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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In re: CV SCIENCES, INC. SECURITIES LITIGATION	Case No. 2:18-cv-01602-JAD-BNW
This Document Relates To: ALL ACTIONS	**LEAD PLAINTIFF'S MOTION TO COMPEL DISCOVERY FROM AND SANCTION THE MONA DEFENDANTS**

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I. INTRODUCTION

This motion to compel by Lead Plaintiff Richard Ina, as Trustee for The Ina Family Trust ("Plaintiff"), concerns the failure of defendants Michael Mona, Jr. ("Mona Jr.") and Michael Mona, III ("Mona, III") (together, the "Mona Defendants") to engage in discovery in good faith. Even though discovery has been ongoing for over seven months, the Mona Defendants have routinely ignored the governing rules, responded in an untimely matter or not at all, raised frivolous objections, taken inconsistent positions, concealed relevant documents and information, and failed to produce a ***single*** document in response to each and every one of Plaintiff's discovery requests. Plaintiff attempted to work with the Mona Defendants to resolve the disputes arising from these deficiencies—while simultaneously producing nearly 4000 pages of documents to the Mona Defendants and the other named defendants—yet the Mona Defendants have consistently refused to participate in good faith.

Plaintiff brings this motion under Rule 37 of the Federal Rules of Civil Procedure, Local Rule 26-6, and the Court's inherent authority. Plaintiff respectfully requests the Court to: (1) deem all objections to Plaintiff's discovery requests untimely and therefore waived; (2) compel the Mona Defendants to provide complete responses to certain of Plaintiff's interrogatories; (3) compel the Mona Defendants to provide all responsive documents to Plaintiff's document requests, including by producing a hard drive whose existence was concealed from Plaintiff; and (4) order the Mona Defendants to pay the fees and costs for this motion and to extend the discovery and other case deadlines a reasonable period of time from the date of the court's ruling on this motion.[1]

II. STATEMENT OF FACTS

A. The Underlying Securities Fraud Class Action

This is a securities fraud class action against CV Sciences, Inc. ("CV Sciences" or the "Company"), a cannabis company, and certain of its current and former officers and directors.

[1] Unless stated otherwise, Plaintiff uses the following conventions herein: (1) all capitalized terms have the same meaning as the terms in the Amended Class Action Complaint for Violations of the Federal Securities Laws, ECF No. 30, and its Table of Defined Terms and Abbreviations; (2) emphases are added; (3) citations and internal quotations are omitted; and (4) all exhibit references are to the exhibits attached to the Declaration of Richard W. Gonnello, filed herewith.

Plaintiff has alleged that, during the relevant time period, the Company, Mona Jr. (the Company's ex-Founder-Emeritus, ex-CEO, and ex-director), Mona, III (the Company's ex-COO and ex-director), and Joseph Dowling ("Dowling") (the Company's current CEO and prior CFO) (collectively, "Defendants") made misleading statements concerning the patent application for, the patentability of, and the proprietary nature of the Company's only pharmaceutical product, CVSI-007 (a nicotine gum with added cannabidiol that purportedly treats smokeless tobacco addiction). After extensive briefing, the district court denied Defendants' motion to dismiss on December 10, 2019 because "the veracity of the defendants' claims that their product was 'patent-pending,' 'patent-protectable,' and 'proprietary' cannot be determined as a matter of law on a motion to dismiss." *See* ECF No. 70 ("MTD Order") at 2. In so doing, the district court explained that "determining whether the challenged statements were materially misleading requires discovery and expert testimony, which exceeds the scope of a proper dismissal inquiry." *Id.* at 9.

Significantly, while the Mona Defendants were initially represented by attorneys at both Marquis Aurbach Coffing and Procopio Cory Hargreaves & Savitch LLP (the "Procopio Firm"), the Procopio Firm withdrew as counsel for the Mona Defendants on December 9, 2019. *See* ECF No. 69 at ¶3 (explaining "CV Sciences and the Monas [made a] ***mutual decision to divest their business and legal interest***."). Accordingly, the Mona Defendants are now represented solely by Marquis Aurbach Coffing; and the Company and Dowling are now represented solely by the Procopio Firm. *Id.*[2]

On January 16, 2020, the Mona Defendants filed an untimely answer to Plaintiff's Amended Class Action Complaint. *Compare* ECF No. 71 (stipulation moving answering deadline from December 24, 2020 to January 7, 2020), *with* ECF No. 76 (the Mona Defendants' answer filed on January 16, 2020). *See* ECF No. 76. In their answer, the Mona Defendants asserted an affirmative

[2] During a meet and confer on September 30, 2020, the Mona Defendants represented that the Procopio Firm would soon be taking over representation of the Mona Defendants from Marquis Aurbach Coffing. Plaintiff intends to object to this substitution of counsel given the Procopio Firm's conflicts of interest. Plaintiff's objection to Procopio's substitution is based in his well-founded concern that the Mona Defendants will use Procopio's substitution to evade any future judgment. Indeed, the Mona Defendants have already tried to evade service in this Action when Plaintiff attempted to serve them with summons, and Plaintiff was only able to serve the Monas after their counsel entered into a stipulation on their behalf under which they agreed that they would not contest service under Fed. R. Civ. P. 4. *See* ECF No. 25 at 1.

defense that "Plaintiff's claims are barred, in whole or in part, because the Mona Defendants reasonably relied on the statements, representations, and opinions of accountants, auditors, and other third parties." *See* ECF No. 76 at 12 (twenty-third affirmative defense).

On February 19, 2020, the Court approved the parties' Stipulated Discovery Plan and Proposed Scheduling Order. *See* ECF No. 78. This plan was modified on June 5, 2020 when the court approved the parties' Joint Stipulation and Proposed Order to alter the discovery deadlines by an additional four months to account for Covid-19 associated delays. *See* ECF No. 84. Under this plan, the deadline for the completion of fact discovery is currently January 8, 2021. *Id.* at 3.

