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 BERNARD J. FRIED**
JUSTICE BARBARA KAPNICK **JUSTICE SHIRLEY W. KORNREICH**
JUSTICE JEFFREY K. OING **JUSTICE CHARLES E. RAMOS**
JUSTICE MELVIN L. SCHWEITZER **JUSTICE O. PETER SHERWOOD**

RULES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM

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, as hereinafter set forth, 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; and commercial cases referred by consent of the parties to the extent the Program can accommodate them. These Rules shall govern all cases so referred.

Rule 2. Panel; Eligibility Requirements; Redesignation. The Administrative Judge shall establish and maintain a panel of Neutrals ("the Panel"). To be eligible to serve as a Mediator on the Panel, a person shall possess the following qualifications and such others as may hereafter be promulgated. A Mediator must (i) have a minimum of ten years of experience in the practice of commercial law or be an accountant or business professional with a comparable level of experience; (ii) have completed at least the amount and type of training required by Part 146 of the Rules of the Chief Administrator; and (iii) have recent experience mediating commercial cases as mandated by Part 146. A Neutral Evaluator must be an attorney or former Judge who has the background and the training required by Part 146. Anyone who applies to become a member of the Panel thereby agrees and undertakes, if called upon, to serve as a Neutral in three matters annually in the Program. Persons may be added to or removed from the Panel as the Administrative Judge may determine. Neutrals shall be redesignated to serve on the Panel every two years. In order to be redesignated, each Neutral must have satisfied the continuing education requirement of Part 146 and otherwise have served satisfactorily.

Rule 3. Determination of Suitability; Order of Reference. Cases shall be referred to alternative dispute resolution ("ADR") as soon after filing of a Request for Judicial Intervention as is practicable. The suitability of the action for ADR shall be determined by the assigned Justice or the Administrative Judge, after considering the views of the parties insofar as practicable. If the Justice or the Administrative Judge decides to refer a case to the Program or if the parties consent to a referral at a conference or in a written stipulation, the Justice shall issue an Order of Reference requiring that the case proceed to ADR in accordance with these Rules. A case not deemed appropriate for referral at its outset may be referred to the Program later in the discretion of the Justice.

Rule 4. Selection of Neutral; Private ADR Providers.

(a) An action referred to the Program shall be assigned to a Neutral chosen from the Panel. The Program Coordinator shall designate the Neutral in the first instance. The Coordinator will endeavor to distribute assignments widely among all active members of the Panel. The Coordinator may, however, depart from this procedure 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 immediately conduct a conflicts check as required by subdivision (d) hereof and advise the Coordinator as to his or her availability. The Coordinator shall inform the parties of the identity of the designated Neutral within five business days from the date on which the Order of Reference reaches the Coordinator. The date of this communication shall constitute the Confirmation Date (except as provided otherwise in subdivision (b)).

(b) 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 and willingness to handle the matter and that he or she has no conflict. The parties shall inform the Coordinator of the alternate selection within the five-day deadline. The Coordinator may, for good cause, allow the parties an additional five business days within which to make such selection. If the parties designate an alternate Neutral pursuant hereto, the Confirmation Date shall be the date they inform the Coordinator of that selection.

(c) Notwithstanding subdivision (a), the parties may designate as the Neutral a person who is not a member of the Panel or may 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 and comply with Rule 6.

(d) Every member of the Panel, and any other person who serves as a Neutral pursuant to this Rule, 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. In each case, the parties referred to ADR shall identify themselves, including, in the case of corporate parties, their parents, subsidiaries, or affiliates. In order to avoid conflicts of interest, any person tentatively designated to serve as a Neutral in a matter shall, as a condition to confirmation in that role, conduct a review of his or her prior activities, and those of any firm of which he or she is a member or employee, on behalf of, in opposition to, or involving any of the parties or entities related to corporate parties. The Neutral shall decline to serve if he or she would not be able to do so fairly, objectively, impartially, and in accordance with the highest professional standards. The Neutral shall also avoid an appearance of a conflict of interest. In the event that any potentially disqualifying facts are discovered, the Neutral shall fully inform the parties and the Commercial Division's Program Administration of all relevant details. Unless all parties after full disclosure consent to the service of that Neutral, the Neutral shall decline the appointment and another Neutral shall promptly be selected by the Administration.

