

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	Civil Action No. 1:17-cv-00006
Plaintiff)	
)	
v.)	
)	
ROBERT BRACE, ROBERT BRACE)	
FARMS, INC., and ROBERT BRACE and)	
SONS, Inc.)	
)	
Defendants)	

RESPONSE TO MOTION TO ENTER ORDER REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION AND CLAIMS OF PRIVILEGE OR WORK PRODUCT PROTECTION

Defendants, Robert Brace, Robert Brace Farms, Inc., and Robert Brace and Sons, Inc. (collectively, “Brace”) file this Response to the United States’ Motion to Enter Order Regarding Discovery of Electronically Stored Information and Claims of Privilege or Work Product Protection (ECF No. 25).

1. As stated by the United States in its Motion, the parties agree in substantial part on an order regarding the discovery of ESI. The United States, however, refused to agree to include certain language requested by Defendants, specifically:

(a) In paragraphs 4 and 8, Defendants propose language reaffirming that EPA will continue its preservation of ESI consistent with and to the full extent required by any applicable published agency policy, procedure or guideline, as set forth in the examples provided in the accompanying footnotes.

(b) In paragraph 5, Defendants propose language identifying an example of a showing of extraordinary circumstances and good cause for the production of certain information.

2. Attached hereto as Exhibit A is a redlined copy of a proposed Order and Stipulation containing the Defendants' proposed additions to the proposed Order and Stipulation filed by the United States with its Motion.

3. Attached hereto as a Proposed Order is a clean copy of Defendants' proposed Order and Stipulation, which includes Defendants' requested additions to the proposed Order and Stipulation filed by the United States with its Motion.

WHEREFORE, the Defendants, by and through their undersigned attorneys, respectfully requests that the Court enter the Proposed Order Regarding Discovery of Electronically Stored Information and Claims of Privilege or Work Product Protection filed herewith.

<p>Respectfully submitted,</p> <p>THE KOGAN LAW GROUP, P.C..</p> <p>By: <u>/s/ Lawrence A Kogan</u> Lawrence A. Kogan, Esq. (<i>Pro Hac Vice</i>) (NY # 2172955) 100 United Nations Plaza Suite #14F New York, New York, 10017</p> <p>(t)212 644-9240</p> <p>Email: lkogan@koganlawgroup.com</p> <p>Attorneys for Defendants, Robert Brace and Robert Brace Farms, Inc.</p>	<p>Respectfully submitted,</p> <p>KNOX McLAUGHLIN GORNALL & SENNETT, P.C.</p> <p>By: <u>/s/ Neal R. Devlin</u> Neal R. Devlin, Esq. (PA ID No. 89223) Alexander K. Cox, Esq. (PA ID No. 322065) 120 West Tenth Street Erie, PA 16501-1461 Telephone: (814) 459-2800 Fax: (814) 453-4530 Email: ndevlin@kmgslaw.com</p> <p>Attorneys for Defendants, Robert Brace and Robert Brace Farms, Inc.</p>
---	---

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:17-00006-BR
)	
ROBERT BRACE, and)	
ROBERT BRACE FARMS, Inc., and)	
ROBERT BRACE and SONS, Inc.,)	
)	
Defendants.)	
_____)	

**ORDER AND STIPULATION REGARDING DISCOVERY OF ELECTRONICALLY
STORED INFORMATION AND CLAIMS OF PRIVILEGE OR WORK PRODUCT
PROTECTION**

I. DEFINITIONS

1. The terms used in this stipulation and order that are also used in the Federal Rules of Civil Procedure have the same meaning that they have under the Federal Rules, unless otherwise provided in this stipulation and order. Whenever the terms set forth below are used in this stipulation and order, the following definitions apply:

(a) "Draft," when used to describe either an electronic or hard copy document, means "a preliminary version of a document that has been shared by the author with another person (by email, print, or otherwise) or that the author no longer intends to finalize or to share with another person."

(b) "Duplicate," when used to describe either an electronic or hard copy document, means that the document does not show any facial differences, such as the inclusion of highlights, underlining, marginalia, total pages, attachments, markings, revisions, or the

inclusion of tracked changes. Differences in system metadata fields, such as date created or modified, that do not affect the face of the document, are not relevant to determining whether the document is a duplicate.

(c) “Gigabyte” means one billion bytes or 1,000 megabytes.

(d) “Parties” means the parties to this litigation, including their employees and agents.

(e) “Policy” means a regular practice at an entity that managers know about and expect to be carried out.

II. PRESERVATION OF ESI

2. ESI That Is Not Reasonably Accessible. The following categories of ESI listed below are not reasonably accessible in this litigation:

(a) Data stored in a backup system for the purpose of system recovery or information restoration, including but not limited to, disaster recovery backup tapes, continuity of operations systems, and data or system mirrors or shadows, if such data are routinely deleted or written over in accordance with an established routine system maintenance practice;

(b) Voicemail messages;

(c) Instant messages, such as messages sent on AOL Instant Messenger or Microsoft Communicator;

(d) Text messages, such as cell phone to cell phone SMS messages;

(e) Electronic mail sent to or from a personal digital assistant (“PDA”), smartphone (e.g., BlackBerry, iPhone), or tablet (e.g., iPad) provided that a copy of such email is routinely saved elsewhere;

(f) Other electronic data stored on a PDA, smartphone, or tablet, such as calendar or contact data or notes, provided that a copy of such information is routinely saved elsewhere;

(g) Logs of calls made from cellular phones;

(h) Deleted computer files, whether fragmented or whole (nothing in this order authorizes the intentional deletion of ESI after the duty arose to preserve such ESI);

(i) Data stored in random access memory (“RAM”), cache memory, or in temporary or cache files, including internet history, web browser cache and cookie files, wherever located;

(j) Data stored on photocopiers, scanners, and fax machines;

(k) Server, system, or network logs;

(l) Electronic data temporarily stored by scientific equipment or attached devices, provided that the data that is ordinarily preserved as part of a laboratory report is, in fact, preserved in its ordinary location and form; and

(m) Data stored on legacy systems that were no longer in use five years before the complaint was filed.

3. Nothing in this Stipulation and Order prevents any Party from asserting, in accordance with the Federal Rules of Civil Procedure, that other categories of ESI are not reasonably accessible with the meaning of Rule 26(b)(2)(B).

