

4. An opinion from the Southern District of California granting the plaintiff's motion to compel the defendant to produce financial data, including from its franchisees to the extent that the defendant had the legal right to access and audit the franchisees' financial data under the relevant franchise agreements.

In *Hall v. Marriott Int'l, Inc.*, 2021 WL 1906464 (S.D. Cal. May 12, 2021), U.S. Magistrate Judge Allison H. Goddard granted Plaintiff's motion to compel discovery over Defendant's objections that responding would be unduly burdensome.

During discovery in this putative consumer class action alleging false and deceptive advertising in the way Defendant represented the prices for its hotel rooms, services, and amenities, Plaintiff sought (among numerous other requests at issue in its motion to compel) revenue and accounting data from Defendant that contained a breakdown of certain fees collected by both Defendant and its franchisee hotels. *Id.* at *11. After failing to object to these requests in their initial discovery responses, any meet-and-confer correspondence, or in any other correspondence to the court, Defendant failed to produce the requested information, and the parties informed the court that they had reached an impasse on these matters. *Id.* at *3. Thereafter, Plaintiff filed this motion to compel, and Defendant objected on the basis that the requests were unduly burdensome.

Magistrate Judge Goddard began her analysis by reviewing the standards applicable to claims of undue burden, *id.*, at *10, namely, that a party claiming that discovery requests are unduly burdensome must do so with specificity — alleging the specific nature and extent of the burden usually by affidavit or other reliable evidence. Boilerplate objections are improper unless based on particularized facts. Conclusory allegations of general harm or inconvenience are insufficient, and just because complying with certain requests “will involve expense or may be time consuming, does not make it unduly burdensome.” *Id.* Thus, Magistrate Judge Goddard noted that she would “closely scrutinize Defendant's description of the alleged burden and disregard conclusory speculation.”

As an initial matter, Magistrate Judge Goddard found that Defendant's objections on undue burden grounds had been waived because they were made for the first time in Defendant's opposition to the motion to compel: “When a party raises an objection to a discovery request for the first time in an opposition to a motion to compel, that objection is waived, unless good cause exists to excuse the objection's untimeliness.” Courts have broad discretion in determining whether there is good cause, considering (1) the length of the delay, (2) the reason for the delay, (3) the existence of bad faith, (4) the prejudice to the party seeking the disclosure, (5) the nature of the request, and (6) the harshness of imposing the waiver. *Id.* at *11. Here, Magistrate Judge Goddard found that Defendant had not demonstrated good faith in making its objections because no information on the purported burden had been shared with Plaintiff before the motion to compel was filed.

However, Magistrate Judge Goddard also addressed the merits of Defendant's undue burden objections and found them deficient. *Id.* Defendant objected to producing information regarding the amount of amenity and resort fees collected for franchised hotels on the grounds that it did not actually possess this data. Rather, Defendant claimed that its franchisees were in possession of the requested data. Magistrate Judge Goddard determined that this was not a “legitimate or burdensome barrier to discovery,” reasoning that Defendant's profit from its franchise agreements is based on a percentage of revenue, and by virtue of franchise agreements, Defendant had the

right to access and audit the franchisees' books. In this context, Magistrate Judge Goddard noted that she had located Marriott franchise agreements through a simple online search, which contained audit provisions.

Magistrate Judge Goddard noted that while Defendant was required to "produce information in its possession, custody, or control," this does not require *actual* possession, custody, or control. *Id.* at *12. Rather, "[p]roperty is deemed within a party's possession, custody, or control if the party has ... the legal right to obtain the property on demand." *Id.* (citation omitted). Magistrate Judge Goddard stated that "the fact that Defendant may have to expend time and energy to retrieve the documents does not make the documents inaccessible or outside of Defendant's control." Furthermore, in responding to discovery requests, a party "is under an affirmative duty to seek that information reasonably available to it from its employees, agents, or others subject to its control." *Id.* (citation and alterations omitted). In this case, Magistrate Judge Goddard held that Defendant had failed to establish that it would be unduly burdensome to respond to Plaintiff's discovery requests and that Defendant must obtain the requested revenue data from franchised hotels to the extent that it has a right to access financial data for those hotels through an audit or other contractual provision.