

**NASSAU COUNTY JUSTICES  
AND LOCAL RULES**



## Commercial Division - NY Supreme Court

### *Nassau County*

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#### **Chambers and Part Information - Justice Bucaria**

##### **Part Information**

Part 3

3rd Floor

Courtroom Phone: 516-493-3171

Part Clerk: Thomas Bencin

##### **Chambers Information**

Commercial Division, Nassau County  
Supreme Court of the State of New York  
100 Supreme Court Drive  
Mineola, NY 11501

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Web page updated: June 24, 2013

## Commercial Division - NY Supreme Court

### *Nassau County*

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#### **Biography of Justice Stephen A. Bucaria**

JUSTICE STEPHEN A. BUCARIA graduated from Fairfield University in Connecticut in 1970, wherein he received a B.A. In 1971, he received his M.A. in Criminal Justice from SUNY - Albany. He received his J.D. from Hofstra University in 1976. Prior to his election to the Bench, Justice Bucaria served in both the public and private sector.

From 1971 through 1976 he was Legislative Assistant to Senator John R. Dunne. Upon his graduation from Hofstra Law School he served in the office of the District Attorney, Nassau County. From the years 1979 - 1987 he was in the private practice of law where he focused primarily on Surrogate, Real Estate and Complex Commercial litigation. In 1987 he became a Law Secretary to the Hon. Gabriel Kohn of the New York Court of Claims, and then he became Law Secretary to Hon. Angelo D. Roncallo, Justice of the Supreme Court. In 1993, Justice Bucaria was elected to the District Court of Nassau County, and in 1995 he was elected as a Justice of the Supreme Court, State of New York.



In addition to his legal experience, Justice Bucaria has served as an Adjunct Professor, Long Island University at C.W. Post at the graduate level. Prior to that he taught at the University of Alberta, Edmonton, Canada, and SUNY, Farmingdale. He has participated in numerous invitational seminars held by the AEI - Brookings Institute in Washington, D.C. He has presided over Mock Trial Competitions, as well as Moot Court held at Hofstra University. He has been active in numerous legal, charitable and educational organizations during his career. He is a past president of the Catholic Lawyers Guild of Rockville Centre and a member of Colombian Lawyers, Friendly Sons of Saint Patrick, and Irish in Government. Justice Bucaria also is a member of the American College of Business Court Judges.

Further, since 1997, he has been active in the New York State Guard, where he attended numerous conferences, including the National Security Seminar for the United States Army, as well as the National Security Seminar for the United States Navy. He presently holds the rank of Brigadier General in the New York Guard, where he is Commander of the Army Division. Among his numerous awards and decorations, he has received the New York State Defense of Liberty Medal presented to those who served the State during the September 11, 2001 tragedy.



## Commercial Division - NY Supreme Court

### *Nassau County*

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#### **Chambers and Part Information - Justice DeStefano**

##### **Part Information**

Part 15

3rd Floor

Courtroom Phone: 516-493-3179

Part Clerk: John Cialone

##### **Chambers Information**

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## Commercial Division - NY Supreme Court

### *Nassau County*

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#### **Biography of Justice Vito M. DeStefano**

Justice Vito M. DeStefano is a New York State Supreme Court Justice, having been elected to that position in 2007. Prior to serving in the Supreme Court, Judge DeStefano was a Nassau County District Court Judge for four years.

In his judicial capacity, Judge DeStefano has handled thousands of civil and criminal matters from commencement through verdict or decision. He is the author of many published decisions covering a wide array of legal issues. In 2004, Judge DeStefano was profiled in the New York Law Journal for his successful efforts in settling 1,400 no-fault insurance cases pending in District Court.



Judge DeStefano presently serves as a member of the Advisory Committee on Judicial Ethics and is an adjunct professor at Molloy College, Hofstra University and Long Island University C.W. Post School of Accountancy. Judge DeStefano is also a frequent continuing legal education lecturer.

From 1999 through 2003, Judge DeStefano was an associate at a major mid-town law firm. A substantial part of his practice involved appellate work and insurance litigation of all types. Before entering private practice, Judge DeStefano served as an Appellate Court Attorney at the Appellate Division Second Judicial Department.

Judge DeStefano received his juris doctor degree from Brooklyn Law School and his Bachelor of Arts Degree in Philosophy and Religious Studies (magna cum laude) from Wagner College. He graduated from Stuyvesant High School and was born in Brooklyn, New York. He and his wife Kim have been married since 1991 and have four children.



## Commercial Division - NY Supreme Court

### *Nassau County*

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#### **Chambers and Part Information - Justice Driscoll**

##### **Part Information**

Part 16

3rd Floor

Courtroom Phone: 516-493-3187

Part Clerk: Ellen Johnson

##### **Chambers Information**

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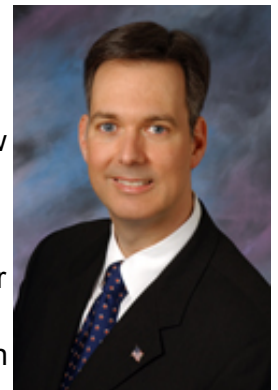
## Commercial Division - NY Supreme Court

### *Nassau County*

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#### **Biography of Justice Timothy S. Driscoll**

JUSTICE TIMOTHY S. DRISCOLL is a Justice of the Supreme Court of the State of New York, and has been assigned to the Nassau County Commercial Division since May 2009. From January 2008 through April 2009, Judge Driscoll sat in the Nassau County Matrimonial Center. Judge Driscoll is also an adjunct professor at Brooklyn Law School and has served as a teaching team member at the Harvard Law School's Trial Advocacy Workshop.



Prior to beginning his judicial service on January 1, 2008, Judge Driscoll held a number of posts in the public and private sector. He served as Deputy Nassau County Executive for Law Enforcement and Public Safety from July 2004 to December 2007. In that position, he oversaw all of the public safety and law enforcement agencies in the County, including the Police, Fire Marshal, Probation, Sheriff, Office of Consumer Affairs, Traffic and Parking Violations Agency, Medical Examiner, and Office of Emergency Management.

Judge Driscoll was an Assistant United States Attorney in the Eastern District of New York from November 2000 to July 2004. His case load included violent crime matters including racketeering, murder, gun possession and trafficking, and narcotics distribution, as well as white collar matters including mail fraud, wire fraud and health care fraud. His work as a federal prosecutor was recognized by the FBI, Nassau County Police Department, Old Brookville Police Department, and the Drug Enforcement Administration.





**Commercial Division, Nassau County  
Guidelines for Discovery of  
Electronically Stored Information (“ESI”)<sup>1</sup>**

The purpose of these Guidelines for Discovery of ESI (the “Guidelines”) is to:

- *Provide efficient discovery of ESI in civil cases;*
- *Encourage the early assessment and discussion of the costs of preserving, retrieving, reviewing and producing ESI given the nature of the litigation and the amount in controversy;*
- *Facilitate an early evaluation of the significance of and/or need for ESI in light of the parties’ claims or defenses;*
- *Assist parties in resolving disputes regarding ESI informally and without Court supervision or intervention whenever possible;*
- *Encourage meaningful discussions and cooperation between parties prior to the Preliminary Conference; and*
- *Ensure a productive Preliminary Conference by, among other things, identifying terms and issues that will be addressed at the Preliminary Conference and/or in the Preliminary Conference Stipulation and Order.*

The Guidelines are intended to be practical suggestions concerning discovery of ESI; they are not intended to be a checklist.

Counsel are encouraged to review the Guidelines at or before the commencement of proceedings.

**I. DEFINITIONS**

- A. As used herein, “ESI” includes, but is not limited to, e-mails and attachments, voice mail, instant messaging and other electronic communications, word processing documents, text files, hard drives, spreadsheets, graphics, audio and video files, databases, calendars, telephone logs, transaction logs, Internet usage files, offline storage or information stored on removable media, information contained on laptops or other portable devices and network access information and backup materials, Native Files and the corresponding Metadata which is ordinarily maintained.
- B. As used herein, the term “Metadata” means: (i) information embedded in a Native File that is not ordinarily viewable or printable from the application that generated,

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<sup>1</sup> These guidelines, which have been prepared in consultation with members of the bar familiar with current issues and trends in litigation involving ESI, are designed to help practitioners identify at the early stage of a dispute the type and nature of electronically stored information that parties may deem appropriate to preserve and/or produce in litigation -- in preparation for a Preliminary Conference under the Commercial Division Uniform Rules. These guidelines substantially rely upon the Suggested Protocol for Discovery of ESI developed by a joint bar-court committee consisting of Chief Magistrate Judge Paul W. Grimm of the United States District Court for the District of Maryland, members of the bar of that court and technical consultants, a copy of which can be found at: [www.mdd.uscourts.gov/news/news/ESIProtocol.pdf](http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf).

edited, or modified such Native File; and (ii) information generated automatically by the operation of a computer or other information technology system when a Native File is created, modified, transmitted, deleted, sent, received or otherwise manipulated by a user of such system. Metadata is a subset of ESI.

- C. As used herein, the term “Native File(s)” means ESI in the electronic format of the application in which such ESI was created, viewed and/or modified. Native Files are a subset of ESI.
- D. As used herein, the term “Load File” means a file that relates to a set of scanned or electronic images or electronically processed files that indicate where individual pages or files belong together as documents, including attachments, and where each document begins and ends. A Load File may also contain data relevant to the individual documents, such as Metadata, coded data, text, and the like. Load Files must be obtained and provided in prearranged formats to ensure transfer of accurate and usable images and data.<sup>2</sup>
- E. As used herein, the term “Static Image(s)” means a representation of ESI produced by converting a Native File into a standard image format capable of being viewed and printed on standard litigation support software. The most common forms of Static Images used in litigation are ESI provided in either Tagged Image File Format (TIFF, or .TIF files) or Portable Document Format (PDF). If Load Files were created in the process of converting Native Files to Static Images, or if Load Files may be created without undue burden or cost, Load Files are typically produced together with Static Images.

## II. PRELIMINARY CONFERENCE

- A. Prior to the Preliminary Conference, counsel for the parties should:
  - 1. review and jointly complete the Preliminary Conference Stipulation and Order, and be familiar with its requirements;
  - 2. meet and confer in a good faith effort to identify matters concerning ESI not in contention, resolve disputed questions without need for court intervention and identify issues requiring court approval or intervention, in compliance with Rule 8 of the Uniform Commercial Division Rules; and
  - 3. prepare a written plan/stipulation for the preservation, collection, review and production of ESI, including without limitation, data and tangible things, if any, reasonably anticipated to be subject to discovery in the action, as set forth in the Preliminary Conference Stipulation and Order.

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<sup>2</sup> The definition of “Load Files” is taken from materials promulgated by the Sedona Conference, whose writings on ESI have had a substantial influence on the development of the law and practices concerning ESI nationwide. Practitioners may find other materials promulgated by the Sedona Conference useful in determining how best to address the challenges their clients face relating to ESI.

