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12 UNITED STATES DISTRICT COURT
 13 CENTRAL DISTRICT OF CALIFORNIA
 14 WESTERN DIVISION
 15

16 COLUMBIA PICTURES INDUSTRIES,
 17 INC.; AMAZON CONTENT
 18 SERVICES, LLC; DISNEY
 19 ENTERPRISES, INC.; PARAMOUNT
 20 PICTURES CORPORATION;
 21 WARNER BROS. ENTERTAINMENT
 22 INC.; UNIVERSAL CITY STUDIOS
 23 PRODUCTIONS LLLP; UNIVERSAL
 24 TELEVISION LLC; and UNIVERSAL
 25 CONTENT PRODUCTIONS LLC,

Plaintiffs,

v.

23 ALEJANDRO GALINDO and DOES 1-
 24 20,

Defendants.

Case No. 2:20-cv-03129-SVW-GJSx

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION FOR AN ORDER:
 1) REQUIRING EVIDENCE
 PRESERVATION, IMAGING OF
 DEVICES, AND DEFENDANT'S
 DEPOSITION;
 2) COMPELLING SUPPLEMENTAL
 RESPONSES AND PRODUCTION;
 3) COMPELLING CONSENT TO
 PRODUCTION OF EMAILS BY
 GOOGLE; AND
 4) FOR ATTORNEYS' FEES**

Filed concurrently herewith: Declaration
 of Julie Shepard, Declaration of Jan van
 Voorn, and [Proposed] Orders

Trial Date: October 13, 2020

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that Plaintiffs Columbia Pictures Industries, Inc.,
3 Amazon Content Services, LLC, Disney Enterprises, Inc., Paramount Pictures
4 Corporation, Warner Bros. Entertainment Inc., Universal Studios Productions
5 LLLP, Universal Television LLC, and Universal Content Productions LLC
6 (collectively, "Plaintiffs") hereby submit this Notice of Motion and Motion for an
7 Order: 1) requiring evidence preservation, imaging of devices, and a deposition of
8 Defendant Alejandro Galindro ("Defendant") regarding document preservation and
9 search issues; 2) compelling supplemental responses and production to Plaintiffs'
10 first set of interrogatories and first and second set of requests for production; 3)
11 compelling consent to production of emails by Google; and 4) finding Plaintiffs
12 should be awarded their reasonable attorneys' fees incurred in connection with this
13 Motion pursuant to Federal Rule of Civil Procedure Rule 37 and setting a briefing
14 schedule.

15 *First*, an order instructing Defendant as to his to duty to preserve is warranted
16 because there is a significant concern that relevant evidence is being, or will be,
17 destroyed, and failure to preserve this evidence will irreparably harm Plaintiffs by
18 depriving them of key proof that is uniquely in Defendant's possession. And to
19 ensure Defendant is preserving all relevant evidence, Plaintiffs need to immediately
20 depose Defendant to identify the repositories of relevant documents and the
21 electronic storage devices he used; his preservation (or lack thereof) of documents;
22 and any deletion of emails or other records. Additionally, an order requiring forensic
23 imaging of Defendant's relevant electronic storage devices, email and social media
24 accounts, and messengering applications is warranted because (1) there are serious
25 questions as to the reliability and completeness of Defendant's discovery responses,
26 and (2) the devices and accounts at issue have a sufficient nexus to this case.

27 *Second*, because the evidence Plaintiffs have uncovered through other means
28 demonstrates that (i) Defendant's claim to have no responsive documents, and (ii)

1 Defendant's responses to Interrogatories Nos. 1-2 and Requests for Production
2 ("RFP") Nos. 2-5 and 7-80, are not be credible, Defendant should be compelled to
3 provide further responses to these discovery requests and to produce all responsive
4 documents in his possession, custody, or control. Defendant has waived all
5 objections to this discovery, which seeks indisputably relevant information.¹

6 *Third*, given the substantial evidence strongly suggesting that Defendant
7 violated his duty to preserve relevant emails, and the fact that now only Google has
8 the ability to produce some of them, Defendant should be compelled to consent to
9 Google's production of these responsive emails.

10 *Finally*, attorneys' fees are warranted given Defendant's misconduct in the
11 discovery process, which required Plaintiffs to bring this Motion.

12 Counsel for the parties have met and conferred pursuant to L.R. 37-1
13 regarding the disputes as detailed in the Declaration of Julie Shepard. On July 7,
14 2020, the undersigned sent counsel for Defendant a meet and confer letter setting
15 forth the deficiencies in Defendant's discovery responses. Counsel then met and
16 conferred by telephone on July 13, 2020, had follow-up discussions regarding
17 Defendant's supplemental interrogatory responses, and ultimately were unable to
18 resolve any of the disputes presented in this Motion. On August 5, 2020, the parties
19 emailed the Court requesting a pre-discovery motion telephonic conference. The
20 Court determined that it would not resolve the issues without full briefing, and

21 _____
22 ¹ This discovery is directed to the core issues in the case: Defendant's direct sales of
23 subscriptions to his infringing Internet Protocol television service called Nitro TV,
24 his reseller network, the revenues he has earned from Nitro TV, his creation of
25 channels and other content sources for Nitro TV, identification of individuals with
26 whom he is working and their roles, his payment processors, his channels of
27 communication regarding Nitro TV (*e.g.*, email, instant messaging applications,
28 social media), the willfulness of his copyright infringement and any violations of the
preliminary injunction order (*e.g.*, his repeat involvement with infringing services,
his knowledge of prior litigation involving a now permanently enjoined IPTV
service called SET TV, any continued involvement in IPTV services), and his
affirmative defenses and disclaimers of responsibility and control.

1 ordered Plaintiffs to file a motion. Dkt. No. 53. Plaintiffs submit this Motion in
2 compliance with that order, as modified. *See* Dkt. No. 56.

3 Plaintiffs' Motion is based on the Notice of Motion and Motion; the attached
4 Memorandum of Points and Authorities; the Declaration of Julie Shepard ("Shepard
5 Decl."); the Declaration of Jan van Voorn previously filed with the Court on April
6 3, 2020 and submitted herewith as Exhibit T to the Shepard Declaration ("Van Voorn
7 Decl."); the Declaration of Jan van Voorn filed concurrently ("Second Van Voorn
8 Decl."); the [Proposed] Orders; all documents on file in this action; and such further
9 or additional evidence or argument as may be presented before or at the hearing on
10 this matter.

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Dated: August 19, 2020

JENNER & BLOCK LLP

By: _____

Julie Shepard

Attorneys for Plaintiffs

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION 1

II. STATEMENT OF FACTS 3

 A. Defendant Operated Nitro TV..... 3

 B. Plaintiffs Secured a Preliminary Injunction Based on Evidence Reflecting Defendant’s Ownership and Operation of Nitro TV..... 4

 C. Plaintiffs Served Their First Set of Targeted Discovery to Test Defendant’s Excuse for Violating the PI Order in Anticipation of Moving for a Finding of Contempt and Then Served a Second Comprehensive Set of Requests for Production. 5

 D. Defendant Provided Deficient Discovery Responses That Reveal He Spoliated Evidence. 6

 E. Third Party Productions Belie Defendant’s Claim That No Responsive Documents Ever Existed and That He Cannot Identify Individuals Involved in Nitro TV..... 8

 1. Google’s Production..... 8

 2. FDCServers’ Production 10

 3. Subpoenas for Payment Records..... 11

III. AN ORDER INSTRUCTING DEFENDANT TO PRESERVE EVIDENCE AND REQUIRING IMAGING OF HIS DEVICES IS WARRANTED. 11

 A. Defendant’s Discovery Misconduct Necessitates an Order to Preserve Evidence. 11

 B. Forensic Imaging of Defendant’s Pertinent Electronic Storage Devices, Email and Social Media Accounts, and Messengering Applications Is Warranted..... 15

IV. AN ORDER COMPELLING FURTHER INTERROGATORY RESPONSES IS WARRANTED. 19

1 V. AN ORDER COMPELLING PRODUCTION OF ALL RESPONSIVE
2 DOCUMENTS TO PLAINTIFFS’ FIRST AND SECOND SET OF
3 REQUESTS FOR PRODUCTION IS WARRANTED. 21
4
5 A. Documents Identifying Others Involved in Nitro TV, Their Roles,
6 and the Companies Providing Content and Infrastructure for Nitro
7 TV 21
8
9 B. Documents Reflecting the Revenues Defendant Derived From Nitro
10 TV and Concerning His Purchase of Reseller Credits and Sales of
11 Subscriptions 22
12
13 C. Documents Reflecting the Payments He Has Made Indirectly and
14 Directly to Others for Their Work on Nitro TV 23
15
16 D. Documents Reflecting Non-Privileged Post-Filing Communications
17 and Communications with Domain Name Registrars 23
18
19 E. Documents Reflecting Defendant’s Email and Telegram Accounts
20 Used for Nitro TV 24
21
22 VI. AN ORDER COMPELLING CONSENT TO PRODUCTION OF EMAILS
23 BY GOOGLE IS WARRANTED. 25
24
25 VII. PLAINTIFFS REQUEST THAT THE COURT FIND DEFENDANTS’
26 MISCONDUCT WARRANTS AWARDED PLAINTIFFS THEIR
27 ATTORNEYS’ FEES. 27
28
29 VIII. CONCLUSION 28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

