

NOTICE TO THE BAR

**EXTENSION OF COMMENT PERIODS ON THREE ITEMS – (1) AMENDMENTS TO RULE 1:4-9;
(2) COMPLEX BUSINESS LITIGATION PROGRAM GUIDELINES, FORMS, AND ORDERS;
(3) REPORT OF THE COMMITTEE ON MUNICIPAL COURT OPERATIONS, FINES, AND FEES**

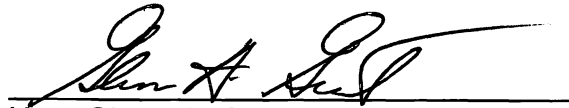
This notice announces the extension of the comment periods for three previously published items as set forth below; the new end date of the comment period for each of the three items will now be Monday, September 24, 2018:

(1) "Proposed Amendment to Rule 1:4-9 Regarding Electronic Filing of Papers," notice dated August 3, 2018 (comment period extended from September 10, 2018);

(2) "Complex Business Litigation Program – Proposed Overview and Case Management Guidelines; Model Forms and Orders," notice dated July 24, 2018 (comment period extended from September 1, 2018); and

(3) "Municipal Courts – Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees," notice dated July 17, 2018 (comment period extended from September 17, 2018).

Comments on these three items during the extended comment periods should be submitted as directed in the respective previously published notices.



Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director

Dated: August 20, 2018

NOTICE TO THE BAR

COMPLEX BUSINESS LITIGATION PROGRAM – PROPOSED OVERVIEW AND CASE MANAGEMENT GUIDELINES; MODEL FORMS AND ORDERS – PUBLICATION FOR COMMENT

The Supreme Court established the Complex Business Litigation Program (CBLP) in November 2014 for the handling of complex business, commercial, and construction cases. As part of the current rules cycle, the Court will be including in its upcoming Omnibus Rule Amendment Order a series of Court Rules on CBLP. In addition to those rules, the following proposed documents, which are appended to this notice, have been developed to provide for better case management and efficiencies in CBLP cases:

1. Proposed CBLP Overview and Case Management Guidelines
2. Joint Proposed Discovery Plan (Model Plan)
3. Scheduling Order (Model Order)
4. Electronic Discovery Stipulation and Order (Model Order)
5. Clawback Stipulation and Order (Model Order)

The Supreme Court invites written comments on the proposed CBLP Overview and Case Management Guidelines and the proposed CBLP model forms/orders published with this Notice. Comments should be submitted in writing by September 1, 2018 to the following address:

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Attn: Comments on CBLP Guidelines and Forms/Orders
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Comments may also be submitted by email to: Comments.Mailbox@njcourts.gov.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by email should include their name and email address. Comments submitted in response to this notice are subject to public disclosure.



Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: July 24, 2018

PROPOSED COMPLEX BUSINESS LITIGATION PROGRAM (CBLP) OVERVIEW AND CASE MANAGEMENT GUIDELINES

PROGRAM OVERVIEW

The Complex Business Litigation Program (“CBLP” or “the Program”) is focused on business, commercial and construction cases with significant amounts in dispute or business or commercial cases involving complex factual or legal issues; a large number of separately represented parties; potential numerous pre-trial motions raising difficult or novel legal issues; case management of a large number of lay and expert witnesses or a substantial amount of documentary evidence (including electronically stored information); substantial time required to complete the trial; significant interpretation of a business, commercial or construction statute; or involves other contentions of a complex business, commercial or construction nature.

Eligibility

A case is assigned to the vicinage CBLP judge in the following situations:

Threshold Damages

The CBLP involves disputes with and between business entities where the claims, counterclaims, or third-party claims allege business, commercial or construction claims and an amount in controversy of at least \$200,000.00, unless the court determines a lesser amount is acceptable.

Self Designation

Attorneys or parties completing the Civil Case Information Statement will self-designate actions as Complex Commercial (Case Type 508) or Complex Construction (Case Type 513). These case types will presumptively be assigned to the vicinage’s CBLP judge for case management.

