

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 3:10-CV-439-FDW-DCK**

LENDINGTREE, LLC,)	
)	
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
ZILLOW, INC., NEXTAG, INC., and)	
ADCHEMY, INC.,)	
)	
Defendants.)	

THIS MATTER IS BEFORE THE COURT on “Defendant NexTag, Inc.’s Motion To Compel Discovery Against Plaintiff LendingTree, LLC” (Document No. 325) and “Defendant NexTag, Inc.’s Motion For Leave To File Reply In Support Of Motion To Compel Discovery Against Plaintiff LendingTree, LLC” (Document No. 334). These motions have been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b), and are ripe for disposition. Having carefully considered the motions, the record, and applicable authority, the undersigned will grant Defendant’s motion to compel, and deny as moot Defendant’s motion to file a reply.

I. BACKGROUND

Defendant NexTag’s pending “...Motion To Compel...” (Document No. 325) was filed on June 25, 2013. A “Memorandum In Support Of NexTag, Inc.’s Motion To Compel Discovery From LendingTree, LLC” (Document No. 327) was filed under seal on June 26, 2013. See (Document No. 326). NexTag’s motion specifically requests that “the Court compel LendingTree to restore and search its back-up tapes for documents responsive to NexTag’s RFP 5 from 2003-2005, and produce all responsive, non-privileged documents from the search.” (Document No. 325, p.1). A “Memorandum Of Law Supporting LendingTree, LLC’s

Opposition To Defendant NexTag Inc.'s 'Motion To Compel...' (Document No. 330) was filed on July 12, 2013.

"Defendant NexTag, Inc.'s Motion For Leave To File Reply In Support Of Motion To Compel..." (Document No. 334), along with a proposed "Reply In Support..." (Document No. 334-2), were filed on July 19, 2012. "LendingTree, LLC's Opposition To Defendant NexTag Inc.'s 'Motion For Leave To File Reply. . .'" (Document No. 335) was filed on July 22, 2013.

These pending motions are now ripe for review.

II. STANDARD OF REVIEW

Rule 26 of the Federal Rules of Civil Procedure provides that:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1). The rules of discovery are to be accorded broad and liberal construction. See Herbert v. Lando, 441 U.S. 153, 177 (1979); and Hickman v. Taylor, 329 U.S. 495, 507 (1947). However, a court may "issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Fed.R.Civ.P. 26(c)(1).

Whether to grant or deny a motion to compel is generally left within a district court's broad discretion. See, Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc., 43 F.3d 922, 929 (4th Cir. 1995) (denial of motions to compel reviewed on appeal for abuse of discretion); Erdmann v. Preferred Research Inc., 852 F.2d 788, 792 (4th Cir. 1988) (noting District Court's

substantial discretion in resolving motions to compel); and LaRouche v. National Broadcasting Co., 780 F.2d 1134, 1139 (4th Cir. 1986) (same).

If the motion is granted – or if the disclosure or requested discovery is provided after the motion was filed – the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.

Fed.R.Civ.P. 37(a)(5)(A). Likewise, if a motion is denied, the Court may award reasonable expenses, including attorney’s fees, to the party opposing the motion. Fed.R.Civ.P. 37(a)(5)(B).

III. DISCUSSION

Defendant NexTag, Inc. (“NexTag” or “Defendant”) contends that its discovery request is focused and limited in time because it “seeks documents that simply mention “NexTag” and “is limited to a critical time period for NexTag’s laches defense, i.e. 2003-2005.” (Document No. 327, p.5). NexTag explains the critical timing as follows:

LendingTree sued NexTag in this Court on September 8, 2010. A presumption of laches arises where the defendant knew or should have known of the infringement more than six years prior to the filing of the suit. Consequently, if LendingTree knew that NexTag was in the mortgage lead generation business prior to September 8, 2004 (the “Critical Date”), a presumption of laches arises.

Id. NexTag further asserts that “[d]ocuments responsive to RFP 5 from the brief periods before and after the Critical Date are important to uncover the extent of LendingTree’s knowledge of NexTag’s services and LendingTree’s reasons for delaying suit against NexTag.” (Document No. 327, p.7).

Defendant NexTag previously sought to compel LendingTree, LLC’s (“LendingTree” or “Plaintiff”) complete response to its Request For Production No. 5 (“RFP 5”) through a motion

to compel filed on December 7, 2012. (Document No. 239). Also on or about December 7, 2012, counsel for LendingTree sent a letter to NexTag's counsel addressing RFP 5 as follows:

LendingTree searched reasonably accessible ESI in its possession, custody, or control for the term 'NexTag.' This search did not exclude the custodians proposed by NexTag. LendingTree expects that it will produce any additional documents responsive to this request in the future, as those documents are located, reviewed, and processed."

(Document No. 239-7, p.2). Then, in opposition to NexTag's December 7, 2012 motion to compel, LendingTree charged that "NexTag asks the Court to order search terms without allowing for a reasoned negotiation with LendingTree." (Document No. 246, p.11).

This Court's "Order" (Document No. 268) on February 6, 2013, denied in part "Defendant NexTag Inc.'s Motion To Compel..." (Document No. 239) regarding RFP 5 as follows:

By this request, Defendant "seeks documents that refer or relate to NexTag, any NexTag product, or any allegation against NexTag." (Document No. 239-1, p.9). Defendant asserts that these documents are critical to its non-infringement and equitable defenses. In response, Plaintiff contends that it has conducted the requested search and suggests that Defendant's motion is premature as to this document request. (Document No. 246, p.11).

The undersigned encourages Plaintiff to supplement its production if appropriate, and for the parties to meet and confer if production related to this request is incomplete on **March 8, 2013**. The Court will decline to compel any other specific action at this time.

(Document No. 268, p.9).

As described above, NexTag's current request has narrowed the scope of information it seeks under RFP 5 since its previous motion to compel. Although the parties have had ample time for "a reasoned negotiation" since the Court's previous Order addressing RFP 5, it appears they have been unable to entirely resolve their dispute over RFP 5. NexTag's "Memorandum In

Support...” (Document No. 327) offers the following timeline of the parties’ efforts to resolve their dispute over RFP 5:

- April 22, 2013: LendingTree made its final production of documents responsive to RFP 5;
- April 26, 2013: May 1, 2013 and May 6, 2013: NexTag provided detailed explanations why LendingTree’s discovery responses were deficient;
- May 17, 2013: Mr. Lebda testified that additional responsive documents may be “sitting on tape backup drives somewhere” and that “it’s an easy thing to find out” how far back has LendingTree kept its backup tapes;
- May 21, 2013: NexTag asked for an inventory of backup tapes;
- May 24, 2013: LendingTree claims to be “working diligently” to provide an answer; and,
- June 8, 2013: after the close of discovery, LendingTree said it would not provide the requested information.

(Document No. 327, p.10) (internal citations omitted).

In opposition to the instant motion to compel, LendingTree asserts six reasons the motion should be denied: (1) “RFP 5 is far too broad;” (2) “NexTag’s motion is far too late;” (3) the motion constitutes “a breach of the parties’ stipulated and Court-entered, Discovery Order;” (4) the “motion constitutes a breach of agreements the parties made during the meet and confers on RFP 5;” (5) “RFP 5 is cumulative and unduly burdensome;” and (6) “NexTag’s motion should not have been brought. LendingTree tried to resolve any issue, but NexTag ignored these efforts.” (Document No. 330, pp.4-5). After careful consideration of all of LendingTree’s arguments in opposition, the undersigned is simply not persuaded that any of them justify denying the discovery sought by NexTag. At bottom, the information NexTag now seeks

appears to be relevant and reasonably calculated to lead to the discovery of admissible evidence. See Fed.R.Civ.P. 26(b)(1).

As noted above, the Court previously considered a motion to compel complete production under RFP 5 filed on December 7, 2012. See (Document No. 239). In that consideration, the Court factored in LendingTree's position that NexTag might have moved to compel production "without allowing for a reasoned negotiation with LendingTree," and then the Court specifically encouraged LendingTree to supplement its response to RFP 5 as appropriate, and for the parties to further confer if the production was still incomplete on March 8, 2013. See (Document No. 246, p.11; Document No. 268, p.9). As to RFP 5, the Court "decline[d] to compel any other specific action **at this time.**" (Document No. 268, p.9) (emphasis added). The Court also declined NexTag's request for fees or expenses related to the prior motion to compel, but ordered that "if Plaintiff fails to adequately supplement its responses, Defendant may renew its request." (Document No. 268, p.12).

Although the passage of time without resolution of this issue is regrettable, the undersigned is not persuaded that the instant motion is "too late." Moreover, NexTag's request under RFP 5 does not appear to be "too broad" or "unduly burdensome," especially as it has been recently narrowed.

To the extent LendingTree relies on the parties' "Joint Agreement On Discovery" (Document No. 77), the undersigned finds that full consideration of that document supports NexTag's position. The "Joint Agreement On Discovery" includes the following provision:

(b) Inaccessible ESI

Backup Tapes. Plaintiff and each Defendant agree that backup tapes are not reasonably accessible within the meaning of Fed. R. Civ. P. 26(b)(2)(B) and need not be searched and produced in this litigation. **Each party retains the right to request additional information about specific ESI, including sources of ESI**

previously identified as not reasonably accessible, if that party can demonstrate that material, relevant, and responsive information that is not otherwise cumulative of information already produced can only be found through such additional efforts. The parties will negotiate in good faith with regard to whether such additional efforts are reasonably required and, if so, who should bear the cost, **with the Court to resolve such disputes if agreement cannot be reached.** The parties are further entitled to revisit the scope and format of document production at a later date should any problem arise.

(Document No. 77, p.3) (emphasis added). The undersigned is satisfied that NexTag has persuasively demonstrated that the information it seeks is “material, relevant, and responsive information that is not otherwise cumulative,” and that the parties have negotiated, but failed to resolve, their dispute over whether the additional effort of searching back-up tapes is required.

Id.

The undersigned disagrees with LendingTree’s arguments that the parties’ prior agreements preclude the requested discovery, that the request is cumulative, or that the motion “should not have been brought.” Of course, the current motion might not have been necessary if LendingTree had more fully followed this Court’s direction on February 6, 2013 to appropriately supplement its responses to RFP 5. (Document No. 268, p.9).

Based on the foregoing, the undersigned will grant Defendant NexTag, Inc.’s Motion To Compel Discovery Against Plaintiff LendingTree, LLC” (Document No. 325), and pursuant to Fed.R.Civ.P. 37(a)(5)(A) will require LendingTree to reimburse NexTag for its reasonable fees and expenses associated with filing Document Nos. 325 and 327. The parties are encouraged to resolve the matter of reasonable fees and expenses without further Court intervention; however, if they are unable to do so, NexTag may file an appropriate motion for attorney’s fees, along with a supporting affidavit, on or before **August 30, 2013**. In addition, LendingTree shall bear its own costs in completing the discovery required by this Order.

Finally, the undersigned observes that the scheduling “Order” (Document No. 228) issued on October 26, 2012 set the mediation deadline as **July 16, 2013**. On March 15, 2013, the parties filed a “Joint Stipulation To Amend Pretrial Order And Case Management Plan” (Document No. 293), proposing to move the mediation deadline to August 13, 2013; and then on July 12, 2013, the parties filed another “Joint Stipulation To Amend Pretrial Order And Case Management Plan” (Document No. 329), proposing to move the mediation deadline to September 30, 2013.

In both stipulations, the parties cite the “Claim Construction Scheduling Order” (Document No. 75) for authority. However, while the “Claim Construction Scheduling Order” (Document No. 75) allows the parties to stipulate to the extension of certain discovery deadlines, it does not appear that the parties are allowed to stipulate to the extension of the mediation or dispositive motions deadlines. See (Document No. 75, pp.2, 5-7). To date there has been no motion seeking leave to extend the mediation, nor have the parties otherwise shown good cause to do so.

The undersigned further notes that the parties’ proposal to extend the mediation deadline beyond the dispositive motions deadline is inconsistent with the typical procedures of this Court. Under the circumstances, the undersigned will *sua sponte* extend the mediation deadline and the dispositive motion and Daubert motions deadlines.

IV. CONCLUSION

IT IS, THEREFORE, ORDERED that “Defendant NexTag, Inc.’s Motion To Compel Discovery Against Plaintiff LendingTree, LLC” (Document No. 325) is **GRANTED**. Plaintiff LendingTree, LLC shall search its back-up tapes for documents with the keyword “NexTag” for

the time period of January 1, 2003 through December 31, 2005, and provide copies of responsive, nonprivileged documents to Defendant NexTag, Inc. on or before **August 23, 2013**.

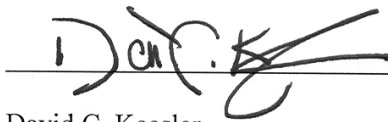
IT IS FURTHER ORDERED that LendingTree, LLC reimburse NexTag, Inc. for its reasonable fees and expenses associated with filing Document Nos. 325 and 327 on or before **August 30, 2013**.

IT IS FURTHER ORDERED that “Defendant NexTag, Inc.’s Motion For Leave To File Reply In Support Of Motion To Compel Discovery Against Plaintiff LendingTree, LLC” (Document No. 334) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that a report on the results of the parties’ mediation shall be filed on or before **August 30, 2013**; and that the deadline for dispositive and Daubert motions is extended to **September 6, 2013**.

SO ORDERED.

Signed: August 8, 2013



David C. Keesler
United States Magistrate Judge



SEALED DOCUMENT with access to All Parties/Defendants.