



Cafferty Clobes
Meriwether & Sprengel LLP

November 4, 2013

BY ECF AND FIRST CLASS MAIL

Honorable Anne E. Thompson, U.S.D.J.
United States District Court
Clarkson S. Fisher Federal Building
and United States Courthouse
402 East State Street, Room 2020
Trenton, NJ 08608

**Re: *State of Indiana v. McWane et al.*
No. 3:12-cv-06667-AET-LHG**

Dear Judge Thompson,

We represent Greg Zoeller, Attorney General for the State of Indiana in the above-captioned action (the “Indiana Action”). We write to respond to Defendants McWane’s and Sigma’s (hereafter “Defendants”) letter request that the Court strike the entries of default against them.¹ McWane and Sigma have not answered the Amended Complaint in the Indiana Action (“Indiana Complaint”). Defendant Star Pipe Products, Ltd. answered the Indiana Complaint on October 22, 2013.

The Orders Consolidating the Class Actions

The apparent basis for the Defendants’ failure to answer the Indiana Complaint is their position that answers are not required under this Court’s Consolidation Orders dated May 10, 2012 (“May 10 Order”) and May 14, 2012 (“May 14 Order”) entered in the Indirect Purchaser Class Action, Civ. No. 12-169.

The May 10 Order was entered pursuant to Rule 23(g) of the Federal Rules of Civil Procedure. Under the authority granted by Rule 23, this Court consolidated all then-pending indirect purchaser class actions under a single consolidated caption, appointed interim liaison

¹ Since the filing of their letter on November 1, 2013, Indiana counsel have had two conversations with Counsel for McWane and Sigma in an effort to resolve this dispute. In their conversation this morning, Indiana advised Defendants that they would file a response to Defendants’ letter by close of business today, unless Defendants’ counsel advised the Court that the parties were discussing the issues and were likely to reach an amicable resolution.

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and co-lead counsel for the class, and entered a briefing schedule for the motion to dismiss the consolidated action. (Indirect Purchaser Class Action, Dkt. No. 60). The May 14 Order also consolidated all then-pending indirect purchaser class actions under a single consolidated caption, and stated that the Order should be entered in subsequent related actions, and “shall apply to the Subsequent Action, unless a party objects to consolidation.” *Id.* at 9.

The Order Consolidating the Attorney General’s Action

On October 23, 2012, Greg Zoeller, the Attorney General for the State of Indiana, through undersigned counsel, filed his complaint in this Court. Upon notice by the parties that the Indiana Action was related to the then-pending class actions, the Court filed the May 14 Order in the Indiana Action. Indiana Action, Dkt. No. 4. Indiana timely objected to consolidation on the following bases: (1) that the Indiana Action is not a class action; (2) that the Attorney General for the State of Indiana is not a member of any class asserted in the Indirect Purchaser Class Action Complaint; and (3) that no person or entity, other than the Attorney General for the State of Indiana, has standing to pursue the indirect purchaser claims alleged in the Indiana Complaint.

On June 22, 2013, this Court consolidated the Indiana Action with the Indirect Purchaser Action for pre-trial purposes.² Indiana Action, Dkt. No. 31 (the “Indiana Consolidation Order”). In so doing however, it acknowledged Indiana’s objections by specifically providing that: “Consolidation is ‘permitted as a matter of convenience and economy in administration, *but does not merge these suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.*’”). *Id.* at 2 (emphasis added) (internal citation omitted). Consistent with the language of the Indiana Consolidation Order, this Court did not order Indiana to withdraw its Complaint or file a consolidated complaint with the classes of indirect purchasers. Nor did it appoint interim lead counsel for the putative class as counsel for Indiana for the purposes of pursuing the litigation on an on-going basis. Nothing in the Indiana Consolidation Order relieves Defendants of their obligation to respond to the Indiana Complaint.

Defendants’ view of the effect of the Consolidation is inconsistent with this Court Order and is in violation of Indiana’s substantive rights.

