

United States District Court
District of Connecticut
FILED

March 25, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Florana D. Tabors, Clerk
By: *Jasha Oliver*
Deputy Clerk

IN RE AGGRENEX ANTITRUST
LITIGATION

C.A. No. 3:14-MD-2516 (SRU)

THIS DOCUMENT RELATES TO:
ALL ACTIONS

**ORDER GOVERNING PROTOCOL FOR DISCOVERY OF
ELECTRONICALLY STORED INFORMATION AND HARD COPY DOCUMENTS**

The following Order Governing Protocol for Discovery of Electronically Stored Information and Hard Copy Documents (“ESI Protocol”) shall apply to all discovery of electronically stored information (“ESI”) in these actions.

To expedite the exchange of ESI and Hard Copy Documents in these actions, pursuant to this Court’s authority and with the consent of the Parties, it is hereby

ORDERED:

A. SCOPE

1. **General.** The procedures and protocols set forth in this Order shall govern the production of ESI and hard copy documents in this matter, unless the Parties agree in writing to change them or they are changed by the Court at the request of a Party.
2. **Domestic Litigation.** The Parties agree that discovery in this matter shall be phased, with discovery initially being limited to the United States. At the appropriate stage, the parties shall meet and confer in good faith regarding expanding discovery to custodians or data sources outside of the United States. To the extent the parties dispute commencing discovery outside the United States, the Parties reserve the right to raise the issue with the Court.
3. **Disputes.** The Parties shall meet and confer in good faith on any issue regarding ESI, as necessary, including any issues relating to custodians and data sources, that arise under this Order or otherwise. In the event the Parties cannot reach an agreement on a disputed matter, the Parties shall submit the matter to the Court.

B. DEFINITIONS

1. “**Documents**” shall have the same definition as set forth in Federal Rule of Civil Procedure 34.
2. “**Electronically stored information**” or “**ESI**,” as used herein, means and refers to computer-generated information or data, stored in or on any storage media located on computers, file servers, disks, tape, USB drives, or other real or virtualized devices or media, as such information is defined in the Federal Rules of Civil Procedure, including Rule 34(a).
3. “**Native Format**” means and refers to the format of ESI in which it was generated and/or as used by the Producing Party in the usual course of its business and in its regularly conducted activities.
4. “**Load/Unitization file**” means an electronic file containing information identifying a set of paper-scanned images or processed ESI and indicating where individual pages or files belong together as documents, including attachments, and where each document begins and ends. A Load/Unitization file will also contain data relevant to the individual Documents, including extracted and user-created metadata.
5. “**Extracted Text**” means the text extracted from a Document, and includes all header, footer and document body information when reasonably available.
6. “**OCR text**” means text generated through Optical Character Recognition Process of image / bitmap picture representation of the documents.
7. “**Patent Cases**” means: (1) *Boehringer Ingelheim Pharma GmbH & Co. KG, et al. v. Barr Laboratories Inc., et al.*, 1:07-cv-00432-GMS (D. Del. 2007) and (2) *Boehringer Ingelheim Pharma GmbH & Co. KG, et al. v. Kremers Urban Pharmaceuticals, Inc.*, 1:13-cv-01580-NLH-KMH (D. N.J. 2013).
8. “**Media**” means an object or device, including but not limited to a disc, tape, computer or other device, whether or not in the Producing Party’s physical possession, on which data is or was stored.
9. “**Parties**” means or refers collectively to the named Plaintiffs and Defendants in the above-captioned matter, as well as any later added plaintiffs and defendants. “Party” shall refer to a plaintiff or defendant, individually.
10. “**Producing Party**” means or refers to a Party in the above-captioned matter from which production of ESI or hard copy documents are sought.
11. “**Requesting Party**” means or refers to a Party in the above-captioned matter seeking production of ESI or hard copy documents.

C. COST CONTAINMENT

1. **Deleted Files and Litigation Freezes.** To help contain costs, the Parties shall not be obligated under this Order to produce or preserve ESI that was deleted or lost prior to the date upon which the duty to preserve ESI arose, as a result of the routine, good-faith operation of an ESI system. Nothing in this provision limits or expands a Party's obligation to search for ESI known to be "deleted" by a user that remains as a copy on an archive, backup tape, or as active data on some other central server or place within a Party's possession, custody, or control provided such search is otherwise consistent with and does not exceed the Party's obligations under the Federal Rules of Civil Procedure.
2. **Types of ESI That Need Not Be Preserved or Searched.** The Parties agree that there is no need to preserve or collect ESI from the following sources which are deemed to not likely contain relevant information and to be not reasonably accessible:
 - a) Voice mails
 - b) random access memory (RAM) or other ephemeral data;
 - c) on-line access data such as temporary internet files, histories, caches, cookies, etc.;
 - d) data in metadata fields that are frequently updated automatically, such as last-opened dates, except as specified in this Order (the metadata fields identified in Exhibit 1);
 - e) text and instant messages;
 - f) mobile devices;
 - g) personal computers and personal e-mail not regularly used for business activities; and
 - h) social media sites.

D. SEARCH PROTOCOL

1. **Protocol For Agreeing on Individual and Departmental Custodians.** In order to reduce the burden of searching the electronic files and data sources only tangentially related to the subject matter of the claims and defenses in this litigation without overlooking production of relevant and responsive documents, the Parties will exchange lists of individual and departmental custodians. Absent an order from the Court to the contrary, the Producing Party will identify its own proposed individual (including title) and departmental custodians within 15 days after the entry of this ESI Protocol. At that time, the producing Party shall provide reasonably accessible existing relevant organizational

charts relating to departments within its organization in which (a) any of the proposed individual custodians work, or (b) which are proposed as a departmental custodian. Additionally, each party will provide organizational charts, to the extent they exist in the normal course of business, illustrating the identified departments' role in the party's larger organization. Thereafter the Parties will meet and confer to agree as to the individual and departmental custodians ("Agreed Individual and Departmental Custodians").

