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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ELIZABETH SEWELL, ET AL.,)	CIVIL ACTION NO. 15-03117
Plaintiffs)	C/W CIVIL ACTION NOS. 15-6276, 16-
VERSUS)	2326, 16-2328
SEWERAGE & WATER BOARD OF NEW ORLEANS,)	
Defendant)	SECTION "N" (3)

DISCOVERY SCHEDULING ORDER

A Federal Rule of Civil Procedure 26(f) discovery scheduling conference was held before the Honorable U.S. Magistrate Judge Daniel E. Knowles III on May 12 and June 27, 2016, in the above-captioned, consolidated cases. Pursuant to order of the District Court, these cases are consolidated for discovery purposes only.

The above-captioned cases arise out of the construction of the Southeast Louisiana Urban Flood Control Project ("SELA Project") in the New Orleans neighborhood generally known as "Uptown." Approximately 200 Plaintiffs have filed claims for inverse condemnation, strict liability, and negligence arising from property, business, and related damages alleged to have been caused by construction of the SELA Project. Plaintiffs have filed these claims against the Sewerage and Water Board of New Orleans ("SWB").¹

The SWB has, in turn, filed third-party claims for indemnity against the three primary contractors on SELA Project: Boh Brothers Construction Co., L.L.C., Cajun Constructors, L.L.C.,

¹ The single Plaintiff in the *Greenblatt* case has also filed direct claims against Boh Brothers Construction Co., LLC, but for all other Plaintiff claims, the SWB is the sole direct defendant.

and B&K Construction Co., L.L.C. (collectively, the “Contractors”). The Contractors have, in turn, filed indemnity claims against several subcontractors on the SELA Project and the subcontractors’ insurers (collectively with the Contractors, the “Third-Party Defendants”). The result 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 to the Court, and assist the parties in resolving their disputes.

Because Plaintiffs’ claims against the SWB are legally distinct from the SWB’s third party, contractual indemnity claims and the defenses to these claims, the most efficient course of discovery is to proceed on two separate tracks until further order from the Court. These separate discovery tracks shall proceed simultaneously as “Track I,” discovery between Plaintiffs and the SWB, and “Track II,” discovery between the SWB and the Third-Party Defendants. All discovery will be available to all parties, regardless of assigned discovery track, through use of a discovery document depository and attendance at depositions, inspections, and other discovery-related events.

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. *See* “Exhibit A.”

The following deadlines and directives take into account the complex nature of this litigation and reflect an interest by the parties and the Court in the timely, efficient resolution of these matters:

I. Motions for Summary Judgment

- A. There are two issues which should be resolved preliminarily in this litigation: (1) whether the SWB is liable to Plaintiffs for their alleged damages, and (2) whether the federal contractor immunity defense shields the Contractors from the SWB's third party complaints. Preliminary resolution of these two issues will set the course for the case, determine the nature and extent of discovery, and dictate the time and expense of the litigation.
- B. Accordingly, the Court orders that, no later than September 6, 2016, the *Sewell* Plaintiffs (Case No. 15-3117), and the Contractors file respective motions for summary judgment on these discrete issues to be heard by the District Judge in accordance with the Local Rules and Federal Rules of Civil Procedure. The parties shall set the motions for hearing on September 28, 2016.
- C. All parties reserve the right to file motions for summary judgment in accordance with the deadlines set by the District Court in its scheduling orders for the respective cases.

II. Discovery Management.

- A. The Court concludes that separating the Plaintiffs' direct claims from the third party claims is appropriate for discovery purposes and shall occur until further order from the Court. In an effort to streamline discovery and expedite resolution of Plaintiffs' claims, discovery will be conducted in the following fashion:

- B.** Following initial disclosures, discovery shall proceed on two separate tracks: (“Track I”) discovery between the Plaintiffs in all consolidated cases against the SWB, and (“Track II”) discovery between the SWB and the Third-Party Defendants.
- C.** Track I and Track II shall proceed simultaneously, but until further order from the Court and subject to the provisions herein, neither the Plaintiffs in Track I shall be obligated to respond to formal discovery from any Third-Party Defendants; nor shall the Third-Party Defendants in Track II be subject to formal discovery from any Plaintiffs.
- D.** This discovery severance does not prohibit any party from inspecting or copying any discovery documents or attending any discovery matters in a separate discovery track. All discovery documents shall be available to all parties in the Depository.

