

# NEW YORK CITY BAR

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### By Email

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Eileen D. Millett, Esq.  
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[rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov)

**Re: New York City Bar Association Response to Request for Public  
Comment on Proposed Amendment of the Commercial Division  
Standard Form Confidentiality Order and Rule 11-g to Allow  
“Highly Confidential – Attorneys’ Eyes Only” Designations**

Dear Mr. McConnell and Ms. Millett:

We write in response to your September 10, 2019, request for public comment regarding a proposed amendment to Commercial Division Rule 11-g (the “Proposal”).

### Suggested Changes to the Proposal

We believe the Proposal presents two issues for consideration: (1) whether parties should be allowed to adopt a second, higher degree of protection for documents and testimony produced in litigation than is allowed by the current Commercial Division Protective Order, and (2) if so, whether “Highly Confidential – Attorneys’ Eyes Only” is the proper designation for such a second tier. Our views are that (1) a second tier may be appropriate under the circumstances of a particular case when the parties agree or the court so orders, and that a standard form of order may provide guidance for such a designation, and (2) “Highly Confidential” is the appropriate designation for such a second tier. In our view, an “attorneys’ eyes only” designation is too easily abused and too likely to interfere with attorneys’ ability to prepare their case for trial. In addition, we believe the term is not accurate as used in the Proposal.

We are guided in our conclusions by the decision of the First Department in *Gryphon Domestic VI v. APP Int'l Fin. Co.*, 28 A.D.3d 322, 325 – 326 (1st Dep't 2006), in which the court addressed a party's argument "that the 'attorney's eyes only' restriction . . . interferes with their counsel's ability to consult with them regarding facts that are essential to their defense," and concluded that such a designation and sealing documents was not appropriate because it "prevents counsel from fully discussing with their clients all of the relevant information in the case so as to properly formulate a defense . . . ."

We are aware, however, that many litigants desire a second tier of protection when particularly sensitive information is at issue. Accordingly, we suggest a revision of the Proposal's model protective order that is marked to show changes from the current Appendix B to the Commercial Division Rule 11-g. We also propose that the text of Commercial Division Rule 11-g in the Proposal be revised as follows:

(b) [DELETE]

...

(d) If the parties agree to adopt a second, higher degree of protection for documents and testimony produced in litigation than is allowed by the model order at Appendix B, the parties may submit to the Court for signature the model stipulation and order that appears in Appendix F to these Rules of the Commercial Division.

(e) If the parties agree to deviate from the forms set forth in Appendix B or Appendix F in a way that provides for a lower degree of protection for documents and testimony produced in litigation than is allowed by the model at Appendix F, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.

(f) If the parties agree to deviate from the forms set forth in Appendix B or Appendix F in a way that provides for a higher degree of protection for documents and testimony produced in litigation than is allowed by the model at Appendix F (or if the parties cannot agree on a form of order), a party or parties may apply to the Court to modify the model orders at Appendix B or F, provided, however, that modifications providing for a higher degree of protection than is allowed by the model at Appendix F will be allowed by the Court only in extraordinary circumstances. An application shall include a red-line of the proposed changes and a written explanation of the extraordinary circumstances warranting the deviation in connection with the pending matter.

### Explanation

The first major change from the Proposal arises from our concern that the designation of evidence as highly confidential should not interfere with the ability of counsel to prepare a case for trial. The Proposal would prohibit the disclosure of Highly Confidential Information to

“personnel of the Parties actually engaged in assisting in the preparation of the action for trial . . . .” (Proposal ¶ 5.1 (excluding disclosure to persons described in ¶ 5(a)).) Our proposed paragraph 5(b) expands the permitted disclosure to include “(1) in-house counsel for the Parties to this action and their associated attorneys, paralegals and other professional and non-professional personnel (including support staff) and (2) no more than three personnel of a Party not included in (1) above who (i) are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, (ii) are under the supervision or control of in-house counsel or counsel of record, (iii) who have been advised by such counsel of their obligations hereunder and (iv) who were identified by name to the Producing Party at least five business days before being provided access to the Producing Party’s Highly Confidential Information.” (Rev. Proposal ¶ 5(b).) This change allows a party’s employees, instructed and supervised by counsel, to assist litigation counsel, but limits the number of employees given such access and requires that they be identified to the producing party in advance of disclosure of Highly Confidential information to them so that the producing party has time to seek an appropriate protective order limiting or prohibiting that access.

