UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KEVIN WALLACE,	*	
	*	
Plaintiff,	*	
	*	
v.	*	**CIVIL NO. SA-11-CA-00099-FB**
	*	
TESORO CORP. and TESORO REFINING AND MARKETING,	*	
	*	
Defendants.	*	

O R D E R

This case involves claims that defendants, Tesoro Corporation and Tesoro Refining and Marketing (jointly referred to as "Tesoro" or "defendants") terminated plaintiff, Kevin Wallace's employment for engaging in protected activity pursuant to the Sarbanes-Oxley Act of 2002 ("SOX") in violation of 18 U.S.C. § 1514A. Before the court are the following motions: plaintiff, Wallace's Motion to Exclude Defendant's Expert Witness (docket nos. 106 and 108), to which defendants have responded (docket no. 107); plaintiff's Motion to Compel (docket nos. 110 and 115), to which defendants have responded (docket nos. 111 and 114); defendants' Motion for Leave to File Evidence (docket no. 112)[1], to which no response has been filed; and plaintiff's Opposed Motion for Leave to File Supplemental Reply

[1] In an advisory filed on August 17, 2016, defendants state that their Motion for Leave to File Evidence is unopposed. (Docket no. 113).

(docket nos. 116/117).[2] Upon consideration of the motions, responses and applicable law, plaintiff's Motion to Exclude Defendant's Expert Witness is **DENIED** (docket no. 106); plaintiff's Motion to Compel is **GRANTED in part and DENIED in part** (docket no. 110); defendants' Motion for Leave to File Evidence is **GRANTED** (docket no. 112); and plaintiff's Motion for Leave to File Supplemental Reply is **GRANTED** (docket no. 116).

I. Motion to Exclude Defendant's Expert Witness

Tesoro has designated Bruce Tophoj both as both a fact witness who "may testify regarding issues raised by the pleadings" and as an non-retained testifying expert who "is expected to testify regarding [p]laintiff's employment with Tesoro, including [p]laintiff's job skills, training, management style, his ability to work with others, standing and job performance related to employee relations." Wallace moves to exclude Tophoj's testimony, maintaining that Tesoro has failed to provide information regarding Tophoj's educational background and training, has only met Wallace on two occasions, is not qualified to opine on Wallace's mental state and has not identified any scientific method used to reach his conclusions. In particular, plaintiff objects to the following opinions: that plaintiff "was a directive and autocratic manager who was unwilling to compromise his opinion or effectively listen to

[2] The non-movant refers to itself alternately in the singular and the plural without distinction.

other viewpoints"; "that Wallace's leadership style would be very difficult to change and that he possessed very little potential for behavioral change as a manager"; and finally, that "Wallace's management style was creating a great deal of stress within his department . . . ."

Defendant contends that because Tophoj is a nonretained expert, defendant was only required to disclose the subject matter of Tophoj's testimony and a summary of the facts and opinions to which he is expected to testify. Rule 26(a)(2)(B) provides that "[u]nless otherwise stipulated or ordered by the court, [ ] disclosure [pursuant to Rule 26(a)(2)(A)] must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." **FED.R.CIV.P. 26(a)(2)(B).** Subsection (C) provides that if a report is not required pursuant to subsection (B), the disclosure must state: "the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705;" and "a summary of the facts and opinions to which the witness is expected to testify." ***Id.*, (C).** The burden of showing that the proposed expert is not required to submit a report is on the party seeking to avoid producing a full expert report. ***Skyeward Bound Ranch v. City of San***

Antonio, No. SA-10-CV-0316-XR, 2011 WL 2162719, at *2 (W.D. Tex. June 1, 2001)(*citing* ***e.g.***, ***Meredith v. Int'l Marine Underwriters***, No. JKB-10-837, 2011 WL 1466436, at *4 (D.Md. Apr. 18, 2011)("A party seeking to avoid producing an expert report bears the burden of demonstrating that the witness is a hybrid."); ***Morris v. Wells Fargo Bank***, No. 09-CV-02160-CMA-KMT, 2010 WL 2501078, at *3 (D.Colo. June 17, 2010)(requiring the party offering the expert to set forth some evidence about why the expert is exempt from submitting an expert report because that party is more likely to possess the information necessary to establish the status of the witness)).

