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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AMERITOX, LTD.,)	Civil No. 12cv2797 W (RBB)
)	
	)	ORDER GRANTING MOTION TO
	)	COMPEL AND ENFORCE FEBRUARY
Plaintiff,	)	19, 2013 DISCOVERY ORDER [ECF
	)	NO. 31], REQUEST FOR JUDICIAL
	)	NOTICE [ECF NO. 35], AND
	)	MOTION FOR LEAVE TO FILE UNDER
v.	)	SEAL PORTIONS OF [AMERITOX'S]
	)	REPLY [ECF NO. 38]; AND
MILLENNIUM LABORATORIES	)	DENYING MOTION TO FILE
CLINICAL SUPPLY, INC.,	)	DOCUMENTS UNDER SEAL BY
	)	DELIVERY TO THE CLERK, IN
	)	SUPPORT OF [MLCS'S] OPPOSITION
	)	TO AMERITOX'S MOTION TO COMPEL
Defendant.	)	AND ENFORCE [ECF NO. 26] AND
	)	EX PARTE APPLICATION FOR LEAVE
	)	TO FILE SURREPLY IN OPPOSITION
	)	TO PLAINTIFF AMERITOX, LTD'S
	)	MOTION TO COMPEL AND ENFORCE
	)	FEBRUARY 19, 2013 DISCOVERY
	)	ORDER [ECF NO. 41]

On July 5, 2013, Plaintiff Ameritox, Ltd. ("Ameritox") filed a Motion to Compel and Enforce February 19, 2013 Discovery Order along with a declaration by Adam L. Marchuk and several exhibits [ECF No. 31]. There, Plaintiff asks the Court to enforce its February 19, 2013 Order (the "Discovery Order") directing Millennium Laboratories Clinical Supply, Inc. ("MLCS") to provide

1 documents in response to two subpoenas served in early 2012. (Mot.
2 Compel & Enforce Disc. Order Attach. #1 Mem. P. & A. 4, ECF No. 31
3 (public version); Mot. Compel & Enforce Disc. Order Mem. P. & A. 4,
4 ECF No. 33 (sealed version).)¹ MLCS filed its Opposition to
5 Plaintiff Ameritox, Ltd.'s Motion to Compel and Enforce February
6 19, 2013 Discovery Order (the "Opposition") on August 5, 2013 [ECF
7 No. 34], along with a declaration by Joseph M. Preis and several
8 exhibits. On August 12, 2013, Ameritox filed sealed and public
9 versions of its Reply in Support of its Motion (the "Reply") [ECF
10 Nos. 39, 40]. For the reasons discussed below, Plaintiff's Motion
11 to Compel and Enforce February 19, 2013 Discovery Order [ECF No.
12 31] is **GRANTED**.

13 I. FACTUAL BACKGROUND

14 Ameritox and Millennium Laboratories, Inc. ("Millennium") are
15 competitors in the urine-drug-testing market. (Mot. Compel Attach.
16 #1 Mem. P. & A. 4, ECF No. 1.) Plaintiff sued Millennium in the
17 United States District Court for the Middle District of Florida for
18 violations of the Lanham Act, Florida's Deceptive and Unfair Trade
19 Practices Act, California's Unfair Competition Law, New Hampshire's
20 Regulation of Business Practices for Consumer Protection Act, and
21 for common-law unfair competition (the "Underlying Action"). (Id.
22 at 5 (citing id. Attach. #2 Ex. C).) Ameritox's suit is based, in
23 part, on the assertion that Millennium "provided Point of Care
24 Testing ('POCT') cups and supplies, used by physicians to conduct
25 urine drug testing, for free or for below-market prices upon the
26 condition that that [sic] those physicians send all confirmatory
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28 ¹ The Court will cite to all documents using the page numbers
assigned by the electronic case filing system.

1 drug tests to Millennium." (Id.) Plaintiff alleges that
2 Millennium initially provided the cups to its customers. (Id.)
3 According to Ameritox, MLCS was later created to distribute the
4 cups on Millennium's behalf. (Id.) MLCS, Plaintiff contends, is
5 controlled by Millennium. (Id.)

6 **II. PROCEDURAL BACKGROUND**

7 On February 27 and April 6, 2012, Ameritox subpoenaed MLCS to
8 produce documents in connection with the Underlying Action. (Mot.
9 Compel & Enforce Disc. Order Attach. #1 Mem. P. & A. 4, ECF No.
10 31.) MLCS responded by providing objections and some documents.
11 (Id. at 6.) Plaintiff concluded that MLCS's production was
12 insufficient and subsequently filed a "Motion to Compel Millenium
13 [sic] Laboratories Clinical Supply, Inc.'s Production of Documents"
14 with a Memorandum of Points and Authorities and several exhibits
15 (the "Motion to Compel") on November 20, 2012 [ECF No. 1]. There,
16 Ameritox moved to compel responses to document requests one through
17 eight and supplemental document requests one through four. (Mot.
18 Compel Attach. #1 Mem. P. & A. 16-24, ECF No. 1.) The Court held a
19 hearing on February 19, 2013; it granted the Motion to Compel and
20 ordered MLCS to provide documents responsive to all of the requests
21 on or before March 21, 2013. (See Mot. Compel Produc. Docs. Rep.'s
22 Tr. Proceedings 50, ECF No. 22.) The Court later issued a written
23 ruling of its findings. (See Mins., Feb. 19, 2013, ECF No. 16.)

