UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EXPERI-METAL, INC.,
a Michigan corporation,

Plaintiff,

v.

COMERICA BANK,
a foreign banking organization,

Defendant.

Case No. 2:09-CV-14890

Hon. Patrick J. Duggan

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DANIEL MCCARTY AND COMERICA BANK'S MOTION TO QUASH SUBPOENA OF DANIEL MCCARTY

Non-party Daniel McCarty and Defendant Comerica Bank ("Comerica") together move to quash the subpoena served upon Mr. McCarty under Fed. R. Civ. P. 45, 30, and 26. In support of this motion, the movants state as follows:

1. Experi-Metal served a subpoena on former Comerica employee, Daniel McCarty, on November 17, 2010. The subpoena instructs Mr. McCarty to appear for deposition and to produce documents only three business days later, on November 23, 2010.
2. The subpoena is improper because it seeks to require Mr. McCarty to produce confidential and privileged information. Mr. McCarty is a former Executive Vice President of Comerica Bank who did not have any direct involvement in the events at issue in this case. However, in that role, he was privy to privileged information and attorney work-product regarding this lawsuit. That information is not discoverable.
3. The subpoena is improper because it does not give Comerica or Mr. McCarty reasonable notice. Mr. McCarty was given only three business days to respond and gather the requested documents. In violation of Fed. R. Civ. P. 45(b)(1), Experi-Metal withheld notice of the subpoena to Comerica until after already serving Mr. McCarty with the subpoena.
4. Experi-Metal withheld this notice to Comerica despite having been informed that, because Mr. McCarty was privy to privileged information and Comerica has a right to preserve that privilege, Experi-Metal should direct all communications to Mr. McCarty through Comerica.
5. The subpoena is also improper because discovery closed in this case on November 1, 2010. The discovery deadline was already extended once, and Experi-Metal has not requested – neither has the Court granted – any additional extension. Further discovery should not be allowed.

6. The subpoena is improper because Experi-Metal has already taken the ten depositions it is permitted to take under the Federal Rules of Civil Procedure, and it did not seek concurrence from Comerica or leave of this Court to exceed that amount. There is no reason to extend this limit for the deposition of Mr. McCarty, who had no direct involvement in the events involved in this lawsuit.

For these reasons, which are more fully discussed in the accompanying brief, Comerica respectfully requests that this Court grant Comerica's motion and enter an order in the form attached quashing Experi-Metal's subpoena to Daniel McCarty.

Respectfully submitted,

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Dated: November 22, 2010

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BRIEF IN SUPPORT OF DANIEL MCCARTY AND COMERICA BANK'S MOTION TO QUASH SUBPOENA OF DANIEL MCCARTY

ISSUES PRESENTED

Whether Experi-Metal's subpoena to former Comerica Executive Vice President Daniel McCarty should be quashed because Mr. McCarty was a high level executive with no direct knowledge of the events in this case, and the subpoena is improper because it:

1. seeks to require Mr. McCarty to produce confidential and privileged information that is not discoverable,
2. does not give reasonable notice to Mr. McCarty or Comerica,
3. was issued after the close of discovery, and
4. exceeds the number of depositions Experi-Metal is permitted under the Federal Rules.

CONTROLLING AUTHORITY

Fed. R. Civ. P. 45(c)(3) permits the court to modify or quash a subpoena. Under that rule, the Court must quash or modify a subpoena that fails to allow a reasonable time to comply, or requires disclosure of privileged or other protected matter. The Court may quash a subpoena that seeks disclosure of confidential information.

Fed. R. Civ. P. 45(b) and Fed. R. Civ. P 30(b)(1) govern service and notice for subpoenas for depositions duces tecum. Fed. R. Civ. P 30(b)(1) requires that a party who wants to depose a person by oral questions must give reasonable written notice to every other party. Fed. R. Civ. P 45 (b)(1) requires that when the subpoena commands the production of documents, that notice must be served on each party before the subpoena is served.

Fed. R. Civ. P. 30(a)(2) limits the number of depositions that each party may take. As stated in that rule, a party must obtain leave of court to take a deposition if it would result in that party having taken more than ten, and the parties have not stipulated to permitting more than ten depositions each.

Fed. R. Civ. P. 26(b) governs the scope and limits of discovery. Fed. R. Civ. P. 26(b)(2)(C) permits the court to limit discovery when the party seeking it has had ample opportunity to obtain the information, or the burden or expense of the proposed discovery outweighs its likely benefit.

INTRODUCTION AND STATEMENT OF FACTS

This case arises from an event on January 22, 2009 when Experi-Metal's financial controller Keith Maslowski gave his confidential online banking user ID and password information to computer criminals who used that information to access Experi-Metal's Comerica bank accounts and wire money out of those accounts. The Court has already determined that the

security procedures Comerica used were commercially reasonable as a matter of law. The only issue remaining in the case is whether Comerica accepted payment orders sent from Experi-Metal's account on January 22, 2009 in good faith, and in compliance with any written instructions from Experi-Metal.

