

**FILED**

Dec 21 2017

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY s/ judep DEPUTYUNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SOLARCITY CORPORATION,

Plaintiff,

v.

DANIEL DORIA,

Defendant.

AND RELATED COUNTERCLAIMS

Case No.: 16cv3085-JAH (RBB)

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL [ECF NOS. 69, 71]; GRANTING PLAINTIFF'S REQUEST FOR THE ENTRY OF A PROTECTIVE ORDER [ECF NO. 75]; DENYING PLAINTIFF'S REQUEST TO STAY DISCOVERY INTO DEFENDANT'S COUNTERCLAIM [ECF NO. 75]; AND DENYING PLAINTIFF'S AND DEFENDANT'S REQUESTS FOR SANCTIONS [ECF NOS. 71, 75].**

Defendant Daniel Doria's Motion to Compel Further Responses to Requests for Production Responsive Documents and for Sanctions (the "Motion to Compel") was filed nunc pro tunc to October 18, 2017 [ECF Nos. 68, 69, 70, 71]. On October 27, 2017, Plaintiff SolarCity filed an opposition to Doria's Motion to Compel, and it requests that the Court enter a protective order, stay discovery into Doria's Counterclaim, and sanction

1 Doria. (See Opp’n 4-5, 9, ECF No. 75.)<sup>1</sup> Defendant’s Reply was filed nunc pro tunc to  
2 November 6, 2017 [ECF Nos. 76, 77]. Shortly thereafter, the Court issued a minute order  
3 requiring the parties to supplement their pleadings by providing the disputed requests for  
4 production and responses [ECF No. 79]. The Court also ordered Plaintiff to file a  
5 detailed privilege log if it was withholding any responsive documents on the basis of  
6 privilege [*Id.*]. Pursuant to the Court’s order, SolarCity filed the requests for production  
7 and responses on November 14, 2017 [ECF No. 82], and its privilege log on November  
8 21, 2017 [ECF No. 85].

9 For the reasons discussed below, Defendant Doria’s Motion to Compel [ECF Nos.  
10 69, 71] is **GRANTED in part** and **DENIED in part**, and Plaintiff’s and Defendant’s  
11 respective requests for sanctions [ECF Nos. 69, 71, 75] are **DENIED**. The Court  
12 **GRANTS** SolarCity’s request for the entry of a protective order and **DENIES** its request  
13 to stay discovery into Doria’s Counterclaim [ECF No. 75].

#### 14 I. FACTUAL BACKGROUND

15 Plaintiff SolarCity, a manufacturer and seller of solar energy products and services,  
16 employed Defendant Daniel Doria as a sales representative from May 2015, until his  
17 termination on October 21, 2016. (Compl. 2-4, ECF No. 1.) On December 23, 2016,  
18 SolarCity filed this action alleging that “[o]n at least five separate occasions while Doria  
19 was still employed by SolarCity, Doria stole SolarCity’s confidential customer  
20 information . . . .” (*Id.* at 2.) Defendant Doria is alleged to have used the information to  
21 contact Plaintiff’s existing and prospective customers in an “attempt to dissuade them  
22 from using SolarCity’s products.” (*Id.*) Plaintiff claims that Defendant stole contact  
23 information for at least 1,343 customers by accessing its confidential customer database,  
24 copying the information, and sending it to his personal e-mail address. (*Id.*) SolarCity  
25 further alleges that Doria “used that confidential information to send the solar warning  
26

---

27  
28 <sup>1</sup> The Court will cite to documents as paginated on the electronic case filing system.

1 email to an unknown number of SolarCity customers in an attempt to dissuade them from  
2 entering into a contract with SolarCity or to terminate their existing contracts with  
3 SolarCity.” (Id. at 8.) Plaintiff contends that as a result, its reputation and relationships  
4 with existing and potential customers were damaged, and it lost business; and that  
5 Defendant’s conduct violated his employment agreements with Plaintiff. (See id. at 3, 8-  
6 11.) SolarCity asserts causes of action for violation of the Defend Trade Secrets Act, the  
7 California Uniform Trade Secrets Act, and breach of contract; it seeks injunctive relief,  
8 restitution, disgorgement, royalties, compensatory and exemplary damages, penalties,  
9 attorneys’ fees, costs, and interest. (Id. at 2, 12-19.)

## 10 **II. PROCEDURAL BACKGROUND**

11 On December 27, 2016, SolarCity filed an Application for Temporary Restraining  
12 Order and Request for Order to Show Cause re Preliminary Injunction [ECF No. 3].  
13 United States District Judge John A. Houston granted Plaintiff’s application for a  
14 Temporary Restraining Order on January 11, 2017, and enjoined Defendant Doria from  
15 (1) “altering, destroying, or disposing of any evidence or other materials” related to this  
16 action; (2) “failing to take all necessary steps to preserve documents, data,” and other  
17 materials relating to the action; and (3) “directly or indirectly accessing, using,  
18 disclosing, or making available” Plaintiff’s customer data. (See Order Granting TRO 2-  
19 3, ECF No. 15.) On January 31, 2017, Judge Houston issued an Order Granting  
20 Plaintiff’s Motion for Preliminary Injunction with the same restrictions [ECF No. 22].

21 Doria answered SolarCity’s Complaint on February 21, 2017 [ECF No. 28], and  
22 the Court subsequently issued a Scheduling Order Regulating Discovery and Other Pre-  
23 trial Proceedings [ECF No. 39]. Defendant’s Motion for Leave to File Amended Answer  
24 and Counter-Claim and Application for Temporary Restraining Order and Request for  
25 Order to Show Cause re Preliminary Injunctive Relief were filed nunc pro tunc to May 3,  
26 2017 [ECF No. 37]. On August 30, 2017, Judge Houston granted both motions and  
27 enjoined SolarCity’s “senior and upper level management” from “making disparaging  
28

1 remarks or causing others to make any disparaging remarks regarding the pending case,  
2 Defendant, or Defendant's business." (Order Granting Prelim. Inj. 2, ECF No. 56.)

3 Defendant's Amended Answer and Counter-Claim for Declaratory Judgment

4 Demand for Damages was filed nunc pro tunc to October 16, 2017 [ECF No. 67]. Doria  
5 alleges that SolarCity defrauded its clients by "causing them to believe that SolarCity net-  
6 metering agreements cannot change" and "omitting virtually all information regarding the  
7 financial instrument . . . known as Solar Renewal Energy Certificates or SREC's from the  
8 information distributed to clients." (Am. Answer & Countercl. 12, ECF No. 67.)

9 Further, Defendant Doria claims that Plaintiff defrauded its employees by "devising a  
10 plan to avoid a traditional restructure or 'layoff'" by manipulating the company's sales  
11 performance requirements and lead distribution. (*Id.* at 13.) He also contends that  
12 SolarCity's Team Lead Guy Zubia assaulted him at work; the assault was witnessed by  
13 multiple individuals and recorded by video surveillance; and that SolarCity investigated  
14 the assault and subsequently terminated Zubia. (*Id.* at 14-15.) Additionally, Defendant  
15 alleges that shortly after his termination, Plaintiff "announced through a 'SolarCity Live'  
16 or 'SolarCity T.V. Event' a one time 'get out of jail free card' to individuals who came  
17 forward regarding trade secret theft they knew about or participated in[.]" and that  
18 Lynden Rive<sup>2</sup> stated during the event that he "intended to prosecute to the fullest extent  
19 of the law, anyone that had been accused of such violations." (*Id.* at 26.) Finally, Doria  
20 maintains that his employment agreement with SolarCity required arbitration of "all  
21 matters regarding Trade Secret disputes" and that SolarCity breached the agreement by  
22 filing this action. (*Id.* at 16.) Defendant alleges causes of action he describes as breach  
23 of contract; "violation of the FLSA employer retaliation"; "violation of the FTC fraud  
24  
25  
26

---

27 <sup>2</sup> Plaintiff's pleadings and requests for production indicate that Mr. Rive was SolarCity's CEO at the  
28 time he allegedly made the statement. (*See* Mem. P. & A. Supp. Mot. Compel 3, ECF No. 71; Suppl.  
Decl. Mack Attach. #1, 8, ECF No. 82.)

1 and deceptive practices”; “violations of the WARN Act”; “civil conspiracy, concert of  
2 action”; and violation of California Civil Code Sections 45 and 46. (Id. at 24-37.)

3 On August 25, 2017, Doria served SolarCity with thirty requests for production.  
4 (Opp’n Attach. #1 Decl. Mack 1, ECF No. 75.) Plaintiff responded to Defendant’s  
5 requests on September 27, 2017. (Id. at 3.) SolarCity agreed to produce documents  
6 responsive to twenty requests, produced 2,774 pages of documents, objected to the  
7 remaining ten requests, and withheld additional responsive documents until the entry of a  
8 protective order governing the use and disclosure of confidential information. (Id.; see  
9 also Reply 13-14, ECF No. 77.)

10 On November 8, 2017, Plaintiff filed a motion to dismiss each of the causes of  
11 action in Defendant’s Counterclaim for failure to state a claim. (Pl.’s Mot. Dismiss  
12 Countercl., ECF No. 78.) District Judge Houston issued a minute order setting January  
13 22, 2018, as a hearing date on the motion. (See id.)

### 14 III. LEGAL STANDARDS

#### 15 A. Motion to Compel

16 A party may obtain discovery regarding any nonprivileged matter that is relevant  
17 to any claim or defense and proportional to the needs of the case, “considering the  
18 importance of the issues at stake in the action, the amount in controversy, the parties’  
19 relative access to relevant information, the parties’ resources, the importance of the  
20 discovery in resolving the issues, and whether the burden or expense of the proposed  
21 discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). Relevant information  
22 need not be admissible at trial to be discoverable. Id. Relevance is construed broadly to  
23 include any matter that bears on, or reasonably could lead to other matters that could bear  
24 on, any issue that may be in the case. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S.  
25 340, 350-51 (1978) (footnote and citation omitted)). District courts have broad discretion  
26 to determine relevancy for discovery purposes and to limit the scope of discovery. See  
27 Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002); see also Fed. R. Civ. P. 26(b)(2)(C)  
28 (allowing courts to limit discovery where it would be unreasonably cumulative or

1 duplicative, or can be obtained from a more convenient, less burdensome, or less  
2 expensive alternate source; the requesting party has had ample opportunity to obtain  
3 discovery; or the discovery sought is beyond the scope of Rule 26(b)(1)).

