# United States District Court

**EASTERN DISTRICT OF TEXAS**
**SHERMAN DIVISION**

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| REALPAGE, INC., REALPAGE VENDOR COMPLIANCE LLC | § | |
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| | § | Civil Action No. 4:16-CV-00737 |
| v. | § | Judge Mazzant |
| | § | |
| ENTERPRISE RISK CONTROL, LLC, LONNIE DERDEN | § | |
| | § | |

## MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiffs' Motion to Compel Document Production, Motion to Overrule Objections, and Motion to Compel Document Custodian Deposition (Dkt. #40). After reviewing the relevant pleadings and motion, the Court finds the motion should be granted in part and denied in part.

## BACKGROUND

Plaintiffs RealPage, Inc. and RealPage Vendor Compliance LLC (collectively, "Plaintiffs" or "RealPage") seek a preliminary injunction against Defendants Enterprise Risk Control, LLC ("Enterprise") and Lonnie Derden ("Derden") (collectively, "Defendants") from using or benefiting from any of Plaintiffs' trade secrets or other confidential or proprietary information (Dkt. #10 at p. 17–18). At the center of the controversy is the allegation that Derden and his employees took trade secret and confidential information from Plaintiffs and used it to create a competing product sold by Enterprise.

On November 30, 2016, the Court entered an Agreed Order Continuing Preliminary Injunction Hearing and Setting Discovery and Briefing Schedule (Dkt. #33) and an agreed Protective Order and Source Code Protocol (Dkt. #34). The agreed discovery schedule set the week of December 19, 2016 as the time to make Source Code available for inspection in

accordance with the agreed protective order, and December 19, 2016 as the deadline for parties to serve responses to requests for production of documents ("RFPs").

On December 2, 2016, Plaintiffs served their first set of requests for production to Enterprise and Derden (Dkt. #40, Exhibits A, B). On December 19, 2016, Defendants served their responses to Plaintiffs' first set of RFPs (Dkt. #40, Exhibits C, D). Between December 19, 2016, and this motion, the parties discussed the allegedly inadequate responses (Dkt. #40, Exhibits E, F).

On February 17, 2017, Plaintiffs filed this motion (Dkt. #40). On February 27, 2017, Defendants filed their response, indicating that certain additional disclosures would be made later that day (Dkt. #44). On the same day, Plaintiffs filed a reply (Dkt. #47). On February 28, 2017, Plaintiffs filed a supplemental reply, confirming that Defendants produced 7,343 emails and their attachments the night before (Dkt. #48). On March 1, 2017, Defendants filed a sur-reply (Dkt. #51).

## LEGAL STANDARD

Under Federal Rule of Civil Procedure 26(b)(1), parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1). Relevance, for the purposes of Rule 26(b)(1), is when the request is reasonably calculated to lead to the discovery of admissible evidence. *Id.*; *Crosby v. La. Health & Indem. Co.*, 647 F.3d 258, 262 (5th Cir. 2011). It is well-established that "control of discovery is committed to the sound discretion of the trial court." *Freeman v. United States*, 556 F.3d 326, 341 (5th Cir. 2009) (quoting *Williamson v. U.S. Dep't of Agric.*, 815 F.2d 368, 382 (5th Cir. 1987)).

Rule 37 of the Federal Rules of Civil Procedure allows a discovering party, on notice to other parties and all affected persons, to "move for an order compelling disclosure or discovery." Fed. R. Civ. P. 37(a)(1). The moving party bears the burden of showing that the materials and information sought are relevant to the action or will lead to the discovery of admissible evidence. *Export Worldwide, Ltd. v. Knight*, 241 F.R.D. 259, 263 (W.D. Tex. 2006). Once the moving party establishes that the materials requested are within the scope of permissible discovery, the burden shifts to the party resisting discovery to show why the discovery is irrelevant, overly broad, unduly burdensome or oppressive, and thus should not be permitted. *Id.*

Federal Rule of Civil Procedure 34 governs requests for production of documents ("RFPs"), electronically stored information, and tangible things. Rule 34 requires responses to "either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons." Fed. R. Civ. P. 34(b)(2)(B). "An objection [to the entire request] must state whether any responsive materials are being withheld on the basis of that objection." *Id.* 34(b)(2)(C). On the other hand, "[a]n objection to part of a request must specify the part and permit inspection of the rest." *Id.*

After responding to each request with specificity, the responding attorney must sign their request, response, or objection certifying that the response is complete and correct to the best of the attorney's knowledge and that any objection is consistent with the rules and warranted by existing law or a nonfrivolous argument for changing the law. Fed. R. Civ. P. 26(g). This rule "simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection." Fed. R. Civ. P. 26(g) advisory committee note (1983).