The Parties shall search the relevant files for the Agreed Individual and Departmental Custodians pursuant to the procedures set out herein and produce non-privileged responsive documents. As to other individual and departmental custodians, the Parties shall take reasonable steps to preserve relevant documents, but are not obligated to search and produce documents.

The Parties reserve their rights as discovery unfolds to seek the production of documents from additional individual or departmental custodians should it become apparent such additional custodians possess information relevant to the claims or defenses in this case and such information is not held by the Agreed Individual and Departmental Custodians. To the extent a Party's additional document requests may require the search of additional individual and departmental custodians, the Parties will meet and confer regarding the addition of any individual or departmental custodians as necessary and appropriate.

If the Parties are unable to reach agreement on the Agreed Individual and Departmental Custodians, the Parties reserve their rights to bring to the Court any dispute concerning the identification of appropriate Individual and Departmental Custodians or additional individual or departmental custodians under the Federal Rules of Civil Procedure or rules of the Court.

2. **Protocol For Agreeing on Use of Search Filters.** The Parties agree that the application of search terms is an appropriate step to reasonably identify potentially responsive documents or to cull ESI once the material is collected from the appropriate data source. Each Party shall take reasonable steps to develop search terms to identify potentially responsive documents including undertaking reasonable steps to test and validate the recall (how many documents determined to be responsive that were actually identified using search terms) and precision (how precise the search terms are, measuring how many non-relevant documents were also search term hits, or how many non-relevant documents one would have to review to find the relevant documents in the document universe) of the terms.

While there are potentially numerous ways to reasonably test and validate search terms, a Producing Party may test the efficacy of proposed search terms by assessing hit reports and/or by sampling individual query results or cumulative results, and during the meet and confer process may support the exclusion of disputed search terms by reference to such statistical hit reporting and/or intelligence garnered from such sampling, provided, however, that if a Producing Party relies upon such statistical hit reporting and/or intelligence for the exclusion of certain search terms it must first provide to the Requesting

Party the underlying “hit rate data” (i.e., total number of documents searched, number of aggregate hits, number of unique hits, etc.) relating to such search terms.

The Parties agree to meet and confer to discuss the use of reasonable search terms and date ranges as a means to identify relevant ESI for review.

The fact that a document may have been retrieved or identified by application of agreed upon search terms shall not prevent any Party from withholding from production such document for privilege or other permissible objection.

Notwithstanding the foregoing, to the extent any Party identifies responsive ESI or documents not identified by the use of agreed upon search terms or filters, all such non-privileged documents must be produced, subject to the Parties’ objections to discovery requests and privileged documents will be logged to the extent required by this agreement.

The meet and confer process regarding search terms will occur based on the following schedule:

- a) **Initial Exchange Date.** Within fourteen (14) days after service of written responses and objections to requests for production of documents, or by such other earlier date as may be set by the Court (the “Initial Exchange Date”), the Producing Party shall provide to the Requesting Party 1) a list of keyword search terms (including semantic synonyms, code words, acronyms, abbreviations, non-language alphanumeric associational references to relevant ESI, etc.) that the Producing Party proposes to use when searching for its responsive ESI, and 2) any proposed exclusion criteria (including, but not limited to, date restrictions) related to its ESI searches.
- b) **Meet and Confer Concerning Search Terms and Data Sources.** Promptly after the Initial Exchange Date the Parties will meet and confer to agree as to the list of keyword search terms to be used in identifying potentially responsive documents and the list of sources of data to be searched and exclusion criteria, if any.

During the meet and confer process the Requesting Parties may suggest to Producing Parties search terms and/or data sources that they believe in good faith will reasonably identify responsive documents without unreasonably identifying non-responsive and/or irrelevant documents. Reasonably promptly, the Producing Party shall notify the Requesting Party whether it will use some or all of the suggested search terms or data sources and, if it will not use all of the suggested search terms or data sources, will provide an explanation. At the conclusion of the meet and confer process, the Parties shall identify those search terms which are “agreed” and those which are “disputed” and whether there exists any data sources in dispute. If forty-five (45) days after the Initial Exchange Date, disputed terms remain, the Requesting Party may submit those terms to the Court seeking resolution of the dispute.

The parties will meet and confer in good faith about the data sources the Producing Party intends to search for responsive documents and data sources the Producing Party reasonably believes contains relevant information. If there is a good faith concern about the scope or adequacy of the search that was conducted or the existence of responsive ESI that has been deleted, the Producing Party will identify any data sources it reasonably believes contains relevant information and knows it will not search because of undue cost or burden under F.R.C.P. 26(b)(2)(B).

