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Attorneys for Defendant  
 CREATIVE NAIL DESIGN, INC.

13 **UNITED STATES DISTRICT COURT**  
 14 **NORTHERN DISTRICT OF CALIFORNIA**  
 15 **SAN FRANCISCO DIVISION**

16 MYCONE DENTAL SUPPLY CO., INC.,  
 D/B/A KEYSTONE RESEARCH &  
 PHARMACEUTICAL,

Case No. 3:12-cv-00747-RS

18 Plaintiff,

**STIPULATION AND ORDER  
 GOVERNING E-DISCOVERY**

19 v.

20 CREATIVE NAIL DESIGN, INC.,

21 Defendant.

22 AND RELATED COUNTERCLAIM.

25 IT IS HEREBY STIPULATED AND AGREED, by and between the parties and by their  
 26 respective undersigned counsel, subject to the approval of the Court, that the following provisions  
 27

1 shall govern procedures for discovery of electronically-stored information (“ESI”) in the above-  
2 captioned action.

3 **I. General Provisions**

4 **A. Preservation of Discoverable Information.** A party has a common law obligation to  
5 take reasonable and proportional steps to preserve discoverable information in the  
6 party’s possession, custody or control.  
7

8 i. Absent a showing of good cause by the requesting party, the parties shall not be  
9 required to modify, on a going-forward basis, the procedures used by them in the  
10 ordinary course of business to back up and archive data; provided, however, that  
11 the parties shall preserve the non-duplicative discoverable information currently  
12 in their possession, custody or control.  
13

14 ii. Absent a showing of good cause by the requesting party, the categories of ESI  
15 identified in Schedule A attached hereto need not be preserved.  
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17 **B. Attorney-Client Privilege and Work Product Protection.**

18 i. Within 45 days of the entry of this Order, the parties are to confer on the nature  
19 and scope of privilege logs for the case, including whether categories of  
20 information may be excluded from any logging requirements and whether  
21 alternatives to document-by-document logs can be exchanged.  
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23 ii. Absent a showing of good cause by the requesting party, with respect to  
24 information generated after the filing of the complaint, the parties are not  
25 required to include any such information in privilege logs.  
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- 1           iii. Activities undertaken in compliance with the duty to preserve information are  
2           protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and  
3           (B).  
4
- 5           iv. Pursuant to Fed. R. Evid. 502(d), the inadvertent production of privileged or  
6           work product protected ESI is not a waiver in the pending case or in any other  
7           federal or state proceeding. Information that contains privileged matter or  
8           attorney work product shall be immediately returned to the producing party if it  
9           is clear on its face that it was inadvertently produced, or if written notice is  
10          provided by the producing party within 5 business days of the producing party  
11          learning of the inadvertent production.  
12
- 13          v. The receiving party shall not use ESI that the producing party asserts is attorney-  
14          client privileged or work product protected to challenge the privilege or  
15          protection.  
16

17 **II. Specific E-Discovery Issues**

18           **A. On-site inspection of electronic media.** Such an inspection shall not be permitted  
19           absent a demonstration by the requesting party of specific need and good cause.  
20

21           **B. Search methodology.** If the producing party elects to use search terms to locate  
22           potentially responsive ESI (including e-mail), it shall disclose the search terms to the requesting  
23           party. A requesting party may request no more than 10 additional terms to be used in connection  
24           with the electronic search within 10 days after receiving the producing party's list of search terms.  
25           One set of search terms, per producing party, shall be used with respect to both this matter and the  
26           ongoing litigation in the U.S. District Court for the District of New Jersey, captioned as *Mycone*  
27

1 *Dental Supply Co., Inc. d/b/a Keystone Research & Pharmaceutical v. Creative Nail Design, Inc. et*  
2 *al.*, Case No. 1:11-cv-04380-JBS-KMW (“the New Jersey Case”).

3 In addition, for good cause shown, a requesting party may request additional search terms  
4 outside of the 10-day period. The parties will meet and confer within 5 days of the request to  
5 discuss any such additional search terms. If the parties cannot agree to the additional search terms,  
6 either party shall have the option of moving the Court for resolution of the outstanding issues. With  
7 respect to the additional terms, focused terms, rather than over-broad terms shall be employed. The  
8 additional search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such as  
9 the producing company’s name or its product name, are inappropriate unless combined with  
10 narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive  
11 combination of multiple words or phrases (e.g., “computer” and “system”) narrows the search and  
12 shall count as a single search term. A disjunctive combination of multiple words or phrases (e.g.,  
13 “computer” or “system”) broadens the search, and thus each word or phrase shall count as a  
14 separate search term unless they are variants or up to 3 synonyms (e.g. “automobile” or “auto” or  
15 “car”) of the same word. Use of narrowing search criteria (e.g., “and,” “but not,” “w/x”) is  
16 encouraged to limit the production and shall be considered when determining whether to shift costs  
17 for disproportionate discovery. If the additional search terms result in an unreasonable number of  
18 documents to be reviewed and/or produced, the parties shall confer in order to revise the additional  
19 search terms.  
20  
21  
22

23 **C. ESI custodians and collection.** Absent a showing of good cause by the requesting  
24 party, each party shall collect and produce ESI from a minimum of 10 custodians total in this matter  
25 and the New Jersey Case. The parties may jointly agree to modify this limit without the Court’s  
26 leave. Within 14 days of entry of this Order, the parties shall confer regarding the appropriate  
27 custodians from whom to collect documents. Consistent with the Federal Rules of Civil Procedure,  
28

1 nothing in this Order shall bar a party from requesting another party to search for ESI from a  
2 particular custodian beyond the custodians identified under this Section based on a showing of good  
3 cause.

