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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JASON TORANTO,

12 Plaintiff,

13 v.

14 DANIEL JAFFURS, et al.,

15 Defendants.

Case No.: 16cv1709-JAH (NLS)

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
EX PARTE MOTION TO COMPEL**

**[ECF No. 180]**

16  
17 Before the Court is Plaintiff's *ex parte* motion to compel the Regents of the  
18 University of California ("Regents") to produce certain documents in response to a  
19 subpoena served on the University of California, San Diego ("UCSD"). ECF No. 180.  
20 UCSD filed an opposition to the motion, and Plaintiff filed a reply. ECF Nos. 191, 194.  
21 Upon consideration and for the reasons stated below, the Court **GRANTS IN PART** and  
22 **DENIES IN PART** Plaintiff's motion.

23 **I. BACKGROUND**

24 In his Second Amended Complaint ("SAC"), Plaintiff alleges nine causes of action  
25 against seven defendants. ECF No. 169. Plaintiff alleges that Defendant Daniel Jaffurs  
26 ("Dr. Jaffurs") conspired with Defendant Amanda Gosman ("Dr. Gosman") and the other  
27 Rady defendants to prevent him from obtaining privileges at Rady Children's Hospital  
28 ("Rady Children's") in San Diego.

1 On May 24, 2017, Plaintiff served a document subpoena on Regents, seeking  
2 documents from both UCSD and the University of California, Irvine (“UCI”). ECF No.  
3 180-1, Ex. A. UCI employs Dr. Jaffurs, and used to employ Plaintiff. UCSD employs  
4 Dr. Gosman and certain other physicians Plaintiff argues are relevant to this case.

5 Dr. Jaffurs moved to quash the subpoena (ECF No. 98), which the Court granted in  
6 part and denied in part. ECF No. 100. However, the Court stayed the document  
7 production pending Judge Houston’s ruling on another issue raised in a prior discovery  
8 dispute regarding whether the “peer review privilege” applied to this case. *See* ECF Nos.  
9 77, 81, 82, 83. After the order issued, it appears that counsel for Plaintiff and counsel for  
10 UCSD held a meet and confer and corresponded over email regarding the scope of  
11 documents to produce. ECF No. 180-1, Ex. C. However, no documents were produced  
12 at that time, in accordance with the stay.

13 Judge Houston ruled on the “peer review privilege” issue on March 21, 2018,  
14 effectively lifting the stay. ECF No. 108. On the same day, Plaintiff’s counsel emailed  
15 counsel for Regents to let her know of the decision. ECF No. 180-1, Ex. C. During this  
16 time, counsel for Regents had moved firms, and during the move, it appears certain  
17 documents were put into storage, including the ones collected in response to this  
18 subpoena. *Id.*

19 Documents were produced to Plaintiff on April 17, 2018. ECF No. 180 at 1.  
20 However, upon review, Plaintiff found that the only documents from UCI were produced  
21 and no documents from UCSD were produced. *Id.* Plaintiff reached out to counsel for  
22 Regents who stated she would look into the issue. *Id.*; ECF No. 180-1, Ex. D.

23 Plaintiff’s counsel claims that counsel for Regents told him that there was a second  
24 box of documents that may have been lost. ECF No. 180 at 5. Counsel for Regents then  
25 went to collect documents from UCSD again, and requested that Plaintiff’s counsel  
26 provide her a list of potential custodians who may have responsive documents, which  
27 Plaintiff’s counsel did. *Id.* at 5-6; ECF No. 180-1, Ex. E. Plaintiff’s counsel claims,  
28 however, that counsel for Regents miscommunicated to UCSD about what documents to

1 search for so the visit did not result in the collection of appropriate documents. ECF No.  
2 180 at 6. Plaintiff's counsel states that he subsequently met with counsel for Regents  
3 again, and despite counsel stating that UCSD was cooperating, UCSD failed to produce  
4 any further documents. *Id.* at 6-7.

