

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition of Tervita Corporation by SECURE Energy Services Inc;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*;

BETWEEN

THE COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

MOTION RECORD OF THE RESPONDENT/MOVING PARTY

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CT-2021-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition of Tervita Corporation by SECURE Energy Services Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant/Responding Party

- and -

SECURE ENERGY SERVICES INC.

Respondent/Moving Party

**NOTICE OF MOTION TO COMPEL PRODUCTION OF THIRD PARTY
DOCUMENTS**

Re: Application Under s. 92 of the *Competition Act*

TAKE NOTICE that the respondent, SECURE Energy Services Inc. (“**SECURE**”), will make a motion to the Competition Tribunal (the “**Tribunal**”) on November 17, 2021 at 10:00 am by videoconference, or on an alternative day and place to be determined by the Tribunal.

THE MOTION IS FOR:

1. An Order that the Commissioner of Competition (the “**Commissioner**”) produce to SECURE the documents listed in Schedule “B” to the Commissioner’s Affidavit of Documents

sworn October 29, 2021 (the “**Commissioner AoD**”) that have the description “Document from Third Party” (the “**Third Party Documents**”);

2. In the alternative, an order the Commissioner provide a further and better affidavit of documents providing further particulars of the Third Party documents, including the nature of the document, the author, the recipient, and anyone copied on the document;

3. Costs of this motion; and

4. Such further and other relief as this Tribunal may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. On June 29, 2021, the Commissioner filed an Application with this Tribunal challenging the proposed acquisition of Tervita Corporation by SECURE Energy Services Inc. (“**SECURE**”) pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34;

2. SECURE responded to the Application and maintains that the Application ought to be dismissed in its entirety;

3. Schedule “B” to the Commissioner AoD lists 502 documents that the Commissioner objects to disclosing on the basis of privilege;

4. The Third Party Documents comprise 55 of the documents listed in the Commissioner’s Schedule “B.” Each of them is described only as “Document from Third Party” (the “**Third Party Documents**”) and has only “Third Party” identified as its author;

5. The Commissioner objects to producing the Third Party Documents on the basis of litigation privilege;

6. Documents that were not created for the dominant purpose of assisting counsel in litigation are not subject to litigation privilege and litigation privilege cannot be used to shield from production documentary evidence obtained by a party;

7. The Commissioner has failed to adequately assert a claim for litigation privilege over the Third Party Documents and has not provided sufficient information to assess the Commissioner's privilege claim;

8. Any Third Party Documents that were created by third parties and supplied to the Commissioner were not created or brought into existence for the dominant purpose of assisting the Commissioner's counsel in the conduct of litigation, and are therefore not privileged and must be produced;

9. Subsections 8 and 8.1 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended;

10. Rules 2(1), 34, 60, and 61 of the *Competition Tribunal Rules*, SOR/2008-141, as amended; and

11. Such further and other grounds as counsel may advise and this Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

12. The affidavit of Daniel Nyman sworn November 8, 2021, and the exhibits thereto;

13. The pleadings herein; and,

14. Such further and other material as counsel may advise and this Tribunal may permit.

November 8, 2021

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Lawyers for the Respondent,
SECURE Energy Services Inc.

TO:

THE REGISTRAR OF THE COMPETITION TRIBUNAL

Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

AND TO: DEPARTMENT OF JUSTICE CANADA
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, Quebec K1A 09C

Jonathan Hood

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Lawyers for the Applicant, the Commissioner of Competition

CT-2021-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition of Tervita Corporation by SECURE Energy Services Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant/Responding Party

- and -

SECURE ENERGY SERVICES INC.

Respondent/Moving Party

AFFIDAVIT OF DANIEL NYMAN
(Sworn November 8, 2021)

I, **DANIEL NYMAN**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a lawyer with the inSource group at Blake, Cassels & Graydon LLP, counsel to the Respondent SECURE Energy Services (“SECURE”) in this Application. As such, I have knowledge of the matters to which I herein depose. Where I do not have personal knowledge, the information set out below is based on my information and belief, and I verily believe it to be true.

2. Pursuant to the Scheduling Order of the Tribunal dated October 12, 2021, the Commissioner of Competition (the “**Commissioner**”) delivered his sworn affidavit of documents on October 29, 2021. A copy of the Affidavit of Documents of the Commissioner of Competition is attached to my affidavit as Exhibit “A” (the “**Commissioner AoD**”).

3. Schedule “B” to the Commissioner AoD lists 502 documents that the Commissioner objects to disclosing on the basis of privilege. These include 55 documents that are described only as “Document from Third Party” (the “**Third Party Documents**”) Each of them has only “Third Party” identified as its author. For ease of reference, a list of the Third Party Documents is attached to my affidavit as Exhibit “B”.


4. The Commissioner has obtained at least three orders under section 11 of the *Competition Act* requiring third parties to produce to him information and data for the purposes of this application. Copies of three orders dated September 23, 2021 issued against Galatea Technologies Inc., AQT Water Management Inc., and Albright Flush Systems Ltd are attached to my affidavit as Exhibits “C,” “D,” and “E,” respectively.

5. I make this affidavit in support of SECURE’s motion for further production from the Commissioner and for no other purpose.

SWORN remotely by Daniel Nyman)
 at the City of Toronto,)
 in the Province of Ontario, before me))
 on November 8, 2021 in accordance)
 with O. Reg. 431/20, Administering)
 Oath or Declaration Remotely)



DANIEL NYMAN



 A commissioner for taking affidavits



**This is Exhibit "A" to the Affidavit
of
Daniel Nyman
Affirmed on November 8, 2021**

CT-2021-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

AND IN THE MATTER OF the proposed acquisition of Tervita Corporation by Secure Energy Services Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to 92 of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

**SECURE ENERGY SERVICES INC.
TERVITA CORPORATION**

Respondents

**AFFIDAVIT OF DOCUMENTS OF THE COMMISSIONER OF COMPETITION
AFFIRMED OCTOBER 29, 2021**

I, Jacqueline Byers, of the City of Ottawa, in the Province of Ontario, solemnly affirm that:

1. I am a Competition Law Officer with the Competition Bureau.
2. I have participated in and overseen a review of the Applicant's potentially relevant documents and have made appropriate inquiries of others to inform myself in order to make this affidavit.
3. Except as described in paragraph 7 below, this affidavit discloses, to the full extent of my knowledge, information and belief, all the documents relevant to matters in issue in this Application as of September 17, 2021, that are in the possession, power or control of the Applicant, or that were but are no longer in the possession, power or control of the Applicant.
4. I have listed and described in Schedule A to my affidavit the relevant documents that are or were in the Applicant's possession, power or control as of September 17, 2021, for which no privilege is claimed.
5. I have listed and described in Schedule B to my affidavit the relevant documents that are or were in the Applicant's possession, power or control as of September 17, 2021, for which privilege is claimed by the Applicant, including the grounds for each such claim.
6. Except as described in paragraph 7 below, the Applicant has never had in his possession, power or control any document relevant to any matter in issues in this Application other than those listed in Schedules A and B.
7. Pursuant to an agreement with the Respondent, Secure Energy Services Inc. ("**Secure**"), the Applicant's affidavit of documents does not need to list the documents produced by Secure in response to the Commissioner's requests for information and supplementary information requests, and documents produced by

CT-2021-002

THE COMPETITION TRIBUNAL

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BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

**SECURE ENERGY SERVICES INC.
TERVITA CORPORATION**

Respondents

**AFFIDAVIT OF DOCUMENTS OF THE
COMMISSIONER OF COMPETITION
AFFIRMED OCTOBER 29, 2021**

Commissioner's List of Documents, Schedule A Public

No.	Date	Document Description	Author/From	Recipient	CC	Level of Confidentiality	Document ID
1	4/28/2009	Copy of Filed Amended Statement of Claim (00346176).PDF				Public	RBBA00003_000004018
2	4/28/2009	Statement of Defence and Counterclaim of Secure (00356415).PDF				Public	RBBA00003_000004019
3	3/12/2021	i. Tervita AIF 2020.pdf				Public	RBBC00003_000000017
4	3/16/2021	e. Cost-Benefit Analysis of the Canada Small Business Financing Program.pdf				Public	RBBC00003_000000024
5	3/16/2021	c. Canadian Cost-Benefit Analysis Guide Regulatory Proposals.pdf				Public	RBBC00003_000000033
6	3/17/2021	Wolverine Financial Statements - 2020.12.31 FS.FINAL.docx.pdf				Public	RBBA00014_000000001
7	3/18/2021	Wolverine Financial Statments - 2020.09.30.MD^0A.Final.docx.pdf				Public	RBBA00014_000000003
8	3/26/2021	CES 2020 Annual Information Form - vFINAL.pdf				Public	RBBA00014_000000002
9	3/26/2021	YE 2020 CES MDA.pdf				Public	RBBA00014_000000004
10	4/14/2021	g. secure-energy-2020-aif.pdf				Public	RBBC00003_000000009
11	4/14/2021	f. march-2021-investor-presentation.pdf				Public	RBBC00003_000000010
12	4/14/2021	h. secure-energy-q4-2020-mda.pdf				Public	RBBC00003_000000028
13	6/8/2021	Section 4.8 OSCM_2019_Dec_02-2.pdf				Public	RBBA00003_000011798
14	6/29/2021	Tervita Corporation Announces Strong First Quarter 2021 Results _ Tervita.pdf				Public	RBBA00003_000003297
15	6/29/2021	CT-2008-006_0036_38QBG-852008-4446.pdf				Public	RBBA00003_000003298
16	6/29/2021	Secure Energy Announces 2021 First Quarter Results - Apr 27, 2021.pdf				Public	RBBA00003_000003299
17	7/28/2021	Public Supplementary Record July 28, 2021.pdf				Public	RCFC00001_000000050
18	8/2/2021	2021-08-02 Letter to R Kwinter.pdf				Public	RBBA00002_000000063
19	8/3/2021	Responding Record of SECURE Energy Services (s. 104) - Public Version.pdf				Public	RCFD00001_000000011
20	8/9/2021	plains_StatsCan.pdf				Public	RBBA00003_000001797
21	8/9/2021	KEYERA CORP_StatsCan.pdf				Public	RBBA00003_000001802
22	8/11/2021	White Swan Environmental Ltd.pdf				Public	RBBA00003_000000848
23	8/11/2021	Pure Environmental LP.pdf				Public	RBBA00003_000000849
24	8/11/2021	Pure Environmental Waste Management Inc.pdf				Public	RBBA00003_000000850
25	8/11/2021	Pure Environmental CORP.pdf				Public	RBBA00003_000008550
26	8/11/2021	White Swan.pdf				Public	RBBA00003_000008551
27	8/11/2021	Pure Environmental-LP.pdf				Public	RBBA00003_000008552
28	8/11/2021	H & L Asset.pdf				Public	RBBA00003_000008553
29	8/11/2021	Four Winds Midstream.pdf				Public	RBBA00003_000008554
30	8/11/2021	Pure Environmental LTD.pdf				Public	RBBA00003_000008555
31	8/11/2021	Aqua Water.pdf				Public	RBBA00003_000008556
32	8/11/2021	Pure Environmental-TN.pdf				Public	RBBA00003_000008557
33	8/11/2021	ALBRIGHT FLUSH SYSTEMS LTD. Corporate Summary.pdf				Public	RBBA00003_000008559
34	8/11/2021	BC Annual Report - JAN 19, 2021.pdf				Public	RBBA00003_000008560
35	8/11/2021	BC Annual Report - JAN 19, 2018.pdf				Public	RBBA00003_000008561
36	8/11/2021	BC Annual Report - JAN 19, 2017.pdf				Public	RBBA00003_000008562
37	8/11/2021	BC Annual Report - JAN 19, 2019.pdf				Public	RBBA00003_000008563
38	8/11/2021	BC Annual Report - JAN 19, 2013.pdf				Public	RBBA00003_000008564
39	8/11/2021	Notice of Articles_Jan 19 2015.pdf				Public	RBBA00003_000008565
40	8/11/2021	BC Annual Report - JAN 19, 2012.pdf				Public	RBBA00003_000008566
41	8/11/2021	Notice of Change of Address_Jan 24 2013.pdf				Public	RBBA00003_000008567

