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Re: *BAE Systems Information and Electronic Systems Integration Inc. v.
Lockheed Martin Corporation*
C.A. No. 3099-VCN
Date Submitted: June 1, 2011

Dear Counsel:

I address three pending motions: Defendant Lockheed Martin Corporation, d/b/a Lockheed Martin STS-Orlando (“LMSTS”) has moved to bifurcate this action into a “Contract Interpretation Phase” and a “Damages Phase,” and both LMSTS and Plaintiff BAE Systems Information and Electronic System Integration Inc. (“BAE”) have filed motions to compel.¹ Because the Court’s determination with

¹ I will address BAE’s Motion to Approve Its Designated Consultant separately.

regard to bifurcation will necessarily affect the scope of the discovery in which the parties must immediately participate, I will address that motion first.

* * *

The Court considers the following factors in determining whether bifurcating an action is appropriate: (1) the complexity of the litigation and the need for different proof; (2) whether discovery on certain claims would delay a single trial; (3) whether different counsel would probably try the various claims; and (4) whether prejudice would result from separate trials.²

This litigation is indisputably complex. Determining the scope and enforceability of the November 27, 2000 Memorandum of Agreement (the “New MOA”) before turning to issues such as a calculation of BAE’s damages would either allow the deferred issues to be considered within a more focused context or, in the case that the New MOA is found to be unenforceable, avoid the expenditure of resources on issues that need not be decided at all. That establishing damages under the MOA would require proof different from that needed to establish its scope

² *Quereguan v. New Castle County*, 2006 WL 2522214, at *6 (Del. Ch. Aug. 18, 2006). See Ct. Ch. R. 42(b).

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and enforceability also counsels for bifurcating this action. Further, both parties agree, in principle, that bifurcation would be appropriate, and they have also reached substantial agreement regarding the issues to be determined during each phase of the action. The Court endorses the parties' agreements in this instance, and thus the motion to bifurcate is granted as follows.

The first phase of the action (the "Contract Interpretation Phase") will determine the parties' rights and obligations under the New MOA, including obligations, if any, arising under the implied covenant of good faith and fair dealing, and will address the parties' affirmative defenses (except that LMSTS's antitrust defense will be addressed during the second phase). It will also address Lockheed's assertion that BAE is not entitled to participate in Joint Strike Fighter-related support equipment work because, it contends, Sanders and/or BAE failed to support or participate in, with respect to support equipment, Lockheed's efforts to win the JSF contract.

The second phase of the action (the "Damages Phase") will address any claims of breach of the New MOA or the implied covenant of good faith and fair dealing that are not specifically addressed in the Contract Interpretation Phase,

determine whether the New MOA violates antitrust laws, and determine the appropriate remedy for any breach, including the calculation of damages.

* * *

Bifurcation of this action effectively postpones the parties' need for much of the discovery they have requested; however, disputes remain with regard to whether certain discovery requests are (1) proper at all or (2) related to the Contract Interpretation Phase. The Court now addresses the competing Motions to Compel in this context.

BAE's Motion to Compel addresses four general categories of documents, although several aspects of the motion have been resolved since it was filed.

First, BAE has requested that Lockheed produce additional documents from business units other than LMSTS, such as LM Aero. Specifically, BAE seeks documents, held by LM Aero and not by LMSTS, "relating to LM Aero's decision whether to outsource work to either LMSTS or BAE, and how it determined that LMSTS was a single source of contact for work that would later be given to BAE." Lockheed contends that it has already done a reasonable search of LM Aero's

records and produced the appropriate documents in its possession. Counsel for BAE has indicated a willingness to accept a good faith representation to this effect.³ Subject to that, BAE's motion to compel is therefore denied with regard to this category of documents.

Second, BAE seeks documents created after the Complaint was filed in 2007; specifically, it asks the Court to compel production of any documents relevant to the Contract Interpretation Phase, "regardless of whether or not they're dated before or after the filing of the Complaint." Lockheed has since produced certain relevant documents that are dated through 2009, and it argues both that discovery must be cut off at a reasonable date and that documents generated after the Complaint was filed are unlikely to be reliable indicators of the New MOA's meaning. BAE argues that documents produced after 2007 may be relevant to, for example, the parties' affirmative defenses. The Court is satisfied that December 31, 2009, will serve as a reasonable discovery cutoff date, and grants the motion to compel with

³ Defs.' Mot. to Bifurcate Hr'g Tr. ("Tr.") 51.

respect to documents, created through that date, that are pertinent to the Contract Interpretation Phase.

BAE's motion was withdrawn as it pertained to the third category of documents, which involved ATS work performed by LMSTS that related to the JSF program.

Lastly, BAE asks the Court to compel responses to its Document Requests 8, 11, and 17. Requests 8 and 11 seek projections and "Monthly Financial Performance" documents, respectively, that Lockheed developed with regard to LMSTS. Request 17 is for "[a]ll documents that refer or relate to any agreement or understanding between LM Aero and LMSTS . . . that refer or relate in any way to ATS."

Projections regarding the amount of ATS work Lockheed expected to perform in the years following the execution of the New MOA may have some relevance to the Contract Interpretation Phase, because they could show whether, and to what extent, Lockheed believed the New MOA would affect its ATS business. Documents relating to agreements or understandings between LM Aero and LMSTS

could also be relevant.⁴ Nonetheless, the requests themselves are very broad, and in response to Lockheed's objection as to breadth, BAE has indicated its willingness to narrow the scope of these document requests. Assuming that BAE does so, Lockheed must reasonably respond to Document Requests 8 and 17. BAE's motion is denied with regard to Document Request 11 because the financial data it concerns is relevant only to the Damages Phase.

* * *

The Court now turns to Lockheed's Motion to Compel, which also identifies four categories of discovery.

First, Lockheed asks the Court to require BAE to supplement its responses to Interrogatories 9, 11, 13, and 14, all of which ask BAE to identify the factual bases for its contentions. BAE contends that it has adequately responded by referencing its detailed complaint. BAE is free to rely on the responses it has already made to these interrogatories if it wishes to be constrained to the factual universe identified

⁴ For example, documents that were created while negotiating an agreement between business units that LMSTS would perform all ATS work going forward would be relevant if they included references to the way the agreement would affect BAE and how it was affected by the New MOA. *See* Tr. 42-43. Indeed, Lockheed has already produced the agreements themselves; it has not produced documents relating to those agreements.

by those responses when it presents its case. In the alternative, it must supplement its responses by identifying the additional facts upon which it intends to rely.

Second, Lockheed contends that BAE should supplement its responses to Interrogatories 30-35, which concern BAE's interpretation of the New MOA and the scope of its claims under that agreement. Whether parties may defer providing detailed answers to contention interrogatories is a matter for the Court's discretion,⁵ and the time has come for BAE to explain, precisely, the scope of the rights and obligations it asserts are created by the New MOA. Lockheed's Motion to Compel is granted in this regard.

Third, Lockheed seeks documents that are relevant to its antitrust defense. Because that affirmative defense will be resolved as part of the Damages Phase, the Court will not compel discovery responses regarding it now.

Fourth, Lockheed has asked the Court to compel BAE to identify specific documents upon which it is relying in its responses to Interrogatories 1-20 and 29-40. Those responses currently refer generally to "documents produced in

⁵ See *In re Walt Disney Co. Deriv. Litig.*, 2003 WL 22682621, at *1 (Del. Ch. Oct. 30, 2003).

connection with this matter” or to “documents produced or to be produced in this case.” Although Court of Chancery Rule 33(d) allows parties respond to interrogatories by reference to the business records of the other party where the burden of ascertaining the answer from the records would be the same for either party, it also requires the party served to “specify” the records where the answer may be obtained.⁶ Therefore, the Court will compel BAE to supplement its responses to Interrogatories 1-20 and 29-40 by identifying the documents that are responsive to each interrogatory, respectively.

* * *

Finally, each party requests that it be awarded attorneys fees. Those requests are denied, because both BAE and Lockheed had good faith grounds for the positions taken.

* * *

Accordingly, the Motion to Bifurcate is granted, as set forth above. Both BAE’s and Lockheed’s Motions to Compel are granted in part and denied in part, also as set forth above.

⁶ See also *Grunstein v. Silva*, 2009 WL 4698541, at *20 n.137 (Del. Ch. Dec. 8, 2009)

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IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K