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Sent: Tuesday, August 1, 2017 2:50 PM
To: rulecomments
Subject: Proposed Model Status Conference Stipulation and Order Form

Categories: [REDACTED]

Dear Mr. McConnell,

We have reviewed the Proposed Model Status Conference Stipulation and Order Form out for comment until August 28, 2017 ("Proposed Form"), and write to bring the Court's attention to some ambiguities with respect to the expert rebuttal reports set forth in the Proposed Form.

Page 21 Rebuttal Report/Reply Deadlines

The first paragraph of the Rebuttal Reports section on page 21 provides, "The parties who have prepared and exchanged Expert-in-Chief reports may submit a Rebuttal Report within 15 days after receiving the opposition(s)' Expert-in-Chief report(s)." [Emphasis added.]

The second paragraph of the same section provides: "If a litigant decides not to have an "expert-in-chief" opine on the issues in the case but, instead, decides to retain an expert only to rebut the expert-in-chiefs report, that rebuttal expert, if any, will be strictly limited to answering the opinions in the expert-in-chiefs report.... The rebuttal expert's report must be exchanged 15 days after the expert-in-chiefs report was disclosed." [Emphasis added.]

Did the Court mean for these 15-day deadlines to be triggered from the same event? If so, although the date the parties exchanging expert-in-chief reports "received" the report and the date the expert-in-chief report was "disclosed" with respect to a party who did not exchange an expert-in-chief report may be the same date, it is not necessarily so. Because there is no requirement that the party exchanging an expert-in-chief report provide it to the non-exchanging parties on the date of the exchange, the litigant retaining only a rebuttal expert may not receive the expert-in-chief report until days after the date of exchange.

Even if the Court did not mean for the two 15-day deadlines to be triggered from the same event, the term "disclosed" is unclear. Does it mean the date the litigant exchanged the expert-in-chief report with other litigants retaining experts-in-chief? Or perhaps it means the date the expert-in-chief report was served on the litigant retaining only a rebuttal expert or the date the litigant retaining only a rebuttal expert received the report? If not clarified, parties in the same case might calculate the same deadline differently, leading to confusion.

To resolve this ambiguity, we respectfully request that the Court further amend the second paragraph. For example, the last sentence might be changed to say, "The rebuttal expert's report must be exchanged 15 days after the expert-in-chiefs report was provided to the non-exchanging litigant." Alternatively, it could be changed to say, "The rebuttal expert's report must be exchanged 15 days after the non-exchanging litigant received the expert-in-chief report."

In addition, the third paragraph of the Rebuttal Reports section also contains an ambiguity. It says, "Finally, if a litigant decides only to use a rebuttal expert, the expert-in-chief will be permitted to submit a reply to the rebuttal expert's report within 15 days after the rebuttal report but no later than 60 days after the close of FACT DISCOVERY or on a date the parties stipulate to exchange the reports AND the court has agreed to by so ordering the stipulation." [Emphasis added.]

Is the 15-day deadline is triggered from the date of the report itself, from the date of receipt of the rebuttal report or perhaps from the date the litigant provides the rebuttal report to the expert-in-chief? It is not clear from proposed language and we respectfully request that the Court add language to the paragraph to clarify the triggering event for this deadline.

Page 23 Rebuttal Report Deadlines

Moreover, on page 23 of the Proposed Form, paragraph (4) provides: “The parties who have received an Expert-in-Chief report may serve a Rebuttal Report on all litigants.... The rebuttal reports must be served no later than 15 days after the Expert-in-Chief reports unless the parties stipulate to exchange the reports on a different day AND the court has agreed to this by so ordering the stipulation.” [Emphasis added.]

This deadline does not match the deadline in either paragraph on page 21. Further it is not clear whether the “parties who have received” the expert-in-chief report means *any* party who received the report, or only parties who received the report as part of the exchange of expert-in-chief reports. Nor is it clear whether the triggering event for the 15-day deadline is meant to be the date of the expert-in-chief reports themselves, the date of exchange of the reports, the date of receipt of the report, etc. We respectfully request that the Court further amend paragraph (4) to clarify these issues.

Page 24 Reply Report Deadline

Finally, paragraph (5) on page 24 of the Proposed Form says, “The Experts who have prepared Expert-in-Chief reports are entitled to prepare Reply reports to the party(ies) who have submitted Rebuttal Reports. They must do so within 15 days of receiving the Rebuttal report.” [Emphasis added.]

Although the language of paragraph (5) is itself clear, it does not match the third paragraph of page 21. First, the paragraph on page 21 seems to limit these replies to rebuttal reports from parties who did not exchange expert-in-chief report (“if a litigant decides only to use a rebuttal expert, the expert-in-chief will be permitted to submit a reply”). No such limitation is included in paragraph (5). Second, paragraph (5) triggers the 15-day deadline from the “receipt” of the rebuttal report. The paragraph on page 21 says only “15 days after the rebuttal report.” As discussed above, this latter deadline could mean 15 days after receiving the report, but also could mean 15 days after the date of the rebuttal report itself or 15 days after the exchange of the report.

We respectfully request that the Court further amend paragraph (5) as well to match the language of the third paragraph on page 21, and to clarify the language of both.

Thank you very much for your time and consideration.

Sincerely,

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