

No. 138, Original

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In the  
**Supreme Court of the United States**

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STATE OF SOUTH CAROLINA,

*Plaintiff,*

v.

STATE OF NORTH CAROLINA,

*Defendant,*

CATAWBA RIVER WATER SUPPLY PROJECT,

*Defendant-Intervenor,*

DUKE ENERGY CAROLINAS, LLC,

*Defendant-Intervenor.*

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**FIRST AMENDED CASE MANAGEMENT PLAN**

## 1. The Parties and Amicus Curiae

### 1.1 General.

The parties in *South Carolina v. North Carolina*, Original No. 138 (the “Litigation”) are plaintiff the State of South Carolina, defendant the State of North Carolina, Defendant-Intervenor Duke Energy Carolinas, LLC, and Defendant-Intervenor the Catawba River Water Supply Project. For the purposes of this Case Management Plan (“CMP”), the parties to the litigation shall be referred to collectively as the “parties”. The City of Charlotte (“Charlotte”) is not a party to the litigation but was granted permission to participate in the litigation as *amicus curiae* as set forth in the Special Master’s June 16, 2010 Order Granting City of Charlotte’s Motion to Participate as an *Amicus Curiae*. The requirements of this CMP, including the Federal Rules of Civil Procedure incorporated herein, apply to Charlotte to the extent of its right to participate as set forth in the Order, but do not expand the scope of its participation in the litigation.

### 1.2 Discovery.

For the purpose of responding to discovery requests, each party State is deemed to include the executive and legislative branch of the State and all departments, agencies, bureaus and other administrative divisions within the State. Any request for discovery shall be made to the attorney for the party State and shall not be made directly to any such division of the party State. Solely for the purposes of discovery, political subdivisions within the State

including institutions of higher education and municipalities are deemed non-parties and are subject to the subpoena power of the Court. Should any dispute arise as to the status of any entity alleged to be a division of the party State, the parties shall submit the matter to the Special Master for determination.

**2. Case Management Orders And Case Management Plan**

The Special Master will issue Case Management Orders (“CMOs”) following conferences with counsel or at such other time as she deems appropriate. This CMP replaces the CMP entered January 7, 2009 and together with all CMOs, will apply to and bind the parties and will control the course of the proceedings. The parties anticipate that additional amendments to the CMP will be needed to set deadlines for expert discovery and the trial on South Carolina’s entitlement to a remedy as well as possible additional discovery and trial to fashion a remedy. The CMP may be further amended by consent of the parties and the Special Master, by motion of a party based on good cause and resulting order of the Special Master, or by the Special Master *sua sponte*.

**3. Filing Of Papers**

**3.1. Filing of Papers with the Special Master and Service**

All documents shall be filed pursuant to the United States Supreme Court rules, except that all pleadings, papers, and documents should be filed with the Special Master on 8 ½ x 11 inch paper, and except as

otherwise modified by the Special Master. The parties shall make filings with the Special Master and service upon the other parties by e-mail in searchable PDF format. In the event filings are too bulky or are otherwise unsuitable for transmission by electronic means, they shall be sent by some means of overnight delivery, with delivery confirmation. An original and four copies of each document shall be forwarded to the Special Master by first class mail for filing. All pleadings, papers, correspondence, and documents submitted to the Special Master shall be served on counsel for the other parties so the documents are received on the same day that the Special Master receives them. Distribution need be made only to those included on the Distribution List attached hereto as **Appendix A**. Each Party may make changes to the Distribution List by forwarding written notification to all parties and the Special Master. All pleadings, papers, and documents submitted to the Special Master must indicate, in the certificate of service, the means by which service or transmittal has been accomplished.

### **3.2. Filing of Discovery Materials**

In order to keep the record free of discovery material that has not become evidence, all interrogatories, requests for production of documents, requests for admissions, responses, replies, and documents produced shall not be filed with the Special Master unless a party

offers a particular sworn discovery response into evidence, uses such response to support or oppose a motion, or requires a ruling on a discovery dispute that the parties have been unable to resolve. In such event, only those portions pertinent to the purpose shall be filed. Correspondence between the parties relating to discovery and/or discovery disputes shall only be filed with the Special Master at the time she is asked to rule on a discovery dispute the parties have been unable to resolve.

### **3.3. Filing of Depositions**

Deposition transcripts shall not be filed with the Special Master until offered and admitted into evidence or used to support or oppose a dispositive motion or to resolve a discovery dispute that the parties have been unable to resolve.

## **4. Status Conferences**

The Special Master will schedule and hold status conferences by telephone, as she deems necessary. Unless the Special Master has assigned another briefing schedule, two days in advance of each status conference, each party (either separately or, by agreement, jointly) shall submit a progress report by e-mail. The progress report shall update the status of each party's discovery efforts, describe any unresolved disputes on which the parties request the Special Master's intervention, and identify any additional matters requiring the Special Master's attention.