Advante Int’l Corp. v. Mintel Learning Tech.,
2006 WL 3371576 (N.D. Cal. Nov. 21, 2006)..... 15, 18

Al Noaimi v. Zaid,
2012 WL 4758048 (D. Kan. Oct. 5, 2012)..... 26

Alexis v. Rogers,
2017 WL 1073404 (S.D. Cal. Mar. 21, 2017)..... 17

Am. LegalNet, Inc. v. Davis,
673 F. Supp. 2d 1063 (C.D. Cal. 2009)..... 11, 12

Bower v. Bower,
2011 WL 1326643 (D. Mass. Apr. 5, 2011) 27

Bright Sols. for Dyslexia, Inc. v. Doe 1,
2015 WL 5159125 (N.D. Cal. Sept. 2, 2015)..... 11, 12, 13

Cahn v. Oversee.net,
2011 WL 13220391 (C.D. Cal. Nov. 29, 2011)..... 18

Columbia Pictures Indus., Inc. v. Fung,
2007 WL 9627610 (C.D. Cal. July 25, 2007) 13, 14, 18

Columbia Pictures Indus. v. Bunnell,
2007 WL 2080419 (C.D. Cal. May 29, 2007)..... 14

Equal Rights Ctr. v. Post Props., Inc.,
246 F.R.D. 29 (D.D.C. 2007) 19

Glazer v. Fireman’s Fund Ins. Co.,
2012 WL 1197167 (S.D.N.Y. Apr. 5, 2012)..... 27

In re Subpoena Duces Tecum to AOL, LLC,
550 F. Supp. 2d 606 (E.D. Va. 2008)..... 27

1 *Mafille v. Kaiser-Francis Oil Co.*,

2 2019 WL 1933747 (N.D. Okla. May 1, 2019) 26

3 *Negro v. Super. Ct.*,

4 230 Cal. App. 4th 879 (2014), *as modified* (Nov. 18, 2014) 26

5 *O’Grady v. Super. Ct.*,

6 139 Cal. App. 4th 1423 (2006), *as modified* (June 23, 2006) 27

7 *OOO Brunswick Rail Mgmt. v. Sultanov*,

8 2017 WL 67119 (N.D. Cal. Jan. 6, 2017) 12, 13, 14

9 *Playboy Enters., Inc. v. Welles*,

10 60 F. Supp. 2d 1050 (S.D. Cal. 1999) 17, 18

11 *Richmark Corp. v. Timber Falling Consultants*,

12 959 F.2d 1468 (9th Cir. 1992) 21

13 *Rogers v. Giurbino*,

14 288 F.R.D. 469 (S.D. Cal. 2012) 21

15 *Romano v. Steelcase Inc.*,

16 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010) 26

17 *Satmodo, LLC v. Whenever Commc’ns, LLC*,

18 2018 WL 3495832 (S.D. Cal. July 20, 2018) 16, 18

19 *Skinner v. Ryan*,

20 2014 WL 3064897 (D. Ariz. July 7, 2014) 19

21 *United Artists Corp. v. United Artist Studios LLC*,

22 2019 WL 9049050 (C.D. Cal. Oct. 7, 2019) passim

23 *Zubulake v. UBS Warburg LLC*,

24 229 F.R.D. 422 (S.D.N.Y. 2004) 13

25 **STATUTES**

26 18 U.S.C. § 2702(b)(3) 26

27 **OTHER AUTHORITIES**

28 Fed. R. Civ. P. 26 15

1 Fed. R. Civ. P. 30..... 15
2 Fed. R. Civ. P. 37(a), (c)..... 27

3
4
5
6
7
8
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10
11
12
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs bring this Motion to address Defendant Alejandro Galindo’s
4 (“Defendant”) intentional spoliation of evidence, false discovery responses, and
5 failure to produce relevant documents and information.

6 Defendant is the owner of an infringing, subscription-based Internet Protocol
7 television (“IPTV”) service, referred to as Nitro TV, which he operated from the
8 shadows of the Internet. Since his scheme was uncovered and Plaintiffs filed this
9 lawsuit, Defendant has admitted that he sold Nitro TV subscriptions to consumers
10 (*i.e.*, he is a frontline Nitro TV reseller), but he has attempted to cover up his role as
11 the operator of the service in a transparent effort to limit his damages exposure.
12 Defendant’s tactical denials of involvement, however, are refuted by the clear
13 evidence that formed the basis for the preliminary injunction granted in May 2020
14 and only underscore his willful violation of the discovery rules. Indeed, Defendant
15 has not produced a single document or identified any of his partners or affiliates in
16 his initial disclosures or verified interrogatory responses. Even worse, Defendant
17 has deleted relevant emails and instant messages demonstrating his operational role
18 in Nitro TV and transferred control over one of the critical domain names used to
19 operate the business shortly after being served with the complaint in this action.

20 Defendant’s remarkable excuse for flouting his discovery obligations is that
21 he ran his Nitro TV business through a web of aliases and with a messaging service
22 called Telegram configured for messages to self-destruct after they are read. But as
23 incriminating as such admissions may be standing alone, Defendant’s cover story
24 for the supposed lack of any records is patently false for several reasons.

25 *First*, by necessity, the purchase and sale of Nitro TV subscriptions and
26 reseller credits means that responsive bank, financial, subscriber, and revenue
27 records were created and exist. This is true whether one credits Defendant’s story
28 of his lesser role as a frontline reseller or instead believes (as Plaintiffs do) that he

1 sits at the top of the pyramid of Nitro TV resellers and directs Nitro TV’s operations.
2 As a result, an order requiring the production of these documents (and the other
3 documents that Defendant is withholding) is warranted.

4 *Second*, Defendant has left an electronic trail, and documents produced by
5 third parties contradict Defendant’s disclaimers and verified discovery responses.
6 By way of example only, Plaintiffs have discovered the identity of a person acting
7 in concert with Defendant—Richard Horsten. Plaintiffs have also learned that
8 Defendant communicated with Mr. Horsten via email (not just Telegram, as
9 Defendant contends). Defendant failed in two sets of verified interrogatory
10 responses to identify Mr. Horsten, provide his contact information, or describe his
11 role in Nitro TV. Defendant cannot credibly explain away this omission by claiming
12 he does not know Mr. Horsten or somehow forgot about the services he provided to
13 Defendant in connection with Nitro TV. Indeed, Defendant paid Mr. Horsten tens
14 of thousands of dollars—including more than \$14,000 in 2020 alone—through an
15 account associated with Defendant’s wife. And Defendant’s omission of Mr.
16 Horsten from his discovery responses appears deliberate: records produced by
17 Google strongly suggest that Defendant deleted emails exchanged with Mr. Horsten
18 along with other relevant, responsive communications in a massive email purge *after*
19 Defendant was served with the complaint in this action.

20 *Third*, Defendant appears to have continued to use Telegram to communicate
21 about Nitro TV after being on notice of this action, and yet he has failed to take basic
22 steps to reconfigure the “app” so that his messages no longer self-destruct. This runs
23 afoul of Defendant’s obligation to preserve evidence and prevent any automated
24 deletion of messages.

25 Notably, when Plaintiffs raised the evidence of Defendant’s document
26 destruction with Defendant’s counsel, he merely said that he has instructed his client
27 to preserve evidence. Defendant’s apparent continued use of Telegram set to auto-
28 delete and his selective deletion of almost 1,500 emails from his Gmail account

1 reflect that Defendant has not followed those instructions.²

2 Defendant's conduct flies in the face of a party's obligations in discovery.
3 Plaintiffs respectfully request, as described more fully below, that the Court enter an
4 order 1) requiring Defendant to preserve evidence, mandating that Defendant be
5 deposed limited to record issues, and allowing the imaging of electronic devices; 2)
6 compelling further interrogatory responses and Defendant's production of
7 responsive documents; 3) compelling Defendant's consent to Google's production
8 of Defendant's responsive emails that he deleted, to the extent recoverable; and 4)
9 awarding Plaintiffs their reasonable attorneys' fees.

10 **II. STATEMENT OF FACTS**

11 **A. Defendant Operated Nitro TV.**

12 Nitro TV is an IPTV service. Van Voorn Decl., ¶¶ 6–11, Ex. 10. Defendant
13 registered the domain name NitroIPTV.com in December 2016,³ several months
14 before the subscription-based Nitro TV service launched. Shepard Decl., ¶ 5, Exs.
15 A, B (Response to Interrogatory No. 9).⁴

16 Defendant promoted, marketed and sold Nitro TV subscriptions via
17 NitroIPTV.com. Shepard Decl., ¶ 6, Ex. G. In exchange for monthly subscription
18 fees of \$20 per month, Nitro TV subscribers were provided unauthorized access to
19 an array of thousands of live and title-curated television channels streamed 24 hours
20 a day, seven days a week. Van Voorn Decl., ¶¶ 18, 22–25. Within approximately

21
22 ² Plaintiffs are awaiting productions pertaining to other email addresses used by
23 Defendant.

