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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT HALF INTERNATIONAL
INC.,

Plaintiff,

v.

ERIC SHANE AINSWORTH, et al.,
Defendants.

AND RELATED COUNTERCLAIM.

Case No.: 14cv2481-WQH (DHB)

ORDER:

- (1) GRANTING IN PART AND DENYING IN PART MOTION FOR PROTECTIVE ORDER [ECF No. 39]; AND**
- (2) GRANTING MOTION TO MODIFY SCHEDULING ORDER [ECF No. 43]**

Pending before the Court is non-party Roth Staffing Companies, L.P.’s (“Roth”) motion for protective order filed on May 5, 2015. (ECF No. 39.) Plaintiff/Counter-Defendant Robert Half International, Inc. (“RHI”) filed an opposition to Roth’s motion on May 19, 2015, and Roth filed a reply to RHI’s opposition on May 22, 2015. (ECF Nos. 46, 47.)

On June 2, 2015, the Court conducted a hearing on Roth’s motion. Appearing before the Court were: Clayton Hix, Esq., counsel for Roth and Defendants/Counterclaimants Eric Shane Ainsworth, Lisa Lynn Aldava, Serena Mai Greenwood, Ruben D. Hernandez, Jr., Deana H. Schweitzer, and Catherine S. Sherman (collectively, “Defendants”); and Roland

1 Juarez, Esq., and Mariana Aguilar, Esq., counsel for RHI. The Court deferred ruling on
2 Roth's motion for protective order to permit counsel to further meet and confer to attempt
3 to resolve the issues raised in Roth's motion concerning RHI's subpoena to Roth. (*See*
4 ECF No. 52.) Pursuant to the Court's order, on June 23, 2015 Roth and RHI filed a Joint
5 Status Report outlining those aspects of the subpoena to which an agreement has been
6 reached, and those aspects that remain in dispute. (ECF Nos. 58, 59.)¹

7 Having thoroughly considered the aforementioned documents, and for the reasons
8 set forth below, *see* Part III(A), Roth's motion for protective order is **GRANTED in part**
9 and **DENIED in part**.

10 In addition, pursuant to Local Civil Rule 16.2, the Honorable William Q. Hayes
11 referred RHI's motion to amend the scheduling order (ECF No. 43) to the undersigned
12 Magistrate Judge. (*See* ECF No. 61 at 7:6-18.) For the reasons set forth below, *see* Part
13 III(B), RHI's motion to amend the scheduling order is **GRANTED**.

14 **I. BACKGROUND**

15 RHI, a professional staffing services firm specializing in recruiting and placing
16 temporary and permanent employees with clients or customers of RHI, brings this lawsuit
17 against six of its former employees who are now employed by Roth, one of RHI's
18 competitors. Although Roth is not a named defendant in this case, RHI alleges in the First
19 Amended Complaint that Roth has, over the course of several years, threatened to poach
20 RHI's employees and "created a culture where its employees disregard laws and
21 contractual obligations and the rules of fair competition all in an effort to damage RHI.
22

23
24 ¹ Roth and RHI's Joint Status Report redacts references to documents and deposition
25 testimony designated as confidential under the Court's January 29, 2015 Protective Order.
26 (ECF No. 21.) In conjunction with the Joint Status Report, RHI filed an *ex parte*
27 application to file under seal an unredacted copy of the Joint Status Report and supportive
28 documents. (ECF No. 56.) Good cause appearing, RHI's *ex parte* application is
GRANTED. The following items shall be filed under seal: (1) the unredacted copy of the
Joint Status Report; and (2) Exhibits Q and S to the Supplemental Declaration of Mariana
Aguilar.

1 Roth has lured dozens of RHI employees, the number increasing dramatically in the last
2 year, to Roth’s Southern California offices.” (ECF No. 66 at ¶ 2.) As against RHI’s six
3 former employees named as Defendants in this case, RHI alleges they have “engag[ed] in
4 unfair, fraudulent, and unlawful competition from the moment they decided to leave RHI.
5 They have purposefully deceived RHI clients, candidates, and employees in order to enrich
6 themselves and Roth, and to damage RHI. The Defendants have done so in ways that
7 breached fiduciary duties, implied covenants, express contractual terms, and the law.
8 These improper competitive tactics have enabled Roth’s companies to compete for clients
9 and customers at levels that would otherwise be unattainable without making the same
10 amount of significant expenditures of time and resources made by RHI.” (*Id.* at ¶ 3.)

11 On April 7, 2015, RHI issued a subpoena to Roth, a non-party, commanding Roth to
12 appear with certain documents at a May 6, 2015 deposition. The subpoena contained 31
13 categories of deposition topics and 159 requests for documents. RHI contends it
14 intentionally set the deposition for May 6, 2015 to ensure it would have time following the
15 deposition to assess whether to move to amend the Complaint by the May 13, 2015
16 deadline to seek leave to amend, as set forth in the Court’s February 11, 2015 Scheduling
17 Order. (ECF No. 25.)

18 On April 15, 2015, counsel for Roth (and the Defendants/Counter-Claimants) sent
19 RHI’s counsel a letter requesting to meet and confer regarding certain categories and
20 requests in the subpoena. Counsel for RHI and Roth met in person on April 17, 2015. Roth
21 maintains that RHI’s counsel agreed to narrow the scope of the subpoena but that RHI
22 failed to do so prior to Roth’s filing of its motion for protective order. RHI contends Roth
23 attempted to place the burden on RHI to suggest revisions to the subpoena and to address
24 Roth’s objections despite the general nature of those objections.

25 On April 20, 2015, Roth served formal objections to the subpoena, many of which
26 were not addressed in the April 15 letter or the April 17 meet and confer. RHI claims these
27 objections caused confusion because it “was not certain which objections it was supposed
28 to address—the objections in the prior letter to a portion of the subpoena or each and every

1 one of the objections served on April 20th.” (ECF No. 46 at 8:15-18.)

2 On May 1, 2015, Roth’s counsel advised RHI’s counsel that Roth would not be
3 appearing at the deposition scheduled for May 6. Roth proceeded to file the instant motion
4 for protective order on May 4, 2015, despite some discussion between counsel about
5 coordinating a joint briefing schedule.

6 Roth argues in its motion for protective order that RHI’s subpoena, when viewed in
7 its entirety, is grossly overbroad and unduly burdensome, particularly because Roth is a
8 non-party entitled to extra protection from the Court. Roth also contends the subpoena is
9 improper because RHI is seeking information unrelated to this lawsuit for an
10 “anticompetitive purpose,” namely, to obtain confidential and proprietary documents from
11 a key competitor in the marketplace, *i.e.*, Roth. According to Roth, such information
12 includes all of Roth’s documents related to RHI, the Defendants and other former RHI
13 employees, and Roth’s business practices, clients, and candidates.² Roth also argues that
14 the subpoena improperly requests (1) irrelevant information regarding the solicitation of
15 Roth’s non-party employees and Roth’s general business practices and operations; (2) all
16 documents regarding Defendants’ employment with Roth; (3) all documents regarding
17 Roth’s clients and employee candidates; and (4) information about all revenue generated
18 by Defendants for Roth. Roth concedes that it has some discoverable information in its
19 possession, but Roth maintains that the scope of the subpoena is so burdensome that the
20 entire subpoena should be quashed and RHI should be required to issue a new, narrowly-
21 drawn subpoena. Roth contends it cannot begin to comply with the subpoena until it knows
22 whether it will be withdrawn, quashed, or limited.

