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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

9 MARKET PLACE NORTH CONDOMINIUM
10 ASSOCIATION, a Washington non-profit
11 corporation,
12

Plaintiff,

13 vs.

14 AFFILIATED FM INSURANCE COMPANY,
15

Defendant.

No. C17-625 RSM

AGREEMENT REGARDING DISCOVERY
OF ELECTRONICALLY STORED
INFORMATION AND ORDER

16
17 **AGREEMENT**

18 The parties hereby stipulate to entry of the below Order regarding the following provisions
19 regarding discovery of electronically stored information (“ESI”) in this matter, based on the Model
20 Agreement Regarding Discovery of Electronically Stored Information for the U.S.D.C., W.D. of
21 Washington, as amended by agreement of the parties:

22 **A. General Principles**

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

AGREEMENT REGARDING DISCOVERY OF
ELECTRONICALLY STORED INFORMATION
AND ORDER

(Cause No. 2:17-cv-00625-RSM) – 1
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1 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied
2 in each case when formulating a discovery plan. To further the application of the proportionality
3 standard in discovery, requests for production of ESI and related responses should be reasonably
4 targeted, clear, and as specific as possible.

5 3. The parties filed their Combined Joint Status Report and Discovery Plan on
6 January 22, 2018, and therein represented that they would work cooperatively to enter into an ESI
7 Agreement for presentation to the Court. This is that ESI Agreement.

8 **B. Preservation of ESI**

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

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

16 2. All parties shall supplement their disclosures, in accordance with Rule 26(e), with
17 discoverable ESI responsive to a particular discovery request or mandatory disclosure where that
18 data is created after a disclosure or response is made (unless excluded under (C)(3) or D(1)-(2),
19 below).

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

- 22 a. Deleted, slack, fragmented, or other data only accessible by forensics.
23 b. Random access memory (RAM), temporary files, or other ephemeral data
24 that are difficult to preserve without disabling the operating system.
25 c. Online access data, such as temporary internet files, history, cache, cookies,
26 and the like.

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

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

5 f. Server, system, or network logs.

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

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

12 **C. Privilege**

13 1. With respect to privileged information, attorney work-product information, and
14 any other confidential, protected, or proprietary information generated after the filing of the
15 Plaintiff’s First Amended Complaint, the parties are not required to include any such information
16 in Privilege Logs. All such information created before the filing of the First Amended Complaint,
17 if withheld, will be accompanied by a Privilege Log; however, this agreement is without waiver
18 of or prejudice to either party’s arguments as to when any attorney-client or work-product
19 privileges attached or may have ended.

20 2. Activities undertaken in compliance with the duty to preserve information are
21 protected from disclosure and discovery under Fed. R. Civ. P. 28(b)(3)(A) and (B).

22 3. Information produced in discovery that is protected as privileged, attorney work
23 product, confidential, or proprietary shall be immediately returned to the producing party, shall not
24 be used or admissible in this litigation, and its production shall not constitute a waiver of such
25 protection(s), if: (i) such information appears on its face to have been inadvertently produced or
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1 (ii) the producing party provides notice within 15 days of discovery by the producing party of the
2 inadvertent production.

3 4. If a document is redacted based on one or more claims of privilege, the producing
4 party shall supply a list of the documents for any such claim or claims of privilege, indicating the
5 grounds for the redaction and the nature of the redacted information (e.g., attorney-client privilege,
6 work product, etc.). During the pendency of the litigation, an electronic copy of the original
7 unredacted data shall be securely preserved.

8 **D. ESI Discovery Procedures**

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

12 2. Search methodology. The parties will, within fifteen (15) days after production of
13 any document in compliance with FRCP 26 (initial disclosures) or in response to any Request for
14 Production, disclose the search terms/queries used, and identify the sources (such as, but not
15 limited to, the individual email accounts, databases, hard drives, and/or hard copy files) that were
16 subject to that search. Focused terms and queries should be employed; broad terms or queries
17 generally should be avoided.

18 3. Disputes. If a dispute arises between the parties regarding the appropriateness of
19 the search terms, methodology, and/or completeness of a production, the parties shall meet and
20 confer to attempt to reach an agreement on the producing party's search terms and/or other
21 methodology. If search terms or queries are used to locate ESI likely to contain discoverable
22 information, a party must identify any specific terms or queries it believes should have been
23 included in the search within fifteen (15) days from the date the search terms are disclosed to that
24 party pursuant to paragraph D(2) ("Search methodology") of this agreement. The parties shall then
25 meet and confer to attempt to find a resolution without resorting to court intervention.
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