

Jeffrey J. Hunt (5855)
 David C. Reymann (8495)
 PARR BROWN GEE & LOVELESS
 185 South State Street, Suite 800
 Salt Lake City, Utah 84111
 Telephone: (801) 532-7840
 Facsimile: (801) 532-7750
 Email: jhunt@parrbrown.com
dreymann@parrbrown.com

Joshua A. Glikin (*pro hac vice*)
 BOWIE & JENSEN, LLC
 29 West Susquehanna Avenue
 Suite 600
 Towson, Maryland 21204
 Telephone: (410) 583-2400
 Facsimile: (410) 583-2437
 Email: glikin@bowie-jensen.com

Walter E. Diercks (*pro hac vice*)
 RUBIN, WINSTON, DIERCKS, HARRIS, &
 COOK, LLP
 1201 Connecticut Avenue NW, Suite 200
 Washington, D.C. 20036
 Email: wdiercks@rwdhc.com

Attorneys for Defendant ReportSee, Inc.

**IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF UTAH, CENTRAL DIVISION**

PUBLIC ENGINES, INC., a Delaware
 corporation,

Plaintiff,

vs.

REPORTSEE, INC., a Delaware corporation,

Defendant.

**DEFENDANT’S MEMORANDUM IN
 SUPPORT OF MOTION TO
 COMPEL AND FOR SANCTIONS**

Case No. 2:10-cv-317

Judge Tena Campbell
 Magistrate Judge Samuel Alba

Pursuant to Fed. R. Civ. P. 37(a) and (d), the Court should compel the Plaintiff, Public Engines, Inc. (“Public Engines”) to supplement its document production to produce all documents that are responsive to Rule 34 requests for production served by Defendant, ReportSee, Inc. (“ReportSee”), and to sanction the Plaintiff for its multiple discovery failures. A Local Rule 37-1 statement showing that counsel for ReportSee has made a reasonable effort to

reach agreement with opposing counsel on the matters set forth in this Motion is attached at **Exhibit 1.**¹

I. BRIEF SUMMARY OF DISCOVERY FAILURES AT ISSUE IN THIS MOTION.

ReportSee served document requests in April, 2010, but Public Engines only recently revealed that it had substantially narrowed the scope of its production of responsive documents based upon a strained interpretation of an unambiguous request that was not clearly identified in Public Engines' written responses. One of those requests was for, "All documents that mention or concern ReportSee (including SpotCrime) and/or Colin Drane" (SpotCrime is ReportSee's crime data website that is at issue in this Action and Mr. Drane is ReportSee's president and sole shareholder of ReportSee's parent company, Colin, Inc.). Public Engines recently revealed, in the context of a separate discovery dispute, that it had interpreted ReportSee's request to seek only those communications *between Public Engines and third parties* that relate to ReportSee or SpotCrime, and that it excluded all "internal communications" from its production. Public Engines now refuses to supplement its production by producing the "internal" documents that it withheld. It contends that its interpretation of ReportSee's request was proper because the request was overbroad and unduly burdensome, without explaining how or why, and even though Public Engines served a mirror request on ReportSee to which ReportSee has responded completely. Moreover, documents that ReportSee obtained from a third party establishes that

¹ As the declaration and attached correspondence establish, the parties have been able to resolve – at least tentatively – most of their discovery disputes; this Motion concerns only the few that remain.

Public Engines has not even produced all documents that would be responsive to its narrow interpretation of ReportSee's request.

Also at issue in this Motion are document requests and an interrogatory served by ReportSee in September, 2010, which seek facts related to Public Engines' demands for damages. Public Engines refuses to provide any responsive information beyond the same generalities that appeared in its Complaint filed seven months ago and insists that it has no obligation to provide any further explanation of its damages, or even any business documents that could be used to support its damages calculations, until its Rule 26(a)(2) expert report is due on December 8, 2010, which is a week after fact discovery closes. Although Rule 26(b)(4) permits a party to withhold drafts of Rule 26(a)(2) expert reports or related documents from discovery until a written report is submitted, and permits a deposition of a retained expert only after the expert's written report is provided, the rule does not permit a party from shielding all facts and documents that relate to its damages contentions until the 26(a)(2) report deadline. Public Engines' plan to withhold, until after discovery closes, all facts and documents that are properly discoverable and relevant to its damages claims, is improper and will cause substantial prejudice to ReportSee.

