

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

_____)	
Deanna Evans,)	
)	C.A. No. 3:16-cv-1215-JMC-KDW
Plaintiff,)	
-v-)	
)	
International Paper Company,)	ORDER
)	
Defendant.)	
_____)	

This matter is before the court on Plaintiff’s Motion to Compel. ECF No. 33. After conducting a brief informal discovery conference with counsel and having considered the Motion and Memorandum, ECF Nos. 33, 33-1; Defendant’s Response, ECF No. 38; and applicable law, the court *grants in part and denies in part* Plaintiff’s the Motion to Compel.¹

I. Background

Plaintiff’s Complaint in this employment matter includes claims of race and gender discrimination, unequal pay, and retaliation against Defendant International Paper (“Defendant” or “IP”). Compl., ECF No. 1-1. Plaintiff filed the Motion to Compel on January 3, 2017, which was the last day of the discovery period under the Second Amended Scheduling Order, ECF No. 31. Defendant opposes Plaintiff’s Motion on both timeliness and substantive grounds. ECF No. 38. At the parties’ request the court held additional scheduling deadlines in abeyance pending the parties’ mediation and the ruling on the instant Motion. ECF Nos. 40, 42. The parties’ mediation

¹ In her Memorandum, Plaintiff calls the court’s attention to a “related case,” *Perkins v. International Paper Company*, C.A. No. 3:16-cv-0172-TLW-JDW, as to which the parties have agreed to conduct joint discovery, indicating the ruling on the “outcome of this motion [will] have a major impact.” ECF No. 33-1 at 1. With this in mind, the undersigned and the judge assigned to the *Perkins* matter asked that counsel advise whether this matter and *Perkins* should be deemed related cases for purposes of the court’s management. *See* ECF No. 34 in this matter. Counsel responded that the matters were not “related” and should not be consolidated for the court’s purposes. ECF No. 36. Accordingly, the undersigned has considered Plaintiff’s Motion on its relative merits without regard to the *Perkins* matter.

did not result in resolution, and, on March 28, 2017, the court conducted an informal status conference to discuss the pending Motion to Compel and other scheduling matters. At that conference counsel advised that portions of the issues raised in the Motion had been resolved, but two issues require the court's ruling.

II. Applicable Law

Federal Rule of Civil Procedure 37 provides that if a party fails to respond to discovery, the party seeking discovery may move for an order compelling production. The decision to grant or to deny a motion to compel discovery rests within the broad discretion of the trial court. *See Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 929 (4th Cir. 1995) (holding the “Court affords a district court substantial discretion in managing discovery and reviews the denial or granting of a motion to compel discovery for abuse of discretion.”) (internal citation omitted); *LaRouche v. Nat’l Broad. Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986) (holding “[a] motion to compel discovery is addressed to the sound discretion of the district court.”). Rule 37(d)(3) provides that when a party fails to serve written responses, “the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(d)(3). The party opposing the discovery—here Defendant—bears the burden of demonstrating why discovery should be denied. *E.g., Beazer Homes Corp. v. Hartford Fire Ins. Co.*, No. 4:10-cv-2419-RBH-TER, 2012 WL 6210323, at *4 (D.S.C. Dec.13, 2012) (“The party opposing a motion to compel bears the burden [of] showing why it should not be granted.”). Guided by these principles, the court considers Plaintiff’s Motion.

III. Analysis

A. The discovery at issue

As narrowed by Plaintiff during the informal conference, the two issues identified in Plaintiff's Motion that require the court's consideration are:

1. Plaintiff's request that Defendant provide documents in response to Plaintiff's Second Set of Requests for Production ("2d RFPs"); and

2. Plaintiff's request that the discovery deadline be extended to permit Plaintiff to depose IP employee Hai Ninh.

Defendant's response to Plaintiff's 2d RFPs raised several objections, and Defendant did not produce any additional documents in response to Plaintiff's 2d RFPs. Defendant's responses include objections that the requests in the 2d RFPs were largely repetitive of Plaintiff's First Set of Requests for Production ("1st RFPs"), as to which Defendant had produced numerous documents. *See* Def. Resp. 2d RFPs, ECF No. 33-4. Further, Defendant objected to Plaintiff's request for electronically stored information ("ESI"), claiming the search terms prescribed by the RFPs were overly broad and ambiguous. *Id.*

