

TO: The Administrative Board of the Courts

FROM: Commercial and Federal Litigation Section of the New York State Bar Association

DATE: May 11, 2017

RE: Proposed Revised Model Compliance Conference Stipulation and Order Form for Use in the Commercial Division

The Commercial and Federal Litigation Section of the New York State Bar Association (“**Section**”) is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated March 30, 2017, proposing the adoption of a revised Model Compliance Conference Stipulation and Order Form for use in the Commercial Division (the “**Proposal**”). A copy of the Proposal is attached hereto as Exhibit “A.”

I. EXECUTIVE SUMMARY

Effective April 1, 2015, the Administrative Board of the Courts approved a Model Compliance Conference Order form for use in the Commercial Divisions of the New York State Supreme Court (“Current CCO”). The Section agrees with the Advisory Council’s Subcommittee on Best Practices for Judicial Case Management (“Advisory Council”) that recent substantive rule changes have been adopted by the Administrative Board of the Courts which necessitate revisions to the Current CCO. The Section therefore recommends that the proposed revised Model Compliance Conference Stipulation and Order (“Proposed Model CCO”) be adopted, with the additional suggested revisions described in Point III.

II. SUMMARY OF PROPOSAL

As set forth in the Proposal, effective April 1, 2015, the Administrative Board of the Courts approved the Current CCO. However, since that time, the Administrative Board of the Courts has adopted new Rules affecting practice in the Commercial Division. Those substantive rule changes resulted in a revised New Model Preliminary Conference Order for optional use in the Commercial Division of the Supreme Court, which became effective on August 1, 2016. The Advisory Council is seeking to make similar revisions to the Current CCO. The Proposal seeks to implement the Proposed Model CCO to replace the Current CCO. The following is a list of substantive changes identified by the Advisory Council:

1. The Proposed Model CCO would be by Stipulation, with a requirement that the lawyers for all parties sign the Proposed Model CCO before the Court “So Orders” the same, thereby noting their agreement to the deadlines outlined therein;
2. A revised section for noting Appearances on behalf of each party, with the intention to “streamline[] the mechanism to report changes in representation[,]” and to require

the parties to disclose the attorney appearing for the compliance conference, with the hope that this disclosure will encourage uniformity in appearances at future conferences;

3. A revision to the section “Confidentiality Agreement” to cite to the new Confidentiality Order;
4. Enlargement of the “Description of the Case” field to include additional information about any appeal of an Order on a Motion to Dismiss and the results thereof, and revision and expansion of the section requesting a summary of the Defendant’s legal theory and current status of the case;
5. Reference in the section titled “Discovery” to the preamble to the Commercial Division Rules to encourage proportionality in discovery, and to specific Commercial Division Rules governing discovery;
6. Differentiation between the requirements for depositions of individuals and depositions of entities, requiring expanded information concerning the depositions of entities, including the date on which a party served a notice or subpoena, whether the individual consents to representing the entity, and the identity of counsel representing the entity;
7. Inclusion in the section for “Discovery” a new subsection for addressing Discovery Disputes, and requiring the parties to disclose the dates the parties engaged in the letter writing mechanism;
8. Expansion of the “Impleader” section to include when the impleading party expects discovery to be complete with respect to the third party, and shortening the time for Impleader to fifteen (15) days after the end of the last deposition of a named party;
9. Revision to the section on “Electronic Discovery” to include the dates of completion of electronic discovery, and expansion of the section to include requirements and deadlines for the completion of Privilege Logs; and
10. Addition to the section on “Dispositive Motions” to include instructions on making a motion for a Sealing Order.

As set forth in the Proposal, and similar to the Current CCO and the New Model Preliminary Conference Order, the Proposed Model CCO is not mandatory, and Justices of the Commercial Division are free to adopt all or part of the Proposed Model CCO.

III. RESPONSE AND SUGGESTIONS TO FURTHER THE GOALS OF THE PROPOSAL

The Section concurs with the Proposal's objective, which is two-fold: (1) to incorporate new rules approved by the Administrative Board of the Courts, and to conform the Current CCO to the New Model Preliminary Conference Order that took effect on August 1, 2016; and (2) to "encourage the Court and litigants to review and update their Compliance Forms." However, the Section suggests the following revisions to the Proposed Model CCO:

In Section II ("Confidentiality Agreements"), the Section raises the issue, given the general practice in New York of maintaining open court records and the disinclination to grant sealing orders, that parties who have chosen not to enter into a Confidentiality Agreement are asked to explain or justify that decision. Therefore, the Section suggests that the last item on page 3 of 31 be modified to apply only in the event that there is disagreement amongst the parties as to whether a Confidentiality Agreement is necessary or as to the language therein:

"If there is a disagreement amongst the parties ~~HAVE NOT~~ entered into concerning the necessity or language of a Confidentiality Agreement, please provide the Court with an explanation of the nature of the disagreement as to the reason(s) the parties decided not to enter into a Confidentiality Agreement."