24 ³ Records show the NitroIPTV.com domain name remained in Defendant's control
25 until after he was served in this action in April 2020, and the domain was transferred
26 in an apparent effort to evade the requested injunctive relief. Shepard Decl., ¶¶ 8–
27 10, Ex. H. It may still reside in Defendant's control, but steps were taken to conceal
28 the current ownership and control of this domain and others after this action was
filed. *Id.*, ¶ 14.

⁴ Plaintiffs did not learn of the Nitro TV service until long after it launched. *See*
Van Voorn Decl., ¶ 8 n.1.

1 24 hours of subscribing to Nitro TV and providing their payment information
2 subscribers were sent an email with their subscriber credentials. *See* Van Voorn
3 Decl., ¶¶ 19-21.

4 The channels made available without authorization on Nitro TV feature many
5 popular television programs and motion pictures, such as *The Office*, *Spider Man:
6 Homecoming*, *Toy Story 3*, *Star Trek Beyond*, *Homecoming*, and *Joker*, including
7 works whose copyrights Plaintiffs own or exclusively control (“Plaintiffs’
8 Copyrighted Works”). Van Voorn Decl., ¶ 6.

9 In addition to directly marketing to subscribers, Defendant also used
10 NitroIPTV.com to promote and expand the scope of Nitro TV by creating and
11 growing a network of resellers—creating an enterprise akin to a pyramid scheme.
12 Shepard Decl., Ex. G; *see also* Van Voorn Decl., ¶¶ 30-31, Ex. 17. Resellers would
13 purchase “TekkHosting Nitro Reseller Credits” which they would exchange for
14 Nitro TV subscriber credentials upon selling a Nitro TV subscription. Volume
15 discounts incentivized resellers to buy large quantities of credits and to market and
16 promote Nitro TV to attract new subscribers to the illegal service. *Id.*

17 Prior to the commencement of the action, the NitroIPTV.com domain
18 redirected to another domain, “TekkHosting.com,” from which Nitro TV
19 subscriptions and Nitro TV TekkHosting reseller credits could be purchased. Van
20 Voorn Decl., ¶ 17. The TekkHosting domain name was held under an alias of
21 Richard Horsten—who, as noted above, Defendant has paid tens of thousands of
22 dollars, including what appears to be a Christmas bonus. Shepard Decl., ¶¶ 15-16,
23 Ex. L.

24 **B. Plaintiffs Secured a Preliminary Injunction Based on Evidence**
25 **Reflecting Defendant’s Ownership and Operation of Nitro TV.**

26 Defendant’s control and ownership of the Nitro TV enterprise was hidden.
27 *See* Van Voorn Decl., ¶¶ 35–45. Plaintiffs, however, eventually learned of the illegal
28 service and subsequently discovered that Defendant—acting in concert with

1 others—owns and operated Nitro TV. Van Voorn Decl., ¶¶ 9-16, 47, Ex. 10; Dkt.
2 Nos. 13-1–13-9 (Plumb Decl., Exs. 1-9).

3 On April 3, 2020, Plaintiffs filed and personally served Defendant with their
4 complaint and motion for a preliminary injunction (“PI Motion”), setting forth
5 evidence reflecting Defendant’s operation, control, and ownership of the infringing
6 Nitro TV service and seeking to enjoin his mass-scale, ongoing infringement of
7 Plaintiffs’ Copyrighted Works. Dkt. Nos. 1 and 12.

8 On May 11, 2020, the Court entered an order preliminarily enjoining
9 Defendant, and those acting in concert with him, from their ongoing infringement of
10 Plaintiffs’ Copyrighted Works. Dkt. No. 34 (“PI Order”) at 4-5. The PI Order also
11 enjoined the domain registrars for NitroIPTV.com and TekkHosting.com (the
12 “Infringing Domain Names”) at the time the action was filed—*i.e.*, Namecheap, Inc.
13 and Domain.com, LLC—“from allowing the Infringing Domain Names to be
14 modified, sold, transferred to another owner, or deleted,” and ordered these registrars
15 to take certain steps to “disable access to the Infringing Domain Names.” *Id.*

16 **C. Plaintiffs Served Their First Set of Targeted Discovery to Test**
17 **Defendant’s Excuse for Violating the PI Order in Anticipation of**
18 **Moving for a Finding of Contempt and Then Served a Second**
Comprehensive Set of Requests for Production.

19 Defendant failed to immediately shut down the Nitro TV service on his own
20 in violation of the PI Order. Shepard Decl., ¶ 7. As a result, Plaintiffs served the PI
21 Order on Namecheap and Domain.com so that access to the Infringing Domain
22 Names would be disabled. *Id.*, ¶ 8. These domain name registrars responded that
23 Defendant’s NitroIPTV.com domain, along with TekkHosting.com, had transferred
24 away within days of Defendant being served with the PI Motion, which (as
25 Defendant intended) prevented these registrars from disabling access to the
26 Infringing Domains. *Id.*, ¶¶ 8–11, Exs. H, I. This allowed Defendant’s Nitro TV
27 service to remain in operation, streaming Plaintiffs’ Copyrighted Works 24 hours a
28 day, seven days a week, in violation of the PI Order. *Id.*, ¶ 12, Ex. J.

1 Plaintiffs made repeated demands for Defendant to disable access to Nitro TV.
2 *Id.*, ¶ 17, Ex. M. In response, through his counsel, Defendant claimed that he was
3 just a reseller with no control over Nitro TV. *Id.*, ¶ 17. He also tried to explain
4 away the evidence submitted in connection with the PI Motion reflecting
5 Defendant’s curating of the content for Nitro TV with a claim that Defendant was
6 just acting at the direction of others. *Id.* Tellingly, however, Defendant never
7 offered a shred of evidence (*e.g.*, records of him purchasing reseller credits,
8 documents reflecting the instructions that he allegedly received)—then or now—to
9 support these claims. *Id.*

10 To aid in their enforcement of the PI Order, Plaintiffs propounded targeted
11 interrogatories and requests for documents to identify others supposedly responsible
12 for Nitro TV, if not Defendant, as well as documents supporting Defendant’s claim
13 that he was just a reseller and did not control Nitro TV. *Id.*, ¶ 18, Exs. A, C.⁵
14 Plaintiffs subsequently served a second, more comprehensive set of document
15 requests. *Id.*, ¶ 24, Ex. D. This Motion concerns Defendant’s responses to the
16 interrogatories and the two sets of requests for production (sometimes “RFP”).

17 **D. Defendant Provided Deficient Discovery Responses That Reveal He**
18 **Spoliated Evidence.**

19 In responding to Plaintiffs’ discovery requests, Defendant failed to produce a
20 single document, including any that support his claim that he is just a reseller with
21 no control over Nitro TV. *Id.*, ¶ 23, Exs. A, C. He also refused to provide the real
22 names or roles of anyone else involved in Nitro TV. *Id.*, ¶ 22, Exs. A, B. Instead,
23 he merely provided the names of two aliases used on Telegram (++240 and AD2020)
24 and claimed that “there are no responsive documents as anything involved with
25

26 ⁵ Plaintiffs were poised to file an *ex parte* application seeking to shorten the time in
27 which Defendant had to respond to this discovery given Defendant’s refusal to shut
28 down Nitro TV when it finally ceased operating at the end of May, approximately
two and a half weeks after the PI Order was entered. Shepard Decl., ¶ 19.

1 nitrolPTV.com (sic) was done through ‘telegram’ (sic) and that application has
2 deleted per settings.” *Id.*, ¶ 20, Ex. C. From his responses, it also appears that
3 Defendant continued to use Telegram, which was set to auto-delete messages, to
4 communicate regarding Nitro TV even after he was on notice of this action on April
5 3. *Id.*, Ex. C (Response to RFP No. 2).⁶

6 Plaintiffs immediately raised concerns about Defendant’s destruction of
7 evidence when they received Defendant’s responses to their first set of discovery
8 and engaged in meet and confer efforts to resolve this dispute. *Id.*, ¶ 17, Ex. N.
9 Defendant’s supplemental interrogatory responses remain deficient, and he
10 continues to claim that he has no responsive documents to Plaintiffs’ first set of RFPs
11 due to his use of Telegram to conduct Nitro TV business. *Id.*, ¶ 22. Defendant, who
12 has waived all objections to the Plaintiffs’ second set of RFPs, has also asserted that
13 he does not have a single responsive document. *Id.*, ¶ 25, Ex. E.

