

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(Filed: June 29, 2012)

NAYSHA BERRIOS, INDIVIDUALLY :
AND AS ADMINISTRATRIX OF THE :
ESTATE OF CASSANDRA BERRIOS :

v. :

C.A. No. PC 2004-2390

JEVIC TRANSPORTATION, INC.; :
CRAIG G. BENFIELD; :
FIRST STUDENT, INC.; :
ILBA BERRIOS, ALIAS; :
SAIA, INC.; SAIA MOTOR FREIGHT :
LINE, L.L.C., ALIAS; AND :
NATIONAL UNION FIRE INSURANCE :
COMPANY OF PITTSBURGH, PA :

DECISION

GIBNEY, P.J. This wrongful death action arises from an automobile accident involving Plaintiff Naysha Berrios (“Plaintiff”), Defendant Ilba Berrios (“Ilba”), Defendant First Student, Inc. (“First Student”), Defendant Jevic Transportation, Inc. (“Jevic”), and various other parties. Jevic moves to compel First Student to produce documents responsive to Jevic’s Requests for Production of Documents. Jurisdiction is pursuant to Super. R. Civ. P. 37. For the reasons stated herein, Jevic’s Motion to Compel is granted in part and denied in part.

I

Facts and Travel

This case's long, complicated history has been recounted in multiple recent decisions of this Court. Accordingly, this Court shall only provide a summary here.¹

On the morning of September 5, 2001, a school bus owned by First Student and operated by First Student employee Ilba traveled northbound along Route I-95. The school bus carried Plaintiff and her infant daughter, Cassandra Berrios ("Cassandra"). Plaintiff was the bus monitor and a First Student employee. According to police reports and deposition testimony, an eighteen wheel, tractor trailer owned and operated by Jevic was parked in the breakdown lane along I-95 North prior to the accident. At some point, the school bus crossed into the breakdown lane and struck the Jevic truck. The infant, Cassandra, was severely injured in the collision and ultimately died. Plaintiff and Ilba were both injured, but survived the accident.

Plaintiff subsequently filed this lawsuit. Thereafter, Jevic and First Student filed Cross-Claims against each other. Discovery has been ongoing for nearly eight years. Over that period, Jevic and First Student have sought this Court's assistance to resolve disputes regarding their discovery obligations on numerous occasions. Today, they do so again.

Several of Jevic's Requests for Production of Documents from 2007 and 2010 are

¹ For a fuller account of this case's underlying factual and procedural history, see Berrios v. Jevic Transportation, Inc., C.A. No. PC-2004-2390 (R.I. Super. June 8, 2012), Berrios v. Jevic Transportation, Inc., C.A. No. PC-2004-2390, 2012 WL 894010 (R.I. Super. Mar. 12, 2012), Berrios v. Jevic Transportation, Inc., C.A. No. PC-2004-2390, 2012 WL 254974 (R.I. Super. Jan. 23, 2012), Berrios v. Jevic Transportation, Inc., C.A. No. PC-2004-2390 (R.I. Super. July 15, 2011), and Berrios v. Jevic Transportation, Inc., C.A. No. PC-2004-2390, 2010 WL 5056132 (R.I. Super. Dec. 6, 2010).

at issue. On April 12, 2007, Jevic served a Request for Production of Documents on First Student (“the April 12 RFP”). First Student responded to the request on May 23, 2007. On August 17, 2010, Jevic served a Fourth Request for Production of Documents on First Student (“the August 17 RFP”). First Student responded to this request on October 13, 2010. In November of 2011, Jevic informed First Student that Jevic considered some of First Student’s responses inadequate. First Student supplemented a number of its responses, but failed to satisfy Jevic. Jevic subsequently filed the instant Motion to Compel.

II

Analysis

Through discovery, Rhode Island litigants can obtain information “regarding any matter, not privileged, which is relevant to the subject matter” of the pending action. Super. R. Civ. P. 26(b). Rule 34 of the Superior Court Rules of Civil Procedure authorizes any party to serve on another party a request to produce any designated documents which are within the other party’s “possession, custody or control” and are relevant to the subject of the litigation. Super. R. Civ. P. 34. As such, the recipient of a Rule 34 request is under an initial duty to provide all documents responsive to the request that are within its possession, custody, or control. See id.; see also 1 Robert B. Kent et al., Rhode Island Civil and Appellate Procedure § 34:6 (West 2004 & supp. 2011). Both Superior Court Rule 34 and its federal counterpart define “document” inclusively to account for changing technology.² See Zubalake v. UBS Warburg LLC, 217 F.R.D. 309,

² Our Supreme Court has “repeatedly stated that federal-court interpretations of a procedural rule that is substantially similar to one of our own state rules of civil procedure should serve as a guide to the construction of our own rule.” See Hall v. Ins.

316-17 (S.D.N.Y. 2003). Accordingly, electronic documents, including e-mail, are discoverable. Id. at 317.

