

TO BE PUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

COMMUNITY VOICE LINE, LLC, a
Maryland Limited Liability Company,

Plaintiff,

vs.

GREAT LAKES COMMUNICATION
CORP., an Iowa Corporation,

Defendant.

No. C12-4048-MWB

ORDER

This case is before me on two motions to compel discovery (Doc. Nos. 85 and 97) filed by Great Lakes Communication Corporation (GLCC). Both motions are resisted and have been fully briefed. I conducted a telephonic hearing on July 25, 2013. Anthony Osborn and Jeana Goosmann appeared for GLCC. David Sellman, Tammy Cohen and Marci Iseminger appeared for Community Voice Line, LLC (CVL).

During the hearing, counsel for GLCC indicated that 13 additional exhibits had been supplied to me, and to CVL's counsel, via email. They had not. While three exhibits did appear in my email in-box during the hearing, others did not arrive until after the hearing. Because neither I nor CVL's counsel had a chance to review the exhibits before or during the hearing, I advised GLCC's counsel that all of its new exhibits had to be delivered to me and to CVL's counsel by the end of the day. I also advised CVL's counsel that it could file a response to the exhibits by August 1, 2013. On July 29, 2013, CVL responded by submitting 10 new exhibits of its own. On July 30, 2013, I entered an order (Doc. No. 121) indicating that I would consider GLCC's 13

new exhibits and CVL's 10 new exhibits as part of the record with regard to the two pending motions to compel. Both motions are now fully submitted.

BACKGROUND AND PROCEDURAL HISTORY

CVL filed this case as a diversity action on May 15, 2012, against GLCC, an Iowa competitive local exchange carrier. CVL provides conference call services, recorded content, audio streams and other business services. It contends GLCC has failed to pay commissions owed to CVL out of revenues GLCC collected from originating carriers for calls from CVL's customers to GLCC numbers assigned to CVL.

GLCC denies liability and asserts various affirmative defenses. It has also asserted counterclaims against CVL and third-party claims against two other parties. Those claims are based on GLCC's allegation that certain agreements, which are not exactly spelled out with precision, impose indemnification obligations on CVL and/or the third-party defendants. In Count I, GLCC contends that CVL and the third-party defendants actually or anticipatorily repudiated the alleged agreements by making it clear that they will not honor the alleged indemnification obligations. In Count II, GLCC seeks a declaratory judgment that CVL and the third-party defendants are required to defend GLCC and indemnify it from certain prospective claims, disputes or lawsuits. Count III sets out a promissory estoppel claim, again relating to alleged promises of future indemnification. In Count IV, GLCC contends that CVL and the third-party defendants fraudulently induced GLCC to enter into agreements with false promises of future indemnification. Counts V and VI make similar allegations in asserting claims of fraudulent and negligent misrepresentation. Count VII alleges that CVL and the third-party defendants are liable on a civil conspiracy theory.

On February 1, 2013, Judge Bennett entered an order (Doc. No. 71) denying pre-answer motions to dismiss the counterclaim and third-party claim. On July 22,

2013, CVL and the third-party defendants filed a motion for summary judgment (Doc. No. 109) directed at all claims presented by GLCC's counterclaims and third-party claims. That motion is pending.

Meanwhile, discovery in this case has not proceeded smoothly. In response to a motion to compel discovery and request for expenses (Doc. No. 44) filed by CVL on November 27, 2012, I entered an order (Doc. No. 64) directing GLCC to take certain actions by January 25, 2013. GLCC violated my order. As such, on July 9, 2013, I entered an order (Doc. No. 106) granting CVL's motion for sanctions and imposed both monetary and non-monetary sanctions on GLCC. On May 30, 2013, and June 19, 2013, while CVL's motion for sanctions was pending, GLCC filed its present motions to compel discovery (Doc. Nos. 85 and 97).

