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by Superior Court of CA,
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on 4/29/2019 8:42 PM
Reviewed By: R. Walker
Case #16CV291137
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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

AGILENT TECHNOLOGIES, INC.,

Plaintiff,

v.

TWIST BIOSCIENCE CORP., EMILY
LEPROUST, SIYUAN CHEN, SOLANGE
GLAIZE, *et al.*

Defendants.

Case No. 16-CV-291137

**ORDER NUMBER 8
BY DISCOVERY REFEREE**

Action Filed: February 3, 2016
Location: Department 1
Judge: Hon. Brian Walsh
Discovery Referee: Hon. James Ware (Ret.)

**DISCOVERY REFEREE'S STATEMENT OF DECISION
ON PLAINTIFF'S MOTION TO COMPEL FURTHER RESPONSES TO SPECIAL
INTERROGATORIES SET TWO, NOS. 218-223**

I. INTRODUCTION

Presently before the Discovery Referee is Plaintiff's Notice of Motion to Compel Further Responses to Special Interrogatories Set Two, Nos. 218-223, a Memorandum of Points and Authorities ("Motion") and the Declaration of J. Hardy Ehlers ("Ehlers Decl."). The

1 Motion was referred to the Referee pursuant to California Code of Civil Procedure sections
2 638 and 644 and the January 22, 2019 Stipulation and Order of the Court.

3 Pursuant to the requirements of paragraph 4 of the January 22 Stipulation and Order,
4 the Referee conducted an in-person hearing on the Motion on April 16, 2019, at the JAMS
5 Silicon Valley Resolution Center. Counsel for all parties were present. The hearing was
6 recorded by a stenographer. The Motion was submitted to the Referee for a decision. Neither
7 party has declared that this Motion is “case dispositive” or presented a “bet-the-company”
8 issue. (See Order of Appointment.) Thus, the Referee reports his Statement of Decision as a
9 definitive ruling on the Motion. (See Order No. 5 at 5, fn. 5.)
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12 **II. BACKGROUND**

13 On May 11, 2018, Plaintiff served, *inter alia*, Interrogatories Numbers 218-223 on
14 Defendant Twist Bioscience Corp. The interrogatories request information regarding each of
15 2,450 documents Defendants had produced. Later, the documents that were the subject of the
16 interrogatories were narrowed to 44 documents pertaining to Plaintiff’s alleged trade secrets
17 and 1,280 documents pertaining to Plaintiff’s alleged confidential information. (Motion at 8;
18 Opposition at 5.) The interrogatories sought forensic information relating to Defendants’
19 possession, access, and deletion of the documents, as well as the earliest date Defendants had
20 knowledge of their possession of the documents. (Id.; see Myre Decl., Ex. 17.) The parties
21 participated in a meet and confer session. A September 20, 2018 Stipulation and Order
22 required Defendants to make available “forensic images of all the devices” but “subject to a
23 mutually agreed protocol protecting both privileged and personal documents.” (Myre Decl.,
24 Ex. 26, September 20, 2018 Joint Stipulation and Order.) Further, the Stipulation and Order
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1 required Defendants to provide written responses to the interrogatories when the
2 information could not be uncovered with forensic examination. (Id. ¶ 11.)

3 On November 2, 2018, Defendants served a supplemental spreadsheet containing
4 forensic data relating to the 44 Identified Trade Secret documents. (Motion at 9-10.) In
5 response to feedback from Plaintiff, Defendants served an additional supplemental response
6 on November 16, 2018. (Id. at 10.)

7 On March 1, 2019, Plaintiff submitted the current Motion. Plaintiff requests the
8 Referee to order Defendants to (1) provide responsive information for all Agilent's
9 confidential and trade secrets documents attributable to former Twist employee Solange
10 Glaize; (2) supplement their cursory responses for the 1,280 Trade Secret & Confidential
11 Documents by, *inter alia*, providing more than a boilerplate response to Interrogatories Nos.
12 218, 219, and 221, responding to No. 223, and responding meaningfully to Nos. 220 and 222,
13 (3) supplement their still-deficient responses for the 44 Identified Trade Secret Documents,
14 and (4) verify all their responses under oath pursuant to CCP § 2030.250(a). (Motion at 19.)
15 Further, Plaintiff requests a monetary sanction for the costs and fees it incurred in bringing
16 this Motion and two prior motions regarding the same interrogatories. (Id. at 18.)

