United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SCRUM ALLIANCE, INC.	§	
	§	
V.	§	**No. 4:20CV227-ALM**
	§	
SCRUM, INC., ET AL.	§	

HOTLINE ORDER[1]

This case is assigned to the docket of United States District Judge Amos L. Mazzant. Pursuant to 28 U.S.C. § 636(b)(1) and the Local Rules for the United States District Court for the Eastern District of Texas, this matter came before the undersigned United States Magistrate Judge for determination of an "emergency" discovery dispute via the"Discovery Hotline" maintained by the United States District Court for the Eastern District of Texas. Pursuant to the undersigned's order that the parties file briefing regarding the discovery dispute, Plaintiff's Motion to Compel

[1] By way of explanation of why the Court is entering a 17-page "Hotline Order," the Court would state the following. On August 25, 2020, Plaintiff's counsel contacted the discovery hotline regarding "a discovery dispute." The law clerk advised counsel regarding the types of "emergency" issues that would ordinarily warrant a hotline hearing and further advised that to the extent the parties believed their dispute fit within those parameters they would need to both be on the phone when they called the hotline. Two days later, Plaintiff's counsel contacted the Court and advised the parties would be calling the hotline the following morning. The Court requested the parties provide letter briefs in advance of the hearing. The parties provided those letter briefs by email late Thursday evening. According to Plaintiff's letter brief, the reason for the hotline request is that the Court's deadline for Plaintiff to submit its expert damages report was the following Friday, September 4, 2020.

The Court, having considered the discovery dispute as presented in the parties' letter briefs, explained on the call August 28 that the looming expert disclosure deadline was a matter that could be resolved by a motion for an extension of time, thus providing the parties sufficient time in which to file an appropriate motion and responsive briefing thereto. The Court instructed the parties to attempt to reach a resolution on the issue but also provided a way to seek resolution through the hotline via briefing in the event they were unable to do so. In the event the parties were unable to reach a resolution, the Court ordered Plaintiff to file this motion to compel by 9:00 a.m. on Monday, August 31, 2020 and for Defendants to file a response by 5:00 p.m. that same day. The undersigned further advised that she would rule on the "hotline" motion as soon as practicable thereafter.

The Court also ordered the parties to file a joint motion to continue the expert disclosure deadlines for District Judge Mazzant's consideration, which the parties filed on August 31, 2020. On September 1, 2020, Judge Mazzant granted the parties' joint motion, continuing the deadline for disclosure of expert testimony on issues for which the party bears the burden of proof to September 25, 2020 and the deadline for disclosure of expert testimony on issues for which the party does not bear the burden of proof to October 23, 2020. Docket Entry # 81.

Production of Damages-Related Discovery (Docket Entry # 79) is before the Court. Also before the Court is Defendants' Opposition to Plaintiff's Motion to Compel Production of Damages-Related Discovery (Docket Entry # 80).

The Court, having considered the relevant briefing, is of opinion the motion should be **GRANTED IN PART and DENIED IN PART**.

FACTUAL BACKGROUND

This case is about two entities that teach the "Scrum framework." Docket Entry # 72 at p. 1 (citing Docket Entry #15). "Scrum" is a framework that "can be used to put agile values and principles into practice." *Id.* By doing so, teams can allegedly "deliver products and services quickly and efficiently." *Id.* Plaintiff Scrum Alliance, Inc. ("Plaintiff" or "SAI") alleges several violations of the Lanham Act against Defendant Scrum, Inc. ("SI"), including federal trademark infringement, service mark infringement, false affiliation, false advertising, and unfair competition. *Id.* at p. 3 (citing Docket Entry #15 at pp. 10–11). SAI also asserts trademark infringement and unfair competition under Texas law against Defendant SI, along with a breach-of-contract claim against Defendants Jeff Sutherland and JJ Sutherland in their individual capacities (collectively, "Defendants"). *Id.* (citing Docket Entry #15 at p. 12).

