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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WAHOO INTERNATIONAL, INC, a
California corporation,

Plaintiff,

v.

PHIX DOCTOR, INC, a Florida
Corporation; and DOES 1-10.

Defendants.

Case No. 13cv1395-GPC (BLM)

ORDER:

**(1) DENYING DEFENDANT’S EX
PARTE MOTION TO QUASH THIR D
PARTY SUBPOENAS;**

**(2) DIRECTING THE PARTIES TO
EXECUTE A PROTECTI VE ORDER;**

AND

**(3) MODI FYING PLAINTI FF’S
SUBPOENAS.**

[ECF No. 50]

On June 25, 2014, Defendant Phix Doctor, Inc. (“Phix Doctor”) filed an “Ex Parte Application for Protective Order, Motion to Quash and an Order Shortening Time.” ECF No. 50. On June 27, 2014, Plaintiff Wahoo International, Inc. (“Wahoo”) filed an “Opposition to Defendant’s Ex Parte Motion to Quash and/or for a Protective Order.” ECF No. 51. Having considered all of the briefing and supporting documents presented, and for the reasons set for below, the Court **DENIES** Defendant’s motion to quash third-party subpoenas, **ORDERS** the parties to execute a protective order, and **MODI FIES** Plaintiff’s subpoenas.

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 On June 14, 2013, Plaintiff Wahoo filed this lawsuit against Defendants alleging
3 trademark infringement, in violation of 15 U.S.C. § 1114, trademark dilution and false
4 designation of origin, in violation of 15 U.S.C. § 1125 (A)&(C), and other related causes of
5 action. ECF No. 1. Plaintiff manufactures UV cure resins that are used to repair fiberglass,
6 plastic, wood, and metal, and sells its products online and through distributors in California,
7 Maryland and Hawaii. Id. at 3. Plaintiff owns SOLAREZ trademark¹ on its repair putty, and
8 alleges that Defendants developed a resin product, which they began marketing under the
9 confusingly similar “Durarez” mark in November 29, 2011. Id. at 4-6, 8, 12.

10 Defendant did not obtain counsel or otherwise respond to the complaint, and on
11 September 17, 2013, Plaintiff filed a motion for entry of default. ECF No. 6. On
12 September 19, 2013, District Judge Gonzalo P. Curiel issued an Order to Show Cause
13 (“OSC”) why default judgment should not be entered against Defendant for failing to obtain
14 counsel. ECF No. 10. At the November 8, 2013 OSC hearing, Defendant appeared through
15 counsel, Isi Mataele, and the Court ordered “defense counsel to file their appearance by
16 11/12/2013.” ECF No. 15. After Defendant did not appear or respond to the complaint by
17 the deadline, Plaintiff renewed its request for entry of default on November 18, 2013, and
18 the district court entered a default judgment against Defendant on November 20, 2013.²
19 ECF Nos. 16 & 17.

20 On December 13, 2013, Plaintiff filed an ex parte motion for an extension of time to
21 file for default judgment and for leave to conduct limited discovery necessary for Plaintiff’s
22 default prove-up, which was granted on December 19, 2013. See ECF No. 22; see also ECF
23 No. 23 (containing District Judge Curiel’s order allowing Plaintiff to “conduct discovery for

24 _____
25 ¹ Plaintiff alleges that it started using the mark on its repair putty in June 26, 1989, and acknowledges
26 that the mark’s first registration lapsed for “inadvertent failure to renew” in 2003. ECF No. 1 at 4, 6. The mark
was subsequently re-registered on January 6, 2004. Id.

27 ² On November 22, 2013, Defendant attempted to file a motion to dismiss Plaintiff’s complaint
28 pursuant to Fed. R. Civ. P. 12(b)(6), which was rejected and stricken by the Court for failure to comply with
the Court’s local rules on November 26, 2013. ECF Nos. 18 & 20.