4. The Parties need not preserve, for this litigation, the categories of ESI listed in paragraph 2 unless, on the date that this stipulation and order is entered by the Court, either Party has a Policy that results in the routine preservation of such ESI, in which case such Party shall continue to preserve such ESI in accordance with its Policy. This means, for example, that

Plaintiff shall continue routine preservation of ESI consistent with and to the full extent required by relevant applicable published agency policies, procedures or guidelines.¹

5. No Discovery of Material Not Required To Be Preserved. Absent a showing of extraordinary circumstances, the Parties shall not seek discovery of items that need not be preserved pursuant to paragraphs 2-4 above. Any discovery request seeking such information must be served separately from discovery requests seeking other materials and must include a statement showing good cause for the discovery of such materials, considering the limitation of

¹ See, e.g., The White House Office of Management and Budget, *Revision of OMB Circular No. A-130, "Managing Information as a Strategic Resource,"* 81 FR 49689 (July 28, 2016), available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-07-28/pdf/2016-17872.pdf>; The White House Office of Management and Budget, *Circular No. A-130 – Managing Information as a Strategic Resource*, available at: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-17872.pdf> ("The Circular establishes general policy for information governance, acquisitions, records management, open data, workforce, security, and privacy"); U.S. Environmental Protection Agency, *EPA Records Schedules in Final Status* (April 2017), available at: https://www.epa.gov/sites/production/files/2017-05/documents/20170512_epa_records_schedules_in_final_status.pdf; U.S. Environmental Protection Agency, *EPA Information Procedures* (CIO 2155-P-02.0, 13-008) (July 23, 2016), available at: <https://www.epa.gov/sites/production/files/2013-11/documents/cio-2155.p-02.0.pdf>; U.S. Environmental Protection Agency, *Records Management Policy to Define EPA's Records Management Responsibilities* (CIO 2155.3, 15-005) (Feb. 10, 2015), available at: <https://www.epa.gov/sites/production/files/2015-03/documents/cio-2155.3.pdf>; U.S. Environmental Protection Agency, *EPA Information Directive Procedures – Essential (Vital) Records Procedures* (CIO 2155-P-01.1, 15-003) (March 24, 2015), available at: <https://www.epa.gov/sites/production/files/2015-08/documents/cio-2155.p-01.0.pdf>; U.S. Environmental Protection Agency, *EPA Information Procedures – Vital Records Procedures*, (CIO 2155.P-01.0) (June 8, 2009), available at: <https://www.epa.gov/sites/production/files/2013-11/documents/cio2155p010.pdf>; U.S. Environmental Protection Agency, *EPA Information Procedure – Managing Social Media Records* (CIO 2155-P-06.0, 15-006) (June 12, 2015), available at: <https://www.epa.gov/sites/production/files/2015-07/documents/2155-p-06.pdf>; U.S. Environmental Protection Agency, *EPA Information Standards – Document Digitalization (Scanning) Standards* (CIO 2155-S-01.0, 15-009) (Aug. 4, 2015), available at: <https://www.epa.gov/sites/production/files/2015-08/documents/2155-s-01.0.pdf>; U.S. Environmental Protection Agency, *EPA Information Standards – Enterprise Information Management (EIM) Minimum Metadata Standards*, (CIO 2135-S-01.0, CIO 15-004) (March 3, 2015), available at: <https://www.epa.gov/sites/production/files/2015-08/documents/cio-2135-s-01-0.pdf>; U.S. Environmental Protection Agency, *EPA Information Policy – Enterprise Information Management Policy (EIMP)*, (CIO 2135.0, 15-004) (March 3, 2015), available at: <https://www.epa.gov/sites/production/files/2015-08/documents/cio-2135-0.pdf>; U.S. Environmental Protection Agency, *SESD Operating Procedure, SESDPROC-002-RI, Control of Records*, (Control of Records (002) AF.R6) (Oct. 23, 2014), available at: <https://www.epa.gov/sites/production/files/2015-06/documents/Control-of-Records.pdf>; U.S. Environmental Protection Agency, *EPA Information Procedures - Procedures for Electronic Management of Rulemaking and Other Docketed Records in the Federal Docket Management System* (CIO 2155-P-02.0) (July 23, 2013), available at: <https://www.epa.gov/sites/production/files/2013-11/documents/cio-2155.p-02.0.pdf>.

Federal Rule 26(b)(2)(C). For purposes of example only, since EPA holds the only known copy in existence of the full trial record of the related (00229) action, Defendants' previously submitted request for EPA to provide Defendants with discovery of that information in electronic (or hardcopy) form would constitute s-a *per se* showing of extraordinary circumstances and good cause under the standards set forth above, consistent with the meaning of Federal Rule 26(b)(2)(C). If any general discovery request is susceptible of a construction that calls for the production of items that need not be preserved pursuant to paragraphs 2-4, such items need not be searched for, produced, or identified on a privilege log pursuant to Fed. R. Civ. P. 26(b)(5).

Formatted: Font: Italic

6. Use of Documents During Litigation. Notwithstanding any other provision of this Order, the Parties may take any of the following actions with respect to documents and ESI without breaching their duty to preserve documents and ESI:

(a) The Parties may continue to work, in the ordinary course of business, on documents that do not meet the definition of Draft in paragraph 1. However, the Parties shall preserve Draft documents for discovery.

(b) The Parties may move unfiled documents or ESI into files or folders that adhere to an organizational scheme that was created before the complaint was filed in this matter. Nothing in this paragraph prevents the Parties from implementing an organizational scheme that applies only to documents or ESI created after the complaint was filed in this matter.

(c) The Parties may delete, overwrite, or wipe ESI from devices that are being replaced, upgraded, reimaged, disposed of, or returned at the end of lease, provided that the potentially relevant ESI is first copied to a new location in a manner that preserves the data, including metadata, that must be produced pursuant to Section V of this Order.

(d) The Parties may move data from one device to another, or from one location to another, provided that a copy of the ESI remains accessible in the first location or the new copy is created in a manner that preserves the data, including metadata, that must be produced pursuant to Section ~~VVI~~ of this Order.

(e) The Parties may load loose ESI into an enterprise content management system, provided that: (1) the enterprise content management system captures all of the metadata fields that must be produced under this order and does not convert the format of the ESI in a way that makes it significantly less accessible; or (2) the Parties maintain a copy of the ESI in its native format and make their production from this native file collection.

(f) The Parties may upgrade, patch, reprogram, or customize software that stores relevant data, even if such actions alter the way data is maintained, stored, or viewed.

(g) The Parties may take any of the following actions with respect to data in a database provided that it is part of the routine use of the database: input additional data; access data; update the software running the database; append new data; and modify existing data.

(h) The Parties may edit or take down any data on a publicly accessible internet site.

(i) The Parties may add data to an intranet or private website. The Parties may edit or take down any data on an intranet or private website, provided that a copy of the data is made before the change and is preserved for discovery.

(j) The Parties may compress, decompress, encrypt, or decrypt data subject to preservation in this matter provided that any data losses during such processes do not result in loss of the metadata required to be produced under this Order or significantly degrade the quality of the data.

(k) The Parties may update social media sites, but may not take affirmative steps to delete relevant data posted before the filing of the Complaint.

7. Preservation Does Not Affect Discoverability or Claims of Privilege. By preserving documents or ESI for the purpose of this litigation, the Parties are not conceding that such material is discoverable, nor are they waiving any claim of privilege.

8. Other Preservation Obligations Not Affected. Nothing in this agreement affects any obligations of the Parties to preserve documents or information for purposes other than this litigation, such as pursuant to court order, administrative order, statute and/or regulation,² or in response to other anticipated litigation.

