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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES
INDUSTRIES, INC., et al.,

Plaintiffs

v.

ALEJANDRO GALINDO, et al.,

Defendants.

Case No. 2:20-cv-03129-MEMF (GJSx)

**REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to United States District Judge Maame Ewusi-Mensah Frimpong, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California. This R&R addresses Plaintiff’s Motion for Sanctions Against Defendant Alejandro Galindo (“Sanctions Motion”) [Dkt. 164] and, additionally, contains the Court’s recommendation of an award of attorneys’ fees for motion practice associated with both the Sanctions Motion (\$93,000 [Dkts. 177, 177-1]) and a previous Discovery Motion [Dkt. 57] (\$88,080 [Dkts. 82, 82-2.]).¹ For the reasons that follow, the

¹ The Magistrate Judge previously ruled that attorneys’ fees and costs would be awarded on Plaintiff’s Motion to Compel [Dkt. 57] but failed to enter a final order regarding the amount of fees after Plaintiffs filed their request and supporting

1 Court recommends that the District Judge (1) find that defendant Alejandro
2 Galindo² willfully violated Court orders, and refused and failed to cooperate in
3 discovery, and (2) issue terminating sanctions against Defendant. Further, (3) the
4 Court recommends that defendant Alejandro Galindo be ordered to pay a total of
5 \$181,080 in attorneys' fees and costs to Plaintiffs.

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INTRODUCTION

8 In this action, Plaintiffs are suing seven named Defendants for copyright
9 infringement based on their ownership, operation, and marketing of an infringing
10 Internet Protocol television ("IPTV") service called Nitro TV. Second Amended
11 Complaint ("SAC") [Dkt. 113] ¶ 1. According to the SAC, until enjoined by the
12 Court (United States District Judge Stephen V. Wilson), Defendants offered Nitro
13 TV subscription packages consisting of thousands of live and title-curated television
14 channels available twenty-four hours a day, seven days a week, throughout the
15 United States and abroad. *Id.* Plaintiffs allege that the channels available on Nitro
16 TV include many popular television programs and motion pictures such as *The*
17 *Office*, *Spider-Man: Homecoming*, *Toy Story 3*, *Star Trek Beyond*, *Homecoming*,
18 and *Joker*, including works whose copyrights Plaintiffs own or exclusively control.
19 *Id.* Plaintiffs further allege that, during the several years Defendants operated Nitro
20 TV, they infringed, at a minimum, the 1897 copyrighted works identified by title
21 and copyright registration number in Exhibit A of their SAC.

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24 _____
25 declaration. Rather than entering attorneys' fees and sanctions orders piecemeal, the
26 Magistrate Judge includes herein the fees award from the earlier motion practice
27 along with her recommendation for terminating sanctions and the additional fees
28 award.

29 ² As detailed below, only Alejandro Galindo was named as a defendant in the
30 original complaint. Relatives of Alejandro Galindo with the same last name are
31 named in the Second Amended Complaint. The Court will use full names or
32 otherwise distinguish the family members from Galindo as necessary in this R&R.

1 Plaintiffs allege that Defendants’ infringement was willful, as Defendants
2 actively selected the programming that they sold and streamed illegally to
3 subscribers on Nitro TV Platforms, notified Nitro TV subscribers when channels
4 containing Plaintiffs’ Copyrighted Works had been added, asked subscribers for
5 feedback regarding what television programs they would like Defendants to add to
6 Nitro TV’s channel lineup, and apparently added television shows in response to
7 subscribers’ feedback. *Id.* ¶ 3. Further, Defendants continued to operate and
8 promote Nitro TV after receiving notices that they were infringing Plaintiffs’
9 copyrights. *Id.* And, according to the SAC, Defendants attempted to hide their
10 tracks and operate anonymously. *Id.* ¶ 4.

11 Plaintiffs filed their original complaint in April 2020. At that time, Defendant
12 Alejandro Galindo (“Defendant”) was the only named defendant. Plaintiffs
13 immediately sought and were granted a preliminary injunction to stop Defendant’s
14 infringement, including his ongoing operation of Nitro TV. [Dkts. 12, 34.]

15 As detailed further below, Defendant refused to cooperate in discovery and
16 did not produce any documents. Nevertheless, after obtaining records through third-
17 party subpoenas and securing leave to amend based on those records, Plaintiffs filed
18 the operative SAC on March 23, 2021, which added additional defendants and
19 copyrighted works they allege were infringed. [Dkt. 113.] Among the newly added
20 defendants are Anna Galindo, Martha Galindo, and Osvaldo Galindo. *Id.*
21 Defendant filed his answer to the SAC on April 13, 2021, in which he asserted
22 several affirmative defenses, including that his infringement was innocent. [Dkt.
23 126.]

24 On August 19, 2020, Plaintiffs filed their first motion for discovery
25 (“Discovery Motion”). [Dkt. 57.] After full briefing, the Court granted that motion
26 at a hearing in October 2020 [Dkts. 88 (transcript (“Tr.)) and 139]. The details of
27 the Court’s ruling are included where necessary in the factual findings below.
28

1 On June 4, 2021, Plaintiffs filed the Sanctions Motion that is the primary
2 subject of the instant R&R. Plaintiffs requested terminating sanctions, or, in the
3 alternative, a host of preclusionary sanctions that would essentially amount to
4 terminating sanctions in the case of Defendant. [Dkt. 164.] The Sanctions Motion
5 was heard by the Court on July 7, 2021, and Plaintiffs filed subsequent documents
6 as ordered by the Court.

7
8 **FINDINGS OF FACT**

9 **I. Defendant's Destruction of Evidence and False Discovery Responses**
10 **Under Oath.**

11 1. Defendant registered the domain name NitroIPTV.com in December
12 2016. [Dkt. 58-6 at 2; *see also* Dkt. 58-1 at 6.] Defendant used several domain
13 names and email addresses. For example, when registering the domain name
14 NitroIPTV.com, Defendant used the email address forenzi@gmail.com. [Dkt. 58-6
15 at 2.] Defendant also created the Google email address NitroIPTV@gmail.com on
16 December 1, 2016. [Dkt. 164-8 at 2.] And Defendant created the Official Nitro TV
17 Facebook Group in 2017, which promoted NitroIPTV.com. [Dkts. 58-2 at 5]
18 (admitting creation of Facebook group); 13 ¶¶ 6–10; 13-1 at 2 (Facebook group
19 page).]

20 2. On April 3, 2020, Defendant was personally served with Plaintiffs'
21 initial complaint and motion for a preliminary injunction seeking to stop
22 Defendant's ongoing operation of Nitro TV. [Dkt. 23.] On April 7, 2020,
23 Defendant's counsel filed a notice of appearance in this case. [Dkt. 20.]