1 the limited purpose of proving Defendant's profits pursuant to 15 U.S.C. § 1117"). On
2 February 18, 2014, Plaintiff served Defendant with discovery requests seeking Defendant's
3 profits from the use of the allegedly infringing mark. ECF No. 51-1, Declaration of Erin K.
4 Barns ("Barns Decl.") at 3. Plaintiff alleges that in response to its discovery requests,
5 Defendant produced two excel spreadsheets, which listed total sales and some categories
6 of expenses, but did not produce any other documents, such as invoices or receipts.³ ECF
7 No. 51 at 7. Although the parties preliminarily agreed on June 5, 2014, to enter into a
8 protective order, such order was not executed. Id. at 4, 7; see also Barns Decl. at 4; ECF
9 No. 50-3, Declaration of Isi Mataele ("Mataele Decl.") at 2.

10 Plaintiff asserts that on June 5,⁴ 2014, it served five subpoenas on Eastern Surf
11 Supply, Larry Block Enterprises, Ocean Lineage, Rainbow Distributing, and Shane Preston
12 of Salamander Paddle Gear. Barns Decl. at 5; see also ECF No. 51-1 at 13, 23, 33, 43, 53,
13 63.

14 The subpoenas requested the following documents:

- 15 1. ALL DOCUMENTS evidencing, constituting or relating to all agreements
16 with PHIX DOCTOR, INC. regarding DURA REZ, including but not limited to,
contracts for purchase or sale and license agreements.
- 17 2. ALL DOCUMENTS evidencing, constituting or relating to the purchase or
18 sale of DURA REZ products, including but not limited to all invoices, receipts,
refunds, COMMUNICATIONS, and agreements with third parties, including
retailers.
- 19 3. ALL DOCUMENTS evidencing, constituting or relating to all COMPLAINTS
received by YOU regarding DURA REZ products.

20 ECF No. 51-1 at 20, 30, 40, 50, 70 (emphasis in original).

21 Defendant filed the instant motion requesting the Court to enter a "protective order,
22

23 ³ Defendant initially agreed to produce "all relevant financial documents in lieu of specific sales,
24 customer list, or buying patterns," but did not do so after the subpoenas were served on its distributors and
the parties were unable to execute the protective order. See Mataele Decl. at 2-3.

25 ⁴ Plaintiff alleges that a legal assistant at Plaintiff's firm "inadvertently served" a subpoena to
26 Salamander Paddle Gear "early (on June 4, 2014)," that the subpoena was "withdrawn and re-issued after it
was served on Defendant," and that the "[r]espondent was expressly told not to respond to the early-served
27 subpoena." See Barns Decl. at 5; see also ECF No. 51-1 at 62. Plaintiff further asserts that "Plaintiff personally
served Defendant's counsel with the subpoenas to be served" at the parties' June 5, 2014 meeting, and that
28 "the other four subpoenas (and the amended fifth subpoena) were served [on third parties] after being served
on Defendant." Barns Decl. at 4-5.

1 a motion to quash, and order shortening time regarding disclosure of Defendant and third
2 party trade secrets, proprietary information, and other protected information.” ECF Nos.
3 50 at 1; 50-1 at 9. In the alternative, Defendant asks the Court to order Plaintiff to bear
4 the cost of production. ECF No. 50-1 at 9. Defendant alleges that Plaintiff’s subpoenas are
5 procedurally deficient, improperly served, and seek to compel Defendant’s distributors to
6 produce protected information. ECF No. 50 at 2.

7 Plaintiff denies Defendant’s allegations that the challenged subpoenas are
8 procedurally deficient and seek privileged or trade secret information. ECF No. 51 at 1; see
9 also ECF No. 50 at 2. Plaintiff further asserts that Defendant’s motion is “procedurally and
10 substantively deficient,” factually inaccurate, and that the ex parte relief sought by
11 Defendant is improper in light of Defendant’s delay in bringing the motion. ECF No. 51 at 1.
12 Plaintiff thus asserts that Defendant’s motion should be denied, or, in the alternative,
13 Plaintiff should be given additional time to respond to the motion. Id. at 9.

