

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**In re CHOCOLATE
CONFECTIONARY ANTITRUST
LITIGATION**

**MDL DOCKET NO. 1935
(Civil Action No. 1:08-MDL-1935)

(Judge Conner)**

**THIS DOCUMENT APPLIES TO:

ALL CASES**

**STIPULATION AND
[PROPOSED] ORDER FOR THE
REVIEW, TREATMENT AND
LOGGING OF RECORDS
WITHHELD UNDER CLAIM OF
PRIVILEGE**

WHEREAS the review of Records and electronically-stored information (ESI) to isolate, withhold and describe Protected Information can impose substantial costs on the Producing Party;

WHEREAS the burden and complexity of privilege review and logging of Protected Information, and the risk of inadvertent production of Protected Information, are magnified in the case of discovery of ESI given the volume of data and nature of electronic communications; and

WHEREAS the Parties seek to reduce the burdens and delay of privilege review while minimizing the risk of privilege waiver,

The Parties (as defined below) stipulate and agree to this proposed order establishing a protocol for the review, treatment and logging of Privileged Information, and related motions. The Court, having reviewed the Parties'

stipulated order, adopts the Parties' stipulation and agreement, and now orders as follows:

I. DEFINITIONS

a. "Parties" or "Party" shall mean all named plaintiffs in this action and all named defendants over which the Court has exercised personal jurisdiction.

b. "Producing Party" shall mean a Party that produces a Record in hard copy or as an Electronic Record or discloses information in a log provided for herein.

c. "Electronic Records" shall mean a Record collected in native form with its metadata collected, processed and preserved simultaneously. It shall not include static Records, e.g. TIFF or PDF files, where any part of the metadata was generated through imaging, optical character recognition or similar technology.

d. "Metadata Privilege Log" shall mean a log created in compliance with the provisions hereof, which shall be deemed to meet the requirements of Fed. R. Civ. P. 26(b)(5). The Metadata Privilege Log should be produced in an electronic format such as Word or Excel.

e. "Manual Privilege Log" shall mean a log created in compliance with the requirements of Fed. R. Civ. P. 26(b)(5), as interpreted by applicable case law. The Manual Privilege Log should be produced in an electronic format such as Word or Excel.

f. "Requesting Party" shall mean a Party that receives a Record or a

privilege log from a Producing Party.

g. “Records” shall have the same meaning as “documents” as defined in Fed. R. Civ. P. 34(a). Records shall include Electronic Records, as contemplated by the Federal Rules of Civil Procedure.

h. “Protected Information” shall mean information for which a claim of attorney-client privilege, work product protection, or other privilege or protection has been or may be made.

i. “Directly Receiving Recipient,” “Directly Received” or “Direct Recipient” shall mean that the recipient is a primary recipient of the record, and excludes records in which the recipient is cc’d or bcc’d.

j. “Complaint Filing Date” shall mean (a) in the case of all Defendants, December 21, 2007; and (b) in the case of any Plaintiff, the date that particular plaintiff first filed its complaint.

II. PRIOR ORDERS CONCERNING DISCOVERY

a. This order is intended to supplement, and not supplant, this Court’s prior orders concerning discovery, including without limitation Case Management Order No. 7 – Protective Order (“CMO No. 7”) and Case Management Order No. 8 Re: Preservation and Production of Documents and Electronically Stored Information (“CMO No. 8”). CMO No. 7 and CMO No. 8 remain in full force and effect, subject to subsequent orders of the Court.

