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28 Sun West Bank

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

23 PROGRESSIVE CASUALTY) Case No. 2:11-cv-00678-LRH-PAL
24 INSURANCE COMPANY,)
25 Plaintiff,) JOINT PROPOSED ESI
26 v.) PROTOCOL
27 JACKIE K. DELANEY; LARRY E.)
28 CARTER; MARK A. STOUT;)
KENNETH TEMPLETON; JOHN)

1 SHIVELY; STEPHEN C. KALB;)
 2 JEROME F. SNYDER; HUGH)
 3 TEMPLETON; and RICK)
 4 DRESCHLER,)
 Defendants.)

5
 6 Plaintiff and Defendants have conferred regarding the
 7 production of electronically stored information in their possession,
 8 custody, or control ("ESI"), agree to the following, and respectfully move
 9 the Court to enter an Order approving the same.

10 1. As used herein, "Plaintiff" or "Progressive" means
 11 Progressive Casualty Insurance Company, "FDIC-R" means the FDIC in its
 12 capacity as Receiver of Sun West Bank ("Sun West" or the "Bank"), and "Ds
 13 & Os" means Defendants Jackie K. Delaney, Larry E. Carter, Mark A. Stout,
 14 Kenneth Templeton, John Shively, Stephen C. Kalb, Jerome F. Snyder,
 15 Hugh Templeton, and Rick Dreschler. As used herein, the words "Party" or
 16 "Parties" include Plaintiff, FDIC-R, and the Ds & Os.

17 2. This Protocol, including the provisions set forth in Exhibit
 18 A, applies to the ESI provisions of Fed. R. Civ. P. 16, 26, 33, 34, and 37.
 19 Insofar as it relates to ESI, this Protocol also applies to Fed. R. Civ. P. 45, if
 20 agreed to by the recipient of any subpoena issued pursuant to that rule, in
 21 all instances in which the provisions of Fed. R. Civ. P. 45 are the same as, or
 22 substantially similar to, the provisions of Fed. R. Civ. P. 16, 26, 33, 34, or 37.
 23 Nothing contained herein modifies Fed. R. Civ. P. 45 and, specifically, the
 24 provision of Rule 45(c)(2)(B) regarding the effect of a written objection to
 25 inspection or copying of any or all of the designated materials or premises.
 26 The Parties agree that this Protocol will serve as a guideline for any
 27 subpoena for documents issued to ABA Insurance Services Inc. ("ABAIS"),
 28 Progressive's managing general agent, in this matter. The Parties shall

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1 meet and confer regarding the appropriateness of this Protocol with respect
2 to any subpoena to ABAIS. Nothing in this Protocol shall be deemed to
3 constitute a waiver of any objections ABAIS may have with respect to any
4 such subpoena. Nothing in this Protocol shall be deemed to prevent a
5 Party from seeking the Court's intervention with respect to any issues that
6 may arise regarding the application of this Protocol to a subpoena issued to
7 ABAIS and/or any objections ABAIS may have with respect to any such
8 subpoena if the Parties are unable to resolve any such issues or objections
9 without the Court's assistance. Likewise, nothing in this Protocol shall be
10 deemed to prevent any other Party from opposing any relief sought from
11 the Court.

12 3. In this Protocol, the following terms have the following
13 meanings:

14 A. "Metadata" means: (i) information embedded in a
15 Native File, including but not limited to the information identified in
16 Exhibit A hereto, that is not ordinarily viewable or printable from the
17 application that generated, edited, or modified such Native File; and (ii)
18 information generated automatically by the operation of a computer or
19 other information technology system when a Native File is created,
20 modified, transmitted, deleted, or otherwise manipulated by a user of such
21 system. Metadata is a subset of ESI.

22 B. "Native File(s)" means ESI in the electronic format
23 of the software application in which such ESI is normally created, viewed,
24 and/or modified. Native Files are a subset of ESI. Native Files include, but
25 are not limited to, the files identified in Exhibit A.

26 C. "Static Image(s)" means a representation of ESI
27 produced by converting a Native File, including but not limited to the
28 types of files identified in Exhibit A, into a standard image format capable

1 of being viewed and printed on standard computer systems. In the absence
2 of agreement of the Parties or order of Court, a Static Image, when
3 provided, should be provided in 300 dpi resolution, single-page black and
4 white CCITT Group IV Tagged Image File Format (TIFF or .TIF files). If a
5 TIFF or .TIF file cannot be created, then the Static Image should be
6 provided in Portable Document Format (PDF).

7 4. Notwithstanding the protocols set forth in this Protocol,
8 each Party shall produce any and all ESI it intends to rely upon in support
9 of any claim or defense with respect to this matter.

10 5. In accordance with Federal Rule of Evidence 502(d), to
11 the extent any Party or subpoena recipient discloses a communication or
12 information covered by the attorney-client privilege, work-product
13 doctrine, or any other applicable privilege(s) or protection(s) (collectively
14 "Privilege") that Privilege is not waived by disclosure connected with the
15 litigation pending before the Court, and the disclosure is also not a waiver
16 in any other federal or state proceeding. Upon discovery by any Party or
17 recipient of a subpoena that produces documents subject to this Protocol
18 that it inadvertently disclosed materials it believes to be protected by
19 Privilege, that Party or subpoena recipient shall promptly notify all Parties
20 or their counsel in writing of the disclosure, identify the document that
21 contains or consists of material believed to be Privileged, and immediately
22 take steps to prevent further disclosure of such material. The provisions of
23 Federal Rule of Civil Procedure 26(b)(5)(B) shall govern the Parties and any
24 subpoena recipient that produces documents subject to this Protocol with
25 respect to any such material. Similarly, if any Party receives ESI from a
26 producing Party or subpoena recipient that it reasonably believes the
27 producing Party or subpoena recipient may have inadvertently produced
28 because it clearly contains information that may be protected by the

