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| Plaintiff(s),  vs.  Defendant(s). | )  )  )  )  )  )  )  )  )  )  )  )  ) | Case Number:  STIPULATED ORDER REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION |

This Order governs discovery of electronically stored information (“ESI”) in this case.

# COOPERATION

The parties agree to cooperate in good faith to reach agreement on conducting e-discovery throughout the course of the matter. This process will begin prior to the initial status conference with the Court at which time the parties shall meet and discuss the application of the discovery process to their specific case. Parties will respond promptly to outstanding discovery issues. This ongoing process will result in a stipulation that the parties agree to in increments as successive provisions are resolved. The goals of this process will include but not be limited to the following:

* 1. to develop familiarity with electronic systems and capabilities (or have reasonable access to those who are) and be able to explain those systems and answer relevant questions;
  2. to develop knowledge about e-discovery efforts;
  3. to develop knowledge about the technical aspects of e-discovery (or have reasonable access to those who are), including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology; and
  4. to prepare to participate in e-discovery dispute resolution.

# E-DISCOVERY LIAISONS

# The parties agree to designate one or more individuals to act as liaisons for purposes of meeting, conferring, and attending court hearings regarding discovery of ESI. Regardless of whether the e-discovery liaison is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, each e-discovery liaison must be prepared to accomplish the goals of cooperation set forth above.

# PRESERVATION

The parties agree that preservation of potentially relevant ESI will be reasonable and proportional to what is at issue in the case. The parties will cooperate during the meet and confer process to reach agreement on the scope of preservation.

**Preservation Agreements**

The parties shall disclose the following information to facilitate agreement on preservation:

a. names of the relevant parties (if not already identified in the pleadings);

b. factual background of the potential legal claim(s) and identification of potential cause(s) of action (if not already identified in the pleadings);

c. names of potential witnesses and other people reasonably anticipated to have relevant evidence;

d. the relevant time period; and

e. other information that may assist the responding party in assessing what information to preserve.

The recipient of a preservation request should provide the requesting party with specific and useful information regarding the preservation efforts that have been or will be undertaken. The recipient should identify any disagreement(s) with the request to preserve, and raise any further preservation issues that may exist.

**Preservation of Metadata**

The parties agree to take reasonable steps to preserve records in a form that will permit the collection and production of Metadata that is necessary to fulfill their agreement on the form of production, referenced in Appendix A.

**Specific Preservation Agreements**

The parties specifically agree that:

1. Only ESI created or received between \_\_\_\_\_\_\_\_ and \_\_\_\_\_\_\_\_ will be preserved.
2. Attached as Exhibit \_\_\_\_\_ is a list of the custodians (or general job titles or descriptions of custodians) for whom ESI should be preserved. The parties will add or remove custodians from this list as reasonably necessary as the litigation progresses. [IF APPROPRIATE, THE PARTIES CAN AGREE TO LIMIT THE NUMBER OF CUSTODIANS LISTED]
3. Attached as Exhibit \_\_\_\_ is a list of the non-custodial data sources and systems from which ESI should be preserved. The parties will add or remove sources and systems from this list as reasonably necessary as the litigation progresses. [IF APPROPRIATE, THE PARTIES CAN AGREE TO LIMIT THE NUMBER OF DATA SOURCES LISTED]
4. The following data sources need not be preserved:[[1]](#footnote-1)
5. deleted, slack, fragmented, or unallocated data on hard drives;
6. random access memory (RAM) or other ephemeral data;
7. on-line access data such as temporary internet files, history, cache, or cookies;
8. data in metadata fields that are frequently updated automatically, such as last-opened dates;
9. automatically saved versions of documents;
10. System or executable files (.exe, .d11, etc.);
11. data from smartphone devices (Blackberry, Android, or iPhone, for example) where the party believes based on its standard practices that the information contained on those devices is duplicative of other sources;
12. The following data sources are not reasonably accessible because of undue burden or cost, and although the parties agree to preserve ESI from these sources, they will not be searched, reviewed, or produced absent a showing of good cause by the requesting party: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
13. The following data sources could contain relevant information, but the parties agree that discovery from these sources would not be proportional to the needs of the case, and these sources need not be preserved: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

A party may use any reasonable steps to preserve documents consistent with the party's record management systems, routine computer operation, ordinary business practices, and the preservation requirements of this agreement. As used in this agreement, "reasonable steps" include: (a) identifying individuals reasonably likely to possess or control potentially relevant documents; (b) notifying such individuals of their duties to preserve potentially relevant documents under the terms of this agreement; and (c) monitoring compliance with the preservation requirements of this agreement. This agreement does not obligate any party to segregate or collect potentially relevant documents unless the party has a reason to anticipate that, absent such actions, relevant information is likely to be lost during the pendency of this matter.

# SCOPE AND PHASING OF DISCOVERY

The parties agree that discovery of ESI will be reasonable and proportional to what is at issue in the case.

**Time Frame for e-Discovery**

Although the Parties have agreed to a longer temporal scope of ESI for preservation, in an effort to expedite discovery, the parties agree to initially limit discovery to the period of time likely to contain information most relevant to this dispute, between \_\_\_\_\_\_\_\_\_\_\_ and \_\_\_\_\_\_\_\_\_\_\_.[[2]](#footnote-2) The parties agree to continue to meet and confer about the scope and phasing of discovery.

**Custodians and Sources of e-Discovery**

Notwithstanding their agreements regarding preservation of information from identified custodians and sources of information, the parties agree that absent a showing of good cause by the requesting party, discovery in this case will focus on the following key custodians or job titles: \_\_\_\_\_\_\_\_\_\_\_.

**Phasing of e-Discovery**

The parties agree to phase the production of ESI. The initial production will be from the following sources and custodians or job titles: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

Following the initial production, the parties will continue meet and confer to prioritize the order and necessity of subsequent productions.

# SEARCH

The parties agree to meet and confer about the methods they will use to (1) search ESI to identify information that is subject to production, and (2) filter out ESI that is not subject to discovery. The parties will cooperate in the development of appropriate search methodology and criteria, including the potential use of computer-assisted search methodologies and other analytics-based search and filtering tools. The parties will discuss whether the use of analytics could be appropriate in this case.

# PRODUCTION FORMATS

**General Agreement**

The parties agree to produce documents in native or TIFF image file format, as detailed below. If particular documents warrant a different format, the parties will cooperate regarding the mutually acceptable production of such documents in an alternative format. A party that receives a document produced in TIFF or other format may make a reasonable request to receive the document in its native format, and upon receipt of such a request, the producing party shall produce the document in its native format.

The parties shall consider producing Excel and PowerPoint files in native format. Audio, video, and other files that are not reasonably useable when converted to TIFF format shall be produced in native format. Documents containing redactions shall be produced in TIFF format with OCR text. All other file types shall be produced in TIFF format unless otherwise agreed upon.

The parties agree to continue to meet and confer about the production formats as necessary.

**Image File Production Requirements**

Document images will be provided as single-page TIFF format, using Group 4 compression with at least 300 dots per inch (“dpi”) resolution. Images may be reduced by up to 10% to allow for a dedicated space for page numbering and other endorsements of documents. Images will be in black and white, unless color is necessary to understand the meaning of the document.

A cross-reference load file in an Opticon (.opt or .log), IPRO (.lfp), or other similar file format will accompany the images, showing the document boundaries and the correlation between the unique page identifier of the document (*i.e.*, “Bates Number”) and the location of the file on the delivery media.

Each page of a document will be electronically saved into an image file. If a document is more than one page, the unitization of the document and any attachments will be maintained as it existed in the original form and reflected in the load file. The parties will make their best efforts to unitize documents correctly.

**Metadata Production Requirements**

The parties agree to provide the metadata fields for all ESI produced, to the extent such metadata exists, as described in Appendix A. The parties agree to continue to meet and confer as need regarding metadata fields.

**De-Duplication**

A party is only required to produce a single copy of a responsive document. Parties may globally de-duplicate stand-alone documents or entire document families using hash value matching (such as MD5 or SHA-1 values). ESI that is not an exact duplicate may not be removed. Paper documents shall not be eliminated as duplicates of responsive ESI. To the extent the parties de-duplicate stand-alone electronic documents against an e-mail attachment, the attachment to the e-mail must be the document that is produced.

**Production of Emails**

Parent-child relationships (the association between emails and attachments) will be preserved, and attachments to e-mails will not be eliminated from the parent e-mail. Email attachments will be consecutively produced with the parent email, and families will be associated using attachment range metadata.

**Other Specific Production Agreements**

The parties further agree as follows:

1. Common system files defined by the NIST library (http://www.nsrl.nist.gov/) need not be produced even if part of families
2. Parties have no obligation to make non-text-searchable documents text-searchable (by OCR scanning, for example). However, to the extent documents already exist in text-searchable format independent of this litigation, or are converted to text-searchable format for use in this litigation (including for use by the producing party), then such documents will be produced in the same text-searchable format at no cost to the receiving party.
3. If a party converts paper documents into electronic format, distinct documents should not be merged into a single record, and single documents should not be split into multiple records (*i.e.*, paper documents should be logically unitized). In the case of an organized compilation of separate documents – for example, a binder containing several separate documents behind numbered tabs – the document behind each tab should be scanned separately, but the relationship among the documents in the compilation should be reflected in the proper coding of the beginning and ending document and attachment fields. For each document the title or subject, and date should be captured as metadata. If the document was originally an email, and this now only exists as paper form, the to / from / cc / date and subject should be captured as metadata too.
4. The parties will make reasonable efforts to identify as exception files those documents that cannot be produced or imaged due to technical difficulties (such as corruption, password protection, digital rights management, or proprietary software associated to the file). Identified exception files will be listed on a log that includes each file’s name, custodian, and reason for the exception.
5. The parties will make reasonable efforts to ensure that documents produced in native form are decrypted (or that passwords are supplied).
6. Any media used for production of documents will be encrypted by the producing party. The producing party will contemporaneously transmit the encryption key or password to the receiving party under separate cover.

# DOCUMENTS PROTECTED FROM DISCOVERY

**Non-Waiver of Protection**

Pursuant to Fed. R. Evid. 502(d), any party's production of documents covered by an applicable privilege or protection shall not constitute a waiver of the privilege or protection with respect to those documents or the subject matter of those documents in this case or any other federal or state proceeding. Nothing in this paragraph shall require a party to produce documents that are protected from disclosure. This paragraph shall be interpreted to provide the greatest protection allowed by Federal Rule of Evidence 502, or otherwise permitted by law.

Nothing contained herein is intended to or shall serve to limit a party’s right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.

**Privilege Logs**

A party that withholds ESI or documents on the grounds of attorney-client privilege and/or work product protection shall provide a:

(a) listing of such ESI and documents in electronic spreadsheet format providing as much objective metadata as is reasonably available (e.g., document control number, date, author(s), recipient(s), file type, etc.; “objective metadata” does not include substantive content from, or a subjective description of the document or ESI being withheld) and an indication of the privilege and/or protection being asserted; and

(b) description by category of ESI and documents that the withholding party asserts are privileged or protected..

Communications involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log. The Parties agree to meet and confer to address undue burden related to this requirement. The privilege log will be produced in accordance with the timing specified by the Federal Rules of Civil Procedure.

**“Clawback” of Documents**

Any Party that inadvertently discloses or produces a document or ESI that it considers privileged or otherwise protected from discovery will give written notice to the Receiving Party, identifying the document or ESI in question, the asserted privilege or protection, and the grounds therefor.

Upon receipt of notice of the assertion of privilege or protection over produced documents or ESI, the receiving party will:

(a) to whatever extent it contests the assertion of privilege or protection, promptly

so notify the producing party, and maintain the contested documents and ESI in confidence pending resolution of the contest by the parties or the Court; and

(b) to whatever extent the receiving party does not contest the assertion of privilege or protection, promptly certify in writing to the producing party that it has returned or destroyed the applicable document(s) and/or ESI, and has made reasonably diligent efforts to identify and destroy each copy thereof and all information derived therefrom (normally reasonable diligence will not include disaster recovery media).

In the event of a contested assertion of privilege or protection over produced documents that cannot be resolved amicably after meeting and conferring in good faith, either party may bring the contest to the attention of the Court by motion.

# THIRD-PARTY ESI DISCOVERY

The Parties identify the following third parties likely to have ESI relevant to this matter: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

A party that issues a non-party subpoena (the “Issuing Party”) will include a copy of this Stipulated Order with the subpoena, and will request that non-parties produce documents in accordance with the specifications set forth herein.

The Issuing Party will produce any documents obtained under a subpoena to all other parties. Any documents the Issuing Party does not intend to process for its own use may be disseminated to all other Parties in the format in which such documents are received by the Issuing Party. If the Issuing Party subsequently processes any such documents, the Issuing Party will produce those processed documents to all other parties.

If the non-party production is not Bates-stamped, the Issuing Party will endorse the non-party production with unique prefixes and Bates numbers prior to producing them to all other parties.

The parties may decide to meet and confer regarding cost sharing arrangements for third party discovery but are under no obligation to do so.

# MODIFICATION

This Stipulated Order may be modified by a Stipulated Order of the parties by the Court for good cause shown or for any other reason the Court deems appropriate.

**IT IS SO STIPULATED**, through Counsel of Record.

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| --- | --- |
| Dated: |  |
|  | Counsel for Plaintiff |
| Dated: |  |
|  | Counsel for Defendant |

**IT IS ORDERED** that the forgoing Agreement is approved.

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| Dated: |  |
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1. Please note, data sources for inclusion are case specific. Confer with your liaison to determine which apply to your case. Other examples for consideration include instant messages; audio, video, or audio-visual information, including voicemail; and materials retained primarily for backup or disaster recovery purposes. [↑](#footnote-ref-1)
2. Please note, in many cases the agreed upon temporal scope of discovery should be the same as the agreed upon scope for preservation. However, in some cases there will be a reason for those date ranges to differ with a broader scope for preservation. [↑](#footnote-ref-2)