On April 13, 2020, the Court approved the parties' Joint Stipulated Protective Order. *See* ECF No. 81. This Stipulated Protective Order was signed by Marquis Aurbach Coffing on behalf of the Mona Defendants and by the Procopio Firm on behalf of the Company and Dowling. *Id.* at 14-15.

B. Mona, III's Concurrent Employment Action Against CV Sciences

Soon after the Procopio Firm withdrew as counsel for the Mona Defendants in this action, Mona, III filed an employment action against CV Sciences in Clark County District Court for, *inter alia*, a contract dispute arising out of his termination from the Company on November 19, 2020. *See Mike Mona, III vs. CV Sciences, Inc., et al.*, Docket No. A-20-808669-C (Nev. Dist. Ct. Jan 16, 2020) ("Mona, III Employment Complaint"). *See* Ex. E. This employment action is relevant to Plaintiff's action because it documents evidence relevant to Plaintiff's case, and it alleges that, in resigning as president of the Company, "Mona III relied on Joe Dowling's representations that his resignation was the last requirement for up-listing [of the Company's stock to the NASDAQ], but, on information and belief, the resignation simply served to give Joe Dowling more control of the company." *Id.* at 5, ¶17.

According to Mona, III's ***verified*** complaint, he possessed a Company laptop that "he used for personal items ***and work with CV Sciences***." *Id.* at 12, ¶51. On or around November 20, 2019, "Joe Dowling advised Mona III to ***restore/clean-up*** the laptop so that it could be given to someone else for use at CV Sciences." *Id.* Thereafter, "Mona III restored/cleaned-up the laptop by simply downloading the contents onto a separate hard drive and deleting it off of the laptop." *Id.* According to Mona, III's complaint, "[o]n or about December 13, 2019, Joe Dowling accused Mona III of taking proprietary information from CV Sciences from the laptop." *Id.* at 12, ¶53. Mona, III then "had the hard drive on

which he downloaded the laptop contents delivered to a third-party vendor to be imaged so a copy could be securely maintained." *Id.*

C. The Mona Defendants Conduct Discovery In Bad Faith

In recognition of the many complex issues in this case, Plaintiff diligently initiated discovery. As explained below, however, the Mona Defendants have repeatedly acted in bad faith.

1. The Mona Defendants' Initial Disclosures Conceal Relevant Documents

On March 20, 2020, the parties exchanged initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1). Even though the Mona Defendants were required to provide Plaintiff with "a copy—or a description by category and location—of ***all*** documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or ***defenses***[,]" Fed. R. Civ. P. 26(a)(1)(A)(ii), the Mona Defendants stated that they had ***no such documents***, despite asserting 27 affirmative defenses. *See* Ex. F at 2 ("DOCUMENTS: **None**. The Mona Defendants reserve the right to amend and/or supplement their disclosure of documents as the same become known to them throughout the discovery process, including expert witness reports/opinions."); *see also* ECF No. 76 at 9-13 (the Mona Defendants' answer in which they assert 27 affirmative defenses). The Mona Defendants omitted mention of the laptop, the hard drive, or any other relevant documents in their possession, custody, or control. *Id.*

On April 7, 2020, upon ***independently*** learning of the existence of the laptop and the hard drive mentioned in Mona, III's Employment Action, Plaintiff emailed all Defendants expressing concern that evidence from the laptop and the hard drive had been spoliated and asking for clarification about the nature of the ESI on the laptop and the hard drive as well as the current status thereof. *See* Ex. U at 3. The Mona Defendants never responded to this email; nor did they respond to follow up emails from Plaintiff on April 9 and May 1. *Id.* at 1-3.

2. Plaintiff's Discovery Requests and the Mona Defendants' Responses

On April 8, 2020, Plaintiff served his first set of discovery requests on the Mona Defendants. The discovery requests included: (i) three identical interrogatories for each of the Mona Defendants (Exs. G, H); (ii) 45 identical document requests for each of the Mona Defendants (Ex. J); (iii) 45 admission requests for Mona, Jr. (Ex. K); and 37 admission requests for Mona, III (Ex. L). On May

14, 2020, Plaintiff served an additional interrogatory on Mona, III seeking information concerning the evidence from the laptop and hard drive due to the Mona Defendants refusal to discuss the issues otherwise. *See* Ex. I. The Company and Dowling were served with copies of all of these requests. *See* Ex. V.

As relayed below, the Mona Defendants' responses to Plaintiff's discovery requests were woefully deficient.

a. The Mona Defendants' Discovery Responses Were Habitually Late

On May 7, 2020 (*i.e.*, the day that responses to the discovery requests served on April 8, 2020 were due), the Mona Defendants requested an additional 30 days to respond to these requests. *See* Ex. W at 2. Plaintiff granted this request, which moved the response deadline to June 8, 2020. *Id.* at 1. Yet, without explanation, the Mona Defendants failed to timely respond on June 8. After Plaintiff inquired about the status of these responses not once but twice (on June 10 and June 18) to no avail, the Mona Defendants eventually provided responses—***15 days late***—on June 23, 2020. *See* Ex. X. The Mona Defendants' responses were ***lifted almost entirely*** from the Company and Dowling's responses, including hundreds of boilerplate objections that were not vetted to determine whether they applied to the Mona Defendants specifically. *See* Exs. M, N, R, S, T. [3]

On May 14, 2020, Plaintiff served an additional interrogatory on Mona, III (concerning the laptop and hard drive) which was due on June 15, 2020. *See* Ex. I. Without explanation, Mona, III again failed to respond to this interrogatory when due. Only after Plaintiff inquired about the status of these responses twice (on June 18 and June 25) and requested a meet and confer, did Mona, III finally respond—***11 days late***—on June 26, 2020. *See* Ex. Y.