According to SAI's First Amended Complaint, in or around August 2019, "SI announced a new certification program to the Scrum world." Docket Entry # 15, ¶ 20. SAI alleges, in effect, "SI decided to copy SAI's highly-recognized and valuable training courses and adopt its own certification program using names that were—and still are—virtually identical to those used (and trademarked) by SAI for years." *Id.* SAI alleges "SI's apparent plan was to directly compete with SAI's certification programs through repackaging SAI's intellectual property and selling it as its

own," while in fact "SI's business model and learning objectives accompanying its new certification program are a near exact duplicate of the same already developed by SAI." *Id.*

PROCEDURAL BACKGROUND

According to the May 5, 2020 Order Governing Proceedings, the deadline to complete initial mandatory disclosures was June 8, 2020. Docket Entry # 18. Under the Order Governing Proceedings, "relevant" is defined by Local Rule CV-26(d). On June 29, 2020, the Court entered the Scheduling Order which controls disposition of this action pending further order of the Court. Docket Entry # 50. All discovery shall be commenced in time to be completed by December 11, 2020. *Id.* at p. 2.

On July 16, 2020, the court granted Plaintiff's First Amended Application for Preliminary Injunction, enjoining SI during the pendency of this action from, directly or indirectly, using its various LICENSED SCRUM marks. Docket Entry # 72 at p. 33.

Thereafter, SAI served SI with discovery requests on July 24, 2020, seeking, among other things, "Monthly financial statements for [SI] including income statements, balance sheets, and cash flow statements from 2016 through the present." SAI also served interrogatories asking, among other things, for SI to, on "a monthly basis, state the profits of [SI] and an explanation of how such profits were calculated." SI responded with objections and responses on August 24, 2020. *See* Docket Entry # 79, Exs. A, B.

SAI'S MOTION TO COMPEL

In its current motion to compel damages-related discovery, SAI requests the Court compel SI to produce its company-wide financial information so that SAI's expert can analyze all pertinent information and properly prepare his expert report on SAI's damages. Docket Entry # 79 at p. 6. SAI

states it has been repeatedly requesting for months that SI produce financial information that SAI's expert needs to render his opinion, but SI has refused to produce this relevant information. *Id.* at p. 1.

SAI states SI produced on August 13, 2020 a one-page spreadsheet with incomplete data, but that spreadsheet "was seriously flawed for several reasons, including the fact that it was limited to a time period of August 2019 through July 31, 2020—despite Defendants admitting they have used the infringing LICENSED SCRUM mark since 2017—and it only included revenue information associated with SI's 'public courses' taught using the infringing mark—despite Defendants admitting to significant use of the LICENSED SCRUM mark in 'private courses.'" *Id*. at p. 3 (further stating the spreadsheet failed to include any information broken down by month or source, did not include SI's company-wide revenue or costs, and appears to apportion numerous employees' entire yearly salaries as costs attributable to the LICENSED SCRUM offerings, with no explanation). SAI acknowledges SI offered to provide more information following the hotline call. *Id.* at pp. 1-2. However, according to SAI, "[w]hile the offered information is necessary and should have been produced long ago, it still falls short of what" SAI's expert needs, which is SI's "company-wide revenue and costs." *Id.* at p. 2.

Finally, SAI asserts SI has waived any objections to producing the requested financials. *Id.* at p. 8. According to SAI, SI improperly relies on general, boilerplate objections that lack the requisite specificity. *Id.*

In SI's response, SI points out SAI's own complaint alleges the infringing activity began in or around August 2019 when SI announced and began offering its public Licensed Scrum courses. Docket Entry # 80 at pp. 2-4. SI represents it has produced all financial information related to the

public Licensed Scrum courses since August 2019. *Id.* at p. 2; *see also id.* at p. 4 ("on August 13, 2020, Scrum, Inc. produced its revenue, expense, and cost information for its public Licensed Scrum courses for the period of August 2019 through the present, i.e., all of the financial information with respect to the allegedly infringing conduct"). SI asserts SAI is not entitled to the overbroad production of irrelevant and sensitive financial documents requested in the motion to compel. *Id.* at p. 3. SI further asserts it has not waived any objection to the production of the documents requested. *Id.*

