

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TRACINDA CORPORATION, :
a Nevada Corporation, :
 :
Plaintiff, :
 :
v. : Civil Action No. 00-993-JJF
 :
DAIMLERCHRYSLER AG, a Federal : CONSOLIDATED
Republic of Germany :
corporation; DAIMLER-BENZ AG, :
a Federal Republic of Germany :
corporation; JÜRGEN SCHREMPP, :
a citizen of the Federal :
Republic of Germany; and :
MANFRED GENTZ, a citizen of :
the Federal Republic of :
Germany, :
 :
Defendants. :

A. Glichrist Sparks, III, Esquire, Alan J. Stone, Esquire, and
Natalie J. Watson, Esquire of MORRIS, NICHOLS, ARSHT & TUNNELL,
Wilmington, Delaware.

Of Counsel: Terry N. Christensen, Esquire, Mark G. Krum, Esquire
and Eric P. Early, Esquire of CHRISTENSEN, MILLER, FINK, JACOBS,
GLASER, WEIL & SHAPIRO, LLP, Los Angeles, California.
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FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, New York, New York.
Attorneys for Plaintiff Tracinda Corporation.

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Delaware.

Of Counsel: Jonathan J. Lerner, Esquire, Lea Haber Kuck, Esquire
and Joseph N. Sacca, Esquire of SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP, New York, New York.
Attorneys for Defendants DaimlerChrysler AG, Daimler-Benz AG,
Jürgen Schrempp and Manfred Gentz.

MEMORANDUM OPINION

April 20, 2005
Wilmington, Delaware


Farnan, District Judge.

Presently before the Court is a Motion For Sanctions (D.I. 956) filed by Tracinda Corporation ("Tracinda") as a result of Defendants' late production of 61 pages of documents (the "Valade Notes"), consisting largely of handwritten notes taken by Gary Valade, the Chief Financial Officer of Chrysler and one of the principal participants in the negotiation of the Merger between Daimler-Benz AG and Chrysler Corporation. The Court has already ruled on Tracinda's requests for trial remedies, denying and mooted those requests in oral rulings codified in a written Order entered on March 31, 2005. The Court also granted Tracinda's request for costs in the March 31, 2005 and will enter an Order awarding Tracinda \$556,061, an amount representing 50% of the fees incurred by Tracinda plus the actual expenses incurred in connection with Defendants' late production of the Valade Notes.

I. Background

The trial in this action was recessed on December 16, 2003, after the Court reviewed the Valade Notes and heard applications and argument from the parties concerning the late production of the Notes. The Court concluded that it could not rule on the applications until a hearing was held regarding the factual circumstances of the production problem, and therefore, the Court referred the parties to the Special Master for a hearing.

The Special Master held a hearing on December 22, 2003, and issued a report on January 12, 2004 detailing his findings. Tracinda filed objections to the report on January 21, 2004.

Shortly thereafter, Tracinda filed the instant Motion For Sanctions requesting the following relief: (1) that Valade be barred from testifying about the subject matter of his notes except in response to questions about the notes by Tracinda and the Court; (2) that Jürgen Schrempp and Thomas Stallkamp be recalled to testify at trial; and (3) that Defendants, jointly and severally, be ordered to pay Tracinda all of its fees and costs incurred from December 16, 2003, through and until the conclusion of trial.

At the teleconference on January 30, 2004, the Court denied Tracinda's request to preclude Valade from testifying except in response to Tracinda and the Court's questions, stating that the Court would "permit [Valade] to testify about all matters" and "consider any objections to that testimony on a showing of undue prejudice post-trial." Tr. 1/30/04 at 4-5. As for Tracinda's request to recall Schrempp and Stallkamp, Defendants agreed to Tracinda's request to have those witnesses recalled. Accordingly, the first two forms of relief sought by Tracinda have been denied and mooted, respectively, and the Court has entered an Order to that effect. The Court's Order also indicated that Tracinda's motion for sanctions would be granted.

The Court's reasoning for that decision and its determination regarding the amount of costs owed to Tracinda follows.

