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14 **UNITED STATES DISTRICT COURT**
 15 **CENTRAL DISTRICT OF CALIFORNIA**

16	AEROS AERONAUTICAL)	
17	SYSTEMS CORP.,)	CV 15-01712-PSG (PJWx)
18)	
19	Plaintiff,)	MASTER DISCOVERY AND
)	PROTECTIVE ORDER
20	v.)	See Court's note at p. 41 PJW
21	UNITED STATES OF AMERICA,)	
22	THE DEPARTMENT OF THE)	
23	NAVY,)	
	Defendants.)	

24
 25
 26 WHEREAS, the Parties mutually seek to protect sensitive and privileged
 27 materials from public disclosure without jeopardizing Parties' access to relevant
 28 information or the public's interest in open proceedings; reduce the time, expense

1 and other burdens of discovery of certain hard copy documents and electronically
2 stored information (“ESI”) and privileged materials as described further below; and
3 to better define the scope of their obligations with respect to preserving and
4 producing such information and materials;

5 This Court having been made aware that the Parties, by and through their
6 counsel, have agreed to the entry of this Master Discovery And Protective Order in
7 the above captioned case, and good cause appearing therefore:

8 IT IS ORDERED, ADJUDGED AND DECREED as follows:

9 **A. Definitions**

10 1. “Drafts,” regardless of whether in an electronic or hard copy form,
11 shall mean a preliminary version of a document that has been shared by the author
12 with another person (by email, print, or otherwise).

13 2. “Party” or “Parties” mean the Parties to this litigation, including their
14 employees and agents.

15 3. “Producing Party” means the party producing documents or ESI.

16 4. “Receiving Party” means the party receiving documents or ESI.

17 5. “Policy” means a formalized requirement regarding document
18 retention.

19 6. “Information” shall be interpreted broadly to include writings and
20 electronically stored information as that term is used in Federal Rule of Civil
21 Procedure 26. Information includes, but is not limited to, Drafts, records, files,
22 correspondence, reports, memoranda, calendars, diaries, minutes, electronic
23 messages, voice mail, e-mail, telephone message records or logs, printouts,
24 document image files, web pages, databases, spreadsheets, software, books,
25 ledgers, journals, orders, invoices, bills, vouchers, check statements, worksheets,
26 summaries, compilations, computations, charts, diagrams, graphic presentations,
27 drawings, films, charts, digital or chemical process photographs, video,
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1 phonographic, tape or digital recordings or transcripts thereof, drafts, jottings and
2 notes, studies or drafts of studies or other similar such material. Information that
3 serves to identify, locate, or link such material, such as file inventories, file folders,
4 indices, and file and application metadata, including embedded data such as track
5 changes and comments, is also included in this definition. Information includes
6 both paper documents and electronic files regardless of whether stored on servers,
7 hard drives, removeable computer storage media such as tapes, discs and cards, or
8 other electronic media. For purposes of this Order only, Information does not
9 include tangible things other than paper documents and storage media described
10 herein.

11 7. “Controlled Unclassified Information” or “CUI” shall mean any
12 document, data, or ESI that contains, describes or refers to any Export Controlled
13 Information. Without limiting the scope of these categories, Controlled
14 Unclassified Information includes drafts, notes of counsel and expert witnesses,
15 and similar writings containing Controlled Unclassified Information.

16 8. “Export Controlled Information” shall mean, for purposes of this
17 Order, unclassified technical information whose export is subject to export control
18 and whose unrestricted public dissemination could help proliferants or potential
19 adversaries of the United States. *See* 22 U.S.C. § 2778 (Control of arms exports
20 and imports) as implemented by the State Department by way of its International
21 Traffic in Arms Regulations, 22 C.F.R. Ch. 1, Subch. M.

22 9. “Confidential Information” refers to information that a Producing
23 Party claims in good faith to be its trade secret or other confidential research,
24 development, claims or commercial information, or information not in the public
25 domain which is proprietary or competitively sensitive. “Confidential
26 Information” means: (a) any type of information that constitutes a trade secret or
27 other confidential research, development, or commercial information within the
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1 meaning of Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure; or (b) is
2 otherwise entitled to protection under Rule 26(c) of the Federal Rules of Civil
3 Procedure, including but not limited to formulas, product information, confidential
4 customer lists etc.; (c) any type of financial information that has not been made
5 public and the disclosure of which the disclosing party contends would cause
6 substantial harm to the disclosing party's or a third party's financial privacy,
7 business operations or interests, or divulge a party or third party's personal
8 financial affairs or transactions, including, but not limited to, any contact
9 information, business information, invoices, receipts, amount or source of any
10 income, profits, revenues, losses, or expenditures of any person, firm, partnership,
11 corporation, or other organization, tax returns or tax related documents, any
12 financial statements or financial documents, banking records, accounts payable,
13 accounts receivable, financial statements, or financial performance data; (d) data or
14 analysis derived from such confidential information, including any summaries,
15 compilations, quotes, or paraphrases thereof; (e) any other type of information that
16 has been held to be private and/or confidential in any precedential case decided by
17 the U.S. Supreme Court, the 9th Circuit, the Federal Court of Appeals, the
18 California Supreme Court, and the California Appellate Court; (f) information that
19 any party believes would affect its competitive position or security interests in an
20 adverse manner; and/or, (g) any type of information gathered/secured from any
21 third parties during the course of discovery that falls within the scope of foregoing
22 definition, inclusive of subsections (a)-(f). The term "Confidential Information"
23 also includes information implicating privacy concerns protected by law, statute or
24 regulation with respect to individuals, including but not limited to employees. The
25 term "Confidential Information" includes, but is not limited to, information
26 protected from disclosure by the Privacy Act, 5 U.S.C. § 552a, the Freedom of
27 Information Act ("FOIA"), 5 U.S.C. § 552, and/or any other federal or state law to
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1 include third-party copyrighted information, which includes, but is not limited to,
2 documents, photographs, videos, and other items that either: (1) bear a copyright
3 notice identifying third parties, who are not Parties to this litigation, as the owner
4 of the copyright; or (2) for which a party to this litigation has been informed a third
5 party, who is not party to this litigation, claims copyright on the work.

6 “Confidential Information” also includes Controlled Unclassified Information or
7 CUI.

8 10. “Forensically Sound Copy” of an electronic file shall mean a copy
9 made by a method that (a) verifies complete and successful transfer (for instance
10 by use of a hash value); (b) does not alter, in any way, the file and application
11 metadata (to the extent it exists) associated with that electronic file; and (c) is
12 documented by a log identifying the date and time of copying, the software used to
13 complete the copy, the original location of the file, and the individual making the
14 copy.

15 11. “Potentially Relevant Information” shall mean Information that is
16 discoverable in this action pursuant to Federal Rule of Civil Procedure 26(b), as
17 well as any Information that will be discoverable but for the application of a
18 privilege or protection such as the attorney work product protection or the
19 attorney-client privilege.

20 12. “Preserve(d)” shall mean to keep and not to alter any Potentially
21 Relevant Information as to its form, content or manner of filing. In the case of an
22 electronic file, it means to retain the original file (including its file and application
23 metadata to the extent it exists) or a Forensically Sound Copy of that file.

24 **B. Requirements**

25 13. This Order applies to Potentially Relevant Information as defined in
26 Paragraph 11. Nothing herein shall be construed as impacting, changing, altering,
27 or obviating the Parties’ obligation to preserve physical evidence, such as
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1 computers, hard drives, and servers.

