

Sirius XM Radio LLC v Adeptus Partners, LLC

2025 NY Slip Op 34214(U)

November 3, 2025

Supreme Court, New York County

Docket Number: Index No. 654079/2024

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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SIRIUS XM RADIO LLC.,

Plaintiff,

- v -

ADEPTUS PARTNERS, LLC, LEWIS STARK,

Defendants.

INDEX NO. 654079/2024

MOTION DATE 02/20/2025

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 87, 90
were read on this motion to DISMISS.

Defendants Adeptus Partners, LLC (“Adeptus”) and Lewis Stark (“Defendants”) move to dismiss Plaintiff Sirius XM Radio LLC’s (“Plaintiff” or “Sirius XM”) first amended complaint with prejudice pursuant to CPLR 3211(a)(1), (5) and (7) and CPLR 3016 (b), and seek an award of costs for making this motion. For the following reasons, Defendants’ motion is denied.

BACKGROUND

I. Statutory and Regulatory Scheme

According to the First Amended Complaint, Plaintiff delivers satellite digital audio radio and webcasting services to approximately 33 million subscribers nationwide pursuant to a statutory license issued under 17 USC § 114 of the U.S. Copyright Act (NYSCEF 37 [“FAC”] ¶¶6, 13).

By regulation, Sirius XM pays royalties for the music it plays under its statutory license. The Copyright Royalty Board (“CRB”) sets the royalty rate for all statutory license users

pursuant to adversarial rule-making proceedings between the license holders and SoundExchange, Inc., who is designated by the CRB to receive and distribute royalty payments to the artists and record companies (FAC ¶¶ 14–15). After SoundExchange deducts an administrative fee from Sirius XM’s royalty payments, it distributes the remaining value to artists and copyright owners (17 USC § 114(g)(3)). SoundExchange also may, once a year, “verify those [royalty] payments ... with an independent audit.” (37 CFR § 382.7(a)–(b)).

Regulations promulgated by the CRB establish the procedures SoundExchange must follow when auditing royalty payments (*see id.* § 382.7). SoundExchange first must “file with the Copyright Royalty Judges a notice of intent to audit.” (*id.* § 382.7(c)). Then, “[t]he audit must be conducted ... by a Qualified Auditor.” (*id.* § 382.7(d)). The CRB regulations define “Qualified Auditor” as a “Certified Public Accountant independent within the meaning of the American Institute [of] Certified Public Accountants [‘AICPA’] Code of Professional Conduct.” (*id.* § 382.1).

The Qualified Auditor that SoundExchange selects also must consult with Sirius XM “to remedy any factual errors and clarify any issues relating to the audit,” (FAC ¶ 24 (citing 37 CFR § 382.7[f])), and must identify any overpayments the company made to SoundExchange (FAC ¶ 23, citing 37 CFR § 382.7[d]).

II. *Plaintiff’s Allegations*

Pursuant to the statutory and regulatory scheme of the Copyright Act, in mid-2019, SoundExchange retained Stark, then a partner at Prager Metis CPAs, LLC (“Prager Metis”), to audit Sirius XM’s 2018 royalty payments (FAC ¶ 25).

Before starting work on the audit, Stark signed a Nondisclosure Agreement (“NDA”) with Sirius XM in which he warranted that he would perform “an independent audit of the

payments and distributions of Sirius XM” within the meaning of the AICPA Code (FAC ¶ 26; NYSCEF 38). “In exchange, Stark obtained information access rights and narrowed his liability for the inadvertent disclosure of information obtained from third parties with confidentiality obligations to Sirius XM” (FAC ¶ 26).

In April 2021, Stark circulated an interim “royalty inspection” report which Plaintiff alleges was “replete with falsely manufactured underpayments” (FAC ¶ 28). According to Plaintiff, Stark then left Prager Metis and joined Adeptus (FAC ¶ 29). After moving to Adeptus, Stark and Adeptus required Sirius XM to retransmit all data and messages that Sirius XM had previously sent to Prager Metis (FAC ¶ 30). Thereafter, on November 23, 2021, the Parties entered an updated NDA (FAC ¶ 31; NYSCEF 39). As with the prior NDA, the agreement granted specific information access rights and limited Defendants’ liability in exchange for their promise to deliver an independent audit that adhered to the requirements of 37 CFR § 382.7 (FAC ¶ 31).

