UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MID-OHIO PIPELINE SERVICES, LLC, and its successors, Respondent,	)	OSHRC Docket No. 15-1879

ORDER GRANTING COMPLAINANT'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES

I. FACTS

On August 26, 2015, the Occupational Safety and Health Administration ("OSHA") inspected the work site of Mid-Ohio Pipeline Services, LLC ("Respondent"). Following the inspection, OSHA issued a three item serious citation with a total proposed penalty of $17,000. The citation alleges Respondent failed to: 1) adequately protect employees from loose rock that lay at the edge of the excavation wall, 2) conduct daily inspections of excavations to address the inadequate ingress and egress points that were obstructed by large rock and debris, and 3) provide an adequate protection system to protect employees from cave-ins of the excavation.

On December 28, 2015, the Secretary of Labor ("Complainant" or "Secretary") filed a Complaint in this matter. On January 14, 2016 Respondent filed its Answer along with 15 Affirmative Defenses.[1] On February 19, 2016, the Secretary served his First Set of Request for

[1] Respondent's Affirmative Defenses include: 1) failure to state a claim, 2) lack of sufficient particularity, 3) statute of limitations, 4) vague standards and complaint, 5) infeasibility,6) no existing hazards, 7) lack of exposure, 8) inapplicability of standards, 9) lack of any violation, 10) lack of knowledge, 11) good faith, 12) *de minimis* violations, 13) adequately communicated and enforced work rules, 14) unpreventable employee misconduct, and 15) greater hazard.

Admissions, First Interrogatories and First Request for Production of Documents upon Respondent. The Secretary's written discovery seeks information relating to Respondent's basis for contesting the citations, including the identification of any relevant documents or witnesses, the basis for Respondent's denials and 15 Affirmative Defenses, and the identification of any employees present at the worksite on August 26, 2015.[2]

On April 22, 2016, Respondent served its responses and objections to the Secretary's discovery requests and provided 233 pages of documents and 143 pages of pictures. In its responses to Interrogatory Nos. 8 through 10, Respondent stated "that it is still investigating the facts of the case and has not yet determined which affirmative defenses will be asserted at hearing." In its response to Interrogatory No. 12, Respondent stated that it is still investigating the facts of the case and has not yet determined the identity of all individuals responsible for ensuring compliance with all procedures or policies in place on August 26, 2015. In its response to Interrogatory No. 13, Respondent stated employees were trained regarding trench excavation and in the use of personal protective equipment.[3] In its response to Interrogatory No. 14, Respondent stated the Secretary did "not identify the type of discipline to which it is referring." In its responses to Interrogatory Nos. 8 through 10 and 12 through 14, Respondent also stated it

[2] The written discovery requests also sought information relating to: 1) the identification and contact information of the witnesses Respondent intends to call at trial, 2) the subject matter and basis to which an expert witness shall testify to, 3) the identity of any employees Respondent has received statements from relating to the citations and a summary of the content of such statements, 4) Respondent's definition of "employee misconduct" in its Affirmative Defense, 5) the identity of employees with knowledge of "employee misconduct", 6) Respondent's procedures or policies relating to employee conduct, 7) the identity and contact information of individuals responsible for ensuring compliance with the employee conduct procedures, 8) the training of the employees regarding employee conduct procedures, 9) Respondent's disciplinary procedures and the information related to such disciplinary procedures, 10) the type of work being done at the worksite, 11) employees working at the worksite on August 26, 2015, 12) employees who were disciplined relating to the events on August 26, 2015, and 13) the reasons for Respondent's denial in whole or in part of any of the Secretary's Requests for Admissions.

[3] Respondent did not identify the names of any such trained employees in its response.

reserves the right to supplement its responses pursuant to Occupational Safety and Health Review Commission ("Commission") Rule 52(i).[4]

On May 2, 2016 Counsel for the Secretary sent a letter to Respondent objecting to Respondent's answers and seeking supplemental answers to the Secretary's written interrogatories.[5]

On May 6, 2016, Respondent responded via letter and declined to provide the supplemental answers to the Secretary's written interrogatories. Respondent outlined the reasoning for each response to the written interrogatories.

