

STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET

414 Washington Street
Grand Haven, MI 49417
616-846-8315

* * * * *

EVOQUA WATER TECHNOLOGIES LLC,

Plaintiff,

v

**M.W. WATERMARK, LLC; MICHAEL
GETHIN**, individually; **DANIEL JANISSE**,
individually; **PAUL MALIK**, individually;
ANDREW HAGEN, individually; **DAVID
HIGGINS**, individually; and **JAMES
DRIESEN**, individually,

Defendants.

**OPINION AND ORDER
REGARDING PLAINTIFF'S
MOTIONS TO COMPEL AND
EXTEND DISCOVERY**

File No. 2017-4997-CB
Hon. Jon A. Van Allsburg

Before this Court is plaintiff Evoqua Water Technologies, L.L.C.'s motions to compel discovery and to extend discovery. Plaintiff's motion seeks to compel defendants to "produce all responsive documents in accordance with MCR 2.310" and "to designate a representative or representatives in accordance with MCR 2.306(B)(5)." Plaintiff's motion to extend discovery seeks extension of the discovery period to at least two weeks after it is provided with the discovery sought by its motion to compel. For the reasons below, plaintiff's motion to compel is GRANTED in part and DENIED in part. Plaintiff's motion to extend discovery is also GRANTED.

Facts

Plaintiff's claims against defendants, as presently alleged in its November 21, 2018 amended complaint, are: misappropriation of trade secrets [against all defendants] (Amended Complaint, November 21, 2018, 142-151); breach of contract [against all defendants] (Amended Complaint, 152-164); conversion [against M.W. Watermark, L.L.C., Michael Gethin, Paul Malik, Andrew Hagen, and David Higgins] (Amended Complaint, 165-169); common-law unfair competition [against Gethin and Watermark] (Amended Complaint, 170-172); unjust enrichment [against Gethin and Watermark] (Amended Complaint, 173-177).



"17004997CB"

On November 26, 2018, plaintiff filed its motion to compel. Plaintiff seeks to compel discovery regarding the following requests for production, summarized in its brief:

Evoqua requested all documents concerning Watermark's sales, revenue, profits, and costs of spare parts for any Evoqua equipment from 2003 forward, through Request Nos. 47-51. See Exhibit 1.

Evoqua requested all documents concerning Watermark's sales, revenue, profits, and costs for any on-site rebuild projects concerning Evoqua equipment from 2003 forward, through Request Nos. 52-54. See *id.*

Evoqua requested all documents concerning Watermark's revenue and profits from customers identified on the SERIAL and CUSTOMER spreadsheets, as well as Mr. Driesenga's Customer Contact List spreadsheet, through request Nos. 56-60. See Exhibit 2.

Evoqua requested all documents showing Defendants' revenue, profits, and costs attributable to Defendants' acts alleged in the Complaint, (Request nos. 91-97) and documents showing Defendants' revenue, profits, and costs for the sales of aftermarket parts and services or capital equipment for any time following the creation of either the SERIAL or CUSTOMER spreadsheets, or Mr. Driesenga's Customer Contact List spreadsheet (Request Nos. 98-99). See Exhibit 3. [Plaintiff's Brief in Support of Motion to Compel, November 26, 2018, 6-7.]

Defendants objected to requests for production 47-51 based on overbreadth, undue burden, confidentiality, and an inability to produce documents responsive to those requests (Defendants' Objections and Responses to Evoqua's First Set of Requests for Production of Documents, June 20, 2016, 27-30, attached as Exhibit 1 to Plaintiff's Brief). Defendants objected to requests for production 52-54 based on overbreadth, undue burden, and confidentiality (Defendants' Objections and Responses to Evoqua's First Set of Requests for Production of Documents, 30-31). Defendants objected to requests for production 56-60 based on overbreadth, undue burden, and confidentiality. Defendants also objected to requests for production 57-60 because the documents requested were not maintained in the ordinary course of business. (Defendants' Objections and Responses to Evoqua's Second Set of Requests for Production of Documents, March 6, 2017, 3-6, attached as Exhibit 2 to Plaintiff's Brief.) Finally, defendants objected to requests for production 91-99 based on overbreadth, undue burden, confidentiality, lack of specificity, and because the documents were not maintained in the ordinary course of business (Defendants' Objections and Responses to Evoqua's Third Set of Requests for Production of Documents, August 24, 2018, 4-10, attached as Exhibit 3 to Plaintiff's Brief).

