UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ELIZABETH SEWELL, ET AL., **Plaintiffs** **VERSUS** **SEWERAGE & WATER BOARD OF NEW ORLEANS,** **Defendant**	**CIVIL ACTION NO. 15-3117** **c/w 15-6276, 16-2326, 16-2328, 16-3120, 16-4233, 16-4248, 16-12368** **THIS DOCUMENT RELATES TO NO. 15-3117** **SECTION "N" (3)**

SEWELL PLAINTIFFS' MEMORANDUM IN OPPOSITION TO SWB'S MOTION TO VACATE OR CLARIFY ORDERS COMPELLING PRIVATE MEDIATION

MAY IT PLEASE THE COURT:

Plaintiffs, Elizabeth Sewell, *et al*., in Civil Action No. 15-3117 ("Plaintiffs"), respectfully submit this Memorandum in Opposition to the Motion to Vacate or Clarify Orders Compelling Private Mediation filed by the Defendant, Sewerage and Water Board of New Orleans ("SWB") (R. Doc. 372). For the following reasons, the SWB's Motion should be denied.

I. SUMMARY OF ARGUMENT

The SWB's Motion largely turns on its unsubstantiated claim that it has not "consented" to the Mediations and the appointment of Mediator Hill under the Discovery Scheduling Order ("DSO"). A review of the undisputed facts in the case, however, disclose that, until the filing of the present Motion, the SWB has not objected to the Mediations or Mediator Hill. Furthermore, the SWB's own actions belie their claim of non-consent; the SWB was involved in drafting the DSO, including the Mediation and Mediator provisions, and to date has actively participated in carrying out the provisions of the DSO. Plaintiffs, the Court, Meditator Hill, and the numerous other parties under the authority of the DSO, have relied upon the SWB's express and implied

consent to the DSO and have expended significant time, money, and resources in participating in discovery and pre-mediation requirements of the DSO.

To the extent that the SWB is now for the first time providing notice of withdrawal of consent for the Mediations and the appointment of Mediator Hill, just mere days before the Mediations are set to begin, the SWB should be imposed the costs of Plaintiffs and Mediator Hill in preparing for and attending Mediations. The SWB's Motion is filed so untimely that the Mediations will have already started by the time that the Court holds its hearing on the Motion. The SWB has provided no reason whatsoever for its tardy withdrawal of consent.

Contrary to the SWB's recitation of the law, the Court does have authority pursuant to Federal Rule of Civil Procedure 16 to order Mediations and appoint Mediator Hill under the DSO. To the extent that the Local Rule relied upon the SWB conflicts with the Court's Rule 16 authority, the Court's Rule 16 authority prevails.

The SWB's Motion is procedurally improper, as neither a motion to vacate nor a motion to clarify exist under the Federal Rules of Civil Procedure or Local Rules. If the SWB endeavors to modify the DSO, it should have filed a motion to modify pursuant to Rule 16. Even if the SWB had filed a procedurally proper motion, however, this motion would still fail as the SWB cannot demonstrate the requisite "good faith" required for its requested modifications to the DSO.

Finally, the SWB's concerns about the confidentiality of their disclosures during the Consultant Meetings are alleviated by the confidentiality provision in the DSO and are waived by the fact that the SWB has already produced thousands of pages of discovery from its consultants. Had the SWB raised its concerns in a more timely manner, Plaintiffs would be

amenable to working with the SWB and Mediator Hill in setting guidelines for the Consultant Meetings that provide the SWB with assurances as to the confidentiality of its purported experts.

II. FACTUAL BACKGROUND ON THE SWB'S CONSENT & PARTICIPATION IN THE MEDIATION & MEDIATOR ORDER & PROCESS

The SWB omits from its Motion the comprehensive factual background on the Court's Discovery Scheduling Order ("DSO"), appointing Mediator Hill and scheduling Mediations/Settlement Conferences in this litigation, which dates back over nine months ago and was carried out with the consent and active participation of the SWB. A summary of this background follows.

A. The Development of the DSO With the SWB's Consent

On March 23, 2016, the Court issued an order directing the parties to participate in a joint Rule 26(f) scheduling conference with Magistrate Judge Knowles. (R. Doc. 94). Thereafter, on April 7, 2016, Magistrate Knowles issued an order setting an in-person Rule 26(f) scheduling conference and directing the parties to meet-and-confer no later than ten days before this conference to discuss proposed discovery deadlines and to thereafter, three days before the conference, fax the Court the agreed upon dates and proposed dates for the disputed dates. (R. Doc. 104). The Rule 26(f) scheduling conference was ultimately set for May 12, 2016. (R. Doc. 110).

Pursuant to Magistrate Knowles' directive to the parties, on April 25, 2016, Plaintiffs circulated a proposed discovery scheduling order to all counsel of record, including counsel for the SWB, and requested input and revisions from all parties in advance of the Court's deadlines. *See* Ex. A (Plaintiffs' Email, Apr. 25, 2016). Plaintiffs' proposed discovery scheduling order offered a solution to addressing and resolving the hundreds of claims against the SWB, as well as

the SWB's third party claims, by staying formal discovery, creating an expedited discovery process for groupings of Plaintiffs, and setting, at the end of each Plaintiff group's discovery, a mediation. Ex. B (Plaintiffs' Proposed DSO, May 9, 2016). Particularly relevant to the present Motion, the Plaintiffs' proposal contained, at "Section XIX. Mediations/Settlement Conferences," a provision requiring all parties, including the SWB, to participate in "Mediations/Settlement Conferences." *Id*. In addition, at "Section XX. Mediator," the Plaintiffs' proposed order provided for the appointment of a mediator to conduct the Settlement Conferences/Mediations and resolve discovery issues. *Id.*

Even though Plaintiffs circulated their proposed discovery scheduling order to the SWB well in advance of the Court's deadline, the SWB did not provide any timely revisions, objections, comments, or any response whatsoever to the Plaintiffs' proposal prior to this deadline. Neither did the SWB provide its own proposal. Thus, Plaintiffs moved forward with timely submission of their proposal to the Court, incorporating comments from other parties but not the SWB. *Id*.

On May 10, 2016, a day after the Court-established deadline, the SWB sent a letter to the Court raising concerns with Plaintiffs' proposed discovery scheduling order, specifically about the scope of discovery, the timing of substantive motions, the creation of a discovery depository, consultant meetings, and selection of properties for "flights." Ex. C (SWB Letter, May 10, 2016). Critically, the SWB did <u>not</u> raise an objection to Mediations/Settlement or appointment of a Mediator as set forth in Plaintiffs' proposal. *See id*.

On May 12, 2016, Magistrate Knowles presided over the discovery scheduling conference, during which the Judge and counsel for all parties, including the SWB, thoroughly discussed the Plaintiffs' proposed discovery scheduling order and offered objections,

suggestions, and revisions. *See* (R. Doc. 117). The SWB has offered no evidence to show that it raised objections at this time to the appointment of the Mediator or the setting of Mediation/Settlement, as set forth in the Plaintiffs' proposal. *See* (R. Doc. 372-1). As a result of this conference, the Court stated it would "prepare an amended discovery scheduling order in line with the discussions at the scheduling conference" and set a subsequent conference to discuss the Court's proposal. *Id*.

On May 24, 2016, the District Judge and Magistrate Judge held a joint status/scheduling conference with counsel for all parties, including the SWB. (R. Doc. 125). During this conference, the Plaintiffs' proposed discovery scheduling order was again discussed. The SWB has offered no evidence to show that during this conference it objected to the appointment of the Mediator or the scheduling of the Mediation/Settlement Conferences as set forth in the Plaintiffs' proposal. *See* (R. Doc. 372-1).

On June 24, 2016, Magistrate Knowles convened a final discovery scheduling conference with counsel for all parties, including the SWB. (R. Doc. 155). During this conference, the Court appointed "retired United States Magistrate Judge Michael Hill…as a private mediator/special master in this lawsuit." *Id*. The SWB claims that it "never consented to [Hill's] appointment or to participation in private mediation, and made its objections clear at that time," (R. Doc. 372-1), but offers no evidence to support this claim. *Id*.

B. Entry of the DSO & Relevant Provisions of the DSO

Magistrate Knowles issued the Discovery Scheduling Order (the "DSO") on June 27, 2016. (R. Doc. 156). The DSO is largely based upon the proposal first circulated by Plaintiffs to all parties back in April 2016 and which was later amended by the Court based upon input,

objections, comments, and revisions made by all parties, including the SWB, at the multiple conferences convened specifically to address the DSO. *See id*.

