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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 William Andreoli,
12 Plaintiff,
13 v.
14 Youngevity International, Inc., et al.,
15 Defendants.

Case No.: 16-cv-02922-BTM-JLB

**ORDER GRANTING IN PART
DEFENDANTS' MOTION TO
COMPEL**

[ECF No. 107]

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18 Presently before the Court is Defendants' Motion to Compel (ECF No. 107).
19 Defendants seek: (1) an order compelling Plaintiff to provided verified discovery responses
20 to Defendants' Second Set of Requests for Production of Documents ("RFPs"); (2) an order
21 compelling Plaintiff to produce all documents responsive to the RFPs; and (3) an award of
22 fees and expenses incurred from submitting this motion. (*Id.* at 2.) For the reasons stated
23 below, Defendants' Motion to Compel is **GRANTED in part and DENIED WITHOUT**
24 **PREJUDICE in part.**

25 **I. BACKGROUND**

26 **A. Factual Background**

27 On April 11, 2018, Plaintiff filed his First Amended Complaint ("FAC"). (ECF No.
28 22). The allegations in Plaintiff's FAC are summarized as follows: In August 2011,

1 Defendant Youngevity International, Inc. (“Youngevity”) purchased a series of companies,
2 FDI entities,¹ from Plaintiff. (*Id.* ¶¶ 20–22.) The parties executed a purchase agreement
3 in which Plaintiff agreed to sell all of his ownership interests in the FDI entities to
4 Youngevity. (*Id.* ¶ 22.) A few months later, in October 2011, the parties executed the
5 Amended and Restated Equity Purchase Agreement that superseded the original purchase
6 agreement. (*Id.* ¶ 23.) The Amended Purchase Agreement contained a set of payment
7 terms that commenced on October 25, 2011. (*Id.* ¶ 30.) In acquiring the FDI entities,
8 Youngevity also assumed one of the FDI entities’ mortgage obligations, which as of
9 December 31, 2014, was approximately \$1,986,000. (*Id.* ¶ 26.) The property, owned by
10 FDIR, was a commercial building in Windham, New Hampshire that was occupied by FDI.
11 (*Id.* ¶ 45.) The Amended Purchase Agreement “provided for a separate closing date” for
12 the property because Defendants “were not able to finance the property until a later date.”
13 (*Id.* ¶ 46.) “However, Defendants agreed to pay the rent and monthly expenses” until the
14 deal closed. (*Id.* ¶ 47.) Immediately after the acquisition, Youngevity’s Board of Directors
15 appointed Plaintiff as Youngevity’s president. (*Id.* ¶ 28.) Plaintiff remained as
16 Youngevity’s president until November 30, 2015. (*Id.* ¶ 29.)

17 In 2014, while Plaintiff remained employed by Youngevity, Defendants allegedly
18 coerced Plaintiff into signing the First Amendment to the Amended Purchase Agreement,²
19 which changed the previous acquisition purchase price and payment terms from
20 \$20,000,000 to \$6,000,000. (*Id.* ¶¶ 36–43.) Plaintiff also claims that Defendants refused
21 to close on the FDIR transaction and only paid rent and related expenses until December
22 2015, leaving Plaintiff with the “burden and costs of running the FDIR operation.” (*Id.* ¶

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24
25 ¹ FDI entities consisted of the following companies: Financial Destination, Inc., a New Hampshire
26 corporation (“FDI”); FDI Management, Inc., a New Hampshire corporation (“FDIM”); FDI Realty, LLC,
27 a New Hampshire limited liability company (“FDIR”); and MoneyTRAX, LLC, a New Hampshire limited
28 liability company (“MoneyTRAX”). (ECF No. 22 ¶ 18.)

² The Amended and Restated Equity Purchase Agreement and First Amendment to the Amended and
Restated Equity Purchase Agreement are the effective and final purchase agreements at issue in this action
(collectively, “Amended Purchase Agreements”). (ECF No. 22 ¶ 24.)

1 58.) Additionally, Plaintiff alleges that Defendants coerced him into resigning on
2 November 30, 2015. (*Id.* ¶ 67.) Since February 2016, Defendants have defaulted on their
3 obligations under the Amended Purchase Agreements and have stopped making
4 commission payments for Plaintiff’s distributorships, which Defendants terminated on
5 March 17, 2016. (*Id.* ¶¶ 82, 95–99.)

6 Plaintiff alleges four causes of action in his FAC: (1) Breach of Contract; (2) Breach
7 of Employment Contract; (3) Conversion; and (4) Violations of California’s Unfair
8 Competitions Laws. (*Id.* ¶¶ 118–238.)

9 On April 24, 2018, Defendants filed nine counterclaims against Plaintiff.³ (ECF No.
10 25). Defendants’ counterclaims allege the following: Around 2011, Youngevity and
11 Plaintiff entered into negotiations to acquire Plaintiff’s companies, which “were struggling
12 financially.” (*Id.* ¶ 13.) In October 2011, the Parties executed the Amended and Restated
13 Equity Purchase Agreement, in which Youngevity would acquire the assets of each of
14 Plaintiff’s companies except FDIR, until completion of a separate set of conditions
15 precedent. (*Id.* ¶¶ 14–15.) Defendants claim that the conditions precedent were never met,
16 so Youngevity “never acquired FDIR’s assets.” (*Id.* ¶ 15.)

17 Also in October 2011, Plaintiff and Youngevity entered into an Employment
18 Agreement, which made Plaintiff Youngevity’s president. (*Id.* ¶ 18.) While serving as
19 president, Plaintiff allegedly “controlled four Youngevity distributor accounts without
20 Youngevity’s knowledge” or permission and “force qualif[ied]” the accounts. (*Id.* ¶ 22–
21 23.) Further, Defendants claim that Plaintiff allowed other businesses to operate out of
22 Youngevity’s New Hampshire office, which Plaintiff maintained ownership of and control
23 over. (*Id.* ¶¶ 24–25.)

24 Defendants also allege that beginning in July 2015 and thereafter, Plaintiff
25 coordinated with top level Youngevity executives and distributors to form a competing
26

27
28 ³ The Honorable Barry T. Moskowitz dismissed Defendants’ first and seventh causes of action in its counterclaim on June 21, 2018. (ECF No. 45.)

1 company, Wakaya Perfection LP (subsequently Wakaya Perfection LLC), without
2 informing Defendants. (*See id.* ¶¶ 28–32.) On November 9, 2015, Plaintiff “was given
3 access to Wakaya’s internal communication system known as ‘BaseCamp,’” which he
4 accessed with the name “General Box.” (*Id.* ¶ 33.) Defendants contend that Plaintiff “had
5 been assisting with Wakaya’s formation and transition to [a] Youngevity [c]ompetitor since
6 July 2015,” and on June 1, 2016, Wakaya named Plaintiff as its president. (*Id.* ¶¶ 39–40.)

7 On October 28, 2015, Plaintiff informed Youngevity’s chief executive officer that
8 he would be resigning as Youngevity’s president on November 30, 2015. (*Id.* ¶ 36.) In an
9 e-mail memorializing his resignation, Plaintiff “pledged that he would ‘honor the six month
10 non-compete [clause] as set forth in the ‘Amended and Restated Equity Purchase
11 Agreement’ and the ‘Employment Agreement.’” (*Id.* ¶ 36.) Relying on Plaintiff’s
12 statement, Youngevity paid Plaintiff approximately \$295,926.42, and his employment
13 ended on November 30, 2015. (*Id.* ¶¶ 36–37.) Youngevity has paid Plaintiff more than
14 \$6,000,000.00 in total. (*Id.* ¶ 37.)

15 Finally, in December 2015, Defendants allege that Youngevity employees visited
16 the New Hampshire office in an effort to close the office and collect Youngevity’s property,
17 including furniture. (*Id.* ¶ 38.) Defendants claim that Plaintiff forbade the employees from
18 taking the furniture. (*Id.*)

19 Defendants and Counterclaimants allege seven causes of action: (1) Fraud –
20 Intentional Misrepresentation (Related to Plaintiff’s Departure from Youngevity); (2)
21 Fraud – Intentional Misrepresentation (Related to Plaintiff’s Representations of a
22 Relationship with Company New Benefits); (3) Intentional Interference with Existing
23 Economic Relations; (4) Breach of Contract; (5) Intentional Interference with Prospective
24 Economic Advantage; (6) Breach of Duty of Loyalty; (7) Conversion.

25 **B. Procedural Background Regarding Discovery Dispute**

26 Defendants served Plaintiff with the RFPs at issue on August 9, 2018. (ECF No.
27 107-2 at 11.) Plaintiff did not file timely written responses and objections to Defendants’
28 RFPs. (ECF No. 107 at 4.)

1 On September 24, 2018, the parties telephonically met and conferred regarding
2 Plaintiff's failure to file a response and the parties' positions on Plaintiff's discovery
3 obligations. (ECF No. 107 at 4–5.) On September 25, 2018, Plaintiff's counsel sent an e-
4 mail confirming the documents Plaintiff was and was not intending to produce. (ECF Nos.
5 107 at 5; 107-2 at 4.) On September 26, 2018, Plaintiff, standing by the objections he
6 communicated in the September 24, 2018 call and the September 25, 2018 e-mail,
7 produced some, but not all, responsive documents. (ECF No. 107 at 5.) Plaintiff has never
8 served a formal discovery response to the RFPs. (*Id.* at 4.)

9 Defendants filed this Motion to Compel on October 22, 2018. (ECF No. 107.)
10 Plaintiff filed an opposition on October 31, 2018. (ECF No. 110.) The Court held a hearing
11 on the motion on November 27, 2018. (ECF No. 118.)

12 **II. DISCUSSION**

13 **A. Legal Standard**

14 Nonprivileged information is discoverable under Federal Rule of Civil Procedure 26
15 if it is (1) relevant, and (2) proportional to the needs of the case. Rule 26(b)(1) provides
16 that parties—

17 may obtain discovery regarding any nonprivileged matter that is
18 relevant to any party's claim or defense and proportional to the
19 needs of the case, considering the importance of the issues at
20 stake in the action, the amount in controversy, the parties'
21 relative access to the information, the parties' resources, the
22 importance of the discovery in resolving the issues, and whether
the burden or expense of the proposed discovery outweighs its
likely benefit.

23 Fed. R. Civ. P. 26(b)(1).

24 Federal Rule of Civil Procedure 34 further provides that a party may serve requests
25 for documents or tangible things on any other party that relate to any matter within the
26 scope of discovery defined in Rule 26(b). Fed. R. Civ. P. 34(a). The propounding party
27 may move to compel a response if a party fails to produce documents requested under Rule
28 34. *See* Fed. R. Civ. P. 37(a). “The party seeking to compel discovery has the burden of

1 establishing that its request satisfies the relevancy requirements of Rule 26(b)(1).
2 Thereafter, the party opposing discovery has the burden of showing that the discovery
3 should be prohibited, and the burden of clarifying, explaining[,] or supporting its
4 objections.” *Bryant v. Ochoa*, No. 07cv200 JM (PCL), 2009 WL 1390794, at *1 (S.D. Cal.
5 May 14, 2009) (internal citations omitted) (first citing *Soto v. City of Concord*, 162 F.R.D.
6 603, 610 (N.D. Cal. 1995); then citing *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D.
7 Cal. 2002)). Those opposing discovery are “required to carry a heavy burden of showing”
8 why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.
9 1975).

10 **B. Adequacy of Plaintiff’s Discovery Response**

11 Defendants argue that Plaintiff was required to respond to the RFPs at issue by
12 September 10, 2018, and failed to do so in any manner within that time period. (ECF No.
13 107 at 4.) Defendants attach to their motion Plaintiff’s September 25, 2018 e-mail from
14 Plaintiff’s counsel Joseph Pia which reads, in full:

15 Josh,

16
17 Per our discussion yesterday, please see below:

18 **Doc Reqs Nos. 257-262.** Andreoli made a production on August 20,
19 2018. Documents within Andreoli’s possession and control were included in
20 that production responsive to 257 and 262. Additional documents have been
21 made available to us and will be produced in response to these requests. It is
our goal to include them in a planned production on Sept. 27th.

22 **Doc Reqs Nos. 263-267.** The request numbers 263-267 are Wakaya
23 documents and should be obtained through them.

24 **Doc Reqs Nos. 268-270.** For the time period up to and including May
25 31, 2016, Andreoli is not aware of any responsive documents. Andreoli was
26 paid as an employee of Wakaya beginning on June 1, 2016. To the extent that
27 Youngevity is requesting documents beginning June 1, 2016, Andreoli
28 opposes this request on the basis of Rule 26(b)(1) that all requests must be
relevant and proportional.

1 (ECF No. 107-2 at 4.) Defendants argue that Plaintiff has waived any objections by failing
2 to serve anything that qualifies as written responses and objections, much less timely ones.
3 (ECF No. 107 at 4–5.)

4 Plaintiff responds that Plaintiff filed a written response in the form of the September
5 25 e-mail and acknowledges that he “did not provide any other written responses.” (ECF
6 No. 110 at 3.) In defending the e-mail response, Plaintiff further argues, “Written
7 responses were clearly and concisely provided, admittedly in abbreviated form, but
8 sufficient to comply with the requests and to permit Defendants to determine what was
9 being produced and what was not, long before this motion was filed.” (*Id.* at 6.)

10 Pursuant to Rule 34, the party to whom a request for production of documents is
11 directed must ordinarily “respond in writing within 30 days after being served.” Fed. R.
12 Civ. P. 34(b)(2). The requirements for such a response are set forth in Rule 26.
13 Specifically, Rule 26(g)(1) requires every discovery response or objection to be “signed by
14 at least one attorney of record in the attorney’s own name . . . and must state the signer’s
15 address, e-mail address, and telephone number.” Subsection (g)(1) of the Rule goes on to
16 state:

17 By signing, an attorney . . . certifies that to the best of the person’s
18 knowledge, information, and belief formed after a reasonable inquiry:

19 . . .

20 (B) with respect to a discovery . . . response, or objection, it is:

21 (i) consistent with these rules and warranted by existing law . . . ;

22 [and]

(ii) not interposed for any improper purpose

23 Fed. R. Civ. P. 26(g)(1).

24 Plaintiff’s e-mail was not signed by an attorney of record and did not state the
25 signer’s address, e-mail address, and telephone number. Because Plaintiff’s counsel did
26 not sign it, counsel, arguably, did not certify to the best of his knowledge, information, and
27 belief formed after a reasonable inquiry that his responses and objections were consistent
28 with the Federal Rules of Civil Procedure and existing law and were not intended for any

1 improper purpose. Plaintiff's e-mail does not constitute an appropriate and legally
2 sufficient response to the discovery propounded by Defendants.

3 **C. Requests for Production Nos. 257–262**

4 Defendants move to compel Plaintiff to produce all documents responsive to RFPs
5 257–262, which “seek documents related to contractual agreements between New Benefits
6 and FDI, Youngevity, or Wakaya.” (ECF No. 107 at 2.) With respect to these documents,
7 Plaintiff argues that he searched for documents containing “New” within two words of
8 “Benefits” and/or the term “NewBenefits.” (ECF No. 110 at 3.) Plaintiff further asserts
9 that Defendants refused to participate in the selection of appropriate search terms. (*Id.* at
10 4.) At the hearing on this motion, Plaintiff's counsel acknowledged that there were
11 documents provided by Defendants that appear to be documents that would have been in
12 Plaintiff's possession and that should have been identified with the described document
13 search. Counsel was unable to explain why certain documents were not captured by the
14 search. Plaintiff further argued at oral argument that Defendants have failed to meet their
15 initial burden of showing the relevancy of documents dated after the end of 2016, by which
16 time New Benefits had cancelled its contract(s).

17 The Court indicated at the hearing that it was not persuaded that any documents
18 responsive to RFPs 257–262 dated after the end of 2016 would have relevance. The parties
19 agreed to meet and confer further on whether or not Plaintiff should conduct a further
20 search for additional documents and, if so, using what search terms. (*See* ECF No. 118.)

21 On November 30, 2018, the parties provided the Court with a joint supplemental
22 statement indicating that they had agreed to search terms for a supplemental search to be
23 conducted by Plaintiff with a relevant time period of January 1, 2014 and December 31,
24 2016, and with a supplemental production deadline of December 7, 2018. (ECF No. 119
25 at 2.) Therefore, as to RFPs 257–262, Defendants' Motion to Compel is **DENIED**
26 **WITHOUT PREJUDICE.**

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1 **D. Requests for Production Nos. 263–267**

2 At the hearing on this motion, the parties represented to the Court that Defendants
3 have withdrawn RFPs 263–267. Therefore, Defendants’ Motion to Compel as to these
4 RFPs is **DENIED AS MOOT**.

5 **E. Requests for Production Nos. 268–270**

6 Lastly, Defendants move to compel Plaintiff to produce all documents responsive to
7 RFPs 268–270, which “seek information related to Andreoli’s compensation from Wakaya
8 Perfection.” (ECF No. 107 at 3.) Defendants argue that this evidence is relevant to
9 Youngevity’s Fourth Affirmative Defense of failure to mitigate damages and to dispute the
10 alleged damages claimed by Plaintiff flowing from Youngevity’s alleged failure to make
11 monthly payments to Plaintiff under the Amended and Restated Equity Purchase
12 Agreement. (*Id.*) Specifically, Defendants argue that Plaintiff was no longer entitled to
13 receive payments under the Amended and Restated Equity Purchase Agreement once he
14 began competing employment. (*Id.*) Plaintiff opposes production, arguing that the
15 documents are irrelevant because: (1) Plaintiff’s claim is not subject to mitigation; and (2)
16 Defendants’ position that Plaintiff’s operation of a competing business voids the
17 distributorships is without merit under California law and will be the subject of a motion
18 for summary judgment. (ECF No. 110 at 5.)

19 Courts have “well established that when a party fails to respond completely to a
20 request for production, any potential objections to that request are waived.” *Cal.*
21 *Sportfishing Protection All.*, No. 2:10-cv-1207-GEB-AC, 2014 WL 5093398, at *4 (E.D.
22 Cal. Oct. 9, 2014). However, the party seeking to compel discovery has the initial
23 burden of establishing that its request satisfies the relevancy requirements of Rule 26(b)
24 (1). *Bryant*, 2009 WL 1390794, at *1.

25 Here, Defendants have met their burden to show the relevancy and proportionality
26 of the requested discovery. Defendants’ Motion to Compel responses to RFPs 268–270 is
27 **GRANTED**. Accordingly, Plaintiff shall produce all documents responsive to RFPs 268–
28 270 on or before **December 21, 2018**.

1 **F. Motion to Compel Verified Response**

2 The Court is not persuaded that compelling Plaintiff to provide a verified response
3 to Defendants' RFPs is warranted. However, Plaintiff is ordered to file a formal response
4 to these RFPs by **December 7, 2018**.

5 **IV. AWARD OF REASONABLE EXPENSES**

6 Rule 37(a)(5)(A) provides that if a motion to compel is granted, "the court must,
7 after giving opportunity to be heard, require the party or deponent whose conduct
8 necessitated the motion, the party or attorney advising that conduct, or both to pay the
9 movant's reasonable expenses incurred in making the motion, including attorney's fees."
10 Fed. R. Civ. P. 37(a)(5)(A). However, "the court must not order this payment if (i) the
11 movant filed the motion before attempting in good faith to obtain the disclosure or
12 discovery without court action; (ii) the opposing party's nondisclosure, response, or
13 objection was substantially justified; or (iii) other circumstances make an award of
14 expenses unjust." *Id.*

15 Although Defendants ultimately withdrew some of the requests upon which this
16 Motion to Compel was based, Defendants prevailed as to the remainder of the requests.
17 Furthermore, Plaintiff has offered no justification for its failure to provide formal written
18 discovery responses to this discovery, even after being asked multiple times by Defendants
19 to do so.

20 Accordingly, Defendants' request for reasonable expenses, including attorneys'
21 fees, incurred from filing this Motion to Compel is **GRANTED**.

22 **V. CONCLUSION**

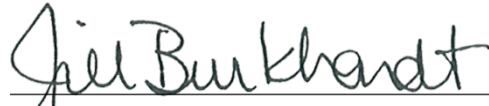
23 For the reasons set forth above, Defendants' Motion to Compel (ECF No. 107) is
24 **GRANTED in part and DENIED WITHOUT PREJUDICE in part**. Plaintiff shall
25 reimburse Defendants for the reasonable expenses, including attorneys' fees, associated
26 with bringing this motion.

27 On or before **January 7, 2019**, Defendants shall provide Plaintiff with a detailed fee
28 and cost invoice(s) supporting the amount of reasonable attorneys' fees and costs incurred

1 by Defendants. The parties shall promptly and thoroughly, and no later than **January 21,**
2 **2019,** meet and confer over any disputed fees and costs incurred by Defendants. If the
3 parties are able to resolve any disputes with respect to the amount of reasonable attorneys'
4 fees and costs, Plaintiff is to pay that amount no later than **February 4, 2019.** If the parties
5 are unable to resolve their dispute(s) through the meet and confer process, then Defendants
6 are granted leave to file, on or before **February 4, 2019,** an *ex parte* motion supported by
7 sufficient evidence in support of the amount of reasonable fees or costs owed by Plaintiff
8 to Defendants in connection with this motion. The deadline for Plaintiff to file an
9 opposition to Defendants' motion for fees and costs, if any, shall be **February 18, 2019.**

10 **IT IS SO ORDERED.**

11 Dated: December 4, 2018

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13 Hon. Jill L. Burkhardt
14 United States Magistrate Judge
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