Additionally, plaintiff seeks to compel the designation of a Watermark corporate representative pursuant to MCR 2.306(B)(5) to testify regarding the following topics:

1. Watermark's direct or indirect revenue, profits and costs directly or indirectly attributable to Defendants' acts alleged by Evoqua to constitute misappropriation of trade secrets.

2. Watermark's direct or indirect revenue, profits and costs directly or indirectly attributable to Defendants' acts alleged by Evoqua to constitute breach of contract.

3. Watermark's direct or indirect revenue, profits and costs directly or indirectly attributable to Defendants' acts alleged by Evoqua to constitute conversion.

4. Watermark's direct or indirect revenue, profits and costs directly or indirectly attributable to Defendants' acts alleged by Evoqua to constitute unfair competition.

5. Watermark's direct or indirect revenue, profits and costs directly or indirectly attributable to Defendants' acts alleged by Evoqua to constitute unjust enrichment.

6. Watermark's revenue, profits and costs from the sales of aftermarket parts and services from any period of time following the date of creation shown on the Evoqua serial log files in Watermark's possession, custody or control, including those referred to in MWW0004515 and MWW0002823-2825, and the customer contact list identified in paragraphs 73 through 76 of the Complaint filed in this action.

7. Watermark's revenue, profits and costs from the sales of capital equipment from any period of time following the date of creation shown on the Evoqua serial log files in Watermark's possession, custody or control, including those referred to in MWW0004515 and MWW0002823-2825, and the customer contact list identified in paragraphs 73 through 76 of the Complaint filed in this action.

8. Watermark's revenue, profits and costs from the sales of aftermarket parts and services from any period of time following the date of creation shown on the Evoqua serial log files in Watermark's possession, custody or control, including those referred to in MWW0004515 and MWW0002823-2825, and the customer contact list identified in paragraphs 73 through 76 of the Complaint filed in this action.

9. Watermark's revenue, profits and costs from the sales of aftermarket parts and services from three years prior to the date of creation shown on the Evoqua serial log files in Watermark's possession, custody or control, including those referred to in MWW0004515 and MWW0002823-2825, and the customer contact list identified in paragraphs 73 through 76 of the Complaint filed in this action.

10. Watermark's revenue, profits and costs from the sales of capital equipment from any period of time following the date of creation shown on the Evoqua serial log files in Watermark's possession, custody or control, including those referred to in MWW0004515 and MWW0002823-2825, and the customer

contact list identified in paragraphs 73 through 76 of the Complaint filed in this action.

11. Watermark's revenue, profits and costs from the sales of capital equipment from three years prior to the date of creation shown on the Evoqua serial log files in Watermark's possession, custody or control, including those referred to in MWW0004515 and MWW0002823-2825, and the customer contact list identified in paragraphs 73 through 76 of the Complaint filed in this action. [Notice of Deposition of M.W. Watermark, L.L.C., July 27, 2018, 2-3, attached as Exhibit 4 to Plaintiff's Brief.]

On November 7, 2018, defendants refused to designate a witness regarding the topics above, based on objections regarding vagueness, indefiniteness, overbreadth, calling for a legal conclusion, and calling for conjecture. Defendants also objected to topics 6 through 11 as being unduly burdensome. (Defendants' Objections and Responses to Notice of Deposition of M.W. Watermark, November 7, 2018, 3-6, attached as Exhibit 5 to Plaintiff's Brief.)

Analysis

MCR 2.302(B)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

MCR 2.306 governs requests for depositions. "After commencement of the action, a party may take the testimony of a person, including a party, by deposition on oral examination." MCR 2.306(A)(1). Pursuant to MCR 2.306(B)(5):

In a notice and subpoena, a party may name as the deponent a public or private corporation, partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization named must designate one or more officers, directors, or managing agents, or other persons, who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena must advise a nonparty organization of its duty to make the designation. The persons designated shall testify to matters known or reasonably available to the organization.