The DSO recognizes this litigation is "a complex, multi-party case requiring Court management and supervision in order to reduce the costs and difficulties of litigation to the parties, ease the burden of the Court, and assist the parties in resolving their disputes." (R. Doc. 156, p. 2). The Court goes on to state:

> Further, given the voluminous claims in this litigation, the Court concludes that the individual Plaintiffs' claims shall be bundled into smaller groups for focused discovery and mediation. Use of Plaintiff groupings will allow for expedited resolution of Plaintiffs' claims and bellwether outcomes, which may inform global resolution of the litigation. This streamlined, expedited approach to discovery and mediation is conducted in the spirit of the Federal Rules of Civil Procedure and the strong policy favoring settlement of claims. As each Plaintiff Group completes focused discovery and progresses to mediation, the subsequent Plaintiff Group will successively begin focused discovery and progress to mediation, until all Plaintiff Groups have completed the expedited discovery and mediation process. *Id*.

The DSO then sets forth details as to selection of Plaintiff claims for each Group, deadlines for the parties to deposit informal discovery, for the SWB and other defendants to conduct visual inspections of Plaintiffs' properties, for the exchange of consultant reports, for the deposition of Plaintiffs, and ultimately mediation of the claims of each Plaintiff Group. *See* (R. Doc. 156).

Particularly relevant to the present Motion, the DSO provides at "Section XIX. Mediations/Settlement Conferences" that all parties are required to participate in Mediations/Settlement Conferences with full authority and in a good faith effort to resolve Plaintiffs' claims. *Id*. at pp. 14-15. The first round of Mediation/Settlement Conferences for Group 1 is to occur on or before December 31, 2016. *Id.* at p. 15. In addition, at "Section XX.

Mediator," the DSO appoints retired Magistrate Judge Hill as the Mediator of Plaintiffs' claims pursuant to the DSO. *Id*. The DSO states that Mediator Hill's fees will be allocated according to participation of the parties at a given mediation and that this allocation is subject to objections by the parties. *Id*. Mediator Hill is authorized to conduct the Settlement Conferences/Mediations pursuant to the DSO. *Id*. at 16.

C. The SWB's Participation Under the DSO

Since the entry of the DSO in June 2016, the parties, including the SWB, have actively carried out the discovery and pre-Mediation provisions of the Order. For example, informal discovery has now been deposited in the Depository for Groups 1-5 Plaintiffs, with Group 6's informal discovery due this week. Thus, informal, written discovery under the DSO has been produced by well over 100 Plaintiffs. The SWB and other third parties defendants have conducted Defense Visual Inspections of the properties of Plaintiff Groups 1-3 and are set to begin inspections of Group 4 properties beginning next week. Plaintiff depositions of Group 1 will be completed by November 30, 2016, with Group 2 depositions set for the first two full weeks of December 2016. The SWB deposited its Defense Response for the Group 1 Plaintiffs' claims on November 15, 2016. Ex. D (SWB Notice of Deposit, Nov. 15, 2016). The Consultant Meetings for Group 1 claims are currently set for December 5, 2016, less than a week away. The Mediations for Group 1 are set for December 6-16, 2016.

All of the efforts thus far by the Plaintiffs, SWB, and other parties in conducting discovery have been done in furtherance of the Mediations scheduled for the end of each of the Plaintiff Groups' discovery and mediation schedule. It is disingenuous for the SWB to now claim, mere days before the Consultant Meetings and Mediation are set to begin for Group 1 and five months after commencing the discovery and mediation process under the DSO, that it never

consented to the Mediation process as set forth in the DSO. Cancelling Mediations and removing Mediator Hill from the case at this juncture of the litigation would be a colossal waste of time and resources by all parties involved, particularly the Plaintiffs, as well as the Court and Mediator Hill.

D. The SWB Did not Challenge Mediation or the Appointment of Mediator Hill After Entry of the DSO

Until the filing the present Motion (almost five months after entry of the DSO), the SWB has not contested the Meditator or Mediations/Settlement Conference provisions of the DSO. *See* (R. Doc. 372-1). The SWB's Motion contains conclusory statements such as "The SWB never consented to [Hill's] appointment or to participation in private mediation, and made its objections clear...," and "The SWB has always objected to this compulsory private mediation," but provides no evidence to support these claims. (R. Doc. 372-1). In fact, as set forth herein, the evidence is to the contrary. The undisputed facts show the SWB's active participation under the DSO, in furtherance of the Mediations under the authority of Mediator Hill.