In meet and confers on July 31, August 6, August 12, and September 30, Plaintiff told the Mona Defendants that Plaintiff considered all the Mona Defendants' objections to Plaintiff's discovery requests waived due to their lateness. *See* Ex. A at 1, 3-4; Ex. B at 1-3; Ex. C at 1-2; Ex. D at 2. The Mona Defendants confirmed that they understood that Plaintiff had taken this position and stated that,

[3] The Mona Defendants' voluminous objections were frivolous. During the meet and confer process, the Mona Defendants could not identify any specific documents or information that they were withholding based on any of their objections. *See* Ex. A at 5. Nor did the Mona Defendants ever provide a privilege log to Plaintiff.

going forward, they understood that Plaintiff's waiver position applied to all their aforementioned responses and that Plaintiff did not need to keep reiterating his position. *See* Ex. C at 1. The Company and Dowling were on the August 12 and September 30 phone calls when this was discussed. *See* Ex. C at 1; Ex. D at 1.

b. The Mona Defendants' Interrogatory Responses Were Deficient

Plaintiff's First Set of Interrogatories: Plaintiff's first set of interrogatories were served on April 8, 2020 and concerned, *inter alia*, information that the Mona Defendants failed to disclose in their initial disclosures and the nature of their twenty-third affirmative defense. *See* Exs. G, H.

Plaintiff's first interrogatory from the April 8, 2020 set, as well as the Mona Defendants' respective responses, are set forth below:

> **INTERROGATORY NO. 1:**. . . .IDENTIFY by category and location all DOCUMENTS containing discoverable information CONCERNING the claims alleged in the AC or YOUR defenses thereto.
>
> **ANSWER TO INTERROGATORY NO. 1:** . . . .Defendant identifies the following categories of documents potentially containing discoverable information concerning the allegations in the Amended Complaint and Defendants' defenses thereto: (i) documents related to the development of the CVSI-007 product ***in possession of Defendant***; (ii) documents related to CV Sciences' efforts to obtain a patent for the CVSI-007 product ***in possession of Defendant***; (iii) documents regarding statements made by Defendants related to the CVSI-007 product in possession of Defendant; (iv) documents regarding other matters related to the CVSI-007 product and Plaintiff's allegations ***in possession of Defendant***; and (iv) all documents identified in Defendant CV Sciences and Joseph Dowling's Rule 26(A)(1) Initial Disclosures."

See Ex. O at 5, 8; Ex. P at 5, 8.

The Mona Defendants' responses were *prima facie* deficient because they failed to identify all responsive categories of documents (not just those the Mona Defendants consider to be in their ***possession***—such as documents under the Mona Defendants' control) ***and*** the location of these documents (*e.g.*, a third-party vendor). *Id.* Tellingly, there was no mention of the hard drive, the laptop, or any other documents that the Mona Defendants obviously had possession, custody, or control of, such as their personal investment account records which demonstrate whether they engaged in illegal insider trading or a pump and dump scheme. *Id.*

These responses became ***even more deficient*** on July 31, 2020, when, during a meet and

confer, the Mona Defendants backtracked on their responses, explaining that, as for the limited categories of documents that they identified as being in their possession, the Mona Defendants supposedly did not possess ***any*** of these documents and that their responses were "mistakenly lifted from the Company's earlier answer to this interrogatory." *See* Ex. A at 2. The Mona Defendants represented that the Company possessed these documents and that Plaintiff should instead obtain them from the Company. *Id.* Despite Plaintiff's admonition that the Federal Rules of Civil Procedure provide that information and documents are subject to discovery if they are in the possession, custody, ***or control*** of the Mona Defendants (and that the Mona Defendants had an independent duty to preserve and produce these documents regardless), *see id*., the Mona Defendants refused to change their answers, including the parts that they contended were mistakenly lifted.

Additionally, Plaintiff was forced to meet and confer with the Mona Defendants over other obvious deficiencies, *see* Ex. A at 1-3, such as the Mona Defendants' failures to (1) verify their answers pursuant to Fed. R. Civ. P. 33(b)(3); (2) locate their answers in response to the correct interrogatory (*e.g.*, the answer for Interrogatory No. 2 was located in the answer for Interrogatory No. 3); and (3) include contact information for the parties listed in their response to Interrogatory No. 1—which deficiencies the Mona Defendants acknowledged by serving amended responses on August 11, 2020. *See* Exs. O, P. As Plaintiff made clear at the time, these amended responses were without prejudice to Plaintiff's argument that the Mona Defendants' objections were untimely and therefore waived. *See* Ex. C at 1.

Plaintiff's second interrogatory from the April 8, 2020 set concerned the Mona Defendants' twenty-third affirmative defense, which asserted that "Plaintiff's claims are barred, in whole or in part, because the Mona Defendants reasonably relied on the statements, representations, and opinions of accountants, auditors, and other third parties." *See* ECF No. 76 at 12. Consistent with the Court's MTD Order, Plaintiff's interrogatory sought to determine the identities of the parties on which the Mona Defendants supposedly relied as well as details regarding the relevant advice they received when they told investors that their product—which had been twice rejected by the USPTO—was "patent-pending, patent-protectable, and 'proprietary." *See* ECF No. 70 at 2 at 9. The interrogatory and the relevant portion of the Mona Defendants' responses are as follows:

> **INTERROGATORY NO. 2:** IDENTIFY all "statements, representations, and opinions of accountants, auditors, and other third parties" referred to in your Answer's Twenty-Third Affirmative Defense, *see* ECF No. 76 at 12, including: (a) the identity of the makers of the statements, representations, and opinions; (b) the recipients of the statements, representations, and opinions; (c) when the statements, representations, and opinions were made, and; (d) whether the statements, representations, and opinions were oral or written, and if the latter, IDENTIFY the DOCUMENT.
>
> **ANSWER TO INTERROGATORY NO. 2:** [. . . .] Subject to and without waiving the foregoing specific and general objections, Defendant responds as follows: Defendant may have relied on statements, representations, and opinions of any of the following third parties: Deloitte and Tanner LLC. There may be others. Investigation and discovery are ongoing. Defendant reserves the right to supplement this information if additional information later becomes known and to designate and/or call additional witnesses and to introduce additional documentary evidence at trial.

