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19 **UNITED STATES DISTRICT COURT**
 20 **NORTHERN DISTRICT OF CALIFORNIA**
 21 **OAKLAND DIVISION**

22
 23 ZOMM, LLC,
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 Plaintiff,
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 v.
 26 APPLE INC.,
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 Defendant.

Case No. 4:18-cv-04969-HSG

**STIPULATION & ORDER RE:
 DISCOVERY OF ELECTRONICALLY
 STORED INFORMATION**

Judge: Haywood S. Gilliam, Jr.

1 Plaintiff Zomm, LLC and Defendant Apple Inc. (collectively, the “Parties”) hereby agree,
2 subject to approval by the Court, that the following procedures shall govern discovery of
3 Electronically-Stored Information (“ESI”) in this case:

4 1. This Order supplements all other discovery rules and orders. It streamlines ESI
5 production to promote a “just, speedy, and inexpensive determination of this action, as required
6 by Federal Rule of Civil Procedure 1.”

7 2. This Order may be modified in the Court’s discretion or by stipulation. The Parties
8 shall jointly submit any proposed modifications within 30 days after the Federal Rule of Civil
9 Procedure 16 Conference.

10 3. As in all cases, costs may be shifted for disproportionate ESI production requests
11 pursuant to Federal Rule of Civil Procedure 26. Likewise, a Party’s nonresponsive or dilatory
12 discovery tactics are cost-shifting considerations. A Party’s meaningful compliance with this
13 Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting
14 determinations.

15 4. The Parties are expected to comply with the District’s E-Discovery Guidelines
16 (“Guidelines”) and are encouraged to employ the District’s Model Stipulated Order Re: the
17 Discovery of Electronically Stored Information and Checklist for Rule 26(f) Meet and Confer
18 regarding Electronically Stored Information. The parties have discussed their preservation
19 obligations and needs and agree that preservation of potentially relevant ESI will be reasonable
20 and proportionate. To reduce the costs and burdens of preservation and to ensure proper ESI is
21 preserved, the parties agree that:

- 22 a. Only ESI created or received after January 1, 2009 through the filing date of this
23 Action will be preserved if it existed in a party’s possession, custody or control as
24 of April 23, 2018;
- 25 b. The parties will exchange a list of the types of ESI they believe should be
26 preserved and the names or general job titles or descriptions of custodians, for
27 whom they believe ESI should be preserved, e.g., “HR head,” “scientist,” and
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1 “marketing manager.” The parties shall add or remove custodians as reasonably
2 necessary;

3 c. The parties will agree on the number of custodians per party for whom ESI will be
4 preserved;

5 d. The parties agree to discuss data sources that may contain ESI that may not be
6 reasonably accessible because of undue burden or cost pursuant to Fed. R. Civ. P.
7 26(b)(2)(B).

8 5. With respect to Plaintiff’s patent claim, general ESI production requests under
9 Federal Rules of Civil Procedure 34 and 45 shall not include email or other forms of electronic
10 correspondence (collectively “email”). To obtain email related to the patent claim, Parties must
11 propound specific email production requests.

12 a. Email production requests shall only be propounded for specific issues, rather than
13 general discovery of a product or business.

14 b. Email production requests shall be phased to occur after the Parties have
15 exchanged initial disclosures and basic documentation about the patents, the prior
16 art, the accused instrumentalities, and the relevant finances. While this provision
17 does not require the production of such information, the Court encourages prompt
18 and early production of this information to promote efficient and economical
19 streamlining of the case.

20 c. Email production requests shall identify the custodian, search terms, and time
21 frame. The Parties shall cooperate to identify the proper custodians, proper search
22 terms and proper timeframe as set forth in the Guidelines.

23 d. The foregoing limitations shall not apply to discovery requests related to Plaintiff’s
24 non-patent claims.

25 6. For all such requests, each requesting Party shall limit its email production
26 requests to: (1) a total of five custodians per producing Party if Plaintiff’s non-patent claims are
27 dismissed and Plaintiff’s patent claim is not stayed; (2) a total of ten custodians per producing
28 Party if Plaintiff’s non-patent claims are not dismissed and Plaintiff’s patent claim is stayed; or

1 (3) a total of fifteen custodians per producing Party if Plaintiff's non-patent claims are not
2 dismissed and Plaintiff's patent claim is not stayed. The Parties may jointly agree to modify this
3 limit without the Court's leave. The Court shall consider contested requests for additional
4 custodians, upon showing a distinct need based on the size, complexity, and issues of this specific
5 case. Cost-shifting may be considered as part of any such request.

6 7. Each requesting Party shall limit its email production requests to: (1) a total of five
7 search terms per custodian per Party if Plaintiff's non-patent claims are dismissed and Plaintiff's
8 patent claim is not stayed; (2) a total of ten search terms per custodian per Party if Plaintiff's non-
9 patent claims are not dismissed and Plaintiff's patent claim is stayed; or (3) a total of fifteen
10 search terms per custodian per Party if Plaintiff's non-patent claims are not dismissed and
11 Plaintiff's patent claim is not stayed. The Parties may jointly agree to modify this limit without
12 the Court's leave. The Court shall consider contested requests for additional search terms per
13 custodian, upon showing a distinct need based on the size, complexity, and issues of this specific
14 case. The Court encourages the Parties to confer on a process to test the efficacy of the search
15 terms. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such
16 as the producing company's name or its product name, are inappropriate unless combined with
17 narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive
18 combination of multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and
19 shall count as a single search term. A disjunctive combination of multiple words or phrases (*e.g.*,
20 "computer" or "system") broadens the search, and thus each word or phrase shall count as a
21 separate search term unless they are variants of the same word. Use of narrowing search criteria
22 (*e.g.*, "and," "but not," "w/x") is encouraged to limit the production and shall be considered when
23 determining whether to shift costs for disproportionate discovery. Notwithstanding prior
24 agreement on the search terms to be used for searches, should a search for emails produce an
25 unreasonably large number of non-responsive or irrelevant results, the Parties shall (at the
26 producing party's request) meet and confer to discuss application of further negative search
27 restrictions (*e.g.*, if a single search was for "card" and ninety percent of the resulting emails came
28 from the irrelevant term "credit card," a negative limitation to ignore emails only returned as a

1 result of “credit card” may be applied to remove these emails). The Party receiving production
2 shall not unreasonably oppose such further restrictions designed to filter immaterial email search
3 results. Should a Party serve email production requests with search terms beyond the limits
4 agreed to by the Parties or granted by the Court pursuant to this paragraph, this shall be
5 considered in determining whether any Party shall bear all reasonable costs caused by such
6 additional discovery.

7 8. Nothing in this Order prevents the Parties from agreeing to use technology assisted
8 review and other techniques insofar as their use improves the efficacy of discovery. Such topics
9 should be discussed pursuant to the District’s E-Discovery Guidelines.

10 9. **Documents Protected from Discovery.** Communications involving outside
11 and/or in-house counsel that post-date the filing of the complaint need not be placed on a
12 privilege log. Communications may be identified on a privilege log by category, rather than
13 individually, if appropriate.

14 10. **Format for production of documents – documents existing in electronic**
15 **format.** Except as otherwise provided for in this Stipulation, all documents existing in electronic
16 format shall be produced in multiple page, searchable PDF format at a resolution of at least 300
17 dpi in accordance with the following:

- 18 a. PDF files shall be produced along with Concordance/Opticon image load files that
19 indicate the beginning and ending of each document.
- 20 b. For documents that already exist in PDF format prior to production (i.e., which the
21 producing party receives from a client or third party in PDF format), the producing
22 party may provide them in that same PDF format, whether searchable or non-
23 searchable. For documents converted to PDF format prior to production, the
24 producing party shall make reasonable efforts to convert to searchable PDF.
- 25 c. **Metadata.** Load files should include, where applicable, the information listed in
26 the Table of Metadata Fields, attached as Exhibit A. However, the Parties are not
27 obligated to include metadata for any document that does not contain such
28 metadata in the original, if it is not possible to automate the creation of metadata

1 when the document is collected. The Parties reserve their rights to object to any
2 request for the creation of metadata for documents that do not contain metadata in
3 the original.

4 d. **Production media and encryption of productions.** Unless otherwise agreed, the
5 Parties shall provide document productions in the following manner: The
6 producing party shall provide the production data on CDs, DVDs, external hard
7 drives or SFTP, as appropriate. The producing party shall encrypt the production
8 data using WinRAR encryption, and the producing party shall forward the
9 password to decrypt the production data separately from the CD, DVD, external
10 drive or SFTP to which the production data is saved.

11 11. **Format for production of documents – hardcopy or paper documents.** All
12 documents that are hardcopy or paper files shall be scanned and produced in the same manner as
13 documents existing in electronic format, above.

14 12. **Source code.** This Stipulation does not govern the format for production of source
15 code, which shall be produced pursuant to the relevant provision of the Protective Order.

16 13. **Parent and child emails.** The Parties shall produce email attachments
17 sequentially after the parent email.

18 14. **Native files.** The Parties will meet and confer to discuss requests for the
19 production of files in native format, on a case-by-case basis. If the Parties are unable to reach
20 agreement with regard to requests for additional documents in native-file format, the Parties
21 reserve the right to seek relief from the Court. Documents produced natively shall be represented
22 in the set of imaged documents by a slipsheet indicating the production identification number and
23 confidentiality designation for the native file that is being produced.

24 15. **Databases.** Certain types of databases are dynamic in nature and will often
25 contain information that is neither relevant nor reasonably calculated to lead to the discovery of
26 admissible evidence. Thus, a Party may opt to produce relevant and responsive information from
27 databases in an alternate form, such as a report or data table. These reports or data tables will be
28 produced in a static format.

1 The Parties agree to identify the specific databases, by name, that contain the relevant and
2 responsive information that Parties produce.

3 **16. Requests for hi-resolution or color documents.** The Parties agree to respond to
4 reasonable and specific requests for the production of higher resolution or color images. Nothing
5 in this Stipulation shall preclude a producing party from objecting to such requests as
6 unreasonable in number, timing or scope, provided that a producing party shall not object if the
7 document as originally produced is illegible or difficult to read. The producing party shall have
8 the option of responding by producing a native-file version of the document. If a dispute arises
9 with regard to requests for higher resolution or color images, the Parties will meet and confer in
10 good faith to try to resolve it.

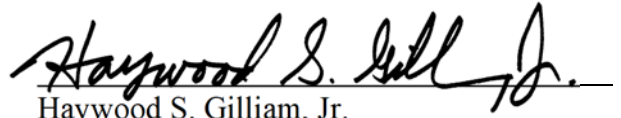
11 **17. Foreign language documents.** All documents shall be produced in their original
12 language. Where a requested document exists in a foreign language and the producing party also
13 has an English-language version of that document that it prepared for non-litigation purposes
14 prior to filing of the lawsuit, the producing party shall produce both the original document and all
15 English-language versions. In addition, if the producing party has a certified translation of a
16 foreign-language document that is being produced, (whether or not the translation is prepared for
17 purposes of litigation) the producing party shall produce both the original document and the
18 certified translation. Nothing in this agreement shall require a producing party to prepare a
19 translation, certified or otherwise, for foreign language documents that are produced in discovery.
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ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: January 22, 2019


Haywood S. Gilliam, Jr.
United States District Court Judge

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EXHIBIT A

TABLE OF METADATA FIELDS

<u>Field Name</u>	<u>Specifications Field Name</u>	<u>Field Type</u>	<u>Description (Email)</u>	<u>Description (E- Files/Attachments)</u>
BegDoc	Unique ID (Bates number)	Paragraph	The Document ID number associated with the first page of an email.	The Document ID number associated with the first page of a document
EndDoc	Unique ID (Bates number)	Paragraph	The Document ID number associated with the last page of an email.	The Document ID number associated with the last page of a document.
BegAttach	Unique ID (Bates number) Parent-Child Relationships	Paragraph	The Document ID number associated with the first page of a parent email.	The Document ID number associated with the first page of a parent document.
EndAttach	Unique ID (Bates number) Parent-Child Relationship	Paragraph	The Document ID number associated with the last page of the last attachment to a parent email.	The Document ID number associated with the last page of the last attachment to a parent document.
Pages	Pages	Number	The number of pages for an email.	The number of pages for a document.
DateSent		Date (MM/DD/YYYY format)	The date the email was sent.	For email attachments, the date the parent email was sent.
Author	Author Display Name (e-mail)	Paragraph	The display name of the author or sender of an email.	The name of the author as identified by the metadata of the document.
To	Recipient	Paragraph	The display name of the recipient(s) of an email.	The display name of the recipient(s) of a document (e.g., fax recipients).

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<u>Field Name</u>	<u>Specifications Field Name</u>	<u>Field Type</u>	<u>Description (Email)</u>	<u>Description (E- Files/Attachments)</u>
CC	CC	Paragraph	The display name of the copyee(s) of an email.	
BCC	BCC	Paragraph	The display name of the blind copyee(s) of an email.	
Subject	Subject (e-mail)	Paragraph	The subject line of an email.	The subject of a document from entered metadata.
Custodian	Custodian	Paragraph	The custodian of an email.	The custodian of a document.