On May 10, 2016, Counsel for the Secretary and Respondent spoke on the phone regarding the dispute over the written interrogatories. Later on the same day, Respondent left a voicemail for the Counsel for the Secretary declining to provide any further information. On May, 11, 2016 Counsel for the Secretary and Respondent exchanged emails regarding the

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[4] Commission Rule 52(i) states;
(i) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to:
(i) The identity and location of persons having knowledge of discoverable matters; and
(ii) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the person is expected to testify, and the substance of the person's testimony.
(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:
(i) The party knows that the response was incorrect when made; or
(ii) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to the hearing through new requests for supplementation of prior responses.

[5] Specifically, the Secretary sought full and complete responsive answers to: 1) Interrogatory Nos. 8 through 10 related to the denials and affirmative defenses Respondent raised in its Answer to the Complaint; and 2) Interrogatory Nos. 12 through 14 for the identification of employees, training, discipline and policies related to work operations on August 26, 2015.

dispute, which ended with Respondent informing the Counsel for the Secretary that a Motion to Compel Answers to Interrogatories would be necessary to resolve the dispute.[6]

On May 13, 2016, the Secretary filed a Motion to Compel Answers to Interrogatories and Quash Subpoena (Motion to Compel). Complainant asks the Court to order Respondent to provide complete responses to Interrogatory Nos. 8 through 10 and 12 through 14.

On May 27, 2016, Respondent filed its Response to the Secretary's Motion to Compel Answers to Interrogatories. For numerous reasons addressed below, Respondent asserts that Secretary's Motion to Compel Answers to Interrogatories is "completely meritless, both factually and legally, and should be denied."

Discovery closes on August 27, 2016. The trial commences on September 21, 2016.

II. DISCUSSION

When solving discovery disputes, it is appropriate for the Court to consider the need of the moving party for the information, any undue burden to the party from whom the discovery is sought, and any undue delay in the proceedings that may occur. *KLI, Inc.*, 6 BNA OSCH 1097, 1098 (No. 13490, 1977). A party may obtain discovery regarding any nonprivileged matter relevant to a party's claims—including "the identity and location of persons who know of any discoverable matter." FED. R. CIV . P. 26(b)(1).[7] The party seeking to compel discovery has the burden of establishing that its request satisfies the relevancy requirements of Fed. R. Civ. P. 26 (b)(1) or Commission Rule 52(b). Thereafter, the party opposing discovery has the burden of showing that the discovery should be prohibited, and the burden of clarifying, explaining or supporting its objections. *Bryant v. Ochoa*, 2009 WL 1390794 at * 1 (S. D. Cal. May 14, 2009).

[6] The Secretary's counsel asserted that the term "discipline" as used in Interrogatory No. 14 was not vague and referred to Commission case law relating to an employer's assertion of an employee misconduct defense in his May 11, 2016, 5:05 PM, email to Respondent.

[7] *See also* Commission Rule 52(b) (Scope of discovery may concern any matter relevant to the subject matter involved in the pending case). 29 C.F.R. § 2200.52(b).

A. COMPLAINANT'S INTERROGATORY NOS. 8 THROUGH 10 AND 12 THROUGH 14 ARE NOT OVERLY BROAD AND UNDULY BURDENSOME

The Secretary argues Respondent has improperly raised boilerplate objections to specific interrogatory requests. The Secretary argues that Respondents' "overly broad and/or unduly burdensome" objection to Interrogatory Nos. 8 through 10 and 12 through 14 is improper as Respondent fails to provide any factual basis for such a claim. The Secretary is correct. "The mere statement by a party that an interrogatory or request for production is overly broad, burdensome, oppressive and irrelevant is not adequate to voice a successful objection." *Wilkinson v. Greater Dayton Reg'l Transit Auth.*, No. 3:11CV00247, 2012 WL 3527871, at *13 (S.D. Ohio Aug. 14, 2012); *see also Kafele v. Javitch, Block, Eisen & Rathbone,* 2005 WL 5095186 at *2 (S.D. Ohio, Apr. 20, 2005). "The burden of proof is on the objecting party to show in what respect an interrogatory is improper." *Wilkinson v. Greater Dayton Reg'l Transit Auth.*, No. 3:11CV00247, 2012 WL 3527871, at *1 (S.D. Ohio Aug. 14, 2012).

