

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

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IN RE: SMITTY’S/CAM2 303 TRACTOR  
HYDRAULIC FLUID MARKETING, SALES  
PRACTICES, AND PRODUCTS LIABILITY  
LITIGATION

MDL No. 2936

Master Case No. 4:20-MD-02936-SRB

“ALL ACTIONS”

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**ORDER ESTABLISHING  
ELECTRONIC DOCUMENT PRODUCTION PROTOCOL**

Before the Court is the parties’ Joint and Stipulated Motion to Enter Order Establishing Electronic Document Production Protocol. (Doc. #37.) For good cause shown, and as set forth below, the motion is GRANTED. The procedures and protocols outlined herein govern the production of Electronically Stored Information (as defined below) by a party during the pendency of this litigation as described in Federal Rules of Civil Procedure 26, 33, and 34.

**A. Definition of Electronically Stored Information**

As used in this Order, the term “Electronically Stored Information” (“ESI”) means discoverable documents and data existing in electronic form consistent with Fed. R. Civ. P. 34(a), including e-mail, writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after export by the responding party into a reasonably usable form, and other reasonably accessible electronically stored information relevant to the claim(s) or defense(s) of any party subject to discovery pursuant to Fed. R. Civ. P. 26(b)(1).

**B. Identification of Responsive Documents**

1. After receiving requests for document production, the producing party shall conduct a reasonable and good faith search for responsive documents and ESI. ESI which is

neither privileged nor otherwise protected shall be timely reviewed and produced in accordance with the guidelines herein.

2. A producing party will disclose to a requesting party the existence of those sources of electronically stored information that it believes contain non-duplicative, responsive information and that are not reasonably accessible. The parties will confer to the extent necessary concerning such information, but a producing party shall not have an obligation to search or produce from sources of electronically stored information that it in good faith identifies as not reasonably accessible because of undue burden or cost in accordance with Fed. R. Civ. P. 26(b)(2) and no such obligation will exist unless and until a showing of good cause is made by the requesting party pursuant to Fed. R. Civ. P. 26(b)(2). The following sources of electronically stored information are presumed inaccessible for preservation, search, and production purposes.

- 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. Back-up data that is substantially duplicative of data that are more accessible elsewhere.
- e. Server, system or network logs.
- f. Data remaining from systems no longer in use that is unintelligible on the systems in use.
- g. Electronic data (e.g. email, calendars, contact data, notes, and text messages) sent to or from mobile devices (e.g., iPhone, iPad, Android, and

Blackberry devices), provided that a copy of all such electronic data is routinely saved elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage).

3. The parties will meet and confer on search terms, date restrictions, custodian restrictions, and/or other technology assisted review techniques to review preserved documents for relevance. The parties anticipate that they will agree on search terms to run (agreeing that the limitations of a native search tool are acceptable and that documents without extracted text do not need to be TIFFed and OCR'd prior to searching them), and that each party will then determine the best method to review those hits for responsiveness – either manually or using analytics and other computer assisted review tools.

4. Regardless of whether search terms are used, the parties shall review documents or sets of documents identified by custodians as potentially containing relevant information, even if they do not hit a search term.

5. The parties will attempt to agree on search protocols, however, the parties acknowledge that the producing party is in the best position to determine how to review its own documents, and if an agreement as to a particular issue cannot be reached, a party may proceed using its own preferred method, including computer assisted review at the parties' option. If, after production, the receiving party believes additional documents should have been produced, the parties will meet and confer as to what additional efforts, if any, should be undergone to resolve the dispute. If the matter cannot be resolved, the burden will be on the receiving party to show that the producing party's efforts were inadequate.

### **C. Processing/Production Instructions**

1. A summary of processing and production standards is attached as **Exhibit A**.

2. **Files Not Processed.** At the time of processing, electronic documents shall be compared to the list of common non-user-generated files maintained by the National Institute of Standards and Technology (NIST) and any files that are contained on the most current version of the NIST list shall not be processed. Container files should have their contents extracted during processing and produced if relevant, but the container files themselves do not need to be processed/produced. Embedded images do not need to be extracted. Reasonable requests to have a document containing an embedded object reprocessed to extract the embedded object or provided in native format will be accommodated unless it would impose an undue burden or cost or is technically infeasible.

