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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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STEINAR MYHRE,

Civil No. 13cv2741 BAS(RBB)

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Plaintiff,

ORDER GRANTING IN PART AND

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v.

DENYING IN PART PLAINTIFF'S**MOTION FOR RULE 37 SANCTIONS**

14

SEVENTH-DAY ADVENTIST CHURCH
REFORM MOVEMENT AMERICAN UNION
INTERNATIONAL MISSIONARY
SOCIETY, a New Jersey**AGAINST DEFENDANTS IMS-NEW****JERSEY, IMS-TEXAS,**

15

corporation; INTERNATIONAL

IMS-GEORGIA, IMS-FLORIDA, AND**IMS-MIAMI [ECF NO. 79]**

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MISSIONARY SOCIETY SEVENTH-DAY

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ADVENTIST CHURCH REFORM

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MOVEMENT GENERAL CONFERENCE, a

19

California corporation; and

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DOES 1-100,

Defendants.

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Plaintiff Steinar Myhre's Motion for Rule 37 Sanctions Against

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Defendants IMS-New Jersey, IMS-Texas, IMS-Georgia, IMS-Florida, and

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IMS-Miami [ECF No. 79] ("Motion for Sanctions") was filed on May

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16, 2014. Defendants filed a response in opposition [ECF No. 82],

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and Myhre filed a reply [ECF No. 84].

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The hearing on the motion was set for June 16, 2014. The

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Court determined the matter to be suitable for resolution without

oral argument, submitted the motion on the parties' papers pursuant

1 to the Local Civil Rule 7.1(d), and vacated the motion hearing.
2 (Mins., June 13, 2014, ECF No. 87.) For the following reasons,
3 Plaintiff's Motion for Sanctions is **GRANTED in part** and **DENIED in**
4 **part.**

5 **I. FACTUAL BACKGROUND**

6 On November 14, 2013, Plaintiff Steinar Myhre filed a
7 Complaint against Defendants Seventh-Day Adventist Church
8 Reform Movement American Union International Missionary Society, a
9 New Jersey Corporation ("IMS-NJ") and International Missionary
10 Society Seventh Day Adventist Church Reform Movement General
11 Conference ("IMS-GC"), alleging breach of contract, breach of the
12 covenant of good faith and fair dealing, fraud, interference with
13 contract, conversion, and civil conspiracy. (Compl. 1-2, ECF No.
14 1.) Plaintiff is a retired pastor who seeks money damages and
15 injunctive relief for the alleged termination of his pension
16 benefits by his former employer. (Id. at 3.) Myhre claimed that
17 he was forced to retire over a theological disagreement in 2009; by
18 then, he had worked for Defendants for over twenty-seven years as
19 an ordained minister. (Id. at 3-5.) Plaintiff stated that his
20 retirement payments ceased in 2013. (Id. at 9-10.)

21 Myhre alleged that he resides in Colorado and that Defendant
22 IMS-NJ is a New Jersey corporation headquartered in Georgia and
23 doing business in various states, including the State of California
24 and the County of San Diego. (Id. at 2.) Plaintiff claimed that
25 Defendant IMS-GC is a California corporation headquartered in
26 Georgia and doing business in various states, including the State
27 of California. (Id.) On January 6, 2014, Plaintiff amended his
28 Complaint, adding five more Defendants: (1) The Seventh-Day

1 Adventist Church Reform Movement American Union International
2 Missionary Society, a Texas corporation ("IMS-TX"); (2) The
3 Seventh-Day Adventist Church Reform Movement American Union IMS,
4 Inc., a Georgia corporation ("IMS-GA"); (3) Miami Dade Area
5 Seventh-Day Adventist Church Reform Movement, International
6 Missionary Society Inc., a Florida corporation ("IMS-Miami"); (4)
7 The Seventh-Day Adventist Church Reform Movement American Union
8 International Missionary Society, a Florida corporation ("IMS-FL");
9 and (5) Tampa Bay Area Seventh Day Adventist Church Reform
10 Movement, International Missionary Society Inc., a Florida
11 corporation ("IMS-Tampa"). (Am. Compl. 2-3, ECF No. 15.)

12 Myhre's Amended Complaint states that "Defendant entities are
13 part of a singular, hierarchical church organization that
14 collectively conducts business throughout the United States and the
15 world, with each level answerable to, and controlled by, higher
16 levels of the organization." (Id. at 3.) Referring to all
17 Defendants collectively as "IMS," Plaintiff also alleged, on
18 information and belief, that "Defendant IMS has officially
19 registered as a non-profit religious organization in the United
20 States via a single entity reference, specifically, 'International
21 Missionary Society Seventh-Day Adventist Church,' EIN 71-0905495,
22 without any reference therein to either 'American Union' or
23 'General Conference.'" (Id.) In the Amended Complaint, Myhre also
24 asserts:

25 15. Defendants IMS-AU-NJ, IMS-Tampa, IMS-AU-TX,
26 IMS-AU-GA, IMS- Miami, and IMS-AU-FL are
27 indistinguishable for purposes of liability under the
28 facts of this case, and are treated as a single entity by
Plaintiff herein, collectively referred to as "Defendant
American Union" unless otherwise specified in this
Amended Complaint.

1 16. Upon information and belief, and based on
2 admissions of Defendants, Defendant American Union has
3 not maintained any principal place of business anywhere
4 for almost 30 years. However, Defendant American Union
5 has churches located in various states, including five
6 churches in California, five in Florida, three in
7 Georgia, two each in New York and Texas, and one each in
8 Illinois, Colorado, New Jersey, Rhode Island, Virginia,
9 and Washington DC.

10 (Id. at 3-4.)

11 Myhre alleged that jurisdiction is proper in this Court
12 pursuant to 28 U.S.C. § 1332 because the parties are citizens of
13 different states and the amount of controversy exceeds \$75,000.

14 (Id. at 4.) Plaintiff claimed that venue is proper in this
15 district "because Defendant American Union resides in this district
16 (by virtue of being registered to do business in California, having
17 a church located in Vista, CA in the Southern District of
18 California, and having further personnel located in Oceanside, CA)
19" (Id.)

20 Currently pending before United States District Court Judge
21 Cynthia A. Bashant are four motions to dismiss filed by the
22 Defendants [ECF No. 81]. Defendant IMS-NJ's Motion to Dismiss for
23 Lack of Subject Matter Jurisdiction or Improper Venue argues that
24 because IMS-NJ's principal place of business is in Colorado, it is
25 a citizen of Colorado and the case must be dismissed for lack of
26 diversity jurisdiction. (Def. [IMS-NJ's] Mot. Dismiss Attach. #1
27 Mem. P. & A. 8, ECF No. 31.) In the alternative, IMS-NJ argues
28 that the case must be dismissed for improper venue because not all
of the corporate Defendants are residents of California. (Id. at
13-14.) Defendant IMS-GC moves to dismiss for failure to state a
claim, arguing that Plaintiff fails to allege any facts against it.
(Def. [IMS-GC's] Mot. Dismiss Attach. #1 Mem. P. & A. 6, ECF No.

