THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY

Report and Recommendations to the Chief Judge of the State of New York

June 2012

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THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY

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Kathryn S. Wylde
The Partnership for NYC

Stephen P. Younger
Patterson, Belknap, Webb & Tyler LLP

Mark C. Zauderer
Flemming Zulack Williamson Zauderer LLP

COUNSEL

Jeremy R. Feinberg
Office of Court Administration

TABLE OF CONTENTS

Page

Executive Summary 1

Formation and Work of the Task Force 5

Report and Recommendations 7

I. Revising the Docket of the Commercial Division 7

II. Judicial Support and Engagement 9

III. Procedural Reforms 14

IV. Proposals that Facilitate Early Case Resolution 25

V. Procedures that Support International Arbitration 29

VI. Long-Term Strategic Goals 31

EXECUTIVE SUMMARY

We must make sure that New York remains at the cutting edge of how commercial disputes are resolved. It is time to set a new vision for how we in the New York State court system might better serve the needs of the business community and our state's economy.

Chief Judge Jonathan Lippman, State of the Judiciary (Feb. 14, 2012)

As the Commercial Division of the New York Supreme Court approaches its twentieth anniversary in a significantly changed world, the Chief Judge constituted this Task Force to ensure that the New York Judiciary helps our State retain its role as the preeminent financial and commercial center of the world. The rule of law and the quality of the courts that apply and enforce it are key elements in keeping us competitive in today's global economy.

In 1995, New York blazed a judicial trail when it launched the first commercial court of its kind in the country. But since that time, the number and complexity of cases in the Commercial Division have grown dramatically. Today, the judges of the Commercial Division adjudicate thousands of cases and motions that include some of the most important, complex commercial disputes being litigated anywhere. This is especially true in the wake of the financial crisis. Commercial Division judges regularly decide cutting-edge legal issues and oversee massive discovery involving multiple parties, dozens of depositions and millions of documents. Additionally, a host of other states have followed New York's lead, creating new commercial courts to attract both business disputes and businesses to their jurisdictions. In 2010, even Delaware, whose Chancery Court remains a leader in the world of corporate law, created in its Superior Court a new Complex Commercial Litigation Division.

In this changed landscape, the quality, reliability and visibility of the Commercial Division are essential to assuring the vitality of our State in the 21st century. That self-evident proposition bears restating, and emphasis, as a preface to our recommendations.

The Chief Judge charged this Task Force to explore, without limitation, the path to a world-class Commercial Division. The Task Force is composed of current and retired judges, experienced business lawyers and commercial litigators, professors of law and business leaders listed in this Report. They bring decades of experience from every perspective in the commercial litigation arena. Mindful of the urgency of vastly increased demands and shrunken resources, over six months the Task Force considered how better to manage judicial resources, use non-judicial personnel and alternative dispute resolution, and engage more closely with the corporate academic community and the Bar to ensure that judges and court staff benefit from the most up-to-date independent perspectives and information.

The recommendations of the Task Force cover a range of matters from docket and procedural reform, to judicial support and engagement, to mediation and arbitration. To confront dramatic growth in the size and complexity of the Commercial Division cases, the Task Force endorses the Chief Judge's legislative proposal to establish a new class of Court of Claims judges to be appointed by the Governor for designation to the Commercial Division; an increase in the monetary threshold for actions to be heard in the Commercial Division; and review of potential adjustments to the categories of cases eligible for the Commercial Division. To strengthen support of the Commercial Division Justices and enhance their engagement with the Bar and Academy, the Task Force's recommendations include providing Commercial Division Justices with additional law clerks; rehiring Judicial Hearing Officers; recruiting seasoned commercial litigation practitioners as "Special Masters" to support Commercial Division Justices upon consent of the parties; and convening an Institute on Complex Commercial Litigation.

In order to reduce delay and eliminate unnecessary costs in commercial litigation in New York, we endorse a variety of procedural reforms in the Commercial Division, from earlier

assignment of cases and uniform and more thorough procedures for expert discovery, to limits on privilege logs and adjustments to the burdens and opportunities of e-discovery. The Task Force also proposes initiatives that will aid parties in reaching early resolution of their business disputes, and that will signal to the international business community New York's commitment to the efficient resolution of court proceedings that relate to international arbitration. Finally, to facilitate further periodic review of the needs and goals of the Commercial Division, the Task Force proposes the creation of a permanent statewide Advisory Council on the Commercial Division with members to be appointed by the Chief Judge. This Report contains a number of recommendations that leave open choices about the best way to operationalize the objectives we identify. An Advisory Council appointed by the Chief Judge would provide the ideal vehicle for refining and implementing those recommendations.

The dedication of our outstanding judges has fueled the Commercial Division's remarkable growth into a model for commercial litigation in court systems around the country. In the course of our efforts, we found that the Bar and the business community are immensely proud of the Commercial Division. The recommendations of the Task Force are made for the purpose of ensuring that the Commercial Division continues to earn that approbation.

Finally, while this Task Force was focused on the Commercial Division, we cannot overstate the importance to New York State generally — its economy and its vitality — of maintaining a first-rate court system. We recognize that certain changes to the Commercial Division bear implications for the rest of the court system, and we believe the following recommendations strike a good balance going forward. Just as a successful, highly regarded Commercial Division provides a benefit to the economy and society of New York and an incentive to businesses to locate in New York, so too these suggestions may in time benefit the

entire court system as well. In that spirit, we underscore that although budget and other considerations have taken their toll on our court system, hopefully our recommendations for the Commercial Division may also serve as a model for broader reform throughout the courts.

