

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

NOTICE TO THE BAR

PROPOSED AMENDMENTS TO THE LOCAL CIVIL RULES

Notice is hereby given to the Bar and all interested parties that the United States District Court for the District of New Jersey proposes to amend the Local Civil Rules. The proposed amendments are posted for public comment as required by 28 U.S.C. § 2071(b) at <http://www.njd.uscourts.gov>.

Amendments are proposed to the following Local Civil Rules:

**Civ. RULE 5.3 CONFIDENTIALITY ORDERS AND RESTRICTING PUBLIC ACCESS
UNDER CM/ECF**

APPENDIX S. DISCOVERY CONFIDENTIALITY ORDER

**L. Civ. R. 9.3 SPECIAL MATTERS - LOCAL PATENT RULES FOR THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

L. Pat. R. 2.2. Confidentiality.

**Civ. RULE 5.3 CONFIDENTIALITY ORDERS AND RESTRICTING PUBLIC
ACCESS UNDER CM/ECF**

(a) Scope of Rule

(1) This rule shall govern any request by a party or parties to seal, or otherwise restrict public access to, any materials filed with the Court or utilized in connection with judicial decision-making. This rule shall also govern any request by a party or parties to seal, or otherwise restrict public access to, any judicial proceedings.

(2) As used in this rule, "materials" includes all documents of any nature and in any medium. "Judicial proceedings" includes hearings and trials but does not include conferences in chambers.

(3) This rule shall not apply to any materials or judicial proceedings which must be sealed or redacted pursuant to statute or other law.

(b) Confidentiality Order

(1) Parties may enter into written agreements to keep materials produced in discovery confidential and to return or destroy such materials as agreed by parties and as allowed by law.

(2) Parties may submit to a district judge or magistrate judge an agreed-on form of order which embodies a written agreement as described above.

(3) No form of order submitted by parties shall supersede the provisions of this rule with regard to the filing of materials or judicial proceedings. The form of order may, however, provide for the return or destruction of discovery materials as agreed by parties. The form of order shall be subject to modification by a district judge or magistrate judge at any time.

(4) Any order under this section shall be filed electronically under the designation “confidentiality order.”

(5) Any dispute regarding the entry of an order, or the confidentiality of discovery materials under any order, under this section shall be brought before a magistrate judge pursuant to L.Civ.R. 37.1 (a)(1).

(6) Absent extraordinary circumstances, a party shall not file a motion or other materials with redacted information, absent a confidentiality order which expressly grants leave to file under seal or other appropriate leave of Court.

(c) Motion to Seal or Otherwise Restrict Public Access

(1) Form of Motion. Any request by a party, parties or nonparty to file materials under seal, or otherwise restrict public access to, any materials or judicial proceedings shall ordinarily be made on notice, by a single, consolidated motion on behalf of all parties, unless otherwise ordered by the Court on a case-by-case basis, including any non-party which has produced materials as to which it seeks to restrict public access. No brief is necessary in support or in opposition to the motion unless a party believes it will assist the Court. The single, consolidated motion shall include all information required by (c)(3) below. Any motion and supporting papers to seal or otherwise restrict public access shall be available for review by the public. In a motion that relies on materials designated as confidential material, only the specific relevant portions cited in the motion, as may be necessary to preserve the context, are to be part of the filing. Uncited confidential materials should not be included as part of the filing.

(2) Timing

(i) Not later than 21 days after the first filing of ~~sealed/redacted~~ materials, the parties shall confer in an effort to narrow or eliminate the materials or information that may be the subject of a motion to seal.

(ii) Any motion ~~to seal or otherwise restrict access~~ made under this rule shall be ~~filed by the party seeking to seal materials, unless the parties otherwise agree. Any such motion shall be~~

(a) filed within 14 days following ~~the completed completion of the~~ briefing ~~on~~ the underlying motion of materials sought to be sealed, or within 14 days following the filing of the pleading or letter to the Court sought to be sealed, or within 14 days following ECF notice of availability of the transcript of a court proceeding sought to be sealed, or as may be ordered by the Court; and (b) filed electronically under the designation "motion to seal materials" or "motion to seal judicial proceedings," and shall be returnable on the next available motion date.