24 3. On April 12, 2020, after being put on notice of the claims asserted
25 against him arising from his operation of Nitro TV, Defendant deleted his primary
26 NitroIPTV@gmail.com email account. [Dkt. 164-8 at 2.]

27 4. While as a legal matter, Defendant was on notice through personal
28 service and because he was represented by counsel that he was required to retain

1 relevant evidence, he was specifically advised by his counsel, Mr. Vondran, that he
2 had to preserve evidence. Mr. Vondran declared on both September 21, 2020 and
3 June 10, 2021 that Galindo had previously been advised of his duty to preserve and
4 not to spoil evidence in this case. Defendant's counsel was, in the Court's view,
5 intentionally vague in both declaration about when he advised Defendant of his duty
6 to preserve evidence.

7 5. Defendant also purged a large quantity of e-mails from his email
8 account forenzi@gmail.com, which was also used in connection with Nitro TV's
9 operations. Over 1,500 of 6,800 emails were deleted. [Dkts. 58 ¶¶ 27–33; 58-2 at 7;
10 58-6; 58-8; 58-15; 58-16; 59 ¶¶ 7–9.] Defendant used this email account to
11 communicate with co-Defendant Richard Horsten and in setting up accounts with
12 providers of services used by IPTV services like Nitro TV. *Id.*

13 6. Deletion of some forenzi@gmail.com emails occurred after Defendant
14 was on notice of the claims asserted against him in this action. This fact is
15 established by the dates of the emails Defendant deleted. Specifically, Defendant
16 received emails after April 3, 2020 that he later deleted. Such e-mails could only
17 have been deleted after Defendant was served with the complaint. [*See, e.g.*, Dkts.
18 164-1 ¶ 11; Dkt. 164-15 at 2–7.]

19 7. Although it has not been possible for Plaintiffs to definitely determine
20 when the deletion of forenzi@gmail.com emails dated prior to April 3, 2020
21 occurred, the information produced pursuant to subpoena by third-party Google
22 strongly suggests they were deleted *after* Defendant was on notice of this litigation.
23 [Dkts. 57 at 17–18; 58 ¶¶ 27–32; 58-15; 58-16.] When Plaintiffs inquired of
24 Defendant whether he deleted emails from this account after April 3, 2020, he
25 refused to answer and invoked the Fifth Amendment. [Dkt. 175 at 5 (108:4–15).]

26 8. The Court finds that emails in Defendant's forenzi@gmail.com account
27 that were deleted when Defendant was on notice of the litigation would have been
28 relevant to this litigation. For example, these emails included communications with

1 iPage, a company affiliated with Domain.com, which registered and held
2 Defendant’s domain name tied to his brand, NitroIPTV.com. Also included are
3 emails with FDCServers, a company offering high volume, large scale web hosting
4 services that would be used to provide IPTV services to subscribers. FDCServers
5 produced records reflecting that it provided a dedicated server to an account for
6 “tekkhosting” using Defendant’s forenzi@gmail.com email address during this time.
7 And further included are emails dated between April 2020 and June 2020 with
8 WHMCS, whose services have been used for managing billing and other aspects of
9 IPTV services like Nitro TV. [Dkts. 58 ¶¶ 10, 27–36; 58-6 at 2; 58-15 at 2–18; 58-
10 16 at 2–3; 59 ¶¶ 10, 14, 16–19; 164-1 ¶ 11; 164-15 at 2–7.]

11 9. For example, screenshots and other evidence detailed throughout
12 Plaintiffs’ complaint [Dkt. 1] show the critical nature of Plaintiff’s e-mails and the
13 “tekkhosting” service related to NitroTV. Generally, Plaintiff was communicating
14 with these services, and through these services with subscribers, to offer specific
15 copyrighted titles, bill customers (relevant to damages), and to manage other aspects
16 of the NitroTV service. While some of the information Plaintiffs need to
17 demonstrate the extent of the harm they suffered has been made available by third
18 parties, gaps in the data – and certainly e-mails between Galindo and others who
19 assisted in creating and operating the NitroTV service – have been lost.

20 10. When Plaintiffs deposed Defendant about his use and deletion of a
21 number of relevant email accounts, he repeatedly refused to answer and asserted the
22 Fifth Amendment. [Dkts. 164-1 ¶ 12; 164-2; 175 at 5–10. *See also* Dkt. 164-1 ¶ 12,
23 Dkt. 164-2 at 142:14–17.]

24 11. On May 29, 2020, Plaintiffs served their first set of interrogatories and
25 requests for production of documents (RFPs), which requested that Defendant
26 identify other individuals involved in Nitro TV and the individuals he believes are
27 responsible for running Nitro TV, as well as certain communications, among other
28 things. [Dkt. 58 ¶ 18.]

1 12. Less than a month later, on June 26, 2020, the Google email account
2 rokutvjunkie@gmail.com, which was used by Defendant, was deleted. [Dkts. 164-1
3 ¶ 10; 164-9 at 2; 164-10 at 2.] That same day, the Google email account
4 nitrovisionplus@gmail.com, which was created by Osvaldo Galindo, was deleted.
5 [Dkts. 164-1 ¶ 10; 164-11 at 2–3; 164-12 at 2.] And then two days later, on June 28,
6 2020, the Google email account tekkhosting@gmail.com, which was created by
7 Anna Galindo, was deleted. [Dkt. 164-1 ¶ 10; 164-13 at 2; 164-14 at 2.]

8 13. As described in Plaintiffs’ motion for preliminary injunction filed with
9 their initial complaint, Plaintiffs’ pre-filing investigation revealed that
10 Tekkhosting.com was one of the key domain names used in the operation of Nitro
11 TV. [Dkt. 14 ¶ 17.]

12 14. On June 27, 2020, Defendant served verified responses to Plaintiffs’
13 first set of RFPs and Plaintiffs’ first set of interrogatories. [Dkts. 58 ¶ 2; 58-1; 58-
14 3.] In the responses, Defendant failed to provide the real names or roles of any
15 individuals involved in Nitro TV. Instead, he provided the aliases of two
16 individuals with whom he communicated through the Telegram application (++240
17 and AD2020). [Dkts. 58 ¶ 2; 58-1 at 5–7, 9.]

18 15. In his verified responses to Plaintiffs’ first set of RFPs, Defendant
19 claimed that “there are no responsive documents as anything involved with
20 NitroIPTV.com (sic) was done through ‘telegram’ (sic) and that application has
21 deleted per settings.” [Dkts. 58 ¶ 2; 58-3 at 7, 8, 10.]

