UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE DOMESTIC AIRLINE TRAVEL ANTITRUST LITIGATION	MDL Docket No. 2656 Misc. No. 15-1404 (CKK)
This Document Relates To: ALL CASES.	

PLAINTIFFS' POSITION STATEMENT ON ISSUES IN DISPUTE IN THE

PROPOSED STIPULATION AND ORDER REGARDING THE SEARCH FOR AND PRODUCTION OF ELECTRONICALLY STORED INFORMATION AND HARD COPY DOCUMENTS

After nearly a month of negotiations regarding the Proposed Stipulation and Order Regarding the Search for and Production of Electronically Stored Information and Hard Copy Documents, the Parties have reached agreement on all provisions with the exception of those identified in the accompanying draft Proposed Stipulation and Order. Pursuant to the Court's February 9, 2017 Order (ECF No. 154), the following is Plaintiffs' position statement on each of those issues.

I. END DATE OF THE PRESERVATION PERIOD FOR UNSTRUCTURED DATA – *SECTIONS I.S & X.B.2*

On March 25, 2016, Plaintiffs filed their Consolidated Complaint ("Complaint"), alleging a conspiracy beginning in 2009 and continuing to the present, with a damages period of July 1, 2011 to the present, which the Court upheld in its entirety. Plaintiffs have proposed that unstructured data be preserved through the Consolidated Complaint filing date. Defendants proposed the July 1, 2015 as the end date for preservation—the date of service of the Department

of Justice's CIDs to defendants (on or about July 1, 2015), thus excluding preservation of documents during at least nine months of the liability period upheld by the Court.

Plaintiffs are entitled to discovery relevant to their claims and proportional to the needs of the case. Fed R. Civ. P. 26(b)(1). During the more than a month of negotiations over the preservation period, Defendants did not explain why the preservation period should be so limited, nor did they identify any undue burden of preserving the nine additional months of unstructured data. They have not identified the volume of material at issue, nor any specific burdens—operational, accessibility, or financial—associated with modifying (if at all) their retention policies. In fact, Defendants averred that for most of their senior leadership, every email is routinely preserved by archival or journal systems regardless of this litigation.

To the extent Defendants, for the first time in their submission to the Special Master, suggest undue burden associated with Plaintiffs' preservation period, it should be rejected; that should have been articulated during meet and confers; permitting such arguments now only encourages meet and confers that waste parties' time and resources. If Defendants are permitted to assert burden now, Plaintiffs request an opportunity to respond so that burdens may be fairly balanced with proportionality factors and assessed by the parties and the Court.

Nor have Defendants offered a substantive explanation regarding why July 1, 2015 is the appropriate cutoff date. If parties in the DOJ investigation agreed to such a date, that has no bearing on the preservation obligations in this matter. The convenience of doing no more to preserve data than they did to respond to the DOJ is not sufficient ground to deny Plaintiffs nine months of data essential to their claims. While there may be *some* burden associated with further preservation; *some* burden is not the standard. In order to justify their truncated preservation period, Defendants must demonstrate undue burden with specificity. Fed. R. Civ. P. Rule 37(e),

2015 Amendments, Advisory Committee Notes (proportionality is relevant to reasonableness of preservation but party claiming disproportionality may need to provide specifics); *see also State Farm Mut. Auto. Ins. Co. v. Fayda,* No. 14-cv-9792, 2015 WL 7871037, at *4 (S.D.N.Y. Dec. 3, 2015) (proportionality argument failed in part due to failure to establish burden).

Indeed, many courts have ordered end dates for preservation beyond the date of service of subpoenas or related government investigations. For example, in *In re Capacitors Antitrust Litigation*, although raids were conducted in March 2014, the parties were required to preserve for five to nine months thereafter. *See* Stip. & Order re: Discovery of Electronically Stored Information ¶ 4(a) and Consol. Second. Amended Compl. ¶¶ 372-73, *In re Capacitors Antitrust Litigation*, No. 14-cv-3264 (N.D. Cal. July 15, 2015 & July 22, 2015), ECF Nos. 782 & 799-4. Similarly, in *In re Resistors Antitrust Litigation*, May 27, 2016 was the agreed end date for preservation although DOJ began investigating nearly a year prior. *See* Stipulation & [Proposed] Order re: Production of Electronically Stored Information at 13 and Consolidated Compl. ¶¶ 7-11, *In re Resistors Antitrust Litigation,* No. 15-cv-3820 (N.D. Cal. Nov. 18, 2016 and May 27, 2016), ECF Nos. 249 (entered Nov. 21, 2016 at ECF No. 252) & 126-4.

To the extent Defendants claim any conspiratorial conduct would have ceased when the CIDs were served, that argument fails. As noted, the alleged liability period extending beyond the CID date was upheld by the Court in denying Defendants' motion to dismiss; accepting Defendants' argument would pre-judge a disputed factual issue. And even if conspiratorial conduct ceased in mid-2015, there are still broad categories of relevant information beyond conspiratorial conduct. For example, documents concerning strategic and operational plans for capacity and fares are relevant to show how those plans changed after DOJ scrutiny commenced.

As Plaintiffs have demonstrated relevance of information during their proposed preservation period and Defendants have failed to identify burden, Plaintiffs' proposed preservation period should be adopted.

II. PROTOCOL FOR NEGOTIATIONS OVER SEARCH TERMS – *SECTIONS III.C.2 & III.C.4*

The Parties agree that, where a Producing Party uses search terms: it will disclose its proposed search terms; the Requesting Party may offer modifications or additions to them and explain its reasons; the Producing Party will explain any rejection of those counterproposals; and the Parties will confer. The dispute centers on what happens when the Parties confer.