According to SI, it has worked in good faith with SAI to come to a mutually agreeable resolution to this dispute, having offered numerous proposals and made concessions, including agreeing to produce all financial information concerning private Licensed Scrum courses and all Licensed Scrum financial documents dating back to 2016. *Id.* at pg. 2. Although SI disputes that the Licensed Scrum private courses financial information is relevant to this lawsuit, SI states it offered in good faith to produce the revenues, costs, and expenses associated with the private courses to SAI on Thursday August 27, 2020, the day before the hotline call. *Id*. at p. 4. According to SI, SI's counsel offered to produce this information on the condition that SAI agrees to withdraw the subpoena duces tecum recently issued to six Scrum, Inc. customers. *Id.* SI contends the "subpoenas do nothing more than impermissibly harass Scrum, Inc.'[s] largest customers by requesting the production of irrelevant documents that SAI is not entitled to. Therefore, to amicably resolve this forthcoming dispute Scrum, Inc. offered to produce all financial documents related to the private Licensed Scrum courses as those courses are presumptively the target of these subpoenas." *Id*. at pp. 4-5.

SI states SAI's counsel, rather than attempting to resolve this dispute in good faith, ignored

SI's request for a meet and confer on this proposal, instead responding that the proposal was "not acceptable" and unilaterally requesting an emergency hearing on this issue. *Id.* at p. 5 (citing attached Ex. A). It is Defendants' position that the parties were absolutely not at an impasse at that stage, as SAI had not yet even responded to Defendants' proposal. Regardless, following the hotline hearing the next morning, wherein the undersigned instructed the parties to resolve the discovery dispute and file for a stipulated motion for the extension of time in order to alleviate SAI's concerns regarding the timeframe to submit its damages expert report, Defendants again proposed in good faith a compromise. *Id.* Specifically, SI offered to further concede to SAI's request, despite its objections to the relevancy or propriety of this request. *Id.* According to SI, the parties met and conferred on Friday morning telephonically, and Defendants offered to produce both private and public Licensed Scrum program financial information from 2016 to present. *Id.* (citing attached Ex. C). At 5:40 p.m. EST, counsel for SAI circulated a Stipulated Motion for Extension of Time. *Id*. (citing attached Ex. B). Understanding that an agreement had been reached on this issue, Defendants assented to the Stipulated Motion for the Extension of Time. However, at approximately 10:30 p.m. EST the following evening, "almost 36 hours after the parties seemingly were on a path to an agreement on this issue, SAI's counsel responded that in fact the agreement was not sufficient, and it would be filing the instant motion." *Id.* at p. 6 (citing attached Ex. C).

APPLICABLE LAW

Federal Rule of Civil Procedure 26(b) provides that the permissible scope of discovery includes "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance

of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." *Matter of AET, Inc., Ltd.*, No. 1:10-CV-51, 2018 WL 4201264, at *2 (E.D. Tex. June 8, 2018) (quoting FED. R. CIV. P. 26(b)(1)). In the Eastern District of Texas, Local Rule CV-26 also provides guidance in considering whether information is relevant for discovery. The rule provides information is relevant if:

> (1) it includes information that would not support the disclosing parties' contentions;
>
> (2) it includes those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties;
>
> (3) it is information that is likely to have an influence on or affect the outcome of a claim or defense;
>
> (4) it is information that deserves to be considered in the preparation, evaluation or trial of a claim or defense; and
>
> (5) it is information that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate, or try a claim or defense.

Matter of AET, 2018 WL 4201264, at *2 (quoting E.D. Tex. Local Rule CV-26(d)). Relevance "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Matter of AET*, 2018 WL 4201264, at *2 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947))).

