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 9 UNITED STATES DISTRICT COURT
 10 DISTRICT OF ARIZONA

11 JENNA MASSOLI p/k/a JENNA)
 JAMESON,)
 12) Plaintiff,)
 13 vs.)
 14 "REGAN MEDIA," and JUDITH)
 REGAN, an individual,)
 15) Defendants.)
 16)

No. CV 05-0854 PHX EHC

**MEMORANDUM IN SUPPORT
 OF REGAN MEDIA'S SECOND
 MOTION TO COMPEL AND
 REQUEST FOR SANCTIONS
 (ORAL ARGUMENT
 REQUESTED)**

17 REGAN MEDIA, INC., a New York)
 corporation, and JUDITH REGAN, an)
 18 individual,)
 19 Defendants/Counterclaimants,)
 20 vs.)
 21 JENNA MASSOLI p/k/a JENNA)
 JAMESON, an individual,)
 22) Plaintiff/Counterdefendant,)
 23 and)
 24 JAY GRDINA, an individual, and)
 25 DOLCE AMORE, INC., a Colorado)
 corporation,)
 26) Counterdefendants.)
 27)

(Assigned to the Honorable
 Earl H. Carroll)

1 Defendant/Counterclaimant Regan Media, Inc. (“Regan Media”) filed its
2 first Motion to Compel when Plaintiff/Counterdefendants Jenna Massoli p/k/a Jenna
3 Jameson, Jay Grdina and Dolce Amore Inc. (collectively, “Counterdefendants”) failed to
4 offer any response at all to Regan Media’s First Request for Production of Documents.
5 Counterdefendants offered no real opposition to that Motion to Compel, “confessing” that
6 they failed to respond and representing to the Court and Regan Media that all responsive
7 documents would be produced by February 7, 2006, a week in advance of the scheduled
8 depositions of Jameson and Grdina. Contrary to those promises, Counterdefendants failed
9 to produce anything on February 7. On February 9, after repeated calls from counsel for
10 Regan Media, Counterdefendants finally served a written response to Regan Media’s
11 Request for Production, but only a handful of documents. As a result, Regan Media has
12 been obliged to postpone the Jameson and Grdina depositions yet again and seek the
13 Court’s intervention to obtain relevant documents. Counterdefendants have already
14 agreed to pay Regan Media’s attorneys’ fees in connection with the first Motion to
15 Compel; this time, more severe sanctions should be imposed.

20 **Pertinent Background**

21 On November 4, 2005, Regan Media first noticed the depositions of Jenna
22 Jameson, Jay Grdina and Dolce Amore, Inc. for the week of January 5, 2006, giving
23 Counterdefendants over two months’ notice of the proposed deposition dates. Also on
24 November 4, Regan Media served its First Request for Production of Documents and First
25 Set of Interrogatories. [See Defendant/Counterclaimant Regan Media’s First Request for
26 Production of Documents from Counterdefendants, attached as Exhibit A.] On December
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1 7, 2005, Counterdefendants served a response¹ to Regan Media's Interrogatories (*see*
2 Counterdefendants' Responses to Regan Media's First Set of Interrogatories, attached as
3 Exhibit B), but no response to Regan Media's Request for Production.
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5 By letter dated December 9, 2005, Regan Media agreed to
6 Counterdefendants' request for an extension to respond to Regan Media's document
7 requests until December 12. [*See* December 9, 2005 letter from David J. Bodney to Roger
8 William Hall, attached as Exhibit C.] To accommodate Counterdefendants' business
9 commitments, Regan Media agreed to reschedule the depositions for a date later in
10 January or February, proposing January 31 and February 2, 2006. [*See id.*] The following
11 week, Counterdefendants indicated that the proposed dates were inconvenient and
12 requested new dates for the depositions. By e-mail dated December 14, 2005, the parties
13 agreed -- again, two months in advance -- to schedule the depositions of Jenna Jameson
14 and Jay Grdina for February 14 and 16, 2006. [*See* December 14, 2005 e-mail from David
15 Bodney to Roger Hall, attached as Exhibit D.] At the time, Regan Media believed it
16 would have Counterdefendants' documents in time to prepare for the depositions.
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20 After several fruitless attempts to secure Counterdefendants' production of
21 documents in December, Regan Media filed a Motion to Compel² on January 5, 2006. On
22 January 23, 2006, Counterdefendants filed a Response to the Motion to Compel, admitting
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24 ¹ Counterdefendants' answers to Regan Media's First Set of Interrogatories were
25 not "signed by the person making them," as required by Rule 33(b)(2). By letter dated
26 December 9, 2005, Regan Media requested that Counterdefendants obtain the signatures
of the individuals making the answers (*see* Ex. B), but Counterdefendants have not
provided them. Regan Media requests that the Court order Counterdefendants to provide
these signatures.

