

## MEMORANDUM

### REGARDING THE PART 3 NEW REVISED PRELIMINARY CONFERENCE ORDER

September 28, 2015

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On May 2, 2014, the Administrative Board of the Courts approved the Preliminary Conference (“PC”) Order form for use in the Commercial Divisions of the New York State Supreme Court starting on June 2, 2014.

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

As a result, the present Part 3 PC Order form has now become dated. This new Part 3 Revised PC Order form attempts to incorporate all the new Rules while also serving as a mechanism to inform the Bar of all the new Discovery Rules.

The new Order Form has as its salient features:

- A new section for Pre-Answer Motion Practice;
- A more streamlined section for the Description of the Case;
- A completely revamped section on Discovery including:
  - (1) A new section incorporating the new Preamble to the Commercial Division Rules, **22 NYCRR 202.70(g)**, particularly the admonition to “*encourage proportionality in discovery. . .*”
  - (2) New language for Document Production pursuant to Rule 11-e(a), **22 NYCRR 202.70(g)(11-e)(a)**;

- (3) New language concerning Interrogatories, Rule 11-a, **22 NYCRR 202.70(g)(11-a)**;
  - (4) A new section concerning Deposition of Individuals including the limitation, without prior court approval, as to the number of depositions and the length of time for each deposition, Rule 11-d, **22 NYCRR 202.70(g)(11-d)**;
  - (5) Another section concerns Deposition of Entities. This new Rule outlines a creative mechanism to streamline the gathering of discovery information from all forms of business entities. The new Rule is outlined in detail in order to provide the Bar with the tools necessary to secure information from these entities;
  - (6) The Revised Part 3 PC Order form also includes information on how to address Disclosure Disputes pursuant to Rule 14, **22 NYCRR 202.70(g)(14)** and Part 3 Rules;
  - (8) The section on Electronic Discovery and Privilege Logs has been completely reworked to condense the previous section pursuant to Rule 8(b), **22 NYCRR 202.70(g)(8)(b)**, and to incorporate the Categorical or Document-by-Document approach to Privilege Logs pursuant to Rule 11-b, **22 NYCRR 202.70(g)(11-b)**;
  - (9) The section on Expert Discovery has been tweaked to remind the parties that there are rules that must be followed in a timely fashion, **22 NYCRR 202.70(g)(13)(c)**;
- The Section on Alternative Dispute Resolution has been reworked to focus the parties on the methods to be used and timing of the use of Alternative Dispute Resolution.
  - Finally, there is a new section concerning Additional Directives emphasizing the need to inform the court of disposition of cases and the absolute need to sign up for the FREE *etrack* notification system in the Court system.

**SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK: PART 3**

-----X

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Plaintiff(s)

- against -

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant(s)

-----X

Present:  
Hon. EILEEN BRANSTEN

Index No.: \_\_\_\_\_

RJI Filing Date: \_\_\_\_\_

**NEW REVISED  
PRELIMINARY  
CONFERENCE ORDER**  
(9-28-2015)

**I. APPEARANCES:** Please include (1) your name; (2) your firm's name and address; (3) your firm's telephone number; (4) your direct telephone number; and (5) your e-mail address.

Plaintiff(s):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant(s):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Please use additional pages, if necessary.

Plaintiff \_\_\_\_\_  
v. Defendant \_\_\_\_\_

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**II. CONFIDENTIALITY AGREEMENT AND ORDER:**

The court recognizes that most cases in the Commercial Division involve facts that are highly sensitive. In such cases, in order for the parties to proceed to proper discovery, the parties should enter into a Confidentiality Agreement which the court will “So Order.”

The parties are directed to use the model Confidentiality Agreement promulgated by the New York City Bar found at:  
*<http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf>*

If the parties need to change the Confidentiality Agreement promulgated in the Trial Part or by the City Bar, the parties are to submit a **signed** Confidentiality Agreement with the changes and a red line copy for the court’s review.