FORMATION AND WORK OF THE TASK FORCE

The Chief Judge created the Task Force on Commercial Litigation in the 21st Century to provide practical proposals that will have a positive and lasting impact on commercial litigation in New York. The Chief Judge appointed an interdisciplinary membership to ensure that the Task Force's recommendations reflect the experiences of seasoned commercial litigators, current and former judges familiar with the Commercial Division, academics whose research interests dovetail with and strengthen the intellectual underpinnings of this mission, and prominent executives who understand the needs, interests and expectations of the business community.

Co-Chairs Judith S. Kaye, former Chief Judge of the State of New York, and Martin Lipton, senior partner of Wachtell, Lipton, Rosen & Katz, structured the work of the Task Force to ensure that every area of potential examination was fully considered and subjected to a range of views and frank discussion. Over a six-month period, the Task Force held five meetings of the full membership, along with more than a dozen meetings of sub-groups charged with the preliminary examination of specific subjects before consideration by the full Task Force.

We are grateful to Jeremy R. Feinberg, the Statewide Special Counsel for the Commercial Division, who served as Counsel to the Task Force. Mr. Feinberg was an invaluable resource, both in gathering information and statistics from the court system and in helping the Task Force to consult with the Justices of the Commercial Division. We also extend very special thanks to Kevin S. Schwartz of Wachtell Lipton and Jeffrey Geier of Skadden Arps for their outstanding contributions to the work of the Task Force. From the outset of the Task Force's efforts they have undertaken a major portion of the work, and their insightful counsel is deeply appreciated.

The Task Force examined national practices and trends, and drew on all aspects of the jurisdiction and operation of New York's Commercial Division since its formation. The Co-

Chairs solicited, and received, valuable input from sitting Justices of the Commercial Division, as well as various bar associations, in both written and oral form. The Task Force also drew on available statistical information and further studied the numerous reform initiatives already in place or in development by court officials and by various federal, state and local bar associations.

In its final meeting on June 20, 2012, the Chief Judge's Task Force voted unanimously to adopt this Report and its recommendations.

REPORT AND RECOMMENDATIONS

I. REVISING THE DOCKET OF THE COMMERCIAL DIVISION

Essential to the future preeminence of the Commercial Division will be its ability to handle the increasingly complex disputes that have proliferated over the past decade. In New York County alone, the Justices now confront a Commercial Division docket with thousands of cases and motions — and the docket continues to grow. This burgeoning, increasingly complex workload limits the amount of time available for judges to prepare for any one case in advance of hearings, affects the atmosphere in courtrooms and delays resolution. For the court to resolve these cases with the efficiency and quality that our business community deserves, it is vital that our Governor and State Legislature consider the Commercial Division legislation below, and that our court system adjust the guidelines controlling which cases are added to the Commercial Division docket.

1. The Task Force endorses the Chief Judge's legislative proposal to establish a new class of Court of Claims judges whom the Governor could appoint specifically to sit in the Commercial Division. A bipartisan screening committee, composed of representatives selected by each branch of government, should recommend the best qualified nominees from whom the Governor will select appointments.

A key way to decrease the impact of each judge's docket size is to increase the number of judges handling Commercial Division cases. Enabling the Governor to directly designate judges qualified and eager to resolve complex commercial disputes represents a compelling opportunity for our court system and for our State. By amending the Court of Claims Act to create these judgeships, our Legislature and Governor would send a message to the financial and commercial world of their commitment to a quality of justice in commercial litigation that is surpassed by none. Based on our consultation with court officials, the Task Force recommends the appointment of six new Court of Claims judges for assignment to the Commercial Division.

We recommend that the Governor create by executive order a special screening committee — composed of representatives selected by each branch of government — to identify the best qualified set of potential nominees from whom the Governor will select his appointments. Modeled after the bipartisan Commission on Judicial Nomination that identifies potential nominees to the Court of Appeals, the screening committee should be composed of individuals who are qualified by experience with the Commercial Division or, more generally, with commercial litigation. In identifying potential nominees for the Governor's appointment consideration, merit alone should be the screening committee's focus.

The Task Force endorses this legislative, rather than constitutional, proposal as the most feasible solution now available to meet the extraordinary docket challenges confronting the Commercial Division.

2. Increase the monetary threshold for actions to be heard in the Commercial Division — to begin, the Division threshold for New York County should be set at $500,000.

Growth in the value of complex commercial disputes, and the proliferation of litigants seeking to direct their cases to the Commercial Division, require reform of the monetary thresholds. Based on our analysis of the docket in consultation with court officials, and a consultation with the Commercial Division Justices of New York County, we urge an increase of the threshold in New York County from $150,000 to $500,000. Consideration of proportionate increases to the monetary threshold in other counties should be made on a county-by-county basis in consultation with the local Commercial Division judges.

Several categories of cases are currently exempt from the monetary threshold for actions to be heard in the Commercial Division. 22 N.Y.C.R.R. 202.70(b). As a starting point, the Administrative Board of the Courts should remove the exemption to the monetary threshold for actions involving arbitration (22 N.Y.C.R.R. 202.70(b)(12)) — these matters should be subject to

the same monetary threshold as are all other non-exempt categories of cases. In addition, the Advisory Council recommended in Section VI of this Report should study the remaining categories of exemptions from the monetary threshold and, as necessary, make appropriate adjustments to address docket overloads.