III. PRODUCTION OF PRIVILEGE LOGS

a. The Parties agree that isolation, review, redaction and logging of Protected Information can be costly and time-consuming. To limit the cost of a privilege review and make Record production more efficient, the Parties have agreed to adopt the protocol set forth herein with respect to searching and handling responsive Records, which may include Protected Information, and producing Manual and/or Metadata Privilege Logs.

b. Within 45 days of the entry of this Protocol, the Parties will provide an initial Manual Privilege Log and/or Metadata Privilege Log, as described herein, covering their Records produced to date. Within 45 days of substantial completion of their productions, the Parties will produce a supplemental Manual Privilege Log and/or Metadata Privilege Log covering Records not previously logged. Thereafter, supplemental Manual Privilege Logs and/or Metadata Privilege Logs will be provided within 30 days from the date of production. Subject to the exceptions noted herein, a Producing Party's logs shall include entries regarding all responsive but withheld Records, including but not limited to e-mail, attachments, hard-copy Records or other materials, including redacted materials.

c. Each Party reserves the right to request a more specific description of specific entries in a Metadata Privilege Log, should a Requesting Party in good faith have reason to believe that one or more specific entries on a Metadata Privilege Log

may not reflect a privileged Record. The Parties agree to tailor any such requests to specific entries, consistent with the Parties' joint intent to reduce the burdens and complexities of privilege review and logging of privileged materials. Unless otherwise agreed to by the Parties, within 20 days of such a good faith request by a Requesting Party, the Producing Party shall manually review the identified document and amend its Metadata Privilege Log as necessary for the specific entries.

d. Nothing in this order shall limit the right of a Requesting Party to petition the Court to compel a more specific description of specific entries in a Manual Privilege Log or a Metadata Privilege Log, to challenge the privileged nature of specific Records, or to demand a manual review by the Producing Party or an *in camera* review by the Court or Special Master of specific entries and documents in the Manual Privilege Log or Metadata Privilege Log.

IV. STANDARDS FOR THE REVIEW, LOGGING OF POTENTIALLY PRIVILEGED INFORMATION

Outside Counsel, To: and From:

a. The Parties may use the following electronic protocol to identify and segregate Electronic Records and their attachments sent to and received by outside counsel.

1. Each Party may search the sender (e.g., Author or From:) or receiver (e.g., To:) metadata fields of Electronic Records for names of outside counsel who were retained by that Party to provide legal services.

2. The Parties that are utilizing the searches described in Section IV.a.1. to segregate Electronic Records and their attachments, as opposed to manually reviewing these Records for privilege, must disclose the names of outside counsel to be included in the search.

3. The Parties that are utilizing the searches described in Section IV.a.1. to segregate Electronic Records and their attachments will manually review any Electronic Record that both (a) does not have one of that Party's custodians or its outside counsel in its sender metadata field and (b) whose subject metadata fields are also responsive to the search: "Re:!" or "Fwd:!", where the exclamation point represents a "wild card" search, as described in IV.c.7. (i.e. an Electronic Record must fulfill both requirements before manual review of that Electronic Record is

required), except as provided by Section IV.b. For any such Electronic Records, each e-mail in the chain must be reviewed and logged if privileged, or produced if not privileged and responsive.

4. Any other Electronic Records resulting from the search described in Section IV.a.1. dated prior to the Complaint Filing Date shall be segregated and need not be produced nor reviewed, but must be identified in a Metadata or Manual Privilege Log, in accordance with Section IV.a.6., along with any Records involving outside counsel that have been determined to be privileged after a manual review. Records resulting from the search dated after the Complaint Filing Date need not be identified, reviewed, logged or produced.

5. Every Electronic Record required to be manually logged pursuant to Section IV.a.3 shall be placed on a Manual Privilege Log or as a manual entry on a Metadata Privilege Log.

6. After any electronic segregation or other manual review is complete, Parties utilizing this electronic protocol will further categorize the Records and generate a Metadata Privilege Log for all documents involving outside counsel manually identified as privileged or electronically determined to be presumptively privileged, as follows:

A. For each Electronic Record withheld for privilege, the Metadata Privilege Log shall contain the following metadata fields set forth in CMO No.

8, Table 1, if they exist: BegDoc, EndDoc, BegAttach, EndAttach, Master_Date, Author, To, CC, BCC, Custodian, NativePath, LastModDate, LastModTime, and LastModAuthor.

B. The Metadata Privilege Log will also contain a subject matter description, which will be populated through the use of electronic search terms identified as follows:

(i) An Electronic Record will be described as “regarding securities issues” if its text does not include the terms described in IV.a.6.(C), but includes the terms: “10k,” “10-k,” “10Q,” “10-Q,” “8k,” “8-k,” “securities,” “Securities and Exchange Commission,” “SEC,” “analyst call,” “shareholder!,” “public /2 statement,” (“stock! /5 price or trad!”), “fraud,” “audit! w/5 report!” or “auditor.”

(ii) An Electronic Record will be described as “regarding intellectual property issues” if its text does not include the terms described in IV.a.6.(C), but includes the terms: “patent,” “copyright,” or “infring!,” “intellectual property,” “IP,” “I.P.,” “trade secret!,” “trademark,” “mark” or “proprietary.”

(iii) An Electronic Record will be described as “regarding product liability issues” if its text does not include the terms described in IV.a.6.(C), but contains the terms: “negligence,” “injur!,” “malfunction,”

“contaminat!,” “foreign /2 object,” “salmonella,” “illness,” “sick!,”
“customer /3 complain!,” “serious /3 complain!” or “infest!.”

(iv) An Electronic Record will be described as “tax law issues” if its text does not include the terms described in IV.a.6.(C), but includes the terms: “tax,” “IRS,” “tariff” or “Internal Revenue Service.”

(v) An Electronic Record will be described as “regarding Labor and Employment Issues” if its text does not include the terms described in IV.a.6.(C), but includes the terms: “labor,” (“collective” /3 “bargain!”), “union,” “terminat!,” “fire,” “sever!,” “discrimin!,” (“work!” /2 “compensation”) or “1983.”

(vi) An Electronic Record will be described as “regarding transactional issues” if its text does not include the terms described in IV.a.6.(C), but includes the terms: “contract,” “merger,” “M & A,” “M&A,” “combination,” “acquisition,” “acquir!,” (“purchas!” /2 “agreement”), (“sale” /2 “agreement”), “joint /2 venture,” “divest!,” “breach,” “clause,” or (“sale” or “sell”) /10 (“division” or “business” or “line” or “company”).

(vii) An Electronic Record will be described as “regarding corporate governance” if its text does not include the terms described in

IV.a.6.(C), but includes the terms: “audit,” “committee,” “subcommittee,” “board” or “resolution.”

(viii) An Electronic Record will be described as “regarding licensing” if its text does not include the terms described in IV.a.6.(C), but includes the terms: CADBURY ONLY: (“licens!” or “licenc!”) and not (“Hershey” or “Mars” or “Nestlé” or “Nestle”)); HERSHEY ONLY: (“licens!” or “licenc!”) and not (“Cadbury” or “Mars” or “Nestlé” or “Nestle”)); MARS ONLY: (“licens!” or “licenc!”) and not (“Hershey” or “Cadbury” or “Nestlé” or “Nestle”)); NESTLÉ ONLY: (“licens!” or “licenc!”) and not (“Hershey” or “Cadbury” or “Mars”)).

(ix) An Electronic Record will be described as “regarding regulatory matters” if its text does not include the terms described in IV.a.6.(C), but includes the terms: “FDA,” “Food and Drug Administration,” “regulat!,” “Canadian Food Inspection Agency,” “CFIA,” “government!,” “rule!,” “prohibit,” “lobby” or “lobbyist.”

C. The Metadata Privilege Log subject matter description for Electronic Records that contain the following terms: “antitrust,” “anti trust,”

“anti-trust,” (pric! /20 (Cadbury or Hershey! or Mars or Nestl!))¹ OR “trade association” will be populated pursuant to the provisions set forth in IV.a.6.(D)(i)-(ii).

D. The Metadata Privilege Log subject matter description for all other Electronic Records that are determined to be privileged, either as a result of automatic or manual segregation that do not hit on strings described in IV.a.6.(B) or IV.a.6.(C), will be treated as follows:

(i) The Metadata Privilege Log subject matter description for those Electronic Records will be populated by those Electronic Records’ actual subject metadata fields (i.e. the subject line of an e-mail) after such subject metadata fields have been reviewed for privilege.

(ii) If any subject metadata field is deemed to be privileged in the course of this review, the Metadata Privilege Log subject matter description will be manually described, after review of the actual Electronic Record.

b. Insofar as the Discovery period in this action ends as of December 31, 2007, and the first Plaintiffs’ complaint was filed on December 21, 2007, the Parties

¹ Each Party shall not use the search term relating to that specific Party. For example, The Hershey Company will not use “Hershey!” as a search term for these purposes.

agree that Records between a Producing Party and that Party's outside counsel, occurring after the Complaint Filing Date need not be identified, reviewed, logged or produced.

In-House Counsel To: and From:; Outside Counsel CC:

c. Electronic Records involving (a) in-house counsel as sender or Direct Recipient or (b) outside counsel as a carbon copy recipient may be segregated and logged in a Metadata Privilege Log using the format described in Section IV.a.6.(A),(B)(i) – (vii) in accordance with the following procedures:

1. Parties wishing to use the electronic protocol without conducting a manual review of the Electronic Records involving in-house counsel to:, from: or outside counsel cc: will disclose the names of in-house counsel used for the search.

2. Parties wishing to use the electronic protocol will apply the search terms described in Section IV.a.6.(B)(i) – (ix) to Electronic Records in which one or more names of a Party's in-house counsel appears as an author or Direct Recipient or outside counsel as a carbon copy, to isolate potentially Protected Information and/or generate subject information for the Metadata Privilege Log.

3. The Metadata Privilege Log subject matter description for Electronic Records involving in-house counsel as an author or Direct Recipient or outside counsel as carbon copy that contain the following terms: "antitrust,"

“anti trust,” “anti-trust,” (pric! /20 (Cadbury or Hershey! or Mars or Nestl!))²
OR “trade association” will be populated pursuant to the provisions set forth in
IV.a.6.(D)(i)-(ii).

4. All other Electronic Records in which inside counsel is a sender or recipient or outside counsel is a carbon copy that are determined to be privileged, either as a result of automatic or manual segregation that do not hit on strings described in IV.a.6.(B)(i) – (ix) or IV.a.6.(C) will be searched against the terms set forth in Table A. Any Records resulting from any of these searches shall be segregated and need not be produced nor reviewed, but must be identified in a Metadata or Manual Privilege Log. The subject matter description for all Records described in this sub-paragraph will be treated as set forth in the next subparagraph.

5. The subject matter fields for all other Electronic Records that are determined to be privileged, either as a result of automatic or manual segregation that are not responsive to the strings described in IV.a.6.(B), IV.a.6.(C), or Table A will be treated as follows:

A. The Metadata Privilege Log subject matter description for

² Each Party shall not use the search term relating to that specific Party. For example, The Hershey Company will not use “Hershey!” as a search term for these purposes.

those Electronic Records will be populated by those Electronic Records' actual subject metadata fields (i.e. the subject line of an e-mail) after such subject metadata fields have been reviewed for privilege.

B. If any subject metadata field is deemed to be privileged in the course of this review, the Metadata Privilege Log subject matter description will be manually described, after review of the actual Electronic Record.

6. In using the search terms set forth in Table A the Producing Party must (a) make reasonable efforts to ensure that automatically-generated language in electronic communications (such as disclaimers automatically inserted as email footers) will not cause the search term filter to screen communications on the basis that the search terms listed in Table A appear only in the automatically-generated language, and (b) disclose in advance to the Requesting Party the efforts to be used, including disclosing any additional search terms applied, to identify electronic communications containing automatically-generated language that includes one or more of the terms listed in Table A.

