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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SATMODO, LLC,
12 Plaintiff,
13 v.
14 WHENEVER COMMUNICATIONS,
15 LLC, et al.,
16 Defendants.
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Case No.: 3:17-cv-192-AJB-NLS

**ORDER ON JOINT MOTION FOR
DETERMINATION OF DISCOVERY
DISPUTE NO. 1**

[ECF NO. 51]

18 Before the Court is the parties' Joint Motion for Determination of Discovery Dispute
19 No. 1. ECF Nos. 51-52. Plaintiff later submitted a supplemental declaration, to which
20 Defendants object. ECF Nos. 53, 56. As discussed below, the motion to compel is
21 **GRANTED IN PART** and **DENIED IN PART**.

22 **I. INTRODUCTION**

23 This case involves two direct competitors in the business of selling satellite phones.
24 Plaintiff's complaint alleges the Defendants engaged in a click-fraud¹ scheme to eliminate
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27 ¹ "Click fraud" generally refers to the practice of clicking on an Internet advertisement for the sole
28 purpose of forcing the advertiser to pay for the click. Because advertisers only pay when someone
clicks through to their website, artificial clicks can be very costly to advertisers. Click fraud includes
the use of illicit practices such as spyware, browser hijacking software, and other 'bots' or 'non-human

1 Plaintiff's paid advertising from appearing in response to internet searches. *See* ECF No.
2 16 (First Amended Complaint). Following extensive motion practice regarding the
3 pleadings, early discovery, and subpoenas (*see* ECF Nos. 5, 17, 26, 38, 40), the parties are
4 now fully engaged in discovery.

5 **II. LEGAL STANDARD**

6 Federal Rule of Civil Procedure 26 permits discovery of “any nonprivileged matter
7 that is relevant to any party’s claim or defense and proportional to the needs of the case,
8 considering the importance of the issues at stake in the action, the amount in controversy,
9 the parties’ relative access to relevant information, the parties’ resources, the importance
10 of the discovery in resolving the issues, and whether the burden or expense of the
11 proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). Information
12 need not be admissible to be discoverable. *Id.* Once the propounding party establishes
13 that the request seeks relevant information, “[t]he party who resists discovery has the
14 burden to show discovery should not be allowed, and has the burden of clarifying,
15 explaining, and supporting its objections.” *Superior Commc’ns v. Earhugger, Inc.*, 257
16 F.R.D. 215, 217 (C.D. Cal. 2009); *see Blankenship v. Hearst Corp.*, 519 F.2d 418, 429
17 (9th Cir. 1975) (requiring defendants “to carry heavy burden of showing why discovery
18 was denied”).

19 “The 2015 amendments to Rule 26(b)(1) emphasize the need to impose ‘reasonable
20 limits on discovery through increased reliance on the common-sense concept of
21 proportionality.’” *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 603 (D. Nev. 2016)
22 (internal citation omitted). The fundamental principle of amended Rule 26(b)(1) is “that
23 lawyers must size and shape their discovery requests to the requisites of a case.” *Id.*
24 Both discovery and Rule 26 are intended to provide parties with “efficient access to what

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27 traffic.’ Such practices result in lower sales conversion rates for advertisers because the leads are false—
28 they do not come from actual buyers interested in purchasing the advertised products.” *FindWhat Inv’r
Group v. FindWhat.com*, 658 F.3d 1282, 1291–92 (11th Cir. 2011).

1 is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery.”

2 *Id.*

3 The Court has broad discretion in determining relevancy for discovery purposes.
4 *Survivor Media Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005); *see U.S.*
5 *Fidelity and Guar. Co. v. Lee Investments L.L.C.*, 641 F.3d 1126, 1136 (9th Cir. 2011)
6 (“District courts have wide latitude in controlling discovery, and [their] rulings will not be
7 overturned in the absence of a clear abuse of discretion.” (internal quotation and citations
8 omitted)). To the extent that the discovery sought is “unreasonably cumulative or
9 duplicative, or is obtainable from some other source that is more convenient, less
10 burdensome, or less expensive,” the court is directed to limit the scope of the request. Fed.
11 R. Civ. P. 26(b)(2). Limits should also be imposed where the burden or expense outweighs
12 the likely benefits. *Id.* How and when to so limit discovery, or to “issue an order to protect
13 a party or person from annoyance, embarrassment, oppression, or undue burden or
14 expense,” remains in the court's discretion. Fed. R. Civ. P. 26(c)(1).

15 **III. DISCUSSION**

16 Plaintiff propounded three forms of discovery: special interrogatories, demand for
17 inspection, and requests for production of documents. ECF No. 51. Plaintiff moves to
18 compel further responses to special interrogatories and requests for production, as well as
19 inspection and imaging of Defendants’ computing devices (computers, phones, tablets,
20 etc.) for forensic analysis. ECF No. 51-1 at 1-2. Defendant argues that the requests are
21 overbroad and outside the proper scope of discovery, and instead of inspection of the
22 devices, proposes an alternative “live test.” *Id.* at 19.

23 **A. Special Interrogatories**

24 Plaintiff issued special interrogatories to Defendants seeking to identify all the
25 “computing devices” used by Defendants, their employees or independent contractors, or
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1 otherwise used to click on one of Plaintiff’s ads (Nos. 1-4)², the operating system on each
2 device (No. 5),³ and a list of all present and former employees and independent contractors
3 (Nos. 8-9).⁴ ECF No. 51-1 at 3. Defendants initially refused to respond and instead stated
4 they would conduct their own investigation. *Id.* at 4. Defendants later supplemented their
5 responses to direct the Plaintiff to a list that purportedly “represented an inventory of the
6 company IP addresses at each location ... and the IP addresses for employees who used
7 their own devices for business purposes ... compiled by Greg Winter, an IT professional.”
8 (hereafter, the “Winter List”) ECF No. 51 at 7.

11 ² Special Interrogatories 1-3 state:

12 Identify each COMPUTING DEVICE

13 [1] within YOUR possession, custody or control which was in use for any purpose related to
14 YOUR operations at any time from January 1, 2016 to the present, whether still in use or not,
15 [2] owned, possessed, and/or used by any of YOUR employees, agents, independent contractors,
16 and agents at any time from January 1, 2016 to the present, whether still in use or not,
17 [3] within YOUR possession, custody or control, whether still in use or not, that was used to
18 access, review, research and/or click on SATMODO’s website or paid advertisements,
19 including for each device:

- 20 a. A description of the device;
- 21 b. The model and serial number;
- 22 c. The time period between January 1, 2016 to the present that the device was in use;
- 23 d. All users for the period referenced above and
- 24 e. Locations where the equipment was located during the same period;
- 25 f. If the device is no longer in use, the last person to have custody.

26 Special Interrogatory 4 states: If you are aware of or contend that any COMPUTING DEVICE(s) not
27 within YOUR possession, custody or control were used to access, review, research and/or click on
28 SATMODO’s website or paid advertisements from the time period between January 1, 2016 to the
present, identify the each [sic] device, including... [a.-f. above, and adding as subpart (b): “Who YOU
believe or contend owned, operated, or used the device”].

3 Special Interrogatory 5 states: “List all Operating Systems (including but not limited to Unix,
Windows, DOS, Linux, Mac OS X, Android, iOS, and PDA OPERATING SYSTEMS) installed on any
computer or mobile device used by YOU from the time period between January 1, 2016 to the present,
the specific equipment the Operating System was installed on and the period during which it was
installed on the specific equipment.”

⁴ Defendants’ portion of the Joint Statement indicates that a list of current and former employees and
independent contractors was provided. ECF No. 51 at 12-13. The motion to compel further response to
Special Interrogatories 8 and 9 is therefore DENIED AS MOOT.