Here, Tophoj is an employee of the defendant and could feasibly have duties that regularly include giving expert testimony, thereby requiring him to submit a written report pursuant to **FED.R.CIV.P. 26(a)(2)(B).** A report under this section must contain the following:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the facts or data considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

> (vi) a statement of the compensation to be paid for the study and testimony in the case.

FED.R.EVID. 26(a)(2)(B). Defendant does not dispute that, pursuant to subsection (C), they merely disclosed the subject matter of Tophoj's testimony and a summary of the facts and opinions to which he is expected to testify. Further, defendant submits no evidence that Tophoj was excluded from providing a full expert report pursuant to subsection (B).

Because defendant has failed to meet its burden of showing Tophoj was not required to produce a full expert report, Tophoj may not testify as an expert pursuant to **FED.R.EVID. 702.** However, Tophoj may testify regarding matters within his personal knowledge. **FED.R.EVID. 602.** Tophoj may also testify regarding his lay opinions provided his opinions are 1) rationally based on his perception; the testimony is helpful to clearly understand his testimony or to determine a fact in issue; and his testimony is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. **FED.R.EVID. 701.** Much like the non-expert treating physician who may be asked questions which implicate his expertise but whose testimony is based on the physician's personal knowledge of the examination, diagnosis and treatment of a patient, Tophoj's testimony and opinions pursuant to Rule 701 should be rationally based on his perception. ***Id.*** This likely includes testimony

regarding his experiences working with Wallace, as well as with other employees Tophoj dealt with regarding Wallace, and may implicate Tophoj's expertise in employee training and organizational development. ***See Skyeward Bound Ranch***, 2011 WL 2162719, at *2 (*citing* ***Young v. United States***, 181 F.R.D. 344, 346 (W.D.Tex. 1997)("holding that unless a treating physician has been specifically retained as an expert, his testimony [should be] based on the physician's personal knowledge of the plaintiff's treatment and cannot be extended to issues not involved with the treatment, examination, or diagnosis of the patient")).

Tophoj states that on two separate occasions, one in 2008 and the other in 2009, he was asked to facilitate meetings involving Wallace. He also states that in early 2010, he was advised by Paul Cashion, the Human Resources Manager, that a complaint had been filed against Wallace. Tophoj asserts that Cashion asked him specifically what he thought of Wallace's management style, whereupon Tophoj told Cashion that "based on his experience working with and supporting Wallace for several years on several matters, Wallace was a directive and autocratic manager who was unwilling to compromise his opinion or effectively listen to other viewpoints." This opinion appears to be based on Tophoj's personal knowledge rather than any scientific, technical, or other specialized knowledge.

FED.R.EVID. 701. Plaintiff's objections that Tophoj only saw Wallace on two occasions and is not qualified to render an opinion as to Wallace's mental state are unavailing. Plaintiff may certainly cross-examine Tophoj regarding his personal knowledge. Further, the Court does not believe this opinion, or any of Tophoj's opinions, render "psychological diagnoses" as plaintiff suggests; these objections are overruled.

Tophoj also seeks to testify "that Wallace's leadership style would be very difficult to change and that he possessed very little potential for behavioral change as a manager." To the extent Tophoj bases this opinion on his personal knowledge of Wallace's management style, this testimony is also admissible pursuant to **FED.R.EVID. 701.**

Lastly, plaintiff objects to Tophoj's opinion that Wallace's management style was creating a great deal of stress within his department. Defendant states that this opinion is based on Tophoj's firsthand knowledge and that Lianne McClure told Tophoj that she was considering leaving the company because of Wallace. As such it appears to be lay witness testimony offered pursuant to **FED.R.EVID. 701.**

Wallace argues these opinions are not relevant; however, defendants maintain Wallace was terminated for legitimate, non-discriminatory, job-related reasons. (Docket no. 94, Defendants' Answer to Plaintiff's Fourth Amended Complaint, pg.