Throughout this proposed revision we have used the term “Highly Confidential” and not “Attorneys’ Eyes Only.” However, other than the key change described in the preceding paragraph, we believe the goal of the Proposal is achieved. We also note that the Proposal as drafted does not actually restrict disclosure to attorneys only, and accordingly use of the term “Attorneys’ Eyes Only” is to a certain extent inaccurate and thus possibly confusing.

The second major change from the Proposal is that a modification of one of the model orders provided by the rule in a way that provides for a higher degree of protection for documents and testimony produced in litigation than is allowed by the model at Appendix F shall be granted only in extraordinary circumstances.<sup>1</sup> This change provides a mechanism for obtaining higher levels of protection of evidence, but is informed by our view that such a level of protection should be rare and is case-specific and document-specific, and thus should only be allowed in exceptional circumstances.

### **References to Electronic Filing**

Both the current model protective order and the new model discussed in the Proposal and this letter contain alternative language in paragraphs 12 and 13 regarding filing documents containing Confidential or Highly Confidential Information depending upon whether a county has electronic filing. It is our understanding that, with the possible exception of the Eighth Judicial District Commercial Division, counties with a Commercial Division have electronic filing, eliminating the need for an alternative rule for counties without electronic filing. We suggest that OCA determine whether this alternative rule still is needed and eliminate it if it is not.

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<sup>1</sup> The “extraordinary circumstances” language draws from the forms used in the Southern District of New York.

John W. McConnell, Esq.  
Eileen D. Millett, Esq.  
Office of Court Administration  
November 22, 2019  
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We hope the foregoing comments and the enclosed draft revision are useful for the Office of Court Administration.

Very truly yours,

Michael P. Regan  
Council on Judicial Administration, Chair

Bart J. Eagle  
State Courts of Superior Jurisdiction Committee, Chair

John M. Lundin  
Litigation Committee, Chair

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_

-----X	:	
_____ ,	:	Index No. _____
	:	
Plaintiff,	:	<b>STIPULATION AND ORDER</b>
	:	<b>FOR THE PRODUCTION AND</b>
-against-	:	<b>EXCHANGE OF</b>
	:	<b>CONFIDENTIAL</b>
_____ ,	:	<b>INFORMATION</b>
	:	
Defendant.	:	
	:	
	:	
-----X		

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

IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery of documents and information that the Parties and, as appropriate, agree merit confidential treatment (hereinafter the “**Documents**” or “**Testimony**”).

2. Any Party or, as appropriate, non-party, may designate Documents produced, or Testimony given, in connection with this action as “confidential,” or “highly confidential” when the Documents or Testimony are within the definition below either by notation on the document, statement on the record of the deposition, written advice to the respective undersigned counsel for the Parties hereto, or by other appropriate means.
3. As used herein:
  - (a) “Confidential Information” shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information or other information the disclosure of which would, in the good faith judgment of the Party or, as appropriate, non-party designating the material as confidential, be detrimental to the conduct of that Party’s or non-Party’s business or the business of any of that Party’s or non-party’s business or the business of any of that Party’s or non-party’s customers or clients.
  - (b) “Highly Confidential Information” shall mean “Confidential Information” that is of such a private, sensitive, competitive or proprietary nature that disclosure to persons other than those identified in paragraph 5(b) below is highly likely to cause significant harm to the business or competitive position of the Producing Party's business. A designation of information as Highly Confidential shall be deemed under this Stipulation to constitute a representation by the Producing Party and its counsel that there is a valid basis therefor.

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

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

4. The Receiving Party may, at any time, notify the Producing Party that the Receiving party does not concur in the designation of a document or other material as Confidential Information, or Highly Confidential Information. If the Producing Party does not agree to declassify such document or material within seven (7) days of the written request, the Receiving Party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall continue to be treated as Confidential Information, or Highly Confidential Information. If such motion is filed, the documents or other materials shall be deemed ~~Confidential Information~~ as designated by the Producing Party unless and until the Court rules otherwise.

Notwithstanding anything herein to the contrary, the producing Party bears the burden of establishing the propriety of its designation of documents or ~~information~~ other material as Confidential ~~Information~~ or Highly Confidential provided herein.

