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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **SAN FRANCISCO DIVISION**

10 LIVE NATION MERCHANDISE, INC.,

11 Plaintiff,

12 v.

13 STANLEY G. MILLER, and others,

14 Defendants.
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Case No. 13-cv-03936 CW (NC)

**ORDER RE: DISCOVERY
DISPUTE**

Re: Dkt. Nos. 46, 53

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17 Pending before the Court are two joint discovery letter briefs, Dkt. Nos. 46, 53, in
18 which defendants and counter-claimants, Stanley Miller and the Alton Kelley and
19 Marguerite Trousdale Kelley 1999 Trust (“Artists”) seek to compel amended responses to
20 document requests and further document production from plaintiff and counterclaim-
21 defendant Live Nation Merchandise, Inc. (“Live Nation”). This order grants the motion to
22 compel in part and orders further briefing on the issue of privilege.

23 **I. BACKGROUND**

24 On January 11, 2013, Live Nation filed a complaint against Artists asserting breach of
25 contract in the San Francisco County Superior Court. Dkt. No. 1. Live Nation alleged that
26 Artists breached a 2007 Agency/Merchandising Agreement concerning certain of Artists’
27 artwork by, among other things, violating Live Nation’s exclusive right to solicit licenses
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1 and refusing to provide accountings or make payments to Live Nation. Dkt. No. 1 at 11,
2 62-67. In response, Artists filed cross-complaints against Live Nation asserting federal
3 copyright infringement under the Copyright Act, 17 U.S.C. § 501 *et seq.*, and violation of
4 the Digital Millennium Copyright Act, 17 U.S.C. § 1202, among other claims, and on that
5 basis removed this action to this Court. Dkt. Nos. 1 at 1-5; 1-3 at 10-71. Artists also
6 contend that Live Nation breached the Agency/Merchandising Agreement by, among other
7 matters, failing to provide proper accountings to Artists, and manufacturing, marketing,
8 selling, licensing and/or distributing merchandise bearing Artists' artwork, names,
9 identities, and/or trademarks without seeking or receiving any approval. Dkt. No. 1-3 at 10-
10 71. The case was referred for all discovery to the undersigned Magistrate Judge. Dkt. No.
11 44.

12 On April 22, 2014, the parties filed a joint letter brief in which Artists seek to compel
13 Live Nation to produce (1) an unredacted copy of a settlement agreement between Live
14 Nation and its former CEO, Dell Furano; and (2) "all documents responsive to the financial
15 interests in this lawsuit (Request Nos. 100-110)." Dkt. No. 46 at 4. Artists contend that the
16 settlement agreement assigns the entirety of the breach of contract claim asserted by Live
17 Nation in this litigation against Artists, and that the documents sought are relevant to the
18 determination of the real party in interest and the financial interests in this litigation. *Id.* at
19 2-3. Live Nation opposed Artists' request on the grounds that it has already produced the
20 relevant portions of the settlement agreement and that the remaining portions are irrelevant
21 to this litigation and involve privacy interests of Live Nation and non-parties. *Id.* at 4-6.
22 Live Nation further indicated that it intended to amend its discovery responses. *Id.* at 6.

23 This Court subsequently ordered the parties to meet and confer regarding the
24 sufficiency of the amended responses. Dkt. No. 49. Live Nation filed amended responses
25 to Artists' document requests Nos. 100-104, 106-110 on April 30, 2014, and a further
26 amendment on May 5, 2014. Dkt. Nos. 51, 52. After meeting and conferring, the parties
27 filed a joint letter brief in which Artists contend that Live Nation's amended responses
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1 remain insufficient and seek to compel further responses and document production. Dkt.
2 No. 53. In addition, as ordered by this Court, Live Nation submitted an unredacted copy of
3 the settlement agreement at issue to the Court for in-camera review. The Court held a
4 hearing to address the pending discovery issues on May 7, 2014.

5 **II. LEGAL STANDARD**

6 In general, “[p]arties may obtain discovery regarding any nonprivileged matter that is
7 relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). Furthermore, “[f]or
8 good cause, the court may order discovery of any matter relevant to the subject matter
9 involved in the action.” *Id.* Information is relevant for discovery purposes if it “appears
10 reasonably calculated to lead to the discovery of admissible evidence.” *Id.* However, even
11 when the information sought by the parties in a civil lawsuit is relevant, the Court must
12 limit the scope of discovery if it determines that (1) “the discovery sought is unreasonably
13 cumulative or duplicative, or can be obtained from some other source that is more
14 convenient, less burdensome, or less expensive”; (2) “the party seeking discovery has had
15 ample opportunity to obtain the information by discovery in the action”; or (3) “the burden
16 or expense of the proposed discovery outweighs its likely benefit, considering the needs of
17 the case, the amount in controversy, the parties’ resources, the importance of the issues at
18 stake in the action, and the importance of the discovery in resolving the issues.” Fed. R.
19 Civ. P. 26(b)(2)(C). In other words, the Court seeks to “strike[] the proper balance between
20 permitting relevant discovery and limiting the scope and burdens of the discovery to what is
21 proportional to the case.” *Kaiser v. BMW of N. Am., LLC*, No. 12-cv-01311 DMR, 2013
22 WL 1856578, at *3 (N.D. Cal. May 2, 2013).