Complex Commercial (508) actions involve claims by, against, and among parties that arise out of business or commercial transactions and involve parties’ exposure to potentially significant damage awards; or where the business or commercial claim involves complex factual or legal issues; a large number of separately represented parties; potential numerous pre-trial motions raising difficult or novel legal issues; case management of a large number of lay and expert witnesses or a substantial amount of documentary evidence (including electronically stored information); substantial time required to complete the trial; significant interpretation of a business or commercial statute; or involves other contentions of a complex business – commercial nature.

Complex Construction (513) actions involve claims by, against, and among owners, contractors, subcontractors, fabricators and installers, architects, engineers, design and construction consultants, and other similar parties associated with a construction project that

involves parties' exposure to potentially significant damage awards because of claimed design and construction defects, delay claims, or where the construction claim involves complex factual or legal issues; a large number of separately represented parties; potential numerous pre-trial motions raising difficult or novel legal issues; case management of a large number of lay and expert witnesses or a substantial amount of documentary evidence (including electronically stored information); substantial time required to complete the trial. Complex construction does not include construction and professional payment and billing claims, change order claims, wrongful termination, quantum merit, construction lien or mechanics lien claims, unless associated with a complex construction claim as herein described.

Actions to establish a constructive trust or impose an equitable lien to satisfy damages are also cognizable in the CBLP, as are cases primarily seeking legal relief in which ancillary injunctive relief is sought. The CBLP encompasses both jury and non-jury matters.

CBLP judges handle cases arising from the following non-exclusive list of circumstances:

- non-consumer Uniform Commercial Code transactions;
- the purchase and sale of assets of businesses or assets of a business, including contract disputes and commercial landlord/tenant claims;
- non-consumer sales of goods or services by or to a business;
- non-consumer bank or brokerage accounts including loan, deposit, cash management, and investment accounts;
- purchase, sale, or lease of commercial personal property, or security interests therein;
- arising out of state securities laws;
- intellectual property disputes;
- business licensing agreement disputes;
- unfair competition disputes;
- sale, purchase of a business or purchase or sale of stock, assets or liabilities of a business;
- mergers and acquisitions disputes;
- franchisee/ franchisor relationship and liabilities;
- business torts, including interference with prospective economic advantage, interference with contractual relations, tortious interference with business relationships, breach of implied covenant of good faith and fair dealing, fraud, fraud in the inducement, misrepresentation, and breach of fiduciary duty;
- liability or indemnity of managers (officers, directors, managers, trustees or members or partners functioning as managers) of corporations, partnerships, limited partnerships, limited liability companies or partnerships, professional associations, business trusts, joint ventures or other business enterprises;
- Racketeer Influenced and Corrupt Organizations Act (RICO) claims;
- complex commercial construction disputes;
- other complex disputes of a business or commercial nature.

The CBLP retains the law and equity separation that was recognized in the 1947 Constitution. It does not encroach on the cases traditionally heard in General Equity. The CBLP does not include matters involving:

- internal affairs or governance disputes over management and/or control of business entities;
- dissolution or liquidation rights or obligation between or among owners (shareholders, partner, members);
- statutory and custodial receivership or actions seeking the appointment of special fiscal agents;
- restructuring of a business entity;
- shareholder derivative suits;
- actions to protect the interests of a business, such as non-compete agreements, trade secrets or restrictive covenant agreements.

Also excluded from CBLP are actions primarily involving consumers, labor organizations, personal, physical or mental injury; mechanics' lien actions, and condemnation proceedings. Following is a non-inclusive list of actions that generally are not handled by CBLP judges and are handled by judges regularly assigned to the Law Division, Civil Part:

- class action consumer claims;
- products liability actions;
- personal injury and wrongful death actions;
- commercial landlord verses consumer tenant actions;
- noncommercial real estate matters actions;
- actions by consumers against a business and businesses against consumers;
- enforcement of arbitration awards;
- condemnation actions;
- landlord-tenant matters involving summary dispossession;
- employment Law Against Discrimination actions;
- civil rights actions;
- professional malpractice actions;
- medical device litigation and pharmaceutical litigation;
- Multicounty Litigation (mass tort);
- environmental litigation including environmental insurance coverage actions;
- Conscientious Employee Protection Act actions;
- agreements relating to an individual or collective contract of employment;
- wrongful discharge actions;
- slander of title or product disparagement actions;
- fraudulent transfers under the Uniform Fraudulent Transfers Act;
- consumer residential construction actions.