(iii) In any action in which materials have been filed temporarily under seal pursuant to (c)(4) of this rule, and the motion or other filing which includes such materials is resolved or otherwise terminated before all briefing is completed, the party filing such materials shall have a continuing obligation to file a motion to seal. Such motion shall be filed within 14 days following the date on which the last of such materials was filed under temporary seal, or as may otherwise be ordered by the Court.

(3) Contents of Motion. Any motion papers shall include as part of an affidavit, declaration, certification or other documents of the type referenced in 28 U.S.C. § 1746, which shall be based on personal knowledge as required by Local Civil Rule 7.2(a), an index, substantially in form suggested by Appendix U, describing with particularity:

(a) the nature of the materials or proceedings at issue;

- (b) the legitimate private or public interest which warrant the relief sought;
- (c) the clearly defined and serious injury that would result if the relief sought is not granted;
- (d) why a less restrictive alternative to the relief sought is not available;
- (e) any prior order sealing the same materials in the pending action; and
- (f) the identity of any party or nonparty known to be objecting to the sealing request.

Such index shall also include, as to each objection to seal any material:

- (g) the materials to which there is an objection;
- (h) the basis for the objection; and
- (i) if the material or information was previously sealed by the Court in the pending action, why the materials should not be maintained under seal.

Proposed Findings of Fact and Conclusions of Law shall be submitted with the motion papers in the proposed order required by (c)(6) below. Any party opposing the sealing request shall submit an alternative proposed order including the party's Proposed Findings of Fact and Conclusions of Law.

(4) Temporary Sealing Pending Decisions on the Motion to Seal; Redacted Public Filings. Any materials deemed confidential by a party or parties and submitted under temporary sealing subject to a motion to seal or otherwise restrict public access shall be filed electronically under the designation "confidential materials" and shall remain sealed until such time as the motion is decided, subject to Local Civil Rule 72.1(c)(1)(C). ~~When a document filed under seal contains both confidential and non-confidential information, an unredacted version shall be filed under seal, and a version with only the confidential portions redacted shall be filed publicly within one day of the filing of the unredacted version.~~ When a document to be filed contains both confidential and non-confidential information, an unredacted version of that document shall be filed under seal. Thereafter, and subject to further order of the court, a redacted, publicly available version of all corresponding filings shall be filed within 14 days following completion of the briefing on the underlying motion of materials sought to be sealed, or within 14 days following the filing of the pleading or letter to the court sought to be sealed, or within 14 days following ECF notice of availability of the transcript of a court proceeding sought to be sealed, or as may be ordered by the Court.

(5) Intervention. Any interested person may move to intervene pursuant to Fed. R. Civ. P. 24(b) before the return date of any motion to seal or otherwise restrict public access or to obtain public access to materials or judicial proceedings filed under seal.

(6) Sealing Order. Any order or opinion on any motion to seal or otherwise restrict public access shall include findings on the factors set forth in (c)(3) above as well as other findings required by law and shall be filed electronically under the designation "order" or "opinion to seal." Such orders and opinions may be redacted. Unredacted orders and opinions may be filed under seal, either electronically or in other medium.

(7) Required Filing to Conform to Order. To the extent that any order or opinion grants less than the full relief sought for any document filed in redacted form, within 14 days after the order or opinion, or as otherwise directed by the Court, the filing party of the redacted materials shall file an amended redacted document or documents, reflecting the rulings of the Court.

(8) Denial of Motion to Seal. To the extent any order or opinion denies a motion to seal material that has been filed under temporary seal, such material shall be unsealed by the Clerk of Court following the 14-day period set forth in Local Civil Rule 72.1(c)(1)(C), unless a notice of appeal is timely filed.

(9) Emergent Application. Notwithstanding the above, on emergent application of a party, parties, nonparties or sua sponte, a district judge or magistrate judge may seal or otherwise restrict public access to materials or judicial proceedings on a temporary basis. The district judge or magistrate judge shall do so by written order which sets forth the basis for the temporary relief and which shall be filed electronically under the designation "temporary order to seal." The sealing party shall have 14 days from entry of the order to file a motion to seal, in accordance with this rule. Any interested person may move pursuant to L. Civ. R. 7.1 and Fed. R. Civ. P. 24(b) to intervene, which motion shall be made returnable on the next available return date.

