

## Best Practices Report on Electronic Discovery (ESI) Issues in Bankruptcy Cases\*

*By ABA Electronic Discovery (ESI) in Bankruptcy Working Group*

The ABA Electronic Discovery (ESI) in Bankruptcy Working Group is part of the ABA Business Law Section's Committee on Bankruptcy Court Structure and the Insolvency Process. The Electronic Discovery (ESI) in Bankruptcy Working Group was formed to study and prepare guidelines or a best practices report on the scope and timing of a party's obligation to preserve electronically stored information ("ESI") in bankruptcy cases. The issues studied by the Working Group include the scope and timing of a Chapter 11 debtor-in-possession's obligation to preserve ESI not only in connection with adversary proceedings, but also in connection with contested matters and the bankruptcy case filing itself, and the obligations of non-debtor parties to preserve ESI in connection with adversary proceedings and contested matters in a bankruptcy case. Because to date there appears to have been only very limited study and reported case authority on ESI-related issues in bankruptcy, it seemed to be an appropriate time to provide more focused guidance on this subject.

The Electronic Discovery (ESI) in Bankruptcy Working Group is comprised of judges, former judges, bankruptcy practitioners, litigation attorneys experienced in bankruptcy and general civil litigation, representatives of the Executive Office for United States Trustees, and law professors knowledgeable in the field of bankruptcy law. The Working Group includes persons with experience in business and consumer bankruptcy cases, large and small Chapter 7, Chapter 11, and Chapter 13 cases, and e-discovery matters in litigation. The goal in forming the Working Group was to provide a broad range of perspectives and experience.

The general subject of electronic discovery (ESI) issues in litigation has engendered much commentary, discussion, and debate in recent years and a significant number of legal opinions. This Report and the guidelines set forth herein are intended to provide a framework for consideration of ESI issues in bankruptcy cases. In drafting the guidelines, it was thought important to include certain guiding principles that need to be considered when addressing ESI issues in bankruptcy cases. Those principles are discussed in the Report. It should be

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\* This Best Practices Report is not, and should not be construed as, the official policy or position of the American Bar Association.

noted that while this has been a collaborative and interactive process, not all Working Group members agree on all points in the Report.

The Working Group wishes to acknowledge the excellent work done by others who have studied and written on the issues relating to electronic discovery (ESI) in civil litigation. In particular, the Working Group wishes to acknowledge the extensive work of The Sedona Conference on electronic discovery issues. The principles and guidelines appearing as part of this Report are not intended to replace other valuable sources of guidance on ESI issues such as *The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production*.<sup>1</sup> Interested parties are encouraged to consult the Sedona Principles for background materials and very instructive general principles and guidelines with respect to ESI issues in civil litigation. This Report is intended to supplement those principles and guidelines and provide more particularized guidance on issues concerning ESI in connection with bankruptcy cases.

This Best Practices Report is divided into six sections. Those sections are (i) ESI Principles and Guidelines in Large Chapter 11 Cases; (ii) ESI Principles and Guidelines in Middle Market and Smaller Chapter 11 Cases; (iii) ESI Principles and Guidelines in Chapter 7 and Chapter 13 Cases; (iv) ESI Principles and Guidelines in Connection with Filing Proofs of Claim and Objections to Claims in Bankruptcy Cases; (v) ESI Principles and Guidelines for Creditors in Bankruptcy Cases; and (vi) Rules and Procedures with Respect to ESI in Adversary Proceedings and Contested Matters in Bankruptcy Cases. Although an in-depth analysis of ESI principles and guidelines in Chapter 9, Chapter 12, and Chapter 15 cases is beyond the scope of this Report, a brief discussion of ESI with respect to each of those chapters is found in note 6 below. In addition, it was thought that it would be helpful to include a short bibliography of useful electronic discovery resources. That bibliography appears at the end of this Report.

Comments on this Report may be submitted to Richard L. Wasserman, the Chair of the Working Group, whose address is Venable LLP, 750 East Pratt Street, Suite 900, Baltimore, Maryland 21202; e-mail address: rlwasserman@venable.com; telephone number: 410-244-7505. The names of the members of the Working Group are set forth below.

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1. See SEDONA CONF., THE SEDONA PRINCIPLES (SECOND EDITION): BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (June 2007) [hereinafter *Sedona Principles*], available at <https://thesedonaconference.org/download-pub/81>.

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## SECTION I

### ELECTRONIC DISCOVERY (ESI) PRINCIPLES AND GUIDELINES IN LARGE CHAPTER 11 CASES

#### I. PRINCIPLES APPLICABLE TO ESI ISSUES IN BANKRUPTCY CASES

The principles set forth below are not meant to be exclusive or to replace other valuable sources of guidance, such as the Sedona Principles. Rather, they are intended to provide more particularized guidance on issues concerning electronic discovery (ESI) that may arise in the bankruptcy context.

**Principle 1: The duty to preserve ESI and other evidence applies in the bankruptcy context.** A person or entity preparing to file a bankruptcy case should consider appropriate steps to preserve ESI and other evidence. In addition, potential debtors and non-debtor parties have an obligation to preserve ESI and other evidence related to the filing of a contested matter, adversary proceeding, or other disputed issue in a bankruptcy case. This duty to preserve may arise prior to the formal filing of the bankruptcy case or other litigated matter, generally when the case filing or other potential litigation matter becomes reasonably anticipated. This duty to preserve is also consistent with and supplemental to the obligation of debtors, debtors-in-possession, and other fiduciaries to take reasonable steps to preserve books and records in order to facilitate the just and efficient administration of the bankruptcy estate and resolution of disputed matters arising in or in connection with the bankruptcy case. A debtor's preservation efforts should extend to representatives and affiliates of the debtor, and the debtor should consider appropriate instructions to such third parties regarding preservation of ESI relating to the debtor.

**Principle 2: The actual or anticipated filing of a bankruptcy petition does not require a debtor to preserve every piece of information in its possession.** A person or entity preparing to file a bankruptcy petition should take reasonable steps to preserve ESI and other evidence that the person or entity reasonably anticipates may be needed in connection with administration of the bankruptcy case or proceedings therein or operation of the business or affairs of the debtor or otherwise relevant to a legitimate subject of dispute in the bankruptcy case or potential litigation therein. This obligation does not require a debtor to preserve all ESI and other information in its possession merely because a bankruptcy petition is filed or shortly anticipated. It would generally not be inappropriate for debtors to continue following routine document retention programs and to continue the good-faith operation of electronic information systems that may automatically delete ESI, so long as the application of such programs and systems is suspended with respect to specific ESI and other evidence to which a duty to preserve has attached.

**Principle 3: Proportionality considerations regarding the preservation and production of ESI are particularly important in the bankruptcy context.** A party's obligations with respect to the preservation and production of ESI should be proportional to the significance, financial and otherwise, of the matter

in dispute and the need for production of ESI in the matter. Proportionality considerations are especially important in the bankruptcy context. Debtors will be operating within constraints and generally have limited assets. Creditors often face the prospect of less than a full recovery, frequently a significantly reduced one, on claims against the bankruptcy estate. Parties should not be forced to spend a disproportionate amount of already limited resources on the preservation and production of ESI.

**Principle 4: Interested parties in a bankruptcy case are encouraged to confer regarding issues related to the preservation and production of ESI.** The value of direct discussions regarding ESI is not a novel concept and is well-recognized, for example, in Sedona Principle No. 3. Indeed, in matters and proceedings where Federal Rule of Bankruptcy Procedure 7026 applies, conferring with opposing counsel is required. Even where it is not required, however, the potential benefit of conferring is heightened in bankruptcy cases. Bankruptcy courts are courts of equity. The stakeholders in a bankruptcy case are tasked with resolving disputes quickly and efficiently in order to avoid dissipating assets of the bankruptcy estate. This means that disputed matters in bankruptcy cases are often heard and decided in an expedited manner. In these circumstances, it is particularly important for parties to confer regarding ESI obligations and requests for production of ESI in order to avoid unnecessary disputes. The development of a proposed ESI protocol by the debtor and interested parties is a suggested best practice to consider in large chapter 11 cases.

## II. ESI GUIDELINES AND SUGGESTED BEST PRACTICES FOR DEBTOR'S COUNSEL IN LARGE CHAPTER 11 CASES

The following are guidelines and suggested best practices with respect to ESI in large chapter 11 cases. It is recognized that the guidelines and recommendations set forth herein may not be appropriate in each and every case. There may be good reasons in a chapter 11 case, large or small, for taking a different approach to ESI issues. The following are intended as suggested guidelines for counsel and courts to consider.

### 1. Pre-filing

- Counsel's pre-filing planning checklist for a chapter 11 case should include a discussion of ESI-related matters with the client.
- Counsel should gain an understanding of the client's electronic information systems, including the types of ESI the client maintains and the locations where it is used and stored. This should include discussion of the client's existing policies and procedures regarding ESI, including any data retention program that calls for the automatic deletion or culling of ESI. It should also include identification of sources of ESI that are likely to be identified as not reasonably accessible because of undue burden or cost.

