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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 OAKLEY, INC.,

12 Plaintiff,

13 v.

14 LIPOPSUN INTERNATIONAL CORP.,

15 Defendant.

Case No.: 17CV1838 CAB (BGS)

**ORDER GRANTING IN PART
JOINT MOTION TO CONTINUE
EARLY NEUTRAL EVALUATION**

[ECF No. 16]

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17 The parties have filed a Joint Motion seeking to continue the Early Neutral
18 Evaluation and Case Management Conference scheduled for October 18, 2017 by six
19 weeks to allow the parties to gather sales figures, exchange settlement demands and allow
20 Liposun to tender its defense to its insurance carrier. (ECF No. 16.) The Joint Motion is
21 GRANTED in part. The ENE and CMC are continued to **November 17, 2017** at **1:30**
22 **p.m.** Other dates are modified as indicated below.

23 **The following are mandatory guidelines for the parties preparing for the**
24 **Early Neutral Evaluation Conference.**

25 1. **Purpose of Conference:** The purpose of the Early Neutral Evaluation
26 Conference (“ENE”) is to hold a serious discussion of every aspect of the lawsuit in an
27 effort to achieve early resolution of the case. All conference discussions will be off the
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1 record, privileged and confidential. Counsel for any non-English speaking parties is
2 responsible for arranging for the appearance of an interpreter at the conference.

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4 2. **Personal Appearance of Parties Is Required:** All parties, adjusters for
5 insured defendants, and client representatives must be present and have full and complete
6 authority to enter into a binding settlement at the ENE.¹ The purpose of this requirement
7 is to have representatives present who can settle the case during the course of the
8 conference without consulting a superior. Counsel for a government entity may be
9 excused from this requirement so long as the government attorney who attends the ENE
10 conference (1) has primary responsibility for handling the case; and (2) may negotiate
11 settlement offers which the attorney is willing to recommend to the government official
12 having ultimate settlement authority. Other parties seeking permission to be excused
13 from attending the ENE in person must follow the procedures outlined in Judge Skomal’s
14 Chambers’ Rules. (See Judge Skomal’s Chambers’ Rules at p. 3, section C.) Failure of
15 any of the above parties to appear at the ENE conference without the Court’s permission
16 will be grounds for sanctions. The principal attorneys responsible for the litigation must
17 also be present in person and prepared to discuss all of the **legal and factual** issues in the
18 case.

19 3. **Confidential ENE Statements Required:** No later than **November 3,**
20 **2017,** the parties must submit confidential ENE statements of seven pages or less. Please
21 also attach relevant exhibits. The statement must address the legal and factual issues in
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24 ¹ “Full authority to settle” means that the individuals at the settlement conference must be authorized to
25 fully explore settlement options and to agree at that time to any settlement terms acceptable to the
26 parties. *Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989). The person
27 needs to have “unfettered discretion and authority” to change the settlement position of a party. *Pitman*
28 *v. Brinker Intl., Inc.*, 216 F.R.D. 481, 485-486 (D. Ariz. 2003). The person must be able to bind the
party without the need to call others not present at the conference for authority or approval. The purpose
of requiring a person with unlimited settlement authority to attend the conference includes that the
person’s view of the case may be altered during the face to face conference. *Id.* at 486. A limited or a
sum certain of authority is not adequate. *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001).

1 the case and should focus on issues most pertinent to settling the matter. The statement
2 should not repeat facts or law contained in the Complaint or Answer. Statements do not
3 need to be filed or served on opposing counsel. The statement must also include any
4 prior settlement offer or demand, as well as the offer or demand the party will make at the
5 ENE. The Court will keep this information confidential unless the party authorizes the
6 Court to share the information with opposing counsel.

7 **ENE statements must be emailed to efile_Skomal@casd.uscourts.gov.**

8 4. **New Parties Must Be Notified by Plaintiff's Counsel:** Plaintiff's counsel
9 shall give notice of the ENE to parties responding to the complaint after the date of this
10 notice.