8). As such, these opinions are relevant. Plaintiff further contends that Tophoj's opinions are more prejudicial than probative. To justify exclusion of evidence pursuant to Rule 403, the danger of unfair prejudice must substantially outweigh the evidence's probative value. **FED.R.EVID. 403.** Generally, this determination is best reserved until trial when the Court is in a better position to employ the balancing process contemplated by the rule. ***Adams v. Ameritech Servs., Inc.***, 231 F.3d 414, 428 (7th Cir. 2000). Accordingly, these objections are **OVERRULED.**

The Court notes that in filing this motion, plaintiff sought to exclude "Tophoj's opinions and proposed testimony on the grounds that they do not meet the standards set forth by the United States Supreme Court in ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993), and its progeny." While the Court agrees that defendants have not met their burden pursuant to Rule 702 and ***Daubert***, the Court **DENIES** plaintiff's motion to exclude Tophoj's opinions and testimony, finding that to the extent Tophoj's opinions and testimony are offered pursuant to **FED.R.EVID. 701** as a non-retained expert, they are permissible.

II. Motion to Compel

A. The parties' motions for leave

Initially, the Court addresses defendants' motion for leave to file evidence supporting defendants' response to plaintiff's motion to compel (docket no. 112), and plaintiff's opposed

motion for leave to file a supplemental reply to plaintiff's motion to compel (docket no. 116). In support of their motion, defendants maintain that three critical witnesses were not available until after defendants' response was due and consequently, defendants filed their response simultaneously with their motion for leave to supplement their evidence. Defendants include a Certificate of Conference stating that an attempt to confer with opposing counsel was made but defense counsel could not reach plaintiff's counsel. ***But see*** **LOCAL COURT RULE CV-7(i)** (providing that "[t]he court may refuse to hear or may deny a nondispositive motion unless the movant advises the court within the body of the motion that counsel for the parties have first conferred in a good-faith attempt to resolve the matter by agreement and, further, certifies the specific reason that no agreement could be made.").

It is unclear why defendants waited until the day their response was due to advise the Court of their inability to contact critical witnesses. In any event, defendants subsequently advised the Court that their motion was unopposed. (Docket no. 113). Defendants' supplement was then filed on August 17, 2016, the same date that plaintiff's reply was due and, in fact, filed. Because plaintiff was unaware of the evidence that defendants submitted when plaintiff filed his reply, plaintiff subsequently filed a motion for leave to file a

sur-reply. (Docket no. 116). Plaintiff's Certificate of Conference states that counsel for plaintiff sent opposing counsel an email and received no response; therefore, counsel for plaintiff is unaware of whether the motion is opposed or not. The Court notes that both certificates are deficient and do not demonstrate a good faith attempt to confer. **LOCAL COURT RULE CV-7(i).** However, rather than deny both motions, the Court reluctantly grants both.

The Court does so, in part, because as the movant, plaintiff is entitled to the last word. ***See Half Price Books, Records, Magazines, Inc. v. Riepe***, No. 3:98-CV-0585-P, 1998 WL 329383, *2 (N.D.Tex. June 12, 1998); ***see also*** **LOCAL COURT RULES CV-7(f)(1)**(a party may file a reply in support of a motion and absent leave, no further submissions are allowed). Permitting the nonmovant to submit evidence after the deadline for filing a response without affording the movant an opportunity to respond undermines the rule's intent. Accordingly, both defendants' Motion for Leave to File Evidence (docket no. 112), and plaintiff's Motion for Leave to File a Supplemental Reply are **GRANTED** (docket no. 116).

