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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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CLERK OF COURT
CLERMONT COUNTY, OHIO

TOTAL QUALITY LOGISTICS, LLC :
Plaintiff : **CASE NO. 2015 CVH 01223**
vs. : **Judge McBride**
ERIC LOVE, ET. AL. : **DECISION/ENTRY**
Defendant :

Lindhorst & Dreidame Co., L.P.A., Barry F. Fagel and Matthew C. Curran, counsel for the plaintiff Total Quality Logistics, LLC, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202;

Lundrigan Law Group Co., L.P.A., Nicole M. Lundrigan and W. Kelly Lundrigan, counsel for the defendant Shane Moore, 1080 Nimitzview Drive, Suite 201, Cincinnati, Ohio 45230;

Nichols, Speidel & Nichols, Donald W. White, counsel for the defendant Eric Love, 237 Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of (1) the defendant Shane Moore's motions to dismiss, to hold the plaintiff Total Quality Logistics, LLC in contempt, and for other sanctions, and (2) the motions of the plaintiff Total Quality Logistics, LLC for sanctions and to strike the defendant's motions.

The court held a hearing on these motions on April 27, 2016. At the conclusion of that hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The plaintiff Total Quality Logistics, LLC (hereinafter referred to as "TQL") filed its complaint against Kansas Continental Express, Inc. (hereinafter referred to as "Kansas"), Eric Love, and Shane Moore on September 16, 2015 requesting a temporary and permanent restraining order and alleging claims of trade secret misappropriation, unfair competition, unjust enrichment, breach of contract, tortious interference with contractual relationship, fraud, breach of fiduciary duty, civil conspiracy, and conversion.

TQL is a national freight brokerage company that links customers who need to transport freight with trucking companies.¹ TQL alleges that Eric Love, its former employee, provided a competitor with confidential information regarding seven TQL customers.² Specifically, TQL alleges the information was provided to defendant Shane Moore, who is an employee at Kansas, which is a competing trucking broker.³

TQL has further alleged that the defendant Moore received the prices TQL charged the customers, TQL's profit margins per load, the routes that TQL handled for the customers, the profit margins for each route, and the amounts TQL paid trucking

¹ Compl. at ¶¶ 2-3.

² Compl. at ¶ 12.

³ Compl. at ¶¶ 4, 6.

companies to transport customer loads.⁴ As a result, TQL alleges that the defendant Shane Moore contacted TQL's customers and then offered to arrange for transportation of the customers' freight at lower prices than TQL's, and that as a result, some customers stopped doing business with TQL in favor of doing business with Shane Moore and Kansas.⁵

On November 27, 2015, the defendant Shane Moore served TQL with its first set of discovery requests, which included interrogatories and requests for the production of documents. On January 14, 2016, the defendant filed an order to compel TQL to respond to his discovery requests. On February 22, 2016 the court issued a detailed order to compel that addressed each individual interrogatory or request for document production at issue. Generally, the court ordered TQL to respond to the defendant's discovery requests. However, in almost all instances, the court narrowed the scope of each request so that it would be more feasible for TQL to comply and to respond. On March 10, 2016 the defendant filed a second motion to compel, as he claimed he had not received any of the discovery materials concerned in the court's order. During a March 15th hearing, the court warned the parties that if the court's order to compel was not complied with, the court would consider striking a pleading, claim, or defense.⁶

On April 18, 2016, the defendant filed the instant motions to dismiss, to hold TQL in contempt of the court's February 22, 2016 order, and for other discovery sanctions. As of April 18, 2016, the defendant still had not received the discovery responses that the court ordered in February.

⁴ Compl. at ¶ 12.

⁵ Compl. at ¶¶ 14-15.

⁶ The court notes that there have been several other discovery issues that have required the court's intervention, but they are not the subject of the February 22, 2016 order to compel and are not further detailed here.

On April 19, 2016, TQL produced documents that consisted of approximately 53,000 electronic files that would amount to an approximate 250,000 hard copy pages by TQL's estimation. On April 21, 2016, TQL filed its response and a contemporaneous motion for sanctions against the defendant and a motion to strike the defendant's motions.

In its defense, TQL argues that it has been expeditious in complying with the court's order but the size of the document production took considerable time to produce. TQL avers that the scope of the court's order was so large that it had to hire a new vendor to help with the production and that the production ultimately required eight employee teams from multiple departments, comprising more than one dozen TQL employees. Moreover, TQL avers that the size of the search froze TQL's computer system multiple times. Searching for customer information was difficult as well, TQL posits, because it had to search by reference numbers for customers, not their names, and each customer could have multiple reference numbers. As for its motion to strike, TQL argues that the court should strike the defendant's motion because it is baseless, frivolous, and filed in bad faith.

The defendant replied on April 27, 2016 and argues that the production was still deficient and that the same sanctions are still warranted. The defendant highlights that he is still lacking answers to interrogatories, the privilege log, internal emails and documents that were subject to the order to compel, carrier agreements, broker agreements, and information regarding new customers that were placed in issue.

Additionally, the defendant takes issue with the organization and form of the document production of electronically stored information. The defendant asserts that

(1) 18,597 emails were produced in three folders, which were not organized, except by subject line, (2) the emails were produced as MSG files instead of in their native format of PST, and (3) 34,320 documents were produced in a single folder that (with the exception of six documents) did not contain subject titles and were not otherwise organized.

The court held a hearing on this matter on April 27, 2016. At the hearing, TQL averred that its counsel had not yet been able to fully review the defendant's response, which had been filed that morning, and that it could not respond to the issues regarding the format and organization of the document production. The court permitted both parties to file supplemental briefings to address the new issues regarding TQL's document production, which they filed on May 5th.

In his brief, the defendant Shane Moore asserted that he had received, in the interim, partial interrogatory answers. The defendant argued that TQL should be required in interrogatory answers, when referring to documents, to specifically identify those documents that apply, particularly for interrogatories Nos. 6, 6(a), 6(b), and 10. The defendant also argued that he did not have a privilege log yet.