1 32.) IMS-GC also claims that it is a California corporation with a
2 principal place of business in Georgia, and it seeks dismissal for
3 improper venue or transfer to the Northern District of Georgia.
4 (Id. at 11-14.)

5 Defendants IMS-TX, IMS-GA, IMS-Miami and IMS-FL filed a Motion
6 to Dismiss for Lack of Subject Matter Jurisdiction or Improper
7 Venue, arguing that both IMS-GA and IMS-FL are citizens of Colorado
8 for purposes of diversity jurisdiction. (Defs. [IMS-TX, IMS-GA,
9 IMS-Miami & IMS-FL's] Mot. Dismiss Attach. #1 Mem. P. & A. 12, ECF
10 No. 34.) Finally, Defendant IMS-Tampa filed a Motion to Dismiss
11 for Improper Venue or, in the Alternative, to Transfer; it claims
12 that transfer to Florida is proper because its principal place of
13 business is in Florida. (Def. [IMS-Tampa's] Mot. Dismiss Attach.
14 #1 Mem. P. & A. 6, ECF No. 39.) In the alternative, it moves to
15 transfer this case to Georgia because IMS-NJ's¹ principal place of
16 business is in Georgia. (Id.)

17 In response to Defendants' challenges to jurisdiction and
18 venue, Plaintiff served discovery requests and subsequently brought
19 a Motion to Compel seeking production of documents and
20 interrogatory answers related to the citizenship of IMS-NJ, IMS-GA,
21 and IMS-FL for diversity jurisdiction, as well as the Defendants'
22 contacts with the Southern District for purposes of venue. (Pl.'s
23 Mot. Compel Attach. #1 Mem. P. & A. 7-8, ECF No. 42.) Myhre also
24 requested Defendants' corporate documents to ascertain whether
25 Defendants observed corporate formalities to withstand allegations
26 that they are alter egos of each other. (Id.) Plaintiff sought to

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28 ¹ IMS-Tampa's memorandum of points and authorities refers to
IMS-NJ as "American Union." (Def. [IMS-Tampa's] Mot. Dismiss
Attach. #1 Mem. P. & A. 5-6, ECF No. 39.)

1 depose Henry Dering, IMS-NJ's vice president, and the president or
2 secretary of IMS-TX. (Id.) The Court granted in part Plaintiff's
3 motion on April 17, 2014, and set the deadline for compliance with
4 the Order for May 8, 2014. (Order Granting & Den. Pl.'s Mot.
5 Compel Jurisdictional Disc. 33, ECF No. 67.)

6 In his Motion for Sanctions, Myhre alleges that Defendants'
7 supplemental discovery responses served on May 8 and May 9, 2014,
8 were "materially non-compliant with the Court's discovery order."
9 (Pl.'s Mot. Sanctions Attach. #1 Mem. P. & A. 5,² ECF No. 79.)

10 Myhre seeks various issue sanctions as well as the attorney's fees
11 associated with bringing this motion. (Id.)

12 II. LEGAL STANDARDS

13 Rule 37 of the Federal Rules of Civil Procedure enables the
14 propounding party to bring a motion to compel responses to
15 discovery requests. Fed. R. Civ. P. 37(a)(3)(B). Rule 37(a)(5)
16 authorizes the imposition of sanctions against the party whose
17 conduct necessitated the motion to compel. The rule authorizes the
18 Court to issue the following types of sanctions against a party who
19 fails to obey an order to provide or permit discovery:

20 (i) directing that the matters embraced in the order or
21 other designated facts be taken as established for
purposes of the action, as the prevailing party claims;

22 (ii) prohibiting the disobedient party from supporting or
23 opposing designated claims or defenses, or from
introducing designated matters in evidence;

24 (iii) striking pleadings in whole or in part;

25 (iv) staying further proceedings until the order is
26 obeyed;

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28 ² Because Plaintiff's brief is not consecutively paginated,
the Court will cite to it using the page numbers assigned by the
Court's ECF system.

1 (v) dismissing the action or proceeding in whole or in
2 part;

3 (vi) rendering a default judgment against the disobedient
4 party; or

5 (vii) treating as contempt of court the failure to obey
6 any order except an order to submit to a physical or
7 mental examination.

8 Fed. R. Civ. P. 37(b)(2)(A). Furthermore, Rule 37(b)(2)(C)

9 provides that "[i]nstead of or in addition to the orders above, the
10 court must order the disobedient party, the attorney advising that
11 party, or both to pay the reasonable expenses, including attorney's
12 fees, caused by the failure, unless the failure was substantially
13 justified or other circumstances make an award of expenses unjust."

14 Id. "By the very nature of its language, sanctions imposed under
15 Rule 37 must be left to the sound discretion of the trial judge."
16 O'Connell v. Fernandez-Pol, 542 F. App'x 546, 547-48 (9th Cir.
17 2013) (citing Craig v. Far West Eng'g Co., 265 F.2d 251, 260 (9th
18 Cir. 1959)).

19 In addition, federal courts have inherent power to impose
20 sanctions against both attorneys and parties for "bad faith"
21 conduct in litigation or for "willful disobedience" of a court
22 order. Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991); Roadway
23 Express, Inc. v. Piper, 447 U.S. 752, 764-66 (1980). The Court may
24 assess attorney fees or other sanctions under its inherent power
25 for the "wilful disobedience of a court order." Chambers, 501 U.S.
26 at 45 (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421
27 U.S. 240, 258 (1975)). A fee award under the Court's inherent
28 power is meant to vindicate judicial authority, rather than to
provide a substantive remedy to an aggrieved party: "The wrong

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1 done was to the court." Mark Indus., Ltd. v. Sea Captain's Choice,
2 Inc., 50 F.3d 730, 733 (9th Cir. 1995).

3 **III. DISCUSSION**

4 Plaintiff moves the Court for sanctions under the Federal Rule
5 of Civil Procedure 37 against Defendants IMS-NJ, IMS-TX, IMS-GA,
6 IMS-FL, and IMS-Miami because of their failure to comply with the
7 Court's April 17, 2014 Order Granting in Part and Denying in Part
8 Plaintiff's Motion to Compel Jurisdictional Discovery [ECF No. 67].
9 (Pl.'s Mot. Sanctions Attach. #1 Mem. P. & A. 4-5, ECF No. 79.)
10 Myhre alleges that the supplemental discovery responses Defendants
11 provided were not in compliance with the Court's discovery order.
12 (Id. at 5.) Based on this, Plaintiff requests the following
13 sanctions:

- 14 1. Prohibiting these Defendants from opposing Plaintiff's
15 allegations that they are alter egos of each other for
16 purposes of this case;
- 17 2. Prohibiting these Defendants from opposing diversity
18 jurisdiction over this case;
- 19 3. Prohibiting these Defendants from contesting venue of
20 this case; and
- 21 4. Attorney's fees in an amount . . . caused by Defendants'
22 non-compliance with the subject discovery order.

23 (Id.) Myhre argues that because the documents Defendants failed to
24 produce relate to their corporate structure, as well as the
25 disputed issues of jurisdiction and venue, Defendants should be
26 precluded from challenging Plaintiff's alter ego allegations,
27 contesting venue, and disputing subject matter jurisdiction in this
28 case. (Id.) Plaintiff also seeks attorney's fees in the amount of
\$6,297.50 incurred as a result of Defendants' failure to comply
with the Court's discovery order. (Pl.'s Reply 11, ECF No. 84.)