24 In response to the Discovery Order, MLCS provided additional
25 documents to Plaintiff on March 21, June 14, and June 21, 2013.
26 (Mot. Compel & Enforce Disc. Order Attach. #1 Mem. P. & A. 5, ECF
27 No. 31.) Ameritox again found MLCS's production deficient; it
28 filed a Motion for Leave to File Under Seal Documents in Support of

1 Motion to Compel Pursuant to Protective Order on July 3, 2013 [ECF
2 No. 26]. On July 5, 2013, Plaintiff filed its Motion to Compel and
3 Enforce Discovery Order [ECF No. 31]. The Court granted Plaintiff
4 Ameritox leave to file documents under seal on July 9, 2013 [ECF
5 No. 32]. On the same day, Ameritox's Memorandum of Points and
6 Authorities in Support of its Motion to Compel and Enforce February
7 19, 2013 Discovery Order was filed under seal along with several
8 exhibits [ECF No. 33].

9 MLCS filed the Opposition on August 5, 2013 [ECF No. 34],
10 along with a Request for Judicial Notice in Support of its
11 Opposition to Ameritox's Motion to Compel and Enforce [ECF No. 35]
12 (the "Request for Judicial Notice") and a Motion to File Documents
13 Under Seal by Delivery to the Clerk, in Support of its Opposition
14 to Ameritox's Motion to Compel and Enforce [ECF No. 36]. The Court
15 determined that the Motion to Compel and Enforce was suitable for
16 decision without oral argument. (Mins., Aug. 6, 2013, ECF No. 37.)
17 On August 12, 2013, Plaintiff filed a Motion for Leave to File
18 Under Seal Portions of Its Reply [ECF No. 38], along with sealed
19 and public versions of the Reply [ECF Nos. 39, 40].

20 MLCS, on August 16, 2013, filed an Ex Parte Application for
21 Leave to File Surreply in Opposition to Plaintiff Ameritox, Ltd.'s
22 Motion to Compel and Enforce February 19, 2013 Discovery Order,
23 along with a copy of the proposed surreply [ECF No. 41]. On August
24 20, 2013, Ameritox filed an Opposition to Third Party Millennium
25 Laboratories Clinical Supply, Inc.'s Ex Parte Application for Leave
26 to File Surreply in Opposition to Plaintiff Ameritox, Ltd.'s Motion
27 to Compel and Enforce February 19, 2013 Discovery Order [ECF No.

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1 42]. MLCS filed a Response in Support of its Ex Parte Application
2 on August 21, 2013 [ECF No. 44].

3 III. DISCUSSION

4 A. Preliminary Matters

5 1. **Motions to file documents under seal**

6 As noted, MLCS filed a Motion to File Documents Under Seal by
7 Delivery to the Clerk, in Support of its Opposition to Ameritox's
8 Motion to Compel and Enforce [ECF No. 36], where it requests to
9 file documents under seal in support of the Opposition. (Mot. File
10 Docs. Under Seal 2, ECF No. 36.) Specifically, it seeks to provide
11 the Court with "[t]he entirety of MLCS's production of documents"
12 on a computer disk rather than via the electronic case filing
13 system. (Id.) MLCS asks to deviate from the standard electronic-
14 filing procedures because of "the exceptional size of the document
15 files." (Id.) The Court finds that additional documents are not
16 necessary to resolve the Motion to Compel and Enforce February 19,
17 2013 Discovery Order. Accordingly, MLCS's Motion to File Documents
18 Under Seal by Delivery to the Clerk [ECF No. 36] is **DENIED**.

19 Plaintiff also filed a Motion for Leave to File Under Seal
20 Portions of Its Reply [ECF No. 38]. There, Ameritox requests to
21 file its Reply under seal because it contains arguments that
22 reference documents that have been designated as "Highly
23 Confidential/Attorneys Eyes Only." (Mot. Leave File Under Seal 2,
24 ECF No. 38.) Because the arguments in the public version of the
25 Reply have been heavily redacted, a complete version of the Reply
26 is necessary for resolving the matters at issue in the Motion to
27 Compel and Enforce February 19, 2013 Discovery Order. Ameritox's

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1 Motion for Leave to File Under Seal Portions of Its Reply [ECF No.
2 38] is therefore **GRANTED**.

3 **2. Ex Parte Application for Leave to File Surreply in**
4 **Opposition to Plaintiff Ameritox, Ltd.'s Motion**

5 On August 16, 2013, MLCS filed an Ex Parte Application for
6 Leave to File Surreply in Opposition to Plaintiff Ameritox, Ltd.'s
7 Motion to Compel and Enforce February 19, 2013 Discovery Order,
8 along with a copy of the proposed surreply [ECF No. 41]. It seeks
9 to file a surreply in order to "rebut the misrepresentations made
10 by Ameritox" in the Reply. (Ex Parte Appl. Leave File Surreply 2,
11 ECF No. 41.) In the alternative, MLCS requests that a hearing be
12 held to allow the parties to present oral argument. (Id.) The
13 Court finds that all issues have been adequately briefed in the
14 Motion to Compel and Enforce February 19, 2013 Discovery Order,
15 Opposition, and Reply. The Ex Parte Application for Leave to File
16 Surreply [ECF No. 41] is therefore **DENIED**.

