

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL BRADY,

Plaintiff,

vs.

AUTOZONE STORES, INC., and
AUTOZONERS, LLC,

Defendant.

CASE NO. 2:13-CV-01862-RAJ

MODEL 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)(2)(C) must be applied in each case when formulating a discovery plan. To further the application of the

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

3 **B. ESI Disclosures**

4 At a time agreed to by the parties, each party shall disclose:

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

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

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

15 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable
16 ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically
17 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P.
18 26(b)(2)(C)(i).

19 **C. Preservation of ESI**

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

23 1. Absent a showing of good cause by the requesting party, the parties shall not
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1 be required to modify the procedures used by them in the ordinary course of business to back-
2 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in
3 their possession, custody or control. All parties shall supplement their disclosures in
4 accordance with Rule 26(e) with discoverable ESI responsive to a particular discovery request
5 or mandatory disclosure where that data is located, discovered or created after a disclosure or
6 response is made (unless excluded under (C)(2) or (D)(1)-(2) below).

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

- 10 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 11 b. Random access memory (RAM), temporary files, or other ephemeral
12 data that are difficult to preserve without disabling the operating
13 system.
- 14 c. On-line access data such as temporary internet files, history, cache,
15 cookies, and the like.
- 16 d. Data in metadata fields that are frequently updated automatically, such
17 as last-opened dates (see also Section (E)(5)).
- 18 e. Back-up data that are substantially duplicative of data that are more
19 accessible elsewhere.
- 20 f. Server, system or network logs.
- 21 g. Data remaining from systems no longer in use that is unintelligible on
22 the systems in use.
- 23 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or
24 from mobile devices (e.g., iPhone, iPad, Android, and Blackberry
25 devices), *provided* that a copy of all such electronic data is routinely
26 saved elsewhere (such as on a server, laptop, desktop computer, or
“cloud” storage).

D. Privilege

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

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

3 3. Information produced in discovery that is protected as privileged or work
4 product shall be immediately returned to the producing party, and its production shall not
5 constitute a waiver of such protection, if: (i) such information appears on its face to have been
6 inadvertently produced or (ii) the producing party provides notice within 15 days of discovery
7 by the producing party of the inadvertent production.
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9 4. The parties have stipulated to the entry of an order regarding the applicability
10 of Fed.R.Evid. 502(d) to this case, in the language set forth in the Order titled Stipulation and
11 Protective Order Governing Confidentiality of Documents Produced During Discovery.

12 5. The parties agree that privilege logs shall be provided 30 days after the date
13 agreed upon for final production in this matter. The privilege log shall include a unique
14 identification number for each document and the basis for the claim (attorney-client
15 privileged and/or work product protection). For ESI, the privilege log may be generated from
16 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or
17 title and date created. Should the available metadata provide insufficient information for the
18 purpose of evaluation the privilege claim asserted, the receiving party may request additional
19 information consistent with the FRCP.
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22 **E. ESI Discovery Procedures**

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

26 2. Search methodology. The parties shall attempt to reach agreement on

1 appropriate search terms, or an appropriate computer- or technology-aided methodology,
2 before any such effort is undertaken. The parties shall continue to cooperate in revising the
3 appropriateness of the search terms or computer- or technology-aided methodology.

4 If the parties are not able to reach agreement on search terms, then:

5 a. A producing party shall disclose what search terms, if any, were used to locate
6 ESI likely to contain discoverable information. If search terms were not used, the producing
7 party shall disclose the search methodology used to locate ESI likely to contain discoverable
8 information.

9 b. If search terms were used to locate ESI likely to contain discoverable
10 information, a requesting party is entitled to no more than 5 additional terms or queries to be
11 used in connection with further electronic searches, absent a showing of good cause or
12 agreement of the parties. The parties shall confer in good faith on the 5 additional terms or
13 queries. Focused terms and queries, rather than overbroad ones (e.g., product and company
14 names), should be employed.

15 c. Absent a showing of good cause, search terms returning more than 250
16 megabytes of data are presumed to be overbroad.

17 d. The producing party shall search both non-custodial data sources and ESI
18 maintained by the custodians identified in the disclosure for Section B.1.

19 3. Format. The parties agree that ESI will be produced to the requesting party
20 with searchable text, in a format to be decided between the parties. Acceptable formats
21 include, but are not limited to, native, TIFF (with a companion text file), and searchable PDF.
22 Unless otherwise agreed to by the parties, files that are not easily converted to image format,
23 such as spreadsheet, database and drawing files, should be produced in native format. The
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1 parties agree to exchange format of production specifications.

2 4. De-duplication. The parties may de-duplicate their ESI production across
3 custodial and non-custodial data sources after disclosure to the requesting party.

4 5. Metadata fields. If the requesting party seeks metadata, the parties agree that
5 only the following metadata fields need be produced, document type; custodian and duplicate
6 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file
7 path; date and time created, sent, modified and/or received; and hash value.
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9 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

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11 DATED: February 24, 2014

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Attorneys for Defendants

1 **ORDER**

2 Based on the foregoing, IT IS SO ORDERED.

3 IT IS FURTHER ORDERED that pursuant to Fed.R.Evid. 502(d), the production of
4 any documents in this proceeding shall not, for the purposes of this proceeding or any other
5 proceeding in any other court, constitute a waiver by the producing party of any privileged
6 applicable to those documents, including the attorney-client privilege, attorney work product
7 protection, or any other privilege or protection recognized by law.
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9 DATED this 5th day of March, 2014.
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13 The Honorable Richard A. Jones
14 United States District Judge
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