

ODS CAPITAL LLC v. JA SOLAR HOLDINGS CO., LTD.
18-cv-12083-ALC (S.D.N.Y.)

Exhibit	Description of Document
A	Summons to Baofang Jin
B	Summons to Shaohua Jia
C	Consolidated Amended Class Action Complaint
D	Local Rules of the United States District Courts for the Southern and Eastern Districts of New York
E	Individual Practices of Andrew L. Carter, Jr.

A

UNITED STATES DISTRICT COURT
for the
Southern District of New York

ODS CAPITAL LLC, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff(s)

v.

JA SOLAR HOLDINGS CO., LTD.,
BAOFANG JIN, AND SHAOHUA JIA

Defendant(s)

Civil Action No. 1:18-CV-12083

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) BAOFANG JIN
c/o JA SOLAR HOLDINGS CO., LTD.
Building No. 8, Noble Center,
Automobile Museum East Road,
Fengtai, Beijing 100070, People's Republic of China

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Christopher J. Keller
LABATON SUCHAROW LLP
140 Broadway, New York, New York 10005

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

RUBY J. KRAJICK
CLERK OF COURT

[Handwritten signature of Ruby J. Krajick]

Signature of Clerk or Deputy Clerk

Date: JAN 22 2019

Civil Action No. 1:18-CV-12083

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

B

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for the

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Plaintiff(s)

v.

JA SOLAR HOLDINGS CO., LTD.,
BAOFANG JIN, AND SHAOHUA JIA

Defendant(s)

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c/o JA SOLAR HOLDINGS CO., LTD.
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Automobile Museum East Road,
Fengtai, Beijing 100070, People's Republic of China

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whose name and address are: Christopher J. Keller
LABATON SUCHAROW LLP
140 Broadway, New York, New York 10005

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

RUBY J. KRAJICK
CLERK OF COURT

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Signature of Clerk or Deputy Clerk

Civil Action No. 1:18-CV-12083

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designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

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My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ODS CAPITAL LLC, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

JA SOLAR HOLDINGS CO., LTD.,
BAOFANG JIN, and SHAOHUA JIA,

Defendants.

Case No. 1:18-cv-12083-ALC

CLASS ACTION

**CONSOLIDATED AMENDED CLASS
ACTION COMPLAINT**

JURY TRIAL DEMANDED

TABLE OF CONTENTS

I. NATURE OF THE ACTION 1

II. JURISDICTION AND VENUE 9

III. PARTIES AND OTHER KEY ACTORS 10

 A. Lead Plaintiffs 10

 B. Defendants 11

 C. The Special Committee 12

 D. The Buyer Group 13

 E. Tianye Tonglian 14

IV. SUBSTANTIVE ALLEGATIONS 15

 A. Overview of JA Solar’s Business 15

 B. Defendant Jin’s Multiple and Conflicting Ties to The Company 16

 C. History of the Merger 18

 D. The Misleading Proxy Materials 22

 1. Dissenting From the Merger Was Difficult and Discouraged 23

 2. Houlihan Lokey’s Analysis of the Merger 24

 3. Assurances That no Relisting was Contemplated 28

 E. The Shareholder Vote and Completion of the Merger 32

 F. JA Solar Completes the Merger 34

 G. The Proxy Materials Understated JA Solar’s Financial Performance 35

 H. JA Solar’s Relisting 38

 1. Many Sources Confirm That the Buyer Group Planned All Along
 to Relist JA Solar 38

 2. JA Solar Announces Relisting Just Three Days After the Merger
 Closed 43

3.	The Announcement of the Relisting Agreement was the Result of Many Months of Planning	49
V.	DEFENDANTS’ MATERIALLY FALSE AND MISLEADING STATEMENTS AND OMISSIONS DURING THE CLASS PERIOD	56
A.	The Announcement of the Merger	59
B.	The Preliminary Proxy Materials.....	60
1.	Statements Concerning Intention Not to Relist	61
2.	Promotion of the Merger Price	64
3.	False Representations that the Transaction Was Fair	64
4.	Statements Concerning the Basis for the Board’s, Special Committee’s, Buyer Group’s, and Houlihan Lokey’s Determinations	66
C.	Statements on JA Solar’s Website	71
D.	The Amended Proxy Materials	72
1.	Statements Concerning Intention Not to Relist	73
2.	Promotion of the Merger Price	74
3.	False Representations that the Transaction Was Fair	74
4.	Statements Concerning the Basis for the Board’s, Special Committee’s, Buyer Group’s, and Houlihan’s Determinations.....	75
E.	Second Amended Proxy Materials.....	77
1.	Promotion of the Merger Price	78
2.	Statements Concerning Intention Not to Relist	78
3.	False Representations that the Transaction Was Fair	78
4.	Statements Concerning the Basis for the Board’s, Special Committee’s, Buyer Group’s and Houlihan’s Determinations.....	79
F.	Announcement of Shareholder Vote.....	79
VI.	CONTROL PERSON ALLEGATIONS.....	81
VII.	ADDITIONAL SCIENTER ALLEGATIONS.....	83

A.	Defendant Jin Had the Motive and Opportunity to Defraud the Class	84
B.	The Timing of the Relisting Transaction Shows Defendants’ Scienter.....	85
C.	Defendant Jin’s November 2017 Speech Reveals His State of Mind at That Key Time	87
D.	Other Documents and Statements Reveal the Relisting Plan Existed Prior to the Merger.....	88
E.	The Divergence Between the Proxy Materials and the 2017 Annual Report Shows Defendants’ Scienter	89
F.	Additional Allegation Regarding JA Solar’s Knowledge.....	91
VIII.	LOSS CAUSATION.....	91
IX.	ALLEGATIONS OF INSIDER TRADING.....	93
X.	NO SAFE HARBOR	96
XI.	CLASS ACTION ALLEGATIONS	97
XII.	APPLICABILITY OF PRESUMPTION OF RELIANCE: FRAUD-ON-THE MARKET AND <i>AFFILIATED UTE</i> PRESUMPTIONS	100
	COUNT I Violation of § 10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder Against All Defendants	102
	COUNT II Violation of § 20A of the Exchange Act Against Defendants JA Solar and Jin	104
	COUNT III Violation of § 20(a) of the Exchange Act Against the Individual Defendants	105
XIII.	PRAYER FOR RELIEF	107
XIV.	DEMAND FOR JURY TRIAL	107

Lead Plaintiffs Altimeo Asset Management (“Altimeo”) and ODS Capital LLC (“ODS,” and, collectively, “Lead Plaintiffs”), individually and on behalf of all other persons similarly situated, by and through Lead Plaintiffs’ undersigned counsel, allege the following based upon personal knowledge as to Lead Plaintiffs and Lead Plaintiffs’ own acts, and information and belief as to all other matters, based upon, *inter alia*, the investigation conducted by and through Lead Plaintiffs’ attorneys, which included, among other things, (a) a review of the Defendants’ public documents, conference calls and announcements made by Defendants; (b) United States Securities and Exchange Commission (“SEC”) filings, wire and press releases published by and regarding JA Solar Holdings Co., Ltd. (“JA Solar” or the “Company”); (c) analysts’ reports and advisories about the Company; (d) consultation with individuals with expertise in Chinese M&A and capital markets transactions; (e) statements made by confidential witnesses; and (f) information readily obtainable on the Internet. Lead Plaintiffs believe that substantial additional evidentiary support exists for the allegations set forth herein after a reasonable opportunity for discovery.

I. NATURE OF THE ACTION

1. This action arises out of Defendants’ scheme to depress the price of JA Solar ADS and stock (together, “JA Solar Securities”) in order to avoid paying a fair price to JA Solar Securityholders during a transaction to take the Company private in 2017 (the “Merger”). Defendants executed this scheme by publishing false and misleading statements about the Merger.

2. First, Defendants told the market that JA Solar had no plans to relist the Company on any other stock exchange after the Merger and instead would keep JA Solar a private company, but they lied. They had a plan to relist the Company on the Chinese stock exchange

all along, and in fact announced this plan *just three days* after the Merger was completed at a value of at least *three times the Merger consideration*.

3. Second, Defendants told the market that JA Solar's share price value leading up to the Merger was depressed for various reasons, including the supposedly weak outlook for the solar industry in general, weak demand for the Company's products in particular, and China's economic slowdown. This too was false because right after shareholders voted to approve the Merger, the Company announced that "industry demand revived in 2015 and 2016 due to the development of emerging markets, such as China and the U.S." and that the Company "expect[ed] industry demand [to have] significant growth in 2017 and 2018."

4. Third, despite these facts (known to Defendants at the time), Defendants claimed that JA Solar Securityholders would receive "fair" consideration for their securities in the Merger; simply put, they did not, and instead suffered at least hundreds of millions of dollars in damages as they traded in their securities for far less than their value. In the meantime, the individuals and entities that acquired JA Solar through the Merger—a group that was led by Defendant Jin (the Company's Chairman, CEO, and founder)—profited enormously by acquiring JA Solar for far less than its fair value.

5. Finally, Defendants falsely claimed that the Merger might not be completed because of the number of JA Solar Securityholders that dissented from the merger. Defendants, however, failed to provide the update that they said they would concerning this Merger condition. Rather, they planned all along to push the Merger through regardless of the amount of dissenting shareholders. Moreover, these false and misleading statements further depressed the price of JA Solar Securities leading up to the Merger by suggesting that the Merger might not be

completed, and gave investors the false impression that the Merger was an arms'-length transaction that provided "fair" value to JA Solar Securityholders.

6. JA Solar is a Chinese solar power company. It primarily designs, develops, manufactures, and sells solar power products that convert sunlight into electricity for a variety of uses. JA Solar is purported to be one of the world's largest manufacturers of high-performance solar power products. JA Solar sells its products to customers in over 90 countries. According to the Company, in 2017, 51.5% of its total revenues were generated from sales to customers outside China. From 2015 to 2017, JA Solar generated approximately \$2 billion to \$2.9 billion in revenue.

7. Defendant Jin founded JA Solar in 2005. JA Solar completed its initial public offering in February 2007 by offering American Depositary Shares ("ADS") that it listed on the NASDAQ. JA Solar's ADS listed on the NASDAQ were the Company's only publicly traded securities from the time of its IPO through the completion of the Merger. From December 10, 2012 through the completion of the Merger, each JA Solar ADS represented five of the Company's ordinary shares.

8. Defendant Jin maintained unusually tight control of JA Solar from its IPO through the Merger. He was JA Solar's single largest individual shareholder during the Class Period through his direct ownership of JA Solar shares and his control of another company called Jinglong Group Co., Ltd. ("Jinglong Group BVI"); he led the group that took JA Solar private in the Merger; he owned approximately 80% of the newly private JA Solar following the Merger; and he controlled several entities associated with Jinglong Group BVI that did substantial business with JA Solar in related-party transactions. Defendant Jin was therefore uniquely

situated to shepherd the Merger along at a depressed valuation so that he could reap outside profits by relisting the Company in China at a much higher value.

9. The group of buyers that took JA Solar private (the “Buyer Group”)—led by Defendant Jin—initially tried to purchase the Company in June 2015 for \$9.69 per ADS. At that point, JA Solar established a Special Committee of the Board of Directors (the “Special Committee”), led by Defendant Jia, to evaluate the proposed going-private transaction.

10. According to JA Solar, the going private transaction was “put on hold” from October 27, 2015 to May 3, 2017 because the Buyer Group could not secure adequate financing for the transaction. On June 6, 2017, the Buyer Group submitted a new proposal to take the Company private at a lower offering price of \$6.80 per ADS in cash.

11. The Buyer Group and the Special Committee ultimately agreed to conduct the Merger at a price of \$7.55 per ADS (and \$1.51 per share)—over 22% *below* the price that the Buyer Group offered in June 2015. Houlihan Lokey (China) Limited (“Houlihan Lokey”), the Special Committee’s financial advisor, purportedly determined on November 16, 2017 that the consideration of \$7.55 per ADS was “fair, from a financial point of view” to JA Solar Securityholders. That same day, the Special Committee and the Board “expressly adopted” Houlihan Lokey’s analysis, determined that the Merger price was “fair” to JA Solar Securityholders, and recommended that the Merger be approved. Based on this price, the proposed Merger implied an equity value for JA Solar of approximately \$360 million.

12. The following day, on November 17, 2017, Company and Buyer Group executed the Merger Agreement and related documentation for the proposed transaction. The Class Period begins on November 20, 2017, when JA Solar filed with the SEC its press release announcing the Merger.

13. Defendants then proceeded to publish proxy materials advising JA Solar Securityholders of the key components of the Merger, including the determination by the Special Committee, the Board, the Buyer Group, and Houlihan Lokey that the Merger was “fair” to JA Solar Securityholders. (These materials are referred to collectively as the “Proxy Materials.”)

14. On December 11, 2017, Defendants published the initial transaction statement for the Merger on Schedule 13E-3, which attached the Company’s Preliminary Proxy Statement and a draft of Houlihan Lokey’s November 16, 2017 presentation to the Special Committee (collectively, the “Preliminary Proxy Materials”).

15. Defendants then published an amended version of the Proxy Materials on January 11, 2018 (the “Amended Proxy Materials,” which included a revised proxy statement (the “Amended Proxy Statement”). On February 1, 2018, Defendants published a second amended version of the Proxy Materials (the “Second Amended Proxy Materials”) that included the final version of the proxy statement that JA Solar Securityholders relied on at the March 12, 2018 shareholder vote on the Merger (the “Final Proxy Statement”).

16. Significantly, the Proxy Materials told the market that JA Solar had no plans to relist the Company on any stock exchange. For example, they assured investors that “[i]f the Merger is completed, the Company will continue its operations as a privately held company and will be wholly owned by the Buyer Group.”

17. On March 12, 2018, JA Solar held the extraordinary shareholder meeting at which shareholders voted on whether to approve the Merger based on the recommendations and/or fairness determinations in the Proxy Materials of the Special Committee, the Board, Houlihan Lokey, and the Buyer Group. The Merger passed with only 56.5% of the Company’s total outstanding ordinary shares voting at the meeting.

18. On July 16, 2018, the last day of the Class Period, the Merger closed.¹ JA Solar then became a newly private company owned by the Buyer Group, and the Company's ADS stopped being listed on the NASDAQ. Defendants also provided JA Solar Securityholders instructions for how they could exchange their JA Solar Securities for the Merger consideration following the closing of the Merger.

19. *Just three days later*, on July 19, 2018, JA Solar signed a letter of intent with Qinhuangdao Tianye Tonglian Heavy Industry Co., Ltd. ("Tianye Tonglian"), a manufacturer of heavy equipment based in the People's Republic of China, for Tianye Tonglian to acquire JA Solar. This deal, operating as a "backdoor listing," would allow JA Solar to return to the stock market in China by relisting on the Shenzhen Stock Exchange. However, JA Solar would relist at a multiple of *at least 3 times its prior value*. This fact was not known by JA Solar's former Securityholders at the time they voted to approve the Merger. The relisting was thus to the detriment of JA Solar's former Securityholders, who had unknowingly agreed to sell their JA Solar Securities at substantially deflated values during the Class Period. Following the Merger, Defendant Jin would become CEO of the publicly listed Tianye Tonglian, which would serve as a vehicle for JA Solar being listed in the Chinese market.

20. The backdoor listing is continuing to progress toward completion. Tianye Tonglian currently plans to acquire JA Solar for 7.5 billion yuan, or \$1.1 billion. That is over three times the approximately \$360 million that Defendant Jin and the rest of the Buyer Group paid to take JA Solar private in the Merger.

21. Contrary to their affirmative statements that there was no relisting plan in the works, Defendants had been secretly planning the relisting all along. The timing of the

¹ See the "Class Action Allegations" section below for the description of which JA Solar Securityholders are included in the Class.

announcement of the relisting agreement is telling. The announcement occurred just three days after the Merger closed. Before reaching the backdoor listing agreement, JA Solar would have needed to engage advisors for the transaction, find viable entities on Chinese stock exchanges to acquire JA Solar, reach an agreement with one of those companies, have both sides conduct due diligence on one another, conduct regulatory and accounting analyses, and agree to the initial terms of the deal that were announced on July 19, 2018. These numerous complicated steps that go into reaching a backdoor listing agreement typically take at least a full year, if not longer. In addition, the particular intricacies of JA Solar's agreement with Tianye Tonglian, such as Tianye Tonglian's agreement to strip itself of its pre-existing assets, would make the deal process take even longer than usual. That timeframe puts the start of the relisting process from Defendants' perspective here in July 2017, if not earlier.

22. In addition, other sources corroborate that Defendants were planning on the backdoor listing transaction at the same time they were telling the market there were no relisting plans, and long before the March 12, 2018 shareholder vote on the Merger. For example, during a speech in China to a select group of people on November 19, 2017, Defendant Jin said that JA Solar had plans to return to the Chinese capital markets in publicly traded form within the following two or three years.

23. Defendants' many descriptions of the Merger price as "fair" were also false and misleading. The fact that JA Solar was being relisted in China at a multiple of the Merger price itself shows that JA Solar's value was much higher than the consideration paid to its Securityholders. Furthermore, several aspects of Houlihan Lokey's, the Special Committee's, the Board's, and the Buyer Group's analysis are highly suspect, and sought to justify this lower valuation of JA Solar (while keeping the relisting secret).

24. First, the Special Committee and the Board explained in the Proxy Materials that negative business conditions for JA Solar, the solar industry in general, and in China supported the low transaction price.

25. Second, Houlihan Lokey based its analysis on Company management's outdated projections for the Company's performance in 2017. By the time Houlihan Lokey considered those projections, there were only one-and-a-half months left in 2017. Defendants then repeated those projections in the Proxy Materials that it provided to shareholders leading up to, and after, their March 12, 2018 vote on whether to approve the Merger.

26. Third, Houlihan Lokey disclaimed any reliance on the traditional valuation methods that compare JA Solar to comparable companies (i.e., "selected companies analysis") and that compare the transaction at issue to comparable transactions involving similar companies (i.e., "selected transactions analysis"). This sort of analysis is a mainstay of "fairness opinion" valuations. While its absence was disclosed and, therefore, not directly fraudulent, it also casts serious doubts on the legitimacy of Houlihan Lokey's motivations and analysis.

27. Then, on April 30, 2018, approximately three months after JA Solar published the Final Proxy Statement and less than two months *after* shareholders voted to approve the Merger based on the representations contained therein, JA Solar disclosed in its Annual Report for 2017 that (1) its results for 2017 were significantly better than projected in the Proxy Materials and (2) JA Solar's business conditions were much more positive than described in the Proxy Materials. Defendants had misrepresented these factors in the Proxy Materials to justify the artificially low Merger price. By this point, however, it was too late for JA Solar Securityholders to dissent from the Merger or exercise their appraisal rights.

28. Defendants further depressed the price of JA Solar Securities by warning JA Solar Securityholders that the Company or the Buyer Group might terminate the Merger after the shareholder vote because the holders of over 10% of JA Solar Securities had objected to the Merger. In reality, neither the Company nor the Buyer Group planned to exercise such a right because they wanted the Merger to proceed so that the Company could then be relisted in China for a much higher value. But Defendants entertained this unfounded concern and never provided JA Solar Securityholders with the notice that was promised concerning the waiver of this termination right.

29. As a result of the Merger and subsequent relisting, the Buyer Group stands to receive three times what they paid to take JA Solar private. At a valuation in China of \$1.1 billion, that means that they are due to receive over \$550 million in profit above what they paid in the Merger (after accounting for the 25.7% ownership stake that they had in the Company before the Merger). Defendant Jin alone stands to earn at least \$440 million in profit for his 79.8% stake in JA Solar following the Merger.

II. JURISDICTION AND VENUE

30. The claims asserted herein arise under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), Rule 10b-5 promulgated thereunder by the SEC, 17 C.F.R. § 240.10b-5; Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a); Section 20A of the Exchange Act, 15 U.S.C. § 78t-1.

31. This Court has subject matter jurisdiction over this action pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and 28 U.S.C. § 1331. The Defendants engaged in a scheme that violated United States securities law. In doing so, the Defendants engaged in conduct that was directed toward the United States. JA Solar registered its ADS with the SEC pursuant to Section 12(b) of the Exchange Act and these securities traded on the NASDAQ stock

exchange. The Bank of New York Mellon, whose corporate headquarters and trust office from which the ADS program is administered, is located in New York, New York, served as the ADS Depositary for JA Solar's ADS.

32. Venue is proper in this judicial district pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and 28 U.S.C. § 1391(b).

33. In connection with the acts alleged in this Complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications, and the facilities of the NASDAQ stock exchange.

III. PARTIES AND OTHER KEY ACTORS

A. Lead Plaintiffs

34. On March 7, 2019 this Court appointed Altimeo and ODS to serve as the Co-Lead Plaintiffs in this action pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). (Dkt. No. 15).

35. Altimeo is an institutional asset manager that manages investment assets through separate funds and is authorized to bring legal action on their behalves. Prior to seeking appointment as Lead Plaintiff, Altimeo obtained valid assignments of the claims of the funds Altimeo Optimum and Altimeo Investissement.

36. Between Altimeo Optimum and Altimeo Investissement, Altimeo purchased 401,110 JA Solar securities (including ADS on the NASDAQ) during the Class Period and sold 347,311 JA Solar securities (including ADS on the NASDAQ) during that time. After accounting for JA Solar securities that Altimeo held prior to the start of the Class Period, it retained 303,095 JA Solar securities (including ADS) through the Merger. These 303,095

securities have now been paid in exchange for the Merger consideration, with those transactions clearing on July 18 and 19, 2018.

37. Lead Plaintiff ODS Capital LLC is a Florida limited liability company with its primary office and business address in Jupiter, Florida. ODS purchased a total of 1,329,633 ADS on the NASDAQ during the Class Period, sold 664,930 ADS during the Class Period, and retained 664,703 ADS through the Merger. These 664,703 ADS have now been paid in exchange for the Merger consideration, with that transaction clearing on July 18, 2018. ODS's transactions in JA Solar's ADS were completed through a New York-based brokerage.

B. Defendants

38. Defendant JA Solar is a Cayman Islands corporation with its principal executive offices located at Building No.8, Noble Center, Automobile Museum East Road, Fengtai, Beijing 100070, The People's Republic of China. JA Solar's common stock is not registered with the SEC. Rather, JA Solar registered ADS that were listed and traded on the NASDAQ under the ticker symbol "JASO." The only public market for JA Solar Securities was for the Company's NASDAQ-listed ADS. Each ADS was redeemable for five shares of JA Solar's ordinary stock. The Bank of New York Mellon served as the ADS Depository for JA Solar's ADS.

39. Defendant Baofang Jin ("Jin") served as the JA Solar's Executive Chairman of the Board of Directors since July 2009, as Chairman since he founded JA Solar in 2005, and as Chief Executive Officer from August 2009 to January 2010 and since January 2013.

40. Defendant Jin has also been the Chairman and Chief Executive Officer of Jinglong Industry and Commerce Group Co., Ltd. ("Hebei Jinglong") since 2003. As discussed further below, Hebei Jinglong does substantial business with JA Solar and is controlled by Jinglong BVI. Jinglong BVI, in turn, is a British Virgin Islands company that is controlled by Defendant Jin, who serves as its sole director. Jinglong BVI was JA Solar's largest

Securityholder prior to the Merger and was part of the Buyer Group that took JA Solar private in the Merger.

41. Defendant Shaohua Jia (“Jia”) has served as a member of JA Solar’s Board of Directors since October 2012. He served as Chairman of the Special Committee of the Board that approved the Merger, as described further below. Jia also served on the Audit Committee, Compensation Committee, and Nominating and Corporate Governance Committee of JA Solar’s Board.

42. Defendants Jin and Jia are collectively referred to hereinafter as the “Individual Defendants.”

43. JA Solar and the Individual Defendants are collectively referred to herein as “Defendants.”

C. The Special Committee

44. In June 2015, JA Solar’s Board of Directors formed a special committee that consisted of directors that the Company described as “independent directors” to advise the Board about a potential going-private transaction that was being considered at that time (the “Special Committee”). The Special Committee consisted of just two members: Defendant Jia, who served as its Chairman, and Mr. Yuwen Zhao. The Special Committee remained intact when it came time to consider the Merger in 2017.

45. The Special Committee was instructed to “to take any actions it deems appropriate to assess the fairness and viability of” the proposed Merger. The Board did not place any limitations on the authority of the Special Committee regarding its investigation and evaluation of the proposed Merger.

D. The Buyer Group

46. Defendant Jin led the group of buyers that took JA Solar private in the Merger and owned 100% of the private company following the Merger (the “Buyer Group”). The other members of the Buyer Group included Mr. Chin Tien Huang, Ms. Pak Wai Wong, Ms. Chi Fung Wong, Jinglong BVI, and other entities that were created solely for purposes of the Merger. The members of the Buyer Group other than these newly formed entities are known as the “Rollover Shareholders” because their prior ownership interests in the Company would continue through the Merger and they would collectively proceed to own 100% of the Company in its newly private form after the Merger.

47. The entities that were created solely for the Merger included JASO Holdings Limited, an exempted company with limited liability incorporated under the laws of the Cayman Islands (“Holdco”); JASO Parent Limited, an exempted company with limited liability incorporated under the laws of the Cayman Islands, and a wholly owned subsidiary of Holdco (“Parent”); JASO Acquisition Limited, an exempted company with limited liability incorporated under the laws of the Cayman Islands, and a wholly owned subsidiary of Parent (“Merger Sub”); and JASO Top Holdings Limited (“JASO Top”), a Cayman Islands company that wholly owned Holdco prior to the Merger and was wholly owned by Defendant Jin. Holdco, Parent and Merger Sub are collectively referred to as the “Parent Parties.”

48. In the Merger, Merger Sub would be merged with and into JA Solar, with the Company continuing as the surviving company and becoming a wholly owned subsidiary of JASO Parent Limited.

49. *The stated goal of the Merger was for JA Solar to continue its operations as a privately held company and to be wholly owned by the Buyer Group, with JA Solar’s ADS retired and no longer publicly listed on the NASDAQ.*

50. Prior to the Merger, the Buyer Group beneficially owned 61,036,142 shares (including shares represented by ADS) of JA Solar stock, which represented approximately 25.7% of the Company's approximately 238 million total issued and outstanding pre-Merger shares. Defendant Jin and Jinglong BVI (which was 32.96% owned by Jin, who was Jinglong BVI's sole Director) together owned 16.5% of the Company's total outstanding pre-Merger shares, and the remaining members of the Buyer Group (Mr. Chin Tien Huang, Ms. Pak Wai Wong, and Ms. Chi Fung Wong) together owned 9.2%. Mr. Bingyan Ren, who owned 4.79% of Jinglong BVI, was also a Director of JA Solar.²

51. As a result of the Merger, Defendant Jin, Jinglong BVI, and Mr. Chin Tien Huang, Ms. Pak Wai Wong, and Ms. Chi Fung Wong would own 79.8% (including 5.4% indirectly owned by Mr. Jin through his 32.96% equity interest in Jinglong BVI), 16.3%, 4.3%, 3.8%, and 1.2% of the surviving Company, respectively, totaling 100% of the equity in the newly private Company.

E. Tianye Tonglian

52. On July 19, 2018, just three days after the Merger closed, it was revealed that Tianye Tonglian, a manufacturer of heavy equipment based in the People's Republic of China, would acquire JA Solar in a deal that would also involve Jingao Solar Energy, Co., Ltd, a wholly owned subsidiary of the Jinglong entities that Defendant Jin controlled. Tianye Tonglian was a publicly traded company on the Shenzhen Stock Exchange in China. Pursuant to the agreement that Tianye Tonglian and JA Solar reached, Tianye Tonglian would issue shares in exchange for 100% of JA Solar's equity. This deal operated as a "backdoor listing" that would allow JA Solar

² The other owners of Jinglong BVI were Mr. Huixian Wang, Mr. Binguo Liu, Mr. Jicun Yan, Mr. Rongrui Liu, Mr. Huiqiang Liu, Mr. Ruiying Cao, Mr. Guichun Xing, Mr. Ning Wen, and Mr. Ruchang Wen.

to return to the stock market in China by relisting on the Shenzhen Stock Exchange at a multiple of its prior value, to the detriment of its former Securityholders who had unknowingly sold their JA Solar Securities at substantially deflated values during the Class Period.

IV. SUBSTANTIVE ALLEGATIONS

A. Overview of JA Solar's Business

53. JA Solar is a Chinese solar power company. It primarily designs, develops, manufactures and sells solar power products that convert sunlight into electricity for a variety of uses. JA Solar is purported to be one of the world's largest manufacturers of high-performance solar power products

54. The Company is incorporated in the Cayman Islands, with its principal executive offices located at Building No.8, Noble Center, Automobile Museum East Road, Fengtai, Beijing 100070, The People's Republic of China.

55. Defendant Jin founded JA Solar in 2005 as an entity called JA Hebei. The Company restructured in 2006 to operate through various subsidiaries under the holding company JA Solar. JA Solar completed its initial public offering in February 2007 and had its ADS listed on the NASDAQ. Through the IPO, its ADS sold for \$15 each, raising \$258,750,000 in cash on an implied equity valuation of \$414,810,000 (after accounting for shares that were held through the IPO). JA Solar's ADS listed on the NASDAQ were the Company's only publicly traded securities from the time of its IPO through the completion of the Merger. From December 10, 2012 through the completion of the Merger, each JA Solar ADS represented five of the Company's ordinary shares. The only public market for JA Solar's equity was through its NASDAQ-listed ADS.

56. JA Solar's primary business has been the manufacturing and sales of solar cells. In the fourth quarter of 2009, it expanded its business to silicon wafers manufacturing and

manufacturing and sales of solar modules. The Company sells its products mainly under its “JA Solar” brand name, and also produces original equipment for third parties under their brand names.

57. JA Solar further expanded its business in 2013 to engage in project development activities and it started to sell electricity in 2015. JA Solar’s website showcases some of its major projects, such as a solar power station in Southwark, UK capable of producing 49 megawatts of electricity; a 132.5 megawatt capacity solar power station in the Philippines; and an 80 megawatt station in Utah. It also engaged in smaller projects, including many high profile projects in the United States, ranging from the installation of a two megawatt project on the roof of Lincoln Stadium, where the Philadelphia Eagles professional football team plays, a 1.1 megawatt project on the roof of a Macy’s department store in New Jersey, and a 9.5 megawatt capacity project in Tennessee, which was then the largest solar installation in the state.

58. JA Solar sells its products to customers in over 90 countries, including China, the U.S., Japan, United Kingdom, India, Thailand, the Netherlands, Australia, Switzerland and Guatemala. According to the Company, in 2017, 51.5% of its total revenues were generated from sales to customers outside China. For the years ended December 31, 2015, 2016 and 2017, JA Solar generated approximately 13.5 billion RMB (or approximately \$2 billion), 15.7 RMB (or approximately \$2.3 billion), and 19.7 RMB in total revenue (or approximately \$2.9 billion), respectively.

B. Defendant Jin’s Multiple and Conflicting Ties to The Company

59. Defendant Jin and his related entities played a central role in JA Solar. Jin controlled the Jinglong group of entities that (1) owned the largest stake in JA Solar prior to the Merger; (2) were part of the Buyer Group that continued to own a substantial stake in the

Company after the Merger; (3) did substantial business with JA Solar in related-party transactions; and (4) facilitated the relisting transaction following the Merger.

60. Jinglong BVI—which was part of the Jinglong group of entities—was JA Solar’s largest shareholder prior to the Merger (owning approximately 16.3% of the Company) and would continue to own that stake following the Merger. Defendant Jin controlled Jinglong BVI, owning approximately 32.96% of that company and serving as its sole director.

61. Jinglong BVI also shared several other close connections with the Company. Mr. Bingyan Ren, who owned 4.79% of Jinglong BVI, was also a Director of JA Solar. In addition, Jinglong BVI shared the same address as JA Solar at Building No. 8, Noble Center, Automobile Museum East Road, Fengtai, Beijing 100070, People’s Republic of China.

62. Defendant Jin also controlled Hebei Jinglong through Jin’s control of Jinglong BVI. Hebei Jinglong did substantial business with JA Solar. Defendant Jin was the Chairman and largest shareholder of Hebei Jinglong. JA Solar considered Hebei Jinglong to be a “related party” to the Company. Defendant Jin owned 78.45% of Hebei Jinglong, and Mr. Bingyan Ren, a JA Solar Director, owned a 4.79% stake in Hebei Jinglong.

63. Hebei Jinglong and its subsidiaries are one of JA Solar’s main suppliers of polysilicon and silicon wafers, which are essential materials for the Company’s products. In 2017 alone, JA Solar spent 2.8 billion RMB (or approximately \$406 million) on the purchase of products from subsidiaries of Hebei Jinglong, among JA Solar’s many other related-party transactions with the Jinglong entities.

64. JA Solar also leased properties from Hebei Jinglong (including for \$5.5 million in 2017) and received guarantees from it for certain of its loans.

65. Several of JA Solar's directors also served various roles in the Jinglong entities, including Yuhong Fan, a JA Solar Director who was the deputy general manager of Jinglong Group from July 2009 to 2016; Bingyan Ren, a JA Solar Director who served as a director and vice chairman of Hebei Jinglong since 2003; and Erying Jia, a JA Solar Director who also served as the chief operating officer and director of Hebei Jinglong since January 2006.

66. Overall, JA Solar explained that "Jinglong BVI may exert significant influence on our affairs through our board of directors" and may have interests that conflict with the Company's interests, including in the Merger and in the Company's substantial transactions with Hebei Jinglong. Even so, these connections did not stop Defendant Jin from simultaneously controlling JA Solar and the Jinglong entities before, during, and after the Merger.

C. History of the Merger

67. The Buyer Group, led by Defendant Jin, initially tried to buy JA Solar in June 2015. On June 5, 2015, the Buyer Group submitted a preliminary non-binding proposal letter to JA Solar's Board of Directors to indicate its intention to acquire all of the outstanding shares of the Company not already owned by the Buyer Group in a going private transaction for \$9.69 per ADS in cash. The Buyer Group engaged Skadden, Arps, Slate, Meagher & Flom LLP as its "international legal counsel" in connection with its proposed transaction.

68. JA Solar initially established the Special Committee to consider the Buyer Group's proposal in 2015. The Board of Directors gave the Special Committee "the power and authority to, among other things, (i) investigate, evaluate, discuss, and negotiate the Proposed Transaction, (ii) make reports and recommendations to the Board as the Special Committee considers appropriate with respect to the Proposed Transaction, (iii) retain any advisors, including independent legal counsel, financial advisors, and outside counsel, as the Special Committee deems appropriate to assist the Special Committee in discharging its responsibilities,

and (iv) exercise any other power that may be otherwise exercised by the Board and that the Special Committee may determine is necessary or advisable to carry out and fulfill its duties and responsibilities through the abandonment or completion of the Proposed Transaction.”

69. The Special Committee engaged Houlihan Lokey as its “independent financial advisor” and Gibson, Dunn & Crutcher LLP as its “independent U.S. legal advisor.”

70. According to JA Solar, the going private transaction was “put on hold” from October 27, 2015 to May 3, 2017 because the Buyer Group could not secure adequate financing for the transaction.

71. On June 6, 2017, the Buyer Group submitted a new proposal to take the Company private, lowering its offering price to \$6.80 per ADS in cash. The Buyer Group gave the following reasons to justify its lowered offering price, including, among others, “(i) significant volatility in global financial markets hindering the Buyer Group’s ability to secure financing, (ii) poor short term outlook for the solar industry, (ii) increased uncertainty in trade policy and government subsidies affecting the Company’s growth prospects, and (iv) economic slowdown and challenges in China.”

72. After negotiations with the Special Committee, on October 27, 2017, the Buyer Group raised its offer to \$7.55 per ADS (and \$1.51 per share). The Buyer Group described this offer of as its “best and final” offer.

73. On November 16, 2017, following negotiations between the Buyer Group and the Special Committee over the price and terms of the transaction, Houlihan Lokey told the Special Committee that it determined that the consideration of \$7.55 per ADS was “fair, from a financial point of view.”

74. Based on this price, the Proposed Transaction implied an equity value of the Company of approximately \$360 million.

75. That same day, both members of the Special Committee approved the proposed Merger and recommended that the Company's Board of Directors authorize and approve the transaction.

76. Shares owned by shareholders that validly exercised their right to dissent from the Merger under Cayman Islands law, and the shares of the Rollover Shareholders that were part of the Buyer Group were excluded from receiving the Merger consideration.

77. The Board, excluding Defendant Jin, then met and unanimously approved of the proposed Merger. The Board concluded that the Merger was "fair to and in the best interests of the Company and the Unaffiliated Security Holders" (i.e., ordinary shareholders including ADS holders that were not affiliated with the Company, including the Buyer Group).

78. The following day, on November 17, 2017, the Company and Buyer Group executed the Merger Agreement and related documentation for the proposed transaction.

79. The Special Committee and the Board promoted the Merger as advisable by marching out a parade of horrors regarding the economic condition of JA Solar and the market it operated within, including:

- a. The weak outlook for the solar industry due to overcapacity and slowing demand;
- b. Weak demand and lower prices for the Company's products in China and the expectation that there will be similar declines in key growth markets, including South America and India;
- c. Uncertainty surrounding ongoing trade cases in the U.S. and India and the existing and potential additional sanctions on solar panel products from China;

- d. China's economic slowdown generally, and slowdown in the Chinese solar industry specifically, including decreased demand for photovoltaic modules and overcapacity in the Chinese solar industry;
- e. The lack of other potentially interested buyers; no interested bidder submitted an indication of interest during the "market check" process conducted by Houlihan Lokey after receipt of the original going private proposal on June 5, 2015, and the Company had received no alternative proposals following the public disclosure of the Company's receipt of the revised going private proposal on June 6, 2017;
- f. The Special Committee's knowledge of the Company's business, financial condition, results of operations, prospects and competitive position and their belief that the Merger is financially more favorable to the Unaffiliated Security Holders than any other alternative reasonably available to the Company and the Unaffiliated Security Holders;
- g. Estimated forecasts of the Company's future financial performance prepared by the Company's management, together with the Company's management's view of the Company's financial condition, results of operations, business, prospects and competitive position;
- h. The current and historical market prices of ADSs, and the fact that the Per ADS Merger Consideration of US\$7.55 offered to the Unaffiliated Security Holders represented a premium of 18.2% over the closing price on June 5, 2017, the last trading day prior to the Company's announcement that it had received a revised going private proposal, and a premium of 24.6% to the average closing price of the Company's ADSs during the 3-month period prior to its receipt of the revised going private proposal;
- i. The possible alternatives to the Merger (including the possibility of continuing to operate the Company as an independent publicly traded entity and the perceived risks of that alternative), the range of potential benefits to its shareholders of the possible alternatives and the timing and the likelihood of accomplishing the goals of such alternatives, and the assessment by the Special Committee that none of these alternatives was reasonably likely to present superior opportunities for the Company or to create greater value for its shareholders than the Merger, taking into account the likelihood of execution as well as business, competitive, industry and market risks;
- j. The financial analysis reviewed by Houlihan Lokey with the Special Committee, as well as the oral opinion of Houlihan Lokey rendered to the Special Committee on November 16, 2017.

80. On November 20, 2017, the Company issued a press release that it filed with the SEC announcing the proposed Merger.

81. In order for the Merger to take place, it would have to be approved by the Company's Securityholders at a shareholder vote that would take place at an extraordinary general meeting that was scheduled for March 12, 2018.

82. Approval of the Merger required an affirmative vote of Securityholders representing at least two-thirds of the Company's shares that were present and voting (as opposed to total outstanding Shares) in person or by proxy as a single class at the extraordinary general meeting where the shareholder vote on the Merger would take place.

83. The SEC noted in a December 29, 2017 comment letter that the shareholder vote required "*two thirds of shares present (as opposed to a percentage of shares outstanding)*" for the Merger to pass. Because the Rollover Shareholders owned only 25.7% of the total voting rights in the Company, the Merger still required Securityholders that were unaffiliated with the Buyer Group to approve the Merger in order for it to pass. If all outstanding shares of the Company would be present and voting at the extraordinary general meeting, 55.2% of the total issued and outstanding shares entitled to vote that were owned by unaffiliated Securityholders would need to be voted in favor of the Merger in order for it to be approved.

D. The Misleading Proxy Materials

84. Between November 17, 2017 and February 1, 2018, in order to convince JA Solar Securityholders to vote in favor of the Merger, Defendants authorized the filing of materially false and misleading Proxy Materials with the SEC, in violation of Sections 10(b) and 20(a) of the Exchange Act. As described further below, the Proxy Materials contained materially false and misleading statements and failed to provide all material information related to the Merger.

1. Dissenting From the Merger Was Difficult and Discouraged

85. Shareholders had a right to dissent from the proposed Merger and to exercise their appraisal rights “to receive payment of the fair value of their Shares in accordance with Section 238 of the Cayman Islands Companies Law.” But Defendants warned in the Proxy Materials that dissenting was a very risky proposition because “[t]he fair value of their Shares as determined under the Cayman Islands Companies Law could be more than, the same as, or less than the merger consideration they would receive pursuant to the Merger Agreement if they do not exercise dissenters’ rights with respect to their Shares. These procedures are complex and you should consult your Cayman Islands legal counsel. If you do not fully and precisely satisfy the procedural requirements of the Cayman Islands Companies Law, you will lose your Dissenters’ Rights.” Defendants further warned that “[t]he provisions of Section 238 of the Cayman Islands Companies Law are technical and complex. If you fail to comply strictly with the procedures set forth in Section 238, you will lose your dissenters’ rights. You should consult your Cayman Islands legal counsel if you wish to exercise dissenters’ rights.”³

86. And dissenting was even more difficult because, as Defendants warned in the Proxy Materials, “THE ADS DEPOSITARY WILL NOT EXERCISE OR ATTEMPT TO EXERCISE ANY DISSENTERS’ RIGHTS WITH RESPECT TO ANY OF THE SHARES THAT IT HOLDS, EVEN IF AN ADS HOLDER REQUESTS THE ADS DEPOSITARY TO DO SO.” According to the Proxy Materials, in order to validly dissent, ADS holders were required to go through extra complicated procedural steps and bear the extra costs of doing so.

³ These steps are recounted here to explain what investors were told, but are not necessarily indicative of Lead Plaintiffs’ position as to the actual steps necessary to exercise appraisal rights under the applicable law.

87. These steps included their surrendering ADS to the ADS Depository; paying the ADS Depository's fees required for cancelling ADS; providing instructions for the registration of the underlying shares in the Company's register of members; certifying that they held ADS as of the ADS record date and would not give voting instructions for their ADS before 5:00 pm on February 9, 2018; and becoming registered holders of shares before the March 12, 2018 shareholder vote on the Merger.

88. Investors were told that, only after all of these difficult and costly steps, could ADS holders object to and dissent from the shareholder vote.

89. The false and misleading Proxy Materials that Defendants issued in connection with the Merger convinced most JA Solar Securityholders that there was no reason for them to take the risk and burden of dissenting from the Merger.

2. Houlihan Lokey's Analysis of the Merger

90. The Special Committee relied upon Houlihan Lokey's financial analysis in reaching the conclusion that the Merger was fair to JA Solar Securityholders that were unaffiliated with the Company (including the Buyer Group) and that the Board should authorize and approve the Merger. The Special Committee and the Board expressly adopted Houlihan Lokey's analysis and opinions in reaching their respective determinations as to the fairness of the Merger.

91. In conducting its analysis, Houlihan Lokey relied on information that the Company provided to it. For example, Houlihan Lokey stated in its written Fairness Opinion that "[w]e have relied upon and assumed, without independent verification, the accuracy and completeness of all data, material and other information furnished, or otherwise made available to us, discussed with or reviewed by us, or publicly available, and do not assume any responsibility with respect to such data, material and other information. In addition,

management of the Company has advised us, and we have assumed, that the financial projections reviewed by us have been reasonably prepared in good faith on bases reflecting the best currently available estimates and judgments of such management as to the future financial results and condition of the Company, and we express no opinion with respect to such projections or the assumptions on which they are based.”

92. Houlihan Lokey further explained that “[w]e understand that the Rollover Shareholders (as defined in the Agreement) have indicated that they are only willing to consider entering into an agreement with Holdco and Parent and amongst themselves in relation to the Transaction and have no interest in entering into any agreement, arrangement or understanding with other parties as an alternative thereto.”

93. In addition, Houlihan Lokey expressly disclaimed any analysis of alternatives to the Merger. Houlihan Lokey stated:

- We have not been requested to, and did not advise the Committee, the Board or any other party with respect to alternatives to the Transaction. This Opinion is necessarily based on financial, economic, market and other conditions as in effect on, and the information made available to us as of, the date hereof. We have not undertaken, and are under no obligation, to update, revise, reaffirm or withdraw this Opinion, or otherwise comment on or consider events occurring or coming to our attention after the date hereof.
- We have not been requested to opine as to, and this Opinion does not express an opinion as to or otherwise address, among other things: . . . (iv) the relative merits of the Transaction as compared to any alternative business strategies or transactions that might be available for the Company or any other party or the effect of any other transaction in which the Company or any other party might engage, (v) the fairness of any portion or aspect of the Transaction to any one class or group of the Company's or any other party's security holders or other constituents vis-à-vis any other class or group of the Company's or such other party's security holders or other constituents (including, without limitation, the allocation of any consideration amongst or within such classes or groups of security holders or other constituents), (vi) whether or not the Company, its security holders or any other party is receiving or paying reasonably equivalent value in the Transaction.

94. In a presentation that Houlihan Lokey gave to the Board dated November 16, 2017, it conducted a “selected companies analysis,” whereby it compared JA Solar to other solar companies and valued JA Solar at a far-lower multiple as compared to these other companies along several key financial metrics. Houlihan Lokey explained this discrepancy by providing several ways in which it claimed that JA Solar differed from these other solar companies. Had Houlihan Lokey valued JA Solar similarly to these other solar companies (as it should have), it would have determined that the merger consideration substantially undervalued JA Solar.

95. Similarly, Houlihan Lokey conducted a “selected transactions analysis” that involved looking at other merger and acquisition transactions involving solar companies, which also had higher multiples along key financial metrics than the Merger here. Houlihan Lokey again explained away these discrepancies by claiming that these other companies were different than JA Solar in various ways.

96. The Preliminary Proxy Statement stated only that the Special Committee and the Board adopted Houlihan Lokey’s analysis, without noting that Houlihan Lokey ignored these basic valuation methods until the more-detailed description of Houlihan Lokey’s analysis that came later in the Preliminary Proxy Statement. By the Amended Proxy Statement and the Final Proxy Statement, in response to the SEC’s comments suggesting that this explanation was deficient, Defendants revised their statements to explain that:

The Special Committee and the Board noted that the financial analyses performed by Houlihan Lokey relied only on a discounted cash flows analysis while also presenting analyses with respect to selected companies and selected transactions for informational purposes only. The Special Committee and the Board also noted Houlihan Lokey’s view that the results derived from the selected companies analysis and selected transactions analysis do not provide a meaningful comparison to the Company. The Special Committee and the Board adopted Houlihan Lokey’s financial analyses as a whole, including its determinations that the selected companies analysis and the selected transactions analysis did not result in meaningful comparisons with respect to the Company and the proposed

Merger. Accordingly, the Special Committee and the Board did not rely on such analyses in reaching their conclusion that the Per Share Merger Consideration to be received by holders of Shares (other than Excluded Shares) and the Per ADS Merger Consideration to be received by holders of ADSs (other than ADSs representing Excluded Shares) are fair, from a financial point of view, to such holders.

97. A typical valuation analysis assesses the company at issue along several common measures, including a “discounted cash flow” analysis that focuses on the company’s projected future cash flow based on key financial metrics; a “selected companies” analysis, which compares the company at issue other similar companies; and a “selected transactions” analysis, which compares the transaction at issue with other merger and acquisition transactions involving similar companies.

