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8 **SPECIAL MASTER**

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **SOUTHERN DIVISION—SANTA ANA**

12 PRESERVATION TECHNOLOGIES
13 LLC.,

14 Plaintiff,

15 vs.

16 MINDGEEK USA, INC., ET AL.

17 Defendants.

CASE NO. 2:17-cv-08906-DOC-JPR

Hon. David O. Carter Courtroom 9D

**SPECIAL MASTER'S REPORT
AND RECOMMENDATION NO. 2
RE: DEFENDANTS' MOTION TO
ENTER PROPOSED SCHEDULE**

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1 **I. INTRODUCTION**

2 Defendants MindGeek USA Inc., et al. (“MindGeek”) argue that good cause
3 exists for a revised case schedule that sets forth deadlines for fundamental patent
4 litigation milestones, such as the service of infringement and invalidity
5 contentions, an “end date” for Plaintiff Preservation Technologies, LLC
6 (“Preservation”) to review MindGeek’s source code, and a *Markman* hearing date,
7 separate and apart from any dispositive motion hearing. (MindGeek’s Motion to
8 Enter Proposed Schedule, at 1 (“Motion”); MindGeek’s Reply In Support of
9 Motion to Enter Proposed Schedule (“Reply”), at 1). MindGeek notes that despite
10 this case pending since December 2017, many patent litigation milestones have yet
11 to occur, and worse yet, there are no deadlines to facilitate their occurrence.
12 (Motion, at 1). Therefore, MindGeek contends that its proposed schedule (Motion,
13 at Ex. A [“Proposed Revised Schedule”]) be adopted by the Court because it
14 includes deadlines that “are critical to the just, orderly and proportional litigation
15 of this case.” (*Id.*). MindGeek also argues that the proposed schedule accounts for
16 the current status of the case (*i.e.*, the lengthy stay of the case as a result of
17 Preservation’s transition to new counsel) and the COVID-19 pandemic. (Motion,
18 at 1).

19 Preservation argues that “[c]ontrary to MindGeek’s assertion that ‘there are
20 no deadlines for the[] fundamental patent litigation milestones or for *Markman*,’ [
21], the existing schedule includes deadlines for infringement contentions, invalidity
22 contentions, [and] *Markman* briefing and hearing,” among other deadlines.
23 (Preservation’s Opposition to Motion to Enter Proposed Schedule, at 2
24 (“Opposition”) (citing ECF No. 112 [Parties’ Revised Joint Rule 26(F) Report]).
25 Preservation further notes that these deadlines “are all triggered from completion
26 of Preservation’s review of source code, which MindGeek has failed to produce to
27 date.” (*Id.*). Accordingly, Preservation argues that MindGeek’s delay cannot serve
28 as “good cause to upend” the party-negotiated and Court-approved schedule. (*Id.*).

1 Preservation also asserts that MindGeek’s motion is procedurally improper because
2 it requests modification of the Court’s existing Scheduling Order, which pursuant
3 to Rule 16(b)(4) of the Federal Rules of Civil Procedure and Central District of
4 California Local Rule 16-14, can only be modified by the District Court Judge, not
5 the Special Master.

6 After reviewing the parties briefing and supporting papers, and after hearing
7 oral argument on June 30, 2020, the Special Master finds as follows.

8 **II. FACTUAL BACKGROUND**

9 After Preservation secured new counsel, the parties attempted to negotiate a
10 revised case schedule from January to March 2020. (Motion, at 1). The Special
11 Master was copied on many of those emails. (See E. Cronin Email to Special
12 Master (March 31, 2020); R. Dengler Email Chain re: “pending Schedule” (Jan.
13 16, 2020 to March 9, 2020). In late March, meet and confer discussions ended
14 without resolution.