Defendants proposal shifts the burden to the requesting party to demonstrate proportionality of search terms when Rule 26(b)(1) contemplates shared responsibilities and a showing of burden by the objecting party once relevance is established. Fed. R. Civ. P. 26(b)(1) Advisory Comm. Notes (2015 amendment); *see also Mortg. Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A.*, No. 15-cv-293, 2016 WL 3906712, at *3 (S.D.N.Y. July 14, 2016); *Fayda*, 2015 WL 7871037, at *2, *4. *Eramo v. Rolling Stone LLC*, 314 F.R.D. 205, 209, at *3 (W.D. Va. 2016); *Halvorsen v. Credit Adjustments Inc*., No. 15-cv-6228, 2016 WL 1446219, at *2 (N.D. Ill. Apr. 11, 2016). Specifically, Defendants demand that (1) the Requesting Party demonstrate the "importance" of counterproposed search terms, and (2) that proportionality guide meet and confers, perhaps to limit the iterative process increasingly recognize as critical.[1] Yet Defendants vehemently rejected any requirement, however malleable,

[1] *See* Hon. Andrew J. Peck, Introduction to eDiscovery, eDiscovery for Corporate Counsel § 1:6 (Mar. 2017 update) ("Intro to eDiscovery).

that they substantiate claims of burden by providing "hit reports"[2] for terms to which they object, placing the proportionality inquiry entirely on Plaintiffs.

As an initial matter, under Section III.C, search term negotiations begin *after* the Parties have resolved disputes over relevance and proportionality of document requests. The search terms are merely a means for the Producing Party to identify ESI responsive to that discovery. Defendants' proposal that a Producing Party justify counterproposals based on their "importance," effectively requires re-litigating the requests' proportionality (and based on only one factor) absent any demonstrated burden.

Although proportionality is relevant to search, the inquiry is different. Search terms pose considerable risks: they are invariably underinclusive (excluding relevant documents) and overinclusive (including irrelevant documents).[3] With proportionality *of the discovery requests* resolved, the inquiry *for search terms* is whether they strike an appropriate balance between over- and under-inclusiveness. This requires an analysis of document "hits" (the burden) and the proportion that are responsive (the benefit), combined, when applicable, with an evaluation of information the terms may find and its value. Thus, where a term seeks relevant documents, "importance" matters only where burden is shown.

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[2] Hit reports provide the number of unique documents hit by a search term and are routinely used (and ordered) to assess search term value and burden. *See, e.g.*, Discovery Order No. 23 at 5-6, *In re Blue Cross Blue Shield Antitrust Litig.*, No. 13-cv-20000 (N.D. Ala. Apr. 21, 2016); *Johnson v. Serenity Transp., Inc.*, No. 15-cv-2004, 2016 WL 6393521, at *1 (N.D. Cal. Oct. 28, 2016); *Salazar v. McDonald's Corp.*, No. 14-cv-02096, 2016 WL 736213, at *3-4 (N.D. Cal. Feb. 25, 2016); *Castle Aero Florida Int'l, Inc. v. Mktg. & Fin. Servs., Inc.*, No. 11-cv-2672, 2013 WL 12152475, at *1-2 (D. Minn. Jan. 4, 2013); *Vasudevan Software, Inc. v. Microstrategy Inc.*, No. 11-cv-06637, 2012 WL 5637611, at *5 (N.D. Cal. Nov. 15, 2012).

[3] *See, e.g.*, Intro to eDiscovery, *supra* n.1; *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 (D. Md. 2008); *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 15 Sedona Conf. J. 217, 232-33, 239, 244 (2014).

Yet Defendants reject any requirement to demonstrate burden. Plaintiffs proposed that, where *reasonably necessary* to substantiate burden, a Producing Party must provide unique hit counts for counterproposed terms to which it objects as overbroad and, where the counterproposal modifies a term, provide hits for the original and modified term, along with results of any responsiveness testing. Defendants vehemently rejected that language and Plaintiffs withdrew it, leaving for later Court resolution any instances of hits unreasonably withheld. Still, Defendants insist that the Requesting Party demonstrate the "importance" of search terms they propose. The Court should reject that position. Plaintiffs agree proportionality applies to search methodologies, but do not agree that a Requesting Party is obligated to demonstrate "importance" absent assurances that the Producing Party holds up its end of the bargain.

Defendants also demand that the Requesting Party identify the document requests to which a particular counterproposed search term pertains without any obligation by the Producing Party to do the same for its proposals. Any such obligation should be reciprocal.

III. REDACTION OF NON-RESPONSIVE MATERIAL/WITHHOLDING OF NON-RESPONSIVE ATTACHMENTS – *SECTIONS VI.K & VIII.C*

At the eleventh hour, Defendants demanded that the Protocol recognize a "right" to redact for non-responsiveness and to withhold attachments from otherwise responsive documents or families, respectively, though weeks earlier they disclaimed intent as to the former and withdrew a proposal for the latter.

Defendants' proposal lacks foundation in the Federal Rules. *See, e.g.*, *Orion Power Midwest, L.P. v. Am. Coal Sales Co.*, No. 05-cv-555, 2008 WL 4462301, at *2 (W.D. Pa. Sept.

30, 2008).[4] Rule 26(b)(5) only permits redaction or withholding of content for privilege or work-product; Rule 34 addresses production of *documents*, not information contained therein, requires documents be produced as kept in the usual course of business (which includes all their contents), and does not limit inspection to only responsive portions. *Id.* Nor does Rule 26(b)(1) provide support. *See United States v. Davis*, No. 85-cv-6090, 1988 WL 96843, at *3 (S.D.N.Y. Sept. 13, 1988). It governs *scope* of discovery; Rule 34 governs what must be *produced*, and it refers to documents, not information.