The defendant requests that TQL be ordered to submit supplemental written responses to the document production that identify which documents satisfy each request. The defendant also requests that TQL should be required to reproduce the emails by email user account and in a PST file format. If that is not feasible, then the defendant requests that future productions of emails be produced in this manner. Finally, the defendant requests that for remaining documents yet to be produced, TQL

should produce them categorically, with reference to which document request they satisfy, and in their native file formats.

In its brief, TQL asserts that it has served interrogatory responses, provided a privilege log, and produced internal documents that were originally withheld due to privilege. TQL also agrees to produce specific broker and carrier documents the defendant reasonably needs, and it will stipulate to the existence and terms of the remaining contracts at issue. TQL posits that it did produce the documents in a structured way because it had a folder for confidential documents and three folders for emails. In its brief, TQL included a screen shot of its document production, showing that six documents were produced with titles and the others had computer generated titles. TQL argues that document productions are routinely not organized.

TQL further argues that the search it was required to undertake was monumental and that it required TQL to run a list of search terms through its entire system. The searches were not conducted individually, but simultaneously. TQL posits that it would take significant time and cost for TQL to organize and relabel the document production.

LEGAL ANALYSIS

I. MOTIONS OF THE DEFENDANT SHANE MOORE

(A) MOTION TO DISMISS AND FOR SANCTIONS

The Civil Rules establish discovery procedures which require "a free flow of accessible information between parties upon request, and impose sanctions for failure to timely respond to reasonable inquiries."⁷ Civ.R. 37(B) "deals with sanctions for failure to comply with a court order."⁸ The court "may make such orders" as are just when a party fails to "to obey an order to provide or permit discovery," including, in pertinent part:

"(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders * * *."⁹

⁷ *Beck v. First Financial Ins. Co.*, 12th Dist. Warren No. CA2005-11-123, 2006-Ohio-3463, ¶ 9, quoting *Jones v. Murphy*, 12 Ohio St.3d 84, 86, 465 N.E.2d 444 (1984).

⁸ 1970 Staff Note, Civ.R. 37.

⁹ Civ.R. 37(B).

Beyond these sanctions, the court "shall require the party failing to obey the order * * * to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." The disobedient party bears the burden of showing that the failure was substantially justified.¹⁰

In addition to Civ.R. 37, Civ.R. 41 also gives the court the option of involuntarily dismissing a suit when the "plaintiff fails to prosecute, or comply with these rules or any court order."¹¹

Trial courts wield "considerable discretion" in regulating discovery and choosing appropriate sanctions.¹² However, such discretion "must be cautiously exercised."¹³ In determining which sanction to impose, the trial court considers "the posture of the case and what efforts, if any, preceded the noncompliance and then balance[s] the severity of

¹⁰ 1970 Staff Note, Civ.R. 37. Additionally, Civ.R. 37(D) provides that if a party fails to * * * (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion and notice may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (a), (b), and (c) of subdivision (B)(2) of this rule." Moreover, under Civ.R. 37(D) the court "shall require the party failing to act * * * to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." A party's mere objection to the discovery is not an excuse for a failure to provide discovery responses. Civ. R. 37(D).

¹¹ Civ.R. 41(B)(1). A court can dismiss a case under Civ.R. 41 for a plaintiff's failure to follow any court order, as opposed to Civ.R. 37, which restricts sanctions to violations of discovery orders. *Action Group, Inc. v. NanoStatistics Corp.*, 82 UCC Rep.Serv.2d 305, 2013-Ohio-5542, ¶ 28 (10th Dist.).

¹² *Beck*, 2006-Ohio-3463 at ¶ 17, citing *Manofsky v. Goodyear Tire & Rubber Co.*, 69 Ohio App.3d 663, 668, 591 N.E.2d 752 (1990) and *Russo v. Goodyear Tire & Rubber Co.*, 36 Ohio App.3d 175, 178, 521 N.E.2d 1116 (1987). See *Carasalina, L.L.C. v. Smith Phillips & Assocs.*, 10th Dist. Franklin No. 13AP-1027, 2014-Ohio-2423, ¶ 31, citing *Betz v. Penske Truck Leasing Co., L.P.*, 10th Dist. No. 11AP-982, 2012-Ohio-3472, ¶ 11 ("A trial court has broad discretion when imposing discovery sanctions.").

¹³ *Action Group, Inc.*, 2013-Ohio-5542 at ¶ 29.

the violation against the degree of possible sanctions.”¹⁴ Courts may also consider the ability of the disobedient party to comply with the discovery order,¹⁵ as well the number of opportunities and the length of time the disobedient party had to comply.¹⁶ “A violation may call for different degrees of sanctions under different circumstances.”¹⁷

Before sanctioning a party under Civ.R. 37, the disobedient party must have been subject to an order to compel discovery.¹⁸ As such, the order must be “clear, definite, and unambiguous” and cannot be “subject to dual interpretations.”¹⁹ An order is not ambiguous simply because a party may misunderstand its mandates.²⁰

For instance, in *Contos v. Monroe County*, 7th Dist. Monroe No. 04 MO 3, 2004-Ohio-6390, an order was ambiguous when it ordered the parties to “prepare proper responses” to the opposing party's discovery requests.²¹ The appellate court observed that “[i]nstead of providing specific direction, such as ordering that [the party] sign his answers to interrogatories, the trial court found that the answers were unresponsive, unhelpful, and possibly untrue.”²² Because the trial court “gave no direction on how to cure the deficiencies,” the appellate court found that the order lacked specificity and

¹⁴ *Beck*, 2006-Ohio- 3463 at ¶ 17, citing *Russo*, 36 Ohio App.3d at 178.

¹⁵ *Carasalina, L.L.C.*, 2014-Ohio-2423 at ¶ 38, citing *Betz*, 2012-Ohio-3472 at ¶ 42.

¹⁶ See *Rogers v. Credit Acceptance Corp.*, 9th Dist. Lorain No. 11CA010141, 2013-Ohio-1097, ¶ 8, citing *Morgan Adhesives Co. Inc. v. Datchuk*, 9th Dist. No. 19920, 2001 WL 7383, *3 (Jan. 3, 2001).

¹⁷ *Betz*, 2012-Ohio-3472 at ¶ 42, citing *Russo*, 36 Ohio App.3d at 178.

¹⁸ *Rogers*, 2013-Ohio-1097 at ¶ 10, citing *Powell v. Wisener*, 9th Dist. No. 22023, 2004-Ohio-4459, ¶ 7. See *Starr v. Rentas*, 9th Dist. Summit No. 22519, 2005-Ohio-5100, ¶ 12 (finding the court abused its discretion when it dismissed the plaintiff's claims absent an order compelling the plaintiff to respond to discovery requests, and the plaintiff did eventually respond to the requests).

¹⁹ *Contos v. Monroe County*, 7th Dist. Monroe No. 04 MO 3, 2004-Ohio-6390, ¶ 2.

²⁰ *Id.* at ¶ 15.

²¹ *Id.* at ¶ 21.

²² *Id.* at ¶ 22.

was ambiguous.²³ Accordingly, the trial court could not impose sanctions on the party because the party "cannot know whether or not its actions violate the trial court's order."²⁴

At least one case, *Rogers v. Credit Acceptance Corporation*, 9th Dist. Lorain No. 11CA010141, 2013-Ohio-1097, found that a lack of deadlines in a court's journal entry created ambiguity in the order.²⁵ The case had sat idle for two years, and then the court entered a journal entry requiring one party to produce a translation log.²⁶ The court's journal entry was the product of the court's ruling on a motion to extend time for briefing, not a motion to compel.²⁷

Because the opposing party had not filed a motion to compel, the disobedient party had no preliminary warning, via a motion to compel, that its failure to produce the log could result in Civ.R. 37 sanctions.²⁸ Moreover, the court failed to conduct a hearing or any further inquiry when the disobedient party failed to produce the translation log.²⁹ The appellate court found that the trial court "should have conducted further inquiry" before imposing sanctions.³⁰ On the whole, the appellate court ruled that the trial court's order was more akin to a pretrial order than an order to compel, and in light of the "trajectory" of the case, the sanctions imposed were unreasonable.³¹

²³ Contos, 2004-Ohio-6380 at ¶ 23.

²⁴ Id. at ¶ 24.

²⁵ *Rogers*, 2013-Ohio-1097 at ¶ 11.

²⁶ Id. at ¶ 11.

²⁷ Id. at ¶ 12.

²⁸ Id. at ¶ 12.

²⁹ Id. at ¶ 12.

³⁰ Id. at ¶ 12.

³¹ Id. at ¶¶ 11-12.

Dismissing a case, which is one of the requested sanctions in the case at bar, is considered the most severe sanction.³² Dismissal is reserved for cases in which “the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to obey a court order.”³³ Furthermore, before the trial court can dismiss an action, it “must find that the failure to comply is due to willfulness, bad faith, or any fault of the disobedient party.”³⁴ If these extreme conditions are not present, the court should consider “lesser sanctions.”³⁵

Before imposing the sanction of dismissal, whether imposing it under Civ.R. 37 or Civ.R. 41, the trial court must give notice to the disobedient party’s counsel.³⁶ When a disobedient party is served a motion to dismiss and has an opportunity to respond, the party has received sufficient notice.³⁷ A disobedient party also receives notice when the court informs it that dismissal is a possibility.³⁸ The purpose of such notice is to allow the disobedient party an opportunity to come into compliance.³⁹ If the disobedient party complies, then the trial court may not dismiss the action.⁴⁰

In the instant matter the defendant Shane Moore has moved for the underlying action to be dismissed with prejudice, for TQL to be held in contempt, for TQL to be

³² *Procedure Credit Corp. v. Voge*, 12th Dist. Preble No. CA2002-06-009, 2003-Ohio-1067, ¶ 14, citing *Ohio Furniture Company v. Mindala*, 22 Ohio St.3d 99, 488 N.E. 881 (1986).

³³ *Voge*, 2003-Ohio-1067 at ¶ 26, citing *Sazima v. Chalko*, 86 Ohio St.3d 158, 155 (1999).

³⁴ *Carasalina, L.L.C.*, 2014-Ohio-2423 at ¶ 38, citing *Tymachko, D.O. v. Ohio Dept. of Mental Health*, 10th Dist. No. 04AP-1285, 2005-Ohio-3454, ¶ 14.

³⁵ *Voge*, 2003-Ohio-1067 at ¶ 26, citing *Sazima* at 155.

³⁶ *Id.* at ¶ 15.

³⁷ *Carasalina, L.L.C.*, 2014-Ohio-2423 at ¶ 33, quoting *Hargrove v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-439, 2012-Ohio-375.

³⁸ *Watkins v. Holderman*, 10th Dist. Franklin No. 11AP-491, 2012-Ohio-1707, ¶ 21, citing *Tymachko*, 2005-Ohio-3454 at ¶ 15.

³⁹ *Voge*, 2003-Ohio-1067 at ¶ 23, citing *Sazima* at 155.

⁴⁰ *Voge*, 2003-Ohio-1067 at ¶ 23, citing *Sazima* at 157. See *Collias v. Redburn*, 3d Dist. Wyandot No. 16-09-18, 2010-Ohio-2296, ¶ 8 (finding that the trial court abused its discretion in imposing sanctions when the disobedient party “complied with the trial court’s order, even if untimely.”).

barred from introducing evidence in support of its claims, for TQL to be barred from introducing evidence in defense of the defendant's counterclaims, and for attorneys' fees and costs caused by TQL's failure to abide by the court's order to compel.