Federal Rule of Civil Procedure 37 allows a discovering party, on notice to other parties and all affected persons, to "move for an order compelling disclosure or discovery." *Star Creek Ctr., L.L.C. v. Seneca Ins. Co., Inc.*, No. 4:17-CV-00607, 2018 WL 1934084, at *1 (E.D. Tex. Apr. 23, 2018) (quoting FED. R. CIV. P. 37(a)(1)). The moving party bears the burden of showing that the

materials and information sought are relevant to the action or will lead to the discovery of admissible evidence. *Star Creek*, 2018 WL 1934084, at *1 (citing *Export Worldwide, Ltd. v. Knight*, 241 F.R.D. 259, 263 (W.D. Tex. 2006)). Once the moving party establishes that the materials requested are within the scope of permissible discovery, the burden shifts to the party resisting discovery to show why the discovery is irrelevant, overly broad, unduly burdensome or oppressive, and thus should not be permitted. *Id.*

Federal Rule of Civil Procedure 34 governs requests for production of documents, electronically stored information, and tangible things. Rule 34 requires responses to "either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons." *Innovation Scis., L.L.C. v. Amazon.com, Inc.*, No. 4:18-CV-474, 2020 WL 3288082, at *2 (E.D. Tex. June 18, 2020) (quoting FED. R. CIV. P. 34(b)(2)(B)). "An objection [to the entire request] must state whether any responsive materials are being withheld on the basis of that objection." *Id.* (quoting FED. R. CIV. P. 34(b)(2)(C)). On the other hand, "[a]n objection to part of a request must specify the part and permit inspection of the rest." *Id.*

After responding to each request with specificity, the responding attorney must sign their request, response, or objection certifying that the response is complete and correct to the best of the attorney's knowledge and that any objection is consistent with the rules and warranted by existing law or a non-frivolous argument for changing the law. *Id.* (citing FED. R. CIV. P. 26(g)). This rule "simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection." *Id.* (quoting FED. R. CIV. P. 26(g) advisory committee note (1983)).

The federal rules follow a proportionality standard for discovery. *Van Dyke v. Retzlaff*, No.

4:18-CV-247, 2020 WL 1866075, at *1 (E.D. Tex. Apr. 14, 2020) (citing FED. R. CIV. P. 26(b)(1)). Under this requirement, the burden falls on both parties and the Court to consider the proportionality of all discovery in resolving discovery disputes. *Id*. (citing FED. R. CIV. P. 26(b)(1), advisory committee note (2015)). This rule relies on the fact that each party has a unique understanding of the proportionality to bear on the particular issue. *Id.* For example, a party requesting discovery may have little information about the burden or expense of responding. *Id.* "The party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination." *Id.*

DISCUSSION

As set forth above, SAI requests that the Court order SI to produce the following information from January 1, 2016 through the present:

> 1. Documents, on a monthly basis, reflecting revenues of Scrum, Inc. (by source) and costs of Scrum, Inc. (by type or category), including but not limited to: (a) Monthly financial statements of Scrum, Inc., including income statements and balance sheets; and (b) General ledger detail for Scrum, Inc.'s revenue, including non-"Licensed Scrum" sales, including General ledger detail for any expenses Scrum, Inc. will claim to be direct or incremental; and
>
> 2. Audited company-wide financial statements of Scrum, Inc.

Docket Entry # 79 at p. 9. SAI further requests that the production be completed no later than September 4, 2020. *Id*. at p. 10. According to SAI, SI's company-wide financial information from January 1, 2016 through the present is relevant to understand the extent of SI's profits associated with use of the infringing LICENSED SCRUM marks. *Id.* at p. 6.

In response, SI states it has already produced the relevant requested information regarding the allegedly infringing public Licensed Scrum courses during the course of time, from August 2019

to current, in which SAI has alleged the infringement took place. Specifically, on August 13, 2020, Defendants produced a "comprehensive excel spreadsheet compiling all of the relevant financials." Docket Entry # 80 at p. 6. As a good faith measure, SI states it has additionally offered to produce revenues, costs, and expenses associated with its public and private Licensed Scrum courses from 2016 to the present. *Id.* SI asserts the Court should deny further production of its company-wide financial documents because such information is irrelevant, overbroad, and unduly burdensome. *Id.*

The Court first considers whether SI has waived its objections to SAI's requests for company-wide financial information. SAI asserts SI has waived any objections to producing the requested financials because SI improperly relies on general, boilerplate objections that lack the requisite specificity. Contrary to SAI's contentions, SI states it has specifically objected to these requests numerous times. Docket Entry # 80 at p. 10.

First, prior to issuing its written Responses and Objections to SAI's requests for production and interrogatories ("Responses and Objections"), SI objected to the production of this detailed financial information, and a meet and confer on this issue was subsequently held. *Id.* (citing attached Ex. A). Second, in its written Responses and Objections, SI asserted specific objections to the request seeking financial information, "as well as incorporating by reference its prior detailed objection." *Id.* Specifically, with respect to Request for Production No. 80, seeking monthly financial statements for SI including income statements, balance sheets, and cash flow statements from 2016 through the present, SI responded as follows:

> In addition to the General Objections, Defendant objects to this request on the grounds that it is vague, overbroad, unduly burdensome, calls for the production of information not reasonably calculated to lead to the discovery of admissible evidence, and is disproportionate under Rule 26(b). In particular, Defendant objects to this request because it is disproportionate and duplicative because Defendant has already

> produced information concerning the revenues, profits and costs associated with the Licensed Scrum marks to the extent that information relates to the claims and defenses at issue in this litigation. Defendant will not produce additional documents responsive to this request, if any.

Docket Entry # 79, Ex. A at pp. 5-6.

Similarly, with respect to Interrogatory No. 5, seeking information on a monthly basis regarding SI's profits and how such profits were calculated, SI responded as follows:

> In addition to the General Objections, Defendant objects to this request on the grounds that it is vague, overbroad, unduly burdensome, calls for the production of information not reasonably calculated to lead to the discovery of admissible evidence, and is disproportionate under Rule 26(b). Defendant further objects to this request because the request seeks confidential and/or proprietary information. Subject to and without waiving these objections and the General Objections, pursuant to Federal Rule of Civil Procedure 33(d), Defendants have produced non-privileged documents responsive to this request subject to its previous objections.

Docket Entry # 79, Ex. B at pp. 5-6.

Although SAI contends the objections are boilerplate, SI contends the "objections are valid, appropriate, and subsisting given that SAI's request seeks broad swaths of documents not relevant to the claims at issue, as well as sensitive, highly confidential financial information to be produced to a competitor, despite lacking any relevance to alleged damages in this case." Docket Entry # 80 at p. 10. The Court finds the objections are sufficient and have therefore not been waived. Where the resisting party raises objections to a request as overbroad, unduly burdensome, and outside the scope of permissible discovery under Rule 26(b)(1) and explains its objections, including by pressing and supporting it in response to a motion to compel, the party seeking the discovery and moving to compel must respond with some specificity. *Samsung Elecs. Am. Inc. v. Yang Kun "Michael" Chung*, 325 F.R.D. 578, 600 (N.D. Tex. 2017).

In its motion, SAI argues the requested financial information is routinely discoverable in

Lanham Act cases. Docket Entry # 79 at p. 1 (citing *OrthoAccel Technologies, Inc. v. Propel Orthodontics, L.L.C.*, No. 4:16-cv-350, 2017 WL 1294451, *3 (E.D. Tex. Apr. 4, 2017) (Mazzant J.)). SAI attached as Exhibit C to its motion a Declaration of John Bone ("Bone Decl."), the expert retained by SAI to provide expert analysis concerning damages in this matter. Bone Decl., ¶ 2. It is Mr. Bone's understanding that SI has agreed to produce "all of the revenue, cost and expense information" with respect to the Licensed Scrum program from 2016 to the present. *Id*., ¶ 3. According to Mr. Bone, access to only a subset of financial information, related only to the Licensed Scrum program, "may limit elements of [his] analysis of damages in this case." *Id*.

Mr. Bone states it is critical he review the following financial documents for his analysis: (1) documents, on a monthly basis, reflecting revenues of SI (by source) and costs of SI (by type of category), including by not limited to (a) monthly financial statements of SI, including income statements and balance sheets and (b) "[g]eneral ledger detail for SI's revenue. . .;" and (2) audited company-wide financial statements of SI. *Id*., ¶ 4. SAI argues Mr. Bone needs this information so that he can understand the importance of the infringing mark to SI's business as a whole, to compare the profitability of the offerings associated with the infringing marks as compared to offerings not involving the infringing marks, and to understand costs and expenses attributable to the infringing marks as opposed to operations unrelated to the infringing marks. Docket Entry # 79 at p. 2.

In response, SI states neither Mr. Bone nor SAI purport to explain why "it is at all necessary to compare the totality of Scrum, Inc.'s business or other offerings to its revenue from Licensed Scrum in order to accurately calculate damages related to the alleged trademark infringement." Docket Entry # 80 at p. 7. The Court would further note that Mr. Bone himself states having access to the financial information related only to the Licensed Scrum program from 2016 to present **may**

limit elements of his analysis. The Court, having reviewed Mr. Bone's declaration, is simply not convinced company-wide financials are warranted at this time.

Additionally, SI argues the relevant damages in a trademark infringement action are the profits directly attributable to the alleged infringement. *Id.* at pp. 7-8 (citing *Streamline Prod. Sys., Inc. v. Streamline Mfg., Inc.*, 851 F.3d 440, 459 (5th Cir. 2017) (plaintiff in a trademark infringement action is only entitled to profits "directly attributable to" [Defendant]'s infringing use"); also citing *Maltina Corp. v. Cawy Bottling Co.*, 613 F.2d 582, 586 (5th Cir. 1980) ("Under 15 U.S.C. Section 1117, the plaintiff has the burden of showing the amount of the defendant's sales of the infringing product.") (emphasis removed)). *OrthoAccel* is the primary case that SAI cites to support its position that it is entitled to the company-wide financial documents from the years it requests because the information is relevant to damages. SI argues the facts of *OrthoAccel* do not support SAI's proposition that "full financials" must be produced under the facts of this case. *Id.* at p. 8. The Court agrees.

In *OrthoAccel,* District Judge Mazzant had previously ordered both OrthoAccel and Propel to produce financial statements for the years 2014, 2015, and 2016. *OrthoAccel*, 2017 WL 1294451, at *1. In response, Propel produced a one-page "Statement of Operations" for each year. *Id.* "OrthoAccel, dissatisfied with the information contained in these reports, requested via email and at a meet and confer 'detailed financial information from January 2015 to present' including Propel's trial balance, QuickBooks, or other financial accounting statements and reports. OrthoAccel also requested Propel's general ledgers including profit and loss statements ('P&L statements')." *Id.*

Following a meet and confer, Propel produced a single Statement of Operations for March 2016 through January 2017. *Id.* In early March 2017, OrthoAccel again requested Propel's trial

balance, QuickBooks, general ledgers, P&L statements, and other financial accounting statements and reports; Propel responded that it had already produced the P&L statements and would provide a Bates label if OrthoAccel was unable to locate them. *Id.* On March 19, 2017, Propel designated Greg Braham as its 30(b)(6) corporate representative to testify on Propel's (1) financial statements and the data supporting those statements; (2) total costs by quarter or month for advertising, marketing, or any other sales efforts for the VPro5; and (3) total revenues by month and quarter for sales of the VPro5. *Id.* OrthoAccel again asked Propel for the Bates label of the P&L statements before Braham's deposition. On the eve of Braham's deposition, Propel instead provided OrthoAccel the Bates label for some of Propel's expenses from March 2016 to January 2017. *Id.*

"Braham's deposition revealed that he exported a P&L statement from QuickBooks, then following a conversation with his counsel, altered the P&L statement to produce a selling general and administrative ('SG&A') report." *Id.* The SG&A report was created by deleting the revenues, cost of goods sold, and research and development costs from the QuickBooks-generated P&L statement. Braham stated it took only five minutes to produce the P&L statements, and he had created P&L statements for Propel in the past. *Id.*

Judge Mazzant ordered Propel to produce monthly P&L statements from January 2014 through January 2017, finding the information relevant to OrthoAccel's damages analysis. *Id*. at * 3. Judge Mazzant was not convinced that the information sought was irrelevant because the requested financials contained sales information for other products in Propel's line that were not subject of the litigation. *Id*. According to Judge Mazzant, "Propel should not deprive OrthoAccel of relevant financial information simply because Propel sells multiple products and does not segregate its product lines in its financials." *Id.* The Court noted the Protective Order only permitted

OrthoAccel's attorneys and designated experts to review the financials. *Id*. The Court further noted that if "the P&L statements incorporate values irrelevant to OrthoAccel's claims or defenses, production would cause Propel no competitive harm." *Id.*

However, Judge Mazzant agreed with Propel's objections that OrthoAccel's request for an electronic copy of Propel's QuickBooks program was irrelevant and overly broad because the QuickBooks program contained Propel's "entire history of financial information for all products sold worldwide." *Id.* In denying this part of OrthoAccel's motion to compel, Judge Mazzant explained as follows:

> Unfettered access to the entirety of Propel's QuickBooks program is clearly not proportional to the needs of the case. But this reasoning does not extend to the requested P&L statements for the relevant period. The Court ordered both parties to produce full financials for the years 2014, 2015, and 2016. . . . Producing P&L statements for these years would be neither irrelevant nor overly broad.

Id.

Judge Mazzant was unpersuaded by Propel's argument that producing the requested financials would be unduly burdensome or duplicative. *Id.* The Court noted Propel had produced SG&A reports; Braham had testified that these SG&A reports were created by exporting P&L statements from QuickBooks, then altering the P&L statements by removing the cost of goods sold, research and development costs, and revenues; Braham further testified that while Propel does not produce P&L statements on a routine quarterly basis, Propel's management has asked him to produce P&L statements in the past; Braham also stated that the QuickBooks program was capable of creating monthly, quarterly, or annual P&L statements; and Braham testified that it took him only five minutes to export the P&L statements from QuickBooks. *Id.* Therefore, the Court found production of the P&L statements appropriate and not unduly burdensome or duplicative. *Id.*

In conclusion, Judge Mazzant found OrthoAccel had proven that the P&L statements were relevant and proportional to its needs in the case. *Id.* The Court further found that Propel had not met its burden in proving the requested P&L statements should not be produced. *Id.* However, the Court denied OrthoAccel's request for an electronic copy of Propel's entire QuickBooks program because it was an overbroad, disproportional request. *Id*.

In this case, the Court finds all financial information concerning Licensed Scrum, including public and private courses from January 1, 2016 through the present, relevant and proportional to SAI's needs in this case. However, the Court finds SI has met its burden in showing the requested company-wide financials should not be produced at this time.[2] SI, as the party resisting discovery, has carried the burden of making specific objections regarding relevance and proportionality concerns, especially considering SI has agreed to produce all financial information regarding License Scrum since 2016.

On the expedited record before the Court, SAI has not sufficiently shown why SI's objections should be overruled. *See Marable v. Dep't of Commerce*, No. 3:18-CV-3291-N-BN, 2019 WL 4689000, at *5 (N.D. Tex. Sept. 26, 2019). At this time and on this record, SAI has not shown company-wide financial documents are proportional to the needs of this case. *Id.* (generally citing *Chung*, 325 F.R.D. at 595 ("[A] failure to appropriately address Rule 26(b)(1) proportionality factors may be determinative in a proportionality analysis and result in the motion to compel being denied on its merits.")). Nor is the Court convinced such information is necessary for Mr. Bone's damages analysis.

Therefore, the Court grants SAI's motion to the extent it seeks production of the additional

[2] The Court notes SAI's requests include a request for audited financials, which SI represents it does not have. Docket Entry # 80 at p. 8.

financial information SI has agreed to produce in good faith to resolve this discovery dispute. To the extent it has not already done so, SI shall produce to SAI, on or before September 4, 2020, all financial information concerning Licensed Scrum, including public and private courses, from January 1, 2016 through the present. Otherwise, SAI's motion to compel company-wide financial information is denied.

Based on the foregoing, it is

ORDERED Plaintiff's Motion to Compel Production of Damages-Related Discovery (Docket Entry # 79) is **GRANTED IN PART and DENIED IN PART**. It is further

ORDERED that to the extent it has not already done so, SI shall produce to SAI, on or before September 4, 2020, all financial information concerning Licensed Scrum, including public and private courses, from January 1, 2016 through the present. Otherwise, SAI's motion to compel is denied.

IT IS SO ORDERED.

SIGNED this 1st day of September, 2020.

CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE