

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

MICHAEL ROWAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 15-cv-9227-JWL-TJJ
	)	
SUNFLOWER ELECTRIC	)	
POWER CORPORATION, et al.,	)	
	)	
Defendants.	)	

**MEMORANDUM AND ORDER**

This matter is before the Court on Defendant Power Constructors, Inc.’s Motion to Compel (ECF No. 130). Pursuant to Fed. R. Civ. P. 37, Defendant Power Constructors, Inc. (“Power”) asks the Court to overrule Plaintiff’s objections and order Plaintiff to fully answer Interrogatory Numbers 11, 12, 14, 16, 17, 18, and 19, and to produce documents responsive to Requests for Production Numbers 15, 24, 27, and 30 in Power’s First Sets of Interrogatories and Requests for Production of Documents. As set forth below, Plaintiff’s objections to the discovery requests are sustained in part and overruled in part, and Power’s motion is granted in part and denied in part.

**I. Relevant Background**

Power served its First Set of Interrogatories to Plaintiff and its First Set of Requests for Production of Documents to Plaintiff on November 18, 2015. Plaintiff responded to Power’s document requests on December 21, 2015, and to Power’s interrogatories on January 18, 2016.<sup>1</sup> On February 12, 2016, Plaintiff provided supplemental responses to Power’s document requests. After conferring with Plaintiff to resolve the issues in dispute without court action, as required by

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<sup>1</sup> See ECF No. 130 at 2.

Fed. R. Civ. P. 37(a)(1) and D. Kan. Rule 37.2, Power filed the instant Motion to Compel.<sup>2</sup>

## **II. Specific Discovery Requests at Issue**

Power requests in its motion that the Court order Plaintiff to provide answers responsive to Interrogatory Numbers 11, 12, 14, and 16-19. Power further requests that the Court order Plaintiff to produce documents responsive to Requests for Production Numbers 15, 24, 27, and 30.

### **A. Interrogatory Nos. 11 and 12**

Power seeks to compel Plaintiff to identify his preexisting conditions he alleges were aggravated by the events of August 29, 2013, and to provide information regarding his treatment for those conditions. Plaintiff posed no objection to either interrogatory and provided answers to both. The interrogatories are as follows:

Interrogatory No. 11: Please describe all injuries, ailments or pains, which Plaintiff Michael Rowan claims to have suffered as a result of the alleged occurrence, stating the part of your body so affected, the severity of such injuries, ailments or pains, and how long each lasted.

Interrogatory No. 12: Please state each date on which you were examined or treated by any doctor, physician, hospital, clinic, or medical practitioner with respect to any injury, illness or disability which you claim to have sustained or suffered as a result of the alleged occurrence, setting forth in detail as to each such date of examination or treatment:

- a. The name and address of each such doctor, physician, or medical practitioner;
- b. The nature and extent of the examination or treatment received from each such doctor, physician, or medical practitioner;
- c. The diagnosis and prognosis made by each such doctor, physician, or medical practitioner;

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<sup>2</sup> The parties' efforts include a golden rule letter from Power, followed by Plaintiff providing supplemental response to Power's First Document Request, a telephone conference, and an exchange of letters. *See id.* at 2-3.

d. The amount charged you, or any other person or organization for your account, by each doctor, physician, or medical practitioner, fully itemized as indicated in any bill rendered therefor.<sup>3</sup>

**B. Interrogatory No. 14**

Power also seeks to compel Plaintiff to respond to Interrogatory No. 14 as modified by Power. Plaintiff objected that the interrogatory was duplicative of Interrogatory No. 13(c), which asked Plaintiff to provide dates during which he was wholly incapacitated from normal activities and to give complete details as to each activity from which he was incapacitated. Plaintiff also objected that the terms “total” and “partial” disability were not defined and were therefore overbroad. The interrogatory states as follows:

Please state the inclusive dates you claim you were, as a result of the alleged occurrence:

- a. Totally disabled from your normal activities;
- b. Partially disabled from your normal activities.<sup>4</sup>

**C. Interrogatory Nos. 16–19**

Power seeks to compel Plaintiff to provide responses to Interrogatory Nos. 16 through 19, to which Plaintiff objected as exceeding the limit of 25 interrogatories, including discrete subparts, imposed by the Scheduling Order and Federal Rule of Civil Procedure 33(a)(1). As Plaintiff’s objection to these interrogatories is not based on the information they seek, there is no need to set forth their content.

**D. Request for Production No. 15**

Power seeks to compel Plaintiff to produce all documents in his possession relating to his current employer which are responsive to Request No. 15, which asks Plaintiff to produce “all

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<sup>3</sup> ECF No. 130-4 at 4-5.

