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8
 9 **UNITED STATES DISTRICT COURT**
 10 **DISTRICT OF NEVADA**

11 V5 TECHNOLOGIES, LLC, d/b/a
 12 COBALT DATA CENTERS,

13 Plaintiff,

14 v.

15 SWITCH, LTD., a Nevada limited company;
 16 SWITCH BUSINESS SOLUTIONS, LLC, a Nevada
 limited liability company; SWITCH
 17 COMMUNICATIONS GROUP, LLC, a Nevada
 limited liability company; SWITCH, INC., a Nevada
 18 corporation.

19
 20 Defendants.

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

**DEFENDANTS' OPPOSITION TO
 PLAINTIFF'S MOTION TO
 COMPEL**

21
 22 Defendants Switch, Ltd., et al (“Switch”), by and through their counsel of record,
 23 Hutchison & Steffen, PLLC, hereby opposes V5 Technologies, LLC, d/b/a Cobalt Data Centers’
 24 (“Cobalt”) Motion to Compel (the “Motion”).

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This Opposition is based upon the pleadings and papers on file herein, the following points and authorities, and any oral argument that this Court may entertain at the time of hearing.

DATED this 9th day of May, 2018.

HUTCHISON & STEFFEN, LLC

/s/ Jeffrey R. Hall

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Attorneys for Defendants

1 **1. Introduction**

2 Consistent with Cobalt’s historical business practices, Cobalt’s Motion is inaccurate in
3 most respects, and misrepresentative in many others. In addition to mischaracterizing counsel’s
4 communications, Cobalt surgically omits several key facts. Switch appreciates that its motion
5 to stay discovery was denied and that Switch has a duty to press forward with discovery and has
6 acted in accordance with this obligation. Between initial disclosures and responses to discovery
7 Switch has produced approximately 4,000 documents, and did so months ago. Switch has also
8 hired a third-party vendor to comply with the ESI Order and is even now in the process of sorting
9 through millions of documents to provide even more productions. *On the other hand, Cobalt*
10 *has failed to produce a single document* in either its initial disclosures *or* in response to Switch’s
11 discovery requests.¹

12 Making matters worse, although Cobalt insists it attempted to discuss each of Cobalt’s
13 discovery requests and that Switch refused to produce documents, *Cobalt* has repeatedly refused
14 to discuss Cobalt’s requests, and it is Cobalt (not Switch) that has not produced any documents.²
15 Applying Cobalt’s own discovery principles in its document production yields a conclusion that
16 Switch has *more* than complied with its discovery obligations.

17 However, in order to assure that these issues can be resolved to the satisfaction of both
18 parties, Switch has consistently and repeatedly offered and attempted to review each of Cobalt’s
19 requests to ensure Switch’s responses were both sufficient and responsive.³ This was after
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1 Cobalt served responses to Switch’s First Request for Production of Documents on April 20, 2018. Cobalt’s Initial Disclosures identifies generic categories of documents, none of which have been produced to date, even though these are Cobalt’s claims.

2 See Declaration of Sam Castor, in-house counsel for Switch, attached as **Exhibit A**.

3 *Id.*

1 Switch provided repeated written and verbal assurances that it never has any intention to
2 withhold *any* unprivileged documents as a result of its stated objections. Despite Switch's
3 repeated offers and efforts to meet and confer, Cobalt refused to discuss its Requests unless
4 Switch unconditionally waived all objections.⁴
5

6 Just two days prior to Cobalt's filing the Motion, Switch's attorneys once again assured
7 Plaintiff's counsel verbally and in writing that all unprivileged documents had been and would
8 continue to be produced.⁵ Yet, Cobalt's counsel reaffirmed further dialogue was useless *unless*
9 Switch waived all objections. In the days since the Motion was filed, Switch has provided Cobalt
10 with amended responses for each of the Defendants in this case, and has discussed *even further*
11 amendments with Cobalt's counsel in an attempt to satisfy Cobalt's overly aggressive concerns.
12 Yet, despite these extraordinary efforts by Switch, Cobalt has refused to withdraw the Motion
13 either in whole or in part.
14