The Court does not find Interrogatory Nos. 8 through 10 and 12 through 14 to be overly broad and unduly burdensome. As discussed further below on the matter of affirmative defenses, they are legitimate in scope and relevancy. Respondent's argument that these interrogatories are overly broad and/or unduly burdensome is without merit.

B. COMPLAINANT'S INTERROGATORY NOS. 8 THROUGH 10

> Interrogatory No. 8 – State in detail the basis for Respondent's denials and Affirmative Defenses in Respondent's Answer to the Complaint in this matter.
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> Interrogatory No. 9 – Describe in detail the actions that constitute "employee misconduct" as referenced in the Affirmative Defenses raised in the Respondent's Answer.
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> Interrogatory No. 10 – Identify the name, last known address and current employer of all individuals who have knowledge of the "employee misconduct" as referenced in the Affirmative Defenses raised in the Respondent's Answer.

The Secretary asserts Respondent's responses to Interrogatory Nos. 8 through 10 are incomplete because they fail to provide any factual basis for the defenses or provide related information that is exclusively within Respondent's control. The Secretary argues a party may obtain discovery regarding any nonprivileged matter relevant to a party's claims. FED. R. CIV. P. 26(b)(1). The information related to the affirmative defenses, particularly the information regarding employee misconduct, is certainly relevant to the Secretary's claim and is generally in the exclusive control of the Respondent.

Respondent makes six arguments rejecting the Secretary's argument that Respondent has failed to provide any factual basis for the asserted 15 affirmative defenses. First, Respondent asserts Interrogatory Nos. 8 through 10 are improper because they are overly broad and unduly burdensome, as they require Respondent to identify and describe the basis for the 15 affirmative defenses. Respondent cites to *Bovarie v. Schwarzenegger*, No. 08cv1661, 2011 WL 719206 at *1 (S.D. Cal. Feb. 22, 2011), where the court found that an interrogatory "seeking every fact that underlies every affirmative defense is unduly burdensome."[8]

The result in *Bovarie* is an anomaly in the cases dealing with contention interrogatories.[9]

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[8] Respondent cites to *Bovarie* and three other cases in its May 6, 2016 letter responding to the Secretary's May 2, 2016 letter requesting supplemental answers to the written interrogatories.

[9] A contention interrogatory is an interrogatory where "an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact." *Dot Com Entm't Grp., Inc. v. Cyberbingo Corp.*, 237 F.R.D. 43, 44 (W.D.N.Y. 2006). In *Convergent Technologies Securities Litigation*, 108 F.R.D. 328 (N.D.Cal.1985), the court described the various types of contention interrogatories as generally a question asking:

> (1) another party to indicate what it contends;
> (2) another party whether it makes some specified contention;
> (3) an opposing party to state all the facts on which it bases some specified contention;
> (4) the responding party to take a position, and then to explain or defend that position, with respect to how the law applies to facts; and
> (5) parties to spell out the legal basis for, or theory behind, some specified contention.

Id. at 338; *see also Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 95 (E.D. Pa. 1992). These are distinguished from interrogatories which seek the identification of witnesses or of documents that support or contradict any of the controverted allegations. *In re Convergent Technologies Securities Litigation*, 108 F.R.D. at 338.

Contention interrogatories that seek to clarify the basis for the scope of an adversary's claims are generally permitted. *Starcher v. Corr. Med. Sys., Inc.*, 144 F.3d 418, 421 (6th Cir. 1998). "Contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required." *Id.* at 421; *see also Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997); *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996).