2 14. The Parties shall take reasonable steps to Preserve all presently
3 existing Potentially Relevant Information that is in their possession, custody or
4 control on the date of this Order, or that comes into their possession, custody or
5 control after the date of this Order.

6 15. With respect to Potentially Relevant Documents, the Parties need only
7 preserve one copy of each potentially relevant non-identical document, but shall
8 retain any existing information related to the custodians of any duplicates that are
9 not Preserved for production.

10 16. The Parties need retain only one copy of a Potentially Relevant
11 electronic message sent to multiple Parties so long as the copy retained contains
12 any existing metadata identified in Appendix A attached to this Order.

13 17. Potentially Relevant Information in the possession of an individual
14 employed by a Party is not within the possession, custody or control of the Party if
15 that information was (a) obtained or created by the individual on his personal time
16 and not within the scope of his employment duties for the Party; (b) obtained or
17 created using personal equipment rather than equipment owned or controlled by
18 the Party; and (c) retained exclusively in the individual's personal files or
19 electronic devices.

20 18. By Preserving Potentially Relevant Information, the Parties are not
21 conceding that such material is discoverable in this matter, nor are the Parties
22 waiving any claim of privilege.

23 **C. Documents and Other Materials Containing Confidential Information**

24 19. This Order governs the treatment and handling of all documents and
25 other materials containing or revealing Confidential Information (including,
26 without limiting the generality of the foregoing, answers to interrogatories,
27 responses to requests for production, responses to requests for admission,
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1 deposition testimony, deposition transcripts, deposition videos, deposition exhibits,
2 and other written, recorded or graphic matter, and copies of the foregoing)
3 produced in accordance with the Federal Rules of Civil Procedure or any order of
4 the Court, by any party or witness (“Producing Party”) to any other party in this
5 matter (“Receiving Party”).

6 20. In accordance with the terms of this Order, pursuant to 5 U.S.C.
7 § 552a(b)(11), the United States is authorized to release to counsel for the other
8 parties in this case discovery, including reports, records of databases searched, and
9 files, unredacted of Privacy Act-protected information, without obtaining prior
10 written consent of the third parties whose names, addresses, and other identifying
11 information may be present in such documents.

12 21. Any Producing Party furnishing documents or any other materials
13 which in the opinion of the Producing Party contains or otherwise reveals
14 Confidential Information, or information protected from disclosure by the Privacy
15 Act, 5 U.S.C. § 552a, the FOIA, 5 U.S.C. § 552, and/or any other federal or state
16 law, may designate such documents and other materials as subject to this Order by
17 so marking them as “SUBJECT TO PROTECTIVE ORDER.” If applicable, the
18 endorsement must appear on each image of the document and be included on the
19 label of any production media with these endorsed documents. The load or dat file
20 metadata field record for these endorsed documents and for applicable documents
21 produced as native files only must have “SUBJECT TO PROTECTIVE ORDER”
22 or “SUBJECT TO PROTECTIVE ORDER – ATTORNEYS’ EYES ONLY,” or
23 “MAY CONTAIN CUI,” as appropriate, entered in the “PROPERTIES” field.

24 22. All documents containing the names, addresses, social security
25 numbers, tax identification numbers, e-mail addresses, phone numbers, financial
26 information, and/or any other personal or identifying information otherwise
27 covered the by Privacy Act, 5 U.S.C. § 552a, shall be treated as subject to this
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1 Order, regardless of whether so marked in the manner set forth in Paragraph 21.

2 23. The Parties must not indiscriminately designate materials or
3 information as Confidential Information.

4 24. Documents and other materials designated as Confidential
5 Information, and the information contained therein, shall be used by the Receiving
6 Party only for purposes related to this action and for no other purpose, under other
7 restrictions as explained elsewhere in this Order, and under no circumstances other
8 than those specifically provided for in this or a subsequent order of this Court, shall
9 the Receiving Party disclose said documents and other materials or the information
10 contained therein to persons or entities other than the following:

- 11 a. The Court, pursuant to this Order;
- 12 b. Outside or inside counsel for a party;
- 13 c. Employees or agents of such counsel or party assigned and necessary
14 to assist such counsel in the conduct of this litigation;
- 15 d. Experts or consultants who have been retained for the purpose of
16 assisting in the conduct of this action;
- 17 e. Other persons upon order of this Court or upon stipulation of the
18 Parties.

19 Counsel shall not disclose documents or materials marked as “SUBJECT TO
20 PROTECTIVE ORDER – ATTORNEYS’ EYES ONLY” to their clients or to any
21 of the client’s officers or employees or to any third party, except as such third party
22 is specified in “a”, “b”, “d”, or “e” of this Paragraph 24.

23 25. Prior to receipt of any documents or other materials designated as
24 Confidential Information, or the information contained therein, any and all counsel
25 of record for a party shall sign and serve the “Acknowledgement of Master
26 Discovery And Protective Order” attached to this Order as Appendix B on all
27 counsel of record for all Parties. Service of the signed “Acknowledgement of
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1 Master Discovery And Protective Order” may be completed by e-mail.

2 26. Prior to disclosing documents or other materials designated as
3 Confidential Information, or any information contained therein, to any other
4 aforementioned individuals designated in Paragraph 24(c) – (e), counsel for the
5 party seeking to disclose such documents or other materials, or the information
6 contained therein, must have such individuals sign the “Acknowledgment of
7 Master Discovery And Protective Order” attached to this Order. The original
8 signed “Acknowledgement of Master Discovery And Protective Order” completed
9 by any individual designated in Paragraph 24(c)-(e) shall be retained by counsel
10 seeking to disclose such documents or other materials, or the information
11 contained therein, to any such individual until this case is conclusively resolved.
12 The signed “Acknowledgment of Master Discovery And Protective Order” may
13 only be disclosed pursuant to Court order.

14 27. Each individual given access to any documents or other materials
15 designated as Confidential Information, or the information contained therein, is
16 hereby advised that such documents or other materials and the information
17 contained therein is being disclosed pursuant and subject to the terms of this Order,
18 may not be disclosed other than pursuant to the terms thereof, and may be used
19 only for purposes related to this action and for no other purposes.

20 28. All information disclosed at (a) the deposition of a party or one of its
21 present or former officers, directors, employees, or agents, or independent experts
22 retained by counsel for the purpose of this litigation, or (b) the deposition of a third
23 party (which information pertains to a party) may be designated by any party as
24 being Confidential Information and that testimony is subject to the provisions of
25 this Order, unless the Parties otherwise agree by written stipulation. A party that
26 designates information as Confidential must follow the procedure for notification as
27 described in Paragraph 37.

1 29. In the event that counsel for any party determines to file with or submit
2 to this Court any documents or other materials designated as Confidential
3 Information, or any information contained therein, such filings or submissions,
4 unless otherwise agreed to by the Parties or ordered by the Court, shall be filed *in*
5 *camera* under seal in accordance with the procedures set forth in this Court's Local
6 Rules 79-5, 79-6 and 79-7.

7 30. Each person given access to, receiving, or in possession of any
8 documents or other materials designated as Confidential Information, or any
9 information contained therein, shall maintain such information, documents and
10 other materials in a manner sufficient to protect against unauthorized or inadvertent
11 disclosure, and refrain from disclosing in any manner such information, documents
12 and other materials except as specifically provided for by the terms of this Order.

13 31. If any party objects to the designation of any documents or other
14 materials as Confidential Information, such party shall attempt to resolve, through
15 consent of the opposing party, the question of whether such documents or other
16 materials or information contained therein should be treated as subject to this
17 Order. A party that challenges information as Confidential must follow the
18 procedures as described in Paragraph 37. Until this Court enters an order
19 determining the status of the document or other materials being objected to, such
20 document or other materials and the information contained therein shall be treated
21 as designated pursuant to this Order, unless the Parties otherwise agree by written
22 stipulation.

