COMMERCIAL DIVISION

SUPREME COURT, NEW YORK COUNTY

HON. SHERRY KLEIN HEITLER
ADMINISTRATIVE JUDGE
SUPREME COURT, CIVIL BRANCH
NEW YORK COUNTY

JUSTICES OF THE COMMERCIAL DIVISION:
JUSTICE EILEEN BRANSTEN JUSTICE MARCY S. FRIEDMAN
JUSTICE SHIRLEY W. KORNREICH JUSTICE LAWRENCE K. MARKS
JUSTICE JEFFREY K. OING JUSTICE CHARLES E. RAMOS
JUSTICE SALIANN SCARPULLA JUSTICE MELVIN L. SCHWEITZER
JUSTICE O. PETER SHERWOOD

RULES AND PROCEDURES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM

A. GENERAL PROVISIONS

Rule 1. Program. The Alternative Dispute Resolution Program ("the Program") of the Commercial Division of the Supreme Court of the State of New York, County of New York, shall be applicable to commercial cases referred by Justices of the Commercial Division, the Administrative Judge of the Supreme Court, Civil Branch, New York County ("the Administrative Judge"), and the other Justices of the Supreme Court, New York County upon authorization of the Administrative Judge.

Rule 2. Panel of Neutrals. The Administrative Judge shall establish and maintain a panel of Neutrals ("the Panel") for the Program. To be eligible to join the Panel as a Mediator, a person shall have a minimum of ten years of experience in the practice of commercial law or comparable experience as an accountant or business professional and satisfy the requirements of Part 146 of the Rules of the Chief Administrator. To become a Neutral Evaluator on the Panel, a person must be an attorney or former Judge who has the background and the training required by Part 146. Each member of the Panel shall, in the event that the caseload of the Program requires it, serve as a Neutral in at least three matters annually in the Program. Persons may be added to or removed from the Panel as the Administrative Judge may determine. Information on the members of the Panel is accessible on the New York County home page of the website of the Commercial Division, the address of which is www.nycourts.gov/comdiv.

Rule 3. Referral of Cases. Cases are referred to alternative dispute resolution ("ADR") in the Program (i) as determined by the Justice assigned to the case, or (ii) pursuant to a standing Administrative Order of the Administrative Judge.

(a) Referral by the Assigned Justice.

(1) Referral on Consent or By Order of the Justice . The assigned Justice may direct parties to ADR in the Program where the Justice deems it useful to do so or upon consent of the parties. The suitability of an action for ADR shall be determined by the assigned Justice after considering the views of the parties insofar as practicable. If a case is referred to ADR, the Justice shall issue

an Order of Reference. Such Order shall not stay court proceedings in the case unless otherwise specified therein.

(2) Applicability of Rules. Rules 4 through 14 of these Rules and Procedures apply to cases referred to the ADR Program by the assigned Justice pursuant to this subdivision.

(b) Designation Pursuant to Administrative Order and Rule 15 of these Rules. The Administrative Judge of this court has issued an Administrative Order establishing a pilot project for automatic referral of certain Commercial Division cases to mediation in accordance with Rule 15 of these Rules and Procedures ("the Pilot Project") and directing the Chief Clerk and Executive Officer or his designee to designate and refer cases pursuant thereto.

B. RULES AND PROCEDURES GOVERNING CASES REFERRED BY THE ASSIGNED JUSTICE

Rule 4. Form of ADR. Cases referred to the Program shall be mediated unless otherwise agreed by the parties.

Rule 5. Initiation Form. In cases referred to ADR, the parties shall sign an ADR Initiation Form, in counterparts if necessary, and shall, within four business days from the date of the Order of Reference, contact the ADR Coordinator and submit the Form to the Coordinator.

Rule 6. Selection of Neutral; Private ADR Providers.

(a) Designation of Neutral. An action referred to the Program shall be assigned to a Neutral from the Panel who shall in the first instance be designated by the ADR Coordinator. The Coordinator will endeavor to distribute assignments widely among all members of the Panel. The Coordinator may, however, select a particular Neutral if the nature of the matter in question calls for special expertise on the part of the Neutral, if difficulties are encountered in locating an available Neutral, or for other administrative reasons. Each Neutral contacted will advise the Coordinator as to his or her availability and, prior to serving, will conduct a conflicts check as required by subdivision (d) hereof. Within five business days from receipt of the Order of Reference, the Coordinator shall inform the parties of the identity of the designated Neutral. The date of this communication shall constitute the Confirmation Date (subject to subdivision (b)).

