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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

The Scripps Research Institute,
Plaintiff,
v.
Illumina, Inc.,
Defendant.

Case No.: 16-cv-00661-JLS-BGS

**NOTICE AND ORDER:
(1) FOR EARLY NEUTRAL
EVALUATION CONFERENCE,
(2) SETTING RULE 26
COMPLIANCE AND CASE
MANAGEMENT CONFERENCE
IN PATENT CASES**

IT IS HEREBY ORDERED that an Early Neutral Evaluation of your case will be held on **June 9, 2017**, at **1:30 p.m.** before United States Magistrate Judge Bernard G. Skomal, United States District Court, 333 W. Broadway, Suite 1280, San Diego, California.

The following are mandatory guidelines for the parties preparing for the Early Neutral Evaluation Conference.

1. **Purpose of Conference:** The purpose of the Early Neutral Evaluation Conference (“ENE”) is to hold a serious discussion of every aspect of the lawsuit in an effort to achieve an early resolution of the case. All conference discussions will be off the record, privileged and confidential. Counsel for any non-English speaking parties is

1 responsible for arranging for the appearance of an interpreter at the conference.

2 2. **Personal Appearance of Parties Is Required:** All parties, adjusters for
3 insured defendants, and other representatives of a party having full and complete
4 authority to enter into a binding settlement, and the principal attorneys responsible for the
5 litigation, must be present in person and legally and factually prepared to discuss
6 settlement of the case.¹ Upon review of the parties' Confidential ENE Statements
7 (discussed below), **the Court at its discretion may elect to convert the ENE to a**
8 **telephonic conference and/or limit it to attorneys only.**

9 3. **Full Settlement Authority Required:** In addition to counsel who will try
10 the case, a party or party representative with full settlement authority must be present for
11 the conference. The purpose of this requirement is to have representatives present who
12 can settle the case during the course of the conference without consulting a superior.
13 Counsel for a government entity may be excused from this requirement so long as the
14 government attorney who attends the ENE conference (1) has primary responsibility for
15 handling the case; and (2) may negotiate settlement offers which the attorney is willing to
16 recommend to the government official having ultimate settlement authority. Other
17 parties seeking permission to be excused from attending the ENE in person must follow
18 the procedures outlined in Judge Skomal's Chambers' Rules. (*See* Judge Skomal's
19 Chambers' Rules at p. 3, section C.) Failure of any of the above parties to appear at the
20 ENE conference without the Court's permission will be grounds for sanctions.

21 4. **Confidential ENE Statements Required:** No later than **May 19, 2017**, the
22

23
24 ¹ "Full authority to settle" means that the individuals at the settlement conference must be authorized to
25 fully explore settlement options and to agree at that time to any settlement terms acceptable to the
26 parties and to bind the party, without the need to call others not present for authority or approval.
27 *Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989). The person needs to
28 have "unfettered discretion and authority" to change the settlement position of a party. *Pitman v.*
Brinker Intl., Inc., 216 F.R.D. 481, 485-486 (D. Ariz. 2003). The purpose of requiring a person with
unlimited settlement authority to attend the conference includes that the person's view of the case may
be altered during the face to face conference. *Id.* at 486. A limited or a sum certain of authority is not
adequate. *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001).

1 parties must submit confidential settlement statements of seven pages or less directly to
2 Judge Skomal's chambers at efile_skomal@casd.uscourts.gov. Please also attach
3 relevant exhibits. The statement must address the legal and factual issues in the case and
4 should focus on issues most pertinent to settling the matter. The statement should not
5 repeat facts or law contained in the Complaint or Answer. Statements do not need to be
6 filed or served on opposing counsel. The statement must also include any prior
7 settlement offer or demand, as well as the offer or demand the party will make at the
8 ENE. The Court will keep this information confidential unless the party authorizes the
9 Court to share the information with opposing counsel.

10 5. **New Parties Must Be Notified by Plaintiff's Counsel:** Plaintiff's counsel
11 shall give notice of the ENE to parties responding to the complaint after the date of this
12 notice.

13 6. **Case Management Under the Amended Federal Rules and Local Patent**
14 **Rules:** In the event the case does not settle at the ENE, the parties can expect to leave the
15 ENE with Rule 26 compliance dates and deadlines, and a Case Management Order
16 including a Claim Construction briefing schedule and hearing date. **Parties shall,**
17 **therefore, meet and confer pursuant to Fed. R. Civ. P. 26(f) no later than May 12,**
18 **2017, regarding:**

- 19 a. Any anticipated objections under Federal Rule of Civil Procedure
20 26(a)(1)(E) to the initial disclosure provisions of Federal Rule of Civil
21 Procedure 26(a)(1)(A-D) and the date of initial disclosures;
- 22 b. Whether the parties will request the preservation and production of
23 Electronically Stored Information ("ESI") and, if so:
 - 24 i. the nature, location, and scope of discoverable ESI;
 - 25 ii. the agreed form of production;
 - 26 iii. the agreed search methodology;
 - 27 iv. whether any proportionality issues exist and whether the parties have
28 identified issues with respect to inaccessible ESI;

- 1 c. Any proposed modification of the deadlines provided for in the Patent Local
2 Rules, and the effect of any such modification on the date and time of the
3 Claim Construction Hearing, if any;
- 4 d. The need for and specific limitations on discovery relating to claim
5 construction, including depositions of percipient and expert witnesses; and
6 Any proposed modifications to the limitations on discovery imposed under
7 the Federal Rules of Civil Procedure or by local rule;
- 8 e. The need, if any, to phase damage discovery.

9 The parties must include their positions with respect to the above issues, in
10 addition to *proposing actual dates* for ALL of the following deadlines in a **Joint**

11 **Discovery Plan:**

- 12 - deadline for disclosure of asserted claims and preliminary infringement
13 contentions;
14 - deadline for preliminary invalidity contentions;
15 - deadline for exchange of proposed claim constructions and extrinsic
16 evidence;
17 - deadline for joint claim construction chart, worksheet and hearing
18 statement;
19 - deadline for completion of claim construction discovery;
20 - proposed briefing schedule for filing of claim construction briefs
21 - proposed date and time of the Claim Construction Hearing, if any;
22 - whether the court will hear live testimony at the Claim Construction
23 Hearing;
24 - the need for and specific limitations on discovery relating to claim
25 construction, including depositions of percipient and expert witnesses;
26 - deadlines for expert witness designation and supplementation;
27 - deadlines for expert witness report submissions and supplementation
28 - deadlines for completions of fact and expert discovery;
- deadline for filing pretrial motions; and
- proposed final Pretrial Conference date.

26 The Joint Discovery Plan shall be submitted via email to Judge Skomal's
27 chambers, as well as filed on the CM/ECF system, **no later than May 19, 2017**. The
28 Court will issue an order following the ENE addressing these issues and setting dates as

1 appropriate. The plan must be one document and must explicitly cover the parties' views
2 and proposals for each item identified in Fed. R. Civ. P. 26(f)(3). In addition, Judge
3 Skomal requires the discovery plan to identify whether the parties will consent to
4 jurisdiction of a Magistrate Judge. Agreements made in the Discovery Plan will be
5 treated as binding stipulations that are effectively incorporated into the Court's Case
6 Management Order.

7 7. **Requests to Continue an ENE Conference:** Local Patent Rule 2.1.a
8 requires that an ENE take place within 60 days of the filing of the first answer. Requests
9 to continue ENEs are rarely granted. The Court will, however, consider formal motions
10 to continue an ENE when extraordinary circumstances exist and the other party has no
11 objection. If another party objects to the continuance, counsel for both parties must call
12 chambers and discuss the matter with the research attorney/law clerk assigned to the case
13 before any motion may be filed. Any request for a continuance must be made as soon as
14 counsel is aware of the circumstances that warrant rescheduling the conference.

15 8. **Settlement Prior to ENE Conference:** The Court encourages the parties
16 to work on settling the matter in advance of the ENE Conference. In the event that the
17 parties resolve the matter prior to the day of the conference, the following procedures
18 must be followed before the Court will vacate the ENE and excuse the parties from
19 appearing:

20 A. The parties may file a Joint Motion to Dismiss and submit a proposed
21 order to the assigned district judge. If a Joint Motion to Dismiss is filed, the Court will
22 immediately vacate the ENE;

23 B. If the parties settle more than 24 hours before the conference but are
24 not able to file a Joint Motion to Dismiss, they must file a Notice of Settlement
25 containing the electronic signatures of counsel for all settling parties and must also
26 identify a date by which the Joint Motion to Dismiss will be filed;

27 C. If the parties settle less than 24 hours before the conference, counsel
28 for the settling parties must JOINTLY call chambers and inform the Court of the

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