When a party objects to a request for production of documents or fails to respond adequately, the party seeking discovery may move for an order compelling production pursuant to Rule 37 of the Superior Court Rules of Civil Procedure. Super. R. Civ. P. 37. The party resisting discovery bears the burden of persuasion as to its objections.³ See Vázquez-Fernández v. Cambridge Coll., Inc., 269 F.R.D. 150, 155-56. This Court has “broad discretion” in its approach to resolving discovery disputes. Corvese v. Medco Containment Servs., Inc., 687 A.2d 880, 881-82 (R.I. 1997).

Jevic argues that First Student’s responses to the April 12 RFP and the August 17 RFP are inadequate and asks this Court to order First Student to correct deficiencies in First Student’s responses. First Student counters that it has produced all responsive documents not otherwise privileged and that no other responsive documents are in its possession, custody, or control. This assertion appears throughout First Student’s

Co. of N. Am., 727 A.2d 667, 669 (R.I. 1999) (citing Smith v. Johns-Manville Corp., 489 A.2d 336, 339 (R.I. 1985)). As our Rule 34 is patterned after its federal counterpart, this Court shall refer to federal precedent where appropriate. Smith, 489 A.2d at 339.

³ In a Decision filed December 6, 2010 (“December 6 Decision”), this Court addressed First Student’s previous Motion to Compel discovery from Jevic. Citing DeCarvalho v. Gonsalves, 106 R.I. 620, 627, 262 A.2d 630, 634 (1970), this Court stated that “the burden of demonstrating requisite materiality under Rule 34 rests on the party seeking production.” Jevic bears that burden here. As used in this Court’s December 6 Decision and in DeCarvalho, however, “materiality” is simply a synonym for relevance. See Decarvalho, 106 R.I. at 627, 262 A.2d at 634. Thus, Jevic bears the burden of demonstrating that its requests are relevant to the subject matter of this litigation. This Court is satisfied that all of Jevic’s requests meet this very basic threshold.

Jevic does not, however, bear the burden of persuasion in every aspect of its Motion to Compel. Such an outcome would be inconsistent with the responding party’s initial duty to produce documents under Rule 34. See Super. R. Civ. P. 34.

responses to Jevic's Motion to Compel.⁴

When reviewing a dispute over a request for production of documents, this Court may consider: (1) whether the party resisting discovery has identified documents it considers responsive; (2) whether the party resisting discovery has responded consistently to both the initial request for production and the Motion to Compel; (3) whether the party seeking discovery attempted to narrow its request; (4) whether the party resisting discovery tried to comply with the narrowed request; (5) whether the party seeking discovery has shown or raised a reasonable inference that responsive documents actually exist and are in the resisting party's possession, custody, or control; and (6) any other relevant factor. See id.; see also In re Hunter Outdoor Prods., Inc., 21 B.R. 188, 192 (Bankr. D. Mass. 1982) (“[W]here the documents . . . sought to be produced have not even been shown to exist, or are not subject to a reasonable inference that they exist, the Court cannot compel their production.”). This Court shall address the adequacy of First Student's responses to the April 12 RFP and the August 17 RFP in turn.

⁴ In each of First Student's initial responses to the August 17 RFP, First Student accompanied its production of documents with a litany of objections. First Student asserted that Jevic's requests were vague, overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and/or sought disclosure of information subject to the attorney-client privilege, the attorney work-product doctrine, and/or a statutory right to confidentiality. First Student, however, failed to explain any of these assertions in its responses to the August 17 RFP or Jevic's Motion to Compel.

Rather, First Student resists Jevic's Motion on the ground that First Student has produced all responsive documents not otherwise privileged and that no other responsive documents exist in First Student's possession, custody, or control. As such, this Court declines to consider the merits of any of First Student's objections. See Vázquez-Fernández, 269 F.R.D. at 155-56 (observing that the mere statement that a discovery request is “overly broad, burdensome, oppressive and irrelevant” is not adequate to voice a successful objection and holding that “the party resisting discovery must show specifically how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive”); see also infra at 25-26 (discussing the importance of specifics in motions to compel discovery and objections thereto).

A

The April 12 RFP (Request No. 2)

On April 12, 2007, Jevic propounded three specific requests for production of documents on First Student. Only Request No. 2 is at issue here. Request No. 2 seeks: “A copy of all documents that refer or reflect the conclusions of First Student, including the conclusions of the Safety Action Team, as to whether or not the accident that is the subject of this litigation was preventable.” First Student responded: “No such documents exist as the Safety Action Team did not meet regarding this accident.”

Jevic observes that First Student’s answer to Request No. 2 only addresses the Safety Action Team’s conclusions as to the preventability of the accident and asks this Court to order First Student to provide documents reflecting First Student’s conclusions. First Student counters that it has fully complied with Request No. 2 and produced all responsive documents not otherwise privileged which reflect the conclusions of First Student as to whether the accident was preventable. First Student further asserts that it cannot produce documents that it does not have and that Jevic cannot show that First Student has additional responsive documents in First Student’s possession, custody, or control.

