

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61**

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| <p>850 THIRD AVENUE OWNER, LLC,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>-against-</i></p> <p>DISCOVERY COMMUNICATIONS, LLC,</p> <p style="text-align: center;"><i>Defendant.</i></p> | <p>Index No.: 654148/2020</p> <p>Hon. Barry R. Ostrager</p> <p style="text-align: center;"><b><del>PROPOSED</del> ESI<br/>PROTOCOL ORDER</b></p> |
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**IT IS STIPULATED AND AGREED**, by and between Plaintiff 850 Third Avenue Owner, LLC (“Owner”) and Defendant Discovery Communications, LLC (“Discovery”), through their counsel, that the following ESI Protocol (the “Protocol”) applies to the discovery of electronically stored information (“ESI”) in this action:

1. **ESI Subject to this Stipulation.** A party is obliged to consider for preservation, identification, collection and production all potentially responsive information items and data sources over which the party (including its employees, officers and directors) has possession, custody or control, including constructive control, so long as reasonable and proportionate. The parties understand that it may not be possible or proportionate to collect all data sources covered by this Stipulation, or to collect ESI in the form provided for in this Stipulation. In such circumstances, the parties will make a good faith effort to collect reasonable and proportionate ESI through a reasonable method.

2. **ESI That is not Discoverable.** Absent a showing of good cause by a receiving party, the following categories of ESI shall not be discoverable in this action:

- a. Deleted, slack, fragmented, or other data only accessible by forensics. This exclusion shall not apply to e-mails located within “deleted items” folders in any given email account, irrespective of what name such folders are identified,

provided that collection of such deleted items does not require forensic assistance to obtain.

- b. Server, system, or network logs.
- c. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.
- d. On-line access data such as temporary internet files, history, cache, cookies, and the like.
- e. Back-up data that are substantially duplicative of data that are more easily accessible elsewhere.
- f. Substantially similar ESI in the possession of multiple custodians, provided responsive ESI is produced from at least one custodian.
- g. ESI remaining from systems no longer in use that is unintelligible on systems in use.
- h. Unless good cause is shown to the contrary, ESI stored in devices, cloud systems or other systems not used for businesses purposes, owned by non-parties, or which are only incidentally used for businesses purposes from time-to-time.
- i. Unless good cause is shown, ESI stored exclusively in mobile devices, such as text messages.
- j. The personal devices of employees, representatives or agents of a party, provided that such devices are not utilized for business purposes, or which are only incidentally used for businesses purposes from time-to-time.
- k. ESI stored on photocopiers, scanners, and fax machines.
- l. ESI sent to or from mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that a copy of all such electronic data is routinely saved

elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage) and will be collected from that alternative source in the course of discovery, if otherwise warranted by this Protocol.

- m. Data stored in a backup system for the purpose of system recovery or information restoration, including but not limited to, disaster recovery backup tapes, continuity of operations systems, data or system mirrors or shadows unless it is the only known source of potentially relevant data.

3. **ESI That is Discoverable.** Absent a showing of good cause by a producing party, the following categories of ESI must be searched for responsive information in this action.

- a. E-mail accounts of designated custodians (see below) used primarily for business purposes.
- b. Chat and instant messenger programs used by designated custodians (see below) primarily for business purposes.
- c. Cloud drives, hard drives, computers or other file-storage system likely to contain responsive information.

4. The foregoing sections are without prejudice to either party to request reasonable additional ESI from the Court, including data stored in any format set forth in Section 2(a)-(m), if such additional discovery appears likely to produce non-duplicative evidentiary material, and is otherwise reasonably proportional to the needs of the case.

5. Unless good cause is show to the contrary, a party requesting ESI from Sections 2(a)-(m) shall bear all costs (except legal fees) associated with collecting such ESI, which shall be payable within 30 days of the producing party incurring such costs. To invoke any such cost shifting, the producing party must provide advance written notice to the receiving party that the

collection of the additional ESI sought will incur additional costs, along with an estimate of such costs, and confirm that the receiving party still desires the additional ESI sought. Each party reserves its right to object to any such additional discovery.

**COLLECTION, SEARCH AND REVIEW**

6. The parties will separately agree on E-Mail Custodians and search terms. After each application of proposed search terms the parties will provide each other with a hit list, and other such reasonable summary information as can be obtained without undue cost or expense to help the parties evaluate the effectiveness, reasonableness, and proportionality of proposed search terms. If agreement cannot be reached after good-faith conference, the parties will submit their disagreement to the Court in accordance with the Judge's Individual Rules.

7. **Custodian Collection Procedures.** For each person identified as an E-mail Custodian in the matter, the producing party will do the following.

(a) Unless a producing party establishes good cause to the contrary, a producing party will search all emails within an agreed upon date range from e-mail accounts in the possession of the E-mail Custodians, either by collecting the entire account and applying search terms thereto or applying search terms at the organizational (i.e. server or cloud) level, provided however, if a designated E-mail Custodian has an e-mail account containing an insubstantial amount of non-duplicative responsive information the entire account need not be collected or searched using search terms. In such circumstances, the responsive ESI may be searched through a reasonable alternative and proportionate method. In the event that the email account of a designated E-mail custodian is searched by means other than a collection of the entire account and application of search terms thereto, or applying search terms at the

server/cloud level, the producing party shall provide the receiving party with the reasons for such deviation and a description of the alternative search method employed.

(b) If responsive information in the possession of an E-mail Custodian is contained in non-cloud based document storage devices (hard drives or media of any kind), a producing party will obtain to the extent possible responsive information from such sources through search terms or another reasonable method.

(c) If an E-mail Custodian used organizational chat or messaging applications (e.g., Skype, Slack, Salesforce, Teams, etc.) a producing party will obtain such chats or messages and run search terms across the resulting dataset, or at the server/cloud level, as limited by the agreed-upon date range. If a producing party believes that the collection or search of such organizational chat or messaging applications in the manner set forth above is likely to be unduly burdensome, the producing party will identify an alternative means of identification and collection of responsive information, and disclose to the opposing party any such alternative method of identification and collection contemporaneously with the determination that an alternative method is appropriate.

(d) If responsive information in the possession of an E-mail Custodian is contained in cloud-based document storage services (such as Apple iCloud, Google, Amazon, Box, DropBox, Microsoft, etc.), a producing party will obtain such documents and run search terms across the resulting dataset or at the server/cloud level, as limited by the agreed-upon date range. If a producing party believes that the collection or search of such documents in the manner set forth above is likely to be unduly burdensome, the producing party will identify an alternative means of identification and collection of responsive information, and disclose to the

opposing party any such alternative method of identification and collection contemporaneously with the determination that an alternative method is appropriate.

(e) With respect to any source of ESI the producing party has the option to employ an alternative search method. However, if they do so, the receiving party reserves the right to request from the Court that search terms be applied to the entire account/data set if the receiving party reasonably believes that that alternative search method omitted non-duplicative responsive ESI, and the producing party reserves its right to object to this application.

8. **Non-Custodial Source Collection Procedures.** If responsive non-email or non-instant messaging ESI is in the possession, custody, or control of the producing party, but cannot reasonably be deemed to be in the possession, custody, or control of an E-mail Custodian, the producing party will do the following:

(a) If responsive information is contained in non-cloud based document storage devices (hard drives or media of any kind), the producing party will obtain to the extent possible responsive information from such sources through search terms or another reasonable method.

(b) If responsive information is contained in cloud-based document storage services (such as Apple iCloud, Google, Amazon, Box, DropBox, Microsoft, etc.), the producing party will obtain responsive information from such sources through search terms or another reasonable method.

(c) For the avoidance of doubt, if responsive ESI is maintained in a manner not conducive to being searched through search terms, and to the extent such data is within the Producing Party's discretion or control, the producing party nonetheless has an obligation to collect such information through another reasonable method.

**PRODUCTION FORMAT**

9. All ESI produced in accordance with this Protocol will be produced electronically in the form of single-page, Group IV TIFFs at 300 dpi. Each TIFF image should be named as its corresponding bates number. Original document orientation should be maintained (*i.e.*, portrait to portrait and landscape to landscape). Bates numbers, confidentiality designations, and redactions should be burned into the TIFF image files. TIFF image files should be provided in a self-identified “Images” folder. E-mails and their attachments will be produced in a manner that preserves the parent-child relationship.

10. For all ESI produced in accordance with this Protocol, the producing party will provide an extracted text file that corresponds to each TIFF image file and metadata. When no extracted text is available for a file, OCR text files will be provided. These files will be provided as a single text file for each document, not one text file per page. Each file should be named with the beginning bates number that is assigned to its corresponding document, followed by .txt.

11. For all ESI produced in accordance with this Protocol, the producing party will provide Concordance-compatible image and data-load files (*i.e.*, .OPT and .DAT files) using standard Concordance delimiters. The first line in each Concordance compatible .DAT file will be the header containing the agreed-upon field names, and each additional line will contain the fielded data for each document. Concordance-compatible image and data load files (*i.e.*, .OPT and .DAT files) will be provided in a self-identified “Data” folder.

12. The parties will not be required to produce native files corresponding with produced Paginated Documents, with the exception of spreadsheets (e.g. Excel), presentations (e.g., PowerPoint), or other documents that cannot be converted to a Paginated Document

without material loss in data or presentation. All responsive documents that have not been converted to a Paginated Document (e.g., placeholder files) shall be produced in native format unless they contain privileged, work-product, or redacted information. Where native files are to be produced, they will be provided to the receiving party in a self-identified “Natives” directory. Each native file will be produced with a corresponding single-page TIFF placeholder image, which will contain language indicating that the document is being produced as a native file. Native files will be named with the beginning bates number that is assigned to that specific record in the production. A “NativeLink” entry for each spreadsheet will be included in the .DAT load file indicating the relative file path to each native file on the production media. Native files will be produced with extracted text and applicable metadata fields.

13. Unless doing so will implicate the attorney-client or other applicable privileged, for all ESI produced in accordance with this Protocol, the producing party will provide the following categories of metadata:

- Beginning Bates Number
- Ending Bates Number
- Beginning Attach Range
- Ending Attach Range
- All Custodians
- Author
- To
- From
- Cc
- Bcc
- E-mail Subject



- Sent date
- Parent Date
- Last Modified Date
- Text Path
- Native Path
- Filename
- MD5
- Volume

### REDACTIONS

14. Files that must be redacted pursuant to any applicable protective order or applicable law, including but not limited to the parties' respective privilege obligations as set forth below, should be produced as Produced PDFs or Produced TIFFs in redacted form, with applicable TIFF text files or PDF text layers, containing extracted or OCRred text acquired after redaction.

15. Native files corresponding with redacted documents may be withheld from production, or a party may employ native redaction techniques so long as the method of redaction employed does not significantly impair the usability or searchability of the redacted item and the fact of alteration is disclosed.

16. If the items redacted and partially withheld from production are PowerPoint-type presentation decks or Excel-type spreadsheets, and the native versions are also withheld, then the entire Paginated Document must be produced, including all unprivileged pages, hidden fields and other information that does not print when opened as last saved by the custodian or end-user. For PowerPoint-type presentation decks, this shall include, but is not limited to, any speaker notes.

For Excel-type spreadsheets, this shall include, but is not limited to, hidden rows and columns, all cell values, annotations and notes.

17. The producing party shall also make reasonable efforts on request to ensure that any spreadsheets produced only as Produced PDFs or Produced TIFFs are formatted so as to be legible. For example, column widths should be formatted so that the numbers in the column will display readable content rather than “#####.”

