

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. RADE : CIVIL ACTION
 :
 v. :
 :
 TRANSITION SOFTWARE CORPORATION :
 and MYLES L. STROHL : NO. 97-5010

MEMORANDUM AND ORDER

HUTTON, J.

March 16, 1998

Presently before the Court is the Motion of Defendants Transition Software Corporation and Myles L. Strohl to Compel Discovery (Docket No. 7) and Plaintiff John A. Rade's Response thereto (Docket No. 8). For the foregoing reasons, the Motion is granted in part and denied in part.

I. BACKGROUND

This is an action for breach of contract and for violations of the Securities Exchange Act, 15 U.S.C. § 78a et seq. (1994). In October 1996, Transition Software Corporation ("TSC") hired John Rade as its President. Rade served as President from November 1, 1996 until January 14, 1997, when TSC terminated his employment, citing frequent absences and failure to produce a business plan. Rade then sued the company, claiming that the termination was improper and that TSC never gave him promised stock benefits.

Part of TSC's theory of the case is that Rade, who was absent from the office four out of the ten weeks of his brief employment,

was actually working for another company at the same time. To obtain facts to substantiate this, TSC propounded interrogatories and requests for production of documents aimed at discovering what Rade did with his time and whether he had additional sources of income.

In the present Motion to Compel, TSC complains that Rade has provided insufficient responses to several of its discovery requests. Specifically, TSC complains that Rade: (A) failed to provide sufficient answers to Interrogatories No. 14 and 15 from its First Set of Interrogatories to Plaintiff; (B) failed to provide non-redacted copies of documents mentioned in Interrogatories No. 8, 14, and 15 of its First Set of Interrogatories to Plaintiff, as requested by Request No. 1 of Defendants' Request for the Production of Documents to Plaintiff; and (C) failed to provide non-redacted copies of documents requested in Requests No. 1-6 of Defendant's Second Request for Production of Documents.

A. Responses to Interrogatories 14 and 15

Defendants' Interrogatory No. 14 asked Rade:

Describe in detail any and all days during your employment with TSC that you were not physically present in your office at TSC, including in your description the following:

- (a) the date of each absence;
- (b) the purpose of such absence (i.e. vacation, personal, sick leave);
- (c) whether the Defendants were notified in advance of such absence;
- (d) the representative(s) of Defendants who were notified;

(e) the nature of the notification (i.e. telephone call, letter, e-mail); and

(f) all documents that relate to such absence.

Rade objected to this interrogatory as overly broad, unduly burdensome and harassing. In part, Rade responded:

As President of Transition Software Corporation, Mr. Rade was not required to be physically present in his office on a daily basis. Moreover, Mr. Rade spent a good deal of time out of the office tending to business matters that were within the scope of his job duties for Transition Software. This time out of the office is documented in Mr. Rade's business diary and journal, copies of which will be supplied in response to Defendants' Request for Production of Documents.

Defendants' Interrogatory No. 15 asked Rade:

Describe in detail the work you performed in drafting an operating plan for TSC for the year 1997 and include in your description:

- (a) the number of hours you spent drafting the operating plan, broken down day by day;
- (b) the nature of the work you performed each day; and
- (c) all documents that relate to your drafting of the operating plan, including but not limited to all documents you referred to or upon which you relied in drafting the operating plan, and any drafts of the operating plan.

Rade again objected that the interrogatory was overly broad, unduly burdensome and harassing. He then responded that he had spent many hours reviewing a plan provided him by Karen Strohl and in developing his own. Rade stated that he had developed the plan, entitled "Income Statement Assumptions," during the Thanksgiving holiday of 1996, and that it would be produced to TSC.

B. First Request for Production of Documents

Request No. 1 of TSC's First Request for Production of Documents demands "All documents identified or requested to be identified in Defendants's First Set of Interrogatories to Plaintiff." Defendant's Interrogatory No. 8 asked:

Describe in detail all communications of any kind, whether written or oral, made by Defendants to Plaintiff regarding the state of readiness of the TRANS2000 system, and for each, identify:

- (a) the representative(s) of Defendants who made the communication;
- (b) the individual(s) present when the communication was made;
- (c) when the communication was made;
- (d) the nature of the communication (i.e. telephone call, letter, e-mail);
- (e) the substance of the communication; and
- (f) all documents that relate to each such communication.

In response, Rade listed a number of communications, accompanied by the requested information. TSC now claims Rade failed to provide a copy of a September 13, 1996 letter from Jim O'Neill to himself in which O'Neill represented the completion date for the initial modules. Rade responds that he produced this letter, bates stamped No. 000015-000017.

TSC also claims Rade failed to provide documents requested in Interrogatories No. 14 and 15. In response to Interrogatory No. 14, Rade produced a copy of his business journal and diary. TSC argues that these documents are illegible and do not provide the information about Rade's day-to-day practices in the requested

detail. In response to Interrogatory No. 15, Rade produced his "Income Statement Assumptions," which he represents to be his operating plan.

C. Second Request for Production of Documents

Finally, in its Second Request for Production of Documents, TSC demanded copies of all of Rade's phone, fax, and cellular phone bills, and any other receipts reflecting phone numbers Rade dialed, for the period between November 1, 1996 and January 15, 1997. Additionally, TSC demanded all credit card bills reflecting charges made during the same period, and Rade's 1996 Federal and State Income Tax Returns.

Rade delayed or disputed the production of much of these materials, and ultimately produced incomplete or heavily redacted versions of the responsive documents. In its Motion, TSC states that Rade produced only a single W-2 Form, one American Express Account Statement reflecting one charge--with the account balance redacted, and five pages of telephone bills in which all but ten of four hundred calls were redacted. After additional discussions, Rade submitted twenty-four pages of his 1996 tax returns, all but three of which were entirely redacted. TSC objects to Rade's response as "entirely insufficient as it negates the very purpose of requesting the documents: Defendants are unable to review any of the documents because of the arbitrary and almost comprehensive redactions made by Plaintiff."

The parties accompany their motion papers with numerous

letters reflecting their dispute over TSC's discovery requests, and the Court is satisfied that TSC has made a good faith effort to reach an extra-judicial resolution, as required by Federal Rule of Civil Procedure 37(a)(2)(B) and Local Rule of Civil Procedure 26.1(f).

II. DISCUSSION

The Federal Rules of Civil Procedure provide for liberal discovery. See Hickman v. Taylor, 329 U.S. 495, 507 (1947). In general:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1).

Rules 33 and 34 establish the procedure governing interrogatories and requests for production of documents, the subjects of the present dispute. Rule 33(b)(1) directs that "Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable." Similarly, Rule 34(b) requires that a party served with a document request either produce the requested documents or else state a specific objection

for each item or category objected to. If the party served fails to respond adequately to either an interrogatory or document request, the serving party may file a motion to compel under Rule 37(a). See Fed. R. Civ. P. 33(b)(5), 34(b), 37(a)(1)(B). For purposes of the Federal Rules, "an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer or respond." Fed. R. Civ. P. 37(a)(3).

Returning to the present discovery dispute, the Court finds that Rade must disclose everything requested--except the O'Neill letter and Income Statement Assumptions already produced--or else file for a protective order under Rule 26(c).¹ See, e.g., First Options of Chicago, Inc. v. Wallenstein, 1994 WL 45160, * 3 (E.D.Pa. February 14, 1994).

TSC designed Interrogatories 14 and 15 to determine how Rade used his time, and whether he directed his efforts towards accomplishing the goals of TSC or some other business venture. Interrogatory 14 asks Rade to account specifically for each of his absences. Interrogatory 15 asks Rade information about time spent in preparing TSC's business plan. Had Rade been employed with TSC for several years, this demand might have been excessively burdensome. But Rade worked at TSC for less than three months and should be able to accommodate TSC's requests. If any or all of

¹ The Court notes that protective orders are available only in the rarest circumstances. A party desiring a protective order must demonstrate specifically, through an application the factors enumerated in Pansy v. Borough of Stroudsburg, 23 F.3d 772, 785 (3d Cir. 1994) and Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995) that disclosure would work a clearly defined and serious injury upon him.

this information appears in Rade's business journal and diary, then

compliance should be simple. If it does not, Rade cannot complain that TSC's request is duplicative.

TSC is also entitled to all of the documents it requested in its First Request for Production of Documents. The Court is satisfied that Rade produced the September 13, 1996 letter responsive to Interrogatory 8, and that Rade's Income Assumption Statement is the business plan responsive to Interrogatory 15. However, in the absence of a protective order, TSC is still entitled to receive all other documents responsive to its requests.

Finally, the Court finds that Rade must submit unredacted versions of all of the telephone, credit card, and tax documents TSC requests in its Second Request for Production of Documents. In the absence of a protective order, or a valid claim of privilege, TSC is entitled to all information reasonably calculated to lead to the discovery of admissible evidence. TSC needs these records to determine whether Rade was simultaneously involved in other business activities. Under the Federal Rules, it is not for Rade to determine what information in these documents is relevant. If Rade wishes to withhold this information, he must obtain a protective order.

An appropriate Order follows.

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O R D E R

AND NOW, this 16th day of March, 1998, upon consideration of the Motion of Defendants Transition Software Corporation and Myles L. Strohl to Compel Discovery (Docket No. 7) and Plaintiff John A. Rade's Response thereto (Docket No. 8), IT IS HEREBY ORDERED that Defendants' Motion is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff shall:

(1) provide more specific and complete responses to Defendant's Interrogatories Nos. 14 and 15 of Defendants' First Set of Interrogatories to Plaintiff;

(2) make available for inspection or copying, or provide copies to Defendants, of non-redacted versions of the documents that relate to its answers to Interrogatories Nos. 14 and 15, as requested by Request No. 1 of Defendants' First Request for Production of Documents; and

(3) make available for inspection or copying, or provide copies to Defendants, of non-redacted versions of the documents requested in Requests Nos. 1-6 of Defendants' Second Request for Production of Documents.

IT IS FURTHER ORDERED that Plaintiff shall provide Defendants with the discovery compelled by this Order within fifteen (15) business days of the date of this Order, or face sanctions provided for in Federal Rule of Civil Procedure 37(b)(2).

BY THE COURT:

HERBERT J. HUTTON, J.