In opposing the Motion to Compel, Defendant first argues the Motion should be denied in its entirety because it was not timely filed based on the requirements of this District's Local Civil Rule 37.01. In addition, Defendant argues the Motion should be denied based on objections raised in responding to Plaintiff's 2d RFPs and because Defendant has already produced "all documents pertaining to the subject matter of the case that it located in its original search for documents," except those withheld and noted on the privilege log. *See* Nov. 11, 2016 Letter from defense counsel Kristen Gray to Plaintiff's counsel Shannon Polvi, ECF No. 38-4. Defendant further represented it was performing an additional search of ESI within the parameters of its

objections and would provide any additional documents as appropriate. Def. Mem. 2.² Defendant also argues Plaintiff’s request to depose IP employee Ninh should be denied because it was raised far too late without a “plausible explanation for this late request.” Def. Mem. 18.

B. Communications of counsel regarding discovery at issue

In considering Defendant’s argument that Plaintiff’s Motion should be denied as untimely pursuant to Local Civil Rule 37.01(A), this synopsis of the parties’ communications is instructive:³

Date	Communication
July 2, 2016	Defendant served responses to Plaintiff’s 1st RFPs, producing documents
August 4, 2016	Current defense counsel substituted for prior defense counsel
September 12, 2016	Plaintiff’s first communication with Defendant regarding alleged deficiencies with Defendant’s July 2016 responses to 1st RFP: an email sent to defense counsel “to follow up on IP’s discovery responses previously submitted in response to our discovery requests regarding ESI.” ECF No. 38-2 (including some detail of claimed deficiencies).
September 14, 2016	Defense counsel orally reminded Plaintiff’s counsel that objections to the July 2016 responses were not timely under Local Rule 37.01.
September 22, 2016	Plaintiff served 2d RFPs. <i>See</i> ECF No. 33-2.
October 20, 2016	Counsel discuss the 2d RFPs; Plaintiff consents to giving Defendant a two-week extension within which to respond to that discovery. Defense counsel notes he will be in contact with Plaintiff’s counsel “about the breadth of those responses.” ECF No. 38-3 at 2-3. In responsive email, Plaintiff’s counsel confirms the extension and notes, regarding the breadth concerns: “[S]end me a proposed modification and we’ll go from there in terms of agreeing or further discussions for a compromise.” <i>Id.</i> at 1.
November 8, 2016	Defendant served responses to 2d RFPs by mail. Responses included

² The court has been provided no information as to whether additional documents were provided to Plaintiff as a result of the search. All parties are reminded of Rule 26(e)’s requirement that they supplement pretrial disclosures and discovery responses, including responses to requests for production. Fed. R. Civ. P. 26(e).

³ In creating this timeline, the undersigned has reviewed in detail the correspondence and information provided by both Plaintiff and Defendant concerning the claimed deficiencies in Defendant’s responses to the 2d RFPs and the request to depose Ninh. *See id.*; Pl. Mem. 2-3, 9-10. Any omission of information contained in the memoranda and attachments should not be construed as an indication that the court has not read all provided information.