17 On March 15, 2019, Defendants filed their Opposition to this Motion ("Opposition"),
18 and served additional supplemental responses regarding the 44 Identified Trade Secrets
19 documents ("March 15, 2019 Supplemental Responses"). Defendants contend that the
20 forensic data contains all of the information Plaintiff seeks, because the information in
21 Defendants' possession were passively retained – that is, it was not accessed or used after Dr.
22 Emily Leproust left her employment at Agilent, and thus there is little human background
23 from Defendants' employees to share. (Opposition at 1.) In addition, regarding Interrogatory
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1 No. 222, Defendants contend that under the September 20, 2018 Stipulation and Order, they
2 await the parties' execution of a stipulation confirming that Defendants' Response to No. 222,
3 which relates to counsel activity, will not result in a waiver of privilege, and that Defendants
4 sent a draft stipulation "over a month ago" to which Plaintiff has not yet responded.
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6 (Opposition at 2.) In its Reply, Plaintiff states that that it had responded to the stipulation
7 with revisions on March 20, 2019, which to date has not yet been executed. (Reply at 6.)

8 Finally, Defendants also request an award of their fees and costs in responding to this
9 Motion. (Opposition at 2.)

11 III. DISCUSSION

12 A. Legal Standard

13 Under Civil Code of Procedure section 2030.210, "[t]he party to whom interrogatories
14 have been propounded shall respond in writing under oath separately to each interrogatory
15 by any of the following: (1) An answer containing the information sought to be discovered; (2)
16 An exercise of the party's option to produce writings; (3) An objection to the particular
17 interrogatory." If an interrogatory cannot be answered completely, it shall be answered to the
18 extent possible. Cal. Code Civ. Proc. § 2030.220. If an objection is made to an interrogatory or
19 to a part of an interrogatory, the specific ground for the objection shall be set forth clearly in
20 the response. If an objection is based on a claim of privilege, the particular privilege invoked
21 shall be clearly stated. Cal. Code Civ. Proc. § 2040.230(b).

24 Under the guidance of these codes, the Referee proceeds to consider Plaintiff's Motion
25 and Defendants' positions with regard to each interrogatory for which Plaintiff seeks to
26 compel supplemental responses.
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1 **B. Interrogatory No. 218**

2 Plaintiff's Special Interrogatory No. 218 requests the following:

3 For each document identified in YOUR April 6, 2018 supplemental response to
4 Interrogatory No. 65, describe how the document came into YOUR possession,
5 custody, or control. (Ehlers Decl., Ex. 3 at 2.)

6 Plaintiff contends that Defendants' November 16, 2018 supplemental responses still
7 fail to comply with the September 20, 2018 Stipulation and Order, because they fail to
8 identify how the documents came into Defendants' possession. (Motion at 11.) Plaintiff
9 contends that Defendants' explanation of "mass data migrations" when Defendant Leproust
10 obtained new laptops does not explain how Leproust originally came into possession of the
11 documents, and that attributing some documents to Defendant Glaize,¹ no longer an
12 employee of Twist, does not exempt Defendants from obtaining responsive information from
13 Glaize for these interrogatories. (Id.) The Referee will discuss the matter of responses from
14 Glaize separately in this Order.
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17 Defendants contend that they have provided all of the known forensic images and
18 extracted forensic data regarding possession of the 44 Identified Trade Secret documents.
19 (Opposition at 7.) Defendants contend that they went above and beyond the requirement of
20 Cal. Code Civ. Proc. § 2030.220 to provide a straightforward and complete response with
21 forensic images by also extracting the data, which required a forensics expert. (Id. at 8.)
22 Further, Defendants contend that they have provided narrative or "human" responses in
23 addition to their forensic images in response to No. 218. (Id. at 10.)
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¹ Defendant Solange Glaize left employment at Twist in October 2017, and is represented by separate counsel in this action. (Opposition at 13-14.)