17 **3. Request for Judicial Notice**

18 In support of its Opposition, MLCS filed a Request for
19 Judicial Notice asking the Court to judicially notice the following
20 documents: (1) a transcript of the February 19, 2013 hearing on
21 Ameritox's Motion to Compel; (2) a Joint Motion for Determination
22 of Discovery Dispute Regarding Defendant's Failure to Produce
23 Responsive Documents and Failure to Produce Witnesses, filed in
24 Millennium Laboratories, Inc. v. Ameritox Ltd., No. 12cv1063 MMA
25 (JMA) (S.D Cal. filed June 11, 2013); (3) two orders from the
26 Underlying Action in Florida; and (4) three orders filed in Nelson
27 v. Millennium Inc., No. 2:12-cv-1301-SLG (D. Ariz.). (Req.

28

1 Judicial Notice 2-3, ECF No. 35.) Plaintiff has neither questioned
2 the authenticity of these documents nor opposed MLCS's request.

3 A fact subject to judicial notice is one that is "not subject
4 to reasonable dispute because it: (1) is generally known within
5 the trial court's territorial jurisdiction or; (2) can be
6 accurately and readily determined from sources whose accuracy
7 cannot reasonably be questioned." Fed. R. Evid. 201(b). A court
8 shall take judicial notice if requested by a party and supplied
9 with the necessary information. Id. 201(c)(2). The Court may take
10 judicial notice of undisputed matters of public record, including
11 "documents on file in federal or state courts." Harris v. Cnty. of
12 Orange, 682 F.3d 1126, 1132 (9th Cir. 2012).

13 "[A] party requesting judicial notice bears the burden of
14 persuading the trial judge that the fact is a proper matter for
15 judicial notice." In re Tyrone F. Conner Corp., 140 B.R. 771, 781
16 (Bankr. E.D. Cal. 1992) (citations omitted). That party must
17 "persuade the court that the particular fact is not reasonably
18 subject to dispute and is capable of immediate and accurate
19 determination by resort to a source 'whose accuracy cannot
20 reasonably be questioned'" Id. (quoting Fed. R. Evid.
21 201). In other words, "the fact must be one that only an
22 unreasonable person would insist on disputing." United States v.
23 Jones, 29 F.3d 1549, 1553 (11th Cir. 1994).

24 When documents are part of the public record, judicial notice
25 is appropriate to show that judicial proceedings occurred or that
26 documents were filed in another action, but courts must not take
27 judicial notice of factual findings from another case. See Wyatt
28 v. Terhune, 315 F.3d 1108, 1114 (9th Cir. 2003); Lee v. City of Los

1 Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001); Jones, 29 F.3d at
2 1553. Courts cannot take judicial notice of any fact that is in
3 dispute. Lee, 250 F.3d at 689; see Lozano v. Ashcroft, 258 F.3d
4 1160, 1165 (10th Cir. 2001).

5 Exhibit A is the transcript from the February 19, 2013 hearing
6 on the Motion to Compel. (See Req. Judicial Notice Attach. #1 Ex.
7 A Mot. Compel Produc. Docs. Rep.'s Tr. Proceedings 2, ECF No. 35.)
8 This document is part of the docket in this matter; thus, a request
9 for judicial notice is not necessary. (See generally Mot. Compel
10 Produc. Docs. Rep.'s Tr. Proceedings 1-51, ECF No. 22); see Negrete
11 v. Petsmart, Inc., No. 2:13-cv-01218-MCE-AC, 2013 WL 4853995, at *1
12 n.2 (E.D. Cal. Sept. 10, 2013); Sarantapoulas v. Bank of America,
13 N.A., No. C 12-0564 PJH, 2012 WL 4761900, at *6 (N.D. Cal. Oct. 5,
14 2012). Nonetheless, the Court may take judicial notice of court
15 records. See Harris, 682 F.3d at 1132.

16 Exhibits B-H are court records from other cases, for which
17 judicial notice is permissible. Nothing suggests that these
18 documents are not authentic. Moreover, the content of each
19 document is commonly known and readily verifiable by independent
20 and dependable methods. See In re Tyrone F. Conner Corp., 140 B.R.
21 at 781; Fed. R. Evid. 201(b). Accordingly, the Request for
22 Judicial Notice [ECF No. 35] is **GRANTED**.

23 **B. The Parties' Arguments**

24 Ameritox lists nine reasons why MLCS's production of documents
25 is not in compliance with the Discovery Order. (See Mot. Compel &
26 Enforce Disc. Order Attach. #1 Mem. P. & A. 6-8, ECF No. 31.) In
27 ground one, Plaintiff maintains that MLCS failed to provide
28 documents in electronic form. (Id. at 8.) Next, it failed to

1 provide documents containing customer names. (Id. at 10.) Third,
2 Ameritox complains that MLCS did not provide sales and payment
3 information for each customer. (Id. at 12.) Plaintiff asserts, in
4 ground four, that MLCS did not provide documents regarding free cup
5 contracts. (Id. at 13.) In ground five, Ameritox insists that
6 third-party, MLCS, failed to produce screen shots of its website.
7 (Id. at 14.) Sixth, MLCS did not produce documents pertaining to
8 cashed checks, uncashed checks, and credit card chargebacks. (Id.
9 at 15.) As a seventh reason, Ameritox states that MLCS failed to
10 provide information related to invoices that have been unpaid for
11 more than sixty days. (Id. at 16.) Eighth, Plaintiff submits that
12 MLCS did not provide documents showing payments and fund transfers
13 between MLCS and Millennium. (Id.) Finally, Ameritox contends
14 that MLCS failed to provide verified responses. (Id. at 17.)
15 Plaintiff concludes by requesting that sanctions be imposed against
16 the third party for its noncompliance with the Court's Discovery
17 Order. (Id. at 18.)

18 **1. Failure to produce documents in proper form**

19 First, Ameritox alleges that the subpoenas required MLCS to
20 provide electronically stored information ("ESI") in a specified,
21 electronic format. (Id. at 8 (citing Mot. Compel Attach. #3 Ex. A
22 at 12, 16, ECF No. 1; id. Attach. #4 Ex. B at 12, 16).) Yet,
23 according to Plaintiff, MLCS provided hard-copy printouts of the
24 requested documents. (Id.) Ameritox contends that the documents
25 are kept in electronic form in the ordinary course of business, but
26 MLCS chose to produce the documents in the "most time consuming and
27 impractical manner imaginable." (Id.) Plaintiff argues that the
28 documents are "difficult to use and unsearchable." (Id. at 9.)

1 Moreover, Ameritox asserts that even if it "did not specify the
2 [requested] format, it is well-settled that a responding party must
3 produce ESI in a 'reasonably useable' form." (Id. (citing Fed. R.
4 Civ. P. 34(b)(2)(E)(ii)).) Thus, Plaintiff asks the Court to order
5 the subpoenaed party to comply with the Discovery Order and produce
6 all remaining documents in electronic format. (Id. at 9-10.)

7 In its Opposition, MLCS submits that "[e]very document in
8 MLCS's production that Ameritox requested in searchable electronic
9 format has been produced." (Opp'n 11, ECF No. 34.) Plaintiff
10 maintains in the Reply that "[w]hile MLCS has provided this Court
11 with a CD containing its entire document production, MLCS never
12 provided Ameritox with a CD containing the entire document
13 production until after MLCS provided it to the Court." (Reply 4,
14 ECF No. 40.)² Plaintiff insists that the electronic documents
15 produced are still inadequate "because the CD does not include any
16 documents in a 'reasonably usable' form, such as the native format,
17 for any documents, including Excel spreadsheets." (Id. at 4-5
18 (footnote omitted).) Ameritox urges that the subpoenaed party,
19 MLCS, must provide the documents in "native format" in order "to
20 prevent an undue burden to Ameritox in comprehending and
21 calculating information contained therein." (Id. at 5.)

22 The Federal Rules of Civil Procedure provide that "[i]f a
23 request does not specify a form for producing electronically stored
24 information, a party must produce it in a form or forms in which it
25 is ordinarily maintained or in a reasonably usable form or forms."

26
27 ² The Court notes that because MLCS's Motion to File
28 Documents Under Seal by Delivery to the Clerk, in Support of its
Opposition to Ameritox's Motion to Compel and Enforce [ECF No. 36]
was denied, the disk the parties refer to was not provided to the
Court.

1 Fed. R. Civ. P. 34(b)(2)(E)(ii). The original and supplemental
2 subpoenas specify the format for producing ESI. They both state,
3 "All electronic documents or electronically-stored information
4 ("ESI") should be produced in single page, group IV .tiff file
5 format, accompanied by OCR text at the document level." (Mot.
6 Compel. Attach. #3 Ex. A at 16, ECF No. 1; id. Attach. #4 Ex. B at
7 16.) While the parties dispute whether the electronic documents
8 are searchable or reasonably usable, neither side addresses whether
9 they are in the precise format called for by the subpoenas. Absent
10 an agreement between the parties, MLCS is ordered to provide all
11 documents in the format described in the subpoenas. The Motion to
12 Compel and Enforce [ECF No. 31] on this basis is **GRANTED**.

13 **2. Failure to produce documents with customer names**

14 Plaintiff contends that when MLCS responded to document
15 request two, it removed all customer names from the documents and
16 replaced them with numeric identifiers. (Mot. Compel & Enforce
17 Disc. Order Attach. #1 Mem. P. & A. 10-11, ECF No. 31.)³ Ameritox
18 argues that the Court has already determined that customer names
19 are relevant, so they must be provided for MLCS to properly respond
20 to this document request. (Mot. Compel & Enforce Disc. Order
21 Attach. #1 Mem. P. & A. 11, ECF No. 31.)

22 ³ Document request two reads as follows:

23
24 Documents sufficient to identify, for each customer
25 or account for whom MLCS has provided, arranged,
26 facilitated, or been involved in any manner with
27 providing or arranging POCT Cups (including reagents),
28 the amount charged for each POCT Cup, the amount the
customer or account actually paid for the POCT Cups, the
terms under which the customer or account received the
POCT Cups, and any written agreement under which the
customer or account received the POCT Cups.

(Mot. Compel. Attach. #3 Ex. A 18-19, ECF No. 1.)