There is inconsistency in First Student’s responses to Request No. 2. First Student’s initial response to Request No. 2 only addresses the Safety Action Team. First Student now asserts that it has produced all documents regarding the conclusions of First Student as to the preventability of the accident. Such inconsistency gives rise to an inference that First Student has not completely responded to Request No. 2. See In re Hunter, 21 B.R. at 192. Further, despite First Student’s claims that it has produced all

responsive documents, First Student fails to state one example of a document it considers responsive.⁵ A lack of concrete examples casts doubt on the viability of First Student's contention that it has produced all responsive documents. See Corvese, 687 A.2d at 881-82.

In addition to these deficiencies in First Student's responses, the back and forth between First Student and Jevic regarding Request No. 2 signifies a fundamental disconnect between the two parties as to whether First Student has provided any responsive documents. Jevic essentially claims that First Student has produced no responsive documents. First Student, conversely, maintains that it has produced all of the responsive documents not otherwise privileged in its possession, custody, or control. The actual existence of responsive documents in First Student's possession, custody, or control, therefore, is inherent in First Student's position. Whether First Student has produced any of these documents is the issue.

In resolving this dispute, this Court observes that Jevic cannot prove that First Student has produced zero documents responsive to Request No. 2 absent this Court's review of every document First Student has produced. First Student, however, can quickly disprove Jevic's assertion that First Student has not produced responsive documents by identifying some specific documents First Student believes are responsive. Given these realities and First Student's inconsistent responses to Request No. 2, this Court concludes that it can neither fully grant, nor deny, Jevic's Motion to Compel relative to Request No. 2. Instead, this Court determines that a half-measure is appropriate. Id.

⁵ Notably, First Student does identify specific documents in some of its responses to the August 17 RFP.

Accordingly, First Student shall initially produce to Jevic five documents not otherwise privileged that First Student believes reflect First Student's conclusions as to the preventability of the accident.⁶ First Student shall also provide a sworn affidavit from a First Student official identifying the specific location(s) in which First Student found these five documents. Additionally, the affidavit shall attest that First Student has produced all documents not otherwise privileged that are responsive to Request No. 2, specifically define First Student's efforts to collect all documents responsive to Request No. 2, and state that First Student has exhausted its efforts to locate such documents.⁷ Fresenius Med. Care Holding Inc. v. Baxter Int'l, Inc., 224 F.R.D. 644, 650-51 (N.D. Cal. 2004) (requiring defendant to produce an affidavit where doubts arise as to the validity of defendant's claims that it has produced all responsive documents).⁸

⁶ Nothing in this Decision should be construed as preventing First Student from identifying more than five responsive documents if it is so inclined. The "five documents" figure is not the product of exact science. After considering the circumstances surrounding Request No. 2, this Court concludes that neither outright denial of Jevic's Motion, nor full compulsion is warranted. Requiring production of five responsive documents is a compromise approach consistent with this Court's conclusion. See Corvese, 687 A.2d at 881-82 (holding that the trial justice has "broad discretion" in granting or denying discovery orders).

⁷ The affidavit must specifically identify the types of documents First Student reviewed (e.g., e-mail, interoffice memoranda, letters) and the specific location(s) that First Student searched. Blanket claims that "First Student searched all its files or documents" are insufficient.

⁸ First Student contends that Jevic has not shown that First Student has additional responsive documents in First Student's possession, custody, or control and that this necessitates denial of Jevic's Motion to Compel. Had First Student answered that no responsive documents exist at all, Jevic would need to demonstrate otherwise before this Court could compel First Student to produce documents. This Court could nevertheless require First Student to produce an affidavit attesting that no responsive documents exist. See Colón v. Blades, 268 F.R.D. 129, 132-33; see infra at 26 and accompanying footnotes.

First Student, however, does not claim that documents responsive to Request No. 2 do not exist in its possession, custody, or control. Rather, First Student claims that it produced all responsive documents. Jevic, conversely, argues that First Student produced

B

The August 17 RFP

On August 17, 2010, Jevic propounded various requests for production of documents on First Student. Several of those requests are at issue here. The requests seek documents relating to: (1) First Student's policy permitting its employees to bring their small children to work with them on First Student buses; (2) other incidents where young children were injured on First Student buses; (3) Ilba's and Plaintiff's traffic law compliance records; (4) Ilba's and Plaintiff's First Student disciplinary history; (5) First Student's procedures regarding accidents; and (6) the accident at the center of this litigation. This Court shall address each category of request in succession.

1

First Student's Policy Permitting Employees to Bring Their Small Children to Work with them on First Student Buses (Request No. 1 and Request No. 6)

Jevic served First Student with two specific requests for production of documents regarding First Student's policy of allowing its employees to bring their small children to work with them on First Student buses: Request No. 1 and Request No. 6. Request No. 1 sought production of documents, drafts, or memoranda "regarding every First Student's [sic] policy that allowed pre-kindergarten children, including the children of bus monitors, to be brought on a First Student bus or van." Request No. 6 sought production

no such documents. This scenario is materially different, therefore, from one where a party seeks documents and receives a response that no documents exist. In the latter scenario, the party seeking discovery need only demonstrate a reasonable inference that a responsive document exists. Here, to the contrary, it is virtually impossible for Jevic to prove its claim, absent this Court undertaking a massive document review. Such distinct circumstances merit a different approach. *See Corvese*, 687 A.2d at 881-82 (holding that the trial justice has "broad discretion" in resolving discovery disputes).

of documents, memoranda, or notes “related to the alteration of First Student’s policies that are reflected in Percy Abbott’s memo of July 5, 2002.” First Student responded to both requests by identifying specific documents it considered responsive and indicating that it would make other responsive documents available.