Opt-In Motion

Parties may formally move before the CBLP judge for inclusion in the Program where a case is not presumptively assigned to the CBLP but involves complex business related issues and/or the amount in controversy is less than \$200,000. Business or commercial disputes that involve complex factual or legal issues; a large number of parties; discovery issues such as managing large numbers of documents, multiple experts; is likely to have implications for business beyond the decision in the particular case; is likely to result in a significant interpretation of a business or commercial statute; or involves other contentions that the CBLP judge finds compelling may be assigned to the Complex Business Litigation Program. Such motions shall be granted for good cause shown.

Complex Business Litigation Assignment Recommendation

If, upon review, the Assignment Judge or the CBLP judge determines a case is appropriate for the CBLP, the judge may, *sua sponte*, assign it to the CBLP.

Exclusion from CBLP

Initial Case Review

The CBLP judge will review actions presumptively assigned to the CBLP to determine if the case is appropriate for the CBLP. If, after review, the CBLP judge determines that the complex nature of the action or the threshold damages claim amount is not established, the CBLP judge shall remove the case from the Program. The Assignment Judge may also conduct initial CBLP eligibility reviews. Cases removed from the CBLP by the Assignment Judge or the CBLP judge will be reassigned to the appropriate track for case management.

Motion for Removal from the Program

Any party may move for removal from the CBLP on the grounds that the action does not meet the eligibility criteria.

GUIDELINES

Assignment of Judges

CBLP cases are assigned to a single judge that handles all aspects of the case, including discovery disputes, summary judgment and other motions, and trial.

Court Rules

Cases assigned to the CBLP are governed by Part IV, Chapter XI (“Complex Commercial & Complex Construction Matters”) of the New Jersey Rules of Court. Absent an express contradictory rule contained in Chapter XI, Parts I and IV of the Court Rules shall otherwise apply to any case in the CBLP.

Pre-Case Management Conference Activity

Initial conference preparation is required pursuant to *Rules* 4:103-2 and 4:103-3, comparable to Federal Rule of Civil Procedure 26, to require attorneys to both meet with their clients as well as each other before a meeting with a judge.

The initial meetings between counsel and their clients will provide an understanding of the potential data and information at issue and the time required to accomplish full discovery. In conferring with counsel, attorneys should prepare a Joint Discovery Plan for all discovery as well as an Electronic Discovery Plan, both of which are to be provided to the Court in advance of the Initial Conference. Counsel should also advise the Court of any unresolved discovery issues.

Electronic discovery (e-discovery): the attorneys should meet and confer to discuss form, scope preservation/destruction, and expense of production; method for asserting or preserving claims of privilege or of protection; confidentiality; and any other electronic discovery issues. The Electronic Discovery Plan should set forth the parties' agreements as to all e-discovery.

Initial Conferences

The case will be scheduled for an Initial Conference with the CLBP Judge.¹ At that Conference, counsel will meet with the Judge/other court representative to discuss assignment and scheduling of the case. If it is determined that it should not be in the CBLP, the case may be removed at that time. If the case remains in the CBLP, a comprehensive Scheduling Order, setting forth all discovery deadlines, will be entered at that time.

Model Stipulations/Orders

The CBLP Internet website has the following model case management, discovery and protective orders:

- Joint Proposed Discovery Plan;
- Discovery Confidentiality Order (Appendix 30 (XXX) to the Rules of Court);
- Clawback Stipulation and Order;
- Electronic Discovery Stipulation and Order; and
- Scheduling Order.

Contacting Chambers

At the time of the Initial Conference, the CBLP Judge should advise the parties the appropriate method(s) (phone, letter, email) and bases for contacting chambers. The CBLP Judge should also advise whether joint submissions will be required.

¹ Should the need arise, the utilization of other judicial staff such as law clerks and/or a designated statewide case manager should be considered for overseeing/conducting certain conferences for CBLP cases.

Case Management/Status Conferences

As needed/requested by the parties (within reason). There, the parties will report their discovery progress and address any issues. Prior to such a conference a joint letter should be sent to the Court advising of the status of the case and the issues to be discussed at the Conference.

Discovery and Motions

The Supreme Court has approved Court Rules to govern cases in the Program. Some aspects of discovery and motions in CBLP cases will be handled differently than other civil matters.

