UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTINA RONALDSON, Plaintiff, v. NATIONAL ASSOCIATION OF HOME BUILDERS, Defendant.	Civil Action No. 19-01034 CKK/DAR

MEMORANDUM OPINION AND ORDER

Pending before the undersigned Magistrate Judge are the discovery disputes referred from the assigned District Judge on April 2, 2020. Order (Apr. 2, 2020) (ECF No. 42). The undersigned has considered the parties' letter briefing, the exhibits attached to the letter briefs, the evidence and arguments proffered during the status conference conducted on May 12, 2020, and the entire record herein. Construing the parties' letter briefing as motions to compel, Plaintiff's motion will be granted in part and denied in part, and Defendant's motion will be denied as moot.

BACKGROUND

Plaintiff, Christina Ronaldson, brought this action against Defendant, the National Association of Home Builders, on April 12, 2019. *See* Complaint (ECF No. 1). In her original Complaint, Plaintiff alleged that Defendant withheld commissions owed to her as Defendant's Director of Affinity Programs. *See id.* ¶¶ 13, 16-32. The original Complaint included a single

count for violations of the District of Columbia Payment and Collection of Wages Law, D.C. Code §§ 32-1301 *et seq*. (the "DCPCWL"). *See id*. ¶¶ 33-45.

The parties agreed to a discovery plan on August 20, 2019. *See* Amended Joint Discovery Plan (ECF No. 17). The plan called for the parties to exchange written and electronic discovery requests by October 2, 2019, serve responses and objections to written discovery requests by December 2, 2019, and serve responses and objections to electronic discovery requests by January 6, 2020.[1] *See id.* at 1.

The parties exchanged written discovery requests on October 2, 2019. *See* Joint Status Report (Feb. 18, 2020) (ECF No. 34) at 1. Plaintiff, but not Defendant, served electronic discovery requests on that date as well. *Id.* Plaintiff responded to Defendant's written discovery requests on December 2, 2019. *Id.* Defendant did not respond to Plaintiff's written discovery requests as provided by the discovery plan. *See id.* at 1-2. Instead, at a status conference conducted on December 13, 2019, the assigned District Judge provided Defendant more time in which to respond to Plaintiff's requests. Memorandum in Response to Minute Order of May 12, 2020 Regarding Defendant's Waiver of the Attorney-Client Privilege ("Plaintiff's Waiver Memorandum") (ECF No. 56) at 4 (indicating that the assigned District Judge "gave defendant several weeks into the New Year"); Rough Transcript, Dec. 13, 2019 Status Conference at 23:9-14 (Defendant's counsel agreeing to January 21, 2020 as a reasonable date for responses to written discovery). The assigned District Judge did not set a deadline for Defendant to serve its electronic discovery responses to Plaintiff's electronic discovery requests, but instead, requested a notice providing an update on Defendant's progress. Rough Transcript, Dec. 13, 2019 Status

[1] Where the parties filed a document through the Court's Electronic Case Files system, the undersigned cites to the page numbering automatically generated by that system. For all other documents, including the parties' letter briefing, the undersigned cites to the page numbering provided by the parties.

Conference at 29:17-19 (ordering that Defendant provide a notice as to progress). Defendant provided such notice and requested an extension of its deadline from January 6, 2020 to February 14, 2020. Defendant's Notice Regarding Status of E-Discovery Search (ECF No. 23). The assigned District Judge denied the request because "[t]he deadline for responses to e-discovery searches is not a deadline set by this Court, but rather one originally agreed upon by the parties." Minute Order (Dec. 20, 2019).

Defendant provided general objections to Plaintiff's electronic discovery requests on January 14, 2020, and responses and objections to Plaintiff's written discovery requests on January 22, 2020. *See* Joint Status Report (Feb. 18, 2020) at 1-2. Defendant served its responses to Plaintiff's electronic discovery requests on February 25, 2020. Letter from Robert C. Seldon to Chambers of Hon. Colleen Kollar-Kotelly (Mar. 9, 2020) at 6.

On March 9 and 10, 2020, the parties engaged in letter briefing concerning their discovery disputes. *See infra*, Contentions of the Parties.