Defendants cite to a paragraph in the May 14 Order as the sole basis to strike the entry of default: “Defendants are not required to answer or otherwise respond to any *Complaint in any of the above actions* except the consolidated complaint that is to be filed within 30 days of May 11, 2012, as the Court directed in its May 10, 2012 Order.” (Dkt. No. 60 (emphasis added)). Not

² The Indirect Purchaser Class Actions are consolidated for all purposes including trial. (Dkt. No. 60).

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only do the May 10 and May 14 Orders only refer to the then-consolidated *class actions* (which did not and could not have included any claims arising under Indiana state law), but Plaintiff State of Indiana objected to the May 14 Order and neither the May 10 or the May 14 Order were ever entered in the Indiana Action. Only the Indiana Consolidation Order, which specifically stated that the Indiana Action *was not merged* with the Indirect Purchaser Class Action, was entered in the Indiana case. *See* Indiana Action, Dkt. No. 31, at 2.

Defendants' view of the effect of consolidation on Indiana's claims is, without exaggeration, that those claims have effectively disappeared from the case and that Indiana's counsel may not litigate Indiana's claims. Consistent with this view, Defendants did not separately move to dismiss the Indiana Complaint,³ arguing instead that because of the consolidation order, the Court need not even *address* Indiana's claims. (Indirect Purchaser Class Action, Dkt. No. 117-1, at 38.) Defendants made this argument even though Indiana asserted state law claims that were not and could not be asserted in the Indirect Purchaser Consolidated Class Action Complaint and alleged a conspiracy period that is different from the period asserted in that Complaint.⁴

Similarly, in connection with negotiating the Rule 26(f) report (in which the IPP and Indiana proposed a single unitary schedule on all discovery and pre-trial matters), Defendants refused to file the Report because it included Indiana as a named party and listed the undersigned as Indiana's counsel. When the document was provided to Judge Goodman by letter, Defendants refused to copy Indiana Counsel.⁵

Finally, just today, in the ultimate expression of their position that Indiana and its claims no longer exist and need not be litigated, Counsel for Sigma has advised lead counsel for the Indirect Purchaser Class that they cannot share the FTC materials produced in discovery with Counsel for Indiana. *See* E-mail from Jason Leckerman, attached hereto as Ex. B.⁶

³ Defendant Star separately moved to dismiss the Indiana Complaint on June 17, 2013 (Indiana Action, Dkt. No. 28.)

⁴ Thus, Defendants are wrong when they assert that they "have already answered all pertinent allegations in the State of Indiana complaint."

⁵ *See* Indirect Purchaser Class Action, Proposed Rule 26(f) Report, attached hereto as "Exhibit A."

⁶ The operative language of the Discovery Confidentiality Order most recently circulated provides that the FTC materials may be provided to counsel of record, who agree to keep the

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Interim Co-Lead Counsel, who were appointed by the Court pursuant to Rule 23(g), do not represent the Attorney General for the State of Indiana. Indiana is not a member of the class. Class counsel has no duty, fiduciary or otherwise, to represent the interests of non-class members. *See* Fed. R. Civ. P. 23(b)(4) (“Class counsel must fairly and adequately represent the interests of the class”).⁷ Class counsel has no interest in pursuing any issues relating to purchases by political subdivisions in the State of Indiana, and if it settles the claims or obtains a judgment for the Class, that settlement and eventual recovery will not include Indiana.⁸

Defendants’ refusal to answer the Indiana Complaint is the culmination of their efforts to remove Indiana from this case and to prevent its counsel from litigating Indiana’s claims. While the Court specifically stated that consolidation did not “change the rights of the parties,” there could be no greater derogation of substantive rights than that claimed by Defendants here. This Court does not have the authority to undermine Indiana’s substantive claims, nor replace its counsel, under the guise of consolidation or otherwise. *See Cella v. Togum Constructeur Ensemleier en Industrie Alimentaire*, 173 F.3d 909, 912-13 (3d Cir. 1999) (noting that a consolidation order must not be read to result in the diminishment or alteration of rights of a party to a consolidated action and that “the consolidation order did not result in the joinder of the defendants in the second action to the first action; rather each action retained its own separate identity.”)⁹ Nor did this Court do so—as it specifically stated in the Indiana Consolidation Order that consolidation “*does not merge these suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.*”¹⁰

materials confidential on an attorneys eyes only basis. Indiana counsel advised Sigma’s counsel of its willingness to keep the materials confidential on an attorneys eyes only basis. (*See* Ex. B).