Discovery

See *Rules* 4:104-1 through 4:104-9, which provide the timing, limits and confidentiality of discovery in CBLP matters. The Rules also address discovery disputes (*R.* 4:105-4). The parties should first “meet and confer” to try to resolve the issues. If an agreement cannot be reached, counsel should submit a letter to the court explaining the basis for the motion and requesting a telephone or in-court conference before the motion is made. The Rule provides a process to resolve the dispute if not resolved by the court conference.

Motions

See *Rules* 4:105-1 through 4:105-9. These Rules seek to streamline and facilitate the motion practice while also addressing the complexity and need for ease and flexibility of litigants to seek and to obtain extensions. Discovery disputes should be handled as noted above and the Dispositive Motion schedule should be set forth in Joint Proposed Discovery Plan.

Settlement and CDR

Any settlement conferences will be held at the CBLP judge’s discretion. The CBLP judge will also advise whether a settlement conference memorandum is necessary as well as any content and formatting requirements.

CBLP cases are not part of the court’s mandatory civil mediation and arbitration programs. However, the CBLP judge in each vicinage, as part of case management, should encourage the parties to engage in mediation or some type of dispute resolution to facilitate settlement.

Pre-trial and Trial

All CBLP actions shall be pretried and the requirements of *Rule* 4:25 shall apply to the final pretrial conference, which should lead to the formulation of a trial plan, including a plan to facilitate the admission of evidence. With regard to trial exhibits, parties should prepare and submit Joint Exhibits to eliminate redundancy (it does not mean the parties are stipulating to its admissibility).

	:	
	:	Superior Court of New Jersey
Plaintiff(s)	:	Law Division - Civil Part
	:	_____ County
	:	
	:	Docket No: L - _____ - _____
	:	
v.	:	JOINT PROPOSED DISCOVERY PLAN
	:	
	:	
Defendant(s)	:	
	:	

1. Set forth the name of each attorney appearing, the firm name, address and telephone number and email address of each, designating the party represented.
2. Set forth a brief description of the case, including the causes of action and defenses asserted.
3. Have settlement discussions taken place? Yes _____ No _____
 - (a) What was each plaintiff's last demand?
 - (1) Monetary demand: \$ _____
 - (2) Non-monetary demand: _____
 - (b) What was defendant's last offer?
 - (1) Monetary offer: \$ _____
 - (2) Non-monetary offer: _____
4. The Parties [have _____ have not _____] met pursuant to *R. 4:103-3*.
5. The Parties [have _____ have not _____] exchanged the information required by *R. 4:103-2(a)(1)*. If not, state the reason therefor.
6. Explain any problems in connection with completing the disclosures required by *R. 4:103-2(a)(1)*.

7. The Parties [have _____ have not _____] conducted discovery other than the above disclosures. If so, describe.
8. Proposed joint discovery plan:
- (a) Discovery is needed on the following subjects:
 - (b) Discovery [should _____ should not _____] be conducted in phases or be limited to particular issues. Explain.
 - (c) Proposed schedule:
 - (1) R. 4:103-2 Disclosures _____.
 - (2) Service of initial written discovery _____.
 - (3) Maximum of _____ Interrogatories and _____ document requests by each party to each other party. NOTE: Parties are to provide rolling privilege logs within ten (10) days after each production.
 - (4) Maximum of _____ depositions to be taken by each party.
 - (5) Motions to amend pleadings or to add Parties to be filed by _____.
 - (6) Motions to resolve any privilege log disputes to be filed by _____.
 - (7) Factual discovery to be completed by _____.
 - (8) Plaintiff's expert report(s) due on _____.
 - (9) Defendant's expert report(s) due on _____.
 - (10) Any rebuttal reports due on _____.
 - (11) Expert depositions to be completed by _____.
 - (12) Discovery end date: _____.
 - (13) Dispositive motions to be served within _____ days of discovery end date.
 - (d) Set forth any special discovery mechanism or procedure requested.
 - (e) A pretrial conference may take place on _____.

(f) Trial date: _____
(_____ Jury Trial _____ Non-Jury Trial).

9. Do you anticipate any special discovery needs (i.e., videotape/telephone depositions, problems with out-of-state witnesses or documents, etc.)? Yes _____ No _____. If so, please explain.

10. Do you anticipate any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced? Yes _____ No _____.
If so, how will electronic discovery or data be disclosed or produced? Describe any agreements reached by the Parties regarding same, including costs of discovery, production, related software, licensing agreements, etc.

11. Do you anticipate entry of a Discovery Confidentiality Order? *See R. 4:104-6 and Appendix XXX.*

12. Do you anticipate any discovery problem(s) not listed above? Describe. Yes _____ No _____.

13. Is this case appropriate for bifurcation? Yes _____ No _____

14. Is the case appropriate for mediation? Yes _____ No _____

15. Do the parties consent to binding arbitration? Yes _____ No _____

16. An interim status/settlement conference (with client representatives having settlement authority in attendance), shall be held on _____.

17. Identify any other issues to address at the Scheduling Conference.

Attorney(s) for Plaintiff(s) / Date

Attorney(s) for Defendant(s)/Name of client / Date

_____	:	
	:	Superior Court of New Jersey
Plaintiff(s)	:	Law Division - Civil Part
	:	_____ County
	:	
	:	Docket No: L - _____ - _____
	:	
v.	:	SCHEDULING ORDER
	:	
	:	
Defendant(s)	:	
_____	:	

This matter having come before the Court for an Initial Conference, and for good cause shown,

It is, on this _____ day of _____, 20 __, ORDERED as follows:

- (1) *R. 4:103-2* Disclosures of the parties must be served on all parties no later than fourteen (14) days from the date of the Initial Conference.
- (2) Service of initial written discovery to be completed by _____.
- (3) Maximum of _____ Interrogatories and document requests by each party to each other party (if other than the limits set forth in *R. 4:104-4*).
- (4) Maximum of _____ depositions to be taken by each party (if other than the limits set forth in *R. 4:104-3*).
- (5) Motions to amend pleadings or to add parties to be filed by _____.
- (6) Motions to resolve any privilege log disputes to be filed by _____.
- (7) Factual discovery to be completed by _____.
- (8) Plaintiff's expert report(s) due on _____.
- (9) Defendant's(s') expert report(s) due on _____.

- (10) Any rebuttal reports due on _____.
- (11) Expert depositions to be completed by _____.
- (12) Discovery end date: _____.
- (13) Dispositive motions to be served within _____ days of discovery end date.
- (14) Tentative Status Conference Date (if necessary): _____.
- (15) Tentative Pre-Trial Conference Date: _____.
- (16) Tentative Trial Date: _____.

J.S.C.

NOTE: The parties may agree to set and/or modify interim deadlines without court approval, provided that any such change will not have any impact on the discovery end date.

NOTE: The setting of the Tentative Trial Date, above, does not implicate the “exceptional circumstances” standard of R. 4:24-1(c), and discovery extensions may be considered for good cause shown.

Plaintiff(s)

v.

Defendant(s)

Superior Court of New Jersey

Law Division - Civil Part

_____ County

Docket No: L - _____ - _____

**ELECTRONIC DISCOVERY
STIPULATION AND ORDER**

1. PURPOSE

This Order (the “eDiscovery Order”) will govern discovery of Electronically Stored Information (“ESI”) and any electronically stored or maintained information in this case as a supplement to the Rules of Court, the Complex Business Litigation Program’s Guidelines, and any other applicable Orders and Rules.

2. COOPERATION

The Parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter consistent with this Court’s Guidelines for the discovery and production of ESI and any electronically stored or maintained documents.

3. LIAISON

The Parties have designated liaisons who are and will be knowledgeable about and responsible for discussing their respective ESI and/or electronic documents (“eDiscovery Liaison”). Each eDiscovery Liaison will be, or have access to those who are, knowledgeable about the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI and/or electronic documents in this matter. The Parties will rely on the eDiscovery Liaison, as needed, to confer about ESI and/or electronic documents and to help resolve disputes without court intervention. The following individuals are the designated as the eDiscovery Liaison for this litigation:

Plaintiff(s) [with contact information]:

Defendant(s)[with contact information]:

4. PRESERVATION

By signing this eDiscovery Order, the Parties certify that they have taken reasonable steps to preserve all ESI and electronically stored documents. Additionally, the Parties have discussed their preservation obligations and needs as litigation progresses and agree that preservation of potentially relevant ESI and electronically stored documents will be reasonable and proportionate. To reduce the costs and burdens of preservation, and to ensure proper ESI and/or electronically stored information is preserved, the Parties agree that:

