



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

MEMORANDUM

JOHN W. McCONNELL
COUNSEL

September 10, 2019

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of the Commercial Division Standard Form Confidentiality Order and Rule 11-g to Allow “Highly Confidential – Attorney’s Eyes Only” Designations

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council (the “Advisory Council”), to amend the statewide form confidentiality order used in the Commercial Division as well as Rule 11-g to allow the designation of documents as “highly confidential – for attorney’s eyes only.” In a memorandum supporting this proposal (Att. A), the Advisory Council notes that the availability of such a designation would be very useful in commercial litigation, especially in matters involving potential disclosure of trade secrets between direct competitors; that such designations are common in federal court; and that a narrowly tailored “attorney’s eyes only” provision would reinforce the presumption that parties generally should be able to review documents produced by the opposing side.

Exhibit A to the Advisory Council’s explanatory memo includes the current version of the form confidentiality order. Exhibit B contains a redline of the proposed changes to the standard form confidentiality order. Exhibit C contains a redline of the proposed changes to Rule 11-g.

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Persons wishing to comment on the 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 November 8, 2019.

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.

ATTACHMENT A

MEMORANDUM

TO: Commercial Division Advisory Council

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

DATE: June 12, 2019

RE: Proposal to Amend the Standard Form Confidentiality Order to Allow
"Attorney's Eyes-Only" Designations

Introduction and Background

In 2015 the Commercial Division Advisory Council proposed amendments to the Commercial Division Rules (22 NYCRR. 202.70(g)) to establish a statewide Standard Form Confidentiality Order (SFO) for the Commercial Division.¹ In doing so, the Advisory Council drew on the widespread use of an SFO in the Commercial Division in New York County. The justices in that court adopted, as a starting point, the SFO drafted by the City Bar in 2007, while allowing parties to modify the language of the SFO with court approval. The Advisory Council (through its Subcommittee on Procedural Rules to Promote Efficient Case Resolution) reviewed the existing (8-year-old) City Bar form and then current practices in the Commercial Division in New York County and other counties, and proposed certain changes to modernize the SFO and introduce it for state-wide use.

Both the SFO as originally conceived by the City Bar in 2007, and the SFO modernized by the Advisory Council in 2015, did not make any provision for distinguishing among varying degrees of confidentiality ("confidential" or "highly confidential") and made

¹ The Office of Court Administration approved the SFO on June 16, 2016. The SFO is an appendix to the Rules of the Commercial Division. A copy of the current SFO is attached as Exhibit A.

no provision for labeling some documents for “Attorney's Eyes-Only”(AEO). For its part, the City Bar has considered and rejected including an AEO provision in the City Bar SFO:

[T]he Committee decided not to include the option for such protection primarily out of concern that it would be invoked far more often than necessary. Inevitable disputes over the propriety of a party’s invoking “Attorney's Eyes-Only” protection would undercut the overall goal of the Committee to reduce the time required to negotiate confidentiality agreements.²

Notwithstanding the City Bar’s expressed concern for inefficiency arising from parties over-designating materials as AEO, such provisions are common in commercial litigation both inside and outside the Commercial Division. *See, e.g., BDCM Fund Adviser, L.L.C. v. Zenni*, 98 A.D.3d 915 (1st Dept. 2012) (affirming Commercial Division [Bransten, J] rejection of challenge to AEO designation); *Callsome Solutions Inc. v. Google, Inc.*, INDEX NO. 652386/2014 (N.Y. Sup. Ct. 2018) [Masley, J.]; *Heritage Auctioneers & Galleries, Inc. v. Christie's, Inc.*, Index No. 651806/2014 (N.Y. Sup. Ct. 2018) [Masley, J.]; *In re Leonard Bernstein*, 232 A.D.2d 336, 337 (1st Dept. 1996) (“Such “attorney's eyes-only” orders have been upheld in order to protect the confidentiality of trade secrets obtained in the course of discovery”) (citing *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir.), *cert denied sub nom. BB Asset Mgt. v. Symantec Corp.*, 506 U.S. 869 (1992)). Such provisions are also common in commercial litigation in federal court. In our experience, AEO designations are appropriate (and may be sought by both sides) when litigation occurs between direct competitors where disclosure of certain information to the opposing party would result in immediate irreparable harm.

² See [undated] report of the New York City Bar Association Committee on State Courts of Superior Jurisdiction available at <https://www.nycbar.org/pdf/report/ModelConfidentiality.pdf>.

