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 8 **UNITED STATES DISTRICT COURT**  
 9 **DISTRICT OF ARIZONA**

10 Health Information Services, Inc., an  
 11 Arizona corporation; Frank C. Yaconis; and  
 12 Barry W. Neel,

13 Plaintiffs,

14 v.

15 DigiStor, Inc., an Arizona corporation; and  
 16 Vincent J. Burr,

17 Defendants.

**No. CV06-2181-PHX-FJM**

**REPLY IN SUPPORT OF MOTION  
 FOR CIVIL CONTEMPT FOR  
 FAILURE TO COMPLY WITH  
 COURT’S ORDER OF FEBRUARY 1,  
 2007, RE ACT! DATABASE**

19 Rather than simply acknowledging their failure to comply with the Court’s  
 20 February 1, 2007 Order regarding the production of the ACT! Database, the Defendants  
 21 spend much of their response blaming Plaintiffs for their non-compliance. First,  
 22 Defendants blame their non-compliance on Plaintiffs’ failure to respond to Defendants’  
 23 invitation to arrange a time to review the ACT! Database contained in a February 2, 2007  
 24

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1 letter to Plaintiffs—a letter that Defendants admit was never mailed to Plaintiffs.<sup>1</sup>

2 *Response* at 2. The absurdity of such contention is self-evident.

3  
4 Defendants also go on to blame Plaintiffs for failing to undertake any action to  
5 “promote” the production process. *Response* at 4. However, the Court’s Order is clear  
6 and unequivocal: “Defendants shall, no later than February 9, 2007 produce for joint  
7 inspection by the parties, their lawyers and Plaintiffs’ IT expert the ACT! Database . . .”  
8 The onus was on Defendants, not Plaintiffs, to undertake the steps necessary to initiate  
9 and produce the ACT! Database. Moreover, other than the phantom February 2, 2007  
10 letter, Defendants made no effort—not a phone call, not an email, not a fax—to contact  
11 Plaintiffs to arrange for production of the ACT! Database. It was not until February 20,  
12 2007, eleven days after the original production date ordered by the Court and eight days  
13 after Plaintiffs filed their motion for contempt, that Defendants ultimately made a copy of  
14 the ACT! Database available to Plaintiffs for inspection.<sup>2</sup>  
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18 <sup>1</sup> Defendants also spend considerable time in their Response and supporting declaration  
19 of counsel discussing their “good faith” acts in “voluntarily” producing to Plaintiffs two  
20 CDs containing what they contend are “insignificant” business records of HIS. *Response*  
21 at 2; Declaration of James Mackinlay at ¶¶ 2,3. Aside from the lack of relevance to the  
22 instant motion, these purportedly “insignificant” materials are comprised of numerous  
23 HIS customer contracts and employee files, which, when printed, generated a paper stack  
24 12 inches high. These materials are anything but “insignificant” and are the exact records  
25 Defendants were ordered to produce to Plaintiffs under the October 6, 2006 Injunction  
(Doc. 15), the non-production of which formed the basis for Plaintiffs’ original Motion  
26 for Contempt (Doc. 19).

<sup>2</sup> The original ACT! Database is located in Ohio and resides on the computer of DigiStor  
sales representative, Keith Anderson. *Response* at footnote 1. The February 20, 2007

1           Finally, Defendants attempt to chalk up their non-compliance with the Court's  
2 Order to human error. *Response* at 3. This, however, is not the first time that Defendants  
3 claim to have failed to comply with an order of this Court due to human error. As the  
4 Court will recall, during the January 17, 2007, evidentiary hearing on Plaintiffs' Motion  
5 for Civil Contempt, Defendants contended that their failure to timely file with the Court a  
6 notice outlining the steps they had taken to comply with the October 6, 2006 Order of  
7 Injunction was due to a calendaring oversight. Although the Court chose to accept  
8 Defendants' excuse and not find them in contempt for such "oversight," it appears that  
9 such repeated instances of non-compliance with this Court's orders cannot be attributed  
10 to mere "human error", but are due to Defendants' failure to respect the authority of this  
11 Court and its orders. However, whatever the case may be, the burden of ensuring  
12 Defendants' compliance with this Court's Order should not be made to continue to fall  
13 upon the shoulders (and pocketbook) of Plaintiffs.

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17           As the evidence of Defendants' non-compliance with the Courts' February 1, 2007  
18 Order is indisputable, the Court should find Defendants in contempt and impose upon  
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20  
21 inspection of the copy of the ACT! Database revealed that there are approximately 1,900  
22 contacts contained in the customer database. See Declaration of Robert J. Itri at ¶ 7. In  
23 addition, the database reflects numerous historical contacts made to existing HIS  
24 customers and prospective customers that were not disclosed to Plaintiffs on the Excel  
25 spreadsheet of customer contacts produced to Plaintiffs by Defendants after entry of the  
26 October 6, 2006 Injunction (submitted as Plaintiffs' Exhibit No. 2 at January 17, 2007  
Contempt Hearing ). *Id* at 8. For example, the database discloses 159 historical contacts  
to the Mayo Clinic between April 2001 and June 29, 2006, none of which were disclosed  
on the spreadsheet. *Id*.

1 Defendants such sanctions as to ensure future compliance with its orders and to  
2 compensate Plaintiffs for their efforts to enforce Defendants' compliance including (1) an  
3 award to Plaintiffs' of their costs, expenses and attorneys' fees in prosecuting this  
4 motion; (2) an award to Plaintiffs' of their costs, expenses and attorneys' fees in  
5 attending the February 20, 2007 production of the ACT! Database; (3) an order directing  
6 Defendants to produce to Plaintiffs on or before February 28, 2007, an unredacted copy  
7 of the ACT! Database currently in their possession; and 4) such other relief as the Court  
8 deems proper.  
9  
10

11 DATED this 21st day of February, 2007.

12 GALLAGHER & KENNEDY, P.A.

13 By s/Robert J. Itri

14 Robert J. Itri  
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Attorneys for Plaintiffs

17 I hereby certify that on February 21, 2007,  
18 I electronically transmitted the attached  
19 Document to the Clerk's Office using the  
20 CM/ECF System for filing and transmittal  
21 of a Notice of Electronic Filing to the following  
22 recipients:

23 James N. MacKinlay, Esq.  
24 Warnock MacKinlay & Associates PLLC  
25 1019 South Stapley  
26 Mesa, Arizona 85204  
Attorneys for Defendants

s/Lori M. Lucas