No.	Date	Document Description	Author/From	Recipient	CC	Level of Confidentiality	Document ID
42	8/11/2021	Notice of Alteration_Jan 28 2011.pdf				Public	RBBA00003_000008568
43	8/11/2021	Notice of Articles_Jan 24 2013.pdf				Public	RBBA00003_000008569
44	8/11/2021	BC Annual Report - JAN 19, 2020.pdf				Public	RBBA00003_000008570
45	8/11/2021	BC Annual Report - JAN 19, 2014.pdf				Public	RBBA00003_000008571
46	8/11/2021	Incorporation Application_Jan 19 2011.pdf				Public	RBBA00003_000008572
47	8/11/2021	Certificate_Jan 19 2011.pdf				Public	RBBA00003_000008573
48	8/11/2021	BC Annual Report - JAN 19, 2016.pdf				Public	RBBA00003_000008574
49	8/11/2021	Notice of Change of Directors_Jan 19 2015.pdf				Public	RBBA00003_000008575
50	8/11/2021	Notice of Articles_Jan 19 2011.pdf				Public	RBBA00003_000008576
51	8/11/2021	BC Annual Report - JAN 19, 2015.pdf				Public	RBBA00003_000008577
52	8/16/2021	Aqua Water.pdf				Public	RBBA00003_000001370
53	8/31/2021	Galatea.pdf				Public	RBBA00003_000003702
54	9/15/2021	Rush Energy Services Inc.pdf				Public	RBBA00003_000000360
55	9/15/2021	Sprocket Energy Corporation.pdf				Public	RBBA00003_000000362
56	9/15/2021	Whitecap_intercorate ownership.pdf				Public	RBBA00003_000000364
57	9/15/2021	Whitecap Resources Inc OneStop.pdf				Public	RBBA00003_000000365
58	9/15/2021	Whitecap_SEDAR.pdf				Public	RBBA00003_000000366
59	9/15/2021	Dragos Energy Corp.pdf				Public	RBBA00003_000000368
60	9/20/2021	T-1427-21_Application_Competition_Sept 20 2021_certified copy.pdf				Public	RCFE00001_000000002
61	9/20/2021	T-1426-21_Application_Competition_Sept 20 2021_certified copy.pdf				Public	RCFE00001_000000004
62	9/20/2021	T-1428-21_Application_Competition_Sept 20 2021_certified copy.pdf				Public	RCFE00001_000000011
63	9/23/2021	T-1426-21_Order_Sept 23 2021.pdf				Public	RCFE00001_000000007
64	9/23/2021	T-1428-21_Order_Sept 23 2021.pdf				Public	RCFE00001_000000008
65	9/23/2021	T-1427-21_Order_Sept 23 2021.pdf				Public	RCFE00001_000000009
66	9/28/2021	CIBC M&A Case Study - Tervita and Secure Announce Merger (Mar 9, 2021).pdf				Public	RCEK00001_000000007
67	10/19/2021	2020 WCN Annual Report and Form 10-K.pdf				Public	RBBA00013_000000001
68	10/19/2021	Clean Harbors 2021 Annual Report.pdf				Public	RBBA00013_000000004
69	10/19/2021	GFL Presentation Q1 2021.pdf				Public	RBBA00013_000000011
70	10/19/2021	Clean Harbors Q1 2021 Investor Review.pdf				Public	RBBA00013_000000012

Pages 7 to 6174 redacted – Confidential Level A and Level B

A handwritten signature in blue ink, appearing to read "Affidavit", written over a horizontal line.

**This is Exhibit "B" to the Affidavit
of
Daniel Nyman
Affirmed on November 8, 2021**

No.	Date	Document Description	Author/From	Recipient	CC	Privilege Type	Document ID
22	3/26/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_00000006
29	3/29/2021	Document from Third Party	Third Party			Litigation Privilege	RCEK00001_00000006
40	4/6/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_00000011
41	4/6/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_00000012
54	4/12/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_00000043
55	4/12/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_00000044
56	4/12/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_00000045
61	4/13/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_00000042
125	6/1/2021	Document from Third Party	Third Party			Litigation Privilege	RBEH00001_00000005
167	6/24/2021	Document from Third Party	Third Party			Litigation Privilege	RCEA00001_00000013
169	6/24/2021	Document from Third Party	Third Party			Litigation Privilege	RCEG00001_00000009
251	7/6/2021	Document from Third Party	Third Party			Litigation Privilege	RCDA00001_00000003
307	7/8/2021	Document from Third Party	Third Party			Litigation Privilege	RCCL00001_00000003
308	7/8/2021	Document from Third Party	Third Party			Litigation Privilege	RCDD00001_00000011
312	7/9/2021	Document from Third Party	Third Party			Litigation Privilege	RBED00001_00000004
315	7/9/2021	Document from Third Party	Third Party			Litigation Privilege	RCBA00001_00000018
318	7/12/2021	Document from Third Party	Third Party			Litigation Privilege	RBEC00001_00000004
320	7/12/2021	Document from Third Party	Third Party			Litigation Privilege	RBED00001_00000005
324	7/12/2021	Document from Third Party	Third Party			Litigation Privilege	RCBD00001_00000020
325	7/12/2021	Document from Third Party	Third Party			Litigation Privilege	RCBJ00001_00000003
326	7/12/2021	Document from Third Party	Third Party			Litigation Privilege	RCBJ00001_00000004
335	7/13/2021	Document from Third Party	Third Party			Litigation Privilege	RCAE00001_00000002
337	7/13/2021	Document from Third Party	Third Party			Litigation Privilege	RCAE00001_00000008
339	7/13/2021	Document from Third Party	Third Party			Litigation Privilege	RCBE00001_00000002
342	7/13/2021	Document from Third Party	Third Party			Litigation Privilege	RCBH00001_00000006
345	7/13/2021	Document from Third Party	Third Party			Litigation Privilege	RCEA00001_00000006
346	7/13/2021	Document from Third Party	Third Party			Litigation Privilege	RCEA00001_00000007
348	7/13/2021	Document from Third Party	Third Party			Litigation Privilege	RCEB00001_00000004
351	7/13/2021	Document from Third Party	Third Party			Litigation Privilege	RCEC00001_00000020
353	7/13/2021	Document from Third Party	Third Party			Litigation Privilege	RCEE00001_00000003
359	7/14/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_00000025
363	7/14/2021	Document from Third Party	Third Party			Litigation Privilege	RCBB00001_00000014
366	7/14/2021	Document from Third Party	Third Party			Litigation Privilege	RCCK00001_00000009
369	7/14/2021	Document from Third Party	Third Party			Litigation Privilege	RCEL00001_00000003
371	7/14/2021	Document from Third Party	Third Party			Litigation Privilege	RCFA00001_00000003

377	7/15/2021	Document from Third Party	Third Party			Litigation Privilege	RBDE00002_000000015
378	7/15/2021	Document from Third Party	Third Party			Litigation Privilege	RBDE00002_000000016
381	7/15/2021	Document from Third Party	Third Party			Litigation Privilege	RCAH00001_000000002
383	7/15/2021	Document from Third Party	Third Party			Litigation Privilege	RCDF00001_000000006
411	7/22/2021	Document from Third Party	Third Party			Litigation Privilege	RCCB00001_000000006
412	7/22/2021	Document from Third Party	Third Party			Litigation Privilege	RCCB00001_000000007
419	7/24/2021	Document from Third Party	Third Party			Litigation Privilege	RCCD00001_000000005
479	9/28/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_000000024
480	9/28/2021	Document from Third Party	Third Party			Litigation Privilege	RCDG00001_000000017
482	10/4/2021	Document from Third Party	Third Party			Litigation Privilege	RCDE00001_000000024
483	10/5/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_000000010
484	10/5/2021	Document from Third Party	Third Party			Litigation Privilege	RCAC00001_000000004
485	10/5/2021	Document from Third Party	Third Party			Litigation Privilege	RCEA00001_000000009
486	10/5/2021	Document from Third Party	Third Party			Litigation Privilege	RCEA00001_000000010
487	10/5/2021	Document from Third Party	Third Party			Litigation Privilege	RCEA00001_000000011
488	10/5/2021	Document from Third Party	Third Party			Litigation Privilege	RCEA00001_000000012
489	10/5/2021	Document from Third Party	Third Party			Litigation Privilege	RCEB00001_000000024
490	10/5/2021	Document from Third Party	Third Party			Litigation Privilege	RCEF00001_000000008
491	10/6/2021	Document from Third Party	Third Party	Competition Bureau Officer		Litigation Privilege	RBBA00003_000001163
495	10/6/2021	Document from Third Party	Third Party			Litigation Privilege	RBDJ00001_000000008



**This is Exhibit "C" to the Affidavit
of
Daniel Nyman
Affirmed on November 8, 2021**

Federal Court



Cour fédérale

Date: 20210923

Docket: T-1428-21

Ottawa, Ontario, September 23, 2021

PRESENT: Mr. Justice Gascon

F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
	23 Sept 2021	
Wayne Sawtell		
Ottawa, ONT		5

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* relating to the acquisition of Tervita Corporation by Secure Energy Services Inc., reviewable under section 92 of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an order requiring Galatea Technologies Inc. to produce records pursuant to paragraph 11(1)(b) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

GALATEA TECHNOLOGIES INC.

Respondent

**ORDER TO PRODUCE RECORDS
AND MAKE AND DELIVER WRITTEN RETURNS OF INFORMATION**

UPON the *ex parte* application made by the Commissioner of Competition [Commissioner] for an Order pursuant to paragraphs 11(1)(b) and 11(1)(c) of the *Competition Act*, RSC, 1985, c C-34 [Act], which was heard this day at the Federal Court, Ottawa, Ontario;

AND UPON reading the affidavit of Jacqueline Byers affirmed on September 17, 2021 [Affidavit];

AND UPON being satisfied that an inquiry is being made under section 10 of the Act relating to the acquisition of Tervita Corporation by Secure Energy Services Inc., reviewable under section 92 of the Act [Inquiry];

AND UPON being satisfied that the Respondent has or is likely to have information that is relevant to the Inquiry;

1. **THIS COURT ORDERS** that the Respondent shall produce to the Commissioner all records specified in this Order, in accordance with the terms of this Order.
2. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver to the Commissioner all written returns of information specified in this Order, in accordance with the terms of this Order.
3. **THIS COURT FURTHER ORDERS** that, in order to facilitate the handling, use, and orderly maintenance of records and to ensure the accurate and expeditious return of records specified in this Order and written returns of information produced pursuant to this Order, the Respondent shall comply with the following requirements:
 - a. the Respondent shall produce records in its possession, control or power;

- b. the Respondent shall make and deliver a written return of information in such detail as is required to disclose all facts relevant to the corresponding specifications in this Order;
- c. the Respondent shall produce: (i) records described in Schedule I created or received or modified during the period from January 1, 2019 to the date of issuance of this Order, inclusive; and (ii) written returns of information described in Schedule II, in respect of the same period;
- d. the Respondent shall produce all records in accordance with the Competition Bureau's Guidelines for the Production of Electronically Stored Information [E-Production Guidelines] attached at Schedule III of this Order;
- e. the Respondent shall scan each paper record into a separate electronic record and produce that copy in lieu of the original record unless making this copy would compromise the integrity of the original, render the copy difficult to read, or the original record size exceeds 216 mm x 356 mm (8½ in x 14 in); and a duly authorized representative of the Respondent shall certify by affidavit the copy is a true copy of the original record;
- f. a duly authorized representative of the Respondent shall certify by affidavit that all electronic records produced by the Respondent pursuant to this Order are true copies of the electronic records in the possession, control or power of the Respondent;

- g. each written return of information made by the Respondent shall be sworn or solemnly affirmed by a duly authorized representative of the Respondent, as having been examined by that person and as being, to the best of his or her knowledge and belief, correct and complete in all material respects;
- h. if a record contains information that the Respondent's claim is privileged, the Respondent shall produce the record with the privileged information redacted and in accordance with paragraphs 4 and 5 of this Order;
- i. the Respondent shall make all written returns of information, including those relating to revenues, costs and margins, in accordance with generally accepted accounting principles [GAAP], International Financial Reporting Standards [IFRS], or other accounting principles that the Respondent uses in its financial statements. Where the Respondent produces a record or make and deliver a written return of information using accounting principles other than GAAP or IFRS, the Respondent shall explain the meaning of all such accounting terms;
- j. the Respondent shall define, explain, interpret or clarify any record or written return of information whose meaning is not self-evident;
- k. before producing records pursuant to this Order, a duly authorized representative of the Respondent responsible for producing electronic records in accordance with the E-Production Guidelines attached at Schedule III of this Order, shall contact a person identified in paragraph 15 of this Order and provide particulars regarding how the Respondent will comply with the E-Production Guidelines. The

Respondent shall make reasonable efforts to address any additional technical requirements the Commissioner may have relating to the production of electronic records in accordance with the E-Production Guidelines;

- l. use of the singular or the plural in the Schedules of this Order shall not be deemed a limitation, and the use of the singular shall be construed to include, where appropriate, the plural; and vice versa; and
 - m. use of a verb in the present or past tense in the Schedules of this Order shall not be deemed a limitation, and the use of either the present or past tense shall be construed to include both the present and past tense.
4. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver, in a written return of information, an index in which the Respondent identifies all records (or parts of records) that are responsive to the Specifications in Schedule I of this Order for which privilege is claimed. The index shall include the title of the record, the date of the record, the name of each author, the title or position of each author, the name of each addressee and recipient, the title or position of each addressee and recipient, and the paragraphs or subparagraphs of Schedule I and II of the Order to which the record is responsive. In lieu of listing the title or position of an author, addressee or recipient for each record, the Respondent may make and deliver a written return of information listing such persons and their titles or positions.

5. **THIS COURT FURTHER ORDERS** that, where the Respondent asserts a legal privilege in respect of all or part of a record, the Respondent shall, in a written return of information:

- a. produce, for each record, a description of the privilege claimed and the factual basis for the claim in sufficient detail to allow the Commissioner to assess the validity of the claim; and
- b. identify by name, title and address, all persons to whom the record or its contents or any part thereof, have been disclosed.

Without restricting any other remedy he may seek, the Commissioner may, by written notice to the Respondent, at any time require the Respondent to produce records for which solicitor-client privilege is claimed to a person identified in subsection 19(3) of the Act.

6. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information confirming that the records produced pursuant to this Order were either in the possession of or on the premises used or occupied by a Respondent or in the possession of an officer, agent, servant, employee or representative of a Respondent. If a record produced by the Respondent pursuant to this Order does not meet the above conditions, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, control, power, and location of such record.

7. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it is not producing pursuant to this Order a record, thing, type of record or type of thing that was formerly in the possession, control or power of a Respondent and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent had continued to have possession, control or power over the record, thing, type of record or type of thing. The Respondent shall state in this written return of information: (i) when and how the Respondent lost possession, control and power over a record, thing, type of record or type of thing; and (ii) the Respondent's best information about the present location of the record, thing, type of record or type of thing.

8. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it never had possession, control or power over a record, thing, type of record or type of thing responsive to a Specification in this Order, that another person not otherwise subject to this Order has possession, control or power over the record, thing, type of record or type of thing, and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent possessed the record, thing, type of record or type of thing. The Respondent shall state in this written return of information their best information about: (i) the Specification to which the record, thing, type of record or type of thing is responsive; (ii) the identity of the person who has possession, control or power

of the record, thing, type of record or type of thing; and (iii) that person's last known address.

9. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that a record, thing, type of record or type of thing responsive to this Order has been destroyed and that the record, thing, type of record or type of thing would have been responsive to a Specification of this Order if it had not been destroyed. The Respondent shall in this written return of information state whether the record, thing, type of record or type of thing was destroyed pursuant to a record destruction or retention policy, instruction or authorization and shall produce that policy, instruction or authorization.

10. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it does not have records, or information responsive to a Specification in this Order because the record, or information never existed. The Respondent shall, upon request of the Commissioner, make and deliver a further written return of information explaining why the record or thing never existed.

11. **THIS COURT FURTHER ORDERS** that, where the Respondent previously produced a record to the Commissioner, the Respondent is not required to produce an additional copy of the record or thing provided that the Respondent: (i) identifies the previously produced record or thing to the Commissioner's satisfaction; (ii) makes and delivers a

written return of information in which it agrees and confirms that the record was either in the possession of the Respondent, on premises used or occupied by the Respondent or was in the possession of an officer, agent, servant, employee or representative of the Respondent; and where this is not the case, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, control, power, and location of such record; and (iii) receives confirmation from the Commissioner that such record or thing need not be produced.

12. **THIS COURT FURTHER ORDERS** that, where the Respondent produces records or delivers written returns of information that are, in the opinion of the Commissioner, adequate for the purposes of the Inquiry, the Commissioner may, by written notice, waive production of any additional records, things or information that would have otherwise been responsive to the Order.

13. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information that:
 - a. describes the authority of the person to make the written return of information on behalf of the Respondent;

 - b. includes a statement that, in order to comply with this Order, the person has made or caused to be made:
 - i. a thorough and diligent search of the records and things in the possession, control or power of the Respondent; and

- ii. appropriate enquiries of the Respondent's personnel; and
 - c. states that the person has examined the records produced and written returns made and delivered pursuant to the Order and that those records, and written returns are, to the best of his or her knowledge and belief, correct and complete in all material respects.
14. **THIS COURT FURTHER ORDERS** that all the requirements herein, including the return of records, things and written returns of information, shall be completed within 30 calendar days of the service of this Order;
15. **THIS COURT FURTHER ORDERS** that:
- a. the Respondent shall produce all records and things and deliver all written returns of information to the Commissioner at the following address:

Competition Bureau
Mergers Directorate
Place du Portage Phase I
50 Victoria Street
Gatineau, Québec K1A 0C9

Attention: Jacqueline Byers, Competition Law Officer
 - b. communications or inquiries regarding this Order shall be addressed to:

Department of Justice
Competition Bureau Legal Services
Place du Portage Phase I
50 Victoria Street
Gatineau, Québec K1A 0C9

Attention: Eric Buist, Counsel

16. **THIS COURT FURTHER ORDERS** that this Order may be served in person or by means of facsimile machine, electronic mail (with acknowledgement of receipt) or registered mail on a duly authorized representative of the Respondent or on counsel for the Respondent who have agreed to accept such service.

"Denis Gascon"

Judge

SCHEDULES I AND II

Notice Concerning Obstruction

Any person who in any manner impedes or prevents, or attempts to impede or prevent, any inquiry or examination under the Act, or who destroys or alters, or causes to be destroyed or altered, any record or thing that is required to be produced under section 11 of the Act may be subject to criminal prosecution for obstruction of justice, contempt of court or other federal criminal violations. Where a corporation commits such an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence, may also be prosecuted. Conviction of any of these offences is punishable by fine or imprisonment, or both.

Definitions

For the purpose of Schedules I and II, the following terms shall have the respective meanings set out below and any grammatical variations of those terms shall also have the corresponding meanings:

“Act” means the *Competition Act*, RSC, 1985, c C-34;

“Affiliate” has the same meaning as in subsection 2(2) of the Act;

“and” and **“or”** have both conjunctive and disjunctive meanings;

“any” means one or more. The term is mutually interchangeable with “all” and each term encompasses the other;

“**Classification**” means any applicable classification (e.g., Class 1, 1a, 1b, 2, secure) for a Facility, including as designated by any applicable federal or provincial authority;

“**Company**” means Galatea Technologies Inc., its predecessors, divisions, Affiliates, and all directors, officers, and employees of the foregoing;

“**Data Dictionary**” means documentation of the organization and structure of data, including: a list of field names; a definition for each field as it is used by the Company, including the meanings of all codes that appear as field values; the format, including variable type and length, of each field; and the primary key in a given table that defines a unique observation;

“**Oilfield Waste**” means any Waste Type generated during the drilling, completion, production or remediation operations of oil and gas entities;

“**Record**” has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;

“**Relevant Area**” means British Columbia, Alberta and Saskatchewan;

“**Relevant Facility**” means, collectively and individually any of the following types of facilities listed on the Company’s platform: (i) treatment, recovery and disposal facilities; (ii) produced and/or waste water disposal wells; and (iii) landfills, as well as any facilities that can be used to perform the functions performed at any of the foregoing in relation to any Oilfield Waste;

“**Relevant Period**” means, January 1, 2019 to the date of issuance of this Order, inclusive;

“Relevant Product” means, collectively and individually: (i) the services offered at full-service terminal facilities; (ii) the services offered at disposal wells; (iii) the services offered at landfills; and (iv) the services offered at any Facility that can be used to perform the functions performed at any of the foregoing in relation to any Oilfield Waste; and

“Waste Type” means, collectively and individually, any type of waste, including, but not limited to: liquid/fluid, solid, sludge, drilling fluids, drill cuttings, completion fluids, produced water, flowback water, emulsions, hazardous, non-hazardous, dangerous, non-dangerous, naturally occurring radioactive material (or “NORM”) and waste from any type of production, including, but not limited to, conventional, unconventional, heavy, SAGD, in situ, light, sour, and sweet.

SCHEDULE I

RECORDS TO BE PRODUCED PURSUANT TO PARAGRAPH 11(1)(b) OF THE COMPETITION ACT

1. Provide any Company data, including all relevant Data Dictionaries, that record sales data related to the Relevant Products in the Relevant Area during the Relevant Period at any Relevant Facility in the most disaggregated form available (e.g. transaction level, if available). The response should contain, but should not be limited to, the information found in Appendix A, if available.

SCHEDULE II

WRITTEN RETURNS OF INFORMATION TO BE PRODUCED PURSUANT TO PARAGRAPH 11(1)(c) OF THE COMPETITION ACT

1. Provide a current list or map identifying Relevant Facilities in the Relevant Area which operated at any time during the Relevant Period. The response should contain, but not be limited to, the information found in Appendix B.

APPENDIX A

The following information, or similar datasets, as and if tracked by the Respondent:

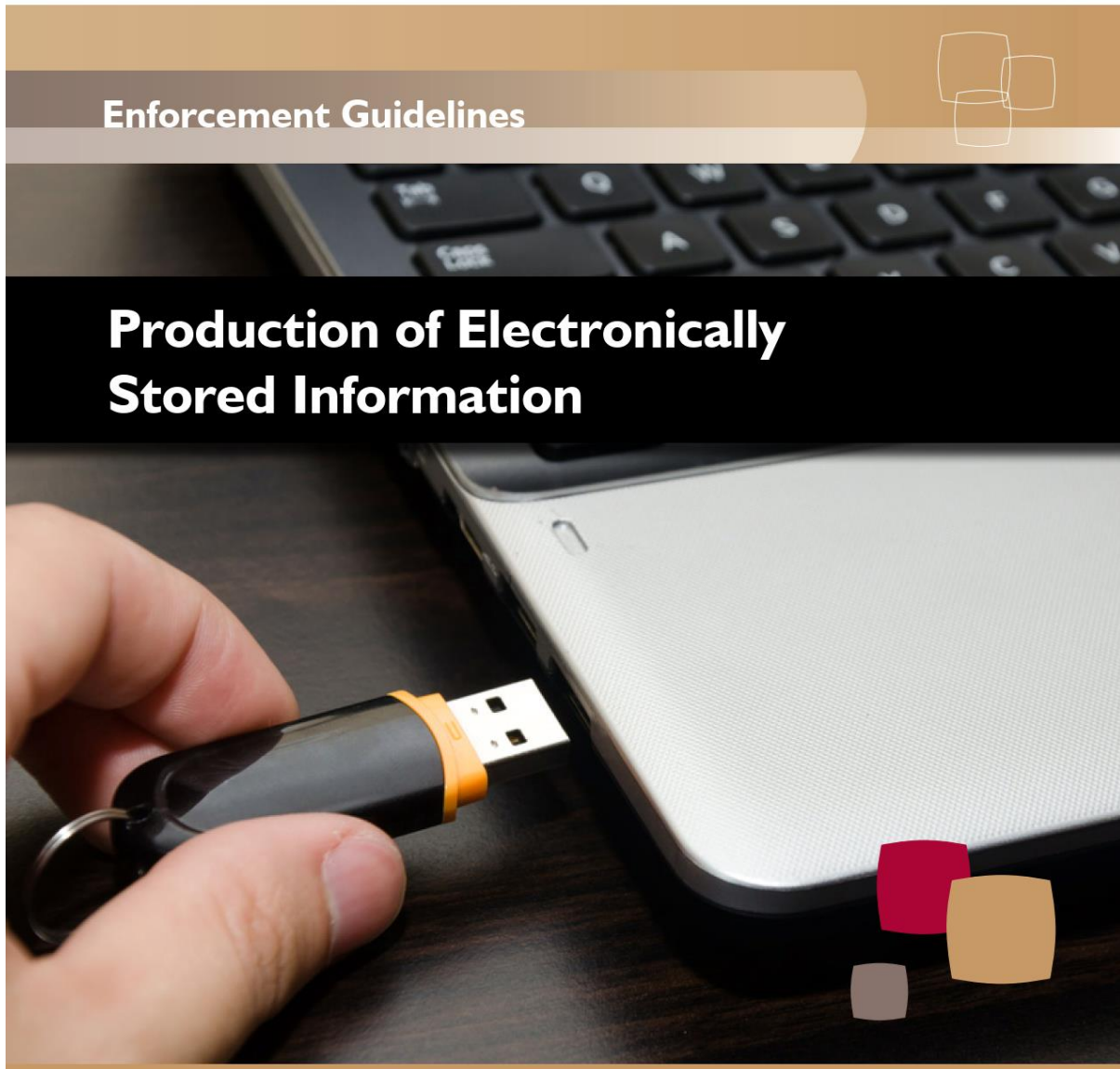
- a) Transaction ID
- b) Transaction date
- c) Number of units
- d) Unit of measure
- e) Final price (excluding taxes, net of discounts)
- f) Shipment costs to waste disposal facility and charges to customer
- g) Transportation company
- h) Product ID
- i) Customer ID
- j) Customer name and address
- k) Facility owner
- l) Facility ID
- m) Facility type
- n) Facility location
- o) Load segment distances
- p) Other Facility characteristics
- q) Shipment ID
- r) Shipment date
- s) Shipment method and characteristics (e.g. hauler, truck-type and capacity, point of origin)
- t) Contemporaneous capacity
- u) Contemporaneous capacity utilization
- v) Contemporaneous wait times predicted and actual

APPENDIX B

The following information:

- a) Facility ID
- b) A unique identifier
- c) Name
- d) Address
- e) Location (e.g. verified longitude and latitude)
- f) Type of Facility (e.g. treatment, recovery and disposal; disposal well; landfill; cavern)

SCHEDULE III
E-PRODUCTION GUIDELINES



This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

For information on the Competition Bureau's activities, please contact:

Information Centre
Competition Bureau
50 Victoria Street
Gatineau QC K1A 0C9

Tel.: 819-997-4282
Toll free: 1-800-348-5358
TTY (for hearing impaired): 1-800-642-3844
Fax: 819-997-0324
Website: www.competitionbureau.gc.ca

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C.D. Howe Building
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Email: info@ic.gc.ca

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PREFACE

The Competition Bureau (the “Bureau”), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the “Act”), the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The Bureau has issued these guidelines for the Production of Electronically Stored Information (“ESI”) to promote the efficient processing and review of any electronic production received by the Bureau and to resolve any details before parties collect and produce responsive records. Transparency regarding the Bureau’s preferences for receiving ESI improves predictability and helps producing parties make informed decisions. These guidelines reflect the Bureau’s current preferences based on existing technologies used by the Bureau to process and review ESI and will be updated, as required, where the Bureau adopts new or different technologies.