As a threshold issue, in order to issue a sanction under Civ.R. 37, TQL must have violated a discovery order from this court. TQL argues that the court's February 2016 order to compel was ambiguous because it did not include a deadline for TQL to complete discovery. In support of this argument, TQL highlights *Rogers v. Credit Acceptance Corporation*, which is a case from the Ninth District Court of Appeals finding that a lack of deadlines in a trial court journal entry created ambiguity in the order.⁴¹ However, the court finds substantial differences between the circumstances of this case and *Rogers* and finds that its February 2016 order was not ambiguous.

Although the court did not include a deadline for TQL's compliance in its February 2016 order, unlike *Rogers*, this case has not sat idle for multiple years. In fact, TQL requested, and the court granted, its motion for expedited discovery deadlines. Moreover, even if this case did not involve expedited discovery, under Civ.R. 33 and Civ.R. 34, TQL would have 28 days to serve its discovery responses on the defendant. The court issued its order to compel on February 22, 2016, and TQL did not comply with any part of that order until April 19, 2016. Thus, TQL waited nearly twice as long as provided in the Civil Rules to begin complying with the court's order.⁴²

⁴¹ *Rogers*, 2013-Ohio-1097 at ¶ 11.

⁴² Furthermore, according to the affidavit from the defendant's counsel, TQL still has not produced complete responses for interrogatories Nos. 6, 6(a), 6(b), and 10, which ask for specific information regarding what trade secrets that TQL contends the defendant obtained involving seven named customers, the methods by which the defendant obtained these trade secrets, the way that the defendant used these trade secrets, etc. Hence, it appears TQL may still not have fully complied with the court's order to compel.

No reasonable party could have assumed that it had unlimited time to comply with the court's February 22, 2016 order to compel when it would not enjoy such time under either the expedited discovery order in place or the default deadlines set forth in the Civil Rules.⁴³ Additionally, the court's order is clear on what TQL was required to answer and produce. For each interrogatory and request for document production at issue the court explicitly stated what TQL's required response should entail. Accordingly, the court finds that it did issue an order to compel as contemplated by Civ.R. 37.

The record demonstrates that TQL has only recently started to comply with the court's order to compel. The defendant filed the instant motion on April 18, 2016,⁴⁴ and TQL began its production of documents on April 19th. The affidavit of TQL's counsel indicated that TQL has now served the defendant the document production, interrogatory responses, a court-ordered privilege log, and internal documents that were originally withheld due to privilege. Counsel also indicated that TQL has agreed to produce specific broker and carrier documents that the defendant reasonably needs, which had been absent or incomplete in the April 19th document production. TQL stated that it will stipulate to the existence and terms of the remaining contracts at issue that are not produced in full. As discussed, the defendant still avers that he has not received complete interrogatory answers for several interrogatories.

⁴³ The present case also differs in many other ways from *Rogers* as well. The *Rogers* Court viewed all the circumstances involved and found that the sanction was not warranted. However, a lack of deadlines was but one reason. Also problematic was the fact that the opposing party never filed a motion to compel, the court never issued an order to compel, but rather a journal entry more akin to a pretrial order, and the court never held a hearing to conduct further inquiry into the matter.

⁴⁴ The parties refer to the filing date as April 15th, which was a Friday. However, the motion is date stamped on April 18th, which was a Monday. TQL's document production occurred on Tuesday, April 19th.

Because TQL has now substantially complied with the court's order, the court finds that the severe sanction of dismissal is unwarranted. The case law demonstrates that dismissal is only appropriate when the disobedient party refuses to comply even after receiving notice that its action may be dismissed. Here, TQL received notice that its case could be dismissed. The court had previously warned TQL in a hearing of such a possibility, and the defendant's motion also served as notice. The purpose of such notice is to allow the disobedient party an opportunity to come into compliance.⁴⁵ In this case, notice to TQL has served its purpose, and TQL has started to substantially comply with the order to compel.

As discussed, in determining which sanction to impose, the trial court considers the case's history, the efforts that preceded the noncompliance, the severity of the violation,⁴⁶ the ability of the disobedient party to comply,⁴⁷ and the number of opportunities and the length of time the disobedient party had to comply.⁴⁸ TQL's eventual discovery responses were both belated and incomplete. Further, the instant case has been fraught with discovery delays, as evidenced by the defendant's multiple motions to compel and present motion to dismiss. Indeed, this is but one of multiple discovery disputes that have required the court's involvement. Additionally, TQL is a sophisticated business that should be able to comply with reasonable discovery requests.

The court finds that the more severe sanctions enumerated under Civ.R. 37 are unwarranted at this juncture because TQL has started to comply with the court's

⁴⁵ *Voge*, 2003-Ohio-1067 at ¶ 23, citing *Sazima* at 155.

⁴⁶ *Beck*, 2006-Ohio- 3463 at ¶ 17, citing *Russo*, 36 Ohio App.3d at 178.

⁴⁷ *Carasalina, L.L.C.*, 2014-Ohio-2423 at ¶ 38, citing *Betz*, 2012-Ohio-3472 at ¶ 42.

⁴⁸ See *Rogers*, 2013-Ohio-1097 at ¶ 8, citing *Datchuk*, 2001 WL 7383 at *3.

discovery order. However, it began to comply only after the defendant filed a motion to dismiss and a motion for sanctions. TQL has argued that it is merely coincidental that it served its production of documents immediately after the defendant filed his motions. The delay, TQL argues, was purely due to the size of the discovery request. However, TQL's argument does not wholly convince the court that its delay in producing any discovery whatsoever until April 19th was unavoidable. For example, the delay in the document production does not explain why TQL never answered any of the defendant's interrogatories.

Given the aforementioned facts, the court finds that TQL shall be sanctioned by paying for the defendant's costs and attorneys' fees associated with the motions for dismissal and sanctions. Costs and attorney fees are an appropriate sanction because it seems unlikely that TQL would have produced the discovery that it produced between April 19th and the present had the defendant not filed the present motions.

For any portion of the court's February 2016 order to compel that TQL has yet to comply with, TQL has seven days to furnish its responses. If a second motion for sanctions is required to catalyze TQL's compliance with the February 2016 order, then TQL can expect that the court will consider all available sanctions.

(B) MOTIONS REGARDING DOCUMENT PRODUCTION

Due to the production that the defendant Shane Moore received during the pendency of these motions, the defendant has additionally requested that TQL organize the document production, reproduce files in native format, and do the same in future

productions. The parties are unable to agree on whether the production must be organized and what form the production must take (e.g. PDF, TIFF, PST, etc.).

Civ.R. 34 governs document productions, including that of electronically stored information (“ESI”). Under Civ.R. 34(B), a party may request “items to be inspected either by individual item or by category.” The party’s “request may specify the form or forms in which electronically stored information is to be produced, but may not require the production of the same information in more than one form.”⁴⁹

“With respect to each item or category, the response shall state that inspection and related activities will be permitted as requested, unless it is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party must state the form or forms it intends to use. * *

*⁵⁰

The producing party then, “at its option” shall “produce them [documents] as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request.”⁵¹ Moreover, when “a request does not specify the form or forms for producing electronically stored information, a responding party may produce the information in a form or forms in which the information is ordinarily maintained if that form is reasonably useable, or in any form that is reasonably

⁴⁹ Civ.R. 34.

⁵⁰ (Emphasis added.) Civ.R. 34(B)(1).

⁵¹ Civ.R. 34(B)(2).

useable.”⁵² Finally, the producing party only needs to produce the ESI in one form, unless it agrees otherwise or the court orders additional forms.

The Ohio legislature amended Civ.R. 34 in 2008 to clarify that ESI is regulated and permitted by Civ.R. 34.⁵³ The staff notes explain that if the requesting party specifies a form of production that the producing party finds to be “unduly burdensome or oppressive,” then the producing party can object under Civ.R. 34(B)(1) and “negotiate a different, mutually acceptable form.”⁵⁴ Moreover, (B)(1) “requires the party responding to a request to * * * identify the form in which electronically stored information will be produced if the requesting party has not specified the format.”⁵⁵

The 2008 changes to Civ.R. 34 closely mirror the 2006 changes to its federal corollary, Fed.R.Civ.P. 34. The staff notes to the federal rule are helpful in explaining the import of Ohio’s Civ.R. 34(B)(1), which mandates that the producing party specify the form of the ESI before producing it: “Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information,” and permits “the parties to identify and seek to resolve disputes before the expense and work of the production occurs.”⁵⁶ The federal staff notes further caution:

“A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a

⁵² Civ.R. 34(B)(3).

⁵³ 2008 Staff Note, Civ.R. 34.

⁵⁴ 2008 Staff Note, Civ.R. 34.

⁵⁵ 2008 Staff Note, Civ.R. 34. Because Ohio case law has not yet dealt with resolving issues of form and organization for ESI, the court has consulted federal cases.

⁵⁶ 2006 Staff Note, Fed.R.Civ.P. 34.

responding party to assess the appropriate form or forms of production."⁵⁷

Once the producing party has satisfied (B)(1) by specifying the intended form for its production, to comply with (B)(2) the party has the option of producing documents either (1) as they are kept in the usual course of business or (2) organized and labeled to correspond with the categories in the request.⁵⁸ This component to the rule provides "structure to the production thereby minimizing the risk of confusion."⁵⁹ When a party chooses the former option, it is assumed that businesses "would keep their documents organized 'in a way that maximizes their usefulness in the day-to-day operations of the business."⁶⁰

When the producing party produces documents as they are kept in the usual course of business, the producing party "bears the burden of establishing that the documents were actually produced as they were kept in the ordinary course of business."⁶¹ To satisfy this burden, the producing party must "do more than merely assert" that its document production was produced as those documents were kept in the

⁵⁷ (Emphasis added.) 2006 Staff Note, Fed.R.Civ.P. 34.

⁵⁸ Civ.R. 34(B)(2).

⁵⁹ *Little Hocking Water Assn., Inc. v. E.I. DuPont De Nemours & Co.*, S.D. Ohio, 2013 WL 608154, *54 (Feb. 19, 2013), citing *Johnson v. Kraft Foods N.E., Inc.*, 236 F.R.D. 535, 540 (D. Kan. 2006). See *Venture Corporation Ltd. V. Barrett*, N.D. Cal. No. 5:13-cv-03384-PSG, 2014 WL 5305575, *1 (Oct. 16, 2014) (observing that Rule 34 aims to prevent the "document dump," which is "at best inefficient and at worst a tactic to work over the requesting party."); *Teledyne Instruments, Inc. v. Cairns*, M.D. Fla. No. 6:12-cv-854-Orl-28TBS, 2013 WL 5781274, *8 (Oct. 25, 2013) (describing "'dump truck' discovery tactics" as those "where a party delivers voluminous and poorly organized documents to his adversary," who is then forced to search through many documents to discover relevant documents).

⁶⁰ *Spilker v. Medtronic, Inc.*, E.D. N.C. No. 4:13-CV-76-H, 2015 WL 1643258, *8 (Apr. 13, 2015), citing *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 351, 363 (N.D. Ill. 2005). See *Cairns*, 2013 WL 5781274 at *9, citing *Andritz Sprout-Baur, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 630 (M.D. Pa. 1997) ("Because businesses have an incentive to keep their documents in a manner that allows ready access, a production of documents kept in the ordinary course of business should permit a 'systemized retrieval of relevant documents.'").

⁶¹ *Guild Associates, Inc. v. Bio-Energy (Washington) LLC*, S.D. Ohio No. 2:13-cv-1041, 2014 WL 2767605, *10 (June 18, 2014).

usual course of business.⁶² Rather, a producing party must “organize its production in such a way as to enable the requesting party to substantially replicate the system used by the producing party, whether the production is ESI or paper documents.”⁶³ “A producing party fails to meet its Rule 34 obligations by producing a mass of undifferentiated documents for the responding party to inspect.”⁶⁴

A producing party satisfactorily demonstrates that “it has produced documents in the usual course by revealing information about where the documents were maintained, who maintained them, and whether the documents came from one single source or file or multiple sources or files.”⁶⁵ Further, a party “produces emails in the usual course when it arranges the responsive emails by custodian, in chronological order and with attachments, if any.”⁶⁶ For “non-email ESI, a party must produce the files by custodian and by the file’s location on the hard drive – directory, subdirectory, and file name.”⁶⁷

⁶² Id. at *10.