23 32. Within three (3) months after the conclusion of this litigation
24 (commencing from the date on which the time for filing an appeal from entry of
25 judgment expires with no party taking an appeal, or in the event an appeal is taken,
26 from the date of exhaustion of any and all appeals), all documents or other
27 materials designated as Confidential Information and copies thereof shall either be
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1 destroyed by any party or their counsel of record in possession of such documents,
2 or returned to counsel of record for the Producing Party. Absent a request by a
3 Producing Party for return of its documents, if Plaintiff's counsel of record elects
4 to destroy the documents or other materials designated as Confidential
5 Information, said persons shall submit a certification to the counsel of record for
6 all other Parties attesting that all such documents and materials were destroyed,
7 within fourteen (14) days of the destruction. The United States, if the Receiving
8 Party, shall retain or destroy all documents or other materials designated as
9 Confidential Information consistent with its records schedule and obligations under
10 the Federal Records Act, 44 U.S.C. Chapter 31. Absent a request by a Producing
11 Party for return of its documents, any individuals listed in Paragraph 24(c)-(e) of
12 this Order to whom documents or other materials designated as Confidential
13 Information were provided shall return such documents or other materials to the
14 counsel of record from whom it was received, who shall then either destroy or
15 return such documents or other materials in accordance with this paragraph.
16 Documents or other materials designated as Confidential Information and all
17 copies thereof which contain markings constituting attorney work product need not
18 be returned or destroyed, provided they remain subject to the provisions of this
19 Order.

20 **D. Protection of Privileges.**

21 Pursuant to Rules 16(b) and 26(c) of the Federal Rules of Civil
22 Procedure, and pursuant to Rule 502 of the Federal Rules of Evidence, it is
23 hereby ORDERED:

24 33. This Order invokes the protections afforded by Rule 502(d) of the
25 Federal Rules of Evidence. Accordingly, the provisions in Rule 502(b) of the
26 Federal Rules of Evidence will not apply to the disclosure of communications or
27 Information in discovery in this matter.
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1 34. The prosecution and defense of this action may require each Party to
2 review and to disclose large quantities of information and documents, including
3 ESI, through the discovery process. As a result, page-by-page preproduction
4 privilege review would likely impose an undue burden on the Parties' resources.

5 35. Each party is entitled to decide the appropriate degree of care to
6 exercise in reviewing materials for privilege, taking into account the volume and
7 sensitivity of the materials, the demands of the litigation, and the resources that the
8 party can make available. Irrespective of the care that is actually exercised in
9 reviewing materials for privilege, the Court hereby orders pursuant to Rule 502(d)
10 of the Federal Rules of Evidence that disclosure of privileged or protected
11 information or documents in connection with this litigation will not constitute or be
12 deemed a waiver or forfeiture—in this or any other federal or state proceeding—
13 of any claims of attorney-client privilege, work product protection, or any other
14 privilege that the disclosing Party would otherwise be entitled to assert with
15 respect to the information or documents and their subject matter.

16 36. The Court further orders that because expedited or truncated privilege
17 review is likely necessary for the just, speedy, and inexpensive resolution of this
18 matter, and because Rule 502(d) does not preserve privileges other than the
19 attorney-client privilege and work-product protection, the Parties are not required,
20 but may, review each and every page of the materials produced in discovery for all
21 applicable privileges. Accordingly, the disclosure of privileged or protected
22 information or documents in discovery conducted in this litigation will be deemed
23 unintentional, inadvertent, and compelled by order of this Court. Such disclosure
24 will not constitute a waiver of the disclosing party's right to claim any privilege or
25 protection, including without limitation the deliberative process privilege, that
26 would have applied to the information or documents or their subject matter but for
27 the disclosure, provided only that the party disclaiming waiver employed
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1 procedures reasonably designed to identify, withhold, and account for privileged
2 materials. However, the Parties shall not argue, in this forum or any other, that any
3 privileges were waived as a result of disclosures in this litigation irrespective of the
4 procedures used to locate privileged materials.

5 37. A Party who wishes to assert privilege or other protections as to
6 a document or ESI produced that contains privileged or protected information
7 shall notify the Receiving Party of the identity of the document or ESI by its
8 specific identifying characteristic, such as by Bates number. This notice shall
9 contain information sufficient to identify: (1) the document or ESI, including
10 information as necessary to locate the materials produced; (2) the privilege or
11 other protection that applies; and (3) the date the document was produced.
12 Notice may be made orally on the record at a deposition or hearing, provided
13 that it is subsequently confirmed in writing within ten (10) days from the date
14 of the hearing or receipt of the deposition transcript by the party asserting
15 privilege or other protection. If the Producing Party claims that only a portion
16 of a document is privileged, the Producing Party shall provide, along with the
17 notice of the claim of privilege or protection, a new copy of the document with
18 the allegedly privileged or protected portions redacted. Any party that
19 complies with this paragraph will be deemed to have taken reasonable steps to
20 rectify disclosures of privileged or protected information or materials.

21 The Parties agree that the documents provided as Initial Disclosures
22 under Rule 26(a)(1) of the Federal Rules of Civil Procedure may contain
23 documents that contain Confidential Information. The Parties agree to meet
24 and confer to discuss the proper procedure to ensure that all of the documents
25 produced prior to the to the entry of this Master Discovery and Protective Order
26 are marked and protected according to this Order.

27 Deliberate Withholding of Privileged or Protected Documents or ESI
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1 A Party may challenge the assertion of any privilege or other protection
2 for any documents or ESI originally withheld from production, or asserted as
3 an objection to any interrogatory or interposed during any deposition by filing
4 a timely motion to compel, provided, however, that within ninety (90) days of
5 the objection or withholding, the moving party notifies in writing to the Party
6 claiming the privilege or protection that the assertion of a privilege or
7 protection is being challenged. The notice required by this paragraph shall
8 contain information sufficient to: (1) identify the document, ESI,
9 interrogatory, or deposition at issue; (2) identify the privilege or protection
10 that is being challenged; and (3) briefly explain the basis for the challenge.
11 The Parties shall in good faith attempt to resolve the matter. If the matter has
12 not been resolved within ten (10) days from the receipt of the notice required
13 by this paragraph, the party challenging the privilege or protection may file a
14 motion to compel and must not assert, as a ground for compelling disclosure,
15 the fact or circumstances of the disclosure. Pending resolution of the motion,
16 the Parties shall not use the challenged information for any other purpose and
17 shall not disclose it to any person other than those required by law to be served
18 with a copy of the sealed motion.

19 Inadvertent Production of Privileged or Protected Documents or ESI

20 Upon notice of a privilege or protection from the Producing Party
21 pursuant to this Order, the Parties shall attempt to reach agreement regarding
22 the assertion of privilege or protection that may apply to the document or ESI
23 or any portion of the document or ESI. If the Parties do not reach an
24 agreement within twenty (20) days after notice (“the meet and confer
25 period”), the Receiving Party is to immediately return, sequester or destroy
26 the document or ESI received and all copies thereof, unless it received the
27 original, in which case it shall return the original to the Producing Party.
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1 (Copies of privileged or protected documents or information that have been
2 stored on electronic media that is not reasonably accessible, such as disaster
3 recovery backup media, are adequately sequestered as long as they are not
4 restored; if such data is restored, the Receiving Party must take steps to re-
5 sequester the restored information.) If the Receiving Party disclosed the
6 information before being notified, it must take reasonable steps to prevent
7 further use of such information until the claim is resolved. The Producing
8 Party must preserve the information until the claim is resolved. Fed. R. Civ. P.
9 26(b)(5)(B).

10 Within sixty (60) days of the expiration of the meet and confer period
11 described herein, any party seeking to contest the assertion of privilege or
12 protection as to inadvertently produced documents or ESI must request *in*
13 *camera* review of the documents or ESI in question by filing a motion that
14 does not disclose the content of the document(s) or ESI over which the
15 Producing Party has asserted privilege or protection. If the Receiving Party
16 fails to file such a motion within the sixty (60) days period, it waives any right
17 to dispute the privilege or protection with respect to that document or ESI
18 unless good cause exists for the failure to file such a motion (for example,
19 evidence not available at the time privilege was asserted demonstrates the
20 document or ESI was not privileged.)

21 At all times after the Producing Party provides the requisite notice, the
22 Receiving Party shall not refer to the allegedly privileged or protected material
23 in any manner, whether written or oral, in any interrogatory, request for
24 admission, document request, interview, deposition, oral argument, trial or
25 submission to the court (other than referencing the allegedly privileged or
26 protected materials for the sole purpose of contesting the asserted privilege, as
27 outlined in the preceding paragraph), nor will the receiving party disclose the
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1 substance of that material to any third party; however, the Receiving Party
2 may reference the allegedly privileged or protected material to the court.

3 Nothing in this Order shall prohibit a party, consistent with the Federal
4 Rules of Civil Procedure, Federal Rules of Evidence, or Orders entered by the
5 court, from withholding from review and/or production any document or ESI
6 covered by any privilege(s) or protection(s).

7 38. If a Party identifies a document that appears on its face or in light of
8 facts known to the Party to be subject to another Party's claim of privilege, the Party
9 identifying the potential claim of privilege is under a good-faith obligation to notify
10 the Party holding the potential claim of privilege. Such notification shall not waive
11 the identifying Party's ability to subsequently challenge any assertion of privilege
12 with respect to the identified document in accordance with Paragraph 37.

13 39. The Parties may stipulate to extend the time periods specified in
14 Paragraph 37.

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

19 41. Once challenged, the Party wishing to assert a claim of privilege
20 retains the burden of establishing the applicability of the claimed privilege by a
21 preponderance of the evidence. This Order does not preclude a Party from
22 voluntarily waiving any claims of privilege. The provisions of Rule 502(a) of the
23 Federal Rules of Evidence apply when a Party uses privileged information to
24 support a claim or defense.

25 **E. Controlled Unclassified Information**

26 WHEREAS, the discovery phase of this litigation may require
27 production of certain Controlled Unclassified Information or CUI to the
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1 Parties:

2 WHEREAS, the discovery phase of this litigation may also result in the
3 inadvertent disclosure of certain categories of Controlled Unclassified
4 Information or CUI that is not relevant to discovery requests in this litigation
5 to the Parties;

6 WHEREAS, various published Federal regulations, Orders, and
7 guidance govern the possession, use, viewing, disclosure, and transfer of such
8 Controlled Unclassified Information or CUI in a non-litigation setting, but do
9 not set forth specific instructions for implementing those various Federal
10 directives in the conduct of litigation;

11 IT IS HEREBY ORDERED, pursuant to Federal Rule of Civil
12 Procedure 26(c) and the general supervisory authority of the Court, and for
13 good cause having been shown, THAT:

14 42. Except as otherwise stated in this Order, the Producing Party
15 shall produce, in response to a valid discovery request, otherwise discoverable
16 information in its possession, custody or control that may contain Controlled
17 Unclassified Information in accordance with Section E of this Order. The
18 Receiving Party shall handle such information in accordance with Section E of
19 this Order. Documents containing controlled unclassified information shall be
20 designated "MAY CONTAIN CUI."

21 43. The Producing Party will make good faith efforts to segregate
22 any documents containing Controlled Unclassified Information prior to
23 production of documents to a Party. If a document containing Controlled
24 Unclassified Information is relevant to the litigation, Producing Party will
25 notify the Receiving Party in writing of the existence of such document(s)
26 including the title, date, author(s) and recipient(s) of such document(s). If a
27 Party believes it may wish to use such documents in the litigation, the
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1 Producing Party will provide copies of such documents to that Party, which
2 shall be maintained only on servers or other electronic media located in the
3 United States and shall be viewed and used only by United States-citizen
4 attorneys to the extent necessary to meet and confer with the Producing Party
5 regarding the use of such document in the litigation. If the Parties cannot
6 agree regarding use of such documents in litigation, the Parties shall seek
7 resolution from the Court; any document containing CUI submitted to the
8 Court for review will be filed under seal.

9 44. Upon receipt of documents or data produced with the legend
10 “MAY CONTAIN CUI” that were not identified by the Producing Party as
11 containing CUI pursuant to its good faith review set forth in Paragraph 43, the
12 Receiving Party shall initially maintain those documents and data only on
13 servers physically located in the United States and shall provide access to the
14 documents and data only to United States citizens. After the Receiving Party
15 has completed a good faith review of those documents and data and
16 concluded, to the best of the Receiving Party’s knowledge, either that (a) none
17 contain CUI or that (b) it has segregated and notified the Producing Party of
18 any document(s) it believes contains Controlled Unclassified Information in
19 accordance with Paragraph 45, the Receiving Party may then permit normal
20 access to all documents not specifically segregated pursuant to Paragraphs 43
21 or 44(b).

22 45. In the event a Receiving Party, in the course of its good faith
23 review pursuant to Paragraph 44 or otherwise, reasonably believes that
24 document(s) in its possession contain Controlled Unclassified Information, it
25 shall promptly notify the Producing Party about such documents, sequester all
26 copies of such document(s), refrain from further copying or distribution of the
27 subject material, and comply with any reasonable instructions provided by the
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1 Producing Party regarding proper handling of the material. Should the Parties
2 dispute the reasonableness or applicability of the instructions, the Receiving
3 Party shall comply with such instructions unless or until otherwise ordered by
4 the Court.

5 a. If the Receiving Party believes the document(s) is relevant to this
6 litigation, it shall limit the viewing and use of such document(s) only
7 to United States-citizen attorneys to the extent necessary to meet and
8 confer with the Producing Party regarding the use of such document
9 in the litigation. If the parties cannot agree regarding use of such
10 documents in litigation, the parties shall seek resolution from the
11 Court; any documents containing CUI submitted to the Court for
12 review shall be filed under seal.

13 b. If the Receiving Party believes the document(s) is not relevant to
14 this litigation, it shall (i) promptly return and/or destroy all copies of
15 the subject material in its possession in accordance with any
16 instructions provided by the Producing Party pursuant to this
17 Paragraph 45, and (ii) take reasonable steps to ensure all copies of
18 the subject material distributed to other counsel or non-parties is
19 returned and/or destroyed in accordance with this Paragraph 45.

20 Electronic versions of any such documents shall be removed from all
21 systems by reasonable technological means which ensure the
22 information cannot be recovered. Should the Producing Party
23 contend that additional steps are legally required, the Parties shall
24 meet and confer regarding such steps and, if the Parties are unable to
25 reach agreement, raise the issue with the Court for resolution.

26 46. In the event that the Producing Party claims that it inadvertently
27 produced Controlled Unclassified Information, it shall promptly notify all
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1 Parties to whom such material was produced or disclosed of the Producing
2 Party's intent to protect such material. Upon receiving a notice from the
3 Producing Party pursuant to this Paragraph 46, the Receiving Party shall
4 immediately sequester all copies of the document(s), refrain from further
5 copying or distribution of the subject material, except as provided in
6 subparagraph (a), and comply with any reasonable instructions provided by
7 the Producing Party regarding proper handling of the material. In the event
8 the Parties dispute the reasonableness or applicability of the instructions, the
9 Receiving Party shall comply with such instructions unless or until otherwise
10 ordered by the Court.

11 a. If the Producing Party believes that the document(s) containing
12 Controlled Unclassified Information is relevant to this litigation, it
13 will so notify all Parties to whom such material was produced or
14 disclosed and shall meet and confer with the Parties regarding use of
15 the document(s). During the meet and confer process, the Parties
16 shall limit the viewing and use of such document(s) only to United
17 States-citizen attorneys to the extent necessary to meet and confer
18 with the Parties to the litigation. If the Parties cannot agree
19 regarding use of such documents in litigation, all parties shall seek
20 resolution from the Court; any document containing CUI submitted
21 to the Court for review will be filed under seal.

22 b. If the Producing Party believes that the document(s) containing
23 Controlled Unclassified Information is not relevant to this litigation,
24 it will so notify all Parties to whom such material was produced or
25 disclosed. If the Receiving Party wishes to challenge the Producing
26 Party's relevancy determination, the Parties shall meet and confer in
27 accordance with subparagraph (a).
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1 47. If the Receiving Party does not intend to challenge the Producing
2 Party's' relevancy determination pursuant to Paragraph 46(b), or if the Parties
3 agree or the Court orders that a document is not relevant or will not be used in
4 the litigation pursuant to Paragraph 46(b), consistent with the Federal Rule of
5 Civil Procedure 26(b)(5)(B), the Receiving Party shall, in addition to the
6 requirements of Paragraph 46, (i) return and/or destroy all copies of the subject
7 materials in its possession in accordance with any instructions provided by the
8 Producing Party pursuant to Paragraph 46, and (ii) take reasonable steps to
9 ensure all copies of the subject material distributed to other counsel or non-
10 parties is returned and/or destroyed in accordance with this Paragraph 47.
11 Electronic versions of any such documents shall be removed from all systems
12 by reasonable technological means which ensure the information cannot be
13 recovered. Should the Producing Party contend that additional steps are
14 legally required, the Parties shall meet and confer regarding such steps and, if
15 the Parties are unable to reach agreement, raise the issue with the Court for
16 resolution.

17 48. Where an inadvertently produced document containing
18 Controlled Unclassified Information was originally produced in electronic
19 format on media containing production materials that are not subject to any
20 exemption from production, the Producing Party shall promptly provide
21 replacement production media to the Receiving Party.

22 49. The inadvertent disclosure of Controlled Unclassified
23 Information by the Producing Party in this Action shall not result in a waiver
24 of any restrictions on the use of Controlled Unclassified Information or for any
25 other materials containing the same or similar subject matter. Nothing in this
26 Order changes, modifies or diminishes any requirements imposed on an
27 individual to protect CUI pursuant to applicable laws, regulations, or
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1 directives. Nothing in this Order shall be read to enhance or negate any
2 argument that any such laws, regulations, or directives apply to any particular
3 document. Notwithstanding any federal statute or regulation, no agency,
4 officer, employee or attorney of any Party shall be subject to any civil or
5 criminal penalty or sanction relating to the disclosure or use of Controlled
6 Unclassified Information, provided that such disclosure or use is made
7 pursuant to this Order, other than this paragraph.

8 **F. Preparation of Privilege Log.**

9 50. Any document falling within the scope of any request for production
10 or subpoena that is withheld on the basis of a claim of attorney-client privilege,
11 work product, or any other claim of privilege or immunity from discovery is to be
12 identified by the Producing Party in a privilege log, which the Producing Party
13 shall produce in an electronic format that allows text searching and organization of
14 data.

15 51. The Producing Party shall produce privilege logs no later than thirty
16 (30) business days after withholding documents pursuant to a claim of privilege.
17 For each document for which a Producing Party asserts that a privilege applies, the
18 Producing Party must include in the privilege log the information required by
19 Federal Rule of Civil Procedure 26(b)(5), including the following:

- 20 a. Bates range of the document withheld as privileged;
- 21 b. assertion of the ground(s) alleged for withholding such document;
- 22 c. the date, if available, of the document or communication;
- 23 d. the identity of its author and signatories and to whom it was sent, if
24 available; and
- 25 e. a description of the withheld document, communication or tangible
26 thing in a manner that, without revealing information claimed privileged, will
27 enable a party to assess the validity or efficacy of the privilege claim.

1 52. Notwithstanding a claim of privilege, any purportedly privileged
2 document containing non-privileged matter must be: (i) produced with the
3 purportedly privileged portion redacted, with the redacted portion indicated on the
4 document itself, and (ii) listed on the privilege log to be provided pursuant to
5 Paragraph 51.

6 53. To assist in the prompt resolution of disputed claims of privilege,
7 upon request by the Court, the Producing Party shall submit to the Court under
8 seal, unredacted copies of all documents for which there is a disputed claim of
9 privilege. The Parties must follow the procedures in Paragraph 37 for disputed
10 claims of privilege for documents or ESI listed on the privilege log, or for disputed
11 claims of privilege for inadvertently produced documents or ESI.

12 54. The Parties may stipulate to extend the time period specified in
13 Paragraph 51.

14 55. The obligation to provide a log of privileged or work product
15 materials pursuant to Rule 26(b)(5)(A) presumptively shall not apply to the
16 following privileged or work product materials created on or after March 9, 2015:

- 17 a. Communications exclusively between a party and its counsel;
18 b. Work product created by counsel, or by an agent of counsel other
19 than a party or an employee of a party; or
20 c. Internal communications within (a) a law firm, (b) a legal assistance
21 organization, (c) a governmental law office, or (d) a legal department of a
22 corporation or another organization.

23 56. Threaded e-mails. An e-mail shall be treated as a single document
24 regardless of the number of threaded e-mails contained within the message body.
25 The privilege log for an e-mail withheld under a claim of privilege, to the extent
26 any is required, shall identify the author, recipient(s), subject, dates and times
27 based on the metadata (to the extent it exists), from the top level message, and shall
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1 not include data from any e-mail embedded in the message body. An e-mail thread
2 contained within a single document need only be recorded once on the Producing
3 Party's privilege log, even if a privilege is asserted over multiple portions of the
4 thread. However, if an e-mail contains both privileged and non-privileged
5 communications, the nonprivileged, responsive communications must be produced.
6 This requirement should be satisfied by producing the original of the threaded,
7 non-privileged e-mail, but if the original is not available, it may be satisfied by
8 producing a redacted version of the privileged e-mail.

9 **G. Document Production**

10 57. Any responsive documents that exist in locations or formats not
11 discussed in these production specifications remain responsive and arrangements
12 should be made with the Parties to facilitate production.

13 58. General Format of Production. The Parties will produce documents
14 either (i) as electronic images with associated text files, with reasonably producible
15 metadata (to the extent it exists), or (ii) in native format, as further described
16 herein.

17 59. ESI Production. The Parties will produce ESI with the exception of
18 inaccessible storage media as described below. ESI will be searched on a custodian
19 and/or search term basis, as described in Paragraph 68. With respect to production
20 of ESI, the following applies:

21 a. E-mail from e-mail repositories ("E-Mail") will be produced as
22 image files with related searchable text and reasonably producible metadata
23 (to the extent it exists) as described in the "Metadata Fields for Production,"
24 which is attached and incorporated as Appendix A [hereinafter "applicable
25 metadata"]. E-mails received outside e-mail repositories or saved in other
26 formats (i.e., as pdf) will be produced as "Other ESI." Documents attached to
27 emails will be extracted and produced as "Other ESI" children documents of
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1 the parent e-mail.

2 b. Other electronic documents and files (“Other ESI”) will be
3 produced as .tif image files with related searchable text and applicable
4 metadata (to the extent it exists) as described in the “Metadata Fields for
5 Production,” which is attached and incorporated as Appendix A except for:

6 1. All spreadsheet (e.g. Access Databases, Excel, Comma
7 Space Value (CSV), etc.) files will be produced in native format with
8 applicable metadata (to the extent it exists). Where a party redacts a portion of
9 a spreadsheet(s), the Parties will meet and confer regarding production of the
10 redacted spreadsheet(s) in .tif;

11 2. PowerPoint files will be produced in native format with
12 applicable metadata (to the extent it exists). Where a party redacts a portion of
13 a PowerPoint slideshow, the redacted PowerPoint file will be produced as
14 a .tif;

15 3. The Parties will discuss any specialized databases or other
16 categories of documents that are responsive to the Parties’ requests. The
17 Parties must confer and reach agreement on what information to extract and
18 how to produce it prior to any production.

19 4. Potentially privileged documents shall be withheld from
20 production; their Bates numbers may be listed as gaps on an “Exception Log”
21 sent with production of that Bates range.

22 5. Documents considered “publically available” such as
23 published articles, postings to public web sites (except postings to Social
24 Media websites, e.g. Twitter, Facebook, etc.) will not be produced, but the
25 location of such “publically available” information will be identified by the
26 Producing Party to the Receiving Party.

27 6. The Producing Party must discuss the potential export
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1 formats with the Receiving Party before collecting information from Social
2 Media websites (e.g. Twitter, Facebook, etc.) to ensure it is collected and
3 produced in a way that preserves the original metadata, has a clear chain of
4 custody, and provides as much information as possible regarding the source
5 and history of each individual communication.

6 60. Paper (“Hard Copy”) Documents. Hard-copy documents will be
7 produced as image files (as explained in Paragraph 61) with OCR text on a rolling
8 basis. All hard-copy documents will be converted into .tif images for production
9 purposes and the Producing Party will address any exceptions with the Receiving
10 party. The Parties shall meet and confer to discuss documents that present imaging
11 or formatting problems in advance of production. To the extent exceptions to the
12 foregoing are required, the Parties will meet and confer to discuss alternative
13 production requirements, concerns, or formats in advance of production.

14 61. Form and Manner of Production.

15 a. Unless subject to the special handling instructions outlined in
16 Paragraph 63, production document images will be provided in single-page .tif
17 format.

18 b. All images generated from hard copy documents shall be scanned
19 as black and white images at 300 d.p.i. resolution and shall be saved and
20 produced in a Group 4 compression single-page “.tif” format and reflect,
21 without visual degradation (if possible), the full and complete information
22 contained on the original document.

23 c. All images generated from responsive native electronic documents
24 shall be saved electronically (or “printed”) in a Group 4 compression single-
25 page “.tif” image format that reflects the full and complete information
26 contained on the original document except as identified in Paragraph 59(b)(1).

27 d. Encrypted documents will be decrypted if the password key is
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1 available and the decrypted version will be produced.

2 e. An “Exception Log” (if applicable) will be included with each
3 production to document production anomalies such as Bates number gaps. The
4 Log will be indexed using the Bates or other DOCID number for each
5 document listed in the report.

6 f. The Parties shall produce documents in a “load file” format that is
7 compatible with a commercially available document management software,
8 such as Concordance, to accompany the images. The load file shall include
9 information about where each document begins and ends to facilitate the use of
10 the produced images through a document management or litigation support
11 database system. The Parties shall meet and confer to the extent reasonably
12 necessary to facilitate the import and use of the produced materials with
13 commercially available document management or litigation support software.

14 g. Productions should include a standard Image Cross Reference file
15 that associates each Bates number with its corresponding single-page “.tif”
16 image file. The Cross Reference file should also contain the image file path for
17 each Bates numbered page. Image Cross Reference Sample Format:
18 USAI00100000001,OLS,D:\DatabaseName\Images\001\USA00100000001.tif,Y,,
19 USAI00100000005,OLS,D:\DatabaseName\Images\001\USA00100000005.tif,Y,,
20 USA00100000008,OLS,D:\DatabaseName\Images\001\USA00100000008.tif,Y,,

21 h. Productions should also include a “text load file” containing
22 delimited text that will populate fields in a searchable, flat database
23 environment. ASCII text delimited load files are defined using the following
24 delimiters:

25 Field Separator = ^ or Code 094

26 Text Qualifier = | or Code 124

27 Substitute Carriage Return or New Line = () or Code 013

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- 1 i. There should be one line for every record in a collection.
- 2 j. The load file must contain a field map/key listing the
- 3 metadata/database fields in the order they appear within the data file. For
- 4 example, if the data file consists of a First Page of a Record (starting Bates),
- 5 Last Page of a Record (ending Bates), Custodian, Document ID, Document
- 6 Date and File Name, then the structure may appear as follows:

7 |BEGDOC|^|ENDDOC|^|CUSTODIAN|^|DOCID|^|DOCDATE|^|FILENAME|

8 The extracted/OCR text for each document should be provided as a

9 separate single text file. The file name should match the BEGDOC or DOCID

10 for that specific record and be accompanied by the .txt extension.

11 62. Document Unitization. To the extent possible and on a going-forward

12 basis, the Parties will endeavor to apply unitization practices consistent with the

13 following description. Each page of a hard copy document shall be scanned into an

14 image. If a document is more than one page, the unitization of the document and

15 any attachments shall be maintained as it existed in the original when creating the

16 image file. For documents that contain fixed notes, the pages will be scanned both

17 with and without the notes and those pages will be treated as part of the same

18 document. The relationship of documents in a document collection (e.g. cover

19 letter and enclosures, email and attachments, binder containing multiple

20 documents, or other documents where a parent-child relationship exists between

21 the documents) shall be maintained through the scanning or conversion process. If

22 more than one level of parent-child relationship exists, documents will be kept in

23 order, but all will be treated as children of the initial parent document. Such

24 information shall be produced in the load file, as hereafter defined, in a manner to

25 enable the parent-child relationship among documents in a document collection to

26 be reconstituted by the Receiving Party in commercially available document

27 management software, such as Concordance. Electronic files will be unitized

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1 according to the source file boundaries.

2 63. Color. Dedicated picture files (e.g., .jpg, .jpeg, .gif, .bmp), video files
3 (e.g., .wma, .mov, .mpg, .wmv, .avi, .asf), and computer animation files
4 (e.g., .avi, .gif, .mpg, .gif, .mpeg, .wmv), shall be produced in color. If other
5 original documents contain color, the Parties will honor reasonable requests to
6 either produce the original document for inspection and copying or produce a color
7 image of the document.

8 Duplicates. Each Party will dedupe data at the Party level using the
9 common MD5 “hash” process as outlined below. Deduplicating is not
10 applicable to “Hard Copy” but should be done for all “E-Mail” and “Other
11 ESI” files.

12 **MD5 HASH**

13 To create an MD5 Hash Value used to dedupe “Other ESI” stream only
14 the internal binary content through the MD5 algorithm.

15 To create an MD5 Hash Value used to dedupe “E-Mail,” combine the
16 binary values of the following fields and stream that through the MD5
17 algorithm:

- 18 a. To
- 19 b. From
- 20 c. CC
- 21 d. BCC
- 22 e. Subject
- 23 f. Date Sent
- 24 g. Body
- 25 h. Name of attachments

26 Where a single document has more than one identical copy based on the
27 MD5 hash value (i.e., the documents are visually the same and contain the
28

1 same electronic text), the Parties need only produce a single copy of that
2 document. In such cases, the Parties will provide metadata (to the extent it
3 exists) for that document which identifies every custodian from whom that
4 document was collected as of the date of production. The “original” document
5 would have multiple custodians listed in the “Custodian” metadata field. If
6 additional copies of the document are identified later, a metadata overlay may
7 be sent to the Parties to update the custodian field at their end. If a duplicate
8 document exists that is part of a document family, the duplicate will only be
9 removed, pursuant to the terms of this paragraph, if the entire family is
10 removed as a duplicate, i.e. a single document will not be removed from a
11 family even if it is a duplicate.

12 64. Bates Numbering.

13 a. For the United States agencies, the Bates number will not be
14 endorsed on the image but just assigned to each image or native file prior to
15 being sent to the Department of Justice. Other Parties will produce imaged
16 documents with a legible, unique page identifier (“Bates number”)
17 electronically “burned” onto each page, at a location that does not obliterate,
18 conceal, or interfere with any information from the source document. This
19 should generally be the bottom right side of each image; use Arial font at 12
20 pt. for this numbering.

21 b. No other legend or stamp will be placed on the document image
22 other than the “SUBJECT TO PROTECTIVE ORDER” or “SUBJECT TO
23 PROTECTIVE ORDER – ATTORNEYS EYES ONLY” or “MAY
24 CONTAIN CUI” legend (where applicable), redactions (consistent with this
25 Order, or any other protective orders agreed to in the future), classification and
26 declassification markings, and the Bates number identified above.

27 c. The “SUBJECT TO PROTECTIVE ORDER” or “SUBJECT TO
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1 PROTECTIVE ORDER – ATTORNEYS EYES ONLY” OR “MAY
2 CONTAIN CUI” legend shall be “burned” onto the document’s image at a
3 location that does not obliterate or obscure any information from the source
4 document and should generally be centered along the bottom of each image; use
5 Arial font at 12 pt. for this endorsement.

6 d. Native files will not be endorsed, but must be assigned a single
7 Bates number for the entire file which will represent the native document in
8 the load/dat file.

9 e. The Bates number shall include leading zeros in the numeric
10 portion of the eight-place number.

11 f. The Bates number shall be a unique name/number associated with
12 each page (when assigned to an image) or to each document (when assigned to
13 a native file).

14 g. For rolling productions, the naming/numbering convention shall
15 remain consistent throughout the entire production. There shall be no spaces
16 between the prefix/container and numeric portion.

17 h. For the United States agencies, the Bates prefix will begin with a
18 3 or 4 character alpha string unique to each agency (prefix to be agreed upon
19 with DOJ prior to use). The first page of each delivery will be an eight-place
20 numeric character or “00000001” with subsequent pages incrementing
21 sequentially by one. Examples:

22 ABC00000001 = Page 1

23 ABC00000015 = Page 15

24 If pages are added later, use a “dot notation” suffix method to label
25 those new pages. Example: 2 new pages are added after page 2:

26 ABC00000002.001

27 ABC00000002.002

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1 i. With respect to the identification of files produced in their native
2 format, the load/dat file will include a reference to the native file path and the
3 DOCLINK production folder that contains the native files (“NATIVELINK”
4 metadata field).

5 File Naming Conventions. Each page image file shall be named with the
6 Bates number, followed by the extension “.tif.” In the event the Bates number
7 contains a symbol and/or character that cannot be included in a file name, the
8 symbol and/or character will be omitted from the file name.

9 65. Production Media.

10 a. The Parties will produce documents on CD-ROM, DVD, external
11 hard drive, or such other readily accessible computer or electronic media as the
12 Parties may hereafter agree upon (the “Production Media”).

13 b. .Tif and text files, along with corresponding native files copied to
14 the media should be in labeled folders (images should be saved in folders with a
15 maximum of 2,000 records each).

16 c. The media label shall include: (1) the case number of the case in
17 which it is produced, (2) the Producing Party’s name (for the United States
18 that should be the specific agency or agencies name), (3) the production
19 volume number for that agency, (4) the date produced, (5) the type of
20 materials on the media (e.g., “Images and text files” or “Custodian Overlay
21 Data”), (6) a “SUBJECT TO PROTECTIVE ORDER” designation or other
22 notation if applicable to the documents provided on that media, and (7) the
23 Bates number range(s) of the materials, if possible; otherwise provide the
24 Bates ranges in an accompanying letter.

25 d. All production media must be encrypted with Symantec Endpoint
26 Encryption in accordance with the current Department of Justice security
27 policy. Passwords or decryption keys for the media will be transmitted to
28

1 Parties separately from the media delivery (i.e. via e-mail).

2 66. Objective/Subjective Coding: Due to the anticipated large volume of
3 hard copy documents that will be produced in this action, the Parties will not
4 produce objective coding or any coding directed or conducted by counsel in these
5 matters (“Subjective Coding”).

6 67. Extracted Text/OCR. For documents that exist natively in electronic
7 format that have not been redacted, the Parties shall produce extracted text files
8 reflecting the full text that has been electronically extracted from the original,
9 native electronic files. The Parties will produce corresponding OCR text files for
10 all hard-copy documents and any electronic documents that require redaction prior
11 to production or have non-searchable native files (i.e. a nonsearchable pdf).
12 Documents produced as native files (i.e. Audios, Computer-Aided Design
13 (“CAD”), Spreadsheets, Videos, etc.) will not have extracted text or OCR
14 produced.

15 68. Use of Search Terms.

16 a. As part of an effort to identify and exclude obvious system or
17 other nonuser generated files from productions, all Parties should agree to use
18 the same “de-nisting” method and term list prior to running any case-specific
19 search terms against potential production data.

20 b. United States agencies should expect to use the standard list
21 maintained and updated by the National Institute of Standards and Technology
22 (“NIST”). Parties may need to meet and agree on the specific list date or other
23 criteria before collecting Potentially Relevant Information.

24 c. In addition to de-nisting, the Parties will meet and confer to
25 identify mutually agreeable search terms for e-mail messages and other ESI.

26 d. Plaintiffs shall provide the United States with an initial listing of
27 search terms and the United States shall have the opportunity to propose
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1 modifications to those search terms. Each party may also propose custodians
2 and date limitations for searches and search procedures.

3 e. Within thirty (30) days of when the Parties agree on an initial set
4 of search terms and search procedures, the Parties shall conduct a further meet
5 and confer to determine whether modifications should be made to those search
6 terms and search procedures.

7 f. The Parties will produce potentially-relevant ESI in their
8 possession according to the agreed search terms, search procedures,
9 custodians, and date ranges.

10 g. The Parties acknowledge that the agreement to the use of such
11 search procedures and terms shall not be construed as a waiver of any party's
12 right to request subsequent searches and productions; particularly where there
13 is a showing that the agreed-to search terms and procedures have resulted in
14 inadequate productions or failed to identify relevant materials. The Parties
15 reserve their right to object to any additional requests or subsequent searches,
16 and to limit changes to future searches against new material received;

17 h. Documents identified by search terms may be reviewed for
18 privilege, confidentiality, redactions, and relevance or responsiveness prior to
19 production; and

20 i. The Parties will produce responsive, non-privileged ESI on a
21 rolling basis so as to provide each other with responsive, non-privileged
22 documents as expediently as possible.

23 69. Original Documents. The Parties will retain the original hard-copy
24 documents and original ESI documents. Subject to preservation of appropriate
25 privileges and other protections, the Parties will consider reasonable requests, after
26 any necessary meet and confer, to produce the original copy and source ESI
27 documents of specific documents or groups of documents, or where a document
28

1 existed originally in only hard copy format, will make originals of any produced
2 document, and produce .tif and OCR for inspection by the requesting party.

3 70. Translation of Produced Materials. For any foreign-language
4 documents responsive to document requests that a party translated or translates into
5 English language for its own purposes, except to the extent such translation is
6 protected by attorney-client or work product privileges, the Producing Party shall
7 produce the translation of the document with the document.

8 There shall be in this matter a rebuttable presumption of evidence that an e-
9 mail correctly addressed to a recipient was actually delivered to that recipient's e-
10 mail inbox, although it might not have been read by the recipient.

11 **H. Document Preservation Not Required for ESI That Is Not Reasonably**
12 **Accessible.**

13 71. Except as provided in Paragraph 72, the Parties need not preserve the
14 following categories of ESI for this litigation:

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

20 b. Voicemail messages;

21 c. Instant messages, such as messages sent on AOL Instant
22 Messenger or Microsoft Communicator;

23 d. Text messages, such as cell phone to cell phone SMS messages;

24 e. Electronic mail sent to or from a personal digital assistant
25 ("PDA") or smartphone (e.g., BlackBerry) provided that a copy of such email
26 is routinely saved elsewhere;

27 f. Other electronic data stored on a PDA or smartphone, such as
28 calendar or contact data or notes, provided that a copy of such information is

1 routinely saved elsewhere;

2 g. Logs of calls made from cellular phones;

3 h. Deleted computer files, whether fragmented or whole;

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

7 j. Data stored on photocopiers, scanners, and fax machines;

8 k. Server, system, or network logs;

9 l. Electronic data temporarily stored by scientific equipment or
10 attached devices, provided that the data that is ordinarily Preserved as part of a
11 laboratory report is, in fact, Preserved in its ordinary location and form; and

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

14 72. Notwithstanding Paragraph 71, if on the date of this agreement either
15 Party has a Policy that results in the routine preservation of any of the categories of
16 information identified in Paragraph 71, such Party shall continue to preserve such
17 information in accordance with its Policy.

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

21 **I. Use of Documents During Litigation.**

22 74. Notwithstanding any other provision of this Order, the Parties may
23 take any of the following actions with respect to documents and ESI.

24 a. Parties may, to the extent necessary to carry out their ordinary
25 duties, edit non-final documents that do not meet the definition of “Draft” in
26 Paragraph 1. However, the Parties shall preserve Draft documents for
27 discovery.
28

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

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

11 d. The Parties may copy data from one device to another, or from
12 one location to another, provided that a copy of the ESI remains accessible in
13 the first location or the new copy is created in a manner that preserves the
14 data, including metadata (to the extent it exists) that will be produced pursuant
15 to Section G of this Order.

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

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

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

3 h. The Parties may edit or take down any data on a publicly
4 accessible internet site, provided that a copy of the data is made before the
5 change and is Preserved for discovery. The Parties may add data to an intranet
6 or private website. The Parties may edit or take down any data on an intranet
7 or private website, provided that a copy of the data is made before the change
8 and is Preserved for discovery.

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

14 j. The Parties may update social media sites, but may not take
15 affirmative steps to delete or alter relevant data posted before the filing of the
16 Complaint.

17 **J. Preservation Does Not Affect Discoverability or Claims of Privilege.**

18 75. By preserving documents or ESI for the purpose of this litigation, the
19 Parties are not conceding that such material is discoverable, nor are they waiving
20 any claim of privilege.

21 **K. Other Preservation Obligations Not Affected.**

22 76. Nothing in this Order shall affect any other obligations of the Parties to
23 preserve documents or information for other purposes, such as pursuant to court
24 order, administrative order, statute, or in response to other anticipated litigation.

25 **L. Meet and Confer Requirements.**

26 77. Discovery Disputes. Before filing any motion with the Court
27 regarding electronic discovery or evidence, the Parties will meet and confer in a
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1 good faith attempt to resolve such disputes.

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

5 **M. Costs of Document Production.**

6 79. Unless this Court orders otherwise for good cause shown, each Party
7 shall bear the costs of producing its own documents.

8 **N. Expert Discovery.**

9 80. Each Party shall not pursue through discovery, trial subpoena or
10 otherwise:

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

13 b. Communications between a witness required to provide a report
14 under Fed. R. Civ. P. 26(a)(2)(B) and a Party's representative—including, but
15 not limited to, another witness required to provide a report under Fed. R. Civ.
16 P. 26(a)(2)(B)—regardless of the form of the communications, except to the
17 extent that the communications:

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

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

26 **O. Enforcement and Modification of This Discovery Order**

27 82. If any party has cause to believe that a violation of this Order has
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1 occurred or is about to occur, it shall have the right to petition this Court for
2 appropriate relief.

3 83. For good cause shown, any party may seek modification of this
4 Order. No part of the provisions of this Order may be modified except in
5 accordance with this Order. The provisions of this Order, and any subsequent
6 amendments thereto and modifications thereof shall continue to be binding after
7 the termination of this case unless otherwise ordered.

8 84. Any party seeking modification of this Order must first provide
9 counsel for all Parties with at least ten (10) days written notice prior to filing any
10 such motion with the Court. During that 10-day period, the Parties shall attempt to
11 agree to a proposed modification. If such agreement is reached, the Parties shall
12 execute a stipulation setting out such modification, which will then be presented to
13 the Court for approval. If no agreement is reached within the 10-day period, the
14 party seeking the modification may apply to the Court for such relief upon notice
15 to all Parties. The Court shall provide an opportunity for the Parties to present their
16 respective views to the Court before approving a stipulated request for
17 modification or before granting a motion seeking modification.

18 85. Nothing in this Order shall be construed to compel the United States
19 to produce information that, under law or agreement, it is prohibited from
20 producing, including, *inter alia*, information protected from compelled disclosure
21 by a Certificate of Confidentiality or an Assurance of Confidentiality issued
22 pursuant to the Public Health Service Act, 42 U.S.C. §§ 241(d), 242m(d), and/or
23 CIPSEA; confidential substance abuse information protected by 42 U.S.C. §§
24 290aa(n) or 290dd-2; visa application material protected by 8 U.S.C. § 1202(f);
25 information subject to the confidentiality provision of section 12(c) of the Export
26 Administration Act of 1979, as amended (50 U.S.C. app 2411(c); or information
27 protected by Federal Rule of Criminal Procedure 6(e). Nothing in this Order shall
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1 be read to enhance or negate any argument that any such laws, provisions, or
2 regulations apply to any particular document.

3 **P. Integration/Appendices.**

4 86. The following documents are incorporated herein by reference:

5 “Appendix A” is a table describing the fields to be included in the load
6 file produced by each Party.

7 “Appendix B” is the “Acknowledgment of Master Discovery And
8 Protective Order.”

9 SO ORDERED this 16th day of February, 2016.

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UNITED STATES MAGISTRATE JUDGE

13 This protective order does not authorize the parties to file documents under
14 seal. Under seal filings are governed by Local Rule 79-5.

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