U.S. Department of Justice

Antitrust Division

Liberty Square Building

450 5ᵗʰ Street, N.W.
Washington, DC 20530

[DATE]

Via Email
[Counsel
Mailing address
Email]

Re: Form of Production of ESI Documents in Response to the Second
Request **[Civil Investigative Demand No. XXX]** Issued to
[Company]

Dear **[Counsel]:**

The Definitions & Instructions of the Second Request **[Civil Investigative Demand
(CID)[1]]** issued to **[Company]** in relation to **[description of transaction or
investigation]** call for the electronic production of electronic documents and information
(i.e., electronically stored information or ESI). This letter and its attachments describe the
Division's requested form of production for ESI in response to the Second Request. The
Division is open to discussing alternative forms of production, including those that may
be more appropriate under specific circumstances (e.g., small productions, dispositive
issue). Any alternative form of production must permit the Division to access the ESI
appropriately. Please contact me as soon as possible if you wish to discuss a form of
production different than that described herein.

To ensure the efficient gathering, processing, and review of ESI for both your client and
the Division, the Division requests that, before you begin to gather and process
responsive ESI, we discuss any issues related to the requested form of production. The
relevant technical staff and vendor representatives should be included in this discussion. I
have attached our *Questionnaire on Electronically Stored Information*, which seeks
information about, among other things, your client's electronic systems and back-up and
archiving policies that may impact the form of production as well as its scope. Please
provide information in response to the *Questionnaire* as it becomes available, rather than
waiting until you can answer all the questions completely. Answers in writing will greatly
assist these discussions, but they should not be delayed while you gather all of this
information and identify all responsive materials.

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[1] **[From this point forward in the letter, the language will use *Second Request* and will need to be
modified for use with a CID, generally by replacing *Second Request* with *CID*.]**

This letter and its attachments are not modifications to the Second Request nor does this letter endorse or sanction any search methods you or your client use to identify responsive documents.

Please note Instruction O.9. Unless documents are designated as "Original," as described in Instruction O.5, the Division will presume that any documents and information produced are copies and will destroy these materials at the conclusion of the investigation (unless the Division determines that some of these materials need to be retained for a law enforcement purpose or pursuant to the Federal Records Act). **If you want the submitted material returned at the conclusion of the investigation <u>you must indicate that preference in writing when the documents are produced</u>**.

A.	**Form of Production Specifications**

ESI will be produced as described in the attached *Standard Specifications for Production of ESI and/or Hard Copy as Images and Text*. These *Specifications* describe a primarily image-based production, submitted as database load files, that includes tiff images, OCR or extracted text, and a specified list of metadata and bibliographic information for each electronic document, along with native files for presentations and spreadsheets. You and your vendor should closely read the attached *Specifications* before beginning to collect or process ESI. Note, these *Specifications* are continually revised, so do not rely upon previous versions of the *Specifications* from another matter. A web-based, hosted production is not likely feasible due to the security requirements for the Division's firewall.

You may produce hardcopy documents electronically as described in the *Specifications*. If hardcopy documents are produced electronically, you do not have to produce them in hardcopy form, unless specifically requested by the Division to properly interpret the document. (Note, some documents may be more appropriately and efficiently reviewed or produced in hardcopy.) If you produce hard copy documents, provide all the information listed in Instruction **[O.1, O.5, and O.7]**.

Our experience has shown that most problems with electronic productions arise from one of the following issues, and therefore we ask that you pay close attention to them as you read the *Specifications* and assemble your production.

	1.	**UNICODE productions.** The *Specifications* are only designed for an ASCII text-based production (as opposed to a UNICODE-text-based production). We will provide the proper specifications for a UNICODE production upon request.

	2.	**Foreign-language translations.** The *Specifications* do not address how to produce translations of foreign-language documents. We will provide the proper specifications for a production of foreign-language translations upon request.

3.   **Sample submission requirement.** Before you "ramp up" production, a sample submission must be provided to the Division for testing and comment. Samples are only effective when they are a sample of the Company's production. Sample productions from public data sets or other sources often do not identify issues or problems with the Company's production. To minimize the likelihood of encountering problems during the full production, the sample must include, among other things, multiple types of documents from multiple custodians, email with and without attachments, and large spreadsheets.

4.   **Encryption and password protection.** Prior to the production of any native files, these files must be decrypted and all password protection must be removed.

5.   **Attachment relationships.** Consistent with the Definitions & Instructions of the Second Request, you must ensure that attachment relationships are preserved and produced as described in the *Specifications* for all documents, particularly emails and hardcopy.

6.   **Shared resources.** Shared resources (e.g., shared drives or servers, shared filing cabinets, Sharepoint sites) should be produced as separate custodians where multiple people have access to them. Your client should provide a brief description of each shared resource, which includes a list of the employees and outside parties who have access to that shared resource. The documents in shared resources should otherwise be produced consistent with the *Specifications*. Personal drives, whether saved locally or on servers, are not shared resources and should be produced as part of each custodian's files.

7.   **Unitization and file folders.** If you choose to produce hardcopy documents electronically, ensure that they are properly unitized and any file folder or binder label information is preserved and provided, consistent with the Definitions & Instructions of the Second Request.

8.   **File path/folder information.** The required metadata for all ESI includes "file path" information for the directory or server folders into which a custodian's documents have been organized or "folder" information for emails. Ensure that you are collecting this information when collecting responsive documents.

