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January 16, 2015

Via ECF

Magistrate Judge Donna M. Ryu
United States District Court
Northern District of California
1301 Clay Street, Courtroom 4, 3rd Floor
Oakland, CA 94612

Re: *In Re Lithium Ion Batteries Antitrust Litigation*
13-MD-02420 YGR (DMR)
Joint Letter Brief re Search Term Protocol

Dear Magistrate Judge Ryu:

The parties have met and conferred repeatedly to negotiate a Search Term Protocol, as required by Judge Gonzalez-Rogers' December 3, 2014 Order (ECF 592). Although the parties have agreed on most points of the Protocol, they seek the Court's guidance on a single remaining issue, and respectfully submit this joint letter brief, pursuant to that Order.

The first deadline set by the Court that may be affected by the outcome of this discovery dispute is the deadline for Plaintiffs' class certification motions on November 30, 2015.

I. PLAINTIFFS' POSITION

Plaintiffs propose a search term protocol that incorporates ESI best practices. The proposed protocol largely mirrors the protocol proposed by the plaintiffs in *ODD* and the one ordered by Magistrate Judge Spero.[1] After negotiations with Defendants, the parties have agreed on all provisions but one: qualitative sampling.

The proposed protocol provides for the parties to work cooperatively to identify a list of agreed search terms, to use metrics (the number of documents returned by a search term) to limit

[1] *See In Re Optical Disk Drive Products Antitrust Litig.* ("*ODD*"), No. 3:10-md-02143-RS (JCS), Order re Discovery Matters, ECF No. 708 (ordering plaintiffs' proposed ESI Search Term Protocol with modifications, including to the qualitative sampling provision). *See also In Re ODD*, Joint Letter re ESI Search Term Protocol Dispute, Sept. 17, 2012), ECF No. 660-1 (attaching Plaintiffs' [Proposed] Order Regarding Search Term Protocol).

any disputed terms, and to engage in the meet and confer process at all stages. If all of these mechanisms fail, however, the protocol provides for the use of sampling of a random population of documents to allow Plaintiffs insight into why the search terms are failing to return an appropriate set of documents. In *ODD*, Magistrate Judge Spero ordered nearly this exact provision regarding random sampling over the defendants' objections. The provision was used effectively to narrow search term disputes between the *ODD* class plaintiffs and one defendant family, obviating the need for motion practice over the search terms themselves.

Issue No. 1. Should a party producing documents identified by a computer search be required to privilege check a non-privileged, random sample of those documents, and to allow the requesting party to review that random sample to determine whether the computer search is identifying relevant, or irrelevant, documents.

Keyword searching is a generally accepted tool for navigating through large data repositories in response to discovery requests. Standing alone, however, keyword searching often suffers from severe shortcomings that lead to inadequate or unreliable search results. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 257 (D. Md. 2008) ("there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying exclusively on such searches"). In too many cases, "the way lawyers choose keywords is the equivalent of the child's game of 'Go Fish' . . . keyword searches usually are not very effective." *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 877 F.Supp.2d 87, 109 (S.D.N.Y. 2012) (ellipsis in the original) (noting studies showing that keyword searches identify only 20%-25% of relevant documents). To address these shortcomings, "[e]lectronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI." *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009).

Plaintiffs' proposal requires that documents identified by a computer search be subject to a process for verifying the accuracy of the search and review process. In particular, a producing party would be required to conduct a random sampling of such documents, privilege check the sample, and then the requesting party would be allowed to review that random sample to determine whether the computer search is identifying relevant, or irrelevant, documents. The requesting party could then improve the computer search and re-run it to exclude the irrelevant documents and/or identify additional relevant documents.

The effectiveness of a computer search can only be determined by viewing the documents identified by that search. If a random sample shows that a search is returning a high percentage of relevant documents, it is a good search, and the producing party should be required to privilege check the entire set of documents identified by that search, and to produce the relevant ones to the requesting party. On the other hand, if a random sample shows that a search is returning a high proportion of irrelevant documents, it is a bad search and needs to be modified to improve its precision in identifying relevant documents. The provision of the search term protocol in dispute here was designed to address this concern and create more efficient searches.