15 Because Cobalt consistently refused to discuss the actual Requests unless Switch
16 provided a blanket waiver of all objections, Cobalt has wasted the Court's time by filing the
17 Motion. Therefore, given Switch's good faith and abundant productions, as well as Switch's
18 amended responses, Switch asks this Court to deny the Motion or, at a minimum, consider it
19 moot given Switch's prior and ongoing productions.
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⁴ See, e.g., Declaration of Jeffrey R. Hall attached as **Exhibit B**, ¶ 3.

⁵ April 19, 2018 email from J. Hall to C. Simonsen attached as **Exhibit C**.

1 **2. Factual and Procedural Background**

2 **A. Switch and the National Data Center Marketplace**

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4 Data centers are the physical structures that power, cool, connect, and protect the world's
5 internet. In 2014, the United States had over three million data centers.⁶ This number has only
6 grown. Although Switch offers the world's largest and most advanced data centers, due to the
7 elite nature of Switch services, Switch's *market share* does not rank in the top 10 in the national
8 data center marketplace.⁷

9
10 Switch asserts it offers the world's best data centers for many reasons. Switch's data
11 centers incorporate more than 500 patent and patent pending claims. Additionally, Switch has
12 won several national awards for "the world's most beautiful data center"⁸, and *the* world's top
13 cloud campus⁹, above Apple, Google, HP, Amazon, Facebook, and many others. Switch's data
14 centers have been independently certified by the Uptime Institute, the most recognized standards
15 body for data centers, as the only Tier IV Gold carrier-neutral colocation data center provider
16 worldwide.¹⁰ In fact, Switch's data centers are so superior that they exceed Tier IV standards and
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21 ⁶ See <https://mashable.com/2014/09/30/doe-energy-efficiency/#QcgR0cmAeuqY>, attached as **Exhibit D**,
22 citing studies by the U.S. Department of Energy.

23 ⁷ See <http://www.datacenterknowledge.com/archives/2017/01/20/here-are-the-10-largest-data-center-providers-in-the-world>, attached as **Exhibit E**.

24 ⁸ See <http://www.datacenterdynamics.com/content-tracks/design-build/top-10-beautiful-data-centers/98421.fullarticle>, attached as **Exhibit F**, wherein Switch's data center in Michigan was ranked No. 1
25 worldwide as the most beautiful data center.

26 ⁹ See <https://datacenterfrontier.com/top-10-cloud-campuses/>, attached as **Exhibit G** wherein Switch's
27 cloud campus was ranked No. 1 worldwide, above Amazon, Apple, Equinix, Digital Realty, DuPont Fabros, Facebook, Microsoft, and Google

28 ¹⁰ See <https://uptimeinstitute.com/TierCertification/constructed-facility-certifications.php?page=1&ipp=All&clientId=203&countryName=&tierLevel=>, attached as **Exhibit H**.

1 reach a new tier 5 standard. These are only some of the reasons that Switch services are world-
2 class.

3 Additionally, Greenpeace has recognized Switch as the “definitive leader among any class
4 of company” for being 100% renewably powered. Switch’s ranking is above Apple, Google,
5 Amazon, Facebook, Microsoft, HP, IBM, Oracle, and many more entities.¹¹
6

7 At the time of Cobalt’s operation, Cobalt held *no* ranking by the Uptime Institute or
8 Greenpeace, and no awards. Switch’s *patented* technology offerings were and remain so vastly
9 superior to anything Cobalt attempted to offer that Cobalt and Switch were simply not
10 competitors. Rather, to create a parallel with the automotive industry, Cobalt offered one economy
11 vehicle while Switch offers an array of top of the line vehicles.¹²
12

13 Switch made its initial public offering on the New York Stock Exchange in November of
14 2018 and continues to actively compete against hundreds of other data center providers,
15 worldwide, as well as several data centers in the Western United States, including Exquinix,
16 CyrusOne, Aligned, CoreSite, ViaWest (now Flexential), and hundreds more.
17

18 **B. Switch’s 2011 suit against Cobalt**

19 *Switch has a long and difficult history with Cobalt.* Switch opened its doors in Las Vegas
20 in early 2000. In late 2003, Michael Ballard (who later became the founder of Cobalt Data
21 Centers) was hired to perform marketing services for Switch.
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25 ¹¹ See <https://www.switch.com/sustainability/>, attached as **Exhibit I**.

26 ¹² Switch invites the Court to view the video entitled “Straight Into Cobalt” available at
27 <https://vimeo.com/138818594> and provided via thumb-drive for the Court’s convenience. The one minute
28 video is a marketing “rap song” created by Cobalt to “compete” with Switch. There is an unmistakable
difference between Switch’s brand presence on www.switch.com designed to instill confidence in the elite
nature of Switch’s services and Cobalt’s marketing efforts that trivialize the nature of their service.

1 Ballard served in various capacities for approximately two years, including acting CFO,
2 until Ballard was terminated by Switch's Board for cause in or around April of 2006. In early
3 2008, Ballard hired Switch's former contractors and engineers to open a competing data center
4 across the street from Switch in Las Vegas; this data center would become Cobalt Data Centers.
5 Switch then learned that Ballard had illegally taken hard drives and copied confidential
6 proprietary information prior to his termination, including construction plans, trade secrets,
7 designs, customer lists.¹³ Ballard then hired referral agents and vendors to attempt to obtain more
8 of Switch's confidential information including current prices and falsely referred to himself as a
9 "founder" of Switch to raise funds and promote Cobalt.
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12 Switch sued Cobalt in February of 2011. During the course of discovery, it was revealed
13 that Cobalt had conspired to systematically misappropriate Switch's intellectual property through
14 corporate espionage and various falsehoods. It became clear that Cobalt had been engaged in
15 attempts to steal Switch's intellectual property, including patent pending trade secrets and
16 designs.
17

18 After years of discovery, motions to compel Cobalt to produce the Switch materials
19 Ballard took prior to his termination, and extensive confidential settlement negotiations, Michael
20 Ballard, John Ritter, Cobalt, and V5 Technologies all settled with Switch, *and publicly*
21 *acknowledged Switch's suit was legitimate*. Switch agreed to a nominal settlement in exchange
22 for Ballard and Cobalt publicly confessing their unlawful acts. *Accordingly, in 2013, Cobalt,*
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26 13 As noted in Switch's filings in Case No. 2:11-cv-00285-JCM-GWF, Cobalt's founder kept several
27 Switch computers and documents and emailed himself customer lists, as well as a building schedule for one of
28 Switch's (then) patent pending data center projects on April 5, 2007; Mr. Tom Harris with Harris Consulting
Engineers, an investor in Cobalt and touted as a member of Cobalt's Management Team was privy to the plans. As
one might expect, Switch was extremely alarmed by the overt activities of Cobalt, and viewed Cobalt's actions as
explicit misappropriation of Switch's *now* patented designs.

1 *Ballard, and V5 Technologies publicly acknowledged the validity of Switch’s lawsuit and*
 2 *admitted in the public settlement agreement that Ballard had breached his agreements with*
 3 *Switch, misrepresented his role as a Switch “founder”, and stolen Switch’s intellectual property*
 4 *and confidential information all to unlawfully compete with Switch.*¹⁴ Cobalt also released all
 5 alleged claims raised against Switch during the course of the suit, ***including past, present, and***
 6 ***future*** claims of anti-trust due to Switch’s AUP.¹⁵ Given the history and reputation of the
 7 Plaintiff, Switch maintains and will demonstrate throughout this matter that the suit is frivolous.¹⁶
 8 Switch further raises these facts to underscore the disparity between Switch’s compliance with
 9 discovery rules and Cobalt’s lack of production to date.
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12 **D. Procedural History.**