B. Wallace's Motion to Compel

Plaintiff moves for an order compelling documents and data within defendants' possession, custody or control. Plaintiff states that defendants have objected to producing much of the

information and documents requested and/or have thwarted discovery by refusing to conduct sufficient ESI searches on their internal systems. In particular, plaintiff seeks to compel discovery relating to five areas: 1) Wallace's investigation of Tesoro's misreporting of taxes as revenue; 2) Wallace's laptop, Blackberry and Team Shared Drive; 3) the analysis conducted by Deloitte regarding Tesoro's financial controls; 4) evidence of the existence of a litigation hold; and 5) emails and files relating to defendant's stated reason for discharge.

Federal Rule of Civil Procedure 26, as amended, governs the scope of permissible discovery, providing that:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED.R.CIV.P. 26(b)(1). A party seeking discovery may move for an order compelling production against a party that has failed to answer an interrogatory or to produce documents requested pursuant to Federal Rules of Civil Procedure 33 and 34. ***See***

FED.R.CIV.P. 37(a)(3)(B)(iii)-(iv). "[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." **FED.R.CIV.P. 37(a)(4).**

To prevail on a motion to compel or resist a motion for protective order, the party seeking discovery may well need to make its own showing of many or all of the proportionality factors set out in Rule 26(b)(1); however, a party resisting discovery still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b) by coming forward with specific information to address--insofar as that information is available to it--the factors enumerated in Rule 26(b)(1). ***Areizaga v. ADW Corp.***, 314 F.R.D. 428, 435 (N.D.Tex. 2016) (*citing* **FED.R.CIV.P. 26(b)(1)**).

1. Wallace's investigation of Tesoro's misreporting of taxes as revenue

a. Wallace's First Requests for Production Nos. 3, 4, 5 & 8

Wallace states Requests Nos. 3-5 and 8 seek specific categories of files relating to Wallace's investigation of Tesoro's misreporting of taxes collected as revenues for accounting purposes. In particular, Request No. 3 seeks the Netback Analysis reports and findings Wallace maintains he and his group were responsible for creating with respect to several of Tesoro's refineries throughout the country during the time in

question. Defendants objected that the request was overbroad and unduly burdensome as to all refinery markets except that of the Pacific Northwest. Subject to these objections, Tesoro agreed to produce responsive documents, if any, for the Pacific Northwest. Defendants subsequently produced some documents pursuant to the Protective Order and now state that there are no other responsive documents.

Although defendants seek to limit production of documents to those pertaining to the Pacific Northwest, Wallace maintains that he was also involved in investigating the following markets: Alaska, Hawaii, Anacortes, Golden Eagle (San Francisco), Los Angles, Salt Lake City, and Mandan North Dakota. Given the importance of this investigation to plaintiff's claim, as well as defendants' failure to locate documents pertaining to the Pacific Northwest refinery, the Court believes defendants should produce responsive documents pertaining to all of the refineries listed in RFP No. 3.

This is not a question of Wallace fishing for information. Wallace has submitted an affidavit stating that prior to his termination, he was assigned the project of investigating and reviewing findings pertaining to Tesoro's financial controls in the following geographic markets: Pacific Northwest (PNW, including Washington State and Oregon), Plains (North Dakota and Minnesota), Mountain (Utah, Nevada), Alaska, Hawaii and

California (northern and southern). (Docket no. 110, exh. A, pgs. 2-3). Clearly, this information is relevant. Further, the Court believes the discovery is proportional to the needs of the case, particularly considering that defendants, rather than Wallace, have access to the relevant information; the discovery is important in resolving the issues; and its likely benefit outweighs the burden or expense of the proposed discovery.