In Section IV.2 ("Document Production"), the Section suggests that the requirement that "[a]ll documents produced by any and all parties and non-parties must be Bates Stamped[.]" be limited to non-native format documents and that electronically stored information contain a unique identifier. The Section also suggests that the term "control numbers" be used instead of "Bates Stamped." Therefore, the Section suggests that the provision be amended as follows:

*"All non-native format documents produced by any and all parties and non-parties **MUST be identified and stamped with control numbers**~~Bates Stamped.~~"*



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. MCCONNELL
COUNSEL

MEMORANDUM

March 30, 2017

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Model Compliance Conference
Stipulation and Order Form for Use in the Commercial Division

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The Commercial Division Advisory Council has recommended adoption of a revised model compliance conference stipulation and order form for use in the Commercial Division. As set forth in a supporting memorandum from the Council's Subcommittee on Best Practices for Judicial Case Management (Exh. A), the compliance conference order form currently in use was issued in April 2015; the proposed revised form reflects Commercial Division rule changes that have taken effect over the last two years. As with other forms implemented at the Council's recommendation, the proposed form is designed to serve as a model; its use would not be mandatory.

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Persons wishing to comment on the proposed form should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than May 30, 2017.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: COMMERCIAL DIVISION ADVISORY COUNCIL

FROM: The Subcommittee on Best Practices for Judicial Case Management

RE: NEW MODEL COMPLIANCE CONFERENCE STIPULATION AND ORDER FORM

DATE: January 12, 2017

On January 15, 2015, the Administrative Board of the Courts approved the Compliance Conference ("CC") Order form for use in the Commercial Divisions of the New York State Supreme Court starting on April 1, 2015.

Since that time, the Commercial Division Advisory Council has recommended and the Administrative Board of the Courts has adopted a substantial number of new Rules affecting practice in the Commercial Division. Many of the new Rules were created in an attempt to streamline and modernize the discovery process.

As a result, a revised New Model Preliminary Conference Order "for optional use in the Commercial Division of the Supreme Court" was adopted by the Administrative Board on June 24, 2016 with the new form becoming effective on August 1, 2016. The Administrative Board also stated that "all prior versions (of the PC Order) are hereby repealed."

Once again, the New Model Compliance Stipulation and Order is precatory and not mandatory. Judges are free to adopt the new CC in its entirety or sections of the same or none of its proposed provisions. It is hoped, however, that the new form will encourage the Court and litigants to review and update their Compliance Forms.

The new Revised Model Preliminary Conference ("PC") Order Form had, as its salient features,

- A new section for Pre-Answer Motion Practice;
- A more streamlined section for the Description of the Case;
- A completely revamped section on Discovery including:
 - (1) A new section incorporating the new Preamble to the Commercial Division Rules, **22 NYCRR 202.70(g)**, particularly the admonition to *“encourage proportionality in discovery. . .”*
 - (2) New language for Document Production pursuant to Rule 11-e(a), **22 NYCRR 202.70(g)(11-e)(a)**;
 - (3) New language concerning Interrogatories, Rule 11-a, **22 NYCRR 202.70(g)(11-a)**;
 - (4) A new section concerning Deposition of Individuals including the limitation, without prior court approval, as to the number of depositions and the length of time for each deposition, Rule 11-d, **22 NYCRR 202.70(g)(11-d)**;
 - (5) Another section concerns Deposition of Entities. This new Rule, which was approved by the Board of Judges on October 15, 2015 for use by litigants on December 1, 2015, outlines a creative mechanism to streamline the gathering of discovery information from all forms of business entities. The proposed new Rule is outlined in detail in order to provide both the Bench and the Bar with the tools necessary to secure information from these entities;
 - (6) The new Revised Model PC Order form also includes information on how to address Disclosure Disputes pursuant to Rule 14, **22 NYCRR 202.70(g)(14)**;
 - (8) The section on Electronic Discovery and Privilege Logs has been completely reworked to condense the previous section pursuant to Rule 8(b), **22 NYCRR 202.70(g)(8)(b)**, and to incorporate the Categorical or Document-by-Document approach to Privilege Logs pursuant to Rule 11-b, **22 NYCRR 202.70(g)(11-b)**;

- (9) The section on Expert Discovery has been modified to remind the parties that there are rules that must be followed in a timely fashion, **22 NYCRR 202.70(g)(13)©**; and
- a reworked Section on Alternative Dispute Resolution to focus the parties on the methods to be used and timing of the use of Alternative Dispute Resolution.
 - Finally, there is a new section concerning Additional Directives emphasizing the need to inform the court of disposition of cases and the absolute need to sign up for the FREE *etrack* notification system in the Court system.

Now the Best Practices Subcommittee is proposing a New Model Compliance Conference Stipulation and Order that closely tracks the New Revised Model Preliminary Conference Order. It provides, as one of its main new features, that the lawyers on the case sign the Stipulation before the Court “So Orders” the form. The idea behind this revision is to encourage a closer participation in the discovery process by the attorneys in the case.

Each section of the new Model CC attempts to further discovery by including special features:

- (1) A new section on Appearances streamlines the mechanism to report changes in representation. It also includes, for the first time, a section on who is appearing for the Compliance Conference. This will encourage, it is hoped, that the same attorneys appear for subsequent conferences.
- (2) The Confidentiality Agreement section contains the cite to the new Confidentiality Order.
- (3) The section on the Description of the Case is greatly expanded to include defendant’s legal theory and current status of the case.
- (4) Deposition of Individuals requires specificity as it concerns the scheduling of depositions.
- (5) The section on Deposition of Entities requires the parties to set forth the actual date a party served a notice or subpoena; and the name of the individual representing the entity, their title and whether the individual consents to representing the entity – a requirement under the rule.