27 ² Regan Media's first Motion to Compel has been fully briefed and is pending
before the Court.

1 . . . if a party, in response to a request for inspection submitted under Rule
2 34, fails to respond that inspection will be permitted as requested or fails to
3 permit inspection as requested, the discovering party may move for . . . an
order compelling inspection in accordance with the request.

4 Fed.R.Civ.P. 37(a)(2)(B). Counterdefendants have refused to produce relevant, requested
5 documents. For the reasons below, and pursuant to Rule 37 and the Court's inherent
6 power, an order compelling production and sanctioning Counterdefendants is justified.
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8 **A. Counterdefendants' Production is Deficient.**

9 Counterdefendants' production of documents in response to Regan Media's
10 First Request for Production can be summarized as follows: (a) Articles of Incorporation
11 for Dolce Amore, Inc.; (b) Dolce Amore's federal tax returns for 2002 and 2003; and (c)
12 approximately 30 e-mail messages.³ Only ten of the e-mails produced are responsive to
13 any of Regan Media's Requests for Production. [See Statement of Moving Counsel at 2.]
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15 Although requested, Counterdefendants produced no records relating to the
16 \$150,000 payment Dolce Amore received from A&E at issue in this lawsuit. [See
17 Counterdefendants' Responses to Defendant/Counterclaimant Regan Media's First
18 Request for Production of Documents, attached as Exhibit E, Nos. 1, 7, 12.] They failed to
19 produce any financial documents or bank records relating to Dolce Amore or either
20 Jameson or Grdina, and no minutes or other corporate documents relating to Dolce Amore
21 other than the initial articles of incorporation. [See *id.*, Request for Production Nos. 1, 7,
22 9, 10, 12, 13, 14, 15.] They failed to produce copies of the one-hour VH1 special
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26 ³ Counterdefendants had previously produced another set of documents in August
27 2005, including several contracts and drafts of contracts, approximately 20-25 e-mail
messages, and two or three miscellaneous documents.

1 featuring Jameson produced under the April 1, 2004 Agreement or the pilot filmed under
2 the A&E Contract. [*See id.*, Request for Production Nos. 5, 17.] Although they produced
3 returns for 2002 and 2003, Counterdefendants failed to produce Dolce Amore's corporate
4 tax returns for 1999-2001 and 2004. [*See id.*, Request for Production No. 11.]
5 Counterdefendants failed to produce an "Exclusive Acting Services Agreement" between
6 Jameson and Dolce Amore, although they represent that it exists. [*See id.*, Request for
7 Production No. 6.] The deficiencies in Counterdefendants' production is discussed in
8 greater detail, item-by-item, in Regan Media's Rule 37.1 Statement.
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11 Nowhere in Counterdefendants' response to Regan Media's Request for
12 Production is any indication that Counterdefendants have conducted a reasonable search
13 and produced all relevant documents. In addition, Regan Media's Request for Production
14 made clear that Regan Media seeks the production of electronic documents and data,
15 wherever stored. Although Counterdefendants have produced some e-mails, there is
16 nothing in Counterdefendants' production to indicate that they made a satisfactory effort to
17 locate and produce electronic documents. To the contrary, the few documents produced,
18 and the obvious absence of a number of clearly requested documents, establishes that
19 Counterdefendants have made either no effort to search for various categories of
20 documents or have deliberately decided not to produce them. In short, Counterdefendants
21 have elected not to participate in good faith in the very litigation they initiated.
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25 **B. Counterdefendants' Objections Are Improper.**

26 The objections asserted by Counterdefendants in response to Regan Media's
27 Request for Productions Nos. 6-9 and 12-14 do not excuse Counterdefendants from
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1 producing the requested documents, and those objections should be stricken as waived.

2 Rule 34(b) reads:

3 The party upon whom the request is served shall serve a written response
4 within 30 days after the service of the request. . . . The response shall state,
5 with respect to each item or category, that inspection and related activities
6 will be permitted as requested, unless the request is objected to, in which
7 event the reasons for the objection shall be stated.

8 Counterdefendants failed to serve a written response until February 9, 2006 -- over three
9 months after Regan Media's Request for Production was served -- waiving any objections
10 to Regan Media's requests. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d
11 1468, 1473 (9th Cir. 1992) ("It is well established that a failure to object to discovery
12 requests within the time required constitutes a waiver of any objection").

13 Even if the objections were not waived, they are inappropriate and do not
14 excuse Counterdefendants' failure to produce relevant documents. The documents subject
15 to Requests for Production Nos. 6-9 and 12-14 are relevant (1) to trace the funds received
16 by Dolce Amore under the A&E Contract, and (2) to establish facts relating to
17 Counterclaimants' alter ego allegations regarding Dolce Amore and Jameson and Grdina.
18 *See Taeger v. Catholic Family and Community Services*, 196 Ariz. 285, 297-298, 995 P.2d
19 721, 733-734 (Ariz. App. 1999) (identifying factors relevant to alter ego analysis,
20 including recognition of corporate formalities and use of corporation as mere
21 instrumentality); *Arizona Public Service Co. v. Arizona Corporation Commission*, 155
22 Ariz. 263, 267, 746 P.2d 4, 8 (Ariz. App. 1987) (overturned on other grounds) (identifying
23 factors relevant to alter ego analysis, including capitalization of corporation); *Honeywell,*
24 *Inc. v. Arnold Construction Co., Inc.*, 134 Ariz. 153, 159, 654 P.2d 301, 307 (Ariz. App.

1 1982) (identifying factors relevant to alter ego analysis, including commingling of
2 corporate and personal funds, diversion of corporate property to personal use).
3 Counterdefendants also object to the production of documents dating back to 1999 as
4 irrelevant, but they failed to produce requested documents regardless of date, even
5 documents from more recent years.
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7 Regan Media requests that the Court issue an Order compelling
8 Counterdefendants to produce all responsive documents, without objection, on or before
9 5:00 p.m. on March 17, 2006, and warning Counterdefendants that failure to do so will
10 result in additional sanctions, potentially including the entry of judgment in
11 Counterclaimants favor on all claims. Once all documents are received, Counterclaimants
12 can proceed with depositions. Regan Media requests that the Court order to Jameson to
13 appear for deposition on April 4 and Grdina to appear for deposition on April 6, 2006.
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16 **C. Counterdefendants Should Be Sanctioned.**

17 In their Response to Regan Media's first Motion to Compel,
18 Counterdefendants (1) promised to produce responsive documents by February 7, 2006,
19 and (2) agreed to pay Regan Media's attorneys' fees incurred in bringing the first Motion
20 to Compel. Neither the promise nor the cost of paying Regan Media's legal fees was
21 sufficient to motivate Counterdefendants to comply with their discovery obligations.
22 Accordingly, the Court should impose more severe sanctions for Counterdefendants'
23 misconduct in responding to Regan Media's discovery requests. Regan Media requests
24 that the Court issue an order requiring Counterdefendants to explain their efforts to locate
25 and produce responsive documents and show cause why additional sanctions, including
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1 the dismissal of Jameson's Complaint and judgment of liability on Counterclaimants'
2 Counterclaims, should not issue. See *Oregon RAS No. 6, Inc. v. Castle Rock Cellular of*
3 *Oregon Limited Partnership*, 76 F.3d 1003, 1007 (9th Cir. 1996) (affirming imposition of
4 discovery sanctions under Rule 26(g) and the court's inherent power: "A district court may
5 also under its inherent powers sanction a party or counsel who willfully abuses the judicial
6 process") (internal quotes omitted); *Tomkins v. Schmid Systems, Inc.*, 2005 WL 2592576 at
7 *1-2 (D. Ariz. Oct. 13, 2005) (recognizing court's "well-acknowledged inherent power to
8 levy sanctions in response to abusive discovery practices. Thus, the decision whether to
9 penalize a party for dilatory conduct during discovery proceedings is committed to the
10 sound discretion of the trial court") (internal quotes and citations omitted).

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13 At a bare minimum, Regan Media is entitled to an award of its expenses and
14 attorneys' fees incurred in bringing this Motion to Compel. Rule 37 provides:
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16 If the Motion is granted or if the disclosure or requested discovery is
17 provided after the motion was filed, the court shall, after affording an
18 opportunity to be heard, require the party or deponent whose conduct
19 necessitated the motion or the party or attorney advising such conduct or
20 both of them to pay the moving party the reasonable expenses incurred in
21 making the motion, including attorney's fees, unless the court finds that the
22 motion was filed without the movant's first making a good faith effort to
obtain the disclosure or discovery without court action, or that the opposing
party's nondisclosure, response, or objection was substantially justified, or
that other circumstances make an award of expenses unjust.

23 Fed.R.Civ.P. 37(a)(4)(A). Regan has fulfilled its obligations to endeavor to resolve this
24 dispute without involving the Court, and there are no other facts or circumstances that
25 would justify Counterdefendants' deficient response or make an award of fees unjust. An
26 award of movants' reasonable attorneys' fees is appropriate.
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D. The Court Should Modify the Scheduling Order.

On January 11, 2006, the Court entered an Order extending the deadline for Regan Media to disclose any expert witnesses and reports until March 3, 2006. This modification of the Scheduling Order was necessary to allow Counterclaimants to conduct the depositions of Jameson and Grdina and submit any testimony to expert witnesses, if necessary. In light of the delay caused by Counterdefendants' failure to produce requested documents, Regan Media has no alternative but to request that the Court modify the Scheduling Order and to accommodate Counterdefendants' delinquent document production and the depositions of Jameson and Grdina.

Under the current Scheduling Order, Regan Media's expert witness disclosure is due March 3, 2006, Counterdefendants' rebuttal expert disclosure is due March 17, 2006, and the expert deposition deadline is April 21, 2006. [See June 20, 2005 Scheduling Order at 3; January 11, 2006 Order.] The final discovery cutoff is scheduled for April 14, 2006. [See June 20, 2005 Scheduling Order at 2.] Regan Media requests that the Scheduling Order be adjusted as follows:

	Current Deadline	Proposed Deadline
Regan Media Expert Disclosure	03/03/06	04/21/06
Counterdefendants' Expert Rebuttal	03/17/06	04/28/06
Discovery Cutoff	04/14/06	05/12/06
Expert Depositions	04/21/06	05/12/06
Motions for Summary Judgment	05/19/06	06/09/06

Conclusion

For the foregoing reasons, Regan Media, Inc. requests that the Court grant this Motion to Compel and Request for Sanctions and issue an order (1) compelling

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2006, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electric Filing to the following CM/ECF

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I hereby certify that on the 17th day of February, 2006, I served the attached document by mail on the following, who are not registered participants of the CM/ECF System:

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