

AMERICAN ARBITRATION ASSOCIATION



Claimant/Counter-Respondent,

Case Number: 

v.

STIPULATED ESI PROTOCOL



Respondent/Counterclaimant.

STIPULATED ESI PROTOCOL

The parties signatory hereto (collectively, the “Parties”) hereby agree and stipulate through their respective counsel to be bound to the following Electronically Stored Information (“ESI”) protocol with regard to discovery matters arising in the above-captioned action.

ELECTRONICALLY STORED INFORMATION PROTOCOL

1. **Application and Scope.** This Protocol shall apply to all Electronically Stored Information (hereinafter, “ESI”) as well as paper documents (collectively with ESI, “Documents”) exchanged in discovery in this action.

2. **Manner of Production of ESI and Paper Documents.** The following provisions apply to the production of all ESI, with the exception of ESI described in Section 3 below, and paper documents.

a. **General Provisions**

i. **De-Duplication.** In order to promote efficiencies, the Parties agree to employ global deduplication across custodians. A Producing Party shall de-duplicate ESI at the family level (provided all files within a family must be an exact duplicate), using industry standard Hash Values (e.g. MD5 or SHA). In addition, the Parties are to produce a Duplicate Custodian field per Appendix 1. At the

completion of the parties' production of documents, each party shall produce a .csv file containing BCC values for all emails produced, including BCC values for emails where the BCC value was not obtained until after its initial production to the other party.

ii. Metadata fields and processing. Each of the Metadata fields set forth in Appendix 1 that can be extracted from a Document shall be produced for that Document. However, the Parties shall not be obligated to populate manually any of the fields in Appendix 1 if such fields cannot be electronically extracted from a Document (in which case no value will be provided for such field) with the exception of the following fields, which shall be populated by the Parties: BEGBATES, ENDBATES, BEGATTACH, ENDATTACH, CUSTODIAN (if applicable), and CONFIDENTIALITY (if applicable). If one or more of the metadata fields to be provided under this Protocol would reveal information that has otherwise properly been redacted, such information may also be redacted from the pertinent metadata field. In no case shall any metadata, document properties, or file names be overridden, deleted, or otherwise changed, with the exception of those properly redacted and noted on the accompanying privilege log or in the case of prefixes to file names added for Bates numbering. For email, in addition to the standard fields listed, the following field shall be incorporated: email header.

iii. Text Files. For each Document, a single document-level text file shall be provided along with the image (or native) files and Metadata. The text file name shall be the same as the Bates Number of the first page of the Document. Electronic text must be extracted directly from the native electronic file unless the DOCUMENT was redacted, is an image file, or is a physical file—in which case a text file created using OCR will be produced in lieu of extracted text.

iv. Load Files. All Documents shall be produced in electronic format, with

files suitable for loading into a Concordance-compatible litigation support review database. Except where noted below in Paragraph 4(e), all productions will include both image and Metadata Load Files, with the Load File in the format described in Appendix 2.

v. Images. Images of all Documents should be produced as single page TIFF images unless the original native file contained color. Documents containing color should be produced as single page JPEG files. Image files shall be named after the Bates Number endorsed on the image. The technical specifications of the TIFF and JPEG images are further described below.

b. Paper Documents. To the extent that a Document exists only in hardcopy paper format, it shall be produced in accordance with the following protocols. If a Document exists in both paper and ESI format, it should be produced in ESI format.

i. TIFF or JPEG Images. Paper Documents shall be scanned as black and white, single page, Group IV compression TIFF or color JPEG images (multi-page PDF is also acceptable) using a print setting of at least 300 DPI. Each image shall have a unique file name—i.e., the Bates Number of the Document—and shall be branded with its corresponding Bates Number and Confidentiality Designation, using a consistent font type and size.

ii. OCR Acquired Text Files. Imaged DOCUMENTS should be produced with OCR text. When subjecting paper Documents to an OCR process, the settings of the OCR software shall maximize text quality over process speed. Functions to “auto-skew” and/or “auto-rotate” should be used when OCRing any scanned images of paper Documents.

iii. Database Load Files/Cross-Reference Files. Paper Documents shall be provided with Concordance load files: (a) a delimited Metadata file (.dat) and (b) an image load file (.opt), as detailed in Appendix 2.