See Ex. O at 9; Ex. P at 9.

The Mona Defendants' responses were *prima facie* deficient because they ignored the entirety of Plaintiff's request that they identify the makers or recipients of the statements, representations or opinions, and the Mona Defendants likewise failed to provide any indication on when these statements, representants or opinions were made, whether they were oral or written, and the nature of the advice. *Id.* The responses were further deficient because "Deloitte and Tanner LLC" does not appear to exist when a web search is run; and if the entity is related to Deloitte Touche Tohmatsu Limited, one of the "Big Four" accounting firms, it is unclear what auditors have to do with patent-related issues. Accordingly, the Mona Defendants would not have relied on Deloitte and Tanner LLC—assuming it exists—when making statements about the status of their product's patent application and proprietary nature.

The Mona Defendants' response became ***even more deficient*** on July 31, 2020, when, during a meet and confer, the Mona Defendants backtracked and represented that that they were not sure whether Deloitte and Tanner LLC gave advice on the patent issues being litigated in this case. *See* Ex. A at 3. The Mona Defendants were also unable to provide Plaintiff with any contact information. *See id.; see also* Ex. B at 2. Even though the Mona Defendants signed their amended responses under oath, on the August 12 meet and confer, the Mona Defendants represented that they "only had limited reliance on any of the patent experts because they were not very involved with the CVSI-007 patent. As such, they did not know whether they relied on these auditors or any other law firm for the public

disclosure of the patent status." *See* Ex. C at 1.[4] What good faith basis the Mona Defendants have for asserting their twenty-third affirmative defense is indeed a mystery.

Accordingly, Plaintiff ***still*** does not know if the Mona Defendants relied on Deloitte and Tanner LLC, or any other parties when making positive statements about CVSI-007; and Plaintiff is therefore unable to subpoena these third parties to determine the nature and viability of the Mona Defendants' affirmative defense.

Plaintiff's Second Set of Interrogatories for Mona, III: Plaintiff served an interrogatory on Mona, III on May 14, 2020 concerning the status of his Company laptop and the hard drive on which he made a copy of it. *See* Ex. I. This interrogatory and Mona III's response is below:

> **INTERROGATORY:** With respect to ¶¶ 51-53 of the MONA III'S VERIFIED EMPLOYMENT ACTION, please explain: (a) whether YOU dispute any of these allegations and, if so, explain how each disputed allegation is inaccurate, incomplete, or misleading; (b) the current status of the LAPTOP RECORDS including whether they all still exist, their location, and all PERSONS in whose possession, custody, or control they reside; (c) the current status of the hard drive referenced in ¶53 and any images or partial images thereof including whether the hard drive and images still exist, their location, and all PERSONS in whose possession, custody, or control they reside; and (d) the current status of the RETURNED LAPTOP RECORDS including whether they all still exist, their location, and all PERSONS in whose possession, custody, or control they reside.
>
> **ANSWER TO INTERROGATORY: (**A) Defendant does not dispute these allegations[;] (B) Defendant is not in possession or control of this information; (C) Defendant turned over possession of these materials to a neutral, third-party vendor, Holo Discovery, for the preservation of said materials[;] (D) Defendant is not in possession or control of this information.

See Ex. Q at 5-6.

This response was *prima facie* deficient because it ignored the instruction in subpart (c) that Mona, III identify all persons who had "possession, custody, or control" over the hard drive. Instead, Mona, III merely stated that Holo Discovery had "possession" of the hard drive. *See id.* at 5. When asked about this deficiency on the July 31, 2020 and August 6, 2020 meet and confers, Mona, III

[4] Plaintiff explained that this response was unacceptable because the Mona Defendants were the parties asserting what appeared to be a reliance on experts/advice of counsel defense, and Plaintiff would need to move to compel a response. *See* Ex. C at 1-2. The Mona Defendants represented that they would look into the issue and consider dropping the defense. *Id.* at 2. Nevertheless, the Mona Defendants never provided Plaintiff with clarification on this issue, choosing instead to ignore two subsequent emails from Plaintiff.

represented that he did not have custody or control over the hard drive because he had signed a confidentiality agreement with CV Sciences in connection with his Employment Action. *See* Ex. A at 4; Ex. B at 2.[5] Mona, III then suggested that Plaintiff subpoena Holo Discovery. *Id*. Plaintiff responded that Mona, III's position was inconsistent with his discovery obligations under the federal rules; that Mona, III's admitted payment to Holo Discovery for its storage services demonstrates that Mona, III in fact has control over the hard drive; and that, if Mona, III did not have control over the drive, his abandonment of the drive amounts to spoliation. *Id.*

Under the threat of a motion to compel, Mona, III suggested that the Plaintiff provide him search terms that he could take to the Company for its approval after which Mona, III would search the hard drive. *See* Ex. B at 2. Plaintiff stated that he did not accept this solution given Mona, III's independent legal obligation to respond to discovery and the additional delays that would result. *Id.*

On August 12, 2020, Mona, III proposed that Plaintiff provide him with search terms so that Mona, III—not the Company—could search the hard drive. *See* Ex. C at 2. In an effort to determine if motion practice could be avoided, Plaintiff agreed to provide a list of terms. *Id.* Mona, III stated that he would timely discuss these search terms with Plaintiff and then conduct a search of the hard drive. *Id.* Plaintiff represented that he would not negotiate over search terms with the Company, and that Plaintiff's provision of a list of search terms was without prejudice to Plaintiff's position that all objections to Plaintiff's discovery requests were untimely and thus waived. *Id.* Plaintiff provided Mona, III with a list of 118 search terms on August 20, 2020. *See* Exs. AA, BB. Consistent with Mona, III's prior dilatory behavior, Mona, III ignored two emails on September 14 and September 20 from Plaintiff attempting to follow up on the status of the search. *Id.* Mona, III never discussed the search terms with Plaintiff; nor did he conduct a search of the hard drive to the best of Plaintiff's knowledge.

On September 22, 2020, the Company and Dowling wrote a letter to Plaintiff objecting to the use of the search terms to search Mona, III's hard drive and demanding that they be permitted to conduct a second layer of confidentiality review on whatever documents the Mona Defendants produce from this hard drive. *See* Ex. Z. As Plaintiff made clear on his August 12 meet and confer to the

[5] Mona, III never provided Plaintiff with a copy of the confidentiality agreement.

Mona Defendants and to the Company and Dowling (all of whom were represented the call), neither filed any objections to Plaintiff's discovery requests of the Mona Defendants nor did the Company or Dowling file a motion for a protective order at any time during this process (thus rendering any arguments they may have had waived). *See* Ex. C at 2. In any event, Plaintiff expressed that this was unacceptable because it would further unduly delay the resolution of these issues. *Id*.

On the September 30, 2020 meet and confer with all Defendants, Plaintiff represented that he was unwilling to wait further for Mona, III to use Plaintiff's proposed search terms to search the hard drive, and that it was improper for the Company to attempt to control and delay the search of the drive. *See* Ex. D at 2. Plaintiff also reiterated that any objections that Defendants may have had to the production of the hard drive have been waived. *Id.* Plaintiff also expressed frustration that the Company waited until September 22, 2020—when there was only three months remaining in fact discovery—to object to the Mona Defendants' production of documents from the hard drive, especially considering Plaintiff had inquired about this hard drive as early as April 7, 2020, when Plaintiff emailed all Defendants concerning the status of the hard drive. *See* Ex. U at 3.

c. The Mona Defendants' Document Request Responses Were Deficient

Plaintiff's first set of requests for production of documents to the Mona Defendants were served on April 8, 2020. *See* Ex. J. On June 23, 2020, the Mona Defendants responded to Plaintiff's these requests. *See* Ex. R. Many of the Mona Defendants' responses were *prima facie* deficient because they refused to so much as search for relevant documents that were in their possession, custody, or control, choosing instead to assert boilerplate and frivolous objections. *See e.g.*, Ex. R at 23 (objecting to request number 32 concerning Mona, Jr's resignation from the Company); Ex. R at 25 (objecting request number 37 concerning the Mona Defendants' trading in the Company's securities). Not one of the Mona Defendants' objections (all of which were waived regardless) had a specific factual basis. On the July 31 meet and confer—after Plaintiff meticulously explained why Plaintiff believed each single request sought relevant information—the Mona Defendants assured Plaintiff that "they were not currently withholding any specific documents based on their objections to each specific request; instead they had not pulled the documents yet and they were trying to preserve these objections." *See* Ex. A at 5. As the Mona Defendants have still not provided Plaintiff with a privilege

log, Plaintiff has no reason to believe that any of these objections were made in good faith.

Nevertheless, the Mona Defendants initially responded that they would produce documents responsive to 28 of the Plaintiff's 45 documents requests, writing that "[t]o the extent they exist, Mona Defendants will produce all responsive, non-privileged documents which are located within their possession, custody, or control after conducting a reasonably diligent search." *See* Ex. R at 5-10, 11-17, 18-20, 20-22, 25-26 (responding to Plaintiff's document requests numbered 1-9, 12-22, 25-26, 28-31, 38-39). However, on the July 31, 2020 meet and confer, the Mona Defendants flipflopped again, instead contending that the Mona Defendants did not have possession, custody, or control over a single document because they were no longer employed by the Company.[6] They instead contended that ***only*** the Company had possession, custody, or control of all of these documents notwithstanding the fact that the Mona Defendants obviously possessed and controlled certain documents, such as their personal financial records demonstrating their compensation from the Company and their trading in the Company's securities, not to mention documents concerning their departures from the Company and the prior SEC charges against Mona, Jr. *See* Ex. A at 4.

Plaintiff explained that the Mona Defendants' failure to produce a single document—including in response to requests concerning documents ***uniquely*** in their position, custody, or control—strained credulity. *Id.* Plaintiff encouraged the Mona Defendants to check their personal cell phones and email accounts, both of which they could have conceivably used for work purposes, to see if any of those sources had information responsive to the Plaintiff's document requests. *Id.* The Mona Defendants stated that they would search these sources and let Plaintiff know if there were any responsive documents. *Id.*; Ex. B at 3. However, the Mona Defendants have not provided any indication that any search was ever performed. In short, the Mona Defendants have failed to produce a single document in response to Plaintiff's 45 requests for document production.

III. LEGAL STANDARD

Rule 26(b)(1) provides that parties may seek information from an opponent if that information

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[6] This position was clearly frivolous because the Mona Defendants were not employed at CV Sciences when the Mona Defendants responded to Plaintiff's discovery requests on June 23, 2020. In reality, the Mona Defendants had merely copied the Company's responses with no real intention of ever producing documents to Plaintiff.

is "relevant" to any party's claim. *See* Fed. R. Civ. P. 26(b)(1). "Rule 26(b) is liberally interpreted to permit wide-ranging discovery of information even though the information may not be admissible at the trial." *Estakhrian v. Obenstine*, No. CV11-3480-FMO (CWX), 2016 WL 6868178, at *5 (C.D. Cal. Feb. 29, 2016), *report and recommendation adopted,* No. CV 11-3480 FMO (CWX), 2016 WL 6275599 (C.D. Cal. May 17, 2016); *see also Collins v. Landry's Inc.*, No. 2:13-cv-1647-JCM-VCF, 2014 WL 2770702, at *2 (D. Nev. June 17, 2014) (Ferenbach, M.J.) (citing *Seattle Times, Co. v. Rhinehart*, 467 U.S. 20, 34 (1984)) ("Rule 26 is liberally construed"). When "a party resists discovery, the requesting party may file a motion to compel discovery," which is governed by Rule 37. *See Collins*, 2014 WL 2770702, at *2. "The 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." *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975)).

IV. ARGUMENT

Plaintiff has conducted discovery in good faith, even as the Mona Defendants have cynically refused to do the same. With only three months remaining in fact discovery and very little to show for it, Plaintiff can no longer rely on the Mona Defendants to work in good faith to resolve these issues without court intervention. Accordingly, Plaintiff requests the court to: (1) deem all objections to Plaintiff's discovery requests untimely and therefore waived; (2) compel the Mona Defendants to provide complete responses to certain of Plaintiff's interrogatories; (3) compel the Mona Defendants to provide all responsive documents to Plaintiff's document requests, including a hard drive whose existence was concealed from Plaintiff; and (4) order the Mona Defendants to pay the fees and costs for this motion and to extend the discovery and other case deadlines a reasonable period of time from the date of the court's ruling on this motion.

A. Plaintiff Moves That The Mona Defendants' Objections Be Deemed Waived

It is undisputed that, without explanation and after already having received a 30-day extension, the Mona Defendants responded to Plaintiff's April 8, 2020 discovery requests ***15 days late***, *see* Ex. X (June 23 response), and similarly responded to Plaintiff's May 14, 2020 interrogatory ***11 days late***, *see* Ex. Y (June 26 response). "It is well established that a failure to object to discovery requests within

the time required constitutes a waiver of any objection." *Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1473 (9th Cir.1992). "This is true even of an objection that the information sought is privileged." *See Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981).

Because the Mona Defendants were untimely in objecting to Plaintiff's interrogatories, document requests, and admission requests, the Mona Defendants' objections to these requests should be deemed waived. *See* Fed. R. Civ. P. 33(b)(4) ("Any ground not stated in a ***timely objection*** is waived unless the court, for good cause, excuses the failure); Fed. R. Civ. P. 34(b)(2)(A) ("The party to whom the request is directed ***must respond in writing within 30 days*** after being served[.]"); Fed. R. Civ. P. 36(a)(3) ("A matter is admitted unless, ***within 30 days*** after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.") Whether any of these requests were objectionable is irrelevant. *See Shotwell v. Stevenson*, No. CVF04-5378 OWW/WMW, 2006 WL 3703365, at *3 (E.D. Cal. Dec. 14, 2006) ("The failure to respond to interrogatories or document requests may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for protective order.").

Plaintiff relayed his contention that the Mona Defendants waived all their objections due to their untimely responses on four different meet and confers on July 31, August 8, August 12, and September 30, *see* Exs. A-D, but the Mona Defendants have refused to withdraw their objections. Accordingly, Plaintiff moves the Court to find that the Mona Defendants have waived all of their objections to Plaintiff's interrogatories and document requests. *See Whittenberg v. Bortolamedi*, No. S04-2225 GEBEFBP, 2007 WL 521399, at *5 (E.D. Cal. Feb. 15, 2007), *report and recommendation adopted,* No. 204CV2225GEBEFBP, 2007 WL 2492151 (E.D. Cal. Aug. 30, 2007) (ordering party that "waived any objections to [] discovery requests due to his failure to timely respond to them. . . .[to] provide written responses, without objections, to the interrogatories and requests for production of documents").

The Mona Defendants' failure to timely respond to the Plaintiff's request for admissions pursuant to Rule 36 should likewise render these requests judicially admitted without court intervention. *See Nachman v. Regenocyte Worldwide, Inc.,* No. 2:13-CV-00319-MMD, 2014 WL

3748616, at *14 (D. Nev. July 29, 2014) (citing *American Technology Corp. v. Mah*, 174 F.R.D. 687 (D. Nev. 1997)) (explaining that "Rule 36(a) is self-executing" such that, "defendants' failure to respond automatically deems those matters judicially admitted without court intervention."). For clarity's sake, Plaintiff requests that this Court make a declaratory judgment to this effect.

B. Plaintiff Moves To Compel The Mona Defendants To Provide Complete Responses To Plaintiff's Interrogatories

The Mona Defendants' responses to Plaintiff's abovementioned interrogatories were deficient: (1) the Mona Defendants failed to identify ***all*** responsive categories of documents (regardless of whether they are in Mona Defendants' possession) ***and*** the location of these documents in response to Plaintiff's first interrogatory from the set served on April 8, 2020, *see* Ex. O at 5, 8; Ex. P at 5, 8; (2) the Mona Defendants' ignored the ***entirety*** of Plaintiff's request that the Mona Defendants identify the makers or recipients of the statements, representations or opinions and failed to provide any indication on when these statements, representants or opinions were made, whether they were oral or written and the nature of the advice in response to Plaintiff's second interrogatory from the set served on April 8, 2020, *see* Ex. O at 9; Ex. P at 9; and (3) Mona, III ignored the instruction that he identify who had "possession, custody, or control" over the hard drive in response to Plaintiff's first interrogatory from the set served on May 14, 2020, *see* Ex. Q at 5-6.

These three incomplete responses, and the Mona Defendants' failure to clarify any of these responses during the meet and confer process, "directly subvert[ed]" the "purpose" of these interrogatories. *See Forest Guardians v. Kempthorne*, No. CIV 06CV2560-L(LSP), 2008 WL 4492635, at *2 (S.D. Cal. Sept. 29, 2008); *see also Schudel v. Searchguy.com, Inc.*, No. 07CV695-BEN (BLM), 2008 WL 11337244, at *4 (S.D. Cal. Aug. 21, 2008) (citing *Davis*, 650 F.2d at 1160) (finding interrogatory responses incomplete because "some minimal level of responsiveness was required to alleviate legitimate doubt the court may have had concerning a party's failure to cooperate in discovery."). Plaintiff therefore requests that the Mona Defendants be compelled to fully answer these interrogatories.