John Pecman
Commissioner of Competition

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I. INTRODUCTION

These guidelines for the production of electronically stored information (“ESI”) set out the Competition Bureau’s (the “Bureau”) preferred formats for receiving ESI produced in response to compulsory processes and, in certain instances, produced voluntarily in the course of an inquiry or investigation under the *Competition Act* (the “Act”).

The Bureau continuously strives to carry out its mandate in the most efficient and effective means possible. The receipt of ESI in a format set out below will assist the Bureau in achieving that objective through the reduction of processing and reviewing times and will avoid unnecessary costs and delays associated with unusable productions. Early and regular communication among the Bureau, producing parties and their counsel regarding production methodologies and formats is encouraged. Given the technical nature of the subject matter, it is also beneficial to involve persons with the requisite technical expertise, whether in-house or those of a third-party service provider, when using these guidelines, including participating in discussions with Bureau representatives regarding the production of ESI.

These guidelines reflect the Bureau’s current preferences based on existing technologies used by the Bureau to process and review ESI and will be updated, as required, where the Bureau adopts new or different technologies.

These guidelines do not address the type or scope of information that may be required or requested by the Bureau in the course of an inquiry or an investigation, nor do they address the Bureau’s preferred practices regarding the production of non-electronic records or other things, except where those records are converted to ESI.

2. APPLICABILITY OF THE GUIDELINES

The Bureau generally seeks production in accordance with these guidelines when seeking a court order under section 11 of the Act or under the *Criminal Code*. Further, the Bureau expects that producing parties will adhere to these guidelines in the following instances:

- responding to a supplementary information request issued under subsection 114(2) of the Act;
- submitting a production pursuant to participation in the Bureau’s Immunity or Leniency Programs; and
- submitting information voluntarily.

In this regard, a copy of the guidelines will generally be incorporated in or appended to an order or request for information.

3. ONGOING COMMUNICATION

Bureau staff will contact producing parties shortly following the issuance of an order or request for information to which these guidelines apply and will be available for ongoing dialogue regarding the production of ESI.

Producing parties, together with their technical staff and/or third-party service provider, are strongly encouraged to speak with Bureau staff (case officers and technical staff) prior to collecting and prior to producing ESI to discuss production details, including the manner in which ESI is stored, the types of information that are available on the electronic source and the format of production.

4. TECHNICAL INSTRUCTIONS

- 4.1 All ESI (i.e., information readable in a computer system) should be produced free of computer viruses or malware, be accessible, readable and printable, and be devoid of passwords or encryption.
- 4.2 All ESI should be produced in its original electronic format (i.e., native format), except where near-native format is required by subsections 4.3.2 or 4.6 or where an image production is produced as per subsection 4.8. Detailed instructions are set out in Schedule A for production using computer systems without application export capabilities and in Schedule B for production using litigation application exports. The Bureau's preference is to receive ESI in accordance with Schedule B.
- 4.3 Where a record being produced is part of a family, all parent and child records should be produced and the parent/child relationship should be preserved. A family is a collection of pages or files produced manually or by a software application, constituting a logical single communication of information, but consisting of more than one single stand-alone record. Examples include:
 - 4.3.1 a fax cover, the faxed letter, and an attachment to the letter, where the fax cover is the parent and the letter and attachment are each a child.
 - 4.3.2 email repositories (e.g., Outlook .PST, Lotus .NSF) can contain a variety of records, including messages, calendars, contacts, and tasks. For purposes of production, all parent records, both native (e.g., documents, spreadsheets, presentations) and near-native email, calendar, contacts, tasks, notes and child records (e.g., object linking and embedding items and attachments of files to emails or to other parent records) should be produced, with the parent/child relationship preserved. Similar items found and collected outside an email repository (e.g., .MSG, .EML, .HTM, .MHT) should be produced in the same manner; and

- 4.3.3 archive file types (e.g., .zip, .rar) should be uncompressed for processing. Each file contained within an archive file should be produced as a child to the parent archive file. If the archive file is itself an attachment, that parent/child relationship should also be preserved.
- 4.4 Hard copy or paper records produced as ESI should be produced as single page TIFF images with a resolution of 300 dpi (dots per inch) and OCR generated text. The records should be produced as they are kept, reflecting attachment relationships between records and information about the file folders within which the record is found. Where colour is required to interpret the record, such as hard copy photos, and certain charts, that image should be produced in colour. These colour images are to be produced as .jpg format. Hard copy photographs should be produced as colour .jpg, if originally in colour, or greyscale .tif files if originally in black and white.
- The following bibliographic information, if it is available, should also be provided for each record:
- a. document ID
 - b. date
 - c. author / author organization
 - d. recipient / recipient organization
- 4.5 The records produced should be indexed as being responsive to the applicable paragraphs or subparagraphs in the [Order/Request].
- 4.6 Each database record submitted in response to a paragraph or subparagraph of the [Order/Request]:
- 4.6.1 should be produced whole, in a flat file, in a non-relational format and exported as a delimited text file where fields are separated by the pipe character (|) and a caret (^) is used as the text qualifier (e.g. ^Field1 ^ | ^Field2 ^ | ^Field3 ^ etc.); and
 - 4.6.2 should include a list of field names; a definition for each field as it is used by the producing party, including the meanings of all codes that can appear as field values; the format, including variable type and length, of each field; and the primary key in a given table that defines a unique observation.
- 4.7 With regard to de-duplication:
- 4.7.1 for investigations relating to Part VI of the Act, all copies of records should be provided; and

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- 4.7.2 for investigations relating to Parts VII.1 and VIII of the Act, the producing party may use de-duplication or email threading software if the producing party provides the Bureau with a written description of the proposed process to be used, including what is considered a duplicate, and the Bureau confirms that the deployment of such process permits the producing party to comply fully with the [Order/Request].
- 4.8 Documents requiring redaction pursuant to any claim of privilege should be produced as single-page TIFF or multi-page PDF images and designated "Redacted" in the field as described in Schedule B. Appropriately redacted searchable text (OCR of the redacted images is acceptable), metadata, and bibliographic information must also be provided. All documents that are part of a document family that includes a document withheld pursuant to any claim of privilege will be designated "Family Member of Privileged Doc" in the field as described in Schedule B for all other documents in its family. Placeholder images with BEGDOC#, FILENAME, FILEPATH and reason withheld (e.g., "Privileged") should be provided in place of the document images of the privileged document.
- 4.9 All ESI should be provided on portable storage media appropriate to the volume of data (e.g., USB/flash drive, CD, DVD, hard drive) and should be identified with a label setting out the matter name, the contents and the date of production. Each medium should contain no more than 250,000 files (e.g., native ESI or images or a combination of both).
- 4.10 In the event that ESI is delivered in a format that is not one of the formats set out in Schedule A or Schedule B, the ESI should be provided along with all available instructions and other materials, including software, as necessary for the retrieval and use of the ESI (subject to any software licensing restrictions, which the producing party and the Bureau should discuss in advance of production).

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Website

[www.competitionbureau.gc.ca]

Address

[Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9]

Telephone

[Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired) 1-800-642-3844]

Facsimile

[819-997-0324]

SCHEDULE A

Computer Systems with No Application Export Capabilities

1. ESI generated by office productivity suite software should be produced in its native format.
2. Emails should be produced in their near-native format. Where an email has attachments, the attachments should be left embedded in the native file and not extracted separately.

SCHEDULE B

Litigation Application Exports

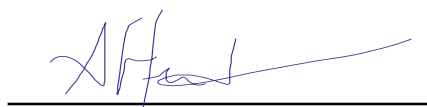
1. A load file (e.g., Opticon (OPT), IPRO (LFP), Summation (DII) or Ringtail (MDB)) and all related ESI should be produced in native format except where near-native format is required by subsections 4.3.2 and 4.6.
2. Within the delimited metadata file where fields are separated by the pipe character (|) and a caret (^) is used as the text qualifier (e.g. ^Field1^|^Field2^|^Field3^ etc.), and depending on the nature of the ESI, the following fields should be provided:

DOCID
BEGDOC
ENDDOC
BEGATTACH
ENDATTACH
FILEPATH
PARENTBATES (bates number of parent record)
CHILDBATES (bates number(s) of any child records)
MD5HASH (MD5HASH of the native format ESI)
TEXTPATH (link to extracted text on the production media for tiffs only)
NATIVEPATH (link to any files produced in native or near-native format on the production media)
CUSTODIAN
ALLCUSTODIAN
TO
FROM
AUTHOR
CC
BCC
SUBJECT/TITLE
FILENAME
DOCDATE
DATESENT

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TIMESENT
DATECREATED
TIMECREATED
DATELASTMOD
TIMELASTMOD
DATEACCESSED
TIMEACCESSED
SPECIFICATION
FILEEXTENSION
REDACTED
FAMILYMEMBERPRIVILEGEDDOC

3. The ESI produced should be indexed by using the 'SPECIFICATION' field as being responsive to the paragraphs or subparagraphs in the [Order/Request]. If multiple values exist for the specification, they should be separated by a semi-colon (e.g. 1a;1b;2a, etc.).

A handwritten signature in blue ink is positioned above a solid horizontal black line. The signature is stylized and appears to be the name 'Daniel Nyman'.

**This is Exhibit "D" to the Affidavit
of
Daniel Nyman
Affirmed on November 8, 2021**

Federal Court



Cour fédérale

Date: 20210923

Docket: T-1427-21

Ottawa, Ontario, September 23, 2021

PRESENT: Mr. Justice Gascon

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* relating to the acquisition of Tervita Corporation by Secure Energy Services Inc., reviewable under section 92 of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an order requiring AQT Water Management Inc. to produce records pursuant to paragraph 11(1)(b) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

AQT WATER MANAGEMENT INC.

Respondent

**ORDER TO PRODUCE RECORDS
AND MAKE AND DELIVER WRITTEN RETURNS OF INFORMATION**

F I L E D	FEDERAL COURT COUR FÉDÉRALE 23 Sept 2021	D É P O S É
Wayne Sawtell		
Ottawa, ONT		5

UPON the *ex parte* application made by the Commissioner of Competition [Commissioner] for an Order pursuant to paragraphs 11(1)(b) and 11(1)(c) of the *Competition Act*, RSC, 1985, c. C-34 [Act], which was heard this day at the Federal Court, Ottawa, Ontario;

AND UPON reading the affidavit of Jacqueline Byers affirmed on September 17, 2021 [Affidavit];

AND UPON being satisfied that an inquiry is being made under section 10 of the Act relating to the acquisition of Tervita Corporation by Secure Energy Services Inc., reviewable under section 92 of the Act [Inquiry];

AND UPON being satisfied that the Respondent has or is likely to have information that is relevant to the Inquiry;

1. **THIS COURT ORDERS** that the Respondent shall produce to the Commissioner all records specified in this Order, in accordance with the terms of this Order.
2. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver to the Commissioner all written returns of information specified in this Order, in accordance with the terms of this Order.
3. **THIS COURT FURTHER ORDERS** that, in order to facilitate the handling, use, and orderly maintenance of records and to ensure the accurate and expeditious return of records specified in this Order and written returns of information produced pursuant to this Order, the Respondent shall comply with the following requirements:
 - a. the Respondent shall produce records in its possession, control or power;

- b. the Respondent shall make and deliver a written return of information in such detail as is required to disclose all facts relevant to the corresponding specifications in this Order;
- c. the Respondent shall produce: (i) records described in Schedule I created or received or modified during the period from January 1, 2019 to December 31, 2020; and (ii) written returns of information described in Schedule II, in respect of the same period;
- d. the Respondent shall produce all records in accordance with the Competition Bureau's Guidelines for the Production of Electronically Stored Information [E-Production Guidelines] attached at Schedule III of this Order;
- e. the Respondent shall scan each paper record into a separate electronic record and produce that copy in lieu of the original record unless making this copy would compromise the integrity of the original, render the copy difficult to read, or the original record size exceeds 216 mm x 356 mm (8½ in x 14 in); and a duly authorized representative of the Respondent shall certify by affidavit the copy is a true copy of the original record;
- f. a duly authorized representative of the Respondent shall certify by affidavit that all electronic records produced by the Respondent pursuant to this Order are true copies of the electronic records in the possession, control or power of the Respondent;

- g. each written return of information made by the Respondent shall be sworn or solemnly affirmed by a duly authorized representative of the Respondent, as having been examined by that person and as being, to the best of his or her knowledge and belief, correct and complete in all material respects;
- h. if a record contains information that the Respondent's claim is privileged, the Respondent shall produce the record with the privileged information redacted and in accordance with paragraphs 4 and 5 of this Order;
- i. the Respondent shall make all written returns of information, including those relating to revenues, costs and margins, in accordance with generally accepted accounting principles [GAAP], International Financial Reporting Standards [IFRS], or other accounting principles that the Respondent uses in its financial statements. Where the Respondent produces a record or make and deliver a written return of information using accounting principles other than GAAP or IFRS, the Respondent shall explain the meaning of all such accounting terms;
- j. the Respondent shall define, explain, interpret or clarify any record or written return of information whose meaning is not self-evident;
- k. before producing records pursuant to this Order, a duly authorized representative of the Respondent responsible for producing electronic records in accordance with the E-Production Guidelines attached at Schedule III of this Order, shall contact a person identified in paragraph 15 of this Order and provide particulars regarding how the Respondent will comply with the E-Production Guidelines. The

Respondent shall make reasonable efforts to address any additional technical requirements the Commissioner may have relating to the production of electronic records in accordance with the E-Production Guidelines;

- l. use of the singular or the plural in the Schedules of this Order shall not be deemed a limitation, and the use of the singular shall be construed to include, where appropriate, the plural; and vice versa; and
 - m. use of a verb in the present or past tense in the Schedules of this Order shall not be deemed a limitation, and the use of either the present or past tense shall be construed to include both the present and past tense.
4. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver, in a written return of information, an index in which the Respondent identifies all records (or parts of records) that are responsive to the Specifications in Schedule I of this Order for which privilege is claimed. The index shall include the title of the record, the date of the record, the name of each author, the title or position of each author, the name of each addressee and recipient, the title or position of each addressee and recipient, and the paragraphs or subparagraphs of Schedule I and II of the Order to which the record is responsive. In lieu of listing the title or position of an author, addressee or recipient for each record, the Respondent may make and deliver a written return of information listing such persons and their titles or positions.

5. **THIS COURT FURTHER ORDERS** that, where the Respondent asserts a legal privilege in respect of all or part of a record, the Respondent shall, in a written return of information:

- a. produce, for each record, a description of the privilege claimed and the factual basis for the claim in sufficient detail to allow the Commissioner to assess the validity of the claim; and
- b. identify by name, title and address, all persons to whom the record or its contents or any part thereof, have been disclosed.

Without restricting any other remedy he may seek, the Commissioner may, by written notice to the Respondent, at any time require the Respondent to produce records for which solicitor-client privilege is claimed to a person identified in subsection 19(3) of the Act.

6. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information confirming that the records produced pursuant to this Order were either in the possession of or on the premises used or occupied by a Respondent or in the possession of an officer, agent, servant, employee or representative of a Respondent. If a record produced by the Respondent pursuant to this Order does not meet the above conditions, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, control, power, and location of such record.

7. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it is not producing pursuant to this Order a record, thing, type of record or type of thing that was formerly in the possession, control or power of a Respondent and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent had continued to have possession, control or power over the record, thing, type of record or type of thing. The Respondent shall state in this written return of information: (i) when and how the Respondent lost possession, control and power over a record, thing, type of record or type of thing; and (ii) the Respondent's best information about the present location of the record, thing, type of record or type of thing.

8. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it never had possession, control or power over a record, thing, type of record or type of thing responsive to a Specification in this Order, that another person not otherwise subject to this Order has possession, control or power over the record, thing, type of record or type of thing, and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent possessed the record, thing, type of record or type of thing. The Respondent shall state in this written return of information their best information about: (i) the Specification to which the record, thing, type of record or type of thing is responsive; (ii) the identity of the person who has possession, control or power

of the record, thing, type of record or type of thing; and (iii) that person's last known address.

9. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that a record, thing, type of record or type of thing responsive to this Order has been destroyed and that the record, thing, type of record or type of thing would have been responsive to a Specification of this Order if it had not been destroyed. The Respondent shall state, in this written return of information, whether the record, thing, type of record or type of thing was destroyed pursuant to a record destruction or retention policy, instruction or authorization and shall produce that policy, instruction or authorization.
10. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it does not have records, or information responsive to a Specification in this Order because the record, or information never existed. The Respondent shall, upon request of the Commissioner, make and deliver a further written return of information explaining why the record or thing never existed.
11. **THIS COURT FURTHER ORDERS** that, where the Respondent previously produced a record to the Commissioner, the Respondent is not required to produce an additional copy of the record or thing provided that the Respondent: (i) identifies the previously produced record or thing to the Commissioner's satisfaction; (ii) makes and delivers a

written return of information in which it agrees and confirms that the record was either in the possession of the Respondent, on premises used or occupied by the Respondent or was in the possession of an officer, agent, servant, employee or representative of the Respondent; and where this is not the case, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, control, power, and location of such record; and (iii) receives confirmation from the Commissioner that such record or thing need not be produced.

12. **THIS COURT FURTHER ORDERS** that, where the Respondent produces records or delivers written returns of information that are, in the opinion of the Commissioner, adequate for the purposes of the Inquiry, the Commissioner may, by written notice, waive production of any additional records, things or information that would have otherwise been responsive to the Order.
13. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information that:
 - a. describes the authority of the person to make the written return of information on behalf of the Respondent;
 - b. includes a statement that, in order to comply with this Order, the person has made or caused to be made:
 - i. a thorough and diligent search of the records and things in the possession, control or power of the Respondent; and

- ii. appropriate enquiries of the Respondent's personnel; and
 - c. states that the person has examined the records produced and written returns made and delivered pursuant to the Order and that those records, and written returns are, to the best of his or her knowledge and belief, correct and complete in all material respects.
14. **THIS COURT FURTHER ORDERS** that all the requirements herein, including the return of records, things and written returns of information, shall be completed within 30 calendar days of the service of this Order.
15. **THIS COURT FURTHER ORDERS** that:
- a. the Respondent shall produce all records and things and deliver all written returns of information to the Commissioner at the following address:

Competition Bureau
Mergers Directorate
Place du Portage Phase I
50 Victoria Street
Gatineau, Québec K1A 0C9

Attention: Jacqueline Byers, Competition Law Officer
 - b. communications or inquiries regarding this Order shall be addressed to:

Department of Justice
Competition Bureau Legal Services
Place du Portage Phase I
50 Victoria Street
Gatineau, Québec K1A 0C9

Attention: Eric Buist, Counsel

16. **THIS COURT FURTHER ORDERS** that this Order may be served in person or by means of facsimile machine, electronic mail (with acknowledgement of receipt) or registered mail on a duly authorized representative of the Respondent or on counsel for the Respondent who have agreed to accept such service.

"Denis Gascon"

Judge

SCHEDULES I AND II

Notice Concerning Obstruction

Any person who in any manner impedes or prevents, or attempts to impede or prevent, any inquiry or examination under the Act, or who destroys or alters, or causes to be destroyed or altered, any record or thing that is required to be produced under section 11 of the Act may be subject to criminal prosecution for obstruction of justice, contempt of court or other federal criminal violations. Where a corporation commits such an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence, may also be prosecuted. Conviction of any of these offences is punishable by fine or imprisonment, or both.

Definitions

For the purpose of Schedules I and II, the following terms shall have the respective meanings set out below and any grammatical variations of those terms shall also have the corresponding meanings:

“Act” means the *Competition Act*, RSC, 1985, c C-34;

“Affiliate” has the same meaning as in subsection 2(2) of the Act;

“and” and **“or”** have both conjunctive and disjunctive meanings;

“any” means one or more. The term is mutually interchangeable with “all” and each term encompasses the other;

“**Classification**” means any applicable classification (e.g., Class 1, 1a, 1b, 2, secure) for a Facility, including as designated by any applicable federal or provincial authority;

“**Company**” means AQT Water Management Inc., its predecessors, divisions, Affiliates, and all directors, officers, and employees of the foregoing;

“**Data Dictionary**” means documentation of the organization and structure of data, including: a list of field names; a definition for each field as it is used by the Company, including the meanings of all codes that appear as field values; the format, including variable type and length, of each field; and the primary key in a given table that defines a unique observation;

“**Oilfield Waste**” means any Waste Type generated during the drilling, completion, production or remediation operations of oil and gas entities;

“**Record**” has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;

“**Relevant Area**” means British Columbia, Alberta and Saskatchewan;

“**Relevant Facility**” means, collectively and individually any of the following types of facilities owned, operated or marketed by the Company: (i) treatment, recovery and disposal facilities; (ii) produced and/or waste water disposal wells; and (iii) landfills, as well as any facilities that can be used to perform the functions performed at any of the foregoing in relation to any Oilfield Waste;

“**Relevant Period**” means, January 1, 2019 to December 31, 2020;

“Relevant Product” means, collectively and individually: (i) the services offered at full-service terminal facilities; (ii) the services offered at disposal wells; (iii) the services offered at landfills; and (iv) the services offered at any Facility that can be used to perform the functions performed at any of the foregoing in relation to any Oilfield Waste; and

“Waste Type” means, collectively and individually, any type of waste, including, but not limited to: liquid/fluid, solid, sludge, drilling fluids, drill cuttings, completion fluids, produced water, flowback water, emulsions, hazardous, non-hazardous, dangerous, non-dangerous, naturally occurring radioactive material (or “NORM”) and waste from any type of production, including, but not limited to, conventional, unconventional, heavy, SAGD, in situ, light, sour, and sweet.

SCHEDULE I

RECORDS TO BE PRODUCED PURSUANT TO PARAGRAPH 11(1)(b) OF THE COMPETITION ACT

1. Provide any Company data, including all relevant Data Dictionaries, that record sales data related to the Relevant Products in the Relevant Area during the Relevant Period at any Relevant Facility in the most disaggregated form available (e.g. transaction level, if available). The response should contain, but should not be limited to, the information found in Appendix A, if available.

SCHEDULE II

WRITTEN RETURNS OF INFORMATION TO BE PRODUCED PURSUANT TO PARAGRAPH 11(1)(c) OF THE COMPETITION ACT

1. Provide a current list or map identifying Relevant Facilities in the Relevant Area which operated at any time during the Relevant Period. The response should contain, but not be limited to, the information found in Appendix B.

APPENDIX A

The following information, or similar datasets, as and if tracked by the Respondent:

- a) Transaction ID
- b) Transaction date
- c) Number of units
- d) Unit of measure
- e) Discount (e.g. multi-site, primary account)
- f) Final price (excluding taxes, net of discounts)
- g) Tax
- h) Shipment costs to AQT Water Management Inc. and charges to customer
- i) Cost of goods sold
- j) Product ID
- k) Product description
- l) Product category and characteristics
- m) Customer ID
- n) Customer name and address
- o) Customer category and characteristics (e.g. multi-site account, primary/secondary account, whether the customer is a competitor in any waste disposal services)
- p) Facility ID
- q) Facility name and address
- r) Other Facility characteristics
- s) Contract ID
- t) Contract start date and term
- u) Contract characteristics (e.g., primary or secondary supplier, preferred access, multi-site contract)
- v) Shipment ID
- w) Shipment date
- x) Shipment method and characteristics (e.g. hauler, truck-type and capacity, point of origin)
- y) Contemporaneous capacity
- z) Contemporaneous capacity utilization
- aa) Contemporaneous wait times

APPENDIX B

The following information:

- a) A unique identifier
- b) Name
- c) Address
- d) Location (e.g. verified longitude and latitude)
- e) Type of Facility (e.g. treatment, recovery and disposal; disposal well; landfill; cavern)
- f) Classification
- g) Estimate of capacity on an monthly basis
- h) Estimate of capacity utilization of an monthly basis

SCHEDULE III

E-PRODUCTION GUIDELINES

Enforcement Guidelines



Production of Electronically Stored Information



This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

For information on the Competition Bureau's activities, please contact:

Information Centre
Competition Bureau
50 Victoria Street
Gatineau QC K1A 0C9

Tel.: 819-997-4282
Toll free: 1-800-348-5358
TTY (for hearing impaired): 1-800-642-3844
Fax: 819-997-0324
Website: www.competitionbureau.gc.ca

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This publication is also available online in HTML at:

www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03907.html

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PREFACE

The Competition Bureau (the “Bureau”), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the “Act”), the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The Bureau has issued these guidelines for the Production of Electronically Stored Information (“ESI”) to promote the efficient processing and review of any electronic production received by the Bureau and to resolve any details before parties collect and produce responsive records. Transparency regarding the Bureau’s preferences for receiving ESI improves predictability and helps producing parties make informed decisions. These guidelines reflect the Bureau’s current preferences based on existing technologies used by the Bureau to process and review ESI and will be updated, as required, where the Bureau adopts new or different technologies.

John Pecman
Commissioner of Competition

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I. INTRODUCTION

These guidelines for the production of electronically stored information (“ESI”) set out the Competition Bureau’s (the “Bureau”) preferred formats for receiving ESI produced in response to compulsory processes and, in certain instances, produced voluntarily in the course of an inquiry or investigation under the *Competition Act* (the “Act”).

The Bureau continuously strives to carry out its mandate in the most efficient and effective means possible. The receipt of ESI in a format set out below will assist the Bureau in achieving that objective through the reduction of processing and reviewing times and will avoid unnecessary costs and delays associated with unusable productions. Early and regular communication among the Bureau, producing parties and their counsel regarding production methodologies and formats is encouraged. Given the technical nature of the subject matter, it is also beneficial to involve persons with the requisite technical expertise, whether in-house or those of a third-party service provider, when using these guidelines, including participating in discussions with Bureau representatives regarding the production of ESI.

These guidelines reflect the Bureau’s current preferences based on existing technologies used by the Bureau to process and review ESI and will be updated, as required, where the Bureau adopts new or different technologies.

These guidelines do not address the type or scope of information that may be required or requested by the Bureau in the course of an inquiry or an investigation, nor do they address the Bureau’s preferred practices regarding the production of non-electronic records or other things, except where those records are converted to ESI.

2. APPLICABILITY OF THE GUIDELINES

The Bureau generally seeks production in accordance with these guidelines when seeking a court order under section 11 of the Act or under the *Criminal Code*. Further, the Bureau expects that producing parties will adhere to these guidelines in the following instances:

- responding to a supplementary information request issued under subsection 114(2) of the Act;
- submitting a production pursuant to participation in the Bureau’s Immunity or Leniency Programs; and
- submitting information voluntarily.