1 Plaintiff argues that the responses and supplemental responses fail to provide the
2 information sought and are not verified. ECF No. 51-1 at 6. Plaintiff also presents some
3 concern that Defendants’ responses provided thus far are unverified; Defendants have not
4 responded to or otherwise confirmed compliance with an evidence preservation letter sent
5 in September 2016, and deposition testimony has revealed that some company
6 computers/phones have been replaced or otherwise altered, or that there are company
7 phones or computers that do not appear on the Winter List, rendering verified responses to
8 the interrogatories of particular importance. ECF No. 51-1 at 7, 9; ECF No. 53 at 2-3; Ex.
9 1.⁵

10 Defendants do not appear to genuinely dispute that the responses do not provide all
11 the information requested, nor do Defendants argue the requests are irrelevant. Defendants
12 argue the requests are disproportionate to the “narrow scope of discovery.” ECF No. 51 at
13 4, 51-1 at 17-18. Defendants also appear to believe that Plaintiff’s requests are seeking to
14 find the “Device ID” assigned by ClickCease⁶ and explain that it will not be on or in the
15 device. *Id.*

16 The Court agrees that the ClickCease assigned “Device ID” will not be revealed as
17 a result of the device inspection as currently proposed by Plaintiff, but also does not believe
18 that was the purpose of the Plaintiff’s interrogatories. Plaintiff’s special interrogatories
19 appear designed to identify the universe of devices at issue and by doing so, obtain a list
20 of devices to inspect—one that can presumably be used to confirm the device identified by
21 model and serial number is the one that is subsequently inspected. *See* ECF No. 51-1 at 3.
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24 ⁵ Defendants’ objections to the Supplemental Declaration of Scott J. Ivy in Support of the Motion for
25 Determination of Discovery Dispute No. 1 are OVERRULED.

26 ⁶ ClickCease is a computer program that “tracks each and every click on Satmodo’s paid advertisements
27 and is able to not only obtain and record the Internet Protocol (“IP”) addresses, operating system, and
28 browsers of the devices used to click on the ads, but is also capable of determining whether those
clicking on the ads are engaging in fraudulent clicking and/or using bots or non-human means to
continuously click on the ads.” ECF No. 51-1 at 3.

1 Defendants rely on the guidelines provided by Judge Battaglia, which state that the
2 “scope of discovery is narrow.” Judge Battaglia’s guidelines outline several factors to
3 evaluate whether discovery is proportionate to the needs of the case: (1) the needs of the
4 case; (2) the importance of the issues at stake in the litigation; (3) the parties relative access
5 to relevant information; (4) the parties resources; (5) the importance of the discovery in
6 resolving the issues; and (6) whether the burden or expense of the proposed discovery
7 outweighs the likely benefit. *Disclosure and Discovery Under the Federal Rules of Civil*
8 *Procedure*, Anthony J. Battaglia (Jan. 2016), p. 43. These factors largely match the factors
9 of Rule 26 set forth above. Fed. R. Civ. P. 26(b)(1).

10 In looking at the factors relevant to discovery as outlined by Judge Battaglia and
11 Rule 26, this Court finds they weigh in favor of discovery. Particularly pertinent here:
12 Defendants have sole and exclusive access to their devices and the burden associated with
13 obtaining this information is minimal, this information is readily available for most devices
14 within “Settings.”

15 The Plaintiff’s interrogatories are properly calculated to obtain relevant information
16 proportional to the needs of the case, and the concerns regarding the completeness and
17 accuracy of the Winter List provided by Defendants to date have merit. *See United Factory*
18 *Furniture Corp. v. Alterwitz*, 2:12-CV-00059-KJD-VC, 2012 WL 1155741, at *3 (D. Nev.
19 Apr. 6, 2012) (“Litigants owe an ‘uncompromising duty to preserve’ what they know or
20 reasonably should know will be relevant evidence in a pending lawsuit even though no
21 formal discovery requests have been made and no order to preserve evidence has been
22 entered.” (citations omitted)). Plaintiff’s motion to compel is **GRANTED**. Defendants
23 must provide a verified response to Interrogatories 1-5 by no later than **August 10, 2018**.

24 **B. Demand for Inspection**

25 This dispute largely centers on the Plaintiff’s request for inspection of the
26 Defendants’ computers and other electronic devices. Plaintiff argues that an inspection is
27 the only way for Plaintiff to “determine what other IP addresses or proxy servers may have
28 been used by each person’s device during the relevant time period and/or if the devices

1 have been modified, altered or ‘wiped clean’ prior to determining the currently used IP
2 address.” ECF No. 51-1 at 9.

