IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: ESSAR STEEL MINNESOTA LLC *and* ESML HOLDINGS INC.*, et al.*, Reorganized Debtors.	Chapter 11 Case No. 16-11626 (CTG) Jointly Administered
MESABI METALLICS COMPANY LLC, Plaintiff, v. CLEVELAND-CLIFFS, INC.*, et al.*, Defendants.	Adv. Proc. No. 17-51210 (CTG) **Related Docket Nos. 458, 530**

MEMORANDUM OPINION

Mesabi has written a letter, D.I. 530, to the Court seeking "clarification" of a discovery ruling.[1] That ruling, D.I. 528, requires Mesabi to gather electronic data from certain document custodians, run keyword searches on the database, review the documents that are "hits" on the keyword search for responsiveness to written document requests, and produce non-privileged responsive documents. The gist of Mesabi's argument is that the burden associated with that exercise is disproportionate to the needs of the case. In response, Cleveland-Cliffs argues, D.I.

[1] Mesabi Metallics Company LLC is referred to as "Mesabi". Mesabi is the successor to Essar Steel Minnesota, LLC, which is referred to as "Essar Steel", and the plaintiff in this adversary proceeding.

532, that the Court considered those points before it issued the discovery ruling, and that Mesabi's request should be denied on that basis.[2]

The Court is operating at a distance from the morass of details involved in the process of electronic discovery. The Court is therefore more open than it would otherwise be (in, for example, the context of the resolution of a pure question of law) to hearing that its ruling failed to consider some or another practical reality of electronic discovery. To the extent a litigant comes forward with a concrete explanation for why a ruling of this Court imposes a burden on a party that the Court may not have fully appreciated, the Court is not inclined stubbornly to ignore the complaint on the ground that the matter has already been decided.

That said, on the existing record it is just too soon to know the magnitude of the burden that this Court's ruling will impose. While Mesabi asserts that the burden of producing documents from two particular custodians will be massive, it does not appear that Mesabi has yet loaded the data from those custodians into a database. There is accordingly no way of knowing how many "hits" the keyword search will generate, and therefore no way of knowing how many documents will actually need to be reviewed. If that turns out to be an enormous undertaking, the Court is open to being persuaded that the obligations imposed by its prior order should be scaled back in light of both the relevance of the material and the associated burden. But nothing in Mesabi's letter persuades the Court that it should reconsider or revise its

[2] Cleveland-Cliffs Inc. is the defendant in this action and is referred to as "Cleveland-Cliffs."

prior order unless and until Mesabi demonstrates, in a concrete way,[3] that the order imposes on it a burden that is disproportionate to the needs of the case.

Background

Mesabi, a successor to Essar Steel, was formed to develop an iron ore pellet production facility in northern Minnesota. Mesabi contends that Cleveland-Cliffs, a current operator of iron ore and pellet production facilities in northern Minnesota, is "a monopolistic predator, intent on preventing Mesabi from competing with Cliffs," D.I. 18 at 2. Mesabi brought this lawsuit alleging that Cleveland-Cliffs violated state and federal antitrust law and committed a host of other business torts.

Separately, the trustee for a trust established under the confirmed plan of reorganization sued certain individuals associated with Essar Global,[4] the former parent of Essar Steel. That complaint alleges that Essar Global looted its former subsidiary, and that those actions were responsible for Essar Steel's business losses.[5] Unsurprisingly, Cleveland-Cliffs has sought to take discovery into the allegations regarding Essar Global's conduct, contending that those allegations suggest that Cleveland-Cliffs' own conduct, even if found to be unlawful, may not have been the cause of Mesabi's losses. D.I. 35, 49. In response, Mesabi acknowledges that "from a discovery perspective Essar Global and its involvement with Mesabi is

[3] *See generally* 8A Charles Alan Wright and Arthur Miller, *Federal Practice and Procedure* § 2035 (before granting a party protection from a facially valid discovery request "courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements"); *Traynor v. Liu*, 495 F. Supp. 2d 444, 451-452 (D. Del. 2007).

[4] Essar Global Fund Limited is referred to as "Essar Global".

[5] *Nystrom v. Vuppuluri*, Bankr. D. Del. Adv. Proc. No. 17-50001.

appropriate[ly] within the scope of discovery in this case." Dec. 12, 2019 Hearing Tr. at 15.

