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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

THE REGENTS OF THE UNIVERSITY  
OF CALIFORNIA; and BECTON,  
DICKINSON and COMPANY,  
  
Plaintiffs,  
  
v.  
  
AFFYMETRIX, INC.; and LIFE  
TECHNOLOGIES CORP.,  
  
Defendants.

Case No.: 17-cv-01394-H-NLS

**ORDER GRANTING JOINT  
MOTION FOR AN ORDER  
GOVERNING DISCOVERY OF  
ELETRONICALLY STORED  
INFORMATION**

[Doc. No. 80.]

On December 18, 2017, the parties filed a joint motion for an order governing the discovery of electronically stored information. (Doc. No. 80.) For good cause shown, the Court grants the parties’ joint motion and enters the following order:

1. This Order supplements all other discovery rules and orders, including the Protective Order in this case. It streamlines ESI collection and searching to promote a “just, speedy, and inexpensive determination” of this action, as required by Federal Rule of Civil Procedure 1.
2. This Order may be modified in the Court’s discretion or by agreement of the parties. If the parties cannot resolve their disagreements regarding such modifications, the parties shall submit their competing proposals to the Court in accordance with the Court’s

1 discovery dispute procedures.

2 3. Proportionality: Parties are expected to use reasonable, good faith and  
3 proportional efforts to preserve, identify and produce relevant information. This includes  
4 identifying appropriate limits to discovery, including limits on custodians, identification of  
5 relevant subject matter, phased discovery, time periods for discovery and other parameters  
6 to limit and guide preservation and discovery issues.

7 4. Search Terms: Focused terms, rather than over-broad terms, shall be  
8 employed to search custodial data, e.g. email and other ESI collected from named  
9 custodians. The parties shall timely attempt to reach agreement on search terms, or a  
10 computer- or technology-aided methodology, and shall continue to cooperate in revisiting  
11 the search terms or computer or technology-aided methodology. The parties' development  
12 and negotiation of search terms for custodial e-mail and other ESI shall not be grounds for  
13 a party to delay review, collection, or production of non-custodial or other documents (e.g.,  
14 network shared documents, laboratory notebooks, development files, etc.) that the  
15 producing party is able to, and without undue burden, identify and locate without the use  
16 of search terms. The parties shall also make reasonable efforts to engage in collection  
17 efforts prior to the finalization of search terms.

18 a. Each Producing Party shall be responsible for generating a searching protocol  
19 that it will apply to its custodial data that it believes in good faith will return a reasonably  
20 high proportion of responsive documents. Within fourteen (14) days of the entry of this  
21 Order or within such time as the Parties agree, the Parties will exchange proposed search  
22 terms that each Producing Party proposes to use to identify its responsive email or other  
23 custodial ESI. A Producing Party need not apply the same search terms to all custodians,  
24 but must disclose if it is applying some search terms to some custodians but not others.

25 b. A Producing Party is not limited to searches using the disclosed terms and  
26 may conduct broader searches using other terms, at the Producing Party's discretion,  
27 without disclosing those additional or broader searches to the Requesting Party. A  
28 Producing Party need not disclose search terms or strategies that will reveal privileged or

1 work product information.

2 c. The Requesting Party, within 7 days of the receiving the Producing Party's  
3 proposed terms, may request revisions to the Producing Party's proposed terms and may  
4 request no more than twenty (20) additional search terms per side to be used in connection  
5 with the search of email or other ESI that the Requesting Party in good faith believes will  
6 return a reasonably high proportion of responsive documents without overbreadth or undue  
7 burden. The foregoing limit assumes that the Producing Party has made good faith efforts  
8 to develop a robust initial set of proposed search terms, and the Court may consider the  
9 scope and reasonableness of the initial proposed search in considering requests for further  
10 searches. Notwithstanding this limit, the parties shall cooperate to minimize and narrow  
11 disputes, and meet and confer as necessary, to ensure that their search proposals identify  
12 responsive documents while avoiding overbreadth or undue burden, including agreeing to  
13 increase the limit on search terms if needed without Court leave. The Court may consider  
14 and grant contested requests for additional search terms, upon a showing that additional  
15 search terms are likely to identify relevant and responsive documents without overbreadth  
16 or undue burden and in view of the adequacy of the Producing Party's initial proposed  
17 terms.

