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17 *Attorneys for Plaintiff*
V5 Technologies, LLC, d/b/a Cobalt Data Centers

18 UNITED STATES DISTRICT COURT

19 DISTRICT OF NEVADA

20 V5 TECHNOLOGIES, LLC, d/b/a
COBALT DATA CENTERS,

21 Plaintiff,

22 v.

23 SWITCH, LTD., a Nevada limited
24 company; SWITCH BUSINESS
SOLUTIONS, LLC, a Nevada limited
25 liability company; SWITCH
COMMUNICATIONS GROUP L.L.C., a
26 Nevada limited liability company;
SWITCH, INC., a Nevada corporation,

27 Defendants.
28

Case No. 2:17-cv-02349-KJD-NJK

**PLAINTIFF V5 TECHNOLOGIES,
LLC, d/b/a COBALT DATA
CENTERS':**

**(1) MOTION TO STRIKE SWITCH'S
REPLY IN SUPPORT OF
MOTION TO QUASH OR
MODIFY SUBPOENAS;
(2) MEMORANDUM OF POINTS
AND AUTHORITIES; AND
(3) DECLARATION OF CATHERINE
S. SIMONSEN**

*[Declaration of Catherine S. Simonsen
Filed Separately]*

1 Plaintiff V5 Technologies, LLC, d/b/a/ Cobalt Data Centers (“Cobalt”) hereby moves to
2 strike defendants’ (“Switch”) reply in support of its motion to quash or modify subpoenas (ECF
3 No. 68) (“Reply”). Switch’s reply is untimely; contains deliberately false representations; raises
4 new arguments and issues; and seeks relief to which Cobalt already agreed.

5 Switch’s reply is untimely. Local Rule 7-2(a) provides: “The deadline to file and serve
6 any reply in support of the motion is seven days after service of the response.” Pursuant to Local
7 Rule 7-2(a), as of the date Cobalt filed its opposition to Switch’s motion to quash, the electronic
8 filing system indicated that Switch’s reply was due seven days later — July 12, 2018. *See* ECF
9 No. 65 Docket Text (“RESPONSE to 63 Motion to Quash by Plaintiff V5 Technologies. **Replies**
10 **due by 7/12/2018.**”) (emphasis added). Switch did not file its reply in support of its motion to
11 quash by July 12, 2018. Instead, on July 12, 2018, Switch re-filed its reply in support of its
12 motion for leave to file surreply to *Cobalt’s motion to compel*, which Switch had already filed on
13 June 19, 2018. *See* ECF Nos. 62, 67. Then, on July 13, 2018, Switch filed its reply in support of
14 its motion to quash. ECF No. 68. Because Switch did not file and serve its reply by the deadline
15 to do so — July 12, 2018 — the Court should strike it. *See, e.g., R&O Constr. Co. v. Rox Pro*
16 *Int’l Grp., Ltd.*, No. 2:09-cv-01749-LRH-LRL, 2011 U.S. Dist. LEXIS 78032, at *18-19 (D. Nev.
17 July 18, 2011) (granting motion to strike untimely reply, noting “the electronic filing system also
18 clearly set forth that the reply was due by March 4, 2011,” after which movant filed reply).

19 Switch’s reply falsely represents that Cobalt “has produced only a single page of
20 documentation to support its claims.” Switch’s reply contains the knowingly false statement that
21 Cobalt “has produced only a single page of documentation” in discovery. Reply at 4. As of the
22 date Switch filed its (untimely) reply, Cobalt had produced 651 pages of documents to Switch.
23 Declaration of Catherine S. Simonsen (“Simonsen Decl.”), ¶ 2. Indeed, the very day Cobalt
24 produced these documents, Switch’s counsel contacted Cobalt’s counsel to ascertain the
25 passwords for downloading the documents. *Id.* Switch thus knew when it filed its reply that its
26 assertion that Cobalt had “produced only a single page of documentation” was objectively untrue.
27 Switch’s deliberately false representation to the Court is an independent basis on which to strike
28 Switch’s reply.

1 Switch’s reply misleadingly represents that the third-party documents are available from
 2 Switch. Switch is not in a position to complain that Cobalt’s subpoenas seek documents Cobalt
 3 should theoretically be able to obtain from Switch, when Switch has deliberately withheld
 4 documents that support Cobalt’s claims and that Cobalt has only been able to obtain from third
 5 parties. For example, in response to Cobalt’s subpoena to SilverBack, SilverBack’s former
 6 president recently produced two emails/chains with Rob Roy, Switch’s founder and CEO, from
 7 May 2015. In the first email chain, SilverBack’s former president writes to Rob Roy from his
 8 @teamsilverback.com email address:

9 **After our last conversation, I told my entire internal team what you told me**
 10 **regarding the issues and heartburn Cobalt has caused; however, I failed to tell**
 11 **Denise. . . . Now that she has the whole story, she understands (as I did after our**
 12 **first conversation regarding Cobalt) Cobalt’s intent and business strategy. She**
 13 **also understands why we no longer partner with them. . . . [P]lease know that**
 14 **I have instructed my team to cut all ties with Cobalt and we are not**
 15 **promoting them in any of our marketing channels effective 2 months ago.**

