

**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 OPINION RE: CROSS-MOTIONS FOR SANCTIONS

Certain problematic and to some extent complicated issues persist following the conclusion of fact discovery. Each party cites FRCP 37(b)(2)(A) as the operative authority justifying sanctions for discovery misconduct.¹ Generally, the defendants claim that plaintiffs failed to comply with various discovery orders, with the result that they did not have documents that could have been used during the fact discovery period. The plaintiffs assert that defendants also failed to obey discovery orders, in connection with non-production of documents and a Rule 30(b)(6) deposition. Both parties have fully briefed these issues and a hearing was held on November 9, 2015. In addition, there were post-hearing submissions from both sides. Because defendants' motion was filed first, I will address it before I deal with plaintiffs' motion.

I. DEFENDANTS' MOTION FOR SANCTIONS

A. Plaintiffs' Failure to Produce Damages Related Documents.

The defendants initially cite plaintiffs' failure to comply with a June 11, 2015 order

¹ The parties understand that their respective motions for spoliation-related sanctions are beyond the purview of my authority as Special Master and that they will have to apply to the Court if they seek any such sanctions. Both parties

which required plaintiffs to follow-through with their verbal commitment at the June 5, 2015 discovery dispute hearing to produce “the damages-related documents sought by the defendant together with all metadata. This includes, *e.g.*, if not already produced...post-closing financial information such as business reports...”²

A number of damages-related financial documents from the files of Virginia Thornton, Opengate Capital’s financial information liaison to Hamilton Scientific, the entity which operated the Reynosa, Mexico lab workstation fabricating plant after October 2012, were eventually produced, but not to the defendants. Instead, they were sent to plaintiffs’ damages expert, Dr. Jeffrey Kinrich. The defendants only received them when Dr. Kinrich’s report was generated in late September 2015. Thermo Fisher claims that, having been deprived of these financial documents while fact discovery was still on-going, it could not utilize them in taking depositions of plaintiffs’ witnesses or conducting third-party discovery. Opengate Capital takes the position that defendants are “making a mountain out of a mole hill”: that Dr. Kinrich doesn’t rely on these documents; that defendants’ review of the “May 2014 forward” documents vitiated plaintiffs’ obligation to produce a responsive set of those documents (which, pursuant to two other Special Master Orders,³ had been “dumped” on Thermo Fisher without a responsiveness review at the end of July 2015); and, that these documents are not relevant to plaintiffs’ theory of

ask me, nevertheless, to impose profound sanctions which they contend are not dependent upon a finding of spoliation but which they believe are contemplated by Rule 37(b)(2)(A).

² Special Master Opinion, dated June 11, 2015, p. 5.

³ Specifically: (1) Special Master Opinion, dated July 15, 2015, p. 2, required production of the May 2014 forward documents by July 17, 2015, and (2) Supplemental Special Master Order, dated July 17, 2015, in response to plaintiffs’ learning that there were, in fact, actually 74,000 such documents, required an immediate digital transfer of the unsearched documents, as well as a subsequent responsiveness review. And, the Supplemental Special Master Order of July 24, 2015 cited the practical choice that defendants had in terms of what they could do with the transferred May 2014 forward documents.

damages⁴ in any event in the sense that they were “financial” but not “damages-related” documents.

The trouble I have with the plaintiffs’ position regarding these documents is at least three-fold: (i) to contend that their theory of damages was evolving and thus they were not required to produce financial documents originally, or even later in response to my June 11 order, ignores that, after fact discovery ended, plaintiffs gave the Thornton documents to their expert but not to Thermo Fisher, (ii) plaintiffs disregard their continuing obligation⁵ to disclose potentially-relevant information, and (iii) it reflects an ostrich-like approach to discovery that runs directly contrary to what the Federal Rules require.

