13-6273 (LDW,AKT)
Kyne	683 Highland Pl.	Narragansett American Bankers	13-5968 (FB, VMS) 13-6291 (JG, JMA)
7001 E.71st LLP	7001E.71 St	Continental Cas. Chubb State court Kings Cty	13-638 (RJD, SMG) 13-2898(MKB,MDG) 506259/2013

Mussman	77 Oregon St	Narragansett Standard Fire	13-5968 (FB, VMS) 13-6911 (ADS, GRB)
Quinn	8 Hastings Rd	Wright Charter Oak Fire	N/A 13-6013 (JFB, ARL)
Dolan	804 Bayside	Safeco Standard Fire	13-5967 (DLI, VMS) 13-6974 (NG, JO)
Salle	81 Buffalo Ave.	Allstate Allstate	13-6020 (SJF, GRB) 13-6016 (ADS, GRB)
Brenner	849 Ocean Front	Hartford Ins. Midwest Hartford Ins. Midwest	14-126 (JS, ARL) 13-5924 (JS, WDW)
McKnight	85 Ohio Ave.	Narragansett Wright	13-5968 (FB, VMS) N/A
Hernandez	85 Pearsall St	Fidelity & Deposit FEMA	13-6906 (NGG, VVP) 13-6599 (ARR, RER)
Hommel	905 West Park Ave.	Narragansett Wright	13-5968 (FB, VMS) N/A
Badamo	910 Lanark Rd	Amer. Security FEMA First Liberty	13-5964 (DLI, VVP) 13-6575 (JG, MDG) 13-6792 (ARR, RER)
Fox	95 Penna. Ave.	Narragansett Standard Fire	13-5968 (FB, VMS) 13-6905 (JS, ARL)
Campbell	979 Bayside	Genl Cas.of Wisc. FEMA	13-7263 (NGG, JO) 14-154 (RJD, CLP)
Guttueri	1212 Cross Bay Blvd.	Liberty Mutual Liberty Mutual Fire	13-6818 (KAM, CLP) 13-7393 (WKF, JMA)
Duggen	20409 10 th Ave	Occidental Standard Fire	13-6008 (PKC, RML) 13-7022 (FB, CLP)
Carey	130 Beach 128 th St. 133-06 Rockaway Beach Blvd.	First Liberty Narragansett	13-5946 (NG, MDG) 13-5968 (FB, VMS)
Nicasio	109-20 Rockaway Beach Blvd.	Wright Wright	N/A N/A

Exhibit C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

IN RE HURRICANE SANDY CASES

14 MC 41

-----X

THIS DOCUMENT APPLIES TO:

-----X

NOTICE DESIGNATING CASE TO COURT ANNEXED ARBITRATION

This case has been designated to participate in the Court Annexed Arbitration Program pursuant to Local Civil Rule 83.7(d) wherein money damages only are being sought.

After the exchange of the first phase of discovery in Hurricane Sandy cases as mandated by Case Management Order No. 1, an arbitration hearing will be set. The Arbitrator shall be selected from the Court's Panel of Arbitrators. Instructions will be provided when a hearing date has been set. It is not anticipated that matters selected for Arbitration will require discovery directions. If a dispute arises which requires a ruling on a question related to discovery, you must move promptly before the assigned magistrate judge, unless otherwise directed by the Court. Attorneys cannot adjourn or change the arbitration hearing date without approval from the Court.

Requests to Adjourn an Arbitration Hearing: Must be filed as a motion via ECF to the assigned district judge or magistrate judge.

Telephone calls to request adjournment of an Arbitration hearing will not be considered. Counsel and pro se litigants should provide the Court with an email address for notification purposes.

You may refer to the Local Civil Rules for Arbitration of the U.S. District Court, Eastern District of New York on our web site, www.nyed.uscourts.gov/adr.

Dated:

Exhibit D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

IN RE HURRICANE SANDY CASES

14 MC 41

-----X

THIS DOCUMENT APPLIES TO:

-----X

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned parties:

1. The parties agree to submit their dispute to mediation in lieu of arbitration.
2. No party shall be bound by anything said or done during the Mediation, unless either a written and signed stipulation is entered into or the parties enter into a written and signed agreement.
3. The Mediator may meet in private conference with less than all of the parties.
4. Information obtained by the Mediator, either in written or oral form, shall be confidential and shall not be revealed by the Mediator unless and until the party who provided that information agrees to its disclosure.
5. The Mediator shall not, without the prior written consent of both parties, disclose to the Court any matters which are disclosed to him or her by either of the parties or any matters which otherwise relate to the Mediation.
6. The mediation process shall be considered a settlement negotiation for the purpose of all federal and state rules protecting disclosures made during such conferences from later discovery or use in evidence. The entire procedure shall be confidential, and no stenographic or other record shall be made except to memorialize a settlement record. All communications, oral or written, made during the Mediation by any party or a party's agent, employee, or attorney are confidential and, where appropriate, are to be considered work product and privileged. Such communications, statements, promises, offers, views and opinions shall not be subject to any discovery or admissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties.

Provided, however, that evidence otherwise subject to discovery or admissible is not excluded from discovery or admission in evidence simply as a result of it having been used in connection with this mediation process.

7. The Mediator and his or her agents shall have the same immunity as judges and court employees have under Federal law and the common law from liability for any act or omission in connection with the Mediation, and from compulsory process to testify or produce documents in connection with the Mediation.
8. The parties (i) shall not call or subpoena the Mediator as a witness or expert in any proceeding relating to: the Mediation, the subject matter of the Mediation, or any thoughts or impressions which the Mediator may have about the parties in the Mediation, and (ii) shall not subpoena any notes, documents or other material prepared by the Mediator in the course of or in connection with the Mediation, and (iii) shall not offer into evidence any statements, views or opinions of the Mediator.
9. The Mediator's services have been made available to the parties through the dispute resolution procedures sponsored by the Court. In accordance with those procedures, the Mediator represents that he has taken the oath prescribed by 28 U.S.C. 453.
10. Any party to this Stipulation is required to attend at least one session and as many sessions thereafter as may be helpful in resolving this dispute.
11. An individual with final authority to settle the matter and to bind the party shall attend the Mediation on behalf of each party.

Dated: _____

Plaintiff

Defendant

Attorneys for Plaintiff

Attorneys for Defendant

Consented to: _____
Mediator

Comments From:
Ronald D. Puhala, Esq.
Goldberg Segalla

Your Honors:

We respond to the Court's invitation for comments or proposals for the case management of Super Storm Sandy insurance coverage cases pending in the New Jersey District courts. As you are most likely aware, on February 21, 2014, the United States District Court for the Eastern District of New York issued Case Management Order No. 1 regarding the administration of Super Storm Sandy insurance coverage cases pending in New York federal court. We recommend that this court adopt a similar approach here.

In reviewing the New York Case Management Order No. 1, three things we thought especially important are the following:

1. The voluntary dismissal of demands for attorneys' fees on first party breach of contract claims and breach of implied covenant of good faith and fair dealing;
2. The automatic disclosures by plaintiffs and defendants; and
3. Alternative Dispute Resolution.

We suggest, however, one modification to the New York plan. In some cases the parties may agree as to the terms, conditions and exclusions in the policy but may disagree as to the dollar value of the property damage suffered by the insured. We suggest the following modification of the New York order in the section regarding mediation and arbitration: "Where the only dispute between the parties is the dollar value of the loss, the parties will submit their competing loss appraisals pursuant to the terms of the policy." Often the policies allow for an independent umpire experienced in loss appraisals to decide the dollar amount of the loss. This may prove to be an efficient method for resolving certain matters.

Respectfully submitted,

Ronald Puhala

Comments From:

Patricia McHugh Lambert, Esq.

PK Law

Pessin Katz Law, P.A.

PK || LAW

PESSIN KATZ LAW, P.A.

901 DULANEY VALLEY ROAD
SUITE 400
TOWSON, MD 21204

TOWSON | COLUMBIA | BEL AIR | CAMBRIDGE

TELEPHONE 410-938-8800
FAX 410-832-5600
WWW.PKLAW.COM

Patricia McHugh Lambert - 410-339-6759 - 410-832-5628 (f) - plambert@pklaw.com

February 26, 2014

VIA EMAIL {sandy litigation@njd.uscourts.gov}

AND VIA FIRST CLASS MAIL

William T. Walsh, Clerk
Clarkson S. Fisher United States Courthouse
Attn: John O'Brien, Chief Deputy
402 E. State Street, Room 2020
Trenton, NJ 08608

Re: Super Storm Sandy Litigation Comments & Proposals

Dear Super Storm Sandy Litigation Committee:

The undersigned represents defendant Harleysville Insurance Company of New Jersey ("Harleysville") and Nationwide Mutual Fire Insurance Company ("Nationwide") in various litigation relating to damage caused by Superstorm Sandy.¹ Defendant Nationwide is a Write-Your-Own ("WYO") insurance company participating in the National Flood Insurance Program ("NFIP"), pursuant to the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001, *et seq.*) ("NFIA"). In that capacity, Nationwide issued a Standard Flood Insurance Policy ("SFIP") to the Plaintiffs in the above-captioned actions. The undersigned's case list has been attached hereto as Exhibit A.

This letter is submitted pursuant to the invitation the Super Storm Sandy Litigation Committee ("Committee") issued on February 18, 2014 for comments and proposals on the handling of Sandy flood litigation. Having responded to a similar invitation from the Honorable Cheryl Pollak seeking proposals for Sandy flood litigation before the United States District Court for the Eastern District of New York, the undersigned has given consideration to these issues and believes that the approach adopted by this Honorable Court should mirror the approach adopted by the Eastern District of New York. The February 21, 2014 Case Management Order ("CMO") of the Eastern District of New York has been attached hereto as Exhibit B. The following constitutes the undersigned's thoughts on the subject matter requested.

