

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 5801

TOTAL MERCHANT SERVICES, LLC,

Plaintiff,

v.

TMS NC, INC. AND CHRISTOPHER
COLLINS,

Defendants.

**ORDER GRANTING PLAINTIFF
TOTAL MERCHANT SERVICES,
LLC'S AMENDED MOTION TO
COMPEL DISCOVERY RESPONSES
AND FOR AWARD OF EXPENSES**

1. **THIS MATTER** is before the Court on Plaintiff Total Merchant Services, LLC's ("TMS") Amended Motion to Compel Discovery Responses and for Award of Expenses, pursuant to Rules 26, 33, 34, and 37 of the North Carolina Rules of Civil Procedure ("Rule(s)") (the "Amended Motion"). (ECF No. 66.) Having considered the Verified Complaint, (ECF No. 2), the materials filed in support of the Amended Motion, the materials filed by Defendants TMS NC, Inc. ("TMS NC") and Christopher Collins ("Collins") in opposition to the Amended Motion, the arguments of counsel at the hearing on the Amended Motion, and other relevant matters of record, the Court hereby **GRANTS in part** and **DENIES in part** the Amended Motion as set forth below.

2. At the time the lawsuit was filed on 28 April 2021, TMS served interrogatories and requests for production of documents on both Defendants (the "Discovery Requests"). (ECF No. 19, at Exs. A–C.)

3. Both Defendants were served with summonses, the Verified Complaint, and the Discovery Requests by personal delivery on 3 May 2021. (ECF Nos. 9, 10.)

4. Defendants' responses to the Discovery Requests were due within forty-five days after service by operation of Rules 33(a) and 34(b).

5. On 2 June 2021, thirty days after Defendants were served with the Discovery Requests, Defendants filed a Notice of Removal of this matter with the United States District Court for the Eastern District of North Carolina. (ECF No. 26.) On 16 December 2021, the United States District Court for the Eastern District of North Carolina entered an Order remanding this case to this Court, concluding that the action had been improperly removed and assessing sanctions against Defendants for their improper removal (the "Remand Order"). (ECF No. 56.)

6. The Remand Order was received by the Wake County Clerk of Superior Court on 21 December 2021. (ECF No. 19, Ex. I.)

7. The parties dispute the effect of the removal on Defendants' deadline to respond to the Discovery Requests. Plaintiff contends that if removal was properly effected in the first instance, which Plaintiff disputes,¹ remand to this Court was complete on 21 December 2021 upon the Wake County Clerk's receipt of the Remand Order. As a result, because thirty days had lapsed between service of the Discovery Requests and remand, Plaintiff argues that Defendants' time for responding to the

¹ Plaintiff contends that remand may not have been effective because there is no record in the Wake County Clerk's office that Defendants ever filed the notice of removal with the Wake County Clerk. As a result, Plaintiff notes that Defendants' discovery responses could have been deemed to be due as early as 17 June 2021, forty-five days after their service on 3 May 2021. (ECF No. 67, at 3 n.1.)

Discovery Requests expired at the absolute latest, fifteen days later, on 5 January 2022. (ECF No. 67, at 3.) Defendants disagree but offer no alternative date by which they contend the Rules required them to serve responses to the Discovery Requests.

8. The Court agrees with Plaintiff and concludes that the latest Defendants' responses to the Discovery Requests were due was 5 January 2022. Even giving Defendants the benefit of the entire time this case was improperly removed to federal court, remand to this Court was effective on 21 December 2021 and the remaining fifteen days within which Defendants were required to respond to the Discovery Requests therefore expired on 5 January 2022.

9. The undisputed evidence shows that Defendants made no effort to answer the Discovery Requests, assert objections to the Discovery Requests, or make any motions for relief related to the Discovery Requests at any time before 16 March 2022—seventy days after Defendants' responses were due—despite Plaintiff's good-faith attempts to resolve Defendants' objections and failure to serve responses to the Discovery Requests. (ECF No. 19, at ¶ 12.)²

10. After Plaintiff's efforts at resolution failed, Plaintiff filed a motion to compel with the Wake County Superior Court on 24 January 2022. (ECF No. 19.) The Superior Court scheduled a hearing on the motion for 17 March 2022. (ECF No. 20.)

² Even if Defendants were entitled to a new forty-five day period to respond after the Wake County Clerk's receipt of remand on 21 December 2021, their responses would have been due no later than 4 February 2022. Defendants initial attempt to respond on 16 March 2022 was still forty days after even this deadline.