III. COLLECTION

9. Deduplication.

(a) *Deduplication of e-mail.* The Parties may deduplicate email by:

- (1) comparing the MessageID or UNID metadata fields; or
- (2) calculating and comparing the MD5 or SHA-1 hash value based on

the following files: to, from, cc, bcc, subject, body, and attachment names.

(b) The Parties hereby stipulate and agree that in this matter there is a rebuttable presumption of evidence that an e-mail correctly addressed to a recipient was actually delivered to that recipient's e-mail inbox.

² See, e.g., U.S. National Archives and Records Administration, *Records Managers - Federal Laws, Policy & Regulations*, available at: <https://www.archives.gov/records-mgmt/laws> (identifying "Federal Records Management laws and regulations that must be followed when managing government records," including, but not limited to: 18 U.S.C. Chapter 101, §2071; 18 U.S.C. Chapter 121; 40 U.S.C. Chapter 25; 44 U.S.C. Chapter 31; 44 U.S.C. Chapter 33; 36 C.F.R. Chapter XII, Subchapter B)). See also U.S. National Archives and Records Administration, *Guide to Federal Records - Records of the Environmental Protection Agency [EPA]*, available at: <https://www.archives.gov/research/guide-fed-records/groups/412.html> (setting for the location of all records of the EPA included in "Record Group 412" spanning from 1944-1996).

Formatted: Font: Italic

Formatted: English (United States)

Formatted: Space After: 0 pt, Line spacing: single

(c) *Deduplication of ESI other than e-mail.* The Parties may identify, based on MD5 or SHA-1 hash values, exact duplicates of electronic files other than e-mails that are larger than zero bytes and smaller than two gigabytes. The Parties shall, to the extent practicable, produce only one copy of each file.

10. Search Technology.

(a) Image files, image-only PDFs, and audio or video files must be reviewed without culling by search terms or other technologies that rely primarily on text.

(b) If a Party intends to use search terms, it shall meet and confer with the other Parties to identify a mutually agreeable protocol for applying search terms.

(c) Nothing in this paragraph obligates any Party to agree to perform an electronic search or to accept the results of an electronic search as a sufficient response to a discovery request.

11. Third-Party Data. The Parties shall meet and confer before serving any subpoenas in this matter on commercial e-mail providers, such as Google™ or Yahoo™, or any social media companies such as Facebook™ or Twitter™.

12. Privileged Materials Located in the Offices of Counsel. The Parties agree that, in response to general discovery requests, the Parties need not search for and produce, nor create a privilege log for, any privileged or work product material that is located in the offices of counsel, including the U.S. Department of Justice, the Office of Regional Counsel, EPA Region III or Defendants' counsel. This limitation has no effect on the parties' obligations to preserve, search for, produce, or otherwise identify as privileged, all documents that are otherwise in a party's possession. Nor may any party rely upon this limitation as grounds to claim ignorance of any

documents previously in a party's possession if the only copy(ies) of such document(s) is/are located in the office(s) of that party's counsel.

IV. PROCESSING

13. The Parties shall use reasonable efforts to process ESI for production in accordance with Section ~~VVI~~ of this Stipulation and Order. If a party identifies ESI that may be responsive but that cannot be processed with reasonable effort, e.g., corrupt files or password-protected files for which the password is not known, it shall promptly identify such ESI to the requesting Party in a table that includes the following information: custodian name, filename, and file path.

14. The Parties shall extract and process embedded files as though they were separate files.

A. 502(d) Order.

15. This Order invokes Rules 16(b) and 26(c) of the Federal Rules of Civil Procedure, as well as the protections afforded by Rule 502(d) of the Federal Rules of Evidence.

Accordingly, the provisions in Rule 502(b) do not apply to the disclosure of communications or information in discovery in this matter.

16. The prosecution and defense of this action may require each Party to review and to disclose large quantities of information and documents, including electronically stored information, through the discovery process. As a result, page-by-page preproduction privilege review may impose an undue burden on the Parties' resources.

17. Each party is entitled to decide the appropriate degree of care to exercise in reviewing materials for privilege, taking into account the volume and sensitivity of the materials, the demands of the litigation, and the resources that the party can make available. Irrespective of the care that is actually exercised in reviewing materials for privilege, the Court hereby orders

pursuant to Rule 502(d) of the Federal Rules of Evidence that disclosure of privileged or protected information or documents in connection with this litigation will not constitute or be deemed a waiver or forfeiture—in this or any other federal or state proceeding—of any claims of attorney-client privilege or work product protection that the disclosing Party would otherwise be entitled to assert with respect to the information or documents and their subject matter.

18. The Court further orders that because expedited or truncated privilege review is likely necessary for the just, speedy, and inexpensive resolution of this matter, the disclosure of privileged or protected information or documents in discovery conducted in this litigation will be deemed unintentional, inadvertent, and compelled by order of this Court. Such disclosure will not constitute a waiver of the disclosing party's right to claim any privilege or protection, including without limitation the deliberative process privilege, that would have applied to the information or documents or their subject matter but for the disclosure, provided only that the party disclaiming waiver employed procedures reasonably designed to screen out privileged materials.

19. Regardless of whether the procedures to screen out privileged materials were reasonable, the Parties shall not argue, in this forum or any other, that any privileges were waived as a result of disclosures in this litigation.

20. If a Party determines that it has produced a document upon which it wishes to make a claim of privilege, the producing Party shall, within 14 days of making such determination, give all counsel of record notice of the claim of privilege. The notice must identify each such document and the date it was produced. If the producing Party claims that only a portion of a document is privileged, the producing Party shall provide, along with the notice of the claim of privilege, a new copy of the document with the allegedly privileged

portions redacted. Any party that complies with this paragraph will be deemed to have taken reasonable steps to rectify disclosures of privileged or protected information or materials.

21. If a Party identifies a document that appears on its face or in light of facts known to the Party to be subject to another Party's claim of privilege, the Party identifying the potential claim of privilege is under a good-faith obligation to notify the Party holding the potential claim of privilege. Such notification will not waive the identifying Party's ability to subsequently challenge any assertion of privilege with respect to the identified document. If the Party holding the potential claim of privilege wishes to assert a claim of privilege, it shall provide notice in accordance with Paragraph ~~2020~~ above within five business days of receiving notice from the identifying Party.

22. Upon receiving notice of a claim of privilege on a produced document, the receiving Party shall, in accordance with Fed. R. Civ. P. 26(b)(5)(B), promptly sequester the specified information and any copies it has and shall not use or disclose the information, except as provided by Fed. R. Civ. P. 26(b)(5)(B), until the claim is resolved. Copies of privileged documents or information that have been stored on electronic media that is not reasonably accessible, such as disaster recovery backup media, are adequately sequestered as long as they are not restored; if such data is restored, the receiving Party shall take steps to re-sequester the restored information. If the receiving Party disclosed the information before being notified, it shall take reasonable steps to prevent further use of such information until the claim is resolved.

23. If a Party wishes to dispute a claim of privilege asserted under this Order, such Party shall, within 14 days, move the Court for an order compelling disclosure of the information. The Party shall follow the procedures described in Fed. R. Civ. P. 26(b)(5)(B) and shall not assert, as a ground for compelling disclosure, the fact or circumstances of the

disclosure. Pending resolution of the motion, the Parties shall not use the challenged information for any other purpose and shall not disclose it to any person other than those required by law to be served with a copy of the sealed motion.