⁷ Class counsel has repeatedly advised the Defendants they do not represent Indiana.

⁸ In the ultimate irony, in their Answer to the Indirect Purchaser Complaint, Sigma states: “The claims against SIGMA under Indiana law are barred because it is a violation of state and/or federal law for the State of Indiana, and any of its sub-divisions, to be represented by counsel other than through the Attorney General of Indiana.” Indirect Purchaser Class Action, Dkt. No. 139, at 49. And yet Sigma asserts here that class counsel, not the counsel retained by the Attorney General, represents Indiana.

⁹ As the parenthetical in the text indicates, the *Cella* case cited by Defendants in their letter stands for the opposite proposition than that for which it is offered.

¹⁰ Defendants note that Indiana did not move for reconsideration of the Indiana Consolidation Order. It was precisely because of this Court’s language protecting the substantive rights of

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Another contention in Defendants' November 4 letter merits attention. Defendants question why Indiana remained "curiously silent about the 'alleged' default" during the pre-trial conference held before Magistrate Judge Goodman on October 28, 2013. The reason is simple—Defendants had requested an extension of time to Answer the Indirect Purchaser Consolidated Complaint (not mentioning the Indiana Complaint), making their answers due two days later on October 30. *See* Indirect Purchaser Class Action, Dkt. No. 134. Star filed an Answer to the Indiana Complaint, and it was Indiana's expectation that McWane and Sigma would do so as well. Indiana's Counsel did not expect McWane and Sigma to fail to answer and did not want to burden the Court with a default issue that they expected would be cured within two days.

Requested Relief

Indiana has no objection to working cooperatively with Co-Lead and Liaison counsel for the Indirect Purchaser Plaintiffs in litigating the claims in this case, and has made this clear to Defendants at every turn, including in the jointly proposed Rule 26(f) report. At all times, Indiana has cooperated with Co-Lead and Liaison counsel for the Class, collectively proposing a single unitary schedule governing the discovery and pre-trial proceedings in the Action. The "interference" about which Defendants complain in their letter (and they want "stopped") consists entirely of having Indiana recognized as a separately represented party, and having Defendants answer the Indiana Complaint. In light of Defendant Sigma's e-mail sent this morning, "interference" must also include allowing Indiana to have access to the discovery in the case.

The Indiana Attorney General respectfully requests this Court to deny Defendants' letter request to strike the entry of default against Defendants Sigma and McWane as improper both procedurally and substantively. If Defendants want the defaults vacated, they must do so by making a motion in the ordinary course, rather than attempt an end-run that seeks to make Indiana's claims simply vanish from existence.

Indiana to pursue its claims, and making clear that its claims were not merged into the class actions, that Indiana found no need to request reconsideration.

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We remain willing to work with the Defendants on an appropriate Stipulation to vacate the defaults and to otherwise cooperatively litigate this case efficiently and expeditiously with Co-Lead and Liaison counsel for the Indirect Purchaser Class.

Respectfully submitted,

/s/ Bryan L. Clobes

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cc by ECF and electronic mail:

The Honorable Lois H. Goodman, U.S.M.J. (by ECF and Regular Mail)

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EXHIBIT A

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VIA E-MAIL

October 25, 2013

The Honorable Lois H. Goodman
United States Magistrate Judge
Clarkson S. Fisher Fed. Bldg. and U.S. Courthouse
402 E. State Street, Room 7050
Trenton, New Jersey 08608

Re: IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") INDIRECT PURCHASER ANTITRUST
LITIGATION
Civil Action No. 12-169 (AET)(LHG)

Dear Magistrate Judge Goodman:

This office represents defendant SIGMA Corporation ("SIGMA") in the above-referenced consolidated cases.