9.   **Deduplication.** The *Specifications* call for deduplication both within a custodian's files and across the entire production, but you must **first** provide the Division with necessary information on how you intend to deduplicate while preserving and producing the required custodial information.

10.   **Submission indices.** With each submission include an index identifying the contents of the submission both electronically and in hardcopy as indicated in the *Specifications*.

11.   **Custodian names.** Every effort should be made to keep the format of custodian names consistent across all ESI sources and all productions (e.g., Last Name,

First Name (the preferred format)). The chosen custodian format should also be used on the privilege log for all names and on the submission indices to allow for efficient cross-referencing.

12. **Native format files.** If any native files will be produced that cannot be viewed using the standard configuration of Microsoft Office 2007, Adobe Acrobat Reader 9, WordPerfect X4, or Internet Explorer 7, you must notify the Division so it can determine whether it has the appropriate software and licenses to view those files. If it does not, it may be necessary for your client to provide that software.

13. **Submission size and duplication.** To minimize any delay in loading your submissions, each submission should be as large as practical under the *Specifications*, while also maintaining a timely and rolling production. Except as otherwise agreed, submitting numerous small load files will result in delay and will prevent the Company from certifying compliance with the Second Request until the Division has had an opportunity to load the entire submission. In addition, subsequent submissions should not include information produced in previous submissions, unless specifically requested by the Division.

14. **Privilege issues.** Documents withheld in full or partially must be appropriately flagged in the production as indicated in the *Specifications*, which requires that when a document is withheld from a family of documents, the other family members will have an indication that a document was withheld. In addition, withheld documents from a family must include the family Bates range in their entry on the privilege log.

15. **Bates numbering.** Make sure Bates numbering is consistent with the *Specifications* and the Definitions & Instructions of the Second Request. All documents must receive Bates numbers that lead with a company identifier and use the same format across all productions.

B.   Issues Requiring Further Discussion or Negotiation

These issues are not covered by the Division's requested form of production as described in this letter and its attachments. They each need to be addressed separately. I am available to discuss any of these issues at your earliest convenience. The Division strongly recommends that we discuss them well before the Company certifies compliance with the Second Request.

1. **Search methods, search terms, or other means of reducing the volume of responsive documents.** *Please review Instruction [Q] carefully*. The Division is committed to working with your client to reduce the size of the production, but to be productive, you must address transparency and verification issues. If you wish to use search terms, please provide the information recommended in Instruction [Q]. The technology and tools associated with the production of ESI are constantly evolving. If you have other methods of reducing the size of the production or reducing the burden on the Division or your client, we are willing to consider any method that meets the needs of

the Division, while simultaneously reducing the burden on your Company and the Division.

2. **Databases.** As soon as possible, provide a description of all potentially responsive databases, along with all the information described in Specifications **[9-12 of the Second Request]**. After providing this information, we can begin discussing whether and how the Company will produce responsive data from these databases. In the case of smaller responsive databases (e.g., Microsoft Access) it may be appropriate to produce the whole database; for such databases, please raise the issue immediately so we can address these databases promptly. In other instances, the Company may need to provide direct access to certain responsive databases. The Division is open to receiving information contained in databases in a variety of ways, but detailed negotiations are typically required.

3. **Personally identifiable information (PII), medical information, or other protected information.** If the production will include PII, information protected by the Health Insurance Portability and Accountability Act (HIPAA), or other information that is protected by statute or regulation, notify staff as soon as possible, but in any event, before producing it. The Division is open to discussing modifications that will permit the Company to withhold this kind of information entirely. If such a modification is not practicable, notice will allow the Division to institute appropriate protections and procedures to protect this sensitive information.

4. **Company intranets, collaboration sites, or social networking information.** If the Company's intranet, collaboration sites (e.g., wikis or Sharepoint sites), or Company social networking content (e.g., Facebook, Twitter) contains responsive information, provide a description of what is responsive, and whether and how it is retained, as soon as possible. We can then discuss whether and how the Company can produce the responsive information. It may be appropriate to provide the Division direct access to the Company's intranet via a secure internet connection, but significant technical and practical issues are often involved.

5. **Production of ESI from non-Windows-based computer systems.** If ESI will be produced from Linux-based, Apple iOS or OS X-based, or other non-Windows-based computer systems, inform me as soon as possible because these systems often give rise to significant technical problems in the production.

6. **Production of proprietary or uncommon file types.** Native files that are unreadable by the Microsoft Office Suite, standard viewer software, or that are in proprietary file formats may require your Company to provide the necessary software for the Division to access those files. Any such file types should immediately be brought to my attention.

7. **Production primarily of native files.** The *Specifications* are not for primarily native file productions. If you are considering a primarily native file

production, you should immediately raise the issue, keeping in mind the issues raised in A(12), B(4), B(5) above, and the size of the production.

Please contact me once you have reviewed this letter and the *Specifications* to schedule our initial call including our respective technical experts.

<div align="center">Sincerely,</div>

        [Your Name]
        Attorney, **[Your Section]**
        [Your e-mail address]
        [Your phone number]

Enclosures (3)
    Standard Specifications for Production of ESI and/or Hard Copy as Images and Text
    Questionnaire on Electronically Stored Information
    Zip File containing sample load files and Standard Specifications