

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Plaintiff,	
	Plaintiff,
v.	
Defendant,	
	Defendant.

Case No.: 00cv0000

**MODEL ORDER
GOVERNING DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION IN PATENT CASES**

The Court ORDERS as follows:

1. This Order supplements all other discovery rules and orders. It streamlines Electronically Stored Information (“ESI”) production to promote a “just, speedy, and inexpensive determination” of this action, as required by Federal Rule of Civil Procedure 1.
2. This Order may be modified for good cause. If the parties cannot resolve their disagreements regarding modifications, the parties may submit their competing proposals and a summary of their dispute. Proposed modifications or disputes regarding ESI that counsel for the parties are unable to resolve will be presented to the Court at the initial case management conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.
3. Costs will be shifted for disproportionate ESI production requests pursuant

1 to Federal Rule of Civil Procedure 26. Likewise, a party's nonresponsive or dilatory
2 discovery tactics will be cost-shifting considerations.

3 4. A party's meaningful compliance with this Order and efforts to promote
4 efficiency and reduce costs will be considered in cost-shifting determinations.

5 5. General ESI production requests under Federal Rules of Civil Procedure 34
6 and 45 must not include metadata absent a showing of good cause. However, fields
7 showing the date and time that the document was sent and received, as well as the
8 complete distribution list, must generally be included in the production.

9 6. Each requesting party will limit its ESI production requests to a total of ten
10 custodians per producing party for all such requests, excluding requests for email which
11 are addressed in paragraphs 8-12. A custodian may be identified by job description or
12 function so long as it identifies a single person. The parties may jointly agree to modify
13 this limit without the Court's leave. The Court will consider contested requests for
14 additional custodians per producing party, or requests for searches of servers, databases
15 or other systems not maintained by a single person, upon showing of good cause and
16 distinct need based on the size, complexity, and issues of this specific case. Should a
17 party serve ESI production requests for additional custodians beyond the limits agreed to
18 by the parties or granted by the Court pursuant to this paragraph, the requesting party
19 may bear all reasonable costs caused by such additional discovery. While there is no
20 *per se* limit on quantity of search terms for the identified custodians for non-email ESI, a
21 party may not request more than twenty search terms absent consent or Order of the
22 Court granted for good cause shown. Parties must meet and confer to limit ESI
23 custodians and search terms prior to approaching the Court for assistance on any ESI
24 matters. Each party must use a common set of search terms for all custodians of another
25 party from whom it seeks ESI.

26 7. General ESI production requests under Federal Rules of Civil Procedure 34
27 and 45 must not include email or other forms of electronic correspondence (collectively
28 "email"). To obtain email parties must propound specific email production requests.

1 8. Email production requests will only be propounded for specific issues, rather
2 than general discovery of a product or business.

3 9. Email production requests must be phased to occur after the parties have
4 exchanged initial disclosures and basic documentation about the patents, the prior art, the
5 accused instrumentalities, and the relevant finances. While this provision does not
6 require the production of such information, the Court-encourages prompt and early
7 production of this information to promote efficient and economical streamlining of the
8 case.

9 10. Email production requests will identify the custodian, search terms, and time
10 frame. The parties will cooperate to identify the proper custodians, proper search terms
11 and proper time frames.

12 11. Each requesting party must limit its email production requests to a total of
13 five custodians per producing party for all such requests. The parties may jointly agree to
14 modify this limit without the Court's leave. The Court will consider contested requests
15 for additional custodians per producing party, upon showing of good cause and distinct
16 need based on the size, complexity, and issues of this specific case. Should a party serve
17 email production requests for additional custodians beyond the limits agreed to by the
18 parties or granted by the Court pursuant to this paragraph, the requesting party may bear
19 all reasonable costs caused by such additional discovery.

20 12. Each requesting party will limit its email production requests to a total of
21 five search terms per custodian per party. The parties may jointly agree to modify this
22 limit without the Court's leave. The Court will consider contested requests for additional
23 search terms per custodian, upon showing a distinct need based on the size, complexity,
24 and issues of this specific case. The search terms must be narrowly tailored to particular
25 issues. Indiscriminate terms, such as the producing company's name or its product name,
26 are inappropriate unless combined with narrowing search criteria that sufficiently reduce
27 the risk of overproduction. A conjunctive combination of multiple words or phrases
28 (e.g., "computer" and "system") narrows the search and will count as a single search

1 term. A disjunctive combination of multiple words or phrases (e.g., “computer” or
2 “system”) broadens the search, and thus each word or phrase will count as a separate
3 search term unless they are variants of the same word. Use of narrowing search criteria
4 (e.g., “and,” “but not,” “w/x”) is encouraged to limit the production and must be
5 considered when determining whether to shift costs for disproportionate discovery.
6 Should a party serve email production requests with search terms beyond the limits
7 agreed to by the parties or granted by the Court pursuant to this paragraph, the requesting
8 party may bear all reasonable costs caused by such additional discovery.

9 13. The receiving party must not use ESI that the producing party asserts is
10 attorney-client privileged or work product protected to challenge the privilege or
11 protection.

12 14. Pursuant to Federal Rule of Evidence 502(d), the inadvertent production of a
13 privileged or work product protected ESI is not a waiver in the pending case or in any
14 other federal or state proceeding.

15 15. The mere production of ESI in a litigation as part of a mass production will
16 not itself constitute a waiver for any purpose.

17 IT IS SO ORDERED this _____ day of _____, _____.

18
19 _____
20 United States Magistrate Judge
21
22
23
24
25
26
27
28