- (6) The section on Disclosure Disputes, which outlines the mechanism for dispute resolutions in discovery matters, has a new section outlining the dates the parties used the letter writing mechanism.
- (8) The Impleader section has been expanded to include more discovery dates.
- (9) The section on Electronic Discovery remains largely the same except for the dates of completion of electronic discovery but the section on Privilege Log has been expanded to include actual dates for the completion of the log.
- (10) The other sections include the same types of questions concerning completion of the work, except that under the Dispositive Motion Section, there is language concerning the issue of Sealing portions of documents that the parties intend to rely on in their dispositive motions.

As previously stated, the Compliance Conference Order includes a section requiring the parties to sign the document stating that they agree to the dates outlined in the document.

The New Model Compliance Conference Stipulation and Order reflects the amount of substantive work the Commercial Division Advisory Council has undertaken over the past three years. The revisions, approved by the Administrative Board of the Courts, made to the Commercial Division Rules have been highly substantive: they have changed the culture of practice in the Commercial Divisions and, it is hoped, provide a new framework to reduce the costly burden of discovery for the practitioners and litigants in the Commercial Division.

The Best Practices Subcommittee respectfully requests that the new Revised Model Compliance Conference Stipulation and Order form, attached hereto, be considered for adoption.

The Best Practices Subcommittee

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW
YORK, COUNTY OF _____

-----X

Plaintiff(s)

- against -

Defendant(s)

-----X

Present: Hon. _____

Part: _____

Index No.: _____

RJI Filing Date: _____

**NEW MODEL
COMPLIANCE
CONFERENCE
STIPULATION AND ORDER
(1-12-2017)**

- I. **PRELIMINARY CONFERENCE:** A Preliminary Conference was held in this case and the Court signed the Preliminary Conference Order on:

_____, 20____

The purpose of this Compliance Conference is to assess the progress the parties have made and to determine what items are outstanding and what needs to be done to ensure that discovery is completed in a timely fashion.

- II. **APPEARANCES:** The parties entered their appearances at the Preliminary Conference.

(a) Counsel for Plaintiff _____ HAS or _____ HAS NOT changed.

(b) Counsel for Defendant _____
_____ HAS or _____ HAS NOT changed.

Plaintiff _____
v. Defendant _____

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(c) Counsel for Defendant _____

_____ HAS or _____ HAS NOT changed.

Please use additional pages, if necessary.

FOR EACH NEW COUNSEL:

Please include (1) your name; (2) your firm's name; (3) your address; (4) your firm's telephone number; (5) your direct telephone number; (6) your e-mail address; and (7) the party you represent.

Please use additional pages, if necessary.

**PLEASE INDICATE WHO IS APPEARING AT THIS COMPLIANCE
CONFERENCE:**

(a) Counsel for Plaintiff: _____
Firm name: _____

(b) Counsel for Defendant _____
Firm name: _____

(c) Counsel for Defendant _____
Firm Name: _____

Please use additional pages, if necessary.

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II. CONFIDENTIALITY AGREEMENT:

At the Preliminary Conference, the parties indicated whether they had or had not entered into a Confidentiality Agreement. The Preliminary Conference Order included an explanation regarding the need for Confidentiality Agreements. The Preliminary Conference Order also stated:

The parties are directed to use the Model Confidentiality Agreement promulgated in the part before which they are appearing. If the Trial Part does not have as specific form it uses, the parties are referred to the model confidentiality agreement found at:

[https://www.nycourts.gov/rules/trialcourts/202.70\(g\)%20-%20Rule%2011-g%20\(attachment\).pdf](https://www.nycourts.gov/rules/trialcourts/202.70(g)%20-%20Rule%2011-g%20(attachment).pdf)

If the parties need to change *either* the Trial Part's model confidentiality agreement or the one found at the link listed above, the parties are to submit a **signed Confidentiality Agreement** with the changes and a **red line copy** for the Court to review.

The parties _____ **HAVE** or _____ **HAVE NOT** entered into a Confidentiality Agreement.

The Court _____ **HAS** or _____ **HAS NOT** so ordered the Confidentiality Agreement and, if the Court has so ordered it, on what date did the Court so order it: _____

If the parties **HAVE NOT** entered into a Confidentiality Agreement, please provide the Court with an explanation as to the reason(s) the parties decided not to enter into a Confidentiality Agreement.

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III. DESCRIPTION OF THE CASE:

(a) Plaintiff

In the Preliminary Conference Order, pursuant to 22 NYCRR 202.12(c)(1), the Plaintiff was asked to provide a brief description of the factual and legal issues of the case. Defendant(s), if issue had been joined, was/were also required to provide a brief description of the case.

- (1) If Plaintiff has filed an amended complaint, please inform the Court as to the changes to Plaintiff's factual and legal case since the Preliminary Conference Order:

and/or

- (2) If the Court has issued an order on a Motion to Dismiss, please inform the Court as to which causes of action remain in the case:

- (3) Has a Notice of Appeal been filed? ____ YES ____ NO

- (4) Was the Appeal perfected? ____ YES ____ NO

- (5) Was the Appeal decided? ____ YES ____ NO

- (6) What was the Appeal Court's decision:

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v. Defendant _____

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- (7) Because of the changes to the case, please indicate whether the amount of damages has changed:

Damages Amount has changed: _____ YES _____ NO

Please indicate the new Damages Amount: \$ _____.