B. Counsel are advised to confer regarding at least the following topics, including and beyond those set forth in Commercial Division Rule 8(b) related to ESI prior to the Preliminary Conference:

1. implementing litigation holds;
  - a. Courts have held that ESI should be preserved when litigation is reasonably foreseeable. Accordingly, counsel should anticipate that parties and/or the Court will likely expect litigation hold(s) to be in place upon commencement of the action, and no later than the date of the Preliminary Conference. Moreover, counsel should be mindful that some courts have imposed duties upon counsel to take reasonable steps to monitor their clients' implementation of litigation holds and revise or supplement the litigation holds as may be appropriate.
  - b. Counsel should discuss the scope of each party's litigation hold, including: the categories of potentially discoverable ESI to be segregated and preserved; the claims and defenses as to which ESI is relevant; identification of "key persons" and likely witnesses; the relevant time period for the litigation hold; the types and locations of ESI; how relevant ESI should be preserved; the location and form of maintaining ESI subject to the litigation hold; instructions to be contained in a litigation hold notice regarding preservation of ESI subject to the litigation hold; and whether an "e-discovery" liaison is required for each party.
2. each party's document or record retention policies; and
3. their respective clients' current and relevant past ESI and policies regarding ESI, if any, and become reasonably familiar with same; or alternatively, identify a person familiar with the client's electronic systems who can participate in the Preliminary Conference. Such persons are invited to attend the Preliminary Conference.

C. At the Preliminary Conference, counsel shall be prepared to discuss:

1. all matters concerning ESI as to which there is disagreement between the parties;
2. the anticipated scope of requests for, and objections to, production of ESI;
3. the form of production of ESI and, specifically, but without limitation, whether all ESI will be produced in a single format, or multiple formats, and whether those formats will be Native File, Static Image, and/or other searchable or non-searchable formats;

4. identification, in reasonable detail, of ESI that is or is not reasonably accessible without undue burden or cost, the methods of storing and retrieving ESI that is not reasonably accessible, and the anticipated costs and efforts involved in retrieving such ESI;
5. methods of identifying pages or segments of ESI produced in discovery (i.e. Bates-stamping);
6. the method and manner of redacting information from ESI if only part of the ESI is discoverable, and the exchange of redaction logs;
7. relevant ESI custodians, including such person(s)' name, title and job responsibilities;
8. cost-sharing or cost-shifting, if applicable, for the preservation, retrieval, review and/or production of ESI, including any litigation support database (e.g. Concordance; Summation; etc.);
9. search methodologies or protocols for retrieving or reviewing ESI. For example, some counsel currently use: key word searches, concept searches, "fuzzy search models", probabilistic search models and clustering searches; agreement(s) on search terms; limitations on the fields or document types to be searched; limitations regarding whether back up, archival, legacy or deleted ESI is to be searched; and sampling to develop an objective basis on which to evaluate the likelihood and cost of obtaining responsive ESI;<sup>3</sup>
10. preliminary depositions of information systems personnel, and limits on the scope of such depositions;
11. the need for two-tier or staged discovery of ESI (e.g., an initial search of a key custodian's documents, or a key time-period, only; followed by a broader or different search if necessary). The two-tiered approach is intended to be used when ESI can initially be produced in a manner that is more cost-effective, while reserving the right to request or to oppose additional more comprehensive production in a later stage or stages;
12. the need for any protective orders or confidentiality orders;
13. the need for certified forensic specialists and/or experts to assist with the search for and production of ESI;
14. the protocols to be observed when preparing logs of documents withheld from production, in whole or in part, based on an assertion of (1) attorney client privilege, (2) work product doctrine and/or (3) any other basis for

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<sup>3</sup> Sampling refers to a process by which subsets of ESI are identified and searched for the purpose of developing a factual basis on which to estimate the cost of collecting, reviewing and producing ESI. Examples of ESI samples include, but are not limited to, identified subsets of (1) "key" custodians, (2) sources of ESI and (3) time periods.

withholding an otherwise responsive document from production; and

15. whether the parties must make reasonable efforts to maintain the data as Native Files in a manner that preserves the integrity of the files, including but not limited to, the contents of the file and the Metadata related to the file, including the file's creation date and time.

D. Parties are encouraged to exchange information regarding ESI prior to the Preliminary Conference, including but not limited to information regarding network design, types of databases, ESI document retention policies, organizational charts for information systems personnel and inaccessible ESI.

### **III. FORM OF PRODUCTION OF ESI**

A. ESI shall be produced in the form in which it is ordinarily maintained or in reasonably usable format. The parties shall agree on the format of production prior to the Preliminary Conference.

B. A Producing Party is not required to produce the same ESI in more than one format. However, the parties may agree that ESI will be produced in one format initially (i.e. TIFF format or Static Images) and that some or all of the same ESI will be produced in another format (i.e. with certain Metadata) upon request, if such data is necessary to support the parties' claims or defenses.

C. The Producing Party may not reformat, scrub or alter the ESI to intentionally downgrade the usability of the data.

### **IV. REASONABLY ACCESSIBLE**

A. As the term is used herein, ESI is not to be deemed "inaccessible" based solely on its source or type of storage media. Inaccessibility is based on the burden and expense of recovering and producing the ESI and the relative need for the data.

B. No party should object to the discovery of ESI on the basis that it is not reasonably accessible because of undue burden or cost unless the objection has been stated with reasonable particularity, and not in conclusory or boilerplate language. Wherever the term "reasonably accessible" is used in these Guidelines, the party asserting that ESI is not reasonably accessible should be prepared to specify facts that support its contention, including submitting an appropriate and detailed analysis in the form of an affidavit.

### **V. COSTS**

A. On the issue of whether the Requesting or Producing Party bears the cost of producing ESI, and cost-shifting/cost-sharing, the law in New York is still developing.