Jevic states that First Student has produced memoranda following First Student’s alteration of the policy, but has not provided documents leading up to the change. Jevic asks this Court to compel First Student to produce all documents regarding the policy, including documents preceding First Student’s amendment of the policy. First Student does not address Jevic’s specific contentions relative to documents preceding the policy change. Rather, First Student contends:

“First Student has fully complied with this discovery request and has produced all documents that are within its possession, custody or control that are responsive and not otherwise privileged. All responsive documents produced for inspection and copying by Jevic were produced as they are ‘kept in the usual course of business’ as required by R.I. Super. R. Civ. P. Rule 34(b). Simply put, First Student cannot produce documents that it does not have, and Jevic has failed to demonstrate that any such further documents exist in First Student’s custody or control. Accordingly, this Court should deny this portion of Jevic’s Motion to Compel.” First Student’s Opp’n to Mot. to Compel at 5-6 (emphasis removed).

A form of this generic assertion appears throughout First Student’s responses to Jevic’s Motion.

First Student argues that Jevic’s Motion must fail because Jevic has not shown that First Student has any other responsive documents within First Student’s possession, custody, or control. This Court disagrees. Jevic has provided First Student’s answers to Plaintiff’s First Set of Interrogatories, which contain a number of statements relative to

First Student's policy. For example, First Student acknowledges that, at the time of the accident, it "had in place a procedure for an employee to meet conditions in order to bring their child on a bus." Jevic's Mot. to Compel, Ex. H, First Student's Answers to Pl.'s Interrogs., at 8. First Student further states that prior to the accident, its policies relative to children of employees riding its buses varied from region to region. Jevic's Mot. to Compel, Ex. H at 2-3, 9. Finally, First Student indicates that a new policy regarding its employees' abilities to bring their children to work with them on First Student buses "took effect after the accident and applied to all regions." Jevic's Mot. to Compel, Ex. H at 9.

Taken together, these statements suggest a shift in corporate policy. First Student replaced an assortment of procedures controlling its employees' abilities to bring their children to work with them on First Student buses in favor of a uniform, company-wide standard. This Court may infer that First Student discussed the policy change prior to actually altering the policy and documented these discussions in some form. See In re Hunter, 21 B.R. at 192. First Student does not expressly claim that documents of this sort do not exist.

Accordingly, this Court orders First Student to produce all documents not otherwise privileged—including e-mail and other electronically stored information—regarding First Student's policy of permitting employees to bring their children on First Student buses. This order not only encompasses documents following the policy change, but also includes documents relative to the internal discussions that preceded the policy change and documents pertaining to First Student's policies in other regions regarding employees bringing their children to work with them on First Student buses. First

Student shall also provide a sworn affidavit from a First Student official that (1) attests that First Student has produced all documents not otherwise privileged that are responsive to Request No. 1 and Request No. 6, (2) defines First Student's specific efforts to collect all documents responsive to the requests, and (3) states that First Student has exhausted its efforts to locate such documents.⁹ See Fresenius Med. Care, 224 F.R.D. at 650-51.

2

Other Incident Evidence (Request No. 7 and Request No. 8)

Jevic propounded two specific requests for documents regarding other incidents where children suffered injuries on a First Student bus: Request No. 7 and Request No. 8.

a

Request No. 7

Request No. 7 sought production of documents, injury reports, medical records, or claims reports regarding any incident where a child under the age of four years sustained an injury on a First Student bus or van. First Student responded that it would make any relevant documents within its possession, custody, or control available for Jevic's inspection and copying. Jevic contends that First Student did not provide any documents responsive to Request No. 7 and narrows its request for production to all documents related to every incident where a person under the age of eighteen months suffered an injury on a First Student bus from 1998 to 2003. First Student replies with the familiar assertion that it "fully complied with this discovery request" and produced all responsive documents that are within its possession, custody, or control and not otherwise

⁹ The affidavit must specifically identify the types of documents First Student reviewed (e.g., e-mail, interoffice memoranda, letters) and the specific location(s) that First Student searched. General assertions that "First Student searched all its files or documents" are insufficient.

privileged. First Student does not speak to Jevic's narrowed request.

The generality of First Student's reply makes it difficult for this Court to measure whether First Student has met its initial duty under Rule 34 to produce all responsive documents not otherwise privileged. Notably, First Student does not indicate whether it tried to comply with Jevic's narrowed request. As parties are encouraged to narrow requests as part of the discovery process, First Student's silence as to whether it attempted to produce this smaller segment of documents is unsettling. Dahl v. Bain Capital Partners, LLC, 655 F. Supp. 2d 146, 149 (D. Mass. 2009) ("The parties should cooperate as much as possible in exchanging information, for this collaboration helps to fulfill the overall goal of discovery: to focus on matters reasonably calculated to produce evidence admissible at trial." (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351-52 (1978))). First Student's decision not to identify specific documents it considers responsive to Request No. 7 raises similar concerns. See Corvese, 687 A.2d at 881-82.