3. **TIFF/JPG Format.** ESI, other than the data identified in Section C.4 below, shall be produced electronically in a single-page Group 4 TIFF image for black and white documents, or a single page JPG for color documents, that reflects how the source document would have appeared if it were printed via an attached printer.

4. **Native Format:** Spreadsheets, database files, audio/visual files (such as jpg, bmp, gif) and presentation (e.g., PowerPoint) files will be produced in their native format unless redacted, in which instance, they will be produced in TIFF (or JPG if the document contains color). A TIFF placeholder indicating the document was provided in native format, and containing the native file name (which, as described below will be a bates number) should accompany the database record. If database files are not legible in their native format, the parties will meet and confer on how to run reports from the database to produce data in a meaningful manner.

5. **Proprietary Software Required:** If documents can be processed, but not imaged and viewed without proprietary software, the parties may either initially produce a native file

along with its metadata and then meet and confer as to whether a different format of production is necessary, or withhold the document and meet and confer as to a form of production. If a document cannot be processed at all without proprietary software, the parties shall meet and confer as to how those documents may be produced.

6. **Duplicate Production Not Required.** A party producing ESI in electronic form need not produce the same document in paper format. A producing party may de-duplicate the documents globally, across custodians, provided that it is possible to identify (in the metadata load file) all custodians of the document and all file paths of the document. However, attachments to e-mails shall not be eliminated from the parent e-mail regardless of whether or not the attachment is a duplicate of another electronic document (i.e., de-dupe at the parent level).

7. If, at the parties' option, the parties are using e-mail threading to aid review, the parties need only produce "inclusive" emails contained in an email thread.

8. **Document Unitization/Families.** If a document is more than one page, the unitization of the document and any attachments and/or affixed notes shall be maintained as it existed in the original file or computer of the producing party or shall be documented in a load file or otherwise electronically tracked. In the event a "family" of documents exists that contains both responsive and non-responsive documents, the parties agree that the non-responsive documents may be replaced with a slipsheet indicating, "Non Responsive Document Withheld." The parties will meet and confer if there is a dispute as to whether a document withheld in this manner should be produced.

9. **Family Groups.** A document and all other documents in its attachment range constitute a family group. If one document within a family is non-responsive and/or privileged,

it does not make the entire family non-responsive or privileged. Each individual document will be treated separately even if they are part of the same family and placed individually on a privilege log.

10. **Metadata.** To the extent that any of the metadata fields listed in Paragraph 6 of Exhibit A are available for the electronic document, the producing party will produce those metadata fields to the requesting party. For paper documents, the metadata set forth on Exhibit A, Paragraph 7 shall be produced to the extent available. If a party requests additional metadata about a particular document, the parties agree to meet and confer as to whether and how such a request can be accommodated.

11. **Extracted Text/OCR.** Full extracted text and/or OCR text shall be produced for all documents as described in Exhibit A, Paragraph 4.

12. **Load files.** The producing party shall provide an .opt load file to accompany the images and a .dat file as described in Exhibit A, Paragraph 5.

13. **Bates Numbering.** Each page of a produced document produced in TIFF format shall have a legible, unique page identifier (Bates Number) electronically “burned” onto the image. The producing party shall make its best efforts to ensure that the Bates Number does not obliterate, conceal or interfere with information from the source document. Any native file shall be renamed to be a single bates number and the original file name shall be produced in the metadata load file.

14. **Confidentiality Designation.** Responsive documents produced shall be stamped with the appropriate confidentiality designation in accordance with the Protective Order in this case. The producing party shall make its best efforts to ensure that the confidentiality designation does not obliterate or obscure information from the source document. Each responsive document

produced in native format will have its confidentiality designation identified in the filename of the native file.

15. **Production Media.** The producing party shall, at its option, produce documents via secure file transfer protocol (FTP) site or on CD-ROM, DVD, external hard drive (with standard PC compatible interface), or such other readily accessible computer or electronic media as the parties may hereafter agree upon (the “Production Media”). Each FTP site folder or piece of Production Media shall be assigned a production number or other unique identifying electronic folder name or label corresponding to the date of the production of documents on the Production Media (e.g., “Plaintiff’s Production Sept. 15 2018”) as well as the sequence of the material in that production wave (e.g. “-00001”, “-00002”).

