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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,

v.

**ORDER ON PARTIES' DISCOVERY  
DISPUTE FOLLOWING TELEPHONE  
CONFERENCE**

KEMPERSPORTS MANAGEMENT, INC.,

Defendant.

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On January 23, 2014, the parties appeared telephonically for an informal discovery conference. Dean Gordon, Esq., appeared on behalf of Plaintiffs; Michael Burns, Esq., and Matthew Mason, Esq., appeared on behalf of Defendant. The Court issues the following order regarding the parties' dispute following the telephone conference.

Mark Livingston "Declaration"

The parties are in agreement regarding the use of the "declaration" of Mark Livingston at trial. Therefore, Defendant's request to inspect Kristine Livingston's computer regarding that document is moot.

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1 Kristine Livingston "Declaration"

2 There are allegedly two purported versions of the "declaration" of Kristine Livingston.  
3 The parties were unable to reach an agreement regarding the use of those documents at trial.  
4 Therefore, Defendant is entitled to inspect Kristine Livingston's computer with respect to those  
5 documents and any documents or evidence related to the creation, editing, or altering of her  
6 "declarations." Plaintiff advised the Court that he has obtained a mirror image of Kristine  
7 Livingston's computer and he will send it to a neutral expert agreed to by the parties, who will  
8 review the mirror image to recover any metadata or other electronic information regarding those  
9 documents. The neutral expert's review of the hard drive shall be completed by January 29, 2014,  
10 and the data recovered relating to these documents shall be delivered to defense counsel by no  
11 later than Friday, January 31, 2014.

12 Teresa Tillima "Declaration"

13 Duplicate documents bates stamped LIV00054 and LIV00069 entitled "Teresa Tillima  
14 declaration" were excluded by prior order of the Court. Specifically, on October 9, 2013,  
15 Plaintiffs were ordered to have their expert obtain the metadata regarding these documents as  
16 requested by Defendant by no later than October 16, 2013. Plaintiffs' expert was unable to recover  
17 any metadata and Plaintiffs failed to provide a report prepared by their expert to Defendant until  
18 October 17, 2013. Part of the metadata sought included information regarding the creation of  
19 document LIV00054 and LIV00069. Due to the fact that Plaintiffs were late in producing a report  
20 from their expert regarding the metadata and because Plaintiffs represented they had no way to  
21 verify the source or creation of these documents, the Court ordered as follows:

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

26 (Doc. 35, 3:2-7.)<sup>1</sup>

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28 <sup>1</sup> Metadata was also sought regarding the "declarations" of Mark and Kristine Livingston, but at a subsequent conference, the parties appeared to have reached agreement regarding the use of those documents thus mooted the

1 The exclusion of these duplicate documents was imposed as a discovery sanction for  
2 Plaintiffs' failure to produce metadata or an expert report timely, as ordered under Rule 37(a). At  
3 the January 23, 2014, conference Plaintiffs asked the Court to reconsider this exclusion sanction  
4 because they have discovered circumstantial evidence regarding the source of this document and  
5 wish to attempt to introduce the document at trial.

6 This discovery sanction will *not* be reconsidered absent a showing that Plaintiffs exercised  
7 reasonable diligence in discovering previously unavailable evidence regarding the date and time of  
8 creation of these duplicate documents. *See generally Ottovich v. City of Fremont*, No. C 09-4184  
9 MMC, 2013 WL 3245162, \* 3 (N.D. Cal. June 26, 2013); *see also All Hawaii Tours Corp. v.*  
10 *Polynesian Cultural Center*, 116 F.R.D. 645, 648 (D. Hawaii 1977), reversed on other grounds,  
11 855 F.2d 860. Plaintiffs may seek electronic data related to these duplicate documents from the  
12 mutually agreed upon expert. To the extent that there is any such data that bears any relation to  
13 documents bates stamped LIV00054 and LIV00069, it shall be provided to Defendant no later  
14 than January 31, 2014. Notwithstanding the foregoing, duplicate documents bates stamped  
15 LIV00054 and LIV00069 shall remain EXCLUDED as a discovery sanction unless Plaintiff  
16 makes the necessary showing for reconsideration of that sanction on or before February 5, 2014.

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19 IT IS SO ORDERED.

20 Dated: January 24, 2014

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

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28 need for the discovery inspection request propounded by Defendant as pertaining to those documents and negating an exclusionary sanction as to those documents.