

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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NATIONAL DAY LABORER ORGANIZING
NETWORK; CENTER FOR CONSTITUTIONAL
RIGHTS; and IMMIGRATION JUSTICE
CLINIC OF THE BENJAMIN N. CARDOZO
SCHOOL OF LAW,

ECF CASE

10 CV 3488 (SAS) (KNF)

Plaintiffs.

[Rel. 10-CV-2705]

v.

UNITED STATES IMMIGRATION
AND CUSTOMS ENFORCEMENT AGENCY;
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; EXECUTIVE
OFFICE FOR IMMIGRATION REVIEW;
FEDERAL BUREAU OF INVESTIGATION;
and OFFICE OF LEGAL COUNSEL,

Defendants.

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**DECLARATION OF PATRICK GARBE IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANTS' MOTION FOR STAY**

I, Patrick Garbe, declare, pursuant to 28 U.S.C. § 1746 and subject to the penalties of perjury, that the following is true and correct:

1. I am an Electronic Discovery Specialist for Mayer Brown LLP ("Mayer Brown"), counsel for National Day Laborer Organizing Network ("NDLON"), one of the three Plaintiffs in the above-captioned matter. Attached as Exhibit A is a copy of my CV.

2. I submit this declaration in support of Plaintiffs' Opposition to Defendants' Motion for Stay of this Court's February 7 and 14, 2011 Opinion and Orders (the "Orders").

3. As a result of the instant litigation, Defendants Federal Bureau of Investigation

(“FBI”), Immigration and Customs Enforcement (“ICE”), the Department of Homeland Security (“DHS”) and the Executive Office of Immigration Review (“EOIR”) have disclosed, over a period of several months, documents responsive to Plaintiffs’ February 3, 2010 Freedom of Information Act (“FOIA”) Request (the “Request”). As Electronic Discovery Specialist for Mayer Brown LLP, I have reviewed each of these document productions as part of my efforts to provide access to the records for further review and analysis. I was also involved in drafting the production protocol that was attached as Exhibit A to the Court’s February 7, Order (the “Production Protocol”), and is attached hereto as Exhibit B.

4. The manner in which Defendants have produced records responsive to the Request has hindered Plaintiffs’ review and organization of the records. Each production has presented Plaintiffs with unique and substantial challenges. At a minimum, the format of the productions, the lack of certain metadata, the failure to provide load files, and the failure to link emails and their attachments (often referred to as a “document family” where the email is the “parent” and the attachment is the “child”) in several of the productions have necessitated tedious manual review of hard copy documents in order to organize and index the records for use in both this litigation and public advocacy efforts. Perhaps more importantly, these issues have undermined the reliability and integrity of the production of records as a whole.

Defendants’ Initial Productions

5. As early as July 23, 2010, Plaintiffs had requested that Defendants electronically produce consecutively Bates-numbered records, and, in so doing, preserve document families. Plaintiffs further requested that Defendants provide Excel documents in their native file format. *See* July 23, 2010 B. Kessler email to C. Connolly. The productions that followed did not accommodate Plaintiffs’ requests.

6. On August 3, 2010, ICE sent to Plaintiffs a disk containing one PDF file. This PDF file contained over 900 pages (Bates-numbered 10-2674.000001 - 10-2674.000926), yet within the single PDF file, there appeared to be numerous, separate records. In fact, there was no clear way to determine how many documents were included in the production, as there were no apparent document breaks within the file, leaving no obvious way to determine where one record ended and the next began. Only by manual review and guesswork could Plaintiffs even attempt to discern document families; however, without maintaining the parent-child relationship, the context and true nature of a document or record is lost. The PDF file contained unusable and irrelevant metadata. That is, the metadata related to the PDF file itself and not the underlying records. No load files were provided by ICE.

7. On August 15, 2010, FBI sent to Plaintiffs a 51-page PDF file. This file appeared to contain multiple documents, but, again, there were no apparent document breaks. As was the case with the ICE production of August 3, there was no clear way to determine the number of documents within the file, as there was no obvious way to determine where one record ended and the next began. Document families were not maintained. The file contained no searchable text and the metadata was unusable and irrelevant. In addition, FBI did not provide a load file.

8. Subsequent productions by ICE and FBI suffered from similar deficiencies. Records were produced in PDF files with no clear way to determine the number of documents within a particular production, document families were not preserved, and Defendants did not produce relevant or usable metadata. Load files were not provided. These limitations were apparent in each of the following productions as well:

- September 8, 2010: ICE sent to Plaintiffs a disk containing a single PDF file of close to 800 pages (Bates numbered 10-2674.000927-10-2674.001715);
- November 18, 2010: FBI sent to plaintiffs one PDF file via email, (Bates stamped

FBI-SC-52-58 – FBI-SC-516-854). This PDF file appeared to contain spreadsheets, which are incomprehensible as a result of reformatting the native spreadsheets to the PDF format. Further, the text was not searchable as provided; and

- December 6, 2010, ICE emailed to Plaintiffs one PDF file containing over 280 pages (Bates stamped ICE FOIA 10-2674.001737 – ICE FOIA 10-2674.002019).

The Court's December 17, 2010 Order

9. By Order dated December 17, 2010, the Court ordered Defendants to produce Opt-Out Records by January 17, 2011 and the Rapid Production List Production by February 25, 2010. The December 17 Order specified that the parties would continue to work to negotiate an agreement regarding a more acceptable format of production. Further, Defendants informed Plaintiffs that the January and February productions would include thousands of responsive records.

The Production Protocol

10. It was because of the production deficiencies noted above, the prospect of receiving larger, similarly unmanageable productions, and the Court's December 17, 2010 Order encouraging the parties' to negotiate acceptable standards for future productions, that, on December 22, 2010, Plaintiffs provided Defendants with the Production Protocol.

11. I assisted in drafting the Production Protocol, which is a template request that Mayer Brown has developed in order to facilitate the exchange of electronically stored information ("ESI") and hard-copy documents for government investigations, litigations and third-party requests for documents. The Production Protocol has evolved based on Mayer Brown's extensive experience managing the identification, collection, production and exchange of ESI to enable effective organization and review of such information. In addition, the Production Protocol is based largely on the Data Delivery Standards of the Securities and Exchange Commission ("SEC") and the Criminal Division, United States Department of Justice

(“DOJ”). These Data Delivery Standards are attached hereto as Exhibit C.

12. The Production Protocol generally provides the foundation for the parties’ communications regarding the format for productions. The parties may negotiate modifications as needed to meet their particular production requirements.

13. The Production Protocol requests that all images be delivered in single-page Group IV Tagged Image File Format (“TIFF(s)”). A TIFF image is a standard image format accessible by commonly available image viewers, such as Opticon and iPro, that are utilized in document review platforms, such as Concordance. TIFFs are static images that preserve a file’s visible content. A TIFF may contain Bates-numbers, confidentiality designations and redactions.

14. The Production Protocol requests that each single-page TIFF image have a unique Bates-number assigned to it. This is a standard request that facilitates accurate identification and retrieval of unique records.

15. The Production Protocol also requests Text Files, which are required for searching for content within a review platform. The content of TIFF images (e.g. the text on the page of the document) is not searchable without first extracting the text and providing it in Text Files.

16. The Production Protocol requests the use of Optical Character Recognition (“OCR”) for all hard copy documents and for all documents containing redactions. The use of OCR permits the production of searchable text contained in the hard copy documents and/or the redacted TIFF images. *See* Declaration of Jason A. Novak ¶¶ 37-38.

17. The Production Protocol requests that parent-child relationships be preserved because of the necessity of maintaining the document family. Without maintaining the parent-child relationship, the context and true nature of a document or record is lost. The importance of maintaining the parent-child relationship applies to hard copy documents as well.

18. The Production Protocol requests database load files and cross-reference files in formats that are compatible with standard document review platforms, such as Concordance and Opticon. Generally, load files provide a means of producing certain metadata and are required for review platforms that permit indexing, searching and organizing documents. For example, the Production Protocol requests the production of metadata associated with author, addressees, date and time associated with email records. This information, which is part of the native record and provided in the load file, expedites qualitative review, organization and use of the produced records. The Production Protocol provides examples of load files designed to facilitate loading the data into the review platform.

19. When a producing party refuses to provide load files that conform to the requested production format, the requesting party bears the avoidable burden associated with revising the load file provided in order to load the data into the review platform, allowing for both a qualitative and functional use of the documents. If a PDF production is made without the requested load file, even the most basic production metadata fields, such as Bates-numbers, would need to be captured through a manual coding process. In this manual coding process, a specialist would need to input the beginning and ending Bates-numbers of each record into a document review database. Even when dealing with a relatively small number of records, manually capturing Bates-numbers is a time consuming process. Obviously, when dealing with thousands of PDF files, these additional steps are sufficiently onerous to render the process impractical.

20. The Production Protocol requests that Defendants provide certain metadata fields in the load files and that these metadata fields be populated by metadata associated with the ESI, to the extent available. The requested metadata fields facilitate the indexing, searching,

organizing and analysis of documents in the document review platform.

21. Like Plaintiffs' July 23, 2010 email request, the Production Protocol requests that spreadsheets be produced in native file format, such as Excel documents, because producing spreadsheets in only the image format strips the record of critical information, such as formulas contained within cells and hidden rows and columns, that are part of the native file. Producing spreadsheets in image format can undermine the integrity of the record and obscure information within the record. It is, however, permitted under certain circumstances, such as when the requesting party agrees to accept images where redactions are required. Precautions are then taken to ensure that no viewable content is withheld.

Defendants' Early 2011 Production of Records

22. At a hearing on January 12, 2011, the Court ordered Defendants to produce records in accordance with the format requested in Plaintiffs' July 23, 2010 email and also to ensure that Plaintiffs could determine the parent-child relationship between the documents. While Defendants' early 2011 productions have been responsive to *some* of the specifications from the July 23, 2010 email, deficiencies remain that continue to impede the review and processing of these records.

23. On January 17, 2011, ICE, DHS, FBI and EOIR produced approximately 15,000 pages of records (the "Opt-Out Production"), saved in individual PDF files on CDs. There were no load files and no metadata provided with these productions. Contrary to the July 23, 2010 email request, Excel spreadsheets were not produced in native format. For those records that were searchable, keyword searches could only be performed in one file at a time, substantially limiting the usefulness of any search feature. While many of these individual files were labeled by Bates-numbers, the file names in ICE's production (the First ICE Opt-Out Production) did not

correspond to the Bates-numbering. For example, the file names in more than half of ICE's first First Opt-Out Production contained numerical designations, some of which included a .1, .2 suffix. When Plaintiffs asked Defendants to explain the significance of the numbers in the file names, Defendants explained that the .1, .2 designations indicated documents with parent-child relationships (*i.e.* the email would be numbered xxxx, the first attachment xxxx.1, the second xxxx.2, etc . . .).

24. ICE offered to reproduce the portion of the Opt-Out Production that had used the suffixes so that the file names would correspond to the Bates-numbering. Plaintiffs received the second version of the ICE production on January 24, 2011 (the "Second ICE Opt-Out Production"). In the Second ICE Opt-Out production, the file names corresponded to the Bates-numbers.

25. ICE's inconsistent manner preserving document families between the First and Second Opt-Out Productions further complicated the process of reviewing and processing the records. Sometimes ICE saved the attachments in the same file as the parent email to which they were attached, while in other cases, each attachment was a separate file. This system impeded the ability to index, search and organize the records.

26. At the January 20, 2010 hearing, in connection with a discussion of the appropriate format of production for spreadsheets, Defendants indicated that there were several spreadsheets in the Opt-Out Production. However, since the documents in the Opt-Out Production were largely unsearchable, Plaintiffs could not locate these spreadsheets within the productions. In a January 21, 2011 email, Defendants informed Plaintiffs of the Bates ranges for the spreadsheets in the Opt-Out Production. Based on this information, on February 3, 2011, Plaintiffs requested that Defendants provide a single Excel document, without redactions and in

native format, for one of the spreadsheets produced in accordance with the Court's instructions to produce records in compliance with the July 23, 2010 email. *See* February 3, 2011 email from N. Cerullo to J. Cordaro, attached hereto as Exhibit D. Defendants did not respond to the request and to this date have not produced the spreadsheet, or, to my knowledge, any other spreadsheet, in native format.

27. With some difficulty, Plaintiffs were able to upload a portion of the Opt-Out Production to Concordance. Due to the formatting deficiencies, however, it was impossible to search the production effectively or sort the documents, even after the time-consuming process of uploading the records. For example, we were unable to search for documents using Bates-numbers, which is a basic search process to perform in a database.

28. The Rapid Production List productions produced to Plaintiffs by Defendants ICE, DHS and FBI on or about February 24, 2011, similarly failed to comply with aspects of the July 23, 2010 email and the Court's instructions. First, the FBI's production was not consecutively Bates-numbered. Defendants did not inform the Plaintiffs of the problem until approximately 8:30 p.m. on the date the production was due, and the FBI did not provide a replacement production until March 4, 2011. Second, the DHS and ICE productions, while identifying parent-child relationships for a majority of the records produced, contained several records indicating that attachments existed, but those attachments were not clearly marked.

29. At this point, I am unaware of Defendants producing a single spreadsheet in Excel or native format. As a result, it has been impossible to provide the attorneys staffed on this matter with the data necessary to determine whether and to what extent record information in these documents remains undisclosed.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: New York, New York
March 30, 2011



PATRICK GARBE