The language proposed by Plaintiffs at Paragraph 7 of the Consolidated Draft Search Term Protocol (Exhibit A), was based in part on the *ODD* litigation, and in part on an Order issued by Magistrate Judge Mary M. Rowland in another antitrust class action – *In re: Potash Antitrust Litigation (II)*, No. 08-CV-6910 (N.D. Ill. Dec. 21, 2012) (ECF No. 479). The latter order states:

> Iterative Process. The parties are encouraged to use sampling in their search protocols. If sampling is used, it shall be done formally, by means of a random number generator that will generate a statistically valid number of ordinal positions of the responsive documents. (ECF No. 479 at 3).

Other courts have also approved random sampling procedures. In *Moore v. Publicis Groupe & MSL Group*, 287 F.R.D. 182, 191 (S.D.N.Y. 2012), Judge Peck stated that "where counsel are using keyword searches for retrieval of ESI, …. the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of 'false positives.'" With this framework in mind, he ordered the defendants to produce a random sample of privileged checked irrelevant and relevant documents to plaintiffs for review. *Id.* at 202. He made clear that the purpose of this random sampling "is to allow calculation of the approximate degree of recall and the precision of the search and review process used," and that inclusion of irrelevant documents in the sample was essential to achieve that goal. *Id.* at 202. This is precisely what Plaintiffs' proposal seeks to accomplish.

Defendants criticize *Moore*, which Plaintiffs provided to them in advance of this briefing, arguing that the case occurs in the context of predictive coding and is therefore inapplicable to more traditional search methodologies. Yet, nowhere in their criticism of *Moore*, do Defendants actually explain why the principles discussed in the case should not apply here. Further, their criticism that the decisions in *Moore* and *In re Potash II* are somehow less persuasive because they are the result of arguments or protocols advanced by the parties in those cases is completely nonsensical. Most court orders result from such a process, including whatever order will eventually result from the present briefing.

These cases aside, Defendants' position, that no random sampling procedure should be included in the Search Term Protocol, would completely destroy the requesting party's ability to determine the effectiveness of the searches. It would also deprive the requesting party of the opportunity to identify relevant documents, and it would subject the producing party to the unnecessary expense of privilege checking too many irrelevant documents.

Defendants grossly mischaracterize Plaintiffs' position by stating that "Plaintiffs want to impose the requirement to produce non-responsive documents…." To the contrary, allowing a requesting party to view a random sample of documents is designed to prevent irrelevant documents from being reviewed or produced in the litigation.

Defendants restate the undisputed fundamental rule (five times in three pages) that irrelevant documents are outside the scope of discovery. Plaintiffs completely agree. Irrelevant

documents are both useless and burdensome to Plaintiffs since they are inadmissible, and any time spent reviewing them is wasted. The entire point of the random sampling procedure is to eliminate irrelevant documents from the group of documents identified by a computerized search, and focus the search on relevant documents only. This can only be done by looking at a sample of the irrelevant documents for the brief time necessary to improve and rerun the computerized search so as to eliminate them in the next run.

Ironically, it is the producing party (for the purpose of this brief, the Defendants) that will save the most time, effort, and expense as a result of the random sampling procedure. A simple example illustrates this point: A keyword search is run against a set of one million documents, and 10,000 of those documents are identified as having the key words. A small random sample of the 10,000 identified documents, perhaps 100, is privilege checked and quickly reviewed. The parties noticed that, in 90% of random sample the keywords are appearing in the letterhead and domain names, which have no significance in the case. The search can be rerun, excluding the phrases used in letterhead and domain names, thereby reducing the size of the identified set of documents from 10,000 to 1,000, and getting rid of 90% of the documents that were irrelevant.