15 The Scheduling Order & Order Re: Pretrial and Trial Procedures (ECF No.
16 114) sets forth the following, non-patent specific dates:

17 Event	Date or Deadline
18 Fact Discovery Cut-Off	February 5, 2021
19 Motion Cut-Off	November 8, 2021 at 8:30 AM
Final Pre-Trial Conference	March 14, 2022 at 8:30 AM
20 Trial	April 12, 2022 at 8:30 AM

21 The Scheduling Order & Order re: Pretrial and Trial Procedures also “adopt[ed]”
22 the remaining dates contained in the Joint Rule 26(f) Report (ECF No. 112). The
23 Parties Joint Rule 26(f) Report (ECF No. 112) sets forth, in relevant part, the
24 following events and deadlines:
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26 Event	Date or Deadline
27 Deadline to Complete Production of 28 Responsive Non-Source Code Technical Discovery described in	March 1, 2019

Event	Date or Deadline
<p>1 Plaintiff's First Set of Requests for 2 Production, served Sept. 13, 2018 and 3 due November 15, 2018</p> <p>4 Deadline to identify Accused Websites 5 that share a common code 6 base/platform and to confer on 7 representative versions of the source 8 code of the Accused Websites</p>	<p>March 1, 2019</p>
<p>9 Date for Defendants to make complete 10 Source Code production (including 11 necessary data structures and 12 configuration files and documents 13 describing the APIs and API 14 commands used by the Accused 15 Devices ... relating to websites that are 16 part of the PornHub Network (and their 17 premium versions) subject to a P.O. 18 being in place</p>	<p>March 11, 2019</p>
<p>19 Date for Defendants (and Plaintiff if 20 applicable) to make complete Source 21 Code production (including 22 necessary data structures and 23 configuration files and documents 24 describing the APIs and API 25 commands used by the Accused 26 Devices ... for the remaining Accused 27 Websites available for inspection, 28 subject to a P.O. being in place</p>	<p>April 22, 2019</p>
<p>Plaintiff to serve Final Infringement Contentions (FICs)</p>	<p>90 days after completion of source code review and production of all necessary source code, data structures and data to understand the operation of the accused devices</p>

Event	Date or Deadline
Defendant to Serve Final Invalidity Contentions	45-days after service of Plaintiff's FICs
Deadline to amend pleadings without leave of Court	July 1, 2019
Plaintiff to serve Final Election of no more than 40 Asserted Claims (from within the set of claims in its Final Infringement Contentions)	14-days after Final Invalidity Contentions
Parties to exchange Proposed Terms for Construction for the 40 elected claims	10-days after Final Election of Asserted Claims
Parties to exchange Preliminary Claim Constructions, and intrinsic and extrinsic support, including experts	One week after exchange of proposed terms for construction of the 40 elected claims
Parties to meet and confer on proposed constructions	One week after above referenced exchange of Preliminary Claim Constructions
Parties to file a Joint Claim Construction and Prehearing Statement identifying: (i) the construction of those terms on which the parties agree; and (ii) each party's proposed construction of the disputed terms; and (iii) parties to identify experts to be used in claim construction and 112 briefing [the P.O. will set forth procedure for objecting]	30 days after exchange of Preliminary Claim Constructions)
Close of Fact Discovery	August 21, 2020
Close of Expert Discovery	February 12, 2021
Hearings on <i>Markman</i> , Rule 12(c) and Summary Judgement related Motions	November 8, 2021

1 MindGeek asserts that many “patent litigation events” are not accounted for in the
2 Scheduling Order, such as “infringement contentions,” and “many of the deadlines
3 ... have passed” as a result of Preservation’s transition to new counsel and the
4 resulting discovery stay from August 2019 to April 2020 (among other things).
5 (Motion, at 1-2; ECF Nos. 176, 194). Accordingly, MindGeek proposes a new
6 schedule “based on the litigation items under the Northern District of California
7 Patent Local Rules,” rules which do account for patent litigation “milestones.”
8 (Motion, at 2).

9 MindGeek further notes that because its source code production has not yet
10 occurred, many of the Rule 26(f) Report’s deadlines that were supposed to occur in
11 2019 were not triggered.¹ (Motion, at 1). Therefore, MindGeek posits that a new
12 case schedule is necessary to help progress this dispute forward on a logical path.
13 MindGeek’s proposed schedule sets forth dates for Preservation to serve
14 infringement contentions with no more than 50 asserted claims; MindGeek to serve
15 invalidity contentions with no more than 110 prior art references; and the Parties to
16 conduct claim construction, among other litigation items.