The Subcommittee has examined current statewide practices in the Commercial Division (anecdotal evidence), and weighed the pros and cons of providing a mechanism in the SFO to make possible AEO designations. On balance, we conclude that a narrowly tailored AEO provision would be a welcome addition to the SFO. If nothing else, such a provision (and its commentary) would reinforce the strong presumption that parties are entitled to review documents produced by the opposing side, and that withholding such production from the parties' review, by designating documents AEO, will rarely be appropriate. Further, the AEO provision we propose is narrowly tailored in scope. We think that counsel and litigants in the Commercial Division would benefit from having sample language to address heightened concerns about confidentiality of sensitive business information that reasonably arise in a narrow class of cases. We do not anticipate that by including an AEO option in the SFO that this amendment will lead to inefficient over-designations of AEO material and extra motion practice. If our predictions in that regard prove inaccurate, the Advisory Council can request the Office of Court Administration to amend the SFO to eliminate it. In other words, we wish to see how the AEO provision works in practice in the crucible of the Commercial Division, believing the pros outweigh the cons.

CONCLUSION

The AEO language we propose to add to the SFO is set out in Exhibit B, which is redlined against the SFO. In addition, we propose that Statewide Rule of the Commercial Division 11-g be amended as set forth in Exhibit C hereto.

EXHIBIT A

**CURRENT FORM OF
STANDARD CONFIDENTIALITY ORDER**

**Appendix B to the
Rules of Practice of the Commercial Division**

(see, 22 NYCRR §202.70[g], Rule 11-g)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

----- X
:
_____, : Index No. _____
:
Plaintiff, :
:
- against - :
:
_____, :
:
Defendant. :
:
----- X

**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, may designate Documents produced, or Testimony given, in connection with this action as "confidential," either by notation on each page

of the 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 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 Parties to this action and/or any non-party receiving “Confidential Information” in connection with depositions, document production, subpoenas 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 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 the Parties 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, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;

(d) the Court and court personnel;

(e) an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;

(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 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 making such disclosure shall provide to the expert witness or consultant a copy of this Stipulation and obtain the expert's or consultant'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, 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 deposition is received by counsel for each of the Parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

9. Should the need arise for any 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 Party or, as appropriate, non-party may do so only after taking such steps as the Court, upon motion of the Producing Party, shall deem necessary to preserve the confidentiality of such Confidential Information.

10. This Stipulation shall not preclude counsel for any Party from using during any deposition in this action any Documents or Testimony which has been designated as "Confidential Information" under the terms hereof. Any 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. Counsel for the Party obtaining the certificate shall supply a copy to counsel for the other 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.

11. A 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 as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the 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 (or, as appropriate, non-party) asserting the confidentiality. 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 and Testimony shall be treated as Confidential Information.

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 the NYSCEF 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 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.

(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 (or, if directed by the court, portions of 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 NYSCEF 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.

(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.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any materials 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

13. (a) A Party or, as appropriate, non-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, or any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information, shall (i) serve upon the other Parties (and, as appropriate, non-parties) a Redacted Filing and a complete and unredacted version of the filing; (ii) file a Redacted Filing with the court; and (iii) transmit the Redacted Filing and a complete unredacted version of the filing to chambers. Within seven (7) days thereafter, the Producing Party may file a motion to seal such Confidential Information.

(b) If the Producing Party does not file a motion to seal within the aforementioned seven (7) 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.

(c) In the event the motion to seal is granted, all (or, if directed by the court, portions of) 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 well 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 or as appropriate, non-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 the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information produced by a Producing Party that is 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.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose 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.

14. 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 and shall use reasonable measures to store and maintain the Confidential Information so as to prevent unauthorized disclosure.

15. 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 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.

16. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions of this Stipulation.

17. 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. Nothing in this Stipulation shall operate as an admission by any Party or non-party that any particular document or information is, or is not, confidential. Failure to challenge a Confidential Information designation shall not preclude a subsequent challenge thereto.

18. This Stipulation is entered into without prejudice to the right of any Party or non-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.

19. 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 may seek the written permission of the Producing Party or further order of the Court with respect to dissolution or modification of the Stipulation. The provisions of this Stipulation shall, absent prior written consent of the parties, continue to be binding after the conclusion of this action.

20. 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.

21. 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, at the Receiving Party's option, shall be destroyed. In the event that any Receiving Party chooses to destroy physical objects and documents, such 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 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. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any Receiving Party, or of experts specially retained for this case, to represent any individual, corporation or other entity adverse to any Party or non-party or their affiliate(s) in connection with any other matter.

22. If a Receiving Party is called upon to produce Confidential Information in order to comply with a court order, subpoena, or other direction by a court, administrative agency, or legislative body, the Receiving Party from which the Confidential Information is sought shall (a) give written notice by overnight mail and either email or facsimile to the counsel for the Producing Party within five (5) business days of receipt of such order, subpoena, or direction, and (b) give the Producing Party five (5) business days to object to the production of such Confidential Information, if the Producing Party so desires. Notwithstanding the foregoing, nothing in this paragraph shall be construed as requiring any party to this Stipulation to subject itself to any penalties for noncompliance with any court order, subpoena, or other direction by a court, administrative agency, or legislative body.

23. This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a 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.

24. This Stipulation may be signed in counterparts, which, when fully executed, shall constitute a single original, and electronic signatures shall be deemed original signatures.

[FIRM]

By: _____

New York, New York

Tel: _____

Attorneys for Plaintiff

[FIRM]

By: _____

New York, New York

Tel: _____

Attorneys for Defendant

Dated: _____

SO ORDERED

J.S.C.

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

----- x

:

Index No. _____

Plaintiff,

:

**AGREEMENT WITH
RESPECT TO
CONFIDENTIAL
MATERIAL**

- against -

:

:

Defendant.

:

----- x

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.

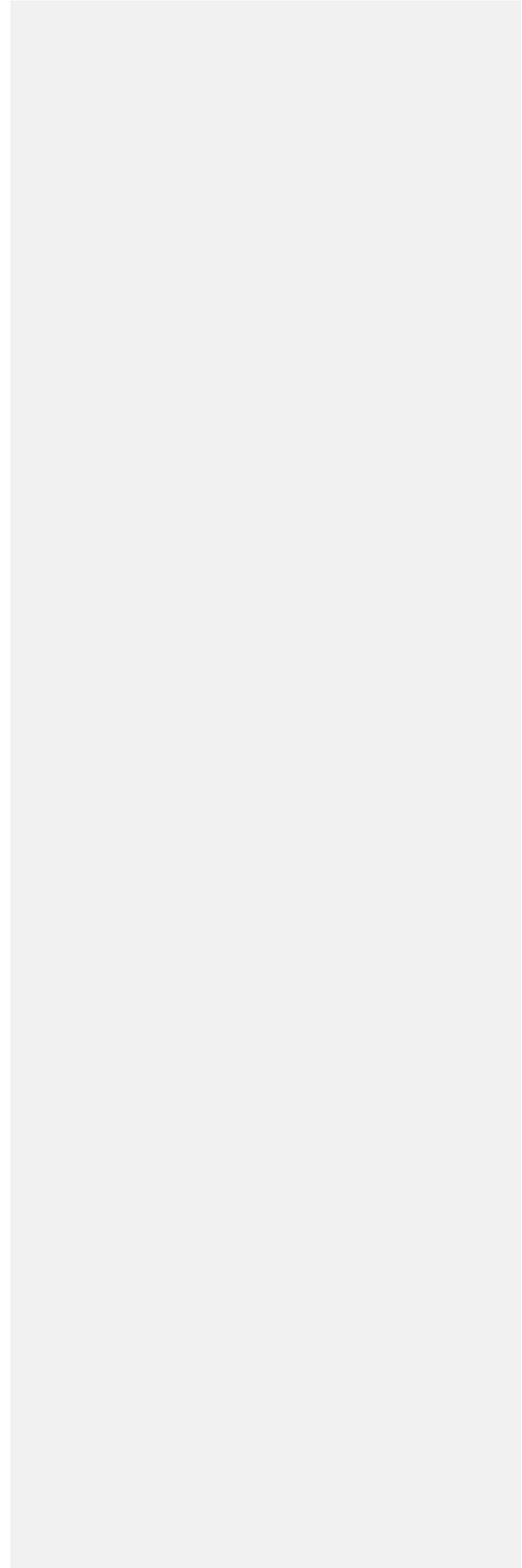
7. I will return all Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information.

