UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 17-6210-JAK (KSx) Date: November 17, 2020

Title *Justice Laub v. Nicholas Horbaczewski, et al.*

Present: The Honorable: Karen L. Stevenson, United States Magistrate Judge

Gay Roberson	N/A
Deputy Clerk	Court Reporter / Recorder

Attorneys Present for Plaintiffs: Attorneys Present for Defendants:

Proceedings: (IN CHAMBERS) ORDER DENYING PLAINTIFFS' MOTION TO COMPEL AND FOR SPOLIATION SANCTIONS [Dkt No. 488]

BACKGROUND

On July 10, 2017, Justice Laub brought this action against Nicholas Horbaczewski and Drone Racing League, Inc. ("DRL") (collectively, "Defendants") in the Los Angeles Superior Court. (Dkt. No. 1-1.) Defendants removed the action to federal court. (Dkt. No. 1.) Plaintiff subsequently filed an amended complaint and added Daniel Kanes as a plaintiff. (Dkt. No. 13.) On July 19, 2018, Plaintiffs filed the operative complaint (the "Complaint" or "TAC"), which asserts, *inter alia*, several contract claims against both Defendants. (Dkt. No. 62.) The claims and allegations of the TAC are detailed in prior discovery orders. (*See, e.g.*, Dkt. Nos. 141, 187.)

On March 31, 2020, the Court permitted Plaintiffs to raise five discovery issues concerning alleged deficiencies in Defendants' document production; the issues are versions of the same issues presented in the motion presently before the Court (described below). (Dkt. No. 442.) On July 17, 2020, the District Judge denied Defendants' Motion for Review of the March 31, 2020 Order, and confirmed that Plaintiffs may raise the five disputes. (Dkt. No. 479.)

On September 22, 2020, Plaintiffs filed a Motion to Compel and for Sanctions Pursuant to Federal Rule of Civil Procedure 37 (the "Motion") in the Joint Stipulation format pursuant to Local Rule 37-2 ("Joint Stip."). (Dkt. No. 488; *see also* Dkt. No. 500 (the Motion filed under seal).) In the Motion, the parties dispute whether Plaintiffs are entitled to five categories of

discovery: (1) messages involving Kanes stored on the Slack instant messaging platform[1]; (2) documents concerning Defendants' Series C Financing, including related valuations; (3) Defendants' investor communications; (4) reproduction of text messages between Horbaczewski and Cristina DeVito, a DRL employee and Horbaczewski's former girlfriend; and (5) a declaration from DRL employee Ryan Gury explaining his actions to preserve, search for, and produce messages of his phone. (*See generally* Motion.) Plaintiffs also contend that sanctions against DRL for spoliation of electronically stored information ("ESI") should be imposed. Plaintiffs attach to the Motion Declarations of Stephen C. Steinberg, Plaintiffs' counsel ("Steinberg Decl."); Gabriella A. Wilkins, Plaintiffs' counsel ("Wilkins Decl."); Ryan Gury, Chief Technology Officer of DRL; Trevor Smith, former DRL executive ("Smith Decl."); Defendant Horbaczewski; and Brian M. Burnovski, Defendants' counsel ("Burnovski Decl."); as well as numerous supporting exhibits. (Dkt. Nos. 488-1 to 488-20.)

On October 3, 2020, Plaintiffs filed a supplemental memorandum in support of the Motion—specifically, they respond to "new points" Defendants make concerning Plaintiffs' requests for the Slack messages and for spoliation sanctions. (Dkt. No. 512 ("Supp. Mem.").)[2]

DISCOVERY DISPUTES

I. Legal Standard

Under Federal Rule of Civil Procedure 26, a party may obtain discovery concerning any nonprivileged matter that is relevant to any party's claim or defense and is proportional to the needs of the case. FED. R. CIV. P. 26(b)(1). As amended in 2015, Rule 26(b)(1) identifies six factors to be considered when determining if the proportionality requirement has been met, namely, the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to the relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Id.* Relevant information need not be admissible to be discoverable. *Id.*

[1] *See* https://slack.com (last visited Nov. 9, 2020).

[2] On October 23, 2020, Plaintiffs filed a Request for Leave to file a Supplemental Declaration of Daniel Kanes in support of the Motion. (Dkt. No. 521.) Defendants opposed Plaintiffs' request. (Dkt. No. 522.) The Court denied the request. (Dkt. No. 526.)

Rule 37 provides that "[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection." FED. R. CIV. P. 37(a)(3). The party seeking to compel production of documents under Rule 34 has the burden of "demonstrating why the information sought is relevant," *Bartoli v. Rancho Cal. RV Resort Owners Ass'n*, Case No. EDCV 18-2643-MWF (KKx), 2020 WL 607116, at *3 (C.D. Cal. Feb. 7, 2020) (citation omitted), and of informing the court why the opposing party's objections are not justified or why the opposing party's responses are deficient." *Best Lockers, LLC v. Am. Locker Grp., Inc.*, Case. No. SACV 12-403-CJC (ANx), 2013 WL 12131586, at *4 (C.D. Cal. Mar. 27, 2013). However, "[t]he party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Duran v. Cisco Sys., Inc.*, 258 F.R.D. 375, 378 (C.D. Cal. 2009) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). And "'the parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.'" *Novoa v. Geo Grp., Inc.*, Case No. CV 17-2514-JGB (SHKx), 2019 WL 7205892, at *4 (C.D. Cal. Dec. 6, 2019) (quoting *Neil v. Travelers Home & Marine Ins. Co.*, 326 F.R.D. 652, 656 (D. Mont. 2018) (internal quotation marks omitted)).

District courts have broad discretion in controlling discovery. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002). When considering a motion to compel, the Court has similarly broad discretion in determining relevancy for discovery purposes. *Surfvivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 635 (9th Cir. 2005) (citing *Hallet*, 296 F.3d at 751). In resolving discovery disputes, the court may exercise its discretion in "determining the relevance of discovery requests, assessing oppressiveness, and weighing those facts in deciding whether discovery should be compelled." *Unilin Beheer B.V. v. NSL Trading Corp.*, Case No. CV 14-2210-BRO (SSx), 2015 WL 12698382, at *4 (C.D. Cal. Feb. 27, 2015) (citing *Favale v. Roman Catholic Diocese of Bridgeport*, 235 F.R.D. 553, 558 (D. Conn. 2006) (internal quotation marks omitted)).

These principles govern the Court's analysis of each of five dispute issues, even though, as discussed below, each issue involves different facts and arguments.

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II. Issue No. 1: Slack Messages Involving Kanes

a. Relevant Background

Plaintiffs first sought Defendants' Slack messages in requests for production of documents ("RFPs") served in November 2017. (*See* Dkt. No. 418-3.) Defendants objected to production of those messages. (Dkt. No. 279-3at 4-5.) In August 2018, the Court held that because the ESI housed at Slack.com was not within the possession, custody, and control of DRL, Defendants were not obligated to produce Slack messages in response to Plaintiffs' RFPs. (Dkt. No. 72 at 2.) The Court instructed Plaintiffs to pursue the Slack messages through third party subpoenas, and held that its ruling was without prejudice to Plaintiffs' ability to seek further discovery from Defendants related to the Slack information at a future date. (*Id.* at 2-3.)

In October 2018, Plaintiffs requested Defendants' advanced consent to Slack's production of messages provided that Defendants had the opportunity to first review the messages. (Dkt. No. 279-6.) In November 2018, Plaintiffs served Slack with a subpoena. (Dkt. No. 279-7.) Slack objected to the subpoena, citing the Stored Communications Act ("SCA"). (Dkt. No. 279-8 at 1.) Plaintiffs then asked Defendants to confirm to Slack their prior promise consenting to production; in response, Defendants declined to affirm their consent, noting that it was untimely, overbroad, and not proportional to the needs of the case. (*See* Dkt. No. 220-2 ¶ 12; *see also* Dkt. No. 220-4 at 1.) Once the District Judge confirmed that the undersigned Magistrate Judge retained jurisdiction to resolve this issue (*see* Dkt Nos. 442, 479), the parties met and conferred, but did not resolve the dispute.

b. Plaintiffs' Position

Plaintiffs argue that they are entitled to the Slack messages involving Kanes or which are otherwise responsive to Plaintiffs' RFPs for the following reasons. First, Plaintiffs contend the messages are relevant to show Plaintiffs' involvement in and contributions to DRL, as Kanes used Slack to communicate with other DRL employees while he worked with DRL in 2015. (Joint Stip. at 12-13.) Plaintiffs speculate that Defendants may now have access to the messages and Defendants may be able to provide them to Plaintiffs, rather than obtaining them from Slack by subpoena. (*Id.* at 13.) Plaintiffs postulate that DRL upgraded its Slack plan, which would permit it to retrieve archived messages that are responsive to Plaintiffs' RFPs; and if so,

Defendants should produce those messages. (*Id.*) Alternatively, if Defendants still cannot access the messages, Defendants should be required to uphold their promise to consent to Slack and cooperate in its production of messages responsive to the subpoena, with Defendants remaining able to review the messages prior to production. (*Id.* at 13-14.)

c. Defendants' Position

Primarily, Defendants emphasize that the Court previously found that DRL did not have access to the Slack messages at issue because of the level of its Slack plan. (*Id.* at 41.) Moreover, contrary to Plaintiffs' speculation to the contrary, the Slack plan to which DRL upgraded did not grant them access to the messages at issue, which still remain inaccessible to DRL. (*Id.* at 41-42.) Defendants argue that, in any event, Plaintiffs' request is not proportional to the needs of the case because the requested messages would be cumulative of the substantial existing record evidence concerning Plaintiffs' involvement in and contributions to DRL. (*Id.* at 42, 45.) Defendants state that they have already agreed to produce messages sent directly by Kanes over Slack's public channels, yet, Plaintiffs' insist, without ample justification, that they are entitled to the messages on the private channels as well. (*Id.*) These additional messages, Defendants contend, would require an overly burdensome review of the messages sent while Kanes worked with DRL. (*Id.* at 44.)

