

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

TRANSPORT SYSTEMS, INC.,)	
)	
Plaintiff,)	
vs.)	
)	
TAFS, INC.,)	
)	Case No. 20-2379-HLT-KGG
Defendant,)	
)	
vs.)	
)	
WARDAH SALEH, an individual,)	
)	
Third-party Defendant.)	
_____)	

**MEMORANDUM & ORDER
GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL DISCOVERY**

Now before the Court is Defendant’s Motion to Compel Discovery. (Doc. 40.) Having reviewed the submissions of the parties, Defendant’s motion is **GRANTED in part** and **DENIED in part** as set forth herein.

BACKGROUND

Defendant is an accounts receivable factoring company and Plaintiff is a commercial motor carrier. (Doc. 40, at 1.) The parties entered into a “factoring services agreement” in which Plaintiff agreed to “produce all accounts receivable generated during the term of the factoring services agreement to [Defendant] for

purchase.” (*Id.*, at 1-2 (citing Doc. 1, ¶ 8).) In exchange for the accounts receivable assignment, Plaintiff agreed to pay Defendant a small percentage on each invoice.” (Doc. 47, at 1-2.) That agreement terminated in April 2020. (Doc. 1, ¶ 14.)

Plaintiff’s lawsuit brings claims for breach of contract, unjust enrichment, conversion, breach of fiduciary duty, fraud, violations of Kansas statutes, and demands an accounting from Defendant. (*See generally* Doc. 1.) Defendant has brought a breach of contract counterclaim against Plaintiff.¹ (Doc. 10, at 30-33.)

The present motion relates to Plaintiff responses to Defendant’s Interrogatories and Requests for Production served on November 2, 2020, which Defendant contends were insufficient. (Doc. 40.) The Court will address the various discovery requests in turn.

ANALYSIS

I. Standards For Discovery.

Federal Rule of Civil Procedure 26(b) establishes the standard for discovery.

The Rule states that

[p]arties 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 state in the

¹ Also pending in this case is Defendant’s third party Complaint alleging breach of contract against Wardah Saleh, the individual who owns Plaintiff. (Doc. 15.)

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.**

Id. (emphasis added.) As such, the requested information must be nonprivileged, relevant, and proportional to the needs of the case to be discoverable. *Holick v. Burkhart*, No.16-1188-JTM-KGG, 2018 WL 372440, at *2 (D. Kan. Jan. 11, 2018).

Discovery requests must be relevant on their face. *Williams v. Board of Cty Comm'rs*, 192 F.R.D. 698, 705 (D. Kan. 2000). Relevance is to be “broadly construed at the discovery stage of the litigation and a request for discovery should be considered relevant if there is any possibility the information sought may be relevant to the subject matter of the action.” *Smith v. MCI Telecommunications Corp.*, 137 F.R.D. 25, 27 (D. Kan. 1991). Within this context, the Court will address the requests at issue.

II. Discovery Requests at Issue.

A. Interrogatory No. 3.

The first interrogatory at issue asks for Plaintiff to identify “all invoices issued or generated” by it from April 10, 2018, to April 9, 2020. (Doc. 41-1, at 2.) As to each, Defendant sought the invoice number, amount, date, debtor’s name,

and whether it was presented to Defendant for purchase. (*Id.*) In response, Plaintiff identified a spreadsheet it had previously produced.

Defendant argues that it “was able to identify a number of invoices in its possession that were not listed on the spreadsheet produced by [Plaintiff.] These omissions demonstrate that the spreadsheet ... does not fully identify all invoices generated during the time period in question.” (Doc. 41, at 3.) Defendant contends that Plaintiff has not even offered to supplement its response. (*Id.*, at 3-4.)

Plaintiff responds that the invoices referenced by Defendant had all been provided prior to termination of the contract in April 2020. (Doc. 47, at 4.)

Plaintiff continues that it

has explained to [Defendant] why this discrepancy occurred and provided additional information at every turn. [Defendant] has unilaterally decided that it believes [Plaintiff] has not been forthcoming with this information and that [Defendant] is ‘not satisfied’ with [Plaintiff’s] explanation. [Defendant] now asks the Court to order Transport Systems to ‘fully respond.’ [Plaintiff] has fully responded to Interrogatory Number 3, therefore, what [Defendant] is really asking of the Court is to subject [Plaintiff] to an oppressive and unduly burdensome review of its files that will not reveal any new information.

