

NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10 CVS 8327

OUT OF THE BOX DEVELOPERS, LLC,
d/b/a OTB CONSULTING,

Plaintiff,

v.

LOGICBIT CORP., FRANCISCO A.
RIVERA, DOAN LAW, LLP, and THE
DOAN LAW FIRM, LLP,

Defendants.

ORDER

THIS MATTER is before the court on Non-Party LexisNexis' Motion to Quash Deposition Subpoena, or in the Alternative, Motion for Protective Order filed January 23, 2013 ("Motion").

PROCEDURAL BACKGROUND

The court first reviews the somewhat extended background regarding Defendants' effort to depose LexisNexis. Pursuant to an agreement with LexisNexis, Plaintiff Out of the Box Developers, Inc. ("OTB") customizes LexisNexis' Time Matters software for use by bankruptcy attorneys, using the trade name *BKexpress*. Defendant The Doan Law Firm, LLP licensed both Time Matters from LexisNexis and *BKexpress* from OTB.

On January 26, 2012, Defendants issued a document subpoena to LexisNexis pursuant to which LexisNexis produced documents on two separate occasions. (Non-Party LexisNexis' Mot. to Quash Dep. Subpoena 4.)

On August 14, 2012, Defendants issued a second subpoena to LexisNexis. (Non-Party LexisNexis' Opp'n to Defs.' Mot. to Compel 7.) On September 6, 2012, Defendants filed their Motion to Compel LexisNexis and Renewed Motion for

Sanctions against LexisNexis for Failure to Obey Subpoena without Adequate Cause. The court denied the motion by Order dated October 11, 2012 but granted Defendants leave to depose LexisNexis if the deposition was taken on or before November 2, 2012. Defendants at first sent LexisNexis a list of 80 topics to be included in the Rule 30(b)(6) deposition, then later reduced the list to 47 topics. (Non-Party LexisNexis' Mot. to Quash Dep. Subpoena Ex. 1, 7.)

On November 1, 2012, LexisNexis informed Defendants that its 30(b)(6) witness resided in California and requested that the deposition topics be further narrowed. (Non-Party LexisNexis' Mot. to Quash Dep. Subpoena Ex. 8.) On November 2, 2012, Defendants sent a revised list of 29 deposition topics. That same day, LexisNexis requested Defendants to identify dates for the deposition, but Defendants did not respond. (Non-Party LexisNexis' Mot. to Quash Dep. Subpoena 5, Exhibit 12; LexisNexis Status Report Ex. 5.)

The court held a general status conference on December 19, 2012. Through counsel, LexisNexis attended as a non-party. At the conference, the court indicated that in light of Defendants' inability to compel LexisNexis to appear at trial, the court would extend the time in which Defendants could depose LexisNexis but the deposition would be limited to five topics, because the court believed that such five topics could be stated broadly enough to allow Defendants to develop the testimony they deem critical to their case. The court did not otherwise agree to relax the requirements for stating topics as provided by Rule 30(b)(6). The court left open whether the Parties could reach agreement on the location for the deposition. The court requested a status report on the deposition by January 11, 2013.

Defendants and LexisNexis then exchanged a series of e-mails regarding the potential topics, place and date for the potential deposition. On December 28, 2012, Defendants identified four topics, loosely expressed, which sought testimony on:

- 1) "Time Matters – in the broadest sense . . .
- 2) Certified Independent Consultants – in the broadest sense and including any and all conceivable topics . . .
- 3) End User – all conceivable matters related to the Time Matters' End User;

4) Out of the Box Developers – in the broadest sense . . .”
(Non-Party LexisNexis’ Mot. to Quash Dep. Subpoena Ex. 14.) Expectedly,
LexisNexis opposed these topics as overbroad. (LexisNexis Status Report Ex. 2.)

On January 8, 2012, Defendants e-mailed LexisNexis to solicit dates for the deposition. (LexisNexis Status Report 3.) The Parties exchanged a series of e-mails on January 10, 2012. LexisNexis reiterated its objection to the breadth of topics but suggested six dates on which its witness could be available for deposition in California. (LexisNexis Status Report 4.) Defendants responded that counsel would issue a deposition for January 31, 2013 and would serve the deposition subpoena on Amy Worley who practices in the Raleigh office of McGuireWoods and who had previously accepted the document subpoena as counsel for LexisNexis. (Non-Party LexisNexis’ Mot. to Quash Dep. Subpoena Ex. 16.) Ms. Worley had signed filings made earlier in the case, but LexisNexis has never been a party to the litigation. LexisNexis’ counsel responded that LexisNexis is not a party, such that service on counsel is effective only with consent, and that Defendants had not yet requested McGuireWoods to seek such consent. (Non-Party LexisNexis’ Mot. to Quash Dep. Subpoena Ex. 17.)

On January 11, 2013, Defendants prepared a subpoena directed to LexisNexis and delivered it to a receptionist at McGuireWoods’ Raleigh, North Carolina office. (Non-Party LexisNexis’ Mot. to Quash Dep. Subpoena Ex. 18.) That same day, Defendants filed their status report with the court, indicating that Defendants had issued a Notice of Deposition and subpoena for LexisNexis to appear for a deposition on January 31, 2013 at 9:00 a.m. in Raleigh, and that LexisNexis had indicated it would not comply. (LexisNexis Status Report 1.)