4 Federal Rule of Civil Procedure 37 enables the propounding party to bring a  
5 motion to compel responses to discovery. Fed. R. Civ. P. 37(a)(3)(B). The party seeking  
6 to compel discovery has the burden of establishing that its request satisfies the relevance  
7 requirement of Rule 26 of the Federal Rules of Civil Procedure. Soto v. City of Concord,  
8 162 F.R.D. 603, 610 (N.D. Cal. 1995). The party opposing discovery bears the burden of  
9 resisting disclosure. See DIRECTV, Inc. v. Trone, 209 F.R.D. 455, 458 (C.D. Cal.  
10 2002); Oakes v. Halvorsen Marine Ltd., 179 F.R.D. 281, 283 (C.D. Cal. 1998).

#### 11 **B. Pro Se Litigants**

12 “In general, pro se representation does not excuse a party from complying with a  
13 court’s orders and with the Federal Rules of Civil Procedure.” Hupp v. San Diego  
14 County, Civil No. 12cv0492 GPC (RBB), 2014 WL 1404510, at \*2 (S.D. Cal. Apr. 10,  
15 2014) (citing Akra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 856-57 (8th Cir.  
16 1996)). Accordingly, parties who choose to represent themselves are expected to follow  
17 the rules of the court in which they litigate. Bias v. Moynihan, 508 F.3d 1212, 1223 (9th  
18 Cir. 2007) (quoting Carter v. Comm’r, 784 F.2d 1006, 1008-09 (9th Cir. 1986)  
19 (“Although pro se, [a litigant] is expected to abide by the rules of the court in which he  
20 litigates.”)). “[W]hile pro se litigants may be entitled to some latitude when dealing with  
21 sophisticated legal issues, acknowledging their lack of formal training, there is no cause  
22 for extending this margin to straightforward procedural requirements that a layperson can  
23 comprehend as easily as a lawyer.” Jourdan v. Jabe, 951 F.2d 108, 109 (6th Cir. 1991).

#### 24 **IV. DISCUSSION**

25 Defendant seeks an order compelling Plaintiff to “serve further responses to [his]  
26 requests for production, produce responsive documents and allow reasonable  
27 inspection . . . .” (Mem. P. & A. Supp. Mot. Compel 2; ECF No. 71.) Doria contends  
28 that SolarCity refused to provide the requested discovery and delayed drafting a

1 protective order. (See Reply 2, 5, 7, 16, ECF No. 77.) He also asks the Court to sanction  
2 Plaintiff for the expenses he incurred in connection with bringing the motion. (Mem. P.  
3 & A. Supp. Mot. Compel 2, 15-16, ECF No. 71.) SolarCity argues that Doria's Motion  
4 to Compel should be denied because it is procedurally deficient, and it asserted valid  
5 objections to the requests at issue. (Opp'n 5-10, ECF No. 75.) Plaintiff also asks the  
6 Court to enter a protective order and sanction Defendant. (Id. at 10-11.)

7 **A. Plaintiff's Request to Enter a Protective Order**

8 Plaintiff requests that the Court enter its proposed protective order. (Id. at 10-11  
9 (citing Fed. R. Civ. P. 26(c), 37(a)(5)(B).) SolarCity claims that Doria refused to  
10 stipulate to the protective order it proposed "or any other" protective order, and Doria's  
11 refusal to agree to a protective order precludes further production. (See id. at 2, 4, 11; id.  
12 Attach. #1 Decl. Mack 3.) Plaintiff asserts that the proposed protective order is  
13 warranted in this trade secret action to protect its confidential information, while  
14 permitting Defendant access to discovery he seeks. (Id. at 2, 11.)

15 Doria contends that SolarCity unjustifiably delayed drafting a protective order.<sup>3</sup>  
16 (See Reply 2-5, 7, 16, ECF No. 77.) Defendant states that although he is willing to enter  
17 into a protective order, he will not stipulate to an order providing "great advantage" to  
18 Plaintiff, and that he "concluded" that a "model court order . . . will not suffice without a  
19 reasonable court intervention, and potential modification." (Id. at 5, 9, 17, 23.)

20 Federal Rule of Civil Procedure 26(c) allows a party from whom discovery is  
21 sought to move for a protective order. Fed. R. Civ. P. 26(c)(1). For good cause, the court  
22 may issue a protective order "specifying terms . . . for the disclosure or discovery";  
23 "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery  
24 \_\_\_\_\_

25 <sup>3</sup> Doria cites Plaintiff's e-mail dated April 5, 2017, stating, "[W]e have not finished drafting the  
26 proposed protective order and will send that over hopefully this week." (Reply 28, ECF No. 77.) He  
27 asserts that despite the parties' numerous communications during May-July 2017, SolarCity did not  
28 provide a protective order draft. (Id. at 3-5.) Defendant further alleges that on August 10, 2017, he e-  
mailed Plaintiff's counsel, Ron Arena, requesting the draft, and on October 11, 2017, Arena finally  
forwarded the draft to Doria. (Id. at 5.)

1 to certain matters”; or “requiring that a trade secret or other confidential research,  
2 development, or commercial information not be revealed or be revealed only in a  
3 specified way . . . .” Id. “For good cause to exist, the party seeking protection bears the  
4 burden of showing specific prejudice or harm will result if no protective order is  
5 granted.” Phillips ex rel. Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1210-11  
6 (9th Cir. 2002). The court has broad discretion to determine whether a protective order is  
7 appropriate and what degree of protection is warranted. Seattle Times Co. v. Rhinehart,  
8 467 U.S. 20, 36 (1984).

9 Although Doria indicates that he is willing to enter into a protective order, he  
10 refused to stipulate to the protective order proposed by SolarCity. (See Reply 17, ECF  
11 No. 77.) The parties’ pleadings include Plaintiff’s proposed protective order, (Opp’n  
12 Attach. #2, 6-15, ECF No. 75), and two paragraphs of Defendant’s proposed “sample”  
13 language, (Reply 44, ECF No. 77). SolarCity contends that its proposed protective order  
14 is modeled after the Southern District of California’s Model Protective Order. (Opp’n  
15 11, ECF No. 75.) A federal district court’s “model protective order, upon which the  
16 parties have based their own proposed protective orders, has been approved by the court  
17 and governs discovery unless the court enters a different protective order.” Barnes and  
18 Noble, Inc. v. LSI Corp., No. C 11-02709 EMC (LB), 2012 WL 601806, at \*1 (N.D. Cal.  
19 Feb. 23, 2012). SolarCity alleges that it modified the model order to account for Doria’s  
20 pro se status, but neither discusses nor identifies any of its proposed modifications.

21 The Court has reviewed the Model Protective Order and Plaintiff’s proposed  
22 protective order. SolarCity’s proposed order adds the following language as paragraphs  
23 two and three to the Court’s Model Protective Order:

24 2. The term “Highly Confidential” will mean and include any  
25 information which belongs to a Designating Party who believes in good faith  
26 that the Disclosure of such information to another Party or non-Party would  
27 create a substantial risk of serious financial or other injury that cannot be  
28 avoided by less restrictive means.



1           3.     “Highly Confidential Materials” will mean and include any  
2 Documents, Testimony, or Information, as defined below, designated as  
3 “Highly Confidential” pursuant to the provisions of this Protective Order.

4 (Opp’n Attach. #2, 7, ECF No. 75.) Without describing its rationale, SolarCity also seeks  
5 to replace a “CONFIDENTIAL-FOR COUNSEL ONLY” designation in the Model  
6 Protective Order with a “HIGHLY CONFIDENTIAL-FOR IN CAMERA REVIEW  
7 ONLY” designation. (See id. at 8, 10-12.)

8           SolarCity, as the party seeking the inclusion of its proposed confidentiality  
9 designation in the protective order, bears the burden of establishing good cause for the  
10 provision. See Rivera v. NIBCO, Inc., 384 F.3d 822, 827 (9th Cir. 2004); Lindsey v.  
11 Elsevier Inc., Case No.: 16-cv-00959-GPC (DHB), 2016 WL 8731471, at \*5 (S.D. Cal.,  
12 Aug. 19, 2016). Other than stating that it modified the Model Protective Order to  
13 account for Defendant’s pro se status, Plaintiff does not provide any explanation or legal  
14 authority to support its proposed confidentiality designation. (See Reply 10-11, ECF No.  
15 77.)

16           Doria’s pro se status is a factor to consider in drafting a protective order, and the  
17 Court is mindful that Doria is litigating this case without legal counsel. By proposing to  
18 replace a “CONFIDENTIAL-FOR COUNSEL ONLY” designation contained in the  
19 Model Protective Order with a “HIGHLY CONFIDENTIAL-FOR IN CAMERA  
20 REVIEW ONLY” provision, SolarCity, in essence, is asking the Court to review  
21 documents that would have been produced and used in this litigation by Doria’s counsel,  
22 if he had retained counsel. The Court is not Doria’s legal representative and cannot  
23 litigate on his behalf.

24           Additionally, the Model Protective Order’s “CONFIDENTIAL-FOR COUNSEL  
25 ONLY” provision does not preclude the use of the information by the party seeking  
26 disclosure; rather, it limits the individuals with access to the information. SolarCity’s  
27 proposed language is not narrowly tailored to recognize this distinction.  
28

1 Further, in cases involving “trade secrets or other confidential commercial  
2 information” the court is required to “balance the risk of disclosure to competitors against  
3 the risk that a protective order will impair prosecution or defense of the claims.”  
4 Nutratech, Inc. v. Syntech (SSPF) Int’l, Inc., 242 F.R.D. 552, 555 (C.D. Cal. 2007)  
5 (citing Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th Cir. 1992));  
6 see also 6 James Wm. Moore et al., Moore’s Federal Practice § 26.105[8][a], at 26-550  
7 (3d ed. 2017) (“To demonstrate good cause under [Rule 26(c)(1)(G)], the party seeking  
8 the protective order must show that the information sought is a trade secret or other  
9 confidential information, and that the harm caused by its disclosure outweighs the need of  
10 the party seeking disclosure.”) (footnote omitted). The district court must “examine  
11 factually all the risks and safeguards surrounding inadvertent disclosure.” Brown Bag  
12 Software, 960 F.2d at 1470. The court should consider “the nature of the claims and of a  
13 party’s opportunity to develop its case through alternative discovery procedures,” and  
14 whether the receiving party is “involved in ‘competitive decisionmaking’[.]” Id. (citing  
15 U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984)).

