

TO: The Administration Board of the Courts

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

DATE: May 11, 2017

RE: Proposed Amendment of Commercial Division Practice Rules 10 and 11 to Address Alternative Dispute Resolution

The Commercial and Federal Litigation Section of the New York State Bar Association (“**Section**”) is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated April 10, 2017, proposing amendments to Rules 10 and 11 of the Rules of Practice for the Commercial Division (22 NYCRR 202.70[g]) to address alternative dispute resolution (the “**Proposal**”). A copy of the Proposal is attached hereto as Exhibit “A.”

I. EXECUTIVE SUMMARY

The Commercial Division Advisory Council (“Advisory Council”) has proposed an amendment to Rule 10 of the Rules of Practice for the Commercial Division to require counsel to certify that, prior to the preliminary and compliance conferences, they have discussed with their clients the availability of Alternative Dispute Resolution (“ADR”) options, and to advise whether their clients are willing to engage a mediator. In the event that the parties are inclined to engage a mediator, the Advisory Council has proposed an amendment to the Rule 11 Preliminary Conference Order to include a date by which a mediator shall be agreed upon by the parties.

The Section agrees with the Advisory Council that the proposed amendments to Rules 10 and 11 of the Rules of Practice for the Commercial Division will ensure that parties are aware of the roles a mediator can play in dispute resolution, and encourage the use of ADR in Commercial Division cases in litigation, before substantial legal fees have been incurred. The Section therefore recommends the adoption of the proposed amendments to Rules 10 and 11 of the Rules of Practice for the Commercial Division.

II. SUMMARY OF PROPOSAL

As set forth in the proposal, the proposed amendment to Rule 10 would add the following language at the end of the current Rule 10:

“Counsel for each party shall also submit to the court at the preliminary conference and each subsequent compliance or status conference, and separately serve and file, a statement, *in a form prescribed by the Office of Court Administration*, certifying that counsel has discussed with the party the availability of alternative dispute resolution mechanisms provided by the

Commercial Division and/or private ADR providers, and stating whether the party is presently willing to pursue mediation at some point during the litigation.”

A proposed form ADR Attorney Certification is also attached to the Proposal.

The proposal suggests amendment to the Rule 11 Preliminary Conference Order, “in all cases in which the parties certify their willingness to pursue mediation pursuant to Rule 10,” to include “a specific date by which a mediator shall be identified by the parties for assistance with resolution of the action[.]” As proposed, Rule 11 would be amended to include the language in bold italics below:

“(a) The preliminary conference will result in the issuance by the court of a preliminary conference order. Where appropriate, the order will contain specific provisions for means of early disposition of the case, such as (i) directions for submission to the alternative dispute resolution program, ***including, in all cases in which the parties certify their willingness to pursue mediation pursuant to Rule 10, provision of a specific date by which a mediator shall be identified by the parties for assistance with resolution of the action;*** (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure.”

The purpose of the Proposal as stated by the Advisory Council is to address the concern identified in Section IV of the June 2012 Report of the Chief Judge’s Task Force on Commercial Litigation in the 21st Century that ADR “is substantially underutilized in New York.” While Rule 8 of the Rules of Practice for the Commercial Division currently requires counsel to consult with each other concerning the use of ADR prior to preliminary and compliance conferences, the proposed amendments will ensure that counsel has specifically advised their clients of the availability of ADR options, and will facilitate the early identification of a mediator as part of a dual ADR/litigation track. It is noted that the amendments do not provide a date by which mediation must be completed, which will allow the parties’ use of the selected mediator in varying capacities (settlement, discovery, etc.) at any stage of the litigation in which the parties feel it may be useful, while allowing the litigation to proceed.

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

The Section concurs with the Proposal’s objective, which is designed to ensure that parties are aware that ADR options are available, both early on and in later stages of the litigation. While Rule 8 of the Rules of Practice of the Commercial Division requires counsel to consult with each other about ADR, the proposed amendments require counsel to certify that the option of ADR has been specifically discussed with their clients, and to disclose to the Commercial Division Justice their clients’ view about the utility of ADR in the particular case. The Section agrees that the early identification of a mediator, even in the event that the parties are not inclined to mediate, can provide a number of benefits during the litigation process,

including facilitation of settlement, limitation of issues, claims and defenses, and assistance in discovery disputes.

Comments on Proposed Amendment of Commercial Division Practice Rules 10 and 11 to Address Alternate Dispute Resolution

DISPUTE RESOLUTION SECTION

DR #1

June 12, 2017

The Dispute Resolution Section of the New York State Bar Association submits these comments in response to the April 10, 2017 Memorandum of John W. McConnell, Esq. requesting comments on the proposal to amend Commercial Division Practice Rules 10 and 11 (the “Proposal”).

Our Section wholeheartedly supports the Proposal’s amendment that requires attorneys to advise their clients of the availability of *early* mediation as an effective way of reducing the costs to the parties inherent in litigation. We totally agree with the reasons for and benefits of the Proposal as set forth in the January 20, 2017 memorandum from the Commercial Division Advisory Council supporting the Proposal. In addition to increasing the use of early mediation in Commercial Division cases, the amendment to Rule 10 will benefit *the parties*, who bear the risks and costs of litigation, by involving them as well as their lawyers in making the decision as to whether and when to pursue mediation.