1 In its Opposition, MLCS maintains that it has "produced a
2 spreadsheet containing all customer names, addresses, and phone
3 numbers -- precisely what the Subpoenas required." (Opp'n 12, ECF
4 No. 34.) It urges that Plaintiff's interpretation of document
5 request two is "strained" because the request does not require MLCS
6 to link customer names to specific transactions. (Id. at 12-13.)
7 Customer names, according to MLCS, are "confidential and highly
8 sensitive." (Id. at 13.) MLCS restates arguments made - and
9 rejected - at the initial motion hearing on February 19, 2013.
10 (Mot. Compel & Enforce Disc. Order Attach. #3 Ex. A Mot. Compel
11 Produc. Docs Rep.'s Tr. at 14, ECF No. 31.) This Court ruled that
12 competitive information was to be produced by MLCS under the terms
13 of the protective order in place. (Id.) Nevertheless, MLCS
14 asserts that Ameritox has all the information it needs to determine
15 whether, as a general matter, MLCS provided POCT cups at a low
16 cost. (Id. at 15.)

17 Plaintiff alleges in the Reply that MLCS changed the documents
18 from the form they are kept in the ordinary course of business by
19 omitting customer names. (Reply 6, ECF No. 40.) Ameritox provides
20 other arguments in the sealed version of its Reply, which the Court
21 has read and considered. (See Reply 6-8, ECF No. 39 (sealed
22 version).)

23 Rule 34 of the Federal Rules of Civil Procedure states, "A
24 party must produce documents as they are kept in the usual course
25 of business or must organize and label them to correspond to the
26 categories in the request." Fed. R. Civ. P. 34(b)(2)(E)(I). Here,
27 MLCS admits that it altered the documents from how they are kept in
28 the usual course by replacing customer names with numeric

1 identifiers. (See Opp'n 14, ECF No. 34 ("[U]nique customer
2 identification numbers for each account . . . were added"))
3 The third party's production is improper, and the Motion to Compel
4 and Enforce [ECF No. 31] as to document request two is therefore
5 **GRANTED**. MLCS is ordered to comply with the Court's Discovery
6 Order and provide Plaintiff with responsive documents that contain
7 customer names, not numeric identifiers.

8 **3. Failure to produce sales and payment information for each**
9 **customer**

10 Next, Ameritox maintains that MLCS responded to document
11 request two by providing transaction histories organized by month
12 and year, rather than by customer. (Mot. Compel & Enforce Disc.
13 Order Attach. #1 Mem. P. & A. 12, ECF No. 31.) "MLCS thus expects
14 Ameritox to dig through tens of thousands of spreadsheet entries to
15 piece together customer sales and payment histories bit-by-bit."
16 (Id.) Plaintiff asserts that MLCS organizes transaction histories
17 by customer, and should be ordered to produce those documents.
18 (Id. at 12-13.)

19 In the Opposition, MLCS insists that it has provided Ameritox
20 with all the requested information sorted by a customer-identifier
21 number. (Opp'n 16-17, ECF No. 34.) Moreover, MLCS contends that
22 it is under no obligation to provide actual customer names because
23 the document request does not ask for them. (Id. at 17.)
24 Supplying customer names, the third party argues, "would give
25 Ameritox the single most important piece of competitive trade
26 secret information possessed by MLCS." (Id.) In the Reply,
27 Plaintiff states that "[n]o valid reason exists for MLCS's attempt
28 to unduly burden Ameritox with voluminous spreadsheets of raw data

1 when MLCS has reports created in the ordinary course of business
2 that compile the information by customer." (Reply 8-9, ECF No.
3 40.)

4 MLCS is ordered to produce responsive documents identifying
5 each customer by name, not with a numerical identifier. MLCS's
6 current production is inadequate and the Motion to Compel and
7 Enforce Discovery Order [ECF No. 31] as to document request two is
8 **GRANTED** on this additional basis.

9 **4. Failure to produce documents regarding free cup contracts**

10 Next, Plaintiff alleges that the third party has failed to
11 provide Ameritox with documents relating to "(1) the terms under
12 which customers received cups; and (2) written agreements between
13 MLCS and its customers." (Mot. Compel & Enforce Disc. Order
14 Attach. #1 Mem. P. & A. 13, ECF No. 31.) The Court infers that
15 Plaintiff is again referring to document request two. (See Mot.
16 Compel Attach. #3 Ex. A at 18-19, ECF No. 1.) According to
17 Plaintiff, in response to this request, "MLCS failed to produce a
18 single Cup Contract to Ameritox." (Mot. Compel & Enforce Disc.
19 Order Attach. #1 Mem. P. & A. 13, ECF No. 31.) Moreover, Plaintiff
20 argues that "MLCS possesses documents that easily identify all
21 customers with Cup Contracts, and the terms of those Cup Contracts,
22 but refused to produce them." (Id. (footnote omitted).)

23 Ameritox also urges that as to document request three, MLCS is
24 obligated to produce invoices for cup contracts or "'documents
25 sufficient to identify the information concerning those invoices.'"
26 (Id. at 14 (quoting Mot. Compel Attach. #3 Ex. A at 19, ECF No.

27
28

1 1).)⁴ Plaintiff maintains that MLCS has only provided a few
2 invoices. (Id.) To the extent MLCS has spreadsheets and other
3 documents showing this information, Ameritox asserts that only one
4 document partially capturing this information was produced and is
5 insufficient. (Id.; see also Mot. Compel & Enforce Disc. Order
6 Mem. P. & A. 14, ECF No. 33 (sealed version) (citing id. Attach.
7 #16 Ex. O (referring to one customer for eight months of one
8 year)).)