22 16. Defendant’s assertion that he had and has no responsive documents,
23 which was made under oath, is demonstrably untrue, as there are—or were prior to
24 being destroyed during the pendency of this case—responsive documents from
25 email accounts, accounts with streaming server providers, accounts with domain
26 name providers, and records of Nitro TV transactions through PayPal, Stripe, and a
27 number of bank accounts used in the operation of Nitro IPTV. [Dkts. 58-6; 58-12;
28 58-15; 58-18; 164-7–164-21.]

1 17. In addition to his email purge, Defendant appears to have hidden or
2 destroyed his electronic devices used in the operation of Nitro TV because, when
3 asked whether he had “dispose[d] of any devices that had Nitro TV records on
4 them,” he again refused to answer, pleading “the Fifth.” [Dkt. 164-2 at 13–25.]
5 Defendant took these actions despite being told by his counsel not to destroy
6 evidence. [See Dkts. 68; 165-4 ¶ 4 (Vondran Declarations stating that Defendant
7 had been advised to retain and not to destroy evidence).] In fact, Defendant has
8 never denied that he destroyed relevant evidence and has never claimed that he was
9 unaware of his obligation not to destroy evidence.

10 18. Indeed, in his Opposition to Plaintiffs’ Motion for Sanctions,
11 Defendant cited his concern with criminal liability for destroying documents as a
12 basis for asserting the Fifth Amendment in response to questions about his
13 destruction of evidence. [Dkt. 165 at 3.]

14
15 **II. The Court Granted Plaintiffs’ Discovery Motion and Warned Defendant**
16 **About Escalating Sanctions.**

17 19. On August 19, 2020, Plaintiffs filed a discovery motion (“Discovery
18 Motion”) requesting an order: (1) requiring evidence preservation, imaging of
19 devices, and a deposition of Defendant regarding document preservation and search
20 issues; (2) compelling supplemental responses to Interrogatories 1 and 2 of
21 Plaintiffs’ first set of interrogatories and compelling production of documents
22 responsive to Plaintiffs’ first and second set of requests for production; (3)
23 compelling consent to production of emails by Google; and (4) finding Plaintiffs
24 should be awarded their reasonable attorneys’ fees incurred in connection with the
25 Discovery Motion. [Dkt. 57.]

26 20. Instead of substantively responding, Defendant opposed Plaintiffs’
27 Discovery Motion by withdrawing his answer to the initial (non-operative)
28

1 complaint, thereby claiming he was in default and had somehow “mooted” the
2 Discovery Motion. [Dkts. 66; 68.]

3 21. On October 14, 2020, the Court heard and largely granted Plaintiffs’
4 Discovery Motion. [Tr. [Dkt. 88] at 5:7–9:20, 24:7–27:8; *see also* Dkt. 139.]
5 Specifically, the Court ordered that: (1) Defendant preserve all relevant information,
6 documents, and evidence in his possession, custody, or control and disable all
7 functions that may destroy or erase such evidence; (2) Plaintiffs be permitted to
8 depose Defendant for up to five hours on the record to identify (i) repositories of
9 relevant evidence, (ii) devices he has used (iii) his preservation of relevant evidence,
10 and (iv) his destruction of relevant evidence, and to seek information responsive to
11 Interrogatories Nos. 1 and 2 (without the deposition counting against the Plaintiffs’
12 ability to substantively depose Defendant); (3) Defendant produce all non-
13 privileged, responsive documents to RFP Nos. 2 through 5 and 7 through 80 in his
14 possession, custody, or control; and (4) Plaintiffs be awarded attorneys’ fees that
15 would be separately briefed. [Dkt. 139.]

16 22. The Court ordered the relief detailed above at the hearing. On October
17 19, 2020, at the Court’s request, after consulting with Defendant’s counsel,
18 Plaintiffs submitted updated proposed orders reflecting the Court’s orders during the
19 hearing. Due to an administrative error and other reasons beyond the parties’
20 control, the revised orders requested by the Court were not docketed until April 29,
21 2021. [*See* Dkt. Nos. 136–39.] Nonetheless, Defendant’s counsel was present at the
22 October hearing in which the Court made clear the obligations imposed on his client
23 and that the Court’s discovery order was effective immediately.

24 23. Given Defendant’s responses to written discovery and other behavior
25 by the time of the October 14, 2020 hearing, the Court determined that the most
26 efficient way for Plaintiffs to obtain information necessary to move the case forward
27 was for Plaintiffs to be allowed to depose Defendant on the topics that were the
28 subject of the written discovery. Defendant was also ordered to respond to

1 questions regarding relevant document repositories and Defendant’s document
2 preservation efforts, if any. [Tr. [Dkt. 88] at 5:13–6:9; Dkt. 139 at 4–5.]

3 24. The Court also stated that its “intent [was] to grant” Plaintiffs’ imaging
4 request once Plaintiffs deposed Defendant as to his document repositories and
5 evidence preservation so as to allow the Court “to figure out the scope” of the
6 devices to be imaged. [Tr. [Dkt. 88] at 25:4–26:14.]

7 25. The Court denied without prejudice Plaintiffs’ request for an order
8 compelling Defendant to consent to Google’s production of his emails. [Tr. [Dkt.
9 88] at 16:17–17:4, 24:17–25:3.]

10 26. The discovery subject to the Court’s order, *see* Dkts. 57 and 139, is
11 directed to numerous core issues in the case: Defendant’s direct sales of
12 subscriptions to Nitro TV, his reseller network, the revenues he has earned from
13 Nitro TV, his creation of channels and other content sources for Nitro TV,
14 identification of individuals with whom he is working and their roles, his payment
15 processors, his channels of communication regarding Nitro TV (e.g., email, instant
16 messaging applications, social media), the willfulness of his copyright infringement
17 and any violations of the preliminary injunction order (e.g., his repeat involvement
18 with infringing services, his knowledge of prior litigation involving a now
19 permanently enjoined IPTV service called SET TV, any continued involvement in
20 IPTV services), and his affirmative defenses and disclaimers of responsibility and
21 control. [*See* Dkts. 164-1 ¶ 6; 58 ¶¶ 2–3; 58-1; 58-2; 58-3; 58-4.]

22 27. At the hearing, the Court cautioned Defendant that although the “first
23 step is monetary sanctions when there’s behavior like this,” further discovery
24 misconduct could lead to “more onerous” sanctions, including further sanctions
25 under Rule 37 and contempt. [Tr. [Dkt. 88] at 6.]

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1 **III. Defendant’s Failure to Produce Documents and Belated Assertion of the**
2 **Fifth Amendment as an Objection to Discovery.**

3 28. In violation of the Court’s order on Plaintiffs’ Discovery Motion,
4 Defendant has not produced any documents. [Dkts. 164-1 ¶ 3; 106-2 ¶ 3.]