- c) **Provision of Reasonable Estimate to Begin and Complete Production.** At the conclusion of the meet and confer process, the Producing Party shall also provide to the Requesting Party, in writing, a date by which it estimates, in good faith, it will begin producing responsive documents and a date by which its production of responsive documents will be substantially complete. If during the discovery process it becomes evident that the production will not be substantially complete by the date provided, the Producing Party shall so inform the Requesting Party and provide a revised date by which the production will be substantially complete, as well as an explanation of the need to revise the date.
- d) **Commencement of Production on Rolling Basis.** At the conclusion of the meet and confer process (and prior to any motion practice regarding disputed search terms), the Producing Party shall commence use of all agreed terms to identify potentially responsive documents. The commencement of this step shall not await the resolution of any remaining disputed search terms or data sources. All queries shall be run in a non-case sensitive matter, unless otherwise agreed by the Parties. The population of documents resulting from this process shall be set-aside to be reviewed for production. Production of responsive documents will be promptly produced to the Requesting Party on a rolling basis.
- e) **Certification that Production is Substantially Complete.** Pursuant to FRCP 26(g), once a Producing Party has substantially completed its production in response to a request for production of documents, it will so certify, in writing, to the Requesting Party.
- f) **Additional Custodians, Search Terms and Data Sources.** In accordance with the overall litigation schedule set by the Court, each Party may, upon reviewing documents produced in the Litigation and conducting other investigation and discovery, request that files from additional custodians and data sources be searched and/or that additional search terms be applied. The Parties agree to meet and confer in good faith concerning any such requests, and such requests will be governed by the standards the Court set forth on the record at the September 10, 2014 hearing, at 21:20-23:10.

If the Producing Party objects to such additional searches and production, the Requesting Party reserves the right to raise the issue with the Court. Absent good cause, such a request must be made ninety (90) days before the end of fact discovery.

g) **Continued Obligation to Meet and Confer.** The Parties will continue to meet and confer regarding any search process issues as necessary and appropriate during discovery. Nothing in this search protocol, or the subsequent designation of any search terms, shall operate to impose additional obligations. This ESI protocol does not address or resolve any other objection to the scope of the Parties' respective discovery requests, and it does not prevent any Party from undertaking searches of its own ESI for any purpose at any time. However, upon locating responsive ESI from such searches that has not yet been produced, the Party must comply with Federal Rule of Civil Procedure 26(e).

3. **Use of Technology Assisted Review.** No Party can compel another Party to use technology assisted review or to produce documents without human review over their objection. The Parties may use technology assisted review to prioritize the order of review of the documents identified by search terms (the "Review Set"). If a Producing Party elects to use technology assisted review to cull documents from the Review Set, it will inform the Requesting Parties when the Producing Party decides to do so. The Parties reserve the right to object to such use of technology assisted review, but by allowing a party the right to reserve their objection no party is agreeing, either explicitly or implicitly, that such objections are legitimate. If a Producing Party is going to use technology assisted review to cull documents, the Producing Party shall maintain any culled documents in the Review Set if needed for further review and provide sufficient notice such that if an objection is sustained, then review can be completed reasonably promptly.

4. **De-duplication of Production.** The Parties shall use reasonable, good faith efforts to avoid the production of duplicate ESI.

To the extent that exact duplicate documents (based on MD5 or SHA-1 hash values) reside within a Party's ESI data set, each Party may produce only a single copy of a responsive document or record ("Single Production Copy"). For exact duplicate documents, the Producing Party will produce the metadata described in Section E.3. herein for the Single Production Copy. Where any such documents have attachments, hash values must be identical for both the document-plus-attachment (including associated metadata) as well as for any attachment (including associated metadata) standing alone.

No Party shall identify and/or eliminate electronic duplicates by manual review or some method other than by use of the technical comparison using MD5 or SHA-1 hash values outlined above. The Producing Party can either de-duplicate documents within custodians, or across custodians, *provided* they comply with the following:

(a) If the Producing Party is de-duplicating across the Agreed Custodians, the Producing Party shall populate a field of data that identifies each Agreed Custodian who had a copy of the produced document (the "duplicate custodian field") in addition to a separate field of data identifying the custodian whose document is produced.

(b) If the Producing Party is de-duplicating within an Agreed Custodians only, there is no need to create or provide the duplicate custodian field.

5. **Cost Shifting.** If a Producing Party reasonably believes in good faith that producing particular ESI poses an undue burden or cost or is otherwise disproportionate such Party, at or before the time the production is due under the Federal Rules of Civil Procedure, shall describe the nature of the objection with reasonable particularity and indicate whether it is willing to offer an alternative to production. The Parties shall promptly meet and confer in an attempt to resolve the issues and, if no resolution is reached, seek appropriate relief from the Court. In such case, the Court may apportion the costs of electronic discovery in accordance with and only as allowed by the Federal Rules of Civil Procedure. A Party's nonresponsive or dilatory discovery tactics will be cost-shifting considerations. Likewise, a Party's meaningful compliance with this Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations. Nothing in this section or the remainder of this Order precludes the Requesting Party from opposing any applications for shifting of costs nor does it preclude a Producing Party from objecting to conducting the discovery at all as disproportionate or for any other reason.

E. PRODUCTION

1. **Prior Production.** To the extent a Party produces documents in this case that were produced in a prior proceeding or litigation (including but not limited to the Patent Cases or any related FTC proceedings or litigation) for which the ESI (including but not limited to metadata fields, searchable text, and organization) differs from the substance and format agreed to herein, the Parties will meet and confer in advance regarding whether the ESI from the prior production is sufficient or whether the ESI from the prior production needs to be supplemented with additional information to make it consistent with the substance and format agreed to herein. If the Requesting Party demands that the ESI from their prior production be supplemented, and the Producing Party refuses to do so, the Requesting Party reserves the right to bring such dispute to the Court.

Based on the representations from Defendants' counsel in the emails on July 25, 2014 and July 28, 2014 regarding the metadata produced to the FTC, Plaintiffs currently expect that such metadata will be sufficient. However, to the extent metadata is missing from individual documents, Plaintiffs reserve the right to request that metadata be supplemented for individually identified documents. Defendants reserve the right to object to such requests including, but not limited to because the metadata is not reasonably available or the cost of production of such information is disproportionate to its value.

Based on the representations from Defendants' counsel in the emails on July 25, 2014 and July 28, 2014 regarding the metadata produced in the Patent Cases, Plaintiffs currently expect that such metadata will be sufficient. However, to the extent metadata is missing from individual documents, Plaintiffs reserve the right to request that metadata be supplemented for individually identified documents. Defendants reserve the right to

object to such requests including, but not limited to because the metadata is not reasonably available or the cost of production of such information is disproportionate to its value.

To the extent Defendants produce documents in this case that were produced in prior proceedings or litigations other than the Patent Cases or related FTC proceedings or litigation, and if the ESI for such prior productions differs from the substance and format agreed to herein, the Parties will follow the process set out above.

2. **Paper Production Format.** All paper documents shall be produced as static images: The images will be in black-and-white, single page, 300 DPI, Group IV* .TIFF images, .TXT format and standard load files, which can be used with commercially available litigation software packages, and the Default Production Fields (“DPF”) as described and designated with a “DPF” in Exhibit 1. Hard copy color paper documents will be produced in grayscale in TIFF format. The Parties will accommodate reasonable requests for production of specific images in color to the extent available. Producing such Paper Documents in such form does not change their character from Paper Documents into ESI.

Upon request, machine-generated OCR created from scanned images of hard copy documents will be provided at a document level to the Requesting Party. There will be one text file per document, named the same as the Beginning Bates number (Document ID) of the document. The OCR text file for a document will reside in the same location (file directory) as the images for that document. The text file associated with any redacted document will exclude redacted text.

If a document is more than one page, to the extent possible, the unitization of the document and any attachments or affixed notes should be maintained as it existed when collected by the Producing Party. Parties may unitize their documents using either physical unitization (*i.e.*, based on physical binding or organizational elements present with the original paper documents like staples, clips and binder inserts) or logical unitization (*i.e.*, a manual review of the paper to determine what logically constitutes a document like page numbers or headers). If unitization cannot be reasonably maintained, the original unitization should be documented in the data load file or otherwise electronically tracked if reasonably possible.

3. **ESI Production Format.** The following provisions shall generally govern the production format and procedure for ESI and are subject to the other provisions contained herein.

- a. **Production of ESI (both Native and Non-Native).** All responsive ESI except that which is produced in Native Format pursuant to paragraph (b) should be produced in black-and-white, single page, at least 300 DPI, Group IV*.TIFF images with corresponding extracted full text and affiliated metadata as identified below. All productions will include these additional specifications:

- a load file for images;
- delimited load files (.dat, .dii, .lfp and .opt) containing a field with the full path and filename to native files produced and the metadata fields Identified below (for ESI);
- document-level .txt files for all native documents containing extracted full text or OCR text (OCR only if extracted text is not available or if the document has been redacted);
- Bates number branding and Confidentiality designation (if any) on the face of the image;
- all hidden text (*e.g.*, track changes, hidden columns, comments, notes, markups, etc.) will be expanded, extracted, and rendered in the TIFF file; this specifically includes, but is not limited to, the inclusion of any notes or comments contained within any PowerPoint slides/presentations that are produced in TIFF format; and
- Each of the Metadata and coding fields set forth in Exhibit 1 which can be extracted from a Document shall be produced for that Document. The Parties are not obligated to populate manually any of the fields in Exhibit 1 if such fields cannot be reasonably extracted from a Document, with the exception of Default Production Fields (“DPF”) that are generated in the course of collection, review and production. If metadata are not produced because they do not exist or because they are not reasonably accessible, then the Producing Party shall identify them as such in their production as “N/A”.

- b. **Production of Native Format ESI.** Responsive spreadsheets (*e.g.*, Excel, Lotus, etc.), presentations (*i.e.*, PowerPoint, Keynote, etc.), shall be produced in Native Format, except where such files are redacted. The production of Structured Data, which the Parties may, from time to time, agree is also to be produced in its Native Format, is governed by Section E.4. below. For documents whose Native Format is multi-media, the original native files shall be produced. A TIFF placeholder embossed with the corresponding confidentiality designation and bates number shall be produced for all ESI produced in Native Format. Responsive ESI produced in Native Format shall be produced with all Metadata contained in or associated with that file to the extent technologically possible consistent with paragraph (a). Nothing in this protocol shall limit a Party’s ability to elect to produce other forms of responsive ESI in Native Format.

Extracted Text taken from native files will be provided at a document level. There will be one text file per document, using the same name as the beginning Bates number (Document ID) of the document. The extracted text file for a document will reside in the same location (file directory) as the images for that document. The text file associated with any redacted document will exclude redacted text (*i.e.*, the Producing Party can OCR the redacted image of the unstructured ESI and replace the original extracted text).

No Party may attach to any pleading or any correspondence addressed to the Court, Special Master, or any adverse or third Party, or submit as an exhibit at a deposition or any other judicial proceeding, a copy of any native format document produced by any Party without ensuring that either the corresponding slip sheet is attached to the document or the corresponding Bates number and confidentiality legend, as designated by the Producing Party, appears on the document.