Plaintiff amended her Complaint on March 26, 2020. Amended Complaint (ECF No. 41). In the Amended Complaint, Plaintiff alleges that, as Director of Affinity Programs when employed by Defendant, she was "responsible for generating revenue for NAHB by creating national partnerships between NAHB and corporations with significant financial interests in the home building industry by marketing products and services to NAHB members, including builders, contractors and sub-contractors, and banks." *Id.* ¶ 3. Her wages included both "a base salary and an Incentive Compensation Plan, one component of which provided for the payment of incentive bonuses or commissions based on a formula tied to Affinity Department annual net revenue goals set by NAHB in advance of each year." *Id.* ¶ 4. Plaintiff maintains that, for 2016 and part of 2017, Defendant did not pay the full commissions owed to Plaintiff, including

commissions earned by Plaintiff as a result of her account with Lowe's in 2016. *See id.* ¶¶ 5-9. Defendant terminated Plaintiff's employment effective August 18, 2017. *Id.* ¶ 10. Plaintiff maintains that Defendant terminated Plaintiff's job in bad faith and, in so doing, "evaded the letter and intent of [Plaintiff's] Incentive Compensation Plan[.]" *Id.* ¶¶ 33-35. The Amended Complaint includes Plaintiff's previous count for violations of the DCPCWL and adds a further count for unjust enrichment. *See id.* ¶¶ 54-59.

On April 2, 2020, the assigned District Judge referred the parties' discovery disputes to the undersigned Magistrate Judge. *See* Order (Apr. 2, 2020). The undersigned conducted a status conference on May 12, 2020. *See* Minute Entry (May 12, 2020). At the status conference, Defendant "withdrew all of its objections to Plaintiff's discovery responses raised in Defendant's March 9 and March 10, 2020 letter briefs." Minute Order (May 12, 2020).

CONTENTIONS OF THE PARTIES[2]

In her March 9, 2020 letter, Plaintiff maintains that five of Defendant's objections are without merit. First, Plaintiff argues that Defendant improperly construed Plaintiff's request for discovery as relating only to "Lowe's Affinity sales" in 2016 when, in fact, Plaintiff's complaints included allegations concerning all of her Affinity commissions in 2016 and 2017. *See* Letter from Robert C. Seldon to Chambers of Hon. Colleen Kollar-Kotelly (Mar. 9, 2020) at 3. Second, Plaintiff argues that Defendant improperly withheld discovery related to Plaintiff's termination because in both complaints, Plaintiff alleges that her termination was pretextual. *See id.* at 4. Third, Plaintiff argues that Defendant's withholding of discovery related to Plaintiff's successor

[2] In its letter addressed to the assigned District Judge on March 9, 2020, Defendant argued that Plaintiff's discovery responses were deficient in numerous ways. *See* Letter from Yoora Pak to Chambers of Hon. Colleen Kollar-Kotelly (Mar. 9, 2020) at 1-7. The undersigned will not address any of these arguments because Defendant has since withdrawn them. Minute Order (May 12, 2020).

is improper because "[t]he issue of who, if anyone, NAHB paid an Affinity commission on [2016 and 2017] sales is highly relevant." *Id.* at 4. Fourth, Plaintiff argues that Defendant improperly refused to search the records of Defendant's chief legal officer because, if there were privilege-protected records, Defendant should have produced a privilege log for those records and produced all non-privileged records. *Id.* Fifth, and lastly, Plaintiff argues that Defendant has responded with boilerplate objections which Defendant has refused to withdraw. *Id.* at 5.