(10) Failure to Timely File. When a motion to seal or otherwise restrict public access is not timely filed in accordance with this rule, the Court may direct that the filings be publicly available without notice.

(d) Settlement Agreements

(1) No party or parties shall submit a proposed settlement agreement for approval by a district judge or magistrate judge unless required to do so by statute or other law or for the purpose of retaining jurisdiction.

(2) Any settlement agreement filed with the Court or incorporated into an order shall, absent an appropriate showing under federal law, be deemed a public record and available for public review.

(e) Dockets

No docket shall be sealed. However, entries on a docket may be sealed pursuant to the provisions of this rule.

(f) Web Site

The Clerk shall maintain for public review on the official Court PACER site a consolidated report which reflects all motions, orders, and opinions described by this rule.

(g) Transcripts/Digital Recordings

(1) This subsection applies to transcript/digital recording redactions which are separate and apart from the redaction of personal identifiers mandated by Federal Rule of Civil Procedure 5.2 and the Court's Electronic Case Filing Policies and Procedures.

(2) A motion to redact and seal any part or all of a transcript/digital recording shall satisfy the standards for sealing set forth in L.Civ.R. 5.3(c). All motions to redact and seal any transcript shall be deemed to apply to the original record as defined in 28 U.S.C. § 753. Any transcript that is the subject of a motion to redact and seal shall be temporarily sealed by the Clerk's Office, pending the Court's determination of the motion. Because transcripts are not available on PACER for ninety (90) days, the party filing the motion to redact and seal shall not electronically file its proposed redacted version of the transcript as part of its motion papers, but shall instead submit same directly to Chambers for the appropriate judge's review. If the motion to redact and seal is granted, the party filing the motion shall submit to the court reporter/transcription agency a Statement of Redaction and Sealing pursuant to L.Civ.R. 5.3, available at <http://www.njd.uscourts.gov/forms.html> at form DNJ-CMECF-009. After receiving same, unless the entire transcript has been ordered sealed, the court reporter/transcription agency shall submit the redacted version of the transcript to the Clerk of the Court for filing on ECF. All other motion papers shall be available for public review in accordance with L.Civ.R. 5.3(c)(1).

(3) To prevent public access to any transcript/digital recording that is the subject of a motion to redact and seal, the party filing the motion to seal shall serve a copy of the Notice of Motion to Seal on the appropriate court reporter/transcription agency with a cover letter

indicating that the transcript/digital recording is the subject of a pending motion to seal and should not be made available to the public until the pending motion is decided by the Court.

(4) Any party who in good faith believes that the confidential information entitled to be sealed pursuant to L.Civ.R. 5.3(c) was discussed during a recorded judicial proceeding may make an application pursuant to L.Civ.R. 5.3(c)(9) to temporarily seal the contents of the transcript/digital recording of that proceeding pending the party's review of the transcript/digital recording and filing of a formal motion to redact and seal. Absent such an application being made and granted, any purchased transcript shall be available for viewing in its unredacted state at the court public terminal until a formal motion to redact and seal is filed.

(h) Effective Date

This rule shall be effective as of September 30, 2016 and shall apply to all motions under this rule.

Adopted February 24, 2005. Amended March 9, 2007; March 1, 2010; June 19, 2013; September 30, 2016.

EXPLANATORY NOTE LOCAL CIVIL RULE 5.3

History. In June of 2004, the Board of Judges was presented with a Lawyers Advisory Committee recommendation for the adoption of a local civil rule that would provide for public (i.e., press) notice of requests to seal, among other things, documents and proceedings. Several months before, in February of 2004, the District of New Jersey implemented CM/ECF (Case Management/Electronic Case Filing). This allowed the electronic filing of pleadings, motions, briefs, etc., under descriptive “events.” CM/ECF also allowed remote access to dockets and filed materials as well as the creation of compilations or reports on the events.