11. On 16 March 2022, the day before TMS's motion to compel was scheduled to be heard, counsel for Defendants served what purported to be responses to Plaintiff's interrogatories via email. The interrogatory responses were not verified as required by Rule 33. (ECF No. 66.1.) The email containing the purported interrogatory responses also included a broken link to a document that was identified as a response to Plaintiff's requests for production of documents. (ECF No. 66.1.) TMS's motion to compel was not heard as originally scheduled because the presiding judge stayed all proceedings in the case until the action could be referred to the North Carolina Business Court. (ECF No. 24.)

12. After receiving Defendants' purported response to the Discovery Requests on 16 March 2022, Plaintiff promptly responded to counsel for Defendants to note numerous deficiencies in Defendants' submission. (ECF No. 66.2.)

13. The case was subsequently designated as a mandatory complex business case and assigned to the undersigned. (ECF No. 1.) TMS thereafter filed the Amended Motion on 30 March 2022. (ECF No. 66.) The Court heard argument on the Amended Motion at a hearing on 18 May 2022 (the "May 18 Hearing") at which all parties were represented by counsel. (ECF No. 84.)

14. On the morning of the May 18 Hearing, Defendants again served purported objections and unverified responses to the Discovery Requests, marking the second occasion that Defendants served objections and unverified responses within hours of a scheduled hearing testing Defendants' compliance with the discovery rules. (ECF Nos. 113, 113.1, 113.2, 113.3, 113.4.) In light of Defendants'

newly made response, the Court ordered TMS to assess the sufficiency of these responses and to confer with Defendants to determine whether the parties could resolve or narrow the issues raised in the Amended Motion. (ECF No. 124.)

15. Consistent with the Court's instructions, on 20 May 2022, TMS outlined the deficiencies in Defendants' responses in a letter to Defendants' counsel. (ECF No. 139.1.) On 24 May 2022, Defendants responded to TMS's deficiency letter and served purported second amended responses to the Discovery Requests. (ECF No. 139.2.) Defendants' purported responses to the interrogatories were, for the first time, verified.

16. TMS filed a supplemental brief at the Court's direction that outlined the continuing deficiencies in Defendants' responses to the Discovery Requests. (ECF No. 139.) Although the Court had permitted Defendants an opportunity to respond to Plaintiff's supplemental brief by 13 June 2022, (ECF No. 124, at ¶ 7.a.v.), Defendants did not file a response.

17. The Amended Motion came on for a further hearing on 15 June 2022 (the "June 15 Hearing"), (ECF No. 124), at which all parties were represented by counsel. During the June 15 Hearing, TMS argued that Defendants' responses continued to be deficient under the discovery rules and explained that it sought five forms of relief on its Motion: (i) an Order compelling by a date certain production of the documents requested in the Discovery Requests that would be considered business records not maintained in email or other ESI (as reflected in a table in Plaintiff's Supplemental Memorandum, (ECF No. 139, at 3–4)), (ii) an Order

compelling Defendants to engage in a reasonable ESI collection process for the purpose of collecting ESI responsive to the Discovery Requests, (iii) an Order compelling Defendants to supplement their responses to Interrogatory Nos. 5, 6, and 7 by a date certain, (iv) an Order compelling Defendant Collins to turn over his entire email file to a vendor employed by TMS with a procedure in place to electronically search for and remove likely privileged and work-product-protected documents, and (v) an Order compelling Defendants to pay TMS's reasonable attorneys' fees incurred in connection with its pursuit of the Discovery Requests, the initial motion to compel, and the Amended Motion.

18. Defendants have failed to produce a single document to Plaintiff, whether in hard copy or electronic form, in response to the Discovery Requests.

19. As an initial matter, the Court concludes, based on the above, that Defendants' responses and objections to the Discovery Requests are untimely. As a result, the Court concludes, in the exercise of its discretion, that any objections to the Discovery Requests that Defendants have or might have asserted, other than constitutionally protected objections, have been waived. *See Harrington Mfg. Co. v. Powell Mfg. Co.*, 26 N.C. App. 414, 415 (1975) (failure to answer interrogatories until twenty-six days after they were due and to object until forty-six days after time for objection had passed resulted in waiver of right to objection); *see also Kean v. Kean*, 2022 N.C. App LEXIS 277, **3–4, **10–12 (Apr. 19, 2022) (unpublished) (affirming trial court's waiver of objections when interrogatories were served thirty-one days after they were due).