Plaintiff also takes issue with Defendant's objections and responses to written discovery requests. In response to Plaintiff's written discovery requests, Defendant produced the affidavit of a corporate officer with accompanying attachments. Attachment C, Letter from Robert C. Seldon to Chambers of Hon. Colleen Kollar-Kotelly ("Defendant's Written Discovery Responses") (Mar. 9, 2020). Plaintiff maintains that this affidavit is not responsive to Plaintiff's requests which include, *inter alia*, " the formula for plaintiff's Affinity commissions was determined; how revenue and revenue targets for the Affinity Programs that would provide the basis for calculating the difference between revenue plaintiff was expected to generate and did generate as Director of Affinity Programs; who played what role in determining revenue, revenue targets, and Affinity commission rates; whether commissions from sales placed by Ms. Ronaldson in 2016 were paid to someone else under a 2017 Incentive Compensation Plan; the dates on which Ms. Ronaldson's plans were developed and put in place; and the basis for terminating Ms. Ronaldson." Letter from Robert C. Seldon to Chambers of Hon. Colleen Kollar-Kotelly (Mar. 9, 2020) at 5-6.

Plaintiff also objects to the form of Defendant's electronic discovery responses, which included "347 disorganized, unindexed pages of emails." *Id.* at 6. Plaintiff maintains that,

without an index or explanation of the emails, Plaintiff cannot determine whether or how Defendant responded to electronic discovery requests. *See id.*

Defendant does not appear to respond to Plaintiff's contention that Defendant improperly construed Plaintiff's request for documents and information as relating only to "Lowe's Affinity sales" in 2016. *See generally* Letter from Yoora Pak to Chambers of Hon. Colleen Kollar-Kotelly (Mar. 9, 2020). Nor does Defendant appear to respond to Plaintiff's argument concerning boilerplate objections. *See id.* Likewise, Defendant does not appear to respond to Plaintiff's argument concerning the disorganized and uncategorized nature of Defendant's responses. *See id.*

In response to Plaintiff's argument that Defendant improperly withheld discovery related to Plaintiff's termination, Defendant maintains that it produced certain termination-related documents and that Defendant "does not have any documents to support a scheme to deprive Plaintiff of her additional bonus payments because no such scheme existed." *See id.* at 9. Later, Defendant represented that it has continued to search for documents relevant to these termination-related requests. Defendant's Status Report (ECF No. 51) at 1. Similarly, in response to Plaintiff's argument that Defendant should have produced a privilege log for records belonging to Defendant's chief legal officer, Defendant responded that it would produce such a privilege log. Letter from Yoora Pak to Chambers of Hon. Colleen Kollar-Kotelly (Mar. 9, 2020) at 9. In responding to Plaintiff's argument concerning the withholding of records and information related to Plaintiff's successor, Defendant argues that such discovery is irrelevant because it has "no bearing on whether a greater ICP bonus should have been paid to Plaintiff." *Id.* at 8.

After the May 12, 2020 status conference, the undersigned asked counsel to address the issue of whether and the extent to which Defendant's untimely discovery objections and responses waived its objections to Plaintiff's discovery requests. *See* Minute Order (May 12, 2020). Defendant argues that counsel's health problems from November 2019 to February 2020 constitute good cause to excuse any failure to timely respond. Memorandum in Response to Minute Order (ECF No. 54) at 3. In response, Plaintiff points to numerous delays and false starts caused by Defendant's other counsel who was not suffering from health issues. Plaintiff's Waiver Memorandum at 3-4. In particular, Plaintiff maintains that Defendant's privilege log has been overdue by more than "five months" and that Defendant's privilege objections should be deemed waived as a result. *Id.* at 3-5.

STATUTORY FRAMEWORK

"The Federal Rules of Civil Procedure encourage the exchange of information through broad discovery." *In re England*, 375 F. 3d 1169, 1177 (D.C. Cir. 2004); *see also Pederson v. Preston*, 250 F.R.D. 61, 63-64 (D.D.C. 2008). "A party may serve interrogatories or requests for production provided such requests fall within the scope of Rule 26(b)." *Breiterman v. United States Capitol Police*, 324 F.R.D. 24, 27 (D.D.C. 2018).

"[C]onsiderations of both relevance and proportionality [] govern the scope of discovery" allowed under Rule 26. *United States ex rel. Shamesh v. CA, Inc.*, 314 F.R.D. 1, 8 (D.D.C. 2016). Specifically, a party may take discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). "Relevance is construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any party's claim or defense."

