

67

SNELL & WILMER L.L.P.
Alan L. Sullivan (3152)
Todd M. Shaughnessy (6651)
Amy F. Sorenson (8947)
15 West South Temple
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

CRAVATH, SWAINE & MOORE LLP
Evan R. Chesler (admitted pro hac vice)
David R. Marriott (7572)
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

*Attorneys for Defendant/Counterclaim-Plaintiff
International Business Machines Corporation*

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

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

**INTERNATIONAL BUSINESS
MACHINES CORPORATION,**

Defendant/Counterclaim-Plaintiff.

**IBM'S MEMORANDUM IN
SUPPORT OF MOTION TO
CONFINE SCO'S CLAIMS TO, AND
STRIKE ALLEGATIONS IN
EXCESS OF, THE FINAL
DISCLOSURES**

**(EXPEDITED BRIEFING AND
ORAL ARGUMENT REQUESTED)**

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

Defendant/counterclaim-plaintiff IBM respectfully submits this memorandum in support of its motion to confine SCO's claims to, and strike allegations in excess of, its December 22, 2005 Disclosure of Material Allegedly Misused by IBM (the "Final Disclosures").

Preliminary Statement

Long after the deadline for disclosing its allegations, SCO seeks by indirection to change them. In three of its eight expert reports, SCO alleges the misuse of material nowhere identified in the Final Disclosures, the very purpose of which was to fix the parties' allegations once and for all last year. Indeed, with respect to its allegation that Linux infringes SCO's alleged UNIX copyrights, SCO proffers expert testimony that has no support in the Final Disclosures and, if allowed, would reinvent the case at the eleventh hour. SCO's attempt to change its case not only violates the Court's scheduling order, but it is unduly prejudicial to IBM and the public interest and should not be allowed. SCO's expert reports should be stricken insofar as they make new, previously-undisclosed allegations of misconduct.

From the beginning of this case, IBM has asked SCO to specify its allegations of misconduct. SCO repeatedly declined, requiring the Court twice to order SCO to respond to IBM's discovery requests and to specify its allegations. When SCO still refused to specify its allegations, IBM moved for summary judgment. The Court recognized that SCO had failed to offer evidence in support of its claims but deferred resolving IBM's motions on the merits and established a final deadline for SCO to disclose any allegations of misuse it wished to pursue. In establishing a final deadline for the identification of allegedly misused material, the Court agreed with IBM that this case should be litigated based on timely disclosures. Notably, SCO stipulated and agreed with IBM that it was

required to identify with specificity any and all material that it contends IBM misused in the Final Disclosures. Although SCO failed to particularize all of its allegations as required by the Court, it submitted the Final Disclosures late last year. (See Section I below.)

Despite the plain language of the Court's scheduling order and SCO's express stipulation and agreement, SCO now seeks, by way of its expert reports, to challenge as "misused" a mass of material nowhere identified in the Final Disclosures. SCO proffers the testimony of Thomas Cargill to support its copyright infringement claim relating to Linux. Rather than limit Dr. Cargill's report to the material identified in the Final Disclosures, SCO uses it to identify three entirely new categories of allegedly misused material. The new material significantly increases the scope of SCO's claims. Whereas the Final Disclosures accused only 326 lines of code from the Linux kernel, the Cargill report challenges nearly every line in Linux. Even with respect to the three categories of material identified in the Final Disclosures, SCO uses Dr. Cargill's report to identify numerous new items of allegedly misused material. For example, the Final Disclosures identify only 15 files of Streams material as supposedly infringing certain Unix copyrights. To that, the Cargill report adds more than 150 additional files of Streams material never before mentioned by SCO. (See Section II below.)

In addition, SCO relies on the testimony of Evan Ivie and Marc Rochkind in support of its contract claims. Like the Cargill report, the Ivie and Rochkind reports identify allegedly misused material found nowhere in the Final Disclosures. With respect to one of the technologies challenged in the Final Disclosures (JFS), SCO uses its expert reports to charge misuse against six times the volume of material identified in the Final

Disclosures. Similarly, the Final Disclosures identify 9,282 lines of code regarding testing technologies as representing "misuse". To that the Rochkind report adds 25,378 additional lines of code. In fact, the Final Disclosures identify only a small fraction of the material challenged in SCO's expert reports, notwithstanding the requirements of the scheduling order and SCO's stipulation and agreement. (See Section II below.)

SCO's new claims have no more merit than those set out in the Final Disclosures. But allowing SCO to ignore the Court's scheduling order and reinvent its case at this juncture would be unduly prejudicial to IBM and contrary to the public interest. Putting aside the fact that SCO's refusal to cooperate in discovery has made it difficult for IBM properly to prepare a defense to the allegations set out in the Final Disclosures, SCO's new, last-minute allegations would force the re-opening of discovery and significantly extend the litigation. SCO's proposed new allegations are not minor; they are far-reaching. SCO's new claims implicate the whole of Linux. While we believe the claims lack merit, assembling the evidence necessary to prove they lack merit would require significant additional litigation. And, of course, fact discovery is closed; initial expert reports have been submitted; dispositive motions are forthcoming, and IBM's opposing expert reports are due in a matter of weeks. Thus, there is no way IBM could properly prepare a defense without substantial delay in the proceedings, including deferral of the existing trial date. This unjustifiable delay would itself prejudice IBM and undermine the public interest because it would allow SCO further to perpetuate fear, uncertainty and doubt about IBM, Linux and IBM's products and services. (See Section III below.)

As is further discussed below, SCO should not be allowed to ignore the deadline for final disclosures and litigate this case by ambush.¹ Insofar as SCO's proposed expert reports exceed the Final Disclosures, they should be stricken.

Argument

I. THE COURT LIMITED SCO'S CLAIMS TO THE MATERIAL IDENTIFIED IN ITS FINAL DISCLOSURES.

IBM asked for years that SCO specify its allegations of misconduct and infringement by IBM. For example, IBM's Interrogatory No. 4 (served on June 13, 2003) demanded that SCO describe in detail "the specific manner in which IBM is alleged to have engaged in misuse or misappropriation", and IBM's Interrogatory No. 13 (served on September 16, 2003) demanded that "for any rights IBM is alleged to have infringed, [SCO] describe in detail how IBM is alleged to have infringed plaintiff's rights". SCO repeatedly refused to specify its claims, requiring IBM to seek the Court's assistance in learning SCO's allegations. In considering IBM's motions for summary judgment, the Court found it "astonishing that SCO has not offered competent evidence to create a disputed fact regarding whether IBM has infringed SCO's alleged copyrights through IBM's Linux activities". (02/08/2005 Order at 10.)

When the Court deferred IBM's summary judgment motions, IBM urged the Court to establish a final deadline for the disclosure of allegedly misused material. As we explained at the time, there was no way IBM could properly prepare its defense without a final deadline, prior to the close of fact discovery, for the identification of all allegedly misused material. SCO's claims potentially implicate billions of lines of source code,

¹ Although we do not burden the Court with a request for sanctions, we believe an order entering sanctions, including the costs of this motion, would be justified.

and it would have been impossible to defend the case by preparing a defense to all possible claims relating to that code. There is too much information and therefore there are simply too many possibilities. Moreover, as we further explained, it was critical that the parties not be allowed to modify their allegations by way of the expert reports lest the deadline become meaningless and render fact discovery an exercise in inefficiency, disconnected from the parties' allegations. (04/21/2005 Hr'g Tr. at 93-94.)

In an order dated July 1, 2005, the Court adopted IBM's proposal over SCO's objection. The Court set October 28, 2005 as the "Interim Deadline for Parties to Disclose with Specificity All Allegedly Misused Material Identified to Date and to Update Interrogatory Responses Accordingly". (07/01/2005 Order ¶ III.) The Court set December 22, 2005, as the "Final Deadline for Parties to Identify with Specificity All Allegedly Misused Material". (Id.) Both parties submitted their final disclosures of allegedly misused material on December 22, 2005, and thus advised the Court that they had nothing more to provide. In fact, SCO specifically advised the Court in opposing IBM's motion to limit the scope of SCO's claims based on its failure to specify all of the allegations contained in the Final Disclosures, that it had fully complied with the scheduling order. (See SCO's 03/07/2006 Memorandum in Opposition to IBM's Motion to Limit SCO's Claims Relating to Misused Material at 1.)

In the Final Disclosures, SCO identified 294 Items of allegedly misused material. Most of the Items (215 Items) concern SCO's allegation that IBM breached its contractual obligations by contributing its own AIX and Dynix code to Linux. These allegedly improper contributions fall into seven categories: (1) Journaling File System (JFS); (2) Enterprise Volume Management System (EVMS); (3) Read-Copy Update

(RCU); (4) Symmetric Multiprocessing (SMP); (5) Non-Uniform Memory Access (NUMA); (6) Testing Technology; and (7) miscellaneous Items that do not fall into any particular category. The remaining items (79 Items) concern SCO's allegations of copyright infringement, which relate primarily to Linux (69 Items). SCO's allegations of infringement relating to Linux, which make no specific allegations of infringement by IBM, concern material of three types—(1) header files (including Open Group headers and Streams headers); (2) specifications (including ELF); and (3) miscellaneous materials (including one Item about memory management). In challenging this material, SCO accuses just 326 lines of code from the Linux kernel. By order of the Court, these 294 Items define the permissible scope of SCO's claims.

In addition to the fact that the Court limited SCO's claims to the Final Disclosures, SCO repeatedly committed to IBM that it would limit its claims to the Final Disclosures. In fact, SCO expressly stipulated and agreed with IBM that its claims would not exceed the Final Disclosures. In a Stipulation Re Scheduling Order filed with the Court on December 7, 2005, the parties stipulated and agreed as follows:

"1. Both parties are required to identify with specificity any and all material that each party contends the other has misused no later than December 22, 2005;

...

(c) Neither party shall be permitted to use [the period for discovery relating to the Final Disclosures] for the purpose of identifying additional misused material not disclosed by the December 22, 2005, deadline." (Ex. A.)

It is thus undisputed and indisputable that the Final Disclosures were to define the scope of SCO's claims. As discussed in Section II below, however, SCO attempts to use its expert reports to exceed the Final Disclosures, despite the Court's order and the parties' agreement.

II. THE CARGILL, IVIE AND ROCHKIND REPORTS FAR EXCEED THE SCOPE OF THE FINAL DISCLOSURES.

Three of SCO's proposed expert reports, those of Drs. Cargill, Ivie and Mr. Rochkind, exceed the scope of its Final Disclosures in significant respects. In fact, by Dr. Cargill's report (which appears to have been prepared in part by a law firm that has never participated actively in this case), SCO effectively seeks to reinvent the case. While the obvious inference is that SCO does not think much of its existing case, SCO's expert reports should be stricken insofar as they exceed the scope of the Final Disclosures.

SCO relies on the Cargill report to support its allegation that Linux infringes SCO's alleged UNIX copyrights. As stated, the Final Disclosures identify three categories of alleged copyright infringement: (1) header files; (2) specifications; and (3) miscellaneous materials. Rather than confine Dr. Cargill's opinions to these three categories of allegedly misused material (which amount to only 326 lines of code in the Linux kernel), SCO now claims three entirely new and vastly different categories of allegedly misused material:

- a) the overall structure of SVr4;
- b) the structure of the SVr4 file system; and
- c) system calls.

Moreover, SCO advances a theory relating to these materials (e.g., copying of selection, coordination and arrangement) that is different from any theory of infringement previously provided by it. The Final Disclosures make no allegations of misuse relating

to the overall structure of SVr4, the structure of the SVr4 file system, or system calls.²

Nor do any of SCO's responses to IBM's interrogatories, which plainly called for SCO to provide all such allegations.

SCO's new copyright claims regarding the overall structure of SVr4, the structure of the entire SVr4 file system and system calls are not minor additions to the Final Disclosures. On the contrary, they represent a significant departure from the Final Disclosures. The Final Disclosures' copyright allegations implicated only 12 Linux kernel files and 326 lines of code from the kernel.³ Since SCO's new theories challenge the overall structure of Linux and its file system, they appear to implicate virtually every file in Linux, which is comprised of millions lines of code. As a practical matter, the Cargill report effectively pleads a brand new and complex (although still meritless) case.

Even as to the categories of material identified in the Final Disclosures, SCO uses Dr. Cargill to expand considerably the scope of its allegations. For example:

- **Header Files:** The Final Disclosures identify source code in 29 Open Group header files and 15 Streams-related header files. The Cargill report goes beyond the Final Disclosures, claiming the "totality of the Streams framework". (Cargill Rpt. at 56.) That claim draws in every line in over 150 new files never before mentioned by SCO.
- **Specifications:** The Final Disclosures identify 19 Linux files relating to the ELF specification, as well as excerpts from several specification documents. Dr. Cargill far exceeds this claim by citing additional ELF-related files in Linux, and asserting infringement of the entire ELF format. The Cargill report also introduces into this case, for the first time, claims

² A handful of system call signatures (also called "function prototypes") appear in a few of the header files claimed in the Final Disclosures. However, SCO's Final Disclosures do not contain any claims about "system calls".

³ The kernel is the core of the operating system and the subject of IBM's counterclaim seeking a declaration of non-infringement relating to Linux.

to the ELF "magic number" (Cargill Rpt. at 76-78) (a unique pattern identifying the type and intended use of a file).

The Rochkind and Ivie reports also exceed the Final Disclosures. Both reports add significant new material, never before disclosed by SCO, as illustrated by the Ivie and Rochkind reports' discussions regarding JFS and Testing Tools:

- JFS: The Final Disclosures alleged that IBM "literally copied code from UNIX System V Release 2.1" and identified one System V file and one AIX file. (Item 1.) The Ivie report adds six additional System V files and six additional AIX files (Ivie Rpt. Exs. C-H), as well as two lists of twenty-one new AIX files. (Ivie Rpt. Exs. I, J.) (Of course, SCO fails to identify any connection between this material and the OS/2 JFS code IBM contributed to Linux.)
- Testing Technology: The Final Disclosures claimed IBM contributed 15 testing files to Linux. (Item 16.) The Rochkind report accuses another 73 files (288 printed pages worth). (Rochkind Rpt. at 149.) The Rochkind report also challenges two documentation files for testing technologies (Rochkind Rpt. at 144-145) that were not mentioned in the Final Disclosures.

These additions are not an exhaustive list of the ways in which SCO's expert reports exceed the scope of the Final Disclosures. They simply demonstrate why SCO's claims must be confined to the Final Disclosures, as per the Court's order and the parties' stipulation and agreement.

The bottom line is simple: SCO seeks by its expert reports to sandbag IBM by changing its case. Sandbagging is improper in any context. But this is especially so based on the Court's multiple attempts to force SCO to reveal its claims.

III. SCO'S CONDUCT IS UNDULY PREJUDICIAL TO IBM.

If SCO is allowed to ignore the Court's scheduling order and exceed the scope of the Final Disclosures, IBM will suffer undue and incurable prejudice. As stated, SCO seeks to expand the scope of the case—nearly six months after the deadline for its Final Disclosures, after the close of fact discovery, simultaneous with the filing of initial expert

reports, on the eve of the due date of IBM's opposing expert reports and when summary judgment briefs are forthcoming. In fact, IBM has already submitted expert reports addressing the very claims SCO now seeks to change. SCO has spent more than three years developing its theory of infringement and seeks to force IBM to respond to its newly-minted allegations, without the benefit of discovery, in a matter of weeks. If that would not be unfair, nothing would.

If (contrary to the existing schedule) IBM is required to pursue fact discovery and develop a defense to SCO's new-found allegations, it would take no less than 12 additional months to litigate SCO's new claims. That would, of course, preclude the existing trial date and push off yet again the resolution of issues on which SCO contends the future of the software industry depends. The only way IBM could get a fair hearing on SCO's claim would be to defer the trial, but that deferral alone would be prejudicial. IBM has been seeking a prompt resolution of this matter since its inception. A prompt resolution of the case matters to IBM because SCO's continued assertions of misconduct and disparagement of IBM's business, products and services has caused and is continuing to cause injury to IBM. Thus, the prejudice IBM would experience if SCO is allowed to change the case would be incurable. SCO's attempt to force IBM to defend new allegations is unfair—if not abusive—and should not be allowed.

Courts have refused to allow a party to change its case under far less compelling circumstances. For example, in Lynchval Systems, Inc. v. Chicago Consulting Actuaries, Inc., Civ. A. No. 95 C 1490, 1996 WL 735586, at *9 (N.D. Ill. Dec. 19, 1996) (Ex. B), the court rejected plaintiff's attempts to expand the scope of its case through its expert reports by striking references to misused materials in the report that were not adequately

disclosed during discovery. As the Court did here, the court in Lynchval entered an “order requiring [plaintiff] to produce a final response to [defendant’s] Interrogatory 2, specifying each allegedly [misused item], by the end of fact discovery.” Id. at *8. Like SCO, the plaintiff in Lynchval provided a list of misused materials, but then filed an expert report referring to numerous materials not disclosed in its final list of misused materials. Id. at *6, 9. Rejecting such attempts to expand the scope of the case, the court in Lynchval struck from plaintiff’s expert report any reference to those misused materials that had not been adequately disclosed in plaintiff’s final list. Id. at *9. The court in Lynchval observed that defendants’ “defense [was] seriously hampered” because defendants “reasonably expected to obtain a complete list of the allegedly stolen trade secrets . . . prepared and exchanged expert reports [based on that list] [and] . . . [i]n light of any additional trade secrets and subsequent depositions, defendants’ expert would have to amend his own report in light of this new information.” Id. The court rejected the notion that reopening discovery would be an adequate remedy because it “compounds the delay until trial and subjects the defendants to costs beyond . . . depositions”. Id.

This Court should do no less. It should strike from SCO’s expert report any reference to allegedly misused materials not disclosed in the Final Disclosures. See also Kern River Gas Transmission Co. v. 6.17 Acres of Land, 156 Fed.Appx. 96, 100, 103 (10th Cir. 2005) (affirming district court’s decision “preclud[ing] . . . [defendant] from introducing at the trial any expert evidence or documents not produced during discovery”) (Ex. C); Praxair, Inc. v. Atmi, Inc., 231 F.R.D. 457, 463-64 (D. Del. 2005) (striking portions of expert report that incorporated new evidence and defenses that were

not disclosed prior to a discovery cutoff).⁴ There is no justification for SCO's conduct, and IBM should not be required to respond to SCO's new allegations as if SCO had complied with the Court's scheduling order, which it plainly has not done.⁵

Conclusion

For the foregoing reasons, IBM respectfully requests that the Court enter an order confining SCO's claims to, and striking allegations in excess of, the Final Disclosures. The Court's Order need not say more than: "IT IS HEREBY ORDERED THAT SCO's claims shall be confined to SCO's December 22, 2005 Disclosure of Material Allegedly Misused by IBM (the "Final Disclosures") and that any allegations in excess of the Final Disclosures shall be and is hereby stricken." The Court set a deadline for final disclosures and the parties reached an agreement on the subject. Both the order and the parties agreement should be enforced.

⁴ In addition to the injury SCO's sandbagging would visit on IBM, it would, if allowed, disserve the judicial process. "[F]idelity to the constraints of Scheduling Orders and deadlines is critical to the Court's case management responsibilities." Finch v. Hercules, Inc., No. Civ. A. 92-251 MMS, 1995 WL 785100, at *9 (D. Del. Dec. 22, 1995) (citations omitted) (Ex. D). The "flouting of discovery deadlines causes substantial harm to the judicial system." Id. (citations omitted).

⁵ In the event the Court allows SCO to disregard the deadline for final disclosures of allegedly misused material—which, we respectfully submit, it should not do—the scheduling order would obviously have to be modified. IBM would not require three years to debunk SCO's claims. In fairness, however, we expect IBM would require no less than 12 months to prepare a defense to SCO's new allegations, especially if SCO is no more forthcoming in providing discovery relating to its new claims than it has been in revealing the particulars of the claims set out in the Final Disclosures. Such an extension would of course be independent of the extension IBM would require if the Court were to deny its already-pending motion to limit the scope of SCO's claims.

DATED this 8th day of June, 2006.

SNELL & WILMER L.L.P.

By /s/ Amy F. Sorenson

Alan L. Sullivan

Todd M. Shaughnessy

Amy F. Sorenson

CRAVATH, SWAINE & MOORE LLP

Evan R. Chesler

David R. Marriott

*Attorneys for Defendant/Counterclaim-Plaintiff
International Business Machines Corporation*

Of Counsel:

INTERNATIONAL BUSINESS MACHINES CORPORATION

Jennifer M. Daniels

Alec S. Berman

1133 Westchester Avenue

White Plains, New York 10604

(914) 642-3000

*Attorneys for Defendant/Counterclaim-Plaintiff
International Business Machines Corporation*

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2006, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court and delivered by CM/ECF system to the following:

Brent O. Hatch
Mark F. James
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

Stephen N. Zack
Mark J. Heise
BOIES, SCHILLER & FLEXNER LLP
100 Southeast Second Street, Suite 2800
Miami, Florida 33131

and by U.S. Mail, postage pre-paid to:

Robert Silver
Edward Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504

/s/ Amy F. Sorenson

EXHIBIT A

SNELL & WILMER L.L.P.
Alan L. Sullivan (3152)
Todd M. Shaughnessy (6651)
Amy F. Sorenson (8947)
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

CRAVATH, SWAINE & MOORE LLP
Evan R. Chesler (admitted pro hac vice)
David R. Marriott (7572)
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

*Attorneys for Defendant/Counterclaim-Plaintiff
International Business Machines Corporation*

FILED
U.S. DISTRICT COURT
2005 DEC -7 P 3 49
372958.4

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

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant/Counterclaim-Plaintiff.

**STIPULATION RE SCHEDULING
ORDER**

Civil No.: 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

The parties, by and through their counsel of record, hereby stipulate and agree as follows with respect to the Court's July 1, 2005, scheduling order (the "Order").

1. Both parties are required to identify with specificity any and all material that each party contends the other has misused no later than December 22, 2005;

2. During the period of fact discovery from January 28, 2006, to March 17, 2006, each party may only conduct fact discovery relating to its defenses to the other party's claims that the first party has misused material. Specifically:

(a). IBM's discovery during this time is limited to discovery relating to its defenses to SCO's claims that IBM has misused certain code or other information, which material SCO is required to identify with specificity no later than December 22, 2005. This includes IBM's Ninth and Tenth Counterclaims. IBM is not permitted to take discovery regarding material which SCO is alleged to have misused, including as it relates to IBM's Sixth and Eighth Counterclaims. SCO shall have the right to cross-examine any witnesses deposed by IBM.


(b). SCO's discovery during this time is limited to discovery relating to its defenses to IBM's claims that SCO has misused certain code or other information, which material IBM is required to identify with specificity no later than December 22, 2005. SCO is not permitted to take discovery regarding material which IBM is alleged to have misused, including as it relates to IBM's Ninth and Tenth Counterclaims. During this time, SCO shall have the right to conduct defensive discovery concerning the interpretation of the General Public License. IBM shall have the right to cross-examine any witnesses deposed by SCO.

(c). Neither party shall be permitted to use this discovery period for the purpose of identifying additional misused material not disclosed by the December 22, 2005, deadline.

3. If either party has a motion to compel pending on December 22, 2005, or January 27, 2006, the parties agree that the passage of the deadline, by itself, will not render moot the pending motion.

DATED this 7th day of December, 2005.

Snell & Wilmer L.L.P.



Alan L. Sullivan
Todd M. Shaughnessy
Amy F. Sorenson

CRAVATH, SWAINE & MOORE LLP
Evan R. Chesler
David R. Marriott

DATED this 7th day of December, 2005.

HATCH, JAMES & DODGE, P.C.
Brent O. Hatch
Mark F. James

By 
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of December, 2005, a true and correct copy
of the foregoing was sent by U.S. Mail, postage prepaid, to the following:

Brent O. Hatch
Mark F. James
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

Robert Silver
Edward Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504

Stephen N. Zack
Mark J. Heise
BOIES, SCHILLER & FLEXNER LLP
100 Southeast Second Street, Suite 2800
Miami, Florida 33131

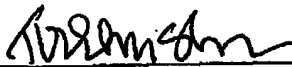


EXHIBIT B

Westlaw

Not Reported in F.Supp.

Page 1

Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.)

H

Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern
Division.

LYNCHVAL SYSTEMS, INC., a Virginia
corporation, Plaintiff/Counterdefendant,
and Josiah LYNCH, Counterdefendant,

v.

CHICAGO CONSULTING ACTUARIES, INC., an
Illinois corporation, Defendant,
and Thomas Terry, an individual, Harold Cooper, an
individual, Lina Hilko, an individual, James Peard,
an individual, Counterclaim in Reply Defendants,
and Winklevoss Consultants, Inc., a Delaware
corporation, Defendant/Counterplaintiff,
and Howard Winklevoss, an individual,
Counterclaim in Reply Defendant.
Civ. A. No. 95 C 1490.

Dec. 19, 1996.

MEMORANDUM AND ORDER

MANNING, District Judge.

*1 This matter comes before the court on motion of plaintiff, Lynchval Systems, Inc., ("Lynchval") for Review and Reversal of Magistrate Judge Joan Humphrey Lefkow's Ruling of May 28, 1996, striking from Lynchval's expert's report all material relating to allegedly misappropriated trade secrets undisclosed in Lynchval's previous answer to the defendants' Interrogatory 2. Defendants Winklevoss Consultants, Inc., ("WCI") and Chicago Consulting Actuaries, Inc., ("CCA") also submit objections to the May 28 Ruling regarding the denial of their request for monetary sanctions against Lynchval. For the reasons set forth below, the court denies both parties' motions and affirms Judge Lefkow's May 28 Ruling.

BACKGROUND

Lynchval produces and leases computer pension valuation software. Defendant WCI is a competing software producer. Defendant CCA is an insurance consulting company which leased from Lynchval the two computer programs at issue in this case, LynchVal and LVmed. In its cause of action, Lynchval alleges that CCA and WCI misappropriated trade secrets from its LynchVal and LVmed programs by disclosing them to WCI so that WCI could incorporate them into its competing software program called ProVal. Defendants deny any misappropriation or misuse of any Lynchval trade secrets, and further challenge whether Lynchval's claimed intellectual property constitutes trade secrets at all. Pursuant to Local Rule 2.41(b), the court referred this case to Magistrate Judge Lefkow to conduct necessary proceedings and enter appropriate orders or reports on all pretrial matters.

This discovery dispute arises from the defendants' efforts to compel Lynchval to specifically identify its allegedly misappropriated trade secrets. On March 23, 1995, defendants served Lynchval with Interrogatories 1 and 2. Interrogatory 1 requested that Lynchval identify all trade secrets that it claims to have provided to CCA through the lease of its software. Interrogatory 2 requested that Lynchval identify which of those trade secrets the defendants' allegedly misappropriated into their competing software.

Lynchval's initial responses failed to specify particular trade secrets embodied in the software it leased to CCA or identify which of these trade secrets were allegedly stolen. On September 25, 1995, WCI filed a motion to compel Lynchval to file supplemental responses to its interrogatories that would specifically identify the trade secrets at issue. Although Lynchval submitted supplemental responses, Judge Lefkow granted WCI's motion at a November 9 hearing and ordered Lynchval to come forward with more specific information. Subsequently, Lynchval presented the defendants with a Request to Admit No. 21 in respect to several

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.

Page 2

Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.)

specified trade secrets that it alleges are contained in the relevant software.

On November 27, Judge Lefkow held a follow-up hearing to consider Lynchval's compliance and WCI's request for monetary sanctions. After Lynchval explained its expert's difficulty identifying all of the allegedly stolen trade secrets before Lynchval had completed its own depositions relating to WCI's software, Judge Lefkow declined to require Lynchval to produce a final binding list. Instead, Judge Lefkow accepted Lynchval's assertion that the trade secrets set forth in its Request to Admit were all that they had identified as yet. Judge Lefkow then found that these trade secrets enumerated in Lynchval's Request to Admit in conjunction with its prior responses to the interrogatories satisfied her order for the time and denied WCI's request for sanctions. However, Judge Lefkow cautioned Lynchval "that at some point this has to come down to a final statement," and that following depositions it must "come forward" with any modifications to its response. Fact discovery ultimately closed on January 17, 1996.

*2 On February 2, 1996, Lynchval served its Second Supplemental Responses to Interrogatories 1 and 2. The Second Supplemental Response to Interrogatory 2 specifically identified over fifty allegedly misappropriated trade secrets in a list of items designated (a)-(qq) as well as a section titled Appendix II. In addition, this response broadly claimed unidentified trade secrets contained in thirty-one specified deposition exhibits and documents. Previously, in January, defendants filed a motion for sanctions seeking to preclude Lynchval from asserting trade secrets allegedly misappropriated from the LVmed software. At a February 26 hearing on this motion, Lynchval's counsel explained that he had "represented to the Court that we would be taking the depositions of the defendants' personnel and, thereafter, we would give a supplemental listing." Counsel argued that its Second Supplemental Response satisfied this promise and "the Court's directive." Finding that Lynchval's previous responses had not adequately notified the defendants or the court of the LVmed allegations, Judge Lefkow permitted the defendants

to reopen discovery and hold further depositions on the alleged LVmed trade secrets and ordered Lynchval to bear the defendants non-attorney costs incurred on these depositions.

Subsequently, Lynchval asserted that all of the items listed in Appendix I to the Supplemental Response to Interrogatory 1 were also misappropriated. Arguing that it presumed Appendix I was only intended as a response to Interrogatory 1, WCI submitted another motion for sanction to obtain an order stating that Appendix I was not a response to Interrogatory 2. On April 15, Judge Lefkow ordered that any material enumerated in Appendix I would not be treated as a response to Interrogatory 2 unless it was "specifically set forth in items (a)-(qq) or Appendix II." Judge Lefkow based this order on (1) the fact that this material had been submitted after the close of fact discovery and (2) Mr. Lynch, who had composed the list in Appendix I identifying trade secrets provided to CCA, did not have access to the defendants' software and so was not competent to identify which trade secrets it appropriated from his software. Lynchval never objected to the April 15 Order.

During April, 1996, Lynchval asserts that one of its two expert witnesses, Gary Mevorah, was forced to withdraw his services as a testifying expert due to personal and professional commitments. Lynchval originally retained Mevorah to issue an expert report and testify on the trade secret issues. Lynchval also retained another expert, Adrien LaBombarde, to testify on ethical and non-technical matters. After Mevorah withdrew, LaBombarde assumed Mevorah's role. Lynchval insists that it was necessary for LaBombarde to compose his own expert report even though the evidence indicates that Mevorah already had drafted his own expert report.

On May 5, Lynchval filed LaBombarde's expert report which referred to some fifty-seven allegedly misappropriated trade secrets. On May 21, defendants moved to strike portions of the expert's report that referred to thirty-six of these trade secrets and for further sanctions, arguing that these trade secrets were not specifically enumerated in

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.

Page 3

Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.)

items (a)-(qq) or Appendix II. At a May 24 hearing, Lynchval responded that none of these trade secrets were new, but were disclosed to the defendants in its Second Supplemental Response. To the extent that there may have been any discrepancies, Lynchval argued this was due to their unexpected change in experts and the necessity that LaBombarde draft his own expert report.