3. Periodically review and adjust, where appropriate, the categories of cases eligible for the Commercial Division.

The demands placed on the Commercial Division, and the need for certain categories of cases to be adjudicated with the expertise of its Justices, have varied since the creation of the Commercial Division. To ensure that all cases on the Commercial Division docket continue to receive appropriate review, the Advisory Council recommended in Section VI of this Report should periodically examine the categories of cases eligible for the Commercial Division and, as necessary, recommend adjustments to the Administrative Board. As a starting point, a number of Justices of the Commercial Division have called for reconsideration of the eligibility of all Yellowstone injunction cases for the Commercial Division.[1]

II. JUDICIAL SUPPORT AND ENGAGEMENT

Enriching the support available to our Commercial Division Justices, and facilitating their engagement with the Bar and Academy, together present powerful means to ensure the Division's quality and enhance its visibility as an attractive forum for commercial litigation. The following recommendations can produce dramatic benefits for the Division.

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[1] *First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968).

1. ***The Task Force endorses the provision of additional Law Clerks for all Commercial Division Justices, akin to the law clerk support available to federal district judges.***

While all New York State Supreme Court Justices have at least one clerk who is usually hired on a long-term basis, Justices in the New York County Commercial Division also currently have a law clerk who serves for a shorter period of time and is recruited and hired directly out of law school or soon thereafter in roughly the same manner as clerks for federal judges. By comparison, each federal judge has as many as three or four law clerks. Most of the screening for this program in the Commercial Division is done by the Office of Court Administration, but each Justice selects his or her law clerk for a one-year or two-year term. The Task Force believes it is essential to retain this program in the Commercial Division of New York County and, as the budget allows, expand it to other counties where warranted by sufficiently demanding caseloads. We recognize the desirability of law clerk support for all judges and the obstacle that budget limitations have posed throughout the court system. Such additional support is especially important in the Commercial Division because its complex docket is often accompanied by enormously complicated motions for which clerk support is essential.

The value of a successful Law Clerk program in the Commercial Division warrants outreach to New York and other area law schools, and to law firm associates, with the goal of recruiting the best candidates possible by increasing the Commercial Division's visibility among young lawyers. In this respect, the Justices themselves would be especially effective advocates to promote the opportunities presented by their clerkships.

2. ***Create a panel of "Special Masters" drawn from our State's seasoned commercial litigators who are no longer in active practice and are available for appointment by the court — upon the consent, and at the expense, of the parties. In addition, rehire a group of Judicial Hearing Officers with assignment to the Commercial Division.***

The complex discovery matters present in many 21st-century commercial cases impose substantial obstacles for both the parties and the court. Magistrate Judges in federal district court allow for dedicated attention to the management of discovery problems, implementation of discovery schedules and performance of discovery tasks like examining vast privilege logs and reviewing documents claimed to be protected.

Our State is blessed with the rich resource of distinguished commercial litigators who are no longer in active practice but are willing to serve. Drawing support from this reservoir of experience would invaluably enhance the visibility and capacity of our Commercial Division. Ideally, the Commercial Division could hire magistrates to support Justices on the same terms as in federal court. But recognizing potential labor-management and budget limitations, we urge the following alternative to draw on this untapped resource: recruit an all-star distinguished panel of such seasoned practitioners to serve as "Special Masters" whom Commercial Division Justices could appoint — but only with the parties' consent and at their expense — to "hear and report" on discovery and other matters. Importantly, no party would be obliged to accept appointment of a master; in the event that any party withholds requisite consent, its identity would not be reported to the judge.

The court system also should rehire Judicial Hearing Officers (JHOs) to be assigned specifically to the Commercial Division and delegated tasks to assist the Justices. JHOs are former Justices with deep experience in the court system who, until recent budget cuts, provided valuable support to the Division and other parts of the court system across the State. At the very

least, reinstituting the JHO program would substantially improve the ability of the Commercial Division to deal with its challenging docket.

3. Convene an Institute on Complex Commercial Litigation.

To increase Commercial Division Justices' engagement with the Bar and the Academy, an Institute on Complex Commercial Litigation should be convened on at least a semi-annual basis. Topics might be selected by the Justices in cooperation with the Office of Court Administration, and speakers alongside the Justices would include experienced practitioners, government officials, law school and business school professors, and corporate general counsel.

Business and law schools throughout New York State could provide a rotating set of forums to host this Institute. Ultimately, such conferences might be organized even more frequently, particularly as appropriate to address timely commercial law subjects of interest. The Task Force hopes that such conferences would provide not merely opportunities for Continuing Legal Education, but also venues to promote greater engagement among Commercial Division Justices, practitioners, scholars and students. Members of the Task Force already have volunteered to form a Steering Committee to organize the first meeting of this proposed Institute. This Steering Committee might be the seed for a future Commercial Division Bar Council, akin to the well-renowned Federal Bar Council long dedicated to promoting the engagement and support of the federal Bench.

4. Create a searchable database of all Commercial Division decisions.

Full accessibility of the orders and opinions of the Commercial Division is critical to continued growth in Commercial Division jurisprudence. While all New York court decisions are available for download from a case docket or by an online search limited to party names or case number, and a select group is published quarterly in the Commercial Division Law Report,

there exists no repository of all Commercial Division decisions that is text-searchable by subject or keywords. The Task Force urges the creation of a text-searchable repository of all Commercial Division decisions, which must begin with the Justices' transmittal of all orders and opinions to the Law Reporting Bureau.

Creating this database would enhance the quality of briefs that can more comprehensively engage caselaw of the Commercial Division instead of other jurisdictions; enhance the ability of the Justices to build on their existing body of caselaw; and enhance academics' ability to analyze Commercial Division jurisprudence as a focus in corporate and commercial law scholarship. Preliminary discussions with court officials suggest that while certain administrative issues must be addressed, including avoiding additional burdens for the Commercial Division Justices, building such a comprehensive, text-searchable database is feasible.