- iv. Unitization. In scanning paper Documents, distinct Documents shall not be merged into a single record, and single documents shall not be split into multiple records (i.e., paper Documents should be logically unitized). For DOCUMENTS that contain affixed notes, the pages will be scanned both with and without the notes and those pages will be treated as part of the same DOCUMENT. In the case of an organized compilation of separate Documents – e.g., a binder containing several separate Documents behind numbered tabs – the Document behind each tab should be scanned separately, but the relationship among the Documents in the binder should be reflected in the metadata of the produced records (i.e., Folderpath). The Parties shall make their best effort to unitize Documents correctly.
- v. Any hard copy DOCUMENTS that, due to their size (such as project drawings), would be unreasonably expensive and/or difficult to produce via load files may be produced in hard copy format or an alternative format if agreed upon by the parties or ordered by the Court. Such DOCUMENT will be made reasonably available to the parties for inspection by witnesses and experts and for copying if desired.
- c. ESI. Unless otherwise expressly stated herein, all Documents will be produced in TIFF or JPEG format (multi-page PDF is also acceptable), according to the following protocol:
- i. Documents containing color should be produced in color. Examples of such Documents include, but are not limited to, JPG, photos, imbedded graphs and charts, and Microsoft PowerPoint slides. For any other Documents that require color to understand their full meaning or content, the Parties shall use their best efforts to produce such Documents in single-page JPEG format. A Party may make reasonable requests for Documents or ESI to be produced in a color format upon review of the other Party's production.

- ii. All other Documents, other than those to be produced in Native Format, shall be produced as single-page Group IV TIFF images using at least 300 DPI print setting.
- iii. Each image (whether JPEG, TIFF, or multi-page PDF) shall have a unique file name, which is the Bates Number of the Document. Bates Numbers shall consist of a prefix identifying the producing party, followed by a 8 digit, zero-filled number. Bates Numbers shall not contain any special characters or embedded spaces. Documents produced in original format, such as photographs, shall have a unique file name consisting of the original file name, prefixed by the Bates number.
- iv. Each image shall be branded with its corresponding Bates Number and Confidentiality Designation, pursuant to any protective order governing the matter, using a consistent font type and size. The Parties shall make reasonable efforts to avoid obscuring any part of the underlying image with the Bates Number or Confidentiality Designation.
- v. If a Document is comprised of more than one image, the unitization and image order must be maintained to reflect the DOCUMENT as it existed in the original when creating the set of images referred to as a “Document.”
- vi. Any hidden slides, text, comments, revisions, columns, worksheets, and/or notes contained in a document shall be unhidden and viewable on the face of the TIFF image.
- vii. Family relationships for all ESI DOCUMENTS (e.g., the association between an attachment and its parent e-mail) must be preserved by assigning sequential Bates numbers to all items within the parent-child group, and identifying those Bates numbers in the relevant ESI metadata. For example, if a Party is producing an e-mail with attachments, the attachments must be processed and assigned Bates numbers in sequential order, following consecutively behind the

parent email. To the extent that any attachment is privileged, is not relevant, is not responsive, or cannot be processed due to a technical issue, a placeholder TIFF image slip sheet for that attachment shall be produced. Such placeholder shall be produced with a Bates-numbered TIFF image slip-sheet stating the reason that the DOCUMENT was produced as a slip-sheet.

viii. Any DOCUMENTS that, due to their size (such as project drawings), would be unreasonably expensive and/or difficult to produce may be made reasonably available to the parties in paper form or electronic form, depending on the type of DOCUMENTS, for inspection by witnesses and experts and for copying if desired, at the cost of the requestor.