Defendants further argue that they should not be compelled to consent to Plaintiffs' subpoena to Slack. (*Id.* at 43-46.) They contend that the subpoena was untimely because it called for documents that were not due until after the fact discovery deadline and because it required consent that was not sought until after the fact discovery deadline. (*Id.* at 43-44.) IN addition, Defendants underscore that even if the subpoena was timely, Plaintiffs fail to show that Defendants had any obligation to consent to Slack's production of messages in response to the subpoena or should be compelled to do so now. (*Id.* at 44.) Defendants did not provide blanket consent to *any* subpoena, regardless of its scope or the time it was served. (*Id.*) They only agreed to consent to a subpoena that was timely served and reasonable in scope. (*Id.*) The subpoena Plaintiffs served on Slack was overbroad in scope, prompting Defendants to decline consent. (*Id.* at 44-45.) Finally, Defendants note that neither party proposed a narrower scope of the subpoena that would be acceptable, and Plaintiffs had the burden to show that the information sought was relevant and proportional to the needs of the case. (*Id.* at 45.)

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d. Plaintiffs' Reply

Plaintiffs take issue with the fact that Defendants only revealed that they upgraded their Slack account for the first time in their portion of the Motion. (Supp. Mem. at 2.) They argue that DRL's new Slack plan has a utility tool that permits users to access messages sent on private channels. (*Id.*) Additionally, Plaintiffs argue that the messages are not cumulative, or of limited relevance; rather, they are relevant because the platform is used primarily for work purposes and was a major communication medium while Kanes worked with DRL. (*Id.* at 3.) Plaintiffs assert that the messages sent on Slack's public channels are insufficient because most Slack messages are sent through direct (private) channels. (*Id.*) Finally, Plaintiffs insist that they acted diligently throughout the discovery process. (*Id.*)

e. Analysis

Plaintiffs have credibly argued the Kanes's private channel Slack messages may be relevant to the issues involved in this case. Specifically, the Court is persuaded that responsive messages, if any, may be relevant to show Kanes's involvement in and contributions to DRL, which could bear on the contract claims at issue in this litigation. But that is not the end of the inquiry because Rule 26 requires that discovery be both relevant and proportional. FED. R. CIV. P. 26(b)(1). Plaintiffs' request founders on the second prong of the analysis.

Plaintiffs' fail to establish that the request is proportional to the needs of the case. In August 2018, the Court found that the same messages that Plaintiffs now request were inaccessible to Defendants because they were electronically stored information ("ESI") housed at Slack.com and, therefore, DRL did not have possession, custody, and control over them. (Dkt. No. 72 at 2.) As of the date of this Order, those messages are still ESI housed at Slack.com and Defendants do not have access to them. Thus, Defendants have no present obligation to produce those messages and to require them to do so would impose an undue burden. *See* FED. R. CIV. P. 26(b)(2)(B) ("A party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost."); *see also, e.g.*, *Gen. Elec. Co. v. Wilkins*, 2012 WL 570048 (E.D. Cal. Feb. 21, 2012) (finding back-up tapes not reasonably accessible and requested party failed to show good cause to require producing party "to expend the resources necessary to make them reasonably accessible").

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Plaintiffs offer no evidence to show that Defendants now have access to the messages to which they previously did not. They merely speculate that DRL has upgraded its Slack plan such that it now has access to messages sent on private channels. (Supp. Mem. at 2.) However, Defendants credibly refute that speculation, explaining that they upgraded from a free Slack account to a "paid account on Slack's 'Standard' plan . . . that does not permit DRL to search messages sent via 'private' channels or 'direct messages.'" (Joint Stip. at 41-42.) They clarify that while Slack offers a utility tool that permits the export and search of messages sent through private channels and of direct messages, the tool is only available to accounts on Slack's "Plus" tier or above, which Defendants do not have.[3] (*Id.* at 42 n.13.) Plaintiffs do not argue that Defendants are misrepresenting their level of access to the messages, and there is no evidence suggesting as such. Thus, as the Court held in August 2018, Defendants need not produce the messages in response to Plaintiffs' RFP because they lack access to ESI housed at Slack.com.

Defendants also point out that the record is replete with evidence of Plaintiffs' involvement in and contributions to DRL, including Plaintiffs' own testimony, other witnesses' testimony, emails, text messages, and Kanes' Slack messages sent over Slack's public channels during the relevant period. (*Id.* at 42.) The Court agrees that any additional evidence derived from Kanes's private Slack messages would likely be cumulative. Plaintiffs offer no evidence that the private messages contain any novel or noteworthy information that warrant compelling their production. Indeed, Plaintiffs' largely speculate that additional responsive messages would be obtained through a search of the private channel messages.

Plaintiffs alternatively request that the Court compel Defendants to consent to Plaintiffs' subpoena to Slack so that Slack can produce the messages in response in Plaintiffs' subpoena. (*Id.* at 13-14.) Plaintiffs do not cite to, and the Court is not aware of, any authority that permits

[3] In support of their position that DRL's upgraded Slack plan granted it access to the messages sent over Slack's private channels, Plaintiffs cite *Calendar Research LLC v. StubHub, Inc.*, Case No. 17-4062-SVW (SSx), 2019 WL 1581406, at *4 (C.D. Cal. Mar 14, 2019). (Supp. Mem. at 2.) However, that case is distinguishable from the present circumstances. *Calendar Research LLC* case presents a similar scenario to the dispute at issue—the defendants initially used a free Slack account without access to messages sent over private channels, they subsequently upgraded to a premium account that included a utility tool allowing them to extract private channel messages, and the court in that case granted the motion to compel those messages. *Calendar Research LLC*, 2019 WL 1581406, at *4. Crucially, however, DRL did not upgrade to premium plan that included the utility tool at issue in *Calendar Research LLC*. (*See* Joint Stip. at 41-42.) Thus, the facts of *Calendar Research LLC* are not analogous to the instant dispute.

the Court to compel a non-consenting party's *consent* to a subpoena served by an opposing party on a non-party for documents. But even if the Court could compel such consent, and assuming the Slack subpoena is timely, Plaintiffs do not adequately explain why the Court should do so. Plaintiffs maintain that Defendants had previously agreed to consent to Slack's production of responsive messages, so long as they could review the messages in advance. (Joint Stip. at 12; Dkt. No. 279-6.) But Defendants deny that they provided advance blanket consent to *any* subpoena served to Slack; rather, they agreed to consent if a subpoena was reasonable in scope and if they had the opportunity to review the documents before they were produced to Plaintiffs. (Joint Stip. at 44.)

Upon review of the parties' communications, Defendants have accurately characterized the limits of their consent. In January 2019, Plaintiffs' counsel emailed defense counsel about Slack's response to Plaintiffs' subpoena. (Dkt. No. 220-4 at 2.) She wrote that defense counsel had signaled that "DRL would consent to Slack issuing the messages to bypass the [SCA]," and asked if he would be willing the memorialize the intent to give consent. (*Id.*) The following week, having not received a response from defense counsel, Plaintiffs' counsel followed up on her previous email. (*Id.*) Two days later, defense counsel replied, asserting, *inter alia*, that the subpoena was untimely and the request for documents was overbroad; he stated, in relevant part:

> I told [Plaintiffs' counsel] back in October 2018 that Plaintiffs would have to subpoena a reasonable amount of documents and DRL would need to have the right to review those documents first before production. Your subpoena to Slack seeks '[a]ll messages between all users of the DRL SLACK DOMAIN from April 2015 until December 2015' in addition to all messages to and from Mr. Kanes. This subpoena is grossly overbroad and far from a reasonable amount of documents that we would have agreed to. We thus view Plaintiffs' subpoena as untimely, overbroad, and not proportional to the needs of the case.

(*Id.* at 1 (alterations and emphasis in original).) Plaintiffs' counsel responded that Defendants' logic applied to their requests for Plaintiffs' documents and that if they wished to reconsider their position to inform Plaintiffs' counsel. (*Id.*)

It is clear from these communications that Defendants indeed conditioned their consent to the subpoena on the reasonableness of the subpoena. Plaintiffs do not attempt to rebut this

qualification, nor do they argue for the reasonableness of the scope of their subpoena. Conversely, Defendants arguments against reasonableness are well-taken. Plaintiffs' subpoena was not narrowly tailored, but sought "[a]ll messages between all users of the DRL Slack domain from April 2015 until December 2015." (Dkt. No. 279-7 at 5 (RFP No. 1).) Defendants were not obligated to counter Plaintiff's subpoena with a request for documents that was narrower in scope, that burden was Plaintiffs'.

