

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 20-cv-81205-RAR-REINHART

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS
GROUP, INC. d/b/a PAR FUNDING, et al,

Defendants.

**DEFENDANT LISA MCELHONE AND THE RECEIVER'S JOINT DISCOVERY
MEMORANDUM REGARDING HEARING SCHEDULED FOR MARCH 1, 2021**

Lisa McElhone (“McElhone”) and the Receiver (together, the “Parties”), pursuant to the Local Rules and the Court’s Standing Discovery Order, respectfully submit this Joint Discovery Memorandum regarding the discovery hearing to be conducted before Magistrate Judge Bruce E. Reinhart on March 1, 2021 (ECF No. 495).¹ The Parties certify that they have complied with the requirements for pre-hearing communication contained in the Court’s Standing Discovery Order.

I. Procedural Background and Current State of Discovery

The Securities and Exchange Commission (the “SEC”) commenced this action on July 24, 2020 (ECF No. 1), and on the same day sought appointment of a Receiver. (ECF No. 4). McElhone has served several Requests for Production on the Receiver. After various proceedings, including several meet-and-confer conferences between the Parties, the Receiver made his first production of documents on January 11, 2021. The Receiver made a second production on January 24, 2021, a third production (to re-produce certain files the Defendants could not access with the password information the Receiver previously provided) on January 28, 2021, a fourth production on February 23, 2021, and is in the final stages of preparing a fifth production of various emails, which will consist of 532,336 pages.

¹ Defense counsel for all Defendants join in McElhone’s position in this Joint Memorandum.

McElhone's position on the current state of discovery in connection with her multiple requests for production is set forth in the email dated February 9, 2021, annexed hereto as Exhibit A. On February 11, 2021, counsel for McElhone and counsel for the Receiver met and conferred about the issues raised therein. The Parties have reached agreement on many issues and agreed to defer certain other issues pending further discussions. One issue remains outstanding for which McElhone respectfully seeks this Court's intervention: McElhone requests that the Receiver produce the email mailboxes for seven (7) custodians - five (5) of which have been initially processed by the Receiver (*i.e.*, they are still in native format but able to be produced with control numbers to allow for tracking and control), and two (2) email accounts in unprocessed format.

II. The Issue Involved in this Discovery Dispute – Emails of the Defendants and Others

On January 12, 2021, the Receiver's counsel advised that they had initially processed email accounts of 25 key custodians in anticipation of making document productions. *See* Email of T. Kolaya dated January 12, 2021, annexed hereto as Exhibit B. The email reported the Receiver's expected initial processing fees for those email accounts to be about \$45,000, followed by monthly hosting costs around \$15,000. The Receiver proposed to have the Defendants provide search terms to the Receiver; the Receiver would then apply the search terms in an eDiscovery database and review the results for purposes of addressing potential confidentiality and privilege concerns, and thereafter provide the results to the Defendants.

McElhone has proposed that the Receiver should produce the full contents of the initially processed five (5) email custodians and provide the unprocessed data for two additional custodians, Ms. Villarose and Ms. Furman, whose emails have not undergone initial processing. *See* Emails of A. Futerfas dated January 25, 2021, and February 1, 2021, annexed hereto as Exhibits C and D.² The Receiver objects to producing the full contents of these email accounts to the Defendants.

A. McElhone's Position

This SEC filed this case on or about July 24, 2020. At that time, the Receiver took control of the books and records of Par Funding, a set of companies which had over 70 employees, in-house accountants, in-house counsel, external securities offerings and regulation counsel, an outside accounting firm specializing in MCA companies, outside auditing firms, and companies

² That email also requested that the Receiver add three (3) other company email addresses to the email accounts it was intending to process.

which conducted due diligence and underwriting analysis on Par's Funding's merchant clients. For the next five months, the Defense was beset with allegations based on documents denied to the Defense. Finally, on January 11, 2021 – five and 1/2 months after this case began – the Defense started to receive documents.³ The Defense is six months behind the Receiver in receiving and analyzing discovery.

An absolutely critical component of the defense to the SEC's allegations—and the Receiver's financial claims—resides in the emails of Joseph LaForte, Joseph Cole Barleta, Lisa McElhone, Jamie McElhone, Ben Mannes, Tori Villarose and Wendy Furman. Those emails contain critically important correspondence with the following people and entities: 70 employees; 12 in-house accountants and CPA's; in-house counsel; external counsel in Fox Rothschild;⁴ external counsel specializing in securities offerings and regulation; Par Funding's long time outside accounting firm which conducted daily reconciliations as well as audits; outside auditing firms; insurance companies; due diligence and underwriting for Par's merchant clients; amongst others. Par Funding funded over 14,000 merchant clients; engaged in over 4 million financial transactions; took in over \$1.2 billion in merchant payments and about \$492 million in investor funds; and paid investors back hundreds of millions of dollars in principal and interest. Par Funding was an extremely complex and massive operation.

The email accounts of Tori Villarose and Wendy Furman are directly at issue in this case. One of the principal allegations in the Amended Complaint is the credit and underwriting analysis of the merchant clients. The Complaint identifies, and the SEC has relied on, various merchant Declarations. And the SEC has made clear that its case alleges systemic underwriting issues. Tori Villarose was the Credit Committee Manager. Wendy Furman was the Underwriting Manager. Of course their email data is large – they did a large amount of work in credit and underwriting analysis and were the principle point of contact with the merchants in that regard. The Receiver asserts a very large expense (\$81,821) to “process” Ms. Villarose and Ms. Furman's currently unprocessed email files, and then another monthly cost to maintain them of \$19,638. There is no

³ As shown in Exhibit A, annexed hereto, although the Receiver suggested that its January 11th production would render the motion to compel moot (*see* DE464 at p.8), not all of those documents have yet been produced and the resolution of these issues were the subject of the February 11th and follow-up discussions amongst the Parties. Those discussions have been fruitful and thus, except for the emails issue, are not part of this application.

⁴ The Receiver notified the parties that it has waived privilege.

reason for that. Those unprocessed emails can easily be exported to our vendor in a day or two at virtually no cost. Our vendor will initially process those emails for \$32,720 and host these emails at a fraction of the monthly costs through the use of AI technology and defense search terms. These expenses will be borne by the defense.

McElhone's vendor can also quickly upload and host the five initially processed email accounts at a fraction of the fees the Receiver suggests. In addition to saving tens of thousands of dollars, Defense hosting will permit the Defense to conduct continuing searches and revise searches on the spot to review additional materials. Searches are an evolving process, particularly when there is so much relevant, indeed critical, material. Additionally, the Defense plans to use Continuous Active Learning AI technologies to locate documents to defend its position. This technology requires access to all of the data for it to be comprehensive. The defense proposal will keep the defense search terms confidential, which will preserve the work-product privilege, and not provide insight into the Defendants' case strategy and methodologies.⁵

Addressing the Receiver's purported control issues, our Vendor, an expert discovery and IT consultant, can provide both Parties with an initial processed production of the Villarose and Furman emails in accordance with the specifications in appendix 2.2 of Exhibit E. The Receiver can provide the same for the five already initially processed mailboxes. Our vendor has confirmed that this is a common practice when producing documents in large scale litigation matters throughout the country. Our vendor served on the committee drafting the ESI Guidelines of the District of Maryland which describes the practice extensively and is attached as Exhibit E. Both parties will quickly, and cost-effectively, have the ability to review and search the 7 emails datasets in a controlled manner. Both datasets will have the same control numbers for verification.⁶

B. *The Receiver's Position*

Through the Court's various Orders, the Receiver has been tasked with taking "custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Entities." *See* ECF No. 141, at 7(B). The Receiver has demonstrated on several

⁵ There is no need to delay production in order for the Receiver to determine if a document is non-Confidential. On December 16, 2020, Judge Ruiz entered a Protective Order. (ECF No. 437) The Defense is assuming that all of the production is under the Protective Order. If any party wishes to de-designate a document, they can ask the other side and follow the procedure.

⁶ With Your Honor's permission, at a conference on this matter, the Defense IT expert, who is also an attorney, can provide additional detail on this discussion.

occasions that the Defendants and other third parties refused to return to the Receiver, or otherwise attempted to gain unauthorized access to, files and data belonging to the Receivership Entities. *See, e.g.*, ECF Nos. 155, 260, 423, 464, 473. The Receiver has no way to monitor the dissemination, modification, and potential misuse of receivership records if he is required to produce native files. Only by processing the records in a mutually-agreeable format and producing them with Bates stamping that allows the parties to track and confirm the original versions of the records can the Receiver control where these records may be used, and who may access them.

McElhone is requesting emails from seven (7) custodians. The Receiver has already incurred the cost of processing the emails for five (5) of these custodians (Joseph LaForte, Joe Cole Barleta, Lisa McElhone, Jamie McElhone, and Ben Mannes). As a result, the Receiver can immediately apply search terms and, upon reaching agreement on reasonable results, Bates stamp and produce responsive emails from those search results. On the other hand, the Receiver is unable to “stamp” native documents (*i.e.*, the format McElhone has requested) and would be limited to simply changing the file names for those documents to include a Bates number and confidentiality designation. Likewise, without search terms, it would be an expensive and time-consuming process for the Receiver to Bates stamp, apply confidentiality designations, and produce the processed contents of the entire mailboxes for these custodians, which total in excess of 650 GB.

McElhone is also requesting the Receiver to produce the emails for two other custodians: former Par Funding employees Tori Villarose and Wendy Furman. These are two of the largest Par Funding email accounts. The uncompressed size of Ms. Villarose’s account is 928.2 GB, and Ms. Furman’s account is 380.6 GB. In order to process these accounts for production, the Receiver would be required to extract the data, which could expand the size of the mailbox by an estimated two and a half times. In other words, the estimated size of Ms. Villarose’s uncompressed mailbox may be 2.321 terabytes (2,321 GB) and Ms. Furman’s uncompressed mailbox may be 952 GB, for a total of approximately 3.273 terabytes (3,273 GB). The files maintained by these custodians are likely to be largely duplicative of the other accounts the Receiver has already processed, and McElhone has not demonstrated any reason to believe that these custodians have relevant materials that will not be in the position of the processed custodians.