The federal rules follow a proportionality standard for discovery. Fed. R. Civ. P. 26(b)(1). Under this requirement, the burden falls on both parties and the court to consider the

proportionality of all discovery in resolving discovery disputes. Fed. R. Civ. P. 26(b)(1), advisory committee note (2015). This rule relies on the fact that each party has a unique understanding of the proportionality to bear on the particular issue. *Id.* For example, a party requesting discovery may have little information about the burden or expense of responding. *Id.* "The party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination." *Id.*

**ANALYSIS**

Plaintiffs ask the Court to overrule Defendants' objections and to order production of certain documents. The Court will take each request in turn, beginning with objections to specific RFPs and then addressing compulsion of documents.

**Objections**

Plaintiffs argue Enterprise's objections to RFPs 1–3, 5–7, 9, 11–13, 15, 16, 18, and 19 and Derden's objections to RFPs 2–5 should be overruled because they are boilerplate and not stated with specificity. Defendants argue that Plaintiffs have not objected to the merits of the objections, but only the specificity. Defendants further argue that their objections are specific because they quoted specific portions of the questions that were vague or overbroad. The Court agrees that Plaintiffs only make specificity arguments in their motion regarding Defendants' responses to discovery. However, Plaintiffs do address the merits in their request to compel documents. Therefore, the Court will address specificity here and the merits later.

*a. "Subject to" language*

As an initial matter, the Court finds Defendants waived each of their objections, except to RFP 11, by including "subject to the foregoing" in the response. The practice of including "subject to" or "without waiving" statements after objections is an age-old habit comparable to

belts and suspenders. This practice is "manifestly confusing (at best) and misleading (at worse), and has no basis at all in the Federal Rules of Civil Procedure." *Keycorp v. Holland*, No. 3:16-cv-1948-D, 2016 WL 6277813, at *11 (N.D. Tex. Oct. 26, 2016) (quoting *Carr v. State Farm Mut. Auto. Ins.*, 312 F.R.D. 459, 470 (N.D. Tex. 2015)). Such an objection and answer "leaves the requesting [p]arty uncertain as to whether the question has actually been fully answered," *Consumer Elecs. Ass'n v. Compras & Buys Magazine, Inc.*, No. 08-21085-CIV, 2008 WL 4327253, at *3 (S.D. Fla. Sept. 18, 2008), and "wondering as to the scope of the documents or information that will be provided as responsive." *Heller v. City of Dall.*, 303 F.R.D. 466, 487 (N.D. Tex. 2014).

Rule 34 does not allow this kind of hedging. Rule 34 allows a party either to "state that inspection and related activities will be permitted as required" or to "state with specificity the grounds for objecting to the request." Fed. R. Civ. P. 34(b)(2)(B). If a party chooses to object to part of a request, the party "must specify the part and permit inspection of the rest." *Id.* 34(b)(2)(C). A response that states "subject to the foregoing" is not specific enough as to either (1) the completeness of the answer or (2) the availability of documents for inspection. The Court finds that Defendants' inclusion of "subject to the foregoing" is not supported by the federal rules and goes against the purposes of a just, speedy, and inexpensive resolution. *See Carr*, 312 F.R.D. at 470.

By answering questions "subject to" Defendants failed to specify the scope of their answer in relation to the request. This makes it impossible for Plaintiffs or the Court to assess the sufficiency of the response. Therefore, Defendants have waived each objection, except to RFP 11, by including "subject to" language in their responses. *See Carr*, 312 F.R.D. at 470.

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