



**MEMORANDUM**

To: All Interested Persons

From: Eileen D. Millett

Re: Request for Public Comment on Proposal to Amend Commercial Division Rules 11-c, 8, 1(b), 9(d), 11-e(f), 11-g, and Appendices A, B, E, and F to Provide Additional Guidelines Related to the Discovery of Electronically Stored Information in the Commercial Division

Date: September 7, 2021

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council (“CDAC”), to amend Commercial Division Rules 11-c, 8, 1(b), 9(d), 11-e(f), 11-g, and Appendices A, B, E, and F to provide updates and further guidelines to practitioners relating to the discovery of electronically stored information (“ESI”) in the Commercial Division. (Ex. A – CDAC memo)

**Proposed Amendments to Rule 11-c**

CDAC posits that the “revised rule consolidates several existing Commercial Division rules concerning e-discovery and makes other additions and revisions consistent with current law and practice.” (Ex. A, p. 3.) The newly revised Rule 11-c refers practitioners to a revised Appendix A – Proposed ESI Guidelines. The goal of the revisions is to address e-discovery in a more consolidated way, modify the rules for clarity and consistency, expand the rules to address important ESI topics consistent with the CPLR and caselaw, and to provide further detail in Appendix A – Proposed ESI Guidelines than is practical in the Commercial Division Rules. The 11-c Rule revision draws from other Commercial Division Rules as well as the Commercial Division Nassau County ESI Guidelines. Exhibit 1 of CDAC’s memo has an annotated version of proposed Rule 11-c, which denotes the source for each provision in the rule. (Ex. A, p. 21-22.)

The revisions to Rule 11-c also specifically direct the parties to confer regarding e-discovery prior to the preliminary conference (Ex. A, p. 4). Parties requesting ESI may specify the format in which ESI shall be produced. The amended rule also states that ESI discovery shall not be disproportionate to its benefits. Expenses associated with non-party ESI productions shall be

defrayed by the requesting party (Ex. A, p. 4). The amended rule also states parties should use efficient means to identify ESI for production, inadvertent production of privileged ESI is not deemed a waiver of privilege, and parties should take reasonable steps to preserve relevant ESI (Ex. A, p. 5).

**Proposed Amendments to Rules 8, 1, 9, 11-e(f), 11-g, Appendices A, B, E, and F**

- CDAC proposes that discussions of ESI discovery in the current version of Rule 8 should be modified and moved to Rule 11-c (Ex. A, p. 6-8). The detailed description of ESI topics to be addressed at the preliminary conference are now moved from Rule 8 to Appendix A, Section II.
- CDAC proposes that references to Rule 8 in Rule 1 should be changed to Rule 11-c (Ex. A, p. 9).
- The proposed modification to Rule 9(d) includes a new reference to Rule 11-c (Ex. A, p. 11).
- CDAC proposes that Rule 11-e(f) be deleted entirely. The substance has been moved to Rule 11-c(e). (Ex. A, p. 12.)
- CDAC proposes that the current Model Confidentiality Order in Appendix B to be modified to include a privilege claw back provision, which is currently Appendix E (Ex. A, p. 13-16). The current Appendix E can be deleted, and Appendix F (attorney’s eyes only confidentiality order) can become the new Appendix E. CDAC proposes that the references to the appendices in Rule 11-g be updated to reflect the new designations.
- CDAC proposes that Appendix A be updated with a number of e-discovery topics (Ex. A, p. 28-34).

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Persons wishing to comment on the proposal should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11<sup>th</sup> Fl., New York, New York, 10004. Comments must be received no later than November 8, 2021.

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**

July 15, 2021

**TO:** The Administrative Board of the Courts

**FROM:** The Commercial Division Advisory Council

**RE:** Proposed Modifications to Commercial Division Rule 11-c

This memorandum provides suggested modifications to Commercial Division Rule 11-c that Technology Committee of the Commercial Division Advisory Council has recommended. The Advisory Council now respectfully submits the following proposed Rule revision for the Administrative Board of the Courts' consideration and approval.

**Rule 11-c. (Discovery of Electronically Stored Information).**

A. Current Version of Rule 11-c

Rule 11-c. Discovery of Electronically Stored Information from Nonparties.

Parties and nonparties should adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information ("ESI") from nonparties, which can be found in Appendix A to these Rules of the Commercial Division.

B. Proposed Revision to Rule 11-c

Rule 11-c. Discovery of Electronically Stored Information.

- (a) Parties ~~and nonparties~~ should ~~adhere to~~ **consult** the Commercial Division's Guidelines for Discovery of Electronically Stored Information ("ESI") (**"the ESI Guidelines"**) ~~from nonparties~~, which can be found in Appendix A to these Rules of the Commercial Division.
- (b) **Prior to the preliminary conference, counsel shall confer with regard to electronic discovery topics, including those set forth in the ESI Guidelines. Such topics shall be addressed with the court at the preliminary conference.**
- (c) **Requests for the production of ESI may specify the format in which ESI shall be produced. In the absence of such specification, or agreement among the parties or court order, the production of electronic documents shall be in the form in which it is ordinarily maintained, or in a searchable format that is usable by the party receiving the ESI;**

- (d) The costs and burdens of discovery of ESI shall not be disproportionate to its benefits, considering the nature of the dispute, the amount in controversy, and the importance of the materials requested to resolving the dispute. A court may deny or modify disproportionate requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment.
- (e) The requesting party shall promptly defray the reasonable expenses associated with a non-party's production of ESI, in accordance with Rules 3111 and 3122(d) of the CPLR.
- (f) The parties are encouraged to use efficient means to identify ESI for production, which may include technology-assisted review in appropriate cases. The parties shall confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they propose to use in document review and production.
- (g) Inadvertent or unintentional production of ESI or documents containing information that is subject to the attorney-client privilege, work product protection, or other generally-recognized privilege shall not be deemed a waiver in whole or in part of such privilege if the producing party (i) took reasonable precautions to prevent disclosure, and (ii) after learning of the inadvertent disclosure, promptly gave notice either in writing, or later confirmed in writing, to the receiving party or parties that such information was inadvertently produced and requests that the receiving party or parties return or destroy the produced ESI. Upon such notice, or as otherwise required, the receiving party or parties shall promptly return or destroy all such material, including copies, except as may be necessary to bring a challenge before the Court. The parties may extend or modify the protections and duties of this provision by written agreement, as provided in Rule 11-g(c), which shall be submitted to the Court to be ordered. Nothing in this rule shall abridge a lawyer's obligations under Rule 4.4(b) of the New York Rules of Professional Conduct concerning a lawyer's receipt of documents that appear to have been inadvertently sent.
- (h) Consistent with CPLR 3126, a party should take reasonable steps to preserve ESI that it has a duty to preserve.

C. Rationale for Revision

The Advisory Council proposes modifying the existing Rule 11-c, which addresses discovery from non-parties, to cover all aspects of electronically stored information (“ESI”) from parties and non-parties alike. E-discovery is fundamental to the conduct of cases in the Commercial Division, with the majority of document discovery in commercial matters now involving ESI. The revised rule consolidates several existing Commercial Division rules concerning e-discovery and makes other additions and revisions consistent with current law and practice. Along with adopting Proposed Rule 11-c, the Advisory Council recommends adopting Proposed Guidelines regarding Discovery of ESI (“Proposed ESI Guidelines”) in order to provide detailed guidance to parties on e-discovery that is not addressed by the rule.

The goal of these recommendations is to:

- Aid in understanding of the rules regarding e-discovery by consolidating Commercial Division rules and guidelines that address e-discovery into a single rule;
- Modify certain aspects of the existing rules for clarity, consistency, and to reflect developments in the law and practice of e-discovery;
- Expand the rule to address important ESI topics not adequately addressed in the Commercial Division rules, including proportionality, production formats, preservation, and the inadvertent production of privileged ESI, consistent with the CPLR and New York decisional law; and
- Provide ESI Guidelines, discussed further below, that (a) address party and non-party discovery, not just non-party discovery, and (b) address e-discovery topics in greater detail than is practical to address in the Commercial Division rules.

Proposed Rule 11-c draws significantly from current Commercial Division Rules and Guidelines. Specifically, Proposed Rule 11-c draws from Rules 8(b), 9(d), 11-c, and 11-e, as well as the Commercial Division Guidelines regarding Discovery of ESI from Non-Parties and the Commercial Division Nassau County ESI Guidelines. An annotated version of Proposed Rule 11-c, which denotes the source for each provision of the proposed rule, and any departures from that source, is contained in Exhibit 1.