23 RHI contends Roth has failed to comply with a lawfully served subpoena, failed to
24 propose any solutions to RHI’s counsel to address Roth’s objections, and failed to satisfy
25

26 ² Roth also argued in its motion that defined terms in the subpoena included attorneys
27 and, thus, implicated the attorney-client privilege and work product doctrine. However,
28 after further meet and confer efforts following the June 2, 2015 hearing, Roth and RHI
have reached an agreement to resolve this issue. (*See* ECF No. 58-1 at 2.)

1 its burden of showing that the subpoena should be quashed in its entirety. RHI further
2 contends that the subpoena seeks relevant discovery, including documents and testimony
3 concerning: (1) the solicitation of RHI’s clients and candidates; (2) the recruitment and
4 solicitation of RHI’s employees, including Defendants; (3) information regarding
5 Defendants’ employment at Roth; (4) RHI’s confidential information; (5) Roth’s business
6 practices, policies, and procedures pertinent to the claims in this case; and (6) damages.
7 RHI contends it expressed during the Early Neutral Evaluation Conference “that it would
8 be looking to investigate Roth with the possibility of adding the company as a defendant.”
9 (ECF No. 46 at 6:10-11.) RHI further contends discovery has implicated Roth as a source
10 for documents responsive to RHI’s discovery requests to Defendants, *e.g.*, Defendants
11 directed RHI to seek certain documents from Roth. RHI responds to Roth’s burden
12 objection on grounds that Roth provides no evidence to support the objection. RHI also
13 argues that the fact it competes with Roth in the marketplace does not immunize Roth from
14 the discovery process. In sum, RHI contends that “Roth’s participation in or ratification
15 of . . . Defendants’ acts has yet to be fully discovered and is a proper source of discovery
16 in this case, regardless of whether Roth turns out to be a witness or another defendant.”
17 (*Id.* at 7:15-18.)

18 **II. LEGAL STANDARDS**

19 Rule 26 of the Federal Rules of Civil Procedure provides:

20
21 Unless otherwise limited by court order, the scope of discovery is as follows:
22 Parties may obtain discovery regarding any nonprivileged matter that is
23 relevant to any party’s claim or defense For good cause, the court may
24 order discovery of any matter relevant to the subject matter involved in the
25 action. Relevant information need not be admissible at the trial if the
discovery appears reasonably calculated to lead to the discovery of admissible
evidence.

26 FED. R. CIV. P. 26(b)(1).

27 Rule 26 authorizes the Court, upon a showing of good cause, to issue an order to
28 “any person from whom discovery is sought . . . to protect [that] person from annoyance,

1 embarrassment, oppression, or undue burden or expense.” FED. R. CIV. P. 26(c)(1). The
2 Court’s order may, among other things, forbid the discovery; “forbid[] inquiry into certain
3 matters, or limit[] the scope of disclosure or discovery to certain matters”; or “require[]
4 that a trade secret, or other confidential research, development, or commercial information
5 not be revealed, or be revealed only in a specified way.” FED. R. CIV. P. 26(c)(1)(A), (D),
6 (G).

7 “A party or attorney responsible for issuing and serving a subpoena must take
8 reasonable steps to avoid imposing undue burden or expense on a person subject to the
9 subpoena. The court for the district where compliance is required must enforce this duty
10 and impose an appropriate sanction--which may include lost earnings and reasonable
11 attorney’s fees--on a party or attorney who fails to comply.” FED. R. CIV. P. 45(c)(1). “On
12 timely motion, the issuing court must quash or modify a subpoena that . . . fails to allow a
13 reasonable time to comply [or] . . . subjects a person to undue burden.” FED. R. CIV. P.
14 45(c)(3)(A)(i), (iv). In addition, the Court may quash or modify a subpoena that requires
15 “disclosing a trade secret or other confidential research, development, or commercial
16 information.” FED. R. CIV. P. 45(c)(3)(B)(i).

17 “On a motion to quash a subpoena, the moving party has the burden of persuasion
18 under Rule 45(c)(3), but the party issuing the subpoena must demonstrate that the discovery
19 sought is relevant.” *Chevron Corp. v. Donziger*, No. 12-mc-80237 CRB (NC), 2013 U.S.
20 Dist. LEXIS 119622, at *13 (N.D. Cal. Aug. 22, 2013) (citing *EON Corp. IP Holdings,
21 LLC v. T-Mobile USA, Inc.*, No. 12-cv-080082-LHK (PSG), 2012 U.S. Dist. LEXIS 76467,
22 at *1 (N.D. Cal. June 1, 2012)). “[I]f the sought-after documents are not relevant nor
23 calculated to lead to the discovery of admissible evidence, then *any burden whatsoever*
24 imposed . . . would be by definition ‘undue.’” *Compaq Computer Corp. v. Packard Bell
25 Elecs., Inc.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995).

26 “[T]he word ‘non-party’ serves as a constant reminder of the reasons for the
27 limitations that characterize ‘third-party’ discovery.” *Dart Indus. Co. v. Westwood Chem.
28 Co.*, 649 F.2d 646, 649 (9th Cir. 1980) (citations omitted). The Ninth Circuit “does not

1 favor unnecessarily burdening nonparties with discovery requests,” and, as a result, “[n]on-
2 parties deserve extra protection from the courts.” *Kim v. Nuvasive, Inc.*, No. 11cv1370-
3 DMS (NLS), 2011 U.S. Dist. LEXIS 96878, at *6 (S.D. Cal. Aug. 29, 2011) (citing *High*
4 *Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 161 F.R.D. 86, 88 (N.D. Cal.
5 1995)); *see also* FED. R. CIV. P. 45(d)(2)(B)(ii) (court order compelling compliance with
6 subpoena following objections by non-party “must protect a person who is neither a party
7 nor a party’s officer from significant expense resulting from compliance.”).

8 III. ANALYSIS

9 A. Roth’s Motion for Protective Order

10 As an initial matter, the Court considers Roth’s request that the Court quash the
11 subpoena in its entirety and force RHI to issue a new, narrowed subpoena. The Court
12 agrees with Roth that the subpoena, as issued, is overbroad and seeks information beyond
13 the scope of discovery permissible under Rule 26. Indeed, the subpoena seeks, in large
14 part, discovery that goes beyond the claims or defenses of the parties, but to *potential*
15 claims by RHI against Roth. The Court does not find good cause under Rule 26(b)(1) to
16 expand the scope of discovery to any matter relevant to the subject matter of this lawsuit.
17 Rather, discovery should be limited to the claims and defenses of the parties. Roth, as a
18 non-party, is deserving of special protection from the Court, and the Court does not
19 condone RHI’s admitted attempt to utilize the subpoena process as a means to gather
20 evidence against Roth in order to determine whether to name Roth as a defendant. *See*
21 *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990) (“The
22 discovery rules are designed to assist a party to prove a claim it reasonably believes to be
23 viable *without discovery*, not to find out if it has any basis for a claim.” (citations omitted)).
24 As the Court advised RHI’s counsel during the June 2 hearing, the information sought in
25 the subpoena should be focused on RHI’s claims against the named Defendants, and not
26 on *potential* claims against Roth. (*See* ECF No. 54 at 19:19-20:1 (“The Court does find
27 that because Roth is a nonparty that the scope of discovery does need to be limited to the
28 applicable claims and defenses in this action . . . [and] the subpoena needs to be

1 dramatically narrowed to a manageable level.”.)

2 Notwithstanding the foregoing, the Court declines to quash the subpoena in its
3 entirety. First, Roth admits it has discoverable information. Second, counsel have worked
4 diligently to significantly narrow the scope of the subpoena by agreeing to numerous
5 limitations and exclusions. (*See* ECF No. 58-1.) The Court’s goal of promoting efficiency
6 in the discovery process is fostered by addressing the remaining disputes rather than
7 requiring RHI to prepare a new subpoena, which would then likely be met with objections
8 from Roth, another discovery motion, and delayed completion of discovery.

9 Next, the Court considers the dispute regarding the definitions of “CLIENTS” and
10 “CANDIDATES.”³ During the meet and confer process, RHI proposed that these terms
11 be limited to “the clients and candidates Defendants worked with, had contact with, or had
12 confidential information about (to the extent they remember) as part of their job duties at
13 RHI.” (ECF No. 58 at 3:18-21.) Roth agrees this limitation satisfies its concerns.
14 However, RHI is now backtracking from its own proposal, arguing that by narrowing these
15 terms in such a manner, “RHI will not be able to determine whether Defendants are telling
16 the truth and/or have accurate recollections when they identified the former RHI clients
17 and candidates they are now working with at Roth. RHI would be forced to rely solely on
18 Defendants’ memories for the information regarding which RHI clients and candidates they
19 now work with at Roth—something that has already been an issue in the litigation.” (*Id.*
20 at 3:23-4:1.) Rather than move forward with its own proposal, RHI instead proposes that
21 Roth create a list of the names and candidates each of the Defendants have worked with
22 and/or had contact with since joining Roth, and RHI would create a similar list of those
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25 ³ The subpoena defines “CLIENT” as “any PERSON that any of the DEFENDANTS
26 worked with, were privy to CONFIDENTIAL INFORMATION about, or for whom any
27 of the RHI offices performs or has performed services in the course of its business.” (ECF
28 No. 46-2 at 7.) The subpoena defines “CANDIDATE” as “any PERSON who was or is
registered for placement by an RHI office whether on a temporary, contract or direct hire
basis.” (*Id.*)

1 clients and candidates Defendants worked with and/or had contact with while employed at
2 RHI. RHI further proposes these lists be designated for attorneys' eyes only pursuant to
3 the Protective Order, and it contends this new proposal will permit RHI to determine which
4 of its clients and candidates are now working with Defendants at Roth. Roth opposes RHI's
5 new proposal: "Roth does not agree to produce a complete client list in exchange for a
6 limitation of these definitions. If the Court is inclined to keep these broad definitions intact,
7 Roth would prefer to attempt to comply with requests that include them in good faith." (*Id.*
8 at 2:23-26.)

9 The Court declines to adopt RHI's newest proposal requiring RHI and Roth to
10 exchange client lists between counsel. First, RHI's proposal is based on an unreasonable
11 concern that Defendants cannot be trusted to comply with their discovery obligations. The
12 only evidence suggesting cause for concern is a single instance where one Defendant did
13 not disclose in her interrogatory response a candidate with whom she worked while at Roth
14 but later identified that candidate during her deposition. However, the Court is not
15 convinced this was anything more than an oversight, as this Defendant readily disclosed
16 the candidate's name during the deposition. It does not appear the interrogatory response
17 was intended to deceive or provide an incomplete response. And it may not have even
18 been incomplete. The interrogatory response was made on March 23, 2015, while the
19 deposition did not occur until June 3, 2015. Who's to say that this Defendant's work with
20 this particular candidate did not commence after service of the interrogatory response? The
21 record before the Court does not indicate that RHI's counsel inquired into this potential
22 inconsistency during the June 3 deposition, and the Court is not willing to assign an
23 improper motive based on this ambiguous evidence. Thus, RHI's entire proposal is based
24 on an unfounded concern that Defendants cannot be trusted. But the federal discovery
25 rules are based on the understanding that a party will dutifully comply with discovery
26 obligations, and there is always the potential that a party might not disclose all relevant,
27 discoverable information. While there are procedures in place to promote compliance (*e.g.*,
28 a party's duty to supplement disclosures and discovery responses, *see* FED. R. CIV. P. 26(e);

1 the Court’s authority to impose sanctions for discovery abuses, *see* FED. R. CIV. P. 37), the
2 Court is not willing to impose an additional burden on Roth, a non-party, as a means to
3 ensure the thoroughness of Defendants’ discovery responses. Moreover, RHI’s client list
4 proposal would be subject to the same issue of trust. That is, can RHI be confident that
5 Roth’s client list is complete? RHI would be in the same position regardless of which
6 proposal is adopted. Thus, the Court finds that RHI’s subpoena should be modified as
7 suggested by RHI’s initial proposal, namely, limiting the definitions of clients and
8 candidates to “the clients and candidates Defendants worked with, had contact with, or had
9 confidential information about (to the extent they remember) as part of their job duties at
10 RHI.”

11 The Court next considers the specific disputed deposition categories and document
12 requests:

13 **1. Category Nos. 1-6**

14 Category Nos. 1-6 seek information regarding the solicitation, recruitment, and/or
15 hiring of Defendants by Roth, including information Roth had regarding Defendants’
16 employment agreement with RHI. (ECF No. 39-2 at 8-9.) Following meet and confer
17 efforts, RHI proposed modifying the categories to focus on the solicitation, recruitment,
18 and/or hiring of Defendants *to* Roth.⁴ (ECF No. 58-2 at 2.) RHI contends this modification
19 will “focus on the Defendants and their solicitation to Roth, which could include
20 solicitation by some or all of the Defendants themselves.” (ECF No. 58 at 5:8-9.)

21 Roth contends these requests, even as modified, are anticompetitive and not relevant
22 to the parties’ claims or defenses. Roth maintains the issues in this case are whether
23 Defendants (1) brought RHI confidential information to Roth and used it to unlawfully
24 solicit RHI employer and applicant customers; and/or (2) unlawfully solicited RHI
25

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27 ⁴ Throughout this Order the Court will analyze RHI’s categories and requests utilizing
28 RHI’s proposed limitations or modifications rather than the original, substantially
overbroad language in the subpoena.