The only time the SWB did seek to amend the DSO was in August 2016, but only with regard to extending the deadline for third parties to file dispositive motions on federal contractor immunity and continuing the deposition of the U.S. Army Corps of Engineers. (R. Doc. 191-1). The SWB raised no objections to Mediator Hill's appointment or the scheduling of Mediations/Settlement Conferences. *See id*. In fact, the SWB acknowledges in that motion "other filing dates, property inspections, mediations and activities leading up to mediation will not be moved to accommodate the proposed filing deadlines or the USACE depositions," thus, indicating its intention not to disrupt the Mediations in the case. *Id*. (emphasis added).

On August 5, 2016, Magistrate Knowles held a telephonic discovery status conference, during which the Court addressed the SWB's objections to Mediator Hill's attendance at the

inspections of Plaintiffs' properties. (R. Doc. 189). There is no evidence that the SWB raised any other objection to Mediator Hill's role as Mediator or the Mediation/Settlement Conferences. *See id.; see also* (R. Doc. 372-1). The Court ruled that Mediator Hill should attend the inspections insofar as his schedule allows and that the costs thereof would be split evenly by the parties who attend the inspections. (R. Doc. 189). These inspections by Mediator Hill have since occurred without further objection from the SWB.

Since the entry of the DSO, the Court has convened regular status conferences to address concerns, issues, and questions of the parties. The SWB has been in attendance at these conferences. In fact, the SWB prepared the proposed agendas for the June 27, 2016, August 23, 2016, and October 28, 2016, status conferences with the Court. While each of the agendas list the SWB's objections and concerns with regard to the litigation, these agendas contain no mention of the SWB's objections to the appointment of Mediator Hill or the Mediations/Settlement Conferences set forth in the DSO. *See* Ex. E (Status Conference Agendas *In Globo*).

E. The SWB has Been Engaged With Mediator Hill in Preparation for Mediations

The SWB has been consistently engaged with Mediator Hill in preparing for the Mediations. Since at least early September 2016, Mediator Hill has been in communication with counsel for SWB regarding Mediations of Plaintiffs' claims. *See* Ex. F (Hill Letter 1, Sept. 2, 2016). On September 2, 2016, Mediator Hill notified counsel for both Plaintiffs and SWB that he would begin billing for his role as Mediator in the litigation. *See* Ex. G (Hill Letter 2, Sept. 2, 2016). There is no evidence set forth by the SWB to demonstrate that it objected to Mediator Hill's engagement in the litigation or his billing for his services as Mediator.

Later in September 2016, Mediator Hill contacted counsel for Plaintiffs and SWB regarding scheduling his inspection of the Group 1 Plaintiff properties. *See* Ex. H (Hill Letter, Sept. 25, 2016). It is undisputed that the SWB's counsel participated in Mediator Hill's inspection of the Group 1 properties on October 18 and 19, 2016.

In October 2016, Mediator Hill contacted counsel for Plaintiffs and SWB to schedule the Consultant Meetings required by the DSO for December 5, 2016; these meetings precede the Mediation/Settlement Conference for each Plaintiff Group. Ex. I (Hill Email, Oct. 26, 2016). The SWB sets forth no evidence that it objected to Mediator Hill's scheduling of the Consultant Meetings.

In November 2016, Mediator Hill contacted counsel for Plaintiffs and SWB to schedule the Mediations of Group 1 for the first two full weeks of December 2016. Ex. J (Mitchell Email, Nov. 17, 2016). Until the filing of the present Motion, the SWB never raised an objection to the scheduling of the Group 1 Mediations/Settlement Conferences by Mediator Hill.

The SWB sets forth no evidence to show that it has not participated in Mediator Hill's Mediations/Settlement Conference meetings; nor has the SWB set forth any evidence to show that it has objected to any of Mediator Hill's efforts in fulfilling his role as Mediator for the litigation. Rather, the SWB has actively participated in the Mediation/Settlement Conference process established by the DSO and under the authority of Mediator Hill.

The SWB, Mediator Hill, Plaintiffs, and the Court, as well as the numerous other parties and even parties in the consolidated cases, have undoubtedly expended significant time and resources in preparing for Mediations/Settlement Conferences set to begin in one week. The SWB should not be allowed, now mere days before the Mediations/Settlement Conferences are scheduled to begin and nine months after this Mediations/Settlement Conference process was

first proposed, to unilaterally cancel Mediations/Settlement Conferences and revoke Mediator Hill authority's over the Mediations/ Settlement Conference.

III. THE SWB CONSENTED TO MEDIATION & THE APPOINTMENT OF MEDIATOR HILL

The SWB's Motion is largely premised on its argument that it has not consented to Mediation or the appointment of Mediator Hill, but the overwhelming evidence demonstrates that for the past nine months the SWB has in fact consented and actively participated in the Mediation process under the authority of Mediator Hill.

While Plaintiffs dispute the applicability of the law cited by the SWB to support its Motion, *see infra* pp. 15-17, applying this law to the undisputed facts demonstrates that the SWB has provided the requisite consent to Mediation and Mediator Hill's appointment. Local Rule 16.3.1 cited by the SWB provides in relevant part: "If the presiding judicial officer determines at any time that the case will benefit from alternative dispute resolution, the judicial officer may: (a) refer the case to private mediation, if the parties consent…." Here, it is undisputed that the SWB has consented to Mediation by Mediator Hill in this litigation.

The SWB was included in the process of developing the document that would ultimately become the DSO and never raised any objections to Mediation or the appointment of a Mediator as set forth in the drafts of this Order. The SWB attended the numerous conferences held by the Court to discuss the DSO, yet the SWB offers no evidence to show that it objected to Mediation or Mediator Hill. Over the last five months, the SWB has actively engaged in all aspects of the DSO leading up to Mediation by Mediator Hill, including but not limited to extensive written discovery, property inspections, consultant reports, depositions, and scheduling and working with the Mediator on the Consultant Meetings and Mediations set in a matter of days. The SWB never previously filed a motion seeking to amend or challenge the DSO with regard to the

Mediation and Mediator provisions. The SWB, which created the agendas for regular conferences with the Court, did not include on those agendas any objections to Mediation or Mediator Hill as currently raised by the present Motion.

Thus, the SWB's own actions and active participation pursuant to the DSO over the last nine months clearly evidence the SWB's consent to Mediation under the authority of Mediator Hill. Because the SWB has consented to Mediation and Mediator Hill, under the SWB's own interpretation of the law, the Mediations should proceed under the authority of Mediator Hill as required by the DSO, and the SWB's Motion should be denied.

IV. IF THE COURT VACATES MEDIATION & THE APPOINTMENT OF MEDIATOR HILL, THE SWB SHOULD BEAR THE COSTS OF PLAINTIFFS & MEDIATOR HILL IN PREPARING FOR & ATTENDING MEDIATIONS

To the extent that the SWB's Motion now indicates its intention to withdraw consent for Mediation under the authority of Mediator Hill and the Court vacates the Mediations and appointment of Mediator Hill (to which Plaintiffs firmly object on legal and factual grounds), the SWB's untimely withdrawal of consent warrants the imposition of sanctions against the SWB.

The DSO was entered by the Court pursuant to its authority under Federal Rule of Civil Procedure 16(f), following an extensive review and comment period with all parties, including the SWB. As evidenced above, the SWB has consented to and carried out the provisions of the DSO, including the Mediation and Mediator provisions of the DSO, since the Order was first issued five months ago. Plaintiffs, the Court, Mediator Hill, as well as all other parties in this case and even parties in consolidated cases, have relied upon the SWB's consent and participation in the DSO and have expended significant time, resources, and money in carrying out the provisions of the DSO over the last five months in hopes of ending the process with successful Mediations. Now on the eve of the Consultant Meetings and Mediations for Group 1,

the SWB provides its first notice of withdrawing consent from Mediations and the appointment of Mediator Hill. The SWB should not be allowed to stymie the significant efforts of the Court, Mediator, and parties in preparing for and attending Mediations at this late date. To do so is in violation of the DSO and evidences bad faith on the part of the SWB.

