IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

OPENGATE CAPITAL GROUP LLC, *et al.*, Plaintiffs, v. THERMO FISHER SCIENTIFIC INC., Defendant.	C.A. No. 13-1475-GMS

SPECIAL MASTER ORDER RE: SUPPLEMENTAL EXPERT REPORT

On January 25, 2016, Opengate Capital asked that, pursuant to FRCP 26(e), I allow its damages expert to supplement his original report even though expert discovery concluded some months ago. Because plaintiffs had failed to disclose what I found to be patently discoverable damages-related information to Thermo Fisher before it provided the damages expert with that information, I held that plaintiffs would be precluded from using any of those documents affirmatively in its proof of damages at trial.[1] On December 29, 2015, Opengate Capital filed an objection to the specific order imposing that constraint.[2] The defendants' response to the objection was filed on January 15, 2016. Whether the Court agrees with my ruling or not is currently unknown and, according to plaintiffs, may not be known before the case shifts to

[1] For example, by not permitting their damages expert to rely on them during direct examination when his opinions were being initially elicited.

[2] Plaintiffs' objection is focused only on the so-called "May 2014 forward" set of documents (which included a number of financial records from Virginia Thornton), but my order also included another set of documents as well [the Hamilton Scientific post-closing records which also had Thornton documents]. See Special Master Opinion, dated November 30, 2015, p. 8.

intensive trial preparation activity.[3] Plaintiffs' logic is that, if Judge Sleet rejects their attack on the November 30, 2015 order, they will not have had the opportunity, without an authorizing order from me, to have their damages expert's report reflect the reality that certain of its present features are incapable of being used.

The Rule 16 Scheduling Order in this case, as subsequently amended, specifies that "Opening expert reports on which a party bears the burden of proof" were due on or before September 25, 2015 and that expert discovery would end by November 20, 2015. Plaintiffs' damages expert issued his report and was deposed consistent with those dates.

There is no literal provision for supplemental expert reports in the Rule 16 Scheduling Order, as amended. On the other hand, there is a provision in the Scheduling Order relating to pretrial disclosures: "Unless otherwise ordered by the Court, the parties should assume that filing the Joint Pretrial Order satisfies the pretrial disclosure requirement in Federal Rule of Civil Procedure 26(a)(3)."[4] There is no provision in the District of Delaware Local Rules regarding expert report supplementation. FRCP 26(e)(1), however, requires that a party "must supplement or correct its disclosure: (A) *in a timely manner* if the party learns that in some material respect the disclosure...is incomplete or incorrect" [emphasis added]. Under Rule 26(e)(2), for expert witnesses, the party's duty to supplement extends "both to information included in the report and

[3] Trial is scheduled for May 2, 2016, about three months from now. More significantly, the parties' proposed Pre-Trial Order, within which a list of evidentiary issues intended to be raised must be included, is due at the end of this month.

[4] Rule 26(a)(3): "**Pretrial Disclosures.** (A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial...:...(iii) an identification of each document or other exhibit...separately identifying those items the party expects to offer... (B) *Time for Pretrial Disclosures*...Unless the court orders otherwise, these disclosures must be made at least 30 days before trial." The Pretrial Order in this case is due to be filed on February 29, 2016.

to information given during the expert's deposition".[5] In addition, FRCP 26(a)(2)(D) requires that, in terms of timing, the disclosure of expert testimony must conform to the time specified in a court's order (presumably, its Scheduling Order) but, in the absence of a stipulation or order, no less than "at least 90 days before the date set for trial." Further, Rule 26(a)(E) mandates supplementation "when required under Rule 26(e)."

Here, plaintiffs contend that their damages expert's report, as it presently stands, is materially incomplete, thus satisfying the supplementation threshold in Rule 26(e)(2). The incompleteness, of course, is a direct product of my having undermined the Rule 702(b) and Rule 703 facts upon which that expert relies. Any supplementation obviously would require the expert to delete certain previous document references and sources, and then add different references (according to plaintiffs, to public and already-produced documents) as a prerequisite to attaining the correction.

Plaintiffs also contend that their expert's report, without supplementation, would be "defective" and "misleading" due to the absence of the excluded material; and that replacing that material is the only way to proceed under Rule 26(e)(2).

