To: David Nocenti, Esq.
Counsel, Office of Court Administration

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

Date: October 18, 2023

Re: Proposal to Amend Rule 202.70(b)(1) to add a Reference to Technology in the Description of Commercial Cases

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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 the Office of Court Administration, dated June 23, 2023 ("Memorandum"), seeking public comment on proposed amendment to Rule 202.70(b)(1) to add a reference to technology in the description of commercial cases (the "Proposal").

I. Executive Summary

The Proposal seeks to amend Rule 202.70(b)(1) of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division) to explicitly confirm that the Commercial Division has jurisdiction over actions in which the principal claims involve or consist of technology transactions and/or other matters involving or arising out of technology.

The Proposal is attached as Exhibit A.

II. CURRENT AND PROPOSED RULE

Current Rule

Pursuant to Section 202.70(b), among several categories of cases:

> Actions in which the principal claims involve or consist of the following will be heard in the Commercial Division provided that the monetary threshold is met or equitable or declaratory relief is sought:
>
> (1) Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g., unfair competition), or statutory and/or common law violation where the breach or violation is alleged to arise out of business dealings (e.g., sales of assets or securities;

corporate restructuring; partnership, shareholder, joint venture, and other business agreements; trade secrets; restrictive covenants; and employment agreements not including claims that principally involve alleged discriminatory practices);

Proposed Amendment Rule

Amendment to Section 202(b)(1) to modify the line that lists examples of commercial cases to include technology-related matters by stating:

"...(e.g.,sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, and other business agreements; technology transactions and/or other matters, involving or arising out of technology; trade secrets; restrictive covenants; and employment agreements not including claims that principally involve alleged discriminatory practices)[.]"

III. RATIONALE

The Commercial Division Advisory Committee ("CDAC") submits that technology playing an increasingly important role in the operation of businesses of all sizes, both inside and outside the State of New York, and that the capabilities and sophisticated expertise of the Commercial Division to handle disputes involving technology are worth noting. Other business courts have explicitly done so. For instance, the business courts in both Maryland and Delaware emphasize their jurisdiction over and experience with technology disputes. Indeed, the business court in Maryland is called the "Maryland Business and Technology Case Management Program." In addition, although the Delaware Chancery Court is generally a court of equitable jurisdiction, as provided via 10 Del. C. § 346, Rule 91 of the Court of Chancery Rules, entitled "Technology Disputes Arising at Law," provides that "The Court shall have jurisdiction to adjudicate a technology dispute involving solely a claim for monetary damages only in the event the amount in controversy exceeds one million dollars." That statute also gives the Chancery Court the ability to mediate technology disputes.

Other states have followed suit in specifically identifying technology based disputes as within their business court's jurisdiction, e.g., Georgia's State-wide Business Court (GS 15-5A-

3(a)(1)(A)(xvii), encompassing matters "[a]rising from e-commerce agreements; technology licensing agreements, including, but not limited to, software and biotechnology license agreements; or any other agreement involving the licensing of any intellectual property right, including, but not limited to, an agreement relating to patent rights"); Iowa's Business Specialty Court (Amended Memorandum of Operation, encompassing cases arising "from technology licensing agreements, including software and biotechnology licensing agreements, or any agreement involving the licensing of any intellectual property right, including patent rights"); Michigan Business Court (MCL 600.8031(2)(b), encompassing disputes "involving information technology, software, or website development, maintenance, or hosting"); North Carolina Business Court (N.C.G.S. § 7A-45.4(a)(5), encompassing "[d]isputes involving the ownership, use, licensing, lease, installation, or performance of intellectual property, including computer software, software applications, information technology and systems, data and data security, pharmaceuticals, biotechnology products, and bioscience technologies."); Tennessee, Business Court Docket Pilot Project (Supreme Court Order ADM2017-00638, encompassing actions arising "from technology licensing agreements, including software and biotechnology licensing agreements, or any agreement involving the licensing of any intellectual property right, including patent rights"); Utah Business and Chancery Court (to become operational in 2024, specifically includes references to adjudication involving blockchain technology); West Virginia Business Court (Rule 29.04(a)(2), encompassing disputes presenting "commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable").

III. SECTION COMMENTS

The Section views favorably the suggestion proposed by the CDAC to amend Rule 202.70(b)(1) of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division) to explicitly confirm that the Commercial Division has jurisdiction over actions in which the principal claims involve or consist of technology transactions and/or other matters involving or arising out of technology.

The Section agrees that "[a]s one of the world's most sophisticated venues for the resolution of commercial disputes and located in the world's leading financial center and serving as technology hub, the Commercial Division Rules should communicate the Commercial Division's receptivity to, and familiarity with, resolving technology disputes."

Although not mentioned in the CDAC's Memorandum, technology-related disputes often involve complex expert testimony, and the parties in such disputes would greatly benefit by the robust and streamlined procedures and deadlines provided by Rule 13(c) of the Commercial Division Rules which provide:

> If any party intends to introduce expert testimony at trial, no later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure -- including the identification of experts, exchange of reports, and depositions of testifying experts -- all of which shall be completed no later than four 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.

