UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. NOVA SHIMMICK JOINT VENTURE d/b/a SHIMMICK JOINT VENTURE, and its successors, Respondent.	OSHRC DOCKET NO. 17-1996

ORDER ON COMPLAINANT'S MOTION TO COMPEL

This matter comes before the Court on *Complainant's Motion to Compel and for an Order for Depositions*. Complainant contends Respondent did not provide sufficient responses to its discovery requests and interposed boilerplate objections without an adequate explanation of the basis for those objections. Respondent contends its responses to Complainant's discovery request were proper; its objections were proper; and that Complainant's requests, especially as regards the depositions, are not proportional to the needs of the case.

For the most part, the Court agrees with Complainant. Respondent's objections, both general and specific, are clear-cut examples of boilerplate objections, devoid of any explanation, and many of its answers are simply legal conclusions, devoid of any facts. Based on what follows, Complainant's *Motion* is GRANTED in part, and DENIED in part.

Standard on Motions to Compel

Commission Rule 52(b) states, "The information . . . sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case." 29 C.F.R. § 2200.52(b). The information sought need not be admissible at hearing so long as it appears reasonably calculated to lead to the discovery of admissible evidence and is

proportional to the needs of the case. *Id.*; *see also id.* § 2200.52(c), Fed. R. Civ. P. 26(b)(1). When another party refuses or obstructs discovery, the requesting party may apply for an order compelling discovery. *Id.* § 2200.52(f). The Court has broad discretion in this arena. *See Del Monte Corp.*, 9 BNA OSHC 2136 (No. 11865, 1981). The Review Commission has stated:

> The decision whether to allow discovery is within the judge's sound discretion. This sound discretion should be guided by the objective of providing a fair and prompt hearing to the parties. Moreover, the judge should consider the need of the moving party for the information sought, any undue burden to the party from whom discovery is sought, and, on balance, any undue delay in the proceedings that may occur. Given the judge's broad discretion, a judge's disposition of discovery matters is reversible only if the judge's actions constitute an abuse of discretion resulting in substantial prejudice.

Id.

The party objecting to production bears the burden of substantiating its objections. *See Oleson v. Kmart Corp.*, 175 F.R.D. 560, 565 (D. Kan. 1997). Merely stating that a request for discovery is overly broad, unduly burdensome, or harassing without an evidentiary declaration supporting such an objection is not adequate to sustain an objection. *See St. Paul Reinsurance Co. Ltd. v. Comm. Fin. Corp.*, 198 F.R.D. 508, 511 (N.D. Iowa, 2000) (citing *Josephs v. Harris Corp.*, 677 F.2d 985 (3d Cir. 1982)); *see also A. Farber and Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006) (faulting defendant for making boilerplate objections to every request for discovery). "The grounds for objecting to an interrogatory *must be stated with specificity*." Fed. R. Civ. P. 33(b)(1)(4) (emphasis added). Otherwise, such "[b]oilerplate, generalized objections are inadequate and tantamount to not making any objection at all." *See Springer v. Gen. Atomics Aero. Systs. Inc.*, Case No. 16cv2331-BTM(KSC), 2018 WL 490745 at *1 (S.D. Cal. January 18, 2018) (slip op.) (citing *Walker v. Lakewood Condo. Owners Ass'n*, 186 F.R.D. 584, 587 (C.D. Cal 1999)).

The Court will address the deficiencies Complainant identified in his *Motion* in conjunction with Respondent's responses and objections thereto.

