

Model Stipulation and Order

Superior Court of New Jersey

Law Division, Civil Part

_____ County

Docket Number: L-_____

Plaintiff(s),

v.

Defendant(s).

**Clawback Stipulation
and Order**

WHEREAS, the Parties¹ believe that it will promote the efficient, just, and economical resolution of this Litigation to supplement the existing Discovery Confidentiality Order by entering into this stipulation and Order (the "Clawback Order") regarding the exchange of certain electronically stored information ("ESI"), any electronically stored or maintained information, documents, or things, or portion of any documents or things ("Discovery Materials"); and

WHEREAS, based upon a good faith belief that the procedures set forth in the Electronic Discovery Stipulation and Order (the "eDiscovery Order") are likely to generate a large volume of Discovery Materials;

WHEREAS, based on the anticipated number of relevant and/or responsive Discovery Materials that will be identified in this Litigation, the Parties have previously agreed upon certain delimiters, procedures and processes set forth in the eDiscovery Order which include, *inter alia*, agreeing to utilize agreed upon search terms, date ranges and custodians to more accurately identify potentially relevant Discovery Materials; and

WHEREAS, despite these methods used to cull-down the number of documents identified as potentially relevant, the Parties recognize that the volume of Discovery Materials that will be exchanged in this Litigation is of a magnitude that the inadvertent disclosure of Discovery Materials that are subject to a claim of attorney-client, work product and/or other applicable privilege or immunity, and/or protected pursuant to applicable state and/or federal privacy laws (collectively, "Privileged Discovery Materials"), as well as the disclosure of other materials irrelevant to this Litigation ("Irrelevant Materials") is possible; and

WHEREAS, the Parties believe that permitting the production of Discovery Materials pursuant to this Clawback Order will materially reduce the cost and duration of discovery, the attendant burdens on the Parties, and the need for judicial intervention; and

WHEREAS, although New Jersey has not adopted a rule of evidence similar to Federal Rule of Evidence 502,² the Parties understand and stipulate that disclosure of Privileged Discovery Materials pursuant

¹ Unless otherwise defined, capitalized terms herein have the meanings assigned in the "Discovery Confidentiality Order").

² Entitled "Attorney-Client Privilege and Work Product; Limitations on Waiver."

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 New Jersey law.

IT IS HEREBY STIPULATED, AGREED AND ORDERED:

1. Discovery Materials exchanged by the Parties in this Litigation is subject to and under the terms of this Clawback Order provided that the Party producing the Discovery Materials has made a good faith effort to prevent the inadvertent production of any Privileged Discovery Materials or Irrelevant Materials.
2. A Producing Party shall not be obligated to conduct a document-by-document review of the Discovery Material prior to its production in order to meet the good faith standard mentioned above; provided however, that a Producing Party utilized, at a minimum, the following best practices to avoid the inadvertent production of documents (“Best Practices”):
 - a. Keyword search terms (e.g., the names of counsel and law firms for the Producing Party);
 - b. Domain names; and
 - c. Analytical software tools and/or other reasonable means to locate and exclude potentially Privileged Discovery Materials prior to the production of the Discovery Materials;
3. Any document that is not identified by using the above Best Practices is considered presumptively responsive/non-privileged and may be produced without performing a document-by-document review.
4. Any documents that are identified as being potentially privileged by using the above Best Practices shall be reviewed by the Producing Party and, if such material is responsive and non-objectionable, shall either be (i) produced (if such material is not deemed Privileged Discovery Material), or (ii) identified as privileged and placed onto the Producing Party's privilege log (if such material is deemed as Privileged Discovery Material), in the normal course of discovery, consistent with the Rules of this Court. If a Producing Party complies with Paragraphs 2 and 3 herein, such Producing Party shall be deemed to have implemented adequate precautions to prevent inadvertent disclosure of any Privileged Discovery Materials.
5. Disclosure of Privileged Discovery Materials in this Litigation, pursuant to this Clawback Order, shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any attorney-client, work product or other applicable privilege or immunity. Any Privileged Discovery Materials or Irrelevant Materials shall be deemed to have been inadvertently produced.
 - a. A Party who receives any Discovery Materials that, upon review by such Party, appears on their face to be Privileged Discovery Materials shall: (i) refrain from any further examination or disclosure of such document pending confirmation by the Producing Party that such document is not Privileged Discovery Material; and (ii) provide reasonably prompt written notice to counsel

for the Producing Party that such document appears to be Privileged Discovery Material. Upon receiving a written notice contemplated by the preceding sentence, the Producing Party shall provide reasonably prompt written notice to the requesting Party indicating whether the document in question constitutes Inadvertent Production Material.