II. THE PARTIES AND A BRIEF HISTORY OF THE LITIGATION TO DATE

Public Engines and ReportSee operate competing websites that provide, for free, members of the general public with basic crime data, updated at least daily. Public Engines' site is called CrimeReports.com, and ReportSee's site is SpotCrime.com. In this case, Public Engines brings a litany of claims against ReportSee arising out of ReportSee's so-called

“scraping” of some crime data from CrimeReports.com, and placing it (for a limited period of time) on ReportSee’s SpotCrime.com website. Public Engines filed its Complaint in April of 2010 and at the same time, moved for a preliminary injunction to stop ReportSee from any further scraping of the CrimeReports site. *See* Motion for Preliminary Injunction, Document 4. Public Engines contends that it possesses exclusive ownership rights over data that public police agencies collect and its Complaint alleges that ReportSee’s collection of that same data and display on a competing website, unless enjoined, would destroy Public Engines’ goodwill, reputation and ultimately, threaten its existence. ReportSee denies that it is liable under any legal theory for its collection and display of basic crime data – including the date, time and approximate location of a crime – and that its actions have not caused, and are not likely to cause, damage or injury to Public Engines.

After the Court granted the parties the right to conduct limited discovery for purposes of the preliminary injunction, both parties served document requests and, after receiving documents, took corporate depositions pursuant to Fed. R. Civ. P. 30(b)(6). ReportSee then submitted its Memorandum opposing Public Engines’ motion for preliminary injunction. Before the Court decided Public Engines’ motion, however, ReportSee agreed to a limited consent injunction, without prejudice to its right to assert any defense. The Court entered the Stipulated Preliminary Injunction on June 24, 2010. *See* Court Docket No. (“Docket No.”) 50.

Following entry of the Stipulated Preliminary Injunction, the Court entered an Order granting the parties’ Stipulated Motion for a Scheduling Order, pursuant to which fact discovery closes on December 1, 2010, and expert discovery closes on January 28, 2011. *See* Docket No.

52 (also requiring Public Engines to submit its 26(a)(2) report(s) on December 8, 2010, and ReportSee to submit rebuttal reports on January 14, 2011). Thus, by the time ReportSee obtains Public Engines' expert report(s) and is able to depose Public Engines' expert(s), the time for ReportSee to obtain any additional fact discovery will have closed.

ReportSee served its Second Request for Production of Documents on September 14, 2010. Presently, ReportSee is scheduled to take Public Engines' Rule 30(b)(6) deposition on November 11, the depositions of two Public Engines employees on November 12, and the deposition of one former Public Engines employee on November 10.

III. LEGAL STANDARD

Pursuant to Rule 37(a)(2)(B), “[a] party seeking discovery may move for an order compelling an answer, designation, production or inspection. This motion may be made if . . . (iv) a party fails to respond that inspection will be permitted – or fails to permit inspection – as requested under Rule 34.” Rule 37(a)(4) provides that, “[f]or purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond.”

Rule 37(d) permits a party to move the Court to sanction a party that, “after being properly served with . . . a request for inspection under Rule 34, fails to serve its answer, objections or written response.” Serving responses to document requests that are either evasive or incomplete, or failing to disclose to the requesting party that a document production was substantially limited, much less the reasons why the production was limited, may be treated as being tantamount to not serving a response at all for purposes of Rule 37(d). *See, e.g., In re*

Plywood Antitrust Litig., 655 F.2d 627, 638 (5th Cir. 1981) (affirming a district court's imposition of Rule 37(d) sanctions for failure to respond to interrogatories and stating that "under appropriate circumstances, evasive and incomplete answers . . . are tantamount to no answers at all" and observing that the fact that the responding party had submitted a written response to a document request was "not enough to insulate it from a Rule 37(d) sanction" under the facts before the court) (citation omitted); *see also OFS Fitel, LLC, et al. v. Epstein, Becker and Green, P.C.*, 549 F.3d 1344, fn.24 (11th Cir. 2008) (adopting Fifth Circuit view of Rule 37(d)).² Pursuant to Rule 37(d)(1)(B)(3), the sanctions that the Court can impose include "prohibiting the disobedient party from . . . introducing designated matters in evidence." *Id.* (quoting Rule 37b)(2)(A)(ii)). A violation of Rule 37(d) also requires that, in addition to or in place of other sanctions, "the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." *Id.*