1 employees (in the specific instances identified in the complaint). Roth contends Category
2 Nos. 1-6, as well as Category Nos. 7-24, “can be boiled down to three requests for
3 testimony on those issues,” and that “Roth’s recruiting practices and strategies are not at
4 issue.” Specifically, Roth proposes the following categories in lieu of Category Nos. 1-24:
5 (1) Defendants’ possession of RHI’s confidential information; (2) Defendants’ use of
6 RHI’s confidential information to solicit its employer and applicant customers for the
7 benefit of Roth; and (3) the specific instances of unlawful recruitment of RHI employees
8 identified in the complaint. (ECF No. 58-2 at 2.)

9 The Court agrees with Roth that these three proposed categories are proper matters
10 for RHI to inquire into during Roth’s deposition as they are directed towards RHI’s claims
11 against Defendants. However, Roth’s proposal is too narrow. RHI should also be
12 permitted to inquire into communications between each Defendant and Roth during the
13 solicitation, recruitment, and/or hiring process. The Court agrees with RHI that it is entitled
14 “to know what Defendants told Roth during the hiring process about RHI’s confidential
15 information and employees—something Roth’s proposal would not necessarily capture.”
16 (ECF No. 58 at 6:5-7.) However, Roth’s internal responses to this information are not
17 relevant to the claims against Defendants, and RHI is therefore not entitled to inquire into
18 this topic.

19 **2. Category Nos. 9-14**

20 Category Nos. 9-14 seek information concerning the terms and conditions of
21 Defendants’ employment with Roth, including their respective compensation packages, job
22 duties, offer letters, and employment agreements. (ECF No. 39-2 at 9-10.) During the
23 meet and confer process, the parties relied on the same arguments they made in connection
24 with Category Nos. 1-6. In addition, RHI now argues that the terms and conditions of
25 Defendants’ employment with Roth is relevant for two reasons:

26
27 First, RHI believes that Roth was able to make offers to certain Defendants
28 and provide them with certain terms because it received RHI’s confidential
business information from one of the Defendants. For example, RHI contends

1 that Aldava provided Roth RHI's confidential information to allow it to
2 fashion offers to Sherman and Greenwood. Moreover, RHI believes that
3 Ainsworth may have engaged in similar activity in an effort to get Hernandez
4 to join him at Roth. Second, RHI needs to know if any of the job offers were
5 contingent or otherwise based on one of the Defendants providing Roth with
6 RHI's confidential information. RHI needs to know how Roth formulated and
7 communicated the terms of each Defendant's position to Defendants and what
8 if, anything, any of the Defendants said in reply.

7 (ECF No. 58 at 6:14-24.)

8 The Court believes RHI has adequately demonstrated the relevance of the requested
9 information. RHI shall not be precluded from inquiring into the terms and conditions of
10 Defendants' employment with Roth.

11 **3. Category Nos. 18 and 22**

12 Category No. 18 seeks Roth's business practices or business strategies related to
13 recruiting Defendants from RHI, although RHI agreed to limit the category to the recruiting
14 of Defendants. (ECF No. 58-2 at 4.) Category No. 22 seeks information about any
15 strategy, plan, or intention by Roth to focus on recruiting RHI employees, although RHI
16 agreed to limit the category to the recruiting of Defendants. (*Id.* at 6.)

17 During the meet and confer process, the parties relied on the same arguments they
18 made in connection with Category Nos. 1-6. In addition, RHI now argues that Category
19 Nos. 18 and 22, as modified, are relevant because although "Roth is not a party, each of
20 the six Defendants were recruited and left RHI's employ within a short period of time. RHI
21 does not believe this is a coincidence whether at the sole hands of Defendants' recruitment
22 or with Roth's involvement. Moreover, RHI believes that the Defendants' recruitment may
23 have had to do with their knowledge of and access to RHI's confidential information."
24 (ECF No. 58 at 7:20-24.) RHI further contends that in addition to the specific instances of
25 unlawful recruitment alleged in the complaint, it "should also be permitted to ask a Roth
26 deponent questions regarding how the other Defendants came to Roth. Documents will
27 not tell RHI if Roth recruited Defendants because they orally represented that they had a
28 book of business, access to specific clients or candidates, or would be able to convince

1 other RHI employees to make the move. Such information is important to RHI’s case.”
2 (*Id.* at 8:1-5.)

3 The Court finds that Roth’s business strategies, plans, and intentions to recruit
4 Defendants, assuming such information exists, are not relevant to the claims and defenses
5 in this case. RHI is already entitled to inquire into what Defendants may have told Roth
6 during the hiring process about RHI’s confidential information and employees. *See supra*
7 Part III(A)(1). Thus, to the extent Category No. 18 seeks information about Roth’s hiring
8 of Defendants, that information is already covered by a separate category. Category No.
9 18 is duplicative in this respect. Moreover, Roth’s business plan, strategies, and intentions
10 are not relevant to the claims against Defendants. Based on the current stage of the
11 pleadings, Roth’s purposes in hiring Defendants are irrelevant.

12 Accordingly, except for the area of Roth’s actual hiring process regarding
13 Defendants and the terms and conditions of Defendants’ employment with Roth, the Court
14 finds that RHI is not entitled to question Roth’s representative concerning the topics
15 identified in Category Nos. 18 and 22.

16 **4. Category No. 19 and Request No. 154**

17 Category No. 19 seeks Roth’s business practices or business strategies related to
18 hiring employees who have signed agreements with their prior employers that contain post-
19 termination obligations, although RHI has agreed to limit the category to Defendants, *i.e.*,
20 whether Roth had in place practices or strategies to ensure that Defendants did not violate
21 their agreements with RHI. (ECF No. 58-2 at 5.) Request No. 154 seeks all Roth policies,
22 procedures, practices, or requirements referring or relating to the hiring of employees
23 bound by a non-competition, non-solicitation, or non-disclosure agreement, although RHI
24 has agreed to limit the request to Defendants. (*Id.* at 20.)

25 RHI contends that “[t]estimony and related documents regarding how Roth dealt
26 with the fact that each of the Defendants had an employment agreement with RHI that
27 contains post-termination obligations goes to the heart of RHI’s case. The question is what
28 did Roth do if anything to inform the Defendants that they were bound by agreements with

1 RHI and, more importantly, how the Defendants reacted to those instructions.” (ECF No.
2 58 at 8:14-19.) RHI contends that at least one of the Defendants represented to Roth that
3 she was not subject to any post-termination agreement with a previous employer, and that
4 a Roth employee told another Defendant that she might not have to provide Roth with her
5 RHI employment agreement given that Roth already knew what RHI’s agreement looks
6 like. RHI further contends it “does not know what, if anything Roth did after those forms
7 were completed, whether the other Defendants ever executed similar forms, or whether any
8 additional procedures were required. RHI should be able to question a Roth deponent about
9 its processes for checking on and reviewing Defendants’ agreements with their former
10 employees. RHI needs to know if the Defendants were told by Roth to abide by their
11 agreement, what exactly they were told, and whether Defendants ignored those
12 instructions.” (*Id.* at 8:25-9:5.)