In order to assist the client in making the decision as to whether and when to pursue mediation, the form of certification attached to the Proposal as Exhibit A wisely requires the attorney to certify that he or she has discussed Alternative Dispute Resolution options with the client. Because not all attorneys may fully understand the benefits of mediation and how and why it works, they might additionally benefit from a reminder that helpful information is available on the Office of Court Administration’s website at https://www.nycourts.gov/ip/adr/What_Is_ADR.shtml.

Chair: Daniel F. Kolb, Esq.

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May 31, 2017

John W. McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Fl.
New York, NY 10004

Re: Proposed Amendment of Commercial Division Practice Rules 10 and 11 to Address
Alternate Dispute Resolution

Dear Mr. McConnell:

As Co-chair of the ADR in the Courts Committee of the Dispute Resolution Section of the New York State Bar Association, I write in response to your April 10, 2017 Memorandum requesting comments on the proposal to amend Commercial Division Practice Rules 10 and 11 (the "Proposal").

Our Committee wholeheartedly supports the Proposal's amendment that requires attorneys to advise their clients of the availability of early mediation as an effective way of reducing the costs to the parties inherent in litigation. We totally agree with the reasons for and benefits of the Proposal as set forth in the January 20, 2017 memorandum from the Commercial Division Advisory Council supporting the Proposal. In addition to increasing the use of early mediation in Commercial Division cases, the amendment to Rule 10 will benefit the parties, who bear the risks and costs of litigation, by involving them as well as their lawyers in making the decision as to whether and when to pursue mediation.

In order to assist the client in making the decision as to whether and when to pursue mediation, the form of certification attached to the Proposal as Exhibit A wisely requires the attorney to certify that he or she has discussed Alternative Dispute Resolution options with the client. However, we recognize that not all attorneys fully understand the benefits of mediation and how and why it works after unmediated negotiations have failed. Thus, we recommend that the form of certification attached as Exhibit A be modified to provide for the delivery to the client a copy of a Notice of Mediation Alternative in the form attached to the certification that explains the benefits of mediation and how and why it works. Accordingly, we have attached to this letter a

revised form of Exhibit A as well as a red-lined copy tracking the changes we recommend.

Respectfully submitted,

A handwritten signature in blue ink that reads "Stephen A. Hochman". The signature is written in a cursive style with a large, stylized initial 'S'.

Stephen A. Hochman

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____ : COMMERCIAL DIVISION

) C/A No.:

)

Plaintiff(s),)

}

)

Defendant(s)

ALTERNATIVE DISPUTE RESOLUTION ("ADR")

ATTORNEY CERTIFICATION

Pursuant to Rule 10 of the Commercial Division Rules, I certify that I have delivered to my client a copy of the Notice of Mediation Alternative in the form attached hereto and discussed with my client any Alternative Dispute Resolution options available through the Commercial Division and those offered by private entities. My client:

() presently wishes to jointly engage a mediator at an appropriate time to aid settlement.

() does not presently wish to jointly engage a mediator at an appropriate time to aid settlement.

Dated: _____

Signature: _____

Printed Name and Address:

ATTORNEY FOR:

Note: This certification must be served and filed pursuant to Rule 10 of the Commercial Division Rules, with a copy submitted to the court at the time of each conference. A separate certification is required for each party represented.

NOTICE OF MEDIATION ALTERNATIVE

As a party or potential party to a lawsuit, you have the right to a trial in which a judge or a jury decides your case. However, over 90% of all lawsuits are resolved or settled before a trial takes place, even where the parties initially believed that settlement was not possible. Settlement reduces the expense and inconvenience of litigation and the uncertainty about the results of a trial and any appeals.

Mediation services are available that may help you settle your lawsuit faster and before substantial expenses are incurred. Mediation is most effective in reducing costs if used early in the course of a lawsuit. A mediator can assist the parties and their attorneys in obtaining the information they need to evaluate their case more quickly and efficiently than by traditional formal discovery. You should discuss with your lawyer the issue of whether mediation might be appropriate in your case and, if so, when and how to best make use of the mediation process. Participation in mediation is entirely voluntary unless ordered by the court. The services of a mediator may be obtained privately or with the assistance of the court.

What Mediation Is and How It Works

Mediation is a confidential process in which the mediator helps the parties reach a settlement. The process is private, informal and non-binding. The parties, assisted by their lawyers, participate fully in the process and retain control of the outcome. Mediators can help the parties communicate constructively and overcome hostilities that may interfere with making a rational cost/benefit or risk/reward analysis between settlement and the costs and uncertainties of litigation. Mediators may also serve as unbiased “agents of reality” who help the parties objectively assess their litigation alternatives. By meeting privately in separate confidential sessions with each party and its counsel, the mediator can help the parties ascertain their real interests and concerns and objectively assess the weaknesses as well as the strengths of their case, hopefully leading to a mutually agreeable settlement. In addition, a mediator can help generate solutions not previously considered by the parties that may reach beyond the scope of the remedies available in a court determination. If the mediation does not result in a settlement, the parties can continue their lawsuit and proceed to a trial. If the mediation results in a settlement, the resulting settlement agreement is binding.

Selecting a Mediator

Some mediators are facilitative in that they generally will not make settlement proposals or give their evaluation as to the likely outcome in litigation if the dispute does not settle. Others may be willing to be evaluative when necessary in order to help a party be more realistic about its case (usually in a private and confidential meeting with that party). You and your lawyer should consider these different styles and approaches to mediation when selecting a mediator. Your lawyer will be available to help you select a mediator and serve as your representative throughout the mediation process. You should discuss with your lawyer any questions you may have about mediation and how it might be beneficial in your case.