5 29. Defendant did not raise a Fifth Amendment objection in his only timely
6 objections to Plaintiffs’ first set of requests for production and first set of
7 interrogatories. Defendant did not provide any objections to Plaintiffs’ second set of
8 requests for production before the Discovery Motion was filed. [Dkts. 164-1 ¶ 7; 58
9 ¶¶ 2–3; 58-1; 58-2; 58-3.] Rather, on May 13, 2021, nearly seven months after the
10 hearing on the Discovery Motion and the Court’s order, and nine months after the
11 discovery was served, Defendant served “responses” to all of the discovery to which
12 the Court ordered him to respond. The “responses” contained only objections based
13 on the Fifth Amendment. [Dkts. 164-1 ¶ 7; 164-4; 164-5.]

14 30. Defendant also failed to serve objections to Plaintiffs’ third set of RFPs
15 and the second set of interrogatories until months after they were due. [Dkt. 164-1 ¶
16 20.] After Plaintiffs contacted Defendant’s counsel to request responses, Defendant
17 served late objections in which he again asserted the Fifth Amendment and refused
18 to respond and to provide the requested documents and interrogatory responses.
19 [Id.; see also Dkts. 164-23–164-26.]

20 31. Defendant had not asserted the Fifth Amendment when he responded to
21 the discovery at issue in the Discovery Motion, in opposing the Discovery Motion,
22 or at the hearing on the Discovery Motion. [See Dkts. 164-1 ¶ 7; 58-1; 58-2; 58-3;
23 58-5; 68; Tr. [Dkt. 88]]. Instead, he asserted it for the first time at his Court-ordered
24 deposition on November 30, 2020 and has consistently done so and failed to
25 cooperate in any form of discovery since that time.

26 32. Although Defendant withdrew his answer to the original complaint in
27 an effort to invoke entry of default, Defendant later served an answer to the SAC.
28 After receiving Defendant’s answer, in which he asserted a number of affirmative
defenses, Plaintiffs served a third set of interrogatories asking Defendant to state all

1 facts and identify all people and documents supporting his affirmative defenses.
2 [Dkts. 164-1 ¶ 21; 164-27.] Plaintiffs also asked for the contact information for
3 Defendant Martha Galindo, as they were trying to serve her with the SAC. [Dkts.
4 164-1 ¶ 21; 164-27.]

5 33. Defendant failed to timely respond to this discovery. [Dkt. 164-1 ¶ 21.]
6 After Plaintiffs raised the issue with Defendant’s counsel, Defendant belatedly
7 responded. *Id.* ¶ 22. In those responses, Defendant refused to disclose how to
8 contact Martha Galindo, once again asserting the Fifth Amendment, and largely
9 declined to provide responses to the other interrogatories. [Dkt. 164-28.]

10 **IV. Defendant Has Refused to Permit Imaging of His Devices.**

11 34. Despite being apprised of the fact that the Fifth Amendment is not a
12 valid basis on which to avoid imaging of devices, Defendant refused to produce any
13 devices in his possession, custody, or control for imaging on that basis. [Dkt. 164-1
14 ¶ 5.] The only exception was an empty offer to provide for imaging a single, new
15 device that he described as never being used in connection with Nitro TV. [*Id.*; Dkt.
16 164-3.]

17 **V. Defendant’s Alleged Basis for Assertion of the Fifth Amendment as an
18 Objection.**

19 35. The Court notes that Plaintiffs informed Defendant that they did not
20 make a criminal referral [Dkt. 164-1 ¶ 8]. Additionally, the Court is unaware of any
21 evidence that a criminal investigation or case is pending. Nor has Defendant
22 asserted that he is aware of any such investigation. The Court therefore does not
23 find that Defendant has any basis for assertion of the privilege against self-
24 incrimination to avoid his discovery obligations.

25 36. Without any of the usual bases for assertion of the privilege, Defendant
26 only started asserting the Fifth Amendment after his counsel claimed to have
27 discovered a “blog” containing a survey of copyright laws in multiple jurisdictions.
28 The purported “blog” (actually an e-mail) included a section on criminal copyright.

1 [Dkts. 164-1 ¶ 8; 165 at 2; 165-4 ¶ 12.] Although the U.S. copyright law component
2 of this publication was prepared by partners at the law firm representing Plaintiffs, it
3 was prepared before (and not in connection with) the present litigation. [Dkt. 164-1
4 ¶ 8.] Plaintiffs’ counsel informed Defendant’s counsel that the publication has
5 nothing to do with this case. [*Id.*; Dkt. 164-6.]

6 37. Although Defendant’s counsel claims to have discovered this “blog” on
7 June 30, 2020 [Dkt. 165 at 2], Defendant failed to assert the Fifth Amendment in
8 discovery responses that were served *after* that date [Dkts. 58 ¶ 3; 58-2; 58-5], in
9 opposing Plaintiffs’ Discovery Motion in September 2020 [Dkt. 68], or at the
10 October 2020 hearing. [(Tr. [Dkt. 88]).]

11 38. Defendant also claimed that he invoked the Fifth Amendment in
12 response to learning that Jan van Voorn, Executive Vice President and Chief of
13 Global Content Protection Enforcement and Operations for the Motion Picture
14 Association (“MPA”), was “involved in this lawsuit.” However, Defendant had
15 been personally served with a declaration from Mr. van Voorn long before he made
16 his objection. Mr. van Voorn’s declaration was filed when the initial complaint was
17 filed and served. [Dkt. 165 at 3; Dkt. 23.]

18 **VI. Plaintiffs Have Demonstrated Their Independent Knowledge of the**
19 **Existence of the Requested Documents.**

20 39. At the outset of the case, Plaintiffs filed declarations from Jan van
21 Voorn and Kevin Plumb in support of their motion for preliminary injunction, which
22 was granted. [Dkts. 12; 13; 14; 34.] These declarations, along with the attached
23 exhibits, reflect Plaintiffs’ knowledge of the existence of numerous documents
24 showing Defendant’s operation of Nitro TV, including Plaintiffs’ knowledge of the
25 existence of (1) domain name records, as Nitro TV operated through various domain
26 names (e.g., NitroIPTV.com and tekkhosting.com) held by identified providers
27 (Domain.com, Inc., NameCheap, Inc.); (2) emails and Facebook records, as
28 Defendant utilized email (including admin@nitroiptv.com and

1 billing@tekkhosting.com) and Facebook to communicate with subscribers regarding
2 numerous issues, including the addition of new channels on Nitro TV, television
3 programs available on Nitro TV’s “24/7” channels, and copyright infringement
4 litigation against other IPTV providers; (3) reseller purchase records, as Defendant
5 operated Nitro TV through a network of resellers who purchased reseller credits; (4)
6 WHMCS subscriber management records, as Defendant utilized the WHMCS
7 service to facilitate Nitro TV subscriber management and sales; and (5) marketing
8 Facebook materials, as Defendant marketed Nitro TV and communicated with
9 subscribers and resellers through Facebook. [Dkts. 13; 13-1–13-9; 14; 14-1–14-25.]