#### 16 **1. The risk to SolarCity of inadvertent disclosure**

17 “A risk of inadvertent disclosure that cannot be adequately mitigated by a  
18 protective order is a factor in limiting access to confidential information.” Barnes and  
19 Noble, Inc., 2012 WL 601806, at \*2 (citing U.S. Steel Corp., 730 F.2d at 1468). The key  
20 factor in this determination is whether the party seeking disclosure engages in  
21 “competitive decisionmaking,” which entails “advising on decisions about pricing or  
22 design ‘made in light of similar or corresponding information about a competitor.’”  
23 Brown Bag Software, 960 F.2d at 1470 (citing U.S. Steel Corp., 730 F.2d at 1468).

24 Doria worked for SolarCity as a sales representative in its Las Vegas territory from  
25 May 2015, until October 21, 2016. (See Compl. 2, 4, ECF No. 1.) His exhibits indicate  
26 that he has been receiving pay checks from “Vivint Solar Developer, LLC” since at least  
27 January 23, 2017. (See Reply 21, ECF No. 77; id. at 68-72.) Although Plaintiff contends  
28 that Doria’s discovery requests seek confidential information, (see Opp’n 3, ECF No. 75),

1 it has not presented any evidence indicating that Doria should be precluded from  
2 obtaining the requested information because he is performing any “competitive decision-  
3 making” functions, such as advising his new employer about marketing and/or business  
4 strategy, product design, development, and product pricing, or engaging in a competitive  
5 analysis. See Barnes and Noble, Inc., 2012 WL 601806, at \*3 (considering those factors  
6 in analyzing whether a company’s in-house counsel was engaged in “competitive  
7 decision-making”). “Nor does [Doria’s] proximity to competitive decisionmakers  
8 necessarily confer that status on him.” Id. at \*4. Furthermore, Doria is now working in a  
9 different geographical market. (See Reply 21, ECF No. 77 (containing Defendant  
10 Doria’s representation that he resided in Nevada during the events giving rise to this suit,  
11 and moved to California on November 1, 2017).)

12 The protective order proposed by Plaintiff requires the recipients of “Confidential  
13 Information” to agree in writing to be bound by the terms of the protective order, to hold  
14 all “Confidential Information” in confidence, use the information “only for purposes” of  
15 this action, and “take reasonable precautions to prevent the unauthorized or inadvertent  
16 disclosure of such information.” (Opp’n Attach. #2, 12, 15, ECF No. 75.) The terms of  
17 the protective order therefore provide additional safeguards against disclosure, and  
18 minimize any potential harm from inadvertent disclosure. Accordingly, SolarCity failed  
19 to establish that there is an unacceptable risk of disclosure that would warrant denying  
20 Doria’s access to highly confidential information.

## 21 **2. The potential prejudice to Doria from nondisclosure**

22 Prejudice can be established where the protective order “actually prejudice[s]  
23 presentation of the moving party’s case.” Lindsey, 2016 WL 8731471, at \*4 (citing Intel  
24 Corp. v. VIA Technologies, Inc., 198 F.R.D. 525, 528 (N.D. Cal. 2000)). Plaintiff’s  
25 proposed “HIGHLY CONFIDENTIAL-FOR IN CAMERA REVIEW ONLY”  
26 designation would preclude Defendant from obtaining, reviewing, and using documents  
27 with that designation. Doria needs to know what information forms the basis of  
28 SolarCity’s claims so that he may adequately assess the claims and the scope of potential

1 damages, meaningfully defend against the claims, engage in settlement discussions, as  
2 well as litigate his counterclaims. See Barnes and Noble, Inc., 2012 WL 601806, at \*4-5  
3 (finding prejudice from nondisclosure where the party seeking disclosure claimed that it  
4 required confidential information to manage litigation and “make a realistic assessment”  
5 of the opposing side’s “infringement claims and the scope of potential damages[]”).  
6 Doria’s ability to litigate will be severely prejudiced by SolarCity’s proposed  
7 confidentiality designation in the protective order. See id. at \*5; Lindsey, 2016 WL  
8 8731471, at \*4 (finding prejudice to plaintiff, where defendant’s proposed confidentiality  
9 designation would have precluded plaintiff from reviewing documents with that  
10 designation, including defendant’s financial information and agreements relevant to  
11 plaintiff’s claims); see also Profil Institut fur Stoffwechselforschung GmbH v. Prosciento,  
12 Inc., Civil No. 16cv1549-LAB(BLM), No. 73, slip op. at 7 (refusing to designate the  
13 allegedly misappropriated information or data as “Highly Confidential-Outside Counsel’s  
14 Eyes Only” in a trade secret misappropriation action between direct competitors).

### 15 **3. Conclusion**

16 Having considered and balanced the parties’ interests, the Court concludes that  
17 SolarCity has not established good cause for the inclusion of a “HIGHLY  
18 CONFIDENTIAL-FOR IN CAMERA REVIEW ONLY” designation in the parties’  
19 protective order. See Lindsey, 2016 WL 8731471, at \*1-2, 5 (finding that defendant did  
20 not establish good cause for the inclusion in the protective order of “Attorneys Eyes  
21 Only” designation, covering documents that plaintiff deemed “highly confidential and  
22 sensitive and or/trade secrets”); see also Mad Catz Interactive, Inc. v. Razor USA, Ltd.,  
23 No. 13CV2371-GPC (JLB), 2014 WL 4161713, at \*5 (S.D. Cal. Aug. 19, 2014) (finding  
24 that plaintiff’s general counsel’s role would not “give rise to an unacceptable risk of  
25 disclosure such that he should be denied access to [defendant’s] highly confidential  
26 information[]”). The Court has modified the protective order proposed by Plaintiff and  
27 separately issues a protective order to govern this case; an unexecuted copy is attached as  
28 Exhibit 1 to this Order.

1           **B. Plaintiff's Request for Discovery Stay**

2           Plaintiff SolarCity asks the Court to stay discovery into Defendant's Counterclaim  
3 until Judge Houston rules on Plaintiff's motion to dismiss. (See Opp'n 9, ECF No. 75;  
4 see also Pl.'s Mot. to Dismiss Countercl. 1, ECF No. 78.) In support of its request,  
5 SolarCity argues that Doria seeks highly confidential information regarding claims that  
6 will "likely" be dismissed. (Opp'n 9, ECF No. 75.) Defendant Doria responds that  
7 Plaintiff's request should be denied because a stay would delay discovery, and the  
8 requested information relates to his counterclaims and defenses. (See Reply 9, 18-20,  
9 ECF No. 77.)

10           In its responses to Defendant's thirty document requests, SolarCity contends that  
11 each request, "to the extent" that it calls for information related to Doria's proposed  
12 counterclaims, is premature because the counterclaims are subject to dismissal. (See  
13 Suppl. Decl. Mack Attach #1, 19-48, ECF No. 82.) "Objections to discovery requests  
14 cannot be conclusory. Proper objections 'show' or 'specifically detail' why the disputed  
15 discovery request is improper." Collins v. Landry's, Inc., Case No. 2:13-cv-01674-JCM-  
16 VCF, 2014 U.S. Dist. LEXIS 83003, at \*8 (D. Nev. June 17, 2014) (citing Blankenship v.  
17 Heart Corp., 519 F.2d 418, 429 (9th Cir. 1975)). "Boilerplate, generalized objections are  
18 inadequate and tantamount to making no objection at all." Id. at \*6-7.

19           In its Opposition, SolarCity identifies six requests for production that it contends  
20 only relate to Doria's counterclaims: 1, 8, 12, 23, 24, and 29. (See Opp'n 7-9, ECF No.  
21 75.) In its response to request number 1, Plaintiff stated that "it has been unable to locate  
22 responsive documents following a reasonably diligent search in conformity with the  
23 Federal Rules of Civil Procedure." (Suppl. Decl. Mack Attach. # 1, 19, ECF No. 82.)  
24 This may be a sufficient response. Bryant v. Armstrong, 285 F.R.D. 596, 603 (S.D. Cal.  
25 2012). For request 23, SolarCity responds that "it is unaware of documents it  
26 understands to be responsive to this request and that it will produce copies of documents  
27 signed by Defendant in connection with his employment." (Suppl. Decl. Mack Attach.  
28 #1, 41, ECF No. 82.) If responsive items do not exist, their production cannot be

1 compelled. But Doria is correct, the discovery sought in the listed document requests is  
2 not only relevant to his counterclaims.

3 “[A] party seeking a stay of discovery carries the heavy burden of making a strong  
4 showing why discovery should be denied.” Clark v. New Century Mortg. Co.,  
5 No. 2:17-cv-01065-JAD-VCF, 2017 U.S. Dist. LEXIS 165266, at 3 (D. Nev. Oct. 4,  
6 2017) (quoting Ministerio Roca Solida v. U.S. Dep’t of Fish & Wildlife, 288 F.R.D. 500,  
7 503 (D. Nev. 2013)). When deciding whether a stay of discovery should be imposed  
8 pending a motion to dismiss, among other things, the Court determines whether it is  
9 “‘convinced’ that the plaintiff [or counterclaimant] is unable to state a claim for relief.”  
10 Id. (citing Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984)). The Court has taken a  
11 “preliminary peek” at the merits of SolarCity’s motion to dismiss and concluded that a  
12 stay of discovery in response to the document requests is not warranted. See id. at \*3-4.  
13 Furthermore, the relevance of the discovery that Doria seeks is broader than SolarCity  
14 contends.

15 The deadline to serve written discovery passed on November 6, 2017, and fact  
16 discovery will close on January 8, 2018. (Scheduling Order 1-2, ECF No. 39.) In light of  
17 the procedural posture of the case, a discovery stay into Defendant’s Counterclaim will  
18 significantly delay discovery, and Plaintiff has not carried its heavy burden of making a  
19 strong showing that discovery should be stayed while its motion to dismiss is pending.  
20 Accordingly, the Court **DENIES** SolarCity’s request to stay discovery.

21 **C. Defendant’s Motion to Compel**

22 Defendant seeks to compel Plaintiff to supplement responses to his requests for  
23 production numbers 1-30. (Mem. P. & A. Supp. Mot. Compel 2, 5-7; ECF No. 71 (citing  
24 Fed. R. Civ. P. 34 and 37).) Doria asserts that the requests seek relevant information, are  
25 narrowly tailored, not burdensome, and are proportionate to the needs of the case. (Id. at  
26 8-14.) He acknowledges that SolarCity produced approximately 2,774 pages of  
27 documents, but states that the production comprised of “hundreds of virtually blank  
28 pages” that were heavily redacted, and contained duplicative and nonresponsive

1 information. (See Reply 6, 13-14, ECF No. 77; see also Mem. P. & A. Supp. Mot.  
2 Compel 2, 14, ECF No. 71.) Defendant Doria further maintains that Plaintiff's objections  
3 to the requests were boilerplate and unsupported, and Plaintiff did not produce a privilege  
4 log describing the documents it withheld as privileged. (See Mem. P. & A. Supp. Mot.  
5 Compel 2, 14-15, ECF No. 71; Reply 6, ECF No. 77.)