Thus, for the same reasons set forth above, it is not reasonable to require the Receiver to produce these documents in native format. Additionally, the cost for the Receiver to process these emails, at a rate of \$25 per GB, is estimated to be \$81,825. Moreover, the estimated monthly cost

to host the emails from just these two accounts, at a rate of \$6 per GB per month, would be \$19,638. These costs are unreasonable and disproportionate to the needs of the case. These are expenses that the Receivership Estate—and, by extension, the investors—should not be required to incur.

It is customary in large electronic discovery cases for parties to apply search terms and filters to narrow the scope of production for emails.⁷ Indeed, in this very case Defendant Perry Abbonizio accepted the Receiver's invitation to propose search terms to assist in identifying emails that were potentially responsive to his document requests. The Receiver has already run those searches and is finalizing his production of responsive emails, which will include 532,336 pages.

It is not reasonable, on the other hand, to require the Receiver to produce the entire native and unprocessed mailboxes of multiple custodians. These mailboxes contain significant volumes of data that is wholly irrelevant to this litigation, as well as other information that is confidential and might be misused if the information found its way into the hands of somebody who should not have access to it. For example, merchant and investor contact information, bank account numbers, and other sensitive financial information are contained within these emails. Given the concerns the Receiver has already articulated regarding the need to maintain and protect this data as confidential, the Defendants should be required to provide search terms that the Receiver can apply for purposes of identifying potentially responsive documents. Moreover, should McElhone demand that the Receiver produce emails from additional email accounts beyond those the Receiver has already processed, McElhone should be responsible for the associated costs.

III. Conclusion

WHEREFORE, the Parties respectfully request the Court's guidance with respect to this discovery dispute regarding the Receiver's production of emails.

Dated: February 27, 2020

⁷ McElhone argues that providing the Receiver search terms to identify responsive documents would require the disclosure of work-product protected information. Courts routinely reject such an argument. See *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 110 (E.D. Pa. 2010) ("Moreover, the Court does not find that such information is subject to any work product protection, as it goes to the underlying facts of what documents are responsive to Plaintiffs' document requests and does not delve into the thought processes of Defendants' counsel"); *Apple, Inc. v. Samsung Elecs. Co. Ltd.*, 12-CV-0630-LHK PSG, 2013 WL 1942163, at *2 (N.D. Cal. May 9, 2013) (same).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 27, 2021, I electronically filed the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Timothy A. Kolaya
TIMOTHY A. KOLAYA

Exhibit “A”

From: [Alan Futerfas](#)
To: [Timothy Kolaya](#)
Cc: [Alan Futerfas](#)
Subject: Outstanding Discovery as of February 9, 2021.
Date: Tuesday, February 9, 2021 9:15:24 AM

Tim:

The purpose of this email is to address outstanding discovery due the Defense as of today. (Please ignore the yellow highlight below) Please feel free to call me as we would like to obtain the materials due in the most prompt and efficient manner possible.

A. Document Demands and Productions

On behalf of Ms. McElhone, we have sent to the Receiver five document demands. The First Document Demand, dated September 22, 2020, included Requests for Production 1 through 19. The Second Document Demand, dated December 10, 2020, included Requests for Production 20 through 24. The Third Document Demand, dated December 15, 2020, included Requests for Production 25 through 28. The Fourth Document Demand, dated January 25, 2021, included Requests for Production 29 through 30. The Fifth Document Demand, dated January 28, 2021, included Requests for Production 31 through 40.

The Receiver has made three document productions:

On January 11, 2021 at 11:18 pm, the Receiver made its First Production of documents, reflecting Bates Numbers CBSG-Receiver-000000001 through 000103887, described as:

Description	Beginning Bates No.	Ending Bates No.
Bank statements for Par Funding	CBSG-Receiver-000000001	CBSG-Receiver-000005984
Deposit Logs and Bank Activity Reports	CBSG-Receiver-000005985	CBSG-Receiver-000006049
Client Consolidation Schedule	CBSG-Receiver-000006050	CBSG-Receiver-000006050
Bank statements for Full Spectrum	CBSG-Receiver-000006051	CBSG-Receiver-000006977
Syndication Agreements	CBSG-Receiver-000006978	CBSG-Receiver-000007770
Tax Returns	CBSG-Receiver-000007771	CBSG-Receiver-000008101
Documents Relied Upon in Report from Development Specialists, Inc., ECF No. 426-1	CBSG-Receiver-000008102	CBSG-Receiver-000103885
CBSG QuickBooks	CBSG-Receiver-000103886	CBSG-Receiver-000103886
FSP QuickBooks	CBSG-Receiver-000103887	CBSG-Receiver-000103887

The password to the QuickBooks did not work, and a Re-Production of the QuickBooks was

sent on January 28, 2021 at 11:36 am.

On January 12, 2021 at 11:05 pm, the Receiver provided an update on planned future productions, but no additional documents were produced.

On January 24, 2021 at 2:23 pm, the Receiver made its Second Production of documents, reflecting Bates Numbers **CBSG-Receiver – 000119538-000112445**. This Production contained Investor Notes, Logs and Agreements.

On January 28, 2021 at 11:36 am, as a Third Production, the Receiver Re-Produced the QuickBooks files, which were given new Bates Number CBSG-Receiver-000122446, described as

Description	BegBates	EndBates
CBSG QuickBooks (Re-Production)	CBSG-Receiver-000122446	CBSG-Receiver-000122446

A new password for the Third Production was provided on January 28, 2021 at 11:37 am.

B. Documents Not Yet Produced Responsive to Ms. McElhone's First Three Document Demands

We have examined the Productions to date against our first three Document Demands and have identified the following documents that the Receiver has yet to produce:

- Request for Production 2— The Receiver has not yet produced any documents or communications concerning the current and closed client consolidation schedules;
- Requests for Production 4—The Receiver has not yet produced any documents or communications concerning bank activity reports;
- Requests for Production 17— The Receiver has not yet produced all of the Par Funding files located on the Par G Suite, including the accounting accounts payable files, vendor invoices, and retainer agreements with law firms;
- Requests for Production 19—The Receiver has produced the merchant underwriting documents for the so-called Top 10 Merchants, but has not produced those files for the remaining merchants, including those mentioned in the Amended Complaint. We note that Par had over 10,000 merchant clients and, since the Amended Complaint alleges a lack of merchant underwriting, all of those files should be produced;
- Requests for Production 20— The Receiver has not yet produced any documents or communications concerning the listed lawyers and law firms, including documents and communications concerning compliance;
- Requests for Production 21—The Receiver has not yet produced any documents or communications concerning insurance coverage for the business of Par Funding, and/or

the insurance coverage for Par Funding merchant clients;

- Requests for Production 22 and 23—The Receiver has not yet produced any documents or communications concerning Rod Ermel;
- Requests for Production 6-13, 17-18, 25—The Receiver has produced the Tax Returns for Full Spectrum Processing (FSP), but not for CBSG or the other related entities;
- Requests for Production 8-9—The Receiver has not yet produced the following account statements:
 - All Chase Bank Closing Statements;
 - Amex Cash 3005 - November 2019;
 - Amex Corp 01001 - October 2018;
 - Amex Corp 01005 - December 2017;
 - Amex Corp 01007 - July 2020;
 - Amex Corp 02003 - January 2020;
 - Amex Corp 02003 - July 2020;
 - Amex Corp 02003 - June 2020;
 - Amex Corp 11000 - All Statement after January 2020;
 - Amex Corp 11000 - November 2017;
 - Amex Corp 12008 - January 2020;
 - Amex Corp 12008 - July 2020;
 - Amex Corp 31008 - All Statements after March 2019;
 - Amex Corp 41009 - July 2020;
 - Amex Corp 51000 - March - August and December 2018;
 - Amex Corp 61001 - January 2020;
 - Amex Corp 61001 - July 2020;
 - Amex Platinum 6007 - December 2018;
 - Amex Platinum 6007 - November 2018;
 - Amex Plum 3000 - December 2018;
 - Amex Plum 3000 - November 2018;
 - Bancorp 6442 - December 2019;
 - BOSJ 2091 - December 2019;
 - Empire Bank 5805 - February 2020;
 - Empire Bank 5805 - March 2020;
 - First Bank 7807 7823 - August 2020;
 - Republic 4169 - March 2019; and
 - TD Bank 9496 - All Statement before July 2019.

All of these documents should be produced immediately.

C. Email Custodians

Pursuant to my email correspondence dated January 25, 2021 at 9:43 pm and February 1, 2021 at 5:08 pm, which responded to your notice of anticipated productions dated January 12, 2021 at 11:05 pm, we agreed to limit, for the time being, the number of individual email accounts to the following individuals. We also asked you to include the following three additional email addresses:

- Joseph LaForte
- Joe Cole Barleta
- Lisa McElhone
- Jamie McElhone
- Ben Mannes
- Tori Villarose
- Wendy Furman
- dealbin@parfunding.com
- submission@parfunding.com
- submissions@capitalsource2000.com

As I stated in my email of January 25, 2021 at 9:43 pm, the Defense can easily and inexpensively host the six email accounts on our platform for searches and review.

The emails for these six individuals should be produced immediately.

D. Ms. McElhone's Fourth and Fifth Document Demands

In addition, we are still awaiting on the following discovery from our Fourth and Fifth document demands. As we are sure you are aware, the Standing Discovery Order for Magistrate Reinhart encourages a rolling production of materials from the producing party.

Request for Production 29—The Receiver has not yet produced any documents or communications hosted by MCA Suites concerning or relating to the underwriting, analysis, financial condition and verification of the business and business premises of Merchants. This request includes the excel worksheets used to update the MCA suite portal.

Request for Production 30—The Receiver has not yet produced any documents or communications hosted by Converge Hub concerning or relating to the underwriting, analysis, financial condition and verification of the business and business premises of Merchants.

