



## **Jim Hawk Truck-Trailers of Sioux Falls, Inc. v. Crossroads Trailer Sales & Service, Inc. et al**

2023 | Cited 0 times | D. South Dakota | January 23, 2023

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION JIM HAWK TRUCK-TRAILERS OF SIOUX FALLS, INC.,

Plaintiff, vs. CROSSROADS TRAILER SALES & SERVICE, INC., ALVIN SCHOLTEN, MARK SNEVE, MICHAEL FALOR, DAVID JENSEN, TRACY THOMPSON, NICK BIG EAGLE, CHAZ KOHERST, TAYLOR LARSON, DEREK FALOR,

Defendants.

4:20-CV-04058-KES

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL  
[DOCKET NO. 116] AND GRANTING IN PART

AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL

[DOCKET NO. 119]

**INTRODUCTION** This matter is before the court on the complaint of plaintiff Jim Hawk Truck-trade secrets and various other tort claims. See Docket No. 1. Defendants Crossroads Trailer Sales and Services, Alvin Scholten, Mark Sneve, Michael Falor, David Jensen, Tracy Thompson, Nick Big Eagle, Chaz Koherst, Taylor filed a counterclaim alleging breach of contract bad-faith refusal to pay wages. See Docket Nos. 37, 38, 39, 41, 42. This court has original jurisdiction over this matter under 28 U.S.C. § 1331 because the action was brought under the federal Defend Trade Secrets Act, 18 U.S.C. § 1836.

Pending are Jim Hawk and Defendants cross motions to compel discovery. See Docket Nos. 116 & 119. Both parties oppose the motions against them. See Docket Nos. 141 & 145. The district court, the Honorable Karen E. Schreier, referred the motions to this magistrate judge for determination pursuant to 28 U.S.C. § 636(b)(1)(A). See Docket No. 163.

**FACTS** Jim Hawk brought suit against Defendants alleging claims of misappropriation of trade



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secrets, breach of duty of loyalty, tortious interference with business relations, tortious interference with employee relationships, unfair competition, unjust enrichment, and defamation against Crossroads and former employees. See Docket No. 1. 1

Jim Hawk asserts

away a s Docket No. 1, p. 12. Jim Hawk alleges Crossroads has obtained confidential

secrets to increase their profits. Docket No. 1.

1 Misappropriation of trade secret claims are against all defendants, breach of duty of loyalty is against the individual defendants, tortious interference with business relations is against all defendants, tortious interference with employee relationships is against Crossroads and Mr. Scholten, unfair competition claims are against all defendants, unjust enrichment claims are against all defendants, and the defamation claim is against Mr. Scholten. See Docket No. 1.

In response, Defendants have filed counterclaims against Jim Hawk alleging breach of contract and bad-faith refusal to pay wages. See Docket Nos. 37, 38, 39, 41, 42. Defendants allege that after the individuals resigned from Jim Hawk and joined Crossroads, Jim

Plaintiffs Mark Sneve, David Jensen, Tracy Thompson, and Docket No. 117, p. 2. Since this case began in March 2020, the parties have had long-standing disputes on discovery. The parties have provided several responses to discovery requests and had several correspondences and meet and confer conferences to discuss the many discovery issues that have delayed this litigation. See Docket Nos. 118-2 through 118-14, 118-19 through 118-31, 155-10, 155-12, 155-14; Docket No. 120-1. Additionally, Jim Hawk has previously moved to compel discovery, which this court decided on July 29, 2022. See Docket Nos. 104 & 136. Now before the court

See Docket Nos. 116 & 119. Defendants requests that the court compel Jim Hawk to: (1) produce the income statements for all Jim Hawk branch locations produce additional discovery responses counterclaims for unpaid commissions; (3) review and produce additional discovery; and (4) change the

designation for all discovery materials, aside from financial records, from Confidential. See second motion requests that the court compel Defendants to provide additional documents responsive to Requests for Production Nos. 7, 8, 33, 65-76, review and produce additional ESI discovery, and produce additional financial documentation. See Docket No. 120. The court will address both motions, starting with the Defendants

DISCUSSION A. Standards Governing Discovery



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Federal Rule of Civil Procedure 26(b)(1) sets forth the scope of discovery in civil cases pending in federal court:

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the

in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable. See FED. R. CIV. P. 26(b)(1). If a party fails to respond to a proper request for discovery, or if an evasive or incomplete response is made, the party requesting the discovery is entitled to move for a motion compelling disclosure after making a good-faith effort to resolve the dispute by conferring first with the other party. See FED. R. CIV. P. 37(a).

The scope of discovery under Rule 26(b) is extremely broad. See 8 Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2007 (3d ed. Oct. 2020 update). The reason for the broad scope of discovery is that

essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts it has. *Id.* (quoting *Hickman v. Taylor*, 329 U.S. 495, 507-08 (1947)). The Federal Rules distinguish between discoverability and admissibility of evidence. FED. R. CIV. P. 26(b)(1), 32, and 33(a)(2) & (c). Therefore, the rules of evidence assume the task of keeping out incompetent, unreliable, or prejudicial evidence at trial. But these considerations are not inherent barriers to discovery.

limited to the precise issues set out in the pleadings. Relevancy . . .

, No. 8:03CV165, 2007 WL 1217919, at \*1 (D. Neb. Mar. 15, 2007) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). The party seeking discovery must make a

not re *Woodmen of the World*, 2007 WL 1217919, at \*1 (citing *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992) will not suffice; litigants seeking to compel discovery must describe[,] with a

reasonable degree of specificity, the information they hope to obtain and its *Woodmen of the World*, 2007 WL 1217919, at \*1 (citing *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972)).

Discoverable information itself need not be admissible at trial; rather, the defining question is whether it is within the scope of discovery. See FED. R. CIV. P. 26(b)(1). Additionally, the court may limit the frequency and extent of discovery. See FED. R. CIV. P. 26(b)(2); see also *Roberts v. Shawnee Mission Ford, Inc.* with discretion to limit discovery if it determines, inter alia, the burden or

*Bank & Tr. Co. of Chi. v. Caton*, 136 F.R.D. 682, 684- discovery requests are a burden on the party who



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must respond thereto. Unless the task of producing or answering is unusual, undue or extraordinary, the general rule requires the entity answering or producing the documents to

## B. otion to Compel

### Discovery 1. Have the Defendants Exhausted Their Obligations to Meet and

Confer under Fed. R. Civ. P. 37(a)(1)? A prerequisite to filing a motion to compel discovery is the filing of certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to

## District

discovery dispute must file a separate certification describing the good faith

The certification mentioned in FED. R. CIV. P. names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, Shuffle Master, Inc. v. Progressive Games, Inc., 170 F.R.D. 166, 170- that the parties made a genuine attempt to resolve the discovery dispute without involving the court. Id. have had an actu Id. Thus, before making a motion -way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judi Id. Unilaterally sending correspondence demanding that the other side comply with a discovery request does not satisfy the requirement. Id. at 172.

Where there is no legitimate reason for expediency, counsel calling opposing counsel and leaving a vague message two hours before filing the discovery motion does not satisfy the meet-and-confer requirement. Alexander v. Federal Bureau of Investigation, 186 F.R.D. 197, 198-199 (D.D.C. 1999). Nor is the meet-and-confer requirement rendered moot merely because when counsel did file the discovery motion it was opposed by the other party. Id. The purpose of the meet-and- nts to attempt

to resolve, or at least narrow, the disputed issues to prevent the unnecessary Id. at 199.

Nor is the meet-and-confer requirement satisfied by the sending of a letter that indicated that a motion to compel would be filed if the opposing party did not comply with discovery requests. Bolger v. District of Columbia, 248 F.R.D. 339, 343-344 (D.D.C. 2008). Likewise, sending a letter discussing the discovery issue did not satisfy the meet-and-confer requirement or the prerequisite of a certification of having conferred in good faith. Ross v. Citifinancial, Inc., 203 F.R.D. 239, 239-40 (S.D. Miss. 2001). The court noted many cases, obliging the attorneys to meet and confer resolved the discovery dispute. Id.

The decision in Cotracom Commodity Trading Co. v. Seaboard Corp., 189 F.R.D. 456 (D. Kan. 1999),



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illustrates how fact-dependent the inquiry is. In that case, four telephone calls by the movant on a motion to compel were not enough to satisfy the meet-and-confer requirement where all four calls took place while opposing counsel was out of the country on vacation. Id. at 458- 459. As the court explained, the meet-and-confer requirement is intended to

Id. at 459. Therefore, sending a letter or making an oral request that simply demands compliance with the discovery request seldom satisfies the meet-and- confer requirement. Id. The court frowned an arbitrary deadline for the filing of a motion to compel because the facts showed that the parties were not at impasse. Id. They had yet to discuss the

genuineness of the ; what, if any, documents the discovering party was reasonably capable of producing; and what specific,

intervention. Id.

In RLI Ins. Co. v. Consecro, Inc., 477 F. Supp. 2d 741 (E.D. Va. 2007), a party was being deposed and refused to answer nine questions during the deposition based on attorney-client privilege or work-product doctrine. Id. at 745. The deposing party sought an order compelling the deponent to answer the questions. Id. The party who had refused to answer argued that the motion to compel should be denied because the movant had failed to comply with the meet-and-confer requirement before filing the motion. Id. at 745-746. The court found that the movant had satisfied the meet-and-confer requirement by making several suggestions for compromise, both by telephone contact and by letter, and by supplying the resisting party with a list of the specific questions the movant would be seeking to compel. Id.

On the other hand, courts have, in very limited circumstances, excused a -and-confer requirement. In Freiria Trading Co. v. Maizoro S.A. de C.V., 187 F.R.D. 47 (D.P.R. 1999), the court excused the m -and-confer requirement where

discovery, but also constituted a direct violation of an order from the court. Id. at 48. See also Bolger, 248 F.R.D. at 343-344 (excusing the failure of the movant to satisfy the meet-and-confer requirement because of the long-

the plaintiffdiscovery).

a.

No. 2

Defendants indicated



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... Plaintiff was certainly on notice that Defendants were seeking view of each of the parties meet-and-confer correspondences, no letter raises an issue with Jim See Docket Nos. 118-11, 118-12, 118-2, 118-3, 118-13, 118-28.

The only correspondence that generally discu See Docket No. 176-

claims are s Id. Hawk identify its 2019 annual net income, and applicable adjustments, that

No. 118-5. Because Defendants did not specifically discuss with Jim Hawk the deficiencies Defendants perceived with regard to Interrogatory No. 2--as Defendants did with the other interrogatories--the court

finds that Defendants failed to meet their obligations under FED. R. CIV. P. 37(a)(1) and D.S.D. LR 37.1. Generally arguing there were deficiencies with

specifying which interrogatory was deficient and what additional information they felt wa

b.

Nos. 1 & 2 Jim Hawk also argues Defendants failed to satisfy the meet and confer requirement Interrogatory Nos. 1 and 2. Docket No. 141, p. 8. Jim Hawk asserts that while issues with these responses were discussed in the past, Jim Hawk provided supplemental responses and Defendants never communicated dissatisfaction with the supplements. Id. Defendants argue

responses did not adequately respond to the interrogatories. See Docket No. 175, pp. 5, 10-14.

In a May 7, 2021, and July 30, 2021, correspondence, Defendants lacked merit and requested answers. Docket No. 118-11, p. 4; Docket No. 118-12, p. 4. In a February 9, 2022, correspondence, Defendants notified Jim Hawk 1 was incomplete, as it did not

2019 commission payment and the precise amount of the [Property and -13, p. 1. Also in the

February 9, 2022, correspondence, Defendants notified Jim Hawk that their 2 was deficient and requested responses with Bates number to the income reports of the parts and services departments for quarter four 2019, quarter one 2020, and specifically for the income statements for February 2020. Id. at 2. These issues were also addressed in a letter dated March 2, 2022. See Docket No. 118-28, pp. 3-4.

Jim Hawk asserts they had not received any communications regarding additional issues with the supplemental responses they provided to Defendants



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aware of the purpo

Interrogatory Nos. 1 & 2 in their motion to compel before the court are the same issues they addressed in previous correspondences. Compare Docket No. 175, pp. 10-14, with Docket No. 118-12, 118-13, 118-

the amount of insurance payment ssion in 2019 and specific income statements from the service department. Thus, Defendants

c. Application of the Stand

Production Jim Hawk also argues Defendants did not meet and conferred with it regarding its sue

Id.

to secure supplemental discovery regarding the insurance payment and the

correspondence from February 9, 2022, and during a conversation from February 25, 2022. Docket No. 175, p. 15. The court agrees.

In the February 9 correspondence, Defendants stated that no

-13, p. 1. And Defendants asserted that not include any income statement that may be applicable to the service Id. meet and confer under FED. R. CIV. P. 37(a)(1) and D.S.D. LR 37.1.

d.

No. Jim Hawk argues Defendants failed to sufficiently meet and confer regarding

asserts that while issues with their responses had previously been addressed, Defendants did not provide notice that the supplemental responses they provided were deficient. Id.

interrogatories on July 30, 2021, and February 9, 2022. See Docket Nos. 118- 12 & 118-13. Jim Hawk provided supplemental responses to these interrogatories on April 1, 2022. See Docket Nos. 118-8, 118-9, 118-10. While Defendants did not communicate issues with these responses to Jim Hawk

inc Docket No. 141, p. 16. Defendants now indicate Jim Hawk has identified responsive documents in their response to the motion to compel, but they are incomplete. Docket No. 175, p. 19.



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It is clear to the court that the parties are aware of the discovery issues surrounding these specific interrogatories. This motion is not the first time Jim Hawk has been made aware of deficiencies. See Docket Nos. 118-12 & 118-13. Simply arguing the parties had not met and conferred on these issues due to their supplemental responses (which Jim Hawk concedes contained many irrelevant documents) is a nonstarter. The question before the court is resolve these discovery disputes. The court believes there has been and will address these interrogatories on the merits.

## 2. Whether Jim Hawk Should Be Ordered to Produce Income

**Statements from Other Branch Locations** The Defendants request that the court compel Jim Hawk to produce income statements from 2016 to 2021 for all the locations within the Jim Hawk Group, not just the Sioux Falls branch location that is part of this litigation.

Docket No. 117, p. 4. Defendants assert this discovery is relevant because Jim

Id. Defendants believe these requested income statements respond to request for production nos. 16, 18, and 26. Id. at 5; see Docket No. 118-4, pp. 6-7, 10.

Jim Hawk opposes this request, arguing the income statements from other Jim Hawk branches are not proportional to the needs of the case,

not entitled to this financial data. Docket No. 141, p. 3.

damages, its calculations under that theory, and expert opinions on the subject *Henne v. Great River Regional Libr.*, No. 19-CV-2758 (WMW/LIB), 2021 WL 6804560, at \*18 (D. Minn. Jan. 4, 2021) (quoting *Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588, 593 (D. Minn. 1986)). Federal courts have held that financial data ed damages are discoverable. See *Unverferth Mfg. Co., Inc. v. Meridian Mfg., Inc.*, No. 19-CV-4005-LTS-KEM, 2020 WL 13015558 (N.D. Iowa Nov. 12, 2020) (holding audited financial statements related to calculating damages is relevant and discoverable); *Uni-Splendor Corp. v. Remington Designs, LLC*, No. CV 16- 9319-PA, 2017 WL 10581102, at \*4-5 (C.D. Cal. Sept. 5, 2017) (holding audited financial statements were relevant and discoverable to damages claim seeking lost profits); *Ag Spectrum Co. v. Elder*, No. 3:15-cv-00007-JEG-HCA, 2015 WL

11117312, at \*1-2 (S.D. Iowa Aug. 28, 2015) (company-wide financial information used to calculate lost-profit damages is discoverable).

required to provide the facts and data that the expert reviewed in preparing the opinion, regardless whether the expert actually relied on the facts and data in *James River Ins. Co. v. Interlachen Propertyowners* , No. 14-cv-3434 (ADM/LIB), 2015 WL 9946407, at \*5 (D. Minn. Dec. 21, 2015); see also *McCormick v. Halliburton Energy Services, Inc.*, Civ. No. 11- 1272, 2015 WL 2345310, \*2 (W.D. Okla. May 14, 2015); FED. R. CIV. P. 26(a)(2)(B)(ii). ocuments and





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Kooima v. Zacklift Intern., Inc., 209 F.R.D. 444, 447 (D.S.D. 2002); Katon v. United States, 5:16-CV-05023-JLV, 2018 WL 3079718, at \*2 (D.S.D. June 21, 2018); Page v. Hertz Corp., No. CIV. 09-5098, 2011 WL 5553489, at \*8, (D.S.D. Nov. 15, 2011) (the discoverable information .

ng its alleged

its other branch locations. Docket No. 117, p. 4, 7. Defendants believe Jim

the individual branch income statements could reveal mistakes in the aggregate calculations . . . different financial performance patterns at the individual branch locations . . . and may identify other weaknesses in the

lost- Id. at 7. The court agrees.

L it is apparent the expert compared an aggregated income statement of the Jim Hawk Group to the See Docket No. 118-1, pp. 15-19; Docket No. 176-1, p. 4. In the schedule 3 graph of the expert report, the financial records of the costs, and income for all the branches from the years 2016 to 2021. Docket No. 176-1, p. 4. Schedule 3 does not contain specifics on which branch each financial statement comes from or any of the underlying source data of this

Because the expert used aggregated income statements in making their

roup financial statements. Page, 2011 WL 5553489, at \*8; see also Ag Spectrum Co., 2015 WL 11117312,

underlying source documents may be inadequate without disclosure of the . income statements for each of the Jim Hawk Group branches that make up the aggregated financial statements in schedule 3 of the expert report.

S d production of corporate financial cases dealing with claims of lost profits. Uni-Splendor Corp., 2017 WL 10581102, at \*2-

revenue); HM Elecs., Inc. v. R.F. Techs., Inc., No. 12cv2884-BAS (MDD), 2014

Palm Bay Intern., Inc. v. Marchesi Di Barolo S.p.A., No. CV 09-601(ADS)(AKT), 2009 WL 3757054, at \*4 (E.D.N.Y. Nov. 9, 2009) (compelling

. This court finds that the income statements from all the branches that comprise the Jim Hawk Group are relevant, as and allow Defendants to adequately defend themselves against a lost profit claim.



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Jim Hawk rejects this conclusion by first Jim el, the Court held that financial information from Docket No. 141, p. 3; Docket No. 136, pp. 6- im Hawk requested production -

s, who all now work at its Luverne and Sioux Falls locations

should be compelled. Docket No. 136, pp. 6-7. The court added that

misappropriation of trade secrets, tortious interference with business relations

Id. at 7.

But here, Defendants are requesting the undincome statements for the Jim Hawk Group branches that make up the aggregated

Docket No. 176- and profit history of all its branches at issue by producing aggregated income statements for the entire company to its expert, and by reliance on 175, p. 2. Unlike J

financial records of each of the Jim Hawk Group branches may reveal errors in the aggregated data relied on by Jim Ha

Jim Hawk also argues that because the income statements of each of

the federal rules of discovery to produce documents that were not provided to or relied upon by

Docket No. 141, p. 3. This argument is unpersuasive.

Under FED. R. CIV. P.

While the specific

income statements from all Jim Hawk branches may have not been produced to their expert, Jim Hawk did provide aggregated income statements of all of Jim Hawk , which were relied on by their expert. See Docket No. 176-1. Inherent in this aggregated data are the specific income statements for all Jim Hawk branches.

scope and interpretation, extending to those matters which are relevant and reasonably Hofer, 981 F.2d at 380 (citing Kramer v. Boeing Co., 126 F.R.D. 690, 692 (D.Minn. 1989)). Jim Hawk cannot simply use FED. R. CIV. P. 26(a) as an end run to producing financial information that , which was put at issue by Jim Hawk in its expert report.

Kayongo- Male and Kooima data provided to the experts, not information beyond what was provided



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to the -6. While this is accurate, it does not change the outcome. Jim Hawk provided its expert aggregated financial data for all of Jim Hawk to be compared to income statements of its Sioux Falls branch. Docket No. 176. This action by Jim Hawk and its expert placed the income statements of all of Jim Hawk at issue. Therefore, this court finds it necessary for Jim Hawk to produce this financial data to Defendants.

Ag Spectrum Co.,

information for its Sioux Falls branch, a separate legal entity from the other Jim Hawk branches. While Jim Hawk may have produced the relevant Sioux Falls branch financial information, they have produced no income statements for the branches that make up the Jim Hawk Group aggregate data in the See Docket No. 176-1. These aggregated income statements were used by Jim Hawk expert to compare the percent change in net income between the Sioux Falls branch and the rest of Jim Hawk Group from 2016 to 2021. Id.

The court in Ag Spectrum Co. stated that the production of summaries of financial information drawn from underlying source documents may be inadequate without disclosure of the source documents themselves, to enable an opponent to analyze the source information on its own 11117312, at \*2. Without the disclosure of the source data within the Jim

all Jim Hawk Group branches), Defendants will be unable to adequately defend themselves profits.

Ji Marvin Lumber & Cedar Co. v. Norton Co. and Fields v. Gen. Motor Corp. Defendants only relied on Marvin Lumber for a general assertion of law, not a factual comparison. See Docket No. 117, p. 6.

damages, its calculations under that theory, and expert opinions on the subject is supported by FED. R. CIV. P. 26 and has been upheld several times by district courts within our circuit. Marvin Lumber, 113 F.R.D. at 593 (citing Kodekey Electronics, Inc. v. Mechanex Corp., 486 F.2d 449, 458 n. 10 (10th Cir. 1973)); see, e.g., Henne, 2021 WL 6804560, at \*18; Marco Technologies, LLC v. Midkiff, No. 19-cv-2323 (PJS/LIB), 2020 WL 13558312, at \*12 (D. Minn. June 4, 2020); Gacek v. Owens & Minor Distrib., Inc., Civ. No. 09-3202 (PAM/LIB), 2010 WL 11534503, at \*3 (D. Minn. Oct. 21, 2010). The assertion that this case is factually distinguishable, but that is beside the point. The statement cited by Defendants from Marvin Lumber remains legally sound.

Conversely, Defendants cited Fields to further their argument that the income statements of all Jim Hawk branches should be compelled, rather than citing it for a general assertion of law. See Docket No. 117, p. 6. Jim Hawk argues this case is distinguishable because it involves different underlying cause there is no claim that the track record of other [Jim Hawk]

No. 141, p. 5. The court disagrees. While Fields does not deal with claims of misappropriation of trade secrets, this is again beside the point.



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In addressing a motion to compel all financial documents (income statements included) of a car dealership, the Fields court determined that

, as it would be relevant to a claim of damages for lost profits. *Fields v. Gen. Motor Corp.*, No. 94 C 4066, 1996 WL 14040, at \*5-6 (N.D. Ill. Jan. 14, 1996). at issue once they provided aggregated income statements to their expert, company-wide income statements are relevant to Defendant a claim of lost profits.

Jim Hawk cites *Willis Elec. Co. v. Polygroup Trading Ltd.*, asserting company- relevant or proportional to the claims even where the defendants argue the information was needed to assess lost profit claims. Jim Hawk is correct in that the *Willis Elec. Co.* court denied a motion to - *Willis Elec. Co. v. Polygroup Trading Ltd.*, No. 15-CV-3443-WMW-Kmm, 2021 WL 568454, at \*10 (D. Minn. Feb. 16, 2021). But this case is distinguishable.

In a footnote, the *Willis Elec. Co.* indication that the targeted cost Id. at \*15, n. 14. But here, there is an indication report what facts, data, and financial information make up the aggregated financial sums relied on information in *Willis Elec. Co.*, the income statements Defendants seek are not Id. at \*10. The moment Jim Hawk and their expert sought to compare the income statements of their Sioux Falls branch to the

income of their entire company, the income statements of all their individual branches became relevant.

not limited to the only location at issue, the Jim Hawk Sioux Falls branch. Docket No. 141, p. 4. The party resisting discovery must show specifically how each interrogatory or request for production is not relevant or how each question is overly broad, burdensome or oppressive *Nye v. Hartford Acc. & Indem. Co.*, No. CIV. 12-5028-JLV, 2013 WL 3107492, at \*8 (D.S.D. June 18, 2013) (citing *St. Paul Reins. Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 512 (N.D. Iowa 2000)). As discussed above, the court finds that the income statements for all the Jim Hawk branches are relevant, proportional to the needs of this case, and not overly broad.

As to whether this discovery request is burdensome, Jim Hawk has not shown with specificity how producing the income statements for all their branches would be burdensome. Merely stating that it would be burdensome for Jim Hawk to produce this financial data amounts to a boilerplate objection. rplate objections fail to pass *Rounds v. Hartford*, 4:20-CV-04010-KES, 2021 WL 4150838, at \*9 (D.S.D. Sept. 13, 2021); , 209 F.R.D. 444, 446 (D.S.D. 2002); *Schultz v. Sentinel Ins. Co.*, No. 4:15-CV-04160-LLP, 2016 WL 3149686, at \*7 (D.S.D. Jun. 3, 2016). Thus, the court finds disclosure of the

Hawk were able to compile the aggregated income of all of Jim Hawk to provide to their expert and Defendants, they can provide the underlying source documents of that aggregated amount without



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significant additional expenditure of time and expense.

to 2021 for all the locations that comprise the Jim Hawk Group is granted. Within 15 days, Jim Hawk shall provide the income statements for these locations: Council Bluffs, Iowa; Davenport, Iowa; Sioux City, Iowa; Des Moines, Iowa; Chicago, Illinois; Morton, Illinois; East Peoria, Illinois; Kansas City, Missouri; Gretna, Nebraska; and Denver, Colorado. In the alternative, Jim Hawk will not be compelled to produce these records if their current expert report is withdrawn and replaced with a new one that analyzes only the profits

company income statements. expert report, the discovery sought must be provided.