6 SolarCity argues that the Motion to Compel fails on procedural grounds and lacks  
7 merit. (Opp'n 5-10, ECF No. 75.) It claims that Defendant's requests seek proprietary  
8 information, and information related to Defendant's Counterclaim that was not filed at  
9 the time Plaintiff served its responses. (Id. at 2-3.) SolarCity states that because it served  
10 "fully compliant" responses, produced responsive documents, and agreed to supplement  
11 its production after the entry of a protective order, the Motion to Compel should be  
12 denied. (Id. at 2-10.)

### 13 **1. Procedural challenges**

14 Plaintiff argues that Defendant's Motion to Compel fails on procedural grounds  
15 because it was not filed and served within the time frame prescribed by Federal Rule of  
16 Civil Procedure 6(d) and Civil Local Rule 7.1.e.4. (Id. at 5.) SolarCity also contends that  
17 the motion lacks supporting documentation and that Doria's pro se status does not excuse  
18 his alleged failure to comply with procedural rules. (Id. (citing Fed. R. Civ. P. 6(c)(2)).)  
19 Defendant responds that Plaintiff fails to explain why the Motion to Compel is  
20 procedurally deficient. (Reply 11, ECF No. 77.)

21 Other than citing Federal Rule of Civil Procedure 6(c)(2) and (d) and Civil Local  
22 Rule 7.1.e.4, SolarCity does not provide any facts or arguments to support its contention  
23 that Doria's motion is procedurally barred. (See Opp'n 5, ECF No. 75.) On August 25,  
24 2017, Defendant served Plaintiff with thirty requests for production, and Plaintiff  
25 provided its responses on September 27, 2017. (Id. Attach. #1 Decl. Mack 2-3.) The  
26 Court's scheduling order states that "[a]ll motions for discovery shall be filed no later  
27 than thirty (30) days following the date upon which the event giving rise to the discovery  
28 dispute occurred[.]" and for "written discovery, the event giving rise to the discovery

1 dispute is the service of the response.” (Scheduling Order 2, ECF No. 39.) Accordingly,  
2 Doria’s motion had to be filed within thirty days of SolarCity’s September 27, 2017  
3 responses, which was October 27, 2017. (See id.) On October 16, 2017, Defendant  
4 informed the Court of the discovery disputes that are the subject of this motion, and the  
5 Court issued a minute order requiring Defendant Doria to file his motion by October 17,  
6 2017. (Mins. 1, October 16, 2017, ECF No. 63.) The Motion to Compel was filed nunc  
7 pro tunc to October 16, 2017 [ECF No. 68]; in any event, it was timely filed. Further,  
8 although Doria did not initially provide the disputed requests for production and  
9 SolarCity’s responses, the alleged deficiency was cured when those documents were filed  
10 on the docket [ECF No. 82].

## 11 **2. Merits**

12 On August 29, 2017, Judge Houston granted Doria’s motion to amend his answer  
13 and file a counterclaim [ECF No. 56]. The Court notes that Plaintiff objected to all of  
14 Defendant’s requests on September 27, 2017, claiming that the requests were premature  
15 because they related to Defendant’s proposed counterclaim. (Suppl. Decl. Mack Attach.  
16 #1, 18-49, ECF No. 82.) Doria filed his Counterclaim on October 18, 2017. (Am.  
17 Answer & Countercl., ECF No. 67.)

18 The filing of Defendant’s Counterclaim triggered Plaintiff’s duty to supplement its  
19 discovery responses pursuant to Rule 26(e) of the Federal Rules of Civil Procedure. The  
20 rule provides that a party who has responded to a request for production “must  
21 supplement or correct its disclosure or response . . . in a timely manner if the party learns  
22 that in some material respect the disclosure or response is incomplete or incorrect, and if  
23 the additional or corrective information has not otherwise been made known to the other  
24 parties during the discovery process or in writing . . . .” Fed. R. Civ. P. 26(e)(1); see also  
25 Medina v. County of San Diego, Civil No. 08cv1252 BAS (RBB), 2014 WL 4793026, at  
26 \*12 (S.D. Cal. Sept. 25, 2014) (reminding the responding party of its duty to supplement  
27 or correct incomplete or inaccurate discovery responses). As discussed above, the Court  
28 declines to stay discovery. Consequently, if SolarCity withheld any documents on the



1 basis that they were only relevant to Doria's counterclaims, it must supplement its  
2 production, subject to the protective order, by **January 8, 2018**.

3 **a. Requests for production numbers 2-6, 11, 13-14, 16-21, 23, 25-**  
4 **28, and 30**

5 Plaintiff SolarCity states that it agreed to produce documents responsive to  
6 Defendant's requests numbers 2-6, 11, 13-14, 16-21, 23, 25-28, and 30, and produced  
7 2,774 pages of responsive documents. (Opp'n 6, ECF No. 75; id. Attach. #1 Decl. Mack  
8 4.) Doria asserts that SolarCity's responses were deficient. (See Mem. P. & A. Supp.  
9 Mot. Compel 2-3, 14-15, ECF No. 71; Reply 6, 9, 13-14, ECF No. 77.) The majority of  
10 Plaintiff's responses to the requests state that Plaintiff will produce documents "following  
11 entry of a protective order governing the use and disclosure of confidential information."  
12 (Suppl. Decl. Mack Attach. #1, 30, 32, 35-37, 43-45, 48-49, ECF No. 82.)  
13 Simultaneously with this Order, the Court is entering a protective order; SolarCity is  
14 required to produce the withheld responsive documents subject to the terms of the  
15 protective order. Further, because Defendant alleges that Plaintiff produced "hundreds"  
16 of heavily redacted pages, (see Reply 6, 13-14, ECF No. 77; see also Mem. P. & A. Supp.  
17 Mot. Compel 2, 14, ECF No. 71), the Court orders Plaintiff to review the redactions,  
18 remove the redacted information, and produce the documents to Defendant subject to the  
19 provisions in the protective order. Finally, if SolarCity withheld any documents on the  
20 basis that they were only relevant to Doria's counterclaims, the documents should be  
21 produced. As discussed below, the Court **GRANTS** the Motion to Compel as to requests  
22 numbers 2-6, 11, 13-14, 16-21, 23, 25-28, and 30.

23 **b. Request for production number 1**

24 The request seeks "SolarCity Live television event recording" during which  
25 Plaintiff's former CEO Lyndon Rive "on a company-wide broadcast to 12,000 or more  
26 people, threatened to ruin the life of and bankrupt, anyone that he feels violated the  
27 mutual Trade Secret Agreement." (Suppl. Decl. Mack Attach. #1, 8, ECF No. 82.)  
28 SolarCity objected that the request was vague, ambiguous, overbroad, unduly

1 burdensome, and premature; and sought irrelevant, confidential, private, proprietary, and  
2 privileged information. (Id. at 19.) Plaintiff also stated that “it has been unable to locate  
3 responsive documents following a reasonably diligent search in conformity with the  
4 Federal Rules of Civil Procedure.” (Id.)

5 Doria argues that the video was made shortly after his termination and is highly  
6 relevant because it establishes Plaintiff’s “malicious” intentions and behavior. (Mem. P.  
7 & A. Supp. Mot. Compel 3, ECF No. 71.) Plaintiff’s counsel states in his declaration that  
8 after a “reasonable diligent search, Plaintiff was unable to locate the video.” (Opp’n  
9 Attach. #1 Decl. Mack 4, ECF No. 75.) SolarCity also asserts that the requested  
10 “Facebook” video is only relevant to Doria’s counterclaims, and would likely be subject  
11 to a protective order. (Opp’n 7, 10, ECF No. 75.) Defendant replies that he is not  
12 seeking a “Facebook” video, but rather a “SolarCity Live’ Event” video, and that  
13 Plaintiff has not disputed the existence of the video. (Reply 10, 16, 22, ECF No. 77.)

14 The videotaped statement allegedly was made by SolarCity’s CEO shortly after  
15 Doria’s termination. If it exists, the requested video is relevant and should be produced  
16 pursuant to the parties’ protective order. Although Plaintiff asserts that it could not locate  
17 the video, its pleadings indicate that it may have been searching for a different video than  
18 the one requested by Defendant Doria. (See id. at 10, 16, 22; see also Opp’n 7, 10, ECF  
19 No. 75.) Accordingly, if SolarCity cannot locate the “SolarCity Live event” video  
20 described in Doria’s Reply, SolarCity should state so under oath. See 7 James Wm.  
21 Moore, et al., Moore’s Federal Practice, § 34.13[2][a], at 34-57 (3d ed. 2017) (providing  
22 that when a party responds to a document request with an answer, as opposed to  
23 production or an objection, the party must answer under oath) (footnote omitted); see also  
24 Bryant, 285 F.R.D. at 603 (“If there are no other responsive documents in [d]efendant’s  
25 possession, custody, or control, after conducting this further attempt to locate records,  
26 [the party resisting discovery] must state so under oath and describe efforts [the party]  
27 made to locate responsive documents.”) (citing Vazquez–Fernandez v. Cambridge Coll.,  
28 Inc., 269 F.R.D. 150, 155 (D.P.R. 2010))). Accordingly, the Court **GRANTS**

1 Defendant's motion as to request number 1. SolarCity is **ORDERED** to either produce  
2 the requested video or provide a sworn declaration describing its efforts to locate the  
3 item.

4 **c. Requests for production numbers 10 and 15**

5 Request number 10 seeks all documents relevant to Plaintiff's allegation that  
6 "information was exported from Plaintiff's servers, post termination" including "all  
7 information that indicates Defendant exported any proprietary information from  
8 Plaintiff's secure servers" after Doria's termination. (Suppl. Decl. Mack Attach. #1, 10,  
9 ECF No. 82.) Request for production number 15 asks for documents relevant to  
10 SolarCity's allegation in the Complaint regarding Doria's "psychological state when  
11 refusing to return information." (Id. at 11.) Plaintiff asserted the same objections as it  
12 did in response to request number 1, and it also stated that the requests were burdensome  
13 because they required Plaintiff to create documents that did not exist. (Id. at 27-28, 32-  
14 33; see also id. at 19.) Additionally, SolarCity stated that it was "unaware of documents  
15 responsive" to the above requests. (Id. at 28, 33.)

16 Doria explains that request number 15 seeks evidence SolarCity relied on to allege  
17 that he was "bitter about his pending termination" and "attempting to conceal" his alleged  
18 theft. (See Mem. P. & A. Supp. Mot. Compel 11, ECF No. 71; Reply 22, ECF No. 77.)  
19 Defendant otherwise generally argues that SolarCity's responses to the above requests  
20 were deficient. (See Mem. P. & A. Supp. Mot. Compel, ECF No. 71.) SolarCity  
21 responds that it is unaware of any documents responsive to the requests, and that Doria is  
22 not entitled to discovery of documents that SolarCity does not possess. (Opp'n 10, ECF  
23 No. 75.)

24 Plaintiff has provided a copy of its discovery responses and a declaration under the  
25 penalty of perjury supporting its assertion that it is unaware of any documents responsive  
26 to requests for production numbers 10 and 15. (See id. Attach. #1 Decl. Mack 5; Suppl.  
27 Decl. Mack Attach. #1, 27-28, 32-33, ECF No. 82.) The Court therefore **GRANTS in**  
28 **part** Doria's motion to compel as to requests for production numbers 10 and 15. (See

1 Fed. R. Civ. P. 34(a)(1) (limiting discovery to “documents in the responding party’s  
2 possession, custody, or control.”).)

3 **d. Request for production number 7**

4 Request number 7 seeks: “All e-mail and text-message communications, between  
5 staff affected by the injunctive relief order granted by the Honorable John A. Houston, as  
6 it relates to Defendant’s counter-claims, including but not limited to, relevant e-mail and  
7 text message communications of Director Gary Algood, and RSM Brian Dickens” dating  
8 back to October 21, 2016. (Suppl. Decl. Mack Attach. #1, 9, ECF No. 82.) SolarCity  
9 objected on the same grounds as it did in response to request number 1, and that the  
10 request was unduly burdensome because it required SolarCity to create documents. (Id.  
11 at 25; see also id. at 19.)

12 Defendant argues in his Motion to Compel that he seeks information regarding  
13 “the extent of damage caused by Plaintiff’s violation of defamation laws, as referenced in  
14 the relief requested prior and granted by the Courts.” (Mem. P. & A. Supp. Mot. Compel  
15 9, ECF No. 71.) Plaintiff responds that the request seeks privileged communications  
16 between SolarCity and its counsel regarding this case, which are protected by the  
17 attorney-client privilege and the work product doctrine. (Opp’n 8, ECF No. 75.) It also  
18 contends that the request was premature when it was served, because it was directed at  
19 Defendant’s proposed counterclaim. (Id.)

20 It appears that Doria is referencing Judge Houston’s August 30, 2017 order  
21 enjoining SolarCity’s “senior and upper level management” from “making disparaging  
22 remarks or causing others to make any disparaging remarks regarding the pending case,  
23 Defendant, or Defendant’s business.” (Order Granting Prelim. Inj. 2, ECF No. 56.)  
24 Among his counterclaims, Doria alleges defamation by Plaintiff and seeks  
25 communications between SolarCity’s upper management, including Director Gary  
26 Algood and Regional Sales Manager Brian Dickens, after Doria’s termination. Further,  
27 because the counterclaims were filed after Plaintiff served its response, request number 7  
28 is no longer premature; additionally, the items sought are relevant. SolarCity does not

1 explain why it would need to “create” the requested text messages and e-mails.  
2 Accordingly, the Court overrules the above objections. If there are no responsive text  
3 messages or e-mails, Plaintiff should state so under oath and describe its efforts to locate  
4 responsive documents. See Bryant, 285 F.R.D. at 603.

5 Plaintiff also objects to the request on the ground of privilege. The Court therefore  
6 will address the application of both the attorney-client privilege and the work product  
7 protection doctrine.

8 The purpose of the attorney-client privilege is “to encourage full and frank  
9 communication between attorneys and their clients.” Upjohn Co. v. United States, 449  
10 U.S. 383, 389 (1981). “The party asserting an evidentiary privilege has the burden to  
11 demonstrate that the privilege applies to the information in question.” Griffith v. Davis,  
12 161 F.R.D. 687, 694 (C.D. Cal. 1995) (quoting Tornay v. United States, 840 F.2d 1424,  
13 1426 (9th Cir. 1988)). “Because it impedes full and free discovery of the truth, the  
14 attorney-client privilege is strictly construed.” United States v. Martin, 278 F.3d 988,  
15 999 (9th Cir. 2002) (quoting Weil v. Inv./ Indicators, Research & Mgmt., Inc., 647 F.2d  
16 18, 24 (9th Cir. 1981)). The privilege “protects only those disclosures necessary to  
17 obtain informed legal advice which might not have been made absent the privilege.”  
18 Fisher v. United States, 425 U.S. 391, 403 (1976). It applies “only when necessary to  
19 effectuate its limited purpose of encouraging complete disclosure by the client.” Griffith,  
20 161 F.R.D. at 694 (quoting Tornay, 840 F.2d at 1428).

21 For a communication to be protected by the attorney-client privilege, eight  
22 essential elements are considered:

- 23 (1) Where legal advice of any kind is sought
- 24 (2) from a professional legal adviser in his capacity as such,
- 25 (3) the communications relating to that purpose,
- 26 (4) made in confidence
- 27 (5) by the client,
- 28 (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal adviser,
- (8) unless the protection be waived.

1 Matter of Fischel, 557 F.2d 209, 211 (9th Cir. 1977).

2 For work-product, Federal Rule of Civil Procedure 26(b)(3)(A) states that  
3 “[o]rdinarily, a party may not discover documents and tangible things that are prepared in  
4 anticipation of litigation or for trial by or for another party or its representative (including  
5 the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” Fed. R. Civ.  
6 P. 26(b)(3)(A). Nevertheless, these materials may be discovered if “(i) they are otherwise  
7 discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for  
8 the materials to prepare its case and cannot, without undue hardship, obtain their  
9 substantial equivalent by other means.” Id. But even when substantial need for work  
10 product has been shown, the Court must still “protect against disclosure of the mental  
11 impressions, conclusions, opinions, or legal theories of a party’s attorney or other  
12 representative concerning the litigation.” Id. (b)(3)(B).

13 The burden is on the party asserting the protection of the work product doctrine to  
14 demonstrate that the withheld documents are protected from discovery. See 6 James  
15 Wm. Moore et al., Moore’s Federal Practice, § 26.70[5][a], at 26-454 (3d ed. 2017)  
16 (footnote omitted). “[T]he party seeking work product protection must establish that the  
17 material is a document or tangible thing prepared in anticipation of litigation for that  
18 party.” Id. at 26-454 to 26-455 (footnote omitted). “A mere allegation that the work  
19 product rule applies is insufficient to invoke its protection.” Id. at 26-455 (footnote  
20 omitted). Rather, “[t]he protection applies ‘if the prospect of litigation is identifiable  
21 because of specific claims that have already arisen.’” QST Energy, Inc. v. Mervyn’s, No.  
22 C-00-1699MJEDL, 2001 WL 777489, at \*5 (N.D. Cal. May 14, 2001) (quoting Conner  
23 Peripherals, Inc. v. W. Dig. Corp., No. C93-20117 RMW/EAI, 1993 WL 726815, at \*4  
24 (N.D. Cal. June 8, 1993)). “The test is whether ‘the document can fairly be said to have  
25 been prepared or obtained because of the prospect of litigation.’” Id.

26 In this case, SolarCity’s privilege log does not list any communications between  
27 Director Gary Algood and Regional Sales Manager Brian Dickens, although it lists  
28 communications dated between October 25, 2016, and December 9, 2016, sent from

1 “Attorneys, Managers and Members of the Legal Department at SolarCity Corporation”  
2 to “Confidential SolarCity customer[s], and Attorneys, Managers and Members of the  
3 Legal Department at SolarCity Corporation, Attorneys, staff and consultants from Arena  
4 Hoffman, LLP, and Discovia” containing e-mail strings concerning SolarCity’s customer  
5 complaint(s) “regarding release of confidential, personal information and subsequent  
6 investigation into matter conducted to assist in anticipated or pending litigation regarding  
7 collection.” (Id. at 3 (emphasis added).)

8 SolarCity bears the burden of establishing that any documents withheld from  
9 production are protected from disclosure by the attorney-client privilege or the attorney  
10 work product doctrine. Although the Court requested that Plaintiff supplement its  
11 opposition to Doria’s motion with a privilege log, (see ECF No. 79), SolarCity’s  
12 subsequent filing is deficient, (see ECF No. 85).

13 SolarCity makes conclusory assertions that Doria seeks items protected from  
14 discovery by the attorney-client privilege and attorney work product doctrine. It fails to  
15 set forth with particularity the specific facts as to each document that would support its  
16 claims that items are protected from disclosure by the attorney-client privilege or attorney  
17 work product doctrine. Plaintiff’s privilege log is inadequate. See e.g., Safeco Inc. Co.  
18 of Am. v. M.E.S., Inc., 289 F.R.D. 41, 47-48 (E.D.N.Y. 2011) (stating that privilege log  
19 should set forth specific facts and not rely on conclusory assertions). Nor has SolarCity  
20 provided the Court with “evidentiary submissions to fill in any factual gaps.” Id. at 48.

21 For these reasons, Plaintiff has not carried its burden of showing that either the  
22 attorney-client privilege or the attorney work product doctrine applies. Doria’s motion to  
23 compel the production of documents in response to request number 7 is **GRANTED**.

24 **e. Requests for production numbers 8 and 12**

25 Request number 8 seeks “[a]ll documentation and/or surveillance footage of the  
26 physical altercation that resulted in [f]ormer SolarCity Team Lead Guy [Zubia’s]  
27 termination, and Doria’s return to work[,]” including witness statements. (Suppl. Decl.  
28 Mack Attach. #1, 10, ECF No. 82.) Request for production number 12 asks for all

1 documents relevant to Plaintiff's contention that it had no obligation to honor its arbitration  
2 agreement with Defendant. (Id.) SolarCity objected and asserted the identical objections  
3 it raised in response to request number 1 described above. (Id. at 25-26, 29; see also id.  
4 at 19.) Plaintiff also stated that the requests were unduly burdensome because they  
5 required the creation of documents that did not exist. (Id. at 26, 29.)

6 Doria contends in his motion that request number 8, among other things, seeks  
7 "specifics of the physical assault, from former Team Lead Guy [Zubia]." (Mem. P. & A.  
8 Supp. Mot. Compel 9, ECF No. 71.) Defendant further asserts that request number 12  
9 seeks the evidence that SolarCity relied on "when stating to the courts, that they had no  
10 obligation to arbitrate when choosing to file this claim." (Id. at 10.) SolarCity responds  
11 that the requests relate to Doria's counterclaims that were not filed at the time of  
12 SolarCity's responses. (Opp'n 8, ECF No. 75.)