Date	Communication
	<p>objections only. ECF No. 33-4. <i>[It is undisputed that November 8, 2016 was the due-date, based on the original 30 days from service plus the two-week extension.]</i></p>
November 9, 2016	<p>Email exchange between counsel in which defense counsel confirmed Defendant had not produced any additional documents with the responses to the 2d RFPs, noting Defendant “gave Plaintiffs the opportunity to narrow the breadth of their requests, and they declined to do so; instead, the only response from Plaintiffs was to ask that IP narrow Plaintiff’s requests.” ECF No. 33-3 at 2.</p>
November 10, 2016	<p>Plaintiff sends “10-Day Letter” to Defendant, seeking to resolve the “dispute over the information sought by Plaintiff’s” 2d RFPs. ECF No. 33-5 at 1. Plaintiff’s letter includes details of each Request and notes Plaintiff’s willingness to “compromise” as to the ESI sought by “reducing the search term list,” agreeing to limit the terms to “Deanna, Evans, race, gender, discrimination.” <i>Id.</i></p> <p>Plaintiff’s counsel indicates that “at no time” prior to receiving the responses to the 2d RFPs did Defendant put Plaintiff “on notice of which Requests” in the 2d RFPs were objectionable. <i>Id.</i> at 6. Plaintiff recalls an October 14 telephone call in which defense counsel Gilley agreed to “reach out” to Plaintiff’s counsel at another time to continue a discussion of revising search terms for ESI. <i>Id.</i> at 6-7. Plaintiff indicates she was “open to compromise on the search terms,” but the “ball was entirely in IP’s court to reinitiate communication about a discovery compromise if one was necessary.” <i>Id.</i> at 7.</p> <p>Plaintiff’s counsel indicates her intention to postpone certain depositions because no additional documents had been produced. Counsel advised she was giving IP 10 days within which to supplement its responses to the 2d RFPs, but “[o]therwise, [counsel] intend[ed] to request a status conference prior to filing a Motion to Compel.” <i>Id.</i></p>
November 11, 2016	<p>Defense counsel Gray sends a responsive letter to Plaintiff’s counsel indicating the following:</p> <ul style="list-style-type: none"> - Many of Plaintiff’s requests were included in “reaction to Plaintiff’s failure to timely confer about any objections” to responses to the 1st RFPs, ECF No. 38-4 at 1; - IP “has already produced all documents pertaining to the subject matter of the case that it located in its original search for documents, except for the documents enumerated in the privilege log provided three months ago,” <i>id.</i>; - IP has already produced numerous documents, “[s]hort of conducting an unduly burdensome forensic computer search,” and - IP is “under no obligation to craft Plaintiff’s discovery requests for her.” <p>Counsel also inquired about status of depositions. <i>Id.</i></p>
November 11, 2016	<p>Plaintiff’s counsel confirmed the depositions would go forward but the</p>

Date	Communication
	discovery matters outlined in the 10-day letter were not resolved. ECF No. 38-5 at 1. In the event Defendant did not plan to make a supplemental production, Plaintiff's counsel advised she would proceed with requesting a status conference with the court to resolve the discovery dispute. Plaintiff indicated she would expect to send the request late in the following week. [No such conference was requested during that timeframe.]
November 16, 2016	Plaintiff's counsel sent email to defense counsel to "recap" counsel's conversation of November 15, 2016. ECF No. 33-6 at 3-5. Plaintiff's counsel indicated IP planned to "supply additional responsive information," although they had discussed no specifics as to which responses were to be supplemented. Plaintiff's counsel agreed to postpone the request for a status conference with the court while the parties were "actively engaged in attempts to resolve the discovery dispute." <i>Id.</i> at 4. Plaintiff's counsel asked that supplemental responses be provided by November 23, 2016.
November 17, 2016	Defense counsel responded to Plaintiff's counsel, noting he had not committed to providing any supplemental information and noted their discussion regarding production of information as to the W-2s of nonparties as requested in RFPs 18-24. Defense counsel agreed to speaking with IP again about the production. ECF No. 33-6 at 2.
November 22, 2016	Plaintiff's counsel advises that her November 10, 2016 letter outlined the discovery at issue and asks defense counsel to advise which requests Defendant would supplement and which it would not, so as to "narrow the scope of what is in dispute." ECF No. 33-6 at 1.
December 16, 2016	Plaintiff's counsel sends email to defense counsel about (1) Plaintiff's intention to depose IP employee Hai Ninh "based on testimony given by Gary Nyman [that day]"; and (2) noting that, although counsel have "talked about the discovery a few times," Defendant has not confirmed whether any would be supplemented. Plaintiff asks that Defendant supplement by December 22, 2016, which is the date Plaintiff's counsel intends to request a status conference with the court. ECF No. 33-7 at 4.
December 21, 2016	Defense counsel advises IP is "unable to make Mr. Ninh available during the few days remaining in the discovery period." <i>Id.</i> at 3. If it will resolve the discovery dispute, IP is willing to "provide the requested salary information" related to "legitimate comparators," so long as a confidentiality order is in place and the documents are produced are for "attorneys' eyes only." <i>Id.</i>
December 22, 2016	Plaintiff's counsel advises defense counsel she will speak with her clients regarding IP's proposal as to supplementation of discovery after the Christmas break. <i>Id.</i> at 2.
December 28, 2016	Plaintiff's counsel advises defense counsel she will need to proceed with status conference to resolve discovery disputes. <i>Id.</i>
December 28, 2016	Plaintiff's counsel emails the court to request a status conference, noting she plans to provide the court with an outline of outstanding issues.