23 **III. DISCUSSION**

24 Artists contend that the amended responses to Requests Nos. 100 and 103-110 remain
25 deficient for several reasons, which the Court addresses in turn.

26 **1. Privilege**

27 First, Artists assert that Live Nation has improperly withheld responsive documents
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1 on the basis of attorney client privilege and/or work product. Dkt. No. 53 at 2-3. Live
2 Nation contends that the privilege applies both because Furano was responsible for handling
3 matters involving Artists while he was employed by Live Nation as CEO/president, and
4 because Live Nation's counsel jointly represents Furano and Live Nation. *Id.* at 4. In
5 response, Artists dispute whether the communications at issue concern matters within the
6 scope of Furano's corporate duties, and whether the requisite joint interest exists between
7 Live Nation and Furano. *Id.* at 3. Finally, the parties disagree about whether privileged
8 communications post-dating the filing of this action need to be logged. *Id.* at 3-4.

9 Having considered the parties' joint letter brief and arguments at the hearing, the
10 Court finds that the privilege issues raised warrant further briefing. By May 14, 2014, Live
11 Nation must file a further brief regarding the privilege issues, attaching a copy of its
12 privilege log. Artists have until May 21, 2014, to file a response. The supplemental briefs
13 are limited to 5 pages each. The matter is set for further hearing on May 28, 2014, at 1:00
14 p.m., which the Court might vacate depending on the parties' submissions.

15 **2. Redactions**

16 Second, Artists contend that Live Nation's document production contains redactions
17 based on relevance, privacy, and confidentiality objections, which are unwarranted
18 considering the protective order in this case, the relevance of the documents, and the
19 concern that Live Nation's unilateral determinations of relevance are unreliable. Dkt. No.
20 53 at 3. Artists seek an order compelling Live Nation to reproduce the documents in
21 unredacted form. *Id.* Live Nation responds that the redacted documents pertain to the non-
22 assignment-related portions of the settlement agreement that are irrelevant, implicate the
23 privacy rights of other artists, and contain confidential/proprietary information. *Id.*
24 Specifically with respect to the settlement agreement, Live Nation contends that it has
25 already produced the relevant portions which pertain to the assignment of the claims
26 asserted in this action to Epic Rights, and that the withheld portions of the settlement
27 agreement involve issues related to other artists and resolution of confidential disputes
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1 between Furano and Live Nation. Dkt. No. 46 at 4-6. Live Nation argues that the non-party
2 artists have privacy interests which must be protected, and that Live Nation and Furano also
3 have privacy interests in how they resolve the disputes between them unrelated to this
4 lawsuit. *Id.* Live Nation further argues that it would give Artists a competitive advantage
5 in negotiating merchandise agreements to see what deal terms other Live Nation artists have
6 negotiated. *Id.* at 6. Finally, Live Nation requests that, if the Court were to require
7 production of the withheld portions of documents, that such production be made subject to
8 “attorneys’ eyes only” (“AEO”) protection. *Id.*; Dkt. No. 53 at 4.

9 The Court agrees with Artists that Live Nation’s redactions of otherwise discoverable
10 documents here are unwarranted because Live Nation’s concern about protecting privacy
11 interests and confidential/proprietary information could be addressed through a protective
12 order. As courts have recognized, this type of unilateral redaction is disfavored, and a
13 protective order could ensure the confidentiality of sensitive information. *See, e.g., Evon v.*
14 *Law Offices of Sidney Mickell*, No. 09-0760, 2010 WL 455476, at *2 n.1 (E.D. Cal. Feb. 3,
15 2010) (“Redaction is, after all, an alteration of potential evidence. The Federal Rules
16 sanction only very limited unilateral redaction, *see* Fed. R. Civ. P. 5.2. Outside of these
17 limited circumstances, a party should not take it upon him, her or itself to decide
18 unilaterally what context is necessary for the non-redacted part disclosed, and what might
19 be useless to the case.”); *Williston Basin Interstate Pipeline Co. v. Factory Mut. Ins. Co.*,
20 270 F.R.D. 456, 458-59 (D.N.D. 2010) (criticizing “the unilateral editing of documents
21 produced in discovery, particularly when there is a protective order in place, given the
22 suspicion and distrust that it generates, which, in turn, leads to unnecessary discovery
23 disputes and burdensome *in camera* inspections.”); *see also Trevino v. ACB Am., Inc.*, 232
24 F.R.D. 612, 617 (N.D. Cal. 2006) (ordering the production of unredacted agreement
25 claimed to contain confidential financial information and trade secrets subject to protective
26 order); *Holman v. Experian Info. Solutions, Inc.*, No. 11-cv-00180 CW (DMR), 2012 WL
27 2501085, at *6 (N.D. Cal. June 27, 2012) (ordering the production of documents in
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1 unredacted form where the redactions were claimed to protect non-responsive, highly
2 sensitive business information, and finding that such information was sufficiently protected
3 by the protective order in the case).