- a) They have exchanged a list of custodians, the types of ESI and/or electronically stored information they believe should be preserved, or general job titles or descriptions of custodians, for whom they believe ESI and/or electronically stored information should be preserved, e.g., “HR head,” “scientist,” “marketing manager,” etc...;
- b) In addition to the previously preserved ESI and/or electronically stored information, the Parties agree that any ESI created or received between _____ and _____ will be preserved for the custodians and/or for those individuals who meet the general job titles or descriptions of custodians provided by the opposing party;
- c) They have agreed/will agree on the number of custodians per party for whom ESI and/or electronically stored information will be preserved;
- d) Data sources that are not reasonably accessible because of undue burden or cost and ESI from these sources will be preserved but not searched, reviewed, or produced: [e.g., backup media of [named] system, systems no longer in use that cannot be accessed];
- e) Among the sources of data the Parties agree are not reasonably accessible, the Parties agree not to preserve the following: [e.g., backup media created before _____, digital voicemail, instant messaging, automatically saved versions of documents];
- f) Any data sources, ESI and/or electronically stored information that has or potentially could have been destroyed is listed below and has been divulged to the opposing party;

Plaintiff(s)' Preservation Issues (if any):

Defendant(s)' Preservation Issues (if any):

- g) In addition to the agreements above, the Parties agree data from these sources (a) could contain relevant information but (b) under the proportionality factors, should not be preserved: _____.

5. CUSTODIANS

The Parties agree that in providing *R. 4:103-2* Initial Disclosures, or earlier if appropriate, they have met and conferred about methods to search ESI in order to identify data sources that are likely to contain relevant documents. The Parties have agreed to ____ custodians and/or data sources each for the purposes of this litigation. Those custodians and/or data sources are listed below. The Parties shall add or remove custodians as reasonably necessary.

- a) Plaintiff(s)' Custodians and/or Data Sources:
- b) Defendant(s)' Custodians and/or Data Sources:

6. SEARCH TERMS

The Parties have agreed upon the following search terms:

- a) Plaintiff(s)' Search Terms:
- b) Defendant(s)' Search Terms:

In the event that any of the search terms return ____ number of documents or more, the Parties agree that the search term is per se overly broad and will work to create a more tailored search term.

7. PRODUCTION

The Parties agree to run the appropriate de-duplication program prior to any production to reduce the number of duplicate documents. The Parties further agree to the Production Format set forth in Exhibit "A", which is attached hereto and incorporated as part of the eDiscovery Order, for all ESI and/or electronically stored information exchanged in this litigation:

The Parties agree to electronically Bates label documents as follows:

- a) Plaintiff(s)' Bates Designation:
- b) Defendant(s)' Bates Designation:

8. PHASING (Rolling) PRODUCTION

When a party propounds discovery requests pursuant to proposed *R. 4:104-5*, the Parties agree to phase the production of ESI (i.e. produce the documents on a rolling basis), and the initial production will be from the above-agreed upon custodians and data sources.

Following the initial production, the Parties will continue to prioritize the order of subsequent productions.

9. DOCUMENTS PROTECTED FROM DISCOVERY

Although New Jersey has not adopted a rule of evidence similar to Federal Rule of Evidence 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver), the Parties understand and stipulate that disclosure of Privileged Discovery Materials pursuant to this Stipulation and Order as well as any Clawback or other Order will not prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of attorney-client, work product or other applicable privilege or immunity, under New Jersey law.

For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case, or in any other Federal or State proceeding.

Communications involving trial counsel that post-date the filing of the Complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.

10. MODIFICATION

This Stipulated Order may be modified by a Stipulated Order of the Parties or by the Court for good cause shown.

IT IS SO STIPULATED, through Counsel of Record.

Dated:

Counsel for Plaintiff

Dated:

Counsel for Defendant

IT IS ORDERED that the foregoing Agreement is approved.

Dated:

J.S.C.