Breiterman, 324 F.R.D. at 30 (citations omitted). "However, the court must limit the extent of discovery that is, *inter alia*, unreasonably cumulative or duplicative, outside the permitted scope of Rule 26(b)(1), or obtainable from another source that is more convenient, less burdensome, or less expensive." *Id*.

Pursuant to Federal Rule of Civil Procedure 37, "a party seeking discovery through an interrogatory under Rule 33, the production of documents under Rule 34, or a deposition under Rule 30, and who believes that the opposing party has failed to meet its obligation under the relevant Rules, may—after conferring in good faith with the opposing party—seek to compel a response." *Id*. at 27; *see also* Fed. R. Civ. P. 37(a)(1), 37(a)(3)(B)(i), (iii)-(iv).

DISCUSSION

A. Defendant Has Waived Some But Not All of Its Objections

In responding to an interrogatory, "[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." Fed. R. Civ. P. 33(b)(4). While Federal Rule of Civil Procedure 34 does not include a similar express provision for objections to requests for production of documents, courts in this Circuit routinely find that, absent good cause, "the failure to timely file an objection to a request for production of documents may be deemed a waiver." *Fonville v. D.C.*, 230 F.R.D. 38, 42 (D.D.C. 2005). Courts nonetheless may excuse "minimal tardiness" in certain instances. *See Kruger v. Cogent Commc'ns, Inc*., No. CV 14-1744 (EGS), 2016 WL 11121058, at *3 (D.D.C. Oct. 24, 2016) (collecting cases). Moreover, where waiver of privilege is at issue, courts are reluctant to find waiver unless there is evidence of "unjustified delay, inexcusable conduct, and bad faith." *In re Papst Licensing GMBH & Co. KG Litig.*, 550 F. Supp. 2d 17, 22 (D.D.C. 2008) (quoting *United States v. British Am. Tobacco*,

387 F.3d 884, 891 (D.C. Cir. 2004)). Broad and unsubstantiated boilerplate objections may also be deemed waived. *See Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181, 191 (D.D.C. 1998).

1. Defendant's Untimeliness Did Not Waive All of Its Objections

The parties agreed to an Amended Joint Discovery Plan which provided for written and electronic requests to be served by October 2, 2019, with responses and objections for written discovery due by December 2, 2019 and responses and objections for electronic discovery due by January 6, 2020. Amended Discovery Plan at 1. The written discovery deadline was extended to January 21, 2020. Rough Transcript, Dec. 13, 2019 Status Conference at 23:9-14. There is no dispute that Defendant sent responses and objections to Plaintiff's written discovery requests on January 22, 2020, with a general letter describing broad objections to Plaintiff's electronic discovery requests a week before on January 14, 2020. *See* Email from Yoora Pak to Molly Buie (Jan. 14, 2020) (ECF No. 56-1) at 2; Memorandum in Response to Minute Order (ECF No. 54).

Defendant's objections and responses to written discovery on January 22, 2020 were a day later than its court-imposed deadline of January 21, 2020. The undersigned finds that this one-day delay was "minimal" and thus excusable. *Kruger*, 2016 WL 11121058, at *3. Before the court imposed this deadline on December 13, 2019, Defendant had already missed a previous deadline of December 2, 2019. *See* Amended Joint Discovery Plan at 1. This previous delay was also minimal and was caused at least in part by Defendant's counsel's health issues. Thus, though Defendant served its objections and responses to written discovery requests in an untimely manner, the undersigned finds, in the context presented here, that Defendant did not waive all of its objections to these requests.

Defendant's objections and responses to Plaintiff's electronic discovery requests were due on January 6, 2020. *See* Amended Joint Discovery Plan at 1. On January 14, 2020, Defendant served a letter describing its general objections to Plaintiff's electronic discovery requests. While this is a close question, Defendant's delay in these circumstances is "excusable." *Kruger*, 2016 WL 11121058, at *3 (collecting cases holding that delays of five, or even nine days may be excusable). The undersigned does not take a failure to comply with deadlines lightly. Here, Defendant at least made some attempt to alert the court to logistical problems which would cause delay. *See* Defendant's Notice Regarding Status of E-Discovery Search. After the assigned District Judge did not grant the exact deadline as requested by Defendant, the record reveals that Defendant made some effort to meet the previous deadline. Thus, though Defendant served its objections to electronic discovery requests in an untimely manner, the undersigned finds that Defendant did not waive all of its objections to these requests.