THE MOTIONS TO COMPEL

The First Motion to Compel. GLCC's May 30, 2013, motion (the First Motion) is narrowly targeted at CVL's response to GLCC's Document Request Number 7, which seeks "[a]ll documents regarding, referencing or related to" Alpine Audio Now, LLC (Alpine). GLCC contends Alpine is, or was, a customer or marketing partner of CVL and that CVL paid commissions to Alpine based on calls Alpine generated to GLCC numbers assigned to CVL. GLCC further contends that some portion of the commissions GLCC paid to CVL were then paid by CVL to Alpine pursuant to the arrangement between CVL and Alpine. GLCC further notes that CVL has sued Alpine in Maryland. CVL states that the Maryland lawsuit is based on a theory that Alpine breached its contract with CVL, interfered with the agreements between GLCC and CVL, and committed other wrongful conduct upon entering into a direct arrangement with GLCC.

CVL objected to request number 7 on grounds that it is not relevant, is not likely to lead to the discovery of relevant or admissible evidence, is overly broad and unduly burdensome and seeks CVL's confidential and proprietary business information. GLCC takes issue with the objections and argues that the requested information is relevant. GLCC has proposed a narrowed version of the request. *See* Doc. No. 95 at 5.

The Second Motion to Compel. GLCC's June 19, 2013, motion (the Second Motion) is not as narrowly-focused. It seeks relief with regard to six interrogatories and twelve document requests (although GLCC has recently narrowed the scope of the motion to five interrogatories and nine document requests). The disputed discovery responses relate to four general areas of inquiry:

- a. The relationship between CVL and the two third-party defendants: Robert Russell (Russell) and Blitz Telecom Services LLC (Blitz).
- b. CVL's customers or marketing partners.
- c. GLCC's contention that CVL and the third-party defendants are subject to contractual indemnification obligations.
- d. The factual bases for affirmative defenses asserted by CVL and the third-party defendants.

CVL objected to the requests and interrogatories at issue on various grounds. Its arguments in resistance to the Second Motion focus primarily on relevance, but CVL also contends that certain of the disputed discovery requests are improper for other reasons.

THE HEARING

GLCC's counsel commenced the telephonic hearing by making reference to a series of new exhibits that had allegedly been delivered to me, and to opposing counsel, before the hearing. They hadn't. Counsel then indicated that GLCC's Exhibit 1 contains the document that GLCC relies on as containing the terms of the agreement in this case. This was useful information, as GLCC's position as to the source of its alleged contractual indemnification rights has never been entirely clear.¹ Exhibit 1 contains an email message and attachment. The message is from GLCC's Josh Nelson and is dated July 6, 2009. It is directed to Neil Rosenblit, who is apparently affiliated with both CVL and Blitz. The message states, in relevant part: "Attached is the standard contract for GLCC."

The attachment is a document entitled "Service Agreement" that appears to be GLCC's standard contract form. The "Customer" line is blank and the document contains other blanks to be filled in by the contracting parties. The incomplete portions of the document include "Schedule C," which would specify the commission rate to the customer. The document is unsigned and undated. It does, however, include an indemnification provision. GLCC's counsel represented during the hearing that this document is the source of the indemnification rights GLCC seeks to invoke in this case. She also asserted that CVL was not formed as a legal entity until either July 8 or July 10 of 2009, and, therefore, could not have been the party to the purported July 6 agreement.

After providing this information, GLCC's counsel undertook a lengthy review of information she has located concerning various business entities that may have some connection to CVL, Russell and/or Blitz. This includes entities that share an address. GLCC's counsel even noted that Google Earth photographs of certain structures do not

¹ The recent motion for summary judgment filed by CVL, Russell and Blitz includes a summary of the positions GLCC has taken concerning the source of its alleged indemnification rights. *See* Doc. No. 109-3 at 6.

match the office buildings depicted on the websites for certain entities. Counsel for CVL interrupted at one point to make the obvious objection that the information was irrelevant. I overruled the objection and allowed the presentation to continue, mostly because I was fascinated by the question of how GLCC's counsel would tie the information to the issues presented by GLCC's motion. She didn't.