98. Houlihan Lokey’s analysis was extremely limited. At best, it relied solely on a discounted cash flow (“DCF”) analysis. The only data that Houlihan Lokey based its conclusion on was the financial data provided by Company management (including management’s flawed projections), assumptions that Houlihan Lokey built into that analysis, and “Selected Market Observations” that reviewed rudimentary public information about the Company (such as its trading history, ownership structure, and the estimates of analysts who did not have the benefit of confidential Company information). This is outside of normal market practice and means that the fairness opinion was not backed by the accepted techniques that typically support such a valuation. That is not to say that DCF analysis cannot be a suitable valuation technique, or that DCF can never stand alone as a suitable technique. But it was highly misleading for Houlihan Lokey to offer what was packaged as a conventional “fairness opinion,” when its opinion was not supported by the techniques typically used in such contexts. Ultimately, Houlihan Lokey concluded: “it is our opinion that, as of [November 16, 2017], the Per Share Merger Consideration to be received by holders of Shares (other than Excluded Shares and Dissenting

Shares) and the Per ADS Merger Consideration to be received by holders of ADSs (other than ADSs representing Excluded Shares) are fair, from a financial point of view, to such holders.” But Houlihan Lokey’s thin analysis failed to serve as any meaningful check on Defendants’ efforts to depress the value of JA Solar Securities leading up to the Merger.

3. Assurances That no Relisting was Contemplated

99. In addition to the previously described efforts to discourage dissent and undervalue the Company, JA Solar’s biggest act of deception was hiding its plans to engage in a relisting in China following the transaction. Toward this end, the Proxy Materials expressly disclaimed that any such transaction was in the works.

100. For example, on December 11, 2017, Defendants published and signed the “Preliminary Proxy Materials,” which made numerous assurances that no transaction was under consideration, such as by stating that:

- a. “If the Merger is completed, the Company will continue its operations as a privately held company and will be wholly owned by the Buyer Group.”
- b. “[T]he Buyer Group anticipates⁴ that the Company’s operations will be conducted substantially as they are currently being conducted, except that the Company will cease to be a publicly traded company and will instead be a wholly owned subsidiary of Parent, which itself is wholly owned by Holdco.”
- c. “The Buyer Group decided to undertake the going-private transaction at this time because it wants to take advantage of the benefits of the Company being a privately held company.”
- d. “Other than as described in this proxy statement and transactions already under consideration by the Company, there are no present plans or proposals that relate to or would result in an extraordinary corporate transaction involving the Company’s corporate structure, business, or management, such as a Merger, reorganization,

⁴ Statements designated from the perspective of the Buyer Group, necessarily purport to convey the position of Defendant Jin, as he was the controlling member of the Buyer Group.

liquidation, relocation of any material operations, or sale or transfer of a material amount of assets.”

- e. “[A]n equity investment in the Surviving Company by the Buyer Group following the Merger will involve substantial risk resulting from the limited liquidity of such an investment” given that “following the Merger, there will be no trading market for the Surviving Company’s equity securities.”
- f. “The Company is not aware of any firm offers made by any unaffiliated person, other than the filing persons, during the past two years for (i) a Merger or consolidation of the Company with or into another company, (ii) a sale of all or a substantial part of the Company’s assets or (iii) the purchase of the Company’s voting securities that would enable the holder to exercise control over the Company.”

101. The Preliminary Proxy Statement also noted the warranty that the Parent Parties made to the Company of “the absence of undisclosed agreements or arrangements involving Holdco, Parent, Merger Sub, or any of their respective affiliates, shareholders, directors, officers, employees or other affiliates of the Company or any of its subsidiaries, in each case relating to the Merger.” And the Preliminary Proxy Statement similarly assured investors that the listed factors that had been considered—which did not describe any potential relisting—were “believed” by the Buyer Group to “include all material factors considered.”

102. These limitations also informed Houlihan Lokey’s analysis and fairness opinion. The Preliminary Proxy Statement stated that “Houlihan Lokey understood that the Rollover Shareholders had indicated that they were only willing to consider entering into an agreement with Holdco and Parent and amongst themselves in relation to the Merger and had no interest in entering into any agreement, arrangement or understanding with other parties as an alternative thereto.” Additionally, Houlihan Lokey made a number of representations that there were not any other “interested potential buyers.” Similarly, the Preliminary Proxy Statement affirmed that

“the Special Committee determined that there was no viable alternative to the proposed sale of the Company to the Buyer Group.”

103. After publishing the Proxy Materials, JA Solar posted an unusual notice on the front page of its corporate website in December 2017 that further assured investors that it had no plans to relist its shares in China. This notice is believed, based on a search of Internet archives, to have remained on JA Solar’s website for at least several months, into March 2018, if not later.

The message assured investors that:

JA Solar Co. Ltd. currently does not have plans to list domestically. JA Solar Co. Ltd. and its related parties have not and will not issue any fundraising notices, announcements, or internal messages in relation to a relisting, much less will it take any public placement actions in relation to a relisting. Any fundraising behavior in relation to a relisting by JA Solar Co. Ltd. is not being done by JA Solar Co. Ltd. or Jinglong Industrial Group Co. Ltd. and does not have their approval. Such fundraising behavior may be committing the crimes of illegal fundraising or fraud. We ask that society and the public not allow themselves to be cheated.

104. This emphatic denial effectively—but falsely—quelled any speculation as to whether JA Solar was planning to relist in China following the Merger. This disavowal referred not only to the Company’s activities as of the announcement, but also affirmed that the Company “will not” undertake any relisting actions going forward. The following image, from an archived version of JA Solar’s website, shows how prominently this message was displayed, in the top-right corner:



105. The Amended Proxy Materials, published January 11, 2018, continued the fraudulent scheme by reproducing the false and misleading statements concerning the intention of the Buyer Group not to relist JA Solar following the Merger. It assured investors that the Amended Proxy contained “all material factors considered by the Special Committee and the Board.” The Preliminary Proxy Statement contained a similar statement as to the Buyer Group, which is also in the Amended Proxy Statement, but not as to the Special Committee and the Board. The Amended Proxy Statement was revised to add this statement as to the Special Committee and the Board only because the SEC specifically called out the Preliminary Proxy Statement for failing to clarify whether it “disclosed all material factors considered in reaching a fairness determination instead of ‘a number’ of those factors.”⁵

106. On February 1, 2018, JA Solar published the Second Amended Proxy Materials and reproduced the false statements that had appeared in the Proxy Materials and Amended Proxy Materials.

⁵ The SEC’s correspondence can be found in a December 29, 2017 letter (filed with the SEC on January 3, 2018) and JA Solar’s response that it filed with the SEC on January 11, 2018.

E. The Shareholder Vote and Completion of the Merger

107. On March 12, 2018, JA Solar announced that at the extraordinary general meeting of shareholders held that day, the Company's shareholders voted in favor of the Merger.

108. JA Solar announced that day that approximately 56.5% of the Company's total outstanding ordinary shares presented in person or by proxy at the meeting. The Merger was approved by over 90% of the ordinary shares that voted. While this 90% number could superficially appear as a vote of confidence, the low turnout meant that only about 30% of the outstanding non-affiliated shares voted in favor of the transaction, with the remaining roughly 70% either voting against the Merger or, for approximately 43.5% of the Company's total outstanding shares, abstaining from the vote. If JA Solar Securityholders knew the truth about the Merger, they could have prevented it from taking place by voting against it, instead of abstaining.

109. While the Merger passed, holders of over 10% of the Company's ordinary shares exercised their dissenting rights under Section 238(2) of the Cayman Islands Companies Law and objected to the Merger.

110. Because holders of over 10% of the Company's ordinary shares objected to the Merger, both the Company and the Parent Parties (who were closely associated with the Buyer Group) had the right to terminate the transaction unless the Parent Parties irrevocably waived that condition within 10 business days. This type of clause is often referred to as a "Blow Provision."

111. The Company stated when announcing the results of the shareholder vote that it would "update its shareholders if and when it receives from the Parent Parties their decision with respect to their granting of the waiver in due course." But the Company never ended up making

any further disclosures on this topic even though the Merger would successfully close with neither the Company nor the buyers taking any steps to terminate the Merger.

112. The dissenting shareholders and JA Solar were unable to agree on a price for the dissenting shares during the 30-day negotiation period provided for under Cayman Islands law. An appraisal action was therefore commenced in the Grand Court of the Cayman Islands on August 23, 2018. Other than the appraisal petition that JA Solar filed pursuant to Cayman Islands law, the records from that proceeding are not publicly available.

113. Immediately following the completion of the Merger, the members of the Buyer Group owned 100% of the surviving Company through their interests in Holdco as follows:

Party	Ownership Interest⁶
Defendant Jin	79.8% ⁷
Jinglong BVI (which Defendant Jin was the sole director of and owned 32.96%)	16.3%
Mr. Chin Tien Huang	4.3%
Ms. Pak Wai Wong	3.8%
Ms. Chi Fung Wong	1.2%

114. The Merger thus raised Jin's stake in the Company from 5.4% to 79.8%, at the expense of ordinary unaffiliated JA Solar Securityholders, while leaving the ownership interests of the other members of the Buyer Group the same as before the Merger. The overall purpose of the Merger was to allow Company insiders, led by Defendant Jin, to take over 100% of JA Solar at a substantial discount to its actual value so that—unbeknownst to ordinary JA Solar

⁶ After subtracting the 5.4% of Defendant Jin's ownership through Jinglong BVI from his 79.8% share to avoid double-counting, these parties' ownership percentages of the newly private JA Solar add up to 100%.

⁷ Defendant Jin's 79.8% stake includes 74.4% that he owned through his sole ownership of JASO Top and 5.4% that he owned indirectly through his 32.96% equity interest in Jinglong BVI.

Securityholders—they could proceed to relist the Company in China for several times what they paid to take it private in the United States.

115. In addition, Defendant Jin substantially increased his stake in the Company through the Merger, so that he owned approximately 80% of the surviving private Company. On the other hand, the other members of the Buyer Group simply maintained their same level of ownership as before the Merger, though they also stood to benefit from the plan to relist the Company in China at a higher valuation. This further highlights the extent of Defendant Jin's control over JA Solar and the Merger.

116. Following the Merger, Defendant Jin would continue to serve as the Chairman of the Board and CEO of the surviving Company.

F. JA Solar Completes the Merger

117. On July 16, 2018, JA Solar completed the Merger. As a result, the Company ceased to be a publicly traded company and became a wholly owned subsidiary of an entity owned entirely by Defendant Jin and the rest of the Buyer Group. Each of the Company's ordinary shares was cancelled in exchange for the right to receive \$1.51 in cash per share and each of the Company's ADS was cancelled in exchange for the right to receive US\$7.55 in cash per ADS—other than shares held by the Buyer Group (which were rolled over into shares in the newly private JA Solar) and shares held by Securityholders that validly exercised their right under Cayman Islands law to dissent from the Merger.

118. Also on July 16, 2018, JA Solar issued its final amendment to the Proxy Materials, which described the completion of the Merger and incorporated the Final Proxy Statement that JA Solar had published on February 1, 2018. JA Solar also issued a press release on July 16, 2018 that it filed with the SEC announcing the completion of the Merger. In that press release, the Company explained how Securityholders could tender their JA Solar Securities

and assent to the sale, in order to receive the Merger consideration. The Company explained: “Each registered shareholder as of the effective time of the merger who is entitled to the merger consideration will receive a letter of transmittal and instructions from the paying agent on how to surrender their share certificates (or affidavits and indemnities of loss in lieu of the share certificates) or non-certificated shares represented by book entry in exchange for the merger consideration. . . . Each registered shareholder will receive in exchange of the shares or ADSs surrendered a check in an amount equal to the merger consideration to which such holder is entitled. Merger consideration is not payable to untraceable shareholders unless such shareholders properly notify the paying agent or the depository of their current contact details prior to the effective time.”

119. In addition, on July 16, 2018, JA Solar gave notice to the SEC of the removal of its shares from listing and of the termination of its registration under the Exchange Act.

G. The Proxy Materials Understated JA Solar’s Financial Performance

120. On April 30, 2018, just seven weeks after the March 12, 2018 shareholder vote on the Merger, JA Solar released its financial results and Annual Report for 2017. The Company’s statements in these disclosures concerning its business outlook and financial results were a marked contrast from the statements that the Company disclosed to Securityholders in the Proxy Materials that it published less than six weeks before the shareholder vote.

121. The Proxy Materials painted a bleak picture of the Company’s business prospects because of, among other things, what Defendants described as “[t]he weak outlook for the solar industry due to overcapacity and slowing demand,” “[w]eak demand and lower prices for the Company’s products in China and the expectation that there will be similar declines in key growth markets, including South America and India,” and “China’s economic slowdown

generally, and slowdown in the Chinese solar industry specifically, including decreased demand for photovoltaic modules and overcapacity in the Chinese solar industry.”

122. The 2017 Annual Report, however, painted a very different picture. The 2017 Annual Report assured that although there was a “severe downturn” in global industry demand for solar power products in 2012 and 2013, “industry demand revived in 2015 and 2016 due to the development of emerging markets, such as China and the U.S.” The Company further “expect[ed] industry demand [to have] significant growth in 2017 and 2018, because of the development of China, India and emerging markets.”

123. JA Solar also expected in the 2017 Annual Report that its “sales of solar power products in China . . . [will] benefit from the recently promulgated PRC laws, regulations and government policies regarding solar energy and other renewable energy, which are intended to provide incentives or otherwise encourage the development of the solar or other renewable energy sectors in China.”

124. JA Solar’s financial results that it disclosed in the 2017 Annual Report were also notably better than the “projections” that the Company provided in the Proxy Materials and that formed the basis for Houlihan Lokey’s financial analysis for the Special Committee. The Proxy Statements that JA Solar released on January 11, 2018 and February 1, 2018 (after the Company’s fiscal 2017 was completed) stated that the Company’s estimated total revenue for 2017 would be \$2.596 billion and its estimated net income for 2017 would be \$39 million. (When JA Solar had earlier issued its Preliminary Proxy Statement on December 11, 2017, its financial projections for 2017 were provided in RMB instead of U.S. dollars.)

125. When the Company released its actual financial results for 2017 on April 30, 2018, less than two months after the March 12 shareholder vote, it disclosed its total revenue for

2017 to be \$3.022 billion and its net income to be \$46 million.⁸ These figures were approximately 16% and 18% higher, respectively, than the total revenue and net income estimates for 2017 that formed a crucial basis for JA Solar Securityholders to decide whether to vote in favor of the Merger.

126. The divergence between JA Solar's projections in the Proxy Materials and actual results that followed shortly after is even more striking when focusing specifically on the fourth quarter of 2017. This is the most meaningful perspective because when JA Solar gave its 2017 projections to Houlihan Lokey, the first three quarters of the year were already complete and only half of the fourth quarter remained. Houlihan Lokey explained in its November 16, 2017 presentation to the Special Committee that Houlihan Lokey's estimates for 2017 "[r]epresent[ed] a 1.5 month stub period ending 12/31/2017 considering FY2017E projections minus nine months ended 9/30/2017 actual results." The following table shows the projections that JA Solar gave to Houlihan Lokey for the fourth quarter of 2017⁹ as compared to the actual results that it reported for that quarter¹⁰:

⁸ In RMB, JA Solar estimated in the Preliminary Proxy Statement that its total revenue for 2017 would be 17.263 billion RMB and its net income would be 259 million RMB. Its actual total revenue, as disclosed in the 2017 Annual Report was 19.658 billion RMB and its actual net income was 300 million RMB.

⁹ These projections are derived by subtracting JA Solar's actual results that it reported for the first three quarters of 2017 (in a November 15, 2017 press release that it filed with the SEC as an exhibit to a Form 6-K) from the full year projections that JA Solar gave to Houlihan Lokey during the fourth quarter (as reported in the Proxy Materials).

¹⁰ JA Solar reported its results for the fourth quarter of 2017 in an April 30, 2018 press release that it filed with the SEC as an exhibit to a Form 6-K and in its 2017 Annual Report.

	Projected	Actual	% Understated
Total Revenue (USD)	\$494 million	\$871.8 million	76%
Total Revenue (RMB)	RMB 3.276 billion	RMB 5.7 billion	
Net Income (USD)	\$11.25 million	\$17.8 million	58%
Net Income (RMB)	RMB 74.18 million	RMB 115.5 million	

127. This shows that the projections that the Company gave to Houlihan Lokey for the fourth quarter of 2017, and that Houlihan Lokey used as a basis for its analysis once that quarter was already half over, understated the actual revenue for that quarter by approximately 76% and understated the net income for that quarter by approximately 58%.

128. Those projections were all-the-more important to the Merger, because Houlihan expressly disclaimed any reliance on the standard “selected companies” and “selected transactions” analyses that are typically done in merger valuations. Houlihan relied, instead, exclusively on its financial analysis of JA Solar “based on the financial projections prepared by the management of the Company.”

129. This created the perfect storm whereby JA Solar Securityholders were forced to decide whether to approve the Merger based entirely on the recommendations and/or fairness determinations in the Proxy Materials of the Special Committee, the Board, Houlihan Lokey, and the Buyer Group that, in turn, were based solely on Company management’s false financial projections and inaccurate characterizations of JA Solar’s business conditions.

H. JA Solar’s Relisting

1. Many Sources Confirm That the Buyer Group Planned All Along to Relist JA Solar

130. Prior to announcing the Merger, on November 19, 2017, in a speech spoken in Chinese at the “2017 Entrepreneur ‘To Conscience’ (Beijing) Forum” in Beijing, China, Defendant Jin stated that JA Solar had plans to return to the Chinese capital markets in a publicly traded form within the following two or three years.

131. This statement at the “2017 Entrepreneur ‘To Conscience’ (Beijing) Forum” did not notify JA Solar Securityholders of the Company’s intent to relist immediately following the Merger because these informal remarks were by no means a definitive statement of the Company’s plans. And because these statements were made in a foreign language in China, they were not accessible to ADS holders, whose securities traded on the NASDAQ in the U.S. Furthermore, even if these statements would have been enough to inform investors of the plans at the time, the statements in the Proxy Materials, JA Solar’s website, the Amended Proxy Materials, and the Second Amended Proxy Materials, were all published after this speech. Investors were entitled to take at face value the assurance in those later statements that the Company had no plans to relist. Defendant Jin’s November 2017 statement does, however, show when put in the context of all of the other evidence described herein that it was his intent as of that time to relist the Company following the Merger.

132. Within the Company, the relisting plans were being widely discussed, further confirming that it was always Defendants’ goal to relist in China. Several reports by former JA Solar employees confirm this point:

133. Confidential Witness (“CW”) 1 was a sales manager in JA Solar’s Shanghai office from before the start of the Class Period to 2018 and reported to a senior member of the Sales group for mainland China. CW 1 recalled hearing about the delisting plan at the beginning of 2018 at the same time that he¹¹ heard about the relisting plan. He further explained that he heard that JA Solar would probably be relisted on the A-Shares market in China at the beginning of 2018.

¹¹ CWs are referred to with male pronouns regardless of their gender.

134. CW 2 was a financial analyst responsible for budget analysis within JA Solar's Beijing office from 2015 until after the Merger closed in July 2018, and reported to a senior member of the financial analysis team. CW 2 stated that he first heard about the delisting plan sometime in 2017 and heard that JA Solar probably would be relisted on the A-shares market after hearing about the delisting plan.

135. CW 3 worked on financial analysis, including JA Solar's financial reports, in JA Solar's Beijing office from before the start of the Class Period to 2018. CW 3 reported to a senior member of JA Solar's financial analysis group. CW 3 recalled visiting JA Solar's website and seeing a message that said there was a rumor that JA Solar will be relisted in Chinese capital markets and telling people not to believe the rumors.¹² CW 3 said that even after this message was posted the internal rumors regarding JA Solar's relisting continued. CW 3 also explained that in May or June of 2018 (*i.e.*, before the Merger closed), an audit team from BDO China came to JA Solar's Beijing office. CW 3 asked one of the people from BDO China which capital market the Company was going to be relisted in, and one of the auditors told him that it was not decided. CW 3 then asked, how they could issue the audit report (*i.e.*, without a particular market), and the person from BDO China told him that they would audit each single subsidiary first, and then wait for the company's decision on corporate structure before they produced a consolidated audit. CW 3 added that it was possible BDO China already knew the decision, but did not want to tell him the answer, since he was planning to leave the Company.

136. This shows that by May or June of 2018, JA Solar was already far enough along in its relisting plans to have its Chinese auditor begin its audit that would be necessary for the transaction to take place. Having an independent auditor such as BDO China visit to conduct an

¹² This appears to be a reference to the message discussed in Paragraphs 103-04 above.

onsite audit would typically not occur until the final stages of the type of backdoor listing process. Otherwise the company undergoing the relisting would risk wasting resources on an intensive audit that might not be necessary or that might be obsolete and need to be redone by the time the relisting transaction is materially agreed upon, or if the relisting occurred in a jurisdiction with different audit requirements.

137. Counsel has also reviewed a translated resume from a former employee of BDO China indicating that beginning in May 2018, this former employee worked on an audit of a JA Solar subsidiary for an “IPO listing.” This not only corroborates CW 3’s account, but provides further proof that BDO was in fact preparing JA Solar for a major capital markets listing. The following image shows the relevant excerpt of the original version of that resume:

工作经历

2015.08 – 2018.09 立信会计师事务所(特殊普通合伙)天津分所 (3年 1个月)
高级审计员 | 8001-10000元/月
其他

工作描述: 立信会计师事务所(特殊普通合伙)天津分所 高级审计员 2015/8-2018/9 (熟练掌握审计底稿及内控底稿编制及审计流程,能熟练编制财务报表及审计报告。曾连续3年整体做过两家上市公司的内控年度审计,及负责两家上市公司部分审计工作。曾接触过不同行业的财务审计及内控审计工作,曾参与过IPO审计重要审计核心工作,可独立带队对一般企业进行审计。)

项目经历

2018.05 – 至今 晶澳(扬州)太阳能科技有限公司 (11个月)

责任描述: 财务审计工作
项目描述: ipo上市,重要子公司

138. CW 4 worked on JA Solar’s Sales staff from 2016 to 2018, including as a key customer manager in the Company’s power plant business unit. CW 4 said that he first heard about the delisting plan in Spring of 2018, and added that he heard the news quite late. When asked what were the reasons given internally for taking the Company private and delisting from NASDAQ, CW 4 explained that he heard from his colleagues that JA Solar wanted to go back to

mainland China and added that there were successful precedents such as Trina Solar and Longi Group, whose valuations were dramatically higher after they returned to domestic capital markets. CW 4 also explained that he first heard about JA Solar's relisting plan on April 20, 2018, when attending an industry conference (SNEC PV Power Expo). One of his colleagues in the power plant business unit told him about the relisting plan at that event.

139. Counsel has also reviewed a translated resume from a former employee of China Dragon Securities Co. Ltd. This employee was a Senior Manager in that firm's investment banking department. He worked in their Beijing office from May 2015 through March 2017. More specifically, he reported working on strategic planning for Jinglong Industry and Commerce Group Co. Ltd. from June 2015 through May 2016. He described himself as a Project Manager and said that his role was to make development plans for each company affiliated to the actual controller of the U.S.-listed JASO (*i.e.*, JA Solar). He then explained that he streamlined the ownership relationship between Jinglong Group and its subsidiaries, designed the operation plan for the privatization of the U.S.-listed JASO (a company under the Jinglong Group's actual controller), and designed the operation plan for Jinglong Group and JASO's relisting on the A-shares market after privatization. This resume shows that the Jinglong Group had plans to relist JA Solar on the A-Shares market after privatization that dated all the way back to the 2015-2016 time period. (That timing coincides with the Buyer Group's original offer to take JA Solar private, before the transaction was "put on hold.") The following image shows the relevant excerpts of the original version of that resume:

华龙证券股份有限公司 2015/05-2017/03(1年10个月)

基金/证券/期货/投资 北京-丰台区 2000-5000人 国有企业

投行部高级经理

所在部门: 投资银行并购重组 下属人数: 2
部

职责业绩: 1、负责制定、实施承做项目的各项工作计划;
2、负责承做项目的质量控制和风险防范;
3、负责组织承做项目的案卷建档、管理工作,对项目案卷的真实性、完整性全面负责;
4、负责企业改制、辅导、上市发行、再融资、股权分置改革、并购、重组、债券承销、财务顾问等各项投行业务的具体实施工作

晶龙实业集团有限公司战略规划 2015/07-2016/05(10个月)

项目职务: 项目负责人

所在公司: 华龙证券股份有限公司

项目简介: 美股上市公司晶澳股份(JASO)实际控制人旗下的各公司发展规划进行梳理

项目职责: 全面梳理晶龙集团及下属各公司的股权关系,对晶龙集团实际控制人旗下的美股上市公司晶澳股份(JASO.O)私有化设计操作方案,并对回归后晶龙集团及晶澳股份在A股上市设计操作路径。

2. JA Solar Announces Relisting Just Three Days After the Merger Closed

140. On July 19, 2018, *just three days after the Merger closed*, JA Solar and Tianye Tonglian signed their agreement for Tianye Tonglian to acquire JA Solar by issuing shares in exchange for 100% of JA Solar's equity. This deal, operating as a "backdoor listing," would allow JA Solar to return to the stock market by relisting on the Shenzhen Stock Exchange at a multiple of the value at which it was taken private, to the detriment of its prior securityholders, who unknowingly sold their JA Solar Securities at substantially deflated values during the Class Period.

141. Further emphasizing the significance of the publicly filed agreement, on that same day (July 19, 2018), Tianye Tonglian published a “Public Notice on Trade Suspension Brought by Significant Event” and its stock was suspended from trading. In other words, this was such a big deal that Tianye Tonglian chose to suspend trading in its stock to prevent a major price swing in reaction to the news.

142. Then, on July 23, 2018, Tianye Tonglian published a “Public Notice on Material Asset Restructurings Agreement” announcing that on July 19, 2018, Tianye Tonglian and JA Solar had signed a letter of intent to conduct the backdoor listing of JA Solar through Tianye Tonglian. This notice announced that Tianye Tonglian would purchase a 100% stake in JA Solar via stock issuance. After the deal would close, Defendant Jin would become the head of Tianye Tonglian and would hold “more than 5% shares of the listed company.”

143. As a July 24, 2018 Bloomberg article titled “JA Solar Seeks Backdoor China Listing After Retreating From U.S.” explained, the newly private JA Solar “plans to sell all its shares to Shenzhen-listed Qinhuangdao Tianye Tolian Heavy Industry Co. as the Chinese panel maker seeks a backdoor listing in China. The two companies signed a letter of intent, under which Tianye will issue shares in a private placement to pay for the deal, Tianye said in a statement to the Shenzhen stock exchange JA Solar’s chairman Jin Baofang will become controller of the listed company after the deal.”

144. This Bloomberg article further explained that “[a] backdoor listing is a way for a company to go public without the hassle and costs of a traditional initial public offering by moving assets into an already-listed stock.”

145. Following the July 2018 notice of the relisting agreement between JA Solar and Tianye Tonglian, the two companies continued to finalize the details of the relisting.

146. On November 4, 2018, STCN, part of the national financial media in China, reported that the relisting plan was well underway and that JA Solar could place an estimated CNY 7 billion (\$1 billion) worth of net assets into Tianye Tonglian. This was multiple times the value at which JA Solar went private and its unaffiliated security holders were paid in the Merger. STCN estimated that after the relisting would be completed, JA Solar's market cap would reach CNY 20 billion (or \$2.883 billion).

147. Bloomberg further reported on January 21, 2019 that "JA Solar Holdings Co. moved forward with a backdoor listing in mainland China after Qinhuangdao Tianye Tolian Heavy Industry Co. said it would buy the cell maker in a 7.5 billion yuan (\$1.1 billion) deal. Tianye will acquire JA Solar's equity interest by issuing almost 953 million shares at 7.87 yuan apiece through a private placement, according to a filing to the Shenzhen stock exchange on Monday. The two companies signed a letter of intent in July after JA Solar completed a deal valued at about \$360 million to delist its American depository receipts. Tianye rose by the exchange-set limit of 10 percent to close at 9.37 yuan per share. 'China has relatively higher valuations for solar manufacturers, prompting overseas-listed producers to return,' said Hong Kong-based Bloomberg NEF analyst Jiang Yali." Through this deal, "China-based JA Solar will become a unit of Tianye . . . and shareholders of the cell maker will become holders of Tianye."

148. Being able to capture this higher valuation for JA Solar by relisting in China was Defendant Jin's and the rest of the Buyer Group's primary motivation for conducting the Merger. Because Defendants made false and misleading statements to JA Solar Securityholders stating that there were no plans in place for such a relisting, and assuring them that the transaction price was fair (including because of what they claimed to be poor market conditions for JA Solar and

in the Chinese market), the Buyer Group was able to purchase JA Solar Securities at deflated values from the unsuspecting JA Solar Securityholders.

149. Similarly, on January 22, 2019, China Business News reported that through this relisting plan, JA Solar planned “to triple its value through a CNY7.5 billion (USD1.1 billion) reverse merger with Shenzhen-listed Tianye Tolian Heavy Industry after quitting the Nasdaq last year.”

150. In addition, Bloomberg reported on January 22, 2019 that, according to Tianye Tonglian, in the relisting transaction, Tianye would purchase all of JA Solar’s “equity for CNY7.5 billion (USD1.1 billion), which is around 11 times JA Solar’s net profit in 2017[.] . . . ***It is also more than three times JA Solar’s earlier valuation.*** The deal would offer a backdoor listing for the solar firm on the Shenzhen bourse.” (Emphasis added.) This article noted, as a basis for comparison, “[a]s of Jan. 18, Shanghai-based Jinko Solar [NYSE: JKS] had a market value of USD498 million and a price[-to]-earnings ratio of 10.9, while that of Guelph-based solar module behemoth Canadian Solar [NASDAQ: CSIQ] was USD1.1 billion and 5.6, public data of the two companies with major links to China show.” These multiples were indicative of the fact that JA Solar should also have been valued in the Merger at a greater multiple of its key financial metrics as well.

151. However, as noted above, in its analysis for the Special Committee, Houlihan Lokey ignored any analysis that compared JA Solar to similar companies or transactions. (*See supra* ¶¶ 94-98). Instead, Houlihan Lokey relied solely on a financial analysis of just JA Solar in which it applied a multiple to JA Solar’s financial results that was significantly lower than the multiple that applied to other solar companies. That decision artificially depressed the value of

JA Solar in the Merger and assisted in the scheme to relist JA Solar in China at a much higher value than what its Securityholders were told was fair in the Merger.

152. JA Solar, Jin, and Tianye Tonglian have continued to prepare for the relisting. In the restructuring report that JA Solar and Tianye Tonglian have issued in connection with the relisting, JA Solar reported operating income for 2015 through 2017 that far exceeds what it reported in the Proxy Materials and other SEC filings when it was listed on the NASDAQ. Specifically, JA Solar reported its operating income for 2015 through 2017 to be 14.019 billion RMB, 16.940 billion RMB, and 20.55 billion RMB, respectively, and net income to be 713 million RMB, 800 million RMB, and 721 million RMB, respectively. In its U.S. financial disclosures, however, it reported operating income (or revenue) to be 13.525 billion RMB, 15.737 billion RMB, and 19.659 billion RMB, and net income to be 624 million RMB, 684 million RMB, and 300 million RMB for 2015 through 2017, respectively. The following chart shows the extent of these discrepancies:

	Operating Income Reported in U.S.	<i>Operating Income Reported in Connection With Relisting</i>	Net Income Reported in U.S.	<i>Net Income Reported in Connection With Relisting</i>
2015	13.525 billion RMB	<i>14.019 billion RMB</i>	624 million RMB	<i>713 million RMB</i>
2016	15.737 billion RMB	<i>16.940 billion RMB</i>	684 million RMB	<i>800 million RMB</i>
2017	19.659 billion RMB	<i>20.55 billion RMB</i>	300 million RMB	<i>721 million RMB</i>

153. The understated figures that JA Solar reported in the U.S. for 2015 through 2016 were included in the Proxy Materials. The final 2017 figures were not reported in the Proxy Materials because the Proxy Materials included projections for 2017. Those projections were substantially deflated even as compared to the full-year 2017 figures that JA Solar reported in the

U.S. shortly after the shareholder vote, as explained above. (*See supra* ¶¶ 125-27). It is now clear that those projections (including the actual results for the first three quarters of 2017) were even more deflated in comparison to the financial figures that JA Solar has reported in China in connection with the relisting.

154. The Shenzhen stock exchange, where Tianye Tonglian is listed, has noted these irregularities and questioned the discrepancy in JA Solar's reported operating income in the relisting proposal as compared to what it reported in the U.S. before privatization. While JA Solar has attributed these inconsistencies in its 2017 figures to timing issues related to its JA Solar Germany subsidiary, that is not a plausible explanation for why these figures would have been consistently understated in the U.S. for three consecutive years, particularly where JA Solar's net income in 2017—the year that was most important to Merger—that it reported in its relisting report showed more than double the net income that it reported in the U.S. before the Merger (721 million RMB as compared to 300 million RMB).

155. In addition, at a March 12, 2019 meeting, Defendant Jin justified JA Solar's 7.5 billion RMB valuation by citing the Company's "steady performance" from 2015 through the first three quarters of 2018. That description stands in stark contrast to his description in the Proxy Materials of the Company's performance during the vast majority of that same time period (2015 through 2017) in disappointing terms. When seeking to justify the relisting in March 2019, however, Jin described the far-higher 7.5 billion RMB valuation as "a conservative and fair valuation of JA Solar."

156. As of the date of this filing, the relisting continues to progress through the Chinese regulatory approval process and remains on track to be completed for 7.5 billion RMB.

3. The Announcement of the Relisting Agreement was the Result of Many Months of Planning

157. The announcement of a relisting agreement in China through a Memorandum of Understanding (“MoU”) is a significant transaction step that can be achieved only after a lengthy period of deal-making. An expert in Chinese M&A and capitals market transactions further explains the work that would ordinarily be required before reaching the MoU, which was disclosed just three days after the Merger here closed. The remaining paragraphs in this subsection are all pled with confirmation from this expert regarding their accuracy.

158. It is important to recognize that an MoU regarding major asset restructuring—as was the case here—is not announced without careful planning and deliberations among all stakeholders. The China Security Regulatory Commission (“CSRC”) issued the “Provisions on Issues Concerning Regulating the Material Asset Reorganizations of Listed Companies” in 2014 (revised in 2016) to ensure that companies do not use corporate restructuring announcements as a means to manipulate stock prices. Individuals and organizations are held legally liable, if they try to use private information about asset restructuring to manipulate stock prices. As a result, investors tend to react very positively upon announcements of asset restructuring MoUs. In this particular case, Tianye Tonglian halted the trading of its stock on July 19, 2018, before the announcement of its deal with JA Solar, and resumed trading on November 5, 2018. The stock price for Tianye Tonglian skyrocketed and hit the daily price limit (10% increase) for three days consecutively following this resumption of trading.

159. Following the publication of an MoU, if the negotiation fails or if the proposal for asset restructuring fails to receive final approval from CSRC and other governing agencies, the stock price for the listed company would suffer a significant loss. There are many incidents, and significant empirical evidence, showing that a company’s stock price can experience large drops

if the announced asset restructuring fails to materialize. In other words, due to the large price impact and strict regulation, companies are very unlikely to announce an asset restructuring MoU without first conducting extensive due diligence. It is reasonable to assume that JA Solar and Tianye Tonglian were fairly confident about the outcome of their restructuring deal before announcing the MoU to the public. The premature filing of the MoU would have exposed JA Solar and Tianye Tonglian to serious litigation risk, including the risk of shareholder litigation by those investing in Tianye Tonglian following this news, if the deal subsequently failed. In fact, the MoU itself begins by stating: “The company and all members of the board of directors guarantee the truthfulness, accuracy and completeness of the announcement.”

160. While the exact details of JA Solar’s behind-closed-doors deal-making are largely unknown, the deal-making necessary to reach the point where the MoU was published could not possibly have occurred in anywhere near just a few days. In fact, there are many lengthy steps to such deal-making, which indicate that JA Solar and its management had been planning a relisting for many months. Those steps include:

161. Hiring a Financial Advisor or Investment Bank and a Legal Advisor. A preliminary step before reaching an MoU is the hiring of an investment advisor to help the company understand the process of listing in the Chinese stock exchange. After a company decides it wants to embark on the relisting process, it then takes a few weeks to a few months to identify an investment bank. Typically, the investment bank will advise the company throughout the whole relisting process, from shell company identification to final public listing. Once an investment bank is identified, it will be necessary to schedule a meeting with the firm to discuss all feasible solutions (*e.g.*, the advantages and disadvantages of direct IPO or backdoor listing through an existing shell company). It is also necessary to get signed engagement letters with

the investment bank defining their compensation and the scope of the work they will perform. Lawyers will typically be involved in the negotiation of those engagement letters, which are often subject to several drafts. *Even in a very fast-moving process, this negotiation might be completed in a few weeks*, and it is unlikely any other deal-making would occur prior to the completion of this step.

162. Identifying a Potential Transaction Counterparty. To conduct a backdoor relisting, one needs to identify a potential target company for the relisting. This is typically done in the first instance by the investment bank and requires that advisor to analyze listed companies that have low valuations, limited liabilities, a simple ownership structure, business models that would allow for a backdoor relisting to make sense, and the proper positioning as a listed company in a desired market. *Even in a very-rushed process, it would be unreasonable to expect this to be completed in less than one month.* The outcome of this step will be a list of viable companies to use as the relisting shell.

163. Finding the Appropriate Relisting Shell. The next step in the process would be to contact the potential companies identified in the prior step. Not all companies that initially appear to be viable options will have interest in serving as a shell for another company's relisting. This is typically handled by the financial advisor in the first instance, who will try to make formal introductions between the company seeking the relisting and the potential shell companies. The potential shell companies will typically take many days, if not weeks, to respond to initial inquiries and will then need to engage their own counsel and investment advisors, before they can engage in any serious conversation. Only then can there be the necessary discussions between the owners of the newly (or, in this case, soon-to-be) privatized company and potential shell companies, including major stakeholders of each company. It

would be unreasonable to expect this process to take less than a month, even in the unlikely event that the first potential shell company contacted is interested in the proposed transaction. More common, however, is that the company seeking relisting negotiates with many potential shells and fails to reach any meaningful agreement. *A more typical process would therefore involve reaching out to many potential shell firms over at least three months, if not longer.*

164. Before any serious discussion, the parties to the potential transaction then need to draft and sign a confidentiality agreement. The shell company wants to sell the shell for high fees and has leverage in the negotiation. In many cases, the existing controlling shareholders of the shell company might want to take equity positions in the new post-relisting firm. *The initial negotiation between the company seeking backdoor listing and the shell company can be expected to take several weeks, if not months.*

165. Auditing and Accounting Compliance. Depending on the market being targeted by the company seeking relisting, it will need to ensure that its accounting records conform to the requirements of that market. Typically, Chinese firms are required to show three years of proper accounting records before listing on a public exchange. While this precise requirement can be relaxed through the relisting process, the company will still need to conform its accounting standards to the required format on a going-forward basis. Thus, the company will need to hire an appropriate accountant capable of either reviewing the company's accounting records or, at the very least, to provide the company with comfort that its existing accounting systems can be conformed without insurmountable problems. This step generally takes months, as the company ensures compliance with the relevant standards on a going-forward basis. *At a minimum, it would take several weeks to hire an appropriate auditor and get comfort from*

*them about the viability of the proposed relisting transaction, prior to the announcement of the MoU.*¹³

166. Performing Diligence on Potential Transaction Counterparty. Once the two companies have begun negotiations, they will both want to begin performing diligence on each other to understand the risks involved in any transaction. One such risk is that, through the relisting, the company will be taking on the corporate form of the target—which could expose it to the shell companies’ outstanding legal liabilities. For example, Tianye Tonglian in its 2018 annual report disclosed an ongoing legal battle with IMI Fondi Chiusi SGR S.P.A. The Shenzhen Stock Exchange issued an inquiry concerning the status of this lawsuit and the potential loss that it might cause Tianye Tonglian to suffer. Before signing on to the MoU, JA Solar would need to get comfortable that this type of legal risk would not undermine the relisting transaction. While diligence would continue after the MoU is issued, it would not be reasonable for the companies to issue an MoU without first completing significant diligence to understand the risks. This pre-MoU diligence typically involves opening a data room to share documents, which means the target must first determine which documents to share. *Altogether, the diligence process leading up to the point at which both sides would be comfortable signing an MoU will typically take at least a few months.* It can be at least partially completed, while other negotiations are occurring.

167. Conducting Regulatory Assessments. Once it is determined that there is a viable relisting deal, it will be necessary to determine that there will not be any major regulatory roadblocks and, as is often the case, whether local government support is needed. Final regulatory approval will require significant additional work that will occur after the MoU is

¹³ Major auditing and accounting compliance work may then be completed after the announcement of the MoU. The analysis above does not include those post-MoU steps.

issued. *Even before the MoU is issued, however, the company seeking relisting will need to assess potential regulatory obstacles. This will take at least several weeks.*

168. Negotiating Preliminary Transaction Terms. Meaningful negotiations between the parties are required to reach the preliminary transaction terms set out in an MoU. This typically involves each party's legal advisor and normally requires several drafts as both sides to the transaction develop their positions. For example, the MoU here states that Tianye Tonglian agreed to issue new shares to acquire 100% of JA Solar's shares. The parties also agreed that upon the completion of the transaction, Defendant Jin would own over 5% of the newly relisted company's shares. *Even in a very fast process, these negotiations would take several weeks to complete.*

169. Removal of VIE Structure. One of the first steps that would be taken in preparing for the privatization would be the removal of the "variable interest entity" ("VIE") structure. The VIE is a complex ownership structure used by Chinese firms to enable foreign investment in companies that would not otherwise be open to foreign investment in China. The removal of VIE structure can be done after the announcement of the MoU. But before that point, the company's management still needs to seek legal advice with respect to the process and timing of VIE removal, and prepare for the new ownership structure change. JA Solar removed its VIE structure in October 2018. This was achieved through a transaction wherein two new companies bought JA Solar's ownership structure. One of those companies was Jingtai Technology, which was established in June 2018—before the Merger closed—and was controlled by Defendant Jin and his wife.¹⁴ The removal of the VIE structure is not necessary if a company is

¹⁴ The other company involved in this transaction was called Qichang Electronics.

going to remain privately owned within China. This step shows that JA Solar was taking necessary preparations before delisting from NASDAQ to expedite its backdoor listing in China.

170. Divesting the Shell Company of Its Assets. In addition, on November 2, 2018, Tianye Tonglian announced that its business would be sold to Huajian Xingye Investment Co. Ltd. in an all-cash transaction. This restructuring would allow Tianye Tonglian to clear out other assets in preparation for the relisting transaction with JA Solar. Because this step involves such a fundamental restructuring of Tianye Tonglian, it would have been part of the agreement between JA Solar and Tianye Tonglian, before they signed the MoU in July 2018. This complicating feature of the transaction means that the process leading up to the MoU would have tended to take on the longer side of the general timeline provided above.

171. Total Timeline. *In total, it would ordinarily take more than 12 months for a company such as JA Solar to be able to agree to announce an asset restructuring deal such as the deal with Tianye Tonglian that they announced in the MoU here.* Similar transactions usually take more than a full year—if not several years—to complete. For example, Giant Interactive Group completed privatization and delisted from NYSE in July 2014, and then announced an asset restructuring MoU with New Century Cruise listed on Shenzhen Stock Exchange on September 30, 2015. That case took over a year to find the shell company and reach a preliminary agreement, before announcing the asset restructuring MoU.

172. Given that JA Solar and Tianye Tonglian reached their backdoor listing agreement on July 19, 2018, it is completely implausible that the process for that transaction had not already begun, while the Merger process was still underway. *Based on just the timing typically involved in these types of transactions, JA Solar's plan to relist must have been*

underway by July 2017, and thus predated the announcement of the Merger on November 17, 2017 and the publication of the Preliminary Proxy Materials on December 11, 2017.

V. DEFENDANTS' MATERIALLY FALSE AND MISLEADING STATEMENTS AND OMISSIONS DURING THE CLASS PERIOD

173. During the Class Period, Defendants made numerous materially false and misleading statements and omissions. The specific false and misleading statements are detailed below and reference is made therein to the following subparagraphs, which explain the reasons those statements are false and misleading.¹⁵

(a) **Statements Concerning Intention Not to Relist.**

Defendants made statements throughout the Proxy Materials stating clearly that there were no plans in place for JA Solar to undergo a transaction following the Merger that would cause the Company's structure to be changed in any way, such as through being relisted in the public markets in China through a backdoor listing. These assurances provided to JA Solar Securityholders were false and misleading because when these statements were made, the Buyer Group had already taken steps to proceed with the relisting transaction.

(b) **Statements That Presented the Transaction in a Positive Light, or As**

"Fair." These statements were false and misleading because they conveyed that the consideration of \$7.55 per ADS (and \$1.51 per share of common stock) was a fair price for the JA Solar Securities when in fact, the JA Solar Securities were undervalued, causing the price to be unfair. The \$7.55 per ADS price was based on Houlihan Lokey's undervalued financial analysis that, in turn, was based on outdated assumptions that Company management, the Special Committee, and the Buyer Group provided concerning JA Solar's business conditions and

¹⁵ The statements that are ***bolded and italicized*** in this section are statements alleged to be false and misleading.

financial projections. These assessments were false and had no basis, as was revealed by statements that Defendants made in JA Solar's 2017 Annual Report, shortly after the shareholder vote on the Merger and—more recently—in connection with its relisting in China, concerning the Company's much higher financial performance and business conditions (which existed at the time, Houlihan Lokey was reviewing the outdated and undervalued projections). In addition, Houlihan Lokey's financial analysis was fundamentally flawed because it ignored, entirely basic valuation methods that compare the company and transaction at issue to peer companies and transactions. Furthermore, the \$7.55 per ADS price, and related statements that this transaction price was "fair," were misleading because Defendants failed to disclose that the Buyer Group had already begun to proceed with the relisting transaction that would secure a much higher valuation.

(c) **Statements Concerning Houlihan Lokey's, the Special Committee's, the Board's, and the Buyer Group's Basis for Determining That the Transaction Price was "Fair".** To support the overall assessment of the transaction price of \$7.55 per ADS (and \$1.51 per share of common stock) as "fair" to JA Solar Securityholders, Defendants repeatedly based that determination on Company management's, the Special Committee's, and the Buyer Group's descriptions of the business conditions that JA Solar faced and on their wholesale adoption of the analysis that Houlihan Lokey relied on in reaching its fairness opinion. These statements were false and had no basis for the reasons described in the subparagraph (b) immediately above. These statements were also false and misleading because they repeatedly described the lack of alternatives to the Merger and the absence of any plan to relist the Company as reasons for supporting the Merger.

(d) **Statements Concerning Dissenting Shareholders.** Defendants made multiple statements concerning what they called a “Dissenting Shareholder Condition” in the Merger Agreement that allowed the Buyer Group or the Company to terminate the Merger, if “more than ten percent (10%) of the Shares shall have validly served a notice of objection under Section 238(2) of the Cayman Islands Companies Law.” Then, after the shareholder vote on the Merger, Defendants disclosed that the Dissenting Shareholder Condition was triggered, which could lead to the termination of the Merger, and that “[t]he Company intends to update its shareholders if and when it receives from the Parent Parties their decision with respect to their granting of the waiver in due course.” These statements, as well as subsequent statements that Defendants made between the announcement of the shareholder vote approving the Merger and the closing of the Merger on July 16, 2018, were false and misleading because the Company and the Buyer Group had no intention of terminating the transaction and Defendants never updated JA Solar Securityholders as to the waiver of this condition. Rather, these parties to the Merger intended to proceed with the transaction so that the Buyer Group, led by Defendant Jin, could go on with relisting the Company in China, at multiple times the value of the Merger. Defendants made these false and misleading statements concerning the Dissenting Shareholder Condition in order to portray the Merger as an ordinary transaction that was not concealing the fact that the relisting was already planned and would be announced just three days after the Merger closed. In addition, Defendants’ statements related to the Dissenting Shareholder Condition further artificially depressed the price of JA Solar Securities by warning of a supposed risk to the Merger’s closing that did not actually threaten the completion of the transaction. This caused the price of JA Solar Securities to be artificially depressed below the Merger price—which itself was

already artificially depressed below its fair value—based on an unfounded risk that the Merger might not close.

174. To the extent that it is determined that any of the statements detailed below are statements of opinions, these opinion statements were false and misleading. Statements of opinion conveying that the Merger was fair or advisable were false and misleading, because they were not actually held by Defendants and failed to disclose information that a reasonable shareholder would assume formed the basis for them. Rather, these statements were part of a fraudulent scheme to deprive JA Solar Securityholders of the fair value of their securities.

A. The Announcement of the Merger

175. JA Solar issued a press release on November 17, 2017, announcing that the Company had agreed to the Merger. This press release was published by JA Solar and was filed on November 20, 2017 with the SEC with an accompanying Form 6-K that was signed by Defendant Jin.

176. This announcement promoted the Merger by disclosing the deal price and pointing to a premium as compared to the Company’s recent trading price, without also disclosing that the JA Solar Securities were worth far more than that deal price. Specifically, the press release explained that:

Pursuant to the terms of the Merger Agreement, at the effective time of the merger (the “Effective Time”), each ordinary share of the Company issued and outstanding immediately prior to the Effective Time (each a “Share”) will be cancelled and cease to exist in exchange for the right to receive \$1.51 in cash without interest, and each American depositary share (each an “ADS”) of the Company, representing 5 Shares, will be cancelled in exchange for the right to receive \$7.55 in cash without interest The merger consideration represents a premium of 18.2% to the closing price of the Company’s ADSs on June 5, 2017, the last trading day prior to the Company’s announcement of its receipt of a revised “going-private” proposal, and a premium of 17.2% to the average closing price of the Company’s ADSs during the 3-month period prior to its receipt of a revised “going-private” proposal.

177. These statements were false and misleading for the reasons stated in ¶ 173(b).

178. The deal announcement further stated that the Transaction had been approved by the Board upon recommendation by the Special Committee and that the Board recommended shareholders approve the Transaction. Specifically, the press release explained that:

The Company's board of directors (the "Board"), acting upon the unanimous recommendation of a committee of independent and disinterested directors established by the Board (the "Special Committee"), approved the Merger Agreement and the merger and resolved to recommend that the Company's shareholders vote to authorize and approve the Merger Agreement and the merger.

179. These statements were false and misleading for the reasons stated in ¶ 173(b).

180. Lastly, the press release intentionally conveyed to investors that there had been a robust negotiation by the Special Committee with the assistance of an independent financial advisor. Specifically, the press release stated that *"[t]he Special Committee negotiated the terms of the Merger Agreement with the assistance of its financial and legal advisors."*

181. These statements were false and misleading for the reasons stated in ¶ 173(b)-(c).

B. The Preliminary Proxy Materials

182. On December 11, 2017, JA Solar filed with the SEC the Preliminary Proxy Materials on Form 13E-3 (including the Preliminary Proxy Statement) explaining the proposed Merger to holders of JA Solar Securities. The Preliminary Proxy Statement was directed to all "Shareholders of JA Solar" and the Preliminary Proxy Materials were signed by Defendant Jin, Defendant Jia (on behalf of JA Solar), and the remaining members of the Buyer Group.

183. In signing the Preliminary Proxy Materials, Defendant Jin, Defendant Jia, and the remainder of the Buyer Group each affirmed that *"[a]fter due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct."*

184. These statements were false and misleading for the reasons stated in ¶ 173(a)-(d).

185. In addition, the Preliminary Proxy Materials included the misleading statements or omissions described in the following sections (1) through (4).

1. Statements Concerning Intention Not to Relist

186. The Preliminary Proxy Statement described the Company's plans following the Merger as follows, stating that there were "no present plans or proposals" involving changes to the Company's structure:

If the Merger is completed, *the Company will continue its operations as a privately held company* and will be wholly owned by the Buyer Group and, as a result of the Merger, the American depository shares ("ADSs"), each representing five Shares, will no longer be listed on the NASDAQ Stock Market LLC ("NASDAQ")

After the Effective Time, *the Buyer Group anticipates that the Company's operations will be conducted substantially as they are currently being conducted, except that the Company will cease to be a publicly traded company* and will instead be a wholly owned subsidiary of Parent, which itself is wholly owned by Holdco.

The *Buyer Group decided to undertake the going-private transaction at this time because it wants to take advantage of the benefits of the Company being a privately held company* as described above and because the Buyer Group was able to secure sufficient equity and debt financing in connection with the Merger.

Other than as described in this proxy statement and transactions already under consideration by the Company, *there are no present plans or proposals that relate to or would result in an extraordinary corporate transaction involving the Company's corporate structure*, business, or management, such as a Merger, reorganization, liquidation, relocation of any material operations, or sale or transfer of a material amount of assets.

187. These statements were false and misleading for the reasons stated in ¶ 173(a).

188. The Preliminary Proxy Statement further stated that one of the primary detriments of the Merger to the Buyer Group included the risk that "*an equity investment in the Surviving Company by the Buyer Group following the Merger will involve substantial risk resulting from the limited liquidity of such an investment;*" that "*following the Merger, there will be no*

trading market for the Surviving Company's equity securities"; and that there would be "*no certainty*" that the Buyer Group would have "*an opportunity to sell its shares in the Surviving Company at an attractive price.*"

189. These statements were false and misleading for the reasons stated in ¶ 173(a).

190. Similarly, the Preliminary Proxy Statement assured investors that neither the Company nor the Buyer Group was aware of any offers or proposals made by any unaffiliated person "*with respect to (a) a Merger or consolidation of the Company with or into another company, (b) a sale of all or a substantial part of the Company's assets or (c) the purchase of the Company's voting securities that would enable the holder to exercise control over the Company.*"

191. These statements were false and misleading for the reasons stated in ¶ 173(a).

192. The Preliminary Proxy Statement also noted the warranty that the Parent Parties made to the Company of "*the absence of undisclosed agreements or arrangements involving Holdco, Parent, Merger Sub, or any of their respective affiliates, shareholders, directors, officers, employees or other affiliates of the Company or any of its subsidiaries, in each case relating to the Merger.*"

193. These statements were false and misleading for the reasons stated in ¶ 173(a).

194. The Preliminary Proxy Statement also warranted that its list of factors that the Buyer Group considered in determining that the Merger was fair and in the interests of JA Solar shareholders was "*believed to include all material factors considered.*"

195. These limitations also informed Houlihan Lokey's analysis and fairness opinion. The Preliminary Proxy Statement stated that "*Houlihan Lokey understood that the Rollover Shareholders had indicated that they were only willing to consider entering into an agreement*

with Holdco and Parent and amongst themselves in relation to the Merger and had no interest in entering into any agreement, arrangement or understanding with other parties as an alternative thereto.”

196. In addition, the Preliminary Proxy Statement affirmed that *“the Special Committee determined that there was no viable alternative to the proposed sale of the Company to the Buyer Group.”*

197. To further the impression that there was no “viable alternative” to the Merger, the Preliminary Proxy Statement described the Buyer Group’s history, including what was characterized as the group’s initial attempt in June 2015 to purchase JA Solar for a higher price of \$9.69 per ADS. Similarly, the Preliminary Proxy Statement described Houlihan’s supposed efforts to find other potential purchasers. For example, the Preliminary Proxy Statement described the following factors as supporting the Board’s and Special Committee’s determinations that the Merger was fair:

- a. *“The lack of other potentially interested buyers; no interested bidder submitted an indication of interest during the ‘market check’ process conducted by Houlihan Lokey after receipt of the original going private proposal on June 5, 2015 and the Company has received no alternative proposals following the public disclosure of the Company’s receipt of the revised going private proposal on June 6, 2017;”*
- b. *“[T]he Special Committee’s knowledge of the Company’s business, financial condition, results of operations, prospects and competitive position and their belief that the Merger is financially more favorable to the Unaffiliated Security Holders than any other alternative reasonably available to the Company and the Unaffiliated Security Holders;”* and
- c. *“[T]he possible alternatives to the Merger (including the possibility of continuing to operate the Company as an independent publicly traded entity and the perceived risks of that alternative), the range of potential benefits to its shareholders of the possible alternatives and the timing and the likelihood of accomplishing the goals of such alternatives, and the assessment by the Special Committee that none of these alternatives was reasonably likely to present superior opportunities for the Company or to create greater value for its shareholders than the Merger, taking*

into account the likelihood of execution as well as business, competitive, industry and market risks[.]”

198. The statements referenced in ¶¶ 194 through 197 were false and misleading for the reasons stated in ¶ 173(a) and (c).

2. Promotion of the Merger Price

199. The Preliminary Proxy Statement promoted the Merger by *describing the merger consideration of \$1.51 per common share and \$7.55 per ADS.*

200. These statements were false and misleading for the reasons stated in ¶ 173(b).

3. False Representations that the Transaction Was Fair

201. The Preliminary Proxy Statement included many false and misleading assertions that the Merger was fair or in the best interests of the holders of JA Solar Securities who were unaffiliated with the Buyer Group.

202. The Special Committee declared the Merger to be fair. According to the Preliminary Proxy Statement:

At a meeting on November 16, 2017, the Special Committee, after consultation with its financial advisor and legal counsels and due consideration, unanimously (a) *determined that the Merger as contemplated in the Merger Agreement and the Plan of Merger is fair to and in the best interests of the Company and the Unaffiliated Security Holders, and it is advisable for the Company to enter into the Merger Agreement, the Plan of Merger and the Transactions, including the Merger,* and (b) recommended that the Board approve and authorize the Merger Agreement, the Plan of Merger and the Transactions, including the Merger.

203. This statement was false and misleading because the merger was not fair or in the best interests of JA Solar Securityholders, for the reasons stated in ¶ 173(b).

204. JA Solar’s Board of Directors, in turn, described, “after careful consideration,” the Merger as fair and recommended that it be approved. According to the Preliminary Proxy Statement:

On November 16, 2017, the Board, acting upon the unanimous recommendation of the Special Committee and on behalf of the Company, unanimously *(a) determined that the Merger as contemplated in the Merger Agreement and the Plan of Merger is fair to and in the best interests of the Company and the Unaffiliated Security Holders and it is advisable for the Company to enter into the Merger Agreement, the Plan of Merger and the Transactions, including the Merger, . . .* and (c) resolved to recommend in favor of the authorization and approval of the Merger Agreement, the Plan of Merger and the consummation of the Transactions, including the Merger, to the shareholders of the company and directed that the Merger Agreement, the Plan of Merger and the consummation of the Transactions, including the Merger, be submitted to a vote of the shareholders of the Company for authorization and approval.

205. This statement was false and misleading because the merger was not fair or in the best interests of JA Solar Securityholders, for the reasons stated in ¶ 173(b).

206. The Preliminary Proxy Statement also affirmed that “[*e*]ach member of the Buyer Group believes that the Merger is fair to the Unaffiliated Security Holders.”

207. This statement was false and misleading because the merger was not fair or in the best interests of JA Solar Securityholders, for the reasons stated in ¶ 173(b).

208. The Preliminary Proxy Statement also included Houlihan’s opinion that the Merger was “*fair*.” While these statements were in some sense originally made by Houlihan, they are attributable to Defendants for two reasons: first, they are part of the Preliminary Proxy Statement, which was signed by Defendant Jin and Defendant Jia (on behalf of JA Solar); second, Defendants “expressly adopted” Houlihan’s analysis as a basis for their conclusion that the Merger was fair to the Unaffiliated Security Holders and their recommendation that the Merger should be approved; and third, the Buyer Group relied on the Special Committee’s and Board’s assessments of the Merger, including Houlihan Lokey’s role in advising the Special Committee.¹⁶

¹⁶ The Preliminary Proxy Statement stated that the “Special Committee expressly adopted” Houlihan’s “analyses and opinions” in the course of “reaching its determination as to the fairness

209. This statement was false and misleading because the Merger was not fair or in the best interests of JA Solar Securityholders, for the reasons stated in ¶ 173(b)-(c).

210. The Preliminary Proxy Statement also appended Houlihan’s written fairness opinion, which concluded that the Merger was fair from a financial point of view, stating specifically:

The Committee has requested that Houlihan Lokey (China) Limited (“Houlihan Lokey”) provide an opinion (this “Opinion”) to the Committee as to whether, as of the date hereof, the Per Share Merger Consideration to be received by holders of Shares (other than Excluded Shares and Dissenting Shares) and the Per ADS Merger Consideration to be received by holders of ADSs (other than ADSs representing Excluded Shares) are fair, from a financial point of view, to such holders. . . . ***Based upon and subject to the foregoing, and in reliance thereon, it is our opinion that, as of the date hereof, the Per Share Merger Consideration to be received by holders of Shares (other than Excluded Shares and Dissenting Shares) and the Per ADS Merger Consideration to be received by holders of ADSs (other than ADSs representing Excluded Shares) are fair, from a financial point of view, to such holders.***

211. This statement was false and misleading because the merger was not fair or in the best interests of JA Solar Securityholders, for the reasons stated in ¶ 173(b)-(c).

4. Statements Concerning the Basis for the Board’s, Special Committee’s, Buyer Group’s, and Houlihan Lokey’s Determinations

212. The Preliminary Proxy Statement included many false and misleading descriptions of the basis for the Board’s, Special Committee’s, Buyer Group’s and Houlihan Lokey’s determinations that the Merger was fair or in the best interests of the holders of JA Solar Securities.

213. Both the Preliminary Proxy Statement and Houlihan Lokey’s fairness opinion that was included with the Preliminary Proxy Statement explained that Houlihan “relied upon and assumed, without independent verification, the accuracy and completeness of all data, material

of the Transactions, including the Merger” and that the Board decided unanimously that the Merger was fair and recommended the Merger “acting upon the unanimous recommendation of the Special Committee.”

and other information furnished, or otherwise made available to it, discussed with or reviewed by it, or publicly available, and does not assume any responsibility with respect to such data, material and other information. In addition, management of the Company has advised Houlihan Lokey, and Houlihan Lokey has assumed, that the financial projections reviewed by Houlihan Lokey have been reasonably prepared in good faith on bases reflecting the best currently available estimates and judgments of such management as to the future financial results and condition of the Company Houlihan Lokey has relied upon and assumed, without independent verification, that there has been no change in the business, assets, liabilities, financial condition, results of operations, cash flows or prospects of the Company since the respective dates of the most recent financial statements and other information, financial or otherwise, provided to Houlihan Lokey that would be material to its analyses or its opinion, and that there is no information or any facts that would make any of the information reviewed by Houlihan Lokey incomplete or misleading. Further, management of the Company has advised Houlihan Lokey that (i) the financial projections used by Houlihan Lokey are the most up-to-date currently available projections prepared by management of the Company (or any affiliated entity).”

214. Houlihan Lokey also “relied upon and assumed, without independent verification, that . . . the representations and warranties of all parties to the Merger agreement and all other related documents and instruments that are referred to therein are true and correct.”

215. These statements show the role of JA Solar management, including Defendants JA Solar and Jin, in providing Houlihan Lokey with the financial information that it relied on in reaching its fairness opinion.

216. The Preliminary Proxy Statement described the following financial projections that Company management gave to Houlihan Lokey in or around November 2017 and that Houlihan Lokey relied on in its analysis of the Merger:

Certain Financial Projections

	Management Projections				
	Fiscal Year Ending December 31,				
	2017E	2018E	2019E	2020E	2021E
	(in millions RMB except percentage)				
Total Revenue	17,263	19,053	22,797	23,917	24,574
Growth		10%	20%	5%	3%
Gross Profit	2,250	2,431	2,789	2,972	3,076
% revenue	13%	13%	12%	12%	13%
EBIT(1)	682	643	654	781	830
% revenue	4%	3%	3%	3%	3%
EBITDA(2)	1,709	1,760	1,773	1,884	1,921
% revenue	10%	9%	8%	8%	8%
Net Income	259	218	240	331	403
% revenue	2%	1%	1%	1%	2%

217. This statement was false and misleading for the reasons stated in ¶ 173(c). In particular, when JA Solar gave its 2017 projections to Houlihan Lokey, the first three quarters of the year were already complete and only half of the fourth quarter remained. The following table shows the projections that JA Solar gave to Houlihan Lokey for the fourth quarter of 2017 as compared to the actual results that it reported for that quarter in the 2017 Annual Report:

	Projected¹⁷	Actual¹⁸
Total Revenue (RMB)	RMB 3.276 billion	RMB 5.7 billion
Net Income (RMB)	RMB 74.18 million	RMB 115.5 million

218. The Preliminary Proxy Statement also described a negative business environment as supporting the low price that JA Solar shareholders would receive in the Merger. In

¹⁷ These projections are derived by subtracting JA Solar's actual results for the first three quarters of 2017 from the full year projections that JA Solar gave to Houlihan Lokey.

¹⁸ JA Solar reported its results for the fourth quarter of 2017 in an April 30, 2018 press release that it filed with the SEC as an exhibit to a Form 6-K.

particular, the Preliminary Proxy Statement stated that *“[i]n the course of reaching its determination, the Special Committee and the Board considered the following factors and potential benefits of the Merger, each of which the Special Committee and the Board believe supported their decision to recommend the Merger Agreement and that the Merger is substantially fair to the Unaffiliated Security Holders.”*

219. These statements were false and misleading for the reasons stated in ¶ 173(c).

220. These factors included what the Preliminary Proxy Statement described, on behalf of the Board and Special Committee, as:

- a. *“The weak outlook for the solar industry due to overcapacity and slowing demand;”*
- b. *“Weak demand and lower prices for the Company’s products in China and the expectation that there will be similar declines in key growth markets, including South America and India;”*
- c. *“Uncertainty surrounding ongoing trade cases in the U.S. and India and the existing and potential additional sanctions on solar panel products from China;”*
- d. *“China’s economic slowdown generally, and slowdown in the Chinese solar industry specifically, including decreased demand for photovoltaic modules and overcapacity in the Chinese solar industry;”*
- e. *“[T]he Special Committee’s knowledge of the Company’s business, financial condition, results of operations, prospects and competitive position and their belief that the Merger is financially more favorable to the Unaffiliated Security Holders than any other alternative reasonably available to the Company and the Unaffiliated Security Holders;”*
- f. *“[E]stimated forecasts of the Company’s future financial performance prepared by the Company’s management, together with the Company’s management’s view of the Company’s financial condition, results of operations, business, prospects and competitive position;”* and

- g. *“The financial analysis reviewed by Houlihan Lokey with the Special Committee, as well as the oral opinion of Houlihan Lokey rendered to the Special Committee on November 16, 2017.”*

221. These statements were false and misleading for the reasons stated in ¶ 173(c).

222. In the course of Houlihan Lokey’s financial analysis, it conducted a “selected companies analysis,” which is a traditional type of analysis performed by investment banks giving fairness opinions on mergers and acquisitions, whereby it compared JA Solar to other solar companies. This analysis resulted in a higher valuation for JA Solar than the Merger price reflected. But Houlihan Lokey discounted this analysis because, according to Houlihan Lokey, *“determining multiples ranges from the selected companies analysis and deriving an implied per ADS reference range for the Company, as compared to the proposed Per ADS Merger Consideration, would not result in a meaningful comparison in light of the limited comparability of the Company to the selected companies due to size, business focus, geographic areas of focus, and product prices, amongst other issues. Accordingly, Houlihan Lokey did not view the results derived from the selected companies analysis as providing a meaningful comparison to the Company.”*

223. The same pattern emerged in Houlihan’s “selected transactions analysis,” where Houlihan compared the Merger to other comparable transactions involving solar companies. Houlihan *“concluded that determining multiples ranges from the selected transactions analysis and deriving an implied per ADS reference range for the proposed Merger, as compared to the proposed Per ADS Merger Consideration, would not result in a meaningful comparison in light of the limited comparability of the proposed Merger to the selected transactions due to business focus, geographic areas of focus, and financial performance, amongst other issues, of the target companies. Accordingly, Houlihan Lokey did not view the*

results derived from the selected transactions analysis as providing a meaningful comparison to the proposed Merger.”

224. In addition, the Preliminary Proxy Statement included a draft copy of the presentation that Houlihan Lokey gave to the Special Committee when presenting its fairness opinion on November 16, 2017. This presentation showed the basis for Houlihan Lokey’s analysis, including its financial analysis based on the financial projections that JA Solar management gave to Houlihan and the selected companies analysis and selected transactions analysis that Houlihan ignored because of purported differences between JA Solar and the comparable companies.

225. As noted above, while these statements were in some sense originally made by Houlihan Lokey, they are attributable to Defendants for two reasons: first, they are part of the Preliminary Proxy Materials, which were signed by Defendant Jin and Defendant Jia (on behalf of JA Solar); second, Defendants “expressly adopted” Houlihan’s analysis as a basis for their conclusion that the Merger was fair to the Unaffiliated Security Holders and their recommendation that the Merger should be approved; and third, the Buyer Group relied on the Special Committee’s and Board’s assessments of the Merger, including Houlihan Lokey’s role in advising the Special Committee.

226. These statements referenced in ¶¶ 222 through 225 concerning Houlihan Lokey’s methodology and the Special Committee’s, the Board’s, and the Buyer Group’s reliance on that analysis were false and misleading for the reasons stated in ¶ 173(c).

C. Statements on JA Solar’s Website

227. In December 2017, JA Solar posted an announcement on its corporate website stating that “*JA Solar Co. Ltd. currently does not have plans to list domestically. JA Solar Co. Ltd. and its related parties have not and will not issue any fundraising notices,*

announcements, or internal messages in relation to a relisting, much less will it take any public placement actions in relation to a relisting. Any fundraising behavior in relation to a relisting by JA Solar Co. Ltd. is not being done by JA Solar Co. Ltd. or Jinglong Industrial Group Co. Ltd. and does not have their approval. Such fundraising behavior may be committing the crimes of illegal fundraising or fraud. We ask that society and the public not allow themselves to be cheated.” Based on a search of Internet archives, this notice is believed to have remained on JA Solar’s website for at least several months, into March 2018, if not later.

228. This emphatic statement falsely quelled any thought that Defendants might have been planning to relist in China following the Merger. Moreover, this denial referred not only to the Company’s activities as of the announcement in December 2017, but also affirmed that the Company “will not” undertake any relisting actions going forward. In addition, this statement was false and misleading for the reasons stated in ¶ 173(a).

D. The Amended Proxy Materials

229. On January 11, 2018, JA Solar published amended proxy materials as an amendment to its earlier filed Form 13E3 (the “Amended Proxy Materials”). The Amended Proxy Materials included an updated preliminary proxy statement (the “Amended Proxy Statement”) and the final version of Houlihan Lokey’s November 16, 2017 presentation to the Special Committee.

230. As with the Preliminary Proxy Statement, the Amended Proxy Statement was directed to all “Shareholders of JA Solar” and was signed by Defendant Jin, Defendant Jia (on behalf of JA Solar), and the remaining members of the Buyer Group.

231. The Amended Proxy Materials continued Defendants’ fraudulent scheme by reproducing the false and misleading statements that were originally included in the Preliminary

Proxy Materials and adding several additional false and misleading statements, as described in the sections that follow.

232. In addition, as with the Preliminary Proxy Materials, when signing the Amended Proxy Materials, Defendant Jin, Defendant Jia, and the remainder of the Buyer Group each affirmed that *“[a]fter due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.”*

233. These statements were false and misleading for the reasons stated in ¶ 173(a)-(d).

234. In addition, the Amended Proxy Materials included the misleading statements or omissions described in the following sections (1) through (4).

1. Statements Concerning Intention Not to Relist

235. The Amended Proxy Materials continued the fraudulent scheme by reproducing the false and misleading statements concerning the intention of the Buyer Group not to relist JA Solar following the Merger, as described in Section V.B.1 above.

236. These statements were false and misleading for the reasons stated in ¶ 173(a)-(c).

237. In addition, the Amended Proxy Statement added that the factors that it listed the Special Committee and the Board as having considered in deciding whether to support the Merger *“includes all material factors considered by the Special Committee and the Board.”* The Preliminary Proxy Statement contained a similar statement as to the Buyer Group, which is also in the Amended Proxy Statement, but not as to the Special Committee and the Board. The Amended Proxy Statement was revised to add this statement as to the Special Committee and the Board only because the SEC specifically called out the Preliminary Proxy Statement for failing to clarify whether it *“disclosed all material factors considered in reaching a fairness determination instead of ‘a number’ of those factors”* (emphasis in original).

238. These statements were false and misleading for the reasons stated in ¶ 173(a)-(c).

2. Promotion of the Merger Price

239. The Amended Proxy Statement continued the fraudulent scheme by continuing to promote the Merger by describing the merger consideration of \$1.51 per common share and \$7.55 per ADS.

240. These statements were false and misleading for the reasons stated in ¶ 173(b).

3. False Representations that the Transaction Was Fair

241. The Amended Proxy Statement also continued the fraudulent scheme by reproducing the false and misleading statements concerning the supposed fairness of the Merger for the holders of JA Solar Securities who were unaffiliated with the Buyer Group, as summarized in Section V.B.3 above.

242. These statements were false and misleading for the reasons stated in ¶ 173(b)-(c).

243. In addition, the Amended Proxy Statement added, again in response to the SEC's comments, that “[t]he *Special Committee and the Board expressly adopted [Houlihan’s] analyses and opinions, among other factors considered, in reaching their respective determination as to the fairness of the Transactions, including the Merger.*” (The Preliminary Proxy Statement had made a similar statement only as to the Special Committee.)

244. The Amended Proxy Statement also added in response to the SEC's comments that the reason why the proposed transaction stalled when first discussed with the Buyer Group in 2015 was because “*the Buyer Group was unable to achieve any substantive progress in securing adequate financing,*” which the Amended Proxy Statement attributed to “*various factors, including uncertainties about China's economy and the solar industry in particular, enhanced foreign exchange control by the Chinese government over outbound investments, and fluctuations in the exchange rate of RMB to USD.*”

245. These statements were false and misleading for the reasons stated in ¶ 173(b)-(c).

4. Statements Concerning the Basis for the Board's, Special Committee's, Buyer Group's, and Houlihan's Determinations

246. The Amended Proxy Statement also continued the fraudulent scheme by reproducing the false and misleading statements concerning the basis for the Board's, Special Committee's, Buyer Group's, and Houlihan Lokey's determinations that the Merger was fair or in the best interests of the holders of JA Solar Securities, as summarized in Section V.B.4 above.¹⁹

247. These statements were false and misleading for the reasons stated in ¶ 173(c).

248. In addition, the Amended Proxy Statement included additional detail concerning the basis for these determinations concerning the fairness of the Merger.

249. The Amended Proxy Statement spelled out, in response to the SEC's comments, that *"[t]he Special Committee and the Board also noted Houlihan Lokey's view that the results derived from the selected companies analysis and selected transactions analysis do not provide a meaningful comparison to the Company. The Special Committee and the Board adopted Houlihan Lokey's financial analyses as a whole, including its determinations that the selected companies analysis and the selected transactions analysis did not result in meaningful comparisons with respect to the Company and the proposed Merger. Accordingly, the Special Committee and the Board did not rely on such analyses in reaching their conclusion that the Per Share Merger Consideration to be received by holders of Shares (other than Excluded Shares) and the Per ADS Merger Consideration to be received by holders of ADSs (other than ADSs representing Excluded Shares) are fair, from a financial point of view, to such holders."*

¹⁹ The Amended Proxy Materials included the final copy of the presentation that Houlihan gave to the Special Committee when presenting its fairness opinion on November 16, 2017 (rather than the draft copy that was included with the Preliminary Proxy Materials).

250. The Amended Proxy Statement included this statement only because the SEC had noted that the Preliminary Proxy Statement failed to explain what effect Houlihan Lokey’s decision to rely solely on its discounted cash flow analysis had “*on the special committee’s and the board’s assessment of the value of Houlihan Lokey’s opinion.*” (Emphasis in original).

251. These statements were false and misleading for the reasons stated in ¶ 173(c).

252. The Amended Proxy Statement also now gave JA Solar’s financial projections that were provided to Houlihan in U.S. dollars, as follows:

(in millions USD except percentage)	Fiscal Year Ending December 31,				
	2017E	2018E	2019E	2020E	2021E
Total Revenue	2,596	2,865	3,507	3,543	3,625
<i>Growth</i>		10%	22%	1%	2%
Gross Profit	338	366	429	440	454
<i>% Revenue</i>	13%	13%	12%	12%	13%
EBIT(1)	103	97	101	116	123
<i>% Revenue</i>	4%	3%	3%	3%	3%
EBITDA(2)	257	265	273	279	283
<i>% Revenue</i>	10%	9%	8%	8%	8%
Net Income	39	33	37	49	60
<i>% Revenue</i>	2%	1%	1%	1%	2%

253. These statements were false and misleading for the reasons stated in ¶ 173(c). In particular, when JA Solar gave its 2017 projections to Houlihan Lokey, the first three quarters of the year were already complete and only half of the fourth quarter remained. The following table shows the projections that JA Solar gave to Houlihan Lokey for the fourth quarter of 2017 as compared to the actual results that it reported for that quarter in the 2017 Annual Report:

	Projected²⁰	Actual²¹	% Understated
Total Revenue (USD)	\$494 million	\$871.8 million	76%
Total Revenue	RMB 3.276 billion	RMB 5.7 billion	

²⁰ These projections are derived by subtracting JA Solar’s actual results for the first three quarters of 2017 from the full year projections that JA Solar gave to Houlihan Lokey.

²¹ JA Solar reported its results for the fourth quarter of 2017 in an April 30, 2018 press release that it filed with the SEC as an exhibit to a Form 6-K.

(RMB)			
Net Income (USD)	\$11.25 million	\$17.8 million	58%
Net Income (RMB)	RMB 74.18 million	RMB 115.5 million	

254. In addition, the Amended Proxy Statement added, again in response to SEC comments, that the “*perpetuity growth rates*” that Houlihan Lokey used in its discounted cash flow analysis “*gave consideration to a number of factors, including the expected long-term growth prospects of the Company, industry growth expectations, and estimated inflation and GDP growth rates.*”

255. This statement was false and misleading for the reasons stated in ¶ 173(c), particularly because these assumptions underlying JA Solar’s business conditions were directly contradicted by the much more positive description of those conditions that were disclosed in the 2017 Annual Report shortly after the shareholder vote.

E. Second Amended Proxy Materials

256. On February 1, 2018, JA Solar published and filed with the SEC another set of amended proxy materials as an amendment to its earlier filed Form 13E-3 (the “Second Amended Proxy Materials”). The Second Amended Proxy Materials included the Final Proxy Statement to shareholders in connection with the Merger.

257. As with the Preliminary Proxy Materials and the Amended Proxy Materials, the Second Amended Proxy Materials were directed to all “Shareholders of JA Solar” and were signed by Defendant Jin, Defendant Jia (on behalf of JA Solar), and the remaining members of the Buyer Group.

258. The Second Amended Proxy Materials continued the fraudulent scheme by reproducing the false and misleading statements that were originally included in the Preliminary Proxy Materials and Amended Proxy Materials, and adding several additional false and misleading statements, as described in the sections that follow.

259. In addition, as with the Preliminary Proxy Materials and Amended Proxy Materials, when signing the Second Amended Proxy Materials, Defendant Jin, Defendant Jia, and the remainder of the Buyer Group each affirmed that “*[a]fter due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.*”

260. These statements were false and misleading for the reasons stated in ¶ 173(a)-(d).

261. In addition, the Second Amended Proxy Materials included the misleading statements or omissions described in the following sections (1) through (4).

1. Promotion of the Merger Price

262. The Second Amended Proxy Materials continued the fraudulent scheme by continuing to promote the Merger by describing the merger consideration of \$1.51 per common share and \$7.55 per ADS.

263. These statements were false and misleading for the reasons stated in ¶ 173(b).

2. Statements Concerning Intention Not to Relist

264. The Second Amended Proxy Materials continued the fraudulent scheme by reproducing the false and misleading statements concerning the intention of the Buyer Group not to relist JA Solar following the Merger, as summarized in Section V.D.1 above regarding the Amended Proxy Materials.

265. These statements were false and misleading for the reasons stated in ¶ 173(a)-(c).

3. False Representations that the Transaction Was Fair

266. The Second Amended Proxy Materials also continued the fraudulent scheme by reproducing the false and misleading statements concerning the supposed fairness of the Merger for the holders of JA Solar Securities, as summarized in Section V.D.3 above regarding the Amended Proxy Materials.

267. These statements were false and misleading for the reasons stated in ¶ 173(b)-(c).

4. Statements Concerning the Basis for the Board’s, Special Committee’s, Buyer Group’s and Houlihan’s Determinations

268. The Second Amended Proxy Materials also continued the fraudulent scheme by reproducing the false and misleading statements concerning the basis for the Board’s, Special Committee’s, Buyer Group’s, and Houlihan Lokey’s determinations that the Merger was fair or in the best interests of the holders of JA Solar Securities, as summarized in Section V.D.4 above regarding the Amended Proxy Materials.

269. These statements were false and misleading for the reasons stated in ¶ 173(c).

F. Announcement of Shareholder Vote

270. On March 12, 2018, JA Solar issued a Form 6-K signed by Defendant Jin and attaching a press release announcing the “Shareholders’ Approval of Merger Agreement.”

271. This press release explained that “[p]rior to the extraordinary general meeting held today, the Company has received written notices of objection validly served by certain shareholders according to Section 238(2) of the Cayman Islands Companies Law. These shareholders together hold more than 10% of the Company’s total outstanding ordinary shares. Pursuant to Section 7.02(d) and Section 8.02(d) of the Merger Agreement, if at the time when the shareholders’ approval is obtained, the holders of more than 10% of ordinary shares have validly served notices of objection, and within 10 business days the Parent Parties have not granted an irrevocable waiver of this condition, either the Company or the Parent Parties may terminate the Merger Agreement. The Company intends to update its shareholders if and when it receives from the Parent Parties their decision with respect to their granting of the waiver in due course.”

272. In the several disclosures that Defendants made after the shareholder vote, however, they never disclosed whether the Parent Parties granted this waiver.

273. On April 30, 2018, JA Solar issued, and filed with the SEC, its Annual Report on Form 20-F for 2017 (the “2017 Annual Report”). The 2017 Annual Report was signed by Ying Li, the Company’s Finance VP.

274. The 2017 Annual Report stated that “*[o]ur board of directors, acting upon the unanimous recommendation of the special committee, which was comprised solely of independent and disinterested directors unaffiliated with any members of the management of our Company, approved the Merger Agreement and the Merger and resolved to recommend that our shareholders vote for authorization and approval of the Merger Agreement and the Merger. The special committee negotiated the terms of the Merger Agreement with the assistance of its financial and legal advisors.*”

275. The Annual Report also warned that “*[a]lthough the merger agreement has been authorized and approved at the extraordinary general meeting held on March 12, 2018, the merger is subject to various closing conditions and we cannot assure you the result of the going private transaction. . . . If the going private transaction is not closed and the merger agreement is terminated, our business and the trading price of our ADSs may be adversely affected.*”

276. Then, without providing any update as to the status of the Dissenting Shareholder Condition, JA Solar announced on July 16, 2018 that the Merger was completed. JA Solar made this announcement in a press release that accompanied a Form 6-K that the Company filed with the SEC and that was signed by Defendant Jin.

277. All of these statements described in this Section V.F were false and misleading for the reasons stated in ¶ 173(d).

278. Also on July 16, 2018, JA Solar filed a final amendment to its proxy materials on Schedule 13E-3 that was signed by Defendant Jin, Defendant Jia (on behalf of JA Solar), and the remaining members of the Buyer Group. This final amendment announced the completion of the Merger.

279. Even at this last possible moment, Defendants said nothing about whether the Buyer Group formally waived the Dissenting Shareholder Condition.

280. This statement was false and misleading for the reasons stated in ¶ 173(d).

281. In addition, as with the prior versions of the Proxy Materials, this amendment also stated for each signatory that “*[a]fter due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.*”

282. This statement was false and misleading for the reasons stated in ¶ 173(a)-(d).

283. In addition, this final amendment to the Proxy Materials incorporated the Final Proxy Statement that had been filed on February 1, 2018. All of the statements from the Final Proxy Statement, which was included with the Second Amended Proxy Materials, that are described in Section V.E above, which were false and misleading for the reasons explained in that section, are reproduced in this final amendment to the Proxy Materials.

VI. CONTROL PERSON ALLEGATIONS

284. The Individual Defendants, by virtue of their senior positions at JA Solar, directly participated in the management and oversight of the Company, were directly involved in the day-to-day operations of the Company at the highest levels, and were privy to confidential, proprietary information concerning the Company and its business, operations, growth, financial statements, and financial condition, as alleged herein. As set forth below, the distribution of

misleading information and the failure to convey material information to the public was the result of their collective actions and knowing inactions.

285. As JA Solar's Chairman, CEO, and Founder, Defendant Jin was closely involved in all aspects of the Company's business operations. Defendant Jin had control over JA Solar during the Class Period, through these positions and his stake in the Company. Defendant Jin and Jinglong BVI (which was 32.96% owned by Jin) together owned 16.5% of the total outstanding shares of JA Solar prior to the Merger. Defendant Jin also controlled the Jingling group of companies that conducted substantial business with JA Solar and on which JA Solar was dependent for essential materials, real estate, and financing.

286. Defendant Jin also had control over the Buyer Group and Parent Parties through his position as the individual person with the largest stake in JA Solar in those groups both before and after the Merger.

287. As a JA Solar director and Chairman of the two-person Special Committee, Defendant Jia had considerable ability to control the Company during the Class Period. Defendant Jia exercised further control over the Company in his roles on the Audit Committee, Compensation Committee, and Nominating and Corporate Governance Committee of the Board of Directors.

288. The Individual Defendants, because of their positions of control and authority as senior executive officers and directors of JA Solar, were able to, and did, control the content of the SEC filings, press releases, and other public statements issued by JA Solar, the Special Committee, the Board, and the Buyer Group during the Class Period. The Individual Defendants were undoubtedly provided with copies of the Company's reports and press releases alleged herein to be misleading prior to, or shortly after, their issuance and had the ability and

opportunity to prevent their issuance or cause them to be corrected. Because of their positions and access to material non-public information available to them, the Individual Defendants knew that the facts specified herein had not been disclosed to, and were being concealed from, the public, and that the representations which were being made were then materially false and/or misleading.

289. Moreover, Defendants Jin and Jia signed SEC filings that contained the material misstatements or omissions at issue here. Accordingly, they are responsible for the accuracy of the public statements detailed herein.

290. The Individual Defendants are liable as participants in a fraudulent scheme and course of conduct that operated as a fraud or deceit on the Class members by disseminating materially false and misleading statements and/or concealing material information. Each of the Individual Defendants were culpable for this deceit insofar as they acted with the requisite scienter, as explained throughout, and especially in the following Section.

291. The Individual Defendants are further liable for the false statements pleaded herein, as those statements were each “group-published” information, the result of the collective actions of the Individual Defendants.

VII. ADDITIONAL SCIENTER ALLEGATIONS

292. At all relevant times, the Individual Defendants acted with scienter in making the materially false and misleading statements and omissions alleged herein. The Individual Defendants had actual knowledge that the statements and omissions made by them were false and misleading, or acted with reckless disregard for the truth or falsity of those statements and omissions. The Individual Defendants’ intent to deceive, or reckless disregard for the truth, is demonstrated by substantial direct and circumstantial evidence supporting a strong inference of scienter. Furthermore, Defendant Jin had the motive and opportunity to commit the fraud.

A. Defendant Jin Had the Motive and Opportunity to Defraud the Class

293. As JA Solar's CEO and the Chairman of its Board, it is clear that Defendant Jin had the opportunity to commit the fraudulent acts described herein. He had the ability to influence the information contained in the Proxy Materials and the information that management provided to Houlihan, and he made public statements about the Company's prospects. Defendant Jin also signed the Proxy Materials and had the ability to influence their preparation. He also had the opportunity to vote his substantial amount of shares as he saw fit as to the acceptance of the Merger.

294. As the leading member of the Buyer Group who would own 79.8% of the Company following the Merger, Defendant Jin had an enormous motivation for the Merger to be completed at as low a transaction price as possible. By deflating the value of the JA Solar Securities through the fraudulent scheme described herein, Defendant Jin was able to reduce the amount of money he needed to spend to acquire JA Solar. In fact, by defrauding the holders of JA Solar Securities, he received a windfall from them of *at least* \$440 million.²² Defendant Jin also stood personally to gain through the completion of the Merger because the transaction would give him private control of the Company. Ultimately, Jin was motivated to see to it that

²² This \$440 million figure is derived by taking Defendant Jin's share (79.8%) of the difference in value between (a) the 74.3% of JA Solar that the Buyer Group (or, more precisely, the Rollover Shareholders) did not own before the Merger (and therefore purchased at a deflated price) and (b) the publicly disclosed valuation of that portion of the Company (which the Buyer Group now owned) after the Merger. This is a very conservative estimate of Defendant Jin's (and the Buyer Group's more generally) gain because it (1) excludes the portion of JA Solar that the Buyer Group owned before the Merger and that increased in value through the relisting; (2) does not attribute any gains to the pre-Merger value of the portion of Defendant Jin's ownership that he acquired through the Merger through little, if any, personal risk or expenditure; and (3) is based on JA Solar's relisting value reported in the financial press as opposed to larger measures of JA Solar's fair value as a publicly listed company in China. This calculation is therefore provided just for demonstrative purposes and does not preclude Lead Plaintiffs from offering other assessments of these values in this action.

the Merger be completed at the agreed-upon transaction price so that he could capitalize on the deflated share price and reap millions in profits when the private Company would then be relisted in China as a public company with a far higher value.

295. The other members of the Buyer Group had the same motive to commit fraud. They would own the remainder of the Company following the Merger that Defendant Jin did not own. They therefore also stood to reap profits by completing the Merger at a deflated price so that they could then sell their shares at higher prices when the Company would be relisted in China. The other members of the Buyer Group also signed the Proxy Materials and had the opportunity to influence the statements contained therein supporting the Merger.

B. The Timing of the Relisting Transaction Shows Defendants' Scienter

296. On July 19, 2018, just three days after the Merger closed, the newly private JA Solar and Tianye Tonglian formally agreed to engage in the backdoor listing transaction that would result in JA Solar relisting in the Chinese public markets.

297. As explained in Section IV.H.3 above, this is not a decision that could have been reached in just three days. In total, it would ordinarily take more than 12 months for a company such as JA Solar to be able to agree to announcing an asset restructuring deal such as the deal with Tianye Tonglian that they announced in the MoU here. Given that JA Solar and Tianye Tonglian reached their backdoor listing agreement on July 19, 2018, it is completely implausible that the process for that transaction had not already begun while the Merger process was underway. Based on just the timing of a typical relisting transaction—without accounting for all of the other evidence described above—the plan to relist predated the announcement of the Merger on November 17, 2017 and the publication of the Preliminary Proxy Materials on December 11, 2017 by at least several months.

298. Many time-consuming steps on the part of both JA Solar and Tianye Tonglian would have gone into their being able to agree to terms of the backdoor listing that they announced on July 19, 2018. Moreover, the particularly complex nature of the backdoor listing here means that it would have taken longer than more straightforward transactions.

299. This timing is further confirmed by CW3's statements. CW3 recalled that in May or June of 2018, well before the Merger was completed, an audit team from BDO China visited JA Solar's office in Beijing for work that appeared to be in connection the planned upcoming relisting. CW 3 was told that the audit team planned to audit each of the Company's subsidiaries before issuing its final consolidated audit report, which would depend in part on the final details of the relisting that had not yet been announced. Counsel has also reviewed a translated resume from a former employee of BDO China indicating that beginning in May 2018, this former employee worked on an audit of a JA Solar subsidiary for an "IPO listing." This not only corroborates CW 3's account, but provides further proof that BDO was in fact preparing JA Solar for a major capital markets listing.

300. This shows that by May or June of 2018, JA Solar was already far enough along in its relisting plans to have its Chinese auditor begin its audit that would be necessary for the transaction to take place. This step would typically not occur until the final stages of the backdoor listing process. Otherwise the company undergoing the relisting (such as JA Solar) would risk wasting resources on an intensive audit that might not be necessary or that might be obsolete and need to be redone by the time the relisting transaction is finally agreed upon.

301. Defendant Jin was the single largest individual shareholder of JA Solar before the Merger, controlled the Company in all the ways described above, owned approximately 80% of JA Solar following the Merger, and is set to be the CEO of Tianye Tonglian after the backdoor

listing is complete. He therefore would have not only been involved in, but would have led, the backdoor listing efforts on behalf of JA Solar.

302. Defendant Jia, by virtue of his role as a director, Chairman of the Special Committee, and member of every Board committee that JA Solar had, would also have been apprised of these backdoor listing negotiations that coincided with the Merger process that he was so heavily involved in.

C. Defendant Jin’s November 2017 Speech Reveals His State of Mind at That Key Time

303. Defendant Jin’s scienter is further evidenced by his November 19, 2017 speech at the “2017 Entrepreneur ‘To Conscience’ (Beijing) Forum” in Beijing. Defendant Jin stated in that speech that JA Solar had plans to return to the Chinese capital markets in publicly traded form within the following two or three years.

304. This statement at the “2017 Entrepreneur ‘To Conscience’ (Beijing) Forum” did not notify JA Solar shareholders of the Company’s intent to relist immediately following the Merger for the reasons explained above. (*See supra* ¶ 131). But this speech, in the context of all of the other facts alleged plainly shows that Defendant Jin had the relisting transaction in mind since at least November 19, 2017.

305. Moreover, this November 19, 2017, speech occurred just two days after Defendants signed the Merger Agreement and the day before the start of the Class Period when JA Solar filed its announcement of the Merger with the SEC. Defendant Jin’s discussion of his plans to relist JA Solar in China just as the terms of the Merger were being finalized and announced shows what was on his mind at that crucial time.

D. Other Documents and Statements Reveal the Relisting Plan Existed Prior to the Merger

306. Several of the previously discussed CWs recalled knowing about the relisting plan prior to the close of the merger. CW 1 recalled hearing about the delisting plan at the beginning of 2018 at the same that he heard about the relisting plan. He further explained that he heard that JA Solar would probably be relisted on the A-Shares market at the beginning of 2018 and clarified that it was a rumor circulated among employees. CW 2 stated that he first heard about the delisting plan sometime in 2017 and, after hearing about the delisting plan, heard that JA Solar probably would be relisted on the A-shares market. CW 3 recalled visiting JA Solar's official website and seeing a message that said there was a rumor that JA Solar will be relisted in Chinese capital markets and telling people not to believe the rumors.²³ CW 3 said that even after this message was posted, the internal rumors regarding JA Solar's relisting continued. CW 4 said that he first heard about the delisting plan in Spring of 2018, and added that he heard the news quite late. When asked what were the reasons given, internally, for taking the Company private and delisting from NASDAQ, CW 4 explained that he heard from his colleagues that JA Solar wanted to go back to mainland China and added that there were successful precedents such as Trina Solar and Longi Group, whose valuations were dramatically higher after they returned to domestic capital markets. CW 4 also explained that he first heard about JA Solar's relisting plan on April 20, 2018, when attending an industry conference, and was told about the relisting plan by a colleague in the power plant business unit.

307. Counsel has also reviewed a translated resume from a former employee of China Dragon Securities Co. Ltd. This resume indicates that the employee assisted the Jinglong group

²³ This appears to be a reference to the message discussed in Paragraphs 103 to 104 above.

in developing its plans to relist JA Solar on the A-Shares market after privatization, dating all the way back to the 2015-2016 time period.

E. The Divergence Between the Proxy Materials and the 2017 Annual Report Shows Defendants' Scienter

308. The financial projections and descriptions of JA Solar's business conditions that were described in the Proxy Materials deviated significantly from the corresponding statements that JA Solar disclosed in the 2017 Annual Report. The statements in the Proxy Materials, which formed the basis for Houlihan Lokey's, the Special Committee's, the Board's, and the Buyer Group's determinations that the Merger was fair, significantly understated the Company's financial projections for 2017 and downplayed its overall business outlook.

309. These misstatements were exacerbated by the fact that (1) Houlihan Lokey relied solely on its financial analysis of JA Solar and ignored other traditional valuation metrics; (2) the Special Committee and the Board "expressly adopted" Houlihan Lokey's analysis; and (3) the Buyer Group relied on the Special Committee and the Board, including Houlihan Lokey's role in advising the Special Committee.

310. In addition, the timing of these statements shows that they were not simply an instance of financial results turning out better than projected or of business conditions changing. The financial projections were provided to Houlihan Lokey in late 2017, once JA Solar's fiscal 2017 was nearly complete. Houlihan Lokey's November 16, 2017 presentation to the Special Committee even incorporated JA Solar's actual financial results through September 30, 2017. The projections that JA Solar gave to Houlihan Lokey were therefore really just projections for the fourth quarter of 2017, which was already halfway done when JA Solar gave its presentation to the Special Committee on November 16, 2017.

311. As described above, the projections that the Company gave to Houlihan Lokey for the fourth quarter of 2017, and that Houlihan Lokey used as a basis for its analysis once that quarter was already half over, understated the actual revenue for that quarter by approximately 76% and understated the net income for that quarter by approximately 58%. (*See supra* ¶¶ 126-27).

312. Despite having actual data that contradicted this information, Defendants also repeated these outlandish projections in the Proxy Materials that they published on December 11, 2017, January 11, 2018, February 1, 2018, and July 16, 2018, well after the fourth quarter ended.

313. Furthermore, Defendants supported these projections in all of the Proxy Materials by describing JA Solar's business prospects in extremely negative ways.

314. Then, when JA Solar announced its actual results for the full year 2017 on April 30, 2018, which was less than two months after the March 12, 2018 shareholder vote, the Company not only disclosed results that far surpassed projections for the fourth quarter of 2017, but also described JA Solar's business conditions in much more positive terms.

315. The short time between when Houlihan Lokey conducted its financial analysis and when JA Solar's full-year 2017 financial results were complete does not support such a drastic shift in results and overall business environment. The only realistic explanation of this incongruity is the fact that the March 12, 2018 shareholder vote fell squarely between the false statements made in the Proxy Materials and the actual results in the 2017 Annual Report.

316. This incongruity is further highlighted by how JA Solar and Defendant Jin have described the Company's *past performance* far-more positively in connection with its relisting process. (*See supra* ¶¶ 152-55).

317. The only plausible explanation of this sequence of events is that JA Solar's management—led by Defendant Jin—sought to understate the Company's financial condition in the Proxy Materials in order to depress the transaction price for the Merger so that Jin could then reap enormous profits from relisting the Company in China at a much higher value.

F. Additional Allegation Regarding JA Solar's Knowledge

318. JA Solar has the knowledge of its employees. It therefore knew of the fraud insofar as any of the Individual Defendants knew of the fraud. Furthermore, several of JA Solar's other high-ranking employees (in addition to the Individual Defendants) would have known that the backdoor listing was already well underway when the Merger process began, that JA Solar's 2017 financial results would be much greater than projected, that the Company's business conditions were far better than described in the Proxy Materials, and there was never any possibility that the Company or the Buyer Group would terminate the Merger after the shareholder vote. All of these facts were misstated or improperly omitted from the Proxy Materials.

VIII. LOSS CAUSATION

319. During the Class Period, as detailed herein, Defendants engaged in a scheme to deceive the market and a course of conduct that artificially deflated the price of JA Solar Securities and operated a fraud or deceit on Class members by failing to disclose and misrepresenting the facts detailed herein. This course of conduct misled the Class members and caused them, in reliance on the misrepresentations and on the market price of JA Solar Securities during the Class Period, to sell their shares at a depressed price. The far higher price that the Company is being valued at in the relisting shows that the Class members did not receive fair value for their shares in the Merger. The fact that the deal's alleged fairness was evaluated only with the use of financial information that Defendants knew was depressed, and the eventual

disclosure of financial results that far-outpaced the financial information used in evaluating the transaction, also show that the true value of the ADS far exceeded the Merger consideration. Class members who sold their JA Solar Securities during the Class Period were damaged thereby because they sold their shares at prices that were lower than the true value of the Company (i.e., Class members suffered damages under the federal securities laws).

320. Those Class members who sold their JA Solar Securities during the Class Period and prior to the Merger being completed on July 16, 2018, suffered economic loss because their securities were sold at a depressed value. Defendants' fraud caused JA Solar's ADS to trade at artificially deflated levels throughout the Class Period and caused the holders of JA Solar Securities to be deprived of the true value of their shares. According to data on Bloomberg, the closing price of JA Solar's ADS on each date during the Class Period ranged from \$6.26 per ADS to \$8.04 per ADS. On the day before the start of the Class Period, JA Solar's ADS closed at \$7.45. The Class members who sold their JA Solar Securities prior to the completion of the Merger on July 16, 2018, were deprived of the fair value of their shares through this fraudulent depression of their shares by Defendants' false and misleading statements and omissions.

321. With respect to those Class members who sold their JA Solar Securities prior to July 16, 2018, the availability of the right of appraisal under Cayman Islands law is relevant in the following sense. But for the fraud, the market price for JA Solar Securities would have more closely reflected its true value, including because the availability of appraisal as a remedy would have prevented the deal price from serving as a ceiling limiting the upper-price of the JA Solar Securities.

322. In addition, Defendants' false and misleading statements caused shareholders to forego their right to dissent prior to the shareholder vote and exercise their appraisal rights.

Defendants' false and misleading statements concealed the true value of JA Solar Securities and therefore prevented JA Solar Shareholders from making an informed decision as to whether they should dissent and seek appraisal. Defendants' descriptions in the Proxy Materials of how difficult it would be for shareholders to cancel their ADS and register their corresponding shares before they would be able to exercise their dissenting rights further deterred them from dissenting absent knowledge of Defendants' fraud.

323. Class members who held their JA Solar Securities through the close of the Class Period ultimately sold their JA Solar Securities for either \$7.55 per ADS or \$1.51 per common share. Each of these holders of JA Solar Securities was deprived of the fair value of their shares through the fraudulent depression of the value of their shares by Defendants' false and misleading statements and omissions. These shares were worth far more than the transaction price, as evidenced by the fact that the relisting in China values JA Solar at multiple times the Merger price.

324. Lead Plaintiffs both sold ADS during the Class Period at a deflated price and were injured thereby and held ADS through the close of the Merger, and ultimately sold those ADS by tendering them for the deflated Merger consideration.

IX. ALLEGATIONS OF INSIDER TRADING

325. Defendants JA Solar and Jin engaged in insider trading to the detriment of the Class members, who were forced to tender their shares in the Merger or who voluntarily sold their shares contemporaneous with JA Solar. Through this insider trading, Defendants JA Solar and Jin are liable under Section 20A of the Exchange Act, 15 U.S.C. § 78t-1, as explained in Count 2 below. Furthermore, to the extent that JA Solar is liable for insider trading, the Individual Defendants are liable as control persons under Section 20(a) of the Exchange Act, 15

U.S.C. § 78t(a), and as expressly permitted by Section 20A(b)(3) of the Exchange Act, 15 U.S.C. § 78t-1(b)(3), as explained in Count 3 below.

326. According to a Schedule 13E-3 filed by JA Solar with the SEC on July 16, 2018, the Merger “became effective” on that day. This is referred to by JA Solar as the “Effective Time.” JA Solar explained that as of the Effective Time, each share of its stock, including shares represented by ADS, was “cancelled and ceased to exist in exchange for the right to receive US\$1.51 (the ‘Per Share Merger Consideration’) and each ADS issued and outstanding immediately prior to the Effective Time (other than ADSs that represent Rollover Shares and Dissenting Shares) was cancelled in exchange for the right to receive US\$7.55 (the ‘Per ADS Merger Consideration’).”

327. Through the Merger, Defendants JA Solar and Jin purchased the shares that were sold by Class members through the Merger. As laid out in Section 2.04(a) of the Merger Agreement, which was approved at the Extraordinary Shareholders Meeting held on March 12, 2018, and which was signed by Defendants JA Solar, Jin, and Jia, the Parent Parties were responsible for depositing the Merger funds with a “paying agent” who would distribute the funds to the Class members for their JA Solar Securities that were purchased by the Parent Parties through the Merger. Section 2.04 of the Merger Agreement further describes how JA Solar (including in its surviving form following the Merger) and the Parent Parties would coordinate the paying agent’s exchange of the Merger consideration for JA Solar shares.

328. Furthermore, the Final Proxy Statement describes how “[a]t or prior to the Effective Time, the Parent Parties will deposit, or cause to be deposited, with a bank or trust company reasonably acceptable to the Company to act as paying agent, an amount in cash equal to the aggregate merger consideration to which all holders of Shares (including Shares

represented by ADSs but not including Excluded Shares) become entitled under the Merger Agreement.”

329. At the Effective Time, upon purchasing the shares thereafter, and all times during the Class Period, Defendants JA Solar and Jin were in possession of material non-public information about the relisting plan and the fact that JA Solar’s operations were far better than what Defendants described in the Proxy Materials. Furthermore, Defendants JA Solar and Jin were aware of the truth regarding each of the misstatements described herein and were aware of the material omissions detailed herein.

330. By virtue of possessing material non-public information, Defendants JA Solar and Jin had a duty to either disclose that information before trading on the basis of that information or abstain from trading. By trading while in possession of such information, they violated this duty and infringed upon the relationship of trust and confidence that they had with JA Solar’s investors.

331. Moreover, Cayman Islands corporations, like JA Solar, have a duty to provide investors with sufficient information to adequately understand the Merger that they are called upon to consider.

332. By failing to disclose the material non-public information prior to trading, Defendants JA Solar and Jin caused selling investors in JA Solar Securities to suffer economic losses. In addition, by trading with JA Solar Securityholders who were acting in reliance on the material misrepresentations made by JA Solar and Jin described throughout this Amended Complaint, they caused selling investors in JA Solar Securities to suffer economic loss. By purchasing the JA Solar Securities from Lead Plaintiffs and other Class members, Defendants

experienced an unlawful and unjust enrichment, since they were able to acquire these securities for less than their fair value.

X. NO SAFE HARBOR

333. The statutory safe harbor provided by the PSLRA for forward-looking statements under certain circumstances does not apply to any of the materially false and misleading statements and omissions alleged in this Complaint. As the Company acknowledged within the Proxy Materials, the Merger was a “going private” transaction under the SEC rules governing such transactions and, therefore, the statements made in connection with the Transaction are not subject to the PSLRA’s safe harbor. *See* 15 U.S.C.A. § 78u-5(b)(E). Furthermore, even if the statements were not covered by this exemption, the statements at issue would not be protected by the PSLRA’s safe harbor or the common law bespeaks caution doctrine for a variety of reasons, including the following.

334. First, Defendants’ statements and omissions alleged to be false and misleading relate to historical facts or existing conditions and, therefore, are not protected by the Safe Harbor. Second, to the extent any of the false and misleading statements alleged may be characterized as forward-looking, they were not adequately identified as “forward-looking” statements when made. Third, any purported forward-looking statements were not accompanied by meaningful cautionary language because risks that Defendants warned of had already come to pass, and any cautionary language did not mention important factors of similar significance to those actually realized. Fourth, to the extent that there were any forward-looking statements that were identified as such, Defendants are liable because, at the time each of those forward-looking statements was made, the speaker knew the statement was false when made.

XI. CLASS ACTION ALLEGATIONS

335. Lead Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all owners and former owners of JA Solar Securities who sold shares, and were damaged thereby, during the period from November 20, 2017 through July 16, 2018, inclusive, and all owners and former owners of JA Solar Securities who owned shares as of the Effective Time of the Merger and have tendered those shares for the Merger consideration, except as excluded below (the “Class”).

336. For the avoidance of doubt, the Class includes those who held JA Solar ADS on November 20, 2017 or purchased JA Solar ADS any time after November 20, 2017, redeemed those ADS for JA Solar common stock during the Class Period, and then tendered those shares for the Merger consideration, in accordance with the instructions that Defendants provided in the Merger on July 16, 2018.

337. Excluded from the Class are: (i) Defendants; (ii) members of the immediate family of the Individual Defendants and the directors and officers of JA Solar; (iii) any entity in which Defendants have a controlling interest; (iv) any person who was an officer or director of JA Solar during the Class Period; (v) any firm, trust, corporation, or other entity in which any Defendant has or had a controlling interest; and (vi) the legal representatives, affiliates, heirs, successors-in-interest, or assigns of any such excluded person in (i)-(v) of this paragraph.

338. The members of the Class are so numerous that joinder of all members is impracticable. During the Class Period, JA Solar had approximately 238 million ordinary shares outstanding. The number of outstanding ADS during the Class Period is not publicly available but the most recent number reported on Bloomberg shows 47.585 million ADS outstanding as of July 16, 2018. JA Solar’s ADS actively traded on the NASDAQ.

339. While the exact number of Class members is unknown to Lead Plaintiffs at this time, and can only be ascertained through appropriate discovery, it is likely that the proposed Class numbers in the thousands and is geographically widely dispersed. Record owners and other members of the Class may be identified from records maintained either by JA Solar or by the Depository of JA Solar's ADS and may be notified of the pendency of this action by mail, using a form of notice similar to that customarily used in securities class actions.

340. Lead Plaintiffs' claims are typical of the claims of the members of the Class. All members of the Class were similarly affected by Defendants' allegedly wrongful conduct in violation of the Exchange Act as complained of herein.

341. Lead Plaintiffs will fairly and adequately protect the interests of the members of the Class. Lead Plaintiffs have retained counsel competent and experienced in class and securities litigation.

342. There is a well-defined community of interest in the questions of law and fact involved in this case. Common questions of law and fact exist as to all members of the Class, and predominate over any questions solely affecting individual members of the Class. The questions of law and fact common to the Class include, without limit:

(a) whether the federal securities laws were violated by Defendants' acts and omissions as alleged herein;

(b) whether the statements made to the investing public during the Class Period contained material misrepresentations;

(c) whether Defendants' statements omitted material facts that Defendants had a duty to disclose;

(d) whether Defendants' statements omitted material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

(e) whether Defendants knew or recklessly disregarded that their statements were false and misleading;

(f) whether defendants acted with the intent to defraud class members regarding the true value of the JA Solar Securities;

(g) whether Defendants' fraudulent conduct depressed the price of JA Solar stock during the Class Period;

(h) whether JA Solar was in possession of material non-public information at the time of the Merger;

(i) whether Class members sold their securities contemporaneously with Defendants JA Solar's and Jin's purchase of those shares;

(j) whether the Individual Defendants were controlling persons of JA Solar;

(k) whether reliance may be presumed pursuant to the fraud-on-the-market doctrine and/or the presumption of reliance afforded by *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972); and

(l) whether and to what extent JA Solar Securityholders suffered losses due to Defendants' fraudulent conduct.

343. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because, among other things, joinder of all members of the Class is impracticable. Furthermore, because the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for

members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

XII. APPLICABILITY OF PRESUMPTION OF RELIANCE: FRAUD-ON-THE MARKET AND *AFFILIATED UTE* PRESUMPTIONS

344. Lead Plaintiffs and Class members are entitled to a presumption of reliance under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), because the claims asserted herein against Defendants are predicated upon omissions of material fact which there was a duty to disclose.

345. In the alternative, Lead Plaintiffs and Class members are entitled to a presumption of reliance on Defendants' material misrepresentations and omissions pursuant to the fraud-on-the-market theory because, among other things:

- (a) Defendants made public misrepresentations or failed to disclose material facts during the Class Period;
- (b) the omissions and misrepresentations were material;
- (c) JA Solar's ADS were actively traded on the NASDAQ, an informationally efficient market, under the ticker symbol "JASO," throughout the Class Period;
- (d) JA Solar's ADS traded at high volumes during the Class Period;
- (e) as the sponsor of its ADS, which are registered with the SEC, JA Solar filed periodic public reports with the SEC;
- (f) JA Solar communicated with public investors by means of established market communication mechanisms, including through regular dissemination of press releases on the major news wire services and through other wide-ranging public disclosures, such as communications with the financial press, securities analysts and other similar reporting services;

(g) the JA Solar Securities were covered by numerous securities analysts employed by major brokerage firms who wrote reports that were distributed to the sales force and certain customers of their respective firms, though many of these firms discontinued coverage after the announcement of the proposed Transaction. Each of these reports was publicly available and entered the public marketplace;

(h) the material misrepresentations and omissions alleged herein would tend to induce a reasonable investor to misjudge the value of the JA Solar Securities; and

(i) without knowledge of the misrepresented or omitted material facts alleged herein, Lead Plaintiffs and other members of the Class sold JA Solar Securities between the time Defendants misrepresented or failed to disclose material facts and the end of the Class Period, at which time the truth had not yet been revealed.

346. As a result of the foregoing, the market for JA Solar stock and ADS promptly digested current information regarding JA Solar from publicly available sources and reflected such information in JA Solar's stock price.

347. Lead Plaintiffs are not only entitled to a presumption that they relied on the market price when deciding whether to and how to vote their JA Solar Securities, whether to sell their JA Solar Securities, whether to hold those JA Solar Securities, or whether to seek appraisal; Lead Plaintiffs also in fact did rely on that market price when engaging in those activities.

348. Under these circumstances, all sellers of JA Solar stock and ADS during the Class Period suffered similar injury through their sale of JA Solar stock and ADS at artificially deflated prices and the presumption of reliance applies.

COUNT I

Violation of § 10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder Against All Defendants

349. Lead Plaintiffs repeat, incorporate, and reallege each and every allegation set forth above as if fully set forth herein.

350. This Count is asserted pursuant to Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder by the SEC against all Defendants.

351. Defendants, individually and in concert, directly and indirectly, by the use of the means or instrumentalities of interstate commerce, the mails, and/or the facilities of national securities exchanges, violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder by the SEC.

352. Defendants made false and misleading statements of material facts, omitted to state material facts which they had a duty to disclose (under both U.S. and Cayman Islands law) and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

353. Defendants made their false and misleading statements and omissions and engaged in the fraudulent activity described herein knowingly and intentionally or in such a reckless manner as to constitute willful deceit and fraud upon Lead Plaintiffs and the other members of the Class who sold JA Solar Securities.

354. Defendants intended to and did, as alleged herein, (i) deceive the investing public, including Lead Plaintiffs and members of the Class; (ii) artificially deflate and maintain the prices of JA Solar Securities; and (iii) cause Lead Plaintiffs and members of the Class to sell JA Solar Securities at artificially deflated prices.

355. The Defendants were individually and collectively responsible for making the false and misleading statements and omissions alleged herein and having engaged in a plan, scheme and course of conduct designed to deceive Lead Plaintiffs and members of the Class, by virtue of having made public statements and prepared, approved, signed and/or disseminated documents that contained untrue statements of material fact and/or omitted facts necessary to make the statements therein not misleading.

356. In ignorance of the false and misleading nature of Defendants' statements and omissions, and relying directly or indirectly on those statements or upon the integrity of the market price for JA Solar stock and ADS, Lead Plaintiffs and other members of the Class sold JA Solar Securities at artificially deflated prices during the Class Period. But for the fraud, Lead Plaintiffs and members of the Class would not have sold JA Solar Securities at such artificially deflated prices.

357. The members of the Class that sold their JA Solar Securities in the Merger would have avoided doing so either by voting against the Merger or objecting to and dissenting from the Merger under Cayman Islands law.

358. By selling the JA Solar Securities at these artificially deflated prices, the Class members suffered economic losses, which losses were a direct and proximate result of Defendants' fraudulent conduct.

359. By virtue of the foregoing, Defendants are liable to Lead Plaintiffs and members of the proposed Class for violations of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

COUNT II

Violation of § 20A of the Exchange Act Against Defendants JA Solar and Jin

360. Lead Plaintiffs repeat and reallege each of the allegations set forth above as if fully set forth herein.

361. This Count is asserted pursuant to Section 20A of the Exchange Act against Defendants JA Solar and Jin, on behalf of Lead Plaintiffs and all members of the Class who sold JA Solar Securities through the Merger and contemporaneously with JA Solar's and Jin's purchase of those securities in connection with the Merger that was completed on July 16, 2018.

362. As alleged herein, JA Solar and Jin bought the JA Solar Securities while knowingly in possession of material positive and non-public information concerning the Company. Among this information was the knowledge that the Proxy Materials understated the Company's value and that the relisting was already being planned and would be announced within days of the Merger being completed.

363. As set forth in the PSLRA certification (*see* Dkt. Nos. 10, Ex. A and 13, Ex. C), Lead Plaintiffs held many of their JA Solar Securities until the close of the Class Period. By doing so they sold those JA Solar Securities to JA Solar and Jin through the Merger. JA Solar's and Jin's purchase and Lead Plaintiffs' sale were contemporaneous within the meaning of Section 20A of the Exchange Act. Numerous members of the Class also sold JA Solar Securities contemporaneous with JA Solar's and Jin's purchase in connection with the Merger.

364. By virtue of possessing material non-public information, JA Solar and Jin had a duty to either disclose that information before trading on the basis of that information or abstain from trading. By trading while in possession of such information, they violated this duty and infringed upon the relationship of trust and confidence that they had with JA Solar's investors.

365. Accordingly, under Section 20A of the Exchange Act, JA Solar's and Jin's purchase of the JA Solar Securities while knowingly in possession of material, positive, and non-public information during the Class Period makes them liable to Lead Plaintiffs and the Class for all profits gained and losses avoided as a result of such stock sales.

366. JA Solar and Jin are required to account for all such stock sales and disgorge their profits or ill-gotten gains.

COUNT III

Violation of § 20(a) of the Exchange Act Against the Individual Defendants

367. Lead Plaintiffs repeat, incorporate, and reallege each of the allegations set forth above as if fully set forth herein.

368. This Count is asserted pursuant to Section 20(a) of the Exchange Act against the Individual Defendants.

369. As alleged above, JA Solar violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder by (i) making false and misleading statements and omitting material information in connection with the purchase and sale of the JA Solar Securities and (ii) participating in a fraudulent scheme and course of business or conduct throughout the Class Period. Also as alleged above, JA Solar violated Section 20A of the Exchange Act by purchasing the Class members' JA Solar Securities through the Merger and while in possession of material non-public information.

370. This fraudulent conduct was undertaken with scienter and the Company is charged with the knowledge and scienter of each of the Individual Defendants who knew of or acted with reckless disregard of the falsity of their statements and the fraudulent nature of its

scheme during the Class Period. Thus, JA Solar is primarily liable under Section 10(b) and Section 20(A) of the Exchange Act.

371. As set forth above, the Individual Defendants were controlling persons of JA Solar during the Class Period, due to their senior executive positions with the Company, positions on the Board and Special Committee, significant control over the Company's stock, and control over entities that did substantial business with the Company. Such positions meant that the Individual Defendants had direct involvement and influence over the Company's day-to-day operations and the Merger process.

372. By virtue of the foregoing, the Individual Defendants had the power to influence and control, and did influence and control, directly or indirectly, the decision-making of JA Solar, including the content of its public statements with respect to, among other things, the Merger.

373. The Individual Defendants acted knowingly and intentionally, or in such a reckless manner as to constitute willful fraud and deceit upon Lead Plaintiffs and the other members of the Class who sold JA Solar Securities during the Class Period.

374. In ignorance of the false and misleading nature of Defendants' statements and omissions, and relying directly or indirectly on those statements or upon the integrity of the market price for JA Solar Securities, Lead Plaintiffs and other members of the Class sold JA Solar Securities at artificially deflated prices during the Class Period. But for the fraud, Lead Plaintiffs and members of the Class would not have sold JA Solar Securities at such artificially deflated prices. By selling the JA Solar Securities at these artificially deflated prices the Class members suffered economic losses, which losses were a direct and proximate result of Defendants' fraudulent conduct.

375. By reason of the foregoing, the Individual Defendants are liable to Lead Plaintiffs and the members of the Class as controlling persons of JA Solar in violation of Section 20(a) of the Exchange Act.

XIII. PRAYER FOR RELIEF

376. WHEREFORE, Lead Plaintiff respectfully prays for judgment against the Defendants as follows:

(a) Determining that this action is a proper class action maintained under Rule 23 of the Federal Rules of Civil Procedure, certifying Lead Plaintiffs as class representatives, and appointing Pomerantz LLP and Labaton Sucharow LLP as class counsel pursuant to Rule 23(g);

(b) Determining and declaring that Defendants violated the Exchange Act by reason of the acts and omissions alleged herein;

(c) Awarding Lead Plaintiffs and the Class compensatory damages against all Defendants, jointly and severally, in an amount to be proven at trial together with interest thereon;

(d) Awarding Lead Plaintiffs and the Class their reasonable costs and expenses incurred in this action, including but not limited to attorneys' fees and costs incurred by consulting and testifying expert witnesses; and

(e) Granting such other and further relief as the Court deems just and proper.

XIV. DEMAND FOR JURY TRIAL

377. Lead Plaintiffs demand a trial by jury of all issues so triable.

Dated: June 14, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2019, a copy of the foregoing was filed electronically via the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties whose counsel has appeared in this action, by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Michael Grunfeld
Michael Grunfeld

D

**Local Rules of the
United States District Courts for the
Southern and Eastern Districts of New York**

Effective October 29, 2018

with amendments to S.D.N.Y. Rule for Division of Business 19

**Adopted by the Board of Judges of the
Eastern District of New York and the
Southern District of New York
Approved by the Judicial Council of the Second Circuit**

**Local Rules of the
United States District Courts for the
Southern and Eastern Districts of New York**

Table of Contents

	<u>Page</u>
LOCAL CIVIL RULES	
1.1. Application of Rules	6
1.2. Night Depository	6
1.3. Admission to the Bar.....	6
1.4. Withdrawal or Displacement of Attorney of Record	11
1.5. Discipline of Attorneys	12
1.6. Duty of Attorneys in Related Cases	18
1.7. Fees of Court Clerks and Reporters.....	18
1.8. Photographs, Radio, Recordings, Television	19
1.9. Acceptable Substitutes for Affidavits [formerly Local Civil Rule 1.10].....	20
5.1. Filing of Discovery Materials	20
5.2. Electronic Service and Filing of Documents.....	20
5.3. Service by Overnight Delivery	21
6.1. Service and Filing of Motion Papers	22
6.2. Orders on Motions	23
6.3. Motions for Reconsideration or Reargument.....	24
6.4. Computation of Time.....	24
7.1. Motion Papers.	25
7.1.1. Disclosure Statement	26
7.2. Authorities to be Provided to Pro Se Litigants	26
11.1. Form of Pleadings, Motions, and Other Papers	27
12.1. Notice to Pro Se Litigant Who Opposes a Rule 12 Motion Supported by Matters Outside the Pleadings.....	28
16.1. Exemptions from Mandatory Scheduling Order	29
16.2. Entry and Modification of Mandatory Scheduling Orders by Magistrate Judges	29
23.1. Fees in Class Action and Shareholder Derivative Actions	30
26.1. Address of Party and Original Owner of Claim to Be Furnished	30
26.2. Assertion of Claim of Privilege.....	31
26.3. Uniform Definitions in Discovery Requests	33
26.4. Cooperation Among Counsel in Discovery [formerly Local Civil Rules 26.5 and 26.7]	35
26.5. Form Discovery Requests [formerly Local Civil Rule 26.6].....	35
30.1. Counsel Fees on Taking Depositions More Than 100 Miles From Courthouse	36
30.2. Telephonic and Other Remote Depositions [formerly Local Civil Rule 30.3].....	36
30.3. Persons Attending Depositions [formerly Local Civil Rule 30.4].....	36
30.4. Conferences Between Deponent and Defending Attorney [formerly Local Civil Rule 30.6].....	37
33.1. [Local Civil Rule Intentionally Omitted].....	37

33.2.	Standard Discovery in Prisoner Pro Se Actions.....	37
33.3.	Interrogatories (Southern District Only).....	39
37.1.	Verbatim Quotation of Discovery Materials	40
37.2.	Mode of Raising Discovery Disputes With the Court (Southern District Only)	40
37.3.	Mode of Raising Discovery and Other Non-Dispositive Pretrial Disputes With the Court (Eastern District Only).....	41
39.1.	Custody of Trial and Hearing Exhibits.....	43
39.2.	Order of Summation	43
47.1.	Assessment of Jury Costs	43
53.1.	Masters.....	44
54.1.	Taxable Costs	45
54.2.	Security for Costs.....	49
54.3.	Entering Satisfaction of Money Judgment.....	49
55.1.	Certificate of Default.....	50
55.2.	Default Judgment.....	51
56.1.	Statements of Material Facts on Motion for Summary Judgment.....	52
56.2.	Notice to Pro Se Litigant Who Opposes a Summary Judgment	52
58.1.	Remand by an Appellate Court.....	54
65.1.1.	Sureties.....	54
67.1.	Order for Deposit in Interest-Bearing Account.....	56
72.1.	Powers of Magistrate Judges	57
72.2.	Reference to Magistrate Judge (Eastern District Only).....	58
73.1.	Consent Jurisdiction Procedure.....	58
77.1.	Submission of Orders, Judgments and Decrees.....	59
81.1.	Removal of Cases from State Courts.....	59
83.1.	Transfer of Cases to Another District.....	60
83.2.	Settlement of Actions by or on Behalf of Infants or Incompetents, Wrongful Death Actions, and Actions for Conscious Pain and Suffering of the Decedent.	60
83.3.	Habeas Corpus	61
83.4.	Publication of Advertisements [formerly Local Civil Rule 83.6]	62
83.5.	Notice of Sale [formerly Local Civil Rule 83.7].....	62
83.6.	Contempt Proceedings in Civil Cases [formerly Local Civil Rule 83.9]	64
83.7.	Court-Annexed Arbitration (Eastern District Only) [formerly Local Civil Rule 83.10].....	65
83.8.	Court-Annexed Mediation (Eastern District Only) [formerly Local Civil Rule 83.11]	72
83.9.	Alternative Dispute Resolution (Southern District Only) [formerly Local Civil Rule 83.12]...79	
83.10.	Plan for Certain §1983 Cases Against the City of New York (Southern District Only)	81

LOCAL ADMIRALTY AND MARITIME RULES

A.1.	Application of Rules	87
B.1.	Affidavit That Defendant Is Not Found Within the District.....	87

B.2.	Notice of Attachment.....	87
C.1.	Intangible Property	87
C.2.	Publication of Notice of Action and Arrest; Sale.....	88
C.3.	Notice Required for Default Judgment in Action In Rem	89
D.1.	Return Date in Possessory, Petitory, and Partition Actions.....	89
E.1.	Adversary Hearing Following Arrest, Attachment or Garnishment	90
E.2.	Intervenors' Claims	90
E.3.	Claims by Suppliers for Payment of Charges.....	91
E.4.	Preservation of Property	91

LOCAL CRIMINAL RULES

1.1.	Application of Rules	92
1.2.	Notice of Appearance	93
12.4.	Disclosure Statement.....	93
16.1.	Conference of Counsel	93
23.1.	Free Press-Fair Trial Directives	94
34.1.	Post-Trial Motions.....	97
45.1.	Computation of Time	98
47.1.	Applications for Ex Parte Orders.....	98
49.1.	Service and Filing of Motion Papers	99
58.1.	Petty Offenses--Collateral and Appearance	99
59.1.	Powers of Magistrate Judges	100

LOCAL PATENT RULES

1.	Application of Rules	98
2.	Initial Scheduling Conference	98
3.	Certification of Disclosures	98
4.	Admissibility of Disclosures	99
5.	Discovery Objections Based on Local Patent Rules.....	99
6.	Disclosure of Asserted Claims and Infringement Contentions	99
7.	Invalidity Contentions	99
8.	Disclosure Requirements in Patent Cases Initiated by Declaratory Judgment	100
9.	Duty to Supplement Contentions.....	100
10.	Opinion of Counsel	100
11.	Joint Claim Terms Chart	101
12.	Claim Constructions Briefing	101

RULES FOR THE DIVISION OF BUSINESS AMONG DISTRICT JUDGES

SOUTHERN DISTRICT 105

1. Individual Assignment System 105

2. Assignment Committee 105

3. Part I 106

4. Civil Actions or Proceedings (Filing and Assignment) 107

5. Criminal Actions or Proceeding (Filing and Assignment) 108

6. Criminal Proceedings (Filing and Assignment) 109

7. Cases Certified for Prompt Trial or Disposition 110

8. Criminal Motions 111

9. Petitions for Collateral Relief from Convictions 111

10. Assignments to New Judges 112

11. Assignments to Senior Judges 112

12. Assignments to Visiting Judges 113

13. Related Cases 113

14. Transfer of Cases by Consent 116

15. Transfers from Senior Judges. 116

16. Transfer Because of Disqualification, etc 116

17. Transfer of Cases Because of a Judges’s Death, Resignation, Prolonged Illness,
Disability, Unavoidable Absence, or Excessive Backlog 116

18. Designation of White Plains Cases 117

19. Reassignment of Cases to/from White Plains 118

20. Removed Actions and Bankruptcy Matters 118

21. Social Security Actions and *Habeas Corpus* Petitions 118

22. Filing at Either Courthouse 119

EASTERN DISTRICT 120

50.1 Categories and Classification of Cases; Information on Cases and Parties 120

50.2 Assignment of Cases 122

50.3.1 Related Civil Cases 125

50.3.2 Related Criminal Cases 127

50.4 Reassignment of Cases 129

50.5 Miscellaneous Judge 129

50.6 Calendars 130

50.7 Conference 131

**JOINT LOCAL CIVIL RULES
UNITED STATES DISTRICT COURTS FOR THE
SOUTHERN AND EASTERN DISTRICTS OF NEW YORK**

Local Civil Rule 1.1. Application of Rules

These Local Civil Rules apply in all civil actions and proceedings governed by the Federal Rules of Civil Procedure.

COMMITTEE NOTE

The Committee recommends that Local Civil Rule 1.1 be reworded in order to make clear that the Local Civil Rules apply in all civil actions and proceedings governed by the Federal Rules of Civil Procedure.

Local Civil Rule 1.2. Night Depository

A night depository with an automatic date stamp shall be maintained by the Clerk of the Southern District in the Pearl Street Courthouse and by the Clerk of the Eastern District in the Brooklyn Courthouse. After regular business hours, papers for the District Court only may be deposited in the night depository. Such papers will be considered as having been filed in the District Court as of the date stamped thereon, which shall be deemed presumptively correct.

COMMITTEE NOTE

The Committee believes that it is unnecessary to have a Local Rule dealing with the hours of opening of the Clerk's Office, which are best set forth in the websites of the respective Courts. Because the Advisory Committee note to the 2009 amendment to Fed. R. Civ. P. 6(a)(4) indicates that a local rule is necessary to authorize the use of night depositories, the Joint Committee recommends the retention of the portion of Local Civil Rule 1.2 dealing with night depositories.

Local Civil Rule 1.3. Admission to the Bar

(a) A member in good standing of the bar of the State of New York, or a member in good standing of the bar of the United States District Court in Connecticut or Vermont and of the bar of the State in which such district court is located, provided such district court by its rule extends a corresponding privilege to members of the bar of this Court, may be admitted to practice in this Court

on compliance with the following provisions:

Each applicant for admission is required to file an application for admission in electronic form and pay the required fee through the Public Access to Court Electronic Records (PACER) system at www.pacer.gov. This one application will be utilized both to admit and then to provide the applicant to the bar of this Court with electronic filing privileges for use on the Court's Electronic Case Filing (ECF) system. The applicant shall adhere to all applicable rules of admission.

The application for admission shall state:

- (1) applicant's residence and office address;
- (2) the date(s) when, and courts where, admitted;
- (3) applicant's legal training and experience;
- (4) whether applicant has ever been held in contempt of court, and, if so, the nature of the contempt and the final disposition thereof;
- (5) whether applicant has ever been censured, suspended, disbarred or denied admission or readmission by any court, and, if so, the facts and circumstances connected therewith;
- (6) that applicant has read and is familiar with
 - (A) the provisions of the Judicial Code (Title 28, U.S.C.) which pertain to the jurisdiction of, and practice in, the United States District Courts;
 - (B) the Federal Rules of Civil Procedure;
 - (C) the Federal Rules of Criminal Procedure;
 - (D) the Federal Rules of Evidence;
 - (E) the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York; and
 - (F) the New York State Rules of Professional Conduct as adopted from time

to time by the Appellate Divisions of the State of New York; and

(7) that applicant will faithfully adhere to all rules applicable to applicant's conduct in connection with any activities in this Court.

The application shall be accompanied by a certificate of the clerk of the court for each of the states in which the applicant is a member of the bar, which has been issued within thirty (30) days of filing and states that the applicant is a member in good standing of the bar of that state court. The application shall also be accompanied by an affidavit of an attorney of this Court who has known the applicant for at least one year, stating when the affiant was admitted to practice in this Court, how long and under what circumstances the attorney has known the applicant, and what the attorney knows of the applicant's character and experience at the bar.

Such application shall be placed at the head of the calendar and, on the call thereof, the attorney whose affidavit accompanied the application shall, for the Eastern District of New York, and may, and is encouraged to, for the Southern District of New York, personally move the admission of the applicant. If the application is granted, the applicant shall take the oath of office and sign the roll of attorneys.

A member of the bar of the state of New York, Connecticut, or Vermont who has been admitted to the bar of this Court pursuant to this subsection and who thereafter voluntarily resigns from membership in the bar of the state pursuant to which he was admitted to the bar of this Court, and who does not within 30 days of that voluntary resignation file an affidavit with the Clerk of this Court indicating that such person remains eligible to be admitted to the bar of this Court pursuant to other provisions of this subsection (such as because he is still a member of the bar of another eligible state and, where applicable, a corresponding district court), shall be deemed to have voluntarily resigned from the bar of this Court as of the same date the member resigned from the bar of the underlying state, provided that such resignation shall not be deemed to deprive this Court of jurisdiction to impose discipline on this person, pursuant to Rule 1.5 *infra*, for conduct preceding the date of such resignation.

(b) A member in good standing of the bar of either the Southern or Eastern District of New York may be admitted to the bar of the other district without formal application

(1) upon electronically filing through the PACER website a certificate of the Clerk of the United States District Court for the district in which the applicant is a member of the bar, which has been issued within thirty (30) days of filing and states that the applicant is a member in good standing of the bar of that Court;

(2) an affidavit by the applicant stating

(A) whether the applicant has ever been convicted of a felony,

(B) whether the applicant has ever been censured, suspended, disbarred or denied admission or readmission by any court,

(C) whether there are any disciplinary proceedings presently against the applicant and

(D) the facts and circumstances surrounding any affirmative responses to (a) through (c); and

(3) upon taking the oath of office, signing the roll of attorneys of that district, and paying the fee required in that district. Each district retains the right to deny admission based upon the content of the affidavit in response to item (2).

(c) A member in good standing of the bar of any state or of any United States District Court may be permitted to argue or try a particular case in whole or in part as counsel or advocate, upon motion as described below.

After requesting pro hac vice electronic filing privileges through the PACER website, applicants shall electronically file a motion for admission pro hac vice on the court's ECF system and pay the required fee.

The motion must be accompanied by a certificate of the court for each of the states in which the

applicant is a member of the bar, which has been issued within thirty (30) days of filing and states that the applicant is a member in good standing of the bar of that state court, and an affidavit by the applicant stating

(1) whether the applicant has ever been convicted of a felony,

(2) whether the applicant has ever been censured, suspended, disbarred or denied

admission or readmission by any court,

(3) whether there are any disciplinary proceedings presently against the applicant and

(4) the facts and circumstances surrounding any affirmative responses to (a) through

(c);

Attorneys appearing for the Department of Justice may appear before the Court without requesting pro hac vice admission. Such attorneys shall request electronic filing privileges through the PACER website. Attorneys appearing for other federal agencies must move for pro hac vice admission but the fee requirement is waived and the certificate(s) of good standing may have been issued within one year of filing. Only an attorney who has been so admitted or who is a member of the bar of this Court may enter appearances for parties, sign stipulations or receive payments upon judgments, decrees or orders.

(d) If an attorney who is a member of the bar of this Court, or who has been authorized to appear in a case in this Court, changes his or her residence or office address, the attorney shall immediately notify the Clerk of the Court, in addition to serving and filing a notice of change of address in each pending case in which the attorney has appeared.

2011 COMMITTEE NOTE

The Committee recommends that Local Civil Rule 1.3(c) be amended to clarify that a motion for admission pro hac vice may be made by the applicant, and does not need to be made by a member of the Court's bar. This is a logical corollary of the fact that the Southern and Eastern Districts no longer require that attorneys admitted pro hac vice be associated with local counsel who are members of the Court's bar.

2013 COMMITTEE NOTE

The amendments to Local Civil Rule 1.3(c) have two purposes. First, to conform the rule to local practice, i.e., to reflect the required fee for pro hac vice admission and the practice, mandated by 28 U.S.C. ' 517, of not requiring Department of Justice attorneys, who are not members of the bar of this Court, to be admitted pro hac vice before appearing. The second purpose of the rule is to make pro hac vice admission less onerous for other federal agency attorneys by waiving the fee requirement and easing the certificate of good standing requirement. It was the considered judgment of the Court that pro hac vice admission remains necessary to ensure recourse in the event of any violation of the rules of court.

2016 COMMITTEE NOTE

A candidate for admission to the bar must respond to inquiries on the application regarding the candidate's criminal and disciplinary history. The amendment requires that the same information be supplied in two circumstances not previously covered by the Rule: (1) an application for admission pro hac vice; and (2) the admission to a second district (whether the Southern or Eastern District of New York) upon the filing of a certificate of good standing from the first district (whether the Southern or Eastern District of New York) within 30 days of admission in the first district. In the latter circumstance, the amendment also provides that the second district may deny admission based upon the disclosed criminal and disciplinary history.

2018 COMMITTEE NOTE

Local Rule 1.3 is revised solely to reflect the new process for electronically filing an application for admission and obtaining electronic filing privileges.

Local Civil Rule 1.4. Withdrawal or Displacement of Attorney of Record

An attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the Court and may not withdraw from a case without leave of the Court granted by order. Such an order may be granted only upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar, and whether or not the attorney is asserting a retaining or charging lien. All applications to withdraw must be served upon the client and (unless excused by the Court) upon all other parties.

COMMITTEE NOTE

The Committee recommends that Local Civil Rule 1.4 be amended to require that the affidavit in support of a motion to withdraw state whether or not a retaining or charging lien is being asserted, and to clarify that all applications to withdraw must be served upon the client and (unless excused by the Court) upon all other parties. This is not meant to preclude the Court from permitting the reasons for withdrawal to be stated in camera and under seal in an appropriate case. It is also not meant to preclude

substitution of counsel by a stipulation which has been signed by counsel, the counsel's client, and all other parties, and which has been so ordered by the Court.

Local Civil Rule 1.5. Discipline of Attorneys

(a) Committee on Grievances. The Chief Judge shall appoint a committee of the Board of Judges known as the Committee on Grievances, which under the direction of the Chief Judge shall have charge of all matters relating to the discipline of attorneys. The Chief Judge shall appoint a panel of attorneys who are members of the bar of this Court to advise or assist the Committee on Grievances. At the direction of the Committee on Grievances or its chair, members of this panel of attorneys may investigate complaints, may prepare and support statements of charges, or may serve as members of hearing panels.

(b) Grounds for Discipline or Other Relief. Discipline or other relief, of the types set forth in paragraph (c) below, may be imposed, by the Committee on Grievances, after notice and opportunity to respond as set forth in paragraph (d) below, if any of the following grounds is found by clear and convincing evidence:

(1) Any member of the bar of this Court has been convicted of a felony or misdemeanor in any federal court, or in a court of any state or territory.

(2) Any member of the bar of this Court has been disciplined by any federal court or by a court of any state or territory.

(3) Any member of the bar of this Court has resigned from the bar of any federal court or of a court of any state or territory while an investigation into allegations of misconduct by the attorney was pending.

(4) Any member of the bar of this Court has an infirmity which prevents the attorney from engaging in the practice of law.

(5) In connection with activities in this Court, any attorney is found to have engaged

in conduct violative of the New York State Rules of Professional Conduct as adopted from time to time by the Appellate Divisions of the State of New York. In interpreting the Code, in the absence of binding authority from the United States Supreme Court or the United States Court of Appeals for the Second Circuit, this Court, in the interests of comity and predictability, will give due regard to decisions of the New York Court of Appeals and other New York State courts, absent significant federal interests.

(6) Any attorney not a member of the bar of this Court has appeared at the bar of this Court without permission to do so.

(c) Types of Discipline or Other Relief.

(1) In the case of an attorney admitted to the bar of this Court, discipline imposed pursuant to paragraph (b)(1), (b)(2), (b)(3), or (b)(5) above may consist of a letter of reprimand or admonition, censure, suspension, or an order striking the name of the attorney from the roll of attorneys admitted to the bar of this Court.

(2) In the case of an attorney not admitted to the bar of this Court, discipline imposed pursuant to paragraph (b)(5) or (b)(6) above may consist of a letter of reprimand or admonition, censure, or an order precluding the attorney from again appearing at the bar of this Court.

(3) Relief required pursuant to paragraph (b)(4) above shall consist of suspending the attorney from practice before this Court.

(d) Procedure.

(1) If it appears that there exists a ground for discipline set forth in paragraph (b)(1), (b)(2), or (b)(3), notice thereof shall be served by the Committee on Grievances upon the attorney concerned by first class mail, directed to the address of the attorney as shown on the rolls of this Court and to the last known address of the attorney (if any) as shown in the complaint and any materials submitted therewith. Service shall be deemed complete upon mailing in

accordance with the provisions of this paragraph.

In all cases in which any federal court or a court of any state or territory has entered an order disbaring or censuring an attorney or suspending the attorney from practice, whether or not on consent, the notice shall be served together with an order by the Clerk of this Court, to become effective twenty-four days after the date of service upon the attorney, disbaring or censuring the attorney or suspending the attorney from practice in this Court upon terms and conditions comparable to those set forth by the other court of record. In all cases in which an attorney has resigned from the bar of any federal court or of a court of any state or territory while an investigation into allegations of misconduct by the attorney was pending, even if the attorney remains admitted to the bar of any other court, the notice shall be served together with an order entered by the Clerk for this Court, to become effective twenty-four days after the date of service upon the attorney, deeming the attorney to have resigned from the bar of this Court. Within twenty days of the date of service of either order, the attorney may file a motion for modification or revocation of the order. Any such motion shall set forth with specificity the facts and principles relied upon by the attorney as showing cause why a different disposition should be ordered by this Court. The timely filing of such a motion will stay the effectiveness of the order until further order by this Court. If good cause is shown to hold an evidentiary hearing, the Committee on Grievances may direct such a hearing pursuant to paragraph (d)(4) below. If good cause is not shown to hold an evidentiary hearing, the Committee on Grievances may proceed to impose discipline or to take such other action as justice and this rule may require. If an evidentiary hearing is held, the Committee may direct such interim relief pending the hearing as justice may require.

In all other cases, the notice shall be served together with an order by the Committee on Grievances directing the attorney to show cause in writing why discipline should not be imposed.

If the attorney fails to respond in writing to the order to show cause, or if the response fails to show good cause to hold an evidentiary hearing, the Committee on Grievances may proceed to impose discipline or to take such other action as justice and this rule may require. If good cause is shown to hold an evidentiary hearing, the Committee on Grievances may direct such a hearing pursuant to paragraph (d)(4) below. If an evidentiary hearing is held, the Committee may direct such interim relief pending the hearing as justice may require.

(2) In the case of a ground for discipline set forth in paragraph (b)(2) or (b)(3) above, discipline may be imposed unless the attorney concerned establishes by clear and convincing evidence (i) that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that this Court could not consistent with its duty accept as final the conclusion of the other court, or (ii) that the procedure resulting in the investigation or discipline of the attorney by the other court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process, or (iii) that the imposition of discipline by this Court would result in grave injustice.

(3) Complaints in writing alleging any ground for discipline or other relief set forth in paragraph (b) above shall be directed to the Chief Judge, who shall refer such complaints to the Committee on Grievances. The Committee on Grievances, by its chair, may designate an attorney, who may be selected from the panel of attorneys established pursuant to paragraph (a) above, to investigate the complaint, if it deems investigation necessary or warranted, and to prepare a statement of charges, if the Committee deems that necessary or warranted. Complaints, and any files based on them, shall be treated as confidential unless otherwise ordered by the Chief Judge for good cause shown.

(4) A statement of charges alleging a ground for discipline or other relief set forth in paragraph (b)(4), (b)(5), or (b)(6) shall be served upon the attorney concerned by certified mail, return receipt requested, directed to the address of the attorney as shown on the rolls of this Court and to the last known address of the attorney (if any) as shown in the complaint and any

materials submitted therewith, together with an order by the Committee on Grievances directing the attorney to show cause in writing why discipline or other relief should not be imposed. Upon the respondent attorney's answer to the charges the matter will be designated by the Committee on Grievances for a prompt evidentiary hearing before a Magistrate Judge of the Court or before a panel of three attorneys, who may be selected from the panel of attorneys established pursuant to paragraph (a) above. The Magistrate Judge or panel of attorneys conducting the hearing may grant such pre-hearing discovery as they determine to be necessary, shall hear witnesses called by the attorney supporting the charges and by the respondent attorney, and may consider such other evidence included in the record of the hearing as they deem relevant and material. The Magistrate Judge or panel of attorneys conducting the hearing shall report their findings and recommendations in writing to the Committee on Grievances and shall serve them upon the respondent attorney and the attorney supporting the charges. After affording the respondent attorney and the attorney supporting the charges an opportunity to respond in writing to such report, or if no timely answer is made by the respondent attorney, or if the Committee on Grievances determines that the answer raises no issue requiring a hearing, the Committee on Grievances may proceed to impose discipline or to take such action as justice and this rule may require.

(e) Reinstatement. Any attorney who has been suspended or precluded from appearing in this Court or whose name has been struck from the roll of the members of the bar of this Court may apply in writing to the Chief Judge, for good cause shown, for the lifting of the suspension or preclusion or for reinstatement to the rolls. The Chief Judge shall refer such application to the Committee on Grievances. The Committee on Grievances may refer the application to a Magistrate Judge or hearing panel of attorneys (who may be the same Magistrate Judge or panel of attorneys who previously heard the matter) for findings and recommendations, or may act

upon the application without making such a referral. Absent extraordinary circumstances, no such application will be granted unless the attorney seeking reinstatement meets the requirements for admission set forth in Local Civil Rule 1.3(a).

(f) Remedies for Misconduct. The remedies provided by this rule are in addition to the remedies available to individual District Judges and Magistrate Judges under applicable law with respect to lawyers appearing before them. Individual District Judges and Magistrate Judges may also refer any matter to the Chief Judge for referral to the Committee on Grievances to consider the imposition of discipline or other relief pursuant to this rule.

(g) Notice to Other Courts. When an attorney is known to be admitted to practice in the court of any state or territory, or in any other federal court, and has been convicted of any crime or disbarred, precluded from appearing, suspended or censured in this court, the Clerk shall send to such other court or courts a certified or electronic copy of the judgment of conviction or order of disbarment, preclusion, suspension or censure, a certified or electronic copy of the Court's opinion, if any, and a statement of the attorney's last known office and residence address.

(h) Duty of Attorney to Report Discipline.

(1) In all cases in which any federal, state or territorial court, agency or tribunal has entered an order disbaring or censuring an attorney admitted to the bar of this Court, or suspending the attorney from practice, whether or not on consent, the attorney shall deliver a copy of said order to the Clerk of this Court within fourteen days after the entry of the order.

(2) In all cases in which any member of the bar of this Court has resigned from the bar of any federal, state or territorial court, agency or tribunal while an investigation into allegations of misconduct against the attorney was pending, the attorney shall report such resignation to the Clerk of this Court within fourteen days after the submission of the resignation.

(3) In all cases in which this Court has entered an order disbaring or censuring an

attorney, or suspending the attorney from practice, whether or not on consent, the attorney shall deliver a copy of said order within fourteen days after the entry of the order to the clerk of each federal, state or territorial court, agency and tribunal in which such attorney has been admitted to practice.

(4) Any failure of an attorney to comply with the requirements of this Local Civil Rule 1.5(h) shall constitute a basis for discipline of said attorney pursuant to Local Civil Rule 1.5(c).

COMMITTEE NOTE

Because Local Civil Rule 1.5 has been the subject of a recent review by the Courts, the Committee has not proposed any substantive changes therein. An amendment is recommended to Local Civil Rule 1.5(g) to recognize the fact that today the Clerks of the Courts often give notice of disciplinary actions to other courts by electronic means.

Local Civil Rule 1.6. Duty of Attorneys in Related Cases

(a) It shall be the continuing duty of each attorney appearing in any civil or criminal case to bring promptly to the attention of the Court all facts which said attorney believes are relevant to a determination that said case and one or more pending civil or criminal cases should be heard by the same Judge, in order to avoid unnecessary duplication of judicial effort. As soon as the attorney becomes aware of such relationship, said attorney shall notify the Judges to whom the cases have been assigned.

(b) If counsel fails to comply with Local Civil Rule 1.6(a), the Court may assess reasonable costs directly against counsel whose action has obstructed the effective administration of the Court's business.

COMMITTEE NOTE

The Committee recommends that Local Civil Rule 1.6(a) be amended to provide simply that notification must be given to the Judges to whom the case has been assigned.

Local Civil Rule 1.7. Fees of Court Clerks and Reporters

(a) The Clerk shall not be required to render any service for which a fee is prescribed by statute or by the Judicial Conference of the United States unless the fee for the particular service is paid to the

Clerk in advance or the Court orders otherwise.

(b) Every attorney appearing in any proceeding who orders a transcript of any trial, hearing, or any other proceeding, is obligated to pay the cost thereof to the court reporters of the Court upon rendition of the invoice unless at the time of such order, the attorney, in writing, advises the court reporter that only the client is obligated to pay.

COMMITTEE NOTE

Local Civil Rule 1.7(a) serves a useful purpose in light of 28 U.S.C. § 1914(c), which provides that “[e]ach district court by rule or standing order may require advance payment of fees.”

Local Civil Rule 1.8. Photographs, Radio, Recordings, Television

Unless authorized to do so by an administrative order of each respective Court, no one other than Court officials engaged in the conduct of Court business shall (a) bring any camera, transmitter, receiver, recording device, cellular telephone, computer or other electronic device into any courthouse; or (b) make an audio or video recording of any proceeding or any communication with the Court, an employee of the Court or any person acting at the direction of the Court, including a mediator.

COMMITTEE NOTE

The recommended revised language of Local Civil Rule 1.8, which the Committee understands has been worked out by the respective Courts, recognizes that both Courts have adopted administrative orders dealing with the extent to which cameras, recording devices, and other electronic devices will be permitted to be brought into their respective courthouses. The environs of the courthouses are excluded from the proposed local rule in accordance with the spirit of the settlement agreement so ordered by the Court in Antonio Musumeci v. United States Department of Homeland Security, 10 Civ. 3370 (RJH).

2016 COMMITTEE NOTE

The Rule has long restricted the act of bringing certain devices into any courthouse without authorization. The amendment now prohibits the making of any audio or video recording of a proceeding or communication with the Court, even if the device was brought into the courthouse with authorization. The amendment encompasses activities regardless of location, including the recording from a remote location of a telephone conversation with a Judge, a member of a Judge’s staff or the Court’s staff or other persons acting at the Court’s direction, including a mediator.

Local Civil Rule 1.9. Acceptable Substitutes for Affidavits [formerly Local Civil Rule 1.10]

In situations in which any Local Rule provides for an affidavit or a verified statement, the following are acceptable substitutes: (a) a statement subscribed under penalty of perjury as prescribed in 28 U.S.C. § 1746; or (b) if accepted by the Court as a substitute for an affidavit or a verified statement, (1) a statement signed by an attorney or by a party not represented by an attorney pursuant to Federal Rule of Civil Procedure 11, or (2) an oral representation on the record in open court.

COMMITTEE NOTE

The Committee believes that this Local Civil Rule continues to serve a useful function, particularly in pro se cases, and therefore recommends its retention.

Local Civil Rule 5.1. Filing of Discovery Materials

A party seeking or opposing relief under Fed. R. Civ. P. 26 through 37 inclusive, or making or opposing any other motion or application, shall quote or attach only those portions of the depositions, interrogatories, requests for documents, requests for admissions, or other discovery or disclosure materials, together with the responses and objections thereto, that are the subject of the discovery motion or application, or that are cited in papers submitted in connection with any other motion or application. See also Civil Local Rule 37.1.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 5.1 continues to serve a very useful purpose by making clear that only those discovery materials that are necessary to the decisional process should be filed in connection with a motion or application. The Committee recommends that language be added to confirm that this principle applies to parties opposing motions as well as to those making motions.

Local Civil Rule 5.2. Electronic Service and Filing of Documents

(a) Parties serving and filing papers shall follow the instructions regarding Electronic Case Filing (ECF) published on the website of each respective Court. A paper served and filed by electronic means in accordance with such instructions is, for purposes of Fed. R. Civ. P. 5, served and filed in

compliance with the Local Civil Rules of the Southern and Eastern Districts of New York.

(b) Subject to the instructions regarding ECF published on the website of each respective Court and any pertinent Individual Judge's Practices, letter-motions permitted by Local Civil Rule 7.1(d) and letters addressed to the Court (but not letters between the parties) may be filed via ECF.

(c) Parties have an obligation to review the Court's actual order, decree, or judgment (on ECF), which controls, and should not rely on the description on the docket or in the ECF Notice of Electronic Filing (NEF).

COMMITTEE NOTE

The substance of the last sentence of Local Civil Rule 5.3(b) has been moved to this local rule, so as to consolidate in this local rule everything in the Local Civil Rules dealing with the subject of ECF. The local rule has been revised to refer to the instructions regarding ECF on the website of each respective Court, because the instructions change with sufficient frequency to make it unfeasible to incorporate them into the local rules.

2013 COMMITTEE NOTE

Recommended new Local Civil Rule 5.2(b) would authorize the filing of letter-motions and letters to the Court by ECF. ECF filing of letters to the Court is already required by the ECF instructions in the Eastern District of New York, and in the Southern District of New York this Local Rule amendment would authorize (but not require) ECF filing of letters to the Court that generally now are accepted by judges in the Southern District of New York. Allowing such letters to be filed will improve the record on appeal in cases where an appeal is taken, and will allow the press and the public to follow more fully what is happening in pending cases. Recommended Local Civil Rule 5.2(b) does not authorize the filing of letters exchanged between the parties.

Parties should remember to review the Individual Judge's Practices for any pertinent restrictions on the filing of letters or letter-motions, such as requirements for courtesy copies and any page limitations. Moreover, before filing a letter via ECF, parties should consider whether the letter contains information about settlement discussions or personal information (including medical information regarding a party or counsel) that should not be in the public file, in which case the letter should be sent directly to chambers instead of via ECF, or, in the Eastern District, if chambers permits, may be filed under seal via ECF.

Recommended new Local Civil Rule 5.2(c) reminds parties that they should review the actual order, decree, or judgment of the Court on ECF, rather than relying upon the description of the order, decree, or judgment on the docket or in the ECF Notice of Electronic Filing, which is often just a short summary of a more detailed order.

Local Civil Rule 5.3. Service by Overnight Delivery

Service upon an attorney may be made by overnight delivery service. "Overnight delivery

service” means any delivery service which regularly accepts items for overnight delivery. Overnight delivery service shall be deemed service by mail for purposes of Fed. R. Civ. P. 5 and 6.

COMMITTEE NOTE

Local Civil Rule 5.3(a), dealing with overnight delivery service, is still necessary, because Fed. R. Civ. P. 5 has not been amended to deal with overnight delivery service. However, many of the detailed provisions of present Local Civil Rule 5.3(a) are unnecessary once it is made clear that overnight delivery service shall be treated the same as service by mail.

In Local Civil Rule 5.3(b), the first two sentences, dealing with service by facsimile, are unnecessary in light of Fed. R. Civ. P. 5(b)(2)(E), and the substance of the last sentence, dealing with ECF, has been moved to Local Civil Rule 5.2.

Local Civil Rule 6.1. Service and Filing of Motion Papers

Except for letter-motions as permitted by Local Rule 7.1(d), and unless otherwise provided by statute or rule, or by the Court in a Judge’s Individual Practice or in a direction in a particular case, upon any motion, the notice of motion, supporting affidavits, and memoranda shall be served and filed as follows:

(a) On all motions and applications under Fed. R. Civ. P. 26 through 37 inclusive and 45(d)(3), (1) the notice of motion, supporting affidavits, and memoranda of law shall be served by the moving party on all other parties that have appeared in the action, (2) any opposing affidavits and answering memoranda of law shall be served within seven days after service of the moving papers, and (3) any reply affidavits and reply memoranda of law shall be served within two days after service of the answering papers. In computing periods of days, refer to Fed. R. Civ. P. 6 and Local Civil Rule 6.4.

(b) On all civil motions, petitions, and applications, other than those described in Rule 6.1(a), and other than petitions for writs of habeas corpus, (1) the notice of motion, supporting affidavits, and memoranda of law shall be served by the moving party on all other parties that have appeared in the action, (2) any opposing affidavits and answering memoranda shall be served within fourteen days after service of the moving papers, and (3) any reply affidavits and memoranda of law shall be served within seven days after service of the answering papers. In computing periods of days, refer to Fed. R. Civ.

P. 6 and Local Civil Rule 6.4.

(c) The parties and their attorneys shall only appear to argue the motion if so directed by the Court by order or by a Judge's Individual Practice.

(d) No *ex parte* order, or order to show cause to bring on a motion, will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why a procedure other than by notice of motion is necessary, and stating whether a previous application for similar relief has been made.

COMMITTEE NOTE

In the initial paragraph of Local Civil Rule 6.1, the Committee recommends the deletion of the parenthetical reference to Fed. R. Civ. P. 56, because Fed. R. Civ. P. 56, as amended effective December 1, 2010, no longer provides for a different period of time to make a motion for summary judgment than that prescribed by Local Civil Rule 6.1. In Local Civil Rule 6.1(c), the Committee recommends the deletion of the words "or upon application" in order to prevent any implication that oral argument will be granted automatically upon application. This change is not intended to suggest that the parties cannot apply to the Court for oral argument.

2013 COMMITTEE NOTE

This is a conforming amendment designed to bring Local Civil Rule 6.1 into conformity with recommended new Local Civil Rule 7.1(d), which authorizes letter-motions in the case of certain non-dispositive matters.

Local Civil Rule 6.2. Orders on Motions

A memorandum signed by the Court of the decision on a motion that does not finally determine all claims for relief, or an oral decision on such a motion, shall constitute the order unless the memorandum or oral decision directs the submission or settlement of an order in more extended form. The notation in the docket of a memorandum or of an oral decision that does not direct the submission or settlement of an order in more extended form shall constitute the entry of the order. Where an order in more extended form is required to be submitted or settled, the notation in the docket of such order shall constitute the entry of the order.

COMMITTEE NOTE

Local Civil Rule 6.2 remains necessary because the Federal Rules of Civil Procedure do not

specify what constitutes the entry of an order. The Committee believes that the existing language of Local Civil Rule 6.2 is broad enough to encompass notations in the ECF docket, and that no change is required for this reason.

Local Civil Rule 6.3. Motions for Reconsideration or Reargument

Unless otherwise provided by the Court or by statute or rule (such as Fed. R. Civ. P. 50, 52, and 59), a notice of motion for reconsideration or reargument of a court order determining a motion shall be served within fourteen (14) days after the entry of the Court's determination of the original motion, or in the case of a court order resulting in a judgment, within fourteen (14) days after the entry of the judgment. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked. The time periods for the service of answering and reply memoranda, if any, shall be governed by Local Civil Rule 6.1(a) or (b), as in the case of the original motion. No oral argument shall be heard unless the Court directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the Court.

COMMITTEE NOTE

Local Civil Rule 6.3 is necessary because the Federal Rules of Civil Procedure do not specify the time periods governing a motion for reconsideration or reargument. In the first sentence of Local Civil Rule 6.3, the Committee recommends an amendment to clarify that the Court may set a different time for the filing of a motion for reconsideration or reargument.

Local Civil Rule 6.4. Computation of Time

In computing any period of time prescribed or allowed by the Local Civil Rules or the Local Admiralty and Maritime Rules, the provisions of Fed. R. Civ. P. 6 shall apply unless otherwise stated. In these Local Rules, as in the Federal Rules as amended effective December 1, 2009, Saturdays, Sundays, and legal holidays are no longer excluded in computing periods of time. If the last day of the period is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

COMMITTEE NOTE

Recommended Local Civil Rule 6.4 is unchanged in substance from the version that became effective on December 1, 2009, pursuant to the time computation amendments to the Federal Rules of Civil Procedure.

Local Civil Rule 7.1. Motion Papers

(a) Except for letter-motions as permitted by Local Rule 7.1(d) or as otherwise permitted by the Court, all motions shall include the following motion papers:

(1) A notice of motion, or an order to show cause signed by the Court, which shall specify the applicable rules or statutes pursuant to which the motion is brought, and shall specify the relief sought by the motion;

(2) A memorandum of law, setting forth the cases and other authorities relied upon in support of the motion, and divided, under appropriate headings, into as many parts as there are issues to be determined; and

(3) Supporting affidavits and exhibits thereto containing any factual information and portions of the record necessary for the decision of the motion.

(b) Except for letter-motions as permitted by Local Rule 7.1(d) or as otherwise permitted by the Court, all oppositions and replies with respect to motions shall comply with Local Civil Rule 7.1(a)(2) and (3) above, and an opposing party who seeks relief that goes beyond the denial of the motion shall comply as well with Local Civil Rule 7.1(a)(1) above.

(c) Unless otherwise ordered by the District Judge to whom the appeal is assigned, appellate briefs on bankruptcy appeals shall comply with the briefing format and length specifications set forth in Federal Rules of Bankruptcy Procedure 8015 to 8017.

(d) Applications for extensions or adjournments, applications for a pre-motion conference, and similar non-dispositive matters as permitted by the instructions regarding ECF published on the website of each respective Court and any pertinent Individual Judge's Practices, may be brought by letter-

motion filed via ECF pursuant to Local Civil Rule 5.2(b).

COMMITTEE NOTE

Recommended Local Civil Rule 7.1 is designed to collect in one place the requirements for motion papers. It includes the substance of the present Local Civil Rule 7.1 on memoranda of law, and of the present Local Civil Rule 7.2 regarding notices of motion and orders to show cause. The Committee believes that it will be helpful, especially to lawyers from out of state and to lawyers who practice primarily in the state courts, to have a Local Rule that sets forth the types of papers that are required in support of or in opposition to a motion.

2013 COMMITTEE NOTE

Local Civil Rule 7.1(d) would authorize the use of letter-motions for applications for extensions or adjournments, applications for a pre-motion conference, and similar non-dispositive matters. Pursuant to recommended Local Civil Rule 5.2(b), such letter-motions may be filed by ECF.

The use of letter-motions is intended to follow existing practice in which counsel request certain non-dispositive relief by letter. Using a letter-motion instead of a letter will ensure that the Court is aware that relief is requested (as distinguished from, for example, a status update letter where no relief is requested). Local Civil Rule 7.1(d) is not intended to expand the types of motions that can be made by letter-motion. For example, motions to dismiss or motions for summary judgment may not be made by letter-motion.

Parties should remember to review the Individual Judge's Practices for any pertinent restrictions on the filing of letter-motions, such as requirements for courtesy copies and any page limitations.

2016 COMMITTEE NOTE

Local Rule 7.1(c) is amended to conform to the Federal Rules of Bankruptcy Procedure.

Local Civil Rule 7.1.1 Disclosure Statement

For purposes of Fed. R. Civ. P. 7.1(b)(2), "promptly" shall mean "within fourteen days," that is, parties are required to file a supplemental disclosure statement within fourteen days of the time there is any change in the information required in a disclosure statement filed pursuant to those rules.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 7.1.1 continues to serve a useful purpose in helping to ensure that Judges will be given prompt notice of changes that might require consideration of possible recusal.

Local Civil Rule 7.2. Authorities to Be Provided to Pro Se Litigants

In cases involving a pro se litigant, counsel shall, when serving a memorandum of law (or other

submissions to the Court), provide the pro se litigant (but not other counsel or the Court) with copies of cases and other authorities cited therein that are unpublished or reported exclusively on computerized databases. Upon request, counsel shall provide the pro se litigant with copies of such unpublished cases and other authorities as are cited in a decision of the Court and were not previously cited by any party.

COMMITTEE NOTE

The Committee recommends the addition of an additional sentence to Local Civil Rule 7.2 in order to facilitate compliance with the decision of the Second Circuit in Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009).

Local Civil Rule 11.1. Form of Pleadings, Motions, and Other Papers

(a) Every pleading, written motion, and other paper must (1) be plainly written, typed, printed, or copied without erasures or interlineations which materially deface it, (2) bear the docket number and the initials of the District Judge and any Magistrate Judge before whom the action or proceeding is pending, and (3) have the name of each person signing it clearly printed or typed directly below the signature.

(b) The typeface, margins, and spacing of all documents presented for filing must meet the following requirements: (1) all text must be 12-point type or larger, except for text in footnotes which may be 10-point type; (2) all documents must have at least one-inch margins on all sides; (3) all text must be double-spaced, except for headings, text in footnotes, or block quotations, which may be single-spaced.

COMMITTEE NOTE

The provisions of Local Civil Rule 11.1 deal with topics that are not covered in Fed. R. Civ. P. 11. Recommended Local Civil Rule 11.1(b), which is based upon similar provisions in other local rules, is intended to set simple and easily followed minimum standards for legibility of documents filed with the Court.

Local Civil Rule 12.1. Notice to Pro Se Litigant Who Opposes a Rule 12 Motion Supported by Matters Outside the Pleadings

A represented party moving to dismiss or for judgment on the pleadings against a party proceeding pro se, who refers in support of the motion to matters outside the pleadings as described in Fed. R. Civ. P. 12(b) or 12(c), shall serve and file the following notice with the full text of Fed. R. Civ. P. 56 attached at the time the motion is served. If the Court rules that a motion to dismiss or for judgment on the pleadings will be treated as one for summary judgment pursuant to Fed. R. Civ. P. 56, and the movant has not previously served and filed the notice required by this rule, the movant shall amend the form notice to reflect that fact and shall serve and file the amended notice within fourteen days of the Court's ruling.

Notice to Pro Se Litigant Who Opposes a Rule 12 Motion Supported by Matters Outside the Pleadings

The defendant in this case has moved to dismiss or for judgment on the pleadings pursuant to Rule 12(b) or 12(c) of the Federal Rules of Civil Procedure, and has submitted additional written materials. This means that the defendant has asked the Court to decide this case without a trial, based on these written materials. You are warned that the Court may treat this motion as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. For this reason, THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION ON TIME by filing sworn affidavits as required by Rule 56(c) and/or other documents. The full text of Rule 56 of the Federal Rules of Civil Procedure is attached.

In short, Rule 56 provides that you may NOT oppose the defendant's motion simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statements or documents, countering the facts asserted by the defendant and raising specific facts that support your claim. If you have proof of your claim, now is the time to submit it. Any witness statements must be

in the form of affidavits. An affidavit is a sworn statement of fact based on personal knowledge stating facts that would be admissible in evidence at trial. You may submit your own affidavit and/or the affidavits of others. You may submit affidavits that were prepared specifically in response to defendant's motion.

If you do not respond to the motion on time with affidavits and/or documents contradicting the facts asserted by the defendant, the Court may accept defendant's facts as true. Your case may be dismissed and judgment may be entered in defendant's favor without a trial.

If you have any questions, you may direct them to the Pro Se Office.

COMMITTEE NOTE

Local Civil Rule 12.1 plays a valuable role in alerting pro se litigants to the potentially serious consequences of a motion to dismiss based upon evidence outside the pleadings, and to the requirements for controverting such evidence. The Committee recommends certain changes in the text of the notice required by the rule in order to make it more understandable to non-lawyers.

Local Civil Rule 16.1. Exemptions from Mandatory Scheduling Order

Matters involving habeas corpus petitions, social security disability cases, motions to vacate sentences, forfeitures, and reviews from administrative agencies are exempted from the mandatory scheduling order required by Fed. R. Civ. P. 16(b).

COMMITTEE NOTE

The Committee recommends the retention of Local Civil Rule 16.1. It serves an important function, because Fed. R. Civ. P. 16(b)(1) requires that any exemption of categories of cases from the mandatory scheduling order requirement must be accomplished by a local rule.

Local Civil Rule 16.2. Entry and Modification of Mandatory Scheduling Orders by Magistrate Judges

In any case referred to a Magistrate Judge, the Magistrate Judge may issue or modify scheduling orders pursuant to Fed. R. Civ. P. 16(b).

COMMITTEE NOTE

Local Civil Rule 16.2 is necessary because Fed. R. Civ. P. 16(b)(1) requires a local rule in order to confer upon Magistrate Judges the power to issue or modify scheduling orders. The Committee recommends that the language of the rule be simplified, and that it be applicable to all cases in which a case has been referred to a Magistrate Judge.

Local Civil Rule 23.1. Fees in Class Action and Shareholder Derivative Actions

Fees for attorneys or others shall not be paid upon recovery or compromise in a class action or a derivative action on behalf of a corporation except as allowed by the Court after a hearing upon such notice as the Court may direct. The notice shall include a statement of the names and addresses of the applicants for such fees and the amounts requested respectively and shall disclose any fee sharing agreements with anyone. Where the Court directs notice of a hearing upon a proposed voluntary dismissal or settlement of a class action or a derivative action, the above information as to the applications shall be included in the notice.

COMMITTEE NOTE

The Committee recommends the retention of Local Civil Rule 23.1.1. Unlike Fed. R. Civ. P. 23 (which deals with class actions), Fed. R. Civ. P. 23.1 (dealing with shareholder derivative actions) does not contain any provisions dealing with attorney's fees. Local Civil Rule 23.1.1 has been part of the local rules for many years, and has proven its usefulness in derivative actions.

2016 COMMITTEE NOTE

The Committee in 2011 recommended that prior Local Rule 23.1 regarding class actions be deleted as unnecessary. The Second Circuit's recent decision in *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 137 n.2 (2d Cir. 2016), stated that the prior Local Rule is not redundant with Fed. R. Civ. P. 23(h) regarding fee sharing arrangements. The Committee therefore recommends reinstating Local Rule 23.1 and combining it with Local Rule 23.1.1 to cover both class actions and derivative actions.

Local Civil Rule 26.1. Address of Party and Original Owner of Claim to Be Furnished

A party shall furnish to any other party, within seven (7) days after a demand, a verified statement setting forth:

- (a) If the responding party is a natural person, that party's residence and domicile, and any state

or other jurisdiction of which that party is a citizen for purposes of 28 U.S.C. § 1332;

(b) If the responding party is a partnership, limited liability partnership, limited liability company, or other unincorporated association, like information for all of its partners or members, as well as the state or other jurisdiction of its formation;

(c) If the responding party is a corporation, its state or other jurisdiction of incorporation, principal place of business, and any state or other jurisdiction of which that party is a citizen for purposes of 28 U.S.C. § 1332; and

(d) In the case of an assigned claim, corresponding information for each original owner of the claim and for any assignee.

COMMITTEE NOTE

Local Civil Rule 26.1 has been revised in order to make it a more effective tool for determining quickly whether or not there is a basis to challenge diversity jurisdiction.

Local Civil Rule 26.2. Assertion of Claim of Privilege

(a) Unless otherwise agreed by the parties or directed by the Court, where a claim of privilege is asserted in objecting to any means of discovery or disclosure, including but not limited to a deposition, and an answer is not provided on the basis of such assertion,

(1) The person asserting the privilege shall identify the nature of the privilege (including work product) which is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; and

(2) The following information shall be provided in the objection, or (in the case of a deposition) in response to questions by the questioner, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) For documents: (i) the type of document, *e.g.*, letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) the

author of the document, the addressees of the document, and any other recipients, and, where not apparent, the relationship of the author, addressees, and recipients to each other;

(B) For oral communications: (i) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (ii) the date and place of communication; and (iii) the general subject matter of the communication.

(b) Where a claim of privilege is asserted in response to discovery or disclosure other than a deposition, and information is not provided on the basis of such assertion, the information set forth in paragraph (a) above shall be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the Court.

(c) Efficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end. For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form.

COMMITTEE NOTE

With the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court. There is a growing literature in decisions, law reviews, and other publications about the need to handle privilege claims in new and more efficient ways. The Committee wishes to encourage parties to cooperate with each other in developing efficient ways to communicate the information required by Local Civil Rule 26.2 without the need for a traditional privilege log. Because the appropriate approach may differ depending on the size of the case, the volume of privileged documents, the use of electronic search techniques, and other factors, the purpose

of Local Civil Rule 26.2(c) is to encourage the parties to explore methods appropriate to each case. The guiding principles should be cooperation and the “just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. See also The Sedona Cooperation Proclamation, available at www.TheSedonaConference.org, whose principles the Committee endorses.

Local Civil Rule 26.3. Uniform Definitions in Discovery Requests

(a) The full text of the definitions and rules of construction set forth in paragraphs (c) and (d) is deemed incorporated by reference into all discovery requests. No discovery request shall use broader definitions or rules of construction than those set forth in paragraphs (c) and (d). This rule shall not preclude (1) the definition of other terms specific to the particular litigation, (2) the use of abbreviations, or (3) a more narrow definition of a term defined in paragraph (c).

(b) This rule is not intended to broaden or narrow the scope of discovery permitted by the Federal Rules of Civil Procedure.

(c) The following definitions apply to all discovery requests:

(1) **Communication.** The term “communication” means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

(2) **Document.** The term “document” is defined to be synonymous in meaning and equal in scope to the usage of the term “documents or electronically stored information” in Fed. R. Civ. P. 34(a)(1)(A). A draft or non-identical copy is a separate document within the meaning of this term.

(3) **Identify (with respect to persons).** When referring to a person, “to identify” means to give, to the extent known, the person’s full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(4) Identify (with respect to documents). When referring to documents, “to identify” means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s). In the alternative, the responding party may produce the documents, together with identifying information sufficient to satisfy Fed. R. Civ. P. 33(d).

(5) Parties. The terms “plaintiff” and “defendant” as well as a party’s full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(6) Person. The term “person” is defined as any natural person or any legal entity, including, without limitation, any business or governmental entity or association.

(7) Concerning. The term “concerning” means relating to, referring to, describing, evidencing or constituting.

(d) The following rules of construction apply to all discovery requests:

(1) All/Any/Each. The terms “all,” “any,” and “each” shall each be construed as encompassing any and all.

(2) And/Or. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

(3) Number. The use of the singular form of any word includes the plural and vice versa.

COMMITTEE NOTE

Local Civil Rule 26.3 has performed a useful role in simplifying definitions that are commonly used in discovery requests. The Committee recommends certain changes to reflect current practice.

The definition of “document” in Local Civil Rule 26.3(c)(2) has been updated to include the term “electronically stored information,” which is now used in Fed. R. Civ. P. 34(a)(1)(A).

Local Civil Rule 26.4. Cooperation Among Counsel in Discovery [formerly Local Civil Rules 26.5 and 26.7]

(a) Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures.

(b) Discovery requests shall be read reasonably in the recognition that the attorney serving them generally does not have the information being sought and the attorney receiving them generally does have such information or can obtain it from the client.

COMMITTEE NOTE

This recommended Local Civil Rule is derived from prior Local Civil Rules 26.5 and 26.7, which applied to the Eastern District only. The Committee endorses the goals of professional cooperation and courtesy embodied in this recommended Local Civil Rule, and recommends that the rule be made applicable to both the Southern and Eastern Districts.

Local Civil Rule 26.5. Form Discovery Requests [formerly Local Civil Rule 26.6]

Attorneys using form discovery requests shall review them to ascertain that they are consistent with the scope of discovery under Fed. R. Civ. P. 26(b)(1). Non-compliant requests shall not be used.

COMMITTEE NOTE

While this Local Civil Rule is a straightforward corollary of Fed. R. Civ. P. 26(g)(1)(B), the Committee understands that it is frequently relied upon, and therefore recommends its retention in the Eastern District and its adoption in the Southern District.

2016 COMMITTEE NOTE

The change to Local Rule 26.5 is necessary because the December 2015 amendments to the Federal Rules of Civil Procedure eliminated discovery about the "subject matter," instead limiting discovery to the claims and defenses, as further limited by proportionality factors.

Local Civil Rule 30.1. Counsel Fees on Taking Depositions More Than 100 Miles From Courthouse

When a deposition upon oral examination is to be taken at a place more than one hundred (100) miles from the courthouse, any party may request the Court to issue an order providing that prior to the examination, another party shall pay the expense (including a reasonable counsel fee) of the attendance of one attorney for each other party at the place where the deposition is to be taken. The amounts so paid, unless otherwise directed by the Court, may be taxed as a cost at the conclusion of the action or proceeding.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 30.1 serves a useful purpose in directing the attention of the parties to their ability to request expenses in the event that a deposition is taken more than 100 miles from the courthouse. Whether or not to award such expenses, and whether or not to tax them as costs at the conclusion of the case, remain in the discretion of the Court.

Local Civil Rule 30.2. Telephonic and Other Remote Depositions [formerly Local Civil Rule 30.3]

The motion of a party to take the deposition of an adverse party by telephone or other remote means will presumptively be granted. Where the opposing party is a corporation, the term “adverse party” means an officer, director, managing agent or corporate designee pursuant to Fed. R. Civ. P. 30(b)(6).

COMMITTEE NOTE

The Committee recommends that this Local Civil Rule be broadened to encompass the taking of depositions by remote means other than telephonic means, as has been done with Fed. R. Civ. P. 30(b)(4).

Local Civil Rule 30.3. Persons Attending Depositions [formerly Local Civil Rule 30.4]

A person who is a party in the action may attend the deposition of a party or witness. A witness or potential witness in the action may attend the deposition of a party or witness unless otherwise ordered by the Court.

COMMITTEE NOTE

This rule provides a useful summary of the rules regarding who may attend a deposition, and the Committee recommends that it be extended to the Southern District as well as the Eastern District. The exclusion-of-witnesses rule of Fed. R. 615 is made inapplicable to depositions by Fed. R. Civ. P. 30(c)(1), but Fed. R. Civ. P. 26(c)(1)(E) allows the Court, for good cause, to “designat[e] the persons who may be present while the discovery is conducted.”

Local Civil Rule 30.4. Conferences Between Deponent and Defending Attorney [formerly Local Civil Rule 30.6]

An attorney for a deponent shall not initiate a private conference with the deponent while a deposition question is pending, except for the purpose of determining whether a privilege should be asserted.

COMMITTEE NOTE

The Committee believes that this Local Civil Rule serves a useful purpose, and that it is consistent with (although not duplicative of) Fed. R. Civ. P. 30(c)(2) and 20(d)(2). The Committee believes that there is a broad consensus that it is improper for the deponent’s attorney to initiate a private conference with the deponent while a question is pending. By recommending that this minimum standard be stated in the rule, the Committee does not intend any negative implication that other types of obstructive conduct during depositions may not be dealt with by appropriate orders of the Court.

[Local Civil Rule 33.1 Intentionally Omitted]

Local Civil Rule 33.2. Standard Discovery in Prisoner Pro Se Actions

(a) This rule shall apply in any action commenced pro se in which the plaintiff’s complaint includes any claim described in paragraph (b) of this rule, in which the events alleged in the complaint occurred while the plaintiff was in the custody of the New York State Department of Corrections & Community Supervision, the Department of Correction of the City of New York, or any other jail, prison or correctional facility operated by or for a city, county, municipal or other local governmental entity (collectively, the “Department”). Defendants represented by the Office of the Attorney General, the Office of the Corporation Counsel of the City of New York, or counsel for or appointed by the Department responsible for the jail, prison or correctional facility (collectively, the

“Facility”), shall respond to the standing discovery requests adopted by the Court, in accordance with the instructions and definitions set forth in the standing requests, unless otherwise ordered by the Court.

(b) The claims to which the standard discovery requests shall apply are Use of Force Cases, Inmate Against Inmate Assault Cases and Disciplinary Due Process Cases, as defined below.

(1) “Use of Force Case” refers to an action in which the complaint alleges that an employee of the Department or Facility used physical force against the plaintiff in violation of the plaintiff’s rights.

(2) “Inmate against Inmate Assault Case” refers to an action in which the complaint alleges that an employee of the Department or Facility was responsible for the plaintiff’s injury resulting from physical contact with another inmate.

(3) “Disciplinary Due Process Case” refers to an action in which (i) the complaint alleges that an employee of the Department or Facility violated or permitted the violation of a right or rights in a disciplinary proceeding against plaintiff, and (ii) the punishment imposed upon plaintiff as a result of that proceeding was placement in a special housing unit for more than 30 days.

(c) If a response to the requests is required to be made on behalf of an individual defendant represented by the Office of the Corporation Counsel, the Office of the Attorney General or counsel for or appointed by the Department responsible for the Facility, it shall be made on the basis of information and documents within the possession, custody or control of the Department or Facility in accordance with the instructions contained in the requests. If no defendant is represented by such counsel, responses based upon such information need not be made pursuant to this Local Rule, without prejudice to such other discovery procedures as the plaintiff shall initiate.

(d) The requests, denominated “Plaintiff’s Local Civil Rule 33.2 Interrogatories and Requests for Production of Documents,” shall be answered within 120 days of service of the complaint on any

named defendant except (i) as otherwise ordered by the Court, for good cause shown, which shall be based upon the facts and procedural status of the particular case and not upon a generalized claim of burden, expense or relevance or (ii) if a dispositive motion is pending. The responses to the requests shall be served upon the plaintiff and shall include verbatim quotation of the requests. Copies of the requests are available from the Court, including the Court's website.

(e) Except upon permission of the Court, for good cause shown, the requests shall constitute the sole form of discovery available to plaintiff during the 120-day period designated above.

JULY 2011 COMMITTEE NOTE

Local Civil Rule 33.2 has worked well, and the Committee recommends its continuation. The Committee recommends that the rule be revised to make it applicable on the same basis in the Eastern District as in the Southern District. In addition, the Committee recommends extension of the rule to other prison facilities in addition to State and New York City prison facilities (12/2014). Because this Local Civil Rule and Local Civil Rule 33.3 are frequently cited, the Committee does not recommend that they be renumbered.

DECEMBER 2011 COMMITTEE NOTE

The Committee recommends extension of the rule to other prison facilities in addition to State and New York City prison facilities. Also, the trigger for a Disciplinary Due Process Case is reduced from 100 days in SHU to 30 days to better reflect the case law in this area.

2014 COMMITTEE NOTE

The Committee recommends deleting Local Civil Rule 33.2(f). The Rule is intended to be automatic and the standard discovery requests are available on the Courts' websites and in most prison libraries. The second sentence of Local Rule 33.2(d) also is amended to require that the responses include verbatim quotation of the requests, to further insure that the pro se plaintiff has the language of the requests.

Local Civil Rule 33.3. Interrogatories (Southern District Only)

(a) Unless otherwise ordered by the Court, at the commencement of discovery, interrogatories will be restricted to those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent

insurance agreements, and other physical evidence, or information of a similar nature.

(b) During discovery, interrogatories other than those seeking information described in paragraph (a) above may only be served (1) if they are a more practical method of obtaining the information sought than a request for production or a deposition, or (2) if ordered by the Court.

(c) At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the Court has ordered otherwise.

COMMITTEE NOTE

Local Civil Rule 33.3 reflects the general practice in the Southern District, and the Committee recommends its continuation there. Practice in the Eastern District is more receptive to the use of interrogatories, and the Committee therefore does not recommend that this Local Civil Rule be extended to the Eastern District.

Local Civil Rule 37.1. Verbatim Quotation of Discovery Materials

Upon any motion or application involving discovery or disclosure requests or responses under Fed. R. Civ. P. 37, the moving party shall specify and quote or set forth verbatim in the motion papers each discovery request and response to which the motion or application is addressed. The motion or application shall also set forth the grounds upon which the moving party is entitled to prevail as to each request or response. Local Civil Rule 5.1 also applies to the motion or application.

COMMITTEE NOTE

Local Civil Rule 37.1 continues to serve a clearly useful purpose, and the Committee recommends its retention.

Local Civil Rule 37.2. Mode of Raising Discovery Disputes With the Court (Southern District Only)

No motion under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure shall be heard unless counsel for the moving party has first requested an informal conference with the Court

by letter-motion for a pre-motion discovery conference (subject to the instructions regarding ECF published on the Court's website and the Judge's Individual Practices) and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference.

COMMITTEE NOTE

The modes of raising discovery disputes with the Court are sufficiently different in the Southern and Eastern Districts that the Committee is constrained to recommend the continuation of two different rules – Local Civil Rule 37.2 applying to the Southern District, and Local Civil Rule 37.3 applying to the Eastern District.

2013 COMMITTEE NOTE

This amendment would make clear that the request to the Court required by Local Civil Rule 37.2 shall now be made by letter-motion as authorized by Local Civil Rule 7.1(d), instead of by letter as before, without any substantive change in practice.

Local Civil Rule 37.3. Mode of Raising Discovery and Other Non-Dispositive Pretrial Disputes With the Court (Eastern District Only)

(a) Good-Faith Effort to Resolve. Prior to seeking judicial resolution of a discovery or non-dispositive pretrial dispute, the attorneys for the affected parties or non-party witness shall attempt to confer in good faith in person or by telephone in an effort to resolve the dispute, in conformity with Fed. R. Civ. P. 37(a)(1).

(b) Disputes Arising During Depositions. Where the attorneys for the affected parties or a non-party witness cannot agree on a resolution of a discovery dispute that arises during a deposition, they shall, to the extent practicable, notify the Court by telephone and seek a ruling while the deposition is in progress. If a prompt ruling cannot be obtained, and the dispute involves an instruction to the witness not to answer a question, the instruction not to answer may stand and the deposition shall continue until a ruling is obtained pursuant to the procedure set forth in paragraph (c) below.

(c) Other Discovery and Non-Dispositive Pretrial Disputes. Where the attorneys for the

affected parties or non-party witness cannot agree on a resolution of any other discovery dispute or non-dispositive pretrial dispute, or if they are unable to obtain a telephonic ruling on a discovery dispute that arises during a deposition as provided in paragraph (b) above, they shall notify the Court by letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials. Within four days of receiving such a letter, any opposing affected party or non-party witness may submit a responsive letter not exceeding three pages attaching relevant materials. Except for the letters and attachments authorized herein, or where a ruling which was made exclusively as a result of a telephone conference is the subject of *de novo* review pursuant to paragraph (d) hereof, papers shall not be submitted with respect to a dispute governed by this rule unless the Court has so directed.

(d) Motion for Reconsideration. A ruling made exclusively as a result of a telephone conference may be the subject of *de novo* reconsideration by a letter not exceeding five pages in length attaching relevant materials submitted by any affected party or non-party witness. Within four days of receiving such a letter, any other affected party or non-party witness may submit a responsive letter not exceeding five pages in length attaching relevant materials.

(e) Decision of the Court. The Court shall record or arrange for the recording of the Court's decision in writing. Such written order may take the form of an oral order read into the record of a deposition or other proceeding, a handwritten memorandum, a handwritten marginal notation on a letter or other document, or any other form the Court deems appropriate.

COMMITTEE NOTE

As explained in the Committee Note to Local Civil Rule 37.2, the Committee believes that it is necessary to have a separate Local Civil Rule setting forth the mode of raising discovery and other non-dispositive pretrial disputes in the Eastern District. In Local Civil Rule 37.3(c), the Committee concluded that, except in the context of an ongoing deposition (which is covered by Local Civil Rule 37.3(b)), disputes should be raised by letter rather than by a telephone call to the Court.

Local Civil Rule 39.1. Custody of Trial and Hearing Exhibits

(a) Unless the Court orders otherwise, trial and hearing exhibits shall not be filed with the Clerk, but shall be retained in the custody of the respective attorneys who produced them in court.

(b) Trial and hearing exhibits which have been filed with the Clerk shall be removed by the party responsible for them (1) if no appeal is taken, within ninety (90) days after a final decision is rendered, or (2) if an appeal has been taken, within thirty (30) days after the final disposition of the appeal. Parties failing to comply with this rule shall be notified by the Clerk to remove their exhibits and upon their failure to do so within thirty (30) days, the Clerk may dispose of them as the Clerk may see fit.

COMMITTEE NOTE

The Committee believes that this Local Civil Rule is useful in alerting counsel to the Courts' practice concerning the custody of trial and hearing exhibits, which differs from the practices of many other courts.

Local Civil Rule 39.2. Order of Summation

After the close of evidence in civil trials, the order of summation shall be determined in the discretion of the Court.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 39.2 serves a useful role in clarifying the power of the Court to determine the order of summation.

Local Civil Rule 47.1. Assessment of Jury Costs

All counsel in civil cases shall seriously discuss the possibility of settlement a reasonable time prior to trial. The Court may, in its discretion, assess the parties or counsel with the cost of one day's attendance of the jurors if a case is settled after the jury has been summoned or during trial, the amount

to be paid to the Clerk of the Court. For purposes of this rule, a civil jury is considered summoned for a trial as of Noon one day prior to the designated date of the trial.

COMMITTEE NOTE

The Committee understands that the power to impose the cost of one day's attendance of jurors upon parties who have failed to reach (or notify the Court of) a settlement at least one business day before trial is exercised only infrequently and in egregious cases. The Committee agrees that the Court should have this power in order to deal with such egregious cases, and that the rule serves a useful purpose in notifying the bar that the Court has this power.

Local Civil Rule 53.1. Masters

(a) Oath. Every person appointed pursuant to Rule 53 shall before entering upon his or her duties take and subscribe an oath, which, except as otherwise prescribed by statute or rule, shall be the same as the oath prescribed for Judges pursuant to 28 U.S.C. § 453, with the addition of the words "in conformance with the order of appointment" after the words "administer justice." Such an oath may be taken before any federal or state officer authorized by federal law to administer oaths, and shall be filed in the office of the Clerk.

