

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES FIRE INSURANCE
COMPANY, et al.,

Plaintiffs/Counterclaim
Defendants,

v.

ICICLE SEAFOODS, INC., et al.,

Defendants/Counterclaim
Plaintiffs.

IN ADMIRALTY

NO. 2:20-cv-00401-RSM

AGREEMENT REGARDING
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION AND
ORDER

**NOTE ON MOTION CALENDAR:
NOVEMBER 5, 2020**

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. As provided in LCR 26(f), 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 targeted, clear, and as specific as possible.

1 **B. ESI Disclosures**

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

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

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

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

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

17 **C. ESI Discovery Procedures**

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

21 2. Search methodology. The parties shall timely confer to attempt to reach
22 agreement on appropriate search terms and queries, file type and date restrictions, data sources
23 (including custodians), and other appropriate computer- or technology-aided methodologies,
24 before any such effort is undertaken. The parties shall continue to cooperate in revising the
25 appropriateness of the search methodology.

1 a. Prior to running searches:

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

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

9 iii. The following provisions apply to search terms / queries of the
10 requesting party. Focused terms and queries should be employed; broad terms or queries, such
11 as product and company names, generally should be avoided. A conjunctive combination of
12 multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and shall count
13 as a single search term. A disjunctive combination of multiple words or phrases (*e.g.*,
14 "computer" or "system") broadens the search, and thus each word or phrase shall count as a
15 separate search term unless they are variants of the same word. The producing party may
16 identify each search term or query returning overbroad results demonstrating the overbroad
17 results and a counter proposal correcting the overbroad search or query. A search that returns
18 more than 250 megabytes of data, excluding Microsoft PowerPoint files, audio files, and
19 similarly large file types, is presumed to be overbroad.

20 b. After production: Within 21 days of the producing party notifying the
21 receiving party that it has substantially completed the production of documents responsive to
22 a request, the responding party may request no more than 10 additional search terms or queries.
23 The immediately preceding section (Section C(2)(a)(iii)) applies.

24 3. Format.

25 a. ESI will be produced to the requesting party with searchable text, in a
26 format to be decided between the parties. Acceptable formats include, but are not limited to,

1 native files, multi-page TIFFs (with a companion OCR or extracted text file), single-page
2 TIFFs (only with load files for e-discovery software that includes metadata fields identifying
3 natural document breaks and also includes companion OCR and/or extracted text files), and
4 searchable PDF.

5 b. Unless otherwise agreed to by the parties, files that are not easily
6 converted to image format, such as spreadsheet, database, and drawing files, will be produced
7 in native format.

8 c. Each document image file shall be named with a unique number (Bates
9 Number). File names should not be more than twenty characters long or contain spaces. When
10 a text-searchable image file is produced, the producing party must preserve the integrity of the
11 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where
12 applicable, the revision history.

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

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, and the
18 duplicate custodian information removed during the de-duplication process tracked in a
19 duplicate/other custodian field in the database load file.

20 5. Email Threading. The parties may use analytics technology to identify email
21 threads and need only produce the unique most inclusive copy and related family members
22 and may exclude lesser inclusive copies. Upon reasonable request, the producing party will
23 produce a less inclusive copy.

24 6. Metadata fields. If the requesting party seeks metadata, the parties agree that
25 only the following metadata fields need be produced, and only to the extent it is reasonably
26 accessible and non-privileged: document type; custodian and duplicate custodians (or storage

1 location if no custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file
2 name; file size; file extension; original file path; date and time created, sent, modified and/or
3 received; and hash value. The list of metadata type is intended to be flexible and may be
4 changed by agreement of the parties, particularly in light of advances and changes in
5 technology, vendor, and business practices.

6 7. Hard-Copy Documents. If the parties elect to produce hard-copy documents in
7 an electronic format, the production of hard-copy documents will include a cross-reference file
8 that indicates document breaks and sets forth the custodian or custodian/location associated
9 with each produced document. Hard-copy documents will be scanned using Optical Character
10 Recognition technology and searchable PDF or ASCII text files will be produced (or Unicode
11 text format if the text is in a foreign language), unless the producing party can show that the
12 cost would outweigh the usefulness of scanning (for example, when the condition of the paper
13 is not conducive to scanning and will not result in accurate or reasonably useable/searchable
14 ESI). Each file will be named with a unique Bates Number (*e.g.*, the unique Bates Number of
15 the first page of the corresponding production version of the document followed by its file
16 extension).

17 **D. Preservation of ESI**

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

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

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

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

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

21 **E. Privilege**

22 1. A producing party shall create a privilege log of all documents fully withheld
23 from production on the basis of a privilege or protection, unless otherwise agreed or excepted
24 by this Agreement and Order. Privilege logs shall include a unique identification number for
25 each document and the basis for the claim (attorney-client privileged or work-product
26 protection). For ESI, the privilege log may be generated using available metadata, including

1 author/recipient or to/from/cc/bcc names; the subject matter or title; and date created. Should
2 the available metadata provide insufficient information for the purpose of evaluating the
3 privilege claim asserted, the producing party shall include such additional information as
4 required by the Federal Rules of Civil Procedure. Privilege logs will be produced to all other
5 parties no later than 30 days after delivering a production unless an earlier deadline is agreed
6 to by the parties.

7 2. Redactions need not be logged so long as the basis for the redaction is clear on
8 the redacted document.

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

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

14 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
15 proceeding shall not, for the purposes of this proceeding or any other federal or state
16 proceeding, constitute a waiver by the producing party of any privilege applicable to those
17 documents, including the attorney-client privilege, attorney work-product protection, or any
18 other privilege or protection recognized by law. Information produced in discovery that is
19 protected as privileged or work product shall be immediately returned to the producing party,
20 and its production shall not constitute a waiver of such protection.

21 Dated this 5th day of November, 2020.

22 BAUER MOYNIHAN & JOHNSON LLP

23 /s Matthew C. Crane
24 Matthew C. Crane, WSBA No. 18003

25 /s Robert D. Sykes
26 Robert D. Sykes, WSBA No. 49635

1 Attorneys for plaintiffs/counterclaim
2 defendants United States Fire Insurance
3 Company, National Union Fire Insurance
4 Company of Pittsburgh, PA, Great American
5 Insurance Company of New York, Argonaut
6 Insurance Company, Endurance American
7 Insurance Company, Houston Casualty
8 Company, and Certain Underwriters at
9 Lloyd's, London

6 Dated this 5th day of November, 2020.

8 MULLIN, ALLEN & STEINER, PLLC

9 s/ Timothy E. Allen (per email authorization)

10 Daniel F. Mullin, WSBA No. 12768

11 Timothy E. Allen, WSBA No. 35337

12 Attorneys for defendants/counterclaim

13 plaintiffs Icycle Seafoods, Inc. and

14 ISVesselCo, Inc.

15 **ORDER**

16 Based on the foregoing, IT IS SO ORDERED.

17 DATED: November 6, 2020.

18 

19 RICARDO S. MARTINEZ

20 CHIEF UNITED STATES DISTRICT JUDGE

21 Presented by:

22 BAUER MOYNIHAN & JOHNSON LLP

23 /s Matthew C. Crane

24 Matthew C. Crane, WSBA No. 18003

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

/s Robert D. Sykes
Robert D. Sykes, WSBA No. 49635
Attorneys for plaintiffs/counterclaim defendants