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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 v.

16 MINDGEEK USA, INC., ET AL.

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

) Honorable David O. Carter  
Courtroom 9D

) **SPECIAL MASTER'S REPORT AND**  
) **RECOMMENDATION NO. 4 RE:**  
) **REQUEST TO MODIFY**  
) **SCHEDULING ORDER**

) Jury Trial Demanded

1           **I. INTRODUCTION**

2           Plaintiff Preservation Technologies LLC (“Preservation”) seeks an amendment  
3 to the case schedule that would require Defendants MindGeek USA, Inc. and its  
4 affiliates (“MindGeek”) to produce a Rule 30(b)(6) witness to testify about source  
5 code topics *before* Preservation must narrow its infringement theories and disclose its  
6 infringement contentions.

7           Preservation argues that good cause supports altering the schedule because: (1)  
8 Forgoing a 30(b)(6) deposition at this stage would prejudice the development of  
9 Preservation’s disclosures; and (2) Preservation diligently sought an earlier deposition  
10 but could not secure it because of various discovery difficulties. In opposition,  
11 MindGeek contends that: (1) Preservation already has the necessary material for  
12 developing its infringement contentions; (2) Preservation will suffer no prejudice from  
13 adhering to the current schedule; and (3) MindGeek cannot prepare its 30(b)(6)  
14 witness on Preservation’s proposed timeline.

15           After reviewing the parties’ letter briefs and supporting papers, and after  
16 hearing oral argument on October 27, 2020, the Special Master finds as follows.

17           **II. FACTUAL BACKGROUND**

18           Preservation sued MindGeek for patent infringement. Under the Revised  
19 Scheduling Order recommended by the Special Master and adopted by the Court,  
20 MindGeek was due to produce its source code on July 27, 2020, and Preservation was  
21 due to set forth its infringement contentions by “10/26/2020: 90 days after MindGeek  
22 makes its Source Code available for inspection[.]” (ECF No. 207, PageID 5878–79.)  
23 The schedule set no deadline for Rule 30(b)(6) depositions.

24           MindGeek produced its source code on the agreed date. That data production  
25 comprised 2.4 terabytes of data in 7.3 million files spread over 1.1 million folders.  
26 (Bhatia Decl. ¶ 8.) On August 25, 2020, Preservation served MindGeek with a 105-  
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1 topic deposition notice under Rule 30(b)(6). Objecting to the scope of the topics,  
2 MindGeek filed a motion for a protective order against the 30(b)(6) deposition notice,  
3 which the Special Master recommended granting in part and denying in part on  
4 October 19, 2020. (ECF No. 213.)

5 Preservation requested that MindGeek agree to a mutual two-week extension  
6 for infringement and invalidity contentions to allow time for Preservation to take the  
7 source code deposition (the 30(b)(6) deposition) in advance of the deadline to disclose  
8 its elected claims and infringement contentions. The parties stipulated to a one week  
9 extension, making Preservation's infringement contentions due on November 2, 2020  
10 (and extending MindGeek's invalidity contentions by one week). MindGeek did not  
11 agree, however, to make its corporate designee available for a deposition before the  
12 deadline. (*See* Preservation Ltr. Ex. A.)

13 Citing paragraph 9 of the Order Appointing Special Master, (ECF No. 77),  
14 Preservation requested expedited review and resolution of the dispute by telephonic  
15 hearing. The parties submitted letter briefs on October 26, 2020, and the Special  
16 Master heard oral argument by telephone on October 27, 2020.

17 At oral argument, MindGeek noted that its corporate representative would be  
18 unavailable from November 9, 2020 through November 23, 2020 due to a vacation.  
19 (Hr'g Tr. (10/17/20), at 6:23–24.)

20 In light of Preservation's impending deadline (November 2, 2020) to produce  
21 its infringement contentions, the Special Master issued a draft Report and  
22 Recommendation on October 31, 2020 so that the parties received notice of the  
23 Special Master's recommendation. After reviewing the draft Report and  
24 Recommendation, MindGeek clarified that its witness would be available on  
25 November 12 and 13, 2020, and further requested that the Special Master attend the  
26 deposition. (*See* ECF No. 77, § I, ¶ 4.) MindGeek also asked for a one week  
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1 extension to serve its invalidity contentions (and accompanying document production)  
2 because of the December holidays.