3 Defendants argue that the requests for inspection are overbroad and intrusive in that
4 they seek to copy the “entire contents of the computers of Defendants and their employees.”
5 *Id.* at 17. Defendants propose an alternative “live test” where Defendants will use their
6 devices to click on a landing page set up for the ClickCease software to identify the device
7 in question in order to see if the Defendants’ devices match the device IDs assigned to
8 offending click-fraud participants. *Id.* at 18-19; ECF No. 51-6 at 4-5. Defendants also
9 point to their own investigation based on a list of allegedly fraudulent clicks provided by
10 Plaintiff, and state that investigation by their expert, Mr. Peter Kent, working off the IP
11 addresses compiled in the Winter List, revealed only 20 clicks that arise from IP addresses
12 associated with Defendants. ECF No. 51-1 at 15-16, 18; ECF No. 51-6 at ¶ 4. Finally,
13 Defendants again rely on Judge Battaglia’s guidelines, which direct that the scope of
14 discovery is narrow in arguing the request for inspection is overbroad.

15 Where, as here, “a defendant allegedly used the computer itself to commit the wrong
16 that is the subject of the lawsuit, certain items on the hard drive may be discoverable.”
17 *Calyon v. Mizuho Securities USA Inc.*, 07 CIV 02241 RODF, 2007 WL 1468889, at *4
18 (S.D.N.Y. May 18, 2007). Imaging the device is also a means for preserving evidence
19 “since electronic evidence can easily be erased and manipulated, either intentionally or
20 unintentionally (by overwriting through continued use of the computer).” *Id.* at *3; *see*
21 *also, United Factory Furniture Corp. v. Alterwitz*, 2:12-CV-00059-KJD-VC, 2012 WL
22 1155741, at *3 (D. Nev. Apr. 6, 2012) (granting mirror imaging of defendant’s computer
23 to preserve evidence).

24 Balancing the relevant factors weighs in favor of permitting the inspection:
25 Defendants have sole and exclusive access to devices and control over the information they
26 share; inspection of the devices could resolve the issues of the case; and the Court finds
27 that any burden and expense associated with the discovery is proportionate to the needs of
28 the case, will be borne primarily by the Plaintiff, and will be important to the resolution of

1 the issues. For example, inspection of the devices could reveal evidence of the click-fraud
2 that Plaintiff alleges; or that there is no evidence of click-fraud and Plaintiff is on a
3 proverbial goose-chase; or, possibly, that the devices have been modified/wiped. Each of
4 these outcomes has importance to the continuation and resolution of this case.

5 The Court agrees with Plaintiff that inspection of the devices is warranted under the
6 circumstances of this case and, in that regard will **GRANT IN PART** the motion to
7 compel. However, the Defendants have raised valid concerns regarding what information
8 may be obtained during an inspection. Defendants' expert, Mr. Kent, testifies that the
9 information Plaintiff seeks may not be available in the devices themselves, regardless of
10 inspection. ECF No. 51-6 at 3, ¶¶ 7-11. Accordingly, the Court will exercise its discretion
11 to fashion an inspection protocol intended to permit discovery of relevant information if it
12 can be obtained while protecting the privacy and business interests of the Defendants and
13 their employees. *See Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054 (S.D.
14 Cal. 1999) (ordering discovery subject to protocol set forth by the court); *Balboa*
15 *Threadworks, Inc. v. Stucky*, No. 05-1157-JTM-DWB, 2006 WL 763668, at *5 (D. Kan.
16 Mar. 24, 2006) (ordering the parties to agree upon a search protocol for imaged computer
17 hard drives in copyright case); *Calyon v. Mizuho Securities USA Inc.*, 2007 WL 1468889,
18 at *4 (examining several cases where independent experts were appointed, and ultimately
19 ordering the parties' own experts to agree and collaborate on a search protocol); *Antioch*
20 *Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 653 (D. Minn. 2002) (appointing
21 independent expert to image devices and search pursuant to discovery requests).⁷

22 The Court hereby **ORDERS** inspection to proceed, subject to the following
23 instructions and guidelines:

- 24 1. Defendants shall make available the devices, including laptops or desktops, smart
25 _____

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27 ⁷ Because the Court believes that any inspection seeking evidence of click-fraud will not require access
28 to any personal or business information but rather will be more focused on metadata and installation
history, the Court does not find the appointment of an independent computer expert necessary under the
facts of this case.