Additionally, we urge court officials to take steps to ensure the more widespread distribution of Commercial Division orders and opinions through existing platforms like Lexis and Westlaw. The Task Force encourages court officials to work with Lexis and Westlaw to secure a standalone location on those research platforms for New York Commercial Division orders and opinions.

5. Revitalize a standalone Support Office, with its own office space, dedicated to the Commercial Division.

Practitioners and Justices from New York County have expressed concern about the level of back-office support available to the Commercial Division and the parties litigating claims there. Having knowledgeable key personnel to assist parties and their attorneys in processing cases through the Division is a major advantage to the Bar and, just as importantly, materially assists the Justices and their staff. Yet despite the best efforts of a number of long-time court personnel, staff support has suffered significantly from recent retirements and layoffs during the

period of budgetary restriction. Further, the Commercial Division's Support Office has merged with other back offices, making support for the Division diluted and less accessible than in the past. The Task Force urges that this Support Office be revitalized with key personnel and moved back to its standalone status with its own office space.

III. PROCEDURAL REFORMS

Reforming the procedures of the Commercial Division is another way to reduce delay and eliminate unnecessary costs in commercial litigation in New York. In identifying these potential reforms, the Task Force focused specifically on the following objectives: facilitate prompt and cost-effective resolution of pretrial proceedings and expedited trial procedures; improve courtroom efficiency; consider the impact of the appellate process on litigants' consideration of the Commercial Division as a forum for their disputes; and enhance the use of technology tools to support the Commercial Division and Bar.

1. Earlier assignment of cases to the Commercial Division.

A hallmark of the Commercial Division has been its interactive, hands-on case management, which helps the Justices process cases more efficiently. Accordingly, the Task Force recognizes the importance of having a judicial officer involved as early in the case as possible. Yet many cases that end up in the Commercial Division do not reach a judge until discovery is well under way, even as late as a summary judgment motion. The Administrative Board should consider promulgating a new rule to modify the current selection mechanism for assignments to the Division. The rule would state that, within 90 days following service of the complaint, any party may seek assignment of the case to the Commercial Division. Failure to file an RJI with such a request by that time would preclude later assignment to the Division,

subject to a *sua sponte* determination by the judge to whom the case is assigned to transfer the case to the Commercial Division.

Among other benefits, early and continued judicial involvement will assist in streamlining discovery by facilitating prompt resolution of disputes and monitoring compliance with discovery obligations.

2. Adopt uniform procedure for more robust and timely expert disclosure.

For many years, commercial litigators have expressed concern about the C.P.L.R.'s limitations on expert disclosure.[2] In particular, there is a lack of predictability and efficiency that results from the requirement to disclose only limited information about an expert's qualifications and opinion, and the failure to impose deadlines by which expert disclosure must be made. These place the Commercial Division at a significant disadvantage when parties consider where to litigate their business disputes. Commercial Division cases often involve controversies where expert opinion is necessary to quantify valuation or damages, full and timely disclosure of which allows parties to assess the risks of trial and the benefits of potential settlement. Since the Commercial Division generally does not require the type of expert disclosure necessary for parties to undertake this analysis, parties who can control forum selection may choose to litigate in Delaware or the federal courts, both of which provide substantially more robust and timely expert discovery. Just as important, the absence of robust and timely disclosure of expert opinions contributes to the inefficiency of cases brought in New York and may delay resolution.

On April 26, 2012, the Office of Court Administration solicited public comment on two amendments to the Uniform Rules of the Commercial Division proposed by the New York State

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[2] Commercial and Federal Litigation Section, New York State Bar Association, *A Proposal for Enhanced Expert Disclosure in the New York State Commercial Division* (Feb. 7, 2011), *available at* http://www nysba.org/AM/Template.cfm?Section=Commercial_and_Federal_Litigation_Home&ContentID=46334 &Template=/CM/ContentDisplay.cfm.

Bar Association relating to enhanced expert disclosure in Commercial Division cases. The first is the adoption of a new Uniform Rule of the Commercial Division providing for expanded expert disclosure in Commercial Division cases only. The proposed rule, modeled after "federal style" expert discovery as well as the approaches and practices already implemented by certain Justices of the Commercial Division, requires all expert disclosures — including identification of expert witnesses, written reports and depositions of testifying experts — to be made no later than four months after completion of fact discovery. Second, the State Bar Association recommended, and the OCA has published for public comment, a modification of Commercial Division Uniform Rule 8 to require parties to discuss the scope and timing of expert disclosure in preparation for and at the Preliminary Conference.

These reforms would harmonize the disclosure rules of our state and federal courts. The Advisory Group to the State/Federal Judicial Council in New York and the 2006 OCA Commercial Division Focus Groups have also endorsed these proposed reforms.[3] The Task Force has reviewed and considered the State Bar Association's report and proposed amendments and recommends their adoption. We have also received and reviewed the thoughtful June 14, 2012 letter of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York, submitted in response to the comment period. We nonetheless adhere to the conclusions of this Report. The Task Force believes that the changes to expert disclosure endorsed above are timely and appropriate steps forward in our Commercial Division's development and growth.

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[3] Advisory Group to the New York Federal-State Judicial Council, *Report on Discrepancies Between Federal and New York State Expert Witness Rules in Commercial Litigations* (Jan. 10, 2012), *available at* http://www nynd.uscourts.gov/documents/ExpertDisclosureReport.pdf; Office of Court Administration, *Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups* (July 2006), *available at* http://www nycourts.gov/reports/ComDivFocusGroupReport.pdf.