Accordingly, the Court concludes that Plaintiffs' request for the Slack messages involving Kanes is not proportional to the needs of the case and Plaintiffs' request to compel production of those documents is DENIED.

III. Issue No. 2: Series C Financing Documents

a. Relevant Background

In November 2017 and August 2018, Plaintiffs served Defendants with requests for production of documents ("RFPs") pertaining to DRL's Series A and Series B financing rounds. (Dkt. Nos. 418-3, 418-4 (RFP Nos. 7, 15, 17, 26, 34).) In late November 2018, after the close of fact discovery, Plaintiffs learned of DRL's intent to participate in a Series C financing. (*See* Dkt. No. 418-8 at 3.) Accordingly, in early 2019, Plaintiffs served additional RFPs on Defendants specifically addressing the new round of C financing and contending that Plaintiffs had the duty to supplement in response to Plaintiffs' RFPs requesting documents relating to Horbaczewski's and others' investment in and ownership of DRL, and valuations of DRL. (*Id.*; *see also* Dkt. No. 418-2 at 5.)

In May 2019, Defendants moved to exclude the expert report and testimony of Greg J. Regan, who was sought by Plaintiffs to proffer an expert opinion concerning Plaintiffs' alleged damages. (Dkt. No. 225.) In June 2019, Plaintiffs opposed Defendants' motion to exclude. (Dkt. Nos. 286, 305.) Defendants filed a reply in support of the motion to exclude. (Dkt. No. 314.) In July 2019, the District Judge held a hearing on, *inter alia*, Defendants' motion, expressing that the tentative view was that damages would be measured not as of the time of trial, but as of some earlier event. (Dkt. Nos. 340, 341 at 4, 6, 20.)

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Meanwhile, in June 2019, DRL publicly announced its Series C financing. (Joint Stip. at 15 n.1.) Arguing that Plaintiffs failed to comply with their obligation to supplement documents about their previous rounds of financing, the parties met and conferred; yet, Defendants' position was that they fully complied with their discovery obligations and were not required to provide additional documents. Defendants further argued that Plaintiffs' RFPs were untimely, Defendants' own damages expert did not rely on the Series C documents in his opinion, and the whole issue was premature. (Dkt. No. 418-2 at 5.)

b. Plaintiffs' Position

Plaintiffs first argue that Defendants must supplement their discovery responses with documents about DRL's Series C financing because those documents relate back to prior discovery requests for documents related to the Series A and B financing that were served long before the discovery cut-off date, and because they are relevant to the calculation of damages for misappropriation. (Joint Stip. at 15.)

Plaintiffs note that their motion to exclude Regan's expert opinion is still pending, and Defendants rely on the District Judge's potential ruling on that motion to support their position that the Series C documents are not discoverable. (*Id*. at 15-16.) But Plaintiffs argue that the Series C documents are discoverable regardless of the District Judge's ruling, therefore Defendants must supplement their prior disclosures and provide the Series C documents, including any valuations prepared in connection with that round of financing. (*Id.* at 16-17.)

c. Defendants' Position

Defendants argue that their Series C financing documents are neither relevant nor proportional to the needs of the case. (*Id.* at 46-51.) They first contend that the documents are not relevant to the calculation of damages for their tort claims. (*Id.* at 46.) Plaintiffs do not assert a conversion claim, and even if they had, damages could not be measured years after the alleged misconduct at issue. (*Id.* at 46-47.) Defendants concede that the conversion statute provides an alternative measure under which damages could be measured at a later date, but that alternative only applies if Plaintiffs plead and prove special circumstances showing that measuring damages at the time of the alleged conversion would be manifestly unjust, which they have not done here. (*Id.* at 47.) Further, Defendants emphasize even if Plaintiffs could show

special circumstances, that would still not support Plaintiffs' position that damages should be measured based on DRL's highest market value through the date of trial or that information bearing on DRL's value more than four years after the alleged misconduct is relevant. (*Id.* at 48.) Defendants urge that allowing Plaintiffs to measure damages as of trial, years after the alleged misconduct, would provide an unjust windfall to Plaintiffs because it would improperly reward their delay in asserting their claims and allow them to recoup damages based merely on the length of pretrial practice and unrelated developments at DRL. (*Id.* at 49.) Defendants also aver that information not relevant in an action is neither admissible nor discoverable. (*Id.*)

Additionally, Defendants argue that Plaintiffs do not have a right to specific performance, as money damages are likely an adequate remedy. (*Id.* at 50.) Defendants maintain that Plaintiffs' argument that the Series C documents could reveal investors in DRL that may have been introduced to Defendants by Plaintiffs is baseless because Plaintiffs know who they introduced to Defendants and offer no evidence that any of them invested in DRL. (*Id.*) Furthermore, Defendants contend that even if DRL's currently capitalization table is arguably relevant, that does not justify the production of *all* documents related to the Series C financing, which is well beyond what is proportional to the needs of the case. (*Id.* at 50-51.)

d. Analysis

The Court finds that Plaintiffs are not entitled to documents concerning DRL's Series C Financing because Plaintiffs have not shown that the documents are relevant to the claims or defenses at issue. Facially, it is not obvious how the documents, which pertain to a round of financing that took place in June 2019, are probative of any injuries that Plaintiffs allegedly suffered before July 2018 (when the TAC was filed). In fact, Plaintiffs allege that they did not discover that Defendants even intended to pursue Series C financing until December 2018, six months after they filed the TAC. (Joint Stip. at 15.) Defendants have already disclosed documents pertaining to their first two rounds of financing, which predated the filing of the TAC. Therefore, Plaintiff has not demonstrated how the newly requested Series C documents are relevant here.

Plaintiffs' arguments do little to clarify the matter. They argue that Defendants are required to supplement their earlier financial disclosures because the Series C documents relate to their earlier discovery requests. (*Id.*) But Plaintiffs do not explain how the documents relate

back. Federal Rule of Civil Procedure 26(e) requires a party to supplement responses to discovery requests if the response is incomplete or incorrect. But Plaintiffs do not contend that the Series A and Series B financing documents are incomplete or incorrect. The documents they seek pertain to an entirely new financing effort that posts-dates any alleged conduct that either gives rise to Plaintiffs' claims or would be a basis for assessing damages in this case. Plaintiffs provide no evidence that DRL's Series C financing involved the same investors or streams of income as prior financing rounds, or that the funds collected in Series C were used for similar purposes as the funds collected in earlier rounds. By its nature, Series C financing (which often focuses on major market expansion and external acquisitions) often involves different considerations than Series A or B financing (which focuses on company development and expanding market reach). Absent allegations that the documents Plaintiffs seek relate to earlier rounds of financing, the Court is not persuaded by Plaintiffs' argument.

Plaintiffs also argue that the Series C documents are relevant to the issue of damages. (*Id.* at 16-17.) This argument is likewise unavailing. The documents are not relevant to the issue of damages for breach of contract because those damages must be measured as of the date of the alleged breach. *See, e.g.*, *Reese v. Wong*, 93 Cal. App. 4th 51, 55 (2001). Nor are they relevant to the issue of damages for Plaintiffs' tort claims. Setting aside the fact that the District Judge in this case indicated in the hearing on the motion to exclude Plaintiffs' damages expert that he would rule that the time to measure damages was not at the time of trial (*see* Dkt. No. 341 at 6), Plaintiffs present no case law that persuade this Court that damages are likely to be measured as of the time of trial.

Plaintiffs rely on the tort of conversion as a basis to support their argument that the Series C financing documents are relevant to damages. (*See* Joint Stip. at 16 (citing Cal. Civ. Code § 3336 ("Section 3336")).) But Plaintiffs do not, either in form or in substance, assert a conversion claim in the TAC. They only assert contract claims, claims for fraud, breach of fiduciary duties, and intentional interference with prospective economic advantage. (*See generally* Dkt. No. 62.) As Plaintiffs did not plead conversion, there is no legal basis on which to calculate damages using a conversion, rather than a breach of contract, measure. *See Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 262 (2d Cir. 2002). Further, where Plaintiffs' allegations (even those grounded in tort) concern breaches of contractual obligations, Plaintiffs cannot constructively plead conversion, because the converted property right at issue must

preexist the contract. *See Expedited Packages, LLC v. Beavex, Inc.*, Case No. CV 15-721-MMM (AGRx), 2015 WL 13357436, at *4 (C.D. Cal. Sept. 10, 2015).

Even if Section 3336 (the California conversion statute) applied to Plaintiffs' tort claims, the requested Series C documents would still not be relevant to damages because damages for conversion are measured at the time of the tortious act, *i.e.*, long before DRL participated in Series C financing. *See Tyrone Pac. Int'l, Inc. v. MV Eurychili*, 658 F.2d 664, 666 (9th Cir. 1981) (citing *Myers v. Stephens*, 233 Cal. App. 2d 104, 116 (1965)). The conversion statute does contemplate an alternative measure, under which damages could be measured at a later date, but that alternative only applies if measuring damages at the time of the alleged conversion would be manifestly unjust. *See id.* So, "a person claiming damages under the alternative [measure] must plead and prove special circumstances." *Lueter v. State of California*, 94 Cal. App. 4th 1285, 1302 (2002). Plaintiffs have not done that. They cite a case for the special circumstances alternative measure, but they do not explain why it applies; they merely assert, without support, that the Series C documents are relevant to the issue of damages. (Joint Stip. at 16.)