Similarly, MCR 2.310 governs requests for the production of documents. After the "service of the summons and complaint on that defendant," a plaintiff may serve the defendant

with requests for the production of documents. MCR 2.310(B)(1); MCR 2.310(C)(1). Where the request of production does not specify the “form or forms in which electronically stored information is to be produced,” the responding party must “produce the information in a form or forms in which the party ordinarily maintains it, or in a form or forms that is or are reasonably usable. A party producing electronically stored information need only produce the same information in one form.” MCR 2.310(C)(2). Additionally:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for the discovery. [MCR 2.302(B)(6).]

A party submitting a request for production of documents may move to compel discovery under MCR 2.306(B)(5) MCR 2.313(A) where the opposing party has objected to or failed to respond to the request for production of documents. MCR 2.310(C)(3).

MCR 2.313(A)(2) provides that if a party fails to designate a representative pursuant to a deposition request made under MCR 2.306(B)(5) and/or fails to answer a request for production, the opposing party may move for an order to compel. MCR 2.313(A)(5) provides that if a motion to compel is granted:

the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct, or both, to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

However, MCR 2.302(C) provides that a court may enter a protective order limiting discovery:

On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

- (1) that the discovery not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place

These court rules are consistent with Michigan courts' approach to discovery, as articulated in *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616-617; 576 NW2d 709 (1998) (citations and quotations omitted):

It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case. In addition, the Supreme Court has repeatedly emphasized that the purpose of discovery is to simplify and clarify issues. Thus, the rules should be construed in an effort to facilitate trial preparation and to further the ends of justice. Moreover, the discovery process should promote the discovery of the facts and circumstances of a controversy, rather than aid in their concealment.

But, "[d]espite this broad discovery policy, courts are empowered to limit excessive, abusive, or irrelevant discovery requests. Under MCR 2.302(C), a party may move the trial court for a protective order to disallow discovery" *Fette v Peters Const Co*, 310 Mich App 535, 547; 871 NW2d 877 (2015) (citation omitted). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

1. Plaintiff's Requests for Production

Initially, this Court addresses defendants' objection that at least some of plaintiff's requests for production seek documents not maintained in the ordinary course of business. Within the objected to requests for production, plaintiff seeks a series of documents "relating to" various specific pieces of information relevant to plaintiff's claims (Requests for Production 47-50, 52-54). However, based on the parties' arguments, as well as the evidence presented by defendants, this Court is satisfied that defendants do not have in their possession documents specifically "relating to" the information sought by those requests for production. Defendants are not required to produce documents that do not exist. See *Coblentz v Novi*, 475 Mich 558, 568-570; 719 NW2d 73 (2006).

However, plaintiff also seeks a series of documents "sufficient to" "show" or "identify" the following things:

"Watermark's customers for spare parts for any Evoqua equipment and Watermark's sales to such customers since December 2003 on a monthly basis" (Request for Production 51).

"Watermark's revenue from customers identified on the customer contact list referred to in paragraphs 71 through 74 of the first amended complaint" (Request for Production 56).

"Watermark's profits from customers identified on Evoqua serial log files, including those referred to in MWW0004515 and MWW0002823-2825" (Request for Production 57).

“Watermark’s profits from customers identified on the customer contact list referred to in paragraphs 71 through 74 of the first amended complaint” (Request for Production 58).

“Watermark’s costs attributable to customers identified on Evoqua serial log files, including those referred to in MWW0004515 and MWW0002823-2825” (Request for Production 59).

“Watermark’s costs attributable to customers identified on the customer contact list referred to in paragraphs 71 through 74 of the first amended complaint (Request for Production 60).

“Defendants’ direct or indirect revenue, profits and costs attributable to any of Defendants’ acts alleged in Evoqua’s Complaint, including any amendments or supplements thereto” (Request for Production 91).

“Defendants’ direct or indirect revenue, profits and costs directly or indirectly attributable to Defendants’ acts alleged by Evoqua to constitute misappropriation of trade secrets (Request for Production 92).

“Defendants’ direct or indirect revenue, profits and costs directly or indirectly attributable to Defendants’ acts alleged by Evoqua to constitute breach of contract” (Request for Production 93).

