

The Honorable Ronald B. Leighton

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SEAN WILSON, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

PTT, LLC, a Delaware limited
liability company, d/b/a HIGH 5
GAMES, LLC, a Delaware limited
liability company,

Defendant.

CASE NO. 3:18-cv-05275-RBL

**STIPULATED MODEL
AGREEMENT REGARDING
DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND
[PROPOSED] 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

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

3 **B. ESI Disclosures**

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

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

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

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

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

18 5. Foreign data privacy laws. Nothing in this Order is intended to prevent either party
19 from complying with the requirements of a foreign country's data privacy laws, *e.g.*, the European
20 Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The parties agree to meet
21 and confer before including custodians or data sources subject to such laws in any ESI or other
22 discovery request.

23 **C. ESI Discovery Procedures**

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

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

9 a. Prior to running searches:

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

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

17 iii. The following provisions apply to search terms / queries of the
18 requesting party. Focused terms and queries should be employed; broad terms or queries, such
19 as product and company names, generally should be avoided. A conjunctive combination of
20 multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and shall count as
21 a single search term. A disjunctive combination of multiple words or phrases (*e.g.*, "computer"
22 or "system") broadens the search, and thus each word or phrase shall count as a separate search
23 term unless they are variants of the same word. The producing party may identify each search
24

1 term or query returning overbroad results demonstrating the overbroad results and a counter
2 proposal correcting the overbroad search or query.

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

7 3. Format.

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

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

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

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

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

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

9 6. Metadata fields. If the requesting party seeks metadata, the parties agree that only
10 the following metadata fields need be produced, and only to the extent it is reasonably accessible
11 and non-privileged: document type; custodian and duplicate custodians (or storage location if no
12 custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;
13 file extension; original file path; date and time created, sent, modified and/or received; and hash
14 value. The list of metadata type is intended to be flexible and may be changed by agreement of
15 the parties, particularly in light of advances and changes in technology, vendor, and business
16 practices.

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
24

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).

1 **E. Privilege**

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

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

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

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

18 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
19 proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding,
20 constitute a waiver by the producing party of any privilege applicable to those documents,
21 including the attorney-client privilege, attorney work-product protection, or any other privilege
22 or protection recognized by law. Information produced in discovery that is protected as privileged
23
24

1 or work product shall be immediately returned to the producing party, and its production shall not
2 constitute a waiver of such protection.

3
4 DATED: February 26, 2020

5
6 By: /s/ Todd Logan

7 EDELSON PC
8 Rafey Balabanian*
9 *rbalabanian@edelson.com*
10 Todd Logan*
11 *tlogan@edelson.com*
12 Brandt Silver-Korn*
13 *bsilverkorn@edelson.com*
14 123 Townsend Street, Suite 100
15 San Francisco, California 94107
16 Tel: 415.212.9300 | Fax: 415.373.9435

17 By: /s/ Cecily C. Shiel

18 TOUSLEY BRAIN STEPHENS PLLC
19 Cecily C. Shiel, WSBA #50061
20 *cshiel@tousley.com*
21 1700 Seventh Avenue, Suite 2200
22 Seattle, Washington 98101-4416
23 Tel: 206.682.5600 | Fax: 206.682.2992

24 *Admitted *pro hac vice*

25 *Attorneys for Plaintiff*

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/Christopher A. Wright
Christopher A. Wright, WSBA #26601
Emilia J. Sweeney, WSBA #23371
Attorneys for Defendant
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Tel: (206) 622-8020 / Fax: (206) 467-8215

s/Jennifer M. Jensen
Erik F. Stidham (Admitted *Pro Hac Vice*)
Jennifer M. Jensen (Admitted *Pro Hac Vice*)
Teague I. Donahey (Admitted *Pro Hac Vice*)
Holland & Hart LLP
800 W. Main Street, Suite 1750
Boise, ID 83702
Tel: (208) 342-5000 / Fax: (208) 343-8869
E-mail: efstidham@hollandhart.com
jmjensen@hollandhart.com
tidonahey@hollandhart.com

ATTORNEYS FOR DEFENDANT HIGH 5 GAMES, LLC.

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

[PROPOSED] ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: _____

The Honorable Ronald B. Leighton
UNITED STATES DISTRICT JUDGE