HONORABLE MITCHELL D. DEMBIN
UNITED STATES MAGISTRATE JUDGE
CHAMBERS RULES
CIVIL PRETRIAL PROCEDURES

Please note: The Court provides this information for general guidance to counsel and litigants. The Court may modify these procedures as appropriate in any case upon request or on its own.

I. Applicability of Local Rules

Except as otherwise provided herein or as specifically ordered by the Court, all parties must comply with the Local Rules of the United States District Court for Southern District of California.

II. Communications with Chambers

A. Letters, Faxes and Emails. Letters, faxes, and emails to chambers are discouraged unless specifically requested or required by the Court. If letters, faxes, or emails are requested, copies of the same must be simultaneously delivered to all counsel. Copies of correspondence between counsel should not be sent to the Court.

B. Telephone Calls. With the exception of scheduled telephonic conferences, and as provided at section V.B. below, telephone calls to chambers are permitted only for non-substantive matters such as scheduling and calendaring. Court personnel are prohibited from giving legal advice or discussing the merits of a case. Appropriate inquiries may be directed to the law clerk assigned to your case. The chambers telephone number is (619) 446-3972.

III. Courtesy Copies

Courtesy copies of filings that exceed twenty (20) pages in length must be submitted directly to Chambers within twenty-four (24) hours

of filing. This includes multiple filings in a single court day that together exceed 20 pages in length (i.e., moving papers consisting of a Notice of Motion (3 pages), a Memorandum of Points and Authorities (12 pages), an Exhibit (10 pages), and a Certificate of Service (2 pages)). Please consult the Electronic Case Filing Administrative Policies and Procedures Manual, available on the Court's internet site, for further information regarding the courtesy copy requirement.

IV. Early Neutral Evaluation ("ENE") and Case Management Conference ("CMC")

The ENE is a multi-purpose conference. The conference is informal, off-the-record and confidential. It is an opportunity for the parties to educate the Magistrate Judge and each other regarding their claims and defenses. A candid discussion allows the Magistrate Judge to fashion an appropriate scheduling order for the case and to consider how best to approach discovery. The ENE also provides an opportunity to have a meaningful discussion regarding settlement, with the assistance of the Magistrate Judge, before costs and fees become significant factors or impediments in resolving the dispute. The ENE typically is not scheduled until Answers have been filed for all significant defendants.

This Court typically conducts the CMC required under Fed. R. Civ. P. 16 immediately following the ENE if no settlement has been obtained at the ENE and will issue a Scheduling Order following the CMC.

A. Required Actions Prior to the ENE/CMC

1. The Order setting the ENE/CMC will require counsel to meet and confer, as required by Fed. R. Civ. P. 26(f), and prepare a Joint Discovery Plan consistent with Rule 26(f) and these Chambers Rules as provided below. The Order setting the ENE/CMC also will require the parties to serve their initial disclosures under Rule 26(a) in advance of the ENE/CMC.

2. An ENE brief should be lodged with chambers no later

than five (5) days before the conference either by messenger or by email to the Court at efile_dembin@casd.uscourts.gov. Each party may choose for their brief to be confidential (court only) or may share it with their party opponent. Regardless, each brief must include the following:

a. A brief description of the essential facts of the case and the elements of the claims or defenses asserted;

b. A specific and current demand for settlement addressing all relief or remedies sought. If a specific demand for settlement cannot be made at the time the brief is submitted, the reasons must be stated along with a statement as to when the party will be in a position to state a demand; and,

c. A brief description of any previous settlement negotiations or mediation efforts.

