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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

SHARIDAN STILES, et al.,  
Plaintiffs,

v.

WALMART, INC., et al.,  
Defendants.

No. 2:14-CV-2234-MCE-DMC

ORDER

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AND RELATED COUNTER-ACTIONS

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Plaintiffs, who are proceeding with retained counsel, bring this civil action alleging intellectual property and antitrust claims. Pending before the court are the following five discovery motions:

Motions Filed by Plaintiffs

- |             |   |
|-------------|---|
| ECF No. 279 | Motion to compel Walmart to provide further responses to:<br>- Requests for production, set one (served August 17, 2018).<br>- Interrogatories, set one (served January 8, 2019). |
| ECF No. 288 | Motion for leave to take deposition in excess of ten.   |
| ECF No. 308 | Motion to compel Walmart to provide further responses to<br>interrogatories, set two (served November 5, 2019).   |

1           Motions Filed by Walmart

2           ECF No. 280           Motion to compel Plaintiffs to provide further responses to  
3                                   requests for production, set one (served March 21, 2019).

4           ECF No. 281           Motion to compel Plaintiffs to provide further responses to  
5                                   interrogatories, set one (service date not provided).

6                           The parties have filed the following joint statements regarding the discovery  
7                           disputes:

8           ECF No. 284, 297    Joint statement and plaintiffs' supplement related to ECF  
9                                   No. 279 (plaintiffs' motion to compel further responses to  
10                                  requests for production and interrogatories, set one).

11          ECF Nos. 283, 313   Joint statements related to ECF No. 280 (Walmart's motion  
12                                  to compel further responses to requests for production, set  
13                                  one).

14          ECF Nos. 282, 314   Joint statements related to ECF No. 281 (Walmart's motion  
15                                  to compel further responses to interrogatories, set one).

16          ECF No. 317           Joint statement related to ECF No. 288 (plaintiffs' motion  
17                                  for leave to take deposition in excess of ten) and ECF No.  
18                                  308 (plaintiffs' motion to compel further responses to  
19                                  interrogatories, set two).

20                          A number of documents, largely consisting of specific discovery responses subject  
21                          to a protective order, have been filed on the public docket with redactions and/or conditionally  
22                          under seal and are the subject of various requests for leave to file documents under seal. See ECF  
23                          Nos. 285, 289, 293, 294, 295, 296, 298, 315, 318, 319, 320, and 321 (Notices of Requests to Seal  
24                          and responses thereto). These requests to seal and responses thereto will be addressed by separate  
25                          order.

26                          The court heard arguments relating to plaintiff's motion to compel Walmart to  
27                          provide further responses to requests for production, set one, on December 11, 2019, and issued  
28                          its order on December 19, 2019. See ECF No. 302 (Clerk's Minutes of Hearing) and 307 (Order).  
Since the December 19, 2019, hearing, plaintiffs have presented no arguments or briefing  
concerning the need for further court intervention with respect to their requests for production, set  
one.

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1 **I. BACKGROUND**

2 **A. Summary of Plaintiffs’ Factual Allegations**

3 This action proceeds on plaintiffs’ fourth amended complaint. See ECF No. 142.  
4 As set forth by plaintiffs in the various joint statements, plaintiffs claim Stiles is the inventor of  
5 the Stiles Razor, a narrow-width-blade razor used for “detailed shaving applications.” See e.g.  
6 ECF No. 284, pg. 12. In 2003, Stiles began courting Walmart as a potential buyer of the Stiles  
7 Razor. See id. Ultimately, Walmart agreed to a test run of the Stiles Razor, which was  
8 successful. See id. Walmart places the Stiles Razor in about 2,000 Walmart stores and sales  
9 were outstanding. See id. Defendants, however, colluded with plaintiffs’ competitors and used  
10 its market power to eliminate the Stiles Razor from the market in favor of a knock-off version of  
11 the Stiles Razor. See id.

12 **B. Summary of Plaintiffs’ Legal Claims**

13 Plaintiffs allege the following legal theories:

- 14 First Claim Violation of the Sherman Act, 15 U.S.C. § 1.  
15 Second Claim Violation of California’s Cartwright Antitrust Act.  
16 Third Claim Patent infringement (the ‘468 patent).  
17 Fourth Claim Patent infringement (the ‘329 patent).  
18 Fifth Claim Trade dress infringement in violation of the Lanham Act.  
19 Sixth Claim False advertising and false association in violation of the  
20 Lanham Act.  
21 Seventh Claim Intentional interference with prospective economic  
advantage.

22 See ECF No. 142, pgs. 31-38.

23 **C. Summary of Relevant Procedural History**

24 On August 10, 2018, the court issued a stipulated discovery and scheduling order.  
25 See ECF No. 146 (Stipulated Order). Pursuant to that order, fact discovery was set to close on  
26 July 10, 2019, and dispositive motions were set to be filed within 150 days after the close of fact  
27 discovery. See id. at 3-4. On June 18, 2019, the District Judge issued an order extending all  
28 operative case deadlines, as outlined in the court’s August 10, 2018, discovery and scheduling

1 order, by six months to January 10, 2020. See ECF No. 229. Pursuant to further stipulation, the  
2 time to conduct fact witness depositions has been extended to and including February 15, 2020.  
3 See ECF No. 291 (Stipulated Order). The docket does not reflect any requests for or orders  
4 approving further modification of the August 10, 2018, scheduling order.