EXHIBIT A

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____ : COMMERCIAL DIVISION

)	C/A No.:
)	
Plaintiff(s),)	
	}	
)	
Defendant(s)	

ALTERNATIVE DISPUTE RESOLUTION ("ADR")

ATTORNEY CERTIFICATION

Pursuant to Rule 1100 of the Commercial Division Rules, I certify that I have delivered to my client a copy of the Notice of Mediation Alternative in the form attached hereto and discussed with my client any Alternative Dispute Resolution options available through the Commercial Division and those offered by private entities. My client:

- () presently wishes to jointly engage a mediator at an appropriate time to aid settlement.
- () does not presently wish to jointly engage a mediator at an appropriate time to aid settlement.

Dated: _____ Signature: _____

Printed Name and Address:

ATTORNEY FOR:

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Note: This certification must be served and filed pursuant to Rule 10 of the Commercial Division Rules, with a copy submitted to the court at the time of each conference. A separate certification is required for each party represented.

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NOTICE OF MEDIATION ALTERNATIVE

As a party or potential party to a lawsuit, you have the right to a trial in which a judge or a jury decides your case. However, over 90% of all lawsuits are resolved or settled before a trial takes place, even where the parties initially believed that settlement was not possible. Settlement reduces the expense and inconvenience of litigation and the uncertainty about the results of a trial and any appeals.

Mediation services are available that may help you settle your lawsuit faster and before substantial expenses are incurred. Mediation is most effective in reducing costs if used early in the course of a lawsuit. A mediator can assist the parties and their attorneys in obtaining the information they need to evaluate their case more quickly and efficiently than by traditional formal discovery. You should discuss with your lawyer the issue of whether mediation might be appropriate in your case and, if so, when and how to best make use of the mediation process. Participation in mediation is entirely voluntary unless ordered by the court. The services of a mediator may be obtained privately or with the assistance of the court.

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**NEW YORK
CITY BAR**

**STATE COURTS OF SUPERIOR
JURISDICTION COMMITTEE**

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June 1, 2017

By Email

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

**Re: New York City Bar Comments on Proposed Commercial Division Rule Changes
Relating to Alternative Dispute Resolution**

Dear Mr. McConnell:

The New York City Bar Association appreciates the opportunity to provide comments on the proposal by the Unified Court System's Commercial Division Advisory Council (the "Advisory Council") to amend Rules 10 and 11 of the Commercial Division to require attorneys to certify that they have discussed with their clients the availability of alternative dispute resolution ("ADR") options. We applaud the Advisory Council for its ongoing efforts to enhance the Commercial Division's status as a preeminent forum for national and international business disputes. We also agree that encouraging greater use of ADR is critically important and support both the proposed amendment and its goals. We offer below, however, some suggestions aimed at affording courts and litigants greater flexibility with respect to use of ADR.

We also urge the Office of Court Administration to adopt an ADR certification requirement, with the modifications we are proposing, in all civil cases. There is no reason it should apply only to Commercial Division cases.

Although we agree that all parties should certify at the Preliminary Conference whether they are willing to engage in ADR, the same requirement should not be imposed for every subsequent conference. If the parties are required to state their intentions with respect to use of

ADR at the initial conference, the court can rest assured that the parties have been apprised of the availability of ADR at the outset of the case. Thereafter, instead of adhering to a strict system where the attorneys must continually re-certify their clients' intentions at subsequent conferences, the court can raise the subject, as appropriate, on a case-by-case basis. Under this approach, the possible use of ADR can be raised (either by the court or by the parties) at the most appropriate stages of the case, such as after the close of fact discovery or after oral argument on a dispositive motion. We also note that, under Commercial Division Rule 3, the court can direct the parties to mediate and the parties can stipulate to mediation or other forms of ADR.

Moreover, a requirement that attorneys discuss ADR with their clients before every conference could be unduly burdensome, particularly in active matters involving numerous parties, which might require numerous conferences during the course of discovery. In such cases, attorneys would be required to contact *each* client before *each* conference to discuss the possibility of ADR, even though neither the parties nor, perhaps, the court believes that ADR would be effective at that stage. The parties' consideration of whether to use ADR should be the product of careful, well-considered and context-sensitive analysis in a particular case, as opposed to merely "checking the box" before every conference.

Accordingly, we recommend amending the language of the proposed change to Rule 10 as follows:

Rule 10. Submission of Information; Certification Relating to Alternative Dispute Resolution.

"At the preliminary conference, counsel shall be prepared to furnish the court with the following: (i) a complete caption, including the index number; (ii) the name, address, telephone number, e-mail address and fax number of all counsel; (iii) the dates the action was commenced and issue joined; (iv) a statement as to what motions, if any, are anticipated; and (v) copies of any decisions previously rendered in the case. Counsel for each party shall also submit to the court at the preliminary conference and at any other time as directed by the court, and separately serve and file, a statement, in a form prescribed by the Office of Court Administration, certifying that counsel has discussed with the party the availability of alternative dispute resolution mechanisms provided by the Commercial Division and/or private ADR providers, and stating whether the party is presently willing to pursue mediation.

We support the proposed change to Rule 11 as drafted by the Advisory Council, which when read together with our amendment to Rule 10, will require the parties to identify a mediator only after certifying that they *presently* wish to engage in ADR.