20. Further, after careful review, the Court concludes that Defendants' belated responses to Plaintiff's Interrogatories 5, 6, and 7 are likewise deficient and not in compliance with Rules 26 and 33 for the reasons set forth in Plaintiff's briefing. (ECF No. 139.)

21. The Court further concludes that Defendants' failure to timely respond to Plaintiff's document requests and to produce any documents to Plaintiff, in hard copy or electronic form, is in violation of Defendants' duties under Rules 26 and 34.

22. Based on the above, the Court therefore concludes that Defendants have failed to comply with their duties and obligations under Rules 26, 33, and 34 in responding to the Discovery Requests and, in the exercise of its discretion, that Plaintiff's Amended Motion under Rule 37 should therefore be granted.

23. In addition, the Court concludes that Defendants' refusal to comply with their discovery obligations was not substantially justified under Rule 37(a)(4) and under Rule 37(d). Defendants have not offered anything approaching a valid reason or excuse for failing to produce full and complete responses to the Discovery Requests within the time periods provided by the North Carolina Rules of Civil Procedure or as otherwise agreed by the parties. Nor have they offered a substantial justification for maintaining their opposition to the Amended Motion. *See, e.g., DSM Dyneema, LLC v. Thagard*, 2016 NCBC LEXIS 198, at *5–7 (N.C. Super. Ct. Feb. 6, 2016) (granting a motion to compel and finding no substantial justification for the nonmoving party's opposition where the party to be compelled "did not have a valid basis to delay production" of the documents that movant requested).

24. In particular, in claiming substantial justification for their discovery conduct and their opposition to the Amended Motion, Defendants contend that Plaintiff's failure to timely reply to Defendants' counterclaims excused Defendants' duty to make a timely response to the Discovery Requests. This argument is specious. First, Defendants ignore that Plaintiff filed its reply within the specific deadline the Court set for that filing, (ECF Nos. 34, 81), and hence was timely filed. More importantly, Defendants offer no basis to tie their noncompliance with the discovery rules to Plaintiff's purported untimeliness in responding to Defendants' counterclaims. The first is entirely independent of the second, and Defendants offer no rule, case law, or persuasive argument to the contrary.

25. Nor are there circumstances present here that make an award of expenses unjust. To the contrary, Defendants have consistently and obstinately refused to comply with their discovery obligations under the North Carolina Rules of Civil Procedure without any legal justification to delay providing full and complete responses to the Discovery Requests—and the production of any documents to Plaintiff—for over a year since the Requests were served. An award of expenses is fully merited in these circumstances, and Plaintiff shall therefore be entitled to its reasonable attorneys' fees and costs incurred in obtaining this Order as well as those caused by Defendants' failure to comply with its discovery obligations.³

³ Where, as here, the Court grants a motion under Rule 37(a)(2), Rule 37(a)(4) requires the Court to order "the party . . . whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified . . ." N.C. R. Civ. P. 37(a)(4). Similarly, under Rule 37(d), where, again as here, a party "fails . . . to

26. Accordingly, the Court concludes, in the exercise of its discretion, that, under Rule 37, TMS is entitled to an Order (i) compelling by a date certain production of all non-privileged business records requested in the Discovery Requests (other than those maintained in email or other ESI) , (ii) compelling Defendants to engage in good faith in a reasonable ESI collection process for the purpose of collecting ESI responsive to the Discovery Requests, (iii) compelling Defendants to supplement their responses to Interrogatory Nos. 5, 6, and 7 by a date certain, and (iv) compelling Defendants to pay TMS's reasonable attorneys' fees and expenses caused by Defendants' failure to comply with their discovery obligations as well as those incurred in obtaining this Order.

27. The Court, however, is not persuaded on the current record that a forensic examination of Collins' laptop is justified or appropriate at this time and therefore denies without prejudice TMS's request for an Order compelling Collins to turn over his entire email file to a vendor employed by TMS with a procedure in place to electronically search for and remove likely privileged and work-product-protected documents.

