IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

WELLS FARGO BANK, N.A.,

Plaintiff, : Case No. 3:07-cv-449

-vs- Magistrate Judge Michael R. Merz

:

LaSALLE BANK NATIONAL ASSOCIATION,

Defendant.

DECISION AND ORDER DENYING PLAINTIFF'S MOTION TO COMPEL

This case is before the Court on Plaintiff's Motion to Compel Responses to Discovery Requests, or Alternatively, Motion for Sanctions for Failure to Supplement [responses to] Discovery Requests and Motion for Sanctions for Spoliation of Electronic Evidence (Doc. No. 155). Defendant opposes the Motion and seeks an award of fees and expenses for being compelled to do so (Memorandum In Opposition, Doc. No. 159). Plaintiff has filed a Reply Memorandum in Support (Doc. No. 171).

This case was filed November 20, 2007 (Complaint, Doc. No. 1). On January 22, 2008, District Judge Rice set the case for a preliminary pretrial conference on March 19, 2008; the notice specifically required use of the Court's form for the Fed. R. Civ. P. 26(f) Report, which contains the following language:

> h. The parties have electronically stored information in the following formats:
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>
> The case presents the following issues relating to disclosure or discovery of electronically stored information, including the form or

> forms in which it should be produced:
>
> _____

(Available at www.ohsd.uscourts.gov/forms.) This setting triggered the responsibility of the parties to confer on a number of subject, including electronically stored information ("ESI"), and to prepare and file a report which was to include a discovery plan dealing with any ESI issues. Fed. R. Civ. P. 26(f)(2) and (3).

The parties filed their Fed. R. Civ. P. 26(f) Report (Doc. No. 14) on March 12, 2008. The only reference therein to electronically stored information is

> h. The Parties anticipate electronically stored information in the form of e-mails, most of the documents that pertain to the two loans in this case, as well as some of the general documents that are expected to be produced. The Parties are currently discussing the feasibility of producing electronic versions of all materials that are produced in this case.

Id. at 4. The preliminary pretrial conference was then held as scheduled on March 19, 2008 (see Minute Entry for that date) and a Scheduling Order was file the same day which set a discovery deadline of October 15, 2008, and provided in pertinent part

> No trial setting will be vacated due to the failure to complete essential pretrial discovery, except under the most unusual of circumstances.
>
> The discovery "cut-off" deadline means that all discovery must be concluded, as opposed to simply requested, by the discovery "cut-off" date. Purely as a hypothetical example, request for the production of documents, with a 28-day response time, must be served upon the opposing party in sufficient time to allow said party to respond prior to the discovery "cut-off" date.
>
> Except for good cause shown, no extension of the discovery "cut-off" deadline will be allowed if such extension would impact adversely on the trial date set herein.

(Scheduling Order, Doc. No. 16, at 4.) This language, which is common to pretrial scheduling orders issued by the judges in Dayton, implements General Order No. 1 (Pretrial and Trial

Procedures) for the Dayton location of court, adopted by all the federal judges at Dayton, which provides in pertinent part:

> A discovery cut-off date will be established, generally 90 to 120 days prior to trial. Parties who undertake to extend discovery beyond the cut-off date do so at the risk the Court may not permit its completion prior to trial. There will be no supervision or intervention by the Court, such as a ruling on a Fed. R. Civ. P. 37 request for sanctions, after the discovery cut-off date, without a showing of extreme circumstances. No trial setting will be vacated due to the failure to complete essential pretrial discovery, except under the most unusual of circumstances.

(General Order No. 1 at 5, available at www.ohsd.uscourts.gov/generalorders.) The discovery deadline was extended several times, ending with the thirtieth day after the last rebuttal expert was identified (Doc. No. 31) or January 7, 2009.

The instant Motion was filed May 15, 2009, and depends extensively on the deposition of Ryan McCarthy, an employee of Bank of America, taken by Plaintiff on April 15, 2009, in parallel pending litigation in Oklahoma and Nevada. Essentially Wells Fargo contends that LaSalle did not search a number of backup tapes for relevant documents and should be subject to spoliation sanctions for not maintaining all of the backup tapes which might have contained responsive ESI. LaSalle responds that ESI on backup tapes is not readily accessible in that it would take six months and almost half a million dollars to restore the backup tapes. LaSalle counterpunchs by accusing Wells Fargo of the same sins – not producing documents from backup tapes, not placing a litigation hold on backups, etc. (Memorandum in Opposition, Doc. No. 159, at 5.)

Amendments to the Federal Rules of Civil Procedure in 2006 to acknowledge and accommodate the digital revolution were five years in the drafting and recognized in part the potential for ESI to overwhelm the litigation system. The Rules Advisory Committee sought to avoid that result by providing for early consultation among counsel to prevent ESI problems. More recently, The Sedona Conference has issued its Cooperation Proclamation to attempt to move

litigators in the direction of cooperating by suggesting methods for doing so:

1. Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;
2. Exchanging information of relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;
3. Jointly developing automated search and retrieval methodologies to cull relevant information;
4. Promoting early identification of form or forms of production;
5. Developing case-long discovery budgets on proportionality principles; and
6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

(The Sedona Conference Cooperation Proclamation, July, 2008, at 2; available at thesedonaconference.org). The current dispute is a mild example of the sorts of problems which result when counsel do not deal systematically with ESI problems and possibilities at the outset of litigation, instead of filing one-paragraph boilerplate statements about ESI and waiting for the explosion later.

Whether it would have been appropriate for the Court to wade into the middle of this ESI dispute earlier in the case, the Court declines to do so now. Wells Fargo has shown no "extreme circumstances" to justify the Court's intervention this late in the process.

First of all, the Motion was filed more than four months after the discovery cut-off of January 9, 2009, and a month after Wells Fargo learned LaSalle had not search the backup tapes. The Motion did not become ripe until June 23, 2009; the parties took the full time allowed under S. D. Ohio Civ. R. 7.2 to brief the Motion and Wells Fargo never requested expedited treatment. Thus the Motion became ripe only two months before trial.

Secondly, restoration of the backup tapes is disproportionate to the likely utility of doing so. While LaSalle should have identified ESI on the backup tapes as not reasonably accessible if in fact they are not, the difficulty of retrieving information from backup tapes should come as no surprise

to at least the information technology personnel of both parties: data stored on backup tapes is well understood as the paradigmatically difficult ESI to search because it must be restored to "active' computers before being searched. The estimated cost of restoration is out of proportion to the amount of money involved in this case and the time required for restoration would certainly require extending the trial date. Because of LaSalle's policy of printing hard copies of important emails for the files on its loans and the loan files having been produced, the likelihood of much additional information is small.

Plaintiff's Motion to Compel is denied. The cross-requests for expenses and attorney fees are also denied. The Court finds the parties could have avoided the expenses of this Motion by conferring appropriately early in the case about ESI.

July 24, 2009.

s/ **Michael R. Merz**
United States Magistrate Judge