2. An order from the U.S. District Court for the District of South Dakota denying Plaintiff's motion to compel Defendants to use an additional seven search terms to locate responsive documents because the cost to search and review the documents that hit the search terms rendered them not reasonably accessible, and no good cause existed to require the review.

In *Jim Hawk Truck-Trails of Sioux Falls, Inc. v. Crossroads Trailer Sales & Service, Inc.*, 2022 WL 3010143 (D.S.D. July 29, 2022), U.S. District Judge Karen E. Schreier denied Plaintiff's motion seeking to compel defendants to use an additional seven search terms to locate responsive documents, because the cost to search and review the electronically stored information ("ESI") that hit the search terms rendered them not reasonably accessible and because no good cause existed to require the review.

Plaintiff sued Crossroads Trailer Sales & Service, Inc. and nine former employees for various tort and contract claims, including misappropriation of trade secrets. *Id*. at *1. The instant motion derived from discovery disputes arising out of Plaintiff's interrogatories and requests for production.

Judge Schreier laid out the rules surrounding scope of discovery under Rule 26(b), including that "either party may compel the other to disgorge whatever facts he has in his possession." *Id*. at *2 (internal marks omitted). She then applied Rule 26(b) to ESI. Judge Schreier stated that the "broad scope of Federal Rule of Civil Procedure 26(b)" can be limited "if the party resisting discovery can establish that ESI is not reasonably accessible because of undue burden or cost." *Id*. at *6 (internal marks omitted). Judge Schreier defined "reasonably accessible" as referring to the "degree of effort in accessing the information, not simply the accessibility of the material's format."

However, Judge Schreier stated that discovery may still be ordered even if not reasonably accessible if the requesting party shows "good cause," considering the three limiting factors in Rule 26(b)(2)(C) as well as a seven-factor test outlined in the Advisory Committee notes: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

Judge Schreier explained that so far, Defendants had conducted searches on 13 individuals, including the nine individual defendants and four Crossroads employees, and produced documents using 92 of 99 search terms proposed by Plaintiff. *Id*. at *7.

However, Defendants had objected to the seven remaining search terms, arguing they "dramatically increase the volume of ESI to be reviewed."

Judge Schreier stated there was no question that the raw data was immediately accessible, but the issue was whether the "burden and expense in reviewing and winnowing down the search results constitutes an undue burden or cost." She noted that the search terms yielded 42,216 documents, and the estimated cost for processing and applying analytics to this additional data was between $3,150 and $4,275, plus an estimated $114,586.29 for 600 hours of attorneys reviewing the documents. Plaintiff argued these additional expenses were not proportional to the needs of the case because the search terms covered only a six-month period. But Judge Schreier was unpersuaded, reasoning that it was "the amount of documents produced, not the period of time to which these search terms are applied, that results in burdensome costs." She therefore concluded that the ESI produced by using the seven search terms in dispute was not reasonably accessible.

Judge Schreier then turned to whether there was nonetheless "good cause" to compel Defendants to review the ESI under the seven-factor test outlined in the Advisory Committee notes. Judge Schreier stated that the first factor weighed in favor of Plaintiff because the request was sufficiently specific. She stated that the second factor weighed in favor of Defendants because there had been "extensive discovery in this case" and Defendants had "already produced ESI responsive to 92 search terms of 13 employees' data" from which a "vast quantity of information is already accessible." The third factor was irrelevant because there was no spoliation of ESI.

Judge Schreier continued that the fourth and fifth factors favored Defendants because the relevancy rate of these search terms would be "incredibly low." She stated that Defendants and their ESI vendor used a continuous active learning model to determine the relevancy of previously searched ESI, which deemed 7% of its total ESI review as relevant, with the prior 2,000 documents reviewed at a maximum relevancy rate of 5%. Plaintiff responded by emphasizing that there still could be relevant documents and the search terms corresponded with facts from the case, but Judge Schreier concluded the ESI was unlikely to contain important information. She stated that the sixth factor weighed in favor of Defendants because the claims in the case were not of public concern. The seventh factor was neutral because neither party provided any information about its resources.

Judge Schreier explained that the good cause factors were not a checklist but "rather, the factors should be weighed by importance." *Id*. at *8. Judge Schreier stated that in this instance, the "low likelihood of finding relevant, responsive information [was] the most important 'good cause' factor weighing in favor of the resisting party." Similarly, she emphasized the low relevancy of current ESI and the low probability of the search

terms’ yielding new and relevant information, which could not justify the substantial burden and expense required to produce the ESI.

Judge Schreier therefore denied Plaintiff’s motion to compel discovery as to the seven additional ESI search terms.