<sup>4</sup> *Id.* at 6-7.

documents evidencing or relating to your employment with any employer within the past five (5) years, including but not limited to your employment with Track Utility, LLC, including contracts, employee handbooks, training materials, pay stubs, paychecks, W-2's, or other similar materials related to your employment.”<sup>5</sup> Plaintiff replied that he was working to identify responsive documents in his possession or that he could obtain, and that he would supplement his response to the extent he could locate responsive documents.<sup>6</sup> On February 12, 2016, Plaintiff supplemented his responses but with respect to his current employer stated, “Plaintiff has not produced any documents from his current employer other than wage information from the date of the incident to current.” Plaintiff objected that any other information from his current employer was irrelevant to any claim or defense in the case.<sup>7</sup>

**E. Request for Production No. 24**

Power's Request No. 24 asks Plaintiff to produce “[a] photocopy of the Plaintiff's driver's license for any state in which he has been licensed in the past five (5) years.”<sup>8</sup> Plaintiff produced copies of his commercial driver's licenses for Idaho and Washington, but redacted his driver's license number from each. Plaintiff objected to revealing the numbers as irrelevant to any party's claims or defenses.<sup>9</sup> Power seeks to compel Plaintiff to produce legible, unredacted copies of his driver's licenses.

**F. Request for Production No. 27**

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<sup>5</sup> ECF No. 130-3 at 6.

<sup>6</sup> *Id.*

<sup>7</sup> ECF No. 130-6 at 7.

<sup>8</sup> ECF No. 130-3 at 9.

<sup>9</sup> ECF No. 130-6 at 10.

Power seeks to compel Plaintiff to produce documents responsive to Request No. 27, which seeks “[a] copy of all cell phone records, text messages, emails, invoices or other documents which would evidence telephone calls or communications made or received by the Plaintiff during the seven days preceding and up to and including the date of the events referred to in your First Amended Complaint.”<sup>10</sup> Plaintiff produced no documents, objecting that the request is overbroad, unduly burdensome, not limited in time or scope, and irrelevant to the extent it requests communications not regarding the project at issue.<sup>11</sup>

#### **G. Request for Production No. 30**

Finally, Power seeks to compel Plaintiff to produce all documents in his possession responsive to Request No. 30, which seeks “all documents concerning any money, payments or reimbursements received by you from any party related to any of [sic] damages, missed work, or medical treatments received as a result of the events described in your First Amended Complaint.”<sup>12</sup> Plaintiff produced no documents, objecting that the request is irrelevant and inadmissible.

### **III. The Parties’ Arguments**

The interrogatories and document requests that are the subject of this motion do not relate to a single issue or set of issues. Instead, as Power states, through this motion it is seeking to discover documents and information regarding the following issues: Plaintiff’s injuries and damages, including his current physical and mental conditions post-injury; Plaintiff’s post-injury capacity to work, including the type of work he is able to perform, as well as the specific work he

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<sup>10</sup> ECF No. 130-3 at 9.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 10.

has told his employers he is able to perform and his earning capacity; Plaintiff's compliance with safety policies, procedures, and regulations; Plaintiff's conduct during the immediate time leading up to and including the time of the accident; the reasonable value of medical services provided him following the accident; and Plaintiff's fault.

Plaintiff has resisted Power's efforts for a variety of reasons, including whether the specific discovery requests at issue, as written, would elicit the documents and information that Power seeks in moving to compel Plaintiff's responses. The Court finds that the motion should be granted in part and denied in part.

#### **IV. Scope of Discovery**

Federal Rule of Civil Procedure 26(b)(1) sets out the general scope of discovery. As recently amended, it provides as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.<sup>13</sup>

Considerations of both relevance and proportionality now govern the scope of discovery.<sup>14</sup> Relevance is still to be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on" any party's claim or defense.<sup>15</sup>

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<sup>13</sup> Fed. R. Civ. P. 26(b)(1).

<sup>14</sup> See Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.

<sup>15</sup> *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Information still “need not be admissible in evidence to be discoverable.”<sup>16</sup> The amendment deleted the “reasonably calculated to lead to the discovery of admissible evidence” phrase, however, because it was often misused to define the scope of discovery and had the potential to “swallow any other limitation.”<sup>17</sup>

The consideration of proportionality is not new, as it has been part of the federal rules since 1983.<sup>18</sup> Moving the proportionality provisions to Rule 26 does not place on the party seeking discovery the burden of addressing all proportionality considerations. If a discovery dispute arises that requires court intervention, the parties’ responsibilities remain the same as under the pre-amendment Rule.<sup>19</sup> In other words, when the discovery sought appears relevant, the party resisting discovery has the burden to establish the lack of relevancy by demonstrating that the requested discovery (1) does not come within the scope of relevancy as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevancy that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.<sup>20</sup> Conversely, when the relevancy of the discovery request is not readily apparent on its face, the party seeking the discovery has the burden to show the relevancy of the request.<sup>21</sup> Relevancy determinations are generally made on a case-by-case basis.<sup>22</sup>

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<sup>16</sup> Fed. R. Civ. P. 26(b)(1).

<sup>17</sup> See Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Gen. Elec. Cap. Corp. v. Lear Corp.*, 215 F.R.D. 637, 640 (D. Kan. 2003).

<sup>21</sup> *McBride v. Medicalodges, Inc.*, 250 F.R.D 581, 586 (D. Kan. 2008).

<sup>22</sup> *Breck & Young Advisors, Inc. v. Lloyds of London Syndicate*, No. 09-cv-2516-JAR, 2011 WL 765882, at \*3 (D. Kan. Feb. 25, 2011).

The parties make no mention of proportionality in their briefing on the motion. Under the amended rule, however, the Court has an obligation to limit the frequency or extent of discovery if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in this action; or (iii) the proposed discovery is outside the scope permitted by the rule.<sup>23</sup>

## **V. Analysis**

With the legal standards in mind, the Court considers each of the discovery requests for which Power seeks to compel a response.

### **A. Interrogatories**

Addressing Interrogatory Nos. 11 and 12, Power contends that because Plaintiff alleges in his First Amended Complaint that the injuries he sustained as a result of the August 29, 2013 accident aggravated preexisting conditions, Plaintiff is obligated to include information concerning his preexisting conditions in his answers to Interrogatory Nos. 11 and 12. Plaintiff did not object to either interrogatory, but in response provided written answers and referenced medical and billing records that he had previously produced.

The interrogatories at issue seek information relating to “all injuries, ailments or pains which Plaintiff . . . claims to have suffered” (Interrogatory No. 11) and relating to “any injury, illness or disability which you claim to have sustained or suffered” (Interrogatory No. 12) as a result of the alleged occurrence. As written, the interrogatories do not seek information concerning Plaintiff’s pre-existing injuries. Moreover, Power is in possession of Plaintiff’s medical records which would reveal his complaints and treatment with respect to aggravated

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<sup>23</sup> Fed. R. Civ. P. 26(b)(2)(C).



conditions.<sup>24</sup> And as Plaintiff points out in his answer, he will also rely on expert opinion regarding the continuing severity of his injuries. The Court does not question that Power is entitled to seek this information concerning Plaintiff's preexisting conditions, but it has means to do so through medical records and interrogatory answers that Plaintiff already has provided, combined with additional medical records and deposition testimony from Plaintiff, Plaintiff's wife, and medical witnesses. The Court denies Power's motion with respect to Interrogatory Nos. 11 and 12.

With respect to Interrogatory No. 14, in response to Plaintiff's objections that it is duplicative of another interrogatory, and that it is overbroad and subjective because "totally" and "partially" disabled and "normal activity" are undefined terms, Power stated that they are "legal terms of art that pertain to claims for workers' compensation disability benefits."<sup>25</sup> Plaintiff responded by stating that he "maintains his position that the information is irrelevant."<sup>26</sup> In his objections and responses to Power's First Set of Interrogatories, however, Plaintiff did not object to Interrogatory No. 14 on the ground that it is irrelevant, and he has therefore waived that objection.<sup>27</sup> Even if Plaintiff had not waived the objection, the Court finds that Interrogatory No. 14 seeks information relevant to Plaintiff's alleged damages. The Court does not find that

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<sup>24</sup> Plaintiff provided Power with copies of all such records within his possession on December 15, 2015, and he executed multiple releases which enabled Power to obtain all additional medical and billing records. See ECF No. 130-4 at 6; ECF No. 148 at 3.

<sup>25</sup> ECF No. 130-5 at 4-5.

<sup>26</sup> ECF No. 130-8 at 3.

<sup>27</sup> *Sonnino v. Univ. of Kan. Hosp. Auth.*, 220 F.R.D. 633, 642 (D. Kan. 2004) ("When ruling on a motion to compel, a court generally considers only those objections that have been timely asserted in the initial responses to the discovery request and that are subsequently reasserted and relied upon in response to the motion to compel.").

Interrogatory No. 14 is overbroad or subjective, and grants Power's motion to compel Plaintiff to respond to Interrogatory No. 14.<sup>28</sup>

Turning to the last of the interrogatories at issue, Interrogatory Nos. 16-19, Plaintiff objected to each of them solely on the basis that Power had exceeded the limit of 25 interrogatories imposed by the Court's Scheduling Order<sup>29</sup> and Federal Rule of Civil Procedure 33(a)(1). Plaintiff contends that Interrogatory Nos. 12 through 15 contain subparts that are sufficiently distinct to be counted as separate interrogatories.<sup>30</sup> Our courts apply the "common theme" standard in determining whether subparts should be counted as separate interrogatories: an interrogatory containing subparts "directed at eliciting details concerning a common theme" is considered a single question.<sup>31</sup> Plaintiff argues that the subparts of Interrogatories 12 through 15 seek discrete separate information and do not address a common theme. The Court disagrees.

Paraphrasing the request, Interrogatory No. 12 asks Plaintiff to state the date of each of his medical examinations or treatments for injuries he sustained in the accident. The four subparts seek information relating to "each such date of examination or treatment," including the name and address of the provider, the nature and extent of the examination or treatment, the diagnosis and prognosis, and the amount charged. Clearly, all of these questions relate to Plaintiff's medical

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<sup>28</sup> In its reply, Power also asks the Court to compel Plaintiff to provide a "day in the life" narrative that he had agreed to provide as responsive to Interrogatory No. 13(c). See ECF No. 169 at 9. Power acknowledges that it did not raise the issue in its motion. The Court will not rule on a matter first raised in a reply brief, and expresses confidence that counsel have resolved or in a timely manner will resolve this issue.

<sup>29</sup> ECF No. 62-1 ¶ 2(k).

<sup>30</sup> ECF No. 148 at 6-8.

<sup>31</sup> *E.g., Pouncil v. Branch Law Firm*, 277 F.R.D 642, 646 (D. Kan. 2011) (quoting 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2168.1 (3d ed. 2010) at 39-40).

examinations and treatment. Interrogatory No. 13 asks, as a result of the accident, how long and between what dates Plaintiff was wholly confined to bed, wholly confined to the house, and wholly incapacitated from normal activities. Again, the questions address a common theme, which is the duration and time frame of any incapacity Plaintiff alleges as a result of the accident.

Interrogatory No. 14 is very similar, seeking the time frames during which Plaintiff claims he was totally and partially disabled from his normal activities. Finally, Interrogatory No. 15 addresses Plaintiff's claim for loss of earning capacity, including the dates he was unable to work, amount of claimed lost earnings, nature of employment and earnings before the accident. All of these subparts seek information about the single theme, as stated in the opening sentence, of Plaintiff's economic damages. Interrogatory Nos. 12 through 15 each state a single request, which means that those interrogatories that follow do not exceed the limit of 25. The Court grants Power's motion to compel Plaintiff to provide answers to Interrogatory Nos. 16 through 19.

#### **B. Requests for Production**

Power asserts that because Plaintiff alleges damages which include future lost earnings, Power is entitled to discover information in response to RFP No. 15 about Plaintiff's current employment in order to assess his earning capacity after the accident. In his response to Power's request, Plaintiff stated that he was working to identify whether he had or could obtain responsive documents, and that he would supplement his response with any documents he found.

Ultimately, Plaintiff did produce documents responsive to this request, including those relating to wage information from his current employer. Plaintiff objected on the basis of relevancy to producing any other documents relating to his current employer. The request sought "all documents evidencing or relating to your employment with any employer within the past five (5)

years, . . . including contracts, employee handbooks, training materials, pay stubs, paychecks, W-2's, or other similar materials related to your employment.”

To the extent Power asserts that this request is intended to discover information relevant to damages, the Court agrees that Plaintiff has satisfied the request by providing documents showing payment information by his current employer. In its reply, however, Power quotes from depositions that Plaintiff took after Power had filed its motion, in which two of Plaintiff's current supervising project managers testified about Plaintiff's job requirements, evaluations, and promotion potential.<sup>32</sup> Power contends that Plaintiff has placed at issue his failure to be promoted and his further employment potential, claims which demonstrate additional relevancy to RFP No. 15. The Court agrees that, to the extent that Plaintiff has or can obtain documents from his current employer relating to Plaintiff's claims that the accident affected his job performance and potential for promotion with his current employer, he must produce them. As narrowed and to this limited extent only, the Court grants Power's motion to compel Plaintiff to produce documents responsive to RFP No. 15.

As for RFP No. 24, Power contends that it is entitled to obtain Plaintiff's Idaho and Washington driver's license numbers, over Plaintiff's objections of relevancy, so as to gain access to Plaintiff's driving record, verify medical records, and ascertain accuracy of employment information. As Plaintiff points out, he was not driving a vehicle at the time of the accident, and his driving record has no relevance to the claims or defenses in this case. As for medical records, Plaintiff's driver's license provides no access to such records, and Plaintiff has produced copies of and executed a release which authorizes Power to obtain all medical records. Power does not

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<sup>32</sup> While the Court normally would not consider an issue raised for the first time in a reply brief, as mentioned in note 28 *supra*, in this instance the Court will do so because the additional relevancy argument became apparent after Power filed its motion.

explain what employment information it is referring to or how Plaintiff's driver's license numbers would allow it to ascertain accurate employment information. Accordingly, the Court concludes that Power is not entitled to Plaintiff's driver's license numbers and denies Power's motion to compel with respect to RFP No. 24.

Power asserts that narrowing RFP No. 27 to Plaintiff's cell phone logs<sup>33</sup> for seven days prior to Plaintiff's accident yields a request for information that is "necessarily relevant to Plaintiff's behavior on or around the specific time of the accident, his focus on the work being performed, and his communications with others regarding the project."<sup>34</sup> Plaintiff objected to the request as originally posed and he continues to object on the grounds that it is overly broad, unduly burdensome, not limited in time or scope as there is no limitation on the subject matter of the conversations, and irrelevant.<sup>35</sup> The Court finds that Plaintiff's objections are largely well-founded. The records Power seeks will reveal none of Plaintiff's conversations (voice or text) and are therefore not likely to yield relevant information concerning his behavior or communications. Moreover, Plaintiff's phone records would identify every individual with whom Plaintiff communicated by phone, and Power has made no showing that an exhaustive list is relevant to claims or defense in this case.

The Court is aware of the allegation that Plaintiff was talking to his wife on his cell phone shortly before the accident, asking her to cancel his credit cards because he had lost his wallet.

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<sup>33</sup> Power identifies cell phone logs as "billing statements from Plaintiff's cell phone provider identifying date, time, and duration of calls and date, time, and data size of text messages." ECF No. 130 at 13.

<sup>34</sup> *Id.*.

<sup>35</sup> The Court notes that Power did identify the time frame as seven days before the accident, which is a defined time. As posed, however, the request seeks to learn of every phone call or text that Plaintiff made or received during any point in each of those days. Power offers no reason why records of every cell phone communication, no matter the time of day or night, is relevant.

These facts support Power's entitlement to information related to Plaintiff's cell phone on the day of the accident, and to that limited extent the Court grants Power's motion. The Court concludes that RFP No. 27 as drafted is not proportional to Power's needs in the case, and denies the motion to compel with respect to RFP No. 27 with the exception that Plaintiff must provide his cell phone logs<sup>36</sup> for August 29, 2013.

Finally, Power urges the Court to compel Plaintiff to provide documents responsive to RFP No. 30 concerning payments he has received from any party for damages, missed work, or medical treatments related to the accident, asserting that it is entitled to the information because Plaintiff has placed his damages at issue, and citing *Martinez v. Milburn Enterprises, Inc.*, 290 Kan. 572 (2010), in support of its argument. Plaintiff objects that RFP No. 30 seeks documents that are irrelevant, and asserts that *Martinez* is not on point. Plaintiff correctly states that *Martinez* addresses the situation in which the determination of the value of medical services makes relevant evidence of the amount accepted in satisfaction of the bill for services.<sup>37</sup> Stated another way, evidence of the amount of money a medical services provider accepted in full satisfaction of its bill is relevant to the amount of money a plaintiff may recover in compensatory damages. The Court agrees that Power is entitled to discover the requested information for this purpose. In addition, payments Plaintiff received from other sources to compensate him for lost work or injury are clearly relevant to his claim for damages. The Court grants Power's motion to compel with respect to RFP No. 30.

**IT IS THEREFORE ORDERED THAT** Defendant Power Constructors, Inc.'s Motion to Compel (ECF No. 130) is granted in part and denied in part. Plaintiff shall provide answers to

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<sup>36</sup> The cell phone logs Plaintiff is to produce are those identified by Power and listed in note 33.

<sup>37</sup> 290 Kan. at 611.

Interrogatory Numbers 14, 16, 17, 18, and 19, and provide documents responsive to Request for Production Numbers 15 and 27 (as narrowed by the Court) and 30 **within fifteen (15) days of the date of this Memorandum and Order.**

**IT IS SO ORDERED.**

Dated this 13th day of May, 2016, at Kansas City, Kansas.

*s/ Teresa J. James*  
Teresa J. James  
U.S. Magistrate Judge