3. The Joint Discovery Plan must be lodged with chambers no later than five (5) days prior to the ENE/CMC. The Joint Discovery Plan must be a single document and specifically must address each item identified in Fed. R. Civ. P. 26(f)(3). In addition, the discovery plan specifically must address:

a. Whether conducting limited discovery is necessary for each party reasonably to evaluate settlement, such as the deposition of plaintiff, defendant, or key witnesses, and the exchange of a few pertinent documents;

b. Any issues regarding preservation of electronically stored information and the procedure the parties plan to use regarding production of such information. The parties are encouraged to use the attached ESI Rule 26(f) Checklist, developed in the Northern District of

California, to guide their discussions;

c. The procedure the parties plan to use regarding claims of privilege, including whether an order under Fed. R. Evid. 502(d) will be sought; and,

d. Whether a protective order will be sought and whether any issues are anticipated regarding the protective order.

B. Appearances Required at ENE

The Court requires all named parties, lead counsel, and any other person(s) whose authority is required to negotiate and enter into settlement to appear **in person** at the ENE and other settlement conferences. Please see the order scheduling the conference for more information. The Court will **not** grant requests to excuse a required party from personally appearing absent good cause. Distance of travel alone does **not** constitute good cause. Counsel requesting that a required party be excused from personally appearing must confer with opposing counsel prior to making the request. The responsible counsel must contact the law clerk assigned to the case at (619) 446-3972 as soon as counsel is certain that he or she will be seeking relief from appearance of a party or party representative. Following telephonic contact with chambers, counsel can expect to be instructed to file an *ex parte* or Joint Motion, as appropriate, which will be granted only upon good cause shown. Based upon the ENE briefs, the Court may exercise its discretion and convert the ENE to a telephonic conference.

C. Continuing the ENE

Counsel seeking to reschedule an ENE or other settlement conference must confer with opposing counsel prior to making the

request. The responsible counsel must contact the law clerk assigned to the case at (619) 446-3972 as soon as counsel is certain that he or she will be requesting a continuance. **Absent compelling circumstances, a request to continue must be made at least seven (7) days prior to the scheduled conference.** Following telephonic contact with chambers, counsel can expect to be instructed to file an *ex parte* or Joint Motion, as appropriate, which will be granted only upon good cause shown. In its discretion, rather than continue the ENE, the Court may convert the ENE to a telephonic conference.

D. Amending the Scheduling Order

As provided at Fed. R. Civ. P. 16(b)(4), modification of the Scheduling Order requires the approval of the Court and good cause. The Court will construe and administer the Federal Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Counsel are reminded that they must "take all steps necessary to bring an action to readiness for trial." Civ. L. R. 16.1(b). Counsel must meet and confer prior to the filing of any motion to amend the Scheduling Order. The Court prefers any motion to amend the schedule be brought as a Joint Motion reflecting the positions of the parties. The motion shall include a declaration by counsel detailing the steps taken to comply with the dates and deadlines set in the order, and the specific reasons why deadlines cannot be met.

E. Notice of Settlement

If the case is settled in its entirety, counsel promptly must file a Notice of Settlement or an appropriate Motion to Dismiss. If a scheduled date with this Court is imminent, counsel also must call chambers at (619) 446-3972 promptly. Once a Notice of Settlement is filed, the Court will schedule a telephonic

Settlement Disposition Conference which will be taken off calendar with the filing of the appropriate Motion to Dismiss.

V. Discovery Disputes

A. Meet and Confer Requirements

Counsel must meet and confer on all issues **before** contacting the court. If counsel are located in the same district, the meet and confer **must be in person**. If counsel are located in different districts, then telephone or video conference may be used. Exchanging letters, facsimiles or emails **does not** satisfy the meet and confer requirement. A party found by the Court to have failed to participate or to participate meaningfully in a required meet and confer session, may be sanctioned.

B. Disputes During Depositions

If a dispute arises during the course of a deposition regarding an issue of privilege, enforcement of a court-ordered limitation on evidence, or pursuant to Fed. R. Civ. P. 30(d), which constitute the only legitimate reasons to instruct a witness not to answer, counsel are to meet and confer prior to seeking any ruling from the Court. *See* Fed. R. Civ. P. 30(c)(2). If the matter is not resolved prior to seeking a ruling, counsel may call chambers at 619-446-3972 and seek a ruling. If the Court is unable to review the matter at that moment, counsel are to proceed with the deposition in other areas of inquiry and the Court will respond as soon as practicable. If the matter cannot readily be resolved by the Court, the Court may require the parties to file a joint motion as provided at subparagraph C below.

C. Disputes Regarding Written Discovery Requests:

1. Joint Motion Required

If the dispute concerns written discovery requests (e.g. interrogatories, requests for production) and a party will be moving to compel or moving for a protective order, the parties shall submit a **"Joint Motion for Determination of Discovery Dispute."** Counsel need not contact chambers in advance of filing a Joint Motion. It is not the Court's practice to consider a discovery dispute, other than one occurring during a deposition, without a Joint Motion being filed. The Court will not provide a hearing date in advance of reviewing the briefs, as provided below.

2. Timing of Discovery Motions - The 30-day Rule

Any motion related to discovery disputes must be filed no later than thirty (30) days after the date upon which the event giving rise to the dispute occurred. For oral discovery, the event giving rise to the dispute is the completion of the transcript of the relevant portion of the deposition. For written discovery, the event giving rise to the discovery dispute is the date of service of the response, **not** the date on which counsel reach an impasse in meet and confer efforts. If the meet and confer process or attempts to supplement disputed responses will extend the dispute beyond 30 days, a motion, preferably a joint motion, to extend the deadline must be filed.

3. Joint Motion - Opportunity to Participate

The aggrieved party must provide the opposing party a reasonable opportunity to contribute to the Joint Motion. Reasonableness depends upon the extent and complexity of

the dispute. A minimum of seven (7) business days prior to the anticipated filing date of the Joint Motion is reasonable, but only barely, for a party to participate meaningfully in the preparation of the joint motion.

4. **Contents of the Joint Motion**

The Joint Motion is to include the following:

a. The Interrogatory, Request for Admission or Request for Production in dispute;

b. The verbatim response to the request or question by the responding party;

c. A statement by the propounding party as to why a further response should be compelled; and,

d. A precise statement by the responding party as to the basis for all objections and/or claims of privilege. Counsel would be wise to avoid boilerplate objections. To the extent the dispute pertains to requests for production of documents, the Court expects full compliance with the requirements of Rule 34, Fed. R. Civ. P.

e. The joint motion shall be accompanied by: (1) a declaration of compliance with the meet and confer requirement; and, (2) points and authorities (not to exceed five (5) pages per side). In the event that the entire motion package, including exhibits, exceeds twenty-five (25) pages, a courtesy copy must be delivered to chambers.

f. The joint motion shall **not** be accompanied by

copies of correspondence or electronic mail between counsel unless it is evidence of an agreement alleged to have been breached.

D. *Ex Parte* Motions in Discovery Disputes

An *ex parte* motion to compel only is appropriate when the opposing party, after being provided a reasonable opportunity to participate, refuses to participate in the joint motion. The *ex parte* motion must contain a declaration from counsel regarding the opportunity provided to opposing counsel to participate in a joint motion. *Ex parte* motions to compel discovery from a party that do not contain a declaration certifying that at least the minimum reasonable opportunity to participate was provided to the opposing party will be rejected by the Court. No later than five (5) business days following the filing an *ex parte* discovery motion directed at a party, that party, if it intends to oppose the motion, must file a Notice of Intent to Respond. The Notice must contain a declaration of counsel explaining why counsel did not participate in a joint motion. The Court will issue a briefing schedule, if warranted, after receipt of the Notice.

E. Discovery Disputes and Non-Parties

If a motion to compel discovery is directed at a non-party, the Court prefers that the joint motion procedure be employed as it likely will lead to a faster resolution. The Court understands that in some circumstances involving third-party discovery practice, the motion may have to be filed *ex parte*. The Court will then set a briefing schedule.

F. Hearings on Discovery Motions

After reviewing the Joint Motion, the Court will decide whether to decide the matter on the papers, conduct a discovery

conference or hold a formal hearing.

VI. *Ex-Parte* Proceedings

The Court does not have regular *ex parte* hearing days or hours. Appropriate *ex parte* applications which, as discussed above, generally do not include discovery disputes, may be brought after contacting chambers and speaking with a law clerk. The purpose for the contact with a law clerk is twofold: 1) To ensure that the motion should be filed with this Court, rather than the District Court; and, 2) To confirm that the motion properly may be brought *ex parte*. Following the conversation with the law clerk, the application describing the dispute and the relief sought must be filed electronically through ECF. **Regarding discovery disputes between the parties, counsel must follow the procedures addressed at Section IV above**. Otherwise, e*x parte* motions must be accompanied by a declaration demonstrating reasonable and proper notice to the opposition.

No later than five (5) business days following service of the *ex parte* application, opposing counsel must contact chambers and state whether an opposition will be filed and an estimate of how much time will be needed to prepare the opposition. The Court will issue a briefing schedule as appropriate. In the event that the motion or response, including exhibits, exceeds twenty-five (25) pages, a courtesy copy must be delivered to chambers. After reviewing the submissions, the Court will determine whether to decide the matter on the papers or to have a hearing. If the Court requires a hearing, the parties will be contacted to set a date and time.

VII. Stipulated Protective Orders

Any protective order submitted for the Court's signature must contain the following **two** provisions:

"*(1) No document shall be filed under seal unless counsel*

secures a court order allowing the filing of a document, or portion thereof, under seal. An application to file a document under seal shall be served on opposing counsel, and on the person or entity that has custody and control of the document, if different from opposing counsel. If opposing counsel, or the person or entity who has custody and control of the document, wishes to oppose the application, he/she must contact the chambers of the judge who will rule on the application to notify the Court that an opposition to the application will be filed.

(2) The Court may modify the protective order in the interests of justice or for public policy reasons on its own initiative."

The Court recommends that the stipulated protective order contain a provision regarding the disposition of confidential or sealed documents and information after the case is closed.

All stipulated protective orders must be filed as a joint motion. The parties must email directly to chambers a proposed order containing the text of the proposed protective order suitable for signature by the Court. The proposed order should be emailed to efile_dembin@casd.uscourts.gov.

VIII. Stipulated Orders Governing Electronically Stored Information

Proposed orders governing electronically stored information must be consistent with the Federal Rules of Civil Procedure and the learned views expressed in the Sedona Principles. For example, Federal Rule of Civil Procedure 34 governs request for production of documents and does not differentiate between information stored on paper or on an electronic medium. It requires the requesting party to request "information." Fed. R. Civ. P. 34(a). The producing party must produce the requested information or object to the request. Fed. R. Civ. P. 34(b)(2)(B). Electronically stored information is addressed in the Rule

to the extent that a party may object to the requested form of production of electronically stored information. Nothing in Rule 34 requires a requesting party to identify custodians or search terms. Neither does it require the producing party to seek approval of the requesting party of its search methodology.

This Court subscribes to the view expressed in Principle No. 6 of the Sedona Principles:

> Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

The Sedona Principles, *Third Edition*, 19 SEDONA CONF. J. 1, Principle 6, 118 (2018). The Court also subscribes to Principles 1 and 3 which provide that electronic discovery is generally subject to the same discovery requirements as other relevant information and that the parties should seek to reach agreement regarding production of electronically stored information.

Moreover, the world of electronic discovery has moved well beyond search terms. While search terms have their place, they may not be suited to all productions. Technology has advanced and software tools have developed to the point where search terms are disfavored in many cases. *See, e.g., da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 189-91 (S.D.N.Y. 2012).

The Court will not decide whether proposed custodians are appropriate, on the use of requested search terms, or on the use of specific search methodologies. Instead, a party must request information, regardless of how or where it is maintained by producing party. The producing party must address as required by Rule 34. That is discovery: a party requests information and the burden is on the producing party to locate and produce it or object legitimately to production. Nonetheless, cooperation is important; if producing party fails to produce relevant, material information by using inappropriate

methodologies or failing to secure and produce such information from custodians, the sanctions can be severe.

IX. Procedure for Filing Documents Under Seal

There is a presumptive right of public access to court records based upon common law and First Amendment grounds. Accordingly, no document may be filed under seal, i.e., closed to inspection by the public, except pursuant to a Court order that authorizes the sealing of the particular document, or portions thereof. A sealing order may issue only upon a request that establishes that the document, or portions thereof, is privileged or otherwise subject to protection under the law. The request must be narrowly tailored to seek sealing only of sensitive personal or confidential information. An unredacted version of the document, identifying the portions subject to the motion to seal, must be lodged with the motion to seal. A redacted version of the document must be publicly filed simultaneously. Of course, if the motion to seal covers the entire document, a redacted version need not be filed in advance of the Court's ruling.

X. General Decorum

The Court insists that all counsel and parties be courteous, professional, and civil at all times to opposing counsel, parties, and the Court, including all court personnel. Professionalism and civility is the rule and not the exception. Personal attacks on counsel or opposing parties will not be tolerated. Counsel are expected to be punctual for all proceedings and are reminded to follow Civil L. R. 83.4, in their practice before this Court.

United States District Court
Northern District of California

CHECKLIST FOR RULE 26(f) MEET AND CONFER REGARDING ELECTRONICALLY STORED INFORMATION

In cases where the discovery of electronically stored information ("ESI") is likely to be a significant cost or burden, the Court encourages the parties to engage in on-going meet and confer discussions and use the following Checklist to guide those discussions. These discussions should be framed in the context of the specific claims and defenses involved. The usefulness of particular topics on the checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter.

I. Preservation

- ❒ The ranges of creation or receipt dates for any ESI to be preserved.
- ❒ The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- ❒ The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved.
- ❒ Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material.
- ❒ The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., "HR head," "scientist," "marketing manager," etc.).
- ❒ The number of custodians for whom ESI will be preserved.
- ❒ The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- ❒ Any disputes related to scope or manner of preservation.

II. Liaison

- ❒ The identity of each party's e-discovery liaison.

III. Informal Discovery About Location and Types of Systems

- ❒ Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems).
- ❒ Description of systems in which potentially discoverable information is stored.
- ❒ Location of systems in which potentially discoverable information is stored.
- ❒ How potentially discoverable information is stored.
- ❒ How discoverable information can be collected from systems and media in which it is stored.

IV. Proportionality and Costs

- ❒ The amount and nature of the claims being made by either party.
- ❒ The nature and scope of burdens associated with the proposed preservation and discovery of ESI.
- ❒ The likely benefit of the proposed discovery.
- ❒ Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measures.

- ❒ Limits on the scope of preservation or other cost-saving measures.
- ❒ Whether there is relevant ESI that will not be preserved pursuant to Fed. R. Civ. P. 26(b)(1), requiring discovery to be proportionate to the needs of the case.

V. Search

- ❒ The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.
- ❒ The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

VI. Phasing

- ❒ Whether it is appropriate to conduct discovery of ESI in phases.
- ❒ Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.
- ❒ Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- ❒ Custodians (by name or role) most likely to have discoverable information and whose ESI
- ❒ will be included in the first phases of document discovery.
- ❒ Custodians (by name or role) less likely to have discoverable information and from whom discovery of ESI will be postponed or avoided.
- ❒ The time period during which discoverable information was most likely to have been created or received.

VII. Production

- ❒ The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- ❒ The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.
- ❒ The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- ❒ The production format(s) that ensure(s) that any inherent searchablility of ESI is not degraded when produced.

VIII. Privilege

- ❒ How any production of privileged or work product protected information will be handled.
- ❒ Whether the parties can agree upon alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification.
- ❒ Whether the parties will enter into a Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production.