d. Documents Produced in Native Format as Part of a Load File.

i. Excel Spreadsheets and Certain Email Attachments. The Parties agree that excel spreadsheets (e.g., .xls, .xlsx, and .csv files) shall be produced in Native Format in accordance with Paragraph 4(d)(ii) below. If an excel spreadsheet must be redacted, it will be redacted in native format. In addition, any Specialty File or Media File as defined below in Paragraph 4(e) that is attached to an email shall be similarly produced in Native Format in accordance with Paragraph 4(d)(ii) below. If a Document does not render or cannot be rendered to TIFF, the Parties agree that such Document may be produced in Native Format. If a producing Party determines in its discretion that any Document loses meaning when produced as an image, the producing Party shall have the discretion to produce such Document in Native Format. However, if a Document is subject to redaction, it may be produced as a TIFF image consistent with Paragraph 3(c). A receiving Party may request that a Document previously-produced in TIFF format be re-produced in native format if the Document is not redacted and cannot be reasonably analyzed or used in TIFF format.

ii. Protocol for Native Format Productions. The production of Documents in Native Format pursuant to the immediately preceding Paragraph 2(d)(i) shall be subject to the following protocol: The Documents shall be produced as part of a Load File after appropriate Bates numbering and shall be accompanied by a TIFF image slip-sheet bearing the corresponding Bates number and stating the Document has been produced in Native Format (and noting the Document's Confidentiality Designation, if any). The data and information contained in any native file produced in this Litigation shall be for viewing purposes only and shall not be changed, manipulated or altered in the native file by the receiving party. Further, the producing Party shall also assign and track industry standard Hash Values (e.g., MD5 or SHA) for all ESI, including, but not limited to, ESI produced in Native Format.

3. Documents to be Separately Produced in Native Format Without a Load File.

a. Scheduling Files and Design Files. Except for files that are attached to emails, the following specialty files shall be segregated and separately produced in their original native format with all metadata intact and in their original foldering structure with no additional processing or renaming of the files (referred to herein as "Specialty Files"): (i) scheduling files generated using Primavera Project Planner, Microsoft Project, Sciforma, or a similar application, including but not limited to files with the following extensions: mpp, mpx, p3, p3c, prx, xer, xml; and (ii) design files generated using AutoCAD, 3D Studio, MicroStation, ACIS SAT, or a similar application, including but not limited to files with the following extensions: dwg, dxf, dgn, prp, prw, 3ds, prj, sat, sab. All such Specialty Files shall be segregated from the greater ESI production and produced on a separate storage media (i.e., hard drive, thumb drive, or CD), with no load file. Moreover, the parties agree that each shall endeavor to produce Specialty Files in a manner that:

(A) memorializes the pedigree of the actual file produced by listing a hash code or other unique identifier, so as to ensure that parties are referring to the same, unaltered version of the file thereafter, and (B) labels the actual file produced with a unique name (bates or other) that can be used to identify the contents for litigation reference. Provided, a Producing Party may elect to produce such Specialty Files as described above and also in a database with a load file for its own tracking purposes if desired as long as it labels/correlates the native and load files to avoid confusion.

b. Rational Databases.

i. Prior to production of the contents of any relational database that requires specialty software for full functionality, such as a job cost-accounting system or a project management system like Prolog, the parties will meet and confer and cooperate to identify the most practical and cost-effective method for making any responsive, non-privileged contents of the database available to the other Parties for review. Producing parties shall make reasonable efforts to produce responsive information and data from databases using existing query and reporting capabilities of the database software. The producing party shall act reasonably and cooperatively to comply with discovery requests from the requesting party for information about the reporting capabilities, structure, organization, query language, and schema of the database.

ii. If, after good faith efforts to reach agreement, the parties cannot agree, any party may seek assistance from the Chair Arbitrator, including by way of a motion to compel, regarding the discoverability, form, and scope of production of data from a relational database.

