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UNITED STATES TAX COURT

DYNAMO HOLDINGS LIMITED)
PARTNERSHIP, DYNAMO GP, INC.,)
TAX MATTERS PARTNER, ET AL.,)
)
     Petitioners,)
)
    v.   ) Docket Nos. 2685-11
)   8393-12
)
COMMISSIONER OF INTERNAL REVENUE,) Judge Ronald L. Buch
)
     Respondent.)

ORDER CONCERNING ESI DISCOVERY

At an informal telephonic conference call on November 24, 2015, among the Court and counsel for petitioners and respondent, petitioners and respondent reached a general agreement for the completion of certain ESI discovery. In an order dated November 24, 2015, the Court directed the petitioners and respondent to submit to the Court a draft Court order regarding the ESI discovery no later than December 11, 2015.

Background

Petitioners have funded the technology assisted review of the contents of two digital backup tapes created with respect to their computer system relating, at least in part, to the time period relevant to the tax returns at issue in these consolidated cases. Petitioners, after removing documents claimed to be privileged, permitted counsel for respondent to review multiple seed sets in order to generate the algorithm ("Algorithm") to be used to reduce the universe of digital documents to a more manageable number. After ten seed sets, the Algorithm had been refined to the point that petitioners' ESI vendor concluded that further sample sets would be unlikely substantially to improve it. At present, petitioners' vendor estimates that running the Algorithm against the entire universe of approximately 500,000 documents would produce the following results at the indicated levels of recall[1] and precision[2]:

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[1] In this type of project, the word "recall" represents the percentage of all truly responsive documents in the total

ATTACHMENT

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Recall target	65%	70%	75%	80%	85%	90%	95%
Projected true positives	8,712	9,075	9,801	10,527	11,253	11,979	12,705
Projected true positives plus false positives	52,336	54,880	69,781	122,116	139,563	157,736	174,091
Precision	16%	16%	14%	8%	8%	7%	7%

Seeking the largest number of true positive documents,
respondent elected to use the 95% recall target.

Order

     Upon the agreement of petitioners and respondent, it is
hereby ORDERED:

General Provisions

     1.   Petitioners will cause their ESI vendor to run the
Algorithm to search the 500,000 documents using a recall target
of 95% to generate a set of documents ("Initial Set").

     2.   Petitioners will then cause their ESI vendor to run a
separate algorithm ("Second Algorithm") on the Initial Set to
remove documents from the Initial Set as tentatively protected
from production. Petitioners will list the documents identified
as tentatively protected from production ("Withheld Set") on a
computer-generated privilege log ("Privilege Log"). Petitioners
and respondent agree that the Second Algorithm may remove
documents that are not protected from production and miss other
documents that are protected from production. To account for
this, petitioners and respondent will follow the provisions set
forth, infra, at paragraphs 6. through 8.

     3.   Petitioners will deliver the documents remaining in
the Initial Set after the removal of the Withheld Set
("Production Set") and the Privilege Log to respondent via a
portable device ("Portable Device") no later than January 4,
2016. Petitioners will deliver the Production Set as a
Concordance deliverable with single-page TIF files, with a load
file in .dat file format, except for spreadsheets and

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universe of documents that will be gathered through running a
particular algorithm.
[2] In this context, the term "precision" reflects the percentage
of documents gathered targeting a particular level of recall
that is truly responsive. The higher the level of recall
sought, the larger the number of documents needed to be gathered
and the smaller the percentage that is truly responsive.

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Powerpoints, which respondent requests in native format.
Petitioners will provide the final relevance score that the
Algorithm generated for each document, along with the following
metadata fields for the .dat file: BATESFIRST, BATESLAST,
ATTACHFIRST, ATTACHLAST, EMAILTO, EMAILFROM, EMAILCC, EMAILBCC,
AUTHOR, DATESENT, SUBJECT, ORIGINALFILENME, FILEPATH, EMAILPATH,
LASTMODDATE, CREATEDATE, CUSTODIAN, DUPECUSTODIAN, SOURCE,
DUPESOURCE, NATIVEPATH, NATIVEFILENAME AND RECIPIENT, or
equivalent fields, and the extracted text files for the
documents produced.

     4.   Respondent will upload the Production Set onto a
server where it will be accessible via respondent's Concordance
review platform. The Production Set will be backed up to
respondent's back-up storage. Respondent will review the
Production Set using the same standards respondent used to
review the seed sets. Respondent estimates that it will take
approximately 60 days for respondent to review the Production
Set. Respondent may retain the documents that respondent
determines to be relevant ("Relevant Documents"). Upon
respondent's completion of respondent's review of the Production
Set, respondent will provide petitioners with a list of the
Relevant Documents referencing them by their document identifier
numbers ("Relevant Documents List").

     5.   Respondent may not use any document respondent obtains
through petitioners' production of the Production Set unless
respondent lists the document in the Relevant Document List.
After respondent's review of the Production Set, respondent will
immediately return the Portable Device to petitioners and delete
all copies of documents from the Production Set, other than the
Relevant Documents, from respondent's server. Respondent will
delete all copies of the Production Set from respondent's back-
up storage within six months, pursuant to respondent's operating
procedures.

Treatment of documents identified as privileged that are
challenged and recovery of privileged documents inadvertently
produced

     6.   Petitioners will make a reasonable attempt to remove
from the Initial Set documents that are protected from
production. Petitioners and respondent agree that production of
any document by petitioners in the Production Set shall not be
deemed a waiver by petitioners of any protection against
production. Petitioners and respondent agree respondent's

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review of the Production Set will be conducted consistent with
the principles of ABA Model Rule 4.4(b).

    7.   In the event that the list of documents on the
Relevant Documents List does not exceed 15,000, petitioners
shall have 30 days from petitioners' receipt of the Relevant
Documents List to identify in writing any documents ("Clawback
Documents") listed on the Relevant Documents List as protected
from production. In the event that there are more than 15,000
documents on the Relevant Documents List, petitioners will have
45 days to identify in writing any Clawback Documents.
Petitioners waive any protection against production for any
document petitioners do not timely identify as a Clawback
Document. Respondent shall have 10 days after respondent's
receipt of the petitioners' identification of the Clawback
Documents to identify in writing any Clawback Documents that
respondent believes are not protected from production.
Respondent waives any argument that a Clawback Document is not
protected from production if respondent does not timely
challenge it. The parties will negotiate in good faith to
attempt to resolve any dispute regarding any Clawback Documents.
In the event that the parties are unable to resolve the dispute
in seven days, the parties agree to submit the dispute to the
Court. In the event that Clawback Documents are delivered to
the Court, they will be delivered under seal, and in accordance
with the Court's rules.

    8.   Respondent shall have 45 days from respondent's
receipt of the Privilege Log delivered with the Production Set
to give petitioners notice that respondent challenges
petitioners' withholding of any document ("Contested Document").
Respondent waives any argument that a Privilege Log document is
not protected from production if respondent does not timely
challenge it. Petitioners shall have 10 days from the receipt
of respondent's notice that there are Contested Documents to
disagree. Petitioners waive any protection against production
for any Contested Document petitioners do not timely challenge.
The parties will negotiate in good faith to attempt to resolve
any Contested Document dispute. In the event that the parties
are unable to resolve the dispute in seven days, the parties

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agree to submit the dispute to the Court.

                                   (Signed) Ronald L. Buch
                                   Judge

Dated: Washington, D.C.
       December __, 2015

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|             US TAX COURT              |
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|     The parties shall comply with     |
|      the foregoing agreed order.      |
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|             DEC 15 2015               |
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|       (Signed) Ronald L. Buch         |
|               Judge                   |
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