Requests Nos. 4, 5 and 8 seek emails authored or received by specified persons and PowerPoint presentations created by Wallace and his team, pertaining to the Netback Analysis reports and findings during the time in question. Defendants initially objected that these requests were vague, overbroad, unduly burdensome, not proportional and sought information that was not relevant. Subject to its objections, defendants maintained that their ESI search efforts had not located responsive emails or files. Defendants now maintain, "without reliance on their objections," that no documents have been withheld in response to Request Nos. 3-5 and 8 and further, that there are no responsive documents.

Plaintiff replies that defendants have refused to employ a Boolean ESI search and instead, have "utilized an ESI search methodology that was virtually guaranteed to avoid finding relevant ESI." With regard to Request No. 4, plaintiff states that defendants searched for "relevant" ESI by combining each of

plaintiff's suggested search terms with the following phrase taken verbatim from the Request: "potential or actual improper recognition of revenue due to the mistreatment of taxes". Indeed one could hardly expect to locate any documents with such a restrictive search. Clearly, the Requests seek documents and information that are relevant and pertain to the central issue here: Tesoro's misreporting of taxes as revenue. Further, for reasons previously stated, the discovery sought is proportional to the needs of the case. The fact that Tesoro has employed such a restrictive qualifier, resulting in its inability to locate a single document responsive to this central issue, suggests an unwillingness to cooperate to identify and fulfill legitimate discovery needs.

Plaintiff's motion to compel is **GRANTED** as to Requests Nos. 3, 4, 5 and 8. Defendants are **ORDERED** to produce documents regarding each of the geographic locations set out in plaintiff's First Request for Production No. 3 and further, must employ a Boolean search in searching for documents responsive to these requests.

b. Wallace's Second Request for Production No. 5

Plaintiff's Request No. 5 sought any and all emails authored or received by plaintiff for the five and a half month period preceding his discharge. Defendants respond that this request is overly broad, unduly burdensome, not reasonably

limited in time and scope, vague and ambiguous, not proportional, and seeks information that is not relevant. In their response, defendants state that "there are more tailored and less burdensome methods to request the data."

Having previously granted plaintiff's motion to compel as to Plaintiff's First Request for Production Nos. 4 and 5, which seek emails created and received by plaintiff as well as other persons, the Court agrees that Request No. 5 contained in Plaintiff's Second Request for Production is burdensome and not proportional to the needs of this case.

Plaintiff's motion to compel as to Plaintiff's Second Request for Production No. 5 is, therefore, **DENIED**.

c. Wallace's Fourth Request for Production Nos. 3, 4 and 5

Plaintiff states that it served its Fourth Request for Production Nos. 3, 4 and 5 "[i]n a final effort to submit requests for the netback analysis investigation emails and files in a form that Tesoro would accept and respond to without a court order." In light of the Court's Order granting plaintiff's motion to compel defendants' responses to plaintiff's First Request for Production Nos. 3, 4, 5 and 8, pertaining to this same information, the Court **DENIES** plaintiff's motion to compel as to Request Nos. 3 and 4 contained in plaintiff's Fourth Request for Production.

Plaintiff also seeks a motion to compel with respect to Request No. 5, which seeks "[a]ll calendar data from Kevin Wallace's Outlook file(s) which existed at the time of his discharge." Defendants objected to this request on the grounds that it was overly broad, unduly burdensome, and not reasonably limited as the request did not identify a subject for the events. Further, defendants objected that this request sought "discovery of documents that are not relevant, unrelated to the issues and merits in this case, and not proportional to the needs of the case as to the absence of a subject for the calendar entries requested."

Plaintiff, who was initially hired by Tesoro in June of 2004 and terminated in March of 2010, sought this information to recreate a timeline of events. As such, the information is relevant. However, plaintiff was employed by Tesoro for almost six years and his complaints appear to focus on events occurring during the year prior to his termination. Consequently, the Court agrees that the six year period requested is overbroad and not proportional to the needs of the case. Limiting this request to an eighteen month period should allay defendants' concerns and result in the exchange of relevant documents and information. Accordingly, plaintiff's motion to compel defendants' responses is **GRANTED as modified** as to Request No. 5 contained in plaintiff's Fourth Request for Production;

defendants shall produce the requested information from January 1, 2009 to June 30, 2010.