3. Limit privilege logs.

Creation of privilege logs has become a substantial expense in complex commercial litigation matters. Often, the cost outweighs their value because the logs are not reviewed or used in any way by the parties. There is a demonstrable need to limit unnecessary costs and delay in the creation of these logs while preserving the ability of the parties and court to police unwarranted withholding or redaction of documents in discovery.

The Task Force endorses limitations on privilege logs in principle, with a focus on instructing parties to meet and confer in order to stipulate to appropriate limitations on what must be logged and how it should be logged. There exist certain rubrics under which privilege logs can be limited including: (a) the Sedona Principles for classifying privileged documents by categories;[4] (b) the Facciola-Redgrave Framework that proposes a categorical approach to privilege review;[5] (c) the approach of the Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases, which makes available, at either party's request, *in camera* sampling of assertions of privilege along with limited letter briefing and swift judicial resolution;[6] and (d) the new Delaware federal court rule that limits logs to communications generated before the complaint is filed, excludes discovery communications related to document preservation, requires non-waiver orders for the return of inadvertently produced privileged communications, and instructs the parties to confer on the

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[4] The Sedona Conference® Working Group on Electronic Document Retention & Production, *The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production* (June 2007), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Principles.

[5] Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Cts. L. Rev. 19 (2010).

[6] Standing Order of the United States District Court for the Southern District of New York (M10-468) and Report of the Judicial Improvements Committee of the Southern District of New York, *Pilot Project Regarding Case Management Techniques for Complex Civil Cases* (Oct. 2011), *available at* http://www nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.

nature and scope of logs.[7] All of the foregoing schemes offer parties examples of ways in which to identify and agree upon effective means of limiting logs. The Advisory Council recommended in Section VI of this Report should evaluate these options and make a recommendation to the Chief Administrative Judge for the model best suited to the Commercial Division.

4. Create standard forms/procedures for optional use in Commercial Division litigation.

Where practicable, standard forms and/or procedures can promote efficiency. The New York County Commercial Division's experience with a model confidentiality stipulation offers a compelling case for statewide adoption. Created by the New York City Bar Association's Committee on State Courts of Superior Jurisdiction, this model confidentiality stipulation has saved parties, and the court, many hours of effort.

Other areas of practice in the Commercial Division can similarly benefit from a standardized form or set of procedures. For example, the Task Force suggests that the Advisory Council recommended in Section VI of this Report create a comprehensive case management order and customized preliminary conference forms that address e-discovery issues at the outset of the litigation. The Bench and Bar should continue to explore whether additional areas of Division practice can likewise benefit from the use of standardized forms or procedures.

Importantly, the parties, subject to court approval, can use a standard form or procedure if they wish, but it is not mandatory: their availability in no way limits the flexibility of parties to negotiate, for example, more complex confidentiality agreements to protect highly sensitive commercial materials.

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[7] United States District Court for the District of Delaware, *Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI"), available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf.

5. Adjust to the burdens, and exploit the opportunities, presented by e-discovery.

Electronic discovery has been a reality of complex commercial litigation for nearly a decade, and the burdens it has created have only increased with the expanded use of technology. Courts must now grapple with disputes concerning data stored on handheld devices, social network sites and information on the Internet — on top of the already significant difficulties presented by discovery of a party's traditional computer system.

The commendable work of the New York State Court System to address the challenges of e-discovery, particularly through its E-Discovery Working Group, has already yielded two proposed reforms which the Task Force endorses. First, the Administrative Board recently adopted Uniform Commercial Division Rule 1(b) (22 N.Y.C.R.R. 202.70(g)(1)(b)), requiring parties to appear at the preliminary conference not with a "covering" attorney, but rather with counsel who have sufficient knowledge of their computer systems to have a meaningful discussion of e-discovery issues. Second, the E-Discovery Working Group is considering the use of internal experts to assist the court, lawyers and parties with the cutting-edge opportunities, and challenges, presented by e-discovery. These goals were specifically identified in the February 2010 Report to the Chief Judge and Chief Administrative Judge on E-Discovery in the New York State Court System.

Predictive coding has recently emerged as a means to streamline the review and production of electronically stored information.[8] We also encourage the E-Discovery Working Group to examine how the courts can capitalize on this important development and potentially generate savings in money and time for the benefit of all.

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[8] *See, e.g.*, *Moore v. Publicis Groupe*, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012), *adopted by Moore v. Publicis Groupe SA*, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

6. Improve courtroom efficiency.

We recommend several changes to the manner in which Commercial Division Parts are run on a day-to-day basis. These changes will make the Commercial Division more "user-friendly" and efficient.

Staggered Court Appearances. We urge regularization of the growing practice of Commercial Division Justices to schedule motions and other court appearances on a given date at specific, staggered times, either individually or in small clusters. This would significantly reduce unnecessary attorneys' fees and dramatically improve the atmosphere of the court when each case is heard. This practice is far preferable to asking all lawyers on all cases for a given day to appear at the same time.

Using Letter Submissions for Discovery Motions. Although letter submissions are encouraged in many Commercial Division Parts, they are not universally permitted. Experience, however, shows that letter submissions are often the most effective way to present discovery disputes: they are cheaper and more efficient than formal motions, and more balanced and less subject to "ambush" than oral presentations at conferences. We recognize that letter submissions, unless e-filed, often do not become part of the official court record, and this may be something that needs to be changed. For now, letters frequently remain the best way to address discovery disputes in the first instance.