- Counsel should explain to the client its obligation to preserve ESI, consistent with the principles outlined above. This should include identification and discussion of issues that are reasonably anticipated to be disputed in the bankruptcy case and the sources and locations of ESI likely to be relevant to such disputes (including key custodians and storage systems or media that are likely to contain such ESI).
- Because first-day motions are contested matters, debtor's counsel should, if reasonably practicable, put appropriate preservation measures in place regarding the subjects of the various first-day motions to be filed on behalf of a chapter 11 debtor-in-possession. The same is true of any adversary proceedings to be filed as part of the first-day filings.
- In order to plan and implement appropriate preservation efforts, the parties may wish to designate a liaison or primary point of contact for ESI issues at both the client and its outside counsel. Discussions of the client's electronic information systems and ESI obligations should include participation by the client's IT department. If an outside vendor or consultant is retained to assist with ESI matters, a lead person in that organization may also be identified and the vendor or consultant's scope of work and reporting obligations should be clearly identified.
- A debtor's preservation plan and instructions should be communicated in writing within the debtor's organization (in the nature of a litigation hold). The debtor's preservation plan should include a mechanism for periodic updates and reminders as issues are identified and refined during the bankruptcy case.
- The review and discussion of the client's ESI obligations should consider any specialized data privacy considerations (e.g., specific regulatory requirements in the client's industry, statutes applicable to the client, confidentiality or non-disclosure agreements with third parties, and obligations imposed under foreign legal systems for clients with operations or affiliates in jurisdictions outside of the United States).

## **2. At Time of Filing of Chapter 11 Case**

- Debtor's counsel should consider whether, at the outset of the case, there is a need for bankruptcy court approval of an interim ESI protocol addressing any pertinent ESI issues, including preservation efforts. Debtor's counsel may also want to consider including in the debtor's first-day affidavit a description of the debtor's prepetition preservation efforts and any changes to the debtor's preservation practices made prior to the bankruptcy filing. Final decisions regarding preservation and other ESI-related issues should be reserved, if possible and if not unduly burdensome to the debtor, until a later date when a Creditors' Committee has been appointed and the debtor can confer with it and other stakeholders in the case.

- If any of the professionals to be employed by the debtor are working on ESI preservation programs, the scope of their work should be identified in the employment application for such professionals.

### **3. Within 45 to 60 Days of Petition Date or at or Before Final Hearing on Bankruptcy Rule 4001 Matters**

- As soon as reasonably practicable in the case, allowing for consultation with the Creditors' Committee, the United States Trustee, and any other interested parties (which could include secured lenders, indenture trustees, or other significant creditor constituencies), the debtor should consider formulating and proposing an ESI protocol for approval by the Bankruptcy Court after notice and opportunity for objection by other parties. An ESI protocol may not be necessary or desirable in every large chapter 11 case.
- The ESI protocol should address preservation efforts implemented by the debtor, document databases or repositories established by the debtor, issues related to the intended form or forms of production of ESI by the debtor, any sources of ESI that the debtor deems not reasonably accessible because of undue burden or cost, any categories of ESI that the debtor specifically identifies as not warranting the expense of preservation, document retention programs or policies that remain in effect, and any other significant ESI-related issues. The ESI protocol should identify a point of contact at debtor's counsel to which third parties can address inquiries or concerns regarding ESI-related issues. The ESI protocol may also identify the parties and subject matters as to which the debtor expects to request production of ESI (but any such provision does not relieve the debtor of any obligation otherwise existing to confer directly with those parties, including regarding any requested preservation of ESI).
- The timing for seeking approval of an ESI protocol will vary depending upon the circumstances of each case. Depending upon how long it takes to appoint a Creditors' Committee and how long the consultation process with interested parties lasts, it may be appropriate to file the motion seeking approval of the ESI protocol within the applicable time period to provide sufficient notice and be calendared for a date within forty-five to sixty days after the Petition Date or for the date of the final hearing on Bankruptcy Rule 4001 matters. Because of its importance, it should be a goal to have the ESI protocol approval order entered early in the debtor's bankruptcy case. Adequate notice of any motion seeking approval of a proposed ESI protocol should be provided to creditors and other parties in interest.
- Among the provisions to consider including in an ESI protocol approval order from the Bankruptcy Court is a provision, in accordance with

Federal Rule of Evidence 502(d), addressing the non-waiver of attorney-client privilege and work-product protection when ESI is disclosed.

- Approval of the ESI protocol should not preclude the debtor or other parties from seeking additional or different treatment of ESI in appropriate circumstances. Any issues regarding requests for deviation from the protocol should be addressed in direct communications between the affected parties before any relief is sought from the Court. The order approving the ESI protocol should include a provision that the terms of the protocol are subject to further order of the Court and can be amended for cause. Although adequate notice to potentially affected creditors and interested parties should be a prerequisite to approval of any ESI protocol, approval of such protocol is not intended to preclude parties engaged in current or future litigation with a debtor, including the debtor, from seeking ESI-related relief particularized to such litigated matter.<sup>2</sup>

#### **4. Other ESI Considerations**

- In addition to ESI obligations in connection with adversary proceedings and contested matters, other ESI issues may arise during the case. For example, special considerations may apply with respect to personally identifiable information and patient records and other patient care information.<sup>3</sup> In addition, if there is a sale or other transfer of property of the estate, consideration should be given to preserving ESI and other data and documents, or providing for continued access by the estate to such ESI and other data and documents, following such sale or other transfer.
- If a preservation obligation arises and appropriate documents and ESI are not preserved, under the applicable rules and case law there is a real possibility of a claim of spoliation of evidence and a request for sanctions. With respect to the wide range of potential sanctions, see Section VI below.

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2. A model template for an ESI Protocol is attached as Appendix 1 to this Report. Also attached as Appendix 2 is a form of ESI Protocol Approval Order, including Federal Rule of Evidence 502(d) provisions. Whether to propose an ESI Protocol and what to include in an ESI Protocol will depend upon the facts and circumstances of each case. As will be noted, a number of the items covered in the attached ESI Protocol template are presented in brackets for "consideration" by the debtor and its counsel, with a view toward customizing the provisions based upon the facts and circumstances applicable to the debtor and its case. Even with respect to matters not presented in brackets, such matters may not be appropriate in every case, and additional matters not set forth in the template may need to be addressed. The same case-by-case approach would also apply to drafting a proposed ESI Protocol Approval Order.

3. See 11 U.S.C. §§ 363(b)(1), 332, 333 (2012).



## SECTION II

### ELECTRONIC DISCOVERY (ESI) PRINCIPLES AND GUIDELINES IN MIDDLE MARKET AND SMALLER CHAPTER 11 CASES

#### I. PRINCIPLES APPLICABLE TO ESI ISSUES IN BANKRUPTCY CASES

The principles set forth below are not meant to be exclusive or to replace other valuable sources of guidance, such as the Sedona Principles. Rather, they are intended to provide more particularized guidance on issues concerning electronic discovery (ESI) that may arise in the bankruptcy context.

**Principle 1: The duty to preserve ESI and other evidence applies in the bankruptcy context.** A person or entity preparing to file a bankruptcy case should consider appropriate steps to preserve ESI and other evidence. In addition, potential debtors and non-debtor parties have an obligation to preserve ESI and other evidence related to the filing of a contested matter, adversary proceeding, or other disputed issue in a bankruptcy case. This duty to preserve may arise prior to the formal filing of the bankruptcy case or other litigated matter, generally when the case filing or other potential litigation matter becomes reasonably anticipated. This duty to preserve is also consistent with and supplemental to the obligation of debtors, debtors-in-possession, and other fiduciaries to take reasonable steps to preserve books and records in order to facilitate the just and efficient administration of the bankruptcy estate and resolution of disputed matters arising in or in connection with the bankruptcy case. A debtor's preservation efforts should extend to representatives and affiliates of the debtor, and the debtor should consider appropriate instructions to such third parties regarding preservation of ESI relating to the debtor.

**Principle 2: The actual or anticipated filing of a bankruptcy petition does not require a debtor to preserve every piece of information in its possession.** A person or entity preparing to file a bankruptcy petition should take reasonable steps to preserve ESI and other evidence that the person or entity reasonably anticipates may be needed in connection with administration of the bankruptcy case or proceedings therein or operation of the business or affairs of the debtor or otherwise relevant to a legitimate subject of dispute in the bankruptcy case or potential litigation therein. This obligation does not require a debtor to preserve all ESI and other information in its possession merely because a bankruptcy petition is filed or shortly anticipated. If in doubt, a debtor should err on the side of preserving its data. Depending on the size of the debtor, the complexity of its ESI systems, and the resources available in advance of the filing of a bankruptcy petition, the most prudent and least burdensome approach may be to suspend even routine data destruction in the period leading up to a bankruptcy filing (as opposed to expending resources identifying more specifically the ESI to which a duty to preserve may have attached).

**Principle 3: Proportionality considerations regarding the preservation and production of ESI are particularly important in the bankruptcy context.** A party's obligations with respect to the preservation and production of ESI should

be proportional to the significance, financial and otherwise, of the matter in dispute and the need for production of ESI in the matter. Proportionality considerations are especially important in the bankruptcy context. Debtors will be operating within constraints and generally have limited assets. Creditors often face the prospect of less than a full recovery, frequently a significantly reduced one, on claims against the bankruptcy estate. Parties should not be forced to spend a disproportionate amount of already limited resources on the preservation and production of ESI.

