

DJW/bh

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**THE STEEL WORKS, LLC,**

**Plaintiff,**

**CIVIL ACTION**

**v.**

**No. 07-2099-CM-DJW**

**SPECIALTY PARTS, INC., et al.,**

**Defendants.**

**ORDER**

Pending before the Court is Plaintiff's Motion to Compel (doc. 39). Plaintiff seeks to compel Defendants to produce the documents sought in Plaintiff's Requests for Production No. 2-6. Plaintiff asks the Court to overrule Defendants' relevance objections to the requests. Plaintiff's motion explains the ways in which Plaintiff contends the documents sought in those requests are relevant.

Defendants' response to the Motion to Compel was due March 10, 2008. To date, no response has been filed, and no party has notified the Court that the Motion has been resolved. The Court will therefore grant the Motion as uncontested.<sup>1</sup>

Within **ten (10) days** of the date of filing of this Order, Defendants shall produce all documents responsive to Plaintiff's Requests No. 2-6. Said production shall take place at the offices of Plaintiff's counsel or at any other location agreed upon by the parties.

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<sup>1</sup>See D. Kan. Rule 7.4 ("If a respondent fails to file a response within the time required . . . the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice.").

The Court will now proceed to address the additional relief Plaintiff requests in its Motion. Plaintiff “asks that the Court . . . provide that if the documents are not produced as this Court directs, that the counterclaim be dismissed with prejudice or, at the very least, that the deadline for plaintiff’s dispositive motion be extended a reasonable time.”<sup>2</sup> The Court finds such a request to be premature. In the event Defendants do not provide the documents as directed in this Order, Plaintiff may file an appropriate motion based on Defendants’ failure to comply with the Order.

Plaintiff does not request an award of expenses or fees in connection with its Motion to Compel. The Court must nevertheless address the issue, as Federal Rule of Civil Procedure 37(a)(5)(A) provides for the payment of the moving party’s expenses if the motion to compel is granted. Under the Rule, the court *must*, after providing an opportunity to be heard, order the party whose conduct necessitated the motion to compel to pay the movant’s reasonable fees and expenses incurred in making the motion, including attorneys’ fees, unless (i) the movant filed the motion before attempting in good faith to obtain the discovery without court action, (ii) the opposing party’s nondisclosure was substantially justified, or (iii) other circumstances make an award of expenses unjust.<sup>3</sup>

As the Rule expressly provides, the Court may award fees and expenses under Rule (37)(a)(5) only after the Court has afforded the parties the “opportunity to be heard.”<sup>4</sup> To satisfy this requirement, the Court directs Defendants to show cause, in a pleading filed with the Court within **twenty (20) days** of the date of this Order, why they and/or their attorneys should not be required

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<sup>2</sup>Mem. in Supp. or Defs.’ Mot. to Compel (doc. 40) at p.4.

<sup>3</sup>Fed. R. Civ. P. 37(a)(5)(A) (Rule renumbered by Dec. 1, 2007 amendments).

<sup>4</sup>*McCoo v. Denny’s, Inc.*, 192 F.R.D. 675, 697 (D. Kan. 2000) (citing Fed. R. Civ. P. 37(a)(4) (now numbered Fed. R. Civ. P. 37(a)(5))).

to pay the reasonable attorney fees and expenses Plaintiff incurred in making the Motion to Compel. Plaintiff shall have **eleven (11) days** thereafter to file a response thereto, if it so chooses. In the event the Court determines that fees and expenses should be awarded, the Court will issue an order setting forth a schedule for the filing of an affidavit reflecting the amount of fees and expenses that Plaintiff has incurred, and for the filing of any related briefs.

**IT IS THEREFORE ORDERED** that Plaintiff's Motion to Compel (doc. 39) is granted.

**IT IS FURTHER ORDERED** that Defendants shall produce all documents responsive to Plaintiff's Requests No. 2-6 within **ten (10) days** of the date of filing of this Order.

**IT IS FURTHER ORDERED** that Defendants shall, within **twenty (20) days** of the date of this Order, show cause in a pleading filed with the Court, why Defendants and/or their attorneys should not be required to pay the reasonable fees and expenses that Plaintiff has incurred in making its Motion to Compel. Plaintiff shall have **eleven (11) days** thereafter to file a response thereto.

**IT IS SO ORDERED.**

Dated in Kansas City, Kansas on this 2nd day of April 2008.

s/ David J. Waxse  
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David J. Waxse  
U.S. Magistrate Judge

cc: All counsel and *pro se* parties