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

The Court \_\_\_\_\_ **HAS** or \_\_\_\_\_ **HAS NOT** “So Ordered” the Confidentiality Agreement and, if the Court has “So Ordered” it, on what date did the Court “So Order” it: \_\_\_\_\_

The parties \_\_\_\_\_ **WILL** or \_\_\_\_\_ **WILL NOT** be entering into a Confidentiality Agreement. If the parties **WILL**, please indicate when the parties expect to enter into the Confidentiality Agreement: \_\_\_\_\_

If the parties have decided that they **WILL NOT** enter into a Confidentiality Agreement, please provide the Court with a brief explanation as to the reason(s) the parties have decided **not** to enter into a Confidentiality Agreement.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Plaintiff \_\_\_\_\_  
v. Defendant \_\_\_\_\_

Index Number: \_\_\_\_\_

**III. PRE-ANSWER MOTIONS**

(a) Has the Plaintiff served an amended complaint?

If so, when \_\_\_\_\_

What are the changes to the Complaint from the original to the amended complaint:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(b) Did Defendant(s) make a pre-answer motion to dismiss?

\_\_\_\_ YES      \_\_\_\_ NO

(c) When did the Court render its decision on the Motion to Dismiss?

\_\_\_\_\_

(d) Is the Court's decision on Appeal?

\_\_\_\_ YES      \_\_\_\_ NO

(e) What Causes of Action remain in the Complaint after the Court's decision?

(i) \_\_\_\_\_  
(ii) \_\_\_\_\_  
(iii) \_\_\_\_\_  
(other) \_\_\_\_\_

(f) When did the Defendant(s) file their answer and counterclaims to the Complaint:

\_\_\_\_\_  
\_\_\_\_\_

Plaintiff \_\_\_\_\_  
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**IV. DESCRIPTION OF THE CASE:** Pursuant to **22 NYCRR 202.12(c)(1)**, please provide a brief description of the factual and legal issues raised in the pleadings of the case:

(a) Plaintiff's salient facts in support of claims/counterclaim defenses:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Amount Demanded: \$ \_\_\_\_\_

(b) If issue has been joined (i.e. if Defendant has answered the Complaint) Defendant \_\_\_\_\_'s, salient facts in support of defenses, counterclaims and Third-Party Claims.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Amount Demanded on the Counterclaim/Third-Party Claims: \_\_\_\_\_

*If there are multiple defendants:*

(c) If issue has been joined (i.e. if Defendant has answered the Complaint), Defendant, \_\_\_\_\_'s, salient facts in support of defenses, counterclaims and Third Party Claims.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Amount Demanded on the Counterclaim/Third-Party Claims: \_\_\_\_\_

Please use additional sheets, if needed.

Plaintiff \_\_\_\_\_  
v. Defendant \_\_\_\_\_

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## V. DISCOVERY

It is hereby **ORDERED** that disclosure shall proceed pursuant to the Commercial Division Rules found at

<http://www.nycourts.gov/rules/trialcourts/202.shtml#70>

### (1) GENERAL ADMONITIONS:

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

### (2) DOCUMENT PRODUCTION

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

Pursuant to **Rule 11-e(a), 22 NYCRR 202.70(g)(11-e)(a)** “For each document request propounded, the responding party shall, in its Response and Objections served pursuant to CPLR 3122(a) (the "Responses"), either:

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

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

(a) Initial demands for discovery and inspection shall be served by all parties on or before \_\_\_\_\_.

(b) Responses to demands shall be served by all parties on or before \_\_\_\_\_

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**(3) INTERROGATORIES**

Pursuant to **Rule 11-a, 22 NYCRR 202.70(g)(11-a)** “Interrogatories (a) are limited to 25 in number, including subparts, unless another limit is specified in the Preliminary Conference Order. This limit applies to consolidated actions as well; (b) Unless otherwise ordered by the court, interrogatories are limited to the following topics: name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of material and necessary documentation, including pertinent insurance agreements, and other physical evidence.

(a) Interrogatories shall be served by all parties on or before \_\_\_\_\_

(b) Answer to interrogatories shall be served on or before \_\_\_\_\_.