First Student contends that this Court must deny Jevic's Motion because Jevic has not shown that First Student has additional responsive documents in First Student's possession, custody, or control. This Court acknowledges that Jevic has not made such an affirmative showing. However, this Court does not believe outright denial of Jevic's Motion is appropriate given the circumstances surrounding Request No. 7. The lack of clarity regarding whether First Student attempted to comply with the narrowed version of Request No. 7, in particular, gives this Court pause. See Dahl, 655 F. Supp. 2d at 149. Further, as with Request No. 2 in the April 12 RFP, Jevic cannot prove that First Student has not produced documents responsive to narrowed Request No. 7 absent this Court undertaking a massive document review. First Student, however, can readily disprove

Jevic’s assertion that First Student has not produced documents responsive to narrowed Request No. 7 by identifying some specific documents First Student believes are responsive.

Given these realities—especially First Student’s failure to indicate whether it tried to comply with narrowed Request No. 7—this Court deems a partial remedy appropriate. First Student shall produce five documents, not otherwise privileged that First Student considers related to incidents where a person under the age of eighteen months was injured on a First Student bus from 1998 to 2003. First Student shall also provide a sworn affidavit from a First Student official identifying the specific location(s) where First Student found these five documents.¹⁰ Additionally, the affidavit shall attest that First Student has produced all documents, not otherwise privileged, that are responsive to narrowed Request No. 7, specifically define First Student’s efforts to collect all documents responsive to narrowed Request No. 7, and state that First Student has exhausted its efforts to locate responsive documents.¹¹ See Fresenius Med. Care, 224 F.R.D. at 651.

¹⁰ Nothing in this Decision should be construed as preventing First Student from identifying more than five responsive documents if it is so inclined. This Court orders production of five documents for the same reasons it did so with regard to Request No. 2 in the April 12 RFP. See supra note 6.

¹¹ The affidavit must specifically describe the types of documents First Student reviewed (e.g., e-mail, interoffice memoranda, letters) and the specific location(s) that First Student searched. General statements that “First Student searched all its files or documents” are inadequate.

b

Request No. 8

Request No. 8 sought production of “[p]leadings related to any litigation filed as a result of any child under the age of four years that was injured on a First Student bus or van.” First Student responded with a litany of objections and stated that it is “not aware of any such litigation that is relevant to this case.” Jevic argues that First Student has not produced any documents responsive to Request No. 8 and amends Request No. 8 to seek all documents related to litigation filed as a result of any injury to a child under the age of twenty-four months suffered on a First Student bus from 1998 to 2003. Jevic asks this Court to compel First Student’s compliance with the amended request. First Student replies with the familiar assertion that it “fully complied with this discovery request” and produced all responsive documents within its possession, custody, or control that are not otherwise privileged.

Jevic’s and First Student’s dispute over Request No. 8 raises many of the same issues as their disputes over previous requests. First, there is inconsistency in First Student’s responses regarding Request No. 8. First Student’s initial response to Request No. 8 featured a list of objections and commented: “First Student is not aware of any such litigation that is relevant to this case.” Conversely, First Student now asserts that it has produced all documents responsive to Request No. 8. Such inconsistency gives rise to an inference that First Student has not completely responded to Request No. 8. See In re Hunter, 21 B.R. at 192.

Second, despite First Student’s claims that it has produced all responsive documents, First Student fails to provide one example of a document it considers

responsive.¹² A lack of specific examples belies First Student's contentions that it has produced all (or any) responsive documents. See Corvese, 687 A.2d at 881-82. Third, First Student does not state whether it tried to comply with Jevic's amended request. As parties are encouraged to cooperate throughout the discovery process, First Student's failure to state whether it attempted to respond to amended Request No. 8 casts some doubt on First Student's contention that it has indeed produced all responsive documents. See Dahl, 655 F. Supp. 2d at 149. Fourth, the dispute over Request No. 8 again poses a scenario where Jevic cannot prove that First Student has not produced any responsive documents without requiring this Court to perform a document review. At the same time, First Student can prove the contrary with relative ease. See supra at 6-7. Under these circumstances, this Court cannot simply deny Jevic's Motion to Compel.

This Court cannot, however, order First Student to comply with amended Request No. 8 either. Although amended Request No. 8 reduces the time-frame from which Jevic sought documents, the amended request materially expands the category of documents that Jevic sought in original Request No. 8. Original Request No. 8 sought production of “[p]leadings related to any litigation filed as a result of any child under the age of four years that was injured on a First Student bus or van.” Conversely, amended Request No. 8 seeks “all documents related to litigation filed as a result of any injury to a child under the age of 24 months that was injured on a First Student bus from 1998 to 2003.” “All documents” is a much broader term than “pleadings.” A decision granting Jevic greater discovery on a Motion to Compel than it initially sought would undermine Jevic's and First Student's ability to cooperate and conclude discovery. See Dahl, 655 F. Supp. 2d at

¹² First Student does identify specific documents it believes are responsive in some of its other responses to the August 17 RFP.

