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

**ORDER GRANTING DEFENDANTS’
MOTION TO COMPEL**

[ECF No. 79]

17
18 Presently before the Court is Defendants’ Motion to Compel (ECF No. 79).
19 Defendants seek: (1) an order compelling Plaintiff to produce all documents responsive to
20 Requests for Production Nos. 232–255 in Defendants’ first set of document requests; and
21 (2) an award of fees and expenses incurred from submitting this motion and from the meet
22 and confer process. For the reasons stated below, Defendants’ Motion to Compel is
23 **GRANTED.**

24 **I. BACKGROUND**

25 **A. Factual Background**

26 On April 11, 2018, Plaintiff filed his First Amended Complaint (“FAC”). (ECF No.
27 22). The allegations in Plaintiff’s FAC are summarized as follows: In August 2011,
28 Defendant Youngevity International, Inc. (“Youngevity”) purchased a series of companies,

1 FDI entities,¹ from Plaintiff. (ECF No. 22 ¶¶ 20–22.) The parties executed a purchase
2 agreement in which Plaintiff agreed to sell all of his ownership interests in the FDI entities
3 to Youngevity. (*Id.* ¶ 22.) A few months later, in October 2011, the parties executed the
4 Amended and Restated Equity Purchase Agreement that superseded the original purchase
5 agreement. (*Id.* ¶ 23.) The Amended Purchase Agreement contained a set of payment
6 terms that commenced on October 25, 2011. (*Id.* ¶ 30.) In acquiring the FDI entities,
7 Youngevity also assumed one of the FDI entities’ mortgage obligations, which as of
8 December 31, 2014, was approximately \$1,986,000. (*Id.* ¶ 26.) The property, owned by
9 FDIR, was a commercial building in Windham, New Hampshire that was occupied by FDI.
10 (*Id.* ¶ 45.) The Amended Purchase Agreement “provided for a separate closing date” for
11 the property because Defendants “were not able to finance the property until a later date.”
12 (*Id.* ¶ 46.) “However, Defendants agreed to pay the rent and monthly expenses” until the
13 deal closed. (*Id.* ¶ 47.) Immediately after the acquisition, Youngevity’s Board of Directors
14 appointed Plaintiff as Youngevity’s president. (*Id.* ¶ 28.) Plaintiff remained as
15 Youngevity’s president until November 30, 2015. (*Id.* ¶ 29.)

16 In 2014, while Plaintiff remained employed by Youngevity, Defendants allegedly
17 coerced Plaintiff into signing the First Amendment to the Amended Purchase Agreement,²
18 which changed the previous acquisition purchase price and payment terms from
19 \$20,000,000 to \$6,000,000. (*Id.* ¶¶ 36–43.) Plaintiff also claims that Defendants refused
20 to close on the FDIR transaction and only paid rent and related expenses until December
21 2015, leaving Plaintiff with the “burden and costs of running the FDIR operation.” (*Id.* ¶
22 58.) Additionally, Plaintiff alleges that Defendants coerced him into resigning on
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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 November 30, 2015. (*Id.* ¶ 67.) Since February 2016, Defendants have defaulted on their
2 obligations under the Amended Purchase Agreements and have stopped making
3 commission payments for Plaintiffs’ distributorships, which Defendants terminated on
4 March 17, 2016. (*Id.* ¶¶ 82, 95–99.)

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

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

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

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

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

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

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

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

25 Defendants served Plaintiff with the Requests for Production (“RFPs”) at issue on
26 May 10, 2018. (ECF No. 79-1 ¶ 4.) On June 7, 2018, Plaintiff served written responses
27 and objections to Defendants’ RFPs but did not produce any documents. (*Id.* ¶¶ 5–6.) On
28 June 22, 2018, the parties filed a joint motion to extend the meet and confer deadline in

1 which Plaintiff represented that he would produce responsive documents to Defendants'
2 RFPs by July 11, 2018. (ECF No. 44 ¶ 3.) The Court granted the parties' joint motion and
3 extended the meet and confer deadline to July 25, 2018. (ECF No. 48.) Defendant did not
4 produce any documents by July 11, 2018. (ECF No. 79-1 ¶ 7.)

5 On July 13, 2018, the parties telephonically met and conferred regarding Plaintiff's
6 lack of production, and Plaintiff represented that he would produce documents by July 20,
7 2018. (*Id.* ¶ 8.) Plaintiff produced 47,275 documents on July 20, 2018. (*Id.* ¶ 9.) However,
8 the production was deficient, so the parties telephonically met and conferred again on July
9 23, 2018. (*Id.* ¶ 10.)

10 On July 27, 2018, the parties filed a second joint motion to extend the time to meet
11 and confer in which Plaintiff stated that he "anticipat[ed] completing production of
12 documents by August 10, 2018." (ECF No. 60 ¶ 8.) The Court granted the parties' joint
13 motion and further extended the time to meet and confer to August 15, 2018. (ECF No.
14 61.) Plaintiff did not make a supplemental production by August 10, 2018, so the parties
15 telephonically met and conferred on August 15, 2018. (ECF No. 79-1 ¶ 11.)

