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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT _____

[PLAINTIFF],

Plaintiff,

v.

[DEFENDANT],

Defendant.

CASE NO. [CASE #]

**[MODEL] AGREEMENT
REGARDING DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND
[PROPOSED] ORDER**

[The red/italicized portions below set forth guidance and instruction to the parties in formulating their agreement but may and should be deleted from the text of the final agreement as adopted. Optional provisions may be useful in cases involving more complicated ESI issues or productions.]

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

1 2. TheAs provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ.
2 P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the
3 application of the proportionality standard in discovery, requests for production of ESI and related
4 responses should be reasonably targeted, clear, and as specific as possible.

5 **B. ESI Disclosures**

6 Within 30 days ~~after the Rule 26(f) conference~~of entry of this Order, or at a later time if
7 agreed to by the parties, each party shall disclose:

8 1. Custodians. The five custodians most likely to have discoverable ESI in their
9 possession, custody, or control. The custodians shall be identified by name, title, connection to
10 the instant litigation, and the type of the information under ~~his/her control~~the custodian's control.
11 [The parties may agree to a different number of custodians to be disclosed based on the
12 complexity and nature of the case. This disclosure provision is distinct from the parties'
13 agreement set forth in Section C below about determining the number of custodians from whom
14 ESI should be gathered.]

15 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g., shared
16 drives, servers, ~~etc.~~), if any, likely to contain discoverable ESI. [These lists can identify the
17 databases that are likely to contain discoverable structured data.]

18 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
19 contain discoverable ESI (e.g., third-party email ~~and/or providers~~, mobile device providers,
20 “cloud” storage, ~~etc.~~) and, for each such source, the extent to which a party is (or is not) able to
21 preserve information stored in the third-party data source.

22 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
23 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
24 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).
25 [Section (E)(D)(3)(a)(i) below sets forth data sources and ESI which are not required to be
26 preserved by the parties. Those data sources and ESI do not need to be included on this list.]

1 5. [Optional] Foreign data privacy laws. Nothing in this Order is intended to prevent
2 either party from complying with the requirements of a foreign country's data privacy laws, e.g.,
3 the European Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The parties
4 agree to meet and confer before including custodians or data sources subject to such laws in any
5 ESI or other discovery request.

6 **EC.** **ESI Discovery Procedures**

7 1. On-site inspection of electronic media. Such an inspection shall not be
8 ~~permitted~~required absent a demonstration by the requesting party of specific need and good cause
9 or by agreement of the parties.

10 2. Search methodology. *[The Court presumes that in the majority of cases, the use of*
11 *search terms and queries, file type and date restrictions, and technology-assisted review will be*
12 *reasonably necessary to locate or filter ESI likely to contain discoverable information.]* The
13 parties shall timely confer to attempt to reach agreement on appropriate search terms, ~~or an~~ and
14 queries, file type and date restrictions, data sources (including custodians), and other appropriate
15 computer- or technology-aided ~~methodology~~methodologies, before any such effort is undertaken.
16 The parties shall continue to cooperate in revising the appropriateness of the search ~~terms or~~
17 ~~computer or technology-aided~~ methodology.

18 In the absence of agreement ~~on appropriate search terms, or an appropriate computer or~~
19 ~~technology-aided methodology~~, the following procedures shall apply:

20 a. Prior to running searches:

21 aj. AThe producing party shall disclose the data sources (including
22 custodians), search terms ~~or~~and queries, ~~if any~~ file type and date restrictions, and any other
23 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable
24 information. The ~~parties shall meet and confer to attempt to reach an agreement on the~~ producing
25 ~~party's search terms and/or other methodology~~ party may provide unique hit counts for each
26 search query.

1 ~~bii. If search terms or queries are used to locate ESI likely to~~
2 ~~contain discoverable information, a~~The requesting party is entitled to, within 14 days of the
3 producing party's disclosure, add no more than ~~5 additional~~10 search terms or queries to ~~be used~~
4 ~~in connection with further electronic searches~~those disclosed by the producing party absent a
5 showing of good cause or agreement of the parties. ~~The 5 additional terms or queries, if any,~~
6 ~~must be provided by the requesting party within 14 days of receipt of the producing party's~~
7 ~~production.~~

8 eiii. The following provisions apply to search terms / queries of the
9 requesting party. Focused terms and queries should be employed; broad terms or queries, such
10 as product and company names, generally should be avoided. ~~Absent a showing of good cause, A~~
11 conjunctive combination of multiple words or phrases (e.g., "computer" and "system") narrows
12 the search and shall count as a single search term. A disjunctive combination of multiple words
13 or phrases (e.g., "computer" or "system") broadens the search, and thus each word or phrase shall
14 count as a separate search term unless they are variants of the same word. The producing party
15 may identify each search term or query returning ~~more than 250~~overbroad results demonstrating
16 the overbroad results and a counter proposal correcting the overbroad search or query. [The
17 following provision is optional and includes alternative provisions. The parenthetical numbers
18 given are a starting point for the negotiations and are not intended to prejudge the merits of an
19 overbreadth challenge.] [Optional] A search that returns more than [alternative 1] [(250)
20 megabytes of data is ~~presumed to be overbroad,~~ excluding Microsoft PowerPoint files, ~~image and~~
21 audio files, and similarly large file types] [alternative 2] [(400) unique documents, excluding
22 families], is presumed to be overbroad.

23 ~~d. The producing party shall search both non-custodial data sources and ESI~~
24 ~~maintained by the custodians identified above.~~

25 b. After production: Within 5 days of the producing party notifying the
26 receiving party that it has substantially completed the production of documents responsive to a

1 request, the responding party may request no more than 5 additional search terms or queries. The
2 immediately preceding section (Section C(2)(a)(iii)) applies.

3 c. [Optional] Upon reasonable request, a party shall disclose information
4 relating to network design, the types of databases, database dictionaries, the access control list
5 and security access logs and rights of individuals to access the system and specific files and
6 applications, the ESI document retention policy, organizational chart for information systems
7 personnel, or the backup and systems recovery routines, including, but not limited to, tape
8 rotation and destruction/overwrite policy.

9 3. Format.

10 3a. ~~Format. The parties agree that~~ ESI will be produced to the requesting party
11 with searchable text, in a format to be decided between the parties. Acceptable formats include,
12 but are not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text
13 file), single-page TIFFs (only with load files for e-discovery software that includes metadata
14 fields identifying natural document breaks and also includes companion OCR and/or extracted
15 text files), and searchable PDF.

16 b. Unless otherwise agreed to by the parties, files that are not easily converted
17 to image format, such as spreadsheet, database, and drawing files, should will be produced in
18 native format.

19 c. Each document image file shall be named with a unique number (Bates
20 Number ~~(e.g. the unique Bates Number of the page of the document in question, followed by its~~
21 ~~file extension)~~). File names should not be more than twenty characters long or contain spaces.
22 When a text-searchable image file is produced, the producing party must preserve the integrity of
23 the underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where
24 applicable, the revision history.

25 d. If a document is more than one page, the unitization of the document and
26 any attachments and/or affixed notes shall be maintained as they existed in the original document.

1 e. ~~[Optional]~~ The parties shall produce their information in the following
2 format: single- page images and associated multi-page text files containing extracted text or with
3 appropriate software load files containing all ~~requisite information for use with the document~~
4 ~~management system (e.g., Concordance® or Summation®), as agreed to by the parties~~required
5 by the litigation support system used by the receiving party.

6 bf. ~~If appropriate to the particular case, the parties shall consider whether or~~
7 ~~not the~~[Optional] The full text of each electronic document shall be extracted (“Extracted
8 Text”) and produced in a text file. ~~If the parties so agree, the~~The Extracted Text shall be provided
9 in searchable ASCII text format (or Unicode text format if the text is in a foreign language) and
10 shall be named with a unique Bates Number (e.g., the unique Bates Number of the first page of
11 the corresponding production version of the document followed by its file extension).

12 4. De-duplication. The parties may de-duplicate their ESI production across custodial
13 and non-custodial data sources after disclosure to the requesting party, and the duplicate custodian
14 information removed during the de-duplication process tracked in a duplicate/other custodian
15 field in the database load file.

16 5. Email Threading. The parties may use analytics technology to identify email
17 threads and need only produce the unique most inclusive copy and related family members and
18 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce
19 a less inclusive copy.

20 36. Metadata fields. ~~The parties are to confer and agree on whether metadata is to be~~
21 ~~produced or may be excluded from discovery. Metadata may not be relevant to the issues~~
22 ~~presented or, if relevant, may not be reasonably subject to discovery, or may be subject to cost-~~
23 ~~shifting, considering the factors set forth in Fed. R. Civ. P. 26(b)(2)(C). For example, if one party~~
24 ~~is producing only paper documents, and the other party is producing ESI, the parties should~~
25 ~~confer on whether the additional cost and burden of producing metadata by the party~~
26 ~~producing ESI is reasonable or should be shifted under the facts and circumstances of the case.~~

1 ~~If~~ If the requesting party seeks metadata, the parties agree ~~to produce metadata, and unless~~
2 ~~otherwise agreed, each party shall produce~~that only the following metadata ~~associated with~~
3 ~~ESI~~fields need be produced, and only to the extent it is reasonably accessible: ~~(a) the author(s)~~
4 ~~of the ESI; (b) the recipient(s) of the ESI; (c) the date the ESI was created; and (d) the source~~
5 ~~from which the ESI was produced. The “source” of ESI shall be the name of the person who~~
6 ~~was the custodian of the ESI or, if the name of a person is not available, the storage~~
7 ~~location (e.g., “Regulatory Shared Drive Wayne, PA”). This information will be included~~
8 ~~in the “Author,” “Recipient,” “Date,” and “Source” fields (respectively) for each document~~
9 ~~in the load file associated with the document images. Although it is presumed generally that~~
10 ~~the above list of metadata fields will be provided, the list of metadata fields and non-privileged:~~
11 document type; custodian and duplicate custodians (or storage location if no custodian);
12 author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size; file
13 extension; original file path; date and time created, sent, modified and/or received; and hash value.
14 The list of metadata type is intended to be flexible and may be changed by agreement of the
15 parties, particularly in light of advances and changes in technology, vendor, and business
16 practices.

17 47. [Optional] Hard-Copy Documents. If the parties elect to produce hard-copy
18 documents in an electronic format, the production of hard-copy documents shall will include a
19 cross-reference file that indicates document breaks and sets forth the ~~Custodian or~~
20 ~~Source~~custodian or custodian/location associated with each produced document. Hard-copy
21 documents shall will be scanned using Optical Character Recognition technology and searchable
22 ASCII text files shall will be produced (or Unicode text format if the text is in a foreign language),
23 unless the producing party can show that the cost would outweigh the usefulness of scanning (for
24 example, when the condition of the paper is not conducive to scanning and will not result in
25 accurate or reasonably useable/searchable ESI). Each file shall will be named with a unique Bates
26

1 Number (e.g., the Uniqueunique Bates Number of the first page of the corresponding production
2 version of the document followed by its file extension).

3 ~~5. Privilege Log Based on Metadata. The parties agree that privilege logs shall~~
4 ~~be provided 30 days after the date agreed upon for final production in this matter.~~

5 **D. Preservation of ESI**

6 The parties acknowledge that they have a common law obligation, as expressed in -Fed.
7 R. Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information
8 in the party's possession, custody, or control. With respect to preservation of ESI, the parties
9 agree as follows:

10 1. Absent a showing of good cause by the requesting party, the parties shall not be
11 required to modify the procedures used by them in the ordinary course of business to back-up and
12 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
13 possession, custody, or control.