Proposed Rule 11-c focuses on consolidating and clarifying current rules and law, consistent with the CPLR and decisional law. As such, Proposed Rule 11-c is suitable for the Administrative Board of the Courts’ consideration and approval. Specifically, with respect to each of the sub-parts of Proposed Rule 11-c:

- (a) As with the existing rule, this sub-part directs the parties to reference the guidelines in Appendix A, although the Proposed ESI Guidelines apply to party and non-party discovery alike, not just non-party discovery.

(b) This sub-part adopts the principal substance of existing Rule 8(b), directing the parties to confer with regard to e-discovery topics prior to the preliminary conference. It does not, however, indicate the specific topics to be addressed by the parties, but rather directs the parties to consult the ESI Guidelines, where such topics are set forth in detail. Addressing the topics in guidelines rather than rules is done in order to allow for greater flexibility regarding the ESI topics to be discussed, given the frequency with which ESI topics can be expected to change as technology evolves.

(c) This sub-part permits the party requesting ESI discovery to specify the format in which ESI shall be produced. This is consistent with CPLR 3120, which states that a party requesting document discovery may specify the “manner” of that discovery. The sub-part also specifies that, in the absence of a specific request, a party may produce ESI in the forms in which it is “ordinarily maintained”. The CPLR is silent as to a default production format for ESI, but CPLR 3122 states that documents may be produced as “they are kept in the ordinary course of business”, which is equivalent to the production of ESI in the form in which it is “ordinarily maintained”. The sub-part permits the additional option that a party may produce ESI in a form that is “searchable” and “usable”. While this is not addressed in the CPLR, it is consistent with New York decisional law, which has required parties to produce ESI in a searchable format.<sup>1</sup>

(d) This sub-part states that the costs and burdens of ESI discovery shall not be “disproportionate” to its benefits. This is consistent with CPLR 3103, which states that a court may issue a protective order to prevent “unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice” resulting from discovery. The sub-part uses the language of proportionality, consistent with the Preamble to the Commercial Division Rules, which state that the rules address “proportionality in discovery”. By referring more directly to proportionality, the sub-part clearly indicates how parties and a court are to evaluate whether discovery is too burdensome or costly to be permitted. The language of the sub-part is drawn from existing Rule 9(d), which applies to accelerated actions.

(e) This sub-part states that expenses associated with non-party ESI productions shall be defrayed by the requesting party. This is consistent with CPLR 3111 and 3122, which state that the “reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery”. The language of this sub-part is drawn from the existing Commercial Division Guidelines Regarding Discovery of ESI from Non-Parties.

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<sup>1</sup> See *Brandofino Commc’ns, Inc. v. Augme Techs. Inc.*, No. 652639/11, 2014 WL 302227, at \*6 (N.Y. Sup. Ct., N.Y. Cnty. 2014); ; *Feldman v. New York State Bridge Auth.*, 40 A.D.3d 1303, 1305 (3rd Dep. 2007); *Dartnell Enterprises, Inc. v. Hewlett Packard Co.*, No. 2006/02709, 2011 WL 4486937, at \*4 (N.Y. Sup. Ct., Monroe Cnty. 2011).



(f) This sub-part adopts the substance of existing Rule 11-e(f), encouraging parties to use efficient means to identify ESI for production, including technology assisted review.

(g) This sub-part states that inadvertent production of privileged ESI or documents shall not, under prescribed circumstances, be deemed a waiver of any privilege. The CPLR does not address the issue of inadvertent production. However, New York courts have held that inadvertent production should not be deemed a waiver, provided that “reasonable precautions to prevent disclosure” of privileged material had been taken, and that the party disclosing the materials promptly asserted the privilege upon becoming aware of the inadvertent production.<sup>2</sup> The language of this sub-part is consistent with those standards, and is drawn from the Commercial Division, Nassau County, Guidelines for Discovery of Electronically Stored Information (“ESI”).

(h) This sub-part states that a party should take “reasonable steps” to preserve relevant ESI that it has a duty to preserve. This is consistent with CPLR 3126, which states that a court may impose certain sanctions against a party who “fails to disclose” information which “ought to have been disclosed”. New York courts have interpreted this rule to mean that parties who fail to preserve relevant evidence that they had a duty to preserve may be subject to sanctions.<sup>3</sup> These decisions have held that such failures may be sanctionable where the spoliation was the result of conduct that is “wilful”, “grossly negligent” or simply “negligent”.<sup>4</sup> The language of this subpart is consistent with those standards, and is drawn from the Commercial Division, Nassau County, Guidelines for Discovery of Electronically Stored Information (“ESI”).

In addition to this memorandum, which describes Proposed Rule 11-c, the memoranda below recommend conforming amendments to certain rules and the adoption of the Proposed ESI Guidelines. The amendments (1) remove provisions that are duplicative or substantially overlap with Proposed Rule 11-c, and (2) revise provisions to align with Proposed Rule 11-c.

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<sup>2</sup> See *Enter. Architectural Sales, Inc. v. Magnetic Builders Grp. LLC*, No. 13501N, 2021 WL 1216453, at \*1 (1st Dept. 2021); *Campbell v. Aerospace Prods. Intl.*, 37 A.D.3d 1156, 1157, 830 N.Y.S.2d 416 (4th Dept. 2007); *Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 132 AD2d 392, 398-99 (4th Dept. 1987); *Galison v. Greenberg*, No. 602478/04, 2004 WL 2848123 (N.Y. Sup. Ct., N.Y. Cnty. 2004).

<sup>3</sup> See *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 46 N.E.3d 601, 602-03 (N.Y. 2015); *China Dev. Indus. Bank v. Morgan Stanley & Co. Inc.*, 183 A.D.3d 504, 505 (1st Dept. 2020).

<sup>4</sup> See *supra* note 3.

July 15, 2021

**TO:** The Administrative Board of the Courts

**FROM:** The Commercial Division Advisory Council

**RE:** Proposed Modifications to Commercial Division Rule 8

This memorandum provides suggested modifications to Commercial Division Rule 8 that the Technology Committee of the Commercial Division Advisory Council has recommended. The Advisory Council now respectfully submits the following proposed Rule revision for the Administrative Board of the Courts' consideration and approval.

**Rule 8. (Consultation prior to Preliminary and Compliance Conferences).**

A. Current Version of Rule 8

Rule 8. Consultation prior to Preliminary and Compliance Conferences.

- (a) Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other issues to be discussed at the conference, including the timing and scope of expert disclosure under Rule 13(c); (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.
- (b) Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) identification of potentially relevant types or categories of electronically stored information ("ESI") and the relevant time frame; (ii) disclosure of the applications and manner in which the ESI is maintained; (iii) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible; (iv) implementation of a preservation plan for potentially relevant ESI; (v) identification of the individual(s) responsible for preservation of ESI; (vi) the scope, extent, order, and form of production; (vii) identification, redaction, labeling, and logging of privileged or confidential ESI; (viii) claw-back or other provisions for privileged or protected ESI; (ix) the scope or method for searching and reviewing ESI; (x) the

anticipated cost and burden of data recovery and proposed initial allocation of such costs; and (xi) designation of experts; and (xii) the need to vary the presumptive number or duration of depositions set forth in Rule 11-d.

B. Proposed Revision to Rule 8

Rule 8. Consultation prior to Preliminary and Compliance Conferences.

Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other **topics** to be discussed at the conference, including **electronic discovery, as set forth in Rule 11-c, and** the timing and scope of expert disclosure under Rule 13(c); (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

~~Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) identification of potentially relevant types or categories of electronically stored information ("ESI") and the relevant time frame; (ii) disclosure of the applications and manner in which the ESI is maintained; (iii) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible; (iv) implementation of a preservation plan for potentially relevant ESI; (v) identification of the individual(s) responsible for preservation of ESI; (vi) the scope, extent, order, and form of production; (vii) identification, redaction, labeling, and logging of privileged or confidential ESI; (viii) claw back or other provisions for privileged or protected ESI; (ix) the scope or method for searching and reviewing ESI; (x) the anticipated cost and burden of data recovery and proposed initial allocation of such costs; and (xi) designation of experts; and (xii) the need to vary the presumptive number or duration of depositions set forth in Rule 11-d.~~

C. Rationale for Revision.

The substance of Rule 8(b) is addressed by Proposed Rule 11-c(b). In addition, much of the detailed description of ESI topics to be addressed at the preliminary conference are addressed in Section II of the Proposed ESI Guidelines. Because of the evolving nature e-discovery practice and the topics that are likely to be germane to a litigation matter, such topics are better addressed in guidelines rather than the rules.