This simple example raises the question, why would Defendants not want to clear irrelevant documents from a document set, by means of random sampling and modification of the computer searches that produced the document set? Both parties benefit by this procedure, which saves time and cost, as well as focuses the computer searches on relevant, discoverable material. There is no downside or violation of a party's "rights" if a requesting party sees a non-privileged, otherwise-irrelevant document long enough to modify a computerized search for the purpose of eliminating that document from the set of documents identified by the modified computer search. Again, these irrelevant documents will never be produced or used for any other purpose in the litigation. To the contrary, they are useless, by their very nature. By seeing irrelevant documents in a small random sample, the parties avoid the burdens of privilege checking, or possibly producing, a much larger body of irrelevant documents in a set identified by an overbroad search.

As a practical matter, the sampling provision here is similar to one ordered in *ODD* (over the defendants' objections). There, only one of the defendant families used this provision – plaintiffs and the other twelve defendant families resolved their disputes through the use of quantitative metrics. For this defendant, the use of qualitative sampling allowed the parties to further refine the search terms and reach agreement. Rather than acting to the detriment of the defendant, instead it allowed the plaintiffs to focus on avoiding irrelevant returns and propose more narrowly crafted terms.

Defendants' reliance on *Han v. Futurewei Technologies, Inc.*, No. 11-CV-831-JM JMA, 2011 WL 4344301 (S.D. Cal. Sept. 15, 2011) is also misplaced. Plaintiffs do not wish to see irrelevant and non-responsive documents as a method for testing whether Defendants are fulfilling their discovery obligations in good faith. Furthermore, *Han* does not mention, let alone address, random sampling, nor does it support the proposition that random sampling of the type proposed by Plaintiffs is contrary to the Federal Rules of Civil Procedure. In *Han*, the court

merely decided to reject the defendant's request for "non-responsive, irrelevant, and privileged information" because the defendant provided no argument or justification for obtaining the requested information other than stating that it did not wish to rely upon the representations of the producing party. *Id*. at *5.

Throughout the negotiations, Plaintiffs invited a counter-proposal from Defendants regarding the use of random sampling. No counter-proposal was ever received. Respectfully, Plaintiffs request that this Court enter the proposed provision allowing for the sampling of documents which, in Plaintiffs' opinion, will only serve to assist both parties in resolving search term disputes.

II. DEFENDANTS' POSITION

Counterstatement of Issue No. 1: Should discovery of irrelevant or non-responsive documents be allowed under the guise of "random qualitative sampling," where the requesting party has sufficient ESI in its possession, and will have the benefit of quantitative information, to assess the efficacy of any search terms in dispute.

The parties have engaged in many meet and confer sessions and developed a comprehensive agreed-upon search term protocol for this case. The proposed protocol allows Plaintiffs to be involved in generating search terms and to obtain quantitative metrics and certain other information concerning any disputed terms. However, Plaintiffs seek another level of information that unfairly, and unnecessarily, infringes Defendants' rights. Plaintiffs seek to require Defendants to provide Plaintiffs with access to documents that are not responsive to any of Plaintiffs discovery requests and which may be completely irrelevant to the claims and defenses in this action. This runs counter to the Federal Rules, the practices of this Court, and the conduct of discovery under our judicial system.

The parties have agreed upon an iterative process for the development and testing of search terms. The protocol can be summarized as follows: (1) the producing party[2] will develop an initial set of search terms and provide those terms to the requesting party; (2) the requesting party will then have 30 days to review those terms, test them against the more than 100,000 documents that have already been produced in this action, and then provide the producing party with up to 125 additional terms or modifications; and (3) upon receipt of any additional terms or modifications, the producing party will evaluate those terms and (i) run all additional terms upon which they can agree and review the results of those searches for responsiveness and privileged or (ii) for those additional terms for which the producing party has concerns and/or objections,

[2] Producing party when used in connection with the Defendants includes all members of a specific defendant family.

the producing party will provide the requesting party with certain quantitative metrics[3] and meet and confer to see if the parties can agree upon modifications to such terms. In the unlikely event that, after the meet and confer process, the parties still cannot reach agreement, the parties reserve the right to bring such a dispute to the court for adjudication.