III. Document Depository.

- A.** The Depository shall be created as a central location for all parties to produce and deposit discovery and to freely inspect and copy discovery from any and all parties.
- B.** Proper and timely deposit of discovery in the Depository satisfies a party’s discovery obligations under the Federal Rules of Civil Procedure and this Discovery Scheduling Order.
- C.** In order to alleviate any prejudice or burden posed by the separate discovery tracks, all discovery produced in this matter, including but not limited to written and documentary discovery, electronic discovery materials, and deposition transcripts and videos, shall be deposited in the Depository and noticed to all parties.

D. The Depository shall be located at Professional Shorthand Reporters U.S. Legal Support, 601 Poydras St., Suite #1615, New Orleans, Louisiana.

E. Costs for the Depository shall be fronted by Plaintiffs, and this Order reserves the right to the Court to re-allocate costs at the conclusion of this litigation.

IV. Method of Deposit.

A. Notice of Deposit Required. The parties shall provide a “Notice of Deposit” via email to all counsel of record within five (5) days of depositing any and all documents into the Depository. This Notice of Deposit form is attached hereto as “Exhibit B.” The “Notice of Deposit” shall contain an index with a description of the documents produced and the Bates-stamp for each document.

B. Identifying and Indexing. The parties shall Bates-number each page of all documents deposited in the Depository and maintain an index of all documents deposited, identifying the documents with reasonable specificity. Each document’s Bates-number shall be preceded by a unique letter code identifying the depositing party (*e.g.*, “P” + surname = Plaintiff; “SWB” = Sewerage & Water Board).

C. Privileged and Protected Documents. Any party withholding any document(s) on grounds of privilege or other protection shall deposit in the Depository and provide Notice of Deposit of a privilege log listing the author, all recipients, the date, a description of the document(s), and the privilege or protection claimed.

D. Inspection of Originals. For good cause, any party may request an opportunity to review the originals of any document in the Depository.

V. Track I Plaintiff Groups.

- A. Discovery and mediation for Track I shall be conducted pursuant to this Order in groupings of Plaintiffs for expedited resolution and bellwether purposes, with each group to proceed simultaneously but staggered with all other groups (“Plaintiff Groups”).
- B. **Plaintiff Groups.** For Track I discovery and mediation, Plaintiffs will be selected and grouped as follows:
1. Group 1 - Twenty (20) Plaintiffs from *Sewell* (Case No. 15-3117).
 2. Group 2 - The one (1) Plaintiff from *Ariyan* (Case No. 16-2328) and nineteen (19) Plaintiffs from *Sewell* (Case No. 15-3117).
 3. Group 3 - The one (1) Plaintiff from *Greenblatt* (Case No. 15-6276) and nineteen (19) Plaintiffs from *Sewell* (Case No. 15-3117).
 4. Group 4 - All Plaintiffs from *Lowenburg* (Case No. 16-2326) and ten (10) Plaintiffs from *Sewell* (Case No. 15-3117).
 5. All subsequent Plaintiff Groups - Proceed in groupings of twenty (20) Plaintiffs from *Sewell* (Case No. 15-3117) until all claims in Track I have proceeded through discovery and mediation pursuant to this Order.
 6. On an as needed basis and where no prejudice results, Plaintiffs may be moved into a different Plaintiff Group than that assigned above.
- C. **Successive Deadlines.** Each Plaintiff Group shall begin the discovery and mediation process approximately thirty (30) days after each prior Plaintiff Group. The deadlines in this Discovery Scheduling Order apply to the first Plaintiff Group, Group 1. All Plaintiff Group deadlines, including those deadlines for all Plaintiff Groups subsequent to Group 1, are contained in the

chart attached hereto as “Exhibit A.” (Exhibit A to be amended by counsel for the *Sewell* plaintiffs to conform with this Order.)

