IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CALLWAVE COMMUNICATIONS, LLC, Plaintiff, v. AT&T MOBILITY, LLC and GOOGLE INC., Defendants.	)	C.A. No. 12-1701 (RGA)
CALLWAVE COMMUNICATIONS, LLC, Plaintiff, v. SPRINT NEXTEL CORP. and GOOGLE INC., Defendants.	)	C.A. No. 12-1702 (RGA)
CALLWAVE COMMUNICATIONS, LLC, Plaintiff, v. T-MOBILE USA INC. and GOOGLE INC., Defendants.	)	C.A. No. 12-1703 (RGA)
CALLWAVE COMMUNICATIONS, LLC, Plaintiff, v. VERIZON COMMUNICATIONS, INC., CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS and GOOGLE INC., Defendants.	)	C.A. No. 12-1704 (RGA)

CALLWAVE COMMUNICATIONS, LLC, Plaintiff, v. AT&T MOBILITY, LLC, BLACKBERRY LTD. and BLACKBERRY CORP., Defendants.	)	C.A. No. 12-1788 (RGA)
BROADSOFT INC., Plaintiff, v. CALLWAVE COMMUNICATIONS, LLC, Defendant.	)	C.A. No. 13-0711-RGA

ORDER REGARDING DISCOVERY, INCLUDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION ("ESI")

1. **Purpose.** This Order will govern discovery of electronically stored information ("ESI") in this case as a supplement to the Federal Rules of Civil Procedure and any other applicable orders and rules.

2. **General Provisions.**

a. **Cooperation.** Parties are expected to reach agreements cooperatively on how to conduct discovery under Fed. R. Civ. P. 26-36. In the event that the parties are unable to agree on the parameters and/or timing of discovery, the following default standards shall apply until further order of the Court or the parties reach agreement.

b. **Proportionality.** Parties are expected to use reasonable, good faith and proportional efforts to preserve, identify and produce relevant information.[1] This includes identifying appropriate limits to discovery, including limits on custodians, identification of relevant subject matter, time periods for discovery and other parameters to limit and guide preservation and discovery issues.

c. **Preservation of Discoverable Information.** A party has a common law obligation to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control.

(i) Absent a showing of good cause by the requesting party, the parties shall not be required to modify, on a going-forward basis, the procedures used by them in the ordinary course of business to back up and archive data; provided, however, that the parties shall preserve the non-duplicative discoverable information currently in their possession, custody or control.

(ii) Absent a showing of good cause by the requesting party, the categories of ESI identified in Schedule A attached hereto need not be preserved.

d. **Privilege.**

(i) The parties are to confer on the nature and scope of privilege logs for the case, including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged.

(ii) With respect to information generated after the filing of the complaint, parties are not required to include any such information in privilege logs.

(iii) Activities undertaken in compliance with the duty to preserve information are protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

---

[1] Information can originate in any form, including ESI and paper, and is not limited to information created or stored electronically.

(iv) Pursuant to Fed. R. Evid. 502(d), the production of a privileged or work-product-protected document is not a waiver of privilege or protection from discovery in this case or in any other federal or state proceeding. Information that contains privileged matter or attorney work product shall be immediately returned and/or destroyed if such information appears on its face to have been inadvertently produced or if notice is provided of inadvertent production.

3. Initial Disclosures. Each party shall disclose:

a. **Custodians.** The 10 custodians (or as many as practicable if fewer than 10 custodians have relevant and noncumulative information) most likely to have discoverable information in their possession, custody or control. This disclosure is per party across all cases and discovery tracks and is not a per-track requirement. The custodians shall be identified by name, title, role in the instant dispute, and the subject matter of the information.

b. **Non-custodial data sources.** A list of the non-custodial data sources that are most likely to contain non-duplicative discoverable information for preservation and production consideration.

c. **Notice.** The parties shall identify any issues relating to:

(i) Any additional sources of ESI not identified in Schedule A (by type, date, custodian, electronic system or other criteria) that a party asserts are not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(C)(i).

(ii) Third-party discovery under Fed. R. Civ. P. 45 and otherwise, including the timing and sequencing of such discovery.

(iii) Production of information subject to privacy protections, including information that may need to be produced from outside of the United States and subject to foreign laws.

4. Specific E-Discovery Issues.

a. **On-site inspection of electronic media.** Such an inspection shall not be permitted absent a demonstration by the requesting party of specific need and good cause.

b. **Search methodology.**

(i) Nothing in this Order shall require a producing party to utilize any particular collection protocol for any particular population of ESI or entire ESI data source. For avoidance of doubt, targeted collection may be used to collect potentially relevant documents from an ESI data source.

(ii) If the producing party elects to use search terms to locate potentially responsive ESI, it shall disclose a list of search terms to the requesting party. Absent a showing of good cause, a requesting party may request no more than 5 additional terms to be used in connection with the electronic searches conducted by the producing party per discovery track. Focused terms, rather than over-broad terms (e.g., product and company names), shall be employed. The parties shall meet and confer on excluding information that is not discoverable under Fed. R. Civ. P. 26(b), including modifying terms where the burden or expense of the proposed terms outweighs the likely benefit.

(iii) Each party is required to produce only a single copy of a responsive document and each party may de-duplicate responsive ESI (based on MD5 or SHA-1 hash values at the document level) across custodians. For emails with attachments (to the extent the parties agree or are ordered to produce emails), the hash value is generated based on the parent/child document grouping. To the extent that de-duplication through MD5 or SHA-1 hash values is not possible, the parties shall meet and confer to discuss any other proposed method of de-duplication.

(iv) In an email thread, only the final-in-time document need be produced, assuming that all previous emails in the thread are contained within the final message. Where a prior email contains an attachment, that email and attachment shall not be removed as a "near-duplicate," unless an identical copy of the attachment is contained in the subsequent-in-time version of the email thread that is being produced.

(v) The producing party shall disclose their list of search terms by July 21, 2014. The requesting party shall respond with its list of additional search terms by July 25, 2014. The parties shall meet and confer by August 1, 2014 to resolve any issues associated with the disclosed search terms.

c. **Format.** ESI and non-ESI shall be produced to the requesting party in the formats described in Schedule B. When a text-searchable image file is produced, the producing party must preserve the integrity of the underlying ESI, i.e., the original formatting, the metadata (as noted below in Schedule B) and the revision history as shown within a document management system ("DMS"), if applicable.

d. **Source Code.** No provision of this Order affects any inspection of source code that is responsive to a discovery request and may be made available consistent with the protective order governing this case.

IT IS SO STIPULATED, through Counsel of Record.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Paul Saindon

Jack B. Blumenfeld (#1014)
Paul Saindon (#5110)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
jblumenfeld@mnat.com
psaindon@mnat.com

Attorneys for Google Inc.

OF COUNSEL:

James F. Hurst
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601-5600
(312) 558-5600

Scott R. Samay
Peter Lambrianakos
Krishnan Padmanabhan
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
(212) 294-6700

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Stephen J. Kraftschik

Karen Jacobs (#2881)
Stephen J. Kraftschik (#5623)
Eleanor G. Tennyson (#5812)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
kjacobs@mnat.com
skraftschik@mnat.com
etennyson@mnat.com

Attorneys for Sprint Nextel Corp. (n/k/a Sprint Communications, Inc.)

OF COUNSEL:

Kirk R. Ruthenberg
Mark L. Hogge
Shailendra K. Maheshwari
DENTONS US LLP
1301 K Street, N.W., Suite 600
Washington, DC 20005

CONNOLLY GALLAGHER LLP

/s/ Arthur G. Connolly, III

Arthur G. Connolly, III (#2667)
Connolly Gallagher LLP
The Brandywine Building
1000 West Street, Suite 1400
Wilmington, DE 19801
(302) 888-6318
aconnolly@connollygallagher.com

Attorneys for T-Mobile USA, Inc.

OF COUNSEL:

Ramsey M. Al-Salam
Kaustuv M. Das
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

Kirk R. Ruthenberg
Mark L. Hogge
Shailendra K. Maheshwari
DENTONS US LLP
1301 K Street, N.W., Suite 600
Washington, DC 20005
(202) 408-6400

SEITZ ROSS ARONSTAM & MORITZ LLP

/s/ Benjamin J. Schladweiler

Collins J. Seitz, Jr. (#2237)
Benjamin J. Schladweiler (#4601)
100 S. West Street, Suite 400
Wilmington, DE 19801
(302) 576-1600
cseitz@seitzross.com
bschladweiler@seitzross.com

Counsel for AT&T Mobility LLC

OF COUNSEL:

Joseph P. Zammit
FULBRIGHT & JAWORSKI L.L.P.
666 Fifth Avenue
New York, NY 10103-3198
(212) 318-3000
jzammit@fulbright.com

Daniel S. Leventhal
Brett McKean
FULBRIGHT & JAWORSKI L.L.P.
Fulbright Tower
1301 McKinney, Suite 5100
Houston, TX 77010-3095
(713) 651-5151

Mark C. Nelson
Matthew P. Harper
Daniel A. Valenzuela
DENTONS US LLP
2000 McKinney Avenue
Suite 1900
Dallas, TX 75201-1858
(214) 259-0900

SEITZ ROSS ARONSTAM & MORITZ LLP

/s/ Benjamin J. Schladweiler

Collins J. Seitz, Jr. (#2237)
Benjamin J. Schladweiler (#4601)
100 S. West Street, Suite 400
Wilmington, DE 19801
(302) 576-1600
cseitz@seitzross.com
bschladweiler@seitzross.com

Attorneys for Verizon Communications, Inc. and Cellco Partnership d/b/a Verizon Wireless

OF COUNSEL:

Kevin P. Anderson
Karin A. Hessler
Paul M. Kim
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

MORGAN, LEWIS & BOCKIUS LLP

/s/ Jody C. Barillare

Colm F. Connolly (#3151)
Jody C. Barillare (#5107)
The Nemours Building
1007 North Orange Street, Suite 501
Wilmington, Delaware 19801
(302) 574-3000
cconnolly@morganlewis.com
jbarillare@morganlewis.com

Attorneys for AT&T Mobility LLC, Blackberry Ltd., and Blackberry Corp.

Eric Kraeutler
John V. Gorman
Andrew C. Whitney
Squire J. Servance
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
(215) 963-5000

ASHBY & GEDDES, P.A.

/s/ John G. Day

John G. Day (#2403)
Tiffany Geyer Lydon (#3950)
Andrew C. Mayo (#5207)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899
(302) 654-1888
jday@ashby-geddes.com
tlydon@ashby-geddes.com
amayo@ashby-geddes.com

Attorneys for BroadSoft, Inc.

OF COUNSEL:

Jonathan G. Graves
Stephen P. McBride
Kevin A. Lake
COOLEY LLP
One Freedom Square
Reston Town Center
11951 Freedom Drive
Reston, VA 20190-5656
(703) 456-8000

PEPPER HAMILTON LLP

/s/ Edmond D. Johnson

Edmond D. Johnson (#2257)
James Gordon McMillan, III (#3979)
Hercules Plaza, Suite 5100
1313 Market Street
Wilmington, DE 19899-1709
(302) 777-6539
johnsone@pepperlaw.com
mcmillanj@pepperlaw.com

Attorneys for Plaintiff

OF COUNSEL:

William D. Belanger
Noah V. Malgeri
Suparna Datta
Christopher M. Boundy
Leah R. McCoy
PEPPER HAMILTON LLP
125 High Street
19th Fl. High Street Tower
Boston, MA 02110-2736
(617) 204-5100

Gregory S. Bishop
PEPPER HAMILTON LLP
333 Twin Dolphin Drive, Suite 400
Redwood City, CA 94065-2133
(650) 802-3600

IT IS ORDERED that the foregoing Agreement is approved.

Dated: Aug 4, 2014

Hon. Richard G. Andrews
United States District Judge

SCHEDULE A

1. Deleted, slack, fragmented, or other data only accessible by forensics.

2. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.

3. On-line access data such as temporary internet files, history, cache, cookies, and the like.

4. Data in metadata fields that are frequently updated automatically, such as last- opened dates.

5. Automatically saved versions of documents and emails.

6. Back-up data that are substantially duplicative of data that are more accessible elsewhere.

7. Voice messages.

8. Instant messages

9. Electronic mail or pin-to-pin messages sent to or from mobile devices (e.g., iPhone and Blackberry devices), provided that a copy of such mail is routinely saved elsewhere.

10. Other electronic data stored on a mobile device, such as calendar or contact data or notes, provided that a copy of such information is routinely saved elsewhere.

11. Logs of calls made from mobile devices.

12. Server, system, network, or transactional logs.

13. Video and audio recordings.

14. Electronic data temporarily stored by laboratory equipment or attached electronic equipment, provided that such data is not ordinarily preserved as part of a laboratory report.

15. Data remaining from systems no longer in use that is unintelligible on the systems in use.

16. System data that are typically overwritten in the normal course of business.

SCHEDULE B
PRODUCTION FORMAT AND METADATA

1. **Production Components.** Productions shall include, single page TIFFs, Text Files, an ASCII delimited metadata file (.dat) and an image load file that can be loaded into commercially acceptable production software (e.g., Concordance).

2. **Image Load File** shall contain the following comma-delimited fields: BEGBATES, VOLUME, IMAGE FILE PATH, DOCUMENT BREAK, FOLDER BREAK, BOX BREAK, PAGE COUNT.