As required by the Court's April 15, 2013 order, as modified the Court's September 18, 2013 order, and as further modified by advices received from your Honor's chambers on Wednesday, October 23, 2013, enclosed please find a true and correct copy of the parties' Fed. R. Civ. P. 26(f)(3) and L. Civ. R. 26.1(b) joint proposed discovery plan.

We look forward to appearing before your Honor on Monday, October 28, 2013, for the scheduling conference listed for 2:30 p.m.

Respectfully yours,

BALLARD SPAHR LLP

By:



Roberto A. Rivera-Soto

encl.

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

IN RE DUCTILE IRON PIPE FITTINGS
("DIPF") INDIRECT PURCHASER
ANTITRUST LITIGATION

Civ. Action No. 12-00169
(AET) (LHG)

JOINT PROPOSED DISCOVERY PLAN

This Joint Proposed Discovery Plan is submitted jointly by Interim Co-Lead and Liaison Counsel for the Indirect Direct Purchaser Plaintiffs and Counsel for the State of Indiana ("Indirect Purchaser Plaintiffs"), along with counsel for Defendants McWane, Inc., SIGMA Corporation, and Star Pipe Products, Ltd. ("Defendants"). Defendants further state they requested that the Direct and Indirect Purchaser Plaintiffs agree to consolidate their respective proposed discovery plans into a single Joint Proposed Discovery Plan which would apply to all parties, and stated that having separate plans is duplicative, inefficient, and unnecessary. All Plaintiffs declined Defendants' request. Defendants respectfully request that the Court enter one Joint Discovery Plan which applies to all parties.

- 1. Set forth the name of each attorney appearing the firm name, address and telephone number and facsimile number of each, designating the party represented.**

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¹ Counsel for the State of Indiana have requested that (a) their case be separately listed in the caption and (b) they be listed as counsel. Defendants believe that neither request is in accord with either the Court's June 26, 2013 order that "ORDERED that the matter *State of Indiana v. McWane, et al.*, Civ. No. 12-6667, is hereby consolidated with the Indirect Purchaser Litigation, Civ. No. 12-169, for pretrial purposes" or the Court's May 10, 2012 order appointing specific interim lead and liaison counsel for these consolidated cases.

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2. **Set forth a brief description of the case, including the causes of action and defenses asserted.**

Plaintiffs' Brief Description of the Case: For Plaintiffs' brief description of the case, they incorporate the description set forth in the Joint Proposed Discovery Plan for the Direct Purchaser action.

Defendants' Brief Description of the Case and Defenses: Defendants' brief description of the case is set forth in the Joint Proposed Discovery Plan for the Direct Purchaser action..

Procedural History: On March 18, 2013, this Court dismissed the Indirect Purchaser Plaintiffs' Amended Complaint, with leave to amend. Thereafter, the Indirect Purchaser Plaintiffs filed a Second Amended Complaint, and the State of Indiana filed an Amended Complaint. Defendants' motions to dismiss those complaints were decided on October 2, 2013. With respect to the Indiana Complaint, this Court dismissed Count I, a claim for injunctive relief under the Clayton Act, but allowed all other claims to proceed. With respect to the Indirect Purchaser Plaintiffs' Second Amended Complaint, this Court dismissed the injunctive relief claims, certain other damages claims asserted under various state laws, and certain plaintiffs.

3. **Have settlement discussions taken place? No.**
4. **Rule 26(f) Meeting:** The parties have not met pursuant to Fed. R. Civ. P. 26(f), but have engaged in various discussions with each other about discovery matters since this Court's ruling on the motions to dismiss.