2. Discovery from Wallace's laptop, Blackberry and Team Shared Drive.

a. Plaintiff's First Request for Production Nos. 33-36

Request Nos. 33-36 seek documents and information that was in Wallace's possession at the time of his discharge. The specific language of these requests is set out below:

> RFP No. 33: Produce copies of the physical files and reports as well as Plaintiff's laptop and hard drive that were in Plaintiff's office at the time of Plaintiff's termination from Defendant (March 10, 2010).
>
> RFP No. 34: Produce printout(s) of the of the [sic] folder/file directory which evidences the folders and files in the Pricing and Commercial Analysis Departments networked common shared drive as they existed on March 10, 2010.
>
> RFP No. 35: Produce the documents which evidence the dates in which the files that were in the Marketing shared drive (in the immediately preceding Request for Production) on March 10, 2010 were edited and/or deleted.
>
> RFP No. 36: Produce the documents which evidence the identities of the person(s) that edited and/or deleted the files responsive to Request for Production No. 34 that were in the Marketing shared drive after March 10, 2010.

Defendants object that these requests are overly broad, vague and ambiguous, not proportional and seek information that is not relevant. Subject to their objections, defendants made no production.

In his declaration, Wallace states that the day he was terminated, his laptop included emails, reports and working

files relating to Wallace's investigation into Tesoro's unlawful financial activities that are at issue in this lawsuit. Clearly, information contained on plaintiff's laptop and defendant's hard drive, as well as papers in Wallace's office at the time of his discharge, regarding the investigation being conducted at the time Wallace was discharged, are relevant. The fact that defendants objected on various grounds including relevancy and have failed to produce *any* documents or information responsive to these requests is further evidence of defendants' unwillingness to cooperate to identify and fulfill legitimate discovery needs. Further, defendants' contention that "the reconstruction of this information is all but impossible and would require unnecessary and disproportionate time and expense" "due to the scale and size of Defendants' archives" is unpersuasive. The information and documents sought appear limited in scope and a search for the relevant time period would not appear overly burdensome. Plaintiff's motion to compel the production of documents and information in response to Plaintiff's First Requests for Production Nos. 33-36 is, therefore, **GRANTED**.

b. Wallace's Blackberry Device

Defendants contend that the parties previously agreed to have Pathway Forensics complete the extraction, review and processing of the Blackberry and that plaintiff has delayed this

process by suggesting that a different person/company complete the task. In his reply, plaintiff asserts that he never agreed to have the Blackberry shipped outside of the Court's jurisdiction. Based on the foregoing, defendants are **ORDERED** to submit the Blackberry to a person or company, mutually agreed upon by the parties, located within the Court's jurisdiction, within thirty (30) days from the date of this Order.

3. Discovery relating to the analysis conducted by Deloitte

Plaintiff maintains that in late 2008, Tesoro retained Deloitte to "assess the effectiveness of Tesoro's commercial business processes and systems and their relationship to Tesoro's overall performance." Wallace states he was on the team that assisted in gathering information and data and that he was provided with a copy of Deloitte's final report. Wallace goes on to state that he was subsequently ordered to surrender the report, which he alleges was unfavorable to Tesoro. Plaintiff sought this information pursuant to Request No. 8 and now seeks an order compelling defendants to produce all documents regarding this assessment in defendants' possession, custody or control.

