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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
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WESTERN DIVISION

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MAX MAY, et al.,)	
)	
Plaintiffs,)	
)	
v.)	03 CV 2112 M1/P
)	
NATIONAL BANK OF COMMERCE, and)	
LAWRENCE SCOTT,)	
)	
Defendants.)	

ORDER DENYING PLAINTIFFS' MOTION TO COMPEL AND
REQUIRING NBC TO PRODUCE INDEX OF
TRUST COMMITTEES' AGENDAS AND MINUTES

Before the Court is Plaintiffs' Motion to Compel National Bank of Commerce to Respond and Produce Documents Responsive to Plaintiffs' Third Request for Production of Documents and Things to NBC, filed on April 8, 2004 (docket entry 203). On April 26, 2004, Defendant National Bank of Commerce ("NBC") filed its response, objecting to the motion to compel on several grounds. The motion was referred to the United States Magistrate Judge for determination. On May 3, 2004, the Court held a hearing on the motion. Counsel for all interested parties attended. For the reasons below, Plaintiffs' motion is DENIED. NBC, however, is ordered to provide Plaintiffs with an index of all NBC trust committee minutes and agendas in its possession, for the period

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January 1, 1998 through June 30, 1999, which index shall list the committee name, the date of the meeting, and the individuals present during the meeting (if known).

I. BACKGROUND

This case arises out of NBC's - the trustee of the Memphis Equipment Company ("MEC") Employee Stock Ownership Plan ("ESOP")- January 1999 sale of 100% of MEC stock to Defendant Lawrence Scott. The matter now before the Court involves a discovery dispute between Plaintiffs and NBC over the production of minutes and agendas for NBC trust committee meetings for the period January 1, 1998 through June 30, 1999 ("trust committees' records").¹

The original scheduling order in this case, entered by the District Judge on September 23, 2003, set the deadline for completing factual discovery for December 31, 2003 and set the trial for June 21, 2004.² On November 24, 2004, Plaintiffs served NBC with their Second Request for Production of Documents, which included a request to produce NBC trust committees' records which mention MEC or the MEC ESOP. On December 18, 2003, NBC informed

¹For purposes of this order, the Court will refer to these committees as "NBC trust committees." However, as the parties explained at the May 3, 2004 hearing, the minutes and agendas at issue are for those committees at NBC that are responsible for handling trusts (which committees may not necessarily fall under the umbrella of NBC's Trust Department).

²The discovery deadline was extended to February 1, 2004, by a consent order entered by the District Judge on December 9, 2003.

Plaintiffs by letter that it had reviewed the minutes of meetings of several NBC committees, including the Encroachment Committee, Compliance Committee, Administrative Committee, Internal Services Committee, and Investment Committee, but found no reference to MEC or the MEC ESOP in any of those minutes. NBC reported that it was still attempting to locate minutes of meetings held by the bank's Trust Committee, Trust Executive Committee, and Employee Benefits Committee. NBC advised Plaintiffs that upon receipt of any such minutes, it would forward them to Plaintiffs to the extent they reference MEC or the MEC ESOP.

On Friday, January 2, 2004, Plaintiffs deposed Jamie Lynch, the former Chairman of NBC's Employee Benefits Committee who allegedly, in January 1999, was the NBC employee primarily responsible for selling the MEC stock to Defendant Scott. Lynch testified in his deposition that he "would have briefed [an executive committee] and sought any advice or counsel they might have [about the MEC stock transaction]." (Lynch Dep. at 216). Lynch's procedure in any ESOP transaction before the exchange would be to bring it before the investment committee. (Id. at 218). In this case, "that would have happened undoubtedly in January likely the week or it may be days preceding the transaction." (Id.) Lynch stated that there should be a document where the investment committee signed off on the MEC transaction, and he believed this would have been at a special board meeting to discuss MEC in

specific and would likely have been the sole matter on the agenda. (Id. at 220).

On Monday, January 5, 2004, Plaintiffs filed an unopposed motion with the Court asking to extend various deadlines, including extending the factual discovery deadline from February 1 to February 25, 2004. In support of this motion, Plaintiffs cited Lynch's recent deposition and the fact that Plaintiffs were still waiting for NBC to locate and produce committee minutes relating to the MEC transaction. This motion was granted on January 8, 2004.

On January 28, 2004, Plaintiffs served NBC with their Third Request for Production of Documents. In this third request, Plaintiffs asked for "[a]ll agendas for meetings and minutes" of NBC's Trust Department's Employee Benefits Committee, Investment Committee, Executive Committee, and Board of Directors, for the period January 1, 1998 through June 30, 1999.³ On February 27, 2004 - the date that NBC's discovery response was due and two days after the discovery deadline - NBC notified Plaintiffs by letter that "it has not located any additional materials or information responsive to [Plaintiffs'] requests beyond what it has previously produced in response to [Plaintiffs'] prior requests for production of documents."

