

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>IN RE: PROCESSED EGG PRODUCTS</b>	:	
<b>ANTITRUST LITIGATION</b>	:	
	:	<b>MDL No. 2002</b>
	:	<b>08-md-02002</b>
<hr/>	:	
	:	
<b>THIS DOCUMENT APPLIES TO:</b>	:	
<b>ALL ACTIONS</b>	:	

**CASE MANAGEMENT ORDER NO. 14 (PRESERVATION ORDER)**

**AND NOW**, this 27th day of March, 2009, upon consideration of the Parties' Joint Proposed Order (Docket No. 51-2) and the Report and Recommendation of Special Master (Docket No. 71), to which no objection has been made, and pursuant to Case Management Order No. 12 (Docket No. 62) and Case Management Order No. 13 (Docket No. 63), it is hereby **ORDERED** that said Report and Recommendation is **APPROVED AND ADOPTED**, and the Court's Order for Preservation of Documents and Electronically Stored Information is as follows:

I. SCOPE OF ORDER

This Order does not address, limit, or determine the relevance, discoverability or admission into evidence of any Record (as defined below), regardless of whether the Record is required to be preserved pursuant to the terms of this Order.<sup>1</sup> This Order does not expand any record preservation requirements under the Federal Rules of Civil Procedure, and it does not limit any protection provided by Rule 37(f). The Parties do not waive any objections as to the production, discoverability, or confidentiality of documents and electronically stored information

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<sup>1</sup> Except as specifically provided in Paragraphs III(E) and III(H)(2).

(“ESI”) preserved under this Order. This Order does not address the Parties’ respective responsibilities for the costs of retrieving or producing documents or ESI that may be subject to discovery.

II. DEFINITIONS

A. “Parties” shall mean all named Plaintiffs in these actions and all named Defendants over which the Court has exercised personal jurisdiction. “Party” shall mean any individually named Plaintiff or named Defendant over which the Court has exercised personal jurisdiction.

B. “Records” shall have the same meaning as “documents” as defined in Federal Rule of Civil Procedure 34(a) that fall within the scope of Federal Rule of Civil Procedure 26(b). Records shall also include “electronically stored information,” as contemplated by the Federal Rules of Civil Procedure.

C. “Backup Systems” refers to computer systems used to store electronic information on magnetic tapes or other media to permit recovery of the information in the event of a disaster such as equipment failure.

D. “Backup Media” refers to magnetic tapes or other media onto which Backup Systems store such electronic information.

E. “Preservation” shall mean taking reasonable steps to prevent the destruction, alteration, deletion, shredding, incineration, wiping, or theft of Records.

F. “Cache File” shall mean a copy of data created by a computer system to a temporary location or “cache,” which allows frequently used data to be accessed more quickly by the computer.

G. “Cookie File” shall mean a file created by web browsers on the user’s hard drive, which is used to identify the user and the user’s preferences when accessing websites.

H. “Snapshot” shall mean a copy of active data files, on active storage media or on a backup media, as of a certain point in time, which preserves the data associated with the files copied as it existed on the original media.

I. “Network Accessible Storage Device” shall mean any hard drive or other data storage device accessible to multiple users remotely over a computer network.

J. “Local Hard Drive” shall mean any hard drive or other device that stores data from a personal computer (whether a desktop or laptop) but that is not part of a network.

### **III. RECORDS REQUIRED TO BE PRESERVED**

A. Within thirty (30) days of the entry of this Order, each Party shall provide to all other parties a list of individual and departmental custodians that are most likely to possess the Party’s relevant Records (“Custodians”), including, for the class period, a brief description of each identified individual’s title and responsibilities and a brief description of each identified department. With this list, each Party shall also provide additional information sufficiently detailed to enable an opposing Party to evaluate that Party’s list of Custodians, including but not limited to a Party’s organization chart(s) sufficient to show the company’s structure for the class period to the extent they exist. Any other Party may dispute such designations within thirty (30) days of receipt of the above information or request additional information that may be needed to evaluate the sufficiency of a Party’s list of custodians. If the Parties are unable to resolve their disputes after good faith negotiations, then any party seeking to add names to the list of Custodians must promptly file a motion with the Court to seek its ruling with respect to the scope of this Order. If no such motion is filed within seventy-five (75) days of the entry of this Order, then the list of Custodians shall be considered complete. Each

Party's list of Custodians, as either agreed to by all other Parties or otherwise ordered by the Court, shall be appended to this Order as "[Insert Party Name]'s Attachment 1 to Preservation Order" within 15 days after the parties agree on the list of Custodians or the Court's order on any objections to the Custodian list.

B. At any time during the case, any Party, upon a showing of good cause, may petition the Court to add names to the list of Custodians, subject to the earlier agreements of this Paragraph. The Record(s) in possession of a Custodian added pursuant to this paragraph will not be considered to have been Retained Records, as defined by Paragraph III(C), retroactively and will only be considered Retained Records going forward from the date an order is entered adding the Custodian's name to Attachment 1.

C. Only the Records in the possession, custody and/or control of the Custodians listed in Attachment 1 are required to be preserved, unless otherwise specifically exempted from preservation by this Order. The Records in the possession, custody and/or control of the Custodians listed in Attachment 1 that are not otherwise exempted from preservation by this Order are referred to as "Retained Records" in this Order. The Parties must take reasonable steps to preserve Records during the process set forth in Paragraph III(A), which obligation may be satisfied by notifying Custodians that the Parties expect to list on Attachment 1 of their duties and obligations with respect to preserving Retained Records under the terms of this Order. At its option, during the process set forth in Paragraph III(A), a Party may also comply with its obligation to preserve electronic Records as set forth in Section III(G)(3) and (4).

D. The Parties shall preserve any Retained Records in their possession, custody or control during the pendency of this action, including any appeals.

E. For Retained Records required to be preserved under this Order, the Parties shall

retain the Records in whatever media the Preserving Party chooses, paper or electronic (including optical images of paper or electronic Records). This Order does not obligate Parties to segregate such Records from other Records or Backup Media where they may reside. This Order does not obligate Parties to image records otherwise stored in paper form, and it does not obligate Parties to retain paper Records if they have been adequately imaged as they were kept in the ordinary course of business (maintaining the integrity and organization of the document). No party shall object or raise admissibility issues under the Federal Rules of Evidence based on such imaging of paper Records pursuant to this Paragraph.

F. Provided both that a Party is otherwise complying with its obligation to preserve Retained Records required to be retained under this Order and that all motions filed pursuant to Paragraph III(A) have been decided (or if no motions are filed, the time for filing such motions has passed), that Party shall not be required to retain Backup Media.

G. Given the number of Parties and the wide range of approaches used by the Parties to manage records (including the management of ESI and the systems used for its recovery in the event of a disaster), it is not practical to attempt to define a single detailed process that all Parties must follow in order to preserve Retained Records. Instead, a Party may use any reasonable method to preserve Retained Records consistent with a Party's record management systems or ordinary practices. The Parties are required to act in good faith and may not transfer ESI to paper form or downgrade ESI for the primary purpose of increasing the burden of discovery for other Parties.

H. Retained Records. The Parties shall preserve Retained Records as follows:

1. Paper Records

For draft or original Retained Records maintained in paper form, at least one copy of all unique Records in paper form or in electronic form as permitted by III(E) above.

2. Electronic Mail

For electronic mail Retained Records, at least one electronic copy of all such Records, including the text of the message and any attachments, and, to the extent such information was created and maintained by the electronic mail system in the normal course of business, available header information associated with a particular piece of electronic mail identifying the message's ID, recipient(s), CC, BCC, sender(s), subject or title, the date and time the message was sent, and the name, count, size, last author, type, creation and last modified date of associated attachments, if any.