On January 23, 2013, LexisNexis filed the current Motion seeking to quash the subpoena. LexisNexis attacks the service, the topics included in the subpoena, and the effort to compel LexisNexis to produce a witness in North Carolina.

DISCUSSION

Rule 45(c)(5), N.C. GEN. STAT. §1A-1 (2013) (“Rules”), provides that “[a] person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or other tangible things . . . may file a motion to quash or modify the subpoena.” A court should quash a procedurally defective subpoena. *Blue Ridge Pediatric & Adolescent Med., Inc. v. First Colony Healthcare, LLC*, 2012 NCBC LEXIS 46, at *34 (N.C. Super. Ct. Aug. 9, 2012).

Rule 4(j)(6) allows that service upon a domestic corporation may be made by delivering a copy to an officer, director, managing agent, or agent authorized to accept service of process, or by certified mail, return receipt requested. Rule 5 allows for service on counsel, but the rule is restricted to parties and does not govern service on non-parties. Unless covered under Rule 5, if the client has not otherwise consented, counsel is not an agent authorized to accept service for the client.

Rule 45 allows parties to subpoena documents and testimony from non-parties, and on its face does not contain language setting geographic limits on the subpoena. *AARP v. Am. Family Prepaid Legal Corp., Inc.*, 2007 NCBC LEXIS 4, at *7 (N.C. Super. Ct. Feb. 23, 2007). “But while the Rule appears to admit of no territorial limits on the power, it is elementary that the ‘subpoena power of a court cannot be more extensive than its jurisdiction.’” *Id.* (quoting *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988)). As for out-of-state non-parties, the appropriate procedure is to request a commission requesting that a subpoena issue from the court where the witness resides. *Id.* at *15.

LexisNexis is correct in its contention that attorneys for non-parties may accept service of a subpoena on behalf of their client only with client authorization. (Non-Party LexisNexis’ Mot. to Quash Dep. Subpoena 10.) There is no evidence that McGuireWoods had such authority. Delivery of the subpoena to the

McGuireWoods' Raleigh office did not then constitute proper service. (Non-Party LexisNexis' Mot. to Quash Dep. Subpoena 10.) LexisNexis has never been made a party, and the fact that McGuireWoods may have filed papers in the litigation for LexisNexis as a non-party does not authorize service on counsel pursuant to Rule 5. Defendants' argument to the contrary is without basis. (Defs.' Resp. to LexisNexis' Mot. to Quash 1.)

The court anticipates that Defendants may pursue a subsequent subpoena, so the court provides further direction on the disputes addressed in the Parties' briefs. Even had service on counsel been properly effected, Defendants cannot compel LexisNexis to present a witness in North Carolina. *AARP*, 2007 NCBC LEXIS 4.

The court has reviewed the e-mails exchanged as to potential deposition topics. The court does not believe the four topics reflected in Defendants' December 28, 2012 e-mail comply with Rule 30(b)(6)'s requirement that topics be stated with reasonable particularity. While the court encouraged some breadth in how the topics might be expressed, it did not invite the imprecision reflected in Defendants' listings. Seeking to avoid yet more unnecessary disagreement or motion practice, the court will state parameters pursuant to which it will allow Defendants, should they choose, to depose LexisNexis pursuant to Rule 30(b)(6). The court will state five topics which it will approve to be included in a notice of deposition. Either Defendants or LexisNexis may within five business days of this Order suggest a revised list of topics, not to exceed five in number, but no topic shall be included in a notice of deposition that has not been approved by the court. The deposition may proceed subject to the following limitations:

- 1) Defendants shall serve a deposition notice on LexisNexis as provided by Rule 4 absent LexisNexis authorizing counsel to accept service on its behalf;
- 2) Service shall be perfected on or before March 15, 2013;
- 3) Absent a request by LexisNexis that it be at a later date, the deposition shall be completed on or before April 5, 2013;
- 4) The deposition shall be taken in California; and

- 5) Absent revisions approved by the court as provided above, Defendants may include the following topics in the Rule 30(b)(6) deposition notice:
- a. The terms of licenses or agreements between LexisNexis and Out of the Box Developers, Inc. during the time period in which The Doan Law Firm licensed *BKexpress*;
 - b. The general terms of agreements between LexisNexis and its Certified Independent Consultants (“CIC”s), including restrictions, if any, which LexisNexis imposes on any third-party customization of Time Matters;
 - c. Limitations, if any, that LexisNexis imposes upon a CIC’s restricting a Time Matters end user access to or use of client data developed or maintained while using Time Matters or *BKexpress*;
 - d. Communications, if any, between LexisNexis and Out of the Box Developers, Inc. concerning Defendants;
 - e. LexisNexis’ awareness and understanding regarding customizations to Time Matters incorporated into *BKexpress* during the time that The Doan Law Firm licensed *BKexpress*.

CONCLUSION

The Motion to Quash is GRANTED. Defendants shall further pursue discovery from LexisNexis only as provided by this Order. In its discretion, the court does not award fees or costs in connection with this Motion. However, should further motion practice regarding discovery of LexisNexis be forthcoming, the court will consider the award of fees and costs, and reserves the right to include in its award any fee or expense incurred prior to the date of this Order.

IT IS SO ORDERED, this the 1st day of March, 2013.

/s/ James L. Gale
James L. Gale
Special Superior Court Judge
for Complex Business Cases