9 MLCS counters by insisting that Plaintiff's request is
10 improper because the contracts sought are between Millennium and
11 its customers, and MLCS thus "does not maintain them." (Opp'n 17,
12 ECF No. 34.) According to MLCS, Ameritox was ordered by the
13 magistrate judge in the Underlying Action to seek these documents
14 directly from Millennium. (Id. at 17-18 (citing Req. Judicial
15 Notice Attach. #3 Ex. C at 2, ECF No. 35).)⁵ MLCS also maintains
16 that summary reports have been produced that contain all relevant
17 information, including "customer identifier[s], date[s], type[s]
18 and quantit[ies] of cups provided, among other things[]." (Opp'n
19 18, ECF No. 34.)

20

21

22 ⁴ Document request three asks for "[a]ll price lists,
23 invoices and/or purchase orders related to the sale and/or
24 provision of POCT cups and/or POCT supplies (including reagents),
25 or documents sufficient to identify the information concerning
26 those invoices and/or purchase order, including but not limited to
27 spreadsheets and other business records." (Mot. Compel. Attach. #3
28 Ex. A 19, ECF No. 1.)

26 ⁵ This misrepresents the context of Judge McCoun's order.
27 The order addressed documents and other items "allegedly improperly
28 retained by [two] witnesses" (See Req. Judicial Notice
Attach. #3 Ex. C, at 2, ECF No. 35.) "Plaintiff [Ameritox] will
have to obtain such matters from Defendant or by some other means."
(Id.)

1 In the Reply, Plaintiff argues that this Court has already
2 ordered MLCS to provide this information and should not entertain
3 MLCS's belated arguments. (Reply 9, ECF No. 39.) Ameritox insists
4 that the spreadsheet provided by MLCS is insufficient because it
5 omits customer names and does not indicate which customers received
6 free cups. (Id. at 10.) If MLCS does not provide the names of its
7 customers in the spreadsheets, Plaintiff contends, MLCS must
8 provide the actual customer invoices. (Id.)

9 "Legal ownership of the requested documents, electronically
10 stored information, or things is not determinative, nor is actual
11 possession necessary if the party has control of the items.
12 Control has been defined to include 'the legal right to obtain the
13 documents requested upon demand.' The term 'control' is broadly
14 construed." 7 James Wm. Moore et al., Moore's Federal Practice §
15 34.14[2][b], at 34-73 to 34-74 (3rd ed. 2013) (footnotes omitted)
16 (discussing requests for production under Rule 34). "[P]ossession
17 or control of documents or other materials can involve
18 consideration of a wide array of factors" Id. at 34-76.

19 Regardless of whether MLCS has custody, possession, or
20 control of the cup contracts or invoices, to the extent it has
21 other documents containing the information requested, MLCS must
22 provide them. MLCS is to provide documents that identify customers
23 by name, not with a numeric identifier. To date, Ameritox has
24 failed to properly comply with the Discovery Order by withholding
25 customer names. The Motion to Compel and Enforce Discovery Order
26 [ECF No. 31] as to document requests two and three is therefore
27 **GRANTED.**

28

1 **5. Failure to produce screen shots of website**

2 Next, Plaintiff asserts that the third party "failed to
3 produce relevant screen shots of the sales, marketing, pricing, and
4 promotional materials that have appeared on its website from 2009
5 to the present." (Mot. Compel & Enforce Disc. Order Attach. #1
6 Mem. P. & A. 14, ECF No. 31.) This request relates to document
7 request four.⁶ Ameritox states that despite its requests for
8 legible copies of the screen shots, MLCS has only produced "three
9 black and white copies of a single webpage, which are undated and
10 illegible." (Id. (citing id. Attach. #17 Ex. P).) MLCS responds
11 by asserting that "[it] has produced the information that it
12 possesses -- including screen shots from its website." (Opp'n 18,
13 ECF No. 34 (citation omitted).)

14 The screen shots provided by MLCS are unintelligible and
15 undated. (Mot. Compel & Enforce Disc. Order Attach. #17 Ex. P. at
16 2-4, ECF No. 33 (sealed version).) The Court made clear at the
17 hearing on the Motion to Compel that MLCS was responsible for
18 providing screen shots of previous versions of the website. (See
19 Mot. Compel Produc. Docs. Rep.'s Tr. Proceedings 18-19, ECF No.
20 22.) To fully comply with the Discovery Order MLCS must provide
21 legible, dated screen shots from May 2009 to the present. (See id.
22 at 11 (holding that the relevant time period for the subpoenas was
23 May 2009 to the present).) It has not done so. The document
24 production is, again, not in compliance the Discovery Order. The

25
26 ⁶ The full text of document request four asks for "[a]ll
27 sales, marketing, pricing and/or promotional materials related to
28 POCT Cups and/or POCT supplies (including reagents) and/or
documents that mention or discuss the sale, marketing, promotion,
pricing and/or provision of POCT Cups and/or POCT supplies
(including reagents)." (Mot. Compel. Attach. #3 Ex. A 18-19, ECF
No. 1.)

1 Motion to Compel and Enforce February 19, 2013 Discovery Order [ECF
2 No. 31] as to document request four is **GRANTED**.

3 **6. Failure to produce documents related to cashed and**
4 **uncashed checks and credit card chargebacks**

5 Plaintiff argues that as to document request six, MLCS refuses
6 to provide "documents reflecting all cashed and un-cashed checks,
7 and credit card chargebacks for POCT cups and supplies." (Mot.
8 Compel & Enforce Disc. Order Attach. #1 Mem. P. & A. 15, ECF No.
9 31.) Ameritox insists that the documents provided by MLCS "lack
10 enough detail for Ameritox to understand the purpose and actual
11 terms of any transaction[.]" (Id.)

