

1. An order from the U.S. District Court for the District of Kansas finding that good cause was shown for expedited forensic imaging of certain of Defendants’ computers and storage devices given the nature of the claims and the need to preserve the information on the devices, but also finding that good cause was not shown for similar treatment of personal cell phones.

In *Ainstein AI, Inc. v. ADAC Plastics, Inc.*, No. 23-2166-DDC-TJJ, 2023 WL 3568661 (D. Kan. May 19, 2023), U.S. Magistrate Judge Teresa J. James addressed whether good cause was shown for expedited forensic imaging of work computers, electronic storage devices, or personal cell phones.

In this case involving claims for misappropriation of trade secrets and unfair competition related to a joint venture between the parties, Plaintiff alleged that four of Defendant’s employees downloaded tens of thousands of documents containing Plaintiff’s trade secrets from a Google drive to which Plaintiff had given them access as part of the joint venture. *Id.* at *1-2. Soon after Plaintiff filed its claim, it moved for a preliminary injunction and sought expedited discovery concerning the downloading of these materials in the form of forensic imaging of various computers, storage devices, and cell phones. *Id.* at *4.

Plaintiff argued that forensic imaging was necessary “because it is the only method of testing whether the downloaded files have been used or modified as the imaging will preserve the system logs and document metadata of the hard drives and devices onto which the material was downloaded and through which it may have been transmitted.” *Id.* at *5. Defendant argued that expedited discovery was not warranted because it had implemented and would continue to implement a litigation hold and would comply with all of its preservation obligations, including its obligations under Fed. R. Civ. P. 37(e). *Id.* at *3.

Magistrate Judge James first noted the general rule that “discovery may not commence before the parties have conferred as required by Rule 26(f) of the Federal Rules of Civil Procedure,” but explained that Plaintiff would be entitled to the expedited forensic imaging in question if it demonstrated “good cause.” She found that Plaintiff had demonstrated good cause for expedited discovery because a motion for a preliminary injunction was pending and such discovery would be “reasonable and proportional to the needs of this case.” In particular, she found that discovery concerning the data files and how Defendant used them after downloading the files from Google Drive was crucial to the issues raised in Plaintiff’s preliminary injunction motion, and that it would be “important to examine the devices at issue as soon as possible or to disallow use of the devices until the imaging can be completed. Unallocated space can be overwritten quickly when files are deleted, which then makes forensic analysis futile.” *Id.* at *4. She further found that the burdens of forensic imaging were “not out of the ordinary in these types of cases involving intellectual property.”

Magistrate Judge James rejected Defendant’s argument that Plaintiff needed to make a “strong showing” that Defendant had failed to comport with its discovery obligations to order forensic imaging because “that is a misstatement of this court’s precedent.” *Id.* at *5. She noted that courts “remain cautious” about ordering forensic imaging and appropriately limit such imaging to “guard against undue obtrusiveness” and “where the request is extremely broad in nature and

the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature.” *Id.* (citations and quotations omitted). But she explained that imaging is especially appropriate in trade secrets cases that involve electronic information.

Magistrate Judge James found good cause for expedited discovery and ordered the forensic imaging of Defendant’s employees’ work computer and storage devices. *Id.* at *4-7. She found that the trade secrets claims provided good cause for the imaging of the computer storage devices and work computers, and that forensic imaging of these devices was necessary “to preserve information relevant to showing whether Defendant misappropriated the intellectual property at issue.” She thus ordered forensic imaging pursuant to an appropriate ESI protocol and the existing protective order in the case. *Id.* at *6.

But Magistrate Judge James found that Plaintiff had not shown good cause for the forensic imaging of personal cell phones, even though Defendant’s employees did not have separate work and personal cell phones (only personal cell phones). She first held that Plaintiff had not demonstrated a unique benefit to the imaging of the personal cell phones. She reasoned that even though the employees lacked work phones, it was still unclear whether the employees had actually used their phones for work. She also noted that Plaintiff had not explained why imaging the cell phones would be necessary if the employees’ computers and storage devices were already being imaged.

Magistrate Judge James also held that imaging the cell phones had costs that argued against their imaging. She noted that generally “personal cell phones likely contain a tremendous volume of information, including possibly text messages, email messages, phone logs, and photographs that are not at all relevant.” *Id.* (citation omitted). As such, she found the request for personal cell phone imaging “overly broad, unduly burdensome, and unduly intrusive” because there would be a “disproportionate amount of personal information totally irrelevant to this lawsuit” on the phones. *Id.* at *7. Magistrate Judge James also held that the early nature of the case cut against the imaging of personal devices “for an unspecified amount of time,” especially because of “the heavy reliance many cell phone users place upon their devices.” Finally, Magistrate Judge James “question[ed] whether Defendant’s employees’ personal cell phones are within the possession, custody, or control of Defendant such that it could be compelled to produce them for imaging.”