**(4) DEPOSITIONS OF INDIVIDUALS:**

Pursuant to **Rule 11-d, 22 NYCRR 202.70(g)(11-d)**,”(a) Unless otherwise stipulated to by the parties or ordered by the court:(1 ) the number of depositions (of individuals) taken by plaintiffs, or by defendants, or by third-party defendants, shall be limited to 10; and (2) depositions shall be limited to 7 hours per deponent.” Please review the remainder of Rule 11-d for additional directives concerning depositions.

(a) Please indicate that the parties have met and conferred concerning the timing of depositions:

\_\_\_\_\_ **YES**

\_\_\_\_\_ **NO**

If **YES**, when \_\_\_\_\_

If **NO**, when will you meet and confer \_\_\_\_\_

(b) Defendant’s deposition of Plaintiff on or before \_\_\_\_\_

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(c) Plaintiff's deposition of Defendant(s) on or before \_\_\_\_\_

(d) **All depositions shall be completed on or before:** \_\_\_\_\_

**(5) DEPOSITION OF ENTITIES:**

A new rule has been proposed (awaiting final action by the Board of Judges) concerning the deposition of entities such as a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or government subdivision, agency or instrumentality, or any other legal or commercial entity.

The new Rule is intended to promote a more efficient process for deposition of entity representatives and reduce the likelihood of a mismatch between the information sought and the witness produced. The proposed Rule and the memorandum in support can be found at: [www.nycourts.gov/rules/comments/index.shtml](http://www.nycourts.gov/rules/comments/index.shtml) April 7, 2015 Proposed adoption of new Commercial Division Rule and amendment to Commercial Rule 11-d, relating to depositions of entity representatives.

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

- (i) A party wishing to take a deposition of an entity will serve a notice or subpoena enumerating those matters to be the subject of the deposition "with reasonable particularity."
- (ii) If the notice or subpoena *does not* name a particular officer, director, member or employee of the entity, the named entity must designate one or more officers, directors, members or employees or other individual(s) who **consent to testify** on its behalf; the identity, description and title of that individual; and the matter(s) on which that individual will testify.
- (iii) If the notice or subpoena *does* name a particular officer, director, member or employee of the entity, the entity, pursuant to CPLR 3106(d), shall produce that individual, **unless**, no later than ten days before the deposition, the entity designates *another individual* who **consents to testify** on its behalf, in the place of the named or subpoenaed officer, director, member or employee of the entity; and

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shall provide the identification, description or title of the new individual, and the matter(s) on which the individual will testify.

- (iv) Deposition testimony given pursuant to this Rule shall be usable against the entity on whose behalf the testimony is given to the same extent provided in CPLR 3117(2).
- (v) The deposition of an entity shall be treated as a *single deposition* even though more than one person may be designated to testify on the entity's behalf. Notwithstanding the foregoing, the cumulative presumptive durational limit is in effect **but** may be enlarged by agreement of the parties or upon application for leave of Court, which shall be freely given.

Names of entities to be deposed:

- (i) For Plaintiff: \_\_\_\_\_
- (ii) For Plaintiff: \_\_\_\_\_
- (iii) For Defendant(s): \_\_\_\_\_
- (iv) For Defendant(s): \_\_\_\_\_

Please use additional sheet if necessary.

**(6) DISCLOSURE DISPUTES**

Pursuant to Rule 14, **22 NYCRR 202.70(g)(14)** and the **Part 3 Rules** discovery disputes will be resolved in the following manner:

A party with a disclosure dispute shall write a letter to the Part 3, maximum 3-page single spaced in length, outlining the issue(s); the other side(s) may submit response letter(s) of equal length. The Part will then schedule a conference to resolve the dispute.

**(7) IMPLAIDER:**

Defendant shall serve his Third-Party summons and complaint no later than 30 days after the end of the last deposition of a named Plaintiff and Defendant(s) and/or the last deposition of a representative of a named party.

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**(8) ELECTRONIC DISCOVERY AND PRIVILEGE LOGS**

Discovery of Electronically Stored Information (ESI) is one of the most expensive and challenging discovery categories. The Rules, as it concerns electronic discovery, **22 NYCRR 202.12(b) and (c)(3)**, as well as the related privilege logs, are an attempt to rein in the cost and complexity of electronic discovery and related privilege logs. In assessing whether the matter before the Court will benefit from electronic discovery, the parties should consider: (i) is there potentially relevant ESI material in the case; (ii) do the parties intend to rely on ESI; (iii) are there less costly or less burdensome alternatives to secure the necessary information without recourse to discovery of the ESI; (iv) is the cost of preserving and producing ESI proportionate to the amount in controversy; and (v) what is the likelihood that discovery of ESI will aid in the resolution of the dispute.