Conducting Discovery Conferences by Telephone. We encourage judges to conduct at least routine discovery and status conferences by telephone rather than requiring the attorneys to travel to court. We recognize that some conferences (for example, the initial discovery conference and post-Note of Issue conferences) should be handled in person, but most others need not be. This is particularly true when the discovery process is proceeding smoothly, or an

open issue has already been fully presented through letters to the court. Allowing telephone conferences in these circumstances will increase efficiency and reduce costs and attorneys' fees.

Encouraging Judges to Preside Over Discovery Conferences. We suggest that, notwithstanding their already heavy caseloads, Commercial Division judges make a greater effort to preside personally over discovery conferences in situations where the parties have not consented to the appointment of the new Special Master proposed earlier in this Report. The past practice of many judges to delegate this work to Law Clerks, Law Secretaries and other attorneys employed by the court — often in the same case — has led to delays, inconsistent decisions and failure to respect the rulings of these nonjudicial court personnel. Judicial participation will reduce these inefficiencies and increase compliance with discovery rulings.

7. The impact of the State's appellate process on the Commercial Division.

The Appellate Divisions and Court of Appeals are vital to the development of commercial law in New York State. The liberal availability of interlocutory appeals from Commercial Division rulings is rare among competitor courts and is generally considered by practitioners to be beneficial. But even as a number of former Commercial Division Justices have been added to the Appellate Divisions in recent years, the increasingly complex nature of some commercial litigation appeals may warrant reforms to the appellate process.

As a starting point, the Task Force encourages opening a dialogue with the Appellate Divisions to achieve the following mutual goals: (i) streamlining the process of interlocutory appeals, perhaps by permitting appeals of discovery rulings by a truncated process of letters, without oral argument, and/or by decreasing the size of appellate panels for discovery rulings; (ii) where necessary in appeals of complex commercial rulings on the merits, permitting more time at oral argument; (iii) establishing e-filing in the Appellate Divisions; and (iv) providing

appellate judges with additional exposure to academic thinking on commercial issues through additional Continuing Legal Education opportunities on all aspects of commercial litigation and through greater engagement with the Bar and Academy.

8. Technology tools.

Courtroom technology, remote services and various tools for case management all should be considered by the court system to ensure that the Commercial Division provides a first-rate experience for the Bar and Bench of New York.

The Task Force acknowledges that relatively recent technological advancements have created significant efficiencies in the Commercial Division. For instance, New York County has completed its shift to electronic filing by requiring filing through the New York State Courts Electronic Filing System for all commercial cases. Counsel in all such cases can file online at any time, from any place. This not only makes the Commercial Division's dockets more accessible but also eliminates, at least in a literal sense, the race to the courthouse to file papers that busy litigants are all too familiar with. The Task Force understands that use of the Electronic Filing System is expanding in New York State courts and encourages the Commercial Division to continue in this effort, particularly for those counties located far from major metropolitan hubs like Manhattan.

The Task Force has considered a number of technology proposals, while recognizing the need to account for resource limitations. The Task Force believes that, with proper budgeting and research, certain innovative technologies are within reach. For instance, the Task Force notes that certain federal courtrooms in the U.S. District Court for the Southern District of New York have recently installed digital monitors at the bench and in the jury box as well as "smart" counsel tables equipped with power outlets and device inputs. This system allows counsel to use

their own computers or media devices to submit exhibits to the judge and publish them to the jury, eliminating the need for much of the trial-tech equipment that can clutter the modern courtroom. This works to bring the state-of-the-art into the courtroom and adds a further degree of professionalism to the practice. The Commercial Division could leverage the Southern District's experience to get an advanced real-world assessment of this type of innovation and its implementation.

9. Additional reforms to enhance efficiency in the Commercial Division.

Accelerated Adjudication Procedure for Commercial Division Cases. The Task Force recommends an amendment to the Commercial Division rules to offer an accelerated adjudication procedure available on the consent of both parties. For instance, within a specified number of days following assignment of their case to the Commercial Division, both parties could have the option to agree to a procedure with highly truncated written discovery, narrowly tailored electronic discovery, limited depositions and other accelerated procedures. This simplified procedure would allow for earlier, more active case management by Commercial Division Justices.

Limitations on Document Demands, Interrogatories and Depositions. The Task Force suggests that the Advisory Council recommended in Section VI of this Report consider modification of the Commercial Division rules to restrict the number and scope of document demands and interrogatories and to limit the number and duration of depositions.

The Task Force endorses as a model the limitations imposed by the Federal Rules of Civil Procedure. For example, under the Federal Rules, there is a presumptive limit of ten depositions per side with each deposition limited to one seven-hour session. Unless the parties stipulate, leave of court is required to increase the number and duration of depositions. While

the Federal Rules on depositions can be restrictive, especially in multi-party cases, the Task Force believes that limitations are fundamentally fair to all parties, prevent gamesmanship, and will assist in streamlining discovery in most commercial cases. In addition, a well-tailored preliminary conference order can address whether additional and/or lengthier depositions are warranted.

Strict Adherence to Rules Governing Discovery Disputes. The Task Force endorses strict adherence to rules requiring the parties to meet and confer regarding discovery disputes and to provide advance notice of discovery motions.

10. Imposition of monetary and non-monetary sanctions for failure to adhere to case management orders and other deadlines.

While sanctions have long been available in New York State courts,[9] they are often underutilized. The integrity of the judicial process is compromised when litigants and counsel ignore or defy case management orders or other deadlines. Further erosion of judicial trust occurs when the court fails to sanction a litigant or counsel who incessantly engages in behavior of this type. The Task Force recommends that Commercial Division Justices be encouraged to consider monetary and non-monetary sanctions already provided for where parties fail to comply with case management orders or other deadlines.

The Task Force also notes the importance of how orders imposing sanctions are viewed by appellate courts, and suggests that stronger pronouncements from the Appellate Division will result in the imposition of more meaningful sanctions orders and, in turn, reduce frivolous practice.

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[9] *See* 22 N.Y.C.R.R. 130-1.1 and C.P.L.R. 3126.

IV. PROPOSALS THAT FACILITATE EARLY CASE RESOLUTION

As set forth below, the Task Force proposes two initiatives that will aid parties in reaching early resolution of their business disputes: (1) a pilot mandatory mediation program and (2) procedures to help identify limited discovery that will aid settlement discussions before comprehensive electronic discovery and depositions multiply the costs of dispute resolution.

More than 90% of business disputes end in a settlement. Yet as businesses frequently complain, far too often the costs of getting to that point are excessive. Litigating a dispute requires not only the substantial sums spent on legal fees, but also disruption to operations, repeated distraction to key business personnel and the costs of preserving electronic data (and even outdated computer systems) to comply with court requirements. Moreover, litigation of business disputes can often take years before a decision on the merits and the exhaustion of appeals.

In the increasingly competitive global economy, it is in New York's interest to address these concerns so that businesses will continue to view New York as a desirable place to conduct business and the Commercial Division as a forum that will facilitate the cost-effective resolution of disputes. Moreover, to the extent that reforms are implemented that help to facilitate settlement and reduce discovery disputes, not only will costs be reduced but also Commercial Division Justices will be able to focus more of their resources on the substantive legal and factual issues that parties need them to resolve and the development of New York commercial and business law that they are particularly suited to address.

1. ***A pilot program for mandatory mediation in the Commercial Division, implemented first in New York County, would illuminate for the Bench and the Bar the efficacy of mediation to help parties resolve their business disputes promptly and cost-effectively, and would help ensure that judicial resources are used where they are needed most.***

Among the hallmarks of an effective forum for resolving business disputes are the efficiency with which the disputes can be resolved, the cost-effectiveness of the processes to achieve the resolution and the parties' satisfaction with the fairness of the result. The Task Force — after speaking to in-house and outside counsel and reviewing steps taken by other courts that regularly handle commercial disputes both in the U.S. and internationally — has concluded that court systems that require parties to engage in mediation in most business disputes help disputants achieve these goals.

The Commercial Division has already taken significant steps to foster the use of mediation. Rule 8 of the Uniform Rules requires parties to discuss the use of alternative dispute resolution in anticipation of the Preliminary Conference and Rule 3 authorizes Justices to refer cases to mediation. In addition, panels of qualified neutrals have been created throughout the State and Part 146 of the Rules of the Chief Administrative Judge has created minimum training and experience requirements for mediators and neutral evaluators.

Where mediation has been used in the Commercial Division, both formal and informal measures indicate success. Matters are resolved faster and less expensively, and, by definition, in a manner that parties find acceptable (since otherwise parties could continue to litigate the dispute). Unfortunately, despite these successes, because of the inherent adversarial nature of litigation and because there is a broad disparity in the degree to which judges refer matters to mediation, the Task Force believes mediation is substantially underutilized in New York. Moreover, the Task Force has observed that in other states and countries that require mediation

prior to summary judgment or trial, settlement rates remain high even when there is an increased volume of cases referred to mediation.

Therefore, the Task Force proposes the implementation of a Pilot Mandatory Mediation Program. In developing this program, we have given careful consideration to party choice in selection of mediators and timing of mediation, ensuring that the increased volume of cases to be mediated can be supported by qualified, experienced and effective mediators, and providing for parties to opt-out of mediation in those rare situations where mediation would be ineffective or otherwise unjust. The Task Force proposes that the Pilot Mandatory Mediation Program be implemented first in New York County, in part because of the large number of experienced commercial mediators available — both on New York County's Roster of Neutrals and in private mediation practice. This pilot program also would provide a platform for the appointment of a statewide administrator who would oversee the new mediation program in New York County as well as its expansion throughout the Commercial Division statewide. This is also an example of where Commercial Division innovation could lead to broader reform in the courts in the future.

While mediation can facilitate settlement at all stages of a litigation, both parties and the court system commonly can achieve even greater benefits to the extent that the parties are able to resolve their disputes before engaging in the protracted and expensive disclosure and motion practice that modern business litigation typically entail. Indeed, at times parties feel that they have little disincentive to continue to litigate if they already have incurred substantial legal costs. The Task Force, therefore, proposes that the New York County Pilot Mandatory Mediation Program be structured to provide for mediation before the parties have reached this tipping point, but to provide sufficient time so that limited, cost-effective, settlement-related information exchange can occur — either through formal disclosure or in the course of the mediation itself.

The Task Force makes the following proposal for a Pilot Mandatory Mediation Program:

> In addition to cases that are directed to mediation pursuant to Rule 3 of the Uniform Rules of the Commercial Division, every fifth newly assigned case to the New York County Commercial Division would be required to be mediated within 180 days of assignment to a Commercial Division Justice unless (a) all parties stipulated that they did not want the case to be mediated or (b) a party made a showing of "good cause" as to why mediation would be ineffective or otherwise unjust.
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> By no later than 90 days after assignment of the case to a Commercial Division Justice, the parties shall jointly inform the ADR Administrator that they either (a) have engaged a mediator or (b) request assignment of a mediator. If the parties request assignment of a mediator, the ADR Administrator shall identify no more than five possible mediators from the list of ADR Neutrals. Within seven days of receiving the list of neutrals, the parties shall either advise the ADR Administrator that they have agreed upon a neutral or provide the ADR Administrator of their rankings of the ADR Neutrals. For example, the first choice "1", the second choice "2", the third choice "3" and so on. The ADR Administrator will select the mediator who gets the lowest number on the combined lists of preferences. Once the mediator is selected, the parties shall comply with the Rules of the Alternative Dispute Resolution Program of New York County.
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> In the event that mediation has not been scheduled prior to the Preliminary Conference, counsel and the court shall identify at the Preliminary Conference any limited discovery that would be necessary for a successful mediation, which would be given priority over other discovery. If mediation proceeds before the Preliminary Conference has been scheduled, the parties and the mediator can independently arrange for any information exchange that would help enable resolution.

