

ALI-ABA Video Law Review
Electronic Discovery for Employment Lawyers

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Live Video Webcast

Sample Documents Relating to E-Discovery

By

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Clawback Agreement

1. Neither party is required to turn over backup tapes of electronic sources gathered before XXXXXXXXXXXX, to the extent they exist, unless the party knows or should know that the back-up tape includes directly relevant material that is not duplicative of material otherwise produced.
2. Neither party is required to create new backup tapes of electronic sources after the date of this agreement, except to the extent new or revised information concerning the project is created in electronic form after the date of this agreement, and Government has not provided hard or electronic copies of the new or revised information to the Claimant.
3. Neither party is required to search for relevant information on secondary sources of electronic media, such as home computers or backup tapes, except where the party knows or should reasonably know, without review of the secondary source information itself, that the secondary source includes directly relevant material that is not duplicative of material otherwise produced.
4. Both parties agree that XXXXXXXXXXXX has collected relevant files from the parties of concern and will disclose the documents to the appellant at a mutually convenient date and time. The parties further agree that in the event that new parties of concern are identified, the XXXXXXXXXXXX will request the relevant files and disclose them to Appellant in a timely manner.
5. Both parties agree that Appellant has collected relevant files from the parties of concern and will disclose the documents to the XXXXXXXXXXXX at a mutually convenient date and time. The parties further agree that in the event that new parties of concern are identified, Appellant will request the relevant files and disclose them the XXXXXXXXXXXX in a timely manner.
6. Both parties agree that any inadvertent inclusion of any privileged material shall not result in the waiver of any associated privilege nor result in a subject matter waiver of any kind. The parties agree, however, that the disclosure of any particular material shall cease to be "inadvertent" if, 3 days after the receiving party notifies the producing party that it has received the material, the producing party does not request the return of the privileged matter pursuant to paragraph 7 below.
7. Both parties agree to return any privileged material inadvertently disclosed immediately upon notice of the disclosure.
8. Both parties agree that no copies will be made of the inadvertently disclosed materials.

xxx,	*	
Claimant and Counter-Respondent,	*	
v.	*	
	*	DOCKET NO.: aaa
yyy,	*	
Respondent and Counter-Claimant.	*	

* * * * *

STIPULATION AND "CLAWBACK" AGREEMENT
RE: DOCUMENTARY AND ELECTRONICALLY STORED INFORMATION

Whereas, the Respondent will, prior to production, have searched documentary and electronically stored information ("ESI") for information responsive to the requests of the Claimant;

Whereas, defendants represent that the ESI that was searched was located on information systems at the CLIENT;

Whereas, defendants represent that they located approximately 2,000 MB of potentially responsive information ("PRI") in their ESI;

Whereas, the parties stipulate and agree, and the Court finds and holds, that, under the circumstances of this case, document by document review of the PRI for purposes of removing or redacting privileged documents, would be unduly burdensome and costly;

Whereas, the defendants have searched the PRI for privileged information (including work product) by means of an electronic search of agreed-upon search terms, such as "_____", "ATTORNEY NAME," "ATTORNEY 2 NAME," "LAST NAME," "LAST NAME 2," "LAST NAME 3," "privilege," "attorney client," "attorney-client," and "work product"(the "Search");

Whereas, defendants represent that the foregoing Search identified a number of documents that defendants assert are privileged and that have been described on a privilege log (the "Privileged Documents");

Whereas, defendants represent that the Privileged Documents have been segregated from the PRI and do not constitute part of the PRI;

Whereas, nothing contained in this stipulation limits plaintiffs' right to challenge the assertion that any of the Privileged Documents are, in fact, privileged;

Whereas, nothing contained in this stipulation limits defendants' right to oppose that challenge;

Whereas, the parties stipulate and agree, and the Court finds and holds, that the defendants have made reasonable efforts under the facts and circumstances to identify privileged documents (including work product) and timely assert a privilege;

Whereas, the only alternative for a further search of the PRI for privileged information would involve a document-by-document review by defense counsel, and a very substantial expenditure of time and effort;

Whereas, the parties stipulate and agree, and the Court finds and holds, that further search of the PRI for privileged documents (including work product) would be unduly burdensome or costly, in light of the circumstances of this case;

Whereas, the parties stipulate and agree, and the Court finds and holds, that a complete pre-production privilege review of the PRI would be unduly burdensome and expensive, in light of the circumstances of this case;

Whereas, defendants do not intend to waive any privilege by production of the PRI;

Whereas, plaintiffs will not contend that production of the PRI waives any privilege;

Whereas, absent a Court order pursuant to *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), if defendants produce the PRI and inadvertently produce privileged documents (and/or work product), there could be a waiver of the privilege;

Whereas, the parties stipulate and agree to entry of the following order;