Plaintiffs' alternative arguments to compel the Series C documents are also unavailing. Plaintiffs contend that the documents would be relevant to their potential remedy of specific performance to compel Defendants to fulfill their contractual obligations. (Joint Stip. at 16.) But Plaintiffs have not demonstrated that they would be entitled to specific performance because money damages would be an adequate remedy for their contract-based injuries, and they have not explained otherwise. *See Lee v. Blumenthal*, 588 F.2d 1281, 1283 (9th Cir. 1979). In fact, Plaintiffs' own expert opined that money damages are easily capable of estimation in this case. (*See* Dkt. No. 341 at 13.)

Plaintiffs also argue that the capitalization table in the Series C documents would identify investors, who may have been introduced to Defendants by Plaintiffs. (Joint Stip. at 16.) But this argument is entirely speculative and does not justify compelling Defendants to produce *all* of the Series C documents. This is especially the case when Plaintiffs know which investors they introduced to Defendants and there is no evidence that any of them invested in DRL. Furthermore, Plaintiffs' argument turns on the relevance the capitalization table, a single document. It would be patently disproportional to compel production of all of the Series C documents based on the potential—albeit slim—relevance of one document. Finally, and more importantly, Plaintiff's relevance arguments are further undermined by the fact that Defendants

previously offered to produce their capitalization table to Plaintiffs and Plaintiffs refused that offer. (Burnovski Decl. ¶ 3.)

Accordingly, Plaintiffs' request to compel the Series C financing documents is DENIED.

IV. Issue No. 3: Investor Communications

a. Relevant Background

In August 2018, during a telephonic conference, Plaintiffs raised concerns that Defendants had not produced all responsive documents concerning communications between Defendants and potential or actual investors. (Dkt. No. 69 at 2.) Defendants indicated that they had searched for all such communications and produced the responsive investor-related documents and communications. (*Id.*) The Court took no further action on the issue. (*Id.*)

In September 2018, Defendants filed their responses to Plaintiffs' second set of RFPs. (*See* Dkt. No. 230-9.) Among those RFPs were RFP No. 25, which requested "[a]ll DOCUMENTS describing the DRL and/or the DRL's business provided to investors and potential investors in connection with the DRL's Series A, Series A1, ad Series B financing rounds, including but not limited to prospectuses and offering memorandums." (*Id.* at 3.) In response, Defendants produced only capitalization tables and communications specifically referencing Plaintiffs through June 30, 2017; they otherwise objected to Plaintiffs' request on the ground that the requested communications were, *inter alia*, not relevant and unduly burdensome to produce. (*Id.*)

In November 2018, during a telephonic conference at which the parties disputed the sufficiency of Defendants' response to the aforementioned RFP, Defendants represented that they had searched for and produced all documents that referred or related to Plaintiffs' investor communications. (Dkt. No. 86 at 3-4.) Plaintiffs argued they were entitled to additional documents because the documents might reveal evidence of contributions of ideas and concepts provided by Plaintiffs. (*Id.* at 4.) The Court found Plaintiffs' argument speculative, and the request overly broad and not proportional to the needs of the case because it would require a further search for and production of virtually every document relating to both financing rounds

whether or not such documents had any bearing on Plaintiffs' claims. (*Id.*) Thus, the Court required no further production by Defendants. (*Id.*)

On December 4, 2018, during the deposition of potential investor Matt Mazzeo, he produced, as relevant here, an email from Horbaczewski attaching a DRL pitch deck, which identified Laub and Kanes as members of DRL's team. (*See* Wilkins Decl. ¶ 9; Dkt. No. 500-3 at 18.) In February 2019, Defendants served their damages expert Todd Schoettelkotte's rebuttal report, which relied on purported investor considerations and motivations. (*See* Dkt. No. 230-5; Dkt. No. 247-2 at 29-30.)

b. Plaintiffs' Position

Plaintiffs argue that Defendants' communications with actual or potential investors are relevant because Plaintiffs' ideas were the basis for Defendants' pitch to investors, Plaintiffs were part of the founding team behind DRL in its early pitch decks sent to potential investors, and Plaintiffs introduced Defendants to potential investors. (Joint Stip. at 17.) Plaintiffs claim that Defendants' failure to disclose the email produced by Mazzeo calls into question Defendants' claim that they searched for and produced all relevant investor communications, as Mazzeo was solicited as a potential investor and the email contained Plaintiffs' identities.

Plaintiffs further argue that the investor communications are relevant to Defendants' defenses because Schoettelkotte actually relied on purported investor considerations and motivations in his damages assessment (that would likely be reflected in their communications). (*Id.* at 18-19.) Additionally, the communications would identify which investors expressed the supposed considerations relied on by Schoettelkotte and who might be a source of relevant testimony. (*Id.* at 19.) Conversely, even if the investor communications make no mention of the considerations cited by Schoettelkotte, they would also be relevant to contradict Defendants' claims. (*Id.*)

c. Defendants' Position

Defendants contend that Plaintiffs seek to relitigate an issue that the Court has already decided—that Plaintiffs are not entitled to investor communications. (*Id.* at 51 (citing Dkt. Nos. 69, 86).) Further, Schoettelkotte's expert opinion did not put the investor communications at

issue; it simply rebuts hypothetical opinions offered by Plaintiffs' damages expert (Regan), and such limited opinions regarding hypothetical matters that were not based on the documents Plaintiffs seek provide no basis to compel production of every single investor communication over the life of DRL. (*Id.* at 51-52.) Defendants argue that Plaintiffs' request represents "extraordinary overreach" for irrelevant documents that would be highly burdensome to review and produce, and would be vastly disproportional to the needs of the case. (*Id.* at 52-53.)

Additionally, Defendants assert that Plaintiffs' argument is contingent on the admissibility of the opinions of both parties' damages experts; yet, Defendants have sought to *exclude* Regan's report. (*Id.* at 53 (citing Dkt. No. 225).) If the District Judge grants Defendants' motion, then Schoettelkotte's opinion would become moot, and the purported basis for the relevance of the investor communication documents would disappear. (*Id.*) Likewise, Plaintiffs have moved to exclude Schoettelkotte's opinion, which, if granted, would produce the same result. (*Id.* (citing Dkt. No. 230-1).)

Defendants reiterate that they already agreed to produce investor communications that referenced Plaintiffs, which the Court held were sufficient, and there is no reason to revisit the Court's earlier decision. (*Id.*) They also note that Plaintiffs' argument that they failed to produce all responsive documents based on Mazzeo's production of an email is baseless because the email was not produced from Horbaczewski's file and other versions of the same investor presentation were separately produced to Plaintiffs by Horbaczewski. (*Id.* at 53-54 n.21.)

d. Analysis

The Court finds that Plaintiffs are not entitled to Defendants' investor communications. In 2018, the Court twice noted that Defendants had already searched for and produced their communications with actual or potential DRL investors, and held that Defendants were not required to produce any additional documents responsive to Plaintiffs' request. (Dkt. No. 69 at 2; Dkt. No. 89 at 3-4.) In the second order, the Court also found that Plaintiffs' request was "overly broad and not proportional to the needs of the case in that it would require a further search for and production of virtually the entirety of the documentation for both financing rounds whether or not such documents have any relationship to Plaintiffs' claims." (Dkt. No. 89 at 4.) The Court's posture has not changed and Plaintiffs present no arguments compelling a different result. Thus, the Court will not authorize Plaintiffs' fishing expedition.

Unlike their earlier attempts to compel production of the investor communication documents, Plaintiffs now contend that the communications are relevant to their damages expert's opinion. (Joint Stip. at 18-19.) But even if that were true, Plaintiffs make no attempt to persuade the Court that their request is proportional to the needs of the case, or to offer an alternative request that would be proportional. The Court has not wavered from its 2018 position that Plaintiffs' request was not proportional to the needs of the case and does not do so now.

The fact that Mazzeo produced an email attaching a pitch desk identifying Plaintiffs as being involved with DRL does not suggest that Defendants evaded their discovery obligations such that the Court must compel a search for further responsive investor communications. The Court is persuaded by Defendants' explanation that the email and pitch deck were sent via Google Drive, not from Horbaczewski's own files, and therefore, did not appear in Horbaczewski's search of his sent emails. (*See* Joint Stip. at 54-55 n.21.) Moreover, a version of the same email and presentation, identifying Plaintiffs as being involved with DRL was produced by Horbaczewski. (*See* Burnovski Decl. ¶ 17; Dkt. No. 500-4.)

Accordingly, the Court DENIES Plaintiffs' request for additional investor communications beyond what Defendants have already produced.