18. If the items redacted and partially withheld from production are audio/visual files, the producing party shall provide the unredacted portions of the content. If the content is a voice recording, the parties shall meet and confer to discuss the appropriate manner for the producing party to produce the unredacted portion of the content.

19. The producing party may not make any redactions based upon the purported relevance or non-relevance of a document.

### **PRIVILEGED INFORMATION**

20. Any responsive document that is withheld on the basis of a claim of attorney-client privilege, work-product or any other claim of privilege or immunity from discovery shall be identified by the producing party in a meta-data privilege log, which the producing party shall produce in an electronic format that allows text searching and organization of data by parent date.

21. An e-mail thread contained within a single document need only be recorded once on the producing party’s privilege log, even if a privilege is asserted over multiple portions of the thread.

22. Privilege log identification is not required for communications exchanged between the producing party and their litigation counsel; in-house counselor among counsel for

the producing party, or among counsel for the producing party and any prospective or actual expert witness after the date of filing of this action.

23. For each document for which a producing party asserts that a privilege applies, the producing party must include in the privilege log all meta-data fields set-forth above, except for those that may reveal the contents of the privilege communications, as well as a statement of the ground(s), on a categorical basis, alleged for withholding such document (i.e. attorney-client privilege or work product). The parties shall produce privilege logs within fifteen days of the close of document discovery. The receiving party may request additional information by identifying specific entries on the log and the basis for why the receiving party disputes the privilege with respect to that entry. Within fifteen days of such an identification, the producing party will respond to the request either with the additional information or a basis for why the requested additional information is being withheld.

24. Notwithstanding a claim of privilege, any purportedly privileged document containing non-privileged matter must be produced with the purportedly privileged portion redacted, with the redacted portion indicated on the document itself. Documents containing privileged information produced in redacted form need not be identified on a privilege log.

25. **In-Camera Review of Documents subject to a Privilege Claim.** If a party challenges a request for further information regarding an assertion of privilege, the parties shall meet and confer to try to reach a mutually agreeable solution. If they cannot agree, the matter shall be brought to the Court.

26. **Non-Waiver of Privilege.** Pursuant to 22 N.Y.C.R.R. 202.70, Rule 11-b, the disclosure during discovery of any communication or information, including ESI, that is protected by the attorney-client privilege or attorney work-product privilege, as defined by

CPLR 3101 and 4503, or other privilege or protection recognized under applicable law, shall not waive the privilege in the above-captioned case, or in any federal, state, administrative action or proceeding of any kind, or for any use whatsoever, for either that material or the subject matter of that material, unless there is an intentional and express waiver of the privilege to support an affirmative use of the material in support of the party's claims or defenses. The parties intend that all disclosures not made to support an affirmative use of the material in support of a party's claims or defenses shall be regarded as inadvertent, and the producing party is deemed to have taken reasonable steps to prevent disclosure, regardless of any argument or circumstances suggesting otherwise.

27. **Return of Privileged Materials.** In connection with their review of electronically stored information and hard copy documents for production (the "Documents Reviewed") the Parties agree as follows:

(a) to implement and adhere to reasonable procedures to ensure Documents Reviewed that are protected from disclosure pursuant to CPLR 3101(c), 3101(d)(2) and 4503 ("Protected Information") are identified and withheld from production.

(b) if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.

(c) upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. For purposes of this paragraph, "destroyed" shall mean that the paper versions are shredded, that accessible electronic

versions are deleted, and that no effort shall be made to recover versions that are not readily accessible, such as those only recoverable through forensic means.

(d) upon request by the Producing Party from the return of Protected Information inadvertently produced, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.