Recognizing that CM/ECF might have a significant impact on what the Lawyers Advisory Committee recommended, the Board of Judges deferred the recommendation. Thereafter, the proposed local civil rule in its current form (“the Rule”) was drafted. It was reviewed on an informal basis by representatives of the Administrative Office of the United States Courts and the Federal Judicial Center. It was also reviewed by Professor Laurie Kratky Dore of Drake University Law School in Des Moines, Iowa. Professor Dore is the author of a leading article on confidentiality, “Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement,” 74 *Notre Dame L. Rev.* 283 (1999), and of “Settlement, Secrecy, and Judicial Discretion: South Carolina’s New Rules Governing the Sealing of Settlements,” 55 *S.C. L. Rev.* 791 (2004). The Rule was circulated among members of the Committee on Rules on Practice and Procedure of the Board of Judges and thereafter submitted to the Lawyers Advisory Committee. The Rule is intended to reflect Supreme Court and Third Circuit law and does not set forth in detail all standards established by precedent.

Subparagraph (a)(1). This subparagraph describes the scope of the Rule. It applies to any application to seal materials filed with the Court, materials utilized in connection with judicial decision-making, or judicial proceedings. The use of the phrase, “otherwise restrict public access,” as used in the Rule, is intended to address any application which might seek less than the complete sealing of materials or proceedings. The phrase, “in connection with judicial decision-making,” is intended to exclude, among other things, letters to judges which are not substantive in nature. See, for the definition of a “judicial record”, *In re Cendant Corp.*, 260 F.3d 183 (3d Cir. 2001), and for the distinction between discovery and nondiscovery pretrial motions, *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157 (3d Cir.1993).

Subparagraph (a)(2). This subparagraph defines “materials” and “judicial proceedings.” The definitions are intended to be broad and to allow for the development of case law. For that reason, the word “materials” is used rather than “judicial records,” the latter approaching a term of art. Note that judicial proceedings are not intended to encompass in-chambers conferences.

Subparagraph (a)(3). The purpose of this subparagraph is to make clear that the rule is not intended to affect any “statute or other law” that mandates sealing of materials or judicial proceedings (for example, amended Section 205 (c)(3) of the E-Government Act of 2002, Pub. L. No. 107-347, and the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.*).

Subparagraph (a)(4). The right of public access to filed materials and judicial proceedings derives from the First Amendment and federal common law. Consistent with this right, this subparagraph establishes a presumption in favor of public access.

Subparagraph (b). In keeping with the comprehensive nature of the Rule, this subparagraph is intended to apply to unfiled discovery materials and to be consistent with footnote 17 of *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994): “because of the benefits of umbrella protective orders in cases involving large-scale discovery, the court may construct a broad protective order upon a threshold showing by the movant of good cause. ... After delivery of the documents, the opposing party would have the opportunity to indicate precisely which documents it believed not to be confidential, and the party seeking to maintain the seal would have the burden of proof with respect to those documents.” 23 F.3d at 787 n.17 (citation omitted).

As a general proposition, there is no right of public access to unfiled discovery materials. *See, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Estate of Frankl v. Goodyear Tire and Rubber and Co.*, 181 N.J. 1 (2004) (*per curium*). This subparagraph, however, is not intended to prohibit any interested person from seeking access to such materials.

Subparagraph (b)(1) recognizes the above proposition, allows parties to enter into agreements such as that contemplated by *Pansy*, and also allows materials to be returned or destroyed. *See, with regard to “Agreements on Return or Destruction of Tangible Evidence,”* ABA Section on Litigation Ethical Guidelines for Settlement Negotiations, Guideline 4.2.4 (August 2002).

Subparagraph (b)(2). This subparagraph describes the procedure which parties must follow in submitting blanket protective orders. Consistent with *Pansy*, there must be a showing by affidavit or certification of “good cause” and specific information must be provided. The affidavit or certification must also be available for public review. The intent of subparagraph (b)(2) is to allow parties to describe the materials in issue in categorical fashion and thus to avoid document-by-document description. This subparagraph does not go in greater detail as to the contents of the affidavit or certification. The sufficiency of an affidavit or certification is a matter for individual determination by a Judge or Magistrate Judge.

Subparagraph (b)(3). This subparagraph is intended to make plain the distinction between blanket protective orders and orders for the sealing of materials filed with the Court. Blanket protective orders should not include a provision that allows materials to be filed under seal with the Court.