13 On September 7, 2017, Cobalt filed its Complaint against Switch.¹⁷ Cobalt named four
 14 entities as Defendants: (i) **Switch, Ltd.** (the parent company and the only one of the four in any
 15 way related to the allegations made against Switch), and the following “Irrelevant Switch
 16 Entities”: (ii) **Switch Business Solutions, LLC**, (iii) **Switch Communications Group, LLC**,
 17 and (iv) **Switch, Inc.**¹⁸
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21 ¹⁴ See Settlement Agreement attached hereto as **Exhibit J**. The recitals in the Settlement Agreement
 22 provide that Ballard admitted that preliminary plans for the Cobalt datacenter resembled Switch’s datacenter and its
 23 design, that he possessed numerous emails and Switch related documents after his termination from Switch, and
 24 that he referred to himself as a “founder” of Switch in violation of his exit settlement agreement with Switch.

25 ¹⁵ *Id.* at § 4.

26 ¹⁶ This is a meritless lawsuit brought for improper purposes brought by a man who is known for
 27 such abusive lawsuits: John Ritter. Ritter has personally been involved in a number of suits, and is
 28 currently going through personal bankruptcy. Ritter, as the surviving investor in post-Ballard Cobalt,
 appears to have strategically filed this suit days before Switch began its initial public offering efforts in
 November, 2017. Switch can only assume that, in filing this lawsuit, Ritter’s goal has been to secure a
 nuisance settlement or at least blame someone else for his own business failures.

¹⁷ Plaintiff’s Complaint, attached as **Exhibit K**.

¹⁸ *Id.*

1 At the outset of the suit and throughout, Switch notified Cobalt that Switch, Ltd. was the
2 only entity with any potential involvement in the case at hand.¹⁹ To wit, Switch noted that Switch,
3 Inc. was not incorporated until June 14, 2017, over eighteen (18) months after Cobalt closed its
4 doors in December of 2015. Switch also noted that “Switch Communications Group L.L.C.” was
5 the same entity as Switch, Ltd., (due to a name change in 2014). Additionally, Switch Business
6 Solutions, LLC is a *regulatory* entity, not an operating entity, holding permits, including a
7 Competitive Local Exchange Carrier License with the Public Utilities Commission of Nevada.
8

9 On October 16, 2017, Switch moved to dismiss the Complaint pursuant to FRCP
10 10(b)(6).²⁰
11

12 Prior to providing its initial disclosures, Switch explained to Cobalt that *only* Switch, Ltd.,
13 was the necessary or factually available party in the lawsuit and that the other defendants should
14 be dismissed. Plaintiff’s counsel refused to acknowledge the distinction and asked for a formal
15 letter detailing the rationale. On December 12, 2017, Switch provided its initial disclosures. On
16 December 18, 2017, Cobalt provided its initial disclosures.
17

18 To date, Switch has produced approximately 4,000 pages of documents in pdf format, and
19 has since retained a third-party service provider (Epiq) to search and produce all relevant meta-
20 data, and has provided responses to all of Cobalt’s discovery requests. Switch also agreed to re-
21 produce its prior productions in .tiff format and completed that re-production on May 4, 2018.²¹
22 *In contrast, Cobalt has not provided a single document.*
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26 ¹⁹ See multiple emails on November 28, 30, and December 4, 5, and 18, attached as **Exhibit L**, wherein,
27 at least as early as December 5, 2017, Plaintiff’s counsel agreed to contact Switch’s in-house counsel *only* as an
28 effort by Switch to mitigate costs in this matter, and failed to do so when serving discovery.

²⁰ Switch’s Motion to Dismiss, attached as **Exhibit M**.

²¹ See Hall Declaration, **Exhibit B**.