⁶³ *Cairns*, 2013 WL 5781274 at *9, citing *Pass & Seymour, Inc. v. Hubbell Inc.*, 255 F.R.D. 331, 335 (N.D. N.Y.) See *Kwasniewski v. Sanofi-Aventis U.S. LLC*, D. Nev. No. 2:12-cv-00515-GMN-NJK, 2013 WL 3297182, *1 (June 28, 2013), quoting *City of Colton v. Am. Promotional Events, Inc.*, 277 F.R.D. 578, 585 (C.D. Cal. 2011) (“Rule 34 does not obligate a producing party to *per se* organize and label usable documents for the requesting party’s convenience, [however] a party exercising Rule 34’s option to produce records as they are kept in the usual course of business should organize the documents in such a manner that the requesting party may obtain, with reasonable effort, the documents responsive to their requests.”).

⁶⁴ *City of Colton*, 277 F.R.D. at 584–85, quoting *Armour Screen Corp. v. Storm Catcher, Inc.*, S.D. Fla, 2009 WL 291160, *5 (2009).

⁶⁵ *Valeo Electrical Systems, Inc. v. Cleveland Die & Mfg. Co.*, E.D. Mich. No. 08-cv-12486, 2009 WL 1803216, *2. (June 17, 2009).

⁶⁶ Id. citing *MGP Ingredients, Inc. v. Mars, Inc.*, D. Kan. No. 06-2318-JWL-DJW, 2007 WL 3010343, *2.

⁶⁷ Id. See *Barrett*, 2014 WL 5305575 at *2 (“At a minimum, the court would expect to see the documents and ESI kept by the name of the employee from whom the documents were obtained* * *.”); *Cairns*, 2013 WL 5781274 at *9 (explaining that, “[t]o satisfy the usual course of business requirement, the mode of production should preserve the function utility of the electronic information produced * * *. [T]his normally requires (1) preserving the format of the ESI, and (2) providing sufficient information about the context in which it is kept and used.”).

To satisfy its burden, “[a]t a minimum the court would expect to see the documents and ESI kept by the name of the employee from whom the documents were obtained.”⁶⁸

If the producing party can satisfy this burden, then it has no obligation to further “organize and label the documents to correlate to the particular request to which they are responsive.”⁶⁹ If the producing party fails, then it must comply with the alternative under Civ.R. 34(B)(2), which requires the production to be “organized and labeled to correspond with the categories in the request.”⁷⁰ The producing party needs to “rationally” organize the production “so that the requesting party ‘may readily identify documents, including ESI, that are responsive to [the] production requests.’”⁷¹

The case of *Guild Associates, Inc. v. Bio-Energy (Washington) LLC*, S.D. Ohio No. 2:13-cv-1041, 2014 WL 2767605 (June 18, 2014), dealt with discovery problems similar to the instant case. According to the receiving party in *Guild Associates, Inc.*, it received 34,000 pages of ESI that was “dumped” and lacked any meaningful

⁶⁸ *Venture Corporation Ltd.*, 2014 WL 5305575 at *2. Notably, multiple other courts have viewed the “minimum” threshold for satisfying the “usual course of business” as much higher. For instance, the Northern District of New York sets forth the following minimum standard: “At a minimum, that means that the disclosing party should provide information about each document which ideally would include, in some fashion, the identity of the custodian or person from whom the documents were obtained, an indication of whether they are retained in hard copy or digital format, assurance that the documents have been produced in the order in which they are normally maintained, and a general description of the filing system from which they were recovered.” *Pass & Seymour, Inc.* 255 F.R.D. 331 at 337.

⁶⁹ *Guild Associates, Inc.*, 2014 WL 2767605 at *10, quoting *Little Hocking Water Assn., Inc.*, 2013 WL 608154 at *54. See *Barrett*, 2014 WL 5305575 at *3, quoting *Pass & Seymour, Inc.*, 255 F.R.D. at 337 (explaining that the producing party should provide “[a]t minimum * * * information about each document which ideally would include, in some fashion, the identity of the custodian or person from whom the documents were obtained, an indication of whether they are retained in hard copy or digital format, assurance that the documents have been produced in the order in which they are maintained, and a general description of the filing system which they were recovered.”).

⁷⁰ Civ.R. 34(B)(2).

⁷¹ *Calms*, 2013 WL 5781274 at *8 quoting *City of Colton v. American Promotional Events, Inc.*, 277 F.R.D. 578, 585 (C.D. Cal. 2011).

organization.⁷² In *Guild Associates*, the Southern District of Ohio denied the receiving party's motion to compel the producing party to organize the production because the producing party had produced the documents as they were maintained in the usual course of business.⁷³

The court found the producing party met its burden by submitting affidavits that established that the electronic folders used were a collection of each employee's documents, as they were usually kept in the business.⁷⁴ Further, the affidavits detailed the organizational methods that the producing party utilized in the document production.⁷⁵ The court concluded that "[b]ased on this explanation, it seems that Guild provided structure to its production with the goal of minimizing the risk of confusion – the very purpose of Rule 34 * * *."⁷⁶ The court held that, to the extent that the producing party did not provide this organizational information (e.g. the identity of the individuals

⁷² *Guild Associates, Inc.*, 2014 WL 2767605 at * 6.

⁷³ *Id.* at *10.

⁷⁴ *Id.* at *11.

⁷⁵ *Id.* Summaries of the affidavit detailed the document production process: "[D]ocuments kept by individuals at Guild who were involved with the project were gathered into sourcespecific [sic] folders containing emails, electronically stored files, and scanned files. After review for privilege and confidentiality, they were converted to .pdf format for Bates-stamping. Files from the same sources remained grouped together. Attachments to emails were kept in the same production files as the source emails. File names within production files were bookmarked and were automatically alphabetized by the computer for ease of reference. The documents themselves are text-searchable .pdfs." *Id.* at *8. One of the affidavits described the process further, helping the receiving party to determine that the documents were produced as kept in the usual course of business: "Guild's CEO directed Guild employees known to be involved with the System, to gather their files. Emails and electronic files for each individual were collected from computers and placed into electronic folders. Hardcopy documents for each individual were scanned and were placed into electronic folders. The folders were, in essence, a collection of each employee's documents as they were kept in the usual course of Guild's business." *Id.* at *8.

⁷⁶ *Id.* at *11.

whose emails and hardcopies were uploaded into each ESI folder), the producing party needed to do so.⁷⁷

Lastly, Civ.R. 34(B)(3) governs the form of ESI when the requesting party has not specified its desired form for the ESI production. In such a case the producing party may produce the ESI in any "reasonably usable form."⁷⁸ "Form" is a term that refers to "whether the production should be native, near-native, imaged as a PDF (or more commonly, as TIFFs accompanied by load files containing searchable text and metadata) or in paper (printed out)."⁷⁹

Like Ohio's Civ.R. 34, Fed.R.Civ.P. 34 also permits the producing party to produce ESI in any form that is reasonably useable when the requesting party has not specified a desired form; however, the federal staff notes caution:

"But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."⁸⁰

⁷⁷ *Guild Associates, Inc.*, 2014 WL 2767605 at *11. See *Spilker*, 2015 WL 1643258 at *5 (finding that the producing party met its Rule 34 burden by providing fully searchable documents, sortable by metadata fields, in a folder structure organized by custodian). Cf. *Quality Manufacturing Systems, Inc. v. R/X Automation Solutions, Inc.*, MD. Tenn. No. 3:13-cv-00260, 2016 WL 1244697* 5 (Mar. 30, 2016) (ordering the producing party to re-produce 90,000 pages of ESI as they are kept within the usual course of business or to identify which documents were produced in response to each request for production within 20 days), *Barrett*, 2014 WL 5305575 at *3 (holding that a party that produced 41,000 pages without a custodial index, table, or any other information (simply just folders of the files themselves) had not complied with Rule 34 and must either organize and label each document it produced or provide custodial and other organizational information).

⁷⁸ Civ.R. 34(B)(3). The producing party must still, of course, comply with (B)(1) by informing the receiving party of what that form will be.

⁷⁹ *Barrett*, 2014 WL 5305575 at *3.

⁸⁰ 2006 Staff Note to Fed.R.Civ.P. 34.

The Southern District of Ohio has "expressed a preference for the production of electronically stored information in its native format."⁸¹ Native formatting is preferred because the receiving party of native format ESI can then view "any metadata that might be embedded in the electronic document" but would not be invisible otherwise.⁸² Especially when a production lacks organization, "a word searchable format can enable a party to locate pertinent information, regardless of any index or labeling provided by the responding party."⁸³

The dispute between the parties regarding the sufficiency of TQL's document production is governed by Civ.R. 34. The defendant's requests for document production do not contain a request for TQL to produce documents in a particular form, as is its option under Civ.R. 34.

As such, under Civ.R. 34(B)(1) TQL was required to identify which form it would produce its ESI in before it made the production. No facts have been presented to the court in the course of this dispute suggesting that TQL informed the defendant of the form it intended to use for the ESI production. As both Ohio and federal staff notes

⁸¹ *In re Porsche Cars North America, Inc. Plastic Coolant Tubes Products Liability Litigation* ("In re Porsche"), 279 F.R.D. 447, 449 S.D. Ohio (2012).

⁸² *In re Porsche*, 279 F.R.D. at 449, citing *Superior Production Pship., d/b/a PBSI v. Gordon Auto Body Parts Co., Ltd.*, S.D. Ohio No. 2:06-cv-0916, 2008 WL 5111184, at *1 (Dec. 2, 2008). Metadata can reveal information about the document such as the date of creation, edits, comments, file size and locations, deletion dates and times, access and distribution, authorship or the username associated with those tasks. Metadata can also be used to conduct a meaningful and relatively inexpensive search of the producing party's ESI.

⁸³ *Anderson Living Trust v. WPX Energy Production, LLC*, 298 F.R.D. 514, 526 (D.N.M. 2014). See *Cairns*, 2013 WL 5781274 at *9 ("Preservation of format is important because conversion from native format may eliminate or degrade search and other information processing features (e.g., copy, paste, and sort). Such features may allow a user to identify relevant information in a document much more quickly, which would significantly enhance the value of a document to a business.").

highlight, this requirement is meant to avoid one of the very problems the parties are now confronted with.

The defendant wants ESI documents produced in native form and emails in their native form, which is PST. During the hearing and in his briefing the defendant expressed that the emails TQL produced are in an MSG form, which is a near-native form, and cannot be searched without using an additional program.

In reference to the other ESI documents, TQL's counsel explained in his affidavit that "[e]ach document is saved as a file without regard to whether it is an email or a word document, picture, or spreadsheet. It is not organized in any way by topic or custodian. The document production – as it was produced – is not searchable, and needs to be loaded onto special software to be searched."⁸⁴

Moreover, in its briefing TQL stated:

"It is true that at times it is possible that documents can be produced in searchable formats that do not require additional software. Indeed, in TQL's first document production in this case, some of the files were able to be produced in such a way in which they were searchable in their native format. But with this most recent production, due to the size and the scope of what had to be produced, TQL had to utilize a different search method. This method resulted in search results which were not in their native format."

Under Civ.R. 34(B)(3) TQL is obligated to produce ESI in a "reasonably usable form."⁸⁵ As discussed, the preferred format for ESI is native format. Native format is preferred for the same reasons the defendant objects to the non-native format used in the production, which is the ability to search and organize the documents. Indeed, the "option to produce in a reasonably usable form does not mean that a responding party

⁸⁴ M. Curran Aff., ¶ 8.