5 Thus, all fact discovery, except fact depositions, closed on or about January 10,  
6 2020. The time to conduct fact depositions has been extended to February 15, 2020.

## 8 II. ISSUES PRESENTED

### 9 A. Plaintiffs' Motions (ECF Nos. 279, 288, and 308)

#### 10 1. Motion to Compel Walmart to Provide Further Responses to 11 Requests for Production, Set One, and Interrogatories, Set One

12 Plaintiffs seek resolution of the following six issues:

#### 13 Issues Relating to Requests for Production, Set One

14 One: Whether Walmart should be compelled to provide further responses  
15 and documents relating to plaintiffs' requests for production nos. 4,  
7-8, 10-12, 13, 15, 20-21, 25-26, 30-31, and 44.

16 Two: Whether Walmart should be compelled to produce documents  
17 withheld from plaintiffs due to an agreement between counsel  
limiting discovery.

18 Three: Whether redactions to produced documents based on relevancy or  
19 business confidentiality are proper.

20 Four: Whether Walmart should be compelled to produce supplemental  
21 responses to state the bases for withholding documents relating to  
plaintiffs' requests for production nos. 1-2, 4-16, 20-21, 25-31, 39-  
44, 49, and 55-56.

#### 22 Issues Relating to Interrogatories, Set One

23 Five: Whether Walmart should be compelled to supplement their responses  
24 to plaintiffs' interrogatories nos. 4 and 5.

25 Six: Whether Walmart should be compelled to supplement their responses  
26 to plaintiffs' interrogatories nos. 7-11 and 13-15.

27 See ECF No. 279, pg. 2 (Notice of Motion); see also ECF No. 284 (Joint  
Statement).

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1 Plaintiffs have withdrawn their motion with respect to issue three. See ECF No.  
2 292. Issues relating to plaintiffs' interrogatories, set one – issues five and six – are currently  
3 before the court. See id. The remaining issues relating to requests for production – issues one,  
4 two, and four – were the subject of a hearing held on December 11, 2019. Plaintiffs' motion as to  
5 these issues was addressed in the court's December 19, 2019, order, see ECF No. 307, and  
6 appears to be resolved.

7 2. Motion to Compel Walmart to Provide Further Responses to  
8 Interrogatories, Set Two

9 Plaintiffs seek an order compelling Walmart to provide substantive response to  
10 three interrogatories – Nos. 16, 17, and 18 – they served as set two. See ECF No. 380 (Notice of  
11 Motion); see also ECF No. 317 (Joint Statement).

12 3. Motion for Leave to Take Depositions in Excess of Ten

13 Plaintiffs seek an order authorizing them to take more than the maximum ten  
14 deposition allowed under the Federal Rules of Civil Procedure without leave of court. See ECF  
15 No. 288 (Notice of Motion); see also ECF No. 317 (Joint Statement).

16 **B. Walmart's Motions (ECF Nos. 280 and 281)**

17 1. Motion to Compel Plaintiffs to Provide Further Responses to  
18 Requests for Production, Set One

19 Walmart identifies the following remaining issues:

20 One: Whether plaintiffs should be compelled to produce tax records.

21 Two: Whether plaintiffs should be compelled to produce financial data.

22 See ECF No. 280 (Notice of Motion); see also ECF Nos. 283, 313 (Joint  
23 Statements).

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1 2. Motion to Compel Plaintiffs to Provide Further Responses to  
2 Interrogatories, Set One

3 Walmart identifies the following remaining issues:

4 One: Whether plaintiffs should be compelled to provide further  
5 supplemental responses to interrogatory nos. 15-18 regarding an  
6 alleged agreement between Walmart and defendant American  
International Industries, Inc.

7 Two: Whether plaintiffs should be compelled to provide a further  
8 supplemental response to interrogatory no. 20 regarding the product  
market alleged in the complaint

9 Three: Whether plaintiffs should be compelled to provide further  
10 supplemental responses to interrogatory nos. 5-7, 10, and 21 regarding  
sales of the Stiles Razor.

11 Four: Whether plaintiffs' assertion of a global privilege objection violates  
12 Federal Rule of Civil Procedure 33(b)(4) requiring objections to be  
stated with specificity.

13 Five: Whether plaintiffs should be precluded from offering or relying on  
14 information or facts responsive to interrogatory nos. 1-14 and 19-21  
that has not been provided in any of their responses to these  
interrogatories.

15 See ECF No. 281 (Notice of Motion); see also ECF Nos. 282, 314 (Joint  
16 Statements).

17  
18 **III. DISCUSSION**

19 **A. Plaintiffs' Motion to Compel Walmart to Provide Further Responses to**  
20 **Interrogatories, Set One (ECF No. 279)**

21 Plaintiffs identify two issues relating to Walmart's responses to interrogatories, set  
22 one. See ECF No. 279, pg. 2 (Notice of Motion); see also ECF No. 284 (Joint Statement).  
23 Specifically, the following questions are before the court (identified as issues five and six in  
24 plaintiffs' motion and issues five, six, and seven in the parties' joint statement):

25 Five: Whether Walmart should be compelled to supplement their responses  
26 to plaintiffs' interrogatories nos. 4 and 5.