14 **LEGAL STANDARD**

15 A court must modify or quash a subpoena that fails to allow a reasonable time to
16 comply, requires a person to travel more than 100 miles (except for trial within the state),
17 requires disclosure of privileged or other protected materials, or subjects a person to undue
18 burden. See Fed. R. Civ. P. 45(d)(3)(A) (i-iv). The Federal Rule of Civil Procedure (“FRCP”)
19 45 further provides that a court may modify or quash a subpoena when the subpoena,
20 *inter alia*, requires the disclosure of a “trade secret or other confidential research,
21 development, or commercial information.” See Fed. R. Civ. P. 45(d)(3)(B).

22 Under FRCP 45(c)(3), a party lacks standing to challenge a subpoena issued to a
23 non-party unless the party claims a personal right or privilege with respect to the
24 documents requested in the subpoena. See In re REMEC, Inc. Sec. Litig., 2008 WL
25 2282647, at * 1 (S.D. Cal. May 30, 2008); see also Malibu Media, LLC v. Does 1-25, 2012
26 WL 2367555, at * 2 (S.D. Cal. June 21, 2012). In evaluating whether a subpoena is unduly
27 burdensome, “the court balances the burden imposed on the party subject to the subpoena
28 by the discovery request, the relevance of the information sought to the claims or defenses

1 at issue, the breadth of the discovery request, and the litigant's need for the information."
2 Call of the Wild Movie, LLC v. Does 1-1,062, 770 F. Supp. 2d 332, 354 (D.D.C. 2011); see
3 also Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 577 (N.D. Cal. 2007) (providing that
4 a court may quash a subpoena if the burden on the third party outweighs the likely benefit
5 of the subpoena, "at least in the absence of a convincing showing that the subpoena is
6 likely to yield unique and material evidence from the third party."). A third-party subpoena
7 issued pursuant to FRCP 45 also is subject to the limitations of FRCP 26. See Nidec Corp.,
8 249 F.R.D. at 577; In Re Subpoena of DJO, LLC, 295 F.R.D. 494, 497 (S.D. Cal. 2014). The
9 court is required to limit the "extent of discovery otherwise allowed" if "the discovery sought
10 is unreasonably cumulative or duplicative, or can be obtained from some other source that
11 is more convenient, less burdensome, or less expensive," or the "burden or expense of the
12 proposed discovery outweighs its likely benefit, considering the needs of the case, the
13 amount in controversy, the parties' resources, the importance of the issues at stake in the
14 action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P.
15 26(b)(2).

16 "A party can move for a protective order in regard to a subpoena issued to a non-
17 party if it believes its own interests are jeopardized by discovery sought from a third party
18 and has standing under Rule 26." In re REMEC, Inc. Sec. Litig., 2008 WL 2282647,
19 at * 1; see also Springbrook Lenders v. Northwestern Nat. Ins. Co., 121 F.R.D. 679, 680
20 (N.D. Cal. 1988) (noting that parties have standing to challenge third-party subpoenas
21 under Rule 26). Upon a showing of good cause, the court may issue a protective order
22 limiting the scope of the discovery sought against third parties. Duffy v. Kent Cnty. Levy
23 Court, 800 F. Supp. 2d 624, 630-31 (D. Del. 2011) (citing Royal Surplus Lines Ins. Co. v.
24 Sofamor Danek Group, 190 F.R.D. 463, 467 (W.D. Tenn. 1999) ("courts have been inclined
25 to limit the scope of discovery directed to non-parties in order to protect the non-party from
26 harassment, inconvenience, or disclosure of confidential documents.")); Societe Nationale
27 Industrielle Aerospatiale v. United States Dist. Ct. S. Dist. Iowa, 482 U.S. 522, 566 (1987)
28 (under FRCP 26, "[a] court may 'make any order which justice requires' to limit discovery,

1 including an order permitting discovery only on specified terms and conditions, by a
2 particular discovery method, or with limitation in scope to certain matters.”).