24. The Parties may stipulate to extend the time periods specified in Paragraphs 20, 21, or 23 above.

25. Nothing in this order overrides any attorney's ethical responsibilities to refrain from examining or disclosing materials that the attorney knows or reasonably should know to be privileged and to inform the disclosing party that such materials have been produced.

26. The Party wishing to assert a claim of privilege retains the burden, upon challenge pursuant to Paragraph 23, of establishing the applicability of the claimed privilege.

27. This Order does not preclude a Party from voluntarily waiving any claims of privilege. The provisions of Rule 502(a) of the Federal Rules of Evidence apply when a Party uses privileged information to support a claim or defense.

B. Privilege Log

28. Embedded e-mails. An e-mail may be treated as a single document regardless of the number of embedded emails contained within the message body. The privilege log for an e-mail withheld under a claim of privilege, to the extent any is required, may identify the author, recipient(s), subject, dates and times based on the metadata from the top-level message, and is not required to include metadata from any e-mail embedded in the message body. However, if an e-mail contains both privileged and non-privileged communications, the non-privileged communications must be produced. This requirement may be satisfied by producing the original of the embedded, non-privileged e-mail, but if the original is not available, it may be satisfied by producing a redacted version of the privileged e-mail.

29. The obligation to provide a log of privileged or work product materials pursuant to Rule 26(b)(5)(A) presumptively does not apply to:

(a) Communications exclusively between a party and its trial counsel;

(b) Work product created by trial counsel for a party, or by an agent of trial counsel; or

(c) Internal communications within (a) a law firm, (b) a legal assistance organization, (c) a governmental law office, or (d) a legal department of a corporation or another organization.

V. PRODUCTION

30. Procedures for Production: The following procedures apply to producing documents or ESI. Compliance with these procedures constitutes compliance with Federal Rule of Civil Procedure 34(b)(2)(E) for this matter.

(a) TIFF Plus Text Productions. Except as stated otherwise below, ESI being produced by a Party shall be converted to 300 dpi, single-page, blank-and-white (no shades of gray) TIFF images using CCITT Group IV compression. Each page must be branded with a unique Bates number, which must not be an overlay of the image. Unless otherwise agreed by the Parties, the TIFF images must be produced on optical media or USB hard drive. Upon request of a party with regard to a specific ESI production, the producing party shall also provide : (1) an Opticon™ or IPRO® “cross reference file” which associates each Bates number with its corresponding single-page TIFF image file; and (2) a “text load file” containing each of the applicable metadata fields described in Appendix A. The text load file must contain Concordance® delimited text that will populate fields in a searchable flat database environment, containing one line for each document. Nothing in this stipulation requires a Party to manually

populate a metadata field in Appendix A (other than “Custodian” and “MD5Hash”) if such fields cannot be extracted from a document.

(b) Paper documents:

(1) Documents printed on paper that is larger than 11 x 17 inches may, at the Producing Party’s discretion, be produced on paper. Documents produced on paper must be produced as they are kept in the ordinary course of business or must be organized and labeled to correspond to the categories in the request.

(2) Documents printed on paper that is 11 x 17 inches or smaller must be scanned and produced on CD-ROM, DVD-ROM, or external hard drive.

(c) Word, WordPerfect, and PDF files.

(1) For Word, WordPerfect, and PDF files, the text load file must contain the full extracted text from the document, unless the document has been redacted during privilege review, in which case the load file may contain OCR text.

(2) For Word, WordPerfect, and PDF files that contain comments or tracked changes that are not part of the ordinary text, the TIFF images must be generated based on how the document appears when first opened using view settings contained in the file. The receiving party has the option, after reviewing the produced TIFF image, to request the native file.

(d) Microsoft PowerPoint files must be processed and produced as full color, half page, JPEG images with one slide per page.

(e) E-mail.

(1) If the producing party redacts any part of an e-mail before producing it, OCR text may be provided in place of extracted text.

(2) E-mail attachments must be processed as though they were separate documents, and the text load file must include a field in which the producing Party identifies, for each e-mail, the Bates range of any attachment;

(f) Microsoft Excel files and other spreadsheets must be produced in native file format in a separate folder on the production media. The text load file must contain a field that identifies the file path of the native file corresponding to each document, and the Parties must provide a placeholder TIFF image that shows the name of the native file and has a Bates number.

(g) Digital photographs must be produced as full color image files at their original resolution with Bates numbers branded onto them;

(h) Before any Party produces any other kinds of electronic data, including data from databases, CAD drawings, GIS data, videos, etc., the Parties shall meet and confer to determine a reasonably useable form for the production.

31. The receiving party has the option, after reviewing a black-and-white TIFF image, to enquire whether the original document contained color and, if so, to request a color image.

32. Except as stated above, a Party need not produce the same electronically stored information in more than one form.

VI. EXPERT DISCOVERY

33. Each Party shall not pursue through discovery, trial subpoena or otherwise:

(a) Notes taken by a witness required to provide a report under Fed. R. Civ. P. 26(a)(2)(B);

(b) Communications between a witness required to provide a report under Fed. R. Civ. P. 26(a)(2)(B) and a Party's representative—including, but not limited to, another

witness required to provide a report under Fed. R. Civ. P. 26(a)(2)(B)—regardless of the form of the communications, except to the extent that the communications:

- (1) Relate to compensation for an expert’s study or testimony;
- (2) Identify facts or data that a Party provided and that the expert considered in forming the opinions to be expressed; or
- (3) Identify assumptions that a Party provided and that the expert relied upon in forming the opinions to be expressed.

(c) The Parties shall bear the costs of their own testifying experts in responding to discovery, and shall not require the Party seeking discovery to pay the other Party’s testifying expert any fee for the time spent in responding to discovery.

VII. MISCELLANEOUS PROVISIONS.

34. Before filing any motion with the Court regarding electronic discovery or evidence, the Parties shall meet and confer in a good faith attempt to resolve such disputes.

35. Costs of Document Production. Unless this Court orders otherwise for good cause shown, each Party shall bear the costs of collecting, processing, reviewing, and producing its own documents.

36. Effect of Order. The Parties’ agreement to this Order is without prejudice to the right of any Party to seek an order from the Court to rescind or amend this Order for good cause shown. Nothing in this Order abridges the rights of any person to seek judicial review or to pursue other appropriate judicial action with respect to any discovery ruling made by the Court in this matter.

37. Integration/Appendices. The following documents are incorporated herein by reference:

(a) “Appendix A” is a table describing the fields to be included in the databases produced by each Party.