Rule 5. Compensation of Neutral.

(a) The Neutral selected by the Administrator pursuant to Rule 4 (a) shall be compensated

by the parties as follows. The Neutral designated as a mediator shall serve in that role at no charge for a total of four hours, regardless of whether such service extends over one mediation session or more than one. Time spent in arranging for the initial session(s) and review of papers in preparation therefor shall not be counted in calculating the four hours. At the conclusion of the four hours, any party may bring the ADR proceeding to an end. If, however, the parties agree to continue, the mediation shall proceed, but the parties shall compensate the mediator for his or her time thereafter at the rate of $ 300 per hour.

(b) If the parties designate an alternate mediator from the Panel pursuant to Rule 4 (b) and that person is available and willing to handle the matter under the circumstances, including at the rate of compensation herein specified, the parties shall compensate the mediator at the rate of $350 per hour commencing from the outset of the initial mediation session.

(c) If the parties agree that the form of ADR to be undertaken shall be arbitration or neutral evaluation, the Neutral shall be compensated at the rate of $300 per hour from the commencement of the initial session.

(d) If the parties and the Neutral agree, 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.

(e) Each party to the ADR proceeding shall pay an equal share of the Neutral's compensation unless otherwise agreed by the parties.

Rule 6. Confidentiality of Mediation and Neutral Evaluation.

(a) The ADR proceeding, other than a binding arbitration, shall be confidential and nothing that occurs during the proceeding shall be disclosed outside thereof, except as provided otherwise hereafter. Therefore, without limitation of the foregoing, none of the following shall be summarized, described, reported, or submitted to the court or revealed to others by the Neutral, the parties, or their counsel: any documents prepared by, or communications made by, parties or their counsel for, during, or in connection with, the ADR proceeding, and any communications made by, or any notes or other writings prepared by, the Neutral for, during, or in connection with the proceeding. No party to the proceeding shall, during the action referred to ADR or in any other legal proceeding, 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 or any other aspect of the substance of the proceeding, including whether or not the parties agreed to settle the matter. Any settlement, in whole or in part, reached during the ADR proceeding shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. The terms of such an agreement shall be kept confidential unless the parties agree otherwise, except that any party thereto may thereafter commence an action for breach of the agreement and may refer to the terms thereof to the extent necessary to prosecute such an action. 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.

(b) In the event that, notwithstanding subdivision (a) hereof, a party to an action that had or

has been referred to the Program attempts in any legal action to compel the testimony of the Neutral concerning the substance of the ADR proceeding, 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.

(c) Notwithstanding the foregoing:

(i) A Neutral shall disclose to a proper authority information obtained in mediation if required to do so by law or if the Neutral has a reasonable belief that such disclosure will prevent a participant from engaging in an illegal act, including one likely to inflict death or serious physical injury.

(ii) A party or the Program Coordinator may report to a proper authority any unethical conduct engaged in by the Neutral and the Neutral may make such a report with respect to any such conduct engaged in by counsel to a party.

(iii) The parties may include confidential information in a written settlement agreement; the Neutral and the parties may communicate with the Program Coordinator about administrative details of the proceeding, including as provided in Rule 8 (g); the Program Coordinator may communicate with the assigned Justice in accordance with Rule 8 (h); 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 7. Immunity of the Neutral. Any person designated to serve as Neutral pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity.

Rule 8. Procedure.

(a) Parties referred to the Program are free to choose the form of ADR they wish to undergo. Unless otherwise agreed by the parties, cases shall be mediated.

(b) The issuance of an Order of Reference shall not stay court proceedings in the case unless otherwise directed by the Justice assigned.

