Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-009438 07/08/2015

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
C. Fitch
Deputy

ROBERT ELLMAN, et al. DAVID E WOOD

v.

JUAN FELIX, et al. GARY L HUDSON JR.

MARC D BLEAMAN
ALTERNATIVE DISPUTE
RESOLUTION - CCC

STATUS CONFERENCE SET

The Court having approved and adopted the parties' proposed deadlines as set forth in the Joint Proposed Scheduling Order,

IT IS ORDERED setting a Telephonic Pretrial Status/Scheduling Conference on **December 1, 2015, at 9:00 a.m. (15 minutes allotted)** for the purpose of assigning a trial date and a final pretrial management conference date if the case has not settled. Counsel shall have their trial calendars available. Counsel for Plaintiff shall initiate the telephonic conference by first arranging the presence of all other counsel on the conference call and by calling this division at: **(602) 372-5851** promptly at the scheduled time. **The parties and counsel shall not be permitted to participate in conferences via cell phones or speakerphone.**

IT IS FURTHER ORDERED the parties shall participate in a mandatory Settlement Conference. This case is referred to the court's Alternative Dispute Resolution for the appointment of a judge *pro tempore* to conduct a settlement conference. **Counsel and/or the parties will receive a minute entry from ADR appointing the judge *pro tempore*.** Counsel and any "pro per" parties will contact the appointed judge ***pro tempore*** to

arrange the date, time and location for the settlement conference. The judge ***pro tempore*** is directed to complete a settlement conference not later than **5:00 p.m. on November 2, 2015**. The Office of Alternative Dispute Resolution will not do the scheduling of the settlement conference so please do not contact that office.

The following pertains to the pretrial matters identified below. To the extent that it is inconsistent with any order that has been entered in this matter, including any scheduling order, this minute entry controls and the inconsistent language in any such previous order is vacated.

Discovery Disputes – Discovery disputes are strongly discouraged. Before filing a written motion to compel, motion for protective order, or any other motion related to discovery, please observe the following procedure.

If you believe that discovery to which you are entitled has not been provided to you as required by the applicable rules, and you want the court to intervene, you must contact the other party's attorney (or the other party if he/she is self-represented), and then together, telephone the court to ask for a telephonic conference. No such request will be considered, however, if made 30 or fewer calendar days before the scheduled trial or evidentiary hearing.

To encourage the resolution of discovery disputes without court intervention, you are urged to consider the risk that comes from not providing discovery responses as required by the applicable rules. Even if court intervention is not requested, should a party fail to provide discovery that the court later decides is relevant, the jury may be told, or the court may assume, that the failure to provide discovery warrants an adverse inference against the party who refused to provide it.[1] Further, when a party fails to respond completely to discovery requests that the court concludes are reasonable, the trier of fact is permitted to assume that party is not credible in other ways.[2] In addition, should a party fail to provide discovery on a matter essential to another party's claim or defense, the party failing to provide the discovery may be precluded from presenting evidence, or that failure may result in the striking of that party's pleadings. (For purposes of this order, "discovery" includes both responses to formal discovery requests and all disclosure required by Ariz. R. Civ. P. 26.1.)

[1] *E .g., Sing v. Gonzales*, 491 F.3d 1019, 1024 (9th Cir. 2007) ("When a party has relevant evidence in his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him" (citation omitted)); *see also Pendleton v. Brown*, 25 Ariz. 604, 622, 221 P. 213, 219 (1923) (similar).

[2] *See generally Callender v. Transpacific Hotel Corp.*, 179 Ariz. 557, 562, 880 P.2d 1103, 1108 (App. 1993); *see also Nardella v. Campbell Mach., Inc.*, 525 F.2d 46, 49 (9th Cir. 1975) (quoting *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968)).

Dispositive Motions – Absent leave of court, and for good cause shown, no party may, from this date forward, file more than one summary judgment motion. If a motion for summary judgment is filed, all issues must be raised in a single motion (e.g., the single motion may consist of what would otherwise be two or more motions for partial summary judgment). All issues in response to a motion must be raised in a single filing, even if that filing includes a cross-motion (a cross-motion is almost always a response to the original motion). All summary judgment motions and submissions that follow the filing of those motions are expected to comply with the letter and spirit of Ariz. R. Civ. P. 56 and Maricopa Cty. Rs. 2.16, 3.2(f).[3]

The one-motion limit deprives no litigant of any privilege or right because it applies only when good cause cannot be shown. The limit is intended to accomplish several objectives. First, limiting the number of summary judgment motions promises to reduce the expense of litigation

[3] Among other things, this means refraining from efforts designed to maneuver around the page limit rules by, for example, placing substantive arguments (including string citations with parenthetical quotations or explanations) in footnotes, an appendix, or accompanying statement of facts – if something needs to be understood before an informed decision can be made, that material should be placed in the main text, and anything not necessary to a reasoned decision does not warrant even footnote or appendix treatment), incorporating by reference substantive arguments that appear in other briefs, or altering the pagination (e.g., placing the number 1 at the bottom of page 2). Effective written advocacy is not a function of quantity. Those who think that lengthy briefs are indispensable to success may be well-served to remember that "the long brief says the question could go either way and begs that you be rewarded for doing your homework. The short brief says there is an answer to the problem and you have found it." James W. McElhaney, *McElhaney's Litigation* 284 (1995); see also *Fleming v. County of Kane*, 855 F.2d 496, 497 (7th Cir. 1988) (page-limit rules "encourage [the parties] to hone their arguments and to eliminate excessive verbiage. [They] induce[] the advocate to write tight prose, which helps his client's cause. . . . Overly long briefs . . . may actually hurt a party's case, making it far more likely that meritorious arguments will be lost amid the mass of detail" (citations and internal quotation marks omitted)).

Further, statements of fact should be presented in "concise, numbered paragraphs" [Ariz. R. Civ. P. 56], preferably with one fact per paragraph (which, among other things, makes it much easier to identify those facts that are disputed or objectionable). Statements of fact should not contain any assertions that amount to argument. See *Breeser v. Menta Group, Inc.*, 934 F.Supp.2d 1150, 1153-54 (D. Ariz. 2013). (Although *Breeser* is a federal court decision applying a local federal rule, in this court's view, that local rule and its application in *Breeser* are consistent with the spirit, if not the letter, of Ariz. R. Civ. P. 56(c)(3). "[F]act statements are designed to assist the court by organizing the evidence, identifying undisputed facts, and demonstrating precisely how each side proposes to prove a disputed fact with admissible evidence. Opinion, suggested inferences, legal arguments and conclusions are not the proper subject matter of a [fact] statement." *Breeser*, 934 F.Supp.2d at 1155.)

Finally, the parties are encouraged to refrain from engaging in what is the all-too-frequent practice of filing "controverting" or "supplemental" statements of facts with their reply memoranda. Rule 56 does not provide for such filings and, moreover, it is "improper to introduce new evidence with the reply." *Wells Fargo Bank v. Allen*, 231 Ariz. 209, 214 n.3, ¶20, 292 P.3d 195, 200 n.3 (App. 2012) (reversing summary judgment). Objections to the nonmoving party's evidence should be treated in the reply memorandum: employing a separate filing that urges objections accompanied by argument is not permitted.

for the parties who must otherwise bear the cost of multiple motions. Second, the more motions that are filed, the more court time is required to deal with them which, when viewed cumulatively, serves to slow down not only the case at hand, but other cases as well. Thus, the limit can assist in moving cases to a just conclusion more quickly. Third, limiting the number of motions promises to enhance the quality and efficacy of motion practice. It is likely that the limit will promote greater thought and more careful attention to crafting that one motion, with the result being a product that is superior to what otherwise would be filed. Fourth, the limit discourages the frequent practice of filing a dispositive motion in the early stages of the case before all claims, defenses, and material facts are understood. Filing a dispositive motion early in the case, accompanied by what is far more often than not an unrealistic hope of achieving an early victory while comforted in the belief that the motion's denial will not prevent filing another (often much the same) motion later in the case on the pretense that the first motion was submitted without benefit of discovery, is a practice that serves no one well, especially the clients who must finance the failed efforts. Moreover, because the limit should, in most cases, cause attorneys to wait before filing a summary judgment motion, they may realize with the benefit of discovery that summary judgment has no chance of being granted, thus eliminating the need for filing what would be a pointless motion.

Unless another order in this case establishes an earlier deadline, the deadline for filing a summary judgment motion is 120 days before trial.

Motions in Limine and *Daubert* Motions – The granting or denial of a motion in limine turns on whether the admission of evidence reaches the level of reversible error or a mistrial.[4] Motions in limine are not granted "except upon a clear showing of non-admissibility."[5] And, motions in limine should not be used as substitutes for dispositive motions.[6]

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[4] *See e.g., State v. Ferrari*, 112 Ariz. 324, 327, 541 P.2d 921, 924 (1975) (affirming denials of motions in limine: framing the issue in terms of reversible error); *State v. Pearce*, 22 Ariz. App. 338, 339, 527 P.2d 297, 298 (1975) (affirming grant of motion in limine: same); *State ex rel. Berger v. Superior Court*, 108 Ariz. 396, 397, 499 P.2d 152, 153 (1972) (framing the issue in terms of a mistrial).

[5] *State ex rel. Berger*, 108 Ariz. at 397, 499 P.2d at 153 (emphasis added); *accord e.g., Indiana Ins. Co. v. General Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004) ("The court has the power to exclude evidence in limine only when evidence is clearly inadmissible on all potential grounds" (emphasis added)).

[6] *E.g., Dunn v. State Farm Mut. Auto. Ins. Co.*, 264 F.R.D. 266, 274 (E.D. Mich. 2009) ("[M]otions in limine are meant to deal with discrete evidentiary issues related to trial, and are not another excuse to file dispositive motions disguised as motions in limine" (citation and internal quotation marks omitted)); *Goldman v. Healthcare Mgt. Sys., Inc.*, 559 F. Supp. 2d 853, 871-72 (W. D. Mich. 2008) (same: collecting cases)); *Johnson v. Chiu*, 199 Cal. App. 4th 775, 780-81, 131 Cal Rptr. 3d 614, 618 (2011) ("What in limine motions are *not* designed to do is to replace . . . dispositive motions"; "To have the sufficiency of the pleading or the existence of triable issues of material fact decided in the guise of a motion in limine is a perversion of the process" (citations and internal quotation marks omitted)).

1. Page Limit and Format: Other than *Daubert* motions and responses to those motions, neither the motion in limine nor the response may exceed two pages, including the caption. Showing that the motion has merit should not require more than that.[7]

Any motion in limine or response to such a motion should begin with a simple declarative sentence that identifies the evidence that is the subject of the motion, with the understanding that the broader the scope of the evidence to be excluded, the less likely it is that a motion in limine will be granted.[8] The remainder of the motion or response should then explain why a mistrial or reversible error would or would not result if the motion is denied, with citations to authority that have reached the same conclusion in the same or similar circumstances (this also applies to motions in limine based on any failure to disclose, keeping in mind that nondisclosure implicates Ariz. R. Civ. P. 37(c)).[9] If the motion is unable to explain why its denial would result in a mistrial or reversible error, the remainder should then demonstrate persuasively what efficiency, economy, or other benefit is to be gained by granting the motion.

Other than *Daubert* motions, which should be filed separately, if two or more motions in limine are filed, they should be combined as a single omnibus motion. The caption should appear on the first page, and each motion should begin on a new page, following the format and page limit standards above. The same applies to any response opposing such an omnibus motion.

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[7] Evidence is not to be excluded even when it is inadmissible for one purpose or against one party if it remains admissible for another purpose or against another party. *E.g., Steele v. Vanderslice*, 90 Ariz. 277, 287, 367 P.2d 636, 643 (1961) ("Evidence admissible for one purpose is not to be excluded because inadmissible for another purpose"); *Cavanagh v. Ohio Farmers Ins. Co.*, 20 Ariz. App. 38, 44, 509 P.2d 1075, 1081 (1973) ("[E]vidence properly offered against one of multiple parties must ordinarily be admitted, although it would be inadmissible and prejudicial against another party").

[8] *Sperberg v. Good year Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975) ("Orders in limine which exclude broad categories of evidence should rarely be employed").

[9] "When a motion in limine is used to enforce the provisions of Rule 26.1, it is effectively a request for sanctions under Rule 37(c), Ariz. R. Civ. P. As such, it must be considered and reviewed using the standards of Rules 26.1 and 37(c) and the cases that have applied them." *Zimmerman v. Shakman*, 204 Ariz. 231, 235, ¶12, 62 P.3d 976, 980 (App. 2003). Among other things, that requires the Court to consider whether a postponement of the trial is warranted. Thus, a motion that urges the exclusion of evidence based on a failure to comply with Rule 26.1 should explain why any unfair prejudice that may result from allowing the evidence cannot be remedied by a trial continuance.

2. Rule 7.2: Before any motion or omnibus motion may be filed, the moving party must comply with Ariz. Rule Civ. P. 7.2(a) (i.e., establishing a meet and confer requirement, which may be satisfied by meeting in person or by way of telephone conversations, but not by written means (e.g., e-mail, letter)).

3. Deadlines: Unless another order in this case, including any subsequent order, establishes an earlier deadline, the deadline for filing *Daubert* motions is 120 days before the scheduled first day of trial and the deadline for motions in limine is 30 days before the pretrial management conference. In both instances, responses must be filed 15 days after service, and no replies should be filed unless requested.