- c. **Request for Documents in Native Format.** If a Party reasonably concludes that production in Native Format of any document(s) initially produced in TIFF format is necessary (*e.g.*, to decipher the complete meaning, context, or content, to determine if there is any relevant “hidden text” in the document, to determine if there is any important use of **color** in the document, etc.), such Party may request production of the original document in Native Format. The Parties agree to meet and confer in good faith with respect to any such request.
- d. **Appearance and Content.** No document may be intentionally manipulated to change how the source document would have appeared if printed out to a printer attached to a computer viewing the file, without prior agreement of the Requesting Party, except as necessary to comply with this Order (*e.g.*, necessary to expand and render hidden text as provided in Section D.3.a or to protect individually identifiable health information as required by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in Section D.3.1). Therefore, subject to any appropriate redaction, each document’s electronic image shall convey the same information and image as the original document. Responsive ESI that presents imaging or formatting problems shall be promptly identified and the Parties shall meet and confer in an attempt to resolve the problems.
- e. **Color.** Parties will produce in color those documents that either (1) include track changes; or (2) that, in their good faith judgment, need to be produced in color in order to reasonably understand the complete meaning, context, or content of the documents. The Parties will also accommodate requests made in good faith for the production of a color image of specific documents originally produced in greyscale TIFF format where reasonably necessary to decipher the complete meaning, context, or content of the documents. Such responsive ESI shall be produced in a manner that preserves, to the maximum extent possible, the integrity of multi-page groups of documents.
- f. **Load File.** To the extent production is made in an electronic format susceptible to creation of a Load File, the Producing Party shall provide a Load File to accompany the native files and TIFF images that are produced, to facilitate the use of the produced images by a document management or litigation support system as described above. Load files shall contain the

parent/child (e.g., Email/Attachment, Memo/Attachment, Letter/Enclosure) relationships of documents, when possible.

For all produced paper and loose ESI (whether produced in Native or TIFF Image), a standard Opticon image load file indicating document boundaries and location of images will accompany the images. The fields that should be included are detailed in Exhibit 2.

When producing a multi-page document, images for the document should not span multiple directories. In addition, Producing Party should not include more than 1,000 images in a single directory unless a document is more than 1,000 pages.

- g. **Document Numbering for TIFF Images.** Each page of a document produced as TIFF images shall have a legible, unique Document Number electronically “burned” onto the image at a location that does not obliterate, conceal or interfere with any information from the source document (i.e., the “Bates Label”). Each file produced in Native Format shall be associated with a unique Document Number included on the TIFF placeholder provided with the native file or, where not produced with a TIFF placeholder, the storage device (e.g., CD, USB, hard drive) containing such native ESI data shall be labeled with a Document Number. The Document Number for each document shall be created so as to identify the Producing Party and the Document Number. Each Party shall have a unique identifying name. Each page of each production shall have a unique number of up to eight digits. The unused digits of the unique number shall be filled with placeholder zeros (0) to facilitate electronic sorting of the documents.
- h. **Organization of Production.** To the extent a Producing Party organizes its production of Loose Files as they are kept in the ordinary course of business, Producing Party should scan and produce folders, redwelds, binder-covers and other organizational structure. Such materials should be produced as independent documents and be produced before the documents that were contained in these elements to the extent reasonably accomplishable by the above-addressed unitization. (e.g., the file folder should have a Bates Label immediately before the documents contained in the file folder). The Producing Party will provide the name of the custodian who had possession of the document when it was collected. A custodian can include an employee or person’s name, a department, or an archive storage if the document was stored in archive when the Party’s duty to preserve was triggered.
- i. **Family Relationships of Electronic Files.** Parent-child relationships between ESI (e.g., the association between an attachment and its parent e-mail, or a spreadsheet embedded within a word processing document),

must be preserved by assigning sequential Bates numbers to all files within a parent-child group, and by providing accurate attachment ranges for those files in the metadata fields required.

j. **Production Media.** Documents shall be produced on CD-ROM, DVD, external hard drive (with standard PC compatible interface), via secure FTP site, or such other readily accessible computer or electronic media as the Parties may hereafter agree upon (the "Production Media"). Each piece of Production Media shall include a unique identifying label and cover letter including the following information:

- (a) Name of the Litigation and its case number;
- (b) Name of the producing Party;
- (c) Date of the production (mm/dd/yyyy);
- (d) Volume number;
- (e) Bates Number range;
- (f) Confidentiality Designation; and
- (g) Notes regarding any irregularities in the production (e.g., whether it is replacement Production Media (see below)).

Producing Parties may elect to produce initially via an FTP site for production volumes equal to or less than 15 GB on the due date of the production. Any productions made by FTP must be followed with the production provided on standard production media described above and shipped no later than the next available shipping date, for next day delivery. Production volumes of a larger size than 15 GB may be produced by FTP in the process described above only upon prior agreement of the Requesting Parties. Any replacement Production Media shall cross-reference the original Production Media, clearly identify that it is a replacement, and cross-reference the Bates Number range that is being replaced. Producing Parties may encrypt their Production Media and, if so, shall provide a key to decrypt the Production Media in a separate communication.

k. **Time.** When processing ESI for review and for production in TIFF format, the Producing Party will instruct its vendor to turn off any automatic date stamping. When processing ESI, GMT should be selected as the time zone and the Producing Party will note the time zone used in its processing. To the extent that a Party has already processed ESI using a different time zone, the Producing Party will note the time zone used in its processing. In such instance, a Party may consistently produce all ESI processed using the

same time zone. When a metadata field includes a date and/or time, it shall be provided in the following format: mm/dd/yyyy HH:mm:ss.