July 15, 2021

**TO:** The Administrative Board of the Courts

**FROM:** The Commercial Division Advisory Council

**RE:** Proposed Modifications to Commercial Division Rule 1(b)

This memorandum provides suggested modifications to Commercial Division Rule 1(b) that the Technology Committee of the Commercial Division Advisory Council has recommended. The Advisory Council now respectfully submits the following proposed Rule revision for the Administrative Board of the Courts' consideration and approval.

**Rule 8. (Consultation prior to Preliminary and Compliance Conferences).**

A. Current Version of Rule 1(b)

Rule 1(b).

Consistent with the requirements of Rule 8(b), counsel for all parties who appear at the preliminary conference shall be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery. Counsel may bring a client representative or outside expert to assist in such discussions.

B. Proposed Revision to Rule 1(b)

Rule 1(b).

Consistent with the requirements of ~~Rule 11-c~~ **Rule 8(b)**, counsel for all parties who appear at the preliminary conference shall be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery. Counsel may bring a client representative or outside expert to assist in such discussions.

C. Rationale for Revision.

This technical change reflects that Rule 8(a) and 8(b) have been collapsed into a single rule, Rule 8.

July 15, 2021

**TO:** The Administrative Board of the Courts

**FROM:** The Commercial Division Advisory Council

**RE:** Proposed Modifications to Commercial Division Rule 9(d)

This memorandum provides suggested modifications to Commercial Division Rule 9(d) that the Technology Committee of the Commercial Division Advisory Council has recommended. The Advisory Council now respectfully submits the following proposed Rule revision for the for the Administrative Board of the Courts' consideration and approval.

**Rule 9(d).**

A. Current Version of Rule 9(d)

Rule 9(d).

In any accelerated action, electronic discovery shall proceed as follows unless the parties agree otherwise:

- i. the production of electronic documents shall normally be made in a searchable format that is usable by the party receiving the e-documents;
- ii. the description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute; and
- iii. where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the court will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment.

B. Proposed Revision to Rule 9(d)

Rule 9(d).

In any accelerated action the description of custodians shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute. **In other respects electronic discovery shall proceed as set forth in Rule 11-c.**

C. Rationale for Revision

The substance of Rule 9(d)(i) and Rule 9(d)(ii) are addressed by Proposed Rule 11-c(c) and Proposed Rule 11-c(d), respectively, and are therefore applicable to all actions, not just the accelerated actions to which Rule 9 applies. What remains unique to Rule 9 is the provision limiting electronic discovery only to custodians whose electronic documents may reasonably be expected to contain evidence that is material to the dispute. In other respects, Rule 9(d) can reference the provisions of Rule 11-c.

July 15, 2021

**TO:** The Administrative Board of the Courts

**FROM:** The Commercial Division Advisory Council

**RE:** Proposed Modifications to Commercial Division Rule 11-e(f)

This memorandum provides suggested modifications to Commercial Division Rule 11-e(f) that the Technology Committee of the Commercial Division Advisory Council has recommended. The Advisory Council now respectfully submits the following proposed Rule revision for the Administrative Board of the Courts' consideration and approval.

**Rule 11-e(f).**

A. Current Rule 11-e(f)

Rule 11-e(f).

The parties are encouraged to use the most efficient means to review documents, including electronically stored information ("ESI"), that is consistent with the parties' disclosure obligations under Article 31 of the CPLR and proportional to the needs of the case. Such means may include technology-assisted review, including predictive coding, in appropriate cases. The parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production.

B. Proposed Revision to Rule 11-e(f)

The Advisory Council recommends that Rule 11-e(f) be removed in its entirety.

C. Rationale for Revision

The substance of Rule 11-e(f) is addressed by Proposed Rule 11-c(e).



July 15, 2021

**TO:** The Administrative Board of the Courts

**FROM:** The Commercial Division Advisory Council

**RE:** Proposed Modifications to Commercial Division Rule 11-g and Appendices B, E and F.

This memorandum provides suggested modifications to Commercial Division Rule 11-g and Appendices B, E and F that the Technology Committee of the Commercial Division Advisory Council has recommended. The Advisory Council now respectfully submits the following proposed Rule revision for the Administrative Board of the Courts' consideration and approval.

**Rule 11-g and Appendices B, E and F.**

A. Current Rule 11-g and Appendices E and F

Rule 11-g.

The following procedure shall apply in those parts of the Commercial Division where the justice presiding so elects:

- (a) For all commercial cases that warrant the entry of a confidentiality order, the parties shall submit to the Court for signature the proposed stipulation and order that appears in Appendix B to these Rules of the Commercial Division.
- (b) In the event the parties wish to deviate from the form set forth in Appendix B, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.
- (c) In the event the parties wish to incorporate a privilege claw-back provision into either (i) the confidentiality order to be utilized in their commercial case, or (ii) another form of order utilized by the Justice presiding over the matter, they shall utilize the text set forth in Appendix E to these Rules of the Commercial Division. In the event the parties wish to deviate from the language in Appendix E, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.

- (d) In the event the parties wish to incorporate Attorney's Eyes-Only protection, the parties shall submit to the Court for signature the proposed stipulation and order that appears in Appendix F to these Rules of the Commercial Division. Appendix F provides both a clean form of order as well as a redline, which illustrates how it differs from the confidentiality order without Attorney's Eyes-Only protection and referenced in Rule 11-g(a) above. In the event the parties wish to deviate from the Attorney's Eyes-Only form set forth in Appendix F, they shall submit to the Court a redline of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.
- (e) Nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the Civil Practice Law and Rules.

Appendix E. Commercial Division Privilege Clawback Provision (Rule 11-g[c]).

In connection with their review of electronically stored information and hard copy documents for production (the "Documents Reviewed") the Parties agree as follows:

- (a) to implement and adhere to reasonable procedures to ensure Documents Reviewed that are protected from disclosure pursuant to CPLR 3101(c), 3101(d)(2) and 4503 ("Protected Information") are identified and withheld from production.
- (b) if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.
- (c) upon request by the Producing Party for the return of Protected Information inadvertently produced the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.

B. Proposed Revision to Rule 11-g and Appendices B, E and F

Rule 11-g.

The following procedure shall apply in those parts of the Commercial Division where the justice presiding so elects:

- (a) For all commercial cases that warrant the entry of a confidentiality order, the parties shall submit to the Court for signature the proposed stipulation and order that appears in Appendix B to these Rules of the Commercial Division.
- (b) In the event the parties wish to deviate from the form set forth in Appendix B, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.
- (c) In the event the parties wish to incorporate a privilege claw-back provision into either (i) the confidentiality order to be utilized in their commercial case, or (ii) another form of order utilized by the Justice presiding over the matter, they shall utilize the text set forth in **Appendix B, Paragraph 18** ~~Appendix E~~ to these Rules of the Commercial Division. In the event the parties wish to deviate from the language in **Appendix B, Paragraph 18** ~~Appendix E~~, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.
- (d) In the event the parties wish to incorporate Attorney's Eyes-Only protection, the parties shall submit to the Court for signature the proposed stipulation and order that appears in **Appendix E** ~~Appendix F~~ to these Rules of the Commercial Division. **Appendix E** ~~Appendix F~~ provides both a clean form of order as well as a redline, which illustrates how it differs from the confidentiality order without Attorney's Eyes-Only protection and referenced in Rule 11-g(a) above. In the event the parties wish to deviate from the Attorney's Eyes-Only form set forth in Appendix F, they shall submit to the Court a redline of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.
- (e) Nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the Civil Practice Law and Rules.

Appendix B.

The Advisory Council recommends a revised Appendix B model confidentiality order (the “Proposed Revised Model Confidentiality Order”) that includes the Commercial Division Privilege Clawback Provision, which is currently Appendix E to the Commercial Division Rules. The Proposed Revised Model Confidentiality Order is attached as Exhibit 4.

Appendix E.

The Advisory Council recommends that Appendix E be removed in its entirety.

Appendix F.

~~Appendix E~~ Appendix F. Standard Form Of Confidentiality Order With Attorney’s.

C. Rationale for Revision

The Advisory Council recommends including the Commercial Division Privilege Clawback Provision in the Proposed Revised Model Confidentiality Order in order to encourage parties to take advantage of that provision. In order to ensure that the parties explicitly agree to the Privilege Clawback Provision, that provision requires the parties to initial their assent to its inclusion.

Because the Privilege Clawback Provision is included in the Proposed Revised Model Confidentiality Order, it is no longer needed as a separate appendix; Appendix E can be deleted, and the current Appendix F relabeled as Appendix E.

July 15, 2021

**TO:** The Administrative Board of the Courts

**FROM:** The Commercial Division Advisory Council

**RE:** Proposed Modifications to Appendix A to the Commercial Division Rules

This memorandum provides a suggested replacement for Appendix A to the Commercial Division Rule 11-c that the Technology Committee of the Commercial Division Advisory Council has recommended. The Advisory Council now respectfully submits the following replacement Appendix A for the Administrative Board of the Courts' consideration and approval.

**Appendix A. Guidelines for Discovery of Electronically Stored Information (“ESI”).**

A. Current Appendix A

The current Appendix A comprise Guidelines for Discovery of Electronically Stored Information (“ESI”) from Non-Parties (“Non-Party ESI Guidelines”), attached as Exhibit 2.

B. Proposed Replacement Appendix A

The proposed replacement Appendix A comprise Guidelines for Discovery of ESI (“Proposed ESI Guidelines”), attached as Exhibit 3.

C. Rationale for Revision

The Advisory Council proposes to replace the Non-Party ESI Guidelines with new guidelines to cover all aspects of ESI, from parties and non-parties alike.

The Proposed ESI Guidelines address all of the topics that the existing Non-Party ESI Guidelines, namely:

- Encouraging early discussions regarding ESI;
- Encouraging discussions about the scope of ESI preservation and litigation holds;
- Limiting ESI discovery requests to what is proportional to the needs of the case;
- Encouraging resolution of ESI disputes through informal mechanisms rather than motion practice;

- Providing that the requesting party should defray a nonparty's reasonable production expenses;

By extending the application of the guidelines to party discovery, the Proposed ESI Guidelines allow the benefits of the above practices to accrue in party discovery as well as non-party discovery.

In addition, the Proposed ESI Guidelines provide guidance on a number of e-discovery topics not addressed by the existing Non-Party ESI Guidelines, namely:

- Encouraging cooperation and good faith conduct in the discovery process;
- Reminding counsel of the importance of technical competence with regard to e-discovery;
- Reminding counsel of its obligation to actively assist its client in the preservation, collection, search, review, and production of ESI in discovery;
- Providing guidance on the defensible preservation and collection of sources of ESI;
- Setting forth a process for parties to address ESI that is "not reasonably accessible" due to undue burden or cost;
- Providing guidance on the selection of appropriate procedures, methodologies, and technologies for producing ESI, including the use of technology assisted review;
- Setting forth a process for parties to discuss and agree on acceptable formats for the production of ESI;
- Providing protection against waiver for privileged ESI that is inadvertently produced;
- Providing guidance on when it is appropriate to shift discovery costs from the producing party to the requesting party.

The Proposed ESI Guidelines incorporate significant developments in the law and practice with respect to e-discovery. As reflected by the annotations in the attached Exhibit 3, they are informed by rules and practices set forth in the ESI guidelines of several federal district and state courts, federal and New York decisional law, and commentaries published by The Sedona Conference.

The Proposed ESI Guidelines are advisory rather than mandatory. Thus, while providing helpful guidance, they allow courts discretion and flexibility in applying them to specific matters.

The Proposed ESI Guidelines also provide much more detailed guidance than could reasonably be provided in the Commercial Division rules themselves. This permits parties and courts to benefit from the guidelines while not being bound to rules that are overly complex and prone to becoming outdated. As e-discovery law and practice changes in the coming years, the Proposed ESI Guidelines can be updated without requiring amendments to the Commercial Division Rules themselves.

# **Exhibit 1**



### Proposed Rule 11-c

#### Rule 11-c. Discovery of Electronically Stored Information.

(a) Parties ~~and nonparties should adhere~~ should consult to the Commercial Division's Guidelines for Discovery of Electronically Stored Information ("ESI") (the ESI "Guidelines") ~~from nonparties~~, which can be found in Appendix A to these Rules of the Commercial Division.

(b) Prior to the preliminary conference, counsel shall confer with regard to ~~anticipated~~ electronic discovery ~~issues~~ topics, including those issues set forth in the ESI Guidelines. Such ~~issues~~ topics shall be addressed with the court at the preliminary conference, ~~and shall include but not be limited to~~ (i) identification of potentially relevant types or categories of electronically stored information ("ESI") and the relevant time frame; (ii) ~~disclosure of the applications and manner in which the ESI is maintained;~~ (iii) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible; (iv) implementation of a preservation plan for potentially relevant ESI; (v) identification of the individual(s) responsible for preservation of ESI; (vi) the scope, extent, order, and form of production; (vii) ~~identification, redaction, labeling, and logging of privileged or confidential ESI;~~ (viii) ~~claw back or other provisions for privileged or protected ESI;~~ (ix) the scope or method for searching and reviewing ESI; (x) the ~~anticipated cost and burden of data recovery and proposed initial allocation of such costs;~~ and (xi) designation of experts; and (xii) ~~the need to vary the presumptive number or duration of depositions set forth in Rule 11-d.~~

(c) Requests for the production of ESI may specify the format in which ESI shall be produced. In the absence of such specification, or agreement among the parties or court order, the production of electronic documents shall ~~normally be in the form in which it is ordinarily maintained, or made~~ in a searchable format that is usable by the party receiving the ESI ~~documents;~~ (d) ~~the description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute; and~~

(d) ~~where~~ The costs and burdens of e-discovery of ESI are shall not be disproportionate to its benefits, considering the nature of the dispute, ~~or to~~ the amount in controversy, and the or to the relevance importance of the materials requested to resolving the dispute. ~~;~~ the ~~A~~ court will either shall may deny or modify ~~such disproportionate~~ requests or ~~order~~ disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment.

(e) The requesting party shall promptly defray the reasonable expenses associated with a non-party's production of ESI, in accordance with Rules 3111 and 3122(d) of the CPLR.

**Commented [A1]:** Proposed Rule 11-c draws significantly from current Commercial Division Rules.

The source for each provision is marked with comments, denoting which Rule the section is based on. Changes to the source text are reflected in track changes.

**Commented [A2]:** See Rule 11-c.

**Commented [A3]:** See Rule 8(b).

**Commented [A4]:** See Rule 9(d).

**Commented [A5]:** See Commercial Division Guidelines regarding Discovery of ESI from Non-Parties, Section V.

(f) The parties are encouraged to use ~~the most~~ efficient means to identify review documents, including electronically stored information (“ESI”) for production, that is consistent with the parties’ disclosure obligations under Article 31 of the CPLR and proportional to the needs of the case. Such means which may include technology-assisted review, ~~including predictive coding,~~ in appropriate cases. The parties ~~are encouraged to~~ shall confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they ~~intend~~ propose to use in document review and production.

**Commented [A6]:** See Rule 11-e(f)

(g) Inadvertent or unintentional production of ESI or documents containing information that is subject to the attorney-client privilege, work product protection, or other generally-recognized privilege shall not be deemed a waiver in whole or in part of such privilege if the producing party (i) took reasonable precautions to prevent disclosure, and (ii); after learning of ~~such the~~ inadvertent disclosure, ~~the Producing Party~~ promptly ~~gives~~ gave notice either in writing, or later confirmed in writing, to the Rreceiving Pparty or Pparties that such information was inadvertently produced and requests that the Rreceiving pParty or parties return or destroy the original-produced data ESI. ~~Absent a challenge under this paragraph or during the pendency of any such challenge, or contemplated challenge;~~ Upon such notice, or as otherwise required, the Rreceiving Pparty or Pparties shall ~~sequester or promptly~~ return or destroy all such material, including copies, except as may be necessary to bring a challenge before the Court, ~~to the Producing Party promptly upon receipt of the written notice and request for return.~~ The parties may extend or modify the protections and duties of this provision by written agreement, as provided in Rule 11-g(c), which shall be submitted to the Court to be ordered. Nothing in these rules shall abridge a lawyer’s obligations under Rule 4.4(b) of the New York Rules of Professional Conduct concerning a lawyer’s receipt of documents that appear to have been inadvertently sent.

**Commented [A7]:** See Nassau County Guidelines, Section VI.

(h) ~~Sanctions may also be imposed if~~ Consistent with CPLR 3126, a party should take reasonable steps ~~fails to maintain and preserve ESI, as provided in paragraph 12(c) of the Preliminary Conference Stipulation and Order.~~ that it has a duty to preserve.

**Commented [A8]:** See Nassau County Guidelines, Section VII.  
B

# **Exhibit 2**

## APPENDIX A. GUIDELINES FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION (“ESI”) FROM NONPARTIES.

### Purpose

The purpose of these Guidelines for Discovery of ESI from Nonparties (the “Guidelines”) is to:

- Provide for the efficient discovery of ESI from nonparties in Commercial Division cases;
- Encourage the early assessment and discussion of the potential costs and burdens to be imposed on nonparties in preserving, retrieving, reviewing and producing ESI given the nature of the litigation and the amount in controversy;
- Identify the costs of nonparty ESI discovery that will require defrayal by the party requesting the discovery; and
- Encourage the informal resolution of disputes between parties and nonparties regarding the production of ESI, without Court supervision or intervention whenever possible.

These Guidelines are not intended to modify governing case law or to replace any parts of the Rules of the Commercial Division of the Supreme Court (the “Commercial Division Rules”), the Uniform Civil Rules for the Supreme Court (the “Uniform Civil Rules”), the New York Civil Practice Law and Rules (the “CPLR”), or any other applicable rules or regulations pertaining to the New York State Unified Court System. These Guidelines should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, and any other applicable rules and regulations. Parties seeking ESI discovery from nonparties in Commercial Division cases are recommended to cite to or reference Rule 11-c of the Commercial Division Rules and these Guidelines in their requests for ESI discovery.

### Definition of ESI

As used herein, “ESI” includes any electronically stored information stored in any medium from which such information can be obtained, either directly or after translation by the responding party into a reasonably usable form.

### Guidelines

- I. Subject to all applicable court rules regarding discovery, a party seeking ESI discovery from a nonparty and the nonparty receiving the request for ESI

discovery are encouraged to engage in discussions regarding the ESI to be sought as early as permissible in an action.

- II. Notwithstanding whether or when the legal duty to preserve ESI arises, which is governed by case law, a party seeking ESI discovery from a nonparty is encouraged to discuss with the nonparty any request that the nonparty implement a litigation hold.
- III. A party seeking ESI discovery from a nonparty should reasonably limit its discovery requests, taking into consideration the following proportionality factors:
  - A. The importance of the issues at stake in the litigation;
  - B. The amount in controversy;
  - C. The expected importance of the requested ESI;
  - D. The availability of the ESI from another source, including a party;
  - E. The “accessibility” of the ESI, as defined in applicable case law; and
  - F. The expected burden and cost to the nonparty.
- IV. The requesting party and the nonparty should seek to resolve disputes through informal mechanisms and should initiate motion practice only as a last resort. The requesting party and the nonparty should meet and confer concerning the scope of the ESI discovery, the timing and form of production, ways to reduce the cost and burden of the ESI discovery (including but not limited to: an agreement providing for the clawing-back of privileged ESI; and the use of advanced analytic software applications and other technologies that can screen for relevant and privileged ESI), and the requesting party’s defrayal of the nonparty’s reasonable production expenses. In connection with the meet and confer process, the requesting party and the nonparty should consider the proportionality factors set forth in paragraph III. In the event no agreement is reached through the meet and confer process, the requesting party and the nonparty are encouraged to seek resolution by availing themselves of the Court System’s resources, such as by requesting a telephonic conference with a law clerk or special referee or the appointment of an unpaid mediator in accordance with Rule 3 of the Commercial Division Rules.
- V. The requesting party shall defray the nonparty’s reasonable production expenses in accordance with Rules 3111 and 3122(d) of the CPLR. Such reasonable production expenses may include the following:
  - A. Fees charged by outside counsel and e-discovery consultants;

- B. The costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production;
- C. The cost of disruption to the nonparty's normal business operations to the extent such cost is quantifiable and warranted by the facts and circumstances; and
- D. Other costs as may be identified by the nonparty.

# **Exhibit 3**

**APPENDIX A**  
**Commercial Division**  
**Guidelines for Discovery of**  
**Electronically Stored Information (“ESI”)**

The purpose of these Guidelines for Discovery of ESI (the “Guidelines”) is to:

- Provide efficient discovery of ESI (a.k.a., e-discovery) in civil cases;
- Assist counsel in identifying ESI issues to be considered and addressed with its client;
- Encourage the early assessment and discussion of the costs of preserving, retrieving, reviewing and producing ESI given the nature of the litigation and the amount in controversy;
- Facilitate an early evaluation of the significance of and/or need for ESI in light of the parties’ claims or defenses;
- Assist parties in resolving disputes regarding ESI informally and without Court supervision or intervention whenever possible;
- Encourage meaningful discussions and cooperation between parties; and
- Ensure a productive Preliminary Conference by, among other things, identifying terms and issues that will be addressed at the Preliminary Conference and/or in the Preliminary Conference Stipulation and Order.

The Guidelines are advisory only and intended to facilitate compliance with the CPLR, the Uniform Civil Rules for the Supreme Court, and the Rules of the Commercial Division of the Supreme Court. In the case of any conflict between the Guidelines and these rules, the relevant rules should control.

Parties are encouraged to review the Guidelines at or before the commencement of proceedings.

**I. CONDUCT OF THE E-DISCOVERY PROCESS**

- A. Parties are encouraged to share information relating to the e-discovery process, and to attempt in good faith to resolve disputes about ESI through the informal meet and confer process where possible, rather than through formal discovery or motion practice. Such informal discussions are strongly encouraged at the earliest reasonable stage of the discovery process. An attorney’s advocacy for a client is not compromised by conducting discovery in a cooperative manner, which tends to reduce litigation costs and delay, and facilitate the cost-effective, predictable and fair adjudication of cases.
- B. Parties should tailor requests for ESI to what is reasonable and proportionate, considering the burdens of the requested discovery, the nature of the dispute, the amount in controversy, and the importance of the materials requested to resolving those issues. Parties should not use discovery of ESI for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.
- C. Consistent with New York Rule of Professional Conduct 1.1, counsel should be familiar with the legal and technical aspects of e-discovery in the matter so that it may

**Commented [A1]:** These guidelines draw significantly from the Nassau County Commercial Division (“Nassau County”), N.D. Cal. and D. Colo. ESI Guidelines.

The source or base for the sections and provisions are marked with comments, denoting whether the section is based on the Nassau County, N.D. Cal. or the D. Colo. Guidelines or other sources (e.g., relevant case law, the Federal Rules of Civil Procedure or publications by the Sedona Conference).

**Commented [A2]:** This section is based on the Nassau County Guidelines, with some updates and additions.

**Commented [A3]:** This provision is based generally on the D. Colo. Guidelines, Commentary 1.1.

**Commented [A4]:** This provision is based generally on both D. Colo. Guidelines, Commentary 1.3 and N.D. Cal. Guideline 1.02.

**Commented [A5]:** This provision generally tracks FRCP 26(g) regarding duties for the appropriate use of discovery.



appropriately advise its client how to conduct discovery in an efficient and legally defensible manner. This should include legal knowledge and skill with respect to the rules and case law related to e-discovery; its client's storage, organization, and format of ESI; and relevant information retrieval technology. Where appropriate (*e.g.*, in cases where there will likely be significant ESI discovery), and in order to assist with competent representation with respect to ESI issues, the parties should consider each designating an ESI Liaison, a person with particular knowledge and expertise about the parties' electronic systems and the e-discovery process, who can be prepared to participate in informal resolution of ESI disputes between the parties and presentation of issues to the Court should the need arise.

**Commented [A6]:** This provision is based generally on N.D. Cal. Guideline 2.05

## II. **PRELIMINARY CONFERENCE**

A. Consistent with Rule [11-c(b)], the parties should confer with the client with regard to anticipated electronic discovery issues prior to the Rule 7 Preliminary Conference. The Parties should consider a written stipulation for the preservation, collection, review and production of ESI, and consider submitting that agreement to the court to be ordered. Issues that cannot be resolved between the parties should be presented to the Court for resolution prior to or at the Preliminary Conference.

**Commented [A7]:** This section is based generally on the Nassau County Guidelines, Section II and the current version of Rule 8(b). Some revisions and additions were made to the Nassau County Guidelines. For example, the Nassau County Guidelines suggested certain topics that seemed more expansive than necessary in most cases; those topics were edited or removed.