Request for Production 31—The Receiver has not yet produced any documents concerning or relating to Shane Heskin.

Request for Production 32—The Receiver has not yet produced documents concerning or relating to communications with the SEC about Shane Heskin.

Request for Production 33—The Receiver has not yet produced any documents concerning or relating to any Heskin Merchant Client.

Request for Production 34—The Receiver has not yet produced any documents concerning or relating to communications with the SEC about any Heskin Merchant Client.

Request for Production 35—The Receiver has not yet produced any documents concerning or

relating to any Qui Tam action relating to or concerning Par Funding.

Request for Production 36—The Receiver has not yet produced any documents concerning or relating to any Qui Tam action relating to or concerning Par Funding filed by Shane Heskin on his own behalf or as legal counsel for any other person or entity.

Request for Production 37—The Receiver has not yet produced any documents concerning or relating to any Qui Tam relating to or concerning Par Funding filed by or on behalf of a Heskin Merchant Client.

Request for Production 38—The Receiver has not yet produced any documents concerning or relating to any financial agreements or arrangements between the SEC and Shane Heskin.

Request for Production 39—The Receiver has not yet produced any documents concerning or relating to any financial agreements or arrangements between the SEC and any Heskin Merchant Client.

Request for Production 40—The Receiver has not yet produced any materials it has received pursuant to subpoenas served on third parties and others.

Please advise regarding the status of the Production of these documents.

E. Conclusion

The Receiver's duty to produce is ongoing. We look forward to receiving the materials requested herein.

Thank you.

Alan,

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Exhibit “B”

From: [Timothy Kolava](#)
To: ["berlina@sec.gov"](#); ["jlc@sallahlaw.com"](#); ["cdp@sallahlaw.com"](#); ["tah@sallahlaw.com"](#); ["jds@sallahlaw.com"](#); ["dab@sallahlaw.com"](#); ["vv@sallahlaw.com"](#); ["jak@sallahlaw.com"](#); ["florida@sallahlaw.com"](#); ["dan.small@hklaw.com"](#); ["aida.guerrero@hklaw.com"](#); ["Christopher.Taquinto@hklaw.com"](#); ["Allison.Kernisky@hklaw.com"](#); ["angel.barber@hklaw.com"](#); ["Chad.vanderhoef@hklaw.com"](#); ["brian.miller@akerman.com"](#); ["kelly.connolly@akerman.com"](#); ["kim.stathopoulos@akerman.com"](#); ["alejandropaz@akerman.com"](#); ["drashbaum@mnrlawfirm.com"](#); ["mordenes@mnrlawfirm.com"](#); ["jmarcus@mnrlawfirm.com"](#); ["kmeyers@mnrlawfirm.com"](#); ["jmays@mnrlawfirm.com"](#); ["Jrfesc61@aol.com"](#); ["jhirschhorn@gray-robinson.com"](#); ["andrew.saragoulis@gray-robinson.com"](#); ["anita.abrams@gray-robinson.com"](#); ["asfuterfas@futerfaslaw.com"](#); ["dfidman@ffslawfirm.com"](#); ["vpantin@ffslawfirm.com"](#); ["bschein@bettinascheinlaw.com"](#); ["arlaw@raikhelsonlaw.com"](#); ["haimovitch@kolawyers.com"](#); ["Chaparro@kolawyers.com"](#); ["fields@kolawyers.com"](#); ["ferguson@kolawyers.com"](#); ["nunez@kolawyers.com"](#); ["Alejandro Soto"](#)
Cc: [gja@pietragallo.com](#); [Douglas K. Rosenblum](#)
Subject: RE: SEC v. Complete Business Solutions Group, Inc., et al., No. 20-CV-81205-RAR (S.D. Fla.) / Receiver's First Requests for Production and Interrogatories
Date: Tuesday, January 12, 2021 11:05:00 PM

Dear Counsel:

We write to update you regarding the Receiver’s ongoing document production efforts in response to the various discovery requests the Defendants have served on the Receiver. As reflected in the Receiver’s objections and responses to these various requests for production, we would like to confer with you on certain discovery-related issues. We hope to work cooperatively with you to reach an agreement on an ESI protocol, proportionality concerns, and privilege issues to ensure you receive necessary discovery in a timely fashion, while also reasonably limiting the expense to the receivership estate.

As an initial matter, the Receiver made his first document production of a significant tranche of discovery materials on Monday, January 11, 2021. The initial production included several categories of financial and operational records, including:

- Static copies of the Quickbooks files for CBSG and FSP;
- Bank records and Amex statements for CBSG and FSP for 2016 through 2020;
- All other documents relied upon by DSI in preparing Exhibit 1 to the Declaration from Development Specialists, Inc, filed as ECF No. 426-1;
- Syndication agreements and reports;
- Par Funding’s consolidation summary report;
- Deposit Logs for 2016 through 2020; and
- Tax returns for CBSG and FSP for 2016 through 2019.

In addition, the Receiver will be making a second production in the coming days consisting of CBSG’s Investor Agreements, Investor Notes, and Investor Log Reports.

To respond to several of the other discovery requests, the Receiver is processing and uploading the contents of several email accounts, as well as certain subfolders from CBSG’s QNAP Drive and shared files on its G Suite, as well as various cloud-based accounts (*e.g.*, Right Networks, OneDrive, and Sharepoint) used by CBSG, ABFP, Retirement Evolution and others. Because these various data sources contain dozens of terabytes of data, it would be cost-prohibitive for the Receiver to process, host, and run structured searches across all of the data. Consequently, the Receiver has decided to process the email accounts for 25 custodians, with an estimated total expanded file size of approximately 2,100 GB, as follows:

Custodian	Company	Estimated Size (GB)
Joseph LaForte	Par Funding	119
Lisa McElhone	Par Funding	42
Joe Cole Barletta	Par Funding	210
Perry Abbonizio	Par Funding	12.25

James LaForte	Par Funding	630
Jaime McElhone	Par Funding	280
Anthony Fazio (AnthonyR)	Par Funding	42
Ben Mannes	Par Funding	1.75
Anthony Zingarelli	Par Funding	113.75
jobs@parfunding.com	Par Funding	140
Pete Mulcahy	Par Funding	15.75
Aida Lau	Par Funding	218.75
Alec Vagnozzi	ABFP	5.25
Andy Zuch	ABFP	10.5
Anita Badalmenti	ABFP	43.75
Dana Scheponik	ABFP	19.25
Dean Vagnozzi	ABFP	50.75
Dominic Primerano	ABFP	8.75
Karen Gillis	ABFP	3.5
Michelle Price	ABFP	47.25
Mike Tierney	ABFP	24.5
Shannon Westhead	ABFP	42
Stephen Breslow	ABFP	1.75
Michael Furman	United Fidelis	8.75
John Gissas	Retirement Evolution	10.5
		2,101.75

So that you can appreciate the cost of this effort, the Receiver expects the initial processing fees for this subset of data to be as high as \$45,000, followed by monthly hosting costs as high as \$15,000. Please let us know if you believe the Receiver should be processing, reviewing, and producing documents from the email accounts of any additional custodians, and provide us with your rationale for why you believe the inclusion of these additional custodians is proportionate to the needs of the case. Although we are willing to consider your input, we are reluctant to expand the scope of review at this time, absent an agreement for appropriate cost-shifting, considering the enormous eDiscovery costs that may be incurred every month.

The Receiver intends to utilize IST Management Services, Inc., an eDiscovery vendor, to process and host these electronic documents. Given the considerable costs associated with this process, we will be filing a motion with the Court, requesting approval to utilize IST for this purpose and to pay these costs according to IST's normal 30-day payment terms, in the ordinary course of the administration and operation of the receivership, as provided by Paragraph 56 of the Amended Receivership Order. **Please let us know by the close of business on Wednesday, January 13, 2021, of your position on this proposed motion.**

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Please let us know if you have questions about these discovery issues, or if there are any other matters you wish to discuss with us.

Regards,

Tim Kolaya



TIMOTHY A. KOLAYA
PARTNER

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MOBILE 305. 321. 3055
E-MAIL TKOLAYA@SFSLAW.COM
WEB WWW.SFSLAW.COM

ONE BISCAYNE TOWER
2 SOUTH BISCAYNE BOULEVARD
SUITE 1600
MIAMI, FL 33131

Exhibit “C”

From: [Alan Futerfas](#)
To: [Timothy Kolaya](#)
Cc: [Bettina Schein](#); [James Froccaro](#); [Jeffrey Marcus](#); [Jeffrey Cox](#); [Brian Miller](#)
Subject: Re: SEC v. Complete Business Solutions Group, Inc., et al., No. 20-CV-81205-RAR (S.D. Fla.) / Receiver's First Requests for Production and Interrogatories
Date: Monday, January 25, 2021 9:43:54 PM

Tim:

Thank you for the email discussion below. After due consideration, on behalf of Lisa McElhone, we request at this time all of the emails for only the following Par Funding/FSP personnel – pursuant to the Protective Order:

Joseph LaForte
Joe Cole Barleta
Lisa McElhone
Jamie McElhone
Ben Mannes
Tori Villarose
Wendy Furman

This is obviously a manageable amount of data and we propose to host it on our defense platform (at very little cost) for searches and review. Please note that, in our view, searches are a fluid process that constantly changes as results are reviewed and is thus a work-product activity. In addition, having to constantly go through a third party will further delay what is already a significantly delayed discovery schedule, and will result in additional costs to the Receivership estate.