**A. ELECTRONIC DISCOVERY**

**(a)** Will there be Electronic Discovery in the case:

\_\_\_ **YES**                      \_\_\_ **NO**                      \_\_\_ **NOT SURE**

**(b) Meet and Confer:** Pursuant to Uniform Commercial Division Rule 8(b), **22 NYCRR 202.70(g)(8)(b)**, counsel **MUST** certify that they have *met and conferred* regarding electronic discovery, *before* the Preliminary Conference

**(i)** Date(s) parties had their meet and confer conference(s):  
\_\_\_\_\_

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

\_\_\_ **YES**                      \_\_\_ **NO**                      \_\_\_ **PARTIALLY**

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

\_\_\_ **YES**                      \_\_\_ **NO**

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

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

- (I) **Preservation: 22 NYCRR 202.12(c)(3)(a), (c) and (g)**
- (ii) **Production: 22 NYCRR 202.12(c)(3)(e),(d)**
- (iv) **Claw Back Provisions** for inadvertent production:
- (v) **Costs:** Each party shall bear its own costs of production pursuant to *U.S. Bank Nat'l Assoc. v. Greenpoint Mtge. Funding Inc.* 94 A.D.3d 58 (1st Dep't 2012). In the event that cost shifting becomes an issue, the parties shall follow the mechanism for Disclosure Dispute found in section **(6)**.

**(d) Judicial Intervention**

The parties anticipate the need for judicial intervention.

\_\_\_ **YES**                      \_\_\_ **NO**                      \_\_\_ **MAYBE**

**(e) Discovery of Electronically Stored Information from Non-Parties:**

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

**B. PRIVILEGE LOGS**

One of the most time-consuming and costly aspects of discovery in complex commercial litigation cases is the creation and maintenance of privilege logs. At present, privilege logs are governed by CPLR 3122(b) which mandates "that a party who intends to withhold documents because of privilege (must) prepare a 'privilege log' which

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(i) contains a separate entry for each document being withheld; (ii) provides ‘pedigree’ information for each such document and (iii) sets forth the specific privileges and immunities that insulate that document from production. (Memorandum concerning Privilege Log Practices in the Commercial Division at p.1)

### **THE CATEGORICAL or DOCUMENT-BY-DOCUMENT APPROACH**

(a) Rule 11-b, **22 NYCRR 202.70(g)(11-b)**, **mandates** that the parties meet and confer at the outset of the case and from time to time thereafter to discuss:

- the scope of the privilege review;
- the amount of information to be set out in the privilege log;
- the use of categories to reduce document-by-document logging;
- whether categories of information can be excluded from the logging requirements;
- any other issues pertinent to privilege review. (Rule 11-b(a))

(b) (1) The rule clearly states that the preference in the Commercial Division is for the parties to use **categorical designations** where appropriate to reduce the time and costs associated with preparing privilege logs. . . . (An example of such a **categorical designation** is the designation that all communications between the client and the client’s attorney AFTER the commencement of the action would be designated as exempt pursuant to the attorney-client privilege.) . . . The parties are encouraged to utilize a reasoned method of organizing the documents . . .

*There are specific rules that must be followed to ensure that the documents contained in a **categorical designation** were properly placed in that category.*

(2) In the event the requesting party refuses to permit a **categorical approach**, and instead insists on a **document-by-document** listing on the privilege log then . . . the requirements of CPLR 3122 must be followed. In that circumstance, however, the producing party, upon showing of good cause, may apply to the

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court for an allocation of costs, including attorneys' fees, incurred with respect to preparing a **document-by-document** privilege log . . . .