Date	Communication
December 30, 2016	In response to court's request for proposed dates of the conference, Plaintiff's counsel advises she plans to file a Motion to Compel rather than a detailed outline.
January 3, 2017	Plaintiff filed Motion to Compel

C. Requests for production

1. Timeliness

Defendant first argues Plaintiff's Motion should be denied because it was not filed within the time set out in this court's local rules. Def. Mem. 10-12. Local Civil Rule 37.01(A) provides as follows:

Motions to compel discovery must be filed within twenty-one (21) days after receipt of the discovery response to which the motion to compel is directed or, where no response has been received, within twenty-one (21) days after the response was due. If counsel are actively engaged in attempts to resolve the discovery dispute, they may agree to extend the time to comply with the discovery request so long as the extension does not place the due date beyond thirty (30) days before the deadline for completion of discovery as set by the scheduling order. *See also* Local Civ. Rule 29.01 (D.S.C.) (Modifications of Discovery Procedure). This extension will automatically extend the deadline for the motion to compel by an equal amount of time. The extension shall be confirmed in writing. In the event a later motion to compel is filed, the correspondence confirming the extension shall be attached.

Local Civ. Rule 37.01(A). Defendant first argues the Motion is untimely because Plaintiff never advised Defendant or the court of any alleged deficiencies with Defendant's July 2, 2016 responses to Plaintiff's 1st RFPs. Defendant submits that many of the requests in Plaintiff's 2d RFP—particularly Requests 1 through 13—are duplicative of portions of the 1st RFPs other than to add the request that Defendant provide ESI “with the following word limitations: Deanne, Evans, race, gender, sex, female, woman, discrimination, complaint.” Def. Mem. 3-6 (providing a chart comparing the requests) (quotation from 2d RFPs, *see* ECF No. 33-2).

Defendant submits that, because Plaintiff never pointed out any deficiencies with Defendant's responses and production provided in early July, she cannot obtain another “bite of

the apple” by including some of the same requests in the 2d RFPs. Further, Defendant submits that, although counsel did engage in several written discussions as to the sufficiency of Defendant’s responses to the 2d RFPs, Plaintiff did not timely file her motion to compel, nor did she obtain appropriate extensions of the 21-day time limit within which motions to compel are to be filed. Def. Mem. 6-12.

Plaintiff did not file a reply to refute these arguments of Defendant. In the informal conference, Plaintiff briefly noted her 10-day letter and other discussions with defense counsel in an effort to resolve discovery issues.

As an initial matter, the court agrees with Defendant that this Motion to Compel is untimely and might be denied as a matter of course because it was not filed within the 21-day timeframe contemplated by Local Civil Rule 37.01 (D.S.C.). In reviewing Plaintiff’s First and Second RFPs, items 1 through 13 are virtually identical to requests in the initial set of RFPs. In early July 2016 Defendant responded to the first set of RFPs and provided numerous documents. *See* ECF No. 38-1. The initial set of RFPs included broad requests for ESI relating to this litigation. *See, e.g., id.* at 20. The only information in the record is that Plaintiff did not raise any potential deficiencies in the July 2016 production until September 12, 2016. *See* ECF No. 38-2. Plaintiff apparently did not pursue discussion of deficiencies as to the 1st RFPs. Rather, on September 22, 2016, she propounded the 2d RFPs.