Thank you,

Alan

The Law Offices of Alan S. Futerfas
565 Fifth Ave., 7th Floor
New York, NY 10017
212-684-8400
asfuterfas@futerfaslaw.com
www.futerfaslaw.com

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From: Timothy Kolaya <tkolaya@sflaw.com>

Date: Tuesday, January 12, 2021 at 11:05 PM

To: Amie Berlin <BerlinA@sec.gov>, Jeffrey Cox <jlc@sallahlaw.com>, "cdp@sallahlaw.com" <cdp@sallahlaw.com>, "tah@sallahlaw.com" <tah@sallahlaw.com>, "jds@sallahlaw.com" <jds@sallahlaw.com>, "dab@sallahlaw.com" <dab@sallahlaw.com>, "vv@sallahlaw.com" <vv@sallahlaw.com>, "jak@sallahlaw.com" <jak@sallahlaw.com>, "florida@sallahlaw.com" <florida@sallahlaw.com>, "dan.small@hklaw.com" <dan.small@hklaw.com>,

"aida.guerrero@hkllaw.com" <aida.guerrero@hkllaw.com>, "Christopher.laquinto@hkllaw.com" <Christopher.laquinto@hkllaw.com>, "Allison.Kernisky@hkllaw.com" <Allison.Kernisky@hkllaw.com>, "angel.barber@hkllaw.com" <angel.barber@hkllaw.com>, "Chad.vanderhoef@hkllaw.com" <Chad.vanderhoef@hkllaw.com>, Brian Miller <brian.miller@akerman.com>, "kelly.connolly@akerman.com" <kelly.connolly@akerman.com>, "kim.stathopoulos@akerman.com" <kim.stathopoulos@akerman.com>, "alejandropaz@akerman.com" <alejandropaz@akerman.com>, "drashbaum@mnrlawfirm.com" <drashbaum@mnrlawfirm.com>, "mordenes@mnrlawfirm.com" <mordenes@mnrlawfirm.com>, Jeffrey Marcus <jmarcus@mnrlawfirm.com>, "kmeyers@mnrlawfirm.com" <kmeyers@mnrlawfirm.com>, "jmays@mnrlawfirm.com" <jmays@mnrlawfirm.com>, James Froccaro <jrfesq61@aol.com>, Joel Hirschhorn <jhirschhorn@gray-robinson.com>, Andrew Sarangoulis <andrew.sarangoulis@gray-robinson.com>, "anita.abrams@gray-robinson.com" <anita.abrams@gray-robinson.com>, Alan Futerfas <asfuterfas@futerfaslaw.com>, Daniel Fridman <dfridman@ffslawfirm.com>, "vpantin@ffslawfirm.com" <vpantin@ffslawfirm.com>, Bettina Schein <bschein@bettinascheinlaw.com>, "arlaw@raikhelsonlaw.com" <arlaw@raikhelsonlaw.com>, "haimovitch@kolawyers.com" <haimovitch@kolawyers.com>, "Chaparro@kolawyers.com" <Chaparro@kolawyers.com>, "fields@kolawyers.com" <fields@kolawyers.com>, David Ferguson <ferguson@kolawyers.com>, "nunez@kolawyers.com" <nunez@kolawyers.com>, "Alejandro O. Soto" <asoto@ffslawfirm.com>

Cc: "Gaetan J. Alfano" <GJA@pietragallo.com>, "Douglas K. Rosenblum" <DKR@pietragallo.com>

Subject: RE: SEC v. Complete Business Solutions Group, Inc., et al., No. 20-CV-81205-RAR (S.D. Fla.) / Receiver's First Requests for Production and Interrogatories

Dear Counsel:

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- Static copies of the Quickbooks files for CBSG and FSP;
- Bank records and Amex statements for CBSG and FSP for 2016 through 2020;
- All other documents relied upon by DSI in preparing Exhibit 1 to the Declaration from Development Specialists, Inc, filed as ECF No. 426-1;
- Syndication agreements and reports;
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- Tax returns for CBSG and FSP for 2016 through 2019.

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several email accounts, as well as certain subfolders from CBSG's QNAP Drive and shared files on its G Suite, as well as various cloud-based accounts (e.g., Right Networks, OneDrive, and Sharepoint) used by CBSG, ABFP, Retirement Evolution and others. Because these various data sources contain dozens of terabytes of data, it would be cost-prohibitive for the Receiver to process, host, and run structured searches across all of the data. Consequently, the Receiver has decided to process the email accounts for 25 custodians, with an estimated total expanded file size of approximately 2,100 GB, as follows:

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Andy Zuch	ABFP	10.5
Anita Badalmenti	ABFP	43.75
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Dean Vagnozzi	ABFP	50.75
Dominic Primerano	ABFP	8.75
Karen Gillis	ABFP	3.5
Michelle Price	ABFP	47.25
Mike Tierney	ABFP	24.5
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Wednesday, January 13, 2021, of your position on this proposed motion.

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Please let us know if you have questions about these discovery issues, or if there are any other matters you wish to discuss with us.

Regards,

Tim Kolaya

Image removed by sender.



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PARTNER

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Exhibit “D”

From: Alan Futerfas
To: Timothy Kolaya; berlina@sec.gov; jlc@sallahlaw.com; cdp@sallahlaw.com; tah@sallahlaw.com; jds@sallahlaw.com; dab@sallahlaw.com; vv@sallahlaw.com; jak@sallahlaw.com; florida@sallahlaw.com; dan.small@hklaw.com; aida.guerrero@hklaw.com; Christopher.Iaquinto@hklaw.com; Allison.Kernisky@hklaw.com; angel.barber@hklaw.com; Chad.vanderhoef@hklaw.com; brian.miller@akerman.com; kelly.connolly@akerman.com; kim.stathopoulos@akerman.com; alejandro.paz@akerman.com; drashbaum@mnrlawfirm.com; mordenes@mnrlawfirm.com; jmarcus@mnrlawfirm.com; kmeyers@mnrlawfirm.com; jmays@mnrlawfirm.com; Jrfesq61@aol.com; jhirschhorn@gray-robinson.com; andrew.sarangoulis@gray-robinson.com; anita.abrams@gray-robinson.com; dfridman@ffslawfirm.com; vpantin@ffslawfirm.com; bschein@bettinascheinlaw.com; arlaw@raikhelsonlaw.com; haimovitch@kolawyers.com; Chaparro@kolawyers.com; fields@kolawyers.com; ferguson@kolawyers.com; nunez@kolawyers.com; Alejandro Soto gja@pietragallo.com; Douglas K. Rosenblum
Cc: gja@pietragallo.com; Douglas K. Rosenblum
Subject: Re: SEC v. Complete Business Solutions Group, Inc., et al., No. 20-CV-81205-RAR (S.D. Fla.) / Receiver's First Requests for Production and Interrogatories
Date: Monday, February 1, 2021 5:08:39 PM

Tim:

If you have not already done so, as part of our Requests, the following three email domains also need to be produced:

- dealbin@parfunding.com
- Submission@parfunding.com
- submissions@capitalsource2000.com

Thank you,
Alan

The Law Offices of Alan S. Futerfas
565 Fifth Ave., 7th Floor
New York, NY 10017
212-684-8400
asfuterfas@futerfaslaw.com
www.futerfaslaw.com

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From: Timothy Kolaya <tkolaya@sfslaw.com>
Date: Tuesday, January 12, 2021 at 11:05 PM
To: Amie Berlin <BerlinA@sec.gov>, Jeffrey Cox <jlc@sallahlaw.com>, "cdp@sallahlaw.com" <cdp@sallahlaw.com>, "tah@sallahlaw.com" <tah@sallahlaw.com>, "jds@sallahlaw.com" <jds@sallahlaw.com>, "dab@sallahlaw.com" <dab@sallahlaw.com>, "vv@sallahlaw.com" <vv@sallahlaw.com>, "jak@sallahlaw.com" <jak@sallahlaw.com>, "florida@sallahlaw.com" <florida@sallahlaw.com>, "dan.small@hklaw.com" <dan.small@hklaw.com>, "aida.guerrero@hklaw.com" <aida.guerrero@hklaw.com>, "Christopher.Iaquinto@hklaw.com" <Christopher.Iaquinto@hklaw.com>, "Allison.Kernisky@hklaw.com" <Allison.Kernisky@hklaw.com>, "angel.barber@hklaw.com" <angel.barber@hklaw.com>, "Chad.vanderhoef@hklaw.com" <Chad.vanderhoef@hklaw.com>, Brian Miller <brian.miller@akerman.com>,

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Cc: "Gaetan J. Alfano" <GJA@pietragallo.com>, "Douglas K. Rosenblum" <DKR@pietragallo.com>

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Tim Kolaya

Image removed by sender.



TIMOTHY A. KOLAYA
PARTNER

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EXHIBIT E

In the United States District Court
for the District of Maryland

PRINCIPLES FOR THE DISCOVERY OF
ELECTRONICALLY STORED INFORMATION IN CIVIL CASES

GENERAL PRINCIPLES

Principle 1.01 (Purpose)

Electronic discovery is now routinely encountered in civil litigation. At the same time, the Court is aware that the discovery of ESI is a potential source of cost, burden, and delay. The purpose of these ESI Principles is to encourage reasonable electronic discovery, in cases where it is appropriate to conduct such discovery, with the goal of reducing cost, burden, and delay and to “secure the just, speedy, and inexpensive determination of every action and proceeding” pursuant to Fed. R. Civ. P. 1. These ESI Principles also promote the avoidance or early resolution of disputes regarding the discovery of ESI without Court intervention. While parties are encouraged to discuss these ESI Principles in individual cases, compliance with them is voluntary and not required by the Court.

Principle 1.02 (Cooperation and Exchange of Information)

The Court recognizes the principles of The Sedona Conference® Cooperation Proclamation¹ and expects cooperation on issues relating to the preservation, collection, search, review, production, integrity, and authentication of ESI. The Court particularly emphasizes the importance, of cooperative exchanges of information about ESI at the earliest stages of litigation. An early exchange about ESI that will be relevant to the case may help ensure that conferences between the parties, as well as agreements between the parties, are meaningful.

¹ <https://thesedonaconference.org/cooperation-proclamation>

Each case is different, and the type of information exchanged should be tailored to best meet the needs of the case. Depending on the case, the parties may consider exchanging a data map (either in list form or visual) and information about the following types of technologies, systems, tools, or protocols as used by the parties: software applications or platforms, including databases; document management, mail, and messaging systems; types of computing devices (including portable computing and storage devices); use of home computers or personally-owned devices; the identity and rights of individuals to access the systems and specific files, services, and applications; network and database design and structure; use of cloud, off-site, or other third-party services, including social media and personal email; and backup and recovery routines, including backup media rotation practices. The parties may also consider exchanging organizational charts for key custodians of ESI and relevant policies, including those relating to computer usage, document management, ESI, or document retention or destruction.

