

The Honorable Thomas S. Zilly

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRENT FREI,

Plaintiff,

v.

FEDERAL INSURANCE COMPANY,

Defendant.

CASE NO. 2:20-cv-01113-TSZ

AGREEMENT REGARDING
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION AND ORDER

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles.

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

AGREEMENT REGARDING DISCOVERY OF
ELECTRONICALLY STORED INFORMATION AND
ORDER - 1
CASE NO. 2:20-cv-01113-TSZ

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1 **B. ESI Disclosures.**

2 Within 60 days after the Rule 26(f) conference, or at a later time if agreed to by the parties,
3 each party shall disclose:

4 1. Custodians. The five custodians most likely to have discoverable ESI in their
5 possession, custody or control. The custodians shall be identified by name, title, connection to the
6 instant litigation, and the type of the information under his/her control.

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

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

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

16 **C. Preservation of ESI.**

17 The parties acknowledge that they have a common law obligation to take reasonable and
18 proportional steps to preserve discoverable information in the party’s possession, custody or
19 control. With respect to preservation of ESI, the parties agree as follows:

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

24 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with
25 discoverable ESI responsive to a particular discovery request or mandatory disclosure where that
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1 data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)–(2)
2 below).

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

5 a. Deleted, slack, fragmented, or other data only accessible by forensics.

6 b. Random access memory (RAM), temporary files, or other ephemeral data
7 that are difficult to preserve without disabling the operating system.

8 c. On-line access data such as temporary internet files, history, cache, cookies,
9 and the like.

10 d. Data in metadata fields that are frequently updated automatically, such as
11 last-opened dates (see also Section (E)(5)).

12 e. Back-up data that are substantially duplicative of data that are more
13 accessible elsewhere.

14 f. Server, system or network logs.

15 g. Data remaining from systems no longer in use that is unintelligible on the
16 systems in use.

17 h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or
18 from mobile devices (*e.g.*, iPhone, iPad, Android, and Blackberry devices), provided that a copy
19 of all such electronic data is routinely saved elsewhere (such as on a server, laptop, desktop
20 computer, or “cloud” storage).

21 **D. Privilege.**

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

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

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1 3. Information produced in discovery that is protected as privileged or work product
2 shall be immediately returned to the producing party, and its production shall not constitute a
3 waiver of such protection, if: (i) such information appears on its face to have been inadvertently
4 produced or (ii) the producing party provides notice within 15 days of discovery by the producing
5 party of the inadvertent production.

6 **E. ESI Discovery Procedures.**

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

10 2. Search methodology. To the extent needed, the parties shall timely attempt to
11 reach agreement on appropriate search terms, or an appropriate computer- or technology-aided
12 methodology, before any such effort is undertaken. The parties shall continue to cooperate in
13 revising the appropriateness of the search terms or computer- or technology-aided methodology.
14 In the absence of agreement on appropriate search terms, or an appropriate computer- or
15 technology-aided methodology, the following procedures shall apply:

16 a. A producing party shall disclose the search terms or queries, if any, and
17 methodology that it proposes to use to locate ESI likely to contain discoverable information. The
18 parties shall meet and confer to attempt to reach an agreement on the producing party's search
19 terms and/or other methodology.

20 b. If search terms or queries are used to locate ESI likely to contain
21 discoverable information, a requesting party is entitled to no more than 5 additional terms or
22 queries to be used in connection with further electronic searches absent a showing of good cause
23 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
24 requesting party within 14 days of receipt of the producing party's production.

25 c. Focused terms and queries should be employed; broad terms or queries,
26 such as product and company names, generally should be avoided. Absent a showing of good

1 cause, each search term or query returning more than 250 megabytes of data are presumed to be
2 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file
3 types.

4 d. The producing party shall search both non-custodial data sources and ESI
5 maintained by the custodians identified above.

6 3. Format. All electronically-stored information (“ESI”) and scanned paper provided
7 in response to these requests should be produced in a structured format including industry standard
8 load files, Bates numbered image files, native files and searchable document-level text files. PDFs
9 are to be ~~in~~ produced as individual document PDFs in searchable, bates-numbered PDF format, as
10 TIFFs, with a Concordance compatible load file (with companion text-delimited files ending with
11 file extension DAT and OPT). ESI that does not readily convert to PDF, including Excel
12 spreadsheet and PowerPoint files, should be produced natively and assigned a single bates
13 number. Documents produced in searchable, bates-numbered PDF or TIFF format should be
14 named to match the beginning Bates number associated with the file. ESI produced in response to
15 these requests should include the following metadata fields: bates start, bates end, doc type,
16 custodian (and duplicate custodians), author, file name and size, original file path, date created,
17 date modified and hash value. In the case of email, in addition to the preceding metadata, please
18 include: date sent and/or received author/from, recipient/to, cc, bee, title/subject, att_family field
19 (or a field similar to this that links any attachments to the parent email). For each document
20 produced in response to these requests, please produce a corresponding load file containing docid
21 and path (*i.e.*, *ABCOOOOJ ,Prod ONImages\00ABCOOOOJ.pdf*). Please contact the
22 undersigned attorneys if you have any concerns about appropriate format for the production of
23 ESI.

24 4. De-duplication. The parties may de-duplicate their ESI production across
25 custodial and non-custodial data sources after disclosure to the requesting party.
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1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 DATED this 15th day of December, 2020.

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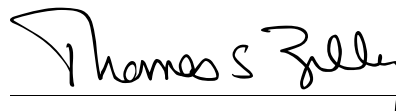
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22 ***Attorneys for Defendant Federal Insurance
Company***

23 **ORDER**

24 Pursuant to the stipulation, IT IS SO ORDERED.

25 DATED this 16th day of December, 2020.

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Thomas S. Zilly

United States District Judge