This revision is especially important for Plaintiff's interrogatory concerning the Mona Defendants' affirmative defense because the Mona Defendants' incomplete response is highly

prejudicial. Plaintiff intended to use this interrogatory to identify the parties on which the Mona Defendants relied for their twenty-third affirmative defense which asserts that "Plaintiff's claims are barred, in whole or in part, because the Mona Defendants reasonably relied on the statements, representations, and opinions of accountants, auditors, and other third parties." *See* ECF No. 76 at 12. Among other issues, Plaintiff sought to determine whether the Mona Defendants were asserting an advice of counsel defense. This seemed likely given that the Mona Defendants represented that they were "unable to admit or deny without disclosing information and/or communications that are protected by the attorney-client privilege" when Plaintiff requested that they admit that they relied on the advice of the Procopio Firm, Marquis Aurbach Coffing, and Banner & Witcoff (their patent firm) when they decided not to disclose the status of the Patent Application, its First Rejection, or its Final Rejection during the Class Period. *See* Ex. S at 6-9, 19-22 (Mona, Jr.'s responses to admission requests number 5-10 and 37-45); Ex. R at 6-9, 16-20 (Mona, III's responses to admission requests number 5-10 and 29-37).

Because the Mona Defendants failed to answer this interrogatory or provide any clarification during the meet and confer process—let alone provide a privilege log—Plaintiff does not know whose advice the Mona Defendants relied on when they spoke about the patent status of CVSI-007, nor do they even have the contact information for the entity listed in the Mona Defendants' response, "Deloitte and Tanner LLC." *See* Ex. O at 9; Ex. P at 9; *see also* Ex. A at 3; Ex. B at 2; Ex. C at 1. Furthermore, if the Mona Defendants are relying on any lawyers or law firms as part of their affirmative defense, they cannot assert attorney-client privilege because they have "placed their "attorney-client communications at issue[.]" *See United States v. Ormat Indus., Ltd.*, No. 3:14 cv-00325-RCJVPC, 2016 WL 4107682, at *4 (D. Nev. Aug. 1, 2016). Given the breadth of the Mona Defendants' presumed reliance and the corresponding breadth of documents that defendants have likely withheld, it is imperative that defendants make this choice now, before depositions begin. *Id.* at *4 (party's failure to confirm whether it planned to "to rely on attorney-client communications in proving its defenses" was "untenable in light of the deposition schedule and document-intensive nature of this case").

Plaintiff therefore specifically requests that the Mona Defendants revise their answer to this

interrogatory to detail all parties—including law firms—whose statements, advice, or opinions they are relying for their twenty-third affirmative defense including the details concerning the statements, advice, or opinions request. Alternatively, Plaintiff requests that the Court compel the Mona Defendants to abandon this defense. *Id.* at *5. ("Ormat may proceed with its good faith defenses and produce the relevant documents, in accordance with the discussion above, or preserve the communications' confidentiality by abandoning the defenses that giving rise to the waiver."). Should the Mona Defendants maintain this defense, they should be compelled to turn over all documents and information that they are withholding on this ground.

C. Plaintiff Moves The Court To Compel The Mona Defendants To Produce All Documents Responsive To Plaintiff's Document Requests And To Compel Mona, III To Produce The Hard Drive

The Mona Defendants' position that they do not have a single document in their possession, custody, or control responsive to the 45 requests Plaintiff served on April 8, 2020 defies credibility and common sense. "Rule 34 requires that the party upon whom the request is served must be in possession, custody, or control of the requested item." *See Clark v. Vega Wholesale Inc.*, 181 F.R.D. 470, 472 (D. Nev. 1998). "A party need not have actual possession of documents to be deemed in control of them. . . . A party that has a legal right to obtain certain documents is deemed to have control of the documents." *Id.* "A reasonable inquiry must be made, and if no responsive documents or tangible things exist, Fed. R. Civ. P. 26(g)(1), the responding party should so state with sufficient specificity to allow the court to determine whether the party made a reasonable inquiry and exercised due diligence." *See Spence v. Kaur*, No. 216CV1828TLNKJNP, 2019 WL 3842867, at *3 (E.D. Cal. Aug. 15, 2019), *reconsideration denied,* No. 216CV01828TLNKJN, 2020 WL 2468090 (E.D. Cal. May 13, 2020).

Plaintiff's document requests asked for numerous categories of documents, at least some of which were clearly in the Mona Defendants' possession, custody, or control, such as documents concerning: (1) Mona, Jr.'s 2018 resignation from his role as President and CEO of the Company, *see* Ex. R at 23 (request number 32); (2) Mona, Jr.'s 2019 retirement from his role as Founder-Emeritus of the Company, *id.* at 24 (request number 35); (3) compensation paid to the Mona Defendants, *id.* (request number 36); (4) purchases and sales of CV Sciences securities by the Mona Defendants, *id.* at

25 (request number 37); (5) Mona, III's resignation from the Company, *id.* at 26 (request number 40), and; (6) Mona, III's employment action against the Company, id. at 26-29 (request numbers 41 to 45). Indeed, before backtracking on their response to Plaintiff's first April 8 interrogatory, the Mona Defendants identified five categories of "documents potentially containing discoverable information" many of which were in their "***possession***." *See* Ex. O at 5, 8; Ex. P at 5, 8 (***still*** asserting this response in their amended answer, even though they backtracked on it during the meet and confer).

While the Mona Defendants might not currently be in possession of all the documents requested, they certainly have the legal right to obtain at least some of them. Before backtracking on their responses to Plaintiff's April 8 document requests, the Mona Defendants appeared to initially acknowledge this when, for 28 of the Plaintiff's 45 documents requests, they responded that "[t]o the extent they exist, Mona Defendants will produce all responsive, non-privileged documents which are located within their possession, custody, or control after conducting a reasonably diligent search." *See* Ex. R at 5-10, 11-17, 18-20, 20-22, 25-26 (responding to Plaintiff's document requests numbered 1-9, 12-22, 25-26, 28-31, 38-39). The fact that the Mona Defendants have repeatedly ignored Plaintiff's requests to check their personal cell phones and email accounts—both of which they could have used for business purposes while employed at CV Sciences—to look for information responsive to the Plaintiff's document requests supports Plaintiff's position that the Mona Defendants are not responding in good faith to his document requests. *See* Ex. A at 4; Ex. B at 3.