3 DISCUSSION

4 Defendant asserts that the subpoenas are procedurally defective and improperly
5 served because they were sent for service before Plaintiff provided Defendant with a “copy
6 or notice,” and because the subpoenas did not give the third parties sufficient time to
7 comply.⁵ ECF Nos. 50 at 2; 50-1 at 2. Defendant further asserts that the subpoenas seek
8 protected information and are overly burdensome. ECF No. 50-1 at 2. Defendant thus asks
9 the Court to quash the subpoenas served on Defendant’s distributors. ECF Nos. 50 at 1-2;
10 50-1 at 9.

11 Plaintiff counters that the subpoenas are not procedurally deficient because it re-
12 issued the prematurely-served subpoena and properly served the subpoenas after providing
13 notice to Defendant. ECF No. 51 at 8; Barns Decl. at 5. Plaintiff also claims that
14 Defendant’s ex parte application is procedurally deficient⁶ and that the ex parte relief sought
15 by Defendant is not justified in light of Defendant’s delay in bringing the instant motion.
16 ECF No. 51 at 5-6. Plaintiff therefore asserts that Defendant’s motion should be denied.
17 Id. at 9.

21 ⁵ Defendant claims that the subpoenas did not give the third parties sufficient time to comply. ECF
22 No. 50-1 at 2. The challenged subpoenas listed the following dates of compliance: June 26, 2014 (subpoenas
23 directed to Eastern Surf Supply, Larry Block Enterprises and Ocean Lineage), July 3, 2014 (re-issued subpoena
24 directed to Salamander Paddle and Gear), and June 10, 2014 (subpoena directed to Rainbow distributing;
25 however Plaintiff represents that it gave Rainbow an extension until July 7, 2014). See id. at 8; Barns Decl.
26 at 4-5; see also ECF No. 51-1 at 13, 23, 33, 43, 63. Further, the cover letters accompanying each subpoena
27 advised the subpoenaed parties of the following: “Should you be unable to meet the deadline herein, we may
28 be able to be flexible in the timing and manner of the production of [the requested] documents.” ECF No. 51-1
at 12, 22, 32, 42, 62. As such, Defendant’s assertion that the subpoenas did not provide the third parties with
the sufficient time to comply lacks merit. See ECF No. 50-1 at 2.

⁶ Plaintiff points to several deficiencies in Defendant’s ex parte application and cites to the California
Rules of Court. ECF No. 51 at 5-6. Plaintiff filed this case in federal court and its claims are, in part, based on
the violations of the Lanham Act, as amended, 15 U.S.C. §§ 1501, *et seq.* ECF No. 1 at 2. Accordingly, the
California Rules of Court are not binding in this proceeding.

1 **A. Defendant’s Procedural Challenges of the Third-Party Subpoenas**

2 Defendant claims that the subpoenas are procedurally defective because they were
3 sent for service before Defendant was provided with a “copy or notice.” ECF No. 50-1 at 2.
4 “If the subpoena commands the production of documents, electronically stored information,
5 or tangible things . . . then before it is served on the person to whom it is directed, a notice
6 and a copy of the subpoena must be served on each party.” Fed. R. Civ. P. 45(a)(4). The
7 “prior notice” requirement of FRCP 45 is satisfied when notice is given simultaneously with
8 the service of the subpoena. Florida Media, Inc. v. World Publications, LLC, 236 F.R.D. 693,
9 695 (M.D. Fla. 2006). Plaintiff represents that it “inadvertently served” a subpoena on
10 Salamander Paddle Gear on June 4, 2014, before giving notice to Defendant, but later
11 withdrew that subpoena. See Barns Decl. at 5. Plaintiff explains that on June 5, 2014, it
12 “personally served” the challenged subpoenas on Defendant and then re-served the
13 subpoena on Salamander Paddle Gear with instructions to disregard the prior subpoena,
14 and served the other four subpoenas on the identified third parties. See id. at 4-5; see also
15 ECF No. 51-1 at 62. Defendant does not provide any contrary facts. See ECF Nos. 50; 50-
16 1; 50-2; 50-3. Accordingly, the Court finds Plaintiff satisfied FRCP 45's notice requirement.
17 See Florida Media, Inc., 236 F.R.D. at 695.

