

APPENDIX B

E-DISCOVERY PLAN GUIDELINES

(a) *Meet and Confer Requirement.* Unless the parties otherwise agree or the Court otherwise orders, not later than 21 days before the first scheduling conference with the Court, all parties that have appeared in the proceeding shall hold a meet and confer session concerning discovery of electronically stored information ("ESI") that is reasonably likely to be sought in the proceeding, and if so the parties shall discuss:

- (1) any issues relating to preservation of ESI;
- (2) the form in which each type of ESI will be produced and any problems relating thereto;
- (3) the scope of production, including the custodians, time period, file types and search protocol to be used to identify which ESI will be produced;
- (4) the method for asserting or preserving claims of privilege or of protection of ESI as trial-preparation materials, including whether such claims may be asserted after production;
- (5) the method for asserting or preserving confidentiality and proprietary status of ESI relating to a party or a person not a party to the proceeding;
- (6) whether allocation among the parties of the expense of preservation and production is appropriate; and,
- (7) any other issue relating to the discovery of ESI.

(b) *e-Discovery Plan and Report to the Court.* The parties shall:

- (1) develop a proposed plan relating to discovery of ESI; and

(2) not later than 14 days after the meet and confer session under subsection (a), submit to the Court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

(c) *Form of Court Order.* Following the submission of the discovery plan and any disputes over the plan, the Court will enter an order governing discovery of ESI that will address:

- (1) preservation of ESI;
- (2) the form in which each type of ESI is to be produced;
- (3) the scope of production, including the custodians, time period, file types and search protocol to be used to identify which ESI is to be produced;
- (4) the permissible scope of discovery of ESI;
- (5) the method for asserting or preserving claims of privilege or of protection of ESI as trial-preparation material after production;
- (6) the method for asserting or preserving confidentiality and the proprietary status of ESI relating to a party or a person not a party to the proceeding;
- (7) allocation of the expense of production; and
- (8) any other issue relating to the discovery of ESI.

(d) *Limitations On Discovery.*

In developing a discovery plan and in entering any discovery order, the plan or order shall provide that a party may object to discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or

expense. In its objection the party shall identify the reason for such undue burden or expense. On a motion to compel discovery or for a protective order relating to the discovery of ESI, the objecting party bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.

The Court may order discovery of ESI that is from a source that is not reasonably accessible because of undue burden or expense if the need for proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

If the Court does order discovery of ESI under this subsection, it may set conditions for discovery of the information, including allocation of the expense of discovery.

The Court shall limit the frequency or extent of discovery of ESI, whether or not that ESI is from a source that is reasonably accessible, if the Court determines that:

- (1) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;
- (2) the discovery sought is unreasonably cumulative or duplicative;
- (3) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or
- (4) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the

parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(e) Safe Harbors.

The order governing e-discovery shall also provide that:

(1) A party that is subject to an order entered by the court to deal with e-discovery and who acts in compliance with the terms of that order may thereafter apply its regular document destruction procedures to any ESI that has not been ordered to be produced and shall not be subject to any sanction for the destruction of ESI that is not subject to its obligation to produce under such court order. The order entered by the Court may be modified upon application for good cause and shall thereafter be applicable to the preservation of ESI.

(2) The production of ESI shall not constitute a waiver of attorney-client privilege or work-product protection if the disclosure was inadvertent and the party making the claim of privilege or protection shall promptly take reasonable steps to recover the ESI.