18 d. Upon receipt of the Requesting Party's search terms, the Producing Party shall  
19 use the search terms proposed by the Requesting Party unless the Producing Party objects  
20 to the use of a given term within 7 days and explains the basis of its objection. Where  
21 possible, the Producing Party shall propose with its objection revisions to the search terms  
22 or other computer or technology-aided methodology in an effort to resolve or narrow its  
23 objections.

24 e. The parties shall meet and confer in good faith to resolve any disputes that  
25 may arise over the search terms and/or the use of other technology-aided methodology and  
26 to ensure the terms are sufficiently tailored to capture documents relevant to the above-  
27 captioned litigation. The parties shall work cooperatively to minimize and narrow disputes  
28 and ensure that their respective searches identify responsive documents while avoiding

1 overbreadth or undue burden. If the parties cannot resolve their dispute regarding search  
2 terms and/or the use of other computer- or technology-aided methodology after reasonable,  
3 thorough good faith negotiations, the Requesting Party may seek relief from the Court in  
4 accordance with the Court's discovery dispute procedures.

5 f. A Producing Party may amend its search terms at any time if any term in good  
6 faith appears to be overly broad, either in general or as applied to a particular custodian or  
7 custodial data source. The Producing Party shall notify the Requesting Party of its  
8 amendment and whether the amendment will apply to searches of all custodians or only  
9 with respect to particular custodians or custodial data sources. The parties agree to the  
10 same dispute resolution procedures set forth in paragraph (e) above with respect to any  
11 such amendment.

12 g. The parties recognize that discovery is an iterative process. A Requesting  
13 Party may therefore request the use of supplemental search terms (up to a cumulative total  
14 limit of fifteen (15) supplemental search terms for each side) at any time prior to thirty (30)  
15 days before the date set by the Court for substantial completion of document discovery if  
16 i) discovery reveals information that in good faith indicates supplemental term(s) will  
17 capture relevant, responsive documents and are not cumulative of previous searches or ii)  
18 the Requesting Party serves additional noncumulative discovery requests necessitating  
19 additional searches. The Requesting Party must identify the specific custodians and time  
20 periods it requests be searched using the supplemental search term(s). The parties may  
21 jointly agree to modify this limit without the Court's leave. The foregoing limitation does  
22 not modify each party's existing independent obligations under Fed. R. Civ. P. 26(e) to  
23 ensure that its discovery disclosures are not incomplete or incorrect in any material respect,  
24 including by conducting additional searches as necessary. The Court may consider and  
25 grant contested requests for additional supplemental search terms, upon a showing that  
26 relevance or materiality of such search terms could not have been reasonably known when  
27 the parties negotiated their initial search terms and are likely to identify noncumulative  
28 relevant and responsive documents without overbreadth or undue burden, taking into

1 account the progress of discovery and the proximity of the request to discovery deadlines.  
2 The same dispute resolution procedures set forth in paragraph (e) above applies with  
3 respect to supplemental terms or if a Requesting Party seeks Court approval of additional  
4 supplemental search terms beyond the limit as to number of terms or time of request set  
5 forth above.

6       5.     Custodian Collection: The parties will negotiate in good faith to identify and  
7 limit the number of custodians whose data (both email and user-generated data) is  
8 collected. The Requesting Parties can request collection and search of data from up to a  
9 total of ten custodians per side from the Producing Parties. The parties may jointly agree  
10 to modify this limit without the Court’s leave. The Court may consider contested requests  
11 for additional custodians per side, upon showing a distinct need based on the size,  
12 complexity and issues of this specific case.

13       6.     Non-Custodial ESI Collection: Nothing in this Order shall require a  
14 producing party to utilize any particular collection protocol for any particular source of  
15 Non-Custodial ESI. For avoidance of doubt, targeted collection may be used to collect  
16 potentially relevant documents from any Non-Custodial ESI data source.

17       7.     System File Filtering: The parties will use their best efforts to filter out  
18 common system files and application executable files by using a commercially reasonable  
19 hash identification process. Hash values that may be filtered out during this process are  
20 located in the National Software Reference Library (“NSRL”) NIST hash set list.

21       8.     Deduplication: A party is only required to produce one copy of each  
22 responsive document and a party may de-duplicate responsive ESI (based on MD5 or SHA-  
23 1 hash values at the document level) on a global scale as long as the Producing Party has  
24 the ability to, and does, provide information identifying the other custodians who possessed  
25 any given record or ESI, for example in a “custodian” meta data field. Alternatively, a  
26 party may elect to de-duplicate each custodian’s responsive ESI and may de-duplicate the  
27 party’s non-custodial ESI (based on MD5 or SHA-1 hash values at the document level).  
28 To the extent emails are produced, the following procedures shall apply. For emails with

1 attachments, the hash value is generated based on the parent/child document grouping. To  
2 the extent that de-duplication through MD5 or SHA-1 hash values is not possible, the  
3 parties shall meet and confer to discuss any other proposed method of de-duplication.

4 9. Production Specifications and Format: The parties have agreed to produce  
5 documents using the format described in the ESI Protocol attached to the Joint Discovery  
6 Plan. To the extent that circumstances require a party to produce documents in a format  
7 other than the format described in the ESI Protocol, e.g. prior or to or during a deposition  
8 or other proceeding, the Producing Party will produce the documents in the agreed format  
9 shortly thereafter.

10 10. Preservation of Discoverable Information: A party has a common law  
11 obligation to take reasonable and proportional steps to preserve discoverable information  
12 in the party's possession, custody or control. Absent a showing of good cause, the parties  
13 shall not be required to modify, on a going-forward basis, the procedures used by them in  
14 the ordinary course of business to back-up and archive data; provided, however, that the  
15 parties shall preserve discoverable information currently in their possession, custody or  
16 control.


17 11. The parties agree that, absent good cause, the following categories of  
18 information need not be preserved nor searched: (1) deleted, slack, fragmented, or other  
19 data only accessible by forensics; (2) random access memory (RAM), temporary files, or  
20 other ephemeral data that are difficult to preserve without disabling the operating system;  
21 (3) on-line access data such as temporary internet files, history, cache, cookies, and the  
22 like; (4) data in metadata fields that are frequently updated automatically, such as last-  
23 opened dates; (5) data stored on disaster recovery tapes, back-up tapes or other back-up  
24 data not otherwise accessed in the normal and ordinary course of business; (6) voice  
25 messages; (7) instant messages that are not ordinarily printed or maintained in a server  
26 dedicated to instant messaging; (8) electronic mail or pin-to-pin messages sent to or from  
27 mobile devices (e.g., smart phones), provided that a copy of such mail is routinely saved  
28 elsewhere; (9) other electronic data stored on a mobile device, such as calendar or contact

1 data or notes, provided that a copy of such information is routinely saved elsewhere; (10)  
2 logs of calls made from mobile devices; (11) server, system or network logs; (12) electronic  
3 data temporarily stored by laboratory equipment or attached electronic equipment,  
4 provided that such data is not ordinarily preserved in the ordinary course of business or as  
5 part of a laboratory report; (13) unindexed electronic data generated by laboratory  
6 equipment and kept in a proprietary / non-standard file format provided that such data is  
7 not ordinarily preserved in the ordinary course of business or as part of a laboratory report;  
8 or (14) data remaining from systems no longer in use that is unintelligible on the systems  
9 in use. Nothing in this section shall limit a Requesting Party's right to request from a  
10 Producing Party more information about the nature of and burden associated with obtaining  
11 documents from a particular location.

12       12. Third-Party Confidentiality Obligations: To the extent that relevant ESI or  
13 other documents sought for production implicate confidentiality obligations owed to third-  
14 parties ("Protected Third-party Information"), the Producing Party will negotiate with  
15 those third-parties in good faith to secure the third-party's approval for production of the  
16 Protected Third-party Information. To the extent that the Producing Party is unable to  
17 secure approval from the third-party, the Producing Party will promptly inform the  
18 Requesting Party of the existence of the Protected Third-party Information and the contact  
19 information for the third party such that the Requesting Party is able to negotiate with the  
20 third-party and, if necessary, seek appropriate relief from the Court.

21       **IT IS SO ORDERED.**

22 DATED: December 22, 2017

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25 MARILYN L. HUFF, District Judge  
26 UNITED STATES DISTRICT COURT  
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