- VI. Track II Discovery.** Track II discovery shall proceed pursuant to the Federal Rules of Civil Procedure and be completed no later than April 30, 2017.
- VII. Protective Order.** By June 30, 2016, the parties shall file with the Court a proposed protective order to govern all discovery in this litigation and all documents and materials produced and exchanged pursuant to this Order. If the parties are unable to agree on a joint protective order, the parties are to file by this same deadline memoranda with the Court setting forth their disputed issues, which the Court will resolve. A separate protective order may be issued for each Track I and Track II, if appropriate. The protective order is subject to amendment as necessitated by the addition of new parties and/or cases to this consolidated litigation.
- VIII. Documents to be Deposited.** For Track I, requests for production pursuant to Federal Rule of Civil Procedure 34 are stayed until further order of the Court. In place of requests for production, the parties are to deposit the following non-privileged documents in the Depository:
- A.** By July 1, 2016, Group 1 Plaintiffs shall deposit the documents and materials listed in “Exhibit C” in the Depository;
 - B.** By August 1, 2016, SWB shall deposit the documents and materials listed in “Exhibit D,” Section I and Section II as it pertains to Group 1 Plaintiffs in the Depository. Should SWB be prepared to deposit the documents at an earlier date, it may do so.

C. For all subsequent Plaintiff Groups, SWB shall deposit documents and materials listed in Exhibit D, Section II on the same deadlines for the Plaintiffs' Document Deposit set forth in "Exhibit A."

D. Group 4 Plaintiffs (those from *Lowenburg*, Case No. 16-2326) reserve the right to supplement "Exhibit D" with additional requests to SWB.

IX. Interrogatories. For Track I, interrogatories pursuant to Federal Rule of Civil Procedure 33 are stayed until further order of the Court. In place of interrogatories, the parties are to deposit the following written responses in the Depository:

A. By July 1, 2016, Group 1 Plaintiffs shall deposit written responses to "Exhibit E" in the Depository;

B. By August 1, 2016, the SWB shall deposit written responses to "Exhibit F" in the Depository.

C. Group 4 Plaintiffs (those from *Lowenburg*, Case No. 16-2326) reserve the right to supplement "Exhibit F" with additional requests to SWB.

X. Admissions. For Track I, admissions pursuant to Federal Rule of Civil Procedure 36 are stayed until further order of the Court, except with regard to Group 4 Plaintiffs (those from *Lowenburg*, Case No. 16-2326), who reserve the right to issue Rule 36 Requests for Admissions to the SWB by the applicable deadline for Depositing Documents and Interrogatories as set forth in "Exhibit A."

XI. Continuing Discovery Obligations. All parties are under a continuing obligation to deposit all non-privileged, responsive discovery and documents after the initial production or exchange, as is required by this Discovery Scheduling Order and the Federal Rules of Civil Procedure.

XII. Non-party Discovery. Discovery is permitted as to individuals and entities not a party to this litigation. Documents obtained via non-party discovery shall be deposited in the Depository and Notice of Deposit provided to all parties within five (5) days of receipt of any non-party discovery.

XIII. Preliminary Statement of Claims.

A. By July 1, 2016 and before the SWB's inspection of Plaintiff properties, Group 1 Plaintiffs shall deposit in the Depository a Preliminary Statement of Claims.

1. Plaintiffs in *Lowenburg* (Case No. 16-2326), *Greenblatt* (Case No. 15-6276), and *Ariyan* (Case No. 16-2328) reserve the right to submit their respective Preliminary Statement of Claims simultaneously with the SWB's deposit of its Defense Response.

B. The Preliminary Statement of Claims shall set forth the type, extent, nature and locations of the Plaintiffs' claimed damages, and the Plaintiffs' contentions as to the cause of each item of claimed damage.

C. Plaintiffs shall also deposit, simultaneously with the Preliminary Statement of Claims, an organized collection of photographs with reference to each of the claims asserted in the Preliminary Statement of Claims.

D. The Preliminary Statement of Claims shall be subject to reasonable revisions pending further discovery by Plaintiffs as a result of further damage and/or Plaintiffs' further investigation.

E. The Preliminary Statement of Claims will be preliminary, not final, and Plaintiffs shall not be limited at the time of trial to the claims set forth therein. This Order

extends to amended or supplemental Preliminary Statement of Claims and/or related reports.

- F. The Preliminary Statement of Claims is a privileged and confidential statement covered by Federal Rule of Evidence 408. It cannot be used by the parties for any purpose connected with discovery or trial and cannot be commented on if its content changes before the deposition of the generator of the report.