2. Defendant Has Waived All Objections It Has Not Raised With Specificity

Defendant's objections to Plaintiff's discovery requests bear several commonalities. Nearly all objections assert that Plaintiff's requests are "overly broad" and "not reasonably calculated to lead to the discovery of admissible evidence." Email from Yoora Pak to Molly Buie (Jan. 14, 2019); *see also, e.g.*, Defendant's Written Discovery Responses, Objection to Plaintiff's Document Request Number Two; *id.*, Objection to Plaintiff's Interrogatory Number Two. Most of Defendant's responses then go on to name a more specific reason. *See id.*, Response to Plaintiff's Interrogatory Number Two (specifying that the interrogatory "seeks compensation information for another NAHB employee who is not a party to this litigation"). Defendant also objected to some requests because they are "unduly burdensome," usually on the

grounds that a request did not provide time limitations. *See id.*, Objection to Plaintiff's Document Request Number Two. In its objections to written and electronic discovery, Defendant never states whether documents or electronically stored information was actually withheld pursuant to any objection.

a. Defendant Has Not Waived Its Relevance Objections

As Plaintiff points out, Defendant repeats its objections in a manner suggesting that these objections are "boilerplate." Letter from Robert C. Seldon to Chambers of Hon. Colleen Kollar-Kotelly (Mar. 9, 2020) at 5. Defendant's objections include phrases like "overbroad," "reasonably calculated to lead to the discovery of admissible evidence," and "exceeding the scope of permissible discovery in this litigation." *See e.g.*, Defendant's Written Discovery Responses, Objection to Plaintiff's Request for Production Number Four. These general objections are conclusions, not analyses of relevance or proportionality in the context of this litigation. *See* Fed. R. Civ. P. 26(b)(1) (defining the scope of discovery in terms of relevance and proportionality). Upon closer review, however, the undersigned finds that what follows all of these general objections is a specific argument concerning relevance. *See* Defendant's Written Discovery Responses, Objection to Plaintiff's Interrogatory Number Two (objecting on the grounds that Plaintiff's interrogatory sought information about a non-party). Thus, the undersigned finds that Defendant's objections concerning relevance are not waived.

b. Defendant Has Waived All Proportionality and Burden-Related Objections

The undersigned finds that Defendant's objections on the grounds of proportionality are waived, however, because Defendant has not met the requirement to sustain any such objection

by "submitting affidavits or offering evidence which reveals the nature of the burden." *Convertino v. U.S. Dep't of Justice*, 565 F. Supp. 2d 10, 14 (D.D.C. 2008). Defendant repeatedly invokes overbreadth and burdensomeness without explaining the precise nature of its burden. *See e.g.*, Defendant's Written Discovery Responses, Response to Plaintiff's Request for Documents Number Three (objection on the grounds that the request is overbroad and burdensome). Thus, Defendant's objections concerning burdensomeness and overbreadth are waived. *See Athridge*, 184 F.R.D. at 191 (holding that waiver is appropriate if "[t]here is nothing in defendant's responses which permits the Court to ascertain why or how the request is burdensome").

c. Defendant Has Waived the Attorney-Client Privilege

Defendant's privilege objections suffer from two flaws: untimeliness and lack of specificity. While there is a heightened standard for finding that the attorney-client privilege has been waived, the circumstances here meet that heightened standard. *See In re Papst Licensing GMBH & Co. KG Litig.*, 550 F. Supp. 2d at 22. Untimeliness or a failure to provide a privilege log may be insufficient, in and of themselves, to warrant waiver. *See Kruger*, 2016 WL 11121058, at *4. Here, however, the combination of these two factors weighs in favor of a finding of waiver. *See id.* (holding that "the noxious combination of untimeliness and failure to provide a privilege log" is grounds for waiver of the attorney-client privilege).

As previously discussed, Defendant's objections on privilege grounds, served on January 14 and January 22, 2020 respectively, were already late. On those dates, Defendant was required to "describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or

protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(ii). Defendant did not do so. *See, e.g.*, Email from Yoora Pak to Molly Buie (Jan. 19, 2020) at 3 ("Defendant objects to the search for emails of [Defendant's chief legal officer] on grounds of attorney-client privilege and/or attorney work product.") Indeed, on March 9, 2020, Defendant acknowledged that a "blanket objection" was insufficient and that it would provide a "privilege log." Letter from Yoora Pak to Chambers of Hon. Colleen Kollar-Kotelly (Mar. 9, 2020) at 8. As of the date of this order, Defendant has not produced such a privilege log.

While one of Defendant's attorneys suffered from health issues which excused some delay, other attorneys entered appearances and helped to prepare discovery responses on behalf of Defendant. *See* Memorandum in Response to Minute Order at 4. Moreover, this good cause would extend only from "November, 2019 through February, 2020[,]"the only "relevant time period" for which Defendant argues that good cause exists. *Id.* Defendant's counsel's health provides good cause for some minimal delay, as described above. It does not excuse a delay nearing six months. Thus, the undersigned finds that Defendant's objections concerning privilege are waived.

B. Plaintiff's Non-Lowe's Commissions Are Relevant

In several of Defendant's objections, Defendant asserts that the "Lowe's Affinity Program . . . is the only account at issue in this action." *See, e.g.*, Defendant's Written Discovery Responses, Objection to Interrogatory Number 7; *see also* Email from Yoora Pak to Molly Buie (Jan. 14, 2020) at 2. These objections may have had more merit at the time they were made. *See* Complaint ¶¶ 21-32 (alleging facts under a section entitled "NAHB's Failure To Pay Ms. Ronaldson's Incentive Commission On The Lowe's Sale"). No matter whether these objections

were well-founded at the time, Plaintiff's Amended Complaint plainly encompasses all of the accounts for which Plaintiff was responsible in 2016 and 2017. *See, e.g.*, Amended Complaint ¶ 26 (alleging, *inter alia*, that Plaintiff was not paid a bonus or commission from "Affinity Programs from the Lowe's sale and others in 2016"). Thus, to the extent that Defendant is withholding discovery pertaining to non-Lowe's accounts in 2016 and 2017, Defendant shall supplement its previous responses and production to include them.[3]

C. Plaintiff's Job Performance and Termination Are Relevant

Defendant objected to proposed search terms related to Plaintiff's job performance on relevance grounds. *See, e.g.*, Defendant's Written Discovery Responses, Objection to Interrogatory Number 7. In letter briefing, Defendant maintains that it already produced a "performance improvement plan, correspondence discussing the complaints against her and the benchmarks established to help her improve her job performance, as well as her termination letter." Yoora Pak to Chambers of Hon. Colleen Kollar-Kotelly (March 9, 2020) at 8-9. Defendant noted that it would review its previous production to ensure that it had produced all relevant discovery. *See id.* Defendant also noted that it had no "documents to support a scheme to deprive Plaintiff of her additional bonus payments[.]" *Id.* at 9.

To be clear, these are not the only documents relevant to Plaintiff's unjust enrichment claim. Plaintiff may seek discovery about the cause of her termination because that is a central part of her unjust enrichment claim. *See* Amended Complaint ¶ 31. This includes, *inter alia*, an explanation of who took personnel actions and when. *See, e.g.*, Attachment B, Letter from

[3] Plaintiff does not argue that Defendant's related temporal limitation is unreasonable, so the undersigned has no basis to order any production of emails which predate January 1, 2016 or postdate December 31, 2018. *See* Email from Yoora Pak to Molly Buie at 2.

Robert C. Seldon to Chambers of Hon. Colleen Kollar-Kotelly ("Plaintiff's Discovery Requests"), Interrogatory Number Seven. To the extent that Defendant has withheld any discovery which is responsive to Plaintiff's performance- and termination-related discovery requests, Defendant shall supplement its previous responses to include them.

D. Commissions Paid to Plaintiff's Successor Are Relevant

Defendant is correct that information about the ICP payments made to Plaintiff's successor have "no bearing on whether a greater ICP bonus should have been paid to Plaintiff." Letter from Yoora Pak to Chambers of Hon. Colleen Kollar-Kotelly (Mar. 9, 2020) at 8. Such information is relevant, however, to the second and third elements of Plaintiff's unjust enrichment claim, whether "(2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." *Peart v. D.C. Hous. Auth.*, 972 A.2d 810, 813 (D.C. 2009). Courts evaluate unjust enrichment claims "on a case-by-case basis, considering the particular circumstances giving rise to the claim." *Id.* at 814 (citation omitted). Plaintiff alleges that Defendant obtained a financial benefit by retaining revenue effectively produced by Plaintiff without providing Plaintiff her full commissions. *See* Amended Complaint ¶¶ 5-9. If Defendant's system works as Plaintiff alleges, assessing whether Plaintiff's successor was paid some of the commissions owed to Plaintiff will help to determine the extent to which Defendant retained this alleged benefit and the fairness of ordering Defendant to disgorge the benefit. *Peart*, 972 A.2d at 813. Thus, Defendant shall supplement its previous discovery responses to include discovery related to the commissions paid to Plaintiff's successor for revenue received through the Affinity Program in 2016 and 2017.[4]

[4] The undersigned notes that Plaintiff expressed concern solely with the discovery of information related to Plaintiff's "successor" and not any other co-worker. *See* Letter from Robert C. Seldon to Chambers of Hon. Colleen

E. Defendant Must Categorize Its Written and Electronic Discovery Responses and State Whether Records Have Been Withheld Pursuant to Its Objections

Pursuant to Federal Rule of Civil Procedure 34, "a party, on whom a demand for production of documents has been made, must produce them in the form in which they are ordinarily maintained or must organize and label them to correspond with the categories of the request for production. *United States v. O'Keefe*, 537 F. Supp. 2d 14, 19 (D.D.C. 2008) (citing Fed. R. Civ. P. 34(b)(2)(E)(i). Thus, documents do not need to be "indexed, catalogued, or labeled" if the "production replicates the manner in which they were originally kept." *Id*. Otherwise, the documents must be made "usable" to the requesting party by "label[ling] them to correspond to the categories in the request[.]" *Id.*; Fed. R. Civ. P. 34(b)(2)(E)(i). For electronically stored information ("ESI"), "[i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." Fed. R. Civ. P. 34(b)(2)(E)(ii).

Defendant's responses to Plaintiff's requests for production of documents did not include the production of documents as those documents were kept in the ordinary course of business. *See* Defendant's Written Discovery Responses (providing an affidavit and accompanying attachments). Nonetheless, Defendant did not "organize and label [documents] to correspond with the categories of the request for production." *O'Keefe*, 537 F. Supp. 2d at 19. Defendant instead provided two repeated responses to Plaintiff's requests for production of documents, depending on the nature of Plaintiff's requests. For some responses, Defendant stated an

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Kollar-Kotelly (Mar. 9, 2020) at 6. Moreover, while Plaintiff originally sought such records from "January 1, 2014 through December 31, 2018," the undersigned notes that these records are relevant only insofar as they relate to Defendant's alleged retention of benefits received in 2016 and 2017. Thus, this supplementation is limited to Defendant's "successor" for the years 2016 and 2017. *See* Letter from Robert C. Seldon to Chambers of Hon. Colleen Kollar-Kotelly (Mar. 9, 2020) at 6.

objection and noted that "Defendant stands on its objection." *See, e.g.*, Defendant's Written Discovery Responses, Response to Request for Production Number Four. For others, Defendant merely stated, "Subject to and without waiving the objection, see Eileen Ramage's affidavit and attachments." *See, e.g.*, *id.*, Response to Request for Production Number Six. By not providing anything further, Defendant failed to comply with the Federal Rules of Civil Procedure. Thus, Defendant shall supplement its responses to Plaintiff's requests for production of documents to "label them to correspond to the categories in the request[.]" Fed. R. Civ. P. 34(b)(2)(E)(i).

While no court in this Circuit appears to address the issue, the undersigned reads the requirement of Section (E)(i) of Rule 34(b)(2) to apply to ESI. Under Section (E)(ii), responses to ESI require that the responding party "produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms" if "a request does not specify a form for producing [ESI.]" Fed. R. Civ. P. 34(b)(2)(E)(ii). Read in context, the undersigned agrees with the "vast majority of courts [which] have treated (E)(i) and (E)(ii) as supplementary rather than alternative." *See Landry v. Swire Oilfield Servs., L.L.C.*, 323 F.R.D. 360, 388 (D.N.M. 2018) (collecting cases); *see also McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, 322 F.R.D. 235, 249 (N.D. Tex. 2016) (collecting cases). Section (E)(ii) "regulates the form of production" for ESI whereas Section (E)(i) regulates the "organization" of all documents whether the documents are ESI or not. *Landry*, 323 F.R.D. at 388. Where ESI is also a document, Sections (E)(i) and (E)(ii) both apply. *See id.* (indicating that "electronic mail transmissions or electronic memoranda, would seem to fit comfortably into the everyday definition of documents"). Thus, Defendant was required to either produce its emails in their original form or "label them to correspond to the categories in the request[.]" Fed. R. Civ. P. 34(b)(2)(E)(i). Defendant made no representation that it had "(1) preserv[ed] the format of the

ESI [or] (2) provid[ed] sufficient information about the context in which it is kept and used." *McKinney/Pearl Rest. Partners*, 322 F.R.D. at 250. Defendant also represented that it had modified the emails to provide Bates numbering. Thus, Defendant's production of the emails did not "replicate[] the manner in which they were originally kept" and Defendant was required to "label them to correspond to the categories in the request[.]" Fed. R. Civ. P. 34(b)(2)(E)(i). Defendant shall supplement its electronic discovery responses to comply with this requirement.

The undersigned must also address another requirement of Rule 34. For objections to requests for both documents and ESI, "[a]n objection must state whether any responsive materials are being withheld on the basis of that objection." Fed. R. Civ. P. 34(b)(2)(C). As Defendant effectively acknowledged at a status conference, Defendant has failed to state whether it actually withheld documents or ESI pursuant to any of its objections. Rough Transcript, May 12, 2020 Status Conference at 15 ("THE COURT: Did you indicate what documents have been withheld among the documents that were requested . . . . MS. PAK: No, Your Honor."). Combined with its other omissions, Defendant's failure to meet this requirement has also frustrated Plaintiff's and the undersigned's understanding of what has been produced, what has been withheld, and why. Thus, Defendant shall supplement its written and electronic discovery objections to include "whether any responsive materials are being withheld on the basis of that objection." Fed. R. Civ. P. 34(b)(2)(C).

CONCLUSION

For the foregoing reasons, it is, on this 3rd day of June, 2020, **ORDERED** that Plaintiff's motion to compel is **GRANTED IN PART,** and that:

(1) Defendant shall produce any discovery withheld pursuant to a proportionality or burdensomeness objection by no later than **July 7, 2020**;

(2) Defendant shall produce any discovery withheld pursuant to any privilege by no later than **July 7, 2020**;

(3) Defendant shall produce any discovery requested by Plaintiff pertaining to non-Lowe's accounts in 2016 and 2017 by no later than **July 7, 2020**;

(4) Defendant shall produce any discovery requested by Plaintiff pertaining to performance- and termination-related issues by no later than **July 7, 2020**;

(5) Defendant shall produce discovery requested by Plaintiff pertaining to Plaintiff's successor's commissions and accounts for 2016 and 2017 by no later than **July 7, 2020**;

(6) Defendant shall supplement its written and electronic discovery responses to comply with Sections (b)(2)(B) and (b)(2)(E)(i) of Federal Rule of Civil Procedure 34 by no later than **July 7, 2020**.

It is **FURTHER ORDERED** that, in all other respects, Plaintiff's motion to compel is **DENIED**; and it is

FURTHER ORDERED that Defendant's motion to compel is **DENIED as MOOT**.

Deborah A. Robinson
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DEBORAH A. ROBINSON
United States Magistrate Judge