This same principle applies to document families—which, by definition, are maintained as a single unit in the ordinary course and constitute a single communication. *See, e.g.*, The Sedona Conference, Glossary: E-Discovery and Digital Information Management 14 (4th ed. Apr. 2014); *In re Denture Cream Prod. Liab. Litig.*, 292 F.R.D. 120, 125 (D.D.C. 2013) (citing authorities). Indeed, federal competition authorities presume production of all family members of responsive documents. *See* FTC Production Guide & DOJ Standard Specifications.

Defendants' proposal would also impede and distort discovery, depriving Plaintiffs of context for produced portions, empowering Defendants to unilaterally determine what context is necessary, and incentivizing withholding whenever there is a colorable argument of irrelevance or confidentiality based on a party's self-serving viewpoint. *See, e.g.*, *Bartholomew v. Avalon Capital Grp., Inc.*, 278 F.R.D. 441, 451-52 (D. Minn. 2011); *Sexual Minorities of Uganda v. Lively*, No. 12-cv-30051, 2015 WL 4750931, at *4 (D. Mass. Aug. 10, 2015); *In re MI Windows & Doors, Inc. Prods. Liab. Litig.*, No. 12-mn-00001, 2013 WL 268206, at *3 (D.S.C. Jan. 24,

[4] For additional cases, see Tab 40.

In the FOIA context, the D.C. Circuit's found redactions for non-responsiveness improper. *Am. Immigration Lawyers Ass'n v. Executive Office for Immigration Review*, 830 F.3d 667, 670 (D.C. Cir. 2016).

2013); *David v. Alphin*, No. 07-cv-11, 2010 WL 1404722, at *7-8 (W.D.N.C. Mar. 30, 2010); *Burris v. Versa Prods., Inc.*, No. 07-cv-3938, 2013 WL 608742, at *3 (D. Minn. Feb. 19, 2013); *Bonnell v. Carnival Corp.*, No. 13-cv-22265, 2014 WL 10979823, at *3-4 (S.D. Fla. Jan. 31, 2014). The risk is particularly acute in parallel conduct cases, which are often proven by circumstantial evidence. *See In re Domestic Airline Travel Antitrust Litig.*, No. 15-mc-1404, 2016 WL 6426366, at *5 (D.D.C. Oct. 28, 2016).

Further, it would unnecessarily burden the parties and the Court with costly disputes, litigation delays, and *in camera* review. *See, e.g.*, *Beverage Distrib., Inc. v. Miller Brewing Co.*, No. 08-cv-1112, 2010 WL 1727640, at *4 (S.D. Ohio Apr. 28, 2010); *Orion Power*, 2008 WL 4462301, at *2. The limited circumstances in which relevance redactions and attachment withholding are sometimes permitted are not present here.[5] *See Beverage Distrib*,, 2010 WL 1727640, at *4.

Nor does protecting sensitive commercial information warrant Defendants' provisions: the Protective Order in this matter broadly defines Highly Confidential Material and strictly limits its disclosure. *See, e.g., Pavillion Bank v. OneBeacon Am. Ins. Co.*, No. 12-cv-5211, 2013 WL 12126258, at *3 (N.D. Tex. Nov. 13, 2013);[6] Protective Order (ECF No. 162) ¶¶ 6, 14-16, 19, 22(b)). If it is insufficient, Defendants may seek to amend it or seek agreement or order to redact or withhold *specific* sensitive commercial information as Section VIII.A permits.

[5] For example, personal privacy or constitutional interests. *See, e.g.*, *Ullman v. Denco, Inc.*, No. 14-cv-00843, 2015 WL 11111288, at *2 & n.3 (D.N.M. Sept. 17, 2015) and *Sexual Minorities*, 2015 WL 4750931, at *3-4.

[6] *See also, e.g.*, *Sexual Minorities*, 2015 WL 4750931, at*4; *In re Atl. Fin. Fed. Sec. Litig.*, No. 89-cv-0645, 1991 WL 153075, at *4 (E.D. Pa. Aug. 6, 1991); *Alphin*, 2010 WL 1404722, at *8.

Nor can Defendants satisfy their burden to demonstrate why an order permitting redactions or withholding should be expressly permitted *now* based on blanket claims of non-responsiveness. *See Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373, 2002 WL 33003691, at *4 (W.D. Tenn. Jan. 30, 2002) (rejecting protective order permitting irrelevance withholding); Memo Endorsement, *Regeneron Pharm., Inc. v. Ablexis LLC*, No. 14-cv-1651 (S.D.N.Y. May 20, 2014) (same).

IV. DISCLOSURE OF INFORMATION TO ASSESS WHETHER RESPONSIVE FIELDS IN STRUCTURED DATA SOURCES WILL BE PRODUCED – *SECTION VI.H.1*

The Parties dispute what a party producing structured data must disclose during meet and confers regarding proposed data productions. Plaintiffs initially proposed that the Producing Party disclose all fields in the database to permit the Requesting Party to assess whether all responsive fields in the database would be produced. When Defendants objected that doing so would require disclosure of thousands of irrelevant fields in massive databases, Plaintiffs proposed a soft disclosure requirement: that the Producing Party disclose only that information "as may be reasonably necessary for the requesting party to understand . . .*whether all fields that are responsive to the information requested are included in the proposed data extraction*." While not requiring disclosure of every field, at least enough must be shared about the databases and the types of information contained therein for the Requesting Party to be assured that the data extraction fully responds to the production request.

