SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: December 5, 2023 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

***New information* (please read)**: To set future motion hearings, you no longer need to file your motion before receiving a hearing date. Phone lines are now open for you to call and reserve a hearing date *before filing and serving* your motion. Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve your date. This will obviate the need to file and serve a separate amended notice at a later time. Please note: if your motion papers are not filed within five business days of reserving the hearing date, the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV389929	Tianqing Li v. Phillip Mummah	Click on LINE 1 or scroll down for ruling.
LINE 2	23CV416799	Ramon Ramirez v. DP Willow Glen Investors, LP et al.	OFF CALENDAR
LINE 3	22CV403017	Applied Materials, Inc. v. Huu T. Vu et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 4	22CV403017	Applied Materials, Inc. v. Huu T. Vu et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 5	2004-1-CV-017343	American Contractors Indemnity Company v. Contractors Bond Brokerage, Inc. et al.	OFF CALENDAR
LINE 6	19CV352193	Barclays Bank Delaware v. Kenneth Mark Durano	Motion for entry of judgment: notice is proper, and the motion is unopposed. The court GRANTS the motion and directs the moving party to submit the proposed order.
LINE 7	20CV362880	Steve Saint v. John Thomas	Motion to set aside default: in light of the moving party's notice of filing of bankruptcy on October 23, 2023, this motion is OFF CALENDAR. The court sets this matter for a case status review on **May 23, 2024 at 10:00 a.m.** in Department 10.
LINE 8	21CV381863	Kathryn Swanson v. Terrence Lapaka Lee	Motion to be relieved as counsel: parties to appear.
LINE 9	21CV386263	Iris Elise Sedano et al. v. Vikas Malyala	Petition for approval of compromise of minor's claim (Alejandro Sedano). Parties to appear, either in person or by MS Teams, in accordance with CRC 7.952.

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LINE 10	21CV386263	Iris Elise Sedano et al. v. Vikas Malyala	Petition for approval of compromise of minor's claim (Thomas Sedano). Parties to appear, either in person or by MS Teams, in accordance with CRC 7.952.

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Calendar Line 1
Case Name: *Tianqing Li v. Phillip Mummah*
Case No.: 21CV389929

I. BACKGROUND

This is an action for declaratory relief arising out of an alleged loan agreement between plaintiff Tianqing "Cindy" Li and defendant Phillip Mummah. On December 22, 2020, Li filed a verified complaint for declaratory relief in San Mateo County Superior Court. The matter was subsequently transferred to this county, pursuant to Code of Civil Procedure section 395, subdivision (a), as Santa Clara County is where Mummah resided at the time of the commencement of the action.

On April 22, 2022, Li filed the operative first amended complaint for declaratory relief ("FAC"). On September 2, 2022, Mummah filed an answer to the FAC and a cross-complaint alleging a violation of the federal and California Fair Debt Collection Practices Acts ("FDCPA") ("cross-complaint"). The cross-complaint named Li's attorney, Scott A. Flaxman, as a cross-defendant. On March 6, 2023, Flaxman filed a motion for judgment on the pleadings ("JOP motion"), contending that the cross-complaint was barred by the statute of limitations. On May 18, 2023, the court sustained Flaxman's JOP motion and granted Mummah 20 days' leave to amend.

On June 6, 2023, Mummah filed a first amended cross-complaint ("FACC") for violations of Business and Professions Code section 17200 ("Unfair Competition Law" or "UCL"). The FACC alleges that violations of the FDCPA, Rosenthal Act, State Bar Act, and California Rules of Professional Conduct all constitute "unlawful, unfair, and/or fraudulent business acts and practices" that support a UCL cause of action. (FACC, ¶¶ 10-11.)

Currently before the court is Flaxman's demurrer to the FACC, filed on July 28, 2023, contending (again) that the pleading is barred by the statute of limitations, as well as contending that it is defective for stating insufficient facts to set forth a valid cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

II. PROCEDURAL ISSUES

A. Request for Judicial Notice

As a threshold matter, the court GRANTS Flaxman's request for judicial notice of the following documents under Evidence Code section 452, subdivision (d), as they are records of the court:

1. Exhibit A: The court's May 18, 2023 order granting Scott A. Flaxman's JOP motion; and

2. Exhibit B: Mummah's FACC.

B. Sham Pleading Doctrine

As an additional procedural matter, the court notes that Flaxman appears to contend in his papers that the demurrer should be sustained because the FACC violates the sham pleading

doctrine. He does not explain how the FACC violates that doctrine, however, and the court ultimately concludes that the doctrine is inapplicable.