A. Law on Sanctions for Violation of a Scheduling Order & Bad Faith at Mediation

Federal Rule of Civil Procedure 16(f) authorizes a district court to impose sanctions on a party or its attorney for failing to appear at a pretrial conference, being substantially unprepared to participate in a pretrial conference, failing to participate in good faith at a pretrial conference, and/or failing to obey a pretrial scheduling order. Rule 16(f) further provides: "Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses - - including attorney's fees - - incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 16(f)(2).

The Fifth Circuit has clarified that Rule 16(f) sanctions may be applied to a party's conduct with regard to settlement. *See Guillory v. Domtar Indus., Inc*., 95 F.3d 1320, 1334-35 (5th Cir .1996). In *Guillory*, the Fifth Circuit affirmed the imposition of sanctions against a party pursuant to Rule 16(f) where the court and other parties wasted resources orchestrating a futile settlement conference and the sanctioned party concealed its true position that it never intended to settle the case. *Id*.

This Court too has applied Rule 16(f) sanctions to a party that exhibited bad faith with regard to settlement. In *In re Bank of Louisiana/Kenwin Shops Incorporated Contract Litig.*, 1999 WL 529532 (E.D. La. July 21, 1999), District Judge Duvall upheld Magistrate Judge Shushan's imposition of sanctions against a party for initiating a settlement conference at great

expense of time and money to the other parties while demonstrating no intention of settling the claims. Looking to *Guillory*, the *Bank of Louisiana* Court concluded that sanctions were appropriate because the party wasted time and resources of the Court and other parties, the party made a number of representations that were not supported by the record, and "[t]hese actions constituted an unreasonable waste of the Court's time and unreasonable cost to the other litigants." *Id*. at *2.

In addition to the authority under Rule 16(f), the Fifth Circuit has recognized a district court's inherent authority to sanction a party or attorney for improper conduct in conjunction with mediation. *See Scaife v. Associated Air Ctr., Inc.*, 100 F.3d 406, 411-12 (5th Cir. 1996). In *Scaife*, the Fifth Circuit upheld the imposition of sanctions – to pay all costs associated with mediation and related motions – on a party that ignored the district court's order to appear at mediation. *Id*.

B. Sanctions Should be Taxed Against the SWB for its Untimely Withdrawal from Mediation

The Court should impose sanctions against the SWB for its untimely withdrawal of consent to Mediation and the appointment of Mediator Hill pursuant to the DSO. The SWB's Motion is so untimely that it cannot be heard by the Court until after the Consultant Meetings and Mediations for Group 1 have already occurred. Now, Plaintiffs and Mediator Hill have to prepare for these events and attend at least two to three days of meetings before finding out whether the Mediations should be halted entirely. The SWB's untimely filing thus poses the risk of a colossal waste of time and resources for the Plaintiffs and Mediator Hill.

Plaintiffs, the Court, Mediator Hill, as well as the numerous other parties and consolidated parties in this litigation, have all relied upon the SWB's consent to and participation in the DSO, including the Mediation and Mediator provisions of the DSO, over the past several

months. This reliance is reasonable given that the SWB has provided no evidence of prior objections to Mediation or Mediator Hill and the SWB has carried out its numerous responsibilities under the DSO up until the current date.

Plaintiffs and Mediator Hill have expended significant amounts of time, money, and resources preparing for Mediation, for which the SWB should be held monetarily responsible. Plaintiffs have produced extensive written discovery, arranged for property inspections, defended depositions, produced consultant reports, and prepared for the Consultant Meeting and Mediation set for next week. Mediator Hill has been involved in the litigation since at least the end of Summer 2016 and has expended his time and resources in communicating with the parties, attending property inspections, scheduling Consultant Meetings and Mediation, and working tirelessly to bring all necessary parties and non-parties to Mediation.

The SWB has misrepresented its position on Mediation and Mediator Hill, and Plaintiffs and Mediator Hill have reasonably relied on this misrepresentation. The SWB apparently assumes the Plaintiffs will now cover the Mediator's costs in preparing for and participating in Mediation and eat their own extensive costs in preparing for Mediation over the last five months. The SWB's misrepresentations to Plaintiffs, the Court, and Mediator Hill regarding its interest and effort towards Mediation constitute bad faith and warrant the imposition of sanctions.

Plaintiffs request that if the Court vacates Mediations and/or the appointment of Mediator Hill, then the SWB be required to bear the costs of Plaintiffs and Mediator Hill in preparing for and attending Mediations. Plaintiffs can make available billing and cost records for the Court to evaluate the quantum of these sanctions and assume Mediator Hill too has similar billing records that may be submitted to the Court for consideration.