¹ Harleysville will, with the approval of the presiding magistrate judge, soon be substituted by Nationwide Mutual Fire Insurance Company—Harleysville's successor by merger.

**Advanced Resolution of State Law Claims and Jury Demand Requests
Included in Federal Flood Suits**

We note from the outset that the efficient administration of the Hurricane Sandy cases could be increased by this Honorable Court's advance resolution of state law claims; early resolution of such state law claims—most of which are preempted or improper—would simplify cases and avoid an unneeded motion practice.

To the extent any Plaintiffs now seek to file suit against Nationwide for purported errors in the adjustment of the flood claims they submitted in the wake of Hurricane Sandy, the only viable claim these Plaintiffs may bring is a breach of contract claim under the SFIP. The federal courts have unanimously held that if the suit relates to claims handling under the SFIP, all state common law and statutory claims for relief are preempted. That means, for instance, that state law claims for relief alleging bad faith or negligent claims handling are preempted. That also means that state law claims for relief demanding punitive damages or attorney's fees are preempted. Finally, that means jury trial demands that are not cognizable for federal flood claims (because Congress has reserved no such right for SFIP claims) are improper.

To the extent that any such state law claims or requests for relief (such as a jury demand) are included in a lawsuit, we propose that this Honorable Court raise, as an initial matter, the issues relating to the non-SFIP claims and any request for a jury trial. The CMO of the Eastern District of New York has already established a procedure for doing so (which has been reproduced below):

Cases Subject to Certain Common Defenses

Counsel for defendants have identified several state law claims common to many of plaintiffs' cases, which defendants contend should be dismissed, including, inter alia, state law claims alleging bad faith or negligent claims handling, certain forms of relief, such as punitive damages, treble damages, and/or attorneys' fees, and requests for jury trial. A number of district judges have already dismissed such claims, finding that the allegations are not viable under New York law. See, e.g., Funk v. Allstate Ins. Co., No. 13 CV 5933 (JS) (GRB) (E.D.N.Y. Dec. 13, 2013); Dufficy v. Nationwide Mut. Fire Ins. Co., No. 13 CV 6010 (SJF) (AKT) (E.D.N.Y. Dec. 2, 2013).

Rather than require each judge to resolve motions to dismiss such claims, plaintiffs are ORDERED within 14 days of the Order to voluntarily withdraw such claims, or if not, submit a letter to the assigned judge, explaining the legal basis for continuing to pursue such claims in any particular action.

The undersigned respectfully requests that this Honorable Court adopt this procedure.

Early Cooperation and Informal Discovery to Narrow the Issues in Dispute

Nationwide notes that many flood cases involve the issue of whether the insureds provided the documentation required by the SFIP to substantiate their flood claims. These types of cases would benefit greatly from early cooperation and informal discovery between the parties. The sooner the parties can get to the issue of what supporting documentation is available, needed, or required, the sooner the parties can resolve and/or narrow their dispute.

We propose that this Honorable Court encourage early cooperation and informal discovery so as to narrow issues in cases where documentation is an issue. Once again, the CMO of the Eastern District of New York has already devised a procedure to achieve this end (which is summarized below for the sake of brevity):

Automatic Discovery Practices in lieu of Initial Disclosures to avoid the need for Scheduling Conferences, Interrogatories, and Request for Production of Documents

- Within 14 days of this order (3/7/14)
 - Defendants' Liaison Counsel will confer with defendants' counsel to provide the Committee a list of commonly occurring legal issues and defenses anticipated to arise

- Within 7 days following Defendants' Liaison Counsel meeting (3/14/14)
 - Plaintiffs' Liaison Counsel will confer with plaintiffs' counsel to address the issues and defenses provided by Defendants' Liaison Counsel and provide any other issues anticipated to the Committee

- At Least 14 days prior to the deadline below (4/8/14)
 - Parties will provide a privilege log of documents that will not be produced by the deadline below

- Within 60 days of this order (4/22/14)
 - Plaintiffs will provide property info, itemized statements of damages and items for which they claim to be underpaid, and documents satisfying POL requirements and regarding payments
 - Defendants will provide an explanation of payment denial or understanding of the dispute if payments have been made or offered. They will also provide non-privileged claim documents, and records of any assessments or payments.

- Within 14 days of the completion of the expedited discovery procedure (5/6/14)
 - Parties will submit either a Notice of Arbitration or a stipulation consenting to mediation

- All arbitrations and mediations are to be concluded within three months (8/6/14) of submission of the notice or stipulation. Unresolved cases will return to judges for trial.
- Any information not exchanged during this period cannot be used in the mediation/arbitration process.

The undersigned respectfully requests that this Honorable Court adopt the same procedure or a similar procedure.

In addition, while the CMO from the Eastern District of New York is silent on these issues, the undersigned also suggests that, to remove as much of the delay from formal discovery as is feasible, the parties, as part of their discovery plan, should agree to prospectively consent to the issuance of non-party subpoenas to the independent adjusters, public adjusters, or other non-parties (such as contractors or vendors) from whom discovery must be sought to investigate the factual issues at play. The parties should also agree to consent to allow participation at deposition by video or telephone.

Pro hac Vice Motions

It would increase efficiencies if the CMO for this Court would allow counsel in flood cases to file a single motion for pro hac vice that would apply to all Superstorm Sandy filings.

Telephone Attendance of Pre-Trial Hearings to Reduce Delays in Scheduling Attributable to Out-of-State Counsel

Many of the Plaintiffs' Counsel representing the insureds in the Hurricane Sandy cases are out-of-state attorneys who are familiar with federal flood litigation due to the frequent flood events that impact those states. Many of the Defense Counsel representing the insurers in the Hurricane Sandy cases are out-of-state attorneys based in various states around the country because they represent a large national insurance company. Arranging routine pre-trial hearings or conferences between these out-of-state attorneys is often difficult as scheduling conflicts invariably prevent everyone from traveling at the same time. Such scheduling conflicts create problems even when there is an in-state attorney representing one of the parties. We believe that pre-trial hearings can be scheduled more efficiently if attendance by telephone is permitted.

We propose that pre-trial hearings and short motions hearings be conducted by telephone. In that same vein, we propose that all written communication between counsel be by email rather than formal letter. We understand the importance of in-person communication when it comes to settlement, however, and would propose that in-person attendance continue to be required for all settlement conferences. The CMO of the Eastern District of New York is silent on these issues.

Wind and Flood Case Association is Acceptable But Consolidation is Not Acceptable

The undersigned generally has no objection to the proposal of some to have the federal flood claims and state law wind claims that relate to the same insured property assigned to the

same magistrate judge. However, the undersigned seeks to be clear on this point. If the proposal is only to have the two cases associated or related with one another, Nationwide can support the proposal. That said, if the proposal is to actually consolidate the two cases, Nationwide, as a WYO Company, participating in the NFIP, cannot support the proposal. While we can understand why the common insured property address might lend itself to the belief that these two cases can be consolidated, we note that such consolidation is neither feasible nor appropriate in this instance.

Inasmuch as the federal flood claims must be tried by bench trial, while the state law wind claims may be tried by jury, there is no feasible way to jointly adjudicate the two cases in one consolidated action. Furthermore, the cost saving goals of the NFIA and/or NFIP and FEMA policy are simply incompatible with the idea of consolidation. The litigation of a straightforward SFIP breach of contract claim before a judge is a wholly different proposition to the protracted and costly litigation of a state law insurance claims against a non-WYO carrier that may include bad faith claims and a demand for punitive damages, attorney's fees, and a jury trial. The defense costs that Nationwide would incur during its involvement in a consolidated action that involved these state law claims for relief are not contemplated by the NFIP.

While the NFIP was designed to absorb the defense costs incurred during an insurer's defense of a federal flood claim, the NFIP was not designed to absorb the additional defense costs that would be incurred through actual consolidation of the wind/flood matter. Under the NFIP, an insurer will be reimbursed for the defense costs it incurs during the defense of a federal flood claim. That reimbursement is drawn from the United States Treasury. Thus, as those defense costs rise, so too does the burden upon the United States Treasury.²

Thus, regardless of whether the state law claims are asserted against the WYO Company or another defendant not participating in the NFIP, Nationwide, as a WYO Company, respectfully suggests that it cannot allow itself to be drawn into state law insurance contract claims and tort litigation since one of the driving policy goals behind limiting SFIP disputes to a simple SFIP breach of contract claim to be tried before a judge is to limit defense costs. Based upon our understanding of the overarching goals of the NFIP, the undersigned cannot support consolidation of Nationwide's federal flood claims with any state law wind claims.

The CMO of the Eastern District of New York is silent on the issue of consolidation but has directed that all flood and wind claims related to the same property must be assigned to the

² See *C.E.R. 1988, Inc. v. Aetna Cas. & Sur. Co.*, 386 F.3d 263, 270 (3d Cir. V.I. 2004)(***Indisputably a central purpose of the Program is to reduce fiscal pressure on federal flood relief efforts... State tort suits against WYO companies, which are usually expensive, undermine this goal.*** Allowing suits to proceed... results in one of two consequences--both bad. If FEMA refused to reimburse WYO carriers for their defense costs, insurers would leave the Program, driving the price of insurance higher. The alternative, remuneration for losses incurred in such suits, would directly burden the federal Treasury.)(emphasis added).