11 5. **Case Management Under the Amended Federal Rules and Local Patent**
12 **Rules:** The parties can expect to leave the ENE with Rule 26 compliance dates and
13 deadlines and a Case Management Order including a Claim Construction briefing
14 schedule and hearing date. **Parties shall therefore meet and confer pursuant to Fed.**
15 **R. Civ. P. 26(f) no later than 14 days before the ENE regarding the following:**

16 a. Any anticipated objections under Federal Rule of Civil Procedure
17 26(a)(1)(E) to the initial disclosure provisions of Federal Rule of Civil Procedure
18 26(a)(1)(A-D) and the date of initial disclosures;

19 b. Whether the parties will request the preservation and production of
20 Electronically Stored Information ("ESI") and, if so:

21 i. the nature, location, and scope of discoverable ESI;

22 ii. the agreed form of production;

23 iii. the agreed search methodology;

24 iv. whether any proportionality issues exist and whether the parties have
25 identified issues with respect to inaccessible ESI;

26 c. Any proposed modification of the deadlines provided for in the Patent Local
27 Rules, and the effect of any such modification on the date and time of the Claim
28 Construction Hearing, if any;

1 d. The need for and specific limitations on discovery relating to claim
2 construction, including depositions of percipient and expert witnesses; and any proposed
3 modifications to the limitations on discovery imposed under the Federal Rules of Civil
4 Procedure or by local rule;

5 e. The need, if any, to phase damage discovery.

6 6. **Joint Discovery Plan**: The parties must include their positions with respect
7 to the meet-and-confer issues listed above, **AND propose actual dates for ALL of the**
8 **following deadlines in a Joint Discovery Plan**:

- 9 - deadline for disclosure of asserted claims and preliminary infringement
- 10 contentions;
- 11 - deadline for preliminary invalidity contentions;
- 12 - deadline for exchange of proposed claim constructions and extrinsic
- 13 evidence;
- 14 - deadline for joint claim construction chart, worksheet and hearing
- 15 statement;
- 16 - deadline for completion of claim construction discovery;
- 17 - proposed briefing schedule for filing of claim construction briefs
- 18 - proposed date and time of the Claim Construction Hearing, if any;
- 19 - whether the court will hear live testimony at the Claim Construction
- 20 Hearing;
- 21 - the need for and specific limitations on discovery relating to claim
- 22 construction, including depositions of percipient and expert witnesses;
- 23 - deadlines for expert witness designation and supplementation;
- 24 - deadlines for expert witness report submissions and supplementation
- 25 - deadlines for completions of fact and expert discovery;
- 26 - deadline for filing pretrial motions; and
- 27 - proposed final Pretrial Conference date.

28 The **Joint Discovery Plan shall be submitted via email to Judge Skomal's**
chambers as well as filed on the CM/ECF system, no later than November 3, 2017

The Court will issue an order following the ENE addressing these issues and setting dates as appropriate.

7. **Requests to Continue an ENE Conference**: Requests to continue ENEs are rarely granted. The Court will, however, consider formal motions to continue an

1 ENE when extraordinary circumstances exist and the other party has no objection. If
2 another party objects to the continuance, counsel for both parties must call chambers and
3 discuss the matter with the research attorney/law clerk assigned to the case before any
4 motion may be filed. **Any request for a continuance must be made as soon as counsel**
5 **is aware of the circumstances that warrant rescheduling the conference.**

6 8. **Settlement Prior to ENE Conference:** The Court encourages the parties
7 to work on settling the matter in advance of the ENE Conference. In the event that the
8 parties resolve the matter prior to the day of the conference, the following procedures
9 must be followed before the Court will vacate the ENE and excuse the parties from
10 appearing:

11 A. The parties may file a Joint Motion to Dismiss and submit a proposed
12 order to the assigned district judge. If a Joint Motion to Dismiss is filed, the Court will
13 immediately vacate the ENE;

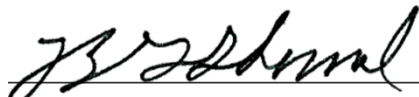
14 B. If the parties settle more than 24 hours before the conference but are
15 not able to file a Joint Motion to Dismiss, they must file a Notice of Settlement
16 containing the electronic signatures of counsel for all settling parties and must also
17 identify a date by which the Joint Motion to Dismiss will be filed;

18 C. If the parties settle less than 24 hours before the conference, counsel
19 for the settling parties must JOINTLY call chambers and inform the Court of the
20 settlement and receive Court permission to not appear at the ENE.

21 Questions regarding this case or the mandatory guidelines set forth herein may be
22 directed to Skomal's research attorney at (619) 557-2993.

23 **IT IS SO ORDERED.**

24 Dated: October 6, 2017

25 
26 Hon. Bernard G. Skomal
27 United States Magistrate Judge
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