The attempted tie-in, as best as I can tell, is an assertion that GLCC does not even know which entity it contracted with. Was it CVL, Blitz or Russell? Or, instead, was it some other entity housed in one of the buildings depicted in a Google Earth photo? GLCC's counsel suggested that the blank "customer" space, which is among the many blank spaces in the attachment to Exhibit 1, shows that this is a legitimate question.

I disagree. First, as CVL points out, email communications in late July of 2009 were entitled "Great Lakes CVL Contract" and indicate that contract negotiations and revisions were still in process. By then, even according to GLCC's own research, CVL existed as a legal entity.

Second, CVL has submitted exhibits showing that during the course of the parties' performance of the agreement, GLCC acted as if it had had a contract with CVL, not some other party. Those exhibits include invoices submitted by GLCC to CVL and a formal notice issued by GLCC to CVL concerning Alpine's request to port certain telephone numbers.

Third, GLCC has repeatedly admitted throughout this case that the other contracting party was CVL or, later, CVL, Blitz and/or Russell. In its original and first amended answers to CVL's complaint, GLCC admitted that it was party to an agreement (albeit, allegedly, an "unwritten" one) with CVL. *See* Doc. No. 13 ¶¶ 10, 15; Doc. No. 15 at ¶ 15. In its second amended answer, filed in conjunction with its counterclaims and third-party claims, GLCC changed its position a bit, deleting the word "unwritten" and admitting that it had an agreement with CVL, Blitz, and/or Russell.

Doc. No. 29 at ¶¶ 10, 15. Even then, GLCC did not contend that its contract might actually be with some other, unnamed entity. And on June 19, 2013, when GLCC filed its Second Motion, it *still* took the position that the party with whom it started doing business in 2009 was CVL, Blitz and/or Russell. Doc. No. 97-1 at 1.

Nonetheless, during the hearing on July 25, 2013, GLCC's counsel announced another change of position. Now, supposedly, GLCC believes that it might have entered into a contract with some *other* entity. In other words, having sued CVL, Blitz and Russell on a theory that one or more of *those parties* owes it contractual indemnification obligations, GLCC now alleges that some other party might be the real obligor. Why the sudden change? I don't know, but one promising theory is that the recent motion for summary judgment has prompted GLCC to try to move the goalposts.²

Whatever the reason, GLCC's counsel spent approximately 20 minutes during the hearing presenting the above-described information about other entities that supposedly have some characteristics in common with CVL, Blitz and/or Russell. I find this information to be completely without relevance to either (a) any claim or defense in this case or (b) any disputed issue raised by GLCC's pending motions. Frankly, the entire presentation was not only an example of poor advocacy, but was also consistent with GLCC's behavior throughout this case. As noted above, I have already imposed sanctions based on GLCC's failure to comply with a discovery order. During the proceedings on that motion, CVL documented GLCC's practice of finding new, responsive documents at convenient times and of suddenly locating documents after previously representing that they did not exist. Now, long after filing and briefing two separate discovery motions, GLCC elected to devote the majority of its presentation to arguments and exhibits that were not part of either motion.

² Many of the new exhibits that GLCC submitted during (and mostly after) the July 25 hearing show that they were printed from the internet on July 22, 2013. The motion for summary judgment was filed on the morning of July 22, 2013.

In any event, and despite the fact that the hearing took a regrettably-long detour into irrelevancy, both sides did present some arguments germane to the specific issues raised by GLCC's motions. Having considered those arguments, and the parties' written submissions, I will now address those issues.

ANALYSIS

The Rules of Civil Procedure authorize broad discovery. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."). For purposes of pretrial discovery, relevancy "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). "Discovery Rules are to be broadly and liberally construed in order to fulfill discovery's purposes of providing both parties with 'information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement.'" *Marook v. State Farm Mut. Auto. Ins. Co.*, 259 F.R.D. 388, 394 (N.D. Iowa 2009) (quoting *Rolscreen Co. v. Pella Prods.*, 145 F.R.D. 92, 94 (S.D. Iowa 1992)).