149. This Court, therefore, shall not order First Student to comply with the exact terms of either original Request No. 8 or amended Request No. 8.

Instead, this Court devises a resolution by combining the narrower terms in each version of Request No. 8. See Corvese, 687 A.2d at 881-82. First Student shall produce for Jevic five sets of pleadings related to litigation filed as a result of any injury to a child under the age of twenty-four months suffered on a First Student bus from 1998 to 2003.¹³ First Student shall also provide a sworn affidavit from a First Student official identifying the specific location(s) that First Student found these documents. Additionally, the affidavit shall attest that First Student has produced all pleadings that are responsive to Request No. 8 as narrowed by this Court, specifically define First Student's efforts to collect all responsive pleadings, and state that First Student has exhausted its efforts to locate responsive pleadings.¹⁴ See Fresenius Med. Care, 224 F.R.D. at 650-51.

3

Ilba's and Plaintiff's Traffic Law Compliance Records (Request No. 13)

Request No. 13 sought production of all documents evidencing Ilba's and Plaintiff's compliance, or lack of compliance, with traffic laws. In response, First Student referred Jevic "to documents previously exchanged among the parties during the course of litigation" without specifically identifying the documents. First Student also offered to make any relevant documents available for inspection and copying. Jevic

¹³ By "sets of pleadings," this Court means the complaint and its respective answer. Nothing in this Decision should be construed as preventing First Student from producing more than five sets of pleadings if it is so inclined. This Court orders production of five sets of pleadings for the same reasons it ordered production of five responsive documents with regard to other requests. See supra note 6.

¹⁴ The affidavit must specifically identify the location(s) that First Student searched. Blanket contentions that "First Student searched all its files or documents" are unsatisfactory.

argues that First Student has not produced any records responsive to Request No. 13 and moves to compel production. First Student responds that it has produced all responsive documents that are within its possession, custody, or control and not otherwise privileged.

After consideration of the circumstances surrounding Request No. 13, this Court concludes that compulsion is not warranted. Jevic has not shown or raised a reasonable inference that First Student has responsive documents in its possession, custody, or control. See In re Hunter, 21 B.R. at 192. Moreover, although First Student has not specifically identified responsive documents, First Student's answers themselves are not inconsistent. Accordingly, Jevic's Motion is denied as it relates to Request No. 13.

4

Ilba's and Plaintiff's Disciplinary History with First Student (Request No. 19 and Request No. 20)

Jevic propounded to First Student two specific requests for production of documents pertaining to any discipline First Student may have administered to Ilba and Plaintiff in their capacities as First Student employees: Request No. 19 and Request No. 20. Request No. 19 sought all documents related to any disciplinary action First Student administered with regard to either Ilba or Plaintiff. Request No. 20 sought all documents related to Ilba's and Plaintiff's termination of employment with First Student. First Student responded to both requests by indicating that it would produce all responsive documents not otherwise privileged.

Jevic contends that First Student has not produced any documents responsive to either request and asks this Court to compel First Student to do so. First Student replies

with its standard claim that it has fully complied with these discovery requests and produced all responsive documents not otherwise privileged. This Court will address Request No. 19 and Request No. 20 relative to Ilba and then turn to the requests as they relate to Plaintiff.

a

Ilba's Disciplinary History

First Student claims that it has produced all responsive documents and argues that this Court must deny Jevic's Motion because Jevic cannot show that First Student has additional responsive documents in First Student's possession, custody, or control. This Court disagrees.

In First Student's answers to Plaintiff's First Set of Interrogatories, First Student indicates that Ilba "was discharged." Jevic's Mot. to Compel, Ex. H at 5. Such an admission gives rise to an inference that documents relating to Ilba's termination and disciplinary history exist in First Student's possession, custody, or control. Beyer v. Medico Ins. Group., 266 F.R.D. 333, 335 (D.S.D. 2009) (resting grant of motion to compel partially on defendant's failure to offer explanation regarding evidence contradicting defendant's claim that no responsive documents exist). First Student, conspicuously, does not deny that it has documents responsive to Request No. 19 and Request No. 20, but claims that it has already produced all responsive documents. First Student nonetheless fails to identify even one specific document it considers responsive to the requests. Consequently, this Court again faces a scenario where Jevic cannot affirmatively prove that First Student has not produced any responsive documents without requiring this Court to review every document First Student has produced. More

specific responses on the part of First Student are necessary.

Accordingly, First Student shall produce to Jevic ten documents not otherwise privileged that First Student considers responsive to Request No. 19 and Request No. 20 as they pertain to Ilba. Five documents should relate to Ilba's disciplinary history as a First Student employee (Request No. 19) and five documents should relate to First Student's termination of Ilba (Request No. 20).¹⁵ See id. First Student shall also provide a sworn affidavit from a First Student official identifying the specific location(s) that First Student found these ten documents. Additionally, the affidavit shall attest that First Student has produced all documents that are responsive to Request No. 19 and Request No. 20 as they relate to Ilba, specifically define First Student's efforts to collect all documents responsive to the requests as they relate to Ilba, and state that First Student has exhausted its efforts to locate such responsive documents.¹⁶ See Fresenius Med. Care, 224 F.R.D. at 650-51.

b

Plaintiff's Disciplinary History

Jevic's request for production of documents relative to Plaintiff's disciplinary history with First Student and the end of her employment with First Student features many of the same issues discussed immediately above. However, there is a key

¹⁵ Nothing in this Decision should be construed as preventing First Student from identifying more than ten responsive documents if it is so inclined. To the extent possible, the five documents responsive to Request No. 19 should be different from the five documents responsive to Request No. 20. This Court orders production of five documents here for the same reasons it did so with regard to other requests. See supra note 6.

¹⁶ The affidavit must specifically identify the types of documents First Student reviewed (e.g., e-mail, interoffice memoranda, letters) and the location(s) that First Student searched. General claims that "First Student searched all its files or documents" are insufficient.

difference between Request No. 19 and Request No. 20 as they relate to Plaintiff and those requests as they relate to Ilba. This Court could infer that documents relative to Ilba's disciplinary history and discharge exist because First Student discharged Ilba from its employ. Nothing in First Student's responses or Jevic's Motion gives rise to a similar inference with regard to Plaintiff. Accordingly, to the extent Jevic's Motion to Compel seeks production of documents relative to Plaintiff's disciplinary history and the termination of Plaintiff's employment with First Student, the Motion is denied. See Corvese, 687 A.2d at 881-82.

5

First Student's Policies and Procedures Regarding Accidents (Request No. 16)

Request No. 16 sought production of "documents evidencing First Student's policies and procedures regarding accidents, the reporting of accidents and the preservation of data following accidents." First Student responded by identifying a number of specific documents it considered responsive to Request No. 16 and indicating that it would make any other responsive documents available for Jevic's inspection and copying. Jevic argues that First Student has not produced any documents responsive to this request and asks this Court to compel First Student's compliance with Request No. 16. First Student counters by listing specific documents that it considers responsive and asserts that it has produced all responsive documents in its possession, custody, or control.

After considering the circumstances surrounding Request No. 16, this Court concludes that compulsion is not warranted. First Student's responses to the initial Request No. 16 and Jevic's Motion to Compel are consistent. Further, First Student

specifically identified numerous documents that it considers responsive to Jevic's request. Jevic does not demonstrate how these documents are unresponsive to Request No. 16. Moreover, Jevic has not shown that First Student has other responsive documents in its possession, custody, or control, nor has Jevic raised an inference that this is so. Jevic's Motion to Compel as to Request No. 16 is therefore denied. See id.

6

The Underlying Accident (Request No. 17)

Request No. 17 sought production of "all documents relating to the accident." First Student responded by identifying specific documents it deemed responsive and stating that it would make all responsive documents available for Jevic's inspection and copying. Jevic asserts that First Student has produced no documentation relative to accident investigation or any correspondence, including e-mail, subsequent to the accident. Jevic asks this Court to compel production of all of First Student's correspondence, including e-mail, with AIG Claim Service and Stephen Fulton regarding the accident. Jevic also contends that First Student produced multiple copies of blank documents entitled "Crash Review," "Questions Regarding Personal Injury," "Questions Regarding Accidents," "Accident Report," and "In the Trainer's Corner—Analyzing Drivers' Accidents." As such, Jevic asks this Court to order First Student to produce all documents relative to the accident at the heart of this litigation. First Student replies with its standard assertion that it has produced all responsive documents that are within its possession, custody, or control and not otherwise privileged. First Student does not address any of Jevic's contentions relative to the correspondence with AIG Claim Service and Stephen Fulton or the blank documents.

Jevic's request for "all documents relating to the accident" is essentially a blanket request for every document connected to the events giving rise to this litigation. Such a request is overly broad and excessive in its generality. Parties should aim for some sort of specificity in their discovery requests. See id.; see also W.E. Aubuchon Co., Inc., v. BeneFirst, LLC, 245 F.R.D. 38, 43 (D. Mass. 2007) (considering the specificity of the request in deciding whether to grant a motion to compel). This Court will not compel First Student's compliance with so general a request, especially when doing so would likely require First Student to produce many of the same documents it has already produced.

Nonetheless, this Court's inquiry is not quite concluded. Within Jevic's Motion to Compel First Student's compliance with Request No. 17, Jevic seeks more specific categories of documents: (1) First Student's correspondence with AIG Claim Services and Stephen Fulton ("the AIG/Fulton Correspondence") related to the accident and (2) a variety of documents filled out in the wake of the accident which First Student produced to Jevic blank. First Student does not state whether it has already produced these documents or even attempted to locate any of them. Rather, First Student falls back on the general refrain that it fully complied with this discovery request and produced all responsive documents within its possession, custody, or control that are not otherwise privileged.