Subparagraph (b)(4). This subparagraph, together with subparagraph (b)(2), describes “events” for purposes of CM/ECF. Affidavits or certifications in support of blanket protective orders as well as the protective orders should be electronically filed using these events.

Subparagraph (b)(5). This subparagraph contemplates that disputes may arise with regard to the terms of blanket protective orders and the designation of materials under such orders. Should such disputes arise, the parties are directed to the procedure set forth in Local Civil Rule 37.1(a)(1) for the resolution of discovery disputes. The Rule is not intended to be applicable to materials submitted with regard to discovery disputes.

Subparagraph (b)(6). This subparagraph has been added to further remind parties that there must be in place either a confidentiality order with an express leave to file under seal or other order of the Court before any documents can be filed under seal. Only in extraordinary circumstances, which are rare, such as commencement of an action with an order to show cause, should a motion to seal in the absence of a confidentiality order be filed. In any event, even where there are extraordinary circumstances, a separate motion to seal must be filed in accordance with this Rule.

Subparagraph (c). This subparagraph establishes the procedure by which applications must be made to seal or otherwise restrict public access to filed materials or judicial proceedings. Such applications may be made in advance of, as part of, or parallel with substantive motions.

Subparagraph (c)(1). This subparagraph provides that any such application must be made by formal motion.

Subparagraph (c)(2). This subparagraph provides that any motion must be available for public access and must set forth, at a minimum, certain specified information.

Subparagraph (c)(3). Under Third Circuit precedent, the filing of otherwise confidential material may make that material a public record and subject to public access. *See, e.g., Bank of America Nat'l Trust and Savings Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339 (3d Cir. 1988). This subparagraph is intended to allow confidential materials to be filed and remain under seal until a motion to seal or otherwise restrict public access is ruled on. Otherwise, arguably confidential materials would be “transmuted” into materials presumptively subject to public access. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 n.8 (2d Cir. 2004).

Subparagraph (c)(4). “[T]he procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action.” *Pansy*, 23 F.3d at 778. Consistent with *Pansy*, this subparagraph allows a person to move to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure before a motion to seal or to otherwise restrict public access is returnable. This subparagraph is not intended to foreclose any subsequent motion to modify or vacate an order.

Subparagraph (c)(5). This subparagraph serves two functions. First, it identifies the “event” corresponding to a sealing order or opinion, as subparagraph (c)(1) identifies events for sealing motions. Subparagraph (c)(5) also reminds Judges and Magistrate Judges that, as appropriate, opinions and orders on motions to seal or otherwise restrict public access may be filed in redacted and unredacted form.

Subparagraph (c)(6). This subparagraph is patterned after Section 7(a) of the Vermont Rules for Public Access to Court Records. It is intended to address emergent applications by parties where there may be a legitimate need for a temporary sealing order (for example, when an ex parte seizure order is sought in a trademark infringement action). The subparagraph identifies the appropriate CM/ECF event and also provides for motions to intervene.

Subparagraph (d). As a general proposition, settlement agreements are not presented to Judges or Magistrate Judges for “approval.” Such approval has no legal significance. *See, e.g., Pascarella v. Bruck*, 190 N.J. Super. 118 (App. Div. 1983). Moreover, judicial approval of a

settlement may make that settlement a public record and subject to public access. *See Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002). For these reasons, subparagraph (d)(1) proves that settlement agreements will not be approved by Judges or Magistrate Judges unless such approval is required by law (for example, in class actions or actions involving infants). Subdivision (d)(1) does, however, provide for judicial approval of a settlement if the intent of the parties in seeking that approval is to have the Court retain jurisdiction to enforce a settlement agreement. *See, e.g., Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). Subdivision (d)(2) provides that, once filed with the Court or incorporated in an order, a settlement agreement becomes a public record and subject to public access absent an appropriate showing.

Subparagraph(e). Dockets are sources of basic information about civil actions and are historically public records. *See, e.g., United States v. Criden*, 675 F.2d 550 (3d Cir.1982). Thus, this subparagraph provides that dockets will not be sealed but that, consistent with the Rule, specific docket entries may be. *See Webster Groves School Dist. v. Pulitzer Publishing Co.*, 898 F.2d 1371 (8th Cir. 1990).