16 Simonsen Decl., Ex. A (emphasis added). In the second email, SilverBack’s former
 17 president writes to Rob Roy from the same @teamsilverback.com email address:

18 I was just informed about a press release Cobalt is planning for Monday. In that
 19 press release they list Silverback as a partner. **I have asked them to remove us**
 20 **from that press release, and not to publish our name without talking to us.**

21 If they don’t heed my request, I wanted you to know before it hits the wire, I did
 22 not authorize this use of our name, and **I remain committed to our partnership.**

23 **I am setting up a meeting with Jeff Brown to formally terminate the**
 24 **Silverback/Cobalt relationship.**

25 *Id.*, Ex. B (emphasis added). Rob Roy responds: “Thanks Ken. Truly appreciated!” *Id.*

26 Despite representing in *February 2018* that Switch had searched for *all* correspondence
 27 with anyone with the @teamsilverback.com email domain that included the words “Cobalt” or
 28 “Jeff Brown,” Switch did not produce the two emails/email chains produced by SilverBack.

 Simonsen Decl., ¶¶ 5-6 & Ex. C. Switch produced 18 *other* emails with SilverBack — which
 confirms that Switch ran a search for correspondence with emails ending in
 @teamsilverback.com — but evidently intentionally withheld these two “smoking gun” emails

1 from its production. *Id.* Far from being “duplicative” of discovery from Switch, Cobalt’s
2 subpoenas are crucial to obtaining *all* documents supporting Cobalt’s claims.

3 Switch raises a new burden argument for the first time on reply. In its reply, Switch
4 claims that Cobalt’s subpoenas to Switch’s board members “were not included in Switch’s
5 Motion to Quash” (Reply at 1). To the contrary, the *first sentence* of Switch’s motion to quash
6 reads: “Defendants Switch, Ltd., et al. (“Switch”) . . . respectfully request that the Court quash or
7 modify the subpoenas served on several of Switch’s clients, vendors, and **members of Switch’s**
8 **Board.**” ECF No. 63 at 1 (emphasis added). Regardless, if Switch has now withdrawn its motion
9 to quash the subpoenas to board members, then Switch’s burden argument — raised for the first
10 time on reply — that “Switch has also been required to pay the necessary legal fees for its board
11 members” (Reply at 4), should be stricken.

12 Switch’s request for an opportunity to designate information produced by third parties
13 “Attorneys’ Eyes Only” is moot. In its reply, Switch states, “Switch is not opposed to simply
14 modifying the terms of the subpoenas to ensure that Switch can review any documents produced
15 in order to classify them as ‘Attorney-Eyes Only’ documents.” Reply at 4. But Cobalt already
16 represented that its counsel will give Switch the opportunity to designate information potentially
17 eligible for an “Attorneys’ Eyes Only” designation under the protective order for redaction prior
18 to disclosing the document(s) containing the information to Cobalt’s client. ECF No. 65 (“Opp.
19 to Motion to Quash”) at 11 & Simonsen Decl. in Support of Opp. to Motion to Quash, ¶ 33; *see*
20 Simonsen Decl., ¶ 7. Accordingly, Switch’s request is moot and should be stricken.¹

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22
23 ¹ Cobalt’s counsel never “renege[d]” on any “agreement” to allow Switch the opportunity to
24 designate information “Attorneys’ Eyes Only” before releasing documents containing such
25 information to Cobalt’s client (*contra* Reply at 4-5). Switch cites to a “Declaration of Chad A.
26 Harrison attached hereto as Exhibit A” (Reply at 5 n.7), but there are no exhibits attached to
27 Switch’s reply. Contrary to Switch’s claim, as Cobalt made clear in its opposition to Switch’s
28 motion to quash, “no one except Cobalt’s outside litigation counsel has viewed any of the
documents produced by the third parties to date,” and Cobalt was and remains willing to allow
Switch to designate Attorneys’ Eyes Only-eligible information as such. Opp. to Motion to Quash
at 11 & Simonsen Decl. in Support of Opp. to Motion to Quash, ¶¶ 32-33. Indeed, Cobalt’s
counsel offered this compromise during a meet and confer in order to address Switch’s concerns
and *avoid* Switch filing a motion to quash. Simonsen Decl., ¶ 7. Despite this offer, Switch
nevertheless filed its motion, and now seeks relief Cobalt long ago agreed to provide.

1 Dated: July 18, 2018

By: I. Scott Bogatz

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21 DATA CENTERS

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PROOF OF SERVICE

I hereby certify that I am employed in Las Vegas, Nevada. I am over the age of 18 and not a party to the within action. My business address is:

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On July 18, 2018, I caused the foregoing document(s) to be filed via the Court’s CM/ECF system, which will accomplish service on all parties of record through their counsel.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on July 18, 2018, at Las Vegas, Nevada.

By: I. Scott Bogatz
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