27 Six: Whether Walmart should be compelled to supplement their responses  
to plaintiffs' interrogatories nos. 7-11 and 13-15.

28 See id.

1 Plaintiffs propounded interrogatories, set one, including interrogatory nos. 4-5, 7-  
2 11, and 13-15, on January 8, 2019. See ECF No. 284, pg. 9. Walmart responded on February 7,  
3 2019. See id. at 9, 92-93. On April 15, 2019, Walmart provided supplemental responses. See id.  
4 at 9, 97. Plaintiffs argue Walmart's responses to interrogatory nos. 4 and 5 are incomplete.  
5 Plaintiffs ask the court to direct Walmart to supplement its responses to interrogatory nos. 4-5, 7-  
6 11, and 13-15. Walmart states that, on December 2, 2019, it informed plaintiffs' counsel that it  
7 will supplement Walmart's responses to address plaintiff's concerns on or before December 13,  
8 2019. See ECF No. 284, pgs. 95, 98, and 105.

9 Given Walmart's representation that supplemental responses would be served on  
10 or before December 13, 2019, given counsel's representation at the hearing that supplemental  
11 responses were indeed served on December 13, 2019, and that they are acceptable to plaintiffs,  
12 and given the lack of any follow-up motion to compel or joint statement concerning supplemental  
13 responses, plaintiffs' motion with respect to Walmart's responses to their first set of  
14 interrogatories is resolved and will be denied as moot.

15 **B. Plaintiffs' Motion to Compel Walmart to Provide Further Responses to**  
16 **Interrogatories, Set Two (ECF No. 308)**

17 Plaintiffs seek an order compelling Walmart to provide substantive response to  
18 three interrogatories – Nos. 16, 17, and 18 – plaintiffs served as set two. See ECF No. 380  
19 (Notice of Motion); see also ECF No. 317 (Joint Statement).

20 As outlined in the parties' joint statement, plaintiffs served interrogatories, set two,  
21 on Walmart on November 5, 2019. See ECF No. 317, pg. 8. While the parties do not provide the  
22 court with copies of the actual discovery requests and responses at issue, according to the joint  
23 statement the dispute concerns interrogatory nos. 16, 17, and 18. See id. at 45-46. In these  
24 interrogatories, plaintiffs seek the following discovery:

25 INTERROGATORY NO. 16: IDENTIFY all category advisors to Walmart  
26 for any categories related to Plaintiffs for Plaintiffs' products, including but  
27 not limited to the wet shave category and the beauty accessories category, at  
any time during the period of January 1, 2002, to the present.

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INTERROGATORY NO. 17: DESCRIBE Walmart’s document or data retention policy, including but not limited to how documents or data are organized and/or categorized for purposes of the policy, when the policy was initiated, and the length of time that each type of document is retained and how it is retained.

INTERROGATORY NO. 18: IDENTIFY all DOCUMENTS and tangible things that (1) were requested from Walmart by Plaintiffs in this action which (2) Walmart believes were deleted.

ECF No. 317, pgs. 45-46.

Walmart did not provide any substantive responses, arguing instead that plaintiff’s interrogatories, set two, exceed the 25 interrogatories allowed under the Federal Rules of Civil Procedure. See id. at 55-59. According to Walmart, plaintiffs’ have with their first set of 15 interrogatories exceeded the maximum of 25. The first set of interrogatories contained 15 items, four of which were withdrawn by plaintiffs. Of the remaining 11 interrogatories, including discreet subparts, Walmart contends interrogatory nos. 5, 11, and 14 are each one interrogatory (total of 3), interrogatory no. 3 is two interrogatories (total of 2), interrogatory no. 4 is six interrogatories (total of 6), interrogatory nos. 7, 8, 13, and 15 each are two interrogatories (total of 8), and interrogatory nos. 9 and 10 each are three interrogatories (total of 6). See id. at 56-59.

Under Federal Rule of Civil Procedure 33(a)(1), “a party” may serve up to 25 written interrogatories without stipulation or leave of court. Subparts to a single interrogatory are only counted as one interrogatory “if they are logically or factually subsumed within and necessarily related to the primary question.” Johnson v. Chau, 2019 U.S. Dist. LEXIS 15011, at \*8-9 (E.D. Cal. Jan. 30, 2019) (citation omitted). Discrete or separate questions should be counted as separate interrogatories. See Kendall v. GES Exposition Servs., 174 F.R.D. 684, 685-86 (D. Nev. 1997). Where separate parties are represented by the same counsel and are acting in unison, they may be treated as one “party” for purposes of the limit on interrogatories. See Gucci Am., Inc. v. Exclusive Imps. Int’l, 2002 U.S. Dist. LEXIS 14837, at \*16-17 (S.D.N.Y. Aug. 12, 2002); see also Jerry Beeman & Pharmacy Servs., Inc. v. Anthem Prescription Mgmt., Inc., 2017 U.S. Dist. LEXIS 191720, at \*10 (C.D. Cal. Nov. 17, 2017).

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1 Plaintiffs contend they are in fact two “parties” – Sharidan Stiles and Stiles 4-U,  
2 Inc. – and, as such, may together propound a total of 50 interrogatories, a number which the  
3 parties agree has not been exceeded. Walmart contends plaintiffs are acting as one “party” under  
4 the rules and, as one party, have with set two exceeded the allowable number of interrogatories  
5 without leave of court or stipulation to do so.

6 Plaintiffs’ contention that they are two distinct parties for purposes of limitations  
7 on discovery is unpersuasive and inconsistent with the position plaintiffs previously took in this  
8 case. Specifically, in the context of plaintiffs’ motion for an order seeking elimination of an  
9 “attorney eyes only” provision in Walmart’s proposed protective order concerning discovery,  
10 plaintiffs took the position that plaintiff Stiles’ participation in the action was essential to the  
11 overall prosecution of the case. See ECF No. 168, pgs. 12-16. Moreover, since the inception of  
12 this case, plaintiffs have been working in unison, first pro se and now with the same counsel.  
13 Thus, the 25-interrogatory limit applies.

14 As to the number of interrogatories that were asked in plaintiffs’ set one, the court  
15 agrees with Walmart’s conclusion that plaintiffs asked at least 25 question in the 11  
16 interrogatories and subparts thereto served as set one. “Parties cannot evade th[e] presumptive  
17 limitation [of 25 interrogatories] through the device of joining as subpart questions that seek  
18 information about discreet subjects.” Johnson v. Chau, 2019 U.S. Dist. LEXIS 15011, at \*8 (E.D.  
19 Cal. Jan. 30, 2019). Subparts are counted as one interrogatory if they are logically or factually  
20 subsumed within and necessarily related to the primary question. See id. at \*8-9. A review of  
21 plaintiffs’ interrogatories, set one, reflects that, as Walmart contends, a number of interrogatories  
22 contain numerous subparts, raising the total count of interrogatories propounded in set one to at  
23 least 25, if not more.

24 Because plaintiffs met or exceeded the 25 allowable interrogatories with set one,  
25 and because plaintiffs did not seek leave to propound additional interrogatories before serving set  
26 two, Walmart’s objection is sustained and plaintiffs’ motion to compel Walmart to respond to  
27 interrogatories, set two, will be denied.

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1           C.     **Plaintiffs’ Motion for Leave to Take Depositions in Excess of Ten (ECF**  
2                                   **No. 288)**

3                                 Plaintiffs seek an order authorizing them to take more than the maximum ten  
4 deposition allowed under the Federal Rules of Civil Procedure without leave of court. See ECF  
5 No. 288 (Notice of Motion); see also ECF No. 317 (Joint Statement). In the notice of motion,  
6 plaintiff states they seek to take a total of 13 depositions. See ECF No. 288, pg. 4. In the joint  
7 statement, plaintiffs state they seek to take a total of 18 depositions. See ECF No. 317, pg. 21.  
8 To date, plaintiffs have not taken any depositions.

9                                 Parties are limited to no more than ten depositions without leave of court or  
10 stipulation. See Fed. R. Civ. P. 30(a)(2)(A)(i); see also Nevis v. Rideout Mem’l Hosp., 2019 U.S.  
11 Dist. LEXIS 188550, at \*5-6 (E.D. Cal. Oct. 30, 2019). The party seeking more than ten  
12 depositions bears the burden of making a particularized showing of the need for additional  
13 depositions. See Rideout Mem’l Hosp., 2019 U.S. Dist. LEXIS 188550, at \*5-6. Where the  
14 action is complex, parties are not required to exhaust the ten allowable deposition prior to seeking  
15 leave to take additional depositions. See Aerojet Rocketdyne, Inc. v. Global Aerospace, Inc.,  
16 2018 WL 5993585 at \*1 (E.D. Cal. Nov. 6, 2018); see also Del Campo v. American Corrective  
17 Counseling Servs., Inc., 2007 WL 3306496 at \*6 (N.D. Cal. Nov. 6, 2007) (“[I]t would be  
18 prejudicial to require Plaintiffs to choose the ten depositions to take before they know whether  
19 they will be granted more”). Finally, once a showing has been made, the court may relieve  
20 parties of the limitations on depositions. See Fed. R. Civ. P. 26(b)(2)(A).

21                                 Here, the court finds plaintiffs have made the necessary showing as to the 18  
22 deponents listed in the parties’ joint statement and will grant plaintiff’s motion for leave to take  
23 18 depositions. While leave is hereby granted to take up to the 18 depositions designated by  
24 plaintiff, the depositions are to be completed by the previously stipulated deadline of February 15,  
25 2020. As Defendant Walmart has indicated that defendant has depositions yet to be completed by  
26 that same deadline, the parties are directed to cooperate in the scheduling and coordination of **all**  
27 remaining depositions, including but not limited to scheduling depositions to proceed on  
28 concurrent schedules, in multiple venues to be covered by multiple counsel, other than just lead

1 counsel, and depositions scheduled outside ordinary business hours, including early mornings,  
2 evenings and weekends.