SO ORDERED this _____ day of _____, 2017,

Hon. Barbara J. Rothstein
U.S. District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:17-00006-BR
)	
ROBERT BRACE, and)	
ROBERT BRACE FARMS, Inc., and)	
ROBERT BRACE and SONS, Inc.,)	
)	
Defendants.)	
)	

**ORDER AND STIPULATION REGARDING DISCOVERY OF ELECTRONICALLY
STORED INFORMATION AND CLAIMS OF PRIVILEGE OR WORK PRODUCT
PROTECTION**

I. DEFINITIONS

1. The terms used in this stipulation and order that are also used in the Federal Rules of Civil Procedure have the same meaning that they have under the Federal Rules, unless otherwise provided in this stipulation and order. Whenever the terms set forth below are used in this stipulation and order, the following definitions apply:

(a) “Draft,” when used to describe either an electronic or hard copy document, means “a preliminary version of a document that has been shared by the author with another person (by email, print, or otherwise) or that the author no longer intends to finalize or to share with another person.”

(b) “Duplicate,” when used to describe either an electronic or hard copy document, means that the document does not show any facial differences, such as the inclusion of highlights, underlining, marginalia, total pages, attachments, markings, revisions, or the

inclusion of tracked changes. Differences in system metadata fields, such as date created or modified, that do not affect the face of the document, are not relevant to determining whether the document is a duplicate.

(c) “Gigabyte” means one billion bytes or 1,000 megabytes.

(d) “Parties” means the parties to this litigation, including their employees and agents.

(e) “Policy” means a regular practice at an entity that managers know about and expect to be carried out.

II. PRESERVATION OF ESI

2. ESI That Is Not Reasonably Accessible. The following categories of ESI listed below are not reasonably accessible in this litigation:

(a) Data stored in a backup system for the purpose of system recovery or information restoration, including but not limited to, disaster recovery backup tapes, continuity of operations systems, and data or system mirrors or shadows, if such data are routinely deleted or written over in accordance with an established routine system maintenance practice;

(b) Voicemail messages;

(c) Instant messages, such as messages sent on AOL Instant Messenger or Microsoft Communicator;

(d) Text messages, such as cell phone to cell phone SMS messages;

(e) Electronic mail sent to or from a personal digital assistant (“PDA”), smartphone (e.g., BlackBerry, iPhone), or tablet (e.g., iPad) provided that a copy of such email is routinely saved elsewhere;

(f) Other electronic data stored on a PDA, smartphone, or tablet, such as calendar or contact data or notes, provided that a copy of such information is routinely saved elsewhere;

(g) Logs of calls made from cellular phones;

(h) Deleted computer files, whether fragmented or whole (nothing in this order authorizes the intentional deletion of ESI after the duty arose to preserve such ESI);

(i) Data stored in random access memory (“RAM”), cache memory, or in temporary or cache files, including internet history, web browser cache and cookie files, wherever located;

(j) Data stored on photocopiers, scanners, and fax machines;

(k) Server, system, or network logs;

(l) Electronic data temporarily stored by scientific equipment or attached devices, provided that the data that is ordinarily preserved as part of a laboratory report is, in fact, preserved in its ordinary location and form; and

(m) Data stored on legacy systems that were no longer in use five years before the complaint was filed.

3. Nothing in this Stipulation and Order prevents any Party from asserting, in accordance with the Federal Rules of Civil Procedure, that other categories of ESI are not reasonably accessible with the meaning of Rule 26(b)(2)(B).

4. The Parties need not preserve, for this litigation, the categories of ESI listed in paragraph 2 unless, on the date that this stipulation and order is entered by the Court, either Party has a Policy that results in the routine preservation of such ESI, in which case such Party shall continue to preserve such ESI in accordance with its Policy. This means, for example, that

Plaintiff shall continue routine preservation of ESI consistent with and to the full extent required by relevant applicable published agency policies, procedures or guidelines.¹

5. No Discovery of Material Not Required To Be Preserved. Absent a showing of extraordinary circumstances, the Parties shall not seek discovery of items that need not be preserved pursuant to paragraphs 2-4 above. Any discovery request seeking such information must be served separately from discovery requests seeking other materials and must include a statement showing good cause for the discovery of such materials, considering the limitation of

¹ See, e.g., The White House Office of Management and Budget, *Revision of OMB Circular No. A-130, "Managing Information as a Strategic Resource,"* 81 FR 49689 (July 28, 2016), available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-07-28/pdf/2016-17872.pdf>; The White House Office of Management and Budget, *Circular No. A-130 – Managing Information as a Strategic Resource*, available at: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-17872.pdf> (“The Circular establishes general policy for information governance, acquisitions, records management, open data, workforce, security, and privacy”); U.S. Environmental Protection Agency, *EPA Records Schedules in Final Status* (April 2017), available at: https://www.epa.gov/sites/production/files/2017-05/documents/20170512_epa_records_schedules_in_final_status.pdf; U.S. Environmental Protection Agency, *EPA Information Procedures* (CIO 2155-P-02.0, 13-008) (July 23, 2016), available at: <https://www.epa.gov/sites/production/files/2013-11/documents/cio-2155.p-02.0.pdf>; U.S. Environmental Protection Agency, *Records Management Policy to Define EPA's Records Management Responsibilities* (CIO 2155.3, 15-005) (Feb. 10, 2015), available at: <https://www.epa.gov/sites/production/files/2015-03/documents/cio-2155.3.pdf>; U.S. Environmental Protection Agency, *EPA Information Directive Procedures – Essential (Vital) Records Procedures* (CIO 2155-P-01.1, 15-003) (March 24, 2015), available at: <https://www.epa.gov/sites/production/files/2015-08/documents/cio-2155.p-01.0.pdf>; U.S. Environmental Protection Agency, *EPA Information Procedures – Vital Records Procedures*, (CIO 2155.P-01.0) (June 8, 2009), available at: <https://www.epa.gov/sites/production/files/2013-11/documents/cio2155p010.pdf>; U.S. Environmental Protection Agency, *EPA Information Procedure – Managing Social Media Records* (CIO 2155-P-06.0, 15-006) (June 12, 2015), available at: <https://www.epa.gov/sites/production/files/2015-07/documents/2155-p-06.pdf>; U.S. Environmental Protection Agency, *EPA Information Standards – Document Digitalization (Scanning) Standards* (CIO 2155-S-01.0, 15-009) (Aug. 4, 2015), available at: <https://www.epa.gov/sites/production/files/2015-08/documents/2155-s-01.0.pdf>; U.S. Environmental Protection Agency, *EPA Information Standards – Enterprise Information Management (EIM) Minimum Metadata Standards*, (CIO 2135-S-01.0, CIO 15-004) (March 3, 2015), available at: <https://www.epa.gov/sites/production/files/2015-08/documents/cio-2135-s-01-0.pdf>; U.S. Environmental Protection Agency, *EPA Information Policy – Enterprise Information Management Policy (EIMP)*, (CIO 2135.0, 15-004) (March 3, 2015), available at: <https://www.epa.gov/sites/production/files/2015-08/documents/cio-2135-0.pdf>; U.S. Environmental Protection Agency, *SESD Operating Procedure, SESDPROC-002-R1, Control of Records*, (Control of Records (002)_AF.R6) (Oct. 23, 2014), available at: <https://www.epa.gov/sites/production/files/2015-06/documents/Control-of-Records.pdf>; U.S. Environmental Protection Agency, *EPA Information Procedures - Procedures for Electronic Management of Rulemaking and Other Docketed Records in the Federal Docket Management System* (CIO 2155-P-02.0) (July 23, 2013), available at: <https://www.epa.gov/sites/production/files/2013-11/documents/cio-2155.p-02.0.pdf>.