(c) 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 comply with said deadline. At least ten days before that session, 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. In cases being mediated or undergoing neutral evaluation, 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.

(d) Attendance of the parties is required at the first four hours of the mediation process, 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, partnership 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 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.

(e) If the ADR process is successful, the Neutral shall immediately advise the Program Coordinator, and 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.

(f) If after four hours the mediation is terminated without a settlement, the Neutral shall immediately so inform the Program Coordinator.

(g) Notwithstanding the foregoing, if a party or counsel fails to cooperate in making arrangements for the mediation, including making timely communications regarding a conference call or other steps preliminary thereto, fails to appear at any scheduled session, or otherwise fails to comply with these Rules, the Neutral shall advise the Program Coordinator, succinctly specifying the nature of the infraction, and may recommend the imposition of sanctions.

(h) The Program 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 Administration shall not reveal to the Justice which party brought the proceeding to an end. The Administration shall report to the Justice at the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part. The Administration 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 (g) 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 9. Completion of ADR; Report.

(a)The ADR process shall be concluded within 45 days from the Confirmation Date. The Neutral shall report the outcome to the Program Administration no later than seven days thereafter.

(b) If the matter has not been entirely resolved within the 45-day 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. However, absent extraordinary circumstances, there shall be

no stay of other proceedings in the case. The ADR process shall be completed within 75 days from the Confirmation Date unless the assigned Justice specifically authorizes the process to continue beyond that date.

Rule 10. Arbitration. Parties who choose to proceed to arbitration pursuant to Rule 8 (a) hereof and the Order of Reference shall agree upon appropriate procedures to govern the process to the extent not herein provided. If the parties agree to arbitration, but are unable to agree upon the procedures, the matter shall either be mediated, or, upon consent, arbitrated pursuant to procedures issued by the Program Coordinator. An award shall be issued within the time for a report of the Neutral fixed by Rule 9.

Rule 11. Conversion of Mediation to Binding Arbitration.

(a) Mediation may be converted to binding arbitration in the Program upon consent of all parties at any stage in the mediation process.

(b) Any such arbitration must proceed before a different Neutral than the one who presided over the mediation session(s). This subdivision, however, shall not apply if the mediator had not received any material or information from a party *ex parte* by the time an agreement to proceed to arbitration was reached.

(c) As soon as practicable and in any event within five days from conclusion of the mediation proceeding, parties who wish to undergo arbitration pursuant to this Rule shall deliver to the Program Administration a written stipulation submitting the case to arbitration under this Rule and identifying the number of arbitrators agreed upon. There shall be a single arbitrator unless otherwise agreed, in which event there may be a maximum of three. Together with the stipulation the parties shall submit a list identifying the person(s) to serve as arbitrator(s) whom they have chosen or the names of at least three prospective arbitrators from the Panel whom they have agreed upon for each position. If the parties are unable to provide either listing, the Program Coordinator shall select the arbitrator(s). Each arbitrator shall be entitled to a fee as provided in Rule 5 (c).

(d) Any person tentatively selected as an arbitrator shall comply with Rule 4 (d) hereof.

(e) The arbitration shall be completed within 45 days from the date on which the Program 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. This award shall be binding upon the parties.

(f) The parties shall stipulate in advance to all other necessary procedures to govern the arbitration.

Rule 12. Further ADR. After completion of the ADR proceeding, upon request of a party or upon its own initiative, the court, in its discretion, may issue an order directing a second referral to the Program, which shall proceed in accordance with these Rules. In any such case, the parties shall compensate the Neutral as provided in Rule 5(b).

Rule 13. Administration of Program. The Program shall be supervised by the Clerk-in-Charge of the Commercial Division Support Office. The conduct of ADR proceedings shall be coordinated by an Alternative Dispute Resolution Coordinator or Coordinators.

Effective Date: April 15, 2011

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SUPREME COURT, CIVIL BRANCH
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