“Defendants’ direct or indirect revenue, profits and costs directly or indirectly attributable to Defendants’ acts alleged by Evoqua to constitute conversion” (Request for Production 94).

“Defendants’ direct or indirect revenue, profits and costs directly or indirectly attributable to Defendants’ acts alleged by Evoqua to constitute unfair competition” (Request for Production 95).

“Defendants’ direct or indirect revenue, profits and costs directly or indirectly attributable to Defendants’ acts alleged by Evoqua to constitute unjust enrichment” (Request for Production 96).

“Defendants’ revenue, profits and costs from the sales of aftermarket parts and services from any period of time following the date of creation shown on the Evoqua serial log files in Watermark’s possession, custody or control, including those referred to in MWW0004515 and MWW0002823-2825, and the customer contact list identified in paragraphs 73 through 76 of the Complaint filed in this action” (Request for Production 97).

“Defendants’ revenue, profits and costs from the sales of capital equipment from any period of time following the date of creation shown on the Evoqua serial log files in Watermark’s possession, custody or control, including those referred to in MWW0004515 and MWW0002823-2825, and the customer contact list identified in paragraphs 73 through 76 of the Complaint filed in this action” (Request for Production 98).

“Defendants’ revenue, profits and costs from the sales of any products sold with or alongside any O&M manual copied or derived from information originally obtained from a document created by Evoqua, or its predecessors-in-interest, including JWI, Inc., U.S. Filter/JWI, Inc., Siemens Industries, Inc. or Siemens Water Technologies LLC” (Request for Production 99).

Again, this Court is satisfied that defendants do not have in their possession any insular document that would specifically “show” or “identify” any of the above items. However, defendants’ own exhibits demonstrate that they have a “Watermark’s customer list” (Affidavit of G. Thomas Williams, December 7, 2018, 6, attached as Exhibit E to Defendants’ Response Brief to Plaintiff’s Motion to Compel, December 7, 2018), plus other documentation sufficient for defendants to generate their Exhibit B, which provides “sales 2012 to present,” “first RFQ,” “first SO#,” and “first sale” information for 56 former Evoqua customers who subsequently became Watermark customers. Accordingly, this Court concludes that defendants have in their possession documents “sufficient to” “show” or “identify” the items above, even if those documents are merely comprised of raw sales and other financial data.

Defendants have also objected to requests for production 51, 56-60, and 91-99, based on overbreadth, undue burden, and confidentiality. Defendants abandoned their confidentiality objections by not pursuing them at oral argument or within their briefs.

Turning to defendants’ overbreadth and undue burden objections, these objections are primarily based on defendants’ argument that requests for production 51, 56-60, and 91-99 improperly seek irrelevant financial documents from 2003 to 2012. This Court has reviewed those requests for production, the relevant allegations in plaintiff’s amended complaint, and evidence presented to this point in this case, and concludes that requests for production 56-60 and 91-99 relate solely to determining damages for acts alleged or shown to have occurred beginning in 2012. Further, while request for production 51 relates to Watermark’s sales of spare parts to customers regarding Evoqua equipment beginning in 2003, plaintiff’s claims presently before this Court do not relate to the sale of spare parts from 2003 to 2012. Accordingly, request for production 51 is irrelevant, and plaintiff’s requests for production 56-60 and 91-99 indicate that they seek documentation beginning in 2012.

Finally, regarding defendants’ remaining undue burden objections, defendants argue that it presently has limited access to its “pre-2016 financial records” and that “any additional production of documents would be a vast undertaking involving a manual review of individual sales orders” (Defendants’ Brief, 9). However, defendants have provided no evidence regarding exactly how much it would cost them to obtain full access to their pre-2016 records. Perhaps more importantly, defendants have misunderstood their burden to produce documents. Defendants need not necessarily review individual sales orders. Rather, defendants need only “produce the information in a form or forms in which the party ordinarily maintains it, or in a form or forms that is or are reasonably usable.” MCR 2.310(C)(2). Therefore, for example, defense counsel’s and defendants’ efforts to create their Exhibit B, while undertaken in good

faith, were wholly unnecessary expenditures of time under MCR 2.310(C)(2). Defendants fail to show that producing documents responsive to requests for production 56-60 and 91-99 would be unduly burdensome.

