IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

THOMAS ENVIRONMENTAL SERVICES, INC., PINNACLE POLLUTION CONTROL SERVICES, LLC, RIGHT INDUSTRIAL SERVICES, INC.,	)	
Plaintiffs,	)	
vs.	)	**No. 15-1474-BC**
NEO CORPORATION, and HARRY PUCKETT,	)	
Defendants.	)	

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D.C. & M.

MEMORANDUM AND ORDER GRANTING PLAINTIFFS' MOTION TO DELAY DISCOVERY TO DEFENDANTS UNTIL COMPLETION OF THEIR DEPOSITIONS BUT DENYING MOTION TO REDEPOSE DEFENDANTS

In this lawsuit the Plaintiffs have sued a former employee, Defendant Puckett, and Plaintiffs' competitor, NEO Corporation, claiming that Defendant Puckett has used Plaintiffs' trade secrets after he left Plaintiffs' employment and went to work for NEO. There is also the claim that NEO has liability for use of Plaintiffs' trade secrets under a Non-Disclosure Agreement it signed with Plaintiffs in January of 2015 when the parties briefly initiated consideration of Defendant NEO acquiring Plaintiffs' business. The parties are presently engaged in discovery, with a closure date for electronic discovery of September 16, 2016, and for closure of all discovery November 30, 2016. The case is set for trial January 23, 2017.

The matter which brings the case before the Court is that the Plaintiffs have filed a motion under Tennessee Civil Procedure Rule 26 to (1) sequence discovery and (2) to depose the Defendants twice – before Plaintiffs receive discovery and after (referred to hereinafter as "redeposing.").

The sequencing requested is that Defendant Puckett and Defendant NEO's representative Steve Steele be deposed before Plaintiffs produce any additional discovery to Defendants and before the results of electronic discovery, being performed by a neutral, are provided to the parties.

The Plaintiffs' reason for such sequencing is to preserve impeachment evidence. The Plaintiffs assert that until the Defendants have committed to a versions of events in depositions, their receipt of written discovery from the Plaintiffs and electronic discovery from the neutral should be delayed, citing *Margeson v. Boston & M.R.R.*, 16 F.R.D. 200, 201 (D. Mass. 1954); Wright & Miller, 8 Fed. Prac. & Proc Civ. § 2015 (3d ed.).

As to the second part of Plaintiffs' motion of redeposing, the Plaintiffs seek to divide the Defendants' depositions and to take them twice. The sequencing in this regard is that after the depositions, Plaintiffs' Counsel will then be provided the electronic discovery, and Plaintiffs' Counsel will redepose the Defendants. The Plaintiffs' reasoning and justification is that it serves the interests of justice:

> Further, divided or multiple depositions are perfectly consistent with the Tennessee Rules of Civil Procedure. Pinnacle's request to continue the depositions of Puckett and Steele, if necessary, to address any issues raised by documents produced through electronic discovery would be prohibited only if the request met the standard required for a protective order: causing annoyance, embarrassment, oppression, or undue burden or expense. *See* Tenn. R. Civ. P. 26.03. In this case, any minor additional expense or

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> inconvenience would be more than justified by the increased likelihood of obtaining truthful testimony, and the greater likelihood that Pinnacle will be able to present the Court with accurate evidence. In other words, granting Pinnacle's request would serve the 'interests of justice.' *See* Tenn. R. Civ. P. 26.04.

Plaintiffs' Memorandum Of Law Concerning Defendants Depositions, p.3 (Aug. 12, 2016).

Defendants object to Plaintiffs' motion. As to withholding discovery from Defendants until they are deposed, Defendants agree to that with respect to no party receiving electronic discovery prior to Defendants' depositions. However, Defendants oppose Plaintiffs not producing and responding to discovery served on them by Defendants prior to the depositions. Pending for an upcoming September 9, 2016 hearing is *Defendant NEO Corporation's Motion To Compel Discovery.*

On redeposing, the Defendants object entirely:

> In this case, the proper procedure is for the Court to grant NEO's separate motion to compel and require plaintiffs to comply with their obligations to produce discoverable material under Rules 26.01(1), 26.02(3) and 26.04 of the Tennessee Rules of Civil Procedure prior to plaintiffs taking the depositions of Puckett and Steele. Without affecting this order of discovery, counsel for plaintiffs may then take the depositions of Puckett and Steele either before or after electronic discovery occurs, but counsel should not be permitted to take the depositions both before *and* after the completion of electronic discovery.

Defendant NEO Corporation's Memorandum In Opposition To Plaintiffs' Request To Take Multiple Depositions Of Defendant Harry Puckett And Steve Steele, p. 5 (Aug. 16, 2016).

After researching the law, the record and argument of Counsel, Plaintiffs motion is granted in part and denied in part.

As to sequencing discovery, Plaintiffs' motion is granted. The reason the motion is granted is that the record in this case demonstrates circumstances for preserving impeachment evidence, and the Court has located precedent for such sequencing.

There is, however, one logistical modification on Plaintiffs' proposal. The Plaintiffs had proposed that no party receive the results of electronic discovery until after the depositions. This procedure, in part, creates the need by Plaintiffs to redepose the Defendants. That this information be withheld from the Plaintiffs appears unnecessary and not in line with the case law discussed below. The more narrow remedy to preserve impeachment evidence is to delay its production only as to the Defendants until after their depositions are taken.

It is therefore ORDERED that Plaintiffs shall not respond to Defendants' discovery until the completion of the depositions of Defendants Puckett and Steven Steele. In so ruling, *Defendant NEO Corporation's Motion To Compel Discovery* set for September 9, 2016 is held in abeyance and removed from the September 9, 2016 docket.

With regard to the different variations of electronic discovery being performed by Logic Force, the Court has identified the following four categories:

(1) the results of electronic discovery Defendants submitted on Plaintiffs' database;

(2) the results of electronic discovery Plaintiffs submitted on Plaintiffs' database;

(3) the results of electronic discovery Plaintiffs submitted on Defendants' database; and

(4) the results of electronic discovery Defendants submitted on Defendants' database.

It is further ORDERED that the neutral performing electronic discovery, Logic Force, shall not release to Defendants the results of electronic discovery in categories (1), (2), and (3) above. This electronic discovery shall not be released until Defendants Puckett and Defendants' representative Steven Steele have been deposed.

It is additionally ORDERED that Logic Force shall release any results of electronic discovery from category (4) above to both the Plaintiffs and Defendants prior to the depositions.

The modifications of Plaintiffs' motion by the Court are that the Plaintiffs will receive the results of all the electronic discovery before the depositions. The Defendants will only receive category (4) prior to the depositions and categories (1), (2), and (3) after the conclusion of the depositions. The reason for this, seen below, is that it obviates the need to redepose the Defendants.

It is additionally ORDERED that, upon completion of Defendants' depositions, Plaintiffs shall forthwith provide and produce responses to Defendants' discovery, and Logic Force shall provide to the Defendants the electronic discovery they submitted on categories (1), (2) and (3) above.

As to Plaintiffs' motion to divide up the depositions and redepose Defendant Puckett and Steven Steele, it is ORDERED that that part of the motion is denied. Based

upon the case law below, Plaintiffs have not at this time demonstrated "good cause" to redepose the Defendants. This is especially so since in the above order Plaintiffs will be given access to all the electronic discovery before the depositions.

The legal analysis on which this decision is based is as follows.

Sequencing/Timing Of E-Discovery Production and Plaintiffs' Responses To Defendants Discovery After Depositions

Under Tennessee law decisions with regard to discovery matters are vested in the sound discretion of the trial court." *Masters by Masters v. Rishton*, 863 S.W.2d 702, 707 (Tenn. Ct. App. 1992). *See also, Price v. Mercury Supply Co.*, 682 S.W.2d 924, 935 (Tenn. Ct. App. 1984).

As part of this discretion, courts are granted the authority to regulate the sequencing/timing of discovery:

> Tenn. R. Civ. P. 26.03 gives the trial court broad discretion to 'make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,' including 'that discovery not be had,' or 'that discovery may be had only on specific terms and conditions....' Although Tenn. R. Civ. P. 26.04 states that 'discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery,' the rule does not provide an absolute right to conduct discovery in any sequence the parties desire. Rather, the rule grants the trial court power to order the discovery sequence 'for the convenience of parties and witnesses and in the interests of justice.'

Federated Rural Elec. Ins. Exch. v. Hill, No. M2005-02461-COA-R3CV, 2007 WL 907717, at *7 (Tenn. Ct. App. Mar. 26, 2007). The Plaintiffs' request in this case falls within the Court's discretion to sequence and time discovery.

In researching the Plaintiffs' specific request to delay production of discovery until the completion of the depositions, the Court found analogous circumstances in other jurisdictions. The Court's research revealed that there are circumstances where a court will delay or postpone production of discovery to accomplish the two purposes of preserving the discovery's impeachment value while at the same time discouraging the deponent from altering the testimony in light of what the discovery reveals. This type of process is more likely to yield direct, spontaneous testimony by the deponent.

The most common circumstance the Court located was delaying disclosure of surveillance videos and audio recordings of the deponent until the deposition has been taken. In those cases, the courts recognize that the discovery at issue is discoverable and must be disclosed prior to trial, but the issue is the timing of the production. As explained in *Parks v. NCL (Bahamas) Ltd.*, 285 F.R.D. 674, 675 (S.D. Fla. 2012), "[t]he Court agrees with Defendant that Plaintiff should be required to give her deposition testimony based on her own independent recollection of the incident, without being refreshed in any way by the videotape. Moreover, the Court does not find that Plaintiff will suffer any prejudice by delaying the production of the videotape." Similar reasoning is found in *Melhorn v. New Jersey Transit Rail Operations, Inc.*, 203 F.R.D. 176, 180 n. 5 (E.D. Pa. 2001), "Caselaw establishes that a defendant may withhold disclosures until the defendant has had an opportunity to fully depose the plaintiff" and *Hildebrand v. Wal-Mart Stores, Inc.*, 194 F.R.D. 432, 435 (D. Conn. 2000), "This Court finds the reasoning of these cases persuasive. The above cited approach enables plaintiffs to prepare for trial as well as preserves the evidence's impeachment value, while protecting privileged

materials." In *Walls v. Int'l Paper Co.*, 192 F.R.D. 294, 299 (D. Kan. 2000), that court also used the delay method sought by Plaintiffs in this case, "Ms. Walls's motion for protective order is granted. Ms. Walls shall notice deposition of Mr. Marotta within five days of the date of this order and Mr. Marotta shall submit to deposition within fifteen days thereafter. At the close of the deposition, Ms. Walls shall immediately furnish to the defendant a copy of all tape recordings made of conversations between herself and Mr. Marotta."

Other examples include *Ward v. CSX Transp., Inc.*, 161 F.R.D. 38, 41 (E.D.N.C. 1995), "The undersigned again concludes that allowing discovery of surveillance materials after the deposition of the plaintiff, but before trial, best meets the ends of justice and the spirit of the discovery rules to avoid surprise at trial. Defendant may insure the impeachment value of the surveillance by taking a video deposition prior to disclosure of the surveillance materials. In that deposition, defendant may carefully examine plaintiff about his injuries and disabilities and even require him to demonstrate alleged limitations of motions on videotape. Inconsistencies between that deposition and the surveillance materials can be used to impeach the plaintiff at trial," and *Blount v. Wake Elec. Membership Corp.*, 162 F.R.D. 102, 104 (E.D.N.C. 1993), "However, the timing of the disclosure must be such that the impeachment value of the evidence is preserved. Therefore, before the disclosure, Defendant must be furnished with the opportunity to depose Plaintiff, so that the prior recording of the sworn testimony will discourage Plaintiff from altering his testimony in light of what the films or tapes reveal."). The delay method was also used in *Daniels v. Nat'l R.R. Passenger Corp.*, 110

F.R.D. 160, 161 (S.D.N.Y. 1986), "Before the disclosure, however, defendant must be afforded the opportunity to take the depositions of the plaintiff and any other affected persons, so that the prior recording of their sworn testimony will avoid any temptation to alter that testimony in light of what the films or tapes show."

Applying the above cases, the Court concludes that in this case the electronic discovery sought by the Defendants of the Plaintiffs' database and sought by the Plaintiffs on its database and the Defendants' database, as well as Plaintiffs' responses to Defendants' discovery requests are analogous to the video and audio recordings in the above cases whose production was delayed until after the deposition. Also analogous is that this case presents the same kind of circumstances as the cases above for preserving impeachment evidence.

The impeachment circumstances in this case are that there is clear evidence in the record, on which a temporary injunction has been issued, that Defendant Puckett diverted business to his upcoming employer, Defendant NEO, while still employed by Plaintiffs. That conduct is a violation of Tennessee law which prohibits competition with an employer while still employed there. *Venture Exp., Inc. v. Zilly*, 973 S.W.2d 602, 603 (Tenn. Ct. App. 1998) (citing *see B & L Corp.*, 917 S.W.2d at 681; *Stangenberg v. Allied Distrib. and Bldg. Serv. Co.*, 1986 WL 7618, at *6-8 (Tenn. App. July 9, 1986); *see also Maryland Metals*, 382 A.2d at 568; *Opie Brush Co. v. Bland*, 409 S.W.2d 752, 757 (Mo. Ct. App. 1966); 18B Am. Jur. 2d *Corporations* §§ 1712, 1713 (1985)). In addition, the Defendants have superior knowledge about the extensiveness and reach of Defendant

Puckett's breach of duty because it was done on Defendant Puckett's computer in anticipation of work with Defendant NEO and the work was diverted to NEO. The Plaintiff is at a disadvantage as to information on the extent and the breach.

Accordingly, having located legal precedent for the sequencing sought by the Plaintiffs and finding the circumstances of this case are analogous, the Court grants Plaintiffs' motion to delay discovery being released to the Defendants until their depositions have been taken.

Continuing/Reopening Depositions

Review of case law on this issue from other jurisdictions and federal courts[1] indicate that continuing/reopening a deposition lies within the sound discretion of the court but is generally disfavored. "The propriety of a deponent's reopened deposition lies in the court's discretion. Without a showing of need or good reason, courts generally will not require a deponent's reopened deposition. Reopened depositions are disfavored, except in certain circumstances, such as, long passage of time with new evidence or new theories added to the complaint." *Couch v. Wan*, No. CV F 08-1621 LJO DLB, 2012 WL 4433470, at *3 (E.D. Cal. Sept. 24, 2012) (citations omitted). "[T]he re-opening of

[1] According to the Advisory Commission Comments to the 1979 Amendments to the Tennessee Rules of Civil Procedure:

> Rules 26 through 37, inclusive, relating to depositions and discovery, have been amended [in 1979] to conform substantially but not identically to Rules 26 through 37, inclusive, of the Federal Rules of Civil Procedure. Each rule should be compared carefully with its Federal counterpart to determine the differences if any.

TENN. R. CIV. P. 26.01 (West 2016).

depositions is disfavored as a general rule..." *Miller v. Fed. Express Corp.*, 186 F.R.D. 376, 389 (W.D. Tenn. 1999).

Under the Federal Rules of Civil Procedure the standard for reopening a deposition is that leave of court must be obtained, and there must be a showing of "good cause", such as passage of time with new evidence or new legal theories. *Bookhamer v. Sunbeam Prod. Inc.*, No. C 09-6027 EMC DMR, 2012 WL 5188302, at *2–3 (N.D. Cal. Oct. 19, 2012). Reopening a deposition will be denied where the discovery is unreasonably cumulative or duplicative, whether the party has had ample opportunity to obtain the information in discovery, and whether the burden or expense of the proposed discovery outweighs its likely benefit – the factors found in Rule 26(b)(2) (i-iii). *Hibbert v. Bellmawr Park Mut. Hous. Corp.*, No. CIV. 10-5386 NLH/JS, 2013 WL 3949024, at *3 (D.N.J. Aug. 1, 2013).

Of particular significance in this case is that other cases have held that inconsistent, contradictory impeachment evidence is not enough by itself to justify reopening a deposition. *Barten v. State Farm Mut. Auto. Ins. Co.*, No. CIV12399TUCCKJLAB, 2014 WL 11512606, at *2 (D. Ariz. July 8, 2014); *see also, Bookhamer v. Sunbeam Products Inc.*, No. C 09-6024 EMC (DMR), 2012 WL 5188302 (N.D. Cal. 2012); *E.E.O.C. v. Prod. Fabricators Inc.*, 285 F.R.D. 418, 422-23 (D. Minn. 2012); *Cunningham v. D.C. Sports and Ent. Commn.*, No. CIVA 03-839 RWR/JMF, 2005 WL 4898867, *5 (D.D.C. 2005).

Based on the foregoing legal authorities, the Plaintiffs have not demonstrated good cause at this time to divide the Defendants' depositions and redepose them. This is

especially true because under the order issued above, Plaintiffs will have access before Defendants' depositions to production of electronic discovery.

Plaintiffs Complied with Rule 26.03

Lastly, the Court rejects the Defendants' argument that the Plaintiff failed to comply with the requirements of Rule 26.03 to seek a protective order. Rule 26.03 provides that a party may seek from the Court an order addressing discovery "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." In substance, that is what the Plaintiffs have done in this case.

The Plaintiffs' *Memorandum Of Law Concerning Defendants' Depositions* goes directly to the heart of Rule 26.03. The specific request to delay production of discovery until the conclusion of two depositions fits within the parameters of the eight (8) categories of timing, sequencing, and organizing discovery that are provided for in Rule 26.03. Rule 26.03 provides the Court broad discretion to fashion a customized approach to sequencing/timing of discovery to assure fair administration of justice between the parties.

For these reasons, the Court finds that the Plaintiffs have in substance complied with Rule 26.03, and does not provide a basis on which to deny Plaintiffs' motion.

ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Nader Baydoun
Stephen C. Knight
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MAILED & faxed
8/25/11