COURT OF CHANCERY GUIDELINES FOR EXPEDITED DISCOVERY IN ADVANCE OF A PRELIMINARY INJUNCTION HEARING

The Court routinely handles cases in which a preliminary injunction is requested on an expedited basis. The time constraints inherent in expedited litigation necessarily limit both the scope and timing of discovery and can impose considerable burdens on the parties. Accordingly, the Court expects the parties to work together in good faith to facilitate the timely completion of the discovery necessary for a fair presentation of the preliminary injunction application to the Court. The following Guidelines set forth typical practice as to the conduct of expedited discovery in advance of a preliminary injunction hearing in high stakes commercial and corporate litigation. The Court encourages the parties and counsel to consider the practices described below, while recognizing that it may be appropriate for the parties to proceed in a different manner in a particular situation, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake.

1. Written Discovery

Although all types of written discovery may be used in the appropriate circumstances, in expedited cases seeking a preliminary injunction, written discovery typically is limited to document requests, as well as narrowly-tailored interrogatories intended primarily to identify persons with relevant knowledge. The parties' initial written discovery requests should be focused on the key issues relevant to the resolution of the matters presented in the application for a preliminary injunction. If further proceedings are necessary after the application is heard, there will be the opportunity for additional, non-duplicative discovery. To facilitate prompt responses to written discovery requests and the production of documents (which, for purposes of these Guidelines, includes electronically stored information), the plaintiff should serve its initial written discovery requests with the complaint or a motion to expedite (or if not feasible, as soon as possible thereafter), and the defendant should propound any requests it may have promptly.

The parties should agree upon a schedule so that initial written discovery and document production is completed before the start of depositions. Due to the nature of expedition, such a schedule usually will require the parties to respond to written discovery in a shorter time period than the default period set forth in the Court of Chancery Rules. In some cases, the parties may decide to forego formal responses in favor of informal communications regarding document production. To avoid misunderstandings or delays, the responses and objections to document requests, whether formal or informal, should make clear what categories of documents will be produced. The parties should meet and confer promptly to attempt to resolve any disputes regarding the scope of document production, with the understanding that time constraints necessarily limit the scope of discovery, including the ability to search and review documents extensively. In addition, the Court encourages documents to be produced on a "rolling basis" and for the parties to agree that certain significant documents (as discussed more below in "Document Collection") will be produced as soon as feasible after the start of discovery (typically subject to an agreement that they will be treated as "attorneys eyes only" until a confidentiality order is entered).

2. Document Collection

When responding to written discovery requests, the parties are obligated to conduct a reasonable search for relevant and responsive documents. The expedited nature of preliminary injunction applications necessarily affects what is deemed to be "reasonable" by the Court. Although each party ultimately is responsible for its own document collection and production, the Court expects the parties to discuss limitations on expedited discovery. In connection with the foregoing, the Court expects the parties to freely exchange information concerning the scope of their respective document collections (*e.g.*, what documents are being collected, how they are being collected, what computers or other electronic devices are being searched, and any search terms or other restrictions being utilized to collect documents).

After a request for a preliminary injunction is filed, the parties should collect and produce the "core documents" associated with that application promptly. Although every dispute is unique, attorneys who frequently practice before the Court generally can identify the documents that are most likely to contain relevant information. For example, where a corporate transaction (*e.g.*, a merger) is being challenged, the "core documents" typically include, at least, (i) the minutes of the relevant meetings of the board of directors and any board committees, (ii) the materials provided to the directors related to the transaction, (iii) the working group lists associated with the transaction, and (iv) the engagement agreements and fee arrangements with investment advisors.

The parties should identify the key custodians and focus their document collection efforts on those custodians. Typically, parties agree to limit the number of custodians from which each party collects. In connection with any such negotiations, each party should make a good faith, reasonable attempt to identify the custodians who are reasonably likely to possess relevant documents. Notwithstanding any agreement to limit the number of custodians, unless otherwise agreed, parties should collect from any centralized document repository or system that is likely to contain relevant documents (*e.g.*, document management systems, sharepoints, central files).

