

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DOW CHEMICAL CANADA INC., on its :
behalf and as assignee of THE DOW :
CHEMICAL COMPANY, :

Plaintiff, :

v. :

HRD CORPORATION (d/b/a Marcus Oil & :
Chemical), :

Defendant/Counterclaim :
Plaintiff, :

v. :

DOW CHEMICAL CANADA INC., on its :
behalf and as assignee of THE DOW :
CHEMICAL COMPANY, and THE DOW :
CHEMICAL COMPANY, :

Counterclaim Defendants :

Civil Action No. 05-023-JJF

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OPINION

July 30, 2009
Wilmington, Delaware


Farnan, District Judge

Pending before the Court is the Motion Of Defendant Counterclaim Plaintiff HRD Corporation For Discovery Abuse Sanctions (D.I. 247). For the reasons discussed, the Court will deny HRD's Motion and award Dow the costs of defending HRD's Motion.

I. BACKGROUND

This litigation stems from a failed business relationship between Dow Chemical Canada Inc. and The Dow Chemical Company (collectively "Dow") on one side and HRD Corporation ("HRD") on the other side. In short, the parties contracted to, first, jointly develop certain polyethylene wax products and, second, at the conclusion of development, for Dow to be HRD's exclusive supplier of the new wax products.

Dow initiated this action in January 2005, asserting one claim for breach of contract. Briefly, Dow alleges that pursuant to the parties' business agreements, it provided certain services and polyethylene wax products to HRD and that HRD failed to pay for these services and products. By its Answer, HRD raised numerous counterclaims, including, most importantly, multiple claims for breach of contract and trade secret misappropriation. HRD now seeks damages exceeding \$700 million. (D.I. 247 at 2.)

The parties have not had an amicable litigation relationship. Indeed, by the Court's count, the parties filed at least eight discovery related motions, including six HRD motions

to compel, at least one of which requested sanctions. (See D.I. 71; D.I. 95; D.I. 119; D.I. 140; D.I. 152; D.I. 171.)

Accordingly, on November 6, 2008, the Court appointed Special Master Wilson B. Redfearn to assist the parties in resolving their ongoing discovery disputes. By March 2009, the Special Master had resolved these disputes, many simply by agreement between the parties.

Nevertheless, on April 16, 2009, HRD brought the instant Motion For Sanctions. HRD alleges eight distinct discovery misdeeds by Dow, including, for instance, the withholding of documents, failure to provide adequately indexed documents, and misrepresentations to the Special Master. (See D.I. 247 at 4.) Many of these alleged misdeeds overlap with the issues previously addressed by the Special Master. By its Motion, HRD requests that the Court strike Dow's breach of contract claim and all of its defenses to HRD's counterclaims. Thus, HRD essentially requests a \$700 million judgment in its favor. In addition, HRD seeks an award of attorneys' fees.

II. DISCUSSION

A. Legal Standard

Pursuant to Rule 37(d), "[i]f a party . . . fails . . . to appear for that person's deposition, . . . or to serve its answers, objections, or written response [to interrogatories or a request for production] . . . then the court may [order

sanctions] . . . listed in Rule 37(b)(2)(A)(i)-(vi)." Fed. R. Civ. P. 37(d). Likewise, pursuant to Rule 37(b), "[i]f a party or a party's officer, director, or managing agent . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders." Fed. R. Civ. P. 37(b)(2)(A). These may include, inter alia, the striking of pleadings, a finding of contempt of court, an order directing that disputed facts be taken as established, and, in extreme cases, dismissal of an action in whole or in part. Id. However, punitive dismissal is a drastic remedy and must be considered in light of the factors set forth in Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863, 868 (3d Cir. 1984).¹

B. Decision

1. Whether the Court Should Sanction Dow

HRD has presented the Court with a piñata of alleged Dow discovery abuses, most of which totally lack merit. Accordingly, the Court concludes that sanctions as requested by HRD are not appropriate against Dow. The Court will not address each and

¹ These factors include "(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense." Poulis, 747 F.2d at 868.

every discovery abuse alleged by HRD. To the extent the Court chooses not to address a particular alleged discovery abuse, the Court simply notes that it has reviewed the allegation and concluded that it does not merit a sanctions award. However, as explained more fully below, the Court identifies two alleged discovery abuses that, while not rising to the level of sanctionable conduct, merit some comment. Below, the Court first addresses a selection of alleged violations that illustrate the overall inappropriateness of HRD's Motion. Then, the Court considers two alleged discovery abuses that appear to have some small amount of merit and that therefore require the Court's attention.