1 **A. Failure to Produce Documents Due to Counsel's Oversight**

2 The Court's jurisdictional discovery order addressed
3 Plaintiff's requests for production which Defendants had not
4 opposed. (Order Granting & Den. Pl.'s Mot. Compel Jurisdictional
5 Disc. 31, ECF No. 67.) Under "Unopposed Requests," the Court
6 ordered production of the following corporate records: (1) bylaws
7 or governing documents for Defendants IMS-TX (request number two),
8 IMS-GA (request number two), IMS-FL (request number two), and
9 IMS-Miami (request number two); (2) articles of incorporation and
10 any amendments for Defendants IMS-FL (request number one) and
11 IMS-Miami (request number one); (3) corporate records reflecting
12 election of directors and/or officers since incorporation for
13 Defendants IMS-TX (request number three), IMS-FL (request number
14 three), and IMS-Miami (request number three); and (4) annual
15 reports filed with any secretary of state since the date of
16 incorporation for Defendants IMS-FL (request number four) and
17 IMS-Miami (request number four). (Id.)

18 Defendants concede that they failed to produce the documents
19 specified in this section of the Court's Order but claim that it
20 was due to their counsel's oversight. (Defs.' Opp'n Mot. Sanctions
21 Attach. #1 Decl. Wade 3, ECF No. 82.) They represent that it was a
22 "good faith mistake that defendants are urgently trying to
23 remedy[,]” and they “fully expect to provide all responsive
24 documents in their possession from the “Unopposed Requests” section

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1 of the Order as soon as possible and prior to the [June 16, 2014]
2 hearing on this motion." (Defendants' Opp'n Mot. Sanctions 4,³ ECF No.
3 82.)

4 Defendants had not opposed these requests. It is unclear
5 whether this failure to oppose was also due to counsel's oversight.
6 Myhre's Motion to Compel, however, explained that Defendants had
7 promised, but failed to provide, the responsive documents. (Pl.'s
8 Mot. Compel Attach. #1 Mem. P. & A. 12, ECF No. 42.) At the very
9 least, Defendants were aware of these requests on March 5, 2014,
10 when the Motion to Compel was filed, if not before. Defendants'
11 attorneys do not contend that the first time they were put on
12 notice regarding these requests was after the May 8, 2014 deadline
13 to supplement discovery responses passed. In any event, Defendants
14 failed to comply with the Court's Order, and the Plaintiff was
15 forced to file yet another motion.

16 **B. Defendants' Incomplete Supplemental Responses**

17 1. Request for production 5 to IMS-TX

18 Myhre alleges that Defendant IMS-TX's supplemental response to
19 request for production five is noncompliant. (Pl.'s Mot. Sanctions
20 Attach. #1 Mem. P. & A. 6, ECF No. 79.) The Court ordered IMS-TX
21 to produce its profit and loss statements for the last five years.
22 Plaintiff alleges that Defendant produced "a one-page document
23 captioned 'Houston Profit/Loss Statement' with a single line for
24 income and expense for the past four years." (*Id.*) Myhre argues
25 that a statement from the Houston church is incomplete because
26 "[a]ccording to the official church website, there are churches in

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28 ³ Because Defendants' brief is not consecutively paginated,
the Court will cite to it using the page numbers assigned by the
Court's ECF system.

1 Dallas and Houston, and this is backed up by Church Member Reports
2 produced that show the existence of a church in Dallas at least as
3 late as 2010." (Id.) Plaintiff argues that the supplemental
4 response is inconsistent with IMS-TX's initial response to
5 interrogatory number eight which discussed multiple church
6 locations in Texas. (Id.)

7 In opposition, IMS-TX argues that its initial response to
8 interrogatory eight, which listed a "local business contact
9 address" in Henderson, Texas, should be ignored because that
10 response has been updated by the supplemental response, which
11 discloses only one church. (Defs.' Opp'n Mot. Sanctions 11-12, ECF
12 No. 82.) Defendant also maintains that it produced all records
13 within its possession, custody, and control. (Id. at 11.)
14 Defendant does not cite any authority or explanation for its
15 contention that because it has provided a supplemental response to
16 interrogatory eight, the initial response should be ignored.

17 The original response to Plaintiff's interrogatory stated that
18 IMS-TX has "multiple church locations in Texas, all of which are
19 public record, with a local business contact address of 4765 FM
20 2865 E. Henderson, TX 75654-2329." (Second Notice of Resubmission
21 Attach. #6 Ex. F, at 8, ECF No. 44.) This response was verified on
22 February 24, 2014, under penalty of perjury, by Pastor Tzvetan
23 Petkov, President of the Seventh-Day Adventist Church Reform
24 Movement American Union. (Pl.'s Mot. Compel Attach. #13 Ex. J, at
25 1-5, ECF No. 42.) Following the Court's jurisdictional discovery
26 order, Defendant supplemented its response and now states that
27 "[t]here is one church in Texas located at 1812 Maine St.,
28 Pasadena, TX 77587." (Pl.'s Mot. Sanctions Attach. #3 Ex. 2, at

1 12, ECF No. 79.) This undated supplemental response is verified by
2 Virgilio Zapeta, an officer of IMS-TX. (Id.) Yet, it appears that
3 even this response is incorrect. Defendant now submits a
4 declaration from Pastor Petkov, who verified IMS-TX's initial
5 responses to the interrogatories, in which Petkov states that
6 "[t]he address for the Texas church had also changed," and he
7 corrects Zapeta's verified discovery response and states that "the
8 proper address" is actually 1812 Main St., South Houston, TX 77587.
9 (Def's.' Opp'n Mot. Sanctions Attach. #3 Decl. Petkov 3, ECF No.
10 82.) This most recent declaration is signed by Petkov under
11 penalty of perjury on May 29, 2014. (Id. at 5.)

12 Defendants do not explain the inconsistency between the
13 original interrogatory response and the supplemental responses.
14 The Defendant's responses and argument leave the Court with the
15 impression that at some point during the relevant time period more
16 than a "Houston" church existed. Similarly, the five-line "Houston
17 Profit/Loss Statement" appears to be a document created in response
18 to request for production number five. If so, that is
19 insufficient.

20 2. Interrogatories 5, 7, and 8 to IMS-TX

21 Myhre contends that IMS-TX's supplemental responses to
22 interrogatories five, seven, and eight are incomplete. (Pl.'s Mot.
23 Sanctions Attach. #1 Mem. P. & A. 7, ECF No. 79.) Interrogatory
24 number five requested the name, address, and role of any employees,
25 independent contractors, or other agents that conduct the
26 day-to-day activities of Defendant. (Id. Attach. #3 Ex. 2, at 10-
27 11.) Defendant provided the following response: "During the time
28 period of December 2013 through January 2014, Virgilio Zapeta,

1 12487 Wood Creek Drive, Willis, TX 77318, conducted the day to day
2 operations." (Id. at 11.) Myhre argues that the supplemental
3 response is incomplete because it is limited to an arbitrary time
4 frame which "neither extends back to the time the lawsuit was
5 filed, nor extends to the date of the responses." (Pl.'s Mot.
6 Sanctions Attach. #1 Mem. P. & A. 8, ECF No. 79.) Defendant IMS-TX
7 argues that the request is "written in the present tense" and does
8 not call for past information, and thus the response need not go
9 back to the time the lawsuit was filed. (Defs.' Opp'n Mot.
10 Sanctions 12, ECF No. 82.) Defendant acknowledges that the
11 interrogatory answer does not extend through the date of the
12 response and states that it will provide a further verified
13 response that "Zapeta continues to conduct day-to-day activities."
14 (Id. at 13.)