Respondent's General Objections

Prior to answering an interrogatory, request for production, or request for admission, Respondent prefaced each set of responses with three general objections: (1) that Respondent has not completed its investigation of the case and reserves the right to amend its response; (2) that Respondent objects "to the *entire set* of interrogatories . . . to the extent that it requests information protected by the attorney client and work-product privileges"; (3) that Respondent objects "to *each and every* interrogatory" to the extent that it seeks privileged information protected by the U.S. and/or California Constitutions, in particular the right of privacy. *See Compl't Motion to Compel*, Ex. 6 at 2 (emphasis added). Further, Respondent incorporated by reference the foregoing general objections to each of its interrogatory responses. *Id.*

Generalized, non-specific objections are improper. The plain language of Fed. R. Civ. P. 33(b)(1)(4) mandates that objections be made with specificity, which requires providing some evidentiary basis for the objection. *See St. Paul Reinsurance Co.*, 198 F.R.D. at 511. By their very nature, general objections made applicable to all discovery responses cannot be stated with specificity. *See Springer*, 2018 WL 490745 at *2. As to the first objection, Respondent does nothing more than reiterate its responsibility under Commission Rule 52(i) to seasonably supplement its prior discovery responses. As to the remaining objections, Respondent's claims of privilege are also deficient according to the Federal Rules, which require "the party [to] make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection." Fed. R. Civ. P. 26(b)(5). No such description accompanies Respondent's general claims of privilege. Instead, Respondent lodges objections "to the extent that" the requests seek privileged information without identifying any information that is being withheld. Only if information or documents are actually being withheld—and the basis explained—is such an objection proper. Otherwise, interposing broad-stroke objections as

Respondent has done here is no less "ambiguous" or "harassing" than the Respondent claims Complainant's requests to be.

Because Respondent failed to proffer any basis for its General Objections, those objections are improper and are hereby OVERRULED both as a general matter and insofar as Respondent attempted to incorporate them by reference into each of its responses to interrogatories, requests for production of documents, and requests for admissions.

Complainant's Interrogatories

Complainant contends Respondent's answers to Interrogatories 1 through 12 are deficient and the objections are improper. In its *Motion*, Complainant split these interrogatories, and the responses thereto, into two general categories: (1) those which requested identifying information; and (2) those which requested "facts upon which Respondent relies in support of" denials or defenses in its *Answer*. The Court will address the general categories and the individual requests insofar as Respondent's response to a specific interrogatory differs from the others in any material way.

Interrogatories 2 and 3

Interrogatories 2 and 3 seek the identity of certain employees and managers. Interrogatory 2 seeks the identity of "all individuals responsible for stacking the I-beams", their employer and supervisor, and any work rules regarding the I-beams that Respondent communicated to those individuals. Similarly, Interrogatory 3 seeks the identity of "all Nova Shimmick managers responsible for supervising the worksite . . . , including the area with stacked I-beams", their duties relating to I-beam storage, and documentation related to those duties on the day in question. In response to these requests, Respondent interposed the same objections: (1) "Vague, ambiguous, and overbroad; no employee was responsible for stacking any I-beams"; and (2) "Right of

Privacy".[1]

As to the "vague, ambiguous, and overbroad" objection, Respondent is overruled. Not only did Complainant define potentially ambiguous terms, he also specified a particular activity occurring at a particular place on a particular date. Indeed, "without waiving these objections", Respondent managed to identify both employees and supervisors that were responsive to the interrogatories. Because Respondent failed to identify how Interrogatories 2 and 3 are vague, ambiguous, or overly broad, its objections are overruled. *See Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827, 856 (3d Cir. 1995) (holding that party resisting discovery must show specifically how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive).

Though Respondent provided the names and employers of each of the identified employers and supervisors, it appears that it did not provide "identifying" information insofar as Complainant requested that person's home address and phone number. Instead, Respondent objected on the basis of California's right of privacy and provided what appear to be corporate addresses and phone numbers, because they are virtually the same for each individual. *See* Cal. Const. Art. 1, § 1 (listing, amongst others, the right to privacy). Respondent does not explain how this state privilege applies to Complainant's request, but asserts that the present case is similar to a federal diversity suit, which, Respondent claims, applies state law privileges. *See Resp't Opposition* at 6 (citing *Oaks v. Halvorsen Marine Ltd.*, 179 F.R.D 281, 284 (C.D. Cal. 1998)). Based on its review of the relevant case law, the Court finds Respondent's claim of privilege based on California's Right to Privacy should yield to the needs of this case. Further, the Court also finds adequate safeguards exist to protect against improper disclosure.