(b) May Sit Outside District. A person appointed pursuant to Rule 53 may sit within or outside the district. When the person appointed is requested to sit outside the district for the convenience of a party and there is opposition by another party, he or she may make an order for the holding of the hearing, or a part thereof, outside the district, upon such terms and conditions as shall be just. Such order may be reviewed by the Court upon motion of any party, served within twenty-one (21) days after service on all parties by the master of the order.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 53.1 serves a useful purpose by clarifying two subjects that are not dealt with in Fed. R. Civ. P. 53.

Local Civil Rule 54.1. Taxable Costs

(a) Notice of Taxation of Costs. Within thirty (30) days after the entry of final judgment, or, in the case of an appeal by any party, within thirty (30) days after the final disposition of the appeal, unless this period is extended by the Court for good cause shown, any party seeking to recover costs shall file with the Clerk a notice of taxation of costs by Electronic Case Filing, except a pro se party may do so in writing, indicating the date and time of taxation which shall comply with the notice period prescribed by Fed. R. Civ. P. 54, and annexing a bill of costs. Costs will not be taxed during the pendency of any appeal, motion for reconsideration, or motion for a new trial. Within thirty (30) days after the determination of any appeal, motion for reconsideration, or motion for a new trial, the party seeking tax costs shall file a new notice of taxation of costs. Any party failing to file a notice of taxation of costs within the applicable thirty (30) day period will be deemed to have waived costs. The bill of costs shall include an affidavit that the costs claimed are allowable by law, are correctly stated and were necessarily incurred. Bills for the costs claimed shall be attached as exhibits.

(b) Objections to Bill of Costs. A party objecting to any cost item shall serve objections by Electronic Case Filing, except a pro se party may do so in writing, prior to the date and time scheduled for taxation. The parties need not appear at the date and time scheduled for taxation unless requested by the Clerk. The Clerk will proceed to tax costs at the time scheduled and allow such items as are properly taxable. In the absence of written objection, any item listed may be taxed within the discretion of the Clerk.

(c) Items Taxable as Costs

(1) Transcripts. The cost of any part of the original trial transcript that was necessarily obtained for use in this Court or on appeal is taxable. Convenience of counsel is not sufficient. The cost of a transcript of Court proceedings prior to or subsequent to trial is taxable only when authorized in advance or ordered by the Court.

(2) Depositions. Unless otherwise ordered by the Court, the original transcript of a deposition, plus one copy, is taxable if the deposition was used or received in evidence at the trial, whether or not it was read in its entirety. Costs for depositions are also taxable if they were used by the Court in ruling on a motion for summary judgment or other dispositive substantive motion. Costs for depositions taken solely for discovery are not taxable. Counsel's fees and expenses in attending the taking of a deposition are not taxable except as provided by statute, rule (including Local Civil Rule 30.1), or order of the Court. Fees, mileage, and subsistence for the witness at the deposition are taxable at the same rates as for attendance at trial if the deposition taken was used or received in evidence at the trial.

(3) Witness Fees, Travel Expenses and Subsistence. Witness fees and travel expenses authorized by 28 U.S.C. § 1821 are taxable if the witness testifies. Subsistence pursuant to 28 U.S.C. § 1821 is taxable if the witness testifies and it is not practical for the witness to return to his or her residence from day to day. No party to the action may receive witness fees, travel expenses, or subsistence. Fees for expert witnesses are taxable only to the extent of fees for ordinary witnesses unless prior court approval was obtained.

(4) Interpreting Costs. The reasonable fee of a competent interpreter is taxable if the fee of the witness involved is taxable.

(5) Exemplifications and Copies of Papers. A copy of an exhibit is taxable if the original was not available and the copy was used or received in evidence. The cost of copies used for the convenience of counsel or the Court are not taxable. The fees for a search and certification or proof of the non-existence of a document in a public office is taxable.

(6) Maps, Charts, Models, Photographs and Summaries. The cost of photographs, 8" x 10" in size or less, is taxable if used or received in evidence. Enlargements greater than 8" x 10" are not taxable except by order of the Court. Costs of maps, charts, and models,

including computer generated models, are not taxable except by order of the Court. The cost of compiling summaries, statistical comparisons and reports is not taxable.

(7) Attorney Fees and Related Costs. Attorney fees and disbursements and other related fees and paralegal expenses are not taxable except by order of the Court. A motion for attorney fees and related nontaxable expenses shall be made within the time period prescribed by Fed. R. Civ. P. 54.

(8) Fees of Masters, Receivers, Commissioners and Court Appointed Experts. Fees of masters, receivers, commissioners, and Court appointed experts are taxable as costs, unless otherwise ordered by the Court.

(9) Costs for Title Searches. A party is entitled to tax necessary disbursements for the expenses of searches made by title insurance, abstract or searching companies.

(10) Docket and Miscellaneous Fees. Docket fees, and the reasonable and actual fees of the Clerk and of a marshal, sheriff, and process server, are taxable unless otherwise ordered by the Court.

COMMITTEE NOTE

Local Civil Rule 54.1 serves a very useful purpose by outlining what costs are and are not taxable unless otherwise ordered by the Court. This is a subject that is not addressed with specificity by 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d)(1). Local Civil Rule 54.1 has been updated with the valuable assistance of the Clerks of the two Courts to reflect more precisely which costs are and are not taxable without an order of the Court.

[August 2014 Note]: Local Rule 54.1 is modified to indicate that the Bill of Costs, and any objection thereto, shall be filed via ECF (except for Pro Se parties) in both Districts.

[July 2013 Note]: The seven-day notice period previously set forth in Local Civil Rule 54.1(a) was in conflict with the 14-day notice period provided by Rule 54(d)(1) of the Federal Rules of Civil Procedure, and the Committee recommends that the Local Rule be changed to conform with Rule 54(d)(1). Instead of prescribing a particular time period (which might be changed by a future amendment to Fed. R. Civ. P. 54), the Committee recommends that the Local Rule refer the reader to Fed. R. Civ. P. 54.

The term “request to tax costs” has misled some parties into not realizing that they need to file a notice of taxation of costs specifying the date and time of taxation. For this reason, the Committee recommends that Local Civil Rule 54.1(a) be amended to substitute the term “notice of taxation of costs” for the term “request to tax costs”, and to add an explicit requirement that the notice specify

the date and time fixed for taxation.

Local Civil Rule 54.1(a) presently provides that costs will not be taxed during the pendency of an appeal. At the suggestion of the Clerk's Offices, the Committee recommends that the Rule be amended to provide that costs will likewise not be taxed during the pendency of a motion for reconsideration or a motion for a new trial. Also at the suggestion of the Clerk's Offices, the Committee recommends that the Rule be amended to provide that the party seeking to tax costs shall file a new notice of taxation of costs within 30 days after the determination of any appeal, motion for reconsideration, or motion for a new trial.

At the suggestion of the Eastern District Clerk's Office, the Committee recommends that Local Civil Rule 54.1(b) be amended to place parties on notice that, in the Eastern District, the parties need not appear at the date and time scheduled for taxation.

The Committee recommends that Local Civil Rule 54.1(c)(1) remain unchanged. It is authorized by 28 U.S.C. § 1920(2), which allows taxation of "fees for printed or electronically recorded transcripts necessarily obtained for use in this case."

The Committee recommends that Local Civil Rule 54.1(c)(2) remain unchanged. 28 U.S.C. § 1920 does not by its terms specifically address costs related to depositions. However the practice of taxing the expenses of a deposition when it is received in evidence or employed on a successful motion for summary judgment is widespread, and can be regarded as authorized by 28 U.S.C. § 1920(2) as "expenses for transcripts necessarily obtained for use in this case." See 10 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2676 (3d ed. 1998) ("There is general agreement that expenses of a deposition may be taxed as costs when it was received in evidence."); 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 54.103(3)(c)(i) (3d ed. 2011) ("§1920 also contains several provisions for the recovery of costs that, alone or in conjunction, have been interpreted to permit the awarding of the routine expenses incurred in taking depositions."). See also *Anderson v. City of New York*, 132 F. Supp. 2d 239, 246 (S.D.N.Y. 2001) (allowing deposition transcripts to be taxed as costs under § 1920).

The Committee recommends that Local Civil Rule 54.1(c)(3) remain unchanged. This subsection is authorized by 28 U.S.C. § 1920(3), which allows taxation of "fees and disbursements for printing and witnesses."

The Committee recommends that the second sentence of Local Civil Rule 54.1(c)(4) be deleted in light of the Supreme Court's ruling in *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997 (2012). The rest of Local Civil Rule 54.1(c)(4) is authorized by § 1920(6), which allows taxation of "compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services" under 28 U.S.C. § 1828.

The Committee recommends that Local Civil Rule 54.1(c)(5) remain unchanged. This subsection is authorized by § 1920(4), which allows taxation of "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in this case."

Courts in other circuits have begun to address the question whether and to what extent the costs of electronic discovery can be taxed as costs of copying or exemplification. See, e.g., *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012). Particularly in the absence of authoritative guidance from the Second Circuit on this issue, the Committee has concluded that it is premature to address this question in Local Civil Rule 54.1(c).

The Committee recommends that Local Civil Rule 54.1(c)(6) remain unchanged. This subsection is authorized by 28 U.S.C. § 1920(4), which allows taxation of "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in this case."

The Committee recommends that Local Civil Rule 54.1(c)(7) be retained, because it does not

authorize taxation of any costs, but instead serves a useful purpose by pointing out that attorney's fees are addressed in Fed. R. Civ. P. 54, and are not taxable except by order of the Court. For the reasons explained in the Committee Note to Local Civil Rule 54.1(a), the Committee recommends that the Local Rule refer the reader to Fed. R. Civ. P. 54 for the time period within which attorney's fees must be sought.

The Committee recommends that Local Civil Rule 54.1(c)(8) remain unchanged. Although 28 U.S.C. § 1920 does not by its terms address fees for masters, receivers, or commissioners, Fed. R. Civ. P. 53(g) authorizes the Court to allocate payment for a master's compensation, and commentators have observed that appropriate expenditures incurred in connection with a special master may be taxed as costs by the prevailing party. 10 Fed. Prac. & Proc. Civ. §2677 (3d ed.).

The Committee recommends that Local Civil Rule 54.1(c)(9) remain unchanged. This subsection is authorized by 28 U.S.C. § 1920(4), which allows a taxation of "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in this case."

The Committee recommends that Local Civil Rule 54.1(c)(10) remain unchanged. This subsection is authorized by 28 U.S.C. § 1920(5), which allows taxation of docket fees under 28 U.S.C. § 1923.

Local Civil Rule 54.2. Security for Costs

The Court, on motion or on its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to comply with the order the Court may make such orders in regard to noncompliance as are just, and among others the following: an order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

COMMITTEE NOTE

Local Civil Rule 54.2 has been applied by the District Courts with the approval of the Second Circuit. The Committee recommends its retention.

Local Civil Rule 54.3. Entering Satisfaction of Money Judgment

Satisfaction of a money judgment entered or registered in this district shall be entered by the Clerk as follows:

- (a) Upon the payment into the Court of the amount thereof, plus interest, and the

payment of the Clerk's and marshal's fees, if any;

(b) Upon the filing of a satisfaction executed and acknowledged by: (1) the judgment creditor; or (2) the judgment creditor's legal representatives or assigns, with evidence of their authority; or (3) the judgment creditor's attorney if within ten (10) years of the entry of the judgment or decree;

(c) If the judgment creditor is the United States, upon the filing of a satisfaction executed by the United States Attorney;

(d) Pursuant to an order of satisfaction entered by the Court; or

(e) Upon the registration of a certified copy of a satisfaction entered in another court.

COMMITTEE NOTE

The Committee recommends a few clarifying changes in the wording of this Local Civil Rule.

Local Civil Rule 55.1. Certificate of Default

A party applying for entry of default under Fed. R. Civ. P. 55(a) shall file:

(a) a request for a Clerk's Certificate of Default; and

(b) an affidavit demonstrating that:

(1) the party against whom a notation of default is sought is not an infant, in the military, or an incompetent person;

(2) the party has failed to plead or otherwise defend the action; and

(3) the pleading to which no response has been made was properly served.

A proposed Clerk's Certificate of Default form must be attached to the affidavit.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 55.1 is helpful in setting forth the contents of the affidavit to be submitted by a party seeking a certificate of default pursuant to Fed. R. Civ. P. 55(a).

2018 COMMITTEE NOTE

The revision to Local Rule 55.1 incorporates the revised ECF Rule requiring the electronic

filing of a request for a Clerk's Certificate of Default.

Local Civil Rule 55.2. Default Judgment

(a) By the Clerk. Upon issuance of a Clerk's certificate of default, if the claim to which no response has been made only sought payment of a sum certain, and does not include a request for attorney's fees or other substantive relief, and if a default judgment is sought against all remaining parties to the action, the moving party shall submit an affidavit showing the principal amount due and owing, not exceeding the amount sought in the claim to which no response has been made, plus interest, if any, computed by the party, with credit for all payments received to date clearly set forth, and costs, if any, pursuant to 28 U.S.C. § 1920.

(b) By the Court. In all other cases the party seeking a judgment by default shall apply to the Court as described in Fed. R. Civ. P. 55(b)(2), and shall append to the application (1) the Clerk's certificate of default, (2) a copy of the claim to which no response has been made, and (3) a proposed form of default judgment.

(c) Mailing of Papers. Unless otherwise ordered by the Court, all papers submitted to the Court pursuant to Local Civil Rule 55.2(a) or (b) above shall simultaneously be mailed to the party against whom a default judgment is sought at the last known residence of such party (if an individual) or the last known business address of such party (if a person other than an individual). Proof of such mailing shall be filed with the Court. If the mailing is returned, a supplemental affidavit shall be filed with the Court setting forth that fact, together with the reason provided for return, if any.

COMMITTEE NOTE

Although Fed. R. Civ. P. 55(b) does not require service of notice of an application for a default judgment upon a party who has not appeared in the action, the Committee believes that experience has shown that mailing notice of such an application is conducive to both fairness and efficiency, and has therefore recommended a new Local Civil Rule 55.2(c) providing for such mailing.

Local Civil Rule 56.1. Statements of Material Facts on Motion for Summary Judgment

a) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

(b) The papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement by the movant or opponent pursuant to Rule 56.1(a) and (b), including each statement controverting any statement of material fact, must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c).

COMMITTEE NOTE

The requirement embodied in Local Civil Rule 56.1 is firmly rooted in the local practice of the Southern and Eastern Districts, and the Committee recommends its retention. The language of Local Civil Rule 56.1 was revised in 2004 to make clear that any statement pursuant to Local Civil Rule 56.1 must be divided into brief, numbered paragraphs, that any opposing statement must respond specifically and separately to each numbered paragraph in the statement, and that all such paragraphs in both statements and opposing statements must be supported by citations to specific evidence of the kind required by Fed. R. Civ. P. 56(c). The Committee believes that the language adopted in 2004 sets forth these requirements clearly, and does not recommend any changes in that language.

Local Civil Rule 56.2. Notice to Pro Se Litigant Who Opposes a Summary Judgment

Any represented party moving for summary judgment against a party proceeding *pro se* shall

serve and file as a separate document, together with the papers in support of the motion, the following “Notice To Pro Se Litigant Who Opposes a Motion For Summary Judgment” with the full texts of Fed. R. Civ. P. 56 and Local Civil Rule 56.1 attached. Where the pro se party is not the plaintiff, the movant shall amend the form notice as necessary to reflect that fact.

**Notice To Pro Se Litigant
Who Opposes a Motion For Summary Judgment**

The defendant in this case has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This means that the defendant has asked the Court to decide this case without a trial, based on written materials, including affidavits, submitted in support of the motion. THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION ON TIME by filing sworn affidavits and/or other documents as required by Rule 56(c) of the Federal Rules of Civil Procedure and by Local Civil Rule 56.1. The full text of Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 56.1 is attached.

In short, Rule 56 provides that you may NOT oppose summary judgment simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statements or documents, countering the facts asserted by the defendant and raising specific facts that support your claim. If you have proof of your claim, now is the time to submit it. Any witness statements must be in the form of affidavits. An affidavit is a sworn statement of fact based on personal knowledge stating facts that would be admissible in evidence at trial. You may submit your own affidavit and/or the affidavits of others. You may submit affidavits that were prepared specifically in response to defendant’s motion for summary judgment.

If you do not respond to the motion for summary judgment on time with affidavits and/or documents contradicting the material facts asserted by the defendant, the Court may accept defendant’s

facts as true. Your case may be dismissed and judgment may be entered in defendant's favor without a trial.

If you have any questions, you may direct them to the Pro Se Office.

COMMITTEE NOTE

Local Civil Rule 56.2 plays a valuable role in alerting pro se litigants to the potentially serious consequences of a motion for summary judgment, and to the requirements for opposing such a motion. The Committee recommends certain changes in the text of the notice required by the rule in order to make it more understandable to non-lawyers.

Local Civil Rule 58.1. Remand by an Appellate Court

Any mandate, order, or judgment of an appellate court, when filed in the office of the Clerk of the District Court, shall automatically become the order or judgment of the District Court and be entered as such by the Clerk without further order, except if such mandate, order, or judgment of the appellate court requires further proceedings in the District Court other than a new trial, an order shall be entered making the order or judgment of the appellate court the order or judgment of the District Court.

COMMITTEE NOTE

The Committee recommends that the word "mandate" be added to Local Civil Rule 58.1 in order to clarify that the mandate of the Court of Appeals, when filed in the Clerk's Office of the District Court as provided in Local Civil Rule 58.1, automatically becomes the judgment of the District Court. The mandate, which consists of "a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs," Fed. R. App. P. 41(a), is the normal means by which the judgment of the Court of Appeals is transmitted to the District Court.

Local Civil Rule 65.1.1. Sureties

(a) Whenever a bond, undertaking or stipulation is required, it shall be sufficient, except as otherwise prescribed by law, if the instrument is executed by the surety or sureties only.

(b) Except as otherwise provided by law, every bond, undertaking or stipulation must be secured by: (1) the deposit of cash or government bonds in the amount of the bond, undertaking or

stipulation; or (2) the undertaking or guaranty of a corporate surety holding a certificate of authority from the Secretary of the Treasury; or (3) the undertaking or guaranty of two individual residents of the district in which the case is pending, each of whom owns real or personal property within the district worth double the amount of the bond, undertaking or stipulation, over all his or her debts and liabilities, and over all obligations assumed by said surety on other bonds, undertakings or stipulations, and exclusive of all legal exemptions.

(c) Except as otherwise provided by law, all bonds, undertakings and stipulations of corporate sureties holding certificates of authority from the Secretary of the Treasury, where the amount of such bonds or undertakings has been fixed by a Judge or by court rule or statute, may be approved by the Clerk.

(d) In the case of a bond, or undertaking, or stipulation executed by individual sureties, each surety shall attach the surety's affidavit of justification, giving the surety's full name, occupation, residence and business addresses, and showing that the surety is qualified as an individual surety under paragraph (b) of this rule.

(e) Members of the bar who have appeared in the case shall not act as a surety in the case. Administrative officers and employees of the Court, the marshal, and the marshal's deputies and assistants, shall not act as a surety in any suit, action or proceeding pending in this Court.

(f) Whenever a notice of motion to enforce the liability of a surety upon a bond is served upon the Clerk pursuant to Fed. R. Civ. P. 65.1 or Fed. R. App. P. 8(b), the party making such motion shall deposit with the clerk the original, three copies, and one additional copy for each surety to be served.

COMMITTEE NOTE

Local Civil Rule 65.1.1 contains useful provisions concerning sureties which supplement the provisions of Fed. R. Civ. P. 65(c) and 65.1. The Committee recommends that Local Civil Rule 65.1.1(f) be broadened to encompass proceedings to enforce the liability of sureties under Fed. R. Civ. P. 65.1 as well as under Fed. R. App. P. 8(b).

Local Civil Rule 67.1. Order for Deposit in Interest-Bearing Account

(a) Whenever a party seeks a court order for money to be deposited by the Clerk in an interest-bearing account, the party shall file the proposed order. The Clerk shall inspect the proposed order for proper form and content and compliance with this rule prior to submission to the Judge for signature.

(b) Proposed orders directing the Clerk to invest such funds in an interest-bearing account or other instrument shall include the following:

- (1) The exact United States dollar amount of the principal sum to be invested; and
- (2) Wording which directs the Clerk to deduct from the income on the investment a fee consistent with that authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office.

(c) Unless otherwise ordered by the court, interpleader funds shall be deposited in the Disputed Ownership Fund in an interest bearing account. Income generated from fund investments in each case will be distributed after the appropriate fee has been applied and tax withholdings have been deducted from the fund.

COMMITTEE NOTE

Local Civil Rule 67.1 contains useful provisions concerning orders for the deposit of money into interest-bearing accounts which supplement the provisions of Fed. R. Civ. P. 67(a). The Committee recommends a clarifying change to Local Civil Rule 67.1(a) in order to make clear that what is required is delivery of the proposed order directly to the Clerk or the Financial Deputy, not personal delivery to them in the sense of hand delivery.

2018 COMMITTEE NOTE

Local Civil Rule 67.1 contains practical provisions concerning orders for the deposit of money into interest-bearing accounts which supplement the provisions of Fed. R. Civ. P. 67(a). The Committee recommends revision to Local Civil Rule 67.1(a) to conform to the new requirement for the electronic filing and subsequent processing of a proposed order for the deposit of funds. The Committee recommends revision to Local Civil Rule 67.1(b)(2) for consistency with S.D.N.Y. Standing

Order M10-1468 [11-MC-173 (LAP)]. The Committee recommends the addition of Local Civil Rule 67.1(c) in order to address the tax administration requirements for certain Court Registry interpleader funds deposited pursuant to 28 U.S.C. § 1335.

Local Civil Rule 72.1. Powers of Magistrate Judges

In addition to other powers of Magistrate Judges:

(a) Full-time Magistrate Judges are hereby specially designated to exercise the jurisdiction set forth in 28 U.S.C. § 636(c).

(b) Magistrate Judges are authorized to entertain *ex parte* applications by appropriate representatives of the United States government for the issuance of administrative inspection orders or warrants.

(c) Magistrate Judges may issue subpoenas, writs of *habeas corpus ad testificandum* or *ad prosequendum* or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings, and may sign in forma pauperis orders.

(d) Matters arising under 28 U.S.C. §§ 2254 and 2255 or challenging the conditions of the confinement of prisoners may be referred to a Magistrate Judge by the District Judge to whom the case has been assigned. A Magistrate Judge may perform any or all of the duties imposed upon a District Judge by the rules governing such proceedings in the United States district courts. In so doing, a Magistrate Judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a District Judge a report containing proposed findings of fact and recommendations for disposition of the matter by the District Judge.

COMMITTEE NOTE

Local Civil Rule 72.1 confirms and continues the Courts' intent to give their Magistrate Judges the maximum powers authorized by law. Local Civil Rule 72.1(a) is necessary in order to authorize full-time Magistrate Judges to exercise the consent jurisdiction conferred by 28 U.S.C. § 636(c)(1). Local Civil Rule 72.1(b) and (c) confer useful administrative powers upon Magistrate Judges. Although Local Civil Rule 72.1(d) may be unnecessary in light of 28 U.S.C. § 636(b)(1)(B), the Committee decided that it would be prudent to retain it in order to avoid any possible question on this

point. The final sentence of Local Civil Rule 72.1(d) seems unnecessary in light of the sentence preceding it.

Local Civil Rule 72.2. Reference to Magistrate Judge (Eastern District Only)

A Magistrate Judge shall be assigned to each case upon the commencement of the action, except in those categories of actions set forth in Local Civil Rule 16.1. In any courthouse in this District in which there is more than one Magistrate Judge such assignment shall be at random on a rotating basis. Except in multi-district cases and antitrust cases, a Magistrate Judge so assigned is empowered to act with respect to all non-dispositive pretrial matters unless the assigned District Judge orders otherwise.

COMMITTEE NOTE

Local Civil Rule 72.2 sets forth the practices governing the automatic assignment of Magistrate Judges to cases in the Eastern District of New York. Local Civil Rule 72.2(b) is unnecessary in light of the modern practice of electronic filing of orders, and the Committee recommends its deletion.

Local Civil Rule 73.1. Consent Jurisdiction Procedure

(a) When a civil action is filed with the Clerk, the Clerk shall give the filing party notice of the Magistrate Judge's consent jurisdiction in a form approved by the Court, with sufficient copies to be served with the complaint on adversary parties. A copy of such notice shall be attached to any third-party complaint served by a defendant.

(b) When a completed consent form has been filed, the Clerk shall forward the form for final approval to the District Judge to whom the case was originally assigned. Once the District Judge has approved the transfer and returned the consent form to the Clerk for filing, the clerk shall reassign the case for all purposes to the Magistrate Judge previously designated to receive any referrals or to whom the case has previously been referred for any purpose, except that, in the Eastern District of New York, upon application of the parties, the Clerk shall select a new Magistrate Judge at random. If no

designation or referral has been made, the Clerk shall select a new Magistrate Judge at random.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 73.1(a) continues to serve a useful function by focusing the attention of the parties at the outset of the case upon the consent jurisdiction of the Magistrate Judges. The Committee proposes a rewording of Local Civil Rule 73.1(b) for purposes of clarification; no change in meaning is intended.

Local Civil Rule 77.1. Submission of Orders, Judgments and Decrees

Proposed orders, judgments and decrees shall be presented as directed by the ECF rules published on the website of each respective Court. Unless the form of order, judgment or decree is consented to in writing, or unless the Court otherwise directs, four (4) days' notice of settlement is required. One (1) day's notice is required of all counter-proposals.

COMMITTEE NOTE

The Committee recommends the deletion of Local Civil Rule 77.1(b), whose provisions have been overtaken by the age of electronic filing. The Committee recommends the retention of Local Civil Rule 77.1(a), which is necessary to specify the timing of the submission of proposed orders, judgments, and decrees.

2018 COMMITTEE NOTE

Local Rule 77.1 is revised to be consistent with ECF Rules and practice.

Local Civil Rule 81.1. Removal of Cases from State Courts

If the Court's jurisdiction is based upon diversity of citizenship, and regardless of whether or not service of process has been effected on all parties, the notice of removal shall set forth (1) in the case of each individual named as a party, that party's residence and domicile and any state or other jurisdiction of which that party is a citizen for purposes of 28 U.S.C. § 1332; (2) in the case of each party that is a partnership, limited liability partnership, limited liability company, or other unincorporated association, like information for all of its partners or members, as well as the state or other jurisdiction of its formation; (3) in the case of each party that is a corporation, its state or other

jurisdiction of incorporation, principal place of business, and any state or other jurisdiction of which that party is a citizen for purposes of 28 U.S.C. § 1332; (4) in the case of an assigned claim, corresponding information for each original owner of the claim and for each assignee; and (5) the date on which each party that has been served was served. If such information or a designated part is unknown to the removing party, the removing party may so state, and in that case plaintiff within twenty-one (21) days after removal shall file in the office of the Clerk a statement of the omitted information.

COMMITTEE NOTE

The Committee recommends the deletion of Local Civil Rule 81.1(b), because 28 U.S.C. § 1446(a) already provides that the removing party or parties shall file with the notice of removal “a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.” The Committee recommends that Local Civil Rule 81.1(a) be reworded, in the same manner as Local Civil Rule 26.1, to describe with greater specificity the information needed to assess the presence of diversity jurisdiction.

Local Civil Rule 83.1. Transfer of Cases to Another District

In a case ordered transferred from this District, the Clerk, unless otherwise ordered, shall upon the expiration of seven (7) days effectuate the transfer of the case to the transferee court.

COMMITTEE NOTE

Local Civil Rule 83.1 needs to be reworded, because the transfer of cases is normally carried out today electronically rather than by mail. On balance, the Committee believes that the seven-day waiting period in Local Civil Rule 83.1 should be retained, in order to allow the party opposing transfer the same opportunity as the current rule affords to seek rehearing or appellate review.

Local Civil Rule 83.2. Settlement of Actions by or on Behalf of Infants or Incompetents, Wrongful Death Actions, and Actions for Conscious Pain and Suffering of the Decedent

(a) Settlement of Actions by or on Behalf of Infants or Incompetents.

(1) An action by or on behalf of an infant or incompetent shall not be settled or compromised, or voluntarily discontinued, dismissed or terminated, without leave of the Court

embodied in an order, judgment or decree. The proceeding upon an application to settle or compromise such an action shall conform, as nearly as may be, to the New York State statutes and rules, but the Court, for cause shown, may dispense with any New York State requirement.

(2) The Court shall authorize payment to counsel for the infant or incompetent of a reasonable attorney's fee and proper disbursements from the amount recovered in such an action, whether realized by settlement, execution or otherwise and shall determine the said fee and disbursements, after due inquiry as to all charges against the fund.

(3) The Court shall order the balance of the proceeds of the recovery or settlement to be distributed as it deems may best protect the interest of the infant or incompetent.

(b) Settlement of Wrongful Death Actions and Actions for Conscious Pain and Suffering of the Decedent.

In an action for wrongful death or conscious pain and suffering of the decedent:

(1) Where required by statute or otherwise, the Court shall apportion the avails of the action, and shall approve the terms of any settlement.

(2) The Court shall approve an attorney's fee only upon application in accordance with the provisions of the New York State statutes and rules.

COMMITTEE NOTE

The Committee believes that paragraph (b) of this Local Civil Rule should logically apply to actions for conscious pain and suffering of the decedent as well as to wrongful death actions, and therefore recommends that the present distinction between the Southern and Eastern District versions of the Local Rule in this regard be eliminated.

Local Civil Rule 83.3. Habeas Corpus

Unless otherwise provided by statute, applications for a writ of habeas corpus made by persons under the judgment and sentence of a court of the State of New York shall be filed, heard and

determined in the District Court for the district within which they were convicted and sentenced; provided, however, that if the convenience of the parties and witnesses requires a hearing in a different district, such application may be transferred to any district which is found by the assigned Judge to be more convenient. The Clerks of the Southern and Eastern District Courts are authorized and directed to transfer such applications to the District herein designated for filing, hearing and determination.

COMMITTEE NOTE

The Committee believes that this Local Civil Rule performs a very useful function by establishing a presumptive rule that habeas corpus applications shall be filed, heard, and determined in the district within which conviction and sentencing occurred.

Local Civil Rule 83.4. Publication of Advertisements [formerly Local Civil Rule 83.6]

(a) Unless otherwise provided by statute, rule, or order of the Court, all advertisements except notices of sale of real estate or of any interest in land shall be published in a newspaper which has a general circulation in this district or a circulation reasonably calculated to give public notice of a legal publication. The Court may direct the publication of such additional advertisement as it may deem advisable.

(b) Unless otherwise ordered, notices for the sale of real estate or of any interest in land shall be published in a newspaper of general circulation in the county in which the real estate or the land in question is located.

COMMITTEE NOTE

This Local Civil Rule continues to be useful in foreclosure and execution cases. The Committee recommends that new introductory language be added to recognize that other means of notice may be authorized by such provisions as Rule G(4)(a)(iv) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, which became effective in 2007.

Local Civil Rule 83.5. Notice of Sale [formerly Local Civil Rule 83.7]

In any civil action, the notice of any proposed sale of property directed to be made by any order

or judgment of the Court, unless otherwise ordered by the Court, need not set out the terms of sale specified in the order or judgment, and the notice will be sufficient if in substantially the following form:

UNITED STATES DISTRICT COURT
.....DISTRICT OF NEW YORK

[Docket No. and Judge's Initials]

[CAPTION],

NOTICE OF SALE

Pursuant to(Order or Judgment)..... of the United States District Court for the District of New York, filed in the office of the clerk on(Date)..... in the case entitled(Name and Docket Number)..... the undersigned will sell at(Place of Sale)..... on(Date and Hour of Sale)..... the property in said(Order or Judgment)..... described and therein directed to be sold, to which(Order or Judgment)..... reference is made for the terms of sale and for a description of the property which may be briefly described as follows:

Dated:

Signature and Official Title

The notice need not describe the property by metes and bounds or otherwise in detail and will be sufficient if in general terms it identifies the property by specifying its nature and location. However, it shall state: the approximate acreage of any real estate outside the limits of any town or city; the street, lot and block number of any real estate within any town or city; and a general statement of the character of any improvements upon the property.

COMMITTEE NOTE

As with Local Civil Rule 83.3, this Local Civil Rule continues to be useful in foreclosure and execution cases.

Local Civil Rule 83.6. Contempt Proceedings in Civil Cases [formerly Local Civil Rule 83.9]

(a) A proceeding to adjudicate a person in civil contempt, including a case provided for in Fed. R. Civ. P. 37(b)(1) and 37(b)(2)(A)(vii), shall be commenced by the service of a notice of motion or order to show cause. The affidavit upon which such notice of motion or order to show cause is based shall set out with particularity the misconduct complained of, the claim, if any, for damages occasioned thereby and such evidence as to the amount of damages as may be available to the moving party. A reasonable counsel fee, necessitated by the contempt proceedings, may be included as an item of damage. Where the alleged contemnor has appeared in the action by an attorney, the notice of motion or order to show cause and the papers upon which it is based may be served upon said attorney; otherwise service shall be made personally, together with a copy of this Local Civil Rule 83.6, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons. If an order to show cause is sought, such order may, upon necessity shown, embody a direction to the United States marshal to arrest the alleged contemnor and hold such person unless bail is posted in an amount fixed by the order, conditioned on the appearance of such person in all further proceedings on the motion, and further conditioned that the alleged contemnor will hold himself or herself amenable to all orders of the Court for surrender.

b) If the alleged contemnor puts in issue his or her alleged misconduct or the damages thereby occasioned, said person shall upon demand be entitled to have oral evidence taken, either before the Court or before a master appointed by the Court. When by law such alleged contemnor is entitled to a trial by jury, said person shall make written demand before the beginning of the hearing on the application; otherwise the alleged contemnor will be deemed to have waived a trial by jury.

(c) If the alleged contemnor is found to be in contempt of court, an order shall be entered (1) reciting or referring to the verdict or findings of fact upon which the adjudication is based; (2) setting forth the amount of damages, if any, to which the complainant is entitled; (3) fixing the fine, if any, imposed by the Court, which fine shall include the damages found and naming the person to whom such fine shall be payable; (4) stating any other conditions, the performance of which will operate to purge the contempt; and (5) directing, where appropriate, the arrest of the contemnor by the United States marshal and confinement until the performance of the condition fixed in the order and the payment of the fine, or until the contemnor be otherwise discharged pursuant to law. A certified copy of the order committing the contemnor shall be sufficient warrant to the marshal for the arrest and confinement of the contemnor. The complainant shall also have the same remedies against the property of the contemnor as if the order awarding the fine were a final judgment.

(d) If the alleged contemnor is found not guilty of the charges, said person shall be discharged from the proceedings and, in the discretion of the Court, may have judgment against the complainant for costs and disbursements and a reasonable counsel fee.

COMMITTEE NOTE

The Committee recommends the deletion of the second sentence of paragraph (c) of this Local Civil Rule on the ground that it is substantive rather than procedural in nature. See generally *Armstrong v. Guccione*, 470 F.3d 89 (2d Cir.), cert. denied, 552 U.S. 989 (2007).

Local Civil Rule 83.7. Court-Annexed Arbitration (Eastern District Only) [formerly Local Civil Rule 83.10]

(a) Certification of Arbitrators.

(1) The Chief Judge or a Judge or Judges authorized by the Chief Judge to act (hereafter referred to as the certifying Judge) shall certify as many arbitrators as may be determined to be necessary under this rule.

(2) An individual may be certified to serve as an arbitrator if he or she: (A) has been

for at least five years a member of the bar of the highest court of a state or the District of Columbia, (B) is admitted to practice before this court, and (C) is determined by the certifying Judge to be competent to perform the duties of an arbitrator.

(3) Each individual certified as an arbitrator shall take the oath or affirmation required by Title 28, U.S.C. § 453 before serving as an arbitrator.

(4) A list of all persons certified as arbitrators shall be maintained in the Office of the Clerk.

(b) Compensation and Expenses of Arbitrators. An arbitrator shall be compensated \$250 for services in each case. If an arbitration hearing is protracted, the certifying Judge may entertain a petition for additional compensation. If a party requests three arbitrators then each arbitrator shall be compensated \$100 for service. The fees shall be paid by or pursuant to the order of the Court subject to the limits set by the Judicial Conference of the United States.

(c) Immunity of Arbitrators. Arbitrators shall be immune from liability or suit with respect to their conduct as such to the maximum extent permitted by applicable law.

(d) Civil Cases Eligible for Compulsory Arbitration.

(1) The Clerk of Court shall, as to all cases filed after January 1, 1986, designate and process for compulsory arbitration all civil cases (excluding social security cases, tax matters, prisoners' civil rights cases and any action based on an alleged violation of a right secured by the Constitution of the United States or if jurisdiction is based in whole or in part on Title 28, U.S.C. § 1343) wherein money damages only are being sought in an amount not in excess of \$150,000.00 exclusive of interest and costs.

(2) The parties may by written stipulation agree that the Clerk of Court shall designate and process for court-annexed arbitration any civil case that is not subject to compulsory arbitration hereunder.

(3) For purposes of this Rule only, in all civil cases damages shall be presumed to be not in excess of \$150,000.00 exclusive of interest and costs, unless:

(A) Counsel for plaintiff, at the time of filing the complaint, or in the event of the removal of a case from state court or transfer of a case from another district to this Court, within thirty (30) days of the docketing of the case in this district, files a certification with the Court that the damages sought exceed \$150,000.00, exclusive of interest and costs; or

(B) Counsel for a defendant, at the time of filing a counterclaim or cross-claim files a certification with the court that the damages sought by the counter-claim or cross-claim exceed \$150,000.00 exclusive of interest and costs.

(e) Referral to Arbitration.

(1) After an answer is filed in a case determined eligible for arbitration, the arbitration clerk shall send a notice to counsel setting forth the date and time for the arbitration hearing. The date of the arbitration hearing set forth in the notice shall be approximately four months but in no event later than 120 days from the date the answer was filed, except that the arbitration proceeding shall not, in the absence of the consent of the parties, commence until 30 days after the disposition by the District Court of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment, if the motion was filed during a time period specified by the District Court. The 120-day and 30-day periods specified in the preceding sentence may be modified by the court for good cause shown. The notice shall also advise counsel that they may agree to an earlier date for the arbitration hearing provided the arbitration clerk is notified with 30 days of the date of the notice. The notice shall also advise counsel that they have 90 days to complete discovery unless the Judge to whom the case has been assigned orders a shorter or longer period for

discovery. The Judge may refer the case to a Magistrate Judge for purposes of discovery. In the event a third party has been brought into the action, this notice shall not be sent until an answer has been filed by the third party.

(2) The Court shall, *sua sponte*, or on motion of a party, exempt any case from arbitration in which the objectives of arbitration would not be realized

(A) because the case involves complex or novel issues,

(B) because legal issues predominate over factual issues, or

(C) for other good cause.

Application by a party for an exemption from compulsory arbitration shall be made by written letter to the Court not exceeding three pages in length, outlining the basis for the request and attaching relevant materials, which shall be submitted no later than 21 days after receipt of the notice to counsel setting forth the date and time for the arbitration hearing. Within four days of receiving such a letter, any opposing affected party may submit a responsive letter not exceeding three pages attaching relevant materials.

(3) Cases not originally designated as eligible for compulsory arbitration, but which in the discretion of the assigned Judge, are later found to qualify, may be referred to arbitration. A U.S. District Judge or a U.S. Magistrate Judge, in cases that exceed the arbitration ceiling of \$150,000 exclusive of interest and costs, in their discretion, may suggest that the parties should consider arbitration. If the parties are agreeable, an appropriate consent form signed by all parties or their representatives may be entered and filed in the case prior to scheduling an arbitration hearing.

(4) The arbitration shall be held before one arbitrator unless a panel of three arbitrators is requested by a party, in which case one of whom shall be designated as chairperson of the panel. If the amount of controversy, exclusive of interest and costs, is \$5,000 or less, the

arbitration shall be held before a single arbitrator. The arbitration panel shall be chosen at random by the Clerk of the Court from the lawyers who have been duly certified as arbitrators. The arbitration panel shall be scheduled to hear not more than three cases.

(5) The Judge to whom the case has been assigned shall, 30 days prior to the date scheduled for the arbitration hearing, sign an order setting forth the date and time of the arbitration hearing and the names of the arbitrators designated to hear the case. If a party has filed a motion for judgment on the pleadings, summary judgment or similar relief, the Judge shall not sign the order before ruling on the motion, but the filing of such a motion on or after the date of the order shall not stay the arbitration unless the Judge so orders.

(6) Upon entry of the order designating the arbitrators, the arbitration clerk shall send to each arbitrator a copy of all pleadings, including the order designating the arbitrators, and the guidelines for arbitrators.

(7) Persons selected to be arbitrators shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. § 144, and shall disqualify themselves in any action which they would be required under title 28, U.S.C. § 455 to disqualify themselves if they were a justice, judge, or magistrate.

(f) Arbitration Hearing.

(1) The arbitration hearing shall take place in the United States Courthouse in a courtroom assigned by the arbitration clerk on the date and at the time set forth in the order of the Court. The arbitrators are authorized to change the date and time of the hearing provided the hearing is commenced within 30 days of the hearing date set forth in the order of the Court. Any continuance beyond this 30 day period must be approved by the Judge to whom the case has been assigned. The arbitration clerk must be notified immediately of any continuance.

(2) Counsel for the parties shall report settlement of the case to the arbitration clerk and all members of the arbitration panel assigned to the case.

(3) The arbitration hearing may proceed in the absence of any party who, after notice, fails to be present. In the event, however, that a party fails to participate in the arbitration process in a meaningful manner, the Court may impose appropriate sanctions, including, but not limited to, the striking of any demand for a trial de novo filed by that party.

(4) Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this Rule. Testimony at an arbitration hearing shall be under oath or affirmation.

(5) The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except those intended solely for impeachment, must be marked for identification and delivered to adverse parties at least fourteen (14) days prior to the hearing. The arbitrators shall receive exhibits in evidence without formal proof unless counsel has been notified at least seven (7) days prior to the hearing that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrators may refuse to receive in evidence any exhibit, a copy or photograph of which has not been delivered to the adverse party as provided herein.

(6) A party may have a recording and transcript made of the arbitration hearing, but that party shall make all necessary arrangements and bear all expenses thereof.

(g) Arbitration Award and Judgment.

(1) The arbitration award shall be filed with the Court promptly after the hearing is concluded and shall be entered as the judgment of the Court after the 30 day period for requesting a trial de novo pursuant to Section (h) has expired, unless a party has demanded a trial de novo. The judgment so entered shall be subject to the same provisions of law and

shall have the same force and effect as a judgment of the Court in a civil action, except that it shall not be appealable. In a case involving multiple claims and parties, any segregable part of an arbitration award as to which an aggrieved party has not timely demanded a trial de novo shall become part of the final judgment with the same force and effect as a judgment of the Court in a civil action, except that it shall not be appealable.

(2) The contents of any arbitration award shall not be made known to any Judge who might be assigned the case,

(A) except as necessary for the Court to determine whether to assess costs or attorneys fees,

(B) until the District Court has entered final judgment in the action or the action has been otherwise terminated, or

(C) except for purposes of preparing the report required by section 903(b) of the Judicial Improvement and Access to Justice Act.

(3) Costs may be taxed as part of any arbitration award pursuant to 28 U.S.C. § 1920.

(h) Trial De Novo.

(1) Within 30 days after the arbitration award is entered on the docket, any party may demand in writing a trial de novo in the District Court. Such demand shall be filed with the arbitration clerk, and served by the moving party upon all counsel of record or other parties. Withdrawal of a demand for a trial de novo shall not reinstate the arbitrators' award and the case shall proceed as if it had not been arbitrated.

(2) Upon demand for a trial de novo and the payment to the Clerk required by paragraph (4) of this section, the action shall be placed on the calendar of the Court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(3) At the trial de novo, the Court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding.

(4) Upon making a demand for trial de novo the moving party shall, unless permitted to proceed in forma pauperis, deposit with the Clerk of the Court an amount equal to the arbitration fees of the arbitrators as provided in Section (b). The sum so deposited shall be returned to the party demanding a trial de novo in the event that party obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. If the party demanding a trial de novo does not obtain a more favorable result after trial or if the Court determines that the party's conduct in seeking a trial de novo was in bad faith, the sum so deposited shall be paid by the Clerk to the Treasury of the United States.

COMMITTEE NOTE

Because this Local Civil Rule has been recently reviewed and updated by the Court, the Committee has not undertaken to review it in detail.

Local Civil Rule 83.8. Court-Annexed Mediation (Eastern District Only) [formerly Local Civil Rule 83.11]

(a) Description. Mediation is a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator improves communication across party lines, helps parties articulate their interests and understand those of the other party, probes the strengths and weaknesses of each party's legal positions, and identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden

resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

(b) Mediation Procedures.

(1) Eligible cases. Judges and Magistrate Judges may designate civil cases for inclusion in the mediation program, and when doing so shall prepare an order to that effect. Alternatively, and subject to the availability of qualified mediators, the parties may consent to participation in the mediation program by preparing and executing a stipulation signed by all parties to the action and so-ordered by the Court.

(A) Mediation deadline. Any court order designating a case for inclusion in the mediation program, however arrived at, may contain a deadline not to exceed six months from the date of entry on the docket of that order. This deadline may be extended upon motion to the Court for good cause shown.

(2) Mediators. Parties whose case has been designated for inclusion in the mediation program shall be offered the options of (a) using a mediator from the Court's panel, a listing of which is available in the Clerk's Office; (b) selecting a mediator on their own; or (c) seeking the assistance of a reputable neutral ADR organization in the selection of a mediator.

(A) Court's panel of mediators. When the parties opt to use a mediator from the Court's panel, the Clerk's Office will appoint a mediator to handle the case who (i) has been for at least five years a member of the bar of a state or the District of Columbia; (ii) is admitted to practice before this Court; and (iii) has completed the Court's requirements for mediator training and mediator expertise. If any party so requests, the appointed mediator also shall have expertise in the area of law in the case. The Clerk's Office will provide notice of their appointment to all counsel.

(B) Disqualification. Any party may submit a written request to the Clerk's

Office within fourteen days from the date of the notification of the mediator for the disqualification of the mediator for bias or prejudice as provided in 28 U.S.C. § 144. A denial of such a request by the Clerk's Office is subject to review by the assigned Judge upon motion filed within fourteen (14) days of the date of the Clerk's Office denial.

(3) Scheduling the mediation. The mediator, however chosen, will contact all attorneys to fix the date and place of the first mediation session, which shall be held within thirty days of the date the mediator was appointed or at such other time as the Court may establish.

(A) The Clerk's Office will provide counsel with copies of the Judge's order referring the case to the mediation program, the Clerk's Office notice of appointment of mediator (if applicable), and a copy of the program procedures.

(4) Written mediation statements. No less than fourteen (14) days prior to the first mediation session, each party shall submit directly to the mediator a mediation statement not to exceed ten pages double-spaced, not including exhibits, outlining the key facts and legal issues in the case. The statement will also include a description of motions filed and their status, and any other information that will advance settlement prospects or make the mediation more productive. Mediation statements are not briefs and are not filed with the Court, nor shall the assigned Judge or Magistrate Judge have access to them.

(5) Mediation session(s). The mediator meets initially with all parties to the dispute and their counsel in a joint session. The mediator may hold mediation sessions in his/her office, or at the Court, or at such other place as the parties and the mediator shall agree. At this meeting, the mediator explains the mediation process and gives each party an opportunity to explain his or her views about the matters in dispute. There is then likely to be discussion and questioning among the parties as well as between the mediator and the parties.

(A) Separate caucuses. At the conclusion of the joint session, the mediator will typically caucus individually with each party. Caucuses permit the mediator and the parties to explore more fully the needs and interests underlying the stated positions. In caucuses the mediator strives to facilitate settlement on matters in dispute and the possibilities for settlement. In some cases the mediator may offer specific suggestions for settlement; in other cases the mediator may help the parties generate creative settlement proposals.