**Principle 4: Interested parties in a bankruptcy case are encouraged to confer regarding issues related to the preservation and production of ESI.** The value of direct discussions regarding ESI is not a novel concept and is well-recognized, for example, in Sedona Principle No. 3. Indeed, in matters and proceedings where Federal Rule of Bankruptcy Procedure 7026 applies, conferring with opposing counsel is required. Even where it is not required, however, the potential benefit of conferring is heightened in bankruptcy cases. Bankruptcy courts are courts of equity. The stakeholders in a bankruptcy case are tasked with resolving disputes quickly and efficiently in order to avoid dissipating assets of the bankruptcy estate. This means that disputed matters in bankruptcy cases are often heard and decided in an expedited manner. In these circumstances, it is particularly important for parties to confer regarding ESI obligations and requests for production of ESI in order to avoid unnecessary disputes. The development of a proposed ESI protocol by the debtor and interested parties may be a useful step to be considered in middle market and even possibly in smaller chapter 11 cases.

## II. ESI GUIDELINES AND CONSIDERATIONS FOR DEBTOR'S COUNSEL IN MIDDLE MARKET AND SMALLER CHAPTER 11 CASES

The following are guidelines and considerations with respect to ESI issues in middle market and smaller chapter 11 cases. It is recognized that the guidelines and recommendations set forth herein may not be appropriate in each and every case. There may be good reasons in a chapter 11 case, large or small, for taking a different approach to ESI issues. The following are intended as suggested guidelines for counsel and courts to consider.

### 1. Pre-filing

- Counsel's pre-filing planning checklist for a chapter 11 case should include a discussion of ESI-related matters with the client. The proportionality principle (Principle 3 above) may take on added significance in middle market and smaller chapter 11 cases. The following suggested guidelines should be read with that principle in mind.
- Counsel should gain an understanding of the client's electronic information systems, including the types of ESI the client maintains and the locations where it is used and stored. This should include discussion of the

client's existing policies and procedures regarding ESI, including any data retention program that calls for the automatic deletion or culling of ESI. It should also include identification of sources of ESI that are likely to be identified as not reasonably accessible because of undue burden or cost.

- Counsel should explain to the client its obligation to preserve ESI, consistent with the principles outlined above. This should include identification and discussion of issues that are reasonably anticipated to be disputed in the bankruptcy case and the sources and locations of ESI likely to be relevant to such disputes (including key custodians and storage systems or media that are likely to contain such ESI).
- If first-day motions are to be filed in the case, because such motions are contested matters, debtor's counsel should, if reasonably practicable, put appropriate preservation measures in place regarding the subjects of the various first-day motions to be filed on behalf of a chapter 11 debtor-in-possession. The same is true of any adversary proceedings to be filed as part of the first-day filings.
- In order to plan and implement appropriate preservation efforts, the parties may wish to designate a liaison or primary point of contact for ESI issues at both the client and its outside counsel. Discussions of the client's electronic information systems and ESI obligations should include participation by knowledgeable persons including, if applicable, the client's IT department. If an outside vendor or consultant is retained to assist with ESI matters, a lead person in that organization may also be identified and the vendor or consultant's scope of work and reporting obligations should be clearly identified.
- A debtor's preservation plan and instructions should be communicated in writing within the debtor's organization (in the nature of a litigation hold). The debtor's preservation plan should include a mechanism for periodic updates and reminders as issues are identified and refined during the bankruptcy case.
- The review and discussion of the client's ESI obligations should consider, to the extent reasonably practicable, any specialized data privacy considerations (e.g., specific regulatory requirements in the client's industry, statutes applicable to the client, confidentiality or non-disclosure agreements with third parties, and obligations imposed under foreign legal systems for clients with operations or affiliates in jurisdictions outside of the United States).

## **2. At Time of Filing of Chapter 11 Case**

- Debtor's counsel may want to consider whether, at the outset of the case, it may be appropriate under the circumstances of the case to seek bankruptcy court approval of an interim ESI protocol addressing any pertinent

ESI issues, including preservation efforts. Debtor's counsel may also want to consider including in the debtor's first-day affidavit (if there is one in the case) a description of the debtor's prepetition preservation efforts and any changes to the debtor's preservation practices made prior to the bankruptcy filing. It may be appropriate in a given case to reserve decisions regarding preservation and other ESI-related issues until a later date in the case when disputed issues become identified and when the United States Trustee and other interested parties, including particularly a Creditors' Committee if it is organized in the case, can participate in discussions and consideration of ESI-related issues.

- If any of the professionals to be employed by the debtor are working on ESI preservation programs, the scope of their work should be identified in the employment application for such professionals.

### **3. Consideration of an ESI Protocol if Appropriate in the Case**

- Subject to the specific circumstances of each case including the proportionality principle referenced above, a debtor may want to consider the possibility of formulating and proposing a protocol addressing pertinent ESI issues, including preservation efforts. An ESI protocol will not be warranted or appropriate in every chapter 11 case.
- If appropriate, among the issues that may be addressed in an ESI protocol are the following: preservation efforts implemented by the debtor, document databases or repositories established by the debtor, issues related to the intended form or forms of production of ESI by the debtor, any sources of ESI that the debtor deems not reasonably accessible because of undue burden or cost, any categories of ESI that the debtor specifically identifies as not warranting the expense of preservation, document retention programs or policies that remain in effect, and any other significant ESI-related issues. If there is an ESI protocol to be proposed in the case, it should identify a point of contact at debtor's counsel to which third parties can address inquiries or concerns regarding ESI-related issues. Any such ESI protocol may also identify the parties and subject matters as to which the debtor expects to request production of ESI (but any such provision does not relieve the debtor of any obligation otherwise existing to confer directly with those parties, including regarding any requested preservation of ESI).
- The timing for seeking approval of an ESI protocol (if applicable) will vary depending upon the circumstances of each case. Consultation with the United States Trustee and other interested parties (including the Creditors' Committee if there is one organized in the case) with respect to a proposed ESI protocol is important and should precede the filing of any motion seeking court approval of such ESI protocol. If an ESI protocol is to be pursued by the debtor, adequate notice of any motion seeking approval of

the proposed ESI protocol should be provided to creditors and other parties in interest.

- Among the provisions to consider including in an ESI protocol approval order from the Bankruptcy Court is a provision, in accordance with Federal Rule of Evidence 502(d), addressing the non-waiver of attorney-client privilege and work-product protection when ESI is disclosed.
- Approval of an ESI protocol in a particular case should not preclude the debtor or other parties from seeking additional or different treatment of ESI in appropriate circumstances. Any issues regarding requests for deviation from the protocol should be addressed in direct communications between the affected parties before any relief is sought from the Court. The order approving an ESI protocol should include a provision that the terms of the protocol are subject to further order of the Court and can be amended for cause. Although adequate notice to potentially affected creditors and interested parties should be a prerequisite to approval of any ESI protocol, approval of any such protocol is not intended to preclude parties engaged in current or future litigation with a debtor, including the debtor, from seeking ESI-related relief particularized to such litigated matter.<sup>4</sup>

#### 4. ESI Considerations During the Case

- In addition to ESI obligations in connection with adversary proceedings and contested matters, other ESI issues may arise during the case. For example, special considerations may apply with respect to personally identifiable information and patient records and other patient care information.<sup>5</sup> In addition, if there is a sale or other transfer of property of the estate, consideration should be given to preserving ESI and other data and documents, or providing for continued access by the estate to such ESI and other data and documents, following such sale or other transfer.
- If a preservation obligation arises and appropriate documents and ESI are not preserved, under the applicable rules and case law there is a real possibility of a claim of spoliation of evidence and a request for sanctions. With respect to the wide range of potential sanctions, see Section VI below.<sup>6</sup>

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4. With respect to the ESI Protocol and the ESI Protocol Approval Order, see *supra* note 2.

5. See 11 U.S.C. §§ 363(b)(1), 332, 333 (2012).

6. Although chapter 12 cases are different in many respects from chapter 11 cases, the ESI principles and guidelines set forth herein with respect to smaller chapter 11 cases may be useful to parties (including debtors-in-possession and trustees) and their counsel in chapter 12 cases. In a small chapter 12 case, the principles and guidelines in Section III of this Report discussing chapter 13 may also be instructive.

This Report does not address ESI issues in chapter 9 cases. Such cases may present unique circumstances and issues. For example, public disclosure laws such as any applicable freedom of

### SECTION III

#### ELECTRONIC DISCOVERY (ESI) PRINCIPLES AND GUIDELINES IN CHAPTER 7 AND CHAPTER 13 CASES

- Consistent with the principles underlying sections 521(a)(3) and (4) and 727(a)(3) of the Bankruptcy Code, Chapter 7 and Chapter 13 debtors should, unless otherwise justified under the circumstances of the case, not destroy information, including electronically stored information (ESI), relating to their bankruptcy case. Counsel should discuss this with their clients.
- In chapter 7 and chapter 13 cases, a guiding principle is that a debtor's obligation with respect to the preservation and production of ESI should be proportional to the resources and sophistication of the debtor, the significance of the matter to which the ESI relates, and the amount or value of the property at issue. Whether a debtor is represented by counsel is a further factor to be considered. The foregoing is hereinafter referred to as the "proportionality principle."
- The "proportionality principle" is a very important factor to keep in mind in Chapter 7 cases. In many Chapter 7 cases, ESI will not be an issue unless it is raised by the Chapter 7 trustee or another party in interest, including the Office of the United States Trustee. If debtor's counsel determines that a case is an asset case, counsel should discuss with the debtor what, if any, ESI there is relating to property of the estate. If the debtor is or was a business entity or sole proprietorship, debtor's counsel should discuss with the debtor what, if any, ESI exists that relates to property of the estate.
- A chapter 7 trustee may request a debtor to preserve ESI within the possession or control of the debtor. The chapter 7 trustee or another party in interest, including the Office of the United States Trustee, may seek an

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information act and state sunshine and open meeting laws may need to be considered. Additionally, considerations and limitations imposed by section 904 of the Bankruptcy Code may come into play in chapter 9 cases. Such topics are beyond the scope of this Report.