For each Record, the following metadata elements shall also be preserved: edited or modified by, version number, any formulaic metadata associated with spreadsheets, and any comments and/or track changes associated with word processing documents. The obligation to preserve these metadata elements exists only to the extent that it is possible to capture such data for a particular file.

The Parties are not required to preserve any other metadata associated with an electronic mail message, other than those fields identified pursuant to this Paragraph. The Parties are not required to retain identical multiple instances of an electronic message sent to multiple recipients (e.g., an email that cc'ed five recipients need only be produced once), provided that all of the recipients can be identified from Retained Records. Where a subsequent electronic mail message contains all of the portions of an earlier message that are required to be preserved under this paragraph (e.g., forwarded or replied- to messages), it is not necessary for the Party to preserve the earlier message in addition to the subsequent inclusive message (provided that the Producing Party agrees not to object or raise admissibility issues under Fed. R. of Ev. based on the lack of such preservation of the earlier message).

3. Other Electronic Records on Computer Systems Saved on Network

Accessible Storage Devices

For Retained Records maintained in electronic form on Network Accessible Storage Devices, and not covered by Paragraph III(H)(2) above, at least one copy of all such Records and agreed-upon metadata identified in Paragraph III(H)(2). Without restricting the freedom to use reasonable alternate methods granted by Paragraph III(G) on how to preserve such Records and agreed upon metadata identified in Paragraph III(H)(2), the Parties may fulfill their preservation obligations for electronic Retained Records on Network Accessible Storage Devices by preserving a Snapshot, through use of a system designed and programmed to preserve Records, or by taking reasonable and good faith steps to: (i) notify Custodians who possess and/or control electronic Retained Records saved on Network Accessible Storage Devices of their duties and obligations with respect to preserving Retained Records under the terms of this Order, (ii) preserve the Records of such Custodians (provided, however, that no party shall be required to take a “snapshot” of its active data files as a result of this provision), and (iii) monitor compliance with the preservation requirements of this Order by re- notifying Custodians of their duties and obligations every six months.

4. Other Electronic Records Saved on Local Hard Drives

For electronic Retained Records saved to a local hard drive, the Parties shall take reasonable, good faith steps to preserve such Records and agreed upon metadata identified in Paragraph III(H)(2). Without restricting the freedom to use reasonable alternate methods granted by Paragraph III(E), the Parties may fulfill their preservation obligations for electronic Retained Records saved on local hard drives by preserving records and agreed upon metadata identified in Paragraph III(H)(2), or by taking reasonable and good faith steps to: (i) notify Custodians who possess or control electronic Retained Records saved on local hard drives of their duties and obligations with respect to

preserving Retained Records under the terms of this Order; (ii) preserve the Records of such Custodians (provided, however, that no party shall be required to take a “snapshot” of its active data files as a result of this provision); and (iii) monitor compliance with the preservation requirements of this Order by re-notifying Custodians of their duties and obligations every six months. At its option, a Party may fulfill its obligation to preserve documents saved on a local hard drive by preserving a Snapshot of such Records.

For all Retained Records, the parties’ preservation obligation is limited to those steps reasonably necessary to secure evidence for the fair and just resolution of the matter in dispute. Each party’s preservation approach must be reasonable and consistent with their record management system. The parties must exercise their own judgment, made upon reasonable inquiry and in good faith, about the data locations that should be subject to preservation efforts. A party may use any reasonable method to preserve its electronically stored information.