Principle 1.03 (Proportionality)

The parties should apply the proportionality standard set forth in Fed. R. Civ. P. 26(b) to all phases of the discovery of ESI, including the identification, preservation, collection, search, review, and production of ESI while maintaining the integrity of the ESI. To assure reasonableness and proportionality in electronic discovery, parties should consider the factors described in Fed. R. Civ. P. 26(b). To facilitate adherence to the proportionality standard, requests for production of ESI and related responses should be prepared in consultation with custodians, IT custodians, and/or IT administrators so the resulting discovery is reasonably targeted, clear, complete, accurate, and as particularized as practicable.

ESI CASE MANAGEMENT PRINCIPLES

Principle 2.01 (Preservation of ESI)

- a) Parties should take measures to preserve ESI as required by law. Parties should discuss preservation of ESI as early in the litigation as feasible. Such discussions should continue to occur periodically as the case and issues evolve.
- b) In determining what ESI to preserve, parties should apply the proportionality standard referenced in Principle 1.03.
- c) Parties are not required to use preservation notices to notify an opposing party of a preservation obligation, but if a party does so, the notice should apply the proportionality standard referenced in Principle 1.03 and be reasonably targeted, clear, complete, accurate, and as specific as practicable.
- d) If there is a dispute concerning the scope of a party's preservation efforts, the parties should comply with the process outlined in Local Rule 104.7 and fully discuss the reasonableness and proportionality of the preservation. If the parties are unable to resolve a preservation issue, then the issue should be promptly raised with the Court.
- e) Consistent with Proportionality Principle 1.03, the parties should discuss limiting the preservation, search, review, and production requirements imposed on each party by determining what ESI sources can be excluded from preservation and production because they are marginally relevant or not reasonably accessible.

Principle 2.02 (Conference of the Parties)

- a) In cases involving ESI, a conference of the parties is helpful. Before such a conference, counsel should discuss who will participate with their clients and each other to ensure the participation of one or more persons for each party who are well-informed concerning the potentially relevant systems and data.
- b) Topics the parties should be prepared to discuss include:
 - 1) The sources, scope, and type of ESI that has been and will be preserved, including: date ranges; identity and number of potential custodians or sources; preservation and production by third parties in possession of relevant ESI, and their costs, capabilities, and policies; and other details that help clarify the scope of preservation;
 - 2) The appropriate form and forms of production;
 - 3) Any difficulties or exceptional costs related to preservation;
 - 4) Search and culling methodologies (including keywords or technology assisted review, as appropriate) and suitable methods to query and produce responsive ESI;
 - 5) The phasing of discovery, where appropriate, to prioritize discovery from custodians or sources most likely to contain discoverable information, including ESI, and those accessible at the lowest cost; and, as warranted, to defer or avoid discovery from sources unlikely to contain discoverable information or that are costliest to access;
 - 6) The potential need for a protective order (see, e.g., Local Rule 104.13 and Appendix D), “clawback” agreement, and any procedure pursuant to Fed. R. Evid. 502(d) or (e), including a Rule 502(d) order; and
 - 7) Opportunities to reduce costs and increase the efficiency and speed of the discovery process.

A more detailed checklist of information that may be helpful in guiding such discussions is included as Appendix 1: Suggested Topics for ESI Discussion. The Court encourages the parties to address any agreements or disagreements related to the above matters in the status report required by the scheduling order.

Principle 2.03 (E-Discovery Liaison)

In many cases, and where consistent with the proportionality factors in Rule 26(b), the discovery of ESI will be aided by the participation of electronic discovery liaisons. In addition, if a dispute arises that involves technical aspects of electronic discovery, as part of its obligations under Local Rule 104 concerning discovery disputes, each party should consider appointing an ESI liaison who will be well-informed concerning the relevant systems and information. An ESI liaison should be knowledgeable about the location, nature, accessibility, format, collection, searching, authenticity, integrity, and production of ESI in the matter. The ESI liaison should, at a minimum:

- a) Be prepared to participate in the resolution of any discovery disputes relating to ESI so as to limit the need for Court intervention;
- b) Be knowledgeable about the party's ESI discovery efforts;
- c) Be familiar with, or gain knowledge about, the party's electronic systems and capabilities in order to explain those systems and answer related questions; and
- d) Be familiar with, or gain knowledge about, the technical aspects of electronic discovery in the matter, including electronic document storage and organization, form/format issues, accessibility, and relevant information retrieval technology (including search methodology).

- e) The failure to appoint an ESI liaison in a case where one is appropriate is one factor the Court may consider in granting relief in any discovery dispute or request for sanctions.

Principle 2.04 (Production of ESI)

- a) Production Format: Production will be (1) in any form or forms agreed to by the parties, or (2) if no agreement is reached, in any reasonable form or forms specified by the requesting party if such format is consistent with Proportionality Principle 1.03, including native production. However, no party shall be compelled, except by Court order, to accept production in a form that substantially degrades or jeopardizes the utility, integrity, and/or authenticity of ESI. The parties may wish to discuss the use of a mutually accessible third-party service for the storage and sharing of discovery documents to minimize potential costs. Sample production protocols are attached as Appendix 2.
- b) Privilege Logs: The parties should confer about the nature and scope of privilege logs for the case, including whether categories of information may be excluded from any logging requirements and whether an alternative to a document-by-document log will suffice.
- c) The Discovery of Search Methodologies and Litigation Hold Material: Depending on the circumstances of a particular case, communications implementing or otherwise facilitating efforts to comply with the duty to preserve information, review for privileged information, or cull for responsive documents may or may not be protected from disclosure and discovery under Fed. R. Civ. P. 26. Unless the parties reach an agreement as to the production of this material, questions of discovery of this material are a matter of substantive law that will be decided on a case-by-case basis. Parties discussing these issues may wish to consider the use of a Fed. R. Evid. 502(d) order.

- d) Metadata: Metadata is an important part of ESI and should be considered for production in every case. The production of metadata should be consistent with the proportionality principles of Fed. R. Civ. P. 26 and Principle 1.03. A detailed discussion of metadata can be found in Appendix 3: Metadata Reference Guide.
- e) Cost-Shifting: Parties are generally responsible for their own costs of production of ESI. However, electronic discovery costs may be shifted in accordance with the applicable provisions of Fed. R. Civ. P. 26. Likewise, a party's nonresponsive or dilatory discovery tactics may prompt cost-shifting considerations. Cost-shifting can be negotiated by agreement of the parties or requested by appropriate motion to the Court.
- f) Integrity of ESI: Parties should discuss how to produce the metadata and/or native files so that ESI maintains its integrity from when it is collected until when it is used in proceedings so that the parties have a method to confirm the integrity of the ESI throughout the litigation.

Principle 2.05 (Disputes Regarding ESI)

Disputes regarding ESI that the parties are unable to resolve shall be presented to the Court at the earliest reasonable opportunity. If the Court determines that any party or counsel has failed to cooperate and participate in good faith in electronic discovery or the Local Rule 104 process (including by the failure to appoint an ESI liaison under Principle 2.03, where appropriate), the Court may require additional discussions between the parties, order the appointment of an ESI liaison, and, if warranted, may consider discovery sanctions, including costs to the aggrieved party.

EXPECTATIONS OF COUNSEL

Principle 3.01 (Preparedness of Counsel)

It is expected that counsel for the parties, including all counsel who have appeared, as well as all others responsible for making representations to the Court or opposing counsel (whether or not they make an appearance), will be familiar with the following:

- a. The electronic discovery provisions of the Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, and Federal Rule of Evidence 502;
- b. The applicable rules of professional responsibility and other duties of counsel that are relevant to electronic discovery; and
- c. The Local Rules and Discovery Guidelines (Appendix A) of this Court.

APPENDICES

Appendix 1: Suggested Topics for ESI Discussions

Appendix 2: Sample Production Protocols

Appendix 3: Metadata Reference Guide

Appendix 1: Suggested Topics for ESI Discussions

Early discussions are often helpful in cases involving ESI. Potential topics for the parties to discuss may, in the appropriate case, include the following, subject to the proportionality analysis contained in Rule 26 of the Federal Rules of Civil Procedure and Proportionality Principle 1.03:

Preservation

1. What are the key factual issues of the case?
2. What are the sources of potentially responsive ESI? Who are the custodians?
3. Can the custodians/sources be prioritized?
4. What are the date ranges for which data should be preserved?
5. Is an organizational chart encompassing the potentially responsive custodians available?
6. Is a data map encompassing the potentially responsive custodians available? What ESI sources exist from which data should be preserved? This could include, but not be limited to, data that is on premise, off-site and in the cloud; structured and unstructured data; network and standalone equipment; applications; removable storage; phones, tablets, mobile devices; social media; voice messaging; and instant messaging systems.
7. What repositories may contain relevant data, but are not reasonably accessible because of undue burden or cost? Will such repositories be preserved?
8. What repositories may contain relevant data, but will not be preserved?
9. What are each party's pertinent information management policies, computer usage policies, retention and destruction policies, "Bring Your Own Device" (BYOD) policies, and any other policies related to information management or governance?
10. Which non-custodial repositories should be preserved? Examples include department share drive, ShareFile locations, etc.
11. Has automatic deletion and purging of potentially responsive ESI been suspended?
12. What methodologies will be used to preserve and collect ESI? Will they account for chain of custody, integrity of ESI, and pertinent metadata and audit trail information?
13. Are there third parties who may possess potentially responsive ESI? If such third parties exist, how will that data be preserved?
14. Are there any disputes related to preservation that need to be presented to the Court for resolution?

Liaison

1. The parties should discuss whether each side will designate an ESI liaison for the duration of the litigation; and
2. If so, how they will be utilized.