(*Id.*, at 4-5.)

Defendant replies that Plaintiff’s assertion that “reviewing its files to ensure that all responsive invoices are identified is unduly burdensome, an objection

which was not timely made.” (Doc. 48, at 3.) Defendant is correct. It is well-established that ““an objection not raised in the initial discovery response is deemed waived if subsequently raised for the first time in response to a motion to compel.” *McFadden v. Corrections Corp. of America*, 09–2273–EMF–KGG, 2012 WL 555069, *5 (D.Kan. Feb.21, 2012) (citing *Seed Research Equip. Solutions, LLC v. Gary W. Clem, Inc.*, No. 09–1282–EFM–KGG, 2011 WL 1743232, at *1 (D.Kan. May 6, 2011) (internal citations omitted)).

Further, even if the objection had been raised in a timely manner, Plaintiff has provided no support for the conclusory statement that this task would be unduly burdensome. Unless a discovery request is facially unduly burdensome, the party resisting the request has the burden to support its objection. *See Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 661, 662, 666 (D.Kan.2004) (stating that the party resisting a discovery request based on overbreadth, vagueness, ambiguity, or undue burden/expense objections bears the burden to support the objections).

Interrogatory No. 3 is not facially unduly burdensome. Plaintiff has not supported this objection. As such, the objection is overruled. Plaintiff does not dispute the discrepancy in its original response detected by Defendant. This alone justifies the current request. This portion of Defendant’s motion is **GRANTED**.

Plaintiff shall provide a supplemental response, without objection, within 30 days of the date of this Order.

B. Interrogatory No. 10.

Interrogatory No. 10 asks Plaintiff to “[i]dentify each communication between [it] and each account debtor referenced in paragraph 31 of Your Complaint.” (Doc. 41-1, at 5.) As to each communication, the interrogatory asks for “(1) the method of communication, (2) all persons involved in the communication, (3) the date of the communication, (4) each invoice or account receivable identified by the account debtor has having been paid to [Defendant] and not returned, and (5) all documents consisting of or reflecting each communication.” (*Id.*) Plaintiff merely responded with “*See Transport Systems’ Rule 26 documents.*” (*Id.* (emphasis in original).)

In its motion, Defendant contends that the document referenced by Plaintiff, an Excel spreadsheet containing a list of invoices and a number of notes, “fail[s] to identify each communication as directed in the interrogatory (i.e. the method of communication, the persons involved, the date, the accounts discussed, etc.).” (Doc. 41, at 4.) Plaintiff responds that Defendant “misrepresents to the Court that the spreadsheet does not provide information such as dates and the accounts discussed.” (Doc. 47, at 5.) Plaintiff also indicates that Defendant “has been advised that the communications between Transport Systems and the account

debtors were verbal and no other written memorialization exists. As such there is no other information to provide in responses to Interrogatory Number 10.” (*Id.*)

Defendant replies that Plaintiff “approaches this interrogatory as if it were a request for documents, admitting that verbal communications occurred which were not identified in [Plaintiff’s] response.” (Doc. 48, at 4.) Defendant continues that “Interrogatory Number 10 is not limited to written communication and, to the extent that certain requested information is unknown, it should be noted. Transport Systems should be order to fully respond to Interrogatory Number 10.” (*Id.*)

The Court agrees. Further, the Court does not agree with Plaintiff’s statement that Defendant has misrepresented anything about the information provided. Defendant has merely pointed out that the information Plaintiff submitted does not provide all of the information requested. This portion of Defendant’s motion is **GRANTED**. Plaintiff shall provide a supplemental response, without objection, within 30 days of the date of this Order.

C. Objections to Interrogatory No. 4 and Requests 6, 8, and 9.

According to Defendant, Interrogatory No. 4 and Requests for Production Nos. 6, 8, and 9 seek “information and documents concerning invoices which were issued immediately after the termination the factoring services agreement for the purposes of determining if any of these invoices were improperly withheld under the terms of the factoring services agreement.” (Doc. 41, at 5. *See also* Doc. 41-1,

at 3; Doc. 41-2, at 3-4.) Interrogatory No. 4 asks Plaintiff to “[i]dentify all Invoices issued or generated by Transport Systems from April 10, 2020[,] through June 1, 2020.” (Doc. 41-1, at 3.) Request No. 6 seeks “[a]ll bank account statements, financial statements, income statements and ledgers of [Plaintiff] showing any financial transactions that occurred between April 10, 2018 and June 1, 2020.” (Doc. 41-2, at 3.) Request No. 8 asks for “[c]opies of each Invoice identified in Your response to [Defendant’s] First Set of Interrogatories.” (Doc. 41-2, at 3.) Request No. 9 sought “[a]ll bills of lading and rate confirmations for each Invoice identified in paragraph 4 of Your response to [Defendant’s] First Set of Interrogatories.” (*Id.*)

Defendant argues that Plaintiff

was obligated under the factoring services agreement to present all accounts it generated during the term of the factoring services agreement to [Defendant] for purchase. (Counterclaim ¶ 12) The factoring services agreement terminated on April 9, 2020. (Counterclaim ¶ 11) However, the volume of invoices presented for purchase by [Plaintiff] in the weeks leading up to April 9, 2020 decreased significantly. (Counterclaim ¶ 21) This drop in the number of invoices presented for purchase suggests that [Plaintiff] may have purposefully withheld invoices from [Defendant] near the end of the term of the factoring services agreement in order to avoid paying [Defendant] the fees to which it is entitled. *Id.*

(Doc. 41, at 4-5.) Plaintiff responds that these requests are “are overly broad, unduly burdensome, and irrelevant to any claim or defense in the case.” (Doc. 47, at 6.)

As an initial matter the Court finds that Request No. 6 is facially over broad as it seeks “[a]ll bank account statements, financial statements, income statements and ledgers of [Plaintiff] showing any financial transactions that occurred between April 10, 2018 and June 1, 2020.” (Doc. 41-2, at 3.) Regardless of whether Defendant has established the relevance of this time frame, a request seeking every financial instrument and transaction is facially overbroad. Defendant’s motion is **DENIED** as to Request No. 6.

As stated above, Request No. 8 seeks “[c]opies of each Invoice identified in Your response to [Defendant’s] First Set of Interrogatories.” (Doc. 41-2, at 3.) In response, Plaintiff merely referred Defendant to Plaintiff’s “Rule 26 documents.” (*Id.*)

Plaintiff now argues that the request contains improper “omnibus language” that is disfavored by courts. (Doc. 47, at 7.) It is well established that Courts in this District have found that discovery requests may be facially overly broad when employing an omnibus term “such as ‘relating to,’ ‘pertaining to,’ or ‘concerning.’” *Johnson v. Kraft Foods North America, Inc.*, 238 F.R.D. 648, 658 (D. Kan. 2006) (citing *Cardenas v. Dorel Juvenile Group, Inc.*, 232 F.R.D. 377,

382 (D.Kan.2005) (internal citations omitted)). Such a finding occurs only when the omnibus term is used as to a general category documents.’ *Id.* See also ***Sonnino v. University of Kansas Hosp. Authority***, 221 F.R.D. 661, 667 (D. Kan. 2004); ***Aikens v. Deluxe Fin. Servs., Inc.***, 217 F.R.D. 533, 538 (D. Kan. 2003). ““When, however, the omnibus phrase modifies a sufficiently specific type of information, document, or event, rather than large or general categories of information or documents, the request will not be deemed objectionable on its face.”” ***Everlast World’s Boxing Headquarters Corp. v. Ringside, Inc.***, No. 13-2150-CM-KGG, 2014 WL 2815515, *6 (D. Kan. June 23, 2014) (citation omitted).

As an initial matter, Plaintiff did not object at all in its response to Request No. 8. As such, Plaintiff cannot raise objections herein for the first time. As stated above, “an objection not raised in the initial discovery response is deemed waived if subsequently raised for the first time in response to a motion to compel.” ***McFadden***, 2012 WL 555069, at *5 (citation omitted). Further, the use of the phrase “each” does not constitute an improper omnibus term in the context of this document request, which seeks a specific set of documents. To the extent Plaintiff has additional responsive documents, it is ordered to produce the same. If no such documents exist, Plaintiff is, at a minimum, required to identify by Bates page number the previously produced documents that are responsive to the request.