William T. Walsh, Clerk
February 26, 2014
Page 6 of 6

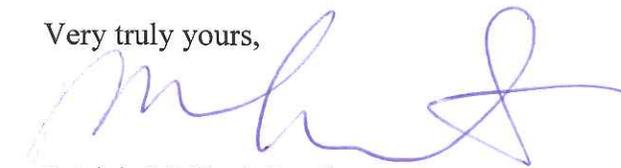
same magistrate. Without waiving any objection to consolidation, the undersigned respectfully requests that this Honorable Court adopt the same procedure.

Conclusion

We share this Honorable Court's aspiration to establish a system that will more efficiently handle the administration of the many Hurricane Sandy cases that have been or soon will be filed. The above proposals are based upon our extensive experience in flood litigation and are respectfully offered to this Honorable Court as a means to our common end.

We look forward to reviewing the comments and proposals of both this Honorable Court and Plaintiffs' Counsel in the coming weeks.

Very truly yours,



Patricia McHugh Lambert

PML/krw

EXHIBIT A

District of New Jersey Hurricane Sandy Cases

Name of Case	Docket Number
<i>Boyle v. Harleysville Insurance</i>	1:14-cv-00903-JHR-AMD
<i>Brusco v. Harleysville Insurance Company</i>	1:14-cv-00914-JEI-JS
<i>Damiano v. Harleysville Insurance Company of New Jersey</i>	3:13-cv-07239-FLW-LHG
<i>Faust v. Harleysville Insurance Company of New Jersey et al</i>	3:14-cv-01163-MLC-TJB
<i>Gencarelli v. Harleysville Ins. Co.</i>	3:13-cv-07300-PGS-TJB
<i>Kuebler v. Harleysville Insurance Company of New Jersey</i>	3:14-cv-00959-JAP-LHG
<i>Land Realty Corporation v. Nationwide Mutual Insurance Company</i>	2:12-cv-05940-CCC-MF
<i>Linblad v. Harleysville Insurance Company</i>	1:14-cv-00908-NLH-KMW
<i>Maccarone et al v. Harleysville Insurance Company of New Jersey et al</i>	1:14-cv-00095-NLH-JS
<i>McCormack et al v. Harleysville Insurance Company of New Jersey</i>	3:14-cv-00239-MAS-LHG
<i>Nill v. Nationwide Insurance Company</i>	2:13-cv-07195-CCC-MF
<i>Nill v. Beers et al</i>	3:13-cv-07556-PGS-LHG
<i>Paul et al v. Harleysville Insurance Company of New Jersey</i>	1:13-cv-06382-NLH-AMD
<i>Rausch et al v. Federal Emergency Management Agency (FEMA)</i>	3:14-cv-00149-FLW-LHG
<i>Ruggieri et al v. Nationwide Mutual Insurance Company</i>	1:13-cv-06391-RMB-AMD
<i>RWLW, L.L.C. v. Harleysville Insurance Company of New Jersey</i>	2:13-cv-06492-SDW-MCA
<i>Textol Systems, Inc. v. Harleysville Insurance Company of New Jersey</i>	2:13-cv-06490-KM-MAH
<i>Volaric et al v. Nationwide Mutual Insurance Company</i>	1:13-cv-06611-JHR-AMD

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

IN RE HURRICANE SANDY CASES

-----X

ORDER

14 MC 41

THIS DOCUMENT APPLIES TO:

ALL RELATED CASES

-----X

CASE MANAGEMENT ORDER NO. 1

INTRODUCTION

On October 29, 2012, the weather event officially designated as Hurricane Sandy made landfall in southern New Jersey, causing severe damage to several states along the East Coast from Florida to Maine.¹ The storm surge struck New York City, causing property damage in excess of \$50 billion, leaving many people homeless and without power.

Currently, more than 800 actions have been filed by property owners in the United States District Court for the Eastern District of New York against various insurers and more cases are expected. The Board of Judges has appointed a committee, consisting of three magistrate judges (the "Committee"), to recommend procedures to ensure proper case filing and relation practices, to establish a plan for expedited discovery, and to facilitate the efficient resolution of these matters in a manner designed to avoid duplication of effort and unnecessary expense. Nothing in this Case Management Order is intended to slow the resolution of any case. Individual cases that are at an advanced stage should not be delayed needlessly as a result of this Order, and counsel are encouraged to employ their own resources in attempting to resolve these cases.

In an effort to explore possible ways in which these matters may be managed more

¹*Hurricane Sandy One Year Later*, FEMA, <http://www.fema.gov/hurricane-sandy>.

effectively, the Committee requested certain basic data about the pending cases from plaintiffs' counsel and obtained written submissions from both plaintiffs' and defendants' counsel setting forth their positions on the best ways to organize and streamline case management. On February 5, 2014, the Committee met with counsel representing all parties to these cases to solicit input and suggestions.

In entering this Case Management Order, the Committee is cognizant of the various interests that need to be balanced here. On the one hand, the Court must ensure that victims of the storm, many of whom were rendered homeless for a time and who may be left without the necessary records or access to qualified contractors to effect repairs, receive an expeditious review of their claims, while at the same time, safeguarding insurers from meritless or inflated claims. As the letters filed by counsel demonstrate, however, there is no universal approach that will facilitate a speedy and fair resolution to these cases. The Court has taken certain steps to ease the burden and expense upon the litigants and the Court. For example, the Court entered consolidated *pro hac vice* orders eliminating the need for out-of-district counsel to file such motions for every case. In addition, with the approval of the Board of Judges, the Court enters the following Order:

I. Appointment of Liaison Counsel

In order to conduct future case management activities more efficiently, the Committee hereby designates Liaison Counsel to assist the Court in coordinating the efforts of all parties.

A. Plaintiffs' Liaison Counsel - The Committee has designated Tracey Rannals Bryan of Gauthier Houghtaling & Williams, and Javier Delgado of Merlin Law Group as Plaintiffs' Liaison Counsel. Plaintiffs' Liaison Counsel shall forward to all plaintiffs' counsel any communication that is designated by the Court as non-case specific.

B. Defendants' Liaison Counsel - The Committee has designated Gerald J. Nielsen of

Nielsen, Carter & Treas, LLC, and Jared T. Greisman of White Fleischner & Fino, LLP as Defendants' Liaison Counsel. Defendants' Liaison Counsel shall forward to all defendants' counsel any communication that is designated by the Court as non-case specific.

II. Misjoinder of Plaintiffs

As an initial matter, the Committee's review of the cases that have been filed to date has revealed that there remain a number of "mass joinder" cases, where plaintiffs joined large groups of property holders in one complaint,² with the only common factor being that the property owners held insurance policies with the same insurance company. The Committee has identified a number of these misjoined cases that are listed in Exhibit A attached hereto. Several district judges, *sua sponte*, dismissed similar complaints without prejudice to refile, based upon their determination that the plaintiffs were impermissibly joined. See, e.g., Funk v. Allstate Ins. Co., No. 13 CV 5933 (JS) (GRB) (E.D.N.Y. Dec. 13, 2013); Dante v. National Flood Ins. Program, No. 13 CV 6297 (NG) (RER) (E.D.N.Y. Nov. 21, 2013).

Accordingly, IT IS HEREBY ORDERED that within 14 days of the date of this Order, counsel shall dismiss all plaintiffs except the first named plaintiff in each misjoined action listed in Exhibit A hereto, without prejudice to refile in accordance with this Order's Case Relation Rule set forth below.

IT IS FURTHER ORDERED that within 14 days of this Order, the parties shall provide the

²In its submission to the Committee, plaintiffs' counsel suggested that not only would it be "convenient and efficient" to proceed by joining the plaintiffs in this manner, but that "it would also result in a considerable savings to the parties in terms of filing fees." No. 14-MC-41, Entry 65. This Court has previously ruled that plaintiffs cannot avoid paying statutorily-mandated filing fees through improper mass joinder. See In re BitTorrent Adult Film Copyright Infringement Cases, Nos. 11 CV 3995, 12 CV 1147, 12 CV 1150, 12 CV 1154, 2012 WL 1570765, at *12-13 (E.D.N.Y. July 24, 2012), *report and recommendation adopted sub nom. Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012).

Committee with a list of any additional cases (not listed in Exhibit A) in which plaintiffs continue to be joined improperly solely because they share a common defendant, and dismiss all but the first named plaintiff in those cases in accordance with this Order.

III. Relation and Consolidation of Cases

In soliciting filings from counsel, the Committee directed counsel to “file a letter in accordance with Local Rule 50.3.1(d) (the “Case Relation Rule”), explaining how counsel proposes to group the cases.” To date, no attorney has proposed a comprehensive plan for relating the cases and several have specifically opposed relation or consolidation of any cases. Notwithstanding these positions, the Committee has determined that, based on the information available, one subgroup of cases will benefit from relation to a single judicial officer.

A. Cases Relating to the Same Property

In a number of instances, multiple cases have been filed relating to the same property, most often where the property is insured under separate policies, such as wind and flood damage policies (“Common Property Cases”). The Committee has compiled a preliminary list of Common Property Cases, attached as Exhibit B to this Order.

Although some counsel have opposed relation or consolidation of the Common Property Cases, the Committee, after careful consideration, has determined that there would be a significant savings of judicial resources if multiple cases relating to the same property were assigned to the same district judge and magistrate judge under the Case Relation Rule. Damages to a particular structure, edifice or property may involve common questions of fact which potentially could be resolved by joint inspections and experts. Relating the cases that deal with a single property to the same judges may also eliminate the risk of inconsistent determinations.

The Committee makes no recommendation with regard to the question of whether any of

the Common Property Cases should be otherwise consolidated for purposes of discovery and/or trial. That decision will be left to the assigned judges.