a. The Alleged Discovery Abuses Are Largely Meritless

The bulk of HRD's abuse allegations lack merit. Consequently, the overall credibility of HRD's Motion is seriously undermined. As a first example of a meritless allegation of discovery abuse, HRD complains that Dow violated Fed. R. Civ. P. 34(b) by producing roughly 153,000 pages of documents that are a "jumbled mess." (D.I. 247 at 6.) Specifically, HRD contends that Dow failed to organize documents "by custodian, by HRD's requests for production, chronologically, or in any other meaningful manner." (Id.) However, in July 2007, Dow agreed to produce documents on a custodian-by-custodian basis and, for a particular custodian, to organize documents by

date. (D.I. 282, Exh. 23.) On reviewing the record, the Court concludes that Dow largely abided by this agreement. Indeed, HRD identifies only one subsequent Dow document production that was not properly organized by custodian. And, after HRD notified Dow of this miscue, Dow promptly corrected it.² (See D.I. 282, Exh. 25.) Furthermore, the record shows that in May 2008, Dow agreed to prepare a searchable, sortable Excel spreadsheet correlating individual documents to particular custodians. (See D.I. 284, Exh. 28.) On reviewing the record, it appears that HRD failed to directly respond to this offer. Instead, in October 2008 - roughly five months after the offer - HRD simply sent a letter to Dow complaining of Dow's continuing failure to provide a custodian list. (See D.I. 247, Exh. 9.) Shortly thereafter, Dow provided HRD with the spreadsheet that it had offered to provide earlier. (See D.I. 284, Exh. 30.) HRD's allegations are made all the more perplexing by the fact that all of Dow's document productions included optical character recognition ("OCR") data. This data enabled HRD to search and sort Dow's document production by name, date, keyword, or any other parameter that could be reduced to a text string. On these facts, the Court

² With respect to whether Dow properly sorted documents for a particular custodian by date, HRD identifies a few additional instances where Dow may have failed to do this. (See D.I. 308 at 40:6 - 41:15.) However, in the Court's view, Dow's alleged failure to fully carry out this particular level of document sorting does not substantially contribute to a sanctions award.

concludes that HRD's complaints regarding Dow's allegedly disorganized document production do not remotely support a sanctions award.

Insisting that a sanctionable discovery abuse is nevertheless present in this incident, HRD further complains that Dow's October 2008 Excel spreadsheet correlating documents to custodians was inaccurate. (D.I. 247 at 7-8.) In particular, HRD complains that Dow designated employee Cyndi Rickey as the custodian of a number of documents, but that she failed to recognize a number of these documents during her deposition. Specifically, HRD claims that it showed Ms. Rickey 91 exhibits during her deposition, but that she was able to recognize only 20 of them. (Id.) However, for a number of reasons, this situation is unsurprising and does not, without more, indicate misconduct or bad faith that could support a sanctions award. Indeed, a custodian of a particular document is not necessarily an individual having detailed knowledge of a particular document. Rather, it is merely an individual who happens to have physical control over it at the time when documents are collected for production. In this day and age - where documents can be delocalized, distributed, and stored inexpensively in countless physical and electronic formats - it is entirely unremarkable that an individual may not have knowledge over a range of documents for which he or she is nonetheless designated as the

custodian. For this reason, in complex cases, it is helpful for litigants to exchange documents with searchable OCR data, as was done here. This enables the recipient of the documents to search and sort documents by, for example, name and keyword, and then, in advance of a deposition, formulate a general picture of the role a particular custodian played in the events giving rise to the litigation, in the process culling documents that a custodian is unlikely to be particularly knowledgeable about. In these circumstances, the Court is unpersuaded that HRD was so misled by Dow's designation of Ms. Rickey as a document custodian that it was forced to confirm at her deposition that she had no knowledge of 71 documents. Indeed, to the extent there was some uncertainty about whether Ms. Rickey was knowledgeable of certain documents, the Court sees no reason why HRD could not have simply used introductory topical questions to focus the subject matter of Ms. Rickey's deposition. The Court further notes that the events giving rise to this litigation took place roughly five years ago. Thus, the natural fading of memories will likely force some custodians to disclaim knowledge of long-forgotten documents that they may have at one point reviewed or worked on. Accordingly, these are not the circumstances that substantiate a sanctions award.³

³ The Court notes that Special Master Redfearn chose to address this issue by having the deponent conduct an advance review of documents that he or she was identified as the

As yet another example of a meritless complaint of discovery abuse, HRD alleges that Dow failed to fully comply with the Court's order to provide a page-by-page redaction log. (D.I. 247 at 9.) As background, in January 2008, in response to an HRD Motion to Compel, the Court concluded that Dow's document production was too heavily redacted and ordered Dow to provide a page-by-page explanation for its redactions. (See D.I. 121 at 3.) In response, Dow identified 17 potential explanations for a redaction, and then produced a "Redaction Key" listing one or more of these reasons for each redacted document. In the context of this particular case, this was reasonable compliance with the Court's order. It does not support a sanctions award.