**Commented [A8]:** Hereinafter, brackets indicate that the reference is to the PROPOSED rule.

B. Matters related to ESI that should be discussed prior to the Preliminary Conference should generally include:

1. the extent to which e-discovery is likely to be necessary for the just and efficient resolution of the dispute;
2. the appropriate scope of preservation, including any sources of ESI that do not need to be preserved because they are not reasonably accessible;
3. any potential conflicts between a party's discovery obligations and state, federal, and foreign laws governing the use and disclosure of protected personal, health, financial, trade secret and other information;
4. the identification of relevant custodians, time frame, and sources of ESI, including the identification of ESI sources that are not reasonably accessible;
5. the method for searching and reviewing ESI, including the use of search terms, the exclusion of certain types of documents and other non-discoverable information from discovery, the use of de-duplication and email thread suppression, and the use of technology assisted review ("TAR").
6. the appropriate format for production of ESI;
7. identification, redaction, labeling, and logging of privileged and other ESI protected from discovery or disclosure, including agreement on the clawback of inadvertently produced materials;

**Commented [A9]:** This provision was added to allow for the possibility that e-discovery may be limited in smaller cases or where the issues can be resolved without extensive ESI searches.

8. the anticipated cost and burden of ESI discovery and whether cost-sharing or cost-shifting is appropriate;
9. opportunities to reduce costs and increase efficiency and speed of e-discovery, such as through the phasing of discovery so as to prioritize searches that are most likely to be relevant, the use of sampling to test the likely relevance of searches, alternative methods for logging privilege information, and/or sharing expenses like those related to litigation document repositories.

### III. **PRESERVATION AND COLLECTION OF ESI**

- A. Counsel should take an active role in assisting its client in the preservation and collection of ESI. This should include becoming knowledgeable about relevant ESI in its client's possession, custody, or control, and how such information is generated, maintained, retained, and disposed. Counsel should assist its client in all stages of the preservation and collection process, including the implementation of an effective legal hold, reasonable monitoring of compliance with that legal hold, identification of sources of relevant ESI, and defensible collection of that ESI.
- B. Counsel should be knowledgeable of the sources where a client's discoverable ESI may exist, including workstations, email systems, instant messaging systems, document management systems (e.g., Google Drive, Sharepoint, Confluence), collaboration tools (e.g., Microsoft Teams, Slack), social media, mobile devices and apps, cloud-based storage, back-up systems, and structured databases, so that it may advise its client as to whether such sources need to be collected and searched. Where counsel is not itself knowledgeable with respect to such sources, it should consult with persons with appropriate subject-matter expertise, knowledge, and competence.
- C. A party should take reasonable steps to identify and to preserve relevant data in its possession, custody, or control once litigation is pending or is reasonably anticipated. Factors to consider in formulating such steps should include, but are not limited to:
  1. the claims, defenses, and relevant facts in dispute;
  2. relevant time frames, geographic locations, and individuals;
  3. the types of ESI that may be relevant to the claims and defenses and the current repositories and custodians of that data;
  4. whether legacy, archived, or offline ESI sources are reasonably likely to contain relevant, non-duplicative information;
  5. whether there are third-party sources that have relevant information that falls within the preservation obligation and, if so, what actions should be taken to preserve that ESI;
  6. whether any automatic or routine document retention or destruction policies should be suspended or modified; and

**Commented [A10]:** This section is based generally on N.D. Cal. Guideline 2.01, with some additions from the D. Colo. Guideline 2 and relevant case law.

**Commented [A11]:** This provision is based on D. Colo. Guidelines, Commentary 2.1.

**Commented [A12]:** This provision generally reflects the case law requiring counsel's role in assisting clients in these activities. Also draws on Del. Chancery Court guidelines.

**Commented [A13]:** This provision is based generally on D. Colo. Guidelines, Commentary 3.3. It is an elaboration of the above requirement that highlights the myriad sources of potentially relevant ESI that counsel should be aware of.

7. the circumstances and information known or reasonably available to counsel and the parties at the time the preservation efforts at issue are or were undertaken.

**Commented [A14]:** This provision is based on D. Colo. Guidelines, Commentary 2.2.

D. Reasonable preservation steps should include a written litigation hold(s) to be distributed to relevant individuals as soon as litigation is reasonably anticipated and/or has commenced. Reasonable preservation may also require affirmative action in order to ensure relevant ESI is not lost through the operation of processes that may automatically delete ESI. Parties should also consider the preservation risks associated with the use of “ephemeral” messaging systems (e.g., Snapchat, Telegram) that facilitate the disappearance of messages after they have been read by a recipient.

**Commented [A15]:** This provision is based generally on, and is generally consistent with, the case law.

**Commented [A16]:** See The Sedona Conference, *Commentary on Ephemeral Messaging* (January 2021).

E. The parties should discuss preservation, including the implementation of litigation holds, in order to ensure that the scope of preservation is reasonably tailored and not unduly burdensome. Such a discussion should occur at the onset of the case and periodically throughout the case as issues evolve. Preservation letters are not required to notify an opposing party of its preservation obligation. If a party does send a preservation letter, the letter should not be overbroad but rather should provide reasonable detail to allow informed decisions about the scope of the preservation obligation, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the party knows or believes are likely to contain relevant information, and any other information that might assist the responding party in determining what information to preserve. A party has a duty to preserve relevant ESI, consistent with its common law, statutory, regulatory, or other duties, regardless of a preservation letter from an opposing party.

**Commented [A17]:** This language is based on D. Colo. Guidelines, Commentary 2.3.

**Commented [A18]:** This language is based on D. Colo. Guidelines, Commentary 2.3.

**Commented [A19]:** This provision is based generally on N.D. Cal. Guideline 2.01.

F. For some sources of ESI, the burden of preserving them outweighs the potential benefit of unique, relevant ESI they may contain. The parties should discuss whether such sources need to be preserved beyond what may be preserved pursuant to normal business retention practices.

**Commented [CSM20]:** This language is based on D. Colo. Guidelines, Commentary 3.6.

#### IV. ESI NOT REASONABLY ACCESSIBLE

A. As the term is used herein, ESI should not be deemed “not reasonably accessible” based solely on its source or type of storage media. Inaccessibility is based on the burden and expense of recovering and producing the ESI and the relative need for the data. Whether data are not reasonably accessible due to undue burden or cost will depend on the facts of the case.

**Commented [A21]:** This provision is based on Nassau County Guidelines, Section IV.

**Commented [A22]:** This language is based on D. Colo. Guidelines, Commentary 3.6.

B. No party should object to the discovery of ESI on the basis that it is not reasonably accessible unless the objection has been stated with particularity, and not in conclusory or boilerplate language. The party asserting that ESI is not reasonably accessible should be prepared to specify facts that support its contention, including submitting an appropriate and detailed analysis in the form of an affidavit.

**Commented [A23]:** This provision is based on Nassau County Guidelines, Section IV.

C. If the requesting party intends to seek discovery of ESI from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, and consider conditions on obtaining this information, such as

limits as to the scope, and allocation of costs between the requesting party and the producing party, as set forth in Rule [11-c(d)] and in accordance with Section VIII of the Guidelines.

**Commented [A24]:** This provision is based on D. Colo. Guidelines, Commentary 3.6.

## V. **SEARCHING, FILTERING AND REVIEWING ESI**

**Commented [A25]:** This section is based generally on D. Colo. Guidelines, Commentary 3.4, with some revisions and additions.

A. Ordinarily, the producing party is best situated to evaluate the procedures, methodologies, and technologies for producing their own ESI, though a producing party should engage in a good faith exchange of information about its process and attempt to resolve any disputes regarding the process to be employed.

**Commented [A26]:** See The Sedona Conference, *The Sedona Principles Third Edition* (October 2017).

B. Counsel should take an active role in assisting its client in the search and review of ESI. Counsel should assist its client in all stages of the search and review process, including, as appropriate, use of search terms and other methods for filtering ESI, review of ESI to determine what is responsive and/or privileged, and the production of responsive ESI.

**Commented [A27]:** This provision generally reflects the case law requiring counsel's role in assisting clients in these activities. It also draws on Del. Chancery Court guidelines.

C. A search methodology need not be perfect but it should be reasonable under the circumstances. A reasonable methodology may include steps to reduce the volume of data by removing ESI that is duplicative, cumulative, or not reasonably likely to contain information within the scope of discovery.

D. The parties should exchange reasonable information about a party's process for searching and reviewing ESI, including search terms to be used, filtering out of certain file types, date filters, de-duplication, email thread suppression, and the use of technology assisted review (TAR) to aid in the review process.

E. Consistent with Rule [11-c(f)], the parties are encouraged to use efficient means to identify ESI for production, including TAR in appropriate situations. So that use of TAR is not unjustifiably discouraged, its use should not be held to a higher standard than the use of search term keywords or manual review. Counsel employing TAR should ensure that it is sufficiently knowledgeable regarding its use and/or associate with persons with appropriate subject-matter expertise, knowledge, and competence.