Considering the September 22, 2016 requests, it is undisputed that, after an agreed-to extension, Defendant timely submitted its responses by mail on November 8, 2016. To be sure, Plaintiff’s counsel quickly put Defendant on notice of the claimed deficiencies in the production. *See, e.g.,* Nov. 10, 2016 “10-Day Letter,” ECF No. 33-5. In addition, the court appreciates the continued discussion amongst counsel as to the discovery. Nonetheless, there is no indication

that counsel agreed in writing to extensions that would operate to extend the 21-day timeframe prescribed by Local Rule 37.01. Further, discovery ended on January 3, 2017. 2d Am. Scheduling Order, ECF No. 31. Local Civil Rule 37.01 permits extensions of discovery-response deadlines and concomitant extension of the 21-day requirement only “so long as the extension does not place the due date beyond thirty (30) days before the deadline for completion of discovery as set by the scheduling order.” Local Civ. Rule 37.01(A).

Plaintiff did not file her Motion to Compel within 21 days of receipt of Defendant’s responses. In any event, to satisfy Rule 37.01(A)’s requirements, any extension could be granted only if the deadline was 30 days or more before the January 3, 2017 close of discovery. Here, Plaintiff filed her Motion on January 3, 2017. Plaintiff’s Motion to Compel as to her 2d RFPs is *denied* as untimely.

2. The 2d RFPs

The timeliness reason notwithstanding, the court has closely reviewed Plaintiff’s 2d RFPs and agrees with Defendant that the requests—particularly the parameters placed on the proposed ESI searches—are overly broad. Further, unless the undersigned completely misinterprets Defendant’s assertions, it appears that Defendant’s initial search and production included review of potentially responsive ESI. At this late date, the court will not order Defendant to conduct and review documents that might be captured by conducting the ESI terms set out in numbers 1 through 13 of the 2d RFPs.

As indicated by counsel during the informal conference, the parties have resolved any issues concerning numbers 14 through 17 of the 2d RFPs. *See also* Def. Mem. 15.

Most of the remaining requests seek information as to potential comparators. In Requests 18 through 24, Plaintiff seeks “W-2 tax forms from employment with Defendant for the time

period of 2007 to 2015” for seven employees of Defendant as well as the “Career and Development Worksheet” for one of the seven. During counsels’ discussions concerning the 2d RFPs, Defendant proposed that it would provide the requested W-2 information for “arguably legitimate comparators,” subject to a confidentiality order and marking the documents for attorneys’ eyes only. *See* Def. Mem. 16; *see also* ECF No. 33-7. In Plaintiff’s Motion, she submits the tax information is necessary and proposes redaction of the employees’ social security numbers and addresses. Pl. Mem. 7-8. Plaintiff noted Defendant’s proposed submission of the W-2 forms, but indicated that “late offer of very limited compromise” addressed only a portion of the issues in dispute and was *not acceptable* to Plaintiff. *Id.* at 9-10.

In responding to Plaintiff’s Motion, Defendant acknowledges its offer of providing the requested W-2 information, but includes excerpts from Plaintiff’s deposition that suggest the individuals listed as potential comparators were not comparable. *See* Def. Mem. 16. At this juncture, the court makes no decision as to whether these individuals are or may be appropriate comparators for Plaintiff. However, because of the untimeliness and Plaintiff’s unwillingness to accept Defendant’s offer, the court will not now order that Defendant provide this information.

The court has also considered the parties arguments concerning the remaining requests in the 2d RFPs and denies Plaintiff’s Motion as to these requests. In Request 24, Plaintiff seeks Dingus’ Career and Development Worksheet for 2007 to 2015, arguing this information is required because Dingus’ career “was accelerated beyond her own.” Pl. Mem. 8. Plaintiff argues the information on the Worksheets will “effectively indicate the comparison between Mr. Dingus and Plaintiff. *Id.* Defendant argues Plaintiff has not indicated how this is relevant and notes Defendant provided a chart indicating Plaintiff consistently earned more than Dingus. Def. Mem. 16-17.

In Request 25, Plaintiff seeks discrimination complaints submitted to the Eastover Concerns Resolution Process (“ECRP”). In responding to the 2d RFPs, Defendant objects to the request as overly broad in that it is not limited by time or subject parameters. Subject to the objections, Defendant indicates no responsive documents exist. ECF No. 33-4 at 24. In the 10-Day Letter, Plaintiff submits Defendant’s response is “false,” because the ECRP policy exists and several witnesses have indicated they submitted discrimination complaints to IP. ECF No. 33-5 at 6. As explained by Defendant in responding to the Motion, discrimination complaints are not presented to the ECRP, as indicated in the ECRP policy produced to Plaintiff. Def. Mem. 17. In addition to being untimely, Plaintiff’s request is overly broad in scope. Further, the court cannot require that Defendant produce documents that do not exist.