Defendant's motion is **GRANTED** as to Request No. 8. Plaintiff shall provide a supplemental response, without objection, within 30 days of the date of this Order.

As for Interrogatory No. 4 and Requests No. 9, Plaintiff contends that the number of invoices during the relevant time period lowered because of COVID-19 rather than nefarious behavior on the part of Plaintiff. The Court finds that Defendant has adequately explained the relevance of the requested information. Defendant is not required to simply accept Plaintiff's explanation without the requested documentation. The relevance objection is **overruled** as to these discovery requests. The Court will, however, address the overbreadth and burdensomeness objections.

In response to the motion, Plaintiff argues that these requests are overly broad and irrelevant because they include omnibus terms. (Doc. 47, at 7.) While Plaintiff did not technically object to the use of omnibus terms in the underlying discovery responses, it did object to the breadth and burden associated with Interrogatory No. 4 and Request No. 9. As such, the Court will not disqualify this argument as to those two discovery requests.

That stated, Interrogatory No. 4 does not employ an improper omnibus term. As stated above, it asks Plaintiff to “[i]dentify all Invoices issued or generated by Transport Systems from April 10, 2020[,] through June 1, 2020.” (Doc. 41-1, at 3.) The use of the term “all” does not, in and of itself, constitute an improper

omnibus phrase as it is related to specific information within a narrowed 7 week time frame. This objection is **overruled**. The Court **GRANTS** Defendant's motion as to Interrogatory No. 4.

Request No. 9 sought "[a]ll bills of lading and rate confirmations for each Invoice identified in paragraph 4 of Your response to [Defendant's] First Set of Interrogatories." (Doc. 41-2, at 3.) Again, the use of the term "all" in this discovery request refers to a very specific subset of information. It does not constitute an improper omnibus term. This objection is overruled. The Court **GRANTS** Defendant's motion as to Request No. 9.

D. Request No. 7.

Finally, this document request seeks "[a]ll tax filings and records of [Plaintiff] required to be filed or maintained by the International Fuel Tax Agreement from April 10, 2018[,] through the present." (Doc. 41-2, at 3.) In response, Plaintiff objected that the request was overly broad, unduly burdensome, and sought irrelevant information because the negotiated settlement between the parties terminated the agreement effective April 10, 2020. (*Id.*) Thus, according to Plaintiff, "any business conducted by [it] and any other information, financial or otherwise, related to [it] from April 10, 2018[,] to the present is irrelevant to either parties' claims or defenses in this case." (*Id.*)

In its motion, Defendant argues that the documents are relevant because they “would evidence the mileage driven and, by extension, the services provided by [Plaintiff] during and immediately after the term of the factoring services agreement.” (Doc. 41, at 6.) According to Defendant, Plaintiff is “required under the law to file and maintain these records for the period requested.” (*Id.*)

Defendant further contends that

there is substantial evidence that [Plaintiff] failed to present accounts and invoices for purchase during the term of the Agreement. [Plaintiff] claims that this failure was due to a downturn in business rather than a wrongful holding of invoices. These documents evidence the state of [Plaintiff’s] business both during and immediately after the term of the Agreement which will allow [Defendant] to determine whether [Plaintiff’s] defense has merit.

(Doc. 48, at 7.)

The Court finds that Defendant has adequately explained the relevance of this Request No. 7. The request is not overly broad or irrelevant. Further, there has been no showing that responding would place an undue burden on Plaintiff. As such, Plaintiff’s objections are **overruled** and the Court **GRANTS** this portion of Defendant’s motion.

IT IS THEREFORE ORDERED that Defendant’s Motion to Compel (Doc. 40) is **GRANTED in part** and **DENIED in part** as more fully set forth

above. The supplemental discovery responses ordered herein shall be served **within 30 days of the date of this Order.**

IT IS SO ORDERED.

Dated this 9th day of March, 2021, at Wichita, Kansas.

S/ KENNETH G. GALE
HON. KENNETH G. GALE
U.S. MAGISTRATE JUDGE