15 Interrogatory seven asked for all officers and directors of
16 IMS-TX from incorporation to the present. (Pl.'s Mot. Sanctions
17 Attach. #1 Mem. P. & A. 7, ECF No. 79.) The following response was
18 provided:

19 During the time period of December 2013 through
20 January 2014, Church Directors were as follows:

21 Virgilio Zapeta, 12487 Wood Creek Dr., Willis, TX
22 77318

23 Juan Pablo Reyes, 8044 Milredge St., Houston, TX
24 77017

25 Cecelia Hernandez, 1610 Beaver Bend Rd., Houston, TX
26 77587

27 Uldarico Alejos, 1280 Little Deer Run, Canton, GA 30102

28 The Seventh-Day Adventist Church Reform Movement
American Union International Missionary Society was
incorporated in 1998 and dissolved in 2009, then was
re-incorporated by Uldarico Alejos in 2012.

1 (Id. at 7-8.) Plaintiff alleges this supplemental response is both
2 incomplete and contains false information; he notes that the 2012
3 filing that placed Defendant back in active status was done by
4 Petkov, not Alejos. (Id. at 8.) Myhre also argues that the time
5 frame of December 2013 through January 2014 is incomplete. (Id.)
6 The Court's order set the responsive time frame as the last ten
7 years or from the date of incorporation, whichever is shorter.
8 (Id.)

9 Defendant argues that its response is neither deceptive nor
10 incomplete because it provided all the information in its
11 possession. (Defs.' Opp'n Mot. Sanctions 4, ECF No. 82.)
12 Defendant's explanation that it dissolved in 2009 and re-
13 incorporated in 2012 suggests, however, that records dating back at
14 least to 2012 should be available. No explanation is offered by
15 Defendant for the failure to produce its records for the time
16 period from 2004 to 2009 and from 2012 until December 2013. The
17 statement that it produced all responsive information implies that
18 no other records exist. The Defendant was required to fully comply
19 with this Court's order or clearly describe the reasons it could
20 not do so. IMS-TX has done neither.

21 Interrogatory eight sought "actual office locations" of
22 Defendant IMS-TX. (Pl.'s Mot. Sanctions Attach. #1 Mem. P. & A. 8,
23 ECF No. 79.) As discussed above, Defendant provided inconsistent
24 discovery responses to this interrogatory. The Court need not
25 resolve these inconsistencies. Their effect on jurisdiction and
26 venue is for Judge Bashant to determine.

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1 3. Requests for production 3 and 5 to IMS-GA

2 Myhre argues that Defendant IMS-GA's supplemental responses to
3 requests for production three and five do not comply with the
4 Court's discovery order. (Id. at 9.) In response to request for
5 production number three, which sought records reflecting the
6 election of directors and officers of IMS-GA since incorporation,
7 Defendant responded that "all documents within the possession,
8 custody, and control of Responding Party will be produced
9 herewith[,] and produced a list of officers for "Southeastern
10 Field," going back to 2008 instead of the date of incorporation in
11 1998. (Pl.'s Mot. Sanctions Attach. #1 Mem. P. & A. 9, ECF No. 79;
12 id. Attach. #3 Ex. 3, at 2.) Plaintiff argues this response is not
13 consistent with IMS-GA's identification of officers in Defendant's
14 annual reporting to the Georgia Secretary of State. (Pl.'s Mot.
15 Sanctions Attach. #1 Mem. P. & A. 10, ECF No. 79.)

16 Defendant's opposition explains that the document was produced
17 by mistake; it was intended to be produced in response to request
18 number fourteen to IMS-NJ. (Def's.' Opp'n Mot. Sanctions 15-16, ECF
19 No. 82.) Defendant incorrectly argues that "the Court compelled a
20 response to this request in the 'Unopposed Requests' section of its
21 order for which [its counsel] initially failed to request documents
22 from the defendant churches." (Id. at 15.)

23 The only unopposed requests for corporate records reflecting
24 the election of directors and/or officers since incorporation were
25 made to Defendants IMS-TX, IMS-FL, and IMS-Miami. IMS-GA and IMS-
26 NJ both objected to this request. Defendant IMS-GA was ordered to
27 produce documents described in request number three for "either the
28 last ten years or since incorporation, whichever is shorter."

1 (Order Granting & Den. Pl.'s Mot. Compel Jurisdictional Disc. 24,
2 ECF No. 67.) The Court cautions Defendant to carefully review the
3 discovery requests, its responses, and the Court's orders before
4 making assertions not based in fact. Defendant again states that
5 it is obtaining the requested documents and expects to produce them
6 to Plaintiff "prior to the hearing on this motion." (Defs.' Opp'n
7 Mot. Sanctions 16, ECF No. 82.)

8 Myhre maintains that the supplemental response to request
9 number five for profit and loss statements for the past five years
10 is incomplete. (Pl.'s Mot. Sanctions Attach. #1 Mem. P. & A. 10,
11 ECF No. 79.) Defendant IMS-GA produced a two-page document
12 entitled "Income and Expenses Financial Statement From the Year
13 2009 to 2013 From the Marietta Church." (Id. Attach. #3 Ex. 3, at
14 22-23.) Myhre contends that this response is insufficient because
15 there are five churches in Georgia. (Pl.'s Mot. Sanctions Attach.
16 #1 Mem. P. & A. at 10, ECF No. 79.) In opposition, Defendant
17 argues that it complied with the order and produced all documents
18 within its possession, custody and control. (Defs.' Opp'n Mot.
19 Sanctions 16, ECF No. 82.) IMS-GA also states: "Plaintiff
20 provides no evidence that there are five churches in Georgia, and
21 indeed there are not. Petkov Dec. ¶ 11." (Id.) Defendant misses
22 the point. The issue is not whether there are five churches in
23 Georgia. Rather, it is whether the production of financial
24 information from one church--the Marietta church--is responsive.
25 The declaration submitted by Pastor Petkov indicates that it is
26 not. He states:

27 The plaintiff claims that we have five churches
28 under the Georgia corporation. This is not true. The
corporation was originally registered when believers

1 formed the first church in Marietta, Georgia. This was
2 also where the first property was purchased. Later on, a
3 small group of members began worshipping in Acworth,
4 Georgia. When the headquarters of the General Conference
of the IMS moved from California to Georgia, the
Cedartown church was organized.