Based on the untimeliness of Plaintiff’s Motion, as well as the reasons set out above, Plaintiff’s Motion is denied as to her request that Defendant be required to supplement the 2d RFPs with documents, other than the supplementation discussed elsewhere in this Order .⁴

D. Deposition of Hai Ninh, Manager of IP’s Eastover Plant

Plaintiff’s request to depose Eastover Plant Manager Ninh is also before the court. On December 16, 2016, after the conclusion of the deposition of Gary Nyman, Plaintiff informed Defendant she wanted to depose Ninh. ECF No. 33-7 at 4. Plaintiff indicated Ninh had advised her that Ninh and Nyman had discussed Plaintiff’s complaints of discrimination. Pl. Mem. 12. When Nyman testified differently in his deposition, Plaintiff determined it important to depose Ninh. *Id.* As Plaintiff properly notes, the December 16, 2016 request for deposition could have been accomplished by the January 3, 2017 close of discovery. Rather than simply send a notice of deposition, Plaintiff’s counsel requested potential dates for the deposition, as was counsels’

⁴ The court agrees with Defendant that Plaintiff’s Request 26—seeking a privilege log—is mooted by Defendant’s provision of a privilege log. Of course, Rule 26(e) requires supplementation of a privilege log.

apparent practice. In a December 21, 2016 email, defense counsel advised it would not agree to make Ninh available for deposition. ECF No. 33-7 at 3 (“Given the late notice and the fact that the holidays are already upon us, we are unable to make Mr. Ninh available during the few days remaining in the discovery period.”).

In support of her request to depose Ninh, Plaintiff provides an excerpt from Nyman’s December 16, 2016 deposition in which Nyman indicates he had not discussed with Ninh the concerns raised by another minority employee. ECF No. 33-10. Plaintiff submits information regarding steps taken or not taken as to discrimination claims is relevant to her claim. Pl. Mem. 12.

In responding to the Motion to Compel, Defendant argues Plaintiff should not be permitted to depose Ninh outside of the now-closed discovery period, claiming Plaintiff has “raised no plausible explanation for this late request.” Def. Mem. 18. In the informal conference, Defendant also argued the deposition testimony provided at ECF No. 33-10 related to another employee, not Plaintiff.

The court finds Defendant’s argument that Plaintiff waited too late to name Ninh as a deponent to be without merit. To the contrary, Plaintiff set out a plausible reason for deciding on December 16, 2016 that she wanted to depose Ninh. Plaintiff requested Ninh’s deposition on the same day she obtained information that made her determine it appropriate to depose Ninh. That the holidays made scheduling the deposition more difficult is no reason for Defendant to refuse to produce a witness whose deposition was timely requested.

The court finds it appropriate to permit Plaintiff to depose Ninh on the limited issue of the involvement Ninh had with Plaintiff’s complaints of discrimination. The parties are to schedule and complete this deposition no later than May 4, 2017.

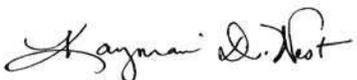
IV. Conclusion

Plaintiff's Motion to Compel, ECF No. 33, is *granted in part and denied in part*. Plaintiff may depose Hai Ninh on the limited subject matter set out above, and must do so no later than **May 4, 2017**. Further, to the extent Defendant has not supplemented its responses as contemplated in Defendant's Memorandum, ECF No. 38, it is instructed to do so by **May 4, 2017**. Fed. R. Civ. P. 23(e)(1)(B).

As deadlines in the Second Amended Scheduling Order, ECF No. 31, had been held in abeyance pending this ruling, *see* ECF No. 42, the court provides the following scheduling information: any dispositive motions in this matter are to be filed no later than **June 5, 2017**; and revised trial-related deadlines will be provided after the court's order ruling on any dispositive motions.

IT IS SO ORDERED.

April 4, 2017
Florence, South Carolina


Kaymani D. West
United States Magistrate Judge