1 attorney-client privilege, work-product doctrine, or any other privileges or
2 protections, the receiving Party shall notify the producing Party or
3 subpoena recipient that it believes that such ESI may have been
4 inadvertently produced. The provisions of Federal Rule of Civil Procedure
5 26(b)(5)(B) shall govern the Parties and any subpoena recipients that
6 produce documents subject to this Protocol with respect to any such
7 material. To the extent the Parties or subpoena recipients disagree
8 regarding the application of these principles to any such material, or
9 challenge the privileged nature of such material, the receiving Parties shall
10 not make use of the material in question until the matter is resolved by the
11 Court.

12 6. Nothing in this Protocol requires Progressive, FDIC-R, or
13 the Ds & Os to produce again information that was produced before this
14 action was commenced and/or before this Protocol has been entered by the
15 Court. The Parties reserve the right to address how to deal with any
16 productions made before the action commenced.

17 7. The Parties have discussed whether the Party receiving
18 ESI should be required to pay to the Party producing ESI six cents (\$0.06)
19 per Static Image for all ESI produced in Static Image format. The Parties
20 have agreed to defer resolution of this issue until a later date. In the event
21 that the Parties are unable to reach agreement regarding this issue, all
22 Parties reserve the right to raise this issue with the Court if they deem it to
23 be necessary. Moreover, nothing in this Protocol shall be deemed to
24 constitute a waiver of any Party's right to do so or a waiver of any Party's
25 right to contest any such effort. Other than the six cents (\$0.06) per page
26 addressed in this Paragraph, the Parties agree that all other costs associated
27 with the production of ESI shall be borne by the producing Party unless
28 otherwise specified in this Protocol.

1 8. Nothing in this Protocol shall preclude any Party from
2 seeking any documents in discovery. However, except for good cause
3 shown, further agreement of the Parties, or as provided in this Protocol, the
4 procedures set forth in this Protocol shall be the only way in which ESI
5 shall be retrieved and produced in this matter.

6 9. The Parties shall exchange a list of electronic data sources
7 that will be searched for relevant ESI and a list of all custodians whose
8 electronic files will be searched for relevant ESI. Absent agreement among
9 the Parties otherwise, all searches shall be run against all electronic data
10 sources and custodians' files disclosed by the producing Party. In the event
11 a specific search for ESI will be run against only certain discrete data
12 sources or a subset of custodians' files, then the Parties shall exchange a list
13 of the discrete data sources and/or the subset of custodians' files that will
14 be searched. If a Party contends the production of materials sought from
15 one or more custodians is unduly burdensome or that the list of custodians
16 whose electronic files will be searched is too broad or too narrow, the
17 Parties agree to meet and confer to attempt to resolve the issue. Nothing in
18 this Protocol shall prevent a Party from seeking the Court's intervention
19 with respect to any such issue if the Parties are unable to resolve it
20 themselves or from preventing any other Party from opposing any relief
21 sought.

22 PROGRESSIVE ESI

23 10. Progressive represents it is in possession, custody, or
24 control of the following categories of ESI: (1) Email; (2) General Documents;
25 (3) Website Documents; and (4) Progress Documents. "General
26 Documents" consists of all electronic documents that may include relevant
27 ESI not encompassed solely in categories (1), (3), or (4). In addition to the
28 foregoing, Progressive has certain ESI stored on backup tapes ("Backup

1 Documents"). Upon restoration from backup, Backup Documents also
2 would be in Progressive's possession. Backup Documents are addressed in
3 Paragraph 17 below. Progressive represents that, to the best of its
4 knowledge, this is a full, complete, and accurate listing of all categories of
5 ESI from which materials relevant to this action may be retrieved. FDIC-R
6 and the Ds & Os reserve the right to seek additional ESI in the possession,
7 custody, or control of Progressive or ABAIS, and nothing contained herein
8 shall be deemed to constitute a waiver of their right to do so. Progressive
9 and ABAIS reserve the right to object to any efforts by FDIC-R or the Ds &
10 Os to seek any such additional ESI, to the extent it exists.

11 11. Subject to the terms of this Protocol, including, but not
12 limited to, Paragraph 9, and the Confidentiality Agreement and Stipulated
13 Protective Order in this matter (Docket No. 63), and pursuant to an Order
14 of this Court which shall be deemed made by approval of this Protocol,
15 Progressive shall produce relevant, non-privileged documents in categories
16 (1) and (2), collectively referred to as the "Progressive Searchable ESI," in
17 accordance with the procedures set forth in this Protocol and in the format
18 specified in Exhibit A hereto. Progressive shall produce relevant, non-
19 privileged ESI in category (3) as specifically addressed in Paragraph 15
20 below. Progressive shall produce relevant, non-privileged ESI in category
21 (4) as specifically addressed in Paragraph 16 below.