c. Privilege.

i. Nothing contained herein is intended to or shall serve to limit a Party's right

to conduct a review of its own Documents, ESI, or information (including metadata) for relevance, responsiveness, and/or segregation of privileged, protected, and/or confidential information before production.

ii. Production of Privilege Logs: For any DOCUMENTS withheld in its entirety or produced but redacted, the producing party will produce privilege/redaction logs in Microsoft Excel format. A producing party will produce a separate privilege/redaction log for each production within thirty (30) days of the production of DOCUMENTS for which a privilege is asserted. All privilege/redaction logs shall be provided no later than February 10, 2023.

iii. Challenges to Privilege Claims: Following the receipt of a privilege/redaction log, a receiving party may identify, in writing, the particular DOCUMENT(S) it believes require further explanation. Within fourteen (14) days of such an identification, the producing party must respond to the request. If a party challenges a request for further information, the parties shall meet and confer to try to reach a mutually agreeable solution. If they cannot agree, the matter shall be brought to the Arbitration Panel.

iv. Any claims of inadvertent production or requests for clawbacks shall be handled in accordance with the Appendix 3.

4. Cost. As a general matter, the costs of producing discovery, including ESI, shall be borne by each respective producing Party. However, the Arbitration Panel may, upon appropriate application by a Party, consider limiting or apportioning the costs of discovery for good cause and/or under the applicable rules of proportionality.

5. Amendments. Any practice or procedure set forth herein may be varied by written agreement of the Parties.

Dated: [REDACTED]

SO STIPULATED.

By: XXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dated: July 13, 2022

By: XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

[REDACTED]

[REDACTED]

APPENDIX 1

REQUESTED METADATA FIELDS

FIELD NAME	EXAMPLE/FORMAT	DESCRIPTION
BEGBATES	US00000001 (Unique ID)	The Bates Number associated with the first page of the Document. The Bates Number shall consists of letters and numbers only, and NOT contain any special characters or embedded spaces.
ENDBATES	US00000003 (Unique ID)	The Bates Number associated with the last page of the Document. The Bates Number shall consists of letters and numbers only, and NOT contain any special characters or embedded spaces.
BEGATTACH	US00000001 (Unique ID Parent- Child Relationships)	The Bates Number associated with the first page of the parent Document. The Bates Number shall consists of letters and numbers only and NOT contain any special characters or embedded spaces.
ENDATTACH	US00000008 (Unique ID Parent- Child Relationships)	The Bates Number associated with the last page of the last attachment in the Document family. The Bates Number shall consists of letters and numbers only, and NOT contain any special characters or embedded spaces.
DATE SENT	MM/DD/YYYY	The date the email was sent.
TIME SENT	HH:MM	The time the email was sent.
DATE CREATED	MM/DD/YYYY	The date the Document was created.
TIME CREATED	HH:MM	The time the Document was created.
DATE RECEIVED	MM/DD/YYYY	The date and time the Document was received.
TIME RECEIVED	HH:MM	The time the Document was received.
TITLE	Resume.docx	The Document's extracted document title.
SUBJECT	Re: Vacation	Subject line extracted from an email.
AUTHOR	j smith	The Document's extracted author.

FIELD NAME	EXAMPLE/FORMAT	DESCRIPTION
FROM	Joe Smith < jsmith@email.com >	The display name and email of the email's author. If only the author's email address is given, then just list the email address.
TO	Joe Smith < jsmith@email.com >; tjones@email.com	The display name and email of the recipient(s) of an email. If only the email address is given, then just list the email address.
CC	Joe Smith < jsmith@email.com >; tjones@email.com	The display name and email of the copyee(s) of an email. If only the email address is given, then just list the email address.
BCC	Joe Smith < jsmith@email.com >; tjones@email.com	The display name and email of the blind copyee(s) of an email. If only the email address is given, then just list the email address.
TIMEZONE	PST, CST, EST, etc.	The time zone the Document was processed in. Note: This should be the time zone where the Documents were located at time of collection.
FILE TYPE	MS Word, MS Excel, etc.	Type of Document by application.
FILE EXTENSION	XLS	The Document's file extension.
FOLDER PATH	X:\Folder\Subfolder\VOL001	The folder path of non-email identifying the location a file was maintained in the ordinary course of business. (Privileged portions of a folder path may be redacted)
FILE NAME	Document Name.xls	The Document's file name.
FILE SIZE	125256	The Document's file size in bytes.
HASH	9CE469B8DFAD1058C3B1E745 001158EA	The MD5 or SHA Hash value or "de-duplication key" assigned to the Document.
NATIVELINK	D:\NATIVES\US00000001.xls	The full path to a native copy of the Document.
TEXTLINK	D:\NATIVES\US00000001.txt	The full path to the extracted or OCR'd text of the Document

APPENDIX 2

REQUESTED LOAD FILE FORMAT FOR ESI

1. Delimited Text File

A delimited text file (DAT File) containing the fields listed in Appendix 1 should be provided. The delimiters for the file should be Concordance defaults:

Comma - ASCII character 20 (,)

Quote - ASCII character 254 (")

Newlin - ASCII character 174 (¶)

2. Image Cross Reference File (Opticon Load File)

The Opticon cross-reference file is a comma delimited file consisting of six fields per line. There must be a line in the cross-reference file for every image in the database. The format for the file is as follows: ImageID (the unique designation that Concordance and Opticon use to identify an image. This should be the Beg Bates Number of the Document), VolumeLabel (the name of the volume), ImageFilePath (the full path to the image file), DocumentBreak (if this field contains the letter "Y," then this is the first page of a Document; if this field is blank, then this page is not the first page of a Document), FolderBreak (please leave empty), BoxBreak (please leave empty) and PageCount (the number of pages in the Document). Sample Data is as follows:

PROD00000001, VOLOO1,E:\100\ PROD00000001.TIF,Y,,2

PROD00000002, VOLOO1,E:\100\ MT00000002.TIF,,,,

PROD00000003, VOLOO1,E:\100\ MT00000003.TIF,Y,,,4

PROD00000004, VOLOO1,E:\100\ MT00000004.TIF,,,,

PROD00000005, VOLOO1,E:\100\ MT00000005.TIF,,,,

PROD00000006, VOLOO1,E:\100\ MT00000006.TIF,,,,

APPENDIX 3

CLAWBACK AND PRESUMPTIVELY PRIVILEGED PROTOCOL

STIPULATION AND IRE 502(c) AND (d) AGREEMENT

The Parties hereby stipulate to protect certain privileged and otherwise protected documents and electronically stored information (collectively, “document” or “documents”) against claims of waiver in the event such document(s) are inadvertently produced during the course of arbitration, whether pursuant a Parties’ discovery request or informal production. The Parties may be required to produce large volumes of documents and, to comply with discovery deadlines in the case, wish to complete discovery as expeditiously as possible while preserving and without waiving any evidentiary protections or privileges applicable to the information contained in the documents produced, including as against third parties, nonparties, and/or arbitral, State, and/or Federal proceedings.

Accordingly, the Parties hereby stipulate to the following:

1. The inadvertent production of any document(s) shall be without prejudice to any claim that such document(s) is protected by any legally cognizable privilege or evidentiary protection including, but not limited to the attorney-client privilege, insurer-insured, or the work product doctrine, and no Party shall be held to have waived any rights by such inadvertent production.

2. Upon written notice of an inadvertent production of a privileged or otherwise protected document(s) by the producing party or oral notice if notice is delivered on the record at a deposition, the receiving party(ies) must promptly return, sequester or destroy the specified document(s) and any hard copy(ies) the receiving party(ies) has and may not use or disclose the information until the privilege claim has been resolved. The producing party shall also provide

an updated privilege log for such document(s) setting forth the author, recipient(s), subject matter of the document, the basis for the claim of privilege or evidentiary protection, and provide any portion of the document that does not contain privileged or protected information.

3. The receiving party(ies) shall have ten (10) business days from receipt of notification of the inadvertent production to determine in good faith whether to contest such claim and to notify the producing party in writing of an objection to the claim of privilege and the grounds for that objection.

4. The receiving party's return, sequestering or destruction of such privileged or protected document(s) as provided herein shall not act as a waiver of the requesting party's right to move for the production of the returned, sequestered or destroyed documents on the grounds that the documents are not in fact subject to a viable claim of privilege or protection. However, the receiving party(ies) is/are prohibited and estopped from arguing that the production of the documents in this matter acts as a waiver of an applicable privilege or evidentiary protection, that the disclosure of the documents was not inadvertent, that the producing party did not take reasonable steps to prevent the disclosure of the privileged documents or that the producing party failed to take reasonable steps to rectify the error. The producing party need make no showing with respect to measures taken to prevent the inadvertent production of the documents in question in order to be entitled to their return.

5. Either party may submit the specified documents to the Chair Arbitrator under seal for a determination of the claim and will provide the Chair Arbitrator with the grounds for the asserted privilege or protection. In that event, the receiving party(ies) may not use the document(s) for any purpose absent that Chair Arbitrator's Order. Any Party may request expedited treatment of any request for the Chair Arbitrator's determination of the claim.

6. Upon a determination by the Chair Arbitrator that the specified documents are protected by the applicable privilege or evidentiary protection, and if the specified documents have been sequestered rather than returned or destroyed, the specified documents shall be returned or destroyed. The Chair Arbitrator may also order, the identification and/or review of documents that have been identified as being potentially subject to a legally recognized claim by search terms or other means.

7. Upon a determination by the Chair Arbitrator that the specified document(s) are not protected by the applicable privilege, the producing party shall reproduce the specified document(s).

8. If any document(s) produced by another Party is on its face subject to a legally recognizable privilege, the receiving party(ies) shall:

- a. refrain from reading the document(s) any more closely than is necessary to ascertain that it is privileged;
- b. immediately notify the producing party in writing that it has discovered document(s) believed to be privileged;
- c. specifically identify the document(s) by Bates number range or hash value range, and,
- d. where possible, return, sequester, or destroy all copies of such document(s), along with any notes, abstracts or compilations of the content thereof, within five (5) days of discovery by the receiving party. Where such document(s) cannot be destroyed or separated it/they shall not be reviewed, disclosed, or otherwise used by the receiving party.

Notwithstanding, the receiving party(ies) is/are under no obligation to search or review the producing party's production to identify potentially privileged or work product protected document(s).

AMERICAN ARBITRATION ASSOCIATION

[REDACTED]

Claimant/Counter-Respondent,

Case Number: [REDACTED]

v.

ORDER

[REDACTED]

Respondent/Counterclaimant.

The Chair Arbitrator having considered the Stipulated ESI Protocol of the parties and good cause appearing therefore, it is so ordered that the terms of the attached stipulation shall govern these proceedings until further order of this Arbitration Panel.

Dated: [REDACTED]

Signed

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

[REDACTED], Chair Arbitrator

PROOF OF SERVICE
(American Arbitration Association Case No. [REDACTED])

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

I am employed by the law office of [REDACTED] in the County of [REDACTED], State of California. I am over the age of 18 and not a party to the within action. My business address is [REDACTED]. My electronic notification address is [REDACTED].

On [REDACTED], I served on the interested parties in said action the within:

STIPULATED ESI PROTOCOL

as stated below:

[REDACTED]

Attorneys for Claimant/Counter Respondent,
[REDACTED]

(BY E-MAIL) by transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth above.

Executed on [REDACTED], at [REDACTED], California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[REDACTED]
(Type or print name)

(Signature)