In this regard, a copy of the guidelines will generally be incorporated in or appended to an order or request for information.

3. ONGOING COMMUNICATION

Bureau staff will contact producing parties shortly following the issuance of an order or request for information to which these guidelines apply and will be available for ongoing dialogue regarding the production of ESI.

Producing parties, together with their technical staff and/or third-party service provider, are strongly encouraged to speak with Bureau staff (case officers and technical staff) prior to collecting and prior to producing ESI to discuss production details, including the manner in which ESI is stored, the types of information that are available on the electronic source and the format of production.

4. TECHNICAL INSTRUCTIONS

- 4.1 All ESI (i.e., information readable in a computer system) should be produced free of computer viruses or malware, be accessible, readable and printable, and be devoid of passwords or encryption.
- 4.2 All ESI should be produced in its original electronic format (i.e., native format), except where near-native format is required by subsections 4.3.2 or 4.6 or where an image production is produced as per subsection 4.8. Detailed instructions are set out in Schedule A for production using computer systems without application export capabilities and in Schedule B for production using litigation application exports. The Bureau's preference is to receive ESI in accordance with Schedule B.
- 4.3 Where a record being produced is part of a family, all parent and child records should be produced and the parent/child relationship should be preserved. A family is a collection of pages or files produced manually or by a software application, constituting a logical single communication of information, but consisting of more than one single stand-alone record. Examples include:
 - 4.3.1 a fax cover, the faxed letter, and an attachment to the letter, where the fax cover is the parent and the letter and attachment are each a child.
 - 4.3.2 email repositories (e.g., Outlook .PST, Lotus .NSF) can contain a variety of records, including messages, calendars, contacts, and tasks. For purposes of production, all parent records, both native (e.g., documents, spreadsheets, presentations) and near-native email, calendar, contacts, tasks, notes and child records (e.g., object linking and embedding items and attachments of files to emails or to other parent records) should be produced, with the parent/child relationship preserved. Similar items found and collected outside an email repository (e.g., .MSG, .EML, .HTM, .MHT) should be produced in the same manner; and

- 4.3.3 archive file types (e.g., .zip, .rar) should be uncompressed for processing. Each file contained within an archive file should be produced as a child to the parent archive file. If the archive file is itself an attachment, that parent/child relationship should also be preserved.
- 4.4 Hard copy or paper records produced as ESI should be produced as single page TIFF images with a resolution of 300 dpi (dots per inch) and OCR generated text. The records should be produced as they are kept, reflecting attachment relationships between records and information about the file folders within which the record is found. Where colour is required to interpret the record, such as hard copy photos, and certain charts, that image should be produced in colour. These colour images are to be produced as .jpg format. Hard copy photographs should be produced as colour .jpg, if originally in colour, or greyscale .tif files if originally in black and white.

The following bibliographic information, if it is available, should also be provided for each record:
 - a. document ID
 - b. date
 - c. author / author organization
 - d. recipient / recipient organization
- 4.5 The records produced should be indexed as being responsive to the applicable paragraphs or subparagraphs in the [Order/Request].
- 4.6 Each database record submitted in response to a paragraph or subparagraph of the [Order/Request]:
 - 4.6.1 should be produced whole, in a flat file, in a non-relational format and exported as a delimited text file where fields are separated by the pipe character (|) and a caret (^) is used as the text qualifier (e.g. ^Field1 ^ | ^Field2 ^ | ^Field3 ^ etc.); and
 - 4.6.2 should include a list of field names; a definition for each field as it is used by the producing party, including the meanings of all codes that can appear as field values; the format, including variable type and length, of each field; and the primary key in a given table that defines a unique observation.
- 4.7 With regard to de-duplication:
 - 4.7.1 for investigations relating to Part VI of the Act, all copies of records should be provided; and

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- 4.7.2 for investigations relating to Parts VII.1 and VIII of the Act, the producing party may use de-duplication or email threading software if the producing party provides the Bureau with a written description of the proposed process to be used, including what is considered a duplicate, and the Bureau confirms that the deployment of such process permits the producing party to comply fully with the [Order/Request].
- 4.8 Documents requiring redaction pursuant to any claim of privilege should be produced as single-page TIFF or multi-page PDF images and designated "Redacted" in the field as described in Schedule B. Appropriately redacted searchable text (OCR of the redacted images is acceptable), metadata, and bibliographic information must also be provided. All documents that are part of a document family that includes a document withheld pursuant to any claim of privilege will be designated "Family Member of Privileged Doc" in the field as described in Schedule B for all other documents in its family. Placeholder images with BEGDOC#, FILENAME, FILEPATH and reason withheld (e.g., "Privileged") should be provided in place of the document images of the privileged document.
- 4.9 All ESI should be provided on portable storage media appropriate to the volume of data (e.g., USB/flash drive, CD, DVD, hard drive) and should be identified with a label setting out the matter name, the contents and the date of production. Each medium should contain no more than 250,000 files (e.g., native ESI or images or a combination of both).
- 4.10 In the event that ESI is delivered in a format that is not one of the formats set out in Schedule A or Schedule B, the ESI should be provided along with all available instructions and other materials, including software, as necessary for the retrieval and use of the ESI (subject to any software licensing restrictions, which the producing party and the Bureau should discuss in advance of production).



HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Website

[www.competitionbureau.gc.ca]

Address

[Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9]

Telephone

[Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired) 1-800-642-3844]

Facsimile

[819-997-0324]

SCHEDULE A

Computer Systems with No Application Export Capabilities

1. ESI generated by office productivity suite software should be produced in its native format.
2. Emails should be produced in their near-native format. Where an email has attachments, the attachments should be left embedded in the native file and not extracted separately.

SCHEDULE B

Litigation Application Exports

1. A load file (e.g., Opticon (OPT), IPRO (LFP), Summation (DII) or Ringtail (MDB)) and all related ESI should be produced in native format except where near-native format is required by subsections 4.3.2 and 4.6.
2. Within the delimited metadata file where fields are separated by the pipe character (|) and a caret (^) is used as the text qualifier (e.g. ^Field1^|^Field2^|^Field3^ etc.), and depending on the nature of the ESI, the following fields should be provided:

DOCID
BEGDOC
ENDDOC
BEGATTACH
ENDATTACH
FILEPATH
PARENTBATES (bates number of parent record)
CHILDBATES (bates number(s) of any child records)
MD5HASH (MD5HASH of the native format ESI)
TEXTPATH (link to extracted text on the production media for tiffs only)
NATIVEPATH (link to any files produced in native or near-native format on the production media)
CUSTODIAN
ALLCUSTODIAN
TO
FROM
AUTHOR
CC
BCC
SUBJECT/TITLE
FILENAME
DOCDATE
DATESENT

130

TIMESENT
DATECREATED
TIMECREATED
DATELASTMOD
TIMELASTMOD
DATEACCESSED
TIMEACCESSED
SPECIFICATION
FILEEXTENSION
REDACTED
FAMILYMEMBERPRIVILEGEDDOC

3. The ESI produced should be indexed by using the 'SPECIFICATION' field as being responsive to the paragraphs or subparagraphs in the [Order/Request]. If multiple values exist for the specification, they should be separated by a semi-colon (e.g. 1a;1b;2a, etc.).



**This is Exhibit "E" to the Affidavit
of
Daniel Nyman
Affirmed on November 8, 2021**

Federal Court



Cour fédérale

Date: 20210923

Docket: T-1426-21

Ottawa, Ontario, September 23, 2021

PRESENT: Mr. Justice Gascon

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* relating to the acquisition of Tervita Corporation by Secure Energy Services Inc., reviewable under section 92 of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an order requiring Albright Flush Systems Ltd to produce records pursuant to paragraph 11(1)(b) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.

BETWEEN:

COMMISSIONNER OF COMPETITION

Applicant

and

ALBRIGHT FLUSH SYSTEMS LTD

Respondent

**ORDER TO PRODUCE RECORDS AND MAKE AND DELIVER WRITTEN RETURNS
OF INFORMATION**

F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
	23 Sept 2021	
Wayne Sawtell		
Ottawa, ONT		5

UPON the *ex parte* application made by the Commissioner of Competition [Commissioner] for an Order pursuant to paragraphs 11(1)(b) and 11(1)(c) of the *Competition Act*, RSC, 1985, c C-34 [Act], which was heard this day by videoconference;

AND UPON reading the affidavit of Jacqueline Byers affirmed on September 17, 2021 [Affidavit];

AND UPON being satisfied that an inquiry is being made under section 10 of the Act relating to the acquisition of Tervita Corporation by Secure Energy Services Inc., reviewable under section 92 of the Act [Inquiry];

AND UPON being satisfied that the Respondent has or is likely to have information that is relevant to the Inquiry;

1. **THIS COURT ORDERS** that the Respondent shall produce to the Commissioner all records specified in this Order, in accordance with the terms of this Order.
2. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver to the Commissioner all written returns of information specified in this Order, in accordance with the terms of this Order.
3. **THIS COURT FURTHER ORDERS** that, in order to facilitate the handling, use, and orderly maintenance of records and to ensure the accurate and expeditious return of records specified in this Order and written returns of information produced pursuant to this Order, the Respondent shall comply with the following requirements:
 - a. the Respondent shall produce records in its possession, control or power;

- b. the Respondent shall make and deliver a written return of information in such detail as is required to disclose all facts relevant to the corresponding specifications in this Order;
- c. the Respondent shall produce: (i) records described in Schedule I created or received or modified during the period from January 1, 2019 to December 31, 2020; and (ii) written returns of information described in Schedule II, in respect of the same period;
- d. the Respondent shall produce all records in accordance with the Competition Bureau's Guidelines for the Production of Electronically Stored Information [E-Production Guidelines] attached at Schedule III of this Order;
- e. the Respondent shall scan each paper record into a separate electronic record and produce that copy in lieu of the original record unless making this copy would compromise the integrity of the original, render the copy difficult to read, or the original record size exceeds 216 mm x 356 mm (8½ in x 14 in); and a duly authorized representative of the Respondent shall certify by affidavit the copy is a true copy of the original record;
- f. a duly authorized representative of the Respondent shall certify by affidavit that all electronic records produced by the Respondent pursuant to this Order are true copies of the electronic records in the possession, control or power of the Respondent;

- g. each written return of information made by the Respondent shall be sworn or solemnly affirmed by a duly authorized representative of the Respondent, as having been examined by that person and as being, to the best of his or her knowledge and belief, correct and complete in all material respects;
- h. if a record contains information that the Respondent claims is privileged, the Respondent shall produce the record with the privileged information redacted and in accordance with paragraphs 4 and 5 of this Order;
- i. the Respondent shall make all written returns of information, including those relating to revenues, costs and margins, in accordance with generally accepted accounting principles [GAAP], International Financial Reporting Standards [IFRS], or other accounting principles that the Respondent uses in its financial statements. Where the Respondent produces a record or make and deliver a written return of information using accounting principles other than GAAP or IFRS, the Respondent shall explain the meaning of all such accounting terms;
- j. the Respondent shall define, explain, interpret or clarify any record or written return of information whose meaning is not self-evident;
- k. before producing records pursuant to this Order, a duly authorized representative of the Respondent responsible for producing electronic records in accordance with the E-Production Guidelines attached at Schedule III of this Order shall contact a person identified in paragraph 15 of this Order and provide particulars regarding how the Respondent will comply with the E-Production Guidelines. The

Respondent shall make reasonable efforts to address any additional technical requirements the Commissioner may have relating to the production of electronic records in accordance with the E-Production Guidelines;

- l. use of the singular or the plural in the Schedules of this Order shall not be deemed a limitation, and the use of the singular shall be construed to include, where appropriate, the plural; and vice versa; and
 - m. use of a verb in the present or past tense in the Schedules of this Order shall not be deemed a limitation, and the use of either the present or past tense shall be construed to include both the present and past tense.
4. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver, in a written return of information, an index in which the Respondent identifies all records (or parts of records) that are responsive to the Specifications in Schedule I of this Order for which privilege is claimed. The index shall include the title of the record, the date of the record, the name of each author, the title or position of each author, the name of each addressee and recipient, the title or position of each addressee and recipient, and the paragraphs or subparagraphs of Schedule I and II of the Order to which the record is responsive. In lieu of listing the title or position of an author, addressee or recipient for each record, the Respondent may make and deliver a written return of information listing such persons and their titles or positions.

5. **THIS COURT FURTHER ORDERS** that, where the Respondent asserts a legal privilege in respect of all or part of a record, the Respondent shall, in a written return of information:

- a. produce, for each record, a description of the privilege claimed and the factual basis for the claim in sufficient detail to allow the Commissioner to assess the validity of the claim; and
- b. identify by name, title and address, all persons to whom the record or its contents or any part thereof, have been disclosed.

Without restricting any other remedy he may seek, the Commissioner may, by written notice to the Respondent, at any time require the Respondent to produce records for which solicitor-client privilege is claimed to a person identified in subsection 19(3) of the Act.

6. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information confirming that the records produced pursuant to this Order were either in the possession of or on the premises used or occupied by a Respondent or in the possession of an officer, agent, servant, employee or representative of a Respondent. If a record produced by the Respondent pursuant to this Order does not meet the above conditions, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, control, power, and location of such record.

7. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it is not producing pursuant to this Order a record, thing, type of record or type of thing that was formerly in the possession, control or power of a Respondent and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent had continued to have possession, control or power over the record, thing, type of record or type of thing. The Respondent shall state in this written return of information: (i) when and how the Respondent lost possession, control and power over a record, thing, type of record or type of thing; and (ii) the Respondent's best information about the present location of the record, thing, type of record or type of thing.

8. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it never had possession, control or power over a record, thing, type of record or type of thing responsive to a Specification in this Order, that another person not otherwise subject to this Order has possession, control or power over the record, thing, type of record or type of thing, and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent possessed the record, thing, type of record or type of thing. The Respondent shall state in this written return of information their best information about: (i) the Specification to which the record, thing, type of record or type of thing is responsive; (ii) the identity of the person who has possession, control or power

of the record, thing, type of record or type of thing; and (iii) that person's last known address.

9. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that a record, thing, type of record or type of thing responsive to this Order has been destroyed and that the record, thing, type of record or type of thing would have been responsive to a Specification of this Order if it had not been destroyed. The Respondent shall state, in this written return of information, whether the record, thing, type of record or type of thing was destroyed pursuant to a record destruction or retention policy, instruction or authorization and shall produce that policy, instruction or authorization.
10. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that it does not have records, or information responsive to a Specification in this Order because the record, or information never existed. The Respondent shall, upon request of the Commissioner, make and deliver a further written return of information explaining why the record or thing never existed.
11. **THIS COURT FURTHER ORDERS** that, where the Respondent previously produced a record to the Commissioner, the Respondent is not required to produce an additional copy of the record or thing provided that the Respondent: (i) identifies the previously produced record or thing to the Commissioner's satisfaction; (ii) makes and delivers a

written return of information in which it agrees and confirms that the record was either in the possession of the Respondent, on premises used or occupied by the Respondent or was in the possession of an officer, agent, servant, employee or representative of the Respondent; and where this is not the case, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, control, power, and location of such record; and (iii) receives confirmation from the Commissioner that such record or thing need not be produced.

12. **THIS COURT FURTHER ORDERS** that, where the Respondent produces records or delivers written returns of information that are, in the opinion of the Commissioner, adequate for the purposes of the Inquiry, the Commissioner may, by written notice, waive production of any additional records, things or information that would have otherwise been responsive to the Order.

13. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information that:
 - a. describes the authority of the person to make the written return of information on behalf of the Respondent;

 - b. includes a statement that, in order to comply with this Order, the person has made or caused to be made:
 - i. a thorough and diligent search of the records and things in the possession, control or power of the Respondent; and

- ii. appropriate enquiries of the Respondent's personnel; and
 - c. states that the person has examined the records produced and written returns made and delivered pursuant to the Order and that those records, and written returns are, to the best of his or her knowledge and belief, correct and complete in all material respects.
14. **THIS COURT FURTHER ORDERS** that all the requirements herein, including the return of records, things and written returns of information, shall be completed within 30 calendar days of the service of this Order.
15. **THIS COURT FURTHER ORDERS** that:
- a. the Respondent shall produce all records and things and deliver all written returns of information to the Commissioner at the following address:

Competition Bureau
Mergers Directorate
Place du Portage Phase I
50 Victoria Street
Gatineau, Québec K1A 0C9

Attention: Jacqueline Byers, Competition Law Officer
 - b. communications or inquiries regarding this Order shall be addressed to:

Department of Justice
Competition Bureau Legal Services
Place du Portage Phase I
50 Victoria Street
Gatineau, Québec K1A 0C9

Attention: Eric Buist, Counsel

16. **THIS COURT FURTHER ORDERS** that this Order may be served in person or by means of facsimile machine, electronic mail (with acknowledgement of receipt) or registered mail on a duly authorized representative of the Respondent or on counsel for the Respondent who have agreed to accept such service.

"Denis Gascon"

Judge

SCHEDULES I AND II

Notice Concerning Obstruction

Any person who in any manner impedes or prevents, or attempts to impede or prevent, any inquiry or examination under the Act, or who destroys or alters, or causes to be destroyed or altered, any record or thing that is required to be produced under section 11 of the Act may be subject to criminal prosecution for obstruction of justice, contempt of court or other federal criminal violations. Where a corporation commits such an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence, may also be prosecuted. Conviction of any of these offences is punishable by fine or imprisonment, or both.

Definitions

For the purpose of Schedules I and II, the following terms shall have the respective meanings set out below and any grammatical variations of those terms shall also have the corresponding meanings:

“Act” means the *Competition Act*, RSC, 1985, c C-34;

“Affiliate” has the same meaning as in subsection 2(2) of the Act;

“and” and **“or”** have both conjunctive and disjunctive meanings;

“any” means one or more. The term is mutually interchangeable with “all” and each term encompasses the other;

“**Classification**” means any applicable classification (e.g., Class 1, 1a, 1b, 2, secure) for a Facility, including as designated by any applicable federal or provincial authority;

“**Company**” means Albright Flush Systems Ltd, its predecessors, divisions, Affiliates, and all directors, officers, and employees of the foregoing;

“**Data Dictionary**” means documentation of the organization and structure of data, including: a list of field names; a definition for each field as it is used by the Company, including the meanings of all codes that appear as field values; the format, including variable type and length, of each field; and the primary key in a given table that defines a unique observation;

“**Oilfield Waste**” means any Waste Type generated during the drilling, completion, production or remediation operations of oil and gas entities;

“**Record**” has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;

“**Relevant Area**” means British Columbia, Alberta and Saskatchewan;

“**Relevant Facility**” means, collectively and individually any of the following types of facilities owned, operated or marketed by the Company: (i) treatment, recovery and disposal facilities; (ii) produced and/or waste water disposal wells; and (iii) landfills, as well as any facilities that can be used to perform the functions performed at any of the foregoing in relation to any Oilfield Waste;

“Relevant Period” means, January 1, 2019 to December 31, 2020;

“Relevant Product” means, collectively and individually: (i) the services offered at full-service terminal facilities; (ii) the services offered at disposal wells; (iii) the services offered at landfills; and (iv) the services offered at any Facility that can be used to perform the functions performed at any of the foregoing in relation to any Oilfield Waste; and

“Waste Type” means, collectively and individually, any type of waste, including, but not limited to: liquid/fluid, solid, sludge, drilling fluids, drill cuttings, completion fluids, produced water, flowback water, emulsions, hazardous, non-hazardous, dangerous, non-dangerous, naturally occurring radioactive material (or “NORM”) and waste from any type of production, including, but not limited to, conventional, unconventional, heavy, SAGD, in situ, light, sour, and sweet.

SCHEDULE I

RECORDS TO BE PRODUCED PURSUANT TO PARAGRAPH 11(1)(b) OF THE COMPETITION ACT

1. Provide any Company data, including all relevant Data Dictionaries, that record sales data related to the Relevant Products in the Relevant Area during the Relevant Period at any Relevant Facility in the most disaggregated form available (e.g. transaction level, if available). The response should contain, but should not be limited to, the information found in Appendix A, if available.

SCHEDULE II

WRITTEN RETURNS OF INFORMATION TO BE PRODUCED PURSUANT TO PARAGRAPH 11(1)(c) OF THE COMPETITION ACT

1. Provide a current list or map identifying the Company's Relevant Facilities in the Relevant Area which operated at any time during the Relevant Period. The response should contain, but not be limited to, the information found in Appendix B, if available.

APPENDIX A

The following information, or similar datasets, as and if tracked by the Respondent:

- a) Transaction ID
- b) Transaction date
- c) Number of units
- d) Unit of measure
- e) Discount (e.g. multi-site, primary account)
- f) Final price (excluding taxes, net of discounts)
- g) Tax
- h) Shipment costs to Albright Flush Systems Ltd and charges to customer
- i) Cost of goods sold
- j) Product ID
- k) Product description
- l) Product category and characteristics
- m) Customer ID
- n) Customer name and address
- o) Customer category and characteristics (e.g. multi-site account, primary/secondary account, whether the customer is a competitor in any waste disposal services)
- p) Facility ID
- q) Facility name and address
- r) Other Facility characteristics
- s) Contract ID
- t) Contract start date and term
- u) Contract characteristics (e.g., primary or secondary supplier, preferred access, multi-site contract)
- v) Shipment ID
- w) Shipment date
- x) Shipment method and characteristics (e.g. hauler, truck-type and capacity, point of origin)
- y) Contemporaneous capacity
- z) Contemporaneous capacity utilization
- aa) Contemporaneous wait times

APPENDIX B

The following information:

- a) A unique identifier
- b) Name
- c) Address
- d) Location (e.g. verified longitude and latitude)
- e) Type of Facility (e.g. treatment, recovery and disposal; disposal well; landfill; cavern)
- f) Classification
- g) Estimate of capacity on an monthly basis
- h) Estimate of capacity utilization of an monthly basis

SCHEDULE III E-PRODUCTION GUIDELINES



Competition Bureau
Canada

Bureau de la concurrence
Canada

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Enforcement Guidelines



Production of Electronically Stored Information



This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

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Competition Bureau
50 Victoria Street
Gatineau QC K1A 0C9

Tel.: 819-997-4282
Toll free: 1-800-348-5358
TTY (for hearing impaired): 1-800-642-3844
Fax: 819-997-0324
Website: www.competitionbureau.gc.ca

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PREFACE

The Competition Bureau (the “Bureau”), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the “Act”), the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The Bureau has issued these guidelines for the Production of Electronically Stored Information (“ESI”) to promote the efficient processing and review of any electronic production received by the Bureau and to resolve any details before parties collect and produce responsive records. Transparency regarding the Bureau’s preferences for receiving ESI improves predictability and helps producing parties make informed decisions. These guidelines reflect the Bureau’s current preferences based on existing technologies used by the Bureau to process and review ESI and will be updated, as required, where the Bureau adopts new or different technologies.

John Pecman
Commissioner of Competition

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I. INTRODUCTION

These guidelines for the production of electronically stored information (“ESI”) set out the Competition Bureau’s (the “Bureau”) preferred formats for receiving ESI produced in response to compulsory processes and, in certain instances, produced voluntarily in the course of an inquiry or investigation under the *Competition Act* (the “Act”).

The Bureau continuously strives to carry out its mandate in the most efficient and effective means possible. The receipt of ESI in a format set out below will assist the Bureau in achieving that objective through the reduction of processing and reviewing times and will avoid unnecessary costs and delays associated with unusable productions. Early and regular communication among the Bureau, producing parties and their counsel regarding production methodologies and formats is encouraged. Given the technical nature of the subject matter, it is also beneficial to involve persons with the requisite technical expertise, whether in-house or those of a third-party service provider, when using these guidelines, including participating in discussions with Bureau representatives regarding the production of ESI.

These guidelines reflect the Bureau’s current preferences based on existing technologies used by the Bureau to process and review ESI and will be updated, as required, where the Bureau adopts new or different technologies.

These guidelines do not address the type or scope of information that may be required or requested by the Bureau in the course of an inquiry or an investigation, nor do they address the Bureau’s preferred practices regarding the production of non-electronic records or other things, except where those records are converted to ESI.

2. APPLICABILITY OF THE GUIDELINES

The Bureau generally seeks production in accordance with these guidelines when seeking a court order under section 11 of the Act or under the *Criminal Code*. Further, the Bureau expects that producing parties will adhere to these guidelines in the following instances:

- responding to a supplementary information request issued under subsection 114(2) of the Act;
- submitting a production pursuant to participation in the Bureau’s Immunity or Leniency Programs; and
- submitting information voluntarily.

In this regard, a copy of the guidelines will generally be incorporated in or appended to an order or request for information.

3. ONGOING COMMUNICATION

Bureau staff will contact producing parties shortly following the issuance of an order or request for information to which these guidelines apply and will be available for ongoing dialogue regarding the production of ESI.

Producing parties, together with their technical staff and/or third-party service provider, are strongly encouraged to speak with Bureau staff (case officers and technical staff) prior to collecting and prior to producing ESI to discuss production details, including the manner in which ESI is stored, the types of information that are available on the electronic source and the format of production.

4. TECHNICAL INSTRUCTIONS

- 4.1 All ESI (i.e., information readable in a computer system) should be produced free of computer viruses or malware, be accessible, readable and printable, and be devoid of passwords or encryption.
- 4.2 All ESI should be produced in its original electronic format (i.e., native format), except where near-native format is required by subsections 4.3.2 or 4.6 or where an image production is produced as per subsection 4.8. Detailed instructions are set out in Schedule A for production using computer systems without application export capabilities and in Schedule B for production using litigation application exports. The Bureau's preference is to receive ESI in accordance with Schedule B.
- 4.3 Where a record being produced is part of a family, all parent and child records should be produced and the parent/child relationship should be preserved. A family is a collection of pages or files produced manually or by a software application, constituting a logical single communication of information, but consisting of more than one single stand-alone record. Examples include:
 - 4.3.1 a fax cover, the faxed letter, and an attachment to the letter, where the fax cover is the parent and the letter and attachment are each a child.
 - 4.3.2 email repositories (e.g., Outlook .PST, Lotus .NSF) can contain a variety of records, including messages, calendars, contacts, and tasks. For purposes of production, all parent records, both native (e.g., documents, spreadsheets, presentations) and near-native email, calendar, contacts, tasks, notes and child records (e.g., object linking and embedding items and attachments of files to emails or to other parent records) should be produced, with the parent/child relationship preserved. Similar items found and collected outside an email repository (e.g., .MSG, .EML, .HTM, .MHT) should be produced in the same manner; and

- 4.3.3 archive file types (e.g., .zip, .rar) should be uncompressed for processing. Each file contained within an archive file should be produced as a child to the parent archive file. If the archive file is itself an attachment, that parent/child relationship should also be preserved.
- 4.4 Hard copy or paper records produced as ESI should be produced as single page TIFF images with a resolution of 300 dpi (dots per inch) and OCR generated text. The records should be produced as they are kept, reflecting attachment relationships between records and information about the file folders within which the record is found. Where colour is required to interpret the record, such as hard copy photos, and certain charts, that image should be produced in colour. These colour images are to be produced as .jpg format. Hard copy photographs should be produced as colour .jpg, if originally in colour, or greyscale .tif files if originally in black and white.