5. **Rule 26(a)(1) Disclosures.** The parties have not exchanged the information required by Fed. R. Civ. P. 26(a)(1). The parties have agreed to do so on or before November 26, 2013.
6. There have not been any problems in connection with completing the disclosures required by Fed. R. Civ. P. 26(a)(1).
7. **Description of the Discovery to Date:** The parties have not conducted any discovery as yet. The parties have agreed that Indirect Purchaser Plaintiffs will have access to the Phase I discovery materials produced to date by the Defendants, subject to keeping the materials strictly confidential on an “attorneys eyes only” basis until the entry of a discovery confidentiality order.
8. **Description of all discovery problems encountered to date, the efforts undertaken by the parties to remedy these problems, and the parties’ suggested resolution of the problems.**
 - a. **Plaintiffs’ Position:** Indirect Purchaser Plaintiffs have reviewed the status of discovery in the Direct Purchaser Plaintiff case and intend to coordinate with that case to the greatest extent possible. In their Rule 26(f) Report, the Direct Purchaser Plaintiffs have identified certain deficiencies with Defendants’ Phase I discovery and have described the efforts they have made to date to obtain the disputed material. Indirect Purchaser Plaintiffs, including Indiana, agree with the position taken by the Direct Purchaser Plaintiffs, and will join in any document requests and, if necessary, motions to compel filed by the Direct Purchaser Plaintiffs relating to the dispute. Indirect Purchaser Plaintiffs reserve the right to serve additional non-duplicative document requests.

b. **Defendants' Position:** Defendants' position is set forth in the Joint Proposed Discovery Plan for the Direct Purchaser action.

9. Description of the Parties' Further Discovery Needs.

a. **Plaintiffs' Discovery Needs.** In their Rule 26(f) Report, the Direct Purchaser Plaintiffs summarized their primary discovery needs. Indirect Purchaser Plaintiffs join in that statement. In addition to the documents and data identified by the Direct Purchaser Plaintiffs, Indirect Purchaser Plaintiffs will also need sales and price discovery from sellers of DIPF to indirect purchasers within the states where indirect purchaser claims are proceeding.

b. **Defendants' Discovery Needs.**

Defendants' discovery needs are set forth in the Joint Proposed Discovery Plan for the Direct Purchaser action.

10. The parties' estimate of the time needed to complete discovery and statement regarding whether expert testimony will be necessary, and the parties' anticipated schedule for retention of experts and submission of their reports.

a. **Indirect Purchaser Plaintiffs' Position.** Indirect Purchaser Plaintiffs are prepared to move forward expeditiously so that they can coordinate their discovery schedule with the schedule set in the Direct Purchaser Action.

To that end, Indirect Purchaser Plaintiffs propose the following:

- Indirect Purchaser Plaintiffs will join in all discovery requests heretofore made by the Direct Purchaser Plaintiffs and will have access to the documents and material produced pursuant to those requests.

- Indirect Purchaser Plaintiffs will serve additional non-duplicative requests within six weeks after receiving responses to Direct Purchaser Plaintiffs' requests.
 - A status conference is scheduled before the Court on 10/28/14. At that conference, a date for an interim status conference should be scheduled in order to address scheduling matters for the remainder of the case and to ensure that outstanding discovery issues are promptly presented to the Court for resolution.
 - Parties complete production of documents: To be determined.
 - Fact discovery completed: To be determined.
 - Indirect Purchaser Plaintiffs' Expert Report (Merits and Class Certification) Submitted: To be determined.
 - Deposition of Indirect Purchaser Plaintiffs' Experts: To be determined.
 - Defendants' Expert Report Submitted: To be determined.
 - Deposition of Defendants' Experts: To be determined.
 - Indirect Purchaser Plaintiffs' Expert Reply Report: To be determined.
 - Indirect Purchaser Plaintiffs Class Certification Motion: To be determined.
 - Defendants Opposition to Class Certification: To be determined.
 - Indirect Purchaser Plaintiffs Reply in Support of Class Certification: To be determined.
 - Dispositive motions, if any: To be determined.
 - Trial date: To be determined.
- b. **Defendants' Position:** Defendants' position is set forth in the Joint Proposed Discovery Plan for the Direct Purchaser action. In addition, all Defendants have produced, or will produce shortly, their Phase I discovery which has been produced to the Direct Purchaser Plaintiffs. Defendants

propose that discovery in the Direct and Indirect Purchaser actions be conducted on the same track. Defendants further request that the Indirect Purchaser Plaintiffs be required to serve any additional non-duplicative document requests no later than December 1, 2013.

- c. Proposed schedule through Phase II discovery:
 - i. Fed. R. Civ. P. 26 Disclosures: November 26, 2013
 - ii. E-Discovery Conference (L. Civ. R. 26.1(d)): November 15, 2013
 - iii. Service of initial written discovery (on or after): November 1, 2013
 - iv. Scheduling conference for Phase III: To be determined
- d. Set forth any special discovery mechanism or procedure requested:
 - i. Phased discovery;
 - ii. Coordination with discovery by the remaining Direct Purchaser Plaintiffs; and
 - iii. Procedure for resolving confidentiality concerns with information designated as *in camera* in the Federal Trade Commission administrative proceeding.

11. Needed Changes in Limitations Imposed by the Federal Rules of Civil Procedure, local rule, or standing order.

- a. **Indirect Purchaser Plaintiffs' Position:** Indirect Purchaser Plaintiffs believe *each side* (i.e., Indirect Purchaser Plaintiffs, including Indiana, collectively and Defendants collectively) should be limited to a total of 25 written interrogatories. Indirect Purchaser Plaintiffs, including Indiana, will participate in

any depositions taken by Direct Purchaser Plaintiffs, to the extent appropriate.

Indirect Purchaser Plaintiffs, including Indiana, may seek additional depositions of third parties regarding aspects of their cases that differ from the Direct Purchasers' case.

b. **Defendants' Position:** Defendants' position is set forth in in the Joint Proposed Discovery Plan for the Direct Purchaser action.

12. Do you anticipate any special discovery needs? The Defendants have indicated that certain Defendants may wish to participate in some depositions by telephone.

13. Do you anticipate any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced? Indirect Purchaser Plaintiffs intend to join (subject to their review) in any ESI protocols agreed to among the Direct Purchaser Plaintiffs and Defendants, or as otherwise ordered by the Court. Defendants' position is that the same ESI protocol should apply to all parties.

14. Discovery Confidentiality Order. Indirect Purchaser Plaintiffs intend to be (subject to their review) included in the proposed Discovery Confidentiality Order that was submitted to the Court in the Direct Purchaser Action.

15. Other Orders That Should be Entered by the Court. Indirect Purchaser Plaintiffs intend to join (subject to their review) in any agreements reached by the Direct Purchaser Plaintiffs and Defendants, or as otherwise Ordered by the Court, relating to an ESI Protocol and Expert Discovery Protocol.

16. Is this case appropriate for voluntary arbitration or mediation?

a. **Plaintiffs' Position:** Indirect Purchaser Plaintiffs believe that this case is appropriate for mediation.

b. **Defendants' Position:** The parties may consider mediation or alternative dispute resolution at an appropriate time.

17. **Is this case appropriate for bifurcation?** Defendants may wish to raise this at a later time depending on what issues Plaintiffs pursue in discovery.

18. The parties do not consent to the trial being conducted by a Magistrate Judge.

Executed this 25th day of October, 2013

Respectfully Submitted,

/s/ Lisa J. Rodriguez
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& LEWIS LLP**
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EXHIBIT B

Ellen Meriwether

From: Leckerman, Jason (Phila) [LeckermanJ@ballardspahr.com]
Sent: Monday, November 04, 2013 9:15 AM
To: 'Mindee Reuben'
Cc: Bryan L. Clobes; Ellen Meriwether; Rivera-Soto, Roberto A. (NJ); John, Leslie E. (Phila); White, Matthew A. (Phila)
Subject: RE: Sigman Materials

Mindee,

Apologies for not responding sooner, I was out on Friday. You do not have SIGMA's permission to share the FTC records with counsel for the State of Indiana. You may only share the materials with co-lead and liaison counsel for the putative indirect purchaser class.

Regards,

Jason

From: Mindee Reuben [mailto:Reuben@wka-law.com]
Sent: Friday, November 01, 2013 8:42 AM
To: Leckerman, Jason (Phila)
Cc: 'Bryan L. Clobes'; Ellen Meriwether
Subject: Sigman Materials

Jason:

Counsel for Indiana would like a copy of the FTC records that you produced to us. Can you please advise if we may send them a copy? They will treat as attorneys-eyes only until the protective order is resolved.

I've copied them hereupon.

Best,

Mindee