14 As detailed immediately below, productions from third parties in response to
15 subpoenas reflect the creation and existence of relevant, responsive documents,
16 which Defendant has not produced. In a number of instances, the evidence shows
17 or, at a minimum, strongly suggests, that responsive, relevant documents were
18 deleted during the pendency of this action.

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23 ⁶ Plaintiffs’ request and Defendant’s response are as follows:

24 Request for Production No. 2:

25 All of your communications with anyone other than your lawyer regarding
26 Nitro TV, TekkHosting.com, and NitroIPTV.com from April 3, 2020 to
27 present, inclusive.

28 Defendant’s Response:

Without waiving any objections, there are no responsive documents as
anything involved with ntrolPTV.com (sic) was done through "telegram" (sic)
and that application has deleted per settings.

1 **E. Third Party Productions Belie Defendant’s Claim That No Responsive**
2 **Documents Ever Existed and That He Cannot Identify Individuals**
3 **Involved in Nitro TV.**

4 In light of Defendant’s refusal to immediately shut down Nitro TV, the
5 absence of support for Defendant’s disclaimer of control over Nitro TV, and his
6 transfer of NitroIPTV.com during the pendency of this lawsuit, Plaintiffs served
7 their first set of subpoenas and have continued to follow Defendant’s electronic trail
8 with additional subpoenas. *Id.*, ¶ 26. Below is a brief overview of the some of the
9 productions received. They show that Defendant has not been accurate or
10 forthcoming in his discovery responses and has likely spoliated evidence.

10 **1. Google’s Production**

11 Plaintiffs served Google with a subpoena for information and communications
12 related to fo*****@gmail.com, an email address they learned had been used by
13 Defendant in connection with Nitro TV. *Id.*, ¶ 27, Ex. O. Google produced, among
14 other things, what it refers to as email header information associated with
15 Defendant’s email address in mid-July. *Id.* The non-content email header
16 information reflects, among other things, the “to”, “from”, and date sent or received
17 and if the email has been put in “trash” (which means the email has been removed
18 from the account holder’s inbox or sent box by selecting to “trash” it) or “deleted”
19 (which means it has been permanently deleted). *Id.*, ¶¶ 27, 29–30, Ex. P.

20 Defendant’s email header information contains close to 1,500 email header
21 entries with “deleted, trash” notations or a variant on that phrase. *Id.*, ¶ 28. Based
22 on the information received from Google, it appears that Defendant engaged in a
23 surgical and massive email purge after being served on April 3. *Id.*, ¶¶ 29–30 Ex.
24 P.⁷ The email header production reflects that from over 6,800 emails, Defendant
25 selected about 1,500 to delete. *Id.*, ¶ 30.

26 _____
27 ⁷ Email header information exists only for emails that are in Google’s possession.
28 Google retains emails that are permanently deleted from the user’s point of view,
which are denoted “deleted” in the headers, for 30 to 60 days following their

1 Defendant's permanently deleted emails include emails that Defendant sent
2 to Mr. Horsten as reflected in the example below:

3 X-Gmail-Labels: Deleted, Sent, Trash
4 ...
5 Thu, 31 May 2018 15:19:15 -0700 (PDT)
6 From: fo*****@gmail.com
7 Date: Thu, 31 May 2018 17:19:15 -0500
8 ...
9 To: horsten@*****.***.**

7 Shepard Decl., ¶ 31, Ex. O (highlighting added). As explained above, Defendant's
8 May 2018 email to Mr. Horsten appears to have been permanently deleted from
9 Defendant's Gmail account *after the case was filed on April 3, 2020*.

10 Defendant did not limit his deletion of relevant emails to his communications
11 with Mr. Horsten. To the contrary, Defendant deleted hundreds of emails sent and
12 received from a number of different providers of services that facilitate the operation
13 and sale of IPTV service. *See* Shepard Decl., ¶ 31; Second Van Voorn Decl., ¶¶ 10–
14 21. Many of these deleted emails likely contain relevant information. For example,
15 hundreds of deleted emails involve communication with MoonClerk, a company that
16 facilitates recurring and one-time payments. Shepard Decl., ¶¶ 30-32, 34, Ex. O;
17 Second Van Voorn Decl., ¶ 20; <https://www.moonclerk.com/>. Such services appear
18 to have been used to support Defendant's Nitro TV operation in terms of his network

19 _____
20 permanent deletion. There are two ways for an email to become permanently deleted
21 from the user's point of view: (1) The user moves an email to the trash folder, and
22 then the user empties the trash folder; or (2) The user moves an email to the trash
23 folder, and Google automatically removes it after it has been in the trash for 30 days.
24 Shepard Decl., ¶ 29, Ex. P. This means that the "deleted" fo*****@gmail.com
25 emails listed in Google's header production were deleted by the
26 fo*****@gmail.com account holder in the 60 to 90 days prior to Google pulling its
27 email header information for production on or around June 15, 2020. *Id.*, ¶ 30, Ex.
28 P. This strongly suggests that Defendant's email purge commenced after Defendant
was served on April 3. Assuming a 90-day window applied, it is theoretically
possible that Defendant randomly decided in late March 2020 to delete close to 1,500
emails from 2016 to 2020 while leaving thousands of other emails untouched. But
this seems highly improbable. The more likely scenario is that Defendant selectively
deleted these emails after being served to try to cover his tracks.

1 of resellers (with the sale of Nitro TV Reseller Credits on a one-time or recurring
2 basis) and/or his direct sales to subscribers (with the collection of recurring payments
3 for their monthly Nitro TV subscriptions). *See* Second Van Voorn Decl., ¶ 20, Ex.
4 B. Defendant also deleted over 20 emails reflecting communications with Coinbase,
5 a cryptocurrency company that can be used to accept payments in the form of
6 cryptocurrency as well as to convert revenues to store them as cryptocurrency. *See*
7 *id.*, ¶ 21; Shepard Decl., ¶ 32, Ex. O; <https://www.coinbase.com/>.

8 Moreover, the very existence of many of these emails undermines
9 Defendant’s claim that he is “just a reseller,” as only *operators*, and not those who
10 were merely selling subscriptions to end user subscribers, would need to
11 communicate with many of these service providers (*e.g.*, Xstream Codes, WHMCS).
12 Second Van Voorn Decl., ¶¶ 12, 14–15.

13 Besides the deletion of relevant documents, Google’s production also reflects
14 that Defendant continues to possess relevant, responsive documents. For example,
15 Defendant received emails on April 11, 2020 from iPage, Inc., which provided
16 services to Defendant pertaining to the NitroIPTV.com website. Shepard Decl., ¶¶
17 10, 33, Ex. O. He has not produced those emails. *Id.*

18 **2. FDCServers’ Production**

19 Plaintiffs subpoenaed FDCServers (“FDC”), a company that offers high
20 volume, large scale web hosting services. Shepard Decl., ¶ 34; Second Van Voorn
21 Decl. ¶ 17; <https://www.fdcservers.net/>. FDC’s production reflects that it had a
22 customer using the email address fo*****@gmail.com associated with Defendant.
23 Shepard Decl., ¶ 34, Ex. O. The company name on this account is “tekkhosting,”
24 and the customer is “Martha Galindo,” who is believed to be Defendant’s mother.
25 *Id.* FDC’s production reflects that it communicated with the account holder
26 regarding this account, and Google’s production reflects that FDC sent emails to
27 and/or received emails to fo*****@gmail.com pertaining to this account. *Id.* None
28

1 of these communications have been produced, and a number of the emails were
2 permanently deleted. *Id.*

3 **3. Subpoenas for Payment Records**

4 The documents Plaintiffs received in response to a subpoena to PayPal for
5 records pertaining to Richard Horsten reflect that Mr. Horsten was paid over \$30,000
6 by Anna Galindo, who is believed to be Defendant’s wife. Shepard Decl., ¶ 16, Ex.
7 L. The response Plaintiffs received to their subpoena to another third party involved
8 in Nitro TV reflects that that party was paid over \$40,000 through Anna Galindo,
9 Martha Galindo, and tekkhosting@gmail.com. Shepard Decl., ¶ 35, Ex. R.

10 **III. AN ORDER INSTRUCTING DEFENDANT TO PRESERVE**
11 **EVIDENCE AND REQUIRING IMAGING OF HIS DEVICES IS**
12 **WARRANTED.**

13 Defendant’s blatant disregard for his discovery obligations and his apparent
14 wholesale destruction of evidence warrants the issuance of an order instructing him
15 on his duty to preserve all remaining evidence (if any) and allowing Plaintiffs to
16 immediately depose Defendant on the issues of document searches and preservation,
17 without it impacting Plaintiffs’ right to later depose Defendant on substantive claims
18 and defenses. The record also supports requiring forensic imaging of Defendant’s
19 electronic storage devices, email and social media accounts, and messaging
20 applications containing evidence relating to this case.

21 **A. Defendant’s Discovery Misconduct Necessitates an Order to**
22 **Preserve Evidence.**

23 An order instructing Defendant as to his to duty to preserve is necessary, as
24 there is a significant concern that relevant evidence is being, or will be, destroyed.

