



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

January 19, 2016

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposed amendment of Commercial Division Rules (22 NYCRR 202.70(g))
Regarding the Standard Form Confidentiality Order.

=====

The Administrative Board of the Courts is seeking public comment on an amendment, proposed by the Commercial Division Advisory Council, of the Standard Form Confidentiality Order (“SFO”) in use currently in the Commercial Division. The proposal would revise and promulgate the form as an appendix to the Rules of the Commercial Division (Exh. B) and would adopt a new rule setting forth procedures for the use of SFOs (Exh. C). As described in a supporting memorandum by the Council (Exh. A), the proposal would update the form to the established Commercial Division practice, including the adoption of a mechanism for the filing of confidential documents in an electronically filed case.

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than March 21, 2016.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution
("Subcommittee")

DATE: September 10, 2015

RE: **Revision to Standard Form Confidentiality Order For Use In Commercial
Division of the Supreme Court of the State of New York**

EXECUTIVE SUMMARY

Subsequent to its establishment in 2013 by Chief Judge Jonathan Lippman, the Commercial Division Advisory Council proposed a number of amendments to the Division's Statewide Rules of Practice (the "Division's Rules"). Through a series of administrative orders, former Chief Administrative Judge Gail Prudenti promulgated these amendments, which have since become fully integrated into the Division's Rules.

The integrated amendments, which implement changes proposed by the Task Force on Commercial Litigation in the 21st Century (the "Task Force") and range from enhanced expert disclosure to presumptive limitations on depositions, all share two common goals: (a) to make more efficient and cost-effective the adjudication of commercial disputes in the New York State Commercial Division; and (b) to burnish the Division's reputation as the premier forum in the United States for the resolution of the most complex business disputes.

Having now given effect to the Task Force's recommendations, the Advisory Council's mandate has shifted to the next phase – "[the] further periodic review of the needs and goals of the Commercial Division" (Task Force Report at 31). Towards that end, the Council's Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the "Subcommittee")

recommends an update to an established staple in Commercial Division practice – – the Standard Form of Confidentiality Order (“SFO”).

Since its release in February 2007 by the New York City Bar Association’s Committee on State Courts of Superior Jurisdiction, many of the Commercial Division Justices throughout the state (and specifically all but one of the Commercial Division Justices in New York County) have explicitly incorporated the SFO into their individual rules of practice. *See* Individual Rules of Justices Bransten, Friedman, Kornreich, Oing, Ramos, Scarpulla, Sherwood and Singh. In fact, many of the justices’ individual rules provide that parties desiring to deviate from the SFO must provide the court with a red-line of the proposed changes along with an explanation as to why the changes are appropriate in the case in question. *See e.g.* Individual Rules of Justice Scarpulla at page 6 (“If the parties believe there is good cause to depart from the [SFO], they must submit their proposed stipulation and order, along with a red-lined version, indicating any departures from the [SFO]”). The City Bar drafted the SFO with an eye towards increasing efficiency and reducing client costs. *See Report of New York City Bar Association’s Committee on State Courts of Superior Jurisdiction, at 1 (February 2007).*

Given the passage of more than seven years since its original release, the SFO needs to be updated to reflect lessons learned over time and key changes in Commercial Division practice. The Subcommittee’s proposal is an attempt to effectuate this update. Accordingly, the Subcommittee recommends that:

- (1) the Council forward to the Administrative Board of the Courts the proposed amendments to the SFO set forth in Exhibit A (the “Amended SFO”); and
- (2) the Amended SFO be incorporated as an appendix to the Commercial Division Rules, along with an amendment to the Rules themselves, regarding the terms of its implementation. The proposed rule is set forth in Exhibit B.

DISCUSSION AND ANALYSIS

Because the Subcommittee's recommendation involves revisions to a multipage form that contains over 21 paragraphs (several of which contain subparagraphs), it has attached to this memorandum a red-lined and annotated draft. The attached draft indicates which phrases or paragraphs have been changed and provides by way of the "COMMENT" feature in Microsoft WORD, the reasoning behind the most significant proposed changes. While the rationale for many of the proposed changes will be evident from either the change itself or the interlineated commentary, there is one change that merits a more fulsome (and standalone) explanation: the proposed modification to paragraph 12, which addresses the filing of confidential documents under seal.

Pursuant to the original SFO, parties wishing to file documents under seal could avail themselves of one of two options. The first, set forth in paragraph 12 (a), contemplates the hard copy filing of confidential documents in the context of a formal motion to seal pursuant to 22 NYCRR 216.1. The second, set forth in paragraph 12 (b), provides an alternative. Under paragraph 12 (b), which stems from a recognition as to the stringent showing that must be made to justify a sealing order, parties may sidestep a formal motion to seal by simply providing a set of motion papers to the assigned Justice's chambers, without filing them at all. After the motion on the merits, chambers either returns or destroys the set of papers provided to it.