Mesabi made an initial document production based on nine custodians whom it identified at the beginning of the lawsuit, producing about 1.2 million documents. Cleveland-Cliffs noted, however, that certain documents cited in the trust's complaint were responsive to its document requests but not included in Mesabi's document production. Counsel for Mesabi explained that the reason these documents were omitted from its production is that those documents were not "in the [possession], custody or control of [any] of our identified custodians." *Id.* at 19.

When Cleveland-Cliffs first moved to require Mesabi to add additional custodians to its document review, it took the view that, because Essar Global had, after Mesabi emerged from bankruptcy, re-acquired an equity position (but not operational control) of Mesabi, Mesabi could be required to produce documents from Essar Global itself. The basis for that was caselaw holding that where a subsidiary has "possession, custody or control" of documents belonging to the parent, the subsidiary may be required, under Fed. R. Civ. P. 34(a)(1), to produce those documents in response to a discovery request. *See In re Global Power Equipment Group Inc.*, 418 B.R. 833, 841-845 (Bankr. D. Del. 2009) (Shannon, J.). The Court rejected that argument, finding that to the extent Essar Global is simply an investor in Mesabi, what Cleveland-Cliffs was seeking was actually third-party discovery against Essar Global. To obtain such discovery, the Court held, Cleveland-Cliffs would need to serve a third-party subpoena on Essar Global, not a Rule 34 document request on Mesabi. D.I. 377 at 2.

Cleveland-Cliffs thereafter made a more direct request to obtain documents not included in Mesabi's original document production. Cleveland-Cliffs asked Mesabi to add ten specific custodians, all of whom were (at least at one point) employees of Mesabi or had engaged directly in Mesabi business, though some also held positions with Essar Global. Mesabi refused to add those (or any) custodians, taking the view that the 1.2 million documents it had already produced were sufficient. Mesabi further argued that Cleveland-Cliffs' effort to add any custodian who was included in the previous request that Judge Shannon had denied should be treated as a motion for reconsideration.

Ruling from the bench following argument on the motion, the Court rejected the argument that the denial of the prior request from additional custodians from Essar Global barred the current request. June 14, 2021 Hearing Tr. at 75. In view of the fact that (on Mesabi's own telling) the identification of custodians was the reason why documents that seemed potentially significant were excluded from its original document production, the Court concluded that the addition of some number of additional custodians would be appropriate. *Id.* at 77. After the parties' meet-and-confer efforts did not produce an agreement regarding the contours of the further discovery that would proceed, the Court directed both parties to propose forms of order, followed by letters in which each party could make the case for its proposed form of order. July 7, 2021 Hearing Tr. at 17-19.

Both parties did so. Mesabi's proposed order identified five particular custodians whose documents would be reviewed, and from particular periods.

Cleveland-Cliffs' proposed order, on the other hand, would have had Mesabi produce documents from all ten of the custodians whose documents it had originally requested.

Seeking to strike an appropriate balance in order to permit "proportional" discovery, the Court adopted, in substantial part, the Cleveland-Cliffs' form of order, but reduced the number of custodians from whom Mesabi would be required to collect data. In an order dated July 28, 2021, the Court limited the number of new custodians to five, but permitted Cleveland-Cliffs to select the five custodians whose documents it believed were most critical. D.I. 528. The five custodians whom Cleveland-Cliffs selected included three who were on the list proposed by Mesabi, plus two custodians who were not included on Mesabi's proposed list.

Mesabi then wrote to the Court purporting to seek clarification of that order. D.I. 530.[6] The letter contends that there is no basis for further discovery from these custodians because it will likely be duplicative of discovery it has already provided. Mesabi added that the two other custodians possess a great deal of data, and for that reason it will be unduly burdensome to review their documents. In response, D.I. 532, Cleveland-Cliffs argued that Mesabi's letter seeks reconsideration of this Court's order, not clarification of it. And Cleveland-Cliffs adds that until Mesabi runs the search terms through the document collection, there is no way to know how many documents the order would require Mesabi to review. *Id.*

[6] This letter was filed under seal. The general summary of the letter set out herein does not reveal any information that is proprietary, trade-secret, or otherwise entitled to protection from public disclosure.