28. In no event will a dispute over the scope of privilege applying to an inadvertently produced document in any way change or alter the destruction obligations set forth above. Only after destruction consistent with this Protocol may the receiving party pursue resolution of any such dispute with the Court. In assessing the validity of any claim of Privilege with respect to an inadvertently produced document, the court shall consider whether the underlying information is privileged and whether timely and otherwise reasonable steps were taken by the producing party to request the return or destruction of the Document once the producing party had actual knowledge of (i) the circumstances giving rise to the claim of privilege and (ii) the production of the document or information in question. For purposes of this paragraph "actual knowledge" refers to the actual knowledge of an attorney of record or other attorney with lead responsibilities in the litigation (for example, lead counsel, trial counsel, or a senior attorney with managerial responsibilities for the litigation).

29. **Receipt of Privileged Information.** Nothing in this Protocol shall relieve counsel for any receiving party of any existing duty or obligation, whether established by case law, rule of court, regulation, or other source, to return, and not to review, any privileged or work-product materials without being requested by the producing party to do so. Rather, in the event a

receiving party becomes aware that it is in possession of what appears to be an inadvertently produced privileged document, then counsel for the receiving party shall immediately: (i) cease any further review of that document; and (ii) notify the producing party of the apparent inadvertent production, requesting whether the producing party intended for the document to be produced. In the event the producing party confirms the inadvertent production of the privileged document, the receiving party shall promptly return or destroy all copies of the inadvertently produced privileged document in its possession and take reasonable steps to retrieve all copies of the inadvertently produced privileged documents distributed to other counsel or non-parties.

### **OTHER AGREEMENTS**

30. This Protocol does not limit or modify any party's obligation to search its non-communication electronic files or its hard copy files for responsive documents. For example, and for the avoidance of doubt, a party that has agreed, or been ordered, to produce its balance sheets must search for these balance sheets in sources other than electronic communications such as a work station drive, share drive, or cloud drive—if the balance sheets can reasonably be expected to be located in these other sources.

31. A party is only required to produce a single copy of a responsive document per custodian. Parties may de-duplicate stand-alone documents or entire document families using hash value matching (such as MD5 or SHA-1 values). ESI that is not an exact duplicate may not be removed. Partial e-mail families may be removed. The parties may utilize e-mail threading, though the receiving party reserves the right to request a non-threaded copy of any document. The parties are not required to produce paper documents if they are exact duplicates of ESI. If a producing party elects to de-duplicate horizontally, all custodians who were in possession of a de-duplicated document must be identified in a metadata field as part of the loadfile or a subsequent overlay file.

32. **Technology Assisted Review.** Before using predictive coding or technology assisted review for the purpose of identifying or culling the documents to be reviewed or produced, the producing party will notify the requesting party with ample time to meet and confer in good faith regarding a mutually agreeable protocol for the use of such technologies or alternatives.

33. **Translations of Produced Materials.** For any of its own foreign-language documents responsive to document requests that a party translated or translates into the English language using human translators for its own purposes, except to the extent such translation is protected by attorney-client or work-product privileges, the producing party shall produce the translation of the original document with the original. This provision will not apply to auto or machine translations.

34. **Databases.** To the extent a response to discovery requires production of discoverable electronic information contained in a database, in lieu of producing the database, the parties shall meet and confer to, with an understanding of which fields are relevant, agree upon a set of queries to be made for relevant reports used in the ordinary course of business and other discoverable information and generate a report in a reasonably usable and exportable electronic file (e.g., Excel or CSV format) for review by the requesting party or counsel. Upon review of the report(s), the requesting party may make reasonable requests for additional information to explain the database schema, codes, abbreviations, and different report formats or to request specific data from identified fields.


35. The parties agreement to this protocol are without prejudice to their rights to contest the reasonableness and proportionality of any legal fees incurred in connection with the performance of this Protocol claimed by the prevailing party in this case.

**[SIGNATURE PAGE TO FOLLOW]**

Dated: May 15, 2021


New York, New York

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**SO ORDERED.** May 14, 2021

  
BARRY R. OSTRAGER, J.S.C.