The Subcommittee recommends that the entirety of paragraph 12 be revamped.

In the years since the City Bar's release of the SFO, filing by electronic means ("E-Filing") has become far more prevalent throughout the Commercial Division and, in many counties, it is now mandatory, not merely optional. Moreover, the ubiquity of E-Filing will only increase with time. The problem with the current SFO is that it provides no mechanism for filing confidential documents in an ECF case. The Amended SFO updates paragraph 12 to provide explicitly a procedure to follow when confidential documents need to be filed under seal in an

ECF case. The proposed procedure is intended to honor both the letter and spirit of Rule 216.1 as well as reflect the realities and mechanics of the electronic filing system. We note that since certain counties have still not made the switch to E-Filing, paragraph 12 in the Amended SFO retains a procedure for filing under seal in hard copy cases.

The Amended SFO also removes entirely the bypass procedure set forth in paragraph 12 (b) of the original SFO. There are two problems with this well-intentioned Rule 216.1 workaround.

First, the appellate courts have become increasingly vocal about the presumption of public access to the court system and the concomitant need for the issuance of a sealing order to follow the strictures of Rule 216.1, which requires a court finding of “good cause” -- *i.e.* that the presumption of open access trumps the need to keep the parties’ information confidential. *See* 22 NYCRR 216.1; *Applehead Pictures LLC v Perelman*, 80 AD3d 181, 191-192 [1st Dept 2010].

The second problem with the workaround is that it creates fundamental problems with respect to appeals, whether from an interlocutory order or a final order or judgment. Chief among these is that by not filing motion papers, the putative appellant lacks a record upon which to premise its appeal. The two most common methods for perfecting an appeal are the so-called “full record” method and the “appendix” method. CPLR 5526, 5528; *see e.g.* 22 NYCRR 600.5(a) & (c)(First Department). Perfecting an appeal using the full record method mandates that appellant’s counsel prepare, along with the reproduced record, a CPLR 2105 certification, attesting to the fact that the reproduced record being submitted on the appeal has been compared against the record on file with the county clerk’s office and that the former is a true and correct copy of the latter. *See e.g.* 22 NYCRR 600.10(b)(1)(viii)(First Department). Since following the paragraph 12(b) procedure would result in no documents on file with the County Clerk (and therefore no record), the CPLR 2105 certification cannot be prepared. *See* 22 NYCRR 202.5-b(d)(4)(documents on the electronic docket constitute the official court “record”).

The same problem attends to perfecting an appeal using the appendix method. Pursuant to this method, the appellant prepares an appendix of only those materials upon which it (and presumably respondent) intends to rely in the appellate briefs. But part and parcel of the appendix method is the issuance of a subpoena to the County Clerk's office, commanding it to transmit the record to the appellate court. *See* 22 NYCRR 600.5(a)(1). Again, by bypassing filing with the County Clerk's office, there is nothing for the clerk to provide the appellate court in response to the subpoena; there is no "record." *See supra*.

In making this recommendation, the Subcommittee does not express any views on the Hobson's choice that businesses currently must make between vindicating their legal rights in court and running the risk of exposing their sensitive business secrets to the public. This policy question is beyond the scope of the current proposal. Instead, through the modification of paragraph 12, the Subcommittee has attempted to give full effect to the presumption of open access as reflected in Rule 216.1, while at the same time providing a mechanism to maximize the chances that a properly issued sealing order can be properly effectuated without an inadvertent disconnect between the Clerk's offices and chambers.

RECOMMENDATION

For the reasons set forth above, the Subcommittee recommends that the Council support the Amended SFO, its adoption as an appendix to the Statewide Rules of the Commercial Division and a corresponding rule regarding the circumstances of its implementation.

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

-----X
:
_____, :
:
Plaintiff, :
:
- against - :
:
_____, :
:
Defendant. :
-----X

Index No. _____

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

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

IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery
of documents and information that the Parties and, as appropriate, non-parties agree merit
confidential treatment (hereinafter the "Documents" or "Testimony").
2. Any Party or, as appropriate, non-party, Either party may designate Documents produced,

Comment [JDL1]: This is the first of several changes that are being made to clarify that both parties AND non-parties may avail themselves of the protections afforded by the Stipulation. It is not at all unusual for commercial litigations to involve subpoenas for documents and testimony from non-parties. This is particularly true in the wake of the New York Court of Appeals decision in *In re Kapon v. Koch* 23 N.Y.3d 32 (2014), which makes clear that disclosure need not be sought, in the first instance, from the adversary, but may be sought directly from non-parties.
Given this reality, the Subcommittee believes it to be appropriate for the Amended SFO to make clear that the protections it confers apply to individuals and entities who are not involved in the litigation at issue.

