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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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M SEVEN SYSTEMS LIMITED,	)	Civil No. 12cv01424 CAB(RBB)
	)	
Plaintiff,	)	ORDER DENYING MOTION [FOR
	)	ORDER TO SHOW CAUSE HEARING]
v.	)	TO HOLD DEFENDANTS CHRIS YOUNG
	)	CHOI, YONGSIK "STANLEY" PARK,
LEAP WIRELESS INTERNATIONAL,	)	AND ACTSCOM USA, INC. IN
INC. et al,	)	CONTEMPT FOR FAILURE TO COMPLY
	)	WITH JUDGE MAJOR'S MARCH 17,
Defendants.	)	2014 ORDER [ECF NO. 110];
	)	
	)	ORDER GRANTING JOINT MOTION TO
	)	SEAL EXHIBITS 5-9 TO VAN LOON
	)	DECLARATION IN SUPPORT OF
	)	MOTION TO HOLD DEFENDANTS
	)	CHRIS YOUNG CHOI, YONGSIK
	)	"STANLEY" PARK, AND
	)	ACTSCOM USA, INC. IN CONTEMPT
	)	FOR FAILURE TO COMPLY WITH
	)	JUDGE MAJOR'S MARCH 17, 2014
	)	ORDER [ECF NO. 111]

On May 11, 2014, Plaintiff M Seven System Limited ("M Seven") filed a "Motion to Hold Defendants Chris Young Choi, Yongsik 'Stanley' Park, and Actscm USA, Inc. in Contempt for Failure to Comply with Judge Major's March 17, 2014 Order [ECF No. 110]" (the "Motion for Contempt") along with a Memorandum of Points and Authorities, declarations from Erica Van Loon and Robert

1 Stillerman, and several exhibits.<sup>1</sup> Plaintiff M Seven asks that the  
2 Court find Defendants Chris Young Choi, Stanley Park, and Actscom  
3 USA, Inc. (collectively, the "Choi Defendants") in civil contempt  
4 for their failure to comply with United States Magistrate Judge  
5 Barbara L. Major's "Order Granting in Part Plaintiff's Motion to  
6 Compel Production of Documents from Defendants Actscom USA, Inc.,  
7 Chris Young Choi, and Stanley Park [ECF No. 71]." (Mot. Contempt  
8 Attach. #1 Mem. P. & A. 4, ECF No. 110.)<sup>2</sup> On the same day, M Seven  
9 and Defendant Cricket Communications, Inc. ("Cricket") filed a  
10 joint motion to file documents under seal [ECF No. 111], along with  
11 several proposed sealed exhibits [ECF Nos. 112-116].

12 The Choi Defendants, on May 28, 2014, filed an "Opposition to  
13 M7's Motion to Hold Defendants in Contempt for Failure to Comply  
14 with Judge Major's March 17, 2014 Order [ECF No. 125]" (the  
15 "Opposition"), with declarations from Choi and Park, and several  
16 exhibits. Defendant Cricket filed an "Opposition to M7's Motion  
17 for Contempt and Sanctions [ECF No. 127]" on the same day, with  
18 declarations and exhibits. On June 4, 2014, Plaintiff filed a  
19 "Reply in Support of Plaintiff M Seven System Limited's Motion to  
20 Hold Defendants Chris Young Choi, Yongsik 'Stanley' Park, and

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21  
22 <sup>1</sup> The Court construes Plaintiff's motion as a request that an  
23 order to show cause be issued as to why Defendants should not be  
24 held in contempt. See Martinez v. City of Avondale, No.  
25 CV-12-1837-PHX-LOA, 2013 WL 5705291, at \*1 (D. Ariz. Oct. 18, 2013)  
26 ("[T]he Court construes Defendants' Motion for Contempt as also  
27 requesting an order to show cause hearing why contempt sanctions  
should not be issued . . . .") (citations omitted); Hawecker v.  
Sorenson, No. 1:10-cv-00085-JLT, 2013 WL 3805146, at \*3 (E.D. Cal.  
July 22, 2013) ("[T]he Court construes the Government's motion as a  
motion for an order to show cause, thereby initiating the civil  
contempt proceeding for Defendant's failure to comply with the  
terms of the Consent Decree.").

28 <sup>2</sup> All documents will be cited using the page numbers assigned  
by the electronic case filing system.

1 Actscom USA, Inc. in Contempt for Failure to Comply with Judge  
2 Major's March 17, 2014 Order [ECF No. 131]" (the "Reply") and a  
3 "Reply to Defendant Cricket Communications, Inc.'s Opposition to  
4 Motion for Contempt and Sanctions [ECF No. 135]."

5 The Court requested supplemental briefing from M Seven and  
6 Choi [ECF No. 140]. Plaintiff filed its supplemental brief on June  
7 12, 2014 [ECF No. 141], and Defendant filed his supplemental brief  
8 on June 19, 2014 [ECF No. 150]. The Motion for Contempt is  
9 suitable for resolution on the papers. See S.D. Cal. Civ. R.  
10 7.1(d)(1). For the reasons explained below, the Motion for  
11 Contempt [ECF No. 110] is **DENIED**, and an order to show cause will  
12 not be issued.

#### 13 I. FACTUAL AND PROCEDURAL BACKGROUND

14 The following factual and procedural background is taken from  
15 Judge Major's "Order Granting in Part Plaintiff's Motion to Compel  
16 Production of Documents From Defendants Actscom USA, Inc., Chris  
17 Young Choi, and Stanley Park":

18  
19 Plaintiff filed a complaint in the instant matter on  
20 June 12, 2012. ECF No. 1. In the complaint, Plaintiff  
21 alleges misappropriation of trade secrets, copyright  
22 infringement, violation of the Digital Millennium  
23 Copyright Act, violation of California Penal Code § 502,  
24 unfair competition, civil conspiracy to misappropriate  
25 trade secrets, and civil conspiracy to unfairly compete.  
26 Id. at 1. Specifically, Plaintiff, a R&D company  
27 providing wireless solutions to customers in "emerging  
28 and established telecommunications markets worldwide,"  
developed the M7 source code for the CDM7126 mobile  
phone, which was launched in March 2008. Id. at 4. The  
phone contained Advanced Wireless Services ("AWS") which  
gave Plaintiff a "unique and competitive advantage in the  
AWS marketplace." Id. at 4-5. Plaintiff "is the owner,  
by work for hire and by way of assignment, of copyrights  
in the M7 Source Code." Id. at 5. Defendant Choi was a  
general manager at Plaintiff's with access to trade  
secrets concerning the CDM7126 phone. Id. Defendant  
Choi subsequently went to work as the Senior Director of

1 Device Development and Design for Defendant Cricket. Id.  
2 Plaintiff alleges that while working for Defendant  
3 Cricket, Defendant Choi was "responsible for the  
4 procurement and deployment of the CDM7126 phone being  
5 supplied by [Plaintiff] at that time." Id. at 6. In  
6 March 2008, Defendant Choi offered to purchase M7 source  
7 code and hardware design from Plaintiff. Id. Plaintiff  
8 refused and two months later other former employees of  
9 Plaintiff formed ACTScom Korea, of which Defendant Choi  
10 was the CEO. Id. In September 2008, Defendant Park left  
11 Plaintiff and went to work as the Chief of Software  
12 Engineering, Chief of Project Management, Chief of  
13 Marketing and Chief of Product Management of ACTScom  
14 Korea. Id. Defendant Cricket and Defendant ACTScom  
15 Korea "entered into a development and supply contract for  
16 AWS mobile phones" in October 2008. Id.