1 Defendants' March 15, 2019 supplemental response to No. 218 states that Leproust
2 came into possession of all alleged Trade Secret Documents while an employee of Agilent,
3 where at times she forwarded documents to her personal email address so that she could
4 work at home on evenings or weekends or while traveling. (Myre Decl., Ex. 28 at 4.)
5 Defendants state that Leproust was not aware she had passively retained these documents,
6 which were automatically copied and moved in mass data migrations (and not individually
7 selected) when she obtained new computers over the years, until Defendants' counsel
8 discovered them in connection with this lawsuit. (Id. at 5.) Upon review of the responses, the
9 Referee finds that narrative responses including more "human" background or intelligence
10 are not available based on what Defendants have already stated. For example, the forensic
11 data demonstrates when the documents were transferred and maintained, and shows that
12 documents were not accessed or used after Leproust left Agilent. (See Opposition at 11.)

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16 Based on the record before the Referee, the Referee is persuaded that Defendants'
17 production of forensic images and forensic data, along with the supplemental narrative
18 responses served on March 15, 2019, are responsive to Plaintiff's Interrogatory No. 218
19 pursuant to section 2030.220, to the extent possible as the information reasonably available
20 to Defendants Twist and Leproust permits. If the documents were automatically copied and
21 passively moved from laptop to laptop over the years, discovery directed at forensic data or
22 depositions of custodians are more efficient discovery tools than compelling further answers
23 to written interrogatories. That being said, the Referee does not make factual findings as to
24 whether these responses are credible or whether the forensic data are accurate. Rather, in
25 ruling on a discovery motion to compel interrogatory responses, the Referee must only
26 determine whether "[e]ach answer in a response to interrogatories shall be as complete and
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1 straightforward as the information reasonably available to the responding party permits.”
2 Cal. Code Civ. Proc. § 2030.220. As such, Plaintiff’s inferences that Defendants may be
3 engaged in fraud by withholding available facts from the interrogatory responses are more
4 appropriately argued in a separate motion or in presenting its case-in-chief to the fact-finder.
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6 Thus, the Referee finds that Defendants’ production for Interrogatory No. 218 satisfies
7 the requirements of section § 2030.220 regarding interrogatory responses. The Referee finds
8 that Defendants have set forth plausible explanations for the allegedly limited narrative
9 responses provided in their supplemental responses, particularly with regard to documents
10 that were never accessed or used, which forensic analysis can support. (See Myre Decl., Ex.
11 28, Further Supplemental Responses to Agilent’s Second Set of Interrogatories, at 14.)
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13 Accordingly, the Referee DENIES Plaintiff’s Motion to Compel further supplemental responses
14 as to Special Interrogatory No. 218.
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16 **C. Interrogatory Nos. 219-221**

17 Plaintiff’s Special Interrogatory No. 219 requests the following:

18 For each document identified in YOUR April 6, 2018 supplemental response to
19 Interrogatory No. 65, **identify each time the document was accessed or used**
20 in any way.

21 Plaintiff’s Special Interrogatory No. 220 requests the following:

22 For each document identified in YOUR April 6, 2018 supplemental response to
23 Interrogatory No. 65, **identify each piece of media** (e.g., computers, tablets,
24 smartphones, mobile devices, compact discs, USB devices, and/or other digital
storage media) on which the document was accessed or used.

25 Plaintiff’s Special Interrogatory No. 221 requests the following:

26 For each document identified in YOUR April 6, 2018 supplemental response to
27 Interrogatory No. 65, **identify each person** who has ever accessed the
28 document. (Ehlers Decl., Ex. 3 at 2.)

