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

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ROBERT R. DI TROLIO
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W.D. OF TN, MEMPHIS

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

ORDER DENYING DEFENDANT NATIONAL BANK OF COMMERCE'S EXPEDITED
MOTION TO COMPEL TO AUTHORIZE RULE 34(a)(2) ENTRY UPON LAND FOR
PURPOSES OF INSPECTION AND PERFORM ENVIRONMENTAL TESTING

Before the Court is Defendant National Bank of Commerce's ("NBC") Expedited Motion to Compel to Authorize Rule 34(a)(2) Entry Upon Land for Purposes of Inspection and Perform Environmental Testing, filed on March 29, 2004 (docket entry 194). NBC asks the Court to allow Professional Services Industries, Inc. ("PSI"), an environmental engineering and consulting firm retained by NBC, to conduct a Limited Phase II Environmental Site Assessment ("ESA") to test for soil and groundwater contamination at Memphis Equipment Company, Inc.'s ("MEC") Memphis, Tennessee facility.¹ On April 5, 2004, Plaintiffs filed their response to the motion. In their

¹MEC also has a facility in Chambersburg, Pennsylvania. However, NBC requests only an inspection of MEC's Memphis facility.

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response, Plaintiffs argue that NBC's motion is untimely, and that the results of the proposed testing would not be relevant to any issue in this case. On April 6, 2004, Defendant Lawrence Scott also filed his objections to NBC's motion. Scott argues that the results of the proposed testing would be irrelevant, that the prejudice to Scott and MEC far outweighs any benefit that the testing might provide to NBC, and that allowing the tests would amount to an unconstitutional taking of Scott's and MEC's property. The matter was referred to the United States Magistrate Judge for determination pursuant to 28 U.S.C. § 636(b)(1)(A). On April 8, 2004, this Court held a hearing on the present motion. Counsel for all parties attended. At the court's request, the parties provided the Court with their expert reports. For the reasons below, NBC's motion is DENIED.

I. BACKGROUND

This case arises out of NBC's (the trustee of the MEC Employee Stock Ownership Plan) January 1999 sale of 100% of MEC stock to Scott. The fair market value of MEC at the time of the sale is a hotly contested issue in this case. Plaintiffs and NBC have each retained a valuation expert to determine MEC's value at the time of the January 1999 transaction. Plaintiffs' expert determined that the value of MEC in January 1999 was \$7,035,000, while NBC's expert concluded that its value was between \$2,027,000 and \$2,377,000. The discrepancy between the two experts' valuations is due at least

in part to their disagreement over the value of MEC's real property.

The District Judge's scheduling order set a November 7, 2003 deadline for NBC to make its expert disclosures pursuant to Rule 26(a)(2). On that date, NBC provided Plaintiffs with the written report prepared by NBC's valuation expert, Mercer Capital ("Mercer"). In its report, Mercer concluded that in January 1999 the value of MEC's Memphis real estate was \$357,700, and the value of MEC's Chambersburg real estate was \$156,680. Mercer discounted the value of a 1998 appraisal which valued the Memphis property at \$1,000,000 and the Chambersburg property at \$700,000 because those "appraisals specifically do not consider the potential for environmental problems at [MEC's] locations." In support of its decision to discount the property value to account for possible environmental problems, Mercer relied upon, among other things, four letters which it contends support the potential existence of environmental contamination.

The first letter, written by Pickering Environmental Consultants, Inc. ("Pickering"), is dated July 15, 1998. Pickering noted that during its Phase I ESA of MEC's Memphis property it identified "[s]uspect asbestos-containing materials," a drain gate with petroleum staining, and records indicating that a gas tank was removed from the property in 1988. Pickering recommended a Phase II ESA to determine the possibility of soil and groundwater

contamination.

