

The Honorable Barbara J. Rothstein

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THROUGHPUTER, INC.,
Plaintiff,
v.
MICROSOFT CORPORATION,
Defendant.

No. 2:22-cv-00344-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

1 of the proportionality standard in discovery, requests for production of ESI and related responses
2 should be reasonably targeted, clear, and as specific as possible.

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

6 **B. ESI Disclosures**

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

9 1. Custodians. The four custodians most likely to have discoverable ESI in their
10 possession, custody, or control. The custodians shall be identified by name, title, connection to the
11 instant litigation, and the type of the information under the custodian's control. The parties shall
12 meet and confer in good faith to determine if additional custodians might be required.

13 **C. Email Discovery Procedures**

14 1. Search methodology. The parties shall timely confer to attempt to reach agreement
15 on appropriate search terms before any such effort is undertaken. The parties shall continue to
16 cooperate in revising the appropriateness of the search methodology.

17 a. The requesting party is entitled to provide up to 10 search terms or queries
18 to be used for email searching absent a showing of good cause or agreement
19 of the parties.

20 b. The following provisions apply to search terms / queries of the requesting
21 party. Focused terms and queries should be employed; broad terms or
22 queries, such as product and company names, generally should be avoided.

23 A conjunctive combination of multiple words or phrases (e.g., "computer")

1 and “system”) narrows the search and shall count as a single search term. A
2 disjunctive combination of multiple words or phrases (*e.g.*, “computer” or
3 “system”) broadens the search, and thus each word or phrase shall count as
4 a separate search term unless they are variants of the same word. The
5 producing party may identify each search term or query returning overbroad
6 results demonstrating the overbroad results and a counter proposal
7 correcting the overbroad search or query.

8 2. After production: Within 21 days of the producing party notifying the receiving
9 party that it has substantially completed the production of documents responsive to a request, the
10 responding party may request no more than 5 additional search terms or queries. The immediately
11 preceding section (Section C(1)(b)) applies.

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 the
8 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 field
17 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 a
21 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: Beginning Bates Number; Ending Bates Number; Beginning Attachment; End
2 Attachment; document type; custodian; all custodians; author; from; recipient/to; cc; bcc;
3 title/subject; email subject; file name; file extension; date and time created (UTC), date sent, date
4 last modified and/or received; pages; native file path; text path; production volume;
5 confidentiality; and hash value.. The list of metadata type is intended to be flexible and may be
6 changed by agreement of the parties, particularly in light of advances and changes in technology,
7 vendor, and business practices.

8 **D. Preservation of ESI**

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

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

17 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
18 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure
19 where that data is created after a disclosure or response is made (unless excluded under Sections
20 (D)(3) or (E)(1)-(2)).

21 3. Absent a showing of good cause by the requesting party, the following categories
22 of ESI need not be preserved:
23

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

E. Privilege

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

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

1 DATED this 24th day of June, 2022.

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18 *Counsel for Defendant Microsoft
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20 **ORDER**

21 IT IS SO ORDERED.

22 DATED: July 31, 2024.

23 

24 The Honorable Barbara J. Rothstein
UNITED STATES DISTRICT JUDGE