14 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
15 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure
16 where that data is created after a disclosure or response is made (unless excluded under Sections
17 (D)(3) or (E)(1)-(2).

18 3. Absent a showing of good cause by the requesting party, the following categories
19 of ESI need not be preserved:

- 20 a. Deleted, slack, fragmented, or other data only accessible by forensics.
21 b. Random access memory (RAM), temporary files, or other ephemeral data
22 that are difficult to preserve without disabling the operating system.
23 c. On-line access data such as temporary internet files, history, cache,
24 cookies, and the like.
25 d. Data in metadata fields that are frequently updated automatically, such as
26 last-opened dates (see also Section (E)(5)).
e. Back-up data that are duplicative of data that are more accessible
elsewhere.

- 1 f. Server, system or network logs.
- 2 g. Data remaining from systems no longer in use that is unintelligible on the
- 3 h. Electronic data (e.g., email, calendars, contact data, and notes) sent to or
- 4 from mobile devices (e.g., iPhone, iPad, Android, and Blackberry
- 5 devices), provided that a copy of all such electronic data is automatically
- 6 saved in real time elsewhere (such as on a server, laptop, desktop
- 7 computer, or “cloud” storage).

8 *[The parties should confer regarding any other categories of ESI that may not need to be*

9 *preserved, such as text messages and social media data, in light of the General Principles set*

10 *forth above, and determine whether they can agree that such categories can be added to the non-*

11 *preservation list above.]*

12 **E. Privilege**

13 *[The parties should confer regarding the nature and scope of privilege logs for the case, including*

14 *whether categories of information may be excluded from any logging requirements and whether*

15 *alternatives to document-by-document logs can be exchanged.]*

16 1. A producing party shall create a privilege log of all documents fully withheld from

17 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this

18 Agreement and Order. Privilege logs shall include a unique identification number for each

19 document and the basis for the claim (attorney-client privileged or work-product protection). For

20 ESI, the privilege log may be generated using available metadata, including author/recipient or

21 to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata

22 provide insufficient information for the purpose of evaluating the privilege claim asserted, the

23 producing party shall include such additional information as required by the Federal Rules of

24 Civil Procedure. Privilege logs will be produced to all other parties [alternative language, choose

25 one of the following clauses] [alternative 1] [no later than 30 days after delivering a production]

26 [alternative 2] [no later than 30 days before the deadline for filing motions related to discovery]

unless an earlier deadline is agreed to by the parties.

1 2. Redactions need not be logged so long as the basis for the redaction is clear on the
2 redacted document.

3 3. With respect to privileged or work-product information generated after the filing
4 of the complaint, parties are not required to include any such information in privilege logs.

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

7 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
8 proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding,
9 constitute a waiver by the producing party of any privilege applicable to those documents,
10 including the attorney-client privilege, attorney work-product protection, or any other privilege
11 or protection recognized by law. Information produced in discovery that is protected as privileged
12 or work product shall be immediately returned to the producing party, and its production shall not
13 constitute a waiver of such protection, ~~if) such information appears on its face to have been~~
14 ~~inadvertently produced or () the producing party provides notice within 15 days of discovery by~~
15 ~~the producing party of the inadvertent production.~~

16 DATED: _____

17
18 [Signature blocks]

19
20 **ORDER**

21 Based on the foregoing, IT IS SO ORDERED.

22 DATED: _____

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24 _____
25 The Honorable _____
26 UNITED STATES DISTRICT JUDGE

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THESE PROVISIONS HAVE BEEN MOVED TO THE MAIN BODY OF THE AGREEMENT. THE “MOVE” IS NOT TRACKED; ANY EDITS ARE TRACKED.

~~ADDITIONAL PROVISIONS FOR MORE COMPLEX CASES~~

~~In addition to the provisions set forth in the Model ESI Agreement above, parties may find the following provisions appropriate and useful in addressing more complicated ESI discovery issues. The complexity of ESI discovery varies from case to case and is not necessarily tied to the number or size of the parties or the amount in controversy. The additional provisions below are intended to assist parties in anticipating and addressing early on more complicated ESI discovery issues but may not be appropriate or necessary in every case. The following provisions are intended as suggested provisions from which parties may pick and choose, taking into consideration the needs of the particular case.~~

~~1. Search methodology.~~

~~Upon reasonable request and if appropriate for the particular case, a party shall also disclose information relating to network design, the types of databases, database dictionaries, the access control list and security access logs and rights of individuals to access the system and specific files and applications, the ESI document retention policy, organizational chart for information systems personnel, or the backup and systems recovery routines, including, but not limited to, tape rotation and destruction/overwrite policy.~~

~~2. Format.~~

~~a. Each document image file shall be named with a unique Bates Number (e.g. the unique Bates Number of the page of the document in question, followed by its file extension). File names should not be more than twenty characters long or contain spaces. 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) and, where applicable, the revision history. The parties shall produce their information in the following format: single page images and associated multi page text files containing extracted text or~~

~~with appropriate software load files containing all requisite information for use with the document management system (e.g., Concordance® or Summation®), as agreed to by the parties.~~

~~b.——If appropriate to the particular case, the parties shall consider whether or not the full text of each electronic document shall be extracted ("Extracted Text") and produced in a text file. If the parties so agree, the Extracted Text shall be provided in searchable ASCII text format (or Unicode text format if the text is in a foreign language) and shall be named with a unique Bates Number (e.g. the unique Bates Number of the first page of the corresponding production version of the document followed by its file extension).~~

~~c.——If a document is more than one page, the unitization of the document and any attachments and/or affixed notes shall be maintained as they existed in the original document.~~

~~3.——Metadata fields. The parties are to confer and agree on whether metadata is to be produced or may be excluded from discovery. Metadata may not be relevant to the issues presented or, if relevant, may not be reasonably subject to discovery, or may be subject to cost shifting, considering the factors set forth in Fed. R. Civ. P. 26(b)(2)(C). For example, if one party is producing only paper documents, and the other party is producing ESI, the parties should confer on whether the additional cost and burden of producing metadata by the party producing ESI is reasonable or should be shifted under the facts and circumstances of the case. If the parties agree to produce metadata, and unless otherwise agreed, each party shall produce the following metadata associated with ESI to the extent reasonably accessible: (a) the author(s) of the ESI; (b) the recipient(s) of the ESI; (c) the date the ESI was created; and (d) the source from which the ESI was produced. The "source" of ESI shall be the name of the person who was the custodian of the ESI or, if the name of a person is not available, the storage location (e.g., "Regulatory Shared Drive Wayne, PA"). This information will be included in the "Author," "Recipient," "Date," and "Source" fields (respectively) for each document in the load file associated with the document images. Although it is~~

~~presumed generally that the above list of metadata fields will be provided, the list of metadata fields is intended to be flexible and may be changed by agreement of the parties, particularly in light of advances and changes in technology, vendor and business practices.~~

~~4. Hard Copy Documents. If the parties elect to produce hard copy documents in an electronic format, the production of hard copy documents shall include a cross reference file that indicates document breaks and sets forth the Custodian or Source associated with each produced document. Hard copy documents shall be scanned using Optical Character Recognition technology and searchable ASCII text files shall be produced (or Unicode text format if the text is in a foreign language), unless the producing party can show that the cost would outweigh the usefulness of scanning (for example, when the condition of the paper is not conducive to scanning and will not result in accurate or reasonably useable/searchable ESI). Each file shall be named with a unique Bates Number (e.g. the Unique Bates Number of the first page of the corresponding production version of the document followed by its file extension).~~

~~5. Privilege Log Based on Metadata. The parties agree that privilege logs shall be provided 30 days after the date agreed upon for final production in this matter.~~