Accordingly, IT IS HEREBY ORDERED that within 14 days of the date of this Order, all cases relating to the same property, listed in Exhibit B hereto, shall be deemed related under the Case Relation Rule, and assigned to the district judge and magistrate judge currently assigned the lowest docket number.³

IT IS FURTHER ORDERED that within 14 days of this Order, the parties shall provide the Committee with a list of any other Common Property Cases (not listed in Exhibit B) that should be related in accordance with this Order.

B. Cases Subject to Certain Common Defenses

Counsel for defendants have identified several state law claims common to many of plaintiffs' cases, which defendants contend should be dismissed, including, *inter alia*, state law claims alleging bad faith or negligent claims handling, certain forms of relief, such as punitive damages, treble damages, and/or attorneys' fees, and requests for jury trial. A number of district judges have already dismissed such claims, finding that the allegations are not viable under New York law. See, e.g., Funk v. Allstate Ins. Co., No. 13 CV 5933 (JS) (GRB) (E.D.N.Y. Dec. 13, 2013); Dufficy v. Nationwide Mut. Fire Ins. Co., No. 13 CV 6010 (SJF) (AKT) (E.D.N.Y. Dec. 2, 2013).

Rather than require each judge to resolve motions to dismiss such claims, plaintiffs are ORDERED within 14 days of the Order to voluntarily withdraw such claims, or if not, submit a letter to the assigned judge, explaining the legal basis for continuing to pursue such claims in any

³Counsel should ensure that when relating cases, the cases are filed in the proper courthouse in accordance with the Eastern District Division of Business Rule, Local Rule 50.1(d).

particular action.

IV. Uniform Automatic Discovery Practices in Sandy Cases

The parties generally agree that a uniform, automatic discovery procedure should be adopted to speed resolution of these matters while also reducing costs for the parties and the burdens on the Court. Counsel advise that, in FEMA cases, insurers are compensated based upon the total payout such that as long as damages are properly documented, carriers have an incentive to pay. Accordingly, rather than waiting for the Court to schedule a Rule 16 conference, the parties are directed to disclose certain information in an expedited manner so that the parties can evaluate their respective cases. The following discovery schedule shall control the first phase of discovery in Hurricane Sandy cases in lieu of the initial disclosures required by Federal Rule of Civil Procedure 26 to avert the need for a Rule 16 conference in these cases and, in the absence of a showing to the contrary, the need to serve document requests and interrogatories.

A. Automatic Disclosures by Plaintiffs

1. Within 60 days of the date of this Order (or in the case of subsequently filed cases, within 60 days of the filing of the Answer) unless such information has already been provided or appears on the face of the complaint, plaintiffs in all Hurricane Sandy cases shall provide the following information to defendants' counsel:
 - a. the complete name of each insurer and all policy numbers for each policy of insurance held by, or potentially benefitting each plaintiff and/or property on the date of the loss (including without limitation wind, flood, fire or a combination thereof), and all claims numbers for any claims made for losses relating to Hurricane Sandy;

- b. the address of each property for which a loss is claimed;
 - c. the current address of each plaintiff property owner;
 - d. an itemized statement of claimed damages for each property, including contents; if the contents claim is no longer in dispute, a statement to this effect must be made;
 - e. a statement as to whether there have been any amounts paid or offered to be paid under the policy, and if so, the difference claimed in this suit, including an itemization of those items for which plaintiff is making a claim of underpayment and any supporting documentation;
 - f. if no payments have been made or offered, a statement of the reasons provided by defendant;
 - g. whether there have been any prior attempts at arbitration or mediation; and
 - h. identify any other Hurricane Sandy related lawsuits filed or contemplated for that particular property or plaintiff.
2. Within 60 days of this Order (or in the case of subsequently filed cases, within 60 days of the filing of the Answer), plaintiffs shall produce to defendants' counsel the following documents:
- a. all documents supporting or evidencing the claimed loss, including loss estimates from other insurers, any adjuster's reports, engineering reports, contractor's reports or estimates; photographs, claim log notes, documents relating to repair work performed after Hurricane Sandy, including contracts, bids, estimates, invoices or work tickets

- for completed work;
- b. all documents reflecting any payments received to date from any insurer, FEMA, or from any other governmental program federal, state or local;
- c. with respect to flood damage claims, all documents relied upon by plaintiff as satisfying Proof of Loss requirements and documentation required by SFIP 44 C.F.R. Pt. 61, App.A(1), Art. VII(J)(3),(4);
- d. any written communications exchanged between the insured or insurer relative to the claimed loss, including any proof of loss required by the applicable policy.

B. Automatic Disclosure by Defendants

1. Within 60 days of the date of this Order (or in the case of subsequently filed cases, within 60 days of the filing of the Answer), defendants in all Hurricane Sandy cases shall provide the following information to plaintiffs:
 - a. if no payment on the policy has been made or offered, an explanation for the declination of coverage, including but not limited to:
 - i. any policy exclusions that apply;
 - ii. whether coverage is denied due to non-payment of premiums;
 - iii. if there is a dispute as to the nature of the damage incurred and its coverage under the policy;
 - iv. if there is a dispute as to the value of the claimed losses, and
 - v. any other legal basis on which coverage has been denied.
 - b. if payment on the policy has been made or offered, defendant's understanding of the nature of the dispute;

- c. whether mediation or arbitration has been attempted in the case.
2. Within the same 60-day period, defendants are ORDERED to provide the following documents and information to plaintiffs' counsel:
 - a. all non-privileged documents contained in the claims file pertaining to the subject policy, including any letters of declination of coverage and notices of nonpayment of premiums;
 - b. 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;
 - c. the names and addresses of the adjusters for each claim;
 - d. all claim log notes;
 - e. records of payments made to the insured pursuant to the policy;
 - f. all expert reports and/or written communications that contain any description or analysis of the scope of loss or any defenses under the policy.

Nothing in this Order shall be construed to limit the information to be exchanged in any particular case. Counsel for each party is encouraged and expected to provide any information that would reasonably be helpful to their adversary in evaluating the case for mediation/arbitration purposes. Any information not exchanged during this period cannot be used in the mediation/arbitration process. The parties are strongly urged to meet and confer in good faith on the exchange of information.

C. Privilege

A party shall produce a privilege log for those documents that it is not producing on the basis of privilege 14 days prior to the completion of the production described in Section IV above. The log should include the author of the document, the recipient of the document, the date of the document, and the nature of the privilege asserted.

Documents for which a privilege is properly asserted include communications between counsel and client, documents created in anticipation of litigation, communications between or among plaintiffs' counsel, and communications between or among non-insurer defendants' counsel, insurer defendants' counsel and their respective clients. Documents routinely prepared in the ordinary course of business, including but not limited to adjusters' reports and other expert analyses, including draft reports, are not privileged and should be produced.

V. Alternative Dispute Resolution

Within 14 days of the completion of the expedited discovery procedure outlined above, the parties are Ordered to submit a Notice of Arbitration in accordance with Local Rule 83.7 in the form attached hereto as Exhibit C, or in the alternative, the parties may submit a stipulation in the form attached as Exhibit D, consenting to mediation. All arbitrations and mediations are to be concluded within three months of submission of the Notice of Arbitration or Consent to Mediation. Mediation may, at the discretion of the Court, be conducted by a magistrate judge rather than a mediator. Cases that are not resolved through arbitration, mediation, or voluntary settlement will be returned to the assigned district judge and magistrate judge for trial.

Within 14 days of the date of this Order, Defendants' Liaison Counsel is Ordered to confer with defendants' counsel and provide the Committee with a list of commonly occurring legal issues and defenses that defendants anticipate, from experience, may arise in a number of these cases,

along with relevant case law or other authority addressing these issues.

Within 7 days thereafter, Plaintiffs' Liaison Counsel is Ordered to confer with plaintiffs' counsel and provide the Committee with any contrary legal authority addressing the issues and defenses identified by Defendants' Liaison Counsel, and provide the Committee with any other issues that plaintiffs anticipate may arise in these cases.

While the ultimate determination of any such legal issue or defense may well be fact driven, and the outcome of any legal defense or issue will be determined by the individual judge assigned to each case, the Committee seeks this information in order to educate and fully prepare our mediators and arbitrators with the hope of expediting the settlement process. These submissions are intended to be summary in nature and may be made by letter; they are not intended to be full briefs on the issues.

SO ORDERED.

Dated: Brooklyn, New York
February 21, 2014

/S/ CHERYL L. POLLAK
Cheryl L. Pollak
United States Magistrate Judge

/S/ GARY R. BROWN
Gary R. Brown
United States Magistrate Judge

/S/ RAMON E. REYES, JR.
Ramon E. Reyes, Jr.
United States Magistrate Judge

Exhibit A

List of Misjoined Cases by Docket Number¹

Docket No.

13-5967 (DLI) (VMS)

13-5972 (PKC) (LB)

13-6008 (PKC) (RML)

13-6009 (CBA) (JMA)

13-6792 (ARR) (RER)

13-6873 (NGG) (JMA)

13-6876 (JS) (ARL)

13-7209 (ERK) (VVP)

13-5956 (BMC) (RML)

13-5962 (KAM) (RLM)

14-23 (JG) (VMS)

14-24 (ENV) (MDG)

13-6001 (ADS) (ARL)

13-6013 (JFB) (ARL)

13-6022 (JFB) (WDW)

13-6273 (LDW) (WDW)

13-5923 (ADS) (AKT)

14-110 (JS) (AKT)

¹This list was compiled from the spread sheet provided by plaintiffs to the court as of January 31, 2014 and may not reflect certain reassignments that may have occurred since that date.