Finally, we propose a small change to the Alternative Dispute Resolution Attorney Certification (the "Certification Form"), as shown by the redline attached hereto as **Exhibit A**. The words "at an appropriate time" do not require the parties to clearly declare their willingness (or unwillingness) to engage in ADR, which is what the court needs to know. Our proposed change—removing the words "at an appropriate time" from the Certification Form's two

options—would inform the court about parties' views on the efficacy of ADR at the time the certification is made.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Chair, Council on Judicial Administration

Adrienne B. Koch
Chair, Committee on State Courts of
Superior Jurisdiction

Barbara Seniawski
Chair, Committee on Litigation

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____: COMMERCIAL DIVISION

_____)	
)	C/A No.:
)	
Plaintiff(s),)	
)	
)	
Defendant(s).)	

**ALTERNATIVE DISPUTE RESOLUTION ("ADR")
ATTORNEY CERTIFICATION**

Pursuant to Rule 10 of the Commercial Division Rules, I certify that I have discussed with my client any Alternative Dispute Resolution options available through the Commercial Division and those offered by private entities. My client:

() presently wishes to jointly engage a mediator ~~at an appropriate time~~ to aid settlement.

() does not presently wish to jointly engage a mediator ~~at an appropriate time~~ to aid settlement.

Dated: _____

Signature: _____

Printed Name and Address:

ATTORNEY FOR:

Note: This certification must be served and filed pursuant to Rule 10 of the Commercial Division Rules, with a copy submitted to the court. A separate certification is required for each party represented.

From: Marc Sheridan [mailto:marc@msslawny.com]

Sent: Friday, June 2, 2017 5:06 PM

To: rulecomments <rulecomments@nycourts.gov>

Cc: MICHAEL WALSH <mtwadr@gmail.com>

Subject: Request for Public Comment on Proposed Amendment of Commercial Division Practice Rules 10 and 11 to Address Alternative Dispute Resolution

Dear Mr. McConnell,

My colleague Michael Walsh and I are writing to you as Co-Chairs of the Westchester County Bar Association's Alternative Dispute Resolution Committee in support of the proposed amendment of Commercial Division Practice Rules 10 and 11 (22 NYCRR §202.70[g]), Rules 10 and 11. We note that Justice Jamieson, who presides in the Supreme Court, Westchester County Commercial Division, has indoctrinated the proposed rule changes in both her Preliminary Conference and Compliance Orders. *See* pages 10 and 11, and 17 and 18 of the attached Preliminary Conference and Compliance Orders respectively. Indeed, Justice Jamieson's form conference orders highlight a progressive push towards ADR at the early stages of litigation, and ultimately, at the Compliance Conference, a statement: when the ADR mechanism was expected to commence, if it has commenced, and if not yet scheduled, when it will be scheduled to commence. The form Compliance Conference Order goes further to *require a justification from counsel why settlement discussions or ADR has not commenced at the compliance conference stage*. We think that this last element of accountability is imperative to the success of increased utilization of ADR options at a relatively early stage in each case, and request that such modification be considered too with the proposed rule changes.

Respectfully submitted,

Marc Sheridan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

-----X

Plaintiff(s)

- against -

Defendant(s)

-----X

Present: HON. LINDA S. JAMIESON, JSC

Part: COMMERCIAL DIVISION

Index No.: _____

RJI Filing Date: _____

**COMPLIANCE
CONFERENCE ORDER**

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

_____, 20_____

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

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

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

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

Plaintiff _____
v. Defendant _____

Index No.: _____

**Compliance
Conference Order
Page 2 of 18**

If there are multiple defendants:

(c) Counsel for Defendant _____

_____ HAS or _____ HAS NOT changed.

Please use additional pages, if necessary.

If counsel has changed: was it done by CPLR 321(b)(1) **Consent to Change Attorney** _____ or by CPLR 321(b)(2) **Court Order** _____ or by CPLR 321(c) **Death, Removal or Disability of Attorney** _____.

If by **Court Order**, when did the Court sign the order: _____
and until what date did the Court order the matter stayed: _____

If counsel has either died, been removed or become disabled, please provide the Court with the nature of the occurrence and the date of the event:

FOR EACH NEW COUNSEL:

Please include (1) your name; (2) your firm's name; (3) your address; (4) your firm's telephone number; (5) your direct telephone number; (6) your e-mail address; and (7) the party you represent. You may (8) also include your cell phone number.

Please use additional pages, if necessary.

Please attach your business card(s) to this Compliance Conference Order and indicate on the card the name of the party you represent.

Plaintiff: _____
 v. Defendant _____

Index No.: _____

**Compliance
 Conference Order**
 Page 3 of 18

III. CONFIDENTIALITY AGREEMENT:

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

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

<http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf>

If the parties need to change *either* the Trial Part’s model confidentiality agreement or the one found at <http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf>, the parties are to submit a **signed Confidentiality Agreement** with the changes and a red line copy for the Court to review.”

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

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

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

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order**
Page 4 of 18

IV. DESCRIPTION OF THE CASE:

(a) Plaintiff

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

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

and/or

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

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

Damages amount has changed: YES NO

Please indicate the new Damages Amount: \$ _____

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order**
Page 5 of 18

(b) Defendant(s)

(i) Since issue has been joined, please describe Defendant's _____, legal theory and salient facts in support of defenses, counterclaims and third-party claims.

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

If there are multiple defendants:

(ii) If issue has been joined, please describe Defendant's _____, legal theory and salient facts in support of defenses, counterclaims and third-party claims.

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

Please use additional sheets, if needed.

Plaintiff _____
v. Defendant _____

Index Number: _____

Compliance
Conference Order
Page 6 of 18

V. DISCOVERY PROVISIONS:

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>.

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

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

- (i) Have Interrogatories, Document Production and Other Disclosure been completed:

___ YES ___ NO

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

- (b) If Interrogatories, Document Production and Other Disclosure have **NOT** been completed, please indicate:

- (i) Whether the parties have met and conferred about the timing of the needed production:

___ YES ___ NO

- (ii) Please inform the Court of the date by which the parties will be able to complete Interrogatories, Document Production, and Other Disclosure pursuant to CPLR 3108, 3120 and 3123:

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order
Page 7 of 18**

The Court _____ **ACCEPTS THE NEW END DATE FOR THE
COMPLETION OF INTERROGATORIES,
DOCUMENT PRODUCTION, AND OTHER
DISCLOSURE**

_____ **DOES NOT ACCEPT THE NEW END DATE
FOR THE COMPLETION OF
INTERROGATORIES, DOCUMENT
PRODUCTION, AND OTHER DISCLOSURE**

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

If the New End Date for the completion of Interrogatories, Document Production, and Other Disclosure is **NOT** agreed to by the Court, the Court hereby sets the following date as the **NEW END DATE FOR THE COMPLETION OF INTERROGATORIES, DOCUMENT PRODUCTION, AND OTHER DISCLOSURE:**

_____ Court's Initial: _____

(c) DEPOSITIONS:

(i) The Preliminary Conference Order directed the Plaintiff(s) and Defendant(s) to complete the parties' depositions by: _____ and to complete non-parties' depositions by _____.

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

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

(iii) If depositions have **NOT BEEN COMPLETED** at this time, please explain why:

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order
Page 8 of 18**

(iv) Please indicate if the parties have met and conferred about the timing of the depositions:

_____ YES _____ NO

(v) Please inform the Court of the date by which Depositions will be completed:

- Plaintiff: _____
- Defendant: _____
- Non-Parties: _____

All depositions shall be completed on or before _____

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

_____ **DOES NOT ACCEPT THE NEW END DATE FOR THE COMPLETION OF DEPOSITIONS**

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

If the New End Date for the completion of Depositions is NOT agreed to by the Court, the Court hereby sets the following date as the *NEW END DATE FOR THE COMPLETION OF DEPOSITIONS*:

_____ Court's Initial: _____

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order
Page 9 of 18**

(d) IMPLEADER:

Defendant shall serve his third-party summons and complaint no later than thirty (30) days after the end of the last deposition of a named plaintiff and defendant and/or the last deposition of a representative of a named party.

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

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

- (ii) If a third-party summons and complaint has been served, please indicate the schedule of discovery dates to be completed:

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

(e) ELECTRONIC DISCOVERY:

- (1) In the Preliminary Conference Order, the parties indicated that there would or would not be any Electronic Discovery in the case. Concerning Electronic Discovery, did the parties indicate that there would be Electronic Discovery:

YES NO NOT SURE**

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order
Page 10 of 18**

The Preliminary Conference Order added:

***If the parties are not sure about whether the case is reasonably likely to include electronically stored information (ESI), they should refer to the non-exhaustive list of considerations provided in [22 NYCRR 202.12 (b)(1)] (presently found at the nycourts.gov website).*

(2) Meet and Confer: It is presumed that pursuant to Uniform Commercial Division Rule 8(b) [22 NYCRR 202.70(g)(8)(b)], the parties met and conferred:

(i) Date on which parties had their **FIRST** meet and confer conference: _____

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

___ **YES** ___ **NO** ___ **PARTIALLY**

(iii) Since the **FIRST** meet and confer, have the parties had any further meet and confer conferences on Electronic Discovery:

___ **YES** ___ **NO**

If **YES**, when: _____

(iv) Are you planning to set up additional meet and confer conferences:

___ **YES** ___ **NO**

If **YES**, when: _____

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order**
Page 11 of 18

(3) Directives concerning electronic discovery

In the Preliminary Conference Order, the Court listed the following topics to be updated and supplemented as new information becomes available:

- (i) **Preservation** [22 NYCRR 202.70(g)(8)(i)-(v)];
- (ii) **Production** [22 NYCRR 202.70(g)(8)(vi) and (ix)];
- (iii) **Privilege Logs and Redactions** [22 NYCRR 202.70(g)(8)(b)(vii)];
- (iv) **Claw-Back Provisions** [22 NYCRR 202.70(g)(8)(b)(viii)] for inadvertent production; and
- (v) **Costs** [22 NYCRR 202.70(g)(8)(b)(x)]

(4) Status of Electronic Discovery

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

(ii) What are the problems and issues encountered by the parties concerning Electronic Discovery Production:

(5) Judicial Intervention

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

Plaintiff _____
v. Defendant _____

Index Number: _____
**Compliance
Conference Order**
Page 12 of 18

(6) Additional Directives

(7) Anticipated Date of Completion of Electronic Discovery

Please set forth the anticipated date for the conclusion of Electronic Discovery and please explain the rationale for the date:

(h) END DATE FOR FACT DISCLOSURE:

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

If it is anticipated that the **END DATE FOR FACT DISCLOSURE**, as set forth in the Preliminary Conference Order, will **NOT** be met, please explain why:

If it is anticipated that the **END DATE FOR FACT DISCLOSURE**, as set forth in the Preliminary Conference Order, will **NOT** be met, what do the parties believe the **NEW END DATE FOR FACT DISCLOSURE** should be:

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order
Page 13 of 18**

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

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

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

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

_____ Court's Initial: _____

(i) EXPERT DISCOVERY (if any):

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

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

Do the parties anticipate **EXPERT DISCOVERY**

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

The note of issue and certificate of readiness may not be filed until the completion of expert disclosure.