The next letter is from Nassaux-Hemsley, Inc. Consultants ("Nassaux-Hemsley"), dated November 17, 1998. The letter stated that based on information provided by Scott regarding MEC's use of the Chambersburg property, Nassaux-Hemsley opined that the property marketability "is and will continue to be extremely limited and substantially impaired, due to the foreseeability of environmental concerns and liabilities associated with the site." The letter states that without having Phase I or Phase II ESA, however, an attempt to qualify potential costs would be "totally speculative," but "it is not improbable that such costs could easily exceed \$250,000.00."

The third letter is from PSI, dated December 28, 1998.² The letter states: "Based upon past experience with this type of facility and information obtained regarding the facility's operations, it is my opinion the future marketability of the [Memphis] property is and will be drastically affected due to the environmental liabilities connected with the facility and the potential groundwater impact from use of petroleum products, solvent, chemicals and underground storage facilities." The cleanup "could range to over one million dollars, however an exact determination cannot be made without soil and groundwater analysis."

²This letter was not included in the copy of Mercer's report received by the Court, but is included as Exhibit 2 to NBC's Memorandum in Support of Expedited Motion.

The fourth letter, dated May 30, 2003, was sent to NBC from PSI. It states that PSI "conducted a visual on-site reconnaissance of the MEC property [in Memphis] and a regulatory file review of the site and surrounding properties" to supplement Pickering's 1998 Phase I ESA and PSI's 1998 letter report. "Based on the historical use of the property for truck teardown and rebuilding purposes and the evidence of the aforementioned recognized environmental conditions," PSI recommended a Phase II ESA of the Memphis property including analysis of soil and groundwater samples.

The deadline for disclosure of Plaintiffs' experts was on January 19, 2004. Plaintiffs timely provided Defendants with their valuation expert's report. Plaintiffs' expert, John V.M. Gibson, noted that appraisals conducted in 1998 valued the Memphis and Chambersburg facilities at \$1,000,000 and \$700,000, respectively, and "has assumed that such appraised values represent a correct assessment of value for purposes of [his] Report." Gibson inspected the Memphis and Chambersburg facilities, and reviewed the four letters relied upon by NBC's expert. Gibson concluded that he had no basis to discount the value of MEC's real estate for "hypothetical costs of clean-up and abatement of an unsubstantiated environmental condition." Gibson did, however, assign \$150,000 as a reserve for costs associated with the environmental issues.

In its motion and at the April 8, 2004 hearing, NBC claimed that until Plaintiffs' expert was recently deposed, it did not know that the expert would take the position that the existence of

environmental contamination at MEC's facilities in January 1999 was mere speculation. NBC now argues that it should be given the opportunity to rebut Plaintiffs' expert by obtaining an expert to conduct Phase II ESA testing to determine the level of soil and groundwater contamination that existed in January 1999. Plaintiffs argue that NBC is merely seeking to "shore up" problems with its own expert testimony by obtaining additional discovery well after the deadline has passed for its expert disclosures.

II. DISCUSSION

Federal Rule of Civil Procedure 26(a)(2) governs the disclosure of expert witnesses. Rule 26(a)(2)(B) requires the expert to prepare a report containing, among other things, "a complete statement of all opinions to be expressed and the basis and reasons therefor," the "data or other information considered by the witness in forming the opinions," and "the qualifications of the witness." Fed.R.Civ.P. 26(a)(2)(B). Once a disclosure is made, it must be kept current. See Fed.R.Civ.P. 26(e); Macaulay v. Anas, 321 F.3d 45, 50 (1st Cir. 2003). If an expert's opinion is to be introduced "solely to contradict or rebut evidence on the same subject matter identified by another party under [Rule 26(a)(2)(B)]," disclosure *shall be* made within thirty days after the disclosure made by the other party. See Fed.R.Civ.P. 26(a)(2)(C) (emphasis added).

The Court finds that the discovery which NBC now seeks to obtain is not intended "solely to contradict or rebut evidence"

introduced by Plaintiff's expert, but rather is additional expert discovery that should have been obtained and disclosed prior to NBC's November 7, 2003 expert disclosure deadline. It is clear from NBC's expert report that NBC and Mercer were aware long before November 7, that a Phase II ESA had been recommended but had not been conducted. In fact, the four letters that Mercer relied upon to value MEC's real property expressly state that the existence of environmental contamination is unconfirmed. Mercer took this information into account when it discounted the total value of MEC's real property by approximately \$1,200,000. NBC's expert report specifies that this discount was based on the possibility of contamination rather than confirmed contamination. Because NBC has long been aware of the environmental concerns and did not timely take the appropriate steps to conduct the inspection, NBC is now precluded from obtaining this additional expert discovery after the disclosure deadline.³

Even assuming, *arguendo*, that the discovery sought by NBC would be introduced solely to rebut Plaintiffs' expert, the motion is still untimely. Plaintiffs' expert disclosure deadline was January 19, 2004.⁴ By that time, NBC knew or should have known

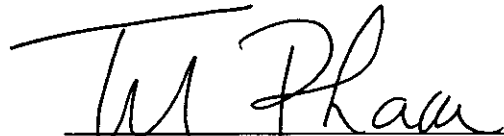
³NBC argues that it did not bring this motion earlier because it was lulled into believing that the other parties would permit it to conduct the proposed inspection. As NBC stated at the April 8 hearing, however, Defendant Scott has consistently objected to the inspection, and there is insufficient evidence to demonstrate that Plaintiffs ever agreed to the inspection.

that Plaintiff's expert disagreed with NBC's expert regarding the issues relating to the alleged environmental contamination. Although NBC had thirty days (until February 19, 2004) to disclose any rebuttal expert witnesses as required by Rule 26(a)(2)(C), it did not file the instant motion until March 29, 2004.⁵ Given NBC's untimely discovery request, and the upcoming June 21, 2004 trial date, the Court finds that NBC's failure to comply with Rule 26(a)(2)(C) and the Court's scheduling order is a further basis for denying the motion.

III. CONCLUSION

For the above reasons, NBC's motion is DENIED.

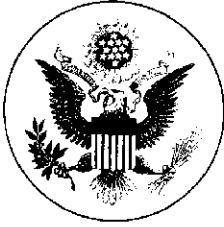
IT IS SO ORDERED.



TU M. PHAM
United States Magistrate Judge
4/19/04

Date

⁵The February 27, 2004 deadline for Rule 26(e) supplementation had also expired by the time NBC filed the instant motion.



Notice of Distribution

This notice confirms a copy of the document docketed as number 217 in case 2:03-CV-02112 was distributed by fax, mail, or direct printing on April 19, 2004 to the parties listed.

John J. Heflin
BOURLAND HEFLIN ALAREZ & MINOR
5400 Poplar Avenue
Ste. 100
Memphis, TN 38119

Kenneth P. Jones
BOURLAND HEFLIN ALAREZ & MINOR
5400 Poplar Avenue
Ste. 100
Memphis, TN 38119

John I. Houseal
GLANKLER BROWN, PLLC
One Commerce Square
Suite 1700
Memphis, TN 38103

Larry Montgomery
GLANKLER BROWN, PLLC
One Commerce Square
Suite 1700
Memphis, TN 38103

Jeremy G. Alpert
GLANKLER BROWN
One Commerce Sq.
Ste. 1700
Memphis, TN 38103

Marc Louis Schatten
GLANKLER BROWN
One Commerce Sq.
Ste. 1700
Memphis, TN 38103

Bobby M. Leatherman
LEATHERMAN LAW OFFICE
1661 International Place Dr.
Ste. 400
Memphis, TN 38120

Tu M. Pham
U.S. MAGISTRATE JUDGE
167 N. Main
Rm. 934
Memphis, TN 38103

Honorable Jon McCalla
US DISTRICT COURT