

THE HONORABLE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HTP, INC., a Washington corporation
Plaintiff,
v.
FIRST MERIT GROUP HOLDING,
INC., et al. Defendants.

CASE NO. 2:21-CV-00732-BJR
**AGREEMENT REGARDING
DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND 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. 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

1 responses should be reasonably targeted, clear, and as specific as possible. This agreement is
2 intended to assist the parties in identifying relevant, responsive information that has been stored
3 electronically and is proportional to the needs of the case. The agreement does not supplant the
4 parties' obligations to comply with Fed. R. Civ. P. 34.

5 **B. ESI Disclosures**

6 Within 14 days of entry of this Order, or at a later time if agreed to by the parties, each
7 party shall disclose:

8 1. Custodians. The custodians most likely to have discoverable ESI in their
9 possession, custody, or control. The custodians shall be identified by name, title, connection to
10 the instant litigation, and the type of the information under the custodian's control. The parties
11 are expected to meet and confer to establish the appropriate number of custodians to be disclosed
12 based on the complexity, proportionality and nature of the case. Disputes should promptly be
13 submitted to the Court for resolution. This disclosure provision is distinct from the parties'
14 agreement set forth in Section C below about determining the number of custodians from whom
15 ESI should be gathered.

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

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

22 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
23 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the

1 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).
2 Section (D)(3) below sets forth data sources and ESI which are not required to be preserved by
3 the parties. Those data sources and ESI do not need to be included on this list.

4 **C. ESI Discovery Procedures**

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

8 2. Search methodology. The Court presumes that the use of search terms and queries,
9 file type and date restrictions, and technology-assisted review will be reasonably necessary to
10 locate or filter some ESI likely to contain discoverable information. The timelines and search
11 related numbers in this section may be sufficient in certain cases, but not in others. The parties
12 are expected to meet and confer to establish the appropriate timing and terms based on the
13 complexity, proportionality and nature of the case. The parties shall timely confer to attempt to
14 reach agreement on appropriate search terms and queries, file type and date restrictions, data
15 sources (including custodians), and other appropriate computer- or technology-aided
16 methodologies, before any such effort is undertaken. The parties shall continue to cooperate in
17 revising the appropriateness of the search methodology.

18 a. Prior to running searches:

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

1 ii. After disclosure, the parties will engage in a meet and confer
2 process regarding additional terms sought by the non-producing party.

3 iii. The following provisions apply to search terms / queries of the
4 requesting party. Focused terms and queries should be employed; broad terms or queries, such
5 as product and company names, generally should be avoided. A conjunctive combination of
6 multiple words or phrases (*e.g.*, “computer” and “system”) narrows the search and shall count as
7 a single search term. A disjunctive combination of multiple words or phrases (*e.g.*, “computer”
8 or “system”) broadens the search, and thus each word or phrase shall count as a separate search
9 term unless they are variants of the same word. The producing party may identify each search
10 term or query returning overbroad results demonstrating the overbroad results and a counter
11 proposal correcting the overbroad search or query. .

12 3. Format.

13 a. ESI will be produced to the requesting party with searchable text, in a
14 format to be decided between the parties. Acceptable formats include, but are not limited to, native
15 files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only
16 with load files for e-discovery software that includes metadata fields identifying natural document
17 breaks and also includes companion OCR and/or extracted text files), and searchable PDF.

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

21 c. Each document image file shall be named with a unique number (Bates
22 Number). File names should not be more than twenty characters long or contain spaces. When a
23 text-searchable image file is produced, the producing party must preserve the integrity of the

1 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,
2 the revision history.

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

5 e. The parties shall produce their information in the following format: single-
6 page images and associated multi-page text files containing extracted text or with appropriate
7 software load files containing all information required by the litigation support system used by
8 the receiving party.

9 f. The full text of each electronic document shall be extracted (“Extracted
10 Text”) and produced in a text file. The Extracted Text shall be provided in searchable ASCII text
11 format (or Unicode text format if the text is in a foreign language) and shall be named with a
12 unique Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding
13 production version of the document followed by its file extension).

14 4. De-duplication. The parties may de-duplicate their ESI production across custodial
15 and non-custodial data sources after disclosure to the requesting party, and the duplicate custodian
16 information removed during the de-duplication process tracked in a duplicate/other custodian
17 field in the database load file.

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

22 6. Metadata fields. If the requesting party seeks metadata, the parties agree that only
23 the following metadata fields need be produced, and only to the extent it is reasonably accessible

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

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

17 **D. Preservation of ESI**

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

1 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
2 possession, custody, or control.

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

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

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

21 **E. Privilege**

22 1. A producing party shall create a privilege log of all documents fully withheld from
23 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this

1 Agreement and Order. Privilege logs shall include a unique identification number for each
2 document and the basis for the claim (attorney-client privileged or work-product protection). For
3 ESI, the privilege log may be generated using available metadata, including author/recipient or
4 to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata
5 provide insufficient information for the purpose of evaluating the privilege claim asserted, the
6 producing party shall include such additional information as required by the Federal Rules of
7 Civil Procedure. Privilege logs will be produced to all other parties no later than 30 days after
8 delivering a production.

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

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

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

15 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents, electronically
16 stored information (ESI) or information, whether inadvertent or otherwise, in this proceeding
17 shall not, for the purposes of this proceeding or any other federal or state proceeding, constitute
18 a waiver by the producing party of any privilege applicable to those documents, including the
19 attorney-client privilege, attorney work-product protection, or any other privilege or protection
20 recognized by law. This Order shall be interpreted to provide the maximum protection allowed
21 by Fed. R. Evid. 502(d). The provisions of Fed. R. Evid. 502(b) do not apply. Nothing contained
22 herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI
23 or information (including metadata) for relevance, responsiveness and/or segregation of

1 privileged and/or protected information before production. Information produced in discovery
2 that is protected as privileged or work product shall be immediately returned to the producing
3 party.

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5 DATED: June 1, 2023

K&L GATES LLP

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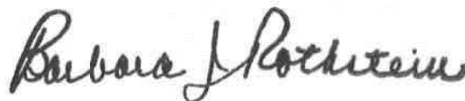
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18 *Attorneys for Defendants*

ORDER

Based on the foregoing, IT IS SO ORDERED.

Dated: June 5, 2023.



Barbara Jacobs Rothstein
U.S. District Court Judge

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