Federal Rule 26(b)(2)(C). For purposes of example only, since EPA holds the only known copy in existence of the full trial record of the related (00229) action, Defendants' previously submitted request for EPA to provide Defendants with discovery of that information in electronic (or hardcopy) form would constitute a *per se* showing of extraordinary circumstances and good cause under the standards set forth above, consistent with the meaning of Federal Rule 26(b)(2)(C). If any general discovery request is susceptible of a construction that calls for the production of items that need not be preserved pursuant to paragraphs 2-4, such items need not be searched for, produced, or identified on a privilege log pursuant to Fed. R. Civ. P. 26(b)(5).

6. Use of Documents During Litigation. Notwithstanding any other provision of this Order, the Parties may take any of the following actions with respect to documents and ESI without breaching their duty to preserve documents and ESI:

(a) The Parties may continue to work, in the ordinary course of business, on documents that do not meet the definition of Draft in paragraph 1. However, the Parties shall preserve Draft documents for discovery.

(b) The Parties may move unfiled documents or ESI into files or folders that adhere to an organizational scheme that was created before the complaint was filed in this matter. Nothing in this paragraph prevents the Parties from implementing an organizational scheme that applies only to documents or ESI created after the complaint was filed in this matter.

(c) The Parties may delete, overwrite, or wipe ESI from devices that are being replaced, upgraded, reimaged, disposed of, or returned at the end of lease, provided that the potentially relevant ESI is first copied to a new location in a manner that preserves the data, including metadata, that must be produced pursuant to Section V of this Order.

(d) The Parties may move data from one device to another, or from one location to another, provided that a copy of the ESI remains accessible in the first location or the new copy is created in a manner that preserves the data, including metadata, that must be produced pursuant to Section V of this Order.

(e) The Parties may load loose ESI into an enterprise content management system, provided that: (1) the enterprise content management system captures all of the metadata fields that must be produced under this order and does not convert the format of the ESI in a way that makes it significantly less accessible; or (2) the Parties maintain a copy of the ESI in its native format and make their production from this native file collection.

(f) The Parties may upgrade, patch, reprogram, or customize software that stores relevant data, even if such actions alter the way data is maintained, stored, or viewed.

(g) The Parties may take any of the following actions with respect to data in a database provided that it is part of the routine use of the database: input additional data; access data; update the software running the database; append new data; and modify existing data.

(h) The Parties may edit or take down any data on a publicly accessible internet site.

(i) The Parties may add data to an intranet or private website. The Parties may edit or take down any data on an intranet or private website, provided that a copy of the data is made before the change and is preserved for discovery.

(j) The Parties may compress, decompress, encrypt, or decrypt data subject to preservation in this matter provided that any data losses during such processes do not result in loss of the metadata required to be produced under this Order or significantly degrade the quality of the data.

(k) The Parties may update social media sites, but may not take affirmative steps to delete relevant data posted before the filing of the Complaint.

7. Preservation Does Not Affect Discoverability or Claims of Privilege. By preserving documents or ESI for the purpose of this litigation, the Parties are not conceding that such material is discoverable, nor are they waiving any claim of privilege.

8. Other Preservation Obligations Not Affected. Nothing in this agreement affects any obligations of the Parties to preserve documents or information for purposes other than this litigation, such as pursuant to court order, administrative order, statute and/or regulation,² or in response to other anticipated litigation.

III. COLLECTION

9. Deduplication.

(a) *Deduplication of e-mail.* The Parties may deduplicate email by:

- (1) comparing the MessageID or UNID metadata fields; or
- (2) calculating and comparing the MD5 or SHA-1 hash value based on

the following files: to, from, cc, bcc, subject, body, and attachment names.

(b) The Parties hereby stipulate and agree that in this matter there is a rebuttable presumption of evidence that an e-mail correctly addressed to a recipient was actually delivered to that recipient's e-mail inbox.

² See, e.g., U.S. National Archives and Records Administration, *Records Managers - Federal Laws, Policy & Regulations*, available at: <https://www.archives.gov/records-mgmt/laws> (identifying "Federal Records Management laws and regulations that must be followed when managing government records," including, but not limited to: 18 U.S.C. Chapter 101, §2071; 18 U.S.C. Chapter 121; 40 U.S.C. Chapter 25; 44 U.S.C. Chapter 31; 44 U.S.C. Chapter 33; 36 C.F.R. Chapter XII, Subchapter B)). See also U.S. National Archives and Records Administration, *Guide to Federal Records - Records of the Environmental Protection Agency [EPA]*, available at: <https://www.archives.gov/research/guide-fed-records/groups/412.html> (setting for the location of all records of the EPA included in "Record Group 412" spanning from 1944-1996).

(c) *Deduplication of ESI other than e-mail.* The Parties may identify, based on MD5 or SHA-1 hash values, exact duplicates of electronic files other than e-mails that are larger than zero bytes and smaller than two gigabytes. The Parties shall, to the extent practicable, produce only one copy of each file.

10. Search Technology.

(a) Image files, image-only PDFs, and audio or video files must be reviewed without culling by search terms or other technologies that rely primarily on text.

(b) If a Party intends to use search terms, it shall meet and confer with the other Parties to identify a mutually agreeable protocol for applying search terms.

(c) Nothing in this paragraph obligates any Party to agree to perform an electronic search or to accept the results of an electronic search as a sufficient response to a discovery request.

11. Third-Party Data. The Parties shall meet and confer before serving any subpoenas in this matter on commercial e-mail providers, such as Google™ or Yahoo™, or any social media companies such as Facebook™ or Twitter™.

12. Privileged Materials Located in the Offices of Counsel. The Parties agree that, in response to general discovery requests, the Parties need not search for and produce, nor create a privilege log for, any privileged or work product material that is located in the offices of counsel, including the U.S. Department of Justice, the Office of Regional Counsel, EPA Region III or Defendants' counsel. This limitation has no effect on the parties' obligations to preserve, search for, produce, or otherwise identify as privileged, all documents that are otherwise in a party's possession. Nor may any party rely upon this limitation as grounds to claim ignorance of any

documents previously in a party's possession if the only copy(ies) of such document(s) is/are located in the office(s) of that party's counsel.

IV. PROCESSING

13. The Parties shall use reasonable efforts to process ESI for production in accordance with Section V of this Stipulation and Order. If a party identifies ESI that may be responsive but that cannot be processed with reasonable effort, e.g., corrupt files or password-protected files for which the password is not known, it shall promptly identify such ESI to the requesting Party in a table that includes the following information: custodian name, filename, and file path.

14. The Parties shall extract and process embedded files as though they were separate files.

A. 502(d) Order.

15. This Order invokes Rules 16(b) and 26(c) of the Federal Rules of Civil Procedure, as well as the protections afforded by Rule 502(d) of the Federal Rules of Evidence.