#### **IV. RECORDS NOT REQUIRED TO BE PRESERVED**

Notwithstanding any other provision of this Order, the Parties have no obligation to preserve the following:

- A. Telephone voicemail recorded messages;
- B. Web content, including but not limited to, Internet, intranet and extranet web pages and their iterations;
- C. Transitory information not otherwise stored as part of business practices;
- D. Data created by the normal operation of computer systems -- including but not limited to metadata not enumerated within this Order, Cookie Files, Cache Files and temporary system files, and data fragments contained in slack space or unused portions of a hard drive --

that could only be read using forensic recovery tools;

E. Briefs, motions, legal or factual memoranda, notes, or other similar materials created by an attorney, law firm, or corporate legal department representing any Party to any case in this proceeding, as well as Records representing, containing or referring to communications exclusively between attorneys and the Parties in anticipation of or regarding this Litigation or any litigation or investigation relating to this Litigation that were created on or after March 1, 2008;

F. Identical copies of Retained Records, provided at least one copy of a Retained Record is preserved in either paper or electronic form (maintaining the integrity and organization of the record);

G. Records filtered out by an automatic spam and/or virus filter, so long as the filtering criteria are reasonable (such criteria to be provided to any other Party upon request);

H. Records not in the possession of the Custodians listed in each Party's Attachment 1 to Preservation Order;

I. Record created before January 1, 1999; and

J. Records created after December 31, 2008.

**V. PERMISSIBLE MODIFICATIONS AND ALTERATIONS OF RECORDS**

Consistent with Paragraph VI.C., Parties shall not be in violation of this Order if Records are altered as a result of any of the following actions undertaken in good faith (and not for any reason based upon this Litigation) and in the ordinary course of business:

A. Routine maintenance and operation of a Party's computer systems;

B. Upgrading, loading, reprogramming, customizing, or migrating software, even if such actions modify or alter the way data is maintained, stored or viewed, provided the data itself

is not altered;

C. Inputting, accessing, updating or modifying data in a database, resulting in the database being modified or altered;

D. Editing, modifying, or taking down an Internet, extranet, or intranet site; and

E. Editing or revising copies of Retained Records, as long as an unedited or unrevised identical version is preserved.

## **VI. IMPLEMENTATION AND MODIFICATION OF ORDER**

A. The Court recognizes that a Party may need up to 60 days to put in place systems and procedures implementing this Order. In the meantime, Parties will use reasonable efforts to preserve Records.

B. Each Party shall communicate the existence and substance of the obligation to preserve documents to those employees responsible for carrying out the Party's obligations hereunder as well as Custodian(s) that a Party expects to list on its Attachment 1, and maintain a record of to whom the existence and substance of this information has been communicated. An e-mail or paper memorandum directed to such employees as well as the Custodian(s) expected to be listed on Attachment 1 shall be sufficient to communicate these obligations.

C. Notwithstanding a Defendant's obligation to preserve Retained Records in accordance with this Order, a Defendant shall send written notice to Plaintiffs of its intention to take action pursuant to routine policies and programs or as a result of other circumstances that would be reasonably anticipated to result in Retained Records being destroyed, lost, or otherwise altered. Service of notice of such intention must be provided to Plaintiffs' Liaison Counsel Steven Asher. Such notice shall include a detailed description of the Retained Records that

would be affected. If, within 30 days after receiving such written notice, Plaintiffs' Liaison Counsel does not indicate in writing any objection, then Plaintiffs shall be deemed to have waived any objection to such destruction or alteration.

D. The Parties are directed to confer to resolve questions as to what Records are required to be preserved under this Order. Counsel for the Parties may stipulate and agree in writing that specific Records need or need not be preserved. Any dispute pursuant to this Paragraph shall be resolved by the Court or any appointed Special Master.

E. In the event that any Party's data management systems are such as to make any term of this Order unreasonably burdensome or impossible for that Party to comply with, counsel for that Party and opposing counsel may negotiate and agree in writing to any reasonable exception to or modification of this Order and a copy of such written agreement shall be provided to the Court promptly. If such negotiation does not lead to an agreed upon modification, the Party may apply to this Court for an exception to or modification of this Order.

BY THE COURT:

S/Gene E.K. Pratter  
GENE E.K. PRATTER  
United States District Judge