1 On October 16, 2017, Cobalt served its First Set of Requests for Production of Documents
2 on Switch.²² Cobalt addressed those Requests to “Switch.” No other names were used. Only one
3 set of requests was provided. Later in the Requests, Cobalt specified that “Switch” was defined
4 as all four Defendants.²³
5

6 On December 20, 2017, Switch, Ltd. timely responded to Cobalt’s Requests, and produced
7 1,417 pages of documents responsive to Cobalt’s Requests.²⁴ This production was *before* the ESI
8 order was filed on December 26, 2017.

9 Switch, Ltd. was the only entity to respond on December 20, 2017 because it the only
10 entity served, and because Switch trusted Cobalt appreciated the other entities were irrelevant.
11 However, in an abundance of caution, on January 16, 2018, Switch sent a letter informing Cobalt
12 once again that Switch, Ltd. was the only entity that would have been involved during the relevant
13 window: 2013-2016. Even so, after Cobalt raised concerns and properly served all entities,
14 Switch provided timely Responses on behalf of all entities (even the fictional ones).
15

16 Switch has worked in good faith to resolve the issues set forth in Cobalt’s Motion to
17 Compel, though Switch disagrees entirely with premise of the Motion.²⁵ Switch has served
18 amended responses to Cobalt’s written discovery requests, consistent with Switch’s position that
19 it was not intending to withhold documents based on objections.²⁶ Additionally, Switch has
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22 Cobalt’s First Set of Requests for Production, attached as **Exhibit N**.

24 *23 Id.*

25 *24 See* December 21, 2017 email to Plaintiff’s counsel noting Switch was producing “our responses to
26 your First Request For Production of Documents (1-93)” and asking counsel to “let Switch know if they had any
27 questions or concerns,” attached as **Exhibit O**. *See also* February 6, 2018 email to Plaintiff’s counsel in which
Switch produced an additional 22 PDFs (a total of 2,814 pages of documents), attached as **Exhibit P**.

28 *25 See* Hall Declaration, **Exhibit B**.

26 Id.

1 worked to move discovery along in this matter, focusing on the substantive issues. Switch has
2 produced organizational charts and employee rosters to further discussions with opposing counsel
3 concerning custodians,²⁷ and agreed with Cobalt concerning custodians and search terms.²⁸
4
5 Counsel for Switch has engaged in numerous discussions with counsel for Cobalt to move
6 discovery forward.²⁹ The instant Motion to Compel was *not* necessary given Switch’s active good
7 faith cooperation concerning discovery issues.

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10 **3. Legal Standard**

11 “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
12 party’s claim or defense and proportional to the needs of the case.”³⁰ The responding party may
13 object to discovery requests, but the grounds for objecting to discovery must be stated with
14 specificity.³¹ A party may bring a motion to compel responses to discovery requests if it deems
15 the responding party to be uncooperative.³² However, if the court determines that a party has
16 already complied with the requests made in a motion to compel, it may deny the motion as moot.³³

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22 ²⁷ *Id.*

23 ²⁸ *Id.*

24 ²⁹ *Id.*

25 ³⁰ Fed. R. Civ. P. 26(b)(1).

26 ³¹ Fed.R.Civ.P. 34(b)(2)(B).

27 ³² Fed.R.Civ.P. 37(a).

28 ³³ *See, e.g.,* United States v. Tran, No. CR 09-172 MJD/SRN, 2009 WL 10678874, at *2 (D. Minn. Oct. 9, 2009).

1 **4. Legal Argument**

2 **A. The Three Defendants Timely Responded to the Requests and in Doing So**
3 **Did Not Waive Their Objections.**

4 Switch maintains its original position that the Irrelevant Switch Entities should be
5 dismissed as non-existent or unrelated. Additionally, Switch maintains that the Irrelevant Switch
6 Entities were not served *until* March 8, 2018. Plaintiff's counsel agreed to limit contact and
7 service to Switch's in-house counsel (at Switch's insistence to help mitigate costs) but failed to
8 do so.³⁴ As such, if Switch misunderstood Cobalt's manner of addressing its Requests, that
9 misunderstanding was due to the party's agreement that only Switch's in-house counsel would be
10 served/contacted; *which did not occur*.