Finally, the Court notes HRD's complaint regarding an "egregious" instance of Dow allegedly "hid[ing] its most damaging documents," which HRD was able to discover only by "sheer luck." (D.I. 247 at 5.) Specifically, in July 2007, Dow produced to HRD a CD containing several thousand documents. Two days later, Dow, explaining that the CD contained an error, asked that it be returned. However, prior to returning the CD, HRD printed at least one document from the CD. This particular document, a January 29, 2005 e-mail, stated that "Marcus boys have lots of problems right now. With a little digging, we could probably

custodian of. The fact that Special Master attempted to streamline the discovery process in this manner does not, in the Court's view, indicate that HRD's allegation has merit.

come up with their customer list" (D.I. 247, Exh. 5.) According to HRD, none of Dow's subsequent document productions - including a revised version of the July 2007 production - contained "this damaging document." In its brief in support of its Motion For Sanctions, HRD asks "[h]ow can this document not be relevant?" (Id. at 5.) Likewise, during the evidentiary hearing on this Motion, HRD stated that it "believes [this] is a relevant document that should have been produced." (D.I. 308 at 58:1-12.) But HRD never actually explains the relevance of this document to any claims at issue in this case. Likewise, the Court, which is by now quite familiar with the legal claims in this case, fails to see the relevance of this document. In spite of its scandalous overtones, there is, in fact, reason to believe that the document is actually irrelevant. Indeed, as Dow notes, the document was prepared after the litigation began and HRD never sought to depose the author of the e-mail. As to the recipient of the e-mail, Dow apparently deposed him in February 2009, yet asked no questions about this document. What's more, it appears that HRD raised this issue for the first time in its sanctions Motion, failing to raise it beforehand with Dow, the Court, or Special Master Redfearn.⁴ Simply put, the Court does

⁴ After HRD raised the issue in its sanctions Motion, Dow promptly provided a second replacement CD, containing an additional 49 documents that were omitted from the July 2007 revised production. (See D.I. 282, Exh. 19.)

not understand why it is now taking the time to write about this incident. It does not support a sanctions award.

b. Two Alleged Dow Discovery Abuses Merit Further Comment

Despite the foregoing, the Court identifies two alleged discovery abuses that, while not rising to the level of sanctionable conduct, require the Court's attention. First, HRD alleges that Dow spoliated evidence when it dismantled the facility used to manufacture the wax products at issue in this case. Second, HRD alleges that Dow failed to produce process flow diagrams, which describe the retrofit of the facility used to manufacture the wax products at issue in this case. The Court will address these two allegations in turn.

i. Sarnia Facility Inspection

The dispute over the destruction of the Sarnia wax production facility may be summarized as follows. In December 2007, HRD suggested that an inspection of the facility in Sarnia, Canada - where the wax products at issue in this case were to have been manufactured - could help resolve a discovery dispute over document redactions. (See D.I. 282, Exh. 21 at Exh. C.) In January 2008, HRD repeated its request to inspect the Sarnia facility. (Id. at Exh. E.) The parties subsequently discussed this request by telephone and by letter, and Dow explained to HRD that the facility would be dismantled starting in April 2008 (Id. at Exh. G.) Thus, Dow further advised HRD that if it wished

to inspect the facility, HRD would need to move quickly in making the appropriate arrangements, which HRD did. (See id.) In response to a Dow question as to the reason for and scope of HRD's proposed inspection, HRD explained as follows:

As to the scope of the inspection, HRD simply wants to see the physical site so they can understand how the plant was operated. Because of the extensive redaction of documents, this inspection is very important. In addition, as a matter of due diligence, my experts want to be able to tell a jury that they physically saw the plant.

(Id. at Exh. H.) After a small amount of additional negotiation, Dow permitted HRD to conduct an inspection of the Sarnia facility on April 8, 2008. (Id. at Exh. K.)

At the inspection, a dispute apparently arose as to (1) whether HRD would be allowed to photograph and/or videotape the plant, (2) whether HRD could photograph the plant using its own equipment, and (3) whether Dow would review HRD's photographs before releasing them to HRD. (D.I. 247 at 10-11.) Dow ultimately permitted HRD to take its own photographs, but only with a Dow-provided digital camera. (D.I. 308 at 31:18-32:8.) Over the course of roughly four and one-half hours, HRD used this camera to take 144 photographs, which Dow subsequently reviewed and sent to HRD. (D.I. 281 at 16.) Unhappy with the circumstances of the inspection, HRD filed an "emergency" motion to compel a new inspection of the Sarnia facility. (D.I. 140.) However, before the Court had an opportunity to address this

motion, Dow, having already substantially delayed demolition of the Sarnia facility, informed HRD that it would proceed with demolition in July 2008. Shortly thereafter, Dow dismantled the Sarnia facility.

HRD claims that it was prejudiced by the circumstances of the inspection and the subsequent demolition of the plant in three ways. First, HRD contends that Dow had, in fact, begun dismantling the Sarnia facility prior to the April 2008 inspection. In this regard, HRD directs the Court to photographs that allegedly depict missing equipment. (See D.I. 308 at 30:5-31:9.) Thus, HRD contends that its inspection was tainted. Second, Dow apparently contends that because the Sarnia facility has been demolished, certain witnesses may no longer have access to information necessary to fully respond to questioning about the plant. (Id. at 34:5 - 35:22.) Finally, HRD contends that the 144 pictures it took during the inspection are inadequate for use as trial exhibits because they are of insufficient resolution to permit enlargement. In other words, HRD argues that its "ability to walk into this courtroom in front of a jury and put up pictures of the plant on a screen like this has been denied." (D.I. 308 at 32:19-21.)

The Court is unpersuaded that HRD has experienced any prejudice by the dismantling of the Sarnia facility. Critical to this conclusion is the fact that although this action was

initiated in January 2005, HRD waited until December 2007 (almost three years) before making its initial request to inspect the Sarnia facility. During this period, as Dow set in motion plans to dismantle the Sarnia facility, HRD otherwise vigorously pursued discovery, even filing numerous motions to compel. In the Court's view, had a thorough inspection of the Sarnia facility been as critical as HRD now contends, HRD surely would have pursued this inspection earlier in discovery. It did not, and the Court is thus highly skeptical of any HRD complaints that its inspection was tainted by Dow's alleged partial dismantling of the facility. Furthermore, after HRD requested an inspection of the Sarnia facility, Dow ultimately offered HRD a full day to inspect the facility. But HRD's inspection lasted only about four and one-half hours. Again, HRD's failure to take full advantage of discovery opportunities betrays its complaints of prejudice. Finally, to the extent Dow complains that its 144 pictures are of inadequate quality for review by the jury, the Court disagrees. Although the pictures, when enlarged, exhibit some small amount of graininess when inspected closely, they are nonetheless of sufficient resolution to adequately depict the details of the facility and are more than adequate for display to

a jury and for an expert witness to rely upon.⁵ This incident does not support a sanctions award.

Nevertheless, in the Court's view, Dow is not entirely blameless here. Indeed, prohibiting HRD from using its own camera to take photographs of the Sarnia plant was overzealous, unnecessary, and an exercise of poor judgment. The same may be said with regard to Dow's initial insistence that it take all photographs on behalf of HRD. Unfortunately, when it comes to discovery, Dow has too frequently exercised an unwarranted level of protectionism. This is reflected, for instance, in the excessive number of sealed Dow filings in this case. Likewise, it has been reflected in Dow's withholding of documents over speculative concerns that HRD may export technology to Iran in violation of export control laws. (See D.I. 92.) Similarly, it is exemplified by Dow's overly extensive document redactions. (See D.I. 121.) Simply put, Dow's approach to discovery appears to have been guided by an undue level of distrust for its adversary, which seems to have again manifested itself during

⁵ HRD further complains that Dow did not permit counsel for HRD to "walk around the plant and video and talk into the video, making my own notes of my observations that I use later as attorney work product." (D.I. 308 at 18-23.) However, this is a patently unreasonable request. Indeed, for HRD to legitimately protect such audio notes as work product, Dow would have had to allow HRD to roam about the plant without any supervision from either Dow's counsel or Dow employees, who would have otherwise overheard HRD's "work product." For reasons related to safety and the protection of HRD trade secrets, this is simply not feasible.

