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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6 SAN JOSE DIVISION
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8 MAXIMILIAN KLEIN, et al.,

9 Plaintiffs,

10 v.

11 FACEBOOK, INC.,

12 Defendant.

Case No. [20-cv-08570-LHK](#) (VKD)

**ORDER PARTIALLY RESOLVING
AUGUST 20, 2021 DISCOVERY
DISPUTE RE ESI PROTOCOL**

Re: Dkt. No. 133

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14 The parties ask the Court to resolve disputes involving several provisions of their ESI
15 protocol. Dkt. No. 133. The Court held a hearing on these disputes on August 31, 2021. Dkt.
16 Nos. 142, 146. Thereafter, the Court issued an interim order requiring the parties to confer further
17 and to make a further submission regarding the categories of documents that must be preserved
18 and those that need not be preserved. Dkt. No. 145.

19 This order resolves several remaining disputes concerning the ESI protocol. For the
20 reasons stated on the record during the hearing and as further explained below, the Court orders as
21 follows:

22 **1. Statement of Sedona Principle No. 6**

23 The parties dispute whether the ESI protocol should include the following text proposed by
24 Facebook: “Responding parties are best situated to evaluate the procedures, methodologies, and
25 technologies appropriate for preserving and producing their own electronically stored
26 information.” Dkt. No. 133 at 1-2. The Court will not require the parties’ ESI protocol to recite
27 this statement, nor will the Court require that the parties adopt this principle in the abstract.
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1 **2. Use of Technology Assisted Review**

2 The parties disagree regarding what information a party should be required to disclose
3 regarding that party's use of technology assisted review ("TAR") and whether such review should
4 be subject to an agreed or court-ordered protocol. *Id.* at 5.

5 Given the volume of documents, any party may use TAR, predictive coding, or other
6 machine learning tools to identify relevant and responsive documents for production and/or to
7 exclude documents that are not relevant and responsive. The Court agrees with Facebook that it
8 may not require any party to adopt a particular TAR protocol or to negotiate in advance the details
9 of its implementation of TAR or a similar tool. *See In re Viagra (Sildenafil Citrate) Products*
10 *Liability Litig.*, No. 16-md-02691-RS (SK), 2016 WL 7336411 at *1-2 (N.D. Cal. Oct. 14, 2016).
11 However, the Court will require a party to disclose its intent to use any such tools. In addition, the
12 Court will require the parties to discuss whether and how TAR or a similar tool will or will not be
13 used in conjunction with search terms to identify potentially relevant and responsive documents.
14 *See, e.g., In re Valsartan, Losartan, and Irbesartan Products Liability Litig.*, 337 F.R.D. 610, 614
15 (D.N.J. 2020) (contrasting use of TAR to prioritize documents for production with use of TAR as
16 an alternative to use of search terms). Finally, any party that chooses to use TAR or a similar tool
17 must be prepared to defend the sufficiency of the resulting document production if another party
18 contends that the production is insufficient, just as it would if the party had chosen not to use such
19 a tool. *See In re Viagra*, 2106 WL 73366411. at *2.

20 **3. Search Term Hit Reports**

21 The parties disagree regarding whether Facebook should be required to disclose, upon
22 request, the number of documents hit by each search term, the number of unique documents hit by
23 each such term, and the total number of documents that would be returned by a particular search
24 term list. Dkt. No. 133 at 5-6; Dkt. No. 133-1 (disputed language in sec. 5.c.). Plaintiffs argue
25 that such a requirement should be part of the ESI protocol; Facebook disagrees.

26 While the Court agrees that information about search term hits can be helpful in assessing
27 whether a particular term is over- or under-inclusive, the Court will not require the parties to adopt
28 plaintiffs' proposed provision as part of the ESI protocol. However, the Court expects the parties

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1 to exchange relevant information as the need arises in order to efficiently resolve disputes about
2 the efficacy of particular search terms.

3 **4. Identity of ESI Custodians**

4 The parties dispute when Facebook must provide a list of document custodians and about
5 how those custodians should be identified. Dkt. No. 133 at 6-7. This dispute was not well-
6 developed in the parties' joint submission, and the Court believes that it is premature, as plaintiffs
7 have not (at least as of the date of the hearing) served any document requests for which custodians
8 might be identified.

9 At this time, the Court will not require Facebook to disclose to plaintiffs the list of
10 custodians who received a litigation hold notice. The Court does expect Facebook to identify
11 document custodians believed to have responsive documents after Facebook has an opportunity to
12 review plaintiffs' document requests. Thereafter, the parties should discuss how to proceed as part
13 of their meet-and-confer process. To facilitate those discussions, if Facebook believes a particular
14 custodian has documents that are duplicative of another custodians' documents, Facebook may so
15 indicate.

16 **IT IS SO ORDERED.**

17 Dated: September 15, 2021

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VIRGINIA K. DEMARCHI
United States Magistrate Judge