Analysis

Motions for reconsideration of a final order or decree are governed by Fed. R. Civ. P. 59 (which applies in bankruptcy cases under Fed. R. Bankr. P. 9023). That rule has generally been construed to limit relief to circumstances involving an intervening change of law, the availability of new evidence, or a clear error of law. *Lazaridis v. Wehmner*, 591 F.3d 666, 669 (3d Cir. 2010). But interlocutory orders (like discovery rulings) are not formally subject to the requirements of Rule 59. While courts may in their discretion decide to apply similar standards, trial courts have greater discretion to reconsider their interlocutory orders whenever they believe the interests of justice so require.[7]

The complex and fluid circumstances of electronic discovery, in this Court's view, counsel in favor of greater judicial flexibility. In modern litigation practice, the practical and sometimes unpredictable challenges of electronic discovery can confound even the most careful planning. Technical or practical issues will commonly arise that may make a task vastly more complex – or vastly simpler – than one had expected.

In addition, in addressing a discovery dispute in the context of electronic discovery, a court is necessarily acting with incomplete information. While a court may be able to estimate the level of burden associated with, for example, adding a particular custodian whose data should be reviewed, that estimate is at best an

[7] *See United States v. Jerry,* 487 F.2d 600, 604 (3d Cir. 1973); *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 90-91 (1922).

educated guess. If the actual consequences of a ruling turn out to be vastly different from what the Court anticipated at the time, this Court is not inclined to insist on strict compliance simply because the matter was previously decided.

There is, of course, a risk on the other side. If interlocutory decisions of a court are always subject to being rebid, one can invite gamesmanship and motions to reconsider that are filed simply for the purpose of seeking a do-over.

This Court takes a middle-ground approach to this problem. The Court limited Cleveland-Cliffs to five custodians but left the selection of those custodians to Cleveland-Cliffs. That determination – which required Cleveland-Cliffs to engage in some triage – was intended to limit the burden imposed on Mesabi, while giving Cleveland-Cliffs the most critical documents. But it does not exclude the possibility that the burden of reviewing and producing documents from the five custodians will be disproportionate to the needs of the case.

Accordingly, if Mesabi were to present a specific and concrete explanation of the reasons why the burden of complying with this Court's order was materially greater than what the Court would have anticipated, the Court would not stubbornly adhere to its previous ruling simply because it had issued an order.

On the other hand, one cannot come running back to Court simply to avoid providing a litigation opponent discovery that it seeks. While this Court would be prepared to modify an earlier ruling if it turned out that the burden of compliance were disproportionate, the explanation set forth in Mesabi's letter does not provide

nearly the level of concrete detail necessary for the Court to make such a determination.

It does not appear from Mesabi's letter, for example, that Mesabi has yet loaded the data from the requested custodians onto a database, an exercise that (for all ten custodians) its counsel estimated could cost as much as $150,000. July 7, 2021 Hearing Tr. at 13. While Mesabi's complaint does not include an *ad damnum*, Cleveland-Cliffs has said (without contradiction from Mesabi) that it seeks a recovery in the billions. June 14, 2021 Hearing Tr. at 12. In these circumstances, the Court does not believe that the requirement of proportionality excuses Mesabi from taking this initial step.[8]

Once the documents are loaded into a database, Mesabi should run the proposed keyword searches through the documents. To the extent application of the protocol set out in the existing order would yield an avalanche of documents to be reviewed, the Court is hopeful that the parties might meet and confer in order to discuss modifications that would generate a more manageable collection of documents for Mesabi to review.[9] But unless and until Mesabi has taken these steps and has

[8] While the Court does not intend to underestimate the burden such a cost will impose on an entity like Mesabi that is not presently an operating business, as the Court noted during the July 7, 2021 hearing, the costs associated with providing a litigation opponent a fair opportunity to take reasonable and proportionate discovery are an unavoidable feature in our system of civil justice. July 7, 2021 Hearing Tr. at 18-19.

[9] The same point applies to the point that Mesabi makes in is subsequent letter, D.I. 533, regarding the potential ambiguity about which documents, of those that are reviewed, must be produced as "responsive." The appropriate answer to that question cannot be determined without some sense of the universe of documents to which it applies. The Court therefore will not address this potential dispute in its present, wholly abstract context. *See generally Traynor v. Liu*, 495 F. Supp. 2d 444 at 452 (particularized showing of cause is necessary to obtain protection from otherwise valid discovery request).

offered a concrete explanation of the specific burden that compliance with the July 28, 2021 Order will impose, the Court is satisfied that no further clarification or reconsideration of that Order is necessary or appropriate.

Dated: August 10, 2021

CRAIG T. GOLDBLATT
UNITED STATES BANKRUPTCY JUDGE