Subparagraph (f). This subdivision requires the Clerk to maintain a report which reflects all motions, order and opinions described in the Rule. The intent of this subparagraph is that reports be generated based on the “events” referred to in the Rule and be available to the general public through PACER.

SUPPLEMENTAL EXPLANATORY NOTE

After publication on December 20, 2004, several comments were received. These comments led to the addition of language in the Explanatory Note (History and subparagraphs (b), (b)(5), (c) and (c)(4)) intended to clarify the intent of the Rule. Subparagraph (d)(2) of the Rule and the accompanying Explanatory Note were revised to reflect that the appropriate standard may derive from other than Fed. R. Civ. P. 26(c). Finally, a new subparagraph (g) was added to the Rule.

APPENDIX S. DISCOVERY CONFIDENTIALITY ORDER

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Plaintiff,
vs.
Defendant.

Civil Action No.: ___ Civ. ____ (XXX)

**DISCOVERY CONFIDENTIALITY
ORDER**

It appearing that discovery in the above-captioned action is likely to involve the disclosure of confidential information, it is ORDERED as follows:

1. Any party to this litigation and any third-party shall have the right to designate as “Confidential” and subject to this Order any information, document, or thing, or portion of any document or thing: (a) that contains trade secrets, competitively sensitive technical, marketing, financial, sales or other confidential business information, or (b) that contains private or confidential personal information, or (c) that contains information received in confidence from third parties, or (d) which the producing party otherwise believes in good faith to be entitled to protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure and Local Civil Rule 5.3. Any party to this litigation or any third party covered by this Order, who produces or discloses any Confidential material, including without limitation any information, document, thing, interrogatory answer, admission, pleading, or testimony, shall mark the same with the foregoing or similar legend: “CONFIDENTIAL” or “CONFIDENTIAL – SUBJECT TO DISCOVERY CONFIDENTIALITY ORDER” (hereinafter “Confidential”).

2. Any party to this litigation and any third-party shall have the right to designate as “Attorneys’ Eyes Only” and subject to this Order any information, document, or thing, or portion of any document or thing that contains highly sensitive business or personal information, the disclosure of which is highly likely to cause significant harm to an individual or to the business or competitive position of the designating party. Any party to this litigation or any third party who is covered by this Order, who produces or discloses any Attorneys’ Eyes Only material, including without limitation any information, document, thing, interrogatory answer, admission, pleading, or testimony, shall mark the same with the foregoing or similar legend: “ATTORNEYS’ EYES ONLY” or “ATTORNEYS’ EYES ONLY – SUBJECT TO DISCOVERY CONFIDENTIALITY ORDER” (hereinafter “Attorneys’ Eyes Only”).

3. All Confidential material shall be used by the receiving party solely for purposes of the prosecution or defense of this action, shall not be used by the receiving party for any business, commercial, competitive, personal or other purpose, and shall not be disclosed by the receiving party to anyone other than those set forth in Paragraph 4, unless and until the

restrictions herein are removed either by written agreement of counsel for the parties, or by Order of the Court. It is, however, understood that counsel for a party may give advice and opinions to his or her client solely relating to the above-captioned action based on his or her evaluation of Confidential material, provided that such advice and opinions shall not reveal the content of such Confidential material except by prior written agreement of counsel for the parties, or by Order of the Court.

4. Confidential material and the contents of Confidential material may be disclosed only to the following individuals under the following conditions:

- a. Outside counsel (herein defined as any attorney at the parties' outside law firms) and relevant in-house counsel for the parties;
- b. Outside experts or consultants retained by outside counsel for purposes of this action, provided they have signed a non-disclosure agreement in the form attached hereto as Exhibit A;
- c. Secretarial, paralegal, clerical, duplicating and data processing personnel of the foregoing;
- d. The Court and court personnel;
- e. Any deponent may be shown or examined on any information, document or thing designated Confidential if it appears that the witness authored or received a copy of it, was involved in the subject matter described therein or is employed by the party who produced the information, document or thing, or if the producing party consents to such disclosure;
- f. Vendors retained by or for the parties to assist in preparing for pretrial discovery, trial and/or hearings including, but not limited to, court reporters, litigation support personnel, jury consultants, individuals to prepare demonstrative and audiovisual aids for use in the courtroom or in depositions or mock jury sessions, as well as their staff, stenographic, and clerical employees whose duties and responsibilities require access to such materials; and
- g. The parties. In the case of parties that are corporations or other business entities, "party" shall mean executives who are required to participate in decisions with reference to this lawsuit.