*3 In her May 28 Ruling, Judge Lefkow found that (1) Lynchval had ample notice that it was required to disclose a final list of allegedly misappropriated trade secrets by the end of discovery, (2) it would be impracticable to reopen discovery to permit defendants to conduct necessary depositions on newly identified items in the expert report, and (3) defendants would be prejudiced if Lynchval were permitted to amend its expert report. Consequently, Judge Lefkow granted the defendants' motion "insofar as it seeks an order striking from the expert's report material relating to previously undisclosed trade secrets allegedly misappropriated by the defendants." However, Judge Lefkow did not determine which of the thirty-six trade secrets at issue were undisclosed. She instead directed the parties to confer in good faith and resolve which of these trade secrets were "merely different characterizations" of previously identified trade secrets and which were truly new. In addition, Judge Lefkow denied the defendants' request for monetary sanctions because Lynchval's "representations to the court were in the main prognostications which did not materialize because of the unexpected change in expert witnesses."

Unfortunately, the parties have proven incapable of resolving this matter among themselves. Consequently, Lynchval submits this Motion to Review and Reverse the May 28 Ruling arguing that (1) Judge Lefkow imposed the sanction without providing Lynchval with the opportunity to submit a written brief or fully prepare an oral defense, and (2) the sanction was unwarranted and unjust under the facts. Lynchval asserts that the May 28 Ruling was unwarranted because its final response to Interrogatory 2 complied with Judge Lefkow's instructions and provided the defendants with adequate notice of all thirty-six objected trade secrets. In addition, Lynchval contends that any

failure on its part to comply with Judge Lefkow's instructions was neither willful nor in bad faith. In particular, Lynchval points to Judge Lefkow's refusal to impose monetary sanctions and her attendant finding that any failure to obey her discovery orders were due primarily to its unexpected change in experts. Finally, Lynchval argues that the defendants have not suffered any incurable prejudice, and that the less drastic sanction of reopening discovery for the defendants at Lynchval's cost is available.

Defendants respond that the May 28 Ruling was warranted under the law and was a logical extension of Judge Lefkow's April 15 Order excluding from Lynchval's response to Interrogatory 2 those trade secrets in Appendix I not "specifically set forth" in items (a)-(qq) or Appendix II of the supplemental response. Defendants contend that Lynchval's Second Supplemental Response did not provide them with notice that it intended to pursue any of the thirty-six trade secrets at issue. In particular, defendants argue that Judge Lefkow required Lynchval to specifically enumerate any allegedly stolen trade secrets by the close of fact discovery. Defendants contend that Lynchval's own representations to the defendants and the court reveal that it understood this requirement.

*4 For their part, defendants also object to the May 28 Ruling insofar as it declined to impose monetary sanctions against Lynchval. Defendants argue that Judge Lefkow's factual finding regarding the degree of Lynchval's fault was clearly erroneous.

DISCUSSION

I. Opportunity to Respond.

As an initial matter, the court finds that Judge Lefkow provided Lynchval with adequate time to respond to the defendant's motion for sanctions. Defendants filed their motion and provided Lynchval with copies on May 21, 1996, three days prior to oral arguments. All parties were then present at the May 24 hearing, and argued over the motion for about one hour. The record reveals that

Not Reported in F.Supp.

Page 4

Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)
 (Cite as: Not Reported in F.Supp.)

Lynchval did not request the opportunity to submit a written brief until the conclusion of these oral arguments. Lynchval has cited neither to statute nor precedent indicating that it was entitled as a matter of law to either more time or an absolute right to submit a written brief. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 57, 111 S.Ct. 2123, 2139, 115 L.Ed.2d 27 (1991) (discovery sanctions require fair hearing and opportunity to respond). Therefore, the court finds that Lynchval had adequate opportunity to prepare a defense and respond to the defendants' charges.

II. Standard of Review.

Next, this court must determine the appropriate standard under which to review Judge Lefkow's May 28 Ruling. Federal Rule of Civil Procedure 72(a) authorizes a magistrate judge to issue binding orders that are "not dispositive of a claim or defense." Under Federal Rule 72(a), a district court may reverse such a nondispositive order that is "clearly erroneous or contrary to law." If the order would be "dispositive of a claim or defense of a party", however, then Federal Rule 72(b) only authorizes a magistrate judge to issue a recommendation to the district court that is subject to that court's de novo review. Consequently, the appropriate standard of review depends upon whether the May 28 Ruling was dispositive or nondispositive of the merits of the case.

The statute providing the authority granted in Federal Rule 72 does not use the terms dispositive or nondispositive. See 28 U.S.C. § 636(b). Rather, section 636(b) authorizes a magistrate judge to determine "any pretrial matter" with the exception of eight specified matters, including motions for the "involuntary dismissal of a claim or defense." FN1 *Id.* Reading section 636(b) and Federal Rule 72 together, the term "dispositive" in Rule 72(b) generally refers to those orders resolving these eight listed matters. See *Adkins v. Mid-American Growers, Inc.*, 143 F.R.D. 171, 175 n. 3 & 176 (N.D.Ill.1992) ("dispositive" and "nondispositive" in Rule 72 do not create categories of orders "separate from the statute that Rule 72 implements").

FN1. Section 636(b) provides in relevant part:

(b)(1) Notwithstanding any provision of law to the contrary-

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

However, dispositive orders are not strictly limited to those orders that formally resolve the eight matters enumerated in the statute. Orders that have the practical effect of necessarily resolving one of those eight matters, such as the "involuntary dismissal of a claim or defense," are considered dispositive of the merits and, consequently, require de novo review under Federal Rule 72. *Ocelot Oil Corp. v. Sparrow Industries*, 847 F.2d 1458 (10th Cir.1988) (order striking plaintiff's pleadings that would result in imminent dismissal of claim are dispositive and so exceed magistrate judge's statutory authority); see, e.g., *Woods v. Dahlberg*, 894 F.2d 187, 187 (6th Cir.1990) (denial of motion to proceed *in form pauperis* is dispositive as functional equivalent to dismissal); see also, e.g., *Alpern v. Lieb*, 38 F.3d 933, 935 (7th Cir.1994) (finding Federal Rule 11 sanction for money damages "dispositive" of merits); *Bennett v. General Caster Service of N. Gordon Co.*, 976 F.2d 995, 997 (6th Cir.1992) (same); see generally 7 *Moore's Federal Practice* 72.04[2-4] (1996). Accordingly, if striking references to certain alleged trade secrets from the plaintiff's expert report necessarily disposes of the substantive merits of Lynchval's claim, then this court must review the May 28 Ruling de novo.

Not Reported in F.Supp.

Page 5

Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.)

*5 Although severe, Judge Lefkow's May 28 Ruling was not "dispositive of a claim or defense" within the meaning of Federal Rule 72(b). As a formal matter, the May 28 Ruling does not expressly dismiss any part of Lynchval's action. The Ruling also does not explicitly prohibit Lynchval from asserting at trial that the defendants misappropriated the stricken trade secrets. Rather, the Ruling only strikes any references to the trade secrets in question from the report of Lynchval's expert witness. Certainly, this sanction is severe. Lynchval's cause of action is likely to revolve around the comparison of highly sophisticated computer programs. Consequently, expert reports and testimony comparing and contrasting these computer programs will have a powerful influence over any trier of fact. Lynchval has no other expert witness scheduled to testify, and any effort to enlist another at this late date would prejudice the defendants. However, this sanction does not necessarily preclude Lynchval's ability to obtain a judgment on any proscribed trade secrets. Lynchval may still enter any other evidence or documents on these trade secrets that it uncovers through discovery, as well as call other witnesses to testify regarding these alleged trade secrets.

For the reasons set forth above, the court considers the May 28 ruling a nondispositive order under Federal Rule 72(a). Therefore, the May ruling will be reversed only if it was "clearly erroneous or contrary to law."

III. Judge Lefkow's Order to Strike.

A. Disclosure of Trade Secrets.

Lynchval argues that the May 28 Ruling was unwarranted and contrary to law because its Supplemental Response to Interrogatory 2 adequately disclosed each of the thirty-six trade secrets at issue. Lynchval asserts that Judge Lefkow never directed it to provide a specific list of trade secrets but only provide a "final statement." Therefore, despite the fact that none of the thirty-six trade secrets at issue appear in identical wording on the text of the Second Supplemental Response,

Lynchval contends that it still identified and disclosed each by reference. First, Lynchval argues that ten of these trade secrets were implicitly revealed by the phrases "specific methods of calculation embodied in Lynchval Systems software" or "the somewhat general aspects of the structure and organization of Lynchval Systems' software." Second, Lynchval argues that another nineteen of the trade secrets were disclosed by reference to thirty-one deposition documents as containing allegedly stolen trade secrets. See *C & F Packing Co. v. IPB, Inc.*, 1994 WL 36874, 1994 U.S. Dist. Lexis 1210 (N.D.Ill.1994) (finding plaintiffs adequately identified allegedly stolen trade secret of pizza recipe by attaching copy of recipe). Third, Lynchval argues that seven of the trade secrets were specifically set forth, but phrased somewhat differently.

The court first addresses Lynchval's discovery duties. In response to WCI's motion to compel, Judge Lefkow ordered Lynchval to identify its allegedly stolen trade secrets. Lynchval's claims involve sophisticated and highly complex computer programs. Neither the court nor any trier-of-fact is likely to have any expertise in this matter. More importantly, the defendants cannot be expected to prepare its rebuttal to Lynchval's claims without some concrete identification of exactly which aspects of Lynchval's programs they alleged were incorporated into their own program. See *AMP, Inc. v. Fleischhacker*, 823 F.2d 1199, 1203 (7th Cir.1987) (plaintiff must ultimately identify specific trade secrets to succeed on trade secret claims). Accordingly, only after Lynchval provided a concrete listing, in the form of its Request to Admit No. 21, did Judge Lefkow find that Lynchval had temporarily satisfied her order to the extent that Lynchval had not identified additional trade secrets. As Lynchval argues, the record does not reveal that Judge Lefkow specifically directed Lynchval at this time to present these trade secrets in a particular format. But Judge Lefkow directed Lynchval that it must provide the defendants with a "final statement", as well as come forward and update its previous list as it identified further allegedly stolen trade secrets. The record of the November hearings reveal that Judge Lefkow required Lynchval to concretely and specifically

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.

Page 6

Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.)

identify these trade secrets in this "final statement."

*6 In reference to ten of the alleged trade secrets ^{FN2}, Lynchval asserts that its Supplemental Response revealed these as either "specific methods of calculation embodied in Lynchval Systems software" or "the somewhat general aspects of the structure and organization of Lynchval Systems' software." These statements put neither the defendants or the court on notice of any alleged trade secret, other than the fact that it is some aspect or function of the software. In fact, it is difficult to imagine any function of Lynchval's computer system that arguably could not fall under such vague descriptions. Judge Lefkow clearly required something more specific than this manner of catch-all phrasing. After review of these trade secrets and Lynchval's responses to the interrogatories, the court finds that these ten trade secrets were not disclosed in any of Lynchval's response to Interrogatory 2.

FN2. LaBombarde's expert report labels these alleged trade secrets as; (o), (s), (u), (v), (w), (y), (dd), (nn), (tt(5)), (vv), and (ww).

Lynchval argues that its Supplemental Response to Interrogatory 2 disclosed another nineteen of the alleged trade secrets ^{FN3} by incorporating any trade secrets contained in thirty-one identified deposition exhibits and other documents. Lynchval has submitted four of these documents where each of these nineteen alleged trade secrets are highlighted and specifically enumerated. As explained, however, Judge Lefkow directed Lynchval to specifically identify the trade secrets at issue. The attached exhibits reveal that these four documents contained descriptions of at least forty computer functions that potentially constituted trade secrets. Yet, Lynchval's position would require the defendants to ascertain which nineteen Lynchval was claiming. Moreover, the Second Supplemental Response referred to thirty-one documents containing hundreds of pages of material. Lynchval apparently expects the defendants to divine which four documents ultimately contained the allegedly stolen trade secrets. As Lynchval

argues, Judge Lefkow did not demand that the trade secrets be provided in list format. However, Judge Lefkow required Lynchval to specifically identify each allegedly stolen trade secret to the defendants. Reference to numerous documents containing a plethora of potential trade secrets does not reasonably satisfy that directive ^{FN4}. Consequently, the court finds that Lynchval's Second Supplemental Response to Interrogatory 2 does not disclose these nineteen trade secrets.

FN3. LaBombarde's expert report labels these alleged trade secrets as; (b), (c), (d), (e), (j), (k), (q), (r), (t), (ij), (kk), (oo), (rr), (ss(1)), (ss(2)), (tt(1)), (tt(2)), (tt(3)), and (uu).

FN4. Lynchval's reliance on *C & F Packing Co. v. IPB, Inc.*, 1994 U.S. Dist. Lexis 1210 (N.D.Ill.1994) is unavailing. First, the *C & F Packing Co.* plaintiff could rely on an attached description of its trade secret recipe as a business document under Federal Rule of Civil Procedure 33 because the description was contained in the plaintiff's own document. *See* Federal Rule of Civil Procedure 33(d) (permitting party to attach its own business records to respond to interrogatories). In its Second Supplement Response, Lynchval refers to copies of the defendants' documents. Second, the recipe at issue in *C & F Packing Co.* in all likelihood was far less complex than the parties' computer software. Thus, a single description of the processes of the entire recipe would adequately notify a defendant of the range of potential stolen secrets. Lynchval's own arguments before Judge Lefkow reveal that it is unlikely that a similar recipe exists for the computer programs at issue in this case.

Finally, Lynchval argues that seven of the trade secrets ^{FN5} at issue are merely reworded versions of trade secrets specifically enumerated in its Second Supplemental Response. As explained, LaBombarde was not Lynchval's original expert

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.

Page 7

Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.)

witness for identifying trade secrets. Lynchval asserts that when LaBombarde composed his own expert report, he did not adopt every trade secret from Mevorah's notes and draft verbatim but altered some of the descriptions. Lynchval notes that Judge Lefkow never articulated that Lynchval is bound by precisely identical descriptions that it must provide in its "final statement." Thus, Lynchval contends that these seven trade secrets are merely different characterizations of the same trade secrets already identified in the Second Supplemental Response.

FN5. LaBombarde's report labels these alleged trade secrets as; (f), (h), (i), (ff), (qq), (xx), and (yy).

*7 Defendants reply that none of these seven trade secrets were disclosed because they are not identical to any descriptive phrases in the Second Supplemental Response. In light of the complexity of discerning the concrete manifestation of these trade secrets in a functioning computer program from a brief grammatical description, defendants assert that LaBombarde's alterations to the descriptions render them distinct computer functions that their expert cannot be expected to identify or locate in the actual processes of Lynchval's programs.

Although the court appreciates the defendant's difficult task in discerning each alleged trade secret's manifestation in the software in order to prepare its defense, the court finds that five of the remaining trade secrets are adequately similar to specific descriptions set forth in Lynchval's response to have placed the defendants on notice. Alleged trade secret (h) is disclosed by both items (dd) and (ii) in the Second Supplemental Response. Although they constitute somewhat broader capabilities, alleged trade secrets (f) and (ff) are respectively disclosed by Second Supplemental Response items (g) and (w). The descriptions provided in the Second Supplemental Response provide concrete examples and are adequately analogous as to have put the defendants and their expert on notice of the nature of the allegedly stolen trade secret. Finally, alleged trade secrets (xx) and

(yy) are both adequately disclosed by the narrative description of the "building block technique" to determine benefits contained in Lynchval's Supplemental Response to Interrogatory 1. Although this narrative is located in Lynchval's first Supplemental Response to Interrogatory 1, Lynchval's response to Interrogatory 2 incorporated this section by reference. This narrative description provides a description of an alleged trade secret as concrete as those set forth in items (a)-(qq) or Appendix II. Accordingly, the court finds that Lynchval's Second Supplemental Response to Interrogatory 2 adequately disclosed LaBombarde's alleged trade secrets (f), (h), (ff), (xx) and (yy).

However, Lynchval attempts to argue that two of these trade secrets, (i) and (qq), are disclosed by the phrase; "the structures and respective organizations of the Lynchval Systems software constitute protectable trade secrets." This vague description does not constitute notice of any trade secret. Therefore, the court finds that these two alleged trade secrets were not disclosed in the prior response.

B. Sanction.

Federal Rule of Civil Procedure 37(b)(2) authorizes a court to strike evidence or disallow claims as a sanction against a litigant that does not cooperate with the discovery process^{FN6}. Federal Rule 37(b)(2) only authorizes a court to impose a sanction if the party fails to comply with a discovery order. Federal Rule 37(b)(2); *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 (7th Cir.1994). In addition, a discovery sanction that dismisses a party's claim requires that the party's conduct displayed willfulness, bad faith or fault. *Phillips Medical Sys. Int'l v. B.V. Bruetman*, 982 F.2d 211, 214 (7th Cir.1992). A party may be subject to less severe sanctions than dismissal if it merely fails to respond to a discovery order. *Halas v. Consumer Services, Inc.*, 16 F.3d 161, 164-65 (7th Cir.1994). With respect to sanctions under Federal Rule 37(b), "order" is interpreted broadly. *Brandt*, 30 F.3d at 756 n. 7. A formal written order to comply with a discovery request is not required; any unequivocal

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.

Page 8

Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.)

oral directive to produce certain information is sufficient. *See Halas*, 16 F.3d at 164.

FN6. Neither the defendants' original Urgent Motion for Sanctions nor the May 28 Ruling identifies the legal authority for the sanction; Federal Rule of Civil Procedure 37(b)(2), Federal Rule 37(d) or the inherent powers of the court. The court shall proceed under the presumption that Judge Lefkow issued her Ruling pursuant to Federal Rule 37(b)(2) but notes that this is only one possible source of authority.

*8 In September, 1995, WCI submitted a motion to compel Lynchval to specify the allegedly stolen trade secrets. Judge Lefkow granted WCI's motion to the extent that it required Lynchval to at least specify those trade secrets that it had currently identified. At the subsequent hearing on November 27, Judge Lefkow only found that Lynchval's supplemental responses satisfied her orders at that time in light of the specific trade secrets set forth in Lynchval's Request to Admit. Judge Lefkow then instructed Lynchval to (1) update its list of trade secrets as they became available to it, and (2) be prepared to ultimately submit a "final statement." Although Judge Lefkow did not provide a specific date, it was clear that she required this "final statement" by the close of fact discovery. In fact, at the February 26 hearing, Lynchval's counsel argued that its Second Supplemental Response had satisfied "the Court's directive" and his own representations that Lynchval would provide a "supplemental list." In light of the November hearings and Lynchval's representations at those hearings, the court finds that Judge Lefkow's oral directive constituted an order requiring Lynchval to produce a final response to Interrogatory 2, specifying each allegedly stolen trade secret, by the end of fact discovery.

The preclusion of certain evidence or testimony generally does not constitute the dismissal of a claim or a default judgment. *See, e.g., Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661, 671-72 (7th Cir.1996) (preclusion of expert testimony did

not constitute default judgment); *Dellums v. Powell*, 566 F.2d 231, 235 (D.C.Cir.1977); *Von Brimer v. Whirlpool Corporation*, 536 F.2d 838 (9th Cir.1976). However, a sanction that prevents a party "from presenting any evidence whatsoever on a claim" may constitute a de facto dismissal or default judgment on that claim. *Crown Life Ins. v. Craig*, 995 F.2d 1376, 1381 (7th Cir.1993). Although the May 28 Ruling significantly restricts Lynchval's ability to demonstrate that the defendants incorporated these trade secrets into their competing computer program, the Ruling does not prohibit Lynchval from proceeding on these matters at trial. More importantly, Lynchval may still offer any documents or other evidence it obtains in discovery to support its contention that defendants stole these trade secrets. *Compare Crown Life Ins.*, 995 F.2d at 1381. Because the May 28 Ruling does not predetermine the disposition of Lynchval's claim in respect to these trade secrets, the Ruling does not constitute a de facto dismissal. Therefore, in contrast to Lynchval's position, the May 28 Ruling did not require a finding of willfulness or bad faith. *See Cope v. McPherson*, 781 F.2d 207, 209 (D.C.Cir.1985) (if plaintiff could still proceed on claim without precluded evidence, no showing of willfulness or bad faith is required).

A sanction under Federal Rule 37(b) should be proportionate to the circumstances surrounding the failure to comply with discovery. *Crown Life*, 995 F.2d at 1382; *see* Federal Rule 37(b) (award such sanctions "as are just"). It should reflect the culpability of the delaying party and seek to prevent prejudice to the other party. *Wilson v. Volkswagon of America, Inc.*, 561 F.2d 494, 504 (4th Cir.1977); *see Tamari v. Bache & Co. (Lebanon)*, 729 F.2d 469, 473 (7th Cir.1984). The preclusion of evidence from an expert report constitutes a significant sanction, particularly in a case likely to revolve around expert testimony. However, the court cannot find that Judge Lefkow's sanction is contrary to law. First, the fact that Judge Lefkow did not find Lynchval's violation of her discovery orders to constitute willful misrepresentations does not indicate that Lynchval was free of blame. The May 28 Ruling also holds that Lynchval had ample notice that they were required to identify a final list of allegedly stolen trade secrets by the close of

Not Reported in F.Supp.

Page 9

Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.)

discovery. As explained above, the court affirms this holding.

*9 Second, to the extent that any of these trade secrets were not set forth in Lynchval's prior responses to Interrogatory 2, the defendants have suffered clear prejudice. In particular, the preparation of their defense is seriously hampered. The defendant's primary strategy has been to depose Mr. Lynch, the president of Lynchval, about each alleged trade secret and how it works on his software. Obviously, the defendants' could not pursue this strategy with any newly identified trade secrets. Lynchval responds that the court may cure this prejudice simply by reopening discovery and permitting the defendants to resume depositions at the plaintiff's cost. Judge Lefkow already reopened discovery once for the plaintiff to permit it to pursue its allegations in respect to the LVmed program. Reopening discovery again compounds the delay until trial and subjects the defendants to costs beyond the depositions themselves. Defendants reasonably expected to obtain a complete list of the allegedly stolen trade secrets by February. The parties have already prepared and exchanged expert reports. In light of any additional trade secrets and subsequent depositions, defendants' expert would have to amend his own report in light of this new information.

In sum, Judge Lefkow's May 28 Ruling striking undisclosed trade secrets from Lynchval's expert report was neither clearly erroneous nor contrary to law. The May 28 Ruling accurately accounts, at the very least, for Lynchval's negligent failure to follow the court's directives, as well as its likely prejudice to the defendants. Accordingly, the court affirms the May 28 Ruling.

IV. Monetary Sanctions.

Under Federal Rule 37(b)(2), the court should impose monetary sanctions on the party failing to obey a discovery order unless the court finds the award of expenses unjust. In her May 28 Ruling, Judge Lefkow denied monetary sanctions because she found that Lynchval's failure to satisfy her previous order in accurately identifying the trade

secrets it would pursue at trial was primarily due to Lynchval's change of experts. Defendants argue that this factual finding was clearly erroneous and ask the court to reverse this aspect of the May 28 Ruling.

After reviewing the record, the court finds that Judge Lefkow's finding was not clearly erroneous. First, defendants have not established that Lynchval's change in experts was expected or due to nefarious stratagem. Second, the fact that Lynchval's Second Supplemental Response was derived from Mevorah's work does not undermine Judge Lefkow's conclusion that Lynchval was not guilty of deceit. The court does not find Lynchval's desire that LaBombarde, its replacement expert, compose his own report instead of merely adopting Mevorah's report to be wholly unreasonable. Lynchval may have worried about the implications for cross-examination, LaBombarde's willingness to adopt Mevorah's text notwithstanding. Lynchval certainly bears some fault for not ensuring that LaBombarde not add previously undisclosed trade secrets. However, Judge Lefkow was not clearly erroneous in finding that this fault failed to render Lynchval's earlier conduct as intentional misrepresentations. Therefore, the court affirms the May 28 Ruling denying monetary sanctions.

CONCLUSION

*10 For the reasons set forth above, the court, having reviewed the May 28 Ruling and objections thereto, denies Lynchval's motion to reverse Judge Lefkow's May 28 Ruling. Likewise, the defendants' objections to the May 28 Ruling are overruled. The May 28 Rulings are affirmed. In addition, the court finds that all of the thirty-six alleged trade secrets at issue under the May 28 Ruling were previously undisclosed except those trade secrets labeled in Lynchval's expert report as (f), (h), (ff), (xx) and (yy).

N.D.Ill.,1996.
Lynchval Systems, Inc. v. Chicago Consulting Actuaries, Inc.
Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)

Not Reported in F.Supp.

Page 10

Not Reported in F.Supp., 1996 WL 735586 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.)

Briefs and Other Related Documents (Back to top)

• 1:95cv01490 (Docket) (Mar. 08, 1995)

END OF DOCUMENT

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

EXHIBIT C

Westlaw

156 Fed.Appx. 96

Page 1

156 Fed.Appx. 96, 2005 WL 3257509 (C.A.10 (Utah))
(Cite as: 156 Fed.Appx. 96)

C

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter. Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals, Tenth Circuit.
KERN RIVER GAS TRANSMISSION COMPANY, a Texas general partnership,
Plaintiff-Appellee,

v.

6.17 ACRES OF LAND, MORE OR LESS, IN SALT LAKE COUNTY, UTAH, Known as Kern River Tracts 186.01W, 186.06W, 186.07W and 187AW; NU Team, a Utah corporation; Founders Title, a Utah corporation and trustee named in a trust deed of record; Caroline Stayman Edler, a beneficiary named in a trust deed of record; Monte C. Nelson, beneficiary, by assignment, of a trust deed of record, trustee of the Monte Cannon Nelson Trust; David M. Nelson, beneficiary, by assignment, of a trust deed of record; Meridian Title, a Utah corporation and trustee named in five trust deeds of record; City Properties, a Utah limited liability company and beneficiary named in a trust deed of record; Gaius Crosby and Susan Crosby Charitable Unitrust, a beneficiary named under a single trust deed of record; Kenbar Family Partnership Larsen, a beneficiary named under a single trust deed of record; W. Bart Christenson, a beneficiary named under a single trust deed of record; Barbara Christenson, a beneficiary named under a single trust deed of record; Katheryn Hoopes Paxman, a beneficiary named under a single trust deed of record; Oak Leaf Investments, a Utah limited liability company and a Beneficiary by assignment of a trust deed of record; Steffenson Law Office; Brian W. Steffenson; C.A.T., LLC, a Utah limited liability corporation; JMS Financial, a Utah limited liability corporation; JS West Associates, a Utah corporation; Watson Family, a Utah limited liability corporation; Wyoming-California Pipeline Company, a Colorado

general partnership and holder of an easement of record, Defendants, and JMS-Meadow, a Utah limited liability company, Defendant-Appellant.
No. 04-4033.

Dec. 2, 2005.

Background: Gas utility brought action under the Natural Gas Act against numerous property owners, seeking to condemn certain property for an interstate natural gas pipeline. The United States District Court for the District of Utah excluded a property owner from presenting expert testimony, expert's report, or other documents at bench trial and refusing to reopen trial to take additional testimony. Property owner appealed.

Holdings: The Court of Appeals, Ebel, Circuit Judge, held that:

- 1(1) District Court was within its discretion in sanctioning property owner for failing to voluntarily produce documents;
- 2(2) District Court did not abuse its discretion in refusing to permit property owner to present expert evidence at bench trial; and
- 3(3) District Court was within its discretion in denying property owner's motion seeking relief for fraud upon the court.

Affirmed.

West Headnotes

[1] Federal Civil Procedure 170A ⇨ 1636.1

170A Federal Civil Procedure
170AX Depositions and Discovery

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

156 Fed.Appx. 96

Page 2

156 Fed.Appx. 96, 2005 WL 3257509 (C.A.10 (Utah))
(Cite as: 156 Fed.Appx. 96)

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)5 Compliance; Failure to Comply

170Ak1636 Failure to Comply; Sanctions

170Ak1636.1 k. In General. Most

Cited Cases

District Court was within its discretion in sanctioning property owner for failing to voluntarily produce documents in gas utility's action to condemn certain property for an interstate natural gas pipeline, although rule requiring a party to provide initial disclosures "without awaiting a discovery request" did not require property owner to produce documents sought, where utility made informal requests for the documents, and property owner did not show that its violation of voluntary disclosure rule was either justified or harmless. Fed.Rules Civ.Proc.Rule 26(a)(1)(B), 28 U.S.C.A.

[2] Federal Civil Procedure 170A ⇌ 1278

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(A) In General

170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

District Court did not abuse its discretion in refusing to permit property owner to present expert evidence at bench trial in gas utility's action to condemn certain property for an interstate natural gas pipeline, as sanction for property owner's failure to present a complete expert report, where property owner failed to show that its violation of rule governing disclosure of expert testimony was justified or harmless, and excluding the evidence properly avoided prejudice to utility, since permitting property owner to present the evidence at trial despite failing to disclose expert report would have inhibited utility's ability to prepare for trial. Fed.Rules Civ.Proc.Rule 26(a)(2), 28 U.S.C.A.

[3] Federal Civil Procedure 170A ⇌ 2654

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(G) Relief from Judgment

170Ak2651 Grounds

170Ak2654 k. Fraud; Perjury. Most

Cited Cases

District Court was within its discretion in denying property owner's motion seeking relief for fraud upon the court, in gas utility's action to condemn certain property for an interstate natural gas pipeline, absent evidence that gas utility, even if it made a misrepresentation to the court, had an intent to defraud.

*98 Stephen Kent Christiansen, Bradley M. Strassberg, Van Cott, Bagley, Cornwall & McCarthy, Martha Jean Amundsen, Kern River Gas Transmission Company, Salt Lake City, UT, for Plaintiff-Appellee.

Brian W. Steffensen, Steffensen Law Office, Salt Lake City, UT, for Defendants.

Before EBEL, HARTZ, and McCONNELL, Circuit Judges.

ORDER AND JUDGMENT ^{FN*}

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.EBEL, Circuit Judge.

**1 After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Kern River Gas Transmission Co. filed an action under the Natural Gas Act, 15 U.S.C. § 717f(h), to condemn certain property in Utah, including property owned by defendant JMS-Meadow, for an interstate natural gas pipeline. The district court granted immediate occupancy of the JMS-Meadow property to Kern River, and later held a bench trial to determine the value of the

156 Fed.Appx. 96

Page 4

156 Fed.Appx. 96, 2005 WL 3257509 (C.A.10 (Utah))
(Cite as: 156 Fed.Appx. 96)

for discovery, Kern River filed, pursuant to Fed.R.Civ.P. 37, a motion to exclude JMS-Meadow's evidence at trial or to compel and for sanctions, arguing that no documents had been produced during discovery as required by Rule 26(a)(1)(B) and (C), JMS-Meadow's witnesses had not appeared for depositions, JMS-Meadow did not provide an expert report complying with Rule 26(a)(2), the discovery period had ended, and the trial date was two months away. JMS-Meadow countered with a motion for protective order asserting that it had not received sufficient time before the depositions were to be taken, and Kern River *100 refused to permit an extension. JMS-Meadow, for the first time in its reply in support of its motion for protective order, indicated that Mr. Turville, who allegedly was the only person who could act on JMS-Meadow's behalf, was dealing with family and personal health issues.

The magistrate judge granted Kern River's motion and denied JMS-Meadow's motion. The magistrate judge ordered JMS-Meadow to produce its two fact witnesses for deposition and precluded, pursuant to Rule 37, JMS-Meadow from introducing at the trial any expert evidence or documents not produced during discovery. The magistrate judge found that JMS-Meadow had failed to comply with Rule 26(a) despite the scheduling order and receiving numerous extensions and that Kern River would be prejudiced by further delay.

JMS-Meadow appealed to the district court arguing that Rule 26(a)(1)(B) only requires identification and not production of documents; Kern River did not make a Fed.R.Civ.P. 34 document request; there was no Rule 26(a) failure to produce documents; even if there had been a Rule 26(a) violation, there was no prejudice to Kern River; JMS-Meadow should have been given an opportunity to cure; there was still time to cure; JMS-Meadow did not act in bad faith; and Mr. Lifferth's report was only technically deficient. The district court upheld the magistrate judge's order.

Thereafter, the district court held a bench trial on the issue of just compensation for the land taking. The evidence showed that based on Kern River's

easelement, JMS-Meadow would lose 67 townhouse units from the total 465 housing units that West Valley City, Utah had approved for JMS-Meadow's townhouse and condominium development. Gary Free, Kern River's expert witness, testified that any alterations to the approved plan would require another approval by West Valley City, but that Steve Pastorik of the city planning department had told Mr. Free that any revision would be done administratively and would not require a public hearing process. Aplt.App., Vol. II at 558, 565 (trial testimony); Aplee App. at 220 (expert report). Mr. Turville countered by testifying about the difficulty of reconfiguring all 67 units and in receiving approval from West Valley City for any changes. He specifically denied that it would be possible to obtain approval administratively. The district court, however, recognized that because neither side presented a city witness specifically addressing the reconfiguration issue, all testimony was speculative.

**3 After the trial, JMS-Meadow filed a motion to reopen to present testimony specifically relating to Mr. Free's testimony about West Valley City's approval process and Mr. Pastorik. JMS-Meadow contended that if Mr. Pastorik could testify he would contradict Mr. Free's trial testimony. In a supporting declaration, Mr. Pastorik stated that he did not remember any details of a conversation he may have had with Mr. Free or someone in his office about the JMS-Meadow property and that, if he did have such a conversation, he never would have said it would be easy to reconfigure the plat or possible to do so administratively without a public hearing.

The district court entered findings of fact and conclusions of law adopting Mr. Free's appraisal and awarded compensation of \$436,000. The district court also denied the motion to reopen, recognizing that (1) it was tardy; (2) JMS-Meadow failed throughout the litigation to meet court-ordered deadlines; and (3) JMS-Meadow failed to justify its request that additional evidence be received at such a late date. JMS-Meadow appealed.

156 Fed.Appx. 96

Page 5

156 Fed.Appx. 96, 2005 WL 3257509 (C.A.10 (Utah))
(Cite as: 156 Fed.Appx. 96)

*101 ANALYSIS

I. Production of Documents

JMS-Meadow argues the district court abused its discretion in sanctioning it pursuant to Rule 37 for failing to voluntarily produce documents. According to JMS-Meadow, Rule 26(a)(1)(B) did not require it to produce documents; that rule only required it to describe and identify the documents. Also, JMS-Meadow argues that Kern River did not request production of the documents pursuant to Rule 34, as Kern River allegedly was required to do after JMS-Meadow had described the documents.

Rule 26(a)(1) requires a party to provide initial disclosures "without awaiting a discovery request" of

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims and defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered[.]

Rule 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) ... is not, unless such failure is harmless, permitted to use as evidence at a trial ... any witness or information not so disclosed." The district court has discretion both to impose sanctions for discovery abuses under Rule 37 and to decide whether any Rule 26(a) violation was justified or harmless. *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 992-93 (10th Cir.1999); *Orjias v. Stevenson*, 31 F.3d 995, 1005 (10th Cir.1994). In reviewing for an abuse of discretion, "we examine the totality of the circumstances involved in the case." *Olcott v. Del. Flood Co.*, 76 F.3d 1538, 1557 (10th Cir.1996).

**4 [1] It is true, as JMS-Meadow argues, that Rule 26(a)(1)(B) did not require JMS-Meadow to produce documents. See Fed.R.Civ.P. 26(a)(1) advisory committee note (1993 amendments). Since JMS-Meadow provided only a description, Kern River was expected to obtain the documents under Rule 34 or through informal requests. *Id.* Although Kern River never made a formal Rule 34 motion, it did make informal requests for the documents, and the magistrate judge ordered that those documents be produced during discovery. JMS-Meadow, however, failed to produce a single document. We therefore reject JMS-Meadow's argument that it was not required to produce any documents.

JMS-Meadow further argues that, even if it was required to produce the documents, the law did not favor the harsh sanction of denying admission of the documents at trial, especially where (1) there was no prejudice to Kern River; (2) JMS-Meadow should have been given an opportunity to cure; (3) there was time to cure; and (4) JMS-Meadow did not act in bad faith, but instead was hampered by Mr. Turville's and his mother's health problems. FN2 In construing Rule 37(c)(1), we have held that:

FN2. Kern River contends that JMS-Meadow did not make most of these arguments to the magistrate judge, and, instead, first made them when appealing the magistrate judge's order to the district court. Because the district court did not decline to consider the arguments, we too address them on their merits.

*102 [a] district court need not make explicit findings concerning the existence of a substantial justification or the harmlessness of a failure to disclose. Nevertheless, the following factors should guide its discretion: (1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness. *Woodworker's Supply*, 170 F.3d at 993 (citation omitted).

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

156 Fed.Appx. 96

Page 6

156 Fed.Appx. 96, 2005 WL 3257509 (C.A.10 (Utah))
(Cite as: 156 Fed.Appx. 96)

Under the totality of the circumstances presented here, JMS-Meadow did not show that its violation of Rule 26(a) was either justified or harmless. JMS-Meadow's behavior prejudiced Kern River in its ability to conduct discovery, prepare for trial and cross-examine JMS-Meadow's witnesses. In light of the many extensions of time it received, JMS-Meadow had ample opportunities to cure, but it failed to do so. JMS-Meadow first asserted Mr. Turville's family problems after the discovery deadline had passed. At no time has Kern River argued that JMS-Meadow acted in bad faith. Even without bad faith, the totality of the circumstances show no abuse of discretion.

II. Expert Evidence

JMS-Meadow argues that the district court abused its discretion in excluding its expert report from the bench trial. Although JMS-Meadow admits Mr. Lifferth's report is deficient, it contends that any flaws were minor, and it should have been permitted to supply the missing information. JMS-Meadow also argues that the district court abused its discretion in precluding Mr. Lifferth's expert testimony at the bench trial.

A party must disclose the written report of its expert witness. Fed.R.Civ.P. 26(a)(2)(B).

The report shall contain 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; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

**5 *Id.* (emphasis added). Rule 26(a)(2)'s requirements "are mandatory and self-executing." *Lohnes v. Level 3 Commc'ns, Inc.*, 272 F.3d 49, 59 (1st Cir.2001). Again, "[a] party that without substantial justification fails to disclose information required by Rule 26(a) ... is not, unless such failure

is harmless, permitted to use as evidence at trial ... any witness or information not so disclosed." Fed.R.Civ.P. 37(c)(1).

[2] JMS-Meadow never argues that its expert report was complete; it admits the report was only a preliminary report. Thus, the report did not comply with Rule 26(a)(2). See *Salgado ex rel. Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 741 n. 6 (7th Cir.1998) ("Expert reports must not be ... preliminary in nature."). The Rule 26(a) violation was neither justified nor harmless. Permitting JMS-Meadow to present expert evidence at trial despite failing to disclose the expert report would have inhibited Kern River's ability to prepare for trial; Kern River would have had no pre-trial opportunity to learn the substance of the expert's direct examination testimony. See *103 *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 953 (10th Cir.2002). Excluding the evidence properly avoided prejudice to Kern River. *Id.* at 953-54. Accordingly, we conclude the district court did not abuse its discretion in refusing to permit JMS-Meadow to present expert evidence at the bench trial.

III. Fraud on the Court

Lastly, JMS-Meadow argues that Kern River committed a fraud on the court by allowing Mr. Free to testify about a purported conversation with Mr. Pastorik. JMS-Meadow argues the district court should have reopened the trial to permit JMS-Meadow to present evidence disputing this alleged conversation.

"[A] finding of fraud on the court permits the severe consequence of allowing a party to overturn the finality of a judgment." *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1291 (10th Cir.2005); see also *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1265 (10th Cir.1995) ("Any request to set aside a judgment must be viewed in light of a fundamental principle of the finality of duly entered judgments: namely, where a reasonable opportunity has been afforded to the parties to litigate a claim before a court having jurisdiction, and the court has finally decided the controversy, the interests of the

156 Fed.Appx. 96

Page 7

156 Fed.Appx. 96, 2005 WL 3257509 (C.A.10 (Utah))
(Cite as: 156 Fed.Appx. 96)

public and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them.”).

Thus, we have described fraud on the court strictly: “Fraud on the court ... is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court. It is thus fraud ... where the impartial functions of the court have been directly corrupted.”

**6 *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir.2002) (quoting *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir.1985)). Clear and convincing evidence is needed to prove fraud on the court. *Id.* “Intent to defraud is an ‘absolute prerequisite’ to a finding of fraud on the court.” *Zurich N. Am.*, 426 F.3d at 1291 (quoting *Robinson*, 56 F.3d at 1267).

[3] JMS-Meadow has failed to sufficiently allege or provide any evidence to show that Kern River had an intent to defraud. Even if Kern River made a misrepresentation to the court through Mr. Free's testimony, there is not a sufficient ground to set aside the district court's judgment based on fraud on the court without an intent to deceive. *See Robinson*, 56 F.3d at 1267. Because the record fails to show any fraud on the court, we conclude the district court did not abuse its discretion in denying relief on that basis. *See Buck*, 281 F.3d at 1342 (reviewing denial of relief for fraud on court for abuse of discretion).

Nor did the district court abuse its discretion by denying the motion to reopen. *See Morsey v. Chevron, USA, Inc.*, 94 F.3d 1470, 1477 (10th Cir.1996) (reviewing denial of motion to reopen for abuse of discretion). JMS-Meadow could have, but did not, participate in discovery. It did not depose either Mr. Pastorik or Mr. Free, even though Mr. Free clearly noted in his disclosed expert report that Mr. Pastorik told him that any alteration to the previously approved plan would be handled administratively without a public hearing. *Aplee*, App. at 220. JMS-Meadow did not subpoena Mr.

Pastorik or another West Valley City planning department employee to testify on its own behalf at trial. Because JMS-Meadow failed to properly *104 prepare for trial, the district court did not abuse its discretion in denying reopening.

The judgment of the district court is AFFIRMED.

C.A.10 (Utah),2005.
Kern River Gas Transmission Co. v. 6.17 Acres of Land, More or Less, in Salt Lake County, Utah
156 Fed.Appx. 96, 2005 WL 3257509 (C.A.10 (Utah))

Briefs and Other Related Documents (Back to top)

- 2005 WL 441630 (Appellate Brief) Appellant's Opening Brief (Jan. 25, 2005) Original Image of this Document with Appendix (PDF)
- 04-4033 (Docket) (Feb. 26, 2004)

END OF DOCUMENT

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

EXHIBIT D

Westlaw

Not Reported in F.Supp.

Page 1

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

H

Briefs and Other Related Documents
Only the Westlaw citation is currently available.

United States District Court, D. Delaware.
David G. FINCH, Plaintiff,

v.

HERCULES INCORPORATED, Defendant.
No. Civ. A. 92-251 MMS.

Dec. 22, 1995.

Richard G. Elliott, Jr., and Helen M. Richards, of
Richards, Layton & Finger, Wilmington, DE, for
plaintiff.

Sheldon N. Sandler, and Bhavana Boggs, of Young,
Conaway, Stargatt & Taylor, Wilmington, DE, for
defendant.

MEMORANDUM OPINION

MURRAY M. SCHWARTZ, Senior District Judge.

I. INTRODUCTION

*1 Plaintiff David G. Finch ("Finch") has filed suit against his former employer, defendant Hercules, Incorporated ("Hercules" or "corporation"), alleging he was discriminated against based on his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34. After over three years of adamant posturing by both parties, the case is finally poised for trial. Before the Court are plaintiff's and defendant's cross-motions in limine seeking the exclusion of various evidence and witnesses in the upcoming trial.

For the reasons set forth below, the Court will grant in part and deny in part both motions in limine.

II. FACTUAL BACKGROUND

For its fifth recitation of this saga, the Court gleans

the following facts, for the most part, from the parties' joint Pretrial Stipulation, Docket Item ("D.I.") 204. Finch is presently age 63 and was born on July 22, 1932. He started his tenure at Hercules in 1962 as a Systems Analyst, progressing up the company hierarchy to the helm of the Audit Department, a position he held for eleven years until Hercules terminated him in February 1991. At that time, Finch was titled as General Auditor and reported to the corporation's Chief Financial Officer, Arden B. Engebretsen ("Engebretsen"). When terminated, Finch was 58 years old and earning an annual salary of \$102,608.

Finch's termination in 1991 is characterized by Hercules as part of a reduction-in-force ("RIF"), which had its genesis in late 1990. The 1991 RIF, which eliminated 402 employees, was merely one in a series of staff reductions in an overall program of restructuring that Hercules had commenced in the mid-1980s. To assist with the RIF process, Hercules hired Thomas S. Litras Consultants ("Litras"), which recommended a forced ranking/paired comparison process to select the individuals to be terminated.^{FN1} In its proposal for ranking employees, Litras recommended that the corporation consider "performance, education, versatility, flexibility, and continuous service. Age [[was] to be the last factor considered, and then only if a 'tie-breaker' was required. If there was a tie, Hercules was to retain the older employee." *Finch v. Hercules, Inc.*, 865 F. Supp. 1104, 1112-13 (D. Del. 1994) (emphasis in original; internal citations omitted). It was agreed that Hercules' preexisting performance appraisal system was inadequate to support the required decisionmaking.

In December, 1990, before any employee had been selected for termination, the Hercules Board of Directors appointed Thomas L. Gossage ("Gossage") as the corporation's new Chief Executive Officer ("CEO"). Coincident with these events, Hercules' Chief Financial Officer ("CFO") Engebretsen also

Not Reported in F.Supp.

Page 2

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

retired, positioning Finch, at least on paper, as directly reporting to the neophyte CEO Gossage. Gossage subsequently gave George MacKenzie ("MacKenzie"), the corporation's Controller, responsibility for Finch's Audit Department.

MacKenzie undertook the forced-ranking of seven managers from the Audit and Controller's Departments. He ranked Finch near the bottom of the list at sixth place. On January 26, 1991, MacKenzie obtained approval for the elimination of the position of General Auditor and, therefore, Finch (as well as the employee who was listed in last place). MacKenzie broke the news to Finch on February 4, 1991; Finch was terminated effective February 28, 1991.

*2 Later in 1991, the successor Chief Financial Officer reinstated the position of General Auditor, but did not interview Finch in the process. Instead, Hercules hired Curtis Tomlin, age 38, for Finch's former position. In response to this entire series of events, armed with his Equal Employment Opportunity Commission right-to-sue letter, Finch brought this action on May 5, 1992. At this point, it is uncertain whether this case will be treated under a "mixed motive" analysis, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Griffiths v. CIGNA*, 988 F.2d 457 (3d Cir.), cert. denied, 114 S.Ct. 186 (1993), or a "pretext" mode of analysis, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Miller v. CIGNA*, 47 F.3d 586 (3d Cir. 1995).^{FN2}

III. CROSS-MOTIONS IN LIMINE

Finch has moved in limine for a ruling on the admissibility of various evidence and testimony that Hercules proposes to put forth at trial. Hercules has likewise cross-moved in limine.

A. Plaintiff's Motion in Limine

1. Evidence Not Considered by MacKenzie When Force-Ranking Finch

As part of its defense to plaintiff's allegations of age discrimination, Hercules seeks to introduce at trial three types of documentary evidence. First, defendant offers an Indirect Productivity Improvement ("IPI") study performed by outside consultants in 1989 as evidence that Hercules needed a more proactive, involved audit department. See D.I. 119 at 486. This IPI study was not factored into any of the adverse employment decisions affecting plaintiff. Second, Hercules seeks to introduce evidence generated contemporaneously with the RIF process. During the latter part of January, 1991, Hercules reviewed the performance of all corporate staff groups for purposes of determining the amount of incentive bonuses ("Management Incentive Compensation Plan" or "MICP") for senior staff employees. Plaintiff asserts, and defendant does not contest, that the results of this MICP evaluation were not known until after Hercules decided to terminate Finch. Finally, Hercules seeks to admit Performance Appraisal Reports prepared by Finch for two of his employees.

Plaintiff argues that none of this evidence surfaced until the discovery phase of this litigation; MacKenzie did not consider any of it in his decision to terminate Finch. As such, plaintiff argues, the above documents should be inadmissible as "after-acquired" evidence under *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995), and its progeny. The Third Circuit Court of Appeals has characterized after-acquired evidence as "evidence of the employee's ... misconduct or dishonesty which the employer did not know about at the time it acted adversely to the employee ..., but which it discovered at some point prior to, or more typically, during subsequent legal proceedings; the employer then tries to capitalize on the evidence to diminish or preclude entirely its liability for otherwise unlawful employment discrimination." *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d at 1222. The evidence of which plaintiff complains does not involve any misconduct or dishonesty by Finch that would serve as a *post hoc* justification for Hercules terminating him; it therefore does not quite fit the Third Circuit's paradigm as being after-acquired. Nevertheless, "to be admissible in either a mixed motives or pretext case, evidence must be relevant to the proofs or rebuttals of

Not Reported in F.Supp.

Page 3

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

defendant's discriminatory motivation." *Finch v. Hercules, Inc.*, 865 F.Supp. at 1110 n.3 (D. Del. 1994) (citing *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742 (1993)). See also *Mardell*, 31 F.3d at 1229 (employee must show that age was a substantial factor motivating the adverse employment decision at the time it was made). The person involved in the forced-ranking of plaintiff, MacKenzie, was not aware of either the IPI study or the MICP evaluation until after the decision to terminate Finch had been made. Consequently, this evidence could not have affected Hercules' motivation in either the forced-ranking process or the ultimate decision to terminate Finch.

*3 Hercules counters that the above evidence is not after-acquired evidence, and that the results of the IPI study and the MICP reports are not being introduced as a basis for MacKenzie's termination decision. Rather, defendant seeks to rebut Finch's assertion that his performance as auditor was "consistently excellent." See Complaint, D.I. 1 at ¶ 8. Hercules would introduce the evidence to show MacKenzie's decision was not "mistaken and unreasonable," but rather was consistent with the vast majority of other high ranking officials' opinions at Hercules. Answer Brief, D.I. 226 at 3. Plaintiff rejoins by citing Fed. R. Evid. 403 and arguing that the dangers of confusing and misleading the jury and the resultant prejudice substantially outweigh any probative value of this evidence.

The Court agrees that any limited probative utility of the IPI and MICP evidence would be substantially outweighed by the undue prejudice to plaintiff. Because MacKenzie did not consider and did not know of unflattering statistics, they are not probative of his decisionmaking process. Hercules should not be allowed to present, after the fact, further justification for its actions if that justification was completely unanticipated at the relevant time. At issue is whether a discriminatory animus motivated Hercules in the employment decisions it made adverse to plaintiff at the time those decisions were made. *Fuentes v. Perkasie*, 32 F.3d 759, 765 (3d Cir. 1994); *Mardell*, 31 F.3d at 1229. Accordingly, for purposes of liability, a jury will deliberate as to whether Hercules was so

motivated on the information it availed itself of at the time.^{FN3} Admission of the MICP or IPI evidence would serve only to feed the jury facts that are extraneous to its task, yet once presented, would be difficult to "unlearn." Consequently, the Court finds any marginal relevance this evidence may have is substantially outweighed by the dangers of confusion and prejudice.

The Courts views differently, however, the third type of evidence Hercules proffers, i.e., Performance Appraisal Reports authored by Finch as products of his evaluating two subordinate employees. Hercules argues that Finch has: expressed disbelief in his low ranking by MacKenzie and has claimed that it could only be due to a discriminatory motive, because his supervisor gave him good evaluations. Ironically, Finch himself ranked two of his employees, Dronney and Mekinc, at the bottom of the forced rankings after having given them good evaluations.

Defendant's Answer Brief, D.I. 226 at 4. Although Finch contends that "Finch's ranking was not based on performance," D.I. 231 at 2, MacKenzie has testified at deposition that his forced ranking of Finch was based on performance. D.I. 121 at B-106. The evidence in question is directly relevant to the fact-finder's consideration of whether Hercules employee evaluations necessarily correlate to forced-ranking decisions or an employee's prior performance. Therefore, the Court will allow this evidence to be admitted at trial.

2. Evidence of Finch's Reputation

*4 Plaintiff next argues that Hercules will try to introduce at trial evidence of Finch's general reputation at Hercules. During discovery, one Hercules employee testified that "[Finch] was not well regarded in Hercules other than by his prior boss." D.I. 119 at A374. Another employee provided a sworn statement that "The general perception within Hercules was that Mr. Finch was a lackluster performer" D.I. 212 at 11, citing D.I. 135 at 8.^{FN4} Finch argues that such testimony concerning the general view of unidentified persons in Hercules management should be excluded as

Not Reported in F.Supp.

Page 4

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

hearsay as it is inherently unreliable, prejudicial, and not susceptible to cross-examination. Finch concedes, however, that a witness's testimony as to his or her own personally-held beliefs is susceptible to cross-examination. D.I. 231 at 8. Finally, Finch contends that such testimony is also barred under Fed. R. Evid. 701. Hercules counters by arguing that Finch misunderstands both the type of testimony it seeks to offer as well as the applicable law; it argues that this evidence is "exactly the type of testimony permissible under Rule 701." D.I. 226 at 6.

Fed. R. Evid. 701 allows the introduction of lay opinion testimony if the witness' testimony is "limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Hercules maintains that both of the rule's requirements are easily met. First, as fulfillment of part (a), it argues that its witnesses are Hercules managers who have had the opportunity to interact with Finch and observe his performance; thus, they have first-hand knowledge about management's perceptions regarding Finch's performance. For part (b), Hercules contends that the managers' testimony will assist the jury to understand Finch's low rank resulting from the RIF process. It also argues that this testimony is crucial for an understanding of whether it was unreasonable for MacKenzie to conclude that Finch was an unsatisfactory performer and therefore terminate him.

If, as Hercules represents, its witnesses' testimony will be based on each witness's own perception of Finch, the testimony is not hearsay and is admissible. Plaintiff will be able to cross-examine these witnesses as to the reasons why they formulated their opinions and whether their opinions are rationally based. Although MacKenzie was the actual manager who decided plaintiff's fate, other managers were privy to the same or similar information possessed by MacKenzie regarding plaintiff's performance, assuming Hercules lays the proper foundation under Rule 701(a). Their testimony may corroborate or undermine MacKenzie's decision; either way, this type of testimony is crucial to the fact-finder's consideration

of whether Hercules' proffered explanation of its decision to terminate Finch is worthy of credence.

However, because the testimony of the individual managers will be admissible, Hercules will not be allowed to elicit testimony of Finch's general reputation among the Hercules management. The Court agrees with plaintiff that under these circumstances, the probative value of general reputation testimony will be substantially outweighed by the resultant prejudice to plaintiff. It will be unnecessary to ask each manager about how management in general regarded Finch because each manager will have the opportunity to testify about his or her personal and fact-based opinion of plaintiff. The jury will thus be able to draw its own conclusion as to Finch's reputation by weighing each manager's testimony. Based on this evidence, plus evidence presented by MacKenzie, the jury may or may not infer that it would be reasonable that MacKenzie held these same beliefs.

3. Finch's Membership and Participation in the Mormon Church

*5 Plaintiff plans to call at trial Arden Engebretsen, Hercules' former Chief Financial Officer and the administrator to whom plaintiff directly reported. Engebretsen and Finch were members of the same church, the Church of Jesus Christ of Latter-Day Saints, also known as the Mormon Church. During 1977-1980, Finch was a bishop of his and Engebretsen's Mormon congregation; Finch's duties as bishop included counseling members of the congregation, including young adults and teens. In his role as lay bishop, Finch counseled one or more of Engebretsen's children. Hercules argues that evidence of Finch's church-based relationship with Engebretsen is relevant to show that Engebretsen, who was responsible for evaluating Finch's performance, may have been and may still be biased in favor of Finch. Finch agrees that the following evidence is admissible: "that Engebretsen and Finch attend the same church and that, in connection with Finch's church activities, he counseled Engebretsen's children some fifteen years ago."^{FN5} D.I. 231 at 12. Finch, however, objects to Hercules placing before the jury any specific reference to

Not Reported in F.Supp.

Page 5

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

Finch's denomination, as it is his understanding that the Mormon sect is generally unpopular and not well understood in the eastern United States. As such, Finch argues, all reference to the Mormon Church should be excluded as unduly prejudicial under Rule 403.

Fed. R. Evid. 610 states that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." The rule's advisory committee notes add that while the rule forecloses inquiry into the religious beliefs or opinions of a witness for purposes of showing the witness's character for truthfulness, "an inquiry for the purpose of showing interest or bias because of them is not within the prohibition." The Court agrees that evidence of Finch attending the same church as his supervisor and counseling his supervisor's children is relevant and admissible to show possible bias on the part of Engebretsen. However, Engebretsen's bias, if there is bias, would flow from the nature of the relationship between these two men as members of the same religious community, independent of the specific denomination that community happens to be. Evidence of Finch's and Engebretsen's specific denomination is irrelevant to the substantive issues in this case; even if it were relevant, its probative value is substantially outweighed by the danger of undue prejudice to the plaintiff. While the Court does not necessarily find that the Mormon religion is unpopular in the District of Delaware, the Court does acknowledge the possibility that this evidence will only serve to distract the jury or take on an inflated and unwarranted significance. The Court therefore holds that evidence of Finch's and Engebretsen's membership in the Mormon church is inadmissible.

4. Exclusion of Hercules Witnesses

*6 Plaintiff also moves to exclude or at least limit the testimony of certain Hercules' witnesses as listed in the Pretrial Stipulation. The grounds for exclusion are several.

a. Curtis "C.T." Tomlin

Hercules proposes to call Curtis Tomlin, a Harvard-educated, African-American, Certified Public Accountant who, at age 38, was hired in December 1991 as the corporation's new General Auditor. According to defendant, Tomlin was hired when R. Keith Elliott, Hercules' newly appointed Chief Financial Officer, decided to reinstate the General Auditor position. D.I. 226 at 34. Hercules seeks to introduce evidence of Tomlin's credentials and qualifications as probative of Hercules' non-discriminatory motive in re-filling Finch's former position; Finch was not interviewed or considered for rehire. Hercules also would have Tomlin testify regarding the environment in the Audit Department following Finch's eleven years at the department's helm. Tomlin would paint an unflattering portrait of Finch's legacy by characterizing the Audit Department as "dispirited and reactive," one which Tomlin "needed to take considerable steps to improve." D.I. 241 at 30.

Finch argues that he is not alleging that Hercules discriminated against him based on his age when it refused to interview or rehire him in December 1991. Plaintiff argues that the only relevant evidence are Tomlin's hire date, his age, and the position for which he was hired. In his Complaint, Finch chose to allege these very facts as bearing on his age discrimination claim.

The Court agrees that Tomlin's age, date of hire, and position are germane to this action. Plaintiff has argued that the replacement of the 58-year-old Finch by this younger individual is probative of Hercules' discriminatory animus. But, if Finch wishes to offer these facts, Hercules will be allowed to offer proof of Tomlin's credentials as evidence of a legitimate motive underlying its actions. The Court is troubled by Hercules' assumption that the condition in which Tomlin found the Audit Department, eleven months after Finch was terminated, is directly attributable to Finch. During this interim period, the Audit Department was headed by one or more temporary managers who may or may not have contributed to the departmental environment into which Tomlin was thrust. However, it is simply impossible to

Not Reported in F.Supp.

Page 6

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

determine in advance of trial whether this testimony would be substantially more prejudicial than probative. Accordingly, any ruling on this issue prior to trial would be premature. The Court will entertain argument on this issue during trial, out of the hearing of the jury, just prior to or at the time Tomlin takes the witness stand.

b. Witnesses Identified By Hercules in the Pretrial Stipulation

In the Pretrial Stipulation, Hercules identified for the first time as trial witnesses several of its present and former employees: David S. Hollingsworth, predecessor CEO to Gossage; Fred L. Buckner, former President; James J. Anthony, Manager of Administration in the Audit Department; William Godfrey, Manager of Computer Audits from 1980 to 1987, Sue A. Murray, who ran the Audit Department on an interim basis after Finch was terminated; and Harry Gordon, who was the Director of Executive Resources in Hercules' Human Resources Department.^{FN6}

*7 Plaintiff protests that these witnesses should have been disclosed as responsive to the following series of interrogatories:

4. Was elimination of the position of General Auditor the sole reason for terminating Mr. Finch? [Hercules' Answer: No]

5. If the answer to Interrogatory 5 was no, please state in detail:

a. each additional reason for terminating Mr. Finch; [Hercules' Answer: In connection with the downsizing, and in compliance with the mandates of Hercules' Policy Compliance Committee's requirements, the Financial Managers falling under the supervision of the Controller's Department were ranked. Mr. Finch's performance caused him to be ranked among the two lowest ranked financial managers in a group of seven, and these two employees were terminated.]

b. description of each document which refers to the additional reason;

c. the name of each person who has knowledge of the additional reasons;

d. whether any of the additional reasons were communicated to Mr. Finch, and if so, by whom."

D.I. 227, Exh. C (emphasis added). Plaintiff contends that Hercules was noncompliant with its answers to his discovery requests, specifically question 5c, and that consequently, he never had an opportunity to depose the above witnesses. Fed. R. Civ. P. 26(a)(5) allows parties to propound written interrogatories as a part of the discovery process; the rules also provide a harsh penalty for noncompliance with this discovery mechanism. "A party that without substantial justification fails to disclose information required by Rule 26(a) ... shall not, unless such failure is harmless, be permitted to use as evidence at a trial ... any witness ... not so disclosed." Fed. R. Civ. P. 37(c)(1). Finch requests these witnesses to be excluded from trial. Plaintiff's Opening Brief, D.I. 212 at 31.

Hercules counters that plaintiff's interrogatories were narrowly focused and, specifically, number 5c was merely "asking for the names of persons who had knowledge of any additional reasons, aside from the position elimination, why Finch was one of those chosen to be RIFed, *i.e.*, knowledge of what those additional reasons were." D.I. 226 at 20. In response to this interrogatory, Hercules identified individuals whom it contends knew *why* Finch was terminated, *i.e.*, that Finch's performance was considered as a factor. The Court agrees that this was a reasonable interpretation of interrogatory 5c, viewed standing alone and especially within the context of the surrounding questions. The interrogatories focus on Hercules' proffered reasons underlying its termination of plaintiff and individuals who were able to proffer those reasons.

In contrast, Hercules now seeks to offer the witnesses in question to testify about the quality (or lack thereof) of Finch's performance; it argues these witnesses did not know that Finch's performance was factored into the forced-ranking and termination decisions. Therefore, defendant argues, a listing of these witnesses was not required by plaintiff's interrogatories. Hercules has tendered a brief description of each of the witnesses in question. James J. Anthony served as Manager of Administration in the Audit Department and reported directly to plaintiff. He would be able to testify about the nature and quality of Finch's performance and present his view as to the

Not Reported in F.Supp.

Page 7

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

functioning of the Audit Department. He was not, however, involved in the decision to terminate Finch.

*8 Sue A. Murray was one of several "interim" managers who ran the Audit Department after Finch was terminated. At trial, she would testify that it was clear that her function in this capacity would be strictly on an interim basis, and that she was granted unencumbered access to the Audit Committee, a Committee of the Hercules Board of Directors. Hercules seeks to rebut plaintiff's assertion that Hercules engaged in "subterfuge" when terminating Finch and eliminating his position on an interim basis. *See* D.I. 204 at 30-31. Hercules would also elicit Murray's testimony regarding problems she encountered when running the Audit Department allegedly stemming from plaintiff's "poor management." D.I. 226 at 34.

Fred Buckner was Hercules' President and Chief Operating Officer during the years antedating the 1991 RIF. Buckner served as the leader of Hercules' President's Team and was also a member of the corporation's Executive Team. These two groups evaluated the performance of different departments within the corporation, D.I. 227, Exh. O at 57; they were also responsible for the MICP evaluation, *supra*, section 1, which has been ruled admissible only if there is bifurcation of liability and damages. Hercules also argues that plaintiff has listed as one of his trial exhibits a document authored by Buckner and that Buckner should be allowed to testify about the document.

William Godfrey worked with Finch from 1980-1987 as Manager of Computer Audits. Hercules states that Godfrey will attest to plaintiff's unique relationship with CFO Engebretsen and his family during that time frame. Godfrey will also testify about Finch's personal activities purportedly occurring during the work day, including sleeping, church business, and reading the newspaper.

David Hollingsworth was Hercules' CEO prior to Gossage. Hercules does not currently plan to call this witness during its case in chief, but wishes to reserve its right to do so if necessary.

The current record shows that none of the above witnesses were positioned to know that Finch's performance played a role in the ultimate decision to terminate him. With one qualification, the Court will allow these witnesses to present their testimony, as outlined by Hercules, at the upcoming trial. If there is no bifurcation, Buckner will not be allowed to testify about the MICP evaluation or any other similar evidence which was not considered in the decision to terminate Finch.

Plaintiff objects to an additional trial witness identified by Hercules, Harry Gordon, who from the mid-1980s until July, 1991, was Hercules' Human Resources Director of Executive Resources. Plaintiff argues that Hercules affirmatively misled him during discovery as to the scope of this witness's knowledge of and involvement with Finch's termination. Hercules initially identified Gordon as an individual who participated in the development of standards or criteria for evaluating employees during or in preparation for its 1991 RIF. However, Hercules later narrowed its characterization of Gordon's expertise in this area by describing Gordon as one who attended a meeting at which the RIF policy was discussed, but who played no role in developing standards or criteria for evaluating employees.

*9 In November, 1992, Finch also asked to discover any Hercules documents related to the "replacement potential of all corporate financial positions" and for "promotability lists" prepared by Human Resources. D.I. 232 at C40. Hercules responded that there were none available at that time. In May, 1995, Finch renewed this same request for documents. Hercules responded by asserting it had just discovered an old notebook of Gordon's in a desk containing notes of business meetings Gordon attended in 1988. Gordon's notes quote Engebretsen, who was Hercules' CFO and Finch's direct supervisor, as declaring the corporation as needing "an accounting guru" and "Need Chief Auditor - repl Finch." D.I. 210, Exh F. at 5. After contacting Gordon, who had retired in July 1991, further probing revealed a 1985 file memo documenting a conversation between Gordon and MacKenzie. MacKenzie is said to have commented that plaintiff was "insecure" and was an "8:00-4:45

Not Reported in F.Supp.

Page 8

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

carpooler." *Id.* at 3. Hercules forwarded these and other of Gordon's documents to plaintiff's counsel in June and July of this year. It now seeks to call Gordon as a witness to testify how plaintiff was not highly regarded by his superiors.

Plaintiff argues that he has been prejudiced in his ability to prepare adequately for Gordon's trial testimony and that Hercules should not be allowed to profit from its abuse of the discovery process. Plaintiff therefore seeks to exclude this witness from testifying at trial.

The exclusion of otherwise admissible testimony because of a party's failure to meet a timing requirement is a harsh measure to be avoided where possible. *Central Maine Power Co. v. Foster Wheeler Corp.*, 115 F.R.D. 295, 297 (D. Me. 1987). However, sometimes, such exclusion is necessary; fidelity to the constraints of Scheduling Orders and deadlines is critical to the Court's case management responsibilities. *Tomlin v. Holecek*, 158 F.R.D. 132, 135 (D. Minn. 1994) (citing *Jochims v. Isuzu Motors, Ltd.*, 144 F.R.D. 350, 356 (S.D. Iowa 1992)). Accordingly, the "flouting of discovery deadlines causes substantial harm to the judicial system." *Id.* As a sanction for failure to comply with a timing requirement set by the Scheduling Order in this case, the Court is authorized to exclude evidence proffered by the disobedient party. *United States v. 68.94 Acres of Land*, 918 F.2d 389, 396 (3d Cir. 1990). However, the Court also acknowledges that unreasonable adherence to such deadlines, without regard to whether a party was justified for its actions, runs counter to the dominant interest in the trial process, *i.e.*, ascertaining the truth. These competing considerations are properly resolved by the Court in exercising its discretion. *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1201 (3d Cir. 1978).

When considering whether to exclude testimony, courts generally look to the following: "the ability of the party to have discovered the witnesses earlier, validity of the excuse offered by the party, willfulness of the party's failure to comply with the court's order, the party's intent to mislead or confuse his adversary, and the importance of the excluded testimony." *Stewart v. Walbridge, Aldinger Co.*,

162 F.R.D. 29, 31 (D. Del. 1995) (citing *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904 (3d Cir. 1977), *overruled on other grounds*, *Goodman v. Lukens Steel*, 777 F.2d 113 (3d Cir. 1985), *aff'd*, 482 U.S. 656 (1987)). Based on these considerations, the court must weigh (1) the prejudice or surprise to the party against whom the excluded witnesses would have testified, (2) the party's ability to cure the prejudice, (3) the extent to which calling undisclosed witness would disrupt the trial process, and (4) bad faith or wilfulness in failing to comply with the court's order. *Meyers*, 559 F.2d at 904-05.

*10 At this point, on the eve of trial, the Court is inclined to exclude this witness. Defendant has not offered any compelling justification for why the documents were not produced when first requested during discovery. Hercules enjoyed access to both the documents and was able to reach Gordon for more information (even though he retired three years ago), and should have done as much as part of its duty to diligently produce evidence requested by its opponent. Plaintiff has been both surprised and prejudiced in not being able to depose this witness and prepare accordingly for trial. It would be unfair to plaintiff to have his case preparation impacted and disrupted at this late date. Additionally, there is no evidence that MacKenzie relied on any of this evidence when force-ranking or terminating Finch. On balance, consideration of the above factors weigh in favor of excluding this witness from trial.

B. Defendant's Motion in Limine

1. Evidence of Hercules Financial Earnings After the 1991 RIF

Hercules seeks to preclude at trial evidence of the earnings and financial status of both the corporation and several of its top executives. Plaintiff argues that Hercules has placed its financial condition at issue when its CEO Gossage declared the purpose of the 1991 RIF was to cut indirect costs and put the company back on the path towards being "lean." Plaintiff's Answer Brief, D.I. 228 at 27. Plaintiff also "vigorously disputes Hercules' justification for

Not Reported in F.Supp.

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

the RIF” and “believes the RIF, as applied to him, was totally pretextual” *Id.* at 27. Specifically, Finch argues that there are substantial reasons to dispute whether Hercules’ fiscal health was in serious jeopardy and whether Hercules’ proffered economic justification for the RIF is worthy of credence.

Hercules argues that this evidence is not probative of whether the corporation discriminated against plaintiff based on his age. Rather, it asserts, evidence of Hercules’ financial wealth would serve to prejudice the jury against defendant and its senior officers by portraying them as “avaricious fat cats who can afford to pay a sizable judgment.” D.I. 209 at 2. The Court agrees. First, plaintiff seeks to introduce evidence of Hercules’ earnings and argue that the RIF was not economically justified. According to plaintiff, Hercules’ annual net earnings/losses were as follows: 1989, the corporation lost \$81 million; in 1990, following a RIF, it enjoyed a net income of \$96 million; in 1991, it similarly gained \$95 million. In addition, plaintiff seeks to introduce the salaries and bonuses of both Hollingsworth and Gossage, Hercules’s two most recent Chief Executive Officers. Their salaries ranged from the high six to low seven figures; plaintiff seeks to draw the inference that because Hercules was willing and able to afford such high-priced talent, it must not have been in such economic dire straits as to justify the 1991 RIF.

These figures would seem staggering to those uninformed about the operation of a large, Fortune 500 corporation such as defendant’s. Were plaintiff allowed to introduce such evidence, defendant would no doubt find itself required to define in great detail the meaning of these numbers and how they compare with other similarly situated businesses and top executives. Hercules would also likely seek to illustrate the economic projections and reasoning behind the multiple RIF’s and whether, in hindsight, the prospective RIF planning correlated to the eventual financial results. In addition, the corporation would explain whether other forces impacted these financial statistics, such as availability and cost of raw materials, market demand, and the economic climate both national and international.

*11 Corporations implementing a RIF generally have an explicit plan to reduce expenses by eliminating jobs. *Hardin v. Hussman Corp.*, 45 F.3d 262, 264 (8th Cir. 1995). Such corporations usually provide decisionmakers with objective criteria by which to decide which jobs to eliminate. *Id.* At trial, plaintiff will have every opportunity to explore Hercules’ stated reasons and criteria for terminating him pursuant to the RIF. However, the Court finds there is no requirement for a corporation to be in financial distress before embarking on such a RIF. *Id.*; *Bashara v. Black Hills Corp.*, 26 F.3d 820, 824-25 (8th Cir. 1994). Therefore, the Court is not inclined to allow a mini-trial on the issue of whether Hercules’ RIF was an exercise in sound business judgment. The presentation of Hercules’ financial history in the years after the 1991 RIF would consume much trial time and serve only to distract attention from the pivotal issue in this case: whether Hercules discriminated against Finch based on his age when it terminated him. Accordingly, the Court holds that the prejudice to defendant resulting from admission of evidence of earnings of Hercules and its senior executives after the would substantially outweigh any probative value this evidence would have.

2. Statements by CEO Gossage

Plaintiff proposes to introduce before the jury the following: (1) a newspaper article appearing in the *Wilmington News Journal* containing comments attributed to CEO Gossage; (2) an article published on February 1, 1991 in *Horizons*, an internal Hercules publication; (3) remarks by Gossage to a Hercules executive named William Hosker in January, 1992; (4) remarks allegedly made by Gossage to another Hercules executive named Doyle Miller, and subsequently repeated by Miller to Hosker.

a. *The News Journal* Article and the *Horizons* Article

Plaintiff seeks to admit a *Wilmington News Journal* article entitled, “Hercules will cut 450 jobs,” which quotes Gossage as saying, “The young people in the

Not Reported in F.Supp.

Page 10

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

company want us to bring Hercules back to where it ought to be again Older people will see friends impacted and will feel bad about it. But we'll get this behind us." D.I. 119 at A539. In his deposition, Gossage testified that if not a direct quote, the article was a "similar quote" to something he said and at least captured the spirit of what he said. D.I. 121 at B71. The article was published on January 9, 1991, right as final approval was given for the RIF to get underway. D.I. 229 at B65, 68.

Subsequently, *Horizons*, Hercules' internal corporate newsletter, published an article styled in a question and answer format, entitled "Gossage answers employees' questions." In the article, Gossage was asked to amplify his statement published in *The News Journal*, and was quoted as saying:

What I said was that younger employees want to know when the company will get up and turn itself around, and I acknowledged that to those with long service to the company, it was painful to watch what was going on. I'd say it again.

*12 D.I. 121 at B288. Gossage allegedly made these remarks during a presentation at the Hercules Men's Club.

Hercules argues that Gossage's comments should not be admitted at trial for several reasons. First, it contends they are irrelevant and characterizes them as merely "observations about the reaction of Hercules' employees to the voluntary phase of the RIF, and generalities about evolutionary changes in expectations about the permanency of employment in the corporate world." D.I. 209 at 10. Second, it characterizes Gossage's remarks as "stray remarks" that are not indicative of age bias. Under the so-called "stray remark" doctrine, such remarks "made by non-decisionmakers or by decisionmakers unrelated to the decisionmaking process are rarely given great weight" and are not direct evidence of discrimination. *Armbruster v. Unisys Corp.*, 32 F.3d 768, 779 (3d Cir. 1994) (citing *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992), *cert. denied*, 114 S.Ct. 88 (1993)). Hercules maintains that Gossage had "very little to do with the 1991 RIF." D.I. 209 at 14.

The Court disagrees with both of Hercules' assertions. Fed. R. Evid. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The rule, therefore, sets a low threshold for relevancy, *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 783 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 1253 (1995); evidence is irrelevant "only when it has no tendency to prove [a consequential] fact." *Spain v. Gallegos*, 26 F.3d 439, 452 (3d Cir. 1994) (citing *Blanca v. Raymark Indus.*, 972 F.2d 507, 514 (3d Cir. 1992)).

Gossage's statements in *The News Journal* and in the *Horizons* newsletter easily satisfy this lenient relevancy standard. In this disparate treatment case, plaintiff seeks to prove a discriminatory motive on the part of Hercules; he may meet his burden either by presenting direct or indirect evidence of unlawful age discrimination. *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1214 (3d Cir.1988), *cert. denied*, 490 U.S. 1098 (1989). As to Hercules' second contention, the Court finds that Gossage, as the corporation's CEO and leader, was well positioned to set the tone for the 1991 RIF. His highly public statement explaining the RIF to *The News Journal* demonstrates Gossage's intent to exhibit strong leadership at the corporate helm. Consequently, "because discriminatory comments by an executive connected with the decisionmaking process will often be plaintiff's strongest circumstantial evidence of discrimination, they are highly relevant." *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, (3d Cir. 1995). Here, Gossage explicitly distinguished between older and younger employees and how he perceived the younger employees, as opposed to the older ones, as those who wanted to bring the corporation back to a better condition; it is for the jury to weigh the competing inferences generated by these remarks. See *Siegel v. Alpha Wire Corp.*, 894 F.2d 50, 54-55 (3d Cir.), *cert. denied*, 496 U.S. 906 (1990) (reversing district court for holding that the defendant's use of the phrase "old dogs won't hunt" was not sufficiently probative to be admissible). As the Third Circuit Court of Appeals has observed:

*13 [w]hen a major company executive speaks, "

Not Reported in F.Supp.

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

everybody listens" in the corporate hierarchy, and when an executive's comments prove to be disadvantageous to a company's subsequent litigation posture, it cannot compartmentalize this executive as if he had nothing more to do with company policy than the janitor or watchman.

Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 54 (3d Cir. 1989). Thus, it is possible that MacKenzie and other Hercules personnel were influenced by Gossage's characterizations of older versus younger employees; drawing or not drawing this inference will also be within the province of the fact-finder at trial. The Court holds this evidence to be relevant to plaintiff's proof of the corporation's anti-age animus.

Hercules adds that even if the remarks are relevant, plaintiff attempts to exploit them "out of context and without any basis in fact." D.I. 209 at 11. Thus, defendant argues, these comments, are misleading and inflammatory, and, if admitted, would be more prejudicial than probative. The Federal Rules of Evidence set forth the standard for this discretionary balancing: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" Fed. R. Evid. 403. Thus, to exclude Gossage's remarks under Rule 403, their probative value must be "substantially" outweighed by their potential for prejudice. The Court finds such prejudice lacking here. It is axiomatic that all evidence adverse to a party is prejudicial; under the rule, the prejudice should rise to a level tantamount to being unfair. *Dollar v. Long Mfg., N.C. Inc.*, 561 F.2d 613, 618 (5th Cir. 1977), cert. denied, 435 U.S. 996 (1978). At trial, Hercules will be afforded ample opportunity to provide context and explanation for Gossage's remarks. Accordingly, the Court does not find Rule 403 to be a basis for excluding this evidence.

In its Reply Brief, D.I. 233, Hercules does make a final persuasive argument for exclusion of the *Horizons* article: it correctly identifies the article as hearsay under Fed. R. Evid. 802. Hercules argues that if the basis of the article was Gossage's Men's Club speech, then plaintiff must introduce

admissible evidence of the speech, and not a hearsay article about the speech published later. The Court agrees that the *Horizons* article, even though arguably relevant, must be excluded as inadmissible hearsay.

Finally, Hercules argues that *The News Journal* article should be excluded because to do otherwise would have a chilling effect on free decisionmaking and encroach on an executive's right to speak about Hercules' future. As legal theory for this argument, Hercules relies on the First Amendment to the United States Constitution. The Court finds that this assertion emotes more heat than light, as there is no state actor involved in this case against whom the First Amendment could be invoked. Consequently, the Court finds this argument wholly without merit, warranting no further analysis.

b. Remarks Attributed to Gossage by Hosker

*14 Plaintiff also seeks to call William E. Hosker, who is the retired head of Hercules' Resins Group. In 1992, approximately one year after Finch's termination, Gossage led a reorganization of the corporation. In the reorganization, Hercules established three new groups: Chemical Specialties, Food and Functional Products, and the Hercules Materials Company. D.I. 229 at B43. According to Hosker, Gossage expressed his intent to have in place at the head of each group, positioned immediately below him in the corporate hierarchy, individuals who would be part of a cadre of qualified CEO candidates who would be in their early 50s by the time Gossage retired. Hosker claims Gossage made it clear that Hosker would be passed over because Hosker was already 54 years old. D.I. 58 at 20-21. According to Hosker, Gossage explained that "someone in their late 50s typically looks, expends their energies in preparing their retirement ...[while] younger people have perhaps more energy and a longer period of time in which they can perform their duties." *Id.* at 27.

In its opinion on Hercules' summary judgment motion, the Court refused to consider this evidence. *See Finch v. Hercules*, 865 F. Supp. at 1125. For purposes of admissibility at trial, the Court reaches

Not Reported in F.Supp.

Page 12

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

a similar result. While this statement on its face may raise an inference of age discrimination, the issue Gossage's statement was addressing, CEO succession planning, is a far cry from the issue in the instant case. The hiring and promotion of individuals to the position of Chief Executive Officer is treated differently under the ADEA. Under the statute's executive and policy making exception, 29 U.S.C. § 631(c)(1), a company has a right to require its CEO to retire at age 65.^{FN7} At summary judgment, the Court held that "[a]ge bias in [such] promotion decisions simply does not make age bias in termination decisions more likely. Further, to the extent this portion of Hosker's testimony is minimally relevant, ... its probative value is substantially outweighed by the danger of unfair prejudice." *Finch v. Hercules*, 865 F.Supp. at 1125. These same considerations apply with full force at this stage of the litigation.

Hosker would also testify about a June 1992 meeting conducted by C. Doyle Miller, Hosker's direct superior. At that meeting, Miller discussed the results of the Management and Organization Review for Hosker's Chemical Specialties Group. While doing so, Miller relayed certain comments that Gossage had allegedly made to him; Hosker dictated a memo to his file that referenced these remarks. Hosker's memo states *inter alia*, that: The only negative criticism received by Miller was Gossage's statement that the Chemical Company had not aggressively or creatively addressed "tired warriors," who, though contributing to the corporation, were blocking the movement of young, aggressive people, upon whom the future of the company had to be built.

D.I. 229 at B12. As a backdrop to this statement, plaintiff explains that "Gossage planned to get younger employees into the pipeline so that they could rise through developmental positions into the more senior positions and provide the Board with a choice of candidates to replace him when he retired." D.I. 228 at 13. Plaintiff quotes Gossage as testifying that "there has been, since I took over the [CEO] position, an ongoing effort between the Board and myself on a regular basis to talk about my eventual retirement and the candidates who might replace me and what development plans are

in place to prepare them for that eventuality." D.I. 229 at B34.

*15 Hercules correctly notes that this testimony was before the Court at summary judgment as well, and the Court declined to make a definitive ruling pending further illumination of this testimony. In its opinion, the Court requested clarification (1) as to the timing of these statements relative to Finch's termination, (2) whether Gossage actually used the words "tired warriors," (3) if he did use the term, what meaning did he ascribe to the phrase, and (4) whether this remark was targeted specifically to the Chemical Specialties Group. *Finch v. Hercules*, 865 F.Supp at 1125. The record shows that this remark allegedly occurred approximately 16 months following the 1991 RIF and Finch's termination. Miller denies ever using the phrase in any meetings he conducted or hearing Gossage use the phrase. D.I. 210 at Exh. G. The record is silent as to whether Gossage himself admits or denies making this statement and what it meant. Miller's memo defines the remark as directed specifically at his Chemical Specialties Group. D.I. 229 at B12. As such, Hercules argues that it is unrelated to the termination of Finch.

The Court finds the issue of admissibility of this evidence a closer question. Standing alone, the temporal remoteness of the statement is not troubling; it could very well indicate an ongoing corporate anti-age bias. Courts have found on numerous occasions remote statements admissible as circumstantial evidence of age discrimination. *Abrams*, 50 F.3d at 1214 (citing *Lockhart*, 879 F.2d at 54; *Roebuck v. Drexel Univ.*, 852 F.2d 715, 733 (3d Cir. 1988)). However, the hearsay nature of Hosker's memo and the circumstances surrounding the document's generation call into question the document's reliability. At summary judgment, the Court voiced concern about the stratified nature of the statements at issue here: Gossage to Miller to Hosker to Hosker's memo to file. The Court is willing to assume *arguendo* that Gossage and Miller both made this alleged remark in their capacities as corporate agents acting within the scope of their agency or employment. *Finch v. Hercules*, 865 F. Supp. at 1126 and n.21. It is at the next level of hearsay, *i.e.*, Hosker's hearing the remark and

Not Reported in F.Supp.

Page 13

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

reducing to writing that is troubling.

Plaintiff has argued that it can show that Hosker's memorandum would satisfy the requirements for the business records exception to the hearsay rule, Fed. R. Evid. 803(6). However, even if this document could be admitted under this rule, the inquiry into the admissibility of this evidence does not end here. Hosker may have been motivated to make this record for considerations other than the ordinary course of business. Just a few months earlier, in January 1992, Hosker was passed over for promotion and has testified that he is of the opinion he was discriminated on the basis of his age. D.I. 158, Exh. 1 at 31, 34. He candidly expressed that as result, he felt disadvantaged, and retained an attorney to look into the matter. *Id.* at 31. In June, 1992, when Hosker recorded his impression of the meeting conducted by Miller, he wrote

*16 Upon questioning Doyle as to the definition of "tired, old warriors," I used the phrase "white, old males," and was admonished that while perhaps that was an equivalent connotation, we must refrain from language that speaks to age discrimination. My point was that, in fact, Tom Gossage and Doyle Miller are urging management to find a mechanism to move old people out of key jobs to make way for younger personnel. To further clarify, I asked Doyle for a profile of a typical "tired, old warrior." His words were, "Someone who may be 54 years old, contributing to the corporation and planning to work until age 65. These types of individuals are blocking the ability to move people through."

D.I. 229 at B12. Hosker's memo clearly records Hosker's sentiments as to the meaning of the phrase "tired warriors." Hosker unabashedly interjected the word "old" into the phrase and recorded his own interpretation of the remark, an interpretation consistent with his previous impression that Gossage was discriminating against older managers such as himself. As someone who had already felt wronged by Gossage's conduct, Hosker seized the opportunity to memorialize in writing his subjective impression of what he considered further evidence of age discrimination by his employer. The memo does not set forth an objective explanation of what meaning Gossage attributed to the remark; "tired warriors," standing alone, may or may not implicate

considerations of age. *See EEOC v. Clay Indus.*, 955 F.2d 936, 942 (4th Cir. 1992) (analogous phrase, "dead wood" referred to employee evaluations regardless of age). Considering Hosker's jaundiced eye towards Gossage, the Court views this memo as reflective of Hosker's subjective opinion regarding Gossage's alleged remark. As such, the memo's potential for prejudice in misleading and confusing the jury substantially outweighs its probative value.

Although Hosker's memo will not be admissible at trial, the Court will allow Hosker to testify that he heard Miller relay Gossage's alleged "tired warriors" comment at the May 29, 1992 presentation. Plaintiff will still be afforded opportunity to expose this remark to the jury, and defendant may vigorously cross-examine and present its opposing evidence regarding the nature or even the existence of this remark. In so doing, however, the potential prejudice to Hercules by the extra layer of hearsay, Hosker's memo, will be eliminated.

3. Exclusion of Plaintiff's Witnesses

In the Pretrial Stipulation, plaintiff lists five witnesses whom he has never before identified as having information about the subject matter of this case. These witnesses are Maynard Turk, Alexander Searl, James Hunter, Chris Witham, and Gary Dunn. Similar to plaintiff's motion in limine to exclude witnesses, defendant seeks a ruling that these witnesses not be allowed to testify because they should have been, but were not, disclosed during discovery.

In its First Set of Interrogatories, Hercules asked plaintiff to "[i]dentify all persons that you know or believe have information regarding the subject matter of this action, and describe the information." D.I. 210, Exh. K. Plaintiff did not include any of these witnesses in his answer. Under Fed. R. Civ. P. 37(c)(1), the Court may permit witnesses not disclosed during discovery if the failure to disclose the identities was harmless, or if there was "substantial justification" for the non-disclosure.

*17 Plaintiff claims that its failure to disclose these

Not Reported in F.Supp.

Page 14

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

witnesses' identity was substantially justified because he had no idea, until summary judgment, that Hercules intended to proffer evidence on why it terminated Finch, *i.e.*, justification based on plaintiff's record of performance. D.I. 228 at 32-33. The Court does not find this argument at all convincing. At deposition, MacKenzie explicitly testified that he based his forced ranking of Finch on Finch's performance. D.I. 121 at B-106. Hercules claims that its subsequent termination of Finch was influenced at least in part by the results of the forced-ranking; it could not have been clearer that plaintiff's performance would be at issue. The Court finds that plaintiff should have disclosed the names of these witnesses in response to the above interrogatory and that plaintiff's purported reasons for his nondisclosure do not rise to a level of being substantially justified.

Similarly, the Court does not find the nondisclosure to be harmless; the *Meyers v. Pennypack* considerations outlined above in section 4b, *supra*, with respect to plaintiff's motion to exclude defendant's witnesses now apply in this converse situation. Defendant has been surprised and prejudiced in not being able to depose these witnesses and prepare accordingly for trial. Because it is the eve of trial, with two closely intervening holidays, the Court is unwilling to disrupt defendant's trial preparation with having to notice five deponents and coordinate schedules. It would be unfair to penalize defendant and in effect reward plaintiff's noncompliance. Consequently, these witnesses will not be allowed to testify at trial.

4. Plaintiff's Rebuttal Evidence Regarding his Bonus and Plaintiff's Trial Exhibits

Additionally, plaintiff listed in the Pretrial Stipulation evidence that Hercules asserts as involving the calculation of Finch's bonus; plaintiff argues that this evidence is relevant to his rebuttal case. Because this is rebuttal evidence, plaintiff does not wish to reveal his reasons for offering these documents for fear of exposing his trial strategy. The Court will defer ruling on this evidence until trial because the current record is not fully developed sufficiently to warrant a considered

decision.

Similarly, defendant has delineated a laundry list of exhibits it seeks to exclude from trial. In his answering brief, plaintiff has provided brief descriptions of the exhibits and his arguments as to why they should be admissible. The Court has not actually viewed the exhibits nor had the benefit of oral explanation or argument on these exhibits. Out of fairness to both parties and a desire to fully appreciate this evidence, the Court will defer its ruling until such time, either at or before trial, that the parties may be heard more completely on these issues.

5. Defendant's Additional Motion in Limine

On November 29, 1995, defendant filed an additional motion in limine, D.I. 243, seeking a substantive ruling on the issue of the relevant time frame for calculation of plaintiff's damages. Defendant's Reply Brief was filed on December 20, 1995. A review of the briefs makes clear the relief defendant seeks is merits relief masquerading as a motion in limine. The proffered record is not appropriate for consideration of merits relief. Because trial will commence on January 8, 1996, and there is inadequate time to both put this matter in the correct procedural posture, and determine the same, the Court is not inclined to consider any application for merits relief. If it should become necessary, since the matter goes to the appropriate amount of damages, it can be treated by post-trial motion.

IV. CONCLUSION

*18 For the above discussed reasons, the Court will grant in part and deny in part Plaintiff's Motion in Limine, D.I. 211, and do the same as to Defendant's Motion in Limine, D.I. 209. Defendant's Motion in Limine, D.I. 243, is denied. An appropriate order will issue.

FN1. When force-ranking employees, "evaluators are instructed to identify the "

Not Reported in F.Supp.

Page 15

Not Reported in F.Supp., 1995 WL 785100 (D.Del.)
(Cite as: Not Reported in F.Supp.)

best employee' and the 'worst' employee with regard to a particular factor, and then the second best and the second worst, and so on down the line." *Finch v. Hercules, Inc.*, 865 F. Supp. 1104, 1111 n.4 (D. Del. 1994) (quoting N. Thompson Powers, *Reductions in Force Under the Age Discrimination in Employment Act*, 2 Lab. Law. 197, 216-217 (1986)). See generally this Court's previous opinion, *supra*, for a more extensive treatment of the factual details in this action.

FN2. For a complete summary of how these analyses differ, see generally, *Finch v. Hercules*, 865 F.Supp. at 1118-1119; *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d at 1225 n.6 (3d Cir. 1994), *opinion vacated on other grounds*, 115 S.Ct. 1397 (1995).

FN3. When this issue first surfaced, the court suggested bifurcation of the liability and damages phases of the trial. At that time, Hercules declined the offer. If Hercules wishes bifurcation it should promptly file a motion requesting the same. Under *Mardell*, after-acquired evidence is not admissible in the liability stage of a cause of action brought under the ADEA. *Mardell*, 31 F.3d at 1239; see also *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 n.1 (3d Cir. 1995). The evidence the Court holds inadmissible here, i.e., the MICP and IPI evidence, would be admissible in a damages phase of trial were the issue of damages bifurcated from the liability phase of trial.

FN4. The above cited affidavit has been ordered stricken. However, Finch referenced it in his brief as a harbinger of possible prejudicial testimony.

FN5. In plaintiff's opening brief, he argued that evidence pertaining to Finch's counseling of Engebretsen's children should be excluded for several reasons. First, he contended that the evidence is

both irrelevant and too remote in time to be admissible in the upcoming trial. Second, he declared that this evidence should be excluded based on the clergy-communicant privilege. D.I. 212 at 25-26. However, the defendant argued in its answering brief that this evidence is relevant to show that bias on the part of Engebretsen. Hercules also argued that the clergy-communicant privilege does not shield the identity of the communicants or the fact that the communication took place. D.I. 226 at 15-16. Because plaintiff has since conceded that evidence of plaintiff's counseling the Engebretsen children is admissible, the Court will not address this issue.

FN6. In his Opening Brief, plaintiff also initially objected to a witness named Patrick Donohue. However, based on Hercules' description of Donohue's proposed testimony, plaintiff subsequently withdrew his objection. D.I. 231 at 16.

FN7. At the pretrial conference in this matter, counsel for Hercules for the first time verified that the company does in fact have such a retirement policy for its CEO. However, this evidence was not known nor necessary to the Court's decision at summary judgment; the Court likewise need not consider it here.

D.Del.,1995.
Finch v. Hercules Inc.
Not Reported in F.Supp., 1995 WL 785100 (D.Del.)

Briefs and Other Related Documents (Back to top)

• 1:92cv00251 (Docket) (May. 05, 1992)

END OF DOCUMENT