10 40. Further, as detailed in the declarations of Julie Shepard and Jan van
11 Voorn filed in August 2020 in support of Plaintiffs’ Discovery Motion, independent
12 of Defendant, Plaintiffs knew and learned about other documents reflecting
13 Defendant’s operation of Nitro TV and the records created in the process through
14 third-party subpoenas. [See Dkts. 58; 59.]

15 41. The documents produced by third parties confirmed Mr. van Voorn’s
16 testimony that, based on his experience and his investigation pertaining to Nitro TV,
17 Defendant created and would have possessed or controlled billing records,
18 subscriber registration records, subscriber payment collection records, domain name
19 maintenance records, and website hosting records through Defendant’s operation of
20 Nitro TV. Those are documents reflecting typical transactions and communications
21 underlying the functions of most IPTV services like Nitro TV. [Dkt. 59 ¶ 5.]

22 42. In addition, Plaintiffs independently obtained additional evidence
23 reflecting the existence of the requested records. For example, Plaintiffs have
24 independent knowledge of accounts at payment processors such as Stripe and
25 PayPal, banks such as Capital One and Woodforest, and additional email accounts
26 used in the operation of Nitro TV. [See Dkts. 90-3–90-26.]

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VII. Prejudice Arising from Defendant’s Discovery Misconduct.

1 43. Defendant’s destruction of evidence and refusal to provide documents
2 and information has drawn out the discovery process and prevented or otherwise
3 delayed Plaintiffs’ discovery of relevant evidence. [See Dkt. 164-1 ¶ 13.] Plaintiffs
4 have, in fact, demonstrated that they spent a year discovering Nitro TV’s financial
5 and operational dealings only through third-party subpoenas because of Defendant’s
6 failure to cooperate and to follow the orders of the Court. Despite these efforts,
7 Plaintiffs and the Court have an incomplete picture of Nitro TV’s actions and
8 financial gains. This incomplete picture cannot be remedied with additional time or
9 third-party discovery.

10 44. This is especially true because the evidence destroyed includes the
11 wholesale deletion of Defendant’s flagship email account, NitroIPTV@gmail.com,
12 as well as the massive and surgical purge of emails from Defendant’s
13 forenzi@gmail.com account, which was used to communicate with co-Defendant
14 Richard Horsten and in setting up accounts with providers of services used by IPTV
15 services like Nitro TV.

GOVERNING STANDARDS

A. Sanctions For Violation Of Discovery Orders And Failure To Cooperate In Discovery

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19 Under Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure and pursuant
20 to their inherent power to control the cases before them, federal district courts are
21 authorized to issue sanctions based upon noncompliance with a discovery order. *See*
22 *Chambers v. Nasco, Inc.*, 501 U.S. 32, 49 n.14 (1991); *Societe Internationale Pour*
23 *Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958);
24 *see also Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (noting that the
25 district court’s “two sources of authority” are its “inherent power to levy sanctions
26 in response to abusive litigation practices” and Rule 37).

27 Under Rule 37(b)(2)(A), this Court may make such sanctions orders as are
28 “just” when a party has failed to comply with a discovery order. These include

1 orders precluding a disobeying party from introducing designated matters into
2 evidence, striking a pleading, and/or rendering a default judgment. *See* Fed. R. Civ.
3 P. 37(b)(2)(A)(ii)&(v); *see also Roadway Express v. Piper*, 447 U.S. 752, 763
4 (1980). The type of sanction ordered is within a district court’s discretion. *Von*
5 *Brimer v. Whirlpool Corp.*, 536 F.2d 838, 844 (9th Cir. 1976).

6 If the sanction ordered is less than and/or is not tantamount to dismissal, the
7 disobeying party’s noncompliance need not be proven to be willful or in bad faith.
8 *See, e.g., Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983). The
9 presence or absence of a disobeying party’s willfulness or bad faith “is relevant to
10 the choice of sanctions rather than to the question whether a sanction should have
11 been imposed.” *Marquis v. Chrysler Corp.*, 577 F.2d 624, 642 (9th Cir. 1978); *see*
12 *also Societe Internationale*, 357 U.S. at 208 (because Rule 37 requires only a failure
13 to obey an order and not a refusal, whether the disobeying party’s conduct was
14 willful or not is “relevant only to the path which the District Court might follow in
15 dealing with” the failure to comply). “In view of the range of sanctions available,
16 even negligent failures to allow reasonable discovery may be punished.” *Marquis*,
17 577 F.2d at 642; *see also David v. Hooker*, 560 F.2d 412, 419-20 (9th Cir. 1977).

18 In contrast with less severe sanctions, terminating sanctions may be imposed
19 only if there has been “willfulness, bad faith, or fault” by the party who has
20 disobeyed a discovery order. *See, e.g., Connecticut Gen. Life Ins. Co. v. New*
21 *Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). This standard is met
22 by a showing of “disobedient conduct not shown to be outside the control of the
23 litigant.” *Henry v. Gill Industries*, 983 F.2d 943, 948-49 (9th Cir. 1993) (internal
24 citation omitted); *see also In re Phenylpropanolamine (PPA) Products Liab. Litig.*,
25 460 F.3d 1217, 1233 (9th Cir. 2006).

26 In the Ninth Circuit, upon a finding of “willfulness, bad faith, or fault,” a
27 court must assess the following five factors to decide if terminating sanctions should
28 be imposed: (1) the public’s interest in the expeditious resolution of litigation; (2)

1 the court’s need to manage its docket; (3) the risk of prejudice to the party seeking
2 sanctions; (4) the public policy favoring the disposition of cases on their merits; and
3 (5) the availability of less drastic sanctions. *See, e.g., Valley Eng’rs Inc. v. Elec.*
4 *Engineering Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998); *Adriana Intern. Corp. v.*
5 *Thoeren*, 913 F.2d 1406, 1412-13 (9th Cir. 1990) (noting that this five-factor test is
6 a balancing test). When a court order has been violated, the first two factors support
7 imposing terminating sanctions and the fourth factor “cuts against” them, and thus,
8 the third and fifth factors are decisive. *Id.* at 1412; *see also Wanderer v. Johnson*,
9 910 F.2d 652, 656 (9th Cir. 1990) (“The first two of these factors favor the
10 imposition of sanctions in most cases, while the fourth cuts against a default or
11 dismissal sanction. Thus, the key factors are prejudice and availability of lesser
12 sanctions.”).