"Under the sham pleading doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or motions for summary judgment. [Citations.]" (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425.)

Here, the court does not find that the FACC omits or alters any previous allegations in an effort to avoid any pleading defects. Rather, the FACC adds a different cause of action based upon the same facts alleged in the prior cross-complaint. This does not run afoul of the sham pleading doctrine. (See, e.g., *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751 ["The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts. [¶] Here, the second amended complaint and the third amended complaint were consistent."], citation omitted.)

C. New Argument on Reply

As a final procedural matter, Flaxman contends for the first time in his reply brief that Mummah fails to allege injury in fact, and that disgorgement of profits is not an available remedy here. "'Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.'" (*Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, 720, fn. 10 [quoting *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453].)

Moreover, a demurrer is not the proper procedural vehicle to contest the application of a particular remedy, which is what Flaxman appears to be doing here. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047 ["[A] demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy."].)

III. LEGAL STANDARD

A demurrer is properly sustained when "'[t]he pleading does not state facts sufficient to constitute a cause of action.'" (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512 [quoting Code Civ. Proc., § 430.10, subd. (e)].) "A demurrer tests only the legal sufficiency of the pleading. [Citation.] It 'admits the truth of all material factual allegations in the complaint . . . ; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*); see also *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47.) A demurrer is also appropriate when the time-bar defect """clearly and affirmatively appear[s] on the face of the complaint; it is not enough that the complaint shows that the action may be barred."""" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232 (*Lee*) [citing *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42].)

IV. ANALYSIS

Flaxman contends that Mummah inappropriately added a UCL cause of action to the FACC and that the FACC is still time-barred. In addition, he reiterates the specificity arguments that he made in his earlier JOP motion on the original FDCPA and Rosenthal Act claims.

A. The UCL Claim Properly Addresses the Court's Prior Order

Mummah responds that the new UCL cause of action is appropriate because it addresses the statute of limitations deficiency identified in the court's prior order. In support, Mummah cites *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, in which the Court of Appeal determined that a plaintiff's new cause of action for declaratory relief "directly respond[ed] to the court's reason for sustaining the earlier demurrer," which was a failure to allege standing for a shareholder derivative claim. (*Id.* at p. 1015.)

The court's May 18, 2023 order granted Flaxman's JOP motion on the ground that it was time-barred because Mummah failed to plead the continuing violation doctrine or any other legal theory that would toll the statute of limitations for his FDCPA and Rosenthal Act claims. Mummah now concedes that the FDCPA and Rosenthal Act claims are statutorily time-barred, but pleads a UCL claim to extend the applicable statute of limitations to four years, as provided for in Business and Professions Code section 17208. Mummah persuasively cites the California Supreme Court's decision in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163 (*Cortez*) for the proposition that a claim otherwise time-barred under a different statute "still may be pursued as a UCL action" if the complained-of action constitutes a business practice. (*Id.* at pp. 178-179.) Here, the FACC sufficiently alleges a business practice because it complains of past violations of the FDCPA, Rosenthal Act, State Bar Act, and California Code of Professional Conduct through Flaxman's legal representation of Li and in the course of collecting on the debt. (FACC, ¶¶ 2, 4, 6.)

Thus, in contrast to the plaintiffs in *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023, Mummah has established that his addition of the UCL claim "directly responds" to the court's reason for granting the JOP motion, and therefore falls within the scope of the order granting leave to amend.

B. Statute of Limitations

Flaxman argues that the applicable statute of limitations is one year, as provided for in Business and Professions Code, section 7031, subdivision (b), but the court disagrees. Section 7031(b) governs disgorgement of compensation claims against construction companies, which is not what is at issue here.

Mummah emphasizes that the ruling in *Cortez* is clear: "*Any* action on *any* UCL cause of action is subject to the four-year period of limitations created by that section." (*Cortez, supra,* 23 Cal.4th at p. 179, italics in original.) In that case, the Court rejected "the defendant's claim that the shorter periods of limitation applicable to contractual or statutory wage claims govern a UCL action based on failure to pay wages." (*Ibid.*) Flaxman does not address the statute of limitations issue in his reply brief and fails to show that Mummah's UCL claim is "clearly and affirmatively" time-barred. (See *Lee, supra,* 61 Cal.4th at p. 1232.)

The court OVERRULES Flaxman's demurrer on the basis of the statute of limitations.

