UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

BALFOUR BEATTY RAIL, INC. CASE NO.: 3:06-cv-551-J-20MCR

Plaintiff,

v.

VINCENT V. VACCARELLO and
CHARLES B. BYERS,

Defendants.
_____

DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

Defendants Vincent V. Vaccarello ("Vaccarello") and Charles B. Byers ("Byers"; collectively the "Defendants") hereby oppose the Motion to Compel Discovery Responses (dkt #33) filed in this action by the Plaintiff Balfour Beatty Rail, Inc. ("Balfour Beatty"). In its Motion to Compel, Balfour Beatty identifies fifteen interrogatories and document requests to the Defendants that it seeks more complete answers to, contending that the objections are "invalid in light of the Court's recent holding." (Motion to Compel, p.1) In support of its Motion, Balfour Beatty attaches a letter from counsel dated November 1, 2006 setting forth the Defendants' objections to the various discovery requests identified in the Motion. The objections and assertions stated by counsel in its November 1, 2006 conferral letter clearly do not reflect counsel's objections "in light of the Court's most recent holding" and counsel was not provided a meaningful opportunity by Balfour Beatty to revisit those objections after the Court's December 21, 2006 Order (dkt #32).

Specifically, counsel received an e-mail near mid-day on Friday, December 22, 2006, informing counsel that Balfour Beatty intended to file a Motion to Compel by the end of the day on Wednesday, December 27, 2006, to reflect its position on the previous discovery requests and objections following the Court's December 21 Order. The undersigned replied on that evening, reminding opposing counsel that lead counsel in this matter for both sides, Messrs. Bishop and Marquardt, would be out of the office the following week and, further, that counsel's offices would be closed on Christmas Day (Monday) and December 26 (Tuesday). In the e-mail, counsel explained that the deadline of Wednesday, December 27, only allowed the Defendants one business day to (i) review the various discovery requests to the Defendants, including multiple subsequent modifications, (ii) review the Defendants' objections and positions with regard to each, (iii) review the Court's December 21 Order, (iv) consider this information and develop advice to the Defendants as to how to proceed, (v) contact each of the Defendants during a week when many people travel and confer with each of them regarding the requests, modifications, objections and the effect of the December 21 Order and, lastly, (vi) contact lead counsel, while on his previously planned vacation, and explain each of the foregoing steps to seek his approval without the assistance of any information in front of him.

Based on these concerns and others, counsel requested a one week extension of the nearly immediate Wednesday, December 27 deadline to give the Defendants a reasonable amount of time to review their objections in consideration of the December 21 Order. Counsel assured opposing counsel that the Defendants would comply with and adhere to the letter and spirit of the December 21 Order and that, if opposing counsel

would give the one week extension to January 3, 2007, it would likely obviate the necessity of a motion to compel. On the afternoon of December 27, counsel received a telephone message from opposing counsel stating that opposing counsel felt it necessary to go ahead with their Motion to Compel.

Balfour Beatty's Motion to Compel is correct in stating that the parties spent several months attempting to resolve the various objections and attempting to agree on the scope of discovery during that time. With regard to the discovery requests addressed in the Motion to Compel, those negotiations ended with the November 1 letter and the objections in that letter were clearly based on the status of the case *at that time*. On November 1, the Amended Stipulated Protective Order (dkt #22), providing for the additional "attorneys' eyes only" protection, had not been entered, nor had the Court's December 21 Order. As outlined above, the first time counsel was asked to review the various objections in light of the additional "attorneys' eyes only" provision and "in light of the Court's recent holding," was on Friday, December 22, 2006, just prior to the Christmas holiday. Therefore, to the extent that the Motion reflects a 3.01(g) conferral of the parties "in light of the Court's recent holding," the undersigned does not agree that a reasonable conferral was attempted or completed prior to the filing of the Motion.

Now that counsel and the Defendants have had a reasonable amount of time to review the various requests and responses while taking into consideration the Court's December 21 Order, the Defendants consider their objections to twelve of the fifteen discovery requests to have been resolved by the Order. Consistent with the Court's Order, the Defendants, on January 10, 2007, provided to Balfour Beatty all documents responsive to (i) Request Nos. 3, 5, 11, 12, 22 and 24 to Vaccarello and (ii) Request Nos.