II. The Parties' Contentions

By its Motion, Tracinda contends that it is entitled to attorneys' fees and costs pursuant to Federal Rules of Civil Procedure 16(f), 37(b)(2), and 37(c)(1) as a result of Defendants' failure to comply with the September 25, 2002 discovery order issued by the Special Master and the Court's Rule 16 Scheduling Order. Tracinda contends that Defendants' delay in producing the Valade Notes was consistent with their pattern of dilatory conduct in discovery throughout this litigation. Tracinda further contends that it has suffered such a high degree of prejudice that it need not show willfulness or bad faith on the part of Defendants to be entitled to sanctions. Specifically, Tracinda contends that timely production of the Valade Notes would have (1) permitted Tracinda to use them in developing its theories of the case, (2) impacted its decision regarding who to depose, (3) helped determined the order in which to depose witness, i.e. Valade would have been deposed earlier; (4) affected the substance of the depositions and trial testimony. In addition, Tracinda contends that motion practice in the case was negatively affected, because Tracinda could have bolstered its response to Defendants' summary judgment motion had it known about the missing Valade Notes.

In response, Defendants contend that the Special Master never made any findings that Defendants acted in a dilatory manner with respect to discovery, and with respect to the production issue concerning the Valade Notes, the Special Master found that Defendants and their counsel "did not intentionally or in bad faith withhold relevant documents from production." D.I. 944 at 3. Accordingly, Defendants contend that no basis exists for awarding Tracinda monetary sanctions.

III. DISCUSSION

A. Whether Tracinda Is Entitled To Its Costs In Connection With Defendants' Late Production Of The Valade Notes

In pertinent part, Federal Rule of Civil Procedure 16(f) provides:

If a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

The imposition of monetary sanctions under this rule does not require a showing of bad faith.¹ See Martin Family Trust v.

¹ See also Ayers v. City of Richmond, 895 F.2d 1267, 1270 (9th Cir. 1990) (affirming sanctions imposed on lawyer for failure to attend settlement conference because "the date 'slipped by him'"); Santos v. U.S. Dept. of Housing and Urban

HECO/Nostalgia Enterprises, Co., 186 F.R.D. 601 (9th Cir. 1999) (collecting sources and stating that "[b]oth courts and commentators agree that sanctions may be imposed for a party's unexcused failure to comply with a Rule 16 order, even if that failure was not made in bad faith"). Rather, the "intent [of Rule 16(f)] is to impose the sanction where the fault lies." In re Matter of the Sanctions of Jay C. Baker, 744 F.2d 1438, 1440-1441 (10th Cir. 1984) (recognizing importance of scheduling orders and court's broad discretion to award sanctions to insure that lawyers and parties "fulfill their high duty to insure the expeditious and sound management of the preparation of cases for trial"). The purpose of sanctions under Rule 16 is "to compensate opposing parties for inconvenience and expense incurred because of any noncompliance with the reasonable management orders of the court." Id.; see also 3 James W. Moore, Moore's Federal Practice § 16.92[5][b][ii] (3d ed. 2003) (stating that Rule 16 sanctions serve the purpose of "compensation and punishment").

Although the Special Master found in his January 12, 2004 Report that Defendants did not act intentionally or in bad faith in withholding the relevant documents from production, the Court concludes that sanctions are warranted in the circumstances of

Dev., 1992 WL 165677, *10 (E.D. Pa. 1992) (recognizing that "court may impose a punitive sanction for even negligent noncompliance with Rule 16").

this case. The Court's Rule 16 Scheduling Order provided for a discovery cut-off date of January 15, 2003. The Valade Notes were highly relevant to issues raised throughout this litigation, yet those notes were produced eleven months after the Court's discovery deadline, on the eve of the last day of trial. As a result of this late production, the Court was required to recess the nearly completed trial and refer this matter to the Special Master for further inquiry into the circumstances surrounding the late production. The remaining days of trial needed to be rescheduled, and trial could not be reconvened until the beginning of February 2004.

In addition to its impact on judicial resources, including the Court's schedule and the management of the trial in this case, the Court also finds that Tracinda was prejudiced to some extent by the delay in production. While the Court tailored the remainder of the trial so as to reduce the prejudice to Tracinda, the Court could not completely obviate the effect of the late production on Tracinda's ability to develop its case, including most particularly its impact on Tracinda's decision of who to depose, the order of depositions and the substance of its deposition questioning, as well as the substance and conduct of the trial prior to the revelation of the documents.