16 On August 15, 2018, the parties filed a third joint motion to extend the time to meet
17 and confer in which Plaintiff stated that he would produce supplemental documents "later
18 that day" on August 15. (ECF No. 64.) The Court granted the parties' joint motion and
19 further extended the time to meet and confer to August 24, 2018. (ECF No. 67.) Plaintiff
20 did not make a supplemental production by August 15, 2018, so the parties left a joint
21 voicemail message with Judge Burkhardt's chambers requesting the Court's assistance
22 with Plaintiff's deficient productions. (ECF Nos. 66, 79-1 ¶ 11.) The Court set a telephonic
23 Discovery Conference for August 20, 2018. (ECF No. 66.)

24 During the August 20, 2018 Discovery Conference, Plaintiff produced 9,460
25 documents and "represented to [Defendants] and the Court that the document production"
26 was complete and "contained responsive text messages." (ECF No. 79-1 ¶¶ 12–13.) After
27 reviewing the supplemental production, Defendants determined that the production did not
28 include responsive documents but instead included e-mails "between [Plaintiff] and his

1 attorney,” e-mails “from dating websites,” pictures of the “Twitter logo,” and pictures of
2 Plaintiff’s family. (*Id.* ¶ 13.) On August 21, 2018, defense counsel e-mailed Plaintiff’s
3 counsel outlining their concerns with Plaintiff’s August 20, 2018 supplemental production.
4 (ECF Nos. 79-1 ¶ 15; 79-2 at 40–41.) Plaintiff’s counsel responded to the e-mail on August
5 27, 2018, and “offer[ed] to provide a supplemental production on September 17, 2018,”
6 and “to meet and confer on August 31, 2018.” (ECF Nos. 79-1 ¶ 15; 79-2 at 43–44.)
7 Because the Court’s August 16, 2018 Order gave the parties until August 27, 2018 to
8 contact the Court for assistance, defense counsel requested “an immediate telephonic meet
9 and confer.” (ECF Nos. 79-1 ¶ 15; 79-2 at 43.)

10 On August 27, 2018, the parties met and conferred telephonically and subsequently
11 left a joint voicemail message with Judge Burkhardt’s chambers requesting to schedule a
12 second Discovery Conference with the Court. (ECF Nos. 73; 79-1 ¶ 17.) The Court held
13 a Discovery Conference with the parties on September 4, 2018, and thereafter issued a
14 briefing schedule for Defendants to file a motion to compel. (ECF Nos. 74, 76.)

15 Defendants filed this Motion to Compel on September 12, 2018. (ECF No. 79.)
16 Plaintiff filed an opposition on September 27, 2018. (ECF No. 86.) In the declaration of
17 John P. Mertens attached to the opposition, Mr. Mertens provided that Plaintiff’s counsel
18 “was unable to access all documents necessary to respond to Defendants’ discovery
19 requests until September 26, 2018,” and that “approximately 10,000 documents” were just
20 made available to Plaintiff’s counsel. (ECF No. 86-1 ¶ 2.) Mr. Mertens also provided that
21 Plaintiff had made a supplemental production of “over 350 pages of documents” on
22 September 26, 2018. (*Id.* ¶¶ 5–6.) Ultimately, Plaintiff represented that Plaintiff “will
23 have produced” all non-privileged⁴ responsive documents except 1) e-mails to or from
24 Youngevity.com e-mail addresses already in the possession of Youngevity (withheld based
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28 ⁴ Plaintiff literally states that he will have produced all “privileged” responsive documents, but this is
presumed by the Court to be a typo.

1 upon undue burden) and 2) e-mails from June 1, 2016, to July 1, 2016 (withheld on the
2 bases of relevance and undue burden). (ECF No. 86 at 4.)

3 Defendants filed a reply to Plaintiff’s opposition on October 3, 2018. (ECF No. 91.)
4 In the declaration of Eric J. Awerbuch attached to the reply, Mr. Awerbuch confirmed that
5 Plaintiff had made supplemental productions on September 17, September 26, and
6 September 29, 2018, of 386 documents, but the production was still deficient. (ECF No.
7 91-1 ¶ 3.)

8 On October 5, 2018, Plaintiff filed a supplemental opposition stating that Plaintiff
9 has since “made a full and complete production of all documents responsive to the Requests
10 for Production upon which Defendants are seeking an order to compel” with the exception
11 of “documents already in the possession of Defendants” and “irrelevant documents” “as
12 specifically set forth in the initial Opposition.” (ECF No. 94 at 2.)

13 In response to Plaintiff’s supplemental opposition, Defendants filed the
14 supplemental declaration of Mr. Awerbuch on October 12, 2018. (ECF No. 99.) In his
15 declaration, Mr. Awerbuch provided that Plaintiff had produced a supplemental production
16 of 2,267 documents on October 4, 2018. (ECF No. 99 ¶ 4.) However, based on his review
17 of the October 4, 2018 supplemental production and all of Plaintiff’s productions in this
18 case, Mr. Awerbuch found that: (1) Plaintiff has still not produced any documents
19 responsive to RFPs 235 and 236; (2) Plaintiff’s production with respect to RFPs 234 and
20 237–255 is still deficient. (*Id.* ¶¶ 5–9.)