**5. General Discovery Issues**

**5.1 Policies**

This discovery plan provides that substantive discovery will proceed promptly and shall be concluded as expeditiously as reasonably practicable. This CMP provides that to the extent possible, written discovery and the exchange of documents should be completed before deposition discovery begins. Although there may be some inevitable overlap, the goal of this CMP is to proceed in an organized fashion that will avoid unnecessary or repetitive discovery efforts. Discovery will continue and be completed in accordance with the schedule stated herein, with all time periods to be computed hereunder in accordance with Federal Rule of Civil Procedure 6. Further discovery will be allowed beyond the schedule stated herein as set forth in revisions to the CMP and at the discretion of the Special Master.

**5.2 Scope of Discovery under this CMP**

This CMP generally addresses fact discovery that will take place before the trial on South Carolina's entitlement to a remedy. This CMP does not include a schedule for expert discovery. Moreover, in the event that these proceedings reach a remedy phase, the parties anticipate further discovery could be required. The parties anticipate they will meet and confer and propose such modifications as are necessary for additional discovery.

*[South Carolina's Proposed Language: Pending further order of the Special Master following summary judgment motions practice concerning whether South Carolina has met its threshold burden to show injury, the following two areas of discovery shall be deferred: (1) inquiry into any alleged benefits of North Carolina interbasin transfers on neighboring river basins in South Carolina, and (2) inquiry into any alleged benefits of electricity generation in either State. No party may raise these two issues in connection with the merits of whether South Carolina has met its threshold burden to show injury, because all parties have agreed that they are irrelevant to that inquiry. The limits set out below on interrogatories, depositions, requests to admit, and the like shall not be applicable to those two deferred issues; any such limits concerning those two deferred issues shall be determined in a future case management plan or order.*

*Discovery into all other issues shall proceed in accordance with governing law and this Amended Case Management Plan.]*

### **5.3. Federal Rules Of Civil Procedure 26-37 And 45**

Discovery will proceed pursuant to Federal Rules of Civil Procedure 26-37 and 45, except as otherwise modified herein or by other order of the Special Master with the following exceptions:

### **5.3.1. Rule 26(a)(1) Initial Disclosures**

The initial disclosures required in Rule 26(a)(1) will not apply. Instead, the parties will be required to provide disclosures as described in section 6 below.

### **5.3.2. Rule 26(a)(2) Disclosure of Expert Testimony; Rule 26(a)(3) Pretrial Disclosures; and Rule 26(a)(4) Form of Disclosures**

These portions of Rule 26 will apply, except insofar as they are trial-specific and except that: (i) all time schedules and deadlines will be determined by the Special Master; and (ii) because the provisions of Rule 26(a)(4) requiring the filing of documents with the court are inconsistent with this CMP, the filing of all documents with the Special Master shall be governed by this CMP.

### **5.3.3. Rule 26(b)(5) Claiming Privilege or Protecting Trial Preparation Materials.**

Rule 26(b)(5) will apply only as set out in section 9 of this CMP.

### **5.3.4. Rule 26(c) Protective Orders**

Rule 26(c) will apply, except to the extent modified by section 10 of this CMP.

### **5.3.5. Rule 26(f) Conferences of the Parties; Planning for Discovery**

Rule 26(f) will not apply.

### **5.3.6. Rule 27 Depositions to Perpetuate Testimony**

Rule 27 will not apply.

**5.3.7. Rule 30 Depositions by Oral Examination;  
Rule 31 Depositions by Written Questions, and  
Rule 33 Interrogatories to Parties**

The limitations in Rules 30(a)(2), 30(d)(2), 31(a)(2), and 33(a) on the number and length of depositions and number of interrogatories will not apply. The number of interrogatories and length of depositions will be as set forth in section 6 and Appendix B of this CMP.

**5.3.8. Rule 32(a)(4)(B) Using Depositions in Court Proceedings**

The 100-mile rule contained in Rule 32(a)(4)(B) will apply unless otherwise agreed by the parties and the witness or the Special Master so orders.

***[South Carolina's Proposed Language:***

***5.3.9 Requests To Admit***

***South Carolina may serve no more than 300 requests for admission on other parties. North Carolina and Intervenors may timely serve a combined total of no more than 300 requests for admission, collectively.]***

**5.3.9. Rule 45 Subpoenas**

Rule 45 will apply with the exception that the subpoena power of the Special Master will not be limited geographically by the 100-mile rule. The parties shall cooperate with each other in

securing the attendance of witnesses for depositions and shall each give reasonable notice to the other parties if a witness is recalcitrant and will require a subpoena.