1 Plaintiff contends that Defendants failed to comply with the September 20, 2018
2 Stipulation and Order in their supplemental responses to these interrogatories, on the basis
3 that the Order required Defendants to provide more “human background” or narrative
4 responses in addition to the forensic images and data provided, because some access dates in
5 the forensic data suggest that documents were accessed after Leproust left Agilent. (Motion
6 at 12.) Thus, Plaintiff contends, Defendants must provide a more detailed narrative response
7 to explain the “automatic system processes” that Defendants allege created access dates,
8 rather than user-generated conduct. (Id.)
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11 As with Interrogatory No. 218, Defendants contend that no other narrative responses
12 containing human intelligence are available for Interrogatories Nos. 219-221, because the
13 documents at issue were never “accessed or used,” and only passively retained, and thus, any
14 interrogatories about accessing the documents are fully responsive with forensic data.
15 (Opposition at 10.) Defendants further contend that custodians of the devices containing the
16 Identified Trade Secret documents will be made available for depositions, and that the
17 devices will be the subject of expert discovery, thus objecting to the necessity of further
18 narrative responses to these interrogatories.
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21 Nonetheless, on March 15, 2019, Defendants submitted further supplemental
22 responses for Nos. 219-221, which provided narrative responses seeking to explain the
23 nature of the “automatic system processes” and their impact on the forensic data indicating
24 access of the Identified Trade Secret Documents. (Myre Decl., Ex. 28 at 18.) Defendants state
25 that “metadata” fields for thousands of files on Leproust’s devices were all accessed on the
26 same dates when a metadata field was updated; for example, on April 1, 2016, 57,158 total
27 items on a Leproust laptop were “accessed,” which Defendants contend is evidence that the
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1 files were accessed in an automatic system process, and not by an individual, who could not
2 plausibly access that many documents in the same day. (Id.) Defendants suggest that an
3 automated process creating the same “access” time stamp for thousands of files at once could
4 be attributed to the operating system scanning the hard drive for viruses, creating
5 thumbnails of the contents of folders, or creating a search “index” of the contents of the
6 documents, all of which are automated. (Id. at 17, fn. 5.)

8 However, at this time, Defendants are unable to identify the specific automatic process
9 that altered the “accessed” timestamp of the Agilent-Alleged Trade Secret Documents.
10 Defendants’ investigations to date have shown that the anti-virus software Cylance was
11 processing data on Emily_Leproust_LT02 on February 29, 2016, and on Emily_Leproust_LT
12 on April 1, 2016. Defendants’ further supplemental response states that Leproust was the
13 only person at Twist who had access to the devices in her custody, which were password
14 protected, and that neither she nor anyone else accessed the alleged Trade Secret Documents
15 stored on her devices after she left Agilent. (Myre Decl., Ex. 28 at 24-25.)

18 Upon review, the Referee finds that the narrative responses provided by Defendants
19 on March 15, 2019 reasonably address Plaintiff’s interrogatories. Demonstrated by the sheer
20 volume or “mass” files transferred, “accessed” by automatic processes, or deleted on the same
21 dates in the forensic data, it is apparent that additional narrative responses will not shed
22 additional light on the electronic maintenance of the Identified Trade Secret documents on
23 devices within Defendants’ possession, custody or control. Furthermore, Plaintiff will have
24 the opportunity to depose expert and percipient witnesses on these issues. Accordingly, the
25 Referee DENIES Plaintiff’s Motion to Compel further supplemental responses as to Special
26 Interrogatories No. 219-221.
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1 **D. Special Interrogatory No. 222**

2 Plaintiff's Special Interrogatory No. 222 requests the following:

3 For each document identified in YOUR April 6, 2018 supplemental response to
4 Interrogatory No. 65, identify the earliest date on which YOU had knowledge of
5 YOUR possession of the document. (Ehlers Decl., Ex. 3 at 2.)

6 With respect to this interrogatory, the parties stipulated that they would "confer
7 regarding a reasonable stipulation that will permit each Party to disclose dates at which
8 certain forensic information was uncovered by the Parties' respective counsel in such a
9 manner that would not result in a waiver of any privilege or work product protections."

10 (September 20, 2018 Stipulation and Order ¶ 12.)

11
12 Plaintiff contends that Defendants have failed to provide any supplemental response
13 to No. 222. (Motion at 12.) Defendants contend a response to No. 222 requires disclosure
14 dates at which forensic information was uncovered by counsel, and therefore it has not
15 provided a response because the parties have not yet executed an agreement regarding the
16 attorney privilege and work product protections described above. (Opposition at 13.)