A party resisting discovery cannot avoid its obligations to produce requested documents by ignoring the request. As parties are encouraged to be as specific as possible in the discovery process, First Student's failure to state whether it attempted to produce this smaller segment of documents casts doubt on First Student's contention that

it has indeed produced all documents responsive to Request No. 17. Cf. W.E. Aubuchon, 245 F.R.D. at 43. Moreover, First Student's production of blank accident reporting documents begs further explanation. First Student's generic response to Jevic's Motion to Compel, however, offers no such answers. When a party relies on general, unsupported assertions in its responses to discovery requests, it becomes more difficult to determine whether the responding party has met its discovery obligations.

Accordingly, this Court grants Jevic's Motion to Compel First Student's compliance with Request No. 17 in a limited fashion. See Corvese, 687 A.2d at 881-82. First Student shall produce all of the AIG/Fulton Correspondence related to the accident, including e-mail correspondence. First Student shall also produce completed versions of the following blank documents already in Jevic's possession to the extent those completed documents relate to the accident: "Crash Review," "Questions Regarding Personal Injury," "Questions Regarding Accidents," "Accident Report" and "In the Trainer's Corner—Analyzing Drivers' Accidents."¹⁷ Additionally, First Student shall provide a sworn affidavit from a First Student official attesting that First Student has produced (1) all of the AIG/Fulton Correspondence pertaining to the accident and (2) complete versions of all of the blank documents First Student previously provided as they relate to the accident. The affidavit shall also specifically define First Student's efforts to collect the AIG/Fulton Correspondence and the completed documents and state

¹⁷ This Court is not ordering First Student to create documents. First Student need only produce complete versions of the blank documents to the extent First Student completed these documents in response to the accident at the center of this litigation. If First Student did not fill out these documents in response to the accident, First Student shall say so expressly in an affidavit.

that First Student has exhausted its efforts to locate such documents.¹⁸ See Fresenius Med. Care, 224 F.R.D. at 650-51.

III

An Observation on Discovery in this Litigation

This Court cannot emphasize enough how important it is for parties seeking discovery to explain their reasoning for filing Motions to Compel. It is similarly crucial for parties resisting discovery to explain their opposition. In re Sciaba, 334 B.R. 295, 297 (Bankr. D. Mass. 2005) (noting that Rule 37 mandates “cooperation among the parties and well-founded bases for resistance as a prerequisite to court intervention”). When arguing that discovery should or should not be had, parties should support their cases not only through citation to applicable precedent, but also by reference to deposition testimony, admissions of parties, answers to interrogatories, affidavits, and/or other specific documents.

Moreover, a responding party’s unsupported assertion that it “has fully complied with a discovery request” or that “no responsive documents exist” is an inappropriate response to a discovery request. Such responses lead to Motions to Compel that might otherwise be avoided. Accordingly, as this litigation proceeds, parties who, in good faith, believe they have produced all responsive documents must provide an affidavit to that effect. Colón v. Blades, 268 F.R.D. 129, 132-33 (D.P.R. 2010) (“When a party claims that the requested documents have already been produced, it must indicate that fact under oath in response to the request.”); Rayman v. Am. Charter Fed. Sav. & Loan Ass’n, 148

¹⁸ The affidavit must specifically identify the types of documents First Student reviewed (e.g., e-mail, interoffice memoranda, letters) and the location(s) that First Student searched. Blanket assertions that “First Student searched all its files or documents” are inadequate.

F.R.D. 647, 651 (D. Neb. 1993) (holding same). Parties who claim that no responsive documents exist are under a similar obligation.¹⁹ This approach reduces the need for an in camera review of hundreds, if not thousands, of documents. This Court, however, does not rule out such a review as a matter of course. Where the circumstances dictate, this Court shall review whatever documents that it concludes it must.

This Decision is not the tocsin signaling the end of discovery. Upon receipt of First Student's documents and affidavit(s), Jevic may seek supplemental discovery from First Student. Any party, in fact, that needs further discovery should request it. Such requests, however, should be made expeditiously. To the extent additional Motions to Compel are necessary, the parties are to comply with the guidelines laid out above.

IV

Conclusion

For the foregoing reasons, this Court grants Defendant Jevic Transportation, Inc.'s Motion to Compel production of documents from Defendant First Student, Inc. in part and denies it in part. First Student shall produce documents and affidavits in accordance with the terms of this Decision. First Student has thirty days from the date of this Decision to comply. Counsel shall prepare an appropriate Order for entry.

¹⁹ The proper procedure for stating that all responsive documents have already been produced or that no responsive documents exist is an answer from a party under oath. 7 James Wm. Moore *et al.*, Moore's Federal Practice § 34.13 (3d ed. 2012); see Colón, 268 F.R.D. at 132-33. This Court, however, did not order Jevic to produce such affidavits when Jevic claimed that no responsive documents existed in Jevic's possession, custody, or control in answer to First Student's 2010 Motion to Compel. For consistency's sake, therefore, this Court declines to order First Student to produce an affidavit regarding Jevic's requests that did not warrant compulsion (*i.e.*, Request No. 13, Request No. 16, and the portions of Request No. 19 and Request No. 20 regarding Plaintiff). In the future, this Court expects parties who believe that they have produced all responsive documents to provide an affidavit to that effect. The same is true for parties who claim that no responsive documents exist. Colón, 268 F.R.D. at 132-33.