1. **Redactions.** To the extent that a responsive document contains (a) privileged content or (b) non-responsive Highly Confidential or DP Information (as those terms are defined in the Protective Order), the Producing Party may produce that document in a redacted form. Any redactions shall be clearly indicated on the face of the document and each page of the document from which information is redacted shall bear a designation that it has been redacted. The designation shall make clear the reason for the redaction (e.g., “Redacted Privileged” or “Redacted DP Information Non-Responsive” or “Redacted Highly Confidential Non-Responsive”). Where a document contains both privileged and non-privileged responsive content, the Producing Party shall redact the privileged material and produce the remainder of the document as redacted. Highly-sensitive, non-responsive business information may be redacted from a document only if the document can be redacted without obscuring otherwise responsive information. The Parties agree to meet and confer in good faith to attempt to resolve any dispute arising under this paragraph. Consistent with the Protective Order in this matter, after a meet and confer, and upon the request of the Receiving Party regarding specific redactions, the Producing Party redacting information pursuant to this paragraph shall promptly produce a redaction log including information sufficiently detailed to allow the Receiving Party to understand and challenge the Producing Party’s basis for claiming the redacted information is non-responsive Highly Confidential/DP Information.

The Parties will meet and confer in good faith whether or not any additional redactions (and the amount of redactions) are appropriate to comply with the German Data Protection Act or other data protection laws if needed.

- m. **Non-Responsive Attachments.** The Parties agree that fully non-responsive attachments to responsive parent documents need not be produced. For such fully non-responsive attachments, a placeholder slip-sheet endorsed “Withheld Non-Responsive” will be produced to capture the family relationship.

4. **Structured Data.** To the extent a response to discovery requires production of discoverable electronic information contained in a database and it cannot reasonably be produced in either Excel or .csv format, in advance of producing such information, the Parties agree to meet and confer-regarding the format of the production (e.g., commercial database, or some other agreed-upon format). If the structured data exists in a proprietary database format, and an exportable electronic file cannot be created in a reasonably usable format, then the Parties will meet and confer regarding utilizing the proprietary software to generate the production in an alternative format.

5. **Confidentiality of Produced ESI.** Responsive ESI, whether produced as TIFF images or in Native Format, shall be produced pursuant to the terms of the Stipulated Protective Order. Any objections to production shall otherwise be made pursuant to the Federal Rules of Civil Procedure or the Federal Rules of Evidence. If the Producing Party is producing ESI in TIFF Format subject to a claim that it is protected from disclosure under any protective agreement or confidentiality order, or any agreement entered into or Order issued in this matter, the word “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” or “DP INFORMATION” shall be burned electronically on each page of such document. The Producing Party should also include in the flat file (.txt or .dat) a designation that the document is protected and the level of protection, as required by any protective order or agreement.

If the Producing Party is producing ESI in Native Format subject to a claim that it is protected from disclosure under any protective agreement or confidentiality order, or any agreement entered into or Order issued in this matter, then the designation shall be included in the filename as well as the TIFF placeholder or where not produced with a TIFF placeholder, the storage device (e.g., CD, USB, or hard drive) containing such native ESI data shall be labeled with the designation “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” or “DP INFORMATION.” The Producing Party should also include in the flat file (.txt or .dat) a designation that the document is protected and the level of protection, as required by the Protective Order.

6. **Third-Party Software.** To the extent ESI produced pursuant to this Order cannot be reasonably rendered or viewed in any of the above formats, the Requesting Party shall alert the Producing Party to the issue within a reasonable time. The Parties shall meet and confer to address such issues as may arise with respect to obtaining access to any Third-Party Software and operating manuals which are the property of a third party. The Producing Party will not be under any obligation to produce commercially-available third-party software or proprietary manuals to the Requesting Party. If ESI cannot be rendered without the use of non-commercially available third-party software or proprietary manuals, the Parties shall meet and confer in an attempt to resolve any issues of access to the ESI.

F. MISCELLANEOUS

1. **English Language.** To the extent any Data exists in more than one language, the Data shall be produced in English, if available. If no English version of a document is available, the Producing Party does not have an obligation to produce an English translation of a document.

2. **Variance.** Any practice or procedure set forth herein may be varied by agreement of the Parties without order of the Court. Failure of the Parties to agree on any modifications may be raised with the Court as necessary and in accordance with the Federal Rules of Civil Procedure and the Local Civil Rules.

3. **Duplicate Production Not Required.** A Party producing responsive ESI need not produce the identical document in paper format, except that, in specific cases in which ESI produced by a Party may, for some reason, be unreadable or otherwise subject to question, a Requesting Party may reasonably request a Producing Party to produce paper copies of previously produced ESI.

G. TIMING AND SEQUENCING OF ELECTRONIC DISCOVERY

Any Party under an obligation to produce ESI shall commence the production of such ESI and proceed with the production of the ESI in a reasonably timely manner consistent with the schedule provided above and/or any orders of the Court.

H. PRIVILEGE

The terms of the Stipulated Protective Order governing the inadvertent production of privileged information govern this Order as well.

I. PRIVILEGE LOGS AND CHALLENGES

1. **Privileged Documents That Need Not Be Logged.** The Parties agree that the following privileged documents and electronically stored information (“privileged material”) need not be logged or indexed:

- (a) privileged material dated after November 8, 2013 and created or received by counsel of record or outside attorneys advising in this matter and their associated attorneys and support staff, including paralegal and secretarial personnel;
- (b) privileged material dated after May 31, 2007 and created or received by counsel of record or outside attorneys advising in the Patent Cases and their associated attorneys and support staff, including paralegal and secretarial personal, provided such privileged material does not relate to any of the following topics:
 - (i) the settlement or potential settlement of the Patent Cases, the agreements between Defendants dated August 11, 2008 referenced in the Consolidated Complaints relating to Aggrenox, or any other potential agreement entered or contemplated by the Defendants regarding Aggrenox, including but not limited to the negotiation of such agreements and the interpretation of the potential or actual impact and/or effect of such agreements;
 - (ii) discussion, analysis or evaluation of the claims or defenses asserted in the Patent Cases, including but not limited to the merits of the patent claims, the patent’s validity, enforceability and infringement by Barr, and the potential outcome of the Patent Cases; and

- (iii) entry or potential entry of generic version(s), including an authorized generic version, of Aggrenox.

