IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
SECOND JUDICIAL DISTRICT AT UTQIAGVIK

KAKTOVIK INUPIAT CORPORATION, Plaintiff, v. HOLLAND & KNIGHT, LLP, and WALTER FEATHERLY Defendants.	)	Case No. 2BA-21-59CI

ORDER GRANTING SECOND MOTION TO COMPEL

Before the Court is Plaintiff Kaktovik Inupiat Corp.'s (KIC) second motion to compel. KIC asks for an order compelling Defendants Holland & Knight, LLP, and Walter Featherly (H&K) to produce responsive documents to the first set of requests for production (RFPs), adopting KIC's Electronically Stored Information (ESI) agreement, and holding monthly discovery status conferences. KIC argues H&K has failed to meet discovery obligations by: (1) failing to search for documents outside the "client file;" (2) failing to provide transparency to discovery processes; (3) providing insufficient search terms; (4) refusing to collect documents from "noncustodial" sources; (5) failing to produce performance reviews; (6) failing to produce information on the decision making of the Anchorage office closure; (7) failing to produce internal H&K documents during and after arbitration; (8) failing to collect categories of information (such as handwritten notes, communications by text message or direct message etc.); and (9) providing numerous irrelevant documents.

H&K opposes arguing (1) H&K's disclosure is sufficient and H&K has fully complied with the Court's order and Rule 34; (2) H&K has disclosed information outside the residual file, including available performance reviews and details about the Anchorage office closure; and (3) H&K's unfortunate disclosure of other client's documents was promptly rectified, inadvertent, the result of a historical mistake predating H&K's involvement, and an administrative error.

The Court held oral argument on May 5th, 2025, and at the request of H&K the Court ordered supplemental briefing. Both parties submitted supplemental briefs before the Court heard

additional argument on June 23, 2025.[1] After reviewing the parties' filings, the Court GRANTS KIC's second motion to compel as explained below.

FACTUAL AND PROCEDURAL HISTORY AND PRELIMINARY FINDINGS

Because this is the second motion to compel and many of the issues are related to the first motion to compel the Court finds it necessary to delineate in greater detail the discovery motion practice before this Court. On January 16, 2024, KIC filed its first motion to compel. On January 26th, H&K filed its opposition, H&K's own motion to compel, a motion for a protective order, and a request for oral argument. H&K's motion to compel was denied and H&K's protective order was mostly denied. The Court held oral argument on the first motion to compel on March 28th. On March 29th, after continued oral argument the Court granted KIC's motion almost completely, denying the ESI agreement as premature.[2] Later, the Court denied H&K's protective order and further clarified its position on the right of privacy.[3]

When the Court granted KIC's motion to compel the Court largely found that H&K was non responsive, failing to conduct reasonably discovery. For the initial disclosures H&K had failed to provide: (1) *any* factual basis for their claims or defenses in their initial disclosures; (2) information for individuals likely to have discoverable information; and (3) a description by category and location of any documents. In fact, H&K only disclosed insurance information after the motion to compel was filed.[4] Similarly, the Court found that H&K's request for production was "incomplete and evasive," finding H&K failed to respond to the "bulk" of requests by providing only a boilerplate response to 40 out of 44 requests.[5] Conspicuously, the only requests for production that H&K disclosed related to H&K's counterclaim.[6]

During the proceedings of the first motion to compel H&K's defense rested on what H&K had termed the "client file." Originally the "client file" was H&K's file. However, when H&K closed their Anchorage office in 2020, many of their attorneys transitioned to Schwabe, the former

[1] Originally, the Court was going issue a decision on record for that time, but H&K filed a notice of supplemental authority in advance of continued oral argument. Since the Court received the notice before the Court had time to review and the Court did not overtly tell parties that a decision on the record would be held on June 23, 2025, the Court allowed continued argument. After review, the Court finds H&K's authority cited to be easily distinguishable and it does not affect the Court's decision in this order. The Court finds the motion to strike is moot.
[2] Court's Summary Order on Plaintiff's Motion to Compel, dated April 5th 2024 (later amended by Court's order Denying Motion for Protective Order) (hereinafter Court's Summary Order from First Motion to Compel).
[3] Court's Order Denying Motion for Protective Order & Clarifying Findings, dated May 31, 2024.
[4] Oral Argument March 28, 2024.
[5] *Id.* at 2.
[6] *Id.* at 3.

H&K attorneys (now Schwabe attorneys) took the file with them. Schwabe then represented KIC in the underlying arbitration case. After arbitration ended, the Schwabe attorneys gave the "client file" to KIC. KIC then disclosed the "client file" to H&K in their initial disclosures in June, 2023, it is now nearly to two years later.