Comment [JDL2]: See Comment # 1

or Testimony given, in connection with this action as “confidential,” either by notation on each page of the document Document so designated, statement on the record of the deposition, or written advice to the respective undersigned counsel for the Parties hereto, or by other appropriate means.

3. As used herein:

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

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

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

4. The Receiving Party may, at any time, notify the Producing Party that the Receiving Party does not concur in the designation of a document or other material as Confidential Information. If the Producing Party does not agree to declassify such document or material

Comment [JDL3]: See Comment #1

within seven (7) days of the written request, the Receiving Party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall continue to be treated as Confidential Information. If such motion is filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise. Notwithstanding anything herein to the contrary, the Producing Party bears the burden of establishing the propriety of its designation of documents or information as Confidential Information.

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

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

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

c. expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided,

Comment [JDL4]: The Subcommittee feels that it is appropriate to impose a time frame for this type of challenge. Furthermore, it is important to make clear that regardless of which party moves to challenge a designation, the burden of establishing entitlement to confidential treatment rests with the party seeking it. See CPLR 3103; see e.g. *Finch, Prayn & Co. Inc. v Niagara Paper Co., Inc.*, 228 AD2d 834 [3d Dept 1996].

Comment [JDL5]: The Subcommittee recommends this change to clarify the universe of individuals who work with counsel of record and who are entitled to see Confidential Information.

however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;

d. the Court and court personnel, ~~if filed in accordance with paragraph 12 hereof;~~

~~e. an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer, if furnished, shown or disclosed in accordance with paragraph 10 hereof;~~

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

g. any other person agreed to by the parties Producing Party.

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

7. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(c) hereof, counsel for the Receiving ~~party~~ Party shall ~~provide~~ the expert's written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. ~~Counsel for the Receiving Party obtaining the certificate shall supply a copy to counsel for the other Parties at the time designated for expert disclosure, of the disclosure of the information required to be disclosed by CPLR 3101(d), except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied.~~

8. All depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said

Comment [JDL6]: It seems apparent that the Court and court personnel should be entitled to review Confidential Information in any situation in which such a review is warranted. Limiting Court review to rulings on motions to seal is unduly restrictive.

Comment [JDL7]: The purpose for these changes is twofold. The first is to reflect the realities of how court reporting services work; with increasing frequency, these services employ personnel not only to record testimony, but to process the video and stenographic work product as well.

The second is to recognize that not all stenographers are willing to sign confidentiality undertakings. This is particularly true in the context of depositions taken at the courthouse, where the parties must use unionized court reporters.

Comment [JDL8]: This change brings the paragraph in line with the relatively recent amendment to the Statewide Rules of the Commercial Division, which now makes fulsome expert disclosure (as opposed to the perfunctory disclosure contemplated by CPLR 3101(d)) the presumptive norm.

deposition is received by counsel for each of the Pparties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

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

Comment [JDL9]: See Comment #1

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

Comment [JDL10]: See Comment #1

11. A ~~party~~ Party may designate as Confidential Information subject to this Stipulation any document, information, or deposition testimony produced or given by any non-party to—_this case, or any portion thereof. In the case of Documents, produced by a non-party, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated

Comment [JDL11]: The Subcommittee added this provision to address the situation in which a reluctant non-party witness is subpoenaed to testify and will be shown confidential documents, but looks to obstruct the examination by refusing to execute the confidentiality undertaking.

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

Comment [JDL12]: See Comment # 1

~~12. (a) A Receiving Party who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information, and any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information, shall provide all other parties with seven (7) days written notice of its intent to file such material with the Court, so that the Producing Party may file by Order to Show Cause a motion to seal such Confidential Information. The Confidential Information shall not be filed until the Court renders a decision on the motion to seal.~~

~~In the event the motion to seal is granted, all deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated by a party as comprising or containing Confidential Information, and any pleading, brief or memorandum which reproduces, paraphrases or discloses such material, shall be filed in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words ACONFIDENTIAL MATERIAL SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION as an indication of the nature of the contents, and a statement in substantially the following form:~~

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

~~(b) As an alternative to the procedure set forth in paragraph 12(a), any party may file with the court any documents previously designated as comprising or containing Confidential~~

Information by submitting such documents to the Part Clerk in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words ACONFIDENTIAL MATERIAL SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION@ as an indication of the nature of the contents, and a statement in substantially the following form:

This envelope, containing documents which are filed in this case by (name of party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of the parties. Such documents shall be returned by the Part Clerk upon disposition of the motion or other proceeding for which they were submitted.

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

[In Counties WITH Electronic Filing]

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

Comment [JDL13]: See Comment #1

Comment [JDL14]: See Comment #1

with its corresponding unredacted version.

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

Comment [JDL15]: See Comment #1

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

Comment [JDL16]: See Comment #1

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

Comment [JDL17]: See Comment #1

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

[In Counties WITHOUT Electronic Filing]

12. (a) A Party or, as appropriate, non-party, who seeks to file with the Court any deposition

Comment [JDL18]: See Comment #1

transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information, or any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information, shall (i) serve upon the Parties (and, as appropriate, non-parties) a Redacted Filing and a complete and unredacted version of the filing; (ii) filing a Redacted Filing with the court; and (iii) transmit the Redacted Filing and a complete unredacted version of the filing to chambers. Within three (3) days thereafter, the Producing Party may file a motion to seal such Confidential Information. If the Producing Party does not file a motion to seal within the aforementioned three (3) day period, the Party (or, as appropriate, non-party) that seeks to file the Confidential Information shall take steps to file an unredacted version of the material.

Comment [JDL19]: See Comment #1

Comment [JDL20]: See Comment #1

(b) In the event the motion to seal is granted, all deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated by a Party (or, as appropriate, non-party) as comprising or containing Confidential Information, and any pleading, brief or memorandum which reproduces, paraphrases or discloses such material, shall be filed in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words "CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" as an indication of the nature of the contents, and a statement in substantially the following form:

Comment [JDL21]: See Comment #1

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

In the event the motion to seal is denied, then the Party (or, as appropriate, non-party) making

Comment [JDL22]: See Comment #1

the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

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

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

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

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

15. Extracts and summaries of Confidential Information shall also be treated as confidential in

Comment [JDL23]: See Comment #1

Comment [JDL24]: See Comment #1

Comment [JDL25]: See Substantive discussion in the accompanying Memorandum from the Subcommittee on Procedural Rules to Promote Efficient Case Resolution to the Commercial Division Advisory Council at pages 3-5 for a discussion of this wholesale revision

accordance with the provisions of this Stipulation.

16. The production or disclosure of Confidential Information shall in no way constitute a waiver of each Producing Party's right to object to the production or disclosure of other information in this action or in any other action.

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

Comment [JDL26]: See Comment # 1

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

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

20. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof, shall be returned to the Producing Party or shall be destroyed, ~~at the option of the Producing Party.~~ In the event that any Receiving ~~Party~~ Party chooses to destroy physical

Comment [JDL27]: The Subcommittee believes that the Receiving Party should be given the option as to whether to destroy or return Confidential Information. The Receiving Party should be entitled to choose the most cost effective method, and the ramifications of a false certification should serve as a sufficient deterrent to avoid circumvention of the confidentiality strictures imposed by the Stipulation.

objects and documents, such ~~party-Party~~ shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the ~~parties-Parties~~ may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable rules of professional conduct ~~annons of ethics or codes of professional responsibility~~. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any ~~party~~ Receiving Party, or of experts specially retained for this case, to represent any individual, corporation, or other entity adverse to any ~~party-Party or non-party~~ or their ~~its~~ affiliate(s) in connection with any other matters.

Comment [JDL28]: Subsequent to the issuance of the SFO, the Appellate Divisions replaced the New York Code of Responsibility with the New York Rules of Professional Conduct. This change is designed to recognize this change.

Comment [JDL29]: See Comment #1

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

[FIRM]
By: _____
New York, New York _____
Tel.: _____

[FIRM]
By: _____
New York, New York _____
Tel.: _____

Attorneys for Plaintiff

Attorneys for Defendant

Dated: _____

SO ORDERED

J.S.C.



EXHIBIT "A"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

-----X
_____,
Plaintiff,
- against -
_____,
Defendant.
-----X

Index No. _____

**AGREEMENT TO
RESPECT
CONFIDENTIAL
MATERIAL**

I, _____, state that:

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

or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information.

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

Dated: _____

EXHIBIT C

EXHIBIT

PROPOSED RULE

The Commercial Division Rules shall be amended to add the following:

“Rule X Proposed Form of Confidentiality Order

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

- (a) For all commercial cases that warrant the entry of a confidentiality order, the parties shall submit to the Court for signature the proposed stipulation and order that appears in Appendix B to these Rules.
- (b) In the event the parties wish to deviate from the form set forth in Appendix B, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.
- (c) It is expressly intended that nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the CPLR.”