

In the United States Court of Federal Claims

_____)	
HOMER J. HOLLAND,)	
HOWARD R. ROSS,)	
AND FIRST BANK,)	No. 95-524 C
)	
Plaintiffs,)	Filed August 1, 2005
)	
v.)	
)	
UNITED STATES,)	
)	
Defendant.)	
_____)	

OPINION AND ORDER

GEORGE W. MILLER, Judge.

This matter is before the Court on defendant's Motion to Compel the Production of Documents Withheld by Plaintiffs, filed June 15, 2005. Plaintiffs filed an opposition brief on June 30, 2005. Defendant filed a reply brief on July 14, 2005. Oral argument was deemed unnecessary. For the reasons set forth below, defendant's motion to compel is GRANTED in part, and DENIED in part.

BACKGROUND

Plaintiffs Holland and Ross filed their complaint in this *Winstar*-related¹ case on August 8, 1995. Discovery, which proceeded in accordance with the *Winstar* procedural orders, concluded more than four years ago. On July 30, 2003, Judge Marian Blank Horn² issued a decision in which the court found that plaintiffs Holland and Ross, as individuals, were in privity of contract with the Government as to the Republic Savings and the Galva, Home, and Mutual transactions, and therefore had standing to assert their breach of contract claims. *Holland v. United States*, 57 Fed. Cl. 540 (2003). The Court further found that the enactment of FIRREA breached the contract rights of plaintiffs Holland and Ross. *Id.* After the court's July 2003 ruling, the parties, on October 10, 2003, filed a Joint Submission Describing Plaintiffs' Damages

¹ See generally *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

² This case was re-assigned to the undersigned on January 15, 2004.

Claims (“Joint Submission”), in anticipation of resolving the issue of damages. On December 2, 2003, defendant filed a motion to dismiss the breach of contract claims of plaintiffs Holland and Ross pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (“RCFC”). Defendant’s motion to dismiss was granted by Opinion and Order dated March 9, 2004, *Holland v. United States*, 59 Fed. Cl. 735 (2004), and Opinion and Order dated December 2, 2004, *Holland v. United States*, 63 Fed. Cl. 147 (2004). On March 24, 2004, plaintiffs filed a Motion to Join First Banks, Inc. as a Plaintiff and for Leave to File the Second Amended Complaint, which motion was granted on October 5, 2004. *Holland v. United States*, 62 Fed. Cl. 395 (2004). On October 28, 2004, Messrs. Holland and Ross and First Banks, Inc. filed the Second Amended Complaint.

Subsequently, First Banks, Inc. filed a Motion for Partial Summary Judgment on Liability. In response, on February 23, 2005, defendant filed a Motion for Continuance pursuant to RCFC 56(f) to permit discovery related to defendant’s contention that First Banks, Inc. was not the correct plaintiff. It appeared that a related corporation, First Bank, was actually the real party in interest to the breach of contract claims of River Valley as originally asserted by Messrs. Holland and Ross. After some investigation by the parties, it was determined that First Bank, and not First Banks, Inc. was the proper plaintiff in this action. Accordingly, on May 12, 2005, the Court granted plaintiffs’ Motion to Join First Bank as a plaintiff. On May 18, 2005, plaintiffs filed the Third Amended Complaint, substituting First Bank for First Banks, Inc. Defendant filed an Answer to the Third Amended Complaint on June 6, 2005. Shortly thereafter defendant filed the motion to compel that is currently pending before the Court.

DISCUSSION

I. Discovery Scope and Limits

The scope of discovery is described in RCFC 26(b)(1), which states, in pertinent part:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. . . . All discovery is subject to the limitations imposed by RCFC 26(b)(2)(i), (ii), and (iii).

RCFC 26(b)(2) sets the following limitations on discovery:

The frequency or extent or use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: . . . (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information

sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

The Federal Circuit has held that “[q]uestions of the scope and conduct of discovery are, of course, committed to the discretion of the trial court.” *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 797 (Fed. Cir. 1984). Accordingly, resolution of a motion to compel discovery is committed to that discretion. *Vons Companies, Inc. v. United States*, 51 Fed. Cl. 1, 5 (2001) (citing *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986)); *St. Matthew Publ'g, Inc. v. United States*, 41 Fed. Cl. 142, 145 (1998). The standard of review for all discovery matters is abuse of discretion. *Heat & Control*, 785 F.2d at 1022. In deciding to compel discovery, the Court must balance potentially conflicting goals. *Vons*, 51 Fed. Cl. at 5. As the Supreme Court stated in *Hickman v. Taylor*, “mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” 329 U.S. 495, 507 (1947). The Court recognized, however, that “discovery, like all matters of procedure, has ultimate and necessary boundaries.” *Id.*

II. Defendant's Motion to Compel

Defendant has requested, in pertinent part, that plaintiffs comply with defendant's request, set forth in Defendant's First Set of Requests for Production of Documents from Plaintiffs, served on plaintiffs Holland and Ross on Sept. 10, 1999, that plaintiffs produce documents from First Banks Inc., including its predecessors and successors in interest, and subsidiaries, pertaining to:

First Banks, Inc.'s relationship to its affiliates, subsidiaries, and/or holding company and all financial information pertaining to same, including income tax returns, financial statements, ledgers, balance sheets, and any documents that show the flow of funds to, from, and/or through First Banks [Inc.] and its subsidiaries or affiliate.

Req. for Produc. of Docs., at 22, ¶ 101 (Sept. 10, 1999). The request encompassed the period of January 1, 1993 through the “present.” In response to ¶ 101 of the document request, plaintiffs objected to producing documents of First Banks, Inc. because “First Banks [Inc.] is an independent third party over whom Plaintiffs have no control.” Pls.' Response to Def.'s First Set of Requests for Prod. of Docs., at 63-64. Plaintiffs also “object[ed] and refuse[d] to produce documents to the extent that the requests seek production of tax returns on the grounds that Defendant has shown no compelling need for tax returns.” *Id.* at 4, ¶ 8.

With respect to the Subpoena *Duces Tecum* defendant served on First Banks, Inc. in April 2000, defendant seeks to compel, *inter alia*, production of documents concerning River Valley and its successors in interest (Subpoena *Duces Tecum*, at 3, ¶ 9) from January 1, 1985 through December 31, 1995. Subpoena *Duces Tecum*, at 7, ¶ 3(h). Specifically, defendant requested:

- 11. All descriptions of River Valley's relationship to its affiliates, subsidiaries, and/or holding company and all financial information pertaining to same, including income tax returns, financial statements, ledgers, balance sheets, and any documents that show the flow of funds to, from, and/or through River Valley and its subsidiaries or affiliates.

* * *
- 47. All federal and state tax returns filed by River Valley, including (but not limited to) all supporting schedules to each return.

* * *
- 52. All documents relating to the financial condition, or anticipated financial condition of River Valley, including (but not limited to) financial statements, general ledgers, documents that detail or reconcile the trial balance of detailed general ledger accounts in the various line items of the financial statements, federal and state tax returns, documents that reconcile the tax returns to year-end financial statements, and any documents comparing the financial condition, or anticipated financial condition, of River Valley to that of other thrifts.

Subpoena *Duces Tecum*, at 10, 18, 19 (Apr. 5, 2000). First Banks, Inc. responded to the Subpoena *Duces Tecum* by stating that it was not aware whether it had all of the information requested, but it did provide to defendant approximately 185 boxes of materials. Answer to Subpoena *Duces Tecum* by First Banks, Inc. (Apr. 19, 2000).

III. Defendant's Motion to Compel Comes After the Close of Discovery

In its Motion to Compel, defendant for the first time asks this Court to consider the completeness of the responses of Holland and Ross and First Banks, Inc. to discovery requests and document subpoenas that defendant served in the fall of 1999 and spring of 2000 – more than five years ago. Discovery in this case closed more than four years ago. While the

Government is correct that there is no authority that automatically precludes the filing of a motion to compel discovery after the close of discovery, it is within the discretion of the Court to deny such a motion. *Suntrust Bank v. Blue Water Fiber, L.P.*, 210 F.R.D. 196, 199 (2002). “If the moving party has unduly delayed, the court may conclude that the motion [to compel] is untimely.” 8A Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d* § 2285 (1994 & Supp. 1998); *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999).

Indeed, “in numerous cases, courts have denied tardy discovery motions that were filed after the close of discovery, especially where the moving party had all the information it needed to timely file the discovery motion, and its late filing would prejudice the non-moving party.” *Suntrust Bank*, 210 F.R.D. at 199 (citing *Ginett v. Federal Express*, 166 F.3d 1213 (6th Cir. 1998) (unpubl. opinion) (affirming trial court’s denial of motion to compel some two months after the discovery cut-off, because plaintiff knew of the document at issue long before the discovery deadline and failed to file a motion at that time); *Willis v. New World Van Lines, Inc.*, 123 F. Supp. 2d 380, 401 (E.D. Mich. 2000) (denying motion to compel discovery that was filed four months after the close of discovery and five days before hearing on summary judgment); *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 647 (7th Cir. 2001); *Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1058 (7th Cir. 2000); *Gault*, 184 F.R.D. at 622 (denying plaintiff’s motion to compel as untimely where motion was filed 76 days after the close of discovery and 136 days after the receipt of defendant’s answers to interrogatories and responses to requests for production of documents, and there was no indication that the delay in filing the motion was caused by matters outside the control of plaintiff and his attorney); *American Motorists Ins. Co. v. General Host Corp.*, 162 F.R.D. 646, 648 (D. Kan. 1995) (denying defendant’s motion to compel, even though the documents it sought were likely relevant, because defendant provided no excuse for waiting two years after discovery deadline to compel production of documents, which plaintiff had objected to producing long before discovery deadline, and where case was 11 years old, and dispositive motions were pending)); *but see Marriott Int’l Resorts, L.P. v. United States*, 61 Fed. Cl. 411 (2004) (granting in part motion to compel as timely even though it was filed approximately six months after the close of fact discovery).

IV. Defendant’s Motion to Compel Is Granted With Respect to Its Request For Previously-Requested Tax Returns

Defendant represented that plaintiffs “set forth a damage valuation methodology whereby millions of dollars of plaintiffs’ damages claims are dependent upon tax considerations (e.g., net operating loss carryforwards (“NOLs”), built-in losses, and alternative minimum tax (“AMT”) credits) which would be recorded in the tax returns of [First Banks, Inc.] and in the computations of internal tax allocations involving [First Bank FSB (“FBFSB”)].” Def.’s Mot. at 4. Based on this description of plaintiffs’ damages model, despite plaintiffs’ earlier objection in 1999, defendant has established a compelling need for the tax returns it has requested. Thus, plaintiffs’ objection on that ground is overruled. Additionally, it is in the interest of “proper litigation,” *Hickman*, 329 U.S. at 507, that defendant receive these returns.

Given the course of proceedings in this case, the objection of plaintiffs Holland and Ross to producing documents of First Banks, Inc. because “First Banks [Inc.] is an independent third party over whom Plaintiffs have no control,” Pls.’ Response to Def.’s First Set of Requests for Prod. of Docs., at 63-64, is overruled. The Court determined that the damages claims being pursued are those of First Bank as successor in interest to River Valley, First Banks, Inc. has been joined and dismissed as a plaintiff, and First Bank, a subsidiary of First Banks, Inc., has been joined and currently is a plaintiff.

Furthermore, the request for tax returns is narrowly tailored such that plaintiffs can comply within a reasonable time period – the production of the tax returns will not delay proceedings in this case. Also, these documents should be easily accessible to plaintiffs, so the cost of producing the tax returns would not constitute an undue burden on plaintiffs. The Court recognizes, and is troubled by, the lengthy delay by defendant in bringing its motion to compel. However, in balancing defendant’s need to obtain the tax returns with the limited burden to plaintiffs in producing the documents, the Court has determined that defendant’s motion to compel with respect to the previously-requested tax returns, should be, and hereby is, granted. *See Marriott*, 61 Fed. Cl. 411.

Specifically, defendant’s Motion to Compel is granted with respect to the income tax returns requested in ¶ 101 of Defendant’s First Set of Requests for Production of Documents from Plaintiffs, served Sept. 10, 1999. Defendant’s Motion to Compel is granted with respect to the income tax returns requested in ¶ 11 and ¶ 52 and the entirety of ¶ 47 of the subpoena duces tecum. Responsive documents shall be produced for the time periods specified in the First Set of Requests for Production of Documents and the Subpoena *Duces Tecum*, respectively.

Plaintiffs argue that “[d]efendant’s assertion that Holland and Ross failed to produce tax returns lacks merit. Holland and Ross produced to the government all River Valley tax returns within their possession, custody, and control, and other parties produced additional tax returns, including tax returns for River Valley I for the years 1988, 1989, 1990, River Valley II for 1989, and River Valley Holdings, Inc. for 1991 and 1992.” Pls. Opp. at 5-6. The Court is not in a position to determine whether the tax returns were actually produced to the Government. Therefore, plaintiffs shall produce the tax returns described above, even if doing so results in plaintiffs having produced some of these documents more than once.

V. Defendant’s Motion to Compel Is Denied With Respect to All Other Requested Documents

Defendant asserts that “FBI should have produced documents of FBFSB, as the successor in interest to River Valley, that related to the first post-acquisition year, where those documents were ‘generated, received, or used by First Banks, or otherwise came into existence during the period from January 1, 1985, through and including the present.’” Def. Mot. at 6 (quoting Ex. 2 at 6, ¶ 2). Defendant states that the responsive documents should have included, *inter alia*, FBFSB’s “. . . financial statements, ledgers, balance sheets, and any documents that show the

flow of funds through FBFSB's subsidiaries or affiliates; FBFSB's board minutes and committee reports; documents relating to FBFSB's current status as a business entity; documents relating to the merger between River Valley Holdings, Inc. ("RVHI") and [First Banks, Inc.], including all documents that evaluate any divestiture transactions relating to River Valley; and documents relating to regulatory relations and oversight of FBFSB." Def.'s Mot. at 6 (internal quotations and citations omitted). Defendant requested the documents in 1999 and 2000. It was aware during that time of the extent to which Messrs. Holland and Ross and First Banks, Inc. did or did not produce them. There is no reason for defendant to have waited until June 2005 to file the present motion to compel.

Defendant argues that the recent joinder of First Bank created the need for the documents. The Court is unpersuaded by this argument. For example, plaintiffs have consistently maintained a damages claim that but for the breach, First Banks, Inc. would have paid more for River Valley. *See* Original Compl., Aug. 8, 1995 at 57, ¶ 70 (payment Holland and Ross received from First Banks, Inc. pursuant to the July 26, 1994 agreement governing the sale of River Valley "was an unfavorably low price which reflected the damage done to River Valley [I] and [River Valley II] by the government and the consequent diminished value of River Valley, [River Valley II] and [River Valley III]. . . . The agreement and plan of merger with [First Banks, Inc.] acknowledged that the amount of consideration to be delivered by [First Banks, Inc.] to the plaintiffs . . . would have been greater if the government had not breached."). The question whether First Banks, Inc. would have paid more for a no-breach River Valley has been squarely at issue since Messrs. Holland and Ross initiated this action in 1995. At his deposition, Mr. Blake, the executive vice president of First Bank, Inc., testified that had River Valley been twice its actual size, "it would probably double the purchase price [First Bank would have paid]." *See* Pls. Reply. to Mot. to Resume, Apr. 22, 2005, at 8, Ex. 8 (Blake Dep., July 7, 2000, at 31-33); *see also* Pls. Opp. to Def. Mot. to Compel, Ex. 1, Dierberg Dep., July 6, 2000, at 67 (confirming that in connection with its acquisition of River Valley, First Banks, Inc. "would have paid more for more deposits and more earnings"). The joinder of First Bank clearly did not give rise to these issues – the diminished sales price of River Valley has been central to plaintiffs' case regardless of whether it was Holland and Ross, First Banks, Inc. or First Bank pursuing the claim.

As noted above, compliance with defendant's request for tax returns should not be unduly burdensome. By contrast, however, plaintiffs would be greatly prejudiced if the Court were to grant the motion to compel with respect to the other requested non-tax return documents discussed in defendant's Motion to Compel. The requested documents encompass a broad and voluminous range of material. Plaintiffs would have to expend significant time, effort, and resources to produce such documents to defendant. Having navigated the tortuous course of proceedings described in the background section, the parties are now once again on the eve of briefing summary judgment motions regarding liability in this ten-year old case. If liability is resolved in favor of plaintiffs, the case will then proceed to a resolution, either by motion or trial, of damages. In the language of RCFC 26(b)(2), "the needs of the case" would be greatly hindered by the lengthy delay and the expenditure of significant resources that would result from granting defendant's motion to compel with respect to the non-tax return documents.

Defendant's motion to compel was filed after the close of discovery, defendant had all the information it needed to have timely filed the motion, and its late filing will prejudice plaintiffs. Accordingly, the Court has determined that defendant's motion to compel production of non-tax return documents, discussed in this subsection, should be, and hereby is, denied. *See Suntrust Bank*, 210 F.R.D. at 199 and cases cited therein.

CONCLUSION

For the reasons set forth above, defendant's Motion to Compel the Production of Documents Withheld by Plaintiffs is GRANTED in part, and DENIED in part. Plaintiffs are ORDERED to produce to defendants the tax returns described in Part IV by August 22, 2005.

IT IS SO ORDERED.

GEORGE W. MILLER
Judge