13 The Court agrees with RHI that testimony and documents regarding what Roth told
14 Defendants about their agreements with RHI is relevant to RHI’s claims against
15 Defendants for breach of contract and unfair competition. RHI is permitted to obtain
16 testimony and documents from Roth regarding Defendants’ employment agreements with
17 RHI including any representations by Defendants to Roth about those agreements (or lack
18 thereof), whether Roth had discussions with or provided instruction to Defendants
19 concerning those agreements, and Defendants’ responses to such instruction. However,
20 Category No. 19 and Request No. 154, even as modified by RHI, go beyond this relevant
21 and discoverable information. RHI is also seeking to know whether Roth’s interactions
22 with Defendants occurred as part of Roth’s general business practices or strategy. This is
23 not relevant to the claims or defenses in the lawsuit. RHI also seeks to discover how Roth
24 responded to representations made by Defendants. Unless Roth’s response consisted of
25 some further discussion or instruction to Defendants, Roth’s internal response to the
26 information provided by Defendants is not discoverable.

27 ///

28 ///

1 **5. Category No. 23**

2 Category No. 23 seeks to discover any strategy, plan, or intention by Roth to focus
3 on recruiting RHI’s employees, although RHI has agreed to modify the category to include
4 any strategy, plan, or intention *by Defendants* to obtain or provide RHI’s confidential
5 information or any other RHI documents to Roth or to use such information for Roth’s
6 benefits. (ECF No. 58-2 at 6-7.)

7 During the meet and confer process, the parties relied on the same arguments they
8 made in connection with Category Nos. 1-6. In addition, Roth argued that it is improper
9 and unnecessary to ask Roth what Defendants were thinking, and that RHI should ask
10 Defendants rather than Roth. RHI responded that the category asks for more than what
11 Defendants were thinking and, even if it did not, “whether Defendants told their employer
12 what they were thinking on this category is relevant information, which RHI should be
13 allowed to test Defendants’ deposition testimony against.” (*Id.* at 7.)

14 Obviously, to the extent Defendants did not disclose to Roth any strategy, plan, or
15 intention to provide RHI’s confidential information or other RHI documents to Roth or to
16 use such information for Roth’s benefit, Roth would not be required to disclose information
17 it never obtained. However, this category, as modified by RHI, is relevant to Defendants’
18 actions and RHI’s claims against them. To the extent Defendants expressed their strategy,
19 plan, or intention to Roth, Roth is required to disclose this information during the
20 deposition. In addition, if Roth became aware of Defendants’ strategy, plan, or intentions
21 through means other than by disclosure from Defendants, Roth is required to disclose this
22 information.

23 **6. Category No. 24, Request Nos. 156, and Proposed New Category No. 160**

24 Category No. 24 and Request No. 156 seek testimony and documents concerning
25 Roth’s policies, procedures, practices, or requirements for documenting its contacts with
26 its existing and prospective clients and candidates, although RHI has agreed to limit the
27 category and request to Roth’s policies, procedures, practices, or requirements for
28 documenting its contacts with Roth’s existing and prospective clients and candidates in the

1 divisions or departments where Defendants work(ed). (*Id.* at 8, 21.)

2 RHI contends this information is “aimed at understanding how to test whether a
3 Defendant or other deponent is being truthful when and if they state that a client or
4 candidate was previously, i.e. before the applicable Defendant became employed, a client
5 or candidate at Roth.” (*Id.* at 8, 21-22.) RHI also contends the information is relevant
6 because one of Defendants’ defenses to RHI’s claim that Defendants unlawfully used
7 RHI’s confidential information to solicit RHI’s clients and candidates is that the solicitation
8 was not wrongful because the client or candidate had previously worked for Roth. (ECF
9 No. 58 at 10:20-25.) RHI further contends that “whether or not the clients and candidates
10 at issue were Roth clients and candidates prior to Defendants’ arrival at the company is
11 clearly related to the case regardless of whether or not it constitutes information regarding
12 Roth’s business practices.” (*Id.* at 11:3-6)

13 In an effort to calm Roth’s concerns, RHI has proposed a new document request,
14 Request No. 160, which seeks documents sufficient to show Roth’s prior business history
15 with any client or candidate that Defendants are working with, worked with, or have made
16 contact with at Roth and that Roth contends it did business with prior to the date it hired
17 the applicable Defendants. (ECF No. 58-2 at 23.) Roth initially objected to this proposed
18 request on grounds that it was not included in the original subpoena, but it later agreed to
19 respond to Request No. 160 if it is limited to the clients and candidates at issue in the case.
20 (*Id.*) RHI agreed on the condition that an agreement regarding the verification of clients
21 and candidates could be reached. (*Id.*)

22 Roth’s policies, procedures, practices, or requirements for documenting its contacts
23 with its existing and prospective clients and candidates, even if limited to the divisions or
24 departments where Defendants work, is unduly intrusive of a non-party competitor. The
25 Court elects to substitute proposed Request No. 160 in place of Category No. 24 and
26 Request No. 156. Moreover, the Court has already resolved the dispute regarding the
27 verification of clients and candidates. *See supra* Part III(A). Roth shall respond to Request
28 No. 160.

1 **7. Category No. 29**

2 Category No. 29 seeks testimony concerning the procedures and processes
3 undertaken by Roth to confirm that it and none of its current and former employees are in
4 possession of RHI’s confidential information or any other RHI documents, although RHI
5 has agreed to limit the category to the procedures and processes undertaken by Roth to
6 confirm that it and none of its current and former employees are, as a result of Defendants’
7 conduct, in possession of RHI’s confidential information or any other RHI documents.
8 (ECF No. 58-2 at 8-9.)

9 RHI contends it is entitled to investigate whether any of its confidential information
10 or other documents were provided by Defendants to Roth and what Roth has done to ensure
11 it is not in possession of such information. (*Id.* at 9.) RHI further contends it “needs to
12 know that Roth has confirmed that the confidential information Defendants took from it is
13 not on Roth’s system.” (ECF No. 58 at 12:9-10.)

14 The Court finds Category No. 29 to be unduly intrusive. RHI has not shown why it
15 should be permitted to inquire into Roth’s procedures and processes. Although knowledge
16 of which RHI documents were provided by Defendants to Roth is plainly relevant, this
17 inquiry can be answered by requiring Roth to produce all RHI documents it obtained from
18 Defendants. This modification avoids imposing on Roth, a non-party, the burden of
19 explaining to a competitor its internal procedures and processes, when those procedures
20 and processes are not relevant to the claims against Defendants. The Court disagrees with
21 RHI as to the relevancy of “what Roth has done to ensure it is not in possession of any
22 [RHI] information.” (ECF No. 58-2 at 9.)

23 Accordingly, RHI shall not be permitted to question a Roth deponent about the
24 information requested in Category No. 29. Instead, Roth shall produce all RHI documents
25 (confidential or otherwise) in its possession, custody, or control that it obtained from
26 Defendants. In addition, to the extent Roth obtained RHI documents from Defendants but
27 those documents are no longer in Roth’s possession, custody, or control, RHI will be
28 permitted to ask a Roth deponent to identify such documents. Inquiry into what Roth did

1 with the documents to make them no longer in Roth’s possession, custody, or control is not
2 permitted.

3 **8. Category No. 31 and Request No. 159**

4 Category No. 31 and Request No. 159 seek testimony and documents concerning the
5 revenue generated for Roth by Defendants, although RHI has agreed to limit them to
6 revenue generated for Roth by Defendants Greenwood, Hernandez, and Sherman, and
7 revenue generated for Roth by Defendants Ainsworth, Aldava, and Schweitzer for any
8 clients or candidates. (*Id.* at 10, 22.)

9 Roth agrees to provide revenue information related to the clients and candidates at
10 issue in this case. Thus, there is no dispute with respect to revenue information generated
11 by Defendants Ainsworth, Aldava, and Schweitzer. However, Roth objects to providing
12 all revenue information generated by Defendants Greenwood, Hernandez, and Sherman.
13 As to these three Defendants, RHI claims full revenue information is needed “because RHI
14 is claiming damages based on the value of the employees it lost as the result of certain
15 Defendants’ conduct.” (*Id.* at 10.) Roth contends revenue that is not tied to the clients and
16 candidates at issue is too speculative to be recoverable under RHI’s theory that recoverable
17 damages include the value of Defendants’ employment.

18 The Court finds that this discovery should, for all six Defendants, be limited to the
19 clients and candidates at issue. Roth is a non-party competitor of RHI and the Court is
20 concerned that requiring it to produce all revenue generated by Defendants Greenwood,
21 Hernandez, and Sherman improperly invades into Roth’s confidential business
22 information. While the Court recognizes the relevance of the information, the Court also
23 concludes that it is based on speculation that revenue generated by certain Defendants
24 while at Roth would have been obtained at RHI had those Defendants remained at RHI.
25 Numerous factors could influence the amount of revenue generated, including Defendants’
26 use of Roth’s proprietary business information or trade secrets that would have been
27 unavailable to them had they never joined Roth. Given the speculative nature of this
28 information, the Court finds that protection from disclosure is appropriate. *See* FED. R.

1 Civ. P. 26(c)(1)(G) (authorizing protective order “requiring that a trade secret or other
2 confidential research, development, or commercial information not be revealed or be
3 revealed only in a specified way.”).

4 Accordingly, the Court modifies Category No. 31 and Request No. 159 to be
5 limited to revenue generated by Defendants for any clients and candidates at issue in this
6 case.

7 **9. Proposed New Category Nos. 32 and Request Nos. 74-79**

8 Request Nos. 74-79 seek all documents referring or relating to Defendants’
9 employment with Roth, including, but not limited to, each Defendants’ resume,
10 applications for employment, personnel file, job offer, performance expectations, job
11 description, job duties, and documents relating to Defendants’ compensation bonuses and
12 benefits. (ECF No. 58-2 at 16.) Roth initially objected to the use of the phrase “all
13 documents,” so RHI proposed limiting the requests to each Defendants’ resume,
14 application for employment, personnel file, job offer, performance expectations, job
15 description, job duties, and documents sufficient to reflect Defendants’ compensation
16 bonuses and benefits. (*Id.*)

17 Roth agrees to produce these documents with one exception. Roth argues the phrase
18 “benefits” is ambiguous and irrelevant and that Defendants’ and Roth’s privacy rights
19 outweigh any relevance. (*Id.* at 16-17.) RHI contends (1) Defendants’ benefits “have the
20 same relevance as any other incentive that may have been used to entice the Defendants to
21 join Roth”; (2) Roth waived its ambiguity and privacy objections by not asserting them in
22 its formal objections; and (3) any privacy concern is cured by the Protective Order issued
23 in this case. (ECF No. 58 at 15:11-24.) The Court agrees with RHI. The term “benefits”
24 is not ambiguous in the context of the specific types of documents requested by RHI, and
25 any privacy concerns can be protected by designating the benefits documents pursuant to
26 the Protective Order. Moreover, Roth waived these objections. Finally, Defendants’
27 benefits package is relevant in that it is part of the compensation package offered to each
28 Defendant, and such information is reasonably calculated to have had at least some impact

1 on Defendants' decision to leave RHI.

2 Accordingly, Roth shall produce all documents responsive to Category Nos. 74-79,
3 as limited by RHI to include each Defendants' each Defendants' resume, application for
4 employment, personnel file, job offer, performance expectations, job description, job
5 duties, and documents sufficient to reflect Defendants' compensation bonuses and
6 benefits.⁵

7 **10. Proposed New Category Nos. 33 and 34, and Request Nos. 80-100 and**
8 **101-124**

9 Request Nos. 80-100 seek all documents regarding certain RHI clients that RHI has,
10 through investigation and discovery in this case, determined that Defendants interacted
11 with since becoming employed by Roth, including, but not limited to communications with
12 the clients' employees, files, contracts, pitches, marketing materials, pricing information,
13 and term sheets. (ECF No. 39-2 at 27-31.) Roth initially objected to the use of the phrase
14 "all documents," so RHI proposed limiting the requests to the following categories of
15 documents: communications with the clients' employees, files, contracts, pitches,
16 marketing materials, pricing information (bill rates), hourly rates, term sheets, placement
17 records, placement requests, placement fees, bills, invoices, commission information, and
18

19 ⁵ RHI proposed a new category of deposition testimony, Category No. 32, as a
20 compromise to Roth's objection to the phrase "all documents." (See ECF No. 58-2 at 11.)
21 RHI contends Roth has refused to provide the specific names of documents that RHI is
22 seeking in connection with Request Nos. 74-79, and that the proposed deposition category
23 will allow RHI to identify those documents that may not be included in the specific list of
24 documents identified by Roth. However, RHI provides no authority for the position that a
25 non-party witness (*i.e.*, Roth) should be required to identify for a party (*i.e.*, RHI) what
26 types of documents that party should include in its subpoena to the non-party. In addition,
27 RHI does not need to know the exact name of the documents contained in, for example,
28 Defendants' Roth personnel file. Production of the personnel file is sufficient. Roth has
agreed in good faith to produce the documents that fall within the general categories of
documents requested by RHI. Finally, the proposed new category is not necessary because
RHI is already permitted to inquire into the terms and conditions of Defendants'
employment with Roth in connection with Category Nos. 9-14. See *supra* Part III(A)(2).

1 related documents. (ECF No. 58-2 at 17.)

2 Request Nos. 101-124 seek all documents, including communications, regarding
3 RHI candidates that Defendants interacted with since becoming employed by Roth. (ECF
4 No. 39-2 at 31-33.) Again, Roth initially objected to the use of the phrase “all documents,”
5 so RHI proposed limiting the requests to the following categories of documents regarding
6 candidates: communications with the candidates, files, contracts, resumes, qualifications,
7 pricing information (bill rates), hourly rates, term sheets, placement records, placement
8 requests, placement fees, bills, invoices, commission information, and related documents.
9 (ECF No. 58-2 at 18-19.)

10 Roth objected to producing documents responsive to RHI’s modified requests on the
11 basis that “[i]n response to Defendants’ document requests, RHI refused to produce these
12 same types of records contained in its MicroJ system regarding these same
13 clients/candidates. If RHI agrees to produce them, Roth will do the same. Can’t have it
14 both ways.” (*Id.* at 17, 19.) RHI responded by noting that it has not refused to produce
15 MicroJ records but that it had made overbreadth objections to Defendants’ requests on
16 which counsel could meet and confer, and Defendants had not proposed any limitations
17 like RHI has done. Roth responded: “Defendants agree to limit their request for MicroJ
18 records in the same way as you have limited the request above. If that is ok with you, then
19 we have a deal.” (*Id.* at 17.) Counsel the argued whether their meet and confer over RHI’s
20 subpoena to Roth was an appropriate forum to meet and confer over Defendants’ document
21 requests to RHI.

22 As it stands, Roth has made no objection to the relevancy of the documents sought
23 in Request Nos. 80-124, as modified by RHI. The Court appreciates that there is a dispute
24 over potentially similar documents⁶ sought by Defendants from RHI. However, Roth
25

26 ⁶ Without the benefit of reviewing Defendants’ requests to RHI, RHI’s objections to
27 those requests, or any briefing on that dispute, the Court cannot conclude that Defendants’
28 requests are the same as RHI’s requests to Roth. This is especially true given that RHI
appears to have demonstrated differences in the requests. (*See* ECF No. 58 at 17:22-28.)

1 cannot use that dispute, over which no adequate meet and confer has yet occurred, to refuse
2 to produce admittedly relevant documents. Accordingly, Roth shall produce all documents
3 responsive to Request Nos. 80-124, as modified by RHI.⁷

4 **11. Request No. 12**

5 Request No. 12 seeks all documents, including communications, referring or relating
6 to any effort by Defendants to solicit, recruit, engage, or hire current or former employees
7 of RHI for Roth's benefit. (ECF No. 39-2 at 18.)

8 Roth contends it should only be required to produce documents concerning
9 Defendants Ainsworth and Hernandez's alleged solicitation of Danielle Healis, and
10 Defendants Greenwood and Sherman's alleged solicitation of Defendant Aldava, because
11 these are the only allegations of solicitation in the complaint. (ECF No. 58-2 at 15-16.)
12 The Court disagrees. RHI is entitled to investigate whether additional solicitation of other
13 RHI employees occurred, even if RHI is not currently aware of such facts. *See* Fed. R.
14 Civ. P. 26(b)(1) advisory committee notes (2000 amendments) (information relevant to the
15 claims and defenses in a case may, in a given action, include "other incidents of the same
16 type."). Accordingly, Roth shall comply with Request No. 12 by producing all documents,
17 including communications, referring or relating to any effort by Defendants to solicit,
18 recruit, engage, or hire current or former employees of RHI for Roth's benefit.

19 **12. Request No. 138**

20 Request No. 138 seeks all communications between Roth and any current or former
21 RHI employee referring or relating to employment or employment opportunities with Roth,
22 although RHI has agreed to limit the request to communications between Roth and any of
23 the Defendants. (ECF No. 58-2 at 20.)

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27 ⁷ RHI's proposed new categories of deposition testimony, Category Nos. 33-34, are
28 inappropriate for the same reasons set forth above in connection with proposed Category
No. 32. *See supra* note 5.

1 Roth contends this request is duplicative of Request Nos. 1-6⁸ and, to the extent it is
2 not duplicative, it seeks irrelevant documents because Roth's business practices with
3 respect to soliciting Defendants is not at issue. (*Id.*)

4 As an initial matter, the Court overrules Roth's objection that this request is
5 duplicative. To the extent it overlaps with documents sought by Request Nos. 1-6, Roth
6 has already agreed to produce the documents. The Court also finds that RHI's proposed
7 limitation properly narrows the scope of this request to focus only on Roth's
8 communications with Defendants relating to employment or employment opportunities.
9 Such communications are plainly relevant to RHI's claims against Defendants, and all
10 responsive documents should be produced. The request does not ask to disclose Roth's
11 business practices with respect to soliciting Defendants. Rather, it seeks communications
12 between Roth and Defendants surrounding the principal issue in this lawsuit, *i.e.*,
13 Defendants' decision to begin working at Roth. Although such communications are
14 relevant, RHI's argument that it is entitled to general employment announcements misses
15 the fact that such announcements are not communications between Roth and Defendants
16 and, thus, are not contemplated by this request.

17 **13. Conclusion**

18 Based on the foregoing, Roth's motion for protective order is **GRANTED in part**
19 and **DENIED in part**. Subject to the foregoing analysis, Roth shall produce all responsive
20 documents to RHI no later than **September 8, 2015**. Counsel for Roth and RHI shall meet
21 and confer to schedule a mutually convenient date for Roth's deposition, which shall be
22 conducted on or before **September 22, 2015**.

23 Notwithstanding the foregoing, Roth is not precluded from designating documents
24 or deposition testimony as "Confidential" or "Attorneys' Eyes Only" pursuant to the
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26
27 ⁸ Request Nos. 1-6, as limited by the agreement of RHI and Roth, seek all documents,
28 including communications, referring or relating to the solicitation or recruitment of
Defendants to join Roth. (*See* ECF No. 58-1 at 7.)

1 Court's January 29, 2015 Protective Order. (ECF No. 21.)

2 **B. RHI's Motion to Amend Scheduling Order**

3 RHI requests that the February 22, 2015 Scheduling Order (ECF No. 25) be amended
4 to extend: (1) the deadline to amend pleadings "within two weeks after [Roth] fully
5 complies with the subpoena issued by RHI"; (2) RHI's expert designation deadline from
6 May 15, 2015, to fifteen days from the date this Order is filed; (3) Defendants' expert
7 designation deadline from May 29, 2015 to thirty days from the date this Order is filed;
8 and (4) the supplemental expert designation deadline to forty-four days from the date this
9 Order is filed. (ECF No. 43-3 at 8:18-9:13.)

10 RHI contends good cause exists for the requested extensions because (1) RHI
11 subpoenaed documents and testimony from Roth to occur before the expiration of the May
12 15 deadline to move to amend pleadings; (2) RHI has been unable to obtain documents or
13 testimony from Roth because Roth failed to appear at the deposition or produce any
14 documents⁹ in an attempt to "block discovery" related to Defendants and RHI; (3) Roth's
15 refusal to comply with the subpoena would prejudice RHI if RHI is not permitted to file an
16 amended complaint should additional discovery warrant amendment; and (4) the current
17 Scheduling Order does not permit RHI to identify experts related to new claims in the [First
18 Amended Complaint], given that the [First Amended Complaint] will not be deemed filed
19 until and unless this Court grants the amendment."¹⁰ (ECF No. 43-3 at 7:23-9:9.)

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22 _____
23 ⁹ RHI's repeated accusations that Roth failed to appear at the deposition are
24 disingenuous. Roth objected to the subpoena, both in its entirety and as to individual
25 categories and requests. Roth's objections excuse compliance with the subpoena until a
26 court orders otherwise. *See* FED. R. CIV. P. 45(d)(2)(B)(ii) ("These acts may be required
only as directed in the order. . . .").

27 ¹⁰ Judge Hayes granted RHI's unopposed motion for leave to file a First Amended
28 Complaint, which added a claim for misappropriation of trade secrets against Defendants
Aldava, Greenwood, Hernandez, and Sherman, on July 15, 2015. (*See* ECF No. 61.)

1 Defendants do not oppose extending the deadline to identify experts specifically
2 related to the new causes of action for misappropriation in RHI's First Amended
3 Complaint. However, Defendants oppose RHI's request to extend the deadlines to move
4 to amend pleadings or to identify experts with respect to preexisting claims for relief in the
5 original complaint. (ECF No. 50 at 2:3-8.)

6 **1. Legal Standards**

7 Rule 16(b) requires that, "as soon as practicable," district courts issue a scheduling
8 order "limit[ing] the time to join other parties, amend the pleadings, complete discovery,
9 and file motions." FED. R. CIV. P 16(b)(2), (3)(A). A scheduling order "may be modified
10 only for good cause and with the judge's consent." FED. R. CIV. P. 16(b)(4). Although
11 "Rule 15(a) liberally allows for amendments to pleadings," *Coleman v. Quaker Oats Co.*,
12 232 F.3d 1271, 1294 (9th Cir. 2000), that policy does not apply after a district court has
13 issued "a pretrial scheduling order that established a timetable for amending the pleadings,
14 and the deadline [has] expired." *Id.* Rather, under those circumstances, parties seeking to
15 amend their complaints "must show good cause for not having amended their complaints
16 before the time specified in the scheduling order expired." *Id.* (citing *Johnson v. Mammoth*
17 *Recreations Inc.*, 975 F.2d 604, 608-09 (9th Cir. 1992)); *see also Aliota v. Town of Lisbon*,
18 651 F.3d 715, 719-20 (7th Cir. 2011) (identifying the majority of circuit courts that "apply
19 the heightened good-cause standard of Rule 16(b)(4) before considering whether the
20 requirements of Rule 15(a)(2) were satisfied."). "This standard 'primarily considers the
21 diligence of the party seeking the amendment.'" *Id.* (quoting *Johnson*, 975 F.2d at 609).
22 "Although the existence or degree of prejudice to the party opposing the modification
23 might supply additional reasons to deny a motion, the focus of the inquiry is upon the
24 moving party's reasons for seeking modification." *Johnson*, 975 F.2d at 609 (citing
25 *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)).

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1 **2. Motion for Leave to Amend Deadline**¹¹

2 As for the deadline to move for leave to amend the pleadings, the Court finds RHI
3 has established it has acted diligently to obtain discovery from Roth that might support
4 additional claims in a further amended complaint. Indeed, RHI served its subpoena on
5 Roth only two months after the Court issued the Scheduling Order, and the date set for
6 compliance was set to occur prior to the deadline to move to amend pleadings.

7 Defendants' arguments that RHI's request is premature and that RHI has known
8 since the outset of this case of potential claims against Roth do not account for the potential
9 that a further amended complaint might also include additional claims against Defendants
10 based on the discovery obtained from Roth. Moreover, RHI did not, as Defendants
11 contend, wait seven months to serve a subpoena on Roth. Discovery was stayed pursuant
12 to Federal Rule of Civil Procedure 26(d)(1) until the parties' Rule 26(f) conference which
13 appears to have occurred in mid-December 2014 prior to their filing of a Joint Rule 26(f)
14 Report on December 22, 2014. (ECF No. 11.) It is not unreasonable to expect RHI to
15 focus its initial discovery efforts on obtaining documents and deposition testimony from
16 Defendants before issuing a subpoena to Defendants' current employer, Roth.

17 In short, RHI has been diligent in seeking the discovery on which it may rely to
18 assert additional claims in an amended complaint. Further, there is no prejudice to
19 Defendants. Accordingly, RHI's motion to amend the Scheduling Order by continuing the
20 deadline to move to amend pleadings is **GRANTED**. The Court will issue a separate
21 Amended Scheduling order setting forth the new deadline.

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26 ¹¹ The Court reminds RHI that the May 15, 2015 deadline was a deadline to file a
27 motion to join other parties, amend the pleadings, or file additional pleadings. (*See* ECF
28 No. 25 at ¶ 2.) RHI's motion repeatedly characterizes the deadline as one to amend the
pleadings, but RHI must first obtain leave of court to file a motion to join other parties,
amend the pleadings, or file additional pleadings. *See* FED. R. CIV. P. 15(a)(2).

1 **3. Expert Designation Deadlines**

2 As to the expert designation deadlines, Defendants contend that RHI only argued an
3 extension was needed to identify experts related to new claims in the First Amended
4 Complaint, but that RHI failed to identify experts in support of the claims in its original
5 complaint and that RHI offers no good cause for its failure or inability to do so. Defendants
6 contend “the Court should only extend the parties’ deadline to identify experts with respect
7 to RHI’s newly added misappropriation claim in the [First Amended Complaint].” (*Id.* at
8 3:10-14.) RHI fails to respond to this argument in its reply.

9 Notwithstanding RHI’s failure to address this issue in its reply, the Court is not
10 inclined to accept Defendants’ argument. As noted above, RHI has diligently sought to
11 complete discovery. It is not unreasonable to assume that RHI needed to obtain the
12 discovery from Roth in order to adequately evaluate what experts to designate (on any of
13 RHI’s claims) and the scope of RHI’s experts’ anticipated testimony. Had there been no
14 delay in obtaining discovery from Roth there likely would be no need to extend the expert
15 designation deadlines. Although the better course would have been for RHI to comply
16 with the deadline despite the pendency of its motion to amend the Scheduling Order, the
17 Court will excuse RHI’s non-compliance. Moreover, extending the deadline for all
18 purposes will foster the Court’s preference that cases be resolved on their merits and it will
19 avoid potential enforcement problems were the Court to only permit RHI to designate
20 experts only as to the misappropriation claims. Finally, Defendants will suffer no prejudice
21 if the expert designation deadlines are extended without qualification.

22 Accordingly, RHI’s motion to amend the Scheduling Order to continue RHI’s expert
23 designation deadline is **GRANTED**. As noted above, the Court will issue a separate
24 Amended Scheduling Order setting forth the new expert designation deadlines.

25 IT IS SO ORDERED.

26 Dated: August 6, 2015



27 DAVID H. BARTICK
28 United States Magistrate Judge