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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

KRISTINE LIVINGSTON, et al.

Case No. 1:12-cv-01427-LJO-SKO

Plaintiffs,

**ORDER RE DISCOVERY DISPUTE**

v.

**ORDER SETTING TELEPHONIC  
CONFERENCE FOR NOVEMBER 12,  
2013, AT 4:00 p.m.**

KEMPERSPORTS MANAGEMENT, INC.,

Defendant.

\_\_\_\_\_ /

On September 4, 2013, Defendant Kempersports Management, Inc. ("Defendant") filed a motion to compel seeking an order requiring Plaintiffs to serve further responses to Defendant's requests for production of documents, special interrogatories, a request for production of documents and inspection of tangible things, and seeking to compel the deposition of Plaintiff Kristine Livingston. (Doc. 27.)

The parties agreed to resolve the dispute via informal telephonic conference, which was held on October 9, 2013. Following the informal telephone conference, the Court issued an order on October 9, 2013, setting forth the resolution of various issues and outlining the parties' further obligations. A further telephonic conference was set for October 23, 2013, which was continued to October 31, 2013, as Plaintiffs had not fully complied with the Court's October 9, 2013, order and the parties had not submitted the required joint statement.

1 On October 31, 2013, the parties appeared for two telephonic conferences. At both  
2 conferences, Dean Gordon, Esq., appeared for Plaintiffs and Michael Burns, Esq., and Matthew  
3 Mason, Esq., appeared for Defendant. The following issues were discussed and decided during  
4 the telephonic conferences.<sup>1</sup>

5 **1. Deposition of Kristine Livingston**

6 Kristine Livingston's deposition shall take place **on November 7, 2013**, in Idaho. In light  
7 of Plaintiffs' continued delay in providing the requested computer information related to  
8 documents purportedly authored by Mark Livingston and modified by Kristine Livingston,  
9 Defendant shall have a total of ten (10) hours to complete this deposition. Defendant may  
10 allocate this time as it deems appropriate with respect to reserving time to continue the deposition  
11 after Kristine Livingston's computer has been mirror imaged and the relevant contents (as set forth  
12 below) have been reviewed. The parties shall discuss the format and location of any continued  
13 portion of the deposition.

14 **2. Forensic Review of Computer Hard Drive**

15 Despite the fact that Defendant's request for metadata and inspection of Plaintiffs'  
16 computer has been pending since May 2013, Plaintiffs' expert has been unable to recover  
17 metadata from Kristine Livingston's computer pertaining to two documents which were  
18 purportedly created by Mark Livingston. As such, Plaintiffs are unable to accurately determine  
19 the creation date of these documents or whether, and in what respects, these documents have been  
20 modified. As Plaintiffs intend to admit these documents during trial, the hard drive of Kristine  
21 Livingston's computer shall be mirror-imaged to provide Defendant with information relevant to  
22 the creation and modification of these particular documents.

23 Plaintiffs' counsel shall verify whether a mirror image of Kristine Livingston's computer  
24 has already been created. If no mirror image exists, Plaintiff's expert shall create a mirror image  
25 of the hard drive by no later than **November 6, 2013**.<sup>2</sup> Meanwhile, by **November 4, 2013**, the  
26 parties are to discuss and propose a plan for either their respective experts or a neutral expert to

27 <sup>1</sup> The factual background is well-known to the parties and will not be set forth in this order.

28 <sup>2</sup> Defendant shall pay for the actual cost of the hard drive.

1 review the mirror image of the hard drive and to obtain the metadata for these documents.

2 Further, with respect to the duplicate document produced by Plaintiffs bates stamped  
3 LIV00054 and LIV00069 and entitled "Teresa Tillima time clock violation," Plaintiffs have  
4 confirmed that neither the author nor the date and time of creation of the document can be  
5 established. Due to Plaintiffs' continued inability to produce discovery necessary to verify the  
6 source and creation date of the document, this document is hereby EXCLUDED from use at trial.  
7 Fed. R. Civ. P. 37(b)(2)(A).

### 8 **3. Documents Responsive to Requests for Production of Documents**

9 The Court's order of October 9, 2013, stated that objections and privileges were waived as  
10 to a number of Defendant's Requests for Production of Documents ("RFPs") because no privilege  
11 or objection was expressly stated. Plaintiffs were ordered to provide supplemental responses no  
12 later than October 18, 2013. Plaintiffs failed to meet this deadline.

13 In their October 29, 2013, Joint Statement, Plaintiffs indicated that they are determining  
14 whether there are documents responsive to a discovery request for which the Court determined  
15 any privilege had been waived for Plaintiffs' failure to assert such privilege. In the Joint  
16 Statement, Plaintiffs' counsel further stated he anticipated producing all such documents by  
17 October 30, 2013. However, no such documents had been produced as of the October 31, 2013,  
18 telephone conference date. As such, Plaintiffs **must** produce any responsive documents **no later**  
19 **than November 5, 2013**, or risk sanctions for repeated failure to comply with the Court's order.

### 20 **4. Special Interrogatories Nos. 6 and 7 to Plaintiffs as Successors-In-Interest re** 21 **Mark Livingston's Family History of Heart Attacks/ Heart-Related Health** 22 **Issues**

23 By no later than **November 6, 2013**, Plaintiffs, as successors-in-interest, are to provide  
24 complete and verified responses indicating whether they are aware of any blood relative of Mark  
25 Livingston who suffers, or has suffered, from a heart condition/illness or a heart-related  
26 condition/illness. The responses must indicate whether Wesley or Jason Livingston themselves  
27 suffer from any heart condition/illness or heart-related condition/illness, and *both Wesley and*  
28 *Jason Livingston must verify the response.*

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1           **5. Special Interrogatories Nos. 1-3 to Jason and Wesley Livingston re Health**  
2           **Care**

3           The Court finds that these interrogatories require no further response by Plaintiffs. The  
4 interrogatories are subsumed by the special interrogatory to the Plaintiffs as successors-in-interest,  
5 which is more narrowly tailored to protect the individual privacy interests raised by Plaintiffs. To  
6 the extent that Wesley and/or Jason Livingston indicate that they currently have or have had heart  
7 conditions/illnesses or heart-related conditions/illness, the scope of any production of medical  
8 records will be revisited at that time.

9           **6. Request for Production No. 103 to Jason Livingston**

10          Jason Livingston must provide a verified response to this RFP **no later than November 6,**  
11 **2013.**

12          **7. Facebook Social Media Production**

13          Where Facebook or other social media messages and posts are responsive to discovery  
14 requests, Plaintiffs are to provide a copy of that message or post in its *original format*, with  
15 manual redactions as necessary to preserve privileged information. Amended responses are due  
16 no later than **November 6, 2013.**

17          **8. Statement of Efforts to Obtain Responsive Documents**

18          Plaintiffs shall provide a statement of the efforts undertaken to search for and obtain  
19 responsive documents; a general statement that a search was conducted is insufficient.  
20 Additionally, Plaintiffs are to describe the search for responsive emails with respect to the email  
21 account [mlivingstongolf@aol.com](mailto:mlivingstongolf@aol.com). This statement must be provided to Defendant **no later than**  
22 **November 6, 2013.**

23          **9. Verifications**

24          Plaintiffs indicate that verification of the discovery responses have been obtained from  
25 Kristine and Wesley Livingston, but no verification from Jason Livingston is available. Jason  
26 Livingston shall provide a verification of the discovery responses **no later than November 6,**  
27 **2013.**

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**10. Mandatory Compliance**

**The parties shall comply with the deadlines set in this order.** If the parties fail to meet these deadlines, a formal hearing will be set to show cause why sanctions should not be imposed on the noncomplying party pursuant to the Court's inherent power to manage its docket and to enforce its orders.

**11. Further Telephonic Conference**

A further telephonic conference is SET for Tuesday, **November 12, 2013, at 4:00 p.m.** The parties shall initiate one joint conference call at the time and date for the informal telephonic status conference.

IT IS SO ORDERED.

Dated: November 1, 2013

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE