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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHANNON DALE PRICE AND CHERYL
EDGEMON, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

SYNAPSE GROUP, INC., SYNAPSECONNECT,
INC., TIME, INC., AND DOES 1-50 inclusive,

Defendants.

Case No.: 16CV1524-BAS(BLM)

**ORDER ON JOINT MOTION FOR
DETERMINATION OF DISCOVERY
DISPUTE**

[ECF No. 59]

Currently before the Court is the parties' Joint Motion for Determination of Discovery Dispute. ECF No. 59 ("Mot."). For the reasons set forth below, Plaintiffs' request to compel further response to Requests for Production of Documents Nos. 16, 17 and 21-23 is **GRANTED IN PART**. Plaintiffs' request to compel further response to Requests for Production of Documents No. 24 is **DENIED AS MOOT**. Defendants' request that Plaintiff's share in the cost of discovery is **DENIED**. Defendants' request to compel production of unredacted bank statements and credit card statements is **DENIED**.

BACKGROUND

Plaintiffs filed a second amended class action complaint alleging false advertising, violation of the California Consumers Legal Remedies Act ("CLRA"), conversion, unfair

1 competition, and unjust enrichment on August 23, 2016. ECF No. 13 (“SAC”). Plaintiffs allege
2 that Defendants “are engaged in an illegal automatic renewal scheme for magazine
3 subscriptions.” Id. at 3. Specifically, Plaintiffs allege that after presenting consumers with an
4 opportunity for free or heavily discounted magazine subscriptions, Defendants misleadingly
5 enroll customers in an automatic renewal program that renews the magazine subscriptions and
6 results in a charge to “the consumer’s credit card, debit card, or third party payment account
7 without providing the requisite disclosures and without obtaining the requisite authorizations
8 required by California law.” Id.

9 On June 27, 2018, counsel for Plaintiffs, Mr. Zachariah Dostart, and counsel for
10 Defendants, Mr. Michael Meuti, contacted the Court regarding the instant dispute. ECF No. 54.
11 In response, the Court ordered the parties to file a Joint Motion for Determination of Discovery
12 Dispute on or before July 30, 2018. Id. The parties timely filed the motion. See Mot.

13 On August 22, 2018, the parties filed a Joint Statement Regarding the instant motion
14 “identif[ying] the issues that have been resolved and the remaining issues the parties believe
15 require a decision by the Court.” ECF No. 79 (“Supp. Jt. Stmt.”).

16 **LEGAL STANDARD – SCOPE OF DISCOVERY**

17 The scope of discovery under the Federal Rules of Civil Procedure is defined as follows:

18 Parties may obtain discovery regarding any nonprivileged matter that is relevant
19 to any party’s claim or defense and proportional to the needs of the case,
20 considering the importance of the issues at stake in the action, the amount in
21 controversy, the parties’ relative access to relevant information, the parties’
22 resources, the importance of the discovery in resolving the issues, and whether
23 the burden or expense of the proposed discovery outweighs its likely benefit.
Information within this scope of discovery need not be admissible in evidence to
be discoverable.

24 Fed. R. Civ. P. 26(b)(1).

25 District courts have broad discretion to determine relevancy for discovery purposes. See
26 Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002). District courts also have broad discretion
27 to limit discovery to prevent its abuse. See Fed. R. Civ. P. 26(b)(2) (instructing that courts must
28 limit discovery where the party seeking the discovery “has had ample opportunity to obtain the

1 information by discovery in the action” or where the proposed discovery is “unreasonably
2 cumulative or duplicative,” “obtain[able] from some other source that is more convenient, less
3 burdensome, or less expensive,” or where it “is outside the scope permitted by Rule 26(b)(1)”.

4 A party may request the production of any document within the scope of Rule 26(b).
5 Fed. R. Civ. P. 34(a). “For each item or category, the response must either state that inspection
6 and related activities will be permitted as requested or state with specificity the grounds for
7 objecting to the request, including the reasons.” *Id.* at 34(b)(2)(B). The responding party is
8 responsible for all items in “the responding party’s possession, custody, or control.” *Id.* at
9 34(a)(1). Actual possession, custody or control is not required. Rather, “[a] party may be
10 ordered to produce a document in the possession of a non-party entity if that party has a legal
11 right to obtain the document or has control over the entity who is in possession of the
12 document.” *Soto v. City of Concord*, 162 F.R.D. 603, 619 (N.D. Cal. 1995).

13 **LEGAL STANDARD – CLASS ACTIONS**

14 Whether or not pre class certification discovery will be permitted is in the sound discretion
15 of the trial court. *Coleman v. Jenny Craig, Inc.*, 2013 WL 2896884, at *4 (S.D. Cal. June 12,
16 2013) (citing *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir.1975)). In seeking discovery
17 before class certification, Plaintiffs bear the burden of making a prima facie showing that the
18 Fed. R. Civ. P. 23 requirements are satisfied or that discovery is likely to substantiate the class
19 allegations (*Mantolete Burden*). *Salgado v. O'Lakes*, 2014 WL 7272784, at *4 (E.D. Cal. Dec.
20 18, 2014); *see also Coleman*, 2013 WL 2896884, at *4 (citing *Mantolete v. Bolger*, 767 F.2d
21 1416, 1424 (9th Cir.1985) (“Although in some cases a district court should allow discovery to
22 aid the determination of whether a class action is maintainable, the plaintiff bears the burden of
23 advancing a prima facie showing that the class action requirements of Fed. R. Civ. P. 23 are
24 satisfied or that discovery is likely to produce substantiation of the class allegations. Absent
25 such a showing, a trial court's refusal to allow class discovery is not an abuse of discretion.”)).
26 Fed. R. Civ. P 23(a) permits a class actions to proceed where

27 (1) the class is so numerous that joinder of all members is impracticable; (2) there
28 are questions of law or fact common to the class; (3) the claims or defenses of the

1 representative parties are typical of the claims or defenses of the class; and (4)
2 the representative parties will fairly and adequately protect the interests of the
3 class

4 Additionally, a class action only will be certified if

5 (1) there is a risk of substantial prejudice from separate actions; or (2) declaratory
6 or injunctive relief benefitting the class as a whole would be appropriate; or (3)
7 “the questions of law and fact common to class members predominate over any
8 questions affecting only individual members and ... a class action is superior to
9 other available methods for fairly and efficiently adjudicating the controversy.

10 Coleman, 2013 WL 2896884, at *4. “In determining whether to grant discovery the court must
11 consider its need, the time required, and the probability of discovery resolving any factual issue
12 necessary for the determination” of whether a class action is maintainable. Id. (citing Kamm,
13 509 F.2d at 210) (stating that “[t]he propriety of a class action cannot be determined in some
14 cases without discovery, as, for example, where discovery is necessary to determine the
15 existence of a class or set of subclasses. To deny discovery in a case of that nature would be an
16 abuse of discretion. Where the necessary factual issues may be resolved without discovery, it is
17 not required.”).

18 **DISCUSSION**

19 **A. Requests for Production Nos. 16 & 17**

20 Plaintiffs seek an order from the Court compelling Defendants to further respond to
21 Request for Production of Documents (“RFPs”) Nos. 16 and 17. Mot. at 20-26. The requests
22 seek the following:

23 Request for Production No. 16:

24 All documents, including but not limited to emails, correspondence, notes, and/or
25 audio files, that constitute, memorialize, reflect, refer to, or relate to any assertion,
26 complaint, or grievance made during the Class Period by a California Customer
27 that he or she did not consent or agree to be enrolled in an Automatic Renewal or
28 Continuous Service subscription. (Plaintiff is amenable to meeting and conferring

1 on ESI search terms, custodians, and time frame for ESI searches).

2 Request for Production No. 17:

3 All documents, including but not limited to emails, correspondence, notes, and/or
4 audio files, that constitute, memorialize, reflect, refer to, or relate to any assertion,
5 complaint, or grievance made during the Class Period by a California Customer
6 that he or she did not consent for his or her credit card, debit card, or third party
7 payment account to be charged for a renewal period. (Plaintiff is amenable to
8 meeting and conferring on ESI search terms, custodians, and time frame for ESI
9 searches).

9 Id. at 12, 16.¹ After asserting numerous objections to RFP No. 16, Defendants agreed to produce
10 recordings of any responsive IVR² calls it locates as relates to these four additional
11 potential class representatives

12 correspondence from California consumers within the approximately 20 accessible
13 boxes containing hard-copy correspondence with customers between May 17,
14 2012 and December 31, 2017

15
16 ¹ The "Definitions" section of the Requests for Production set forth the following defined terms:

17 "Automatic Renewal" means a plan or arrangement in which a magazine
18 subscription is set to automatically renew at the end of a definite term for a
19 subsequent term, unless the subscriber cancels before the renewal is to take
20 effect.

21 "California Customer" means an individual who, at any time on or after May 17,
22 2012, was enrolled by or through Synapse in an Automatic Renewal or Continuous
23 Service magazine subscription for which the mailing address is in the State of
24 California. "Class Period" means the period May 17, 2012 to the present.

25 "Continuous Service" means a plan or arrangement in which a magazine
26 subscription continues until cancelled by the subscriber.

27 Mot. at 12-13.

28 ² IVR stands for Interactive Voice Response System. Mot. at 8.

1 responsive consumer correspondence with the Better Business Bureau and state
2 attorney generals from California consumers, with information identifying any
3 consumer redacted

4 relevant responsive emails through the process identified above and embodied in
5 the Court-ordered ESI Stipulation. Any customer identifying information will be
6 redacted.

7 Id. at 15-16. Defendants also asserted numerous objections to RFP No. 17 but then agreed to
8 (1) "run a reasonable set of search terms on a reasonable list of custodians' documents" for
9 emails once the parties agree on a reasonable set of search terms, (2) "produce recordings of
10 any responsive IVR calls it locates as relates to these four additional potential class
11 representatives," (3) "identify correspondence from California consumers within the
12 approximately 20 accessible boxes containing hard-copy correspondence with customers
13 between May 17, 2012, and May 17, 2016," (4) "produce responsive consumer correspondence
14 with the Better Business Bureau and state attorney generals from California consumers, with
15 information identifying any consumer redacted," and (5) "produce relevant responsive emails
16 through the process identified above and embodied in the Court-ordered ESI Stipulation." Id.
17 at 19-20.

18 Plaintiffs argue that Defendants' responses are insufficient and that they should be
19 required to produce (1) responsive documents from all twenty-six boxes that Defendants have
20 located as opposed to the twenty boxes suggested by Defendants, (2) responsive
21 correspondence from May 12, 2012 to June 30, 2018 (as opposed to only December 31, 2017
22 as suggested by Defendants), (3) documents with unredacted customer identifying information,
23 (4) documents received through intermediaries with Defendants' responses, and (5) a twenty-
24 day sample of audio files from the class period without redaction. Id. at 20-25. Plaintiffs note
25 that in accordance with the ESI Order entered on April 25, 2018 [see ECF No. 47], Defendants'
26 compliance with the ESI protocol does not relieve Defendants from the requirement to produce
27 "all known responsive documents" even if they are not a "hit" in an ESI search. Mot. at 25-26.

28 While Plaintiffs concede that their Automatic Renewal Law ("ARL") claims can be
established without the requested discovery, Plaintiffs argue that the requested discovery is

1 relevant to their claims under the California consumer protection laws, specifically, the CLRA and
2 UCL. Mot. at 21. Plaintiffs argue that under the CLRA and the unfair/fraudulent prongs of the
3 UCL, they must show that “members of the public are likely to be deceived.” Id. For purposes
4 of class certification, Plaintiffs must also establish there are common issues that predominate
5 and that class treatment is the best method for resolving the disputes. Id. at 21-22. RFP Nos.
6 16 and 17 seek consumer complaints, grievances, and discussions about consumers’ consent to
7 enrollment in an Automatic Renewal subscription and to having their credit or debit cards
8 charged for a renewal period. Id. at 12, 16. Plaintiffs argue that the requested discovery will
9 “support their argument that the capacity, likelihood, or tendency to deceive or confuse the
10 public or a significant portion of the targeted consumers is a common issue; that common issues
11 predominate over individual issues, and that common proof is available.” Id. at 22. Defendants
12 disagree and argue that Plaintiffs’ requests are overbroad, not relevant to the class certification
13 issue, and the burden of collecting and producing them outweighs any relevance. Id. at 11.

14 The Court finds that Plaintiffs have made a prima facie showing that the Rule 23 class
15 requirements are satisfied for purposes of obtaining the requested discovery and the Court finds
16 that RFP Nos. 16 and 17 are relevant to Plaintiffs’ CLRA and UCL claims. The Court must now
17 decide if the requests are proportional to the needs of the case and consider Plaintiffs’ “need,
18 the time required, and the probability of discovery resolving any factual issue necessary for the
19 determination” of whether a class action is maintainable. Coleman, 2013 WL 2896884, at *4
20 (citing Kamm, 509 F.2d at 210). The Court will consider each of the disputes identified by the
21 parties.

22 1. Documents in Storage

23 Defendants have identified twenty-six boxes of hard copy documents that may contain
24 documents responsive to RFP Nos. 16 and 17. Id. at 28. Defendants contend that reviewing
25 the documents contained in the boxes will “impose[] a significant burden” as the documents in
26 the boxes are not organized by state or topic and will have to be sorted for California consumers,
27 scanned, and reviewed, which will cost approximately \$4,000. Id. Despite this, Defendants are
28 willing to review the twenty boxes that are located in a remote storage facility in Utah and

1 produce responsive documents with customer identifying information redacted. Id. Defendants
2 are not, however, willing to review the remaining six boxes, which are located in a remote
3 storage facility in Maine, because

4 [i]n order to access the files in Maine, Synapse would need to send a Synapse
5 employee to the storage facility in Maine, which is a sixteen-hour round trip drive
6 from Synapse's headquarters in Stamford, Connecticut. It is my understanding
7 that the storage facility will not ship the boxes to Synapse's headquarters.

8 ECF No. 59-1, Declaration of Jody Freire In Support of Joint Motion for Determination of
9 Discovery Dispute ("Freire Decl.") at ¶ 3. Ms. Freire's declaration states that she does not believe
10 that the six boxes can be shipped, but she provides no facts or evidence to support this
11 "understanding" and she fails to address whether there are other ways to transport or review
12 the documents. Id. Defendants also fail to cite any cases or authority supporting the proposition
13 that a sixteen hour drive to retrieve the potentially responsive documents is overly burdensome.
14 Mot. at 28. While the Court appreciates the inconvenience of a sixteen hour drive to comply
15 with discovery requests, Defendants admit the boxes may contain responsive documents and
16 the Court finds the request is proportional to the needs of the case given that the complaints
17 and grievances are relevant to Plaintiffs' claims, Plaintiffs cannot access the information any
18 other way, and the burden of a long drive does not outweigh the likely benefit. Fed. R. Civ. P.
19 26(b)(1). Accordingly, Plaintiffs' request to require Defendants to review all twenty six boxes
20 and produce responsive documents is **GRANTED**.

21 2. Complaints through June 30, 2018

22 Plaintiffs request that Defendants be compelled to produce responsive correspondence
23 through June 30, 2018. Mot. at 23. In support, Plaintiffs note that the "Class Period" has been
24 defined as the period May 17, 2012 to the present. Id. at 12. Defendants' response states that
25 they will produce customer complaints between May 12, 2012 and December 31, 2017. Id. at
26 28. Defendants explain their unwillingness to produce responsive documents dated between
27 January 1, 2018 and June 30, 2018 by referencing the definition of the Class Period and arguing
28 proportionality. Id. at 13-14, 17, 28. In the Supplemental Joint Statement, Defendants agree

1 to produce responsive documents through the present although they explicitly reserve their right
2 to argue that the Class Period ends on an earlier date. Supp. Jt. Stmt. at 3.

3 Given Defendants' concession, Plaintiffs' motion to compel responses through June 30,
4 2018, is **GRANTED**.

5 3. Customer Complaints Received Through Intermediaries

6 With respect to correspondence between customers and the BBB and other
7 intermediaries, and Defendants' responses to that correspondence, Defendants have

8 agreed, and still agree[], to produce all non-privileged documents responsive to
9 RFP Nos. 16 and 17 relating to complaints received through the Better Business
10 Bureau or a state Attorney General, including any response by Synapse.

11 Supp. Jt. Stmt. at 2.³ Accordingly, Plaintiffs' request to compel customer complaints through
12 intermediaries is **DENIED AS MOOT**.

13 4. Audio Files

14 Plaintiffs' RFPs seek audio files from Defendants' IVR. Mot. at 8. The audio files contain
15 telephone conversations between Defendants' representatives and consumers who call with
16 concerns or complaints about renewal charges. Id. Plaintiffs request that Defendants produce
17 a twenty day sample of the calls with California customers which they assert represents less
18 than 1% of the days in the Class Period. Id. at 24. Plaintiffs note that the calls can be labeled
19 as Confidential – For Counsel Only pursuant to the protective order and note that Defendants
20 should not be able to avoid production based on the sheer volume of calls. Id. at 25.

21 Defendants contend that Plaintiffs' request for audio files is overbroad and
22 disproportionate to the needs of the case. Id. at 27-28. Defendants offer to "seek to determine
23 whether there are any audio files relating to these four new potential 'class representatives,'" and
24 "produce recordings of any responsive calls it locates as relates to these four additional
25 potential class representatives." Id. at 26-27. Defendants note that they have at least 1,051,000

26
27 ³ "There is still a dispute about whether Synapse may redact the customer's name, address, and
28 other contact information." Supp. Jt. Stmt. at 2. The Court will address that in section A6 below.

1 “unique audio files where the customer expressed an interest in potentially cancelling a
2 subscription and was associated with a California billing zip code” and that each file would have
3 to be reviewed manually, requiring extraordinary effort. Id. at 27; see also ECF No. 59-2,
4 Declaration of Robert Vance in Support of Joint Motion for Determination of Discovery Dispute
5 (“Vance Decl.”) at ¶ 2-3. The calls are an average of eight minutes long (8,408,000 minutes of
6 audio) and would take approximately 5,839 days to review. Id.

7 The Court agrees that reviewing all audio files at this time is not proportionate to the
8 needs of the case under Fed. R. Civ. P. 26(b)(1). However, Plaintiffs are no longer requesting
9 all audio files and Defendants do not address Plaintiffs’ proposal for a twenty day sample of
10 audio recordings. Similarly, Plaintiffs do not address Defendants’ proposal of producing audio
11 files relating to the class representatives. Also, it is unclear how Defendants are able to
12 determine if there are audio files for the four new potential class representatives if they have
13 “no method or means to search these audio files or otherwise determine whether they contain
14 discussions responsive to RFP Nos. 16 or 17.” Id. at 27.

15 Plaintiffs’ motion is **GRANTED IN PART**. The Court finds both suggestions to be
16 reasonable and proportional. Defendants are ordered to produce all audio files for the named
17 Plaintiffs, including the four individuals identified on July 25, 2018. Defendants also are ordered
18 to review all audio files for a fourteen day period and to produce to Plaintiffs all responsive audio
19 files with a California consumer. Plaintiffs may choose any fourteen day period during the Class
20 Period and must notify Defendants by **September 14, 2018**, of the chosen dates and
21 Defendants must search the identified fourteen-day period.

22 5. ESI Search

23 Plaintiffs seek to compel Defendants to produce all known responsive documents
24 regardless of whether they are a “hit” in an ESI search. Id. at 25, 26. Plaintiffs argue that this
25 was contemplated in the ESI Stipulation entered on April 25, 2018. Id. at 25. Plaintiffs note
26 that Defendants are likely to have responsive ESI in both emails and “internal documents
27 (particularly within its Customer Care team)” and that Defendants should be required “to
28 produce such documents that its Customer Care personnel are aware of, whether or not a

1 particular document is a "hit" in an ESI search." Id. at 25-26.

2 Defendants state that they are "willing to produce relevant responsive emails through the
3 process identified above and embodied in the Court-ordered ESI Stipulation. Any customer-
4 identifying information will be redacted." Id. at 29. Defendants contend that producing all
5 documents responsive to RFP No. 16 and 17 "obviates the need for the ESI protocol and would
6 greatly increase [Defendants'] burden in responding." Id. Defendants contend that the request
7 is not proportional to the needs of the case given that the ESI protocol is designed to identify
8 responsive documents and that they should not have to "incur the additional expense of
9 interviewing every Synapse employee to search for "known" documents that are not caught by
10 the ESI protocol." Id.

11 On April 23, 2018, the parties submitted a Joint Statement Regarding ESI Stipulation
12 which set forth their agreements and disagreements regarding the handling of ESI. ECF No. 46.
13 One of the disputes focused on whether a responding party was required to produce ESI that it
14 knew was responsive to a discovery request if the ESI was not identified in the required ESI
15 search. Id. at 4, 13, 15-16. After considering the parties' arguments, the Court entered the ESI
16 order including section 1.f. which states that

17 ESI that is known to a Party to be responsive to a discovery request or relevant to
18 the subject matter of this action may not be withheld on the grounds that it was
19 not identified as responsive by the protocol described in, or developed in
20 accordance with, this Order.

21 ECF No. 47 at 3.

22 In the ESI joint statement and again in the instant joint discovery motion, Defendants
23 argue that the section 1.f. requirement is inappropriate and unduly burdensome because it
24 requires Defendants to ask every employee about what he/she "knew" about Plaintiffs' discovery
25 requests in order to determine if there is "known" ESI that was not identified by the agreed
26 upon ESI protocol. ECF Nos. 46 at 13, 59 at 29. Defendants further argue that such a
27 requirement obviates the purpose of an ESI protocol which is to streamline the discovery of ESI.
28 Id.

1 The Court acknowledges that it initially ruled in favor of Plaintiffs on this issue when it
2 included the section 1.f. language in the ESI Order, however, upon further consideration and in
3 light of how Plaintiffs are seeking to apply the provision in the instant dispute, the Court reverses
4 itself and finds that the term "known" is vague in this context and that it would be unduly
5 burdensome to require Defendants to interview every employee to determine whether that
6 employee knows of potentially responsive ESI that Defendants would then be required to
7 produce. The parties have agreed upon search terms and custodians and Defendants are
8 required to comply with those agreements and produce all non-privileged responsive documents
9 that are identified by the protocol. Plaintiffs' request to compel production of all known
10 responsive ESI regardless of whether it was a hit in an ESI search is **DENIED**.

11 The Court is concerned, however, by Defendants' failure to respond to Plaintiffs' concern
12 that Defendants are not producing responsive corporate or internal documents, especially those
13 within its Customer Care team. The parties have not provided the Court with specific details
14 regarding this potential dispute (and it does not appear that the parties have adequately
15 discussed the issue) so the Court is not issuing a ruling on it. If Plaintiffs believe that Defendants
16 are inappropriately failing to produce responsive documents, such as those from the Customer
17 Care team, Plaintiffs must meet and confer with Defendants in an effort to resolve the dispute
18 and, if necessary, may file another motion to compel.

19 6. Redaction of Consumer Identifying Information

20 Defendants object to producing confidential information, such as credit card information,
21 as well as all "information identifying any consumer" and seek to redact all such information.
22 Mot. at 28-29. Defendants contend that Plaintiffs' need for the confidential information does
23 not outweigh the customer's claimed privacy rights, but they do not provide any explanation for
24 their request to redact identifying information. Defendants also do not address why the
25 protective order entered in this case is insufficient to protect the customer's confidential
26 identifying information.

27 Plaintiffs argue that "[t]here is no legitimate basis to redact" customer identifying
28 information because RFPs 16 and 17 only seek complaints by California customers meaning that

1 any complainants are a part of the class. Id. at 23. Plaintiffs also argue that the complainants
2 are potential witnesses whose identities Defendants should not be permitted to hide. Id.

3 The Court finds that the credit card numbers have minimal, if any, relevance to the
4 litigation and a significant confidentiality concern so Defendants may redact all credit card
5 numbers from compelled and voluntarily produced discovery. On the other hand, the Court
6 finds that the requested California Consumer identifying information is relevant to the litigation
7 and will be adequately protected by the Protective Order so that information may not be
8 redacted in the compelled and produced discovery. See ECF Nos. 30-31; see also Miller v. Fuhu,
9 Inc., 2015 WL 12914393, at *1 (C.D. Cal. Mar. 17, 2015) (finding that “the names and contact
10 information of all purchasers of Nabi tablets [wa]s too broad of a request,” but permitting
11 plaintiff to learn “the names and contact information of customers who have complained about
12 the power adapters or charging issues with the Nabi tablets [as they] may be relevant to
13 Plaintiff’s efforts to obtain class certification for the reasons supplied by Plaintiff—to demonstrate
14 typicality and adequacy of the class representative) (citing Pioneer Elecs. (USA), Inc. v. Super.
15 Ct., 40 Cal. 4th 360, 373 (2007) (“Contact information regarding the identity of potential class
16 members is generally discoverable, so that the lead plaintiff may learn the names of other
17 persons who might assist in prosecuting the case.”)); and ShopKo Stores Operating Co., LLC v.
18 Balboa Capital Corp., 2016 WL 9308530, at *1 (C.D. Cal. Oct. 19, 2016) (finding records showing
19 that Defendant’s other customers “were confused, misled or deceived by pro-rata rent lease
20 terms comparable to those at issue in this lawsuit [we]re relevant to Plaintiff’s fraud and UCL
21 claims. Persisting in an allegedly deceptive business practice after receiving customer
22 complaints could be evidence of intent to defraud” and ordering defendant to respond to an RFP
23 seeking “documents and communications concerning other lawsuits, complaints, objections or
24 grievances, whether formal or informal, from any past, present or prospective customer.”).

25 **B. Requests for Production Nos. 21-22**

26 Plaintiffs seek an order from the Court compelling Defendants to further respond to RFPs
27 Nos. 21-22. Mot. at 33. RFP No. 21 seeks the following:
28

1 All scripts utilized at any time during the Class Period by any telephone
2 representative of Synapse that relate to answering questions from consumers
3 regarding Automatic Renewal or Continuous Service subscriptions.

4 Mot. at 29. RFP No. 22 seeks:

5 All documents that constitute, memorialize, or reflect Synapse's policies,
6 procedures, and/or practices during the Class Period concerning the handling of
7 telephone calls that included an inquiry regarding enrollment into or cancellation
8 of an Automatic Renewal or Continuous Service subscription.

9 Mot. at 31. Defendants objected to RFP Nos. 21 and 22 but agreed in response to RFP No. 21
10 to

11 produce copies of all of the scripts within Synapse's possession, custody, or control
12 that Synapse can, after a reasonable search, determine were used by telephone
13 representatives between May 17, 2012 and May 17, 2016.

14 Id. at 31. Defendants supplemented their response to RFP No. 22 by stating they would produce

15 [a]ll training manuals within Synapse's possession, custody, or control used in
16 training customer-service telephone representatives between May 17, 2012, and
17 May 17, 2016; and [] [a]ll policies-and-procedures documents that were provided
18 to telephone representatives between May 17, 2012, and May 17, 2016 concerning
19 how telephone representatives handle telephone calls inquiring into enrollment
20 into or cancelling Synapse automatic-renewal or continuous-service subscriptions.

20 Id. at 33.

21 In the motion, Plaintiffs asserted that Defendants' response to RFP Nos. 21 and 22 were
22 inadequate because the appropriate end date is "the present" not May 17, 2016 as set by
23 Defendants. Id. In the Supplemental Joint Statement, Defendants agree to produce responsive
24 scripts and policies and procedure documents through the present but preserve their rights to
25 argue that the Class Period ended on May 17, 2016. Supp. Jt. Stmt. at 3. Accordingly, Plaintiffs'
26 motion is **GRANTED** as to the relevant time period and Defendants are ordered to provide
27 responsive documents from May 17, 2012 to the present.

28 Plaintiffs argue that the response to RFP No. 22 is deficient because Defendants should

1 not limit their production to “policies-and-procedure documents that were provided to telephone
2 representatives” as the request seeks the described documents regardless of whether the
3 documents were given to telephone representatives. Id. at 33; Supp. Jt. Stmt. at 4. Plaintiffs
4 argue that their request is directly relevant “to common proof on the issue of whether reasonable
5 consumers were likely to be misled” and should be produced. Mot. at 34. Defendants respond
6 that to the extent Plaintiffs’ request seeks more than Defendants have agreed to produce, the
7 request is not proportional under Rule 26. Id. at 35. Defendants also assert that they “cannot
8 assume the burdensome task of producing “[a]ll documents” responsive to this request. Id.

9 Defendants do not provide a factual basis for their position that the request is unduly
10 burdensome. For example, Defendants do not provide an estimate of how many documents
11 regarding policies and procedures are at issue, state where they are stored, describe any ESI
12 accessibility issues, or explain how much larger their burden will be if they are required to
13 produce responsive documents beyond what was provided to telephone representatives. Id.
14 Defendants do not provide any explanation or support for their apparent position that documents
15 regarding relevant policies and procedures that were not provided to telephone representatives
16 have minimal or no relevance to the instant litigation. Id. Finally, Defendants do not provide
17 an adequate explanation for why they should not have to “assume the burden of searching for
18 and producing all documents responsive to th[ese] request[s].” Id. at 34-35. When responding
19 to a request for production of documents a party is to produce all relevant documents in his
20 “possession, custody, or control.” Fed. R. Civ. P. 34(a)(1). “Accordingly, a party has an
21 obligation to conduct a reasonable inquiry into the factual basis of his responses to discovery.
22 Based on that inquiry, a party responding to a request for production ‘is under an affirmative
23 duty to seek that information reasonably available’ to it and make an appropriate production of
24 responsive documents.” Hartline v. Nat’l Univ., 2018 WL 1014611, at *3 (E.D. Cal. Feb. 22,
25 2018) (citing National Ass’n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 554– 56 (N.D.
26 Cal. 1987) and quoting Gray v. Faulkner, 148 F.R.D. 220, 223 (N.D. Ind. 1992)). Defendants
27 must make a reasonable effort to produce all responsive documents. See Kaur v. Alameida,
28 2007 WL 1449723, *2 (E.D. Cal. May 15, 2007) (ordering defendants to conduct additional

1 research for responsive documents and reminding defendants and counsel “of their duty under
2 Rule 34 to conduct a diligent search and reasonable inquiry in effort to obtain responsive
3 documents”); see also Lopez v. Florez, 2013 WL 1151948, * 2 (E.D. Cal. March 19, 2013) (“[a]
4 responding party has an affirmative duty to reasonably seek information requested under Rule
5 34(a) from its agents or others under its control) (citing Hill v. Eddie Bauer, 242 F.R.D. 556, 560
6 (C.D. Cal. 2007)).

7 The Court finds RFP No. 22 seeks relevant information and that Defendants have not
8 provided a factual or legal reason to limit the request to the terms they propose. Defendants
9 also have not established that the request as written is not proportional to the needs of the
10 case. Accordingly, Plaintiffs’ motion is **GRANTED** and Defendants may not limit their response
11 to documents provided to telephone operators.

12 **C. Requests for Production Nos. 23-24**

13 Plaintiffs seek an order from the Court compelling Defendants to further respond to RFPs
14 Nos. 23-24. Mot. at 38-39. RFP No. 23 seeks the following:

15 Request for Production No. 23:

16 Documents sufficient to identify the name, address, telephone number, and job
17 title/position of each telephone representative who, during the Class Period,
18 handled telephone calls from one or more California Customers concerning an
19 Automatic Renewal or Continuous Service subscription.

20 Mot. at 35. Defendants initially objected to the RFP

21 based on attorney-client privilege, the work product doctrine, confidentiality and
22 privacy, proportionality regarding accessibility of certain ESI, proportionality
23 regarding distribution channels, and the definitions of Document, Class Period and
24 Synapse.

25 Id. at 36. Defendants further objected to the request as overbroad, unduly burdensome and
26 disproportional to the needs of the case because it sought discovery about personal information
27 of Defendants’ employees. Id. Defendants supplemented their objection by noting that the
28 discovery appeared to relate more to the Cruz matter than the instant matter. Id. at 36.

1 Plaintiffs argue that Defendants' response to RFP No. 23 is insufficient because the
2 request is not limited to representatives employed by Defendants and that Defendants must
3 respond with any information that they are able to obtain from its contractors as well. Id. at
4 38. Defendants contend that they "do[] not directly employ any such telephone representatives,
5 and thus will not be providing the information requested in RFP 23." Id. at 39.

6 RFP No. 23 seeks information about the telephone representatives who handled calls
7 from California customers. Id. at 35. The request is not limited to telephone representatives
8 "directly employ[ed]" by Defendants. Id. at 39. Defendants are required to produce responsive
9 documents that are in their "possession, custody, or control." Fed. R. Civ. P. 34(a)(1). This
10 includes documents in the possession of third parties from whom Defendants have a right to
11 obtain the documents or over whom Defendants have control. Soto, 162 F.R.D. at 619. If, for
12 example, Defendants "indirectly" employ telephone representatives through contractors or by
13 other means, Defendants are required to obtain the requested information from said contractors
14 or other sources. Similarly, if Defendants have responsive documents identifying the described
15 telephone representatives, they must produce the documents even if the representatives are
16 employed by another entity. Defendants' narrow interpretation of RFP No. 23 is not reasonable
17 in light of the text of the request. Accordingly, Plaintiffs' motion to compel further response to
18 RFP No. 23 is **GRANTED**.

19 RFP No. 24 seeks:

20 Documents sufficient to identify each entity that employed telephone
21 representatives who, during the Class Period, handled telephone calls for Synapse
22 regarding consumer complaints about Automatic Renewal or Continuous Service
23 subscriptions.

24 Mot. at 37. In the August 22, 2018 Joint Statement, the parties informed the Court that

25 Synapse agrees to identify each entity that employed telephone representatives
26 who handled the telephone calls for Synapse at any time between May 17, 2012
27 and the present. With that information, there will be no further dispute regarding
28 RFP No. 24.

1 ECF No. 79 at 4. Accordingly, Plaintiffs' motion to compel further response to RFP No. 24 is

2 **DENIED AS MOOT.**

3 **D. Cost Sharing**

4 Defendants request that to the extent the Court grants Plaintiffs' motion, Plaintiffs be
5 ordered to bear the costs of the discovery they seek. Mot. at 11-12. Plaintiffs do not address
6 this request. Mot.

7 The responding party generally bears the expense of complying with discovery requests.
8 See United States ex rel Hooper v. Lockheed Martin Corp., 2009 WL 10655342, at *3 (C.D. Cal.
9 Dec. 10, 2009) (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) ("the
10 presumption is that the responding party must bear the expense of complying with discovery
11 requests")). However, the Court may "specify the conditions for [] discovery[,] which may
12 include cost sharing." U.S. ex rel. Guardiola v. Renown Health, 2015 WL 5056726, at *2 (D.
13 Nev. Aug. 25, 2015) (citing 2006 Advisory Committee Notes to FRCP 26(b)). Cost sharing may
14 be appropriate when electronic documents are not reasonably accessible. See Connecticut Gen.
15 Life Ins. Co. v. Earl Scheib, Inc., 2013 WL 485846, at *2-3 (S.D. Cal. Feb. 6, 2013). "When
16 considering cost shifting, courts in this circuit rely on the seminal Zubulake factors." U.S. ex rel.
17 Guardiola, 2015 WL 5056726, at *2 (citing Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324
18 (S.D. N.Y. 2003) ("Zubulake I ") (identifying seven factors); Zubulake v. UBS Warburg LLC, 216
19 F.R.D. 280, 284 (S.D. N.Y. 2003) ("Zubulake II ") (applying those factors); and Tierno v. Rite
20 Aid Corp., 2008 WL 3287035, at *4 (N.D. Cal. July 31, 2008) (characterizing the Zubulake factors
21 as a "gold standard" in ESI discovery disputes)). Zubulake identified the following factors to be
22 considered:

- 23 1. Extent to which the request is specifically tailored to discover relevant
24 information; 2. Availability of such information from other sources; 3. Total cost of
25 production, compared to the amount in controversy; 4. Total cost of production,
26 compared to the resources available to each party; 5. Relative ability of each party
27 to control costs and its incentive to do so; 6. Importance of the issues at stake in
the litigation; and 7. Relative benefits to the parties of obtaining the information.

28 Couch v. Wan, 2011 WL 2551546, at *4 (E.D. Cal. June 24, 2011) (quoting Zubulake v. UBS

1 Warburg LLC, 216 F.R.D. at 284).

2 Cost shifting should only be considered when discovery imposes an undue burden
3 or expense that outweighs the likely benefit of the discovery. With discovery of
4 electronic documents, whether production of such documents is unduly
5 burdensome or expensive turns primarily on whether it is kept in an accessible or
6 inaccessible format.

7 Id. (quoting Fed. R. Civ. P. 26(b)-(c) and Zubulake v. UBS Warburg LLC, et al., 217 F.R.D. at
8 318) (internal citations and quotations omitted). Accessibility turns largely on the expense of
9 production.

10 Here, Defendants have not established a basis for cost sharing. As discussed above,
11 Plaintiffs' requests seek relevant information and documents and Defendants have not
12 established that responding to the requests is unduly burdensome or expensive. After
13 considering the Zubulake factors, the Court **DENIES** Defendants' request to shift the discovery
14 costs to Plaintiffs.

15 **E. Unredacted Bank and Credit Card Statements**

16 Defendants seek an order from the Court compelling Plaintiffs to produce unredacted
17 versions of their bank and credit card statements. Mot. at 40. Defendants state that Plaintiffs
18 have produced heavily redacted statements that leave only the bank boilerplate language and
19 the specific charges at issues unredacted. Id. Defendants argue that in addition to redacting
20 information Plaintiffs deemed to be irrelevant, Plaintiffs admitted to redacting potentially
21 relevant information if it was not responsive to Defendants' requests. Id. Defendants speculate
22 that the relevant redacted information could include "Plaintiffs' purchases leading to the
23 magazine offers at issue [and] other items which may auto-renew, and their business
24 sophistication." Id. at 41. Defendants note that they do not object to the redaction of credit
25 card and bank account numbers. Id. at n. 2.

26 Plaintiffs contend that the statements at issue were redacted "to omit details about the
27 Plaintiffs' respective financial transactions unrelated to Synapse" and that there is no basis to
28 compel further production. Id. at 41. Plaintiffs explain that redacted information has never

1 been the subject of a discovery request. Id. Plaintiffs note that the litigation itself does not
2 waive their rights to privacy. Id. at 42.

3 The parties do not provide the exact language of the request(s) at issue, but Defendants
4 argue that the redacted responses were to "requests for the statements reflecting the charges
5 at issue in this case." Id. at 40 (emphasis added). While this wording indicates Defendants
6 were seeking the entire statement, it also indicates that the only reason the statements were
7 relevant was because they contain the charges at issue in this case. As such, Plaintiffs' decision
8 to redact all charges other than the ones at issue was reasonable. The Court notes that
9 Defendants do not dispute Plaintiffs' claim that the request(s) do not seek any information or
10 charges other than the charges at issue. Assuming that is true, Defendants have no basis to
11 object to Plaintiffs' failure to produce unrequested information. If Defendants believes additional
12 charges are relevant, they should properly request them. Accordingly, Defendants' motion to
13 compel Plaintiffs to produce unredacted versions of their bank and credit card statements is

14 **DENIED.**

15 **CONCLUSION**

16 Plaintiffs' motion to compel further response to RFP No. 16 and 17 is **GRANTED IN**
17 **PART.** Plaintiffs' motion to compel further response to RFP No. 21, 22, and 23 is **GRANTED.**
18 Plaintiffs' motion to compel further response to RFP No. 24 is **DENIED AS MOOT.** Defendants
19 must provide supplemental responses on or before **September 28, 2018.**

20 Defendants' motion to compel unredacted bank and credit card statements is **DENIED.**

21 **IT IS SO ORDERED.**

22 Dated: 9/12/2018

23 
24 Hon. Barbara L. Major
25 United States Magistrate Judge