21 **II. DISCUSSION**

22 **A. Legal Standard**

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

26 may obtain discovery regarding any nonprivileged matter that is
27 relevant to any party’s claim or defense and proportional to the
28 needs of the case, considering the importance of the issues at

1 stake in the action, the amount in controversy, the parties’
2 relative access to the information, the parties’ resources, the
3 importance of the discovery in resolving the issues, and whether
4 the burden or expense of the proposed discovery outweighs its
likely benefit.

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

6 Federal Rule of Civil Procedure 34 further provides that a party may serve requests
7 for documents or tangible things on any other party that relate to any matter within the
8 scope of discovery defined in Rule 26(b). Fed. R. Civ. P. 34(a). The propounding party
9 may move to compel a response if a party fails to produce documents requested under Rule
10 34. *See* Fed. R. Civ. P. 37(a). “The party seeking to compel discovery has the burden of
11 establishing that its request satisfies the relevancy requirements of Rule 26(b)(1).
12 Thereafter, the party opposing discovery has the burden of showing that the discovery
13 should be prohibited, and the burden of clarifying, explaining[,] or supporting its
14 objections.” *Bryant v. Ochoa*, No. 07cv200 JM (PCL), 2009 WL 1390794, at *1 (S.D. Cal.
15 May 14, 2009) (internal citations omitted) (first citing *Soto v. City of Concord*, 162 F.R.D.
16 603, 610 (N.D. Cal. 1995); then citing *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D.
17 Cal. 2002)). Those opposing discovery are “required to carry a heavy burden of showing”
18 why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.
19 1975).

20 **B. Requests for Production Nos. 232 and 233**

21 Defendants move to compel Plaintiff to produce all documents responsive to RFPs
22 232 and 233, which “seek documents related to Andreoli’s property at 1 Industrial Dr.,
23 Windham, NH.” (ECF No. 79 at 3–4.) RFPs 232 and 233 request the following:

24 232. Produce all lease agreements, rental agreements, contracts,
25 and documents that relate or refer to the property at 1 Industrial
26 Drive, Windham, New Hampshire.

27 233. Produce all documents that list the names of individuals,
28 businesses, non-profits, or any other entity which used space

1 whether paid or not at the FDIR building located in Windham,
2 New Hampshire which is at issue in this matter.

3 (ECF No. 79-2 at 18–19.)

4 Plaintiff’s response to both requests is as follow:

5 To the extent this Request may call for communications
6 between Plaintiff and counsel, such is objected to on the grounds
7 of attorney–client privilege and/or attorney work product. To the
8 extent that this Request seeks information which may be of a
9 confidential, sensitive, and/or proprietary business nature,
10 Plaintiff reserves the right to respond to this Request upon entry
11 of a suitable, mutually-agreeable Protective Order. Plaintiff
12 further objects as this Request is vague as to time.

13 Without waiving any objection or claim of privilege,
14 Plaintiff responds as follows: Discovery is continuing and
15 Plaintiff reserves the right to supplement and/or amend this
16 Response as permitted by Fed. R. Civ. P. [26(e)].

17 (ECF No. 79-2 at 18–19.)

18 As detailed above, before Defendants filed their reply, Plaintiff made three
19 supplemental productions totaling 386 documents. (ECF No. 91-1 ¶ 3.) With their reply,
20 Defendants filed a declaration of Mr. Awerbuch, which states that despite the three
21 supplemental productions, Plaintiff still has “not produce[d] any of his tax returns or any
22 lease agreements or similar documents relating to the property at 1 Industrial Dr.,
23 Windham, NH.” (*Id.* ¶ 13.) Plaintiff then filed a supplemental opposition, which claims
24 that as of October 5, 2018, Plaintiff had “made a full and complete production of all
25 documents responsive to the Requests for Production upon which Defendants are seeking
26 an order to compel” with the exception of “documents already in the possession of
27 Defendants” and “irrelevant documents” “as specifically set forth in the initial Opposition.”
28 (ECF No. 94 at 2.) Because documents responsive to RFPs 232 and 233 would not be
included in the excepted documents “specifically set forth in the initial Opposition,”
Plaintiff is presumably representing that all non-privileged documents responsive to RFPs
232 and 233 have been produced.

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1 In response to Plaintiff’s supplemental opposition, Defendants filed a third
2 declaration of Mr. Awerbuch, which confirms that Plaintiff made a supplemental
3 production of 2,267 documents on October 4, 2018. (ECF No. 99 ¶ 4.)

4 Because Mr. Awerbuch’s declaration does not state that Plaintiff’s October 4, 4018
5 supplemental production is deficient with respect to RFPs 232 and 233, but specifically
6 states that the production is deficient with respect to the other RFPs at issue, it may be that
7 Plaintiff has produced all documents responsive to these two requests. However, to the
8 extent that Plaintiff’s October 4, 2018 production is deficient with respect to RFPs 232 and
9 233, the Court will address Plaintiff’s objections.

10 When ruling on a motion to compel, courts in this district “generally consider[] only
11 those objections that have been timely asserted in the initial response to the discovery
12 request and that are subsequently reasserted and relied upon in response to the motion to
13 compel.” *SolarCity Corp. v. Doria*, No. 16cv3085-JAH (RBB), 2018 WL 467898, at *3
14 (S.D. Cal. Jan. 18, 2018) (quoting *Medina v. County of San Diego*, Civil No. 08cv1252
15 BAS (RBB), 2014 WL 4793026, at *8 (S.D. Cal. Sept. 25, 2014)); accord *The Sherwin-*
16 *Williams Co. v. Earl Scheib of Cal., Inc.*, No. 12CV2646-JAH(JMA), 2013 WL 12073836,
17 at *2 n.1 (S.D. Cal. Mar. 4, 2013). “If a party fails to continue to assert an objection in
18 opposition to a motion to compel, courts deem the objection waived.” *SolarCity Corp.*,
19 2018 WL 467898, at *3.

20 In his initial responses, Plaintiff objects to RFPs 232 and 233 based on: (1) attorney–
21 client privilege and/or attorney work product; (2) entry of a protective order; and (3)
22 vagueness as to time. (ECF No. 79-2 at 18–19.) The Court entered a protective order in
23 this case on July 6, 2018. (ECF No. 53.) Plaintiff’s objection on this basis is therefore
24 moot. Additionally, Defendants do not seek attorney–client privileged documents. (ECF
25 No. 89 at 8–9.) Finally, Plaintiff has not, in his opposition, relied on his objection of
26 vagueness as to time, so this objection has been waived.

27 Accordingly, Defendants’ Motion to Compel as to RFPs 232 and 233 is **GRANTED**.
28 To the extent he has not done so, Plaintiff shall produce all non-privileged documents

1 responsive to RFPs 232 and 233 on or before **December 21, 2018**. By the same date,
2 Plaintiff shall produce supplemental written responses to RFPs 232 and 233 confirming
3 that all responsive documents have been produced.

4 **C. Requests for Production Nos. 235 and 236**

5 Defendants next move to compel Plaintiff to produce all documents responsive to
6 RFPs 235 and 236, which “seek information related to Andreoli’s income.” (ECF No. 79
7 at 4.) RFPs 235 and 236 request the following:

8 235. Produce all YOUR personal tax returns, including 1099’s,
9 W-2’s, Schedules from 2010 to the Present.

10 236. Produce all of YOUR business tax returns, including
11 attachments from 2010 to the Present.

12 (ECF No. 79-2 at 9.) The term YOUR is defined as: “William Andreoli or any
13 representative acting on [his] behalf.” (*Id.* at 7.)

14 Plaintiff’s response to both requests is as follows:

15 To the extent that this Request seeks information which is
16 of a private, confidential[,] and highly sensitive nature, and to the
17 extent that entitlement of this information has not been
18 demonstrated, Plaintiff reserves the right to respond to this
19 Request upon entry of a suitable, mutually agreeable Protective
20 Order, if at all.

21 Without waiving any objection or claim or privilege,
22 Plaintiff responds as follows: Discovery is continuing and
23 Plaintiff reserves the right to supplement and/or amend this
24 Response as permitted by Fed. R. Civ. P. [26(e)].

25 (ECF No. 79-2 at 20.)

26 As detailed above, Plaintiff made three supplemental productions totaling 386
27 documents before filing his opposition and an additional production of 2,267 documents
28 after Defendants filed their reply. (ECF Nos. 91-1 ¶ 3; 99 ¶ 4.) However, despite all of the
supplemental productions Plaintiff made during the briefing of this motion, Mr. Awerbuch’s
third and final declaration states that Plaintiff has still not produced any tax returns in
response to RFPs 235 and 236. (ECF No. 99 ¶ 5.)

1 In his initial responses, Plaintiff’s only objection to RFPs 235 and 236 is a
2 reservation of the right to respond after entry of a protective order, which the Court entered
3 on July 6, 2018.⁵ (ECF No. 53.) The Court therefore finds that Plaintiff’s objection on this
4 basis is moot.

5 Because Plaintiff does not raise any other objections that apply to these RFPs,
6 Defendants’ Motion to Compel as to RFPs 235 and 236 is **GRANTED**. Accordingly,
7 Plaintiff shall produce all documents responsive to RFPs 235 and 236 on or before
8 **December 21, 2018**. By the same date, Plaintiff shall produce supplemental written
9 responses to RFPs 235 and 236 confirming that all responsive documents have been
10 produced.

11 **D. Requests for Production Nos. 234, 237–255**

12 Lastly, Defendants move to compel Plaintiff to produce all documents responsive to
13 RFPs 234 and 237–255, which “seek communications or documents in [Plaintiff]’s
14 possession and related to Wakaya or key Wakaya individuals.” (ECF No. 79 at 8.) RFPs
15 234 and 237–238 request the following:⁶

16 234. Produce all documents, emails, notes, written
17 correspondence to Defendants/Counterclaim Plaintiffs
18 regarding the company previously called Wakaya
Perfection LP.

19 237. Produce all communications YOU have received or sent,
20 including but not limited to text messages, Facebook

21
22
23 ⁵ As with RFPs 232 and 233, Plaintiff does not object to RFPs 235 and 236 in his opposition, but rather
24 states that Plaintiff was in the process of “produc[ing] all [non]privileged, responsive documents to RFP[s]
25 232–255” when Defendants’ motion to compel was filed, and all responsive documents will be produced,
“not subject to [his] three objections.” (ECF No. 86 at 4.) However, none of the exceptions Plaintiff
carved out in his opposition are applicable to RFPs 235 and 236.

26 ⁶ RFPs 239–255 are identical to RFP 238 except that in each subsequent RFP, the name Todd Smith is
27 replaced with one of these names: Blake Graham, Mike Randolph, Mike Koliniski, Brytt Cloward, Patti
28 Gardner, Dave Pitcock, Barb Pitcock, Andre Vaughn, Maxandra Desrosiers, Jimmy Hyun, Marin Barney,
Jennifer Halliday, David Gilmour, David Roth, Jason Martin, Rachael Beet, and Michael Casperson.
(ECF No. 79-9 at 9–11.)

1 messenger posts, emails, etc., between January 1, 2015 to
2 July 1, 2016 regarding Wakaya Perfection.

3 238. Produce all communications between YOU and Todd
4 Smith, including but not limited to text messages,
5 Facebook messenger posts, emails, etc., between January
6 1, 2015 to July 1, 2016.

7 (ECF No. 79-2 at 9.) The term YOU is defined as: “William Andreoli or any representative
8 acting on [his] behalf.” (*Id.* at 7.)

9 Plaintiff’s objections to RFP’s 234 and 237 in his initial responses are essentially the
10 same, in that Plaintiff objects to both requests based on: (1) attorney–client privilege and/or
11 attorney work product; (2) Plaintiff’s pending Motion to Dismiss Defendants’
12 Counterclaims; and (3) entry of a protective order. (ECF No. 79-2 at 19–21.) Plaintiff
13 likewise objects to RFPs 238–255 based on: (1) Plaintiff’s pending Motion to Dismiss
14 Defendants’ Counterclaims; and (2) entry of a protective order. (ECF No. 79-2 at 21–32.)

15 Plaintiff does not reassert these three objections in his opposition or supplemental
16 opposition but instead provides that he will produce all “[non]privileged, responsive
17 documents” not subject to three exceptions mentioned above:

- 18 (1) E-mails to or from Youngevity.com accounts are already in Defendants’
19 possession and are unduly burdensome to produce;
- 20 (2) E-mails from June 1, 2016 to July 1, 2016 are irrelevant to any parties’ claim
21 or defense; and
- 22 (3) E-mails from June 1, 2016 to July 1, 2016 are unduly burdensome to produce.

23 (ECF No. 86 at 4.)

24 As detailed above, Plaintiff made four supplemental productions during the briefing
25 of this motion. (*See* ECF Nos. 91-1 ¶ 3; 99 ¶ 4.) After making his last supplemental
26 production, Plaintiff filed a supplemental opposition, stating that:

27 At this time, [Plaintiff] has made a full and complete production
28 of all documents responsive to the Requests for Production upon

1 which Defendants are seeking an order to compel. [Plaintiff]’s
2 search has included all text messages, Facebook Messenger
3 messages, and e-mails, as well as the contents of [Plaintiff]’s
4 computer hard drive. All responsive[,] non-privileged
5 documents, except certain documents already in the possession
6 of Defendants as specifically set forth in the initial Opposition,
and irrelevant documents also as specifically set forth in the
initial Opposition, have been produced.

7 (ECF No. 94 at 2.)

8 In response to Plaintiff’s supplemental opposition, Defendants filed a third
9 declaration of Mr. Awerbuch, which states that despite Plaintiff’s October 4, 2018
10 supplemental production, Plaintiff has only produced “approximately 55 documents
11 containing text messages.” (ECF No. 99 ¶ 6.) Mr. Awerbuch’s declaration further provides
12 that Plaintiff has still not produced any text messages responsive to RFPs 238, 247, 240,
13 241, 244, and 246, responsive “communications to or from his “General Box” Basecamp
14 account dated before June 1, 2016,” and “responsive communications to or from his
15 @comcast.net” account. (*Id.* ¶¶ 7–9.)

16 **i. Plaintiff’s Objections in His Initial Responses**

17 The Court turns first to the three objections Plaintiff raised in his initial responses to
18 RFPs 234 and 237–255: (1) attorney–client privilege and/or attorney work product; (2)
19 Plaintiff’s pending Motion to Dismiss Defendants’ Counterclaims; and (3) entry of a
20 protective order. Because Plaintiff’s Motion to Dismiss is no longer pending and the Court
21 entered a protective order in this case on July 6, 2018 (ECF No. 53), the Court finds that
22 Plaintiff’s second and third objections are moot. As to the third objection, Defendants are
23 “not seeking attorney–client communications.” (ECF No. 79 at 10.)

24 **ii. Plaintiff’s Objections in His Oppositions**

25 The Court turns next to the three objections Plaintiff raises in his opposition and
26 supplemental opposition, but does not raise in his initial responses. Courts have “well
27 established that when a party fails to respond completely to a request for production, any
28 potential objections to that request are waived.” *Cal. Sportfishing Protection All.*, No.

1 2:10-cv-1207-GEB-AC, 2014 WL 5093398, at *4 (E.D. Cal. Oct. 9, 2014). It follows
2 then that when a party raises an objection to a request for production for the first time in
3 an opposition to a motion to compel, that objection is waived, unless good cause exists to
4 excuse the objection's untimeliness. *See Na'im v. Sophie's Arms Fine Residences, LLC*,
5 No. 13cv2515-JAH (BLM), 2014 WL 3537807, at *4 & n.3 (S.D. Cal. July 2, 2014);
6 *Hinostroza v. Denny's Inc.*, No. 2:17-cv-02561-RFB-NJK, 2018 WL 3212014, at *5 (D.
7 Nev. June 29, 2018) ("In response, Plaintiff objects to this request on the grounds that it is
8 overbroad and unduly burdensome. Plaintiff, however, did not raise these objections in
9 her initial response to Defendant's [requests for production] and, therefore, the Court finds
10 that she has waived these objections.").

11 **a. Responsive E-Mails to or from Youngevity.com Accounts**

12 Plaintiff first argues that this Court should not compel him to produce responsive e-
13 mails to or from Youngevity.com accounts because these e-mails are (1) already in
14 Defendants' possession, "as they exist on their servers," and (2) unduly burdensome to
15 produce. (ECF No. 86 at 4.) Defendants in reply identify certain categories of documents,
16 including e-mails to or from Plaintiff's "General Box" and "@comcast.net" accounts,
17 which have not been produced, contradicting Plaintiff's claims about the completeness of
18 the production to date. (ECF No. 91 at 3.)

19 As an initial matter, the Court finds Plaintiff's objection to producing e-mails to or
20 from Youngevity.com accounts because they already in Defendants' possession is without
21 merit, for a party "is required to produce documents he has in his possession, custody, or
22 control, regardless of whether he believes [the opposing party] already has those
23 documents." *The Walt Disney Co. v. DeFabiis*, 168 F.R.D. 281, 284 (C.D. Cal. 1996).
24 Further, because Plaintiff did not raise an objection of undue burden in his initial responses,
25 Plaintiff waives this objection unless good cause exists for his untimeliness in asserting it.
26 *See Na'im*, 2014 WL 3537807, at *4 & n.3.

27 Plaintiff's opposition details how he was unable to "access all necessary documents
28 until September 26, 2018," because of issues obtaining documents in possession of

1 Plaintiff's counsel in the related and concurrent case, *Youngevity International, Corp. v.*
2 *Smith et al.*, 3:16-cv-00704-BTM-JLB (S.D. Cal.) ("Concurrent Case"), and issues with
3 Plaintiff's document vendor. (ECF Nos. 86 at 2–3; 86-1 ¶¶ 2–3.) The Court finds that
4 there was good cause for Plaintiff not to assert an undue burden objection in his initial
5 responses because Plaintiff was not yet in possession of "all necessary documents" when
6 responses were due. The Court, however, overrules Plaintiff's objection.

7 The burden is on the party objecting to discovery to show undue burden and cost.
8 *Unisource Worldwide, Inc. v. Swope*, No. CV 13–02822–JEM, 2013 WL 12116382, at *2
9 (C.D. Cal. May 14, 2013). A party must base their objection "on specific facts, such as the
10 numerosity of a particular type of document, to facilitate a meaningful evaluation of what
11 may be considered relevant or an undue burden." *Tourgeman v. Collins Fin. Servs., Inc.*,
12 Civil No. 08cv1392–JLS (NLS), 2010 WL 2181416, at *4 (S.D. Cal. May 25, 2010). Here,
13 Plaintiff merely states that he will be reducing his burden "by excluding from review
14 approximately 8,000 documents that were sent to or from a [Y]oungevity.com e[-]mail
15 account or were sent from June 1, 2016 through July 1, 2016." (ECF No. 86 at 3.) From
16 this statement, the Court cannot discern how many of the approximated 8,000 documents
17 are e-mails sent to or from a Youngevity.com account. Further, Plaintiff does not explain
18 why a review of approximately 8,000 documents would be *unduly* burdensome. The Court
19 therefore finds Plaintiff's undue burden objection to be unsupported and therefore without
20 merit, and thus, this objection is overruled. *See Unisource Worldwide, Inc.*, 2013 WL
21 12116382, at *2 (finding a party's undue burden objection "insufficient" when the party
22 made "only a generalized burden argument" and "fail[ed] even to submit a declaration
23 detailing why producing documents would be unduly burdensome").