Plaintiffs have proposed an additional provision that they say will allow for "qualitative sampling." But the sampling they seek would impose upon Defendants discovery obligations far beyond what is authorized under the Federal Rules. Significantly, Plaintiffs demand that Defendants share a large sample of the documents which are returned by a particular disputed search term but are nevertheless ***irrelevant*** and ***not responsive*** to any of the Plaintiffs' document requests. Plaintiffs' provision states as follows:

> For any Disputed Terms, the parties shall conduct a random sampling of the resulting document set. The random sampling shall be done formally, by means of a random number generator, which will generate a statistically valid number of ordinal positions of the identified documents. A sample of 100 plus 1 percent of the number of identified documents (100 + .01(number of hits)) is presumed to be statistically valid, but this presumption may be modified by agreement of the parties. The randomly selected documents may be viewed by the Requesting Party immediately after the appropriate privilege check.

Defendants object to this provision in its entirety for a number of reasons, including, among others, that this provision is not consistent with the scope of discovery as defined in Rule 26 or the obligations imposed by Rule 34, and, at the time Plaintiffs' want to impose the requirement to produce non-responsive documents (before Plaintiffs have even had an opportunity to review and analyze all responsive documents that will be produced under the protocol), there has been no showing that any Defendant's production is incomplete.

Rule 26(b)(1) limits the scope of discovery to any non-privileged matter that is relevant to any party's claim or defense[.]" Similarly, Rule 34 only requires the producing party to provide documents that are responsive to the requesting party's document requests. It is black-letter law that non-responsive information is not subject to discovery and need not be produced. *See Angeles Chem. Co., Inc. v. McKesson Corp.*, Nos. C-06-80343 Misc. MMC (EDL), C-07-80123 Misc. MMC (EDL), 2007 WL 2238044 (N.D. Cal. Aug. 2, 2007) (holding in the context of a motion to compel that "[n]onresponsive documents do not need to be produced or logged as privileged[.]"); *see also Makowski v. SmithAmundsen LLC*, No. 08 C 6912, 2012 WL 1634832, at *3 (N.D. Ill. May 9, 2012) (noting "[n]on-responsive documents need not be produced by

[3] Those metrics include the aggregate number of hits and the number of unique hits for each such disputed term, the total number of documents returned by all terms upon which the parties have reach agreement, the total number of documents upon which the disputed terms are being run, and the nature and type of irrelevant documents that a disputed search term is returning.

Defendants …. Even non-privileged materials may be withheld if they are not responsive to one Plaintiffs' requests"); *A.N.S.W.E.R. Coalition v. Salazar*, Civil Action No. 05-0071, 2010 WL 1687913 (D.D.C. Apr. 23, 2010) (finding "defendants have no obligation to produce non-responsive or irrelevant documents"). Indeed, this Court in its most recent discovery order for this case recognized that parties in discovery are under no obligation whatsoever to produce information that has no relevance to the claims in this action. ECF No. 624.

Plaintiffs' proposal—which would require Defendants to provide a large sampling of irrelevant and non-responsive ESI to Plaintiffs—seeks to turn the discovery process on its head and runs counter to the Federal Rules of Civil Procedure. Plaintiffs offer no legal authority to support a finding that Defendants are required to provide Plaintiffs with access to such materials. Instead they point to an order in *In re Potash Antitrust Litigation (II)*, 08-CV-6910 (N.D. Ill.) (ECF No. 479) and the decision in *Moore v. Publicis Group*, 287 F.R.D. 182 (S.D.N.Y. 2012). Both these cases are inapposite. The order in *In re Potash (II)* that Plaintiffs cite simply notes that the parties were "encouraged to use sampling in their search protocols." There was no requirement that sampling be utilized. Nor was there any requirement that the requesting party be given access to irrelevant and/or non-responsive documents resulting from any sampling. The language that Plaintiffs urge the Court to adopt here comes from the mutually agreed-upon order that the parties later submitted to the *Potash* court for approval. The *Potash* case is also distinguishable because the court was not asked to review competing proposals and then determine that the defendants had to provide plaintiffs access to irrelevant and non-responsive documents.