To avoid any confusion, documents relating to foregoing topics (i-iii) must be logged.

- (c) privileged material dated after February 5, 2009 and created or received by counsel of record or outside attorneys advising in any related FTC proceedings or litigation and their associated attorneys and support staff, including paralegal and secretarial personnel;
- (d) correspondence sent exclusively between in-house attorneys acting as counsel and outside counsel, provided such correspondence does not relate to any of the following topics:
 - (i) the topics identified in Section I(1)(b)(i-iii) above; and
 - (ii) the antitrust risk associated with the agreements referenced in Section I(1)(b)(i) above prior to February 5, 2009.

To avoid any confusion, documents relating to foregoing topics (i-ii) must be logged.

- (e) privileged material related to activities undertaken in compliance with the duty to preserve information (including, but not limited to, litigation hold letters) that are protected from disclosure under Federal Rules of Civil Procedure 26(b)(3)(A) and (B).

Notwithstanding the above stipulation, all privileged material should be preserved in the event of a later dispute with respect to the propriety of any privilege claim or the sufficiency of the privilege log. The Parties agree that they will confer at a later time to determine whether any other categories of privileged documents can be excluded from the logging requirement.

2. **Format of Privilege Log.** The privilege log shall be produced as an Excel Spreadsheet.

3. **Contents of Privilege Log.** Documents withheld from production that a Party believes are covered by an attorney-client privilege and/or work product protection, which do not fall into the categories specifically excluded above, should be logged on a privilege log on a document-by-document basis, except as identified below. Consistent with Local Rule 26(e) and Fed. R. Civ. P. 26(b)(5), the following information should be provided (as applicable) in the privilege log for each document: (1) unique document identification number; (2) document type; (3) family relationship; (4) date; (5) author; (6) each recipient; (7) copies(s); (8) privilege or protection claimed; and (9) description of the subject matter of the document or electronically stored information sufficient to enable the requesting party to assess the validity of the privilege claim.

For those documents that contain a series of e-mail communications in a single document (“email string”), it shall be sufficient to log the ‘string’ without separate logging of each included communication, but reference to the document as an “email string” should be made in the document description field of the log; every individual author and recipient in the portion of the email string withheld or redacted as privileged will be identified; the entire date range for the string of emails will be identified; the description provided should be sufficient to enable the requesting party to assess the claim of privilege for each e-mail in the string; and it shall be noted if there are any e-mails that do not include a lawyer. Email strings that are not privileged in their entirety should be redacted, the redaction labeled to reflect the nature of the privilege; the document logged; and the non-privileged portions produced. Parties retain the right to request individual emails be logged as individual entries if necessary to properly assess the privilege claim for any individual email in the string or the entire string. The Parties will meet and confer as to which party shall pay all reasonable costs, including attorneys’ fees, for creating the individual log of emails.

All counsel or their employees (or direct reports for in-house counsel) involved in purportedly privileged communications or work product shall be identified as such for each document in the privilege log.

4. **Challenges to Privilege Log.** If a Requesting Party believes in good faith that one or more items in a Producing Party’s privilege log should be produced and are inappropriately being withheld, then it shall raise the issue as to each log entry with the Producing Party in writing with reasonably sufficient detail so that the Producing Party may understand the Requesting Party’s complaint. Within ten (10) business days, the Producing Party shall respond in writing. If the response does not satisfy the Requesting Party, then the Parties shall meet and confer and if the dispute as to the privileged nature of the material cannot be resolved, then the Requesting Party may seek relief from the Court as to the specific log entries raised with the Producing Party. Nothing in this procedure to challenges to a Party’s privilege log modifies the Producing Party’s burden to establish the privileged nature of the withheld document.

5. **Prior Privilege Logs.** To the extent a Party produces documents in this case that were produced in a prior proceeding or litigation (including but not limited to the Patent Cases or any related FTC proceedings or litigation), the producing Party may produce the privilege logs from those prior proceedings/litigations rather than creating a new log for the documents that were withheld. However, the Requesting Party retains the right to request additional information regarding entries in the log. If the Producing Party objects to producing such additional information, the Requesting Party retains the right to challenge the sufficiency of the privilege log and whether the Producing Party has met its burden in asserting its privilege claims.

J. **OBJECTIONS TO ESI PRODUCTION**

If any Party objects to producing the requested ESI on the grounds that such information is not reasonably accessible because of undue burden or cost, or because

production in the requested format is asserted to be not reasonably accessible because of undue burden or cost, the Party, at or before the time the production is due under the Federal Rules of Civil Procedure, shall describe the nature of the objection with reasonable particularity and indicate whether the Producing Party is willing to offer an alternative.

The Parties do not waive any objections to the relevance, responsiveness, production, discoverability, possession, custody, control, or confidentiality of Documents, including (without limitation) objections regarding the burden, over-breadth, or relevance of document requests related to Documents. Nothing in this Stipulated Order shall be interpreted to require the disclosure of irrelevant information, relevant information that is overly burdensome, or relevant information protected by the attorney-client privilege, work product immunity, or any other applicable privilege or immunity or is otherwise not discoverable.

By entering this Order, a Party is not giving up its right to review its documents for privilege or any other reason (including to identify non-responsive documents) and the existence of this Order cannot be used to compel a Party to produce documents without review. Moreover, this Order does not mean that the cost of review should not be considered in whether any particular discovery is disproportionate (i.e., that the marginal benefit of the discovery is not as great as the marginal cost of said discovery including review).

The Parties will meet and confer in an attempt to resolve the objections if necessary.