According to the FAC, Defendants’ demands on Sirius XM throughout the course of their “inspection” were “egregiously resource-intensive,” requiring Sirius XM to create custom coding and data preparation, demanding that Sirius XM create data visualizations that might unearth an error; called for increasingly granular “gap” performance data while refusing to accept Sirius XM’s playlist logs as proffered; and conducting a detailed review and purported legal analysis, not an accounting analysis, of the terms and conditions of Sirius XM’s direct licenses and artist waivers, under which Sirius XM obtains performance rights directly from record companies and artists (rather than via the statutory licenses) (FAC ¶ 35).

On July 12, 2022, Defendants issued tentative “findings” in a second draft report, alleging that Sirius XM had underpaid royalties for the 2018 calendar year by approximately

\$10.3 million (FAC ¶ 38). The draft report did not identify any overpayments that Sirius XM made to SoundExchange, which SiriusXM describes as “an unsurprising outcome given their examination’s exclusive focus on potential *underpayments*” (FAC ¶ 39 [emphasis in original]).

Sirius XM responded in writing to Defendants’ tentative “findings” in a letter dated August 5, 2022, and challenged Defendants’ inspection process, identifying alleged accounting and legal errors contributing to Defendants’ identification of royalty underpayments (FAC ¶ 41). According to the FAC, Defendants refused to correct these errors (*id.*).

Defendants sent their final report to SoundExchange on September 6, 2022. Sirius XM alleges that although Stark initially offered to append Sirius XM’s letter to that report (in accordance with his historical practice), he did not do so (FAC ¶ 43). Upon receipt of Defendants’ final report, SoundExchange demanded that Sirius XM pay it \$10.3 million in underpayments for the 2018 calendar year (FAC ¶ 44). When Sirius XM refused, SoundExchange brought suit against Sirius XM, as discussed below. .

Procedural Background

SoundExchange initiated litigation against Sirius XM in federal court premised in substantial part on Defendants’ royalty inspection (*see SoundExchange Inc., v Sirius XM Radio Inc.*, 1:23-cv-01083 [ED Va Aug 16, 2023]). In July 2024, that matter was transferred from the Eastern District of Virginia to the Southern District of New York (*see SoundExchange Inc., v Sirius XM Radio Inc.*, 1:24-cv-05491 [SDNY] [the “SoundExchange Action”]). On August 7, 2025, the Southern District Court dismissed SoundExchange’s complaint, holding that “[17 USC §114] does not authorize SoundExchange to litigate royalty disputes” (*SoundExchange, Inc. v Sirius XM Radio Inc.*, 2025 WL 2257704, at *1 [SDNY 2025]).

Plaintiff filed this action on or around August 12, 2024, alleging breach of contract, breach of the covenant of good faith and fair dealing, and negligence premised on alleged violations of the requirements of the CRB regulations at 37 CFR § 382.1 and 37 CFR § 382.7 (NYSCEF 1-4). Defendants removed the action to the Southern District of New York (NYSCEF 12). However, that court remanded the case back to this Court on November 19, 2024 (NYSCEF 13), finding that there was no federal question jurisdiction because “the Copyright Act neither establishes nor clarifies the standard for royalty audits. Rather, that benchmark is instead set by AICPA” (*Sirius XM Radio Inc. v Adeptus Partners, LLC*, 24 CIV. 6953 (NRB), 2024 WL 4827770, at *1 [SDNY 2024]).

Defendants moved to dismiss the Complaint and, in response, Plaintiff filed its First Amended Complaint (“FAC”) (NYSCEF 37-39). The FAC alleges claims of fraud, breach of contract, and negligence. Defendants then filed the instant motion to dismiss addressed to the FAC.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a viable claim, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “A motion to dismiss pursuant to CPLR 3211(a)(1) should be “granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Where a cause of action or defense is based upon misrepresentation, [or] fraud . . . the circumstances constituting the wrong shall be stated in detail” (CPLR 3016[b]).

1. *Negligence (Third Cause of Action)*

As an initial matter, Defendants argue that Plaintiff's negligence claim is untimely. The statute of limitations for accountant malpractice, whether the underlying theory is in contract or tort, is three years (CPLR 214[6]). "A malpractice cause of action sounds in tort and, therefore, absent fraud, accrues when an injury occurs, even if the aggrieved party is then ignorant of the wrong or injury" (*Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]). "In the context of a malpractice action against an accountant, the claim accrues upon the client's receipt of the accountant's work product since this is the point that a client reasonably relies on the accountant's skill and advice and, as a consequence of such reliance, can become liable for tax deficiencies" (*id.*).