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order
Page 14 of 18**

(j) END DATE FOR ALL DISCOVERY:

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

If it is anticipated that the END DATE FOR ALL DISCOVERY, as set forth in the Preliminary Conference Order, will NOT be met, please explain why:

If it is anticipated that the END DATE FOR ALL DISCOVERY, as set forth in the Preliminary Conference Order, will NOT be met, when do the parties believe the NEW END DATE FOR ALL DISCOVERY should be:

The Court _____ **ACCEPTS THE NEW END DATE FOR ALL DISCOVERY**

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

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

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

Court's Initial _____

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order
Page 15 of 18**

VI. FINAL DIRECTIVES:

(a) NOTE OF ISSUE:

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

If it is anticipated that the NOTE OF ISSUE DATE, as set forth in the Preliminary Conference Order, will NOT be met, please explain why:

If it is anticipated that the NOTE OF ISSUE DATE, as set forth in the Preliminary Conference Order, will NOT be met, when do the parties believe the *NEW NOTE OF ISSUE DATE* should be:

The Court _____ **ACCEPTS THE NEW NOTE OF ISSUE DATE**

_____ **DOES NOT ACCEPT THE NEW NOTE OF ISSUE DATE**

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

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

_____ Court's Initial _____

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

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order**
Page 16 of 18

(b) DISPOSITIVE MOTION(S):

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

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

(c) STATUS CONFERENCE:

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

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

(d) ADDITIONAL DIRECTIVES:

Plaintiff _____
 v. Defendant _____

Index Number: _____
**Compliance
 Conference Order**
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VII. ALTERNATIVE DISPUTE RESOLUTION:

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

IN THE PRELIMINARY CONFERENCE ORDER THE PARTIES STATED:

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

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

Please indicate when (as stated in the Preliminary Conference Order) the alternate dispute resolution mechanism was expected to commence:

Plaintiff _____
v. Defendant _____

Index Number: _____

**Compliance
Conference Order
Page 18 of 18**

(c) Has the alternate dispute resolution mechanism

_____ Commenced _____ Not Commenced

(d) If not yet scheduled, when will it be scheduled to commence:

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

* * *

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

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

SO ORDERED:

DATE: _____

HON. LINDA S. JAMIESON, JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

Plaintiff(s)

- against -

Defendant(s)

-----X

Present: HON. LINDA S. JAMIESON, JSC

Part: COMMERCIAL DIVISION

Index No.: _____

RJI Filing Date: _____

**PRELIMINARY
CONFERENCE ORDER
COMMERCIAL DIVISION**

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; and (6) the party you represent.

Plaintiff(s):

Defendant(s):

Please use additional pages, if necessary.

Please attach your business card(s) to the last page of this PC order and indicate on the card the name of the party you represent.

Plaintiff _____
 v. Defendant _____

Index Number: _____
Preliminary Conference Order
 Page 2 of 13

II. CONFIDENTIALITY ORDER:

The court recognizes that most cases in the Commercial Division involve facts which are highly sensitive. In such cases, in order to proceed to proper discovery, the Court *may order* the parties to enter into a Confidentiality Agreement, which the court will "So Order." The parties are free to draft their own confidentiality agreement, which the Court can so-Order. In the alternative, if they do not wish to do so, the parties are referred to the model confidentiality agreement found at:

<http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf>

If the parties need to change *either* the Trial Part's model confidentiality agreement or the one found at

<http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf>, the parties are to submit a **signed Confidentiality Agreement** with the changes and a red line copy for the Court to review.

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

The parties _____ WILL or _____ WILL NOT be submitting a Confidentiality Agreement.:

If the parties WILL, please indicate when: _____

If the parties WILL NOT, please explain why:

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: _____

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
Page 3 of 13

III. 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 legal theory and salient facts in support of claims/counterclaim defenses:

Amount Demanded: \$ _____

- (b) If issue has been joined, Defendant _____, legal theory and salient facts in support of defenses, counterclaims and third-party claims. If issue has *not* yet been joined, Defendant need not, at this time, answer this question.

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

If there are multiple defendants:

- (c) If issue has been joined, Defendant _____, legal theory and salient facts in support of defenses, counterclaims and third-party claims. If issue has *not* yet been joined, Defendant need not, at this time, answer this question.

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
Page 4 of 13

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

Please use additional sheets, if needed.

IV. DISCOVERY PROVISIONS

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>

(a) **BILL OF PARTICULARS** (See CPLR 3130(1)):

(1) Demand for a Bill of Particulars shall be served by _____
on or before _____.

(2) Responses to the Bill of Particulars shall be served by _____
_____ on or before _____.

Comment:

(b) **DOCUMENT PRODUCTION**

All documents produced by any and all parties must be Bates Stamped.

(1) Initial demands for discovery and inspection shall be served by all parties on or before _____.

(2) Responses to demands shall be served by all parties on or before _____.

Comment:

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
Page 5 of 13

(c) INTERROGATORIES

(1) Interrogatories shall be served by all parties on or before _____

(2) Answers to interrogatories shall be served on or before _____

Comment:

(d) DEPOSITIONS:

Defendant's deposition of plaintiff(s) on or before _____

Plaintiff's deposition of defendant(s) on or before _____

If there are multiple parties, please use additional sheets. Please be sure to indicate the name of the case, the index number and question being answered. Please include the (1) name of the party to be deposed; (2) the name of the person who will be deposing the party; and (3) the date and time of the deposition.