K. DESIGNATED ESI LIAISON

Each Party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject (“Designated ESI Liaison”). The Designated ESI Liaison must:

1. be prepared to participate in e-discovery discussions and dispute resolution;
2. be knowledgeable about the Party’s e-discovery efforts;
3. be, or have reasonable access to those who are, familiar with the Party’s electronic systems and capabilities in order to explain those systems and answer relevant questions; and

4. be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

Dated: March 24, 2015

/s/ Stefan R. Underhill

Hon. Stefan R. Underhill
United States District Judge

EXHIBIT 1

FIELDS AND METADATA TO BE PRODUCED

Field	Data Type	Loose Native Files & Attachments	Email	Calendar Entries
BegDoc (DPF)	Integer – Text	Start Bates	Start Bates	StartBates
EndDoc (DPF)	Integer – Text	End Bates	End Bates	EndBates
Attach Count (DPF)	Integer – Text	Number of attachments to document	Number of attachments to document	Number of attachments to document
BegAttach (DPF)	Integer – Text	Starting Bates number of document family	Starting Bates number of document family	Starting Bates number of document family
EndAttach (DPF)	Integer – Text	Ending Bates number of document family	Ending Bates number of document family	Ending Bates number of document family
Parent ID (DPF)	Integer – Text	Starting Bates number for the parent email or edoc		
Page Count (DPF)	Integer – Text	Number of pages in a document	Number of pages in a document	
Custodian (DPF)	Text – Paragraph	Custodians of the document	Custodians of the document	Custodians of the document
Duplicate Custodian (DPF)	Text – Paragraph	All custodians of the document <i>only if a</i> Producing Party elects, under C.4. above, to de-duplicate across custodians	All custodians of the document <i>only if a</i> Producing Party elects, under C.4. above, to de-duplicate across custodians	All custodians of the document <i>only if a</i> Producing Party elects, under C.4. above, to de-duplicate across custodians
CONFIDENTIAL (DPF)	Text	Confidentiality Designation	Confidentiality Designation	Confidentiality Designation
REDACTED (DPF)	Y/N	(Y/N) If redaction is applied	(Y/N) If redaction is applied	(Y/N) If redaction is applied
Doc Extension	Text – paragraph	Doc extension field of metadata associated with file	Doc extension field of metadata associated with email	Doc extension field of metadata associated with calendar entry
From	Text – paragraph		Sender of message	Sender of calendar invite

Field	Data Type	Loose Native Files & Attachments	Email	Calendar Entries
To	Text – paragraph		Recipients of message	Recipients of calendar invite
CC	Text – paragraph		Copied recipients	
BCC	Text – paragraph		Blind copied recipients	
Subject	Text – paragraph		Subject of message	Subject of calendar appointment
DateSent	Date (mmddyyy y)		Date message sent	Date calendar invite sent (if any)
TimeSent	Time (HH:mm:ss Z)		Time message sent	Time calendar invite sent (if any)
Received Date	Date (mmddyyy y)		Date message received	Date Calendar invite received
Received Time (for emails only)	Time (HH:mm:ss Z)		Time message received	Time Calendar invite received
DateCreated	Date (mmddyyy y)	Date file was created		
TimeCreated	Time (HH:mm:ss Z)	Time file was created		
DateModified	Date (mmddyyy y)	Date file was last modified		
TimeModified	Time (HH:mm:ss Z)	Time file was last modified		
Title	Text – paragraph	Title from document metadata		
Author	Text – paragraph	Document author from metadata		
MD-5 Hash Value or SHA-1 Hash Value	Integer-Text	Hash value	Hash value	Hash value
Conversation thread	Text	Email conversation thread		
File/folder path	Text – paragraph	The full path to the file at the original location		
Application type	Text – paragraph	Application used to create a document		

Field	Data Type	Loose Native Files & Attachments	Email	Calendar Entries
Participants	Text – paragraph	names included in a meeting invitation	names included in a meeting invitation	

EXHIBIT 2

REQUESTED LOAD FILE FORMAT FOR ESI

1. Delimited Text File. A delimited text file (DAT File) containing the fields listed in [CROSS REFERENCE] should be provided. The delimiters for the file should be Concordance defaults:

- Comma – ASCII character 20 ()
- Quote – ASCII character 254 (b)
- Newline – ASCII character 174 (®)

2. Image Cross-Reference File (Opticon Load File). The Opticon cross-reference file is a comma delimited file consisting of six fields per line. There must be a line in the cross-reference file for every image in the database. The format for the file is as follows: ImageID,VolumeLabel,ImageFilePath,DocumentBreak,FolderBreak,BoxBreak,PageCount.

ImageID: The unique designation that Concordance and Opticon use to identify an image. This should be the Bates Number of the Document.

VolumeLabel: The name of the volume.

ImageFilePath: The full path to the image file.

DocumentBreak: If this field contains the letter “Y,” then this is the first page of a Document. If this field is blank, then this page is not the first page of a Document.

FolderBreak: Leave empty.

BoxBreak: Leave empty.

PageCount: Number of pages in the Document.

3. Sample Data

```
PROD00000001,VOL001,E:\100\ PROD00000001.TIF,Y,,2 PROD00000002,  
VOL001,E:\100\ MT00000002.TIF,,,,, PROD00000003, VOL001,E:\100\  
MT00000003.TIF,Y,,,4 PROD00000004, VOL001,E:\100\ MT00000004.TIF,,,,,  
PROD00000005, VOL001,E:\100\ MT00000005.TIF,,,,, PROD00000006,  
VOL001,E:\100\ MT00000006.TIF,,,,,
```