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14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 WESTERN DIVISION

17 In re Subpoena Of
18 BELLATOR SPORT WORLDWIDE,
19 LLC
20 Underlying Matter
21 Cung Le, Nathan Quarry, Jon Fitch, et
22 al., on behalf of themselves and all
23 others similarly situated,
24 Plaintiffs,
25 v.
26 Zuffa, LLC, d/b/a Ultimate Fighting
27 Championship and UFC,
28 Defendant.

Case No.: 2:17-mc-00016-PSG-RAO
Underlying Case No.: 2:15-cv-01045-
RFB-PAL (D. Nev.)

**ZUFFA, LLC’S OPPOSITION TO
NON-PARTY BELLATOR SPORT
WORLDWIDE, LLC’S MOTION
TO QUASH OR MODIFY
SUBPOENAS**

Judge: Hon. Rozella A. Oliver
Date: March 29, 2017
Time: 10:00 AM

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1 **I. INTRODUCTION**

2 Zuffa, LLC (“Zuffa”) is a defendant in a large class action antitrust lawsuit
3 brought by athletes who were formerly under contract with the UFC. *Cung Le et al. v.*
4 *Zuffa, LLC*, Case No. 15-1045-RFB-PAL (D. Nev.) (“Nevada Action”). In this suit,
5 Plaintiffs allege that Zuffa has monopolized the market for “live Elite Professional
6 MMA bouts” by foreclosing other MMA promoters from access to “elite MMA
7 fighters,” “key sponsors,” content distributors, and “premier venues.” ECF 1-1, Ex. A
8 to Kelly Decl., Consolidated Amended Class Action Complaint (hereinafter, “CAC”)
9 ¶¶ 55, 68, 76, 107, 116, 122. According to Plaintiffs, Zuffa’s monopolization of the
10 market for MMA bouts has enabled Zuffa to become a monopsonist in the market for
11 “Elite Professional MMA Fighter services.” *Id.* ¶¶ 77, 159-160.

12 Bellator Sport Worldwide, LLC (“Bellator”) is a major MMA promotion that
13 competes with Zuffa in the markets that Plaintiffs allege and that Plaintiffs say Zuffa
14 has monopolized. Bellator, televised on Spike TV and owned by Viacom, in less
15 than a decade has “steadily grown its market, signing an enviable roster of new
16 prospective athletes as well as well-known free agents from the United States and
17 abroad” ECF 1 (“Mot. to Quash”) at 3.

18 Zuffa would not normally seek non-public information from a competitor, such
19 as Bellator, but Zuffa’s counsel and experts must have access to certain Bellator
20 documents to defend against the antitrust lawsuit brought in the Nevada Action. Zuffa
21 cannot defend against the allegations of monopoly or monopsony without this
22 discovery. Zuffa will show that it has not constrained athlete choice and rather has
23 increased athlete pay and the supply of MMA events and products, all of which
24 requires data and documents from Bellator. Zuffa will also show that it has competed
25 in a market subject to entry by promoters such as Bellator, again requiring discovery
26 from Bellator. Zuffa cannot defend a lawsuit about competition consistent with due
27 process without discovery from Bellator.

28 To gather evidence that would support or refute Plaintiffs’ antitrust theory, the

1 parties to the Nevada Action have issued subpoenas to third parties, including athletes,
2 managers, and other competing MMA promoters. After issuing these subpoenas, both
3 parties have negotiated extensively with third parties to minimize the burden of
4 compliance with the subpoenas in accordance with Federal Rule of Civil
5 Procedure 45. Declaration of Stacey K. Grigsby (“Grigsby Decl.”) ¶ 3. Zuffa’s
6 counsel has spent over 18 months attempting to tailor the scope of its subpoena to
7 Bellator so as to minimize the burden of compliance for a non-party organization.
8 Zuffa has also agreed to a strict protective order so that necessary information will be
9 disclosed to Zuffa counsel and experts, but not Zuffa.

10 Despite these efforts, Bellator has brought a motion to quash three requests in
11 Zuffa’s subpoena, namely Zuffa’s requests for: Bellator’s unredacted contracts and
12 documents regarding its negotiations with athletes, and limited financial information
13 including profit/loss statements and financial projections. Bellator argues that the
14 information contained in these documents is confidential commercial information, that
15 the documents are irrelevant to the claims and defenses at issue in the Nevada Action,
16 that producing the information would be an undue burden, and that Bellator may
17 suffer competitive harm from disclosing the information. Bellator is incorrect: this
18 information is relevant – essential – to the claims or defenses of the Nevada Action.
19 As discussed more extensively below, the requested information is highly relevant to
20 both parties’ competition in the relevant markets. Furthermore, the disclosure of the
21 requested information would impose little, if any, burden on Bellator. Finally,
22 Bellator’s competitively sensitive information would be protected by the protective
23 order in the Nevada Action, which permits documents of an extremely sensitive nature
24 to be produced as Highly Confidential – Attorneys’ Eyes Only. *Le*, 15-cv-01045,
25 ECF No. 217. Moreover, the parties are willing to modify the protective order further
26 to address Bellator’s specific concerns about protecting its confidential commercial
27 information.

1 **II. FACTS**

2 **A. Plaintiffs' Antitrust Lawsuit Against Zuffa**

3 Plaintiffs' antitrust putative class action lawsuit alleges that Zuffa engaged in
 4 anticompetitive conduct in two markets. First, Plaintiffs allege that Zuffa has
 5 monopolized the output market for "live Elite Professional MMA bouts." CAC ¶ 55.
 6 According to Plaintiffs, Zuffa effected this so-called monopolization through
 7 exclusive contracts with venues, sponsors, athletes, and content distributors. As a
 8 result, Plaintiffs allege that Zuffa "has the ability to foreclose, and in fact foreclosed,
 9 would-be rivals from the market for promoting live Elite Professional MMA bouts,"
 10 and that Zuffa has "deprived potential and actual competitors of Elite Professional
 11 MMA Fighter services . . . [and] top quality venues, sponsors, endorsements, [and]
 12 PPV and television broadcast outlets." *Id.* ¶¶ 68, 73.

13 Second, Plaintiffs allege that through its conduct Zuffa has become a
 14 monopsonist in the input market for "Elite Professional MMA Fighter services."
 15 Notwithstanding the existence of other MMA promoters, Plaintiffs claim that the UFC
 16 is "the 'only game in town' for Elite Professional MMA Fighters who want to earn a
 17 living in their chosen profession at the highest level of the sport of MMA." *Id.* ¶ 5.
 18 According to Plaintiffs, other promoters are "minor leagues . . . developing talent for
 19 the UFC but not competing directly with it," *id.* ¶ 7, that are unable to:

- 20 • Provide athletes with "lucrative bout purses, endorsements, or sponsorships."
 21 *Id.* ¶ 135.
- 22 • Offer athletes an opportunity "to maintain a successful MMA fighting career
 23 outside of the UFC" or "to build public notoriety, reputation, fan base, sponsor
 24 interest and earnings potential." *Id.* ¶ 138.
- 25 • "Secure sufficient public interest or sponsors and venues large enough or
 26 prestigious enough to generate revenues and bout purses that can sustain the
 27 demands of training costs, travel, health coverage, gym membership, sparring
 28 partners, and other expenses necessary for sustaining a career" *Id.* ¶ 139.

- “Invest in and develop Professional MMA Fighters to their full potential . . .” and therefore “can only afford small purses.” *Id.* ¶ 140.

B. Third Party Discovery In The Nevada Action

Much of the evidence needed to prove or disprove Plaintiffs’ sweeping allegations about the market for “live Elite Professional MMA bouts” and “Elite Professional MMA Fighter services” lies in the hands of Zuffa’s competitors. As a result, the parties to the Nevada Action have served a significant number of third party subpoenas. Plaintiffs have subpoenaed¹ a number of past and current UFC competitors and individuals associated with those entities, including Bellator.

On September 29, 2015, Zuffa served its subpoena on Bellator (“Bellator Subpoena”) containing 15 discrete requests. Mot. to Quash at 5; Kelly Decl. Ex. C. This subpoena included the requests that are the subject of Bellator’s instant motion:

Zuffa Document Request No. 1: All Agreements between Bellator and any Athletes relating to participation in a Combat Sport, including any Professional MMA Fighters, and any Documents and Communications relating to the negotiation, termination, cancellation or transfer thereof. Responsive Documents include, without limitation, executed Agreements, draft Agreements, side letters, all negotiations between Bellator and any Athlete, including any Professional MMA Fighters, or their agents, managers, promoters, or other representatives (regardless of whether such negotiations resulted in an executed Agreement), copies of any form agreements; and all Documents relating to the effects any such actual or potential Agreements between Bellator and any Athlete, including any Professional MMA Fighter, had on Bellator’s revenues, valuation, or ability to operate profitably as a Promoter.

¹ Zuffa cross-subpoenaed these individuals and entities.

1 **Zuffa Document Request No. 7:** Documents sufficient to show each
2 Professional MMA Bout presented or promoted by Bellator or planned to
3 be presented or promoted by Bellator, regardless of whether the event
4 actually took place, including the date, time, location, name of Venue, the
5 Athletes involved, all compensation paid to the Athletes, all income or
6 other consideration or other consideration Your Company received or
7 projects to receive from presenting each Professional MMA Event
8 (including actual or projected ticket prices and gate receipts, advertising
9 revenue, Broadcast revenue, merchandising revenue and sponsorship
10 revenue), the costs of promoting each Professional MMA Event
11 including but not limited to all amounts paid or projected to be paid for
12 Athletes, the Venue, MMA Promotional Materials, audio-visual content
13 production, security and support staff, and licensing

14 **Zuffa Document Request No. 12:** Documents and data in as granular
15 form as it is maintained sufficient to show all revenues, expenses, and
16 other budget items relating to operating Your Company that are not
17 included in Your response to Request No. 7 above.

18 **C. Zuffa Unsuccessfully Attempts To Negotiate The Scope Of The**
19 **Bellator Subpoena.**

20 As it has with all the third parties it has subpoenaed in the Nevada Action,
21 Zuffa has worked extensively with Bellator to address its concerns related to
22 producing documents in response to Zuffa's subpoena. Bellator initially objected to
23 producing certain documents in the absence of a "Highly Confidential – Attorneys'
24 Eyes Only" designation in the underlying protective order in the Nevada Action.
25 Zuffa requested and the Court issued a revised protective order which provides for an
26 attorneys' eyes only designation. Mot. to Quash, Ex. F to Kelly Decl. Even with the
27 revised protective order in place containing the additional designation inserted at its
28 request, Bellator continued to resist production.

1 In addition, Zuffa has substantially narrowed its requests to Bellator in an effort
2 to ease any burden associated with the request. In a letter dated June 16, 2016,
3 counsel for Zuffa proposed narrowing both the substance of many of the requests as
4 well as the means to collect responsive documents. Grigsby Decl. ¶ 4. For certain of
5 the requests, Zuffa identified a narrow set of relevant issues conducive to targeted,
6 non-search term based collections. For others, Zuffa narrowed the request and
7 identified a small number of custodians to search using limited search terms. The
8 parties eventually reached an impasse on certain of the requests. In November 2016,
9 Bellator indicated it would move to quash, but waited four months to file the present
10 motion. ECF 1-1, Kelly Decl. ¶ 11.

11 **III. ARGUMENT**

12 Federal Rule of Civil Procedure 45 governs discovery of non-parties by
13 subpoena. Like the rule governing the production of documents between parties, the
14 proper scope of discovery for non-parties is set out in Rule 26(b). Rule 26(b) allows
15 discovery of any non-privileged material “relevant to any party’s claim or defense and
16 proportional to the needs of the case” Fed. R. Civ. P. 26(b)(1). Relevance is
17 defined broadly: “Relevant information need not be admissible at trial if the discovery
18 appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.*;
19 *see Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (construing
20 language contained in Rule 26 prior to 2015 amendments) (“The key phrase in this
21 definition— ‘relevant to the subject matter involved in the pending action’—has been
22 construed broadly to encompass any matter that bears on, or that reasonably could
23 lead to other matter that could bear on, any issue that is or may be in the case”).
24 Although Rule 26 was modified to add a proportionality requirement as part of a
25 larger restyling of the Federal Rules of Civil Procedure, the Comments for the 2015
26 Amendments explain that the addition was intended to restore and reinforce the focus
27 on proportionality in discovery, but not to “change the existing responsibilities of the
28 court and the parties to consider the proportionality.” *Wit v. United Behavioral*

1 *Health*, Case No. 14-cv-02346-JCS, 2016 WL 258604, at *10 (N.D. Cal. Jan. 21,
2 2016).

3 Rule 45 allows a court to quash a subpoena in certain, limited circumstances.
4 The party moving to quash a subpoena has the “burden of persuasion.” *Moon v. SCP*
5 *Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005). Bellator has moved to quash
6 Zuffa’s subpoena under Rule 45(d)(3)(B)(i), which permits the court to modify or
7 quash the subpoena if it requires disclosing a trade secret or other confidential
8 research, development, or commercial information. Courts evaluate a motion to quash
9 under this subsection using a burden shifting framework. First, the non-party must
10 show the requested information is a trade secret or confidential commercial
11 information. Then, if the non-party meets its burden, the burden shifts to the
12 requesting party to demonstrate a “substantial need for the testimony or material that
13 cannot be otherwise met without undue hardship.” Fed. R. Civ. P. 45(d)(3)(C)(i);
14 *Gonzales v. Google*, 234 F.R.D. 674, 684 (N.D. Cal. 2006) (setting out burden-
15 shifting framework).

16 **A. Bellator Should Be Compelled To Respond To Zuffa’s Narrow**
17 **Requests.**

18 Zuffa has a substantial need for documents relating to Bellator’s contracts with
19 athletes and financial information. Contrary to Bellator’s assertions, the heart of the
20 Nevada Action is whether other promoters can compete with the UFC to put on live
21 MMA bouts and whether the alleged lack of competition has depressed MMA
22 athletes’ compensation for bouts and for the rights to their names and likenesses.
23 Granting Bellator’s motion would deny Zuffa its due process right to defend itself
24 with relevant evidence to rebut Plaintiffs’ claims.

25 **1. The Contract Documents Sought In Request Number 1 Will**
26 **Demonstrate The Intense Competition For “Elite Professional**
MMA Fighter services.”

27 As Bellator acknowledges, “Plaintiffs allege . . . ‘Elite Professional MMA
28 Fighters do not have the ability to turn to alternative MMA Promoters to earn

1 competitive compensation in response to the UFC’s artificial suppression of demand
2 and compensation.” Mot. to Quash at 4 (citing CAC ¶ 91). This allegation stands at
3 the center of Plaintiffs’ monopsony claim. In the underlying litigation, Zuffa will
4 prove that Plaintiffs’ claim that Zuffa acts as a monopsonist in the market for “Elite
5 Professional MMA Fighter services” is demonstrably false. Yet Zuffa needs
6 documents from competitors, such as Bellator, to refute and contextualize Plaintiffs’
7 broad allegations.

8 Bellator has stated repeatedly that it is UFC’s biggest competitor. Mot. to
9 Quash, Coker Decl. ¶¶ 4, 5. Bellator’s contracts and negotiations with its athletes will
10 confirm that, contrary to Plaintiffs’ allegations, the UFC is not the “only game in
11 town,” and Bellator aggressively competes with the UFC for athletes. CAC ¶ 5.
12 Furthermore, the documents Zuffa seeks will demonstrate the extent to which Bellator
13 – the UFC’s self-identified biggest competitor – is able to offer athletes competitive
14 compensation. By Bellator’s own admission, Zuffa cannot get this information from
15 any source. As Bellator notes:

16 the key terms and conditions of [athlete contracts] are never publicized in
17 the normal course of business . . . such information is not disclosed by
18 either promoters or fighters . . . [any public] disclosures do not include
19 any other material terms or conditions of the athletes’ deals with
20 promoters, such as contract length, signing bonuses, and other significant
21 deal terms that govern the very nature of the promoter-athlete
22 relationship.

23 Coker Decl. ¶ 10. Bellator’s contracts and negotiations with athletes will demonstrate
24 the fierce competition for MMA athletes’ services. Zuffa has a substantial need for
25 this information to mount a defense against Plaintiffs’ monopsonization allegations.

26 Based on its understanding of the Nevada Action, Bellator argues that “the
27 names and amounts paid to each athlete . . . would not be probative of any issue in the
28 case.” Mot. to Quash at 18. This is incorrect. The names of athletes are necessary to

1 identify and track the compensation of athletes who are “elite” under Plaintiffs’
2 definition of the relevant market, and to make apples-to-apples comparisons between
3 the amounts each promoter paid those athletes (by weight class, years of experience,
4 etc.). Declaration of Dr. Sean May (“May Decl.”) ¶ 10. If an athlete at Bellator
5 receives the same or more in total compensation than an athlete at UFC or other
6 promoters, that fact would undermine Plaintiffs’ claim that other promoters cannot
7 offer athletes lucrative purses, endorsements, and sponsorship deals. Bellator’s athlete
8 compensation is relevant to these allegations. Bellator’s contract negotiations with its
9 athletes are similarly relevant to understanding competition in the market for athlete
10 services, and the extent to which athletes are able to negotiate their Bellator contracts.

11 Bellator’s athlete contracts will allow Zuffa to analyze numerous issues central
12 to the Nevada Action. For example, Plaintiffs allege that Zuffa’s contracts with
13 athletes are of an unreasonable duration, which prevents “Elite” MMA athletes from
14 ever competing for other promotions. *E.g.*, CAC ¶ 110. Bellator’s athlete contracts
15 will not only demonstrate that athletes previously under contract with the UFC have
16 competed for other promotions, but will allow Zuffa to analyze the average duration
17 of each athlete’s contract with Bellator. May Decl. ¶ 7. Zuffa’s experts would not be
18 able to determine the total duration that an athlete competes in bouts for Bellator from
19 anonymized contracts because the contract could be extended for various reasons,
20 such as injury, retirement, or for the period of time that athlete is the current
21 champion. *Id.*

22 Bellator’s offer to provide a small sample of contracts is insufficient. Mot. to
23 Quash at 7. To conduct the analyses necessary to disprove many of Plaintiffs’
24 allegations, at minimum all contracts for a sufficient number of representative athletes
25 is required. Without a large enough set of contracts, Zuffa could not analyze the
26 prevalence of contractual provisions in Bellator’s contracts that Plaintiffs claim are
27 anticompetitive when included in Zuffa’s contracts. May Decl. ¶ 8. Zuffa could also
28 not quantify the frequency with which athletes were able to negotiate these provisions

1 out of their contracts with Bellator, *id.*, or build an econometric model using Bellator
2 information as a dependent or independent variable for use in class certification or
3 damages. *Id.* ¶ 11.

4 Plaintiffs also seek injunctive relief in the Nevada Action, and will likely
5 request elimination of many of Zuffa's contractual provisions, including their multi-
6 bout duration. Bellator's contractual documents will show the inequitable effect
7 Plaintiffs' requested relief would have on Zuffa vis-à-vis its competition. If (as
8 anticipated) Bellator's documents reflect that it engages in the same practices and has
9 the same contractual provisions as Zuffa, this will show that Zuffa's practices are
10 common in the industry, and that Plaintiffs' anticipated injunctive relief would put
11 Zuffa at a severe prospective competitive disadvantage. Zuffa has a due process right
12 to obtain evidence that would prove the unjust outcome that would result if Zuffa were
13 forced to change its industry-standard practices when its competitors were not.

14 **2. Bellator's Financial Information Will Show That Bellator,**
15 **Like Other MMA Promoters, Has Not Been Foreclosed From**
16 **The Alleged Market.**

17 Plaintiffs allege that other promoters, such as Bellator, have been foreclosed
18 from the market for "live Elite Professional MMA bouts," and that Zuffa has
19 "deprived potential and actual competitors of Elite Professional MMA Fighter
20 services . . . [and] top quality venues, sponsors, endorsements, [and] PPV and
21 television broadcast outlets." CAC ¶¶ 68, 73. Bellator repeats Plaintiffs' unattributed
22 and unsubstantiated figure that UFC is alleged to control "some ninety percent of the
23 revenues derived from elite professional MMA matches." Mot. to Quash at 3.
24 Plaintiffs further allege that it is difficult for any would-be competitors to enter the
25 market because of high barriers to entry. CAC ¶ 75. Zuffa needs the financial
26 information that it has requested from Bellator to disprove these spurious claims.

27 Bellator's rise to become a top promoter belies any argument that other MMA
28 promoters have been foreclosed from the relevant market. Bellator's growth indicates
that (1) Zuffa's conduct has not deprived Bellator of any necessary inputs and

1 (2) barriers to entry are low. Paragraph 4 of Mr. Coker’s declaration confirms:
2 “Bellator was founded in 2008. Since its inception, Bellator has steadfastly grown its
3 market, signing numerous new athletes from the United States and abroad,
4 commanding record attendance, and continuing to expand its television audience, with
5 distribution in more than one hundred forty countries. Today, it is this country’s
6 second largest MMA promoter.” Coker Decl. ¶ 4. Bellator’s financial information
7 will confirm that new market entrants have been successful and allow Zuffa to proffer
8 evidence in the Nevada Action that other promoters, such as Bellator, can and have
9 entered the market and run competitive MMA promotions. Zuffa needs the
10 subpoenaed financial information to present affirmative evidence concerning its
11 competitors’ ability to flourish in the alleged market, to analyze the impact (if any) of
12 Zuffa’s acquisitions on competitors, such as Bellator, and to determine whether the
13 output of live MMA events has increased or decreased over time. May Decl. ¶ 9.
14 Zuffa is entitled to information which will disprove Plaintiffs’ central allegations –
15 that Zuffa has prevented rival MMA promotions from competing and paying athletes
16 well in the MMA market. Depriving Zuffa of this information will deny Zuffa
17 evidence that bears directly on its defenses in the Nevada Action.

18 Although Bellator has offered to provide “consolidated summaries of particular
19 categories of promotion expenses,” Mot. to Quash at 7, in lieu of complying with its
20 obligations under the subpoena, this proposal is not sufficient. Providing only a
21 subset of its expenses will neither allow Zuffa to analyze Bellator’s promotion costs,
22 nor provide any information regarding whether Bellator has been able to successfully
23 grow over time. Bellator’s event-level financials will show the nature of Bellator’s
24 growth, whether it is tied to the success or failure of particular events, the drivers
25 behind those event-specific successes (or failures), and what risks MMA promoters
26 face in putting on events. May Decl. ¶ 9. Bellator’s company-wide financials and
27 forward-looking projections will show Bellator’s expansion over time, how that
28 expansion may lead to increased costs, how Bellator’s athlete compensation has

1 changed, and whether UFC’s self-identified largest competitor plans to expand in the
2 future in spite of Plaintiffs’ allegations that MMA promoters are unable to compete in
3 the marketplace. *Id.* Bellator’s financial information will also allow Zuffa to build an
4 econometric model using Bellator information as a dependent or independent variable
5 for use in class certification or damages. *Id.* ¶ 11. Again, the only source for this
6 information is Bellator.

7 **3. The Requests Are Proportional To The Needs Of The Case.**

8 The documents Zuffa seeks are proportional to the needs of the Nevada Action.
9 Bellator makes no real attempt to argue otherwise, instead merely asserting the
10 requests are not proportional without explaining why. Mot. to Quash at 16. The
11 Advisory Committee Notes to Rule 26(b)(1) caution that the addition of the
12 proportionality requirement was never “intended to permit the opposing party to
13 refuse discovery simply by making a boilerplate objection that it is not proportional.”
14 Fed. R. Civ. P. 26(b)(1) advisory committee’s note to 2015 amendment. Bellator’s
15 boilerplate objection cannot survive scrutiny.

16 In any event, the requests are proportional to the needs of the Nevada Action.
17 Proportionality is analyzed by “considering the importance of the issues at stake in the
18 action, the amount in controversy, the parties’ relative access to relevant information,
19 the parties’ resources, the importance of the discovery in resolving the issues, and
20 whether the burden or expense of the proposed discovery outweighs its likely benefit.”
21 Fed. R. Civ. P. 26(b)(1). All of these factors favor denying the motion to quash. The
22 issues at stake in the Nevada Action have the potential to fundamentally reshape the
23 entire MMA industry. The amount in controversy—setting aside the financial impact
24 of Plaintiffs’ requested equitable relief—is significant. Bellator’s documents are
25 relevant to Plaintiffs’ central allegations in the Nevada Action.

26 Among other reasons, Zuffa needs the unredacted contracts and financial
27 statements to:

- 28 • Evaluate the success and viability of an MMA competitor in the alleged market;

- 1 • Determine the total duration of the contracts between athletes and Bellator;
- 2 • Show that “elite” athletes are able to earn competitive compensation outside of
- 3 the UFC;
- 4 • Demonstrate the intense competition for MMA athletes’ services; and
- 5 • Establish that barriers to entry to the alleged market of promoting live “elite”
- 6 MMA bouts are low and that new market entrants are able to attain success.

7 Lastly, while discovery always involves some burden and expense, Bellator is
 8 owned by Viacom, a company with over \$12 billion in yearly revenue. In light of the
 9 importance of these documents, any burden is outweighed by Zuffa’s right to marshal
 10 relevant and probative evidence in support of its defense. Under the Rule 26(b)(1)
 11 factors, Zuffa’s request easily meets the proportionality requirement.

12 4. The Burden Of Compliance With The Subpoena Is Minimal.

13 Bellator contends that this Court should quash the subpoena because
 14 “[r]equiring Bellator to determine all of its nondisclosure commitments across ‘all’ its
 15 business relationships, and in many cases to reach out to counterparties, would be
 16 extraordinarily burdensome.” Mot. to Quash at 20. As numerous courts have held,
 17 confidentiality provisions in contracts cannot shield them from discovery. *Green v.*
 18 *Cosby*, 314 F.R.D. 164, 170–71 (E.D. Pa. 2016) (“An agreement between two parties
 19 to keep materials confidential cannot block the disclosure of those materials to third
 20 parties in discovery”); *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664,
 21 665 (7th Cir. 2009) (“Contracts bind only the parties. No one can ‘agree’ with
 22 someone else that a stranger’s resort to discovery under the Federal Rules of Civil
 23 Procedure will be cut off.”); *Kalinauskas v. Wong*, 151 F.R.D. 363, 367 (D. Nev.
 24 1993) (“With respect to contracts containing explicit guarantees of confidentiality,
 25 such contracts, of course, cannot bind parties who do not sign them and may have
 26 little effect on the capacities of a non-party to discover or introduce at trial the
 27 settlement communications covered by the contract.” (internal quotation marks
 28 omitted)).

1 It is also unlikely that Zuffa's requests would trigger such confidentiality
2 provisions in the first place. The only request at issue which seeks the disclosure of
3 actual contracts relates to Bellator's athletes. The parties have already reached
4 agreement on Zuffa's request for documents related to sponsors, venues, and other
5 third parties, so the supposed burden of these requests with respect to confidentiality
6 is hyperbolic at best. Request 7 asks for documents *sufficient to show* compensation
7 paid to athletes, costs, and profit by event. Request 12 asks for documents *sufficient*
8 *to show* revenues, expenses, and other budget items. It is highly unlikely that
9 confidential third party information could be discerned from these summary
10 financials. Even if it could, Bellator claims at most it must notify these third parties of
11 the disclosure. Bellator cites no authority for the proposition that notification of
12 contractual counterparties qualifies as undue burden sufficient to overcome legitimate
13 discovery requests.²

14 **B. The Protective Order Provides Sufficient Protection For Bellator's**
15 **Confidential Information.**

16 Bellator extensively describes the harm that would occur if its confidential
17 information became public or was disclosed to Zuffa. Bellator even claims that the
18 discovery is being used to conduct "market intelligence." Mot. to Quash at 15. Under
19 the protective order in the Nevada Action, there is no risk that any Zuffa employee
20 could ever see Bellator's documents, much less use them for market intelligence. The
21 protective order allows Bellator to designate its information "HIGHLY
22 CONFIDENTIAL – ATTORNEYS' EYES ONLY," eliminating the risk that either
23 the public or any Zuffa employees would ever see the information. ECF 1-2, Ex. F to
24

25 ² Bellator relies on *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 683 (N.D. Cal. 2006) to
26 support its undue burden argument. *Gonzales* is inapposite—that court did not discuss
27 contractual confidentiality provisions (which other courts have held are not a shield
28 from discovery, *see supra*), and granted in part Google's motion to quash principally
because the discovery requests were duplicative, while denying other parts of
Google's motion to quash because of the Government's substantial need for
information given Google's prominent role in the market.

1 Kelly Decl. at § 9(a). The protective order specifically protects the information that
2 Bellator is seeking to withhold. The “HIGHLY CONFIDENTIAL – ATTORNEYS’
3 EYES ONLY” designation is defined to protect “a Non-Party’s extremely sensitive,
4 highly confidential, non-public information, consisting either of trade secrets or other
5 highly confidential information directly concerning business plans, strategies,
6 revenues, or costs, disclosure of which to a Party or another Non-Party would create a
7 substantial risk of significant competitive or business injury to the Designating Non-
8 Party that could not be avoided by less restrictive means.” *Id.* § 2.8. This provision—
9 not included in the original order but added to address third party concerns—
10 specifically protects Bellator’s information from disclosure to Zuffa or the public.
11 Only outside counsel and other specific individuals who have undertaken the legal
12 obligations of the protective order would ever see Bellator’s documents, thus
13 obviating Bellator’s concerns.

14 The very purpose of a protective order is to allow for the disclosure of
15 confidential information to be used for the limited purpose of litigation and not to be
16 released to the public or competitors. The Federal Rules envision sensitive
17 commercial information to be protected in exactly the way Zuffa proposes—with a
18 protective order which allows the non-party to designate their documents as
19 confidential. Fed. R. Civ. P. 45(d)(3)(B)(i) (providing that courts *may* quash a
20 subpoena if it requires disclosing sensitive confidential information, unlike other
21 provisions which require quashing); Fed. R. Civ. P. 26(c)(1)(G) (providing that
22 protective orders can be issued which require that “a trade secret or other confidential
23 . . . commercial information . . . be revealed only in a specified way”). Courts have
24 routinely denied a motion to quash on this basis where the protective order provides
25 adequate protections for the commercially sensitive information. *Festus & Helen*
26 *Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner, & Smith Inc.*, 432 F. Supp. 2d
27 1375, 1380-81 (N.D. Ga. 2006) (holding that “confidentiality concerns are not
28 sufficiently compelling to excuse TH Lee and Click Tactics from providing the

1 subpoenaed information, and the appropriate solution is rather to compel discovery of
2 the documents subject to a protective order . . . limited to viewing by petitioner’s
3 attorneys, and, as necessary, respondent’s attorneys, experts, and arbitrators”);
4 *Verisign, Inc. v. XYZ.com, LLC*, No. CV 15-MC-175-RGA-MPT, 2015 WL 7960976,
5 at *5 (D. Del. Dec. 4, 2015) (ordering disclosure of trade secret information to non-
6 party’s main competitor “under the ‘Attorney’s Eyes Only’ designation provided for
7 in the protective order.”); *Covelo Clothing Inc. v. Altadia Imports, Inc.*, 2007 WL
8 4287731, at *2 (D. Colo. Dec. 5, 2007) (denying motion to quash where protective
9 order with attorney’s eyes only provision adequately protected producing party’s trade
10 secret information).

11 To the extent Bellator is concerned with the use of its documents at trial or
12 believes the current provisions in the protective order do not give it sufficient time to
13 assert its rights, Zuffa was and remains amenable to stipulate to additional changes to
14 offer more protection for Bellator’s confidential information. However, to the extent
15 Bellator argues the subpoena should be quashed because of the risk of inadvertent
16 disclosure (which will allegedly be “aggressively” reported by the “MMA press,”
17 Mot. to Quash at 23), that risk is overstated. Zuffa has produced over 651,000
18 documents in the Nevada Action, including approximately 1,300 designated as Highly
19 Confidential. Additionally, Plaintiffs have produced approximately 64,000 documents
20 and third parties have produced approximately 241,000 documents. Of those,
21 approximately 4,300 and 2,800 were designated as Highly Confidential, respectively.
22 Grigsby Decl. ¶ 5. There is no indication that any of these Highly Confidential
23 documents were disseminated to anyone other than attorneys and experts in the
24 Nevada Action, and the parties have worked diligently to ensure that confidential
25 information has been adequately protected through the use of filings under seal.

26 Bellator cites three news articles to suggest that the parties have not maintained
27 the confidentiality of their own documents. Mot. to Quash at 23. But these articles
28 recount the parties’ disputes about the designation of protected materials and whether

1 those materials should be disclosed to the other party. One article (ECF 1-2, Ex. H to
2 Kelly Decl.) reported on the inadvertent disclosure of privileged information by
3 Zuffa’s attorneys to *Plaintiffs’ attorneys*. The documents themselves were never
4 disclosed outside the litigation. Another article (ECF 1-2, Ex. G to Kelly Decl.)
5 concerns the parties’ negotiations on the “Highly Confidential” designation under the
6 protective order. Neither the article nor the actual negotiation of the revised protective
7 order suggests that either party had disclosed Highly Confidential information to the
8 public or competitors. The only article that even remotely bears on Bellator’s concern
9 about inadvertent public disclosure of confidential information is a Bloody Elbow
10 article that reports that Plaintiffs filed redacted versions of Zuffa’s confidential
11 documents, the text of which mistakenly could be copied. (ECF 1-2, Ex. I to Kelly
12 Decl.). The documents at issue were produced as confidential, not Highly
13 Confidential, and Plaintiffs promptly took steps to seal this information once they
14 recognized their error.

15 Third parties have produced thousands of documents and not one has been
16 disclosed to the public or to competitors. Bellator has no evidence that the protective
17 order in the Nevada Action is insufficient to protect its information—even if it did,
18 Zuffa is more than willing to amend the order to address those concerns.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Zuffa respectfully requests that this Court deny
3 Bellator's Motion to Quash.

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10 Dated: March 8, 2017

Respectfully Submitted,

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12
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