Similarly, this Report does not address the subject of electronic discovery (ESI) issues in Chapter 15 cases. Some of the ESI principles and guidelines discussed in this Report may apply in Chapter 15 cases, but issues of foreign law, comity, and United States public policy, all of which are beyond the scope of this Report, may also need to be considered. *See, e.g., In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) (refusing to allow foreign representative's request on an ex parte basis to access emails of debtor stored on two internet service providers located in the United States based on 11 U.S.C. § 1506, which allows a court to refuse to take an action "if the action would be manifestly contrary to public policy of the United States"). Issues relating to international discovery considerations in the federal courts have been addressed in numerous cases. *See, e.g., Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987). Those issues may also be implicated in Chapter 15 cases. In addition, as a helpful resource and guide with respect to ESI discovery issues in cross-border disputes, see SEDONA CONF., INTERNATIONAL PRINCIPLES ON DISCOVERY, DISCLOSURE & DATA PROTECTION: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING THE PRESERVATION & DISCOVERY OF PROTECTED DATA IN U.S. LITIGATION (2011).

order from the Bankruptcy Court, as part of a request for a Bankruptcy Rule 2004 examination or otherwise, to preserve and/or turn over ESI. Relevance, reasonableness, and proportionality should be applied to any such request, depending upon the circumstances of each case.

- With respect to chapter 13 cases, in addition to documentary materials needed for purposes of complying with the debtor's duties in connection with the case, a chapter 13 debtor should, subject to the proportionality principle and reasonableness and relevance, preserve ESI concerning the same subject matter as the documentary materials required to be retained by the debtor.
- A chapter 13 trustee may request a chapter 13 debtor to preserve ESI within the possession or control of the debtor. The chapter 13 trustee or another party in interest, including the Office of the United States Trustee, may seek an order from the Bankruptcy Court to preserve and/or turn over ESI. Relevance, reasonableness, and proportionality should be applied to any such request, depending upon the circumstances of each case.
- If adversary proceedings are filed in a chapter 7 or chapter 13 case, the ESI preservation and production obligations set forth in Bankruptcy Rules 7026, 7033, 7034, and 7037 apply. If the filing of an adversary proceeding by, on behalf of, or against a chapter 7 or chapter 13 debtor is reasonably likely, counsel for the debtor should discuss with the debtor whether there is any ESI that should be preserved by the debtor in connection with such adversary proceeding. Similarly, if there is a significant contested matter to be filed by or on behalf of a chapter 7 or chapter 13 debtor or likely to be filed against or involving the debtor seeking relief for or with respect to the debtor from the Bankruptcy Court, counsel for the debtor should discuss with the debtor whether there is any ESI that should be preserved by the debtor in connection with such contested matter. In addition, debtors in chapter 7 and chapter 13 cases should understand that the chapter 7 trustee or the chapter 13 trustee (as applicable) may need identification of and access to ESI and the debtor's assistance in connection with litigation by or against the estate.
- Counsel for creditors involved in chapter 7 and chapter 13 adversary proceedings and significant contested matters should discuss with their clients whether they have in their possession ESI that should be preserved in connection with such adversary proceedings or contested matters.
- If the nature of a creditor's claim makes it foreseeable that access to documents including original documents will be needed to support or challenge the claim in litigation, the creditor should take appropriate steps to preserve such documents.

- Nothing set forth in these guidelines is intended to alter or affect any applicable privilege, including the attorney-client privilege, or the work-product protection of communications, documents, or ESI, as such doctrines exist under otherwise applicable law.

## SECTION IV

### ELECTRONIC DISCOVERY (ESI) PRINCIPLES AND GUIDELINES IN CONNECTION WITH FILING PROOFS OF CLAIM AND OBJECTIONS TO CLAIMS IN BANKRUPTCY CASES

The following are principles, guidelines, and suggested best practices with respect to ESI issues in connection with proofs of claim and objections to claims in bankruptcy cases. The guidelines and recommendations set forth herein may not be appropriate in each and every case, and there may be good reasons for taking a different approach with respect to ESI issues in a given case. These principles and guidelines are a suggested starting point for counsel and judges to consider as they assess what is appropriate under the circumstances of their particular case.

#### I. ESI PRINCIPLES APPLICABLE TO PROOFS OF CLAIM AND OBJECTIONS TO CLAIMS

**Principle 1:** The filing of a proof of claim is not a “per se” trigger of a debtor’s duty to preserve documents and electronically stored information (ESI). This principle is directly reflected in cases such as *In re Kmart Corp.*, 371 B.R. 823 (Bankr. N.D. Ill. 2007). The Working Group directly borrows from and endorses the *Kmart* court’s conclusion on this point. In larger cases, there may be hundreds or thousands of proofs of claim. Treating each of them as an independent trigger of a duty to preserve could overwhelm a debtor and lead to a conclusion that every document and every piece of ESI relating to the claim should be preserved, which is not necessary or appropriate. (See Principle 2.)

**Principle 2:** The duty to preserve arises when litigation regarding a proof of claim is reasonably anticipated. Factors to be considered in this analysis include the size of the claim, the nature of the claim (including whether it is a prepetition or an administrative claim), the specificity of the basis for the claim, and the nature and extent of the debtor’s opposition. As the court observed in *Kmart*, “the ‘duty to preserve documents in the face of pending litigation is not a passive obligation,’ but must be ‘discharged actively.’”<sup>7</sup>

**Principle 3:** The scope of the duty to preserve should be proportional to the reasonably anticipated scope of the litigation regarding the proof of claim. As with other types of disputes, the amount of a claim is an important but not de-

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7. 371 B.R. at 846 (citations omitted).



terminative factor to consider regarding the appropriate scope of preservation. Even an exceedingly large claim may not require extensive preservation efforts if the debtor or trustee disputes only some minor aspect of the claim. With respect to a creditor filing a proof of claim, the creditor should take steps to preserve a reasonable and proportional scope of documents and ESI relating to the claim, including documents and ESI that form the basis of the claim. As the possibility of an objection or other litigation with respect to the claim becomes reasonably anticipated, the creditor's preservation obligation attaches and extends to the issues raised by the objection or litigation. A creditor's preservation efforts should be reasonable in light of the nature of the dispute and proportional to the amount at issue. The scope of that obligation will vary depending upon the facts and circumstances of each case, the nature of the creditor's claim, and the nature of any actual or reasonably anticipated objection or dispute regarding the claim.

## II. ESI GUIDELINES AND SUGGESTED BEST PRACTICES REGARDING PROOFS OF CLAIM AND OBJECTIONS TO CLAIMS

### **1. The Obligation of Debtors-in-Possession and Trustees to Preserve Documents and Electronically Stored Information Relating to Claims in Chapter 11 Cases**

- In the period leading up to the filing of a chapter 11 case, a debtor should preserve documents and ESI regarding reasonably anticipated subjects of claim objections and litigation with respect to claims. Those preservation efforts should be reasonable in light of the nature of the dispute and proportional to the amount at issue. If a particular issue or dispute (or type of issue or dispute) precipitated the debtor's filing, then the debtor should preserve documents and ESI reasonably likely to be relevant to litigation concerning the issue or dispute.
- The filing of a proof of claim has in a number of cases been analogized to the filing of a complaint in civil litigation.<sup>8</sup> Similarly, the filing of an objection to a claim has been analogized to the filing of an answer.<sup>9</sup> The Advisory Committee Note to Bankruptcy Rule 3007 makes it clear that the filing of an objection to a claim initiates a contested matter governed by Bankruptcy Rule 9014, unless a counterclaim is joined with the objection to the claim, in which event ordinarily an adversary proceeding subject to Part VII of the Federal Rules of Bankruptcy Procedure is commenced.

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8. See, e.g., *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995); *Simmons v. Savell*, 765 F.2d 547, 552 (5th Cir. 1985); *In re Barker*, 306 B.R. 339, 347 (Bankr. E.D. Cal. 2004); *In re Lomas Fin. Corp.*, 212 B.R. 46, 55 (Bankr. D. Del. 1997); *In re 20/20 Sport, Inc.*, 200 B.R. 972, 978 (Bankr. S.D.N.Y. 1996).

9. See *supra* note 8.

- As the term is used by the Bankruptcy Court in the *Kmart* case, the “trigger date” is the date on which the obligation to preserve documents relating to the claim at issue in the case arose.<sup>10</sup> In general, “the duty to preserve documents arises when a party is on notice of the potential relevance of the documents to pending or impending litigation, and [in general civil litigation] a party may be on notice even prior to the filing of a complaint.”<sup>11</sup>
- Accordingly, the duty of a debtor-in-possession or chapter 11 trustee to preserve documents and ESI would ordinarily arise no later than the date of the filing of an objection to a claim and often would arise earlier when the objection becomes reasonably anticipated. As a debtor-in-possession or trustee begins to evaluate potential objections to claims, it should also evaluate whether there are any corresponding preservation efforts that should be implemented.
- By way of example, in the context of the administrative claim at issue in the *Kmart* case, the Bankruptcy Court determined that the debtor-in-possession’s duty to preserve, under the facts and circumstances of that case, arose shortly after the administrative claim was filed. As the court in *Kmart* stated, “the particular administrative claim filed in this case contained sufficient information to put Kmart on notice that litigation was likely.”<sup>12</sup>
- Because in many chapter 11 cases proofs of claim are not filed directly with the debtor or chapter 11 trustee (if applicable), and because in many cases it is unclear at the time of the filing of the proof of claim whether an objection will be filed or litigation will ensue, a general rule that the duty to preserve documents and ESI arises at the time of filing a proof of claim or shortly thereafter seems neither prudent nor practical. A debtor has a duty to preserve where it or its counsel anticipates or reasonably should anticipate that litigation about a particular claim is likely. The debtor may have a duty to preserve even before the filing of a proof of claim if the debtor believes litigation about the claim is likely. The reasonableness of beliefs about the likelihood of litigation should be evaluated based not only on the content of a proof of claim but on all pertinent circumstances. If counsel for a particular creditor believes that document preservation is important with respect to litigation of its claim, counsel may expressly notify the debtor by separate written communication at the time of filing such creditor’s proof of claim and may do so even before filing its proof of claim. Such a notice from a creditor or its counsel will then need to be evaluated by counsel for the debtor-in-possession

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10. 371 B.R. at 843.

11. *Id.*

12. *Id.* at 844.

or chapter 11 trustee and appropriate steps taken depending upon whether the debtor reasonably expects objections to the proof of claim to be filed, either by the debtor or other parties in interest.

## **2. Creditor/Claimant Obligation to Preserve Documents and Electronically Stored Information Relating to Claims in Chapter 11 Cases**

- A creditor should consider preserving documents and ESI, including at a minimum documents and ESI that form the basis for the claim, as the creditor is preparing to file its proof of claim or otherwise to assert a claim in the bankruptcy case. When preparing to file a claim, ordinarily the creditor should preserve documents relating to such claim, particularly if it is likely or expected that litigation concerning such claim will result in the bankruptcy case. Among the matters to consider in assessing whether it is reasonable to anticipate an objection is the treatment of the creditor's claim on the debtor's schedules (and any amendments thereto), including the amount of the claim as scheduled by the debtor and whether the claim is listed as disputed, contingent, or unliquidated. The scope of the creditor's preservation should correspond to any anticipated objection or actual objection to the claim. The preservation efforts should be reasonable in light of the nature of the dispute and proportional to the amount at issue. As a general guideline and subject to the principles set forth above, if a proof of claim is filed, documents required to be attached to the proof of claim in accordance with Bankruptcy Rule 3001 and documents and ESI that would be needed to prove the claim affirmatively should be preserved, and if an objection to the claim is filed or reasonably anticipated by the creditor, documents and ESI relevant to the filed objection or anticipated objection should also be preserved. Each situation should be considered by the creditor's counsel based upon the facts and circumstances relating to the particular claim and the likely or expected response to such claim by the debtor-in-possession or trustee.
- A creditor has a preservation obligation with respect to documents and ESI relating to its claim that arises no later than when an objection to the claim is filed and served on the creditor. A creditor should evaluate and refine its preservation obligation based on any objection that is filed to the claim. As noted above, in many instances a creditor's preservation obligation will be triggered when a claim is filed but a debtor's preservation obligation, even for the same claim, will not be triggered until an objection is reasonably anticipated. The Working Group does not consider this temporal variation unfair. An earlier "trigger date" for a bankruptcy claimant's duty to preserve is analogous to the earlier duty, outside bankruptcy, of a prospective plaintiff who may reasonably anticipate litigation before the potential defendant.

### **3. The Obligation to Preserve Documents and Electronically Stored Information in Connection with Proofs of Claim and Objections to Claims in Chapter 7 and Chapter 13 Cases**

- To the extent that a chapter 7 or chapter 13 trustee is contemplating an objection to a claim and is in possession of documents and ESI relating to the claim, the trustee should preserve such documents and ESI. In such a circumstance, the trustee should, to the extent that he or she has not already done so, request the debtor to preserve any documents and ESI relating to the claim in question and to turn over such documents and ESI to the trustee. If a chapter 7 or chapter 13 debtor or other party in interest is contemplating filing an objection to a proof of claim, the debtor or other party in interest should preserve all documents and ESI relating to such claim. If a chapter 7 trustee needs to request the debtor to preserve and turn over documents and ESI relating to a claim in the bankruptcy case and the debtor in such case is not an individual debtor, the trustee should determine which individuals at the debtor or formerly with the debtor likely would have pertinent materials and should request that they preserve and turn over such documents and ESI. The timing and scope of such request will vary depending upon the facts and circumstances of each case and the claim in question.
- A creditor in a chapter 7 or chapter 13 case who has filed a proof of claim should consider taking steps to preserve documents and ESI relating to such claim no later than when such creditor reasonably anticipates that an objection may be raised to the claim. In addition, a creditor who files a proof of claim in a chapter 7 or chapter 13 case should preserve documents required to be attached to the proof of claim in accordance with Bankruptcy Rule 3001 and, subject to the principles set forth above, documents and ESI that would be needed to prove the claim affirmatively and documents and ESI relevant to any filed objection or reasonably anticipated objection to such creditor's claim. A creditor's preservation obligation with respect to documents and ESI relating to its claim arises no later than when an objection to the claim is filed and served on the creditor. Even before filing a proof of claim, a creditor having reason to believe that litigation will arise concerning its claim should take steps to preserve documents and ESI relating to its claim. For example, if a creditor is preparing to file a motion to lift the stay, that creditor should take steps to preserve documents and ESI relating to its claim, whether or not it has filed a proof of claim in the bankruptcy case. As another example, the debtor's listing of a mortgage arrearage amount in a chapter 13 plan may trigger a preservation obligation on the part of the mortgage creditor if the amount listed is going to be contested by the creditor. The exact timing of a creditor's obligation to preserve documents and ESI may vary depending upon the facts and circumstances of

the case and the nature of the creditor's claim (e.g., asset case v. no-asset case, secured claim v. unsecured claim, administrative or priority claim v. prepetition general unsecured claim).

## SECTION V

### ELECTRONIC DISCOVERY (ESI) PRINCIPLES AND GUIDELINES FOR CREDITORS IN BANKRUPTCY CASES

A bankruptcy case has been filed. What obligation, if any, does a creditor have to preserve documents and electronically stored information (ESI) relating to its dealings with the debtor and its claims against the debtor? The following are principles, guidelines, and suggested best practices with respect to electronic discovery issues for creditors in bankruptcy cases. The guidelines and recommendations set forth herein may not be appropriate in each and every case, and there may be good reasons for taking a different approach with respect to ESI issues in a given case. Hopefully, the following principles and guidelines will provide a helpful starting point for creditors and their counsel to consider.

#### I. ESI PRINCIPLES FOR CREDITORS WHEN CONFRONTED WITH A BANKRUPTCY FILING BY A DEBTOR

**Principle 1: The duty to preserve ESI and other evidence applies in connection with bankruptcy cases. The timing and scope of such duty will vary from case to case.** Creditors and other non-debtor parties in interest have an obligation to preserve ESI and other evidence relating to contested matters, adversary proceedings, and other disputed matters that are, or are likely to be, the subject of litigation in or in connection with the bankruptcy case. With respect to documents and ESI relating to a creditor's claim against a debtor who has filed bankruptcy, the creditor should, if it decides to file a claim or it reasonably believes that its claim is likely to be the subject of a dispute, take steps to preserve a reasonable and proportional scope of such documents and ESI, including documents and ESI that form the basis of its claim.

**Principle 2: The filing of a bankruptcy case does not require a creditor to preserve every document or piece of information in its possession relating to the debtor or its dealings with the debtor.** The mere filing of the bankruptcy case will not ordinarily by itself trigger a creditor's duty to preserve documents and ESI regarding its various dealings with the debtor. However, if the creditor reasonably anticipates litigation with the debtor, a duty of the creditor to preserve documents and ESI relating to such litigation or potential litigation arises.

**Principle 3: Proportionality considerations should apply with respect to a creditor's obligation to preserve documents and ESI in connection with bankruptcy cases.** The scope of a creditor's preservation obligation, if and when it arises, does not automatically include every document or piece of information in the creditor's possession, custody, or control concerning the debtor.

A rule of reasonableness should apply. The scope of the duty to preserve should be proportional to the reasonably anticipated scope of the matters at issue or expected to be at issue. A creditor's obligation with respect to preservation of documents and ESI should be proportional to the significance, financial and otherwise, of the creditor's claim or the matter in dispute and the need for production of such documents and ESI in the matter. A creditor's preservation efforts should be reasonable in light of the facts and circumstances in each particular case.

## II. ESI GUIDELINES AND SUGGESTED BEST PRACTICES FOR CREDITORS AND THEIR COUNSEL WHEN A DEBTOR FILES A BANKRUPTCY CASE

- The filing of a bankruptcy case by a debtor is not by itself the commencement of litigation against a creditor. Therefore, a creditor is not obligated to institute a litigation hold with respect to its documents and ESI relating to the debtor based solely upon a bankruptcy petition being filed by the debtor. However, upon the filing of a bankruptcy petition, the creditor should assess whether it reasonably anticipates adversary proceedings, contested matters, or other disputed matters that are likely to be the subject of litigation with the debtor. The creditor should consider consulting with legal counsel regarding such issues, including implementing a litigation hold to preserve a reasonable and proportional scope of documents and ESI if the duty to preserve is triggered.
- The scope of a creditor's preservation obligation when it arises extends to matters at issue or in dispute, or reasonably anticipated to be at issue or in dispute, in or in connection with the debtor's bankruptcy case. The scope of a creditor's preservation obligation may change during the course of the bankruptcy case as new issues arise.
- Once an adversary proceeding, contested matter, or other litigated matter is reasonably anticipated by a creditor or commenced against a creditor, a duty of the creditor to preserve documents and ESI relating to such matter arises. The scope of that obligation is subject to reasonableness and proportionality considerations, which will vary depending upon the specific circumstances of each particular matter.
- A creditor's preservation efforts should be reasonable in light of the nature of the dispute and proportional to the amount at issue. Principle 3 above provides additional guidance with respect to the concept of proportionality. Once an adversary proceeding or contested matter is filed, the obligations set out in the applicable Bankruptcy Rules and Federal Rules of Civil Procedure with respect to ESI apply.<sup>13</sup> The parties to any such contested matter or adversary proceeding are encouraged to

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13. See Bankruptcy Rules 7026, 7033, 7034, 7037, 9014, and 9016 and the corresponding Federal Rules of Civil Procedure incorporated thereby.

work cooperatively on document and ESI preservation and production efforts.

- With respect to proofs of claim and claims litigation, a creditor should consider preserving documents and ESI, including at a minimum documents and ESI that form the basis for its claim, as the creditor is preparing to file a proof of claim or otherwise assert its claim in the bankruptcy case. A creditor has a preservation obligation with respect to documents and ESI relating to its claim that arises no later than when an objection to the claim is filed and served on the creditor. A creditor should evaluate and refine its preservation obligation based on the objection that is actually filed to the claim. When preparing to file a claim in a bankruptcy case, a creditor should consider taking steps to preserve documents and ESI relating to the claim if such creditor reasonably anticipates that an objection may be raised to the claim. Among the matters to consider in assessing whether it is reasonable to anticipate an objection is the treatment of the creditor's claim on the debtor's schedules (and any amendments thereto), including the amount of the claim as scheduled by the debtor and whether the claim is listed as disputed, contingent, or unliquidated. A creditor's preservation efforts should be reasonable in light of the nature of the objection that is filed or reasonably anticipated and should be proportional to the amount at issue. If a proof of claim is filed, documents required to be attached to the proof of claim in accordance with Bankruptcy Rule 3001 and documents and ESI that would be needed to prove the claim affirmatively should be preserved, and if an objection to the claim is filed or reasonably anticipated by the creditor, documents and ESI relevant to the filed objection or anticipated objection should also be preserved.
- If a creditor is put on notice of a potential dispute or litigation by a trustee or debtor-in-possession, such creditor should consult with counsel about such notice and how to respond, including whether a document and ESI preservation obligation arises and, if so, what steps should be taken to implement it. Similarly, if a creditor is put on notice that certain documents and other information including ESI should be preserved, the creditor should again consult counsel with respect to its response thereto including any potential preservation obligation. It is important that a creditor take appropriate steps to preserve documents and ESI if a preservation obligation arises.
- Other procedural settings in which a preservation obligation may arise include a Bankruptcy Rule 2004 examination or the receipt of a non-party subpoena. If a creditor is the target of a Rule 2004 examination or otherwise receives a subpoena, the creditor should consult counsel about its obligations in response thereto, including a document and ESI preservation obligation.

- If a preservation obligation arises and appropriate documents and ESI are not preserved, under the applicable rules and case law there is a real possibility of a claim of spoliation of evidence and a request for sanctions. With respect to the wide range of potential sanctions, see Section VI below.

## SECTION VI

### **RULES AND PROCEDURES WITH RESPECT TO ELECTRONICALLY STORED INFORMATION (ESI) IN ADVERSARY PROCEEDINGS AND CONTESTED MATTERS IN BANKRUPTCY CASES**

The Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) contain a number of rules relating to ESI in adversary proceedings and contested matters in bankruptcy cases. These rules incorporate by reference provisions from the Federal Rules of Civil Procedure relating to the discovery and production of ESI, the failure to comply with such discovery requirements, and associated sanctions. In addition, the federal rule of civil procedure relating to subpoenas, Rule 45, including its ESI provisions, is also incorporated into bankruptcy practice through Bankruptcy Rule 9016. Supplementing the Federal Rules of Civil Procedure incorporated into bankruptcy practice through the applicable Bankruptcy Rules in adversary proceedings and contested matters, there are also various Bankruptcy Court local rules applicable to ESI that need to be consulted.

Part VII of the Bankruptcy Rules applies to adversary proceedings brought in bankruptcy cases. A number of the Part VII Bankruptcy Rules incorporate by reference and make applicable to adversary proceedings specific federal rules of civil procedure. Such rules include those federal rules of civil procedure relating to discovery and production of ESI and sanctions relating to the failure to produce required information. With respect to the ESI obligations of parties in adversary proceedings, the following rules are applicable:

- Bankruptcy Rule 7026 incorporating Federal Rule of Civil Procedure 26, including, specifically with respect to ESI, Rule 26(a)(1)(A)(ii), Rule 26(b)(2)(B), and Rule 26(f)(3)(C).
- Bankruptcy Rule 7033 incorporating Federal Rule of Civil Procedure 33, including, specifically with respect to ESI, Rule 33(d).
- Bankruptcy Rule 7034 incorporating Federal Rule of Civil Procedure 34, including, specifically with respect to ESI, Rule 34(a)(1)(A) and Rule 34(b)(1)(C) and (2)(D) and (E).
- Bankruptcy Rule 7037 incorporating Federal Rule of Civil Procedure 37, including, specifically with respect to ESI, Rule 37(e).

With respect to contested matters in bankruptcy cases, certain Part VII Bankruptcy Rules are incorporated and apply in such matters.<sup>14</sup> Included among the

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14. See FED. R. BANKR. P. 9014(c).



rules that apply in contested matters are Bankruptcy Rules 7026, 7033, 7034, and 7037, all referenced above. Accordingly, unless the Bankruptcy Court otherwise directs, the same ESI discovery rules and sanction rules with respect to ESI and other document discovery apply in contested matters in bankruptcy cases.<sup>15</sup>

Bankruptcy Rule 9016 incorporates Federal Rule of Civil Procedure 45, the federal rule with respect to subpoenas, into bankruptcy practice. Rule 45 applies in both adversary proceedings and contested matters. It also applies in connection with Bankruptcy Rule 2004 examinations.<sup>16</sup> Rule 45 specifically addresses ESI in several places.<sup>17</sup>

Counsel will also need to consult local rules of procedure with respect to electronic discovery and other issues relating to ESI. For example, in the District of Delaware, the Bankruptcy Court for the District of Delaware has adopted a rule noting that court's "expect[ation] that parties to a case will cooperatively reach agreement on how to conduct e-discovery," and detailing "default standards" by which any e-discovery will be conducted if by the Federal Rule of Civil Procedure 16 scheduling conference agreement has not been reached about the conduct of such discovery.<sup>18</sup> The local rules of each jurisdiction need to be consulted as to whether they have any local rules applicable to ESI issues in cases pending in that jurisdiction.

General federal civil litigators will be familiar with the ESI provisions contained in the Federal Rules of Civil Procedure and the case law interpreting those rules. Bankruptcy lawyers will need to become familiar with those rules to the extent that ESI issues arise in bankruptcy cases and in particular in adversary proceedings and contested matters.

A number of bankruptcy courts have addressed ESI issues and spoliation and sanction claims related thereto in bankruptcy cases. Each case presents its own unique set of facts, but they illustrate that sanctions may be imposed in appropriate circumstances. A sampling of those cases appears below.<sup>19</sup>

15. Note should be made that, as set forth in Bankruptcy Rule 9014(c), certain subparts of Federal Rule of Civil Procedure 26 do not apply in contested matters unless the Bankruptcy Court otherwise directs.

16. See FED. R. BANKR. P. 2004(c).

17. See FED. R. CIV. P. 45(a)(1)(A)(iii), (C), and (D), 45(b)(1), 45(c)(2)(A) and (B), 45(d)(1).

18. DEL. BANKR. CT. LOCAL RULE 7026-3, "Discovery of Electronic Documents (E-Discovery)."

19. See, e.g., *Herzog v. Zyen, LLC* (*In re Xyience Inc.*), No. BK-S-08-10474, Adv. No. 09-1402, 2011 Bankr. LEXIS 4251 (Bankr. D. Nev. Oct. 28, 2011) (imposing monetary sanctions to reimburse plaintiff-trustee's expenses, costs, and reasonable attorney's fees); *Harmon v. Lighthouse Capital Funding, Inc.* (*In re Harmon*), No. 10-33789, Adv. No. 10-03207, 2011 Bankr. LEXIS 323 (Bankr. S.D. Tex. Jan. 26, 2011) (sanction deeming a particular fact established in plaintiff's favor awarded against defendant in adversary proceeding); *In re Global Technovations, Inc.*, 431 B.R. 739 (Bankr. E.D. Mich. 2010) (court declined to grant terminating sanctions, adverse inference instruction, or monetary sanctions; sanctions found to be inappropriate under facts of this case); *GFI Acquisition, LLC v. Am. Federated Title Corp.* (*In re A&M Fla. Props. II, LLC*), No. 09-15173, Adv. No. 09-01162, 2010 Bankr. LEXIS 1217 (Bankr. S.D.N.Y. Apr. 7, 2010) (court declined to order dismissal or grant adverse inference instruction; monetary sanctions awarded); *Sabertooth, LLC v. Simons* (*In re Venom, Inc.*), No. 09-10445, Adv. No. 09-0006, 2010 Bankr. LEXIS 723 (Bankr. E.D. Pa. Mar. 9, 2010) (attorneys' fees awarded as sanction; request to preclude evidence

## CONCLUSION

It has been the goal of the Working Group to present a Best Practices Report and a set of principles and guidelines with respect to electronic discovery and ESI issues in bankruptcy cases. Because electronic discovery is a rapidly developing area of the law, and one unfamiliar to many bankruptcy attorneys and their clients, it is hoped that these materials will provide a helpful resource guide. It is further hoped that this Report will engender further discussion and thoughtful analysis and commentary on the matters addressed in the Report and other ESI-related issues in bankruptcy cases. Undoubtedly new court rules and case law will be forthcoming addressing ESI-related issues in bankruptcy cases. The Working Group has prepared this Report to serve as a starting point for judges, attorneys, and academics when considering and addressing issues related to electronic discovery and ESI in bankruptcy cases.

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denied); *Chrysler Fin. Servs. Ams. LLC v. Hecker* (*In re Hecker*), 430 B.R. 189 (Bankr. D. Minn. 2010) (entry of judgment that debtor's debt to plaintiff was not dischargeable imposed as sanction); *Grochocinski v. Schlossberg* (*In re Eckert*), 402 B.R. 825 (N.D. Ill. 2009) (facts alleged by trustee taken as proof against defendant and defendant precluded from offering testimony or other evidence in opposition; monetary sanctions also awarded); *Springel v. Prosser* (*In re Prosser*), No. 06-30009, 2009 Bankr. LEXIS 3209 (Bankr. D.V.I. Oct. 9, 2009) (court disallowed all of debtor's claimed exemptions); *In re Riverside Healthcare, Inc.*, 393 B.R. 422 (Bankr. M.D. La. 2008) (sanction for alleged spoliation held to be inappropriate); *In re Kmart Corp.*, 371 B.R. 823 (Bankr. N.D. Ill. 2007) (request for default judgment or adverse inference instruction denied but attorneys' fees awarded as sanction); *United States v. Krause* (*In re Krause*), 367 B.R. 740 (Bankr. D. Kan. 2007) (partial default judgment entered as sanction in adversary proceeding); *Shaw Grp., Inc. v. Next Factors, Inc.* (*In re Stone & Webster, Inc.*), 359 B.R. 102 (Bankr. D. Del. 2007) (request for sanctions denied); *Quintus Corp. v. Avaya, Inc.* (*In re Quintus Corp.*), 353 B.R. 77 (Bankr. D. Del. 2006) (entry of judgment against defendant imposed as sanction in adversary proceeding); *Oscher v. Solomon Tropp Law Group P.A.* (*In re Atl. Int'l Mortg. Co.*), 352 B.R. 503 (Bankr. M.D. Fla. 2006) (entry of default judgment in adversary proceeding was too drastic a sanction; monetary sanctions imposed).

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**Appendix 1**  
**\*\*\* TEMPLATE FOR ESI PROTOCOL \*\*\***

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF [STATE]

In re:	)
	)
[DEBTOR(S)]	)
	)
Debtors.	)
	)

**ELECTRONICALLY STORED INFORMATION PROTOCOL**

Following consultation with the Official Committee of Unsecured Creditors, the Office of the United States Trustee, and other parties in interest [including \_\_\_\_\_], the Debtors have agreed to this protocol with respect to the preservation of electronically stored information (“ESI”). This protocol (the “ESI Protocol”) is intended to provide information and identify a general framework regarding the Debtors’ plans for the preservation and handling of ESI. The Debtors intend to present this ESI Protocol to the Bankruptcy Court for approval.

**I. GENERAL PROVISIONS**

This ESI Protocol is intended to provide general information to parties in interest in order to minimize requests and demands to the Debtors regarding issues related to ESI. This ESI Protocol is not an agreement by the Debtors to produce any particular type or scope of ESI in an adversary proceeding, contested matter, or other dispute. Nothing in this ESI Protocol waives any of the Debtors’ rights concerning ESI or otherwise under applicable law or rules, including the Bankruptcy Rules, incorporated Federal Rules of Civil Procedure, or local rules. The Debtors will use reasonable and good faith efforts to preserve and produce a reasonable and proportional scope of ESI in appropriate matters. The Debtors and other parties shall be expected to use reasonable and good faith efforts to limit requests for ESI to a reasonable and proportional scope, which may include limits on the number of custodians, date limits, file type limits, and other limits or agreements that are appropriate under the circumstances.

## II. OVERVIEW OF DEBTORS' ELECTRONIC INFORMATION SYSTEMS AND PRESERVATION EFFORTS

A. The Debtors maintain the following electronic information systems:

[In this section, *consider* disclosing information regarding:

- General information regarding operating systems
- What email system the Debtors use (e.g., Outlook or Lotus Notes)
- Whether there is automatic overwriting or deletion of user mailboxes based on date or size limitations
- Whether the Debtors maintain a general email archive or repository and, if yes, what are the parameters
- Typical organization/storage of non-email documents—e.g., is there a document management system, do users have a dedicated/portioned network directory location, shared locations/etc.
- What database information the Debtors maintain—e.g., ERP/finance/accounting/inventory/HR/etc.
- Any proprietary/industry specific/custom systems]

B. The Debtors' preservation efforts to date include:

[In this section, *consider* disclosing information regarding:

- Any specific preservation efforts requested by the Committee/U.S. Trustee/etc. to which the Debtors have agreed
- Any other general preservation efforts that the Debtors may have implemented, which *might* include
  - Snapshots/copies of servers or systems
  - Mailbox snapshots for individual custodians, which might include senior management or other employees, that the Debtors know will be relevant to particular matters in the case
  - Any collection/snapshot of non-email documents for custodians (e.g., copies of network directory locations for individual custodians)
  - Preservation/collection from non-custodian-based sources such as database systems
  - Whether the Debtors have taken backup tapes out of rotation and, if so, the nature and date
- Any large collections/databases the Debtors maintain—e.g., if there is a large litigation-related database, the Debtors might consider disclosing the custodians and collection time periods related to that

- Any preservation efforts the Debtors have implemented for significant litigation/anticipated litigation (but unless there is a small number, not every single matter for which they have implemented a litigation hold)]

C. The Debtors consider the following data sources to be not reasonably accessible because of undue burden or cost and do not intend to preserve or produce from the following:

[In this section, the following, based largely on the Delaware default standard, might be considered:

- Deleted, slack, fragmented, or other data only accessible by forensics
- Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system
- On-line access data such as temporary Internet files, history, cache, cookies, and the like
- Metadata other than as provided in Section III below, specifically including data in metadata fields that are frequently updated automatically, such as last-opened dates
- Backup data that are substantially duplicative of data that are more accessible elsewhere
- Voicemail and other voice messages (except as may be routinely generated as attachments to emails that are themselves preserved)
- Instant messages that are not ordinarily printed or maintained in a server dedicated to instant messaging
- Text messages
- Electronic mail or pin-to-pin messages sent to or from mobile devices (e.g., iPhone and Blackberry devices), provided that a copy of such mail is routinely saved elsewhere
- Other electronic data stored on a mobile device, such as calendar or contact data or notes, provided that a copy of such information is routinely saved elsewhere
- Logs of calls made from mobile devices
- Server, system, or network logs
- Electronic data temporarily stored by laboratory equipment or attached electronic equipment, provided that such data is not ordinarily preserved as part of a laboratory report
- Data remaining from systems no longer in use that is unreadable or unusable on the systems in use]

The Debtors reserve the right to supplement or amend the foregoing and to identify other sources of not reasonably accessible data in individual matters.

### **III. INTENDED STANDARD FORM OF PRODUCTION**

For matters requiring production of any significant volume of ESI, unless otherwise agreed to by the parties or ordered by the court, the Debtors intend to produce in the following format and to request production in the following format:

- **General format** - Subject to the exceptions below, ESI will be provided as single-page TIFF format utilizing Group 4 compression with at least 300 dots per inch resolution. Images shall be reduced by up to 10% to allow for a dedicated space for Bates numbering and any other electronic stamping or document designations (such as those pertaining to confidentiality).
- **General Metadata Load File Format** - All produced ESI documents shall be accompanied by metadata load files that shall be delimited with the following data fields:
  - Beginning Document Number;
  - Ending Document Number;
  - BegAttach (the Beginning Document Number of the parent document);
  - EndAttach (the Ending Document Number of the last attachment);
  - Custodian;
  - Page Count;
  - MD5; and
  - Extracted Text.
- **Non-email Metadata Load File** - In addition to the general metadata fields contained above, the metadata load file for all non-email ESI (including attachments to emails and loose files) shall, where available, also contain the following data fields:
  - FileExt (the extension of the filename, e.g., “DOC” for an MS Word document);
  - Filename (the original filename);
  - Filepath;
  - Date Created;
  - Date Last Modified;

- Author; and
- Native Path (relative path to the native version of the ESI when a native version is delivered (e.g., Excel/PowerPoint files)).
- **Email Metadata Load File** - In addition to the general metadata fields contained above, the metadata load file for all email ESI shall, where available, also contain the following data fields:
  - PST or NSF File Name;
  - To;
  - From;
  - Cc;
  - Bcc;
  - Date Sent;
  - Date Received; and
  - Subject Line.
- **Exceptions** - Because Microsoft Excel and PowerPoint files are not amenable to production in the formats above, the Debtors will produce Microsoft Excel files in native format. A placeholder image will be included with the TIFF files indicating the Bates number of the document and that the document was produced in native format. Certain other file types (e.g., program, video, database, sound files, etc.) are also not amenable to conversion into TIFF format. In general, these types of files will not be collected or processed. When present in a collection, however, such documents will be represented in the form of a placeholder TIFF image and will be produced in a reasonably usable form upon a showing of need. Debtors will use reasonable and good faith efforts to address production of any other types of documents that reasonably should be produced in a particular matter but that might not be amenable to production in the foregoing format (e.g., oversized documents).

The Debtors reserve the right to supplement or modify the intended or requested form of production in individual matters. For smaller matters and/or those with lower volumes of ESI, the Debtors may produce in any reasonably useable format, which could include native production or searchable .pdfs. In addition, the Debtors will consider and discuss in good faith any requests for production in formats other than as set forth above.

#### IV. DESIGNATION OF ESI LIAISONS

Any questions or issues regarding the Debtors' handling of ESI should be directed to:



[identification and contact information for Debtors' ESI liaison, which can be a client representative and/or an attorney at the law firm serving as Debtors' counsel] ("Debtors' ESI Liaison").

Any party directing any such question or issue to the Debtors or requesting the preservation or production of ESI by the Debtors, or from whom the Debtors request preservation or production of ESI, should designate their own ESI liaison in a writing directed to Debtors' ESI Liaison. Absent agreement to the contrary by the Debtors and the other party, all requests and communications regarding ESI should ordinarily be accomplished through the ESI Liaisons.

## **V. MISCELLANEOUS PROVISIONS**

- A. The "safe harbor" provisions of Federal Rule of Civil Procedure 37(e), Federal Rule of Bankruptcy Procedure 7037, and the Advisory Committee Notes to Rule 37(e) shall be applicable to this ESI Protocol and the Debtors' preservation efforts. Consistent with the foregoing, the Debtors shall not be in violation of this ESI Protocol, or the Order of the Bankruptcy Court approving the ESI Protocol (the "Protocol Approval Order"), if, despite the Debtors' good faith efforts to comply with their preservation undertakings in this ESI Protocol, any documents or ESI are altered, lost, overwritten, or destroyed as a result of the Debtors' routine, good faith operation of their information or computer systems. This includes, but is not limited to:
  - (1) good faith upgrading, loading, reprogramming, customizing, or migrating software;
  - (2) good faith inputting, accessing, updating, or modifying data in an accounting or other business database maintained on an individual transaction, invoice, or purchase order basis in an accounting or other business database; and
  - (3) good faith editing, modifying, updating, or removal of an internet site.
- B. The Debtors may use any reasonable method to preserve documents and ESI consistent with the Debtors' record management systems, routine computer operation, ordinary business practices, and the scope of preservation set forth in this ESI Protocol. Ordinarily, the Debtors will preserve in native format or some other reasonably useable format that preserves available metadata of the type specified in Section III above. The Debtors will act in good faith and may not transfer documents and ESI to another form solely for the purpose of increasing the burden of discovery for creditors or other interested parties.
- C. This ESI Protocol does not obligate the Debtors to segregate specific documents or ESI from other documents or ESI where they presently

reside. This ESI Protocol does not obligate the Debtors to mirror image any media or to image documents maintained in paper form.

- D. Nothing in this ESI Protocol shall constitute a waiver by the Debtors or any other interested party of any claim of privilege or other protection from discovery. In particular, no inadvertent production of any document or ESI that the producing party contends is privileged shall constitute a waiver of that privilege. It is intended that the Protocol Approval Order will contain clawback and non-waiver provisions pursuant to Rule 502 of the Federal Rules of Evidence.
  
- E. This ESI Protocol and the Protocol Approval Order do not address, limit, or determine the relevance, discoverability, or admissibility of any document or ESI, regardless of whether any such document or ESI is intended to be preserved pursuant to the terms of this ESI Protocol. Neither the Debtors nor any party in interest waive any objections as to the production, discoverability, or confidentiality of documents and ESI preserved pursuant to this ESI Protocol.
  
- F. As stated above, it is intended that this ESI Protocol will be presented to the Bankruptcy Court for approval. This ESI Protocol and the Protocol Approval Order may be modified, amended, or supplemented by further order of the Bankruptcy Court after proper notice of any request therefor. Nothing herein or in the Protocol Approval Order shall limit or otherwise affect the right (to the extent that any such right may otherwise exist under applicable law) to obtain or otherwise seek production of documents and ESI from the Debtors under applicable law. Nothing contained herein or in the Protocol Approval Order shall limit, preclude, or otherwise affect the entry of, or the terms and provisions of, stipulations and orders entered in adversary proceedings, contested matters, or other litigation involving the Debtors, or other agreements between the parties thereto, regarding document and ESI preservation, production, and/or discovery procedures. In the event of any conflicting terms, the terms of any such stipulations, orders, or agreements shall govern in such adversary proceedings, contested matters, or other litigation.

Dated: \_\_\_\_\_

[Debtors]

by: \_\_\_\_\_

**Appendix 2**  
**\*\*\* MODEL FORM OF ESI PROTOCOL**  
**APPROVAL ORDER \*\*\***

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF [STATE]

	)
In re:	)
	)
[DEBTOR(S)]	)
	)
Debtors.	)
	)

**ORDER APPROVING ELECTRONICALLY  
STORED INFORMATION (ESI) PROTOCOL  
AND ADDRESSING NON-WAIVER OF ATTORNEY-CLIENT  
PRIVILEGE AND WORK-PRODUCT PROTECTION PURSUANT  
TO RULE 502(d) OF THE FEDERAL RULES OF EVIDENCE**

Upon the Debtors’ Motion for Order Approving Electronically Stored Information (ESI) Protocol (the “Motion”) and the other pleadings and proceedings herein; due and adequate notice of the Motion having been provided and a hearing having been held before this Court on \_\_\_\_\_; it appearing that the relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors, and all other parties in interest; after due deliberation and sufficient cause appearing therefor, it is, by the United States Bankruptcy Court for the District of \_\_\_\_\_, HEREBY ORDERED THAT:

1. The Electronically Stored Information (ESI) Protocol, a copy of which is attached hereto as Exhibit 1 (the “ESI Protocol”), is approved.
2. Pursuant to Fed. R. Evid. 502(d) and (e), the disclosure during discovery or other voluntary production of any communication or information including electronically stored information (hereinafter “Document”) by any of the Debtors or any other party in this case that is protected by the attorney-client privilege (“Privilege” or “Privileged,” as the case may be) or work-product protection (“Protection” or “Protected,” as the case may be), as defined by Fed. R. Evid. 502(g), shall not waive the Privilege or Protection for either that Document or the subject matter of that Document, unless there is an intentional waiver under Fed. R. Evid. 502(a)(1), in which event the scope of any such waiver shall be

determined by Fed. R. Evid. 502(a)(2) and (3). Unless otherwise ordered by this Court, this provision shall displace the provisions of Fed. R. Evid. 502(b)(1) and (2) in this case.

3. Except when the requesting party contests the validity of the underlying claim of Privilege or Protection, any Document the party producing the Document claims as Privileged or Protected shall, upon written request, promptly be returned to the producing party and/or destroyed, at the producing party's option. If the underlying claim of Privilege or Protection is contested, the requesting party and the producing party shall comply with, and may promptly seek a judicial determination of the matter pursuant to, Fed. R. Civ. P. 26(b)(5)(B). In assessing the validity of any claim of Privilege or Protection, this Court shall not consider the provisions of Fed. R. Evid. 502(b)(1) and (2), but shall consider whether timely and otherwise reasonable steps were taken by the producing party to request the return or destruction of the Document once the producing party had actual knowledge of (i) the circumstances giving rise to the claim of Privilege or Protection and (ii) the production of the Document in question. For purposes of this paragraph, "destroyed" shall mean that the paper versions are shredded, that active electronic versions are deleted, and that no effort shall be made to recover versions that are not readily accessible, such as those on backup media or only recoverable through forensic means. For purposes of this paragraph, "actual knowledge" refers to the actual knowledge of an attorney with lead responsibilities in this case or in the adversary proceeding or contested matter if applicable.
4. The ESI Protocol and the terms of this Order may be modified, amended, or supplemented for cause by further order of this Court after due and proper notice. In addition, the entry of this Order shall not preclude the entry of case- or matter-specific ESI-related orders in future litigated matters.
5. This Court retains jurisdiction with respect to all matters arising from or related to this Order.

Dated: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE  
FOR THE DISTRICT OF \_\_\_\_\_