C. Pleading Standards for UCL Claims

While Mummah argues in response to the demurrer that the UCL claim is not a fraud claim, and therefore does not require specificity in pleading, California courts have held that a UCL cause of action must be stated with reasonable particularity. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1261; see also *Committee on Children's Television, supra,* 35 Cal.3d at pp. 213-214.)

The UCL prohibits "unfair competition," which is broadly defined to include any unlawful, unfair, or fraudulent act or practice. (Bus. & Prof. Code, § 17200.) "'Because the UCL is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.'" (*Berryman v. Merit Prop. Mgm't, Inc.* (2007) 152 Cal.App.4th 1544, 1554 [citing *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647].)

"Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) Thus, the viability of the UCL claim stands or falls with the underlying cause of action. (*Krantz v. BT Visual Images, LLC* (2001) 89 Cal.App.4th 164, 178 (*Krantz*).)

1. Whether Flaxman Is a Debt Collector

The court's prior order on Flaxman's JOP motion found Flaxman's status as a debt collector sufficiently pled, because the cross-complaint alleged the ultimate fact, and Flaxman's arguments relied on inadmissible extrinsic evidence.[1] On demurrer, Flaxman contends again that the FACC insufficiently pleads facts to support the assertion that Flaxman is a "debt collector" as defined by the FDCPA and Rosenthal Act.[2] Central to Flaxman's argument is the FACC's failure to allege that Flaxman *regularly* engages in debt collection.

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[1] Specifically, the May 18, 2023 order held:

> [A] cross-complainant need only allege the ultimate facts to state a cause of action. (See *Shea, supra,* 110 Cal.App.4th at p. 1254.) Flaxman's arguments are based on extrinsic evidence. Accordingly, Mummah's allegation that Flaxman is a "debt collector" is sufficient for purposes of the JOP motion. (Cross-Compl., ¶ 2.)
>
> The cross-complaint sufficiently alleges that Flaxman is a debt collector for purposes of the FDCPA; it further alleges that Flaxman was hired to represent Li in collecting the Debt and subsequently filed a Complaint on behalf of Li to collect on the Debt in December 22, 2020. (*Id*. ¶¶ 4, 6.)

[2] The FDCPA defines a "debt collector" as a person who regularly collects, or attempts to collect, consumer debts owed (or asserted to be owed) to others; or uses any instrumentality of interstate commerce or the mails in a business whose principal purpose is collecting consumer debts. (15 U.S.C. § 1692a(6).)

The Rosenthal Act defines a "debt collector" as "any person who, in the ordinary course of business, regularly, on behalf of that person or others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection." (Civ Code, § 1788.2, subd. (c).)

In *Heintz v. Jenkins* (1995) 514 U.S. 291, the United States Supreme Court held that lawyers could be "debt collectors" for the purposes of FDCPA if they "'regularly,' *through litigation,* [try] to collect consumer debts." (*Id.* at p. 292.) Here, the FACC solely alleges that Li hired Flaxman to collect on the debt, not that Flaxman is regularly engaged in the business of debt collection through litigation. (FACC, ¶ 4, 7.) Moreover, the FACC lacks facts establishing Flaxman as a debt collector for purposes of the Rosenthal Act. In *Minser v. Collect Access, LLC* (2023) 92 Cal.App.5th 781 (*Minser*), the Court of Appeal affirmed the trial court's decision that maintaining and reviewing records pertaining to a debt account in the regular course of business, among other factors, are sufficient to establish *regular* engagement in debt collection under the Rosenthal Act. (*Id*. at p. 791.)

Because the underlying FDCPA and Rosenthal Act claims are insufficiently plead, the court SUSTAINS Flaxman's demurrer to the UCL claim on the ground of insufficient facts and grants 10 days' leave to amend. (See *Krantz, supra,* 89 Cal.App.4th at p. 178.)

Assuming that Mummah has a good-faith basis for pleading the ultimate fact of "regular" debt collection, the court expects this to be a straightforward amendment and will be very surprised to see a third demurrer on the cross-complaint.