17 Defendants represent that they sent a draft stipulation to Plaintiff via email on February 8,
18 2019, to which they had received no response by the time they filed their Opposition to this
19 Motion on March 15, 2019. (Id.) In its Reply, Plaintiff represents that it provided proposed
20 revisions to the non-waiver stipulation on March 20, 2019, and awaits Defendants' response.

21 (Reply at 7.)

22
23 In light of the pending non-waiver stipulation, the Referee holds in abeyance Plaintiff's
24 Motion to Compel with respect to Interrogatory No. 222. On or before **May 3, 2019**, the
25 parties shall submit a Joint Statement updating the Referee as to the status of the parties'
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1 efforts in finalizing the non-waiver stipulation and any agreement as to further responses
2 regarding No. 222 based on the non-waiver stipulation.

3 **E. Special Interrogatory No. 223**

4 Plaintiff's Special Interrogatory No. 223 requests the following:

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6 Identify all documents that contain or reflect any AGILENT confidential
7 information that were in YOUR possession, custody, or control that were
8 deleted and the date of each deletion. (Ehlers Decl., Ex. 3 at 2.)

9 Plaintiff contends that Defendants' supplemental response for No. 223 is incomplete
10 because it identifies only one mass deletion of 76 documents that occurred when Leproust
11 transferred the contents of her hard drive on January 27, 2016. (Motion at 12.) Plaintiff
12 contends that Defendants failed to address other deletions that occurred when Leproust
13 "wiped" her personal computer. (Id. at 12-13.) Further, Plaintiff contends that in Defendants'
14 December 28, 2018 supplemental responses, they removed any mention of Leproust's
15 personal laptop being wiped, rather than providing more information. (Id. at 13.) Following
16 Defendants' further supplemental responses on March 15, 2019, Plaintiff contends that they
17 are still incomplete or evasive. (Reply at 7.)

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19 Defendants' March 15, 2019 supplemental response to No. 223 provided a narrative
20 response explaining how and why Leproust made deletions. In summary, Leproust wanted to
21 give a laptop she was no longer using to her partner, so she copied approximately 37,702
22 items from the old laptop in a "mass data migration" on January 27, 2016 to an external hard
23 drive (Emily_Leproust_EXTHD), in order to retain any documents she had on the device. (See
24 Myre Decl., Ex. 28 at 27.) It appears that later that same day, Leproust deleted approximately
25 7,512 documents from the hard drive as part of a mass deletion. (Id.) Moreover, the March
26 15 further supplemental response to No. 223 provides that the documents that were deleted
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1 from Leproust's devices, as shown in Exhibit B to Defendants' November 2, 2018
2 Supplemental Response, have "an exact duplicate of each file" as found in Exhibit A to the
3 March 15 response, and have been produced to Agilent. (See Myre Decl., Ex. 28 at 26.)
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5 Thus, the Referee finds that Defendants have complied with section 2030.220 because
6 the narrative supplemental responses provided by Defendants regarding No. 223 are "as
7 complete and straightforward as the information reasonably available to the responding
8 party permits." Cal. Civ. Code Proc. § 2030.220. Indeed, Defendants have provided
9 straightforward and complete information as to when, why, and how any of the Identified
10 Trade Secret documents were deleted. Accordingly, the Referee DENIES Plaintiff's Motion to
11 Compel further supplemental responses for Interrogatory No. 223.²
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13 **F. "Confidential" Information Documents**

14 In addition to 44 documents relating to Identified Trade Secrets pursuant to section
15 2019.210, Plaintiff also identified at least 1,280 documents in Defendants' possession that
16 contain trade secret³ and other confidential information. (Motion at 8.) Defendants initially
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20 ² In their Reply brief, Plaintiff takes issue with Defendants' statement in the further
21 supplemental response that "[t]ypically when Dr. Leproust would delete an entire folder she
22 would confirm that it existed elsewhere," and contend that it is spoliation. (Reply at 7.) The
23 Referee declines to consider the briefly mentioned issue of spoliation at this time as it is not
24 fully brief. Whether Defendants improperly or negligently deleted any information is not the
25 subject of this Motion. To the extent that Plaintiff has evidence of spoliation, the Referee
26 invites Plaintiff to make a separate motion in that regard and seek all legal remedies available
27 if spoliation is proved.