B. Several courts in the Commercial Division have addressed the issue, and counsel should consider and be guided by such case law, including but not limited to:

- **Finkelman v. Klaus**, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 23 (N.Y. Sup. Ct., Nassau Co. Nov. 28, 2007) (Bucaria, J.).
- **Delta Financial Corp. v. Morrison**, 13 Misc.3d 604, 819 N.Y.S.2d 908 (N.Y. Sup. Ct., Nassau Co. Aug. 17, 2006) (Warshawsky, J.).
- **Weiller v. New York Life Ins. Co.**, 6 Misc.3d 1038(A), 800 N.Y.S.2d 359 (N.Y. Sup. Ct., N.Y. Co. Mar. 16, 2005) (Cahn, J.).
- **Lipco Elec. Corp. v. ASG Consulting Corp.**, 4 Misc.3d 1019(A), 798 N.Y.S.2d 345 (N.Y. Sup. Ct., Nassau Co. Aug. 18, 2004) (Austin, J.).

See also:

- **Waltzer v. Tradescape & Co., L.L.C.**, 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dep't 2006).
- **Etzion v. Etzion**, 7 Misc. 3d 940, 796 N.Y.S.2d 844 (N.Y. Sup. Ct., Nassau Co. 2005) (Stack, J.).

## **VI. PRIVILEGE**

Inadvertent or unintentional production of ESI containing information that is subject to the attorney-client privilege, work product protection, or other generally-recognized privilege shall not be deemed a waiver in whole or in part of such privilege if, after learning of such disclosure, the Producing Party promptly gives notice either in writing, or later confirmed in writing, to the Receiving Party or Parties that such information was inadvertently produced and requests that the Receiving Party return the original data. Absent a challenge under this paragraph or during the pendency of any such challenge, or contemplated challenge, the Receiving Party or Parties shall sequester or return all such material, including copies, except as may be necessary to bring a challenge before the Court, to the Producing Party promptly upon receipt of the written notice and request for return. The parties are encouraged to seek an order of the Court to further clarify the protections to be given to inadvertently disclosed privileged materials. Counsel are also reminded of their obligations under Rule 4.4(b) of the New York Rules of Professional Conduct concerning their receipt of documents that appear to have been inadvertently sent to them.

## **VII. SANCTIONS**

- A. Sanctions may be imposed against a party and/or its counsel when ESI is demanded, withheld or destroyed in bad faith or with gross negligence, including but not limited to the penalties permitted pursuant to Rule 12 of the Rules of the Commercial Division of the Supreme Court.
- B. Sanctions may also be imposed if a party fails to maintain and preserve ESI, as provided in paragraph 12(c) of the Preliminary Conference Stipulation and Order.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU \_\_\_\_\_  
COMMERCIAL DIVISION : IAS PART \_\_\_\_

PRESENT: Hon. \_\_\_\_\_,  
Justice.

Index No. \_\_\_\_\_

Plaintiff(s),  
- against -  
Defendant(s).

**Preliminary Conference  
Stipulation and Order**  
(Section 202.8[f] and 202.12  
of the Uniform Rules)

(All items on the form must be completed unless inapplicable.)

It is hereby STIPULATED and ORDERED that disclosure shall proceed as follows:

(1) **Nature of case:**

(a)

Plaintiff's Claims / Counterclaim Defenses

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Amount Demanded                    \$ \_\_\_\_\_

(b)

Defendant \_\_\_\_\_'s Claims/Defenses

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Amount Demanded                    \$ \_\_\_\_\_

Defendant \_\_\_\_\_'s Claims/Defenses

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Amount Demanded \$ \_\_\_\_\_

Defendant \_\_\_\_\_'s Claims/Defenses

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Amount Demanded \$ \_\_\_\_\_

Defendant \_\_\_\_\_'s Claims/Defenses

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Amount Demanded \$ \_\_\_\_\_

(Add additional sheets, if needed)

(2) **Insurance Coverage (CPLR 3101[f]):** If not provided, shall be furnished on or before \_\_\_\_\_. Not applicable \_\_\_\_\_.

(3) **Bill of Particulars:** (If relevant)

(a) Demand shall be served on or before \_\_\_\_\_.

(b) Bill of Particulars shall be served not later than \_\_\_\_\_ days after receipt of the demand.

(c) All previously served demands shall be responded to on or before \_\_\_\_\_, 200\_\_.

(4) **Discovery and Inspection:**

(a) All Demands for Discovery and Inspection (CPLR 3120) shall be served not later than \_\_\_\_\_ days from the date of this Order.



(b) All responses to Discovery and Inspection demands shall be served not later than \_\_\_\_\_ days after receipt of the opposing party(ies) demand(s).

(c) All previously served demands shall be responded to on or before \_\_\_\_\_, 200\_\_.

(d) All demands for production of books, documents, records and other writings relevant to a party's claims or defenses shall be deemed to include a demand for production of any photograph(s), audio tape(s), video tape(s) and Electronically Stored Information ("ESI").

(5) **Depositions:**

(a) Depositions shall be held as follows:

(Priority shall be in accordance with CPLR 3106 unless otherwise agreed or ordered.)

<u>Party</u>	<u>Date</u>	<u>Time</u>	<u>Place</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

(Add additional sheets, if needed)

(b) Unless otherwise agreed or ordered, if a party fails or refuses to be deposed, he/she may not utilize the deposition of the adverse party(ies) at trial in addition to such other sanctions as may be available (CPLR 3126).

(c) Depositions of non-party witnesses shall not be noticed until the conclusion of all party depositions unless otherwise agreed by all party(ies) or ordered by the Court.

(d) Any disputes with regard to the propriety of questions at a deposition shall be promptly resolved via an application to the Court either in person, if the deposition is conducted in the Courthouse, or via telephone, if the deposition is conducted elsewhere. In the event the Justice presiding or his/her law secretary is not available, such applications shall be addressed to the Justice presiding in Special Term Part II.

(6) **A Compliance Conference** shall be held on \_\_\_\_\_, 20\_\_.

- (7) **Other disclosure:**
- (a) Commissions or letters rogatory (CPLR 3108): identify and set forth the location of each witness.
- \_\_\_\_\_
- \_\_\_\_\_
- (b) Expert disclosure (CPLR 3101[d]):
- Plaintiff(s) shall provide expert disclosure by \_\_\_\_\_
- Defendant(s) shall provide expert disclosure by \_\_\_\_\_
- (c) Interrogatories (CPLR 3130 - 3133): Each party shall serve no more than 25 interrogatories, inclusive of subdivisions and subparts unless otherwise ordered by the Court.
- (8) **End Date for All Disclosure**, other than expert disclosure\_\_\_\_\_.  
(Set by Court or Part Clerk)
- (9) **Certification Conference** shall be held on \_\_\_\_\_20\_\_\_\_\_.(Set by Court or Part Clerk)
- (10) **Motions:**
- (a) All dispositive motion(s) (CPLR 3211 and 3212) shall be made on or before \_\_\_\_\_20\_\_\_\_\_. (Not more than \_\_\_\_\_ days after the Certification Order is granted or conclusion of discovery.)
- (b) All other motions, including those for impleader and amendment of pleading(s) shall not be made until compliance with Commercial Division Rule 24.
- (11) **Confidentiality/Non-Disclosure Agreement:**
- (a) In the event that there is a need for a Confidentiality/Non-Disclosure Agreement prior to disclosure, the party(ies) demanding same shall prepare and circulate the proposed agreement. If the party(ies) cannot agree as to same, they shall promptly notify the Court. The failure to promptly seek a confidentiality agreement may result in a waiver of same.
- (b) \_\_\_\_\_ anticipates the need for a Confidentiality Agreement as to the following issues: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

(12) **Preservation of Electronic Evidence:**

- (a) The term ESI shall include but not be limited to e-mails and attachments, voice mail, instant messaging and other electronic communications, word processing documents, text files, hard drives spreadsheets, graphics, audio and video files, databases, calendars, telephone logs, transaction logs, internet usage files, offline storage or information stored on removable media, information contained on laptops or other portable devices and network access information and backup materials, Native Files and the corresponding Metadata which is ordinarily maintained.
- (b) (i) By entering into this Preliminary Conference Stipulation and Order, each signatory hereto represents that, prior to this date, they have complied with Rule 8 of the Uniform Commercial Division Rules (22 NYCRR 202.70) by having met and conferred with regard to all ESI related discovery issues and that they have entered into a preliminary written plan/stipulation for the preservation of ESI related documents, data and tangible things reasonably anticipated to be subject to discovery in this action. Such plan, which may be updated, shall identify the categories of ESI to be preserved, individuals responsible for preservation, maintenance and production of ESI and issues relating to potential costs of maintenance, preservation and production of ESI; or, in the alternative,  
  
(ii) The parties may stipulate to limit and/or eliminate the discovery of ESI in whole or part and/or to forego or limit the production of information in electronic form, as further provided in paragraph 12(d).
- (c) For the relevant periods relating to the issues in this litigation, each party shall take all reasonable steps (including suspending aspects of ordinary computer processing and/or backup of data that may compromise or destroy ESI) necessary to maintain and preserve such ESI as may be (i) relevant to the parties' claims and/or defenses, or (ii) reasonably calculated to lead to the discovery of admissible evidence, including but not limited to all such ESI data generated by and/or stored on the party's computer system(s) and/or any computer system and storage media (i.e., internal and external hard drives, hard disks, floppy disks, memory sticks, flash drives and backup tapes), under the party's possession, custody and/or control. The failure to comply herewith may result in appropriate sanctions or such other relief as the court may be authorized to impose or award, including but not limited to precluding use of evidence, taking adverse inferences, and/or rendering judgment in whole or part against the offending party(ies).

- (d) (i) When ESI is produced, it shall be produced on appropriate electronic media (i.e. CD, DVD or portable hard-drive) in the following format(s), as may be agreed:

\_\_\_\_\_ TIFF images endorsed with numbers and confidentiality legends, searchable text and agreed-to metadata fields with regard to the following data:

\_\_\_\_\_  
\_\_\_\_\_;

\_\_\_\_\_ Native Format with metadata intact and, as appropriate under the circumstances, endorsed with numbers and confidentiality legends with regard to the following data:

\_\_\_\_\_  
\_\_\_\_\_;

\_\_\_\_\_ The following format, as agreed by the parties, with regard to the following data:

\_\_\_\_\_  
\_\_\_\_\_

(ii) In the absence of an agreement by the parties, the court shall direct the manner of production upon application of the party(ies).

- (e) Issues with regard to cost shifting shall be brought to the attention of the Court as soon as practicable.

(13) **Miscellaneous:**

- (a) If the matter settles, the Court shall be promptly notified and a courtesy copy of the Stipulation of Discontinuance shall be promptly forwarded to the Court. Failure to comply with any of these directions may result in the imposition of costs, sanctions or other actions authorized by law.
- (b) The failure of any party(ies) to perform any of the requirements contained in this Order shall not excuse any other party(ies) from performing any other requirement contained herein.
- (c) Any dates established herein shall not be changed or adjourned without the prior approval of the Court.
- (d) Each counsel/party acknowledges receipt of the Commercial Division Rules.

(14) **Trial:**

(a) Plaintiff anticipates his/her/its case on the trial of this matter to be \_\_\_\_\_ days.

Defendant \_\_\_\_\_ anticipates the trial of this matter to be \_\_\_\_\_ days.

Defendant \_\_\_\_\_ anticipates the trial of this matter to be \_\_\_\_\_ days. (Add additional sheets, if needed)

(b) The matter is hereby set down for trial on \_\_\_\_\_ 20\_\_\_\_.

(c) All pre-trial filings and submissions (including trial notebooks), jury selection, if appropriate, and marking exhibits pursuant to Rules 28, 29, 31 and 32 (22 NYCRR 202.70) shall be on \_\_\_\_\_ 20\_\_\_\_, at \_\_\_\_\_ A.M./P.M.

(d) A pre-trial conference of this matter shall be held on \_\_\_\_\_ 20\_\_\_\_, at \_\_\_\_\_ A.M./P.M.

(15) This Order includes the attached \_\_\_\_\_ page(s) which is/are incorporated herein by reference.

Attorney for Plaintiff(s) Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_  
E-mail: \_\_\_\_\_

Attorney for Defendant(s) Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_  
E-mail: \_\_\_\_\_

Attorney for Defendant(s) Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_  
E-mail: \_\_\_\_\_

Attorney for Defendant(s) Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_  
E-mail: \_\_\_\_\_

Dated: \_\_\_\_\_, 20\_\_

**SO ORDERED:**

\_\_\_\_\_  
J.S.C.

February 1, 2009

## Commercial Division - NY Supreme Court

### *Nassau County*

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## Rules of the Alternative Dispute Resolution Program

### INTRODUCTION

Alternative dispute resolution ("ADR") refers to a variety of processes other than litigation that parties use to resolve disputes. ADR offers the possibility of a settlement that is achieved sooner, at less expense, and with less inconvenience and acrimony than would be the case in the normal course of litigation. The principal forms of ADR include arbitration, neutral evaluation and mediation.

The Court will offer mediation as the default ADR option. Mediation is a confidential, informal procedure in which a neutral third party helps disputants negotiate. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome. Although parties are not obligated to settle during mediation, the process frequently concludes with a written agreement.

Mediation is particularly appropriate for the resolution of complex commercial cases. Mediation offers the parties a confidential, structured forum in which to explore practical business concerns and develop tailor-made solutions beyond those that a Judge can often provide. Moreover, a mediator will not impose a solution on the parties or attempt to tell them what to do; if the parties cannot reach agreement, the case will be returned to the referring Justice.

The following Rules shall govern cases sent to mediation by Justices of the Commercial Division and other authorized Justices in Nassau County, as well as cases referred upon consent of the parties. Parties whose cases are the subject of an order of reference are free at the outset to use the services of a private ADR provider of their choosing in lieu of taking part in this court's program. After a case has been submitted to the court's program, parties can terminate the process and proceed to ADR elsewhere.

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### **Rule 1. The Program:**

The Commercial Division of the Supreme Court of the State of New York, Nassau County, operates the Alternative Dispute Resolution Program ("the Program"). The Program shall be applicable to cases referred by Justices of the Commercial Division, the District Administrative Judge of the Supreme Court, Nassau County ("the Administrative Judge"), and the other Justices of the Supreme Court, Nassau County upon authorization of the Administrative Judge; and commercial cases referred by consent of the parties.



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### **Rule 2. The Roster:**

(a) The Administrative Judge shall establish and maintain a roster of mediators ("the Roster") who shall

possess such qualifications and training as required by Part 146 of the Rules of the Chief Administrative Judge (see <http://www.nycourts.gov/rules/chiefadmin/146.shtml>).

(b) Every member of the Roster, and any other person who serves as a mediator pursuant to these Rules, shall comply with the Code of Ethical Standards for Mediators of the Commercial Division upon its issuance. Continuing presence on the Roster is subject to review by the Administrative Judge. Mediators may be removed from the Roster at the discretion of the Administrative Judge in consultation with the Unified Court System Office of ADR Programs.

(c) The Roster will be available through the Nassau County Supreme Court or on the Commercial Division website (at <http://www.nycourts.gov/courts/comdiv/nassau.shtml>).



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### **Rule 3. Procedure:**

(a) Cases shall be referred to mediation as early as is practicable. If the Justice or the Administrative Judge decides to refer a case to the Program or if the parties consent to a referral at a conference or in a written stipulation, the Justice shall issue an Order of Reference requiring that the case proceed to mediation in accordance with these Rules. A case not deemed appropriate for referral at its outset may be referred to the Program later in the discretion of the Justice.

(b) Within five (5) business days from receipt of the Order of Reference, the parties shall confer and select an agreed-upon mediator from the court=s roster. During this time, the parties shall also complete and return to the court and selected mediator the Mediation Initiation Form. Copies of the Mediation Initiation Form can be obtained from the Nassau County Supreme Court or on the Commercial Division website (at <http://www.nycourts.gov/courts/comdiv/nassau.shtml>).

(c) If the parties are unable to agree on a mediator, the parties shall within the same five (5) business days from receipt of the Order of Reference, submit to the Court the Mediation Initiation Form with four (4) names from the roster (two names from each party if necessary without indicating who picked which mediator). The Court will select a mediator from among the four (4) names submitted by the parties. Once a mediator is agreed upon or selected by the Court, the parties shall contact the mediator to schedule an initial session. Any mediator selected pursuant to this rule must comply with the conflict check procedures in Rule 8 below.

(d) The parties may agree on a mediator other than one listed on the Court=s roster, if they so desire. For a substitution to be made, the parties must contact the other mediator directly, make arrangements for that person to conduct the mediation, and submit a Mediation Initiation Form to both the Court and the selected mediator. Mediators selected from outside the Roster must comply with the deadlines set forth in these Rules and the confidentiality and immunity rules set forth herein as well.

(e) The initial mediation session must be conducted within 45 days from the date of the Order of Reference. This deadline is important and must be met. In the event of any extraordinary difficulties, the mediator shall contact the Court and, if necessary, intervention will occur to expedite the process. The mediator may initially request a conference call with both parties regarding any preliminary matters.

(f) At least one week before the initial session, each party shall deliver to the mediator a memorandum of not more than three pages, (12 point font, doubled spaced) setting forth that party's views as to the nature of the dispute, and suggestions as to how the matter might be resolved. This memorandum shall not be served on the adversary or filed in court, shall be read only by the mediator, and shall be destroyed by the mediator immediately upon completion of the proceeding.

(g) Unless exempted by the mediator for good cause, every party, including counsel must attend the initial



mediation session either in person or, in the case of a corporation, partnership or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and authorized to settle the matter. Any attorney who participates in the mediation process shall be fully familiar with the action and authorized to settle.

(h) Parties and their counsel may be referred to mediation for a free four (4) hour initial session. Subject to the mediator's discretion and full disclosure to the parties at the beginning of the initial session, the mediator may apply up to one (1) hour of preparation time toward the initial session, in which case the initial session shall last for no more than three (3) hours. At the conclusion of the initial session, the parties and mediator may (but are not required to) agree to continue the mediation. Mediator compensation for any additional mediation time beyond the initial session is governed by Rule 6, below.

(i) Within seven (7) days after the mediation process has concluded-whether by agreement, or the refusal of one or more parties to continue, the mediator shall complete the Mediation Disposition Form indicating settlement or lack thereof and transmit the Form, along with any written agreement, to the Court. If the mediation process results in a settlement, the parties shall submit an appropriate stipulation to the Part of the Justice assigned.

(k) At the end of an initial session mandated by subdivision (h) of this Rule, any party or the mediator may terminate the mediation process. If the mediation process has been terminated by one party only, the identity of that party shall not be reported.

(l) Notwithstanding the foregoing, if a party or counsel fails to schedule an appearance for a mediation session in a timely manner, appear at any scheduled session or otherwise fail to comply with these Rules, the mediator may advise the Court and the Court may impose sanctions.



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#### **Rule 4. Confidentiality:**

(a) The mediation process shall be confidential. All documents prepared by parties or their counsel and any notes or other writings prepared by the mediator in connection with the proceeding-as well as any communications made by the mediator, parties or their counsel, for, during, or in connection with the mediation process-shall be kept in confidence by the mediator and the parties and shall not be summarized, described, reported or submitted to the court by the mediator or the parties. No party to the mediation process shall, during the action referred to mediation or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the mediation process, or seek to compel the testimony of any other party concerning the substance of the mediation process. Any settlement, in whole or in part, reached during the mediation process shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. Such an agreement shall be kept confidential unless the parties agree otherwise, except that any party thereto may thereafter commence an action for breach of this agreement. Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because the documents and information are submitted or referred to in the mediation process (including, without limitation, any documents or information which are directed to be produced pursuant to Rule 7b herein).

(b) No party to an action referred to the Program shall subpoena or otherwise seek to compel the mediator to testify in any legal proceeding concerning the content of the mediation process. In the event that a party to an action that had or has been referred to the Program attempts to compel such testimony, that party shall hold the mediator harmless against any resulting expenses, including reasonable legal fees incurred by the mediator or reasonable sums ~~costs~~ by the mediator in representing himself or herself in

connection therewith. However, notwithstanding the foregoing and the provisions of Rule 4 (a), a party or the Court may report to an appropriate disciplinary body any unprofessional conduct engaged in by the mediator and the mediator may do the same with respect to any such conduct engaged in by counsel to a party.

(c) Notwithstanding the foregoing, to the extent necessary, (i) the parties may include confidential information in a written settlement agreement; (ii) the mediator and the parties may communicate with the Court about administrative details of the proceeding; and (iii) the mediator may make general reference to the fact of the services rendered by him or her in any action required to collect an unpaid, authorized fee for services performed under these Rules.



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### **Rule 5. Immunity of the Neutral:**

Any person designated to serve as a mediator pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity to the extent permitted by law.



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### **Rule 6. Compensation:**

Parties shall not be required to compensate the mediator for services rendered during the initial session, or for time spent in preparation for the initial session. Should the parties choose to continue beyond the initial session, mediators shall be compensated at a maximum rate of \$300/hour for time spent in mediation, and up to \$150/hour for any additional preparation time needed beyond the initial session. All mediator fees and expenses shall be borne equally by the parties unless the court determines otherwise.



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### **Rule 7. Stay of Proceedings:**

(a) Unless otherwise directed by the Justice assigned, referral to mediation will not stay the court proceedings in any respect.

(b) Parties committed to the mediation process who conclude that additional time is required to fully explore the issues pertaining to their case may request a stay of proceedings. Regardless of whether a stay is granted by the Assigned Justice, if informal exchange of information concerning the case will promote the effectiveness of the mediation process and the parties so agree, the mediator shall make reasonable directives for such exchange consistent with any pre-existing disclosure order of the court and in compliance with the deadlines set forth herein.

(c) If the matter has not been entirely resolved within the 45-day period as provided in these rules (See Rule 3 (e)) but the parties and the mediator believe that it would be beneficial if the mediation process were to continue, the process may go forward. However, the mediation process should be completed within 75 days from the date of the Order of Reference unless the assigned Justice specifically authorizes the process to continue beyond the 75 days.



### **Rule 8. Conflicts of Interest:**

In order to avoid conflicts of interest, any person tentatively designated to serve as a mediator shall, as a condition to confirmation in that role, conduct a review of his or her prior activities and those of any firm of which she is a member or employee. The mediator shall disqualify him or herself if the mediator would not be able to participate fairly, objectively, impartially, and in accordance with the highest professional standards. The mediator shall also avoid an appearance of a conflict of interest. In the event that any potentially disqualifying facts should be discovered, the mediator shall fully inform the parties and the Court of all relevant details. Unless all parties after full disclosure consent to the service of that mediator, the mediator shall decline the appointment and another mediator shall promptly be selected by the parties or the Court in a manner consistent with Rule 3 (b). Any such conflicts review shall include a check with regard to all parents, subsidiaries, or affiliates of corporate parties.



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### **Rule 9. Communication with Assigned Justice:**

The mediator may communicate with the assigned Justice or the assigned Justice=s staff about administrative details of the processing of any case referred to the Program by that Justice, but shall not discuss any substantive aspect of the case. Upon termination of the proceeding by a party pursuant these rules, the mediator shall not reveal to the Court which party brought the proceeding to an end. The mediator shall report to the Court at the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part.



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### **Rule 10. Further ADR:**

(a) While early attempts at mediation may not necessarily result in settlement, follow up attempts at a later date are consistent with the goals of this Program. Accordingly, upon request of a party or upon its own initiative, the Court may in its discretion issue an order directing subsequent referrals to the Program.

(b) Any case subsequently referred shall proceed in accordance with these Rules. For example, the parties shall not compensate the mediator for services rendered during an initial session or for time spent in preparation for an initial session conducted pursuant to a subsequent Order to the Program.

(c) Nothing in this Rule shall prohibit the parties from proceeding to mediation or other ADR, without Order of the court, and at their own expense.



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### **Rule 11. Administration of Program:**

The Program shall be supervised by the Hon. Thomas A. Adams, Administrative Judge, Tenth Judicial District – Nassau County.





Web page updated: May 28, 2013

SUPREME COURT OF THE STATE OF NEW YORK  
COMMERCIAL DIVISION- COUNTY OF NASSAU

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Part \_\_\_\_

Plaintiff,

Index No. \_\_\_\_\_

- against -

MEDIATION INITIATION FORM

Defendant,

-----X

(1) This case was referred to mediation through the Nassau County Commercial Division's ADR Program (order of Justice \_\_\_\_\_ dated \_\_\_\_\_).

(2) Pursuant to Rule 3 of the Nassau County Commercial Division ADR Program's Rules, located at <http://www.nycourts.gov/courts/comdiv/nassau.shtml>, the parties have conferred and **(CHECK APPROPRIATE BOX BELOW)**:

a.  Selected the following to serve as mediator.

Name	Address	Phone	Email
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b.  Are unable to agree on a mediator and submit the following 4 (four) names from which the Court may assign a mediator.

Name	Name	Name	Name
Address	Address	Address	Address
Phone	Phone	Phone	Phone
Email	Email	Email	Email

(3) For the mediator to run the required conflicts check, counsel for any corporate party must list here or on an attached sheet the names of all corporate parents, subsidiaries or affiliates:

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(4) Please indicate whether there are in this case:

Motions *sub judice*: Yes \_\_\_ No\_\_\_ Appeals: Yes \_\_\_ No \_\_\_

If you indicated yes to either of the foregoing, please contact the Court immediately.

(5) The attorneys for the parties herein are as follows:

For Plaintiff:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Phone: \_\_\_\_\_

E-Mail: \_\_\_\_\_

For Defendant:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Phone: \_\_\_\_\_

E-Mail: \_\_\_\_\_

(6) This form shall be completed and returned to the Court and the selected mediator **within 5 business days** from receipt of the Order of Reference. This deadline will not be extended. **The initial mediation session must be conducted within 45 days** from the date of the Order of Reference (see Rule 3 (e)). At least one week before the initial session, each party shall deliver to the mediator a memorandum of not more than three pages (see Rule 3(f)).

(7) By signing below, the parties and their Counsel, certify that they have read and will comply with the ADR Rules of the Nassau County Commercial Division. The parties and their Counsel further understand and agree that the mediation process is confidential and that the mediator shall be immune from suit by any of the parties or other participants in this case because of or based upon the mediator's activities as such in this matter to the extent permitted by law. Parties agree that no attorney-client relationship exists between the mediator and the parties, and the mediator shall not provide legal services to the parties during the process.

\_\_\_\_\_  
Counsel for Plaintiff

\_\_\_\_\_  
Counsel for Defendant

Date: \_\_\_\_\_

SUPREME COURT OF THE STATE OF NEW YORK  
COMMERCIAL DIVISION- COUNTY OF NASSAU

PRESENT: Hon. \_\_\_\_\_

Justice

-----X

Index No. \_\_\_\_\_

Plaintiff,

**ORDER OF REFERENCE TO  
MEDIATION**

against -

Defendant.

-----X

(1) On CONSENT OF THE PARTIES or by ORDER OF THE COURT (**CIRCLE ONE**) this case is referred to mediation through the ADR Program of the Commercial Division;

(2) The parties shall select a mediator and jointly execute a Mediation Initiation Form, located at <http://www.nycourts.gov/courts/comdiv/nassau.shtml> within five business days of receipt of this Order.

(3) The parties shall schedule an initial mediation session within 45 days of the date of this Order pursuant to the ADR Program's Rules (available at <http://www.nycourts.gov/courts/comdiv/nassau.shtml>.)

(4) All proceedings in this action (including motion practice, shall continue during the mediation process except for (depositions), (e-discovery), \_\_\_\_\_ /shall be stayed during the mediation process (strike non relevant portions).

(5) The parties shall appear for a status conference with the court on \_\_\_\_\_  
\_\_\_ at \_\_\_\_\_AM/PM.

Dated: \_\_\_\_\_

\_\_\_\_\_  
J.S.C.