2. Whether Litigation Privilege Applies

Flaxman contends that the litigation privilege bars the FDCPA and Rosenthal Act claims. But the otherwise broad litigation privilege is generally not applicable "when it conflicts with another statute 'more specific than the litigation privilege,' [and] when the second statute 'would be significantly or wholly inoperable if its enforcement were barred when in conflict with the privilege.'" (*Minser, supra,* 92 Cal.App.5th at p. 791 [quoting *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1246].) In *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324 (*Komarova*), the Court of Appeal followed multiple federal cases in holding that the application of litigation privilege to the Rosenthal Act would negate a plaintiff's claim and inevitably come into conflict with the act. (*Id*. at pp. 337-338; see also *Oei v. N Star Capital Acquisitions, LLC* (C.D.Cal. 2006) 486 F.Supp.2d 1089, 1100 ["Were the privilege to apply broadly to Rosenthal Act claims, however, it would effectively immunize conduct that the Act prohibits"].) In *People v. Persolve, LLC* (2013) 218 Cal.App.4th 1267, the Court of Appeal extended the ruling in *Komarova* to the FDCPA because the Rosenthal Act required compliance "with a number of the Federal Act's provisions." (*Id*. at p. 1275.) In reaching this decision, the Court of Appeal also held that to the extent that the FDCPA and the Rosenthal Act underlie a UCL claim, the litigation privilege does not apply. (*Id*. at p. 1277 [citing *Komarova, supra,* 175 Cal.App.4th at pp. 339-340].)

Accordingly, the court OVERRULES Flaxman's demurrer on the basis of the litigation privilege. (Code Civ. Proc., § 430.10, subd. (e).)

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Calendar Lines 3-4
Case Name: *Applied Materials, Inc. v. Huu T. Vu et al.*
Case No.: 22CV403017

Plaintiff Applied Materials, Inc. ("Applied") brings two motions to compel against defendant Capital Asset Exchange & Trading LLC ("CAE"): (1) to compel further responses to document requests (Nos. 2, 5-11, 15-21, 24-25, and 28) under Code of Civil Procedure section 2031.310, and (2) to compel compliance with responses to document requests (Nos. 1-4) under Code of Civil Procedure section 2031.320. As set forth below, the court GRANTS in part and DENIES in part the motion to compel further responses; the court GRANTS the motion to compel compliance.

1. Motion to Compel Further Responses

As a general matter, the court finds the vast majority of Applied's document requests to be overbroad, seeking information about not just potentially stolen Applied products, but also nearly all documents relating to legitimate sources and sales of Applied products. As far as the court is aware, all of the allegations of stolen Applied products in this case revolve around products obtained by co-defendants Huu Vu, Tuan Vu, and James Nguyen. As a result, the discovery must be more specifically tailored to those individuals and the products they allegedly stole. At the moment, there does not appear to be any basis for broader (and unnecessarily burdensome) discovery pertaining to all of CAE's sources of Applied products.

At the same time, CAE has taken an unduly restrictive approach with respect to some of the requests for production. Although the court understands CAE's contention that it neither bought nor sold any products directly from Nguyen, CAE must still produce any documents that relate to products that it attempted to buy from Nguyen or that it attempted to resell on behalf of Nguyen, regardless of whether any sale actually went through. It is unclear from the parties' briefs and their separate statements whether CAE has actually agreed to search for and produce documents that relate to all *offers for sale* by Nguyen, as CAE's brief focuses solely on whether products were "bought or sold."

The definition of the phrase "APPLIED MATERIALS PRODUCTS" should be modified as follows: "any parts, products, tools, components, or sub-assemblies thereof engineered, manufactured, or sold by plaintiff, *and either resold or offered for resale by James Nguyen or Mechatronics Engineering Group*, including any manuals, specifications, datasheets, or instructions relating thereto." With this modification, the court would find that the scope of the requests for production of documents is appropriate.

Request No. 2: This request is overbroad. CAE's agreement to produce communications either with or about the individual defendants is a reasonable narrowing of the scope of this request. As for whether CAE has complied with this agreement, that issue is discussed below in connection with the second motion to compel. DENIED.

Request No. 5: This request is overbroad, but CAE's response is insufficient, as it should still produce any documents that it sent or received relating to any Applied products that were sold or offered for sale by Nguyen/Mechatronics. The court understands that CAE *may* have agreed to do so in the course of its meet-and-confer discussions, but that agreement is not

reflected in the written response (and is not 100% clear from the parties' briefs, either). GRANTED IN PART.

Request No. 6: Again, the definition of "ANY APPLIED MATERIALS PRODUCTS" is overbroad, but CAE's written response is insufficient. The court interprets "documents relating to the sale of . . . products" to include documents that relate to any *offers for sale* of those products. And the court interprets "APPLIED MATERIALS PRODUCTS" to mean products that were "either resold or offered for resale by James Nguyen or Mechatronics Engineering Group." GRANTED IN PART.