During the first motion to compel, H&K argued that KIC possessed the relevant documents to the case because KIC possessed the "client file." During oral argument H&K put it this way, "the oddity of this case is that the [Schwabe] lawyers... they took with them the KIC 'client file'... [and] continued to build as arbitration went on and at some point Schwabe gave the file to [KIC]."[7] This is "how the client (KIC), and not the former lawyer (H&K), came to possess the Defendants' Client File in this legal malpractice case."[8] In other words, H&K argued they did not have a copy of the contents of the "client file," it was "lost" when the office closure occurred, and KIC, not H&K, has all responsive documents.

When the Court asked H&K about the "client file" during oral argument, H&K explained that "when H&K closed its anchorage office... it transitioned out clients, it moved its file, it gave away what it considers to be the client file... [And,] we [H&K] have still been doing exhaustive efforts to find residual traces of the file."[9] Comparing the "client file" to a physical file, H&K put it this way, "we all imagine in a malpractice case that you have the physical file and he hands it to the client and the client takes gets to do with it what he wants with it. That's what happened in 2020 [when the Anchorage office closure occurred]."[10]

Taking H&K's representations as true the Court found in its summary order:

- It was unreasonable of H&K to not keep a copy of H&K's "client file" when attorneys from H&K exited the firm taking the "client file" with them.
- Since H&K represented KIC for eight of the previous ten years, they had an ethical duty to take reasonable steps to preserve the "client file." H&K's ethical duty was heightened in light of potential future litigation.
- There is good cause to compel discovery based on KIC's good faith attempt to obtain the discoverable information without court involvement.[11]

[7] Oral Argument, March 28, 2024, at 1:56:25.
[8] Defs.' Opp. to Pl's M. to Compel Discovery Responses and Request for Related Relief., at 3 (Jan. 26, 2024).
[9] Oral Argument, March 28, 2024, at 1:57:00.
[10] Oral Argument, March 28, 2024, at 1:57:20.
[11] Court's Summary Order from First Motion to Compel, at 1-2.

Over a year later, KIC filed a second motion to compel (the motion currently before the Court) and the Court has learned of additional facts that occurred in the intervening time:

- On May 1, 2024, H&K disclosed a "residual file" within the 30-day deadline set by the Court during the first motion to compel decision.[12]
- On July 29, 2024, KIC notified H&K that their productions included documents from other clients and asked H&K to remove them.[13]
- On August 9, 2024, H&K reproduced the "residual file" with the other clients documents allegedly removed.[14] In reproducing the "residual file," the same files were re-disclosed with different bate stamp numbers.[15]
- In November, 2024, parties met and conferred and KIC learns the residual file is almost entirely duplicative of the "client file" and that H&K's document collection has relied almost solely on collections from the prior arbitration and the "client file."[16] And according to Adam Hollander, "Mr. Gilmore refused to provide the criteria or protocols that Defendants used to collect and review documents for production" for the requests for production.[17]
- On January 29, 2025, H&K sent a letter stating that the residual file is "largely if not entirely duplicative (as we have always said) of the file that [KIC] received from Schwabe."[18] In this letter, H&K revealed for the first time some of the search terms and limitations they used in conducting searches of ESI.[19]
- KIC continued to notice many documents from other clients amounting to 37,000 documents, comprising over 50% of the residual file[20]

Based on these additional facts, the Court finds it necessary to make a few preliminary findings concerning H&K's behavior:

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[12] Defs.' Ex. 2.
[13] Pl.'s Ex. C at 7.
[14] *Id.*; D.'s Opp. at 11; D.'s Ex. 6.
[15] Denise M. Berry Aff 2.;
[16] Ex. C at 2.
[17] Adam Hollander Aff. at 2; *but c.f.* Pl.'s Ex. B at 2 ("you must have misunderstood what was said during our call on November 1, 2024. Defendants' production has *not* been based only on 'the prior arbitration and the client file that was transferred to Schwabe.' We have never said this, and this is an inaccurate statement.").
[18] Pl.'s Ex. A at 2.
[19] Pl.'s Ex. A at 3.
[20] Oral Argument, May 6, 2025; Pl.'s Ex. C at 7; Adam Hollander's Aff. at 2.

- H&K's representations to the Court that they had lost the "client file" during the first motion to compel proceedings amount to a misrepresentation at worst and at best gross negligence;
- H&K's representations during the first motion to compel proceedings to the Court that H&K has still been performing "exhaustive efforts to find residual traces of the file" and similar statements amount to at worst a misrepresentation and at best gross negligence;
- H&K's representations to the Court during the first motion to compel at worst violate their duty of candor to the Court and at best show gross negligence;[21]
- H&K's subsequent disclosure after the first motion to compel revealing they had never lost the "client file" show H&K's conduct in the first motion to compel was worse than known and shows a willful withholding of discovery;
- H&K's numerous statements during the first motion to compel proceedings that they were diligently searching platforms and had given all material not duplicative or already available in the "client file" show gross negligence and a willful intent to impede discovery[22]

The above findings of fact, show the case is at a very different juncture then it was during the first motion to compel. Given H&K's bad faith representations and willful obstruction, the Court cannot take every argument and statement they make at face value. The Court has a duty to make credibility determinations and has found H&K's conduct, to put it mildly is deeply troubling. Unfortunately, future filings by H&K must be analyzed through the lens of their past bad faith behavior evidenced by their filings to this point. Further, the Court notes that since the discovery issues raised by KIC's Motion to Compel involve many different issues, there will be some overlap throughout the order.