4 Here, the dispute regarding the redacted settlement agreement between Live Nation
5 and Furano illustrates the delays and burden imposed on the Court and the litigants by the
6 practice of unilateral redaction. Artists assert that Live Nation initially objected to
7 producing the agreement, and only produced the current version after significant meet and
8 confer efforts by Artists' counsel, and after first producing an even more heavily redacted
9 version of the agreement. Dkt. No. 46 at 2-3. Live Nation's assertion in response that
10 Artists "have been well aware of Furano's involvement in this litigation" does not excuse its
11 failure to disclose a relevant document sought in discovery. *Id.* at 5. The Court has
12 reviewed the settlement agreement in camera and finds that the redactions in the most
13 recently produced version of the agreement are overly broad as they include defined terms
14 and other information that is useful in understanding the relevant portions of the agreement,
15 as well as some information that does not implicate privacy or confidentiality concerns.

16 Accordingly, the Court orders Live Nation to produce an unredacted version (except
17 for any redactions made on the basis of privilege) of the settlement agreement and the other
18 documents it has produced in redacted form. The production must be completed within 7
19 days after the Court issues a protective order that includes an AEO protection. By May 9,
20 2014, the parties must meet and confer and file with the Court an agreed proposed
21 protective order containing AEO protection, or a joint letter brief if no agreement has been
22 reached. The Court does not make a determination here whether an AEO designation is
23 appropriate for any particular documents produced by Live Nation.

24 Live Nation indicates that it has withheld the production of certain documents
25 pending a determination by the Court on the redaction issue. Dkt. No. 53 at 4. Since the
26 issue has now been resolved, Live Nation must produce the withheld, non-privileged
27 documents by May 21, 2014.

1 **3. Document Request No. 5**

2 Artists move to compel the production of documents in response to request No. 5
3 which seeks “ALL DOCUMENTS RELATING TO any payments or scheduled payments
4 to Dell Furano from YOU since 2007.” Dkt. No. 50 at 26. Artists argue that such payments
5 are relevant to Furano’s motive, bias, and interest in this lawsuit. *Id.* Live Nation responds
6 that the assignment portion of the settlement agreement is sufficient to show Furano’s bias,
7 motive and interest, and objects that these documents are irrelevant, would violate privacy
8 rights of other artists, Furano and Live Nation and contain confidential/proprietary
9 information. *Id.* at 4.

10 The Court finds that, in its current form, the burden or expense of document request
11 No. 5 outweighs its likely benefit. As Artists’ counsel acknowledged at the hearing, the
12 request should be limited. Accordingly, the Court limits the request to any payments or
13 scheduled payments to Furano related to Artists or this litigation. By May 21, 2014, Live
14 Nation must respond to the request as limited and produce any responsive, non-privileged
15 documents.

16 **4. Lack of Clarity as to the Scope of Production**

17 Finally, Artists contend that Live Nation should be compelled to amend its responses
18 because it is unclear which documents have been withheld and based on which specific
19 objections. Dkt. No. 53 at 2. Artists further argue that Live Nation’s qualified response
20 that “Live Nation has otherwise produced all non-Privileged documents responsive to this
21 request so far as known, but search efforts continue” raises questions about the sufficiency
22 of its search. *Id.*; *see e.g.*, Dkt. No. 52 at 9:22-23. With respect to the “search efforts
23 continue” qualification, Live Nation responds that it was necessary because a portion of
24 responsive emails inadvertently did not get uploaded to Artists’ counsel but is now in the
25 process of being produced.

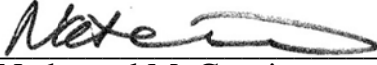
26 The Court agrees that the assertion of boilerplate objections makes Live Nation’s
27 responses ambiguous and unclear as to what documents are being withheld. *See Fed. R.*
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1 Civ. P. 34(b)(2)(C) (“An objection to part of a request must specify the part and permit
2 inspection of the rest.”). By May 21, 2014, Live Nation must complete its document
3 production and amend its responses to identify the parts of the requests to which each
4 objection pertains and which documents are being withheld.

5 Any party may object to this non-dispositive discovery order within 14 days under
6 Federal Rule of Civil Procedure 72(a).

7 IT IS SO ORDERED.

8 Date: May 9, 2014

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10 Nathanael M. Cousins
11 United States Magistrate Judge
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