Requests Nos. 7-11: As with Requests Nos. 5 and 6, these requests are appropriate if the definition of "APPLIED MATERIALS PRODUCTS" is modified as set forth above. CAE's written responses consist solely of objections, and so they must be supplemented. GRANTED IN PART.

Requests Nos. 15 & 28: The scope of these requests is appropriate, and CAE's original objection-only responses were improper. CAE claims in its separate statement that it has since amended its responses to these requests (although those amended responses have not been filed, and the court does not know what they say). The court accepts CAE's word that the dispute over these requests is now moot.

Requests Nos. 16-21 & 24-25: Again, if the definition of "APPLIED MATERIALS PRODUCTS" is modified as set forth above, then these requests are appropriate, and CAE must supplement its written responses. It is particularly unclear from CAE's brief and the repetitive text contained in its separate statement whether CAE has agreed to search for, has searched for, and intends to produce (or has produced) documents that are sufficient to identify each person who *inquired* about any offers for sale of Applied products by Nguyen/ Mechatronics, as requested in Request No. 17 and as illustrated in Exhibit J to the Declaration of Quyen Ta (October 2021 emails between CAE and Nguyen). Such documents must be produced if CAE has not already produced them or agreed to produce them. GRANTED IN PART.

2. Motion to Compel Compliance

CAE agreed to produce all communications with and relating to the other defendants in the case. Applied now argues that CAE has still failed to produce metadata for these communications and failed to produce all social media communications on applications such as WhatsApp, WeChat, Viber, etc. CAE responds primarily by criticizing Applied's meet-and-confer efforts as inadequate. CAE argues secondarily that it has produced all responsive communications and that there "should be no order regarding the metadata." The court finds CAE's arguments to be unpersuasive.

First, Applied is correct that there is no meet-and-confer requirement on a motion to compel compliance under section 2031.320 of the Code of Civil Procedure. Even if there were, the court would find that Applied's meet-and-confer efforts were adequate. Indeed, the court finds that CAE unduly dragged its feet during the negotiations between the parties and withheld key information during these negotiations. Most critically, the court does not understand why CAE waited until after Applied filed its second motion to inform Applied (and the court) that nine out of 18 of the identified custodians who had communications with

Nguyen were no longer with the company. It appears that at least two of these employees left in the Fall of 2021; therefore, waiting until November 2023 to let everyone else know about it is inexcusable. If any party failed to meet and confer in good faith, the court finds that it was CAE.

Second, because of this eleventh-hour revelation by CAE, there is insufficient information on this motion about what efforts CAE undertook to preserve or retrieve any communications from these former employees' devices.[3] That is something as to which an e-discovery vendor could provide assistance. Although CAE claims to have an e-discovery vendor in this case, it is not apparent what, if anything, that vendor has actually done. Applied points out that CAE produced WhatsApp messages as PDF documents where the text was cut and pasted onto a blank page. That is not the type of production that the court would have expected of an e-discovery vendor. The court expects CAE to work with a professional discovery vendor to determine the state of data with respect to these former employees.

Third, the court expects CAE to work with an e-discovery vendor to produce the metadata requested by Applied. CAE's claim that such metadata may be duplicative is not persuasive, given that CAE does not appear to have any actual knowledge regarding what the metadata would show. Its briefing makes clear that it wishes to avoid the expense of producing the metadata, and in doing so, CAE also makes clear that it has not actually tried to collect that information. It refers repeatedly to "five short and unremarkable Whats[A]pp messages," but it is now plain that there were more messages with former CAE employees that may not have been preserved. Applied is entitled to discovery regarding the full extent of the WhatsApp and other social media communications between Nguyen and CAE employees, to the extent that it exists or is still retrievable.

At any rate, CAE already indicated in its written responses that it would produce this information—it did not object to Applied request for metadata until after it served its responses. CAE may not backtrack on its written statement of compliance.

The motion to compel compliance is granted.

3. **Requests for Sanctions**

Both sides have requested monetary sanctions against the other, with respect to both motions. The court finds that both sides acted with *and* without substantial justification. The court denies monetary sanctions to the parties, as they would only offset each other.

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[3] The Declaration of Corey Batrous states that the data were "wiped" from Jean Fan and Kiwoong Kim's phones when they left. (¶¶ 2-3.) It does not address any of the other former employees, and it does not describe any effort to preserve or retrieve information from their devices.