3 **III. DISCUSSION**

4 **A. Standard of Review**

5 Under Federal Rule of Civil Procedure 16, the Court may modify its scheduling  
6 order only upon “good cause” shown and with the Judge’s consent. Fed. R. Civ. P  
7 16(b)(4). Judge Carter’s Standing Order further provides that “any request . . . to  
8 continue the date of any matter before this Court must be supported by a detailed  
9 explanation of the grounds for the requested continuance or extension of time.  
10 Without compelling factual support, requests to continue dates set by this Court will  
11 not be approved.” (ECF No. 11, § 3.)

12 Courts in the Ninth Circuit employ a three-factor test when determining  
13 whether “good cause” supports modifying the pretrial schedule. *Johnson v. Mammoth*  
14 *Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992); *Grant v. United States*, 2011 WL  
15 5554878, at \*4 (E.D. Cal. Nov. 15, 2011), adopted, 2012 WL 218959, at \*1 (E.D. Cal.  
16 Jan. 23, 2012). Under that inquiry:

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18 [T]o demonstrate diligence under Rule 16’s “good cause” standard, the movant  
19 may be required to show the following: (1) that [it] was diligent in assisting the  
20 Court in creating a workable Rule 16 order; (2) that [its] noncompliance with a  
21 Rule 16 deadline occurred or will occur, notwithstanding [its] diligent efforts to  
22 comply, because of the development of matters which could not have been  
23 reasonably foreseen or anticipated at the time of the Rule 16 scheduling  
24 conference; and (3) that [it] was diligent in seeking amendment of the Rule 16  
25 order, once it became apparent that [it] could not comply with the order.

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28 *Grant*, 2011 WL 5554878, at \*4 (quoting *Jackson v. Laureate, Inc.*, 186 F.R.D. 605,  
608 (E.D. Cal. 1999)) (other citation omitted).

1 Above all, the Court “primarily considers the diligence of the party seeking the  
2 amendment.” *Johnson*, 975 F.2d at 608. By the same token, lack of diligence “offers  
3 no reason for a grant of relief.” *Id.*; *C.F. ex rel. Farnan v. Capistrano Unified Sch.*  
4 *Dist.*, 654 F.3d 975, 984 (9th Cir. 2011). The burden falls on the movant to establish  
5 good cause under Rule 16. *Morgal v. Maricopa Cnty. Bd. of Sup’rs*, 284 F.R.D. 452,  
6 460 (D. Ariz. 2012).

7 **B. Preservation’s Position**

8 Preservation argues that good cause justifies amending the case schedule  
9 because requiring it to develop its infringement contentions without the benefit of a  
10 Rule 30(b)(6) deposition would force it to litigate “in the dark.” (Preservation Ltr. at  
11 1.) Preservation also contends that good cause supports modifying the schedule for  
12 three reasons: (1) The large source code production compelled its expert to undertake  
13 a laborious review; (2) technical problems in the code production hindered progress;  
14 and (3) delays stemming from discovery disputes stymied Preservation’s source code  
15 review.

16 Preservation also points out that “as soon” as it identified problems with  
17 MindGeek’s source code production, it noticed a Rule 30(b)(6) deposition that would  
18 aid its construction of infringement contentions. (Preservation Ltr. at 2.)

19 **C. MindGeek’s Position**

20 MindGeek marshals three primary arguments against modifying the schedule.  
21 First, MindGeek contends that Preservation already has all the information needed to  
22 develop infringement contentions because it has all of MindGeek’s source code.  
23 Relatedly, MindGeek argues that precedent establishes Preservation is not entitled to a  
24 30(b)(6) deposition because it has not “crystalized its theories of infringement.”  
25 (MindGeek Ltr. at 2 (citing *Finjan, Inc. v. SonicWall, Inc.*, No. 17CV04467BLFVKD,  
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1 2019 WL 2077849 (N.D. Cal. May 10, 2019); *Dig. Reg. of Texas, LLC v. Adobe Sys.*  
2 *Inc.*, No. CV 12-01971-CW (KAW), 2013 WL 3361241 (N.D. Cal. July 3, 2013)).