Mr. Daniel McCarty is a former Executive Vice President at Comerica. He did not have any involvement in accepting or processing the January 22, 2009 wire transfers. *See* Ex A, Declaration of Daniel McCarty. However, once this case was filed, he participated in discussions with counsel regarding the lawsuit, and during those discussions became privy to privileged information and attorney work product. *See id.* Aside from that privileged information, he has no knowledge about this case.

On or about November 16, 2010, and without notice to Comerica or its counsel, Experi-Metal's attorney contacted Mr. McCarty regarding this lawsuit. At that time, Mr. McCarty informed Experi-Metal's counsel that he was no longer employed by Comerica – Experi-Metal's attorney did not appear to know that fact before he had contacted Mr. McCarty. Mr. McCarty then also informed Experi-Metal's attorney that, pursuant to an agreement that he has with Comerica, he could not and would not discuss the company's business. When Comerica learned of this *ex parte* contact with its former executive, its counsel immediately faxed a letter to Experi-Metal's attorneys, informing them that Mr. McCarty was privy to privileged information, and to protect this privilege, all further communications with Mr. McCarty should be coordinated through Comerica's counsel. *See* Ex B.

Despite this letter, and again without prior notice to Comerica or its counsel, Experi-Metal's attorney served Mr. McCarty with a subpoena on November 17, 2010. *See* Ex C. Neither Comerica nor its counsel were given notice of the subpoena until the next day. *See* Ex

D. The subpoena requires Mr. McCarty to appear for deposition, with documents, only three business days later on November 23. In other words, with three business days notice, Mr. McCarty is ordered to gather documents and appear for deposition two days before Thanksgiving. This subpoena does not give reasonable notice to Mr. McCarty, or to Comerica.

Under the Federal Rules, Experi-Metal was required to serve notice of the subpoena on Comerica *before* it served Mr. McCarty, to give Comerica an opportunity raise objections. *See* Fed. R. Civ. P. 45 (b)(1). But Experi-Metal did just the opposite, it waited an extra day to inform Comerica of its intentions. Its violation of the Federal Rules renders the subpoena improper. And, in the context of Comerica's request that all communications with Mr. McCarty be coordinated through Comerica's counsel, the extra delay in serving Comerica appears to have been in bad faith.

The subpoena to Mr. McCarty is also improper because discovery in this case closed on November 1, 2010. Experi-Metal had ample time to notice any depositions that it wanted to take, and has already taken all ten to which it is entitled under the Federal Rules of Civil Procedure. It cannot now compel the deposition of Mr. McCarty. This deposition is not permitted, and is entirely unnecessary as Mr. McCarty was a high level executive who does not have any information regarding the events of January 22, 2009, other than privileged information which cannot be discovered. For these reasons, this Court should quash Experi-Metal's subpoena to Mr. McCarty.

ARGUMENT

I. Standard of Review

Courts are required to modify or quash a subpoena that fails to allow a reasonable time to comply, or requires disclosure of privileged or other protected matter. *See* Fed. R. Civ. P.

45(c)(3). In addition, courts may limit discovery when the party seeking it has had ample opportunity to obtain the information, or the burden or expense of the proposed discovery outweighs its likely benefit. *See* Fed. R. Civ. P. 26.

II. This Court Should Quash Experi-Metal's Subpoena Because Experi-Metal Has Attempted To Compel Discovery Of Privileged Information From A Third Party With No Personal Knowledge Of The Events At Issue In This Case

Experi-Metal knows that Mr. McCarty was a high level executive at Comerica. Through the course of discovery, there has been absolutely no indication that Mr. McCarty was involved in the day to day operations of wire transfers, in approving the wire transfers placed from Experi-Metal's account on January 22, 2009, or in responding to the January 22, 2009 phishing event. Indeed, he was not, and has no personal knowledge of the events at issue in this case. *See* Ex. A. That fact alone is sufficient to preclude his deposition. *See Lewelling v. Farmers Ins. of Columbus, Inc*., 879 F.2d 212, 218 (6th Cir. 1989) (upholding district court's grant of a protective order barring plaintiffs from deposing their employer's chief executive officer, who lacked knowledge about any pertinent facts); *Bush v. Dictaphone Corp*., 161 F.3d 363, 367; (6th Cir. 1998) (upholding district court's order precluding the deposition of defendant company's CEO and severely limiting the deposition of its president when there was no evidence that they were directly involved in the events at issue in the case); *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991) (affirming district court's order barring the deposition of Priscilla Presley, when she had no knowledge relevant to the case).

Further, the only knowledge Mr. McCarty possesses about the case is that which he learned in the course of privileged communications with counsel after the threat of litigation arose. *See* Ex A. That information is protected from discovery by the attorney-client privilege and work product doctrine. *See Valassis v. Samelson*, 143 FRD 118, 124 (E.D. Mich., 1992) (the attorney client privilege applies to prevent disclosure of privileged information known by a

party's former employee). As such, this Court must quash Experi-Metal's subpoena. *See* Fed. R. Civ. P 45(c)(3)(iii) ("On timely motion, the issuing court must quash or modify a subpoena that … requires disclosure of privileged or other protected matter, if no exception or waiver applies.")

III. This Court Should Quash Experi-Metal's Subpoena Because Experi-Metal Did Not Provide Adequate Notice To Mr. McCarty Or Comerica

The unreasonably short notice that Experi-Metal gave before attempting to compel testimony and documents from Mr. McCarty also require the Court to quash Experi-Metal's subpoena. *See* Fed. R. Civ. P 45(c)(3)(i) ("On timely motion, the issuing court must quash or modify a subpoena that fails to allow a reasonable time to comply.") Experi-Metal sent its subpoena to Mr. McCarty on November 17. *See* Ex C. It gave him only three business days' notice to gather documents and appear for a deposition. Even under normal circumstances, this is paltry notice. But the problem is compounded because Experi-Metal is compelling Mr. McCarty to appear on November 23, two days before Thanksgiving, and Mr. McCarty is not available that day. No consideration was given for Mr. McCarty's holiday plans, or the notice he would need in order to change them. Had Experi-Metal bothered to ask, it would have discovered that this date is not available for Mr. McCarty. He was not given adequate notice of his deposition.

Comerica was given even less notice than Mr. McCarty. Comerica specifically informed Experi-Metal that Mr. McCarty possessed privileged information, which remains protected beyond the term of his employment with Comerica. *See* Ex B; *Valassis, supra.* Comerica told Experi-Metal that to ensure protection of that privilege all correspondence with Mr. McCarty should be coordinated through Comerica. *See* Ex B. For reasons inexplicable to Comerica, Experi-Metal ignored both this letter and the Federal Rules by notifying Comerica of Mr.

McCarty's deposition duces tecum only after it had already served Mr. McCarty. That notice was not adequate under the Federal Rules, which require Experi-Metal to notify Comerica *before* serving Mr. McCarty. *See* Fed. R. Civ. P 45(b)(1) ("If the subpoena commands the production of documents…then before it is served, a notice *must* be served on each party.") As such, this Court must quash Experi-Metal's subpoena under Fed. R. Civ. P 45(c)(3).

IV. This Court Should Quash Experi-Metal's Subpoena Because it Exceeds the Scope of Permissible Discovery.

This Court ordered discovery to close on November 1, 2010. *See* 8/24/2010 First Amended Scheduling Order. The discovery period was already extended once, and Experi-Metal made no attempt to seek a second extension before November 1. As such, Experi-Metal had ample time to conduct discovery. It cannot continue to notice new depositions or request additional documents beyond the cut off date in this Court's order, and its subpoena to Mr. McCarty should be quashed. *See* Fed. R. Civ. P. 26(b)(2)(C) (permitting courts to limit discovery when the party seeking it has had ample opportunity to obtain the information.)

Further, under Fed. R. Civ. P. 30(a)(2), Experi-Metal is limited to ten depositions. It has already taken ten, and, before the close of discovery, noticed several others, which Comerica has allowed to proceed after the close of discovery. These depositions have included that of an out of state Comerica employee who, as Comerica has informed Experi-Metal, would only be called to authenticate a document. Now, in violation of the Court's scheduling order and the limitations imposed by Fed. R. Civ. P. 30(a)(2), Experi-Metal is seeking to compel the deposition of a former high level executive, who had no involvement in the events of January 22, 2009 whatsoever. *See* Ex A. There is no reason to permit this additional deposition, as Mr. McCarty is unlikely to have any discoverable information. *See Lewelling, supra; Elvis Presley Enterprises, Inc., supra; Bush, supra*. Allowing Experi-Metal to flout the scheduling order and

deposition limits to take further unnecessary discovery would only push this case off track and impose an undue burden on Comerica, which has already had to defend over ten depositions.

Under this Court's scheduling order, trial is to occur in January or February, making expert reports due this month. *See* 8/24/2010 First Amended Scheduling Order; Fed. R. Civ. P. 26(a)(2)(C)(i). But the parties cannot have finalized expert reports until factual discovery closes. Discovery is supposed to be over. The parties need to move forward with preparing for expert witness preparation and trial. This Court should not permit Experi-Metal to continue to initiate discovery in contravention to this Court's scheduling order and the limits imposed by the Federal Rules, and should quash the subpoena to Mr. McCarty. *See Jewell v. Ohio State University,* 941 F.2d 1209, 1991 WL 158755 at *2 (6th Cir. 1991) (district court did not abuse its discretion in disallowing depositions that were scheduled to occur after the close of discovery); *Bell v. Fowler*, 99 F.3d 262 (8th Cir. 1996) (district court did not abuse its discretion by refusing leave for Plaintiff to take more than ten depositions when Plaintiff did demonstrate why the additional depositions were necessary).

CONCLUSION

For all the reasons discussed above, Mr. McCarty and Comerica Bank respectfully request that this Court enter an order in the form attached quashing the subpoena served upon Mr. McCarty and award the movants their costs and fees in having to file this motion.

Respectfully submitted,

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Dated: November 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system and the Court will send notification of such filing to the following parties:

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