XIV. Defense Visual Property Inspections.

- A. Between August 15, 2016 and October 1, 2016, Group 1 Plaintiffs shall make their properties available for the SWB's and Third-Party Defendants' visual inspection ("Defense Visual Property Inspections").
- B. Plaintiffs shall provide a schedule for Defense Visual Property Inspections no later than ten (10) days before the Inspections are to begin
- C. Deadlines for Defense Visual Property Inspections of subsequent Plaintiff Group properties in Track I are governed by the schedule in "Exhibit A."
- D. The SWB and Third-Party Defendants are entitled to inspect, photograph, videotape, and observe the Plaintiff properties, but are prohibited from conducting any testing. This Order reserves the right to the SWB and Third-Party Defendants to conduct a second visual inspection once the District Court has ruled on any dispositive motion that they may file.

XV. Preliminary Cost of Repair Estimate & Statement of Damages.

- A. By July 1, 2016, Group 1 Plaintiffs shall deposit into the Depository a Preliminary Cost of Repair Estimate and Statement of Damages.

- 1.** Plaintiffs in *Lowenburg* (Case No. 16-2326), *Greenblatt* (Case No. 15-6276), and *Ariyan* (Case No. 16-2328) reserve the right to submit their respective Preliminary Cost of Repair Estimates and Statement of Damages simultaneously with the SWB's deposit of its Defense Response.
- B.** The Preliminary Cost of Repair Estimate sets forth the detailed cost of repair for each item of each Plaintiff's alleged damages and the evidentiary basis for the cost of repairs. This Preliminary Cost of Repair Estimate shall be subject to reasonable revisions pending further discovery and investigation. This Order extends to amended or supplemental Preliminary Cost of Repair and/or related reports provided to the defense.
- C.** The Preliminary Statement of Damages sets forth the detailed damages sought by each Plaintiff and the legal and evidentiary bases for these damages. This Preliminary Statement of Damages shall be subject to reasonable revisions pending further discovery and investigation. This Order extends to amended or supplemental Preliminary Statement of Damages and/or related reports provided to the defense.
- D.** The Preliminary Cost of Repair Estimate and Statement of Damages is a privileged and confidential statement covered by Federal Rule of Evidence 408. The Preliminary Cost of Repair Estimate and Statement of Damages will be preliminary, not final, and Plaintiffs shall not be limited at the time of trial to the claims set forth therein. It cannot be used by the parties for any purpose connected with discovery or trial and cannot be commented on if its content changes before the deposition of the generator of the report.

XVI. Depositions.

A. Track I.

1. Depositions for Group 1 Plaintiffs shall be completed during November 1-30, 2016. The length of each deposition shall be governed by the Federal Rules of Civil Procedure.
2. All subsequent Plaintiff depositions in Track I shall be completed by the deadlines set forth in “Exhibit A.”

B. Track II. Depositions for Track II shall be completed by March 30, 2017.

C. Transcripts. The deposing party shall deposit deposition transcripts in the Depository within five (5) days of receipt of the certified deposition transcript.

XVII. Defense Response.

- A. By November 15, 2016, the SWB shall deposit in the Depository a written response to Group 1 Plaintiffs’ Preliminary Statement of Claims and Preliminary Cost of Repair Estimates and Statement of Damages (“Defense Response”).
- B. The Defense Response shall respond to each and every claimed item of damage and cost of repair set forth in Group 1 Plaintiffs’ Preliminary Statement of Claims and Preliminary Cost of Repair Estimates and Statement of Damages, including SWB’s contentions as to the cause of each item of claimed damage.
- C. The SWB shall deposit, simultaneously with the Defense Response, an organized collection of photographs with reference to each of the assertions in the Defense Response.
- D. The Defense Response shall be subject to reasonable revisions pending further discovery and/or further investigation by the SWB.

- E.** The Defense Response will be preliminary, not final, and the SWB shall not be limited at the time of trial to the claims set forth therein. This Order extends to amended or supplemental Defense Responses and/or related reports.
- F.** The Defense Response is a privileged and confidential statement covered by Federal Rule of Evidence 408. It cannot be used for any purpose connected with discovery or trial and cannot be commented on if its content changes before the deposition of the generator of the report.
- G.** The Third-Party Defendants are permitted but not required to deposit their own Defense Responses pursuant to these provisions, subject to the same deadlines and guidelines as the SWB.