3. **Metadata Fields and Metadata File.** The parties are only obligated to provide the following metadata for all ESI produced to the extent such metadata exists. The parties are not obligated to populate manually any of the fields below if such fields cannot be extracted from a document, with the exception of the following: BEGBATES, ENDBATES, BEGATTACH, ENDATTACH, CUSTODIAN, and POD. The metadata file shall be delimited according to the following characters:

    - Delimiter = ¶ (ASCII:020)
    - Text-Qualifier = þ (ASCII:254)
    - New Line = ® (ASCII:174)

Field Name	Field Description
BEGBATES	Beginning Bates number as stamped on the production image
ENDBATES	Ending Bates number as stamped on the production image
BEGATTACH	First production Bates number of the first document in a family
ENDATTACH	Last production Bates number of the last document in a family
POD	Confidentiality designation
CUSTODIAN	Includes the Individual (Custodian) from whom the documents originated and all Individual(s) whose documents de-duplicated out (De-Duped Custodian).
SUBJECT	Subject line of email
DATESENT	Date email was sent (format: MM/DD/YYYY)
TO	All recipients that were included on the "To" line of the email

FROM	The name and email address of the sender of the email
CC	All recipients that were included on the "CC" line of the email
BCC	All recipients that were included on the "BCC" line of the email
NATIVELINK	Native File Link (Native Files only)

4. **TIFFs.** Documents that exist only in hard copy format shall be scanned and produced as TIFFs. Unless excepted below, documents that exist as ESI shall be converted and produced as TIFFs. Unless excepted below, single page Group IV TIFFs should be provided, at least 300 dots per inch (dpi) for all documents. Each TIFF image shall be named according to a unique corresponding Bates number associated with the document. Each image shall be branded according to the Bates number and the agreed upon confidentiality designation. Original document orientation should be maintained (i.e., portrait to portrait and landscape to landscape). TIFFs shall show all text and images that would be visible to a user of the hard copy documents.

5. **Color Documents.** Documents containing color need not be produced in color. For the avoidance of doubt, the TIFF images described herein need not be produced in color. Upon the Receiving Party's identification of Documents that it for good cause requests to be produced in color, the Producing Party may produce such Documents in single page, color Joint Photographic Experts Group (.JPEG or .JPG) file format.

6. **Text Files.** A single multi-page text file shall be provided for each document, and the filename should match its respective TIFF filename. A commercially acceptable technology for optical character recognition "OCR" shall be used for all scanned, hard copy documents. When possible, the text of native files should be extracted directly from the native file. Text files will not contain the redacted portions of the documents and OCR text files will be substituted instead of extracted text files for redacted documents.

7. **Image Load Files / Data Load Files.** Each TIFF in a production must be referenced in the corresponding image load file. The total number of documents referenced in a production's data load file should match the total number of designated document breaks in the Image Load file(s) in the production. The total number of pages referenced in a production's image load file should match the total number of TIFF files in the production. The total number of documents in a production should match the total number of records in the data load file.

8. **Bates Numbering.** All images must be assigned a unique Bates number that is sequential

within a given document and across the production sets.

9. **Redaction Of Information.** If documents are produced containing redacted information, an electronic copy of the original, unredacted data shall be securely preserved in such a manner so as to preserve without modification, alteration or addition the content of such data including any metadata therein.

10. **Spreadsheets.** TIFF images of spreadsheets (MS Excel, Google Sheets, Access, Microsoft projects) need not be produced unless redacted, in which instance, spreadsheets may be produced in TIFF format with OCR Text Files. Native copies of spreadsheets shall be produced with a link in the NativeLink field, along with extracted text and applicable metadata fields set forth in Paragraph 3. A TIFF placeholder indicating that the document was provided in native format should accompany the database record. If a spreadsheet has been redacted, TIFF images and OCR text of the redacted document will suffice in lieu of a native file and extracted text. The parties will make reasonable efforts to ensure that any spreadsheets that are produced only as TIFF images are formatted so as to be readable.

11. **Proprietary Files.** To the extent a response to discovery requires production of ESI accessible only through proprietary software, the parties should continue to preserve each version of such information. The parties shall meet and confer to finalize the appropriate production format.

12. **Request(s) for Additional Native Files.** If good cause exists to request production of certain files, other than those specifically set forth above, in native format, the party may request such production and provide an explanation of the need for native file review, which request shall not unreasonably be denied. Any native files that are produced shall be produced with a link in the NativeLink field, along with extracted text and applicable metadata fields set forth in Paragraph 3. A TIFF placeholder indicating that the document was provided in native format should accompany the database record. If a file has been redacted, TIFF images and OCR text of the redacted document will suffice in lieu of a native file and extracted text.