- (3) Even if a party insists on a **document-by-document** privilege log as contemplated by CPLR 3122 . . . each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following: (i) an indication that the e-mail chain represents an uninterrupted dialogue; (ii) the beginning and ending dates and times (as noted in the e-mails) of the dialogue; (iii) the number of e-mails in the dialogue; and (iv) the names of all the authors and recipients, together with sufficient identifying information about each person (e.g. name of the employer, job title, person's role in the case) to allow for a considered assessment of the privilege issue.

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

- (c) Have both the Plaintiff and Defendant(s) read the Rules concerning Electronically Stored Information (ESI) and the new Privilege Logs:

Plaintiff: _____	_____	<b>YES</b>	_____	<b>NO</b>
Defendant: _____	_____	<b>YES</b>	_____	<b>NO</b>
Defendant: _____	_____	<b>YES</b>	_____	<b>NO</b>

Please use additional sheets if necessary.

- (d) Pursuant to the new Electronic Discovery and Privilege Log Rules, have the parties met and conferred concerning ESI and Privilege Logs:

\_\_\_\_\_ **YES**                      \_\_\_\_\_ **NO**

- (e) If the Parties have met and conferred, when did they meet:

\_\_\_\_\_



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**(12) NOTE OF ISSUE:**

\_\_\_\_\_ shall file a note of issue/certificate of readiness on  
or before \_\_\_\_\_.

A copy of this P.C. order and all subsequent Compliance and Status  
Conference Order must be served and filed with the Note of Issue.

**(13) DISPOSITIVE MOTION(S):**

All dispositive motion(s) shall be made on or before \_\_\_\_\_ or  
within \_\_\_\_\_ days after the filing of the Note of Issue.

***Please Note:** If a party intends to use documents in their dispositive  
motion that the party wishes to file in a redacted form or under seal, the  
party must make an application to the court under **22 NYCRR 216.1(a)**  
to have the Court issue a **written decision** specifying that there is  
“good cause” for such document(s) to be filed in a redacted form or  
under seal. This should be done **PRIOR** to making a dispositive  
motion.*

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

**(14) COMPLIANCE CONFERENCE:**

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

\_\_\_\_\_

Parties or their representatives **with knowledge of the case and this  
Preliminary Conference Order** shall appear as well at all *subsequent* Status  
Conferences.

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## **VI. ALTERNATIVE DISPUTE RESOLUTION**

Justice Eileen Bransten, Part 3 of the Commercial Division, encourages all parties to work toward a proper and just resolution of all the issues in the case. Justice Bransten believes that the parties are better served the earlier a proper and just resolution can be reached. Toward that end, Justice Bransten asks the litigants and their attorneys, on a *continuous basis going forward*, to consider any and all mechanisms to resolve the issues before them.

- \_\_\_ • settlement conferences;
- \_\_\_ • participation in the Commercial Division’s Alternative Dispute Resolution (ADR) and/or
- \_\_\_ • retention of a private mediator.

Please indicate when the parties believe they will be ready to commence their chosen mechanism to resolve the issues in the case:

- \_\_\_ (a) Within sixty (60) days of the Preliminary Conference;
- \_\_\_ (b) Within thirty (30) days after document and interrogatory discovery has been completed;
- \_\_\_ (c) When depositions of the parties have been completed; or
- \_\_\_ (d) After the close of Fact Discovery and during the four month period of Expert Discovery.

## **VII. ADDITIONAL DIRECTIVES:**

Please follow the specific Rules found under the Part Rules of the Judge before whom you are appearing.

Please be aware of and follow **all** the Rules found at **22 NYCRR 202.70(g)**. Particularly, please comply with the following two Rules:

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**Rule 2:** Parties shall **immediately** inform the court that an action has settled, been discontinued or disposed of by submission of a stipulation or a letter;

**Rule 5:** ALL counsel **MUST** sign up for the FREE *eTrack* court notification service to keep track of future court appearances. The *eTrack* service is separate and apart from the e-filing system. Counsel are also responsible for notifying all other counsel of future court appearances. Please review the *eTrack* "Frequently Asked Questions" for details.

\*\*\*\*\*

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

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

**SO ORDERED:**

**DATE:** \_\_\_\_\_

\_\_\_\_\_  
**HON. EILEEN BRANSTEN J.S.C.**