12 MLCS urges that this document request does not ask for "actual
13 cashed or uncashed checks or chargebacks." (Opp'n 19, ECF No. 34
14 (emphasis omitted).) Rather, MLCS claims it may produce
15 "information sufficient to identify those transactions." (Id.) On
16 this basis, MLCS contends that responsive documents have been
17 produced in electronic, searchable form. (Id.) Plaintiff asserts
18 arguments in the sealed version of the Reply, which the Court has
19 read and considered. (See Reply 11-12, ECF No. 39.)

20 In Exhibit Q of the Motion to Compel and Enforce February 19,
21 2013 Discovery Order, Plaintiff includes documents provided by MLCS
22 in response to this request. (See Mot. Compel & Enforce Disc.
23 Order Attach. #18 Ex. Q, ECF No. 33 (sealed version).) MLCS does
24 not dispute that Exhibit Q contains the documents it provided to
25 Ameritox. (See Opp'n 19-20, ECF No. 34.) The twenty-six pages of
26 fragmented information MLCS produced confirms Ameritox's claim that
27 the documents provided are insufficient to identify the
28 transactions. MLCS is to comply with the Discovery Order and

1 produce documents containing the requested information. The Motion
2 to Compel and Enforce Discovery Order [ECF No. 31] as to document
3 request six is **GRANTED**.

4 **7. Failure to provide invoices that have been unpaid for**
5 **sixty days or longer**

6 Ameritox argues that MLCS failed to properly respond to
7 document request eight because it did not "produce copies of all
8 invoices for POCT cups and supplies that have been unpaid for sixty
9 (60) days or longer." (Mot. Compel & Enforce Disc. Order Attach.
10 #1 Mem. P. & A. 16, ECF No. 31.) Plaintiff states that MLCS only
11 provided a few open invoices for 2009 and 2010. (Id.)

12 MLCS maintains that it may produce summaries of the requested
13 information, as producing all the invoices would be "a laborious
14 and time-consuming task." (Opp'n 20, ECF No. 34.) Additionally,
15 it contends that Plaintiff should seek this information from
16 Millennium in the Underlying Action. (Id.) In its Reply, Ameritox
17 asserts a number of arguments under seal, which the Court has
18 considered. (See Reply 12, ECF No. 39.)

19 The plain language of document request eight calls for the
20 production of "all invoices." (Mot. Compel. Attach. #3 Ex. A at
21 19, ECF No. 1.) Yet, the number of MLCS customers with open
22 balances is disparate from the number of invoices produced to
23 Ameritox. (Mot. Compel & Enforce Disc. Order Mem. P. & A. 16, ECF
24 No. 33 (sealed version).) To the extent MLCS has invoices, it must
25 provide them. If, in the ordinary course of business, it uses
26 spreadsheets or other reports to manage invoice information, those
27 unredacted documents may be sufficiently responsive if they contain
28 all the information contained in the invoices. In either case, the

1 Motion to Compel and Enforce February 19, 2013 Discovery Order [ECF
2 No. 31] as to document request eight is **GRANTED**.

3 **8. Failure to provide documents reflecting payments and fund**
4 **transfers**

5 Ameritox contends that to properly respond to supplemental
6 document request four, MLCS must produce all documents showing any
7 payments or transfers of funds between MLCS and Millennium. (Mot.
8 Compel & Enforce Disc. Order Attach. #1 Mem. P. & A. 17, ECF No. 31
9 (citing Mins., Feb. 19, 2013, ECF No. 16; Mot Compel Attach. #4 Ex.
10 B at 19, ECF No. 1).) In the sealed version of the Motion to
11 Compel and Enforce Discovery Order, Plaintiff provides additional
12 arguments and cites to a document produced by MLCS that contains
13 fragments of information called for by Ameritox's subpoena. (See
14 id.) Based on MLCS's limited production to date, Ameritox argues
15 that additional documents likely exist relating to these
16 transactions. (Mot. Compel & Enforce Disc. Order Attach. #1 Mem.
17 P. & A. 17, ECF No. 31.) Plaintiff insists that the third party
18 should be ordered to produce those documents. (Id.)

19 MLCS claims that it has complied with the subpoena by
20 producing responsive documents showing the "dates of payments,
21 transaction types[,] and amounts." (Opp'n 20-21, ECF No. 34.)
22 Additionally, MLCS contends that Ameritox's request is improper
23 because Plaintiff was ordered to seek from Millenium the documents
24 that can be obtained directly from it in the Underlying Action.
25 (Id. at 21.) Thus, any documents produced in this action would be
26 duplicative of those already provided. (Id.) If MLCS is asserting
27 a new objection to the production of documents subpoenaed by
28

1 Ameritox and ordered produced by this Court, the objection comes
2 too late and is not well founded.

3 Supplemental document request four asks for "All documents
4 reflecting any payments or transfer of funds of any nature between
5 MLCS and Millennium Laboratories, Inc." (Mot. Compel. Attach. #4
6 Ex. B at 19, ECF No. 1 (emphasis added).) The documents provided
7 do not fully comply with the Discovery Order. First, based on the
8 document reproduced on page seventeen of the sealed version of the
9 Motion to Compel and Enforce Discovery Order, it appears that MLCS
10 eliminated data fields from the document. (See Mot. Compel &
11 Enforce Disc. Order Mem. P. & A. 17, ECF No. 33 (sealed version).)
12 Second, MLCS does not argue that it has produced "all documents"
13 reflecting the requested information. Rather, MLCS merely contends
14 that it has "produced documents reflecting this information."
15 (Opp'n 20, ECF No. 34.) The morsels of information produced are
16 insufficient to comply with the Court's Discovery Order. For these
17 reasons, MLCS is ordered to comply with the Discovery Order and
18 provide all responsive documents to Plaintiff. The Motion to
19 Compel and Enforce February 19, 2013 Discovery Order [ECF No. 31]
20 as to supplemental document request four is **GRANTED**.