Generally, contention interrogatories are overly broad and unduly burdensome on their face if they seek "all facts" supporting a claim or defense, such that the answering party is required to provide a narrative account of its case. *Hiskett v. Wal–Mart Stores, Inc.*, 180 F.R.D. 403, 404–05 (D. Kan. 1998). However, contention interrogatories may properly ask for the principal or material facts that support an allegation or defense as well as the identities of knowledgeable persons and supporting documents for the principal or material facts supporting an allegation or defense. *Id.* at 405.

Bovarie is one of only a few reported cases where a Court does not require the answering party to provide the principal or material facts upon which the answering party bases its allegations. Even the cases cited by the *Bovarie* court, while acknowledging the potential burden of contention interrogatories, still require the principal or material facts to be provided where they had not already done so explicitly. *See e.g. Mancini v. Insurance Corp. of New York,* 2009 WL 1765295 at * 3 (S.D. Cal. Jun 18, 2009); *Bashkin v. San Diego County,* 2011 WL 109229 at * 2 (S .D. Cal. Jan 13, 2011); *Miles v. Shanghai Zhenhua Port of Machinery Co., LTS.*, 2009 WL 3837523 at * 1 (W.D. Wash. Nov 17, 2009). *Bovarie* is neither controlling precedent here nor persuasive as it significantly departs from the majority of cases dealing with contention interrogatories.

Respondent failed to provide even the principal or material facts upon which the 15 Affirmative Defenses are based. Interrogatories seeking such information are well within the acceptable norms of discovery requests. They provide the party seeking discovery information material that would be useful to it when preparing to respond to the raised defenses. *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 445, 446 (D. Kan. 2000); *see also Stoldt v. Centurion Indus., Inc.*, No. 03-2634-CM-DJW, 2005 WL 375667, at *5 (D. Kan. Feb 3, 2005). Respondent provided limited information concerning: 1) the credentials of the Project Manager and Safety Director, 2) inspections of the work site, 3) the performance of a Job Safety Analysis each morning, and 4) the safety equipment the employees were required to wear. Respondent did not address the employee misconduct defense or identify any individuals with knowledge of the employee misconduct. Respondent provided little to no principal or material facts in the answers to proper interrogatories.

Second, Respondent argues Commission Rule 34(b)(4)[10] requires affirmative defenses be raised early in litigation; before parties have a chance to fully develop the facts necessary to support such a claim. *See* 29 C.F.R. § 2200.34(b)(4). Respondent claims that it is unfeasible to assume that it has all the facts necessary to support all of its affirmative defenses when it files its answer. Commission Rule 34(b)(4) is specific to the *answer* of a complaint, not the *answer* to an interrogatory. The Secretary is not challenging the sufficiency of Respondent's answers to the complaint. Rather the Secretary is challenging the sufficiency of the Respondent's answers to interrogatories. The answer was then and discovery is now, at a different time frame. Five of the seven months of the discovery period in this case have passed. Pursuant to Commission Rule

[10] Commission Rule 34(b)(4) states:

The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.

55(b), Respondent has a duty to provide answers to interrogatories "in good faith and as completely as the answering party's information will permit." *See* 29 C.F.R. § 2200.55. Respondent has had ample time to prepare complete responses to Interrogatory Nos. 8 through 10 relating to defenses it raised in its answer.

Third, Respondent argues that a party does not have to disclose the basis of its affirmative defenses in the early stages of litigation before substantial discovery has been conducted. This argument is similar to its second argument. It fails for the same reasons. Respondent cites to *Gen-Probe Inc. v. Becton, Dickinson & Co.*, No. 09CV2319 BEN NLS, 2010 WL 2011526, at *1-2 (S.D. Cal. May 19, 2010) (denying motion to compel documents and support for the defendant's affirmative defenses when the parties were in the early stages of litigation). In *Gen-Probe Inc.*, the Defendant objected to further responding to the Plaintiff's interrogatories because it allegedly could not provide any further information without obtaining discovery from the Plaintiff. *Id.* at *1. Defendant objected to the interrogatories because the Defendant's discovery requests had not been answered and therefore Defendant had insufficient information to respond to Plaintiff's discovery request. Here, Respondent is not relying upon information from the Secretary to answer the interrogatories. The circumstance that the *Gen-Probe Inc.* court addressed is not present here. *Gen-Probe Inc.* is not relevant to the facts at hand. Instead, Commission Rule 55(b) is controlling, requiring Respondent to provide answers to interrogatories "in good faith and as completely as the answering party's information will permit." *See* 29 C.F.R. § 2200.55. Respondent's argument that a party does not have to disclose the basis of its affirmative defenses in the early stages of litigation before substantial discovery has been conducted is rejected.

Fourth, Respondent asserts its investigation of the case is incomplete and is therefore unaware which affirmative defenses will be asserted. Respondent argues that under Commission Rule 55, it has made a reasonable inquiry by having Mr. Keith Karchella[11] supply answers, to the best of his knowledge, to the interrogatories. Mr. Karchella certified under penalty of perjury that the facts contained in the interrogatories were both true and accurate.

The Secretary argues that all "answers [to interrogatories] shall be made in good faith and as completely as the answering party's information will permit." 29 C.F.R. § 2200 55(b). Additionally, the Secretary argues that the "answering party is required to make reasonable inquiry and ascertain readily available information" *Id.* Specifically, that "an answering party may not give lack of information ... as a reason for failure to answer, unless he states that he has made reasonable inquiry and the information known or readily obtainable by him is insufficient to enable him to answer the substance of the interrogatory. *Id.*

The parties are at odds in the interpretation of Commission Rule 55(b) and what a party is required to do in order to claim lack of information in a discovery response. In order to claim lack of information under Rule 55(b) two elements must be met: (1) party has made a reasonable inquiry, and (2) that the information known or readily obtainable by the party is insufficient to enable the party to answer the substance of the interrogatory. Here, Respondent has provided certification by Mr. Karchella "that the facts contained in Respondent's Responses and Objections to Complainant's First Set of Interrogatories to Respondent are true and accurate to the best of my knowledge, information, and belief." Mr. Karchella does not state that he has made a reasonable inquiry of any kind. He states only that the facts in Respondent's responses are based upon his personal knowledge or were prepared with the assistance of others upon

[11] Mr. Karchella is Respondent's Safety Director.

whom he relied. Respondent's argument that its discovery responses are justified because discovery is not yet complete is rejected.

Fifth, Respondent argues that there are approximately three months left in discovery and therefore there is time for Respondent to supplement its answers pursuant to Commission Rule 52(i). Respondent also cites to a patent case, *Univ. of Virginia Patent Found. v. Gen. Elec. Co.*, No. 3:14CV51, 2015 WL 4878880, at *4 (W.D. Va. Aug. 14, 2015), which found certain interrogatories did not have to be answered until additionally discovery is completed. In *Univ. of Virginia Patent Found.*, the Court noted that "[p]atents often involve hundreds of claims that could potentially be infringed, and patent rules are designed to efficiently narrow the dispute to the few claims at the heart of the case through a series of standardized steps." *Id.* at *3. The Court found the interrogatories to be premature for two reasons. First, the litigation was nine months old, and the parties were still moving through the beginning stages of discovery. *Id.* Second, the interrogatories at issue asked Defendant to identify part of the evidence it will rely upon to counter Plaintiff's claims that the '644 and '190 patents were invalid. *Id.* The Court noted "asking a party to defend the validity of its claims before it knows which claims are under attack would disrupt the orderly development of a patent case." *Id.*

Here, both parties are beyond the early stages of discovery, the concerns governing the efficiency of patent claims are not present, and the Secretary is not asking Respondent to defend its affirmative defenses, but merely provide the underlying basis for them.