Defendants rejected that compromise, insisting they need only disclose information "reasonably necessary for the requesting party to understand . . . *the responsiveness of the fields proposed to be extracted to the information required.*" That misses the point. Plaintiffs presume a Producing Party will propose responsive fields; the applicable question is whether there are *other*

responsive fields (or fields that provide context to them) that have not been disclosed and will not be produced. *The Sedona Conference Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, 15 Sedona Conf. J. 171, 176 (2014 ed.) (*Database Principles*) (requesting party is entitled to fields that contain relevant information and those that give context to that information). Such disclosures permit the parties to meet and confer and agree on a reasonably responsive data extraction, or to seek Court assistance, before the producing party extracts and produces its data.

Defendants' only articulated objection—that Plaintiffs seek disclosure of "thousands" of potential fields—maintained *even after* Plaintiffs offered their compromise, is a straw man. As Plaintiffs made clear, they are concerned only with responsive data and seek only cooperation sufficient to assess the completeness of the extractions. By contrast, Defendants' proposal would permit a responding party to unilaterally select fields of data for extraction, with no obligation to disclose whether there are additional potentially responsive fields it plans to omit or any other information that might permit the Requesting Party to assess the extraction's completeness.

This precise issue has been addressed by the Sedona Conference Working Group 1. As the 2014 Sedona Conference Database Principles explain:

> Database discovery may entail some of the most expensive and complex discovery in a litigation matter, and meaningful conversations between the parties early in the litigation can substantially reduce confusion and waste of resources. It may be in the best interest of the parties to *meet and confer regarding the specific fields that contain relevant information*, and the specific exports and production format.

Database Principles 15 Sedona Conf. J. at 186 (emphasis added). Disclosure can reduce disputes about format and overbreadth, and prevent the production of useless information. *Id.* at 172. Courts presented with this issue have ruled in favor of disclosure. *See, e.g.*, *Woods v. Google, Inc.*, No. C11-01263-EJD, 2014 WL 1321007, at *3 (N.D. Cal. Mar. 28, 2014); *see also Barnes v.*

District of Columbia, 289 F.R.D. 1, 21-25 (D.D.C. 2012) (ordering production of query used to extract data when plaintiff discovered the data production incomplete).

Plaintiffs' reasonable compromise disclosure proposal is consistent with the Federal Rules and Sedona Conference recommendations and avoids the delays and expense that result when transparency is lacking. If omitted responsive data are discovered after the structured data have been produced, the costs of reproduction increase substantially. Moreover, failure to meet and confer on agreed fields risks protracted motion practice and formal discovery to secure disclosures that could have been made cooperatively at far lower cost and is inconsistent with the cooperation and transparency anticipated under the Federal Rules. *See In re Seroquel Prod. Liab. Litig.*, 244 F.R.D. 650, 660 (M.D. Fla. 2007) (chastising party for failure to facilitate understanding of databases); *Bd. of Regents of Univ. of Neb. v. BASF Corp*., No. 04-cv-3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) ("The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable.").

Plaintiffs' proposal is reasonable and proportionate; it should be adopted.

V. LOGGING OF PRIVILEGED EMAIL THREADS – *SECTION VII.G*

Defendants propose to log only the last-in-time email for email threads withheld in full or part, leaving the requesting party with no ability to assess the validity of the privilege claim for subordinate emails in the thread. Although Defendants assert there will be "relatively few" subordinate emails that are not separately logged or produced, they acknowledge that they cannot actually know whether all subordinate emails were logged, produced, or even captured by their search methodology. Sensitive to the burdens of a complete log, Plaintiffs proposed two

significantly less burdensome alternatives; Defendants rejected both. Their position —"trust us"— defeats the purpose of a privilege log.

The weight of authority in federal courts, including this Court, dictates that *all* emails in a thread withheld as privileged be separately logged. *See, e.g.*, *In re Application of Chevron Corp.*, No. 10-mc-371, 2013 WL 11241413, at *5 (D.D.C. Apr. 22, 2013) ("[F]ederal courts generally expect that attachments, *like earlier strings in e-mail correspondence*, need to be treated separately and logged as such.") (emphasis added, quotations omitted); *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 503 (4th Cir. 2011); *United States v. Davita, Inc.*, 301 F.R.D. 676, 685-686 (N.D. Ga. 2014); *Acosta v. Target Corp.*, 281 F.R.D. 314, 320 & n.4 (N.D. Ill. 2012); *Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, No. 09-cv-1002, 2012 WL 5415108, at *5, *11, *14 n.8 (M.D. Fla., Nov. 6, 2012); *Helm v. Alderwoods Grp., Inc.*, No. 08-01184, 2010 WL 2951871, at *2 (N.D. Cal. July 27, 2010); *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 238, 240-242 (E.D. Pa. 2008); *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp.2d 789, 812-813 & n.33, 816 (E.D. La. 2007); *In re Universal Service Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 672-674 (D. Kan. 2005); see also Hon. John M. Facciola, Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation*, 4 Fed. Cts. L. Rev. 19, 48–49 (2010).

The tortured language of Defendants' proposal suggests they intend to rely on an outlier: *Muro v. Target Corp.*, 250 F.R.D. 350, 354, 362-363 (N.D. Ill. 2007) (and the few cases relying on *Muro*). But as that court acknowledged, its decision was "contrary to . . . persuasive authority." *Id.* Consequently, *Muro* has been distinguished and limited. *See, e.g., Rhoads Indus.*, 254 F.R.D. at 240-241; *Helm*, 2010 WL 2951871, at *2; *Lee v. Chic. Youth Ctrs.*, 304 F.R.D. 242, 251 (N.D. Ill. 2014).

Although the weight of authority supports Plaintiffs' position, they nonetheless proposed two reasonable alternatives to reduce Defendants' logging burden but still provide Plaintiffs with some basis to assess the privilege:

1. Logging the last-in-time email and *producing* the thread with all content redacted except header information (senders, recipients, dates, and subject lines), as Defendants intend to do for redacted email threads.