5. Permitted Disclosures:

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

- i personnel of the Parties actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;
- ii counsel for the Parties to this action and their associated attorneys, paralegals and other professional and non-professional personnel (including support staff and outside copying services) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;
- iii expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;
- iv ~~the Court and court personnel;~~ court personnel, and any special master, referee, mediator or neutral evaluator appointed by the Court or selected by the parties;
- v an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;
- vi trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 9 and 10, respectively, hereof; and
- vii any other person agreed to by the Producing Party.



(b) Except with the prior written consent of the Producing Party or by Order of the Court, Highly Confidential Information shall not be furnished, shown or disclosed to any person or entity except those persons described in paragraphs (ii) – (vii) of section 5(a); provided, however, that Highly Confidential Information may be furnished, shown or disclosed to (1) in-house counsel for the Parties to this action and their associated attorneys, paralegals and other professional and non-professional personnel (including support staff) and (2) no more than three personnel of a Party not included in (1) above who (i) are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, (ii) are under the supervision or control of in-house counsel or counsel of record, (iii) who have been advised by such counsel of their obligations hereunder and (iv) who were identified by name to the Producing Party at least five business days before being provided access to the Producing Party’s Highly Confidential Information.

~~5-6.~~ Confidential Information shall be utilized by the Receiving party and its counsel only for purposes of this litigation and for no other purposes.

~~6-7.~~ Before any disclosure of Confidential Information or Highly Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(ea)(iii) and 5(b) hereof, counsel for the Receiving Party shall provide to the expert witness or consultant a copy of this Stipulation and obtain the expert’s or consultant’s written agreement, in the of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Receiving Party obtaining the certificate shall supply a copy to counsel for the other Parties at the time designated for expert disclosure, except that any certificate signed by

an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied.

7.8. ~~All~~Unless otherwise designated during the deposition, all depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the Parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

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

9.10. This Stipulation shall not preclude counsel for any Party from using during any deposition in this action any Documents or Testimony which has been designated as “Confidential Information” [or “Highly Confidential Information”] under the terms hereof. Any deposition witness who is given access to Confidential Information shall, prior thereto, be provided with a copy of this Stipulation and shall execute a written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the ~~party~~Party obtaining the certificate shall supply a copy to counsel for the other Parties and, as appropriate, a non-party that is a Producing Party. In the event that, upon being presented with a copy of the Stipulation, a witness refuses to

execute the agreement to be bound by this Stipulation, the Court shall, upon application, enter an order directing the witness's compliance with the Stipulation.

~~10.11.~~ A party may designate as Confidential Information or Highly Confidential Information subject to this Stipulation any document, information, or deposition testimony produced or given by any non-party to this case, or any portion thereof. In the case of Documents, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the Party asserting the confidentiality privilege. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the Party (or, as appropriate, non-party) asserting the confidentiality. Prior to the expiration of such fifteen (15) day period (or until a designation is made by counsel, if such a designation is made in a shorter period of time), all such Documents and Testimony shall be treated as Confidential Information- or Highly Confidential Information, as appropriate.

### **In Counties WITH Electronic Filing**

~~11.12.~~

- (a) A Party or, as appropriate, non-party, who seeks to file with the Court (i) any deposition transcripts, exhibits, answers to interrogatories, or other documents which have previously been designated as comprising or containing Confidential Information or Highly Confidential Information, or (ii) any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential

Information or Highly Confidential Information shall file the document, pleading, brief, or memorandum on the NYSCEF system in redacted form until the Court renders a decision on any motion to seal (the “Redacted Filing”). If the Producing Party fails to move to seal within seven (7) days of the Redacted Filing, the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

- (b) In the event that the Party’s (or, as appropriate, non-party’s) filing includes Confidential Information or Highly Confidential Information produced by a Producing Party that is a non-party, the filing Party shall so notify that Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant Producing Party’s Confidential Information or Highly Confidential Information unredacted.
- (c) If the Producing Party makes a timely motion to seal, and the motion is granted, the filing Party (or, as appropriate, non-party) shall ensure that all documents (or, if directed by the court, portions of documents) that are the subject of the order to seal are filed in accordance with the procedures that govern the filing of sealed documents on the NYSCEF system. If the Producing Party’s timely motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.
- (d) Any Party filing a Redacted Filing in accordance with the procedure set forth in this paragraph 12 shall, contemporaneously with or prior to making the Redacted

Filing, provide the other Parties and the Court with a complete and unredacted version of the filing.