Plaintiffs' reliance on *Moore v. Publicis Groupe* is similarly misplaced. Plaintiffs misrepresent what happened in *Moore*, which was the first reported case to approve the use of predictive coding. Magistrate Judge Peck did indeed discuss the limitations of using keyword search terms, but he did so in order to argue for the application of predictive coding as a more effective means of review. Plaintiffs have conveniently omitted the portion of the first quoted sentence where Judge Peck notes that when using keyword search terms counsel must carefully craft the appropriate keywords.[4] Judge Peck was not attempting to require that opposing counsel be given access to irrelevant or non-responsive documents or that they be involved in the testing process. Plaintiffs point to specific provisions in the parties' agreed-upon protocol for the production of electronically stored information to suggest that these provisions were required by Judge Peck. They were not. The defendant in *Moore* wanted to use predictive coding and was willing to provide plaintiffs with this information as a concession in order to secure both the plaintiffs' and Judge Peck's approval for what was then considered an unproven technology.

[4] It is worth noting that the quoted language actually came from Judge Peck's decision in *William A. Gross Constr. Assocs., Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009), where the search terms the parties were urging the court to use were designed without any input from the individuals who wrote the e-mails. This is certainly not the case here.

Significantly, this action is not the garden variety case where the plaintiffs are operating in a vacuum and do not have any involvement in the development and/or testing of the search terms. Here, Plaintiffs have already received over 140,000 documents from which they can test Defendants' proposed search terms and develop 125 additional terms or modifications. For each disputed term, Defendants have agreed to provide Plaintiffs with both the aggregate number of hits and the number of unique hits. Plaintiffs will also know the total number of documents being searched for such term and the total number of documents that have already been returned using the terms upon which the parties have agreed. Defendants have also agreed to describe the nature and type of irrelevant documents that each disputed term is returning. Moreover, Defendants have also agreed, that Plaintiffs may request, upon a showing of good cause, that additional search terms be run after all terms have been run and productions received.

Defendants believe that these provisions satisfy their obligation to cooperate with Plaintiffs and allow Plaintiffs adequate insight into the process of developing and applying search terms. To the extent that Plaintiffs want to see irrelevant and non-responsive documents to test whether Defendants are fulfilling their discovery obligations in good faith, that basis is improper. *See Han v. Futurewei Tech., Inc.*, No. 11-CV-831-JM (JMA), 2011 WL 4344301, at *5 (S.D. Cal. Sep. 15, 2011). In *Han*, the court noted that a requesting party "must rely on the representations of the producing party or its representative that it is producing all responsive, relevant, and non-privileged discovery," and that the "convention under the Federal Rules [is] that the party *responding* to discovery determines what is relevant, responsive and protected by privilege or privacy interests." *Id.* at *6 (emphasis in original).

Here, Plaintiffs have offered no authority for their proposition that Defendants should be required to provide Plaintiffs with access to irrelevant and non-responsive information, nor have the pointed to any failings of the Defendants that would justify the imposition of this drastic and extraordinary remedy. Accordingly, Defendants respectfully submit that the Court should approve the ESI Protocol with the agreed upon provisions and deny Plaintiffs' request to permit qualitative sampling.

Respectfully submitted,

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ATTESTATION

I, Aaron M. Sheanin, hereby attest, pursuant to Northern District of California, Local Rule 5-1(i)(3), that concurrence to the filing of this document has been obtained from each signatory hereto.

Dated: January 16, 2015

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