The following bibliographic information, if it is available, should also be provided for each record:
 - a. document ID
 - b. date
 - c. author / author organization
 - d. recipient / recipient organization
- 4.5 The records produced should be indexed as being responsive to the applicable paragraphs or subparagraphs in the [Order/Request].
- 4.6 Each database record submitted in response to a paragraph or subparagraph of the [Order/Request]:
 - 4.6.1 should be produced whole, in a flat file, in a non-relational format and exported as a delimited text file where fields are separated by the pipe character (|) and a caret (^) is used as the text qualifier (e.g. ^Field1 ^ | ^Field2 ^ | ^Field3 ^ etc.); and
 - 4.6.2 should include a list of field names; a definition for each field as it is used by the producing party, including the meanings of all codes that can appear as field values; the format, including variable type and length, of each field; and the primary key in a given table that defines a unique observation.
- 4.7 With regard to de-duplication:
 - 4.7.1 for investigations relating to Part VI of the Act, all copies of records should be provided; and

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- 4.7.2 for investigations relating to Parts VII.1 and VIII of the Act, the producing party may use de-duplication or email threading software if the producing party provides the Bureau with a written description of the proposed process to be used, including what is considered a duplicate, and the Bureau confirms that the deployment of such process permits the producing party to comply fully with the [Order/Request].
- 4.8 Documents requiring redaction pursuant to any claim of privilege should be produced as single-page TIFF or multi-page PDF images and designated "Redacted" in the field as described in Schedule B. Appropriately redacted searchable text (OCR of the redacted images is acceptable), metadata, and bibliographic information must also be provided. All documents that are part of a document family that includes a document withheld pursuant to any claim of privilege will be designated "Family Member of Privileged Doc" in the field as described in Schedule B for all other documents in its family. Placeholder images with BEGDOC#, FILENAME, FILEPATH and reason withheld (e.g., "Privileged") should be provided in place of the document images of the privileged document.
- 4.9 All ESI should be provided on portable storage media appropriate to the volume of data (e.g., USB/flash drive, CD, DVD, hard drive) and should be identified with a label setting out the matter name, the contents and the date of production. Each medium should contain no more than 250,000 files (e.g., native ESI or images or a combination of both).
- 4.10 In the event that ESI is delivered in a format that is not one of the formats set out in Schedule A or Schedule B, the ESI should be provided along with all available instructions and other materials, including software, as necessary for the retrieval and use of the ESI (subject to any software licensing restrictions, which the producing party and the Bureau should discuss in advance of production).

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Website

[www.competitionbureau.gc.ca]

Address

[Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9]

Telephone

[Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired) 1-800-642-3844]

Facsimile

[819-997-0324]

SCHEDULE A

Computer Systems with No Application Export Capabilities

1. ESI generated by office productivity suite software should be produced in its native format.
2. Emails should be produced in their near-native format. Where an email has attachments, the attachments should be left embedded in the native file and not extracted separately.

SCHEDULE B

Litigation Application Exports

1. A load file (e.g., Opticon (OPT), IPRO (LFP), Summation (DII) or Ringtail (MDB)) and all related ESI should be produced in native format except where near-native format is required by subsections 4.3.2 and 4.6.
2. Within the delimited metadata file where fields are separated by the pipe character (|) and a caret (^) is used as the text qualifier (e.g. ^Field1^ | ^Field2^ | ^Field3^ etc.), and depending on the nature of the ESI, the following fields should be provided:

DOCID
BEGDOC
ENDDOC
BEGATTACH
ENDATTACH
FILEPATH
PARENTBATES (bates number of parent record)
CHILDBATES (bates number(s) of any child records)
MD5HASH (MD5HASH of the native format ESI)
TEXTPATH (link to extracted text on the production media for tiffs only)
NATIVEPATH (link to any files produced in native or near-native format on the production media)
CUSTODIAN
ALLCUSTODIAN
TO
FROM
AUTHOR
CC
BCC
SUBJECT/TITLE
FILENAME
DOCDATE
DATESENT

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TIMESENT
DATECREATED
TIMECREATED
DATELASTMOD
TIMELASTMOD
DATEACCESSED
TIMEACCESSED
SPECIFICATION
FILEEXTENSION
REDACTED
FAMILYMEMBERPRIVILEGEDDOC

3. The ESI produced should be indexed by using the 'SPECIFICATION' field as being responsive to the paragraphs or subparagraphs in the [Order/Request]. If multiple values exist for the specification, they should be separated by a semi-colon (e.g. 1a;1b;2a, etc.).

CT-2021-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition of Tervita Corporation by SECURE Energy Services Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant/Responding Party

- and -

SECURE ENERGY SERVICES INC.

Respondent/Moving Party

**WRITTEN REPRESENTATIONS OF THE MOVING PARTY
SECURE ENERGY SERVICES INC.
(Motion to compel production of third party documents)**

OVERVIEW

1. SECURE Energy Services Inc. (“**SECURE**”) brings this motion for an Order directing the Commissioner of Competition (the “**Commissioner**”) to produce documents listed in Schedule “B” to his affidavit of documents described as “Document from Third Party” (the “**Third Party Documents**”).

2. While the Commissioner claims litigation privilege over these documents, they were ostensibly documents created by third parties for reasons unrelated to the litigation and then supplied to the Commissioner as documentary evidence for use in this application. Because they were not created for the dominant purpose of assisting the Commissioner’s counsel in the conduct of the litigation, no privilege attached and the documents should be produced.

PART I – FACTS

3. The Commissioner has commenced an application under section 92 of the *Competition Act* challenging a transaction through which SECURE acquired all of the outstanding shares of Tervita Corporation. The application is scheduled to be heard on its merits beginning in May 2022.

4. Pursuant to the Scheduling Order of Justice Gascon dated October 12, 2021, the Commissioner delivered his Affidavit of Documents to SECURE on October 29, 2021 (the “**Commissioner AoD**”).¹

5. Schedule “B” to the Commissioner’s AoD lists 502 documents that the Commissioner objects to disclosing on the basis of privilege. The Third Party Documents comprise 55 of the documents listed in the Commissioner’s Schedule “B.” Each of them is described only as

¹ Affidavit of Daniel Nyman, sworn November 8, 2021, para 2, Motion Record, Tab 2 and Exhibit “A” [*Nyman Affidavit*].

“Document from Third Party” (the “**Third Party Documents**”) and has only “Third Party” identified as its author. No further information is provided regarding the nature of these documents. The Commissioner objects to producing the Third Party Documents on the basis of litigation privilege.²

6. It is apparent from the Commissioner AoD that he has sought information, documents, and data from third parties to use as evidence on this application. Additionally, the Commissioner has obtained at least three orders under section 11 of the *Competition Act*, compelling third parties to produce information and data to him for the purposes of this application.³

7. The Commissioner has also claimed litigation privilege over a number of communications (e.g., emails and call notes) with third parties. SECURE acknowledges that communications with third parties for the predominant purpose of the litigation can properly be the subject of a claim for litigation privilege (without prejudice to its rights to challenge any privilege claims following examinations for discovery). This preliminary motion is limited to extrinsic documents that the Commissioner has ostensibly obtained from third parties for the purposes of this litigation.

PART II – ISSUES IN DISPUTE

8. The sole issue before the Tribunal is whether the Commissioner should be compelled to produce any of the 55 documents listed in his Schedule “B” as being authored and provided by third parties, and that were not created for the dominant purpose of assisting the Commissioner’s

² *Nyman Affidavit*, para 3 and Exhibits “A” and “B”.

³ *Nyman Affidavit*, para 4 and Exhibits “C”-“E”.

counsel in the conduct of the litigation, or, alternatively, order the Commissioner to provide a further and better Schedule “B” that sets out further particulars of the Third Party documents, including at a minimum the nature of the document, from whom the document was obtained, the author, the recipient, and anyone copied on the document.

PART III – SUBMISSIONS

A. Rules

9. Each party to an application before the Tribunal is required to produce an affidavit of documents that lists all documents that are relevant to any matter in issue and that are or were in the possession, power or control of the party. To the extent that the party objects to producing any document on the basis of privilege, the affidavit of document must identify the basis for that claim. The Tribunal has the power to inspect any document to determine the validity of any privilege claim.

B. Litigation Privilege – Dominant Purpose Test

10. A document is privileged only if it meets the “dominant purpose” test. While a document may be prepared with more than one purpose in mind, litigation privilege attaches only if the “dominant purpose” for creation of the document was to prepare for existing or reasonably anticipated litigation.⁴

11. Litigation privilege is a limited exception to the principle of full disclosure in the discovery process and is narrower than solicitor client privilege.⁵ The policy rationale for litigation privilege is to create a “zone of privacy” for litigants “to prepare their contending

⁴ *Blank v Canada*, 2006 SCC 39 at paras 59-60 [*Blank*]; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at paras 19, 64 [*Lizotte*].

⁵ *Lizotte* at paras 22-23.

positions in private”⁶ and to “confidently develop strategies knowing that they cannot be compelled to disclose them.”⁷ The Supreme Court of Canada and other appellate courts have noted with approval that the “dominant purpose” test is consistent with the modern trend to limit the scope of litigation privilege.⁸

C. Third Party Documents

12. Litigation privilege is not intended as a mechanism to shield relevant documentary evidence from discovery where it does not fall within the parameters of the privilege. Documents received from third parties that were not created for the dominant purpose of litigation, cannot be shrouded in litigation privilege simply by being “funneled” through counsel. In other words, a document that was created other than for the predominant purpose of litigation is not privileged and does not become privileged merely because it falls into the hands of counsel. Unless solicitor-client privilege exists in the document, the party must show that the document was prepared for the dominant purpose of using it in the conduct of litigation.⁹

13. In the *Vancouver Airport Authority* case, the Federal Court of Appeal held that the Commissioner is not entitled to claim a blanket public interest privilege over documents that he obtains from third parties for the purposes of litigation.¹⁰ Such a privilege is also not recognized in other common law jurisdictions.¹¹ The Commissioner cannot evade the effect of the *Vancouver Airport Authority* case by selectively claiming litigation privilege over third party documents it does not want to disclose.

⁶ *Blank* at paras 27-28, 34.

⁷ *Lizotte* at para 64.

⁸ *Blank* at paras 60-61. See also *General Accident Assurance Co. v. Chrusz*, [1999] O.J. No. 3291 at 331 (Ontario Court of Appeal) [*Chrusz*].

⁹ *International Minerals & Chemical Corp. (Canada) Ltd. v. Commonwealth Insurance Co.*, [1990] S.J. No. 185, 20 A.C.W.S. (3d) 619, 84 Sask. R. 117.

¹⁰ *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24 at paras 2-4, 115 [*Vancouver Airport Authority*].

¹¹ *Ibid* at para 107.

14. In *General Accident Assurance Co. v Chrusz*, the Ontario Court of Appeal confirmed the modern view that litigation privilege does not attach to documents merely because they are collected by counsel. In *Chrusz*, Carthy J.A. cited with approval the dissent of Craig J.A. in *Hodgkinson v. Sims*:¹²

I fail to comprehend how original documents which are not privileged (because they are not prepared with the dominant purpose of actual or anticipated litigation) can become privileged simply because counsel makes photostatic copies of the documents and puts them in his 'brief'. This is contrary to the intent of the rules and to the modern approach to this problem. If a document relates to a matter in question, it should be produced for inspection.¹³

15. The Commissioner has produced a number of documents obtained from third parties in Schedule "A" to the Commissioner AoD, but has not provided any reason why he has treated the 55 Third Party Documents differently. On the face of the Commissioner AoD, there is no basis to conclude that the Third Party Documents were created for the dominant purpose of litigation.

16. The obvious inference is that the Third Party Documents are materials prepared by one or more third parties—likely, other market participants—in the ordinary course of their business and then provided to the Commissioner, either voluntarily or under compulsion. If these documents were prepared for a purpose other than for this litigation, they fail the dominant purpose test, are not subject to litigation privilege, and must be produced.

17. Alternatively, the Tribunal should order the Commissioner to provide a further and better Schedule "B" that sets out further particulars of the Third Party documents, including at a

¹² *Hodgkinson v Sims*, [1988] B.C.J. No. 5235, [1989] 3 W.W.R. 132.


¹³ *Chrusz* at para 36.

minimum the nature of the document, from whom the document was obtained, the author, the recipient, and anyone copied on the document.

PART IV – ORDER REQUESTED

18. SECURE requests an order requiring the Commissioner to produce the Third Party Documents forthwith, and costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th of November, 2021.

Per: 

Robert E. Kwinter
Nicole Henderson
Brian A. Facey
Joe McGrade

Counsel to the Respondent/Moving Party,
SECURE Energy Services Inc.