

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DUNCAN LINDSEY,

Plaintiff,

v.

ELSEVIER INC., et al.,

Defendants.

Case No.: 16-cv-00959-GPC (DHB)

**ORDER FOLLOWING DISCOVERY
CONFERENCE**

On January 25, 2017, the Court held a telephonic Discovery Conference with counsel for Plaintiff Duncan Lindsey (“Plaintiff”) and Defendants Elsevier Inc., Elsevier B.V., and Elsevier, Ltd. (collectively, “Defendants”). (See ECF No. 36.) In its December 22, 2016 Order, the Court set the Discovery Conference in order to discuss potential bifurcation of the case between liability and damages, and the status of discovery. (ECF No. 31.)

To the extent it was not previously clear from the Court’s December 22, 2016 Order, all prior motions to compel are hereby **DENIED WITHOUT PREJUDICE**. (See ECF Nos. 24, 30.) After hearing arguments from the parties during the Discovery Conference, the Court also **DENIES** Defendants’ motion to bifurcate and stay discovery. (See ECF No.

1 27.) As discussed during the Settlement Conference, the Court does not find any further
2 phasing of discovery or bifurcation to be appropriate. Phase I of discovery did not meet its
3 goal of enabling the parties the discuss settlement. Instead, it wasted nine months,
4 accomplished little, and left the parties in a discovery quagmire. Accordingly, the Court
5 finds good cause to issue an Amended Scheduling Order opening up discovery on all
6 issues.¹ The parties should therefore proceed with full discovery within the parameters
7 discussed during the Discovery Conference and as laid out below.

8 **1. Protective Order**

9 The existing Protective Order in this case protects the confidentiality of trade secrets,
10 but does not contain an “Attorney’s Eyes Only” provision. (ECF No. 18.) The Protective
11 Order may, however, be modified by the parties or by the Court “for good cause, or in the
12 interest of justice, or on its own order at any time in these proceedings.” (*See id.* at p. 9.)
13 In light of Plaintiff’s alleged threats that discovery in this matter “could lead to other
14 customer lawsuits,”² the Court reminds Plaintiff of both his confidentiality obligations
15 under the Protective Order and the Court’s ability to modify the Protective Order at any
16 time in these proceedings.

17 As discussed during the Discovery Conference, if, during the course of these
18 proceedings, a party believes a trade secret cannot or will not be protected absent an
19 “Attorney’s Eyes Only” provision, the party may move to modify the Protective Order as
20 to that trade secret.³ In any Joint Motion for Modification of the Protective Order, the party
21 seeking protection must establish that the information sought is in fact a trade secret, and
22

23
24 ¹ The Court will not consider any prior discovery requests, to the extent they
25 are withdrawn, as counting towards the parties’ limitations on discovery. *See e.g.*, Fed. R.
26 Civ. P. 33; Civ. L.R. 33.1, 36.1.

27 ² *See* ECF No. 35 at p. 5 n. 1.

28 ³ The Court advises the parties that this should not be viewed as an opportunity
to re-litigate the prior Joint Motion Re: Disputed Protective Order. (*See* ECF No. 12.)
There must be a specific, non-speculative changed circumstance.

1 that its disclosure would be harmful to the party’s interest in the property. *Nutratch, Inc.*
2 *v. Syntech (SSPF) Int’l, Inc.*, 242 F.R.D. 552, 554-550 (C.D. Cal. 2007). The party seeking
3 disclosure must then establish that the information is relevant to the party’s claims or
4 defenses or the subject matter of the lawsuit, and is necessary to prepare the case for trial.
5 *Id.* at 555.

6 If a party fails to comply with the Protective Order, at any time, the Court advises
7 that it will not hesitate to impose “any and all sanctions authorized by statute or rule or
8 within the inherent power of the court, including, without limitation, dismissal of any
9 actions, entry of default, finding of contempt, imposition of monetary sanctions or
10 attorneys’ fees and costs, and other lesser sanctions.” *See* Civ. L.R. 83.1.

11 2. Discovery

12 As stated in Federal Rule of Civil Procedure 26(b), discovery is limited to “any
13 nonprivileged matter that is **relevant** to any party’s claim or defense and proportional to
14 the needs of the case, considering the importance of the issues at stake in the action, the
15 amount in controversy, the parties’ relative access to relevant information, the parties’
16 resources, the importance of the discovery in resolving the issues, and whether the burden
17 or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1)
18 (emphasis added).

19 As discussed during the Discovery Conference, absent a compelling argument not
20 presently before the Court, the Court advises that discovery concerning what third parties
21 “intended” when they entered their own contracts with Defendants is not relevant. The
22 Court further advises that it will not hesitate to order payment of attorney’s fees and costs
23 going forward as set forth in Federal Rule of Civil Procedure 37. The Court will also
24 consider cost-shifting if discovery appears unduly burdensome or expensive. *See* Fed. R.
25 Civ. P. 26(c)(1)(B); *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 475-76 (N.D. Cal. 2003);
26 *Nehad v. Browder*, No. 15-cv-1386 WQH NLS, 2016 WL 3769807, at *3 (S.D. Cal. July
27 15, 2016).

28 ///

1 The Court will separately issue an Amended Scheduling Order. If the parties need
2 to modify the Amended Scheduling Order, they may do so by Joint Motion and upon a
3 showing of good cause.

4 IT IS SO ORDERED.

5 Dated: January 27, 2017



LOUISA S PORTER
United States Magistrate Judge

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28