   Or

2. Logging the last-in-time email and including in the general description cell a list of others who sent or received emails in the subordinate threads (an approach adopted by the S.D.N.Y. Pilot Project, *see* Standing Order at 6, *Pilot Project Regarding Case Management Techniques*, No. 11-mc-388 (S.D.N.Y.).

Defendants asserted these alternatives were burdensome and "error prone." Plaintiffs disagree. The first requires no additional logging *at all* and imposes only an incremental burden of redact the email body from withheld threads; as Defendants acknowledged during a telephonic meet and confer, doing so takes little time during privilege review. Meanwhile, the Requesting Party has all the information that would have been provided in the log, albeit at the extra burden of collecting those documents and reviewing them individually.

The second alternative requires only that reviewers copy and paste the names of the other participants in the thread into the general "description" cell of the log and provide the date range, just as Defendants acknowledge they must do for attorneys that appear in subordinate emails but not in the last-in-time (and have done in their DOJ logs). *See* Ex. A (Excerpts from United's DOJ log). It is little extra burden to add *non*-attorneys to that description, and significantly less burdensome than providing a separate line entry for the date, senders, recipients, and subject matter

for subordinate emails in the thread. It does not provide Plaintiffs with enough to assess the privilege for each email, but allows them to flag troublesome entries.

Defendants' unsupportable position appears to be that *any* additional burden is too much. Plaintiffs have been more than cooperative in offering reasonable compromises, only to face intransigence at every turn. The Court should reject Defendants' "trust-us" privilege log.

VI. TYPES OF DOCUMENTS CULLED PRIOR TO TAR APPLICATION THAT NEED NOT BE DISCLOSED – *SECTION III.D.4*

This dispute arose after the Parties had isolated all disputes as communicated to Your Honor via email on March 30, 2017. It centers on what a Producing Party *need not* disclose with respect to pre-culling prior to application of Technology Assisted Review ("TAR"), not whether pre-culling may be conducted.

Section III.D.4 provides that before a party pre-culls a document collection using Search Terms or other limiters prior to application of TAR, it must disclose those limiters and terms and the parties shall meet and confer per III.C. This is because, despite the cost-reducing and efficacy advantages of TAR compared to Search Terms, pre-culling poses considerable risks given the limitations of Search Terms. Stephanie Serhan, *Calling an End to Culling: Predictive Coding and the New Federal Rules of Civil Procedure*, 23 Rich. J.L. & Tech. 5, 9-10, 29-35 (2016). It not only can reduce the effectiveness of TAR, it can eliminate responsive documents from the TAR collection *before the tool is ever applied*. *See id.* at 6-10. Additionally, TAR tools must review significant quantities of both responsive and non-responsive documents to effectively categorize the two, thus non-responsive documents are appropriately included in the collection.

Because of this, Magistrate Judge Peck, a noted judicial expert on ESI, reluctantly permitted the use of search term pre-culling, noting that ordinarily pre-culling should not occur. *Tinto v. Vale*, No. 14-cv-3042, 2015 WL 4367250, at *1 (S.D.N.Y. July 15, 2015). In *In re Biomet M2A Magnum Hip Implant Products Liability Litigation* makes clear why. There, the court permitted non-disclosed pre-culling despite plaintiffs' complaint that it tainted the process, concluding that pre-culling did not remove significant numbers of responsive documents. No. 12-md-2391, 2013 WL 1729682, at *1 (N.D. Ind. Apr. 18, 2013). Two noted ESI experts subsequently noted the faulty math of the *Biomet* court and concluded that the pre-culling likely excluded *half* of all responsive documents from the TAR process. *See* IT-Lex Technology Law Blog, *In re: Biomet – Doing the Math on Court Approved Multimodal Review* (April 22, 2013). Accordingly, parties should proceed with caution when pre-culling prior to TAR, with appropriate disclosures and negotiations about those exclusions, as Section III.D.4 requires. *See generally The Sedona Conference TAR Case Law Primer*, 18 Sedona Conf. J. 1. 30-35 (forthcoming 2017) (discussing court views on transparency).

Accordingly, the Protocol provides that the Parties must meet and confer where search terms and limiters are used to pre-cull prior to TAR. Nonetheless, acknowledging that certain pre-culling designed to reduce the volume of documents ingested into a TAR process may be appropriate where the documents excluded are of a type that are *already known*, could *never be responsive*, and add needless volume to the collection without any benefit to the TAR tool, <u>*Plaintiffs*</u> proposed that certain limited types of such documents could be excluded *without disclosing those limiters to the requesting party*, using the examples of spam and junk email and date filters. All other limiters and terms must be disclosed and negotiated. The Parties had agreed on the following language:

> If a producing party using TAR intends to pre-cull a document collection to be subject to TAR using Search Terms or other limiters, other than limiters intended to eliminate known non-responsive documents *(e.g., junk or spam email unrelated to the litigation)* or to eliminate documents outside of the agreed-upon discovery period, the Producing Party shall so disclose such intent to the requesting party, and the provisions of Section III.C shall apply.

Unfortunately, late in the game, Southwest complained the examples implied spam and junk mail were the only documents that could be pre-culled without disclosure. The Parties agreed that the solution would be to add additional specific "no-brainer" examples to make clear the Parties' intent regarding the non-disclosure exception. For example, counsel for one Defendant explained that daily company-wide emails listing cafeteria items would fall into this category, and Plaintiffs agreed that this was the type of known document to which the non-disclosure exception applied.