[21] Rule 3.3 Alaska Rules of Professional Conduct.

[22] It is important to note that H&K made many of these statements about having given all non-duplicative material when they claimed they had only scratched the surface of the contents of the "client file." Therefore, H&K's excuse that they withheld the "residual file" because it was duplicative contradict H&K's claims that due to the voluminous nature of the client file they did not know what was in it.

DISCUSISON

The Court addresses the matters in the following order: (1) the deficiency of H&K's Discovery; (2) H&K's counterarguments; (3) whether the Court should enter the ESI agreement and set discovery status meetings; and (4) future expectations and sanctions.

H&K's Deficient Disclosure

The Court now addresses whether H&K's disclosure up until filing the second motion to compel is deficient. Specifically, KIC complains that (a) H&K has failed to search outside the residual file, (b) failed to provide performance reviews, (c) failed to provide documents as to key personnel, (d) failed to provide documents on the anchorage office closure, (e) failed to produce internal H&K documents from the time period after the Anchorage office closure, and (f) has failed to provide documents from non-custodial sources.

Under Alaska law, courts must "broadly construe" discovery rules.[23] A party may acquire discovery of "any matter, not privileged" if relevant to the case.[24] Parties must give even inadmissible information during discovery if, "reasonably calculated to lead to" admissible evidence.[25] But, the Court will limit discovery if it determines (i) it is unreasonably cumulative or duplicative, (ii) there was ample opportunity to discover it, (iii) or the expense or burden outweighs its likely benefit.[26] The burden is on the party disclosing discovery to "show the information is not reasonably accessible because of undue burden or cost."[27]

Under Civil Rule 26, parties may also obtain relevant matters "including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter."[28] Further, parties are required to "meet in good faith to agree" on a proposed discovery plan including, among other things, (1) the timing, (2) the subjects and issues, (3) Electronically stored information, including the forms to be produced.[29]

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[23] *Lee v. State*, 141 P.3d 342, 347 (Alaska 2006).
[24] Civil Rule 26(b)(1).
[25] *Id.*
[26] *Id.* at 26(b)(2)(A) (weighing the "needs of the case, the amount in controversy, the parties' resources, the importance of the issues... and the importance of the proposed discovery.").
[27] Civil Rule 26(b)(2)(B).
[28] Civil Rule 26(b)(1).
[29] Civil Rule 26(f).

The Court finds that H&K's disclosures are largely deficient to date. As explained below there are multiple reasons compelling the Court to find H&K's disclosures deficient:

(1) H&K's failure to meaningfully provide transparency in their discovery plan and process;

(2) H&K's failure to meaningfully search outside the residual file;

(3) Requests for production showing there are significant gaps in H&K's disclosures;

(4) H&K's disclosure of thousands of pages of irrelevant documents;

(5) H&K's manipulation of source material;

(6) H&K's unreasonably delayed disclosure of search terms;

(7) H&K's failure to disclose H&K documents during and after arbitration proceedings; and

(8) H&K's lack of disclosure of categories of information, including handwritten notes, text messages, direct messages, or documents stored on custodians' personal devices.

First, the Court finds that H&K's disclosures are deficient for failing to provide transparency throughout the discovery process. Since the first motion to compel, KIC has asked the Court to enter an ESI agreement showing KICs attempt at negotiating in good faith on search terms and moving discovery forward.[30] H&K originally claimed an ESI agreement was necessary and in response to KIC's proposed ESI agreement before the Court. The Court declined to enter the ESI agreement since it was premature due to H&K's noncompliance when the Court granted the first motion to compel. During the first motion to compel the Court ordered H&K to amend its initial disclosures to include the "category and location of any documents in conformity with Rule 26(a)(1)(D)."[31] And the Court said during the decision on record, pertaining to H&K's deficient disclosure that "[t]here's been reference to servers that H&K may have but there's no listing of that [or] where other items might be found."[32] Since then KIC has continued to ask for transparency in the discovery process asking for specific details such as what devices were searched and the current location of the responsive documents.[33]

[30] Court's Summary Order from First Motion to Compel, 1, 3; Pl.'s Ex. A from the first motion to compel.
[31] Court's Summary Order from First Motion to Compel, 2.
[32] Decision on Record March, 29, 2024; Pl.'s Ex. F at 4.
[33] Pl.'s Ex. C at 2, 3; Hollander Aff. 2.