FRCP 26(a)(1)(A)(iii) mandates disclosure of “documents or other evidentiary material” on which a party’s damages claims are predicated.⁶ This is especially true for the plaintiffs where, as described by plaintiffs’ counsel at the November 9 hearing: “[W]e’ve been after Virginia Thornton since February or March. We knew she was key.” In fact, Ms. Thornton was listed on plaintiffs’ Initial Disclosures (item 1.b.ii.) as an individual “likely to have discoverable information.”⁷ Given these facts and defendants’ multiple requests for the Thornton records,⁸ what legal basis could plaintiffs possibly have for not producing these “financial” documents

⁴ Plaintiffs posit that their damages theory relates to reliable institutional customers discontinuing their business relationships with them in light of the revelation of cartel activity in proximity to the Reynosa facility but, as I will now explain, I fail to understand how finally settling on that theory justifies a failure to produce financial records in the context of discovery.

⁵ FRCP 26(e)(1)(B), for example, expects supplementation of a Rule 26(a) disclosure without one’s opponent requesting such.

⁶ Opengate Capital’s initial disclosures were served on August 15, 2014.

⁷ Plaintiffs’ Amended Initial Disclosures (item 1.c.ii.), dated July 21, 2015, continued to list Ms. Thornton the same way. And, their Supplemental Initial Disclosures, dated November 23, 2015, retained the same designation.

many months ago?

While plaintiffs claim that defendants' should have followed up with even further requests for the Thornton documents, there was a court order requiring plaintiffs to produce the May 2014 forward documents (which contained at least some Thornton documents). It goes without saying that the individual at Opengate Capital charged with monitoring, collecting or otherwise tracking the performance of a subsidiary company through periodic financial reports to the parent would be at least one of the custodians whose records would be placed in a litigation hold⁹ and preserved. Plaintiffs' assertion that their responsiveness searches of the post-closing Hamilton Scientific and the May 2014 forward documents using the agreed-upon search protocol, didn't reveal financial records, is not an adequate excuse since it seems fairly evident that using only the agreed-upon search terms would not pick up financial records.

Putting aside the evolving nature of plaintiffs' damages theories, it is difficult to conceive of a situation under which Hamilton Scientific's post-closing financial records in the custody of an Opengate employee should not have been disclosed simply on the basis that, even if not ultimately admissible into evidence, they might lead to the discovery of admissible evidence on the issue of damages.¹⁰ I note, incidentally, that on July 10, 2015 Thermo Fisher noticed Ms. Thornton's deposition for July 30, 2015, the latter being a date within 4 days of the end of the

⁸ Why else would plaintiffs look for documents in the custody of a "key" individual unless (a) the defendants had requested them, and/or (b) plaintiffs knew/suspected their real or potential importance?

⁹ Previous Special Master proceedings have revealed that, despite anticipating litigation shortly after closing in October 2012, Opengate Capital only imposed a litigation hold for its custodians as of May 23, 2013.

¹⁰ I am aware by the way that, effective tomorrow, December 1, 2015, a revised FRCP 26(b)(1) deletes the reasonably-calculated-to-lead-to-the-discovery-of-admissible-evidence criteria for discoverability, and substitutes a "proportionality" concept that, *e.g.*, emphasizes "the importance of the issues at stake" and "the parties' relative access to relevant information," etc., but the standard that will have preceded these changes is still applicable as of the date of this opinion.

fact discovery period; however, plaintiffs assert that her deposition never occurred.¹¹ In the overall scheme of things, though, the failure to take Ms. Thornton's deposition is immaterial to plaintiffs' duty to timely produce the financial records of which she was the custodian.

Finally, Opengate Capital claims that it was excused from producing Ms. Thornton's financial records because defendants chose to search the May 2014 forward documents (which contained, as noted earlier, some of the Thornton financial documents) at their own expense rather than wait until plaintiffs had reviewed them for responsiveness and privilege. Plaintiffs contend that, because defendants performed a rudimentary search of the mass of May 2014 forward documents upon receipt and then used some of those documents in depositions and in support of the defendants' letter memorandum to the Court seeking permission to file a dispositive motion, plaintiffs were no longer under any duty to further comply with my order. This contention unsuccessfully attempts to avoid plaintiffs' own unilateral duty of disclosure described earlier. Moreover, my July 24, 2015 Supplemental Order¹² stated unequivocally my expectation that plaintiffs would conduct a responsiveness review of the May 2014 forward documents, and plaintiffs could not reasonably have interpreted it otherwise. That the defendants chose to do their best to utilize plaintiffs' non-reviewed documents, in the face of numerous last-minute depositions occurring in the remaining few days before fact discovery ended, was an anticipated creature of those circumstances, not evidence of a choice that relieved plaintiffs of

¹¹ Defendants claim that the deposition ultimately wasn't taken because they never received any of Ms. Thornton's records.