28 ³ Plaintiff characterizes the 1,280 confidential documents as containing "trade secret and
other confidential information," but apparently not of the same category as trade secrets it
identified pursuant to section 2019.210. (Motion at 8.) Defendants characterize the 1,280
documents as containing "non-trade-secret confidential information." (Opposition at 3.) The
September 20, 2018 Stipulation and Order refers to "the specific allegedly 'confidential
information' contained within each document or category of documents" and required
Plaintiff to "specify and describe the requested information Agilent asserts cannot be

1 responded with forensic analysis to the 44 Identified Trade Secret documents, and declined
2 to respond regarding the other 1,280 documents, claiming undue burden. (Id.)

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4 Plaintiff contends that the Court's prior instructions and Orders require Defendants to
5 provide both forensic data and human background for all of the documents at issue, including
6 the 1,280 "confidential" documents. (Reply at 8-9.) Generally, Plaintiff contends that the
7 interrogatories request information that cannot be uncovered through forensic data, that the
8 Court agreed, and thus Defendants' responses for the 1,280 documents are necessarily
9 incomplete because they include no narrative responses. (Reply at 9.)

10
11 Defendants contend that the forensic images it provided for the 1,280 documents is a
12 complete and straightforward response, and that the September 20, 2018 Stipulation and
13 Order specifically requires Plaintiff to perform forensic data extraction on those documents,
14 which is expensive, and *then* inform Defendants of any information that could not be obtained
15 via forensic analysis. (Opposition at 8.) Further, Defendants contend that with respect to the
16 1,280 "confidential" documents, the September 20, 2018 Stipulation and Order states that
17 Defendants would incur the expense for examination of the 44 Identified Trade Secret
18 documents, and Agilent would incur the burden and expense for the remainder. (Opposition
19 at 8, fn. 8.) However, "Defendants are willing to provide extracted forensic data for some
20 small number (e.g., five to ten) of non-trade-secret Documents of Agilent's choosing." (Id.)

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23 With regard to this issue, the parties dispute what the Court instructed each to do
24 regarding supplemental interrogatory responses. Plaintiff contends that the Court instructed,

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28 uncovered through a forensic examination of the devices containing such document(s)"
(Myre Decl., Ex. 26 ¶ 11.)

1 during the August 17, 2018 IDC,⁴ that “Defendants could not rely on forensic data alone to
2 answer the Special Interrogatories and explained that forensic intelligence would not provide
3 the complete set of information the Special Interrogatories requested.” (Ehlers Decl. ¶ 9.)
4 Plaintiff was then instructed to categorize the “confidential” documents so that Defendants
5 could better respond. (Id. ¶ 10.) On the other hand, Defendants contend that the Court
6 ordered Plaintiff to extract the forensic data from the forensic images Defendants had already
7 served, because it is time consuming and expensive, and *then* inform Defendants as to which
8 *specific documents* required a supplemental response beyond forensic data. (Opposition at 8.)
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11 With respect to the 1,280 “confidential” documents, Paragraph 11 of the September
12 20, 2018 Stipulation and Order provides:

13 For the documents Agilent identified in response to Defendants’ Special
14 Interrogatory Nos. 241 and 243, Agilent will (a) identify the specific allegedly
15 “confidential information” contained within each document or category of
16 documents; and (b) specify and describe the requested information Agilent
17 asserts cannot be uncovered through a forensic examination of the devices
18 containing such document(s) or categories. Subject to any objections not
19 already raised and discussed with the Court regarding Agilent’s [Nos. 218-223]
20 that Defendant may have about the scope of Agilent’s narrowed list or the
21 questions it propounds, Defendants will provide written responses compliant
22 with [CCP § 2030.220] to Agilent with information available to Defendants that
23 cannot be uncovered through a forensic examination, within 45 days of
24 Agilent’s identification of the above.... (Myre Decl., Ex. 26 ¶ 11.)

