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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 PACIFIC MARINE PROPELLERS,  
12 INC.,  
13 Plaintiff,  
14 v.  
15 WARTSILA DEFENSE, INC., BRYAN  
16 RUTTER, BOBBY HENINGER,  
17 Defendants.  
18  
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Case No.: 17cv555 BEN (NLS)

**ORDER ON JOINT MOTION FOR  
DETERMINATION OF DISCOVERY  
DISPUTE NO. 3**

[ECF No. 40]

20 Before the Court is the parties' Joint Motion for Determination of Discovery  
21 Dispute No. 3 whereby Defendant Wartsila Defense, Inc. ("Wartsila") moves to compel  
22 documents responsive to two document requests. ECF No. 40. Having reviewed the  
23 briefing submitted and for the reasons set forth below, the Court **DENIES** Wartsila's  
24 motion to compel.

25 **I. BACKGROUND**

26 Plaintiff Pacific Marine Propellers, Inc. ("Plaintiff") and Wartsila both are in the  
27 business of repairing marine propellers. ECF No. 19 ¶¶ 6, 8. In its Second Amended  
28 Complaint ("SAC"), Plaintiff presents seven claims related to Wartsila's entry into the

1 San Diego marine propeller repair market and its actions in competing for government  
2 subcontracts.

3 Specifically, Plaintiff explains that only companies holding a Basic Ordering  
4 Agreement (“BOA”) from the U.S. Navy may submit bids to the U.S. Navy or to civilian  
5 vessel repair contractors (who are in need of subcontractors) for marine propeller repair.  
6 Id. ¶¶ 14-15. As the holder of a BOA, Plaintiff underwent an audit by the Defense  
7 Contract Management Agency of the actual cost of providing marine propeller repairs on  
8 U.S. Navy vessels. Id. ¶ 20. The audit yielded Plaintiff’s “wrap rate,” which is an hourly  
9 rate for the audited cost of propeller repair and related work that includes labor and  
10 overhead costs. Id. Plaintiff states that it is the only facility at the Port of San Diego  
11 holding a BOA for propeller repair and that Wartsila holds BOAs at the Port of Seattle  
12 and the Port of Norfolk. Id. ¶¶ 16-17. In its SAC, Plaintiff alleges that Wartsila has  
13 intentionally underbid its own costs in order to improperly divert marine propeller repair  
14 work from Plaintiff in the Port of San Diego.

## 15 **II. DISCUSSION**

16 Discovery Dispute No. 3 involves a dispute regarding Plaintiff’s production of  
17 documents and responses to Wartsila’s Request for Production of Documents (“RFP”)  
18 Nos. 13 and 26, which are set forth below. ECF No. 40 at 1-2.

### 19 Request No. 13:

20 “All documents that evidence, support, refer to, or relate to your ‘cost’ of propeller  
21 repair, as the term ‘cost’ is used in California Business and Professions Code section  
22 17026.”

### 23 Plaintiff’s Response to Request No. 13:

24 Responsive documents in Plaintiff’s possession, custody and control will be  
25 produced. Plaintiff’s wrap rate determination is previously produced in  
26 Response to Request No. 12 above. Plaintiff incorporates by reference its  
27 response to Request No. 12 as if fully set forth herein. Additional  
28 responsive information is set forth in Plaintiff’s invoices and bids produced  
in response to Request No. 1. Generally, cost accounting calculations were  
done by Plaintiff’s outside CPA, David Park, who as indicated above, passed

1 away recently. Plaintiff is working to recover its files from his business and  
2 upon doing so will produce any additional responsive documents contained  
3 therein.

4 Request No. 26:

5 “To the extent not responsive to Request No. 24<sup>[1]</sup> or a previous Request for  
6 Production served by Wartsila, all documents necessary to compute your cost for  
7 performing propeller repair as the term cost is defined in [Cal.] Bus. & Prof. Code[]  
8 § 17026.”