24 **b. Relevancy of E-Mails Dated June 1, 2016 to July 1, 2016**

25 In their opposition, Defendants argue that the communications requested in RFPs
26 237–255 between Plaintiff and Wakaya-related individuals from January 1, 2015 to July 1,
27 2016 are relevant to Plaintiff's First Cause of Action (breach of contract) and four of
28 Defendants' counterclaims. (ECF No. 79 at 3.) Specifically, Defendants argue that

1 Plaintiff's right to receive payments under the Amended and Restated Purchase Agreement
2 ceased when he "engaged in employment . . . in anyway competitive with Youngevity" or
3 "provided material assistance to any other [p]erson in compete[tion] with Youngevity."
4 (*Id.*) Further, Defendants' argue that their counterclaims seek damages from Plaintiff's
5 alleged involvement with Wakaya, beginning as early as July 2015. (*Id.*)

6 Plaintiff in response argues that the Court should not compel him to produce
7 responsive e-mails dated between June 1, 2016 to July 1, 2016, the last month of the
8 requested timeframe, because such e-mails are irrelevant to any party's claim or defense.
9 (ECF No. 86 at 4.)

10 As mentioned above, courts have "well established that when a party fails to respond
11 completely to a request for production, any potential objections to that request are waived."
12 *Cal. Sportfishing Protection All.*, 2014 WL 5093398, at *4. However, the party seeking to
13 compel discovery has the initial burden of establishing that its request satisfies the
14 relevancy requirements of Rule 26(b)(1). *Bryant*, 2009 WL 1390794, at *1. Here, the
15 Court finds that Defendants have met their burden to show the relevancy of the discovery
16 requests as drafted. Plaintiff has waived the right to object to producing the subset of those
17 documents dated between June 1, 2016 to July 1, 2016 that he now asserts are irrelevant to
18 the litigation. Even if the Court were to consider Plaintiff's relevancy objection to the e-
19 mails during that one month period, the objection would be overruled.

20 **c. Burden of Producing E-Mails Dated June 1, 2016 to July 1, 2016**

21 Finally, Plaintiff argues that it would be unduly burdensome to produce responsive
22 e-mails dated between June 1, 2016 and July 1, 2016. Defendants do not address the merits
23 of this objection in their reply.

24 Because Plaintiff did not raise an undue burden objection in his initial responses,
25 Plaintiff waives this objection unless good cause exists for his untimeliness in asserting it.
26 *See Na'im*, 2014 WL 3537807, at *4 & n.3. As analyzed above, the Court finds that there
27 was good cause for Plaintiff not to assert this objection in his initial responses because he
28

1 did not yet have access to all responsive documents. However, the Court finds overrules
2 Plaintiff's objection.

3 Again, Plaintiff merely states in his opposition that he will be reducing his burden
4 "by excluding from review approximately 8,000 documents that were sent to or from a
5 [Y]oungevity.com e[-]mail account or were sent from June 1, 2016 through July 1, 2016."
6 (ECF No. 86 at 3.) From this statement, the Court cannot discern how many of the
7 approximated 8,000 documents are e-mails sent from June 1, 2016 through July 1, 2016.
8 Further, as addressed above, Plaintiff does not detail why a review of approximately 8,000
9 documents would be *unduly* burdensome. The Court therefore finds Plaintiff's undue
10 burden objection to be unsupported and therefore without merit, and thus, this objection is
11 overruled. *See Unisource Worldwide, Inc.*, 2013 WL 12116382, at *2.

12 **iii. Conclusion**

13 Based on the foregoing, the Court **GRANTS** Defendants' Motion to Compel as to
14 RFPs 234 and 237–255. Accordingly, Plaintiff shall produce all documents responsive to
15 RFPs 234 and 237–255 on or before **January 4, 2019**. By the same date, Plaintiff shall
16 produce supplemental responses to RFPs 234 and 237–255 confirming that all responsive
17 documents have been produced. If Plaintiff cannot produce additional responsive
18 documents, he shall provide the Court with a declaration under penalty of perjury
19 describing the reasonable efforts he and his counsel undertook to locate
20 responsive documents.