#### 5.4 Timeline for Completion of Fact Discovery.

*[South Carolina's proposed language: Fact discovery shall]*

**[North Carolina's Proposed Language: The parties anticipate that fact discovery may]** be completed within *[South Carolina's proposed language: 15 months, absent good cause shown,]*

**[North Carolina's proposed language: three years]** from the date

the CMP is signed, *[South Carolina's proposed language: Fact discovery shall precede expert discovery absent good cause*

*shown.]* **[North Carolina's proposed language: The parties**

**anticipate that fact discovery shall precede expert discovery;**

**however, additional fact discovery may be required following**

**receipt of expert reports provided after the close of fact**

**discovery if South Carolina objects to and does not respond to**

**Contention Interrogatories until such time as it provides**

**expert reports.]**

#### 5.5 Deadlines for Expert Discovery.

The deadline for expert discovery shall be established in a subsequent CMP, enacted by order of the Special Master. *[South Carolina's*

*proposed language: Six months before the close of fact*

*discovery the parties shall* *[North Carolina's proposed language: The parties shall have six months from the date this Amended CMP is entered to* present joint or individual proposals for expert discovery deadlines to the Special Master for decision. Prior to those submissions, the parties shall meet and confer in a good faith attempt to agree on as many issues as possible and limit the areas of legitimate dispute. Expert discovery may nevertheless be permitted to proceed by agreement pending the Special Master's order concerning expert discovery deadlines.

#### **5.6 Suspension of Deadlines.**

By mutual agreement of the parties and following notice to the Special Master, the deadlines contained herein may be suspended for purposes of engaging in good-faith settlement negotiations to resolve the case.

#### **5.7 Discovery Not To Be Duplicative**

The Parties shall endeavor not to serve duplicative discovery. *[South Carolina's proposed language: Thus, for example, discovery served on the party States by Intervenors shall not be duplicative of discovery served on either Party State by the other.*

#### **5.8 Discovery to be Served by Defendant-Intervenors**

Both Defendant-Intervenors shall have an opportunity within the period for fact discovery set forth in Section 5.4 to propound catch-up

discovery on the party States and any other third-party from which either Defendant-Intervenor wishes to subpoena testimony or documents.

## **6. Substantive Discovery**

Substantive fact discovery before the trial on South Carolina's entitlement to a remedy shall consist of the following and, to the extent reasonably possible, follow the schedule set forth herein. Except with respect to contention interrogatories, or where otherwise permitted by the Special Master for good cause shown, all written discovery shall be propounded no later than 30 days prior to the close of fact discovery. The following limits on discovery in the remainder of § 6 may be modified by agreement of all parties or further order of the Special Master.

### **[North Carolina's Proposed Language:**

#### **6.1 Disclosures/ Supplemental Responses to Contention Interrogatories Already Propounded in the Case**

**Some parties have already exchanged contention interrogatories regarding certain issues in the case and have been engaged in negotiations regarding the adequacy of the responses. Following entry of this CMP, the parties may supplement their responses to contention interrogatories. Specifically, Plaintiff shall have 60 days from the date this CMP is entered by the Special Master to supplement its responses to contention interrogatories. Defendant and**

Defendant-Intervenors may have 60 days following receipt of Plaintiff's supplemental responses to supplement their responses to contention interrogatories. No party shall refuse to respond or to supplement a response to a contention interrogatory on the grounds that discovery is not yet complete or, where the party chooses to rely on its experts to provide its response, that the service of expert reports has not yet been required.

6.2 Number of Contention Interrogatories.

[North Carolina's Proposed Language: Each party State may serve no more than 75 contention interrogatories on each other party. Intervenors may serve a combined total of no more than 75 contention interrogatories, collectively.] *[South Carolina's proposed language: South Carolina may serve no more than 40 contention interrogatories, and North Carolina and Intervenors may serve a combined total of no more than 40 contention interrogatories, collectively.]*

The contention interrogatory counts shall include all contention interrogatories previously served. Each party served with contention interrogatories shall have 30 days from the date of service to respond. Without prior written approval of the Special Master, no additional contention interrogatories may be served.

### 6.3 Number of Fact Interrogatories.

*[South Carolina's proposed language: South Carolina may serve no more than 100 fact interrogatories, and North Carolina and Intervenors may timely serve a combined total of no more than 100 fact interrogatories, including discrete subparts, collectively.]*

[North Carolina's proposed language: Each party State may serve on each other party no more than 200 fact interrogatories, including discrete subparts. Intervenors may serve a combined total of no more than 100 interrogatories, collectively.]

These interrogatory counts shall include all interrogatories previously served and to be served in this case. Interrogatories shall be labeled as such and be served on a date such that the response is due no later than the close of fact discovery. Each party served with interrogatories shall have 30 days from the date of service to respond. Without prior written approval of the Special Master, no additional interrogatories may be served.

### 6.4 Requests For Production Of Documents/Inspections to Parties

Each party may serve requests for production of documents/inspection on the other parties. Responses are due 30 days from the date of service. In the past, the production of documents has been made on a "rolling basis" on the terms agreed by the parties through previous correspondence.