11, 12, 21 and 23. Additionally, Mr. Vaccarello provided to Balfour Beatty, contemporaneously with this Response, complete responses to Interrogatory Nos. 9 and 10 to Vaccarello.

The remaining discovery requests that were not resolved by the Court's December 21 Order are: Interrogatory No. 8 to Vaccarello, updated Request No. 23 to Vaccarello, and updated Request No. 22 to Byers. The specific requests, and the Defendants' objections and arguments on those requests are detailed below.

Interrogatory No. 8 to Vaccarello: Identify (as that term is defined in the Definitions and Instructions above) each and every person or entity with an investment, ownership interest, or other financial interest in ARS, and state the amount of money the person or entity has invested, as well as his, hers, or its ownership interest in ARS, as measured as a percentage of the outstanding shares of ARS stock.

Initial Response: Vaccarello objects to Interrogatory 8 to the extent that the Interrogatory calls for irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence and to the extent that the information sought is confidential business information of ARS. Without waiving these objections, the individuals with an ownership interest in ARS are:

Robert Flacco
44 Fink Drive
Ottsville, PA 18942
(610) 847-0121

Michael Heridia
44 Fink Drive
Ottsville, PA 18942
(610) 847-0121

Vincent Vaccarello
c/o Tanner Bishop

As shown above, Vaccarello provided the names of the three ARS investors in response to Interrogatory No. 8. Deposition testimony has confirmed that each of the three founders is a one-third investor in ARS. As indicated in the response to Balfour Beatty's Motion to Compel Discovery from Heridia and Flacco (dkt #21), the

Defendants, Heridia and Flacco object to producing documents revealing each individual investor's specific financial interest and amounts they have invested in ARS because the information is highly confidential and the documents showing the investors' respective one-third interests in ARS provides a sufficient basis for its intended use – impeachment. In the Court's December 21 Order, the Court appears to agree with this position and accordingly did not compel the production of documents revealing the specific amounts contributed by the investors.

In a footnote in its Motion to Compel, Balfour Beatty acknowledges the Court's position that the specific financial interest and amounts invested was not discoverable from the ARS investors, however, contends that Vaccarello, as a party, should be compelled to respond the interrogatory in full. The Defendants disagree. Providing Balfour Beatty with the specific financial interest and amount that Vaccarello has invested in ARS would provide Balfour Beatty with the same information as to the other two investors, Heridia and Flacco, thereby revealing information indirectly that the Court explicitly precluded Balfour Beatty from obtaining directly.

As expressed in its Motion to Compel and prior pleadings, Balfour Beatty seeks this information solely for impeachment purposes. Like the other investors, knowing that Vaccarello has a one-third interest in ARS should suffice for impeachment purposes as it will be clear to the finder of fact that Vaccarello is keenly interested in ARS' success. The Defendants submit that Vaccarello's initial response to Interrogatory No. 8 is sufficient and does not need to be supplemented with further detail regarding specific financial information and amounts invested. Accordingly, this Court may properly deny Balfour Beatty's Motion to Compel with respect to Interrogatory No. 8.

Updated Request No. 22 To Byers: Produce the hard drive of any computer that you used for ARS or Balfour Beatty business purposes at any time during 2005, or 2006.

Objection: Byers objects to Request No. 22 because the result calls for confidential business information of ARS. Byers does not have a hard drive he used for Balfour Beatty business purposes.

Updated Request No. 23 To Vaccarello: Produce the hard drive of any computer that you used for ARS or Balfour Beatty business purposes at any time during 2005, or 2006.

Objection: Vaccarello objects to Request No. 23 because the result calls for confidential business information of ARS. Vaccarello does not have a hard drive he used for Balfour Beatty business purposes.

Request No. 22 to Byers and Request No. 23 to Vaccarello demand the Defendants produce the hard drive of all computers used by the Defendants for business purposes. These requests are objectionable for several reasons: (i) pursuant to Rule 34, Fed.R.Civ.P., parties are not required to produce a computer hard drive, (ii) it creates an incredible hardship for ARS, (iii) the hard drive itself, if produced, contains large swaths of information that is either (a) privileged, (b) confidential, and/or (c) completely irrelevant to this litigation and not likely to lead to the discovery of admissible evidence and (iv) the Defendants and ARS are willing to search and produce to Balfour Beatty all non-privileged, relevant documents and information stored on the computer hard drives, as they have already done.[1]

[1] Balfour Beatty is correct in its assertion that the only objection stated by the Defendants in the November 1, 2006 conferral letter with regard to these requests was an objection based on confidentiality. On September 6, 2006, in their initial responses to Balfour Beatty's first request for production, the Defendants objected to these requests as overly broad and burdensome and calling for irrelevant information not reasonably calculated to lead to the discovery of admissible evidence, as well as confidential. During extensive efforts among the parties to meet and confer and broker an agreeable scope of discovery in this litigation, counsel focused on the confidentiality objection (as evident in the November 1 letter) due to the highly sensitive and confidential nature of the information contained on the hard drives that is clearly irrelevant and outside the scope of this litigation and the potential harm that disclosure would cause ARS.

First, the request itself is objectionable because Balfour Beatty asks for the actual computer hard drive rather than specific categories of information contained on the hard drive. Balfour Beatty does not specify any type of documents or category of documents or information contained on the hard drive that it seeks and may be subject to discovery. Pursuant to Rule 34(a), Fed.R.Civ.P., a party must specify the category and type of electronically information it seeks so that the responding party may produce that information in a reasonably usable format. The Federal Rules of Civil Procedure do not grant unrestricted direct access to opponents' electronic files and information. See In re: Ford Motor Co., 345 F.3d 1315, 1316-17 (11th Cir. 2003).

In In re: Ford, the plaintiff, through discovery, sought access to the defendant's computer data base and filed a motion to compel after access was refused in response to various document requests. The district court granted the plaintiff's motion, allowing the plaintiff direct access to the defendant's computer database. The defendant, after losing on a motion for reconsideration, filed a petition for writ of mandamus with the Eleventh Circuit. Id. at 1316.

In evaluating the petition and reviewing the plaintiff's discovery request, the Eleventh Circuit held that Rule 34, like other rules of discovery, allows the responding party to search his own records and produce the relevant required information; Rule 34 does not give the requesting party the right to conduct the actual search through the responding party's files and information. Id. at 1317. The Eleventh Circuit pointed out that the district court had established virtually no parameters limiting the plaintiff's search of defendant's computers and information. The court granted the extraordinary

remedy of mandamus, concluding that the district court clearly abused its discretion under the circumstances. Id.[2]

The In re: Ford decision was recently relied upon in the Middle District of Florida case of Floeter v. City of Orlando, 2006 WL 1000306, *3 (M.D. Fla. 2006). In the Floeter case, the plaintiff sought entry into the defendant's offices to inspect the computer hard drives of computers used by certain employees of the defendant. The defendant objected arguing that the hard drives contained much information that was not relevant and may contain confidential information. The Floeter court followed the In re: Ford reasoning in holding that Rule 34(a) does not give the requesting party the right to conduct the actual search and noted that the plaintiff had not made any showing that he had requested information contained on the hard drives that the defendant had failed to produce. Under the circumstances presented, the motion to compel access to the computer hard drives was denied.

With Request No. 22 to Byers and Request No. 23 to Vaccarello, Balfour Beatty essentially seeks unfettered access to explore ARS' files and systems. This is simply not

[2] Courts in other jurisdictions recognize Ford as the standard rule with regard to precluding an opposing party's unfettered access to a party's computer hard drive or database. See, e.g., Diepenhorst v. City of Battle Creek, 2006 WL 1851243, *2-3 (W.D. Mich. 2006) ("In most cases, the computer itself is not evidence (like a typewriter) or the means of storing it (like a file cabinet). Increasingly, however, litigants have sought access to the opponent's computer or other electronic devices to search for evidence, especially deleted e-mails. The federal courts have generally resisted such incursions…This court concludes that the policy espoused by [In re: Ford] is consistent with the Rules of Civil Procedure..."); Powers v. Thomas M. Cooley Law School, 2006 WL 2711512, *5 (W.D. Mich. 2006) (following In re: Ford and holding that the discovery process is designed to be extrajudicial and relies upon the responding party to search his records to produce the requested data and in the absence of a strong showing that the responding party has somehow defaulted in this obligation, the court should not resort to extreme, expensive or extraordinary means to guarantee compliance; forensic inspection of computer hard drives is an expensive process and adds to the burden of litigation for both parties as an examination of a hard drive by an expert automatically triggers the retention of an expert by the responding party for the same purpose and inevitably results in the production of massive amounts of irrelevant and perhaps privileged information); Ameriwood Industries, Inc. v. Liberman, 2006 WL 3825291, *2-3 (E.D. Mo. 2006) (citing In re: Ford for the proposition that Rule 34(a) does not give the requesting party the right to search through all of the responding party's records and setting forth an extensive process for accessing an opposing party's computer hard drives to ensure privacy).

a proper procedure for conducting discovery. The Defendants and ARS have produced in excess of 6,000 pages of documents responsive to various Balfour Beatty requests. There is no evidence that the Defendants or ARS have attempted to hide or destroy documents. If Balfour Beatty had requested specific categories of information from the hard drives, the Defendants would have complied and produced all non-privileged, relevant information in a usable format. Request No. 22 to Byers and Request No. 23 to Vaccarello are analogous to a request to "produce all files and information ever created, received or stored electronically by ARS".

Secondly, to respond to these requests would require a full halt in ARS' business operations as ARS would have to surrender the hard drive of each and every computer that either of the Defendants has used at any time for the business of ARS. ARS would be compelled to surrender the use of its computers without knowing when it may get the hard drives returned and without access to the information stored thereon. Additionally, ARS would have no guarantees or recourse with regard to any damage that may occur, or documents or information that may be lost, during the requested inspection. It is simply unjust, and incompatible with the spirit and rule of discovery, for an opponent in the same industry to have access and control of the entirety of another company's files and information – especially considering the other company is not a party to the litigation.[3]

Additionally, ARS, a new and relatively small company, would be forced to incur significant expense to adequately defend itself if forced to turn over its computer hard drives. ARS would have to hire a computer expert to (a) validate whatever methods are used to search the hard drives, (b) do his/her own search to confirm an alleged document

[3] Balfour Beatty has moved to amend its complaint to, *inter alia*, add ARS as a party (dkt # 29). The Defendants oppose the Motion to Amend for the reasons stated in their Response (dkt #34). At the time of filing, the Court had not yet ruled on the Motion to Amend.

actually came from the hard drive and is an accurate representation of the information stored thereon and (c) potentially provide expert testimony at trial. This expense is simply unnecessary when the Defendants and ARS will provide all responsive, discoverable documents (in addition to the 6,000 pages already provided) to Balfour Beatty's requests for specific categories of documents.

Lastly, it would be naïve to think that Balfour Beatty's access to the electronic information stored on the hard drives will be limited to information relevant to this litigation and not protected by privilege. The "attorneys' eyes only" protection is not enough to shelter ARS from this type of invasion of privacy. Even unintentionally, information will be discovered by Balfour Beatty that is highly confidential (and completely irrelevant to this litigation), including documents that are protected by the work product doctrine, attorney-client privilege and other applicable privileges without affording ARS or its attorneys an opportunity to review the information prior to discovery.

In conclusion, ARS and the Defendants are willing to provide relevant, non-privileged or protected documents to any specific and appropriate request of Balfour Beatty. By seeking the entire computer hard drives of the Defendants, Balfour Beatty is essentially seeking unfettered access to all of the Defendants and ARS' files. At the time of this Response, the Defendants and ARS have provided Balfour Beatty with over 6,000 pages of documents responsive to various requests. Such an expansive production evidences the willingness of the Defendants and ARS to comply and provide responses to reasonably framed requests. Pursuant to the Federal Rules of Civil Procedure, it is incumbent on Balfour Beatty to seek specific categories of information and for the

Defendants and ARS to search their own respective files for and produce information responsive to each appropriate request. It is not proper for Balfour Beatty to essentially access all of the Defendants' and ARS' files so that it may conduct the search itself. See, e.g., In re Ford, 345 F.3d at 1317. For the foregoing reasons, Balfour Beatty's Motion to Compel with regard to Request No. 22 to Byers and Request No. 23 to Vaccarello is properly denied.

WHEREFORE, the Defendants respectfully request this Court deny Balfour Beatty's Motion to Compel with regard to Balfour Beatty's Interrogatory No. 8 to Vaccarello, Request No. 22 to Byers and Request No. 23 to Vaccarello.

TANNER BISHOP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 6th day of January, 2007, a true and correct copy of the foregoing was furnished by United States mail and e-mail to Christopher C. Marquardt, Esq., Alston & Bird LLP, 1201 West Peachtree Street, Atlanta, GA 30309; cmarquardt@alston.com.

/s/ Thomas E. Bishop
Attorney

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