3. on of Documents Scholten requests that the court compel

No. 117, p. 10. It appears Jim Hawk has produced relevant documents, but many have been designated as Attorne question before the court is whether the AEO designation should be removed from the relevant documents produced by Jim Hawk for production. See Docket No. 117, p. 11.

Defendants argue the AEO designations should be removed because they

ion. Id. Jim Hawk rejects this, arguing

competitor of Jim Hawk, an unfair competitive advantage. Docket No. 141, p. 11. Jim Hawk asserts that these documents contain information on Jim Id.

The court in , discussed the proper application of AEO:

While limiting di as an appropriate method of protecting information in very limited situations, e.g. cases involving trade secrets, e.g., *In re City of New York*, 607 F.3d 923, 935-36 (2d Cir. 2010) a drastic remedy given its impact on the party entitled to the information. For one thing, it limits the ability of the receiving party to view the relevant evidence, fully discuss it with counsel, and make intelligent litigation decisions. E.g., *Dorchen/Martin Assoc., Inc. v. Brook of Cheboygan*, 2012 WL 1936415, at \*1 (E.D. Mich. May 29, 2012). Also, in many cases, it limits the ability of a party to provide needed assistance to counsel. E.g., *MGP Ingredients, Inc. v. Mars, Inc.*, 245 F.R.D. 497, 500- 02 (D. Kan. 2007); *Medtronic Sofamor Danek, Inc. v. Michelson*, 2002 WL 33003691, at \*2-4 (W.D. Tenn. Jan. 30, 2002); *Frees, Inc. v. McMillian*, 2007 WL 184889, at \*5 (W.D. La. Jan. 22, 2007). For these reasons, any designation should be reserved for only those rare instances in which it is truly justified, i.e, when there is a real expectation and entitlement to confidentiality under the law that has been preserved and not waived and there is no other effective alternative. *Burris v. Versa Products, Inc.*, 2013 WL 608742, at \*2 (D. Minn. Feb. 19, 2013) (strict criteria for closure not met); *EQ Oklahoma, Inc. v. A Clean Environment Co.*, 2012 WL 5429869, at \*2 (N.D. Okla. Nov. 7,



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2012) (same); Scentsy, Inc. v. B.R. Chase, L.L.C., 2012 WL 4523112, at \*4-6 (D. Idaho Oct. 2, 2012) (same); Brandt Industries, Ltd. V. Pitonyak Machinery Corp., 2012 WL 3704956, at \*\*2-3 (S.D. Ind. Aug. 27, 2012) (same). In other words, it should not be authorized simply because one of the parties would prefer that certain information not be disclosed to an opposing party. See id. Cu , 4:19-CV-04031-KES, 2021 WL 680173, at \*13-14 (D.S.D. Feb. 22, 2021) (quoting Ragland v. Blue Cross Blue Shield of North Dakota, No. 1:12-cv-080, 2013 WL 3776495, at \*1-2 (D.N.D. June 25, 2013)). In Ag Spectrum Co.,

Ag Spectrum Co., 2015 WL 11117312, at \*2. Similarly, in White Cap Const. Supply, Inc. v. Tighton Fastener and Supply Corp.

because the parties were direct competitors and the information would provide a competitive advantage. White Cap Const. Supply, Inc. v. Tighton Fastener and Supply Corp., No. 8:08CV264, 2009 WL 3836891, at \*2 (D. Neb. Nov. 13, 2009).

This case involves allegations of trade secret misappropriations between direct competitors and the documents at issue are general ledger income statements. assume that providing income statements and financial information to a direct competitor could give Defendants an unfair competitive advantage outside of this litigation.

financial information should be designated as AEO. See Docket Nos. 117, p. 28 & 175, p. 26. Within the parties stipulated protection order, a Confidential to non-public

72, pp. 2-3. An AEO designation does not prevent counsel, independent non-party experts, consultants, and investigators from viewing these income statements in order seek the information Defendants want commission. Id. The court finds that an AEO designation is proper and should

for production.

4. Defendants request that the court compel a supplemental answer which: (1) identifies the commission; (2) a description of how the pro rata share of the insurance payment was applied to Sneve and how his 2019 fourth quarter commission was calculated; (3) details on Jim Hawk s net income figures used to calculate and (4) any business records, by Bates stamps, which are relevant to this interrogatory, without an AEO designation. Docket No. 117, p. 13.

Identify, with specificity, each component and any applicable terms of including hourly wage or salary, vacation or paid time off benefits, and

any commission or bonus compensation and the method [Jim Hawk} used to calculate the commission or bonus payments. Docket No. 118-7. Jim Hawk first objected to this request because terms used in the request were vague and ambiguous and the request was overly broad, unduly



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burdensome, and not proportional to the needs of the case. Id. Jim

Id. Jim Hawk has since provided two supplemental responses, which included details on Snev salary, commission rate, when commissions were paid, and a discussion on pro rata payments for Property and Casualty insurance. Id. Defendants assert these responses are deficient because they

commission in 2019, including the amount of the payment, what the insurance payment was for, and how it was pro-rated to

-7. A pro rata payment for insurance is certainly a factor that would In fact, Hawk explained that the

for the service department, which resulted in him not receiving a commission. Docket No. 155-6, p. 4. Thus, data related to the exact amounts of the insurance payments attributed to Sneve and how it was pro-rated to Jim

commissions. Jim Hawk argues that Interrogatory No. 1 does not include a request for information on how the insurance payment was calculated and they have already given Defendants information on why Sneve did not receive a commission. Docket No. 141, p. 12. But this is not the first time Defendants have requested this information. In a February 9, 2022, correspondence,

No. amount

No. 118-13, p. 1. While Jim Hawk may have provided Defendants with documents showing a net loss to the service department, these documents do not explain what the exact amount of the insurance payment was and how it was pro- Docket No. 118-18.

Sneve was paid a commission based on a percentage of the net income of the service department. Docket No. 118-7. Thus, any information on how insurance payments affected the net income of the service department would be relevant to his unpaid commission claims. granted.

5. Defendants request that the court compel Jim Hawk to disclose the gross sales of the service department from January 1, 2020, to March 31, 2020, and

p. 14. identifying Bates numbers that contained No. 141, p. 13; see also Docket No. 118-7. Defendants now claim that many documents referenced by Jim Hawk contain irrelevant materials. Docket Nos. 117 & 175.

s review prior to

irrelevant documents produced in their supplemental responses. Docket No. 141, p. 13. In other words, Jim Hawk again asserts Defendants did not meet their obligations to meet and confer on this





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issue before filing the motion to compel. argument. See, supra, Section B(1)(b). The parties argue at length whether the documents provided in Jim were relevant or irrelevant. Hawk provided were not responsive to the interrogatory, and the few relevant documents are designated as AEO. Docket No. 175, p. 12. Jim Hawk

but that some documents referenced were relevant. Docket No. 141, p. 13. Jim Hawk also concede the request. Id.

a detailed Interrogatory Answer Speed RMG Partners, LLC v. Arctic Cat Sales Inc., No. 20-cv-609 (NEB/LIB), 2021 WL 5087362, at \*5 (D. Minn. Jan. 5, 2021). Rule 33(d) Id. at \*6 (quoting Schwendimann v. Arkwright Advanced Coating, Inc., No. 11-820 (ADM/JSM), 2015 WL 12781248, at \*5 (D. Minn. Oct. 14, 2015) In addition, simply referring the interrogating party generally to large numbers of documents does not satisfy a obligations under Rule 33(d). Id. including ranges of non-responsive documents and inadvertently failing to include separate relevant documents, Jim Hawk has failed to satisfy their discovery obligations under Rule 33(d).

Information on the g

commissions were based on the revenue of the service department. Again, ter that is FED. R. CIV. P. 26(b)(1). Because of the longstanding issues between the parties on the documents being produced as to this interrogatory, the court compels Jim Hawk to provide three numbers to Defendants the s department for January, February, and March 2020. The court also compels

Jim Hawk provide the monthly income statement for the service department for February 2020. But, as this court held in Section B(3), supra, this documentation may be designated as AEO, as it would contain sensitive financial information.

