

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 IceMOS Technology Corporation,

No. CV-17-02575-PHX-JAT

10 Plaintiff,

**ORDER**

11 v.

12 Omron Corporation,

13 Defendant.  
14

15 This case is subject to General Order No. 17-08. (Doc. 4). “The discovery  
16 obligations addressed in [General Order No. 17-08] supersede the disclosures required by  
17 Rule [of Civil Procedure] 26(a)(1) and are framed as court-ordered mandatory initial  
18 discovery.” Gen. Order No. 17-08, at 1 (D. Ariz. Nov. 1, 2018). The parties have been  
19 relying on Rule 26(a)(1) rather than General Order No. 17-08 in their disputes regarding  
20 their mandatory initial discovery obligations. Going forward, the parties should look to  
21 General Order No. 17-08 and frame their arguments around its requirements.

22 That being said, General Order No. 17-08 requires that the parties “provide the  
23 requested information as to facts that are relevant to the claims and defenses in the case.”  
24 Gen. Order No. 17-08, at 2. That information includes “all persons who [the party]  
25 believe[s] are likely to have discoverable information relevant to any party’s claims or  
26 defenses” and “the documents, electronically stored information (‘ESI’), tangible things,  
27 land, or other property known by [the party] to exist . . . that [the party] believe[s] may be  
28 relevant to any party’s claims or defenses.” Id. at 4–5. General Order No. 17-08 omits Rule

1 26(a)(1)(A)'s language that exempts disclosure of individuals, documents, electronically  
2 stored information, and tangible things that would be used "solely for impeachment."<sup>1</sup> Fed.  
3 R. Civ. P. 26(a)(1)(A)(i)–(ii). Much ink has been spilled in this case on the issue of  
4 witnesses who will be used "solely for impeachment." Accordingly, for the sake of  
5 fairness, consistency, and efficiency, the Court will now discuss whether General Order  
6 No. 17-08 requires disclosure of individuals and information that would be offered "solely  
7 for impeachment" as that term is used in Rule 26(a)(1)(A).

### 8 **I. LEGAL STANDARD**

9 The Court has "broad discretion in interpreting, applying, and determining the  
10 requirements of [its] own . . . general orders." *United States v. Gray*, 876 F.2d 1411, 1414  
11 (9th Cir. 1989). The Court finds that General Order No. 17-08 purports to replace Federal  
12 Rule of Civil Procedure 26(a)(1). See Gen. Order No. 17-08, at 1 ("The discovery  
13 obligations addressed in this General Order supersede the disclosures required by Rule  
14 26(a)(1) . . ."). As such, it will interpret General Order No. 17-08 like it would interpret  
15 one of the Federal Rules of Civil Procedure.

16 Courts "employ the 'traditional tools of statutory construction' to interpret the  
17 Federal Rules of Civil Procedure." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125  
18 (9th Cir. 2017) (citation omitted). The rule's text is the starting point for divining its  
19 meaning. *Id.* Whenever possible, a rule should be construed based on the plain meaning of  
20 its text. *Id.* Applying a rule's plain meaning requires that the court read each of the rule's  
21 provisions in context with the other provisions in the rule. See *id.* at 1125–26. In fact,  
22 provisions relating to discovery must be read in light of other discovery provisions as  
23 discovery is an "integrated mechanism." 9A Charles Alan Wright, Arthur R. Miller, Mary  
24 Kay Kane, Richard L. Marcus & Adam N. Steinman, *Federal Practice and Procedure*  
25 § 2452 (3d ed. 2019) (collecting cases) [hereinafter *Wright & Miller*]; see *United States v.*  
26 *Lopez-Cavasos*, 915 F.2d 474, 478–79 (9th Cir. 1990).

27 \_\_\_\_\_  
28 <sup>1</sup> The Court will use quotation marks around the term solely for impeachment when it is  
referring to the language used by Rule 26(a)(1)(A) but will not when it is using the term  
generically.

1 **II. ANALYSIS**

2 As noted above, the requirements under General Order No. 17-08 ostensibly replace  
3 and supersede the initial disclosures required by Rule 26(a)(1). Gen. Order No. 17-08, at  
4 1. The key question then is whether General Order No. 17-08 exempts disclosure of  
5 individuals and information that would be used solely for impeachment just as Rule  
6 26(a)(1)(A) does. The Court is inclined to rule that General Order No. 17-08 does not  
7 require disclosure of individuals or information that would be used “solely for  
8 impeachment” as that term is used in Rule 26(a)(1)(A). The Court leans this way for several  
9 reasons.

10 **a. General Order No. 17-08’s Text**

11 First, the Court begins with General Order No. 17-08’s text, as it must. General  
12 Order No. 17-08 requires that the parties “provide the requested information as to facts that  
13 are relevant to the claims and defenses in the case.” Gen. Order No. 17-08, at 2 (emphasis  
14 added). That information includes all individuals that a party “believe[s] are likely to have  
15 discoverable information *relevant to any party’s claims or defenses*” and “documents,  
16 electronically stored information (‘ESI’), tangible things, land, or other property . . . that  
17 [the party] believe[s] may be *relevant to any party’s claims or defenses*.” Id. at 4–5  
18 (emphasis added). General Order No. 17-08’s text reveals that, to determine the scope of  
19 General Order No. 17-08’s requirements, the Court must analyze what is relevant to the  
20 parties’ claims or defenses.

21 Evidence offered solely for impeachment purposes is not evidence that is relevant  
22 to a claim or defense. See Evidence, *Black’s Law Dictionary* (11th ed. 2019) (defining  
23 “substantive evidence” as “[e]vidence offered to help establish a fact in issue, as opposed  
24 to evidence directed to impeach or to support a witness’s credibility”). Under Rule  
25 26(a)(1)(A), a party need not disclose an individual or information that the party will use  
26 “solely for impeachment,” that is, solely to attack a witness’s credibility. Fed. R. Civ. P.  
27 26(a)(1)(A)(i)–(ii); *Newsome v. Penske Truck Leasing Corp.*, 437 F. Supp. 2d 431, 434–  
28 36 (D. Md. 2006); see also *Norwood v. Children & Youth Servs. Inc.*, No.

1 CV107944GAFMANX, 2013 WL 12133879, at \*3–5 (C.D. Cal. Dec. 3, 2013);  
2 Valiavicharska v. Tinney, CV 10-4847 JSC, 2012 U.S. Dist. LEXIS 11334, at \*5 (N.D.  
3 Cal. Jan. 31, 2012). In contrast, individuals or information that a party may use to supply  
4 evidence on a substantive issue, one that is relevant to a claim or defense, in support of its  
5 case must be disclosed under Rule 26(a)(1)(A) as that use would not be “solely for  
6 impeachment.” See Newsome, 437 F. Supp. 2d at 434–36; see also Norwood, 2013 WL  
7 12133879, at \*3–5; Valiavicharska, 2012 U.S. Dist. LEXIS 11334, at \*5. At bottom,  
8 evidence is not relevant to the parties’ claims or defenses when it is offered solely for  
9 impeachment purposes, and thus, individuals or information used to supply that evidence  
10 need not be disclosed under Rule 26(a)(1)(A).

11 The impeachment exception under Rule 26(a)(1)(A) sheds light on General Order  
12 No. 17-08’s requirements. Parties are required to disclose certain “information as to facts  
13 that are relevant to the claims and defenses in the case.” Gen. Order No. 17-08, at 2. But,  
14 as discussed, individuals or information that would be used at trial solely for impeachment  
15 purposes are not “relevant to the claims and defenses in the case.” Id. General Order No.  
16 17-08 does omit Rule 26(a)(1)(A)’s “solely for impeachment” language, however. See  
17 Briseno, 844 F.3d at 1125–26 (noting that omission of a term can be “meaningful”).  
18 Nonetheless, this omission does not illustrate that the General Order requires disclosure of  
19 impeachment evidence as Rule 26(b)(1) provides further support as to why General Order  
20 No. 17-08’s requirements do not extend to individuals or information that will be offered  
21 solely for impeachment.

22 Rule 26(b)(1), which governs the scope of discovery, uses the same operative  
23 language as General Order No. 17-08: “Parties may obtain discovery regarding any  
24 nonprivileged matter that is relevant to any party’s claim or defense and proportional to  
25 the needs of the case.” Fed. R. Civ. P. 26(b)(1) (emphasis added). But, at one time, Rule  
26 26(b)(1) read: “Parties may obtain discovery regarding any matter, not privileged, that is  
27 relevant to the claim or defense of any party . . . . For good cause, the court may order  
28

1 discovery of any matter relevant to the subject matter involved in the action.” Fed. R. Civ.  
2 P. 26(b)(1) (as amended Apr. 17, 2000).

