

**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: ATTORNEYS' FEES**

In connection with my Special Master Opinion dated November 30, 2015, I awarded Thermo Fisher its reasonable expenses, including attorneys' fees, incurred in connection with Opengate Capital's violation of a number of discovery orders. Defendants' application for fees has been submitted as well as plaintiffs' response. This Order specifies the scope of the fees awarded.<sup>1</sup>

Although defense counsel's request for fees describes their review of time entries, I was not provided with a copy of any actual invoices sent to their clients. I was, though, given a discounted hourly rate schedule, in which defense counsel requested rates lower than the rates billed to their clients and consistent with the rates I allowed to defendants in an earlier attorneys' fees order.<sup>2</sup>

Defense counsel ask that I recognize their efforts relating to (i) researching, drafting and

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<sup>1</sup> Plaintiffs have filed an Objection to one aspect of the November 30, 2015 Opinion, but not directly to the award of attorneys' fees associated with that aspect. Plaintiffs noted in their response to the fee application that, in the event their limited objection results in either a reversal or modification, there is a possibility that today's Order may be revisited. My only comment is that the attorneys' fees award related to three separate sanctions, at least two of which were not the subject of an objection.

<sup>2</sup> See Special Master Order dated July 20, 2015.

preparing submissions<sup>3</sup> to me for the November 9, 2015 Special Master hearing, and (ii) preparation for and attendance at that hearing. They cite the involvement of four attorneys and two legal assistants with regard to the first item and three attorneys and one legal assistant needed for the second item.

Thermo Fisher contends that the allocation of counsel's time for the hearing was "conservative" by using a 50/50 time split instead of, e.g., something more reflective of the fact that there were three discovery issues which they raised whereas Opengate Capital only raised two.

Defense counsel request fees for 209.6 hours of their time devoted to pre-hearing activity (i.e., three separate items, being opening and reply briefs and a supplemental letter) and 33.1 hours for hearing prep and hearing time. The plaintiffs' response to these numbers is unsurprisingly robust and negative. For example, they criticize the inclusion of spoliation-related argument and cases in Thermo Fisher's opening brief. Certainly, since providing spoliation relief was beyond the scope of the authority granted in the Order appointing me as Special Master in this case, no attorneys' fees can be awarded for that portion of defendants' briefing focused on such relief.

In determining appropriate attorneys' fees, I am obligated to apply the "lodestar" methodology described in my July 20, 2015 Special Master Order re: Attorneys' Fees (pp. 2-3), the analysis and logic of which I adopt by reference for purposes of this Order.

Ultimately, my impression is that, although I have no doubt that the professionals expended the time listed on defense counsel's submission, more effort was expended than

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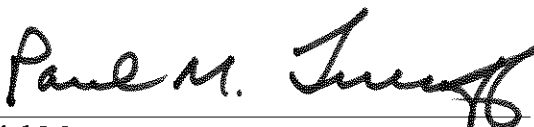
<sup>3</sup> I saw nothing in defendants' application that clearly differentiated between the submissions connected to Thermo Fisher's own motion for sanctions and its additional submission opposing plaintiffs' motion for sanction. I assume, however, based on the specific language in their December 22, 2015 letter memorandum, that the time devoted to the brief opposing plaintiffs' motion was not included in the hours tabulation.

reasonably necessary given the objects of the expenditure. I am particularly concerned about the need for four attorneys, in addition to two legal assistants, in connection with the pre-hearing activity. Despite their reference to “intensive”, “record-citation-laden” work, having both legal assistants and attorneys doing such, to the tune of 209.6 hours total, seems a bit too aggressive. I have some, but fewer, concerns about the accounting for the hearing-related activity itself. Under these circumstances, an ultimate fee request of \$90,806.50 for all work, while less than the fees shifted in the *In re Shaw & Eling LLC* Chancery Court case cited by the defendants, still merits the scrutiny I have indulged in.

Consequently, my award of reasonable attorneys’ fees<sup>4</sup> stemming from the November 30, 2015 Opinion, covering both segments of defendants’ application, is as follows:

<u>Professional</u>	<u>Hours Allowed</u>	<u>Rate Allowed</u>	<u>Total</u>
Nolan	1.0	\$725	\$ 725.00
Lockwood	25.0	\$700	\$17,500.00
Huffman	20.0	\$425	\$ 8,500.00
Kunz	64.0	\$300	\$19,200.00
Kwiatkowski	30.0	\$315	\$ 9,450.00
Hauck	<u>7.0</u>	\$180	<u>\$ 1,260.00</u>
	147.00		<u>\$56,635.00</u>

IT IS SO ORDERED.

  
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Special Master

Dated: January 14, 2016

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<sup>4</sup> The prevailing market rates recognized as applicable by defendants are adopted from the forensic accountant’s survey plaintiffs submitted to me last year and reference to which (see Special Master Order dated July 20, 2015, p. 4) is specifically made herein.