9 Plaintiff’s Response to Request No. 26:

10 Objection is made to this Request on the following bases: (1) The Request is  
11 not limited or defined as to the time, location, or job scope; (2) There is no  
12 issue pending in the within litigation concerning Plaintiff’s cost of  
13 performance, therefore the Request is overbroad, burdensome, not relevant  
14 and not likely to lead to admissible evidence; (3) Cost of performance for  
15 navy propeller repairs was determined by the Defense Contract Management  
16 Agency, and the audit letter was previously produced in response to Request  
17 Nos. 12 and 13; and (4) the Request is vague and ambiguous as to the  
18 documents being requested. Plaintiff declines to speculate as to which  
19 documents Defendants may deem pertinent or necessary to perform the  
20 calculation(s) sought. Without waiving the foregoing, see Response to  
21 Request No. 24.<sup>[2]</sup>

22 ECF No. 40 at 1-2.

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24 Wartsila argues that Plaintiff already agreed to provide responsive documents and  
25 that Plaintiff’s costs, nonetheless, are relevant. Id. at 3. Plaintiff responds that the  
26 motion is untimely with respect to Request No. 13 and that Request No. 26 is, by  
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28 <sup>1</sup> Request No. 24 requested “your financial records from January 1, 2012 to the present.” ECF No. 40 at 2 n.1.

<sup>2</sup> Plaintiff’s response to Request No. 24 was: “Objection, this Request is duplicative of earlier Request Nos. 7 and 11. Further objection on the grounds that the request is overbroad, burdensome, and not relevant to any issue pending in this action. Notwithstanding the foregoing objections, plaintiff will produce standard financial statements to the extent they currently exist and have not been previously produced in the within action. Plaintiff is willing to meet and confer to narrow the scope of the within request.” ECF No. 40 at 2 n.3.

1 Wartsila’s own admission, an attempted end-run around the 45-day limitations period for  
2 bringing a discovery dispute. Id. at 11. Additionally, Plaintiff asserts that it already  
3 provided documents showing its wrap rate and will produce financial statements as soon  
4 as they are available. Id. at 12-16. But, to the extent Wartsila seeks other information  
5 regarding Plaintiff’s calculation of costs, Plaintiff contends this information is not  
6 relevant. Id. 17-19.

7 **a. Timeliness**

8 Under this Court’s Chambers Rules, counsel were required to file their joint  
9 motion for determination of their discovery dispute within forty-five days of the service  
10 of Plaintiff’s initial response to Wartsila’s document requests. Hon. Nita L. Stormes,  
11 Civil Case Procedures § VI(C)(2)(b). Plaintiff served its response to Request No. 13 on  
12 August 18, 2017 (ECF No. 40 at 11), making this motion long-overdue as to that request  
13 (the forty-five days ran on October 2, 2017). Wartsila argues this delay should be  
14 excused because Plaintiff promised to produce responses and Wartsila waited in  
15 consideration of the unfortunate passing of Plaintiff’s outside CPA. Id. at 3. However,  
16 as set forth in the Chambers Rules, a party faced with this dilemma should file a request  
17 to continue the deadline for filing their joint motion, citing good cause (see Hon. Nita L.  
18 Stormes, Civil Case Procedures §§ III(C) and VI(C)(2)(d)). See also LaNier v. United  
19 States, No. 15CV360-BAS (BLM), 2017 WL 951040, at \*4 (S.D. Cal. Mar. 10, 2017)  
20 (“If a party is unable to comply with the [discovery motion] deadline, the party should  
21 file a motion to extend the deadline before the deadline passes and not wait nearly three  
22 months after the deadline passed before taking action.”). Wartsila did not do so. And,  
23 while Plaintiff did agree in its response to Request No. 13 to produce responsive  
24 documents upon receipt of documents from its new accountant, such is the downside to  
25 not seeking court approval of side agreements between the parties. As the Court  
26 expressly warned the parties in its initial scheduling order in this case,

27 If the parties reach an impasse on any discovery issue, counsel shall file an  
28 appropriate motion within the time limit and procedures outlined in the

1 undersigned magistrate judge’s chambers rules. **A failure to comply in this**  
2 **regard will result in a waiver of a party’s discovery issue. Absent an**  
3 **order of the court, no stipulation continuing or altering this**  
4 **requirement will be recognized by the court.**

5 ECF No. 15 at ¶ 2 (emphasis in original). By not bringing a timely motion to compel  
6 these documents or seeking an extension of time in which to do so, Wartsila waived its  
7 right to compel the documents requested in Request No. 13. See Guzman v. Bridgepoint  
8 Educ. Inc., No. CIV 11-0069-WQH WVG, 2014 WL 1057417, at \*3 (S.D. Cal. Mar. 18,  
9 2014) (denying motion to compel as untimely and noting that “[t]he clock does not reset  
10 simply because Plaintiff allowed Defendants to serve untimely responses”).