18 Defendant also argues that the subpoenas should be quashed because they require
19 the responsive documents to be produced in San Diego, which is beyond the authorized 100
20 miles, and because Plaintiff failed to “ensure reasonable compensation to the witnesses.”
21 ECF No. 50-1 at 7 (citing Fed. R. Civ. P. 45). “A person commanded to produce documents,
22 electronically stored information, or tangible things, or to permit the inspection of premises,
23 need not appear in person at the place of production or inspection unless also commanded
24 to appear for a deposition, hearing, or trial.” Fed. R. Civ. P. 45(d)(2)(A). The subpoenaed
25 third parties are located in Wilmington, NC; Simi Valley, CA; Orange, CA; Indian Harbour
26 Beach, FL; and Boise, ID. See ECF No. 51-1 at 13, 23, 33, 43, 63. Although the challenged
27 subpoenas seek production of documents at a designated location in San Diego, California,
28 the subpoenas do not require any travel by the third parties. See id. “[T]he 100 mile limit

1 [imposed by FRCP 45] applies to travel by a subpoenaed person, but a person commanded
2 to produce documents need not appear in person at the place of production or inspection.”
3 Walker v. Ctr. for Food Safety, 667 F. Supp. 2d 133, 138 (D.D.C. 2009) (internal quotation
4 omitted); see also Kremen v. Cohen, 2012 WL 1669358, at *2 (S.D. Cal. May 11, 2012).
5 Accordingly, the Court finds that Defendant’s challenge to the validity of the subpoenas on
6 the ground that they require compliance beyond the geographical limits specified in FRCP
7 45 is without merit. See Fed. R. Civ. P. 45; Walker, 667 F. Supp. 2d at 138; Kremen, 2012
8 WL 1669358, at *2. Likewise, Defendant’s argument that the subpoenas are procedurally
9 defective because Plaintiff failed to “ensure reasonable compensation to the witnesses” also
10 fails because witness fees are not required for subpoenas seeking documents. See ECF No.
11 50-1 at 7; see also Fed. R. Civ. P. 45(b)(1). Accordingly, the Court finds that the subpoenas
12 are valid. See Fed. R. Civ. P. 45.

13 **B. Defendant’s Motion to Quash Third-Party Subpoenas**

14 Defendant alleges the information sought in the subpoenas is protected information
15 and asserts that the subpoenas are overly burdensome. ECF No. 50-1 at 3-5; see also ECF
16 No. 50-2, Declaration of Tony Gowen (“Gowen Decl.”) at 2-3. Defendant thus asks the
17 Court to quash the subpoenas. ECF Nos. 50 at 1-2; 50-1 at 9. Plaintiff objects by asserting
18 that the subpoenas do not seek privileged or trade secret information. ECF No. 51 at 1.
19 Plaintiff further claims that in response to its discovery requests, Defendant produced two
20 excel spreadsheets, listing total sales and certain categories of expenses, and did not
21 produce any documents, such as invoices or receipts, to establish its sales revenues to
22 “support or authenticate” the produced data. Id. at 7. Plaintiff thus claims that it had “no
23 choice but to subpoena this information” from third parties. Id. at 7-8; Barns Decl. at 4.

24 Defendant argues that the subpoenas seek protected information belonging to the
25 subpoenaed parties and Defendant, and asks the Court to quash them because they
26 improperly require the disclosure of a “trade secrets or other confidential research,
27 development, or commercial information.” ECF No. 50-1 at 5-6. Defendant asserts that the
28 disclosure of the information about “[t]he region [Defendant sells in], what [Defendant]

1 sells, when it sells, how much it sells, and other similar information such as buying habits⁷,”
2 will afford Plaintiff and competitors an “unfair economic advantage,” because they “could
3 solicit distributors with business” by identifying “distributors’ particular retailers and the
4 amount of business and rate for each retailer.” See ECF No. 50-1 at 4-5; see also Gowen
5 Decl. at 2. Plaintiff objects by claiming that the subpoenas do not seek privileged or trade
6 secret information. See ECF No. 51 at 1.

7 As noted by Plaintiff, Defendant’s website displays a list of Defendant’s distributors.
8 See Barns Decl. at 4. The website also lists Defendant’s products, as well as retailers by
9 geographical regions. See <http://phixdoctor.net> (last visited on July 17, 2014). As such,
10 Defendant’s distributor and retailer lists, the regions in which the retailers are located, and
11 the products that Defendant sells, are readily available on the publicly-accessible website,
12 and thus do not warrant protection. However, as pointed out by Defendant, the
13 information concerning the volume of business conducted with a particular retailer, the
14 pricing offered to those retailers, customers’ preferences, buying habits, and information
15 reflecting business cycles, is not publicly available, and could be derived from the
16 documents sought in the challenged subpoenas and used by Defendant’s competitors to
17 advance their economic interests. See Gowen Decl. at 3. Consequently, such information
18 may warrant protection. See Triangle Mfg. Co. v. Paramount Bag Mfg. Co., 35 F.R.D. 540,
19 543 (E.D.N.Y. 1964).

20 As a general rule, a party does not have standing to challenge a subpoena issued to
21 a third party, unless the party has some personal right or privilege relating to the
22 information sought. See In re REMEC, Inc. Sec. Litig., 2008 WL 2282647, at * 1; see also
23 Malibu Media, LLC, 2012 WL 2367555, at * 2 (“[H]owever minimal or exceedingly small . . .
24 Defendants’ interests . . . are, parties need only have some personal right or privilege in the
25 information sought to have standing to challenge a subpoena to a third party.”) (internal
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27 ⁷ Defendant claims that it “spent years and tens of thousands of dollars” acquiring the information
28 about clients’ preferences, buying habits, and business cycles. See Gowen Decl. at 3.

1 quotations omitted)). None of the subpoenaed parties have moved to quash the
2 subpoenas. However, as discussed above, certain financial data concerning Defendant's
3 sales sought in the subpoenas warrants protection, and thus, the Court will not deny
4 Defendant's motion to quash for lack of standing.

5 In deciding whether to quash a third-party subpoena, a court must balance the
6 burden imposed on the third parties subject to the subpoena with "the relevance of the
7 information sought to the claims or defenses at issue, the breadth of the discovery request,
8 and the litigant's need for the information." Call of the Wild Movie, LLC, 770 F. Supp. 2d
9 at 354; see also Nidec Corp., 249 F.R.D. at 577. Plaintiff asserts that the information
10 sought in the challenged subpoenas is relevant. In support, Plaintiff states that "any profits
11 made by Defendant (through its distributors) on sales of the infringing product [are]
12 relevant to Plaintiff's damages calculations" and customer complaints are relevant to
13 Plaintiff's "allegation that Defendant's product melts Styrofoam boards." ECF No. 51 at 6-7.
14 Defendant does not challenge Plaintiff's claim of relevance. See ECF Nos. 50; 50-1; 50-2;
15 50-3. District Judge Curiel's December 19, 2013 order allowed Plaintiff to conduct discovery
16 for "the limited purpose of proving Defendant's profits." ECF No. 23. In addition, the
17 parties have conducted their Rule 26 conference and have agreed to conduct discovery.
18 ECF No. 48. As such, the requested information is relevant to claims and defenses at issue
19 in this case.