(B) Additional sessions. The mediator may conduct additional joint sessions to promote further direct discussion between the parties, or she/he may continue to work with the parties in private caucuses.

(C) Conclusion. The mediation concludes when the parties reach a mutually acceptable resolution, when the parties fail to reach an agreement, on the date the Judge or Magistrate Judge specified as the mediation deadline in their designation order, or in the event no such date has been specified by the Court, at such other time as the parties and/or the mediator may determine. The mediator has no power to impose settlement and the mediation process is confidential, whether or not a settlement is reached.

(6) Settlement. If settlement is reached, in whole or in part, the agreement, which shall be binding upon all parties, will be put into writing and counsel will file a stipulation of dismissal or such other document as may be appropriate. If the case does not settle, the mediator will immediately notify the Clerk's Office, and the case or the portion of the case that has not settled will continue in the litigation process.

(c) Attendance at Mediation Sessions.

(1) In all civil cases designated by the Court for inclusion in the mediation program,

attendance at one mediation session shall be mandatory; thereafter, attendance shall be voluntary. The Court requires of each party that the attorney who has primary responsibility for handling the trial of the matter attend the mediation sessions.

(2) In addition, the Court may require, and if it does not, the mediator may require the attendance at the mediation session of a party or its representative in the case of a business or governmental entity or a minor, with authority to settle the matter and to bind the party. This requirement reflects the Court's view that the principal values of mediation include affording litigants with an opportunity to articulate their positions and interests directly to the other parties and to a mediator and to hear, first hand, the other party's version of the matters in dispute. Mediation also enables parties to search directly with the other party for mutually agreeable solutions.

(d) Confidentiality.

(1) The parties will be asked to sign an agreement of confidentiality at the beginning of the first mediation session to the following effect:

(A) Unless the parties otherwise agree, all written and oral communications made by the parties and the mediator in connection with or during any mediation session are confidential and may not be disclosed or used for any purpose unrelated to the mediation.

(B) The mediator shall not be called by any party as a witness in any court proceeding related to the subject matter of the mediation unless related to the alleged misconduct of the mediator.

(2) Mediators will maintain the confidentiality of all information provided to, or discussed with, them. The Clerk of Court and the ADR Administrator are responsible for program administration, evaluation, and liaison between the mediators and the Court and will

maintain strict confidentiality.

(3) No papers generated by the mediation process will be included in Court files, nor shall the Judge or Magistrate Judge assigned to the case have access to them. Information about what transpires during mediation sessions will not at any time be made known to the Court, except to the extent required to resolve issues of noncompliance with the mediation procedures. However, communications made in connection with or during a mediation may be disclosed if all parties and, if appropriate as determined by the mediator, the mediator so agree. Nothing in this section shall be construed to prohibit parties from entering into written agreements resolving some or all of the case or entering and filing with the Court procedural or factual stipulations based on suggestions or agreements made in connection with a mediation.

(e) Oath and Disqualification of Mediator.

(1) Each individual certified as a mediator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as a mediator.

(2) No mediator may serve in any matter in violation of the standards set forth in 28 U.S.C. § 455. If a mediator is concerned that a circumstance covered by subparagraph (a) of that section might exist, e.g., if the mediator's law firm has represented one or more of the parties, or if one of the lawyers who would appear before the mediator at the mediation session is involved in a case on which an attorney in the mediator's firm is working, the mediator shall promptly disclose that circumstance to all counsel in writing. A party who believes that the assigned mediator has a conflict of interest shall bring this concern to the attention of the Clerk's Office in writing, within fourteen (14) days of learning the source of the potential conflict or the objection to such a potential conflict shall be deemed to have been waived. Any objections that cannot be resolved by the parties in consultation with the Clerk's Office

shall be referred to the Judge or Magistrate Judge who has designated the case for inclusion in the mediation program.

(3) A party who believes that the assigned mediator has engaged in misconduct in such capacity shall bring this concern to the attention of the Clerk's Office in writing, within fourteen (14) days of learning of the alleged misconduct or the objection to such alleged misconduct shall be deemed to have been waived. Any objections that cannot be resolved by the parties in consultation with the Clerk's Office shall be referred to the Judge who has designated the case for inclusion in the mediation program.

(f) Services of the Mediators.

(1) Participation by mediators in the program is on a voluntary basis. Each mediator shall receive a fee of \$600 for the first four hours or less of the actual mediation. Time spent preparing for the mediation will not be compensated. Thereafter, the mediator shall be compensated at the rate of \$250 per hour. The mediator's fee shall be paid by the parties to the mediation. Any party that is unable or unwilling to pay the fee may apply to the referring judge for a waiver of the fee, with a right of appeal to the district judge in the event the referral was made by a magistrate judge. Each member of the panel will be required to mediate a maximum of two cases pro bono each year, if requested by the Court. Attorneys serving on the Court's panel will be given credit for pro bono work.

(2) Appointment to the Court's panel is for a three year term, subject to renewal. A panelist will not be expected to serve on more than two cases during any twelve month period and will not be required to accept each assignment offered. Repeated rejection of assignments will result in the attorney being dropped from the panel.

(g) Immunity of the Mediators. Mediators shall be immune from liability or suit with respect to their conduct as such to the maximum extent permitted by applicable law.

COMMITTEE NOTE

Because this Local Civil Rule has been recently reviewed and updated by the Court, the Committee has not undertaken to review it in detail.

Local Civil Rule 83.9. Alternative Dispute Resolution (Southern District Only) [formerly Local Civil Rule 83.12]

(a) Alternative Dispute Resolution Options:

The U.S. District Court for the Southern District of New York provides litigants with opportunities to discuss settlement through judicial settlement conferences and mediation.

(b) Definition of Mediation

In mediation, parties and counsel meet, sometimes collectively and sometimes individually, with a neutral third party (the mediator) who has been trained to facilitate confidential settlement discussions. The parties articulate their respective positions and interests and generate options for a mutually agreeable resolution to the dispute. The mediator assists the parties in reaching their own negotiated settlement by defining the issues, probing and assessing the strengths and weaknesses of each party's legal positions, and identifying areas of agreement and disagreement. The main benefits of mediation are that it can result in an expeditious and less costly resolution of the litigation, and can produce creative solutions to complex disputes often unavailable in traditional litigation.

(c) Administration of the Mediation Program

(1) The Mediation Supervisor, appointed by the Clerk of the Court, shall administer the Court's mediation program. The Chief Judge shall appoint one or more District Judges or Magistrate Judges to oversee the program.

(2) The Mediation Supervisor, in consultation with other Court personnel, shall ensure that information about the Court's mediation program is available on the Court's website which will be updated as needed.

(3) The mediation program shall be governed by the “Procedures of the Mediation Program for the Southern District of New York,” which sets forth specific and more detailed information regarding the mediation program, and which is available on the Court’s official website (<https://nysd.uscourts.gov>) or from the Mediation Office.

(4) In no event is the scheduling of mediation to interfere with any scheduling order of the Court.

(d) Consideration of Alternative Dispute Resolution

In all civil cases, including those eligible for mediation pursuant to paragraph (e), each party shall consider the use of mediation or a judicial settlement conference and shall report to the assigned Judge at the initial Rule 16(b) case management conference, or subsequently, whether the party believes mediation or a judicial settlement conference may facilitate the resolution of the lawsuit. Judges are encouraged to note the availability of the mediation program and/or a judicial settlement conference before, at, or after the initial Rule 16(b) case management conference.

(e) Mediation Program Eligibility

(1) All civil cases other than social security, habeas corpus, and tax cases are eligible for mediation, whether assigned to Manhattan or White Plains.

(2) The Board of Judges may, by Administrative Order, direct that certain specified categories of cases shall automatically be submitted to the mediation program. The assigned District Judge or Magistrate Judge may issue a written order exempting a particular case with or without the request of the parties.

(3) For all other cases, the assigned District Judge or Magistrate Judge may determine that a case is appropriate for mediation and may order that case to mediation, with or without the consent of the parties, before, at, or after the initial Rule 16(b) case management conference. Alternatively, the parties should notify the assigned Judge at any time of their desire to mediate.

(f) Judicial Settlement Conferences

Judicial settlement conferences may be ordered by District Judges or Magistrate Judges with or without the request or consent of the parties.

COMMITTEE NOTE

Local Civil Rule 83.9 has been revised to refer to the “Procedures of the Mediation Program for the Southern District of New York.” This revision is intended to increase flexibility in the administration of the Mediation Program. Local Civil Rule 83.9 has been revised to make clear that judicial settlement conferences are an available form of alternative dispute resolution.

Local Civil Rule 83.10. Plan for Certain § 1983 Cases Against the City of New York

(Southern District Only)

Supporting documents can be found at <https://nysd.uscourts.gov/programs/mediation-adr>.

Unless otherwise ordered, in civil cases filed by a represented plaintiff against the City of New York (“City”) and/or the New York City Police Department (“NYPD”) or its employees alleging the use of excessive force, false arrest, or malicious prosecution by employees of the NYPD in violation of 42 U.S.C. § 1983, the procedures set forth below shall apply, except that the procedures and Protective Order identified in paragraphs 3 through 12 shall not apply to class actions, actions brought by six or more plaintiffs, complaints requesting systemic equitable reform, or actions requesting immediate injunctive relief.

1. Service of Releases with Complaint

- a. At the same time that plaintiff serves the complaint, plaintiff must serve on the City the release annexed as Exhibit A (“§ 160.50 Release”) for sealed arrest records for the arrest that is the subject of the complaint, and for a list of all prior arrests. In the case of class actions, plaintiff must serve § 160.50 Releases for the named putative class representatives.

b. If plaintiff seeks compensation for any physical or mental injury caused by the conduct alleged in the complaint other than “garden variety” emotional distress, plaintiff must serve on the City the medical release annexed as Exhibit B (“Medical Release”) for all medical and psychological treatment records for those injuries at the same time that plaintiff serves the § 160.50 Release. Where plaintiff has a pre-existing physical or mental condition that reasonably appears to be related to the injury for which compensation is sought, plaintiff must at that same time serve Medical Releases on the City for all records of treatment for such pre-existing condition(s). Failure to so serve the above-described Medical Release(s) will constitute a waiver of plaintiff’s claims for compensation for that physical or mental injury.

2. Failure to Serve § 160.50 Release

If no § 160.50 Release is served on the City with the complaint, the City will promptly send a letter to plaintiff’s counsel requesting the § 160.50 Release and attaching a copy of Local Civil Rule 83.10.

3. Time to Answer

If the § 160.50 Release is served on the City at the time the complaint is first served on a defendant, that defendant will have 80 days from the date of such service to answer the complaint. Any subsequently-served defendant will have the greater of (i) 60 days or (ii) the date by which the first-served defendant must answer, to answer the complaint. If the § 160.50 Release is served on the City after the complaint is first served on a defendant, each defendant will have the greater of (i) 60 days from the date the § 160.50 Release is served on the City, or (ii) 60 days after that defendant is served, to answer the complaint. If any defendant moves to dismiss the entire complaint rather than filing an answer, the deadlines in this Rule shall be stayed unless the Court orders otherwise.

4. Rule 26(f) Conference, Initial Disclosures, and Applying for Exemption from the Rule

- a. Within 14 days after the first defendant files its answer, the parties shall meet and confer pursuant to Fed. R. Civ. P. 26(f). The parties shall also discuss whether to request that the court (i) refer the case for settlement purposes to a magistrate judge; or (ii) exempt the case from Local Civil Rule 83.10. Any such application by a party must be submitted to the presiding judge no later than 21 days after the first defendant files its answer. Absent any such application from a party, the case shall automatically proceed under the Rule and shall automatically be referred to a mediator selected from the Southern District Mediation Panel.
- b. Within 21 days after the first defendant files its answer, the parties shall exchange their initial disclosures.

5. Limited Discovery

Within 28 days after the first defendant files its answer, the parties must complete production of the following discovery. All other discovery is stayed. Unless otherwise ordered, the discovery stay shall expire at the conclusion of the mediation or settlement conference.

- a. The City shall serve on plaintiff:
 - i. Subject to any applicable privileges, any items on the list attached as Exhibit C that were not part of the City's initial disclosures; documents received from the District Attorney's office; and documents obtained from the court file.
 - ii. Any CCRB records and the IAB closing report regarding the incident that forms the basis of the complaint. If the incident or the conduct of defendants involved in the incident is the subject of an ongoing CCRB investigation, NYPD investigation or disciplinary proceeding, criminal investigation or outstanding indictment or information, discovery under this paragraph shall be suspended, and the City will produce the investigative records 30 days after the investigation or

proceeding has been terminated (whether by completion of the investigation without charges being brought or by disposition of such charges). This suspension shall not apply to documents related to any investigation or proceeding that has concluded.

- iii. For each defendant, the CCRB and CPI indices of complaints or incidents that are similar to the incident alleged in the complaint or that raise questions about the defendant's credibility. If the complaint alleges that a defendant officer used excessive force, the City will state whether that defendant officer has been or is on NYPD "force monitoring."
- iv. For each officer named as a defendant, a list identifying all prior Section 1983 lawsuits filed against and served on the defendant.
- v. Any records obtained by the City pursuant to the Medical Releases. Medical records received after this date shall be produced to plaintiff within 7 days of receipt.

b. Plaintiff shall serve on the City:

- i. Any documents identified in Exhibit C; documents received from the District Attorney's office; and documents obtained from the court file.
- ii. Any medical records for which plaintiff has served a Medical Release on the City.
- iii. Any video and photographs of the incident.

6. Amended Pleadings

The complaint may be amended to name additional defendants without leave of the presiding judge within six weeks after the first defendant files its answer. The filing of the amended complaint shall not affect any of the duties imposed by Local Civil Rule 83.10.

7. Settlement Demand and Offer

Within six weeks after the first defendant files its answer, plaintiff must serve a written

settlement demand on the City. The City must respond in writing to plaintiff's demand within 14 days thereafter. The parties shall thereafter engage in settlement negotiations.

8. Mediation or Settlement Conference

Unless the presiding judge has referred the case to a magistrate judge to conduct a settlement conference, within 14 days after the first defendant files its answer, the Mediation Office will assign a mediator. The mediator shall promptly confer with counsel for the parties to schedule a mediation session to occur no later than 14 weeks after the first defendant files its answer. The mediator shall inform the Mediation Office no later than 60 days after the first defendant files its answer of the schedule for the mediation session. Unless the parties have filed a Stipulation of Dismissal with the Clerk of Court, the parties shall appear at the mediation session or at a settlement conference before a magistrate judge. The plaintiff shall attend the mediation or settlement conference. The City's representative must have full authority to settle the case; if the City requires additional approvals in order to settle, the City must have arranged for telephone access to such persons during the mediation or settlement conference.

9. Failure to Timely Comply with the Requirements of this Rule

If any party fails to comply with any requirement under this Rule, the other party shall promptly write to the presiding judge indicating the nature of the failure and requesting relief.

10. Request for Initial Pre-Trial Conference

Unless the presiding judge has already scheduled or held an initial pre-trial conference, if the mediation or settlement conference is unsuccessful, the parties shall promptly request that the presiding judge schedule an initial pre-trial conference.

11. Protective Order

The Protective Order attached as Exhibit D shall be deemed to have been issued in all cases governed by this Rule.

12. Preservation

Local Civil Rule 83.10 does not relieve any party of its obligation to preserve documents and to issue preservation instructions

LOCAL ADMIRALTY AND MARITIME RULES

Local Admiralty Rule A.1. Application of Rules

(a) These Local Admiralty and Maritime Rules apply to the procedure in the claims and proceedings governed by the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure.

(b) The Local Civil Rules also apply to the procedure in such claims and proceedings, except to the extent that they are inconsistent with the Supplemental Rules or with these Local Admiralty and Maritime Rules.

[Source: Former Local Admiralty Rule 1 and Supplemental Rule 1]

Local Admiralty Rule B.1. Affidavit That Defendant Is Not Found Within the District

The affidavit required by Supplemental Rule B(1) to accompany the complaint, and the affidavit required by Supplemental Rule B(2) (c), shall list the efforts made by and on behalf of the plaintiff to find and serve the defendant within the district.

[Source: Maritime Law Association Model Rule (b)(1)]

Local Admiralty Rule B.2. Notice of Attachment

The plaintiff shall give prompt notice to the defendant of an attachment following plaintiff's being advised of such an attachment by the garnishee. Such notice shall be in writing, and may be given by fax, email or other verifiable electronic means.

[Source: Former Local Admiralty Rule 10(b)]

Local Admiralty Rule C.1. Intangible Property

The summons issued pursuant to Supplemental Rule C(3)(c) shall direct the person having

control of freight or proceeds of property sold or other intangible property to show cause at a date which shall be at least fourteen (14) days after service (unless the court, for good cause shown, shortens the period) why the intangible property should not be delivered to the court to abide the judgment. The person who is served may deliver or pay over to the marshal the intangible property proceeded against to the extent sufficient to satisfy the plaintiff's claim. If such delivery or payment is made, the person served is excused from the duty to show cause.

[Source: Former Local Admiralty Rule 2]

Local Admiralty Rule C.2. Publication of Notice of Action and Arrest; Sale

(a) The notice required by Supplemental Rule C(4) shall be published at least once and shall contain (1) the fact and date of the arrest, (2) the caption of the case, (3) the nature of the action, (4) the amount demanded, (5) the name of the marshal, (6) the name, address, and telephone number of the attorney for the plaintiff, and (7) a statement that claimants must file their claims with the clerk of this court within fourteen (14) days after notice or first publication (whichever is earlier) or within such additional time as may be allowed by the court and must serve their answers within twenty one (21) days after the filing of their claims. The notice shall also state that all interested persons should file claims and answers within the times so fixed otherwise default will be noted and condemnation ordered.

(b) Except in the event of private sale pursuant to 28 U.S.C. §§ 2001 and 2004, or unless otherwise ordered as provided by law, notice of sale of the property after condemnation in suits in rem shall be published daily for at least six (6) days before sale.

[Source: Former Local Admiralty Rule 3(a), c]

Local Admiralty Rule C.3. Notice Required for Default Judgment in Action In Rem

(a) Notice Required in General. A party seeking a default judgment in an action in rem must satisfy the court that due notice of the action and arrest of the property has been given:

(1) By publication as required in Supplemental Rule C(4) and Local Admiralty Rule C.2;

(2) By service upon the master or other person having custody of the property; and

(3) By service under Federal Rule of Civil Procedure 5(b) upon every other person who has not appeared in the action and is known to have an interest in the property.

(b) Notice Required to Persons With Recorded Interests.

(1) If the defendant property is a vessel documented under the laws of the United States, plaintiff must attempt to notify all persons named in the certificate of ownership issued by the United States Coast Guard, or other designated agency of the United States, as holding an ownership interest in or as holding a lien in or as having filed a notice of claim of lien with respect to the vessel.

(2) If the defendant property is a vessel numbered as provided in 46 U.S.C. § 12301(a), plaintiff must attempt to notify the persons named in the records of the issuing authority.

(3) If the defendant property is of such character that there exists a governmental registry of recorded property interests or security interests in the property, the plaintiff must attempt to notify all persons named in the records of each such registry.

[Source: Maritime Law Association Model Rule (c)(3)]

Local Admiralty Rule D.1. Return Date in Possessory, Petitory, and Partition Actions

In an action under Supplemental Rule D, the court may order that the claim and answer be

filed on a date earlier than twenty one (21) days after arrest, and may by order set a date for expedited hearing of the action.

[Source: Maritime Law Association Model Rule (d)(1)]

Local Admiralty Rule E.1. Adversary Hearing Following Arrest, Attachment or Garnishment

The adversary hearing following arrest or attachment or garnishment that is called for in Supplemental Rule E(4)(f) shall be conducted by a judicial officer within seven (7) days, unless otherwise ordered.

[Source: Maritime Law Association Model Rule (e)(8)]

Local Admiralty Rule E.2. Intervenors' Claims

(a) Presentation of Claim. When a vessel or other property has been arrested, attached, or garnished, and is in the hands of the marshal or custodian substituted therefor, anyone having a claim against the vessel or property is required to present the claim by filing an intervening complaint, and not by filing an original complaint, unless otherwise ordered by a judicial officer. Upon the satisfaction of the requirements of Federal Rule of Civil Procedure 24, the clerk shall forthwith deliver a conformed copy of the complaint to the marshal, who shall deliver the copy to the vessel or custodian of the property. Intervenors shall thereafter be subject to the rights and obligations of parties, and the vessel or property shall stand arrested, attached, or garnished by the intervenor.

(b) Sharing Marshal's Fees and Expenses. An intervenor shall have a responsibility to the first plaintiff, enforceable on motion, consisting of the intervenor's share of the marshal's fees and expenses in the proportion that the intervenor's claim bears to the sum of all the claims. If a party plaintiff permits vacation of an arrest, attachment, or garnishment, remaining plaintiffs share the

responsibility to the marshal for the fees and expenses in proportion to the remaining claims and for the duration of the marshal's custody because of each claim.

[Source: Maritime Law Association Model Rule (e)(11)]

Local Admiralty Rule E.3. Claims by Suppliers for Payment of Charges

A person who furnishes supplies or services to a vessel, cargo, or other property in custody of the court who has not been paid and claims the right to payment as an expense of administration shall submit an invoice to the clerk in the form of a verified claim at any time before the vessel, cargo or other property is released or sold. The supplier must serve copies of the claim on the marshal, substitute custodian if one has been appointed, and all parties of record. The court may consider the claims individually or schedule a single hearing for all claims.

[Source: Maritime Law Association Model Rule (e)(12)(d)]

Local Admiralty Rule E.4. Preservation of Property

Whenever property is attached or arrested pursuant to the provisions of Supplemental Rule E(4)(b) that permit the marshal or other person having the warrant to execute the process without taking actual possession of the property, and the owner or occupant of the property is thereby permitted to remain in possession, the court, on motion of any party or on its own motion, may enter any order necessary to preserve the value of the property, its contents, and any income derived therefrom, and to prevent the destruction, removal or diminution in value of such property, contents and income.

LOCAL CRIMINAL RULES

Local Criminal Rule 1.1. Application of Rules

- (a) These Local Criminal Rules apply in all criminal proceedings.
- (b) In addition to Local Civil Rules referenced elsewhere in these Local Criminal Rules, the following Local Civil Rules also apply in criminal proceedings:

- 1.2. *Clerk's Office*
- 1.3. *Admission to the Bar*
- 1.4. *Withdrawal or Displacement of Attorney of Record*
- 1.5. *Discipline of Attorneys*
- 1.6. *Duty of Attorney in Related Cases* (to the extent cases may be considered related under the Courts' Rules (SDNY) or Guidelines (EDNY) for the Division of Business)
- 1.7. *Fees of Court Reporters*
- 1.8. *Photographs, Radio, Recordings, Television*
- 1.9. *Acceptable Substitutes for Affidavits*
- 5.2. *Electronic Service and Filing of Documents*
- 5.3. *Service by Overnight Delivery*
- 6.2. *Orders on Motions*
- 39.1. *Custody of Trial and Hearing Exhibits*
- 58.1. *Remand by an Appellate Court*
- 67.1. *Order for Deposit in Interest-Bearing Account.*

COMMITTEE NOTE

The titles of cross-referenced rules have been added for clarity. The parenthetical to Local Civil Rule 1.6 harmonizes that rule's otherwise broad concept of relatedness with the narrow concepts of relatedness specified in the Courts' Rules (SDNY) or Guidelines (EDNY)

for the Division of Business. Finally, the Committee believed it useful to add cross-references to Local Civil Rules 5.2, 5.3, 6.2, 58.1 and 67.1, since they address procedures useful in criminal as well as in civil proceedings.

Local Criminal Rule 1.2. Notice of Appearance

Attorneys representing defendants in criminal cases shall file a notice of appearance. Once a notice of appearance has been filed, the attorney may not withdraw except upon prior order of the Court pursuant to Local Civil Rule 1.4.

COMMITTEE NOTE

This rule, derived from former Local Criminal Rule 44.1, has been renumbered to place it in closer proximity to the cross-references in Local Criminal Rule 1.1 to admission to the bar and withdrawal from a case. Former Local Criminal Rule 44.1(b) has been stricken. That rule required attorneys to submit a certificate of good standing from at least one of the states in which the attorney was admitted and was intended to ensure that criminal defendants are in fact represented by admitted attorneys. However, the rule only required an attorney to submit such a certificate once and thus does not appear to serve a substantially different function from the provisions of Local Civil Rule 1.3 on admission to the bar. In addition, former Local Criminal Rule 44.1(b) did not appear to be enforced in practice.

Local Criminal Rule 12.4. Disclosure Statement

For purposes of Fed. R. Crim. P. 12.4 (b)(2), “promptly” shall mean “within fourteen (14) days,” that is, parties are required to file supplemental disclosure statement within fourteen (14) days of the time there is any change in the information required in a disclosure statement filed pursuant to those rules.

Local Criminal Rule 16.1. Conference of Counsel

No motion addressed to a bill of particulars or any discovery matter shall be heard unless counsel for the moving party files in or simultaneously with the moving papers an affidavit certifying that counsel has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the Court and has been unable to reach agreement. If some of the issues raised by the motion have been resolved by agreement, the

affidavit shall specify the issues remaining unresolved.

COMMITTEE NOTE

The rule was simplified to refer to “a bill of particulars or any discovery matter,” and to make clear that the requisite certification could be filed as part of the motion papers.

Local Criminal Rule 23.1. Free Press-Fair Trial Directives

(a) It is the duty of the lawyer or law firm, and of non-lawyer personnel employed by a lawyer’s office or subject to a lawyer’s supervision, private investigators acting under the supervision of a criminal defense lawyer, and government agents and police officers, not to release or authorize the release of non-public information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which they are associated, if there is a substantial likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(b) With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation (including government lawyers and lawyers for targets, subjects, and witnesses in the investigation) shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers or otherwise to aid in the investigation, if there is a substantial likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the administration of justice.

(c) During a jury trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial which a reasonable person

would expect to be disseminated by means of public communication if there is a substantial likelihood that such dissemination will interfere with a fair trial; except that the lawyer or the law firm may quote from or refer without comment to public records of the Court in the case.

(d) Statements concerning the following subject matters presumptively involve a substantial likelihood that their public dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice within the meaning of this rule:

(1) The prior criminal record (including arrests, indictments or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation and family status; and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in the accused's apprehension or to warn the public of any dangers the accused may present;

(2) The existence or contents of any confession, admission or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Information the lawyer or law firm knows is likely to be inadmissible at trial and would if disclosed create a substantial likelihood of prejudicing an impartial trial; and

(7) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

(e) Statements concerning the following subject matters presumptively do not involve a substantial likelihood that their public dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice within the meaning of this rule:

(1) An announcement, at the time of arrest, of the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit and use of weapons), the identity of the investigating and arresting officer or agency and the length of investigation;

(2) An announcement, at the time of seizure, stating whether any items of physical evidence were seized and, if so, a description of the items seized (but not including any confession, admission or statement);

(3) The nature, substance or text of the charge, including a brief description of the offense charged;

(4) Quoting or referring without comment to public records of the Court in the case;

(5) An announcement of the scheduling or result of any stage in the judicial process, or an announcement that a matter is no longer under investigation;

(6) A request for assistance in obtaining evidence; and

(7) An announcement, without further comment, that the accused denies the charges, and a brief description of the nature of the defense.

(f) Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against said lawyer.

(g) All Court supporting personnel, including, among others, marshals, deputy marshals,

Court Clerks, bailiffs and Court reporters and employees or sub-contractors retained by the Court-appointed official reporters, are prohibited from disclosing to any person, without authorization by the Court, information relating to a pending grand jury proceeding or criminal case that is not part of the public records of the Court. The divulgence by such Court supporting personnel of information concerning grand jury proceedings, in camera arguments and hearings held in chambers or otherwise outside the presence of the public is also forbidden.

(h) The Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses and any other matters which the Court may deem appropriate for inclusion in such order. In determining whether to impose such a special order, the Court shall consider whether such an order will be necessary to ensure an impartial jury and must find that other, less extreme available remedies, singly or collectively, are not feasible or would not effectively mitigate the pretrial publicity and bring about a fair trial. Among the alternative remedies to be considered are: change of venue, postponing the trial, a searching voir dire, emphatic jury instructions, and sequestration of jurors.

(i) Any lawyer who violates the terms of this rule may be disciplined pursuant to Local Civil Rule 1.5.

COMMITTEE NOTE

This rule was the subject of substantial debate and compromise at the time of the 1997 revisions to the Local Rules. During the 2011 revision, the Committee, in the absence of intervening decisions substantially impacting the subject of the rule, decided not to recommend any changes to the rule.

Local Criminal Rule 34.1. Post-Trial Motions

Post-trial motions in criminal cases, including motions for correction or reduction of sentence

under Federal Rule of Criminal Procedure 35, or to suspend execution of sentence, or in arrest of judgment under Federal Rule of Criminal Procedure 34, shall be referred to the trial Judge. If the trial Judge served by designation and assignment under 28 U.S.C. §§ 291-296, and is absent from the district, such motions may be referred to that Judge for consideration and disposition.

Local Criminal Rule 45.1. Computation of Time

In computing any period of time prescribed or allowed by the Local Criminal Rules, the provisions of Federal Rule of Criminal Procedure 45 shall apply unless otherwise stated. In these Local Rules, as in the Federal Rules as amended effective December 1, 2009, Saturdays, Sundays, and legal holidays are no longer excluded in computing periods of time. If the last day of the period is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

COMMITTEE NOTE

Specific references to subsections (a) and (e) of Fed. R. Crim. P. 45, which have been re-lettered in any event, were deleted.

Local Criminal Rule 47.1. Applications for Ex Parte Orders

Any application for an ex parte order shall state whether a previous application for similar relief has been made and, if so, shall state (a) the nature of the previous application, (b) the judicial officer to whom such application was presented, and (c) the disposition of such application.

COMMITTEE NOTE

This rule, former Local Criminal Rule 1.2, was renumbered to associate it with the relevant Federal Rule of Criminal Procedure, Rule 47, *Motions and Supporting Affidavits*.

Local Criminal Rule 49.1. Service and Filing of Motion Papers

Unless otherwise provided by statute or rule, or unless otherwise ordered by the Court in a Judge's Individual Practices or in a direction in a particular case, upon any motion, the papers shall be served and filed as follows:

(a) All papers in support of the motion shall be filed and served by the moving party on all other parties that have appeared in the action.

(b) Any opposing papers shall be filed and served within fourteen (14) days after service of the motion papers.

(c) Any reply papers shall be filed and served within seven (7) days after service of the opposing papers.

(d) A motion for reconsideration or reargument of a Court order determining a motion shall be filed and served within fourteen (14) days after the Court's determination of the original motion. A memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked shall accompany the motion.

COMMITTEE NOTE

This rule, former Local Criminal Rule 12.1, was renumbered to associate it with the relevant Federal Rule of Criminal Procedure, Rule 49, *Serving and Filing Papers*. The phrase "filed and" was added to the text of subparts (a)-(c). Former subpart (d), relating to computation of time, was deleted as duplicative of Local Criminal Rule 45.1. A new subpart (d) was added to provide guidance regarding motions for reconsideration in criminal cases.

Local Criminal Rule 58.1. Petty Offenses--Collateral and Appearance

(a) A person who is charged with a petty offense as defined in 18 U.S.C. § 19, or with violating any regulation promulgated by any department or agency of the United States government, may, in lieu of appearance, post collateral in the amount indicated in the summons or other accusatory instrument, waive appearance before a United States Magistrate Judge, and consent to forfeiture of collateral.

- (b) For all other petty offenses the person charged must appear before a Magistrate Judge.

COMMITTEE NOTE

This rule (formerly Local Criminal Rule 58.2) authorizes the forfeiture of collateral pursuant to Federal Rule of Criminal Procedure 58(d)(1).

Local Criminal Rule 59.1 Powers of Magistrate Judges

In addition to other powers of Magistrate Judges:

(a) Full-time Magistrate Judges are hereby specially designated to exercise the jurisdiction set forth in 18 U.S.C. § 3401, *Misdemeanors: application of probation laws*. Unless there is a pending related indictment before a District Judge, the Clerk shall automatically refer misdemeanor cases initiated by information or indictment or transferred to the district under Federal Rule of Criminal Procedure 20 to a Magistrate Judge for arraignment. A petition by the government that the trial of a misdemeanor proceed before a District Judge pursuant to 18 U.S.C. § 3401(f) shall be filed prior to arraignment of the defendant.

(b) Magistrate Judges are hereby authorized to exercise the jurisdiction set forth in 18 U.S.C. § 3184, *Fugitives from foreign country to United States*.

(c) Local Civil Rule 72.1, *Powers of Magistrate Judges*, also applies in criminal proceedings.

COMMITTEE NOTE

This rule, formerly Local Criminal Rule 58.1, has been redesignated Local Criminal Rule 59.1 to associate it with the relevant Federal Rule of Criminal Procedure, Rule 59, *Matters Before a Magistrate Judge*. The general statutory authority of Magistrate Judges is set forth in 28 U.S.C. § 636; however, certain provisions, including 18 U.S.C. §§ 3401 & 3184, and 28 U.S.C. § 636(c), require specific authorization by the District Court for the Magistrate Judge to exercise the designated authority. This rule, and Local Civil Rule 72.1, which new subpart (c) specifically makes applicable to criminal proceedings, confirm and continue the Courts' intent to give their Magistrate Judges the maximum powers authorized by law. For the sake of clarity, the titles of the statutes referenced in the rule have been added. Former subpart (c), relating to the power of Magistrate Judges to issue subpoenas and writs, has been stricken as duplicative—the same provision already appears in Local Civil Rule 72.1(c) and will thus continue to apply in criminal proceedings.

LOCAL PATENT RULES

Local Patent Rule 1. Application of Rules

(a) These Local Patent Rules apply to patent infringement, validity and unenforceability actions and proceedings. The Court may modify the obligations or deadlines set forth in these Local Patent Rules based on the circumstances of any particular case, including, without limitation, the simplicity or complexity of the case as shown by the patents, claims, technology, products, or parties involved.

(b) The Local Civil Rules also apply to such actions and proceedings, except to the extent they are inconsistent with these Local Patent Rules.

Local Patent Rule 2. Initial Scheduling Conference

When the parties confer pursuant to Fed. R. Civ. P. 26(f), in addition to the matters covered by Fed. R. Civ. P. 26, the parties must discuss and address in the report filed pursuant to Fed. R. Civ. P. 26(f):

- i. any proposed modification of the deadlines or proceedings set forth in these Local Patent Rules;
- ii. proposed format of and deadlines for claim construction filings and proceedings, including a proposal for any expert discovery the parties propose to take in connection therewith; and
- iii. proposed format of and deadlines for service of infringement, invalidity and/or unenforceability contentions, including any proposed deadlines for supplementation thereof.

Local Patent Rule 3. Certification of Disclosures

All statements, disclosures, or charts filed or served in accordance with these Local Patent Rules

are deemed disclosures subject to Rule 26(g) of the Federal Rules of Civil Procedure.

Local Patent Rule 4. Admissibility of Disclosures

Statements, disclosures or charts governed by these Local Patent Rules are admissible to the extent permitted by the Federal Rules of Evidence or Civil Procedure. However, the statements and disclosures provided for in Local Patent Rule 11 are not admissible for any purpose other than in connection with motions seeking an extension or modification of the time periods within which actions contemplated by these Local Patent Rules shall be taken.

Local Patent Rule 5. Discovery Objections Based on Local Patent Rules

A party may object to a mandatory disclosure under Fed. R. Civ. P. 26(a) or to a discovery request as conflicting with or premature under these Local Patent Rules only if the mandatory disclosure or discovery request would require disclosure of information of the kind dealt with by Local Patent Rules 6, 7, 8, 10, 11 and 12.

Local Patent Rule 6. Disclosure of Asserted Claims and Infringement Contentions

Unless otherwise specified by the Court, not later than forty-five (45) days after the Initial Scheduling Conference, a party claiming patent infringement must serve on all parties a “Disclosure of Asserted Claims and Infringement Contentions,” which identifies for each opposing party, each claim of each patent-in-suit that is allegedly infringed and each product or process of each opposing party of which the party claiming infringement is aware that allegedly infringes each identified claim.

Local Patent Rule 7. Invalidity Contentions

Unless otherwise specified by the Court, not later than forty-five (45) days after service of the

“Disclosure of Asserted Claims and Infringement Contentions,” each party opposing a claim of patent infringement must serve upon all parties its “Invalidity Contentions,” if any. Invalidity Contentions must identify each item of prior art that the party contends allegedly anticipates or renders obvious each asserted claim, and any other grounds of invalidity, including any under 35 U.S.C. § 101 or § 112, or unenforceability of any of the asserted claims.

Local Patent Rule 8. Disclosure Requirement in Patent Cases Initiated by Declaratory

Judgment

In all cases in which a party files a pleading seeking a declaratory judgment that a patent is not infringed, is invalid, or is unenforceable, Local Patent Rule 6 shall not apply with respect to such patent unless and until a claim for patent infringement of such patent is made by a party. If a party does not assert a claim for patent infringement in its answer to the declaratory judgment pleading, unless otherwise specified in the Court’s Scheduling Order, the party seeking a declaratory judgment must serve upon all parties its Invalidity Contentions with respect to such patent that conform to Local Patent Rule 7 not later than forty-five (45) days after the Initial Scheduling Conference.

Local Patent Rule 9. Duty to Supplement Contentions

The duty to supplement in Fed. R. Civ. P. 26(e) shall apply to the Infringement Contentions and the Invalidity Contentions required by Local Patent Rules 6 and 7.

Local Patent Rule 10. Opinion of Counsel

Not later than thirty (30) days after entry of an order ruling on claim construction, each party that will rely on an opinion of counsel as part of a defense to a claim of willful infringement or inducement of infringement, or that a case is exceptional, must produce or

make available for inspection and copying the opinion(s) and any other documents relating to the opinion(s) as to which attorney-client or work product protection has been waived as a result of such production.

Local Patent Rule 11. Joint Claim Terms Chart

By a date specified by the Court, the parties shall cooperate and jointly file a Joint Disputed Claim Terms Chart listing the disputed claim terms and phrases, including each party's proposed construction, and cross-reference to each party's identification of the related paragraph(s) of the invalidity and/or infringement contention(s) disclosures under Local Rules 6 and 7.

Local Patent Rule 12. Claim Construction Briefing

Unless otherwise specified by the Court:

- (a) Not later than thirty (30) days after filing of the Joint Disputed Claim Terms Chart pursuant to Local Patent Rule 11, the party asserting infringement, or the party asserting invalidity if there is no infringement issue present in the case, must serve and file an opening claim construction brief and all supporting evidence and testimony.
- (b) Not later than thirty (30) days after service of the opening claim construction brief, the opposing party must serve and file a response to the opening claim construction brief and all supporting evidence and testimony.
- (c) Not later than seven (7) days after service of the response, the opening party may serve and file a reply solely rebutting the opposing party's response.

RULES FOR THE DIVISION OF BUSINESS AMONG DISTRICT JUDGES

SOUTHERN DISTRICT

These rules are adopted for the internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys and shall be subject to such amendments from time to time as shall be approved by the court.

Rule 1. Individual Assignment System

This court shall operate under an individual assignment system to assure continuous and close judicial supervision of every case. Each civil and criminal action and proceeding, except as otherwise provided, shall be assigned by lot to one judge for all purposes. The system shall be administered by an assignment committee in such a manner that all active judges, except the chief judge, shall be assigned substantially an equal share of the categories of cases of the court over a period of time. There shall be assigned or transferred to the chief judge such matters as the chief judge is willing and able to undertake, consistent with the chief judge's administrative duties.

Rule 2. Assignment Committee

An assignment committee is established for the administration of the assignment system. The committee shall consist of the chief judge and two other active judges selected by the chief judge, each to serve for one year. The chief judge shall also select two other active judges, each to serve for a period of one year, as alternate members of the committee.

The assignment committee shall supervise and rule upon all issues relating to assignments under this system, in accordance with these rules, as amended from time to time by the board of judges.

Rule 3. Part I

(a) Establishment of Part I

Part I is established for hearing and determining certain emergency and miscellaneous matters in civil and criminal cases. Judges shall choose assignment to Part I from an appropriate schedule, in order of their seniority, for periods not to exceed three weeks in each year. The judge(s) assigned full-time to White Plains do not sit in Part I in Manhattan. The assignment committee may, on consent of the judges affected, change such assignments, if necessary, to meet the needs of the court.

Part I shall be open from 9:00 a.m. to 5:00 p.m. Monday through Friday except on holidays. The judge presiding in Part I may fix such other times for any proceeding as necessary.

(b) Civil Proceedings in Part I

Admissions to the bar shall be heard in Manhattan on Tuesdays at 10:00 a.m. Admissions to the bar shall be held in White Plains on a schedule to be published annually. Civil matters other than emergencies shall be heard in Manhattan on Tuesdays at 11:00 a.m. Naturalization proceedings shall be conducted in Manhattan on Fridays at 11:00 a.m.

(i) Miscellaneous Civil Matters.

The judge presiding in Part I shall hear and determine those miscellaneous proceedings in civil matters not assigned to a judge.

(ii) Civil Emergency Matters.

The Part I judge shall hear and determine all emergency matters in civil cases which have been assigned to a judge when the assigned judge is absent or has expressly referred the matter to Part I only when that judge is unavailable due to extraordinary circumstances. In the absence of a judge at the White Plains Courthouse, emergency matters are heard in Part I at the Manhattan Courthouse. Depending on the procedures the Part I judge deems the more efficient, the Part I judge may either dispose of an emergency matter only to the extent

necessary to meet the emergency, or, on consent of the assigned judge and notice to the clerk, transfer the action to himself or herself for all further proceedings.

(iii) Subsequent Emergency Proceedings.

If a civil emergency matter is brought before the Part 1 judge and the judge concludes that for lack of emergency or otherwise the proceeding should not be determined in Part I, the party who brought the proceeding shall not present the same matter again to any other Part I judge unless relevant circumstances have changed in the interim in which case the party shall advise the judge of the prior proceedings and changed circumstances.

(iv) Modifications

When a modification or further action on a Part I determination is sought, it shall be referred in the first instance to the judge who made the original determination even though that judge is no longer sitting in Part I.

(c) Criminal Proceedings in Part I

The judge presiding in Part I shall:

(i) Hear and determine all emergency matters in criminal cases which have been assigned to a judge when the assigned judge is absent or has expressly referred the matter to Part I only when that judge is unavailable due to extraordinary circumstances. In the absence of a judge at the White Plains Courthouse, emergency matters are heard in Part I at the Manhattan Courthouse.

(ii) Hear and determine appeals from orders of a magistrate judge in cases that have not yet been assigned to a district judge.

Rule 4. Civil Actions or Proceedings (Filing and Assignment)

(a) Filing with the Clerk.

All civil actions and proceedings shall be numbered consecutively by year upon the filing of the first document in the case.

When a complaint or the first document is filed in a civil action or proceeding, counsel shall accurately complete and file form JS44C-SDNY: Civil Court Cover Sheet, in triplicate, consistent with Rule 18 below.

(b) Assignment by the Clerk by Lot.

Each civil action and proceeding, except applications for leave to proceed *in forma pauperis*, upon being filed and each appeal from the bankruptcy court upon being docketed in this court shall be assigned by lot within each designated category to a district judge for all purposes.

An action, case or proceeding may not be dismissed and thereafter refiled for the purpose of obtaining a different judge. If an action, case or proceeding, or one essentially the same, is dismissed and refiled, it shall be assigned to the same judge. It is the duty of every attorney appearing to bring the facts of the refiling to the attention of the clerk.

Rule 5. Criminal Actions or Proceedings (Filing and Assignment)

(a) Filing With the Clerk.

Criminal actions shall be numbered consecutively by year upon the filing of the indictment or information. The number of a superseding indictment or information shall be preceded by the letter "S".

When an indictment or information is filed, the United States Attorney shall simultaneously file the original and two copies of the indictment or information. The United States Attorney shall also supply form AO257: Defendant Information Relative to a Criminal Action and the Designation Form issued by the United States Attorney, in triplicate.

Rule 6. Criminal Proceedings

(a) Indictments designated for Manhattan may be returned by the grand jury in open court to the magistrate judge presiding in the criminal part. Indictments designated for White Plains may be returned by the grand jury to the magistrate judge presiding in the White Plains Courthouse.

(b) Assignments.

In a criminal case, after an indictment has been returned by the Grand Jury or a notice has been filed by the United States Attorney's Office of an intention to file an information upon the defendant's waiver of indictment, the magistrate judge on duty will randomly draw from the criminal wheel, in open court, the name of a judge to whom the case should be assigned for all purposes. The notice to file an information upon the defendant's waiver of indictment shall be signed by the United States Attorney's Office and by the defendant's attorney. Waiver of indictment cases will not be assigned a criminal docket number until the waiver has been accepted by the assigned judge. Sealed indictments will be assigned a criminal docket number upon filing, but a judge will not be selected until such time that the indictment is unsealed.

(c) Arraignments.

The United States Attorney's Office will promptly contact the judge to whom the case is assigned and request the scheduling of a pretrial conference at which the defendant will be arraigned.

(d) Waiver of Indictments.

When any person offers to waive indictment, the judge to whom the case has been assigned will conduct or refer to a magistrate judge such proceedings as may be required by law to establish that the waiver is both knowing and voluntary before an information is filed. The judge or the assigned magistrate judge shall then arraign the defendant. If the defendant fails to waive indictment and is subsequently indicted on the same or similar charges, the case shall be assigned by the clerk to the same judge to whom the original information was assigned.

(e) Assignment of Superseding Indictments and Informations.

An indictment or information designated by the grand jury or the United States Attorney as a superseding indictment or information will be assigned to the same judge to whom the original indictment or information was assigned and may not be reassigned from that judge except pursuant to the order of that judge or in the circumstances outlined in Rules 14 through 17. Any questions with respect to such designation as a superseding indictment or information shall be decided by that judge subject to appellate review where applicable. The judge may require the United States Attorney to explain in writing, either under seal or otherwise, the reasons for proceeding by superseding indictment or information before that judge rather than in another manner.

(f) With the exception of Rules 6(a) and 6(e), which apply in Manhattan and White Plains, this rule applies only to Manhattan. The judges in White Plains will continue to follow such procedures as they find convenient.

Rule 7. Cases Certified for Prompt Trial or Disposition

When the assignment committee certifies that a case requires extraordinary priority or a prompt trial or other disposition, it shall so advise the judge to whom the case has been assigned. The judge so assigned shall advise the assignment committee whether that judge can accord the case the required priority. In the event the judge so assigned advises the assignment committee that he or she cannot accord the required priority, the case shall immediately be assigned to another judge by lot and the same procedure followed until the case is assigned to a judge able to accord it the required priority. The name of the judge to be so assigned shall be drawn by lot in the same manner as other civil and criminal actions are initially assigned.

Rule 8. Criminal Motions

Motions in criminal actions shall be made returnable before the assigned judge at such time as that judge directs. Criminal motions must be made within the time required by the Federal Rules of Criminal Procedure and the Criminal Rules of this court.

Rule 9. Petitions for Collateral Relief from Convictions

(a) Federal Convictions.

When a motion for collateral relief under 28 U.S.C. § 2255 or an *audita querellas* is filed, it shall be assigned for all further proceedings to the judge to whom the underlying case was assigned. That judge may either act on the motion without responsive papers or advise the United States attorney of the date(s) when responsive papers are due.