5. Confidential material shall be used only by individuals permitted access to it under Paragraph 4. Confidential material, copies thereof, and the information contained therein, shall not be disclosed in any manner to any other individual, until and unless (a) outside counsel for the party asserting confidentiality waives the claim of confidentiality, or (b) the Court orders such disclosure.

6. With respect to any depositions that involve a disclosure of Confidential material of a party to this action, such party shall have until thirty (30) days after receipt of the deposition transcript within which to inform all other parties that portions of the transcript are to be designated Confidential, which period may be extended by agreement of the parties. No such deposition transcript shall be disclosed to any individual other than the individuals described in Paragraph 4(a), (b), (c), (d) and (f) above and the deponent during these thirty (30) days, and no individual attending such a deposition shall disclose the contents of the deposition to any individual other than those described in Paragraph 4(a), (b), (c), (d) and (f) above during said

thirty (30) days. Upon being informed that certain portions of a deposition are to be designated as Confidential, all parties shall immediately cause each copy of the transcript in its custody or control to be appropriately marked and limit disclosure of that transcript in accordance with Paragraphs 3 and 4.

7. Material produced and marked as Attorneys' Eyes Only may be disclosed only to outside counsel for the receiving party and to such other persons as counsel for the producing party agrees in advance or as Ordered by the Court.

8. If counsel for a party receiving documents or information designated as Confidential or Attorneys' Eyes Only hereunder objects to such designation of any or all of such items, the following procedure shall apply:

(a) Counsel for the objecting party shall serve on the designating party or third party a written objection to such designation, which shall describe with particularity the documents or information in question and shall state the grounds for objection. Counsel for the designating party or third party shall respond in writing to such objection within 14 days, and shall state with particularity the grounds for asserting that the document or information is Confidential or Attorneys' Eyes Only. If no timely written response is made to the objection, the challenged designation will be deemed to be void. If the designating party or nonparty makes a timely response to such objection asserting the propriety of the designation, counsel shall then confer in good faith in an effort to resolve the dispute.

(b) If a dispute as to a Confidential or Attorneys' Eyes Only designation of a document or item of information cannot be resolved by agreement, the proponent of the designation being challenged shall present the dispute to the Court initially by telephone or letter, in accordance with Local Civil Rule 37.1(a)(1), before filing a formal motion for an order regarding the challenged designation. The document or information that is the subject of the filing shall be treated as originally designated pending resolution of the dispute.

9. All requests to seal documents filed with the Court shall comply with Local Civil Rule 5.3. Any document designated "Confidential" or "Attorneys' Eyes Only" by a party or non-party and which document is filed with the Court shall be filed under seal, in accordance with Local Civil Rule 5.3.

10. If the need arises during trial or at any Hearing before the Court for any party to disclose Confidential or Attorneys' Eyes Only information, it may do so only after giving notice to the producing party and as directed by the Court.

11. To the extent consistent with applicable law, the inadvertent or unintentional disclosure of Confidential material that should have been designated as such, regardless of whether the information, document or thing was so designated at the time of disclosure, shall not be deemed a waiver in whole or in part of a party's claim of confidentiality, either as to the specific information, document or thing disclosed or as to any other material or information concerning the same or related subject matter. Such inadvertent or unintentional disclosure may be rectified by notifying in writing counsel for all parties to whom the material was disclosed that the material should have been designated Confidential within a reasonable time after

disclosure. Such notice shall constitute a designation of the information, document or thing as Confidential under this Discovery Confidentiality Order.

12. When the inadvertent or mistaken disclosure of any information, document or thing protected by privilege or work-product immunity is discovered by the producing party and brought to the attention of the receiving party, the receiving party's treatment of such material shall be in accordance with Federal Rule of Civil Procedure 26(b)(5)(B). Such inadvertent or mistaken disclosure of such information, document or thing shall not by itself constitute a waiver by the producing party of any claims of privilege or work-product immunity. However, nothing herein restricts the right of the receiving party to challenge the producing party's claim of privilege if appropriate within a reasonable time after receiving notice of the inadvertent or mistaken disclosure.

13. No information that is in the public domain or which is already known by the receiving party through proper means or which is or becomes available to a party from a source other than the party asserting confidentiality, rightfully in possession of such information on a non-confidential basis, shall be deemed or considered to be Confidential material under this Discovery Confidentiality Order.

14. This Discovery Confidentiality Order shall not deprive any party of its right to object to discovery by any other party or on any otherwise permitted ground. This Discovery Confidentiality Order is being entered without prejudice to the right of any party to move the Court for modification or for relief from any of its terms.

15. This Discovery Confidentiality Order shall survive the termination of this action and shall remain in full force and effect unless modified by an Order of this Court or by the written stipulation of the parties filed with the Court.

16. Upon final conclusion of this litigation, each party or other individual subject to the terms hereof shall be under an obligation to assemble and to return to the originating source all originals and unmarked copies of documents and things containing Confidential material and to destroy, should such source so request, all copies of Confidential material that contain and/or constitute attorney work product as well as excerpts, summaries and digests revealing Confidential material; provided, however, that counsel may retain complete copies of all transcripts and pleadings including any exhibits attached thereto for archival purposes, subject to the provisions of this Discovery Confidentiality Order. To the extent a party requests the return of Confidential material from the Court after the final conclusion of the litigation, including the exhaustion of all appeals therefrom and all related proceedings, the party shall file a motion seeking such relief.

IT IS SO ORDERED.

Dated: _____, _____, U.S.M.J.

EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Plaintiff,

vs.

Defendant.

Civil Action No.: __ Civ. ____ (XX)

**AGREEMENT TO BE BOUND BY
DISCOVERY CONFIDENTIALITY ORDER**

I, _____, being duly sworn, state that:

1. My address is _____.
2. My present employer is _____ and the address of my present employment is _____.
3. My present occupation or job description is _____.
4. I have carefully read and understood the provisions of the Discovery Confidentiality Order in this case signed by the Court, and I will comply with all provisions of the Discovery Confidentiality Order.
5. I will hold in confidence and not disclose to anyone not qualified under the Discovery Confidentiality Order any Confidential Material or any words, summaries, abstracts, or indices of Confidential Information disclosed to me.
6. I will limit use of Confidential Material disclosed to me solely for purpose of this action.
7. No later than the final conclusion of the case, I will return all Confidential Material and summaries, abstracts, and indices thereof which come into my possession, and documents or things which I have prepared relating thereto, to counsel for the party for whom I was employed or retained.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____

[Name]

L. Civ. R. 9.3 SPECIAL MATTERS - LOCAL PATENT RULES FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

L. Pat. R. 2.2. Confidentiality.

Discovery cannot be withheld or delayed on the basis of confidentiality absent Court order. Pending entry of a confidentiality order, discovery and disclosures deemed confidential by a party shall be produced to the adverse party for outside counsel's Attorney's Eyes Only, solely for purposes of the pending case and shall not be disclosed to the client or any other person.

Within 14 days after the initial Scheduling Conference, (a) the parties shall present a consent confidentiality order, ~~supported by a sufficient certification (or statement complying with 28 U.S.C. § 1746)~~ under L. Civ. R. 5.3(b)(2), or (b) in the absence of consent, a party shall, ~~supported by a sufficient certification~~, apply for entry of a confidentiality order under L. Civ. R. 5.3(b)(5) and L. Civ. R. 37.1(a)(1). The Court will decide those issues and enter the appropriate order, or the Court may enter the District's approved Confidentiality Order as set forth in Appendix S to these Rules if appropriate, in whole or in part.

With respect to all issues of discovery confidentiality, the parties shall comply with all terms of L.Civ.R. 5.3.

Comments must be received by the Clerk of the Court by February 19, 2021 and should be addressed to:

William T. Walsh, Clerk of Court
United States District Court
Martin Luther King Jr. Federal Bldg. & U.S. Courthouse
50 Walnut St.
Newark, NJ 07101

or by e-mail to: localrules@njd.uscourts.gov

Date: January 13, 2021

For the Court

Freda L. Wolfson
Chief Judge