² It does not appear that there is any precedent in the Tenth Circuit or from this Court that addresses whether (or not) evasive or incomplete responses that rise to a substantial level, as was the case in *In re: Plywood* and *OFS Fitel*, are sanctionable pursuant to Rule 37(d). The Tenth Circuit has, however, expressly recognized that, "[t]he imposition of sanctions for abuse of discovery under Federal Rule of Civil Procedure 37 is a matter within the discretion of the trial court" and that "[d]ecisions on evidentiary matter are also within the trial court's discretion." *Robinson v. Audi Nsu Auto Union Aktiengesellschaft*, 739 F.2d 1481, 1483 (10th Cir.1984) (citations omitted). Given the facts explained below and the resulting prejudice to ReportSee as a result of Public Engines' discovery failures, this Court should exercise its broad, inherent authority to issue an appropriate sanction.

IV. ARGUMENT

A. The Court should order Public Engines to provide non-privileged, internal correspondence that relates to ReportSee, as ReportSee properly requested.

On April 19, 2010, ReportSee served the following document request, and it received the following response from Public Engines on April 28, 2010:

REQUEST NO. 2: All documents that mention or concern Reportsee (including SpotCrime) and/or Colin Drane.

RESPONSE: Public Engines objects to this request as overbroad, vague, unduly burdensome, and not likely to lead to the discovery of admissible evidence. Without waiving these objections, documents responsive to this request are included in Public Engines' responses to Reportsee's other document requests including, without limitation, Request No. 3 below.

See Public Engines' Responses to ReportSee's First Set of Document Requests (dated April 28, 2010), attached at **Exhibit 2**. This response contains conclusory, boilerplate objections that courts deem to be insufficient and waived, and thus, ReportSee had no need to challenge the objections. This response also implies that, notwithstanding the objections to the Request, Public Engines agreed to produce all responsive documents. It did not become clear that Public Engines had substantially narrowed its response to this Request, however, until September 24, 2010, when Public Engines' counsel responded to a September 13 letter from ReportSee questioning why certain documents that would have been responsive to Request No. 2 had not been produced, and why Public Engines' original document production was so paltry. *See* September 13, 2010, letter from Mr. Glikin to counsel for Public Engines, attached at **Exhibit 3**.

The September 13 letter questioned why certain documents that concerned ReportSee – minutes of Public Engines’ board of directors in which ReportSee had been discussed – had not been produced in response to Request No. 2. The letter observes that, “it does not appear that Public Engines has been forthright in its document production. In reviewing the production, we have been unable to find a single document that in any manner relates to Public Engines Board of Directors . . . [y]et, Mr. Whisenant acknowledged during his deposition that the Board and the investors who sit on it have discussed ReportSee.” *See id.* (explaining how such documents, among others, would have been responsive to ReportSee’s Request No. 2).³

Public Engines’ September 24 letter in response states that, with respect to Request No. 2, “Public Engines objected that this request was overly broad, unduly burdensome, and not likely to lead to the discovery of admissible information. Consequently, Public Engines limited its response to documents between it and third-parties that concerned the lawsuit, its subject matter, Colin Drane, or ReportSee.” *See* September 24 letter from counsel for Public Engines, **Exhibit 4**, at pp. 1-2.

By letter dated October 1, 2010, ReportSee pointed out that, “the explanation that you provided in your letter of the scope of the self-imposed limitation that Public Engines placed on Request No. 2 was not provided in Public Engines response to the document request itself. Public Engines cannot hide the ball about what it produced and what it did not, and then reveal the scope of its limitations only when a particular issue with its production is discovered.” *See*

³ Mr. Whisenant is Public Engines’ President and the quoted portion of the letter refers to Public Engines’ Rule 30(b)(6) deposition testimony in which Mr. Whisenant was one of two testifying representatives.

Letter from J. Glikin, **Exhibit 5**, at p. 1. ReportSee demanded an explanation for Public Engines' underwhelming document production, including:

- Why Public Engines' first production contained a total of 287 documents, by our count, and of those, only about 200 were emails.
- With respect to the emails, the earliest email that even concerns or mentions SpotCrime is dated 06/02/2008, and the next earliest is date 03/24/2009. Paragraph 33 of Public Engines' Complaint alleges that Public Engines discovered SpotCrime's scraping in the "Spring of 2008". It is difficult to believe that there would be *no* correspondence or other documents that relate to SpotCrime, save the cease & desist letter from Public Engines' counsel (dated June 16, 2008) and ReportSee's response to it, between June 2008 and March 2009.

Id. The letter also demands a supplemental document production, and provides an example: "We have, for example, received documents that evidence correspondence between the San Jose Police Department and Public Engines, which relate to SpotCrime, that Public Engines has not produced. In fact, the most recent email that we possess from Public Engines is dated April 21, 2010." *Id.*

After several demands to respond to the October 1 letter, counsel for Public Engines responded by email on October 28, 2010, refusing to provide any additional documents responsive to Request No. 2:

Public Engines read ReportSee's requests, correctly we believe, as asking for the production of email correspondence on various topics that took place between any employee of Public Engines and any third party. Those requests did not call for the production of all internal emails on those topics, which may answer your question about the date of the first email you claim to have that mentions SpotCrime and the claimed absence of communications

between June 2008 and March 2009 (which we have not confirmed).

October 28, 2010, email from Mr. Shaughnessy, at **Exhibit 6**.

It is not reasonable to interpret a request for “All documents that mention or concern ReportSee” to mean, “email correspondence on various topics that took place between any employee of Public Engines and any third party.” It also was not clear from Public Engines’ response to Request No. 2 that it had imposed that substantial restriction to narrow its production to eliminate internal correspondence that related to ReportSee – notwithstanding that its Complaint alleges that ReportSee’s activities since at least June of 2008 have caused substantial disruption, harm and other injury to Public Engines. Moreover, Public Engines must believe that Request No. 2 is proper and sufficiently clear as written because it served a mirror request on ReportSee. *See* Request No. 21 of Public Engines’ Second Set of Document Requests to ReportSee, attached at **Exhibit 7** (which reads, “**Request No. 21:** ALL DOCUMENTS RELATED TO Public Engines or CrimeReports.com”).

Finally, third party discovery has revealed that Public Engines has not been complete in its production of documents responsive to Request No. 2, even under its own narrowed interpretation. One of the third parties that is central to the litigation is the San Jose Police Department (“SJPD”), and ReportSee subpoenaed that agency for its documents that relate to Public Engines and/or ReportSee. That agency responded by producing, *inter alia*, email correspondence to and from Public Engines in which Public Engines (Mr. Whisenant) is commenting on, offering to provide assistance with, and scheduling telephone calls about,

ReportSee's request under California's Open Records Act for crime data from the SJPDP – yet not a single one of these emails has been produced to date by Public Engines. *See* sampling of SJPDP emails not produced by Public Engines, attached at **Exhibit 8**.

The Court should order Public Engines to produce all documents responsive to the clear and unambiguous Request No. 2 from ReportSee's first set of document requests, and order Public Engines to appear for another deposition, at its cost and expense, should its production not occur within sufficient time for ReportSee to review and prepare to discuss those documents at the upcoming Rule 30(b)(6) deposition of Public Engines on November 11. Given the clear evidence that Public Engines failed to produce all the documents that are responsive even to its narrowed reading of Request No. 2, the Court also should order Public Engines to provide a written, detailed description of the methods that it employed to retrieve documents responsive to ReportSee's requests (including the identities of each custodian whose records were searched, the date(s) of the searches and any search terms or other search methods employed), and to provide a detailed explanation of how and why the SJPDP emails attached at Exhibit 8 have not been produced to date.⁴ Depending upon the responses provided, the Court should consider