At the same time, "relevancy under Rule 26 is not without bounds." *Bredemus v. Int'l Paper Co.*, 252 F.R.D. 529, 533 (D. Minn. 2008); *see also* *Oppenheimer Fund*, 437 U.S. at 351 ("discovery, like all matters of procedure, has ultimate and necessary boundaries.") (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). Generally, the party resisting production of the requested information bears the burden of establishing lack of relevancy. *Marook*, 259 F.R.D. at 394 (citing *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511 (N.D. Iowa 2000)).

Accordingly, the "mere statement by a party that the interrogatory [or request for production] was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to

voice a successful objection.” *St. Paul Reinsurance Co., Ltd.*, 198 F.R.D. at 511 (quoting *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982)). Rather, “the party resisting discovery ‘must show specifically how ... each interrogatory [or request for production] is not relevant or how each question is overly broad, burdensome or oppressive.’” *Id.* at 512 (quoting *Josephs*, 677 F.2d at 992). In some cases, however, if the request for discovery is “overly broad on its face or when relevancy is not readily apparent, the party seeking discovery has the burden to show the relevancy of the request.” *Marook*, 259 F.R.D. at 395 (quoting *Cunningham v. Standard Fire Ins. Co.*, Civil Action No. 07-cv-02538-REB-KLM, 2008 WL 2902621 at *1 (D. Colo. July 24, 2008)).

With these principles in mind, I will address each remaining, disputed discovery request by category.

A. Alpine Documents

As noted earlier, the First Motion relates entirely to Document Request Number 7, which seeks “[a]ll documents regarding, referencing or related to” Alpine. This easily falls within the category of a request that is “overly broad on its face.” However, GLCC has offered to narrow the scope of the request to “(1) communications between CVL and Audio Now³ regarding or mentioning Great Lakes and/or the agreement between Great Lakes and CVL; (2) written discussions regarding the negotiation of the contract between CVL and Alpine, or discussing the terms of the contract; and (3) invoices/billing statements between CVL and Alpine from June 2010 to the present.” *See* Doc. No. 95 at 5. Having considered the parties’ arguments, and the scope of the claims present in this case, I find that only the first class of documents is discoverable. As such, I will grant GLCC’s First Motion in part by ordering CVL to produce any and

³ GLCC uses “Audio Now” and “Alpine” interchangeably to refer to Alpine Audio Now LLC.

all communications between CVL and Alpine Audio Now regarding or mentioning GLCC and/or the agreement between GLCC and CVL.

B. The Relationship Between CVL, Blitz And Russell

This category of the Second Motion includes ten separate discovery requests: Interrogatory Numbers 21, 23 and 25 and Document Request Numbers 26, 27, 32, 33, 35, 38 and 39. At the outset, I reject GLCC's argument that it is entitled to broad discovery concerning relationships between CVL, Blitz and Russell. Given the claims and defenses currently present in this case, this category of discovery qualifies as being one for which relevance is not readily apparent. As such, GLCC must provide a satisfactory explanation of relevancy.

GLCC asserts relevance on the basis of its purported confusion as to which entity it contracted with. As I noted earlier, GLCC seems to have had no such confusion during the course of contractual performance, or even at the beginning of this case (when it admitted that its agreement was with CVL). In any event, discovery concerning shared obligations, finances, bank accounts, intercompany financial transactions, loans, etc., is not relevant to the issue of which person or entity entered into a contract with GLCC. That question can only be answered by the documents and communications exchanged between GLCC and CVL, or Blitz, or Russell, along with evidence of the parties' conduct toward each other after the contract was formed.