Plaintiff therefore moves the Court to compel the Mona Defendants to produce all documents responsive to his 45 requests for production and, if unable to produce any of these documents, to provide Plaintiff with "a declaration detailing the steps he went through to locate" these documents. *See Uribe v. McKesson*, No. 08CV1285 DSM (NLS), 2010 WL 892093, at *3 (E.D. Cal. Mar. 9, 2010) (explaining that if the defendant could not provide receipts then "he must provide to Plaintiff a declaration detailing the steps he went through to locate those receipts and explain the prison's document retention policy").

Plaintiff also moves the Court to compel Mona, III to produce the hard drive on which he supposedly copied his laptop's electronic records. Mona, III has waived any objection to the production of the hard drive. Furthermore, he violated his discovery obligation when he concealed the

existence of the laptop and the hard drive in his initial disclosures on March 20 and then failed to acknowledge his control over the hard drive in his interrogatory response. Undoubtedly, this is because Mona, III—***who created the hard drive and handed it over to Holo Discovery during the pendency of the underlying securities litigation***—is concealing the fact that he in fact has control over the hard drive or has improperly abandoned his obligation to preserve evidence. The Mona Defendants' broad "pattern of non-disclosure" renders their "failure to timely supplement their Rule 26 initial disclosures far more damaging than it likely would have otherwise been." *See Webster v. Psychiatric Med. Care, LLC*, 386 F. Supp. 3d 1358, 1366 (D. Mont. 2019). Similarly, Mona, III's "failure to preserve electronic or other records. . . .raises the issue of spoliation of evidence and its consequences." *See Compass Bank v. Morris Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1052 (S.D. Cal. 2015).

Moreover, Mona, III should not be permitted to collude with the Company to stop the disclosure this hard drive because, by his own admission, the Company and Mona, III have "divest[ed]" legal interests. *See* ECF No. 69 at ¶3. The Company's objections to Plaintiff's proposed search terms and its proposal to conduct a second confidentiality review of any documents from the hard drive, *see* Ex. Z, are yet another attempt to materially delay the production of responsive documents. There is already a protective order in place stating that "[a] Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this case only for prosecuting, defending, or attempting to settle this litigation." *See* ECF No. 81 at 7.

Plaintiff therefore moves the Court to compel the Mona Defendants to produce all responsive documents to Plaintiff's requests for production, and Mona, III to produce the hard drive purportedly containing an image of Mona, III's laptop. *See James Stewart Entm't, LLC v. L&M Racing, LLC*, No. ED-CV-1249-JGBSPX, 2013 WL 12248146, at *5 (C.D. Cal. June 28, 2013) (the defendants "failure to search all the computers in their possession, custody, and control earlier was not substantially justified.").

D. Plaintiff Requests That the Court Order The Mona Defendants To Pay The Fees and Costs For This Motion And To Extend The Case Deadlines By A Reasonable Period Of Time

"There are two sources of authority under which a district court can sanction a party who has despoiled evidence: the inherent power of federal courts to levy sanctions in response to abusive litigation practices, and the availability of sanctions under Rule 37 against a party who "fails to obey an order to provide or permit discovery." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Specifically, "[a] federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence." *Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc.*, 306 F.3d 806, 824 (9th Cir. 2002). Further, Rule 37, "authorizes the district court, in its discretion, to impose a wide range of sanctions when a party fails to comply with the rules of discovery or with court orders enforcing those rules." *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983).

The fact that the Mona Defendants continue to suggest that they do not have a single discoverable document in their possession, custody, or control while refusing to search the hard drive that Mona, III created during the pendency of this action is (at best) an abusive litigation practice and (at worst) spoliation. Tellingly, on June 3, 2020, when the parties jointly moved to alter the discovery deadlines by an additional four months to account for Covid-19 associated delays, Plaintiff noted that there was good cause for this extension because the Defendants had not yet responded to his document requests and he was concerned that he "will not be able to review documents, potentially raise challenges to Defendants' production, or conduct depositions of all witnesses" by the fact discovery deadline. *See* ECF No. 83 at 1-2. It is unfathomable that Plaintiff is still in this exact same position.

Plaintiff therefore encourages the Court to sanction the Mona Defendants by ordering them to pay the fees and costs for this motion and by extending the discovery and other case deadlines by a reasonable period of time from the date of its order, depending on how this motion and other anticipated events unfold. Plaintiff believes that this method will deter the Mona Defendants from future misconduct, "place[] the risk of an erroneous judgment" on the Mona Defendants, and restore Plaintiff to his "rightful litigation position." *See United States v. Town of Colorado City, Ariz.*, No. 3:12-CV-8123-HRH, 2014 WL 3724232, at *7 (D. Ariz. July 28, 2014); *see also Hoy's, Inc. v.*

EBJ&F, LLC, No. 2:13-CV-912-APG-VCF, 2014 WL 12791222, at *2 (D. Nev. Mar. 3, 2014) (Ferenbach, M.J.) (finding that sanctions in the form of fees and costs were warranted when "the parties stipulated to an extension of discovery" due to the defendants' noncompliance with written discovery but then the defendants "still failed to respond" with "rule-compliant responses.").

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court to: (1) deem all objections to Plaintiff's discovery requests untimely and therefore waived; (2) compel the Mona Defendants to provide complete responses to certain of Plaintiff's interrogatories; (3) compel the Mona Defendants to provide all responsive documents to Plaintiff's document requests, including the hard drive whose existence was concealed from Plaintiff; and (4) order the Mona Defendants to pay the fees and costs for this motion and to extend the discovery and other case deadlines a reasonable period of time from the date of the court's ruling on this motion

Dated: October 5, 2020

By: */s/ Richard W. Gonnello*
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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record.

By: */s/ Richard W. Gonnello*
Richard W. Gonnello