16. **Security.** All parties shall make reasonable efforts to ensure that productions are free from viruses and that any copy of a production on physical media is encrypted. Any copies made of the production for internal use should also be encrypted or stored on a computer system that requires a password to access.

#### **D. Privilege**

1. **Privilege Logs.** A party withholding documents based on one or more claims of privilege will produce a privilege log within 90 days after the completion of its document production. The parties may modify the deadlines for production of the privilege logs by agreement. When there is a chain of privileged e-mails contained within one record, the producing party need only include one entry on the privilege log for the entire e-mail chain, and need not log each e-mail contained in the chain separately, provided that the description of the e-mail chain is accurate as to all e-mails in the chain. If a “family” of documents is entirely privileged, each document in the family shall be listed on the privilege log separately, and the

family relationship shall be indicated on the log. In the event a “family” of documents exists that contains both privileged and non-privileged documents, the parties agree that the privileged documents in the family may be replaced with a slipsheet indicating, “Privileged Document Withheld.” The withheld document will be logged and the remaining non-privileged “family” will be produced. The bates number of the slipsheet for the document withheld in this manner will be provided. Documents produced in a redacted format should be logged as well. The parties will meet and confer if there is a dispute as to whether a document withheld in this manner should be produced.

Communications with in-house or outside counsel beginning on May 25, 2018 do not need to be logged. In addition, communications with the undersigned counsel, whether before or after the date the action was commenced, do not need to be logged. The parties recognize the situation whereby non-privileged documents may be forwarded to a legal team for review, and that the very fact that the documents were grouped together and forwarded to counsel could be considered work product or protected by the attorney-client privilege. Thus, in the event there is a privileged email to either in house or outside counsel that would not have to be logged pursuant to this paragraph, and that has attachments to it that are responsive, non-duplicative, and not privileged in and of themselves, it is acceptable to produce those documents as though they were loose documents without any reference to the fact that they were part of an email family sent to counsel.

2. **Disclosure of Privileged Information.** The provisions of paragraphs 13 and 14 of the Protective Order governing the production of privileged documents shall apply to ESI. If the parties are using a review database, a privileged document should be replaced with a slipsheet indicating the document was removed and delete all extracted text (other metadata may be



retained) associated with the document. The parties do not need to remove any copies that may remain on server backups after deletion from the active computer system. The parties will meet and confer as to how to handle the original production containing the privileged document, i.e., whether the original production may be maintained with the privileged document or whether the producing party will provide a replacement production with a slipsheet inserted where the privileged document was located.

#### **E. Timing and Sequencing of Electronic Discovery**

The parties will proceed with the production of electronic information in a timely manner consistent with time considerations to be developed by the parties. The parties shall meet and confer to arrange an orderly production of ESI. Rolling productions are encouraged and will be discussed by the parties as they meet and confer.

#### **F. Exceptions to Protocol**

If the forms of production allowed by this protocol present an undue burden or cost for a producing party, the parties shall meet and confer to agree on a reasonable, alternative form of production. Any party may file a motion to seek individual relief from this protocol, but only after full compliance with Local Rule 37.1.

#### **G. Costs of Production**

Each party will presumptively bear its own costs of production. However, the parties reserve the right to seek cost shifting, and/or to object to any proposed cost-shifting, as appropriate at a later time. Nothing in this Order is intended or should be interpreted as affecting, in any way, a parties' rights to seek reimbursement for costs associated with the collection, review, and/or production of documents as allowed by law.

## **H. Discovery, Admissibility and Objections**

1. Nothing in this Order shall be construed to affect the discoverability or admissibility of any document or data. All objections to the discoverability or admissibility of any document or data are preserved and may be asserted at the appropriate time.

2. Nothing in this Order shall be interpreted to require disclosure of irrelevant information or relevant information protected by the attorney-client privilege, work-product doctrine, or any other applicable privilege or immunity. The parties do not waive any objections as to the production, discoverability, admissibility, or confidentiality of documents and/or ESI.

3. Nothing in this Order is intended or should be interpreted as narrowing, expanding, or otherwise affecting the rights of the Parties or third parties to object to a subpoena.

**IT IS SO ORDERED.**

/s/ Stephen R. Bough  
STEPHEN R. BOUGH  
UNITED STATES DISTRICT JUDGE

Dated: July 22, 2020