25 “[C]ourts have the implied or inherent power to issue preservation orders . . .
26 .” *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1071 (C.D. Cal. 2009). In
27 most cases, a preservation order is unnecessary because parties “are under [an
28 ongoing] duty to preserve [relevant] evidence.” *Bright Sols. for Dyslexia, Inc. v. Doe*

1 1, 2015 WL 5159125, at *2 (N.D. Cal. Sept. 2, 2015). When, however, there is “a
2 significant concern that potentially relevant evidence will be destroyed causing harm
3 to the opposing party,” courts deem it appropriate to issue a preservation order. *Id.*

4 To assess whether a preservation order is warranted, courts apply two related
5 tests. The first test asks whether a preservation order “is necessary and not unduly
6 burdensome.” *Am. LegalNet*, 673 F. Supp. 2d at 1072. Under this test, “the
7 proponent ordinarily must show that absent a court order, there is significant risk
8 that relevant evidence will be lost or destroyed—a burden often met by
9 demonstrating that the opposing party has lost or destroyed evidence in the past or
10 has inadequate retention procedures in place.” *Id.* (citation omitted). The second
11 test balances three considerations: “(1) threats to preservation of the evidence, (2)
12 irreparable harm likely to result to the party seeking preservation, and (3) the
13 capability of the custodian to maintain the evidence sought to be preserved.” *OOO*
14 *Brunswick Rail Mgmt. v. Sultanov*, 2017 WL 67119, at *1 (N.D. Cal. Jan. 6, 2017).

15 Plaintiffs readily satisfy both tests. As an initial matter, Defendant admits that
16 he is a reseller of Nitro TV, owned the NitroIPTV.com domain name to resell Nitro
17 TV, and that he created and administered the Nitro TV Official Facebook group
18 page. Shepard Decl., ¶ 20, Exs. A, B. Thus, even accepting Defendant’s description
19 of his role in Nitro TV, it is implausible that Defendant would have no responsive
20 documents unless he had engaged in widespread deletion.

21 Indeed, there is substantial evidence that Defendant has destroyed and
22 concealed relevant evidence. As previously noted, a Google production shows that
23 close to 1,500 emails were permanently deleted, which, based on information from
24 Google, indicates such emails were likely deleted after the lawsuit was filed. *See*
25 Section II.E, *supra*. What is more, there is reason to believe that a number of the
26 deleted emails are relevant to this action. By way of example, Defendant deleted
27 emails he sent to “horsten@*****.***.***”—*i.e.*, Richard Horsten, along with
28 emails from FDC related to the business of “tekkhosting” and communication with

1 the recurring payment processor MoonClerk. *Id.* Accordingly, it is highly likely
2 that these and other deleted emails relate to the operation of Nitro TV. *See OOO*
3 *Brunswick*, 2017 WL 67119, at *1 (issuing a preservation order because the
4 defendant’s misconduct—sending confidential documents from a work email
5 account to a personal email account, deleting the sent messages, and emptying the
6 trash folder—suggested that defendants would “delete relevant material from their
7 [personal] email accounts”).

8 Significantly, any pertinent deleted emails—and other “deleted” data on
9 Defendant’s electronic storage devices more generally (*e.g.*, software applications
10 and text/SMS messages)—are at risk of permanent destruction absent intervention.
11 Shepard Decl., ¶ 29, Ex. P; *Bright Sols.*, 2015 WL 5159125, at *3 (noting that under
12 Google’s “regular business practices, user data is routinely destroyed within months
13 after a user deletes that information”); *OOO Brunswick*, 2017 WL 67119, at *1
14 (noting the risk “that Google and Rackspace might delete material themselves . . .
15 by automatically erasing emails that [the defendants] moved to their trash folders”);
16 *see also Columbia Pictures Indus., Inc. v. Fung*, 2007 WL 9627610, at *5 (C.D. Cal.
17 July 25, 2007) (noting that “[d]eleting’ a file does not actually erase that data from
18 the computer’s storage devices” but rather “changes [the data] to a ‘not used’ status,”
19 which “permit[s] the computer to write over the ‘deleted’ data”).

20 In addition to email destruction, as described above, it appears that Defendant
21 has continued his practice of communicating about Nitro TV via Telegram, which
22 he admits is set to auto-destruct messages. Shepard Decl., ¶ 20, Ex. C. Defendant’s
23 admission shows a knowing, ongoing, and willful destruction of evidence in
24 violation of his duty to preserve evidence that is plainly relevant to this action. *See*
25 *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004) (“Once a
26 party reasonably anticipates litigation, it must suspend its routine document
27 retention/destruction policy and . . . ensure the preservation of relevant documents.”)
28 (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

1 A preservation order is necessary here because the failure to preserve this
2 evidence will irreparably harm Plaintiffs by depriving them of key proof that is
3 uniquely in Defendant’s possession. As noted, deleted ESI—whether
4 communications or other data—exists, if at all and only temporarily, in Defendant’s
5 electronic storage devices. *See Columbia Pictures*, 2007 WL 9627610, at *5 (noting
6 that “data which is deleted from a computer is retained on the hard drive, but is
7 constantly being overwritten by new data, through the normal use of the computer
8 equipment”). Yet such evidence is key to refuting Defendant’s claim that he is just
9 a Nitro TV reseller (by, for example, revealing use of software or services for IPTV
10 operators); showing the extent of the infringement of Plaintiffs’ Copyrighted Works
11 (by, for example, reflecting the works streamed); and identifying his Nitro TV
12 network (by, for example, identifying his resellers). *See OOO Brunswick*, 2017 WL
13 67119, at *1 (concluding that the deletion of pertinent emails would cause
14 irreparable harm); *Columbia Pictures Indus. v. Bunnell*, 2007 WL 2080419, at *4
15 (C.D. Cal. May 29, 2007) (noting that certain ESI was relevant to Plaintiffs’
16 copyright infringement action because it evinced “whether defendants’ users have
17 directly infringed plaintiffs’ copyrighted works, and to what extent defendants’
18 website is used for purposes of copyright infringement”).

19 Finally, the burden, if any, on Defendant to preserve this evidence is trivial—
20 especially as compared to the ill-gotten gains he reaped by way of his mass-scale
21 copyright infringement of Plaintiffs’ works. At most, Defendant will simply have
22 to cease affirmatively deleting relevant evidence, switch off any auto-delete settings,
23 and forensically image pertinent electronic storage devices so as to prevent further
24 overwriting of deleted data. The first two pose no burden at all. *See id.* at *7
25 (concluding that retaining the data “would be a trivial matter involving little more
26 than a setting change on the web server program”). And it would not be unfair to
27 require Defendant to cover the costs of imaging, as it is his brazen conduct that
28 requires the issuance of a preservation order in the first place. *Cf. United Artists*

1 *Corp. v. United Artist Studios LLC*, 2019 WL 9049050, at *10–11 (C.D. Cal. Oct. 7,
2 2019) (noting “the evidence is clear that, but for [defendant’s misdeeds], the forensic
3 investigation would not be necessary” and ordering the parties to share equally in
4 the cost of forensic investigation subject to cost shifting if further evidence of
5 “discovery misconduct . . . should surface”).

6 Accordingly, the Court should issue an order instructing Defendant as to his
7 duty to preserve relevant evidence. To ensure Defendant is preserving all relevant
8 evidence, Plaintiffs further request that the Court order an immediate deposition of
9 Defendant to identify the repositories of relevant documents and the electronic
10 storage devices he used; his preservation (or lack thereof) of documents; and any
11 deletion of emails or other records. Fed. R. Civ. P. 26, Cmt. (noting that “[w]hen a
12 case involves discovery of electronically stored information,” “identification of, and
13 early discovery from, individuals with special knowledge of a party’s computer
14 systems may be helpful”). Plaintiffs also ask that the Court order that such a
15 deposition will not count against Plaintiffs’ deposition of Defendant regarding the
16 claims and defenses in this matter.⁸

17 **B. Forensic Imaging of Defendant’s Pertinent Electronic Storage**
18 **Devices, Email and Social Media Accounts, and Messaging**
19 **Applications Is Warranted.**

20 Courts typically order forensic imaging under two distinct circumstances.⁹
21 The first is where “serious questions exist both as to the reliability and the
22 completeness of materials produced in discovery.” *Advante Int’l Corp. v. Mintel*

23 _____
24 ⁸ See Wright & Miller, *Federal Practice & Procedure*, § 2104 (3d ed.) (noting that
25 “that there is a strong reason to take [ESI discovery] depositions early in the case,
26 and in such circumstances it could readily be counterproductive for that early and
27 narrow deposition to foreclose a later deposition addressed to the merits of the
28 case”); see also Fed. R. Civ. P. 30 (permitting leave of court to take multiple
depositions “to the extent consistent with Rule 26(b)(1) and (2)”).

⁹ Assuming a preservation order is in place, the imaging could occur after Plaintiffs
depose Defendant regarding the devices and repositories he used as described above.