17  
18 In January 2009, Defendant ACTScom USA was  
19 incorporated in San Diego with Defendant Choi as the  
20 primary investor and CEO and Defendant Park as the CFO.  
21 Id. at 7. One month later, Defendant Cricket  
22 commercially launched the A100 phone, which Plaintiff  
23 alleges contains "the stolen M7 Source Code and Hardware  
24 Design." Id. Plaintiff further alleges that Defendant  
25 "ACTScom [USA] would not have been able to offer AWS  
26 phones at the \$61.99 price point, less than a year after  
27 its incorporation and with only a few months of research  
28 and development," Id. Defendant Cricket  
replaced Plaintiff with ACTScom USA and began selling  
phones supplied by ACTScom USA. Id. Plaintiff alleges  
that Defendant ACTScom USA supplied Defendant Cricket  
with phones incorporating the stolen Source Code and  
Hardware Design, including models A100, A200, A300, A310,  
and A210. Id.

On July 30, 2012, Defendant Cricket Wireless filed a  
motion to dismiss [ECF No. 21] as did Defendants [ECF No.  
22]. Both motions were granted in part and denied in  
part on June 26, 2013. ECF No. 33. All Defendants  
answered the complaint on August 1, 2013 [ECF Nos. 34 &  
35] and participated in a telephonic Early Neutral  
Evaluation Conference on September 9, 2013 [ECF Nos. 38 &  
39]. The parties participated in a telephonic Case  
Management Conference on October 7, 2013 [ECF Nos. 44 &  
45] and the Court entered the parties' protective order  
on October 21, 2013 [ECF No. 49].

On February 3, 2014, counsel for all parties jointly  
contacted the Court regarding a discovery dispute brought  
by Plaintiff concerning Defendants and their objections  
to Plaintiff's discovery requests for various versions of  
source code. ECF No. 58.

1 (Order Granting Part Pl.'s Mot. Compel 1-3, ECF No. 71 (footnote  
2 omitted).)

3 M Seven filed a "Motion to Compel Production of Documents from  
4 Defendants Actscom USA, Inc., Chris Young Choi, and Stanley Park  
5 [ECF No. 59]" (the "Motion to Compel") before Judge Major on  
6 February 10, 2014. There, Plaintiff moved to compel production of  
7 the source code for five different phones -- models A100, A200,  
8 A210, A300, and A310. (Mot. Compel 6, ECF No. 59.) On February  
9 21, 2014, a "Motion by Defendants Actscom USA, Inc., Chris Choi,  
10 and Yongsik Park for Summary Judgment, and/or to Dismiss or Stay  
11 [ECF No. 63]" was filed. The Choi Defendants filed an "Opposition  
12 to Plaintiff's Motion to Compel" [ECF No. 66], and M Seven filed  
13 its "Reply in Support of Plaintiff's Motion to Compel Production of  
14 Documents" [ECF No. 68]. In connection with their dispositive  
15 motions, the Choi Defendants filed an ex parte application to stay  
16 discovery [ECF No. 95], and on April 14, 2014, United States  
17 District Court Judge Cathy Ann Bencivengo granted their request  
18 [ECF No. 106].

19 On March 17, 2014, Judge Major granted in part and denied in  
20 part the Plaintiff's Motion to Compel [ECF No. 71]. She directed  
21 the Defendants to produce the source code for the A200, A210, A300,  
22 and A310 phones. (Order Granting Part Pl.'s Mot. Compel 8, ECF No.  
23 71.) If Defendants were unable to obtain and produce the source  
24 code, each Defendant was directed to provide a declaration  
25 outlining what efforts were made to do so. (Id.) The case was  
26 subsequently transferred to the undersigned [ECF No. 84].  
27 Defendants Choi, Park, and Actscom USA, Inc. filed declarations in  
28 accordance with Judge Major's order on April 11, 2014 [ECF Nos.

1 103, 104]. On May 11, 2014, Plaintiff filed the Motion for  
2 Contempt [ECF No. 110].

3 While this motion was pending, Judge Bencivengo granted  
4 summary judgment on claim preclusion grounds in favor of Defendant  
5 Choi on June 4, 2014, dismissing the claims against him [ECF No.  
6 137]. She held that a final judgment had been entered against Choi  
7 in an action in South Korea, precluding M Seven from seeking relief  
8 in this Court. (Order Granting Part Dispositive Mot. 8, 11, ECF  
9 No. 137.) She also noted that since the filing of the "Motion by  
10 Defendants Actscom USA, Inc., Chris Choi, and Yongsik Park for  
11 Summary Judgment, and/or to Dismiss or Stay," a final judgment had  
12 been entered against Defendant Park in South Korea. (Id. at 11.)  
13 The request of Park and Actscom USA for a dismissal or stay was  
14 deemed withdrawn in light of the entry of judgment against Park in  
15 South Korea. (Id.) Park and Actscom USA, Inc. were allowed to  
16 file additional dispositive motions by June 13, 2014. (Id. (citing  
17 Order Setting Br. Schedule 2, ECF No. 126).)

18 M Seven objected to the Choi Defendants' declarations filed in  
19 opposition to the Plaintiff's motion to hold them in contempt [ECF  
20 Nos. 132, 133], and the Defendants objected to the evidence  
21 supporting the Plaintiff's Reply [ECF No. 144]. Each side  
22 responded to the objections [ECF Nos. 147, 148, 152]. On June 5,  
23 2014, in light of the dismissal of the claims against Choi,  
24 supplemental briefing was requested from Plaintiff and Choi  
25 regarding whether this Court could find a dismissed party in  
26 contempt. (Mins., June 5, 2014, ECF No. 140.) M Seven and Choi  
27 filed their supplemental briefs on June 12 and 19, 2014,  
28 respectively [ECF Nos. 141, 150]. Park and Actscom USA, Inc. filed

1 a Motion for Summary Judgment on June 13, 2014 [ECF No. 142].  
2 Plaintiff has appealed the "Order Granting in Part the Dispositive  
3 Motion of Defendants Chris Young Choi, Stanley Park, and Actscm  
4 USA, Inc. [ECF No. 137]" to the Ninth Circuit Court of Appeals on  
5 June 30, 2014 [ECF No. 162].<sup>3</sup> On July 14, 2014, the Ninth Circuit  
6 gave Plaintiff twenty-one days to voluntarily dismiss the appeal  
7 because "[i]t appear[ed] that the district court's order challenged  
8 in this appeal did not dispose of the action as to all claims and  
9 all parties." (Order 1, ECF No. 174.) In the alternative,  
10 Plaintiff was allowed to "show cause why [the appeal] should not be  
11 dismissed for lack of jurisdiction." (Id. (citation omitted).)