V. Issue No. 4: DeVito Text Conversations

a. Relevant Background

In July 2018, Defendants inadvertently produced, without review, a spreadsheet containing thousands of text messages from collected from Horbaczewski's cell phone and involving five individuals believed to be involved in the formation and development of DRL; among those individuals was Cristina DeVito, who had had a romantic relationship with Horbaczewski and for a time worked for DRL's Human Resources Department. (*See* Dkt. No. 149-2 ¶ 2.) In December 2018, Defendants, arguing that the wholesale production without counsel review was inadvertent and Defendants sought to claw back the messages on grounds of irrelevance, privacy, and privilege and sought to replace them with fewer messages from those individuals. (Dkt. No. 149-1 at 5-6.) Defendants submitted to the Court for *in camera* review nine spreadsheets containing all text messages exchanged between Horbaczewski and the individuals during the period at issue. (Burnovski Decl. ¶ 4.) Among those spreadsheets was

one containing nearly 4,000 text messages exchanged between Horbaczewski and DeVito; Defendants highlighted 3,741 of the text messages as personal and not concerning the issues involved in this case. (*Id.* at ¶ 5.)

In January 2019, the Court denied Defendants' request to claw back the messages and ordered them to reproduce all non-privileged text messages; the Court observed that Defendants' proposed selective substitution failed to contextualize the messages within the "larger conversation in which the message was sent or received," and "d[id] not adequately capture the responsive communications between these and other key actors that Defendants are obligated to disclose." (Dkt. No. 128 at 5-6.) The Court stated that "[a] single text message, because individual messages are often quite brief, may provide no context whatsoever for the overall conversation and, therefore, could appear to be irrelevant in isolation but may be highly relevant when read in context." (*Id.* at 6.) It further stated that if the redacted information was irrelevant or non-responsive, "then it would afford no unfair advantage to Plaintiffs to have sufficient contextual information to make the responsive, relevant disclosures reasonably usable." (*Id.* at 8.) In February 2019, the Court vacated its January 2019 order and ordered the parties to brief the issue. (Dkt. No. 143.)

In April 2019, the Court entered an Order permitting Defendants to withhold Horbaczewski's private messages with DeVito, while compelling them to reproduce all of Horbaczewski's non-privileged text messages with Mazzeo (who introduced the parties to each other) and other DRL employees. (Dkt. No. 191.) As to the DeVito messages, the Court held that 3,741 text messages between Horbaczewski and DeVito were not relevant or proportional to the needs of the case, reasoning that "the seriousness of any prospective invasion of privacy for the individuals involved outweigh[ed] any countervailing interest there might be in discovery." (*Id.* at 15.) As to the other text messages not involving DeVito, the Court noted that case law supported the proposition that messages should be provided in a manner than provided a "complete record," as opposed to "scattershot texts." (*Id.* at 23 (citing *Paisley Park Enters., Inc. v. Boxill*, 2019 WL 1036058, at *6 (D. Minn. Mar. 5, 2019)).) It ordered Defendants to "produce the text messages either in the spreadsheet form as originally produced, albeit inadvertently, or, alternatively, in an otherwise mutually agreeable usable format that preserve[d] the integrity of the threads of communication reflected in the text messages." (*Id.* at 25.) The Court did not expressly order Defendants to reproduce any additional messages with DeVito; it simply ordered

Defendants to "produce the text messages between Horbaczewski, Mazzeo, and DRL employees Gury, Smith, and Budding[.]" (*Id.* at 26.)

In May 2019, Defendants reproduced 229 text messages between Horbaczewski and DeVito, which represented all text messages submitted to the Court for *in camera* review excluding the 3,741 private messages. (*See* Wilkins Decl. ¶ 3, Burnovski Decl. ¶ 6; *see also* Dkt. Nos. 488-3, 500-1.) Plaintiffs challenged this production on the ground that the subset of messages appeared to be cherry-picked, omitted parts of responsive conversations, and lacked context (similar to the earlier proposed substitution for the original production that the Court had found inadequate in its January 2019 Order). (*See* Dkt. No. 417-1 at 8-9.)

In July 2020, the Court issued its Order Denying Defendants' Motion for Review of Non-Dispositive Ruling regarding Plaintiffs' Motion Regarding Timeliness of Discovery Disputes. (Dkt. No. 479.) The parties then met and conferred four times in July and August 2020 regarding the outstanding discovery disputes that are the subject of the instant Motion. (Wilkins Decl. ¶ 2.) As relevant to this issue, Defendants agreed to produce the relevant and responsive images, videos, and files embedded in the text messages previously reproduced in May 2019, and a redacted log showing the date and time (but not content) of the withheld text messages with DeVito; they did so on August 14, 2020. (*Id.* at ¶ 4.) Defendants continued to withhold the 3,741 text messages on relevance and privacy grounds. (Dkt. No. 488-5 at 1.) Plaintiffs' Motion followed shortly thereafter.

b. Plaintiffs' Position

Plaintiffs argue that Defendants must be required to reproduce certain text messaged they recovered and withheld for irrelevance, but which are part of "indisputably relevant" and responsive messages, some of which they relied on in their motion for summary judgment. (Joint Stip. at 19.) The text messages, they contend, may themselves be irrelevant, but are necessary to maintain the integrity and context of each conversation. (*Id.* at 19, 22.) Plaintiffs offer examples of messages that Defendants provided that Plaintiffs claim are misleading when read alone, but when read with other messages that Defendants omitted, are clearly relevant because they provide context to the conversation. (*Id.* at 22-23.)

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Plaintiffs conclude that Defendants' message reproduction suffers the same defects identified by the Court in its January 2019 Order. (*Id.* at 23-24.) Thus, to comply with their discovery obligations, Defendants must be compelled to reproduce the text messages that complete the relevant conversation threads. (*Id.* at 24.) Plaintiffs request in the alternative that Defendants not be permitted to rely on the text messages between Horbaczewski and DeVito in their substantive motions or at trial because of their failure to comply with Court orders. (*Id.*)

c. Defendants' Position

Defendants posit that Plaintiffs merely attempt to relitigate an issue that the Court already decided in its April 2019 Order. (*Id.* at 54.) Defendants fully complied with that order, in which the Court expressly held that the 3,741 texts Plaintiffs now seek "may be withdrawn and need not be reproduced." (*Id.* (citing Dkt. No. 191 at 25).) They contend that Plaintiffs ignore the plain language of the Court's April 2019 Order and oppose the argument that the Court did not see the individual text messages as part of larger conversations when it reviewed the spreadsheets *in camera*—Defendants submitted all of the messages in a single spreadsheet in chronological order, highlighting the personal messages they sought to exclude. (*Id.* at 56-57.) Thus, it was "readily apparent" whether the highlighted messages were necessary to preserve the conversational integrity of the other messages on the spreadsheet. (*Id.* at 57.) Defendants further argue that Plaintiffs have not shown that any of the withdrawn messages were needed to preserve the integrity of the text conversations that were produced. (*Id.* at 57-58.) Defendants maintain that they reviewed the messages, which are unquestionably irrelevant and add no material context to the texts that were produced. (*Id.* at 58.)

Additionally, Defendants argue that the texts are not relevant to the parties' claims or defenses. (*Id.* at 54, 58.) They point out that the fact that some withdrawn text messages had temporal proximity to some reproduced messages has no bearing on the relevance of the messages and their purported necessity for providing context. (*Id.*) They confirm that the withdrawn messages that were exchanged near the date of some produced messages relate only to personal matters, and do not concern DRL or Plaintiffs. (*Id.*) Further, any decision by Defendants to produce some withdrawn text messages exchanged in between two non-discoverable messages does not render the produced messages misleading, as the intervening omitted text messages concerned only personal matters. (*Id.* at 59.)

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d. Analysis

The Court finds that Plaintiffs are not entitled to reproduction of the complete text conversations between Horbaczewski and DeVito. Primarily, it is worth noting that Plaintiffs' reliance on the Court's holding and reasoning of the January 2019 Order is misplaced. That Order was vacated several weeks after it was entered (*see* Dkt. No. 143), and the Court's April 2019 Order (Dkt. No. 191) is the operative ruling guiding the Court's analysis. In that April 2019 Order, the Court explicitly held, after reviewing the text messages *in camera*, that the same messages Plaintiffs currently seek need not be reproduced. (Dkt. No. 191 at 25.) It did not, as Plaintiffs contend, instruct that the messages that Plaintiffs currently seek be reproduced in a way that preserves the integrity of the text conversations—that instruction was limited to texts not involving DeVito. (*See id.*)

Plaintiffs essentially request that the Court revisit its April 2019 ruling. Their request is both substantively and procedurally defective. A motion for reconsideration can be brought:

> [O]nly on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

C.D. Cal. L.R. 7-18; *see also* FED. R. CIV. P. 72(a). Here, Plaintiffs have not satisfied their burden to establish that any of these limited circumstances apply require that the Court reverse or otherwise amend its prior 26-page ruling on scope of production of Horbaczewski's text messages. More importantly, however, Plaintiffs' request that the Court revisit the issue at this juncture is, in essence, seeking "proverbial second bite at the apple." *Rhodes v. Pfeiffer*, Case No. CV 14-7687, 2017 WL 10519635, at *1 (C.D. Cal. 2017) ("Litigants may not use motions for reconsideration to get a proverbial second bite at the apple.'" (internal quotation marks and citation omitted).) Local Rule 72-2.1 requires that a party objecting to a ruling of a magistrate judge as to a non-dispositive pretrial matter file a motion for review and reconsideration within 14 days of service of the written ruling by the magistrate judge. C.D. Cal. L.R. 72-2.1.
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Accordingly, the Court DENIES Plaintiffs' request for the text messages between Horbaczewski and DeVito, as the requested messages are not relevant or proportional to the needs of the case. Additionally, because Plaintiffs' fail to demonstrate that Defendants have somehow failed to comply with the Court's prior orders governing this dispute, the Court also DENIES Plaintiffs' alternative request to bar Defendants from relying on the text messages in their motion for summary judgment or at trial.

VI. Issue No. 5: Declaration of Non-Party Ryan Gury

a. Relevant Background

With respect to this disputed issue, the parties give similar accounts of the relevant factual background, but present broadly different interpretations of their respective communications. In July 2018, Defendants produced text messages involving non-party Ryan Gury and another DRL employee, Trevor Smith, but it was unclear to Plaintiffs how the text messages were uncovered and whether the search included messages from Gury's and/or Smith's phones. (Steinberg Decl. ¶ 2.) More than a year later, in October 2019, the parties met and conferred over Plaintiffs' request that Defendants conduct a broader search of Gury's and Smith's text messages than the search to which they had conducted prior to the July 2018 production. (*Id.* at ¶ 2; Burnovski Decl. ¶ 8.)

Plaintiffs provide the following account of the parties' October 2019 discussions: defense counsel initially claimed during the parties' first two calls that Defendants had searched Gury's and Smith's phones, but only for messages exchanged with Plaintiffs (not messages responsive to any other document requests) and did not locate any. (Steinberg Decl. ¶ 3.) During a third meet and confer call, defense counsel claimed that Gury and Smith got new phones in 2016, and Defendants did not search their phones because they had not kept or backed up any older messages and had not exchanged messages with Plaintiffs since then. (*Id.*) During a fourth meet and confer call, defense counsel claimed that Defendants had searched Gury's and Smith's phones for the aforementioned messages, but had not located any because they replaced their phones in 2016 and had not saved or backed up any older messages. (*Id.*) Defendants made the same representation to the Court in an October 28, 2019 email requesting a pre-motion telephone conference. (*Id.*) Defendants did not disclose in that email that Smith's phone had broken and was returned to Apple in 2018. (*Id.*)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 17-6210-JAK (KSx) Date: November 17, 2020

Title *Justice Laub v. Nicholas Horbaczewski, et al.*

Defendants describe the foregoing events as follows. During the parties' initial October 2019 meet and confer calls, defense counsel explained that, in their responses to Plaintiffs' discovery requests, Defendants timely objected to producing any of Gury's and Smith's text messages other than those directly with Plaintiffs, and Plaintiffs' attempt to procure additional texts was untimely. (Burnovski Decl. ¶ 8.) On October 26, 2019, Plaintiffs' counsel acknowledged that he may not have understood the relevant facts and, based on subsequent emails, he interpreted defense counsel's statements to mean that Defendants had only searched for messages directly between Gury and/or Smith and Plaintiffs and found nothing because Gury and Smith did not save the messages. (*Id.*; Dkt. No. 488-18 at 3, 6.) In a responsive email, defense counsel explained that Plaintiffs' counsel's understanding was not accurate. (Burnovski Decl. ¶ 8; Dkt. No. 488-18 at 2.) Defense counsel subsequently explained that Defendants had searched for messages that mentioned Plaintiffs, but did not identify such messages on Gury's or Smith's phones for any period relevant to the litigation because Gury and Smith got new phones in December 2016 and had not backed up their text messages. (Burnovski Decl. ¶ 9.) Defense counsel never represented that Defendants had not searched Gury's or Smith's phones at all on account of the fact that they got new phones. (*Id.*) Plaintiffs continued to inaccurately characterize Defendants' search efforts in a joint email to the Court sent on October 28, 2019. (*Id.* at ¶ 10 (citing Dkt. No. 418-2).) Defendants maintained to Plaintiffs that they continued to believe Plaintiffs' description was not accurate, but, for sake of time, consented to sending the joint email to the Court despite the inaccuracies. (*Id.*; *see also* Dkt. No. 488-16 at 2.)

Defendants ultimately agreed to conduct a broader search of Gury's and Smith's messages. (Burnovski Decl. ¶ 11.) They first agreed to conduct a reasonable search of Gury's messages from the earliest available date (December 2016) through July 2017, when this action commenced. (*Id.*; Wilkins Decl. ¶ 2; *see also* Dkt. No. 488-10.) On August 21, 2020, Defendants produced some text messages that they discovered, which were dated between March and June 2017. (Burnovski Decl. ¶ 11; Wilkins Decl. ¶ 10.) Defendants extended their search for two weeks' worth of additional messages and produced two more arguably responsive messages, but those had already been produced from Horbaczewski's phone. (*Id.* at ¶ 12; Dkt. No. 488-19.) Defendants offered to reproduce the messages, but Plaintiffs did not reply to the offer. (Burnovski Decl. ¶ 12.)

Plaintiffs then requested that Defendants provide a declaration from Gury explaining his actions to preserve, search for, and produce messages on his phone, similar to declarations

Defendants had demanded and the Court ordered from Plaintiffs. (Wilkins Decl. at ¶ 2; *see* Dkt. No. 212 at 9.) Plaintiffs contend that Defendants refused to do so unless Plaintiffs would agree to waive further motion practice regarding the contents of the declaration. (Wilkins Decl. ¶ 2.) The instant Motion followed.

b. Plaintiffs' Position

After recounting their version of the foregoing events (described in the Steinberg and Wilkins declarations), Plaintiffs request that the Court compel Defendants to provide a declaration from Gury explaining his actions to preserve, search for, and produce messages on his phone. (Joint Stip. at 24-25.)

c. Defendants' Position

Defendants argue that Plaintiffs' request to compel the Gury declaration is not properly before the Court for several reasons. (*Id.* at 59-62.) First, Plaintiffs' request is procedurally improper because they never sought or obtained the Court's permission to file a motion for the relief it now requests; they previously sought to compel the production of additional text messages from Gury responsive to their discovery requests, but they now seek entirely different relief. (*Id.* at 60.) Second, Defendants maintain that notwithstanding the procedural infirmity of Plaintiffs' request, it is based on an inaccurate and misleading characterization of the facts—Defendants never "changed their story," as Plaintiffs assert; rather, Defendants timely objected to the production of text messages other than those directly with Plaintiffs. (*Id.* at 60-61 (citing Burnovski Decl. ¶ 8.) Defendants argue that this did not mean that Plaintiffs had only searched for the messages directly with Plaintiffs, but that Defendants had searched for messages that mentioned Plaintiffs and did not identify any relevant messages on Gury's or Smith's phones. (*Id.* at 61 (citing Burnovski Decl. ¶¶ 8-9).)

Defendants assert that their explanation is consistent with the fact that Gury and Smith got new phones in December 2016 and did not back up or save their text messages. (*Id.*) Finally, Defendants confirm that they ultimately agreed to conduct a broader search of Gury's and Smith's phones, but the fact that their search produced limited additional messages does suggest that Gury exchanged any further messages with Plaintiffs or anyone else that would be arguably responsive to Plaintiffs' requests. (*Id.* at 61-62.)

Defendants attach to their portion of the Motion a Declaration of Ryan Gury in Opposition to Plaintiffs' Motion to Compel, setting forth information about his cell phone history. (*See* Dkt. No. 488-13.) Defendants offer the declaration "in the interest of transparency, without prejudice to their position that Plaintiffs' motion is meritless." (Joint Stip. at 62.)

d. Analysis

The Court finds that Plaintiffs' request for a declaration from Ryan Gury is DENIED as moot. Defendants have provided Plaintiffs the declaration they seek. (*See* Dkt. No. 488-13.) Accordingly, even assuming Plaintiffs' request is procedurally proper and substantively meritorious, there is nothing for the Court to compel and Plaintiffs' request is moot.

SPOLIATION SANCTIONS (Issue No. 6)

The final issue in the Motion concerns Plaintiffs' request for spoliation sanctions against DRL for its failure to preserve text messages on non-party Smith's iPhone before it broke in 2018 and he returned it to Apple without saving or backing up its contents. For the reasons outlined below, Plaintiffs' request is DENIED.

I. Relevant Background

Since 2015, Smith has had several phones, all of which were personal devices not paid for by DRL. (Smith Decl. ¶ 16.) In 2015, Smith used an Android phone. (*Id.* at ¶ 12.) In late 2015, he replaced that device with an iPhone. (*Id.*) In December 2016, he replaced his first iPhone with an iPhone 7 Plus. (*Id.* at ¶ 13.) He did not back up his text messages, either locally or to iCloud storage, at the time he replaced his Android phone in December 2015 or his first iPhone in 2016. (*Id.* at ¶¶ 12-13.) Thus, according to Smith, after December 2016, he no longer had access to text messages that predated the purchase of his iPhone 7 Plus. (*Id.*)

Plaintiffs served Defendants with notice of their claims in June 2017 and served RFPs for, *inter alia*, text messages involving Smith in November 2017. (*See* Dkt. No. 418-3.) In July 2018, Defendants produced text messages, some involving Smith, but those messages were only from Horbaczewski's phone. (Joint Stip. at 26.) In mid-2018, Smith's iPhone 7 Plus broke and he replaced it with another iPhone 7 Plus. (Smith Decl. ¶ 14.) At that time, he was aware of this

lawsuit, as DRL had sent a preservation notice requesting that Smith preserve all documents relevant to this action. (*Id.*) However, Smith did not believe that the broken phone contained any relevant text messages, as it did not contain any messages from before December 2016, and he did not recall exchanging any messages with Plaintiffs or messages that were relevant to the claims at issue in this lawsuit between December 2016 and 2018. (*Id.*) Thus, Smith returned his broken phone to Apple and did not back up his text messages. (*Id.*; Wilkins Decl. ¶ 2, 12.)

In August 2018, Plaintiffs served another set of RFPs on Defendants, which again sought responsive documents that would include text messages involving Smith. (*See* Dkt. No. 418-4.) In September 2018, Smith's replacement iPhone 7 Plus broke and he purchased an iPhone XS Max, which he uses to this day. (Smith Decl. ¶ 15.) He later returned the broken replacement iPhone 7 Plus to Apple; for the same reasons discussed above, he did not believe that the replacement phone contained any messages relevant to this lawsuit and so, he did not back up any messages on the device. (*Id.*) In response to Plaintiffs' discovery requests, Smith provided his iPhone XS Max to defense counsel, and the phone was searched in connection with Defendants' responses to Plaintiffs' requests. (*Id* at ¶ 17; Burnovski Decl. ¶ 13.) The search did not reveal any text messages from earlier than September 2018. (Burnovski Decl. ¶ 13.) Thus, Defendants did not produce any messages from Smith's device.

During the parties' October 2019 meet and confer calls, Defendants confirmed that they had searched Smith's phone for messages exchanged with Plaintiffs, but had not located any. (Joint Stip. at 26.) According to Plaintiffs, Defendants only later informed Plaintiffs that Smith got a new phone in 2016, and he had not kept or backed up any of his older messages. (*Id.*) Defendants later informed Plaintiffs that in 2018, Smith broke his phone and returned it to Apple in exchange for a new one, so he has no additional text messages from the relevant period. (Wilkins Decl. ¶ 2, 12.)

II. Legal Standard

Spoliation sanctions based on a failure to preserve ESI are governed by Federal Rule of Civil Procedure 37(e), which states: "If [ESI] that should have been preserved in anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court":
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> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

FED. R. CIV. P. 37(e).

Thus, a movant must satisfy four threshold requirements to establish that spoliation governed by Rule 37(e) occurred: (1) the information at issue constitutes ESI; (2) ESI was lost and "cannot be restored or replaced through additional discovery"; (3) the loss was due to the responding party's failure to take reasonable steps to preserve the ESI; and (4) the responding party was under a duty to preserve the ESI. *Gaina v. Northridge Hospital Med. Ctr.*, Case No. CV 18-177-DMG (RAOx), 2019 WL 1751825, at *2 (C.D. Cal. Feb. 25, 2019). Here, there is no dispute with respect to the first requirement that Smith's text messages constitute ESI. (*See* Joint Stip. at 27-28; *see generally id.* at 62-73.) Accordingly, the Court's initial focus is on whether Smith's text messages were lost and cannot be restored or replaced through, *inter alia*, additional discovery. *See* FED. R. CIV. P. 37 advisory committee note to 2015 amendment.

The standard of proof for spoliation motions in the Ninth Circuit is the preponderance of the evidence. *OmniGen Research v. Yongqiang Wangi*, 321 F.R.D. 367, 372 (D. Or. 2017) (internal quotation marks and citation omitted). "[O]nce spoliation is shown, the burden of proof shifts to the guilty party to show that no prejudice resulted from the spoliation." *Id.* Where spoliation and prejudice is established, Rule 37(e)(1) authorizes courts to impose measures "no greater than necessary" to cure the prejudice due to the loss of the ESI. If the moving party establishes that the party guilty of spoliation acted with the *intent* to deprive the moving party of the lost information's use in litigation, courts may infer that the lost information was favorable to the opposing party in the litigation. *See* FED. R. CIV. P. 37 advisory committee note to 2015 amendment. However, neither negligence, nor even gross negligence, is insufficient to satisfy

Rule 37(2)'s intent requirement. *Id*. Consequently, "very severe" measures, such as adverse inference instructions, should not be used in the absence of a finding of intent. *Id.*

III. Discussion

a. ESI Was Lost and Cannot Be Restored or Replaced

As stated above, there is no dispute that Smith's text messages qualify as ESI and, therefore, the first prong of Rule 37(e) is satisfied. The Court therefore begins its analysis with whether ESI was lost and cannot be restored or replaced. *Id.* The moving party must show by competent evidence that the ESI sought was lost, or, at least, "that categories of irreplaceable, relevant documents were *likely* lost." *Colonies Partners L.P. v. Cnty. of San Bernardino*, Case No. CV 18-420-JGB (SHKx), 2020 WL 1496444, at *5 (C.D. Cal. Feb. 27, 2020) (emphasis added) (citing *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 328 F.R.D. 543, 553 (N.D. Cal. 2018)), report and recommendation adopted, 2020 WL 1491339 (C.D. Cal. Mar. 27, 2020).

Plaintiffs note that Smith broke his phone and returned it to Apple in 2018 and any messages that were on his phone at the time were lost and no longer exist; thus, the messages have been irretrievably lost. (Joint Stip. at 28.) Defendants present a concurring version of events and concede that they cannot retrieve Smith's text messages. (*Id.* at 63-64.) As the Court previously found in its Order Granting In Part and Denying In Part Defendants' Motion for Spoliation Sanctions, the destruction of a phone, without first backing up the information of it, likely results in the loss of ESI—here, Smith's text messages predating the destruction of the phone—and those conversations cannot now be restored or replaced (*See* Dkt. No. 475 at 5). *Colonies Partners L.P.*, 2020 WL 1496444, at *5. Thus, Plaintiffs have satisfied the second prong of the spoliation analysis.

b. Whether the Loss of ESI was Due to Defendants' Failure to Preserve the ESI

Plaintiffs contend that DRL did not take any, let alone reasonable, steps to preserve Smith's text messages. (Joint Stip. at 28-30.) They assert that Defendants never produced any messages from Smith's phone, despite receiving notice of the case and discovery requests in 2017; Smith was a key figure in this case; and when he surrendered his phone without saving or backing up his messages, the messages were irretrievably lost. (*Id.* at 28.) Plaintiffs contend that

Smith has never attested under penalty of perjury that none of the lost messages were not relevant, and Defendants cannot know for certain what was on Smith's phone when it broke or what was retrievable by a forensic expert. (*Id.* at 29.) And similar to other DRL personnel who sent and received relevant and responsive text messages in 2017, it is likely that Smith did as well. (*Id.*) Thus, the fact that Defendants never backed up Smith's text messages before he replaced his phone alone qualifies as failure to take reasonable steps to preserve. (*Id.* at 30.) But Plaintiffs' argument fails to establish that Defendants had any obligation or even capacity to require non-party Smith to back up his personal phone.

As Defendants emphasize, Plaintiffs conflate non-party Smith with Defendants. (*Id.* at 70-72.) They point out that DRL fulfilled its threshold obligation to issue a preservation notice to Smith before he returned his phone. (*Id.* at 70.) Defendants further note that Smith's conduct cannot be attributed to Defendants because even if his actions constituted spoliation on his *own* behalf, Plaintiffs seek spoliation against Defendants, not Smith and spoliation by a third party may only be imputed to a defendant where the destroying party is an agent of the defendant. (*Id.* at 71.) Finally, Defendants observe that Smith did not believe that the messages on his personal device, were relevant to the litigation; thus, Defendants had no affirmative preservation obligation with respect to Smith's device. (*Id.* at 71-72.)

In the Supplemental Memorandum, Plaintiffs argue that Defendants' preservation notice to Smith was insufficient and the case law on which Defendants rely is inapposite. (Supp. Mem. at 5.) Thus, DRL must be held liable for their inadequate efforts to preserve messages from key actors in this litigation. (*Id.*)

In assessing the reasonableness of a responding party's efforts to preserve ESI, courts "should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly *individual* litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation." FED. R. CIV. P. 37 advisory committee note to 2015 amendment (emphasis added). Specifically, the advisory committee pointed out that courts should be sensitive to party resources: "aggressive preservation efforts can be extremely costly, and parties . . . may have limited staff and resources." *Id.*

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Here, it is undisputed that Smith failed to adequately preserve the ESI on his previous cell phone. Smith admits as much, *i.e.*, he did not save his messages or back them up before returning his broken phones and, as a result, messages from those phones are irretrievable. But the salient issue here is whether Smith's failure to preserve ESI can be imputed to Defendants for purposes of awarding spoliation sanctions under Rule 37(e) for failure to preserve ESI. Contrary to Defendants' assertions, it can.

"[T]he duty to preserve extends to those employees likely to have relevant information—the 'key players' in the case." *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 881 F. Supp. 2d 1132, 1137 (N.D. Cal. 2012) (collecting cases). Additionally, a "non-party's spoliation of evidence may be imputed to a party who did not engage in spoliation." *Ramos v. Swatzell*, Case No. EDCV 12-1089-BRO (SPx), 2017 WL 2857523, at *6 (C.D. Cal. June 5, 2017). Smith is indisputably a key player in this case. So, to the extent Smith's own actions resulted in the spoliation of evidence, those actions may be imputed to Defendants.

c. Defendants' Duty to Preserve ESI

The fourth prong of the spoliation analysis considers whether, at the time the ESI was lost, Defendants were under a duty to preserve the ESI. In considering the 2015 amendments to Fed. R. Civ. P. 37, the advisory committee clarified that, in determining whether and when a duty to preserve arose, courts should consider "the extent to which a party was on notice that litigation was likely and that the information would be relevant." *See* FED. R. CIV. P. 37 advisory committee note to 2015 amendment; *see also Apple Inc.*, 881 F. Supp. 2d at 1137 (stating that duty to preserve includes "obligation to identify, locate, and maintain, information that is relevant" to litigation); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1067-68 (N.D. Cal. 2006) ("As soon as a potential claim is identified, a litigant is under a duty to preserve evidence which [he or she] knows or reasonably should know is relevant to the action" or "'may be relevant to future litigation'" (citation omitted)).

Plaintiffs contend that Defendants and Smith had a duty to preserve Smith's texts at the time the texts were lost. (Joint Stip. at 30-31.) They argue that Defendants' duty was triggered no later than when they received Laub's June 30, 2017 demand letter. (*Id.* at 30 (citing Dkt. No. 17-1 at 11-12).) They speculate that Smith's messages concerning Plaintiffs or the contributions they made to DRL are likely relevant. (*Id.*) These may include Smith's messages around the

time DRL acquired another company co-founded by Smith and acquired by DRL, or later messages reflecting on his early work on drone racing. (*Id.* at 30-31.) Finally, other relevant evidence shows that Smith and other DRL employees communicated about Plaintiffs in July 2017 and later. (*Id.* at 31 (citing Dkt. Nos. 488-11, 488-12).)

In opposition, Defendants contend that Plaintiffs have not shown that any relevant text messages from Smith's phone were lost at a time Defendants had a duty to preserve ESI. (Joint Stip. at 64-70.) First, when he replaced his phone in 2018, Smith's phone contained no messages predating December 2016 because replaced his phone at that time without saving or backing up the messages; and neither Defendants nor Smith had a duty to preserve when Smith replaced his phones in December 2015 and December 2016. (*Id.* at 65.) The duty to preserve only attached in June 2017 when Defendants received the demand letter, and Plaintiffs fail to show that the messages lost after that date were relevant to this action. (*Id.* at 66.) On the contrary, the record evidence shows that any texts on Smith's phone after December 2016 were either irrelevant or preserved through other sources. (*Id.* at 66-68.)

Smith does not recall exchanging texts with Laub, Kanes, or any third parties after the duty to preserve attached and any relevant text messages that Smith exchanged with Horbaczewski and Gury have been produced by those individuals (and were thus not lost). (*Id.* at 67-68.) At best, Plaintiffs speculate that categories of text messages exist, but that speculation is not sufficient to support an inference of spoliation against Defendants. (*Id.* at 68.) Additionally, the evidence Plaintiffs cite apparently showing that Smith and other DRL employees communicated about Plaintiffs in July 2017 and after does not suggest that Smith exchanged relevant text messages at any time after December 2016. (*Id.* at 68-69.) Defendants also contend they are not estopped from opposing Plaintiffs' sanctions request. (*Id.* at 69-70.)

In their Supplemental Memorandum, Plaintiffs balk at Defendants' apparent failure to preserve, collect, or search Smith's phone until late 2018, more than a year after the duty to preserve attached. (Supp. Mem. at 4.) Plaintiffs also assert that Defendants fail to show that no relevant evidence was lost, pointing out that Smith provides no evidence to corroborate his phone backup or storage settings, or that defense counsel ever searched his phone before he replaced it in 2018. (*Id.* at 6.) Additionally, Plaintiffs contend that Defendants have not produced Horbaczewski's or Gury's texts to which Defendants refer. (*Id.*) Therefore, Plaintiffs argue, even if Smith's belief that his 2018 phones had no messages from 2016 and earlier is

valid, it is reasonable to think his previous phones might have had relevant and responsive messages from 2017-18, including messages that have not been produced. (*Id.*)

As an initial matter, the Court agrees that Defendants' duty to preserve ESI was triggered by Plaintiffs' June 30, 2017 demand later. (*See* Joint Stip. at 30.) Thus, Defendants cannot be held liable for the loss of any of Smith's messages prior to that date, unless "there was a reasonable expectation of litigation." *See DelGiacco v. Cox Commc'ns, Inc.*, Case No. SACV 14-200-DOC (DFMx), 2015 WL 1535260, at *22 (C.D. Cal. Apr. 6, 2015). Plaintiffs have not shown that there was a reasonable expectation of litigation before Laub sent his demand letter. Accordingly, neither Defendants nor Smith had the duty to preserve Smith's messages that were lost when he replaced his phones in December 2015 and December 2016.

As to the messages that were lost *after* Defendants' duty to preserve was triggered in June 2017, the analysis is more nuanced. Clearly, as of that date, Defendants were on notice that litigation was likely, but it is not at all clear that either Defendants or Smith were on notice that the information contained in Smith's messages from December 2016 onward would be relevant. *See* FED. R. CIV. P. 37 advisory committee note to 2015 amendment; *see also Apple Inc.*, 881 F. Supp. 2d at 1137; *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d at 1067-68. Because this inquiry is an essential factor in the duty-to-preserve analysis, *i.e.*, the fourth spoliation prong, Plaintiffs as the moving party still bear the burden of establishing the messages' relevance.

Plaintiffs have not satisfied this burden. Plaintiffs merely speculate that messages between Smith and third parties or other DRL employees and his messages about his drone racing work *would* be relevant to the claims and defenses at issue. (Joint Stip. at 30-31; Supp. Mem. at 6.) But there is no suggestion that those messages exist, especially in light of Smith's sworn statements that he did not recall exchanging text messages with Plaintiffs. (*See* Joint Stip. at 66-67.) The record evidence supports Smith's assertions. It is undisputed that, as of 2017, it had been over a year since the parties had any dealing with each other. (*See* Dkt. No. 461 at 15.) Consistent with that, Plaintiffs themselves only produced text messages in the action dating through April 2016. (*See* Burnovski Decl. ¶ 16; Dkt. No. 212 at 2.) Smith declares that none of those messages were between Laub and Smith, no messages between Smith and Kanes were exchanged later than 2016, and any messages he exchanged with Horbaczewski or Gury were preserved and produced to Plaintiffs. (Smith Decl. ¶¶ 18-19; Burnovski Decl. ¶ 15.)

Accordingly, Plaintiffs' arguments do not support a reasonable inference that any of Smith's messages after the duty to preserve was triggered were relevant to the litigation.

Plaintiffs contend that Defendants fail to show that no relevant evidence was lost. (Supp. Mem. at 6.) But this argument improperly shifts the burden of proof in the spoliation analysis. To establish spoliation, it is Plaintiffs who must affirmatively show that relevant evidence that Defendants had the duty to preserve was lost. For the reasons discussed, Plaintiffs have not done so. Plaintiffs further contend that Defendants failed to produce Horbaczewski's or Gury's texts on which they rely to rebut Plaintiffs' arguments. (*Id.*) Plaintiffs' argument is frivolous, as Horbaczewski's and Gury's messages have been produced to Plaintiffs. (*See* Joint Stip. at 69.)

Because Plaintiffs have not met the requirements of establishing spoliation, the Court need not address whether Defendants have met their burden of showing that no prejudice resulted from the spoliation. *See OmniGen Research*, 321 F.R.D. 367 at 372. Accordingly, the Court finds the imposition of spoliation sanctions is not warranted. *See Gaina*, 2019 WL 1751825, at *2.

IV. The Court Declines to Award Reasonable Expenses and Fees Under Rule 37 to the Non-Moving Party

Although the Court has denied Plaintiffs' Motion in its entirety, the Court exercises its discretion and declines to award sanctions to the nonmoving party in the form of reasonable expenses, including attorneys' fees, incurred in opposing the Motion. *See* FED. R. CIV. P. 37(a)(5)(B); *Putman v. BMW of N. Am., LLC*, Case No. CV 17-3485-JAK (KSx), 2018 WL 6137160, at *5-6 (C.D. Cal. May 14, 2018). Plaintiffs' arguments fail, but in light of the importance of the issues raised, the presiding District Judge's Order on December 3, 2018 authorizing this Court to resolve remaining discovery disputes after the discovery cut-off so long as no new discovery was served (*see* Dkt. No. 95), and this Court's Order of March 31, 2020 granting Plaintiff's Motion for Leave to Raise Discovery Disputes (Dkt. No. 442), "the Court finds that the Motion itself was not substantially unjustified." *Putman*, 2018 WL 6137160, at *6.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 17-6210-JAK (KSx) Date: November 17, 2020

Title *Justice Laub v. Nicholas Horbaczewski, et al.*

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Compel and For Sanctions Pursuant to Federal Rule of Civil Procedure 37 is **DENIED in all respects**. Each party to bear its own costs and expenses.

IT IS SO ORDERED.

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