Accordingly, the provisions in Rule 502(b) do not apply to the disclosure of communications or information in discovery in this matter.

16. The prosecution and defense of this action may require each Party to review and to disclose large quantities of information and documents, including electronically stored information, through the discovery process. As a result, page-by-page preproduction privilege review may impose an undue burden on the Parties' resources.

17. Each party is entitled to decide the appropriate degree of care to exercise in reviewing materials for privilege, taking into account the volume and sensitivity of the materials, the demands of the litigation, and the resources that the party can make available. Irrespective of the care that is actually exercised in reviewing materials for privilege, the Court hereby orders

pursuant to Rule 502(d) of the Federal Rules of Evidence that disclosure of privileged or protected information or documents in connection with this litigation will not constitute or be deemed a waiver or forfeiture—in this or any other federal or state proceeding—of any claims of attorney-client privilege or work product protection that the disclosing Party would otherwise be entitled to assert with respect to the information or documents and their subject matter.

18. The Court further orders that because expedited or truncated privilege review is likely necessary for the just, speedy, and inexpensive resolution of this matter, the disclosure of privileged or protected information or documents in discovery conducted in this litigation will be deemed unintentional, inadvertent, and compelled by order of this Court. Such disclosure will not constitute a waiver of the disclosing party's right to claim any privilege or protection, including without limitation the deliberative process privilege, that would have applied to the information or documents or their subject matter but for the disclosure, provided only that the party disclaiming waiver employed procedures reasonably designed to screen out privileged materials.

19. Regardless of whether the procedures to screen out privileged materials were reasonable, the Parties shall not argue, in this forum or any other, that any privileges were waived as a result of disclosures in this litigation.

20. If a Party determines that it has produced a document upon which it wishes to make a claim of privilege, the producing Party shall, within 14 days of making such determination, give all counsel of record notice of the claim of privilege. The notice must identify each such document and the date it was produced. If the producing Party claims that only a portion of a document is privileged, the producing Party shall provide, along with the notice of the claim of privilege, a new copy of the document with the allegedly privileged

portions redacted. Any party that complies with this paragraph will be deemed to have taken reasonable steps to rectify disclosures of privileged or protected information or materials.

21. If a Party identifies a document that appears on its face or in light of facts known to the Party to be subject to another Party's claim of privilege, the Party identifying the potential claim of privilege is under a good-faith obligation to notify the Party holding the potential claim of privilege. Such notification will not waive the identifying Party's ability to subsequently challenge any assertion of privilege with respect to the identified document. If the Party holding the potential claim of privilege wishes to assert a claim of privilege, it shall provide notice in accordance with Paragraph 20 above within five business days of receiving notice from the identifying Party.

22. Upon receiving notice of a claim of privilege on a produced document, the receiving Party shall, in accordance with Fed. R. Civ. P. 26(b)(5)(B), promptly sequester the specified information and any copies it has and shall not use or disclose the information, except as provided by Fed. R. Civ. P. 26(b)(5)(B), until the claim is resolved. Copies of privileged documents or information that have been stored on electronic media that is not reasonably accessible, such as disaster recovery backup media, are adequately sequestered as long as they are not restored; if such data is restored, the receiving Party shall take steps to re-sequester the restored information. If the receiving Party disclosed the information before being notified, it shall take reasonable steps to prevent further use of such information until the claim is resolved.

23. If a Party wishes to dispute a claim of privilege asserted under this Order, such Party shall, within 14 days, move the Court for an order compelling disclosure of the information. The Party shall follow the procedures described in Fed. R. Civ. P. 26(b)(5)(B) and shall not assert, as a ground for compelling disclosure, the fact or circumstances of the

disclosure. Pending resolution of the motion, the Parties shall not use the challenged information for any other purpose and shall not disclose it to any person other than those required by law to be served with a copy of the sealed motion.

24. The Parties may stipulate to extend the time periods specified in Paragraphs 20, 21, or 23 above.

25. Nothing in this order overrides any attorney's ethical responsibilities to refrain from examining or disclosing materials that the attorney knows or reasonably should know to be privileged and to inform the disclosing party that such materials have been produced.

26. The Party wishing to assert a claim of privilege retains the burden, upon challenge pursuant to Paragraph 23, of establishing the applicability of the claimed privilege.

27. This Order does not preclude a Party from voluntarily waiving any claims of privilege. The provisions of Rule 502(a) of the Federal Rules of Evidence apply when a Party uses privileged information to support a claim or defense.

B. Privilege Log

28. Embedded e-mails. An e-mail may be treated as a single document regardless of the number of embedded emails contained within the message body. The privilege log for an e-mail withheld under a claim of privilege, to the extent any is required, may identify the author, recipient(s), subject, dates and times based on the metadata from the top-level message, and is not required to include metadata from any e-mail embedded in the message body. However, if an e-mail contains both privileged and non-privileged communications, the non-privileged communications must be produced. This requirement may be satisfied by producing the original of the embedded, non-privileged e-mail, but if the original is not available, it may be satisfied by producing a redacted version of the privileged e-mail.

29. The obligation to provide a log of privileged or work product materials pursuant to Rule 26(b)(5)(A) presumptively does not apply to:

- (a) Communications exclusively between a party and its trial counsel;
- (b) Work product created by trial counsel for a party, or by an agent of trial counsel; or
- (c) Internal communications within (a) a law firm, (b) a legal assistance organization, (c) a governmental law office, or (d) a legal department of a corporation or another organization.

V. PRODUCTION

30. Procedures for Production: The following procedures apply to producing documents or ESI. Compliance with these procedures constitutes compliance with Federal Rule of Civil Procedure 34(b)(2)(E) for this matter.

- (a) TIFF Plus Text Productions. Except as stated otherwise below, ESI being produced by a Party shall be converted to 300 dpi, single-page, blank-and-white (no shades of gray) TIFF images using CCITT Group IV compression. Each page must be branded with a unique Bates number, which must not be an overlay of the image. Unless otherwise agreed by the Parties, the TIFF images must be produced on optical media or USB hard drive. Upon request of a party with regard to a specific ESI production, the producing party shall also provide : (1) an Opticon™ or IPRO® “cross reference file” which associates each Bates number with its corresponding single-page TIFF image file; and (2) a “text load file” containing each of the applicable metadata fields described in Appendix A. The text load file must contain Concordance® delimited text that will populate fields in a searchable flat database environment, containing one line for each document. Nothing in this stipulation requires a Party to manually

populate a metadata field in Appendix A (other than “Custodian” and “MD5Hash”) if such fields cannot be extracted from a document.

(b) Paper documents:

(1) Documents printed on paper that is larger than 11 x 17 inches may, at the Producing Party’s discretion, be produced on paper. Documents produced on paper must be produced as they are kept in the ordinary course of business or must be organized and labeled to correspond to the categories in the request.

(2) Documents printed on paper that is 11 x 17 inches or smaller must be scanned and produced on CD-ROM, DVD-ROM, or external hard drive.