Here, the statute of limitations began to run in September 2022 when Defendants issued their final "royalty examination" (*see Levin v PricewaterhouseCoopers, LLP*, (302 AD2d 287, 288 [1st Dept 2003] [limitation "period began to run, at the latest, on the date respondent delivered its last report to the companies"])). This action was initiated within three years of that date and is therefore timely. Defendants' suggestion that the limitations began when Plaintiff received the draft report—which was subject to change—on April 6, 2021 is unavailing.

Moving to the substance of Sirius XM's negligence claim, "[t]o establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages" (*Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011]). Although there was no accountant/client relationship between the parties, Sirius XM argues that Defendants assumed a negligence duty by entering "a special, beneficial relationship with Sirius XM by holding themselves out as a Qualified Auditor to perform an independent audit of Sirius XM's 2018 royalty payments according to GAAS."

(FAC ¶ 60 [citing 37 CFR § 382]). Defendants disagree, contending that Sirius XM “lacks privity or near privity” with them.

Where, as here, there is no contractual privity, a duty in negligence may arise when the following factors are present: “(1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendants linking them to the party or parties and evincing defendant’s understanding of their reliance” (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 425 [1989], citing *Credit All. Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985], *amended*, 66 NY2d 812 [1985]).

To analyze whether this “near privity” principle applies, the Court first addresses the purpose of the audit in this context. The regulations promulgated by the CRB provide that:

The audit must be conducted during regular business hours by a Qualified Auditor who is not retained on a contingency fee basis and is identified in the notice. The auditor shall determine the accuracy of royalty payments or distributions, including whether the Payor made an underpayment or overpayment of royalties. An audit of books and records, including underlying paperwork, performed in the ordinary course of business according to generally accepted auditing standards by a Qualified Auditor, shall serve as an ***acceptable verification procedure*** for all parties with respect to the information that is within the scope of the audit.

(37 CFR 382.7[d] [emphasis added]). As noted, the CRB regulations define “Qualified Auditor” as a “Certified Public Accountant independent within the meaning of the American Institute [of] Certified Public Accountants [‘AICPA’] Code of Professional Conduct.” (*id.* § 382.1). “Under AICPA’s Professional Code, an auditor can be considered “Qualified” and satisfy standards of ‘independence’ if it maintains: (a) ‘[i]ndependence of mind,’ which requires not ‘being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity and exercise objectivity and professional skepticism’; and (b) ‘independence in

appearance’ by avoiding ‘circumstances that would cause a reasonable and informed third party ... [to] conclude that the integrity, objectivity or professional skepticism of a firm or member of the [audit] team is compromised.’” (*Sirius XM Radio Inc. v Adeptus Partners, LLC*, 2024 WL 4827770, at *3 [SDNY 2024]). Thus, since the AICPA Code requires “independence in appearance” and “independence of the mind,” the Qualified Auditor must adhere to those requirements.¹

Defendants do not argue that they met the AICPA standard for Qualified Auditor. Defendants argues instead that they were not hired to perform an audit under AICPA audit standards, rather they were hired to perform royalty examinations under the AICPA standards for consulting services.

However, as the CRB recently made clear, “the plain and unambiguous language of § 382.7(d), like its predecessor, § 382.6(e), contains only one set of audit standards for any audit commissioned by either the collective (SoundExchange) or a PSS” (*see* Initial Determination after Remand, *In re Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III)*, No. 16-CRB-0001 SR/PSSR [2018–2022]). While it may be true that SoundExchange hired Defendants to conduct consulting services, at this stage, it is unclear what authority there is to conduct a such

¹ Plaintiff also argues that the CRB recently made clear that the audit must be conducted according to generally accepted auditing standards (“GAAS”). *See* Initial Determination after Remand, *In re Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III)*, No. 16-CRB-0001 SR/PSSR (2018–2022) (“*SDARS III* Remand Determination”), at 68 (“SoundExchange’s suggestion that its audits ... are not subject to GAAS ... is unsupported by the text of the regulation.”).

a “consulting audit.”² Moreover, Defendants do not argue that they were unaware of the CRB regulations or the AICPA standards; to the contrary, Plaintiff alleges that Defendants have been performing such services for SoundExchange for many years (FAC ¶¶8, 30). Further, as Plaintiff points out, Defendants agreed in the NDA that they would comply with AICPA auditing standards (see *infra*, discussion of Sirius XM’s breach of contract claim). Defendants’ “royalty inspection” procedures involved direct substantive communications, document exchange, and other direct interaction with both Sirius XM and SoundExchange.

Furthermore, the CRB regulations provide that the audit “shall serve as an *acceptable verification procedure for all parties* with respect to the information that is within the scope of the audit.” (37 CFR 382.7[d] [emphasis added]). Giving the Complaint’s allegations the benefit of reasonable inferences, this language appears to indicate that the audit was intended to be for the use and benefit of both parties—not just SoundExchange. Thus, taking Plaintiff’s allegations as true for the purposes of this motion, Plaintiff has alleged that although Defendants intended their purported audit to be relied upon by SoundExchange, they also knew or should have known that Sirius XM was relying on the report to settle payment discrepancies—including any applicable overpayments for *Sirius XM’s* benefit—and that that Sirius XM was fooled or misled by Defendants’ non-compliance with 37 CFR § 382. Those allegations are sufficient to assert a privity-like relationship sufficient to support a negligence duty in these circumstances.

As to breach, Plaintiff alleges that it was entitled under the law to an independent audit report that was both free of factual errors and that accurately identified any overpayments Sirius XM made to SoundExchange that would have accrued to Sirius XM’s benefit. Thus, Plaintiff

² The Court notes that if Defendant’s report was not made pursuant to the CRB, then it is unclear what authority, if any, SoundExchange has to enforce its report.

alleges that Defendants breached their duties “by violating GAAS and negligently failing to perform [the] auditing tasks that exist for the benefit of ... Sirius XM.” (FAC ¶ 65, citing 37 CFR § 382.7[d], [f], [g]). Because of Defendants’ purported breaches, Sirius XM alleges that it has suffered significant financial losses (*id.* ¶ 67).³ These allegations are sufficient to state a claim for negligence.

2. *Fraud (First Cause of Action)*

Accepting the facts alleged in the First Amended Complaint as true, and according Plaintiff the benefit of every favorable inference (*Leon*, 84 NY2d at 87-88), the First Amended Complaint states a viable cause of action for fraud.

As an initial matter, no privity is required to bring a fraud claim (*Houbigant, Inc. v Deloitte & Touche LLP*, 303 AD2d 92, 95 [1st Dept 2003] [“even where the law does not permit a claim of negligence to be brought against a professional by a person not in privity with the professional, this rule ‘does not emancipate accountants from the consequences of fraud’”]).

Under CPLR 3016(b), pleading fraud requires that the “circumstances constituting the wrong [must] be stated in detail.” At the pleading stage, “the plaintiff must only allege facts from which it may be inferred that the defendant was aware that its misrepresentations would be reasonably relied upon by the plaintiff, not that the defendant intended to induce the particular acts of detrimental reliance ultimately undertaken by the plaintiff” (*Houbigant*, 303 AD2d at 100). This pleading requirement is satisfied by Sirius XM’s allegations that Defendants

³ The Court notes that Plaintiff may ultimately be unable to prove any such damages, given the southern District Court’s finding that “SoundExchange cannot bring suit because [17 USC §114] does not authorize SoundExchange to litigate royalty disputes” (*SoundExchange, Inc. v Sirius XM Radio Inc.*, 24 CIV. 5491 (NRB), 2025 WL 2257704, *1 [SDNY 2025]), and the parties’ representation at oral argument that the CRB has disclaimed any jurisdiction to apply law to fact in a particular dispute (NYSCEF 91 [Tr.] at 75-76).

represented themselves to be acting as an independent regulatory auditor while failing to disclose that they were (allegedly) in fact a non-independent “consultant” that would render a one-sided royalty inspection—focused solely on purported underpayments—“in concert” with SoundExchange.

Specifically, Sirius XM alleges that Defendants represented and warranted to Sirius XM that “that it is a ‘Qualified Auditor’ within the meaning of 37 C.F.R. § 382.1, and will at all times during the performance of the Project remain a ‘Qualified Auditor’ within the meaning of 37 C.F.R. § 382.1 (NYSCEF 39 ¶¶ 6–7; *see* FAC ¶46). “A false statement of intention is sufficient to support an action for fraud, even where that statement relates to an agreement between the parties” (*Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995]).

The FAC also sufficiently alleges fraudulent intent, alleging facts that provide a “rational basis for inferring that [Defendants’] alleged misrepresentation[s] [were] knowingly made” (*Houbigant*, 303 AD2d at 98). For example, Sirius XM alleges that Defendants had a “co-dependent” relationship with SoundExchange, which prompted them “to act as advocates” for SoundExchange (FAC ¶¶ 8, 34, 48; *see, e.g., Franklin High Income Tr. v App Glob., Ltd.*, 7 AD3d 400, 401 [1st Dept 2004] [denying CPLR 3211 motion where “the accounting defendants dispute[d] plaintiffs’ allegations respecting [their] assertedly close and controlling relationship” with the “entity that was purportedly immediately responsible for the complained-of audits and financial statements”]). Sirius XM also adequately alleges that Defendants departed from Generally Accepted Auditing Standards to “manufacture support” for SoundExchange’s theory that Sirius XM had underpaid royalties (FAC ¶¶ 34–37, 50) (*see Shavolian*, 2020 WL 2135749, at *4 [“Shavolian alleges, for example, that Defendants intentionally used an incorrect percent capitalization rate, undertook no rental comparisons, and failed to account for a wide arrange of

expenses ... all as part of a scheme to harm Shavolian.”)]. These “are ample factual allegations ... sufficient to state an action for fraud” (*Fid. and Deposit Co. of Maryland v Arthur Andersen & Co.*, 131 AD2d 308, 311 [1st Dept 1987]). At this juncture, Sirius XM “need not ... make an evidentiary showing of exactly what the accountant[s] knew as to falsehoods” (*Houbigant, Inc.*, 303 AD2d at 97).

A plaintiff suing based on a purportedly fraudulent audit generally is “not required to establish reliance, inasmuch as the complaint sufficiently identifies a number of breaches of [GAAS] and procedures applying to all reports at issue, including defendant’s failure to engage in an independent review[.]” (*DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302, 303 [1st Dept 2005]).

Finally, the Court declines to dismiss the fraud claim as duplicative of the breach of contract claim at this stage (*Shear Enterprises, LLC v Cohen*, 189 AD3d 423, 424 [1st Dept 2020] [“The court should not have dismissed the cause of action for fraud as duplicative of the cause of action for breach of contract ... given this early procedural stage of the action” [citations omitted]). Under CPLR 3014, a plaintiff “is not required to select” between duplicative or inconsistent claims when questions exist as “to what extent the contract applies to the dispute.” (*Donaldson Interiors, Inc. v Cauldwell-Wingate Co., LLC*, 58 Misc 3d 1228(A) [Sup Ct, NY County 2018]). In any event, the fraud claim alleges that Defendants misled Sirius XM about their *existing* independence “as an inducement for [Sirius XM] to enter into the contracts”—distinct from the breach of contract claim.

3. *Breach of Contract (Second Cause of Action)*

Plaintiff alleges that Defendants breached the that parties' NDA by failing to conduct the royalty payment audit in conformity with CRB regulations and AICPA standards claiming Defendants were not independent when they conducted the royalty audits (FAC ¶¶ 54-55).

Defendants' suggestion that Sirius XM "slipped in" representations concerning auditor independence and regulatory compliance into the NDA is unavailing. Defendants are sophisticated parties accustomed to proposing, reviewing, and entering into contracts, and are bound by what they signed (*Heaphy v Kerr*, 190 AD 810, 810 [1st Dept 1920] [contracting party has a "duty to read carefully before executing the contract"], *affd*, 232 NY 526 [1921]; *Touloumis v Chalem*, 156 AD2d 230, 232 [1st Dept 1989] ["Plaintiff signed this document and, having willfully subscribed it, cannot be said to have misunderstood its terms. A party is under an obligation to read a document before he or she signs it, and one cannot generally avoid the effect of a release upon the ground that he or she did not read it or know its contents"]).

The remainder of Defendants' arguments simply illustrate that there are fact issues about the relationship between the parties and the purpose of the audit—which demonstrate that a motion to dismiss cannot be granted on the pleadings.

The Court has considered the parties' remaining arguments and finds them unavailing.

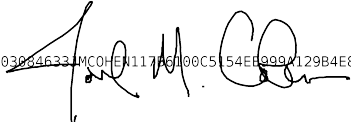
Accordingly, it is

ORDERED that Defendants' Motion to Dismiss the First Amended Complaint is **DENIED**; it is further

ORDERED that Defendant shall file an Answer to the First Amended Complaint within twenty-one (21) days of the date of this Order; and it is further

ORDERED that the parties appear for a preliminary conference on January 6, 2026, at 11:00 a.m., with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference.⁴

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

<u>11/3/2025</u> DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
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⁴ If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online at <https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Part3-Preliminary-Conference-Order.pdf>), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.