On March 1, 2004, Plaintiffs sent a letter to NBC clarifying that their Third Request for Production of Documents encompassed

³Plaintiffs also made requests for documents not at issue here, such as Lynch's expense reports around the time of the transaction and Lynch's work evaluations.

all agendas and meeting minutes regardless of whether or not they included any reference to MEC or the MEC ESOP. On April 5, 2004, Plaintiffs sent another letter to NBC as "a final attempt to avoid filing a Motion to Compel Discovery against NBC." In that letter, Plaintiffs' counsel explained that "I understand from you that those [committee] records do not mention MEC or the MEC ESOP, which does not deter me in my request. It is because they do not mention MEC or the MEC ESOP that I want to review them and to consider using them at trial."⁴

On April 8, 2004, Plaintiffs filed the present motion to compel. First, Plaintiffs argue that NBC failed to timely object or respond to Plaintiffs' Third Request for Production of Documents pursuant to Fed.R.Civ.P. 34, and therefore has waived any objections. Second, Plaintiffs contend that the minutes and agendas are relevant because "the very fact that MEC or [the] MEC ESOP are not mentioned in any agendas or minutes from NBC's Trust Department's Committee Meetings shows that Lynch failed to discuss MEC or [the] MEC ESOP at the NBC Trust Department Committee

⁴At the May 3 hearing before this Court, Mr. John Heflin (counsel for Plaintiffs) stated that although Mr. John Houseal is lead counsel for NBC, due to Mr. Houseal's trial schedule, Mr. Heflin's verbal communications about the minutes and agendas at issue in the Third Request for Production of Documents was with two of Mr. Houseal's associates. According to Mr. Heflin, those associates informed Mr. Heflin that they would discuss Plaintiffs' Third Request with Mr. Houseal and get back with him about whether those documents would be produced. Mr. Heflin claims that NBC's counsel never got back with him, and that it was not until he filed Plaintiffs' motion to compel and consulted with NBC's counsel on April 7, 2004, that NBC confirmed the documents at issue would not be produced.

Meetings despite his testimony to the contrary, and would further evidence NBC's lack of care in this transaction." Finally, Plaintiffs state that they do not object to NBC redacting the documents to exclude private information such as any names of persons or companies not relevant to this case and redacting any proprietary or confidential information.

On April 12, 2004, NBC sent Plaintiffs its formal response to Plaintiffs' Third Request for Production of Documents. NBC's response stated that it did not have any committee meeting agendas or minutes relating to MEC or the MEC ESOP, and that it objected to producing agendas and minutes that do not refer to MEC or the MEC ESOP on grounds that such information is confidential and not relevant to this case.

On April 26, 2004, NBC filed its response in opposition to Plaintiffs' motion to compel. NBC argues that Plaintiffs' motion is untimely because it was filed after the discovery deadline. NBC also asserts relevance, confidentiality, and trade secrets objections in opposition to producing the requested documents. At the May 3 hearing, NBC informed the Court that several committees' records have not been located because they were either destroyed by water damage or lost, and offered to provide Plaintiffs with an index of all minutes and agendas which NBC has been able to locate.⁵

⁵These minutes and agendas, according to NBC, do not make any reference to MEC or the MEC ESOP.

II. DISCUSSION

The issue that this Court must first consider is whether the motion to compel was filed timely. It is well established that the scope of discovery is within the sound discretion of the trial court. Lavado v. Keohane, 992 F.2d 601, 604 (6th Cir. 1993). A district court may properly deny a motion to compel discovery where the motion to compel was filed after the close of discovery. Overnite Transportation Co. v. International Brotherhood of Teamsters, No. 99-2747, 2001 WL 1910054, *1 (W.D. Tenn. Oct. 26, 2001); Medtronic Sofamor Danek, Inc. v. Osteotech, Inc., No. 99-2656, 2001 WL 1910058 (W.D. Tenn. Sept. 21, 2001); see also Banks v. CBOCS West, Inc., No. 01 C 0795, 2004 WL 723767, *2 (N.D. Ill. April 1, 2004); Willis v. New World Van Lines, Inc., 123 F.Supp.2d 380, 401 (E.D. Mich. 2000) (citing Ginett v. Federal Express Corp., 166 F.3d 1213 (6th Cir. 1998)); Gault v. Nabisco Biscuit Co., 184 F.R.D. 620, 622 (D. Nev. 1999). As this Court in Overnite Transportation explained:

Local Rule 26.1(d) of the Western District of Tennessee provides "All discovery shall be completed and all motions in connection with disputed discovery shall be filed no later than the dates designated in the scheduling order." (emphasis added). The plain language of the amended scheduling order indicates that all discovery was to be "completed" by May 31, 2001, nearly five months ago. The term "completed" means "finished," or with "nothing substantial remaining to be done." Black's Law Dictionary 285 (6th ed. 1990).

Id. at *1; see also Medtronic, 2001 WL 1910058, at *4 ("the motion to compel was filed with the Court on August 22, 2001, one day

after the August 21, 2001 discovery deadline had passed. If for no other reason, the motion should be denied as untimely filed after the discovery deadline.")

Although under certain circumstances there may be good cause to excuse an untimely motion to compel, the Court finds that no such good cause exists given the procedural history of this case. Plaintiffs' Third Request for Production of Documents could have been served, and in light of the Court's upcoming June 21 trial date, should have been served on NBC well before January 28. By at least as early as January 2, 2004, Plaintiffs knew through Lynch's deposition testimony that all NBC trust committees' records (whether or not they mention MEC or the MEC ESOP) could be relevant to their case. In fact, the day after Lynch's deposition, Plaintiffs asked for and received an extension from the Court of the discovery deadline so that the parties could finalize their discovery. However, by waiting until January 28 to serve their third set of document requests, Plaintiffs put themselves in a difficult position whereby NBC's responses to the third request would not be due until after the newly-extended discovery deadline had expired. At minimum, the motion to compel should have been filed at or near the time that NBC's responses were due - i.e. the end of February. By the time Plaintiffs filed their motion to compel on April 8, 2004, fact discovery had been closed for six weeks and trial was only two-and-a-half months away. For these

reasons, and given the Court's requirement that NBC provide Plaintiffs with an index of committees' records, discussed *infra*, Plaintiffs' motion to compel is denied.

Alternatively, the motion to compel is denied because the discovery sought is unreasonably cumulative and duplicative, is obtainable from some other source that is more convenient, less burdensome, and less expensive, and the burden and expense of the proposed discovery outweighs its likely benefit. See Fed.R.Civ.P. 26(b)(2); see also Delph v. Trent, 86 F.Supp.2d 572, 577 ("a court may *sua sponte* impose limits on discovery to prevent duplicative, unnecessary or inefficient requests"). Since Lynch testified in his deposition that he presented the MEC transaction to one of NBC's committees, the absence of any mention of MEC or the MEC ESOP in NBC trust committees' records is relevant to issues surrounding Lynch's credibility as well as NBC's failure to consider the MEC transaction during its committees' meetings. However, the discovery sought falls within the limitations of Fed.R.Civ.P. 26(b)(2) because NBC has reviewed all trust committees' records that it has been able to locate, and has confirmed that none of the records mention MEC or the MEC ESOP. The absence of any reference to MEC or the MEC ESOP does not entitle Plaintiffs to discovery of the substance of eighteen months of the committees' records.

At the May 3 hearing, Plaintiffs stated that without seeing the committees' records, they could not determine if the records

were complete or incomplete. In response, NBC offered to provide Plaintiffs with an index of all the minutes and agendas that it has in its possession. The Court finds that this index - combined with NBC's repeated admission that NBC's minutes and agendas do not mention MEC or the MEC ESOP - sufficiently balances Plaintiffs' particular concern about the completeness of the committees' records with NBC's confidentiality and proprietary concerns.⁶

III. CONCLUSION

Accordingly, for the above reasons Plaintiffs' motion to compel is DENIED.

IT IS FURTHER ORDERED that NBC provide Plaintiffs with an index of all NBC trust committee minutes and agendas in its possession, for the period January 1, 1998 through June 30, 1999, which index shall list the committee name, the date of the meeting, and the individuals present during the meeting (if known). NBC shall provide the index to Plaintiffs by no later than Friday, May 21, 2004.

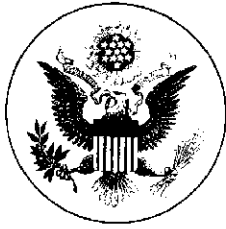
⁶At the May 3 hearing, Plaintiffs argued for the first time that they needed the committees' records in order to look at other transactions, determine the level of detail with which the trust committees analyzed these other transactions, and then compare that level of analysis with the analysis (or lack thereof) used by the committees in considering the January 1999 MEC transaction. The Court finds that Plaintiffs' request, on these grounds, is not relevant and not reasonably calculated to lead to the discovery of admissible evidence, is overly broad and unduly burdensome to NBC, and would amount to a fishing expedition.

IT IS SO ORDERED.



TU M. PHAM
United States Magistrate Judge

5/14/04
Date



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