3 **D. Walmart’s Motion to Compel Plaintiffs to Provide Further Responses to**  
4 **Requests for Production, Set One (ECF No. 280)**

5 In its notice of motion and the parties’ first joint statement concerning its requests  
6 for production, set one, Walmart identifies the following issues:

7 One: Whether plaintiffs failed to serve a privilege log.

8 Two: Whether plaintiffs failed to collect responsive documents from all relevant  
9 custodians.

10 Three: Whether plaintiffs failed to produce certain responsive documents, or  
confirm such documents do not exist, in eight categories:

- 11 - Tax filings.
- 12 - Comprehensive sales financial data.
- 13 - Contracts.
- 14 - Documents relating to actual or contemplated patent agreements.
- 15 - Communications with third parties.
- 16 - Documents concerning patents.
- 17 - Documents concerning “razor-related products.”
- 18 - Documents concerning manufacture of the Stiles Razor.

19 See ECF No. 280 (Notice of Motion); see also ECF No. 283 (First Joint  
20 Statement).

21 Following the prior hearing at which the court encouraged the parties to engage in  
22 good-faith meet-and-confer efforts to resolve as many of the pending discovery disputes as  
23 possible, over the course of December 2019 and the first week of January 2020, plaintiffs  
24 supplemented their responses and produced additional documents as well as a privilege log. See  
25 ECF No. 313, pgs. 3-5 (Second Joint Statement). Walmart continues to argue plaintiffs’  
26 “document production in response to Walmart’s RFPs remains deficient.” Id. at 14. Walmart’s  
27 contentions, however, are now narrowed to two issues: (1) whether plaintiffs should be compelled  
28 to produce further tax records in response to request for production no. 87; and (2) whether  
plaintiffs should be compelled to produce other financial data in response to request for  
production nos. 69, 75, 79, 81-84, and 93. See id. at 14-16.

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1 Regarding tax records, Walmart contends:

2 Walmart’s RFP No. 87 seeks all documents regarding the value or  
3 valuation of the Stiles Razor, including local, state, and federal tax filings.  
4 Plaintiffs responded that they will search for relevant, non-privileged or  
5 private documents and produce such documents on a rolling basis. *See*  
6 *Kiernan Decl.*, Ex. 1 at 94-95. Plaintiffs have produced two documents  
7 regarding a profit loss statement from 2008 and a tax return history report  
8 from 2013. *Id.*, ¶ 34. Other than these two documents, plaintiffs have not  
9 produced documents responsive to RFP No. 87. *Id.*, ¶ 17. Walmart needs the  
10 information to assess the value of the Stiles Razor and defend itself against  
11 Stiles’ claim for damages. Plaintiffs claim they have “produced ***all***  
12 ***responsive documents*** within our clients’ possession, custody, or control as  
13 of the date of the last production, except for privileged/work product  
14 documents, which we have properly logged on a privilege log.” *Kiernan*  
15 *Decl.*, Ex. 5, but it is simply not credible that a small business owner does  
16 not have in her possession, custody, or control, any of her tax filings related  
17 to a product she purportedly patented and sold for years at Walmart and  
18 elsewhere. *See Soto v. City of Concord*, 162 F.R.D. 603, 619 (N.D. Cal.  
19 1995) (“Thus, actual possession of the requested documents is not required.  
20 A party may be ordered to produce a document in the possession of a non-  
21 party entity if that party has a legal right to obtain the document or has  
22 control over the entity who is in possession of the document.”) (citation  
23 omitted). When asked during the parties’ meet and confer call what plaintiffs  
24 did to search for documents responsive to Walmart’s RFPs—specifically,  
25 plaintiffs’ tax records—plaintiffs’ counsel refused to respond, claiming the  
26 information was “work product.” *Simonsen Decl.*, ¶ 3.

27 To be clear, plaintiffs’ qualified privilege objection to producing their  
28 tax returns is meritless. Plaintiffs concede that “[o]rdering production of tax  
returns requires both that ‘they are relevant’ and that ‘there is a compelling  
need for them because the information sought is not otherwise available.’”  
ECF No. 283 at 16 (quoting *Aliotti v. Vessel SENORA*, 217 F.R.D. 496, 497–  
98 (N.D. Cal. 2003)). As discussed below, there are significant gaps in the  
financial and revenue data produced by plaintiffs. Accordingly, the  
information about plaintiffs’ sales of their product contained in their tax  
returns “is not otherwise available,” and accordingly plaintiffs’ tax returns  
are discoverable.

The Court should order plaintiffs to produce the responsive tax  
records or, if they claim they cannot find the records or the records do not  
exist, to “produce a declaration signed under penalty of perjury . . .  
explaining the specific efforts and methods used to locate these records,” to  
the extent they “conclude[] that [they] [are] not in possession, custody, or  
control of any such records.” *Berger v. Home Depot United States, Inc.*, 2010  
U.S. Dist. LEXIS 152830, at \*15 (C.D. Cal. Oct. 7, 2010); *see Coppola v.*  
*Smith*, 2016 U.S. Dist. LEXIS 22066, at \*9, \*11 (E.D. Cal. Feb. 23, 2016)  
 (“In responding to discovery requests, a reasonable inquiry must be made . . .  
. To comply with the discovery rules, the [responding party] must confirm  
that a thorough search was conducted with due diligence . . . .”) (emphasis  
added).