Unfortunately, Defendants' proposed language now includes broad categories of documents in the non-disclosure exception that are far afield from agreed-upon concept to eliminate known and readily identifiable junk without disclosure and add, rather than reduce, the ambiguity about non-disclosure; They include information such as personal communications, calendar entries, invitations, newsletters, operational notifications, and the like that, in fact, *could* be responsive. If these types of limiters are applied, they should be disclosed and negotiated. Given the risks of pre-culling, and the reasonableness of Plaintiffs' original and subsequently refined proposal, Plaintiffs language should be adopted.

Dated: April 11, 2017

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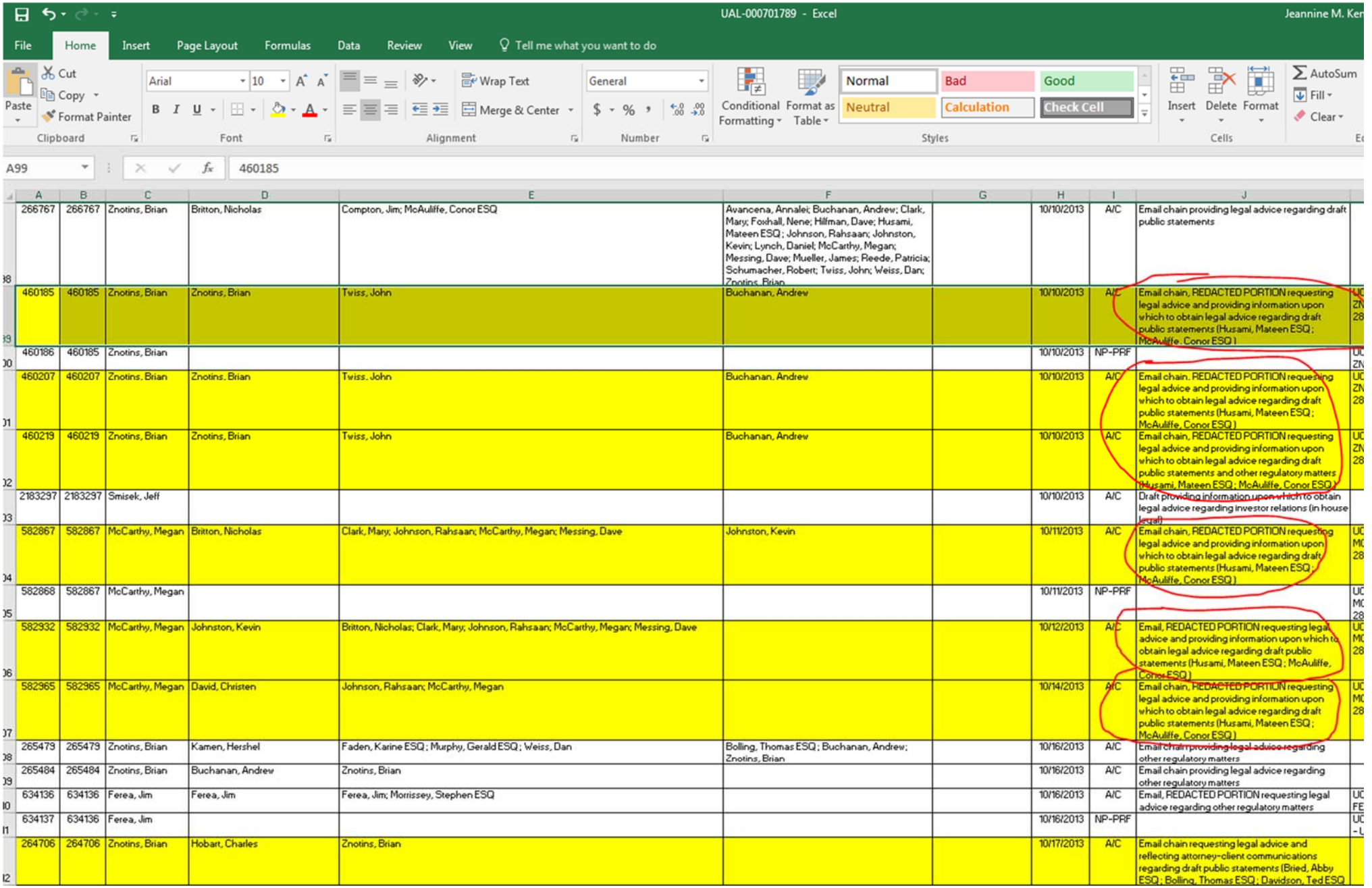
Exhibit A



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General Number

Conditional Formatting Format as Table

Normal Bad Good Neutral Calculation Check Cell Styles

Insert Delete Format Cells

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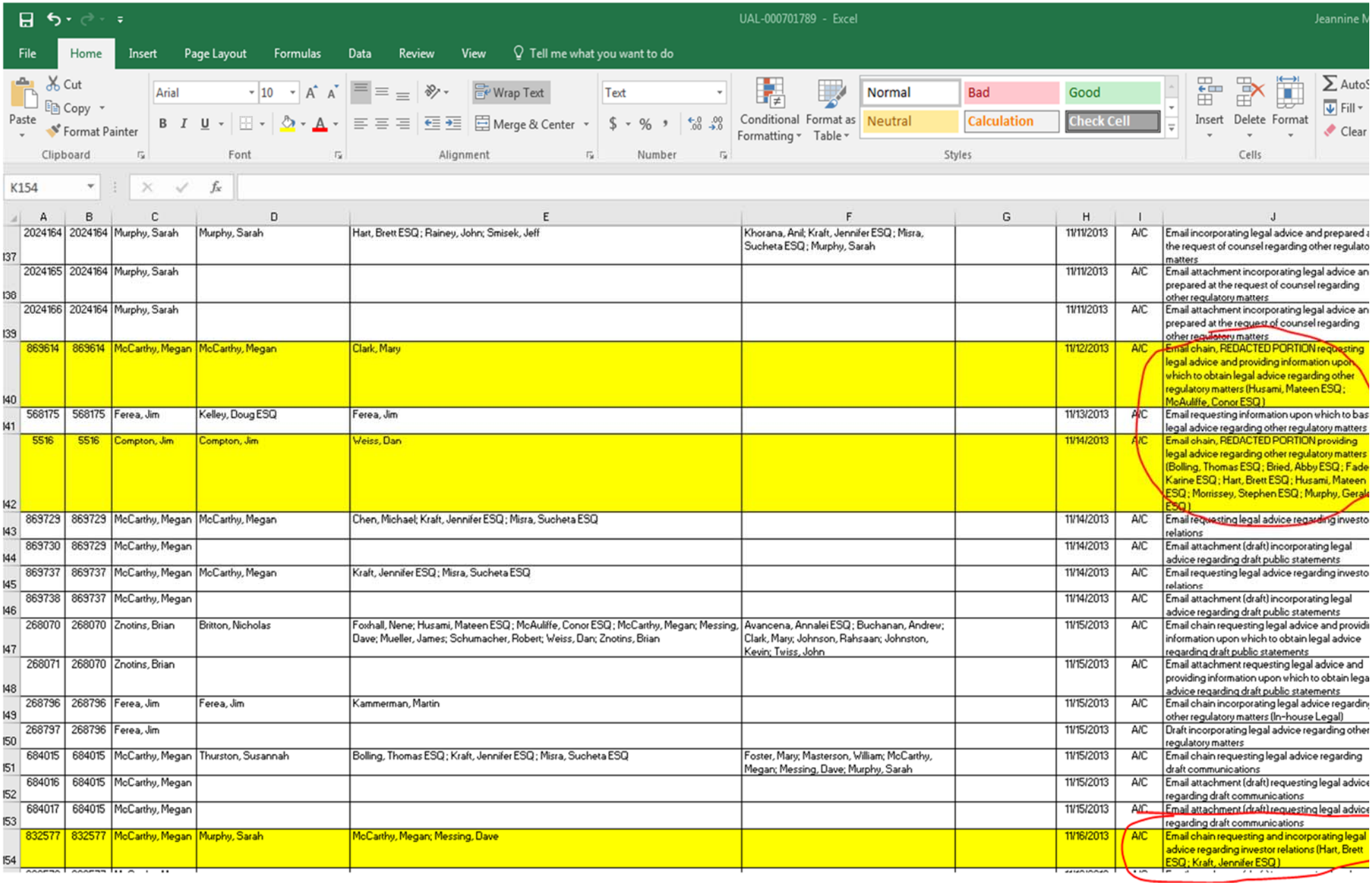
	A	B	C	D	E	F	G	H	I	J
38	266767	266767	Znotins, Brian	Britton, Nicholas	Compton, Jim; McAuliffe, Conor ESQ	Avancena, Annalei; Buchanan, Andrew; Clark, Mary; Foxhall, Nene; Hilfman, Dave; Husami, Mateen ESQ; Johnson, Rahsaan; Johnston, Kevin; Lynch, Daniel; McCarthy, Megan; Messing, Dave; Mueller, James; Reede, Patricia; Schumacher, Robert; Twiss, John; Weiss, Dan; Znotins, Brian		10/10/2013	A/C	Email chain providing legal advice regarding draft public statements
39	460185	460185	Znotins, Brian	Znotins, Brian	Twiss, John	Buchanan, Andrew		10/10/2013	A/C	Email chain, REDACTED PORTION requesting legal advice and providing information upon which to obtain legal advice regarding draft public statements (Husami, Mateen ESQ; McAuliffe, Conor ESQ)
40	460186	460185	Znotins, Brian					10/10/2013	NP-PRF	
41	460207	460207	Znotins, Brian	Znotins, Brian	Twiss, John	Buchanan, Andrew		10/10/2013	A/C	Email chain, REDACTED PORTION requesting legal advice and providing information upon which to obtain legal advice regarding draft public statements (Husami, Mateen ESQ; McAuliffe, Conor ESQ)
42	460219	460219	Znotins, Brian	Znotins, Brian	Twiss, John	Buchanan, Andrew		10/10/2013	A/C	Email chain, REDACTED PORTION requesting legal advice and providing information upon which to obtain legal advice regarding draft public statements and other regulatory matters (Husami, Mateen ESQ; McAuliffe, Conor ESQ)
43	2183297	2183297	Smisek, Jeff					10/10/2013	A/C	Draft providing information upon which to obtain legal advice regarding investor relations (in house legal)
44	582867	582867	McCarthy, Megan	Britton, Nicholas	Clark, Mary; Johnson, Rahsaan; McCarthy, Megan; Messing, Dave	Johnston, Kevin		10/11/2013	A/C	Email chain, REDACTED PORTION requesting legal advice and providing information upon which to obtain legal advice regarding draft public statements (Husami, Mateen ESQ; McAuliffe, Conor ESQ)
45	582868	582867	McCarthy, Megan					10/11/2013	NP-PRF	
46	582932	582932	McCarthy, Megan	Johnston, Kevin	Britton, Nicholas; Clark, Mary; Johnson, Rahsaan; McCarthy, Megan; Messing, Dave			10/12/2013	A/C	Email, REDACTED PORTION requesting legal advice and providing information upon which to obtain legal advice regarding draft public statements (Husami, Mateen ESQ; McAuliffe, Conor ESQ)
47	582965	582965	McCarthy, Megan	David, Christen	Johnson, Rahsaan; McCarthy, Megan			10/14/2013	A/C	Email chain, REDACTED PORTION requesting legal advice and providing information upon which to obtain legal advice regarding draft public statements (Husami, Mateen ESQ; McAuliffe, Conor ESQ)
48	265479	265479	Znotins, Brian	Kamen, Hershel	Faden, Karine ESQ; Murphy, Gerald ESQ; Weiss, Dan	Bolling, Thomas ESQ; Buchanan, Andrew; Znotins, Brian		10/16/2013	A/C	Email chain providing legal advice regarding other regulatory matters
49	265484	265484	Znotins, Brian	Buchanan, Andrew	Znotins, Brian			10/16/2013	A/C	Email chain providing legal advice regarding other regulatory matters
50	634136	634136	Ferea, Jim	Ferea, Jim	Ferea, Jim; Morrissey, Stephen ESQ			10/16/2013	A/C	Email, REDACTED PORTION requesting legal advice regarding other regulatory matters
51	634137	634136	Ferea, Jim					10/16/2013	NP-PRF	
52	264706	264706	Znotins, Brian	Hobart, Charles	Znotins, Brian			10/17/2013	A/C	Email chain requesting legal advice and reflecting attorney-client communications regarding draft public statements (Bried, Abby ESQ; Bolling, Thomas ESQ; Davidson, Ted ESQ