3 Second, MindGeek maintains that Preservation’s unnecessary delay in taking  
4 the 30(b)(6) deposition demonstrates that Preservation’s alleged prejudice is  
5 “feigned.” Specifically, MindGeek notes that it produced its source code on July 27,  
6 2020, and that Preservation has been in possession of MindGeek’s source code for  
7 over 90 days. (MindGeek Ltr. at 2–3.) Indeed, MindGeek notes that Preservation’s  
8 expert “inspected source code on 44 of the available 90 days that source code has been  
9 made available.” (Hr’g Tr. (10/27/20), at 14). MindGeek further argues that  
10 Preservation knew of its claims election/infringement contentions deadline for  
11 months, and waited until the last minute to seek an extension. (*Id.*)

12 Last, MindGeek contends there is simply not enough time prior to the  
13 Preservation’s claims election/infringement contentions deadline to prepare its  
14 30(b)(6) deponent. (MindGeek Ltr. at 3.)

15 **D. Analysis**

16 1. Preservation’s Diligence in Seeking an Amended Schedule

17 *1. Assistance in creating schedule.* The parties do not dispute Preservation’s  
18 assistance in creating the current case scheduling order, and the Special Master  
19 observed no lack of diligence by Preservation in creating the operative Revised  
20 Scheduling Order. (ECF Nos. 207, 208.) Because Preservation discharged its duty to  
21 assist the Court in fashioning a Rule 16 order, this factor favors modifying the  
22 schedule. *See Jackson*, 186 F.R.D. at 607 (“Central to this required showing of  
23 diligence is whether the movant discharged her obligation under Rule 16 to  
24 collaborate with the district court in managing the case.”).

25 *2. Diligent efforts to comply with the scheduling order.* Preservation’s request  
26 to amend the schedule stems from “the development of matters which could not have  
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1 been reasonably foreseen or anticipated at the time of the Rule 16 scheduling  
2 conference[.]” *Johnson*, 975 F.2d at 609. In particular, when the Special Master  
3 recommended the Revised Scheduling Order on July 21, 2020, MindGeek still had not  
4 produced its source code. (ECF No. 207, PageID 5876 (setting July 27, 2020 as the  
5 deadline for source code production).) That data production, however, proved larger  
6 than expected. Mr. Jay Bhatia, Preservation’s technical consultant, explains that in his  
7 “12 years’ experience of litigation consulting and for more than 60 source code review  
8 projects, [he has] never encountered a source code production of this size.” (Bhatia  
9 Decl. ¶ 9.) Nor did the parties anticipate the technical problems that hindered  
10 Preservation’s examination of the source code. As a result of those difficulties,  
11 Preservation determined that a 30(b)(6) deposition inquiring into aspects of the source  
12 code was necessary for it to develop its infringement contentions.

13 Preservation reasonably proceeded under the operative scheduling order until it  
14 became evident that additional discovery would aid it in developing its infringement  
15 contentions. While it is true that Preservation could have reviewed source code more  
16 often during the 90 day period, this fact is countered by the necessary reproductions of  
17 source code and technical issues Preservation encountered when attempting to review  
18 MindGeek’s source code. (*See* Preservation Ltr. at 2.) Thus, Preservation’s diligent  
19 efforts to comply with the schedule thus weigh in favor of granting the requested  
20 amendment.

21 *3. Diligent efforts to amend the scheduling order.* Though Preservation lodged  
22 this request to amend the schedule only ten days before its infringement contentions  
23 came due, its efforts to obtain deposition testimony about MindGeek’s source code  
24 began with the Notice of Deposition on August 25, 2020. That notice launched a  
25 discovery dispute that reached resolution only when the time for appealing the Special  
26 Master’s partial protective order passed on October 26, 2020. Because Preservation  
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1 could not reasonably seek an order setting a date for the 30(b)(6) deposition while a  
2 motion for protective order remained pending, Preservation displayed no lack of  
3 diligence in seeking an order scheduling that deposition shortly after the Special  
4 Master issued the recommended disposition on the protective order. Preservation thus  
5 demonstrated diligent efforts to secure a revised schedule under the circumstances.  
6 This factor thus favors granting the schedule modification.

7 \* \* \*

8 In sum, each factor favors finding that Preservation acted with reasonable  
9 diligence under *Johnson* and thus can establish good cause under Rule 16.

10 2. Prejudice to MindGeek

11 Because Preservation successfully shows reasonable diligence, the Court should  
12 also consider the “existence or degree of prejudice” to MindGeek, as those factors  
13 “might supply additional reasons to deny a motion[.]” to modify the schedule.  
14 *Johnson*, 975 F.2d at 609. To that end, MindGeek contends that it is “impractical and  
15 unfair to force a deposition in a few days.” (MindGeek Ltr. at 3.) MindGeek argues  
16 that requiring a 30(b)(6) deposition to take place at this juncture would leave it  
17 inadequate time to prepare its witness(es). Because its witness(es) live in Canada,  
18 MindGeek contends that preparing those witnesses and setting a date for the  
19 deposition is unduly burdensome, especially in light of COVID-19 travel and  
20 quarantine restrictions. (*Id.*)

21 That said, Rule 30(b)(6) does not set forth how much notice a party must give  
22 an organization prior to the deposition. *See Hart v. United States*, 772 F.2d 285, 286  
23 (6th Cir. 1985) (“The rules do not require any particular number of days, so that  
24 reasonableness may depend on the particular circumstances.”). Instead, courts have  
25 taken varying approaches to what length of time is considered “reasonable.” *See, e.g.,*  
26 *Paige v. Commissioner*, 248 F.R.D. 272, 275 (C.D. Cal. Jan.18, 2008) (finding that



1 fourteen days' notice was reasonable); *Jones v. United States*, 720 F. Supp. 355, 366  
2 (S.D.N.Y. 1989) (holding that eight days' notice was reasonable); *In re Sulfuric Acid*  
3 *Antitrust Litig.*, 231 F.R.D. 320, 327 (N.D. Ill. 2005) (“[T]en business days’ notice  
4 would seem to be reasonable”).

5 Here, MindGeek received the Notice of Deposition on August 25, 2020.  
6 During the parties’ September 3, 2020 meet and confer, Preservation agreed to limit  
7 the deposition to ten specified topics. MindGeek then sought a protective order  
8 against those ten topics on September 15, 2020, which the undersigned recommended  
9 granting in part on October 19, 2020. Assuming that MindGeek has prudently made  
10 some preparation for the 30(b)(6) deposition over the past two months despite seeking  
11 a protective order, MindGeek has had adequate time to prepare. *See Mem’l Hospice,*  
12 *Inc. v. Norris*, No. CIV.A. 208CV048-B-A, 2008 WL 4844758, at \*1 (N.D. Miss.  
13 Nov. 5, 2008) (one week’s notice held reasonable); *P.S. v. Farm, Inc.*, No. 07-CV-  
14 2210-JWL, 2009 WL 483236, at \*4 (D. Kan. Feb. 24, 2009) (five days’ notice held  
15 reasonable). Besides, MindGeek can use the time from the issuance of this  
16 recommendation to further prepare its witnesses. Because MindGeek cannot show  
17 that preparing its witnesses would be unreasonable, its argument about prejudice fails  
18 to persuade.

19 Furthermore, Preservation’s offer to conduct the 30(b)(6) deposition remotely  
20 assuages MindGeek’s travel/COVID-19 concerns. (Preservation Ltr. at 3  
21 (“Preservation also agrees to take this deposition remotely by videoconference, further  
22 alleviating any travel-related delay issues.”).)

### 23 3. Timing of Infringement Contentions and Rule 30(b)(6) Deposition

24 Citing *Finjan, Inc. v. SonicWall, Inc.* and *Digital Registry of Texas, LLC v.*  
25 *Adobe Systems Inc.*, MindGeek further contends that Preservation is not entitled to a  
26 30(b)(6) deposition because it has not yet disclosed “its theories of infringement.”  
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1 (MindGeek Ltr. at 2.) In *Finjan, Inc.*, the court denied Finjan’s oral motion for a Rule  
2 30(b)(6) deposition before infringement contentions came due, noting that “[t]he  
3 Court is not persuaded [] Finjan should be allowed to depose a corporate witness  
4 before it has crystallized its infringement theories.” 2019 WL 2077849, at \*16. The  
5 *Adobe Systems* court denied a similar request in a summary manner. 2013 WL  
6 3361241, at \*6.