7. The search terms in Table A are not case-sensitive; the Producing Party shall ensure that the search method employed will capture the listed terms whether in upper-case, lower-case or a combination thereof. In addition, some

of the search terms in Table A employ an exclamation point (!) as a wild-card; the Producing Party shall ensure that the search method employed will capture all terms that begin with the word or partial word preceding such an exclamation point. For example, a search for privile! must capture all of the following terms: privilege, privileged, Privilege, Privileged.

d. Insofar as the Discovery period in this action ends as of December 31, 2007, and the first Plaintiffs' complaint was filed on December 21, 2007, the Parties agree that Records between a Producing Party and that Party's in-house counsel, or where outside counsel is copied, occurring after the Complaint Filing Date need not be identified, reviewed, logged or produced.

e. The Parties agree that they may employ any additional search terms or search methodology they choose to identify potentially privileged Records, including Electronic Records and hard copy Records such as paper Records that have been scanned or otherwise converted into an electronic image. However, records that are segregated by methods other than those described in Section IV.a.6. must be manually reviewed by the Producing Party to confirm the Record's privilege.

f. Counsel for a Producing Party may mask ("redact") Protected Information. However, any Record in which Protected Information has been redacted shall bear a mark on its face indicating that a redaction has occurred. In addition, the reason for all such redactions shall be stated on a log to be provided.

g. Nothing in this Order shall limit the right of a Producing Party, subject to the schedule in Section III.e herein, to conduct a traditional privilege review or to produce a privilege log in any form that fulfills the requirements of Fed. R. Civ. P. 26(b)(5).

V. INADVERTENT PRODUCTION OF PRIVILEGED INFORMATION

a. The Parties agree that the inadvertent disclosure of Protected Information shall be covered by Section 5.4 of CMO No. 7.

b. To the extent that the Producing Party recalls a document pursuant to Section 5.4 of CMO No. 7 that the Requesting Party has relied on in a submission to the Court, including an expert report, the Parties agree that this fact alone will not be a basis to strike that submission. The Parties further agree that the Requesting Party will not continue to rely on the recalled Record but will be allowed to substitute the recalled document with another non-privileged document within a reasonable time after the Producing Party's notice of recall.

VI. PRIVILEGE MOTIONS

a. A Requesting Party may move the Court for an Order compelling production of Protected Information. Such a motion shall be filed under seal and shall not assert as a ground for entering such an Order the fact or circumstances of any inadvertent production.

b. The Producing Party retains the burden of establishing privileged or protected nature of any Protected Information. Nothing in this paragraph shall limit the right of any Party to petition the Court for an *in camera* review of the Protected Information.

IT IS SO STIPULATED.

Dated: July 23, 2010

Respectfully submitted,

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TABLE A³

(“advice” or “advise”) /3 (“attorney!” or “counsel” or “lawyer!” or “law firm”)

affidavit!

alternative /3 dispute

(ADR or A.D.R.)

arbitrat!

attorney! /5 client

(“court” or “judge) /10 (“proceeding” or “case” or “complaint” or “pleading” or

“answer” or “argu!”)

contract

declaration!

“defense strategy”

deposition!

enjoin

injunction

“joint defense”

lawsuit

³ All terms should be run with the following connector and terms “(!) “and not antitrust or anti-trust or cartel or pric! or [other defendants’ names]”

liability

liable

litigation

mediat!

motion /5 (“dismiss” or “summary judgment” or “summary judgment” or “verdict” or
“compel” or “quash” or “exclude” or “protective order” or “relief”)

opinion! /5 (attorney! or counsel or lawyer!)

privilege!

release!

(“retention” or “retain”) /3 (“attorney” or “counsel” or “lawyer” or “law firm”)

settlement

subpoena!

testimony

“work-product”

“work product”