



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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December 27, 2012

Via Overnight Mail

Hon. George B. Daniels
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007-1312

Re: **SEC v. Yorkville Advisors, LLC: 12-CV-7728**

Dear Judge Daniels:

In advance of the initial pretrial conference scheduled for January 3, 2013, the parties have conferred and submit the attached initial pretrial conference checklist.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Todd D. Brody", written over a horizontal line.

Todd D. Brody

cc: Nicolas Morgan, Caryn Shechtman

PARTIES' INITIAL PRETRIAL CONFERENCE CHECKLIST
SEC v. Yorkville Advisors, LLC, et al. 12-CV-7728

1. Possible limitations on document preservation (including electronically stored information)

- Plaintiff proposes no limitation.
- Defendants propose that the parties abide by document preservation obligations as set forth in the Federal Rules of Civil Procedure, the SDNY Local Rules and the applicable case law.

2. Appropriateness of initial disclosures pursuant to Rule 26(a)(1)

a. Is there some readily identifiable document or category of documents that should be produced immediately in lieu of initial disclosures?

- The parties exchanged initial disclosures on November 27, 2012.
- Plaintiff has voluntarily produced its entire non-privileged, non-work product investigative file.
- Defendants have requested that Plaintiff produce all attorney notes related to witness interviews maintained in the investigative file, and Plaintiff has indicated that such documents are attorney work product, and Plaintiff objects to their production.

3. Possibility of a stay or limitation of discovery pending a dispositive motion

- Defendants have filed a motion to dismiss the Complaint. Plaintiff proposes that the discovery of documents, electronically stored information, and tangible things pursuant to Rule 34 and Rule 45 proceed notwithstanding the filing of the dispositive motion. All other discovery with respect to any claim that is the subject of the motion (including interrogatories, depositions, and requests to admit) shall be stayed pending the Court's decision on the motion.
- Defendants agree with Plaintiff's request with the exception that Plaintiff be required to produce to Defendant all attorney notes related to witness interviews maintained in the investigative file.

4. Possibility of communication/coordination between the Magistrate Judge and District Judge with respect to pretrial matters.

- The parties consent to communication and coordination between Judge Daniels and Magistrate Judge Pitman.

5. Preliminary issues that are likely to arise that will require court intervention

- Issues likely to arise include the Defendants' claim of attorney-client privilege the work-product doctrine to certain documents not produced during the Plaintiff's investigation. Plaintiff also anticipates that Defendants will object to the scope of document requests.
- The Plaintiff does not contest the Defendants' request to place under seal documents supporting their motion to dismiss the Complaint, if the seal order terminates by its terms upon the Court's decision on the motion. Following the Court's decision, should the Defendants move to file these or any other supporting documents under seal, the Plaintiff will oppose such motion.
- Defendants anticipate that the following issues may require the Court's intervention:
 - In light of the fact that Plaintiff's complaint references many confidential documents maintained by Defendants in connection with their business, Defendants have requested that certain documents be filed under seal and Plaintiff has objected.
 - Defendants anticipate seeking a motion to compel Plaintiff's witness notes maintained in Plaintiff's investigative file.
 - Defendants anticipate that they will object to the scope of Plaintiff's document requests.
 - Defendants anticipate that Plaintiff will object to depositions of Plaintiff's personnel.

6. Discovery issues that are envisioned and how discovery disputes will be resolved

- The Plaintiff envisions disputes concerning the Defendants' claims of attorney-client privilege and the work-product doctrine, and any waiver thereof. The Plaintiff also anticipates issues concerning the Defendants' anticipated objections to the Plaintiff's Rule 34 document requests.
- Defendants anticipate that discovery disputes over requested documents maintained in Plaintiff's investigative file, depositions of Plaintiff's personnel, and the scope of Plaintiff's discovery requests will arise.
- The parties agree that discovery disputes may be resolved a Magistrate Judge.

7. Proposed discovery including:

- a. limitations on types of discovery beyond those in the Rules (i.e., waiver of interrogatories, requests for admission, expert depositions)**
- b. limitations on scope of discovery**
- c. limitations on timing and sequence of discovery**
- d. limitations on restoration of electronically-stored information**

e. agreement to allow depositions of trial witnesses named if not already deposed

f. preservation depositions

g. foreign discovery and issues anticipated

- The Plaintiff does not consent to any of the above limits on discovery.
- Defendants agree that discovery should be conducted in accordance with the Federal Rules of Civil Procedure and the S.D.N.Y. Local Rules. Defendants further state that no party should be required to re-produce documents already provided to the opposing party in response to a subpoena. Defendants anticipate that one or more foreign third-party depositions may be necessary.