13 The third factor—prejudice—is satisfied if the disobeying party’s actions
14 impair the ability of the moving party “to go to trial” or “threaten to interfere with
15 the rightful decision of the case.” *Adriana*, 913 F.2d at 1412. Although mere delay
16 alone does not establish prejudice, a failure to produce documents, as ordered, “is
17 considered sufficient prejudice.” *Id.*

18 Under the fifth factor, a district court must consider the impact of the
19 terminating sanction sought and the adequacy of less drastic sanctions. *Id.* Whether
20 or not the district court warned a disobeying party of the possibility of dismissal is
21 relevant, but “an explicit warning is not always necessary” for a dismissal order to
22 be proper. *Id.* at 1412-13. As the Ninth Circuit explained in *Valley Engineers*,
23 *supra*, “the central factor in evaluating the district court order is justice, and
24 everyone has notice from the text of Rule 37(b)(2) that dismissal is a possible
25 sanction for failure to obey discovery orders.” 158 F.3d at 1056-57. The five-part
26 test is used “to determine whether a dismissal sanction is ‘just,’” but
27 notwithstanding the fifth factor, “it is not always necessary for the court to impose
28 less serious sanctions first, or to give any explicit warning.” *Id.* at 1057

1 (characterizing the five-part test as “a way for a district judge to think about what to
2 do, not a series of conditions precedent before the judge can do anything”).

3 **B. Fee Shifting Under Rule 37(a)**

4 If a discovery motion is granted or disclosure or requested discovery is
5 provided only after the filing of a motion, “the court *must*, after giving an
6 opportunity to be heard, require the party . . . whose conduct necessitated the
7 motion, the party or attorney advising the conduct, or both to pay the movant’s
8 reasonable expenses incurred in making the motion, including attorney’s fees.” Fed.
9 R. Civ. P. 37(a)(5)(A) (emphasis added). The exceptions to this rule are if (1) the
10 moving party did not first, in good faith, seek to obtain the discovery prior to filing
11 the motion; (2) the “opposing party’s nondisclosure, response, or objections was
12 substantially justified”; or other circumstances make an award unjust. Fed. R. Civ.
13 P. 37(a)(5)(A)(i)-(iii).

14 **DISCUSSION**

15 There are several independent grounds warranting entry of the default
16 judgment as requested by Plaintiffs: Defendant’s violation of this Court’s order;
17 Defendant’s destruction of evidence; and Defendant’s wholesale refusal to engage in
18 the discovery process. Each of these provides an independent ground for entry of
19 default judgment, but when combined make the case for entry of default judgment
20 even stronger. Defendant’s attempt to sidestep this result by belatedly asserting the
21 Fifth Amendment is unavailing.

22 **I. Defendant’s Assertion of the Fifth Amendment Is Invalid.**

23 As an initial matter, the Court must consider whether Defendant’s invocation
24 of the Fifth Amendment to avoid any of the discovery at issue is proper. For the
25 following reasons, the Court holds it is not.

26 It is for the Court to determine if Defendant’s repeated assertions of the Fifth
27 Amendment are justified; Defendant’s own “‘say-so’ does not of itself establish the
28 hazard of incrimination.” *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (“The

1 witness is not exonerated from answering merely because he declares that in so
2 doing he would incriminate himself—his say-so does not of itself establish the
3 hazard of incrimination. It is for the court to decide whether his silence is justified
4”); accord *Davis v. Fendler*, 650 F.2d 1154, 1159-60 (9th Cir. 1981).

5 “A proper assertion of a Fifth Amendment privilege requires, at a minimum, a
6 good faith effort [by the party asserting the privilege] to provide the trial judge with
7 sufficient information from which [she] can make an intelligent evaluation of the
8 claim.” *Davis*, 650 F.2d at 1160; see also *S.E.C. v. Kiselak Cap. Grp., LLC*, 2011
9 WL 4398443, at *5 (N.D. Tex. Sept. 20, 2011) (“[A] party must selectively invoke
10 the privilege against self-incrimination and ‘object with specificity to the
11 information sought from him.’”) (citation omitted).

12 A defendant must have “reasonable cause to apprehend [such] danger from a
13 direct answer” to questions posed to him. *Hoffman*, 341 U.S. at 486; see also
14 *United States v. Neff*, 615 F.2d 1235, 1240 (9th Cir. 1980). And as the party
15 resisting discovery, it was incumbent upon Defendant to establish that his assertions
16 of the Fifth Amendment were proper. *Davis*, 650 F.2d at 1159-60 (finding the
17 District Court “did not err in finding that appellant failed to support his claim of
18 privilege” even where the appellant claimed a criminal case was pending); see also
19 *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981) (“[T]he privilege normally is not
20 asserted properly by merely declaring that an answer will incriminate.”) (citation
21 omitted).

22 In this case, Defendant has not supported his broad assertion of the Fifth
23 Amendment, as he has not shown that he is faced with “substantial hazards of self-
24 incrimination,” *California v. Byers*, 402 U.S. 424, 429 (1971), that are “‘real and
25 appreciable,’ and not merely ‘imaginary and unsubstantial,’” *Marchetti v. United*
26 *States*, 390 U.S. 39, 48 (1968) (citing *Rogers v. United States*, 340 U.S. 367, 374
27 (1951)). Plaintiffs’ document requests, interrogatories, and deposition questions
28 posed to Defendant have all arisen in civil litigation, and Defendant has presented

1 no evidence that there is any criminal investigation, let alone criminal action,
2 pending.

3 Defendant points only to an email (or “blog,” as Defendant refers to it)
4 received by his counsel in June 30, 2020, which attached a survey of copyright law
5 in the U.S. and various other territories, and included discussion of its longstanding
6 criminal law components, as supporting his assertion of the Fifth Amendment in all
7 instances. [Dkts. 164-1 ¶ 8; 165 at 2; 165-4 ¶ 12.] This does not establish that
8 Defendant himself is faced with a real or substantial hazard of self-incrimination.
9 Further, Defendant cannot create a real threat of incrimination by demanding that
10 Plaintiffs agree not to make a criminal referral and then claiming that Plaintiffs’
11 refusal to do so provides a basis to invoke the Fifth Amendment.