Instead of transparency, H&K has relied on a number of euphemisms to convey their efforts, such as "we continue to search across platforms,"[34] we have searched "H&K's archived emails,"[35] or we searched "our client records and materials."[36] Further, as will be explained later in this order, when H&K did, eventually, give some specifics of H&K's searches it was deficient and far too late, occurring years after the case was initiated, and almost a year after the first motion to compel was granted by this Court.[37] The Court finds, to date, H&K has meaningfully failed to amend its initial disclosures to include the "category and location of any documents in conformity with Rule 26(a)(1)(D)" in violation of the Court's order for the first motion to compel.[38] The Court also finds that H&K's lack of transparency in providing the process or method of their discovery in a reasonably specific manner violates Rule 26(f) which requires parties to meet in good faith to make a discovery plan and otherwise provide relevant disclosure. H&K's lack of transparency provides strong evidence that H&K's disclosures are deficient.

Second, the Court finds H&K's disclosure is deficient because H&K has failed to meaningfully search outside the "residual file," the KIC disclosed "client file," or the files obtained from Schwabe.[39] In November, 2024, H&K admitted, for the first time, that the residual file documents produced "were largely or entirely duplicative" of the "client file."[40] Later H&K stated to H&K "your demands that we search outside the KIC residual file at H&K for the possibility that other relevant evidence exists is unprecedented and very complicated."[41] While H&K objected claiming their response was "consistent" with past objections, H&K misleadingly leaves out important context surrounding the first motion to compel.[42] For these reasons the Court finds that

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[34] Pl.'s Ex. B at 2.
[35] Pl.'s Ex. A at 3.
[36] *Id.*
[37] Pl.'s Ex. A at 2-3. As will be explained later in this order, H&K limited the date range which would leave out many responsive documents. Even though KIC specifically asked in RFPs for documents in these time ranges.
[38] While H&K did amend their initial disclosures they only provide previously bate-stamped documents, a description of the residual file, the "client file" and a claim that KIC and its subsidiaries have discoverable documents. See Def.'s Ex. 1 at 10. Notably, H&K failed to give a description of the location of any of their own files.
[39] Pl.'s Ex. C, 2 ("H&K's document collection efforts it has, to date, relied solely on the collections from the prior arbitration and the client file that was transferred to Schwabe (with a small handful of additional documents concerning Defendant's counterclaims).").
[40] Adam Hollander's Aff., 2; Pl.'s Ex. A, 1-2. In defense H&K claims they have always said that their
[41] Pl,'s Ex. D at 2; *see also*, Pl.'s Ex. A, 1-2. As explained later, H&K appears to claim that they provided information outside the residual file, client file, or Schwabe file, but the answer is sufficiently vague to avoiding answering the substance of KIC's claim. Pl.'s Ex. B, 2.
[42] Defs.' Opp'n 8-9; H&K made the same boilerplate objection that they had given all documents not duplicative during the first motion to compel. However, H&K simultaneously claimed they did not have a copy of the KIC disclosed "client file" which is duplicative of H&K's residual file. H&K's positions are contradictory and their "consistent" objection was found to be evasive by the Court. As the Court has discovered, H&K misrepresented that H&K did not have the "client file" or the "residual file." *See*, preliminary findings in this order.

H&K has failed to search meaningfully beyond the "client file", residual file, or documents that Schwabe has disclosed.

Third, KIC has pointed to several H&K responses to requests for production with unexplainable gaps in production. RFP no. 29 seeks documents surrounding Walter Featherly's departure and RFP no. 30 seeks documents concerning H&K's decision to close the H&K Anchorage office. H&K has provided no H&K documents other than logistical documents, instead objecting that "there are no H&K management meeting minutes on this topic."[43] In addition, H&K points to a Schwabe document where a former H&K attorney claimed he and other attorneys left H&K for a better fit.[44] In other words, H&K, to date, has not provided any internal H&K documents giving reasons for the office closure. Similarly, KIC has pointed to the lack of documents from Walter Featherly's current employer from before Featherly's departure. The Court agrees with KIC that H&K's lack of disclosure "strains credulity," H&K must have internal documents relating to the reasons for the office closure and Walter Featherly's departure, other than logistical documents. H&K's responses to RFP 29 and 30 do not show that H&K has diligently fulfilled their discovery obligations.

