

HONORABLE ROBERT J. BRYAN

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

PORT OF VANCOUVER USA, a Washington
Port District,

Plaintiff,

v.

HDR ENGINEERING, INC., a Nebraska
corporation, SMITH-MONROE GRAY
ENGINEERS, INC., an Oregon corporation,

Defendants.

NO. 3:20-CV-05967

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

**NOTE ON MOTION CALENDAR:
APRIL 12, 2021**

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. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P.
2 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
6 **B. ESI Disclosures**

7 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each
8 party shall disclose:

9 1. Custodians. The five custodians most likely to have discoverable ESI in their
10 possession, custody, or control. The custodians shall be identified by name, title, connection to
11 the instant litigation, and the type of the information under the custodian's control.

12 2. Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared
13 drives, servers), if any, likely to contain discoverable ESI.

14 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
15 contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud
16 storage) and, for each such source, the extent to which a party is (or is not) able to preserve
17 information stored in the third-party data source.

18 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
19 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
20 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).
21

22
23 **C. ESI Discovery Procedures**

24 1. On-site inspection of electronic media. Such an inspection shall not be required
25 absent a demonstration by the requesting party of specific need and good cause or by agreement
26 of the parties.

1 2. Search methodology. The parties shall timely confer to attempt to reach agreement
2 on appropriate search terms and queries, file type and date restrictions, data sources (including
3 custodians), and other appropriate computer- or technology-aided methodologies, before any such
4 effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the
5 search methodology. Agreement on a search methodology does not relieve a party of its obligation
6 under the Federal Rules of Civil Procedure to conduct a reasonable search and produce all relevant
7 and responsive documents of which a party is aware, regardless of whether the contain search
8 terms of or some other search methodology agreed to by the parties or ordered by the Court.
9 Discovery requests shall govern the scope of documents to be produced, subject to any agreements
10 reached during the parties' conferral, and search terms do not supplant discovery requests. To the
11 extent a party is aware of non-duplicative documents that are relevant, responsive, non-privileged,
12 and reasonably accessible, such documents will be produced regardless of whether they contain
13 search terms or some other search methodology agreed to by the parties or ordered by the Court
14

15 a. Prior to running searches:

16 i. The producing party shall disclose the data sources (including
17 custodians), search terms and queries, any file type and date restrictions, and any other
18 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable
19 information. The producing party may provide unique hit counts for each search query.
20

21 ii. The requesting party is entitled to, within 14 days of the producing
22 party's disclosure, add no more than 10 search terms or queries to those disclosed by the
23 producing party absent a showing of good cause or agreement of the parties.
24

25 iii. The following provisions apply to search terms / queries of the
26 requesting party. Focused terms and queries should be employed; broad terms or queries, such as

1 product and company names, generally should be avoided. A conjunctive combination of multiple
2 words or phrases (*e.g.*, “computer” and “system”) narrows the search and shall count as a single
3 search term. A disjunctive combination of multiple words or phrases (*e.g.*, “computer” or
4 “system”) broadens the search, and thus each word or phrase shall count as a separate search term
5 unless they are variants of the same word. The producing party may identify each search term or
6 query returning overbroad results demonstrating the overbroad results and a counter proposal
7 correcting the overbroad search or query. A search that returns more than 20 gigabytes of data,
8 excluding Microsoft PowerPoint files, audio files, and similarly large file types, is presumed to
9 be overbroad.
10

11 b. After production: After the producing party has substantially completed
12 the production of documents responsive to a request, it shall notify the receiving party of such;
13 the responding party may thereafter request no more than 10 additional search terms or queries.
14 The immediately preceding section (Section C(2)(a)(iii)) applies.
15

16 c. Upon reasonable request, a party shall disclose information relating to
17 network design, the types of databases, database dictionaries, the access control list and security
18 access logs and rights of individuals to access the system and specific files and applications, the
19 ESI document retention policy, organizational chart for information systems personnel, or the
20 backup and systems recovery routines, including, but not limited to, tape rotation and
21 destruction/overwrite policy.
22

23 3. Format.

24 a. ESI will be produced to the requesting party with searchable text. Each
25 requesting party may specify in its requests for production the acceptable format (*i.e.* one
26 compatible with its e-discovery platform). Acceptable formats include, but are not limited to,

1 native files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs
2 (only with load files for e-discovery software that includes metadata fields identifying natural
3 document breaks and also includes companion OCR and/or extracted text files), and searchable
4 PDF. If a producing party's platform cannot process documents in the requested format (e.g.,
5 Relativity cannot process multi-page TIFF files), then the producing party shall notify the
6 requesting party as soon as feasible, and the requesting party will coordinate with producing party
7 on an alternative compatible format with both parties' platforms.
8

9 b. Unless otherwise agreed to by the parties, files that are not easily converted
10 to image format, such as spreadsheet, database, and drawing files, shall be produced in native
11 format. Native files shall be produced with a link in the NATIVEPATH field, along with extracted
12 text (where extracted text is available) and applicable metadata fields set forth elsewhere herein.
13 For each native file produced, the production will include a TIFF image slipsheet indicating the
14 production number of the native file and stating, "File Provided Natively."
15

16 c. Each document image file shall be marked with a unique number (Bates
17 Number). File names should not be more than twenty characters long or contain spaces. When a
18 text-searchable image file is produced, the producing party must preserve the integrity of the
19 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,
20 the revision history. Nothing in this provision entitles a party to overwrite a document's filename
21 with a Bates-number.
22

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

26 e. 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

1 software load files containing all information required by the litigation support system used by
2 the receiving party.

3 f. The full text of each electronic document shall be extracted (“Extracted
4 Text”) and produced in a text file. The Extracted Text shall be provided in searchable ASCII text
5 format (or Unicode text format if the text is in a foreign language) and shall be marked with a
6 unique Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding
7 production version of the document followed by its file extension).

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

13 5. Email Threading. The parties may use analytics technology to identify email
14 threads and need only produce the unique most inclusive copy and related family members and
15 may exclude lesser inclusive copies—unless the lesser inclusive copy includes attachments to an
16 email, in which case, it must be produced. Upon reasonable request, the producing party will
17 produce a less inclusive copy.

18 6. Metadata fields. If the requesting party seeks metadata, the parties agree that only
19 the following metadata fields need be produced, and only to the extent it is reasonably accessible
20 and non-privileged: document type; custodian and duplicate custodians (or storage location if no
21 custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;
22 file extension; original file path; date and time created, sent, modified and/or received; and hash
23 value. Additionally, two time-related metadata fields should be produced: (1) Time Zone (a
24 description of the time zone in which the document was processed such as “Pacific Standard Time
25
26

1 (PST)”; and (2) UTC_Offset (difference in hours and minutes from Coordinated Universal Time
2 for a particular place and date). The list of metadata type is intended to be flexible and may be
3 changed by agreement of the parties, particularly in light of advances and changes in technology,
4 vendor, and business practices.

5
6 7. Processing Specifications. When processing ESI for production as an electronic
7 image, if a native file originally had track changes, comments, or other collaborative change
8 features turned on, the TIFF file will display those changes in the converted image file; the
9 producing party shall set imaging settings to force off “Auto Date” and force on: hidden columns
10 or rows, hidden worksheets, speaker notes, track changes, and comments.

11
12 8. Parent-Child Relationships. For ESI only, Parent-child relationships (association
13 between an attachment and its parent document) shall be preserved. The attachment(s) shall be
14 produced adjacent to the parent document, in terms of Bates numbers, with the first attachment
15 being named with the next sequential number after the parent, and any additional attachment(s)
16 sequentially numbered after that first attachment.

