UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Charles E. Moody and Timothy L. Tallentine, et al, Plaintiffs, vs. The Turner Corporation, and the Employees' Cash Balance Retirement Plan of the Turner Corporation, Defendants.	:	Case No. 1:07-cv-692

ORDER

Before the Court is Plaintiffs' motion to set aside or modify the Magistrate Judge's May 12, 2010 Order. (Doc. 104) Defendants have responded to the motion (Doc. 118). Magistrate Judge Hogan's Order denied Plaintiff's motion to enforce a prior September 30, 2009 discovery order.

Plaintiffs generally contend that Defendants violated ERISA by failing to calculate lump sum, pre-retirement pension benefits using a "whipsaw" calculation. They also contend that descriptions of Plan benefits contained in some of the Plan's Summary Plan Descriptions differed from the Plan's descriptions, and that they are entitled to the more advantageous calculation. Magistrate Judge Hogan's May 12, 2010 Order granted in part, but largely denied Plaintiffs' motion to enforce a prior discovery order. All matters concerning discovery in this case were

referred to Magistrate Judge Hogan, and his orders will not be set aside or disturbed by this Court unless Plaintiffs demonstrate that the orders are clearly erroneous or contrary to law.

To comprehend Plaintiffs' pending objections, it is unfortunately necessary to review some history of this case. Almost immediately after this Court denied Defendants' motion to dismiss (see Doc. 25, August 6, 2008 Order), the parties began what has turned out to be a lengthy and contentious discovery process. Plaintiff sought leave to serve discovery requests on Defendants prior to the Rule 26 conference, accusing Defendants of failing to cooperate in scheduling a conference. (Doc. 28) Despite the accusations, a Rule 26(f) discovery plan was filed by the parties on September 29, 2008 (Doc. 35), and the Magistrate Judge conducted a scheduling conference on December 18, 2008.

Plaintiffs' lengthy first motion to compel (Doc. 43), filed a month later on January 30, 2009, sought an order compelling Defendants to fully respond to Plaintiffs' document requests, arguing that Defendants served boilerplate responses and failed to produce what Plaintiffs asserted were essential, relevant documents. Plaintiffs contended that the documents that had been produced were largely "junk" that were useless to Plaintiffs. The document requests at issue (attached as Exhibit 7 to Plaintiff's first motion to compel), sought production of an

extremely broad array of email files, electronically-stored material, and hard-copy documents on a wide variety of subjects. In particular, Plaintiffs' request for production No. 1 and No. 2 sought production of emails concerning the plan that contained words or phrases identified in nine separate sub-requests; the Court's rough count of the requested search terms is at least 160 different terms.

Defendants' response (Doc. 48) detailed Defendants' objections to both the discovery requests and to what Defendants labeled as Plaintiffs' unreasonable discovery positions on most issues. They objected to the broad definitions of search terms proposed by Plaintiffs, and stated they had produced some 44,000 pages of hard copy documents by the end of December 2008. The Rother affidavit filed with the response provided examples of documents produced (identified by Bates numbers) that were responsive to Plaintiffs' requests. (See Doc. 48, Exhibit A, Aff. of Charles Rother at ¶19) Rother also described a "test" search Defendants ran on ESI databases for Plaintiff's Request No. 1. Rother stated that the resulting database for subpart 1 of Request No. 1 alone was 29.54 gigabytes of information. Id. at ¶23.

Plaintiffs' reply and supplemental reply (Docs. 50 and 69) disputed all of Defendants' positions. They noted that Defendants were producing extremely important documents

concerning their communications with the IRS about the Plan and the whipsaw issue at the last hour; that Plaintiffs' ESI production requests were not overly broad because the question of the proper meaning of the Plan's complicated formula is a question of fact, not one of law, and thus would require extensive factual discovery; that Defendants failed to produce complete documents in some cases; and that they had not served a proper privilege log. Plaintiffs submitted copies of responsive documents they had obtained from the IRS under an FOIA request that Defendants had not yet produced. Plaintiffs also objected to Defendants' failure to conduct a search for "all" documents within their "custody or control," specifically for relevant documents from Plan actuaries, consultants and attorneys.

Magistrate Judge Hogan conducted a hearing on these issues on May 12, 2009. His September 30, 2009 order (Doc. 75) granted Plaintiffs' motion in part, subject to further conferences with the parties to try to narrow the scope of these discovery disputes. As his Order aptly observes, "In essence, this discovery dispute amounts to a situation in which both sides have dug their heels into the proverbial sand of their respective corners in the sandbox. Plaintiffs argue that they are entitled to everything they have asked for, as written, without consideration given to any objections or claims of privilege. Defendants, on the other hand, firmly assert that they have

produced everything to which plaintiffs are entitled and steadfastly refuse to produce any ESI whatsoever on the grounds that the expense renders any such search and production too burdensome. **Neither position is tenable**." (Doc. 75 at p. 3; emphasis added) The Magistrate Judge found that many of Plaintiffs' discovery requests were overly broad and irrelevant, particularly those directed at Defendants' motives or intent with respect to the Plan's rather complicated crediting rate formula. However, he concluded that Plaintiffs are entitled to all information about the crediting rate the Plan actually applied to lump sum payments, and to information relevant to the issue of actuarial equivalence of those payments to the normal retirement age benefit. The Order clearly states that it was intended to provide guidelines for both parties to review and revise their discovery requests and responses, in anticipation of further discovery conferences with the Court and, obviously, in anticipation that many of these disputes could be and should be resolved without further Court intervention.

The Magistrate Judge held further conferences on October 28, 2009, November 12, 2009, and December 1, 2009. Some efforts were made on both sides to reach agreement on some of the discovery disputes.

The efforts were apparently unsuccessful from Plaintiffs' perspective, as they filed a second motion to compel on January

27, 2010, this one seeking an order requiring Defendants to comply with the September 30, 2009 Order, and to fully respond to Plaintiffs' revised discovery requests. (See Doc. 89) The pleadings relating to this motion are voluminous; correspondence and emails flowing between the parties are too lengthy for any concise review at this juncture. However, the Court notes that according to the Sharpe Declaration filed with Plaintiffs' motion, Defendants had agreed to run a list of search terms against the email files that had been collected from 33 identified custodians. Defense counsel told Plaintiffs in conference calls during November that ESI documents would be produced in approximately two weeks, with additional materials 4-6 weeks thereafter. At a December 1 status call with Judge Hogan, he suggested that Plaintiffs consider serving interrogatories to obtain responses to their concerns about the scope and extent of ESI discovery. Those interrogatories were served in early December, and responded to on December 23, 2009. (See Doc. 90, Exhibit 6.)

Magistrate Judge Hogan conducted another hearing on March 17 concerning Plaintiffs' January 2010 motion to compel. The transcript of that hearing has been filed (Doc. 98), and the Court has reviewed it. Plaintiffs insisted that Defendants had not done what they agreed to do, and had "stonewalled" Plaintiffs' attempts to obtain documents via subpoenas.

Plaintiffs argued that because the Plan's rate formula is so complicated and so unusual, they were entitled to any and every document that might impeach any testimony from Defendants about how payments should be calculated, or any argument Defendants might offer concerning proper actuarial value calculations.

Defense counsel complained that the costs of attempting to comply with Plaintiffs' increasingly burdensome requests were escalating rapidly, and there was no reason to require Defendants to incur those costs without a clear demonstration of relevance. With regard to Plaintiffs' December 2009 interrogatories about ESI, counsel characterized them as "asking for everything under the sun related to how Turner's computer systems operated going back to the early '90s." (Doc. 98 at p. 30) Defense counsel defended Ms. Sibley's search of corporate office files, because she searched the files that would normally be expected to contain responsive documents concerning the cash balance plan. Plaintiffs had been given responsive information on the crediting rates that were actually applied, and the account balances for plan participants who took lump sum distributions. Once Defendants finished producing the additional e-mail documents, defense counsel argued that it would be unreasonable to require them to do more.

Magistrate Judge Hogan noted that one of the problems was that Defendants initially promised to do something, but

"basically did nothing." (Doc. 98 at p. 8) He also concluded that "... plaintiff is overreaching way beyond what I think anybody is ultimately going to need ... to resolve this case." (Id.) He made the sensible suggestion that a far simpler method for Plaintiffs to obtain information about the "design" of the plan with respect to the complicated formula, would be to take a 30(b)(6) deposition from a person most knowledgeable about those issues. It is not clear if Plaintiffs have followed that suggestion.

Magistrate Judge Hogan's May 12, 2010 Order (Doc. 101) to which Plaintiffs now object, began by again noting that both parties had taken unrealistic positions concerning discovery. He cited Defendants' prior failure to conduct the key word search that they had agreed to conduct. He ordered that Defendants immediately produce all the raw data concerning the crediting and/or projection rates that the Plan applied, lump sum payments, dates of participants' reaching normal retirement age, and "any and all information" about actuarial equivalence. He noted that Defendants had produced some of these materials, and had informed the Court that the rest would be produced soon. He denied Plaintiffs' motion to compel the production of materials from Defendants' law firms, concluding that such material was likely privileged, and that ordering the production would impose a significant burden on non-parties.

DISCUSSION

The discovery disputes between the parties have consumed an inordinate amount of judicial time and effort, not to mention the time and resources of the parties. The Court agrees with Magistrate Judge Hogan's observation that both parties have taken unrealistic positions over the course of this case. The Court has reviewed the background of this dispute in some detail, and it is clear that Judge Hogan has devoted considerable time and effort in understanding the parties contentions, and in attempting to resolve these disputes. 28 U.S.C. §636(b)(1)(A) states that this Court may reconsider any pretrial order entered by a magistrate judge "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." Plaintiffs have not established a right to relief under this section.

As other commentators have observed, the increasing amount of electronic information in the possession of parties to litigation has caused discovery in some cases to become increasingly complex and expensive. In this Court's view, the mere availability of such vast amounts of electronic information can lead to a situation of the ESI-discovery-tail wagging the poor old merits-of-the-dispute dog. That appears to be the situation that occurred in this case. Plaintiffs' original document requests, in particular requests 1, 2 and 7, were

clearly overly broad and would have imposed an undue burden upon Defendants that is disproportionate to the likelihood of discovering truly relevant information. The Court has also reviewed Defendants' responses to Plaintiffs' Second Set of Discovery Requests (see Doc. 90, Exhibit 6), and concludes that Defendants need not respond further to these requests, nor engage in additional ESI searches. As Magistrate Judge Hogan noted in his orders, Defendants failed to perform certain searches that they had previously agreed to perform. Conduct of this sort does not contribute to prompt resolution of discovery disputes, and creates conflict and suspicion. Nevertheless, Defendants have specifically represented to this Court that they have in fact conducted that search on the 33 record custodians previously agreed upon with the Plaintiffs. (Doc. 118, p. 19)

Plaintiffs asked Magistrate Judge Hogan to order Defendants to respond to yet another round of discovery requests (see Doc. 90, Exhibit 24), which they argued were substantially narrower than their originals. That request was denied, except for the information described in Magistrate Judge Hogan's order: documents "explaining the plan, raw data upon which calculations are based, projection and crediting rates used, payments made under the plan, and retirement dates for the beneficiaries under the Plan." (Doc. 101 at p. 2) Plaintiffs' insistence that Defendants must respond to yet another set of discovery requests

that include entirely new areas of inquiry was properly rejected.

Plaintiffs also accused Defendants of interfering with their subpoenas issued to various actuaries, consultants, and law firms that previously represented Defendants. The parties were apparently negotiating a method for obtaining these documents (see December 4, 2009 letter to defense counsel, Doc. 90, Exhibit 21), and the subpoenas were apparently responded to, if not as quickly as Plaintiffs would have liked. Despite all of the initial problems, delays, suspicions and conflicts that were encountered, however, Defendants have represented to this Court and stated in their discovery responses that they have produced all of the documents they were ordered to produce.

This Court affirms Magistrate Judge Hogan's repeated observation and his ruling that documents concerning the "intent" or the "motivation" of the Plan designers are not relevant. As Magistrate Judge Hogan aptly observed, "whether an investment adviser or Plan consultant assumed in 1995, 2000, or even 2005 that the Plan would enjoy a supplemental credit rate of 7.5% or better does not determine whether the crediting rate actually applied to the lump sum payments results in the actuarial equivalent of the amount that would have been received if the plaintiffs had waited until normal retirement age to receive their plan benefits." (Doc. 75 at p. 4)

With respect to the discovery from the law firms that have

represented Defendants over the years, Magistrate Judge Hogan's order denying the motion to compel is affirmed. Plaintiffs' overly broad discovery requests and demands for extensive key word searches of the law firms' ESI are not reasonably calculated to the lead to the discovery of relevant, admissible evidence in this case. And requiring such a broad search would impose an undue burden on those law firms, without a corresponding showing from Plaintiffs of the likelihood of discovering relevant, non-privileged information.

Finally, Plaintiffs object to Magistrate Judge Hogan's failure to enter their Proposed Order granting their motion, and his refusal to specifically rule on each of their separate discovery requests. Plaintiffs tendered an order (Doc. 89, Exhibit 1) that would have required Defendants (among other things) to collect ESI from all of their former law firms; to conduct searches on a broad array of local storage devices (iPhones, BlackBerries, PDAs, etc.); to respond to Plaintiffs' revised set of discovery requests in toto; and to conduct yet another search for "hard copy" documents defined by confusing cross-references to various letters and declarations. Magistrate Judge Hogan did not abuse his discretion in refusing to enter this broadly worded order, nor in refusing to address each and every one of Plaintiffs' multiple requests for documents.

In sum, this Court concludes that Plaintiffs have not

demonstrated that Magistrate Judge Hogan clearly erred in the May 12, 2010 Order at issue. Plaintiffs have not established a basis upon which this Court could find that the order is contrary to law.

Therefore, Plaintiffs' motion to set aside or modify the May 12, 2010 Order (Doc. 104) is DENIED.

SO ORDERED.

DATED: September 21, 2010

s/Sandra S. Beckwith
Sandra S. Beckwith
Senior United States District Judge