12 Moreover, even if Defendant’s assertion of the Fifth Amendment were valid,
13 Defendant did not timely assert the Fifth Amendment as an objection to the
14 discovery Plaintiffs served. *See, e.g., Davis*, 650 F.2d at 1160 (“Clearly, the Fifth
15 Amendment is not a self [-]executing mechanism. It can be affirmatively waived or
16 lost by not asserting it in a timely fashion.”); *Kiselak Cap. Grp., LLC*, 2011 WL
17 4398443, at *5, *8 (finding that defendant had “waived his right [under the Fifth
18 Amendment] to object” to discovery requests where he “failed to present any valid
19 excuse for the now untimely assertion of his objection to the discovery requests”)
20 (citing *Davis*, 650 F.2d at 1160); *In re Hammer*, 2007 WL 9775483, at *5 (W.D.
21 Wash. Mar. 30, 2007) (“Because Appellant did not properly raise his Fifth
22 Amendment objection . . . by asserting it in a timely manner, he waived it.”); *Jaffe v.*
23 *Grant*, 793 F.2d 1182, 1190 n.6 (11th Cir. 1986) (finding that it was not error for
24 district court to find that defendant had waived objection based on Fifth Amendment
25 by defendant’s failure to timely assert it in response to discovery).

26 The Court is of the firm belief that, here, Defendant only belatedly raised a
27 Fifth Amendment objection as a tactical maneuver to further hamper Plaintiffs’
28 attempts to obtain key information through the discovery process. Defendant was

1 never in real fear of criminal prosecution. Notably, his counsel claims to have
2 discovered the “blog” in an email received in June 2020, yet Defendant did not
3 assert the Fifth Amendment until months later, notably *after* this Court informed the
4 parties in mid-October 2020 that Plaintiffs’ Discovery Motion was largely granted.

5 Finally, the Fifth Amendment privilege against self-incrimination does not
6 protect against the production of records, even if production would be testimonial in
7 nature where, as here, the information conveyed by the act of production is “a
8 foregone conclusion.” *See Fisher v. United States*, 425 U.S. 391, 411 (1976). As
9 the Ninth Circuit has explained, “where the existence and location of [documents]
10 are a foregone conclusion and the [defendant] adds little or nothing to the sum total
11 of [plaintiffs’] information by conceding that he in fact has the [documents,]”
12 enforcement of the Court’s order compelling production “does not touch upon
13 constitutional rights.” *United States v. Sideman & Bancroft*, 704 F.3d 1197, 1202
14 (9th Cir. 2013) (citation and internal quotation marks omitted). Even if the Fifth
15 Amendment applied here – which the Court does not find – the foregone conclusion
16 exception applies to the documents at issue. Plaintiffs have established with
17 “reasonable particularity” that they have “independent knowledge” of the existence
18 of authentic documents that are (or were) in defendant’s possession or control.
19 *United States v. Bright*, 596 F.3d 683, 692 (9th Cir. 2010).

20 **II. Default Judgment Is Warranted For Defendant’s Willful Misconduct**

21 Given the Court’s finding that the Fifth Amendment does not shield
22 Defendant from his discovery obligations, default judgment is warranted here due to
23 (1) Defendant’s willful non-compliance with this Court’s October 2020 discovery
24 rulings, (2) willful destruction of evidence, and (3) willful disregard for his
25 discovery obligations following the October 2020 hearing. *See, e.g., Davis*, 650
26 F.2d at 1161 (finding the trial court did not abuse its discretion in entering default
27 where the defendant did not support his late claim of privilege under the Fifth
28 Amendment, given the defendant’s “persistent unresponsiveness to both informal

1 discovery requests and formal court orders”); *Columbia Pictures, Inc. v. Bunnell*,
2 2007 WL 4877701, at *8 (C.D. Cal. Dec. 13, 2007) (entering default where
3 evidence reflected defendant destroyed evidence and refused to cooperate in
4 discovery).

5 **A. Defendant’s Actions Were Willful**

6 Defendant’s violation of the Court’s order to produce documents, and his
7 spoliation of evidence, was unquestionably willful. As detailed above, Defendant’s
8 spoliation included (1) a mass email purge within days of being served, (2) another
9 mass email purge in the days immediately surrounding when Defendant provided
10 verified discovery responses (falsely) claiming that he had no responsive documents
11 and could not name anyone else involved in Nitro TV, (3) continued use of the
12 messaging application Telegram—which was set to auto-delete messages—to
13 communicate regarding Nitro TV even after he was on notice of this action, and (4)
14 jettisoning of his electronic devices after being served with the complaint.

15 Moreover, Defendant has no excuse for his continued use of Telegram set to
16 automatically delete messages. *See Hausman v. Holland Am. Line-U.S.A.*, 2016 WL
17 51273, at *9 (W.D. Wash. Jan. 5, 2016) (“[I]f Plaintiff did have a routine practice of
18 deleting his emails . . . he was obligated to stop such practice with the onset of this
19 litigation.”); *Perez v. U.S. Postal Serv.*, 2014 WL 10726125, at *5 (W.D. Wash. July
20 30, 2014) (describing the “fail[ure] to . . . suspend routine email deletions upon
21 receiving notice of potential litigation” as “gross negligence sufficient to support
22 sanctions”).

23 **B. The Factors the Court Must Consider Favor Default as a Sanction**

24 As set forth above, the Court must weigh: “(1) the public’s interest in
25 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the
26 risk of prejudice to the [party seeking sanctions]; (4) the public policy favoring
27 disposition of cases on their merits; and (5) the availability of less drastic sanctions.”
28 *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 1169 (9th Cir. 2012) (citation

1 omitted). Four of the five factors favor ordering default here, and any public policy
2 favoring disposition on the merits is outweighed by the other factors. *See Rio*
3 *Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002) (upholding
4 default and noting that even though the “public policy favoring disposition of cases
5 on the merits weighs against default judgment, that single factor is not enough to
6 preclude imposition of this sanction when the other four factors weigh in its favor”).

7 “Where a court order is violated, the first and second factors will favor
8 sanctions.” *Comp. Task Grp., Inc. v. Brotby*, 364 F.3d 1112, 1115 (9th Cir. 2004).
9 Further, as discussed above, Defendant’s destruction of evidence and refusal to
10 provide documents and information, including after being ordered to do so, has
11 drawn out the discovery process and prevented or otherwise delayed Plaintiffs’
12 discovery of relevant evidence. [Dkt. 164-1 ¶ 13]; *see Wood v. L.A. Cty. Sheriff’s*
13 *Dep’t*, 2009 WL 5090932, at *4 (C.D. Cal. Dec. 10, 2009) (adopting report and
14 recommendation imposing terminating sanctions where party’s “refusal to comply
15 with discovery rules” “undermined the process of bringing evidence to light”);
16 *Microsoft Corp. v. Maturano*, 2009 WL 650589, at *5 (E.D. Cal. Mar. 12, 2009)
17 (default ordered where defendant’s discovery failures “unnecessarily continued the
18 duration of th[e] case,” increased plaintiff’s costs of litigation, and “prevent[ed]
19 [plaintiffs] from investigating its claims” against defendant).

20 The third factor favors default because the prejudice that Plaintiffs have
21 already suffered will only continue if this Court does not order default. Defendant
22 has defied this Court’s order by refusing to produce a single document, refusing to
23 answer questions at his Court-ordered deposition, and destroying evidence. *See*
24 [Dkt. 106-2 ¶¶ 3–4.] Indeed, Defendant’s “fail[ure] to produce documents as
25 ordered is considered significant prejudice.” *See In re Phenylpropanolamine (PPA)*
26 *Prods. Liab. Litig.*, 460 F.3d at 1227. Moreover, Plaintiffs cannot eliminate this
27 prejudice through third-party discovery. Without the documents and information
28 that Defendant has destroyed or is otherwise withholding, Plaintiffs cannot present

1 the trier of fact with a full picture of the scope and willful nature of Defendant’s
2 infringement.

3 With respect to the fifth factor, Defendant’s past conduct demonstrates that
4 nothing short of default is warranted here. Under the fifth factor, the Court may
5 take into consideration: “whether the court explicitly discussed alternative sanctions,
6 whether it tried them, and whether it warned the recalcitrant party about the
7 possibility of dismissal.” *Valley Engineers Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051,
8 1057 (9th Cir. 1998). Importantly, however, “it is not always necessary for the court
9 to impose less serious sanctions first, or to give any explicit warning.” *Id.*

10 In October 2020, this Court granted Plaintiffs’ Discovery Motion in large part
11 and ordered Defendant to pay Plaintiffs’ attorneys’ fees, pursuant to Rule 37, as
12 sanctions for his discovery misconduct. [*See* Tr. [Dkt. 88] at 7-8.] At that time, the
13 Court cautioned Defendant that although the “first step is monetary sanctions when
14 there’s behavior like this,” further discovery misconduct could lead to “more
15 onerous” sanctions, including further sanctions under Rule 37 and contempt. *Id.* at
16 6.

17 Later, at the July 7, 2021, hearing on Plaintiff’s Motion for Sanctions, the
18 Court specifically warned that Defendant should comply with the Court’s earlier
19 October Order before the Court issued a written decision on the Sanctions Motion.
20 Defendant was given a chance to mitigate further prejudice to Plaintiffs. Yet despite
21 these prior sanctions and warnings from the Court, Defendant continued to disregard
22 his discovery obligations. He has failed to produce *any* documents, and, further, has
23 refused to answer court-ordered questions about his preservation of relevant
24 documents and the identities of others involved in Nitro TV. *See* [Dkts. 164-1 ¶ 3;
25 106-2 ¶ 3.]

26 Defendant’s unwillingness to comply with the Court’s orders and his
27 discovery obligations even after being cautioned of the possibility of escalating
28 sanctions demonstrates that further sanctions short of default will be ineffective.

1 *See, e.g., Adriana Int’l Corp.*, 913 F.2d at 1413-14 (upholding entry of default
2 where district court had already imposed “alternative sanctions before default,”
3 including monetary sanctions, and warned party about the possibility of greater
4 sanctions, reasoning that party “had not complied with past sanctions, and the court
5 had no reason to believe they would in the future”); *Garrison v. Ringgold*, 2020 WL
6 6537389, at *6 (S.D. Cal. Nov. 6, 2020) (granting motion for terminating sanctions
7 and reasoning that “any other less drastic sanctions would not render Ringgold’s
8 compliance or deter any future noncompliance” where the court had already
9 imposed sanctions and the defendant had not complied).

10 Finally, it is appropriate for default judgment here to encompass the well-
11 pleaded allegations pertinent to statutory damages in a copyright case. *See C&SM*
12 *Intl v. Closet Signature*, 2018 WL 4847052, at *2 (C.D. Cal. Feb. 12, 2018) (“Where
13 . . . the plaintiff has ‘pled that the defendants engaged in continuing willful
14 infringement of its copyrights . . . the district court’s default judgment includes an
15 implied finding of willfulness.’”) (quoting *Aries Music Entm’t, Inc. v. Angelica’s*
16 *Record Distributions, Inc.*, 506 F. App’x 550, 552 (9th Cir. 2013)).

17 Accordingly, “[a]lthough termination of a case is a harsh sanction appropriate
18 only in ‘extraordinary circumstances,’ the undersigned finds that the circumstances
19 in this case warrant the entry of default judgment.” *Consumer Fin. Prot. Bureau v.*
20 *Morgan Drexen, Inc.*, 101 F. Supp. 3d 856, 875 (C.D. Cal. 2015) (quoting *Halaco*
21 *Eng’g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988)); *accord Bunnell*, 2007 WL
22 4877701, at *8.

23 **III. The Court Must Award Reasonable Attorneys’ Fees Incurred by Plaintiffs**
24 **For the Discovery and Sanctions Motions.**

25 Under Federal Rule of Civil Procedure 37(a)(5)(A), fee shifting is required if
26 the Court finds that there is no substantial basis for the losing party’s position in
27 discovery motion practice. In this case, Defendant Galindo’s willful destruction of
28

1 evidence and complete failure to cooperate in discovery warrant fee shifting
2 pursuant to the rule for both the Discovery Motion and the Sanctions motion.

3 The Court has reviewed the requests for attorneys' fees submitted by
4 Plaintiffs for both the Discovery Motion and Sanctions Motion. While the
5 Magistrate Judge granted the Discovery Motion last year, she did not enter an order
6 specifying the amount of fees to be awarded at that time. The Court therefore
7 recommends an award of \$88,080 in attorneys' fees and costs for motion practice
8 associated with the Discovery Motion.

9 The Court further recommends an award of \$93,000 for the briefing and
10 argument and costs related to the Sanctions Motion.

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13 ///

14 **RECOMMENDATION**

15 For all of the foregoing reasons, **IT IS RECOMMENDED** that the District
16 Judge issue an Order:

17 (1) accepting this Report and Recommendation;

18 (2) awarding Plaintiff fees and costs in the amount of \$88,080 in attorneys' fees
19 and costs for motion practice associated with Discovery Motion;

20 (3) awarding Plaintiff \$93,000 for fees and costs associated with litigating the
21 Sanctions Motion;

22 (4) requiring payment of all monetary sanctions ordered by the District Court
23 pursuant to this recommendation within 60 days of the District Court's Order;

24 (5) granting Plaintiff's Motion for Terminating Sanctions and ordering judgment
25 entered finding Defendant Alejandro Galindo liable in this action;

26 (6) holding that the judgment entered include an explicit finding that Defendant's
27 copyright infringement was willful, therefore encompassing the Second
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1 Amended Complaint's well-pleaded allegations related to statutory damages
2 under Federal copyright law.

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DATED: June 14, 2022



GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the United States Court of Appeals for the Ninth Circuit, but may be subject to the right of any party to file objections as provided in the Local Civil Rules for the United States District Court for the Central District of California and review by the United States District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until the District Court enters judgment.