	:	
	:	Superior Court of New Jersey
Plaintiff(s)	:	Law Division - Civil Part
	:	_____ County
	:	
	:	Docket No: L - _____ - _____
	:	
v.	:	CLAWBACK STIPULATION
	:	AND ORDER
	:	
Defendant(s)	:	
	:	
_____	:	

WHEREAS, the Parties¹ believe that it will promote the efficient, just, and economical resolution of this Litigation to supplement the existing Discovery Confidentiality Order by entering into this stipulation and Order (the "Clawback Order") regarding the exchange of certain electronically stored information ("ESI"), any electronically stored or maintained information, documents, or things, or portion of any documents or things ("Discovery Materials"); and

WHEREAS, based upon a good faith belief that the procedures set forth in the Electronic Discovery Stipulation and Order (the "eDiscovery Order") are likely to generate a large volume of Discovery Materials;

WHEREAS, based on the anticipated number of relevant and/or responsive Discovery Materials that will be identified in this Litigation, the Parties have previously agreed upon certain delimiters, procedures and processes set forth in the eDiscovery Order which include, *inter alia*, agreeing to utilize agreed upon search terms, date ranges and custodians to more accurately identify potentially relevant Discovery Materials; and

¹ Unless otherwise defined, capitalized terms herein have the meanings assigned in the "Discovery Confidentiality Order").

WHEREAS, despite these methods used to cull-down the number of documents identified as potentially relevant, the Parties recognize that the volume of Discovery Materials that will be exchanged in this Litigation is of a magnitude that the inadvertent disclosure of Discovery Materials that are subject to a claim of attorney-client, work product and/or other applicable privilege or immunity, and/or protected pursuant to applicable state and/or federal privacy laws (collectively, "Privileged Discovery Materials"), as well as the disclosure of other materials irrelevant to this Litigation ("Irrelevant Materials") is possible; and

WHEREAS, the Parties believe that permitting the production of Discovery Materials pursuant to this Clawback Order will materially reduce the cost and duration of discovery, the attendant burdens on the Parties, and the need for judicial intervention; and

WHEREAS, although New Jersey has not adopted a rule of evidence similar to Federal Rule of Evidence 502,² the Parties understand and stipulate that disclosure of Privileged Discovery Materials pursuant to this Clawback Order will not prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of attorney-client, work product or other applicable privilege or immunity, under New Jersey law.

IT IS HEREBY STIPULATED, AGREED AND ORDERED:

1. Discovery Materials exchanged by the Parties in this Litigation is subject to and under the terms of this Clawback Order provided that the Party producing the Discovery Materials has made a good faith effort to prevent the inadvertent production of any Privileged Discovery Materials or Irrelevant Materials.
2. A Producing Party shall not be obligated to conduct a document-by-document review of

² Entitled "Attorney-Client Privilege and Work Product; Limitations on Waiver."

the Discovery Material prior to its production in order to meet the good faith standard mentioned above; provided however, that a Producing Party utilized, at a minimum, the following best practices to avoid the inadvertent production of documents (“Best Practices”):

- a. Keyword search terms (*e.g.*, the names of counsel and law firms for the Producing Party);
 - b. Domain names; and
 - c. Analytical software tools and/or other reasonable means to locate and exclude potentially Privileged Discovery Materials prior to the production of the Discovery Materials;
3. Any document that is not identified by using the above Best Practices is considered presumptively responsive/non-privileged and may be produced without performing a document-by-document review.
4. Any documents that are identified as being potentially privileged by using the above Best Practices shall be reviewed by the Producing Party and, if such material is responsive and non-objectionable, shall either be (i) produced (if such material is not deemed Privileged Discovery Material), or (ii) identified as privileged and placed onto the Producing Party's privilege log (if such material is deemed as Privileged Discovery Material), in the normal course of discovery, consistent with the Rules of this Court. If a Producing Party complies with Paragraphs 2 and 3 herein, such Producing Party shall be deemed to have implemented adequate precautions to prevent inadvertent disclosure of any Privileged Discovery Materials.
5. Disclosure of Privileged Discovery Materials in this Litigation, pursuant to this Clawback

Order, shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any attorney-client, work product or other applicable privilege or immunity. Any Privileged Discovery Materials or Irrelevant Materials shall be deemed to have been inadvertently produced.