4           For each custodian, the parties shall collect from all reasonably accessible data sources  
5 within the party's possession, custody or control specifically associated with that custodian,  
6 including, without limitation, the custodian's email files (whether located on an email server, the  
7 custodian's local hard drive, or in other archive or server locations), electronic files from the  
8 custodian's hard drive(s), and electronic files from any server location(s) specifically assigned for  
9 use by the custodian. Absent a showing of good cause by the requesting party, the parties shall not  
10 be obligated to conduct enterprise-wide searches for all emails to or from any of their identified  
11 custodians. Absent a showing of good cause by the requesting party, the parties shall not be  
12 obligated to collect ESI from backup tapes, but shall be obligated to maintain such non-duplicative  
13 backup tapes in the event a showing of good cause is made.

14           Each party shall inquire with its identified custodians about the existence of any general  
15 company document sources or repositories (both electronic and hardcopy) that may contain relevant  
16 documents. With respect to any such source identified, the party shall collect and produce  
17 documents from those sources in conformance with the provisions herein. Absent a showing of  
18 good cause by the requesting party, the parties are not obligated to collect from shared ESI sources  
19 that are accessible to the custodian and other employees (such as shared directories or company  
20 databases to which the custodian has access) if the custodian does not identify the shared source as  
21 one that may contain relevant documents.  
22

23           Once collected, ESI may be de-duplicated prior to keyword searching. De-duplication may  
24 include (1) de-duplication across the data set without regard to custodian ("exact de-duplication"),  
25 and (2) de-duplication of email files that are portions of longer email chains ("near de-  
26  
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1 duplication”). If a party employs near de-duplication, it will (i) review all portions of any email  
2 chain for responsiveness and privilege, (ii) produce all non-privileged portions of an email chain if  
3 any embedded email contained in the chain is responsive, and (iii) redact only those portions of a  
4 responsive email chain that are privileged or otherwise subject to redaction under the terms of this  
5 agreement.

6  
7 **D. Format.** ESI and non-ESI shall be produced to the requesting party as text-  
8 searchable image files (e.g., TIFF). When a text-searchable image file is produced, the producing  
9 party must preserve the integrity of the underlying ESI, i.e., the original formatting. The parties  
10 shall produce their information in the following format: single page TIFF images and associated  
11 multi-page text files containing extracted text or OCR with Concordance and Opticon load files.

12  
13 **E. Native files.** Absent a showing of good cause by the requesting party, the only files  
14 that should be produced in native format are files not easily converted to image format, such as  
15 Excel and Access files.

16  
17 **F. Metadata files.** The parties are not obligated to provide metadata except upon  
18 request by the receiving party and upon a showing of good cause. Upon such request and with good  
19 cause shown, the following metadata need only be produced, to the extent such metadata exists:  
20 Custodian, File Path, Email Subject, From, To, CC, BCC, Date Sent, Time Sent, Date Received,  
21 Time Received, Filename, Author, Date Created, Date Modified, MD5 Hash, File Size, File  
22 Extension, Control Number Begin, Control Number End, Attachment Range, Attachment Begin,  
23 and Attachment End (or the equivalent thereof).

24 **G. Financial and Marketing Materials.** Absent a showing of good cause by the requesting  
25 party, the parties agree to the production of final, rather than draft, marketing, licensing, and/or  
26 financial materials. The parties also agree to the initial production of summary financial materials  
27 in lieu of all invoices, receipts, purchase orders, etc.  
28

1 SO STIPULATED:

2 Dated: March 15, 2013

3  
4 /s/ Jonathan E. Singer

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FILER'S ATTESTATION

I, Craig R. Kaufman, am the ECF User whose identification and password are being used to file this STIPULATION AND ORDER GOVERNING E-DISCOVERY. In compliance with General Order 45.X.B, I hereby attest that counsel for Plaintiff and Counterclaim Defendants concur in this filing.

By: /s/ Craig R. Kaufman  
Craig R. Kaufman

SO ORDERED, this 18th day of March, 2013.



Richard Seeborg  
United States District Court Judge

1 **SCHEDULE A**

2 1. Deleted, slack, fragmented, or other data only accessible by forensics.

3  
4 2. Random access memory (RAM), temporary files, or other ephemeral data  
5 that are difficult to preserve without disabling the operating system.

6 3. On-line access data such as temporary internet files, history, cache,  
7 cookies, and the like.

8  
9 4. Data in metadata fields that are frequently updated automatically, such as  
10 last-opened dates.

11  
12 5. Back-up data that are substantially duplicative of data that are more  
13 accessible elsewhere.

14 6. Voice messages.

15  
16 7. Instant messages that are not ordinarily printed or maintained in a server  
17 dedicated to instant messaging.

18  
19 8. Electronic mail or pin-to-pin messages sent to or from mobile devices  
20 (e.g., iPhone and Blackberry devices), provided that a copy of such mail is routinely saved  
21 elsewhere.

22  
23 9. Other electronic data stored on a mobile device, such as calendar or  
24 contact data or notes, provided that a copy of such information is routinely saved elsewhere.

25 10. Logs of calls made from mobile devices.

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27 11. Server, system or network logs.



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12. System-generated files or other file types not containing end user-created data.

13. Electronic data temporarily stored by laboratory equipment or attached electronic equipment, provided that such data is not ordinarily preserved as part of a laboratory report.

14. Data remaining from systems no longer in use that is unintelligible on the systems in use.