

This is a sample quick-peek stipulation referenced in Section C(7)(g)(xix) (“Expedited Discovery”), page 31 of the Guidelines to Help Lawyers Practice in the Court of Chancery. It should be modified to fit the circumstances and used in conformity with the Guidelines.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

_____)	
)	
Plaintiff,)	
)	
v.)	C.A. No. ____ - ____
_____)	
)	
Defendant.)	

QUICK-PEEK STIPULATION AND [PROPOSED] ORDER

WHEREAS, the Parties¹ believe that it will promote the efficient, just, and economical resolution of this Litigation to supplement the existing Confidentiality Stipulation by entering into this stipulation and order (the “Clawback Order”) regarding the exchange of certain Discovery Material;

WHEREAS, based upon a good faith belief that such procedures are likely to generate documents relevant and/or responsive to the discovery requests in this Litigation, the Parties have previously agreed to limit their respective document collection and production efforts to certain document custodians and repositories, and further agreed to utilize electronic keyword search terms to identify potentially relevant documents from the foregoing document sources;

¹ Unless otherwise defined, capitalized terms herein have the meanings assigned in the Stipulation and Order for the Production and Exchange of Confidential and Highly Confidential Information entered in this Litigation (the “Confidentiality Stipulation”).

WHEREAS, despite these limitations on the scope of discovery, the volume of documents that are likely relevant and/or responsive to the discovery requests in this Litigation is of a magnitude that a document-by-document review of documents before production would cause substantial delay and would be unduly burdensome on the Producing Parties;

WHEREAS, the Parties believe that permitting the production of documents pursuant to this Clawback Order, without the necessity of a document-by-document review by the Producing Person before production, will materially reduce the cost and duration of discovery, and the attendant burdens on the Parties;

WHEREAS, adopting the approach set forth herein may result in the inadvertent disclosure of Discovery Material that is subject to a claim of attorney-client, work product and/or other applicable privilege or immunity (collectively, “Privileged Discovery Material”), as well as the disclosure of other material irrelevant to this Litigation (“Irrelevant Material”); and

WHEREAS, pursuant to Delaware Uniform Rule of Evidence 510, the Parties understand and stipulate that disclosure of Privileged Discovery Material pursuant to this Clawback Order will not prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of attorney-client, work product, or other applicable privilege or immunity, under Delaware law;

IT IS HEREBY STIPULATED, AGREED AND ORDERED:

1. Any Producing Person may designate any document(s) (or collection of documents) that it produces in this Litigation as “Clawback Discovery Material”

under the terms of this Clawback Order, if the Producing Person's counsel reasonably concludes in good faith that: (i) the Clawback Discovery Material is likely to contain documents or information responsive to the Requesting Person's requests for the production of documents; and (ii) a document-by-document review by the Producing Person to confirm responsiveness or to identify privileged materials before production is unduly burdensome or not practicable.

2. A Producing Person need not conduct a document-by-document review of Clawback Discovery Material before production; provided however, that a Producing Person must use keyword search terms (*e.g.*, the names of counsel and law firms for the Producing Person), analytical software tools and/or other reasonable means to locate and exclude potentially Privileged Discovery Material before producing Discovery Material as Clawback Discovery Material. The Producing Person must review that excluded potentially Privileged Discovery Material and, if it is responsive, either (i) produce any non-privileged material or (ii) log any privileged material. Compliance with this paragraph constitutes adequate precautions to prevent inadvertent disclosure of any Privileged Discovery Materials produced as Clawback Discovery Material.

3. Unless the Producing and Receiving Persons otherwise agree, the designation of Discovery Material as Clawback Discovery Material must comply with paragraph 5 of the Confidentiality Stipulation, and the Producing Person must either affix an appropriate legend or use a separate Bates number prefix for Clawback Discovery Material.

4. Unless otherwise agreed by the Parties, Clawback Discovery Material must be produced in an electronically searchable format (e.g., as text-searchable PDFs or TIFFs, native format, etc.), and shall otherwise comply with any production protocols agreed to by the Parties.

5. Clawback Discovery Material must be designated as Highly Confidential Discovery Material for purposes of the Confidentiality Stipulation.

6. If a Party (i) reasonably believes, in good faith, that Discovery Material designated as Clawback Discovery Material is relevant to the claims, defenses, subject matter of, or a dispute at issue in this Litigation and (ii) wishes to disclose that Clawback Discovery Material to a person identified in paragraphs 7 and 8(g) of the Confidentiality Stipulation (other than court reporters transcribing any deposition in this Litigation) for a use that is permitted by the Confidentiality Stipulation, then the Party may provide a written notice to every other Party (a “Redesignation Notice”) that (a) identifies the Bates number(s) of the Clawback Discovery Material, and (b) asks that it be re-designated as “Produced Clawback Material” (defined below)

A. Upon receiving a Redesignation Notice, the Producing Person must make a reasonable, good-faith effort to promptly* (i) determine whether the Clawback Discovery Material identified in the Redesignation Notice constitutes Privileged Discovery Material (the “Privilege Determination”) and

* [Note: In paragraphs 7(A) and 7(B), Parties may wish to further define “promptly” to address the circumstances of the Litigation, such as by setting shorter deadlines for Redesignation Notices covering a smaller number of documents and longer deadlines for Redesignation Notices covering a larger number of documents.]

(ii) inform every other Party of the Producing Person's Privilege Determination.

B. If a Party reasonably believes, in good faith, that the Producing Person made a Privilege Determination that incorrectly asserts privilege, then that Party may promptly provide a written notice to every other Party (a "Redesignation Objection Notice") that (i) identifies the Bates number(s) of such Clawback Discovery Material and (ii) identifies the basis for the objection. After a timely Redesignation Objection Notice, the pertinent Clawback Discovery Material remains Clawback Discovery Material unless (i) all Parties agree to different treatment or (ii) the Court orders different treatment.

C. Any Clawback Discovery Material identified in a Redesignation Notice that the Producing Person determines is not Privileged Discovery Material and that is not the subject of a timely Redesignation Objection Notice (a) is deemed to be "Produced Clawback Material" and (b) must be re-produced promptly as Confidential Discovery Material by the Producing Person, with a Bates prefix different from that used for Clawback Discovery Material, and without the necessity of a document-by-document review by the Producing Person—i.e., paragraph 6 of the Confidentiality Order shall not apply to any Produced Clawback Material. Once re-produced by the Producing Person, (a) the provisions of paragraph 15 of the Confidentiality Order with regard to objections to a confidentiality designation shall

thereafter apply to Produced Clawback Material and (b) the Produced Clawback Material will no longer be treated as Clawback Discovery Material.

D. Any Clawback Discovery Material that the Producing Person concludes is Privileged Discovery Material shall be timely logged by the Producing Person. The Parties may retain a copy of any such Privileged Discovery Material designated in this manner on an attorney's-eyes-only basis for the purpose of bringing a motion to compel the redesignation of Privileged Discovery Material as Produced Clawback Material.

7. Disclosure of Privileged Discovery Materials under this Clawback Order does not prejudice, waive, or estop the Producing Person from asserting the attorney-client privilege, work product doctrine, or other applicable privilege or immunity. If a Producing Person produces Privileged Discovery Materials as Clawback Discovery Material, then for purposes of analyzing any claim of privilege or immunity, the Clawback Discovery Material is deemed to have been inadvertently produced.

8. Any Person who receives a document designated as Clawback Discovery Material that appears on its face to be Privileged Discovery Material must (i) provide reasonably prompt written notice to counsel for the Producing Person and (ii) refrain from examining, disclosing, or using the document pending confirmation by the Producing Person that the document is not Privileged Discovery Material.

9. A Producing Person may demand the return of any Irrelevant Material it produces. Once notified about Irrelevant Material, the Receiving Person must

refrain from any further examination or disclosure of the Irrelevant Material, except that the Receiving Person may review the Irrelevant Material to the limited extent necessary to meet and confer with the Producing Person. The Parties agree to meet and confer in good faith to resolve any disputes over Irrelevant Material.

10. Nothing in this Clawback Order:

A. requires any Person to produce or disclose any Privileged Discovery Materials;

B. requires any Person to produce any Clawback Discovery Material;

C. modifies the Confidentiality Stipulation, unless expressly stated herein;

D. except as expressly stated herein, modifies any prior agreements concerning the conduct of discovery in this Litigation, including but not limited to agreements regarding the collection of Discovery Material from certain custodians or the use of search terms to identify potentially responsive documents; or

E. prevents any Party from arguing that a Producing Person waived the attorney-client, work product, or other applicable privilege or immunity under circumstances not covered by this Clawback Order.

11. The Parties agree that any violation of this Clawback Order results in irreparable harm for which there is no adequate remedy at law. A Producing Person may obtain a protective order compelling compliance with this Clawback Order. If necessary, the Producing Person may sue the Receiving Person and obtain

injunctive relief to enforce this Clawback Order. The Parties acknowledge that the Court may award such other and further relief as the Court may deem appropriate.

12. This Clawback Order governs Clawback Discovery Material produced by any Party or non-party who executes and files with the Court its agreement to be bound by this Clawback Order. No non-Party has access to Clawback Discovery Material before signing and filing the agreement to be bound.

13. The Parties agree to be bound by the terms of this Clawback Order upon execution, before entry by the Court. Before the Court approves the order, the Court may enforce the Clawback Order as if it had already been approved.

14. Subject to any applicable rule of the Delaware Court of Chancery or the Delaware Supreme Court, the provisions of this Clawback Order shall, absent written permission of the Producing Person or further order of the Court, continue to be binding throughout and after the conclusion of the Litigation, including any appeals therefrom.

15. The Parties agree and the Court hereby orders, pursuant to Delaware Uniform Rule of Evidence 510, that any disclosures made pursuant to this Clawback Order shall not be deemed a waiver of any applicable privilege or confidentiality doctrine (including the attorney-client privilege, the business strategy or work product doctrine, or other privilege or immunity) with respect to any other documents or communications, regardless of subject matter, in this or any other proceeding(s). The Parties further agree and the Court hereby orders, pursuant to Delaware Uniform Rule of Evidence 510(f)-(g), that no person may

assert that any disclosures made pursuant to this Clawback Order, by reason of such production, constitutes a waiver of any privilege or doctrine.

[COUNSEL]
Attorneys for Plaintiff

[COUNSEL]
Attorneys for Defendant

SO ORDERED this _____ day of _____, 20__.

[Vice] Chancellor