17 Preservation counters that “[t]he only deadlines that have ‘passed’ are
18 deadlines for MindGeek’s technical non-source code and source code production.”
19 (Opposition, at 3). Accordingly, Preservation argues that there is no “good cause”
20 to enter a new schedule. (*Id.*). The parties may proceed with the schedule
21 negotiated over a year-and-a-half ago (ECF No. 112).

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26 ¹ Pursuant to Special Master’s Scheduling & Procedure Order No. 3, Joint
27 Stipulation re Addendum to Order re Source Code (ECF No. 153-2) (ECF No.
28 205), and Order Granting Joint Stipulation re Addendum to Order re Source Code
(ECF No. 153-2) (ECF No. 206), MindGeek’s source code will be made available
for inspection on July 27, 2020.

1 **III. ANALYSIS**

2 **A. The Special Master May Recommend a Modification to the**
3 **Court’s Schedule, Particularly When Discovery Issues Are**
4 **Implicated**

5 The Scheduling Order & Order Re: Pretrial and Trial Procedures (ECF No.
6 114) sets forth traditional, non-patent related deadlines (*i.e.*, fact discovery cut-off,
7 motion cut-off, FSC, and trial); however, it also “adopts the remaining dates
8 contained in the Joint Rule 26(f) Report (ECF No. 112).” (ECF No. 114, at 12). In
9 other words, the Court previously adopted the parties negotiated, patent-specific
10 deadlines, and incorporated said deadlines into an order of the Court. (ECF No.
11 114). Accordingly, Preservation argues that MindGeek’s Motion, submitted to the
12 Special Master, is an underhanded attempt to modify the case schedule approved
13 by Judge Carter, without seeking Judge Carter’s approval for the modification.
14 (Opposition, at 3-4 [collecting cases]).

15 Pursuant to the Order Appointing Special Master, “[t]he Special Master is
16 appointed to assure and provide cost-effective discovery and to minimize the
17 burden of discovery disputes upon the Court. Any and all discovery motions and
18 other discovery disputes in the above-captioned action shall be decided by the
19 Special Master pursuant to Federal Rule of Civil Procedure 53.” (ECF No. 77, at
20 2). Furthermore, the Special Master has the authority to “prepare, file, and serve
21 other orders and reports and recommendations, as appropriate,” if the orders and
22 reports and recommendations concern party and third-party discovery. (*Id.* at 2-3).

23 Additionally, as MindGeek has noted, the parties have routinely submitted
24 scheduling and procedure documents to the Special Master for his review and
25 approval prior to submitting such documents to Judge Carter for his final order.
26 (Reply, at 1; Special Master’s Report & Recommendation No. 1 (ECF No. 163), at
27 10 [continuing Preservations’ responsive pleading deadline]; Joint Stipulation
28 Regarding Parties’ Request to Stay Discovery (ECF No. 175), at 2 [Special Master

1 approving stay of discovery]; Special Master’s Email to Parties (April 1, 2020)
2 [approving lifting of discovery stay]). Furthermore, the parties previously
3 anticipated submitting a revised case schedule, such as the one at issue in this
4 Motion, to the Special Master for approval. (*See Reply*, at 1-2 [setting forth email
5 communications showing that both parties have sought the Special Master’s
6 approval regarding changes to court ordered deadlines]); R. Dengler Email Chain
7 re: “pending Schedule” (Jan. 16, 2020 to March 9, 2020) (emails regarding
8 proposed schedule with Special Master copied).

9 Accordingly, the Special Master does have the authority to recommend
10 modifications to the Court’s scheduling orders, particularly when the modifications
11 concern the informal and formal exchange of information and discovery generally.
12 *See Fed. R. Civ. Proc. Rule 53(c)(1)* (“[A] master may (A) regulate all
13 proceedings; (B) take all appropriate measures to perform the assigned duties fairly
14 and efficiently”). Of course, the Special Master’s Report & Recommendation
15 must be approved and adopted by the Court; the Court has the final “say” on
16 whether to accept any modifications to the Scheduling Order & Order Re: Pretrial
17 and Trial Procedures (ECF No. 114). *See Fed. R. Civ. Proc. Rule 53(f)(1)* (Court
18 “may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the
19 master with instructions.”). Accordingly, the Court, after consideration of the
20 Special Master’s Report & Recommendation, will make the ultimate decision on
21 whether to modify the case schedule.

22 **B. Relevant Rules of Court re: Modification of Case Schedule**

23 “A schedule may be modified only for good cause and with the judge’s
24 consent.” Fed. R. Civ. P. 16(b)(4). Judge Carter’s Standing Order further provides
25 that “any request . . . to continue the date of any matter before this Court must be
26 supported by a detailed explanation of the grounds for the requested continuance or
27 extension of time. Without compelling factual support, requests to continue dates
28 set by this Court will not be approved.” ECF No. 11, § 3. The “good cause”

1 standard primarily considers the diligence of the party seeking the amendment.
2 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992).

3 **i. Good Cause Exists to Modify the Case Schedule**

4 Preservation asserts that MindGeek cannot possibly show diligence because
5 “the entire factual basis for [MindGeek’s] Motion is that it has not complied with
6 the Court-ordered deadlines to produce technical documents and source code more
7 than a year ago, from which other deadlines trigger. (Opposition, at 5). However,
8 this argument over-simplifies the factual history of this dispute. The deadlines for
9 MindGeek to produce non-source code technical discovery [March 1, 2019] and to
10 make complete Source Code production [March 11, 2019] were contingent on a
11 Protective Order being in place. (Reply, at 2). The Protective Order was not in
12 place until May 21, 2019, months after the parties’ schedule called for technical
13 and source code production. (*Id.* at 3). Accordingly, the Special Master, in Special
14 Master’s Report & Recommendation No. 1, ordered MindGeek to make its
15 production on or before June 17, 2019. (ECF No. 163, at 9; *see also* Hr’g Tr. (June
16 30, 2020), at 7:2-12).

17 After MindGeek made its productions in June 2019, Preservation disputed the
18 completeness of the technical production and submitted the issue to the Special
19 Master on August 6, 2019. (*See* Plaintiff’s Fourth Motion to Compel Defendants
20 to Produce Technical Discovery (Aug. 6, 2019); Hr’g Tr. (June 30, 2020), at 7:13-
21 18). The Special Master set hearing on Preservation’s motion (as well as other
22 motions) for August 28-29, 2019 in Washington, D.C. (*See* ECF No. 171, at 2).
23 However, prior to the August 28-29 hearing, the Parties stipulated to a stay of
24 discovery; the Special Master and the Court approved and entered the stipulation
25 staying discovery as an order of the Court on August 21, 2019. (ECF Nos. 175 and
26 176.) That stay was not lifted until April 3, 2020. (ECF. No. 194; Hr’g Tr. (June
27 30, 2020), at 7:19-25). Less than two months later, and after extensive meet and
28 confer efforts with Preservation, MindGeek filed its Motion to Enter Proposed

1 Schedule. Under these circumstances, the Special Master does not find that
2 MindGeek unreasonably delayed bringing its Motion, *i.e.*, that it was not diligent.
3 *See Johnson*, 975 F.2d at 608.

4 Given the discovery stay, Preservation’s transition to new counsel, and the
5 COVID-19 pandemic, there is good cause to reexamine and modify case deadlines
6 entered over a year-and-a-half ago. (Hr’g Tr. (June 30, 2020), at 8:1-4 (“So, in
7 short, about 15 months elapsed from the time of that Rule 16 conference and a
8 Rule 26(f) report with a schedule that went in.”). Indeed, Preservation must have
9 believed that modifications to the case schedule (ECF Nos. 112 and 114) were
10 appropriate because Preservation and MindGeek exchanged many edits to a new,
11 proposed case schedule between January 2020 and March 2020. (Dengler Email
12 Chain re: “pending Schedule” (Jan. 16, 2020 to March 9, 2020)).

13 The new schedule, once entered, shall not be “cavalierly disregarded by
14 counsel without peril.” *Johnson*, 975 F.2d at 610. Indeed, as recognized by the
15 Court at the June 24, 2020 status conference, this case has stalled, and the parties
16 must make efforts to proceed at a more deliberate pace.

17 **C. Revised Case Schedule**

18 **i. Stipulated Dates and Deadlines**

19 At the June 30, 2020 hearing before the Special Master, the Parties
20 stipulated to the following:

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Event	Old Date	New Date
Date for MindGeek to make Source Code available for inspection by Preservation	March 11, 2019 April 22, 2019	July 27, 2020
Plaintiff to serve Final Infringement Contentions	90 days after completion of source code review and production of all necessary source code,	90 days after MindGeek makes its Source Code available for inspection at Venable’s Wilmington,

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Event	Old Date	New Date
	data structures and data to understand the operation of the accused devices	DE office, subject to COVID-19 pandemic conditions
Discovery Cut-Off	February 2, 2021	July 2, 2021

(See Hr’g Tr. (June 30, 2020), at 5:15-6:14; 12:21-13:4; 14:20-15:3; 18:5-10; 20:9-15; ECF Nos. 205 & 206).

ii. Dates and Deadlines in Dispute

MindGeek argues that without a revised case schedule that includes important patent litigation deadlines, Preservation will have unlimited time to review MindGeek’s technical production and source code without any obligation to provide MindGeek infringement contentions. (Motion to Enter Schedule, at 3). It is true that under ECF No. 112, there is no hard deadline for Preservation to complete its source code review, which is the “trigger point” for Preservation to serve its infringement contentions under the old schedule. MindGeek argues “It is unduly burdensome for [it] to continue to prepare invalidity contentions on nearly 300 claims across the 11 asserted patents, all while Preservation has MindGeek’s substantial technical information in hand—but with no deadline for infringement contentions. (Motion to Enter Schedule, at 3).

Preservation counters that there is no reason to upend the current Scheduling Order because there are no deadlines that cannot be met. (Opposition to Motion to Enter Schedule, at 5). In effect, Preservation argues that MindGeek now attempts to have a schedule that stops at the *Markman* hearing and to have other deadlines, including expert discovery and dispositive motions, be vacated and determined after the unscheduled *Markman*. (Opposition, at 6). Preservation also argues that “MindGeek is trying to renege on [its] agreement” that Preservation would narrow its claims *after* its received MindGeek’s final invalidity contentions. (Hr’g Tr.

1 (June 30, 2020), at 13:14-25). In short, Preservation argues that MindGeek cannot
2 back-peddle from a schedule it previously agreed to and thought was acceptable.

3 While the “domino-style” schedule (*i.e.*, events triggered by the completion
4 of other events) negotiated by the parties over a year-and-a-half ago may have been
5 workable then, the Special Master finds that this case will benefit by the imposition
6 of clearer, more definite deadlines. The Special Master, in crafting the below
7 schedule, considered Preservation’s claim that MindGeek’s proposed schedule
8 (Motion, at Ex. A) is one-sided, self-serving, and thus prejudicial to Preservation.
9 (Opposition, at 7). In drafting the below schedule, the Special Master also
10 reviewed the parties’ meet and confer correspondence relating to a new case
11 schedule. (*See, e.g.*, O. Elkhunovich Email to R. Dengler (02/14/2020)). The
12 Special Master further considered ECF Nos. 112 and 114, the discovery stay,
13 Preservation’s transition to new counsel, and the impact of COVID-19 on this
14 case’s progression to trial.

15 The Special Master recommends entry of the following Scheduling Order:

Event or Deadline	Date	Authority or ECF No.
For email discovery, parties to exchange search terms for disclosed custodians	4 weeks from agreement on number of custodians, but no later than August 10, 2020	ECF No. 121-1, ¶¶10-11
Once parties agree on search terms and custodians, the producing party shall produce emails within four weeks	4 weeks from search terms and custodians’ agreements	ECF No. 121-1, ¶10
Date for MindGeek to make Source Code available for inspection at Venable in Wilmington, DE, pursuant to Source Code Inspection	7/27/2020	ECF Nos. 205 & 206

Event or Deadline	Date	Authority or ECF No.
Order and COVID-19 conditions		
Deadline for Preservation to make its Disclosure of 50 Asserted Claims and Infringement Contentions and L.R. 3-2 ² document production	10/26/2020: 90 days after MindGeek makes its Source Code available for inspection at Venable’s Wilmington, DE office, subject to COVID-19 pandemic conditions	Hrg. Tr. (June 30, 2020), at 12:21-13:4; 18:5-10.
Deadline for MindGeek to serve Invalidity Contentions ³ and L.R. 3-4 document production ⁴	12/10/2020: 45 days after deadline for PT to make its Disclosure of 50 Asserted Claims and Infringement Contentions and L.R. 3-2 document production	L.R. 3-3 and 3-4
Deadline to amend pleadings	01/08/2021	N/A

² Any reference to “L.R.” means the United States District Court, Northern District of California Patent Local Rules (Last Revised January 17, 2017).

³ Limited to no more than 110 prior art references upon Preservation’s reduction to 50 asserted claims.

⁴ During the June 30, 2020 hearing, Preservation argued that “there’s no reason to depart from what the parties negotiated” in ECF No. 112 regarding when Preservation’s disclosure of Asserted Claims and Infringement Contentions shall be made—*after* MindGeek serves its invalidity contentions. (Hr’g Tr. (June 30, 2020), at 13:14-25; ECF No. 112, at 13). However, this position is at odds with the progress made during the parties’ meet and confer efforts in February and March 2020, where Preservation appeared receptive to narrowing and serving its Asserted Claims and Infringement Contentions prior to MindGeek narrowing and serving its Infringement Contentions; this is the procedure outlined in the Northern District of California’s Patent Local Rules. (*See* O. Elkhunovich Email to R. Dengler (Feb. 14, 2020) (attaching redline edits to proposed schedule); R. Dengler Email to O. Elkhunovich (March 9, 2020) (describing proposed compromises to the proposed schedule). Preservation did not make any argument as to why it was back-peddling from the progress made during the meet and confer efforts.

Event or Deadline	Date	Authority or ECF No.
Parties to exchange Proposed Terms for Construction	01/15/2021	L.R. 4-1
Parties to exchange Preliminary Claim Constructions, and intrinsic and extrinsic support, including experts; and to meet and confer on proposed constructions	02/05/2021	L.R. 4-2
Parties to file Joint Claim Construction and Prehearing Statement	02/19/2021	L.R. 4-3 <i>{Note: 8 days added}</i>
Completion of Claim Construction discovery	03/19/2021	L.R. 4-4
Preservation to file and serve Opening Claim Construction Brief	05/03/2021	L.R. 4-5(a)
MindGeek to file and serve Responsive Claim Construction Brief	05/17/2021	L.R. 4-5(b)
Preservation to file and serve Reply Claim Construction Brief	05/24/2021	L.R. 4-5(c)
Close of Fact Discovery, including source code inspection	07/02/2021	Hr'g. Tr. (June 30, 2020), at 20:9-15
Expert Reports (where party bears burden of proof on an issue)	08/23/2021	N/A

Event or Deadline	Date	Authority or ECF No.
Rebuttal Expert Reports (Where parties do not bear burden of proof)	9/20/2021	N/A
Close of Expert Discovery	10/18/2021	N/A
<i>Markman</i> Hearing	11/08/2021	Reply, at 4:15-17; Subject to Court's availability
Motion Cutoff (Opening dispositive and <i>Daubert</i> Motions)	11/08/2021	ECF No. 114
Parties to file Oppositions to Dispositive and <i>Daubert</i> Motions	12/08/2021	C.D. L.R. 7-9 (modified)
Parties to file Replies to Dispositive and <i>Daubert</i> Motions	12/22/2021	C.D. L.R. 7-10
Hearing on Dispositive and <i>Daubert</i> Motions	01/05/2022	Subject to Court's availability
Final Pretrial Conference	03/14/2022	ECF No. 114
Trial (subject to Court's availability)	04/12/2022	ECF No. 114

IT IS SO RECOMMENDED

Dated: July 13, 2020

/s/ Stephen G. Larson

 Hon. Stephen G. Larson (Ret.)
 Special Master