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12
13 This is why Cobalt conceded and finally attempted to serve the three Irrelevant Switch
14 Entities on March 8, 2018, acknowledging that these three entities had not been previously served.
15 Switch timely responded to these new sets of discovery requests, in good faith, while again noting
16 that the Irrelevant Switch Entities were non-existent or have no nexus with the instant suit.

17
18 Additionally, after this Motion was filed, all Switch entities provided Cobalt with
19 Amended Responses to all of Cobalt's Requests.³⁵ Switch, Ltd.'s Amended Responses are
20 intended, in the spirit of cooperation and administrative efficiency, to resolve all if not a majority
21 of the issues raised in the Motion. Those Amended Responses are addressed in further detail in
22 sections 4B and 4C, *infra*.

23
24 The Amended Responses from the Irrelevant Switch Entities also address Cobalt's
25 concerns. The Irrelevant Switch Entities all maintain the objections made in their original
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34 *See* emails contained in **Exhibit L**.

35 *See* Amended Responses from all four Switch Defendants, attached as **Exhibit Q**.

1 Responses, as Switch does not feel that, at worst, a good faith error between the parties should
2 result in the forfeiture of objections, particularly when those Requests are objectively faulty.

3 However, the Irrelevant Switch Entities' Responses *have* been amended in two significant
4 ways. First, the types of objections and their phrasing, although maintained, have been revised
5 to mirror Cobalt's own objections to Switch's discovery, in an attempt to allay Cobalt's concerns
6 set forth in the Motion. Second (and more importantly, based on the emphases in the Motion),
7 all Irrelevant Switch Entities have made it clear that they *are not withholding, and do not intend*
8 *to withhold, any unprivileged documents as a result of their objections.* Switch's actions and
9 unreciprocated concessions more than make up for any alleged deficiencies in the other three
10 Switch Defendants' Responses. Moreover, any perceived delay on Switch's part was due to the
11 time required to secure an appropriate ESI service provider (which was permitted in the fully
12 negotiated protective order).³⁶

13
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15 **B. Switch's Objections Were Reasonable and Made in Good Faith; Nevertheless,**
16 **Cobalt's Problems with Switch's Responses Have Been Resolved by Switch's**
17 **Amended Responses.**

18 Cobalt spends a significant amount of time arguing about each of Switch's objections to
19 Cobalt's various Requests. However, as stated above, Cobalt's only substantive goal was to
20 receive an assurance that no documents are being withheld by Switch as a result of their
21 objections. As noted *supra*, Switch has served Amended Responses which make nearly all of the
22 changes requested by Cobalt in the Motion (as described below), and as such, the Motion is moot.
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27 ³⁶ See pg. 2, ln. 20 of the ESI Order, where the parties noted that "Switch will produce ESI in compliance
28 with this ESI Stipulation within a reasonable time after securing such a vendor who can properly perform its
services within Switch's secure environment and under these unique circumstances." This line was expressly
negotiated between the parties to ensure Switch could locate a service provider that met Switch's regulatory and
customer based security requirements. **No time limit was imposed.**

1 Switch's General Objections. Switch's in-house counsel spent hours crafting and tailoring
2 the original objections to each response and did not rely on "general objections," despite the
3 allegations in the Motion.³⁷ In its amended responses, Switch has removed any reference to
4 general objections from each of its Responses. Rather, the General Objection section of Switch's
5 Responses now contains exactly one objection, identical to a general objection made in Cobalt's
6 Responses to Switch's First Set of Requests for Production of Documents.
7