ECF No. 313, pgs. 14-15.

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1                   Regarding financial data, Walmart contends:

2                   Walmart's RFP Nos. 69, 75, 79, 81-84, and 93 seek comprehensive  
3 financial data for sales of the Stiles Razor, including sales through third party  
4 retailers. *See* Kiernan Decl., Ex. 1 at 81-82, 86, 88-89, 90-92, & 98-99. In  
5 response, plaintiffs have produced limited financial data from Walmart and  
6 Crossmark, Inc., as well as a screen shot of an account payable summary for  
7 Stiles from Target Corp. Following the parties' November meet and confer,  
8 plaintiffs made three document productions. Those document productions  
9 contained purchase orders and invoices for Stiles' products at Target,  
10 Walmart, Amazon, Big Lots, and Body 4 Real. Plaintiffs also produced order  
11 forms and invoices for the manufacturing of plaintiffs' products and  
12 shipment of plaintiffs' products to retailers. *See* Kiernan Decl., ¶¶ 18, 33.  
13 Plaintiffs have not produced any internal financial reporting or data, let alone  
14 comprehensive financial data for sales of the Stiles Razor through retailers  
15 other than Walmart or any other financial data by which Walmart can  
16 ascertain the sales amounts. *Id.* Walmart needs this information to prepare a  
17 defense to plaintiffs' claims for damages. Again, plaintiffs' claim that they  
18 have produced all responsive, non-privileged documents is simply not  
19 credible, and plaintiffs have refused to provide any information about what  
20 they did to search for responsive documents. Simonsen Decl., ¶ 3. The Court  
21 should order plaintiffs to produce comprehensive and complete financial data  
22 for sales of the Stiles Razor or, if they claim they cannot find any other  
23 records or no other records exist, to "produce a declaration signed under  
24 penalty of perjury . . . explaining the specific efforts and methods used to  
25 locate these records," to the extent they "conclude[] that [they] [are] not in  
26 possession, custody, or control of any such records" beyond what they have  
27 produced. *Berger*, 2010 U.S. Dist. LEXIS 152830, at \*15.

28                   Id. at 15-16.

                  According to plaintiffs, during the course of the meet-and-confer process, they  
repeatedly informed Walmart that all responsive documents in their custody, possession, or  
control had been produced. See ECF No. 313, pgs. 16-18. The gravamen of Walmart's argument  
is its apparent disbelief in plaintiffs' representations. Walmart seeks an order consistent with  
Berger requiring plaintiffs to submit a declaration under penalty of perjury regarding efforts  
plaintiffs took to locate and produce responsive tax records and financial data.

                  At the hearing, Walmart's counsel represented that plaintiff had produced  
additional tax and financial records just the night prior. Plaintiffs' method of document  
production in response to request for production no. 87 suggests a lack of diligence and good  
faith, though the court does not so find at this time. Plaintiffs will be directed to serve a  
supplemental response to request for production no. 87 and to produce all responsive documents  
which have not already been produced. If there are no more responsive documents to produce,

1 plaintiffs shall so state.

2 The court declines to require plaintiffs' counsel to submit a declaration consistent  
3 with Berger. Ordinarily, counsel's representations that a diligent search has been made and that  
4 responsive documents have been produced is sufficient. See e.g. Goethe v. Cal. DMV, 2009 U.S.  
5 Dist. LEXIS 105292 at \*2-4 (E.D. Cal. Oct. 27, 2009). Walmart has not presented any evidence  
6 to suggest that plaintiffs' counsel is not being truthful or that there are concerns of spoliation of  
7 evidence, as was the situation in Berger, cited by Walmart.

8 Both parties are reminded that any documents that would have been responsive to  
9 proper discovery, but which was not produced, will not be admitted at the time of trial.

10 **E. Walmart's Motion to Compel Plaintiffs to Provide Further Responses to**  
11 **Interrogatories, Set One (ECF No. 281)**

12 In November and December 2019, the parties engaged in meet-and-confer efforts.  
13 See ECF No. 314, pgs. 5-9 (Second Joint Statement). As a result of these efforts, plaintiffs served  
14 supplemental responses and objections to Walmart's interrogatories, set one, on December 15,  
15 2019. See id. at 6. Following plaintiffs' supplementation, Walmart continues to assert plaintiffs'  
16 responses to certain interrogatories remain deficient and that the court should order further  
17 responses. See id. at 18-50. Walmart's motion is now limited to the following issues:

18 (1) whether plaintiffs should be compelled to provide further supplemental responses to  
19 interrogatory nos. 15-18 regarding an alleged agreement between Walmart and defendant  
20 American International Industries, Inc. (AI); (2) whether plaintiffs should be compelled to  
21 provide a further supplemental response to interrogatory no. 20 regarding the product market  
22 alleged in the complaint; (3) whether plaintiffs should be compelled to provide further  
23 supplemental responses to interrogatory nos. 5-7, 10, and 21 regarding sales of the Stiles Razor;  
24 (4) whether plaintiffs' assertion of a global privilege objection violates Federal Rule of Civil  
25 Procedure 33(b)(4) requiring objections to be stated with specificity; and (5) whether plaintiffs  
26 should be precluded from offering or relying on information or facts responsive to interrogatory  
27 nos. 1-14 and 19-21 that has not been provided in any of their responses to these interrogatories.

28 See id.

1                   1.       Sufficiency of Substantive Responses

2                   In its first three contentions, Walmart challenges the sufficiency of plaintiffs'  
3 supplemental substantive responses to interrogatory nos. 5-7, 10, 15-18, 20, and 21. Plaintiffs  
4 served their supplemental responses on December 15, 2019. See ECF No. 314-8.

5                   i.       Interrogatory Nos. 5-7, 10, and 21

6                   In supplemental response to interrogatory nos. 5-7 and 21, plaintiffs state:  
7 “. . . Stiles identifies the documents in Exhibits 1 and 2, a subset of which will contain the  
8 information responsive to this interrogatory.” Id. at 14-17, 133. Exhibits 1 and 2 consist,  
9 respectively, of lists of 773 and 1,400 discovery documents previously produced. See id. at 135-  
10 184. In supplemental response to interrogatory no. 10, plaintiffs state: “. . .Stiles identifies the  
11 documents in Exhibit 3, a large subset of which will contain the information responsive to this  
12 interrogatory.” See ECF No. 314-8, pg. 21. Exhibit 3 consists of a list of 837 documents. See id.  
13 at 185-204. Walmart asserts this method of responding to its interrogatories is deficient.

14                   Federal Rule of Civil Procedure 33(d)(1) permits reference to business records in  
15 response to interrogatories provided “the answer to an interrogatory may be determined by  
16 examining, auditing, compiling, abstracting, or summarizing a party’s business records. . . , and if  
17 the burden of deriving or ascertaining the answer will be substantially the same for either  
18 party. . . .” Fed. R. Civ. P. 33(d)(1). A responding party citing such records must specify the  
19 record that must be reviewed in sufficient detail to enable to interrogating party to locate and  
20 identify them as readily as the responding party could. . . .” Id. A repeated reference to a block  
21 of documents does not constitute compliance. See E. & J. Gallo Winery v. Rallo, 2006 U.S. Dist.  
22 LEXIS 84048, at \*11-12 (E.D. Cal. Nov. 8, 2006); see also Carolina Cas. Ins. Co. v. Oahu Air  
23 Conditioning Serv., 2014 U.S. Dist. LEXIS 131109, at \*25-27 (E.D. Cal. Sep. 16, 2014) (“A  
24 citation to thousands of pages of documents in an insufficient response to interrogatories”). If a  
25 responding party provides a voluminous reference to business records, the party must also include  
26 an index guiding the interrogating party to the specific responsive documents. See Carolina Cas.  
27 Ins. Co., 2014 U.S. Dist. LEXIS 131109, at \*27.

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1 Here, as Walmart notes, plaintiffs have in essence directed Walmart to lists of  
2 numerous documents, a subset of which contain responsive information, and said “good luck.”  
3 Plaintiffs have failed to provide any meaningful way for Walmart to discern from the volumes of  
4 documents cited which specific documents contain responsive information. As such, plaintiffs’  
5 method of responding under Rule 33(d)(1) is insufficient and plaintiffs will be ordered to provide  
6 further supplemental responses. If responsive information are within the universe of records  
7 identified by plaintiffs in exhibits 1, 2, and 3, plaintiffs shall identify the specific documents  
8 containing such responsive information.

9 ii. Interrogatory Nos. 15-18

10 Walmart seeks the following discovery:

11 INTERROGATORY NO. 15: Identify every Communication and meeting,  
12 including any Document related to such Communications and meetings,  
13 which you contend Relates to any alleged unlawful agreement between  
14 Walmart and American International, including but not limited to the  
15 individuals that you contend were involved in each such Communication or  
16 meeting, whether the Communication or meeting was in person or over the  
17 phone, and the place where the Communication or meeting occurred.

18 INTERROGATORY NO. 16: Identify all facts and Documents You contend  
19 support Your allegations that Walmart and American International entered  
20 into the unlawful agreement allege din the Fourth Amended Complaint.

21 INTERROGATORY NO. 17: Identify all facts and Documents that You  
22 contend support Your allegations in paragraph 129 of the Fourth Amended  
23 Complaint that “before May 30, 2012, American Industries began discussing  
24 the creation of the Salon Perfect Micro Razor with Walmart.”

25 INTERROGATORY NO. 18: Identify all facts and Documents that You  
26 contend support Your contention that Walmart’s 2012 line review of  
27 American International’s product line occurred earlier than July of 2012,  
28 including when You contend such line review occurred.

ECF No. 314-8, pgs. 28, 61, 94, 107.

29 Plaintiffs served lengthy and virtually identical initial and supplemental responses to these  
30 interrogatories. See id. at 28-127.