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

**In Counties WITHOUT Electronic Filing**

12.13.

- (a) A Party or, as appropriate, non-party, who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information or Highly Confidential Information, or any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information or Highly Confidential Information, shall (i) serve upon the other Parties (and, as appropriate, non-parties) a Redacted Filing and a complete and unredacted version of the filing; (ii) file a Redacted Filing with the court; and (iii) transmit the Redacted Filing and a complete unredacted version of the filing to chambers. Within seven (7) days thereafter, the Producing Party may file a motion to seal such Confidential Information or Highly Confidential Information.
- (b) If the Producing Party does not file a motion to seal within the aforementioned seven (7) day period, the Party (or, as appropriate, non-party) that seeks to file the

Confidential Information or Highly Confidential Information shall take steps to file an unredacted version of the material.

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

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

In the event the motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

- (d) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information or Highly Confidential Information produced by a Producing Party that is non-party, the Party (or, as appropriate, non-party) making the filing shall so notify the Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant non-party's Confidential Information or Highly Confidential Information unredacted.
- (e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any documents which have previously been designated by a party as comprising or containing Confidential Information or Highly Confidential Information shall identify such documents by the production number ascribed to them at the time of production.

~~13.~~14. Any person receiving Confidential Information or Highly Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof and shall use reasonable measures to store and maintain the Confidential Information or Highly Confidential Information so as to prevent unauthorized disclosure.

~~14.~~15. Any document or information that may contain Confidential Information or Highly Confidential Information that has been inadvertently produced without identification as to its "confidential" nature as provided in paragraphs 2 and/or 11 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving Party identifying the document or information as

“confidential” within a reasonable time following the discovery that the document or information has been produced without such designation.

~~15.16.~~ Extracts and summaries of Confidential Information or Highly Confidential Information shall also be treated as confidential in accordance with the provisions of this Stipulation.

~~16.17.~~ The production or disclosure of Confidential Information or Highly Confidential Information shall in no way constitute a waiver of each Producing Party’s right to object to the production or disclosure of other information in this action or in any other action. Nothing in this Stipulation shall operate as an admission by any Party or non-party that any particular document is, or is not, confidential. Failure to challenge a Confidential ~~information~~ Information or Highly Confidential Information designation shall not preclude a subsequent challenge thereto.

~~17.18.~~ This Stipulation is entered into without prejudice to the right of either Party or non-party to seek relief from, or modification of, this Stipulation or any provisions thereof by properly noticed motion to the Court or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

~~18.19.~~ This Stipulation shall continue to be binding after the conclusion of this litigation except (a) that there shall be no restriction on documents that are used as exhibits in Court (unless such exhibits were filed under seal); and (b) that a Receiving Party may seek the written permission of the Producing party or further order of the Court with respect to dissolution or modification of any the Stipulation. The provisions of this Stipulation shall, absent prior written consent of the parties, continue to be binding after the conclusion of this action.



~~19.20.~~ Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

~~20.21.~~ Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information or Highly Confidential Information produced or designated and all reproductions thereof, shall be returned to the Producing Party or, at the Receiving Party's option, shall be destroyed. In the event that any Receiving Party chooses to destroy physical objects and documents, such Party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the Parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable rules of professional conduct. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any Receiving Party, or of experts specially retained for this case, to represent any individual, corporation, or other entity adverse to any Party or non-party or their affiliate(s) in connection with any other matter.

~~21.22.~~ If a Receiving Party is called upon to produce Confidential Information or Highly Confidential Information in order to comply with a court order, subpoena, or other direction by a court, administrative agency, or legislative body, the Receiving Party from which the Confidential Information or Highly Confidential Information is sought shall (a)

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

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

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

[FIRM]

[FIRM]

By: \_\_\_\_\_  
\_\_\_\_\_

By: \_\_\_\_\_  
\_\_\_\_\_

New York, New York \_\_\_\_\_

New York, New York \_\_\_\_\_

Tel.: \_\_\_\_\_

Tel.: \_\_\_\_\_

*Attorneys for Plaintiff*

*Attorneys for Defendant*

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

SO ORDERED

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



counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information- or Highly Confidential Information.

9. — I will hereby submit to the jurisdiction of this court for the purpose of enforcement of the ~~10.9.~~ Stipulation in this action.

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