In sum, plaintiff is entitled to discovery regarding requests for production 56-60 and 91-99, but this Court also chooses to exercise its discretion pursuant to MCR 2.302(C) to enter a protective order limiting discovery regarding requests for production 56-60 and 91-99 to 2012 to present. In all other aspects, plaintiff's motion to compel production of documents is denied.

2. Plaintiff's Request for Designation of Corporate Representative

Again, defendants object to designating a corporate representative to testify regarding the 11 topics listed *supra*. This Court has reviewed those topics, and concludes that, in essence, plaintiff wishes for a Watermark employee to act as a forensic accountant, perform all of the forensic accounting that should properly be plaintiff's burden, and then obtain the benefit of that accounting through a deposition.

But, MCR 2.306(B)(5) provides that a corporate representative need only "testify to matters known or reasonably available to the organization." This Court is satisfied, based on the arguments and evidence available to it at this late stage of this litigation, that Watermark and its employees do not have the specific knowledge sought regarding the 11 objectionable topics.

Further, this Court finds, again based on the arguments and evidence, that the evidence sought by those topics are not reasonably available to Watermark. It would take a forensic accountant many hours to process the various sources of raw sales data in Watermark's possession to obtain the answers sought by the objectionable topics. This Court refuses to find that it is reasonable to place the burden of such an accounting on Watermark. Rather, it is incumbent on plaintiff, as the party with the burden to prove damages, to use the data contained in the documents discovered from defendants to determine the answers it seeks. Plaintiff's motion to compel the designation of a corporate representative to testify regarding the 11 topics listed above is denied.

Conclusion

For the reasons above, plaintiff's motion to compel the designation of a representative in accordance with MCR 2.306(B)(5) is DENIED. Plaintiff's motion to compel the production of requests for production 47-54 is also DENIED. However, plaintiff's motion to compel the production of requests for production 56-60 and 91-99 is GRANTED, subject to a protective order entered pursuant to MCR 2.302(C) limiting the production of documentation to 2012 to present.

In granting this limited motion to compel, this Court provides the following clarification. Defendants must produce documents "in a form or forms in which the party ordinarily maintains it, or in a form or forms that is or are reasonably usable." MCR 2.310(C)(2). Accordingly,

defendants need not create new documentation. Rather, defendants must produce the documents that are most responsive to requests for production 56-60 and 91-99. If defendants have pre-existing documents¹ providing the specific information sought, they must produce those documents. If, however, defendants merely have documents that are “sufficient to” “show” or “identify” the information sought, they must produce such documentation with raw sales and financial data sufficient for plaintiff to “identify” the information sought.

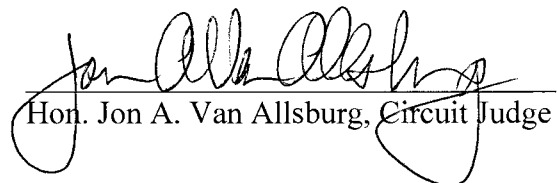
Additionally, plaintiff’s motion for a modification of the scheduling order pursuant to MCR 2.401(B)(2)(d)(iii) is GRANTED. This Court orders that the discovery deadline be extended for 28 days from the date of the entry of this order. This discovery extension is applicable solely in regard to this Court’s grant of the motion to compel the production of requests for production 56-60 and 91-99. Defendants shall have 14 days from the entry of this order to comply with this Court’s order to compel production of requests for production 56-60 and 91-99.

Further, the deadline to complete a hearing regarding the parties’ summary disposition motions is extended to 56 days after the entry of this order. The parties’ settlement conference shall be scheduled on a date convenient for the parties after the resolution of any motions for summary disposition.

Finally, no reasonable expenses are awarded pursuant to MCR 2.313(A)(5) because defendants’ opposition to plaintiff’s motion to compel was substantially justified.

IT IS SO ORDERED.

Dated: December 19, 2018



Hon. Jon A. Van Allsburg, Circuit Judge

¹ That is, documents that were not created by defendants solely for the purposes of the present litigation.