Non-party's depositions on or before _____

All depositions shall be completed on or before _____

Comment:

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
Page 6 of 13

(e) **OTHER DISCLOSURE:**

(f) **IMPLEADER:**

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

(g) **ELECTRONIC DISCOVERY**

(1) Will there be Electronic Discovery in the case:

___ YES ___ NO ___ NOT SURE**

***If the parties are not sure about whether the case is reasonably likely to include electronically stored information (ESI), they should refer to the non-exhaustive list of considerations provided in [22 NYCRR 202.12 (b)(1)] (presently found at the nycourts.gov website.)*

(2) **Meet and Confer:** Pursuant to Uniform Commercial Division Rule 8(b) [22 NYCRR 202.70(g)(8)(b)] counsel certify that they have fulfilled their requirement to meet and confer regarding certain matters relating to electronic discovery, before the Preliminary Conference. Pursuant to Uniform Commercial Division Rule 1(b) [22 NYCRR 202.70(g)(1)(b)] and 22 NYCRR 202.12(b), counsel are reminded that to the extent they believe this case is reasonably likely to include electronic discovery, counsel must be sufficiently versed in matters relating to their clients' technological systems to discuss

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
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competently all issues relating to electronic discovery or counsel have brought someone to address these issues on their behalf; and that pursuant to 22 NYCRR 202.12(c)(3), counsel have met and conferred to discuss these issues.

(i) Date(s) on which parties had their meet and confer conference(s): _____

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

___ YES ___ NO ___ PARTIALLY

(3) **Directives concerning electronic discovery.**

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

(i) **Preservation:** [22 NYCRR 202.70(g)(8)(i)-(v)]: Please indicate for both the plaintiff(s) and each of the defendant(s) that the parties have created a preservation plan; have identified the relevant custodians for each computer/server and have designated the individual(s) responsible for the preservation of relevant ESI.

Please do not list the names of the custodians or the designated individuals – only the fact that it has been done or is in the process of being done.

(ii) **Production** [22 NYCRR 202.70(g)(8)(vi) and (ix)]: Please identify (1) that the parties have agreed on the scope and method for searching and reviewing ESI (i.e. the relevant

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
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search terms or technology-assisted review); (2) that the parties have agreed on the extent, order and form of production; and (3) a projected production schedule.

Please do not list the actual terms of the review but just the fact that it has been done or is in the process of being done.

- (iii) **Privilege Logs and Redactions** [22 NYCRR 202.70(g)(8)(b)(vii)]. Please identify how the parties will provide for the identification, redaction, and logging of privileged or otherwise confidential ESI.

- (iv) **Claw-Back Provisions** [22 NYCRR 202.70(g)(8)(b)(viii)] for inadvertent production:

- (v) **Costs** [22 NYCRR 202.70(g)(8)(b)(x)] (*presently found at the nycourts.gov website*):

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 write a letter to the Court of not more than three (3) pages outlining the problem prior to setting up a conference call with the Court.

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
Page 9 of 13

(4) Judicial Intervention

The parties anticipate the need for judicial intervention regarding the following issues concerning the scope and methods of preserving and/or producing ESI:

(5) Additional Directives

Please set forth any additional directives or issues relation to ESI:

(h) END DATE OF FACT DISCLOSURE:

Fact Disclosure shall be completed by _____

(i) EXPERT DISCOVERY (if any):

Pursuant to the Commercial Division Rules 13(c) and 8 (*available at <http://www.nycourts.gov/rules/trialcourts/202.shtml#70>*), which mandate consultation with opposing counsel, the Court hereby ORDERS that if any party intends to introduce expert testimony at trial or in support of a motion for summary judgment, the parties, no later than thirty (30) days prior to the completion of fact discovery, shall confer on a schedule for expert disclosure – including the identification of experts, the agreement to exchange expert reports and the timetable for the deposition of testifying experts. Expert disclosure shall be completed no later than four (4) months after the completion of fact discovery.

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

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
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The note of issue and certificate of readiness may not be filed until the completion of expert disclosure.

(j) END DATE OF ALL DISCOVERY:

V. ALTERNATIVE DISPUTE RESOLUTION

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

- (a) Counsel for the parties have discussed or will be discussing the use of the following alternate dispute mechanisms for use in this case: (i) a settlement conference; (ii) participation in the Commercial Division's Alternative Dispute Resolution Program (if applicable); and/or (iii) retention of a privately-retained mediator. Counsel for the parties propose the following alternate dispute resolution mechanism for this case:

- (b) Counsel for the parties recommend that the alternate dispute resolution mechanism set forth above be employed at the following point in the case: (e.g., within the next sixty (60) days; thirty (30) days after document and interrogatory discovery is completed; after the deposition of the parties are completed on or before _____; or after the close of fact discovery and before the commencement of expert discovery.)

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
Page 11 of 13

Please indicate when the alternate dispute resolution mechanism should commence:

VI. FINAL DIRECTIVES

(a) NOTE OF ISSUE

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

A copy of this PC order and subsequent Compliance and Status Conference orders shall be served and filed with the note of issue.

(b) DISPOSITIVE MOTION(S):

All dispositive motion(s) shall be made on or before _____.

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

(c) 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.