Nor does GLCC's speculative and purely hypothetical "pierce the corporate veil" argument justify the broad discovery GLCC demands. GLCC does not argue that one defendant is responsible for the wrongful acts of another. It contends that one of the defendants owed obligations to GLCC and breached those obligations. If GLCC someday wins a money judgment and is unable to collect that judgment from the actual judgment debtor, perhaps it might be able to make a "pierce the veil" argument to collect

from another entity. At this stage, however, the mere possibility that GLCC might someday be in a position to make the argument does not justify the broad discovery that GLCC currently seeks.

Finally, I note that even if GLCC could demonstrate some level of relevance, many of the discovery requests at issue are overly broad to a disturbing extent. For example, I would find Document Request Numbers 26, 32 and 33 to be improper even if GLCC could establish relevance.

Having made these findings, I will deny GLCC's motion with regard to the "relationship" discovery requests in nearly every regard. However, I will compel CVL to supplement its responses two of those requests. First, CVL must provide a limited, supplemental response to Interrogatory Number 23. For each of the five individuals listed in that interrogatory, CVL must describe his role(s) within CVL during the year 2009, including his job title(s) and responsibilities and the extent (if any) to which he was authorized to bind CVL to contractual agreements.⁴ Second, CVL must provide a limited, supplemental response to Document Request Number 38. In particular, CVL must produce (if it has not previously done so) all documents it has filed with the Maryland Secretary of State.

C. Information About CVL's Marketing Partners

Interrogatory Number 19 is the only remaining, disputed discovery request in this category. It states:

Identify all of CVL's current and/or former customers to whom Great Lakes' telephone numbers were assigned or by whom Great Lakes' telephone numbers were otherwise utilized pursuant to an agreement with CVL; a complete response to this interrogatory shall include the complete

⁴ GLCC's Second Motion is directed only at CVL. It appears that the discovery requests at issue were also directed only at CVL. As such, there is no basis in the record for me to order Blitz or Russell to produce information.

legal name, address and telephone number of each identified customer as well as the name of your primary contact for each identified customer.

CVL raised various objections, including objections based on relevancy and CVL's contention that the information is of a proprietary nature such that GLCC could use it to damage CVL's business. CVL also stated that it "does not assign telephone numbers to anyone."

I find that this interrogatory is narrowly tailored in that it is limited only to "[GLCC]'s telephone numbers." I further find (a) that this interrogatory is not so obviously irrelevant on its face as to shift the burden of demonstrating relevance to GLCC and (b) that CVL has not met its burden of establishing a lack of relevance.

With regard to CVL's objection concerning proprietary information, I find that CVL has articulated a valid concern. Rather than prohibiting discovery, however, I conclude that the appropriate remedy is an "Attorney's Eyes Only" designation. CVL shall provide a supplemental, sworn answer to Interrogatory Number 19 and shall mark each page of that answer as "Attorney's Eyes Only." GLCC's counsel shall not disclose the supplemental answer, or the information contained therein, to any other person or entity unless and until it obtains either (a) CVL's written permission to do so or (b) an order of this court permitting such disclosure. If GLCC seeks to file the supplemental answer for any purpose in this matter, it shall do so under seal. Any violation of these restrictions will be treated as contempt of court.

D. Discovery Concerning The Alleged Indemnification Provision

The only discovery requests still at issue with regard to this category are Document Requests 30 and 36. Number 30 asks CVL to produce all documents "which refute Great Lakes' contention . . . that the relevant contracts(s) [sic] include a provision requiring the Customer to defend, indemnify and hold Great Lakes harmless relative to

any disputes emanating from said contract(s).” Similarly, Number 36 asks CVL to produce all documents “which refute Great Lakes’ contention . . . that you anticipatorily breached the relevant contract’s(s’) provision requiring you to defend, indemnify and hold Great Lakes harmless relative to any disputes emanating from said contract(s).”