- b. A Producing Party shall be obligated to make a reasonably prompt claim of inadvertent production upon the earlier of: (i) receiving notice under the preceding paragraph concerning such document, or (ii) otherwise becoming aware of the inadvertent production of such document. If a Producing Party complies with this paragraph, such Party shall be deemed to have acted timely and adequately to rectify any inadvertent disclosure of Privileged Discovery Materials.
 - c. The procedures set forth in Paragraph 9 of the Discovery Confidentiality Order shall apply to any Discovery Material which is claimed to be Inadvertent Production Material.
 - d. The Producing Party shall timely log any Discovery Material that is claimed to be Inadvertent Production Material, consistent with the Rules of Court.
6. Each Party shall have the right to demand the immediate return of any Irrelevant Material produced by such Party. After the documents are returned, the Parties agree to meet and confer in good faith to resolve any disputes that arise regarding the alleged Irrelevant Materials. The Party that is challenging the designation of potentially Irrelevant Material and is subject to destroy and/or return the documents at issue must also destroy and/or obtain from any Party or third party that was provided with the potentially Irrelevant Material until the issues are resolved through the meet and confer or by motion to the Court.
7. Nothing in this Clawback Order shall:
- a. Require any Party to produce or disclose any Privileged Discovery Materials;
 - b. Require any Party to produce documents or data as Clawback Discovery Material;
 - c. Waive any Party's right to conduct limited pre-production review of Discovery Material prior to production of such materials;
 - d. Modify the Discovery Confidentiality Order, unless expressly stated herein;
 - e. Except as expressly stated herein, modify any prior agreements among the Parties 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
 - f. Prevent any Party from arguing that a waiver of an attorney-client, work product, or other applicable privilege or immunity has occurred from circumstances other than disclosure of Discovery Material pursuant to this Clawback Order.

8. The Parties agree that any violation of this Clawback Order shall result in irreparable harm for which there is no adequate remedy at law. The Parties further agree that any Party shall be entitled to injunctive relief to enforce the terms hereof. In addition, the Parties expressly acknowledge that the Court may, in its discretion, award such other and further relief as the Court may deem appropriate.
9. This Clawback Order applies only to Discovery Material produced by the Parties, and does not apply to Discovery Material produced by non-parties. In the event additional parties join or are joined in the Litigation, they shall not have access to Discovery Material until the newly-joined party, by its counsel, has executed and, at the request of any Party, filed with the Court its agreement to be fully bound by this Clawback Order.
10. The Parties agree to be bound by the terms of this Clawback Order pending the entry of this Clawback Order by the Court, and any violation of its terms shall be subject to the same sanctions and penalties as if this Clawback Order has been entered by the Court. Notwithstanding the foregoing, the Parties shall not be obligated to provide any Discovery Material prior to entry of this Clawback Order by the Court, unless the production of such Discovery Material is expressly required by another Order of the Court.
11. Subject to any applicable Rule of Court, the provisions of this Clawback Order shall, absent written permission of the Producing Party or further Order of the Court, continue to be binding throughout and after the conclusion of the Litigation, including without limitation any appeals therefrom.
12. Nothing in this Clawback Stipulation and Order shall preclude any Party from seeking judicial relief, upon notice to the Parties, with regard to any provision hereof.
13. This Clawback Stipulation and Order may be executed by PDF or conformed signature and may be executed in one or more counterparts, each of which shall be deemed to constitute an original, but all of which together shall constitute but one agreement.

Dated: _____

Counsel for Plaintiff

Dated: _____

Counsel for Defendant

IT IS SO ORDERED.

Dated: _____

J.S.C.