5 (Id. Attach. #3 Decl. Petkov 4-5.) The declaration reveals the
6 existence of another church located in Acworth, Georgia. Pastor
7 Petkov's declaration also states that IMS-GC moved to Georgia and
8 organized the Cedartown church; whether its financial records
9 should be produced in response to request five directed to IMS-GA
10 cannot be determined from the information before the Court.

11 4. Interrogatories 5 and 7 to IMS-GA

12 Interrogatories number five and seven to Defendant IMS-GA are
13 identical to those propounded on IMS-TX, seeking information about
14 individuals conducting day-to-day activities, and identifying all
15 officers and directors for the past ten years or from the date of
16 incorporation. Myhre alleges that IMS-Georgia's supplemental
17 responses were incomplete. (Pl.'s Mot. Sanctions Attach. #1 Mem.
18 P. & A. 10, ECF No. 79.) In response to interrogatory five,
19 Defendant stated: "During the time period of December 2013,
20 through January 2014, Angel Ojeida of Marieta [sic] Georgia
21 conducted the day to day activities." (Id. (alteration in
22 original).) Plaintiff argues that the supplemental response is
23 incomplete because it is limited to an arbitrary time frame that
24 "neither extends back to the time the lawsuit was filed, nor
25 extends to the date of the responses." (Id. at 11.) Although IMS-
26 GA was ordered to answer this interrogatory, the Defendant argues
27 that the Plaintiff does not explain why the response should include
28 the period since the time the lawsuit was filed. (Defs.' Opp'n

1 Mot. Sanctions 17, ECF No. 82.) Defendant also contends that this
2 is a "minor issue" that does not warrant sanctions, and it will
3 provide a further verified response stating that Mr. Ojeida
4 continues to conduct day-to-day activities. (Id.)

5 Plaintiff challenges Defendant's supplemental response to
6 interrogatory seven, stating that it only identifies IMS-GA's
7 officers and directors from 1997-1999 and December 2013-January
8 2014. (Pl.'s Mot. Sanctions Attach. #1 Mem. P. & A. 11, ECF No.
9 79.) The Court directed IMS-GA to provide names of its officers
10 and directors for the last ten years or since incorporation,
11 whichever is shorter. (Order Granting & Den. Pl.'s Mot. Compel
12 Jurisdictional Disc. 24, ECF No. 67.)

13 Defendant's supplemental response was as follows:

14 **RESPONSE TO INTERROGATORY NO. 7:**

15 During the time period of December 2013 through
16 January 2014, Church Directors were as follows:

17 Angel Ojeida, Church Leader, 1035 Metropolitan
Parkway, Atlanta, GA 30310

18 Niriam Chocoyo, Treasurer, 2433 Swanson Ct.,
Marieta, GA 30066

19 Tzvetan Petkov, 102 Virginia Circle, Cedartown, GA
20 30125 **1998 (founding)**

21 Henry Dering, President, 3741 Valerio Dr., Cameron
Park, CA 95682; served 1997 - 1999

22 Branko Cholich, Vice President, 10238 Bellman Ave.,
23 Downey, CA 90241; served 1997 - 1999

24 Gretchen Schendel, Secretary, 8725 Cherrington Lane,
25 Elk Grove, CA 95624; served 1997 - 1999

26 Ernestine Schendel, Treasurer, 10117 Sheldon Rd., Elk
Grove, CA 95624; served 1997 - 1999

27 Lambert Hazelhoff, Board Member, 1700 Kisra Lane,
28 Powhatan, VA 23139; served 1997 - 1999

1 Antony Hernandez, Board Member, 3440 Steve Dr.,
2 Marietta, GA 33064

3 Idel Suarez, Jr., Board Member, 6515 Sheldon Road,
4 Tampa, FL 33615; served 1997 - 1999

5 (Pl.'s Mot. Sanctions Attach. #3 Ex. 4, at 29-30, ECF No. 79.) In
6 its opposition to Plaintiff's Motion for Sanctions, Defendant IMS-
7 GA explains its interrogatory answer.

8 A review of defendants' response shows that defendants
9 provided the names and addresses of 10 different board
10 members from 1999 through 2014. Notice of Lodgment at
11 29-30. Again, the defendant churches have a total
12 membership of fewer than 400 people, and they have
13 responded with all of the information that they have in
14 their possession. The fact that plaintiff wants more
15 information than defendants possess does not entitle him
16 to Rule 37 sanctions. To the extent defendants discover
17 further material information, such information will be
18 provided in a timely manner pursuant to Federal Rule of
19 Civil Procedure 26(e).

20 (Def.' Opp'n Mot. Sanctions 17, ECF No. 82.)

21 The supplemental response provided by IMS-GA does not clearly
22 show which individuals served as church directors during the
23 relevant time period. If there were no directors between 1999 and
24 December 2013, Defendant IMS-GA should have made that clear.
25 Alternatively, if there are no records or information to identify
26 the individuals who served in that capacity, that response should
27 have been provided. The same applies to the period from January
28 2014 through the date of Defendant's discovery response. Notably,
in its prior filings with the Court, Defendant stated that "[a]s of
March 14, 2013, Neptali Acevedo was an officer in IMS-AU-GA [ECF
15, ¶80], and as of March 7, 2013, a secretary in IMS-AU-GA [Ex. E,
Req. JN]." (Def. [IMS-TX, IMS-GA, IMS-Miami & IMS-FL's] Mot.
Dismiss Attach. #1 Mem. P. & A. 19, ECF No. 34 (alteration in
original).) IMS-GA also identified Tzvetan Petkov and Evelyn

1 Arevalo as officers in 2012 and 2013. (Id.) Defendant's argument
2 that its small size explains its inadequate corporate records is
3 belied by its February 10, 2014 representation that "the evidence
4 is that IMS-AU-TX, IMS-AU-GA, IMS MIAMI, and IMS-AU-FL have
5 observed corporate formalities." (Id. at 10.)

6 Defendant's responses are insufficient to satisfy its
7 discovery obligations; it must make a reasonable effort to obtain
8 the records ordered produced. See Kaur v. Alameida, No. CV F 05
9 276 OWW DLB, 2007 WL 1449723, *2 (E.D. Cal. May 15, 2007) (ordering
10 defendants to conduct additional research for responsive documents
11 and reminding defendants and counsel "of their duty under Rule 34
12 to conduct a diligent search and reasonable inquiry in effort to
13 obtain responsive documents"); see also Lopez v. Florez, No.
14 1:08-cv-01975-LJO-JLT, 2013 WL 1151948, at *2 (E.D. Cal. Mar. 19,
15 2013) ("A responding party has an affirmative duty to reasonably
16 seek information requested under Rule 34(a) from its agents or
17 others under its control) (citing Hill v. Eddie Bauer, 242 F.R.D.
18 556, 560 (C.D. Cal. 2007)).