## 12 II. LEGAL STANDARDS

13 Generally, "proceedings for civil contempt are instituted by  
14 the issuance of an Order to Show Cause . . . why a contempt  
15 citation should not issue and a notice of a date for the hearing."  
16 Hawecker v. Sorenson, 2013 WL 3805146, at \*3 (citation omitted)  
17 (internal quotation marks omitted). In the Ninth Circuit, "a civil  
18 contempt proceeding is 'a trial within the meaning of Fed.R.Civ.P.  
19 43(a) rather than a hearing on a motion within the meaning of  
20 Fed.R.Civ.P. 43(e)[;] . . . the issues may not be tried on the

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21  
22 <sup>3</sup> M Seven's Notice of Appeal does not divest this Court of  
23 jurisdiction to rule on the Motion for Contempt. See 20 James Wm.  
24 Moore et al., Moore's Federal Practice § 303.32[2][b][iii], at  
25 303-79 (3rd ed. 2013) ("Most courts have held that a district court  
26 may award attorney's fees and impose sanctions after a timely  
27 notice of appeal has been filed.") (citing Masalosaló v. Stonewall  
28 Ins. Co., 718 F.2d 955, 956-57 (9th Cir. 1983)) (other citations  
omitted); see Kadant Johnson Inc. v. D'Amico, No. 3:12-mc-00126-SI,  
2012 WL 2019648, at \*5 (D. Or. June 5, 2012) ("The filing of a  
notice of appeal does not divest this court of authority to issue a  
contempt citation for failure to comply with a court order.")  
(citing United States v. Phelps, 283 F.3d 1176, 1181 (9th Cir.  
2002); Stein v. Wood, 127 F.3d 1187, 1189 (9th Cir. 1997);  
Masalosaló, 718 F.2d at 957; Am. Town Ctr. v. Hall 83 Assocs., 912  
F.2d 104, 110 (6th Cir. 1990)).

1 basis of affidavits.'" Pennwalt Corp. v. Durland-Wayland, Inc.,  
2 708 F.2d 492, 495 (9th Cir. 1983) (quoting Hoffman Beer Drivers &  
3 Salesman's Local Union No. 888, 536 F.2d 1268, 1277 (9th Cir.  
4 1976)). The responding party may present live testimony and cross-  
5 examine witnesses and declarants. See Rodriguez v. Cnty. of  
6 Stanislaus, No. 1:08-CV-00856 OWW GSA, 2010 WL 3733843, at \*5 (E.D.  
7 Cal. Sept. 16, 2010). If "affidavits offered in support of a  
8 finding of contempt are uncontroverted, a full evidentiary hearing  
9 is not essential to due process and the trial court may treat the  
10 facts set forth in the uncontroverted affidavits as true." Id.

11 "'Civil contempt . . . consists of a party's disobedience to a  
12 specific and definite court order by failure to take all reasonable  
13 steps within the party's power to comply." Reno Air Racing Ass'n  
14 v. McCord, 452 F.3d 1126, 1130 (9th Cir. 2006) (quoting In re  
15 Dual-Deck Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th  
16 Cir. 1993)). Rule 37(b) of the Federal Rules of Civil Procedure  
17 authorizes district courts to impose a wide range of sanctions,  
18 including contempt, on a party that fails to comply with a  
19 discovery order. Fed. R. Civ. P. 37(b)(2)(A). "Contempt power  
20 should not be used where there is uncertainty." Sunbeam Corp. v.  
21 Black & Decker (U.S.) Inc., 151 F.R.D. 11, 15 (D. R.I. 1993).

22 "'Civil contempt is a refusal to do an act the court has  
23 ordered for the benefit of a party; the sentence is remedial.  
24 Criminal contempt is a completed act of disobedience; the sentence  
25 is punitive to vindicate the authority of the court." Bingman v.  
26 Ward, 100 F.3d 653, 655 (9th Cir. 1996) (quoting In re Sequoia Auto  
27 Brokers Ltd., 827 F.2d 1281, 1283 n. 1 (9th Cir. 1987)). In the  
28 Ninth Circuit, a contempt order is for civil contempt if the



1 sanction coerces compliance with a court order or compensates the  
2 injured party for losses sustained. Koninklijke Philips Elecs., N  
3 .V. v. KXD Tech., Inc., 539 F.3d 1039, 1044 (9th Cir. 2008).

4 "The party alleging civil contempt must demonstrate that the  
5 alleged contemnor violated the court's order by 'clear and  
6 convincing evidence,' not merely a preponderance of the evidence."  
7 In re Dual-Deck Cassette Recorder Antitrust Litig., 10 F.3d at 695  
8 (citing Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc., 689  
9 F.2d 885, 889 (9th Cir. 1982)). Therefore, a court may impose a  
10 civil contempt sanction only if there is clear and convincing  
11 evidence that "(1) the contemnor violated a court order, (2) the  
12 noncompliance was more than technical or de minimis (substantial  
13 compliance is not punishable as contempt), and (3) the contemnor's  
14 conduct was not the product of a good faith or reasonable  
15 interpretation of the violated order." 7 James Wm. Moore et al.,  
16 Moore's Federal Practice § 37.51[7][b], at 37-109 (3rd ed. 2013)  
17 (footnotes omitted); see United States v. Bright, 596 F.3d 683, 694  
18 (9th Cir. 2010) (quoting Labor/Cmtty. Strategy Ctr. v. L.A. Cnty.  
19 Metro. Transp. Auth., 564 F.3d 1115, 1123 (9th Cir. 2009)). "Any  
20 doubts as to whether these requirements have been met in a  
21 particular case must be resolved in favor of the party accused of  
22 the civil contempt." 7 James Wm. Moore et al., Moore's Federal  
23 Practice § 37.51[7][b], at 37-109 (footnote omitted).

### 24 III. DISCUSSION

#### 25 A. The Joint Motion to File Documents Under Seal

26 With the Motion for Contempt, Plaintiff and Defendant Cricket  
27 filed a "Joint Motion to Seal Exhibits 5-9 to Van Loon Declaration  
28 in Support of Motion to Hold Defendants Chris Young Choi, Yongsik

1 'Stanley' Park, and Actscom USA, Inc. in Contempt for Failure to  
2 Comply with Judge Major's March 17, 2014 Order [ECF No. 111]," (the  
3 "Joint Motion to Seal Exhibits") and several proposed sealed  
4 exhibits [ECF Nos. 112-116]. Cricket and M Seven request to file  
5 under seal confidential "hardware and software release notes  
6 involving the Cricket A100, A200, A210, A300, and A310 cell phone  
7 models." (Joint Mot. Seal Exs. 2, ECF No. 111.) The terms of the  
8 protective order in this case allow either party to request to file  
9 documents under seal. (See Order Granting Mot. Stipulated  
10 Protective Order 1-2, ECF No. 49.) The Joint Motion to Seal  
11 Exhibits [ECF No. 111] is **GRANTED**.

12 **B. The Parties' Supplemental Filings**

13 Plaintiff filed a Reply in support of its motion and two  
14 separate documents containing objections to the declarations of  
15 Park and Choi that accompanied the Defendants' Opposition [ECF Nos.  
16 131, 132, 133]. Defendants responded to the objections [ECF Nos.  
17 147, 148].

18 Much of Plaintiff's Reply addresses statements made by Park  
19 and Choi in their declarations. (See Reply 8-12, ECF No. 131.)  
20 M Seven references its evidentiary objections to Park's declaration  
21 and argues that his declaration should be disregarded. (Id. at 12  
22 n.1.)

23 Park fails to set forth foundational facts and any basis  
24 for making statements regarding mobile phone development  
25 or business practices of Actscom Korea, Appeal System or  
26 BNSoft, or showing that he has sufficient knowledge to  
testify as to the technical source code analysis he  
undertook, and only presents impermissible hearsay from a  
former Actscom Korea engineer.

27 (Id.)

28

1 Under the local rules, "No reply memorandum will exceed ten  
2 (10) pages without leave of the judge." S.D. Cal. Civ. R. 7.1(h).  
3 M Seven's reply brief is ten pages in length, and Plaintiff did not  
4 seek leave from the Court to file a brief in excess of ten pages.  
5 (See Reply 4-13, ECF No. 131.) Accordingly, the Clerk of Court is  
6 ordered to **STRIKE** M Seven's "Evidentiary Objections to Chris Choi's  
7 Declaration in Support of Opposition [ECF No. 132]" and  
8 "Evidentiary Objections to Yongsik 'Stanley' Park's Declaration in  
9 Support of Opposition [ECF No. 133]" from the docket. The  
10 corresponding "Response to M7's Evidentiary Objections to  
11 Declaration of Yongsik 'Stanley' Park [ECF No. 147]" and "Response  
12 to M7's Evidentiary Objections to Declarations of Chris Choi [ECF  
13 No. 148]" are also **STRICKEN** from the docket.

14 Similarly, because Defendants did not seek leave to file a  
15 surreply, the Clerk of Court is also ordered to **STRIKE** the Choi  
16 Defendants' "Objections to Evidence Submitted with M7's Reply in  
17 Support of Motion to Hold Defendants in Contempt for Failure to  
18 Comply with Judge Major's March 17, 2014 Order [ECF No. 144]" and  
19 the "Response to Objections to Evidence Submitted with M7's Reply  
20 [ECF No. 152]." (See Mins., May 14, 2014, ECF No. 119 (providing  
21 deadlines for opposition and reply only).)

22 **C. Judge Major's Order**

23 As noted, Judge Major granted in part and denied in part  
24 Plaintiff's Motion to Compel. (See Order Granting Part Pl.'s Mot.  
25 Compel 9, ECF No. 71.) She held that the Choi Defendants failed to  
26 show that they made a reasonable effort to obtain the source code  
27 for the Crickett model A200, A210, A300, and A310 cell phones.  
28 (Id. at 6-8.)

1 Defendants' failure to make any effort to learn what  
2 source code, if any, ACTScom Korea has in its possession  
3 and/or to verify the amount and location of ACTScom  
4 Korea's ESI, under cuts Defendants' argument that the  
5 source code is not readily available. Defendants must  
6 make a reasonable effort to obtain the source code.

7 For the reasons set forth above, Plaintiff's motion  
8 is **GRANTED IN PART** and Defendants must produce the source  
9 code for phones A200, A210, A300, and A310. If  
10 Defendants are unable to obtain the source code for any  
11 of the phones, each Defendant must provide a declaration  
12 stating whether the code for each phone was ever in  
13 Defendant's possession, custody, or control and, if it  
14 was, what happened to the code. Each defendant's  
15 declaration also must identify what efforts were made to  
16 locate the code and the results of those efforts.  
17 Defendant Choi's declaration must include his efforts to  
18 obtain the source code from ACTScom Korea, Appeal System,  
19 and BNSoft. Defendants Park and ACTScom USA must include  
20 their efforts to obtain the source code from BNSoft.

21 (Id. at 8 (citations omitted).) As to the A100 source code, the  
22 Motion to Compel was denied because the Defendants had already  
23 produced the code. (Id. at 5, 8-9.)

#### 24 **D. The Defendants' Declarations**

25 On April 11, 2014, the Choi Defendants filed declarations in  
26 response to Judge Major's order [ECF Nos. 103, 104]. There, they  
27 explained that subsequent to the discovery ruling, Defendants gave  
28 Plaintiff copies of the A210, A300, and A310 source code. (Decl.  
Choi 2-3, ECF No. 103; Decl. Park 2-3, ECF No. 104.) They stated  
that a former associate at Actscom Korea, Henry Jeong, was able to  
procure the source code from a company computer. (Decl. Choi 2-3,  
ECF No. 103; Decl. Park 2, ECF No. 104.) Jeong knew where to find  
the relevant code because "when he and other engineers were laid  
off by Actscom Korea early last year, they copied certain major  
files (including source code related to prior projects) onto a  
computer at Actscom Korea, and saved the files to a certain folder

1 within the computer." (Decl. Choi 3, ECF No. 103; Decl. Park 2,  
2 ECF No. 104.)

3 Jeong was unable to find the A200 source code, however.  
4 (Decl. Choi 3, ECF No. 103; Decl. Park 3, ECF No. 104.) Choi and  
5 Park both stated, "I have never had a copy of the A200 source code  
6 in my possession, custody or control, and Actscm USA also has  
7 never had a copy of the A200 source code in its possession, custody  
8 or control." (Decl. Choi 3, ECF No. 103; Decl. Park 3, ECF No.  
9 104.) The Choi Defendants provided the following account of what  
10 may have happened to the A200 source code:

11 [O]ne possible explanation is that the A200 was not kept  
12 because it was superseded by the A210. In particular, I  
13 am informed and believe that the source code for the A210  
14 device is virtually the same as the source code for the  
15 A200 device. The A210 was largely a cosmetic update to  
16 the A200. The two phones have the same hardware, the same  
17 general source code, and the same dimensions. The only  
18 major differences between the phones are that the housing  
19 was slightly updated, and the color was updated. In  
20 addition, any bugs in the software were likely fixed.

21 (Decl. Choi 3-4, ECF No. 103; Decl. Park 3, ECF No. 104.)

22 In addition to attempting to obtain the code from Actscm  
23 Korea and Jeong, Defendants also contacted the subcontractors  
24 responsible for creating the code, Appeal System and BNSoft.  
25 (Decl. Choi 4, ECF No. 103; Decl. Park 3, ECF No. 104.) These  
26 attempts were unsuccessful. (Decl. Choi 4-5, ECF No. 103; Decl.  
27 Park 4-5, ECF No. 104.) Defendants e-mailed the chief executive  
28 officer of Appeal System and sent letters to the company and its  
attorney. (Decl. Choi 4, ECF No. 103; Decl. Park 4, ECF No. 104.)  
The e-mail was returned as nondeliverable, and no response was  
received to either letter. (Decl. Choi 4, ECF No. 103; Decl. Park  
4, ECF No. 104.) Defendants explained that they did not anticipate

1 a response from Appeal System because Actscm Korea was suing the  
2 company. (Decl. Choi 4, ECF No. 103; Decl. Park 4, ECF No. 104.)  
3 Further, Choi and Park have been informed that Appeal System was  
4 "no longer a viable, operating business." (Decl. Choi 4, ECF No.  
5 103; Decl. Park 4, ECF No. 104.)