November 13, 2023

VIA EMAIL

David Nocenti, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004
rulecomments@nycourts.gov

Re: Proposed Amendment to 22 NYCRR 202.70(b)(1)

Dear Mr. Nocenti:

We write on behalf of the Managing Attorneys and Clerks Association, Inc. ("MACA") in response to your memorandum, dated October 5, 2023, requesting comment on a proposed amendment to 22 NYCRR 202.70(b)(1) to add reference to technology in the description of commercial cases over which the New York State Commercial Division has jurisdiction (the "Technology Amendment").

MACA is comprised of 120 law firms with litigation practices (primarily large and mid-sized firms) as well as the New York State Attorney General's Office. Our members' representatives' positions within our respective firms and concomitant responsibilities afford us a breadth of understanding of court rules and procedures, clerk's office operations, and the needs of attorneys and litigants. In particular, our members' attorneys litigate frequently in the New

York Commercial Division, and as a result, we are well acquainted with practice and procedure there.

We would advise the Administrative Board against adopting the Technology Amendment. Since the Commercial Division already has jurisdiction over business disputes arising from technology, the Technology Amendment is unnecessary, and may have unintended consequences as currently drafted. We nonetheless support the goal of promoting the Commercial Division as a premier venue for resolving business disputes, technology-related or otherwise. We respectfully submit that there are other, more effective means of supporting this object that the Advisory Board should consider, including ensuring that the clerk's offices and other administrative staff that support the Commercial Division courts have the resources they need to effectively perform their essential work.

As the Commercial Division Advisory Council's ("CDAC") memorandum in support ("CDCA Memo") notes, the Technology Amendment is not intended to expand the Commercial Division's jurisdiction, but rather to "explicitly confirm" that the Commercial Division already has jurisdiction over commercial disputes "arising out of technology." Memo at 2. Such confirmation is not necessary. There is no question that, under the existing version of 202.70(b)(1), commercial disputes "involving or arising out of technology" that would otherwise fall under the Commercial Division's jurisdiction can be assigned to the Commercial Division. In our experience, technology companies and their attorneys are already well-aware of this and frequently seek to have cases arising from such things as software and webservice licensing agreements, contracts concerning the sale or provision of computer-related hardware, cryptocurrencies, and technology-related intellectual property assigned to the Commercial Division. As such, and notwithstanding the jurisdictional provisions of other states' business courts, there is no need to amend the rule simply to "confirm" that point for the Commercial Division.

Moreover, the language of the Technology Amendment is so general that it threatens to introduce confusion into the construction of subsection (b)(1) of Rule 202.70. As currently written, subsection (b)(1)'s parenthetical describes types of "business dealings"—such as partnership agreements or sales of securities—to illustrate the phrase "business dealings," without reference to the underlying subject matter of those dealings. But the new proposed language does just the opposite and describes a subject matter of business dealing, specifically, "matters involving or arising out of technology" without any reference to a specific type of transaction or business arrangement. As such, it could be easily be misconstrued as expanding the Commercial Division's jurisdiction to cover any dispute that "involve[s] or aris[es] out of technology," regardless of whether that dispute arises out of a business dealing embodied in the other illustrative cases in the current version of subsection (b)(1). This could include product liability and other types of tort claims that were never within the intended purview of the Commercial Division. The provisions from other states that are cited in the CDCA Memo use more specific terminology, which we believe makes for better clarity and less risk of confusion. Accordingly, while we remain opposed to the Technology Amendment in its entirety, if the Administrative Board nonetheless determines to enact it, we would propose adding the more specific phrase "technology sales, licensing and/or servicing agreements" in place of the currently proposed "technology transactions and/or other matters involving or arising out of technology."

* * *

While we oppose the Technology Amendment, MACA is generally supportive of the CDAC's goal in proposing it, namely to promote the Commercial Division's standing as "one of the world's most sophisticated venues for the resolution of commercial disputes[.]" CDCA Memo at 2. We submit, however, that there are other more effective means of raising the public's awareness of the Commercial Division than rule amendments, particularly ones that are not intended to establish or modify court procedures. These would include public engagement efforts that remind potential litigants about the Commercial Division's abilities to adjudicate technology-related commercial disputes; continuing legal education programs for Commercial Division practitioners—and comparable programs for Commercial Division judges—on legal matters relevant to such disputes; and development and promotion rosters of individuals with special expertise in technology matters who could serve as referees under CPLR Article 43 in Commercial Division matters. If the Administrative Board is nonetheless inclined to pursue rules changes, MACA submits that rules unifying and streamlining procedures for filing confidential trade-secret and other sensitive business information under seal would go much further in improving the Commercial Division's stature as preferred venue for technology-related disputes than the proposed Technology Amendment.