Finally, Opengate Capital posits that there will be no prejudice to the defendants under circumstances where, e.g., the expert's new report is issued on February 15, 2016 and defendants are given an opportunity for a supplemental but limited deposition of the damages expert sometime during the week that starts on February 29, 2016. Plaintiffs make no allowance for a counterpoint report by the defense damages expert or for the latter's deposition after that report is published.

[5] "Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due."

Thermo Fisher, quite naturally, takes the position that plaintiffs' request is demonstrably untimely and would inevitably conflict with the remaining deadlines set out in the Pretrial Order.[6] Indeed, the defendants posit, that conflict impairs the final, critical activities of the parties leading up to and including trial. In addition, defendants characterize plaintiffs' supplementational effort as a misuse of Rule 26(e). They rely on authority cited by Opengate Capital as distinguishing between legitimate supplementation and what plaintiffs would have me allow, claiming that supplementing an expert report is only permitted for "the narrow purpose of correcting inaccuracies or adding information that was not available at the time of the initial report." *Novartis Pharma. Corp. v. Actavis, Inc.*, 2013 WL 7045056, *7 (D. Del. 2013).

The defendants also contend that, overriding everything is plaintiffs' lack of diligence; that Rule 26(e) is not meant to be used as a safe harbor where a party has not been diligent.

The tension that exists between a party's on-going duty to supplement its discovery responses pursuant to Rule 26(e) and the limitations built into a case's Scheduling Order is sometimes difficult to reconcile. As the Court recognized in *Abbott Laboratories v. Lupin Ltd.*, 2011 WL 1897322, *3 (D. Del. 2011), while "parties are always under an obligation to supplement their contentions, including supplementing expert reports...parties may not use their obligation to supplement as an excuse to violate the clear terms of a Scheduling Order, unilaterally buying themselves additional time to make disclosures, thereby unduly prejudicing other parties and potentially delaying the progress of a case."

As both parties recognize, I must apply the so-called *Pennypack* or *Meyers* factors to the question I am asked to resolve. Those factors are:

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[6] The Court requires that all witness and evidentiary questions be resolved at the time of the Pretrial Conference (which is set for March 22, 2016) based on a presentation of such issues no later than the last day of February.

- The prejudice or surprise to the party against whom the evidence is offered.
- The ability of the opposing party to cure any prejudice.
- The extent to which allowing the evidence would disrupt an orderly and efficient trial.
- Whether there was any bad faith or willfulness in failing to comply with the court's order.
- The importance of the evidence being considered.

INVISTA N. America S.a.r.l. v. M&G USA Corp., 2013 WL 3216109, *2 (D. Del. 2013)[citing *Meyers v. Pennypack Woods Home Ownership Ass'n.*, 559 F.2d 894, 904-905 (3rd Cir. 1977)]; *Abbott Laboratories*, 2011 WL 1897322, *supra*, at *3; *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 719 (3rd Cir. 1997); *Allen v. Parkland School District*, 2007 WL 1228947, *4-5 (3rd Cir. 2007).

Here, having examined the *Pennypack* factors in the context of the factual background, I always come back to the reality facing Opengate Capital as of November 30, 2015. At that point, the plaintiffs had become aware that some, but not all, of the information upon which their damages expert had based his September 25, 2015 expert opinion was now unavailable to him. Putting aside the plaintiffs' belief that I had erred in one of my November 30 orders, plaintiffs' application to me for leave to serve a supplemental report was not delivered until January 25, 2016. This latter date was almost two entire months after plaintiffs had been confronted with the necessity of dealing with the gap(s) in their expert's report. I'm having trouble understanding why, if plaintiffs anticipated the possibility that Judge Sleet would affirm my November 30 order, they didn't act much sooner to seek relief from me? That is, given the imminent filing of

the Pretrial Order[7] as well as the subsequent trial date, plaintiffs should have foreseen the need to supplement their damages expert's report two months ago. In this regard, plaintiffs obviously made a conscious choice; as they put it, "Plaintiffs' initial efforts were directed to seeking reconsideration from the Special Master. When Your Honor denied that request (December 18, 2015), Plaintiffs then prepared the necessary motion directed to Judge Sleet (filed December 29, 2015)." They took this approach despite the absence of a rule requiring conformance to a particular sequence for seeking relief.