Exhibit B

List of Related Cases^{1*}

<u>Plaintiff</u>	<u>Property</u>	<u>Defendants</u>	<u>Docket Nos.</u>
Israel	10 Suffolk Walk	Allstate Occidental Fire	13-6686 (KAM, JO) 14-23 (JG, VMS)
Wade	100 East Hudson	Nationwide Hartford	13-7000 (SJF, ARL) N/A
Maiorana	107 Cuba Ave.	Standard Fire Occidental	13-6926 (WFK, RER) 14-25 (DLI, CLP)
Halligan	11 Graham Pl.	FEMA Charter Oak	13-6596 (FB, MDG) 13-6013 (JFB, ARL)
Thomson	111 Hett Ave.	Narragansett Standard Fire	13-5968 (FB, VMS) 13-6934 (RRM, CLP)
Little	115 Oceanside Ave.	Narragansett FEMA	13-5968 (FB, VMS) 13-6603 (PKC, RML)
Buckley	12½ Neptune Walk	American Bankers Narragansett	13-6291 (JG, JMA) 13-5968 (FB, VMS)
Faulkener	125 Bedford Ave.	Narragansett Selective Ins.	13-5968 (FB, VMS) 14-170 (JFB, AKT)
Mastey	13008 Cronston Ave	Allstate Narragansett	13-6698 (FJ, RER) 13-5968 (FB, VMS)

¹This list was compiled from the spread sheet provided by plaintiffs to the court as of January 31, 2014 and may not reflect certain reassignments that may have occurred since that date.

^{*}To the extent that docket numbers on this list, including but not limited to 13-5914, 13-5964, 13-5968, 13-6291, 13-6818, 13-5995, and 13-7073, had misjoined plaintiffs as of January 31, 2014, and thereafter plaintiffs on those dockets were terminated and refiled under new docket numbers, counsel should ascertain that the newly filed cases have been properly related to any other cases relating to the same property.

Fugelsang	14 Ocean Ave.	FEMA Univ.No.Am.	13-6373 (JG, VMS) 13-7209 (ERK, VVP)
Erber	143-01 Rockaway Bch	FEMA Occidental	13-6592 (ILG, SMG) 13-6008 (PKC, RML)
Baldeo	1431 Pearl St.	FEMA Occidental	13-6579 (ERK, CLP) 13-6008 (PKC, RML)
Sears	156 Reid St	American Bankers Narragansett	13-6291(JG, JMA) 13-5968 (FB, VMS)
McDonnell	157 Blackheath Rd	Narragansett Standard Fire	13-5968 (FB, VMS) 13-6891 (ADS, GRB)
Arnella	16 Sutton Pl.	Farmington Cas. Travelers	14-190 (LDW, AKT) N/A
Moran	17 Deal Rd	FEMA Liberty Mutual	13-6587 (ADS, AKT) 13-7301 (NGG, JO)
Ryan	172 Reid Ave..	Foremost Mutual FEMA	13-5961 (DLI, RML) 13-6611 (JG, RLM)
Beaumont	174 Coronodo St	Wright Nsl Flood Ocean Harbor	N/A 13-7073 (SJF, AKT)
Gallagher	175 Beach 128 th St	Narragansett Am. Bankers	13-5968 (FB, VMS) 13-6291 (JG, JMA)
Ruggiero	178 Beach 133 rd St	Auto Ins. of Hartford Liberty Mut.	13-5962 (KAM,RLM) 13-7313(RRM,MDG)
Bennett	18 Beach 221 st St	Liberty Mut. Liberty Mut. Fire	13-6818 (KAM, CLP) 13-7302 (WFK,RML)
Connors	180 Beach 123 rd St	Ocean Harbor Allstate	13-7102 (DLI, JO) 13-6656 (FB, RML)
Downs	19 Doris Lane	Liberty Mut. Fire First Liberty	13-5957 (CBA, CLP) 13-6792 (ARR, RER)
McGovern	2Beach 219 th St	Standard Fire Occidental Fire	13-7019 (NG, JO) 14-23 (JG, VMS)

Cloos	203 Bayside Ave.	Wright Universal N.Am.	N/A 13-7242 (WFK,RLM)
Hadef	203 Beach 149 th St.	Occidental Fire Allstate	14-24 (ENV, MDG) N/A
Phillips	208 E. 8 th Rd	Liberty Mut. Liberty Mut.	13-7111 (LDW,GRB) N/A
Wernick	210 Sportsman Ave.	FEMA Narragansett	13-6590 (JFB, WDW) 13-5968 (FB, VMS)
Farr	21415 12 th Ave. 214-215 12 th Ave.	Occidental Fire Standard Fire	14-23 (JG, VMS) 13-6981 (SLT, JO)
Mellett	215 Beach 142d St	Amer. Bankers Narragansett	14-142 (MKB, RER) 13-5968 (FB, VMS)
Washington	21620 Rockaway Point	Amer. Bankers Narragansett	14-208 (MKB, VVP) 13-5968 (FB, VMS)
Leiner	237 Beach 118 th St	Everest Nsl Hartford Ins.	13-5975 (DLI, RLM) N/A
Ramey	24 Michigan St	Wright Fireman's Fund	N/A 13-5978 (JFB, WDW)
Stapleton	251 W. Fulton St	Narragansett Wright	13-5968 (FB, VMS) N/A
Arnella	2525 Cedar St	Auto Ins. of Hartford Travelers	14-110 (JS, AKT) N/A
Ferner	2653 Hewlett Lane	Allstate Standard Fire	13-6767 (JFB, AKT) 13-6904 (LDW,AKT)
Mingino	310 Beach 142 St	Farmington Cas. Standard Fire	13-5923 (ADS, AKT) 13-7024 (RRM, RER)
Szajt	310 E. Shore Dr.	Narragansett Allstate	13-5968 (FB, VMS) 13-6737 (LDW,AKT)
Fields	333 Beach 40 th St	Stillwater Wright	13-6994 (ILG, RLM) N/A

Memi	335 Beach 145 th St	Nationwide Mut. Fire Nationwide Prop & Cas.	13-6001(ADS, ARL) 13-6009 (CBA, JMA)
Curtis	336 Beach 148 th St	Allstate Occidental	13-6712 (BMC, VVP) 13-6008 (PKC, RML)
McKinney	36 Janet Lane	Allstate Narragansett	13-6702 (SLT, VVP) 13-5968 (FB, VMS)
Febrizio	365 W. Pine	Wright Stillwater	N/A 13-6999 (LDW,AKT)
Hamlet	378 West Pine	Great Lakes Reins. Wright	13-5941 (SJF, GRB) N/A
Murphy	413 Beach 134 th St	FEMA Narragansett	13-6606 (SLT, LB) 13-5968 (FB, VMS)
420 Tenants	420 Shore Rd	Standard Fire CHUBB	13-5909 (JFB, GRB) 14-10 (JS, WDW)
Grzegorski	426 Beach 138 th St	Narragansett Standard Fire	13-5968 (FB, VMS) 13-6984(RRM,MDG)
McDonnell	440 Beach 134 th St	American Security First Liberty	14-133 (ARR, RLM) 13-6792 (ARR, RER)
Rudden	454 Beach 124 th St	Standard Fire Universal No. Am	13-6897 (JFB, ARL) 13-7209 (ERK, VVP)
Lindon	457 Beach 124 th St	Liberty Mut. Fire Liberty Mut. Fire	13-7312 (FB, RML) 13-6873 (NGG, JMA)
Mastey	457 Beach 145 th St	Narragansett Standard Fire	13-5968 (FB, VMS) 13-7010 (RRM, CLP)
LaConti	463 E. Penn St.	Narragansett Wright	13-5968 (FB, VMS) N/A
King	487A Seabreeze Walk	Standard Fire Farmington Cas.	13-6951 (SLT, RER) 13-5923 (ADS, AKT)
Corbett	51 Waterford Rd	Liberty Mut. Fire American Security	13-6022 (JFB, WDW) 14-124 (SJF, GRB)

Rayner	52 California St	Narragansett Hartford of Midwest	13-5968 (FB, VMS) 14-173 (SJF, WDW)
Schlossberg	522 East Fulton St	Nationwide Mut. Fire Nationwide Mut. Fire	13-6001 (ADS, ARL) 13-7281 (JS, WDW)
Velez	53 Howard Ave.	Narragansett Wright	13-5968 (FB, VMS) N/A
Whelan	541 Beach 129 th St	Naragansett Standard Fire	13-5968 (FB, VMS) 13-6973 (JG, MDG)
Courtney	547 Beach 127 th St	Standard Fire Universal No. Ame	13-6959 (DLI, RLM) 13-7209 (ERK, VVP)
Jackson	551 So Ocean Ave.	Narragansett American Security	13-5968 (FB, VMS) 14-121 (JS, AKT)
Mason	561 Beach 67 th St	Allstate American Security Fed. Emerg. Mgmt.	13-7013 (PKC,MDG) 13-6884 (ERK,MDG) 14-30 (KAM, SMG)
Fraser	561 W. Bay Drive	Narragansett FEMA	13-5968 (FB, VMS) 13-6580 (JFB, GRB)
Wheellock	569 West Park Ave.	Merrimack Mut. Fidelity	13-5981 (JFB, ARL) 13-7004 (ADS, ARL)
Demic	60 Ocean Ave.	Allstate Liberty Mut.	13-6663 (NG, JO) 13-6873 (NGG, JMA)
Peterson	618 Beach 66 th St	Nationwide Underwriters at Lloyds	13-6009 (CBA, JMA) 13-7306 (MKB,MDG)
Wolken	68 W. 18 th Rd	Safeco Ins. Metro. Prop. & Cas.	13-5967 (DLI, VMS) 13-6273 (LDW,AKT)
Kyne	683 Highland Pl.	Narragansett American Bankers	13-5968 (FB, VMS) 13-6291 (JG, JMA)
7001 E.71st LLP	7001 E.71 St	Continental Cas. Chubb State court Kings Cty	13-638 (RJD, SMG) 13-2898(MKB,MDG) 506259/2013

Mussman	77 Oregon St	Narragansett Standard Fire	13-5968 (FB, VMS) 13-6911 (ADS, GRB)
Quinn	8 Hastings Rd	Wright Charter Oak Fire	N/A 13-6013 (JFB, ARL)
Dolan	804 Bayside	Safeco Standard Fire	13-5967 (DLI, VMS) 13-6974 (NG, JO)
Salle	81 Buffalo Ave.	Allstate Allstate	13-6020 (SJF, GRB) 13-6016 (ADS, GRB)
Brenner	849 Ocean Front	Hartford Ins. Midwest Hartford Ins. Midwest	14-126 (JS, ARL) 13-5924 (JS, WDW)
McKnight	85 Ohio Ave.	Narragansett Wright	13-5968 (FB, VMS) N/A
Hernandez	85 Pearsall St	Fidelity & Deposit FEMA	13-6906 (NGG, VVP) 13-6599 (ARR, RER)
Hommel	905 West Park Ave.	Narragansett Wright	13-5968 (FB, VMS) N/A
Badamo	910 Lanark Rd	Amer. Security FEMA First Liberty	13-5964 (DLI, VVP) 13-6575 (JG, MDG) 13-6792 (ARR, RER)
Fox	95 Penna. Ave.	Narragansett Standard Fire	13-5968 (FB, VMS) 13-6905 (JS, ARL)
Campbell	979 Bayside	Genl Cas.of Wisc. FEMA	13-7263 (NGG, JO) 14-154 (RJD, CLP)
Guttueri	1212 Cross Bay Blvd.	Liberty Mutual Liberty Mutual Fire	13-6818 (KAM, CLP) 13-7393 (WKF, JMA)
Duggen	20409 10 th Ave	Occidental Standard Fire	13-6008 (PKC, RML) 13-7022 (FB, CLP)
Carey	130 Beach 128 th St. 133-06 Rockaway Beach Blvd.	First Liberty Narragansett	13-5946 (NG, MDG) 13-5968 (FB, VMS)
Nicasio	109-20 Rockaway Beach Blvd.	Wright Wright	N/A N/A

Exhibit C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

IN RE HURRICANE SANDY CASES

14 MC 41

-----X

THIS DOCUMENT APPLIES TO:

-----X

NOTICE DESIGNATING CASE TO COURT ANNEXED ARBITRATION

This case has been designated to participate in the Court Annexed Arbitration Program pursuant to Local Civil Rule 83.7(d) wherein money damages only are being sought.

After the exchange of the first phase of discovery in Hurricane Sandy cases as mandated by Case Management Order No. 1, an arbitration hearing will be set. The Arbitrator shall be selected from the Court's Panel of Arbitrators. Instructions will be provided when a hearing date has been set. It is not anticipated that matters selected for Arbitration will require discovery directions. If a dispute arises which requires a ruling on a question related to discovery, you must move promptly before the assigned magistrate judge, unless otherwise directed by the Court. Attorneys cannot adjourn or change the arbitration hearing date without approval from the Court.

Requests to Adjourn an Arbitration Hearing: Must be filed as a motion via ECF to the assigned district judge or magistrate judge.

Telephone calls to request adjournment of an Arbitration hearing will not be considered. Counsel and pro se litigants should provide the Court with an email address for notification purposes.

You may refer to the Local Civil Rules for Arbitration of the U.S. District Court, Eastern District of New York on our web site, www.nyed.uscourts.gov/adr.

Dated:

Exhibit D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

IN RE HURRICANE SANDY CASES

14 MC 41

-----X

THIS DOCUMENT APPLIES TO:

-----X

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned parties:

1. The parties agree to submit their dispute to mediation in lieu of arbitration.
2. No party shall be bound by anything said or done during the Mediation, unless either a written and signed stipulation is entered into or the parties enter into a written and signed agreement.
3. The Mediator may meet in private conference with less than all of the parties.
4. Information obtained by the Mediator, either in written or oral form, shall be confidential and shall not be revealed by the Mediator unless and until the party who provided that information agrees to its disclosure.
5. The Mediator shall not, without the prior written consent of both parties, disclose to the Court any matters which are disclosed to him or her by either of the parties or any matters which otherwise relate to the Mediation.
6. The mediation process shall be considered a settlement negotiation for the purpose of all federal and state rules protecting disclosures made during such conferences from later discovery or use in evidence. The entire procedure shall be confidential, and no stenographic or other record shall be made except to memorialize a settlement record. All communications, oral or written, made during the Mediation by any party or a party's agent, employee, or attorney are confidential and, where appropriate, are to be considered work product and privileged. Such communications, statements, promises, offers, views and opinions shall not be subject to any discovery or admissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties.

Provided, however, that evidence otherwise subject to discovery or admissible is not excluded from discovery or admission in evidence simply as a result of it having been used in connection with this mediation process.

- 7. The Mediator and his or her agents shall have the same immunity as judges and court employees have under Federal law and the common law from liability for any act or omission in connection with the Mediation, and from compulsory process to testify or produce documents in connection with the Mediation.
- 8. The parties (i) shall not call or subpoena the Mediator as a witness or expert in any proceeding relating to: the Mediation, the subject matter of the Mediation, or any thoughts or impressions which the Mediator may have about the parties in the Mediation, and (ii) shall not subpoena any notes, documents or other material prepared by the Mediator in the course of or in connection with the Mediation, and (iii) shall not offer into evidence any statements, views or opinions of the Mediator.
- 9. The Mediator's services have been made available to the parties through the dispute resolution procedures sponsored by the Court. In accordance with those procedures, the Mediator represents that he has taken the oath prescribed by 28 U.S.C. 453.
- 10. Any party to this Stipulation is required to attend at least one session and as many sessions thereafter as may be helpful in resolving this dispute.
- 11. An individual with final authority to settle the matter and to bind the party shall attend the Mediation on behalf of each party.

Dated: _____

Plaintiff

Defendant

Attorneys for Plaintiff

Attorneys for Defendant

Consented to: _____
Mediator

Comments From:

Jack T. Spinella, Esq.

Marco A. Gonzalez, Esq.

Nicoll Davis & Spinella LLP

ND&S NICOLL DAVIS & SPINELLA LLP
New Jersey | New York | Florida

MARCO A. GONZALEZ, JR.
MGONZALEZ@NDSLAW.COM

JACK T. SPINELLA
JSPINELLA@NDSLAW.COM

February 21, 2014

Via Electronic Mail

The Hon. Jerome B. Simandle, C.J., USDC-NJ
William T. Walsh, Clerk
Clarkson S. Fisher United States Courthouse
402 E. State Street, Room 2020
Trenton, NJ 08608

Attn: John O'Brien, Chief Deputy

Re: Comments from Jack T. Spinella & Marco A. Gonzalez, Jr. of
Nicoll, Davis & Spinella, LLP to the
Super Storm Sandy Litigation Committee

Dear Judge Simandle:

Kindly accept our comments below in response to Your Honor's February 14, 2014 Notice of Public Meeting to discuss the management of the Super Storm Sandy Flood Litigation and for comments from the public and the Bar to discuss the management of this litigation in advance of the meeting.

By way of background both of us have substantial experience and exposure in mediating Super Storm Sandy cases or representing Storm victims. Jack Spinella was appointed to the New Jersey State Sandy Mediation Panel and in that role successfully mediated a substantial number of Sandy related claims. Marco Gonzalez played a key role in setting up Sandy Legal Clinics with the Volunteer Lawyers for Justice of NJ (VLJ) and has worked in many of those clinics throughout the State in the pro bono representation of Super Storm Sandy Victims. In light of our combined experience with these type of claims, we respectfully offer for Your Honor and the Super Storm Sandy Litigation Committee's consideration ("Sandy Litigation Committee"), the following comments in advance of the March 4th meeting:

95 Route 17 South, Suite 316
Paramus, NJ 07652
201.712.1616
201.712.9444 facsimile

450 Seventh Avenue, Suite 2205
New York, NY 10123
212.972.0786
201.712.9444 facsimile

Wellington Commons
8461 Lake Worth, Suite 248
Lake Worth, FL 33467
561.880.4039
561.828.0157 facsimile

1. **Expedited, Uniform Discovery Procedures.** Many, if not most, of these claims will be based upon an under-valuation of loss. Accordingly, given our experience with the State Sandy Mediation Program and the VLJ Sandy Legal Clinics, we recommend that the Sandy Litigation Committee adopt a uniform and streamlined discovery process that is simple to implement and facilitates judicial economy and efficiency without sacrificing litigants' rights. A uniform and streamlined discovery process should include an expedited exchange of information after the pleadings stage that covers the policy(s) at issue, claim documentation, proofs supporting plaintiff's valuation claim (including photos, receipts, adjustor reports, expert valuations, etc.) and any other documents supporting the valuation and proof of loss. The process should also cover any rebutting valuation evidence in possession of defendants, any correspondence between the parties, reports and final determinations by the carrier. We believe that a uniform, streamlined discovery process can be implemented by the District via order or a new Appendix to the Local Civil Rules. Case management schedules for these claims should be uniform and adopts an expedited schedule. The discovery schedule cannot be adjusted on consent of the parties but must, upon the showing of good cause, have the approval of the Magistrate Judge or (if appointed) a Special Master (see below).
2. **Limited Discovery Requests** Because most of the flood claims will involve allegations that Plaintiffs' losses were under-valued, written discovery can be limited to 25 interrogatories and requests for the production of documents each without sacrificing litigants' rights. Exceptions could be granted on a case-by-case basis upon the showing of good cause. While other jurisdictions have used uniform discovery requests in similar disaster-related litigation, because the losses caused by Super Storm Sandy vary throughout the State, it is likely that the parties would object to the use of uniform discovery requests.
3. **Mandatory Mediation.** Given our experience with the Super Storm Sandy cases we have handled thus far, the Sandy Litigation Committee should incorporate a mandatory mediation session between the parties. In our view, the session should occur subsequent to the initial exchange of information as set forth in our first comment, above. The window to complete mediation should conform to Appendix Q to the Local Civil Rules of the District with the exception that the stay of discovery during mediation should be limited to sixty (60) days, at which point the mediation should be completed. However, in the event the stay expires and the case has not settled, consistent with Appendix Q, the parties and the mediator should be allowed to apply for a *brief* extension of the stay pursuant to Local Civil Rule 301.1(e)(5) for additional time to attempt to settle a case that is close to settling.