17
18 9. Hard-Copy Documents. If the parties elect to produce hard-copy documents in an
19 electronic format, the production of hard-copy documents will include a cross-reference file with
20 metadata that indicates document breaks and sets forth the custodian or custodian/location
21 associated with each produced document. The following objective coding fields should be
22 provided, if applicable: (1) beginning Bates number, (2) ending Bates number, (3) page count,
23 and (4) source location/custodian. The documents should be logically unitized. The parties will
24 have their vendors unitize documents correctly and will commit to address situations where there
25 are improperly unitized documents. Hard-copy documents will be scanned using Optical
26 Character Recognition (“OCR”) technology and searchable ASCII text files will be produced (or

1 Unicode text format if the text is in a foreign language), unless the producing party can show that
2 the cost would outweigh the usefulness of scanning (for example, when the condition of the paper
3 is not conducive to scanning and will not result in accurate or reasonably useable/searchable ESI).
4 The OCR software should maximize text quality over process speed. Settings such as “auto-
5 skewing” and “auto-rotation” should be turned on during the OCR process. Each file will be
6 named with a unique Bates Number (e.g., the unique Bates Number of the first page of the
7 corresponding production version of the document followed by its file extension).
8

9 10. Color. The parties shall produce documents in color where color is reasonably
10 helpful to understanding or viewing the document (e.g., charts and graphics, tracked changes, or
11 other highlights). Color images should be produced as single page JPG files at 300dpi with JPG
12 compression and a high-quality setting as to not degrade the original image.
13

14 **D. Preservation of ESI**

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

19 1. Absent a showing of good cause by the requesting party, the parties shall not be
20 required to modify the procedures used by them in the ordinary course of business to back-up and
21 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
22 possession, custody, or control.
23

24 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
25 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure
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1 where that data is created after a disclosure or response is made (unless excluded under Sections
2 (D)(3) or (E)(1)-(2)).

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

- 5 1. Deleted, slack, fragmented, or other data only accessible by forensics.
- 6 2. Random access memory (RAM), temporary files, or other ephemeral data
7 that are difficult to preserve without disabling the operating system.
- 8 3. On-line access data such as temporary internet files, history, cache,
9 cookies, and the like.
- 10 4. Data in metadata fields that are frequently updated automatically, such as
11 last-opened dates (see also Section (E)(5)).
- 12 5. Back-up data that are duplicative of data that are more accessible
13 elsewhere.
- 14 6. Server, system or network logs.
- 15 7. Data remaining from systems no longer in use that is unintelligible on the
16 systems in use.
- 17 8. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or
18 from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that
19 a copy of all such electronic data is automatically saved in real time
20 elsewhere (such as on a server, laptop, desktop computer, or “cloud”
21 storage).
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1 **E. Privilege**

2 1. A producing party shall create a privilege log of all documents fully withheld from
3 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this
4 Agreement and Order. Privilege logs shall include a unique identification number for each
5 document and the basis for the claim (attorney-client privileged or work-product protection). For
6 ESI, the privilege log may be generated using available metadata, including author/recipient or
7 to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata
8 provide insufficient information for the purpose of evaluating the privilege claim asserted, the
9 producing party shall include such additional information as required by the Federal Rules of
10 Civil Procedure. Privilege logs will be produced to all other parties no later than 30 days after
11 delivering a production unless an earlier deadline is agreed to by the parties.
12

13 2. Redactions need not be logged: (1) so long as the basis for the redaction is clear
14 on the redacted document; and (2) the date and author(s)/attendee(s)/participant(s) of the redacted
15 material are visible.
16

17 3. With respect to privileged or work-product information generated after the filing
18 of the complaint, parties are not required to include any such information in privilege logs.
19

20 4. Activities undertaken in compliance with the duty to preserve information are
21 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).
22

23 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
24 proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding,
25 constitute a waiver by the producing party of any privilege applicable to those documents,
26 including the attorney-client privilege, attorney work-product protection, or any other privilege
or protection recognized by law. Information produced in discovery that is protected as privileged

1 or work product shall be immediately returned to the producing party, and its production shall not
2 constitute a waiver of such protection.

3 DATED this 12th day of April, 2021.

4 CAIRNCROSS & HEMPELMANN, P.S.

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ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: _____

The Honorable Robert J. Bryan
UNITED STATES DISTRICT JUDGE

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Certificate of Service

I, Kacie Coselman, certify under penalty of perjury of the laws of the State of Washington that on April 12, 2021, I electronically filed this document entitled AGREEMENT REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION AND [PROPOSED] ORDER using the CM/ECF system which will send notification of such filing to all attorneys of record.

DATED this 12th day of April, 2021, at Seattle, Washington.



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