8 Form of Production. Switch has removed these objections from its Amended Responses.
9 The parties are very close to agreeing upon search terms and a list of Switch's custodians of
10 records. Switch is in the process of preparing for the production of all nonprivileged responsive
11 documents to Cobalt in compliance with the terms set forth in the ESI stipulation.
12

13 Temporal Scope. Switch has removed from all of its Amended Responses the more
14 general objection that Cobalt provided no temporal scope. Where applicable, an objection to the
15 relevant time period has been made in individual Responses. Switch's specific concern is with
16 the length of the timeframe from which Cobalt has requested documents, particularly due to the
17 limits imposed by the Switch/Cobalt Settlement Agreement from March, 2013. In recent
18 communications between the parties' attorneys, both sides have agreed that some narrowing of
19 the temporal scope would be appropriate. Switch intends to produce all nonprivileged responsive
20 documents to Cobalt in compliance with whatever temporal limitations are agreed upon by the
21 parties.
22

23 Possession/Availability. Switch has removed some of the objections Cobalt addresses
24 with regard to possession/availability. Some objections remain as originally presented if, based
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27

28 ³⁷ See Castor Declaration, **Exhibit A**, at ¶3.

1 on the searches that *have* been performed, Switch has been unable to locate documents responsive
2 to some Requests. However, nearly every amended Response explicitly indicates that Switch will
3 be performing additional searches once the parties agree upon search terms and custodians of
4 records, and will produce all nonprivileged documents to Cobalt which those searches identify as
5 responsive. At that point, Switch anticipates that additional documents will be identified,
6 reviewed for privilege, and produced.
7

8 Vague, Ambiguous, Overbroad, Unduly Burdensome, and Irrelevant. Switch still has
9 concerns with the nature of many of Cobalt's requests, including even the definition of Cobalt
10 itself, in Request No. 1. This was the only objection Cobalt was willing to discuss with Switch
11 in the attempted meet and confers. In that conference, Switch's counsel noted that the definition
12 of "Cobalt" included a list of approximately 17 different entities, roles, and individuals, and that
13 Switch had no way of knowing the identities of everyone included in that universe of people.
14 Cobalt's counsel responded that she would confer with her co-counsel and contact Switch's
15 counsel again. This never occurred.
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18 The same problem occurs throughout Cobalt's Requests, as there are a number of
19 additional definitions with identical extensive lists of entities, roles, and individuals to be included
20 in the defined term. Furthermore, several of Cobalt's individual requests contain terms that are
21 vague, ambiguous, overbroad, etc.
22

23 Nevertheless, Switch has significantly altered its objections wherever possible. With
24 regard to Cobalt's defined entities, Switch notes where applicable that Cobalt's definitions are
25 simply too broad for Switch to ensure that every listed individual and entity is included. With
26 regard to terms included only in individual Requests, Switch has specified which terms it deems
27 to be vague, ambiguous, or overbroad. And, as mentioned above, nearly every Response
28

1 explicitly indicates that Switch will be performing additional searches once the parties agree upon
2 search terms and custodians of records, and *will produce all nonprivileged documents to Cobalt*
3 *which those searches identify as responsive*. No documents will be withheld as a result of
4 Switch's vague/ambiguous/overbroad objections, and as such Cobalt's arguments in the Motion
5 are moot.
6

7 Duplicative, Compound, Speculation, Foundation/Premise. Switch has clarified these
8 objections as well, and has noted that all nonprivileged responsive documents will be produced
9 to Cobalt. However, in some of these situations, Switch will be unlikely to find responsive
10 documents without some additional clarification by Cobalt. For example, in Requests that Switch
11 understands to require speculation, it will be difficult for Switch to identify truly responsive
12 documents. In Requests whose premise Switch disagrees with (for example, Switch's "intent to
13 control markets"), Switch may be unable to locate documents without some clarification or
14 narrowing of the Request by Cobalt. Nevertheless, Switch again notes that no nonprivileged
15 responsive documents that result from the good-faith searches performed by Switch in an attempt
16 to respond to these Requests will be withheld from Cobalt.
17

18
19 Confidentiality and Trade Secrets. Switch has modified all of these objections to clarify
20 that it intends to produce documents that it deems confidential or related to trade secret pursuant
21 to the terms of the stipulated protective order. Confidential/trade secret documents have not and
22 will not be withheld as a result of these objections, except to the extent permitted by the ESI order
23 (namely, when disclosing confidential documents that require third party approval); rather, they
24 will be produced in the specific manner which both parties have agreed upon to protect sensitive
25 documents.
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1 **C. Switch has Resolved All of Plaintiff’s Concerns through Their Amended**
2 **Responses.**

3 Cobalt’s concerns with regard to the language in Switch’s Responses is focused on form
4 over substance. Cobalt has spent significant time parsing out each of Switch’s responses. As such,
5 Switch has modified its searches to address the problems alleged by Cobalt as described in Section
6 4B, *supra*.

7 Additionally, nearly every Response explicitly indicates that Switch will be performing
8 additional searches once the parties agree upon search terms and custodians of records, and will
9 produce all nonprivileged documents to Cobalt which those searches identify as responsive. As
10 has been repeatedly stated, *no* nonprivileged documents have been or will be withheld solely as
11 a result of Switch’s objections.
12

13 **D. Switch Has No Objection to Producing “All Responsive, Non-Privileged**
14 **Documents” Pursuant to the Parties’ Ongoing Negotiations With Regard to**
15 **Applicable Search Terms and Custodians of Record.**

16 As set forth above, Switch has made and is continuing to make every effort to cooperate
17 with Cobalt in the production of documents, and committed before the Motion was filed not to
18 withhold any properly discoverable documents for any reason other than privilege. That being
19 said, this is a complex case. In current discussions between the parties’ attorneys, more than thirty
20 (30) different custodians of record for Switch have been identified. These custodians’ emails and
21 documents will need to be searched by Epiq, Switch’s third party provider, then copied from
22 Switch’s internal databases and reviewed for privilege prior to being produced. That search will
23 be performed using a list of search terms agreed upon by both parties. While the discussions
24 regarding search terms are progressing quickly, and will likely be completed soon, there is still at
25 least some discussion remaining. The parties have not yet addressed search terms for Cobalt.
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1 None of this should be construed as a representation that Switch does not intend to
2 cooperate with Cobalt's requests for documents pursuant to federal law. The opposite is true, as
3 evidenced by Switch's current production, and extensive and ongoing communications with
4 Cobalt's attorneys. Switch is entirely willing to produce all responsive documentation by the
5 (arbitrary) May 31, 2018 deadline suggested by Cobalt. However, that willingness is *contingent*
6 upon the parties reaching an agreement with regard to custodians and search terms for both sides
7 quickly enough that the searches can be done and all resulting documents can be reviewed for
8 privilege. Switch *can* firmly commit, however, to working as quickly as possible and providing
9 all nonprivileged responsive documents to Cobalt as quickly as time permits.
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1 **5. Conclusion**

2 Cobalt's requests to this Court are both unreasonable and unnecessary, as the parties have
3 been actively working to ensure that Cobalt receives every non-privileged document in Switch's
4 possession, custody, and/or control that is responsive to Cobalt's Requests. The Motion is
5 focused almost exclusively on the *form* of Switch's Responses rather than the actual documents
6 that have been and will be produced. However, in order to ensure that this litigation proceeds
7 smoothly, Switch has served Amended Responses that address all of Cobalt's concerns, and
8 Switch intends to continue working with Cobalt to ensure that the all nonprivileged responsive
9 documents are produced. As such, Switch respectfully requests that this Court deny Cobalt's
10 Motion as moot.
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13 DATED this 9th day of May, 2018.

14
15 HUTCHISON & STEFFEN, LLC

16 */s/ Jeffrey R. Hall*

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