(b) Defendant(s)

- (1) If not done in the Preliminary Conference, please describe Defendant _____'s, legal theory and salient facts in support of defenses, counterclaims and third-party claims.

Amount Demanded on the Counterclaim/Cross Claim: \$ _____

If there is more than one defendant, please repeat Question No. III(b) for each defendant.

- (2) Did a party make a Motion to Dismiss the counterclaims?
_____ YES _____ NO

- (3) If the Court has issued an order on a Motion to Dismiss the counterclaims, please inform the Court as to which counterclaims remain in the Defendants' case:

- (4) Has a Notice of Appeal been filed? _____ YES _____ NO

- (5) Was the Appeal perfected? _____ YES _____ NO

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(6) Was the Appeal decided? _____ YES _____ NO

(7) What was the Appeal Court's decision:

Please use additional pages, if necessary.

IV. DISCOVERY

It is hereby **ORDERED** that disclosure shall proceed pursuant to the Commercial Division Rules found at <http://www.nycourts.gov/rules/trialcourts/202.shtml#70>

(1) **GENERAL ADMONITIONS:**

The Preamble to the Commercial Division Rules, **22 NYCRR 202.70(g)**, states that the Commercial Division is “mindful of the need to conserve client resources, *encourage proportionality in discovery*, promote efficient resolution of matters, and increase respect for the integrity of the judicial process. Litigants and counsel who appear in this Court are directed to review the Rules regarding sanctions, including the provisions in Rule 12 regarding failure to appear at a conference, Rule 13(a) regarding adherence to discovery schedules, and Rule 24(d) regarding the need of counsel to be fully familiar with the case when making appearances.” (Emphasis added.)

Have you met and conferred concerning discovery?

_____ YES _____ NO. If YES, **when** did you meet and confer? _____

- Have you adjusted your discovery demands in order to comply with the “*proportionality in discovery*” admonition in the Commercial Division Rules? _____ YES _____ NO

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v. Defendant _____

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- If YES, please indicate what each party did to meet the "proportionality in discovery" requirement?

(a) Plaintiff:

(b) Defendants

(2) DOCUMENT PRODUCTION:

All documents produced by any and all parties and non-parties MUST be Bates Stamped.

Pursuant to **Commercial Division Rule 11-e(a)**, "For each document request propounded, the responding party shall, in its Response and Objections served pursuant to CPLR 3122(a) (the "Responses"), either:

(a) state that the production will be made as requested; or

(b) state with reasonable particularity the grounds for any objection to production."

In the *Preliminary Conference Order*, the parties were to exchange **Interrogatories, Document Production and Other Disclosure** pursuant to CPLR 3108, 3120 and 3123 by a date certain. Please indicate the date by which Interrogatories and Document Production was (is) to be completed by:

Was this deadline met? ____ YES ____ NO

(i) Has Document Discovery been completed?

____ YES ____ NO

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(ii) If **NOT COMPLETED** at this time, please explain why:

(iii) By what date will be parties be able to **complete** Document Discovery:

The Court _____ **ACCEPTS THE NEW DATE
FOR THE COMPLETION OF
DOCUMENT DISCOVERY**

_____ **DOES NOT ACCEPT THE
DATE FOR THE COMPLETION
OF DOCUMENT DISCOVERY**

(The Court should place its initial on the appropriate line.)

If the New Date for the Completion of all Document Discovery is **NOT** agreed to by the Court, the Court hereby sets the following **date as the NEW DATE FOR THE COMPLETION OF ALL DOCUMENT DISCOVERY**

_____ Court's Initial: _____

(3) INTERROGATORIES

Pursuant to **Commercial Division Rule 11-a**, "Interrogatories (a) are limited to 25 in number, including subparts, unless another limit is specified in the Preliminary Conference Order. This limit applies to consolidated actions as well; (b) Unless otherwise ordered by the court, interrogatories are limited to the following topics: name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of

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v. Defendant _____

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material and necessary documentation, including pertinent insurance agreements, and other physical evidence.”

(i) Have the Interrogatories been completed?

_____ YES _____ NO

(ii) If **NOT COMPLETED** at this time, please explain why:

(iii) By what date will parties be able to **complete** Interrogatories:

The Court _____ **ACCEPTS THE NEW DATE
FOR THE COMPLETION OF
INTERROGATORIES**

_____ **DOES NOT ACCEPT THE
DATE FOR THE COMPLETION
OF ALL INTERROGATORIES**

(The Court should place its initial on the appropriate line.)

If the New Date for the Completion of all Interrogatories is **NOT** agreed to by the Court, the Court hereby sets the following **date as the NEW DATE FOR THE COMPLETION OF ALL INTERROGATORIES**

_____ Court's Initial: _____

(4) DEPOSITION OF INDIVIDUALS

Pursuant to **Commercial Division Rule 11-d**, “(a) Unless otherwise stipulated to by the parties or ordered by the court: (1) the number of

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depositions (of individuals) taken by plaintiffs, or by defendants, or by third-party defendants, shall be limited to 10; and (2) depositions shall be limited to 7 hours per deponent." Please review the remainder of Rule 11-d for additional directives concerning depositions.

(a) In the Preliminary Conference Order, the Plaintiff and Defendant(s) stated that they would complete the parties' depositions by: _____ and complete non-parties' depositions by _____.

(b) If the dates for depositions to be completed have not yet passed, please indicate whether you believe the deposition dates will be adhered to:

_____ YES _____ NO

(c) If Individual Depositions have **NOT BEEN COMPLETED** in a timely fashion, please explain why:

- Please indicate if the parties have met and conferred about the timing of the Individual Depositions:

_____ YES _____ NO;

- If **YES**, when did you meet and confer concerning the timing of the Depositions: _____

- By what date will be parties be able to **COMPLETE** the **Individual Depositions**:

Plaintiff: _____

Defendant: _____

Defendant: _____

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v. Defendant _____

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Others: _____

Please use additional pages, if necessary.

**ALL INDIVIDUAL Depositions shall be COMPLETED on or
before _____**

The Court _____ **ACCEPTS THE NEW DATE
FOR THE COMPLETION OF
ALL INDIVIDUAL
DEPOSITIONS**

_____ **DOES NOT ACCEPT THE
DATE FOR THE COMPLETION
OF ALL INDIVIDUAL
DEPOSITIONS**

(The Court should place its initial on the appropriate line.)

If the New Date for the Completion of all Individual Depositions is
NOT agreed to by the Court, the Court hereby sets the following date
as the **NEW DATE FOR THE COMPLETION OF ALL
INDIVIDUAL DEPOSITIONS**

_____ Court's Initial: _____

(5) DEPOSITION OF ENTITIES

On October 15, 2015, a new rule concerning the deposition of entities went into effect. **Commercial Division Rule 11-f.** The new rule concerns the deposition of entities such as a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public

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corporation, government, or government subdivision, agency or instrumentality, or any other legal or commercial entity.

The Rule is intended to promote a more efficient process for deposition of entity representatives and reduce the likelihood of a mismatch between the information sought and the witness produced.

The essential elements of the new Rule are (emphasis added):

- (i) A party wishing to take a deposition of an entity will serve a notice or subpoena enumerating those matters to be the subject of the deposition **“with reasonable particularity.”**
- (ii) If the notice or subpoena *does not* name a particular officer, director, member or employee of the entity, the named entity must designate one or more officers, directors, members or employees or other individual(s) who **consent to testify** on its behalf. The named entity must identify the individual who will be testifying on the entity’s behalf, the description and title of that individual; and the matter(s) on which that individual will testify.
- (iii) If the notice or subpoena *does* name a particular officer, director, member or employee of the entity, the entity, pursuant to CPLR 3106(d), shall produce that individual, **unless**, no later than ten days before the deposition, the entity designates *another individual* who **consents to testify** on its behalf, in the place of the named or subpoenaed officer, director, member or employee of the entity; and shall provide the identification, description or title of the new individual, and the matter(s) on which the individual will testify.
- (iv) Deposition testimony given pursuant to this Rule shall be usable against the entity on whose behalf the testimony is given to the same extent provided in CPLR 3117(2).
- (v) The deposition of an entity shall be treated as a *single deposition* even though more than one person may be designated to testify on the entity’s behalf. Notwithstanding the foregoing, the cumulative presumptive durational limit is in effect **but** may be enlarged by

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agreement of the parties or upon application for leave of Court, which shall be freely given.

- (a) At the Preliminary Conference, the parties designated the entities to be deposed. Since that time have the parties served a notice or subpoena enumerating those matters to be the subject of the deposition of the entity "with reasonable particularity?"

_____ YES _____ NO

If YES, *when* did you serve the notice or subpoena?

If NO, *when will you serve* the notice or subpoena?

- (b) Has the individual identified to represent the entity, consented to testify on behalf of the entity?

Plaintiff: Entity: _____
Name of Individual(s) _____

Title of the Individual: _____
Individual's Consent: _____ YES _____ NO

Defendant: Entity: _____
Name of Individual(s) _____

Title of the Individual: _____
Individual's Consent: _____ YES _____ NO

Defendant: Entity: _____
Name of Individual(s) _____

Title of the Individual: _____
Individual's Consent: _____ YES _____ NO

Please use additional pages, if necessary.

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(c) By what date will the parties be able to **COMPLETE** the Entity
Depositions:

- **Plaintiff:** _____
- **Defendant:** _____
- **Others:** _____

Please use additional pages, if necessary.

ALL ENTITY depositions shall be COMPLETED on or before

The Court _____ **ACCEPTS THE NEW DATE FOR THE
COMPLETION OF ALL ENTITY
DEPOSITIONS**

_____ **DOES NOT ACCEPT THE DATE FOR
THE COMPLETION OF ALL ENTITY
DEPOSITIONS**

(The Court should place its initial on the appropriate line.):

If the New Date for the Completion of all Entity Depositions is **NOT**
agreed to by the Court, the Court hereby sets the following date as the
**NEW DATE FOR THE COMPLETION OF ALL ENTITY
DEPOSITIONS**

_____ Court's Initial: _____

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(6) OTHER DISCOVERY

Please indicate what, if any, "Other Discovery" will be needed in this case pursuant to CPLR 3108 (Depositions by written questions or oral depositions obtained by commission or letters rogatory), CPLR 3120 (Inspection, testing, copying and photographing) and CPLR 3123 (Admissions as to matters of fact, paper, documents and photographs):

By what date will this "Other Discovery" be completed?

(7) DISCLOSURE DISPUTES

Pursuant to **Commercial Division Rule 14**, discovery disputes will be resolved in the following manner:

1. If the Part Rules outline a mechanism to resolve discovery disputes, the Part Rules must be followed; or, if there are no Part Rules:
2. Follow the mechanism laid out in **Rule 14**, namely a party with a disclosure dispute shall write a letter to the Part, maximum 3-pages single spaced in length, outlining the issue(s); the other side(s) may submit response letter(s) of equal length. Necessary documents in support of the issue must also be attached to the letter. The Part will then schedule a (telephone) conference to, hopefully, resolve the dispute.
 - (a) Have either you or your opposition availed yourself of the mechanism outlined in Rule 14?

_____ **YES** _____ **NO**

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(b) (i) When was the first letter written:

By whom?

About what?

When was the telephone conference held:

Was the issue resolved?

(ii) When was the second letter written:

By whom?

About what?

When was the telephone conference held:

Was the issue resolved?

Please use additional pages, if necessary.

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(8) IMPLADER:

Defendant(s) shall serve third-party summons and complaint no later than 15 days after the end of the last deposition of a named plaintiff and defendant and/or the last deposition of a representative of a named party.

Defendant(s) **MUST SERVE** all third parties with copies of all pleadings; bates-stamped document discovery; interrogatories and deposition transcripts, as well as any other information no later than 14 DAYS after serving a third-party pleading.

- (i) If Depositions have been completed, has/have the Defendant(s) served a third party summons and complaint. ____ YES ____ NO

If so, against whom and please provide the Court with an updated caption.

- (ii) Please provide the Court with the name; the firm's name; the firm's address; the firm's telephone number; the attorney's direct telephone number; and the attorney's e-mail address, if you know it.

- (iii) If a third-party summons and complaint has been served, please indicate if:

Answer(s) have been served: ____ YES ____ NO

- (iv) If YES, has a schedule for discovery been completed:

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- (1) Interrogatories: _____
(2) Document Discovery: _____
(3) Depositions: _____

- (v) When is this Impleader discovery expected to be completed:

The Court	_____	ACCEPTS THE DATE FOR THE COMPLETION OF IMPLEADER DISCOVERY,
	_____	DOES NOT ACCEPT THE DATE FOR THE COMPLETION OF IMPLEADER DISCOVERY

(The Court should place its initial on the appropriate line.):

**If the New Date for the Completion of Impleader Discovery is NOT
acceptable, the NEW DATE FOR THE COMPLETION OF ALL
IMPLEADER DISCOVERY is:**

_____ Court's Initial: _____

(9) ELECTRONIC DISCOVERY and PRIVILEGE LOGS:

Discovery of Electronically Stored Information (ESI) is one of the most expensive and challenging discovery categories. The new Commercial Division Rules, as it concerns electronic discovery privilege logs, **22 NYCRR 202.12(b) and (c)(3)**, attempt to rein in the cost and complexity of electronic discovery and related privilege logs.

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A. ELECTRONIC DISCOVERY

- (a) Have the parties agreed that there will be Electronic Discovery in the case?

____ YES ____ NO ____ NOT SURE

- (b) **Meet and Confer:**

Pursuant to 22 NYCRR 202.12(b) and (c)(3)

- (i) Date(s) parties had their meet and confer conference(s):

- (ii) Did the parties reach an agreement concerning electronic discovery

____ YES ____ NO ____ PARTIALLY

- (iii) Are counsel at this Compliance Conference sufficiently versed in matters related to their client's technological systems to discuss competently all issues relating to electronic discovery:

____ YES ____ NO

- (c) **Other directives concerning electronic discovery.**

The following topics are to be updated and supplemented as new information becomes available.

- (i) **Preservation:** 22 NYCRR 202.12(c)(3)(a), (c) and (g)
- (ii) **Production:** 22 NYCRR 202.12(c)(3)(e) and (d)
- (iv) **Claw Back Provisions** for inadvertent production:
- (v) **Costs:** Each party shall bear its own costs of production pursuant to *U.S. Bank Nat'l Assoc. v. Greenpoint Mtge. Funding*

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Inc., 94 A.D.3d 58 (1st Dep't 2012). In the event that cost shifting becomes an issue, the parties shall follow the mechanism for Disclosure Dispute found in section (6).

(d) Judicial Intervention

The parties anticipate the need for judicial intervention regarding electronic discovery.

____ YES ____ NO ____ MAYBE

(e) Status of Electronic Discovery

(i) What is the current status of Electronic Discovery Production:

- Have the parties agreed to the search terms?

____ YES ____ NO

- Have the parties commenced production of documents?

____ YES ____ NO

(f) Judicial Intervention

What, if anything, can the Court do to facilitate the successful competition of Electronic Discovery:

(g) Additional Directives

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(h) Anticipated Date of Completion of Electronic Discovery

When do the parties anticipate completion of electronic discovery?

The Court _____ **ACCEPTS THE DATE FOR THE
C O M P L E T I O N O F
ELECTRONIC DISCOVERY.**

_____ **DOES NOT ACCEPT THE
DATE FOR THE COMPLETION
OF ELECTRONIC DISCOVERY.**

(The Court should place its initial on the appropriate line.):

If the New Date for the Completion of Electronic Discovery is **NOT acceptable, the NEW DATE FOR THE COMPLETION OF ELECTRONIC DISCOVERY is:**

_____ Court's Initial: _____

B. PRIVILEGE LOGS

One of the most time-consuming and costly aspects of discovery in complex commercial litigation cases is the creation and maintenance of privilege logs. Privilege logs are governed by Commercial Division Rule 11(b) and CPLR 3122(b).

THE CATEGORICAL or DOCUMENT-BY-DOCUMENT APPROACH

- (a) **Commercial Division Rule 11-b, mandates** that the parties meet and confer at the outset of the case and from time to time thereafter to discuss:

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- the scope of the privilege review;
 - the amount of information to be set out in the privilege log;
 - the use of categories to reduce document-by-document logging;
 - whether categories of information can be excluded from the logging requirements;
 - any other issues pertinent to privilege review. (Rule 11-b(a))
- (b) (1) Rule 11(b) clearly states that the preference in the Commercial Division is for the parties to use **categorical designations** where appropriate to reduce the time and costs associated with preparing privilege logs. . . . (An example of such a **categorical designation** is the designation that all communications between the client and the client's attorney AFTER the commencement of the action would be designated as exempt pursuant to the attorney-client privilege.) . . . The parties are encouraged to utilize a reasoned method of organizing the documents.
- There are specific rules that must be followed to ensure that the documents contained in a categorical designation were properly placed in that category.*
- (2) In the event the requesting party refuses to permit a **categorical approach**, and instead insists on a **document-by-document** listing on the privilege log then, the requirements of CPLR 3122 must be followed. In that circumstance, however, the producing party, upon showing of good cause, may apply to the Court for an allocation of costs, including attorneys' fees, incurred with respect to preparing a **document-by-document** privilege log.
- (3) Even if a party insists on a **document-by-document** privilege log as contemplated by CPLR 3122, each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following: (i) an indication that the e-mail chain represents an uninterrupted

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dialogue; (ii) the beginning and ending dates and times (as noted in the e-mails) of the dialogue; (iii) the number of e-mails in the dialogue; and (iv) the names of all the authors and recipients, together with sufficient identifying information about each person (e.g. name of the employer, job title, person's role in the case) to allow for a considered assessment of the privilege issue.

While there are other important sections of the new Privilege Log Rule that will have to be considered and followed, these sections need not be repeated here.

- (c) In the Preliminary Conference Order, the parties chose:

Categorical Privilege Log: ____ YES ____ NO

OR Document-by-Document Privilege Log:

____ YES ____ NO

- (d) Have the Parties prepared the Privilege Log using the chosen Categorical or Document-by-Document Privilege Log?

____ YES ____ NO

If YES, what is the status of the Privilege Log?

If YES, when will the Privilege Log be complete:

If NO, please explain why the Privilege Log has not been commenced?

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If **NO**, when will the privilege log be completed?

(e) **FINAL DATE FOR THE COMPLETION OF THE PRIVILEGE LOG:**

The Court

_____ **ACCEPTS THE DATE FOR
THE COMPLETION OF THE
PRIVILEGE LOG.**

_____ **DOES NOT ACCEPT THE
DATE FOR THE COMPLETION
OF THE PRIVILEGE LOG.**

(The Court should place its initial on the appropriate line.):

**If the New Date for the Completion of Privilege Logs is NOT
acceptable, the *NEW DATE FOR THE COMPLETION OF
THE PRIVILEGE LOG.* is:**

_____ Court's Initial: _____

(h) **END DATE FOR FACT DISCLOSURE:**

In the Preliminary Conference Order, it was anticipated that all Fact
Disclosure would be completed by:

Will this date be complied with: ____ **YES** ____ **NO**

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If the original **END DATE FOR FACT DISCLOSURE** will **NOT** be met,
what do the parties believe the **NEW END DATE FOR FACT**
DISCLOSURE should be

The Court _____ **ACCEPTS THE NEW END DATE**
FOR FACT DISCLOSURE

_____ **DOES NOT ACCEPT THE NEW END**
DATE FOR FACT DISCLOSURE

(The Court should place its initial on the appropriate line.)

If the New End Date for Fact Disclosure is **NOT** agreed to by the Court, the
Court hereby sets the following date as the **NEW END DATE FOR FACT**
DISCLOSURE:

_____ Court's Initial: _____

(i) EXPERT DISCOVERY (if any):

Pursuant to **Commercial Division Rules 8 and 13(c)**, which mandate consultation with opposing counsel, the Court hereby **ORDERS** that if any party intends to introduce expert testimony at trial or in support of a motion for summary judgment, the parties, no later than thirty (30) days *prior to* the completion of fact discovery, shall confer on a schedule for expert disclosure – including the identification of experts, the agreement to exchange expert reports and the timetable for the deposition of testifying experts. Expert disclosure shall be completed no later than four (4) months after the completion of Fact Discovery.

In the event that a party objects to this procedure or timetable, the parties shall request a conference to discuss the objection with the Court.

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Do the parties anticipate EXPERT DISCOVERY

_____ YES _____ NO

*The Note of Issue and Certificate of Readiness may not be filed
until the completion of expert disclosure.*

- Was there an END DATE for Expert Discovery set in the
Preliminary Conference Order, _____ YES _____ NO
- If YES, what was the date? _____

If the original **END DATE FOR EXPERT DISCOVERY** will **NOT** be
met, what do the parties believe the **NEW END DATE FOR EXPERT
DISCOVERY** should be

The Court

_____ **ACCEPTS THE NEW END
DATE FOR EXPERT
DISCOVERY.**

_____ **DOES NOT ACCEPT THE
NEW END DATE FOR EXPERT
DISCOVERY**

(The Court should place its initial on the appropriate line.)

If the New End Date for Expert Discovery is **NOT** agreed to by the Court,
the Court hereby sets the following date as the **NEW END DATE FOR
EXPERT DISCOVERY**:

Court's Initial: _____

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(j) END DATE FOR ALL DISCOVERY:

In the Preliminary Conference Order, it was anticipated that the END DATE FOR ALL DISCOVERY would be completed by:

Will this date be complied with: ____ YES ____ NO

If the original END DATE FOR ALL DISCOVERY will NOT be met, when do the parties believe the **NEW END DATE FOR ALL DISCOVERY** should be: _____

The Court	_____	ACCEPTS THE NEW END DATE FOR ALL DISCOVERY
	_____	DOES NOT ACCEPT THE NEW END DATE FOR ALL DISCOVERY

(The Court should place its initial on the appropriate line.)

If the New END DATE FOR ALL DISCOVERY is NOT agreed to by the Court, the Court hereby sets the following date as the **NEW END DATE FOR ALL DISCOVERY**:

_____ Court's Initial _____

V. FINAL DIRECTIVES

(a) NOTE OF ISSUE

In the Preliminary Conference Order, it was anticipated that the NOTE OF ISSUE would be filed on:

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Will this date be complied with: ____ YES ____ NO

If the original **NOTE OF ISSUE DATE** will **NOT** be met, when do the parties believe the **NEW NOTE OF ISSUE DATE** should be

The Court _____ **ACCEPTS THE NEW NOTE OF
ISSUE DATE**
_____ **DOES NOT ACCEPT THE
NEW NOTE OF ISSUE DATE**

(The Court should place its initial on the appropriate line.)

If the **NEW NOTE OF ISSUE DATE** is **NOT** agreed to by the Court, the Court hereby sets the following date as the **NEW NOTE OF ISSUE DATE**

_____ Court's Initial ____

A copy of the Preliminary Conference order and subsequent Compliance and Status Conference orders shall be served and filed with the Note of Issue.

(b) DISPOSITIVE MOTION(S):

All dispositive motion(s) shall be made on or before
_____ or within _____ days after the Note of
Issue is filed.

Such motions may be filed by Order to Show Cause or Notice of Motion. The Court encourages the parties to confer and agree on the dates for the opposition and reply papers to be exchanged and e-filed.

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PLEASE REMEMBER that if the parties intend to submit documents in a redacted or sealed form, the party **MUST** make a "Sealing Motion" pursuant to 22 NYCRR §202.70, Rule 11-h or Section 216.1 of the Uniform Rules of the Supreme Court and County Court. Nothing may be used in any document submitted to the Court in a sealed or redacted form **WITHOUT** a separate and written Order of the Court.

(c) **STATUS CONFERENCE:**

Parties or their representatives **with knowledge of the case and the Preliminary Conference Order** shall appear for a Status Conference on

Parties or their representatives **with knowledge of the case and the Preliminary Conference Order** shall also appear for all future Status Conferences.

(d) **ADDITIONAL DIRECTIVES:**

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VI. ALTERNATIVE DISPUTE RESOLUTION

The Judges in the Commercial Division encourage all parties to work towards a proper and just resolution of the issues in the case. The judges of the Commercial Division believe that the parties are better served the earlier a proper and just resolution can be reached. Toward that end, the judges asks the litigants in this case, on a continuous basis going forward, to consider any and all mechanisms to resolve the issues before them.

IN THE PRELIMINARY CONFERENCE ORDER THE PARTIES STATED:

- (a) That they would be using the following alternative dispute mechanisms in this case: (i) a settlement conference; (ii) participation in the Commercial Division's Alternative Dispute Resolution Program (if applicable); and/or (iii) retention of a private mediator. Counsel for the parties stated they planned to use the following alternative dispute resolution mechanism for this case:

- (b) The parties stated that they believed they would be ready to commence the proposed alternative dispute mechanism on or before the following event (e.g., within sixty (60) days of the Preliminary Conference; thirty (30) days after document and interrogatory discovery was completed; when the depositions of the parties are completed on or before _____; or after the close of fact discovery and before the commencement of expert discovery).
- (c) Please indicate when (as stated in the Preliminary Conference Order) the alternate dispute resolution mechanism is expected to commence:

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(d) **PLEASE EXPLAIN *WHY* SETTLEMENT DISCUSSIONS OR
ADR HAVE NOT COMMENCED:**

* * * * *

**THE DATES SET FORTH HEREIN MAY NOT BE ADJOURNED
EXCEPT WITH THE APPROVAL OF THE COURT.**

***THE PARTIES MUST BRING COPIES OF ALL
DISCLOSURE ORDERS TO ALL CONFERENCES.***

Agreed to by: _____
Counsel for Plaintiff

Agreed to by: _____
Counsel for Defendant _

Agreed to by: _____
Counsel for Defendant _____

Please use additional pages, if necessary.

SO ORDERED:

DATE: _____

J.S.C.