Although Defendants have offered possible explanations for the delay in production, the Court concludes that those

explanations do not amount to substantial justification for the disregard of the Court's Scheduling Order. Indeed, Defendants acknowledged that the Valade Notes were responsive to discovery requests designed by Tracinda and should have been produced during discovery. Thus, it is clear to the Court that, regardless of the reason for the failure to produce these documents, the fault for this production failure and the related delays and proceedings which followed, lies with Defendants. Accordingly, Tracinda is entitled to compensatory sanctions.

B. Whether The Costs Tracinda Seeks Are Reasonable

Having concluded that sanctions should be awarded to Tracinda, the Court must next determine the amount of the award. Initially, Tracinda requested reimbursement of all of its fees and expenses, and Defendants responded that it would be inappropriate for Tracinda to recover fees or costs incurred in connection with (1) the December 22, 2003 hearing before the Special Master, (2) Tracinda's appeal of the Special Master's findings, 3) Tracinda's motion for sanctions, and (4) the conclusion of trial. However, Tracinda has since modified its request. Specifically, Tracinda requests only half of the fees it incurred plus actual expenses, an amount totaling \$556,061, in

order to avert the need to litigate any question concerning the reasonableness of the fees and expenses it seeks.²

Defendants have filed additional briefing challenging the reasonableness of the fees Tracinda requests. Specifically, Defendants contend that Tracinda's affidavit is insufficient to satisfy its burden of demonstrating the reasonableness of its fees, because Tracinda did not submit its actual billing records and only submitted a summary of the hours expended by its attorneys and others without any detail as to the task performed by each of these individuals. Defendants also challenge the amount sought by Tracinda on the grounds that Defendants should not be charged for (1) Tracinda's analysis of "other documents of Gary Valade," (2) Tracinda's preparation for the examination of Mr. Valade, and (3) Tracinda's re-examination of Stallkamp, because the re-examination did not focus on the Valde notes, because these tasks had to be performed regardless of the late production of the Valade Notes and/or are not connected to the late production of the Valade Notes.

In the Court's view, the categories of tasks objected to by Defendants are properly considered in the sanctions award to the extent that those tasks needed additional attention in light of

² Tracinda's counsel represents that it expended 2300 hours resulting in fees of approximately \$870,000. Tracinda has also specified that the costs and fees it seeks in connection with the conclusion of trial pertain to the reexamination of Messrs. Schrempf and Stallkamp.

the late production of the Valade Notes. The Court is further persuaded that the amount Tracinda seeks is reasonable, and therefore, the Court will not parcel out the actual expenses for any of the objected to activities referred to by Defendants.³ Accordingly, the Court will order Defendants to remit to Tracinda \$556,061 in costs.

IV. CONCLUSION

For the reasons discussed, the Court has entered an Order granting Tracinda's request for costs. Consistent with this Order and the reasoning espoused in this Memorandum Opinion justifying that Order, the Court will award Tracinda costs in the amount of \$556,061.

An appropriate Order will be entered.

³ Tracinda is certainly entitled to recover the actual costs it incurred in connection with the Special Master's hearing and the re-examination of Messrs. Schrempp and Stallkamp as these activities were precipitated by Defendants' late production of the documents. The only costs remotely in question are the costs incurred by Tracinda in connection with its objection to the Special Master's Report. However, given that Tracinda has requested only 50% of the attorneys' fees it incurred and Tracinda bears no fault for any of the activities resulting from the late production of documents, the Court is persuaded that it should permit recovery of the sum requested by Tracinda without parceling out its costs for objecting to the Special Master's Report.

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MANFRED GENTZ, a citizen of :
the Federal Republic of :
Germany, :
 :
Defendants. :

O R D E R

At Wilmington, this 20 day of April 2005, for the reasons set forth in the Memorandum Opinion issued this date, and in accordance with the Order entered on March 31, 2005;

IT IS HEREBY ORDERED that Tracinda is awarded costs in the amount of \$556,061.


UNITED STATES DISTRICT JUDGE