19 When answering interrogatories, the obligations are similar.
20 "Rule 33 imposes a duty on the responding party to secure all
21 information available to it." Thomas v. Cate, 715 F. Supp. 2d
22 1012, 1032 (E.D. Cal. 2010). "When responding to interrogatories,
23 a party has a duty to respond with all information under its
24 custody and control." Fresenius Med. Care Holding, Inc. V. Baxter
25 Int'l, Inc., 224 F.R.D. 644, 651 (N.D. Cal. 2004). "Parties have
26 an obligation to make a reasonable effort to locate all documents
27 and information necessary to fully respond to discovery." United
28 //

1 States v. Reeves, No. 2:12-CV-01916-JAD-GWF, 2013 U.S. Dist. LEXIS
2 146671, at *2-3 (D. Nev. Oct. 3, 2013).

3 For the reasons outlined above, Defendant's responses to the
4 discovery requests are incomplete, and IMS-GA has not established
5 that its deficient responses should be excused. If it was unable
6 to obtain the responsive records and information, it should have
7 described its efforts to locate records and information, and the
8 results of those efforts.

9 5. Interrogatories 5 and 7 to IMS-FL

10 Plaintiff contends that IMS-FL failed to properly respond to
11 interrogatories asking that it identify the persons conducting
12 day-to-day activities (number five) and all officers and directors
13 for the past ten years or from the date of incorporation (number
14 seven). (Pl.'s Mot. Sanctions Attach. #1 Mem. P. & A. 12, ECF No.
15 79.) IMS-FL's response to interrogatory five states that "[d]uring
16 the time period of December 2013 through January 2014, Ciro
17 Arevalo, President of the Southeastern Field, 10700 Harkwood Blvd.,
18 Orlando, FL 32817 conducted day to day operations." (Id. Attach.
19 #3 Ex. 6, at 42.) Defendant concedes that its response "does not
20 extend to the date the response was given," and promises to provide
21 "a further verified response." (Defs.' Opp'n 18, ECF No. 82.)
22 Defendant responded to interrogatory seven in a similar fashion,
23 only providing names of individuals serving on its board of
24 directors from December 2013 through January 2014. (Id.) IMS-FL
25 argues that "defendants have responded with all of the
26 information that they have in their possession." (Id.) It is not
27 clear whether Defendant contends that on May 8, 2014, the date the
28 supplemental response was given, it did not know the identities of

1 individuals that previously served as its directors. Likewise,
2 Defendant does not assert that records prior to December 2013 do
3 not exist. Indeed, in an earlier submission to the Court, IMS-FL
4 represented that “[a]s of January 14, 2013, [Henry] Dering was vice
5 president for IMS-AU-FL” (Defs. [IMS-TX, IMS-GA, IMS-Miami
6 & IMS-FL’s] Mot. Dismiss Attach. #1 Mem. P. & A. 18, ECF No. 34.)
7 This statement is inconsistent with Defendant’s argument that it
8 has provided all the information available to it.

9 IMS-FL’s responses do not satisfy its discovery obligations
10 under Rule 33. Defendant was required to produce all responsive
11 information as ordered by the Court. It has not complied with this
12 Court’s discovery order, and it has not provided a satisfactory
13 explanation for its failure to do so.

14 6. Request for production 5 to IMS-Miami

15 Myhre’s request for production number five to Defendant IMS-
16 Miami sought profit and loss statements for the last five years.
17 Plaintiff alleges that Defendant provided only two years of
18 responsive documents, and the documents are in Spanish. (Pl.’s
19 Mot. Sanctions Attach. #1 Mem. P. & A. 13, ECF No. 79.) Defendant
20 argues that sanctions are not warranted “because defendants only
21 possessed two years of such documents when [Myhre] wanted more.”
22 (Defs.’ Opp’n 20, ECF No. 82.)

23 Defendant IMS-Miami was not required to provide Myhre with an
24 English translation of Spanish-language documents, and Plaintiff
25 has cited no authority imposing that requirement. Nevertheless,
26 its production is incomplete. Defendant’s brief does not explain
27 what efforts IMS-Miami employed to obtain the requested documents.
28 As stated above, this is insufficient to satisfy its discovery

1 obligations under Rule 34. Defendant IMS-Miami was required to
2 produce all records for the time period ordered by the Court, or if
3 it was unable to do so, it should have described the efforts made
4 to locate the records and the results of those efforts.

5 7. Interrogatories 2, 5, and 7 to IMS-Miami

6 In his motion to compel a supplemental response to
7 interrogatory number two to IMS-Miami, Myhre sought clarification
8 of the term "local" as used by Defendants in reference to churches
9 and the area they serve. (See Order Granting & Den. Pl.'s Mot.
10 Compel Jurisdictional Disc. 26, ECF No. 67.) Plaintiff now moves
11 for sanctions, arguing that Defendant's supplemental response is
12 substantially the same as its original response. (Pl.'s Mot.
13 Sanctions Attach. #1 Mem. P. & A. 13, ECF No. 79.) Defendant
14 concedes that it failed to properly supplement its prior response,
15 and states that this was "an oversight and a further response will
16 be provided as soon as possible and prior to the hearing on this
17 motion." (Defs.' Opp'n 20, ECF No. 82.)

18 Interrogatories five and seven to IMS-Miami are identical to
19 those propounded to IMS-TX, IMS-GA, and IMS-FL, requesting
20 identification of the persons conducting day-to-day activities for
21 these churches, and the identification of all officers and
22 directors for the past ten years or from the date of incorporation.
23 (Pl.'s Mot. Sanctions Attach. #1 Mem. P. & A. 14, ECF No. 79.)
24 Plaintiff alleges that, similarly to other Defendants, IMS-Miami
25 provided responses limited to the time period of December 2013
26 through January 2014. (Id. at 14-15.)

27 IMS-Miami responded to interrogatory number five that
28 "[d]uring the period of December 2013 through January 2014,

1 Alejandro Pena Sr., 528 S W1 St. Apt 2, Miami, FL 33130, conducted
2 day to day operations." (Id. Attach. #4 Ex. 8, at 10.) Defendant
3 argues that to the extent the response needs to extend to the date
4 it was given, May 8, 2014, it will provide a further verified
5 response. (Defs.' Opp'n 21, ECF No. 82.)

6 In response to interrogatory seven, Defendant stated:

7 During the time period of December 2013 through
8 January 2014, the Board of Directors were as follows:

9 Elsa Argueta, 1800 S.W. 9 Street, Miami, FL 33135

10 Elsa E. Tapia, 1800 SW 9 Street, Miami, FL 33135
11 Alejandro Pena, Sr., 528 SW 1st Street, Apt. 2,
12 Miami, FL 33130

13 During the time period of December 2013 through January
14 2014, Church Directors were as follows:

15 Church Leader: Alejandro Pena, Sr.

16 Secretary: Amanda Navedo, 501 SW 35 Ave, Miami, FL
17 33135

18 Treasurer: Alejandro Pena, Sr.

19 (Pl.'s Mot. Sanctions Attach. #4 Ex. 8, at 10, ECF No. 79.)
20 Plaintiff contends that this response is incomplete because it is
21 limited to the names of church leaders from December 2013 through
22 January 2014, and does not extend back ten years or to the date of
23 IMS-Miami's incorporation. (Pl.'s Mot. Sanctions Attach. #1 Mem.
24 P. & A. 15, ECF No. 79.) In opposing the request for sanctions,
25 Defendant again states: "Defendants have provided all of the
26 responsive information in their possession. Plaintiff can make of
27 that what she will, but plaintiff is not entitled to sanctions when
28 defendants responded to the best of their ability with all of the
information at their disposal." (Defs.' Opp'n Mot. Sanctions 21,
ECF No. 82.)