11 With regard to Request No. 26, the question is whether it is duplicative of Request  
12 No. 13 and, thus, represents an attempt by Wartsila to circumvent the time bar on  
13 enforcing Request No. 13. It seems apparent to the Court that the request for “all  
14 documents necessary to *compute* your cost for performing propeller repair as the term  
15 cost is defined in [Cal.] Bus. & Prof. Code[] § 17026” is covered entirely by Request No.  
16 13’s solicitation of “all documents that evidence, *support*, refer to, or *relate to* your ‘cost’  
17 of propeller repair, as the term ‘cost’ is used in California Business and Professions Code  
18 section 17026.” (emphasis added). Under Rule 26(b)(2)(C) of the Federal Rules of Civil  
19 Procedure, the Court must limit discovery that is “unreasonably cumulative or  
20 duplicative.” Fed. R. Civ. P. 26(b)(2)(C). Moreover, courts in this district, including this  
21 one, routinely reject attempts to circumvent discovery deadlines via duplicative discovery  
22 requests. See, e.g., Cruz v. United States, No. 14CV2956-LAB (DHB), 2016 WL  
23 727066, at \*2–3 (S.D. Cal. Feb. 24, 2016) (finding subsequent RFP to be “substantially  
24 similar” to earlier RFP and rejecting as untimely joint discovery motion based on  
25 response deadline for subsequent RFP); ViaSat, Inc. v. Space Sys./Loral, Inc., No. 12-  
26 CV-0260-H WVG, 2013 WL 3467413, at \*5–7 (S.D. Cal. July 10, 2013) (declining to  
27 allow end run around discovery deadline via Rule 30(b)(6) deposition on twenty-four  
28 topics duplicative of interrogatory responses, to which the court already denied motion

1 for supplemental responses); see also Bird v. PSC Holdings I, LLC, No. 12-CV-1528 W  
2 NLS, 2013 WL 1120659, at \*1 (S.D. Cal. Mar. 18, 2013) (finding joint motion untimely,  
3 advising the parties that “any discovery demands which are substantially similar to  
4 previous demands will not re-start the clock for filing a discovery motion, and may be  
5 grounds for a protective order,” but exercising discretion to address the merits)<sup>3</sup>. Here,  
6 more than five months have passed since Plaintiff served its initial response to Request  
7 No. 13. Because Wartsila seeks “substantially similar” information by way of Request  
8 No. 26, the Court finds that the joint motion to compel responses to Request No. 26 is an  
9 attempted end run around the expired deadline for seeking supplemental responses to  
10 Request No. 13. The joint motion, therefore, is untimely.

11 While Wartsila did not expressly argue that its failure to seek an extension of the  
12 deadline was the result of excusable neglect and that good cause existed to continue the  
13 deadline for moving to compel RFP No. 13 (see Fed. R. Civ. P. 6(b)(1) and Hon. Nita L.  
14 Stormes, Civil Case Procedures §§ III(C) and VI(C)(2)(d)), the Court will briefly  
15 consider these issues. LaNier, 2017 WL 951040, at \*4 (requiring a showing of good  
16 cause and excusable neglect if request for extension is made after deadline passes);  
17 Herrera v. Hitman Fight Gear, LLC, No. CV 12-7927 AG (VBKX), 2013 WL 12138586,  
18 at \*3 (C.D. Cal. Nov. 18, 2013) (same). In the context of schedules and deadlines set by  
19 district courts, good cause is shown if the party seeking the continuance acted diligently.  
20 See Johnson v. Mammoth Recreations, 975 F.2d 604, 609 (9th Cir. 1992). Wartsila  
21 argues that it did not move to compel earlier in light of Plaintiff’s representation that  
22 responsive documents would be produced once they were collected and in consideration  
23 of the unfortunate passing of Plaintiff’s accountant. ECF No. 40 at 3. Wartsila became  
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26 <sup>3</sup> The Bird case involved somewhat unique facts in that the document demands underlying the untimely  
27 motion were served by only one defendant in a five defendant case. Bird, 2013 WL 1120659, at \*1. As  
28 a result, the defendants were under the misapprehension that any of the other defendants (who all were  
represented by the same counsel) could serve the same demands and restart the forty-five day clock. Id.  
The joint motion also was filed less than a month after the deadline, not five months late as in the instant  
case.

1 aware of the death when Plaintiff first responded to Request No. 13. Wartsila generally  
2 states that “[o]ver the months that followed,” it became clear at some point that Plaintiff  
3 was not going to be producing more than financial documents. *See* ECF No. 40 at 6.  
4 Thus, at this point in time, it should have been clear to Wartsila that there was a conflict  
5 between the parties as to the scope of what Request No. 13 covers. While Wartsila fails  
6 to state exactly when this became clear, Wartsila obviously had this knowledge when it  
7 served Plaintiff with the second set of requests for production, including Request No. 26,  
8 which it admits it served due to Plaintiff’s “narrow” interpretation of Request No. 13.  
9 Wartsila does not explain why it waited another two and a half months before bringing  
10 this motion.<sup>4</sup> The Court does not find that Wartsila has demonstrated good cause as to  
11 why it waited until now to bring a motion.<sup>5</sup>

12 Furthermore, it is not clear what, if any, additional information Wartsila seeks to  
13 obtain. Plaintiff stated in its response to Request No. 13 that it previously produced its  
14 wrap-rate, invoices, and bids in response to other requests. In the instant briefing,  
15 Plaintiff explains that “while the wrap-rate is determined for purposes of [the BOA] and  
16 pricing for work contracted directly with the [United States Navy], Plaintiff also chooses  
17 to use this rate when bidding subcontracts from civilian shipyards for naval surface ship  
18 propeller repairs.”<sup>6</sup> ECF No. 40 at 12. Thus, whether or not Plaintiff is required to use  
19 the wrap-rate in bidding subcontracts, it does in fact do so and Wartsila can confirm this  
20 by consulting the bids and invoices already in its possession. To the extent Wartsila  
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23 <sup>4</sup> Neither party includes the date of when Wartsila served Plaintiff with Request No. 26, but assuming  
24 Plaintiff’s response was timely when it was served on January 29, 2018, that request would have been  
25 served around the end of December 2017.

26 <sup>5</sup> Because the Court does not find that Wartsila showed good cause, it will not address excusable  
27 neglect.

28 <sup>6</sup> Plaintiff asserts that the wrap-rate falls within the definition of “cost” set forth in California Business  
and Professions Code § 17026. While Wartsila notes that “the issue in this case is the determination of  
cost according to Section 17026 of the California Business and Professions Code, not the determination  
of cost according to a department of the federal government,” Wartsila does not explain how they differ  
or why the distinction matters in light of Plaintiff’s acknowledgment that it uses the wrap-rate for  
government and non-government contracts.

1 seeks to evaluate Plaintiff's damages claim, it has Plaintiff's evidence of costs (via the  
2 wrap-rate) and bids and invoices from which it can confirm Plaintiff's claim that "the  
3 price charged and the price bid by Plaintiff was the wrap-rate plus a 10% profit." Id. at  
4 15.<sup>7</sup> Wartsila does not identify any further examples of information or categories of  
5 documents it seeks from Plaintiff that it contends is necessary to determine cost.

6 **III. CONCLUSION**

7 For the foregoing reasons, the Court **DENIES** Wartsila's motion to compel.

8 **IT IS SO ORDERED.**

9 Dated: April 3, 2018

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

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27 <sup>7</sup> In addition, the Court notes that Plaintiff represents in its motion that it will produce its financial  
28 statements for the Fiscal Year that ended on March 31, 2017 once this information becomes available.  
ECF No. 40 at 16-17.