¹² See footnote 3 above.

any responsibility under my order.¹³ Ultimately, whatever efforts defendants expended in that time period¹⁴ did not alleviate plaintiffs' underlying obligation to conduct a responsiveness search and privilege review of the May 2014 forward documents, an exercise that was explicit in my orders; it was an exercise that plaintiffs' counsel eventually insisted be accomplished notwithstanding the great expense involved and plaintiffs' unjustified interpretation of the applicable order.

Objectively, plaintiffs should have known about not only the existence of the May 2014 forward documents (a lapse for which they have been previously sanctioned), but their scope and size, long before their failure to produce them was brought to my attention by defendants. Despite having been ordered to produce those records, plaintiffs' document management scheme had enough leaking holes that further sanctions were imposed. The production of these documents was anticipated after a responsiveness search and privilege review inevitably reduced their numbers.

Both parties asked me to defer ruling on the financial records issue until after the deposition of Dr. Kinrich to see if he did or did not rely on them. I have now reviewed the transcript of the Kinrich deposition, taken on November 16, 2015. Plaintiffs' damages expert testified on multiple occasions that he relied upon various Hamilton Scientific post-closing financial records such as "control books," "quarterly business reviews," "Hamilton Actual Monthly Financials," "monthly reports," and "Income Statements." Dr. Kinrich relied, as well, on telephonic communications with Virginia Thornton. Although the expert did not base his

¹³ In fact, I directed plaintiffs to immediately transfer these records electronically to the defendants with the expectation that defendants would expend some effort to review the transferred files so that they might find a few that could be useful in the days remaining before fact discovery ended.

¹⁴ Plaintiffs are incredulous that defendants' search was anything other than full-blown.

entire damages analysis on those discussions, his calculations and projections incorporated them in a number of respects. Thus, there can be no question that the documents for which Thornton was the custodian should have been located and produced to defendants at least seven or eight months ago.

Plaintiffs' unfathomable failure to do so violates not only FRCP 26(a)(1), but also the Court's order of March 18, 2015 (in which the date for substantial completion of document production was extended [a second time] from March 1, 2015 to March 26, 2015), as well as my orders of June 11, 2015 and July 15, 2015. That defendants had an opportunity to question Dr. Kinrich about his reliance on documents that had previously been withheld does not cure the prejudice created by their non-production. Had these financial documents been produced on a timely basis, defendants would have been in a position to take Ms. Thornton's deposition during the fact discovery period. That deposition in turn would probably have allowed defendants to be better prepared for the damages expert's deposition and to take other steps to counteract plaintiffs' damages theory in whatever evolutionary stage it had reached.

Plaintiffs' violation of both the Court's and my discovery orders by not producing responsiveness-searched financial records until after the fact discovery cut-off deserves to be sanctioned under FRCP 37(b)(2)(A). Defendants ask that I implement mechanisms under Rule 37(b)(2)(A)(ii) to preclude plaintiffs from introducing evidence showing that drug cartel activity harmed the Hamilton Scientific business. In this regard, they also ask me to order an adverse inference that plaintiffs' business was not harmed by cartel activity. In the alternative, defendants seek an order barring plaintiffs from using documents from any of the July "document dumps" or damages-related documents not produced by June 12, the date by which I originally ordered their production.