- a. A Party who receives any Discovery Materials that, upon review by such Party, appears on their face to be Privileged Discovery Materials shall: (i) refrain from any further examination or disclosure of such document pending confirmation by the Producing Party that such document is not Privileged Discovery Material; and (ii) provide reasonably prompt written notice to counsel for the Producing Party that such document appears to be Privileged Discovery Material. Upon receiving a written notice contemplated by the preceding sentence, the Producing Party shall provide reasonably prompt written notice to the requesting Party indicating whether the document in question constitutes Inadvertent Production Material.
- b. A Producing Party shall be obligated to make a reasonably prompt claim of inadvertent production upon the earlier of: (i) receiving notice under the preceding paragraph concerning such document, or (ii) otherwise becoming aware of the inadvertent production of such document. If a Producing Party complies with this paragraph, such Party shall be deemed to have acted timely and adequately to rectify any inadvertent disclosure of Privileged Discovery Materials.
- c. The procedures set forth in Paragraph 9 of the Discovery Confidentiality Order shall apply to any Discovery Material which is claimed to be Inadvertent Production Material.
- d. The Producing Party shall timely log any Discovery Material that is claimed to be

Inadvertent Production Material, consistent with the Rules of Court.

6. Each Party shall have the right to demand the immediate return of any Irrelevant Material produced by such Party. After the documents are returned, the Parties agree to meet and confer in good faith to resolve any disputes that arise regarding the alleged Irrelevant Materials. The Party that is challenging the designation of potentially Irrelevant Material and is subject to destroy and/or return the documents at issue must also destroy and/or obtain from any Party or third party that was provided with the potentially Irrelevant Material until the issues are resolved through the meet and confer or by motion to the Court.
7. Nothing in this Clawback Order shall:
 - a. Require any Party to produce or disclose any Privileged Discovery Materials;
 - b. Require any Party to produce documents or data as Clawback Discovery Material;
 - c. Waive any Party's right to conduct limited pre-production review of Discovery Material prior to production of such materials;
 - d. Modify the Discovery Confidentiality Order, unless expressly stated herein;
 - e. Except as expressly stated herein, modify any prior agreements among the Parties concerning the conduct of discovery in this Litigation, including but not limited to agreements regarding the collection of Discovery Material from certain custodians or the use of search terms to identify potentially responsive documents; or
 - f. Prevent any Party from arguing that a waiver of an attorney-client, work product, or other applicable privilege or immunity has occurred from circumstances other than disclosure of Discovery Material pursuant to this Clawback Order.
8. The Parties agree that any violation of this Clawback Order shall result in irreparable harm

for which there is no adequate remedy at law. The Parties further agree that any Party shall be entitled to injunctive relief to enforce the terms hereof. In addition, the Parties expressly acknowledge that the Court may, in its discretion, award such other and further relief as the Court may deem appropriate.

9. This Clawback Order applies only to Discovery Material produced by the Parties, and does not apply to Discovery Material produced by non-parties. In the event additional parties join or are joined in the Litigation, they shall not have access to Discovery Material until the newly-joined party, by its counsel, has executed and, at the request of any Party, filed with the Court its agreement to be fully bound by this Clawback Order.
10. The Parties agree to be bound by the terms of this Clawback Order pending the entry of this Clawback Order by the Court, and any violation of its terms shall be subject to the same sanctions and penalties as if this Clawback Order has been entered by the Court. Notwithstanding the foregoing, the Parties shall not be obligated to provide any Discovery Material prior to entry of this Clawback Order by the Court, unless the production of such Discovery Material is expressly required by another Order of the Court.
11. Subject to any applicable Rule of Court, the provisions of this Clawback Order shall, absent written permission of the Producing Party or further Order of the Court, continue to be binding throughout and after the conclusion of the Litigation, including without limitation any appeals therefrom.
12. Nothing in this Clawback Stipulation and Order shall preclude any Party from seeking judicial relief, upon notice to the Parties, with regard to any provision hereof.
13. This Clawback Stipulation and Order may be executed by PDF or conformed signature and may be executed in one or more counterparts, each of which shall be deemed to

constitute an original, but all of which together shall constitute but one agreement.

[COUNSEL]

Attorneys for Plaintiff

[COUNSEL]

Attorneys for Defendant

IT IS SO ORDERED.

Dated: _____

J.S.C.