7 As Preservation explained at oral argument, however, the *Finjan* and *Adobe*  
8 *Systems* cases both proceeded under the Northern District of California Patent Local  
9 Rules. (See Hr’g Tr. (10/27/20), at 10–11.) A party claiming patent infringement in  
10 the Northern District must serve preliminary infringement contentions within ten days  
11 of the initial case management conference. See N.D. Cal. Patent L.R. 3-1. Among  
12 other things, those contentions must specify each claim of each patent that is allegedly  
13 infringed, each product that allegedly infringes, and the location in the product where  
14 each element of each asserted claim is found. See *id.* Later, the plaintiff may amend  
15 its preliminary contentions in light of discovery. See N.D. Cal. Patent L.R. 3-6.

16 This case, however, is not strictly proceeding under the Northern District Patent  
17 Local Rules.<sup>1</sup> As a result, Preservation was not required to make preliminary  
18 infringement contentions. Preservation’s upcoming infringement disclosures thus  
19 more closely resemble final infringement contentions under the Northern District  
20 rules, which appear to be generally informed by discovery. (See Hr’g Tr. (10/27/20),  
21 at 11.) The two case cited by MindGeek are thus distinguishable because of the  
22 different procedures in the Northern District of California.

23 \* \* \*

24 In sum, the Special Master recommends finding that Preservation has shown  
25 good cause to modify the schedule and that MindGeek fails to demonstrate

26 <sup>1</sup> It is only true that the Northern District Patent Local Rules served as a guide in  
27 creating a workable case schedule.

1 Preservation's request will cause prejudice. Further, no applicable authority prevents  
2 Preservation from taking a 30(b)(6) deposition before disclosing its infringement  
3 contentions. Accordingly, the Special Master recommends modifying the case  
4 schedule so that Preservation may take the 30(b)(6) deposition before its infringement  
5 contentions come due.

6 At MindGeek's request under paragraph 4 of the Order Appointing Special  
7 Master, (ECF No. 77), the Special Master will attend the Rule 30(b)(6) deposition.  
8 That deposition will take place on November 13, 2020, given MindGeek's  
9 clarification about its witness's availability and the Special Master's schedule.  
10 Preservation shall then disclose its infringement contentions no later than November  
11 20, 2020.

12 **E. Good Cause Supports Extending the Deadline for MindGeek's**  
13 **Invalidity Contentions**

14 In its request for clarification about the draft of this Report and  
15 Recommendation, MindGeek requested a one week extension of its deadline for  
16 serving its invalidity contentions and accompanying document production. Since  
17 those disclosures would otherwise come due on January 4, 2021 (*see* ECF No. 207,  
18 PageID 5878 (setting date for invalidity contentions as 45 days after Preservation's  
19 infringement contentions)), MindGeek asks for the extension to accommodate its  
20 schedule around the December holidays.

21 The Special Master recommends finding that MindGeek has demonstrated good  
22 cause supporting a one week extension, making MindGeek's invalidity contentions  
23 and document production due on January 11, 2021. *See United States v. Bd. of Cnty.*  
24 *Com'rs of Cnty. of Dona Ana*, Case No. 08-0501JB/WPL, 2010 WL 965607, at \*4  
25 (D.N.M. Feb. 18, 2010) (finding that the difficulty of meeting a filing deadline during  
26 the December holidays is "good cause" for an extension).

1 By this recommendation, the Special Master is not altering and is not finding  
2 good cause to alter any other dates in the case schedule, including the January 15,  
3 2021 exchange of proposed terms for construction.


4 **IV. CONCLUSION**

5 The Special Master recommends GRANTING Preservation's request to modify  
6 the case schedule so that it may take a Rule 30(b)(6) deposition of MindGeek's  
7 corporate representative before it must disclose its infringement contentions. That  
8 Rule 30(b)(6) deposition will take place on November 13, 2020 with the Special  
9 Master in attendance. Preservation shall then disclose its infringement contentions by  
10 November 20, 2020.

11 The Special Master further recommends GRANTING MindGeek's request for a  
12 one-week extension for filing its invalidity contentions. MindGeek shall serve its  
13 invalidity contentions (and accompanying documents) no later than January 11, 2021.

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15 **IT IS SO RECOMMENDED**

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17 Date: November 2, 2020

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