Collection

1. What has been preserved; what will be collected?
2. How will it be collected?
3. How will it be processed?

4. Will phased collection and processing be efficient for the case?
5. Is there an agreement on a method for dealing with collection exceptions for which remediation is impossible or too costly?

Search

1. What methods of searching the data will be used to identify responsive ESI and filter out ESI that is not responsive?
2. Parties may discuss, if and as applicable, search and review methodologies and technologies.
3. Parties may discuss whether or not a search protocol should be presented to the Court for prior approval.

Production

1. In what forms and formats will ESI be produced, including decisions concerning:
 - a. Which metadata fields, if any, will be provided;
 - b. Whether OCR should be produced for non-text searchable files;
 - c. The form and format of load files, if any, accompanying the production of documents;
 - d. The naming conventions and Bates numbering of produced documents, including native files, full-text documents, OCRRed documents and images;
 - e. What, if any, files should be produced in native format;
 - f. The image format, if any, to be produced;
 - g. Whether the parties shall produce ESI in phases; and
 - h. The media upon which the ESI productions will be delivered.
2. Are there any security or privacy issues applicable to any produced ESI?

Privilege

1. The parties should discuss a plan for dealing with privileged information, including obtaining an order from the Court pursuant to Fed. R. Evid. 502, if necessary.
2. The parties should discuss, if necessary, the production, exchange, and format of privilege logs.

Appendix 2: Sample Production Protocols

One of the easiest ways to minimize waste and unnecessary dispute is for parties to reach early agreement on the form or forms of production. Where the parties have not already agreed upon a production protocol, these sample production protocols are offered as a starting point for negotiation of the form or forms in which electronically stored information (“ESI”) is exchanged. Any production protocol should be tailored to the needs of the parties and to the types of systems and data subject to discovery. If appropriate, the parties may discuss the procedure for maintaining the integrity of produced ESI throughout the litigation.

These sample protocols attempt to suggest best practices as of the writing of this appendix. As the types of ESI and the tools used to support electronic discovery evolve over time, so too must the manner in which ESI is produced. An overview of each sample is included below.

Appendix 2.1: Hybrid Production Protocol – This protocol permits the conversion of ESI to static image format. By creating a static image of each page, the parties are able to cite to a normalized representation of each page, aiding in creating a clearer record. Though searchability and application metadata is stripped away by image conversion, it is largely restored by the production of attendant extracted or OCR text and metadata in ancillary “load files.” Imaged production protocols necessitate upfront expenditure to convert records, much of which may never be used in proceedings. Furthermore, the conversion of all produced ESI to image increases the size of the files ultimately exchanged, which has the potential to increase downstream processing and storage costs. To ameliorate some of these shortcomings, this hybrid production protocol provides for production of certain ESI in native formats, cross-referenced to Bates numbered image placeholders. This protocol assumes the parties have access to the resources and litigation support software required to generate and work with images and load files.

Appendix 2.2: Native Production Protocol – This protocol recognizes that conversion of ESI from its native format may impose an undue burden on the parties and may render the production less complete and usable. A native production permits technically-proficient parties to make more efficient use of the production and enables parties with limited resources to utilize low-cost and commonly-available tools to conduct search and review, eliminating the need to procure additional software required to pair images with text and metadata. Moreover, native productions offer greater flexibility, and because of their smaller size, native formats can reduce the cost to process and store data on a per-gigabyte basis. For use in proceedings, parties may wish to convert selected native documents to static images or present the information digitally. In the case of the former, the parties may consider reaching agreement on the procedure for stipulation to the image format.

Appendix 2.1
Sample HYBRID PRODUCTION PROTOCOL

1. "Information items" as used here encompasses individual documents and records (including associated metadata), whether on paper, as discrete "files" stored electronically, optically or magnetically, or as a record within a database, archive, or container file. The term should be read broadly to include e-mail, text messages, word processed documents, digital presentations, social media posts, webpages, and spreadsheets.
2. Responsive electronically stored information ("ESI") (except for spreadsheets, presentation files, or other information items containing speaker notes, animated text, embedded comments, or tracked changes) should be converted to image, Bates numbered, and produced with fully searchable text. A single-page TIFF placeholder bearing the Bates number for each record not converted to image shall also be produced. This Protocol describes the specifications for producing hybrid productions and attendant load files.
3. Images
 - a. Images should be single-page, Group IV TIFF files, scanned at 300 dpi.
 - b. File names cannot contain embedded spaces.
 - c. The number of TIFF files per folder should not exceed 2,000.
 - d. If an information item contains color, it shall be produced in color, unless the color is merely decorative (e.g., company logo or signature block).
4. Image Cross-Reference File

A comma-delimited image cross-reference file (e.g., .OPT or .LFP) to link the images to the metadata and text should be supplied. Such a cross-reference file typically consists of nine fields per line, with a line for every file in the database.

For example, the .OPT format is as follows:

```
ABC00000001,VOL0001,\IMAGES\0001\ABC00000001.TIF,Y,,,4  
ABC00000002,VOL0001,\IMAGES\0001\ABC00000002.TIF,,,,  
ABC00000003,VOL0001,\IMAGES\0001\ABC00000003.TIF,,,,  
ABC00000004,VOL0001,\IMAGES\0001\ABC00000004.TIF,,,,
```

5. Text

Searchable text of the entire document must be provided for every record, at the document level.

- a. Searchable text must be provided for all documents that originated in electronic format but are not produced in their native forms. Text files should include page breaks that correspond to the pagination of the image files. Any document in which

text cannot be extracted must be processed using optical character recognition (OCR), including PDFs without embedded text.

- b. OCR text must be provided for all documents that originated in hard copy format. A page marker should be placed at the beginning, or end, of each page of text, *e.g.*, ***IMG0000001 *** whenever possible. The data surrounded by asterisks is the ImageID.
- c. For redacted documents, provide the full text for the redacted version.
- d. Text should be delivered as multi-page ASCII text files with the files named to conform to the ImageID field. Text files should be placed in separate subfolders with each subfolder limited to 500 files.

6. Data File

The data file (*e.g.*, .DAT or .CSV) is another delimited file containing all of the fielded information and associated metadata for each information item produced.

- a. The first line of the data file must be a header row identifying the field names.
- b. Date fields should be provided in the format: MM/DD/YYYY.
- c. All family relationships should be preserved, and all attachments should sequentially follow the parent document/email.
- d. All metadata associated with email, audio, and native electronic document collections must be produced per the table below.
- e. In some cases, it may be appropriate to specify the data file delimiters for certain litigation support systems. For example, default .DAT file delimiters for Concordance are:

Comma	,	ASCII character (020)
Quote	”	ASCII character (254)
Newline	®	ASCII character (174)

The text and metadata of email and attachments, and all other native file document collections, should be extracted and provided in a data file using the field definition and formatting described below:

Field Position	Field Name	Type	Description/Metadata
1.	BEGDOC	Paragraph	Beginning bates number
2.	ENDDOC	Paragraph	Ending bates number
3.	BEGATTACH	Paragraph	Beginning bates number of family
4.	ENDATTACH	Paragraph	Ending bates number of family
5.	ATTCOUNT	Paragraph	Attachment count

Field Position	Field Name	Type	Description/Metadata
6.	PARENTID	Paragraph	Bates number of family parent
7.	DOCDATE	Date	Date of document or creation date (MM/DD/YYYY)
8.	DATESENT	Date	Date Email Sent (MM/DD/YYYY)
9.	TIMESENT	Time	Time Email Sent (HH:MM:SS AM/PM)
10.	DATERECEIVED	Date	Date Email Received (MM/DD/YYYY)
11.	TIMERECEIVED	Time	Time Email Received (HH:MM:SS AM/PM)
12.	TIMEZONE	Paragraph	Time zone used to process custodian data
13.	AUTHOR	Paragraph	Who created document (LASTNAME, FIRST)
14.	FROM	Paragraph	Who is document sent from (LASTNAME, FIRST)
15.	TO	Paragraph	Who is document sent to (LASTNAME, FIRST)
16.	CC	Paragraph	Who is copied on document (LASTNAME, FIRST)
17.	BCC	Paragraph	Who is blind copied on document (LASTNAME, FIRST)
18.	DOCTYPE	Paragraph	What type of document this is (e.g., Message or attachment)
19.	FILEEXT	Paragraph	File Extension (e.g., .msg or .doc)
20.	EMAILSUBJECT	Paragraph	Email subject line
21.	EMAIL MESSAGE ID	Paragraph	Message ID for email
22.	FILENAME	Paragraph	Original file name
23.	LASTMOD	Date	Date last modified (MM/DD/YYYY)
24.	CUSTODIAN	Paragraph	Custodian (LASTNAME, FIRST)
25.	SOURCE	Paragraph	Where did document come from?
26.	ORIGFOLDER	Paragraph	Original file folder (e.g., Personal Folders\Deleted Items\)
27.	PAGES	Number	Number of pages in document
28.	DOCLINK	Paragraph	This will be used if there is a native, path to folder where data LINK record is located
29.	HASH	Paragraph	MD5 or SHA Hash Value (unique file signature)
30.	HASH DE-DUPLICATE	Paragraph	Instances of hash de-duplication (by full path)

Field Position	Field Name	Type	Description/Metadata
	INSTANCES		
31.	CONVERSATION INDEX ID	Paragraph	Microsoft Conversation index number generated by Microsoft Outlook to identify email conversations.

7. Linked Native Files

Spreadsheets must be produced in their native electronic formats. Also, Microsoft Office files, or other information items containing speaker notes, animated text, embedded comments, or tracked changes must be produced in their native electronic formats.

- a. Native file documents must be named per the BEGDOC (beginning bates number).
- b. The full path of the native file must be provided in the .data file for the DOCLINK field.
- c. The number of native files per folder should not exceed 2,000 files.

8. Image Handling

For any records converted to image, the following settings should be applied at conversion.

