

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WASTE ACTION PROJECT,

Plaintiff,

v.

PERDUE FOODS LLC,

Defendant.

CASE NO. C20-0836-JCC

ORDER

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 targeted, clear, and as specific as possible.

1 **B. ESI Disclosures**

2 Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by the  
3 parties, each 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 to  
6 the instant litigation, and the type of the information under his/her control.

7 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared  
8 drives, servers, etc.), 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 and/or mobile device providers, “cloud” storage,  
11 etc.) 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 ESI  
14 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the  
15 data source) that a party asserts is not reasonably accessible under Rule 26(b)(2)(B)

16 **C. Preservation of ESI**

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

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

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

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

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

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

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

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

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

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

14 f. Server, system or network logs.

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

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

21 i. Social media data.

22 **D. Privilege**

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

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

1           3.       As stated in Fed. R. Evid. 502(b), disclosure does not operate as a waiver in this  
2 proceeding if (1) the disclosure is inadvertent and (2) the holder of the privilege or protection  
3 took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to  
4 rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B). This paragraph  
5 does not change or modify the parties' rights under Fed. R. Evid. 502(b).

6 **E.     ESI Discovery Procedures**

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

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

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

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

20               b.       If search terms or queries are used to locate ESI likely to contain  
21 discoverable information, a requesting party is entitled to no more than 5 additional terms  
22 or queries to be used in connection with further electronic searches per discovery request  
23 and per category of records being searched, absent a showing of good cause or agreement  
24 of the parties. The 5 additional terms or queries per discovery request and category of  
25 records, if any, must be provided by the requesting party within 30 days of receipt of the  
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1 producing party's production and disclosure of the search terms used by the producing  
2 party, absent a showing of good cause for additional time.

3 c. Focused terms and queries should be employed; broad terms or queries,  
4 such as product and company names, generally should be avoided. Absent a showing of  
5 good cause, each search term or query returning more than 250 megabytes of data are  
6 presumed to be overbroad, excluding Microsoft PowerPoint files, image and audio files,  
7 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 OCR text in PDF format and with load files, however, files that are not easily  
12 converted to image format, such as spreadsheet, database and drawing files, should be produced  
13 in native format unless agreed to otherwise between the parties.

14 4. De-duplication. The parties may de-duplicate their ESI production across  
15 custodial and non-custodial data sources. The party will disclose such de-duplication to the  
16 requesting party at the time of document production.

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

21 6. Email Threading. The parties may use analytics technology to identify email  
22 threads and need only produce the unique most inclusive copy and related family members and  
23 may exclude lesser inclusive copies. At the time of production, the producing party will notify  
24 the other party about the use of any analytics technology to exclude lesser inclusive copies.  
25 Upon reasonable request, the producing party will produce a less inclusive copy.

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**ORDER**

Based on the foregoing, IT IS SO ORDERED.

DATED this 29th day of January 2021.



John C. Coughenour  
UNITED STATES DISTRICT JUDGE

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