HRD's inspection of the Sarnia facility. Thus, although the Court concludes that Dow did not commit any sanctionable conduct in connection with HRD's inspection of the Sarnia facility, the Court nevertheless takes this opportunity to note that, during discovery, Dow has not always been reasonable.

ii. Process Flow Diagrams

HRD contends that the "biggest problem in discovery" involves Dow's alleged failure to promptly produce process flow diagrams for the Sarnia facility, which HRD maintains "are the heart and soul of any plant reconstruction or retrofit." (D.I. 308 at 48:15-17; D.I. 247 at 11.) HRD contends that, beginning in April 2006, it sought process flow diagrams from Dow, but that Dow falsely asserted that it had never prepared process flow diagrams for the retrofit of the Sarnia facility. HRD notes that as late as December 2008, Dow asserted before the Special Master that there were no such diagrams for the Sarnia plant. (See D.I. 247, Exh. 24.) However, in March 2009, HRD deposed Dow engineer Frank Cerk, who testified that there were, in fact, process flow diagrams for the Sarnia facility. (Id., Exh. 26.) Shortly thereafter, Dow produced to HRD process flow diagrams for the Sarnia plant. HRD now contends that its expert witnesses are unable to accurately state whether these or some other documents were actually used to retrofit the Sarnia facility. (See D.I. 308 at 48:14-19.)

Dow responds that their failure to promptly produce process flow diagrams was an "innocent mistake" that was "promptly corrected." (Id. at 88:12-13.) Furthermore, Dow points out that it had previously produced numerous Aspen process simulations, "which present and depict, inter alia, process conditions, lines and equipments in the plant, and stream compositions pressures, and temperatures." (D.I. 281 at 19.) In this regard, Dow contends that it has produced documents containing information cumulative to that which is contained in the process flow diagrams.

The Court does not see sufficient evidence to conclude that Dow's admitted failure to promptly produce process flow diagrams was anything more than a mistake. In these circumstances, sanctions are not appropriate.

Nevertheless, the Court finds the mistake significant and worthy of further comment. Indeed, the process flow documents are unquestionably relevant, and the record reflects that HRD had repeatedly requested that they be produced. Dow's failure to produce these documents may well have been the result of a lack of reasonable effort on the part of Dow's counsel to thoroughly determine whether such documents exist. Similarly, the failure of individuals within Dow itself to conduct a thorough search for these documents may have contributed to the error. Or, the mistake may have been attributable to a communication

breakdown between Dow and its counsel. Possibly, the error arose from a combination of these factors. Whatever the case, although the Court is aware that innocent mistakes occasionally occur during discovery, the Court notes that such mistakes are not necessarily acceptable. In this regard, when considered against the backdrop of Dow's occasional unreasonable conduct in discovery matters, the Court concludes that Dow's failure to produce process flow diagrams suggests more systemic problems with Dow's approach to discovery. Going forward, especially in connection with continuing discovery disputes before the Special Master, the Court advises Dow to address these issues.

2. Whether The Court Should Award Dow The Cost Of Defending HRD's Motion For Sanctions

"It is inherent in the court's discretionary power to award attorneys' fees 'when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" In re Elonex Phase II Power Mgmt. Litig., 279 F. Supp. 2d 521, 525 (D. Del. 2003) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991)). Furthermore, "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

Given the Court's conclusion that, although Dow did not commit sanctionable conduct, it has sometimes acted unreasonably in discovery matters, the Court is reluctant to award Dow the cost of defending HRD's Motion For Sanctions. However, the Court also advised the parties certain conditions would apply to the continued litigation of the current Motion. Specifically, during an April 23, 2009 hearing regarding HRD's Motion, the Court advised the parties that it was struck by the seriousness of the allegations. The Court further advised the parties that unless they resolved the Motion on their own terms, one of them would ultimately pay the costs of the Motion. (D.I. 282, Exh. 6 at 13:13 - 14:2 (emphasis added).) As explained above HRD's allegations fall well short of supporting the requested sanctions. Accordingly, the Court will award Dow the cost of defending HRD's Motion For Sanctions.

III. CONCLUSION

For the reasons discussed, HRD's Motion For Sanctions (D.I. 247) will be denied. In addition, Dow will be awarded the costs of defending HRD's Motion.

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CHEMICAL COMPANY, :

Counterclaim Defendants :

Civil Action No. 05-023-JJF

O R D E R

At Wilmington, this 30 day of July 2009, for the reasons set
forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. The Motion Of Defendant Counterclaim Plaintiff HRD
Corporation For Discovery Abuse Sanctions (D.I. 247) is
DENIED.

2. HRD shall pay to Dow the costs associated with Dow's defense of HRD's Motion. Within ten days of the date of this order, Dow shall file with the Court a bill of costs.


UNITED STATES DISTRICT JUDGE