22 12. The Parties shall collectively agree upon a reasonable set
23 of search terms to run across the processed Progressive Searchable ESI. If
24 the Parties are unable to agree upon search terms after conferring in good
25 faith, any Party may raise the issue with the Court by motion. In order to
26 facilitate the good faith negotiation of search terms among the Parties, with
27 respect to any search term requested by FDIC-R or the Ds & Os but
28 objected to by Progressive on the grounds that it is overly broad or unduly

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1 burdensome, Progressive shall provide search term hit reports to FDIC-R
2 and the Ds & Os which identify the number of unique documents that hit
3 upon each identified search term requested by FDIC-R or the Ds & Os and
4 objected to by Progressive. This search term process will be iterative and
5 therefore might require several iterations of revised search terms and hit
6 reports. If requested by FDIC-R or the Ds & Os with respect to any search
7 term to which Progressive objects on the grounds that it is overly broad or
8 unduly burdensome, Progressive shall also produce statistically random
9 subsets of search-term-positive, non-privileged data for FDIC-R and the Ds
10 & Os to assess the utility of the search terms prior to final agreement on
11 search terms ("test production"). The Parties shall meet and confer to
12 determine the specific parameters of the test production, including, but not
13 limited to, the sample size and data sources from which the test production
14 will be derived. The Parties reserve the right to seek the Court's
15 intervention with respect to such issues if they are unable to reach
16 agreement. To the extent there is a dispute among the Parties regarding
17 documents retrieved by the search terms that Progressive does not
18 produce, or an issue arises regarding the timeliness of Progressive
19 producing the documents, the Parties shall meet and confer and determine
20 whether there are ways to resolve the dispute without Court intervention.
21 In the event that the Parties are unable to reach agreement regarding this
22 issue, all Parties reserve the right to raise the issue with the Court.
23 Progressive shall also provide FDIC-R and the Ds & Os with an exception
24 report listing any data that could not be searched or processed ("Exception
25 Documents"). The report shall include, without limitation, the file
26 extension for each Exception Document contained in the report.

27 13. After the Parties have agreed upon search terms or
28 established search terms with the assistance of the Court, Progressive shall

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1 apply the search terms to the documents in categories (1) and (2), review
2 the documents retrieved, and produce to FDIC-R and the Ds & Os, at its
3 option, either all non-privileged documents captured by the agreed-upon
4 search terms or all non-privileged documents captured by the agreed-upon
5 search terms that are responsive to FDIC-R's or the Ds' & Os' document
6 requests and relevant pursuant to the Federal Rules of Civil Procedure,
7 subject to any proper objections Progressive may have to such requests.
8 Progressive shall advise FDIC-R and the Ds & Os which option it selects.
9 FDIC-R and the Ds & Os agree that Progressive need not review the
10 documents captured by the agreed-upon search terms for relevance or
11 responsiveness prior to production but that Progressive may do so at its
12 option. Progressive shall advise FDIC-R and the Ds & Os whether it has
13 reviewed documents for relevance or responsiveness prior to production
14 and, if so, whether it has withheld documents on the grounds that they are
15 not relevant or responsive. Progressive shall produce documents in the
16 format specified in Exhibit A. The Parties agree that Progressive will, as
17 practicable, produce documents on a rolling basis and will produce
18 documents as soon as practicable after the Parties have agreed upon search
19 terms or established search terms with the assistance of the Court. To the
20 extent Progressive does not produce documents retrieved by the agreed-
21 upon search terms based on its determination that such documents are not
22 relevant or an issue arises regarding the timeliness of Progressive's
23 production, the Parties shall meet and confer and determine whether there
24 are ways to resolve the issue without Court intervention. In the event that
25 the Parties are unable to reach agreement regarding this issue, all Parties
26 reserve the right to raise the issue with the Court.

27 14. The Parties may make multiple, reasonable requests for
28 production of ESI utilizing this process. In the event the producing party

1 believes a subsequent request is not reasonably calculated to lead to the
2 discovery of admissible evidence and objects to the subsequent request,
3 then the burden shall be on the requesting party to demonstrate that such
4 subsequent request is reasonable and necessary.

5 15. Progressive represents that ESI in category (3), Website
6 Documents, consists of: (a) the website located at <http://www.abais.com>
7 as of August 20, 2012 (the "ABAIS Website"); (b) previous iterations of the
8 ABAIS Website, if any, maintained by ABAIS; (c) the website located at
9 <http://banks.progressive.com> as of March 8, 2013 (the "Progressive
10 Website"); and (d) previous iterations of the Progressive Website, if any,
11 maintained by ABAIS or Progressive. Progressive shall produce the ABAIS
12 Website (item (a)) and the Progressive Website (item (c)) in a form that will
13 allow them to be viewed in their entirety in a standard web browser, i.e.,
14 Internet Explorer, Firefox, Chrome. Progressive shall produce previous
15 iterations of the ABAIS Website (item (b)), if any, and previous iterations of
16 the Progressive Website (item (d)), if any, in this same form where
17 available and, when not available in a readable electronic format, by
18 printing out copies and producing them in accordance with the procedures
19 for producing physical documents agreed to by the Parties. Progressive
20 shall produce all documents within category (3) as soon as practicable after
21 execution of this Protocol by all Parties.

22 16. Progressive represents that ESI in category (4), Progress
23 Documents, consists of documents maintained in a proprietary computer
24 system utilized by Progressive, commonly referred to as "Progress."
25 Among other things, Progress contains information also contained in
26 physical copies of Progressive's claim and underwriting files. Progressive
27 represents that ESI stored in Progress is not amenable to production as ESI
28 in accordance with the terms of this Protocol. Therefore, Progressive shall

1 produce all relevant, non-privileged documents and information stored in
2 Progress, that it is not otherwise producing as part of its production of
3 physical documents, in a manner that most accurately reflects the
4 appearance and content of such documents when viewed using the
5 Progress software. At the time it produces such documents, Progressive
6 shall provide a description of the manner in which it selected or procured
7 them and of the ways in which the appearance or content of the documents
8 as produced differs from the appearance or content of the documents when
9 viewed using Progress. Nothing in this paragraph shall be deemed to
10 constitute acknowledgement or agreement by FDIC-R or the Ds & Os
11 concerning Progressive's representation that ESI stored in Progress is not
12 amenable to production as ESI in accordance with the terms of this
13 Protocol. Further, the Parties reserve the right to re-address the
14 methodology of how ESI in this category is produced in the event it can be
15 produced in its electronic format. In the event that the Parties are unable to
16 reach agreement regarding this issue, all Parties reserve the right to raise
17 this issue with the Court if they deem it to be necessary. Moreover,
18 nothing in this Protocol shall be deemed to constitute a waiver of any
19 Party's right to do so or a waiver of any Party's right to contest any such
20 effort. Progressive shall produce all documents within category (4) as soon
21 as practicable after execution of this Protocol by all Parties.

22 17. Progressive represents that Backup Documents consist of
23 documents maintained by Progressive on backup tapes. Progressive shall
24 provide to FDIC-R and the Ds & Os a description of ESI maintained solely
25 in the form of Backup Documents. Progressive contends that Backup
26 Documents are not readily available and that the production of Backup
27 Documents by Progressive would be unduly burdensome and would
28 require the expenditure of significant time and resources. For that reason,

1 Progressive does not intend to produce Backup Documents. In the event
2 that FDIC-R or the Ds & Os believe that Progressive should produce such
3 documents, they may file a motion with the Court seeking an order
4 compelling such production. Nothing contained herein shall be deemed to
5 constitute a waiver of their right to do so or a waiver of Progressive's right
6 to contest any such motion.

7 18. Progressive has converted, or will convert, to electronic
8 format, ESI, relevant documents that exist solely in physical, hard-copy
9 format. With respect to hard-copy documents Progressive converted to ESI
10 prior to the execution of this Protocol in this matter, such documents were
11 subject to an Optical Character Recognition ("OCR") process when they
12 were collected. To the extent not previously produced by Progressive prior
13 to execution of this Protocol, Progressive shall produce such relevant, non-
14 privileged ESI in the format specified in Exhibit A along with metadata
15 created when the hard-copy documents were converted to ESI, if any. For
16 purposes of this paragraph, metadata means the following: (1) Custodian
17 (Name of Custodian from whom the document was collected); (2) Author;
18 (3) Doc Title (Title of file or email subject); (4) Doc Date (Visible data on
19 loose files or Sent Date on emails); (5) Doc Type; (6) Page Count; (7) Bates
20 Begin (Beginning Production Number); and (8) Bates End (Ending
21 Production Number). Progressive shall not be required to create metadata
22 with respect to such hard-copy documents that does not presently exist.
23 The load file shall indicate document breaks. With respect to relevant,
24 hard-copy documents Progressive has not yet converted to ESI, Progressive
25 will convert such documents to ESI and shall subject them to an OCR
26 process. Progressive shall produce such relevant, non-privileged ESI in the
27 format specified in Exhibit A. The load file shall indicate document breaks,
28 and, where readily available, the metadata created when the hard-copy

1 documents were converted to ESI. Nothing in this paragraph shall be
2 deemed to require Progressive to produce again any hard-copy documents
3 it produced prior to execution of this Protocol, regardless whether its prior
4 production(s) conformed to the requirements of this Protocol.

5 19. Documents withheld by Progressive on the basis of
6 privilege, work product, or any other privilege or protection shall be
7 logged, and Progressive shall provide the log to FDIC-R and the Ds & Os
8 together with Progressive's ESI production or within thirty (30) days after
9 its production of the ESI material the privileged documents relate to.

10 **FDIC-R ESI**

11 20. FDIC-R represents it is in possession, custody, or control
12 of ESI related to Sun West Bank ("SWB ESI"). The SWB ESI includes the
13 following databases: (1) S5 Forensic Data; (2) S5 Scanned Documents; (3)
14 S5 Forensic Data Email; (4) various loan-related databases (S5 Director
15 Loan Reports, S5 Laserpro Loan Origination Information, S5 OMS Loan
16 Info); and (5) network file shares database (S5 Fileshares). A complete list
17 of available databases is attached hereto as Exhibit B. FDIC-R represents
18 that, to the best of its knowledge, Exhibit B is a full, complete, and accurate
19 listing of all categories of ESI from which materials relevant to this action
20 may be retrieved. As it relates to ESI in the possession or control of FDIC-
21 R, this Protocol applies only to SWB ESI as defined herein. Progressive and
22 the Ds & Os reserve the right to seek additional ESI in the possession,
23 custody, or control of the FDIC and/or FDIC-R, and nothing contained
24 herein shall be deemed to constitute a waiver of their right to do so. FDIC-
25 R and the FDIC-Corporate reserve the right to object to any efforts to seek
26 any such additional ESI, to the extent it exists.

27 21. Subject to the terms of this Protocol, including, but not
28 limited to, Paragraph 9, and the Confidentiality Agreement and Stipulated

1 Protective Order in this matter (Docket. No. 63), and pursuant to an Order
2 of the Court which shall be deemed made by approval of this Protocol,
3 FDIC-R shall produce relevant, non-privileged documents from databases
4 (1) through (4) in accordance with the procedure set forth in this Protocol
5 and in the format specified in Exhibit A hereto.

6 22. The Parties shall collectively agree upon a reasonable set
7 of search terms to run across the processed SWB ESI. If the Parties are
8 unable to agree upon search terms after conferring in good faith, any Party
9 may raise the issue with the Court by motion. In order to facilitate the
10 good faith negotiation of search terms among the Parties, with respect to
11 any search term requested by Progressive or the Ds & Os but objected to by
12 FDIC-R on the grounds that it is overly broad or unduly burdensome,
13 FDIC-R shall provide search term hit reports to Progressive and the Ds &
14 Os which identify the number of unique documents that hit upon each
15 identified search term requested by Progressive or the Ds & Os and
16 objected to by FDIC-R. This search term process will be iterative and
17 therefore might require several iterations of revised search terms and hit
18 reports. If requested by Progressive or the Ds & Os with respect to any
19 search term to which FDIC-R objects on the grounds that it is overly broad
20 or unduly burdensome, FDIC-R shall also produce statistically random
21 subsets of search-term-positive, non-privileged data for Progressive and
22 the Ds & Os to assess the utility of the search terms prior to final agreement
23 on search terms ("test production"). The Parties shall meet and confer to
24 determine the specific parameters of the test production, including, but not
25 limited to, the sample size and data sources from which the test production
26 will be derived. The Parties reserve the right to seek the Court's
27 intervention with respect to such issues if they are unable to reach
28 agreement. FDIC-R shall also provide Progressive and the Ds & Os with

1 an exception report listing any data that could not be searched or processed
2 ("Exception Documents"). The report shall include, without limitation, the
3 file extension for each Exception Document contained in the report.

4 23. After the Parties have agreed upon search terms or
5 established search terms with the assistance of the Court, FDIC-R shall
6 apply the search terms to the documents in databases (1) through (4) and,
7 at its option, may perform an initial review of the documents captured by
8 the search terms for privilege, responsiveness, or relevance pursuant to the
9 Federal Rules of Civil Procedure. FDIC-R shall make the documents
10 available to Progressive and the Ds & Os in an online Relativity database as
11 soon as practicable after the Parties have agreed upon search terms or
12 established search terms with the assistance of the Court. FDIC-R shall
13 advise Progressive and the Ds & Os whether it has reviewed documents for
14 privilege, responsiveness, or relevance prior to making them available in
15 Relativity and, if so, whether there are any documents retrieved by the
16 search terms that FDIC-R is not making available to Progressive and the Ds
17 & Os based on that review. To the extent there is a dispute among the
18 Parties regarding documents retrieved by the agreed-upon search terms
19 that FDIC-R does not make available in Relativity or an issue arises
20 regarding the timeliness of FDIC-R making documents available in
21 Relativity, the Parties shall meet and confer and determine whether there
22 are ways to resolve the dispute without Court intervention. In the event
23 that the Parties are unable to reach agreement regarding this issue, all
24 Parties reserve the right to raise the issue with the Court. The Parties agree
25 that FDIC-R is not required or obligated to conduct a relevancy,
26 responsiveness, or privilege review on the documents captured by the
27 agreed-upon search terms prior to making the documents available on
28 Relativity. The Parties further agree that FDIC-R will not be deemed to

1 have waived any privilege by not conducting a privilege review before
2 making documents available on Relativity. Once FDIC-R has made
3 documents available to Progressive and the Ds & Os on Relativity,
4 Progressive and the Ds & Os will review the documents made available by
5 FDIC-R and advise FDIC-R which, if any, of those documents they want
6 FDIC-R to produce to them. FDIC-R shall then produce all such non-
7 privileged documents identified by Progressive or the Ds & Os in the
8 format specified in Exhibit A. The Parties agree that FDIC-R will, as
9 practicable, produce documents on a rolling basis and will produce
10 documents as soon as practicable after Progressive and/or the Ds & Os
11 have provided notice to FDIC-R as to which documents they want
12 produced. In the event that a dispute arises among the Parties regarding
13 documents identified for production by Progressive and/or the Ds & Os
14 but withheld by FDIC-R, or an issue arises regarding the timeliness of
15 FDIC-R's production, the Parties shall meet and confer and determine
16 whether there are ways to resolve the issue without Court intervention. In
17 the event that the Parties are unable to reach agreement regarding this
18 issue, all Parties reserve the right to raise the issue with the Court.

19 24. The Parties may make multiple, reasonable requests for
20 production of ESI utilizing this process. In the event the producing party
21 believes a subsequent request is not reasonably calculated to lead to the
22 discovery of admissible evidence and objects to the subsequent request,
23 then the burden shall be on the requesting party to demonstrate that such
24 subsequent request is reasonable and necessary.

25 25. With respect to database (5), the database has not been
26 processed or OCR'd and is not in a full text searchable form pursuant to
27 this Protocol. Database (5) is searchable by the current limited metadata of
28 file name and file path. FDIC-R, after the Parties have agreed-upon search