2. Establish procedures for early settlement-related discovery to facilitate mediation or other settlement efforts.

The Preliminary Conference in any Commercial Division case provides a prime opportunity to encourage parties to identify the discovery that is most necessary for settlement discussions to be effective. To that end, the Task Force proposes that Rules 7 and 8 of the Uniform Rules be amended to require the parties to discuss prior to the Preliminary Conference, and for the court to address at the Preliminary Conference, whether any particular limited disclosure — whether in the form of document exchange, interrogatories or partial depositions of one or two key witnesses or party representatives — would help facilitate settlement discussions or a mediation.

V. PROCEDURES THAT SUPPORT INTERNATIONAL ARBITRATION

Designate specific New York County Justices for lead responsibility over all international arbitration-related matters that require the attention of the Commercial Division.

In our increasingly global economy, parties engaged in international commerce often agree to resolve their disputes through arbitration. When parties elect to submit their disputes to international arbitration, they typically designate a specific jurisdiction, such as New York, as the venue for that arbitration. In most cases, that venue's arbitration law will govern the parties' arbitration[10] and the courts of that venue may be called upon, among other arbitration-related matters, to compel the parties to arbitration, provide preliminary and interim relief in aid of arbitration, preserve the integrity of the arbitration process, and confirm and (where necessary) enforce the eventual arbitration award. The parties also may designate that the courts of other jurisdictions can perform some of these functions. The parties' selection of a venue for their arbitration often will depend on the degree to which the courts of that venue are viewed as sophisticated and experienced in international commercial and arbitration law.

Many of the world's leading business centers, including London, Paris, Hong Kong and Singapore, actively compete to host international arbitrations, and the courts of the venues selected to host international arbitrations are typically regarded as the most respected courts by the international business community. Certainly, New York's Commercial Division is among those select courts, and New York's economy benefits from the business that hosting international arbitrations can provide.

To signal to the international business community New York's commitment to the efficient resolution of court proceedings that relate to international arbitration, specific Justices

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[10] In the case of New York, an international arbitration will most often be governed by the Federal Arbitration Act (found in Title 9 of the U.S. Code), as well as (where it is not preempted by federal law) any relevant New York arbitration law, such as Article 75 of the New York Civil Practice Law and Rules.

in New York County should be designated for lead responsibility over international arbitration-related matters that require the attention of the Commercial Division. While all of the Justices have the experience and ability to address international arbitration issues in the same manner that they handle the broad range of complex and innovative commercial issues in their other cases, designating specific Justices in this way would be valuable in promoting the Commercial Division to the world.

In recommending the designation of specific Justices to take lead responsibility in international arbitration matters, the Task Force is not identifying a substantive need. It has full confidence that the current arrangement can meet the legal needs in any proceeding that may arise relating to international arbitration. However, when parties and counsel who regularly engage in international arbitration select where they will conduct their arbitrations, they place significant weight on the degree to which that forum offers specialized support for international arbitration. Indeed, a recent report from the New York State Bar Association highlighted the importance of designating specific international arbitration judges in attracting such international commercial disputes to New York.[11]

These designated Justices could participate in symposia on the subject of international arbitration, as do their counterparts in other parts of the world. In doing so, these Justices would not only enhance the Commercial Division's knowledge of the issues involved in the international arbitration context, but would also help raise the Commercial Division's profile in the international business and legal community, thus enhancing the Commercial Division's reputation generally. Moreover, these Justices — through their regular exposure to proceedings relating to international arbitration — would gain even more familiarity and experience with the

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[11] *Final Report of the New York State Bar Association's Task Force on New York Law in International Matters* (June 25, 2011), *available at* http://www nysba.org/.

multiple issues that arise that require judicial intervention in arbitration-related matters and would develop jurisprudence on the subject that would provide clarity and certainty to disputants.

The number of proceedings before the Commercial Division that involve international arbitration at this time is not statistically significant. Thus, the Task Force does not believe that designating specific Justices to hear such proceedings will inhibit these Justices from continuing to handle the broad array of business disputes that comprise their current caseload.

VI. LONG-TERM STRATEGIC GOALS

The Task Force proposes that the Chief Judge appoint a statewide Advisory Council on the Commercial Division.

To facilitate further periodic review of the needs and goals of the Commercial Division, as well as the collateral effects on the New York State economy from a top-quality Commercial Division, the Task Force proposes that the Chief Judge appoint a statewide Advisory Council on the Commercial Division. The design and focus of the Advisory Council can draw on the analogue of the existing Advisory Group to the New York Federal-State Judicial Council, as well as informal advisory groups that also may exist within the court system. Throughout this Report, we have included a number of recommendations that leave open choices about the best way to operationalize some of the forward-looking objectives we identify for the Commercial Division. The Chief Judge's appointment of a formal, statewide Advisory Council on the Commercial Division would provide an essential platform to guide the implementation of the recommendations in this Report and to periodically review and help to fulfill the long-term strategic goals of a world-class Commercial Division in New York State.