(b) Selection of Alternate Neutral from Panel. Once informed of the identity of the Neutral, the parties shall have five business days within which to select an alternate Neutral from the Panel. The parties shall agree upon the alternate Neutral and contact him or her directly to ensure the Neutral's availability to handle the matter and the absence of any conflict on the Neutral's part, and shall inform the Coordinator of the alternate selection within the five-day deadline. If the parties select an alternate Neutral pursuant hereto, the Confirmation Date shall be the date on which they inform the Coordinator of that selection.

(c) Other Person as Neutral. Notwithstanding subdivision (a), the parties may designate as

the Neutral a person who is not a member of the Panel or proceed to ADR through a private ADR provider and in accordance with the rules thereof, but the parties must nevertheless *complete the* ADR process within the deadlines set forth in these Rules.

(d) Ethical Standards. Prior to confirmation as the Neutral in any case, a prospective Neutral shall conduct a check for conflicts with regard to parties or related entities. The Neutral shall decline to serve if he or she would not be able to do so fairly, impartially, and in accordance with the highest professional standards. Neutrals on the Panel shall comply with the Standards of Conduct for Mediators of the Commercial Division or, if applicable, the Standards of Conduct for Arbitrators and Neutral Evaluators (accessible on the New York County home page of the Commercial Division website). Unless all parties consent to the Neutral's service after having been advised of all disqualifying facts, the Neutral shall decline the appointment and another Neutral shall promptly be selected.

Rule 7. Compensation of Neutral.

(a) The Neutral designated pursuant to Rule 6 (a) or (b) shall be compensated by the parties as follows.

(1) Mediators. The Neutral designated as a mediator shall serve in that role at no charge during preparation for the mediation (e.g., scheduling conferences and review of documents in preparation) and for a total of four hours during the actual mediation session or sessions. At the conclusion of the four hours, any party may bring the ADR proceeding to an end, but, if the parties agree to continue, they shall compensate the mediator for his or her time thereafter at the rate of $ 300 per hour.

(2) Arbitrators and Neutral Evaluators. If the parties agree that the form of ADR to be undertaken shall be arbitration or neutral evaluation, the Neutral(s) shall be compensated at the rate of $300 per hour from the commencement of the initial session. Preparation time will not be compensable.

(b) Other Compensation. If so agreed, the parties may compensate the Neutral at a rate in excess of those specified in this Rule. Any such agreement shall be set forth in writing.

(c) Party's Share of Compensation. Unless otherwise agreed, each party to the ADR proceeding shall pay an equal share of the Neutral's compensation.

Rule 8. Confidentiality of Mediation and Neutral Evaluation.

(a) An ADR proceeding in the Program, other than a binding arbitration, shall be confidential and, except as otherwise provided hereafter, any document prepared, or communications made, by parties, their counsel or a Program Neutral for, during, or in connection with the proceeding shall not be disclosed outside its confines by any participant. No party to the proceeding shall, during the action referred to ADR or in any other legal matter, seek to compel production of documents, notes, or other writings prepared for or generated in connection with the ADR proceeding, or the testimony

of any other party or the Neutral concerning communications made during the proceeding. A settlement, in whole or in part, reached during the ADR proceeding shall be set forth in a writing signed by all parties affected or their duly authorized agents. Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because they are submitted or referred to in the ADR proceeding. Should a party attempt in any legal action to compel the testimony of the Neutral concerning the substance of an ADR proceeding in the Program, that party shall hold the Neutral harmless against any resulting expenses, including reasonable legal fees incurred by the Neutral or the reasonable value of time spent by the Neutral in representing himself or herself in connection therewith.

(b) Notwithstanding the foregoing:

(1) A Neutral shall disclose to a proper authority information obtained in mediation if required to do so by law or rule or if the Neutral has a reasonable belief that such disclosure will prevent a participant from engaging in an illegal act.

(2) A party, the ADR Coordinator, or the Neutral may report any unethical conduct during the proceeding to a proper authority.