1 The Defendant's response is also contradicted by evidence it
2 submitted previously to the Court. IMS-Miami requested that the
3 Court take judicial notice of a "'Detail by Entity Name' from the
4 Florida Department of State website
5 (<http://search.sunbiz.org/Inquiry/CorporationSearch>) for IMS-Miami
6 as of January 15, 2014." (See Defs. [IMS-TX, IMS-GA, IMS-Miami &
7 IMS-FL's] Mot. Dismiss Attach. #3 Re. Judicial Notice Ex. G, at 1-
8 2, ECF No. 34.) The entry lists several individuals under the
9 section titled "Officer/Director Detail," including Elsa Argueta,
10 Elsa Tapia, and Alejandro Pena. It also shows that annual reports
11 were filed on March 1, 2011, April 3, 2012, and April 24, 2013,
12 which presumably identify the directors for those years. (Id. at
13 21-22.) The supplemental response demonstrates that IMS-Miami did
14 not undertake reasonable efforts to answer this interrogatory.

15 8. Requests for production 14 and 18 to IMS-NJ

16 Plaintiff alleges that Defendant IMS-NJ did not adequately
17 respond to his request for production fourteen which sought "copies
18 of all Field-Union Officer Election, Secretarial Six-Month Report,
19 Quarterly Church Missionary Report, and Church Membership List
20 reports prepared by, submitted to, or copied to, Responding Party
21 from 2008 to the present." (Pl.'s Mot. Sanctions Attach. #1 Mem.
22 P. & A. 15, ECF No. 79.) Myhre contends that IMS-NJ submitted
23 Church Membership List reports dating only through December 2010,
24 and Secretarial Six-Month Reports only through June 2011. (Id.)
25 Defendant's response stated: "Please note that none of these
26 reports have been kept since 2011." (Id. Attach. #4 Ex. 9, at 17,
27 ECF No. 79.) Plaintiff argues that this statement "is belied by
28 other documents produced earlier, namely the minutes of the

1 American Union delegates meeting in August 2013, wherein the
2 American Union Secretary provided a report including the precise
3 membership numbers." (Pl.'s Mot. Sanctions Attach. #1 Mem. P. & A.
4 15, ECF No. 79.)

5 In opposition, IMS-NJ claims that it provided all membership
6 lists within its possession, custody, and control. Defendant
7 maintains that no written reports after 2011 exist and explains
8 that the report regarding membership at the 2013 American Union
9 delegates meeting was made orally. (Defs.' Opp'n Mot. Sanctions
10 21-22, ECF No. 82.)

11 Lastly, Plaintiff challenges Defendant's supplemental response
12 to his request for documents identifying real property in
13 California in which IMS-NJ held a beneficial interest at any time
14 in the past ten years (request eighteen). (Pl.'s Mot. Sanctions
15 Attach. #1 Mem. P. & A. 15, ECF No. 79.) Myhre contends that IMS-
16 NJ failed to provide documents regarding property owned by the
17 church in Huntington Park, California. (Id. at 16.) IMS-NJ argues
18 that it provided all documents in its possession, custody, and
19 control, including for properties located in Sacramento, Elk Grove,
20 and Riverside. (Defs.' Opp'n 22, ECF No. 82.) Defendant claims
21 that it made a good faith effort "to locate responsive documents
22 for the Huntington Park address that plaintiff has pointed out, but
23 could not locate them[,]" but the documents have since been located
24 and are attached to the opposition papers. (Id.) IMS-NJ argues it
25 should not be sanctioned because its response was "complete and
26 accurate with the information [Defendant] possessed at the time of
27 the response."

28 //

1 In opposing Myhre's earlier motion to compel discovery,
2 Defendant IMS-NJ argued that the Court should deny Plaintiff's
3 request for documents because the real property locations are
4 equally available to Myhre through searches of public records or
5 the church's website. (See Defs.' Opp'n Mot. Compel 16, ECF No.
6 58.) Defendant now claims it should not be sanctioned for failing
7 to comply with the Court's order because it "made a good faith
8 effort to locate" responsive documents. (Defs.' Opp'n Mot.
9 Sanctions 22, ECF No. 82.) The evidence of IMS-NJ's good faith
10 efforts is one conclusory paragraph in a declaration of its
11 Secretary, Margie Seely.

12 I also made a good faith effort to locate documents
13 responsive to Request 18 to IMS-New Jersey, including in
14 relation to the Huntington Park, California address
15 mentioned in plaintiff's motion. At first, I was unable
16 to locate responsive documents. However, we ultimately
located one such document, and we understand that this
will be provided to plaintiff as soon as possible (if it
has not already been provided).

17 (Id. Attach. #2 Decl. Seely 6.) Seely's declaration does not
18 explain what actions she undertook to search for the real
19 properties owned by IMS-NJ in California, for example, what she had
20 to do to ultimately locate the Huntington Park documents and why
21 those actions were not undertaken sooner.

22 **C. Attorney's Fees Sanction**

23 Rule 37(b)(2) of the Federal Rules of Civil Procedure states
24 that if a party fails to obey an order to provide or permit
25 discovery, the court may issue further orders, which may include
26 the imposition of sanctions upon the disobedient party. Fed. R.
27 Civ. P. 37(b)(2)(A). The Court may assess attorney's fees pursuant
28 to the Federal Rules of Civil Procedure 37(b)(2)(c), which requires

1 the disobedient party to pay reasonable attorney's fees caused by
2 its failure to comply unless the failure was substantially
3 justified or other circumstances make an award of expenses unjust.
4 The party seeking the award of fees must submit evidence to support
5 the number of hours worked and the rates claimed. Van Gerwen v.
6 Guarantee Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000).

7 Here, Plaintiff originally sought \$3,960.00 in attorney's fees
8 for preparation of the Motion for Sanctions; Myhre's counsel
9 anticipated incurring additional fees to review and reply to the
10 Defendants' opposition. (Pl.'s Mot. Sanctions Attach. #1 Mem. P. &
11 A. 23, ECF No. 79.) The declaration submitted by Plaintiff's
12 counsel details the time and expenses incurred. Counsel spent
13 "approximately 6.1 hours in reviewing Defendants' supplemental
14 discovery responses and identifying areas of non-compliance,
15 seeking to obtain resolution of this matter by way of belated
16 compliance, entry into a stipulation of facts, or other
17 resolution," and additional 8.3 hours to draft the Motion for
18 Sanctions. (Pl.'s Mot. Sanctions Attach. #2 Decl. Kramer 3-4, ECF
19 No. 79.) Kramer has twenty years of trial experience and
20 represents that her hourly rate of \$275 is equal to, if not less
21 than, the rate of similarly qualified attorneys in the Southern
22 District of California. (Id. at 4.) Her rate and fees are
23 reasonable in light of counsel's experience and qualifications.