(c) Word, WordPerfect, and PDF files.

(1) For Word, WordPerfect, and PDF files, the text load file must contain the full extracted text from the document, unless the document has been redacted during privilege review, in which case the load file may contain OCR text.

(2) For Word, WordPerfect, and PDF files that contain comments or tracked changes that are not part of the ordinary text, the TIFF images must be generated based on how the document appears when first opened using view settings contained in the file. The receiving party has the option, after reviewing the produced TIFF image, to request the native file.

(d) Microsoft PowerPoint files must be processed and produced as full color, half page, JPEG images with one slide per page.

(e) E-mail.

(1) If the producing party redacts any part of an e-mail before producing it, OCR text may be provided in place of extracted text.

(2) E-mail attachments must be processed as though they were separate documents, and the text load file must include a field in which the producing Party identifies, for each e-mail, the Bates range of any attachment;

(f) Microsoft Excel files and other spreadsheets must be produced in native file format in a separate folder on the production media. The text load file must contain a field that identifies the file path of the native file corresponding to each document, and the Parties must provide a placeholder TIFF image that shows the name of the native file and has a Bates number.

(g) Digital photographs must be produced as full color image files at their original resolution with Bates numbers branded onto them;

(h) Before any Party produces any other kinds of electronic data, including data from databases, CAD drawings, GIS data, videos, etc., the Parties shall meet and confer to determine a reasonably useable form for the production.

31. The receiving party has the option, after reviewing a black-and-white TIFF image, to enquire whether the original document contained color and, if so, to request a color image.

32. Except as stated above, a Party need not produce the same electronically stored information in more than one form.

VI. EXPERT DISCOVERY

33. Each Party shall not pursue through discovery, trial subpoena or otherwise:

(a) Notes taken by a witness required to provide a report under Fed. R. Civ. P. 26(a)(2)(B);

(b) Communications between a witness required to provide a report under Fed. R. Civ. P. 26(a)(2)(B) and a Party's representative—including, but not limited to, another

witness required to provide a report under Fed. R. Civ. P. 26(a)(2)(B)—regardless of the form of the communications, except to the extent that the communications:

- (1) Relate to compensation for an expert's study or testimony;
- (2) Identify facts or data that a Party provided and that the expert considered in forming the opinions to be expressed; or
- (3) Identify assumptions that a Party provided and that the expert relied upon in forming the opinions to be expressed.

(c) The Parties shall bear the costs of their own testifying experts in responding to discovery, and shall not require the Party seeking discovery to pay the other Party's testifying expert any fee for the time spent in responding to discovery.

VII. MISCELLANEOUS PROVISIONS.

34. Before filing any motion with the Court regarding electronic discovery or evidence, the Parties shall meet and confer in a good faith attempt to resolve such disputes.

35. Costs of Document Production. Unless this Court orders otherwise for good cause shown, each Party shall bear the costs of collecting, processing, reviewing, and producing its own documents.

36. Effect of Order. The Parties' agreement to this Order is without prejudice to the right of any Party to seek an order from the Court to rescind or amend this Order for good cause shown. Nothing in this Order abridges the rights of any person to seek judicial review or to pursue other appropriate judicial action with respect to any discovery ruling made by the Court in this matter.

37. Integration/Appendices. The following documents are incorporated herein by reference:

(a) “Appendix A” is a table describing the fields to be included in the databases produced by each Party.

SO ORDERED this _____ day of _____, 2017,

Hon. Barbara J. Rothstein
U.S. District Judge

Appendix A:
Fields to Exchange in Databases of Discovery Materials

Name of Field	Type of field	Contents				
		E-mail	Word Processing or PDFs	Spreadsheets	Digital Photos	Paper
Bates Beg	Text	Bates number for the TIFF image of the first page	Bates number for the TIFF image of the first page	Bates number for the TIFF image of the first page, or, if spreadsheets are not TIFFed, the Bates number of the placeholder page	Bates number branded onto a TIFF file that has the same resolution as the native image file.	Bates number for the TIFF image of the first page
Bates End	Text	Bates number for the TIFF image of the last page	Bates number for the TIFF image of the last page	Bates number for the TIFF image of the last page or, if spreadsheets are not TIFFed, the Bates number of the placeholder page	Bates number branded onto the native image file	Bates number for the TIFF image of the last page
Attachment Range	Text	Bates number of the first page of the parent document and the last page of the last attachment.	“Attachments” include all embedded files and all documents (including e-mails) to which this file was attached or in which it was embedded. Bates number of the first page of the parent document and the last page of the last attachment is shown.	“Attachments” include all embedded files and all documents (including e-mails) to which this file was attached or in which it was embedded. Bates number of the first page of parent document and the last page of the last attachment is shown.	“Attachments” include all embedded files and all documents (including e-mails) to which this file was attached or in which it was embedded. Bates number of the first page of the parent document and the last page of the last attachment is shown.	“Attachments” include all document that were physically attached by clips, staples, or binding. Bates number of the first page of the parent document and the last page of the last attachment is shown.
Custodian	Text	<blank>	The name of the person who had primary control over the location from which the document was collected	The name of the person who had primary control over the location from which the document was collected	The name of the person who had primary control over the location from which the document was collected	The name of the person maintaining the file from which the paper was obtained
Sender Combined	Paragraph	“From” field	<blank>	<blank>	<blank>	<blank>

Name of Field	Type of field	Contents				
		E-mail	Word Processing or PDFs	Spreadsheets	Digital Photos	Paper
Addressee Combined	Paragraph	“To” field	<blank>	<blank>	<blank>	<blank>
CC Combined	Paragraph	“CC” field	<blank>	<blank>	<blank>	<blank>
BCC Combined	Paragraph	“BCC” field	<blank>	<blank>	<blank>	<blank>
Email Subject	Paragraph	“Subject” field	<blank>	<blank>	<blank>	<blank>
Email Sent Date	Date	The date and time the message was sent	<blank>	<blank>	<blank>	<blank>
Message ID	Text	For e-mails in Microsoft Outlook, the “Message ID” field; For e-mail stored in Lotus Notes, the UNID field	<blank>	<blank>	<blank>	<blank>
MD5 Hash	Paragraph	The MD5 hash value calculated based on addresses, subject line, body, and attachment names.	The MD5 hash value calculated when the file was collected (or, alternatively, when it was processed into the review database)	The MD5 hash value calculated when the file was collected (or, alternatively, when it was processed into the review database)	The MD5 hash value calculated when the file was collected (or, alternatively, when it was processed into the review database)	<blank>
File Name	Paragraph	<blank>	The name of the file	The name of the file	The name of the file	<blank>
File_Path	Paragraph	<blank>	The path to the native file on the production media (if it is being provided)	The path to the native file on the production media	<blank>	<blank>
Extracted or OCR Text	Paragraph	Text extracted from the message body	Text extracted from the file. However, if the file does not contain text or if redactions were made, then OCR text shall be provided.	Text extracted from the file or if redactions were made, then OCR text shall be provided.	<blank>	OCR Text