## **6.5 Requests For Production of Documents/Inspections To Non-Parties**

The parties may serve on non-parties requests for production of documents/inspection as provided in Federal Rule of Civil Procedure 45. Any party receiving documents from a non-party pursuant to a subpoena issued pursuant to Fed. R. Civ. P. 45 or some other request shall be responsible for providing copies of everything received from the non-party to the other parties in this litigation including but not limited to the production of e-mail, portable document format files, and other electronic records without regard to whether they have been reduced to printed form. Each Party producing documents pursuant to this CMP is responsible for transmitting the production to the other parties in the litigation by hard drive, CD, DVD or other appropriate form. Furthermore, all documents received from non-parties shall be marked with an identifying unique number prior to production by the receiving party and shall include the proper name or recognized abbreviation of the non-party before the Bates number. In addition, non-party documents received pursuant to subpoena issued by South Carolina, Catawba River Water Supply Project, or Duke Energy Carolinas, LLC shall be marked on each page using the following protocol: [Initial or abbreviated name of the party who subpoenaed documents]sub\_[proper name or recognized abbreviation of the non-party]-00001 and each page following will including a continuing

sequential number. E.g., a page produced by Concord in response to a South Carolina subpoena would be marked: “**SCsub\_Concord-00001.**” Non-party subpoenaed documents already produced by North Carolina have been marked with a prefix consisting of the name or abbreviation of the producing entity followed by a space and the Bates number: [Initial or abbreviated name of producing party] 00001. E.g., a page of a document produced by Concord in response to a North Carolina subpoena would be marked: “Concord 00001”. Each page produced by a non-party to the producing party in this litigation will have a unique identifying mark. Any documents produced by North Carolina after the date of this CMP shall include “NCsub\_” before the non-party identification and Bates number. E.g. “NCsub\_Concord-00001”. If the producing non-party has already number stamped the documents produced, the producing Party will not redact or obscure the existing Bates stamp number. Notwithstanding an existing Bates stamp number, a producing Party will add a unique number stamp as provided for under this Stipulated Agreement to each page of a previously Bates stamped document received from a non-party. Thus, the parties anticipate that some pages will have more than one number stamp but only one that follows the protocol set forth in the CMP.

**6.6. Deposition Discovery prior to the Trial regarding South Carolina's Entitlement to a Remedy.**

Deposition discovery will take place according to the schedule set forth herein. Parties shall endeavor to complete fact/lay witness deposition discovery prior to initiation of expert witness deposition discovery.

**6.6.1 Depositions of Fact/Lay Witnesses.**

Any party may schedule depositions of fact/lay witnesses.

*[South Carolina's proposed language: South Carolina may timely depose no more than 30 non-expert witnesses.*

*North Carolina and Intervenors may timely depose a combined total of no more than 30 non-expert witnesses,*

*collectively.] [North Carolina's proposed language: Each*

*party may notice and take 150 depositions.* These totals

shall not include cross-notices of depositions noticed first by another party. All depositions shall be scheduled to commence at least five business days prior to the close of fact discovery.

The parties shall work together in good faith to resolve scheduling conflicts and to arrange depositions for the reasonable convenience of the witnesses and counsel, and to minimize travel requirements where feasible. Any party who objects to a notice of deposition may request a protective order from the Special Master. Depositions will be conducted in accordance with the guidelines attached hereto as **Appendix B**.

### 6.6.2. Depositions of Expert Witnesses

The Parties shall conduct expert witness depositions after the close of the **[North Carolina's proposed language: initial]** period for fact/lay witness deposition discovery. **[North Carolina's proposed language: However, additional fact discovery may be required following expert depositions as set forth in Section 5.4 above.]** Expert witnesses include all witnesses whose identity is required to be disclosed under Fed R. Civ. P. 26(a)(2). For the purpose of this section, experts are those persons who have been retained by the parties to testify as to matters and issues in this case. The schedule for the deposition of expert witnesses shall be established in a subsequently amended CMP enacted by order of the Special Master.

## 6.7 Expert Discovery

### 6.7.1 Expert Reports

Dates for service of expert reports required by Rule 26(a)(2)(B) shall be established in a subsequently amended CMP enacted by order of the Special Master. Defendant-Intervenors have indicated they intend to serve expert reports and present expert testimony. Any disputes concerning expert reports or testimony,

including the dates of filing, will be resolved in subsequent case management orders.

### **6.7.2 Discoverability Of Expert Materials**

Discovery of experts shall not extend to (a) draft expert reports, including revisions or mark-ups, notes, or other work product prior to the final report, on which the expert does not intend to rely in support of his or her opinion; (b) expert work completed solely for settlement discussion purposes; or (c) communications to, from, or in the presence of an attorney for the party expecting to call the expert as a witness, unless the expert is relying on the communication in support of his or her opinion. Within 15 days after serving an expert report, the party expecting to call the expert shall produce to the other parties copies of all documents relied upon by the expert in the preparation of his or her final report. Readily available public documents (like books, USGS reports, etc.) need not be produced, provided that they are referenced. Documents already produced may be referenced by their Bates numbers. To the extent possible, all documents shall be produced in electronic format. Model codes (source and executable codes), documentation (including that imbedded in codes), and input and output data shall be produced in the electronic format used by the reporting expert. If evolving

versions of models are used in sequential analyses, the party that expects to offer the expert witness's opinion shall clearly identify changes from one version to another. If proprietary models are used, the party offering the witness's opinion must still produce the source codes, but shall be entitled to an appropriate protective order.

**7. Pre-Trial Plan.**

Following the close of expert discovery, as agreed to by the parties and Special Master, the parties shall meet and confer to develop a plan designed to make trial as efficient as possible. A final pretrial order will be issued subsequently.

**8. Bates Numbering System**

All documents produced by the parties shall bear a distinctive Bates number. Each State shall begin each Bates number with the two-letter abbreviation for the State as designated by the United States Postal Service. For example, a South Carolina Bates-numbered document will begin SC 00001. All documents produced by the Defendant-Intervenors shall include a recognized abbreviation before the Bates number. As set forth above in Section 6.6, all documents produced by non-parties shall state the identity of the producing party and the non-party using a recognized abbreviation before the Bates number. The parties may agree on protocols for Bates numbering of particular materials such as computer data, as they have already done in the

past, so long as the protocol permits reasonable identification of documents used by any party. No party shall use any document at trial that has not been Bates-numbered and produced, except by agreement of the parties, for impeachment, or for other good cause shown.

**9. Privilege Logs**

If a party withholds on the ground of privilege any written information (in hard copy or electronic form), it shall provide a privilege log to opposing counsel. These privilege logs shall set forth the following information: (a) author's name, place of employment, and job title; (b) addressee's name, place of employment, and job title; (c) recipient's name, place of employment, and job title, if different than that of addressee; (d) general subject matter of document; (e) site of document; (f) nature of privilege claimed; and (g) consistent with Rule 26(b)(5), any other information necessary fairly to evaluate a claim of privilege if the preceding information is insufficient to do so. Privileged documents concerning attorney-client communications in this action between a party to this action and its counsel need not be logged. Documents concerning communications made pursuant to a joint-defense or common-interest agreement or privilege may be described in the log by category, so long as sufficient information is provided to permit fair assessment of the claim of privilege consistent with Rule 26(b)(5). Thereafter, any privilege log shall be supplemented to include any documents that are subsequently designated privileged by counsel.

**10. Confidentiality**

All documents or other tangible things containing a trade secret, protected personal information, sensitive public security information, or protected tax information may be designated “Confidential,” so long as such documents have not been disclosed by the producing party to the public or third parties who are not under a duty to protect the confidentiality of the information. The term “trade secret” shall mean business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

- a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
- b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The term “protected personal information” shall mean social security numbers; taxpayer identification numbers; driver’s license or state identification numbers; passport numbers; checking account, savings account, credit card, or debit card numbers; personal identification (PIN) codes or passwords; or other personal account information protected by applicable law.

The term “sensitive public security information” shall mean sensitive information or documents, including specifications or drawings of infrastructure, that are protected by law from public disclosure for purposes of national security or public safety.

The term “protected tax information” shall mean tax-related information (such as tax returns, tax reports, tax records, or audits conducted by a taxing authority) that is protected from disclosure by federal, state, or local law.

Documents or portions of documents containing trade secrets, protected personal information, sensitive public security information, or protected tax information shall be so designated by stamping “Confidential – S. Ct. 138” on each page. Any party may contest the designation of a document as “Confidential,” or request that a document not otherwise covered by this CMP be considered confidential, by serving an objection to such designation. The objecting party or parties and the producing party shall attempt in good faith to resolve the issue. If they are unable to resolve such dispute, it shall be the obligation of the party designating the items “Confidential” to move for a ruling regarding the propriety of the designation. The party requesting confidentiality shall have the burden of showing that such designation is appropriate. At a deposition, or within ten (10) business days after receipt of the transcript, a party or deponent may designate as confidential any trade secret, protected personal information, sensitive public security information, or confidential tax information, and such designation shall be served on all

counsel. Confidentiality objections need not be made at a deposition and they shall not be a ground for a direction or refusal to answer, but counsel may indicate such designation during the deposition and the parties shall govern themselves accordingly. Depositions and transcripts will be considered to be confidential until expiration of the ten (10)-day period and thereafter as to any part or all so designated. Any individual not authorized by this CMP to be a recipient of confidential information may be excluded from a deposition while such information is being elicited. In the event that a producing party wishes to have documents other than trade secrets, protected personal information, sensitive public security information, or confidential tax information treated as “confidential” pursuant to this CMP, the producing party shall promptly move the Special Master for an appropriate protective order. The Special Master has entered two Stipulated Protective Orders at the request of the parties and producing parties. The Stipulated Protective Order Concerning HDR Source Code and Confidential Documents was entered by the Special Master as an order in this Litigation on September 1, 2010./ The Stipulated Protective Order Concerning Unimin Corporation’s Confidential Documents was entered by the Special Master as an order in this Litigation on September 22, 2010.

Confidential documents or information subject to this CMP may not be disclosed to or used by anyone except those hereby authorized and by them only in the context of this case. Such individuals shall include counsel, the

parties' specifically authorized employees, experts, fact witnesses, and counsel and specifically authorized employees of Charlotte, provided that Charlotte shall have entered into an agreement to the satisfaction of all parties providing for the confidentiality of such materials, as required by the Special Master's Order of June 16, 2010, together with such others as are agreed to by the parties or are approved by the Special Master. Each individual who is permitted to see such confidential documents, or given access to such confidential information, shall be bound to observe the provisions of this CMP with respect to all documents and information produced through these proceedings by signing a Non-Disclosure Agreement in a form agreed upon by the parties or approved by the Special Master if the parties cannot agree. The Non-Disclosure Agreement shall include an agreement to submit to the Special Master's jurisdiction for enforcement of this portion of the CMP and to return all such designated documents and information promptly at the end of the litigation.