24 After Defendants opposed the Motion for Sanctions, Plaintiff
25 submitted a declaration from his counsel stating that Kramer spent
26 an additional 8.5 hours reviewing and responding to Defendants'
27 filing. (Pl.'s Reply Attach. #1 Decl. 5, ECF No. 84.) Plaintiff's
28 counsel states that she spent a total of 22.9 hours in connection

1 with Plaintiff's Rule 37 motion. (Id.) Myhre currently seeks an
2 award of \$6,297.50 in attorney's fees from Defendants for their
3 failure to sufficiently comply with the Court's jurisdictional
4 discovery order.

5 Defendants argue they made a good faith effort to comply with
6 the Court's discovery order. (Defs.' Opp'n 7, ECF No. 82.) A
7 finding of good faith may be a consideration in determining whether
8 the imposition of sanctions would be unjust. Hyde & Drath v.
9 Baker, 24 F.3d 1162, 1171 (9th Cir. 1991). "[D]isobedient conduct
10 not shown to be outside the control of the litigant is all that is
11 required to demonstrate willfulness, bad faith, or fault." Id. at
12 1167; Fjelstad v. Am. Honda Motor Co., Inc., 762 F.2d 1334, 1341
13 (9th Cir. 1985). Moreover, the Ninth Circuit has held that
14 sanctions may be imposed even for negligent failures to provide
15 discovery. See Fjelstad, 762 F.2d at 1343; Lew v. Kona Hosp., 754
16 F.2d 1420, 1427 (9th Cir. 1985); Marquis v. Chrysler Corp., 577
17 F.2d 624, 642 (9th Cir. 1978). The party opposing the imposition
18 of sanctions has the burden of establishing substantial
19 justification for its actions or special circumstances. Hyde &
20 Drath v. Baker, 24 F.3d at 1171.

21 Defendants have not met their burden. First, despite
22 receiving notice from Plaintiff of the insufficient discovery
23 responses on May 9, 2014, counsel did not call Plaintiff's counsel
24 to resolve the issues until May 16, 2014. (See Pl.'s Mot.
25 Sanctions Attach. #2 Decl. Kramer 3, ECF NO. 79.) Second, although
26 acknowledging multiple deficiencies in the supplemental responses,
27 Defendants do not offer a coherent and credible explanation for
28 majority of the omissions. Instead, they assert the records either

1 do not exist, or are outside of Defendants' control. But when
2 opposing Plaintiff's Motion to Compel [ECF No. 42], Defendants
3 never argued that these records existed. Plaintiff points out that
4 Defendants also sought a protective order against production of the
5 documents they currently contend never existed. (Pl.'s Mot.
6 Sanctions Attach. #1 Mem. P. & A. 18, ECF No. 79.) Defendants'
7 assertion that obtaining documents is difficult because they are
8 small corporations with limited resources is not persuasive.
9 Plaintiff's request involves basic corporate records. Plaintiff
10 notes that in opposing the Motion for Sanctions, Defendants
11 submitted declarations from Mr. Petkov and Ms. Seely, two current
12 officers of four Defendants, who presumably had the duty to observe
13 corporate formalities and maintain records. (Pl.'s Reply 6-7, ECF
14 No. 84.) Moreover, to the extent Defendants required more time to
15 comply with the deadline for production, they should have sought an
16 extension. Defendants have not shown that their noncompliance was
17 substantially justified or that other circumstances make an award
18 of attorney's fees unjust.

19 As a result of Defendants' refusal to provide discovery,
20 Plaintiff was forced to file two motions. The initial motion to
21 compel was filed on March 5, 2014. (See Order Granting & Den. Mot.
22 Compel Jurisdictional Disc. 1, ECF No. 67.) For the most part,
23 Plaintiff's motion was granted, and Defendants were directed to
24 provide or supplement their discovery responses by May 8, 2014.
25 (Id. at 33.) When they failed to do so, Myhre filed this motion
26 for sanctions on May 16, 2014. Even at the time of their
27 opposition to the motion for sanctions, May 30, 2014, Defendants
28 still had not complied with the Court's April 17, 2014 discovery

1 order. Under these circumstances, the attorney's fees incurred in
2 bringing Plaintiff's motion for sanctions for Defendants' failure
3 to comply with the Court's order is an appropriate compensatory
4 sanction. See Devaney v. Cont'l Am. Ins. Co., 989 F.2d 1154, 1163
5 (11 Cir. 1993) (affirming award of sanctions where plaintiff
6 brought a successful motion to compel and "then a motion for
7 sanctions when [Defendant] failed to comply with the court order
8 granting the motion to compel[]").

9 **D. Resolving Disputed Issues as a Sanction**

10 Myhre seeks evidentiary sanctions in connection with
11 Defendants' noncompliance with the Court's discovery order.
12 Plaintiff argues that the disputed issues of citizenship for
13 purposes of diversity jurisdiction, as well as Defendants' contacts
14 with the Southern District for purposes of venue, should be
15 resolved in Plaintiff's favor. (Pl.'s Mot. Sanctions Attach. #1
16 Mem. P. & A. 21, ECF No. 79.) Myhre also requests that the Court
17 rule "that these Defendants failed to observe corporate formalities
18 and these five Defendants are alter egos of each other." (Id. at
19 22.) Plaintiff argues that "less drastic sanctions . . . may be
20 available, but wouldn't be appropriate." (Id. at 19.)

21 The requested sanctions against these Defendants are severe.
22 The Court will evaluate the Plaintiff's request as analogous to a
23 motion seeking dismissal under Rule 37(b)(2) for noncompliance with
24 a discovery order. In that context, the Court considers five
25 factors: "(1) the public's interest in expeditious resolution of
26 litigation; (2) the court's need to manage its docket; (3) the risk
27 of prejudice to [the party seeking sanctions]; (4) the public
28 policy favoring disposition of cases on their merits; and (5) the

1 availability of less drastic sanctions." Rio Props., Inc. v. Rio
2 Int'l Interlink, 284 F.3d 1007, 1022 (9th Cir. 2002); see Computer
3 Task Group, Inc. v. Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004).

4 The Court finds that the requested issue sanctions are not
5 appropriate at this time. Venue and Defendants' citizenship are
6 currently the subject of Defendants' Rule 12 motions pending before
7 Judge Bashant. Plaintiff will be able to argue Defendants'
8 inconsistent assertions to the Court. Additionally, the policy
9 favoring disposition on the merits weighs against the exclusion of
10 evidence, especially when the imposition of monetary sanctions is
11 available. Accordingly, Myhre's request that disputed issues be
12 resolved in his favor is premature.

13 **IV. CONCLUSION**

14 For the reasons stated above, the Court **GRANTS in part** and
15 **DENIES in part** Plaintiff's Motion for Sanctions [ECF No. 79]. The
16 Court GRANTS Myhre's request for reasonable attorney's fees in the
17 amount of \$6,297.50 incurred in pursuing this motion. The
18 sanctions are assessed against Defendants IMS-TX, IMS-GA, IMS-FL,
19 IMS-Miami, and IMS-NJ, severally. Each of these Defendants shall
20 pay to Plaintiff \$1,259.50 on or before August 15, 2014. The Court
21 DENIES Plaintiff's request for other sanctions.

22 **IT IS SO ORDERED.**

23 Dated: July 1, 2014



Ruben B. Brooks
United States Magistrate Judge

25 cc: Judge Bashant
26 All Parties of Record