1 *Learning Tech.*, 2006 WL 3371576, at *1 (N.D. Cal. Nov. 21, 2006); *see also United*
2 *Artists Corp.*, 2019 WL 9049050, at *9 (“The scales tip in favor of compelling
3 forensic imaging where there exists evidence of either discrepancies in discovery
4 response or a failure by the responding party to produce requested information”).
5 The second is where there is a special connection between the electronic storage
6 devices and the claims in the case. *See, e.g., Satmodo, LLC v. Whenever Commc’ns,*
7 *LLC*, 2018 WL 3495832, at *4 (S.D. Cal. July 20, 2018) (ordering hard drive imaged
8 as “[the] defendant allegedly used the computer itself to commit the wrong that is
9 the subject of the lawsuit”). Both circumstances are present here.

10 *First*, there is specific, concrete evidence raising serious doubts about the
11 reliability and completeness of Defendant’s discovery responses. To begin,
12 Defendant has produced *zero* documents in response to Plaintiffs’ document
13 requests, stating that “there are no responsive documents.” Shepard Decl., ¶¶ 20,
14 23, Ex. B. This strains credulity for many reasons. It is impossible to believe that
15 Defendant, who has admittedly been involved with Nitro TV for over three years,
16 does not have a single document pertaining to Nitro TV. Defendant’s efforts to
17 explain this away with claims such as “[m]any companies are paperless” is
18 nonsensical. Shepard Decl., Ex. S. It ignores the common meaning of the word
19 “paperless” and erroneously equates it with “record-less.” Moreover, Defendant’s
20 representation that there are no responsive documents is even inconsistent with his
21 purported counter-narrative—that he is simply a Nitro TV reseller. Even if that were
22 true, there would, at a minimum, be communications and financial documents
23 evincing his Nitro TV transactions as well as records reflecting the revenues that
24 Defendant earned from selling Nitro TV subscriptions. Finally, non-party discovery
25 has yielded scores of documents regarding Defendant’s ownership and subsequent
26 transfer of NitroIPTV.com; Defendant’s financial dealings with individuals and
27 entities involved in operating Nitro TV; and Defendant’s communications with such
28 individuals and entities (most likely regarding Nitro TV). *See* Section II.E. The

1 circumstances here go far beyond raising serious doubts about the reliability and
2 completeness of Defendant’s discovery responses and, thus, warrant imaging.
3 Courts have ordered forensic imaging under similar circumstances. *See, e.g., United*
4 *Artists Corp.*, 2019 WL 9049050, at *10 (ordering forensic imaging upon a showing
5 of serious doubts about the reasonableness and adequacy of the defendant’s search
6 efforts where the defendant, an online film festival operator accused of trademark
7 infringement, produced only 56 pages of publicly-available internet printouts and
8 screenshots of two emails in response to 57 document requests).

9 Next, to the extent Defendant is not presently willfully withholding
10 documents and in fact, has “no responsive documents,” the evidence indicates this
11 is because Defendant has engaged in across-the-board destruction and spoliation of
12 relevant evidence. *See* Section II.E. This provides further grounds for ordering
13 forensic imaging. *See Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1052
14 (S.D. Cal. 1999) (ordering forensic imaging of the defendant’s hard drive where
15 there was evidence that defendant’s “custom and practice [was] to delete incoming
16 e-mail after [she] read it and to delete outgoing e-mail after [she] sent it,” as well as
17 to “delete from the ‘trash’ section of the computer the e-mail which [she] deleted
18 from the e-mail mailbox”); *Alexis v. Rogers*, 2017 WL 1073404, at *5 (S.D. Cal.
19 Mar. 21, 2017) (concluding the defendants “established a legal basis justifying their
20 request for a forensic examination of Plaintiff’s computer and/or hard drive(s)”
21 based on evidence that the plaintiff’s “computer or hard drive crashed and that she
22 lost, or subsequently was unable to locate, relevant documents”).

23 *Second*, there is a special connection between Defendant’s electronic storage
24 devices, as well as his email and social media accounts and messaging
25 applications (collectively, “Accounts”), and this action. Given that Nitro TV was an
26 online/digital business, Defendant’s electronic storage devices and Accounts used in
27 connection with operating Nitro TV likely contain unique evidence that is material
28 to this case. This includes, among other things, the software (or the remaining traces

1 of such software) that Defendant used to support the illegal IPTV service and other
2 incriminating data that Defendant has likely deleted from all other servers or
3 electronic storage devices but that persists in the devices' hard drives. *See United*
4 *Artists Corp.*, 2019 WL 9049050, at *10 (noting that “[b]ecause UAS is an online
5 business, there is no [] means [other than forensic imaging] by which UAC may
6 obtain these documents, to the extent they exist”); *Columbia Pictures*, 2007 WL
7 9627610, at *4–5 (observing that “it is well-established that deleted files are
8 discoverable” and noting that “data which is deleted from a computer is retained on
9 the hard drive, but is constantly being overwritten by new data, through the normal
10 use of the computer equipment”). Along the same lines, Defendant’s infringing
11 conduct was necessarily perpetrated by way of his computers, mobile phones, and
12 other electronic devices. *See, e.g., Satmodo*, 2018 WL 3495832, at *4 (ordering
13 forensic imaging because the defendant “allegedly used the computer itself to
14 commit the wrong,” and “inspection of the devices could reveal evidence of the
15 click-fraud that Plaintiff alleges . . . or, possibly, that the devices have been
16 modified/wiped”).

17 Accordingly, the Court should order forensic imaging of any computers,
18 mobile phones, hard drives, or other electronic storage devices in Defendant’s
19 possession, custody, or control used in connection with Nitro TV, as well as any
20 Accounts Defendant used in connection with Nitro TV. To that end, Plaintiffs
21 submit a [Proposed] Order setting forth an imaging protocol, which is narrowly
22 tailored to the needs of this case and tracks imaging protocols other federal courts
23 have found sufficient to safeguard against any privilege and privacy concerns. *See,*
24 *e.g., Playboy*, 60 F. Supp. 2d at 1054; *Advante*, 2006 WL 3371576, at *1; *Cahn v.*
25 *Oversee.net*, 2011 WL 13220391, at *2 (C.D. Cal. Nov. 29, 2011).

26 \\
27 \\
28

1 **IV. AN ORDER COMPELLING FURTHER INTERROGATORY**
2 **RESPONSES IS WARRANTED.**

3 Defendant has “a duty to provide true, explicit, responsive, complete and
4 candid answers to [Plaintiffs’] discovery.” *Skinner v. Ryan*, 2014 WL 3064897, at
5 *4 (D. Ariz. July 7, 2014) (citation omitted); *see also Equal Rights Ctr. v. Post*
6 *Props., Inc.*, 246 F.R.D. 29, 32 (D.D.C. 2007) (“One of the primary purposes of
7 discovery is to make a trial less a game of blind man’s bluff and more a fair contest
8 with the basic issues and facts disclosed to the fullest practicable extent.”)
9 (alterations omitted) (citation omitted). As set forth below, Defendant utterly failed
10 to fulfill this duty in his responses to Plaintiffs’ Interrogatories Nos. 1 and 2.

11 These interrogatories simply ask Defendant to identify (1) other individuals—
12 “including full name, all known aliases, and full contact information”—involved in
13 Nitro TV and their roles and (2) the individuals responsible for running or operating
14 Nitro TV, to the extent Defendant claims he is not in control. Ex. A. Defendant was
15 not candid or complete in his verified responses.

16 As explained above, Defendant claimed that he could only recall two aliases
17 for individuals he communicated with via Telegram. Then, after a meet-and-confer
18 call pointing out that this response could not be squared with records Plaintiffs
19 submitted in connection with their PI Motion, Defendant merely supplemented his
20 response to add individuals Plaintiffs were already aware worked with Defendant on
21 his Official Nitro TV Facebook group, and then he continued his stonewalling by
22 claiming that he did not “know anything” about these admins “or the details that you
23 seek.” *See* Shepard Decl., ¶ 22, Ex. B. Defendant justified his supposed inability to
24 identify anyone by asserting that “anything involved with nitroIPTV (sic) was done
25 through ‘telegram’ (sic) and that application has deleted per settings.” *See* Shepard
26 Decl., ¶ 20; Ex. C. Plaintiffs do not doubt that Defendant communicated about Nitro
27 TV using Telegram to hide his illegal conduct. But that does not mean Defendant is
28

1 unable to provide the real names and contact information for these individuals or
2 other key participants in Nitro TV operations.