Similarly, in RFP No. 31, KIC asks for formal and informal performance reviews for six different attorneys. H&K has provided performance reviews for two attorneys and objects that "informal performance reviews" is too vague and would exceed relevance to the case.[45] H&K has only provided performance reviews for two of those attorneys who are associates.[46] H&K claims based on information from their client that there are no formal performance reviews for partners. Taking that representation as true, H&K must still have some way of evaluating performance of its attorneys given the size of their firm.[47] A large firm the size of H&K must also have some way of evaluating partners or some reason or document stating a policy reason. As a result, the Court finds that H&K's production for RFP's No. 29-31 are deficient. The gaps in disclosures in the RFPs that KIC has brought before the Court give evidence that H&K's disclosures are deficient.

Fourth, KIC points to H&K's disclosure of tens of thousands of pages of irrelevant documents as evidence of H&K's deficient disclosures. H&K disclosed the "residual file" on May

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[43] Defs.' Opp'n, 21.
[44] Defs.' Opp'n, 21 at n.108.
[45] Defs.' Ex. 9 at 36-39.
[46] *Id.*
[47] H&K says that "H&K has disclosed performance metrics and other available information about partner performance, which is arguably a performance review in another form." D.'s Opp'n 20 at n. 102.

1st, 2024.[48] In July, KIC gave notice to H&K that there were numerous irrelevant documents from other clients in the residual file. [49] On August 9, 2024, H&K re-produced the residual file with other clients documents allegedly removed.[50] Over 6 months later when KIC filed their second motion to compel they identified "over 37,000 documents belonging to other H&K clients."[51] This comprises over 50% of the disclosed documents of the residual file which totaled approximately 72,000 documents. The Court finds that this is strong evidence that H&K has failed to diligently conduct discovery by not reviewing the documents disclosed. H&K counters that this "document dump" was inadvertent because a majority was from a client with the same initials "KIC" and some was from a client predating the firms involvement.[52] However, he Court does not find H&K's excuses credible, especially since KIC provided notice of the problem, giving H&K a chance to remedy. Therefore, Court finds H&K's "document dump" fits the unreasonable, abusive, and obstructionist conduct described under Rule 37(g).[53]

Fifth, KIC complains that H&K's disclosure is deficient since H&K manipulated the documents in a manner that removed metadata, changed bate-stamps, and made discovery more difficult.[54] H&K admits they "changed them into format readily accessible" by consolidating the residual files into 22 PDFs.[55] H&K claims they changed the format to PDFs "because [H&K] thought the information to be gathered was more significant than providing it in the metadata format."[56] Similarly, H&K also admits they removed the bate stamps and gave new bate stamp numbers.[57] However, surprisingly, H&K claims they were compliant with Civil Rule 34. From the Court's view, Civil Rule 34 makes it clear that a party "*must* produce the information in a form... in which it is ordinarily maintained" unless "that form is not reasonably usable."[58] H&K does not claim that the native format was not in a form reasonably useable, therefore, H&K's decision to

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[48] Defs.' Ex. 2.
[49] Pl.'s Ex. C, 7; Defs.' Opp'n 11.
[50] Pl.'s Ex C, 7; Defs.' Opp'n at 11; Defs.' Ex. 6.
[51] Pl.'s Motion to Compel, 20; Adam Hollander aff. 2.
[52] Defs.'s Opp'n 26-27.
[53] Civil Rule 37(g).
[54] Pl.'s Supp. Br. 2-4.
[55] Defs.' Opp'n 17, 5 n.7.
[56] Defs.'s Ex. 17, at pg. 28.
[57] E.g., Defs.' Supp. Br. 3 ("not only did H&K not purposely remove any bate stamps, t was also reasonable to uniquely bates stamp the 22 PDFs"); Defs.' Ex. 17 at pg 25 ("so then we had everything together and then we were going to Bates stamp everying... it's too burdensome here to, you know grab the printed copies that have Bates stamps on them and slam them together; I'm going to run a new set of Bates stamps on, admittedly duplicative material, but it will be organized in a new and different way that's an improvement").
[58] Civil Rule 34(b)(2).

unilaterally change the disclosure format violates Rule 34. H&K's repeated arguments that H&K complied with Rule 34 since PDFs are a "reasonably useable" format contradicts the rule. To compound H&K's noncompliance, H&K ignored KIC's request that the data be provided in native format with metadata included. Therefore, the Court finds that H&K's manipulation of the source data, stripping the metadata, and changing the bates stamps constitutes deficient disclosure and bad faith obstruction.

Sixth, KIC argues that H&K's late-divulged search terms show H&K's disclosure is deficient. As mentioned earlier, KIC made attempts to negotiate in good faith on search terms and get reasonably specific information on KIC's search process.[59] H&K provided a few search terms in a letter January 29, 2025. However, H&K's provided search terms present obvious shortcomings. For example, the date range limited the search from 2015 to present, even though RFPs 1, 9, 33, 41, and 42 specifically ask for documents before 2015. Similarly, the search H&K disclosed specified searching "archived emails," leaving out other discoverable sources. In addition, KIC points out that the H&K's provided search terms left out other relevant information.[60] Therefore, the Court finds that H&K's limited search terms provide strong evidence H&K's disclosures are deficient.