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

Dated: _____

EXHIBIT B

**STANDARD FORM OF CONFIDENTIALITY ORDER WITH ATTORNEY'S
EYES-ONLY DESIGNATED (REDLINED TO SHOW CHANGES)**



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, may designate Documents produced, or Testimony given, in connection with this action as “~~confidential~~confidential,” or “highly

confidential – attorney’s eyes only” either by notation on each page of the 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) Highly Confidential – Attorney’s Eyes-OnlyEyes-Only Information" shall mean any “Confidential Information” that is of such a private, sensitive, competitive or proprietary nature that present disclosure to persons other than those identified in paragraph 5.1 below would reasonably be expected to cause irreparable harm or materially impair the legitimate competitive position or interests of the Producing Party. A designation of Confidential Information as Attorney’s Eyes-Only Information constitutes a representation that such Confidential Information has been reviewed by an attorney for the Producing Party and that there is a valid basis for such a designation.

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(b)(c) “Producing Party” shall mean the parties to this action and any non-parties producing “Confidential Information” or “Highly Confidential – Attorney’s Eyes-OnlyEyes-Only Information” in connection with depositions, document production or otherwise, or the Party or non-party asserting the confidentiality privilege, as the case may be.

~~(e)~~(d) “Receiving Party” shall mean the Parties to this action and/or any non-party receiving “Confidential Information” or “Highly Confidential – Attorney’s Eyes-Only Eyes-Only Information” in connection with depositions, document production, subpoenas 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 or “Highly Confidential – Attorney’s Eyes-Only Eyes-Only Information”. If the Producing Party does not agree to declassify such document or material 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 or Highly Confidential – Attorney’s Eyes-Only Eyes-Only Information. If such motion is filed, the documents or other materials shall be deemed as designated by the Producing Party 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 or Highly Confidential – Attorney’s Eyes-Only Eyes-Only 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 the Parties 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, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;

(d) the Court and court personnel;

(e) an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;

(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 Producing Party.

5.1 Except with the prior written consent of the Producing Party or by Order of the Court, Highly Confidential – Attorney’s ~~Eyes-Only~~Eyes-Only Information shall not be furnished, shown or disclosed to any person or entity except to those identified in paragraphs 5(b)-5(g).

6. Confidential Information or “Highly Confidential – Attorney’s ~~Eyes-Only~~Eyes-Only 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 or “Highly Confidential – Attorney’s Eyes-Only Information” is made to an expert witness or consultant pursuant to paragraph 5 (c) thereof, counsel for the Receiving Party making such disclosure shall provide to the expert witness or consultant a copy of this Stipulation and obtain the expert’s or consultant’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, 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. Unless otherwise designated during the deposition, A 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 deposition is received by counsel for each of the Parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

9. Should the need arise for any Party or, as appropriate, non-party, to disclose Confidential Information or “Highly Confidential – Attorney’s Eyes-Only Information” during any hearing or trial before the Court, including through argument or the presentation of evidence, such Party or, as appropriate, non-party may do so only after taking such steps as the Court, upon motion of the Producing Party, shall deem necessary to preserve the confidentiality of such Confidential Information or “Highly Confidential – Attorney’s Eyes-Only Information”.

10. This Stipulation shall not preclude counsel for any Party from using during any deposition in this action any Documents or Testimony which has been designated as “Confidential Information” or “Highly Confidential – Attorney’s Eyes-Only Eyes-Only

Information” under the terms hereof. Any deposition witness who is given access to Confidential Information or “Highly Confidential – Attorney’s ~~Eyes-Only~~Eyes-Only 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. Counsel for the Party obtaining the certificate shall supply a copy to counsel for the other 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.

11. A Party may designate as Confidential Information or “Highly Confidential – Attorney’s ~~Eyes-Only~~Eyes-Only 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 as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the 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 (or, as appropriate, non-party) asserting the confidentiality. 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 and Testimony shall be treated as Confidential Information.

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 “Highly Confidential – Attorney’s Eyes-Only Information”, or (ii) any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information or “Highly Confidential – Attorney’s Eyes-Only Information” shall file the document, pleading, brief, or memorandum on the NYSCEF 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 with its corresponding unredacted version.

(b) In the event that the Party’s (or, as appropriate, non-party’s) filing includes Confidential Information or “Highly Confidential – Attorney’s Eyes-Only 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 or “Highly Confidential – Attorney’s Eyes-Only Information” unredacted.

(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 (or, if directed by the court, portions of 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 NYSCEF

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.

(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.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any materials which have previously been designated by a party as comprising or containing Confidential Information or "Highly Confidential – Attorney's Eyes-Only Eyes-Only Information" shall identify such documents by the production number ascribed to them at the time of production.