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
Page 12 of 13

(d) **ADDITIONAL DIRECTIVES:**

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

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

SO ORDERED:

DATE: _____

HON. LINDA S. JAMIESON, JSC

Plaintiff _____
v. Defendant _____

Index Number: _____
Preliminary Conference Order
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ADDITIONAL PAGES

MANAGING ATTORNEYS AND CLERKS ASSOCIATION, INC.

Timothy K. Beeken, *President*
Dennis Murphy, *Vice-President*
Owen G. Wallace, *Treasurer*
Peter McGowan, *Secretary*

John D. Bovè
Richard V. Conza
Henry J. Kennedy
Maura A. McLoughlin
Bradley Rank
Robert T. Westrom
Ira E. Wiener
Directors

June 5, 2017

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th floor
New York, NY 10004

Proposed Commercial Division Rules 10 and 11

Dear Mr. McConnell,

On behalf of the Managing Attorneys and Clerks Association, Inc. (MACA) and its Rules Committee, we write to comment on the proposal to amend Commercial Division Rules 10 and 11, published April 10, 2017. We welcome this opportunity and thank the Office of Court Administration for soliciting the views of the bar on this important subject.

MACA is comprised of over 120 large, litigation based law firms and corporate legal departments. Our members' positions within their respective firms and companies and concomitant responsibilities afford them a breadth of understanding of the day to day operations of the various state and federal court systems. In particular, our members have extensive experience relating to calendaring deadlines and filing papers in the courts of the State of New York.

As an initial matter, the Managing Attorneys and Clerks Association supports the idea of encouraging counsel and litigants to consider, and if appropriate, to engage in alternative dispute resolution (ADR). However, we oppose the amendment of Commercial Division Rules 10 and 11 as drafted. Part of what the proposed rule intends

to accomplish is already provided for under Commercial Division Rules 3 and 8(a)(iii), both of which address the use of ADR in the action and require counsel to consult on that issue. Additionally, the proposed amendments add an unnecessary extra layer of administrative work such as having to calendar the required pre-conference filing, preparation of the certification, and filing it via NYSCEF, all of which may add to the expense of the litigation.

Discussing the potential use of ADR with your client is worthwhile and suggested in the New Model Preliminary Conference Form, adopted on June 24, 2016, and effective August 1, 2016. In pertinent part, that section provides that, “the judges ask the litigants and their attorneys, on a *continuous basis going forward*, to consider any and all mechanisms to resolve the issues before them.” Model Prelim. Conf. Form § VI (italics in original). Among the options suggested are participation in the Commercial Division’s ADR program and retention of a private mediator. To require an attorney also to prepare and file a certification for every conference is unnecessary.

One of the goals of the Commercial Division in general is to make New York an attractive venue for commercial disputes. In fact, the matters brought in the Commercial Division bring together sophisticated attorneys and clients well versed in the process of civil commercial litigation. To require counsel to submit a certification at the Preliminary Conference and each subsequent conference certifying that the attorney has discussed with his client the availability of alternative dispute resolution would be an onerous intrusion on the lawyer’s communication with her client. Further, requiring the filing of a certification publicly disclosing litigants’ positions in the case could chill interest in litigating in New York on the part of litigants who do not wish their lawyer to force a discussion about ADR in advance of every conference or to incur the costs associated with the proposed certificates.

Finally, from a logistical perspective, requiring counsel to complete and submit the ADR Attorney Certification form as proposed (Exhibit A) is merely busy work. The Note on the proposed certification states that “[a] separate certification is required for each party represented.” In complex commercial litigations multiple attorneys from several firms may represent the same party or parties. If counsel represents several individuals and entities united in interest, it makes no sense that separate certifications must be drafted and filed for each. Such a tedious, repetitive, and required process can only diminish the appeal of the Commercial Division as a venue of choice.

*

*

*

Again, we are grateful for the opportunity to comment on the proposed amendments to Commercial Division Rules 10 and 11, and look forward to helping achieve successful implementation of whatever approach the court system chooses to adopt. Should you have questions or would like further elaboration on any of the foregoing, please contact Owen Wallace at OWallace@ebglaw.com and/or Tim Beeken at tkbeeken@debevoise.com.

Respectfully submitted,

s/Owen G. Wallace

Owen G. Wallace, Esq.

MACA Rules Committee Chair

Managing Attorney, Director of Legal
Support Services

Epstein Becker Green

s/Timothy K. Beeken

Timothy K. Beeken, Esq.

MACA President

Counsel & Managing Attorney

Debevoise & Plimpton LLP

[REDACTED]

From: Renee J. Roberts
Sent: Wednesday, May 10, 2017 12:46 PM
To: rulecomments
Subject: Early ADR

[REDACTED] [REDACTED]

Hello, I am a Court Attorney Referee in Suffolk County in the Commercial Division. I am in agreement that early intervention and settlement is a good idea.

I have had the pleasure of speaking to the attorneys during court conferences regarding settlement. While many of the parties agree that mediation would assist in settling their cases, they relay that they are unwilling or unable to pay the added expense of the mediator's fees in addition to their attorney's fees. As a result, the rate of mediations that lead to settlement are very few, if any, in Suffolk County.

After speaking at a conference last year on this very topic at a training course at the Nassau Bar Association, I had the opportunity to speak with other attorneys from other counties and learned that many counties and the Federal Court provide free mediation services. In addition, there was no shortage of volunteer mediators in those programs and the mediations were occurring regularly. I suggest that this possibility be explored in Suffolk County as well.

Thank you for listening.
Renee Roberts