CVL objected to both requests on many grounds, including that they are overly broad, unduly burdensome, vague, harassing and ambiguous, and that they invade the work product doctrine. Many of these objections are well-taken. These two documents requests are poorly drafted. However, the subject matter of both requests is appropriate. If CVL has documents in its possession or control that it intends to rely on to refute GLCC’s allegation that the parties’ agreement includes an indemnification provision, and if CVL has not already produced those documents, then it must do so. Likewise, if CVL has documents in its possession or control that it intends to rely on to refute GLCC’s allegation that CVL anticipatorily repudiated a contractual indemnification provision, and if CVL has not yet produced those documents, then it must do so.

E. CVL’s Affirmative Defenses

Interrogatory Number 24 is the only discovery request at issue with regard to this category. It requests that CVL, for each of its affirmative defenses, “set forth all facts supporting each defense and identify all documents supporting each defense.” The answer filed by CVL, Blitz and Russell to GLCC’s counterclaims and third-party claims includes 24 separate affirmative defenses, including such timeless favorites as waiver, estoppel (general, equitable and promissory) and statute of frauds.

It is understandable that GLCC would seek to discover information concerning these various defenses. CVL, however, complains that Interrogatory Number 24 is overly broad in its demand for a recitation of “all” facts. CVL also states that the

interrogatory is a compound interrogatory (because it addresses multiple defenses) and that it was drafted in that manner to circumvent the rule prohibiting one party from serving more than 25 interrogatories, “including all discrete subparts,” on another party. *See* Fed. R. Civ. P. 33(a)(1).

CVL’s response to Interrogatory Number 24 did not include an objection based on the number of interrogatories GLCC had served. As such, that objection has been waived. *See* Fed. R. Civ. P. 33(b)(4). However, CVL’s objection concerning the overly-broad nature of the interrogatory has some merit. So-called “blockbuster” or “contention” interrogatories (*i.e.*, those that demand disclosure of each and every fact supporting a claim or defense) are disfavored. *See, e.g., Clean Earth Remediation and Const. Servs., Inc., v. Am. Int’l Grp., Inc.*, 245 F.R.D. 137, 141 (S.D.N.Y. 2007); *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 404-05 (D. Kan. 1998); *Hilt v. SFC Inc.*, 170 F.R.D. 182, 186-87 (D. Kan. 1997). Nor should an interrogatory purport to require that the answering party provide a narrative account of its entire case. *Hiskett*, 180 F.R.D. at 404.

At the same time, it is perfectly appropriate to use interrogatories to obtain disclosure of the *material or principal* facts supporting an allegation or defense. *Id.* at 405; *accord Lawrence v. First Kansas Bank & Trust Co.*, 169 F.R.D. 657, 664 (D. Kan. 1996). This is especially appropriate with regard to affirmative defenses. When drafting answers, attorneys routinely list every conceivable (and sometimes inconceivable) affirmative defense in order to prevent the inadvertent waiver of a defense that may become later viable through discovery. Asserting every affirmative defense known to the law presents virtually no risk, while leaving one out could someday cause remorse.

Interrogatories allow the opposing party to discover which of the litany of stated defenses are actually at issue in the case. Moreover, responding to interrogatories

about affirmative defenses gives the asserting party and its counsel a chance to actually think about those defenses, both strategically and with regard to Rule 11, and to voluntarily abandon them when appropriate. As such, and while Interrogatory Number 24 is overly broad, it is not entirely improper. CVL – the party that chose to assert two dozen affirmative defenses – must provide an answer to the interrogatory. That answer must indicate which affirmative defenses CVL actually intends to litigate in this case and which, if any, it now elects to abandon. For each defense CVL will continue to litigate, it must disclose the material or principal facts it relies on in support of that defense.

Conclusion

GLCC's motions to compel discovery (Doc. Nos. 85 and 97) are both **granted in part and denied in part**. CVL shall provide supplemental responses to Document Request Numbers 7, 30, 36, 38, and supplemental answers to Interrogatory Numbers 19, 23 and 24, to the extent described in this order. CVL shall serve its supplemental responses and answers, along with any additional responsive documents, no later than **August 19, 2013**.

IT IS SO ORDERED.

DATED this 1st day of August, 2013.



LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE