

THE HONORABLE JAMES L. ROBERT

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CALIFORNIA EXPANDED METAL  
PRODUCTS COMPANY, et al.

Plaintiffs,

vs.

JAMES KLEIN, et al.

Defendants.

No. 2:18-cv-00659-JLR

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

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

3 **A. General Principles**

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

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

12 **B. ESI Disclosures**

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

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

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

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

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

1 **C. Preservation of ESI**

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

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

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

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

- 15 a. Deleted, slack, fragmented, or other data only accessible by forensics.  
16 b. Random access memory (RAM), temporary files, or other ephemeral data that  
17 are difficult to preserve without disabling the operating system.  
18 c. On-line access data such as temporary internet files, history, cache, cookies, and the  
19 like.  
20 d. Data in metadata fields that are frequently updated automatically, such as last-  
21 opened dates (see also Section (E)(5)).  
22 e. Back-up data that are substantially duplicative of data that are more accessible  
23 elsewhere.  
24 f. Server, system or network logs.  
25 g. Data remaining from systems no longer in use that is unintelligible on the systems  
26 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 1. With respect to privileged or work-product information generated after the filing of the  
2 complaint on January 10, 2018, parties are not required to include any such information in privilege  
3 logs.

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

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

11 **E. ESI Discovery Procedures**

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

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

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

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

25 b. If search terms or queries are used to locate ESI likely to contain  
26 discoverable information, a requesting party is entitled to no more than 5 additional terms or

1 queries to be used in connection with further electronic searches absent a showing of good cause  
2 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the  
3 requesting party within 14 days of receipt of the producing party's production.

4 c. Focused terms and queries should be endeavored to be employed.  
5 Absent a showing of good cause, each search term or query returning more than 250 megabytes  
6 of data are presumed to be overbroad, excluding Microsoft PowerPoint files, image and audio  
7 files, and similarly large file types.

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

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

18 4. De-duplication. The parties may de-duplicate their ESI production across custodial  
19 and non-custodial data sources after disclosure to the requesting party.

20 5. Metadata fields. If the requesting party seeks metadata, the parties agree that only  
21 the following metadata fields need be produced: document type; custodian and duplicate  
22 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file path;  
23 date and time created, sent, modified and/or received; and hash value.

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IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

by

Nov. 19, 2018

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Nov. 19, 2018

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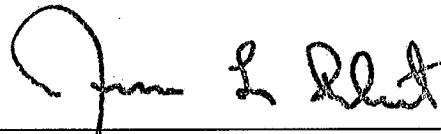
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~~PROPOSED~~ ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: November 20, 2018



The Honorable James L. Robart  
UNITED STATES DISTRICT JUDGE

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of November 2018, I caused to have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- tjl@elamburke.com
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