25 Essentially, Plaintiff contends that it has satisfied both (a) and (b) above and that
26 Defendants continue to refuse to provide narrative responses. Defendants appear to
27 contend that Plaintiff did not satisfy requirement (b) by specifying and describing the
28 requested information that cannot be uncovered by forensic examination, and thus they will
not yet provide supplemental responses.

⁴ “Informal Discovery Conference.”

1 Based on Plaintiff’s declaration regarding the August 17, 2018 IDC and on the face of
2 the parties’ stipulation, the Referee finds that Judge Walsh’s instructions are clear – namely,
3 that Plaintiff was instructed to indicate to Defendants which specific information could *not*
4 be obtained from a forensic examination of the forensic images, which requires an
5 extraction of data to determine.⁵ Nowhere in the parties’ papers or the Court’s Orders does
6 the Referee see a finding by Judge Walsh that the interrogatories themselves required
7 narrative responses; rather, Plaintiff was required to “specify and describe” the requested
8 information that could not be uncovered through a forensic examination of the devices. This
9 appears to be a separate instruction from identifying the specific allegedly “confidential
10 information” contained within each document or category of documents. (See Ehlers Decl.,
11 Ex. 26 ¶ 11.) Thus, the Referee finds that Plaintiff has not yet specified what responses
12 cannot be uncovered without forensic examination.
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15 Accordingly, on or before **May 15, 2019**, Plaintiff shall comply with Paragraph 11 of
16 the September 20, 2018 Stipulation and Order’s requirement, namely, to “specify and
17 describe the requested information Agilent asserts cannot be uncovered through a forensic
18 examination” These requests should be based on a forensic examination that concludes
19 the specific information sought is indeed not within the forensic data.
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26 ⁵ In its Motion, Plaintiff requests direct input from Judge Walsh on this point, regarding the
27 Judge’s findings at the August 17, 2018 IDC that were later incorporated into the parties’
28 stipulation. (Reply at 9; Reply at 9, fn.4.) The Referee has made his findings based on the
plain language of the September 20 Stipulation and Order. To the extent Plaintiff wishes to
have further input from Judge Walsh on this issue, the Referee invites Plaintiff to make a
motion for clarification directly before Judge Walsh.

1 **G. Requested Responses from Solange Glaize**

2 Plaintiff requests the Referee to compel supplemental, narrative interrogatory
3 responses for Interrogatories Nos. 218-223 from former Twist and Agilent employee Solange
4 Glaize, who was the custodian of at least two devices, a USB drive and Google Drive account,
5 containing Identified Trade Secret documents. (Motion at 12.) Plaintiff also alleges that
6 Glaize was the custodian of the “Dell” and “Gateway” laptops, and requests the Referee to
7 compel a further response specifically to Interrogatory No. 219 regarding any use or access of
8 trade secret or confidential documents by Glaize. (Reply at 10.) Plaintiff contends that
9 “Defendants are manifestly withholding information regarding what Solange Glaize—their
10 CFO of two years—did with the documents she brought to Twist from Agilent.” (Reply at 8.)
11 Plaintiff contends that because Glaize was not a named defendant when these interrogatories
12 were served, and was an employee of Twist when Twist came into possession of these
13 documents, Twist is obligated to provide all facts in its possession or in the possession of its
14 counsel. (Reply at 5.)

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18 Defendants contend that because as of October 2017, Glaize is no longer employed at
19 Twist, and is a separate defendant represented by separate counsel, Defendants Twist and
20 Leproust have no control or obligation to seek responsive information from Glaize herself,
21 but Plaintiff is free to serve Glaize with forensic discovery interrogatories if it seeks further
22 information from her. (Opposition at 13-14.) Defendants also contend that they provided the
23 forensic evidence in Defendants’ possession, custody or control attributable to the documents
24 possessed by Glaize during her employment at Twist. (Myre Decl., Ex. 28 at 7.)
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1 The California Code of Civil Procedure requires that a party must make a reasonable
2 and good faith effort to obtain the information sought in an interrogatory, except where the
3 information is equally available to the propounding party. Cal. Code Civ. Proc. § 2030.220(c).