1. With respect to Number 2, Respondent also claimed such information was outside of its custody and control; however, it withdrew that objection after further discussion with Complainant. *See Resp't Opposition* at 6.

The California Supreme Court explained that the right of privacy enshrined in the California Constitution "protects the individual's *reasonable* expectation of privacy against a *serious* invasion." *Pioneer Electronics v. Superior Court*, 150 P.3d 198, 204 (Cal., 2007). Thus, conduct characterized as an invasion of privacy must be evaluated on the "extent to which it furthers legitimate and important competing interests." *Hill v. NCAA*, 865 P.2d 633, 656 (Cal. 1994). "[I]f intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged." *Id.* Personal contact information of a non-party witness is "generally discoverable, and it is neither unduly personal nor overly intrusive." *Pioneer*, 150 P.3d at 205. That is because such information is typically used to "identify witnesses rather than to establish facts about the existence of [private] relationships." *Puerto v. Superior Court*, 158 Cal. App. 4th 1242, 1254 (Cal. Ct. App. 2008)

The Court finds that the identifying information requested by Complainant does not violate any of the identified individuals' rights to privacy. The address and phone number of the identified employees and supervisors is neither unduly personal nor overly intrusive; it is only being used for the limited purpose of identifying witnesses to the events related this case. Further, such information can be protected through the entry of appropriate orders, and its dissemination is restricted according to the Freedom of Information Act. *See, e.g.*, *SafeCard Svcs. Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (discussing the broad privacy rights afforded to suspects, witnesses, and investigators). Accordingly, Respondent's objection on the basis of the California Constitution's right to privacy is overruled.[2]

2. Respondent's reliance on *Oaks v. Halvorsen Marine Ltd.* is misplaced. While that case does state that federal courts sitting in diversity will apply state law privileges, the court also noted "the courts have frequently found that a party's need for the information may outweigh whatever privacy rights, if any, another party may have." 179 F.R.D. 281, 284 (citation omitted). The court in *Oaks* was dealing with the more sensitive topic of financial information. Although such information is clearly within the ambit of the right to privacy, the court found that the information in question was crucial to a key issue and could be adequately protected by a protective order. Thus, it ordered discovery of the financial information. Based on this reading, *Oaks* supports the position taken by Complainant here.

Interrogatories 1 and 4 through 12

Interrogatories 1 and 4 through 12 are all of the same form: "State all facts upon which Respondent relies in support of" the various defenses or denials made in its *Answer*. Complainant contends Respondent's responses are boilerplate, conclusory statements, which are not supported by any recitation of facts. Respondent argues its responses are appropriate in their narrative form and "provide the Secretary with sufficient facts to put the Secretary on notice of Respondent's defense theories . . . ." *Resp't Opposition* at 6. Although Respondent's answers vary a little more than suggested by Complainant, the Court finds they neither constitute a narrative, nor do they apprise Complainant of *any* facts relevant to the defenses or denials asserted by Respondent.

In response to Interrogatories 1, 4, 5, and 11, Respondent answered as follows:

> Complainant will be unable to establish the existence of the alleged violation; Complainant will be unable to prove there was a substantial probability the alleged violation could result in death or serious physical injury; Respondent had no knowledge of the alleged violation; if it is found that a valid violation of the safety order existed, said violation was the result of unforeseeable actions of one or more employees of Respondent, actions for which Respondent should not be held accountable; if it is found that a violation of the safety order existed, said violation was the result of unforeseeable actions of one or more employees of an employer other than Respondent; actions for which Respondent should not be held accountable.

Compl't Motion, Ex. 6 at 2–6. Although couched in terms to make it appear as a narrative, Respondent's response is nothing more than a list of legal conclusions, which could have been reproduced as follows: (1) Complainant cannot prove it's *prima facie* case; (2) the violation was not serious; and (3) if valid, the violation was the result of unpreventable employee misconduct of Respondent's own employee or that of another employer. Complainant is already aware of Respondent's defenses and denials because: (a) Respondent's *Answer* already contains this information in substantially the same language, and (b) Complainant asked for *all facts* supporting these denials and defenses. *See Resp't Answer* at 2–3. If Respondent is denying an allegation or

asserting an affirmative defense, it must have some facts in its possession to support such allegations. Complainant's interrogatories seeking such information are proper. As they stand, Respondent's responses to Interrogatories 1, 4, 5, and 11 are deficient. As indicated below, Respondent shall provide Complainant with facts that are responsive to the foregoing interrogatories.

Respondent's answers to Interrogatories 6 and 7 are different in form, if not in substance. In Interrogatory 6, which asks about Respondent's denial that the proposed penalty was appropriate, Respondent answers, "Complainant will be unable to establish that the proposed penalties were calculated correctly." *Compl't Motion*, Ex. 6 at 6. Presumably, Respondent's answer to this interrogatory is premised, at least in part, on its answer to Interrogatory 1. Again, however, there are no facts included in Respondent's answer to this or virtually every other interrogatory. Facts used to support other denials and affirmative defenses are also relevant to the question of penalty. Thus, when Respondent provides updated responses to the interrogatories discussed above, the answer to Interrogatory 6 will be a natural extension of those responses.

With respect to Interrogatory 7, the Court perceives no deficiency based on Complainant's original allegation in the *Complaint*, Respondent's *Answer*, or the Interrogatory itself. Complainant has not identified any independent problem with Respondent's answer, instead claiming that it was the same boilerplate answer found in 1 and 4 through 12. Clearly the answer to Interrogatory 7 is not similar to the others. As far as the Court can tell, Respondent's answer to Interrogatory 7 is sufficient.

Respondent's answers to Interrogatories 8, 9, 10 and 12, however, are not. Each response states, "Respondent had no knowledge, nor could have reasonably foreseen any of the alleged violative conditions." *Compl't Motion*, Ex. 6 at 6.[3] As with Respondent's answers to

3. The one exception is Interrogatory 9, which adds the following ". . . which may have been the result of actions of

Interrogatories 1, 4, 5, and 11, Respondent merely states a legal conclusion, *e.g.*, that it did not have knowledge. Because Complainant requested facts in support of that conclusion, Respondent's answers are deficient. As indicated below, Respondent shall provide Complainant with facts that are responsive to the foregoing interrogatories.

Complainant's Requests for Production

The Court has already rejected Respondent's general objections and will not re-address them here. Further, the Court also incorporates by reference its findings as to Respondent's specific objections on the basis of vagueness, ambiguity, overbreadth, undue burden, oppressiveness, and harassment. *See* **Respondent's General Objections**, p. 3, *supra*. Respondent provides no factual basis for any of these boilerplate objections, and the Court does not find the requests made by Complainant to be objectionable. Thus for the reasons already stated above, Respondent's objections on the basis of vagueness, ambiguity, overbreadth, undue burden, oppressiveness, and harassment are overruled.

Respondent makes one additional objection to the production of certain documents that bears discussion. In response to Requests for Production 1 through 4, Respondent states:

> Respondent is unaware of the existence of any documents which may respond to this request, other than those documents Respondent provided to Complainant during the subject inspection. Those documents in Complainant's possession are equally available to Complainant and will not be produced again. Production of items which Complainant already has in its possession is not calculated to lead to the discovery of relevant evidence, and is burdensome, oppressive, and harassing.

Compl't Motion, Ex. 6 at 10. The objection that documents are "equally available" has routinely been rejected by the courts. *See St. Paul Reinsurance Co. Ltd.*, 198 F.R.D. 508, 514 (N.D. Iowa 2000) (noting that "courts have unambiguously stated that this exact objection is insufficient to resist a discovery request"); *Nat'l Academy of Recording Arts & Sciences, Inc. v. On Point Events,*

Shimmick Construction or Quanta Services, Inc. employees." *Compl't Motion*, Ex. 6 at 2–6. This does not change the Court's analysis of the issue.

LP, 256 F.R.D. 678, 682 (C.D. Cal. 2009) (citing *St. Paul Reinsurance* for same proposition). Simply because documents may have been provided to Complainant during the inspection does not absolve Respondent of its responsibility to provide such documents if they are responsive to a formal request for production. Respondent will suffer no prejudice, nor *undue* burden, by producing such documents. Accordingly, Respondent shall provide ALL documents responsive to Complainant's request, irrespective of whether such documents may have been provided during the course of Complainant's inspection.

Complainant's Requests for Admissions

According to the Ninth Circuit, "The purpose of Rule 36(a) is to expedite trial by establishing certain material facts as true and thus narrowing the range of issues for trial."[4] *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1245 (9th Cir. 1981). To facilitate that goal "parties should not seek to evade disclosure by quibbling and objection. They should admit to the fullest extent possible, and explain in detail why other portions of a request may not be admitted." *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 938 (9th Cir. 1994). "When the purpose and significance of a request are reasonably clear, courts do not permit denials based on an overly-technical reading of the request." *U.S. ex rel Englund v. Los Angeles County*, 235 F.R.D. 675, 684 (E.D. Cal. 2006) (citing *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 580 (9th Cir. 1992)).

Respondent denied all of Complainant's requests for admissions on the premise that they "were so vague, ambiguous, and unintelligible that Respondent cannot, in good faith, frame an intelligent reply other than to deny." *Resp't Opposition* at 7. Respondent also states, without explaining, that this conclusion "is not based on an overly technical reading of the requests." *Id.*

4. Although cases before the Commission apply a different procedural rule, the Court finds the purpose behind these rules is the same.

Much like its responses to Complainant's interrogatories, Respondent merely asserts that the requests are ambiguous without supporting that conclusion with facts or argument. Although there is nothing inherently wrong with denying each of the propounded requests for admission,[5] Respondent's reasons for its denials justify the Court's intervention in this case.

All of the requests provide concrete details, including: (1) the date: July 17, 2017; (2) the location: Naval Base Point Loma Fuel Pier South Dolphin; and (3) the condition: the stacked I-beams that caused an injury to a Nova Shimmick employee. Further, each request only seeks to establish a single point of fact about the condition, individuals exposed to that condition, or the opportunity for a supervisor to observe the condition. To suggest, as Respondent does here, that "nearly all" of Complainant's requests for admissions are so vague and ambiguous as to render them unintelligible is absurd. Complainant's Request for Admission No. 3 illustrates the absurdity of Respondent's position and the problem of asserting an objection in boilerplate fashion, without a supporting rationale. It states: "On or around July 17, 2017, Patrick Monahan was a Nova Shimmick employee." *Compl't Motion*, Ex. 5 at 8. On July 17, 2017, either Patrick Monahan was a Nova Shimmick employee, or he was not. There is nothing ambiguous or vague about such a statement, nor, insofar as the Court reads them, is there anything vague or ambiguous about the remaining requests for admission.

This is not a complicated case: the condition involves a stack of I-beams that fell and injured someone on July 17, 2017 at Naval Base Point Loma Fuel Pier South Dolphin. Complainant's requests seek Respondent's position regarding the orientation of the I-beam stack and whether any particular I-beam was sticking out from it; whether employee(s)/individual(s) were exposed to that condition; and whether any supervisors did, or could have, observed the

5. *See, e.g.*, *United Coal Companies v. Powell Const. Co.*, 839 F.2d 958, 967 (3d Cir. 1988) ("Where, as here, issues in dispute are requested to be admitted, a denial is a perfectly reasonable response. Furthermore, the use of only the word 'denied' is often sufficient under the rule.") (citations omitted).

condition. These are all basic facts that do not require verbal gymnastics to answer. *See Holmgren*, 976 F.2d at 580 ("Epistemological doubts speak highly of (party's) philosophical sophistication, but poorly of its respect for Rule 36(a)."). Respondent's argument that the "nearly all" of these requests are "so vague, ambiguous, and unintelligible" smacks of gamesmanship and is rejected.

Complainant's Requests for Depositions

Finally, the Court also finds that depositions of Art Mendoza, Dale Bergman, and Michael Comer shall be allowed. In addition to the fact that the foregoing individuals were identified as being responsible for safety at the worksite on the evening of the accident, the Court is also persuaded by Complainant's argument that Respondent's evasiveness in answering discovery provides further justification for taking depositions. Instead of engaging in a meaningful and useful exchange of discovery, Respondent has stonewalled Complainant's attempts to acquire relevant information through its indiscriminate use of objections and vague, conclusory statements of "fact".

Furthermore, the proportionality factors in Fed. R. Civ. P. 26(b)(1) also support this conclusion. First, Respondent suggests that Complainant's concern for a safe workplace for employees is somehow heavily outweighed by Respondent's interest in maintaining a clean safety record, the tarnishing of which, it claims, could be fatal to its entire business operation. While having a "serious" violation on the books may impact Respondent's ability to compete in the federal contracting process, Respondent's concerns about the livelihood of its business on the facts of this case are overblown. Further, employee safety is no less vital to Respondent's business as an ongoing concern. Second, while the amount in controversy is only $11,408, Complainant's concerns—no less than Respondent's—go beyond the mere question of money. Indeed, an employee was injured in this case. Third, with respect to the parties' access to relevant information and their respective resources, the Court finds this factor supports Complainant's request. The

supervisors identified above possess information about the events of July 17, 2017, and were in charge of safety when the accident occurred. Without their deposition testimony, Complainant will not be able to adequately evaluate its case. As such, the fourth factor also supports allowing the depositions, because the information the managers are likely to provide will be important to resolution of the dispute, whether at trial or through settlement. Finally, as regards the expense involved in conducting the depositions, the Court finds that Complainant has already assisted in limiting the expense by requesting only a single day of depositions for three different management personnel. Further, consistent with Respondent's request, the Court finds that taking these depositions close to Respondent's headquarters in Napa, California will similarly limit expenses.

Based on the foregoing, the Court finds it appropriate to allow depositions of the three managers, which shall be limited to total of one day at a mutually agreeable location in Napa, California.

ORDERS

Based on the foregoing, Complainant's *Motion* is AFFIRMED in part, and DENIED in part. Within 10 days of the date of this Order, Respondent is Ordered to:

1. Provide the contact information requested in Interrogatories 2 and 3. To the extent Respondent feels one is necessary, it may submit a proposed protective order to limit disclosure of such information.

2. Provide all facts that are responsive to Interrogatories 1, 4, 5, 6, 8, 9, 10, 11, and 12. However, insofar as Interrogatories 1 and 11 seek similar information, Complainant shall clarify which interrogatory seeks information regarding the *prima facie* elements and which seeks information regarding the citation's characterization as serious. Because abatement does not appear to be an issue in this case, Respondent is not required to respond to Interrogatory 7.

3. Provide ALL documents responsive to Complainant's requests for production of documents, even if said documents were already provided to Complainant during the inspection.

4. Provide updated responses, independent of the objections overruled herein, to Complainant's requests for admission. Insofar as Respondent feels it cannot fully admit or deny a particular request, the Court directs Respondent to the following passage from

Rule 36(a):

> The answer shall specifically deny the matter or set forth in detail why the answering party cannot admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as true and qualify or deny the remainder.

Fed. R. Civ. P. 36(a)(4).

5. Seasonably supplement its responses to Complainant's requests for discovery when such information becomes available through the exercise of reasonable diligence.

6. Confer with Complainant to schedule the depositions of Art Mendoza, Dale Bergman, and Michael Comer. The depositions shall take place in Napa, California by June 15, 2018.

SO ORDERED.

Date: March 29, 2018

S/ Patrick B. Augustine

Denver, Colorado

Patrick B. Augustine
Judge, OSHRC