3 The deficiencies in Defendants’ responses are apparent for two main reasons.
4 *First*, Defendant’s long involvement as—at a minimum—a reseller in the illegal
5 Nitro TV enterprise and the creator and administrator of the Nitro TV Official
6 Facebook group belies his assertion that he knows *nothing* about *anyone* else
7 involved. Indeed, Defendant was involved with Nitro TV before the service itself
8 was launched through 2020. *See* Section II.A. Further, because Defendant was,
9 even by his own admission, at the very least a reseller of Nitro TV subscriptions,
10 financial and subscriber records reflecting these sales and purchases—and the names
11 of the other parties to these financial transactions—must have been created. *See*
12 *Second Van Voorn Decl.*, ¶¶ 3, 5. Simply put, Defendant’s story that he can identify
13 just two aliases of individuals involved in the Nitro TV enterprise has been
14 implausible from the outset.

15 *Second*, the productions from third parties demonstrate that Defendant
16 communicated with other individuals involved in Nitro TV through email and paid
17 some of them, like Richard Horsten and others involved in the Nitro TV enterprise,
18 large sums of money through payments made by Defendant’s family members,
19 Martha Galindo and Anna Galindo. *See* Section II.E, *supra*. This evidence reflects
20 that Defendant has not been forthcoming in his verified responses and has much
21 more responsive information that he has not yet provided, including information
22 explaining the roles of Martha and Anna Galindo in his Nitro TV enterprise.¹⁰

23 Plaintiffs respectfully request that the Court order Defendant to provide
24 fulsome, verified, supplemental responses to Interrogatories Nos. 1 and 2.

25 ¹⁰ Defendant’s failure to identify Martha Galindo, Anna Galindo, and Mr. Horsten
26 are just a few examples of his refusal to identify those with whom he has worked
27 and regularly communicated regarding Nitro TV. Other examples exist but are not
28 provided here, as Defendant’s tactic is to “supplement” his deficient discovery
responses with information Plaintiffs already know.

1 **V. AN ORDER COMPELLING PRODUCTION OF ALL RESPONSIVE**
 2 **DOCUMENTS TO PLAINTIFFS' FIRST AND SECOND SET OF**
 3 **REQUESTS FOR PRODUCTION IS WARRANTED.**

4 Defendant has stonewalled Plaintiffs by claiming that he does not have a
 5 single document referring Nitro TV and otherwise responsive to Plaintiffs' requests.
 6 *See* Shepard Decl., ¶¶ 20–21, 23, 25, Exs. C, E. As stated before and confirmed by
 7 the examples below, Defendant's position is demonstrably untrue in many cases and
 8 not credible in others. Accordingly, Plaintiffs respectfully request that Defendant be
 9 ordered to produce all documents responsive to RFP Nos. 2 through 5 and 7 through
 10 80 in his possession, custody, or control. *See Rogers v. Giurbino*, 288 F.R.D. 469,
 11 485 (S.D. Cal. 2012) (granting motion to compel further responses to discovery
 12 requests where "responsive documents [were] likely to exist"); *see United Artists*
 13 *Corp.*, 2019 WL 9049050, at *6, *11 (compelling further searches for responsive
 14 documents because "there [was] reason to believe that the production [was]
 15 incomplete").¹¹

16 **A. Documents Identifying Others Involved in Nitro TV, Their Roles, and**
 17 **the Companies Providing Content and Infrastructure for Nitro TV**

18 Plaintiffs served document requests seeking types of information similar to
 19 that sought by Plaintiffs' Interrogatories Nos. 1 and 2, including RFP Nos. 37
 20 (seeking documents identifying people involved in Nitro TV), 34 (seeking
 21 documents identifying any person from whom Defendant has acquired content for
 22 Nitro TV and the he amount paid them), 39-43 (seeking documents pertaining to Mr.
 23 Horsten and the administrators of Defendant's Official Nitro TV Facebook group),
 24 47 (seeking documents identifying all payment processors), 50–52 (seeking

25 _____
 26 ¹¹ Defendant has waived all objections to RFP Nos. 2 through 5 and 7 through 80 by
 27 not asserting any objections and failing to timely respond. Shepard Decl., ¶ 25, Ex.
 28 E. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th
 Cir. 1992) ("It is well established that a failure to object to discovery requests within
 the time required constitutes a waiver of any objection.").

1 documents identifying Nitro TV resellers and the number of subscribers they have),
2 and 64 (seeking documents identifying people involved in the marketing and
3 promotion of Nitro TV). Shepard Decl., ¶ 24, Ex. D. Defendant has failed to
4 produce any responsive documents. *Id.*, ¶ 25, Ex. E. Yet for the reasons set forth
5 above in Sections II.E and IV, responsive documents were created and must exist
6 unless Defendant destroyed them.

7 **B. Documents Reflecting the Revenues Defendant Derived From Nitro**
8 **TV and Concerning His Purchase of Reseller Credits and Sales of**
9 **Subscriptions**

10 Plaintiffs asked Defendant to produce documents and all communications
11 related to his purchases of Nitro TV reseller credits as well as documents sufficient
12 to identify the total number of Nitro TV subscribers on a monthly basis. *See* RFP
13 Nos. 3, 4, and 55. In response, Defendant repeated the refrain that he has no
14 responsive documents, as “anything involved with nitroIPTV (sic) was done through
15 ‘telegram’ (sic) and that application has deleted per settings.” *See* Ex. C (Def’s
16 Responses to Pl.’s First Set of RFPs). Plaintiffs also asked for documents reflecting
17 any revenues Defendant earned and other consideration he received in connection
18 with Nitro TV as well as documents reflecting revenue sharing arrangements. *See*
19 RFP Nos. 9-12, 38, 56-59. Again, Defendant responded he has no responsive
20 documents.

21 Defendant’s responses cannot be squared with the facts even if Defendant is
22 only a Nitro TV reseller. As a Nitro TV reseller for a *paid* subscription service
23 (which Defendant says he is), Defendant would necessarily have—at the very
24 least—financial records, such as credit card statements, and other bank and
25 subscriber records, reflecting his purchases of Nitro TV reseller credits as well as
26 the revenues from his subscription sales. Defendant’s use of Telegram does not
27 explain his failure to produce such documents, as Telegram can only be used to
28 communicate with other users who have downloaded and installed the Telegram app.

1 Second Van Voorn Decl., ¶ 5. Thus, as a practical matter, Telegram cannot be used
2 for transactions and communications regarding most of the underlying functions of
3 a subscription-based IPTV service such as billing and payment. *Id.* Indeed, the
4 Google email headers reflect Defendant used a recurring payment processor called
5 MoonClerk. They also include communications with Coinbase, a company whose
6 services would permit Defendant both to accept payments in cryptocurrency as well
7 as to convert revenues earned from Nitro TV into cryptocurrency. Second Van
8 Voorn Decl., ¶ 21; <https://www.coinbase.com/>. In short, Defendant's use of
9 Telegram cannot explain his complete failure to produce his financial, subscriber,
10 and reseller records, as well as related emails.¹²

11 **C. Documents Reflecting the Payments He Has Made Indirectly and**
12 **Directly to Others for Their Work on Nitro TV**

13 RFP No. 46 seeks documents evidencing who Defendant has paid, directly or
14 indirectly, for assistance with Nitro TV and how much they were paid. Defendant
15 claims that he has no responsive documents, but records produced by third parties
16 show otherwise, as they reflect that Defendant's wife and mother paid Mr. Horsten
17 and another individual who also assisted Defendant with Nitro TV tens of thousands
18 of dollars, which suggests that Defendant used them as conduits. *See* Section II.E.

19 **D. Documents Reflecting Non-Privileged Post-Filing Communications**
20 **and Communications with Domain Name Registrars**

21 As noted above, RFP No. 2 asked Defendant to provide all of his
22 communications regarding Nitro TV, NitroIPTV.com, and TekkHosting.com, from
23 April 3, 2020, when the complaint in this action was served, to the present. RFP No.

24 ¹² As noted above, Defendant's assertion that he possesses no communications with
25 persons from whom he has purchased Nitro TV reseller credits cannot be squared
26 with the all of the evidence submitted with the Plaintiffs' PI Motion, including
27 exhibits thereto, reflecting the purchase, sale, and transmittal of login credentials,
28 that were conducted through websites (*e.g.*, inquiry pages and chats) and follow-up
emails. *See* Dkt. 12.

1 5 seeks communications with “Namecheap, Inc., Domain.com, LLC, Tucows, Inc.,
2 TucowsDomain.com and any other domain registrars regarding Nitro TV.” In
3 response to both RFPs, Defendant stated that he had no responsive documents due
4 to his use of Telegram set to delete. *See* Shepard Decl. ¶ 23; Ex. C.

5 Even putting aside evidence that Defendant spoliated evidence by destroying
6 a portion of his communications regarding Nitro TV, third-party productions alone
7 reflect that Defendant’s response is suspect. *See* Section II above. As previously
8 explained, records produced by Google, FDC, and other third parties indicate that
9 Defendant communicated via email with companies providing infrastructure to
10 IPTV services (*see id.*; Second Van Voorn Decl., ¶¶ 10–21), and that these emails
11 likely were related to Nitro TV, NitroIPTV.com, and/or TekkHosting.com. By way
12 of example only, Defendant’s email header information reflects that Defendant
13 exchanged emails with iPage, Inc., the website host for NitroIPTV.com, in April
14 2020, within days of the commencement of transfer away request. *See* Shepard
15 Decl., ¶ 33; Exs. H, O. For these reasons, Defendant’s claim that he has no
16 documents responsive to these requests is unconvincing.