6. Defendants request that the court compel

provided an accurate answer to this Sneve was not entitled to any additio No. 118-7, p. 3. Defendants argue this response is -

answers that explain why it did not pay [Sneve] the commission they had The court disagrees.

There is no requirement in FED. R. CIV. P. 33 that a party must respond only that the question has been See FED. R. CIV. P. [I]nterrgatories are intended to be a relatively inexpensive discovery method used to obtain sworn answers Sprint Comms. Co. L.P. v. Crow Creek Sioux Tribal Court, 316 F.R.D. 254, 273 (D.S.D. Feb. 26, 2016) (citing 8B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, § 2163 (3d. ed)). explanation on why Sneve did not receive a final commission payment. Jim Hawk stating that





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Sneve was not entitled to any additional commission or compensation sufficiently answers that question.

Whether Defendants have factual disagreements with the response given by Jim Hawk is irrelevant for purposes of this motion to compel. The

See Docket No. 155- gave details on how commissions were calculated, the timing of when commissions were paid, and some details on why the individual Defendants were not entitled to commissions. Id.

Defendants also argue they are entitled to an explanation because Jim

Docket No. 117, p. 16; see also Docket No. 118-18. But, again, this assertion raises a factual dispute rather than a discovery dispute asks for an explanation on why he was not paid a commission payment. Jim Hawk provided an adequate response indicating he was not entitled to any additional compensation. Interrogatory No. 3 is denied.

7. Defendants request that the court compel Jim Hawk provide additional documentation related to commission agreement and payments. Docket No. 117, p. 16. Defendants

s not produced any documents that reflects the lump sum insurance payment that JHTT claims Id. Jim Hawk

has already on payments and an explanation for withholding the insurance payment during depositions. Docket No. 141, p. 15.

To begin, this court previously compelled Jim Hawk provide additional responses of the Property and Casualty insurance premium that affected the net income See, supra, Section B(4). The court finds that documents related to the exact amounts of the insurance payments attributed to Sneve and how it was pro-

unpaid commissions. To clarify, Jim Hawk in its supplemental responses did provide details on

discussion on pro rata payments for Property and Casualty insurance. Docket No. 118-7. However, these responses do not include the amount of the insurance paym department. Jim Hawk also provided documents showing that the insurance costs resulted in a loss to the service department, but, again, these documents

do not provide information on the exact cost of the insurance. See Docket No. 118-18.

CFOs, Ryan Burke, and Diana Thorston. Docket No. 141, p. 15. But neither Mr. Burke nor Ms.



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Thorston provided information on the amount of the See Docket Nos. 155-7 & 155- production of documents detailing the insurance payment Jim Hawk allocated to its service department is granted.

8. , and

Interrogatory No. 1 for Jensen, Thompson, and Falor seeks details on the components and terms of their compensation, including details on their commissions and how those commissions were calculated. Docket No. 117, p. om January 1, 2020, to March 31, 2020. Id. at 18. Jim Hawk asserts they have properly responded to these interrogatories by providing relevant documents. Docket No. 141, p. 16; see also Docket Nos. 118-8, 118-9, 118-10. In their response, Jim Hawk co and realized that it inadvertently included some documents that were not

some relevant documents were provided. Docket No. 141, p. 16. Jim Hawk

also provided more specific details on which documents were relevant to the interrogatories within the Bates range they initially provided. Id. Jim Hawk

numbers could have Id. The court disagrees.

category and location, the records from which answers to interrogatories can be Speed RMG Partners, LLC, 2021 WL 5087362, at \*5 (quoting Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc., No. 9-cv-1091 (JNE/JSM), 2012 WL 12894846, at \*10 (D. Minn. May 11, 2012 imply referring the interrogating party generally to large numbers of documents does not satisfy a obligations under Rule 33(d). Id. (quoting Schwendimann, 2015 WL 12781248, at \*5)). By Bates range which included irrelevant documents. Docket No. 141, p. 16. It was only after Jim Hawk provided specifics within their response to this motion that Defendants were able to locate documents relevant to their interrogatories. improper under FED. R. CIV. P. 33(d).

But, with the specific details now provided by Jim Hawk, Defendants have suggested that many of the have been alleviated. See Docket No. 175, pp. 17-20. From this courts view, the only remaining issues with these interrogatories are: (1) whether the AEO designation on the documents provided should be designation, (2) whether an explanation of how Jim Hawk set Thompson and

(3) whether

commission plans should be compelled, (4) whether the Parts Department income statement for February 2020 should be compelled, and (5) whether Defendants should be awarded and costs due to Jim As a preliminary matter, whether fees and costs will be awarded to the Defendants is addressed below. See infra Section B(12).

As to issue (1), the court finds the documents should be re-designated as Confidential, not AEO.



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Under the parties the witness or Party making the designation shall have the burden of proof that the challenged Discovery Material is entitled to the protection of the particular designation of Confidential or Confidential within the scope of protection afforded by Fed. R. Civ. P. 26(c). Docket No. 72. Again, an AEO designation is truly justified, i.e., when there is a real expectation and entitlement to confidentiality under the law that has been preserved and not waived and there is no other effective alternative. , 2021 WL 680173, at \*13 (quoting Ragland, 2013 WL 3776495, at \*1-2)). Ragland, the court did not approve the inclusion of an AEO designation . . . because the movant had failed

Id.

Jim Hawk makes no argument that the documents provided in response

no. 2 should have the AEO designation. See Docket No. 141, pp. 16-17. Without such argument, Jim Hawk has failed to meet its burden of proof and the documents will be re-designated as Confidential. These documents will include: JHTT-Crossroads 002206-002208, 000865-000926, 002428, 000799-000864, 001392-001397, 002206-002207, 002428, 000927-000983, 001398- 001403.

As to issue (2), Defendants request that the court compel Jim Hawk to explain goals contained within the provided discovery. Docket No. 175, p. 18; see also Docket No. 155-9. Jim Hawk claims this information was provided in JHTT- Crossroads 002206-002208, as well as their past responses. Docket No. 141, p. 16.

JHTT-Crossroads 002206-002208 sets forth what data was used to calculate No. 155-9. Jim Hawk also provided information on how Jensen and Thompson could earn commissions based on the quotas, what the percentages were, and how they would apply. See Docket Nos. 118-9 & 118-10. Jim Hawk also provided JHTT-Crossroads 002428, which shows gross sales, gross margin, and cost of goods sold attributed to Jensen and Thompson. Docket No. 176- 11.

The court believes these responses are sufficient to answer Defendants

request for more information on ny ascertains and calculates the gross margin for Thompson See Docket No. 117, p. 21.

As to issue (3), Defendants assert the documents specified by Jim Hawk are not responsive to Thompson an do

Docket No. 175, p. 20. Jim Hawk claims this information was provided in JHTT-Crossroads 000799-000864, 001392- 001397, 002206-002207, 002428, 000927-000983, 001398-001403. 2

Docket No. 141, p. 16. JHTT-Crossroads 000799-000864 shows itemized pay summaries for Jensen



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from February 2019 until March 2020, including details on commission payment amounts. See Docket No. 179-1, pp. 1-41. These documents also provide detailed summaries of the sales attributed to Jensen and calculations of his commission payments. Id. at 42-66. JHTT-Crossroads 002428 shows gross sales, gross margin, and cost of goods sold attributed to Jensen and Thompson, and JHTT-Crossroads 002206-002208 shows data on

Docket No. 176-11; Docket No. 155-9.

2 JHTT-Crossroads 001392-001397 and 001398-001403 provide sales summaries for Ryan Wendling and Jim Murphy. See Docket Nos. 179-2 & 179-6.

JHTT-Crossroads 000927-000983 shows itemized pay summaries for Thompson from January 2019 to March 2020, including details on commission payment amounts. See Docket No. 179-3. These documents also show details on the sales attributed to Thompson and calculation of her commission payments. See Docket No. 179-4. Commission percentages. See Docket Nos. 118-9 & 118-10. The court believes these documents and prior responses sufficiently

compensation.

As to issue (4), Defendants assert Jim Hawk has not completely

monthly parts department income statement for February 2020. Docket No. 175, p. 19. Jim Hawk points to JHTT-Crossroads 000865-000926, 002428. Docket No. 141, p. 16. JHTT-Crossroads 002428 specifies that in February 2020, the net income of the parts department was \$36,647.35. Docket No. 176-11.

But Defendants indicate that JHTT-Crossroads 00899- 00926 appear to be monthly income statements for the parts department, excluding the income statement from February 2020. Docket No. 175, p. 19. JHTT-Crossroads 000865-000926 first shows itemized pay summaries for Falor from January 2019 to March 2020, including details on commission

payments. See Docket No. 180-1, pp. 1-34. Next, these documents show itemized income statements for the parts department, but it does not include a February 2020 statement. See Docket No. 180-1, pp. 35-62. The court compels Jim Hawk to provide the February 2020 income statement for the parts department.

9. Thompson, Jensen, and Defendants request that the court compel Jim Hawk to explain why Thompson, Jensen, and Falor did not receive their commission payments. Docket No. 117, pp. 21- the Defendant No. 141, p. 17. For the same reasons provided in Section B(6), supra, the court

Interrogatory No. 3.



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10. Motion to Compel E Defendants request that the court compel Jim Hawk to provide additional electronic discovery. Docket No. 117, p. 22. Defendants request Jim Hawk: (1) collect, review, and produce text messages from Jim Ha custodians, including Jim Hawk, Dave Hawk, Clint Carter, Tim Big Eagle, Curt Westphal, Dan Buckley, Bill Forsling, and Ryan Burke; (2) provide an explanation as to Burke within its custody and control and (3) review and provide discovery on additional ESI search terms. See Docket No. 175, pp. 20-26. Jim Hawk argues Defendants have not met and conferred on these issues, they have

already provided the relevant information, and some of the requested information is not reasonably accessible. See Docket No. 141, pp. 17-26. As a preliminary matter, the court finds that Defendants sufficiently met their obligations to meet-and-confer on issues of ESI through many correspondences between the parties. See Docket Nos. 118-3, 118-24, 118-25, 118-26, 118-27, 118-28, 118-29, 118-30, 118-31, 155-10.

a. Standard for ESI Discovery The scope and limits of ESI discovery are governed by FED. R. CIV. P. not provide discovery of [ESI] from sources that the

FED. R. CIV. P.

Best Buy Stores, L.P. v. Developers Diversified Realty Corp., 247 F.R.D. 567, 570 (D. Minn. Nov. 29, 2007) (quoting Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318 (S.D.N.Y. 2003)) FED. R. CIV. P. 26(b)(2)(B).

Id. Courts consider seven factors to

specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more

easily accessed sources; (4) the likelihood of finding relevant responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' Helmert v. Butterball, LLC, No. 4:08CV00342 JLH, 2010 WL 2179180, at \*8 (E.D. Ark. May 27, 2010) (citing FED. R. CIV. P. 26(b)(2) advisory

responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the Id.; see also Johnson v. Neiman, 4:09CV00689 AGF, 2010 WL 4065368, at \*1 (E.D. MO. Oct. 18, 2010).

b. Whether Text Message ESI Should Be Compelled Defendants request that the court compel at



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issue. Docket No. 175, p. 23. Defendants assert these custodians include: Jim Hawk, Dave Hawk, Clint Carter, Tim Big Eagle, Curt Westphal, Dan Buckley, Bill Forsling, and Ryan Burke. Id. at 24. Jim Hawk argues these text messages are not relevant and asserts they have already produced considerable amounts of ESI. Docket No. 141, pp. 23-24. The court disagrees.

A review and collection of Jim Hawk employee text messages for messages related to the claims brought by Defendants is certainly relevant. The individuals that Defendants seek messages from are, or were, either

leaders or employees within Jim Hawk and review of these messages may provide Defendants with relevant discovery on their claims. Jim Hawk has clarified they have reviewed and provided ESI from the cellphones of the Defendants, however, they have made clear they will not review their own employees See Docket No. 118-31. This is improper without a

e discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or FED. R. CIV. P. 26(b)(2)(B). Jim Hawk has made no such argument. In Hawk indicated they have reviewed and provided considerable ESI data to Defendants and spent \$42,065.61 in fees with its ESI vendor and approximately \$84,387.50 in

show how the review and production of text messages from Jim Hawk

Jim Hawk has provided no insight as to how many documents Defendants request will cumulate, how expensive this review will be, or how much time it will take to conduct this review. Simply arguing that they have already provided considerable ESI and their own witnesses have testified that no text messages exist is irrelevant for purposes of ESI discovery. Jim Hawk must show oduction of text messages from Jim Hawk company- They have failed to do so.

messages. As to the first factor, Defendants have made a specific request for review of Jim Hawk employee text messages that referred to

Crossroad

-24.

The second factor favors Jim Hawk. Jim Hawk asserts they have provide totaling approximately 260,570 documents; data from the mobile phones of the Individual Defendants who possessed company-owned mobile phones totaling approximately 17,000 documents; and an additional 20 GB of data consisting 24. It is reasonable to assume there is vast amounts of relevant information within this ESI data already produced. As to the third factor, there is no argument of spoliation of ESI, thus this factor favors neither party.



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Factors four and five favor the Defendants. It is possible Jim Hawk will

ees referencing Defendants Defendants to support their claims against Jim Hawk. As this court has previously held, factor six

would favor Jim Hawk, as this litigation is not a matter of public concern, and factor seven is irrelevant because neither party has shared with the court information on their resources. See Docket No. 136, pp. 18-19.

good cause factors as a checklist; rather, Johnson, 2010 WL 4065368, at \*2 (citing Helmert, 2010 WL 2179180, at \*9). Because Defendants have shown good cause for specifically requesting these relevant text messages and Jim

and production of Jim Hawk employee text messages is granted. Jim Hawk shall collect, review, and from Jim Hawk, Dave Hawk, Clint Carter, Tim Big Eagle, Curt Westphal, Dan -owned cellphones.

The court is sympathetic to the large costs associated with producing

Hawk shall be conducting this review of text messages. Without date restrictions, it is reasonable to assume the search of all these individuals text messages will produce large amounts of data. Therefore, the court will sua sponte impose a date restriction: Jim Hawk shall review and produce Jim Hawk employee text messages between November 1, 2019, and June 1, 2020.

## c. Whether Jim Hawk Should Be Compelled to Provide

Additional Details on ESI Defendants request that the court compel Jim Hawk to provide further explanation as to their own electronic discovery methods. Docket No. 175,

pp. 24-25. Defendants request its October 2021 ESI collections that included Jim Hawk, Dave Hawk, Clint Cater, Tim Big Eagle, Curt Westphal, Dan Buckley, and Bill Forsling included

calendar entries reduce [their] ESI collection lain why it does not have any email or Id.

As to issue 1, it appears Jim Hawk has already answered Defendants as to whether the ESI provided included the custodians sent and deleted email folders and any calendar entries and appointment. See Docket No. 118-31. On March 11, 2022, Jim Hawk stated they had provided the email inboxes for the following individuals: Alvin Scholten, Bill Forsling, Clint Carter, Curt Westphal, Dave Hawk, David Jensen, Derek Falor, Jim Hawk, Mark Sneve, Michael Falor, Tim Big Eagle, and Tracy Thompson. Docket No. 118-29, p. 2. Within days, Defendants eference - - -30, p. 1. Shortly after, Jim Hawk confirmed





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of the inbox itself, as well as the sent and deleted items folders and any -31.

Defendants object to individually mentioned. But, as reflected in the March 11 correspondence, Jim Hawk

intended to provide all the email inboxes at issue. Jim Hawk provided an explanation that the ESI contained both the sent and deleted items folders and any calendar entries and appointments. Thus, it is reasonable to assume Jim Hawk also meant that within all the email inboxes they provided to Defendants, the ESI included the sent and deleted items folders and the calendar entries and appointments for all twelve individuals. Further explanation is denied.

parameters or searches that it applied to the large, pre-discovery ESI collection

No. 175, p. 24. On March 28, 2022, Jim Hawk responded to Defendants' similar request stating:

Jim Hawk narrowed this data using date filters to eliminate data outside of date parameters not relevant to the litigation. Jim Hawk then ran searches for emails between the individual defendants, searches for emails sent to or received from personal email addresses, and searches for key words like Crossroads, customer, list, and Alvin. Further, Jim Hawk ran a search for Termination, Fire, Firing, Resign, Quit, Retirement, Commission, Bonus, TruckPro (Truck /5 Pro), (sale sell) /10 "parts division", (sale sell) /10 "parts department" against all data from the Individual Defendants. This resulted in 1,433 unique results with families. These documents are being reviewed and will be produced by March 30. Docket No. 118-31, p. 2. While Jim Hawk has provided the search terms

the date range they used in reducing their ESI production.

explanation as to why Jim Hawk did not have any email or other ESI attributable to Burke within its custody or control. This question would be more appropriate as a separate interrogatory or as a question during the deposition

d. Whether Jim Hawk Should be Compelled to Review

Additional Search Terms Defendants request that the court compel Jim Hawk to produce documents responsive to the No. 117, p. 27; Docket No. 175, pp. 25-26. Jim Hawk argues ESI on these two

Again, if the party identifies as not reasonably accessible because of undue burden or FED. R. CIV. P. 26(b)(2)(B). Jim Hawk asserts that the search terms returned 11,000 documents, many of which were spam or irrelevant. Docket No. 141, p. 25. Jim Hawk estimates it will take around 183 hours to review these 11,000 documents, which could cost around \$39,000. *Id.* at 26. Defendants do not dispute these numbers, but argue that if the results are mostly non-relevant spam, then Jim Hawk should be able to review these documents significantly faster. Docket No. 175, pp. 25- 26. This argument is





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unpersuasive.

Jim Hawk has conducted extensive review of ESI in this case. Specifically, Jim Hawk has reviewed inboxes of 12 individuals totaling approximately 260,570 documents; data from

the mobile phones of the Individual Defendants who possessed company- owned mobile phones totaling approximately 17,000 documents; and an

Requiring Jim Hawk to review additional search terms which they have continuously claimed results in large amounts of spam or irrelevant data would be improper given the costs associated with such review.

Nonetheless, the court will compel this review if Defendants can show FED. R. CIV. P. 26(b)(2)(B). request for additional re

Jim Hawk, based on the extensive amounts of ESI discovery already provided to Defendants in this case. Factor three is irrelevant as there are no claims of spoliation of ESI data in this case.

Factors four and five also favor Jim Hawk. Jim Hawk asserts that many of the 11,000 d were spam, non-responsive, and not proportional to the needs of the case. Docket No. 141, p. 25. With this, it is unlikely that Defendants would be able to find relevant responsive information from this ESI review. In fact, Defendants have not provided any argument or evidence that review of these 11,000 documents will provide any new or relevant information. And, as addressed previously, factor six would favor Jim Hawk, as this litigation is not a matter of public concern, and factor seven is irrelevant

because neither party has shared with the court information on their resources. See Docket No. 136, pp. 18-19; see, supra, Section B(10)(b).

Given the substantial expense required for Jim Hawk to review and

review turning up any relevant discovery, the court finds Defendants have nably FED. R. CIV. P. 26(b)(2)(B)

Defendants propose an alternative, requesting that the court compel Jim Hawk to only review and produce 2,803 documents. Docket No. 175, p. 26. But this alternative should have been proposed during one of the many meet-and-confer conferences the parties had, not for the first time within a motion to compel. See Docket Nos. 118-29, 118-30, 118-31. This request is similarly denied.

11. -Designate AEO Materials Defendants request that the court compel -designate all



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reports, sales reports, invoices, receipts, internal summaries and calculations, deposition testimony provided about the customers with whom Plaintiff claims

p. 26. Jim Hawk resists overly broad,

and the documents Defendants seek to be de-designated were properly classified as AEO. Docket No. 141, p. 27. The court agrees.

any designation of material as should be reserved for only those rare instances in which it is truly justified, i.e, when there is a real expectation and entitlement to confidentiality under the law that has been preserved and not waived and there is no other effective alternative. Cu , 2021 WL 680173, at \*13-14 (citing Burris, 2013 WL 608742,

at \*2). Without Defendants referencing specific documents they seek to be de- designated, it is difficult for the court to determine whether an AEO designation is justified. Thus, the court will consider these requests generally.

First, commission reports, sales reports, invoices, receipts, and internal summaries and calculations are certainly have conceded can remain AEO. Next, customer lists, email communications,

also properly designated as AEO. See Consultus, LLC v. CPC Commodities, No. 19-00821-CV-W-FJG, 2020 WL 8513823, at \*4 (W.D. Mo. Dec. 3, 2020)

, 235 F.R.D. 435, 445 (N.D. Ill. 2006)). Again, this case involves allegations of trade secret misappropriation between direct competitors. Providing this confidential customer information to a direct competitor could put Jim Hawk at a competitive disadvantage outside of this litigation.

However, ins financial information, the court believes it should be de-designated to Confidential, not AEO. See Docket No. 118-1. If this case were to go to trial, it is likely this expert report would be placed into evidence and the expert would testify. If this were to happen, would inevitably discover the sensitive financial information contained within this report since they have a right to be present during trial. Due to this, the courts believes it would be pointless to prevent the Defendants from gaining access to this report at this point in the litigation. -designate all documents other than financial records is denied, with the exception that expert report shall be de-designated to Confidential.

12. Defendants request that the court award motion to compel under Federal Rule of Civil Procedure 37(a)(5)(A-C). Docket No. 117, p. 28. The court orders Defendants to serve Jim Hawk within twenty-one (21) days of the date of this opinion a motion for attorneys fees together with a detailed accounting of the time spent in preparing and defending this motion. Jim Hawk shall have twenty-one (21) days to respond in opposition thereto. Defendants may file a reply within fourteen



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(14) days. If objections are lodged to this opinion, all litigation over attorneys fees will be suspended until the outcome of such objections is known. If objections are timely filed, Defendants shall hold objections are resolved.

C.

## 1. Has Jim Hawk Exhausted their Obligations to Meet and Confer

under Fed. R. Civ. P. 37(a)(1)? Again, before a party may move for an order compelling discovery certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to must be filed. Fed. R. Civ. P. 37(a)(1).

dispute without involving the court. Shuffle Master, Inc., 170 F.R.D. at 170- 171. C Id. Thus, before must personally engage in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine Id.

Defendant first asserts that Jim Hawk failed to exhaust their obligations to meet and confer regarding requests for production nos. 65-76. 3

Docket No. 145, p. 27. For these requests, Crossroads believed the parties could resolve any of those issues [and]

No. 177, p. 12. Thus, Jim Hawk argues any further efforts to meet and confer on these issues would have been futile. Id.

3 Jim Hawk has indicated that request nos. 65-66 & 72-76 are now moot.

a. Requests for Production Nos. 65-76 Jim Hawk sent correspondence outlining issues with requests for production nos. 65-76 on June 28, 2022, and set a two-day deadline for Defendants to respond. See Docket No. 120-1, pp. 16-18. In this correspondence, Jim Hawk indicated they would be willing to discuss the issues over the phone. Id. at 16. Defendants responded to this correspondence on June 30, as requested, stating:

In light of the short-turnaround for which you have requested a response, we will need additional time to review the issues raised in your letter. Until we have had such opportunity to review and reconsider, our position on these issues remains consistent with the objections and responses previously articulated to these discovery requests. Docket No. 120-1, p. 19. The very next day, July 1, 2022, Jim Hawk filed this motion to compel. See Docket No. 120.

Filing a motion to compel one day after Defendants indicated they would need more time to review and properly respond to issues with the discovery requests is certainly not a good faith effort by Jim



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Hawk to resolve this dispute without court intervention. See *Compass Bank v. Shamgochian*, 287 F.R.D. 397, 400 (S.D. Tex. 2012) (Plaintiff's single letter unilaterally identifying flaws in Defendant's discovery responses and setting an arbitrary response deadline for Defendant would seem to be inadequate, as it does not equate to a good faith conferral or attempt to confer. motion to compel requests for production nos. 65-76 are denied pursuant to FED. R. CIV. P. 37(a)(1).

b. Requests for Production Nos. 7 & 8 Defendants also assert that Jim Hawk failed to meet and confer on requests for production nos. 7 & 8. Docket No. 145, p. 28. Defendants argue that while Jim Hawk indicated the discovery on these requests were deficient, Id. On March 31, 2022, Jim Hawk sent correspondence addressing issues with requests for production nos. 7 and 33. Docket No. 120-1, p. 11. Defendants did not respond to this correspondence. Then, on June 27, 2022, Jim Hawk sent correspondence addressing issues with requests for production nos. 7, 8, and 33 and stated they would be willing to meet and confer on these issues if Defendants had concerns. Docket No. 120-1, p. 13. Defendants responded to this correspondence, but did not address any issues raised by Jim Hawk. See Docket No. 120-1, p. 12. The court believes Jim Hawk has exhausted its obligations to meet and confer on requests for production nos. 7 & 8. The lack of conferral on issues with regard to these discovery requests was due to Defendants refusal to respon correspondences. The failure to confer was not attributable to lack of effort on part.

2. Jim Hawk requests that the court compel and all documents and/or communications reflecting any service, parts and trailer sales business Crossroads Docket No. 105-1, p. 28. ion of

Docket No. 145, p. 4.

litigants seeking to compel discovery must describe[,] with a reasonable degree of specificity, the information they hope to obtain and its importance to their Woodmen of the World, 2007 WL 1217919, at \*1 (citing *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972)). Jim Hawk asserts this documentation is discoverable because it:

(1) following the bad acts of Defendants; (2) which customers have increased their business with Crossroads following the bad acts of Defendants; (3) what revenue Crossroads has received from this new and increased business; (4) what specific work Crossroads is performing for such customers in comparison to the work performed by JHTT; and (5) any communications with these customers, including whether unlawful means were used by the Defendants to transition customers from JHTT to Crossroads.

Docket No. 177, p. 3. In order unlimited time period within this request, Jim Hawk has subsequently agreed to limit these requests to March 1, 2018, to the present. Docket No. 177, p. 2. Aside from the lack of a time restriction, Defendants argue these requests are vague, overbroad, [and] unduly burdensome, and Defendants do



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145, p. 4. Instead, Defendants have referred Jim Hawk to its website, which

Id.

Jim Hawk argues the website is not responsive to these requests, as the

with each customer, the volume of business conducted with such customers and/or the revenue generated from the business conducted with such But these concerns raised by Jim Hawk are not addressed in their requests for production they are broadly requesting any and all documents/communications reflecting any service, parts and trailer sales business Crossroads engaged in.

These requests leave the court with question as to what exactly Jim

approximately 12,000 customers, or only mutual customers with Jim Hawk? Jim Hawk

what type of documents or communications related to sales? Financial records, income statements, sales reports, emails, phone calls, text messages? Even to limit this request to March 1, 2018 to present, the court finds that Jim Hawk has not hese requests. See *Woodmen of the World*, 2007 WL 1217919, at \*1. These uncertainties could have been clarified by the parties during one of the many meet and confer conferences. Therefore, Jim Hawks request for production nos. 7 & 8 are denied.

3. Jim Hawk requests that the court compel Defendants to produce

Defendants request that this court reconsider and clarify its prior order, 4

customers and Discovery Agreement by ten- - request is without merit.

Request for Production No. 33 previously,

customers for the period of January 1, 2017, p. mutual customers nor does this it simply states they must Id.; see also Docket No. 120, p. 3.

Additionally, any issues Defendants had with the scope or relevancy of should have been taken up in a motion to reconsider pursuant to Fed. R. Civ. P. 60, not in a response to a separate motion to compel. This court stands by its previous order requiring

4 See Docket No. 136, pp. 10-11

period of January 1, 2017, With this, . This court



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documents, ESI or otherwise, from a period of January 1, 2017, to present. And the parties have already identified the mutual customers that would be relevant to this request. See Docket No. 105-1, pp. 121, 123; Docket No. 110, pp. 20-21.

### 4. ESI

Jim Hawk believes these additional searches Crossroads is conducting with JHTT customers, and what business has been Id. information could show how Crossroads is pricing its products, and to what ex Id. at 11.

Again, the scope and limits of ESI discovery are governed by FED. R. CIV. P. 26(b). Defendants

FED. R. CIV. P. 26(b)(2)(B). Defendants have the burden to show that Jim Id. But the court may

Id.

unclear which customers Jim Hawk is seeking information from communications with all customers, communications with all customers. Docket No. 145, p. 19. The court agrees. Jim Hawk has failed to indicate with a reasonable degree of specificity, they are seeking information from. Woodmen of the World, 2007 WL 1217919, at \*1. In both briefs, Jim Hawk requests,

See Docket No. 120, pp. 10-11; Docket No. 177, pp. 9-10. The court cannot ascertain which group of customers Jim Hawk hopes to obtain additional ESI discovery on. Therefore, the court finds that this discovery request is not

Similarly, Defendants assert there would be substantial cost in conducting additional ESI discovery. Docket No. 145, p. 22. Defendants state they have incurred costs of \$25,757.65 with their ESI vendor, excluding attorneys does not know the size of the additional Id. Jim Hawk disputes this, stating the additional 30 days of data should only cost around \$4,292.94. Docket No. 177, p. 10. But, whether burdensome or not, there still would be costs involved with additional ESI discovery.

In fact, Defendants assert, and Jim Hawk concedes, that Defendants initial ESI review and production included relevant customer communications. Docket No. 177, p. 10. In response, Jim Hawk simply states, the list of ESI search terms did not include all Id. But which relevant customers names? Without more specifics on which group of customers Jim Hawk is seeking communications from, this request is not

Nonetheless, the court can compel this additional ESI discovery if Jim Hawk shows good cause. Courts consider seven factors to determine whether a

request; (2) the quantity of information available from other and more easily accessed sources; (3) the



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failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance Helmer 2010 WL 2179180, at \*8.

For the first factor, as addressed previously, the court finds that Jim

also favors Defendants, as there has been significant ESI discovery in this case, including the production of customer communications. See Docket No. 145,

pp. 20-21; Docket No. 177, p. 10. Factor three favors neither party as there is no claim of spoliation of ESI data.

Factors four and five also favor Defendants. Defendants assert that further search and review for all customer communications would not yield much more relevant evidence. Jim Hawk relies on the testimony of Dan Buckley and Jim Murphy to assert others were being told incorrect information about JHTT and warrants searching for additional customer 177, p. 11. But the testimony of these two individuals does not evidence the likelihood of Defendants finding additional relevant information beyond the customer communications that have already been produced. As held previously, factor six would favor Defendants, as this litigation is not a matter of public concern, and factor seven is irrelevant because neither party has shared with the court information on their resources. See Docket No. 136, pp. 18-19.

here each factor either favors Defendants or is neutral. Johnson, 2010 WL

4065368, at \*2 (citing Helmer, 2010 WL 2179180, at \*9). Given the lack of

communications have already been produced, and the low likelihood of additional searches yielding more relevant information, the court finds Jim Hawk has failed to FED. R. CIV. P. 26(b)(2)(B). Thus, is

denied. Jim Hawk makes a separate argument to expand the date range parameter of ESI discovery from June 1, 2020, to June 30, 2020. Docket No. 177, p. 12. additional ESI discovery, this issue is moot.

5. Defendants Jim Hawk requests that the court compel Defendants to produce financial documentation beyond its Sioux Falls and Luverne branches. Docket

compel the production of financial documents from locations. *Id.*; see, *supra* Section B(2).

locations is similar, and thus any expansion of financial record production should be mutual. Docket No. 177, p. 12.





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customer that was improperly taken by the Defendants significantly increased the wrongful acts of  
However, as this court has previously

Falls and Luverne locations because

As this court discussed in Section B(2), Defendants are requesting the roup branches

to calculate lost profits. Docket No. 176-1. Because Jim Hawk placed the revenue and profit history of all its branches at issue by having its expert rely on aggreg request relevant and not overboard. Review of these financial records by Defendants may reveal calculation errors in the aggregated data relied on by

But, as this court prefaced, Jim Hawk would not be compelled to produce these records if their current expert report is withdrawn and replaced with a new one that analyzes only without a comparison to general aggregated company income statements. Thus, in keeping with this court s previous order,

locations is denied.

6. Whether Jim Hawk is Jim Hawk requests that the court award motion to compel under Federal Rule of Civil Procedure 37(a)(5)(A-C). Docket No. 177, p. 13. The court orders Jim Hawk to serve Defendants within twenty- one (21) days of the date of this opinion a motion for attorneys fees together with a detailed accounting of the time spent in preparing and defending this motion. Defendants shall have twenty-one (21) days to respond in opposition thereto. Jim Hawk may file a reply within fourteen (14) days. If objections are lodged to this opinion, all litigation over attorneys fees will be suspended until

the outcome of such objections is known. If objections are timely filed, Jim Hawk shall hold are resolved.

The court notes that both parties won some issues and lost some issues on each of their respective motions. Total attorney time for making the motions would accordingly be reduced based on the nature of the outcome

Therefore, the court asks both parties to take this into consideration before

fees on these motions.

CONCLUSION Based on the foregoing facts, law, and analysis, it is hereby: ORDERED that motion to compel [Docket No. 116] is granted in part and denied in part in accordance with this opinion. Plaintiff shall provide, within 21 days of the date of this order, documents or answers to





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interrogatories responsive to these discovery requests, unless objections are filed.

119] is granted in part and denied in part in accordance with this opinion. Defendants shall provide, within 21 days of the date of this order, information and copies of documents responsive to these discovery requests, unless objections are filed.

NOTICE OF RIGHT TO APPEAL Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have fourteen (14) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1)(A), unless an extension of time for good cause is obtained. See Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. *Id.* Objections must be timely and specific in order to require review by the district court. *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990); *Nash v. Black*, 781 F.2d 665 (8th Cir. 1986).

DATED this 23rd day of January, 2023.

BY THE COURT:

VERONICA L. DUFFY United States Magistrate Judge