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	A	B	C	D	E	F	G	H	I	J
137	2024164	2024164	Murphy, Sarah	Murphy, Sarah	Hart, Brett ESQ; Rainey, John; Smisek, Jeff	Khorana, Anil; Kraft, Jennifer ESQ; Misra, Sucheta ESQ; Murphy, Sarah		11/11/2013	A/C	Email incorporating legal advice and prepared a the request of counsel regarding other regulato matters
138	2024165	2024164	Murphy, Sarah					11/11/2013	A/C	Email attachment incorporating legal advice an prepared at the request of counsel regarding other regulatory matters
139	2024166	2024164	Murphy, Sarah					11/11/2013	A/C	Email attachment incorporating legal advice an prepared at the request of counsel regarding other regulatory matters
140	869614	869614	McCarthy, Megan	McCarthy, Megan	Clark, Mary			11/12/2013	A/C	Email chain, REDACTED PORTION requesting legal advice and providing information upon which to obtain legal advice regarding other regulatory matters (Husami, Mateen ESQ; McAuliffe, Conor ESQ)
141	568175	568175	Ferea, Jim	Kelley, Doug ESQ	Ferea, Jim			11/13/2013	A/C	Email requesting information upon which to bas legal advice regarding other regulatory matters
142	5516	5516	Compton, Jim	Compton, Jim	Weiss, Dan			11/14/2013	A/C	Email chain, REDACTED PORTION providing legal advice regarding other regulatory matters (Bolling, Thomas ESQ; Bried, Abby ESQ; Fade Karine ESQ; Hart, Brett ESQ; Husami, Mateen ESQ; Morrissey, Stephen ESQ; Murphy, Gerald ESQ)
143	869729	869729	McCarthy, Megan	McCarthy, Megan	Chen, Michael; Kraft, Jennifer ESQ; Misra, Sucheta ESQ			11/14/2013	A/C	Email requesting legal advice regarding investo relations
144	869730	869729	McCarthy, Megan					11/14/2013	A/C	Email attachment (draft) incorporating legal advice regarding draft public statements
145	869737	869737	McCarthy, Megan	McCarthy, Megan	Kraft, Jennifer ESQ; Misra, Sucheta ESQ			11/14/2013	A/C	Email requesting legal advice regarding investo relations
146	869738	869737	McCarthy, Megan					11/14/2013	A/C	Email attachment (draft) incorporating legal advice regarding draft public statements
147	268070	268070	Znotins, Brian	Britton, Nicholas	Foxhall, Nene; Husami, Mateen ESQ; McAuliffe, Conor ESQ; McCarthy, Megan; Messing, Dave; Mueller, James; Schumacher, Robert; Weiss, Dan; Znotins, Brian	Avancena, Annalei ESQ; Buchanan, Andrew; Clark, Mary; Johnson, Rahsaan; Johnston, Kevin; Twiss, John		11/15/2013	A/C	Email chain requesting legal advice and providi information upon which to obtain legal advice regarding draft public statements
148	268071	268070	Znotins, Brian					11/15/2013	A/C	Email attachment requesting legal advice and providing information upon which to obtain lega advice regarding draft public statements
149	268796	268796	Ferea, Jim	Ferea, Jim	Kammerman, Martin			11/15/2013	A/C	Email chain incorporating legal advice regardin other regulatory matters (In-house Legal)
150	268797	268796	Ferea, Jim					11/15/2013	A/C	Draft incorporating legal advice regarding other regulatory matters
151	684015	684015	McCarthy, Megan	Thurston, Susannah	Bolling, Thomas ESQ; Kraft, Jennifer ESQ; Misra, Sucheta ESQ	Foster, Mary; Masterson, William; McCarthy, Megan; Messing, Dave; Murphy, Sarah		11/15/2013	A/C	Email chain requesting legal advice regarding draft communications
152	684016	684015	McCarthy, Megan					11/15/2013	A/C	Email attachment (draft) requesting legal advice regarding draft communications
153	684017	684015	McCarthy, Megan					11/15/2013	A/C	Email attachment (draft) requesting legal advice regarding draft communications
154	832577	832577	McCarthy, Megan	Murphy, Sarah	McCarthy, Megan; Messing, Dave			11/16/2013	A/C	Email chain requesting and incorporating legal advice regarding investor relations (Hart, Brett ESQ; Kraft, Jennifer ESQ)