In light of the plaintiffs' consistent lack of compliance with orders relating to documents', including financial records, production, it is difficult to envision any remedy short of a very serious one.¹⁵ Under these circumstances, although I decline to implement either of the more severe sanctions that defendants would prefer, pursuant to FRCP 37(b)(2)(A)(ii) I will preclude plaintiffs from affirmatively using¹⁶ any document from either the late-produced Hamilton Scientific post-closing data base or the late-produced May 2014 forward data base to support their damages proof at trial. *See, e.g., Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 100, 105 (D.N.J. 2006)(precluding sanctioned party from introducing evidence as remedy for, *inter alia*, "deliberately causing [opponents] to conduct depositions hindered by an incomplete set of each deponents' documents, and causing [opponents] to prepare their case, including summary judgment motions, without full discovery"). Further, consistent with Rule 37(c), plaintiffs must pay defendants' reasonable expenses, including one-third (1/3) of their attorneys' fees, incurred in presenting the motion for sanctions. Defendants shall account to me for such expenses by December 18, 2015. IT IS SO ORDERED.

B. Plaintiffs' Failure to Produce Pre-Closing "Hamilton Fisher" Documents.

The second deficiency defendants cite is plaintiffs' failure to produce pre-closing "Hamilton Fisher" ("Hamilton Scientific" after October 2012) documents for six custodians after

¹⁵ Each litigant cited the important Third Circuit case, *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984), for the application of six criteria to determine whether a trial court abused its discretion. That both parties cited *Poulis* is perhaps coincidental, perhaps not. From my perspective, however, the *Poulis* factors need not be addressed unless the sanction being applied is the most profound one, *i.e.*, dismissal. To the extent that some of those factors must still somehow be applied in a situation like I am confronted with here, I have considered and satisfied at least 4 of the 6 factors, having found: the plaintiffs' personal responsibility, prejudice to the defendants, a history of dilatoriness, and the effectiveness of sanctions other than dismissal. Not all factors need to be met even for a dismissal to be justified. *Hicks v. Feeney*, 850 F.2d 152, 156 (3d Cir. 1988).

a responsiveness review and in a format required by the District of Delaware Default Standard for Discovery, Including Discovery of Electronically Stored Information (“DDSD”).

Plaintiffs’ proffered explanation for failing to conduct a responsiveness review--a task plaintiffs committed to undertake--falls significantly short. First, plaintiffs contend that their production of these documents followed a search using the agreed-upon search terms; however, they did not limit that production to those responsive to defendants’ request (*i.e.*, documents from only six custodians), instead producing documents from all of plaintiffs’ custodians. Second, plaintiffs assert that Thermo Fisher, as the entity committing a fraud and thus by definition anticipating eventual litigation, had a duty to preserve records and issue a litigation hold.¹⁷ Plaintiffs offer no legal authority for this extraordinarily creative proposition, however, and concede there is none. Finally, plaintiffs assert that, because these documents were originally Thermo Fisher’s, and that the latter had an obligation to retain them post-closing, to follow-through as ordered would essentially reward the defendants for failing to abide by the terms of the Sales Agreement. This assertion, though, ignores not only plaintiffs’ written commitment, but also my order of July 15, 2015. In fact, I resisted defendants’ subsequent request for clarification of that order by noting on July 24, 2015 that I expected plaintiffs to specifically comply with “the agreed protocol” or risk further sanctions.¹⁸ A “responsiveness review of these documents” [*i.e.*, the pre-closing Hamilton Fisher set] required such compliance. Based on plaintiffs’ own representation regarding the lengthy amount of time it would take to complete, the agreed

¹⁶ Effectively, this means that, although plaintiffs cannot, in the first instance, offer any of these data bases’ documents into evidence, through any witness, fact or expert, they can subsequently use any such document if defendants refer to it/them for any purpose.

¹⁷ Which, in this case, would have required the defendants to preserve records as soon as closing occurred.

¹⁸ Supplemental Special Master Order, dated July 24, 2015, p. 1.

protocol included “the necessary participation of an outside vendor and pre-release review by counsel.”¹⁹

Yet, when pre-closing documents were produced, as ordered by me, on July 27, 2015, they had not been subjected to a complete responsiveness review. Moreover, they did not contain mandatory metadata fields and were delivered in a native format. The Court required use of the DDSO in this action by order dated July 28, 2014. Paragraph 5.e. of the DDSO requires the producing party to provide two dozen types of metadata fields. Defendants posit that the plaintiffs did not comply with this mandatory, non-aspirational aspect of the DDSO.²⁰

More significantly, as far as I can tell, plaintiffs have still not produced a searchable data base of responsive documents. Again, the prejudice to defendants is obvious in that the latter were prevented, *e.g.*, from using documents in depositions or in connection with their letter brief seeking authority to file a dispositive motion. Accordingly, defendants ask that I preclude plaintiffs from using any documents from this set. On the other hand, defendants concede that any pre-closing Thermo Fisher documents plaintiffs obtained from defendants’ own production, or from other sources, could be used at trial.

Ultimately, I’m faced, on the one hand, with what seems to be an intentional violation of my July 15, 2015 order. On the other hand, I’m confronted with a potential remedy which is designed to eliminate at least some of plaintiffs’ documentary evidence of defendants’ pre-closing knowledge of drug cartel activity adjacent to the Reynosa facility. Yet, given that this latter cat is already out of the bag in that Thermo Fisher readily acknowledges its pre-closing

¹⁹ Special Master Opinion, dated July 15, 2015, p. 2, footnote 1.

²⁰ See transcript of March 11, 2015 discovery dispute teleconference with Judge Sleet, p. 27, lines 24-25: “That is my directive.”

recognition of drug cartel activity, limiting plaintiffs' ability to make use of some Hamilton Fisher documents dated before October 2012 makes sense. Accordingly, pursuant to Rule 37(b)(2)(A)(ii), plaintiffs are precluded from using affirmatively at trial²¹ any document from this pre-closing data base of Hamilton Fisher documents. *See, e.g., Delaware Art Museum, Inc. v. Ann Beha Architects, Inc.*, C.A. No. 06-481 (GMS), March 10, 2008 bench ruling (D. Del. 2008)[precluding testimony of a witness and use of documents produced late and without appropriate searchable metadata].

But, there is a further sanction required for this specific failure. By not conducting the second phase of the responsiveness review, and thus having not fully complied with my July 15, 2015 order, plaintiffs have added insult to injury. Under these circumstances, plaintiffs must re-produce to defendants the pre-closing Hamilton Fisher documents after the required counsel review for responsiveness.²² This will be undertaken at plaintiffs' sole expense and must be completed by December 15, 2015. In addition, pursuant to Rule 37(c), plaintiffs must pay defendants' reasonable expenses, including one-third (1/3) of their attorneys' fees²³, incurred in bringing the motion for sanctions. Defendants must submit to me their accounting for these items no later than December 18, 2015. IT IS SO ORDERED.

C. Plaintiffs' Failure to Timely Review and Produce Documents.

The final discovery deficit raised by the defendants stems from their belief that Opengate Capital also violated the July 15, 2015 opinion by its failure to timely produce a responsiveness-

²¹ See footnote 16.

²² This sanction may appear to be non-functional in the sense that plaintiffs must complete this project in the face of their not being able to use any documents from this data base. However, the defendants might chose to use these documents despite the possible evidentiary consequences.

²³ This 1/3 is in addition to the 1/3 imposed earlier.

cleared set of documents following the “document dump” of tens of thousands of items at the end of July. Of course, this is part of the same factual frame of reference for defendants’ first issue regarding damages-connected sanctions²⁴. It was only on October 2, 2015, after the defendants filed their reply brief in support of their motion for sanctions, that Opengate Capital finally served its full-responsiveness set of May 2014 forward documents such that the total had been reduced to about 6,400.²⁵

I have already addressed the plaintiffs’ excuses for that extraordinarily late production and have imposed appropriate sanctions in connection with the plaintiffs’ damages proof. To further sanction the plaintiffs under Rule 37(b)(2)(A) for this abject failure is unnecessary, and I decline to do so. However, it is necessary to invoke Rule 37(c) here. Consequently, plaintiffs must pay defendants’ reasonable expenses, including one-third (1/3) of its attorneys’ fees, incurred in presenting the motion for sanctions²⁶. Defendants must account to me for these items no later than December 18, 2015. IT IS SO ORDERED.