(3) The Neutral and the parties may communicate with the ADR Coordinator about administrative details of and the schedule for the proceeding, including as provided in Rule 10; the ADR Coordinator may communicate with the assigned Justice in accordance with Rule 10 (f); and the Neutral may make general reference to the fact of services rendered in any action to collect an unpaid fee for services performed under these Rules.

Rule 9. Immunity of the Neutral. Any Neutral from the Panel who is designated to serve pursuant to these Rules and Procedures shall be immune from suit based upon actions engaged in or omissions made while so serving.

Rule 10. Procedure.

(a) Deadline for First Session; Memorandum of Position. The first ADR session shall be conducted no later than 30 days from the Confirmation Date. Immediately after confirmation, all parties shall communicate with one another and the Neutral and take all steps necessary to schedule the first proceeding and comply with said deadline. Typically, a mediator will begin the process by conducting a conference call with all counsel to arrange details. At least ten days before the first session in cases being mediated or undergoing neutral evaluation, each party shall deliver to the Neutral a copy of its pleadings and a memorandum of not more than ten pages (except as otherwise agreed) setting forth that party's opinions as to the facts and the issues that are not in dispute, contentions as to liability and damages, and suggestions as to how the matter might be resolved. This memorandum shall not be filed in court nor, unless otherwise agreed by the parties, served on the adversary, and it shall be destroyed by the Neutral immediately upon completion of the proceeding.

(b) Attendance Required. Attendance of the parties is required at the first four hours of the mediation proceeding, whether at a single session or more than one. Unless exempted by the Neutral

for good cause, every party must appear at each ADR session in person or, in the case of a corporation or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and empowered on his or her own to settle the matter. Where necessary to an effective mediation, the Neutral may require the insurance carrier of a party to attend. In addition, counsel of record for each represented party shall be present at each session. Any attorney who participates in the ADR process shall be fully familiar with the action and authorized to take all steps necessary to a meaningful mediation process.

(c) Adjournments. Once a session of the ADR proceeding has been scheduled, it may be adjourned only at the direction of the Neutral.

(d) Discovery. Subject to any applicable disclosure order of the court, the Neutral may help the parties to provide such focused discovery as may assist in the ADR proceeding.

(e) Failure to Comply with Rules. If a party or counsel fails to cooperate in making arrangements for the mediation or to take steps preliminary thereto, fails to appear at any scheduled session, or otherwise fails to comply with these Rules, the Neutral shall advise the ADR Coordinator, succinctly specifying the nature of the infraction, and may recommend the imposition of sanctions.

(f) Communications with Justice; Reporting Violations of the Rules; Sanctions. The ADR Coordinator may communicate with the assigned Justice about administrative details of the processing of any case referred to the Program by that Justice, but shall not identify the Neutral designated or disclose any substantive aspect of the ADR proceeding. If a proceeding is terminated after four hours without a settlement, the Coordinator shall not reveal to the Justice which party brought the proceeding to an end. The Coordinator shall report to the Justice at the conclusion of the proceeding whether a resolution of the case in whole or in part was reached. The Coordinator shall also report to the Justice, on an appropriate form, a copy of which shall be forwarded to the parties, any violation of these Rules as indicated by a Neutral pursuant to subdivision (e) of this Rule and any recommendation for sanctions. The Justice may impose sanctions or take such other action as is necessary to ensure respect for the court's Order and these Rules.

Rule 11. Completion of ADR; Report.

(a) Conclusion; Continuation; Monitoring by Coordinator. The ADR process shall be concluded within 45 days from the Confirmation Date. If the matter has not been entirely resolved within that period, but the parties and the Neutral believe that it would be beneficial if the ADR process were to continue, the process may go forward for an additional 30 days. The ADR process shall be completed within 75 days from the Confirmation Date unless the assigned Justice, upon request presented by the ADR Coordinator, specifically authorizes the process to continue beyond that date. The ADR Coordinator will monitor progress of ADR proceedings to ensure that the deadlines set forth herein are complied with.

(b) Report of Outcome. The Neutral shall report the outcome of the proceeding to the ADR Coordinator no later than three business days after its conclusion. If the ADR process is successful, the parties shall forthwith submit a stipulation of discontinuance to the County Clerk (with fee) and

transmit a copy to the Part of the Justice assigned.

Rule 12. Arbitration. Parties who choose to arbitrate shall agree upon appropriate procedures to govern the process to the extent not herein provided. If the parties are unable to so agree, the matter shall either be mediated, or, upon consent, arbitrated pursuant to procedures issued by the ADR Coordinator. An award shall be issued within the time for a report fixed by Rule 10 (b).

Rule 13. Conversion of Mediation to Binding Arbitration.

(a) Arbitration Permitted. Mediation may be converted to binding arbitration in the Program upon consent of all parties at any stage in the mediation process. Any such arbitration, however, must proceed before a Neutral different than the one who presided over the mediation session(s), unless the mediator did not receive any information from a party *ex parte* prior to the time an agreement to proceed to arbitration was reached.

(b) Stipulation; Identification of Arbitrator(s); Fee. Within five days from conclusion of the mediation proceeding, parties who wish to undergo arbitration pursuant to this Rule shall deliver to the ADR Coordinator a written stipulation submitting the case to arbitration under this Rule. There shall be a single arbitrator unless the parties agree to have three. Together with the stipulation the parties shall transmit the name of the person or persons they have agreed upon to serve as arbitrator(s). If the parties are unable to agree upon the person or persons who shall serve, the Coordinator shall select the arbitrator(s). Each arbitrator shall be entitled to a fee as provided in Rule 6 (a) (2).

(c) Deadlines. The arbitration shall be completed within 45 days from the date on which the Coordinator advises the parties of the confirmation of the selection of the arbitrator(s). The arbitrator(s) shall issue a written award within seven days after completion of the proceeding.

Rule 14. Further ADR. After completion of a mediation, upon request of a party or upon its own initiative, the court, in its discretion, may issue an order directing a second referral to mediation, which shall proceed in accordance with these Rules. In any such case, the parties shall compensate the Neutral as provided in Rule 7 (a) (2).

C. RULES AND PROCEDURES GOVERNING CASES REFERRED TO MEDIATION IN THE PILOT PROJECT

Rule 15. Pilot Project for Automatic Referral of Certain Cases to Mandatory Mediation. Pursuant to the Administrative Order referred to in subdivision (b) of Rule 3 above, Commercial Division cases shall be referred to mandatory mediation by the Chief Clerk and Executive Officer or his designee and shall proceed to mediation as set forth in this Rule.

(a) Designation of Cases for Referral. Each week, or at other appropriate interval, the Clerk shall designate for automatic referral to mediation in this Pilot Project pursuant to the aforesaid Administrative Order every fifth case from among those listed on a report of the cases newly

assigned to the Commercial Division (i.e, assigned to a Division Justice after filing of a Request for Judicial Intervention), except a matter in which a party is unrepresented. Promptly after such designation, the Clerk shall inform counsel of the designation by posting a notice to the case file in the New York State Courts Electronic Filing System ("NYSCEF") or by other means. Counsel who receives such notice and who is aware that the attorney for a party to the case has not yet appeared or that notification through NYSCEF will not reach all attorneys on the case shall inform such other attorney or attorneys of the notice as soon as possible. Every case so designated shall proceed to mediation in accordance with this Rule unless (i) all parties stipulate that the case is not suitable for mediation, or (ii) the assigned Justice exempts the case from mediation upon a showing of good cause by a party as to why mediation would be ineffective, unduly burdensome, or unjust. If a case in which a party is unrepresented is inadvertently designated, it shall be removed from the Pilot Project *sua sponte* by the ADR Coordinator or upon submission to the ADR Coordinator by an attorney for a party therein of notice of the presence of such party. A stipulation or application for exemption shall be submitted to the ADR Coordinator within 30 days from transmission of the notice of referral by the Clerk. If after designation by the Clerk and prior to mediation an order of transfer is issued by the assigned Division Justice as provided in Uniform Rule 202.70 (f) and no ruling by the Administrative Judge to the contrary is issued, the mediation need not proceed, but it shall go forward in accordance with this Rule if all parties to the case so agree.

(b) Consultation about Selection of the Mediator. Counsel for the parties in a matter referred to mediation pursuant to this Rule shall promptly after the designation of the case consult one another and endeavor in good faith to agree upon a mediator who shall serve in the case. The mediator shall be one of the Neutrals listed in the roster of the Panel, except that counsel may agree upon someone else to serve in that role subject to the procedures of this Rule. If the mediator is selected from the Panel, counsel must confirm directly with the mediator that the mediator is ready and available to serve and can do so in compliance with the deadlines set forth in these Rules and Procedures and without a conflict of interest. Any mediator agreed upon by the parties pursuant to this subdivision shall be compensated as provided in Rule 7 (a) (1) hereof or on such terms as counsel shall agree upon, which shall be put in writing.

(c) Notification to the ADR Coordinator. No later than 120 days after the filing of a Request for Judicial Intervention in a case that is included in the Pilot Project, counsel for the parties shall jointly inform the ADR Coordinator that they either (i) have agreed upon a mediator as provided in subdivision (b) of this Rule, or (ii) request that the Coordinator assign a mediator. Counsel for the parties shall so inform the ADR Coordinator by submitting thereto by e-mail a completed Pilot Project Notification Regarding Selection of Mediator (form posted on the ADR page of the New York County Commercial Division (at www.nycourts.gov/courts/comdiv/ADR_overview.shtml)). If the parties fail to comply with this subdivision in a timely manner, the Coordinator shall select a mediator for the case from the Neutrals on the roster of the Panel.

(d) Assignment of a Mediator by the Coordinator. If in a timely manner the parties request assignment of a mediator, the ADR Coordinator shall identify three prospective mediators for the case from among the Neutrals on the Panel who are available to handle the case within the deadlines set forth in these Rules and Procedures and who have satisfactorily completed a conflicts check or at least a preliminary such check, in which latter event a satisfactory final check shall be completed

before acceptance of the case. The Coordinator shall promptly transmit the list of the three names to counsel. Counsel shall immediately consult one another and endeavor in good faith to agree upon one of the three to serve as the mediator for the case. If counsel are unable to agree, each of them shall provide to the Coordinator his or her preferences with regard to the three proposed mediators, ranking them in order of preference (the first choice shall be ranked "1," the second shall be ranked "2," and the third shall be ranked "3."). Within seven days from the date the list of prospective mediators is transmitted to counsel by the Coordinator, counsel must, by e-mail, either inform the Coordinator of the name of the mediator they have agreed upon, or provide to the Coordinator their list of rankings. The Coordinator shall designate as the mediator for the case the person agreed upon or, in the absence of agreement, the person who has received the lowest number on the combined lists of rankings, subject to a satisfactory conclusion to the final steps in the conflicts check process, if not already so concluded. If the ranking process does not produce a preferred mediator, the Coordinator shall select one of the three as mediator for the case. In the event that, where required, some but not all counsel submit their rankings in a timely manner, the Coordinator shall designate as the mediator the person who has received the lowest number on the combined lists of rankings without regard to the preferences of the counsel who failed to comply. In a case in which all counsel fail to inform the Coordinator in a timely manner of their agreement or their ranked preferences, the Coordinator shall designate the mediator from among the Neutrals on the Panel without regard to any preferences.

(e) Confirmation of Mediator; Confirmation Date; Deadlines for Mediation. Promptly after the selection of a mediator pursuant to subdivisions (b), (c) or (d) of this Rule, the Coordinator shall transmit to all counsel by e-mail or other means a notice confirming the name of the mediator who has been designated to handle the case. The date of transmission of this notice by the Coordinator shall be the Confirmation Date for the purpose of this Rule. Mediation under this Rule shall proceed and be concluded in accordance with the deadlines set forth in Rules 10 (a) and 11 (a), except that, in instances in which a mediator has been designated and confirmed prior to the 120-day deadline set forth in subdivision (c) of this Rule and where the first session has been held and the parties require additional time for discovery of facts relevant to the mediation or for other reasons, the Coordinator, upon the request of the mediator and the parties, may, without court intervention, extend the time to complete the process to a date up to and including 210 days from filing of the RJI, but the assigned Justice, upon request presented by the Coordinator, may authorize the process to continue beyond that date.

(f) Mediation of Pilot Project Cases. Unless clearly inconsistent with this Rule 15, all the Rules and Procedures of the Alternative Dispute Resolution Program shall apply to the Pilot Project except for Rules 6 (a), (b) and (c).

Effective Date: July 28, 2014

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No. 9: 6/18/14