Most importantly, we strongly encourage the Administrative Board to consider efforts to ensure the various County Clerk and Clerk of Court offices that support the Commercial Division courts are adequately staffed and resourced. Members of our Association know and appreciate, perhaps more than most, that these departments are made up of dedicated, hard-working individuals who are as integral to the Commercial Division's standing as one of the worlds premiere business litigation venues as the judges assigned to it and the attorneys who practice before it. However, we are also aware that recent budget cuts and attrition have left these support offices woefully understaffed and under-resourced, and that despite their best efforts, even routine matters—such as assignment of index numbers, assignment of judges, and entries of orders and judgments—can take weeks. Providing the clerks' offices with the resources they need to resolve current backlogs and perform their essential work in a timely fashion would, we submit, be one of the most effective ways of preserving and enhancing the Commercial Division's well-deserved reputation.

We are grateful for the opportunity to offer MACA's views on the Technology Amendment. If we can elaborate further on our comments or assist the Administrative Board in any way, please let us know.

Respectfully,

s/Peter McGowan
MACA President
Managing Attorney
Freshfields Bruckhaus Deringer US LLP

s/Timothy K. Beeken
MACA Rules Committee Chair
Counsel & Managing Attorney
Debevoise & Plimpton LLP

s/Brendan Cyr
MACA Rules Committee Member
Managing Attorney, New York Office
Cleary Gottlieb Steen & Hamilton LLP

s/James Rossetti
MACA Rules Committee Member
Managing Clerk
Boies, Schiller & Flexner LLP

s/Daniel B. Kaplan
MACA Rules Committee Member
Litigation Counsel and Managing Attorney
Milbank LLP

s/Bradley Small
MACA Rules Committee Member
Managing Attorney
Cadwalader, Wickersham & Taft LLP

Supreme Court
of the
State of New York

HON. BARRY R. OSTRAGER

60 CENTRE STREET
NEW YORK, NY 10007-1474

October 20, 2023

Administrative Board of the Courts
c/o David Nocenti, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004

Dear Mr. Nocenti,

On behalf of the judges of the New York Supreme Court, Commercial Division, New York County, I respectfully submit the following response to the Request for Public Comment on Amending 22 NYCRR § 202.70(b)(1) to Add a Reference to Technology in the Description of Commercial Cases, dated October 5, 2023.

Our comment to the proposed amendment is a narrow one. We take no issue with the overarching goal of communicating "the Commercial Division's receptivity to, and familiarity with, resolving technology disputes." Indeed, we and our colleagues throughout the State spend a substantial amount of time each year addressing commercial cases raising technology-related issues.

We are concerned, though, that the proposed language will create some uncertainty as to scope of the Commercial Division's jurisdiction. Specifically, the proposal would add the following language to the subject matter deemed to be predominantly commercial in nature: "technology transactions and/or *other matters involving or arising out of technology*" (emphasis added). The italicized portion is, in our view, unnecessarily vague and could be viewed as encompassing "matters" that are not commercial disputes at all but which happen to "involve" or "arise out of" technology. We doubt that is the intention but given that this amendment impacts one of the core jurisdictional provisions of the Rules, we think it would be prudent to tighten the language to make clear that the lawsuit must in all cases be predominantly commercial in nature **and otherwise satisfy the jurisdictional and other requirements of the commercial division.**

We would offer the following as a suggested revision of the proposed amendment: "technology transactions and/or commercial disputes involving or arising out of technology."

Respectfully submitted,

Barry Ostrager

Barry R. Ostrager, JSC

From: Tom Curtis <thomasmcurtis@yahoo.com>
Sent: Tuesday, October 17, 2023 7:59 PM
To: rulecomments
Subject: Reference to Technology in the Description of Commercial Cases

Categories: Comm Div - Technology

I have read the memo form David Nocenti and Exhibit A. I think it is important that you further define what is meant by "Technology" when such cases are added to the scope of the Commercial Division subject matter jurisdiction.

I note that in the description of what other States have enacted there are expanded descriptions of what is meant by Technology cases. The failure to address this issue will simply create the opportunity for litigants to argue what is meant by a Technology case and waste Judicial time.

Today every contract case involves some aspect of "Technology" whether it is how a document is signed to how the records were kept. Disclosure in a complicated case involves Technology. I could go on. These cases involve Technology but they are not the same as a dispute between Meta and Apple involving arcane patent rights.

So I suggest that you define exactly what is to be included in the new category.

Sincerely, Tom Curtis
Law Office of Thomas M. Curtis
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From: Derek Zisser <Derek.Zisser@mgclaw.com>
Sent: Monday, October 16, 2023 9:38 AM
To: rulecomments
Subject: Proposed amendment to Rules of the Comm. Div. 202.70(b)(1)

Categories: Comm Div - Technology

Good morning: Having reviewed the proposal, I believe it is too broad as worded. For example, does a technology transaction include torts/personal injury claims arising out of Uber, Lyft, Doordash or other gig economies that are app based? Perhaps adding clarification excluding such suits would avoid this issue?

Derek Zisser

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