

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

THE PROCTER & GAMBLE COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. ) Civil Action No.: 1:12-cv-00264  
 )  
BE WELL MARKETING, INC., ) Judge Timothy S. Black  
 )  
Defendant. )

**STIPULATED ORDER ESTABLISHING PROTOCOL FOR DISCOVERY OF  
ELECTRONICALLY STORED INFORMATION**

After conferring on these matters, the Parties hereby propose, subject to the Court’s approval, the following agreed upon protocol for electronic discovery:

**IT IS HEREBY STIPULATED:**

1. **General:** The procedures and protocols set forth in this Order shall govern the production of Electronically Stored Information (“ESI”) in this litigation. Except as expressly stated, nothing in this order affects the Parties’ discovery obligations under the Federal or Local Rules.
2. **Paper Discovery:** Each Producing Party has an independent and separate obligation to produce non-duplicative paper discovery responsive to a discovery request. Hard copy documents may be scanned and produced in the same manner as electronic documents, as identified below, or, at the producing party’s election, produced in hard copy format.
3. **Electronic Discovery:** The Parties agree that ESI is subject to discovery, provided that back up tapes and reasonably inaccessible archival records need not be searched. Costs will be shifted for disproportionate ESI production requests pursuant to Federal Rule of Civil Procedure 26. Likewise, a Party’s nonresponsive or dilatory discovery tactics will be cost-shifting considerations. A Party’s meaningful compliance with this Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations.
4. **Searches:** For all ESI except emails, the Parties shall meet and confer to reach an agreement regarding limits on the custodians to be searched, the use of keywords

and search terms to be applied to collected data for the purpose of processing, and relevant time periods to be searched. The search protocols regarding emails are addressed in section 7 below.

5. **Production Format:** The Parties shall exchange ESI in the following format:

A. Documents will be produced as single-page black-and-white Group IV TIFF images, 300 dpi; if color images are required, these will be provided upon reasonable request of counsel.

B. The Producing Party will also produce appropriate image load files in .LFP format.

C. The preferred production/Bates numbering scheme will be comprised of an alphabetical prefix with no less than eight (8) following numbers, starting with 00000001. There will be no spaces or punctuation in the identifying control number.

D. All electronic documents will be converted to image format; provided however, in the event that unredacted Excel spreadsheets, database, audio/video files, or other documents are not amenable to conversion to image format, they may, at the producing party's election, be produced as native files.

E. If the above-described production format is determined to be impractical for a particular subset of documents, the Parties shall follow the procedures described in Section 8, *infra*, to reach an alternate production format.

F. General ESI production requests under Federal Rules of Civil Procedure 34 and 45 shall not include metadata absent a showing of good cause. However, fields showing the date and time that the document was sent and received, as well as the complete distribution list, shall generally be included in the production.

6. **Duplicate Production Not Required:** A Party producing documents in electronic form need not produce the same document in paper format, unless the paper document contains additional annotations not present on the electronic version. Each party may de-duplicate identical ESI globally within its production.

7. **Email:** The production of electronic mail documents or other forms of electronic correspondence (collectively "email") will be governed by the following procedures:

A. General production requests calling for the production of documents or information under Federal Rules of Civil Procedure 34 and 45, or compliance with a mandatory disclosure of this Court, shall not include email. To obtain email, the Parties must propound specific email

production requests. Email production requests shall only be propounded for specific issues, rather than general discovery of a product or business.

B. Email production requests shall be phased to occur after the Parties have exchanged initial disclosures and basic documentation about the patents, prior art, the accused instrumentalities and the relevant finances.

C. Email production requests shall identify the custodian, search terms, and time frame.

D. Each Requesting Party shall limit its email production requests to a total of five custodians per Producing Party for all such requests. The Parties may jointly agree to modify this limit without leave of Court. The Parties may submit to the Court a request for up to five additional custodians per Producing Party, which the Court may consider upon showing a distinct need based on the size, complexity, and issues of this specific case. Should a Party serve email production requests for additional custodians beyond the limits agreed to by the Parties or granted by the Court pursuant to this paragraph, the Requesting Party shall bear all reasonable costs caused by such additional discovery.

E. Each Requesting Party shall limit its email production requests to a total of five search terms per custodian per party. The Parties may jointly agree to modify this limit without leave of Court. The Parties may submit to the Court a request for up to five additional search terms per custodian, which the Court may consider upon showing a distinct need based on the size, complexity, and issues of this specific case. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such as the Producing Party's company name or its product name, are inappropriate unless combined with narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive combination of multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and shall count as a single search term. A disjunctive combination of multiple words or phrases (*e.g.*, "computer" or "system") broadens the search, and thus each word or phrase shall count as a separate search term unless they are variants of the same word. Use of narrowing search criteria (*e.g.*, "and," "but not," "w/x") is encouraged to limit the production and shall be considered when determining whether to shift costs for disproportionate discovery. Should a Party serve email production requests with search terms beyond the limits agreed to by the Parties or granted by the Court pursuant to this paragraph, the requesting party shall bear all reasonable costs caused by such additional discovery.

F. The Receiving Party shall not use ESI that the Producing Party asserts is attorney-client privileged or work product protected to challenge the privilege or protection.

G. Pursuant to Federal Rule of Evidence 502(d), the inadvertent production of privileged or work product protected ESI is not a waiver in the pending case or in any other federal or state proceeding.

H. The mere production of ESI or emails in litigation as part of a mass production shall not itself constitute a waiver for any purpose.

I. If any disputes arise with respect to the production of e-mail, the Parties shall follow the procedures described in Section 8, *infra*, to resolve the dispute.

8. **Cooperation and Dispute Resolution:** The Parties shall, as necessary, meet and confer to resolve any issues associated with any electronic production. If, after meeting and conferring, the Parties are unable to resolve such issues, the burden shall be on the Requesting Party to seek the Court's assistance in resolving the dispute. The Requesting Party shall follow the procedures set forth in S. D. Ohio Civ. R. 37.1 before filing a motion under Fed. R. Civ. P. 26 or 37.

ACCEPTED AND AGREED TO this 28th day of June, 2012.

Respectfully submitted:

THE PROCTER & GAMBLE COMPANY

BE WELL MARKETING, INC.

By:  /s/ David M. Maiorana

By:  /s/ Daniel P. Carter

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**THE FOREGOING STIPULATION  
IS APPROVED AND IS SO ORDERED**

Date: 6/29/2012

s/ Timothy S. Black  
Hon. Timothy S. Black