March 2011

INDIVIDUAL PRACTICES OF JUSTICE MELVIN L. SCHWEITZER PART 45

1. Commercial Division Rules

All parties should familiarize themselves with the Commercial Division Rules, available at http://www.nycourts.gov/courts/comdiv/newyork_rules.shtml

2. Electronic Filing

All cases in Part 45 must be electronically filed through the Court's Filing By Electronic Means (FBEM) system. All submissions to the Court (including briefs, proposed Orders and Judgments, and letters) must be electronically filed. For FBEM instructions, contact the Efiling Support Center at (646) 386-3033 or efile@courts.state.ny.us, or see the Commercial Division's website for New York County at: http://www.nycourts.gov/courts/comdiv/newyork.shtml

3. Scheduling

All scheduling of appearances or adjournments, and questions pertaining to scheduling, must be addressed to our Part Clerk, Steve O'Fee, at (646) 386-3306. Appearances shall be scheduled at either 60 Centre Street, Room 218, or at 26 Broadway, 10th Floor. **Court permission is needed to adjourn any scheduled conference. Requests shall be made to Part Clerk Steve O'Fee no later than two (2) business days in advance of the scheduled appearance. Requests submitted after the deadline will be denied absent a showing of good cause.**

4. Communications with Chambers

Litigants may communicate with the Court by mail, fax, e-mail or telephone, more specifically as follows:

A. Written Correspondence. Hard copies of letters may be mailed or hand delivered to Chambers at 26 Broadway, 10th Floor, New York, NY 10004. All letters concerning a substantive matter also must be electronically filed. **Letters may not exceed three pages in length.**

B. Faxes. Faxes to Chambers (212) 361-8173 are permitted so long as they are followed by a hard copy sent to Chambers. Faxes also must be electronically filed.

C. E-mail. Brief e-mail communications with Counsel to Justice Schweitzer, Jay Wilker, will be permitted if initiated by Mr. Wilker. All counsel must be copied on any e-mail sent. If this is not done, the e-mail will be deleted and unread.

D. Telephone Conferences. **Litigants must call our Part Clerk, Steve O'Fee, at (646) 386-3306 to schedule a telephone conference with Chambers on substantive matters.** Such calls generally will be scheduled after 4 p.m. Counsel for all litigants must initiate and be on the call at the time assigned by Mr. O'Fee. Chambers will not communicate with a litigant ex parte.

5. Motion Practice

A. Motion Sequence Numbers. **Motion sequence numbers shall appear on ALL motion papers**; i.e. the notice of motion, memos of law, exhibits, affirmations, settled orders, etc. The numbers shall also appear on all correspondence with Chambers pertaining to the motion.

B. Questions. Questions pertaining to motion practice should be addressed in the first instance to the Commercial Division Support Office at (646) 386-3020.

C. Prior Permission. No prior permission is required before making a motion except discovery motions. See ¶ 5D below. Commercial Division Rule 24 letters are not required in Part 45.

D. Discovery Motions. **Discovery motions may be made only with leave of the Court.** Discovery disputes are to be resolved in the first instance through court conference. Adversaries are first to meet and confer in good faith. If they are unable to resolve the dispute, the aggrieved party shall send a letter to the Court describing the issues **(no more than three pages in length)**, after which the Court will schedule the conference. Only if the dispute is incapable of being resolved at the conference will leave be given to file the appropriate motion.

E. Discovery Not Stayed. **Discovery is not stayed by a dispositive motion unless the Court otherwise directs.**

F. Dispositive Motions; Deadline. These must be initiated not later than **60 days** following the filing of the note of issue.

G. Motion Submission; Papers. No additional papers on a motion will be accepted for filing after the papers in support of and in opposition to the motion are filed on the submission date in the Motion Submission Part, Room 130.

H. Courtesy Copy. A courtesy copy of all motion papers must be submitted directly to Chambers (26 Broadway,10th Floor) in addition to the hard copy which is required to be submitted to the Motion Submission Part in Room 130 on e-filed motions.

I. Oral Argument. **No oral argument will be heard on the motion submission date.** If thereafter the Court determines that oral argument should be heard, **the Court will notify the parties**. No motion or order to show cause scheduled for oral argument shall be adjourned at the request of the parties unless that request is received by our Part Clerk, Steve O'Fee, no later than two (2) business days prior to the scheduled oral argument.

J. Transcript. **If oral argument is held, at its conclusion the movant is to order the transcript. The parties are responsible for both e-filing the transcript and submitting a hard copy to Part Clerk Steve O'Fee who, in turn, will submit it to Chambers.** The motion will not be deemed *sub judice* until a transcript has been received in Chambers.

In the event that a party requests a transcript to be "So Ordered" by the Court, the following procedure must be adhered to: the transcript shall be submitted together with an errata sheet correcting all errors in the record, including presumed court errors. If all parties consent to the proposed corrections or agree that no corrections are required, a stipulation to that effect shall accompany the errata sheet or transcript. In the absence of consent, the requesting party shall notice the record for settlement pursuant to CPLR 5525 [c].

6. Discovery

A. Interrogatories. **Interrogatories are limited to 25 in number** unless another limit is specified in the PC Order. This limit also applies to consolidated actions.

B. Privilege. If a party objects to a disclosure demand on the ground of privilege, together with its response to the demand the party asserting the privilege shall serve on all other parties a privilege log of the responsive documents that are not being disclosed and a copy of the redacted documents, bate-stamped. The privilege log shall identify all redacted and completely withheld documents by bate-stamp numbers, dates, authors and recipients, and shall state the privileges being asserted. Failure to serve a privilege log and redacted documents with the party's response to a disclosure demand will, absent good cause, be deemed a

waiver of the party's objection on the ground of privilege. Following service of a privilege log, the parties shall confer in an attempt to reach agreement on whether the asserted privileges apply. If agreement cannot be reached, the parties shall call the Part Clerk, Steve O'Fee, to schedule a conference.

C. Confidentiality Orders. Any order regarding the exchange of confidential information will be based on the Proposed Stipulation and Order for the Production and Exchange of Confidential Information, prepared by a committee of the Association of the Bar of the City of New York for use in the Commercial Division, available at: http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf. If the parties believe there is good cause to depart from this model, they should call the Part Clerk, Steve O'Fee, to schedule a conference.

D. Sealing. Documents filed with the court will not be sealed merely on the ground that they are subject to a confidentiality agreement. 22 NYCRR § 216.1. Where a party wishes to seal a submission, the party shall first submit a letter to the Court setting forth good cause for the requested relief. The Court then will conduct a conference in an effort to resolve the matter, i.e. to determine whether "good cause" has been readily demonstrated. In the event the Court is unable to resolve the matter at the conference, it will endeavor to fashion temporary relief until a formal motion is made on which it may rule *viz.* the question of "good cause."

E. Electronic Discovery. Please consult Rule 8 (b) of the Rules of the Commercial Division pertaining to Consultation prior to Preliminary and Compliance Conferences and Rules §§ 202.12 (b) and 202.12 (c) (3) of the Uniform Civil Rules for the Supreme Court pertaining to electronic discovery and the Preliminary Conference. (22 NYCRR)

F. Expert Disclosure. No later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure, which shall include the identification of experts, the exchange of expert reports, and depositions of testifying experts – all of which shall be completed no later than four months after completion of fact discovery. In the event that a party withholds consent to this procedure, the parties shall raise the objection as to enhanced expert disclosure and shall request a conference to discuss the objection with the Court. Unless otherwise stipulated or ordered by the Court, expert disclosure must be accompanied by a written report – prepared and signed by the witness – if the witness is one retained or specially employed to provide expert testimony in the case of one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(1) a complete statement of all opinions the witness will express and the basis and the reasons for them;

(2) the data or other information considered by the witness in forming them;

(3) any exhibits that will be used to summarize or support them;

(4) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(5) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(6) a statement of the compensation to be paid for the study and testimony in the case.

The note of issue and certificate of readiness may not be filed until completion of expert disclosure, and expert disclosure provided after dates prescribed herein without good cause will be precluded from use at trial.

7. Pre-Trial or Pre-Evidentiary Hearing Conferences

A. When. A pre-trial or pre-hearing conference (TPC) will be scheduled to be conducted by the Court's Counsel in Chambers at 26 Broadway approximately two weeks prior to the trial or evidentiary hearing. In the event an evidentiary hearing is to be conducted on an accelerated time schedule (*e.g.* a preliminary injunction evidentiary hearing), the Court will arrange for acceleration of the TPC and its attendant time deadlines pertaining to the matters to be addressed.

B. Matters to be Addressed. Attention is directed to the following Commercial Division Rules: Rule 26 (Estimated Length of Trial), Rule 27 (Motions *in Limine*), Rule 28 (Pre-Marking of Exhibits), Rule 29 (Identification of Deposition Testimony), Rule 30(b) (Pre-Trial Conference), Rule 31 (Pre-Trial Memoranda, Exhibit Book and Requests for Jury Instructions), Rule 32 (Scheduling of Witnesses) and Rule 33 (Preclusion). Litigants are directed to address all matters referenced in these rules prior to the TPC (between themselves, where appropriate) and to comply with them so that they come to the TPC prepared to have these matters disposed of in a Pretrial Order. The parties also shall provide the Court with a statement of agreed upon facts and of disputed contentions. With respect to the exhibit binder or book (Rule 32), **the Court requires TWO copies for its own use.**

C. The TPC will result in the entry of a Pretrial Order, signed by the Court, which will govern the trial or hearing.

8. Non-Jury Trial or Evidentiary Hearings

Unless otherwise ordered, all direct testimony of a party's own witnesses (including expert witnesses) in non-jury trials or evidentiary hearings shall be submitted in affidavit form. At the trial or hearing itself, each witness shall swear to the contents of the affidavit submitted, which shall be followed by the opposing side's objections to the testimony and cross-examination. Affidavits containing direct testimony shall be exchanged between or among adversaries and delivered to Chambers at 26 Broadway at least one week prior to the commencement of the trial or evidentiary hearing (unless this deadline is accelerated by the Court for a hearing conducted on an accelerated time schedule). Counsel need not submit direct testimony in affidavit form if a witness is not within the party's control.

9. Inquest Procedures

A party requesting an inquest shall submit the following information or documents:

A. An affidavit from a person with knowledge of the facts setting forth how damages are computed.

B. Attorney's affirmation setting forth a brief recitation of the facts and the grounds for liability. The affirmation also should discuss the damages incurred by the party.

C. Exhibits should be submitted in support of all requests for damages. For example:

- if the relief is attorneys' fees, the attorney's affirmation should attach the billing statements describing the activity, the identity and title of the person performing the activity, time, date, and billing rate.

- if the relief is for lost profits, financial statements for comparative time periods should be provided.

D. Whenever counsel believes it would assist the Court, affidavits from experts (i.e. accountants, appraisers, etc.) should be submitted.

E. Proof of service must be filed indicating that all papers and exhibits submitted to the Court were served on opposing parties.

F. Proposed findings of fact and a proposed order must be e-filed.

G. Papers in opposition shall follow the format set forth above.

H. For inquests that were not granted on default, no submissions of evidence should be made for causes of action that previously have been dismissed or on which no liability was found.