



1 First, Plaintiff claims that the recommended adverse inference instruction  
2 “simply informs the jury of only some of Defendants’ discovery shortcomings” and  
3 “does not address . . . Defendants’ failure to produce marketing materials or emails.”  
4 (Objections at 3.) Notably, and as an initial matter, Plaintiff did not raise such  
5 shortcomings in its request for an adverse instruction. (*See* Mot. at 24 n.37 (seeking an  
6 adverse instruction with respect to induced infringement and sales of Accused Products  
7 only).)

8 Regardless, the proposed instruction sufficiently covers all of Defendants’  
9 discovery failures related to the Accused Products, including the non-production of  
10 marketing and promotional documents, as it states that “Defendants failed to produce  
11 complete and accurate data related to the Accused Products . . . .” (*See* R&R at 7); *cf.*  
12 *also Byrd v. Maricopa Cty. Sheriff’s Dep’t*, 629 F.3d 1135, 1147 n.10 (9th Cir. 2011)  
13 (“[T]he district court did not abuse its discretion when it declined to use the exact  
14 wording [plaintiff] requested for the adverse inference instruction.”). To tread into the  
15 minutia of Defendants’ discovery faults, especially when Plaintiff itself could have  
16 been more diligent during discovery, (*see* R&R at 6-7), may prove excessive and  
17 unduly prejudicial.

18 Second, Plaintiff claims that the proposed adverse inference instruction “fails to  
19 instruct the jury that it can or should draw an adverse inference from Defendants’  
20 misconduct.” (Objections at 7-8.) It is well established that “[t]he Court has broad  
21 discretion to fashion, on a case-by-case basis, an appropriate adverse inference jury  
22 instruction for [discovery violations].” *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*,  
23 2009 WL 1949124, at \*10 (N.D. Cal. July 2, 2009), *modified*, 2009 WL 2485556  
24 (N.D. Cal. Aug. 12, 2009); *see also DeCastro v. Kavadia*, 309 F.R.D. 167, 182  
25 (S.D.N.Y. 2015) (“[T]he particular nature of the [adverse inference] instruction . . .  
26 lie[s] within the discretion of the court. Upon finding that evidence was wrongfully  
27 withheld or destroyed, a court ‘[may] . . . simply [tell] the jury those facts and nothing  
28 more . . . .’” (internal citations omitted)). After conducting its *de novo* review, the

1 Court believes that the recommended adverse inference instruction is largely  
2 appropriate. The Court, however, will add the following sentence at the end of the  
3 recommended instruction: “You may infer that Defendants did not produce this  
4 information to Plaintiff because they believed that this information would help Plaintiff  
5 and hurt Defendants.”

6 Third, Plaintiff argues that the reasons given in the R&R for not granting  
7 attorneys’ fees were insufficient. (Objections at 10-11.) Specifically, the Magistrate  
8 Judge noted that an award of expenses, including attorneys’ fees, “would be  
9 disproportionate to the harm caused by Defendants’ actions, in light of the adverse  
10 inference instruction already recommended.” (See R&R at 7.) Despite Plaintiff’s  
11 objections, and as alluded to above, proportionality must be considered in issuing  
12 sanctions. (See R&R at 5); *see also Google Inc. v. Am Blind & Wallpaper Factory,*  
13 *Inc.*, 2007 WL 1848665, at \*6 (N.D. Cal. June 27, 2007) (finding that courts must  
14 avoid issuing discovery sanctions that are “out of all proportion to the actual harm  
15 wrought by the failure to meet [] discovery obligations”); *Guerrero v. McClure*, 2011  
16 WL 4566130, at \*3 (E.D. Cal. Sept. 29, 2011) (finding that “an award of . . .  
17 attorneys[’] fees would be unjust” because such an imposition would not be  
18 proportional based on the conduct of the non-moving party). As such, in light of  
19 Defendants’ conduct and the proposed adverse inference instruction, attorneys’ fees  
20 will not be awarded.

21  
22 Accordingly, IT IS ORDERED THAT:

- 23 1. The Report and Recommendation is generally approved and accepted,  
24 along with the additional adverse inference language provided for in this  
25 Order;

26 //

27 //

28 //

1 Plaintiff's Motion (Doc. 69) is granted only with respect to the issuance of the  
2 adverse inference instruction;

3 2. The Clerk serve copies of this Order on the parties.  
4

5   
6

7 DATED: February 13, 2017

---

8 HON. JOSEPHINE L. STATON  
9 UNITED STATES DISTRICT JUDGE  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28