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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CERTIFIED NUTRACEUTICALS, INC.,  
12 Plaintiff,  
13 v.  
14 AVICENNA NUTRACEUTICAL, LLC,  
15 Defendant.

Case No.: 16cv2810 BEN (BGS)

**ORDER DENYING PLAINTIFF  
CERTIFIED NUTRACEUTICAL  
INC.'S MOTION TO REOPEN  
DISCOVERY RELATED TO RFPs 4  
AND 6**

[ECF 24]

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20 On December 7, 2017 the Court allowed a limited re-opening of discovery as  
21 follows:

22 Fact discovery is reopened, but only as to Plaintiff's First Set of  
23 Request for Production of Documents 4 and 6, and only to the extent  
24 Defendant has not already produced the requested documents.  
25 Plaintiff may not modify RFPs 4 and 6 and Defendant's objections are  
26 limited to its previously stated objections. If Defendant does not seek  
to enforce any of its previously stated objections, Defendant shall  
supplement its production to RFPs 4 and 6 by **January 3, 2018**.

27 (Court's Dec. 7, 2017 Order [ECF 20] at ¶ 1.) The Court's Order further provided:

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1 If Defendant's supplemental production to RFPs 4 and 6 requires any  
2 additional fact discovery by either party, the parties must jointly contact the  
3 Court by **January 10, 2018** to seek leave to conduct specifically identified  
4 discovery. Any party seeking additional discovery should be prepared to  
5 address why the discovery was not previously sought, how the limited  
6 supplemental production ordered here justifies additional discovery, and  
7 how long it will take to complete.

8 (*Id.* at ¶ 5.)

9 Plaintiff now seeks to reopen discovery pursuant to this Order. (Pl.'s Mot. to  
10 Reopen Discovery Related to RFPs 4 & 6 ("Pl.'s Mot.") [ECF 24].) In sum, Plaintiff  
11 concedes that Defendant produced numerous invoices and purchase orders regarding  
12 Neocell Corporation, but alleges that this production is wholly incomplete, bearing  
13 inconsistent amounts and gaps in timing. (*Id.* at 2.) Specifically Plaintiff states that  
14 Neocell began doing business with Defendant in June of 2014, yet the invoices do not  
15 begin until January 2016. Further, the invoices stop in June of 2017, over six months  
16 ago. And the invoices total \$955,140, yet the purchase orders total \$982, 870. (*Id.*) As  
17 regards the emails, Plaintiff claims that while the supplemental production includes  
18 emails from other customers, it produces no emails from Neocell. (*Id.*) On this basis,  
19 Plaintiff seeks to directly subpoena Neocell for documents and information to ascertain  
20 whether they exist. (*Id.* at 4.) Plaintiff requests two additional months of fact discovery  
21 to accomplish this task. (*Id.*)

22 In response, Defendant claims that that all agreed upon documents have been  
23 produced and a verification under oath has been provided attesting to the production's  
24 completeness. (Def.'s Opp'n [ECF 25] at 3.) Defendant asserts that it has produced all  
25 invoices and purchase orders with NeoCell, a fact that is attested to in the signed  
26 verification. (*Id.*) Defendant attaches the verification under oath by Ali Elnajjar, Chief  
27 Executive Officer of Avicenna Nutraceutical, LLC. (Adams Decl., Ex. B, [ECF 25-3 at  
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1 10<sup>1</sup>]. As regards the lack of responsive emails, Defendant points to an agreement with  
2 Plaintiff which limited the email production to those relating to any representation by  
3 Defendant that its products are patented, or emails necessary to reflect any sales not  
4 reflected in the purchase orders and invoices. (ECF 25 at 3).<sup>2</sup> Defendant states that there  
5 are no emails responsive to this narrow scope. (*Id.*)

6 Of note, Plaintiff has not called into question his agreement memorialized in ECF  
7 25-2 at 3-4 with Defendant which limits the supplemental discovery to production of all  
8 invoices and purchase orders for sales of Defendant's collagen to Vibrant, Emenee,  
9 NeoCell, and any other third party up to January 3, 2018; all emails relating to any  
10 representation by Defendant that its products are patented, or emails necessary to reflect  
11 any sales not reflected in the purchase orders and invoices. Plaintiff's issue in this  
12 dispute is whether or not the Defendant is withholding this agreed upon discovery, which  
13 is based on alleged gaps and inconsistencies in the invoices and purchase orders, as well  
14 as the lack on any emails regarding NeoCell. The Defendant in turn has provided a  
15 declaration under penalty of perjury that it has provided all the discovery agreed upon.

16 Pursuant to the Court's December 7, 2017 Order, Plaintiff bears the burden to  
17 show how the supplemental discovery provided by Defendant justifies the additional  
18 discovery he now requests. Plaintiff's stated purpose for requesting this additional  
19 discovery is to ascertain whether or not Defendant is indeed withholding discovery from  
20 Plaintiff. (Pl.'s Mot. at 4.) The Court finds that Plaintiff's disbelief of Defendant does  
21 not meet this burden, and therefore does not justify reopening discovery. *Martin v. State*  
22 *Farm Mut. Ins. Co.*, No. 3:10-cv-0144, 2011 WL 13228851 (S.D. W. Va. Jan. 20, 2011)  
23 ("The Court cannot compel defendants to produce documents 'based solely on opposing  
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26 <sup>1</sup> The Court cites the CM/ECF pagination for the documents attached to Defendant's  
27 Opposition.

28 <sup>2</sup> Defendant attaches an email exchange with Plaintiff which corroborates this agreement.  
(ECF 25-2 at 3-4.)

1 speculation and belief that responsive documents exists and that the producing party is  
2 withholding them”); *Hubbard v. Potter*, 247 F.R.D. 27, 29 (D. D.C. 2008) (“Instead of  
3 chasing the theoretical possibility that additional documents exist, courts have insisted  
4 that the documents that have been produced permit a reasonable deduction that other  
5 documents may exist”); *see also Heilman v Silva*, No. 13cv2984 JLS (MDD), 2015 WL  
6 1632693, at \*4 (S.D. Cal. April 13, 2015) (“Plaintiff provides no basis (besides his own  
7 disbelief) for concluding that the Defendants’ responses were evasive”).

8 The Court also notes that under Federal Rule of Civil Procedure 26(e)(1)(A) the  
9 parties are under a continuing obligation to timely supplement responses to discovery if  
10 the party determines its prior responses are incomplete or incorrect. Failure to comply  
11 with this obligation may result in sanctions, including being precluded from using that  
12 information, payment of reasonable expenses caused by the failure to supplement, and  
13 “other appropriate sanctions.” Fed. R. Civ. P. 37(c)(1).

14 Plaintiff’s Motion to Reopen Discovery is **DENIED**.

15 **IT IS SO ORDERED.**

16 Dated: February 13, 2018

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18 Hon. Bernard G. Skomal  
19 United States Magistrate Judge  
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