**Commented [A28]:** See *Rio Tinto v. Vale*, No. 14-CV-3042, 2016 WL 872294, at \*1, 3 (S.D.N.Y. Mar. 2, 2015).

**Commented [A29]:** This provision was added to ensure counsel is sufficiently knowledgeable about Technology Assisted Review ("TAR") prior to using it.

## VI. **FORM OF PRODUCTION OF ESI**

A. As set forth in Rule [11-c(c)], a party requesting ESI may specify the format in which ESI shall be produced. The party responding to that request may object to the requested format to the extent it is burdensome or for any other valid reason, and if it does so, it should specify with particularity the format in which it proposes to produce ESI, about which the parties should meet and confer, consistent with Rule [11-c(c)]. The parties are encouraged to reach agreement on a format for the production of ESI to avoid unnecessary expense and the risk of costly re-productions.

**Commented [A30]:** This provision is based on the procedure required under FRCP 34; added to clarify the process for requesting/objection to the format of ESI.

B. Agreement on the form of production of ESI should address, among other issues, the following:

- whether documents should be produced as images (e.g., TIFF, JPG) or as native files;

2. how searchable text associated with documents should be provided;
3. what metadata fields should be provided;
4. how documents should be labeled (e.g., by bates number) and how confidentiality designations and privilege redactions should be applied;
5. production formats for non-document forms of ESI, such as multimedia, text messages, instant messages, social media, and structured databases.

C. Ordinarily, absent agreement or court order to the contrary, a party should be permitted to produce ESI in the form in which it is ordinarily maintained, i.e., its native format. Where the native format would be unusable to the requesting party, the parties should meet and confer on a reasonable format.

D. The producing party should not reformat, scrub or alter the ESI to intentionally downgrade the usability of the data.

**Commented [A31]:** Based on D. Colo. Guidelines 3.5, with some updates and revisions.

**Commented [A32]:** This provision was added to address the concern that a party with less sophistication / fewer resources should not be required to reformat ESI to meet particular format requirements where native format will do.

**Commented [A33]:** This provision is based on Nassau County Guidelines, Section III.

## VII. PRIVILEGE AND OTHER PROTECTIONS FROM DISCOVERY

A. Parties should take reasonable steps to safeguard ESI subject to the attorney client privilege or other protections from disclosure. That said, pursuant to Rule [11-c(g)], the inadvertent or unintentional production of ESI containing protected information should not be deemed a waiver if reasonable precautions were taken to prevent disclosure and prompt notice is given of the inadvertent disclosure. The use of search terms or other technology processes rather than wholesale manual review may be considered reasonable precautions to identify privileged material provided that they were appropriately employed.

B. The parties may extend or modify the protections and duties of Rule [11-c(g)] by written agreement.

C. Counsel are reminded of their obligations under Rule 4.4(b) of the New York Rules of Professional Conduct concerning their receipt of documents that appear to have been inadvertently sent to them.

D. Parties should be aware of and give due regard to state, federal, and foreign laws governing the use and disclosure of protected personal, health, financial, trade secret and other information, consistent with their New York discovery obligations.

**Commented [A34]:** This language is based on the Advisory Committee Notes to Fed. R. Evid. 502.

**Commented [A35]:** This provision is based on D. Colo. Guidelines, Commentary 5.2.

**Commented [A36]:** This provision is based on Nassau County Guidelines, Section VI.

**Commented [A37]:** See The Sedona Conference, *International Principles on Discovery, Disclosure & Data Protection in Civil Litigation* (Transitional Edition) (Jan. 2017).

## VIII. COSTS

A. As a general matter, the producing party should bear the cost of searching for, retrieving, and producing ESI. However, where the court determines the request constitutes an undue burden or expense on the responding party, the court may exercise its broad discretion to permit the shifting of costs between the parties. When evaluating whether costs should be shifted, courts should consider:

**Commented [A38]:** These seven factors were outlined in *U.S. Bank Nat. Ass'n v. GreenPoint Mortg. Funding, Inc.*, 94 A.D.3d 58, 63-64 (2012) and reflects the court's decision to follow *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 317-318 (S.D.N.Y. 2003).

**Commented [A39]:** This provision is based generally on, and is consistent with, relevant case law.

1. the extent to which the request is specifically tailored to discover relevant information;
  2. the availability of such information from other sources;
  3. the total cost of production, compared to the amount in controversy;
  4. the total cost of production, compared to the resources available to each party;
  5. the relative ability of each party to control costs and its incentive to do so;
  6. the importance of the issues at stake in the litigation; and
  7. the relative benefits to the parties of obtaining the information.
- B. Where a party seeks production of ESI from a non-party, the party seeking discovery shall promptly defray the reasonable expenses associated with the non-party's production of ESI, in accordance with Rules 3111 and 3122(d) of the CPLR.

**Commented [A40]:** This provision is based on the current Rule 11-c and Appendix A.

# **Exhibit 4**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_

----- X  
\_\_\_\_\_, : Index No. \_\_\_\_\_  
 :  
Plaintiff, :  
 :  
- against - :  
 :  
\_\_\_\_\_, :  
 :  
Defendant. :  
 :  
----- X

**STIPULATION AND  
ORDER FOR THE  
PRODUCTION AND  
EXCHANGE OF  
CONFIDENTIAL  
INFORMATION**

This matter having come before the Court by stipulation of plaintiff, \_\_\_\_\_, and defendant, \_\_\_\_\_, (individually “Party” and collectively “Parties”) for the entry of a protective order pursuant to CPLR 3103(a), limiting the review, copying, dissemination and filing of confidential and/or proprietary documents and information to be produced by either party and their respective counsel or by any non-party in the course of discovery in this matter to the extent set forth below; and the parties, by, between and among their respective counsel, having stipulated and agreed to the terms set forth herein, and good cause having been shown;

IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery of documents and information that the Parties and, as appropriate, non-parties, agree merit confidential treatment (hereinafter the “Documents” or “Testimony”).

2. Any Party or, as appropriate, non-party, may designate Documents produced, or Testimony given, in connection with this action as “confidential,” either by notation on each page



of the Document so designated, statement on the record of the deposition, or written advice to the respective undersigned counsel for the Parties hereto, or by other appropriate means.

3. As used herein:

(a) “Confidential Information” shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information or other information the disclosure of which would, in the good faith judgment of the Party or, as appropriate, non-party designating the material as confidential, be detrimental to the conduct of that Party’s or non-party’s business or the business of any of that Party’s or non-party’s customers or clients.

(b) “Producing Party” shall mean the parties to this action and any non-parties producing “Confidential Information” in connection with depositions, document production or otherwise, or the Party or non-party asserting the confidentiality privilege, as the case may be.

(c) “Receiving Party” shall mean the Parties to this action and/or any non-party receiving “Confidential Information” in connection with depositions, document production, subpoenas or otherwise.

4. The Receiving Party may, at any time, notify the Producing Party that the Receiving Party does not concur in the designation of a document or other material as Confidential Information. If the Producing Party does not agree to declassify such document or material within seven (7) days of the written request, the Receiving Party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall continue to be treated as Confidential Information. If such motion

is filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise. Notwithstanding anything herein to the contrary, the Producing Party bears the burden of establishing the propriety of its designation of documents or information as Confidential Information.

5. Except with the prior written consent of the Producing Party or by Order of the Court, Confidential Information shall not be furnished, shown or disclosed to any person or entity except to:

(a) personnel of the Parties actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;

(b) counsel for the Parties to this action and their associated attorneys, paralegals and other professional and non-professional personnel (including support staff and outside copying services) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

(c) expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;

(d) the Court and court personnel;

(e) an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;

(f) trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 9 and 10, respectively, hereof; and

(g) any other person agreed to by the Producing Party.

6. Confidential Information shall be utilized by the Receiving Party and its counsel only for purposes of this litigation and for no other purposes.

7. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(c) hereof, counsel for the Receiving Party making such disclosure shall provide to the expert witness or consultant a copy of this Stipulation and obtain the expert's or consultant's written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Receiving Party obtaining the certificate shall supply a copy to counsel for the other Parties at the time designated for expert disclosure, except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied.

8. All depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the Parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

9. Should the need arise for any Party or, as appropriate, non-party, to disclose Confidential Information during any hearing or trial before the Court, including through argument or the presentation of evidence, such Party or, as appropriate, non-party may do so only after taking such steps as the Court, upon motion of the Producing Party, shall deem necessary to preserve the confidentiality of such Confidential Information.