Obviously, this narrative begs the question: would application of the first three *Pennypack* factors (i.e., prejudice to Thermo Fisher, the defendants' ability to cure any prejudice and the extent to which allowing a supplemental report would disrupt an orderly and efficient trial) differ if the request to supplement came two months ago? As it is, Opengate Capital, in its letter memorandum to me, recognizes the prejudice caused by the timing of its request. To alleviate that prejudice, the plaintiffs offer to produce their expert's revised report by February 15, 2016 and to permit Thermo Fisher the opportunity to take a limited, 3-hour deposition during the week of February 29, 2016. What this offer does not take into account, though, is that plaintiffs' damages expert is not the only damages expert in this case. Plaintiffs have made no provision for the additional time that would be required to allow defendants to rebut the supplemental report (and the inevitable necessity of a deposition of the rebuttal expert). Putting aside that plaintiffs' supplemental report-deposition arrangement would overlap the February 29, 2016 Court-ordered due date for the Joint Pretrial Order, it does not accommodate the inevitable subsequent discovery, all of which could have taken place many weeks ago if I had granted

[7] According to the Rule 16 Scheduling Order, the Pretrial Order satisfies the pretrial disclosure mandate of Rule 26(a)(3); i.e., that is the date no later than which the parties must complete the process of disclosing trial-related witnesses and evidence.

plaintiffs' hypothetically more timely request then.

The last *Pennypack* factor is also implicated. Plaintiffs tell me that the supplemental report would "remove references to excluded documents and replace those with references to sources that are not precluded, including publicly available documents and other documents timely produced by Plaintiffs". It seems clear that, had he chosen to, plaintiffs' damages expert could have consulted those "publicly available documents" and/or "other documents timely produced" right after November 30, 2015 just as easily as now. In a case bearing some similarity to the circumstances of this case, Judge Andrews upheld my decision to reject a plaintiff's effort to introduce an unauthorized supplemental damages expert's report. *Robocast, Inc. v. Apple, Inc.*, 2014 WL 334199, *1 (D. Del. 2014)[some of the damages expert's opinions were no longer supported, compelling the Court to describe what occurred as "a tactical decision" rather than an inadvertent error or omission].

I do not find any bad faith in plaintiffs' late request to supplement; however, there is a form of "wilfullness" in their conduct, as described below, such that this *Pennypack* factor also weighs against them.

In terms of the last factor, importance, I do not doubt that damages is an important element of plaintiffs' proof. But, as Judge Jordan noted in *Chase Manhattan Mtg. Corp. v. Advanta Corp.*, 2004 WL 912949, *1 (D. Del. 2014), "if the evidence it now sought to bring into the trial were genuinely critical, Advanta could have and should have made a motion to supplement months ago, but it did not." I recognize the Third Circuit's concern about excluding "critical" evidence. *Konstantopolous v. Westvaco*, 112 F.3d 710, *supra*, at 719 [excluding critical evidence is an "extreme" sanction, not normally imposed absent willful deception or flagrant

disregard of court order]. On the other hand, the "flouting of discovery deadlines" has been the basis for decisions to exclude even critical evidence. *See*, *Withrow v. Spears*, 967 F. Supp. 2d 982, 1001 (D. Del. 2013); *Konstantopoulos v. Westvaco*, 112. F. 3d, *supra*, at 719. Moreover, as I have previously recognized,[8] courts applying the *Pennypack* factors in "sophisticated, complex litigation involving parties represented by competent counsel have been less indulgent" with respect to requests to supplement critical evidence. *Bridgestone Sports Co., Ltd. v. Acushnet Co.*, 2007 WL 521894, *4 (D. Del. 2007).

Plaintiffs have always known the importance of their damages proof. To apply to me two months after I excluded part of that proof in order to "correct" it not only subverts the notion of its criticality, but also constitutes sufficient flouting of discovery deadlines by failing to conform to the Rule 26(e) requirement that a party's disclosures must be made "in a timely manner". Opengate Capital knew or should have known there might be a day of reckoning. That day is today.

Plaintiffs' request to serve a supplemental damages expert report is denied. IT IS SO ORDERED.

Special Master

Dated: February 1, 2016

[8] *Robocast, Inc. v. Apple, Inc.*, 2013 WL 7118691, *2 (D. Del. 2013).