Defendants respond that their review of company records indicates that no such study was conducted and that there are no responsive documents. In support thereof, defendants submit the declaration of Andrea Encina, a Contract Administrator Assistant

in Tesoro's Records & Information Governance department. (Docket no. 114, exh. 4). Ms. Encina states that she searched within the departmental managed contract system and the Supply Chain departmental contract system for contracts or agreements with Deloitte for the relevant time period for services involving assessing the effectiveness of Tesoro's commercial business processes and systems and "there does not appear to be any" such contract.

Rule 34 requires a party, served with a relevant request, "to produce ... items in the responding party's possession, custody, or control." **FED.R.CIV.P. 34(a)(1)(A).** This includes documents within the possession or custody of a non-party. ***Perez v. Perry***, SA-11-CV-360-OLG-JES, 2014 WL 1796661, at *1 (W.D.Tex. May 6, 2014)(*citing* ***e.g. In re NTL, Inc. Secs. Litig.***, 244 F.R.D. 179 (S.D.N.Y. 2007)("neither legal ownership nor physical possession of documents required for a party to 'control' them"); ***Rosie D. v. Romney***, 256 F.Supp.2d 115 (D.Mass. 2003)("State officials had 'control' over documents in non-party state agency's possession")). A party has control over documents not otherwise in its possession "when that party has the right, authority, or practical ability to obtain the documents from a nonparty." ***Perez***, 2014 WL 1796661, at *1 (*quoting* ***Shell Global Sols. (US) Inc., v. RMS Eng'g, Inc.***, No.

4-09-3778, 2011 WL 3418396, at *2 (S.D.Tex. Aug. 3, 2011) (citations omitted)).

Here, the fact that defendants have no record of the study does not relieve defendants of the obligation under Rule 34 of obtaining the documents from a nonparty that does. Accordingly, plaintiff's motion to compel is **GRANTED** as to Request No. 8 contained in Plaintiff's Second Request for Production.

IT IS ORDERED that defendants obtain the requested information from Deloitte or any other third party from whom defendants "[have] the right, authority, or practical ability to obtain the documents" and that they timely produce this information to plaintiff in accordance with this Order.

4. Evidence of a litigation hold

Plaintiff's Third Request for Production No. 28 seeks the production of "all correspondence, letters, e-mails and directives issues to Tesoro Corp and/or Tesoro Refining and Marketing employees notifying them of the litigation hold incident to Plaintiff's claims." Plaintiff asserts that due to the lack of documents produced in this case, it appears that documents were not properly preserved and "a motion for sanctions relating to the proper preservation of evidence is possible."

Defendants objected that the request was overly broad, not reasonably limited in scope, disproportionate, and sought privileged and protected documents, as well as documents that were not relevant. Defendants state they are withholding documents on the basis of privilege. The Court defers ruling on this Request until a later date. In the event defendants produce the information they are being ordered to produce, it is unlikely that the Court will require the requested information to be disclosed. Accordingly, plaintiff's motion to compel information and documents responsive to Request No. 28 contained in Plaintiff's Third Request for Production is **DENIED** subject to being reurged.

5. Emails and files relating to defendant's stated reason for discharge

Lastly, plaintiff seeks emails and documents relating to Tesoro's assessment of Wallace as an employee and the facts surrounding Wallace's termination, allegedly due to complaints by a subordinate employee.

a. Plaintiff's Fourth Request for Production No. 1

Wallace's Request No. 1 sought emails, drafted or received by twenty-three named individuals from June 1, 2009 through March 18, 2010, that discuss or reference Wallace. In his motion, Wallace states he is seeking emails about him that were drafted or received by those who worked most closely with

Wallace or who defendants have listed as a witness in support of Tesoro's stated reason for discharging Wallace. Defendants respond this request is overbroad, unduly burdensome, not reasonably limited in scope and disproportional to the needs of the case. Defendants further maintain that the request, which would result in the production of emails entirely unrelated to the present lawsuit, seeks information that is not relevant and would require defendants to spend thousands of dollars reviewing this information.

