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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 VERIDIAN CREDIT UNION, on behalf of
   itself and a class of similarly situated financial
10 institutions

11   Plaintiff,

12   v.

13 EDDIE BAUER LLC,

14
                                    Defendant.
15

CASE NO. 2: 17-cv-00356-JLR

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

16   The parties hereby stipulate to the following provisions regarding the discovery of

17 electronically stored information ("ESI") in this matter:

18 **A.   General Principles**

19   1.   An attorney's zealous representation of a client is not compromised by conducting

20 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate

21 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and

22 contributes to the risk of sanctions.

23   2.   The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be

24 applied in each case when formulating a discovery plan. To further the application of the

25 proportionality standard in discovery, requests for production of ESI and related responses

26 should be reasonably targeted, clear, and as specific as possible.

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B. ESI Disclosures

Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by the parties, each party shall disclose:

1. <u>Custodians.</u> A list of the custodians most likely to have discoverable ESI in their possession, custody or control. The custodians shall be identified by name, title, connection to the instant litigation, and the type of the information under his/her control.

2. <u>Non-custodial Data Sources.</u> A list of non-custodial data sources (e.g. shared drives, servers, etc.), if any, likely to contain discoverable ESI.

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

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

C. Preservation of ESI

The parties acknowledge that they have a common law obligation to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control. With respect to preservation of ESI, the parties agree as follows:

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

2. All parties shall supplement their disclosures in accordance with Rule 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure where that

data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)-(2) below).

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

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

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

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

     d.   Data in metadata fields that are frequently updated automatically, such as last-opened dates (see also Section (E)(5)).

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

     f.   Server, system or network logs.

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

     h.   Electronic data (e.g. email, calendars, contact data, and notes) sent to or from mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that a copy of all such electronic data is routinely saved elsewhere (such as on a server, laptop, desktop computer, or "cloud" storage).

D.   Privilege

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

      2.   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).

      3.   Information produced in discovery that is protected as privileged or work product shall be immediately returned to the producing party, and its production shall not constitute a waiver of such protection, if: (i) such information appears on its face to have been inadvertently produced or (ii) the producing party provides notice within 15 days of discovery by the producing party of the inadvertent production.

E.   ESI Discovery Procedures

1.   <u>On-site inspection of electronic media.</u> Such an inspection shall not be permitted absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties.

2.   <u>Search methodology.</u> The parties shall timely attempt to reach agreement on appropriate search terms, or an appropriate computer- or technology-aided methodology, before any such effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the search terms or computer- or technology-aided methodology.

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

a.   A producing party shall disclose the search terms or queries, if any, and methodology that it proposes to use to locate ESI likely to contain discoverable information. The parties shall meet and confer to attempt to reach an agreement on the producing party's search terms and/or other methodology.

b.   If search terms or queries are used to locate ESI likely to contain discoverable information, the parties will attempt agree upon an agreed-upon list of search terms of queries to be used in connection with electronic searches.

c.   Focused terms and queries should be employed; broad terms or queries, such as product and company names, generally should be avoided.

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

3.   <u>Format.</u> The parties agree that ESI will be produced to the requesting party with searchable text, in a format to be decided between the parties. Acceptable formats include, but are not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file), group IV TIFFs imaged at 300 dpi. The document's original orientation should be maintained (i.e., portrait to portrait and landscape to landscape). Bates numbers, confidentiality

1   designations (in accordance with the protective order governing the case), and redactions (to the

2   extent they are necessary) should be burned into the image. TIFF image files should be provided

3   in an "Images" folder. (only with load files for e-discovery software that includes metadata fields

4   identifying natural document breaks and also includes companion OCR and/or extracted text

5   files),and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily

6   converted to image format, such as spreadsheet, database and drawing files, should be

7   produced in native format.

8   a.   **Parent-Child Relationships**. The Parties agree that if any part of an

9   Email or its attachments is responsive, the entire Email and attachments will be produced, except

10 any attachments that must be withheld or redacted on the basis of privilege or work-product

11 protection the relationship between attachments, enclosures, embedded files, and/or exhibits to

12 any parent document shall be preserved. The child-document should be consecutively produced

13 immediately after the parent-document. Each document shall be produced with the production

14 number for the first and last page of that document in the "BegBates" and "EndBates" fields of

15 the data load file and with the "BegAttach" and "EndAttach" fields listing the production number

16 for the first and last page in the document family.

17   b.   Production Media. The preferred means of producing documents is via

18 secure FTP or secure file share. However, documents may also be produced via CD, DVD, flash

19 drive, or hard drive if (a) the size of the production exceeds the size limitations applicable to the

20 producing party's secure FTP or file share or (b) if the interest of preserving the confidentiality of

21 the information produced outweighs the speed and efficiency of producing documents via secure

22 FTP or secure file share. To the extent possible, physical media should be write protected before

23 it is produced.

24   c.   Naming **Convention for Production Media**. Whether produced via

25 secure FTP, file share, or physical media, the files produced should be combined into a

26 compressed file such as .zip, .rar, etc. The compressed file should be named so as to indicate the

1 producing party, the date of the production, and the sequence of the production (e.g., "Wendys

2 Production 20160801-001").

3   d.   Dates. All documents shall be processed so as to show the date and time in

4 a uniform time zone, i.e., Eastern Standard Time.

5   4.   De-duplication. The parties may de-duplicate their ESI production across

6 custodial and non-custodial data sources after disclosure to the requesting party. A producing

7 party shall de-duplicate ESI horizontally (globally) across the population of records at the family

8 level. An email that includes content in the BCC or other blind copy field shall not be treated as

9 a duplicate of an email that does not include content in the BCC or other blind copy field, even if

10 all remaining content in the email is identical. Emails retrieved from different storage locations

11 (i.e. desktop vs laptop vs smart phone) shall not be considered unique based solely on the

12 originating storage location.

13   The producing party shall identify all custodians who were in possession of a de-

14 duplicated document in the "Other Custodian" metadata field specified in Appendix A. In the

15 event of a rolling production of documents or ESI items, the producing party shall provide an

16 overlay load file with updated Other Custodian along with each production.

17   The parties expressly agree that a document produced from one custodian's file but not

18 produced from another custodian's file as a result of deduplication will nonetheless be deemed as

19 if produced from that other custodian's file for purposes of deposition, interrogatory, request to

20 admit and/or trial testimony.

21   5.   Metadata fields. The parties agree to produce the following metadata fields:

22 document type; custodian and additional/duplicate custodians; author/from; recipient/to, cc and

23 bcc; title/subject; bates number begin, bates number end, attachment begin, attachment end,

24 file name and size; original file path; date and time created, sent, modified and/or received; and

25 hash value.

26   6.   Meet and Confer Obligations. To the extent there is any issue or potential dispute

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1   with respect to the provisions of this Order, or with the method(s) or manner(s) of the

2   production of ESI, the parties shall meet and confer in attempt to resolve such issue or dispute

3   prior to seeking judicial intervention.

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5   DATED: August 24, 2017.   DATED: August 24, 2017.

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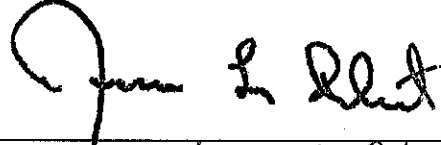Facsimile: (612) 341-0844
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*Attorneys for Plaintiff Veridian
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ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED this 25th day of August , 2017.

The Honorable James L. Robart
UNITED STATES DISTRICT JUDGE

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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.

1   b.   If appropriate to the particular case, the parties shall consider whether or

2 not the full text of each electronic document shall be extracted ("Extracted Text") and produced

3 in a text file. If the parties so agree, the Extracted Text shall be provided in searchable ASCII

4 text format (or Unicode text format if the text is in a foreign language) and shall be named with a

5 unique Bates Number (e.g. the unique Bates Number of the first page of the corresponding

6 production version of the document followed by its file extension).

7   c.   If a document is more than one page, the unitization of the document and

8 any attachments and/or affixed notes shall be maintained as they existed in the original

9 document.

10   3.   Metadata fields.

11   The parties are to confer and agree on whether metadata is to be produced or may be

12 excluded from discovery. Metadata may not be relevant to the issues presented or, if relevant,

13 may not be reasonably subject to discovery, or may be subject to cost- shifting, considering the

14 factors set forth in Fed. R. Civ. P. 26(b)(2)(C). For example, if one party is producing only

15 paper documents, and the other party is producing ESI, the parties should confer on whether

16 the additional cost and burden of producing metadata by the party producing ESI is

17 reasonable or should be shifted under the facts and circumstances of the case. If the parties

18 agree to produce metadata, and unless otherwise agreed, each party shall produce the following

19 metadata associated with ESI to the extent reasonably accessible: (a) the author(s) of the ESI;

20 (b) the recipient(s) of the ESI; (c) the date the ESI was created; and (d) the source from which

21 the ESI was produced. The "source" of ESI shall be the name of the person who was the

22 custodian of the ESI or, if the name of a person is not available, the storage location

23 (e.g., "Regulatory Shared Drive–Wayne, PA"). This information will be included in the

24 "Author," "Recipient," "Date," and "Source" fields (respectively) for each document in

25 the load file associated with the document images. Although it is presumed generally that

26 the above list of metadata fields will be provided, the list of metadata fields is intended to be

1   flexible and may be changed by agreement of the parties, particularly in light of advances and

2   changes in technology, vendor and business practices.

3   4.   Hard-Copy Documents.

4   If the parties elect to produce hard-copy documents in an electronic format, the

5   production of hard-copy documents shall include a cross-reference file that indicates document

6   breaks and sets forth the Custodian or Source associated with each produced document. Hard-

7   copy documents shall be scanned using Optical Character Recognition technology and

8   searchable ASCII text files shall be produced (or Unicode text format if the text is in a foreign

9   language), unless the producing party can show that the cost would outweigh the usefulness of

10 scanning (for example, when the condition of the paper is not conducive to scanning and will

11 not result in accurate or reasonably useable/searchable ESI). Each file shall be named with a

12 unique Bates Number (e.g. the Unique Bates Number of the first page of the corresponding

13 production version of the document followed by its file extension).

14   5.   Privilege Log Based on Metadata.

15   The parties agree that privilege logs shall be provided 30 days after the date agreed

16 upon for final production in this matter. The privilege log shall include a unique identification

17 number for each document and the basis for the claim (attorney-client privileged or work-

18 product protection). For ESI, the privilege log may be generated using available metadata,

19 including author/recipient or to/from/cc/bcc names; the subject matter or title and date created.

20 Should the available metadata provide insufficient information for the purpose of evaluation the

21 privilege claim asserted, the producing party shall include such additional information as

22 required by the Federal Rules of Civil Procedure.

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APPENDIX 2

The following metadata fields associated with each electronic document will be produced, where reasonably available:

Field Name	Field Description	Email	Non-e-mail ESI	Hard Copies/Static Image files
Custodian	Name of custodian(s) or source of email(s) or file(s) produced	X	X	X
BegBates	Beginning Bates number (including Prefix)	X	X	X
EndBates	Ending Bates number (including Prefix)	X	X	X
BegAttach	Beginning Bates number of the first document in an attachment range (only in emails with attachments)	X	X	X
EndAttach	Ending Bates number of the last document in attachment range (only in emails with attachments)	X	X	X
Attachment Count		X		
Redacted		X	X	
From	From field extracted from an email message	X		
Author	Author field extracted from the metadata of a non-email document[1]		X	
To	To or Recipient extracted from an email message	X		
Cc	Carbon Copy ("Cc") field extracted from an email message	X		
Bcc	Blind Carbon Copy ("Bcc") field extracted from an email message	X		

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[1] The parties recognize that the "author" field does not necessarily reflect the actual author of the document and that in many cases the information may not exist. No party is under the obligation to populate this field to the extent that it is not already populated.

Field Name	Field Description	Email	Non-e-mail ESI	Hard Copies/Static Image files
Email Subject	Subject line extracted from an email message	X		
Filename	Name of file as saved on system		X	
Date Sent	Sent date of e-mail message	X		
Time Sent	Sent time of e-mail message	X		
Date Rcvd	Date e-mail message was received	X		
Time Rcvd	Time e-mail message was received	X		
Date and Time Last modified	The application recorded date and time on which the document was last modified		X	
File Type	The type of document		X	
Native Link (if natives are exchanged)	Relative path to any files produced in native format, such as Excel spreadsheets		X	
Text Link (if text is exchanged)	Relative path to any OCR/extracted text files in the production set	X	X	X^2
Hash Value	MD5 or SHA-1 hash value used to deduplicate the data	X	X	
Duplicate Custodian	When globally dedupuing, this field will list the other custodians within the production who possessed a copy of the file	X	X	

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[2] *See* n.1.