⁸⁵ Civ.R. 34(B)(3). The producing party must still, of course, comply with (B)(1) by informing the receiving party of what that form will be.

is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation."⁸⁶ By failing to inform the defendant of the form it intended to use for ESI before its production, TQL ignored Civ.R. 34(B)(1) to its peril.

For future productions, TQL shall produce all ESI in native format, unless the parties come to a different agreement. As to the existing production, given that TQL has already made a large production that it described as monumental, costly, and time consuming, TQL shall choose between reproducing the emails to the defendant in PST file format or paying for the costs associated with the separate program or programs that the defendant has used to convert the emails into searchable form.⁸⁷

While Civ.R. 34(B)(1) and (3) deal with the form of an ESI production, (B)(2) deals with its organization. TQL had the option of producing documents either (1) as they are kept in the usual course of business or (2) organized and labeled to correspond with the categories in the request.⁸⁸ TQL has admitted that the ESI production is "not organized in any way by topic or custodian."⁸⁹ Hence, Civ.R. 34(B)(2) is not satisfied.

⁸⁶ 2006 Staff Note, Fed.R.Civ.P. 34.

⁸⁷ Providing TQL the option to pay for the defendant's separate program is not imposed as a sanction upon TQL. Under Civ.R. 26(B)(4) the court can specify the allocation of expenses for ESI discovery. The defendant requested in his reply brief that all emails, including the present and future productions, be produced in PST form. Defs. Sup. Brief, pg. 3. The defendant also requested that all ESI documents be produced in native file format in the future. However, the defendant did not request that non-email ESI that has already been produced be reproduced in native file format. Therefore, TQL's choice between reproducing emails in PST format or paying the costs for a separate program to convert them into searchable documents does not apply to TQL's production of non-email ESI.

⁸⁸ Civ.R. 34(B)(2).

⁸⁹ M. Curran Aff., ¶ 8.

TQL organized the production by creating three folders for emails entitled "CONFIDENTIAL Emails Part 1," "CONFIDENTIAL Emails Part 2," and "CONFIDENTIAL Emails Part 3." The emails retained their original subject names. A fourth folder, entitled "CONFIDENTIAL Documents" contains all other ESI documents. All but six documents in the "CONFIDENTIAL Documents" folder have computer-automated names.

TQL has not met the burden of showing that it produced its ESI documents as it normally maintains them in the usual course of its business.⁹⁰ It is all the more important that TQL complies with Civ.R. 34(B)(2) because it has admittedly not produced documents in their native format, therefore making it more difficult for the defendant to independently arrange, organize, and review the sizable ESI production.

At minimum, to be produced in the usual course of business, TQL must reproduce the ESI arranged by custodian, or provide an index identifying the custodian for each document. TQL would also need to provide the defendant sufficient information about how the documents are organized in the usual course of its business. Alternatively, TQL can choose to organize and label the documents to correspond with the categories in the defendant's document production requests.

II. MOTIONS OF THE PLAINTIFF TOTAL QUALITY LOGISTICS

⁹⁰ See *Pass & Seymour, Inc.*, 255 F.R.D. at 335 ("If [the producing party] could sustain its burden of showing that in fact the documents produced are maintained in that same fashion—that is, contained within the same 220 unlabeled folders [containing 405,367 pages of ESI]—either digitally or in hard copy, then it clearly would have met the requirement of production of the documents as they are ordinarily maintained in the course of its business. The court doubts, however, that this is the case * * *."

TQL has moved to strike the defendant's motion for dismissal and sanctions. TQL argued that the court should strike the motion because it is baseless, frivolous, and filed in bad faith. Because the court has found that the defendant's motion for sanctions has merit, TQL's motion to strike is not well-taken and is denied. For this same reason the court finds that TQL's motion for sanctions against the defendant on the same basis is not well-taken and is denied.

CONCLUSION

For the foregoing reasons the court orders as follows:

(1) TQL is sanctioned for failing to follow the court's February 22, 2016 order compelling it to respond to the defendant's discovery. TQL shall pay for the defendant's costs and attorneys' fees associated with his motions for dismissal and sanctions. Counsel are directed to conference and call the Assignment Commissioner within three days in order to schedule a hearing on the amount of the attorney fees to be awarded by the court. The hearing shall be scheduled within 3-6 weeks of the date of this decision and shall be scheduled for two hours unless counsel indicate that they need more time during their conference call with the Assignment Commissioner. At the hearing, the attorney fees shall be calculated using the two-step determination set forth in *Ohio Valley Associated Bldrs. & Contrs. v. Rapier Elec., Inc.*, 12th Dist. Butler App. No. CA2013-07-110, 2014-Ohio-1477 at ¶ 59.

(2) For any portion of the court's February 22, 2016 order to compel that TQL has still failed to comply with, TQL shall furnish its response within seven days of this order.

(3) In all future document productions TQL shall produce all ESI in its native format, unless the parties come to a different agreement. For emails, this directive requires TQL to produce them in PST file format.

(4) TQL shall either (a) reproduce the emails in its current production to the defendant in PST file format, or (b) pay the defendant the costs associated with using a separate program to convert the MSG emails into a searchable format. If TQL elects to reproduce the emails, it shall do so within twenty one days of this order.

(5) TQL shall either (a) supplement or re-produce the documents so that they are produced as they are kept in the usual course of business or (b) organize and label the documents it produced to correspond with the categories in the defendant's request. TQL shall comply with this directive within twenty one days of this order.

If TQL elects the first option, to comply TQL shall, at minimum, (a) either arrange the documents by custodian and reproduce them, or supplement the production by providing an index identifying the custodian for each document, and (2) supplement the production by providing the defendant information regarding the way in which the documents were organized in the usual course of its business.

IT IS SO ORDERED.

DATED: 5-16-16



Judge Jerry R. McBride