This information is clearly relevant as it pertains to plaintiff's claims that he was wrongfully discharged. Further, to the extent plaintiff seeks information from June 1, 2009 to March 18, 2010 pertaining to persons defendants have listed as witnesses in support of Tesoro's stated reason for discharging Wallace, the request is reasonably limited in time and scope. Additionally, the Court finds the information sought is proportional to the needs of the case, particularly given the parties' relative access to this information and the importance of this discovery in resolving the issue of why plaintiff was terminated. Although defendants contend that they will incur thousands of dollars in reviewing documents, it is likely that much of this same evidence will have to be reviewed regardless given that defendants have designed these witnesses in support of Tesoro's stated reason for discharging plaintiff.

Accordingly, plaintiff's motion to compel the production of documents and information as to Request No. 1 contained in Plaintiff's Fourth Request for Production is **GRANTED.**

IT IS THEREFORE ORDERED that defendants produce all emails (with any attachments), that discuss or reference Wallace, and were drafted, sent or received from June 1, 2009 through March 18, 2010 by all persons defendants have listed as witnesses defendants may call in support of Tesoro's stated reason for discharging Wallace.

b. Plaintiff's First Request for Production No. 37

Similarly, plaintiff seeks emails authored by key personnel for the same time period that specifically mention or discuss the topic of Wallace's employment. Defendants against objected that this request was overly broad and unduly burdensome both as to the time and the persons listed. Subject to its objections, defendants produced eleven pages. Defendants now state that they made complete production and produced all documents responsive to this request.

While defendants do not state here, as they do elsewhere, that "no documents have been withheld from production in reliance on the objections," having previously granted plaintiff's motion to compel as to Plaintiff's Fourth Request for Production No. 1, which plaintiff acknowledges is similar to

Request No. 37, plaintiff's motion to compel as to Request No. 37 is **DENIED.**

c. Plaintiff's Second Request for Production No. 6

Finally, plaintiff seeks to compel the production of documents pursuant to Request No. 6 which seeks "the e-mails between Monica Prado and Kevin Wallace during the time period October 1, 2009 through March 12, 2010, including all attachments to said e-mails." Defendants objected on the grounds that this request was overly broad, unduly burdensome, not reasonably limited in scope, vague and ambiguous, and not proportional to the needs of the case or relevant. In its response, defendants claim that because the request is not limited, it would require thousands of dollars in attorney's fees to review the information prior to its production.

The Court does not believe that a five and a half month period is overbroad. Further, although defendants maintain this request would produce a large number of emails, it could have provided the Court with an approximate, if not an exact, number of emails that were sent and received during the time at issue but did not. Defendants' argument that this request would produce emails that are not relevant to this dispute is unavailing. Defendants terminated Wallace's employment based on a complaint filed by Ms. Prado. Their relationship during the five and a half months prior to Wallace's termination is,

therefore, relevant. For reasons previously stated, the requested discovery is also proportional to the needs of this case. Plaintiff's motion is **GRANTED** as to Request No. 6 contained in Plaintiff's Second Request for Production.

C. Time for Compliance

Defendants are Ordered to produce all documents and information as required by this Order within thirty (30) days from the date of this Order. With respect to the Blackberry, **IT IS ORDERED** that defendants submit the device to a person or company, mutually agreed upon by the parties, located within the Court's jurisdiction, within thirty (30) days from the date of this Order.

CONCLUSION

For the foregoing reasons, plaintiff's Motion to Exclude Defendant's Expert Witness is **DENIED** (docket no. 106), plaintiff's Motion to Compel is **GRANTED in part and DENIED in part** in accordance with this Order (docket no. 110), defendants' Motion for Leave to File Evidence is **GRANTED** (docket no. 112), and plaintiff's motion for leave to file a sur-reply is **GRANTED** (docket no. 116).

It is so **ORDERED.**

SIGNED September 26, 2016.

JOHN W. PRIMOMO
UNITED STATES MAGISTRATE JUDGE