13 Defendant alleges in his Counterclaim that Plaintiff's Team Lead Zubia assaulted  
14 him at work; the assault was witnessed by multiple individuals and recorded by a video  
15 surveillance; and that after investigating the incident, Plaintiff terminated Mr. Zubia.  
16 (Am. Answer & Countercl. 14-15, ECF No. 67.) The requested documents and video are  
17 therefore relevant and should be produced to Doria subject to the parties' protective  
18 order. Likewise, because Doria alleges that SolarCity breached its contractual agreement  
19 to arbitrate by filing this suit [id. at 16], the requested documents are relevant and should  
20 be produced subject to the protective order. Accordingly, the Court **GRANTS**  
21 Defendant's motion as to requests numbers 8 and 12.

22 **f. Request for production number 9**

23 Request number 9 seeks "[a]ll documents as it relates to Plaintiff's contention that  
24 the financial risks discussed in the communication in question, are 'false and misleading'."  
25 (Suppl. Decl. Mack Attach. #1, 10, ECF No. 82.) SolarCity objected on the same  
26 grounds it did in response to request number 1, and stated that the request was  
27 burdensome. (Id. at 26-27; see also id. at 19.)  
28



1 Doria contends in his Motion to Compel that the request seeks evidence that  
2 SolarCity relied on when alleging that he made false and misleading statements. (Mem.  
3 P. & A. Supp. Mot. Compel 9, ECF No. 71.) Plaintiff argues in its opposition that the  
4 request is vague because there are “multiple communication at issue” in this case, and  
5 Defendant fails to identify which “communication” he is referring to. (See Opp’n 9, ECF  
6 No. 75; id. Attach. #1 Decl. Mack 5.) SolarCity also asserts that the request seeks  
7 information protected by the attorney-client privilege and the work product doctrine.  
8 (Opp’n 9, ECF No. 75.) Defendant replies that “I have challenged [Plaintiff’s] ability to  
9 produce the communications they claim to have caused them damages. They have failed  
10 to provide those communications . . . .” (Reply 20-21, ECF No. 77.) He further states  
11 that SolarCity fails to establish that the communications are protected by the work  
12 product doctrine. (Id. at 21.)

13 Federal Rule of Civil Procedure 34 requires requests for production to “describe with  
14 reasonable particularity each item or category of items to be inspected[.]” Fed. R. Civ. P.  
15 34(b)(1)(A); see also 7 James Wm. Moore, et al., Moore’s Federal Practice, § 34.11[3], at  
16 34-29 (3d ed. 2017) (“The ‘reasonable particularity’ standard is not susceptible to precise  
17 definition. The test is whether a reasonable person would know what documents or  
18 things are called for in the request.”) (footnotes omitted). Request number 9 does not  
19 describe what “communication in question” it seeks, and Defendant’s pleadings refer to  
20 multiple communications. (See Reply 20-21, ECF No. 77 (stating that Defendant seeks  
21 “communications [SolarCity] claim to have caused them damages” and that SolarCity  
22 “failed to provide those communications[.]”). The Court therefore finds that the request  
23 is vague and **DENIES** Doria’s motion to compel as to request number 9.

#### 24 **g. Request for production number 22**

25 Request number 22 seeks “[a]ny documentation supporting Plaintiff’s argument  
26 that Defendant could have existed in the state of California during the dates mentioned in  
27 ‘COMPLAINT’.” (Suppl. Decl. Mack Attach. #1, 13, ECF No. 82.) Plaintiff objected on  
28 the same grounds as it did in response to request number 1. (Id. at 40; see also id. at 19.)

1 SolarCity also stated that “documents reflecting Defendant’s San Diego residence during  
2 times relevant to the complaint are within Defendant’s possession, custody or control and  
3 are therefore equally available to Defendant.” (Id.)

4 Doria alleges in his motion that the request seeks evidence that SolarCity relied on  
5 when alleging that he “resided, or existed, in the State of California during the dates in  
6 question.” (Mem. P. & A. Supp. Mot. Compel 12, ECF No. 71.) Plaintiff responds that  
7 the requested documents are in Defendant’s possession, custody or control, and that the  
8 requested discovery is therefore not proportional to the needs of the case. (See Opp’n 10,  
9 ECF No. 75; id. Attach. #1 Decl. Mack 5.) Defendant replies that he resided in Nevada  
10 “on the dates in question” and moved to California on November 1, 2017; and that  
11 Plaintiff therefore fails to establish that the alleged misconduct took place in California.  
12 (Reply 21, ECF No. 77 (citing id. at 72-76).)

13 “A court may refuse to order production of documents of public record that are  
14 equally accessible to all parties.” 7 James Wm. Moore, et al., Moore’s Federal Practice,  
15 § 34.12[5][b], at 34-53 (3d ed. 2017) (footnote omitted). “However, production from the  
16 adverse party may be ordered when it would be excessively burdensome . . . for the  
17 requesting party to obtain the documents from the public source rather than from the  
18 opposing party.” Id. (footnote omitted). SolarCity states that Doria seeks documents in  
19 his possession, custody, or control that are equally available to him. (See Opp’n 8, ECF  
20 No. 75; Mack Decl. at 5.) Although this is true, items in Doria’s possession will not  
21 establish that SolarCity was aware of their contents. Defendant is entitled to discover the  
22 bases for Plaintiff’s statements. Accordingly, the Motion to Compel production of  
23 documents in response to request 22 is **GRANTED**.

#### 24 **h. Request for production number 24**

25 Request for production number 24 seeks the following:

26 All documents referencing changes to security protocol for Plaintiff’s  
27 internal databases. This should include but is not limited to the date and  
28 time any new security measures went into effect for internal databases  
“SalesForce”, and “SolarWorks”, and how the changes affected Plaintiff’s

1 employees' ability to obtain access to any information concealed, as a result  
2 of the change. Plaintiff should include without limitation, all non-  
3 privilege[d] documents, referencing Plaintiff's motive behind the change.  
4 This information should be easily searchable.

5 (Suppl. Decl. Mack Attach #1, 14, ECF No. 82.) Plaintiff objected on the same  
6 grounds as it did in repose to request number 1, and stated that the request was  
7 burdensome. (Id. at 42; see also id. at 19.)

8 Doria contends in the Motion to Compel that the request seeks evidence supporting  
9 SolarCity's contention that it took reasonable steps to secure the e-mail addresses at issue  
10 in the internal "SolarWorks" database. (Mem. P. & A. Supp. Mot. Compel 13, ECF No.  
11 71.) Plaintiff objects that the request seeks confidential and proprietary information  
12 about its internal databases, and that the request was premature at the time it was made,  
13 because it related to Defendant's "then-nonexistent counterclaim." (Opp'n 8, ECF No.  
14 75.) Doria replies that the requested information is relevant to his defenses. (See Reply  
15 18-19, ECF No. 77.)

16 As an initial matter, Defendant's request expressly seeks nonprivileged documents,  
17 and the Court overrules Plaintiff's objection based on privilege. (See Suppl. Decl. Mack  
18 Attach. #1, 14, ECF No. 82.) Further, Doria contends in his Answer that SolarCity did  
19 not take "necessary steps to protect the information from the database known as  
20 SolarWorks or to properly inform employees as to the detailed definition of a Trade  
21 Secret, inside the signed Employment Agreement." (Am. Answer & Countercl. 6, ECF  
22 No. 67.) The Court therefore finds that the requested information is relevant and not  
23 premature. "[T]rade secrets have widely been held to be discoverable upon appropriate  
24 findings and with an appropriate protective order[.]" Nat'l Acad. of Recording Arts &  
25 Sciences, Inc. v. On Point Events, LP, 256 F.R.D. 678, 681 (C.D. Cal. 2009) (alterations  
26 in original) (quoting MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 120 (4th Cir.),  
27 cert. denied, 513 U.S. 1000 (1994)); see also BrightEdge Tech., Inc. v. Searchmetrics  
28 GmbH., Case No. 14-cv-01009-HSG (MEJ), 2017 WL 5171227, at \*2 (N.D. Cal. Nov. 8,

1 2017) (ordering production of the “SugarCRM database” and the underlying documents  
2 referenced in the database subject to the parties’ protective order). Accordingly, the  
3 Court **GRANTS** Defendant’s motion as to request number 24. Plaintiff is ordered to  
4 produce documents responsive to the request subject to a protective order.

5 **i. Request for production number 29**

6 Request number 29 seeks “[a]ll documents containing the word ‘grandfather’ or  
7 ‘grand’ or ‘grand-father’ or ‘grandfathering’ or ‘father’, or any variation thereof, making  
8 reference to this term” supporting “Plaintiff’s denial, that Plaintiff intentionally instructed  
9 their agents and representatives to provide information Plaintiff had good cause to know  
10 was false, and would cause imminent financial harm to those clients who had relied on  
11 this false information, regarding ‘grandfathering’, in the State of Nevada.” (Suppl. Decl.  
12 Mack Attach. #1, 15, ECF No. 82.) SolarCity objected on the same grounds as it did in  
13 response to request number 1, and stated that the request was unduly burdensome. (*Id.* at  
14 47-48; see also id. at 19.)

15 Doria argues in his motion that he requests information regarding SolarCity’s  
16 utilization of the term “grandfathering” by their Energy Specialists to defraud SolarCity’s  
17 employees and investors. (See Mem. P. & A. Supp. Mot. Compel 14, ECF No. 71.)  
18 Plaintiff responds that the request seeks information supporting Defendant’s counterclaim  
19 that was not filed at the time of Plaintiff’s responses, and that Defendant has no standing  
20 to assert his counterclaim. (Opp’n Attach. #1 Decl. Mack 6, ECF No. 75.)

21 Doria’s Counterclaim contains allegations that SolarCity defrauded its clients by  
22 “causing them to believe that SolarCity net-metering agreements cannot change, and that  
23 despite future legislative changes, the terms of their agreement are such that their  
24 financial position regarding rates and compensation cannot be changed.” (Am. Answer  
25 & Countercl. 12, ECF No. 67.) Accordingly, the requested information is relevant.  
26 Further, Plaintiff does not provide any evidence establishing undue burden. SolarCity, as  
27 the party opposing disclosure, has the burden to show that discovery should not be  
28 allowed. Oakes, 179 F.R.D. at 283 (“The party who resists discovery has the burden to

1 show that discovery should not be allowed, and has the burden of clarifying, explaining,  
2 and supporting its objections.”). Plaintiff has not carried its burden of explaining and  
3 supporting its objections to Defendant’s request. See id. The Court therefore **GRANTS**  
4 Doria’s motion to compel, and orders SolarCity to produce all nonprivileged documents  
5 responsive to request number 29.

6 **j. Conclusion**

7 For the reasons above, the Court **GRANTS in part** and **DENIES in part**  
8 Defendant’s Motion to Compel [ECF Nos. 69, 71]. All documents ordered produced are  
9 to be provided to Doria by **January 8, 2018**, and all further responses that are to be made  
10 under oath are due by **January 8, 2018**. Documents are to be produced pursuant to the  
11 protective order limiting use and dissemination of the items.

12 **D. Plaintiff’s and Defendant’s Respective Requests for Sanctions**

13 SolarCity seeks \$5,000 in sanctions against Doria as reimbursement for attorneys’  
14 fees and costs incurred in opposing the Motion to Compel. (Opp’n 4-5, 11, ECF No. 75.)  
15 Plaintiff alleges that Defendant’s motion was unjustified because it agreed to produce,  
16 and did produce, documents responsive to twenty of the discovery requests at issue, and  
17 properly objected to the remaining ten requests. (Id. at 2, 10-11 (citing Fed. R. Civ. P.  
18 37(a)(5)(B).) SolarCity further maintains that there are no circumstances rendering the  
19 award of sanctions unjust in this case. (Id. at 11.)

20 Defendant asks the Court to sanction Plaintiff \$12.55 for expenses he incurred in  
21 connection with bringing the Motion to Compel.<sup>4</sup> (Mot. Compel 2, ECF No. 69; Mem. P.  
22 & A. Supp. Mot. Compel 2, 15-16, ECF No. 71.) Doria asserts that the requested  
23 sanctions are reasonable and warranted in light of SolarCity’s refusal to meet and confer  
24 in good faith, and to supplement its production. (See id. at 2; see also Reply 19, ECF No.

---

25  
26  
27 <sup>4</sup> He calculates the requested amount of sanctions as follows: \$ 2.00 for downtown courthouse parking,  
28 \$ 1.00 for vehicle depreciation, \$ 0.70 for fuel, \$ 2.00 for printer toner and wear and tear, \$ 1.25 for  
paper, \$ 4.00 for certified mail, \$ 1.50 for USPS envelope, and \$ 0.10 for paper clips. (Mot. Compel 2,  
ECF No. 69.)

77.) Defendant also argues that he complied with his discovery obligations and properly brought the Motion to Compel, and that Plaintiff's request for sanctions should therefore be denied. (Id. at 23-24.)

Rule 37(a)(5)(C) of the Federal Rules of Civil Procedure provides that "[i]f the motion is granted in part and denied in part, the court . . . may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion." Fed. R. Civ. P. 37(a)(5). "By the very nature of its language, sanctions imposed under Rule 37 must be left to the sound discretion of the trial judge." O'Connell v. Fernandez-Pol, 542 Fed. App'x. 546, 547-48 (9th Cir. 2013) (citation omitted). "[T]he burden of showing substantial justification and special circumstances is on the party being sanctioned." Cruz v. Aurora Loan Servs., LLC, Case No. 3:15-cv-00585-LB, 2016 WL 2621795, at \*5 (N.D. Cal. May 9, 2016) (quoting Hyde & Drath v. Baker, 24 F.3d 1162, 1171 (9th Cir. 1994)).

In this case, the Court grants in part and denies in part Defendant's Motion to Compel. In light of the filing of Doria's Counterclaim and the parties' inability to stipulate to a protective order, the Court finds that the parties' positions were substantially justified and declines to sanction either party. See Franklin v. Smalls, Civil No. 09cv1067 MMA(RBB), 2012 WL 5077630, at \*32 (S.D. Cal. Oct. 18, 2012) ("A request for discovery is 'substantially justified' under Rule 37 if reasonable people could differ on the matter in dispute.") (citing Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647, 649 (9th Cir. 1982); United States EEOC v. Caesars Entm't, Inc., 237 F.R.D. 428, 435 (D. Nev. 2006)). Accordingly, the Court **DENIES** SolarCity's and Doria's respective requests for sanctions.

///

///

///

///

///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**V. CONCLUSION**

For the reasons set forth above, the Court enters the following **ORDERS**:

1. Plaintiff's request to enter a protective order [ECF No. 75], as modified by the Court, is **GRANTED**. Simultaneously with the filing of this order, the Court will enter a protective order governing the parties' disclosure and use of information obtained through discovery;

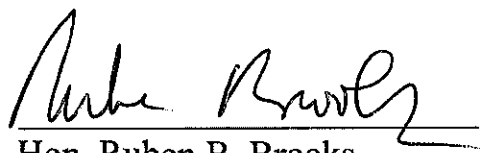
2. SolarCity's request to stay discovery into Doria's Counterclaim [ECF No. 75] is **DENIED**;

3. Defendant's Motion to Compel [ECF Nos. 69, 71] is **GRANTED in part** and **DENIED in part**. Plaintiff is to produce items requested in response to requests for production numbers 2-6, 8, 11-14, 16-30 no later than **January 8, 2018**. In response to request for production number 1, SolarCity is **ORDERED** to either produce the requested video or provide a sworn declaration describing its efforts to locate the video no later than **January 8, 2018**. Similarly, with respect to request numbers 7, 10, 15, and 23, Plaintiff should either produce the requested e-mails, text messages, and documents, or state under oath that there are no responsive documents and describe the efforts it undertook to locate them by **January 8, 2018**. Defendant's motion to compel is **DENIED** as to request number 9; and

4. SolarCity's and Doria's respective requests for sanctions [ECF Nos. 71, 75] are **DENIED**.

**IT IS SO ORDERED.**

Dated: December 21, 2017

  
Hon. Ruben B. Brooks  
United States Magistrate Judge

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## **EXHIBIT 1**



1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 SOLARCITY CORPORATION,

12 Plaintiff,

13 v.

14 DANIEL DORIA,

15 Defendant.  
16

Case No.: 16cv3085-JAH (RBB)

**PROTECTIVE ORDER**

17  
18 AND RELATED COUNTERCLAIMS  
19  
20  
21

22 The Court recognizes that at least some of the documents and information  
23 (“materials”) being sought through discovery in the above-captioned action are, for  
24 competitive and other reasons, normally kept confidential by the parties. The parties in  
25 this action are to comply with the terms of this Protective Order (“Order”).

26 The materials to be exchanged throughout the course of the litigation between the  
27 parties may contain trade secret or other confidential information, research, technical,  
28 cost, price, marketing or other commercial information, as is contemplated by Federal

1 Rule of Civil Procedure 26(c)(7). The purpose of this Order is to protect the  
2 confidentiality of such materials as much as practical during the litigation.

3 THEREFORE:

4 **DEFINITIONS**

5 1. The term "Confidential Information" will mean and include  
6 information contained or disclosed in any materials, including documents, portions of  
7 documents, answers to interrogatories, responses to requests for admissions, trial  
8 testimony, deposition testimony, and transcripts of trial testimony and depositions,  
9 including data, summaries, and compilations derived therefrom that is deemed to be  
10 Confidential Information by any party to which it belongs.

11 2. The term "Highly Confidential" will mean and include any  
12 information which belongs to a Designating Party who believes in good faith that the  
13 Disclosure of such information to a non-Party would create a substantial risk of serious  
14 financial or other injury that cannot be avoided by less restrictive means.

15 3. "Highly Confidential Materials" will mean and include any  
16 Documents, Testimony, or Information, as defined below, designated as "Highly  
17 Confidential" pursuant to the provisions of this Protective Order.

18 4. The term "materials" will include, but is not limited to: documents;  
19 correspondence; memoranda; bulletins; blueprints; specifications; customer lists or other  
20 material that identify customers or potential customers; price lists or schedules or other  
21 matter identifying pricing; minutes; telegrams; letters; statements; cancelled checks;  
22 contracts; invoices; drafts; books of account; worksheets; notes of conversations; desk  
23 diaries; appointment books; expense accounts; recordings; photographs; motion pictures;  
24 compilations from which information can be obtained and translated into reasonably  
25 usable form through detection devices; sketches; drawings; notes (including laboratory  
26 notebooks and records); reports; instructions; disclosures; other writings; models and  
27 prototypes and other physical objects.  
28

1           5.     The term “counsel” will mean outside counsel of record, and other  
2 attorneys, paralegals, secretaries, and other support staff employed in the law firms  
3 identified below: Arena Hoffman, LLP. Counsel also includes in-house attorneys for  
4 Plaintiff SolarCity Corporation.

5           6.     The term “Doria” will mean Defendant Daniel Doria.

6                                   **GENERAL RULES**

7           7.     Each party to this litigation that produces or discloses any materials,  
8 answers to interrogatories, responses to requests for admission, trial testimony, deposition  
9 testimony, and transcripts of trial testimony and depositions, or information that the  
10 producing party believes should be subject to this Protective Order may designate the  
11 same as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL.”

12               a.     Designation as “CONFIDENTIAL”: Any party may designate  
13 information as “CONFIDENTIAL” only if, in the good faith belief of such party and its  
14 counsel, the unrestricted disclosure of such information could be potentially prejudicial to  
15 the business or operations of such party.

16               b.     Designation as “HIGHLY CONFIDENTIAL”: Any party may  
17 designate information as “HIGHLY CONFIDENTIAL” only if, in the good faith belief of  
18 such party and its counsel, the information is among that considered to be most sensitive  
19 by the party, including but not limited to trade secret or other confidential research,  
20 development, financial or other commercial information.

21           8.     In the event the producing party elects to produce materials for  
22 inspection, no marking need be made by the producing party in advance of the initial  
23 inspection. For purposes of the initial inspection, all materials produced will be  
24 considered as “CONFIDENTIAL” and must be treated as such pursuant to the terms of  
25 this Order. Thereafter, upon selection of specified materials for copying by the  
26 inspecting party, the producing party must, within a reasonable time prior to producing  
27 those materials to the inspecting party, mark the copies of those materials that contain  
28 Confidential Information with the appropriate confidentiality marking.

1           9.     Whenever a deposition taken on behalf of any party involves a  
2 disclosure of Confidential Information of any party:

3               a.     the deposition or portions of the deposition must be designated  
4 as containing Confidential Information subject to the provisions of this Order; such  
5 designation must be made on the record whenever possible, but a party may designate  
6 portions of depositions as containing Confidential Information after transcription of the  
7 proceedings; a party will have until fourteen (14) days after receipt of the deposition  
8 transcript to inform the other party or parties to the action of the portions of the transcript  
9 to be designated "CONFIDENTIAL" or HIGHLY CONFIDENTIAL".

10              b.     the disclosing party will have the right to exclude from  
11 attendance at the deposition, during such time as the Confidential Information is to be  
12 disclosed, any person other than the deponent, counsel (including their staff and  
13 associates), the court reporter, and the person(s) specified in Paragraph 13 below; and

14              c.     the originals of the deposition transcripts and all copies of the  
15 deposition must bear the legend "CONFIDENTIAL" or HIGHLY CONFIDENTIAL", as  
16 appropriate, and the original or any copy ultimately presented to a court for filing must  
17 not be filed unless it can be accomplished under seal, identified as being subject to this  
18 Order, and protected from being opened except by order of this Court.

19           10.    All Confidential Information designated as "CONFIDENTIAL" or  
20 HIGHLY CONFIDENTIAL" must not be disclosed by the receiving party to anyone  
21 other than those persons designated within this order and must be handled in the manner  
22 set forth below and, in any event, must not be used for any purpose other than in  
23 connection with this litigation, unless and until such designation is removed either by  
24 agreement of the parties, or by order of the Court.

25           11.    If the Court determines that the information does not qualify for the  
26 HIGHLY CONFIDENTIAL designation identified in Paragraph 7(b) above, the  
27 information shall be designated "CONFIDENTIAL" and disclosed to the non-designating  
28 party.

1                   12. The right of any independent expert to receive any  
2 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” Information will be subject to the  
3 advance approval of such expert by the producing party or by permission of the Court.  
4 The party seeking approval of an independent expert must provide the producing party  
5 with the name and curriculum vitae of the proposed independent expert, and an executed  
6 copy of the form attached hereto as Exhibit A, in advance of providing any Confidential  
7 Information of the producing party to the expert. Any objection by the producing party to  
8 an independent expert receiving Confidential Information must be made in writing within  
9 fourteen (14) days following receipt of the identification of the proposed expert.  
10 Confidential Information may be disclosed to an independent expert if the fourteen (14)  
11 day period has passed and no objection has been made. The approval of independent  
12 experts must not be unreasonably withheld.

13                   13. Information designated “CONFIDENTIAL” must be viewed only by  
14 counsel and (as defined in paragraph 5) of the receiving party, by Doria, by independent  
15 experts (pursuant to the terms of Paragraph 12), and by the additional individuals listed  
16 below, provided each such individual has read this Order in advance of disclosure and  
17 has agreed in writing to be bound by its terms:

- 18                   i. Executives who are required to participate in policy  
19                    decisions with reference to this action;
- 20                   ii. Technical personnel of the parties with whom Counsel  
21                    for the parties find it necessary to consult, in the  
22                    discretion of such counsel, in preparation for trial of this  
23                    action; and
- 24                   iii. Stenographic and clerical employees associated with the  
25                    individuals identified above.

26                   14. With respect to material designated “CONFIDENTIAL” or “HIGHLY  
27 CONFIDENTIAL,” any person indicated on the face of the document to be its originator,  
28 author or a recipient of a copy of the document, may be shown the same.

1           15. All information which has been designated as "CONFIDENTIAL" or  
2 "HIGHLY CONFIDENTIAL" by the producing or disclosing party, and any and all  
3 reproductions of that information, must be retained in the custody of Doria or the counsel  
4 for the receiving party identified in Paragraphs 5 and 6, except that independent experts  
5 authorized to view such information under the terms of this Order may retain custody of  
6 copies such as are necessary for their participation in this litigation.

7           16. Before any materials produced in discovery, answers to  
8 interrogatories, responses to requests for admissions, deposition transcripts, or other  
9 documents which are designated as Confidential Information are filed with the Court for  
10 any purpose, the party seeking to file such material must seek permission of the Court to  
11 file the material under seal. No items will be electronically filed under seal without a  
12 prior application to, and order from, the judge presiding over the hearing or trial. Only  
13 when the judge presiding over the hearing or trial permits filing an item or items under  
14 seal may confidential material be filed with the Court under seal.

15           Whenever the Court grants a party permission to file an item under seal, a  
16 duplicate disclosing all nonconfidential information shall be filed and made part of the  
17 public record. The item may be redacted to eliminate confidential material from the  
18 public document. The public document shall be titled to show that it corresponds to an  
19 item filed under seal, e.g., 'Redacted Copy of Sealed Declaration of John Smith in  
20 Support of Motion for Summary Judgment.' The public redacted documents shall be  
21 filed within twenty-four hours of the Court order authorizing the filing of a document  
22 under seal.

23           17. At any stage of these proceedings, any party may object to a  
24 designation of the materials as Confidential Information. The party objecting to  
25 confidentiality must notify, in writing, counsel for the designating party of the objected-to  
26 materials and the grounds for the objection. If the dispute is not resolved consensually  
27 between the parties within seven (7) days of receipt of such a notice of objections, the  
28 objecting party may move the Court for a ruling on the objection. The materials at issue

1 must be treated as Confidential Information, as designated by the designating party, until  
2 the Court has ruled on the objection or the matter has been otherwise resolved.

3           18. All Confidential Information must be held in confidence by those  
4 inspecting or receiving it, and must be used only for purposes of this action. Counsel for  
5 each party, and each person receiving Confidential Information must take reasonable  
6 precautions to prevent the unauthorized or inadvertent disclosure of such information. If  
7 Confidential Information is disclosed to any person other than a person authorized by this  
8 Order, the party responsible for the unauthorized disclosure must immediately bring all  
9 pertinent facts relating to the unauthorized disclosure to the attention of the other parties  
10 and, without prejudice to any rights and remedies of the other parties, make every effort  
11 to prevent further disclosure by the party and by the person(s) receiving the unauthorized  
12 disclosure.

13           19. No party will be responsible to another party for disclosure of  
14 Confidential Information under this Order if the information in question is not labeled or  
15 otherwise identified as such in accordance with this Order.

16           20. If a party, through inadvertence, produces any Confidential  
17 Information without labeling or marking or otherwise designating it as such in  
18 accordance with this Order, the designating party may give written notice to the receiving  
19 party that the document or thing produced is deemed Confidential Information, and that  
20 the document or thing produced should be treated as such in accordance with that  
21 designation under this Order. The receiving party must treat the materials as confidential,  
22 once the designating party so notifies the receiving party. If the receiving party has  
23 disclosed the materials before receiving the designation, the receiving party must notify  
24 the designating party in writing of each such disclosure. Counsel for the parties will  
25 agree on a mutually acceptable manner of labeling or marking the inadvertently produced  
26 materials as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" - SUBJECT TO  
27 PROTECTIVE ORDER.  
28

1           21. Nothing within this order will prejudice the right of any party to  
2 object to the production of any discovery material on the grounds that the material is  
3 protected as privileged or as attorney work product.

4           22. Nothing in this Order will bar counsel from rendering advice to their  
5 clients with respect to this litigation and, in the course thereof, relying upon any  
6 information designated as Highly Confidential Information, provided that the contents of  
7 the information must not be disclosed.

8           23. This Order will be without prejudice to the right of any party to  
9 oppose production of any information for lack of relevance or any other ground other  
10 than the mere presence of Confidential Information. The existence of this Order must not  
11 be used by either party as a basis for discovery that is otherwise improper under the  
12 Federal Rules of Civil Procedure.

13           24. Nothing within this order will be construed to prevent disclosure of  
14 Confidential Information if such disclosure is required by law or by order of the Court.

15           25. Upon final termination of this action, including any and all appeals,  
16 counsel for each party must, upon request of the producing party, return all Confidential  
17 Information to the party that produced the information, including any copies, excerpts,  
18 and summaries of that information, or must destroy same at the option of the receiving  
19 party, and must purge all such information from all machine-readable media on which it  
20 resides. Notwithstanding the foregoing, counsel for each party may retain all pleadings,  
21 briefs, memoranda, motions, and other documents filed with the Court that refer to or  
22 incorporate Confidential Information, and will continue to be bound by this Order with  
23 respect to all such retained information. Further, attorney work product materials that  
24 contain Confidential Information need not be destroyed, but, if they are not destroyed, the  
25 person in possession of the attorney work product will continue to be bound by this Order  
26 with respect to all such retained information.

27           26. The restrictions and obligations set forth within this order will not  
28 apply to any information that: (a) the parties agree should not be designated Confidential



Information; (b) the parties agree, or the Court rules, is already public knowledge; (c) the parties agree, or the Court rules, has become public knowledge other than as a result of disclosure by the receiving party, its employees, or its agents in violation of this Order; or (d) has come or will come into the receiving party's legitimate knowledge independently of the production by the designating party. Prior knowledge must be established by pre-production documentation.

27. The restrictions and obligations within this order will not be deemed to prohibit discussions of any Confidential Information with anyone if that person already has or obtains legitimate possession of that information.

28. Transmission by email is acceptable for all notification purposes within this order.

29. This Order may be modified by agreement of the parties, subject to approval by the Court.

30. The Court may modify the terms and conditions of this Order for good cause, or in the interest of justice, or on its own order at any time in these proceedings. The parties prefer that the Court provide them with notice of the Court's intent to modify the Order and the content of those modifications, prior to entry of such an order.

31. This Court shall retain jurisdiction over any and all disputes arising under this Protective Order for a period of one (1) year after the conclusion of the case.

**IT IS SO ORDERED.**

Dated: December 21, 2017

Hon. Ruben B. Brooks  
United States Magistrate Judge

**EXHIBIT A**

**AGREEMENT TO BE BOUND**

I, \_\_\_\_\_ [print or type full name], declare and say that:

1. I am employed as \_\_\_\_\_ by \_\_\_\_\_

2. I have read the Protective Order entered in the case of SolarCity Corporation v. Daniel Doria, Case No. 3:16cv3085-JAH(RBB), and have received a copy of the Protective Order.

3. I promise that I will use any and all "Confidential" or "Highly Confidential" information, as defined in the Protective Order, given to me only in a manner authorized by the Protective Order, and only to assist counsel in the litigation of this matter.

4. I promise that I will not disclose or discuss such "Confidential" or "Highly Confidential" information with anyone other than the persons described in Paragraphs 5, 6, 11 and 12, 13 of the Protective Order.

5. I acknowledge that, by signing this agreement, I am subjecting myself to the jurisdiction of the United States District Court for the Southern District of California with respect to enforcement of the Protective Order.

6. I understand that any disclosure or use of "Confidential" or "Highly Confidential" information in any manner contrary to the provisions of the Protective Order may subject me to sanctions for contempt of court.

I declare under penalty of perjury that the foregoing is true and correct.

Date: \_\_\_\_\_

Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_