11. **Resolution Of Discovery Disputes And Motions To Quash And Seek Protective Orders**

Before bringing a discovery dispute to the attention of the Special Master, the parties shall confer in an attempt to resolve the dispute. It shall be the responsibility of the moving party to in a reasonably timely manner initiate the conference following the identification of the dispute. If the conferences do not resolve the dispute, the procedure for resolving the discovery dispute shall be as follows:

## **11.1. Written Discovery Disputes**

### **11.1.1 Failure To Timely Respond To Written Discovery Requests**

In the event that timely responses to written interrogatories or document requests are not forthcoming, the proponent of the discovery should file a motion to compel, which shall set forth the date the discovery was served and the due date for the responses, together with an averment of the default. No brief or copy of the interrogatories or document requests should accompany the motion. Upon receipt of such a motion, the Special Master, without waiting for a response, may enter an order directing the discovery to be provided by a certain date and including such sanctions as she deems appropriate.

### **11.1.2 Disputes Regarding Discovery Objections Or Adequacy Of Responses**

In the event of a discovery dispute – in contrast to a default – arising by reason of the respondent’s objections or concerning the adequacy of responses to interrogatories, document requests, requests to inspect, or requests to admit, the parties shall promptly and in good faith exert every reasonable effort to resolve their differences. Where objections are made, the objecting party shall provide all other discovery that such party does not consider to be objectionable. As a last resort, any

unresolved dispute shall be submitted to the Special Master. The parties shall make a written submission setting forth as to each individual discovery item in dispute the interrogatory, document request, request to inspect or request to admit, together with the answer or response, including any objection, as well as the parties' respective positions on a schedule set by the Special Master. These shall be set forth in sequence and, if practicable, on a single page and, in any event, separate and apart from any other discovery dispute. Case citations and other authority should be included.

## **12. Deposition Disputes**

### **12.1. General Procedures**

Except as is expressly provided in paragraph 12.2 below, discovery disputes that arise concerning a deposition shall be resolved by submission to the Special Master according to the procedure set forth in section 11 above.

### **12.2. Disputes That Require Immediate Resolution**

Where a dispute arises at a deposition and a party believes that an immediate resolution is necessary to avoid the re-scheduling of the deposition or a significant disruption of the discovery schedule, the Special Master shall be telephoned.

**12.2.1** If the Special Master is available and a telephone conference is held, the ruling of the Special Master shall be recorded in the deposition. The deposition shall proceed according to such ruling or direction. If the ruling or direction is that a witness must answer a question or questions despite an objection based upon claim of privilege or work product, the objecting party shall not be deemed to have withdrawn or waived its objection.

**12.2.2** If the Special Master is not available by telephone during the deposition, the dispute shall be noted for the record and the deposition shall proceed with respect to all other issues. Thereafter, the dispute shall be presented to the Special Master as provided in section 11.

**12.2.3** No party shall refuse to continue participating in a deposition with respect to matters not in dispute because of the unavailability of the Special Master to resolve a dispute telephonically.

**13. Motions To Quash Or For Protective Orders**

The following procedures are to be employed in situations where subpoenaed persons or entities desire to move to quash a subpoena or seek a protective order from the demand of a subpoena.

**13.1. Subpoenaed Parties**

If the subpoenaed entity or person is a party or the employee of a party, then the entity or person must seek appropriate relief from the Special Master pursuant to the procedures for resolving written discovery disputes in section 9.

### **13.2. Subpoenaed Entities Or Persons Who Are Not Parties**

When a party subpoenas a person or entity, the party issuing the subpoena should serve upon the subpoenaed person or entity, along with the subpoena, a copy of sections 11-13 of this CMP. The subpoenaed person or entity may seek relief under this CMP, by submitting the dispute to the Special Master pursuant to the procedures for resolving written discovery disputes in section 11.

## **14. Dispositive Motions**

Motions to dismiss or motions for summary judgment may be filed at any time. Motions pursuant to Fed. R. Civ. P. 12(c) shall be filed early enough not to delay any trial on entitlement to a remedy.

## **15. Inadvertent Disclosure Of Protected Information**

### **15.1 Non-Waiver Of Privilege Or Other Protective Doctrine By Inadvertent Disclosure**

The inadvertent disclosure of any document that is subject to a claim that the document should have been withheld from disclosure as privileged information or protected attorney work-product material prepared or compiled in anticipation of litigation and not subject to discovery under the Federal Rules of Civil Procedure or the Federal

Rules of Evidence (“Protected Material”) shall not waive any privilege or other applicable protective doctrine for that document or for the subject matter of the inadvertently disclosed document if the producing party, upon becoming aware of the disclosure, promptly requests return of the Protected Material and has taken reasonable precautions to avoid such inadvertent disclosure.

The receiving party is under an obligation to notify the producing party if the receiving party believes a protected document has been produced. The notification shall be in writing and shall identify each document in question with reasonable and sufficient particularity. The disclosure of any protected material shall cease to be “inadvertent” if, three (3) business days after the receiving party notifies the producing party that it has received the protected material, the producing party does not request in writing the return of the Protected Material. Notices and requests shall be made both by hard copy and by e-mail, and the time periods shall be based on delivery of hard copies, measured in accordance with Federal Rule of Civil Procedure 6. Each party may designate the persons to receive notice.

Upon written request by the inadvertently producing party, the receiving party shall (unless the receiving party disputes the producing party’s claim in accordance with the following paragraph) immediately return all copies of the Protected Material, electronic or otherwise, or

destroy all copies at the producing party's option, and not use the information in the Protected Material for any purpose until further order of the Special Master. The term "copy" as used in this Agreement shall include the substance of the document. In the event that the producing party requests destruction, the requesting party shall provide written certification of compliance within thirty (30) days of such written request.

In the event the receiving party disputes the producing party's claim as to the protected nature of the inadvertently disclosed materials, a single set of copies may be sequestered and retained by and under the control of the receiving party for the sole purpose of seeking determination by the Special Master of the issue pursuant to Federal Rule of Civil Procedure 26(b)(5)(B).

Any such Protected Material inadvertently disclosed by the producing party to the requesting party pursuant to this Agreement shall be and remain the property of the producing party.

The parties will take reasonable measures to protect against inadvertent disclosure of privileged and work product protected materials.

## **15.2 Confidential Treatment Of Protected Material**

If Protected Material is disclosed through inadvertence or otherwise to any person not authorized under this Agreement, the party causing

such disclosure shall inform the person receiving the Protected Material that the information is covered by this Agreement, make its best efforts to retrieve the Protected Material, and promptly inform the producing party of the disclosure.

No use will be made of the substance of the Protected Material (e.g., the substance will be excluded from depositions, etc.), and no reference will be made to the Protected Material unless necessary to dispute another party's claim of privilege.

The party inadvertently disclosing the Protected Material will add the document(s) to its privilege log.

Any party may apply to the Special Master for further or additional protective Orders or, in the case of an Agreement between the parties, for any modification of the applicable provisions of the governing CMP, subject to the approval of the Special Master for good cause shown.

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Kristen Linsley Myles  
Special Master

---

Date

APPENDIX A –

Distribution List for Service

*Special Master*

**(Email + Original and 4 copies by  
U.S. Mail)**

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## APPENDIX B – DEPOSITION GUIDELINES

### 1. **Cooperation**

Counsel will cooperate with each other and exercise civility in all aspects of this litigation.

### 2. **Waiver Stipulations**

Unless contrary to an order of the Special Master, the parties (and, when appropriate, a non-party witness) may stipulate, in a suitable writing, to alter, amend, or modify any practice relating to noticing, conducting, or filing a deposition. Stipulations for any discovery beyond discovery cutoffs or deadlines set by the Special Master are not valid without approval of the Special Master.

### 3. **Scheduling**

Except in extraordinary circumstances, noticing counsel shall consult in advance with counsel for the deponent, if any, and with opposing counsel, so as to schedule depositions at mutually convenient times and places.

### 4. **Attendance:**

In the event an issue arises with respect to who may attend a deposition, the issue may be resolved on a case-by-case basis as contemplated by Rule 26(c)(1)(E) of the Federal Rules of Civil Procedure. During examination of a deponent about any document stamped “Confidential – S. Ct. 138” or its confidential contents, persons to whom disclosure is not authorized under section 10 of this CMP shall be excluded.

## **5. Conduct**

### **5.1. Examination**

Ordinarily, each party should designate one attorney to conduct the principal examination of the deponent. Examination by other attorneys for that party should be limited to situations where designated counsel must leave before the deposition is completed or is otherwise incapacitated.

### **5.2. Objections And Directions Not To Answer**

Counsel shall comply with Federal Rule of Civil Procedure 30(d)(1). When a claim of privilege is made, the witness should nevertheless answer questions relevant to the existence, extent, or waiver of the privilege, including (without limitation) the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself privileged.

### **5.3. Time Limitations**

Except with prior agreement of counsel or written approval of the Special Master, no deposition may last longer than 10 hours (or 15 hours for a cross-noticed deposition as provided below in section 5.4), provided that no such agreement of counsel may extend any discovery deadline. However, it is anticipated that depositions of some

witnesses, particularly experts and those with extensive knowledge of factual issues, may take longer, and consent to a longer deposition shall not be unreasonably withheld. The parties are expected to conduct the deposition process cooperatively and in good faith. At the time a deposition is noticed, the noticing party will estimate the reasonable amount of time needed for the deposition. In the event any other party considers the proposed amount of time to be unreasonable, the dispute, if unresolved, may be referred to the Special Master pursuant to section 11 of this CMP.

#### **5.4. Cross-Noticing**

Any party may cross-notice a deposition. The cross-notice shall be served at least ten (10) days prior to the date noticed for the deposition unless otherwise provided for by an applicable rule or Case Management Order. When a cross-notice is served, the noticing parties shall divide the transcription fees and costs in proportion to the length of the examination by each party. In the event of a cross-notice, the total time of the deposition shall not exceed 15 hours, except by agreement of the parties or order of the Special Master.