⁴ Mr. Shaughnessy's October 28 email invites ReportSee to provide Public Engines with the missing SJPDP emails so that it can "determine whether anything was missed and, if so, why." *See* Exhibit 6. It is too late, however, for Public Engines to begin offering to investigate why it has not produced documents that are clearly responsive to ReportSee's requests – including emails that mention ReportSee and/or SpotCrime and Mr. Drane by name. There can be no adequate explanation for the failure to produce these documents so clearly responsive and relevant to the litigation, and which were created while the litigation was pending, that is sufficient to avoid this Motion. A simple search through emails for "ReportSee" or "SpotCrime" or "Drane" would have turned up these and other responsive emails.

sanctioning Public Engines for its discovery failure, and it should also award ReportSee its expenses, including attorneys' fees, in preparing and filing this Motion.⁵

B. Documents and Information that ReportSee Refuses To Disclose Or Produce Until Its 26(a)(2) Expert Report Is Provided After the Close of Discovery.

ReportSee's Interrogatories and a Second Set of Document Requests to Public Engines served on September 14, 2010, contain requests that seek information and documents that concern Public Engines' alleged damages. Public Engines' responses do not provide any more information than the generalities in its Complaint filed seven months ago. The following is ReportSee's Interrogatory No. 12 and Public Engines' answer served on October 18, 2010:

⁵ ReportSee raised a number of other concerns regarding deficiencies with Public Engines' document production and written responses, which Mr. Shaughnessy's October 28 email agrees to resolve through a supplemental production of documents. However, should the supplemental responses and production not be made with sufficient time to review the responses before the November 11, 2010, Rule 30(b)(6) deposition of Public Engines, ReportSee reserves the right to seek appropriate relief from the Court.

INTERROGATORY NO. 12: Please explain and calculate every loss to Public Engines incurred from and including April 9, 2009 through and including April 9, 2010, as a direct and proximate result of any actions by ReportSee, including in your response a detailed itemization of your calculation the identity of every document that establishes each itemized item in your calculation.

OBJECTION AND RESPONSE: Public Engines has been damaged by the actions of ReportSee because it has been required to devote extensive time and personnel resources to addressing ReportSee's scraping of Public Engines' data. Public Engines also has been damaged to the extent that it has lost revenue because of the scraping and other activities of ReportSee, and Public Engines is entitled to all revenue that ReportSee has received because of the inclusion of Public Engines' data on ReportSee's websites. Public Engines has been injured in being required to enforce its rights thereby incurring significant attorneys' fees and costs.

Additionally, Public Engines objects that Interrogatory No. 12 seeks information protected by the work product doctrine and the attorney client privilege. Plaintiff also objects that this request is premature in that Public Engines' is still analyzing and investigating the amount of its damages and reserves the right to supplement its response under Federal Rule of Civil Procedure 26(e).

See Public Engines' Responses to ReportSee's Interrogatories, attached at **Exhibit 9**.

This response is insufficient and improper. Although Public Engines' "lost revenue" damages may be the subject of expert testimony, if Public Engines performed any of its own calculations of lost revenue, it must disclose those in response to this interrogatory. However, although lost revenue may be a subject for expert testimony, the other damages referenced in the response, including the "substantial attorneys' fees" are not damages that fall within the purview of expert testimony.

Seven months ago, Public Engines' Complaint alleged, "Public Engines has suffered damage or loss exceeding \$5,000.00 in aggregate value in a one year period as a result of [ReportSee's alleged unauthorized] access. These damages or losses include, without limitation, the costs of responding to and monitoring ReportSee's unauthorized access, conducting damages assessments, and undertaking various measures to attempt [to] prevent ReportSee's unauthorized access." Complaint, ¶ 64. Public Engines should not be permitted to continue to hide the ball regarding the basis for its damages calculations, nor can it withhold until after the close of discovery, facts and calculations relevant to its damages calculations under the auspices of Rule 26(e). Public Engines should not be permitted to contend that, with discovery closing, it is "still analyzing and investigating the amount of its damages[.]" It should be ordered to provide the requested calculations of all damages other than its expert's report on lost revenue (if, however, Public Engines created its own analysis of lost revenues, it also should be ordered to disclose that analysis as well), before its November 11, 2010, Rule 30(b)(6) deposition.

ReportSee also served the following document requests that concern Public Engines' damages allegations:

REQUEST NO. 10: All documents that concern, itemize or calculate any damages or losses that you suffered as a result of any actions or activities of ReportSee that are the subject of your Complaint.

RESPONSE: Public Engines objects to this request as premature. Public Engines reserves the right to supplement its responses and plans to produce all documents responsive to this request when it files its expert reports, consistent with the Court's July 30, 2010 scheduling order. Public Engines states that it is not in possession of documents responsive to this request.

With only a month left for fact discovery, a request for documents that underlie or support Public Engines' damages demands is not "premature" – yet Public Engines continues to insist that it need not disclose any documents or information related to its damages calculations – regardless of the type or category of damages – until its expert report deadline a week after fact discovery closes. *See* October 28 email from Public Engines' counsel, **Exhibit 6** (stating that, "Public Engines' calculation of its damages will be provided in the form of its Rule 26(a)(2) expert disclosures. Public Engines will produce documents or a summary sufficient to show the time, personnel resources and other expenses associated with ReportSee's scraping of Public Engines' data").

Rule 26 does not permit a party to withhold all information and documents related to its damages calculations until its 26(a)(2) disclosure deadline. The limitations on expert discovery Rule 26(b)(4) are not written that broadly, and permitting such a reading would result in prejudice to parties that are in ReportSee's position. For example, Public Engines contends in its Complaint that a portion of its damages demand includes the time its staff spent attempting to employ technical measures to stop ReportSee's collection of crime data from CrimeReports.com. Certainly there must be documents such as timesheets, logs and other records of work performed by Public Engines' staff, which would substantiate its allegations. Under Public Engines' apparent reading of Rule 26, even those contemporaneous business records can be withheld until after fact discovery closes. This would leave ReportSee without the ability to question Public Engines about the documents and the underlying factual bases for its damages calculations.

Ordinarily, ReportSee would request an order compelling production of all documents responsive to Request 10, except for those documents specifically protected by Rule 26(b)(4)(B). However, because Public Engines' response states that, "it is not in possession of documents responsive to this request," ReportSee asks the Court to hold Public Engines to that response and prohibit a last minute Rule 26(e) retraction of it. Accepting its response as true, Public Engines does not possess a single document that supports or concerns any of damages contentions, except for whatever summaries and report its testifying expert will disclose on December 8.

Thus, ReportSee requests that the Court issue an order excluding any business records that concern⁶ its damages calculations, including timesheets, logs, attorneys' fee reports and records, and other documents – including correspondence and business records upon which its expert report may rely, except for documents already produced as of the date of this Motion.

V. CONCLUSION

For the reasons above, the Court should:

- (i) Compel a complete production in response to ReportSee's document Request No. 2, before Public Engines' Rule 30(b)(6) deposition on November 11, 2010;
- (ii) Order Public Engines to provide a written, detailed description of the methods that it employed to retrieve documents responsive to ReportSee's Request No. 2 (including the identities of each custodian whose records were searched, the date(s) of the searches and any search terms or other search methods employed),

⁶ ReportSee's Requests for Production of Documents define "Concern" to mean, "relating to, referring to, describing, mentioning, evidencing or constituting."

Facsimile: (410) 583-2437

and

Jeffrey J. Hunt

jhunt@parrbrown.com

David C. Reymann

dreymann@parrbrown.com

PARR BROWN GEE & LOVELESS

185 South State Street

Suite 800

Salt Lake City, Utah 84111

(801) 532-7840

Facsimile: (801) 532-7750

Counsel for Defendant, ReportSee, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November 2010, I filed the foregoing
**DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL AND FOR
SANCTIONS** via the CM/ECF system, which electronically served the following counsel of
record:

Alan L. Sullivan
Todd M. Shaughnessy
J. Elizabeth Haws
SNELL & WILMER LLP
15 West South Temple, Suite 1200
Beneficial Tower
Salt Lake City, Utah 84101-1004

Mark Lambert
Mark Weinstein
COOLEY GODWARD KRONISH, LLP
Five Palo Alto Square
Palo Alto, California 94306-2109

/s/ Jeffrey J. Hunt