21 **IV. AWARD OF REASONABLE EXPENSES**

22 **A. Reasonable Expenses Incurred from Filing the Motion to Compel**

23 Rule 37(a)(5)(A) provides that if a motion to compel is granted, "the court must,
24 after giving opportunity to be heard, require the party or deponent whose conduct
25 necessitated the motion, the party or attorney advising that conduct, or both to pay the
26 movant's reasonable expenses incurred in making the motion, including attorney's fees."
27 Fed. R. Civ. P. 37(a)(5)(A). However, "the court must not order this payment if (i) the
28 movant filed the motion before attempting in good faith to obtain the disclosure or

1 discovery without court action; (ii) the opposing party’s nondisclosure, response, or
2 objection was substantially justified; or (iii) other circumstances make an award of
3 expenses unjust.” *Id.*

4 Defendants argue that they are entitled to recover the reasonable costs incurred from
5 filing this Motion to Compel because Plaintiff’s nondisclosure was not substantially
6 justified. (ECF Nos. 79 at 10; 91 at 4.) Specifically, Defendants maintain that “[Plaintiff]
7 cannot reasonably blame the failure to produce documents on his own counsel in the
8 Concurrent Case” and that “many of the documents responsive to [Defendants’] RFPs in
9 this case have not been obtained or produced in the Concurrent Case.”
10 (ECF No. 91 at 4–5.)

11 Plaintiff contends that his delayed productions are “substantially justified, because
12 despite his diligent efforts, the anticipated issues concerning coordination with counsel in
13 the Concurrent Case, plus the issues encountered with the document vendor, have rendered
14 it impossible to comply with production deadlines.” (ECF No. 86 at 4.)

15 The Court is sympathetic to Plaintiff’s difficulties with his document vendor—but
16 only to a point. As Defendants highlight, the Court granted Plaintiff three extensions to
17 meet and confer and produce responsive documents before Defendants filed this motion.
18 (ECF Nos. 48, 61, 67.) In support of each extension, Plaintiff represented that he would
19 produce all responsive documents first by July 20, 2018 (ECF No. 44), then by August 10,
20 2018 (ECF No. 60), and then by August 15, 2018 (ECF No. 67). Plaintiff failed to meet
21 any of his self-imposed deadlines. Moreover, Plaintiff’s supplemental opposition claims
22 that as of October 5, 2018, Plaintiff “has made a full and complete production of all
23 documents” not subject to his three new objections. (ECF No. 94 at 2.) However, Plaintiff
24 has not produced any documents responsive to RFPs 235 and 236, and he does not object
25 to these requests in his oppositions. (ECF No. 99 ¶ 5.) Given that Plaintiff’s supplemental
26 opposition misleadingly claims that he has made a full production of all responsive
27 documents, when in fact he has not, the Court finds that Plaintiff is not substantially
28 justified in his delayed and incomplete supplemental productions.

1 Accordingly, Defendants’ request for reasonable expenses, including attorneys’
2 fees, incurred from filing this Motion to Compel is **GRANTED**.

3 **B. Reasonable Expenses Incurred from Meet and Confer Efforts**

4 Defendants also argue that Rule 37(a)(5) gives the Court discretion, in limited
5 circumstances, to award attorneys’ fees incurred from meeting and conferring on a motion
6 to compel. (ECF Nos. 79 at 10; 91 at 5.) Defendants predominately rely on *Matlink, Inc.*
7 *v. Home Depot USA, Inc.*, No. 07cv1991–DMS (BLM), 2008 WL 8504767 (S.D. Cal. Oct.
8 27, 2018) for this proposition.⁷ (ECF Nos. 79 at 10–11; 91 at 5.)

9 Plaintiff contends that Defendants’ reliance on *Matlink* is misplaced, and the
10 “standing rule” in this District is that “meet and confer expenses are not recoverable.”
11 (ECF No. 86 at 11–12.) The Court agrees with Plaintiff and finds that the reasoning set
12 forth in *Matlink* is inapplicable here. In *Matlink*, the court found that “Plaintiffs’ dilatory
13 actions in response to Defendants’ discovery requests justified” sanctions under Rule
14 37(a)(5) because “Plaintiffs repeatedly stonewalled Defendants’ efforts to meet and
15 confer.” 2008 WL 8504767, at *1. Here, there is no evidence that Plaintiff has
16 intentionally delayed production of responsive documents, nor has Plaintiff evaded
17 Defendants’ requests to meet and confer. Although other district courts in the Ninth Circuit
18 have found meet and confer efforts compensable under Rule 37(a)(5) in limited
19 circumstances, the Court in its discretion declines to award those fees here.

20 **V. CONCLUSION**

21 For the reasons set forth above, Defendants’ Motion to Compel (ECF No. 79) is
22 **GRANTED**. Plaintiff shall reimburse Defendants for the reasonable expenses, including
23 attorneys’ fees, associated with bringing this motion.


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27 ⁷ Defendants also cite to *Aevoe Corp. v. AE Tech Co.*, No. 2:12–cv–00053–GMN–NJK, 2013 WL
28 5324787, at *6 n.12 (D. Nev. Sept. 20, 2013) and *Subramanian v. QAD Inc.*, No. C 06-3050 VRW, 2008
WL 11387036, at *2 (N.D. Cal. Nov. 20, 2008) for the proposition that meet and confer efforts are
compensable under Rule 37(a)(5). (ECF No. 79 at 11.)

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

12 **IT IS SO ORDERED.**

13 Dated: December 5, 2018

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15 Hon. Jill L. Burkhardt
16 United States Magistrate Judge
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