10. This Stipulation shall not preclude counsel for any Party from using during any deposition in this action any Documents or Testimony which has been designated as “Confidential Information” under the terms hereof. Any deposition witness who is given access to Confidential Information shall, prior thereto, be provided with a copy of this Stipulation and shall execute a written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Party obtaining the certificate shall supply a copy to counsel for the other Parties and, as appropriate, a non-party that is a Producing Party. In the event that, upon being presented with a copy of the Stipulation, a witness refuses to execute the agreement to be bound by this Stipulation, the Court shall, upon application, enter an order directing the witness’s compliance with the Stipulation.

11. A Party may designate as Confidential Information subject to this Stipulation any document, information, or deposition testimony produced or given by any non-party to this case, or any portion thereof. In the case of Documents, produced by a non-party, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the Party asserting the confidentiality privilege. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the Party (or, as appropriate, non-party) asserting the confidentiality. Prior to the expiration of such fifteen (15) day period (or until a designation is made by counsel, if such a designation is made in a shorter period of time), all such Documents and Testimony shall be treated as Confidential Information.

### **In Counties WITH Electronic Filing**

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(a) A Party or, as appropriate, non-party, who seeks to file with the Court (i) any deposition transcripts, exhibits, answers to interrogatories, or other documents which have previously been designated as comprising or containing Confidential Information, or (ii) any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information shall file the document, pleading, brief, or memorandum on the NYSCEF system in redacted form until the Court renders a decision on any motion to seal (the “Redacted Filing”). If the Producing Party fails to move to seal within seven (7) days of the Redacted Filing, the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(b) In the event that the Party’s (or, as appropriate, non-party’s) filing includes Confidential Information produced by a Producing Party that is a non-party, the filing Party shall so notify that Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant Producing Party’s Confidential Information unredacted.

(c) If the Producing Party makes a timely motion to seal, and the motion is granted, the filing Party (or, as appropriate, non-party) shall ensure that all documents (or, if directed by the court, portions of documents) that are the subject of the order to seal are filed in accordance with the procedures that govern the filing of sealed documents on the NYSCEF system. If the Producing Party’s timely motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) Any Party filing a Redacted Filing in accordance with the procedure set forth in this paragraph 12 shall, contemporaneously with or prior to making the Redacted Filing, provide the other Parties and the Court with a complete and unredacted version of the filing.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any materials which have previously been designated by a party as comprising or containing Confidential Information shall identify such documents by the production number ascribed to them at the time of production.

**In Counties WITHOUT Electronic Filing**

13. (a) A Party or, as appropriate, non-party, who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information, or any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information, shall (i) serve upon the other Parties (and, as appropriate, non-parties) a Redacted Filing and a complete and unredacted version of the filing; (ii) file a Redacted Filing with the court; and (iii) transmit the Redacted Filing and a complete unredacted version of the filing to chambers. Within three (3) days thereafter, the Producing Party may file a motion to seal such Confidential Information.

(b) If the Producing Party does not file a motion to seal within the aforementioned three (3) day period, the Party (or, as appropriate, non-party) that seeks to file the Confidential Information shall take steps to file an unredacted version of the material.

(c) In the event the motion to seal is granted, all (or, if directed by the court, portions of) deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated by a Party (or, as appropriate, non-party) as comprising

or containing Confidential Information, and any pleading, brief or memorandum which reproduces, paraphrases or discloses such material, shall be filed in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words “CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION” as well as an indication of the nature of the contents and a statement in substantially the following form:

“This envelope, containing documents which are filed in this case by (name of Party or as appropriate, non-party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of the parties. Violation hereof may be regarded as contempt of the Court.”

In the event the motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) In the event that the Party’s (or, as appropriate, non-party’s) filing includes Confidential Information produced by a Producing Party that is non-party, the Party (or, as appropriate, non-party) making the filing shall so notify the Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant non-party’s Confidential Information unredacted.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any documents which have previously been designated by a party as comprising or containing Confidential Information shall identify such documents by the production number ascribed to them at the time of production.

14. Any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms

hereof and shall use reasonable measures to store and maintain the Confidential Information so as to prevent unauthorized disclosure.

15. Any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its “confidential” nature as provided in paragraphs 2 and/or 11 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving Party identifying the document or information as “confidential” within a reasonable time following the discovery that the document or information has been produced without such designation.

16. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions of this Stipulation.

17. The production or disclosure of Confidential Information shall in no way constitute a waiver of each Producing Party’s right to object to the production or disclosure of other information in this action or in any other action. Nothing in this Stipulation shall operate as an admission by any Party or non-party that any particular document or information is, or is not, confidential. Failure to challenge a Confidential Information designation shall not preclude a subsequent challenge thereto.

Initial  
assent to  
Paragraph  
18:

18. In connection with their review of electronically stored information and hard copy documents for production (the "Documents Reviewed") the Parties agree as follows:

(a) to implement and adhere to reasonable procedures to ensure Documents Reviewed that are protected from disclosure pursuant to CPLR 3101(c), 3101(d)(2) and 4503 (“Protected Information”) are identified and withheld from production.



(b) if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.

(c) upon request by the Producing Party for the return of Protected Information inadvertently produced the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.

~~18.19.~~ This Stipulation is entered into without prejudice to the right of any Party or non-party to seek relief from, or modification of, this Stipulation or any provisions thereof by properly noticed motion to the Court or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

~~19.20.~~ This Stipulation shall continue to be binding after the conclusion of this litigation except that there shall be no restriction<sup>9</sup> on documents that are used as exhibits in Court (unless such exhibits were filed under seal); and (b) that a Receiving Party may seek the written permission of the Producing Party or further order of the Court with respect to dissolution or modification of the Stipulation. The provisions of this Stipulation shall, absent prior written consent of the parties, continue to be binding after the conclusion of this action.

~~20.21.~~ Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

~~21~~22 Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof shall be returned to the Producing Party or, at the Receiving Party's option, shall be destroyed. In the event that any Receiving Party chooses to destroy physical objects and documents, such Party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the Parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable rules of professional conduct. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any Receiving Party, or of experts specially retained for this case, to represent any individual, corporation or other entity adverse to any Party or non-party or their affiliate(s) in connection with any other matter.

~~22~~23 If a Receiving Party is called upon to produce Confidential Information in order to comply with a court order, subpoena, or other direction by a court, administrative agency, or legislative body, the Receiving Party from which the Confidential Information is sought shall (a) give written notice by overnight mail and either email or facsimile to the counsel for the Producing Party within five (5) business days of receipt of such order, subpoena, or direction, and (b) give the Producing Party five (5) business days to object to the production of such Confidential Information, if the Producing Party so desires. Notwithstanding the foregoing, nothing in this paragraph shall be construed as requiring any party to this Stipulation to subject

itself to any penalties for noncompliance with any court order, subpoena, or other direction by a court, administrative agency, or legislative body.

~~23~~24. This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a Party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

~~24~~25. This Stipulation may be signed in counterparts, which, when fully executed, shall constitute a single original, and electronic signatures shall be deemed original signatures.

[FIRM]

[FIRM]

By: \_\_\_\_\_

By: \_\_\_\_\_

\_\_\_\_\_

New York, New York

New York, New York

Tel: \_\_\_\_\_

Tel: \_\_\_\_\_

*Attorneys for Plaintiff*

*Attorneys for Defendant*

Dated: \_\_\_\_\_

SO ORDERED

\_\_\_\_\_

J.S.C.

**EXHIBIT "A"**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_

_____	X	
_____,'	:	Index No. _____
Plaintiff,	:	
	:	
- against -	:	<b>AGREEMENT WITH</b>
	:	<b>RESPECT TO</b>
_____,'	:	<b>CONFIDENTIAL</b>
	:	<b>MATERIAL</b>
Defendant.	:	
	:	
_____	X	

I, \_\_\_\_\_, state that:

1. My address is \_\_\_\_\_.
2. My present occupation or job description is \_\_\_\_\_.
3. I have received a copy of the Stipulation for the Production and Exchange of Confidential Information (the "**Stipulation**") entered in the above-entitled action on \_\_\_\_\_.
4. I have carefully read and understand the provisions of the Stipulation.
5. I will comply with all of the provisions of the Stipulation.
6. I will hold in confidence, will not disclose to anyone not qualified under the Stipulation, and will use only for purposes of this action, any Confidential Information that is disclosed to me.
7. I will return all Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information.

8. I hereby submit to the jurisdiction of this court for the purpose of enforcement of the Stipulation in this action.

Dated: \_\_\_\_\_