Parties typically agree to limit the computer devices and systems from which they collect, the date range associated with various document requests, and the file types collected (*e.g.*, excluding ".exe" files). Parties also typically agree that they will not produce documents created after the date that the complaint was filed, unless post-complaint events are or become relevant to the dispute.

Even in expedited discovery, counsel should interview the custodians from whom they have collected to understand, among other things, any potential sources of relevant documents (*e.g.*, centralized document repositories or systems, PDAs, work and home computers), determine the records that are kept in the ordinary course, and identify any relevant jargon, acronyms or code names.

Outside litigation counsel should actively oversee the collection of documents. As in any other case, the Court expects Delaware counsel to play an active role in the collection, review and production of documents in expedited litigation. The role that the Court expects Delaware counsel to play is set forth above in the general discussion of document collection and review.

Those expectations are not lessened in expedited litigation, and if anything become more important because of the absence of any room in the schedule to redress discovery shortcomings.

If search terms are utilized to identify potentially relevant documents, the parties should make a good faith, reasonable attempt to negotiate those terms with the opposing parties. In any such discussions, the Court expects the parties to exchange relevant information, such as statistics concerning the number of documents or "hits" associated with particular search terms and examples of documents that are responsive to particular search terms but are not relevant to the case.

3. Document Review and Production

The Court expects outside litigation counsel actively to oversee document collection, review and production pursuant to a reasoned process designed to result in the prompt production of the documents necessary for a fair presentation of the dispute to the Court.

The Court does not require documents to be produced in a particular format. The parties are expected to cooperate to produce documents in a format that is usable to the parties. Typically, the parties agree to produce most documents as single- or multiple-page image files, and to produce spreadsheets, audio and video files, etc., in their native format. The parties also typically agree to provide standard load files (*e.g.*, a data file for metadata and an image file for images), certain metadata (if reasonably available) and text-searchable documents. Absent agreement, the parties typically do not provide OCR (optical character recognition) data.

Eliminating the production of duplicate, substantively identical documents (both within and across custodians) is a standard practice that the Court encourages. In connection with the foregoing, parties typically record the custodians possessing duplicate copies and provide that information as a separate field in the production load files.

As mentioned above, the parties usually agree to produce significant documents as soon as possible, and all other documents on a rolling basis, and the Court encourages this practice.

4. Privilege and Redactions Logs

In expedited litigation, the Court encourages the parties to make agreements that reduce the time, expense and burden associated with conducting a document-by-document privilege review and preparing privilege and redaction logs so that the merits of the application may be developed in the limited time available and fairly presented to the Court.

For example, the parties may agree to limit the types of documents that will be logged (*e.g.*, to include only documents from a certain time frame or relating to certain subjects, or to exclude communications post-dating the filing of the complaint or solely between attorneys). The parties also may agree to defer a privilege log until later stages of the litigation.

The parties also frequently agree to forego a redaction log if the information in such a log would be redundant of information provided in the redacted documents—for example, if the redacted document identifies the sender and recipients of the communication, the general subject

matter (*e.g.*, through a "subject" line on an email), and the basis for the redaction (*e.g.*, the redacted material is stamped "Redacted—attorney-client privilege").

Finally, the parties sometimes agree to forego a full document-by-document privilege review before production and, instead, enter into a "quick peek" agreement whereby the party seeking discovery is permitted to review responsive documents without effectuating a waiver of privilege by the producing party. Whether a quick peek agreement is appropriate depends on the facts and circumstances of each case, and counsel and client should confer to make an informed decision about whether to enter into such an agreement. A sample quick peek agreement is attached as Exhibit 1. This sample does not necessarily ensure that documents produced pursuant to the agreement will not be considered a waiver of privilege in other jurisdictions, and this risk should be discussed between counsel and client.

5. Discovery From Third Parties

Expedited litigation often involves discovery of third parties, such as investment advisors. The Court expects that the parties will (i) encourage the third parties that they have retained or with which they have relationships to respond promptly to discovery requests, and (ii) help facilitate the completion of third party discovery in accordance with the expedited schedule.