28. **WHEREFORE**, for good cause shown and in the exercise of the Court's discretion, it is hereby **ORDERED** that the Amended Motion is **GRANTED in part**

serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories" or "to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request," "the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." N.C. R. Civ. P. 37(d).

and **DENIED in part**. Defendants TMS NC and Collins are hereby **ORDERED** as follows:

- a. TMS NC and Collins shall produce to Plaintiff all non-privileged business records requested in the Discovery Requests (other than those maintained in email or other ESI) within fifteen (15) days of the entry of this Order. These documents shall include:
 - i. Contracts and agreements between the parties, and drafts of those agreements;
 - ii. Documents evidencing the offering of payment card processing services from processors other than TMS, including agreements with any other processors;
 - iii. Since 19 October 2018, all account statements for any bank account operated, maintained, or controlled by TMS NC, and all deposit slips, wires, checks, or other evidence of payments into or out of those accounts;
 - iv. Since 19 October 2018, a listing (or other evidence) of all merchants TMS NC has signed up for Card processing services or programs with any processor other than TMS;
 - v. Since 19 October 2018, documents evidencing all payments to TMS NC from any source other than TMS;
 - vi. Financial statements, including profit and loss statements and balance sheets, and all other documents

showing the assets, liabilities, costs, expenditures, receipts, and other such related matters of TMS NC, for the period 19 October 2018 to the present;

- vii. Documents sufficient to identify TMS NC's directors, officers, shareholders, partners, members, or principals;
- viii. Any documents evidencing the financial compensation of TMS NC's directors, officers, shareholders, partners, members, or principals for the period 19 October 2018 to the present;
- ix. Documents evidencing the financial compensation of all of TMS NC's subagents for the period 19 October 2018 to the present;
- x. A copy of TMS NC's federal, state, and local income tax returns for 2018–2020;
- xi. To the extent not produced in response to any other request for production, all books, accounts, records, and files of TMS NC relating to TMS NC's performance of the Services and its obligations under the Agreement for the period 19 October 2018 to the present; and
- xii. All requests for documents to, and any documents received from, third parties that relate to this litigation

or the claims and allegations in the Plaintiff's complaint
or in any answer to the complaint.

- b. Separate and apart from the ESI Protocol that the parties must file no later than 18 July 2022 under the Case Management Order, (ECF No. 149), TMS NC and Collins shall engage in a reasonable ESI collection process in good faith for the purpose of collecting ESI responsive to the Discovery Requests that will require Defendants, at a minimum, to (i) identify to TMS all custodians of ESI potentially responsive to the Discovery Requests and (ii) propose a plan for searching the ESI of those custodians reasonably anticipated to have documents responsive to the Discovery Requests, within fifteen (15) days of the entry of this Order; thereafter TMS NC and Collins are ordered to meet and confer in good faith with TMS in an effort to agree on an ESI plan to facilitate Defendants' response to the Discovery Requests;
- c. TMS NC and Collins shall serve supplemental responses to Interrogatory Nos. 5, 6, and 7 that correct the deficiencies in those supplemental responses outlined in TMS's briefing on the Amended Motion within fifteen (15) days of the entry of this Order;
- d. To the extent that TMS NC or Collins withholds any documents from production on the grounds of privilege or attorney work product, they shall by the time production is ordered produce a privilege log that

includes, at a minimum, the following information about each disputed document: the Bates numbers, the date, the type, the subject matter, the page numbers, the author, the recipients, including people or entities receiving carbon copies, and the privilege asserted over the document;

- e. Any non-privilege-based objections that TMS NC or Collins have made or might have otherwise made to the Discovery Requests are hereby **DEEMED WAIVED**; and
- f. Pursuant to Rules 37(a)(4) and 37(d) of the North Carolina Rules of Civil Procedure and in light of Defendants' lack of substantial justification for their complete failure to respond to discovery, TMS shall be awarded its expenses, including its reasonable attorneys' fees, caused by Defendants' failure to comply with their discovery obligations concerning the Discovery Requests as well as those incurred in obtaining this Order, in an amount to be determined by the Court through the following process:
 - i. TMS shall have through and including ten (10) days after entry of this Order to file its fee application and any supporting materials;
 - ii. Defendants shall have through and including ten (10) days after TMS files its fee application and supporting materials to file any response to TMS's fee submission;

- iii. TMS shall have through and including seven (7) days after Defendants' response to file a reply in support of its fee application.
- iv. The Court will determine at a later date whether to convene a hearing on Plaintiff's anticipated petition for fees and costs.
- v. The Court shall determine and issue an award of attorneys' fees and costs to Plaintiff by separate order.

It is **SO ORDERED**, this the 1st day of July, 2022.

/s/ Louis A. Bledsoe, III

Louis A. Bledsoe, III
Chief Business Court Judge