V. THE COURT HAS AUTHORITY TO ORDER MEDIATIONS & APPOINT MEDIATOR HILL

The Court has authority pursuant to Federal Rule of Civil Procedure 16(a) to order the parties, including the SWB, to attend the Mediations/Settlement Conference under the authority of Mediation Hill, as is required by the DSO.

Rule 16(a) provides in relevant part: "In any action, the court may order the attorneys and any unrepresented parties to appear to one or more pretrial conferences for such purposes as: … (5) facilitating settlement." Furthermore, Rule 16(c)(2) authorizes a district court to "take appropriate action" in "(I) settling the case and using special procedures to assist in resolving the dispute with authorized by statute or local rule" and "(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."

Thus, under these cited provisions of Rule 16, the Court has authority to order the Mediations/Settlement Conferences and appoint Mediator Hill to preside over the Mediations/Settlement Conferences as is set forth in the DSO. As recognized by the DSO, this is a large and complex case that requires the Court's assistance and direction in facilitating settlement. The Mediations and Mediation provisions of the DSO are consistent with the Court's authority under Rule 16 to "take appropriate action" and "adopt[] special procedures" for resolving disputes in this complex case.

To the extent that the Local Rule relied upon by the SWB conflicts with the Court's authority under Federal Rule of Civil Procedure 16, Rule 16 provides the applicable rule of law. *See* Fed. R. Civ. P. 83(a)(1); *El-Kassi v. Martinaire, Inc*., 2005 WL 2897055, at *2 (S.D. Tex. Nov. 3, 2005) (citing authorities).

Furthermore, the Court also has authority pursuant to Federal Rule of Civil Procedure 53(a)(1)(C) to appoint Mediator Hill as a special master to "address pretrial…matters that cannot

be effectively and timely addressed by an available district judge or magistrate judge of the district." Because of the complex and numerous claims involved in this case, Magistrate Knowles has indicated that, with his already busy docket, he does not have the time or resources to mediate the case. Thus, Mediator Hill is stepping into Magistrate Knowles' shoes for the limited purpose of overseeing and facilitating settlement in this case. If the Court determines Mediator Hill should be designated as a special master to facilitate Mediations under the DSO, then Plaintiffs will work with the Court in carrying out the procedures set forth in Rule 53 for confirming Hill as a special master.

VI. THE SWB'S MOTION IS PROCEDURALLY IMPROPER & SUBSTANTIVELY LACKS MERIT

The SWB's "Motion to Vacate or Clarify Orders Compelling Private Mediation" is procedurally improper and should be dismissed on this basis alone. Neither the Federal Rules of Civil Procedure nor the Local Rules of this Court recognize the existence of a motion to vacate or motion to clarify in civil litigation. Indeed, the SWB does not cite any law or standard of review to support the procedural propriety of its Motion. Instead, the SWB should have brought its Motion as one to modify the DSO. However, even if the SWB had brought a procedurally proper motion, it still could not overcome its burdens in prevailing on that motion.

A. Law on Motion to Modify Scheduling Order

A motion to modify a scheduling order is brought pursuant to Federal Rule of Civil Procedure 16, and modification is permitted "only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "Good cause" in this context is evaluated by four factors: (1) the explanation for untimely filing, (2) the importance of the amendment, (3) potential prejudice in allowing the amendment, and (4) availability of a continuance to cure such prejudice. *Rebaldo v. Jenkins*, 2012 WL 315647, at *1 (E.D. La. Feb. 1, 2012) (quoting *Southwestern Bell Tel. Co. v.*

City of El Paso, 346 F.3d 541, 546 (5th Cir. 2003)). "The district court has 'broad discretion to preserve the integrity and purpose of the pretrial scheduling order.' " *Id*. (quoting *Barrett v. Atl. Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996)). Applying the four "good cause" factors to the issues raised by the SWB's Motion it is clear that the SWB does not have good cause to modify the DSO's Mediation and Mediator provisions.

B. The SWB Lacks "Good Cause" to Modify the DSO

The DSO is a discovery scheduling order issued by the Court pursuant to its authority under Rule 16. The DSO, thus, can only be modified by a showing a good cause by the SWB. The SWB, however, entirely lacks good cause for its requested modifications to the DSO.