31 Walmart contends plaintiffs’ responses are deficient because they incorporate  
32 arguments relating to new allegations and claims contained in a proposed fifth amended  
33 complaint the District Judge did not grant leave to file. Walmart seeks an order compelling  
34 plaintiffs to provide substantive responses to interrogatory nos. 15-18 which are based solely on



1 the allegations contained in the operative fourth amended complaint. A review of plaintiffs'  
2 responses to interrogatory nos. 15-18 reflects that they are indeed ambiguous and confusing.  
3 Plaintiffs' responses consist largely of arguments relating to various legal theories, some of which  
4 Walmart contends are not at issue in this action. Plaintiffs will be directed to serve supplemental  
5 responses to interrogatory nos. 15-18 which are more directly responsive and applicable to the  
6 facts plaintiffs allege support their various legal theories.

7 iii Interrogatory No. 20

8 Walmart seeks the following discovery:

9 INTERROGATORY NO. 20: Identify every razor (by make and model)  
10 from January 1, 2007, to present that You contend falls within the  
11 Disposable Personal Styling Razors product market alleged in the Fourth  
12 Amended Complaint.

ECF No. 314-8, pg. 129.

13 Walmart persuasively argues that plaintiffs' supplemental response to Interrogatory 20 is  
14 deficient in the inclusion of qualifying terms such as "some or all," "without limitation," and  
15 "may", which limiting language is elusive and fail to respond with sufficient specificity to a  
16 request to identify "every razor" within the designated category. See Fed. R. Civ. P. 33(b)(3)  
17 (requiring full answers) and 33(d)(1) (regarding reference to business records). Plaintiffs will be  
18 ordered to provide a further supplemental response to Walmart's interrogatory no. 20.

19 2. Privilege Objection

20 Walmart contends plaintiffs' assertion of a boilerplate global objection based on  
21 privilege fails to comply with Federal Rule of Civil Procedure 33(b)(4). Under Rule 33(b)(4),  
22 "[t]he grounds for objecting to an interrogatory must be stated with specificity." "Whe[n] a  
23 responding party states a general objection to an entire discovery document on the basis of  
24 privilege, . . . the resulting 'blanket objection' is decidedly improper." Eureka Fin. Corp. v.  
25 Hartford Acci. & Indem. Co., 136 F.R.D. 179, 182 (E.D. Cal. 1991). According to Walmart,  
26 none of plaintiffs' responses to Walmart's interrogatories, set one, state whether plaintiffs have  
27 withheld information on the grounds of privilege." ECF No. 314, pg. 49. Walmart seeks an order  
28 compelling plaintiffs to so state. See id.

1 Plaintiffs state in the second joint statement filed regarding Walmart's  
2 interrogatories, set one, that they are "not withholding an information on behalf of any privilege  
3 objection." Id. at 55. Because plaintiffs have not formally stated this in writing, and because  
4 Walmart is entitled to a formal response to its interrogatories, set one, indicating that no  
5 information is being withheld on the basis of privilege, Walmart's motion will be granted and  
6 plaintiffs will be required to serve a supplemental response indicating that no information is being  
7 withheld in response to Walmart's interrogatories, set one, on the basis of privilege. To the extent  
8 any privilege is being asserted, plaintiff shall identify the specific privilege, and shall serve a  
9 privilege log as required by statute.

10 3. Future Use of Undisclosed but Responsive Information

11 Relying solely on Tumbling v. Merced Irrigation Dist., 2010 U.S. Dist. LEXIS  
12 101404, at \*60-61 (E.D. Cal. Sep. 27, 2010), Walmart argues the court should enter an order  
13 precluding plaintiffs from offering or using at any time in the future of this litigation any  
14 information responsive to its discovery requests but which has not been disclosed in any  
15 responses to interrogatory nos. 1-14 and 19-21. As plaintiffs note, this request for relief is not  
16 ripe until and unless plaintiffs attempt to offer evidence which is responsive but was not  
17 disclosed. In Tumbling, the court concluded in ruling on a motion for summary judgment that the  
18 plaintiff's retaliation claim was limited to the facts in his answer to interrogatory no. 21. See id.  
19 Thus, the issue before the court was whether evidence that was sought to be used could actually  
20 be used. In this case, plaintiffs have not yet sought to offer or otherwise use information which  
21 Walmart claims is responsive to its interrogatories but was previously undisclosed. Until this  
22 happens, Walmart's request is premature. It could be that plaintiff will never seek to use such  
23 information. If plaintiffs do, the issue should be decided in the context the information is offered,  
24 such as in considering a motion for summary judgment or at trial. Walmart's premature motion  
25 for a preclusion order will be denied.

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#### IV. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiffs' motion to compel (ECF No. 279) is denied;
2. Plaintiffs' motion to compel (ECF No. 308) is denied;
3. Plaintiff's motion for leave to take depositions in excess of ten (ECF No. 288) is granted;
4. Walmart's motion to compel (ECF No. 280) is granted in part;
5. Plaintiffs shall serve supplemental responses to Walmart's request for production no. 87 on or before January 21, 2020;
6. Walmart's motion to compel (ECF No. 281) is granted in part; and
7. Plaintiffs shall serve supplemental responses to Walmart's interrogatory nos. 5-7, 10, 15-18, 20, and 21 on or before January 27, 2020, such supplemental responses to indicate, as represented by counsel at the hearing, that no information is being withheld on the basis of privilege.

Dated: January 17, 2020



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DENNIS M. COTA  
UNITED STATES MAGISTRATE JUDGE