II. PLAINTIFFS’ MOTION FOR SANCTION

A. Defendants’ Failure to Produce Further Records.

For its part, Opengate Capital raises two unrelated issues as deserving of critical attention, including defendants’ failure to produce attachments to twenty-eight documents,

²⁴ See p. 5 above.

²⁵ Thermo Fisher points out in a motion “up-date” that, of these 6,000+ documents, plaintiffs still did not produce, *e.g.*, any of the Thornton documents that were in the July 27 data dump, or any that were used at various depositions. My assumption regarding this apparent further anomaly is that Opengate Capital simply continued to use the agreed-upon search terms, so that, for example, Ms. Thornton’s documents would still not be identified. Inevitably from my perspective, the preclusive sanction I have already imposed for the plaintiffs’ failure to produce the Thornton financial records adequately deals with the compound nature of the problem.

²⁶ In the aggregate, obviously, the total amount of defendants’ reasonable expenses in connection with their motion for sanctions will include the entirety of defendants’ attorneys’ fees incurred for that purpose.

citing, *e.g.*, “self-selection” and inadequate functioning of word search protocols. The document-related issue is easy to resolve since it is really a non-issue, having been specifically raised by plaintiffs and decided by me previously. See Special Master Opinion dated September 8, 2015, pp. 1-3.²⁷ Consequently, I will deny the plaintiffs’ request for sanctions with respect to the document production matter. IT IS SO ORDERED.

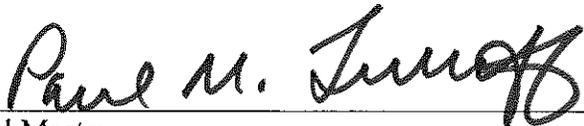
B. Defendants’ Failure to Adequately Prepare a Rule 30(b)(6) Witness.

Plaintiffs claim that there was an inadequately prepared Thermo Fisher witness for the “do-over” Rule 30(b)(6) deposition I ordered on September 8, 2015. I have read the transcript of John Piccione’s deposition. Mr. Piccione is the Associate General Counsel for Mergers and Acquisitions of Thermo Fisher and he was designated by the defendants as the witness most knowledgeable about various items raised during the earlier Rule 30(b)(6) deposition of Scott Mazur, another attorney (perhaps not coincidentally a member of the defendants’ “core deal team”) who had been previously designated by Thermo Fisher. I determined that Mazur had not been adequately prepared to respond to about one-half of the topics identified by Opengate Capital. As a result, I compelled the subsequent Rule 30(b)(6) deposition, totally at defendants’ expense.

As evidence of Piccione’s purported lack of preparation, plaintiffs focus almost exclusively on his answer to a single question: whether he had personally inquired of Thermo Fisher upper management if, despite an unequivocal confirmation that no literal disclosure had occurred (for reasons that Piccione explained), any consideration was given to disclosing to the prospective buyer of the lab workstation business that there had been drug cartel activity in the vicinity of the Reynosa plant prior to the sale in October 2012. Initially, the adequacy of Rule

²⁷ I also dealt with this subject, at least tangentially, in my first Special Master Opinion, dated June 11, 2015, p. 2.

30(b)(6) deposition preparation has never, as far as I can tell, been found to justify sanctions simply upon the basis of the witness' response to *one* question. The applicable case law²⁸ reflects a standard for Rule 30(b)(6) deposition preparation that does not require perfection, but only a good faith effort. Moreover, based on my review of the Piccione transcript, I do not find his preparation to have been inadequate in any respect or lacking in good faith. Accordingly, plaintiffs' application for sanctions deriving from the Piccione deposition is denied. IT IS SO ORDERED.



Special Master

Dated: November 30, 2015

²⁸ For example, as cited in Special Master Opinion dated September 8, 2015, pp. 4 and 7.