First, the SWB offers no explanation as to why it filed its Motion nine months after the DSO was first drafted and so late that that the Motion cannot be heard before the Court prior to the commencement of Consultant Meetings and at least the first two or three days of Mediation for Group 1.

Second, the SWB offers no explanation as to the importance of the suggested modifications, except to say that it will suffer irreparable harm, which as demonstrated below, lacks merit. *See infra* pp. 19-20.

Third, the prejudice that the Plaintiffs will suffer by the cancellation of Mediation and removal of Mediator Hill from the case is exponential. Plaintiffs have invested considerable time, money, and resources over the last five months in preparation for Mediation with Mediator Hill and in doing so, relied upon the SWB's consent and participation in the DSO. To now, on the even of Mediations, cancel Mediations completely and remove Mediator Hill from the case will cause Plaintiffs significant prejudice.

Fourth, the SWB does not raise the possibility of a continuance of the Mediation, which is a less extreme measure than complete elimination of Mediation as is requested in the Motion. If the SWB is simply seeking a reasonable continuance of the Mediation, then the SWB should properly raise this issue with Plaintiffs, Mediator Hill, and the Court. Plaintiffs are currently engaged in preparation for both the Consultant Meetings set to start on December 5th and the ten days of Mediations set to commence the next day, but are willing to work with the SWB, subject to its paying costs to Plaintiffs for efforts expended thus far, in finding another date for these meetings. Thus, considering the four good faith factors under the current facts of the case, it is clear that modification of the DSO as sought by the SWB's Motion is not warranted.

VII. THE SWB WILL NOT SUFFER "IRREPARABLE HARM" FROM THE CONSULTANT MEETINGS

In its final justification for its Motion, the SWB claims that its continued participation in Mediation "is likely to result in severe and irreparable prejudice that cannot later be remediated," because the Consultant Meetings required by the DSO will violate Federal Rule of Civil Procedure 26(b)(4)(D). However, the language of this Rule does not support the SWB's claim.

Rule 26(b)(4)(D) states: "Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." (emphasis added). The Consultant Meetings do not involve interrogatories or depositions so this Rule does not apply to the SWB's argument.

Furthermore, while the Plaintiffs are not aware of which consultants will attend the Consultant Meetings on behalf of SWB, the SWB has already produced in discovery thousands of pages of reports, data, and photographs from its consultant, Quick & Associates, Inc. Thus, to

the extent the SWB is now claiming that this consultant's attendance at the Consultant Meeting will run afoul of Rule 26(b)(4)(D), such claim is disingenuous.

The SWB's purported concerns about confidentiality with the Consultant Meetings are alleviated by the language of the DSO. The DSO contains the following confidentiality provision: "All discussions, statements, and documents presented during the Consultant Meetings are confidential an privileged pursuant to Federal Rule of Evidence 408 and shall not be admissible at trial or other stages of litigation other than mediation." (R. Doc. 156, p. 14).

To the extent this confidentiality provision does not provide the protection sought by the SWB, Plaintiffs are amenable to working with the SWB and Mediator Hill in conducting the Consultant Meetings so as to avoid any disclosure of experts or information that would run afoul of the Federal Rules of Civil Procedure. This is the first time any such concerns were brought to Plaintiffs' attention. Again, had the SWB raised this concern more timely, such concern would likely be resolved without the need for Court intervention.

VIII. CONCLUSION

For the foregoing reasons, the SWB's Motion to Vacate or Clarify Orders Compelling Private Mediation should be denied. The SWB has in fact consented to the Mediations and the appointment of Mediator Hill and offers no evidence to the contrary. If the SWB is now withdrawing its consent to the Mediations and Mediator Hill and the relevant DSO provisions are vacated on the eve of Mediations, the SWB should be taxed the costs of Plaintiffs and Mediator Hill in preparing for and attending Mediations. The Court does in fact and in law have authority to order the Mediations and appoint Mediator Hill. The SWB's Motion is procedurally improper and cannot be remedied by refilling. The SWB has not demonstrated it will suffer irreparable harm from the Consultant Meetings.

Respectfully submitted:

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November 2016, I served a copy of the foregoing on all counsel of record by filing through the Court's CMECF e-filing system.

/s/_____