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5 The Referee finds Defendant Twist has no further obligation to obtain a response from
6 Glaize herself. Glaize is now a named defendant in this litigation, and Plaintiff may serve her
7 with these interrogatories if the forensic analyses are considered insufficient by Plaintiff.
8 Accordingly, the Referee DENIES Plaintiff's Motion to Compel additional narrative responses
9 from Defendant Twist with respect to interrogatories directed at Defendant Glaize.

10 **H. Verification of Responses**

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12 Defendants served a verification of their supplemental responses on March 15, 2019,
13 executed by Bill Banyai, Chief Operating Officer at Twist Bioscience Corp. (Myre Decl., Ex.
14 33.) Plaintiff contends that the verification is insufficient because Leproust herself did not
15 verify the narrative responses, which mostly rely on her recollection, and thus she has not
16 provided responses under oath even though she was individually served the same
17 interrogatories. (Reply at 7, 10.) Prior to Defendants' March 15, 2019 service of verification,
18 Plaintiff specifically requested that Leproust verify the interrogatory responses. (Ehlers
19 Decl., Ex. 10 at 8.)

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22 The Civil Code of Procedure section 2030.050 requires a responding party to verify all
23 of their responses under oath. In this case, the interrogatories were served to Defendant
24 Twist. (Ehlers Decl., Ex. 15 at 1.) Defendant Twist apparently interviewed Leproust and
25 included human background information from her in its responses and supplemental
26 responses. Plaintiff provides no legal authority requiring a defendant's employees to
27 individually verify interrogatory responses with a declaration made under oath. Although
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1 Leproust is also a named defendant in this case, the Referee finds that the interrogatories
2 were served upon and responded to by Twist, and that Twist made a reasonable and good
3 faith effort to obtain information from its employee, Leproust, to respond to the
4 interrogatories to the extent possible. Indeed, the Chief Operating Officer of Twist has
5 executed the required verified responses. Accordingly, the Referee DENIES Plaintiff's Motion
6 to Compel additional verification to Defendants' responses to Interrogatories Nos. 218-223.
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8 **I. Requests for Attorney Fees and Costs**

9 Both parties request an award of fees and costs pursuant to California Code of Civil
10 Procedure section 2030.330(d).
11

12 Section 2030.330(d) provides: "The court shall impose a monetary sanction under
13 Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who
14 unsuccessfully makes or opposes a motion to compel a further response to interrogatories,
15 unless it finds that the one subject to the sanction acted with substantial justification or that
16 other circumstances make the imposition of the sanction unjust."
17

18 Based on the totality of the record, the Referee finds that both sides acted with
19 substantial justification in filing and responding to this discovery dispute. Accordingly, an
20 award of fees and costs is unwarranted.
21

22 **IV. CONCLUSION**

23 The Referee DENIES in-part Plaintiff's Motion to Compel Further Responses to Special
24 Interrogatories, Set Two, Nos. 218-223 as follows:

25 (1) On or before **May 3, 2019**, the parties shall submit a Joint Statement updating the
26

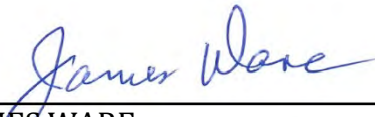
27 Referee as to the status of the parties' efforts in finalizing the non-waiver stipulation
28

1 and any agreement as to further responses regarding No. 222 based on the non-
2 waiver stipulation.

3 (2) On or before **May 15, 2019**, Plaintiff shall comply with Paragraph 11 of the
4 September 20, 2018 Stipulation and Order’s requirement, namely, to “specify and
5 describe the requested information Agilent asserts cannot be uncovered through a
6 forensic examination” These requests should be based on a forensic examination
7 that concludes the specific information sought is indeed not within the forensic data.
8

9 (3) The Referee DENIES the parties’ request for attorney fees and costs.
10

11
12 Dated: April 25, 2019

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15 _____
16 JAMES WARE
17 UNITED STATES DISTRICT JUDGE (RET.)
18 DISCOVERY REFEREE
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