3 The rationale behind the 2000 amendment to Rule 26(b)(1) was that it would  
4 “focus” the parties and the court “on the actual claims and defenses involved in the action.”  
5 See Fed. R. Civ. P. 26, Committee Notes on Rules—2000 Amendment. Even so, the parties  
6 could still discover information beyond the scope of those issues solely relevant to the  
7 “actual claims and defenses” to matters “relevant to the subject matter involved in the  
8 action,” upon a showing of good cause. See *id.* Therefore, under the 2000 version of Rule  
9 26(b)(1), a party could seek discovery of impeachment material either because it had  
10 substantive value as evidence relevant to the parties’ claims and defenses or because the  
11 material was relevant to the subject matter of the action as it reflected on a witness’s  
12 credibility. See *Dzani v. JPMorgan Chase & Co.*, No. 10 CIV. 3384 BSJ JLC, 2011 WL  
13 5979650, at \*6 (S.D.N.Y. Nov. 30, 2011); *Thornton v. Crazy Horse, Inc.*, No. 3:06-CV-  
14 00251TMB, 2010 WL 3718945, at \*1–2 (D. Alaska Sept. 14, 2010).

15 In 2015, Rule 26(b)(1) was amended, and the provision “authorizing the court, for  
16 good cause, to order discovery of any matter relevant to the subject matter involved in the  
17 action” was deleted. Fed. R. Civ. P. 26, Committee Notes on Rules—2015 Amendment.  
18 Broadly, current Rule 26(b)(1) limits discovery to information that is relevant to the  
19 parties’ claims and defenses. See *In re Williams-Sonoma, Inc.*, 947 F.3d 535, 539 (9th Cir.  
20 2020) (noting that removal of the subject matter language from Rule 26(b)(1) was  
21 “intended to restrict, not broaden, the scope of discovery” (citations omitted)); *Pizzella v.*  
22 *Smugglers’ Wharf, Inc.*, No. 1:19-CV-248, 2020 WL 1061666, at \*1 & n.1 (W.D. Pa. Mar.  
23 5, 2020). Indeed, “[t]he standing committee acknowledged that its proposed 2015  
24 amendments deleted the sentence authorizing court-controlled discovery of any matter  
25 relevant to the subject matter involved in the action, and, that under the proposed rule,  
26 ‘[d]iscovery should be limited to the parties’ claims or defenses.’” *Cole’s Wexford Hotel,*  
27 *Inc. v. Highmark Inc.*, 209 F. Supp. 3d 810, 822–23 (W.D. Pa. 2016) (quoting Comm. on  
28 Rules of Practice & Procedure of the Judicial Conf. of the U.S., Preliminary Draft of

1 Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 265–66  
2 (2013)). Thus, “information that could be used to impeach a likely witness” is still  
3 discoverable pursuant to Rule 26(b)(1) if “suitably focused,” that is, that the information  
4 sought is relevant to the parties’ claims and defenses. See Fed. R. Civ. P. 26, Committee  
5 Notes on Rules—2015 Amendment; *Cole’s Wexford Hotel, Inc.*, 209 F. Supp. 3d at 822–  
6 23.

7 In sum, before the 2015 amendment, under Rule 26(b)(1), a court could order  
8 discovery, upon good cause shown, into a matter solely relevant to impeachment as that  
9 discovery was relevant to the subject matter of the action. See Thornton, 2010 WL  
10 3718945, at \*1. But now, Rule 26(b)(1)’s plain language limits discovery to matters  
11 relevant to the parties’ claims and defenses. The 2015 amendment illustrates then that  
12 impeachment material is discoverable when it is relevant to the parties’ claims and defenses  
13 while evidence that will be offered solely for impeachment purposes is not discoverable.

14 General Order No. 17-08’s disclosure requirement is nearly identical to Rule  
15 26(b)(1)—parties must disclose “information as to facts that are relevant to the claims and  
16 defenses in the case.” Gen. Order No. 17-08, at 2 (emphasis added). General Order No. 17-  
17 08’s mandatory initial discovery requests are therefore limited to the same scope of  
18 information as Rule 26(b)(1). See *In re Grantham Bros.*, 922 F.2d 1438, 1441 (9th Cir.  
19 1991). Accordingly, just as with Rule 26(b)(1), individuals or information that would be  
20 offered to supply evidence solely for impeachment purposes need not be disclosed under  
21 the General Order because such evidence is not relevant to the parties’ claims and defenses.

22 In short, the plain meaning of General Order No. 17-08’s text requires that parties  
23 only disclose “information as to facts that are relevant to the claims and defenses in the  
24 case.” Gen. Order No. 17-08, at 2. That requirement does not include disclosure of  
25 individuals or information who will be used to supply evidence “solely for  
26 impeachment”—as that term is used in Rule 26(a)(1)(A)—as that evidence is not relevant  
27 to any claim or defense.

28

1           **b.     Discovery Scheme**

2           Second, the Court considers General Order No. 17-08 in context with the rest of  
3 Rule 26. As noted, General Order No. 17-08 can be viewed as replacing Rule 26(a)(1). See  
4 Gen. Order No. 17-08, at 1. As such, there are many other provisions under Rule 26 that  
5 General Order No. 17-08 must be read in conjunction with. See Wright & Miller, *supra*,  
6 § 2452.

7           For example, Rule 26(a)(3) deals with pretrial disclosures. Rule 26(a)(3)(A)  
8 requires that each party “provide to the other parties and promptly file [certain] information  
9 about the evidence that it may present at trial other than solely for impeachment.” That  
10 information includes the witnesses and exhibits it expects to offer at trial. Fed. R. Civ. P.  
11 26(a)(3)(A)(i), (iii). If General Order No. 17-08 is read to include disclosure of individuals  
12 or information that would be offered solely for impeachment purposes, then it would lead  
13 to the anomalous result that the General Order’s early disclosures—so early that it is before  
14 the time when the parties can even propound discovery, Gen. Order No. 17-08, at 2, would  
15 have a more expansive reach than Rule 26(a)(3)’s pretrial disclosures that are due shortly  
16 before trial, after discovery is complete, Fed. R. Civ. P. 26(a)(3)(B). There is no apparent  
17 reason for this inconsistency. As such, construing General Order No. 17-08 to require  
18 disclosure of individuals or information that would be used solely for impeachment  
19 purposes would not make sense in light of Rule 26(a)(3)(A)’s exemption of that same  
20 evidence. Consequently, the Court is reluctant to give General Order that construction.  
21 *Briseno*, 844 F.3d at 1125–26; *Lopez-Cavasos*, 915 F.2d at 479; Wright & Miller, *supra*,  
22 § 2452.

23           Similarly, without the impeachment exception, General Order No. 17-08 would  
24 have broader reach than Rule 26(b)(1)’s nearly-identical language. See *supra* pp. 4–6  
25 (discussing Rule 26(b)(1)’s scope). That result would be inconsistent with the overall  
26 discovery scheme, a result the Court should avoid, if possible.<sup>2</sup> See *Lopez-Cavasos*, 915

27 \_\_\_\_\_  
28 <sup>2</sup> In fact, General Order No. 17-08 indicates that the disclosures it requires are to be viewed  
as “court-ordered mandatory initial discovery.” See Gen. Order No. 17-08, at 1. In other

1 F.2d at 479; Wright & Miller, *supra*, § 2452. And, the Court should construe the same  
2 language in the same way. See *In re Grantham Bros.*, 922 F.2d at 1441. Therefore, viewing  
3 General Order No. 17-08 in light of Rule 26(b)(1)'s plain language illustrates that reading  
4 the General Order in a way that would require disclosure of individuals and information  
5 that would be used solely for impeachment purposes is inconsistent with the overall  
6 discovery scheme.

7 The discovery regime established by Rule 26 supports the conclusion that General  
8 Order No. 17-08 does not require disclosure of individuals or information that would be  
9 used solely for impeachment.

10 **c. Scheduling Order (Doc. 35)**

11 Finally, on a case-specific note, even if the Court determined that General Order  
12 No. 17-08's requirements pertain to individuals or information that will be used solely for  
13 impeachment purposes, the Court is not inclined to order exclusion of any such evidence  
14 at trial. Federal Rule of Civil Procedure 37(b)(2) applies to any failure to abide by the  
15 requirements set by General Order No. 17-08. Gen. Order No. 17-08, at 4. Under Rule  
16 37(b)(2), the Court "may issue further just orders" for a violation of any provision under  
17 General Order No. 17-08. See Fed. R. Civ. P. 37(b)(2)(A). An order sanctioning a party  
18 under Rule 37(b)(2) must be "just." *Id.*; *Navellier v. Sletten*, 262 F.3d 923, 947 (9th Cir.  
19 2001). And, the court is not required to order sanctions even where the court has the  
20 authority to do so under Rule 37(b)(2). See Fed. R. Civ. P. 37(b)(2)(A) (providing that the  
21 court "may" issue a sanction for failure to obey a discovery order); *Fontana Prods. Inc. v.*  
22 *Spartech Plastics Corp.*, 6 F. App'x 591, 594 (9th Cir. 2001) (stating that Rule 37(b)(2)  
23 grants district courts "broad discretion" on whether to order sanctions and how to shape  
24 them).

25  
26  
27 \_\_\_\_\_  
28 words, the parties are to respond to the General Order's discovery requests just as they  
would respond to a party's request for discovery. See *id.* at 4 (listing the required  
disclosures after the heading "Mandatory Initial Discovery Requests"). As such, the  
General Order's requirements should be viewed in light of the scope of discovery that Rule  
26(b)(1) sets.



1           If General Order No. 17-08 applies to individuals or information that would be used  
2 solely for impeachment purposes, the Court would have the authority to sanction the  
3 offending party under Rule 37(b)(2). In that event, the Court is not inclined to issue any  
4 order sanctioning the party under Rule 37(b)(2) as the Court finds that the Court’s  
5 scheduling order (Doc. 35) gave the impression that the parties were not required to  
6 disclose impeachment evidence (that is, individuals or exhibits that would be used to  
7 supply evidence solely for impeachment).

8           The Court’s scheduling order reads, in relevant part:

9           The Court requires that all evidence to be offered at trial (other than  
10 impeachment evidence) be contained in the Joint Proposed Final Pretrial  
11 Order. Therefore all exhibits and witnesses that may be offered at trial must  
12 be disclosed before the discovery deadline and sufficiently in advance of the  
13 deadline that meaningful discovery necessitated by such disclosures can  
14 reasonably be completed before the discovery deadline. This Order therefore  
15 supersedes the “thirty-day before trial” disclosure deadline contained in Rule  
16 26(a)(3) and the “by the fact discovery” default deadline contained in Gen.  
17 Ord. No. 17-08 (D. Ariz. Apr. 14, 2017).

18 (Doc. 35 at 3 (emphasis added)). The parties were justified in relying on this language—  
19 particularly given the fact that the Court indicated that impeachment evidence did not need  
20 to be disclosed in the Joint Proposed Final Pretrial Order (which relates to Rule 26(a)(3)’s  
21 pretrial disclosure requirements). It does not take a great leap for one to assume that the  
22 exception for impeachment evidence under the scheduling order (Doc. 35) included  
23 disclosures mandated by General Order No. 17-08, especially in light of the fact that the  
24 Court’s scheduling order (Doc. 35) altered the deadline for disclosures under both General  
25 Order No. 17-08 and Rule 26(a)(3). (Doc. 35 at 3–4). At this time, it appears that an order  
26 excluding individuals or information that would be used to supply evidence solely for  
27 impeachment purposes would be unjust as the parties were entitled to rely on this Court’s  
28 scheduling order (Doc. 35).

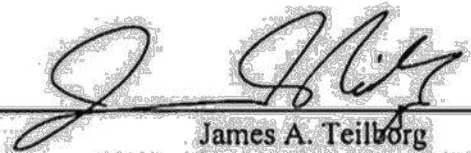
1 **III. CONCLUSION**

2 Accordingly, the Court is prepared to conclude that General Order No. 17-08 does  
3 not require disclosure of individuals or information that will be used to supply evidence  
4 solely for impeachment purposes. The Court welcomes the parties' views on this matter.<sup>3</sup>  
5 Despite whether the parties offer a view on this issue, the Court will rule, prior to trial,  
6 whether undisclosed evidence—both testimonial and nontestimonial—that will be used  
7 solely for impeachment at trial will be excluded upon an appropriate objection.

8 **IT IS ORDERED** that the parties may file a memorandum, not to exceed ten pages,  
9 that discusses whether individuals or information that will be offered to supply evidence  
10 “solely for impeachment,” as that term is used in Federal Rule of Civil Procedure  
11 26(a)(1)(A)(i)–(ii), must be disclosed pursuant to General Order No. 17-08. The parties  
12 must file this memorandum by **Friday, May 1, 2020**.

13 **IT IS FURTHER ORDERED** that each party may file a response to the  
14 memorandum filed by the opposing party. The response may not exceed five pages and  
15 will be due by **Friday, May 8, 2020**.

16 Dated this 17th day of April, 2020.

17  
18  
19  
20  
21  
22  
23  
  
James A. Teilborg  
Senior United States District Judge

24 <sup>3</sup> “Gamesmanship” will not be tolerated. (See Doc. 474 at 5). The Court is only interested  
25 in the meaning of General Order No. 17-08’s provisions. The Court’s determination on  
26 whether there is an impeachment exception to General Order No. 17-08’s requirements  
27 will not affect the Court’s rulings as to Richard Williams (Doc. 462) or Tetsuya Yoda  
28 (Doc. 474). Both rulings turned on whether the witness was adequately disclosed. Williams  
was not adequately disclosed, and because he could not qualify under the impeachment  
exception, he is still subject to exclusion. (Doc. 462 at 9). Yoda was adequately disclosed,  
and thus, the existence of an impeachment exception under General Order No. 17-08 is  
irrelevant. (Doc. 474). The parties shall not raise either issue in the memorandum the Court  
requests.