## 5 **II. DISCUSSION**

6 Plaintiff and UCSD agree that there are three categories of documents for which  
7 UCSD was to search and produce documents. The Court will address each category in  
8 turn.

### 9 **A. Documents Regarding Plaintiff and his Application to Rady's Children**

10 The first category of documents at issue in this dispute relate to Plaintiff Toranto.  
11 The specific relevant requests in the subpoena were:

12 2. All DOCUMENTS mentioning, referring or relating to Dr. Jason Toranto.

13 4. All DOCUMENTS constituting, referring or relating to  
14 COMMUNICATIONS between GOSMAN and any other person or entity  
15 concerning Dr. Jason Toranto.

16 ECF No. 180-1, Ex. A at 5-6. UCSD claims that it has no communications to produce.  
17 Plaintiff, on the other hand, refutes this statement because he claims he has  
18 communications in his possession that would be responsive to these requests, which  
19 UCSD did not produce. The parties' briefing on this category of documents raises  
20 several issues, which the Court will below.

#### 21 **i. The Scope of the Requests**

22 First, there appears to be a discrepancy between the parties' views as to the scope  
23 of these requests. According to Plaintiff, in the subsequent meet and confers, UCSD  
24 agreed to produce documents and communications regarding Plaintiff *and* his application  
25 for privileges at Rady Children's. ECF No. 180 at 3. In its filings, UCSD seems to  
26 believe that it agreed to produce "emails reflecting communications regarding Jason  
27 Toranto, M.D.'s application to Rady Children's Hospital." ECF No. 191 at 2.  
28

1 To the extent UCSD is considering responsive only documents regarding his  
2 application, this interpretation is too narrow. The requests are broadly worded and the  
3 Court has already previously ruled on Requests 2 and 4, overruling UCSD’s objections at  
4 that time and compelling production. *See* ECF No. 100 at 7-8. Furthermore, Plaintiff  
5 submitted communications between his counsel and counsel for Regents that suggest the  
6 scope was not so limited either during the meet and confer process. *See* ECF No. 180-1,  
7 Ex. F at 31 (template email separately listing documents and communications regarding  
8 “Jason Toranto” and “Jason Toranto’s application for privileges at Rady Children’s”).

9 **ii. Emails of UCSD’s Employees**

10 Second, one of the primary disputes is whether UCSD collected emails from its  
11 employees that may be responsive to these requests. In its opposition, UCSD submitted a  
12 declaration stating that: (1) “UC San Diego does not have any documents or  
13 communications between Amanda Gosman and any other individual or entity regarding  
14 Jason Toranto;” and (2) “UC San Diego does not have possession of any e-mails  
15 regarding Jason Toranto’s application to Rady Children’s Hospital.” ECF No. 191-2 at  
16 ¶¶ 2, 7. However, based on these statements, Plaintiff argues that it is unclear whether  
17 UCSD searched the emails of any of its employees—who Plaintiff claims is within  
18 UCSD’s control.

19 The Court agrees that work emails of employees falls under the scope of the  
20 subpoena. Federal Rule of Civil Procedure 45 governs discovery of third-parties by  
21 subpoena and is subject to the same scope of discovery as a party. Like under Rule 34  
22 pertaining to parties, Rule 45 also requires a third-party to produce all discovery  
23 documents or things responsive to a request that are in the third-party’s “possession,  
24 custody, or control.” Fed R. Civ. P. 45(a)(1)(A)(iii). Current employees are considered  
25 to be within that party’s “possession, custody, or control” and a party is under an  
26 affirmative duty to seek documents from them. *See A. Farber & Partners, Inc. v.*  
27 *Garber*, 234 F.R.D. 186, 189 (C.D. Cal. 2006) (“[A] party responding to a Rule 34  
28 production request is under an affirmative duty to seek that information reasonably

1 available to it from its employees, agents, or others subject to its control.”) (internal  
2 quotations and citations omitted); *Meeks v. Parsons*, No. 03cv6700-LJO-GSA, 2009 WL  
3 3003718, at \*4, 2009 U.S. Dist. LEXIS 90283, at \*11-12 (E.D. Cal. Sept. 18, 2009)  
4 (party “cannot furnish only that information within his immediate knowledge or  
5 possession; he is under an affirmative duty to seek that information reasonably available  
6 to him from his employees, agents, or others subject to his control”) (internal citations  
7 and quotations omitted).