8. Schedule (as appropriate and possibly excluding public agency cases) including:

a. date(s) for completion of discovery

In light of the large number of fact witnesses who reside abroad and the potential difficulties of scheduling those depositions, the parties request that fact discovery conclude on October 31, 2013.

b. date(s) for dispositive motions

January 31, 2014.

c. date(s) for exchange for expert reports

December 2, 2013. [Expert depositions to be completed by January 2, 2014]

d. date(s) for exchange of witness lists

21 days from decision on dispositive motions.

e. date(s) for Joint Preliminary Trial Reports and Final Joint Trial reports

Joint Trial Reports – 21 days from decision on dispositive motions.

f. date for Case Management Conference

28 days from decision on dispositive motions.

9. Issues to be tried

a. ways in which issues can be narrowed to make trial more meaningful and efficient

- Plaintiff believes the issues are sufficiently narrow.
- Defendants believe that the Complaint is overly broad and vague and fails to sufficiently state a claim under the federal securities laws.

b. whether there are certain issues as to which a mini-trial would be helpful

- The parties do not believe any issues would benefit from a mini-trial.

10. Bifurcation

- Plaintiff proposes that the trial be bifurcated into a liability phase as determined by a factfinder, with a second phase to determine relief, if any.
- Defendants do not consent to a bifurcated trial.

11. Class certification issues

12. ADR/mediation

13. Possibility of consent to trial before a Magistrate Judge

- The parties do not consent to a trial before a Magistrate Judge.

14. Pleadings, including sufficiency and amendments, and the likelihood and timing of amendments

- Defendants have filed a motion requesting that Plaintiff's complaint be dismissed with prejudice. Defendants do not believe that Plaintiff should be given the opportunity to replead in the event that the motion is granted in light of the fact that Plaintiff has had three (3) years to investigate Defendants and put forth a sufficient pleading against them.
- Should the Court decide, in whole or in part, in favor of the Defendants' motion to dismiss the Complaint, the Plaintiff will request leave to amend the Complaint.

15. Joinder of additional parties, and the likelihood and timing of joinder of additional parties

- In light of the fact that Plaintiff has engaged in a three-year investigation of Defendants prior to filing the Complaint, Defendants propose that Plaintiff be prevented from joining any additional parties.

- The Defendants did not produce a large number of documents during the investigation due to claims of privilege, and the Plaintiff anticipates moving the Court to compel the production of certain of these documents because they are not privileged. Based on the content of these documents, the Plaintiff may seek leave to join additional parties.

16. Expert witnesses (including necessity or waiver of expert depositions)

17. Damages (computation issues and timing of damages discovery)

18. Final pretrial order (including possibility of waiver of order)

19. Possible trial-ready date

20. Court logistics and mechanics (e.g., communication with the court streamlined motion practice, pre-motion conferences, etc.)

21. The need for additional meet and confer sessions, to continue to discuss issues raised at the initial conference among counsel.

- The parties believe that Checklist items 11 through 21 are either inapplicable or do not need to be ruled on at this time.

PARTIES' PROPOSED SCHEDULE FOR FACT AND EXPERT DISCOVERY

See Item 8 of the Pretrial Conference Checklist for specific scheduling proposals. Following are Plaintiff's proposals in response to Item I.A.2. of the Standing Order.

1. Any recommendations for limiting the production of documents, including electronically stored information.

- Apart from privilege, the Plaintiff proposes no limitation of the production of documents.
- Defendants agree that discovery should be conducted in accordance with the Federal Rules of Civil Procedure and the S.D.N.Y. Local Rules. Defendants further state that no party should be required to re-produce documents already provided to the opposing party in response to a pre-litigation subpoena.

2. Any recommendations for limiting depositions, whether by numbers or days of depositions, and by the elimination of expert depositions.

- Plaintiff proposes no limitation on the number or days of depositions. Presumptively, depositions of defendants may last longer than seven hours.
 - Defendants agree that depositions should be conducted in accordance with the Federal Rules of Civil Procedure and the S.D.N.Y. Local Rules.
- 3. A protocol and schedule for electronic discovery, including a brief description of any disputes regarding the scope of electronic discovery.**
- Defendants agree that discovery should be conducted in accordance with the Federal Rules of Civil Procedure and the S.D.N.Y. Local Rules. Defendants further state that no party should be required to re-produce documents already provided to the opposing party in response to a pre-litigation subpoena.
- 4. Whether the parties recommend that expert discovery precede or follow any summary judgment practice.**
- The parties agree that expert discovery practice precede summary judgment practice.
- 5. Whether the parties agree to allow depositions preceding trial of trial witnesses not already deposed.**
- The parties agree to allow depositions preceding trial of trial witnesses not already deposed.