Sixth, Respondent argues the premise of the Secretary's Motion to Compel is "also wrong factually." The Secretary argues that Respondent's refusal to answer is not based on insufficient information; rather it is based on Respondent's presumption that additional facts may become known to it during discovery. Respondent offers its statement in the May 11, 2016 Email

Communication between the Secretary's Counsel and Respondent which stated that if Respondent determines it has an affirmative defense based on the facts it gathers during depositions, it will supplement its responses pursuant to Commission Rule 52. Respondent argues that it never stated it has an answer and is withholding it, but instead, had no answers at all. Respondent's argument that all it needs to do when responding to the Secretary's interrogatories is to state it may supplement its incomplete answers later on is rejected. The allegations concern violations alleged to have occurred on August 26, 2015. The alleged three serious items do not appear to be overly complicated.[12] The citation was issued on September 30, 2015. Pleadings were filed by January 14, 2016. The parties have had more than five months to conduct discovery, which closes in two months. Of course, a party has a duty to supplement any of its discovery responses when called for. It is not enough for a party to make a "bare-bones" response to an interrogatory accompanied by a statement that a supplemental response "down the road" may be forthcoming. More is required. By now, Respondent has had ample time to provide a more complete response to Interrogatory Nos. 8 through 10.

C. INTERROGATORY NO. 12

> Interrogatory No. 12 – Identify any and all individual(s) responsible for ensuring compliance with any procedure(s) and/or policy(ies) identified in response to Interrogatory No. 11[13] and the actions said individual(s) took to ensure compliance with said procedure(s) and/or policy(ies).

Respondent argues it is still investigating the facts of the case and has not yet determined the identity of all individuals responsible for ensuring compliance with all procedures or policies in place on August 26, 2016. In its response to Interrogatory No. 11, Respondent states it has "produced its procedures and policies." It does not identify the procedures and policies it

[12] The case was initially designated as a simplified proceeding.
[13] Interrogatory No. 11 requested Respondent to: "Identify any procedure(s) and/or policy(ies) Respondent had in place on August 26, 2015 relating to employees' conduct in and around an excavation or trench.

produced that are responsive to Interrogatory No. 11. By now, Respondent should have identified any procedure(s) and/or policy(ies) it had in place on August 26, 2015 relating to employees' conduct in and around an excavation or trench. By now, Respondent should have identified the names of the individual who were responsible for ensuring compliance with any procedure(s) and/or policy(ies) identified in response to Interrogatory No. 11 and the actions said individual(s) took to ensure compliance with said procedure(s) and/or policy(ies).

Respondent's argument that it is still investigating the facts of the case and has yet to determine the identity of all of the individuals responsible is insufficient and rejected.

D. INTERROGATORY NO. 13

> Interrogatory No. 13 – Prior to August 26, 2015, were Respondent's employees who worked at the worksite identified in the Citation trained regarding Respondent's procedure(s) and/or policy(ies) relating to employees' conduct in and around an excavation trench? If so, state the type of training, dates of training, the names of individuals that were trained, the name of the person(s) who conducted such training, and the qualifications of the person(s) conducting such training.

Respondent answered Interrogatory No. 13 by stating that employees who worked at the site in question were trained regarding trench excavation and in the use of safety equipment. It further states that relevant procedures and policies were either produced during the inspection of the case or are being produced in response to the Secretary's First Request for Production of Documents.

Respondent's response is incomplete. All answers to interrogatories are to be made in good faith and as completely as the answering party's information will permit. 29 C.F.R. § 2200.55(b). The answering party is required to make a reasonable inquiry and ascertain readily obtainable information. *Id.* Respondent's response only acknowledged the employees were trained but provided no details as to how, when, or by whom the employees were trained. The Court has no basis to conclude that such information is not now available to Respondent.