6 As to BNSoft, Defendants sent a letter to the company and e-  
7 mailed its vice president. (Decl. Choi 5, ECF No. 103; Decl. Park  
8 4, ECF No. 104.) A BNSoft employee responded to the e-mail saying  
9 that "he looked for the A300 and A310 code, but could not find it."  
10 (Decl. Choi 5, ECF No. 103 (attaching e-mail response); Decl. Park  
11 4, ECF No. 104 (attaching e-mail response).) Each Defendant  
12 concluded, "Because these projects are at least four years old, it  
13 is not surprising to me that BNSoft could not find any copies of  
14 the source code." (Decl. Choi 5, ECF No. 103; Decl. Park 4-5, ECF  
15 No. 104.)

16 **E. The A100 Source Code**

17 As noted, Judge Major denied the Motion to Compel production  
18 of the A100 source code because the Choi Defendants had already  
19 produced it. (See Order Granting Part Pl.'s Mot. Compel 8, ECF No.  
20 71.) M Seven now contends that its expert, Robert Stillerman,  
21 compared the source code provided by Defendants with the source  
22 code found in a commercially released A100 phone. (Mot. Contempt  
23 Attach. #1 Mem. P. & A. 9 n.1, ECF No. 110 (citing id. Attach. #4  
24 Decl. Stillerman at 6).) Stillerman determined that the code  
25 provided is different from, and an earlier version of, the code  
26 found in the phone he examined. (Id.) Plaintiff asks the Court to  
27 compel Defendants to produce the source code for the commercially  
28 released A100 phone. (Id.)

1 In the Opposition, the Choi Defendants argue that the A100  
2 source code "was not the subject of Judge Major's order." (Opp'n  
3 6, ECF No. 125.) They admit that the version of source code  
4 provided may differ from the source code found in the commercially  
5 released phone that Stillerman examined. (Id. at 14.) Defendants,  
6 however, maintain that any difference is immaterial because both  
7 versions are "maintenance releases" and thus are among several  
8 final versions of the code. (Id.)<sup>4</sup>

9 In the Reply, M Seven insists that the evidence suggests that  
10 Defendants had possession of multiple final versions of the source  
11 code. (Reply 8, ECF No. 131 (citing Opp'n 14, ECF No. 125; id.  
12 Attach. #5 Decl. Park at 5-6).) Plaintiff urges that Defendants  
13 must provide each version of the source code or an explanatory  
14 declaration for each. (Id. at 10.)

15 In effect, Plaintiff seeks reconsideration of Judge Major's  
16 order based on the recent opinion of its expert. (See Mot.  
17 Contempt Attach. #1 Mem. P. & A. 9 n.1, ECF No. 110.) Although  
18 M Seven did not file a motion for reconsideration of the ruling, it  
19 argues that "the Choi Defendants should be compelled to produce a  
20 complete, undoctored version of A100 source code as well, including  
21 the commercially released version." (Id.) But except as permitted  
22 under Rules 59 and 60 of the Federal Rules of Civil Procedure,  
23 motions for reconsideration must be brought "within twenty-eight  
24 (28) days after the entry of the ruling, order or judgment sought  
25 to be reconsidered." S.D. Cal. Civ. R. 7.1(i)(2). M Seven's

26

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27 <sup>4</sup> "A maintenance release is a version of code released after  
28 the phone is initially manufactured, for use in subsequent  
production runs (for example, the updated code may fix certain  
bugs)." (Id. at 13.)

1 Motion for Contempt was filed on May 11, 2014; even this motion was  
2 brought more than twenty-eight days after Judge Major's March 17,  
3 2014 Order. Plaintiff does not argue that the deadline for filing  
4 its request for reconsideration should be extended. (See generally  
5 Mot. Contempt Attach. #1 Mem. P. & A. 9 n.1, ECF No. 110.) On this  
6 basis, Plaintiff's request for the source code for the commercially  
7 released A100 phone or, alternatively, for reconsideration of Judge  
8 Major's order as to the A100 source code is **DENIED**.

9 **F. The A210, A300, and A310 Source Code**

10 Next, M Seven contends that the A210, A300, and A310 source  
11 code that was produced is deficient for several reasons. (Mot.  
12 Contempt Attach. #1 Mem. P. & A. 8, 14-15, ECF No. 110.) First,  
13 like the A100 source code, Plaintiff insists that the code provided  
14 is different from the code found in the A210, A300, and A310 cell  
15 phones that Stillerman examined. (Id. at 8, 14 (citing id. Attach.  
16 #4 Decl. Stillerman at 6-7).) Stillerman determined that the  
17 source code produced was only "a single pre-release version of the  
18 code," and "insufficient to confirm that the full functionality of  
19 the commercially-released versions of the code." (Id. at 8-9  
20 (citing id. Attach. #4 Decl. Stillerman at 4, 7).)

21 M Seven also alleges that Defendants' production is deficient  
22 because they only produced one version of the source code; yet,  
23 numerous versions of the code existed for each model of phone.  
24 (See Mot. Contempt Attach. #1 Mem. P. & A. 9, 14-15, ECF No. 110.)  
25 It maintains that "[t]he Court's Order specifically applies to all  
26 the 'various versions of the source code.'" (Id. at 13 (quoting  
27 Order Granting Part Pl.'s Mot. Compel 3, ECF No. 71).) For each  
28 version of code contained in the cell phone models, Plaintiff urges



1 that Defendants must provide either the source code or an  
2 explanatory declaration. (Id. at 14-15.) Further, M Seven argues  
3 that "[g]iven that the source code was a key part of the Choi  
4 Defendants' business, it is implausible that the final version of  
5 the source code was never in their possession." (Id. at 15-16.)  
6 Plaintiff speculates that Defendants may have destroyed the source  
7 code. (Id. at 16.)

8 M Seven claims that these deficiencies are clear and  
9 convincing evidence that the Choi Defendants violated Judge Major's  
10 discovery order. (Id. at 13.) Plaintiff additionally asserts that  
11 Defendants have not substantially complied with the ruling. (Id.  
12 at 17-18.) Finally, M Seven contends that Defendants' conduct was  
13 not based "on a good faith interpretation of this Court's ruling"  
14 because Judge Major's order is "simple, explicit, and unambiguous."  
15 (Id. at 18.)

16 In the Opposition, the Choi Defendants maintain that they have  
17 reasonably interpreted and fully complied with the order. (Opp'n  
18 8, ECF No. 125.) They argue that they were not required to produce  
19 all versions of the source code, just a final version for each  
20 phone model. (Id.) "[T]he order does not specifically state that  
21 Defendants were required to produce every historical version of  
22 source code, even including old, superseded versions not actually  
23 used in the phones." (Id.) Judge Major's holding is vague, they  
24 insist, and simply orders that "'the source code'" be produced.  
25 (Id. (citing Order Granting Part Pl.'s Mot. Compel 8, ECF No. 71).)  
26 Plaintiff submits that the order required production of "'various  
27 versions of source code,'" but Defendants counter that the portion  
28 of the order upon which M Seven relies is from the factual

1 background, not the holding. (Id. at 8-9 (citing Mot. Contempt  
2 Attach. #1 Mem. P. & A. 1, 10, ECF No. 110; Order Granting Part  
3 Pl.'s Mot. Compel 3, ECF No. 71).)

4       The Choi Defendants assert that they have complied with Judge  
5 Major's order because they produced every version of the source  
6 code that they possessed. (Id. at 9-10 (citing id. Attach. #1  
7 Decl. Choi at 4; id. Attach. #5 Decl. Park at 4).) Because they  
8 provided source code for the A210, A300, and A310 models,  
9 Defendants argue that they were not required to provide  
10 declarations for those phones. (Id.) They insist that Plaintiff's  
11 claim that Defendants destroyed source code is "categorically  
12 false" and "pure speculation." (Id. at 11.) "Such speculation is  
13 insufficient to satisfy M7's burden to show contempt." (Id.  
14 (citing NLRB v. S.F. Typographical Union No. 21, 465 F.2d 53, 58  
15 (9th Cir. 1972); FTC v. Lights of Am. Inc., SACV 10-1333 JVS, 2012  
16 WL 695008, at \*4 (C.D. Cal. Jan. 20, 2012)).)

17       According to the Choi Defendants, Cricket contracted with  
18 Actscom Korea to create the source code, which in turn  
19 subcontracted the job to Appeal System for the A100, A200, and A210  
20 phones and to BNSoft for A300 and A310 phones. (Id. (citing id.  
21 Attach. #1 Decl. Choi at 2; id. Attach. #5 Decl. Park at 2).) They  
22 state that Choi, Park, and Actscom USA, Inc. were not involved in  
23 the creation of the source code. (Id. (citing id. Attach. #1 Decl.  
24 Choi at 2-3; id. Attach. #5 Decl. Park at 2-3).) While Appeal  
25 System and BNSoft may have possessed multiple versions of the  
26 source code, only binary code and the final versions of the code  
27 were sent to Actscom Korea. (Id. at 11-12 (citing id. Attach. #1  
28 Decl. Choi at 3; id. Attach. #5 Decl. Park at 3).)

1           The Choi Defendants also contend that M Seven's expert erred  
2 when he opined that Defendants did not produce a final version of  
3 the source code. (Id. at 13.) As to the A210 code, Defendants  
4 state that the version they produced "is actually more current than  
5 the version of code used in the phone analyzed by Stillerman."  
6 (Id.) They explain that the source code produced for the A210  
7 phone -- version A210\_CK\_D1.35 -- was the last maintenance release.  
8 (Id. (citing id. Attach. "Here, Stillerman's mistake was in  
9 apparently not seeing that the correct version number (D1.35) was  
10 indicated in the row immediately below the version number he relied  
11 on (C1.20).") (Id. (citing id. Attach. #5 Decl. Park at 5).)

12           For the A300 and A310 phones, Defendants assert that the code  
13 provided is the "exact same version" found in the phone examined by  
14 Stillerman. (Id. (citing id. Attach. #5 Decl. Park at 4).) The  
15 Choi Defendants insist, "It appears that Stillerman's mistake was  
16 in looking at the version number of the non-proprietary 'AMSS' code  
17 (AMSS stands for Advanced Mobile Subscriber Software, and is a  
18 Qualcomm product), rather than the version number of the complete  
19 source code that was built on top of the AMSS code." (Id. (citing  
20 id. Attach. #5 Decl. Park Exs. 2-5).) For these reasons, the Choi  
21 Defendants maintain that the Motion for Contempt should be denied.

22           In the Reply, Plaintiff repeats that Judge Major ordered  
23 production of all versions of the source code because the document  
24 requests asked for "all prior and current versions of the code".  
25 (Reply 5-6, ECF No. 131 (citing Mot. Compel Attach. #4 Ex. G at 85,  
26 ECF No. 59; id. Ex. H at 112; id. Ex. I at 11).) M Seven insists  
27 that Judge Major "essentially mirror[ed] M7's requested relief to  
28 compel its discovery request." (Id. at 6.) According to

1 Plaintiff, the ruling is not vague or ambiguous because "a  
2 defendant cannot create ambiguity or manipulate the meaning of an  
3 order to compel by divorcing it from the discovery request that  
4 gave rise to it." (Id. at 6-7 (citing Keithley v. Homestore.com  
5 Inc., 629 F. Supp. 2d 972, 975-76 (N.D. Cal. 2008)).)

6 M Seven urges that the Choi Defendants had possession of  
7 multiple "final" versions of the source code, which they failed to  
8 produce. (Id. at 9-10 (citing id. Attach. #1 Decl. Van Loon at 2;  
9 Opp'n 13-14, ECF No. 125; id. Attach. #5 Decl. Park at 5).)  
10 Plaintiff rebuts Defendants' argument that they only had possession  
11 of binary code because "the Choi Defendants would not have been  
12 able to view or edit binary code, as their emails indicate they are  
13 doing." (Id.) Finally, M Seven asserts that to the extent Appeal  
14 System and BNSoft deleted the A300 and A310 source code, Choi and  
15 Park "had a duty to preserve" the deleted code because they  
16 controlled those companies. (Id. at 13.)

17 First, the Court must consider whether there is a specific and  
18 definite order requiring the production of all versions of the code  
19 for each cell phone model. See United States v. Bright, 596 F.3d  
20 at 694; Reno Air Racing Ass'n v. McCord, 452 F.3d at 1130. Judge  
21 Major's holding was that "Defendants must produce the source code  
22 for phones A200, A210, A300, and A310." (See Order Granting Part  
23 Pl.'s Mot. Compel 8, ECF No. 71.) This language does not  
24 explicitly refer to historical and final versions of the code for  
25 each of the subject phones.

26 M Seven's assertion that the order "specifically applies to  
27 all the 'various versions of the source code'" is inaccurate. (See  
28 Mot. Contempt Attach. #1 Mem. P. & A. 13, ECF No. 110 (citing Order

1 Granting Part Pl.'s Mot. Compel 3, ECF No. 71).) The quoted  
2 material upon which Plaintiff relies is taken from the procedural  
3 background for the order. In context, Judge Major wrote, "On  
4 February 3, 2014, counsel for all parties jointly contacted the  
5 Court regarding a discovery dispute brought by Plaintiff concerning  
6 Defendants and their objections to Plaintiff's discovery requests  
7 for various versions of source code." (Order Granting Part Pl.'s  
8 Mot. Compel 1, 3, ECF No. 71.)<sup>5</sup> The reference to "various  
9 versions" of code appears to allude to different codes for  
10 different phones.

11 Other portions of Judge Major's order, at a minimum, undermine  
12 M Seven's argument that all versions of source code were to be  
13 produced. In the February 24, 2014 Opposition to M Seven's Motion  
14 to Compel, Defendants represented that the only source code in  
15 their possession was "a single copy of the A100 source code."  
16 (Opp'n Mot. Compel 8, ECF No. 66; see id. at 5, 9, 11-12, 15.)  
17 Judge Major found the production of that code sufficient. (See  
18 Order Granting Part Pl.'s Mot. Compel 5, ECF No. 71 ("Defendants  
19 assert, and Plaintiff does not dispute, that Defendants possess and  
20 have made available to Plaintiff the source code for phone A100.");  
21 id. at 8 ("Because Defendants produced the source code for phone  
22 A100 prior to the filing of the motion to compel, the Court is  
23 granting in part and denying part Plaintiff's motion.").)

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24  
25 <sup>5</sup> The Court notes that this is not the first time M Seven's  
26 counsel has made inaccurate representations to the Court. (See  
27 Order Granting Part Dispositive Mot. 7, ECF No. 137 ("In an attempt  
28 to distinguish . . . this case from the Choi Korean Action,  
plaintiff inaccurately contends . . . . Plaintiff also  
inaccurately contends . . . .").) Counsel is presumably familiar  
with an attorney's duties to the Court, particularly the duty of  
candor as set out by California Rule of Professional Conduct 5-200  
and the California Business and Professions Code.

1 Accordingly, Defendants reasonably interpreted the discovery order  
2 and produced a single version of the A210, A300, and A310 code.  
3 Even if Defendants interpreted the discovery order too narrowly,  
4 M Seven cannot complain because the Defendants produced source code  
5 in their possession, custody, and control. (See Opp'n 9, ECF No.  
6 125 ("Defendants produced every version [of source code] they had,  
7 and would have produced older versions if they were available."))

8 Relying on Keithley, 629 F. Supp. 2d at 975-76, Plaintiff  
9 insists that "a defendant cannot create ambiguity or manipulate the  
10 meaning of an order to compel by divorcing it from the discovery  
11 request that gave rise to it." (Reply 5-6, ECF No. 131.) In that  
12 case, the court granted a motion to compel and ordered "'production  
13 of website documents responsive to requests that do not call for  
14 source code'; included among the requests that do not call for  
15 source code was request six . . . ." Keithley, 629 F. Supp. 2d at  
16 976. "[D]efendants' contention that request six was so vague and  
17 ambiguous . . . does not explain why defendants did not believe  
18 that request six, which explicitly lists 'reports,' did not cover  
19 reports." Id. The reviewing court determined that the responding  
20 party had been directed to provide all documents responsive to  
21 discovery requests that did not call for source code, regardless of  
22 whether the court discussed each, specific type of document at the  
23 hearing. Id. at 975-76. Here, Judge Major did not order  
24 compliance with specific document requests or order production of  
25 prior versions of source code. (See Order Granting Part Pl.'s Mot.  
26 Compel 8, ECF No. 71 ("Defendants must produce the source code for  
27 phones A200, A210, A300, and A310.")) Keithley is not this case.

28

1           Because multiple versions of the code existed for each phone,  
2 the Court must next determine which version of the source code the  
3 Defendants needed to produce in order to substantially comply with  
4 Judge Major's order. See Bright, 596 F.3d at 694. Neither the  
5 Opposition to Plaintiff's Motion to Compel nor the discovery order  
6 make any reference to whether the A100 code that was produced was a  
7 pre-release version or a version of source code contained in a  
8 commercially released phone. (See generally Opp'n Mot. Compel 5-  
9 21, ECF No. 66; Order Granting Part Pl.'s Mot. Compel 1-9, ECF No.  
10 71.) The Court construes Judge Major's order as requiring the  
11 production of source code contained in a commercially released  
12 phone. Thus, to the extent Defendants produced code used in a  
13 commercially released phone, they have substantially complied with  
14 the order. See Bright, 596 F.3d at 694.

15           In the Motion for Contempt, Plaintiff initially argued that  
16 the A200, A300, and A310 code provided by the Choi Defendants was a  
17 pre-release version of the code. (Mot. Contempt Attach. #1 Mem. P.  
18 & A. 17, ECF No. 110.) In the Opposition, Defendants explain under  
19 oath, however, that (1) M Seven's expert misread the code and (2)  
20 the source code provided for the A210, A300, and A310 phones was  
21 contained in commercially released phones. (Opp'n 12-14, ECF No.  
22 125; id. Attach. #5 Decl. Park at 4-5.) Plaintiff does not address  
23 the issue in the Reply. (See Reply 5-10, ECF No. 131.) M Seven  
24 has failed to prove by clear and convincing evidence its claim that  
25 Plaintiff was provided early versions of source code not found in  
26 the commercially released phones. See In re Dual-Deck Cassette  
27 Recorder Antitrust Litig., 10 F.3d at 695.

28

1 In sum, the discovery order does not preclude more than one  
2 reasonable interpretation of its scope, a factor that weighs  
3 against finding the Defendants in contempt. See Reno Air Racing  
4 Ass'n, 452 F.3d at 1132 ("The judicial contempt power is a potent  
5 weapon. When it is founded upon a decree too vague to be  
6 understood, it can be a deadly one.") (quoting Int'l  
7 Longshoremen's Ass'n. v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76  
8 (1967)); Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc., 689  
9 F.2d at 889 ("Where the language of a consent judgment is too  
10 vague, it cannot be enforced; to do so would be an invalid exercise  
11 of judicial authority.") (citations omitted). The Defendants  
12 produced the source code for the A210, A300, and A310 phones. They  
13 reasonably interpreted and substantially complied with Judge  
14 Major's order. Plaintiff did not seek clarification or  
15 reconsideration of the discovery order. Instead, M Seven filed a  
16 Motion to Hold Defendants Chris Young Choi, Yongsik "Stanley" Park,  
17 and Actscom USA, Inc. in Contempt [ECF No. 110]. For all these  
18 reasons, the Motion for Contempt [ECF No. 110] as to A210, A300,  
19 and A310 phones is **DENIED**.

20 **G. The A200 Source Code**

21 In her order, Judge Major states, "If Defendants are unable to  
22 obtain the source code for any of the phones, each Defendant must  
23 provide a declaration stating whether the code for each phone was  
24 ever in Defendant's possession, custody, or control and, if it was,  
25 what happened to the code." (Order Granting Part Pl.'s Mot. Compel  
26 8, ECF No. 71.) The A200 code was not produced, so the Choi  
27 Defendants submitted declarations explaining why they were unable  
28 to obtain and produce a copy of the source code. (See Mot.



1 Contempt Attach. #1 Mem. P. & A. 14, ECF No. 110; Opp'n 15, ECF No.  
2 125.) Plaintiff urges that Defendants' declarations are deficient  
3 because they do not account for every version of the A200 code.  
4 (Mot. Contempt Attach. #1 Mem. P. & A. 9-10, 15, ECF No. 110.)  
5 Moreover, they do not contain all the information required. (Id.  
6 at 9-11, 15-17.)

7 M Seven insists that the Choi Defendants fail to explain why  
8 Jeong and others copied the computer files, as well as where they  
9 found the files. (Id. at 10, 16.) "Additionally, Choi and Park's  
10 descriptions of the measures undertaken to secure the source code  
11 from third parties offer no explanation as to why it is that the  
12 source code has gone missing." (Id. at 10.) Plaintiff argues that  
13 this lack of explanation suggests that the code may have been  
14 destroyed. (Id. at 16.)

15 According to M Seven, the Defendants only sent a letter and an  
16 e-mail to obtain the code; these efforts are insufficient to comply  
17 with the discovery order. (Id. at 10-11, 16-17.) Further,  
18 "[a]lthough BNSoft did actually respond that they did not find the  
19 code, Choi and Park declined to ask what types of searches were  
20 conducted, or where BNSoft actually looked." (Id. at 16.)  
21 Plaintiff also asserts that it is implausible that Defendants never  
22 possessed the final version of the code. (Id. at 15.) For these  
23 reasons, Plaintiff maintains that the Defendants should be found in  
24 contempt.

25 In the Opposition, the Choi Defendants contend that their  
26 declarations are adequate because "they confirmed they never had a  
27 copy of the A200 source code in their possession, custody, or  
28 control." (Opp'n 15, ECF No. 125 (citing Decl. Choi 3, ECF No.

1 103; Decl. Park 3, ECF No. 104).) "Second, they explained what  
2 efforts were made to locate the A200 source code, and the results  
3 of those efforts." (Id.) Defendants argue that they provided more  
4 information than was required because they explained why the source  
5 code may not have been kept and detailed how the A210 source code  
6 was almost identical to the A200 code. (Id.) Finally, Choi and  
7 Park state that they had minimal contacts with Actscom Korea during  
8 the relevant time period. (Id. at 16-17.)

9 In the Reply, M Seven asserts that the Choi Defendants  
10 contradict themselves because they state that they never had a copy  
11 of the A200 source code, yet they also explain that a copy of the  
12 code was likely sent to Actscom Korea, an entity within Park and  
13 Choi's control. (Reply 10, ECF No. 131.) Defendants fail to  
14 explain, Plaintiff alleges, "'what happened to the code',  
15 sufficient to be able to determine if spoliation has occurred."  
16 (Id.) M Seven also contests Choi's attempts to distance himself  
17 from Actscom Korea. (Id. at 11-12.) According to Plaintiff, the  
18 "established facts" show that Choi was active in managing Actscom  
19 Korea from 2007 to 2010. (Id.)

20 Judge Major acknowledged that there was some evidence that, at  
21 one time, the Choi Defendants may have had possession of the A200  
22 source code. (See Order Granting Part Pl.'s Mot. Compel 5-7, ECF  
23 No. 71.) She gave the Defendants the opportunity, however, to  
24 state under oath that they presently are "unable to obtain the  
25 source code." (Id. at 8.) Defendants Choi and Park both stated,  
26 "I have never had a copy of the A200 source code in my possession,  
27 custody or control, and Actscom USA also has never had a copy of  
28

1 the A200 source code in its possession, custody or control."

2 (Decl. Choi 3, ECF No. 103; Decl. Park 3, ECF No. 104.)

3       These statements are consistent with Judge Major's conclusion  
4 that "the evidence presented to the Court does not establish that  
5 any of the Defendants had actual possession of the requested source  
6 code and failed to produce it." (Order Granting Part Pl.'s Mot.  
7 Compel 9, ECF No. 71.) The Court cannot find clear and convincing  
8 evidence that the Choi Defendants had possession of the A200 source  
9 code and failed to produce it. See 7 James Wm. Moore et al.,  
10 Moore's Federal Practice § 37.51[7][b], at 37-109 ("Any doubts as  
11 to whether these requirements have been met in a particular case  
12 must be resolved in favor of the party accused of the civil  
13 contempt.") (footnote omitted).

14       In their declarations, both Choi and Park adequately explained  
15 that the A200 source code was never in their custody, possession,  
16 or control. (See Decl. Choi 3, ECF No. 103; Decl. Park 3, ECF No.  
17 104.) Further, they sufficiently described their attempts to  
18 obtain the code. (See Decl. Choi 4-5, ECF No. 103; Decl. Park 3-5,  
19 ECF No. 104.) Plaintiff additionally seeks a finding of contempt  
20 because Defendants did not explain why the source code files were  
21 copied, where the original files were found, why the source code  
22 went missing, and how BNSoft conducted its search. (Mot. Contempt  
23 Attach. #1 Mem. P. & A. 10, 16, ECF No. 110.) Yet, none of this  
24 information was required by the discovery order. (See Order  
25 Granting Part Pl.'s Mot. Compel 8, ECF No. 71.)

26       Judge Major also held that the Choi Defendants needed to "make  
27 a reasonable effort to obtain the source code." (Id.) M Seven  
28 criticizes Defendants' attempts to obtain the A200 code and

1 concludes that the efforts made were not reasonable. (Mot.  
2 Contempt Attach. #1 Mem. P. & A. 10-11, 16-17, ECF No. 110; Reply  
3 13, ECF No. 131.) Plaintiff overstates its case and provides no  
4 support for its conclusion. Defendants contacted Actscom Korea and  
5 Appeal System, the entities most likely to have the code, by both  
6 e-mail and letter. (Decl. Choi 3-4, ECF No. 103; Decl. Park 3-4,  
7 ECF No. 104.) Plaintiff expects more, but more was not required.

8 M Seven has failed to prove by clear and convincing evidence  
9 that the Choi Defendants' efforts were unreasonable. See L.H. v.  
10 Schwarzenegger, No. S-06-2042 LKK GGH, 2007 WL 2781132, \*2 (E.D.  
11 Cal. Sep. 21, 2007) (citing United States ex rel Englund v. L.A.  
12 Cnty., 235 F.R.D. 675 (E.D. Cal. 2006)) (explaining that the  
13 reasonableness of efforts to obtain information responsive to  
14 discovery requests is "determined by the size and complexity of the  
15 case and the resources that a responding party has available"). As  
16 to the A200 source code, Defendants' declarations are sufficient,  
17 and Plaintiff's motion [ECF No. 110] is **DENIED**.

18 Because the Court has determined that Defendants should not be  
19 found in contempt, it need not address "Defendant Cricket  
20 Communications, Inc.'s Opposition to M7's Motion for Contempt and  
21 Sanctions [ECF No. 127]" and "M Seven System Limited's Reply to  
22 Defendant Cricket Communications, Inc.'s Opposition to Motion for  
23 Contempt and Sanctions [ECF No. 135]," both of which address  
24 whether the Court should impose specific types of sanctions.

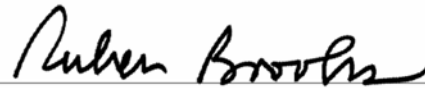
#### 25 IV. CONCLUSION

26 The motion for an order to show cause why the Choi Defendants  
27 shall not be held in contempt [ECF No. 110] is **DENIED**. The Joint  
28 Motion to Seal Exhibits [ECF No. 111] is **GRANTED**. The Clerk of

1 Court is ordered to **STRIKE** "Evidentiary Objections to Chris Choi's  
2 Declaration in Support of Opposition [ECF No. 132]," "Evidentiary  
3 Objections to Yongsik 'Stanley' Park's Declaration in Support of  
4 Opposition [ECF No. 133]," "Objections to Evidence Submitted with  
5 M7's Reply in Support of Motion to Hold Defendants in Contempt for  
6 Failure to Comply with Judge Major's March 17, 2014 Order [ECF No.  
7 144]," "Response to M7's Evidentiary Objections to Declaration of  
8 Yongsik 'Stanley' Park [ECF No. 147]," "Response to M7's  
9 Evidentiary Objections to Declarations of Chris Choi [ECF No. 148]"  
10 and "Response to Objections to Evidence Submitted with M7's Reply  
11 [ECF No. 152]" from the docket.

12

13 DATE: August 11, 2014



14

Ruben B. Brooks  
United States Magistrate Judge

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16 cc:  
17 Judge Bencivengo  
18 All parties of record

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