Based on our experience, one of the shortfalls in the State Mediation program was that it restricted mediation to two (2) hours per session. While many cases were settled successfully despite this time limitation, we recommend that that no hourly time limits be placed in any mediation program adopted by this District to adjudicate the Sandy claims other than what is in Appendix Q and the 60 day stay referenced above.

Appendix Q to the Local Civil Rules also sets forth that the mediation compliance judge designates mediators for cases in the District. Because this is the first time that such a volume of disaster –related cases are before the District, we recommend that: (1) the mediation compliance judge continue to designate mediators to Sandy flood cases but that (2) the District compile a list of certified mediators (that includes mediators with either experience in mediating Sandy or other disaster-related claims) for inclusion in a specific panel that is vetted or approved by the Sandy Litigation Committee, and (3) that those selected for the panel take part in a brief training session run by the District that includes useful background information relating to the storm, the losses and damages caused in the different areas of the state, and familiarity with policy language in the various federal flood policies. While the training session seems at first counter-intuitive to the streamlining of these cases, we have found (and particularly in the VLJ Sandy Clinics) that brief, upfront training in fact facilitates and streamlines the legal process.

4. **Misc. Considerations.**

- a. Consolidation. The Committee will likely hear comments from the bar and members of the judiciary for the need to consolidate groups of cases that are very similar, which was done in the Eastern District of Louisiana in litigating flood cases after Hur. Katrina. However, an examination of those proceedings reveals that, for instance, certain neighborhoods were flooded in the same manner at the same time after certain levies and dikes were breached. But the flooding caused during Super Storm Sandy was different, with numerous stories of one home in the same block being washed away by flood waters when a neighboring property remained intact. Accordingly, case consolidation here may prove to be difficult and will likely be objected to by many of the parties.
- b. Joint Defense Group. It is possible that some of the defendants may join up, if they haven't already, in JDGs. JDGs may develop especially if the Committee and Your Honor decide that the cases should be consolidated in some fashion. If so, the Sandy Litigation Committee should consider an order that such groups elect/decide upon Liaison Counsel, whose position would be to communicate to the court or the Special Master common issues, procedural questions and litigation/settlement progress on behalf of that particular JDG.
- c. Special Master. The Sandy Litigation Committee should consider the appointment of a Special Master to adjudicate common discovery disputes between plaintiffs' counsel may resist because they will not wish to bear the cost of a SM (some in the defense may support it because having a SM would, for the most part, ensure a more streamlined, and expedited, process to resolve discovery disputes. If a SM is appointed to adjudicate discovery issues during the Sandy litigation, then it would

make sense that all discovery-related motions, applications and issues go through the SM first for adjudication but that there is a limited mechanism, upon the showing of good cause, for the parties to seek further review by a Magistrate Judge.

Thank you for the opportunity to submit these comments to the Sandy Litigation Committee.

Respectfully submitted,

/s/ Jack T. Spinella

Jack T. Spinella, Esq.

/s/ Marco A. Gonzalez, Jr.

Marco A. Gonzalez, Jr., Esq.

Comments From:

Gerald J. Nielsen, Esq.

Nielsen, Carter, Treas, LLC

GERALD J. NIELSEN
JOHN D. CARTER
WILLIAM T. TREAS

KIM TRAN BRITT
JOSEPH J. AGUDA JR.
ALLEN D. KINCANNON
CHRISTOPHER J. BELL
MICHAEL D. BREININ
DEANI BEARD MILANO
JASON M. VERDIGETS
KRISTIE LUKE MOUNEY
KEITH M. DETWEILER
WILLIAM R. DEJEAN

NIELSEN, CARTER & TREAS, LLC

3838 NORTH CAUSEWAY BOULEVARD
SUITE 2850
METAIRIE, LOUISIANA 70002
PHONE (504) 837-2500
FAX (504) 832-9165
E-MAIL: GJNielsen@nct-law.com

February 28, 2014

GINO R. FORTE
HEATHER W. BLACKBURN
KENNETH M. WAGUESPACK, JR.
B. MARIANNE WISE
JADE C. McKEOUGH
SHANNON C. BURR
MEGAN E. SNIDER
SEAN P. SULLIVAN
DAVID A. POTE
KRISTINA J. FONTE
RICHARD J. WOLFF
DUSTIN L. POCHE
MEREDITH A. MAYBERRY
ROBERT W. TSCHIRN
JORDAN M. JEANSONNE

William T. Walsh, Clerk
Clarkson S. Fisher United States Courthouse
402 E. State Street, Room 2020
Trenton, NJ 08608

Attn: John O'Brien, Chief Deputy

Re: Hurricane Sandy Related Cases Seeking Benefits Under The National Flood Insurance Program Pending Before The United States District Court for the District of New Jersey

Dear Chief Deputy O'Brien:

I write in reply to the letter and proposed "Uniform Scheduling Order" submitted by John F. Casey of the Wolff & Samson Law Firm on February 24, 2014. This letter supplements my prior letter to Chief Judge Simandle, along with a quite different proposed Case Management Order, both of which were submitted to Judge Simandle on January 31, 2014.

Undersigned counsel has had the great pleasure of working with Messrs. Martin Mayo, Chip Merlin and Sam Bearman over the last many years upon NFIP cases. However, undersigned counsel writes to express his respectful disagreement with those attorneys regarding their apparent belief, as displayed in their proposed "Uniform Scheduling Order, that discovery in NFIP cases can be completed in four months. Given the substantive laws at issue, it cannot.

Said plaintiffs' counsel represent to this Court that they have litigated "thousands" of flood cases on behalf of plaintiffs. Being the senior partner of the one law firm that has litigated more than 80% of all of these cases over the past 30 years for the entire Country, that claim is highly exaggerated. This point is not made frivolously or to be petty. The point is important, because undersigned counsel believes it critical to convey to this Court that while Messrs. Mayo, Merlin and Bearman are certainly well-qualified to handle NFIP cases for plaintiffs, not one of these attorneys has ever, once, completed discovery in an NFIP case in four months.

Indeed, this Honorable Court may independently confirm for itself, via the Pacer System, that more than half of the NFIP cases filed by Mr. Mayo and Mr. Bearman in the Southern District of Texas following Hurricane Ike, are still pending TODAY in 2014, even though Hurricane Ike happened in 2008. And while this firm has indeed settled many cases with said plaintiffs' counsel, this does not occur until after all needed discovery is completed.

This Court is also asked to examine Magistrate Judge John Froeschner's recent decisions in three Hurricane Ike NFIP cases Mr. Mayo and Mr. Bearman recently picked as their first Ike cases that they wanted to go to trial, namely *Charnock v. Fidelity*, Case 3:10-MC-07015 (S.D.Tex. 2014)¹; *Donovan v. Fidelity*, 2014 WL 50811 (S.D.Tex. 2014); and *Pye v. Fidelity*, 2014 WL 496520 (S.D.Tex. 2014). Magistrate Judge Froeschner's decision upon trial on the merits in all three of those cases will provide this Court an objective and meaningful window into the types of issues defendants must address during discovery in the NFIP cases that are pending before the District of New Jersey. And, while not intending to put too fine a point upon it, the \$2,500 judgment that Judge Froeschner imposed in the *Pye* case for the claim for car parts, is being appealed to the Fifth Circuit. Car parts are not covered under the NFIP. When the program's rules are not followed, settlements become impossible, and trials and appeals are almost assured. For a perfect example of a district court refusing to abide by FEMA's rules, please see *DeCosta v. Allstate*, 736 F.3d 76 (1st Cir. 2013).²

The substantive laws governing NFIP litigation are completely incompatible with the suggestion that this work can be done in such a short time frame. This is particularly true for plaintiffs' counsel who have filed dozens or even hundreds of cases. Please consider the following two sets of laws:

First, please examine the regulations that govern the NFIP-WYO Program. These make clear that a WYO carrier is the Government's "fiduciary," and that its duty is to "assure that any taxpayer funds are accounted for and appropriately expended." 44 C.F.R. Pt. 62.23(f). See also 44 C.F.R. Pt. 62.23(i)(2), which states in part, "It is important that the company's Claims Department verifies the correctness of the coverage interpretations and reasonableness of the payments recommended by the adjusters." Please consider also that within the Arrangement between FEMA and all WYO carriers, which is itself a federal law, the Arrangement provides at 44 C.F.R. Pt. 62, App. A, Art. II(G), that, "The company shall comply with written standards, procedures, and guidance issued by FEMA or FIA relating to the NFIP and applicable to the company." These are non-discretionary legal duties governing disbursements of federal funds. At bottom, WYO carriers facing NFIP litigation cannot settle those cases without first "verifying" all damages being claimed. A WYO carrier cannot just take a public adjuster's word for it.

Second, the Court is asked to give due consideration to the Improper Payments Information Act of 2002, and the Improper Payments Elimination and Recovery Act of 2010. ("IPIA" and "IPERA"). These federal laws contain nondiscretionary Congressional mandates that apply to FEMA, which require it to require WYO carriers to reimburse to FEMA, any payments made that

¹ Copy attached as Exhibit A.

² FEMA's rules have already led to the successful resolution of 99% of the NFIP claims arising from Hurricane Sandy. They will be sufficient for the remaining 1% that have resulted in litigation. Irrefutably, it would be inappropriate and wrong to extend to the 1%, different or better rules than those that governed the claims of the 99%.

William T. Walsh, Clerk
Clarkson S. Fisher United States Courthouse
February 28, 2014
Page 3

are not properly documented in accordance with agency rules and regulations. For example, if a WYO carrier were to engage in a traditional “split the baby” type settlement as might occur routinely in private litigation, this would constitute a direct violation of both the IPIA and the IPERA.

The undersigned agrees with plaintiffs’ counsel that discovery will be necessary if amicable resolutions are to occur. However, the undersigned must also submit that if this Court were to impose such a short discovery schedule, this would lead to far more trials, and to more trials of longer duration. This would occur because the WYO carrier defendants would be forced to literally use trials to complete their discovery, in order to develop the necessary record during trial to support additional claims payments. As the Court can well imagine, trials during which discovery is being completed as the judge watches, run much longer than properly prepared trials. This is not in anyone’s interest.

Next, it is noted that Mr. Merlin separately provided this Court the Case Management Order recently entered in the Eastern District of New York concerning its Sandy cases. Please compare the documents that have been ordered to be disclosed by the plaintiffs in the New York CMO, to the documents to be disclosed in the CMO proposed by these counsel to the District of New Jersey. Among the many items that have been omitted in the version submitted to this Court, is any requirement of producing documentation relating to repairs already made. It is an absolute impossibility that a WYO carrier can consider settlement of an NFIP case until it has completely “nailed down” all questions attendant to whether or not repairs have been completed, and what those repairs actually did cost.

It also appears that the New York court has precluded all formal discovery for the next six months. Given the substantive laws governing the NFIP, this will preclude almost all settlements of NFIP cases in New York during that entire timeframe. That issue will be raised with the New York court in a filing to occur on Friday, March 7, 2014.

In closing, and as the only attorney who will appear before the Court on March 6, 2014 who actually has handled “thousands” of NFIP cases, the proposed CMO that was submitted by the undersigned to Chief Judge Simandle on January 31, 2014 does accurately set forth a Case Management Order that actually would achieve the Court’s desire for many settlements and very few trials for the remaining 1% of Sandy claimants who have not yet achieved resolution of their NFIP claims dispute.

Respectfully submitted,



Gerald J. Nielsen

GJN/tp

Attachment

cc: All Known Counsel with NFIP Cases Arising From Hurricane Sandy

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

PETER CHARNOCK §
V. § MISCELLANEOUS NO. G-10-mc-7015
§ (Lead Case No. G-10-cv-450)
FIDELITY NATIONAL PROPERTY and §
CASUALTY INSURANCE COMPANY §

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court with the consent of the Parties pursuant to 28 U.S.C. §636(b)(1)(c). Having considered and reviewed the evidence in a trial on March 27, 2013, the Court now issues the following Findings of Fact and Conclusions of Law.

1. Plaintiff, Peter Charnock, a licensed building contractor since 1984, is the owner of an elevated home at 1140 Sailfish, located within the City of Bayou Vista in Galveston County, Texas. He purchased the home in 1972 for \$66,000.00.
2. At all times relevant to this case, Charnock's home was insured under a Standard Flood Insurance Policy (SFIP) issued by Defendant, Fidelity National Property and Casualty Insurance Company, a WYO carrier under the National Flood Insurance Program. The SFIP provided coverage in the amounts of \$250,000.00 for the building and \$10,500.00 for contents.
3. In early September 2008, Charnock's home was significantly damaged by flooding caused during Hurricane Ike.

4. Charnock notified Fidelity of his claim and following an adjuster's visit, Fidelity, on October 3, 2008, issued preliminary checks in the amount of \$10,000.00 for building damage and \$5,000.00 for contents damage.
5. On November 2, 2008, Charnock filed a pro se proof of loss which included a detailed list of the damages to his building in the amount of \$84,411.00 and its contents in the amount of \$32,949.76, for a "total loss due to Hurricane Ike" of \$117,360.76.
6. On December 8, 2008, the adjuster assigned to the claim issued his report which assessed the building loss at \$53,429.08 and the contents loss as "in excess of the policy limits." On January 15, 2009, Fidelity issued additional checks in the amounts of \$42,429.00 for building damage and \$5,500.00 for contents damage.
7. On June 4, 2009, Fidelity issued its final check in the amount of \$14,408.59 for recoverable depreciation on the building.
8. In total, by June 4, 2009, Fidelity had paid Charnock a total of \$66,837.67 for damage to his home.
9. Unhappy with Fidelity's payments, Charnock signed a sworn Proof of Loss, dated July 22, 2009, claiming a net amount of \$258,500.00, the policy limits. Apparently, Charnock sent the Proof of Loss to their attorney, Samuel Bearman, who then sent it to Fidelity. Included with the Proof of Loss was a detailed Flood Repair Estimate prepared by Halley Lovato, of Top Construction, Inc., which set the repair/replacement cost of Charnock's damages at only \$90,750.00. Charnock testified that he did not recall ever seeing Lovato's report. He testified he probably would have remembered

it because he would have disagreed with it. He further testified that the Proof of Loss he swore to exceeded his actual damages, a fact he referred to as a “technicality.” On October 19, 2009, Fidelity sent a letter to Charnock’s attorney, Samuel Bearman, acknowledging receipt of “*your* Proof of Loss in the amount of \$258,00.00” and explaining why Fidelity was denying any further payments. Since the letter specifically referred to the “enclosed” estimate the Court assumes, without finding, that Bearman, acting as counsel for Charnock, included Lovato’s estimate with Charnock’s Proof of Loss and submitted both to Fidelity. Regardless, Charnock is bound by the acts of his attorney. Callip v. Harris County Child Welfare Dept., 757 F.2d 1513, 1522 (5th Cir. 1985) (citing Link v. Wabash R. Co., 370 U.S. 626, 633 (1962))

10. On April 27, 2011, Charnock, through current counsel, Martin Mayo, sued Fidelity for breach of contract.
11. Ultimately, Charnock, using his own construction company, completely repaired his home, restoring it to its pre-Ike condition, for a total cost, including labor and profit, of \$133,269.13. At trial, Charnock testified that he had calculated this figure “last night.”
12. The Standard Flood Insurance Policy contains numerous mandatory provisions addressing a Proof of Loss. Among others, the Proof of Loss must state the amount the insured is claiming under the policy and be sworn to by the insured. In completing the Proof of Loss, the insured is required to “use your own judgment concerning the

amount of loss and justify that amount” and must not misrepresent any material facts or include false statements. See SFIP §§ VII. J.5 and VII.B.1.

13. While this Court would be inclined to take the more relaxed approach, urged by Plaintiff’s counsel, to the sufficiency of documentation submitted in support of the Proof of Loss and the need to pinpoint the expense of repairs and replacement items to make the amount of the Proof of Loss “match” the documentation amount, Cf. Sunray Village Owners’ Association v. Old Dominion Insurance Co., 546 F.Supp. 2d 1283 (N.D. Fla. 2008), as opposed to the more draconian approach favored by Fidelity, it cannot “turn a blind eye” to Charnock’s submission, under oath, of a known falsely inflated claim. Whether Charnock submitted the Proof of Loss out of anger, frustration, caution, or some other reason, he knew it was excessive at the time he signed it. The submission seems even more egregious since Charnock had the experience to calculate his loss with much more accuracy than most insureds, in fact, his original pro se proof of loss was much more accurate than the one pending when this suit was filed. It is clear to the Court that Charnock, in violation of the policy, swore to false statements in the Proof of Loss; did not use his best judgment concerning the amount of his claim; and did not justify the policy limit amount of \$258,500.00 he claimed was due.
14. It may be unrealistic to expect an insured to understand the potential pitfalls of the National Flood Insurance Program; however, as harsh as it may seem, federal law requires the Court to strictly construe and enforce the claims presentment rules of the

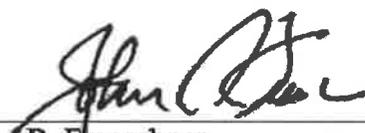
SFIP. Gowland v. Aetna Casualty and Surety Co., 143 F.3d 951, 954 (5th Cir. 1998)

The filing of a Proof of Loss sufficient to allow FEMA the opportunity to properly evaluate a claim is required. Foreman v. Federal Emergency Management Agency, 138 F.3d 543, 545 (5th Cir. 1998) Charnock's sworn Proof of Loss did not comply with this requirement. In the "best of all possible worlds" Charnock would be entitled to recover exactly the cost of restoring his house to its pre-hurricane condition, but in the "world" of the National Flood Insurance Program, any non-compliance not waived by FEMA can render an unfair result. Only FEMA can forgive an insured's noncompliance, Gowland v. Aetna Casualty and Surety Co., 143 F.3d 951, 954 (5th Cir. 1998), this Court cannot force it to do so. For whatever reason, FEMA will not forgive Charnock, even though it means he will not recover the amount it seems clear that he would be otherwise owed under the policy. As a result, on the facts in this case, Charnock is not entitled to recover any additional insurance benefits.

CONCLUSION

It is, therefore, **ORDERED** that the Amended Complaint of Peter Charnock, is **DISMISSED**.

DONE at Galveston, Texas, this 7th day of January, 2014.



John R. Froeschner
United States Magistrate Judge