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1 terms or established search terms with the assistance of the Court, shall
2 apply the search terms to the metadata available in database (5) and, at its
3 option, may perform an initial review of the documents captured by the
4 search terms for privilege, responsiveness, or relevance pursuant to the
5 Federal Rules of Civil Procedure. As soon as practicable after the Parties
6 have agreed upon search terms or established search terms with the
7 assistance of the Court, FDIC-R shall make the documents available to
8 Progressive and the Ds & Os in an online Relativity database. To the extent
9 there is a dispute among the Parties regarding documents retrieved by the
10 agreed-upon search terms that FDIC-R does not make available in
11 Relativity or an issue arises regarding the timeliness of FDIC-R making
12 documents available in Relativity, the Parties shall meet and confer and
13 determine whether there are ways to resolve the dispute without court
14 intervention. The Parties agree that FDIC-R is not required nor obligated
15 to conduct a relevancy, responsiveness, or privilege review on the
16 documents captured by the agreed-upon search terms prior to making the
17 documents available on Relativity. The Parties further agree that FDIC-R
18 will not be deemed to have waived any privilege by not conducting a
19 privilege review before making documents available on Relativity. Once
20 FDIC-R has made documents available to Progressive and the Ds & Os on
21 Relativity, Progressive and the Ds & Os will review the documents made
22 available by FDIC-R and advise FDIC-R which, if any, of those documents
23 they want FDIC-R to produce to them. FDIC-R shall then produce all such
24 non-privileged documents identified by Progressive or the Ds & Os in the
25 format specified in Exhibit A. The Parties agree that FDIC-R will, as
26 practicable, produce documents on a rolling basis and will produce
27 documents as soon as practicable after Progressive and/or the Ds & Os
28 have provided notice to FDIC-R as to which documents they want

1 produced. In the event that a dispute arises among the Parties regarding
2 documents identified for production by Progressive and/or the Ds & Os
3 but withheld by FDIC-R, or an issue arises regarding the timeliness of
4 FDIC-R's production, the Parties shall meet and confer and determine
5 whether there are ways to resolve the issue without Court intervention. In
6 the event that the Parties are unable to reach agreement regarding this
7 issue, all Parties reserve the right to raise the issue with the Court.

8 Additionally, upon review of the documents produced, if Progressive or
9 the Ds & Os determine that they require OCR searches of this database, the
10 Parties will discuss and attempt to reach an agreement regarding the OCR
11 processing and production of responsive, non-privileged documents in this
12 database and the costs involved in doing so. If the Parties are unable to
13 reach an agreement, the Parties will have the right to address issues
14 relating to this database with the Court. Nothing contained herein shall be
15 deemed to constitute acknowledgement or agreement by Progressive or the
16 Ds & Os that the means of production of documents contained in database
17 (5) described in this paragraph are sufficient or that FDIC-R is not required
18 to OCR the documents contained in database (5) at its expense to facilitate
19 retrieval and production of relevant ESI contained in that database.

20 Nothing contained herein shall be deemed to constitute a waiver by FDIC-
21 R of its right to object to any effort by Progressive or the Ds & Os to require
22 it to OCR the documents contained in database (5).

23 26. Progressive shall pay a monthly fee of \$10 per gigabyte of
24 ESI hosted on the Relativity database until such time as Progressive
25 determines that such ESI need no longer be hosted on the Relativity
26 database and provides written notification of this to FDIC-R and the Ds &
27 Os. Progressive will pay the monthly fee for the entire month in which it
28 provides such notification to FDIC-R and the Ds & Os. In no event shall

1 Progressive be required to pay the monthly fee for any period of time after
2 the month of notification. If one or more of the Ds & Os wish for such ESI
3 to be hosted on the Relativity database after Progressive has provided such
4 notification, the Ds & Os shall pay the monthly fee of \$10 per gigabyte
5 beginning the month after that in which Progressive provides notice to
6 FDIC-R and the Ds & Os that such ESI need no longer be hosted in
7 Relativity and continuing until such time as the Ds & Os notify FDIC-R that
8 such ESI need no longer be hosted on the Relativity database. The Ds & Os
9 will pay the monthly fee for the entire month in which they provide such
10 notification to FDIC-R. In no event shall the Ds & Os be required to pay
11 the monthly fee for any period of time after the month of notification.

12 27. FDIC-R has converted, or will convert, to electronic
13 format, ESI, relevant documents that exist solely in physical, hard-copy
14 format. With respect to hard-copy documents FDIC-R converted to ESI
15 prior to the execution of this Protocol in this matter, such documents were
16 subject to an Optical Character Recognition ("OCR") process when they
17 were collected. To the extent not previously produced by FDIC-R prior to
18 execution of this Protocol, FDIC-R shall produce such relevant, non-
19 privileged ESI in the format specified in Exhibit A along with metadata
20 created when the hard-copy documents were converted to ESI, if any. For
21 purposes of this paragraph, metadata means the following: (1) Custodian
22 (Name of Custodian from whom the document was collected); (2) Author;
23 (3) Doc Title (Title of file or email subject); (4) Doc Date (Visible data on
24 loose files or Sent Date on emails); (5) Doc Type; (6) Page Count; (7) Bates
25 Begin (Beginning Production Number); and (8) Bates End (Ending
26 Production Number). FDIC-R shall not be required to create metadata
27 with respect to such hard-copy documents that does not presently exist.
28 The load file shall indicate document breaks. With respect to relevant,

1 hard-copy documents FDIC-R has not yet converted to ESI, FDIC-R will
2 convert such documents to ESI and shall subject them to an OCR process.
3 FDIC-R shall produce such relevant, non-privileged ESI in the format
4 specified in Exhibit A. The load file shall indicate document breaks, and,
5 where readily available, the metadata created when the hard-copy
6 documents were converted to ESI. Nothing in this paragraph shall be
7 deemed to require FDIC-R to produce again any hard-copy documents it
8 produced prior to execution of this Protocol, regardless whether its prior
9 production(s) conformed to the requirements of this Protocol.

10 28. Documents withheld by FDIC-R on the basis of privilege,
11 work product, or similar exemption shall be logged, and the log shall be
12 provided to Progressive and the Ds & Os together with FDIC-R's ESI
13 production or within 30 days after its production of the ESI material the
14 privileged documents relate to.

15 Ds' & Os' ESI

16 29. If the Ds & Os are in possession of any ESI that is
17 responsive to document requests issued to them by Progressive or FDIC-R,
18 including, without limitation, email and documents of various types,
19 subject to this Protocol and the Confidentiality Agreement and Stipulated
20 Protective Order in this matter (Docket. No. 63), and pursuant to an Order
21 of this Court which shall be deemed made by approval of this Protocol, the
22 Ds & Os shall produce to FDIC-R and Progressive any such non-privileged
23 ESI. With respect to any such ESI that the Ds & Os contend is protected
24 from disclosure by the attorney-client privilege, the work-product doctrine,
25 or any other applicable privileges or protections, the Ds & Os shall produce
26 to Progressive and FDIC-R a log identifying any such documents together
27 with their production of ESI or within 30 days after the production of the
28 ESI material the privileged documents relate to.

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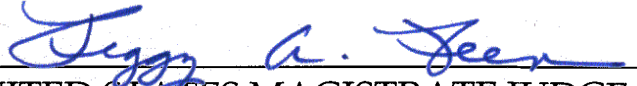
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ORDER

IT IS SO ORDERED that each of the parties and their respective counsel shall be governed by the terms and conditions of the above agreement concerning the production of ESI documents.



UNITED STATES MAGISTRATE JUDGE

DATED: October 24, 2013

EXHIBIT A

EXHIBIT A

EXHIBIT A TO ESI PROTOCOL

Form of Production for Email

All electronic email from Windows-Based ESI ("WESI") shall be produced as Static Images.¹ Static Images shall be produced by FDIC-R complete with full text extracts and the following fields of Metadata, to the extent the Metadata is available:

1. Custodian (Natural person or device in possession of the record at the time of collection)
2. Group_Custodian (Name(s) of custodian(s) with exact copy of file before de-duplication)
3. From (Name)
4. Author Meta (Last editor of attachment/e-doc)
5. CC
6. BCC
7. Sent To
8. MD5 Hash Value or Equivalent
9. Sent Date (Date e-mail was sent from sender)
10. Sent Time (Time e-mail was sent from sender)
11. COMPPATH (Complete Filename and path)

¹ "Static Image(s)" means a representation of ESI produced by converting a Native File, including but not limited to the files identified in Exhibit A, into a standard image format capable of being viewed and printed on standard computer systems. In the absence of agreement of the Parties or order of Court, a Static Image, when provided, should be provided in 300 dpi resolution, single-page black and white CCITT Group IV Tagged Image File Format (TIFF or .TIF files). If a TIFF or .TIF file cannot be created, then the Static Image should be provided in Portable Document Format (PDF).

12. Document Type (Field in Relativity describing the family relationship (parent or attachment) of a record)
13. Application (Program commonly used to access the record)
14. Extracted Text (Text of e-mails, nested e-mail body, or raw text from images, edocs, or attachments)
15. Bates Begin
16. Bates End
17. Bates Attach Begin
18. Bates Attach End
19. Relativity ID (Unique Relativity identifier – Document Control Number)
20. Subject (e-mail subject line)
21. Group Identifier (Full range of Relativity records between beginning parent document and ending child document)
22. Title Meta (Title of attachment/standalone edoc metadata)
23. Last Modified Date (Full date edoc was modified before saving/sending)

Static Images shall be produced by Progressive complete with full text extracts and the following fields of Metadata, to the extent the Metadata is available:

1. Custodian (Name of Custodian from which file is being produced);
2. Other Custodians (Name(s) of custodian(s) who had exact copy of message before de-duplication);
3. Author (FROM field);

4. CC;
5. BCC;
6. Recipient (TO field);
7. MD5 Hash Value or Equivalent;
8. Time Sent (Time the email was sent);
9. Time Received (Time the email was received);
10. File Type (Application used to create the file);
11. Page Count;
12. PST Name;
13. Body Text (Extracted text);
14. Bates Begin (Beginning Production Number);
15. Bates End (Ending Production Number);
16. Attach Begin (Beginning Attachment Range Number);
17. Attach End (Ending Attachment Range Number);
18. Control Number or DocID Number;
19. Subject (subject line of the e-mail).

With respect to productions by both FDIC-R and Progressive, electronic mail shall be produced along with attachments to the extent the message and/or any attachment is responsive, relevant and not privileged. As a general matter, subject to specific review, a message and its attachments(s) shall not be withheld from production based on the fact that one or more attachments are privileged, irrelevant, or non-responsive. To the extent the message and/or one or more attachments is privileged or non-responsive, the responsive, non-privileged documents shall be produced along with placeholders indicating whether the accompanying record was withheld as non-responsive or privileged. All Parties should

confirm that their ESI is Windows-based or, if not, identify the other forms of ESI within their possession, custody and control.

Form of Production for Other WESI

All other WESI (including attachments to electronic mail) shall be produced as Static Images. Static Images shall be produced by FDIC-R complete with full text extracts and the following fields of Metadata, to the extent the Metadata is available:

1. Custodian (Natural person or device in possession of the record at the time of collection)
2. Group_Custodian (Name(s) of custodian(s) with exact copy of file before de-duplication)
3. Author Meta (Last editor of attachment/e-doc)
4. Title Meta (Title of attachment/standalone edoc metadata)
5. Created Date (Contains the date the edoc was created)
6. Created Time (Contains the time the edoc was created)
7. Last Modified Date (Full date the edoc was modified before saving/sending)
8. Application (Program commonly used to access the record)
9. Document Type (Field in Relativity describing the family relationship (parent or attachment) of a record)
10. Group Identifier (Full range of Relativity records between beginning parent document and ending child document)
11. COMPPATH (Complete Filename and path)
12. MD5 Hash

13. Extracted Text (Text of e-mails, nested e-mail body, or raw text from images, edocs, or attachments)

14. Bates Begin

15. Bates End

16. Bates Attach Begin

17. Bates Attach End

18. Relativity ID (Unique Relativity identifier – Document Control Number)

Static Images shall be produced by Progressive complete with full text extracts and the following fields of Metadata, to the extent the Metadata is available:

1. Custodian (Name of Custodian from which file is being produced);

2. Other Custodians (Name(s) of custodian(s) who had exact copy of message before de-duplication);

3. Author;

4. Doc Title (Title of file from properties);

5. Doc Subject (Subject of file from properties);

6. Created Date (Date the file was created);

7. Created Time (Time the file was created);

8. Last Modified Date and Time (Date and Time the file was last modified);

9. Last Saved By (Name of user who last saved the file);

10. File Type (Application used to create the file);

11. Doc Type;

12. Page Count;

13. Path (Full path of the original location where the file was located);
14. MD5 Hash (MD5 hash value of the original native file);
15. Body Text (OCR for paper data or Extracted text for all ESI);
16. Bates Begin (Beginning Production Number);
17. Bates End (Ending Production Number);
18. Attach Begin (Beginning Attachment Range Number);
19. Attach End (Ending Attachment Range Number);
20. Control Number or DocID Number.

Native Production

The Parties shall have the right to request that ESI be produced as Native Files in addition to the format set forth above when a party has a reasonable belief that a Native File contains additional information not otherwise viewable from the production format set forth above and such additional information is relevant and reasonably calculated to lead to the discovery of admissible evidence. These documents will be accompanied with the appropriate load files indicating a cross reference to the Bates numbered Static Image.

Additionally, in the event a Party wishes to produce WESI e-mail and non-email in native form rather than as Static Images, the Parties shall meet and confer to discuss the feasibility of, and guidelines for, any such production.

Each WESI document produced as a Native File will have a unique document identification number (i.e., "Relativity ID") generated and included within the production as a separate metadata field within the

DAT or DII load file. The Relativity ID shall be the default unique document identification number.

Form of Production for Spreadsheets

ESI in the form of spreadsheets shall be produced as Native Files along with a placeholder Static Image listing the spreadsheet document that is being produced. These documents will be accompanied by the appropriate load files indicating a cross reference to the Bates numbered Static Image.

Microsoft Access Databases

With respect to non-privileged Microsoft Access Database files, each Party shall provide a list of all such files, along with a description of each database sufficient to allow the other Parties to determine whether they wish the database(s) to be produced. In the event that they do, the Parties shall meet and confer to discuss the production of such database(s).

Load Files²

All WESI shall be produced along with an IPRO, Opticon, or Summation DII load file indicating Bates numbers and document breaks as applicable. Metadata shall be produced in Concordance DAT file format, DII format, and summary text file for Summation, or XML format, and extracted full text shall be provided in TXT file format at the document level. Non-Windows-Based Applications and Data shall be subject to the same production requirements to the extent technically and legally feasible.

² A litigation support "load file," as that term is used herein, refers to the file necessary to reference images of documents and corresponding load file data into a reviewable database. A load file can, for example, specify what individual pages belong together as a document, what attachments are included with a document, where a document begins and ends, and what metadata is associated with a document.

Duplicates

To avoid the production of more than one copy of a particular unique item, the Parties shall use industry standard MD5 (or SHA-1) hash values within (1) all emails identified for production, and (2) all loose electronic files identified for production. The Parties will not de-duplicate attachments to emails against loose electronic files. The Parties shall also produce a field listing all custodians of any de-duplicated copies of an email or other electronic document.

Other Methods to Streamline Discovery

The Parties agree to meet and confer in good faith about any other technology or process that a producing party proposes to use to streamline the culling, review and production of ESI (e.g., email threading, near de-duplication, technology assisted review). The Parties shall make reasonable good faith efforts to resolve any objections to the use of such technology or process before seeking relief from the Court.

Production Media

Documents shall be produced on external hard drives or readily accessible computer or electronic media, e.g., CDs, DVDs, or flash or thumb drives ("Production Media"). All Production Media should have the following five directories: (1) IMAGES for the images; (2) DATA for the .dat and .opt files; (3) TEXT for the extracted text/OCR files; (4) NATIVES for any native Excel files or Exception Documents; and (5) Load Files. The Production Media shall identify: (a) the producing Party's name; (b) the production date; and (c) the Bates Number range of the materials contained on the Production Media.

Color

Where the original of a produced document is in color, and color is material to the interpretation of the document, the receiving party may request that the document be produced in color (whether electronic or paper). Otherwise, production will be in 300 dpi resolution, single-page black and white CCITT Group IV Tagged Image File Format.

EXHIBIT B

EXHIBIT B

EXHIBIT B TO ESI PROTOCOL

Sun West Bank ESI Databases

S5 Director All Reports

S5 Director Deposit Reports

S5 Director Loan Reports

S5 Fileshares

S5 Forensic Data

S5 Forensic Data Email

S5 Laserpro Customer Information

S5 Laserpro Loan Origination Information

S5 OMS Deposit Info

S5 OMS GL Info

S5 OMS Loan Info

S5 Scanned Documents