1 phones, and tablets used by any employee for business purposes at the San Diego
2 office location during the relevant time period for on-site inspection by the
3 Plaintiff's experts. Devices of independent contractors are excluded from
4 inspection. Defendants' expert is to be present to supervise the inspection. The
5 experts are to confer to find a mutually convenient date and time for the on-site
6 inspection within 30 days of this order.

- 7 2. The on-site inspection must permit the Plaintiff's expert to gather and/or confirm:
- 8 a. The model and serial number of the device;
 - 9 b. The operating system(s) currently installed;
 - 10 c. The browsers currently used/installed;
 - 11 d. The IP address(es) presently associated with the device.
- 12 3. During the on-site inspection, the Plaintiff's expert is to be provided access
13 sufficient to determine if further forensic analysis would reveal:
- 14 a. Whether the devices are capable of/did convey and record IP addresses
15 other than those previously provided by Defendants during the on-site
16 inspection;
 - 17 b. Any operating system(s) un-installed/reinstalled between January 2016
18 and the present;
 - 19 c. Any browsers un-installed/re-installed between January 2016 and the
20 present;
 - 21 d. Whether the device used any proxy servers or other IP masking
22 devices/programs between January 2016 and the present;
 - 23 e. Any information that the device has been "wiped" since September 2016.
- 24 4. If the Plaintiff's expert determines that it cannot obtain any of the information in
25 3(a)-(e) within a reasonable time during an onsite inspection, then the Plaintiff's
26 expert may image the devices from the San Diego office and employees (desk
27 tops, lap tops, smart phones, and tablets) for off-site forensic analysis.

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1 5. If the inspection proceeds to off-site forensic analysis, the following guidelines
2 SHALL be followed:

3 a. The imaged devices shall be designated HIGHLY CONFIDENTIAL -
4 ATTORNEY'S EYES ONLY under the protective order (ECF No. 44).

5 b. Forensic analysis by Plaintiff's expert is limited to the review of data to
6 evidence click-fraud. The expert may not access business or personal
7 information on the devices such as emails, call histories, financial plans,
8 or business documents. This is not to say documents cannot be obtained
9 from the devices; however any material obtained and/or printed must be
10 demonstrably related to pursuit of evidence click-fraud, e.g., whether the
11 device was "wiped," installation or reinstallation of browsers/operating
12 systems, use of proxy servers, etc.

13 c. A copy of any documents obtained/printed from any device during off-site
14 forensic inspection must be provided to counsel for Defendants at the
15 conclusion of the analysis. Defendants' counsel shall have 10 days from
16 receipt of the documents to challenge the use of any document it believes
17 contains trade secrets, proprietary information, or is privileged.⁸
18 Defendants shall then include any challenged document on a privilege log.
19 If the Plaintiff's counsel believes any challenge lacks merit, the parties
20 shall submit a Joint Motion for Determination of Discovery Dispute
21 regarding the documents at issue.

22 Failure to follow the guidelines set forth in this order or any bad faith conduct by
23 either side during the inspection process may subject the parties, their counsel, and/or their
24 experts, in both their personal and business capacities, to the imposition of discovery
25 sanctions.

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28 ⁸ Based on the parameters set forth regarding the types of documents the Plaintiff's expert may access (primarily metadata), the Court does not anticipate any such challenges.

1 Within **90 days** of this order, and sooner if the inspection and analysis allows, the
2 parties are to submit a status report to the Court, outlining the results of the onsite
3 inspection and, if it was deemed necessary, the offsite forensic analysis, from the San Diego
4 site. The parties are to include their respective positions and proposals on whether or how
5 to proceed with inspection from other facilities, and any proposed amendment to the
6 Scheduling Order. The Court hereby extends the fact discovery cut off to **November 26,**
7 **2018.** The status report should not exceed 10 pages, allotting 5 pages to each party. The
8 Court will set a telephonic status conference if appropriate, or issue a written decision on
9 how to proceed.

10 **C. Requests for Production**

11 Finally, Plaintiff moves to compel production of documents in response to 3 requests
12 for production (“RFP”) propounded to each Defendant, Whenever Communications and
13 Ms. Blanco. ECF No. 51 at 19.

14 **1. Request for Production No. 1**

15 RFP No. 1 to each Defendant asks for documents relating to “any attempts to access,
16 review, research, interact with and/or click on SATMODO’s website or paid
17 advertisements.” ECF No. 51 at 19. Defendants’ responses indicated they “would not
18 permit inspection” and that Defendants would make “best efforts to identify clicks in
19 dispute.” *Id.* at 20.

20 Plaintiff argues that the inquiry is relevant to the case and production should be
21 compelled. Defendants counter that they did not participate in any fraudulent conduct and
22 that Plaintiff “provides no suggestion [of] what such a document might be.”

23 The Advisory Committee Notes to Rule 34 explain:

24 ...it has become increasingly difficult to say that all forms of
25 electronically stored information, many dynamic in nature, fit
26 within the traditional concept of a “document.” Electronically
27 stored information may exist in dynamic databases and other
28 forms far different from fixed expression on paper. Rule 34(a)
is amended to confirm that discovery of electronically stored
information stands on equal footing with discovery of paper

1 documents. The change clarifies that Rule 34 applies to
2 information that is fixed in a tangible form and to information
3 that is stored in a medium from which it can be retrieved and
4 examined. At the same time, a Rule 34 request for production of
5 “documents” should be understood to encompass, and the
6 response should include, electronically stored information unless
7 discovery in the action has clearly distinguished between
8 electronically stored information and “documents.”

9 Fed. R. Civ. Proc. 34 advisory committee notes to 2006 amendments.

10 Items such as a browser history may contain “information that is stored in a medium
11 from which it can be retrieved and examined” that may reflect attempts to access Satmodo’s
12 website. While it is unlikely that a browser history would store information for the length
13 of time in question and the Court does not find a browser history to be the type of
14 information required to be electronically preserved (*see* Fed. R. Civ. P. 37(e)), it may
15 contain relevant data or evidence of recent searches. The Court will not require Defendants
16 to produce an unredacted print outs of browser histories as that would be intrusive, contain
17 irrelevant information, be disproportionate to the needs of the case, and unlikely to yield
18 any information due to the length of time browser histories are generally saved. However,
19 it is appropriate that Defendants conduct a search for information stored in locations such
20 as the devices’ browser histories for “Satmodo” and produce any results. Plaintiff’s motion
21 to compel is therefore **GRANTED IN PART**.

22 **2. Requests for Production 5 & 6 and 9&10**

23 Plaintiff’s portion of the Joint Memorandum only addresses RFP No. 1. ECF No.
24 51-1 at 10. However, the Joint Statement also includes RFP Nos. 5 and 6 to Ms. Blanco
25 and RFP Nos. 9 and 10 to Whenever Communications.

26 These remaining requests are identical: RFP Nos. 5 and 6 to Ms. Blanco match RFP
27 Nos. 9 and 10 propounded to Whenever Communications. ECF No. 51 at 18-22. RFP
28 Nos. 5/9 asks for a list of internet service providers and RFP Nos. 6/10 requests “documents
sufficient to identify any and all IP addresses used by or assigned to YOU from September
1, 2016 to the present.” ECF No. 51 at 20-21. Defendants’ initial responses indicate that

1 they will provide lists, and the responses to motion to compel indicate that lists have been
2 produced. *Id.*

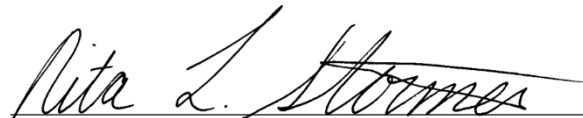
3 Because Defendants represent that responses have been provided and Plaintiff does
4 not identify these RFPs in the Joint Motion, the Court will **DENY AS MOOT** the motion
5 to compel further responses to these RFPs.

6 **IV. CONCLUSION**

7 Plaintiff's motion to compel is **GRANTED IN PART** and **DENIED IN PART**
8 consistent with the terms of the this order.

9 **IT IS SO ORDERED.**

10 Dated: July 20, 2018



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12 Hon. Nita L. Stormes
13 United States Magistrate Judge
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