Seventh, the Court addresses the unexplained absence of H&K documents from certain time periods. Specifically, KIC has pointed to an absence of disclosed H&K documents during and after arbitration. KIC claims that H&K has failed to provide any H&K documents during and after arbitration. Instead, H&K's disclosures from this time period "[rely] wholly on documents produced by Schwabe."[61] H&K admits they have failed to disclose this information arguing that KIC's request "has expanded its discovery demands."[62] The Court finds this unexplained "gap" in their production scope is further evidence of H&K's deficient disclosure and is additionally in violation of the Court's prior order which compelled discovery of events occurring during or after the time of the arbitration, such as RFP 30.

Lastly, the Court addresses H&K's lack of disclosure of categories of information, including handwritten notes, text messages, direct messages, or documents stored on custodians'

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[59] *Supra* note 27; see also, e.g., Pl.'s Ex. C, 3 (KIC's request for H&K to explain the efforts taken to "search across platforms" and additionally asking eight reasonably specific questions about the details of their discovery process).
[60] Defs.' Opp'n 15-17.
[61] Pl.'s Motion to Compel, 19 (citing Pl.'s Ex. E).
[62] Defs.' Opp'n 22.

personal devices.[63] The Court finds that this is strong evidence that H&K's disclosures are deficient and that they are not meaningfully searching beyond the residual file.

Based on the above findings the Court finds H&K's disclosures deficient and GRANTS KIC's second motion to compel which requested H&K to:

1. Conduct reasonable disclosure beyond the "residual file," Schwabe disclosed documents, and the KIC disclosed "client file;"
2. Amend their initial disclosures to provide descriptions and locations of documents in conformity with Rule 26 (a)(1)(D);
3. Negotiate meaningfully on ESI protocol and search terms;
4. Search non-custodial sources;
5. If requested by KIC, re-disclose residual file in native format with metadata without changing bate stamps for ease of cross-reference for KIC;
6. reasonably review disclosures so as not to burden KIC with numerous irrelevant documents;
7. provide reasonable transparency of search procedures, methods, and locations.

H&K Counterarguments

The Court now addresses H&K's remaining counterarguments that were not fully addressed above. H&K's primary argument, is that they have provided voluminous amounts of timely discovery consistent with the Court's order. H&K did provide *some* documents (though mostly duplicative) and *some* disclosure was timely, but these disclosures do not explain the gaps of the types of information, nor the largely duplicative nature of the disclosures. Nor does the volume of H&K's disclosure show compliance. Nor does H&K's "near-constant communication"[64] show good faith, transparency, or a willingness to disclose responsive documents since they are almost entirely duplicative.

Another argument H&K makes is that the disclosure of the "residual file" is not a document dump because RFP no. 43 asked for the complete client file, and there is no violation "when the responding party gave what was asked for (no matter how large)."[65] However, this overly-literal argument misses the point. H&K has a responsibility to provide responsive documents in good

[63] Pl.'s Motion to Compel, 15.
[64] Defs.'s Opp'n 11.
[65] *Id.* at 17.

faith and *review* what is disclosed. Since over 50% of the residual file was from other clients, it is easy to see that H&K never properly reviewed the documents. Additionally, the Court granted KIC's first motion to compel over 8 months after KIC asked for them, meaning H&K had several months to review.

H&K also argues their disclosures are sufficient since discovery is ongoing and that H&K is currently searching outside the residual file while implementing H&K's ESI protocol.[66] However, assuming their argument is valid, the Court had to determine whether H&K's disclosures were sufficient *before* the second motion to compel was filed, not *after*. Under Civil Rule 37, a Court should grant a motion to compel "if the disclosure or requested discovery is provided *after* the motion was filed."[67] Since approximately 10 months have past since the first motion to compel was granted, these disclosures are late. Nor do these efforts excuse H&K's deficient disclosure to date. Further, the Court notices that certain details of H&K's "ongoing" discovery efforts have been left out, giving the Court an inability to evaluate to what extent good faith efforts are occurring.[68]

H&K also argues in different ways that discovery should be limited because what KIC requests is overburdensome and costly compared to the importance of the discovery requested. Under Civil Rule 26, discovery of ESI may be limited when the discovery is not "reasonably accessible" due to undue burden or cost.[69] However, the objecting party "must show that the information is not reasonably accessible."[70] Since H&K has largely refused to provide transparency of their discovery processes H&K's cost estimates are vague and conclusory. Therefore, the Court cannot find that H&K has met the burden of showing that the discovery is not reasonably accessible due to undue burden or cost. Further, even if the costs were high, the Court finds there is good cause to compel discovery given the relevance of much of the discovery and H&K's willful noncompliance with discovery requests to date.

H&K also argues that their conduct should be excused because many of the claimed of deficiencies were also present in KIC's disclosures.[71] However, the Court finds KIC's supposed

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[66] Defs.'s Opp'n 23; Defs.'s Notice of Supp. Authority & Evidence for Oral Argument, 3.
[67] Civil Rule 37(a)(4)(A) (emphasis added).
[68] For example, H&K represents that they have engaged a "third-party company" with "over a dozen attorneys" but does not say when the review started, nor give details as to how, where, or what is being searched. Gilmore's Aff., 3-4 dated April 11, 2025; Defs.'s Notice of Supp. Authority & Evidence for Oral Argument, 3.
[69] Civil Rule 26(b)(2)(B).
[70] *Id.*
[71] E.g., Defs.' Opp'n 27-28 (KIC committed all of the supposed 'discovery crimes' that it presently accuses H&K of committing).

discovery failures, even if found, do not excuse H&K from providing reasonable disclosures.[72] Also given the severity of H&K's violations up to this point, the Court is not persuaded that any of KIC's alleged violations are comparable.

Another argument H&K frequently employs in defense of their document dump is that H&K has long warned KIC that all their discovery would be duplicative.[73] In doing so H&K frequently points to objections and arguments made during the first motion to compel. However, the Court finds these arguments misrepresent the surrounding circumstances when those past statements were made. For example, during the first motion to compel, in Samuel Gottstein's affidavit he claims "Given the large number of documents involved... I have not been able to review even 1% of the reviewable data [from the "client file"]."[74] H&K's representations during the first motion to compel repeatedly made clear that they had barely reviewed the data of the KIC "client file." At the same time, during the first motion to compel, H&K also argued they were diligently searching for residual traces of the "client file". As previously mentioned, after the first motion to compel was granted, H&K claimed to have discovered a backup copy of the "client file" that has now been labeled the "residual file." As a result, the Court cannot find H&K's earlier excuse for failing to disclose the "residual file" was credible. Likewise, the Court finds H&K's argument they have long warned KIC that the disclosure would be duplicative as disingenuous and misleading, at best, and at worst a willful misrepresentation.

Status Meetings, ESI Agreement, & Deadlines

The Court agrees with parties that monthly discovery status conferences are necessary to move the case forward given H&K's conduct, therefore the Court will set monthly discovery status conferences. The first status conference will be **July 31[at] at 10 a.m. via Zoom**.

The Court also finds that based on KIC's request and the need to move the case forward an ESI agreement is appropriate. However, the Court noticed some slight typological errors in the current ESI agreement, for example it is missing referenced sections, and as a result it appears it needs some revision. Therefore, the Court directs parties to meet and meaningfully negotiate terms

[72] *See* Civil Rule 26(a)(1)(H). Although this rule pertains to initial disclosures, the Court finds it applicable here. The supposed deficiencies H&K primarily complains of involve KIC's initial disclosure of H&K's "client file." However, KIC disclosed the "client file" KIC was really re-disclosing an H&K document to H&K. Therefore, these "deficiencies" appear to be partially attributable to H&K and should be overlooked.

[73] E.g., Defs.' Opp'n 28 ("And unfortunately, many of the concerns H&K expressed about the possible disclosure of irrelevant, duplicative discovery have borne out.").

[74] Samuel Gottstein aff., 3, dated Jan. 26, 2024.

substantially in line with KIC's ESI agreement before the first status meeting. Further, given the conduct by H&K necessitating the ESI agreement the Court finds that it is appropriate for H&K to bear the burden of any costs associated with implementing the ESI agreement.

The Court sets the following additional deadlines:

- within 7 days, H&K must amend their initial disclosures to include the "category and location of any documents in conformity with Rule 26(a)(1)(D)" as detailed above;
- within 10 days H&K must disclose responsive information for RFPs 29, 30, and 31 correcting the deficiencies detailed above, **failure to fully disclose the documents may result in sanctions** including an adverse finding for missing documents;[75] and
- within 14 days KIC must submit reasonable costs and attorney fees that were incurred in filing this motion pursuant to Civil Rule 37(a)(4)(A) including fees that were not included from the first motion to compel.

Future Expectations and Summary Disposition

Based on above, the Court also finds it necessary make clear expectations moving forward. Generally, courts give litigants leeway to make creative arguments, even when the arguments are borderline frivolous. If the arguments have at least some legal merit the Court will entertain these arguments. The Court is mindful that attorneys have a duty to advocate zealously on behalf of their clients.[76] But, as a counterbalance, attorney behavior must also not violate court rules and professional rules of conduct, such as, candor towards the court, competence, and diligence.

In this case, H&K has shown a pattern of behavior that causes the Court to question whether basic good faith efforts to comply with discovery are being observed in even the most menial matters. As an example, H&K repeatedly uses overly-literal statements to describe their efforts in discovery. For example, H&K claims they are complying with Rule 34(b) because H&K produced the residual file "'in the manner' it is kept."[77] This is in direct contradiction to Rule 34(b) which requires parties to produce documents "as they are kept in the usual course of business" not as they

[75] Honda Motor Co., Ltd. v. Salzman, 751 P.2d 489, 492 (1988)
[76] "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Preamble, Alaska Rules of Professional Conduct.
[77] Defs.' Opp. at 13, 18.

are kept when preparing for discovery. In a similar manner, H&K repeatedly misstates arguments or over-generalizes statements in a manner that allows H&K to deny or avoid answering the substance or essence of the questions altogether. The Court provides the following as an example:

> **KIC:** On our call on November 1, 2024, you indicated that with respect H&K's document collection efforts it has, to date, relied solely on the collections from the prior arbitration and the "client file" that was transferred to Schwabe (with a small handful of additional documents concerning Defendant's counterclaims).[78]
>
> **H&K response:** In terms of Defendants' document collection efforts to date, you must have misunderstood what was said during our call on November 1, 2024. Defendants' production has *not* been based only on "the prior arbitration and the client file that was transferred to Schwabe." We have never said this, and this is an inaccurate statement. What we have provided are H&K's residual and other files, some of which we previously indicated were likely to be duplicative of Plaintiff's initial disclosures.[79]

H&K's ambiguous response above provides no real answers. Notably, H&K narrowly focuses only on a part of KIC's statement leaving out crucial details, before proclaiming the statement is "inaccurate." These types of non-responses by H&K are frequent and cause the Court to question whether H&K has any intention of providing discovery in good faith. To the extent H&K's arguments present factual circumstances that misleadingly lack candor, or simply obstruct the discovery process the Court may sanction H&K. In granting this second motion to compel, it has now been firmly established that H&K has been unwilling "to comply with the rules governing discovery and this Court's prior order compelling discovery."[80] Therefore, future sanctions may include the full panoply of sanctions available under Rule 37(b) including an order that liability be declared against Holland & Knight, and Walter Featherly.[81]

In addition, the Court at this point is aware that the "client file" and the "residual file" as well as the documents disclosed from Schwabe are almost entirely duplicative. The Court finds that H&K has played what amounts to a "shell game" up until this point, disclosing, redisclosing, and duplicating disclosures in different manners to make it look as if they are complying with discovery. At the same time this behavior has burdened KIC with irrelevant and wasteful review. These discovery abuses have prejudiced KIC and it is likely that KIC may lose its trial date due to H&K's behavior. The Court finds this behavior to be willful and in bad faith and constitute the

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[78] Pl.'s Ex. C at 2
[79] Pl.'s Ex. B at 2.
[80] *Honda Motor Co., Ltd. v. Salzman*, 751 P.2d 489, 492 (1988).
[81] Civil Rule 37(b)(2); *Honda Motor Co., Ltd.*, 751 P.2d at 493 (1988).

types of obstructionist conduct described in Rule 26(f) and sanctionable under Rule 37. Since the Court finds H&K's disclosures are largely duplicative and deficient, the Court also finds that H&K has failed to comply with the Court's first order compelling disclosure of KIC's RFPs. Because the Court has made the finding that H&K's conduct has been willful and in bad faith, the burden is now on H&K to demonstrate that their future disclosures to these RFPs are in good faith. Since H&K has been willfully withholding discovery previously ordered in the first motion to compel "it is proper to place the burden of showing that noncompliance was not willful on the party from whom discovery is sought."[82]

In summary, the Court GRANTS KIC's second motion to compel, requiring H&K:

1. Conduct reasonable disclosure beyond the "residual file," Schwabe disclosed documents, and the KIC disclosed "client file;"
2. Amend their initial disclosures to provide descriptions and locations of documents in conformity with Rule 26 (a)(1)(D);
3. Negotiate meaningfully on ESI protocol and search terms;
4. Search non-custodial sources;
5. If requested by KIC, re-disclose residual file in native format with metadata without changing bate stamps for ease of cross-reference for KIC;
6. reasonably review disclosures so as not to burden KIC with numerous irrelevant documents;
7. provide reasonable transparency of search procedures, methods, and locations.

IT IS SO ORDERED.
Dated at Kotzebue, Alaska, this 3rd day of July, 2025.

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA SECOND JUDICIAL DISTRICT

PAUL A. ROETMAN
Superior Court Judge

[82] *Honda Motor Co., Ltd. v. Salzman*, 751 P.2d 489, 492 (Alaska 1988).

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