21 **9. Failure to produce verified responses**

22 Ameritox maintains that the Court ordered MLCS to provide
23 verified discovery responses for all document requests where
24 "responsive documents do not exist or have been produced." (Mot.
25 Compel & Enforce Disc. Order Attach. #1 Mem. P. & A. 17-18, ECF No.
26 31 (citing Mins., Feb. 19, 2013, ECF No. 16).) Yet, while MLCS
27 claims that it has produced all documents responsive to some of
28 Plaintiff's requests, MLCS has failed to provide a verified

1 statement from a company officer to this effect. (Id. at 18.) In
2 its Opposition, MLCS submits that the Court did not require it to
3 provide verified responses for all document requests, merely to
4 those where additional documents would not be forthcoming after the
5 hearing on the Motion to Compel. (Opp'n 21-22, ECF No. 34 (citing
6 Mins. 1, Feb. 19, 2013, ECF No. 16).)

7 At the February 19, 2013 hearing on Ameritox's Motion to
8 Compel the Court held, "'When a party claims that all the requested
9 documents have already produced, it must state that fact under oath
10 in response to the request.' That guidance is useful here.

11 Although Millennium Laboratories Clinical Supply urges that many
12 documents have already been produced, that response should be made
13 under oath." (Mot. Compel Produc. Docs. Rep.'s Tr. Proceedings 18,
14 ECF No. 22.) If MLCS has produced all responsive documents, it
15 must make that statement under oath. To the extent the third party
16 claims that more documents will not be forthcoming as to any
17 document request because all responsive documents have been
18 provided or do not exist, it is to state so under oath.

19 Accordingly, the Motion to Compel and Enforce February 19, 2013
20 Discovery Order [ECF No. 31] is also **GRANTED**.

21 **10. Sanctions**

22 Plaintiff asks the Court to award sanctions "as the Court
23 deems appropriate, in light of MLCS's conduct since the Discovery
24 Order was entered more than four months ago." (Mot. to Compel &
25 Enforce Disc. Order Attach. #1 Mem. P. & A. 18, ECF No. 31.) Yet,
26 Ameritox does not support this request with case law or an
27 application of the facts to the standards for imposing sanctions.
28 It is unclear whether Plaintiff seeks monetary, or some other type

1 of sanction. Based on Ameritox's one-sentence request for
2 sanctions, the Court declines to rule on the issue.

3 A company's culture of compliance with court orders is set at
4 the top of the organization. Here, MLCS's compliance with
5 subpoenas and court orders is suspect. This conclusion is
6 buttressed by the fact that at the time Ameritox moved to compel
7 compliance with its subpoenas, the chief executive officer of MLCS,
8 James Slattery, was also the chief executive officer of Millennium,
9 the defendant in the Underlying Action in Florida. (See Mot.
10 Compel Attach. #1 Mem. P. & A. 3 n.3, ECF No. 1.) Furthermore,
11 "MLCS and Millennium share the same address, same suite number, and
12 the same agent" (Id.) Additional factors suggest a unity
13 of interests that may explain a grudging production of subpoenaed
14 items in response to this Court's Discovery Order. (See id.)

15 Yet, to be clear, the Court expects MLCS's full compliance
16 with the Court's orders. Plaintiff has filed two motions to
17 compel, and both have been granted. The third party has twice
18 taken the position that it need not produce documents, and it has
19 twice been wrong. In light of the attorney's fees and judicial
20 resources expended to date, and mindful of the schedule set in the
21 Underlying Action, further motion practice is highly discouraged.

22 IV. CONCLUSION

23 For the reasons described above, Plaintiff's Motion to Compel
24 and Enforce February 19, 2013 Discovery Order [ECF No. 31] is
25 **GRANTED**. Supplemental documents are to be produced by MLCS on or
26 before November 11, 2013. MLCS's Request for Judicial Notice [ECF
27 No. 35] is **GRANTED**. MLCS's Motion to File Documents Under Seal by
28 Delivery to the Clerk, in Support of its Opposition to Ameritox's

1 Motion to Compel and Enforce [ECF No. 36] is **DENIED**. Ameritox's
2 Motion for Leave to File Under Seal Portions of Its Reply [ECF No.
3 38] is **GRANTED**. MLCS's Ex Parte Application for Leave to File
4 Surreply in Opposition to Plaintiff Ameritox, Ltd.'s Motion to
5 Compel and Enforce February 19, 2013 Discovery Order [ECF No. 41]
6 is **DENIED**.

7 **IT IS SO ORDERED.**

8
9 Dated: October 25, 2013


RUBEN B. BROOKS
United States Magistrate Judge

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11 cc: Judge Whelan
12 All Parties of Record
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