8       Thus, UCSD has a duty to search for responsive communications from its  
9 employees. UCSD does not state in its opposition whether it has done this. However, it  
10 does state—in the context of communications from Dr. Gosman to others regarding Dr.  
11 Toranto—that “[i]f such documents exist, they would be in the possession of Amanda  
12 Gosman and/or the other individual entity.” ECF No. 191-2 at ¶ 2. Amanda Gosman is  
13 an employee of UCSD, and this statement suggests that UCSD considers her emails, even  
14 her email address associated with UCSD, to be in her “possession” and not in the  
15 possession of UCSD. This is not consistent with the cases that hold employee documents  
16 within the “possession, custody, or control” of the company. *A. Farber & Partners*, 234  
17 F.R.D. at 189; *Meeks*, 2009 WL 3003718, at \*4.

18       To the extent that UCSD has not, it needs to search the work email addresses of  
19 individuals potentially having responsive documents. A reasonable inquiry involves, “at  
20 a minimum, a reasonable procedure to distribute discovery requests to all employees and  
21 agents of the [party] potentially possessing responsive information, and to account for the  
22 collection and subsequent production of the information to [the requesting party].” *A.*  
23 *Farber & Partners*, 234 F.R.D. at 189 (quoting *Nat’l Ass’n of Radiation Survivors v.*  
24 *Turnage*, 115 F.R.D. 543, 556 (N.D. Cal. 1987)). It appears that Plaintiff and UCSD  
25 began this process during meet and confers—Plaintiff sent UCSD a list of potential  
26 custodians of responsive documents (ECF No. 180-1, Ex. E at 28) and provided a draft  
27 template email to send to them (ECF No. 180-1, Ex. F at 31-32)—but the process was not  
28

1 completed. The Court leave the details on how to complete this process up to Plaintiff  
2 and UCSD, and **ORDERS** them to meet and confer on how to complete this discovery.

3 **iii. Emails UCSD Claims are Inaccessible**

4 The final issue in dispute between Plaintiff and UCSD is with regards to the emails  
5 that UCSD contends are no longer “accessible.” UCSD claims that it does not have  
6 access to e-mail communications between its physicians and any other individuals older  
7 than six months, unless those communications were otherwise saved. ECF No. 191-2 at ¶  
8 5. Plaintiff counters that this statement is not credible, given that UCSD is a major  
9 research university who would likely have the need to access emails from more than six  
10 months ago. ECF No. 194 at 6. Plaintiff believes that even if UCSD removes older  
11 emails, such emails must be accessible at least through an archive or back-up tapes. *Id.*

12 Electronically stored information is discoverable under the same relevance  
13 standards of Rule 26, “regardless of their present format and level of accessibility.” *U.S.*  
14 *ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 229 (S.D. Cal. 2015) (“Per the  
15 Rules’ plain text, for accessible or inaccessible ESI to be discoverable, the relevance test  
16 set in Rule 26(b) must be satisfied.”). “Inaccessible” information is generally defined as  
17 “backup tapes and erased, fragmented or damaged data.” *Id.* at 239. The *Bridgeport* case  
18 described that in most cases, “‘inaccessible’ simply means that expenditure of resources  
19 required to access the contents is itself unreasonable.” *Id.* Normally, in such cases,  
20 courts will order production as long as relevance is met, but will consider shifting the cost  
21 of production to the requesting party depending on several factors. *Id.* at 237-38 (listing  
22 factors). However, “if a party converts into an inaccessible format data that it should  
23 have reasonably foreseen would be discoverable material at a time when it should have  
24 anticipated litigation, then it should not be entitled to shift the costs of restoring and  
25 searching the data.” *Id.* at 241 (citing *Quinby v. WestLB AG*, 245 F.R.D. 94, 104  
26 (S.D.N.Y. 2006)).

27 It is unclear from UCSD’s filing what it means when it claims that emails older  
28 than six months are “inaccessible.” Regardless, the Court finds that at least some

1 discovery into these older emails is appropriate under these circumstances. To the extent  
2 any older emails that may be responsive can be retrieved through a back-up tape, archive,  
3 or other similar access, they should be retrieved and produced. Plaintiff's application to  
4 Rady Children's occurred more than six months ago and any communications regarding  
5 the same is relevant to this case. Finding relevance met, the Court will not impose any  
6 cost-shifting for the production because UCSD should have been on reasonable notice to  
7 maintain this information. The original subpoena to UCSD was served on June 6, 2017  
8 (ECF No. 180-1, Ex. A at 2) and even though production was stayed, the Court ruled on  
9 the motion to quash the subpoena on July 10, 2017 (ECF No. 100). Plaintiff represents  
10 that he has in his possession at least some responsive emails "throughout the past several  
11 years to show that if UCSD had properly search for such communications in any given  
12 six-month window, they would have found some of them." ECF No. 194. This, at the  
13 very least, calls into question whether UCSD maintained access to documents that may  
14 have been responsive even after it had notice of the subpoena. Alternatively, if by  
15 "inaccessible," Regents truly means that the data is irretrievable, regardless of cost and  
16 effort, it must declare so in a sworn statement and Plaintiff may seek alternative relief at  
17 that time, if appropriate and justified.

18 Accordingly, Plaintiff's motion to compel regarding this category of documents is  
19 **GRANTED**, consistent with the above rulings. The parties are ordered to meet and  
20 confer regarding the protocol to complete this discovery. UCSD shall identify a person  
21 most knowledgeable regarding its email systems and whether any archives and back-up  
22 tapes exist and must make him or her available to answer any questions, should any arise  
23 during the parties meet and confer.

#### 24 **B. Documents Regarding the Recruitment and Hiring of Samuel Lance**

25 Though the parties agree that Plaintiff requested information regarding the hiring  
26 of Samuel Lance, there is some disagreement as to the scope of this request. Plaintiff  
27 states that he is seeking information regarding the position filled by Samuel Lance, such  
28 as information showing (1) how and when UCSD decided it had a need for such a

1 position; (2) how and when UCSD posted or advertised the position; (3) when Lance  
2 applied to Rady/UCSD; (4) who asked or encouraged him to apply; (5) what was said to  
3 Lance about the need for an additional craniofacial surgeon; and (6) when the decision  
4 was made to hire Lance. ECF No. 180 at 8. Plaintiff is not seeking confidential  
5 information such as his personnel file. *Id.*

6 UCSD, on the other hand, characterizes this request as seeking documents  
7 reflecting efforts to recruit a pediatric plastic and craniofacial surgery position. ECF No.  
8 191. Its position is that Samuel Lance was hired straight from his fellowship, so there are  
9 no documents specific to recruitment of a pediatric plastic and craniofacial surgery  
10 position. *Id.* at 3-4; ECF No. 191-2 at ¶ 4.

11 The Court finds that the information that Plaintiff seeks is relevant to his case.  
12 Plaintiff alleges that he was told by Dr. Gosman that Rady/UCSD had enough  
13 craniofacial coverage and that they were not looking for anyone at that time. ECF No.  
14 169 at ¶ 80. If Lance was hired for craniofacial coverage, information regarding his  
15 hiring and position may be relevant to the issue of whether Rady/UCSD did indeed have  
16 sufficient coverage, as Plaintiff was informed. Thus, documents reflecting this  
17 information, if they exist, should be produced.

18 It is not clear from UCSD's opposition whether it searched for all the potentially  
19 responsive documents. To the extent that UCSD's position is that this request is  
20 specifically targeting a "pediatric plastic and craniofacial surgery position" and it has no  
21 responsive documents because there was never such an open position since Lance was  
22 hired directly from his fellowship, the request is not so narrow. The text of the actual  
23 subpoena seeks "All DOCUMENTS constituting, referring or relating to  
24 COMMUNICATIONS from 2015 and 2016 regarding the recruitment and hiring of  
25 Samuel Lance." ECF No. 180-1, Ex. A at 6. Even if the parties subsequently narrowed  
26 this request, Plaintiff's counsel submitted a declaration stating he believed an agreement  
27 was reached for UCSD to produce documents regarding the "recruitment and hiring for  
28 the position filled by Samuel Lance." ECF No. 180-1 at ¶ 14.



1           Accordingly, the Court **GRANTS** the motion to compel as to this category of  
2 documents. UCSD shall search for responsive documents, not limited specifically to  
3 recruitment of a “pediatric plastic and craniofacial surgery position,” but for the position  
4 that Samuel Lance was hired. Consistent with above, this shall include searching for  
5 emails from the relevant UCSD employees. The parties may meet and confer to discuss  
6 the most efficient way to search for responsive documents.

### 7           **C. Market Analysis Documents**

8           The last category of documents that Plaintiff seeks are for “market analysis”  
9 documents regarding the pediatric craniofacial and plastic surgery practices in Southern  
10 California. Plaintiff claims that counsel for UCSD agreed to produce these documents  
11 and that she stated that she had seen these exact documents. ECF No. 180-1 at ¶ 13.  
12 However, in its opposition, counsel for UCSD now states that the documents she  
13 remembered seeing were for another case, unrelated to this matter. ECF No. 191 at 3.  
14 UCSD claims that it searched for responsive documents and found nothing. *Id.* at 3; ECF  
15 no. 191-2 at ¶ 3.

16           Despite UCSD’s representation that it has no responsive documents, Plaintiff  
17 argues that UCSD should be compelled to give further information regarding whether its  
18 declarant is the proper custodian for responsive documents should they exist and how the  
19 search was conducted. ECF No. 194 at 8. Plaintiff argues that this is proper in light of  
20 UCSD’s failure to conduct adequate searches on the previous categories of documents.  
21 *Id.*

22           The Court does not find that a further order to compel is warranted here. Given  
23 UCSD’s statement, made under the penalty of perjury, that no responsive documents  
24 exist, Plaintiff has not put forth sufficient reason for the Court to doubt that. Counsel for  
25 Regents stated that UCSD “usually has ‘Market Analysis Research’ when they are hiring  
26 a specialist,” but “not always.” ECF No. 180-1, Ex. C at 22. Further, as UCSD states,  
27 Lance was hired from his fellowship, so it is unclear whether there was ever an open  
28 position for a specialist specifically that may have triggered such market analysis. While

1 the Court is compelling UCSD to search for and gather email communications responsive  
2 to the other requests discussed above, the market analysis documents are of a different  
3 nature. They are not email communications that would need to be collected from  
4 custodians or that may have been archived. Thus, issues that may have rendered those  
5 searches inadequate would not necessarily affect the search performed here.

6 Accordingly, the Court **DENIES** the motion to compel as to this request.

7 **III. CONCLUSION**

8 For the foregoing reasons, Plaintiff's motion to compel documents from UCSD is  
9 **GRANTED IN PART** and **DENIED IN PART**.

10 **IT IS SO ORDERED.**

11 Dated: September 26, 2018



Hon. Nita L. Stormes  
United States Magistrate Judge