Microsoft Word		
Option	Setting	Description
Show Track Changes	Yes/No	If yes, 'Final Showing Markup' will be used. If not, 'Final' view will be used.
Show Hidden Text	Yes/No	If yes, text marked as hidden will be printed.
Show Comments	Yes/No	If yes, comments will be printed.
Print Headers	Yes/No	If yes, headers will be printed.
Print Footers	Yes/No	If yes, footers will be printed.
Print Field Codes	Yes/No	If not yes, fields containing PRINT code are cleared to prevent output TIFF corruption.
Use SavedDate Instead of CurrentDate	Yes/No	Any auto date/time fields will be replaced with Saved Date/Time instead of current date.
Use Filename Only for Auto Filename Fields	Yes/No	If yes, any auto filename fields will be printed with just the filename, not the path.
Disable Auto Hyphenation	Yes/No	If yes, auto hyphenation will not be used for foreign language docs.
Microsoft Excel		
Option	Setting	Description
Unhide Columns	Yes/No	If yes, all hidden columns will be printed.
Unhide Rows	Yes/No	If yes, all hidden rows will be printed.
Unhide Worksheets	Yes/No	If yes, all hidden worksheets will be printed.

Unhide Charts	Yes/No	If yes, all hidden charts will be printed.
Print Order	Over Then Down	This is the order that excel pages are printed.
Print Orientation	Portrait/Landscape	This will enforce the print orientation to portrait or landscape.
Paper Size	Letter/Legal	This will force the paper size to letter or legal.
Print Comments	None	Choose where to print comments on the converted image.
Unhide Formulas	Hidden/Visible	If set to Hidden, the cell values will be displayed. If set to Visible, formulas will be displayed.
Set Scaling to Fit	Yes/No	If yes, the width of the Excel file will be squeezed to fit on one page.
Autofit Column and Row Sizes	Yes/No	If yes, height and width is increased to fit contents.
Disable Custom Filters	Yes/No	If yes, custom filters are disabled.
Black Font	Yes/No	If yes, font color of all cells is set to black so that content is displayed.
Reset Print Area	Yes/No	If yes, the print area is reset.
Set Header Margin	0.5	Top margin is checked and adjusted to prevent truncation.
Margin Handling Header	Keep Offset	Define how the margin of the header is calculated.
Set Footer Margin	0.5	Bottom margin is checked and adjusted to prevent truncation.
Margin Handling Footer	Keep Offset	Define how the margin of the footer is calculated.
Use Filename Only For Auto Filename Fields	Yes/No	If yes, auto filename fields will be printed with just the filename, not the path.
Show Auto File Name	Yes/No	If yes, the English code will be shown, not the value.
Show Auto Date	Yes/No	If yes, the English code will be shown, not the value.
Show Auto Time	Yes/No	If yes, the English code will be shown, not the value.
Limit Output to ### Pages	250	The output for each file will be limited to the given number of pages (0 means no limitation)
Microsoft PowerPoint		
Option	Setting	Description
Print Hidden Slides	Yes/No	If yes, all hidden slides will be printed.
Scale to Fit the Paper	Yes/No	If yes, the converted slide will be scaled to fit the page.
Print Comments	Yes/No	If yes, comments will be printed.
Print Type	Unchanged	Number of slides per page. Notes page will print both the slide and the notes on the same page.
Print Notes at End	Yes/No	If yes, all notes will be displayed at the end of the document.
Use Default Theme	Yes/No	Default theme can be used to display text that will not print because it blends within the image.

Appendix 2.2
Sample NATIVE FORMAT PRODUCTION PROTOCOL

1. "Information items" as used here encompasses individual documents and records (including associated metadata), whether on paper, as discrete "files" stored electronically, optically or magnetically, or as a database, archive, or container file. The term should be read broadly to include all forms of electronically stored information (ESI), including but not limited to e-mail, messaging, word processed documents, digital presentations, social media posts, webpages, and spreadsheets.
2. Responsive ESI shall be produced in its native form; that is, in the form in which the information was created, used, and stored by the native application employed by the producing party in the ordinary course of business.
3. If it is infeasible or unduly burdensome to produce an item of responsive ESI in its native form, it may be produced in an agreed upon near-native form; that is, in a form in which the item can be imported into an application without a material loss of content, structure, or functionality as compared to the native form. Static image production formats serve as near-native alternatives only for information items that are natively static images (*i.e.*, faxes and scans).
4. Examples of agreed-upon native or near-native forms in which specific types of ESI should be produced are:

Source ESI	Native or Near-Native Form or Forms Sought
Microsoft Word documents	.DOC, .DOCX
Microsoft Excel spreadsheets	.XLS, .XLSX
Microsoft PowerPoint presentations	.PPT, .PPTX
Microsoft Access Databases	.MDB, .ACCDB
WordPerfect documents	.WPD
Adobe Acrobat documents	.PDF
Photographs	.JPG, .PDF
E-mail	.PST, .MSG, .EML ¹
Webpages	.HTML

¹ Messages should be produced in a form or forms that readily support import into standard e-mail client programs; that is, the form of production should adhere to the conventions set out in RFC 5322 (the Internet e-mail standard). For Microsoft Exchange or Outlook messaging, .PST format will suffice. Single message production formats like .MSG or .EML may be furnished if source foldering metadata is preserved and produced (*see* paragraph 13). For Lotus Notes mail, furnish .NSF files or convert messages to .PST. If your workflow requires that attachments be extracted and produced separately from transmitting messages, attachments should be produced in their native forms with parent/child relationships to the message and container(s) preserved and produced in a delimited text file.

5. Where feasible, when a party produces reports from databases that can be generated in the ordinary course of business (*i.e.*, without specialized programming skills), these shall be produced in a delimited electronic format preserving field and record structures and names. The parties will meet and confer regarding programmatic database productions, as necessary.
6. Information items that are paper documents or that require redaction shall be produced in static image formats, *e.g.*, single-page .TIF or multipage .PDF images. If an information item contains color, it shall be produced in color unless the color is merely decorative (*e.g.*, company logo or signature block).
7. Individual information items requiring redaction shall (as feasible) be redacted natively or produced in .PDF or .TIF format and redacted in a manner that does not downgrade the ability to electronically search the unredacted portions of the item. The unredacted content of each redacted document should be extracted by optical character recognition (OCR) or other suitable method to a searchable text file produced with the corresponding page image(s) or embedded within the image file. Parties shall take reasonable steps to ensure that text extraction methods produce usable, accurate and complete searchable text.
8. Except as set out in this Protocol, a party need not produce identical information items in more than one form and may globally deduplicate identical items across custodians using each document's unique MD5 or other mutually agreeable hash value. The content, metadata, and utility of an information item shall all be considered in determining whether information items are identical, and items reflecting different information shall not be deemed identical. Parties may need to negotiate alternate hashing protocols for items (like e-mail) that do not lend themselves to simple hash deduplication.
9. Production should be made using commercially reasonable electronic media of the producing party's choosing, provided that the production media chosen not impose an undue burden or expense upon a recipient.
10. Each information item produced shall be identified by naming the item to correspond to a Bates identifier according to the following protocol:
 - a. The first four (4) or more characters of the filename will reflect a unique alphanumeric designation identifying the party making production.
 - b. The next nine (9) characters will be a unique, consecutive numeric value assigned to the item by the producing party. This value shall be padded with leading zeroes as needed to preserve its length.
 - c. The final six (6) characters are reserved to a sequence beginning with a dash (-) followed by a four (4) or five (5) digit number reflecting pagination of the item when printed to paper or converted to an image format for use in proceedings or when attached as exhibits to pleadings.
 - d. By way of example, a Microsoft Word document produced by ABC Corporation in its native format might be named: ABCC00000123.docx. Were the document printed out

for use in deposition, page six of the printed item must be embossed with the unique identifier ABCC000000123-00006.

- 11. Information items designated "Confidential" may, at the Producing Party's option:
 - a. Be separately produced on electronic production media or in a folder prominently labeled to comply with the requirements of paragraph ___ of the Protective Order entered in this matter; or, alternatively,
 - b. Each such designated information item shall have appended to the file's name (immediately following its Bates identifier) the following protective legend:
~CONFIDENTIAL-SUBJ TO PROTECTIVE ORDER IN CAUSE MDL-13-0123.

When any "Confidential" item is converted to a printed or imaged format for use in any submission or proceeding, the printout or page image shall bear the protective legend on each page in a clear and conspicuous manner, but not so as to obscure content.

- 12. The producing party shall furnish a delimited load file supplying the metadata field values listed below for each information item produced (to the extent the values exist and as applicable):

Field	BeginBates
EndBates	
BeginAttach	
EndAttach	
Custodian/Source	
Source File Name	
Source File Path	
From/Author	
To	
CC	
BCC	
Date Sent	
Time Sent	
Subject/Title	
Last Modified Date	
Last Modified Time	
Document Type	
Redacted Flag (yes/no)	
Hidden Content/Embedded Objects Flag (yes/no)	
Confidential flag (yes/no)	
E-mail Message ID	
E-mail Conversation Index	
Parent ID	
MD5 or other mutually agreeable hash value	
Hash De-Duplicated Instances (by full path)	

13. Each production should include a cross-reference load file that correlates the various files, images, metadata field values and searchable text produced.

Questions and Answers about the Native Production Protocol

Q. If our company used a PDF or TIFF file in the ordinary course of business, do we have to convert that to some “native” form?

A. No, if the information item originated natively in the usual course of business (such as by scanning a paper document to PDF or a receiving a fax as a TIFF image), those forms are the native forms and should not be converted to another form.

Q. If we have a printout of a document and an electronic version that we think is the file used to create the printout, do we have to deduplicate them? Which do we produce?

A. No, this protocol recognizes that they are not the same. The electronic file holds more information than the printed page (*e.g.*, comments and application metadata) and the printout may reflect different information (*e.g.*, signatures, highlighting, and margin notes). Furthermore, the electronic version is inherently searchable and sortable by metadata, where the paper document is not. If responsive, you produce both, as they are not identical under the protocol.

Q. So, what items are identical and must be deduplicated?

A. Only items with matching hash values are deemed sufficiently identical that just one instance need be produced. If you have been deduplicating in other matters or producing as TIFF images and load files, computing and matching hash values is something you already do. If not, it’s a very low-cost undertaking that saves a lot of wasted effort and money.

Q. Won’t it cost more to produce in native and near-native forms?

A. No. The forms of production in this protocol require considerably fewer steps because there is no need to convert the items from the forms in which the parties use and store them in the ordinary course of business to other, less utile and complete forms. Further, producing in native and near-native forms minimizes the expensive and error-prone processes of extracting searchable text and converting it to images. Especially with Microsoft Office productivity formats (Excel, Word, and PowerPoint documents), conversion to image formats significantly downgrades utility and completeness of the evidence.

Q. But won’t we lose the ability to Bates number production? I want my Bates numbers!

A. Not at all. Electronic productions are “Bates numbered” consecutively, and when items are printed out or imaged for use in proceedings or as exhibits, they will bear embossed Bates numbers, page numbers, and protective legends, just as they always have. What changes is that you don’t have to emboss all that on each page until you actually need that information in a paginated format. Still, the electronic forms always carry a Bates number (in their file name) and even a protective legend for items designated “confidential.” It’s a little different than paper, but then, ESI is a lot different than paper. This protocol saves a great deal of money without adding complexity, so the difference is a change for the better.

Q. Footnote 1 states: “[T]he form of production [for e-mail] should adhere to the conventions set out in RFC 5322.” What does that mean?

A. It’s just a shorthand way to tell your technical people they shouldn’t downgrade the e-mail for production. RFC 5322 is the current international Internet standard that sets out what needs to be present in an e-mail for it to be complete and functional. By using any of the everyday forms of e-mail that are RFC 5322-compliant (*e.g.*, PST, MSG, EML, EMLX, MBOX, etc.), you will be preserving the content and structure of the e-mail that allows it to be reviewed in any of the tools that support e-mail, including all major e-discovery platforms. These forms afford the parties maximum flexibility at lowest cost. Plus, they are less costly because they come straight out of the mail servers and archives in RFC 5322-compliant formats. Conversion to TIFF and load files requires costly parsing and processing of e-mail contents with the result that, *e.g.*, message header values needed for threading conversations and message IDs helpful to deduplication are lost or corrupted. Moreover, family relationships between messages and attachments that support efficient review are often lost or misplaced. Trying to dissect and rebuild e-mail messages as TIFF images and load file data often leads to contentious motions, expensive experts, and sanctions, all of which could have been avoided by sticking to the forms e-mails are intended to take.

Q. Why do we have to extract searchable text and embedded metadata values from native and near-native files?

A. You don’t. Unlike TIFF images, native and near-native forms are inherently electronically searchable and carry application metadata within the files. So there’s no need to extract text for search as it’s already in the file produced. The metadata production requirement speaks to production of fields “as applicable.” If the metadata is in the file produced, extracting the same data to a load file is redundant and, accordingly, not “applicable.”

Q. Our lawyers don’t have the tools to review native forms. Their review tools are pretty old and only support review of TIFF images. What do they do?

A. They can keep on using their tools. Native and near-native forms are easily downgraded to forms that lawyers with older tools can manage. That's what they've been doing and one reason why e-discovery has been so costly. Any party who needs downgraded forms of production can go on paying to convert the data for their use. This protocol serves to eliminate that cost and hardship to those capable of dealing with the evidence in the same forms in which the witnesses and parties do. If you don't mind the higher cost, use any old tool you want to review; just *produce* in native and near-native forms.

Q. We want to produce on CDs. Is that an "appropriate" medium of production?

A. That depends upon the volume of data you're producing. If your production can fit on 2-3 CDs, it's appropriate. If your production will span 20 CDs, it's a waste of everyone's time and money to spend hours extracting from 20 CDs what would have taken minutes to pull from a ten buck thumb drive.

Q. We prefer to produce as TIFF images because then no one can see the hidden metadata—like collaborative comments, speaker notes, formulas, tracked changes, and such. Isn't that just metadata?

A. The information listed is user-generated content, and dismissing it as "just metadata" doesn't justify its eradication. It is evidence, like margin notes on paper documents and comments written on Post-Its. If you've been ignoring it without consequence, consider yourself lucky. This protocol treats it as part and parcel of the ESI to be produced.

Q. If we don't convert everything to TIFF or PDF, what will prevent you from changing the evidence? Aren't TIFF and PDF images harder to alter than native forms?

A. Nothing prevents a dishonest litigant from seeking to change the evidence, save the certainty that any change important enough to impact the outcome of a case will be checked against the source and exposed. Because of the ability to digitally fingerprint or "hash" native and near-native productions, it's far easier to quickly and reliably detect alterations. Contrary to popular misconceptions, it's simple to alter TIFF and PDF files in ways that are difficult for a reader to detect. Adobe Acrobat has supported extensive editing of PDF files for years. TIFF images are just pictures, so can be modified using the same off-the-shelf tools used to enhance snapshots. It's an urban myth that producing TIFFs and PDFs is more secure.

Q. Why must MD5 hashes of each production item be furnished?

A. Though parties are free to negotiate an agreement to produce alternate metadata, parties are cautioned to always calculate, supply, and preserve the hash value of each electronic information item produced as a simple and reliable method by which to ascertain if an item has been inadvertently or deliberately altered following production.

Appendix 3: Metadata Reference Guide

Metadata is information that helps us use and make sense of other information. More particularly, metadata is information, typically stored electronically, that describes the characteristics, origins, usage, structure, alteration, and validity of other electronically stored information (“ESI”). Metadata occurs in many forms within and without digital files. Some is supplied by the user, but most metadata is generated by systems and software.

Some define metadata simply as “data about data,” where others characterize metadata as data that is not user-generated but is created by a computer system or application to keep track of a file’s attributes. However, even user-generated data may qualify as metadata. For example, a Bates number is metadata, although assigned by counsel.

Because metadata is defined so broadly, a blanket request for the production of metadata may be unhelpful. The metadata values associated with a particular file or information item vary according to the nature of the item and its use. For example, the relevant metadata from a word processed document differs from e-mail metadata and from metadata pertinent to a database.

Metadata is unlike almost any other discoverable information because its import may flow from its probative value as relevant evidence, its utility in functionally abetting the searching, sorting, and interpretation of ESI, or both. If the origin, use, distribution, destruction, or integrity of electronic evidence is at issue, the relevant “digital DNA” of metadata is probative evidence that should be preserved and produced. Likewise, if the metadata materially facilitates the searching, sorting, and management of ESI, it should be preserved and produced for its utility.

Absent a specific agreement between parties or instruction from the Court as to the form or forms of production, parties typically produce information in the form or forms the information is ordinarily maintained or in some other reasonably usable form. In determining what form or forms to produce data, a producing party should take into account the need to make metadata as accessible both to display and to search, for the receiving party as it is to the producing party, where appropriate and necessary, after consideration of proportionality factors outlined in Principle 1.03.

Metadata can be generally categorized as System Metadata or Application Metadata.

System Metadata reflects context, being information about a file that is not embedded within the file it describes, but is stored externally by the computer’s file management system, which uses system metadata to track file locations and store demographics about each file, e.g., file name, size, creation, modification, and usage. System metadata may be crucial to electronic discovery because so much of our ability to identify, find, sort, and cull information depends on its system metadata values. For example, system metadata helps identify the custodians of files, when files were created or altered, and the folders in which they were stored.

Other metadata, called Application Metadata, reflects content. It is information that the software application creates and stores within the file. As an example, Microsoft Word stores the date when a document was last printed and the time expended editing the document.

The following are suggestions for producing different types of metadata.

1. Application metadata is, by definition, embedded within native files; so native production of ESI obviates the need to selectively preserve or produce application metadata. When ESI is converted to other forms for production, the producing party should assess what metadata will be lost or corrupted by conversion and identify, preserve, and extract relevant or useful application metadata fields for production. The extracted metadata is produced in ancillary production formats called “load files,” designed to be ingested by tools used to review electronic documents. Not all metadata lends itself to production in load files because some metadata (like tracked changes in a Word document) must be seen in context within the native application or an e-discovery review platform.
2. For e-mail messages, this is a fairly straightforward process, notwithstanding the dozens of metadata values that may be introduced by e-mail client and server applications. The metadata essentials for e-mail messages are typically:
 - Custodian – Owner of the mail container file or account collected;
 - To – Addressee(s) of the message;
 - From – The e-mail address of the person sending the message;
 - CC – Person(s) copied on the message;
 - BCC – Person(s) blind copied on the message;
 - Date Sent – Date the message was sent;
 - Time Sent – Time the message was sent with UTC/UMG offset;
 - Subject – Subject line of the message;
 - Date Received – Date the message was received;
 - Time Received – Time the message was received;
 - Attachments – Name(s) or other unique identifier(s) of attachments;
 - Mail Folder Path – Path of the message from the root folder to the mail folder (to permit the threading of messages as a “conversation”);
 - Message ID – Microsoft Outlook or similar unique message identifier; and
 - In-Reply-To – Microsoft Outlook or similar unique message identifier.
3. Other Mail Metadata: E-mail messages that traverse the Internet contain so-called “header data” detailing the routing and other information about message transit and delivery. Header data may be useful to address questions concerning authenticity, receipt, or timing of messages. Certain header values are essential to support the ability to thread messages into intelligible conversations. Metadata essentials may also include metadata values generated by the discovery and production process itself,

such as Bates numbers and ranges, hash values, production paths, extracted or OCR text, family designations, and time zone offset values.

4. The system metadata values that should typically be considered for preservation and production include:
 - File name;
 - File size;
 - File path;
 - Last modified date and time; and
 - Source or custodian.

5. Parties should discuss the production of metadata at an early practicable stage in the litigation and use proportionality principles in determining the scope of such production. The fields of metadata to be produced, if any, and the form(s) of production should be addressed by the parties and memorialized in a written agreement.