

HONORABLE RICARDO S. MARTINEZ

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF ISSAQUAH,

Plaintiff,

v.

ORA TALUS 90, LLC, et al.,

Defendant.

CASE NO. 18-cv-00910 RSM

**AGREEMENT REGARDING DISCOVERY
OF ELECTRONICALLY STORED
INFORMATION AND ORDER**

AND RELATED COUNTERCLAIMS,
CROSS-CLAIMS AND THIRD
PARTY CLAIMS

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.

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

1 targeted, clear, and as specific as possible.

2 **B. ESI Disclosures**

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

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

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

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

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

18 **C. Preservation of ESI**

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

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

26 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with

1 discoverable ESI responsive to a particular discovery request or mandatory disclosure where that
2 data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)-
3 (2) below).

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

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

17 **D. Privilege**

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

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

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

1 4. Privilege Log Based on Metadata. The parties agree that privilege logs shall include
2 a unique identification number for each document and the basis for the claim (attorney-client
3 privileged or work-product protection). For ESI, the privilege log may be generated using
4 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title
5 and date created. Should the available metadata provide insufficient information for the purpose
6 of evaluating the privilege claim asserted, the producing party shall include such additional
7 information as required by the Federal Rules of Civil Procedure.

8 **E. 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 shall timely attempt to reach agreement on
13 appropriate search terms, or an appropriate computer- or technology-aided methodology, before
14 any such effort is undertaken. The parties shall continue to cooperate in revising the
15 appropriateness of the search terms or computer- or technology-aided methodology.

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

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

22 b. If search terms or queries are used to locate ESI likely to contain
23 discoverable information, a requesting party is entitled to no more than 5 additional terms or
24 queries to be used in connection with further electronic searches absent a showing of good cause
25 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
26 requesting party within 14 days of receipt of the producing party's production.

1 c. Focused terms and queries should be employed; broad terms or queries,
2 such as product and company names, generally should be avoided. Absent a showing of good
3 cause, each search term or query returning more than 250 megabytes of data is presumed to be
4 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file
5 types.

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

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

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

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

22
23 DATED: August 16, 2019

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15 **ORDER**

16 Based on the foregoing, IT IS SO ORDERED.

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18 DATED: August 19, 2019

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21 RICARDO S. MARTINEZ
22 CHIEF UNITED STATES DISTRICT JUDGE