#### **5.5 Designated Longer Depositions**

Each party may designate a certain number of depositions among those noticed that will not be subject to the time limits set forth in this CMP. The actual number of such depositions will be determined by

agreement between the parties. Such agreement will not be unreasonably withheld.

#### **5.6. Continuation Of Deposition**

If a deposition is not finished by the end of the business day, it will continue on the following business day, subject to the availability of the witness and time limitations otherwise set by agreement or by order of the Special Master. The parties may agree to continue or suspend a deposition until a mutually agreed upon later date, provided that the later date is within any discovery deadline set by the Special Master.

### **6. Documents**

#### **6.1. Production Of Documents**

All documents should be requested and produced pursuant to the provisions of this CMP. If a non-party witness is believed to have documents not previously produced, a subpoena to produce documents should be served at least thirty (30) days before the scheduled deposition. Arrangements should be made to permit inspection of the documents by both parties before the deposition begins. Any documents produced in such a manner should be Bates-numbered pursuant to section 6 of the CMP.

## **7. Videotaped Depositions**

By request in its notice of a deposition, a party may record the deposition as permitted under Federal Rule of Civil Procedure 30(b)(3)-(4).

### **7.1. Video Operators**

The operator(s) of the videotape recording equipment shall be subject to the provisions of Federal Rule of Civil Procedure 28(c). At the commencement of the deposition, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

### **7.2. Attendance**

Each witness and each examining attorney shall be identified on camera at the commencement of the deposition. All others present at the deposition shall be identified off-camera. Thereafter, generally speaking, only the deponent (and demonstrative materials used during the deposition) shall be videotaped.

### **7.3. Standards**

Unless physically incapacitated, the deponent shall be seated at a table or in a witness box other than when reviewing or presenting demonstrative materials for which a change in position is needed. The deposition should be conducted in a neutral setting, with only such lighting as is required for accurate video recording. Lighting, camera angles, lens setting, and field of view should be changed only as necessary to record accurately the natural body movements of the

deponent or to portray exhibit and materials used during the deposition. Sound levels should be altered only as necessary to record satisfactorily the voices of counsel and the deponent. No eating or smoking by deponents or counsel should occur during the deposition.

**7.4. Interruptions**

The videotape shall run continuously throughout the active conduct of the deposition. Videotape recording shall be suspended during agreed “off the record” discussions.

**7.5. Index**

The videotape operator(s) shall use a counter on the recording equipment and, after completion of the deposition, shall prepare a log, cross-referenced to counter numbers.

**7.6. Filing**

The operator(s) shall send the original videotape in its original condition to the deposing party in a sealed envelope.

**7.7. Objections**

Requests for ruling on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. Each issue shall be separately submitted. If needed for a ruling, a copy of the videotape shall also be made available to the Special Master.

**8. Telephonic Depositions**

By stating in the deposition notice that it wants to conduct the deposition by telephone, a party shall be deemed to have moved for an order under Federal Rule of Civil Procedure 30(b)(7). Except where the parties agree to a shorter period, notice of a telephonic deposition shall be served at least thirty (30) days before the deposition. Unless an objection is filed and served at least twenty (20) days before the deposition, the motion shall be deemed to have been granted. Other parties may examine the deponent telephonically or in person. All persons present with the deponent shall be identified in the deposition and shall not by word, or otherwise, coach or suggest answers to the deponent. The parties agree that, when a live deposition has been properly noticed, but because of extenuating circumstances there arises a need to conduct the deposition telephonically, consent to conduct the deposition telephonically shall not be unreasonably withheld.

**9. Use**

Under the conditions prescribed in Federal Rule of Civil Procedure 32(a)(1)-(4), as otherwise permitted by the Federal Rules of Evidence, or as agreed to by the parties with approval of the Special Master, depositions may be used against either party. In addition, under the conditions prescribed in Federal Rule of Civil Procedure 32(a)(4), depositions *de bene esse* may be taken in this case, in which event the deponent is the witness of the party that noticed or cross-noticed such deposition.

**10. Supplemental Depositions**

To the extent a deponent acquires new information, forms new opinions, or finds new grounds to support previous opinions, any party may move for a supplemental deposition. Such motion shall be made for good cause shown within thirty (30) days of a party's learning of the new information, opinion, or grounds from supplemental discovery responses provided under Federal Rule of Civil Procedure 26(e) or any other source. If permitted, the supplemental deposition shall be treated as the resumption of the deposition previously taken. However, the supplemental deposition itself shall not exceed four (4) hours, in the absence of agreement of the parties or order of the Special Master. Supplemental depositions shall be reasonably limited to addressing the new information, new opinions, or new grounds that justified the taking of the supplemental deposition. Supplemental deposition examination shall not be repetitive of prior examination.

**11. Rulings**

Rulings on objections made during a deposition will be resolved according to the procedure set forth in section 11 of the CMP.