XVIII. Consultant Meetings

- A.** Once discovery is finalized for each Plaintiff Group in Track I, the Plaintiffs' and SWB's respective consultants shall participate in a Consultant Meeting, where the consultants meet-and-confer regarding the Plaintiffs' claimed damages, causation, liability, costs of repair, and any other issues that may aid in resolving the litigation.
- B.** The Mediator shall attend and moderate all Consultant Meetings.
- C.** The goal of the Consultant Meetings is for the parties to formulate an Agreed Upon Scope of Repair and Damages, setting forth the agreed upon scope for repairing each Plaintiff's property, the costs of this repair, the categories and values of damages for each Plaintiff, and any terms or conditions of repair or resolution of each Plaintiff's claims.
- D.** If the parties are unable to reach an Agreed Upon Scope of Repair and Damages, the SWB shall create and deposit a Scope of Repair and Damages in the Alternative,

setting forth the SWB's *ex parte* position with regard to the subject Plaintiff's damages, causation of damages, cost of repair, and other related issues.

- E. Consultants for the Third-Party Defendants may attend and participate in any Consultant Meetings conducted pursuant to this Order.
- F. The consultant meetings for Group 1 Plaintiffs and the SWB shall occur on or before December 15, 2016. All subsequent Consultant Meetings shall be scheduled in accordance with the deadlines set forth in "Exhibit A."
- G. Consultants of the Corps are required to attend and participate in all Consultant Meetings, unless they acquire a dispensation from the Court.
- H. All discussions, statements, and documents presented during the Consultant Meetings are confidential and privileged pursuant to Federal Rule of Evidence 408 and shall not be admissible at trial or other stages of litigation other than mediation.
- I. To extent not listed above, any and all entities and persons with authority necessary to settle Plaintiffs' claims shall attend the Consultant Meetings.

XIX. Mediations/Settlement Conferences.

- A. The two discovery tracks, Track I and Track II, shall merge for Mediations/Settlement Conferences, requiring all parties to participate in Mediations/Settlement Conferences.
- B. As the Plaintiff Groups in Track I complete the discovery process set forth herein, these Plaintiff Groups, the SWB, the Corps, and the Third-Party Defendants are ordered to participate in Mediations/Settlement Conferences in a good faith effort to resolve Plaintiffs' claims.

- C. The Corps is required to attend and participate in all Mediations/Settlement Conferences.
- D. The Group 1 Plaintiffs, the SWB, the Corps, and the Third-Party Defendants shall participate in a Mediation/Settlement Conference on or before December 31, 2016. All subsequent Mediations/Settlement Conferences of Plaintiff Groups shall follow the schedule attached hereto as “Exhibit A.”
- E. Counsel, parties and representatives of the parties and the Corps with full authority to settle the claims shall personally attend the Mediations/Settlement Conferences, unless excused by the Magistrate Judge for good cause shown.
- F. To extent not listed above, any and all entities and persons with authority necessary to settle Plaintiffs’ claims shall attend the Consultant Meetings.
- G. All discussions and exchanges of information at the Mediations/Settlement Conferences shall be considered privileged and confidential in accordance with Federal Rule of Evidence 408.

XX. Mediator.

- A. Retired United States Judge Michael Hill shall be appointed as the Mediator of Plaintiffs’ claims pursuant to this Order. Judge Hill will allocate his fees according to the participation of the parties at any given mediation. After Judge Hill allocates the fees, each party shall pay its allocated share, and should circumstances so warrant, may do so under objection within thirty (30) days of the allocation. This Order reserves the right to each party to brief their objections as to the allocation of any fees post-trial.

B. The Mediator has authority to conduct the Settlement Conferences/Mediations pursuant to this Order, as well as address and make recommendations to the Court regarding any and all disputes that arise regarding discovery deadlines and procedure under this Order.

C. A separate order will be issued addressing appointment and costs of the Mediator.

Pretrial Conference and Trial. If Mediations/Settlement Conferences are unsuccessful in resolving any claims of the Plaintiff Groups, then those parties at issue in these claims shall be subject to expanded discovery and pretrial and trial deadlines set by the District Court in its Scheduling Order and as required by the Federal Rules of Civil Procedure.

New Orleans, Louisiana, this 28th day of June, 2016.


U.S. MAGISTRATE JUDGE