Respondent's second argument that documents were already produced with the necessary information is rejected. FED. R. CIV. P. 33(d) allows a party to answer an interrogatory by referring to documents already produced or readily available if both the burden of deriving the answer to the interrogatory is substantially the same and the party provide access to said records to the opposing party.[14] Here, Respondent answered by referring to 233 documents and 143 pages of pictures already produced in the matter. However, "the responding party must specify which records contain the information sought by the interrogatory." *Bayview Loan Servicing, LLC v. Boland*, 259 F.R.D. 516, 518 (D. Colo. 2009). The answering party cannot just provide a mass of documents without further specificity or explanation in its response. *See Bayview Loan Servicing, LLC*, 259 F.R.D. at 518-19 (the court noted that FED .R. CIV. P. 33(d) is not satisfied by the "wholesale dumping of documents"). Furthermore, a general reference to responsive documents is an insufficient response. *Pardick v. Barrow,* No. 07–cv–02056–WYD–MEH, 2008 WL 2902623, at *2 (D.Colo. July 24, 2008); *see also Pulsecard, Inc. v. Discover Card Servs.*, No. 94–2304, 1996 WL 397567, at *8 (D. Kan. July 22, 1996) (under FED. R. CIV. P. 33(d) the response must identify the specific responsive documents).[15] "The responding party may not avoid answers by imposing on the interrogating party a mass of business records from which answers cannot be ascertained by a person unfamiliar with them." *Mullins v. Prudential Ins. Co.*

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[14] Fed. R. Civ. P. 33(d): If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

[15] Additionally, *see also United States, ex rel. Englund v. Los Angeles County*, 235 F.R.D. 675, 680–81 (E.D.Cal. 2006), where the court found that if the "information sought is contained in the responding party's files and records, he or she is under a duty to search the records to provide the answers ... But where information is contained in business records and answering the question would require the responding party to engage in burdensome or expensive research, the responding party may answer by specifying the records from which the answer may be obtained and making them available for inspection by the party seeking discovery."

of Am., 267 F.R.D. 504, 514 (W.D. Ky. 2010) (the court found the Respondent's answers to interrogatories insufficient because Respondent merely makes a general reference to the administrative record, or "claims file produced under seal," without adequate specification of the specific documents therein in violation of FED. R. CIV. P. 33(d)).

E. INTERROGATORY NO. 14.

> Interrogatory No. 14 – If Respondent has a policy, procedure or practice of discipline for violations of its policies and procedures relating to safety and health, identify any and all employees who have been disciplined for violating such policy, procedures or practices during the 5 year period prior to August 26, 2015 through the present, the date of violation, the substance of the violation, and the type of discipline received and the names of the individuals who decided and administered the discipline.

Respondent objects to Interrogatory No. 14 by arguing that the Secretary does not identify the type of "discipline" to which it is referring. The party objecting to discovery as vague or ambiguous has the burden to show such vagueness or ambiguity. *McCoo v. Denny's Inc.*, 192 F.R.D. 675, 694 (D. Kan. 2000), *see also Pulsecard, Inc. v. Discover Card Services, Inc.*, 168 F.R.D. 295, 310 (D. Kan. 1996). A party responding to discovery requests "should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in interrogatories." *McCoo*, 192 F.R.D. at 694. If necessary to clarify its answers, the responding party may include any reasonable definition of the term or phrase at issue. *Id.*

Respondent's objection to Interrogatory 14 is rejected. The Court finds that the Secretary's use of the term "discipline" in Interrogatory No. 14, as discussed further in his May 11, 2016 email, is not vague.

III. ORDER

WHEREFORE IT IS ORDERED that the Secretary's Motion to Compel Answers to Interrogatories is GRANTED.

IT IS FURTHER ORDERED that Respondent shall provide Complainant with separate, full and complete responses to Interrogatory Nos. 8 through 10 and 12 through 14 within 10 days of the date of this order; such responses to be made under oath or affirmation signed by the person making them pursuant to Commission Rule 55.

The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: JUN 16 2016
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that a copy of the Order was emailed to the parties listed below on June 16, 2016.

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