When a motion under Fed. R. Crim. P. 41(g) for the return of property seized in a criminal case is filed, it shall be assigned for all further proceedings to the judge to whom the underlying case was assigned. The judge may either act on the motion without responsive papers or advise the United States attorney of the date(s) when responsive papers are due. Rule 41(g) motions that are filed after the related criminal case is closed, shall be opened as a new civil action, and all filings shall be docketed therein.

If the judge to whom the underlying case was assigned is unable to entertain the motion, the motion shall be assigned by lot, or to the Chief Judge where appropriate.

(b) State Convictions

When a *pro se* petition under 28 U.S.C. § 2254 for collateral relief from a state conviction is filed, the *Pro Se* Office shall first ascertain whether the petition is properly filed and, if not, the Office shall take proper steps to have it corrected. The *Pro Se* Office shall ascertain if the petition is related to any prior application and, if so, send a memorandum to that judge pursuant to Rule 13 of these

Rules for a determination on relatedness. If there was a related case but the judge to whom that case was assigned is unable or declines to entertain the petition, or if the petition is unrelated to any prior application, the petition shall be assigned pursuant to Rule 21 of these Rules, or to the Chief Judge where appropriate.

Rule 10. Assignments to New Judges

When a new judge is inducted, the assignment committee shall transfer to the new judge an equal share of all cases then pending (including cases on the suspense docket).

The cases shall be taken equally, by lot, from the dockets of each of the judges' most recent chronological list of cases which have been designated by the transferor as eligible for transfer, except if the Assignment Committee determines that the interests of court administration requires an alternative method of reassignment. No case shall be transferred without the consent of the transferor judge. The assignment committee shall also direct the clerk to add the name of the new judge to the random selection system for assigning new cases to active judges.

Rule 11. Assignments to Senior Judges

If a senior judge is willing and able to undertake assignment of new cases for all purposes, that judge shall advise the assignment committee of the number and categories of new cases which that judge is willing and able to undertake. New cases in the requested number in each category shall then be assigned to that judge in the same manner as new cases are assigned to active judges.

If a senior judge is willing and able to undertake assignment of pending cases from other judges, that judge may (1) accept assignment of all or any part of any case from any judge on mutual consent, or (2) advise the assignment committee of the number, status and categories of pending cases which

that judge is willing to undertake. Such cases will be drawn by lot from current lists provided to the assignment committee by the judges wishing to transfer cases under this rule. If a senior judge does not terminate any action so transferred, it shall be reassigned to the transferor judge.

Rule 12. Assignments to Visiting Judges

When a visiting judge is assigned to this district, that judge shall advise the assignment committee of the number and categories of pending cases which that judge is required or willing to accept. The assignment committee shall then transfer to that judge the required number of cases in each category with the consent of the transferor judge. If the visiting judge does not terminate the action, it shall be reassigned to the transferor judge.

Rule 13. Related Cases

(a) Determination of Relatedness

(1) General Rule. Subject to the limitations set forth below, a civil case, bankruptcy appeal, or motion to withdraw the bankruptcy reference will be deemed related to one or more civil cases, appeals or motions when the interests of justice and efficiency will be served. In determining relatedness, a judge will consider whether (A) the actions concern the same or substantially similar parties, property, transactions or events; (B) there is substantial factual overlap; (C) the parties could be subjected to conflicting orders; and (D) whether absent a determination of relatedness there would be a substantial duplication of effort and expense, delay, or undue burden on the Court, parties or witnesses. Bankruptcy appeals are deemed related if they arise from the same order or judgment of the bankruptcy court. Motions to withdraw the bankruptcy reference are deemed related if they seek withdrawal with respect to all or part(s) of the same adversary proceeding. Nothing in this Rule is intended to preclude parties from moving for consolidated proceedings under Fed. R. Civ. P. 42.

(2) Limitations on General Rule. Notwithstanding paragraph (a)(1):

(A) Civil cases shall not be deemed related merely because they involve common legal issues or the same parties.

(B) Other than cases subject to Rule 4(b) and actions seeking the enforcement of a judgment or settlement in or of an earlier case, civil cases presumptively shall not be deemed related unless both cases are pending before the Court (or the earlier case is on appeal).

(C) Criminal cases are not treated as related to civil cases. Criminal cases are not treated as related to each other unless a motion is granted for a joint trial.

(D) Bankruptcy appeals and motions to withdraw the reference are not treated as related merely because they arise from the same bankruptcy proceeding.

(b) Procedure in Regard to Cases Said to be Related

(1) Disclosure of contention of relatedness. When a civil case is filed or removed or a bankruptcy appeal or motion to withdraw the reference of an adversary proceeding from the bankruptcy court is filed, the person filing or removing shall disclose on form JSC44C any contention of relatedness and shall file a Related Case Statement stating clearly and succinctly the basis for the contention. A copy of the civil cover sheet and Related Case Statement shall be served with the complaint, notice of removal, notice of appeal, or motion. Any party may contest a claim of relatedness by any other in writing addressed to the judge having the case with the lowest docket number of all cases claimed to be related. However, the foregoing shall not delay the assignment process or the operation of this Rule.

(2) Assignment of cases that are designated as related. A case, bankruptcy appeal, or motion to withdraw the bankruptcy reference that is designated as related shall be forwarded to the judge before whom the allegedly related case, appeal or motion having the lowest docket number is or was pending, who shall decide whether to accept or reject the case. The decision of the judge with

the lowest docket number shall control unless the Assignment Committee determines otherwise, applying the standards of relatedness set forth in this Rule. The judge with the lowest docket number shall notify the Assignment Committee of his or her decision to accept or reject the case, appeal or motion and provide the Committee with the Related Case Statement and any submission in opposition to the contention that the cases are related. If the Assignment Committee does not concur with the judge's decision to accept the allegedly related case, appeal or motion, the matter shall be assigned by the Clerk by random selection.

(3) Claims of relatedness by other parties. A party other than the one filing a case, bankruptcy appeal or motion to withdraw the reference that contends its case is related to another may so advise in writing the judge assigned in its case and request a transfer of its case to the judge that the party contends has the related case with the lowest docket number. If the assigned judge believes the case is related under paragraph (a), he or she shall refer the question to the judge having the case with the lowest docket number. In the event the latter judge agrees, the case shall be transferred to that judge unless the Assignment Committee disagrees.

(c) Other Matters

(1) Motions in civil and criminal cases to consolidate, or for a joint trial, are regulated by the Federal Rules. A defendant in a criminal case may move on notice to have all of his or her sentences in this district imposed by a single judge. All such motions shall be noticed for hearing before the judge having the lowest docket number, with courtesy copies to be provided to the judge or judges having the cases with the higher docket numbers.

COMMITTEE NOTE

This rule authorizes the transfer of later-filed cases to the judge to whom an earlier-filed related case is assigned while recognizing the difficulty of formulating a definitive and entirely objective definition of "relatedness." It seeks to strike a balance between the benefits that may be achieved by avoiding unnecessary duplication of effort, expense and burden on the Court and parties through the assignment of related matters to a single judge and the desirability of enriching the development of the

law by having a plurality of judges examine in the first instance common questions of law. This rule is designed to be sufficiently specific to enable litigants to present, and judges to determine, issues of relatedness in a consistent manner.

Rule 14. Transfer of Cases by Consent

Any judge, upon written advice to the assignment committee, may transfer directly any case or any part of any case on that judge's docket to any consenting judge except where Rule 16 applies.

Rule 15. Transfers from Senior Judges

A senior judge may keep as much of his or her existing docket as that judge desires and furnish the assignment committee with a list of all cases which the judge desires to have transferred. The assignment committee will distribute the cases equally by lot to each active judge.

Rule 16. Transfer Because of Disqualification, etc.

If a judge is disqualified or if a judge has presided at a mistrial or former trial of the case, and requests reassignment, the assignment committee shall transfer the case by lot.

Rule 17. Transfer of Cases Because of a Judge's Death, Resignation, Prolonged Illness, Disability, Unavoidable Absence, or Excessive Backlog

The assignment committee shall, in the case of death or resignation, and may, in the event of a judge's prolonged illness, disability, unavoidable absence, or the build up of an excessive backlog, transfer any case or cases pending on the docket of that judge by distributing them to any judge or visiting judge willing to accept such case and thereafter, distributing them as equally as is feasible by lot, to all remaining active judges and to such senior judges who are willing and able to undertake them.

Rule 18. Designation of White Plains Cases

(a) Civil.

At the time of filing, the plaintiff's attorney shall designate on the civil cover sheet whether the case should be assigned to White Plains or Manhattan in accordance with these rules.

A civil case shall be designated for assignment to White Plains if:

(i) The claim arose in whole or in major part in the Counties of Dutchess, Orange, Putnam, Rockland, Sullivan and Westchester (the "Northern Counties") and at least one of the parties resides in the Northern Counties; or

(ii) The claim arose in whole or in major part in the Northern Counties and none of the parties resides in this District.

A civil case may also be designated for assignment to White Plains if:

(iii) The claim arose outside this district and at least some of the parties reside in the Northern Counties; or

(iv) At least half of the parties reside in the Northern Counties.

All civil cases other than those specified in the foregoing paragraphs (i), (ii), (iii), and (iv) and social security and habeas corpus petitions brought under 28 U.S.C. §2241 which are assigned on a district-wide basis shall be designated for assignment to Manhattan.

(b) Criminal.

The U.S. attorney designates on the criminal cover sheet that the case is to be assigned to White Plains if the crime was allegedly committed in whole or predominant part in the Northern Counties.

Defendants in any criminal case designated for White Plains may be arraigned at the White Plains Courthouse before a magistrate judge or a district judge.

Bail applications in any case designated for White Plains may be heard before a magistrate judge at White Plains, or, if unavailable, before a judge in White Plains, or a magistrate judge in Manhattan.

Rule 19. Reassignment of Cases to/from White Plains

If the Judge to whom the case is assigned believes that it should be assigned to the other courthouse under these rules, a request for reassignment shall be sent to the Assignment Committee, which shall determine if the case should be reassigned. If the case is reassigned, it will be reassigned as if it were a new filing, but will retain its original case number.

2018 COMMITTEE NOTE

Rule 19 is revised to require approval of the Assignment Committee before a case is reassigned to or from the White Plains courthouse.

Rule 20. Removed Actions and Bankruptcy Matters

Actions removed from a state court in New York County or Bronx County will be assigned to Manhattan. Actions removed from a state court in any of the other counties within the district will be assigned to White Plains. In either case, the attorney for the defendant may move for reassignment as provided in the section entitled Reassignment of Cases.

Bankruptcy appeals from the White Plains and Poughkeepsie bankruptcy courts are also assigned to White Plains.

Rule 21. Social Security Actions and *Habeas Corpus* Petitions

Social security cases and petitions for *habeas corpus* relief under 28 U.S.C. § 2241 shall be assigned proportionately to all judges of the Court, whether sitting in White Plains or Manhattan.

Habeas corpus petitions brought under 28 U.S.C. § 2254 shall be assigned as follows: where the *habeas corpus* petitions arise out of state convictions obtained in the counties of Westchester, Rockland, Putnam, Dutchess, Orange and Sullivan, the cases shall be assigned to

district judges assigned to White Plains; where the *habeas corpus* petitions arise out of state convictions obtained in the counties of Bronx and New York, the cases shall be assigned to district judges assigned to Manhattan.

Rule 22. Filing at Either Courthouse

Complaints and all subsequent papers are accepted at either courthouse, regardless of the place for which the case is designated.

**GUIDELINES FOR THE DIVISION OF BUSINESS
AMONG DISTRICT JUDGES**

EASTERN DISTRICT

ADOPTED PURSUANT TO 28 U.S.C. § 137

These rules are adopted for the internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys and shall be subject to such amendments from time to time as shall be approved by the court.

50.1 Categories and Classification of Cases; Information on Cases and Parties

(a) Categories of Cases.

Cases shall be divided into the following main categories:

- (1) Civil.
 - (A) Regular.
 - (B) Multidistrict litigation.
 - (C) Patent.
- (2) Criminal.
- (3) Miscellaneous.

(b) Information Sheet.

The party filing the initial paper in a civil or criminal case shall complete and attach an information sheet. The information sheet shall be placed in the case file.

Where it appears to the Court that the filing party's reasons for joinder of parties are not apparent from the face of the complaint, the Clerk of Court is authorized to request a written explanation consistent with Federal Rule of Civil Procedure 19 and any other appropriate Federal Rule.

The response of the filing party will be docketed and a copy forwarded to the assigned judicial officer.

(c) Disclosure of Interested Parties.

To enable judges and magistrates to evaluate possible disqualification or recusal, counsel for a private (nongovernmental) party shall submit at the time of initial pleading a certificate identifying any corporate parent, subsidiaries, or affiliates of that party.

(d) Long Island Cases.

(1) A criminal case shall be designated a “Long Island case” if the crime was allegedly committed wholly or in substantial part in Nassau or Suffolk County.

2) A civil case shall be designated a Long Island case if:

a) the case has been removed to this Court from a New York State court located in Nassau or Suffolk County, or

b) in any other case,

i) a substantial part of the events or omissions giving rise to the claim or claims occurred in Nassau or Suffolk County, or

ii) a substantial part of the events or omissions giving rise to the claim or claims did not occur in the Eastern District of New York and the defendant (or a majority of the defendants if there is more than one) resides in Nassau or Suffolk County or, in an interpleader action, the claimant (or a majority of the claimants if there is more than one) resides in Nassau or Suffolk County.

For purposes of this rule, a corporation shall be considered a resident of the county in which it has the most significant contacts.

(3) As provided in 50.2(f) a party may move to designate a case as a Long Island case or to cancel such designation on the grounds that such action will serve the

convenience of the parties and witnesses or is otherwise in the interests of justice.

(e) Miscellaneous Cases.

All matters that do not receive a civil or criminal docket number shall be given a miscellaneous docket number and assigned as provided in 50.5 of these rules.

[Amended: September 9th, 2014]

50.2 Assignment of Cases

(a) Time of Assignment.

The clerk shall assign a civil case upon the filing of the initial pleading. In a criminal case after an indictment is returned or after an information (including a juvenile information under 18 U.S.C. § 5032) or a motion to transfer under 18 U.S.C. § 5032 has been filed, the United States Attorney shall refer the case to the clerk who shall then assign the case. The United States attorney shall arrange with the judge to whom the case is assigned, or if that judge is absent or unavailable as provided in 50.5, with the miscellaneous judge, to have the defendant arraigned and a plea entered as promptly as practicable.

(b) Random Selection Procedure.

All cases shall be randomly assigned by the clerk or his designee in public view in one of the clerk's offices in such a manner that each active judge shall receive as nearly as possible the same number of cases, except as provided in paragraph (h) Where a party or his counsel requests prior to selection that he or she be present at the selection, the clerk shall make reasonable efforts to comply with the request. In Brooklyn civil cases a magistrate judge shall be drawn at the same time and in the same manner as a judge. All Long Island civil cases shall be assigned to the Long Island magistrate judge. The parties to any Long Island case assigned to a Brooklyn judge may stipulate that the case be assigned to the Long Island magistrate judge, for pretrial purposes.

(c) Assignment of Civil Cases.

(1) There shall be separate Brooklyn and Long Island civil assignment wheels. At least quarterly the Chief Judge shall fix the proportion of cases to be assigned to the Long Island courthouses so as to distribute the civil cases relatively equally among all the active judges.

(2) There shall be separate patent assignment wheels for district judges and magistrate judges. A district judge or magistrate judge not in the patent assignment wheel who received a new patent case by random selection from the civil assignment wheel may elect, within thirty (30) days of assignment for district judges and seven (7) days of assignment for magistrate judges, to direct reassignment of the case. A new district or magistrate judge, or both, will then be assigned by random selection from the appropriate patent assignment wheel(s).

(d) Assignment of Criminal Cases.

(1) There shall be a Brooklyn criminal and a Long Island criminal assignment wheel.

(2) There shall be a Brooklyn and Long Island criminal misdemeanor assignment wheels for the random assignment of these matters to a magistrate.

(e) Place of Trial.

Except in emergencies a case shall be tried at the place to which it has been assigned.

(f) Objection.

Any objection by a party to designation of a judge or to place of trial shall be made by letter or motion to the judge assigned

(1) in a criminal case, within fourteen (14) days from arraignment or from initial notice of appearance, whichever is earlier; or

(2) in a civil case, within the time allowed to respond to the complaint.

(g) Special Cases.

(1) The miscellaneous judge shall send all narcotics addict commitment cases involving

"eligible individuals" as defined by 28 U.S.C. § 2901(g) to the clerk for assignment as provided in paragraph (b).

(2) *Pro se* applications or claims by persons in custody shall be filed without prepayment of fees upon receipt, prior to decision on their *in forma pauperis* petitions.

(3) Multidistrict litigation is to be assigned to the judge selected by the multidistrict litigation panel; subject to reassignment by the Chief Judge of the Eastern District of New York, according to the usual reassignment rules of the district, to adjust caseload distribution in the interests of justice.

(h) Chief Judge; Senior Judges; Temporarily Overloaded Judges; Notice of Removal from Wheel.

The chief judge and each senior judge shall indicate from time to time to the clerk the percentage of a full caseload that he or she elects to have assigned. The chief judge, with the consent of a judge, may remove that judge from any wheel temporarily to reduce the number of pending cases and prevent delay in the disposition of cases by a judge who is then overburdened by cases or due to ill health. The chief judge shall return that judge to the wheel only on consent of the judge. The clerk shall upon request inform any attorney or party of the identity of judges whose names have been removed from a wheel.

(i) Visiting Judge.

The chief judge shall approve the assignment or transfer of cases to a visiting judge.

(j) Proceedings After Assignment.

All proceedings in a case after assignment shall be conducted by the assigned judge, except as provided by these guidelines.

(k) Recusal.

A judge or magistrate judge may recuse himself or herself at any time in accordance with

28 U.S.C. § 455. This guideline takes precedence over any other guideline.

(l) Appeals-Assignment on Reversal or Remand.

(1) In a criminal case upon reversal of a judgment and a direction for retrial or resentence, on receipt of the mandate of the appellate court the clerk shall randomly select a different judge to preside over the case. Notwithstanding this provision the chief judge may order the case assigned to the original presiding judge to avoid placing an excessive burden on another judge.

(2) In a civil case upon reversal the case shall remain assigned to the judge who was previously assigned, unless the chief judge or his designee orders otherwise.

[Amended: January 10th, 2012]

50.3.1 Related Civil Cases

(a) “Related” Civil Case Defined. A civil case is “related” to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge.

(b) Civil Cases Not Deemed “Related”. A civil case shall not be deemed “related” to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties.

(c) Civil Cases Presumptively Not “Related”: Unless Both Cases Are Still Pending.

Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be “related” unless both cases are still pending before the court.

(d) Judicial Determination That Civil Cases Are “Related”. Except for the cases

described in the final sentence of paragraph (e), all civil cases shall be randomly assigned when they are filed. Other than the cases described in the final sentence of paragraph (e), civil cases shall not be deemed to be “related” for purposes of this guideline at the instance of any litigant or attorney unless and until there has been a determination by a judge of this court that the standard of paragraph (a) is met, i.e., that because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge. Any party may apply for such a determination by filing with the clerk a letter of no more than three single-spaced pages explaining why the standard of paragraph (a) is met and serving copies of the letter on all other parties. Such an application must be made after the date when at least a majority of the defendants have been served with the complaint, but not more than 30 days after that date unless the judge passing on the application permits a later filing for good cause shown. Before making such an application, the applicant must confer in good faith with all other parties in an effort to reach an agreement on whether or not the case is “related”. After such an application is made, any other party may serve and file within seven (7) days a letter of no more than three single-spaced pages supporting or opposing the application. Any determination by a judge of this court that the standard of paragraph (a) is or is not met shall be made by a judge or judges designated by the chief judge, who shall not include the judge to whom the case has been randomly assigned or the judge to whom the case will be assigned if it is determined to be “related”.

(e) Assignment of Related Cases. Cases which have been judicially determined to be related shall be assigned by the clerk to the judge to whom was assigned the case with the lowest docket number in the series of related cases. The clerk shall advise the judge of such assignment of a related case. In the interest of judicial economy, the following categories of civil cases shall be deemed to be “related” without further order of the court: (1) all habeas corpus petitions filed by the same

petitioner; (2) all pro se civil actions filed by the same individual; and (3) any other subject-matter category of cases where the chief judge finds that the standard of paragraph (a) is met.

(f) No Vested Rights. As stated in the Introduction to these Division of Business Rules, this rule is adopted for the internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys and shall be subject to such amendments from time to time as shall be approved by the court. This rule shall not be deemed to prevent the reassignment of cases at the initiative of and by agreement of the judges involved.

[Amended: September 22, 2008]

50.3.2 Related Criminal Cases

(a) In General

(1) For purposes of this rule, a “case” refers to a criminal proceeding commenced by indictment or information. It does not include wiretap applications, motions in connection with grand jury proceedings, or ex parte motions made outside of a proceeding commenced by indictment or information.

(2) All criminal cases shall be randomly assigned upon filing.

(3) This rule shall not be deemed to prevent the reassignment of cases at the initiative of and by agreement of the judges involved.

(4) As stated in the Introduction to these Division of Business Rules, this rule is adopted for the internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys and shall be subject to such amendments from time to time as shall be approved by the court.

(b) Relevant Considerations in Relating Cases

(1) There shall be a presumption that one case is “related” to another when the

facts of each arise out of the same charged criminal scheme(s), transaction(s), or event(s), even if different defendants are involved in each case.

(2) The presumption shall be overcome upon a determination by the relevant judges that reassignment would not achieve a significant savings of judicial resources or serve the interests of justice.

(3) In a case involving racketeering charges, the determination of whether that case should be related to another shall be made on the basis of the predicate acts charged, not the criminal enterprise.

(4) If a defendant has been convicted in more than one case and the sentences are pending before different judges, each of the pending sentences shall be imposed by a single judge determined by all of the relevant judges to be best suited to do so.

(c) Obligation of the United States Attorney's Office

(1) It is the affirmative obligation of the United States Attorney's Office ("USAO") to give notice to all relevant judges whenever it appears that one case may be presumptively related to another pursuant to Section (b)(1). Such notice shall be by letter and filed together with the indictment, information or Federal Criminal Rule 7(b) motion and addressed to each of the judges concerned. The letter shall set forth the facts relevant to deciding whether the indictment or information should be related to another case. The letter shall in addition state clearly whether its purpose is solely to provide notice to the Court under this rule, or whether the USAO seeks reassignment.

(2) The USAO may move for leave to file a notice required by the rule ex parte and under seal for good cause shown. The USAO shall promptly move to unseal the notice once the need for ex parte and sealed filing no longer exists. Absent leave of court, the USAO shall publicly file a notice indicating that an ex parte sealed filing pursuant to this rule is being

submitted.

(3) These obligations are continuing. The USAO should endeavor to provide notice that could avoid having two or more judges sentence different defendants or the same defendant in related cases.

(d) Input from Defendants

Any defendant may request reassignment to a judge whom the defendant contends has a case that is presumptively related pursuant to Section (b)(1). In addition, any defendant may request that a case previously assigned to a judge as related be reassigned to the original judge on the ground that it was not properly related. Such requests shall be made by filed letter in both cases, addressed to both judges.

(e) Joint Application for Reassignment

Nothing in this rule shall preclude the USAO and defendant from jointly seeking reassignment to another judge in the interests of justice or on the grounds that a significant savings of judicial resources would be achieved.

50.4 Reassignment of Cases

No case shall be reassigned except in the interest of justice and the efficient disposition of the business of the court. The chief judge may at any time, with the consent of the judges involved, reassign individual cases. Reassignment of cases to accommodate changes in the complement of judges shall be made in accordance with the order of the Board of Judges.

50.5 Miscellaneous Judge and Duty Magistrate Judge

(a) Duties and Functions of the Miscellaneous Judge

(1) All matters, including those requiring immediate action or brought as special proceedings which cannot be assigned in the ordinary course, shall be randomly assigned pursuant to the procedures set forth in 50.2(b) of these rules.

(2) The miscellaneous judge shall hear and determine matters requiring immediate action in cases already assigned to any judge of the court, if that judge is unavailable or otherwise unable to hear the matter only for such immediate emergency action. The matter or case will remain assigned to the judge originally selected at random.

(3) The miscellaneous judge shall preside over admissions to the bar and naturalization proceedings.

(b) Duties and Functions of the Duty Magistrate Judge

(1) Preside over the arraignment part;

(2) Empanel grand juries, receive indictments and enter presentment orders, refer criminal cases to the clerk for assignment pursuant to 50.2, and discharge grand juries;

(3) Decide requests to be excused from service on the grand and petit juries; and

(4) Preside over admissions to the bar and naturalization proceedings when requested.

(c) Limitation of Duties in Matters Already Assigned.

The miscellaneous judge shall dispose of matters under paragraph (a)(2) only to the extent necessary and shall continue the case before the assigned judge. All applications for emergency action or relief shall disclose any prior application to a judge for the same or related relief and the outcome thereof.

50.6 Calendars

(a) Numbers; Order of Cases.

The docket number of each case shall be the calendar number. No note of issue shall be

required to place the case on the calendar. Each judge shall dispose of cases assigned to him or her as required by law and the efficient administration of justice.

(b) Preferences.

Each judge shall schedule cases appearing on his or her docket in such order as seems just and appropriate, giving preference to the processing and disposition of the following:

- (1) *habeas corpus* petitions and motions attacking a federal sentence;
- (2) Proceedings involving recalcitrant witnesses before federal courts or grand juries, under 28 U.S.C. § 1846;
- (3) Actions for temporary or preliminary injunctive relief; and
- (4) Any other action if good cause is shown.

(c) Publication of Calendars.

Each court day the clerk shall post on bulletin boards throughout the courthouse and provide to legal newspapers for publication copies of the judges' calendars.

50.7 Conference

The judge assigned to any case may direct the attorneys to appear to discuss the case informally, to entertain oral motions, to discuss settlement, or to set a schedule for the events in the case, including completion of discovery, pretrial and trial.

E

INDIVIDUAL PRACTICES OF ANDREW L. CARTER, JR.
Current as of February 3, 2020

Chambers

United States District Court
Southern District of New York
40 Foley Square, Room 435
New York, NY 10007
ALCarterNYSDChambers@nysd.uscourts.gov

Courtroom

Courtroom 1306
Tara D. Hunter-Hicks
Courtroom Deputy
(212) 805-0141

Unless otherwise ordered by Judge Carter, matters before Judge Carter will be conducted in accordance with the following practices:

1. Communications With Chambers

A. Letters. Except as otherwise provided below, communications with Chambers should be by letter, with copies simultaneously delivered to all counsel. All letters must provide the name of the case and its docket number, and must state the name of the party that counsel represents.

Generally, letters should be filed electronically on ECF and courtesy copies should be emailed to Chambers as a .pdf attachment to the following address:

ALCarterNYSDChambers@nysd.uscourts.gov with all counsel copied on the email. Counsel should include the case caption, docket number, and a brief description in the subject line of every email sent to Chambers. Example: *Jane v. John*; 12 Civ. 0000; Defendant's request for a Pre-Motion Conference.

Courtesy copies of letters filed under seal or containing sensitive or confidential information should also be emailed to Chambers in the format listed above. *Pro se* litigants may send letters via email or regular mail. Copies of correspondence between counsel should **not** be sent to Chambers.

B. Telephone Calls. For routine docketing, scheduling, and calendar matters, please call Tara Hunter-Hicks, the Deputy Clerk, at 212-805-0141 between 9 a.m. and 4:30 p.m. Telephone calls to Chambers for other matters are permitted for urgent situations requiring immediate attention and should not be ex-parte. The telephone number for Chambers is 212-805-0280.

C. Faxes. Judge Carter prefers that counsel email letters to ALCarterNYSDChambers@nysd.uscourts.gov. Faxes to Chambers are not permitted without express prior permission, and only in cases of unforeseeable emergencies. Requests for extensions of time and pre-motion letters, for example, are very rarely considered unforeseeable or emergencies.

D. Requests for Adjournments or Extensions of Time. Applications for adjournments and extensions of time must be made by letter posted to ECF (not by telephone) and received in Chambers by email (or regular mail for *pro se* litigants) at least two business days before the scheduled appearance. See Rule 1A.

All such applications must state (1) the original date, (2) the number of previous requests, (3) whether those previous requests were granted or denied, and (4) whether the adversary consents, and, if not, the reasons given by the adversary for refusing to consent. **Failure to comply with these requirements will result in a denial of the request, absent good cause shown.** If the requested adjournment or extension affects any other scheduled dates, a proposed Revised Scheduling Order **must be** attached. Requests for extensions of deadlines regarding a matter that has been referred to a Magistrate Judge should be directed to that assigned Magistrate Judge.

E. Related Cases. After an action has been accepted as related to a prior filing, all future court papers and correspondence must contain the docket number of the new filing, as well as the docket number of the case to which it is related.

F. Proposed Orders and Stipulations. All stipulations and orders, including consent orders, orders to show cause, preliminary injunctions, and temporary restraining orders, should be brought to the Orders Clerk (500 Pearl Street, Clerk’s Office) and Judgments should be presented to the Judgments Clerk (500 Pearl Street, Clerk’s Office). Counsel may also email them to orders_and_judgments@nysd.uscourts.gov. Courtesy copies need not be sent to Chambers.

G. Courtesy Copies. Any courtesy copy submitted to Chambers that was originally filed on ECF must be clearly marked “Courtesy Copy,” “Original Filed by ECF,” and “Assigned Document Number [print or type assigned document number].”

2. Motions

A. Pre-Motion Conferences in Civil Cases. For discovery motions, follow Local Civil Rule 37.2, requiring the moving party to request an informal conference with the Court before the filing of any such motion. Strict adherence to Fed. R. Civ. P. 37(a)(1), the “meet and confer” rule, is required. To raise a discovery dispute with the Court, contact the assigned Magistrate Judge.

A pre-motion conference with the Court is required before making any motion, except:

- orders to show cause;
- motions for admission *pro hac vice*;
- motions to remand;
- motions for reargument or reconsideration (time to oppose (14 days); time to reply (7 days));
- motions for reduction of sentence;
- *in forma pauperis* motions;
- applications for attorney’s fees;

- motions to be relieved as counsel;
- motions for a new trial or amendment of judgments;
- motions for default judgment;
- motions that are required by the Federal Rules of Appellate Procedure;
- objections to Magistrate Judges' rulings;
- motions for appointment of lead plaintiffs and counsel in class actions;
- petitions to confirm or compel arbitration;
- motions *in limine*;
- habeas corpus petitions;
- motions in Social Security cases; and
- motions for temporary restraining orders or preliminary injunctions.

To arrange a pre-motion conference, the moving party should submit a letter, not to exceed 3 pages (exclusive of letterhead and signature block(s)), setting forth the basis for the anticipated motion. The opposing party should submit a letter, also not to exceed 3 pages, setting forth its position within 3 business days from the service of the moving party's letter. If a pre-motion conference is requested in connection with a proposed motion to dismiss, the request will stay the deadline for the requesting party to move or answer.

B. Page Limits. A memorandum of law, in support of or in opposition to any motion, is limited to 25 pages and reply briefs should be no longer than 10 pages. All memoranda of law should be in 12-point font or larger, with 1" margins on all sides. Sur-reply memoranda will not be accepted without prior permission of the Court.

C. Filing of Motion Papers. Counsel should electronically file its own motion papers at the time of service. In cases involving *pro se* litigants, the party represented by counsel is responsible for filing the entire motion on ECF. **Counsel should deliver one courtesy copy of the respective motion papers to Chambers after service.**

D. Special Rules for a Motion to Dismiss.

- i. During a pre-motion conference to discuss a motion to dismiss, the non-moving party must advise the Court and its adversary whether it intends to file an amended pleading based on the pre-motion conference letter, and if so, when it will do so. If the party amends, the opposing party may then: (a) file an answer or (b) submit a letter stating that it still intends to file a motion to dismiss. No further requests for a pre-motion conference are necessary.
- ii. If the non-moving party elects not to amend its complaint and the motion to dismiss is granted, **it is unlikely that the Court will grant the non-moving party leave to amend.**

E. Special Rules for a Summary Judgment Motion.

- i. Except in *pro se* cases, the moving party should provide all other parties with an electronic copy of the moving party's Statement of Material Facts Pursuant to

Local Civil Rule 56.1. The 56.1 Statement must contain only one factual assertion in each numbered paragraph. Each factual assertion must be followed by a citation to the portion(s) of the evidentiary record relied upon. Opposing parties must reproduce each entry in the moving party's Rule 56.1 Statement, and set out the opposing party's response directly beneath it. The response must state specifically what is admitted and what is disputed, and the basis for any dispute, citing specific portions of the evidentiary record relied upon. The response may go on to make additional factual allegations in paragraphs numbered consecutively to those of the moving party (*i.e.*, do not begin re-numbering at 1). If additional factual allegations are made by the opponent, the moving party must file a responsive 56.1 Statement addressing the additional assertions.

- ii. If multiple parties are submitting 56.1 Statements, they must coordinate their statements to provide for consecutive, non-overlapping, numbered paragraphs in their respective statements.
- iii. With respect to any deposition that is supplied, whether in whole or in part, in connection with a summary judgment motion, the index to the deposition should be included if it is available.

F. Oral Argument on Motions. The parties may request oral argument; the Court will advise counsel if argument will be heard and, if so, of the argument date.

G. Default Judgments. See Attachment A.

H. Unpublished Cases. Westlaw citations should be provided, if available, to cases not available in an official reporter.

3. Conferences

A. Principal Trial Counsel. The attorney who will serve as principal trial counsel must appear at all conferences with the Court.

B. Initial Civil Case Management Conference. At the start of a case, parties consenting to proceeding before a magistrate judge should file form AO85 with the Clerk of Court. Parties wishing to proceed before Judge Carter are required to register in accordance with the Procedures for Electronic Case Filing as soon as reasonably practicable and file a notice of appearance. Counsel can access the web site www.nysd.uscourts.gov and click on CM/ECF Home Page for complete instructions on how to register. **In any case involving allegations of personal injury – whether physical, psychological, emotional or otherwise – the plaintiff is to provide to the defendant prior to the initial pretrial conference all necessary medical authorizations.**

C. Criminal Cases. Upon assignment of a criminal case to Judge Carter, the parties should immediately call the Deputy Clerk at 212-805-0141 to arrange for a prompt conference, at which the defendant will be present, in order to set a discovery and motion schedule. The

Assistant United States Attorney should deliver a courtesy copy of the indictment and the criminal complaint, if one exists, to Chambers as soon as practicable.

D. Courtroom. All conferences will be held in Courtroom 1306 in 40 Foley Square, unless otherwise indicated.

4. Pretrial Procedures

A. Joint Pretrial Orders in Civil Cases. Unless otherwise ordered by the Court, within 30 days after the date for completion of discovery in a civil case, or, if a dispositive motion has been filed, within 30 days of its decision, the parties should file on ECF a joint pretrial order, which should include the information required by Fed. R. Civ. P. 26(a)(3) and the following:

- i. The full caption of the action.
- ii. The names, addresses (including firm names), email addresses, and telephone and fax numbers of trial counsel.
- iii. A brief statement by plaintiff as to the basis of subject matter jurisdiction, and a brief statement by each other party as to the presence or absence of subject matter jurisdiction. Such statements should include citations to all statutes relied on and relevant facts as to citizenship and jurisdictional amount.
- iv. A brief summary by each party of the claims and defenses that party has asserted that remain to be tried, without recital of evidentiary matter but including citations to all statutes relied on. The parties should also identify all claims and defenses previously asserted that are not to be tried.
- v. A statement by each party as to whether the case is to be tried with or without a jury, and the number of trial days needed.
- vi. A statement as to whether all parties have consented to trial of the case by a magistrate judge (without identifying which parties have or have not so consented).
- vii. Any stipulations or agreed statements of fact or law.
- viii. A list of the witnesses each party expects to call on its case in chief, including a very brief description of the witness's role and/or the subject matter of his or her anticipated testimony, and a statement as to whether any other party objects to the witness.
- ix. A designation by each party of deposition testimony to be offered in its case in chief, with any cross-designations and objections by any other party.

- x. A list by each party of exhibits to be offered in its case in chief, with an indication of whether any party objects to the exhibit and a *brief* statement of the nature of the objection (e.g., “relevance,” “authenticity,” “hearsay”).
- xi. A statement of damages claimed, itemizing each component or element of the damages sought with respect to each claim, including the manner and method used to calculate the claimed damages.
- xii. A statement as to whether the parties consent to a less than unanimous verdict.

At least 14 days before the parties file their joint pretrial order, all counsel must meet for at least one hour to discuss settlement in good-faith. Counsel are encouraged to request a settlement conference before the assigned magistrate judge.

B. Filings Prior to Trial in Civil Cases. Unless otherwise ordered by the Court, each party should file on ECF (*pro se* litigants should file via regular mail) the following documents 21 days before the date of commencement of trial:

- i. In jury cases, proposed *voir dire* questions, requests to charge and verdict form. The plaintiff’s proposed *voir dire* questions should include an agreed-upon paragraph (designated as such) for the Court to use in *voir dire* to provide the jury panel with a brief explanation of the case. If the parties cannot agree on such a paragraph after good-faith efforts, their respective proposed paragraphs (designated as such) should be set forth in their respective *voir dire* submissions. In addition to being filed on ECF, the proposed *voir dire* questions, requests to charge and verdict form should be emailed as single MS Word documents to ALCarterNYSChambers@nysd.uscourts.gov. Each proposed jury instruction must contain a citation to the source/authority for the proposed instruction.
- ii. In nonjury cases, proposed findings of fact and conclusions of law. Proposed findings of fact should be detailed, and proposed conclusions of law should include a statement of the elements of each claim or defense.
- iii. In all cases, motions addressing any evidentiary or other issues that should be resolved *in limine*; and
- iv. In any case where any party believes it would be useful, a pretrial memorandum.

C. Filings in Opposition. Unless otherwise ordered by the Court, any represented party should file on ECF the following documents within 1 week of the filing of any document described in section 5.B. above (*pro se* litigants may file via regular mail):

- i. Objections to the other party’s proposed *voir dire* questions or requests to charge.
- ii. Opposition to any motion *in limine*.

- iii. Opposition to any legal argument made in a pretrial memorandum.

D. Additional Submissions in Non-Jury Cases. At the time the joint pretrial order is filed, each party should serve, but not file, the following:

- i. Affidavits constituting the direct testimony of each trial witness, except for the testimony of an adverse witness for whom a party has requested and the Court has agreed to hear direct testimony during the trial. Three business days after submission of such affidavits, counsel for each party should submit a list of all affiants whom he or she intends to cross-examine at trial. Only those witnesses who will be cross-examined need appear at trial. The original affidavit should be marked as an exhibit at trial.
- ii. All deposition excerpts which will be offered as substantive evidence, as well as a 1-page synopsis (with page references) of those excerpts for each deposition.
- iii. All documentary exhibits.

One courtesy copy of the joint pretrial order and all documents filed with the pretrial order should be submitted to chambers on the date of filing. One week before the start of the trial, each party should file, with an accompanying table of contents or index, all documents referenced in Section 5-D of these Rules. Two courtesy copies should be hand delivered to chambers on that date as well.

5. Post-Trial Procedures

Counsel are responsible for raising promptly any issue concerning the accuracy of transcripts certified by the Court Reporter to be used for purposes of appeal. Counsel perceiving an error that is material should stipulate to the appropriate correction or, if agreement cannot be reached, should proceed by motion on notice. Non-material defects in syntax, grammar, spelling or punctuation should be ignored.

6. Other Pretrial Matters

A. Bankruptcy Appeals. Briefs must be submitted in accordance with Federal Rule of Bankruptcy Procedure 8009. Counsel may extend these dates by stipulation submitted to the Court no later than 2 business days before the brief is due. The page limits in Rule 7.1(b) of the Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York must be observed.

B. Settlement Agreements. The Court will not retain jurisdiction to enforce confidential settlement agreements. If the parties wish that the Court retain jurisdiction to enforce the agreement, the parties must place the terms of their settlement agreement on the public record. The parties may either provide a copy of the settlement agreement for the Court to endorse or include the terms of their settlement agreement in their stipulation of settlement and dismissal.

C. Electronic Filing Under Seal in Civil and Miscellaneous Cases

- i. **Sealing/Redactions Not Requiring Court Approval.** Federal Rule of Civil Procedure 5.2 describes sensitive information that must be redacted from public court filings without seeking prior permission from the Court.
- ii. **Sealing/Redaction Requiring Court Approval.** Motions or Letter Motions for approval of sealed or redacted filings in civil and miscellaneous cases and the subject documents, including the proposed sealed document(s), must be filed electronically through the court's ECF system in conformity with the court's standing order, 19-mc-00583, and ECF Rules & Instructions, section 6.

The motion must be filed in public view, must explain the particular reasons for seeking to file that information under seal and should not include confidential information sought to be filed under seal. Supporting papers must be separately filed electronically and may be filed under seal or redacted only to the extent necessary to safeguard information sought to be filed under seal.

The proposed sealed document must be contemporaneously filed under seal in the ECF system and electronically related to the motion. The summary docket text, but not the sealed document, will be open to public inspection and should not include confidential information sought to be filed under seal.

Where the motion seeks approval to redact information from a document that is to be publicly filed, the filing party shall: (a) publicly file the document with the proposed redactions, and (b) electronically file under seal a copy of the unredacted document with the proposed redactions highlighted. Both documents must be electronically filed through the ECF system and related to the motion.

Any party unable to comply with the requirement for electronic filing under seal through the ECF system, or who has reason to believe that a particular document should not be electronically filed, must move for leave of the Court to file in the traditional manner, on paper.

D. Requests for Sealing. Parties must obtain leave of this Court before filing any document under seal. Any sealing request should include a party's proposed redactions. If leave is granted, parties must file redacted copies with the Clerk of the Court. Proposed protective orders should include a provision reflecting this requirement.

7. Policy on the Use of Electronic Devices

A. Mobile Phones and Personal Electronic Devices. Attorneys' use of mobile phones, Blackberries, and other personal electronic devices within the Courthouse and its environs is governed by Standing Order M10-468. Any attorney wishing to bring a telephone or other personal electronic device into the Courthouse must be a member of this Court's Bar, must obtain the necessary service pass from the District Executive's Office, and must show the service pass upon entering the Courthouse. **Mobile phones are permitted inside the Courtroom, but must be kept turned off at all times.**

B. Computers, Printers, or Other Electronic Equipment. In order for an attorney to bring into the Courthouse any computer, printer, or other electronic equipment not qualifying as a "personal electronic device," specific authorization is required by prior Court Order. Any party seeking to bring such equipment into the Courthouse should send a letter to Chambers at least 10 business days in advance of the relevant trial or hearing requesting permission to use such equipment. The request letter should identify the type(s) of equipment to be used and the name(s) of the attorney(s) who will be using the equipment. Chambers will coordinate with the District Executive's Office to issue the Order and forward a copy to counsel. The Order must be shown upon bringing the equipment into the Courthouse.

ATTACHMENT A

DEFAULT JUDGMENTS

- 1. Certificate of Default.** To file for a certificate of default, parties must submit to the Clerk of the Court a “request for entry of default” and a proposed “clerk’s certificate.” Parties must submit this electronically through the ECF system but must also send a courtesy copy of the certificate only, by hand or mail (along with a self addressed stamped envelope) to the Orders and Judgments Clerk for signature and seal. This signed certificate is to be attached to the default judgment when the default judgment is electronically filed.
- 2. Motion for Default Judgment.** Once the plaintiff obtains a Certificate of Default, it should deliver to the Orders and Judgments Clerk an Order to Show Cause, including a return date and time approved by chambers, and a proposed default judgment Order. It should also file on ECF its motion for a default judgment. The motion should include:
 - A.** An attorney’s affidavit setting forth:
 - i) why a default judgment is appropriate, including a description of the method and date of service of the original summons and complaint;
 - ii) whether, if the default is applicable to fewer than all of the defendants, the Court may appropriately order a default judgment on the issue of damages prior to resolution of the entire action;
 - iii) the proposed damages and the basis for each element of damages including interest, attorneys’ fees, and costs;
 - iv) legal authority for why an inquest would be unnecessary; and
 - v) that the defendant is not an infant or an incompetent.
 - B.** A proposed default judgment.
 - C.** Copies of all the pleadings.
 - D.** A copy of the affidavit of service of the original summons and complaint.
 - E.** If failure to answer is the basis for the default, a Certificate from the Clerk of the Court stating that no answer has been filed.
 - F.** A certificate of service complying with Local Civil Rule 55.2(c). Service on the defaulting parties must be made by certified mail and the plaintiff should submit the tracking number to the Court.
 - G.** A memorandum providing the legal and factual authority proving that liability has been established.

- 3. Damages.** If the plaintiff seeks an award of damages in the motion for a default judgment, the plaintiff must also include:
- A.** A request for an amount equal to or less than the principal amount demanded in the complaint;
 - B.** Definitive information and documentation such that the amount provided for in the proposed judgment can be calculated. (If this requirement cannot be satisfied, a default judgment may be granted as to liability, and damages will be determined by an inquest);
 - C.** An affidavit representing that no part of the judgment sought has been paid, other than as indicated in the motion;
 - D.** A request for interest on the principal amount not to exceed 9%, if interest is sought;
 - E.** Reasonable attorney's fees incurred in the preparation of the default judgment application, usually not to exceed \$2,000, if attorney's fees are sought; and
 - F.** The calculations made in arriving at the proposed judgment amount.

The plaintiff(s) must submit one courtesy copy to Chambers.

ATTACHMENT B

PROCEDURE FOR SENTENCINGS

Unless permission to the contrary has been obtained, every document in a sentencing submission, including letters, should be filed in the public record, either in paper form or through the ECF system, using the procedures described below. Defense counsel is responsible for filing all letters submitted on behalf of the defendant, including those from friends, relatives, etc. The Government is responsible for filing all letters from victims.

In this regard, the parties are referred to E-Government Act of 2002 and the Southern District's ECF Rules & Instructions, Section 21, Privacy and Public Access to ECF cases, ("Privacy Policy") and reminded not, unless necessary, to include the five categories of "sensitive information" in their submissions (i.e., social security numbers; names of minor children [use the initials only]; dates of birth [use the year only]; financial account numbers; and home addresses [use only the city and state]). Parties may redact the five categories of "sensitive information" and the six categories of information requiring caution (i.e., personal identifying numbers; medical records, treatment and diagnosis; employment history; individual financial information; proprietary or trade secret information; and information regarding an individual's cooperation with the government) as described in the Privacy Policy, without application to the Court. If any material is redacted from the publicly filed document, only those pages containing the redacted material will be filed under seal. Bring a copy of those pages to the sentencing proceeding, marked to indicate what information has been redacted from the publicly filed materials, to give to the Court for filing under seal.

1. A defendant's sentencing submission should be served two weeks in advance of the date set for sentence. The Government's sentencing submission should be served one week in advance of the date set for sentence. The parties should provide the Court with one courtesy copy of each submission when it is served. At the time it is served, a party should file its sentencing submission following one of the two procedures described here.
 - a. ECF Filing. If the case is electronically filed, letters must be filed electronically on the ECF system. A party should group and file the letters together as attachments to a single document marked SENTENCING MEMORANDUM with the caption and docket number clearly indicated.
 - b. Paper Filing. If the case is not electronically filed, letters must be filed as hard copies. A party should group all letters together in a single paper filing under a cover marked SENTENCING MEMORANDUM with the caption and docket number clearly indicated and submit it to the Clerk's Office.
2. If a party redacts information beyond the eleven categories of information identified in the Privacy Policy, an application to do so must be served and filed at the time the sentencing submission is served. The application should clearly identify the redaction

and explain the reasons for the redaction. The application will be addressed at the sentencing proceeding.