In Counties WITHOUT Electronic Filing

13. (a) A Party or, as appropriate, non-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 or "Highly Confidential – Attorney's Eyes-Only Information", or any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information or "Highly Confidential – Attorney's Eyes-Only Information", shall (i) serve upon the other Parties (and, as appropriate, non-parties) a Redacted Filing and a complete and unredacted version of the filing; (ii) file a Redacted Filing with the court; and (iii) transmit the Redacted Filing and a complete unredacted version of the filing to chambers. Within seven (7) days thereafter, the Producing Party may file a motion to seal such Confidential Information or "Highly Confidential – Attorney's Eyes-Only Eyes-Only Information".

(b) If the Producing Party does not file a motion to seal within the aforementioned seven (7) day period, the Party (or, as appropriate, non-party) that seeks to file the Confidential Information or “Highly Confidential – Attorney’s Eyes-Only Eyes-Only Information” shall take steps to file an unredacted version of the material.

(c) In the event the motion to seal is granted, all (or, if directed by the court, portions of) 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 or “Highly Confidential – Attorney’s Eyes Only 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” or HIGHLY CONFIDENTIAL MATERIAL – ATTORNEY’S EYES-ONLY – SUBJECT TO STIPUALTION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION.” as well 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 or as appropriate, non-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 the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) In the event that the Party’s (or, as appropriate, non-party’s) filing includes Confidential Information or “Highly Confidential – Attorney’s Eyes-Only Information”

produced by a Producing Party that is 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 or "Highly Confidential – Attorney's Eyes-Only Information" unredacted.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any documents which have previously been designated by a party as comprising or containing Confidential Information or "Highly Confidential – Attorney's Eyes-Only Eyes-Only Information" shall identify such documents by the production number ascribed to them at the time of production.

14. Any person receiving Confidential Information or "Highly Confidential – Attorney's Eyes-Only Information" shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof and shall use reasonable measures to store and maintain the Confidential Information or "Highly Confidential – Attorney's Eyes-Only Information" so as to prevent unauthorized disclosure.

15. Any document or information that may contain Confidential Information or "Highly Confidential – Attorney's Eyes-Only 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 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.

16. Extracts and summaries of Confidential Information or “Highly Confidential – Attorney’s Eyes-Only Information” shall also be treated with the same level of confidentiality as the designated information from which it was derived~~as confidential in accordance with the provisions of this Stipulation.~~

17. The production or disclosure of Confidential Information or “Highly Confidential – Attorney’s Eyes-Only Eyes-Only 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. Nothing in this Stipulation shall operate as an admission by any Party or non-party that any particular document or information is, or is not, confidential or “highly confidential attorney’s-eyes only”. Failure to challenge a Confidential Information ~~or~~ “Highly Confidential – Attorney’s Eyes-Only Eyes-Only Information” designation shall not preclude a subsequent challenge thereto.

18. This Stipulation is entered into without prejudice to the right of any Party or non-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.

19. 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 may seek the written permission of the Producing Party or further order of the Court with respect to dissolution or modification of the Stipulation. The provisions of this Stipulation shall, absent prior written consent of the parties, continue to be binding after the conclusion of this action.

20. 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.

21. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information or “Highly Confidential – Attorney’s Eyes-Only Eyes-Only Information” produced or designated and all reproductions thereof shall be returned to the Producing Party or, at the Receiving Party’s option, shall be destroyed. In the event that any Receiving Party chooses to destroy physical objects and documents, such 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 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. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any Receiving Party, or of experts specially retained for this case, to represent any individual, corporation or other entity adverse to any Party or non-party or their affiliate(s) in connection with any other matter.

22. If a Receiving Party is called upon to produce Confidential Information or “Highly Confidential – Attorney’s Eyes-Only Information” in order to comply with a court order, subpoena, or other direction by a court, administrative agency, or legislative body, the Receiving Party from which the Confidential Information or “Highly Confidential – Attorney’s

Eyes-Only Information” is sought shall (a) give written notice by overnight mail and either email or facsimile to the counsel for the Producing Party within five (5) business days of receipt of such order, subpoena, or direction, and (b) give the Producing Party five (5) business days to object to the production of such Confidential Information or “Highly Confidential – Attorney’s Eyes-Only Information”, if the Producing Party so desires. Notwithstanding the foregoing, nothing in this paragraph shall be construed as requiring any party to this Stipulation to subject itself to any penalties for noncompliance with any court order, subpoena, or other direction by a court, administrative agency, or legislative body.

23. This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a 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.

24. This Stipulation may be signed in counterparts, which, when fully executed, shall constitute a single original, and electronic signatures shall be deemed original signatures.

[FIRM]

[FIRM]

By: _____

By: _____

New York, New York

New York, New York

Tel: _____

Tel: _____

Attorneys for Plaintiff

Attorneys for Defendant

Dated: _____

SO ORDERED

J.S.C.

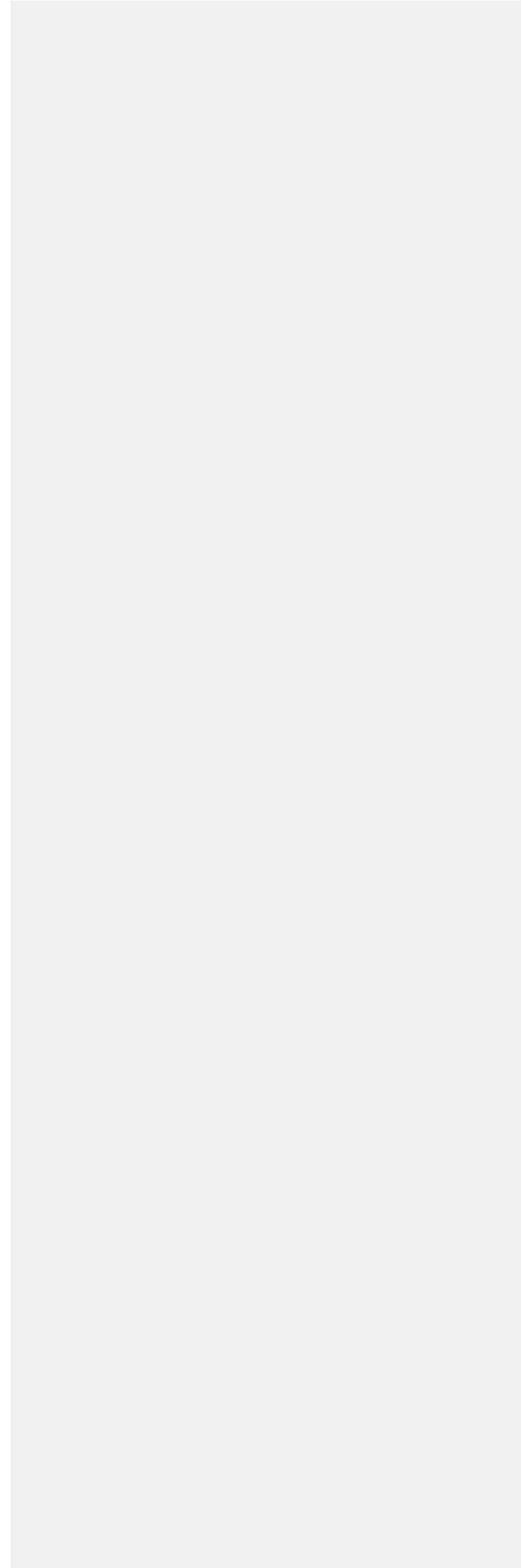


EXHIBIT "A"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

----- x

	:	Index No. _____
Plaintiff,	:	AGREEMENT WITH RESPECT TO CONFIDENTIAL MATERIAL
- against -	:	
	:	
Defendant.	:	

----- x

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 or "Highly Confidential – Attorney's Eyes-Only Eyes-Only Information" that is disclosed to me.
7. I will return all Confidential Information or "Highly Confidential – Attorney's Eyes-Only 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 or “Highly Confidential – Attorney’s Eyes-Only Information”.

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

Dated: _____

[4823-9416-7192, v. 14848-4878-4607, v. 4](#)

Exhibit C – Proposed Amendment to Commercial Division Rule 11-g

Rule 11-g. 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 of the Commercial Division.
- (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) In the event the parties wish to incorporate a privilege claw-back provision into either (i) the confidentiality order to be utilized in their commercial case, or (ii) another form of order utilized by the Justice presiding over the matter, they shall utilize the text set forth in Appendix E to these Rules of the Commercial Division. In the event the parties wish to deviate from the language in Appendix E, 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.

(d) In the event the parties wish to incorporate Attorney’s Eyes-Only protection, the parties shall submit to the Court for signature the proposed stipulation and order that appears in Appendix F to these Rules of the Commercial Division. Appendix F provides both a clean form of order as well as a redline, which illustrates how it differs from the confidentiality order without Attorney’s Eyes-Only protection and referenced in Rule 11-g(a) above. In the event the parties wish to deviate from the Attorney’s Eyes-Only form set forth in Appendix F, 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.

~~(e)~~ Nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the Civil Practice Law and Rules.