17 **E. Documents Reflecting Defendant’s Email and Telegram Accounts
18 Used for Nitro TV**

19 Plaintiffs requested documents reflecting Defendant’s email addresses, the
20 messaging applications he used, and his Telegram account information and
21 credentials. *See* RFP Nos. 21, 22, 26, 27, 69. After Defendant repeatedly
22 represented that he used Telegram, he now implausibly claims that he has no ability
23 to produce documents reflecting his Telegram credentials or the accounts used.
24 Equally unbelievable is Defendant’s claim that he has no documents reflecting the
25 email accounts he used in connection with Nitro TV, as it is clear he used
26 fo*****@gmail.com, and Plaintiffs’ have located several others through third-party
27 subpoenas. Shepard Decl., ¶ 36.

28 ***

1 As reflected in the examples above, Defendant’s claim to have no responsive
2 documents appears to be false.¹³ Plaintiffs respectfully request that Defendant be
3 ordered to produce all documents responsive to RFP Nos. 2–5 and 7–80 in his
4 possession, custody, or control that have not been permanently deleted. To the
5 extent that Defendant permanently deleted documents from his email inbox, but
6 those documents remain in Google’s possession, Plaintiffs request that Defendant be
7 ordered to consent to Google’s production of these emails, as detailed in Section VI
8 below. Further, given the significant issues that exist with respect to the adequacy
9 of Defendant’s search for responsive documents, Plaintiffs also request a deposition
10 of Defendant pertaining to document repositories, retention, and searches, as further
11 described in Section III above.

12 **VI. AN ORDER COMPELLING CONSENT TO PRODUCTION OF**
13 **EMAILS BY GOOGLE IS WARRANTED.**

14 Citing the Stored Communications Act (“SCA”), Google has refused to
15 produce emails from the address fo*****@gmail.com without Defendant’s consent
16 (which he has not provided). But as previously explained, Google has been able to
17 provide Plaintiffs with the non-content headers for these emails, and Plaintiffs were
18 able to determine that:

- 19 • Defendant had deleted close to 1,500 emails in the 60 to 90 days preceding
20 Google’s pull of the email header information on or about June 15, 2020,

21 _____
22 ¹³ Plaintiffs’ examples address many but not all of the document requests at issue in
23 this Motion, given that Defendant has waived all objections to every document
24 requests, and, in an effort to avoid redundancy, as Defendant has proffered the same
25 unbelievable response to each document request. In addition to what has been
26 described before, Plaintiffs’ RFPs seek highly relevant information, including
27 information regarding Defendant’s creation of Nitro TV channels and his other
28 content sources, identification of all payment processors, the willfulness of his
copyright infringement and any violations of the preliminary injunction order (*e.g.*,
his repeat involvement with infringing services, his knowledge of prior litigation
involving a now permanently enjoined IPTV service called SET TV, any continued
involvement in IPTV services), and his affirmative defenses.

1 strongly suggesting that Defendant deleted those emails after being served
2 with the complaint in this case.

- 3 • Many of these emails are likely relevant to this case and responsive to the
4 requests for production Plaintiffs served on Defendant and not likely to have
5 been deleted in the regular course of Defendant's business. Indeed, many of
6 these emails are several years old, so it is highly unlikely Defendant would
7 have decided to delete them in April or May of 2020 had he not been served
8 with the complaint.

9 *See* Section II.E, *supra*. Given the substantial evidence strongly suggesting that
10 Defendant violated his duty to preserve these emails, and the fact that now only
11 Google has the ability to produce them, Defendant should be compelled to consent
12 to Google's production of these emails.

13 The SCA permits providers to disclose electronic communications "with the
14 lawful consent of the originator or an addressee or intended recipient of such
15 communication, or the subscriber in the case of remote computing service." 18
16 U.S.C. § 2702(b)(3). Such "lawful consent" may be compelled by court order.
17 Indeed, several courts have compelled such consent.¹⁴ *See, e.g., Mafille v. Kaiser-*
18 *Francis Oil Co.*, 2019 WL 1933747, at *4 (N.D. Okla. May 1, 2019) ("The court
19 views requiring Christopher to execute a consent to the release of the information
20 sought by the subpoena in Request No. 1 to be no more invasive than requiring him
21 to open a physical filing cabinet to supply documents responsive to a discovery
22 request."); *Al Noaimi v. Zaid*, 2012 WL 4758048, at *3 (D. Kan. Oct. 5, 2012);
23 *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010); *cf. Negro v.*
24 *Super. Ct.*, 230 Cal. App. 4th 879, 899 (2014), *as modified* (Nov. 18, 2014) (holding

25
26 ¹⁴ Google indicated that it would produce the requested emails pursuant to a court
27 order specifying Defendant's consent along with Defendant's provision of consent.
28 Plaintiffs modeled the [Proposed] Order submitted herewith on a form supplied by
Google.

1 that Florida court’s order compelling consent “constituted ‘lawful consent’ under the
2 SCA”).¹⁵

3 Plaintiffs, thus, respectfully request that the Court compel Defendant to
4 consent to Google’s production of the deleted emails. To the extent Defendant may
5 claim privilege over some of these emails, Plaintiffs would not object to Google
6 producing the deleted emails to Defendant’s counsel for counsel to review and
7 produce all responsive, non-privileged emails and log all emails Defendant
8 withholds as privileged. Further, as Plaintiffs have outstanding subpoenas for other
9 relevant email header information, Plaintiffs respectfully request that the Court
10 compel Defendant to consent to all other providers’ production of deleted emails.

11 **VII. PLAINTIFFS REQUEST THAT THE COURT FIND DEFENDANTS’**
12 **MISCONDUCT WARRANTS AWARDDING PLAINTIFFS THEIR**
13 **ATTORNEYS’ FEES.**

14 Defendant’s false discovery responses, refusal to produce documents, and
15 spoliation of evidence warrant an order reimbursing Plaintiffs for the reasonable
16 expenses incurred in bringing this Motion. *See* Fed. R. Civ. P., 37(a), (c).¹⁶ Plaintiffs

17
18
19 ¹⁵ Several other courts have endorsed this approach. *See, e.g., Glazer v. Fireman’s*
20 *Fund Ins. Co.*, 2012 WL 1197167, at *3 (S.D.N.Y. Apr. 5, 2012) (“The Court . . .
21 may simply *direct* that [a party] consent to disclosure if the chats are likely to contain
22 information relevant to this case.”); *Bower v. Bower*, 2011 WL 1326643, at *2 (D.
23 Mass. Apr. 5, 2011) (“The parties do not seem to dispute that this court could order
24 El-Nady to consent to the production of the emails since they are under her control
25 although maintained by the service provider.”); *In re Subpoena Duces Tecum to*
26 *AOL, LLC*, 550 F. Supp. 2d 606, 613 n.5 (E.D. Va. 2008) (indicating that court
27 “could order the Rigsbys to consent to AOL’s disclosing the contents of their e-mails
under the pain of sanctions”); *O’Grady v. Super. Ct.*, 139 Cal. App. 4th 1423, 1446
(2006), *as modified* (June 23, 2006) (noting “[w]here a party to the communication
is also a party to the litigation, it would seem within the power of a court to require
his consent to disclosure on pain of discovery sanctions”).

28 ¹⁶ Plaintiffs reserve the right to seek additional sanctions for Defendant’s spoliation
of evidence once its scope and impact is more fully ascertained.

1 respectfully request that the Court set a briefing schedule for Plaintiffs’ attorneys’
2 fees motion.

3 **VIII. CONCLUSION**

4 Defendant’s intentional spoliation of evidence, false discovery responses, and
5 failure to produce relevant documents and information warrant the issuance of each
6 of the three [Proposed] Orders submitted herewith. These orders:

- 7 • Require Defendant to preserve evidence and immediately provide a
8 deposition regarding document preservation and search issues that will not
9 impact Plaintiffs’ right to subsequently fully depose Defendant on
10 substantive issues; compel Defendant to provide supplemental
11 interrogatory responses and responses to document requests and to produce
12 all documents responsive to RFP Nos. 2-5 and 7-80 in his possession,
13 custody, or control; and find that Plaintiffs should be awarded their
14 reasonable attorneys’ fees incurred in connection with this Motion;
- 15 • Require Defendant to allow the imaging of all devices in his possession,
16 custody, or control, as well as all Accounts, used in connection with Nitro
17 TV or any IPTV service; and
- 18 • Compel Defendant’s consent to production of responsive emails by Google
19 in the form submitted concurrently with this Motion.

20
21 Dated: August 19, 2020

JENNER & BLOCK LLP

22
23 By:


24 Julie Shepard

25 *Attorneys for Plaintiffs*
26
27
28