20 With respect to the breadth of discovery requests, the challenged subpoenas seek
21 all documents "evidencing, constituting or relating to" the following: "all agreements with
22 [Defendant] regarding DURA REZ, including but not limited to, contracts for purchase or
23 sale and license agreements", "the purchase or sale of DURA REZ products, including but
24 not limited to all invoices, receipts, refunds, COMMUNICATIONS, and agreements with third
25 parties, including retailers," and "all COMPLAINTS received by [third parties] regarding
26 DURA REZ products." ECF No. 51-1 at 20, 30, 40, 50, 70 (emphasis in original). Other than
27 boldly alleging that the "requests are broad," Defendant does not provide any evidence to
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1 support its assertion. See ECF Nos. 50; 50-1; 50-2; 50-3. Defendant also does not provide
2 any alternative, narrower interpretation of the requests; Defendant’s only recommendation
3 is to quash all of the subpoenas. See id. Because the majority of the requests seek
4 relevant documents establishing Defendant’s profits from the sales of Dura Rez products
5 and complaints regarding Dura Rez products, the Court finds that the majority of the
6 requests are appropriate. However, the Court finds that Plaintiff’s requests for (1) “license
7 agreements” and (2) all “COMMUNICATIONS and agreements with third parties, including
8 retailers” are overbroad and Plaintiff has not established at this time a need for those
9 documents. See ECF No. 51-1 at 20, 30, 40, 50, 70. The Court therefore modifies the
10 subpoenas to delete the quoted language.

11 To establish its need for the subpoenaed information, Plaintiff represents that aside
12 from producing the excel spreadsheets reflecting total sales and certain categories of
13 expenses, Defendant did not produce any financial documents, such as invoices or receipts,
14 to establish its sales revenues. ECF No. 51 at 7. As a result, Plaintiff argues that it needs
15 to obtain the financial information from third parties. Id. at 7-8; Barns Decl. at 4.
16 Defendant does not dispute Plaintiff’s need for the information. See ECF Nos. 50; 50-1; 50-
17 2; 50-3. Accordingly, the Court finds that Plaintiff has established a sufficient need for the
18 requested documents, as modified by the Court in this order.

19 Defendant also alleges that the requests in the subpoenas are burdensome, because
20 they are broad and seek the appearance of the subpoenaed parties, some of which are
21 located more than 2,000 miles away, and impose substantial costs on third parties. See
22 ECF No. 50-1 at 2, 5; see also Gowen Decl. at 3. Contrary to Defendant’s assertions, the
23 third parties are not required to appear in San Diego, California, but rather are directed to
24 produce documents at a designated location in San Diego. Defendant also claims that
25 Plaintiff’s request creates an undue burden on the third parties because the “cost for
26 personnel to search for the records and print out the documents is substantial.” Gowen
27 Decl. at 3. The Court does not find this argument persuasive, because, as noted above, the
28 documents sought are reasonably-tailored to seek the information concerning Defendant’s

1 profits. Furthermore, the cover letters accompanying the subpoenas advised the third
2 parties that the requesting party was “flexible in the timing and manner of the production”
3 of the requested documents. ECF No. 51-1 at 12, 22, 32, 42, 62. As such, the documents
4 could be produced electronically, thereby avoiding any printing or copying costs. Moreover,
5 Defendant has not provided any facts or evidence regarding the burden of the subpoenaed
6 entities. See ECF Nos. 50; 50-1; 50-2; 50-3. This failure is significant since Defendant will
7 not be responding to these subpoenas; the third parties will and they have not filed a
8 motion to quash on the grounds that the subpoenas are unduly burdensome.

9 After considering the relevance of the information sought, the breadth of the
10 discovery requests, Plaintiff’s need for the information, and the lack of evidence regarding
11 burden, the Court finds that the burdens imposed on the third parties do not outweigh the
12 likely value of the responsive documents. See Call of the Wild Movie, LLC, 770 F. Supp.
13 2d at 354; see also Nidec Corp., 249 F.R.D. at 577. Therefore, the Court **DENIES**
14 Defendant’s ex parte motion to quash third-party subpoenas. See Fed. R. Civ. P. 45(d)(3).

15 **C. Defendant’s Motion for a Protective Order**

16 Defendant claims that the disclosure of the subpoenaed information to Defendant’s
17 competitors or the public will cause “irreparable harm,” and asks the Court to grant a
18 protective order. See ECF No. 50-1 at 3-5, 8; see also Gowen Decl. at 2. Defendant asserts
19 that the third parties “feel harassed and aggravated by the subpoenas,” and are “fearful
20 they may be liable in part for being in business” with Defendant. Gowen Decl. at 3.
21 Plaintiff counters by arguing that the subpoenas do not seek privileged or trade secret
22 information and thus none of the documents sought should be subject to a protective order.
23 ECF No. 51 at 1, 6. Because the subpoenas seek sensitive financial information regarding
24 Defendant’s sales, were served on Defendant’s current distributors, and put a strain on
25 Defendant’s business relationship with the distributors, Defendant’s interests are sufficiently
26 jeopardized to afford standing to seek a protective order. See Fed. R. Civ. P. 26; see also
27 In re REMEC, Inc. Sec. Litig., 2008 WL 2282647, at * 1; Springbrook Lenders, 121 F.R.D.
28 at 680.

1 For good cause, a court may issue an order “specifying terms . . . for the disclosure
2 or discovery”, “prescribing a discovery method other than the one selected by the party
3 seeking discovery”, “forbidding inquiry into certain matters or limiting the scope of
4 disclosure or discovery to certain matters,” and “designating the persons who may be
5 present while the discovery is conducted.” Fed. R. Civ. P. 26(c)(1). Because Plaintiff seeks
6 detailed information concerning Defendant’s financial data that could give Defendant’s
7 competitors a competitive advantage, good cause exists for a protective order in this case.
8 See In re Adobe Sys., Inc. Sec. Litig., 141 F.R.D. 155, 158 (N.D. Cal. 1992) (stating that
9 good cause may be found to protect “financial information and business strategy or
10 marketing information which, if revealed to a competitor, would put a company at a
11 competitive disadvantage.”).

12 The parties’ pleadings and affidavits indicate that they preliminarily agreed to enter
13 into a protective order. See ECF No. 51 at 4, 7; Barns Decl. at 4; Mataele Decl. at 2.
14 However, such order was not executed as of June 25, 2014, when Defendant filed the
15 instant motion. See ECF No. 51 at 7. Accordingly, the Court **ORDERS** the parties to meet
16 and confer on this issue and then execute an appropriate protective order, which must be
17 filed with the Court by **August 1, 2014**. If the parties are unable to agree on the terms
18 of a protective order, each party must file a proposed protective order with the Court by
19 **August 1, 2014**. The Court further **ORDERS** Eastern Surf Supply, Larry Block Enterprises,
20 Ocean Lineage, Rainbow Distributing, and Salamander Paddle Gear to produce all
21 documents responsive to the subpoenas as modified by this order by **August 8, 2014**.
22 The documents will be produced pursuant to the protective order.

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SUMMARY AND CONCLUSION

For the reasons set forth above, the Court:

- (1) **DENIES** Defendant's ex parte motion to quash third-party subpoenas;
- (2) **ORDERS** the parties to execute a protective order;
- (3) **MODIFIES** Plaintiff's subpoenas as follows:

- 1. ALL DOCUMENTS evidencing, constituting or relating to all agreements with PHIX DOCTOR, INC. regarding DURA REZ, including contracts for purchase or sale.
- 2. ALL DOCUMENTS evidencing, constituting or relating to the purchase or sale of DURA REZ products, including all invoices, receipts, refunds.
- 3. ALL DOCUMENTS evidencing, constituting or relating to all COMPLAINTS received by YOU regarding DURA REZ products.

The third parties on whom the subpoenas were served must produce all documents and information responsive to these requests by **August 8, 2014**. Plaintiff is ordered to serve a copy of this order on the five subpoenaed entities by **July 23, 2014**.

IT IS SO ORDERED.

DATED: July 18, 2014



BARBARA L. MAJOR
United States Magistrate Judge